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# NEGOTIATING FEDERALISM

ERIN RYAN\*

**Abstract:** Bridging the fields of federalism and negotiation theory, *Negotiating Federalism* analyzes how public actors navigate difficult federalism terrain by negotiating directly with counterparts across state-federal lines. In contrast to the stylized, zero-sum model of federalism that pervades political discourse and judicial doctrine, the Article demonstrates that the boundary between state and federal power is negotiated on scales large and small, and on an ongoing basis. It is also the first to recognize the procedural tools that bilateral federalism bargaining offers to supplement unilateral federalism interpretation in contexts of jurisdictional overlap.

The Article begins by situating its inquiry within the age-old federalism discourse about which branch can best safeguard the values that give federalism meaning: Congress, through political safeguards; the Supreme Court, by judicially enforceable constraints; or the Executive, through administrative process. Yet each school of thought considers only how the branches operate unilaterally—on one side of the state-federal line or the other—missing the important ways that each one also works bilaterally across that line to protect federalism values through various forms of negotiated governance. Because unilateral interpretive methods fail to establish clear boundaries at the margins of state and federal authority, regulators increasingly turn to bilateral intergovernmental bargaining to allocate contested authority and facilitate collaboration in uncertain federalism territory. Procedural constraints available within these negotiations can help bridge the interpretive gaps unresolved by more conventionally understood forms of interpretation.

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\* © 2011, Erin Ryan, Associate Professor, William & Mary Law School; J.D., Harvard Law School, M.A., Wesleyan University, B.A. Harvard University. A project of this scope has left me indebted to many knowledgeable and generous colleagues. For critical suggestions at various stages of my research, I thank Angela Banks, Robin Craig, Neal Devins, Scott Dodson, Brian Galle, Howard Latin, Paul Marcus, Melissa Nelken, Dave Owen, Larry Palmer, Ned Ryan, Cathy Sharkey, and Rick Su. I am especially grateful to David Adelman, Lan Cao, Amy Cohen, Nestor Davidson, Holly Doremus, Kirsten Engel, Michael Gerhardt, Robert Glicksman, John Lesly, Gillian Metzger, Michael Moffit, John Nagle, J.B. Ruhl, Judith Resnik, Jonathan Siegel, Robert Schapiro, and Larry Susskind for invaluable commentary on late-stage drafts. I am also grateful to the many state and federal officials who shared their federalism bargaining experiences with me, including Melanie Davenport, Roscoe Howard, Mike Murphy, Jeff Reynolds, Laurie Ristino, Melissa Savage, Rick Weeks, and others who requested anonymity so that their comments would not be mistaken for official administrative pronouncements. Finally, I thank my wonderful research assistants, Brianna Coakley, Perry Cooper, and especially Jessie Coulter.

Creating the first theoretical framework for organizing federalism bargaining, the Article provides a taxonomy of the different opportunities for state-federal bargaining available within various constitutional and statutory frameworks. Highlighting forms of conventional bargaining, negotiations to reallocate authority, and joint policymaking bargaining, the Article maps this vast, uncharted landscape with illustrations ranging from the 2009 Stimulus Bill to Medicaid to climate policy. The taxonomy demonstrates how widely federalism bargaining permeates American governance, including not only the familiar example of spending power deals, but also subtler forms that have escaped previous scholarly notice as forms of negotiation at all.

The Article then reviews the different media of exchange within federalism bargaining and the legal rules that constrain them, together with supporting data from primary sources. Finally, it evaluates how some forms of federalism bargaining—legitimized by the procedural constraints of mutual consent and the procedural engineering of regard for federalism values—can supplement unilateral interpretation. Differentiating itself from previous process-based claims, the analysis provides new theoretical justification for the interpretive work that federalism bargaining presently provides and calls for greater judicial deference to qualifying examples. Having offered recommendations about the kinds of federalism bargaining that should be encouraged, the Article offers recommendations for legislators, executive actors, stakeholders, practitioners, and adjudicators about how best to accomplish these goals.

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## INTRODUCTION

Opponents of Congress's 2010 Medicaid expansion decried the move as a "gross federal overreach,"<sup>1</sup> invoking familiar tropes about the bitter contest between state and federal authority in contexts of juris-

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<sup>1</sup> See, e.g., Press Release, Tex. Office of the Governor, Statement by Gov. Rick Perry on Passage of Federal Health Care Bill (Mar. 21, 2010), available at <http://governor.state.tx.us/news/press-release/14396/> (official statement on passage of the Patient Protection and Affordable Care Act of 2010, Pub. L. No. 111-148, 124 Stat. 119).

dictional overlap. But state and federal regulators in the trenches of health care law know that the truth is more nuanced—that the Medicaid program really represents a site of extensive negotiation between state and federal actors about the specifics of each state plan, set within purposefully broad federal boundaries.<sup>2</sup> Those who opposed the 2009 Stimulus Bill on federalism grounds<sup>3</sup> similarly discounted the substantial role of state actors in negotiating the terms of the federal law.<sup>4</sup> And those who challenged the Clean Water Act's stormwater regulations on federalism grounds missed the pivotal role state and municipal actors played in negotiating the terms of the rule—which itself became a forum for ongoing negotiation between state and federal regulators about how each municipality would ultimately comply.<sup>5</sup>

Such instances of intergovernmental bargaining offer a means of understanding the relationship between state and federal power that differs from the stylized model of zero-sum federalism dominating political discourse, which emphasizes winner-takes-all jurisdictional competition.<sup>6</sup> Contemporary judicial doctrine presents a similarly wooden view of sovereign antagonism within American federalism.<sup>7</sup> But countless real-world examples show that the boundary between state and federal authority is actually negotiated on scales large and small, and on a continual basis. Working in a dizzying array of regulatory contexts, state and federal actors negotiate over both the allocation of policymaking authority and the substantive terms of the mandates policymaking will impose. Bargaining takes place both in realms plagued by legal uncertainty about whose jurisdiction trumps, and in realms unsettled by uncertainty over whose decision *should* trump, regardless of legal supremacy. Reconceptualizing the relationship between state and federal power as one heavily mediated by negotiation demonstrates how feder-

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<sup>2</sup> See *infra* notes 328–344 and accompanying text (discussing the Medicaid demonstration waiver program).

<sup>3</sup> See, e.g., *Some State Lawmakers Fighting Federal Stimulus*, ARIZ. REPUBLIC, Mar. 2, 2009, <http://www.azcentral.com/news/articles/2009/03/02/20090302stimulus-states0302-ON.html> (reporting on efforts to “fight against decades of federal overreach, culminating in the stimulus package”).

<sup>4</sup> See *infra* notes 117–122 and accompanying text (discussing state roles in negotiating the stimulus bill).

<sup>5</sup> See *infra* notes 283–290 and accompanying text (discussing the Phase II Stormwater Rule).

<sup>6</sup> See, e.g., Ed Hornick, *‘Tenther’ Movement Aims to Put Power Back in States’ Hands*, CNN (Feb. 10, 2010), <http://www.cnn.com/2010/POLITICS/02/10/tenth.amendment.movement/index.html>.

<sup>7</sup> See, e.g., *United States v. Morrison*, 529 U.S. 598, 617–18 (2000) (“The Constitution requires a distinction between what is truly national and what is truly local.”).

alism practice departs from the rhetoric, and offers hope for moving beyond the paralyzing features of the zero-sum discourse.

This Article explores the role of state-federal bargaining in areas of concurrent regulatory jurisdiction, where both state and federal actors hold legitimate regulatory interests or obligations.<sup>8</sup> Even as jurists remain mired in debate over how to resolve regulatory competition, regulators working in contested contexts have learned to confront this uncertainty simply by negotiating through it. Working directly or indirectly with counterparts across state-federal lines, regulators reach consensus about sharing or dividing contested authority (and how to implement it) in order to move forward with needed governance. When they do so in processes consistent with the principles of fair bargaining and federalism, they are negotiating the answer to federalism's most critical question in a manner that vindicates constitutional goals. Indeed, they are interpreting federalism.

In the face of persistent uncertainty about the boundaries between state and federal reach, the Article demonstrates how government actors move forward by substituting procedural consensus for substantive clarity about the central federalism inquiry—*who gets to decide?*—in individual regulatory contexts. Procedural consistency with fair bargaining and federalism principles yields instances in which the very process of intergovernmental bargaining proves more able to preserve constitutional values than judicial or legislative decisions alone. Recognizing how intergovernmental bargaining supplements these more conventionally understood means of allocating authority provides a new lens for understanding the uniquely collaborative process of American governance.

Using the negotiation theorist's definition, the Article broadly understands bargaining as “an iterative process of joint decision-making,”<sup>9</sup> encompassing conventional political haggling (as over the terms of the Stimulus Bill), formalized methods of collaborative policymaking (as in the Medicaid partnership), and even more remote signaling processes by which state and federal actors share responsibility for public decision

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<sup>8</sup> See Erin Ryan, *Federalism and the Tug of War Within: Seeking Checks and Balance in the Interjurisdictional Gray Area*, 66 MD. L. REV. 503, 567–95 (2007) (describing the phenomenon of jurisdictional overlap).

<sup>9</sup> Adopting the definition of negotiation theorists, I define bargaining as any iterative process of communication by which two or more parties seek to influence the outcome of a joint decision. ROGER FISHER & WILLIAM URY, *GETTING TO YES: NEGOTIATING AGREEMENT WITHOUT GIVING IN*, at xvii (Bruce Patton ed., Penguin Books 2d ed. 1991) (1981); RICHARD SHELL, *BARGAINING FOR ADVANTAGE: NEGOTIATION STRATEGIES FOR REASONABLE PEOPLE* 6 (1999); *infra* note 99.

making over time (as they have over medical marijuana enforcement). I use the word “substantive” to refer to the substance of a legal rule or negotiated outcome, and “procedural” to refer to the process by which that rule or outcome was reached. Because “state-federal intergovernmental bargaining” is a mouthful, I use the term “federalism bargaining” to refer collectively to the forums in which state and federal actors engage in these processes of joint decision making, focusing on the vertical federalism relationship within each given array of state and federal participants.<sup>10</sup>

Given the foundational role that negotiated federalism plays in the American system of dual sovereignty, academics would be wise to better understand it: where and how it happens, what works well and what does not, and what legal constraints should apply. Most importantly, we should understand how procedural tools within negotiated governance can assist the navigation of difficult federalism terrain that other means of interpretation have failed to clarify. Incorporating general bargaining principles of mutual consent and the procedural application of core federalism values, negotiated governance opens possibilities for filling interpretive gaps in the Supreme Court’s jurisprudence or congressional legislation. This Article thus moves beyond the historic debate about the unilateral roles of the Court, Congress, and the Executive in protecting federalism<sup>11</sup> and provides the first recognition that bilateral federalism bargaining is itself a means of interpreting the

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<sup>10</sup> This inquiry considers municipal participants in intergovernmental bargaining as agents of the state, consistent with the U.S. Supreme Court’s treatment of municipal activity under its Tenth Amendment jurisprudence. *See, e.g., Nat’l League of Cities v. Usery*, 426 U.S. 833, 838–40 (1976) (affirming that the Tenth Amendment protects both state and local entities), *overruled on other grounds by Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528 (1985). For a more modern example, see *Environmental Defense Center v. EPA*, 344 F.3d 832, 844–45 (9th Cir. 2003), where the court considered an anticcommandeering challenge to a federal law applying to municipal permitting. For discussion about how independent municipal activity further complicates the analysis, see *infra* notes 78–80 and accompanying text.

<sup>11</sup> *E.g.,* 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, 588 (1954) (articulating the “political safeguards” theory that trusts federalism constraints to Congress); MORTON GRODZINS, *THE AMERICAN SYSTEM* 8, 60–153 (Daniel J. Elazar ed., Transaction Books 1984) (1966) (describing the cooperative federalism model based on the political safeguards theory); Lynn A. Baker, *Putting the Safeguards Back into the Political Safeguards of Federalism*, 46 VILL. L. REV. 951, 952 (2001) (endorsing the move toward judicially enforceable constraints in the New Federalism model); Thomas W. Merrill, *Preemption and Institutional Choice*, 102 NW. U. L. REV. 727, 755–56, 759 (2008) (arguing that executive agencies do not warrant the same deference as Congress in preempting state law); Brian Galle & Mark Seidenfeld, *Administrative Law’s Federalism: Preemption, Delegation, and Agencies at the Edge of Federal Power*, 57 DUKE L.J. 1933, 1940 (2008) (making the opposite argument).

Constitution. When the procedural criteria are met, intergovernmental bargaining enables a partnership of state and federal actors to interpret constitutional directives *bilaterally*, through negotiated exchange across the state-federal divide.

Part I situates the inquiry within the iconic federalism discourse about which branch can best safeguard American federalism: Congress, through political safeguards; the Court, by judicially enforceable constraints; or the Executive, through administrative process.<sup>12</sup> Views have vacillated over whether Congress or the Supreme Court should be the final arbiter of compliance with federalism directives, and more recent scholarship addresses the positive and negative contributions of administrative agencies.<sup>13</sup> These arguments, however, focus exclusively on unilateral branch activity, eliding the important ways that public actors work bilaterally across state-federal lines to safeguard federalism by negotiating the terms of governance with important federalism implications.<sup>14</sup> Federalism scholars have neglected the significance of negotiated federalism, which presents on a continuum from the obvious to the subtle, because it has never before been surveyed.

To remedy this gap, Part II offers the first theoretical framework for cataloguing this uncharted landscape in a taxonomy of the opportunities for state-federal bargaining available within various constitutional and statutory frameworks.<sup>15</sup> Highlighting categories of conventional bargaining, negotiations to reallocate authority, and joint policymaking bargaining, the taxonomy reviews familiar forms of negotiation used in lawmaking (such as the Stimulus), negotiations over various kinds of law enforcement (such as immigration or pollution), negotiations under the federal spending power (such as the No Child Left Behind Act of 2001), and negotiations for exceptions under otherwise applicable laws (such as the Endangered Species Act).<sup>16</sup> It then considers the more in-

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<sup>12</sup> I have previously argued that the best way to understand federalism is in terms of the good governance values it fosters, including the checks and balances between local and national levels of government that safeguard individual rights, the benefits of variation and innovation that accrue to localism, the need for governmental accountability that enables meaningful democratic participation, and the synergistic problem-solving capacity that accords a federal system. *See generally* Ryan, *supra* note 8. This values-based understanding of federalism is also the subject of a forthcoming book, ERIN RYAN, *FEDERALISM AND THE TUG OF WAR WITHIN* (forthcoming 2011).

<sup>13</sup> *See* sources cited *supra* note 11; *infra* notes 28–95 and accompanying text.

<sup>14</sup> Ryan, *supra* note 8, at 567–91.

<sup>15</sup> *See infra* notes 96–399 and accompanying text.

<sup>16</sup> *See* American Recovery and Reinvestment Act of 2009, Pub. L. No. 111-5, 123 Stat. 115 (codified as amended in scattered sections of 6, 19, 26, 42, and 47 U.S.C.); Immigration and Nationality Act, ch. 477, § 287, 66 Stat. 163 (1952) (codified as amended at 8



teresting, less obvious forms of negotiated policymaking, including negotiated federal rulemaking with state stakeholders (as was used to regulate stormwater pollution), federal statutes that share policy design with states (such as Medicaid), staggered programs of iterative shared policymaking (as used to regulate auto emissions), and intersystemic signaling negotiations, by which independently operating state and federal actors trade influence over the direction of evolving interjurisdictional policies (as reflected in medical marijuana enforcement).<sup>17</sup> The taxonomy demonstrates how federalism bargaining permeates American governance, from familiar examples under the spending power to the subtler forms that have previously escaped scholarly notice as forms of negotiation at all.

In fleshing out these details, one normative purpose of the piece is simply to call attention to how much federalism-sensitive governance is already negotiated, belying the zero-sum discourse. This should not be surprising, given the negotiation features built into the very structure of American government. The bicameral nature of the legislature, the presidential veto, and even the subtle invitation to iterative policymaking afforded by judicial review—prompting Congress to try again to meet constitutional muster, or signaling the concerns future legislators must heed<sup>18</sup>—all speak to the way American governance is, by design, an iterative process of joint decision making. Indeed, the interest group representation model of democratic governance itself anticipates how lawmaking will reflect the results of bargaining between competing interest groups.<sup>19</sup> But even beyond these features of the American system (and in contrast to the more privately bargained-for governance advocated by the New Governance movement),<sup>20</sup> it is striking how much

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U.S.C. § 1357 (2006)); Endangered Species Act of 1973, Pub. L. No. 93-205, 87 Stat. 884 (codified as amended in scattered sections of 16 U.S.C.); No Child Left Behind Act, Pub. L. No. 107-110, 115 Stat. 1425 (enacted Jan. 8, 2002) (codified as amended in scattered sections of 20 U.S.C.); *infra notes* 110–250 and accompanying text.

<sup>17</sup> See 42 U.S.C. §§ 1315, 1396n (2006); 42 U.S.C. § 7543 (2006); 40 C.F.R. § 122.34 (2010); *infra notes* 251–399 and accompanying text; see also, e.g., *Gonzales v. Raich*, 545 U.S. 1, 9 (2005).

<sup>18</sup> For example, Congress designed the Religious Land Use and Institutionalized Persons Act (RLUIPA) of 2000 in response to the U.S. Supreme Court's 1997 invalidation of the Religious Freedom Restoration Act (RFRA) as exceeding legislative authority under the Fourteenth Amendment. RLUIPA, Pub. L. No. 106-274, 114 Stat. 803 (2000) (codified as amended at 42 U.S.C. §§ 2000cc to -5 (2006)); RFRA, Pub. L. No. 103-141, 107 Stat. 1488 (1993), *invalidated by* *City of Boerne v. Flores*, 521 U.S. 507, 511 (1997).

<sup>19</sup> Jody Freeman, *Collaborative Governance in the Administrative State*, 45 UCLA L. REV. 1, 18 & n.48 (1997).

<sup>20</sup> See generally William Simon, *Toyota Jurisprudence: Legal Theory and Rolling Rule Regimes*, in *LAW AND NEW GOVERNANCE IN THE EU AND THE US* (Grainne de Burca & Joanne Scott

federalism-implicating governance is accomplished bilaterally, whether by conventional or dialogic processes. Examples are especially prevalent in environmental law, where jurisdictional overlap is particularly acute and where the federalism discourse is most driven to extremes.<sup>21</sup>

After mapping this landscape and identifying commonalities, Part III draws on both primary and secondary sources to evaluate the different sources of trade in federalism negotiations—exploring the media of exchange, or what it is that the parties are actually bargaining for.<sup>22</sup> Federalism bargainers trade on the various aspects of governing capacity available to each side, including financing, resources, and expertise to accomplish specific regulatory goals, and release from inhibiting legal obligations that one side may hold over the other. In addition, the normative power of federalism itself forms important leverage at the bargaining table—often by clever statutory design—constraining the results of negotiations in which participants are also motivated by other concerns. Part III also considers what constitutional or jurisprudential rules constrain different negotiating currencies.<sup>23</sup> Without additional judicial or legislative guidance, some forms of bargaining may remain mired in the kind of legal uncertainty that can inhibit optimal results or strain public faith in the process.<sup>24</sup> To that end, another purpose of the Article is to call attention to instances of mismatch between legal limits and empirical needs in federalism bargaining, where constraints occasionally operate unnecessarily and license elsewhere may call out for structure.

This positive account ultimately provides foundation for Part IV's critical normative claim that the robust recourse to bargaining is not

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eds., 2006) (articulating the principles of the New Governance movement); Amy J. Cohen, *Negotiation, Meet New Governance: Interests, Skills, and Selves*, 33 LAW & SOC. INQUIRY 503 (2008) (examining the New Governance and negotiation literature and points of convergence between them); Michael C. Dorf & Charles F. Sabel, *A Constitution of Democratic Experimentalism*, 98 COLUM. L. REV. 267 (1998) (identifying and discussing a decentralized model of governance in which actors are able to effectively utilize their local knowledge); Orly Lobel, *The Renew Deal: The Fall of Regulation and the Rise of Governance in Contemporary Legal Thought*, 89 MINN. L. REV. 342 (2004) (contrasting the New Deal and New Governance regulatory models). In contrast to federalism bargaining between state and federal actors, the New Governance movement advocates devolution of national command-and-control regulation to locally mediated negotiation among private stakeholders.

<sup>21</sup> See, e.g., *Rapanos v. United States*, 547 U.S. 715, 716 (2006) (adjudicating overlap in wetlands regulatory jurisdiction); *New York v. United States*, 505 U.S. 144, 149 (1992) (adjudicating jurisdictional overlap in radioactive waste siting).

<sup>22</sup> See *infra* notes 400–549 and accompanying text.

<sup>23</sup> See *infra* notes 400–549 and accompanying text.

<sup>24</sup> Cf. Ronald H. Coase, *The Problem of Social Cost*, 3 J.L. & ECON. 1, 15 (1960) (arguing that bargaining produces efficient results when transaction costs are low, but that transaction costs—like uncertainty—can hinder efficiency).

merely a de facto response to regulatory uncertainty on the part of the Supreme Court or Congress. There, I make the case that federalism bargaining can *itself* be a legitimate way of interpreting federalism, when federalism interpretation is understood as a way of constraining public behavior to be consistent with constitutional values. Some forms of federalism bargaining provide legitimate means for answering *who gets to decide?* by procedurally incorporating not only the consent principles that legitimize bargaining in general, but also the fundamental values that should guide federalism interpretation in any forum.

After all, the core federalism values—the good-governance principles that federalism helps ensure—are essentially realized through good governance procedure: (1) the maintenance of checks and balances to protect individual rights against government excess; (2) the protection of accountability and transparency to ensure meaningful democratic participation; (3) the preference for process that fosters local innovation, variation, and competition; and (4) the cultivation of regulatory space for harnessing synergy between local and national capacity, when needed to cope with interjurisdictional problems.<sup>25</sup> Incorporating these values into the bargaining process allows negotiators to interpret federalism directives procedurally when consensus on the substance is unavailable, thereby filling the inevitable interpretive gaps left by judicial and legislative mandates.

Synthesizing these analyses, Part IV evaluates how some forms of federalism bargaining supplement the unilateral interpretive efforts of the courts, Congress, and the Executive in advancing the values of constitutional federalism.<sup>26</sup> In short, the more that federalism bargaining incorporates legitimizing procedures founded on mutual consent and federalism values, the more it warrants deference as a means of federalism interpretation. Interpretive bargaining becomes less legitimate as factual circumstances depart from the assumptions of mutual consent—in other words, when bargainers cannot freely opt out, cannot be trusted to understand their own interests, or cannot be trusted to faithfully represent their principals—and when procedures contravene core federalism values. Differentiating itself from previous process-based claims, the analysis advances the federalism discourse by providing new theoretical justification for the interpretive work that federalism bargaining presently provides, calling for greater judicial deference to qualifying examples. At a minimum, courts adjudicating federalism-based

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<sup>25</sup> Ryan, *supra* note 8, at 596–628.

<sup>26</sup> *Infra* notes 550–673 and accompanying text.

challenges to the results of such bargaining should consider procedural factors when deciding the appropriate level of deference to extend.

Finally, Part IV applies the interpretive framework to the taxonomy, analyzing the forms of federalism bargaining with the most interpretive potential. After identifying the most robust forms of federalism bargaining for confronting various regulatory challenges, it suggests how legislators, executive actors, stakeholders, practitioners, and adjudicators can further develop the tools of federalism bargaining to navigate jurisdictional overlap.<sup>27</sup>

## I. INTERPRETING FEDERALISM

Notwithstanding the stylized narrative of federalism in rhetoric, the boundary between state and federal authority in practice is the subject of ongoing intergovernmental negotiation. More interesting still are the possibilities for federalism bargaining to fill interpretive gaps through recourse to procedural principles that are closely aligned with core federalism values. This Part situates these two normative claims within the existing federalism discourse and explains how a better understanding of federalism bargaining can contribute to the overall federalism interpretive endeavor. It outlines the federalism values, summarizes the federalism safeguards debate, introduces the concept of bilaterally negotiated interpretation, and suggests insights from negotiation theory that could better inform the federalism discourse.

By whatever means, federalism interpretation constrains public behavior so that it is consistent with constitutional values. Since the nation's founding, jurists and scholars have debated the roles that the three branches of government should play in interpreting the constitutional promise of federalism. The courts explicitly interpret federalism directives in judicial opinions, while political actors implicitly interpret federalism whenever they take action implicating federalism concerns.<sup>28</sup> Superficially, the protection of vertical federalism is viewed as a matter of ensuring that the respective exercise of authority by national and local government honor constitutional directives. But before broaching the venerable debate over the role of each branch in doing this, it is important to consider what "safeguarding federalism" means at a more fundamental level.

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<sup>27</sup> *Infra* notes 550–673 and accompanying text.

<sup>28</sup> Frederic M. Bloom, *State Courts Unbound*, 93 CORNELL L. REV. 501, 505–06 & 505 n.24 (2008) (listing primary texts in the political branch interpretation discourse).

Located within the emerging field of dynamic federalism,<sup>29</sup> this project is grounded in a values-based understanding of federalism that identifies its meaning in terms of the fundamental principles that federalism brings to good governance, including checks and balances, accountability and transparency, local innovation, and problem-solving synergy.<sup>30</sup> The checks and balances created by a federal system prevent both the state and national governments from becoming so powerful as to threaten individual liberties.<sup>31</sup> The governmental accountability and transparency that should accompany federalism ensures voters' ability to accurately reward and punish policymaking choices at the ballot box, thereby allowing them to participate meaningfully in the democratic process at various levels.<sup>32</sup> Fostering local variation allows for the inter-jurisdictional innovation and competition promised by the cherished federalism "laboratory of ideas."<sup>33</sup> Finally, federalism allows local and national actors to harness synergy between unique regulatory capacities, allowing them to partner more effectively in managing interjurisdictional problems.<sup>34</sup> In previous work, I have argued that faithfulness to these values should be the touchstone when adjudicating difficult

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<sup>29</sup> In contrast to the strict "dual federalism" model preferred by the New Federalism movement, the Dynamic Federalism movement explores how simultaneous local and national activity within spheres of shared jurisdiction advances constitutional goals. *See generally* ERWIN CHERMERINKSY, ENHANCING GOVERNMENT: FEDERALISM FOR THE 21ST CENTURY (2008) (envisioning federalism as the empowerment of government at multiple levels); ROBERT SCHAPIRO, POLYPHONIC FEDERALISM (2009) (arguing that multiple perspectives in government create a more efficient, more democratic system); William W. Buzbee, *Interaction's Promise: Preemption Policy Shifts, Risk Regulation, and Experimentalism Lessons*, 57 EMORY L.J. 145 (2007) (discussing "ceiling preemption" and "experimentalist" agency modes); Kiersten H. Engel, *Harnessing the Benefits of Dynamic Federalism in Environmental Law*, 56 EMORY L.J. 159 (2006) (critiquing a static allocation of authority between state and federal levels of government); Ryan, *supra* note 8.

<sup>30</sup> *See* Ryan, *supra* note 8, at 596–658.

<sup>31</sup> *Id.* at 602–06; *see also* Gregory v. Ashcroft, 501 U.S. 452, 458 (1991) (emphasizing the importance of preserving balance between state and federal power).

<sup>32</sup> Ryan, *supra* note 8, at 606–10; *see also* New York v. United States, 505 U.S. 144, 182–83 (1992) (discussing the importance of keeping government actors accountable in contexts of jurisdictional overlap).

<sup>33</sup> Ryan, *supra* note 8, at 610–20; *see also* New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting) ("It is one of the happy incidents of the federal system that a single courageous state may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.").

<sup>34</sup> Ryan, *supra* note 8, at 620–28. *See generally* Stephen Gardbaum, *Rethinking Constitutional Federalism*, 74 TEX. L. REV. 795 (1996) (discussing the role of subsidiarity within federalism, and how interjurisdictional deference ensures efficient and robust lawmaking).

jurisdictional issues that raise questions of federalism<sup>35</sup>—a principle that should hold true regardless of whether the decisionmaker is judicial, legislative, or executive.

Through most of American history, the debate over which branch should be the final federalism arbiter has centered on whether Congress or the Court is best positioned to defend federalism values. In the early years of the new century, attention has shifted toward the role of the executive branch. Indeed, the debate has remained lively over time precisely because there are strong arguments to be made for the critical contributions of each branch. But the entire discourse has focused exclusively on how the branches interpret federalism *unilaterally*—alone in their chambers on one side of the federal system or the other—when they decide whether to pass a law in contested regulatory space, whether to uphold it when challenged, and how to implement or enforce it. Acting unilaterally, branch actors interpret federalism by deciphering text, applying precedent, and formulating substantive answers to precise questions about state and federal power: “Is this federal statute within Article I authority?” “Is this state statute legitimately preempted?”

This project, however, shows how actors within each branch also participate in *bilateral* federalism interpretation, negotiating the allocation of policymaking authority (and subsequent policy terms) with others across the state-federal line. In the spaces between clearly articulated substantive interpretation, state-federal bargaining offers bilateral interpretive tools to realize constitutional meaning, by procedurally yoking the allocation of contested authority to the principles that legitimize bargaining generally and federalism specifically. As discussed in Part IV, bargaining confers procedural legitimacy on outcomes when the prerequisites of genuine mutual consent are met: when parties sufficiently understand their interests, can meaningfully opt out of the agreement, and are faithfully represented at the negotiating table.<sup>36</sup> Federalism bargaining confers further interpretive legitimacy when negotiations are procedurally consistent with the core federalism values of checks, accountability, innovation, and synergy.<sup>37</sup>

Until now, the discourse has failed to account for the federalism implications that accrue—for better or worse—when state and federal actors resolve federalism uncertainty through negotiation. Filling this

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<sup>35</sup> Ryan, *supra* note 8, at 644–62; see also Erin Ryan, *Federalism at the Cathedral: Property Rules, Liability Rules, and Inalienability Rules in Tenth Amendment Infrastructure*, 81 U. COLO. L. REV. 1, 9–10 (2009).

<sup>36</sup> See *infra* notes 561–577 and accompanying text.

<sup>37</sup> See *infra* notes 578–617 and accompanying text.

important gap in federalism scholarship, this Article explores the possibilities raised by state-federal negotiation, broadly understood, to help navigate public decision making in contexts fraught with federalism concerns, such as environmental law, financial regulation, and public health. Decision making in some of these contexts remains stalled due to genuine legal uncertainty about which side is entitled to regulate what, as demonstrated by the difficulties regulating water pollution after the U.S. Supreme Court's decision in *Rapanos v. United States* in 2006.<sup>38</sup> Elsewhere, federalism uncertainty revolves around preemption questions about who *should* lead in shared policymaking contexts, even with greater legal clarity about who *could* trump,<sup>39</sup> as the need for impending climate regulation demonstrates.<sup>40</sup>

This inquiry assesses how federalism bargaining helps bridge pockets of uncertainty that remain after exhausting the more conventionally understood forms of federalism interpretation, to help allocate contested authority and shepherd interjurisdictional collaboration. It also considers the dangers for federalism values posed by problems of representation, transparency, and autonomy that may attend certain negotiations. Part I.A begins with a review of the central theoretical controversy in federalism, highlighting the unilateral focus of the discourse already in progress about which branch most faithfully interprets federalism.

#### A. *Political Safeguards and New Federalism*

For many years, the view prevailed that Congress is the ideal guardian of federalism, operating within a political process that ensures local concerns are considered during national lawmaking. As Herbert Wechsler famously argued in 1954, judicially enforceable constraints were unnecessary because of Congress's institutional design.<sup>41</sup> Legisla-

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<sup>38</sup> See generally 547 U.S. 715 (2006) (limiting the Clean Water Act's definition of "navigable waters"); Charles Duhigg & Janet Rodgers, *Rulings Restrict Clean Water Act, Foiling EPA*, N.Y. TIMES, Feb. 28, 2010, at A1, available at <http://www.nytimes.com/2010/03/01/us/01water.html?emc=eta>.

<sup>39</sup> See generally WILLIAM W. BUZBEE, PREEMPTION CHOICE: THE THEORY, LAW AND REALITY OF FEDERALISM'S CORE QUESTION (2009) (detailing the variety of architectural choices by which federal preemption decisions can be limited to allow for the benefits of institutional and regulatory diversity).

<sup>40</sup> See generally Kirsten Engel, *State and Local Climate Change Initiatives: What Is Motivating State and Local Governments to Address a Global Problem and What Does This Say About Federalism and Environmental Law?*, 38 URB. LAW. 1015 (2006) (discussing the "role reversal" between federal- and state-level governments in addressing climate change).

<sup>41</sup> Wechsler, *supra* note 11, at 558. As Professor Wechsler has written:

tors are elected at the state level, they are understood to represent local interests during federal lawmaking, and they demonstrate keen awareness of issues that matter to constituents (exemplified by the prevalence of local “earmark” legislation within national statutes).<sup>42</sup> Even after senators were elected by popular vote rather than state legislatures,<sup>43</sup> they continued to answer to state-based constituencies.

Because Congress is a large, deliberative, locally elected body, the “Political Safeguards” view holds that courts should leave interpretation of close federalism calls to the political process.<sup>44</sup> This approach—which assumes that Congress is properly equipped to unilaterally<sup>45</sup> interpret constitutional federalism directives through the federal lawmaking process—underlies the “Cooperative Federalism” model that informed the U.S. Supreme Court’s federalism jurisprudence between the New Deal and New Federalism eras.<sup>46</sup> Later scholarship contributed additional process-based theories of federalism,<sup>47</sup> echoed in judicial decisions such as *Garcia v. San Antonio Metropolitan Transit Authority*.<sup>48</sup>

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[T]he 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 . . . the inherent tendency in our system . . . necessitat[es] the widest support before intrusive measures of importance can receive significant consideration, reacting readily to opposition grounded in resistance within the states.

*Id.*

<sup>42</sup> *Id.* at 558 (discussing political process); see John Dinan & Dale Krane, *The State of American Federalism, 2005: Federalism Resurfaces in the Political Debate*, 36 *PUBLIUS* 327, 343–44 (2006) (discussing congressional clashes over earmarks in legislation).

<sup>43</sup> U.S. CONST., amend. XVII.

<sup>44</sup> Wechsler, *supra* note 11, at 547 (“To the extent that federalist values have real significance they must give rise to local sensitivity to central intervention; to the extent that such a local sensitivity exists, it cannot fail to find reflection in the Congress.”).

<sup>45</sup> The Political Safeguards/New Federalism debate evokes a separate contest over unilateral federalism interpretation, with each school advocating exclusive interpretive control by Congress or the Court, respectively. For the purposes of my larger analysis here, however, I use the term “unilateral” interpretation to refer to interpretive activity that takes place exclusively on either the state or federal side of the system.

<sup>46</sup> The Political Safeguards model prevailed in the Court’s federalism jurisprudence between *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 30 (1937), which upheld Congress’s authority to enact the National Labor Relations Act, thereby ending a period of judicial rejection of New Deal legislation, and *New York v. United States*, 505 U.S. at 149 (1992), which rejected provisions of the Low-Level Radioactive Waste Policy Amendments Act of 1985 for exceeding commerce authority and signaling a new, narrower judicial view of federal reach.

<sup>47</sup> *E.g.*, JESSE H. CHOPER, *JUDICIAL REVIEW AND THE POLITICAL PROCESS* 175 (1980) (arguing that the judiciary should not adjudicate the limits of state and federal power); Larry Kramer, *Putting the Politics Back into the Political Safeguards of Federalism*, 100 *COLUM. L.*



Nevertheless, others have critiqued the assumption that political safeguards are sufficient to protect federalism, fearing unchecked federal expansion into traditional areas of state prerogative.<sup>49</sup> As federal regulatory programs grew more ambitious regarding civil rights and environmental objectives, a political movement blossomed in the 1980s urging judicial intervention.<sup>50</sup> The “New Federalism” movement influenced a series of decisions by the Rehnquist Court that erected judicially enforceable limits on federal authority.<sup>51</sup>

The New Federalism jurisprudence empowered the judiciary to unilaterally interpret federalism constraints through jurisdictional boundary-setting doctrines institutionally amenable to judicial oversight.<sup>52</sup> For example, departing from the previous era of deferral to congressional fact-finding about a law’s relationship to interstate commerce, the Rehnquist Court articulated an “economic activity” limitation on the commerce power, enabling the judiciary to establish definitively whether a regulatory target was within Congress’s regulatory reach.<sup>53</sup> Some scholars applaud these cases, arguing that “political safeguards” fail to police Congress’s expanding regulatory appetite.<sup>54</sup> Oth-

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REV. 215, 215 (2000) (arguing that political parties and other political institutions effectively safeguard federalism). Other process-federalism scholarship focusing on congressional lawmaking includes Ernest A. Young, *Two Cheers for Process Federalism*, 46 VILL. L. REV. 1349, 1364 (2001); Vicki Jackson, *Federalism and the Uses and Limits of Law: Printz and Principle?*, 111 HARV. L. REV. 2180, 2240–42 (1998); and Gardbaum, *supra* note 34, at 799–800. See generally JOHN HART ELY, *DEMOCRACY AND DISTRUST* (1980) (articulating a general process-based theory of constitutional interpretation).

<sup>48</sup> 469 U.S. 528, 550–54 (1985). More recently, the political safeguards theory appeared in the dissenting opinions of Justices Breyer and Souter in *United States v. Morrison*, 529 U.S. 598 (2000) (invalidating portions of the Violence Against Women Act). 529 U.S. at 660 (Breyer, J., dissenting); *id.* at 647 (Souter, J., dissenting).

<sup>49</sup> E.g., Baker, *supra* note 11, at 952 (2001) (critiquing Wechsler’s and Kramer’s political safeguards arguments); Saikrishna B. Prakash & John C. Yoo, *The Puzzling Persistence of Process-Based Federalism Theories*, 79 TEX. L. REV. 1459, 1460–62 (2001) (making a textual case for judicially enforceable federalism constraints); William W. Van Alstyne, *The Second Death of Federalism*, 83 MICH. L. REV. 1709, 1723–27 (1985) (critiquing the political safeguards theoretical underpinnings of the Court’s decision in *Garcia*).

<sup>50</sup> Ryan, *supra* note 8, at 539–41 & 539 n.145.

<sup>51</sup> See, e.g., *Morrison*, 529 U.S. at 602 (invalidating a section of the Violence Against Women Act of 1994 for surpassing Congress’s commerce power); *United States v. Lopez*, 514 U.S. 549, 551 (1995) (overturning the Gun-Free School Zones Act of 1990 for similarly exceeding federal power); see also Ryan, *supra* note 8, at 507 n.1 (detailing the standard canon of New Federalism cases).

<sup>52</sup> Ryan, *supra* note 8, at 551. See generally SCHAPIRO, *supra* note 29.

<sup>53</sup> *Morrison*, 529 U.S. at 610.

<sup>54</sup> Lynn A. Baker & Ernest A. Young, *Federalism and the Double Standard of Judicial Review*, 51 DUKE L.J. 75, 128 (2001); Neal Devins, *The Judicial Safeguards of Federalism*, 99 NW. U. L.

ers question whether the judicial line-drawing exercise tracks the realities of interjurisdictional governance,<sup>55</sup> and whether it ultimately serves federalism values.<sup>56</sup>

### B. *Administrative Safeguards and the Role of the Executive*

Even as proponents of Cooperative and New Federalism sparred over whether Congress or the courts should lead, most agreed that the Executive should be last in line.<sup>57</sup> The unelected nature of most executive agents and branch capacity for swift, decisive federal action runs counter to the legislative features that convince Political Safeguards adherents that judicial constraints are unnecessary.<sup>58</sup> Concerns especially revolve around the scope of executive authority to preempt state law through agency rulemaking.<sup>59</sup>

More recently, the scholarly community has divided over executive federalism. Some maintain that political safeguards cannot apply to agencies, which operate less accountably, less deliberatively, and with institutional focuses on narrow areas of concern.<sup>60</sup> But an emerging literature makes the opposite claim, suggesting that agencies are the preferred guardians due to their own institutional capacity. For example, Professors Brian Galle and Mark Seidenfeld argue that agencies are better positioned than Congress to advance federalism interests in regulating because administrative competence makes them *more* delibera-

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REV. 131, 137–43 (2004); William Van Alstyne, *Federalism, Congress, the States, and the Tenth Amendment*, 1987 DUKE L.J. 769, 782–83, 797–98.

<sup>55</sup> E.g., William W. Buzbee, *Contextual Environmental Federalism*, 14 N.Y.U. ENVTL. L.J. 108, 108–09 (2005); 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, 831–32 (1998); Jackson, *supra* note 47, at 2196; Ryan, *supra* note 8, at 567–91.

<sup>56</sup> See Ryan, *supra* note 8, at 644–62. See generally CHEMERINKSY, *supra* note 29 (emphasizing the advantages of multiple sources of government power, and how overlapping jurisdiction advances liberty); SCHAPIRO, *supra* note 29.

<sup>57</sup> E.g., Cass Sunstein, *Law and Administration After Chevron*, 90 COLUM. L. REV. 2071, 2072–73 (1990) (arguing that distinguishing between legislative and administrative deliberation is important to the separation of powers).

<sup>58</sup> E.g., Merrill, *supra* note 11, at 755–56; Sunstein, *supra* note 57, at 2072–73.

<sup>59</sup> Compare *Geier v. Am. Honda Motor Co.*, 529 U.S. 861, 864 (2000) (deeming preempted a tort claim for failure to include airbags in an automobile that met federal safety standards), with *Wyeth v. Levine*, 129 S. Ct. 1187, 1200–01 (2009) (ruling against the agency but declining to overrule *Geier* in a case with similar facts).

<sup>60</sup> E.g., Nina Mendelson, *A Presumption Against Agency Preemption*, 102 NW. U. L. REV. 695, 699 (2008); Merrill, *supra* note 11, at 755–56, 759; Sunstein, *supra* note 57, at 2111–15.

tive and transparent than Congress, based on subject matter expertise and frequent experience working with related state agencies.<sup>61</sup>

Professor Gillian Metzger advocates administrative law as a subconstitutional surrogate for addressing federalism concerns,<sup>62</sup> noting that procedural and substantive safeguards in administrative law offer useful avenues for judicial federalism review that are unavailable for review of legislation.<sup>63</sup> She also observes that agencies are often better-equipped to deal with core federalism concerns, which often arise in specific policymaking contexts in which agency experts are better positioned to investigate state interests.<sup>64</sup>

Professor Catherine Sharkey adds that President Clinton's Federalism Executive Order provides an excellent framework for making agencies accountable to federalism concerns, and argues that it should be made enforceable.<sup>65</sup> She also observes that agencies engaged in programs of cooperative federalism with state partners better heed federalism concerns than those administering programs without state collaboration.<sup>66</sup> For example, the Environmental Protection Agency (EPA), which works closely with states in administering the Clean Air and Water Acts, has shown much greater deference to state interests than the Federal Drug Administration, whose regulations have preempted state common law without much sensitivity.<sup>67</sup>

These "Administrative Safeguards" authors skillfully highlight the institutional features that make agencies more responsive to state interests. They show the federalism benefits that follow intergovernmental interaction by demonstrating the respect for state concerns that federal agents gain from consistent contact. Thus, even though the arguments for Administrative Safeguards are implicitly framed in unilateral terms, the suggestion that the executive branch offers the last, best hope for protecting federalism is predicated on the volume of executive rule-

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<sup>61</sup> Galle & Seidenfeld, *supra* note 11, at 1955–59; *see also* Catherine Sharkey, *Federalism Accountability: 'Agency-Forcing' Measures*, 58 DUKE L.J. 2125, 2146–55 (2009).

<sup>62</sup> Gillian Metzger, *Administrative Law as the New Federalism*, 57 DUKE L.J. 2023, 2063–69 (2008) (discussing *Massachusetts v. EPA*, 549 U.S. 497, 521 (2007), conferring state standing to raise climate change, and *Gonzales v. Oregon*, 546 U.S. 243, 263–64 (2006), declining to preempt state law legalizing assisted suicide).

<sup>63</sup> *Id.* at 2086–88; *see also* Sharkey, *supra* note 61, at 2128–31. *But see* Wayne Logan, *The Adam Walsh Act and the Failed Promise of Administrative Federalism*, 78 GEO. WASH. L. REV. 993, 994–95 (2010) (contesting these claims).

<sup>64</sup> Metzger, *supra* note 62, at 2073–74; *see also* Sharkey, *supra* note 61, at 2146–55.

<sup>65</sup> Sharkey, *supra* note 61, at 2128–31, 2156–73. *See generally* Exec. Order No. 13,132, 64 Fed. Reg. 43,255 (Aug. 4, 1999).

<sup>66</sup> *Id.* at 2155–72.

<sup>67</sup> *Id.* at 2159–61; *cf.* Metzger, *supra* note 62, at 2078.

making, implementation, and enforcement that is effectively negotiated in consultation with state partners.

### C. *Negotiating Federalism*

The federalism safeguards debate is contentious, but the voices are uniform in considering only the federalism implications of unilateral branch activity<sup>68</sup>—even though a substantial amount of governmental activity is better understood as moves made within bilateral state-federal negotiation. The disconnect is stark, especially for the political branches, where negotiations are most apparent.

It is easier to understand this unilateral bias in certain regulatory contexts. For example, the Supreme Court acts fairly unilaterally by design—consulting only the Constitution and precedent—and so we naturally expect unilateralism along the state-federal line when it decides cases with important federalism implications. It acts unilaterally when interpreting constitutional constraints, as it did in articulating the “economic activity” test limiting the commerce power,<sup>69</sup> and in upholding laws against federalism challenges, as it did in affirming supremacy of federal drug laws over state medical marijuana laws.<sup>70</sup> The debate over Congress’s role also presumes unilateral action, alternatively referencing unilateral choices to legislate to the broadest reach of its enumerated powers—such as its failed attempt to expand protection for religious expression under the Religious Freedom Restoration Act<sup>71</sup>—or to exercise restraint of the sort envisioned by the Political Safeguards model.

The executive branch may have the greatest institutional freedom to act unilaterally in every sense of the word, given the single individual at the top of the decision-making apex.<sup>72</sup> Nevertheless, it also holds the

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<sup>68</sup> See *supra* note 45 (distinguishing the contest over interpretive unilateralism between federal branches from the federal/state-side unilateralism on which this analysis is focused).

<sup>69</sup> See *Morrison*, 529 U.S. at 610.

<sup>70</sup> See *Gonzales v. Raich*, 545 U.S. 1, 9 (2005).

<sup>71</sup> See Pub. L. No. 103-141, 107 Stat. 1488, *invalidated by* *City of Boerne v. Flores*, 521 U.S. 507, 511 (1997) (partially overturning the act for exceeding congressional authority to regulate state government); see also 42 U.S.C. § 2000bb(b)(1) (2006) (restoring protection for religious activity burdened by neutrally applicable regulations in the wake of contrary Supreme Court precedent).

<sup>72</sup> See William G. Howell, *Unilateral Powers: A Brief Overview*, 35 PRESIDENTIAL STUD. Q. 417, 418 (2005) (discussing controversial executive decisions); Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245, 2331–46 (2001) (discussing the benefits of presidential control over administrative process); Matthew Stephenson, *Optimal Political Control of the Bureaucracy*, 107 MICH. L. REV. 53, 73 (2008) (critiquing the unitary executive theory on the basis of accountability).

greatest potential to act bilaterally across state-federal lines, with responsibilities ranging from policymaking to implementation and enforcement. Especially in the realms of implementation and enforcement, federal executive activity becomes less unilateral and more negotiated with state and other stakeholders.<sup>73</sup> This high degree of involvement between some federal agencies and state partners substantiates the arguments for Administrative Safeguards.<sup>74</sup>

Yet executive agents are hardly the only federal bargainers. Sometimes Congress participates by engaging its spending power to negotiate with states, creating statutory forums for more nuanced intergovernmental bargaining, or enacting laws by state invitation through negotiated political process. One scholar even describes how the Supreme Court effectively bargains with state courts over the future direction of federal law (though even this novel work fails to recognize the indirect bargaining process that a negotiation theorist understands as intersystemic signaling).<sup>75</sup> Some forms of federalism bargaining are relatively straightforward, as when state actors negotiate for specific policies within federal lawmaking.<sup>76</sup> Others partner different federal, state, and local actors from across the different branches on both sides of the line in an elaborate process with multiple stages of iterative exchange—such as negotiated federal lawmaking over policy, which leads to negotiated rulemaking over the details of implementation, which, in turn, leads to a general permit system that itself become a site for continued negotiation over the details of individual compliance.<sup>77</sup>

As demonstrated in the next Part, all three branches of government participate across state-federal lines in the iterative process of joint decision making that—whether or not they realize it—is the hallmark of bargaining. They do so in a profound variety of contexts, and with a startling array of participants. Although negotiations often match executive actors at the highest state and federal levels, they just as often match federal executive or legislative actors at various points along the authoritative continuum with even more local actors, representing individual cities, discrete municipal agencies, or national organizations of local

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<sup>73</sup> See *infra* notes 96–399 and accompanying text.

<sup>74</sup> *Supra* text accompanying notes 57–67.

<sup>75</sup> See Bloom, *supra* note 28, at 509–47 (discussed *infra* notes 374–399 and accompanying text).

<sup>76</sup> See *infra* notes 113–127 and accompanying text.

<sup>77</sup> See *infra* notes 256–300 and accompanying text.

governance actors.<sup>78</sup> For the sake of simplifying an already complex theoretical inquiry, this Article focuses on the “bilateral” vertical federalism relationship between state and federal participants, occasionally submerging the more multilateral matrix of inter- and intra-state and federal interests concealed behind that line.<sup>79</sup> Indeed, though the conceit of monolithic state and federal actors clarifies my analysis without violating its premise, a fuller treatment of federalism bargaining should take even better account of the horizontal and diagonal dimensions of federalism relationships, and better emphasize the ways in which municipal actors operate independently from the states.<sup>80</sup>

Because federalism scholars habitually see the issue in unilateral terms along the state-federal axis, the bilateral interpretive enterprise of intergovernmental bargaining is missing from the federalism safeguards discourse. But recognizing how much federalism practice is suffused in negotiation opens up new possibilities for managing federalism controversies, and new theoretical tools for analyzing them.

Negotiation theory offers well-developed conceptual frameworks for understanding the dynamics and dilemmas of federalism bargaining, including issues of representation, commitment, leverage, sources of trade, competition, collaboration, and ethics.<sup>81</sup> Negotiation theorists

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<sup>78</sup> See Judith Resnik, *Ratifying Kyoto at the Local Level: Sovereignism, Federalism, and Translocal Organizations of Government Actors (TOGAS)*, 50 ARIZ. L. REV. 709, 711, 739–48 (2008) (describing the role of the “Big 7” and other translocal organizations in the adaptation of legal norms).

<sup>79</sup> Certainly, different federal agents can conflict over a negotiated outcome, as can states on the other side, and localities within states. See generally, e.g., Hari M. Osofsky, *Diagonal Federalism and Climate Change: Implications for the Obama Administration*, 62 ALA. L. REV. (forthcoming 2011) (describing diagonal federalism relationships).

<sup>80</sup> See Nestor M. Davidson, *Cooperative Localism: Federal-Local Collaboration in an Era of State Sovereignty*, 93 VA. L. REV. 959, 960 (2007) (discussing interjurisdictional governance partnerships between municipal and federal actors that bypass the state level). See generally Osofsky, *supra* note 79; Judith Resnik, *Foreign as Domestic Affairs: Rethinking Horizontal Federalism and Foreign Affairs Preemption in Light of Translocal Internationalism*, 57 EMORY L.J. 31 (2007) (disaggregating state and local interests in horizontal federalism terms).

<sup>81</sup> See generally FISHER & URY, *supra* note 9; DAVID A. LAX & JAMES K. SEBENIUS, *THE MANAGER AS NEGOTIATOR: BARGAINING FOR COOPERATION AND COMPETITIVE GAIN* (1986) (discussing negotiation and its managerial applications); HOWARD RAIFFA, *THE ART AND SCIENCE OF NEGOTIATION: HOW TO RESOLVE CONFLICTS AND GET THE BEST OUT OF BARGAINING* (1982) (discussing interpersonal and analytical aspects of negotiation theory); *THE CONSENSUS BUILDING HANDBOOK: A COMPREHENSIVE GUIDE TO REACHING AGREEMENT* (Lawrence Susskind et al. eds., 1999) (describing an approach to negotiation whereby groups jointly develop solutions that are more widely supported than those enacted through traditional decision making); Carrie Menkel-Meadow, *Toward Another View of Legal Negotiation: The Structure of Legal Problem Solving*, 31 UCLA L. REV. 754 (1984) (discussing the merits of “problem-solving” as opposed to zero-sum negotiations). For an excellent collection of essays reviewing the practical insights of negotiation theory in specific dispute

have harnessed insights from law, economics, game theory, psychology, and organizational behavior to build an extensive and interdisciplinary vocabulary for discussing the mechanics of bargaining, analyzing them simultaneously within frameworks of decision theory, societal norms, economic exchange, group dynamics, and cognitive science.<sup>82</sup> In addition, negotiation theory offers negotiated governance new means to accomplish effective democratic participation, incorporate contingent and revisable decision making, manage barriers to consensus, and maximize integrative (rather than purely distributive) solutions to resource allocations whenever possible.<sup>83</sup>

Negotiation theory becomes especially valuable when disaggregating federalism bargainers into the matrix of separate local, state, and federal actors that may have independent interests behind the state-federal line.<sup>84</sup> The multilateral characteristics of federalism bargaining align with many of the central problems with which multiparty negotiation theorists have long wrestled,<sup>85</sup> including group behavior,<sup>86</sup> coalition dynamics,<sup>87</sup> process management,<sup>88</sup> and representation and agency tensions.<sup>89</sup> Negotiation theorists' application of game theory, decision analysis, and behavioral economics could shed light on perverse incentives and irrational outcomes in federalism bargaining contexts, as well as means for overcoming multiparty process impediments such as ex-

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resolution contexts, see *THE HANDBOOK OF DISPUTE RESOLUTION* (Michael L. Moffitt & Robert C. Bordone eds., 2005).

<sup>82</sup> See sources cited, *supra* note 81; see also Carrie Menkel-Meadow, *Roots and Inspirations: A Brief History of the Foundations of Dispute Resolution*, in *THE HANDBOOK OF DISPUTE RESOLUTION*, *supra* note 81, at 13.

<sup>83</sup> E.g., Carrie Menkel-Meadow, *Getting to "Let's Talk": Comments on Collaborative Environmental Dispute Resolution Processes*, 8 *NEV. L.J.* 835, 836 (2008). In negotiation theory, an integrative solution is one that incorporates as much interest-based value into the decision as possible, uncovering potentially beneficial trades between parties' differing interests that may never be realized during conventional haggling between positions. FISHER & URY, *supra* note 9, at 40–80.

<sup>84</sup> See *supra* notes 13–14.

<sup>85</sup> See generally LAWRENCE SUSSKIND & LARRY CRUMP, *MULTIPARTY NEGOTIATION* (2008).

<sup>86</sup> See generally Cass R. Sunstein, *Deliberative Trouble? Why Groups Go to Extremes*, 110 *YALE L.J.* 71 (2000).

<sup>87</sup> See generally James Sebenius & David Lax, *Thinking Coalitionally: Party Arithmetic, Process Opportunism, and Strategic Sequencing*, in *NEGOTIATION ANALYSIS* 153 (H. Peyton Young ed., 1991); James Sebenius, *Sequencing To Build Coalitions: With Whom Should I Talk First?*, in *WISE CHOICES: DECISIONS, GAMES, AND NEGOTIATIONS* (Richard Zeckhauser et al. eds., 1996).

<sup>88</sup> See, e.g., David Strauss, *Managing Meetings to Build Consensus*, in *THE CONSENSUS BUILDING HANDBOOK*, *supra* note 81, at 287. See generally LAWRENCE SUSSKIND & JEFFREY CRUIKSHANK, *BREAKING ROBERT'S RULES* (2006).

<sup>89</sup> See, e.g., ROBERT H. MNOOKIN ET AL., *BEYOND WINNING* 69–92, 178–203 (2004).

clusion and holdout.<sup>90</sup> The multilateral nature of federalism bargaining offers unexplored possibilities for interest linkages and the kind of integrative value creation that negotiation theorists have demonstrated among multiple dovetailing interests.<sup>91</sup> Federalism bargainers would also do well to heed research by negotiation theorists on the powerful heuristic biases that compromise negotiations.<sup>92</sup> The architects of federalism bargaining forums could especially learn from the emerging field of dispute systems design, which applies negotiation theory in organizational structure to reduce the drag of conflict on institutional goals,<sup>93</sup> and new governance theorists' experimentation with process pluralism and iterative self-assessment criteria.<sup>94</sup>

Drawing insights from this literature, this Article fords new theoretical territory to assess how intergovernmental bargaining contributes to the overall federalism interpretive project. Building on previous negotiated governance scholarship,<sup>95</sup> it reconceptualizes the boundary between state and federal authority as a project of ongoing negotiation across the regulatory spectrum. It shows how government actors navigate the challenges of federalism not by virtue of unilateral good (or bad) faith, but through bilateral exchange with counterparts across the

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<sup>90</sup> See LEIGH L. THOMPSON, *THE MIND AND HEART OF THE NEGOTIATOR* 189–94, 198–203 (2d ed. 2001). See generally R. DUNCAN LUCE & HOWARD RAIFFA, *GAMES AND DECISIONS: INTRODUCTION AND CRITICAL SURVEY* (1957); HOWARD RAIFFA, *DECISION ANALYSIS: INTRODUCTORY LECTURES ON CHOICES UNDER UNCERTAINTY* (1997).

<sup>91</sup> See, e.g., FISHER & URY, *supra* note 9, at 40–80; LAX & SEBENIUS, *supra* note 81, at 88–116; RAIFFA, *supra* note 81, at 131–47; see also Michael L. Moffitt, *Disputes as Opportunities to Create Value*, in *THE HANDBOOK OF DISPUTE RESOLUTION*, *supra* note 81, at 173 (summarizing the literature). Indeed, for conflicts amenable to non-zero-sum solutions, increasing the number of parties at the table can provide even more opportunities for value creation. For federalism bargaining that is predominantly zero-sum, negotiation theory offers promising new aspiration points.

<sup>92</sup> See Russell Korobkin & Chris Guthrie, *Heuristics and Biases at the Bargaining Table*, in *THE NEGOTIATOR'S FIELDBOOK* 351 (Andrea Kupfer Schneider & Christopher Honeyman eds., 2006). See generally BARRIERS TO CONFLICT RESOLUTION (Kenneth Arrow et al. eds., 1995); MAX H. BAZERMAN & MARGARET A. NEALE, *NEGOTIATING RATIONALLY* (1992); THOMPSON, *supra* note 90.

<sup>93</sup> E.g., Khalil Z. Shariff, *Designing Institutions to Manage Conflict: Principles for the Problem Solving Organization*, 8 HARV. NEGOT. L. REV. 133, 133–57 (2003). See generally WILLIAM URY ET AL., *GETTING DISPUTES RESOLVED: DESIGN SYSTEMS TO CUT THE COSTS OF CONFLICT* (1993).

<sup>94</sup> See sources cited *supra* note 20.

<sup>95</sup> See generally, e.g., Bruce Babbitt, *ADR Concepts: Reshaping the Way Natural Resources Decisions Are Made*, 19 ALTERNATIVES TO HIGH COST OF LITIG. 13, 13 (2001); Freeman, *supra* note 19, at 4, 8–31 (proposing a model of collaborative governance as an alternative to the model of interest representation); Brad Karkkainen, *Collaborative Ecosystem Governance: Scale, Complexity, and Dynamism*, 21 VA. ENVTL. L.J. 189 (2002) (discussing the emergence of a new model of collaborative ecosystem governance).



divide. It explores how procedural bargaining tools can supplement other interpretative methods to fill inevitable gaps, advancing the values that give federalism meaning.

But to fully understand the collaborative project of American federalism and the tools intergovernmental negotiation yields for navigating it, the first step is to explore the previously uncharted federalism bargaining landscape, the task of Part II.

## II. A TAXONOMY OF STATE-FEDERAL BARGAINING

This Part provides a positive account of federalism bargaining to substantiate the normative claims of the piece and empirically demonstrate the breadth and depth of negotiated governance in federalism-sensitive contexts. Responding to calls within the literature for “thick description” of collaborative governance—especially “in the context of enormously complex problems that implicate multiple jurisdictions and a great variety of parties”<sup>96</sup>—it identifies the primary ways in which state and federal actors negotiate with one another, grouping selected examples into a theoretical framework that establishes key commonalities across the spectrum.

The resulting taxonomy focuses on opportunities for federalism bargaining within the structure of specific constitutional and statutory laws. The categories and examples are illustrative but not exclusive, and the taxonomy itself is loose, affording overlap between some categories. The discussion balances brevity with the detail needed to substantiate the analysis. Despite shortcomings, the taxonomy provides vocabulary for my subsequent analysis and a critical mass of examples from which to generalize, paving the way for future research.

By way of executive summary, state-federal bargaining is endemic to American governance and pervasive in many substantive areas of law. Negotiations take place over both the allocation of policy or decision-making authority and the content of policies made pursuant to that authority. Many negotiations are of the standard variety, neatly book-ended in space and time and conducted among self-identified participants.<sup>97</sup> Yet some of the most interesting examples evoke a broader understanding of negotiation because they take place over longer periods of time,

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<sup>96</sup> Menkel-Meadow, *supra* note 83, at 850. The brevity of taxonomic descriptions may be too “thin” to meet the precise call, but the breadth of coverage fills an equally important gap.

<sup>97</sup> *See, e.g., infra* notes 123–127, 148–157, 158–162 and accompanying text (discussing, in part, banking and financial services regulation, immigration, and the Clean Water Act’s pollution permitting program).

with a broader array of participants, or otherwise depart from the bounded exchange conjured by conventional images of the negotiating table.<sup>98</sup> This Article adopts the broad definition of bargaining that negotiation theorists prefer: an iterative process of communication by which multiple parties seek to influence one another in a project of joint decision making.<sup>99</sup> Unified by this definition, the taxonomy sketches a continuum of negotiating formats that range from familiar forms of face-to-face bargaining to remote exchanges between separately deliberating groups.

State-federal negotiations that follow the conventional model are easily recognizable. For example, state and federal executive actors frequently negotiate in a conventional manner over the details of federal law that may impact the states, about law enforcement matters in which both hold interests, and over administrative details within cooperative programs that include state and federal participation.<sup>100</sup> In addition, Congress frequently uses its spending power to bargain with state policymakers in areas of law traditionally associated with state prerogative, such as education, family law, and health policy.<sup>101</sup>

Other forums for intergovernmental negotiation have conventional features, but are more deeply buried within other legal frameworks. For example, within some spending power-based programs of cooperative federalism, Congress invites further state-federal bargaining by creating statutory invitations for states to propose innovations to existing federal programs, the details of which are often heavily negotiated with the overseeing federal agencies.<sup>102</sup> In addition, some federal agencies invite state stakeholders to the negotiating table early in the process of administrative rulemaking, thereby affording them a greater opportunity to influence the process than is possible under traditional notice-and-comment rulemaking.<sup>103</sup>

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<sup>98</sup> See, e.g., *infra* notes 352–358, 376–392 and accompanying text (discussing Clean Air Act emissions standards setting and the regulation of medical marijuana).

<sup>99</sup> See, e.g., FISHER & URY, *supra* note 9, at xvii (describing it as “back-and-forth communication designed to reach agreement” whenever parties have both shared and differing interests); SHELL, *supra* note 9, at 6 (describing negotiation as an “interactive communication process” that takes place whenever parties want something from one another).

<sup>100</sup> See *infra* notes 110–163 and accompanying text.

<sup>101</sup> Examples of spending power deals, discussed *infra* notes 167–182 and accompanying text, include the No Child Left Behind Act, Pub. L. No. 107-110, 115 Stat. 1425 (enacted Jan. 8, 2002) (codified as amended in scattered sections of 20 U.S.C.).

<sup>102</sup> See, for example, the discussion of policymaking laboratory negotiations, *infra* notes 301–349 and accompanying text.

<sup>103</sup> See, for example, the discussion of negotiated rulemaking, *infra* notes 256–300 and accompanying text.

Still other forms depart even further from the conventional model, and may be overlooked as state-federal bargaining entirely. For example, states have occasionally negotiated with Congress to become bound by enforceable federal laws, and Congress has occasionally created forums for long-term, iterative sharing of policymaking authority with states.<sup>104</sup> In the most exotic examples, participants may not have even recognized what they were doing as negotiation—such as the “iterative federalism” provisions of the Clean Air Act’s two-track vehicular emissions program,<sup>105</sup> or the intersystemic signaling between state and federal policymakers that is currently underway regarding medical marijuana.<sup>106</sup> Nevertheless, they meet the criteria of joint consensus that sets negotiated decision making apart from other forms of state-federal interaction.

Defining negotiated governance so broadly invites the fair question of what acts of governance would *not* be considered some move within a larger negotiation. If intersystemic signaling between state and federal lawmakers over medical marijuana policy counts, what about amicus briefs by state actors in federal court, or even less formal means by which state and federal actors influence one another’s decisions? In fact, our tradition of deliberative democracy within a federal system creates an almost infinite array of possibilities for federalism bargaining, and demonstrating that array is a central purpose of the piece. Still, only the most formalized methods—those most amenable to procedural constraints, public scrutiny, and judicial review—are candidates for the interpretive deference discussed in Part IV.

The taxonomy that follows reviews ten basic types of federalism bargaining, identifying common norms and illustrating each with subject-matter examples. The types are roughly organized into three overarching categories: conventional examples, negotiations to reallocate authority, and joint policymaking negotiations. Some types of bargaining fit into more than one structural group, and some statutory examples include more than one type of bargaining. Although some are more easily recognizable as negotiation than others, each contains the core bargaining constraints that render them candidates for procedural interpretive legitimacy.

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<sup>104</sup> See the discussion of bargained-for commandeering and modified bargained-for commandeering, *infra* notes 183–210 and accompanying text, and the discussion of iterative federalism bargaining, *infra* notes 350–373 and accompanying text.

<sup>105</sup> See *infra* notes 352–358 and accompanying text.

<sup>106</sup> See *infra* notes 376–392 and accompanying text.

The first group encompasses the most conventional examples of federalism bargaining, where the iterative process most resembles colloquial understandings of bargaining as a simple exchange, or a purposeful and time-bounded collective deliberation.<sup>107</sup> These include: (1) interest group representation bargaining, by which state actors lobby federal lawmakers; (2) enforcement negotiations, including those over individual enforcement cases, state-federal enforcement partnerships, and enforcement matters within programs of cooperative federalism; and (3) negotiations over more administrative details, resource allocation, or settlement of litigation. (Spending power deals and negotiated rulemaking also reflect conventional bargaining, but they are addressed in categories that focus on their more interesting features.)

The second category includes negotiations to reallocate authority or to depart from an otherwise established legal order.<sup>108</sup> These take place in contexts of overlap in which a constitutional or statutory provision provides an initial answer to the question of who gets to decide, but the parties choose to bargain around that line. Examples include: (4) spending power bargains, in which the federal government negotiates to extend its regulatory reach into zones otherwise constitutionally reserved to the states; (5) bargained-for encroachment and commandeering, two closely related (but occasionally unconstitutional) forms in which states bargain to assume federal power or become bound by federal law; and (6) negotiations for various exceptions and permissions within frameworks of statutory law.

Finally, the taxonomy turns with greatest attention to joint policymaking bargaining, the most theoretically interesting category, which draws elements from the prior two.<sup>109</sup> Joint policymaking forms include: (7) negotiated rulemaking under the Administrative Procedure Act; (8) policymaking laboratory negotiations, by which federal laws create “fill-in-the-blank” state policymaking zones and otherwise invite state proposals to modify federal law; (9) iterative policymaking negotiations, which create a limited forum for shared state-federal policymaking over time; and (10) intersystemic signaling negotiations, by which separately deliberating state and federal actors trade influence over the direction of shared policy. Negotiations within this final category receive the most sustained attention because they hold the most meaningful promise for federalism interpretation.

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<sup>107</sup> See *infra* notes 110–163 and accompanying text.

<sup>108</sup> See *infra* notes 164–250 and accompanying text.

<sup>109</sup> See *infra* notes 251–399 and accompanying text.

The many subject-matter examples in the taxonomy demonstrate the Article's central claim that the boundary between state and federal authority is more porous than political rhetoric suggests, and more contingent than federalism jurisprudence has acknowledged. They also highlight under-theorized issues in federalism bargaining, and provide supporting data for the analysis in Parts III and IV. The discussion offers rich analysis of a variety of contexts in which federalism bargaining takes place, building a platform for future research.

#### A. *Conventional Forms of Federalism Bargaining*

The most familiar examples of federalism bargaining may be the most frequently used. The first category encompasses these most conventional examples, where the iterative process best resembles colloquial understandings of bargaining as a simple exchange or a time-bounded collective deliberation. These include: (1) interest group representation bargaining, by which state actors lobby federal lawmakers;<sup>110</sup> (2) enforcement negotiations, including those over individual enforcement cases, state-federal enforcement partnerships, and enforcement matters within programs of cooperative federalism;<sup>111</sup> and (3) negotiations over more administrative details, resource allocation, or in settlement of litigation.<sup>112</sup>

The conventional negotiations involve a wide array of participants and variously address policymaking, implementation, and enforcement. Although the result of these negotiations usually becomes a matter of public record, the process itself may be hidden from public view, such that details are ascertainable only through first-hand accounts. In that regard, though these familiar forms of federalism bargaining may raise the fewest eyebrows, they may also be the most vulnerable to conventional negotiating concerns about transparency, inclusion, third-party impacts, and principal-agent tensions.

##### 1. Interest Group Representation

Though hardly unique to federalism bargaining, state agents negotiate with federal policymakers just like any other lobby to protect their interests during federal lawmaking. These negotiations reflect the normal workings of our interest group representation model of gov-

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<sup>110</sup> See *infra* notes 113–127 and accompanying text.

<sup>111</sup> See *infra* notes 128–162 and accompanying text.

<sup>112</sup> See *infra* note 163 and accompanying text.

ernance, in which stakeholders leverage their representation to accomplish their preferences during the legislative process.<sup>113</sup> In these conventional negotiations, state actors voice concerns, rally supporters, and pressure representatives to secure favorable legislative outcomes. Although Congress retains the ultimate decision to enact a law (and the President retains veto power), the sausage-making process by which a bill is created and shepherded through passage is always an elaborate multiparty negotiation between the various stakeholders and their representatives.<sup>114</sup>

The mechanics of this conventional form of bargaining would be familiar to any dealmaker, but interest group negotiations present interesting questions about who best represents state interests. As collective bargainers have long understood, leverage often follows clout, and states often work together to accomplish common legislative preferences in Congress through national organizations such as the National Governors Association (NGA), the National Conference of State Legislatures (NCSL), the National Association of Attorneys General, and the United States Conference of Mayors.<sup>115</sup> Nevertheless, consensus is often hard-fought even within those organizations.<sup>116</sup> When interests diverge among the states, state actors lobby or otherwise negotiate with federal lawmakers independently, as demonstrated by the special interests taken by New York State in federal financial services regulation, or by California in federal environmental policy. In this context, negotiations are usually initiated by state interests, sometimes to spur desired federal policy, and other times in response to federal movement toward undesired policies.

a. *Stimulus Bill*

For example, the states shared fairly uniform interests in President Obama's \$787 billion stimulus proposal, and played a formidable role in designing the resulting American Recovery and Reinvestment Act of 2009.<sup>117</sup> Although the policy decisions associated with the stimulus package are usually attributed to the Obama administration, extensive lobbying by the NGA and NCSL secured the substantial provision of

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<sup>113</sup> Freeman, *supra* note 19, at 18.

<sup>114</sup> *Id.*

<sup>115</sup> *E.g.*, Resnik, *supra* note 78, at 726–69.

<sup>116</sup> Telephone Interview with Melissa Savage, Policy Officer, Nat'l Council of State Legislatures (Jan. 15, 2010).

<sup>117</sup> American Recovery and Reinvestment Act of 2009, Pub. L. No. 111-5, 123 Stat. 115 (codified as amended in scattered sections of 6, 19, 26, 42, and 47 U.S.C.).

direct relief to support state infrastructure and public education.<sup>118</sup> The NGA lobbied Congress to fund state projects that could quickly channel stimulus money into jobs,<sup>119</sup> while NCSL urged the President to aid fiscally hemorrhaging states because their need to cut spending and raise taxes (to meet state constitutional balanced-budget requirements) would inevitably worsen the national slump.<sup>120</sup> In the end, the Stimulus Bill included over \$250 billion in direct assistance to states,<sup>121</sup> approximately one-third of the total funds allocated.<sup>122</sup>

b. *Banking and Financial Services Regulation*

Some states with unique financial regulatory interests have also negotiated tenaciously with federal lawmakers over recent proposals to regulate banking and financial services in the wake of the 2008 crisis. For instance, the recently passed Restoring Financial Stability Act of 2010 creates both a Financial Stability Oversight Council and a new Consumer Financial Protection Agency housed within the Federal Reserve.<sup>123</sup> States lobbied hard to accomplish their legislative preferences in the crafting of these proposals, which could dramatically impact their own regulatory jurisdiction (as the former could wrest regulatory control from dozens of state and federal agencies, and the latter would set consumer protection standards that could alternatively undergird or preempt existing state laws).<sup>124</sup> Some negotiations evidence jealous bat-

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<sup>118</sup> ROBERT JAY DILGER, CONG. RESEARCH SERV., RS 22849, STATES AND PROPOSED ECONOMIC RECOVERY PLANS 7–8 (2009).

<sup>119</sup> Letter from Governors Edward Rendell & James Douglas, Nat'l Governors Ass'n, to Senators Harry Reid & Mitch McConnell and Representatives Nancy Pelosi & John Boehner (Oct. 27, 2008) (concerning a proposed Economic Recovery Package), available at <http://www.nga.org/letters> (follow "October 27, 2008" letter from Governor Rendell and Governor Douglas hyperlink).

<sup>120</sup> DILGER, *supra* note 118, at 1–2 (quoting Letter from Representative Joe Hackney, NCSL President, to President Barack Obama (Nov. 12, 2008) (concerning the Economic Stimulus Package), available at [http://www.ncsl.org/print/statefed/Transition\\_Stim111308.pdf](http://www.ncsl.org/print/statefed/Transition_Stim111308.pdf)).

<sup>121</sup> NAT'L GOVERNORS ASS'N, STATE IMPLEMENTATION OF THE AMERICAN RECOVERY AND REINVESTMENT ACT 2 (Mar. 10, 2009), available at <http://www.nga.org/Files/pdf/ARRASTATEIMPLEMENTATION.pdf>.

<sup>122</sup> Lawrence Michel et al., *The Road to Recovery: Is Obamanomics a Boom or a Bane?*, NEWSWEEK, Nov. 30, 2009, at 46–47 (quoting Professor Allan Meltzer).

<sup>123</sup> Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1376 (2010).

<sup>124</sup> Damian Paletta, *Consumer-Agency Bill Moves in House*, WALL ST. J., Oct. 23, 2009, at A5; Karey Wutkowski, *Dodd's Super Bank Cop Faces Tough Battle*, REUTERS, Nov. 11, 2009, available at <http://www.reuters.com/article/idUSTRE5A94T520091110>.

tles for regulatory turf,<sup>125</sup> while others demonstrate the potential for effective collaboration in areas of jurisdictional overlap.<sup>126</sup> For example, New York State regulators have also collaborated with federal counterparts to bilaterally regulate hot-button issues like executive compensation.<sup>127</sup>

## 2. Enforcement Negotiations

State and federal executive actors frequently negotiate over matters of enforcement where jurisdiction overlaps—ranging from individual criminal cases to enforcement responsibilities within complex programs of cooperative federalism. Ongoing state-federal partnerships have been negotiated to cope with chronic enforcement issues involving gun violence and child pornography, and to extend federal enforcement authority to state actors in contexts where states possess critical enforcement capacity, such as immigration law.<sup>128</sup> State and federal actors also negotiate over enforcement policy and individual enforcement actions arising within cooperative federalism programs, such as the Clean Air, Clean Water, and Superfund Acts.

### a. *Criminal Enforcement Cases*

State and federal law enforcement agencies regularly negotiate responsibility for investigating and prosecuting criminal activity punishable under both state and federal law, often involving drug trafficking, alien smuggling, racketeering, or conspiracy cases.<sup>129</sup> Negotiations over individual cases are usually informal and rarely adversarial; participants range from top lawyers at the Justice Department to individual

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<sup>125</sup> Sarah H. Burghart, *Survey: Overcompensating Much? The Impact of Preemption on Emerging Federal and State Efforts to Limit Executive Compensation*, 2009 COLUM. BUS. L. REV. 669, 673 (2009).

<sup>126</sup> Press Release, Office of N.Y. Attorney Gen., Statement from Attorney General Andrew Cuomo Regarding New Developments in Investigation of Merrill Lynch Bonuses and Bank of America (Jan. 27, 2009), available at [http://www.oag.state.ny.us/media\\_center/2009/jan/jan27a\\_09.html](http://www.oag.state.ny.us/media_center/2009/jan/jan27a_09.html) (describing collaborative state-federal regulatory efforts).

<sup>127</sup> *Id.*

<sup>128</sup> See, e.g., Immigration and Nationality Act, 8 U.S.C. § 1357(g)(1) (2006) (detailing the “ACCESS” program, whereby the Attorney General can “enter into a written agreement with a State . . . pursuant to which an officer or employee of the State . . . who is determined by the Attorney General to be qualified to perform a function of an immigration officer . . . may carry out such function . . .”).

<sup>129</sup> Interview with Paul Marcus, Professor of Criminal Law, William & Mary Law Sch., in Williamsburg, Va. (Oct. 16, 2009).



investigators.<sup>130</sup> Federal agencies usually become involved only after criminal activity has exceeded state and local law enforcement capacity.<sup>131</sup> Negotiations then begin early because decisions about where the case will be prosecuted determine the allocation of resources and investigative responsibilities.<sup>132</sup>

In contrast to state-federal competition over policymaking jurisdiction, state actors usually welcome federal intervention in criminal enforcement matters, especially those involving terrorism and immigration issues, because the deployment of federal resources frees up scarce state resources for other cases.<sup>133</sup> In addition, state and federal agencies occasionally negotiate collaborative “strike force” agreements, a cooperative enterprise for investigating and prosecuting interjurisdictional crime.<sup>134</sup> State district attorneys and lawyers from the state attorney general’s office are occasionally deputized to act as U.S. Attorneys in order to collaborate in these interjurisdictional partnerships.<sup>135</sup>

#### i. Project Safe Neighborhoods

Collaborative state-federal programs have been especially popular in efforts to combat gang violence.<sup>136</sup> Building on successful pilot programs in Virginia and Massachusetts, the Department of Justice has joined with the National District Attorneys Association and the International Association of Chiefs of Police to administer the Project Safe Neighborhoods program, which partners regional U.S. Attorney’s offices with corresponding State Attorney General’s offices, the FBI, ATF, state and local police, and state probation and parole officers to coordinate the deterrence, investigation, and prosecution of gun violence in metropolitan areas.<sup>137</sup> Nearly all such initiatives also involve local government and community representatives, with explicit recognition of the benefits of

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<sup>130</sup> *Id.*

<sup>131</sup> *Id.*

<sup>132</sup> *Id.*

<sup>133</sup> Telephone Interview with Roscoe Howard, former U.S. Attorney for the District of Columbia (Jan. 4, 2010).

<sup>134</sup> *Id.*

<sup>135</sup> *Id.*

<sup>136</sup> *Cf.* Eric Holder, Attorney Gen., U.S. Dep’t of Justice, Remarks at the California Cities Gang Prevention Network (May 10, 2010) (“[W]e must build on the work that law enforcement officials, in partnership with our U.S. Attorneys’ Offices and Justice Department prosecutors, have done to take violent offenders off our streets.”), *available at* <http://www.justice.gov/ag/speeches/2010/ag-speech-100510.html>.

<sup>137</sup> *About Project Safe Neighborhoods*, PROJECT SAFE NEIGHBORHOODS, <http://www.psn.gov/about/index.html> (last visited Nov. 24, 2010).

drawing on both local and national capacities.<sup>138</sup> Similar enforcement partnerships have been established to combat child predation through the Internet Crimes Against Children Task Force Program.<sup>139</sup>

b. *Cooperative Federalism Enforcement Actions*

Copious negotiation also takes place during individual enforcement cases that arise within complex programs of cooperative federalism. In these situations, state and federal regulators assume distinct but interlocking roles to accomplish complex regulatory objectives.

i. Environmental Statutes

For example, EPA often negotiates with state counterparts in prioritizing and implementing enforcement actions against in-state violations under the Clean Air and Water Acts.<sup>140</sup> In one recent instance, EPA collaborated with the Pennsylvania Department of Environmental Protection (DEP) in an attempt to bring a Pennsylvania foundry into compliance with Clean Air Act emissions standards, prompting the Department of Justice to file a federal suit against the foundry on behalf of EPA and the Pennsylvania DEP.<sup>141</sup> Congress also amended the Clean Water Act in the 1970s to require EPA to follow a state list of priority water pollution cleanup projects, rather than allowing EPA to create its own list based on need and public health dangers. As a result, EPA must negotiate with states about which treatment facilities to build where and when.<sup>142</sup> (Allocation by the Clean Air and Water Acts of state

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<sup>138</sup> *Id.* (including “a commitment to tailor the program to local context” in acknowledgement of interjurisdictional variation). Nearly two billion dollars have been committed to the program since 2001. *Id.*

<sup>139</sup> *Internet Crimes Against Children Task Force Program*, DEP’T OF JUSTICE OFFICE OF JUVENILE JUSTICE & DELINQUENCY PREVENTION, <http://ojjdp.ncjrs.org/Programs/ProgSummary.asp?pi=3> (last visited Nov. 24, 2010). Since 1998, over 230,000 law enforcement officers, prosecutors, and other professionals have been trained through the program, which has reviewed more than 180,000 complaints resulting in over 16,500 arrests. *Id.*

<sup>140</sup> Clean Water Act § 309, 33 U.S.C. § 1319 (2006); Clean Air Act § 113, 42 U.S.C. § 7413 (2006).

<sup>141</sup> Press Release, EPA, Complaint against Erie Coke for Clean Air Act Violations Filed Today by the U.S. Attorney for EPA and Pa. DEP (Sept. 22, 2009) (reporting on the complaint and state-federal cooperation); Press Release, Pa. Dep’t of Env’tl. Prot., DEP, EPA Begin Joint Inspection of Erie Coke with Coke Oven Expert (Jan. 12, 2009) (reporting on EPA and DEP investigations).

<sup>142</sup> *See* 33 U.S.C. § 1296 (2006) (providing that states control priority). At least one scholar recalls resulting negotiations that may not have advanced the ultimate objectives of the Act. Emails from Howard Latin, Professor, Rutgers Law Sch., to author (July 2, 2009 & Dec. 31, 2009) (on file with author) (recalling political patronage negotiations in which

implementation responsibilities also engendered a distinct form of policymaking bargaining discussed under the Policymaking Laboratory category in Section C.2, below.)<sup>143</sup>

Similarly, the Superfund Act<sup>144</sup> effectively requires state-federal negotiation over enforcement priorities by mandating that states pay at least ten percent of remedial action to qualify for certain federal clean-up funds.<sup>145</sup> Because EPA cannot force a state to pay more than it is willing to spend, states are effectively empowered to negotiate with EPA over the priority and intensity of proposed cleanups insofar as they can limit cleanup costs to what the relevant state is willing to pay.<sup>146</sup>

*c. Shared Enforcement Policy Negotiations*

Congress has also created specific forums for state-federal enforcement bargaining in more purposeful ways. Some statutes authorize state-federal negotiation over memoranda of agreement (“MOAs”) that govern state-federal enforcement partnerships, as in immigration enforcement and environmental permitting contexts.<sup>147</sup>

*i. Immigration and Nationality Act ACCESS Program*

The Immigration and Nationalization Act enables U.S. Immigration and Customs Enforcement (ICE) to delegate certain enforcement authority to state and local law enforcement agencies under the Agreements of Cooperation in Communities to Enhance Safety and Security (ACCESS) program.<sup>148</sup> Provided that local officers receive proper federal training and supervision, the program allows state and local patrol officers, detectives, investigators, and correctional officers to be equipped with resources and authority to pursue matters otherwise within the exclusive jurisdiction of ICE, including human smuggling, gang activity and organized crime, money laundering, and nar-

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“efforts to grasp a large pot of money triumphed over technical efforts to achieve water pollution control”).

<sup>143</sup> See *infra* notes 301–349 and accompanying text.

<sup>144</sup> Comprehensive Environmental Response, Compensation, and Liability Act of 1980, Pub. L. No. 96-510, 94 Stat. 2767 (codified as amended at 42 U.S.C. §§ 9601–9675 (2006)).

<sup>145</sup> 42 U.S.C. § 9604(c)(3)(C).

<sup>146</sup> Emails from Howard Latin to author, *supra* note 142.

<sup>147</sup> See, e.g., Immigration and Nationality Act, 8 U.S.C. § 1357(g)(1) (2006); 33 U.S.C.A. § 1342 (West 2008).

<sup>148</sup> 8 U.S.C. § 1357(g)(1) (commonly referred to as “287(g)” agreements, these authorize state employees to perform “function[s] of an immigration officer in relation to the investigation, apprehension, or detention of aliens in the United States” under the terms of a MOA).

cotics smuggling.<sup>149</sup> At present, 63 separate ACCESS agreements have been negotiated and 840 local officers trained.<sup>150</sup> Since 2006, more than 70,000 immigration violators have been identified through the program.<sup>151</sup>

The MOA at the center of the ACCESS program defines the scope and limitations of the designated law enforcement authority.<sup>152</sup> Until recently, ACCESS agreements have varied between jurisdictions,<sup>153</sup> highlighting the degree to which terms are negotiated.<sup>154</sup> Although a model agreement has circulated among some localities, many agreements have been tailored to meet the specific interests and needs of individual state or local governments.<sup>155</sup> Variation between MOAs can also reflect concerns of the federal agency, especially when local and federal immigration priorities diverge. For example, ICE limited the scope of shared enforcement authority with Phoenix, Arizona based on concerns that a Maricopa County sheriff's aggressive enforcement activity was inconsistent with federal practice.<sup>156</sup> Many agreements now limit local authority to investigating incarcerated suspects, and only a few allow for a more expansive local role.<sup>157</sup>

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<sup>149</sup> See *Delegation of Immigration Authority Section 287(g) Immigration and Nationality Act*, COLO. DEPARTMENT PUB. SAFETY (Aug. 18, 2008), <http://cdpsweb.state.co.us/immigration/Meetings/October21/> (follow "Delegation of Immigration Section 287(g)" hyperlink) (handout at October 21, 2008 meeting of Colorado Department of Public Safety's Immigration Working Group).

<sup>150</sup> *Id.*

<sup>151</sup> *Id.*

<sup>152</sup> *Id.* Section 1357(g) of title 8 outlines some of the details regarding scope and limitations that are to be included in memoranda between local law enforcement and ICE.

<sup>153</sup> See LISA SEGHETTI ET AL., CONG. RESEARCH SERV., RL 32270, ENFORCING IMMIGRATION LAW: THE ROLE OF STATE AND LOCAL LAW ENFORCEMENT, CONGRESSIONAL RESEARCH SERVICE REPORT 15–18 (2004). Former variation between MOAs focusing on detention facility and field screening are coalescing into relatively standardized agreements, the "Jail Enforcement" model and the "Task Force" model. 2009 ACCESS MOAs, U.S. IMMIGRATION & CUSTOMS ENFORCEMENT, <http://www.ice.gov/foia/readingroom.htm#>.

<sup>154</sup> For a review of negotiated immigration policy in other contexts, see Miriam J. Wells, *The Grassroots Reconfiguration of U.S. Immigration Policy*, 38 INT'L MIGRATION REV. 1308, 1328–31 (2004).

<sup>155</sup> For example, although the first two MOAs with Florida and Alabama contained similar training and federal tort claims provisions, only Florida's included minimum educational criteria, and only Alabama's secured federal representation for state officers in ACCESS-related litigation. SEGHETTI ET AL., *supra* note 153, at 17–19.

<sup>156</sup> J.J. Henley, *Sheriff Arpaio May Lose Immigrant Authority*, ARIZ. REPUBLIC, Oct. 3, 2009, <http://www.azcentral.com/arizonarepublic/news/articles/2009/10/03/20091003arpaio-ice1003.html> (discussing changes in the MOA stripping local enforcement authority on the streets and limiting it to county jails).

<sup>157</sup> See 2009 ACCESS MOAs, *supra* note 153.

## ii. Clean Water Act NPDES Program

States also assume *in situ* enforcement authority over the heart of the Clean Water Act's pollution permitting program through negotiated MOAs. Administered by EPA, the National Pollutant Discharge Elimination System (NPDES) program prohibits the discharge of pollutants into federally protected water bodies without a permit, and allows EPA to delegate permitting authority to willing states.<sup>158</sup> All but a few states have chosen to self-administer the NPDES program because it allows them to control in-state water resources and economic development.<sup>159</sup>

When a state elects to assume NPDES permitting authority, it negotiates a MOA with EPA that sets forth the details about how the permitting program will be implemented.<sup>160</sup> Although most memoranda begin with fairly standard language, there is enough meaningful variation between them to indicate negotiated input from the states.<sup>161</sup> Differences range from varying time periods for review to significantly different allocation of permitting authority in various contexts.<sup>162</sup>

## 3. Administrative Negotiations

State and federal executive agencies also conduct conventional negotiations over administrative matters with fewer policy implications, including some licensing decisions, resource allocation decisions in some of the cooperative programs discussed above, and the settlement

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<sup>158</sup> 33 U.S.C.A. § 1342(b) (West 2008).

<sup>159</sup> *E.g.*, *NPDES State Program Authorization Briefing Paper*, N.M. ENV'T DEP'T (June 2004), [http://www.nmenv.state.nm.us/swqb/PSRS/NPDES-DelegationBriefingPaper\\_June-04.pdf](http://www.nmenv.state.nm.us/swqb/PSRS/NPDES-DelegationBriefingPaper_June-04.pdf) (discussing the benefits of self-administration); Interview with Mike Murphy, Dir. of Envtl. Enhancement, Va. Dep't of Envtl. Quality (DEQ), in Richmond, Va. (Jan. 25, 2010) (noting that state agencies can respond to permit applications more quickly and knowledgeably than EPA).

<sup>160</sup> 40 C.F.R. § 123.24(a)-(b) (2010) (detailing MOA requirements).

<sup>161</sup> E-mails from Robin Kundis Craig, Professor of Envtl. Law, Fla. State Univ. Coll. of Law, to the author (July 3, 2009, 7:18 EST & Jan. 1, 2010, 12:32 EST).

<sup>162</sup> For example, in otherwise similar agreements, EPA retains authority to review any permits issued by the State of Maine but waives review of draft wastewater, stormwater, and sewage sludge permits in Texas. *Compare* NPDES MEMORANDUM OF AGREEMENT BETWEEN THE STATE OF MAINE AND THE UNITED STATES EPA REGION 1, at 5 (2000), *available at* <http://www.maine.gov/dep/blwq/delegation/moa.pdf>, *with* MEMORANDUM OF AGREEMENT BETWEEN THE TEXAS NATURAL RESOURCE CONSERVATION COMMISSION AND THE U.S. EPA, REGION 6, at 27 (1998), *available at* <http://www.epa.gov/region6/water/npdes/docs/texas-moa.pdf>. Other differences include provisions for permitting in Indian country, for enforcing the Endangered Species Act, and for timing, notice, and review. *Compare* NPDES MEMORANDUM OF AGREEMENT BETWEEN THE STATE OF MAINE AND THE UNITED STATES EPA REGION 1, *supra*, at 2, 9, *with* MEMORANDUM OF AGREEMENT BETWEEN THE TEXAS NATURAL RESOURCE CONSERVATION COMMISSION AND THE U.S. EPA REGION 6, *supra*, at 3, 17.

of litigation. For example, negotiation is common in the settlement of litigation over interstate water allocation in which both parties have interests.<sup>163</sup> In contrast to other federalism bargaining forums, administrative negotiations involve less latitude for policymaking, fewer opportunities for impacting the ultimate objectives of a previously defined policy, and are often over the finer details of implementation. Nevertheless, in contrast to purely ministerial decision making (e.g., driver's license issuance), administrative federalism negotiations can involve iterative processes that incorporate input from both sides.

### B. Negotiations to Reallocate Authority

The second category includes negotiations to reallocate authority that is already delegated to one side or the other under an established constitutional or statutory order. Examples include (1) spending power bargains, in which the federal government negotiates to extend its regulatory reach into zones otherwise constitutionally reserved to the states;<sup>164</sup> (2) bargained-for encroachment and commandeering, related forms in which states respectively seek to expand their jurisdiction into federal territory or limit their own regulatory authority under binding federal law;<sup>165</sup> and (3) negotiations for permissions and exceptions within otherwise applicable legal frameworks.<sup>166</sup>

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<sup>163</sup> E.g., Press Release, Dep't of the Interior, Nez Perce Water Rights Settlement Benefits Tribe, Idaho, Pacific Northwest (May 15, 2004), available at [http://www.idwr.idaho.gov/waterboard/WaterPlanning/nezperce/pdf\\_files/press\\_release.pdf](http://www.idwr.idaho.gov/waterboard/WaterPlanning/nezperce/pdf_files/press_release.pdf) (describing negotiations over Snake River Basin water allocation involving state, federal, tribal, and private participants).

<sup>164</sup> See *infra* notes 167–182 and accompanying text.

<sup>165</sup> See *infra* notes 183–210 and accompanying text.

<sup>166</sup> See *infra* notes 211–250 and accompanying text. States also trade power with the federal government in the negotiation of federal enclaves carved out of existing state lands, in which states often cede power in exchange for desired federal policies—such as the creation of a wanted National Park, or the application of the Assimilative Crimes Act, 18 U.S.C. § 13(a) (2006), which allows the borrowing of state law when there is no applicable federal statute. For more on federal enclaves, see INTERDEPARTMENTAL COMM. FOR THE STUDY OF JURISDICTION OVER FEDERAL AREAS, JURISDICTION OVER FEDERAL AREAS WITHIN THE STATES 7–11 (1956), available at <http://www.constitution.org/juris/fjur/1fj1-3.htm>. Another interesting arena of criminal law bargaining is the cross-deputization agreements between the federal government and Indian tribes expanding the jurisdiction of each side without compromising either's sovereignty. Joseph P. Kalt & Joseph W. Singer, *Myths and Realities of Tribal Sovereignty: The Law and Economics of Indian Self-Rule* 11 (KSG Faculty Research Working Paper No. RWP04-016, 2004), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=529084](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=529084).

## 1. Spending Power Deals

The most recognized form of federalism bargaining is that which takes place between the federal and state governments under Congress's Article I spending power.<sup>167</sup> By conditioning the offer of federal funds on federally desired state action, Congress may extend its regulatory reach beyond that of its other enumerated powers.<sup>168</sup> Bargaining with the spending power this way has become a standard congressional tool for influencing regulatory policy in areas of interjurisdictional concern since the New Deal.<sup>169</sup> Examples pervade the regulatory landscape, ranging from simple exchanges sought by "federal funds with strings" to elaborate programs of cooperative federalism.

Of all federalism bargaining forms, spending power bargaining has received the most direct judicial and scholarly attention. Some scholars have critiqued spending power bargaining as an unbounded exercise of federal authority that cannot be reconciled with the New Federalism limits on federal power.<sup>170</sup> They urge that spending power deals allowing federal reach into state jurisdiction cannot be considered fair simply because states consent, because the bargaining leverage so favors the federal side that state participation is effectively coerced.<sup>171</sup> States dependent on federal funding cannot realistically opt out, they argue, so resulting deals are as flawed as a contract made under duress.<sup>172</sup> Yet the Supreme Court has not been receptive, reasoning that, like contracting individuals at common law, states hold the ultimate authority to decide whether their interests are best served by taking or rejecting the proffered deal.<sup>173</sup> The Court has never invalidated a deal meeting its modest spending doctrine constraints, and it rejected

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<sup>167</sup> U.S. CONST. art. I, § 8.

<sup>168</sup> See *South Dakota v. Dole*, 483 U.S. 203, 206 (1987) ("Here, Congress has acted indirectly under its spending power to encourage uniformity in the States' drinking ages. . . . [W]e find this legislative effort within constitutional bounds even if Congress may not regulate drinking ages directly."); see also *New York v. United States*, 505 U.S. 144, 167 (1992) (citing to *Dole* when considering a challenge to the Low-Level Radioactive Waste Policy Amendments Act of 1985, discussed *infra* notes 197–207 and accompanying text).

<sup>169</sup> See Lynn A. Baker, *The Spending Power and the Federalist Revival*, 4 CHAP. L. REV. 195, 196, 213 (2001) (critiquing the prevalence of spending power governance).

<sup>170</sup> See generally Lynn A. Baker & Mitchell N. Berman, *Getting Off the Dole: Why the Court Should Abandon Its Spending Doctrine, and How a Too-Clever Congress Could Provoke It to Do So*, 78 IND. L.J. 459 (2003).

<sup>171</sup> *Id.* at 467–70, 520–21.

<sup>172</sup> *Id.* at 487.

<sup>173</sup> *Dole*, 483 U.S. at 207–08.

an invitation to extend New Federalism constraints to that doctrine in the late Rehnquist years.<sup>174</sup>

Spending power deals are exclusively at the invitation of Congress, to the state executive or legislative actors empowered to act on the deal. Yet the negotiation process usually begins in interest group bargaining over terms before the deal is formally proffered—and Congress does not always initiate this bargaining.<sup>175</sup> For that reason, spending power bargains are not always federally force-fed policy directives to states; some represent the wishes of state advocates.<sup>176</sup>

a. *Energy Efficiency Conservation Block Grant Program*

For example, state actors were instrumental in the genesis of the Energy Independence and Security Act (EISA) of 2007,<sup>177</sup> which authorized the Energy Efficiency Conservation Block Grant program (EECBG) as part of a national clean energy legislative effort.<sup>178</sup> Thanks to state leadership in the design of the program, federal grants under the EECBG program offer funds to state, tribal, and municipal governments in exchange for their development and implementation of community-based projects to improve energy efficiency, reduce energy use, and reduce carbon emissions.<sup>179</sup> Congress proposed \$2 billion in annual funding for the EECBG program in the EISA, with 2% going to tribal programs, 28% to states, 68% to large cities and counties, and an additional 2% for a competitive program for small cities and counties.<sup>180</sup>

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<sup>174</sup> *Pierce Cnty., Wash. v. Guillen*, 537 U.S. 129, 146 (2003).

<sup>175</sup> See, e.g., *New York v. United States*, 505 U.S. at 150 (discussing Congress's reliance on a report by the National Governors Association in drafting the Low-Level Radioactive Waste Policy Amendments Act of 1985); Anonymous Interview, U.S. Senate, Wash., D.C. (Nov. 24, 2009) [hereinafter Senate Interview] (on file with the *Boston College Law Review*) (describing how state actors often initiate spending power legislation through interest group negotiations with federal lawmakers, including the Energy Efficiency Conservation Block Grant Program).

<sup>176</sup> See Senate Interview, *supra* note 175.

<sup>177</sup> Pub. L. No. 110-140, 121 Stat. 1492 (codified as amended in scattered sections of 2, 15, 42, and 46 U.S.C.).

<sup>178</sup> See 42 U.S.C. §§ 17151–17158 (2006).

<sup>179</sup> *Weatherization and Intergovernmental Program: Efficiency Conservation Block Grant Program*, ENERGY EFFICIENCY & RENEWABLE ENERGY, <http://www.eecbg.energy.gov/> (noting that DOE has already awarded \$1.6 billion in grants to over 1400 projects).

<sup>180</sup> Energy Efficiency and Conservation Block Grant Program—State, Local and Tribal Allocation Formulas, 74 Fed. Reg. 17,461 (Apr. 15, 2009); see also U.S. CONFERENCE OF MAYORS, THE ENERGY EFFICIENCY AND CONSERVATION BLOCK GRANT (EECBG) 2, available at <http://usmayors.org/climateprotection/documents/eecbghandout.pdf>.



b. *No Child Left Behind*

On the other hand, other spending power deals are more clearly driven by federal policymakers, and some are unpopular even among the states that choose to bargain. For example, the No Child Left Behind Act of 2001<sup>181</sup> is a standards-based education reform law that trades federal education funding for states' agreement to focus on bringing their most disadvantaged students up to a federally mandated level of achievement. Although few question the value of its goals and no states chose to forgo needed federal funds, the Act's assessment policies have proved controversial. For example, many school systems argue that the Act forces unbeneficial "teaching to the test," unnecessarily usurps local authority, and penalizes already struggling school systems.<sup>182</sup>

2. Bargained-for Encroachment and Commandeering

On the flip side of spending power bargaining are states' occasional attempts to bargain around constitutionally designated lines of authority by negotiating to expand their jurisdiction at the expense of federal prerogative, or to be bound (or "commandeered") by federal law.

In bargained-for encroachment, states negotiate for federal approval of interstate compacts that derogate federal power. Interstate compacts (which can also involve federal parties) represent the converse of spending power bargaining, in that states seek federal permission to encroach on federal jurisdiction.<sup>183</sup> As a doctrinal matter, congressional approval is required whenever such an agreement would increase the power of states at the expense of the federal government,<sup>184</sup> effectively reallocating the initial distribution of regulatory authority.

For example, eight states negotiated the Great Lakes-St. Lawrence River Basin Compact between 2001 and 2005 out of fear that proposals from the Army Corps of Engineers to divert Great Lakes waters to the high plains might trigger further federal mandates to funnel Great Lakes waters to arid western states.<sup>185</sup> The compact, like many similar interstate water compacts, won congressional approval despite clear

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<sup>181</sup> Pub. L. No. 107-110, 115 Stat. 1425 (enacted Jan. 8, 2002) (codified as amended in scattered sections of 20 U.S.C.).

<sup>182</sup> Sam Dillon, *Obama to Seek Sweeping Change of the 'No Child' Law*, N.Y. TIMES, Feb. 1, 2010, at A1 (noting criticisms of the Act); Krista Kafer, *No Child Left Behind: Where Do We Go from Here?*, BACKGROUND (The Heritage Found., Wash., D.C.), July 6, 2004, <http://www.heritage.org/research/education/bg1775.cfm> (full state participation).

<sup>183</sup> DAN TARLOCK, LAW OF WATER RIGHTS AND RESOURCES § 10:24 (2009).

<sup>184</sup> *Id.*

<sup>185</sup> *Id.* § 10:32.

Supreme Court precedent establishing federal supremacy in the allocation of interstate waters.<sup>186</sup> Notwithstanding, the compact makes it difficult to divert water from the basin, empowering state decision making at the expense of federal prerogative.<sup>187</sup>

Congressional consent also saves interstate compacts that might otherwise encroach on Congress's exclusive authority over interstate commerce.<sup>188</sup> For example, the terms of the Yellowstone River Compact contravene the Commerce Clause by requiring that Montana, North Dakota, and Wyoming consent to any water diversions outside the water basin,<sup>189</sup> but the Ninth Circuit has affirmed that congressional approval of the compact immunized this consent requirement from objections under the dormant commerce clause.<sup>190</sup>

More controversially, in bargained-for commandeering, states negotiate with the federal government to bind state regulatory discretion under a federal law that reflects state preferences, usually to referee a collective action problem among the states without losing state policy leadership.<sup>191</sup> When state actors have initiated this kind of bargaining, it is generally because they prefer the solution they are proposing to a fully preemptive solution imposed top-down from federal lawmakers.<sup>192</sup> State consensus is often developed through the activities of a national state interests group, such as the National Governors Association, which then bargains directly with federal actors on behalf of its constituency.<sup>193</sup>

Federal involvement is often necessary to make these state-initiated agreements enforceable because state compacts are too easily abandoned by states that later repudiate the deal.<sup>194</sup> Securing federal en-

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<sup>186</sup> *Sporhase v. Nebraska ex rel. Douglas*, 458 U.S. 941, 953–54, 959–60 (1982).

<sup>187</sup> *TARLOCK*, *supra* note 183, § 10:32.

<sup>188</sup> *Id.* § 10:26.

<sup>189</sup> YELLOWSTONE RIVER COMPACT COMM'N, <http://yrcc.usgs.gov/> (last visited Nov. 25, 2010).

<sup>190</sup> *Intake Water Co. v. Yellowstone River Compact Comm'n*, 769 F.2d 568, 570 (9th Cir. 1985).

<sup>191</sup> *E.g.*, Low-Level Radioactive Waste Policy Act, Pub. L. No. 96-573, 94 Stat. 3347 (1980), *amended by* Low-Level Radioactive Waste Policy Amendments Act of 1985, Pub. L. No. 99-240, 99 Stat. 1842 (1986) (current version at 42 U.S.C. §§ 2021b–2021j (2006)).

<sup>192</sup> Ryan, *supra* note 35, at 33.

<sup>193</sup> *See* MITCHEL N. HERIAN, GOVERNORS AND THE NATIONAL GOVERNORS ASSOCIATION (NGA): EXAMINING THE FEDERAL LOBBYING IMPACT OF THE NGA 31 (2008) (finding that the NGA has a good success rate in achieving the outcomes for which it lobbies on behalf of its state-based constituencies).

<sup>194</sup> Ryan, *supra* note 35, at 35; *see also* *Alabama v. North Carolina*, 130 S. Ct. 2295, 2305–13 (2010) (rejecting the request by members of a radioactive waste disposal state compact to hold North Carolina liable for damages and sanctions after it withdrew from the agree-

forcement of a plan collectively chosen by the states behind the regulatory veil of ignorance allows the parties to fairly chart a course of horizontal and vertical consensus before history determines the plan's eventual winners and losers.<sup>195</sup> The most famous example of this kind of bargaining was rejected by the U.S. Supreme Court as unconstitutional in *New York v. United States* in 1992 for violating the allocation of state and federal power protected by the Tenth Amendment.<sup>196</sup> Nevertheless, as demonstrated by the Clean Water Act's Phase II Stormwater Rule, weaker "modified commandeering bargains" have enabled individual state actors to opt out of an overall agreement to reallocate state and federal authority.

a. *Low-Level Radioactive Waste Policy Act*

In the most notorious example of bargained-for commandeering, the states persuaded Congress to enact the terms of the Low-Level Radioactive Waste Policy Act (LLRWPA).<sup>197</sup> The LLRWPA created a federal regulatory program in which states agreed to be responsible for their fair share of radioactive waste. Prior to its passage, the few states with disposal facilities were so frustrated at being the toxic dumping grounds for the others that—unable to reject interstate shipments without violating the dormant commerce clause—they threatened to close their facilities entirely, leaving the nation with no safe disposal options.<sup>198</sup> To resolve the collective action problem without ceding all regulatory control to the federal government, the states unanimously negotiated with one another and then with Congress for a preferred solution that ultimately bound state legislative discretion under federal law.<sup>199</sup>

In a conscious attempt to respect state consensus, Congress adopted the state-led approach in enacting the LLRWPA and subsequent amendments requiring each state to either arrange for safe dis-

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ment, even though North Carolina had accepted \$80 million from plaintiff states in anticipation of its performance).

<sup>195</sup> Ryan, *supra* note 35, at 35.

<sup>196</sup> See 505 U.S. at 174–75 (“The take title provision is of a different character . . . . In this provision, Congress has crossed the line distinguishing encouragement from coercion.”). *But see* Ryan, *supra* note 35, at 13 (arguing this overbroad conclusion is inconsistent with federalism when bargaining is state-initiated).

<sup>197</sup> Pub. L. No. 96-573, 94 Stat. 3347 (1980), amended by Low-Level Radioactive Waste Policy Amendments Act of 1985, Pub. L. No. 99-240, 99 Stat. 1842 (1986) (current version at 42 U.S.C. §§ 2021b–2021j (2006)).

<sup>198</sup> *New York v. United States*, 505 U.S. at 150; Ryan, *supra* note 35, at 30–31.

<sup>199</sup> *New York v. United States*, 505 U.S. at 192 (White, J., concurring and dissenting); Ryan, *supra* note 35, at 33–34.

posal of in-state waste by the deadline or assume legal responsibility.<sup>200</sup> Although New York State helped lead negotiations with Congress, it had trouble siting an in-state facility and ultimately sued to repudiate the deal.<sup>201</sup> The Supreme Court invalidated the key penalty provision, holding that the facility-siting requirement violated the Tenth Amendment.<sup>202</sup> The Court held that the law unconstitutionally commandeered New York's sovereign authority, even though New York had consensually negotiated the deal.<sup>203</sup>

*New York v. United States* presents a rare example of an explicit doctrinal barrier to potentially desirable federalism bargaining. The case also offers an unusually clear example of how a decision implicating an important policy result—one potentially resolving the ongoing radioactive waste disposal dilemma<sup>204</sup>—might have come out differently had the justices more clearly understood the interpretive potential of state-federal bargaining in contexts of jurisdictional overlap. By engaging in bargained-for commandeering, states can secure a federal umpire for collective action disputes and retain greater control over the policymaking process than is available to them as the more passive partners in congressional spending power bargains.

Scholars have critiqued the logic of the Court's decision in *New York v. United States*, which seems to deny state initiative and self-determination in a way that contradicts federalism values.<sup>205</sup> In previous work I have explored the anti-bargaining implications of the decision in detail, showing how the Court could eliminate the doctrinal barrier simply by revising its implicit remedy rule to enable state-initiated bargaining around the anti-commandeering entitlement.<sup>206</sup> Nevertheless,

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<sup>200</sup> 99 Stat. at 1842; Ryan, *supra* note 35, at 33–34.

<sup>201</sup> *New York v. United States*, 505 U.S. at 154; Ryan, *supra* note 35, at 33–34.

<sup>202</sup> *New York v. United States*, 505 U.S. at 149.

<sup>203</sup> *See id.* at 174–75. A more interesting suit not addressed by these facts would have been one by a state that had not consented to the terms of the deal proffered to Congress by the NGA. That would have demonstrated the kind of commandeering that would rightly concern the Court—but the *New York v. United States* rule clearly declined to differentiate between bargained-for commandeering with and without state consent. *Id.* at 180–82 (“Where Congress exceeds its authority relative to the States, therefore, the departure from the constitutional plan cannot be ratified by the ‘consent’ of state officials.”).

<sup>204</sup> *See* Ryan, *supra* note 35, at 50–55.

<sup>205</sup> *Id.* at 13, 55–64. *See generally* Jessica Bulman-Pozen & Heather K. Gerken, *Uncooperative Federalism*, 118 YALE L.J. 1256 (2009) (discussing how states use their regulatory power to resist federal policy); Neil S. Siegel, *Commandeering and Its Alternatives: A Federalism Perspective*, 59 VAND. L. REV. 1629 (2006) (critiquing the consequences of the anti-commandeering doctrine).

<sup>206</sup> *See generally* Ryan, *supra* note 35.

bargained-for commandeering remains a form of federalism bargaining unavailable as a matter of constitutional law.<sup>207</sup>

b. *Modified Bargained-for Commandeering: Stormwater Regulation*

Modified bargained-for commandeering involves a broad consensus between most state actors to be bound under federally enforceable law, but with an opt-out provision for individually dissenting states. For example, drawing lessons from the failed LLRWPA agreement, the states later negotiated away regulatory discretion in permitting local construction projects through a process of negotiated rulemaking over the terms of the Clean Water Act's Phase II Stormwater Rule, which regulates the stormwater discharges of small and medium-sized municipalities.<sup>208</sup> That bargain survived a Tenth Amendment challenge because the drafters allowed individual municipalities to opt out of the overall state-federal partnership in favor of a more complicated permitting provision for large cities.<sup>209</sup>

Although the modified approach might not have worked in the more pressing collective action problem confronted by the LLRWPA, Phase II Rule negotiations show how a weaker form of commandeering bargaining can withstand constitutional challenge and still contribute to state-federal partnerships. The opt-out provision also hedges against the representational concerns raised in situations like this one, in which the negotiated consensus had been reached between EPA and an incomplete sample of the thousands of impacted municipalities.<sup>210</sup>

### 3. Exceptions Negotiations

State and federal actors also negotiate for exceptions under otherwise applicable statutory law. Most of the time, these negotiations feature state executive actors seeking release from federal executives who administer federal laws that apply to state activity (or private activity of economic interest to the state), such as the Endangered Species Act (ESA). In the ESA context, states negotiate to undertake otherwise pro-

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<sup>207</sup> *Id.* at 39.

<sup>208</sup> 40 C.F.R. § 122.34 (2010), discussed *infra* notes 283–290 and accompanying text.

<sup>209</sup> *Env'tl. Def. Ctr. v. EPA (EDC II)*, 344 F.3d 832, 845 n.18 (9th Cir. 2003).

<sup>210</sup> See Phase II Stormwater Final Rule, 60 Fed. Reg. 40,230, 40,232 (Aug. 7, 1995) (“Several commentators questioned whether State and local officials had been consulted in developing the proposed rule . . . . Prior to publication of the direct final and proposed rules . . . EPA met with representatives of key municipal organizations . . . . EPA will continue its outreach efforts . . . .”).

hibited activities under “Incidental Take Permits” (ITPs), they negotiate over federal listing decisions that threaten state economic interests, and they negotiate over consultation requirements.<sup>211</sup> In other examples, such as federal hydroelectric licensing, state actors hold important cards.<sup>212</sup>

a. *ESA Incidental Take Permits*

The ESA<sup>213</sup> forbids public and private actions that would harm plant and animal species listed under the statute as threatened or endangered,<sup>214</sup> and requires federal actors to consult with federal wildlife agencies before taking action that could result in harm to listed species.<sup>215</sup> State actors must heed listed species protections both in maintaining state infrastructure<sup>216</sup> and in regulating private activity.<sup>217</sup> Nevertheless, the many opportunities that have evolved to negotiate ESA restrictions exemplify how states negotiate for federal exceptions.

Most notably, although the statute prohibits human actions that harm (or “take”) listed species, it provides a window to negotiate exceptions for certain activities that might cause unintentional harm if that harm is sufficiently mitigated.<sup>218</sup> When applicants create a “Habitat Conservation Plan” (HCP) to compensate for any harm, they can seek an ITP that exempts them from ESA liability.<sup>219</sup> States have used this provision to negotiate exceptions for both development and conservation-oriented projects.

For example, California and federal agencies negotiated the complex Natomas Basin HCP in 2003 to enable the Sacramento Area Flood Control Agency to protect the city with a needed levee system that nevertheless placed habitat for listed species within the redirected flood-

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<sup>211</sup> See *infra* notes 213–237 and accompanying text.

<sup>212</sup> See *infra* notes 240–247 and accompanying text.

<sup>213</sup> 16 U.S.C. § 1531–1544 (2006).

<sup>214</sup> *Id.* § 1538.

<sup>215</sup> *Id.* § 1536.

<sup>216</sup> See, e.g., NATOMAS BASIN CONSERVANCY, <http://www.natomasbasin.org/> (last visited Nov. 25, 2010).

<sup>217</sup> E.g., *Strahan v. Coxe*, 127 F.3d 155, 158 (1st Cir. 1997) (holding that state fishing permits allowing fixed nets in Northern Right whale breeding habitat constituted a vicarious take).

<sup>218</sup> 16 U.S.C. § 1539.

<sup>219</sup> See *id.* Applicants must submit a conservation plan specifying the likely impact from the taking, why alternatives are not preferable, and steps to minimize and mitigate negative impacts. *Id.* § 1539(a)(2)(A).

plain.<sup>220</sup> Similarly, several northwest states have participated in the negotiation of complex HCPs to enable large-scale timber harvest on state forestlands.<sup>221</sup> Sometimes (as in the Natomas Basin example), states are bargaining in their sovereign capacity as local regulators; elsewhere (as with state timber sales), they act as ordinary regulated parties in their proprietary capacity as landowners—a distinction that may fairly warrant different interpretive bargaining scrutiny.<sup>222</sup> State-federal negotiated HCPs (and others) have been lauded as striking a pragmatic balance between environmental and economic needs, but have also been criticized for undermining the preservation principle behind the ESA, which pointedly does not call for cost-benefit analysis.<sup>223</sup>

States have also negotiated ESA exceptions to enable even more ambitious conservation programs. For example, in the early 1990s, California passed the Natural Community Conservation Planning Act (NCCP), a voluntary conservation program to protect intact ecosystems rather than individual species.<sup>224</sup> The program sought to accommodate compatible land use and prevent the regulatory “gridlock” that can accompany listing decisions by engaging interested parties before species became threatened.<sup>225</sup> The NCCP was thus more ambitious in scope than both the ESA and the California Endangered Species Act, which only protect individual species that have already significantly de-

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<sup>220</sup> See NATOMAS BASIN CONSERVANCY, *supra* note 216. The levee required a federal permit that could not issue because the habitat for twenty-two listed species would be drowned by the redirected flood. *Id.* However, a complex deal between federal agencies, state regulators, and private parties enabled an ITP on the basis of an HCP in which private landowners surrounding the levee protected additional habitat. *Id.*

<sup>221</sup> For example, proposals to list the northern spotted owl and marbled murrelet as endangered in Washington State prompted state-federal negotiation of a multi-species HCP to enable logging while mitigating harm. See Craig Hansen & William Vogel, *Forest Land HCPs: A Case Study*, ENDANGERED SPECIES BULL., July/Aug. 2000, at 18, 18–19, <http://www.fws.gov/endangered/esa-library/pdf/18-19.pdf>.

<sup>222</sup> Cf. *Klump v. United States*, 30 F. App'x 958, 961 (Fed. Cir. 2002) (adjusting scrutiny of a takings claim against a state acting not as a sovereign regulator but as a riparian landowner).

<sup>223</sup> 16 U.S.C. § 1533(1)(A) (2006) (specifying that listing determinations be made “solely on the basis of the best scientific and commercial data available,” without cost-benefit analysis). For the argument that HCPs simply “nickel-and-dime species toward extinction,” see Gregory A. Thomas, *Where Property Rights and Biodiversity Converge, Part I: Conservation Planning at the Regional Scale*, 17 ENDANGERED SPECIES UPDATE 139, 140 (2000), available at <http://deepblue.lib.umich.edu/bitstream/2027.42/39357/1/als9527.0017.006.pdf>.

<sup>224</sup> CAL. FISH & GAME CODE §§ 2800–2835 (West 2003).

<sup>225</sup> *Natural Community Conservation Planning*, CAL. DEP'T OF FISH & GAME, <http://www.dfg.ca.gov/habcon/nccp/> (last visited Dec. 4, 2010).

clined.<sup>226</sup> However, the NCCP's "all carrots and no stick" approach did not marshal broad participation.<sup>227</sup>

The state labored to procure participation until the ESA listing of the California gnatcatcher threatened the NCCP's viability because actions permitted under the NCCP (as consistent with preserving the birds' overall habitat) could still violate specific ESA protections for the birds (if individual birds were actually harmed or harassed).<sup>228</sup> State regulators understood that the conflict was fatal to the NCCP, and federal regulators were open to suggestions, as corresponding federal conservation efforts had been hamstrung without the kinds of legal authority and regulatory capacity available at the state and local level.<sup>229</sup>

Under the leadership of Interior Secretary Bruce Babbitt, state and federal wildlife agencies negotiated a framework that would enable the NCCP to accomplish its goals without risk of participant prosecution under the ESA.<sup>230</sup> Through an extensively negotiated ITP, developers of targeted habitat were required to participate in the NCCP,<sup>231</sup> but actions taken in compliance with an NCCP permit were formally exempted from ESA liability.<sup>232</sup>

#### b. *Endangered Species Act Consultation and Listing Negotiations*

The ESA also requires that federal agencies considering action that could potentially impact listed species must consult with designated resource agencies to evaluate the likelihood of harm and recommend alternatives.<sup>233</sup> Although there is no formal role for state agencies in this process, federal consultation often triggers state-federal bargaining if state and federal projects are intertwined. For example, California agencies have long negotiated with the U.S. Fish and Wild-

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<sup>226</sup> *Id.*

<sup>227</sup> BRUCE BABBITT, *CITIES IN THE WILDERNESS: A NEW VISION OF LAND USE IN AMERICA* 66 (2005); Mara A. Marks et al., *The Experimental Metropolis: Political Impediments and Opportunities for Innovation*, in *UP AGAINST THE SPRAWL: PUBLIC POLICY AND THE MAKING OF SOUTHERN CALIFORNIA* 353, 353 (Jennifer Wolch et al. eds., 2004).

<sup>228</sup> BABBITT, *supra* note 227, at 66; DeAnne Parker, Comment, *Natural Community Conservation Planning: California's Emerging Ecosystem Management Alternative*, 6 U. BALT. J. ENVTL. L. 107, 129–30 (1997).

<sup>229</sup> BABBITT, *supra* note 227, at 70 ("We had legal authority, yet there was no practical way to use it without the active cooperation of city and county governments willing to use their traditional zoning powers to regulate land use.").

<sup>230</sup> *Id.* at 64–72.

<sup>231</sup> Marks et al., *supra* note 227, at 353.

<sup>232</sup> John M. Gaffin, *Can We Conserve California's Threatened Fisheries Through Natural Community Conservation Planning?*, 27 ENVTL. L. 791, 793 (1997).

<sup>233</sup> 16 U.S.C. § 1536(a) (2006).



life Service (FWS) and the National Oceanic and Atmospheric Association Fisheries (NOAA Fisheries) over consultations that impact state water projects.<sup>234</sup>

Similarly, although there is no formal invitation for state participation in decisions to list a species proposed for protection, the statute encourages state-federal cooperation, and listing proposals that could impact important state economic interests have led to state-federal bargaining.<sup>235</sup> These negotiations are controversial because they appear to reallocate federal decision-making authority to states in a manner inconsistent with the conservation goals of the statute. For example, Maine negotiated a five-year opportunity to experiment with state-based conservation efforts before its Atlantic salmon run was ultimately listed.<sup>236</sup> However, eleven Midwestern states used a negotiated reprieve from a Black-Tailed Prairie Dog listing to successfully increase breeding populations while staving off the negative economic consequences of an ESA listing.<sup>237</sup>

### c. Federal Licensing Decisions

Sometimes federalism bargaining occurs in the seemingly administrative context of federal licensing decisions that impact state proprietary or economic interests. For example, hydroelectric licensing decisions by the Federal Energy Regulatory Commission (FERC) are negotiations for permission to violate the otherwise applicable federal navigational servi-

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<sup>234</sup> PERVAZE SHEIKH & BETSY CODY, CONG. RESEARCH SERV., RL 31975, CALFED BAY-DELTA PROGRAM: OVERVIEW OF INSTITUTIONAL AND WATER USE ISSUES 7 (2005), available at <http://www.nationalaglawcenter.org/assets/crs/RL31975.pdf> (describing state-federal negotiations over regulating project operations to protect water quality and listed species).

<sup>235</sup> 16 U.S.C. § 1533 (2006).

<sup>236</sup> John Elmen, *Swimming Upstream: A Legal Analysis of Listing Atlantic Salmon as an Endangered Species*, 9 OCEAN & COASTAL L.J. 333, 334 (2004). After FWS's 1995 determination that Maine's population was threatened, state-federal negotiations delayed formal listing to enable state-led management efforts. Proposed Threatened Status for a Distinct Population Segment of Anadromous Atlantic Salmon (*Salmo Salar*) in Seven Maine Rivers, 60 Fed. Reg. 50,530, 50,539 (Sept. 29, 1995) (codified at 50 C.F.R. pts. 17, 425 (2010)). Despite Maine's conservation plan, the species was ultimately listed as endangered in 2000. Elmen, *supra*, at 334.

<sup>237</sup> JAMES RASBAND ET AL., NATURAL RESOURCES LAW AND POLICY 344 (1st ed. 2004). FWS determined that the species warranted listing in 2000, but, after successful state-based management efforts, found that the listing was no longer warranted in 2009. 12-Month Finding on a Petition to List the Black-Tailed Prairie Dog as Threatened or Endangered, 74 Fed. Reg. 63,343, 63,366 (Dec. 3, 2009) (codified at 50 C.F.R. pt. 17 (2010)).

tude.<sup>238</sup> Similarly, many federal decisions to license offshore oil drilling projects must receive permission from states participating in Coastal Zone Management Act programs.<sup>239</sup> Both represent unusual cases in which the states can hold the legally trumping authority.

#### i. Hydroelectric Dam Licensing

Hydroelectric licensing decisions regularly feature state-federal bargaining because the Clean Water Act's section 401 certification process gives states a regulatory hook over an otherwise federal process.<sup>240</sup> This provision authorizes states and tribal governments to review and approve, condition, or deny all federal permits or licenses that might result in a discharge to state or tribal waters, including wetlands.<sup>241</sup> The major federal licenses and permits subject to section 401 are FERC hydropower licenses, Rivers and Harbors Act section 9 and 10 permits, and CWA sections 402 and 404 permits in the few states that have not assumed NPDES permitting authority.<sup>242</sup>

States wield their authority to ensure that the activity will comply with state water quality standards and other state water resource regulations.<sup>243</sup> When an applicant requests a license from FERC, either to relicense an existing dam or for new construction, the state determines whether state standards will be attainable if the license is granted, and what conditions may be required in the CWA section 401 certification to ensure that the standards will be met.<sup>244</sup> Because these conditions are incorporated into the ultimate FERC license, states are effectively able to dictate some of the terms of the federal license—an ability that

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<sup>238</sup> *E.g.*, *Fed. Power Comm'n v. Niagara Mohawk Power Corp.*, 347 U.S. 239, 249 (1954) (describing how the Commerce Clause creates a dominant servitude to regulate navigation).

<sup>239</sup> *Infra* notes 303–327 and accompanying text.

<sup>240</sup> 33 U.S.C. § 1330 (2006); *see also* GEORGE COGGINS & ROBERT GLICKSMAN, *PUBLIC NATURAL RESOURCES LAW* § 37:41 (2d ed. 2009) (noting that the state certification process “represents the states’ best opportunity to significantly affect the licensing process for hydroelectric facilities on waters within federal jurisdictions”).

<sup>241</sup> 33 U.S.C. § 1330.

<sup>242</sup> 16 U.S.C. § 797(e) (2006) (authorizing FERC to license hydroelectric facilities); 33 U.S.C. §§ 401, 403 (2006) (regulating construction in navigable waters); 33 U.S.C.A. § 1342 (West 2008) (outlining the “National Pollutant Discharge Elimination System” permitting regime); Debra L. Donahue, *The Untapped Power of Clean Water Act Section 401*, 23 *ECOLOGY L.Q.* 201, 219–20 (1996).

<sup>243</sup> *Section 401 Certification and Wetlands*, EPA, <http://www.epa.gov/owow/wetlands/facts/fact24.html> (last visited Nov. 26, 2010).

<sup>244</sup> *See* *PUD No. 1 v. Wash. Dep’t of Ecology*, 511 U.S. 700, 710 (1994) (“The court concluded that § 401(d) confers on States power to ‘consider all state action related to water quality in imposing conditions on section 401 certificates.’”).

invites a limited process of state-federal logrolling.<sup>245</sup> States have particularly strong bargaining leverage when the project implicates a state's proprietary water rights,<sup>246</sup> or when the project is governed under the Reclamation Act, which requires the Bureau of Reclamation to use project water in conformity with state law absent contrary congressional directives.<sup>247</sup>

## ii. Offshore Drilling Licensing

Discussed in greater detail in the next Section, the Coastal Zone Management Act (CZMA)<sup>248</sup> invites states to participate in the protection of coastal zones in which both the federal and state governments have significant interests. When a state elects to participate by creating a federally approved management plan for its coastal resources, approval authority for federal activities within the zone shifts to the states.<sup>249</sup> For this reason, the Department of Interior must often receive state approval before issuing federal leases for offshore drilling on the outer continental shelf (OCS).<sup>250</sup>

### C. Joint Policymaking Bargaining Forms

Finally, the taxonomy turns to the most theoretically interesting category of joint policymaking bargaining, which often incorporates elements from previous categories. The forms here include: (1) negotiated rulemaking under the Administrative Procedure Act;<sup>251</sup> (2) policymaking laboratory negotiations, by which federal laws invite state proposals to create or modify federal law;<sup>252</sup> (3) iterative policymaking negotiations, which create staggered dialogues of state-federal policy-

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<sup>245</sup> *Id.* at 711–12 (holding that the CWA authorizes state conditions on section 401 certifications to enforce compliance with state water quality standards, conferring broad-based negotiating authority on states in this context); *California v. Fed. Energy Regulatory Comm'n*, 495 U.S. 490, 496 (1990) (reaffirming federal preemption of other state minimum flow requirements).

<sup>246</sup> COGGINS & GLICKSMAN, *supra* note 240, § 37:8–10.

<sup>247</sup> *Id.* § 36:15; *California v. United States*, 438 U.S. 645, 677–79 (1978) (requiring that the New Melones Dam so conform).

<sup>248</sup> 16 U.S.C. §§ 1451–1466 (2006).

<sup>249</sup> 15 C.F.R. pt. 930 (2010).

<sup>250</sup> BRANCH OF ENVTL. ASSESSMENT, *Environmental Program: Coastal Zone Management Act*, BUREAU OF OCEAN ENERGY MGMT., REGULATION & ENFORCEMENT, <http://www.boemre.gov/eppd/compliance/czma/index.htm> (last visited Nov. 26, 2010). Federal interests may override state objections in limited circumstances, but the program's policy is to resolve differences with states, by mediation if necessary. *Id.*

<sup>251</sup> See *infra* notes 256–300 and accompanying text.

<sup>252</sup> See *infra* notes 301–349 and accompanying text.

making;<sup>253</sup> and (4) intersystemic signaling negotiations, by which separately deliberating state and federal actors trade influence over the direction of shared policy over time.<sup>254</sup>

In contrast to the more conventional forms of negotiation where only the results become matters of public record, the process of negotiation used in joint policymaking is often as available for public scrutiny as the results, moderating negotiated governance concerns that hinge on transparency.<sup>255</sup> Although conventional federalism bargaining often arises spontaneously, joint policymaking bargaining is usually the result of premeditated design, affording legislative opportunities to engineer support for federalism considerations into the process even when participants are distracted by more immediate goals.

### 1. Negotiated Rulemaking

Although the most conventional of the less familiar forms, “negotiated rulemaking” between federal agencies and state stakeholders is a sparingly used tool that holds promise for facilitating sound administrative policymaking in disputed federalism contexts, such as those implicating environmental law, national security, and consumer safety.

Under the Administrative Procedure Act, the traditional “notice and comment” administrative rulemaking process allows for a limited degree of participation by state stakeholders who comment on a federal agency’s proposed rule. The agency publishes the proposal in the Federal Register, invites public comments critiquing the draft, and then uses its discretion to revise or defend the rule in response to comments.<sup>256</sup> Even this iterative process constitutes a modest negotiation, but it leaves participants so frequently unsatisfied that many agencies began to informally use more extensive negotiated rulemaking in the 1970s.<sup>257</sup> In 1990, Congress passed the Negotiated Rulemaking Act, amending the Administrative Procedure Act to allow a more dynamic

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<sup>253</sup> See *infra* notes 350–373 and accompanying text.

<sup>254</sup> See *infra* notes 374–399 and accompanying text.

<sup>255</sup> Cf. Telephone Interview with Lawrence Susskind, Professor, Mass. Inst. of Tech. (Feb. 19, 2010) (explaining that the transparency within stakeholder participation leads to stability, thereby reducing the need for future revisitation of issues because stakeholders already understand why the process reached the given outcome).

<sup>256</sup> 5 U.S.C. § 553 (2006).

<sup>257</sup> Bertram I. Spector, *Negotiated Rulemaking: A Participative Approach to Consensus-Building for Regulatory Development and Implementation*, TECHNICAL NOTES (U.S. Agency for Int’l Dev., Wash., D.C.), May 1999, at 2, available at [http://www.usaid.gov/our\\_work/democracy\\_and\\_governance/publications/ipc/tn-10.pdf](http://www.usaid.gov/our_work/democracy_and_governance/publications/ipc/tn-10.pdf). See generally DAVID M. PRITZKER & DEBORAH S. DALTON, NEGOTIATED RULEMAKING SOURCEBOOK (1995).

and inclusive rulemaking process,<sup>258</sup> and a subsequent Executive Order required all federal agencies to consider negotiated rulemaking when developing regulations.<sup>259</sup>

Negotiated rulemaking allows stakeholders much more influence over unfolding regulatory decisions. Under notice and comment, public participation is limited to criticism of well-formed rules in which the agency is already substantially invested.<sup>260</sup> By contrast, stakeholders in negotiated rulemaking collectively design a proposed rule that takes into account their respective interests and expertise from the beginning.<sup>261</sup> The concept, outline, and/or text of a rule is hammered out by an advisory committee of carefully balanced representation from the agency, the regulated public, community groups and NGOs, and state and local governments.<sup>262</sup> A professional intermediary leads the effort to ensure that all stakeholders are appropriately involved and to help interpret problem-solving opportunities.<sup>263</sup> Any consensus reached by the group becomes the basis of the proposed rule, which is still subject to public comment through the normal notice-and-comment procedures.<sup>264</sup> If the group does not reach consensus, then the agency proceeds through the usual notice-and-comment process.<sup>265</sup>

The negotiated rulemaking process, a tailored version of interest group bargaining within established legislative constraints, can yield important benefits.<sup>266</sup> The process is usually more subjectively satisfying

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<sup>258</sup> 5 U.S.C. §§ 561–570.

<sup>259</sup> See Exec. Order No. 12,866, 3 C.F.R. 638 (1993), *reprinted in* 5 U.S.C. § 601 (2006).

<sup>260</sup> See Spector, *supra* note 257, at 1.

The traditional process of regulatory development is typically top-down. Government initiates, formulates and proposes the rules. In . . . closed systems, regulations are imposed; in more open systems, groups or individuals may comment on the proposals . . . , but with little possibility of making major structural and functional modifications to the regulations.

*Id.*

<sup>261</sup> See *id.* (“Negotiated rulemaking brings together affected stakeholder groups with the relevant government agency and a neutral mediator or facilitator to build a consensus on the features of a new regulation *before* it is proposed officially by the agency.”).

<sup>262</sup> *Negotiated Rulemaking Fact Sheet*, EPA, <http://www.epa.gov/adr/factsheetregneg.pdf> (last visited Nov. 26, 2010).

<sup>263</sup> Gerard McMahon & Lawrence Susskind, *Theory and Practice of Negotiated Rulemaking*, 3 *YALE J. REG.* 133, 155 (1985).

<sup>264</sup> *Id.* at 137.

<sup>265</sup> *Id.*

<sup>266</sup> Jody Freeman & Laura I. Langbein, *Regulatory Negotiation and the Legitimacy Benefit*, 9 *N.Y.U. ENVTL. L.J.* 60, 60–64 (2000); McMahon & Susskind, *supra* note 263, at 137–38; Joshua Secunda & Lawrence Susskind, *The Risks and the Advantages of Agency Discretion: Evidence from EPA’s Project XL*, 17 *UCLA J. ENVTL. L. & POL’Y.* 67, 112–16 (1999).

for all stakeholders, including the government agency representatives.<sup>267</sup> More cooperative relationships are established between the regulated parties and the agencies, facilitating future implementation and enforcement of new rules.<sup>268</sup> Final regulations include fewer technical errors and are clearer to stakeholders, so that less time, money and effort is expended on enforcement.<sup>269</sup> Getting a proposed rule out for public comment takes more time under negotiated rulemaking than standard notice and comment, but thereafter, negotiated rules receive fewer and more moderate public comment, and are less frequently challenged in court by regulated entities.<sup>270</sup> Ultimately, then, final regulations can be implemented more quickly following their debut in the Federal Register, and with greater compliance from stakeholders.<sup>271</sup> The process also confers valuable learning benefits on participants, who come to better understand the concerns of other stakeholders, grow invested in the consensus they help create, and ultimately campaign for the success of the regulations within their own constituencies.<sup>272</sup>

Negotiated rulemaking offers additional procedural benefits because it ensures that agency personnel will be unambiguously informed about the full federalism implications of a proposed rule by the impacted state interests. Federal agencies are already required by executive order to prepare a federalism impact statement for rulemaking with federalism implications,<sup>273</sup> but the quality of state-federal communication within negotiated rulemaking enhances the likelihood that federal agencies will appreciate and understand the full extent of state

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<sup>267</sup> PRITZKER & DALTON, *supra* note 257, at 3–5; Spector, *supra* note 257, at 2.

<sup>268</sup> Cf. Freeman & Langbein, *supra* note 266, at 62 (citing to Cornelius M. Kerwin & Laura I. Langbein, *Regulatory Negotiation Versus Conventional Rule Making: Claims, Counterclaims, and Empirical Evidence*, 10 J. PUB. ADMIN. RES. & THEORY 599, 610, 625 (2000) (finding from an empirical study that participants believed negotiated rulemaking led to more learning and higher satisfaction than conventional rulemaking, and by extension, better rules)).

<sup>269</sup> PRITZKER & DALTON, *supra* note 257, at 3–5; Spector, *supra* note 257, at 2.

<sup>270</sup> Spector, *supra* note 257, at 2.

<sup>271</sup> *Id.*

<sup>272</sup> McMahon & Susskind, *supra* note 263, at 161–65.

<sup>273</sup> Exec. Order No. 13,132, 64 Fed. Reg. 43,255, 43,257–43,258 (Aug. 10, 1999). The order requires:

[A] description of the extent of the agency's prior consultation with State and local officials, a summary of the nature of their concerns and the agency's position supporting the need to issue the regulation, and a statement of the extent to which the concerns of State and local officials have been met . . . .

*Id.*

concerns. Just as the consensus-building process invests participating stakeholders with respect for the competing concerns of other stakeholders, it invests participating agency personnel with respect for the federalism concerns of state stakeholders.<sup>274</sup> State-side federalism bargainers interviewed for this project consistently reported that they always prefer negotiated rulemaking to notice and comment—even if their ultimate impact remains small—because the products of fully informed federal consultation are always preferable to the alternative.<sup>275</sup>

Nevertheless, the limitations of negotiated rulemaking also warrant attention. Some critics argue that the process does not always deliver the goods it promises because consensus cannot always be won.<sup>276</sup> To facilitate consensus, a substantial amount of pre-negotiation consultation sometimes occurs, which can helpfully advance the negotiated rulemaking but may compromise transparency.<sup>277</sup> There may also be rulemaking subjects that are simply inappropriate for negotiation, such as those that implicate fundamental rights (perhaps in the realm of family law). Similarly, it would be unwise to trust the legitimate interests of vulnerable and insular minorities to negotiated decision making by unsympathetic majorities.<sup>278</sup>

Another potential pitfall of negotiated rulemaking is deciding which stakeholders will be represented on the Advisory Committee, and by whom they will be represented. The process breaks down if there are too many negotiators involved, so agents must be selected to represent large groups of occasionally diverse stakeholders (such as the fifty states,

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<sup>274</sup> Cf. Anonymous Interview, U.S. EPA, Office of the Administrator, Wash., D.C., (Jan. 4, 2010) [hereinafter EPA Interview] (on file with the *Boston College Law Review*) (“Early consultation is an important way of avoiding ‘process fouls,’ where someone says, ‘hey you never asked us about that!’ Consultation can help with buy-in to the rules, but even where it doesn’t help with buy-in to the rules, it helps get buy-in to the process. It’s much easier to move forward with that.”).

<sup>275</sup> E.g., Telephone Interview with Melissa Savage, *supra* note 116.

<sup>276</sup> Cary Coglianese, *Assessing Consensus: The Promise and Performance of Negotiated Rulemaking*, 46 DUKE L.J. 1255, 1261, 1321–34 (1997). *But see* Philip Harter, *Assessing the Assessors: The Actual Performance of Negotiated Rulemaking*, 9 N.Y.U. ENVTL. L.J. 32, 39–44, 54–57 (2000) (challenging Coglianese’s methodology and arguing that negotiated rulemaking has lived up to its promise).

<sup>277</sup> EPA Interview, *supra* note 274 (noting that the most protracted part of all state-federal bargaining is about “what the opening gambit will be” when the formal negotiation begins, but also that this facilitates progress and that, “when we’re doing our job, there are lots of conversations like these early on in the process”).

<sup>278</sup> Cf. Owen Fiss, *Against Settlement*, 93 YALE L.J. 1073, 1076 (1984). Nevada faced this problem when Yucca Mountain was selected for nuclear waste disposal over the State’s vociferous protest. Ryan, *supra* note 35, at 29 n.104.

hundreds of large cities, and countless smaller municipalities).<sup>279</sup> Among stakeholders who feel poorly represented, the rule will lack the legitimacy that often makes the results achieved by negotiated rulemaking more effective than the standard process. Nor will absent stakeholders amass the learning benefits or become the rule evangelists that make negotiated rules less vulnerable to challenge, less likely to be violated, and generally less expensive to implement and enforce. The transparency of the negotiation process will be especially important for concerned stakeholders who do not participate directly.

Negotiated rulemaking is initiated by federal agencies, and can involve the participation of state actors from all levels of government and from national organizations advocating state interests.<sup>280</sup> The EPA is the most frequent federal user, followed by the Department of Labor, the Department of the Interior, and the Department of the Treasury.<sup>281</sup> Nevertheless, in the first thirteen years surrounding passage of the Negotiated Rulemaking Act, only fifty federal rules were produced through negotiated rulemaking—as little as one percent of the total number of rules promulgated over this period.<sup>282</sup> Standard notice-and-comment rulemaking clearly remains the dominant form of executive rulemaking.

a. *The Phase II Stormwater Rule*

Negotiated rulemaking can be used to forge uniform regulations that best meet the interests of a large variety of stakeholders, or to forge regulations conferring wide discretion on regulated parties. For example, EPA used negotiated rulemaking to forge the complex regulations needed to implement the Clean Water Act's Phase II Stormwater program.<sup>283</sup>

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<sup>279</sup> Cf. Robert Stavins, *Another Copenhagen Outcome*, EU ENERGY POL'Y BLOG (Jan. 6, 2010, 11:38 EST), <http://www.energypolicyblog.com/2010/01/06/another-copenhagen-outcome-serious-questions-about-the-best-institutional-path-forward/> (discussing multi-party gridlock in Copenhagen climate negotiations).

<sup>280</sup> See 5 U.S.C. §§ 562(8), 563(a) (2006). Many state agencies are also frequent users, as are agencies in other countries. Spector, *supra* note 257, at 2.

<sup>281</sup> Spector, *supra* note 257, at 2.

<sup>282</sup> Coglianesse, *supra* note 276, at 1336–41 (listing negotiated rules); Spector, *supra* note 257, at 2 (noting fifty cases between 1982 and 1995). This estimate is based on reports that federal agencies promulgated an average of five hundred rules per year during the early 2000s. See John Graham, Adm'r, White House Office of Info. & Regulatory Affairs, Speech at the Kennedy School of Government (Sept. 25, 2003), *available at* [http://www.whitehouse.gov/omb/inforeg\\_speeches\\_030925graham/](http://www.whitehouse.gov/omb/inforeg_speeches_030925graham/).

<sup>283</sup> EPA OFFICE OF WATER, OVERVIEW OF THE STORM WATER PROGRAM 8 (1996), *available at* <http://www.epa.gov/npdes/pubs/owm0195.pdf>.



Situated vexingly at the crossroad between land uses regulated locally and water pollution regulated federally, contaminated stormwater is mostly discharged to federally protected waters by municipalities that collect it through curbside storm drains.<sup>284</sup> The Phase II negotiated rulemaking advisory committee included thirty-five members representing municipal, environmental, and industrial stakeholder groups.<sup>285</sup> Reached through a decade of intense negotiation, the final rule<sup>286</sup> empowers municipalities to tailor regulatory efforts as individually as possible while still accomplishing the overall federal goal, as reduced to five minimum criteria.<sup>287</sup> Dischargers may develop any program that: (1) educates the public about stormwater hygiene, (2) incorporates public participation, (3) prevents illicit discharges, (4) controls construction debris, and (5) manages pollutant runoff from municipal operations.<sup>288</sup>

The rule's flexibility reflects the impact of multiple perspectives during the rulemaking process, in which participants recognized that circumstances differed too widely for consensus on requirements more specific than the five minimum measures.<sup>289</sup> Although the rule nevertheless endured legal challenges from several plaintiffs unsatisfied with different aspects of the rule, it withstood challenge on almost every point, including a federalism-based claim.<sup>290</sup> Considering the massive number of municipalities it regulates, the fact that the rule was challenged by only a handful of Texas municipalities (in a lawsuit the state of Texas did not join) testifies to the strength of the consensus through which it was created.

b. *A Cautionary Tale: The REAL ID Act*

The value of negotiated rulemaking to federalism bargaining may be best understood in relief against the failure of alternatives in federal-

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<sup>284</sup> See *EDC II*, 344 F.3d at 840–41.

<sup>285</sup> *Id.* at 864.

<sup>286</sup> The Phase II Final Rule was published in the *Federal Register* on December 8, 1999. See Regulations for Revision of the Water Pollution Control Program Addressing Storm Water Discharges, 64 Fed. Reg. 68,722 (Dec. 8, 1999) (codified at 40 C.F.R. pts. 9, 122, 123, 124 (2010)).

<sup>287</sup> *EDC II*, 344 F.3d at 847–48.

<sup>288</sup> 40 C.F.R. § 122.34(b) (2010).

<sup>289</sup> See Regulations for Revision of the Water Pollution Control Program Addressing Storm Water Discharges, 64 Fed. Reg. at 68,754 (“EPA has intentionally not provided a precise definition of MEP [maximum extent possible] to allow maximum flexibility in MS4 permitting.”).

<sup>290</sup> *EDC II*, 344 F.3d at 840 (finding, among other things, that the EPA had the authority to impose the NPDES rule and that the EPA properly consulted with state and local officials).

ism-sensitive contexts. Particularly informative are the strikingly different state responses to the two approaches Congress has recently taken in tightening national security through identification reform—one requiring regulations through negotiated rulemaking, and the other through traditional notice and comment.

After the 9/11 terrorist attacks, Congress ordered the Department of Homeland Security (DHS) to establish rules regarding valid identification for federal purposes (such as boarding an aircraft or accessing federal buildings).<sup>291</sup> Recognizing the implications for state-issued driver's licenses and ID cards, Congress required DHS to use negotiated rulemaking to forge consensus among the states about how best to proceed.<sup>292</sup> States leery of the staggering costs associated with proposed reforms participated actively in the process.<sup>293</sup> However, the subsequent REAL ID Act of 2005 repealed the ongoing negotiated rulemaking and required DHS to prescribe top-down federal requirements for state-issued licenses.<sup>294</sup>

The resulting DHS rules have been bitterly opposed by the majority of state governors, legislatures, and motor vehicle administrations,<sup>295</sup> prompting a virtual state rebellion that cuts across the red-state/blue-state political divide.<sup>296</sup> No state met the December 2009 deadline initially contemplated by the statute, and over half have enacted or considered legislation prohibiting compliance with the Act, defunding its implementation, or calling for its repeal.<sup>297</sup> In the face of this unprecedented state hostility, DHS has extended compliance deadlines even for those that did not request extensions, and bills have been introduced in both houses of Congress to repeal the Act.<sup>298</sup> Efforts to repeal what is increasingly referred to as a “failed” policy have won endorsements

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<sup>291</sup> National Security Intelligence Reform Act of 2004, Pub. L. No. 108-458, 118 Stat. 3638.

<sup>292</sup> *Id.*

<sup>293</sup> Sharkey, *supra* note 61, at 2151 (noting that DHS's detailed federalism impact statement included a three hundred-page transcript of input from the NGA, NCSL, and many individual governors and state agencies).

<sup>294</sup> Pub. L. No. 109-13, 119 Stat. 302 (codified at 8 U.S.C. § 1778 (2006)).

<sup>295</sup> *The History of Federal Requirements for State-Issued Drivers Licenses and ID Cards*, NAT'L CONFERENCE OF STATE LEGISLATION (NCSL), <http://www.ncsl.org/Default.aspx?TabId=13581> (last visited Nov. 26, 2010).

<sup>296</sup> ACLU, *Anti-REAL ID Legislation in the States*, REALNIGHTMARE.ORG, <http://www.realnightmare.org/news/105/> (last visited Nov. 26, 2010).

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

<sup>298</sup> Identification Security Enhancement Act of 2007, S. 717, 110th Cong. (2007); The REAL ID Repeal and Identification Security Enhancement Act of 2009, H.R. 3471, 111th Cong.

from organizations across the political spectrum.<sup>299</sup> Even the Executive Director of the ACLU, for whom federalism concerns have not historically ranked highly, opined in *USA Today* that the REAL ID Act violates the Tenth Amendment.<sup>300</sup>

## 2. Policymaking Laboratory Negotiations

Particularly powerful fora for federalism bargaining are “policy-making laboratory negotiations,” which harness the promise of federalism as a national laboratory of state-based ideas and experimentation. In these negotiations, the federal government invites the states to propose innovations and variations within existing federal laws that address realms of concurrent jurisdiction. Sometimes, Congress explicitly authorizes bargaining in a statute that invites states to lead local policy-making in support of national objectives. Other statutes invite states to experiment with local improvements on the general federal approach, realizing the “laboratory of ideas” promise of federalism. Still others invite states to design implementation policy in support of federally mandated standards. Federal agencies may use a similar process in articulating rules to implement congressional statutes. These negotiations usually take place in the context of a spending power-based program of cooperative federalism.

### a. *Policymaking Zones Partnerships*

In some policymaking laboratory negotiations, the federal government articulates the overall goals of an interjurisdictional regulatory policy and invites states to “fill in the blanks” on how best to get there based on unique economic, environmental, topographical, or demographic factors that vary regionally. For example, although the Phase II Stormwater Rule was created through a process of negotiated rulemaking, the resulting rule itself creates policymaking zones in which individual municipalities craft unique management programs meeting minimum federal criteria.<sup>301</sup> The Coastal Zone Management Act (CZMA), in which

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<sup>299</sup> Declan McCullagh, *Congress Rethinks the REAL ID Act*, CNET NEWS (May 8, 2007), [http://news.cnet.com/Congress-rethinks-the-Real-ID-Act/2100-1028\\_3-6182210.html](http://news.cnet.com/Congress-rethinks-the-Real-ID-Act/2100-1028_3-6182210.html).

<sup>300</sup> Anthony Romero, Opinion, *Repeal REAL ID*, USA TODAY, Mar. 5, 2007, [http://www.usatoday.com/news/opinion/2007-03-05-opposing-view\\_N.htm](http://www.usatoday.com/news/opinion/2007-03-05-opposing-view_N.htm) (last visited Nov. 26, 2010).

<sup>301</sup> See Regulations for Revision of the Water Pollution Control Program Addressing Storm Water Discharges, 64 Fed. Reg. 68,722 (Dec. 8, 1999) (codified at 40 C.F.R. pts. 9, 122, 123, 124 (2010)).

Congress agreed to subordinate federal prerogative to an unprecedented degree of state control, creates an even more intriguing example.<sup>302</sup>

i. Coastal Zone Management Act

The Coastal Zone Management Act (the “CZMA”)<sup>303</sup> is a voluntary cooperative federalism program designed to protect coastal resources from intense development pressures that isolated local land use planning could no longer contain.<sup>304</sup> The CZMA offers federal funding and technical assistance for voluntary state management programs that protect resources in coastal waters, submerged lands, and adjacent shore lands.<sup>305</sup> Unlike other environmental laws that promise federal control if states choose not to participate in administration, the Act establishes no mandatory compliance standards<sup>306</sup> and does not authorize the federal government to develop programs for states that choose not to participate.<sup>307</sup> States have responded enthusiastically, welcoming both federal support and national recognition of the need for comprehensive coastal management.<sup>308</sup> Thirty-four of thirty-five eligible states have approved coastal management plans, and Illinois, the remaining state, is presently composing a plan.<sup>309</sup> The Act also provides for extensive participation from local and municipal governments.<sup>310</sup>

Perhaps most significant, once a coastal zone management plan receives federal approval, all federal action directly or indirectly affecting the coastal zone (generally extending three miles seaward from a state’s coastal boundary) must then receive approval by the state for “consistency” with the plan.<sup>311</sup> The Department of Commerce describes the consistency provision as “a limited waiver of federal supremacy and

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<sup>302</sup> Pub. L. No. 92-583, 86 Stat. 1280 (1972) (codified as amended at 16 U.S.C. §§ 1451–1466 (2006)).

<sup>303</sup> 16 U.S.C. §§ 1451–1466.

<sup>304</sup> *Id.* § 1451(i); 136 CONG. REC. 26030, 26030–67 (1990) (statement of Rep. Walter B. Jones); S. REP. NO. 92-753, at 3 (1972), *reprinted in* 1972 U.S.C.C.A.N. 4776, 4778.

<sup>305</sup> 16 U.S.C. § 1453(1).

<sup>306</sup> *Summary of Coastal Zone Management Act and Amendments*, EPA, <http://www.epa.gov/oecaagct/lzma.html> (follow summary hyperlink) (last visited Dec. 4, 2009).

<sup>307</sup> 136 CONG. REC. 26030, 26030–67 (1990) (statement of Rep. Walter B. Jones). *See generally* Jeffrey H. Wood, *Protecting Native Coastal Ecosystems: CZMA and Alaska’s Coastal Plan*, 19 NAT. RESOURCES & ENV’T 57 (2004).

<sup>308</sup> Wood, *supra* note 307, at 57; S. REP. NO. 92-753.

<sup>309</sup> OFFICE OF OCEAN & COASTAL RES. MGMT., COASTAL ZONE MANAGEMENT ACT PERFORMANCE SYSTEM 2 (2006), *available at* <http://coastalmanagement.noaa.gov/resources/docs/npmsupdate.pdf>.

<sup>310</sup> Wood, *supra* note 307, at 57.

<sup>311</sup> BRANCH OF ENVTL. ASSESSMENT, *supra* note 250.

authority,”<sup>312</sup> allowing states to review not only those activities conducted by or on behalf of a federal agency, but also activities that require a federal license or permit, activities conducted pursuant to an Outer Continental Shelf Lands Act exploration plan,<sup>313</sup> and any federally funded activities that may impact the coastal zone.<sup>314</sup> States may disapprove activities that “affect any land or water use or natural resource of the coastal zone” unless they are “consistent to the maximum extent practicable” with accepted state management programs.<sup>315</sup> In this way, the CZMA uniquely designates concurrent state and federal jurisdiction for the zone between state-regulated lands and federally regulated waters.<sup>316</sup>

The CZMA consistency provision thus creates a rare instance in which the federal government must seek *state* permission before taking action affecting the interjurisdictional zone, opening the door for federalism bargaining and regulatory variation.<sup>317</sup> It provides a mandatory but flexible mechanism for resolving potential conflicts between state and federal priorities and, in so doing, fosters early consultation and negotiated coordination.<sup>318</sup> Legislative history indicates that “the intent of [the bill] is to enhance state authority by encouraging and assisting the states to assume planning and regulatory powers over their coastal zones,” with “no attempt to diminish state authority through federal preemption.”<sup>319</sup> Indeed, Congress amended the CZMA to be even more protective of state interests in 1990, clarifying that the consistency determination applied not only to federal activity within the designated boundaries of the coastal zone but also to any activities conducted anywhere that affect resources within the coastal zone.<sup>320</sup>

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<sup>312</sup> Coastal Zone Management Act Federal Consistency Regulations, 71 Fed. Reg. 787 (Jan. 5, 2006) (codified at 15 C.F.R. pt. 930 (2010)).

<sup>313</sup> A common example is the administration of federal leases for offshore drilling on the outer continental shelf. BRANCH OF ENVTL. ASSESSMENT, *supra* note 250.

<sup>314</sup> 16 U.S.C. § 1456(c) (2006); Coastal Zone Management Act Federal Consistency Regulations, 71 Fed. Reg. at 789–90.

<sup>315</sup> 16 U.S.C. § 1456(c)(1)(A). A federal agency may override objection only if it demonstrates its activity is consistent to the maximum extent practicable. *Id.*

<sup>316</sup> 43 U.S.C. § 1301 (2006) (referring to the general three-mile boundary designated by the Submerged Lands Act).

<sup>317</sup> KIM DIANA CONNOLLY ET AL., WETLANDS LAW AND POLICY: UNDERSTANDING SECTION 404, 344–45 (2005) (noting that the CZMA is “implemented differently in each state”).

<sup>318</sup> 16 U.S.C. § 1456; *see also Coastal Zone Management Act*, FLA. DEP’T OF ENVTL. PROT., <http://www.dep.state.fl.us/secretary/oip/czma.htm> (last visited Nov. 26, 2010).

<sup>319</sup> S. REP. NO. 92–753, at 1 (1972), *reprinted in* 1972 U.S.C.C.A.N. 4776, 4776.

<sup>320</sup> Coastal Zone Reauthorization Amendments of 1990, Pub. L. No. 101-508, 104 Stat. 1388–307 (codified as amended at 16 U.S.C. §§ 1455b, 1456c, 1460 (2006)): *see also* 136

None of this is to say that conflicts do not persist, or that states always prevail. Disputing states and federal agencies may seek mediation by the Secretary of Commerce to resolve serious federal consistency disputes,<sup>321</sup> and, if consensus fails, the state may request judicial mediation or seek other relief in federal court.<sup>322</sup> Finally, if a federal court decides that the proposed federal agency activity does not comply with a state management program, and the Secretary certifies that mediation will not result in compliance, the Secretary may request that the President make an exemption for the federal agency action if the action is “in the paramount interest of the United States.”<sup>323</sup> The presidential exemption has been used exceedingly sparingly, however, and possibly only once—when President George W. Bush controversially used it in 2008 to override California’s objection to the Navy’s use of sonar in training exercises.<sup>324</sup>

Nevertheless, the vast majority of state-federal interaction under the CZMA is harmonious, and federal consistency determinations are usually administered without controversy.<sup>325</sup> NOAA reports that “[w]hile States have negotiated changes to thousands of federal actions over the years, States have concurred with approximately 93%–95% of all federal actions reviewed.”<sup>326</sup> Even before the Act was amended in 1990 to improve state leverage in consistency negotiations, states concurred with 93% of the 400 proposed federal activities in 1983, 82% of the 5500 proposed federal licenses and permits, 99% of the 435 submit-

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CONG. REC. 26030, 26035, 26038 (1990) (explaining the decision to strengthen consistency after contrary Supreme Court precedent).

<sup>321</sup> 16 U.S.C. § 1456(h)(2).

<sup>322</sup> See, e.g., *California v. Norton*, 311 F.3d 1162, 1167 (9th Cir. 2002).

<sup>323</sup> 16 U.S.C. § 1456(c)(1)(B); FLA. DEP’T OF ENVTL. PROT., *supra* note 318 (noting that the exemption applies only to agency activities, not federally funded or permitted activities).

<sup>324</sup> Joseph Romero, *Uncharted Waters: The Expansion of State Regulatory Authority over Federal Activities and Migratory Resources Under the Coastal Zone Management Act*, 56 NAVAL L. REV. 137, 146 (2008). The military use of sonar in these exercises was ultimately upheld in *Winter v. NRDC*, 129 S. Ct. 365, 370 (2008), but the consistency exemption was not a part of the case that reached the Supreme Court. The district court had questioned the constitutionality of the exemption on separation of powers grounds, as the President had effectively overturned the order of an Article III court when he enjoined the Navy from using the challenged sonar. *NRDC v. Winter*, 527 F. Supp. 2d 1216, 1233–34 (C.D. Cal. 2008) (“Since the grounds for [the] President’s exemption are the same as the grounds for the Court’s injunction, the exemption ‘reviews and overturns an order of an Article III Court.’”). Under the doctrine of constitutional avoidance, however, the district court never ruled on the issue because it was not necessary to reach its ultimate result. *Id.* at 1237–38.

<sup>325</sup> 136 CONG. REC. 26030, 26034 (1990) (statement of Rep. Walter B. Jones).

<sup>326</sup> Coastal Zone Management Act Federal Consistency Regulations, 71 Fed. Reg. at 789.

ted plans for outer continental shelf exploration, and 99.9% of the 2000 proposals for federal funding and assistance.<sup>327</sup>

Without access to the actual decisionmakers over this time period, it is hard to know exactly how to interpret such high levels of consensus. It is possible that they reflect the federal ability to override state protest through the presidential exemption, which could reduce a state's incentive to expend resources fighting a battle it expects to lose. But given that the presidential trump has been used so sparingly—only once, and years after these statistics—a more likely explanation is that the consistency process itself moderates what federal agencies seek. Understanding that federal action will require state approval may promote greater federal deference to state interests in the very spirit intended by the Act. After all, the process that must be navigated after a state objects is costly to resource-poor federal agencies as well.

b. *Demonstration Waivers*

Another version of policymaking zones arises under the various federal statutes that allow states to propose variations on generally applicable standards within programs of cooperative federalism, often through demonstration waiver programs.<sup>328</sup> The Social Security Act includes several demonstration waiver programs that enable states to propose variations to standard federal entitlement programs, including the State Children's Health Insurance Program, Medicaid, and other forms of assistance to needy children and families.<sup>329</sup> Medicaid remains the leading site of state-federal negotiated social welfare policy.

i. Medicaid

The Medicaid law invites states to apply for “demonstration waivers” and “program waivers” that allow them to depart from the otherwise applicable terms of the law to pursue an objective coincident with the goals of the federal program.<sup>330</sup> The Medicaid program was initially designed as a classic spending power-based program of cooperative fe-

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<sup>327</sup> 136 CONG. REC. 26030, 26034 (1990) (statement of Rep. Walter B. Jones).

<sup>328</sup> See, e.g., 42 U.S.C. §§ 1315, 1396n (2006) (inviting states to apply for “demonstration waivers” and “program waivers”).

<sup>329</sup> Ann Laquer Estin, *Sharing Governance: Family Law in Congress and the States*, 18 CORNELL J.L. & PUB. POL'Y 267, 293 (2009).

<sup>330</sup> 42 U.S.C. §§ 1315, 1396n; 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, 973–74 (2007).

deralism under which Congress offered the states incentive funding to provide for the health care needs of vulnerable populations. The baseline legislation and corresponding rules identified the populations that would be covered (children living in poverty, certain expecting mothers, and many other groups),<sup>331</sup> the services that would be covered (inpatient hospital and outpatient physician services),<sup>332</sup> and additional guidelines for state programs funded by Medicaid.<sup>333</sup> Congress had previously enabled states to propose beneficial departures from Social Security Act rules via a demonstration waiver program,<sup>334</sup> and Congress extended it to Medicaid in 1965.<sup>335</sup>

The Medicaid demonstration waiver programs were to function as the hallowed federalism laboratory of ideas would intend: the goal was to allow a limited degree of flexibility so that each state could experiment in a way that would yield learning benefits to the overall program. Over time, however, the waiver program has become the standard way that Medicaid is administered, as most states now use the waiver provisions to individually tailor the terms of their own Medicaid programs.<sup>336</sup> The application process is extensively negotiated with the Department of Health and Human Services, with executive agents on both sides dickering back and forth over proposal terms before the application receives federal approval.<sup>337</sup>

Results of the waiver programs suggest that the policymaking laboratory of ideas can work.<sup>338</sup> Though not every waiver proposal has been a success, many of the proposals Congress is now considering in health

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<sup>331</sup> Colleen M. Grogan, "Medicaid": *Health Care for You and Me?*, in HEALTH POLITICS AND POLICY 329 (J. Morone et al. eds., 2008); ELICIA J. HERZ, CONG. RESEARCH SERV., RL 33202, MEDICAID: A PRIMER, CRS REPORT FOR CONGRESS 1 (2008), available at <http://aging.senate.gov/crs/medicaid1.pdf> (listing categories of covered groups).

<sup>332</sup> HERZ, *supra* note 331, at 7 (listing examples of mandatory benefits for most groups).

<sup>333</sup> Federal guidelines establish services that states *may* provide and *must* provide, allowing states to define specifics within guidelines mandating sufficient care, equal treatment, and patient choice. *Id.* at 3–4.

<sup>334</sup> Public Welfare Amendments of 1962, Pub. L. No. 87-543, tit. I, § 122, 76 Stat. 172, 192 (codified as amended at 42 U.S.C. § 1315 (2006)).

<sup>335</sup> *Id.*; Judith M. Rosenberg & David T. Zarin, *Managing Medicaid Waivers: Section 1115 and State Health Care Reform*, 32 HARV. J. ON LEGIS. 545, 547 (1995).

<sup>336</sup> Thomas Gais & James Fossett, *Federalism and the Executive Branch*, in THE EXECUTIVE BRANCH 509 (Joel D. Aberbach & Mark A. Peterson eds., 2005).

<sup>337</sup> *Id.*

<sup>338</sup> That said, bad ideas are also tested through the waiver programs. Interview with Lawrence Palmer, Professor of Health Law & Bioethics, William & Mary Law Sch., in Williamsburg, Va. (June, 2009). Although this can provide useful lessons nationally, the subjects of experimentation—sick, poor people—may have preferred not to be subjects of experimentation.



reform efforts began as experimental terms in state waivers.<sup>339</sup> For example, Massachusetts used a demonstration waiver to extend health insurance to all residents,<sup>340</sup> and North Carolina used a programmatic waiver to experiment with a community care program that the Obama administration may emulate.<sup>341</sup> As one observer described, “Doctors like it, patients stay healthier, and the state saves hundreds of millions of dollars.”<sup>342</sup> Another state-based innovation that has altered the overall Medicaid program includes the increased movement of covered populations into managed care.<sup>343</sup> Additional waivers have expanded the populations covered under original program rules in the hopes that preventative care to vulnerable populations will forestall more serious (and expensive) emergency care later.<sup>344</sup>

*c. Cooperative Federalism State Implementation Plans*

Finally, in many programs of cooperative federalism, such as the Clean Air and Water Acts, Congress allocates rulemaking authority to a federal agency but invites the states to implement and enforce those rules. Delegating the design of statewide implementation and enforcement programs vests an important degree of policymaking discretion in the states, which wield substantial creative authority in deciding how to accomplish federal technical standards.

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<sup>339</sup> *Id.*

<sup>340</sup> Thompson & Burke, *supra* note 330, at 971 (describing how Medicaid waiver negotiations between federal and state officials led to health coverage for all Massachusetts residents); Kay Lazar, *Mass. Gets \$10.6b for Healthcare Insurance*, BOS. GLOBE, Oct. 1, 2008, at A1, available at [http://www.boston.com/news/local/articles/2008/10/01/mass\\_gets\\_106b\\_for\\_healthcare\\_insurance](http://www.boston.com/news/local/articles/2008/10/01/mass_gets_106b_for_healthcare_insurance) (describing subsequent waiver negotiations leading to additional federal support for the state's expanded coverage).

<sup>341</sup> Rose Hoban, *N.C. Program A Model For Health Overhaul?*, (NPR radio broadcast Oct. 15, 2009), available at <http://www.npr.org/templates/story/story.php?storyId=113816621> (reporting on White House consultation over North Carolina's Community Care program after financial analysis showed it saves Medicaid \$170 million annually); *Medicaid Waivers and Demonstrations List: Details for North Carolina ACCESS HealthCare Connection 1915(b)*, U.S. DEP'T OF HEALTH & HUMAN SERVS. CTRS. FOR MEDICARE & MEDICAIDE SERVS., <http://www.cms.hhs.gov/MedicaidStWaivProgDemoPGI/MWDL/list.asp> (follow “show only items whose State is North Carolina”; then follow “North Carolina ACCESS HealthCare Connection”) (last visited Nov. 26, 2010).

<sup>342</sup> Hoban, *supra* note 341.

<sup>343</sup> Gais & Fossett, *supra* note 336, at 509 (noting that waivers are the primary drivers of health policy change, especially in shifting low-income clients into managed care); Thompson & Burke, *supra* note 330, at 985 (finding evidence of state policy diffusion in the ninefold proliferation of major managed care initiatives during the 1990s).

<sup>344</sup> Lazar, *supra* note 340.

### i. Clean Air and Water Acts

Under the Clean Air Act (CAA), EPA sets overall standards for permissible levels of air pollutants, and the states generally develop individualized implementation plans to realize them given their unique economic, geographic, and demographic circumstances (otherwise, they must submit to a federal implementation plan).<sup>345</sup> EPA must approve the state implementation plans, however, and the process reportedly involves a fair amount of negotiation back and forth with state counterparts.<sup>346</sup> Similarly, states theoretically have some flexibility in setting water quality standards under the Clean Water Act's Total Maximum Daily Load (TMDL) program,<sup>347</sup> but EPA retains final approval authority. States often use their clout to push, sometimes successfully and other times less so, for EPA approval of relaxed standards.<sup>348</sup> Conversely, federal negotiators use their approval authority to push, sometimes successfully and other times not, for more stringent standards.<sup>349</sup>

### 3. Iterative Policymaking Negotiations

In contrast to the formal zones and waivers of policymaking laboratory federalism, another type of joint policymaking negotiation happens so slowly that it is possible to miss as a form of negotiation at all. This type of negotiation, labeled "iterative federalism" by Professor Ann Carlson,<sup>350</sup> takes place within a regulatory regime in which the federal and state governments share authority to create regulatory policy in a precise and limited way. The federal government creates a uniform national plan while allowing a selected state to develop a competing standard—and then allows the other states to choose between the federal and single-

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<sup>345</sup> 42 U.S.C. § 7410(a)(1) (2006). The overwhelming majority of states choose to create their own implementation plans under the Act. Siegel, *supra* note 205, at 1676.

<sup>346</sup> Cf. Dave Owen, *Probabilities, Planning Failures, and Environmental Law*, 84 TUL. L. REV. 265, 280–87 (2009); EPA Interview, *supra* note 274.

<sup>347</sup> 33 U.S.C. § 1313(d)(1)(C) (2006) (authorizing state TMDLs for waters prioritized under § 1313(d)(1)(A)). See Rebecca L. Puskas, Note, *Measure 37's Federal Law Exception: A Critical Protection for Oregon's Federally Approved Land Use Laws*, 48 B.C. L. REV. 1301, 1312–13, 1320–23 (2007) (describing Oregon's implementation plans under the TMDL program).

<sup>348</sup> Robert Glennon & John Thorson, *Federal Environmental Restoration Initiatives: An Analysis of Agency Performance and the Capacity for Change*, 42 ARIZ. L. REV. 483, 517–19 (2000) (discussing state-federal negotiations to reverse deteriorating conditions in the San Francisco Bay/Sacramento-San Joaquin River Delta).

<sup>349</sup> Cf. *id.*

<sup>350</sup> Ann Carlson, *Iterative Federalism and Climate Change*, 103 NW. U. L. REV. 1097, 1099 (2009) (coining the term to describe "repeated, sustained, and dynamic lawmaking efforts involving both levels of government").

state alternatives. By allowing states to choose between the two, iterative federalism programs—such as the CAA’s regulation of motor vehicle emissions—create a dynamic of regulatory innovation and competition by which state choices influence federal standards over time.

Iterative federalism strikes a wise compromise in regulatory marketplaces where legitimate concerns over stagnating regulatory monopoly compete with legitimate economic needs for regulatory uniformity. Regulated parties never have to cope with more than two sets of regulatory standards at a time, but enabling the regulatory competitor to coexist with the federal baseline allows room for at least some innovation.<sup>351</sup> Over time, this often means that as states gravitate toward the state alternative, the federal law adjusts itself toward the state alternative in a slow, iterative form of state-federal negotiation.

a. *Clean Air Act Emissions Standards*

Under the Clean Air Act (the “CAA”), EPA creates national standards for emissions from mobile sources,<sup>352</sup> saving the auto manufacturing industry from the crippling multiplicity of standards that might ensue if states were able to regulate independently. Nevertheless, Congress allowed the state of California to set an alternative standard deviating upward from the national floor.<sup>353</sup> The “California exception” was initially created out of respect for California’s leadership in the field, and also because air quality in parts of the state so exceeded national averages that more stringent motor vehicle regulations were necessary to meet other CAA obligations.<sup>354</sup>

Congress later modified the Act to permit other states to choose between EPA’s standards or California’s.<sup>355</sup> This critical structural change enabled a loose but powerful forum to conduct state-federal bargaining over the ultimate path of national emissions regulation, thus beginning an iterative process of subtle but joint state-federal decision

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<sup>351</sup> See William W. Buzbee, *Asymmetrical Regulation: Risk, Preemption, and the Floor/Ceiling Distinction*, 82 N.Y.U. L. REV. 1547, 1590–92 (2007) (showing how, in comparison to more narrowly tailored floor preemption, unitary federal choice (“ceiling”) preemption leads to both poorly tailored regulation and public choice distortions of political process).

<sup>352</sup> 42 U.S.C. § 7543 (2006).

<sup>353</sup> *Id.* § 7543(b)(1) (so authorizing California as well as all states with an emissions program before 1966).

<sup>354</sup> DAVID WOOLEY & ELIZABETH MORSS, *CLEAN AIR HANDBOOK* § 5:11 (19th ed. 2009).

<sup>355</sup> 42 U.S.C. § 7507 (2006); NAT’L RESEARCH COUNCIL COMM. ON STATE PRACTICES IN SETTING MOBILE SOURCE EMISSIONS STANDARDS, STATE AND FEDERAL STANDARDS FOR MOBILE-SOURCE EMISSIONS 70–71 (2006) (explaining that Congress did so in response to state requests for more tools to meet ambient air standards).

making. Over time, more and more states lined up behind California instead of EPA, such that by 2009, fourteen states had adopted the more stringent standards<sup>356</sup> and up to twelve others had expressed interest in doing so.<sup>357</sup> This trend has exerted pressure on EPA to raise its standards, even as California has continued to raise its own standards.<sup>358</sup> The overall effect, as states vote with their regulatory feet, has been an upward migration in the nation's vehicular emissions standards.

Iterative policymaking provides a unique means of balancing competing needs for federalism innovation and economic uniformity in the national market for automobiles. Automobile manufacturers may prefer a single set of emissions standards, but building for two sets of standards is preferable to coping with fifty. States may prefer to set their own standards, but the ability to choose between two levels of stringency is preferable to no choice at all. Meanwhile, the iterative dimension of the process enables the operation of a limited level of regulatory innovation and competition with demonstrated effect in the regulatory marketplace. A more uniform, traditional command-and-control regulation imposed from the top down may not have been so responsive.

The iterative policymaking structure also protects state innovators that invest in efforts to resolve their share of an interjurisdictional problem before the rest follow. These states would suffer disproportionately if forced to abandon path-breaking regulatory infrastructure to conform to a preemptive federal standard. Moreover, a purely preemptive policy would disincentivize states from taking needed action early on—at the most efficient opportunity for intervention—lest their investments prove wasted when the federal government eventually gets around to regulating.

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<sup>356</sup> JAMES E. MCCARTHY & ROBERT MELTZ, CONG. RESEARCH SERV., RL 34099, CALIFORNIA'S WAIVER REQUEST UNDER THE CLEAN AIR ACT TO CONTROL GREENHOUSE GASES FROM MOTOR VEHICLES 4 n.13 (2009), available at <http://ncsconline.org/NLE/CRSreports/09Mar/RL34099.pdf>.

<sup>357</sup> Emily Chen, *State Adoption Status on California Vehicle Emissions Control Requirements*, W. STATES AIR RESOURCES COUNCIL (Feb. 2008), available at <http://www.westar.org/Docs/Business%20Meetings/Spring08/ParkCity/03.2.2%20CAA%20177%20states.xls> (listing states considering adoption of California standards).

<sup>358</sup> David E. Adelman & Kirsten H. Engel, *Adaptive Federalism: The Case Against Reallocating Environmental Regulatory Authority*, 92 MINN. L. REV. 1796, 1840 (2008) (explaining the dissemination of California's standards as other states, EPA, and automakers gradually adopted them).

b. *Iterative Climate Federalism*

A number of scholars, including Professor Carlson, have proposed that the CAA's model of iterative federalism policymaking may also be a useful means of navigating federalism concerns in climate policymaking.<sup>359</sup> The suggestion may have merit, given the role states have already played in early rounds of policymaking negotiations over climate regulation,<sup>360</sup> and the collective action problems necessarily implied.<sup>361</sup> Nearly all of the proposals considered in recent federal climate bills—including renewable energy and portfolio standards, power plant emissions standards, net metering, and building codes—are already in place among many states,<sup>362</sup> including the centerpiece of the federal legislation proposed this year, carbon cap-and-trade.<sup>363</sup> In the Northeast and Mid-Atlantic regions, ten states have joined the Regional Greenhouse Gas Initiative (RGGI) and pledged to reduce carbon dioxide emissions from their power sectors by 10% by 2018.<sup>364</sup> RGGI states held their tenth carbon auction on December 1, 2010.<sup>365</sup> In the West, seven states joined four Canadian provinces to form the Western Climate Initiative, with plans to begin carbon trading by 2012.<sup>366</sup> In the Midwest, six states and one Canadian province formed the Midwest Greenhouse Gas Reduction Accord, pledging to establish a multi-sector cap-and-trade sys-

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<sup>359</sup> Carlson, *supra* note 350, at 1099.

<sup>360</sup> See Michele M. Betsill & Barry G. Rabe, *Climate Change and Multilevel Governance: The Evolving State and Local Roles*, in TOWARD SUSTAINABLE COMMUNITIES: TRANSITIONS AND TRANSFORMATIONS IN ENVIRONMENTAL POLICY 201–26 (Daniel A. Mazmanian & Michael E. Kraft eds., 2d ed. 2009). See generally Kirsten H. Engel, *Whither Subnational Climate Change Initiatives in the Wake of Federal Climate Legislation?*, 39 PUBLIUS 432 (2009) (reviewing existing state and regional initiatives).

<sup>361</sup> See, e.g., Robert L. Glicksman & Richard E. Levy, *A Collective Action Perspective on Ceiling Preemption by Federal Environmental Regulation: The Case of Global Climate Change*, 102 Nw. U. L. REV. 579, 579–80 (2008) (proposing a collective action framework to determine when state law should be federally preempted).

<sup>362</sup> Engel, *supra* note 360, at 432; KATHERINE PROBST & SARAH SZAMBELAN, THE ROLE OF THE STATES IN A FEDERAL CLIMATE PROGRAM 3–8 (White Paper, Nov. 2009), <http://www.rff.org/documents/RFF-DP-09-46.pdf>.

<sup>363</sup> American Clean Energy and Security Act of 2009, H.R. 2454, 111th Cong. (2009) [hereinafter Waxman-Markey] (as passed by House, June 26, 2009). The Clean Energy Jobs and American Power Act, S. 1733, 111th Cong. (2009) [hereinafter Kerry-Boxer] and American Clean Energy Leadership Act, S. 1462, 111th Cong. (2010) are pending in the Senate. See Press Release, RGGI Inc., RGGI States Complete Sixth Successful CO2 Auction (Dec. 4, 2009), [http://www.rggi.org/docs/Auction\\_6\\_Results\\_Release\\_MMrep.pdf](http://www.rggi.org/docs/Auction_6_Results_Release_MMrep.pdf).

<sup>364</sup> Press Release, RGGI Inc., *supra* note 363.

<sup>365</sup> *Auction Results*, REGIONAL GREENHOUSE GAS INITIATIVE, [http://www.rggi.org/market/co2\\_auctions/results](http://www.rggi.org/market/co2_auctions/results) (last visited Dec. 29, 2010).

<sup>366</sup> *Milestones*, W. CLIMATE INITIATIVE, <http://www.westernclimateinitiative.org/milestones/> (last visited Dec. 29, 2010).

tem to meet regional greenhouse gas reduction targets.<sup>367</sup> The State of California is creating its own state-wide program, with plans to adopt cap-and-trade regulations by 2011 and begin trading in 2012.<sup>368</sup>

By these initiatives, a handful of states have organized regional policymaking, in part to put pressure on the federal government to regulate carbon emissions.<sup>369</sup> Success is apparent in the climate bill that passed the House in 2009, and suggested by the others that have made it to the Senate.<sup>370</sup> Congress's proposal to preempt regional cap-and-trade for the first five years of a national market<sup>371</sup> demonstrates that it is heeding conventional economic wisdom that a national carbon market offers the best chance of achieving cost-efficient economy-wide reductions.<sup>372</sup> Nevertheless, after five years, a two-track iterative system could offer an innovation-preserving alternative to the hurdles that could arise if multiple cap-and-trade programs were to operate simultaneously. The bills also show congressional sensitivity to the federalism implications of enacting federal legislation in a field dominated by state leadership: beyond cap-and-trade, they foreclose preemption of state programs meeting the federal floor.<sup>373</sup>

#### 4. Intersystemic Signaling Negotiations

Iterative federalism negotiations like the CAA's are created by intentional legislative design. Indirect state-federal policymaking negotiations, however, can approximate iterative bargaining in unintentional contexts. In these situations, state actors use sovereign capacity to influence federal lawmakers regarding federal policies that they disapprove through intersystemic signaling. Intersystemic signaling negotiations arise when separately deliberating state and federal actors influence one another's outcomes through indirect iterative exchange. This usually occurs in

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<sup>367</sup> MIDWESTERN GREENHOUSE GAS REDUCTION ACCORD 4 (2007), available at <http://www.midwesternaccord.org/midwesterngreenhousegasreductionaccord.pdf>.

<sup>368</sup> *Cap-and-Trade*, CAL. AIR RESOURCES BOARD, <http://www.arb.ca.gov/cc/capandtrade/capandtrade.htm> (last visited Dec. 29, 2010). The California Warming Solutions Act of 2006 directed the California Air Resources Board to develop a plan to reduce greenhouse gas emissions to 1990 levels by 2020. *Id.*; see also *Facts About Assembly Bill 32*, CAL. AIR RESOURCES BOARD (Dec. 7, 2009), <http://www.arb.ca.gov/cc/factsheets/ab32factsheet.pdf>.

<sup>369</sup> Engel, *supra* note 360, at 432; PROBST & SZAMBELAN, *supra* note 362, at 3.

<sup>370</sup> Waxman-Markey, *supra* note 363; see Kerry-Boxer, *supra* note 363.

<sup>371</sup> Kerry-Boxer, *supra* note 363, tit. I, § 125; Waxman-Markey, *supra* note 363, tit. III, § 335.

<sup>372</sup> PROBST & SZAMBELAN, *supra* note 362, at 15.

<sup>373</sup> Kerry-Boxer, *supra* note 363, tit. I, § 124; Waxman-Markey, *supra* note 363, tit. III, § 334.

interjurisdictional regulatory contexts where each is vying for policymaking control in the face of regulatory dissensus.<sup>374</sup> The Supremacy Clause<sup>375</sup> notwithstanding, it is not always the federal government that prevails—as demonstrated by the arc of national policy regarding medical marijuana, and by a provocative analysis of intersystemic signaling between state and federal courts, discussed below.

a. *Medical Marijuana*

For example, several states have legalized the use of marijuana for medical treatment,<sup>376</sup> even though federal law does not distinguish between marijuana consumed for medical or recreational purposes.<sup>377</sup> In 2005 in *Gonzales v. Raich*, the U.S. Supreme Court resolved a standoff between California and the federal government on this issue by reaffirming the supremacy of the federal law over conflicting state laws.<sup>378</sup> The Court's decision has significant federalism implications due to its broad interpretation of the federal commerce power.<sup>379</sup> Nevertheless, states and municipalities have continued to pass contrary laws,<sup>380</sup> and the conflict has prompted unusual judicial decisions that appear to favor state over federal laws in individual cases, even in federal court. In turn, these contrary state laws and confusing federal cases have prompted federal legislators to consider federal legislation to bridge the gap between state and federal law.

In one notable example, the federal government brought charges against Ed Rosenthal in 2003 for cultivating marijuana, despite the fact that he had been duly authorized by the City of Oakland to distribute

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<sup>374</sup> See, for example, the discussion *infra* notes 376–389 and accompanying text.

<sup>375</sup> U.S. CONST. art. VI, cl. 2.

<sup>376</sup> *Active State Medical Marijuana Programs*, NORML, [http://norml.org/index.cfm?Group\\_ID=3391](http://norml.org/index.cfm?Group_ID=3391) (last visited Nov. 28, 2010) (detailing legalization in thirteen states).

<sup>377</sup> *Drug Fact Sheet: Marijuana*, U.S. DRUG ENFORCEMENT ADMIN., [http://www.justice.gov/dea/pubs/abuse/drug\\_data\\_sheets/marijuana\\_DrugDataSheet.pdf](http://www.justice.gov/dea/pubs/abuse/drug_data_sheets/marijuana_DrugDataSheet.pdf) (last visited Nov. 9, 2010) (defining marijuana as a “Schedule I” drug with no accepted medical use).

<sup>378</sup> 545 U.S. 1, 22 (2005) (determining that Congress could regulate the intrastate manufacture and possession of marijuana to avoid undermining the Controlled Substances Act).

<sup>379</sup> See *id.*

<sup>380</sup> For example, Breckenridge, Colorado recently legalized possession of small amounts of marijuana, despite contrary state and federal law. *Colorado Ski Town Legalizes Pot*, WASH. TIMES, Nov. 4, 2009, <http://www.washingtontimes.com/news/2009/nov/04/colo-ski-town-could-push-pot-legalization/>.

the drug for medicinal purposes under California state law.<sup>381</sup> Rosenthal was not able to present this information as a defense at his trial, however, because federal law does not recognize state laws legalizing medicinal marijuana.<sup>382</sup> Without the benefit of this potentially exculpatory information, Rosenthal was convicted by a jury of an offense that required a mandatory minimum five-year prison term.<sup>383</sup> Nevertheless, the district court judge sentenced him to only one day, based on the “unique circumstances of the case” (a decision the government is appealing).<sup>384</sup> In response to cases like this, federal legislators have introduced the Truth in Trials Act,<sup>385</sup> still pending, which would enable federal drug offenders to raise the affirmative defense of acting in compliance with applicable state medical marijuana laws.<sup>386</sup>

Even as such legislative proposals languish in Congress, the pressure of the conflict between state and federal law has successfully moved federal policymaking at the executive level. The Obama administration recently announced that the Department of Justice would not pursue enforcement cases against medical marijuana users or distributors in states where such use is legal.<sup>387</sup>

With no record for review in intersystemic signaling, it is difficult to definitively establish the causal link between state action and federal reaction in this situation—and there are certainly contrary examples.<sup>388</sup>

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<sup>381</sup> *United States v. Rosenthal*, 266 F. Supp. 2d 1091, 1098 (N.D. Cal. 2003); see also Michael O’Hear, *Federalism and Drug Control*, 57 VAND. L. REV. 783, 787 (2004) (discussing *Rosenthal*).

<sup>382</sup> O’Hear, *supra* note 381, at 787.

<sup>383</sup> *Rosenthal*, 266 F. Supp. 2d at 1093.

<sup>384</sup> *Id.* at 1099. The U.S. Court of Appeals for the Ninth Circuit ultimately overturned Rosenthal’s conviction in 2006 because a confused juror (probably confused about the state/federal law conflict) had improperly contacted a lawyer for advice during deliberations. Bob Egelko, *Pot Advocate Convicted on Three Charges, but ‘Ganga Guru’ Won’t Face Further Punishment*, SAN FRAN. CHRON., May 30, 2007, <http://www.sfgate.com/cgi-bin/article.cgi?f=/c/a/2007/05/30/BAGTPQ420H5.DTL>. Nevertheless, Rosenthal was re-indicted a few months later and was again convicted by the same judge after once more being prevented from presenting evidence that he was acting pursuant to state law. *Id.* Still, the judge would not sentence Rosenthal beyond the day he had already served, and so his conviction resulted in no additional prison time. *Id.*

<sup>385</sup> H.R. 1717, 108th Cong. (2003) (reintroduced as H.R. 3939, 111th Cong. (2009)).

<sup>386</sup> O’Hear, *supra* note 381, at 787 n.16.

<sup>387</sup> David Stout & Solomon Moore, *U.S. Won’t Prosecute in States That Allow Medical Marijuana*, N.Y. TIMES, Oct. 19, 2009, at A1, available at <http://www.nytimes.com/2009/10/20/us/20cannabis.html>.

<sup>388</sup> See generally, e.g., Judith Resnik, *Lessons in Federalism from the 1960s Class Action Rule and the 2005 Class Action Fairness Act: “The Political Safeguards” of Aggregate Translocal Actions*, 156 U. PENN. L. REV. 1929 (2008) (arguing that national lawmakers preempt state-based decisions they disapprove by federalizing rights). Federal enforcers have also used su-



Nonetheless, circumstantial evidence of the success of such dialogic processes is compelling, and could soon include climate change.<sup>389</sup> In addition, Arizona's aggressive new immigration law—the most stringent in the nation—may be viewed as an attempt at intersystemic signaling with Congress in an effort to nationalize immigration policy.<sup>390</sup> The most aggressive portions of the law have been enjoined pending suit by the U.S. Attorney General; the suit claims that Arizona's foray into new immigration policy is preempted by federal law.<sup>391</sup> But in an unlikely coincidence, after years of inaction and within only weeks of the date that Arizona's new law went into force, Congress returned from an August recess to pass an immigration enforcement bill funding greater security measures along the southwestern border.<sup>392</sup> The flurry of state laws limiting the use of eminent domain for private economic development after the Supreme Court's decision in *Kelo v. City of New London*<sup>393</sup> provides another example of this fascinating dialectic.<sup>394</sup>

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premacry to undermine contrary state policies by prosecuting crimes permissible under state laws, such as the previous practice of prosecuting for possession of medical marijuana. O'Hear, *supra* note 381, at 810–11.

<sup>389</sup> See generally Kirsten Engel, *State and Local Climate Change Initiatives: What Is Motivating State and Local Governments to Address a Global Problem and What Does This Say About Federalism and Environmental Law?*, 38 URB. LAW. 1015 (2006) (arguing that subnational efforts to combat global warming will prompt national and international regulatory response).

<sup>390</sup> Randal C. Archibold, *Arizona Enacts Stringent Law on Immigration*, N.Y. TIMES, Apr. 24, 2010, at A1, available at <http://www.nytimes.com/2010/04/24/us/politics/24immig.html> (reporting that the law requires immigrants to carry documents at all times and allows police to question anyone of uncertain citizenship).

<sup>391</sup> Press Release, Dep't of Justice Office of Pub. Affairs, Citing Conflict with Federal Law, Department of Justice Challenges Arizona Immigration Law (July 6, 2010), available at <http://www.justice.gov/opa/pr/2010/July/10-opa-776.html> (arguing that the Arizona law exceeds a state's role with respect to aliens, interferes with the federal government's balanced administration of the immigration laws, and critically undermines U.S. foreign policy objectives); see also Randall C. Archibold, *Judge Blocks Part of Arizona's Immigration Law*, N.Y. TIMES, July 28, 2010, at A1, available at <http://www.nytimes.com/2010/07/29/us/29arizona.html> (reporting that one day before the law was to take effect, a federal judge blocked the statute's most controversial provisions, including those requiring officers to affirmatively check immigration status and immigrants to carry immigration documentation at all times).

<sup>392</sup> Julia Preston, *Obama Signs Border Bill to Increase Surveillance*, N.Y. TIMES, Aug. 13, 2010, at A10, available at <http://www.nytimes.com/2010/08/14/us/politics/14immig.html>.

<sup>393</sup> 545 U.S. 469, 484 (2005) (holding that the Public Use Clause of the Fifth Amendment does not prohibit this use of eminent domain).

<sup>394</sup> Cf. Ilya Somin, *The Limits of Backlash: Assessing the Political Response to Kelo*, 93 MINN. L. REV. 2100, 2114–49 (2009) (listing state legislative responses).

b. *State and Federal Courts*

Although this project primarily analyzes negotiations between the political branches, a compelling research project identifies a pattern of intersystemic signaling negotiations by which state courts have sought to alter binding rulings by the U.S. Supreme Court.<sup>395</sup> Challenging the idea of the Court's interpretive monopoly, Professor Frederic Bloom has described a dynamic by which state courts have occasionally defied binding Court precedent in order to signal the need for its reversal.<sup>396</sup> Moreover, Professor Bloom argues that in these cases, the Supreme Court has effectively signaled its willingness to be influenced by state courts in unsettled areas of its jurisprudence:

Nearly all of [the Court's calls for state court disobedience] come in coded legal whispers—about strategically unsettled constitutional substance and over generous decision-making procedures—instead of dramatic doctrinal shouts. But quietly and methodically, the Supreme Court has encouraged state courts to ignore binding Court precedent—to act, in other words, as “state courts unbound.” We should hardly be surprised when state courts agree.<sup>397</sup>

If Professor Bloom is right, then even the seemingly remote judicial branches participate in federalism bargaining, and to worthwhile effect. By Professor Bloom's account, state courts have succeeded at renegotiating U.S. Supreme Court precedent in the areas of matrimonial domicile, criminal sentencing reforms, and juvenile death sentencing.<sup>398</sup> Even the implicit conversations between federal and intermediate state courts under the *Erie* doctrine (over uncertain state precedent in federal cases) might be understood as negotiation.<sup>399</sup>

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<sup>395</sup> Bloom, *supra* note 28, at 503.

<sup>396</sup> *Id.* at 504.

<sup>397</sup> *Id.*

<sup>398</sup> *Id.* at 516, 533, 544.

<sup>399</sup> *Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 77–78 (1938) (establishing that a federal court in diversity must apply substantive state law). For a more overt example of judicial bargaining in a different context, see Linda Greenhouse, *Clarence Thomas, Silent but Sure*, OPINIONATOR (Mar. 11, 2010, 9:37 PM), <http://opinionator.blogs.nytimes.com/2010/03/11/clarence-thomas-silent-but-sure/> (describing a series of invitations within Justice Thomas's dissents to challenge various Supreme Court precedents). See generally Gerald Frug, *The Judicial Power of the Purse*, 126 U. PA. L. REV. 715 (1978) (describing executive and judicial collusion in adversarial proceedings seeking judicial decrees that would require legislative authorization and funding for legal and social reform).

### III. MARKETPLACE NORMS AND SOURCES OF TRADE

Furthering the Article's positive account of federalism bargaining, this Part incorporates data from the taxonomy and interviews with a limited sample of bargaining participants<sup>400</sup> to analyze federalism bargaining norms and sources of trade. Precious few generalizations apply to so diverse an array of intergovernmental bargaining, but useful commonalities can be drawn about the four kinds of currencies with which participants bargain, and the legal constraints and uncertainties that restrict them. Consulted primary sources especially support the Article's normative account of the role of negotiated federalism.

#### A. *Marketplace Norms*

The following analysis reveals soft generalizations about the norms that operate in commonplace markets for state-federal bargaining, including participation, rites of initiation, bargaining mechanics, negotiating leverage, and the uncertainty about roles and limits that often characterizes the federalism bargaining marketplace.

##### 1. Participation: Executive Dominance, with Exceptions

Most federalism bargaining takes place between the executive actors on either side of the state-federal divide; it is axiomatic in enforcement negotiations and in most permitting and licensing negotiations. For example, EPA and state environmental agencies generally negotiate the terms of state implementation programs under the Clean Air Act,<sup>401</sup> while HHS and state health and social service agencies negotiate the terms of Medicaid demonstration waivers.<sup>402</sup> When federal executive agencies initiate negotiated rulemaking with state input, state participants are usually members of the executive branch.<sup>403</sup> That executive actors lead in many instances of state-federal bargaining is not surprising, as they are charged with the details of statutory implementa-

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<sup>400</sup> My small, non-statistical sample included five state agents and five federal agents who regularly engage in federalism bargaining, as well as five legal scholars who research regulatory overlap, and five who research some of the relevant bargaining venues. Several requested anonymity to avoid the appearance of making official pronouncements.

<sup>401</sup> See 42 U.S.C. § 7410(a)(1) (2006) and related discussion, *supra* notes 345–346 and accompanying text.

<sup>402</sup> See 42 U.S.C. §§ 1315, 1396n and related discussion, *supra* notes 330–344 and accompanying text.

<sup>403</sup> See, for example, the Endangered Species Act (ESA) § 9, 16 U.S.C. § 1538 (2006), discussed, *supra* notes 213–237 and accompanying text.

tion and possess the most reliable substantive expertise about what each side can accomplish. Although high-ranking executive officials can play important roles in the process, the most important players are often the career agency staff on both sides.<sup>404</sup>

That said, there are many exceptions. For example, Congress is the federal negotiator in all spending power deals, in most policymaking laboratory and iterative federalism negotiations, and in much interest group representation bargaining. Sometimes Congress convenes the process of negotiated rulemaking by statute, as it initially required under the REAL ID Act.<sup>405</sup> Congress was also the federal partner in the LLRWPA negotiation with the states,<sup>406</sup> and it is the intersystemic signaling partner targeted by states that have organized regionally on climate change initiatives.<sup>407</sup> We might even consider the indirect negotiating roles played by judicial actors—not only as envisioned by Professor Bloom,<sup>408</sup> but even that of lower court judges like the one who sentenced Ed Rosenthal to one day in prison (rather than the federal mandatory five-year minimum) for cultivating medical marijuana under a state license.<sup>409</sup> Understood broadly, all branch actors may engage in federalism bargaining at one time or another.

## 2. Initiation: Federal Dominance, on the Surface

The federal government most often initiates negotiations, especially when federal supremacy or the spending power plays an important role. The Clean Air and Water Acts, Medicaid, and No Child Left Behind Act all offer good examples, although even these statutory bargaining forums may obscure important state roles in interest group negotiations leading up to the statutes' enactment.<sup>410</sup>

That said, sometimes states are the clear initiators. States often initiate by taking the policymaking lead in a way that evolves toward feder-

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<sup>404</sup> Telephone Interview with Melissa Savage, *supra* note 116.

<sup>405</sup> See National Security Intelligence Reform Act of 2004, Pub. L. No. 108-458, 118 Stat. 3638, and related discussion, *supra* notes 291–300 and accompanying text.

<sup>406</sup> See Low-Level Radioactive Waste Policy Act, Pub. L. No. 96-573, 94 Stat. 3347 (1980), *amended by* Low-Level Radioactive Waste Policy Amendments Act of 1985, Pub. L. No. 99-240, 99 Stat. 1842 (1986) (current version at 42 U.S.C. §§ 2021b–2021j (2006)), and related discussion, *supra* notes 197–207 and accompanying text.

<sup>407</sup> See, for example, 42 U.S.C. § 7543 (2006) and related discussion, *supra* notes 352–358 and accompanying text.

<sup>408</sup> See *supra* notes 395–398 and accompanying text.

<sup>409</sup> See O'Hear, *supra* note 381, at 787.

<sup>410</sup> *Supra* notes 164–399.

alism bargaining—either formally (e.g., vehicular emissions),<sup>411</sup> or informally (e.g., medical marijuana enforcement).<sup>412</sup> Other times, states initiate more straightforwardly, engaging Congress either in a spending power deal they have designed, as they did by lobbying for the Energy Efficiency Block Grant Program,<sup>413</sup> or in bargained-for commandeering negotiations, like those that occurred between the NGA and Congress in enacting the LLRWPA.<sup>414</sup> In each of these cases, the states seek a particular form of federal capacity that they need to implement their own policy preferences—either financial resources, freedom from otherwise operative legal rules, or legal authority to resolve a collective action problem among the states.<sup>415</sup> Federalism bargaining arises from both ends of the state-federal divide.

### 3. Mechanics: Forum-Dependent

The mechanics of state-federal bargaining vary depending on the forum, indicating various opportunities for federalism engineering in their design.

Sometimes Congress explicitly invites negotiation by statute, even if it leaves the particulars of the negotiating process to executive agencies. Congress took this approach in the Medicaid demonstration waiver programs, which invite states to propose exceptions,<sup>416</sup> and the Clean Water Act, which required that EPA consult with states in developing the Phase II Stormwater Rule.<sup>417</sup> In other examples, Congress enacts a statute that implicitly necessitates state-federal bargaining, as it did in authorizing the formation of memoranda of understanding be-

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<sup>411</sup> See 42 U.S.C. § 7543 and related discussion, *supra* notes 352–358 and accompanying text.

<sup>412</sup> *Supra* notes 376–387 and accompanying text.

<sup>413</sup> See Energy Independence and Security Act of 2007, Pub. L. No. 110-140, 121 Stat. 1492 (codified at 42 U.S.C. §§ 17001–17386) and related discussion, *supra* notes 177–180 and accompanying text.

<sup>414</sup> See Low-Level Radioactive Waste Policy Act, Pub. L. No. 96-573, 94 Stat. 3347 (1980), *amended by* Low-Level Radioactive Waste Policy Amendments Act of 1985, Pub. L. No. 99-240, 99 Stat. 1842 (1986) (current version at 42 U.S.C. §§ 2021b–2021j (2006)), and related discussion, *supra* notes 197–207 and accompanying text.

<sup>415</sup> For a more detailed treatment of when federal preemption is and is not an appropriate response to state collective action problems, see Robert L. Glicksman & Richard E. Levy, *A Collective Action Perspective on Ceiling Preemption by Federal Environmental Regulation*, 102 Nw. U. L. Rev. 579, 591–603 (2008).

<sup>416</sup> See 42 U.S.C. §§ 1315, 1396n and related discussion, *supra* note 330–344 and accompanying text.

<sup>417</sup> *Supra* notes 283–290 and accompanying text; see 33 U.S.C.A. § 1342(p)(5) (West 2008) (requiring EPA to consult with states in design of the Phase II Rule).

tween state and federal agencies in allocating enforcement authority for immigration violations under the ACCESS program<sup>418</sup> and permitting pollutant discharges under the NPDES program.<sup>419</sup> Elsewhere, state and federal actors bargain under statutory provisions that enable more explicit negotiations, such as state-federal negotiations for incidental take permits under the ESA.<sup>420</sup>

These various legislative arrangements may take advantage of the different institutional competencies of each branch to account for federalism concerns. For example, Congress may create explicit avenues for state-federal bargaining when it intends to engage the highest level of state government in policy design, while leaving executive agencies to manage the details of bargaining in individual circumstances where specialized expertise and particular relationships among federal and state negotiators will be useful.

In addition, federal statutes and rules incorporate features that cleverly motivate state-federal bargaining and collaboration where it is especially needed. For example, although seized criminal assets become state property and enter the general treasury under most state forfeiture laws, federal forfeiture laws remand most seized assets directly to state law enforcement agencies.<sup>421</sup> This creates a powerful incentive for state law enforcers to collaborate with federal agencies in investigating criminal activity in areas of jurisdictional overlap, motivating them to share information that may lead to more effective enforcement and more efficient allocation of scarce funding.<sup>422</sup> The Superfund Act includes a similar feature to encourage state-federal remediation partnerships.<sup>423</sup> If a state partners with EPA under the Natural Resources Damages Assessment program, then recovered funds

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<sup>418</sup> Immigration and Nationality Act, 8 U.S.C. § 1357(g)(1) (2006); 33 U.S.C.A. § 1342 and related discussion, *supra* notes 148–157 and accompanying text.

<sup>419</sup> See 33 U.S.C.A. § 1342(b) and related discussion, *supra* notes 158–162 and accompanying text.

<sup>420</sup> See 16 U.S.C. § 1538 (2006) and related discussion, *supra* notes 213–217 and accompanying text.

<sup>421</sup> Telephone Interview with Roscoe Howard, *supra* note 133; see, e.g., 28 U.S.C. § 524 (2006) (establishing the DOJ Assets Forfeiture Fund); Eric D. Blumenson & Eva S. Nilsen, *Contesting Government's Financial Interest in Drug Cases*, 13 CRIM. JUST. 4, 5 (1999) (contrasting federal and state asset forfeiture laws).

<sup>422</sup> Telephone Interview with Roscoe Howard, *supra* note 133 (“It’s a purposefully designed dealmaking tool, and it works very well: bring us your big cases with federal import, and we’ll give you the money!”).

<sup>423</sup> Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C. § 9628 (2006); Interview with Mike Murphy, *supra* note 159.

go to restoring the local resource—but if EPA acts alone, then 40% of recovered funds go into the United States' operating budget.<sup>424</sup>

#### 4. Leverage: Federal Supremacy, State Capacity

The conventional wisdom is that the federal government possesses substantially more leverage in state-federal negotiations, by combined force of the Supremacy Clause<sup>425</sup> and superior fiscal resources. Federalism bargaining participants confirm this view in many areas of governance.<sup>426</sup> One state agency attorney noted that “states lack leverage at the table . . . because they aren't as cohesive as they could be, notwithstanding the National Governors Association.”<sup>427</sup> He explained: “Political differences between states mean that they aren't always on the same side, so they cannot get it together enough to lobby effectively as a single force—they care about different things, so they cannot really leverage effectively based on their collective capacity.”<sup>428</sup> Despite the suspicion that leverage favors the federal government, however, state bargainers defend negotiation vigorously as a preferred tool of inter-jurisdictional governance.<sup>429</sup> As a National Conference of State Legislatures source noted, “even if the states lack leverage, [bargaining] is still the best, fairest process.”<sup>430</sup>

Participants are also quick to note exceptions to the rule in both political and policymaking contexts. For example, state governors have formidable political leverage over their state's federal legislators by virtue of a governor's superior local access to state media.<sup>431</sup> The governor can generate serious political consequences for a legislator's career by manipulating the popular opinion through statements to the press. State actors also possess more powerful leverage when they are the primary implementers of bargained-for policies.<sup>432</sup>

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<sup>424</sup> Interview with Mike Murphy, *supra* note 159.

<sup>425</sup> U.S. CONST. art. VI, cl. 2.

<sup>426</sup> Telephone Interview with Jeff Reynolds, Staff Attorney, Va. DEQ (Jan. 4, 2010); Telephone Interview with Melissa Savage, *supra* note 116; Senate Interview, *supra* note 175.

<sup>427</sup> Telephone Interview with Jeff Reynolds, *supra* note 426.

<sup>428</sup> *Id.* Subject-specific state alliances, such as the Environmental Council of the States, are more successful at lobbying federal policymakers because member concerns are more unified. Interview with Mike Murphy, *supra* note 159.

<sup>429</sup> *E.g.*, Interview with Rick Weeks, Chief Deputy Dir. of Va. DEQ, in Richmond, Va. (Jan. 25, 2010) (“Things typically work pretty well and leverage is not a real concern of ours.”).

<sup>430</sup> Telephone Interview with Melissa Savage, *supra* note 116.

<sup>431</sup> Senate Interview, *supra* note 175.

<sup>432</sup> *See generally* Hills, *supra* note 55.

Although the conventional wisdom about favorable federal leverage should not be underestimated, negotiation theory helps unpack bargaining leverage in ways that highlight easily missed state advantages. In whatever form, leverage tracks influence in deal-making. The party with the most leverage is best positioned to secure its preferred terms, assuming the leverage is effectively deployed. Conversely, the party with the least leverage usually has the most to lose if a deal is not reached. But leverage really arises in three different forms: negative, positive, and normative.<sup>433</sup> Often most obvious to the naked eye, negative leverage is power held by one side that the other does not want it to use—like a state governor’s ability to generate negative local press about a senator. By contrast, a party exerts positive leverage in wielding power or resources that the other side *does* want it to use—such as that Congress wields in bargaining with the spending power. Finally, normative leverage is morally based power, compelling the parties in a certain direction based on shared authoritative norms, such as fairness, consistency, patriotism, honesty, and any other values that might apply more locally.

Federal actors often hold the most important negative leverage, given their ability to preempt state law under the Supremacy Clause, and at times, powerful positive leverage in the form of federal funds. States, however, often possess the most important positive leverage, given their generally superior capacity for enforcement, implementation, and innovation (and reciprocal negative leverage when they can credibly threaten to withhold it). As detailed in Part III.B, states also benefit from the powerful normative leverage that constitutional norms and federalism principles exert on the federalism bargaining process.

In federalism bargaining, the negative leverage of federal preemption is often balanced by the positive leverage of state capacity. The more the implicated realm of governance depends on state capacity, the more power state negotiators wield at the table.<sup>434</sup> For example, negotiating leverage is more closely matched in many environmental negotiations because participants understand that the programs of cooperative federalism on which the big federal environmental statutes depend would implode without the good faith participation of state

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<sup>433</sup> SHELL, *supra* note 9, at 40–57 (discussing leverage).

<sup>434</sup> EPA Interview, *supra* note 274; Telephone Interview with Jeff Reynolds, *supra* note 426; Telephone Interview with Melissa Savage, *supra* note 116; Senate Interview, *supra* note 175.



environmental agencies.<sup>435</sup> In theory, EPA assumes the roles that states choose not to fulfill, but participants understand that EPA could never realistically assume responsibility for localized implementation in each state, or even a handful at any given time.<sup>436</sup> As a result, state agents occasionally hear EPA threats of preemption as hollow, and occasionally expect that EPA is more likely to support failing state programs with additional funding and technical assistance than it is to assume control.<sup>437</sup> Where meaningful state participation is critical to federal success, state bargaining power waxes.<sup>438</sup>

Criminal law negotiations present the opposite scenario because federal law enforcement agencies hold the capacity advantage in realms of jurisdictional overlap. Lacking legal supremacy and with fewer resources to allocate over a broader array of enforcement obligations, state negotiators should have measurably less leverage in criminal enforcement bargaining. Nevertheless, some sources indicate that leverage conflicts are muted in this arena because conflicting interests are infrequent.<sup>439</sup> According to Roscoe Howard, former U.S. Attorney for the District of Columbia, criminal enforcement federalism bargaining proceeds with surprisingly little controversy because the incentives toward cooperation on both sides are powerfully aligned:

There are very practical reasons for the copious amount of state-federal bargaining that goes on in the criminal realm. It's unbelievably helpful, and without it, both systems would bog down . . . . States may have less leverage in terms of fiscal and legal resources, but it doesn't really amount to much, because it's not really a zero-sum game. When we cooperate, everyone wins because a threat is taken off the street. The only conten-

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<sup>435</sup> See, for example, enforcement under the Clean Air Act, 42 U.S.C. § 7413 (2006), and under the Clean Water Act, 33 U.S.C. § 1319 (2006); EPA Interview, *supra* note 274; Interview with Mike Murphy, *supra* note 159.

<sup>436</sup> EPA Interview, *supra* note 274; Telephone Interview with Melissa Savage, *supra* note 116.

<sup>437</sup> Anonymous Interview with State Agency Official (Jan. 15, 2010) [hereinafter State Agency Interview] (on file with the *Boston College Law Review*). State agencies generally assume EPA is more likely to assist failing state programs than to terminate them, as may happen now that Michigan has requested to return delegated CWA authority due to its budget crisis. Interview with Mike Murphy, *supra* note 159 (explaining that it would cost EPA more to issue individual permits than to fund failing state programs); see *Key Corps Official Faults States' Push to Oversee Wetlands Permits*, INSIDE THE EPA, Apr. 24, 2009, available at 2009 WLNR 7604929 (reporting on Michigan's request).

<sup>438</sup> EPA Interview, *supra* note 274; Telephone Interview with Melissa Savage, *supra* note 116.

<sup>439</sup> Telephone Interview with Roscoe Howard, *supra* note 133.

tious issue is credit—that’s usually when there is competition for jurisdiction. But state prosecutors, sheriffs, and commonwealth attorneys are usually elected, and very sensitive to public image. They need credit. The federal guy at the table is always appointed. So it’s usually easy to manage that.<sup>440</sup>

Aside from rare, high-profile cases, interjurisdictional criminal matters are seldom tried in both state and federal forums, so credit usually rests with whoever prosecutes.<sup>441</sup> (Of course, it is unlikely that all federalism bargaining is equally as harmonious, especially in regulatory contexts in which incentives are not so cleanly dovetailed.)

Admittedly, it can be problematic to analyze leverage according to a binary state-federal metric, when policymaking leverage often shifts between coalitions of different state and federal actors. For example, one U.S. Senate attorney described how state-federal negotiations over “cap-and-trade” policy were complicated by the fact that state legislators did not want federal law to put all delegated state power into the hands of state governors.<sup>442</sup> Battles over the REAL ID Act reveal similar dynamics of cross-party alliances within federalism bargaining. According to one source, DHS Secretary Janet Napolitano agreed with the state criticism of the Act, but her only leverage to pressure congressional amendment was to allow the December 31, 2009 deadline to expire without extensions in the face of massive state noncompliance.<sup>443</sup> She reportedly seriously considered this tactic, by which she hoped to shame her federal peers in Congress into revising the law, but she ultimately issued the extensions to avoid stranding millions of holiday travelers unable to board aircrafts without federally valid identification.<sup>444</sup> The complex interplay of independent municipal actors further complicates federalism bargaining dynamics.<sup>445</sup>

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<sup>440</sup> *Id.* (adding that bargaining proceeds smoothly “at least 90% of the time”).

<sup>441</sup> The high-profile “D.C. Sniper” case offers the rare counter-example of multijurisdictional competition over prosecution rights. Virginia and Maryland competed over trying the defendants, and the FBI (which held the defendants after making the arrests) was ready to try them if the states could not agree. Virginia ultimately convicted both defendants in the first trials, but Maryland re-prosecuted one defendant to ensure against death penalty procedural issues. FBI BEHAVIORAL ANALYSIS UNIT, SERIAL MURDER: MULTI-DISCIPLINARY PERSPECTIVES FOR INVESTIGATORS 37 (2008), <http://www.fbi.gov/stats-services/publications/serial-murder/serial-murder-july-2008-pdf>.

<sup>442</sup> Senate Interview, *supra* note 175 (describing how different state-side negotiators can compete with one another by negotiating directly with federal policymakers rather than as a unified block).

<sup>443</sup> Telephone Interview with Melissa Savage, *supra* note 116.

<sup>444</sup> *Id.*

<sup>445</sup> See *supra* notes 78–80 and accompanying text.

## 5. Relationships and Consultation: Key Building Blocks

Participants report that positive working relationships with counterparts are the bedrock of successful federalism bargaining.<sup>446</sup> Whether bargaining takes place in a collaborative enforcement context or in a policymaking context fraught with preemption conflict, frequent communication, mutual concern for shared interests, and mutual respect for differing interests are the key ingredients for progress. As an attorney within the EPA Administrator's Office explained,

We spend a lot of time communicating with people in the field. It's so much harder to negotiate without that investment. If you haven't spent time getting that information and building those relationships, then the likelihood that you'll end up arguing over the shape of the table is much higher.<sup>447</sup>

As Rick Weeks, Chief Deputy Director of Virginia's Department of Environmental Quality, explained about his negotiations with federal partners, "[T]here usually is not a clear right answer—both parties can be right [about who should do what], so we look for solutions that work for everybody."<sup>448</sup> When asked for the most important item in his negotiation toolbox, former U.S. Attorney Roscoe Howard said, "Knee pads—very useful when asking for things!"<sup>449</sup>

Subjects uniformly highlighted the importance of frequent consultation with counterparts.<sup>450</sup> Most praised their negotiating relationships as critical to the success of interjurisdictional governance, and agreed that more consultation was always preferable to less. Interview subjects believed the system works well as it stands, and were hesitant to suggest improvements (even when prompted, and even anonymously).<sup>451</sup> Sev-

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<sup>446</sup> *Id.* ("To make these efforts work, it's all about relationship building . . . . [Who] matters most is the local career folks at both the state and federal levels."); *see also* Telephone Interview with Roscoe Howard, *supra* note 133; Interview with Laurie Ristino, USDA Gen. Counsel's Office, in Wash., D.C. (Dec. 31, 2009); Interview with Rick Weeks, *supra* note 429.

<sup>447</sup> EPA Interview, *supra* note 274.

<sup>448</sup> Interview with Rick Weeks, *supra* note 429.

<sup>449</sup> Telephone Interview with Roscoe Howard, *supra* note 133.

<sup>450</sup> *E.g.*, EPA Interview, *supra* note 274 ("The effectiveness of regulatory structure depends on [stakeholders] believing that the regulations are needed, make sense, and will be administered fairly—so if you have important stakeholders, be in frequent contact with them.").

<sup>451</sup> *E.g.*, Telephone Interview with Jeff Reynolds, *supra* note 426 (quoted main text); Telephone Interview with Melissa Savage, *supra* note 116 ("I'd say that things are pretty good the way they are . . . basically, bargaining is better than the alternative, and changes could always make things worse.").

eral opined that altering the federalism bargaining marketplace with additional constraints or requirements was a bad idea, even when considering negotiations in which they did not achieve preferred results.<sup>452</sup> On the other hand, all agreed that consultation was only helpful when it was genuine, and several suggested revision of requirements that reward “hoop-jumping” over substantive communication.<sup>453</sup>

Subjects generally agreed that implementation and enforcement negotiations are the smoothest because they involve a level of consultation considered optimal by both sides.<sup>454</sup> State participants noted that policymaking negotiations present a greater challenge because there is less consultation than they believe is needed.<sup>455</sup> These negotiations are more fraught by nature because states are usually reluctant to cede authority to the federal programs implicated—but many state participants do acknowledge the need for national leadership in appropriate regulatory realms and note the helpfulness of a federal regulatory backstop in contexts where local enforcement is difficult or unpopular.<sup>456</sup>

A more common theme of concern among state participants is that federal policymakers underestimate the financial burden of new federal laws on states, and most prescribe greater consultation as the remedy.<sup>457</sup> Federal agencies often project the costs of new programs

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<sup>452</sup> *E.g.*, EPA Interview, *supra* note 274; Telephone Interview with Jeff Reynolds, *supra* note 426; Telephone Interview with Melissa Savage, *supra* note 116 (no matter how unsatisfying the result, “any kind of negotiation is preferable to the top-down approach, because the states come in too many different shapes and sizes for the ‘one-size-fits-all’ approach to work well”).

<sup>453</sup> *E.g.*, Telephone Interview with Melissa Savage, *supra* note 116 (noting that more consultation requirements “could slow down an already slow process,” but that “mak[ing] sure Congress is at least well-informed is a good idea”). Another interviewee distinguished between “real give and take” ensuring that stakeholders are actually heard, and “listening sessions” where “a series of state stakeholders make a five-minute speech about what they want while the federal people eat lunch, so they can check the box that says they listened.” See EPA Interview, *supra* note 274. This source would not support “ineffective consultation requirements that end up costing time and resources disproportionate to the purpose they should serve, or that make it impossible to do work in real time.” *Id.*

<sup>454</sup> *E.g.*, Interview with Mike Murphy, *supra* note 159; Telephone Interview with Jeff Reynolds, *supra* note 426; Interview with Rick Weeks, *supra* note 429.

<sup>455</sup> Interview with Mike Murphy, *supra* note 159; Telephone Interview with Melissa Savage *supra* note 116; Interview with Rick Weeks, *supra* note 429.

<sup>456</sup> EPA Interview, *supra* note 274 (“[T]he flip side is that [states] are closer to the people, who, to them, are voters—so sometimes they ask us to take the hard line because it’s politically safer to have us do it.”); Telephone Interview with Jeff Reynolds, *supra* note 426; Interview with Rick Weeks, *supra* note 429 (“Having the 800-pound gorilla in the closet is helpful!”).

<sup>457</sup> Senate Interview, *supra* note 175 (acknowledging the concern); see Interview with Mike Murphy, *supra* note 159 (same); Telephone Interview with Melissa Savage *supra* note

based on an assumption of full compliance at the outset, even though states almost always face significant enforcement expenses in bringing the regulated community up to new compliance standards.<sup>458</sup> After a recent lobbying effort by state interest groups, at least one source sees encouraging signs that federal agencies understand the need to be better informed by state partners.<sup>459</sup> For example, the Environmental Council of the States persuaded EPA to form a “Cost of Rules Regulatory Workgroup” of EPA and state representatives to recommend reforms to address this problem.<sup>460</sup>

## 6. Underlying Legal Uncertainty

A final feature warranting analysis is the substantive legal uncertainty that pervades many federalism bargaining forums about respective roles and legal limits—or who, in the end, should get to decide.<sup>461</sup> Negotiations take place in realms of overlapping state and federal jurisdiction, where both governments have regulatory interests to protect, authority to wield, and obligations to fulfill.<sup>462</sup> Together with other scholars, I have previously identified obstacles for policymaking in such realms posed by the Rehnquist Court’s resurrection of a classical dual

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116 (emphasizing that greater state consultation would help). An attorney from the Virginia Department of Environmental Quality elaborated:

Unfunded mandates cause good ideas to fail. . . . You can see it in failing underfunded environmental programs. States could give federal agencies a realistic assessment of what the new law will require to make it work. States are different, and they have different resources—they have to be able to talk about this when the rule is being made, or else states end up in a bind, unable to get things done.

Telephone Interview with Jeff Reynolds, *supra* note 426.

<sup>458</sup> Interview with Mike Murphy, *supra* note 159.

<sup>459</sup> *Id.* (noting that he serves on this new committee as one of four state agency delegates).

<sup>460</sup> *Id.*; *Information Management*, ENVTL. COUNCIL OF STATES, [http://www.ecos.org/section/committees/information\\_management](http://www.ecos.org/section/committees/information_management) (last visited Nov. 29, 2010) (providing information on ECOS’s Data Management Work Group, which coordinates with EPA to build information systems regarding, among other things, cost of compliance).

<sup>461</sup> *Supra* text accompanying notes 38–39.

<sup>462</sup> *See, e.g.*, Clean Water Act § 303, 33 U.S.C. § 1313(d) (2006) (governing water quality standard setting under the Clean Water Act); *supra* notes 347–349 and accompanying text; *see also* 33 U.S.C.A. § 1342(b) (governing pollution permitting under the Clean Water Act); *supra* notes 158–162, 345–347 and accompanying text; *see also* Clean Air Act, 42 U.S.C. § 7507 (2006) (providing states with a choice between compliance with national emissions standards or with California standards); *supra* notes 352–358 and accompanying text.

federalism ideal seeking cleaner jurisdictional separation.<sup>463</sup> Friction between the interjurisdictional reality in which governance takes place and the theoretical model animating the Court's adjudication of conflicts creates uncertainty about the kinds of federalism bargaining that are enforceable (and even desirable).<sup>464</sup> As Professor Coase has predicted, such uncertainty threatens bargaining optimality as an additional transaction cost.<sup>465</sup> If federalism bargaining plays such an important role in already challenging realms of jurisdictional overlap, then optimizing results by reducing uncertainty should be a priority.

But even as academics continue to fret over the conflict, participants report that they rarely worry about it.<sup>466</sup> They may not be entirely certain about legal constraints in the background, but they report that this uncertainty does not impact most negotiations, where the shared objective is usually to solve a clearly shared problem.<sup>467</sup> As one state attorney reported,

Nobody is thinking about the New Federalism cases, or at least I'm not anymore. I know they were supposed to rein in federal law, but that hasn't really happened. [I work with a] problematic law, and the boundaries are confusing. But everyone ploughs ahead with it anyway: "Forget whether we have the authority—we're just going to press ahead and do it because it's the right thing to do . . . ." Let the chips fall where they may.<sup>468</sup>

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<sup>463</sup> See, e.g., Ryan, *supra* note 8, at 567–95 (describing how regulatory problems requiring simultaneous state and federal response grate against the classical dual federalism model, which idealizes mutually exclusive realms of state and federal jurisdiction). The federalism bargaining marketplace is broader.

<sup>464</sup> See, e.g., *supra* notes 183–210 and accompanying text (describing uncertain bargained-for commandeering negotiations); *supra* note 194 (citing recent Supreme Court precedent making federally approved interstate compacts harder to enforce).

<sup>465</sup> Coase, *supra* note 24, at 15–19.

<sup>466</sup> Telephone Interview with Roscoe Howard, *supra* note 133; Interview with Mike Murphy, *supra* note 159; Telephone Interview with Melissa Savage, *supra* note 116; Senate Interview, *supra* note 175; Interview with Rick Weeks, *supra* note 429.

<sup>467</sup> Senate Interview, *supra* note 175; see also Telephone Interview with Jeff Reynolds, *supra* note 426 ("As for awareness about federalism concerns—I think it goes over everyone's heads, at least in the terms you're using, but they are thinking about them in other language. . . . It's on people's minds, but they just don't know what to do with it.").

<sup>468</sup> State Agency Interview, *supra* note 437; see also Telephone Interview with Melissa Savage, *supra* note 116 (reporting that although the National Conference of State Legislatures is mindful about federalism, "court cases aren't usually the first thing we're thinking of . . . . We try to stay up to date . . . but honestly, in that whole process, the New Federalism cases are pretty remote").

A federal attorney similarly explained, “federalism constraints operate in the background, but they are not usually on the minds of most legislative bargainers; the first priority . . . is to solve the problem and get a bill passed that can do it.”<sup>469</sup> When I asked one state official whether he ever thinks about the lines of jurisdictional separation that the New Federalism cases draw, he responded simply: “No—because there are no bright lines [in this realm]! So no, we do not really give them much thought.”<sup>470</sup> He then observed that the State Attorney General’s office might have a different answer, nodding humorously to the plain disjuncture between the focus of unilateral and bilateral federalism interpretation.<sup>471</sup>

Other subjects reported that genuine federalism issues do arise during intergovernmental bargaining, even if they are not regarded in those terms.<sup>472</sup> These include questions about which side must yield on a given implementation issue, or concerns about the appropriate degree of consultation in policymaking.<sup>473</sup> Demystifying legal constraints would thus be an important way of bettering the federalism bargaining enterprise.<sup>474</sup> And to the extent that participants do not actively consider legal constraints during negotiation, careful design of the legal frameworks that provide opportunities for federalism bargaining is important.

### B. Sources of Trade

Having identified the forums in which federalism bargaining takes place and many of the norms that operate within them, we reach the meat of the actual intergovernmental exchange. This Section analyzes what it is, exactly, that federalism bargainers are trading on, and evaluates what constitutional or jurisprudential rules constrain these various media of exchange.

In all bargaining, each side possesses something the other side wants or needs, and these become the sources of trade for negotiation.

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<sup>469</sup> Senate Interview, *supra* note 175 (adding, “most aren’t thinking about whether things will be litigated for federalism reasons; maybe they did a little bit after [*Lopez* and *Morrison*], but that was years ago”).

<sup>470</sup> Interview with Mike Murphy, *supra* note 159.

<sup>471</sup> *Id.*

<sup>472</sup> *Id.*; Telephone Interview with Jeff Reynolds, *supra* note 426; Senate Interview, *supra* note 175.

<sup>473</sup> For example, Jeff Reynolds reports ongoing state-federal conflict over waivers of sovereign immunity under various permitting provisions of the CAA, CWA, and RCRA. Telephone Interview with Jeff Reynolds, *supra* note 426.

<sup>474</sup> *Cf.* Coase, *supra* note 24, at 43 (“A better approach would seem to be to start our analysis with a situation approximating that which actually exists . . .”).

Things in demand are the unique currency within any given deal, and there is usually more than one form operating at any given time. The medium of exchange can be a tangible resource, an intangible legal authority, or adherence to a normative principle that motivates the choices made in negotiation. To be sure, the details that motivate the parties will vary in each specific context. But the media exchanged in most state-federal negotiations are of the following types: money, regulatory capacity, permission, credit, and principle (the normative leverage that federalism values themselves exert on the negotiation). And though the legal constraints on some forms of trading are clear, others remain murky.<sup>475</sup>

### 1. The Power of the Purse

When money is the most salient federal-state medium of exchange, it is likely a spending power deal. Federal dollars were the critical negotiating currency when Congress used highway funds to bargain with states for a national drinking age,<sup>476</sup> matched state funds to provide health insurance for poor citizens through Medicaid,<sup>477</sup> and conditioned education funds on the adoption of national standards in the No Child Left Behind Act (the “NCLB”).<sup>478</sup>

#### a. Constraints

*South Dakota v. Dole* articulated a set of loose constraints on how Congress may bargain through conditional spending: conditions must (1) promote the general welfare, (2) be unambiguous, (3) relate to the federal interest or program, and (4) not offend other constitutional requirements.<sup>479</sup> In other words, Congress may wield the power of its purse when there is a reasonable nexus between the strings attached to federal money and a legitimate federal purpose. Underscored by invalidation of the LLRWPA bargained-for commandeering, negotiating states must have genuine choices about whether to participate—although participation will be deemed voluntary even when agreed to

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<sup>475</sup> See, e.g., *infra* notes 503–510, 517–522 and accompanying text (discussing the uncertain legal constraints regarding capacity and permissions trading).

<sup>476</sup> See *South Dakota v. Dole*, 483 U.S. 203, 206 (1987).

<sup>477</sup> 42 U.S.C. §§ 1315, 1396n (2006) and related discussion, *supra* notes 330–344 and accompanying text.

<sup>478</sup> See Pub. L. No. 107-110, 115 Stat. 1425 (enacted Jan. 8, 2002) (codified in scattered sections of 20 U.S.C) and related discussion, *supra* notes 181–182 and accompanying text.

<sup>479</sup> 483 U.S. at 207–08.



under enormous economic pressure.<sup>480</sup> Finally, the deal cannot otherwise violate the Constitution—for example, Congress cannot bribe states to restrict free speech.

Congress thus bargains with a relatively free hand under the spending power, but the doctrine still yields points of uncertainty—as demonstrated by a recent series of federal circuit court cases challenging the NCLB.<sup>481</sup> Although all states have chosen to participate in the program (in order to continue receiving federal educational funds),<sup>482</sup> ten school districts around the country recently sued over an NCLB provision they argued failed to meet *Dole's* unambiguousness requirement.<sup>483</sup>

In 2009 in *School District of the City of Pontiac v. Secretary of the Department of Education*, the U.S. Court of Appeals for the Sixth Circuit considered whether states could escape a spending deal they argued was ambiguous, when the alternative interpretation was not one they could reasonably have believed at the time the deal was made.<sup>484</sup> The plaintiffs argued that NCLB included a provision that could be read to prohibit federal enforcement of state action (such as hiring or purchasing) that would require funding beyond what was provided under the Act, even if the disputed action were necessary to meet the federal standards designated by the Act.<sup>485</sup> The Department of Education (the

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<sup>480</sup> See *Jim C. v. United States*, 235 F.3d 1079, 1082 (8th Cir. 2000).

[H]ere, the Arkansas Department of Education can avoid the requirements of Section 504 simply by declining federal education funds. The sacrifice of all federal education budget, approximately \$250 million or 12 percent of the annual state education . . . would be politically painful, but we cannot say that it compels Arkansas's choice.

*Id.*

<sup>481</sup> See *supra* notes 181–182 and accompanying text.

<sup>482</sup> Kafer, *supra* note 181 (“So far, no state has refused to participate, although a few isolated districts have pulled out; apparently the money is too good to pass up.”).

<sup>483</sup> See generally *Sch. Dist. of the City of Pontiac v. Sec’y of Dept. of Educ.*, 584 F.3d 253 (6th Cir. 2009) (en banc). In this case, school districts receiving federal funds under No Child Left Behind sued unsuccessfully for a declaratory judgment stating compliance with Act’s provisions was not required if compliance led to increased costs not covered by federal funds.

<sup>484</sup> *Id.* at 259.

<sup>485</sup> *Id.* at 259–60. 20 U.S.C. § 7907(a) (2006) states:

General Prohibition. Nothing in this Act shall be construed to authorize an officer or employee of the Federal Government to mandate, direct, or control a State, local educational agency, or school’s curriculum, program of instruction, or allocation of State or local resources, or mandate a State or any subdivision thereof to spend any funds or incur any costs not paid for under this Act.

“DOE”) insisted that the provision merely prohibited federal actors from applying more stringent standards than specifically mandated in the Act.<sup>486</sup> DOE argued that the provision was unambiguous in the context of the full statutory bargain, which clearly indicated that Congress was trading a set amount of funding for states’ agreement to meet the stated federal standards by whatever means.<sup>487</sup>

Strikingly, this seemingly generic statutory interpretation case failed to produce a majority opinion from the Sixth Circuit, sitting en banc.<sup>488</sup> Sixteen judges split evenly over whether the case should be dismissed, embroiled in contrary positions about how the spending power’s “clear notice” requirement should comport with the interpretation of the “core bargain” under consideration in a spending power deal.<sup>489</sup> The case thus asked the judges not only to evaluate ordinary statutory language, but also, in negotiation theory terms, the core elements of a state-federal bargain. For example, Judge Jeffrey Sutton favored dismissal because the plaintiffs’ ambiguity argument would undermine the Act’s “central tradeoff”: providing states funds and flexibility to develop their own educational programs in exchange for accountability to federal standards.<sup>490</sup> Indicating the significance of this question for federalism bargaining more generally, a similar debate arose among the Supreme Court justices deciding *New York v. United States* over how to interpret the LLRWPA without vitiating the “core bargain” that the states had reached with Congress over its enactment.<sup>491</sup>

The Sixth Circuit’s astonishing failure to win even a narrow judicial consensus in *Pontiac School District* indicates the sensitivity with which judges must employ tools of statutory interpretation within the federalism bargaining context. Although statutory interpretation tools

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*Id.*

<sup>486</sup> *Pontiac Sch. Dist.*, 584 F.3d at 284 (Sutton, J., concurring) (noting that plaintiff “must identify a *plausible* alternative interpretation”).

<sup>487</sup> *Id.* at 272–76.

<sup>488</sup> *En Banc Sixth Circuit Rebuffs Panel, Affirms Dismissal of ‘No Child’ Challenge*, U.S. L. WEEK, Oct. 27, 2009, available at 78 U.S.L.W. 1241. The district court voted to dismiss for failure to state a legitimate spending power claim; an appellate panel reversed, and the panel’s decision was vacated when the Sixth Circuit reconvened to review the case en banc. *Id.* Without a majority consensus, the district court’s dismissal stands. *Id.*

<sup>489</sup> Seven judges voted to allow the claim on the merits; an eighth judge rejected their rationale but voted to remand; six judges voted to dismiss on the merits; two judges voted to dismiss as nonjusticiable—yielding a tie on whether to dismiss. *Id.*

<sup>490</sup> *Pont. Sch. Dist.*, 584 F.3d at 285–86 (Sutton, J., concurring) (noting that plaintiff’s interpretation “fail[ed] to account for, and effectively eviscerate[ed], numerous components of the Act,” and “would break the accountability backbone of the Act”).

<sup>491</sup> Compare *New York v. United States*, 505 U.S. 144, 181 (1992), with *Pontiac Sch. Dist.*, 584 F.3d at 199 (White, J., concurring in part and dissenting in part).

are no different in spending power cases, the court struggled with the federalism implications of releasing states from bargained-for federal obligations on an alleged technicality that half the judges believed would void the core essence of the bargain the states had struck when they agreed to take the funds.<sup>492</sup> In addition, and contrary to popular criticism of the spending doctrine, the case indicates the seriousness with which the judiciary will evaluate clear notice questions. A similar case in the U.S. Court of Appeals for the Second Circuit<sup>493</sup> indicates states' continuing dissatisfaction with NCLB.

## 2. Capacity Trading

The spending power is often the most salient medium of exchange in a deal, but spending power deals are always also about a less obvious, equally important source of trade: state regulatory capacity. Sometimes the federal government buys state cooperation to advance a regulatory agenda exceeding clearly enumerated powers (e.g., a national drinking age).<sup>494</sup> Elsewhere, Congress creates programs of cooperative federalism in commerce-related realms it could manage from top to bottom—but chooses not to, because the federal government lacks the local expertise, regulatory authority, boots on the ground, or perceived legitimacy—in short, the *capacity*—that state government can provide.<sup>495</sup>

Regulatory capacity is the power to make things happen—by whatever resources or institutional feature enables either side to accomplish an objective that the other cannot do as well. In spending power deals, Congress trades federal fiscal capacity for state regulatory capacity to implement goals it lacks the expertise or resources to implement alone (for example, in regulating stormwater or insuring poor children).<sup>496</sup> The states thus wield powerful leverage in spending power negotiations because they control a reservoir of local expertise, resources, and authority that federal counterparts cannot replicate (without replicating the very structure of local government that creates this capacity).<sup>497</sup> The previously underappreciated power of the states in spending

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<sup>492</sup> See *Pontiac Sch. Dist.*, 584 F.3d at 255–56 (describing the various parts of the opinions that each of the en banc judges did or did not join).

<sup>493</sup> See generally *Connecticut v. Duncan*, 612 F.3d 107 (2d Cir. 2010).

<sup>494</sup> See *Dole*, 483 U.S. at 206.

<sup>495</sup> See, e.g., Coastal Zone Management Act, Pub. L. No. 92-583, 86 Stat. 1280 (1972) (codified as amended at 16 U.S.C. §§ 1451–1466 (2006)).

<sup>496</sup> See *id.*; 42 U.S.C. §§ 1315, 1396n (2006) (providing for Medicaid demonstration waivers); discussion, *supra* notes 301–349 and accompanying text.

<sup>497</sup> See, e.g., Ryan, *supra* note 8, at 580–84.

deals—first analyzed by Professor Roderick Hills<sup>498</sup>—has become increasingly appreciated by all involved. Bargaining participants generally understand federal dependence on state cooperation, especially in the environmental context.<sup>499</sup>

State capacity is not only important in spending power deals, as Bruce Babbitt understood when he negotiated a partnership with California to link the independent ESA and NCCP regulatory programs.<sup>500</sup> In negotiating a straight exchange of state and federal capacity, he understood that the success of both programs would require combining federal multijurisdictional vision and authority with the local land use authority and outreach that only the state commanded:

The jurisdiction of local officials ends at the municipal or county boundary; while developers continually threaten to pack up and go across that boundary to the next jurisdiction down the road where local officials will be more pliable and willing to accommodate their demands. Pondering how to engage with the community in the face of these realities, we circled back to the state government . . . . It was becoming excruciatingly clear that neither of us could make this work without the other. Though we had provided California with the missing ingredient of [an enforceable] development moratorium, only California could provide us with the necessary credibility, capacity for outreach to local communities, and planning capabilities. It was time to reach across partisan lines and try for a working partnership with the state.<sup>501</sup>

In other examples, federal regulatory capacity is the more important currency of exchange. For example, the states sought federal authority when they asked Congress's blessing to violate the dormant commerce clause through the LLRWPA, or when they embraced EPA's ability to mediate the collective action problem of stormwater management under the Phase II Rule.<sup>502</sup> When states lobby for federal leader-

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<sup>498</sup> See generally Hills, *supra* note 55.

<sup>499</sup> EPA Interview, *supra* note 274; Telephone Interview with Melissa Savage, *supra* note 116; State Agency Interview, *supra* note 437.

<sup>500</sup> Endangered Species Act, 16 U.S.C. §§ 1531–1544 (2006); Natural Community Conservation Planning Act (NCCP), CAL. FISH AND GAME CODE §§ 2800–2835 (2003).

<sup>501</sup> BABBITT, *supra* note 227, at 70–71.

<sup>502</sup> See Low-Level Radioactive Waste Policy Amendments Act of 1985, Pub. L. No. 99-240, 99 Stat. 1842 (1986); Clean Water Act's Phase II Stormwater Rule, 40 C.F.R. § 122.34 (2010).

ship on climate policy, they are seeking federal capacity at levels of both legal authority and superior informational and financial resources.

a. *Constraints*

At first blush, federal capacity trading seems innocuous, or at least no more troubling than the exchange of federal fiscal capacity for state regulatory capacity that regularly takes place under the spending power. Nevertheless, the U.S. Supreme Court's decision in 1992 in *New York v. United States* suggests that the parties may actually be less free to bargain over federal capacity than they are to bargain over federal money.<sup>503</sup>

In *New York v. United States*, the Court constrained capacity bargaining more tightly than spending power bargaining, at least in the bargained-for commandeering context.<sup>504</sup> After striking down the federalism bargain at the heart of the LLRWPA, the Court expressly opined that if Congress really wanted to bind states to their promises to take responsibility for their radioactive waste, then it should do so in a spending power deal, rather than binding them directly.<sup>505</sup> But the decision misses the critical point that it was the states, not Congress, that initiated the negotiation. As I have previously argued, a spending power deal could not have replicated the particular result the states sought, nor would the deal seem as palatable to Congress if proposed that way (i.e., "Please use your regulatory capacity to allow us to negotiate among ourselves without violating the dormant commerce clause, and by the way, also give us some money!").<sup>506</sup>

*New York v. United States* is the only Supreme Court precedent directly on point (although *Printz v. United States* reiterated the Court's commitment to the anti-commandeering rule in prohibiting a similar directive to state executives).<sup>507</sup> Yet the case clearly differentiated between the wide scope of permissible bargaining available when the medium of exchange is federal dollars, and the narrower scope when the medium is federal regulatory capacity—even when the states consent, and the regulatory result is similar.<sup>508</sup> In both cases, the states negotiate for a different aspect of federal capacity: fiscal or regulatory. But the Court was clear that, even when asked, Congress does not have the

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<sup>503</sup> See 505 U.S. at 182.

<sup>504</sup> *Id.*

<sup>505</sup> *Id.* at 158–59.

<sup>506</sup> Ryan, *supra* note 35, at 45–50.

<sup>507</sup> *Printz v. United States*, 521 U.S. 898, 935 (1977). *But see* *Reno v. Condon*, 528 U.S. 141, 150–51 (2000).

<sup>508</sup> See *New York v. United States*, 505 U.S. at 166–67, 168.

same latitude to agree when money is not the medium.<sup>509</sup> As a result, lower courts face uncertainty in interpreting other federalism bargains that trade on federal capacity.<sup>510</sup>

### 3. The Power of the Permit

A subset of capacity bargaining, the medium of exchange can also be permission for one side to do something the other could prohibit. Although permission most often runs from federal to state actors, the taxonomy reveals a few interesting contrary examples.<sup>511</sup>

Sometimes, permission is negotiated through an explicit permitting program designed by Congress, such as ESA provisions allowing incidental take permits in exchange for a qualifying habitat conservation plan.<sup>512</sup> Medicaid demonstration waivers present a hybrid between negotiations under the powers of the purse and the permit because they begin within a spending power deal but involve subsequent negotiations for state permission to deviate from standard Medicaid requirements.<sup>513</sup> Other times, states might seek permission to modify federal law beyond the confines of a specific statute, as occurred when the states asked Congress to waive the dormant commerce clause.<sup>514</sup>

Occasionally, the power of the permit can broker trading in the opposite direction: the federal government negotiates for state permission to do something that the state could otherwise prohibit. The Coastal Zone Management Act presents the clearest example, in that federal activity must receive state approval when it takes place within the three mile zone of concurrent coastal jurisdiction.<sup>515</sup> Similarly, thanks to state-protecting features in the Clean Water Act, applications for federal

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<sup>509</sup> See *id.* at 168 (noting that “[w]here Congress encourages state regulation rather than compelling it, state governments remain responsive to the local electorate’s preferences,” without recognizing how bargained-for commandeering parallels spending power bargaining in a way that strains the compulsion analysis).

<sup>510</sup> See *infra* text accompanying notes 517–522 (discussing the Phase II Stormwater Rule challenge).

<sup>511</sup> Compare *supra* notes 303–327 and accompanying text (CZMA consistency), with *supra* notes 238–250 and accompanying text (FERC relicensing).

<sup>512</sup> See 16 U.S.C. § 1539 (2006) and related discussion, *supra* note 219 and accompanying text.

<sup>513</sup> See 42 U.S.C. §§ 1315, 1396n (2006) and related discussion, *supra* notes 330–344 and accompanying text.

<sup>514</sup> See Low-Level Radioactive Waste Policy Amendments Act of 1985, Pub. L. 99-240, 99 Stat. 1842 (1986) and related discussion, *supra* notes 197–207 and accompanying text.

<sup>515</sup> See 16 U.S.C. § 1456(c) and related discussion, *supra* notes 303–327 and accompanying text.

licensing of hydroelectric dams often require final authorization from state actors that the project will not compromise water quality.<sup>516</sup>

a. *Constraints*

As a subset of capacity bargaining, federal bargaining with the power of the permit suffers the same uncertainty that attends federal capacity bargaining in general. The point has never been litigated directly, but the two iterations of the Ninth Circuit's handling of a federalism challenge to the CWA's Phase II Stormwater Rule demonstrate the delicacy of the question.<sup>517</sup>

When the Phase II Stormwater Rule was challenged in 2003 for violating the Tenth Amendment in *Environmental Defense Center v. EPA*, the Ninth Circuit needed two tries to securely uphold the modified bargained-for commandeering in the construction-permitting measure.<sup>518</sup> On its first try, it analogized the deal to spending power bargaining, reasoning that plaintiffs had waived their Tenth Amendment objections (as they would in a spending power deal) when they bargained to regulate construction pollution in exchange for permission to discharge polluted stormwater into federal waters.<sup>519</sup> When challenged on rehearing, the panel withdrew its analogy between spending and capacity bargaining, which lacked direct support in any Supreme Court precedent. Instead, it upheld the provision on the safer basis that the rule was not coercive because it allowed dissenters to opt out in favor of a separate permitting program for larger cities.<sup>520</sup> The Supreme Court declined to hear the case.<sup>521</sup>

*Environmental Defense Center* demonstrates just how unclear the law is regarding the power to bargain for permission in the absence of more specific Supreme Court precedent. The Court could conceivably find the reach of permission bargaining to be indistinguishable from spending power bargaining, as many of the reasons that justify the freewheeling power of the purse could also justify a freewheeling power of the

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<sup>516</sup> See 33 U.S.C. § 1330 (2006) and related discussion, *supra* notes 240–247 and accompanying text.

<sup>517</sup> Ryan, *supra* note 35, at 59–60. See generally *Env'tl. Def. Ctr., Inc. v. EPA (EDC I)*, 319 F.3d 398 (9th Cir. 2003), *vacated*, 344 F.3d 832 (9th Cir. 2003); *Env'tl. Def. Ctr., Inc. v. EPA (EDC II)*, 344 F.3d 832 (9th Cir. 2003).

<sup>518</sup> *EDC II*, 344 F.3d at 845 (confirming the original *EDC I* affirmation of the regulatory partnership against a Tenth Amendment challenge); Ryan, *supra* note 35, at 59–60.

<sup>519</sup> *EDC I*, 319 F.3d at 411–19.

<sup>520</sup> *EDC II*, 344 F.3d at 847–48.

<sup>521</sup> See *Tex. Cities Coal. on Stormwater v. EPA*, 541 U.S. 1085, 1085 (2004) (denying certiorari).

permit.<sup>522</sup> Yet other considerations suggest that the Court may not tolerate as broad a reach for permissions bargaining. Permitting authority may be more vulnerable to bargaining abuse because inherent political limitations on use of the spending power may not apply to permissions bargaining. (After all, though Congress must enact politically unpopular taxes to amass negotiating currency under the spending power, it costs comparatively little to create permitting currency by passing new federal limits that states must negotiate their way out of.) Without greater clarity on the permissible scope of capacity bargaining, courts may continue to duck the issue as the Ninth Circuit did, adding to the environment of legal uncertainty in which federalism bargainers negotiate.

#### 4. The Normative Leverage of Federalism Values

The powers of the purse, the permit, and the power to get things done represent the mainstay of federalism bargaining currency, but there is another important medium of exchange that motivates decisions at the table. State and federal negotiators are not only driven by issue-specific needs such as funding, authority, or other forms of regulatory capacity. Sometimes bargaining results are influenced by regard for the American system of federalism itself—the desire to reach an outcome that respects the constitutional design and that harnesses the ways in which divided local and national authority serve the ultimate purposes of government. This more ethereal currency may best be understood as regard among the participants for the values of federalism themselves, and it is often present even when negotiators are not using the specific vocabulary of federalism to define it.<sup>523</sup>

For example, Laurie Ristino of the U.S.D.A. General Counsel's Office described how she approaches negotiations with state actors:

As a federal attorney, you have an extra burden, you have this public trust. You're an advocate for the federal government, but you're also a public servant, so you have to think about how to uphold the law and act in a way that really advances the public benefit. You understand that this is a shared system of power, and that you have to be careful, and that preemption is not the favored approach. Sometimes you have to throw down the gauntlet of federal power, but as soon as you

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<sup>522</sup> *Cf. Dole*, 483 U.S. at 206–07.

<sup>523</sup> *E.g.*, EPA Interview, *supra* note 274; Telephone Interview with Jeff Reynolds, *supra* note 426; Interview with Rick Weeks, *supra* note 429.



do, you lose the ability to get compromise, to bring the situation to a point where everyone feels like they're getting what they need and can move on.

I was taught to watch my use of the Supremacy stick, to try to avoid using the word "preemption" or bring out the big guns. We work hard to find a compromise based on common ground, and only bring out big guns if [absolutely necessary]. We recognize that state actors may feel like the "little guy" when they have to go up against the federal government with all its resources and legal supremacy. They may feel like they're going to get run over, so we try not to act in ways that justify those fears.<sup>524</sup>

On the state side, Jeffords Reynolds, staff attorney at the Virginia Department of Environmental Quality, describes his own approach to intergovernmental bargaining:

I consider myself a trench lawyer. I'm in the trenches. I started out in JAG as a federal criminal attorney, then I was in private practice on oil and gas matters, and now I work with the state at DEQ. I've been an environmental attorney for fifteen years. Federalism issues were raised for me [early on in my practice], and I've always been sensitive to them. Federalism issues are extremely important in environmental realms because of the boundary-crossing problems in environmental law, like the Chesapeake . . . .

If it weren't for federal intervention, we wouldn't have so much critical [protection]. Where industry is involved, you really need the federal government to be forceful to achieve meaningful national standards. Technological and environmental changes have changed federalism, broken down some of the local prerogative. Environmental law is one area where federal strength is needed and appropriate . . . . The conventional wisdom is true that states lack leverage at the table. But do I think this means that the process is flawed? Not really. Things are as they should be, except that state finances need to be taken account of.<sup>525</sup>

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<sup>524</sup> Interview with Laurie Ristino, *supra* note 446 (composite quote).

<sup>525</sup> Telephone Interview with Jeff Reynolds, *supra* note 426 (composite quote).

Both lawyers indicate how the positions they take in intergovernmental bargaining are moderated by the values they associate with the proper roles of state and federal government within the American system. In this way, federalism values operate as an important motivator at the table, normatively impacting negotiators' choices just as the more material forms of currency do. They are especially evident in negotiations in which federal restraint or state cooperation goes beyond the strict limitations of capacity, based on constitutional and political considerations of role.<sup>526</sup>

As discussed above, negotiation theorists recognize this type of currency as "normative leverage," or the application of norms or standards that are persuasive to the other side for reasons that may be unrelated to the specific interests at stake.<sup>527</sup> Conventional examples of normative negotiating leverage include the do-unto-others principle, fair market value, respect for the rule of law, the persuasive value of precedent, and the consistency principle.<sup>528</sup> In the context of state-federal bargaining, negotiators' own regard for federalism values is a powerful source of leverage when it influences the outcome in ways unrelated to the individual interests at stake in the deal. Though participants concede that they rarely consider federalism at the level of specific Supreme Court precedents,<sup>529</sup> they report conscientious regard for the proper relationship between state and federal regulatory efforts during bargaining.<sup>530</sup> In other words, even without the formal vocabulary of federalism, they are moved by the fundamental values of federalism.

Federalism values help explain the motivation of both sides to engage in negotiated rulemaking and policymaking laboratory negotiations—even those within cooperative federalism programs—rather than alternatives that speak to contrary interests on both sides. Federal regulators have more control over administrative rulemaking through notice and comment, just as Congress could legislate more efficiently without state input in such policymaking laboratory contexts as Medicaid and

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<sup>526</sup> For example, the federal government has the constitutional authority to regulate interstate water allocation and external threats to federal lands much more than it currently does. See, e.g., Interview with Laurie Ristino, *supra* note 446.

<sup>527</sup> SHELL, *supra* note 9, at 44–45 (discussing normative leverage).

<sup>528</sup> Individuals prefer to see themselves as principled and consistent, rendering their previous statements and practices effective normative leverage if they attempt to negotiate a contrary result. *Id.* at 43–46 (discussing the normative leverage of the consistency principle).

<sup>529</sup> See *supra* notes 466–474.

<sup>530</sup> See *supra* note 523; *infra* note 535.

the Coastal Zone Management Act.<sup>531</sup> However, the value of state and local participation outweighs the federal interest in control. State influence over the formulation of federal law flows from the formidable subject matter expertise states hold, and their interests as ultimate stakeholders in the given policy arena. Federal agencies want to hear from state participants so that they can establish solid, workable policies that respect the federalism issues that inevitably attend concurrent regulatory realms. As a source in the Office of the EPA Administrator noted,

We're thinking about the role and interest of the states in virtually everything we do, because the states are critical in everything we do. We don't use the word "federalism" to describe what we're thinking about, but there's almost nothing that we do in the field that doesn't involve state, local, and regional input. So thinking about [federalism] is a matter of agency culture by design.<sup>532</sup>

Meanwhile, states want input into federal policymaking for the same reasons. Neither negotiated rulemaking nor cooperative federalism programs compel state participation.<sup>533</sup> States are never required to negotiate, but the benefits of doing so include greater influence over the final result. States could opt for a federal implementation plan administered by EPA rather than designing and enforcing their own state implementation plans under the Clean Air Act, but their interests in regulatory participation generally outweigh contrary interests in frugality.<sup>534</sup>

Of course, some federal policies threaten financial or regulatory impacts on states that provide incentive to participate beyond mere respect for federalism (such as the imposition of unfunded mandates or preemption of state police power). Nevertheless, most values that make federalism good for governance—including checks, localism, and synergy—are in especially high relief in negotiated rulemaking and cooperative federalism programs. These values inform negotiations over the way that federal policies should take account of state interests—and

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<sup>531</sup> See 16 U.S.C. §§ 1451–1466 (2006), discussed, *supra* notes 303–327 and accompanying text; 42 U.S.C. §§ 1315, 1396n (2006), discussed, *supra* notes 328–344 and accompanying text.

<sup>532</sup> EPA Interview, *supra* note 274.

<sup>533</sup> *E.g.*, *supra* notes 256–300 and accompanying text (discussing negotiated rulemaking); *supra* notes 303–327 and accompanying text (discussing an example of cooperative federalism, the Coastal Zone Management Act).

<sup>534</sup> See 42 U.S.C. § 7410(a)(1) (2006); Siegel, *supra* note 205, at 1676 (discussing the fact that the majority of states create their own implementation plans, despite the option of relying on a federal implementation plan).

vice versa—as both levels of government work to solve common problems. Deputy Director Rick Weeks of Virginia DEQ described his agency's regard for federalism values in these terms:

We don't think about federalism so much in the generic terms. But we think about it in terms of who is really the right agency to be doing what. There are some things that really only the national government can do. For example, you need a national program to deal with air emissions, because of the way they move across state boundaries. This is less of an issue for water resources, which are more local—but then you have the Chesapeake Bay situation . . . . And industry needs some certainty, which is hard to get without a national program. [There are other things that states do better.]<sup>535</sup>

Nevertheless, at least one participant commented on the way that the normative leverage of federalism values can also be used, disingenuously, to manipulate decisionmakers.<sup>536</sup> The Senate attorney interviewed described the use of normative federalism leverage in interest group negotiations over a bill Congress had recently considered to protect aquatic species against invasives by authorizing the Coast Guard to regulate ballast water.<sup>537</sup> The new law might have preempted CWA provisions that also regulate invasive aquatic species, and the environmental community split over whether to support the new bill.<sup>538</sup> As he explained,

We could have passed a bill, with industry support, that would have imposed much stricter national standards through the Coast Guard, and would have been much more likely to actually solve the problem [than the existing CWA provisions]. But some in the environmental community were unwilling to see any preemption of the CWA. They argued hard against the bill on grounds that preempting the CWA would dissolve the important state-federal program of cooperative federalism in the CWA, and touted how valuable that was. And they ulti-

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<sup>535</sup> Interview with Rick Weeks, *supra* note 429.

<sup>536</sup> Senate Interview, *supra* note 175.

<sup>537</sup> *Id.*; see also Brian Laskowski, *Coast Guard Considers New Rules to Regulate Ballast*, GREAT LAKES ECHO, Oct. 8, 2009, <http://greatlakesecho.org/2009/10/08/coast-guard-considers-new-rules-to-regulate-ballast-takes-up-where-congress-left-off/> (discussing the failure of the bill at issue, which passed the House but not the Senate).

<sup>538</sup> See Environmental Impacts Statements, 73 Fed. Reg. 79,473 (Dec. 29, 2008) for the proposed CWA regulations.

mately won the day by appealing to federalism this way . . . but *they* didn't really care about federalism! All they cared about was preserving their rights to litigate under the CWA.<sup>539</sup>

Some members of Congress thus manipulated normative federalism leverage in persuading others to reach their preferred outcome, even though (according to this source) they were not personally interested in federalism at all. The success of the gambit demonstrates the real normative power of federalism—but also how vulnerable it can be to opportunism. That said, the same problem holds true for all other ideals that exert normative leverage at the bargaining table, including legal precedent and even the do-unto-others principle, which are occasionally used by unscrupulous negotiators to manipulate an outcome desired for other reasons.<sup>540</sup>

a. *Constraints*

Negotiations in which respect for federalism is a primary currency require few additional constraints. No precedent addresses this bargaining currency except cases praising federalism values themselves as worthy of legal protection.<sup>541</sup> Some scholars have reviewed the historic problem of federalism opportunism, or the invocation of federalism values as cover for unrelated policy goals.<sup>542</sup> However, in previous work I have proposed tools that could help distinguish between bargaining that is and is not ultimately consistent with federalism values.<sup>543</sup>

5. Credit

Finally, credit represents a form of negotiating currency that triggers no legal analysis but can politically motivate federalism bargainers. In contexts of jurisdictional overlap, state and federal actors may compete for credit in situations in which it is difficult to share. For example,

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<sup>539</sup> Senate Interview, *supra* note 175.

<sup>540</sup> *E.g.*, SHELL, *supra* note 9, at 56–57 (discussing the negotiating ramifications of the fact that there are often two reasons people do things—“a good one and the real one”).

<sup>541</sup> *See generally, e.g.*, United States v. Morrison, 529 U.S. 598 (2000); United States v. Lopez, 514 U.S. 549 (1995); Gregory v. Ashcroft, 501 U.S. 452 (1991); Ryan, *supra* note 8, at 507 n.1.

<sup>542</sup> *E.g.*, Devins, *supra* note 54, at 133–35 (tracing the opportunistic invocation of federalism from the Louisiana Purchase to the modern day); Ryan, *supra* note 8, at 536–39 (analyzing Federal Emergency Management Agency director Michael Brown's invocation of federalism to defend his agency's lack of initiative after Hurricane Katrina).

<sup>543</sup> *See* Ryan, *supra* note 8, at 644–62 (proposing a judicial balancing test for evaluating faithfulness to federalism values).

leverage dynamics in state-federal interest group bargaining are impacted by competition between governors and federal legislators from their states over credit for regulatory programs the legislator enacts that the governor implements.<sup>544</sup>

Similarly, in the criminal enforcement context, contests over credit are the principal driver of otherwise rare jurisdictional competition.<sup>545</sup> Credit is harder to share in the criminal context because arrests and trials are usually only made once, in either state or federal hands. Although federal law enforcers are appointed, state law enforcers are usually elected, and thus more sensitive to matters of credit and favorable publicity. Thus, under-resourced state prosecutors who are usually happy to cede cases to federal partners may balk when asked to cede a high-profile case that could impact public opinion, preferring to keep the investigation, arrests, and trial within the state system.<sup>546</sup> At least one former federal prosecutor notes that federal actors are sensitive to this dynamic and work hard to protect the interests of their state partners.<sup>547</sup> Nevertheless, many federal prosecutors also have career ambitions hinging on credit,<sup>548</sup> and at least one former state official recalls vivid state resentment over issues of credit and federal intervention in settling enforcement cases under the Clean Air Act's New Source Review program during the early 2000s.<sup>549</sup>

Because of its potential to impact the personal careers of participants, negotiating credit stands apart from the other sources of trade as the most vulnerable to disjuncture between a federalism bargainer's personal interests and her state or federal constituents' interests. For this reason, negotiations in which credit forms an important medium of exchange may raise comparatively more serious principal-agent con-

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<sup>544</sup> Senate Interview, *supra* note 175 ("States also have leverage because they tend to get the credit for programs that are funded with federal money their federal legislators have brought home to them. Governors get credit for programs that Senator worked hard to pass—which can be very frustrating for senators!").

<sup>545</sup> See Telephone Interview with Roscoe Howard, *supra* note 133 ("The only contentious issue is credit—that's usually when there is competition for jurisdiction. But state prosecutors, sheriffs, and commonwealth attorneys are usually elected, and very sensitive to public image. They need credit. The federal guy at the table is always appointed. So it's usually easy to manage that.").

<sup>546</sup> *Id.*

<sup>547</sup> *Id.*

<sup>548</sup> For example, Attorney General Eric Holder and Homeland Security Secretary Janet Napolitano began their careers as U.S. Attorneys.

<sup>549</sup> Interviews with Anonymous Official, State Attorney Gen.'s Office (May 18, 2010 & July 2, 2010) (on file with the *Boston College Law Review*).

cerns than others—an issue of import for the following interpretive analysis.

#### IV. INTERGOVERNMENTAL BARGAINING AND INTERPRETING FEDERALISM

With the preceding positive account and conceptual vocabulary of federalism bargaining in place, this Part advances to the ultimate normative inquiry of the project: the interpretive potential of intergovernmental bargaining. The taxonomy and participant reports establish that federalism bargaining is widespread in areas of jurisdictional overlap, affording procedural response to the uncertain question of *who decides*.<sup>550</sup> The boundary between state and federal power is far more contingent—and collaboratively determined—than acknowledged by conventional federalism rhetoric. But the fact that federalism bargaining is frequently used does not resolve whether or when it warrants interpretive deference.

Exploring the procedural basis for interpretive legitimacy and the role of judicial review, this Part argues that negotiated governance is not just a de facto response to regulatory uncertainty about who should decide, but can be, in and of itself, a constitutionally legitimate way of deciding. More than just a means to an end, carefully crafted federalism bargaining can also be a principled means of allocating state and federal authority in realms of concurrent regulatory interest. As such, federalism bargaining can be part of the solution to the interpretive quandary that has preoccupied jurists over generations. This Part advances the federalism discourse by providing the needed theoretical justification to explain the critical role that federalism bargaining already plays in constitutional terms.

As detailed in Part I, the conventional federalism discourse has probed how the three branches unilaterally interpret federalism directives by defining the contours, goals, and limits implied by the American system of dual sovereignty.<sup>551</sup> Yet scholars have alternatively worried that legislative political safeguards operate intermittently and that judicial constraints are ill-suited to navigating the porous boundaries of jurisdictional overlap. Properly designed, some forms of federalism bargaining can supplement these approaches by interpreting who should decide within the pockets of uncertainty unresolved by unilateral interpretation. Sometimes these pockets reflect legal uncertainty about which side is entitled to act, and other times they reflect pragmatic uncertainty

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<sup>550</sup> *Supra*, text accompanying notes 41–67.

<sup>551</sup> *Supra* notes 28–95 and accompanying text.

about how best to allocate authority to advance the overall federalism project.<sup>552</sup> Either way, persistent uncertainty about who decides can lead to litigation, regulatory stagnation, and even abdication.<sup>553</sup>

To resolve this uncertainty, unilateral federalism interpretation deciphers meaning from legal text, applies precedent, and yields substantive answers to precise questions about where federal authority ends and state authority begins. But where unilateral tools fall short, bilateral bargaining offers procedurally based interpretive tools to fill gaps. Intergovernmental bargaining grounds the legitimacy of its outcome in the legitimacy of its process, when that process is consistent with the principles of fair bargaining on the one hand, and federalism values on the other.

The procedural principles of fair bargaining are the necessary prerequisite, and procedural consistency with federalism values—themselves procedural values of good governance—are the ultimate criteria for interpretive deference. Once again, the values-based theory of federalism on which this inquiry is predicated locates the central purpose of federalism in the good governance values that it fosters: checks and balances, accountability and transparency, local autonomy and innovation, and the problem-solving synergy available between local and national regulatory capacity.<sup>554</sup> Federalism bargaining that is procedurally faithful to these values constrains public behavior to be consistent with constitutional goals, just as federalism interpretation intends.

Although the federalism literature has previously entertained process-based theories of federalism that eschew judicial review of substantive rules,<sup>555</sup> it is now realizing the benefits of partnering selected substantive rules with more flexible procedural constraints that can enforce federalism norms within uncertain factual contexts.<sup>556</sup> Because the process of negotiated governance is often more amenable to assessment by the federalism criteria than the substantive outcome itself, bilateral bargaining can do interpretive work where unilateral tools are unavailing. Still, legislative and executive interpretive bargaining is appropriately checked by limited judicial review that scrutinizes proce-

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<sup>552</sup> *Supra* notes 38–40 and accompanying text.

<sup>553</sup> Ryan, *supra* note 8, at 584–96. *See generally* Ryan, *supra* note 35 (discussing the example of regulatory stagnation, litigation, and abdication in radioactive waste siting).

<sup>554</sup> *See supra* text accompanying notes 30–35.

<sup>555</sup> *See* Wechsler, *supra* note 11; *supra* text accompanying footnote 47.

<sup>556</sup> *See, e.g.*, Ashira Pelman Ostrow, *Process Preemption in Federal Siting Regimes*, 48 HARV. J. OF LEGIS. (forthcoming 2011) (manuscript at 8), *available at* <http://ssrn.com/abstract=1719050>; Ryan, *supra* note 35; Young, *supra* note 47.



dure, and if satisfied, defers to substance. If bargaining challenged on federalism grounds meets the procedural criteria, then the court defers to the negotiated results; if it fails the test, then the court reviews the substance of the deal de novo. Qualifying examples are thus shielded from judicial interference, while federalism bargaining abuses remain subject to judicial oversight.

Of course, federalism bargaining is hardly collapsing from judicial interference; the taxonomy demonstrates a healthy variety of bargaining notwithstanding doctrinal constraints. Nevertheless, Parts II and III also reveal several examples of judicial federalism doctrine and insensitivity that frustrate certain forms of intergovernmental bargaining. The anti-commandeering doctrine chills strong forms of bargained-for commandeering,<sup>557</sup> and sovereign immunity doctrine can interfere with certain bargaining between state and federal agencies.<sup>558</sup> The Pontiac School District case suggests how judicial insensitivity to bargaining dynamics within negotiated governance could result in unnecessary invalidation of potentially qualifying bargaining.<sup>559</sup> Underlying legal uncertainty about the permissible scope of federalism bargaining could also pose obstacles to potentially fruitful bargaining if participants are sufficiently unnerved by these litigated examples, or by the lack of clarity discussed in Part III about what legal rules operate in constraint of available sources of trade.<sup>560</sup>

The following analysis thus focuses on those forms of federalism bargaining that are most amenable to public scrutiny, judicial challenge, and procedural review. Less formal versions of federalism bargaining (such as intersystemic signaling, amicus brief-writing, and the like) may serve valuable purposes within the system but do not invite interpretive deference, because they do not yield a record that would enable procedural review of the sort envisioned here. The Part concludes by evaluating examples from the taxonomy and offering recommendations for stakeholders, participants, and policymakers.

#### A. *Procedural Tools of Interpretation*

Bargaining brings two important sets of procedural tools to federalism interpretation, the former common to all forms of negotiation

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<sup>557</sup> See *supra* notes 197–210 and accompanying text.

<sup>558</sup> See *supra* note 473.

<sup>559</sup> See *supra* notes 481–493 and accompanying text.

<sup>560</sup> See *supra* notes 475–549 and accompanying text. In Coasian terms, such uncertainty creates transaction costs that could cost marginal utility from underutilized bargaining. *Supra* note 465 and accompanying text.

and the latter specific to federalism bargaining: respectively, the legitimizing principle of mutual consent, and the procedural constraints of federalism values.

### 1. The Legitimizing Principle of Mutual Consent

Bargaining has always been the last resort for bridging dissensus—the time-honored means of moving toward “the good” in the absence of agreement about the perfect.<sup>561</sup> Dissensus pervades the historical discourse about how the Constitution adjudicates jurisdictional competition<sup>562</sup>—and as negotiation theorists have long recognized, when consensus on a substantive outcome is elusive, next best is consensus on a procedure for moving forward.<sup>563</sup> In the absence of agreement over the precise contours of federalism directives in a given regulatory context, bargaining thus offers invaluable procedural tools. In the federalism context, as in others, the primary procedural tool offered by negotiated resolution is the fundamental fairness constraint of mutual consent.

For thousands of years, human cultures worldwide have turned to procedurally based negotiated outcomes when mired in substantive disagreement<sup>564</sup>—deferring to bargained-for results on the simple grounds that, even without a more convincing substantive rationale, the results must hold merit if all parties are willing to abide by them. In other words, even if the parties cannot agree on *why* the negotiated outcome is the right answer, it must be a worthy choice if the parties

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<sup>561</sup> Cf. Lee Anne Fennell, *Hard Bargains and Real Steals: Land Use Exactions Revisited*, 86 IOWA L. REV. 1, 26–27 (2000) (recognizing the bargaining environment generated by the modern zoning model); Carol M. Rose, *Planning and Dealing: Piecemeal Land Controls as Problem of Local Legitimacy*, 71 CALIF. L. REV. 837, 849 (1983) (discussing use of bargaining in land use development proposals); Erin Ryan, *Zoning, Taking & Dealing: The Problems and Promise of Bargaining in Land Use Planning Conflicts*, 7 HARV. NEGOT. L. REV. 337, 348 (2002) (advocating bargaining as “a highly rational strategy for pursuing the public good under conditions of substantive uncertainty about its shape or meaning”).

<sup>562</sup> See, e.g., Ryan, *supra* note 8, at 507–17.

<sup>563</sup> See, e.g., FISHER & URY, *supra* note 9, at 56–80; Susan Carpenter, *Choosing Appropriate Consensus Building Techniques and Strategies*, in THE CONSENSUS BUILDING HANDBOOK, *supra* note 81, at 61–97 (outlining tools for breaking through negotiating gridlock); Dwight Gollan & Eric E. Van Loon, *Legal Issues in Consensus Building*, in THE CONSENSUS BUILDING HANDBOOK, *supra* note 81, at 495–522 (same). The resort to procedural solutions on substantive dissensus is demonstrated by the simplest of all negotiating tools—the “split-the-difference” principle. See generally JOHN DEWEY, RECONSTRUCTION IN PHILOSOPHY (Dover Publications, Inc. 2004) (1920) (outlining a philosophy of pragmatism); WILLIAM JAMES, PRAGMATISM (1907) (same); William H. Simon, *Solving Problems v. Claiming Rights: The Pragmatist Challenge to Legal Liberalism*, 46 WM. & MARY L. REV. 127 (2004).

<sup>564</sup> Cf. SHELL, *supra* note 9, at 5 (“People negotiate in generally similar ways in virtually every culture in the world and have done so since time began.”).

earnestly believe it more desirable than no agreement at all. Lacking substantive consensus about why the result is legitimate, they substitute procedural consensus in agreeing to defer to the results of fair bargaining. Mutual consent ensures fairness, on the theory that reasonable negotiators will not bargain for results that contravene their best interests. Thus, a deal is only reached when all parties consent to the terms. If negotiators truly understand their own interests and pursue them faithfully, then we can trust that they will not consent to terms that undermine their interests. And as long as they can truly walk away from the table when no beneficial deal is possible, then we can trust that the terms they negotiate benefit all parties more than no agreement at all.

This principle of mutual consent underlies our faith in the bargaining process, conferring legitimacy on negotiated results so long as these three underlying assumptions are met: (1) bargaining autonomy, (2) interest literacy, and (3) faithful representation. The parties must have a genuine opportunity to walk away from the bargaining table, or the fact of agreement cannot substantiate its value as preferable to the alternatives. Similarly, to be confident that negotiated results are truly preferable to the status quo, we must be confident that the parties truly understand their best interests and are not operating under a personal or situational disability causing substantial misinformation or misunderstanding. And, of course, we must be confident that the agents involved in the bargaining process are faithfully representing the interests of the principals on whose behalf they are negotiating, rather than contrary personal interests.

When these prerequisites are met, then bargaining can be a valuable means of resolving jurisdictional contest where governance must press forward despite legal or practical uncertainty (such as that clouding environmental, public health, and financial regulatory law). The more the facts in a given negotiating scenario support these core assumptions, the more confidence in the legitimacy of the bargained-for result. When facts in the scenario apply undue stress to any of these assumptions, however, less legitimacy is conferred. In this regard, consent-based legitimacy can suffer from several important points of vulnerability in the federalism bargaining context.

a. *Bargaining Autonomy and Unequal Power*

First, some critics argue that spending power deals strain the assumption of bargaining autonomy. They urge that state consent cannot justify the legitimacy of spending power deals because the balance of leverage far favors the federal government, with its daunting control

over fiscal resources on which state programs rely.<sup>565</sup> The leverage imbalance is arguably similar in non-spending power contexts, such as negotiated rulemaking, where the federal government has trumping legal authority, superior fiscal resources, and is often empowered as the scribe of the proceedings.

Courts have consistently rejected the argument that spending power deals are akin to federal contracts of adhesion, holding fast to the view that states are free to forgo federal funds if they really prefer that alternative.<sup>566</sup> Both contract law and negotiation theory generally hold parties responsible for their choices when choice is available, and both differentiate between strong leverage and true coercion.<sup>567</sup> Even when the stronger party crafts terms without input from the weaker party, the latter can still decide whether its interests are better served by taking or leaving the proffered deal.

In addition, the argument may elide the considerable leverage states wield in controlling the regulatory capacity that federal spending power bargainers seek, mitigating the concern.<sup>568</sup> Much of the prior analysis proceeds from the premise that the reason state and federal actors bargain with one another is because they need each other. When bargaining occurs in contexts of overlap, it is because neither the federal nor state government has all the tools needed to address a given problem. The more the states possess capacity that the federal government needs to accomplish a desired objective, the more leverage the states have in bargaining, and the less likely the federal government can deny them meaningful bargaining authority. Thus, at least in the regulatory realms where federalism bargaining is most needed, it is least likely to be unfair.

That said, as the ability of the weaker party to meaningfully impact the negotiated outcome wanes, so too does the force of the constraint in conferring procedural legitimacy. Even deals that satisfy constitutional scrutiny under the spending power doctrine may be understood as warranting more or less interpretive deference on procedural grounds depending on the degree to which individual facts stress the

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<sup>565</sup> See Baker & Berman, *supra* note 170, at 517–21.

<sup>566</sup> See *South Dakota v. Dole*, 483 U.S. 203, 207 (1987); *Jim C. v. United States*, 235 F.3d 1079, 1082 (8th Cir. 2000).

<sup>567</sup> See 17A C.J.S. Contracts § 176 (2010) (“[O]ne may not avoid a contract on the ground of duress merely because he or she entered into it with reluctance, the contract is very disadvantageous to him or her, the bargaining power of the parties was unequal, or there was some unfairness in the negotiations . . .”).

<sup>568</sup> *Supra* notes 494–510 and accompanying text. See generally Hills, *supra* note 55.

assumptions of bargaining autonomy. Spending power bargaining in which states have more genuine input—such as the joint policymaking forms—may confer more interpretive legitimacy than those in which states consent as a legal matter but under substantial economic pressure. For example, states participating in spending power deals under Medicaid or the Coastal Zone Management Act seem relatively satisfied with their autonomy, but many have expressed frustration at their perceived inability to walk away from deals under the No Child Left Behind Act, unable to reject the proffered federal educational funds for fiscal reasons, even when they dislike other terms in the deal.<sup>569</sup> Using this lens of analysis, state agreement to No Child Left Behind may be seen as warranting less procedurally based interpretive deference than state agreement to the terms of the Coastal Zone Management Act.

b. *Faithful Representation of Citizens*

Mutual consent as a meaningful procedural constraint must also contend with the representation-based critique that state and federal agents may reach consensus in collusion with one another against the true interests of their principals, the citizens.<sup>570</sup> The concern that elected state officials might betray the interests of their constituents was among Justice O'Connor's chief rationales for the anti-bargaining holding in *New York v. United States*.<sup>571</sup> The tension between citizen principals and their elected agents in government is endemic to representational democracies, but I have previously shown that the danger of federalism collusion is least pressing when the medium of exchange is the sovereign authority at the heart of all federalism bargaining.<sup>572</sup> Indeed, when government agents bargain with their own regulatory authority, their interests are more aligned with those of their constituents than in many legal realms where government agents freely negotiate against constituents' interests (i.e., in setting time, place, and manner restrictions on citizens' exercise of free speech rights).<sup>573</sup> Both state and federal

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<sup>569</sup> See 16 U.S.C. §§ 1451–1466 (2006) (Coastal Zone Management Act); No Child Left Behind Act, Pub. L. No. 107-110, 115 Stat. 1425 (enacted Jan. 8, 2002) (codified as amended in scattered sections of 20 U.S.C.); 42 U.S.C. §§ 1315, 1396n (2006) (demonstration waivers).

<sup>570</sup> See John McGinnis & Ilya Somin, *Federalism vs. States' Rights*, 99 *Nw. L. Rev.* 89, 90 (2004) (warning that states may collude with the federal government in undermining federalism constraints).

<sup>571</sup> See 505 U.S. 144, 182–83 (1992) (worrying that “powerful incentives” might lead bargaining officials to betray their principals), and related discussion in Ryan, *supra* note 35, at 84–87.

<sup>572</sup> Ryan, *supra* note 35, at 84–87.

<sup>573</sup> *Id.*

agents are unlikely to trade the basis of their power unless it is clearly justified by offsetting benefits (although, as noted in Part III, bargaining in which credit is a particularly salient medium of exchange may warrant closer scrutiny).<sup>574</sup>

Nevertheless, the assumption that federalism bargainers faithfully represent their constituents underlies the principle of mutual consent as foundationally as the assumptions that they act autonomously and in appreciation of their own interests. The more the facts depart from any of these assumptions, the less legitimate the resulting bargain. This is why an important prerequisite for legitimate federalism bargaining must be that the process remains sufficiently transparent for monitoring to ensure that the interests of principals and agents remain well-aligned (enabling citizens to hold representatives accountable for decisions made on their behalf).<sup>575</sup> Public law scholars have long worried about the undue sacrifice of transparency and accountability in the settlement of private litigation to promote the flexibility and creativity that accords negotiated dispute resolution.<sup>576</sup> However, scholars of negotiated governance have shown that there is no need to sacrifice transparency or accountability in intergovernmental negotiation when the relevant stakeholders are appropriately involved and both final and draft documents become part of the record.<sup>577</sup>

### c. *Risk of Competing Interests*

Finally, any legitimacy conferred on federalism bargaining by the principle of mutual consent must confront the concern that federalism-related interests may be overwhelmed by competing non-federalism interests during deal making. Long-sighted negotiators are unlikely to fall prey to this problem, as thorough consideration puts values of the

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<sup>574</sup> *Supra* notes 544–549 and accompanying text.

<sup>575</sup> *Cf.* Telephone Interview with Professor Lawrence Susskind, *supra* note 255.

<sup>576</sup> *See, e.g.*, Fiss, *supra* note 278, at 1078–82.

<sup>577</sup> *See, e.g.*, SUSSKIND & CRUIKSHANK, *supra* note 88, at 176; Carrie Menkel-Meadow, *The Lawyer's Role(s) in Deliberative Democracy*, 5 NEV. L.J. 347, 348–49 (2005); Lawrence E. Susskind, *Deliberative Democracy and Dispute Resolution*, 24 OHIO ST. J. ON DISP. RESOL. 395, 399–401 (2009); Lawrence E. Susskind, *Keynote Address: Consensus Building, Public Dispute Resolution, and Social Justice*, 35 FORDHAM URB. L.J. 185, 192, 202 (2008). The notion that legislation and litigation provide greater transparency is also flawed, given how much decision making takes place beyond the reach of the stenographer. Telephone Interview with Professor Lawrence Susskind, *supra* note 255. *See generally* Amy J. Cohen, *Revisiting Against Settlement: Some Reflections on Dispute Resolution and Public Values*, 78 FORDHAM L. REV. 1143 (2009) (arguing that Fiss's procedural critique is really embedded in a substantive vision advocating a particular form of public morality).

constitutional order in their rightful place. But what about negotiators preoccupied by more immediate needs? For example, consider the criminal enforcement negotiation in which state actors agree to cede jurisdiction over a case to federal agents because it will free up scarce local resources to investigate others lacking a federal nexus. Does the fact that both parties believed this result was in their best interest really mean that the result was consistent with their federalism-related interests? In fact, does this agreement really have anything to do with federalism at all?

As ultimately revealed below, the answer is yes, as demonstrated by federalism bargaining's other procedural tools of interpretation—those that inhere in the specific context of federalism-sensitive governance.

## 2. The Procedural Constraints of Federalism Values

When substantive federalism interpretation fails to resolve jurisdictional contest, federalism bargaining's second set of procedural constraints can bridge interpretive gaps in ways that parallel the procedural benefits of generic bargaining. Just as bargaining procedurally legitimizes negotiated results in the absence of substantive agreement, these procedural constraints legitimize interpretive bargaining in the absence of substantive federalism consensus. The constraints of mutual consent continue to operate, but validly interpretive federalism bargaining also affords procedural consistency with the fundamental federalism values of checks, accountability, localism, and synergy.

Interpretive process proves invaluable when substantive federalism interpretation becomes stymied, because achieving procedural consistency with federalism values is both easier to accomplish and easier to assess. Why? Critically, because the federalism values *themselves* are essentially about process. They don't tell us anything about the actual substance of good government at the end of the day; rather, they tell us about the process by which good governance is conducted.<sup>578</sup> Accountability seeks transparency in governance, requiring process conducted openly enough to ensure that informed citizens can participate meaningfully at all levels of the democratic process.<sup>579</sup> The localism value champions processes of governance that enable local variation, competition, and innovation of the sort promised by the great "laboratory of ideas" model of federalism.<sup>580</sup> The problem-solving value advocates

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<sup>578</sup> See Ryan, *supra* note 8, at 602–06.

<sup>579</sup> *Id.* at 606–10.

<sup>580</sup> *Id.* at 610–20.

process that enables the harnessing of interjurisdictional synergy between the unique capacities of local and national government where both are needed.<sup>581</sup>

Checks, accountability, localism, and synergy are not coextensive with all purposes of government, but they do align federalism with the fundamentals of good governance that extend to international norms (and beyond domestic “states’ rights” rhetoric).<sup>582</sup> I have previously demonstrated how federalism analysis is complicated by the fact that these values are in tension, such that fortifying one can weaken another in a given scenario.<sup>583</sup> For this reason, the Supreme Court’s federalism jurisprudence has vacillated over history between eras that appear to privilege one value and then another.<sup>584</sup> Thus, just as no theory of bargaining can forecast the outcome of every case, no theory of federalism bargaining can guarantee the best balance in each instance;<sup>585</sup> this inquiry therefore stops short of deciphering between rightly and wrongly decided outcomes in individual cases. Instead, it deciphers between rightly and wrongly conducted processes.

Procedural consistency with federalism values helps ford the impasse caused by interpretive uncertainty just as fair bargaining principles ford generic substantive impasse. Certain areas in federalism jurisprudence are plagued by dissensus, as demonstrated by the volume of controversy over recent Supreme Court federalism decisions in contexts of overlap, especially in environmental law.<sup>586</sup> The federalism canon demonstrates how frequently reasonable legal minds disagree about whether a given outcome is consistent with constitutional federalism (for example, Justice White believed the LLRWPA was consistent, but Justice O’Connor did not).<sup>587</sup> Part of the problem is that different adjudicators may be relying on different theories of federalism,<sup>588</sup> but

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<sup>581</sup> *Id.* at 620–28.

<sup>582</sup> Galle & Seidenfeld, *supra* note 11, at 1942 (defining federalism interests instrumentally, as that which enables “better governance” but is not in service to an “abstract” ideal of states’ rights).

<sup>583</sup> Ryan, *supra* note 8, at 605–06, 609–10, 618–19, 626–28.

<sup>584</sup> *Id.* at 629–44.

<sup>585</sup> *But see generally* SOL ERDMAN & LARRY SUSSKIND, *THE CURE FOR OUR BROKEN POLITICAL PROCESS* (2008) (arguing that mutual-gains consensus-building processes in political negotiations do produce substantively superior outcomes).

<sup>586</sup> Ryan, *supra* note 8, at 549–54.

<sup>587</sup> *New York v. United States*, 505 U.S. at 181–83, 189–90.

<sup>588</sup> Ryan, *supra* note 8, at 518–22 (noting that “[c]onstitutional analysis sometimes reveals pockets of textual ambiguity that must be resolved by application of some interpretive federalism theory—a model that describes how the given federal system should work,” and discussing different alternatives to which the Court has turned over time).



another factor is that there are so many considerations operating in addition to federalism concerns that it can be difficult to disentangle them at the level of the substantive outcome. Tension between federalism values at the substantive level further compounds interpretive difficulties.<sup>589</sup> By contrast, at least when the challenged governance was negotiated, it is much easier to assess whether the federalism bargaining *process* was consistent with federalism values, redirecting the federalism inquiry to more fruitful territory.

To be sure, the process values implied within federalism can certainly be understood in relation to more substantive constitutional norms—for example, the importance of procedural checks and balances are rooted in the importance of protecting individual rights against government, and the importance of governmental accountability and transparency is rooted in democratic ideals. Previous process-based theories of constitutional interpretation have been ably critiqued for their failure to account for the Constitution's clear commitment to such substantive norms as protections for human rights, free press, and private property, and for eliding how good constitutional process is but a means to constitutionally sanctioned substantive ends.<sup>590</sup> For this reason, claims to protect individual rights properly trump conflicting claims to protect structural federalism, as they have in various chapters of the nation's struggle to achieve civil rights.<sup>591</sup> But in evaluating a federalism bargaining challenge unencumbered by an independent rights claim—for example, a claim about whether the state or federal government should decide a given environmental policy—evaluating whether the negotiation process honored checks, accountability, localism, and synergy gets as close to what we ask of the federal system as evaluating the policy outcome itself.

In contrast to adjudicating rights, a substantive realm in which the Constitution's directions are relatively clear, the adjudication of federalism draws on penumbral implications in the text that leave much more to interpretation.<sup>592</sup> The boundary between state and federal authority is implied by structural directives such as the enumeration of federal

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<sup>589</sup> Ryan, *supra* note 8, at 605–06, 609–10, 618–19, 626–28.

<sup>590</sup> Cf. Laurence H. Tribe, *The Puzzling Persistence of Process-Based Constitutional Theories*, 89 YALE L. REV. 1063, 1065–72 (1980) (critiquing John Hart Ely's process-based theory of interpretation in ELY, *supra* note 47, and emphasizing the Constitution's substantive commitment to human rights and individual dignity).

<sup>591</sup> See, e.g., ROBERT V. REMINI, A SHORT HISTORY OF THE UNITED STATES 261 (2008) (describing executive intervention by Presidents Truman and Eisenhower against Jim Crow laws and judicial civil rights rulings such as *Brown v. Bd. of Educ.*, 347 U.S. 483, 493 (1954)).

<sup>592</sup> See Ryan, *supra* note 8, at 518–19.

powers in Article I and the retention of state power in the Tenth Amendment,<sup>593</sup> but neither commands the clarity of commitment that the Constitution makes to identifiable individual rights.<sup>594</sup> Setting aside marginal uncertainty about the extent to which “no law” really means *no law* in the First Amendment context, the Constitution is comparatively clear in its substantive commitment to free speech and free exercise.<sup>595</sup> It is equally clear on the allocation of certain state and federal powers, such as which is responsible for waging war (the federal government) and which is responsible for setting the location of federal elections (the states).<sup>596</sup> Yet the document gives less guidance about the correct answers to the federalism questions that become the subject of intergovernmental bargaining, such as how to balance local and national interests in coastal zone management, or how to allocate state and federal resources in criminal law enforcement.<sup>597</sup> For these reasons, negotiated federalism is not only inevitable but appropriate, and arguably constitutionally invited—at least when negotiations take place within the boundaries of federalism values that are most directly understood as procedural directives.

Bargaining that procedurally safeguards rights, enhances participation, fosters innovation, and harnesses interjurisdictional synergy accomplishes what federalism is designed to do—and what federalism interpretation is ultimately for. As such, it warrants interpretive deference from a reviewing court, or any branch actor interrogating the result. Of course, not all federalism bargaining will warrant such interpretive deference. Bargaining that allocates authority through processes that weaken rights, threaten democratic participation, undermine in-

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<sup>593</sup> U.S. CONST. art. I, § 8; *id.* amend. X.

<sup>594</sup> See Jesse H. Choper, *The Scope of National Power Vis-à-Vis the States: The Dispensability of Judicial Review*, 86 YALE L.J. 1552, 1554–57 (1977).

<sup>595</sup> U.S. CONST. amend. I.

<sup>596</sup> U.S. CONST. art. I, § 4 (delegating responsibility for the location of congressional elections to the state legislatures); *id.* § 8 (empowering Congress to declare war).

<sup>597</sup> *Cf.* Choper, *supra* note 594, at 1556.

The functional, borderline question posed by federalism disputes is one of comparative skill and effectiveness of government levels . . . . Whatever the judiciary’s purported or self-professed special competence in adjudicating disputes over individual rights, when the fundamental constitutional issue turns on the relative competence of different levels of government to deal with societal problems, the courts are no more inherently capable of correct judgment than are the companion federal branches. . . . [This is so] given both the highly pragmatic nature of federal-state questions and the forceful representation of the states in the national process of political decisionmaking.

*Id.*

novation, and frustrate problem solving is not consistent with federalism values and does not warrant deference. The more consistency with these values of good governing process, the more interpretive deference is warranted; the less procedural consistency with these values, the less interpretive deference is warranted.

Just as not all federalism bargaining warrants deference, not all regulatory matters warrant federalism bargaining. Many regulatory arenas are not ripe for state-federal bargaining at all, as when they involve clearly designated areas of state or federal jurisdiction about which there is no legitimate claim for overlap.<sup>598</sup> Even in contexts of legitimate overlap, federalism bargaining should not trump all other means of interpretation—it merely adds tools to supplement unilateral interpretation at the margins where those methods falter.<sup>599</sup> The more a given federalism question can be resolved through conventional interpretive means, the weaker the need for bilateral interpretive tools. Still, these are powerful interpretive tools for use by all branches of government. Ex ante, consistency with federalism values, including respect for clearly delineated authority, can be engineered into the bargaining process. Ex post, federalism bargaining can be judicially reviewed for procedural consistency with these values.

Indeed, the important interpretive roles by political actors in vertical federalism bargaining are enhanced by the horizontal check of judicial review. The availability of limited judicial review strengthens the institution of federalism bargaining in a variety of ways. The potential for neutral judicial oversight smooths leverage imbalances that could otherwise frustrate mutual consent, compromise checks and balances, and hinder local participation. Judicial review gives procedural re-

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<sup>598</sup> For example, except in the most indirect intersystemic signaling sense, state actors would not normally bargain with the federal government over the prosecution of a war, or over foreign policy—when they have, they have faced foreign affairs preemption. *See, e.g.,* *Am. Ins. Assoc. v. Garamendi*, 539 U.S. 396, 429 (2003) (similarly preempting a California law requiring insurers doing business in the state to disclose holocaust era insurance policies); *Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 364, 373–74 (2000) (finding a Massachusetts law limiting state entities and contractors from doing business with Myanmar preempted under the foreign affairs power). Similarly, federal actors would not normally bargain with states over the establishment of local governments within them, or the provision of local fire service.

<sup>599</sup> As discussed in Part I, sometimes this is due to legal uncertainty about interpreting constitutional principles (for example, establishing the limits of federal authority over intrastate wetlands after *Solid Waste Agency v. U.S. Army Corps of Eng'rs*, 531 U.S. 159 (2001), and *Rapanos v. United States*, 547 U.S. 715 (2006)), and sometimes it is due to practical uncertainty about the best allocation of national and local authority where both are needed (for example, in a national climate regulatory policy).

quirements for accountability and transparency enforceable bite. Just as parties to a contract bargain more efficiently when secure in the knowledge that fair bargaining norms are protected by contract law, so too will federalism bargaining parties negotiate more productively when secure that the process must be consistent with constitutional and fairness norms.<sup>600</sup> In contrast with pure political safeguards, interpretive work by the political branches that is made falsifiable by judicial review will command greater political respect. Moreover, to the extent that the carrot of judicial deference provides meaningful incentive to federalism engineers and participants, the proposal will encourage intergovernmental bargaining that better harmonizes with federalism values, advancing the goals of federalism itself.

Nevertheless, judicial review of federalism-related challenges to the products of legitimate federalism bargaining should be limited by a threshold inquiry for interpretive integrity—sheltering instances where the bargaining process itself offers the best realization of federalism values. The reviewing court's first task should be to scrutinize the bargaining process for consistency with the procedural principles of fair bargaining and federalism values. If it passes, then the outcome warrants deference as a legitimate way of determining who gets to decide. The court should not interpret the allocation of rights as though legitimate federalism bargaining never took place (as the Supreme Court did in *New York v. United States*).<sup>601</sup> When federalism and fair bargaining principles are honored, we can trust that the process achieves constitutional goals and that the need for negotiation itself provides important substantive checks.

But if the threshold inquiry shows that the bargaining process is not consistent with the requisite procedural principles, then the reviewing court should be free to assess the negotiated outcome *de novo*. Negotiations that, on balance, violate federalism values should be rejected as interpretive devices. Negotiations that fail one or more of the assumptions underlying mutual consent also confer weakened interpretive legitimacy. Some of these failures may require less of a binary scale and more of a sliding one; for example, even a bargain that is consensual for legal purposes may slide uncomfortably down the legitimacy

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<sup>600</sup> In this respect, the security afforded by judicial review confers a sort of forward-looking exit valve to substantiate the “walk-away” principle of genuine consent, as participation may be more meaningfully consensual when parties agree from this position of relative security.

<sup>601</sup> 505 U.S. at 174–75; *see supra* notes 291–300 and accompanying text (discussing this example of failed bargained-for commandeering).

scale as the assumptions that underlie mutual consent are stressed. Bargaining that strains the consensual nature of agreement, that excludes relevant stakeholders, or in which participants may not fully understand implicated interests all require more careful scrutiny.

Judicial review of federalism bargaining would thus be unlimited in three circumstances. If the challenged intergovernmental bargaining takes place beyond the defensible realm of jurisdictional overlap, it receives no interpretive deference. If the challenged bargaining fails the court's threshold procedural review, then the court reviews the substance of the outcome *de novo*, applying its own interpretive judgment on the federalism-related challenge. Non-federalism related challenges to the products of valid interpretive federalism bargaining warrant ordinary judicial scrutiny. Judicial deference to interpretive legislative and executive bargaining need not undermine judicial supremacy in protecting the rights of insular minorities against the majoritarian impulses of the political branches in any context. Otherwise, however, judicial review should be limited to scrutiny for consistency of the bargaining process with federalism and fair bargaining principles, deferring to results in a procedural analog to rational basis review.<sup>602</sup> This enables an interpretive partnership between the political and judicial branches that harnesses what each best contributes to federalism implementation while honoring the premise of *Marbury v. Madison*.<sup>603</sup>

In administering procedurally based deference, courts could draw from that applied to agency decision making under the Administrative Procedure Act<sup>604</sup> (and state analogs), and the interpretive deference federal courts apply to agency statutory interpretation under the Supreme Court's 1984 decision in *Chevron v. NRDC*.<sup>605</sup> New Governance scholars have also proposed theories of judicial review that position courts to monitor and incentivize problem-solving processes, rather

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<sup>602</sup> *United States v. Carolene Prods. Co.*, 304 U.S. 144, 153 n.4 (1938) (distinguishing rational basis review from strict scrutiny).

<sup>603</sup> 5 U.S. (1 Cranch) 137, 177 (1803) (affirming judicial review as a constitutional check on the political branches).

<sup>604</sup> Administrative Procedure Act, 5 U.S.C. §§ 551–559 (2006) (requiring deference to administrative action taken in accordance with the requirements of the statute).

<sup>605</sup> 467 U.S. 837, 842–43 (1984) (holding that courts should defer to an agency's reasonable interpretation of the statute it administers if statutory ambiguity requires interpretation). Notably, the doctrine of *Chevron* deference was designed to limit judicial interference in agency interpretation, but courts maintain substantial discretion in deciding the threshold issue of statutory ambiguity. Judicial review of federalism bargaining could take a similar turn, highlighting an area of uncertainty in how the proposal might evolve, and an opportunity for further theorizing.

than adjudicate substantive disputes.<sup>606</sup> Review of bargaining autonomy, interest literacy, and faithful representation would rely on familiar judicial tools from contract and agency law,<sup>607</sup> and courts could draw from established federalism jurisprudence and scholarship in articulating the tests for procedural consistency with federalism values.<sup>608</sup>

At a minimum, courts reviewing for consistency with checks and balances should ensure that the process did not violate other rights, that neither party was coerced or undermined during negotiations, and that any long-term impacts of the bargain on future intergovernmental relations were adequately considered. Accountability review should ensure that the process by which a bargain was reached was sufficiently transparent, produced an adequately reviewable record, followed any established protocols, maximized opportunities for public participation, and meaningfully involved affected stakeholders. Localism review should ensure that local interests were represented, that the process maximized opportunities for subsidiarity-based innovation through local variation and competition, and that there was adequate opportunity for interjurisdictional experimentation prior to the implementation of a national solution. Synergy review should ensure that the process maximized opportunities to assess and exploit comparative advantages in allocating and coordinating authority.<sup>609</sup> Federalism bargaining that yields little record for procedural review, such as intersystemic signaling, warrants little judicial deference.

Articulating a role for judicial review raises the fair question of whether the need for policing bargaining abuse is worth the risk that courts will mis-assess procedure during their review. As with all legal innovations, the transition period may yield difficult cases as the judiciary settles into a new pattern of precedent. The overall thrust of the proposal, however, is to reduce judicial interference with federalism bargaining. It does so primarily by providing theoretical justification for the role intergovernmental bargaining already plays in interpreting federalism quandaries, offering guidance, security, and encouragement to the engineers and practitioners of worthy examples. It also adds a

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<sup>606</sup> See generally, e.g., Simon, *supra* note 20; Susan Sturm & Joanne Scott, *Courts as Catalysts*, 13 COLUM. J. EUR. L. 565 (2007).

<sup>607</sup> For example, courts might assess whether the bargaining results were distorted by flagrant bargaining power imbalances between the parties, critical but unavailable information, or by bargaining agents' private financial interests or desire for personal credit.

<sup>608</sup> Cf. Ryan, *supra* note 8, at 648–58 (proposing judicial criteria for assessing substantive consistency with federalism values).

<sup>609</sup> *Id.*

new layer of defense against whatever existing doctrinal challenges may threaten its results.

In contrast to previous process-based proposals, judicial oversight of federalism bargaining is available but limited in comparison to the status quo. Outcomes challenged on federalism grounds are assessed for procedure before substance; if the bargaining process satisfies the criteria, then the court defers to the substance of the negotiated result. The proposal prevents the judiciary from invalidating results that are procedurally faithful to federalism values even if the outcome seems doctrinally vulnerable (as was the bargaining over the LLRWPA and the Phase II Stormwater Rule). Yet it does not provide any new grounds for challenging federalism bargaining in court. The proposal thus provides a new defense against negotiated federalism challenges without providing additional sources of doctrinal challenge—reducing the overall impact of judicial constraints while preserving courts' ability to police for abuses.

Returning at last to the criminal enforcement example, recall the negotiation in which state actors cede a case to interested federal agents to direct scarce resources for cases without a federal nexus (and assume it follows the model described in the taxonomy).<sup>610</sup> Applying the above analysis shows that both procedure and outcome resonate with both fairness and federalism values.

The bargaining takes place in a realm of legitimate jurisdictional overlap, and the bargaining parties satisfied the requirements of mutual consent by agreeing freely to an outcome that advanced the legitimate law enforcement interests of their principals. Checks are satisfied, because both parties meaningfully participated in the decision to allocate authority this way, constitutional guarantees of other implicated rights remain in force, and the bargain does not threaten other sovereignty concerns in the state-federal relationship. Assuming case files are adequately prepared and relevant rules of criminal procedure followed, the bargain poses no significant tradeoffs against accountability values. It honors localism values by involving state participation in the decision making and shifting to a federal approach only after adequate local experience indicates the value of the trade. Finally, the regulatory partnership harnesses synergy in allocating authority along lines of comparative advantage.

Thus, in a world of scarce resources, what looks like a straightforward cost-benefit analysis proves not only a reasonable way to allocate contested jurisdiction, but also a wise one that takes advantage of

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<sup>610</sup> *Supra* notes 129–135.

the capacity each has to offer. The deal ensures that the case at hand is investigated (federally) while increasing the likelihood that other cases get better attention from the only available (state) authority. Were the same decision rule applied in all such cases—such that federal enforcement interests in an area of concurrent jurisdiction effectively removed it from state reach without benefit of public process—the quantifiably different tradeoffs against checks and localism values would warrant closer examination. But real-world law enforcement officials seem to understand the difference, because state actors are generally unwilling to cede this kind of blanket authority for cost-saving purposes,<sup>611</sup> and federal actors that do focus on whole categories of cases work hard to create collaborative enforcement programs that share planning, oversight, and credit with state partners.<sup>612</sup>

Importantly, whether bargaining is consistent with federalism is not an inquiry into the bargainer's subjective considerations. A procedurally legitimate bargain advances federalism values even if negotiators never think about federalism during the process. As in many areas of law, the focus is not on the black box of the mind, but on objective manifestations. If the negotiation process safeguards individual rights, enables democratic participation, fosters jurisdictional innovation, and harnesses problem-solving synergy—or if it does so on balance more than it detracts from those values—then the process is consistent with constitutional federalism regardless of what the participants thought about while negotiating. Solid federalism engineering in design of bargaining forums can thus facilitate constitutional objectives just as *Miranda* warnings engineer behavior consistent with Fourth Amendment values regardless of the subjective views of individual police officers.<sup>613</sup>

To reiterate the critical caveat, the interpretive potential within federalism bargaining does not mean that every bargain between state and federal actors will always be faithful to federalism. Scholars have already shown that some instances of state-federal bargaining are more consistent with these values than others, demonstrating variable interpretive potential.<sup>614</sup> By corollary, federalism bargaining that fails this

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<sup>611</sup> Telephone Interview with Roscoe Howard, *supra* note 133.

<sup>612</sup> *Supra* notes 137–139 (discussing gun violence and child pornography collaborations).

<sup>613</sup> *Miranda v. United States*, 384 U.S. 436, 441–42 (1966).

<sup>614</sup> See generally, e.g., Lawrence E. Susskind et al., *Collaborative Planning and Adaptive Management in Glen Canyon: A Cautionary Tale*, 35 COLUM. J. ENVTL. L. 1 (2010) (critiquing an example of sub-optimal federalism bargaining for failure to allow meaningful stakeholder participation).



test is not inherently bad; it merely cannot confer interpretive legitimacy. Fortunately, both judicial review and the political process afford able mechanisms for flushing out true violators. In the most egregious cases, bargains that violate federalism principles will reallocate authority even beyond the pockets of uncertainty in existing jurisprudence. In these cases, bad federalism bargaining will be weeded out judicially, by a court applying clear precedent independent of procedural review. Alternatively, bargained-for results in legitimate contexts of overlap that are reached in contravention of good governance procedures are likely to distinguish themselves as bad governance. An otherwise legal bargain reached in a process that blurs boundaries, obfuscates accountability, undermines localism, and harnesses no meaningful problem-solving synergy is as unlikely to survive long politically as it is to withstand judicial review.

This evaluation of bargaining procedure operates from the *ex ante* perspective, suggesting the potential for engineering federalism bargaining forums for interpretive purposes. In other words, when the bargaining process is designed to safeguard rights, participation, innovation, and synergy, we can assume that federalism bargaining will harmonize with federalism as a procedural matter without reference to the substantive results. However, bargained-for results that also substantively advance federalism values are further evidence of good process. Indeed, the negotiation literature offers encouraging empirical evidence that correlates the use of similar procedural tools with outcomes that are highly consistent with federalism values.<sup>615</sup> For example, Professor Lawrence Susskind has empirically evaluated volumes of governance outcomes against criteria of fairness, efficiency, stability, and wisdom, and found that negotiated governance consistently outperforms alternatives.<sup>616</sup> He convincingly argues that these criteria closely align with federalism values, noting that the problem-solving qualities of ne-

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<sup>615</sup> See Carrie J. Menkel-Meadow, *San Francisco Estuary Project*, in THE CONSENSUS BUILDING HANDBOOK, *supra* note 81, at 818. See generally, e.g., LAWRENCE SUSSKIND & OLE AMUNDSEN, USING ASSISTED NEGOTIATION TO SETTLE LAND USE DISPUTES: A GUIDEBOOK FOR PUBLIC OFFICIALS (1999) (analyzing the results of 105 cases); Kirk Emerson et al., *Environmental Conflict Resolution: Evaluating Performance Outcomes and Contributing Factors*, 27 CONFLICT RESOL. Q. 27 (2009) (analyzing the outcomes of sixty different mediated agreements between local, state, and federal governments); Freeman & Langbein, *supra* note 266 (reporting on empirical data in studies of collaborative governance).

<sup>616</sup> LAWRENCE SUSSKIND & JEFFREY CRUIKSHANK, BREAKING THE IMPASSE: CONSENSUAL APPROACHES TO RESOLVING PUBLIC DISPUTES 14 (1987). See generally sources cited *supra* note 615.

gotiation naturally advance localism and synergy values, while representation is the key to accountability and transparency.<sup>617</sup>

### B. *Evaluating Interpretive Federalism Bargaining*

This interpretive framework for analyzing federalism bargaining can now be applied to the taxonomy, indicating those forms in which bargaining is most useful, and those in which the bargaining process itself may prove more protective of federalism than judicially enforceable doctrine. Not coincidentally, interpretive integrity closely tracks the primary sources of trade, anointing bargaining in which federalism values provide important normative leverage as the most reliable. This Section evaluates which forms of federalism bargaining hold the greatest interpretive potential for allocating contested authority or shepherding collaboration, grouped according to the primary media of exchange.<sup>618</sup>

Some characteristics are universal. In general, the more a regulatory context draws on complementary state and federal capacities, the more opportunities for productive integrative exchange. Regulatory problems characterized by rapidly changing data, which may benefit from adaptive management or other incremental and contingent policies, are also good candidates for intergovernmental bargaining. Unyielding dissensus behind the state line (leading to holdouts and other transaction costs) limit the scope of productive bargaining, as do uncertainties regarding legal bargaining entitlements. The more leverage gaps or participation concerns strain mutual consent, the more other procedural constraints are needed to preserve bargaining legitimacy. The more evenly balanced the leverage and well-represented the stakeholders, the more freely the rest of the bargaining may proceed. Regulatory matters that match a need for state land use authority or other basic police powers with spillover concerns requiring federal oversight are especially ripe for federalism bargaining, given the important inter-

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<sup>617</sup> Telephone Interview with Professor Lawrence Susskind, *supra* note 255.

These criteria are indistinguishable to me from the federalism values [of checks, accountability, localism, and synergy]. Preserving fairness is what checks and balances are for. Wisdom is about local innovation—allowing parties to apply all the information at hand to do the best thing possible in their unique circumstances. Stability is bound up with accountability—you don't have to keep revisiting the issue, because stakeholders were involved in the process and approved the result. Problem-solving synergy is bound up with efficiency.

*Id.*

<sup>618</sup> See *infra* notes 619–643 and accompanying text.

est linkages, complementary regulatory capacities, and comparatively even positive and negative leverage.

### 1. The Normative Leverage of Federalism Values

Unsurprisingly, bargaining in which the normative leverage of federalism values heavily influences the exchange offers the most reliable interpretive tools, smoothing out leverage imbalances and focusing bargainers' interlinking interests.<sup>619</sup> Negotiations in which participants are motivated by shared regard for checks, localism, accountability, and synergy naturally foster constitutional process and hedge against non-consensual dealings. All federalism bargaining trades on the normative values of federalism to some degree, and any given negotiation may feature it more or less prominently based on the factual particulars.<sup>620</sup> Yet the taxonomy reveals several forms in which federalism values predominate by design, and which may prove especially valuable in fraught federalism contexts: negotiated rulemaking, policymaking laboratory negotiations, and iterative federalism.<sup>621</sup> These examples indicate the potential for purposeful federalism engineering to reinforce procedural regard for state and federal roles within the American system.

(1) *Negotiated Rulemaking* between state and federal actors improves upon traditional administrative rulemaking in fostering participation, localism, and synergy by incorporating genuine state input into federal regulatory planning.<sup>622</sup> Most negotiated rulemaking also uses professional intermediaries to ensure that all stakeholders are appropriately engaged and to facilitate the search for outcomes that meet parties' dovetailing interests.<sup>623</sup> For example, after discovering that extreme local variability precluded a uniform federal program, Phase II stormwater negotiators invited municipal dischargers to design individually

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<sup>619</sup> See *supra* notes 523–543 and accompanying text (discussing the normative leverage of federalism values).

<sup>620</sup> See Interview with Laurie Ristino, *supra* note 446; see also Telephone Interview with Jeff Reynolds, *supra* note 426.

<sup>621</sup> See discussion, *supra* notes 96–399 and accompanying text. Examples include: the Phase II Stormwater Rule, which was devised via negotiated rulemaking; the Coastal Zone Management Act, which was drafted using policymaking laboratory negotiations; and emissions standards under the Clean Air Act, which developed following a process of iterative federalism. See 16 U.S.C. §§ 1451–1466 (2006) (Coastal Zone Management Act); 42 U.S.C. § 7543 (2006) (Clean Air Act emissions standards); 40 C.F.R. § 122.34(b) (2010) (Phase II Stormwater).

<sup>622</sup> See *supra* notes 256–300 and accompanying text.

<sup>623</sup> McMahon & Susskind, *supra* note 263, at 154–55.

tailored programs within general federal limits.<sup>624</sup> Considering the massive number of municipalities involved, the fact that the rule faced legal challenge from only a handful of Texas municipalities testifies to the strength of the consensus through which it was created.

By contrast, the iterative exchange within standard notice-and-comment rulemaking—also an example of federalism bargaining—can frustrate state participation by denying participants meaningful opportunities for consultation, collaborative problem-solving, and real-time accountability. The contrast between notice-and-comment and negotiated rulemaking, exemplified by the two phases of REAL ID rulemaking, demonstrates the difference between more and less successful instances of federalism bargaining.<sup>625</sup> Moreover, the difficulty of asserting state consent to the products of the REAL ID notice-and-comment rulemaking (given the outright rebellion that followed) limits its interpretive potential.

Negotiated rulemakings take longer than other forms of administrative rulemaking, but are more likely to succeed over time. Regulatory matters best suited for state-federal negotiated rulemaking include those in which a decisive federal rule is needed to overcome spillover effects, holdouts, and other collective action problems, but unique and diverse state expertise is needed for the creation of wise policy. Matters in contexts of overlap least suited for negotiated rulemaking include those in which the need for immediate policy overcomes the need for broad participation—but even these leave open possibilities for incremental rulemaking, in which the initial federal rule includes mechanisms for periodic reevaluation with local input.

(2) *Policymaking Laboratory Negotiations*, among all federalism bargaining forms, offer the richest resources for productive bargaining and procedurally harnessing federalism values. They foster both checks and localism by maximizing state autonomy within national regulatory programs, and accountability because they proceed by formal operation of law. Advancing localism and synergy—and capitalizing on federalism’s promise of the “laboratory of ideas”—they allow for localized innovation to confer learning benefits on the entire system, and locally tailored solutions that reflect unique state circumstances. For example, Medicaid demonstration waivers enable states to share policymaking design with both Congress and the DHS, harnessing the energy of state and local regulators to address unique circumstances while disseminat-

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<sup>624</sup> *Supra* notes 283–290 and accompanying text.

<sup>625</sup> *Supra* notes 291–300 and accompanying text.

ing innovation throughout the system. North Carolina's innovative Community Care program has thus received attention not only from other states but also from the Obama administration as a potential innovation for national health reform.<sup>626</sup>

Because they represent purposeful legislative design, policymaking laboratory negotiations also offer the greatest opportunities for pre-meditated federalism engineering, as recommended below. They are available for use by both political branches, and initiated by congressional statute, such as the Coastal Zone Management Act's creation of state policymaking zones for coastal management, or by administrative rule, such as the Phase II Stormwater Rule's creation of municipal policymaking zones for stormwater management.<sup>627</sup>

Policymaking laboratory negotiations are the grandest of federalism bargaining enterprises, requiring formidable regulatory architecture on the front end and considerable time periods before both horizontal and vertical learning benefits can be fully realized. Matters best suited for policymaking laboratory negotiations include those in which federal needs for comprehensive regulation are closely matched by the benefits of state regulatory autonomy. Matters least suited include those in which the need for national uniformity (for reasons of economic efficiency or justice) overwhelms the benefits of local autonomy.

(3) *Iterative Policymaking Negotiations*, a subset of policymaking laboratory negotiations, allow for balance between reasonable uniformity to enable commercial development and critical flexibility to foster competitive and adaptive policymaking. For example, the Clean Air Act's two-track system for regulating automobile emissions allows states to choose between the federal or more stringent California standard, preventing regulatory stagnation, hedging against capture, and maximizing state autonomy without unduly compromising industrial needs.<sup>628</sup> Similar measures have been suggested to modify federal carbon cap-and-trade proposals, lest a fully national program fall prey to the pitfalls of regulatory monopoly.<sup>629</sup>

Iterative policymaking negotiations offer the best means of splitting the difference between the costs and benefits of policymaking laboratory negotiations. They are most appropriate when clear leadership by a state or regional partnership warrants exceptional status as a

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<sup>626</sup> See Hoban, *supra* note 341.

<sup>627</sup> See 16 U.S.C. § 1456(c) (Coastal Zone Management Act) (2006); 40 C.F.R. § 122.34(b) (2010) (Phase II Stormwater).

<sup>628</sup> *Supra* note 355 and accompanying text.

<sup>629</sup> *Supra* notes 369–373 and accompanying text.

co-policymaker with the national government, and least appropriate when conferring different levels of policymaking status would threaten values of equity among the states.

## 2. Trading on Capacity

As discussed in Part I, one focus of contemporary negotiation theory has been to facilitate the formation of integrative agreements, which exploit linkages between the parties' broadly construed interests to uncover value-creating trades, bridge leverage imbalances, and break negotiating deadlocks.<sup>630</sup> Federalism bargaining that trades on the different parties' unique capacities has great integrative potential, enabling the kinds of Pareto-superior trades that skilled negotiators capitalize on, and allowing the accomplishment of regulatory objectives that neither side could realize alone.<sup>631</sup>

For this reason, capacity-based federalism bargains, including those to reallocate federal authority, seem especially useful in advancing interjurisdictional synergy within the bounds of mutual consent. When both sides trade on unique capacity, each possesses a meaningful opportunity to impact the outcome. Results are less vulnerable to leverage imbalance because unique capacity is a powerful form of positive leverage that holders wield over those seeking access. Examples of capacity-based trading from the taxonomy include: negotiations within cooperative federalism programs, negotiations for exceptions, and enforcement negotiations.

(1) *Cooperative Federalism Negotiations*: Cooperative Federalism negotiations harness valuable synergy between state and federal institutional capacity. For example, the Coastal Zone Management Act incentivizes states to use local land use planning authority that the federal government pointedly lacks, in order to protect critical coastal resources of both local and national importance.<sup>632</sup> It does so while substantially protecting local policymaking authority, and erecting unprecedented checks through the limited waiver of federal supremacy in the consistency provision.

The CZMA draws strong legitimacy from the principle of mutual consent because states have wide control over the degree and nature of their own participation. Other cooperative federalism programs put slightly more strain on that principle. For example, the Clean Air and

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<sup>630</sup> *Supra* note 83 and accompanying text.

<sup>631</sup> *See, e.g.*, FISHER & URY, *supra* note 9, at 40–80; MNOOKIN ET AL., *supra* note 89, at 325.

<sup>632</sup> *Supra* notes 306–310 and accompanying text.

Water Acts occasionally prompt state complaints about their Hobson's choice between expensive implementation obligations or submission to federal permitting by agents lacking expertise and investment in the local economy.<sup>633</sup> Nevertheless, states have ably wielded their capacity within these bargaining forums, negotiating air quality implementation plans, water quality standards, and NPDES permitting agreements. States retain substantial leverage in these negotiations because they alone possess the capacity to bring federal policies to fruition (deflating many threats of preemption).<sup>634</sup>

Regulatory matters allowing space for variation over uniform regulatory floors are good candidates for programs of cooperative federalism like the Clean Air and Water Acts, especially when regulatory targets require state implementation capacity. These afford less state influence on federal policymaking than full-blown policymaking negotiations (like the CZMA), but more space for negotiation than full-blown command-and-control regulations (like the REAL ID Act). Poor candidates for cooperative federalism programs involve regulatory matters in which there is no space for local variation, no nexus with state police powers, or in which state and federal actors cannot reach basic agreement on policy goals, making partnership unworkable.

(2) *Negotiations for Exceptions* can also yield fruitful collaborations in areas of concurrent jurisdiction, reallocating authority in support of localism and synergy values. For example, the Interior Department and California broke regulatory ground in harmonizing the Endangered Species Act and Natural Communities Conservation Program.<sup>635</sup> State and federal officials have continued to collaborate, negotiating additional incidental take permits to harmonize ESA and NCCP requirements regarding state water projects, such as the Bay Delta Conservation Plan.<sup>636</sup> Exceptions negotiations open possibilities for productive exchange whenever the initial allocation of authority is not purposefully and properly assigned to one side under a statutory or constitutional inalienability rule, such as federal coinage, or state elections.<sup>637</sup>

(3) *Enforcement Negotiations* speak directly to the problem-solving synergy value of federalism. Unified by the shared desire to avoid public

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<sup>633</sup> Jonathan Adler, *Jurisdictional Mismatch in Environmental Federalism*, 14 N.Y.U. ENVTL. L.J. 130, 169–73 (2005).

<sup>634</sup> *Supra* note 437 (discussing EPA's "hollow threats").

<sup>635</sup> *Supra* notes 224–232 and accompanying text.

<sup>636</sup> *What Is the BDCP?*, BAY DELTA CONSERVATION PLAN, <http://baydeltaconservationplan.com/BDCPPlanningProcess/AboutBDCP.aspx> (last visited Dec. 3, 2010).

<sup>637</sup> *Cf. generally* Ryan, *supra* note 35.

harm, participants in contexts from criminal to environmental law tend to cooperate smoothly and infrequently compete for jurisdiction.<sup>638</sup> Collaborative criminal law enforcement partnerships have been especially adept at linking a wide variety of local and national expertise, such as the Project Safe Neighborhoods program.<sup>639</sup> Enforcement negotiations are widespread and generally uncontroversial because they generally herald the hallmarks of both mutual consent and federalism values.

### 3. Spending Power Deals

Spending power deals are an important means of navigating jurisdictional overlap within the American system of dual sovereignty.<sup>640</sup> They are among the best understood, most popular, and least constrained form of federalism bargaining. Ironically, they may also rank among the least legitimate for interpretive purposes, in that state consent is not always as free as negotiation theory would prefer. Examples vary widely, from programs where state consent is unquestioningly genuine, such as the Coastal Zone Management Act, to examples notoriously fraught with consent-based controversy, such as the pending suits over No Child Left Behind.<sup>641</sup>

No Child Left Behind provides a good example of federalism bargaining that strains the principle of mutual consent, because states felt coerced by profound needs for federal educational funding, and the Act has struggled for legitimacy in federalism terms. Nevertheless—and attesting to the force of at least some political safeguards in the process—the Act is currently under modification in light of state dissatisfaction.<sup>642</sup> The Obama administration's new approach seems promising, adopting many of the federalism engineering devices of the successful policymaking laboratory negotiations in offering additional funds and policymaking discretion to states that compete on the strength of individual proposals.<sup>643</sup>

For this reason, spending power deals should be evaluated on the basis of their particulars, and not as an entire category. The least worrying spending power deals for interpretive purposes involve the states in

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<sup>638</sup> See Interview with Roscoe Howard, *supra* note 133; Interview with Mike Murphy, *supra* note 159; Telephone Interview with Rick Weeks, *supra* note 429.

<sup>639</sup> *Supra* notes 136–139 and accompanying text.

<sup>640</sup> See *Dole*, 483 U.S. at 206; discussion *supra* notes 167–182 and accompanying text.

<sup>641</sup> *Supra* notes 483–490 (discussing *School District of the City of Pontiac v. Secretary of the U.S. Department of Education* and the new pending suit).

<sup>642</sup> Dillon, *supra* note 182.

<sup>643</sup> *Id.*



participatory partnerships that afford genuine consultation and synergy, of the sort enabled in the joint policymaking forums. The most worrying are those that afford the least discretion to states and invite the least meaningful participation. That said, even spending power deals that fail the requirements of interpretive legitimacy may be legal (and even worthwhile) bargains; they simply warrant a different level of interpretive deference when challenged on federalism grounds.

### C. *Toward Better Federalism Bargaining*

The previous discussion identifies how certain forms of intergovernmental bargaining can serve the purposes that federalism sets out to accomplish. Identifying the criteria for this assessment opens up new possibilities for engineering and conducting federalism bargaining to better accomplish these goals. Although some forms are more promising than others in their ability to navigate federalism challenges, much can be done to further enhance interpretive bargaining at a variety of intervention points. This Section offers suggestions for how legislators, stakeholders, negotiators, and adjudicators can help facilitate more effective and legitimate federalism bargaining.

#### 1. Legislative and Administrative Design

Legislators and administrators should draw from the lessons of federalism engineering in creating forums for state-federal bargaining. They should seek opportunities to reduce transaction cost barriers to interpretive bargaining through legal structures that could increase information flow, reduce strategic behavior, and build working relationships between bargaining participants.<sup>644</sup> Congress could consider more explicitly empowering agencies to negotiate directly with states in appropriate contexts, mirroring its endorsement of negotiated rule-making more generally.<sup>645</sup> Executive agencies could consider institutional reforms to realign internal culture toward negotiating norms, self-assessing against positive baselines set by model agencies.<sup>646</sup> Lawmakers should carefully consider how their pronouncements will function as intergovernmental bargaining defaults, clarifying whether or not they should be subject to renegotiation. They should develop clear

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<sup>644</sup> Cf. generally Clayton P. Gillette, *Regionalization and Interlocal Bargains*, 76 N.Y.U. L. REV. 190 (2001) (discussing institutional tools for reducing bargaining costs in the regional context).

<sup>645</sup> *Supra* notes 258–259 and accompanying text..

<sup>646</sup> Metzger, *supra* note 62, at 2078; Sharkey, *supra* note 61, at 2159–61.

baseline entitlements and legal endowments, clarifying bargaining power and enabling better advocacy by participants.<sup>647</sup>

To the extent bargaining participants may stray from federalism concerns during negotiation, legislators and administrators can foster federalism values through purposeful procedural design. For example, Congress should consider requiring greater use of negotiated rulemaking in statutes requiring regulations that preempt state authority, impose significant costs, or about which states hold special expertise. Negotiating agencies' use of professional intermediaries can also reinforce procedural regard for federalism values by ensuring that stakeholders are adequately represented during the process, fortifying bargaining against concerns about transparency and accountability. Congress could also require transparency measures to alleviate concerns about principal-agent tensions in federalism bargaining, such as requiring that draft agreements be included in the public record after final agreement is reached.

A significant contribution of negotiation theorists is the importance of process pluralism, which emphasizes the value of variability and flexibility in process design to allow tailoring for individual circumstances.<sup>648</sup> Although Congress should heed this wisdom, successful federalism bargaining forums may provide appropriate models for imitation in related regulatory contexts. For example, policymaking laboratory forums such as Medicaid, CZMA, and those with state implementation plans provide procedural assists to strengthen local input in spending power negotiations that might otherwise strain the assumptions of mutual consent.<sup>649</sup> The CAA iterative federalism device for regulating automobile emissions provides an ingenious tool for moderating between the benefits of jurisdictional competition and uniform industrial standards, a model that could prove useful in contexts facing similar tensions.<sup>650</sup> Similar provisions in the Superfund Act and federal forfeiture laws incentivize intergovernmental enforcement partnerships; the same tool may prove useful in other contexts as well.<sup>651</sup>

Congress could also enact a statutory framework to facilitate its own creation of future policymaking negotiation forums, by establish-

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<sup>647</sup> Menkel-Meadow, *supra* note 83, at 852.

<sup>648</sup> *Id.* at 850.

<sup>649</sup> See 16 U.S.C. § 1456(c) (2006) (Coastal Zone Management Act); 42 U.S.C. §§ 1315, 1396n (2006) (Medicaid demonstration waivers).

<sup>650</sup> See 42 U.S.C. § 7543 (2006).

<sup>651</sup> See Comprehensive Environmental Response, Compensation, and Liability Act of 1980, Pub. L. No. 96-510, 94 Stat. 2767 (codified as amended at 42 U.S.C. §§ 9601-9675).

ing templates to streamline future lawmaking. For example, Congress could create a uniform policymaking laboratory template based on Social Security Act demonstration waivers or the Coastal Zone Management Act, easing the way for process differentiation after establishing successful baseline terms.<sup>652</sup>

Finally, Congress should consider ways to maintain a meaningful role for states as partners in spending power deals where exit is less politically available. Although not appropriate in every instance, the joint policymaking forums enable especially valuable spending power partnerships. The emerging field of Dispute Systems Design may be a fruitful source of federalism engineering innovations to respond to persistent state concerns about consultation during policymaking.<sup>653</sup> The new behavior economics literature on suggestive policymaking may also provide tools,<sup>654</sup> as may important advances in multiparty negotiation theory<sup>655</sup> and collaborative governance theory.<sup>656</sup>

## 2. Awareness Measures

Stakeholders should be made familiar with the most effective tools of federalism bargaining and the procedural constraints that confer interpretive legitimacy, empowering them to participate more meaningfully. As it once did through the Negotiated Rulemaking Act,<sup>657</sup> Congress could statutorily encourage use of specific forms by executive agencies. But to improve upon the lackluster impact of that Act, Congress could further require that executive agencies give written guidance about specified forms to state stakeholders, enabling them to advocate for their use in appropriate circumstances. Given the rarity of negotiated rulemaking even after the Negotiated Rulemaking Act, Congress should begin there.<sup>658</sup>

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<sup>652</sup> See 16 U.S.C. §§ 1451–1466 (Coastal Zone Management Act); 42 U.S.C. §§ 1315, 1396n (Medicaid demonstration waivers).

<sup>653</sup> *Supra* note 92.

<sup>654</sup> See generally, e.g., RICHARD THALER & CASS SUNSTEIN, *NUDGE: IMPROVING DECISIONS ABOUT HEALTH, WEALTH, AND HAPPINESS* (2008).

<sup>655</sup> See generally, e.g., 2 LAWRENCE SUSSKIND, *MULTIPARTY NEGOTIATION: THEORY AND PRACTICE OF PUBLIC DISPUTES RESOLUTION* (2008).

<sup>656</sup> See generally, e.g., Karkkainen, *supra* note 95; Menkel-Meadow, *supra* note 83.

<sup>657</sup> See 5 U.S.C. §§ 561–570 (2006).

<sup>658</sup> See discussion *supra* note 282 (noting that in the decade following enactment, less than one percent of new administrative rules were promulgated through negotiated rulemaking).

### 3. Seeking Opportunities

Once state and federal actors better understand alternatives for productive bargaining, they should search actively for opportunities. With recommendations by executive agencies, Congress could identify specific zones of jurisdictional overlap where valid interpretive bargaining could optimize collaboration. Even if Congress chooses not to mandate negotiated governance in these realms, it could require more meaningful consultation with state partners to inform federal lawmakers, emphasizing genuine rather than box-checking exchange.

Executive agencies should also identify opportunities for promising federalism bargaining independently of congressional mandates. Federal executive agencies should choose negotiated forms of policymaking in contested federalism arenas, such as those intersecting federal safety regulations and state tort law. Where federal agencies extend genuine invitations to states to negotiate, state counterparts should make reasonable efforts to participate.

Meanwhile, state actors need not wait for federal initiative. State executive agencies should reach out to regional federal partners in setting statewide policy on matters of interjurisdictional concern, strengthening regulatory relationships and policy resiliency. National organizations of state actors, such as the National Governors Association, the National Conference of State Legislatures, and the Environmental Council of States, can lobby on behalf of their constituents for a greater role in negotiating regional and federal policymaking.

In general, complex regulatory arenas that would benefit from contingent agreements with flexible terms, incremental process, and built-in re-evaluation mechanisms should signal the potential value of forums for federalism bargaining, collaborative regulatory planning, and adaptive management between state and federal actors.<sup>659</sup>

### 4. Leveraging Leverage

One way of facilitating the interpretive potential of federalism bargaining is to ensure that both sides meaningfully influence the outcome by helping them understand the full array of leverage and exchange in play. Federal powers of the purse and the permit seem well understood, but some participants may not appreciate the leverage conferred by various forms of state and local capacity, or the normative power of federalism values.

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<sup>659</sup> Menkel-Meadow, *supra* note 83, at 833–34.

Negotiation theory suggests that negotiations in which leverage is more evenly matched will produce the most integrative, value-encompassing results.<sup>660</sup> Although federal negotiators will always be able to leverage legal supremacy and superior fisc, the preceding discussion reveals the significant leverage that states wield based on unique land use authority, local expertise, public outreach, and normative federalism leverage. If state actors more effectively leveraged the leverage they brought to the table, this might facilitate the development of more optimal alternatives within synergistic collaborations. At the very least, it would alter unfavorable negotiating dynamics.

Negotiation theorists also advise that parties study their best alternative to negotiated agreement and seek to improve it during the course of negotiations, if possible.<sup>661</sup> States have demonstrated their willingness and ability to do this by creating regional cap-and-trade governing partnerships where the federal government has refused to bargain. For example, the states forming the Northeast Regional Greenhouse Gas Initiative and Western Climate Initiative have materially altered states' leverage in interest group negotiations with federal lawmakers over the direction of national climate policy.<sup>662</sup> If state actors better understood their alternatives to a proffered federal deal, as well as the force of federal need for state capacity in that deal, it could mitigate doubts about the "mutual consent" underlying some spending power deals.

Skilled intermediaries and better negotiation training for participants could help the parties fully understand their alternatives, enabling them to identify unappreciated leverage and linkages that can motivate earnest trade even in the presence of power imbalances.<sup>663</sup>

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<sup>660</sup> This result is because parties evenly matched in leverage are more likely to fully exploit the integrative stage of negotiation (in which a variety of potential alternatives are explored before agreement is reached) than they are in negotiations in which one party can prematurely force the other into the distributive stage toward a favorable but Pareto sub-optimal outcome. Cf. FISHER & URY, *supra* note 9, at 177–87 (discussing leverage dynamics in negotiation); MNOOKIN ET AL., *supra* note 89, at 325 (discussing Pareto optimality in negotiating outcomes); SHELL, *supra* note 9, at 101–05, 113 (discussing leverage dynamics in negotiation); *see also* SHELL, *supra* note 9, at 220 (noting the greater risk of unethical behavior in negotiating contexts of leverage imbalance).

<sup>661</sup> FISHER & URY, *supra* note 9, at 97–106; SHELL, *supra* note 9, at 101.

<sup>662</sup> *See generally* Erin Ryan, Understanding Climate Federalism (2010) (unpublished manuscript) (on file with author).

<sup>663</sup> Menkel-Meadow, *supra* note 83, at 848.

## 5. Negotiation Training

Indeed, both the pragmatic and interpretive potential of federalism bargaining would likely improve if state and federal participants received formal negotiation training. Training can help even skilled intuitive negotiators identify opportunities for productive bargaining, understand leverage and alternatives, and manage the mechanics of difficult multiparty negotiations.<sup>664</sup> (And for the many Americans intimidated by negotiation in general, it can make an even more profound difference.)<sup>665</sup>

Negotiation skills training confers many benefits, but among the most important are an enhanced sensitivity to opportunities for productive exchange and the tools to transform opportunities into mutually beneficial solutions. Training also enhances sensitivity to the negotiation dynamics of social interaction, behavioral economics, game theory, and organizational behavior that can impede the formation or functioning of otherwise valuable collaboration. Federalism bargaining can trigger a surprisingly powerful subset of these “soft” negotiating obstacles, including in-group/out-group identity dynamics, affiliation and status sensibilities, and enforcement hurdles.<sup>666</sup> Better still, agency leaders should consider strategies to build institutional negotiating competency beyond individual skills.<sup>667</sup>

## 6. Judicial Role

Finally, the judiciary can aid federalism bargaining by clarifying and refining legal constraints as needed, acknowledging bargaining dynamics when interpreting negotiated results, and adopting the proposed deferential procedural scrutiny.

Although spending power bargaining is well-treated in judicial opinion, other forms of federalism bargaining remain murky without

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<sup>664</sup> My years of teaching negotiation substantiate this claim, seeing the profound difference it can make in student after student. *See generally, e.g.*, SHELL, *supra* note 9; *id.* at xvii–xviii (summarizing the benefits of training).

<sup>665</sup> *Cf. id.* at xvi, 7 (discussing the nagging anxiety that average people, including professional students in all disciplines, feel about negotiating).

<sup>666</sup> *Cf. generally* DANIEL SHAPIRO & ROGER FISHER, *BEYOND REASON: USING EMOTIONS AS YOU NEGOTIATE* (2006) (discussing strategies for addressing various emotional hurdles that arise within negotiations).

<sup>667</sup> *See generally, e.g.*, HAL MOVIUS & LAWRENCE SUSSKIND, *BUILT TO WIN: CREATING A WORLD CLASS NEGOTIATING ORGANIZATION* (2009) (arguing that successful multiparty negotiations require institutional competence).

judicial elaboration, especially federal capacity bargaining.<sup>668</sup> Of course, without recourse to advisory opinion, the Court cannot elaborate until an appropriate case arises. But the Court's past precedent is responsible for some of this anxiety (especially *New York v. United States*),<sup>669</sup> demonstrating its lack of sensitivity to federalism bargaining at the time.<sup>670</sup> The Supreme Court justices should heed this error when they encounter future cases that raise similar issues. In particular, the overly broad prescription against "bargained-for commandeering" should be modified to allow consenting states to negotiate binding federal terms to resolve state collective action problems.<sup>671</sup>

Adjudicators should also give deeper consideration to the bargaining factors present in Judge Sutton's analysis in *Pontiac School District*<sup>672</sup> and Justice White's in *New York v. United States*.<sup>673</sup> In cases interpreting federalism bargaining results, courts should evaluate the bargain at the heart of the transaction in deciding whether results are voidably ambiguous (as alleged in *Pontiac School District*) or voidably nonconsensual (as held in *New York v. United States*). Just as context from elsewhere in a statute (or others in related fields) are used to resolve ambiguity in conventional statutory interpretation, so should the "core bargain" illuminate its terms. Otherwise, plaintiffs will opportunistically renege on clearly understood terms, reaping benefits without delivering on their own promises. Interpreting state-federal bargaining by statute—in which states that choose to participate play a role beyond mere compliance with congressional dictates—thus demands a level of scrutiny one degree more complicated than ordinary statutory interpretation.

Finally, adjudicators should adopt the deferential interpretive scrutiny advanced above when intergovernmental bargaining is challenged on federalism grounds. Courts should defer to the allocation of authority in negotiated governance that meets the basic procedural requirements of fair bargaining and constitutional federalism. They should not defer to challenged bargaining that fails the constitutional criteria, and they should facilitate real consequences for bargaining that violates fundamental fairness by stressing mutual consent to the breaking point.

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<sup>668</sup> *Supra* notes 517–521 and accompanying text.

<sup>669</sup> 505 U.S. at 149.

<sup>670</sup> *Supra* notes 475–549 and accompanying text.

<sup>671</sup> *Supra* notes 183–210 and accompanying text. *See generally* Ryan, *supra* note 35 (proposing a jurisprudential fix).

<sup>672</sup> *Sch. Dist. of the City of Pontiac v. Sec'y of Dept. of Educ.*, 584 F.3d 253, 285–92 (6th Cir. 2009) (en banc); *supra* note 483 and accompanying text.

<sup>673</sup> 505 U.S. at 196–98 (White, J., dissenting).

Courts should discourage potential harm not by outlawing whole categories of federalism bargaining (such as spending power deals), but by scrutinizing alleged harm in individual instances, enforcing transparency requirements or due process norms as appropriate. Above all, they should interpret bargained-for results in the context of bargaining, and not as though consensual negotiations had never taken place.

#### CONCLUSION

Thus, even as jurists parse the constitutional oracles on which side trumps where, those charged with governing in contexts of jurisdictional overlap have learned to cope with federalism uncertainty through negotiation. In the face of persistent uncertainty about the boundaries between state and federal reach, regulators move forward by substituting procedural consensus for substantive clarity about the time-honored federalism quandary—*who gets to decide?* Federalism is negotiated not only between the proclamations of the Court and the statutory will of Congress, but also in the day-to-day activities of individual state and federal actors in all three branches. Recognizing how interpretive bargaining helps allocate authority at the uncertain margins of state and federal power provides a new lens for understanding the uniquely collaborative process of American governance.

Federalism bargaining engages federalism values at the structural level, surpassing the political safeguards available through unilateral policymaking. The bilateral nature of the exchange balances state and federal interests in the first-order policy issue at hand, protecting federalism values in a way that transcends the subjective considerations of participants. Federalism bargaining thus provides structural support for federalism that is simply unavailable through unilateral safeguards. Although unilateral decisions may warrant deference in proportion to their satisfaction of similar criteria, negotiated governance offers structural protection for federalism values that unilateral regulation can never truly replicate.

Bargaining that satisfies the procedural criteria in Part IV accomplishes the objectives of federalism by giving expression to its core values as a procedural matter, and by leveraging the unique capacity that the political branches bring to federalism interpretation and implementation. Federalism bargaining in which the normative leverage of federalism values is institutionally engineered offers the most promise for bridging interpretive gaps, but all federalism bargaining would benefit from increased awareness at three levels: (1) more conscious judicial consideration of federalism bargaining and its procedural in-



puts, (2) more thoughtful federalism engineering in statutes that create forums for bargaining, and (3) more opportunities for professional development among federalism bargaining architects and participants.

More work is needed to develop federalism engineering in bargaining forums and to assess the full implications for judicial review (including, for example, issues of standing). Moving forward from this proposal will require more detailed attention to how courts would actually assess the outcomes of varying forms of bargaining for fealty to federalism values. Nevertheless, this treatment provides a starting point by recognizing the federalism bargaining enterprise, charting the landscape, building a framework of analysis, and articulating the baselines of a theory of procedural interpretation. In contrast to previous theoretical models, the proposal demonstrates instances in which the very process of intergovernmental bargaining proves more able to preserve constitutional values than judicial or legislative decisions alone. In the middle, perhaps, lies wisdom.

Most importantly, the Article provides the missing theoretical justification for the interpretive work that federalism bargainers do every day under clouds of doctrinal and rhetorical uncertainty. In the end, negotiated governance achieved by mutual consent in a process that safeguards rights, participation, innovation, and synergy accomplishes exactly what it is that federalism is designed to do. When it honors these principles through falsifiable process, intergovernmental bargaining is itself a legitimate means of allocating authority in contexts of jurisdictional overlap. The state and federal actors that bilaterally negotiate federalism-sensitive regulatory dilemmas are doing more than just solving the problems with which they are charged; they are interpreting the very constitutional directives that frame their obligations. Indeed, in negotiating federalism, they are helping to interpret federalism.