States, Agencies, and Legitimacy

*Miriam Seifter**

Scholarship on the administrative process has scarcely attended to the role that states play in federal regulation. This Article argues that it is time for that to change. An emerging, important new strand of federalism scholarship, known as "administrative federalism," now seeks to safeguard state interests in the administrative process and argues that federal agencies should consider state input when developing regulations. These ideas appear to be gaining traction in practice. States now possess privileged access to agency decisionmaking processes through a variety of formal and informal channels. And some courts have signaled support for the idea of a special state role in federal agency decisionmaking.

These developments have important implications for administrative law and theory. In particular, they bear on the paramount question of administrative legitimacy—the decades-long effort to justify the exercise of lawmaking power by unelected administrators in our constitutional democracy. A robust state role in the administrative process, this Article shows, is in tension with the models of legitimacy that have come to serve as administrative law's North Star. Whereas the two reigning legitimacy models alternatively prize (1) centralized presidential control to ensure responsiveness to majority preferences, and (2) apolitical application of expertise, state input raises the specter of regional factionalism and home-state politics. Two types of solutions could alleviate this tension: reforming state involvement in the regulatory process, or updating legitimacy models. The Article concludes by charting both courses—identifying potential reforms and sketching possibilities for a new understanding of administrative legitimacy that would better accommodate the state role.

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I. INTRODUCTION

The perennial struggle for control of the administrative state—which "wields vast power and touches almost every aspect of daily life"[1]—has now captured the attention of federalism scholars. An important, emerging literature on "administrative federalism" argues that federal agencies should consider state input when making regulatory decisions. This literature seeks, in relevant part, to protect states from federal overreaching by giving them special access to agency decisionmaking: scholars in the field urge that agencies should treat states as regulatory partners and suggest that courts should limit deference where agencies fail to collaborate with states.[2] Federal politicians, too, embrace the notion that agencies should work closely with states, and state officials clamor to expand their own involvement.

Scholars of the administrative process, however, have scarcely studied the state role in federal regulation. States, that is, have never been considered part of the main cast of characters that shape federal agencies' decisions on the front end——namely, the President, Congress, the courts, interest groups, and administrators themselves.[3] Accordingly, scholars have not considered the implications of state involvement for what is perhaps the central question in administrative law: whether agency action is legitimate, particularly in light of the broad powers exercised by unelected administrators.[4]

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1. Free Enter. Fund v. PCAOB, 130 S. Ct. 3138, 3156 (2010); *see also id.* at 3168 (Breyer, J., dissenting) (describing the scope of modern regulatory power).

2. *See infra* Part II.A.

3. *See, e.g.*, CORNELIUS M. KERWIN & SCOTT R. FURLONG, RULEMAKING 193–268 (2011) (describing participation by business groups and citizen organizations in the rulemaking process, as well as oversight by the President, Congress, and the courts); Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245, 2246 (2001) ("The history of the American administrative state is the history of competition among different entities for control of its policies. All three branches of government—the President, Congress, and Judiciary—have participated in this competition; so too have the external constituencies and internal staff of the agencies."); Cass R. Sunstein, *Participation, Public Law, and Venue Reform*, 49 U. CHI. L. REV. 976, 976 (1982) (describing efforts by "all three branches of the federal government" to "discipline and police the exercise of discretion by federal agencies").

4. *See* JAMES FREEDMAN, CRISIS AND LEGITIMACY 31–57 (1978) (describing the crisis of public ambivalence towards agency action). As one of Freedman's reviewers observed, "so constant has been the sense of crisis attending the agencies that the problem probably transcends the specific concerns that successive generations have voiced." William H. Allen, *The Administrative Process: Which Crisis?*, 32 STAN. L. REV. 207, 208 (1979). Though the contours of the legitimacy dilemma have varied, the concerns continue to receive extensive attention. *See, e.g.*, Cynthia R. Farina, *The Consent of the Governed: Against Simple Rules for a Complex World*, 72 CHI.-KENT L. REV. 987, 987 (1997) ("Like an intriguing but awkward family heirloom, the legitimacy problem is handed down from generation to generation of administrative law

Whereas studies of legitimacy have "explore[d] the optimal allocation of oversight authority" among Congress, the President, and the courts,[5] as well as the appropriate participatory role of administrators, interest groups, and members of the public,[6] they have not yet considered the descriptive or theoretical facets of a state role in the federal administrative process.

This Article begins to take up that sizeable task. As a descriptive matter, the Article shows that the ideas fueling the administrative federalism literature appear to have traction in practice. Statutes, executive orders, and formal agreements now afford states privileged access to federal agency decisionmaking. States also regularly consult with agencies through myriad informal and largely opaque channels, due in large part to the interdependence between many federal regulatory programs and state government. And while access does not equal influence, there are reasons to believe the federalism scholars who have described this state role as influential. Such reasons include the cultural ties between state and federal administrators; federal agencies' dependence on state cooperation; the political salience of state concerns, which triggers the sensitivity of federal agencies' elected principals; and the threat of judicial review. Indeed, some judicial opinions seem to encourage a special state role in the federal regulatory process.[7]

This descriptive account paves the way for the Article's core analytic inquiry: how the participation of states in federal agency decisionmaking affects administrative legitimacy. Whereas the administrative federalists ask what administrative law can do for

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scholars."); Jerry L. Mashaw, *Small Things Like Reasons Are Put in a Jar: Reason and Legitimacy in the Administrative State*, 70 FORDHAM L. REV. 17, 19–26 (2001) (describing demands for administrative legitimacy); Mark Seidenfeld, *A Civic Republican Justification for the Bureaucratic State*, 105 HARV. L. REV. 1511, 1512 (1992) ("Over the past century, the powers and responsibilities of administrative agencies have grown to an extent that calls into question the constitutional legitimacy of the modern federal bureaucracy."); Sidney Shapiro et al., *The Enlightenment of Administrative Law: Looking Inside the Agency for Legitimacy*, 47 WAKE FOREST L. REV. 463, 463 (2012) ("The history of administrative law in the United States constitutes a series of ongoing attempts to legitimize unelected public administration in a constitutional liberal democracy."); Richard B. Stewart, *The Reformation of American Administrative Law*, 88 HARV. L. REV. 1669, 1676, 1679–81 (1975) (discussing techniques for curtailing broad administrative discretion); Michael P. Vandenbergh, *The Private Life of Public Law*, 105 COLUM. L. REV. 2029, 2035 (2005) ("Agencies are neither mentioned in the Constitution nor directly responsive to the electorate, leaving their democratic legitimacy unclear. Administrative law scholars have sought to ground the legitimacy of agency actions in a variety of theories.").

5. Vandenbergh, *supra* note 4, at 2031.

6. *See, e.g.*, KERWIN & FURLONG, *supra* note 3, at 114–17 (discussing the problems of participation and discretion in agency rulemaking).

7. *See infra* Part II.A.

federalism, this project pursues the converse inquiry: what might states do for, or to, the longstanding legitimacy values that animate administrative law?

Although the precise meaning of "legitimacy" is notoriously elusive,[8] it is most commonly associated with concerns regarding agencies' unelected, constitutionally uncertain status. As an extension of these concerns, commentators have long feared that agencies are "particularly susceptible to the pressures imposed by powerful private groups"[9] and are thus prone to capture, faction, and deviation from majority preferences. The decades-long effort to address these fears, scholars agree, has yielded four main accounts, or "models," of administrative legitimacy. The first and most dominant model envisions agencies as instruments of presidential control. Under a second, less dominant but still pervasive model, courts and commentators cast agencies as experts engaged in apolitical problem solving. The older, final two models of legitimacy portray agencies as either mere "transmission belts" for congressional commands or forums for bargaining among diverse interest groups.[10] Without attempting to resolve the longstanding debates among adherents to these models, this Article explains that the privileged consultation role for states envisioned by administrative federalism—and increasingly playing out in practice—has important implications for all four models.

The core insight is simple: a strong form of state consultation threatens to undermine each model of legitimacy.[11] With regard to

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8. *See, e.g.*, Evan J. Criddle, *Fiduciary Foundations of Administrative Law*, 54 UCLA L. REV. 117, 123 (2006) (noting that "agency 'legitimacy' is a contested concept resting on other contested concepts"); Richard H. Fallon, Jr., *Legitimacy and the Constitution*, 118 HARV. L. REV. 1787, 1790 (2005) ("Those who appeal to legitimacy frequently fail to explain what they mean or the criteria that they employ."); Jody Freeman, *The Private Role in Public Governance*, 75 N.Y.U. L. REV. 543, 557 (2000) ("The concept of legitimacy has remained usefully vague in administrative law theory, serving as a vessel into which scholars could pour their most pressing concerns about administrative power.").

9. Cass R. Sunstein, *Factions, Self-Interest, and the APA: Four Lessons Since 1946*, 72 VA. L. REV. 271, 291 (1986) [hereinafter Sunstein, *Factions*]; *see also* Thomas W. Merrill, *Capture Theory and the Courts: 1967-1983*, 72 CHI.-KENT L. REV. 1039, 1064–65 (1997) (describing increased judicial efforts, fueled by concerns regarding agency capture, to control agency action); Cass R. Sunstein, *Interest Groups in American Public Law*, 38 STAN. L. REV. 29, 66 (1985) [hereinafter Sunstein, *Interest Groups*] ("The constitutional status of administrative agencies has been uncertain precisely because they evade the ordinary constitutional safeguards against domination by powerful private groups.").

10. *See infra* Part III.

11. In undertaking the Article's analysis, I map legitimacy models onto a "strong" form of state consultation in which states' privileged access yields some influence, such that consultation is not merely a procedural formality. It is not necessary to the analysis to assume implausibly that agencies always listen to states, or that they always do precisely what states ask; I assume

presidential control, state consultation threatens to push federal agencies away from the centralized, transparent control the model prizes—a structure thought to make agencies responsive to national preferences—and toward opaque decisionmaking and factional interests. Regarding expertise, states will often push political agendas that expertise-based legitimacy eschews. Probing the two earlier legitimacy models exposes similar worries. States may happen to enhance fidelity to Congress, but there is no logical reason that they will do so; they are equally likely to pursue agendas at odds with congressional commands. Finally, by giving voice to underrepresented "public" interests, states *could* remedy what is often perceived as skewed representation in agency rulemaking—yet they will often exacerbate that skew by channeling powerful private influences from their home state. Thus, what we find is that efforts to give states special access to agency decisionmaking are in tension with the way we legitimize bureaucracy.

None of this is to say that states participate in the regulatory process with any ill intent, or that their contributions to agency decisionmaking raise unique problems. Rather, this Article reflects that states function much like other interest groups in the administrative process[12] and shows that states thereby raise many of the legitimacy concerns long associated with private influence over agencies. From a legitimacy perspective, then, granting states privileged, unrestricted access to agency decisionmaking and praising the federalism benefits of state involvement without considering its costs create incongruities requiring reflection.

Attending to the state role in federal regulation has significant practical import. States currently act as consultants on regulatory issues at the forefront of contemporary debates. In the healthcare context, states have helped shape the content of regulations and

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only that consultation has some substantive effect. In addition to being descriptively plausible, see *infra* Part II.C, this assumption tracks the normative vision of administrative federalism: the literature, legal instruments, and political proclamations that embrace a state role in administrative decisionmaking seek some degree of state influence, not just access. Studying a robust version of what administrative federalism seeks facilitates analytic clarity and helps tease out the tensions with models of administrative legitimacy.

12. *See* Erin Ryan, *Negotiating Federalism*, 52 B.C. L. REV. 1, 28–29 (2011) ("[S]tate 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 governance, in which stakeholders leverage their representation to accomplish their preferences during the legislative process."); *see also* ANNE MARIE CAMMISA, GOVERNMENTS AS INTEREST GROUPS 21–34 (1995) (discussing the interest group activity of state and local governments); DONALD H. HAIDER, WHEN GOVERNMENTS COME TO WASHINGTON 20–31, 46–113 (1974) (tracing the history and efficacy of states' federal lobbying efforts).

guidance implementing the Affordable Care Act.[13] In the financial context, states have participated in developing the hundreds of new federal regulations required by the Dodd-Frank Wall Street Reform and Consumer Protection Act.[14] And in environmental regulation—a focus of this Article due to the extensive state-federal interaction it entails[15]—states have played a consulting role in the development of federal drinking water standards,[16] air pollution standards,[17] listings under the Endangered Species Act,[18] and waste regulation,[19] to name just a few. It is time to consider how such state involvement squares with the foundational concerns of administrative legitimacy.

The principal project of this Article is to reveal and explain the tension between existing understandings of administrative legitimacy and special state access to the federal regulatory process. Doing so illuminates important areas for future work, and the Article sketches two paths forward to alleviate the tension. First, the state role in the

13. *See, e.g.*, Establishment of the Multi-State Plan Program for the Affordable Insurance Exchanges, 77 Fed. Reg. 72,599 (proposed Dec. 5, 2012) (to be codified at 45 C.F.R. pt. 800) (describing state involvement in healthcare reform implementation); *see also* Gillian E. Metzger, *Federalism Under Obama*, 53 WM. & MARY L. REV. 567, 578–79 (2011) (describing state involvement in shaping Affordable Care Act regulations and implementation).

14. Dodd-Frank makes some state regulators nonvoting members of the Financial Stability Oversight Council, 12 U.S.C. § 5321(b)(2) (2012), and requires the Consumer Financial Protection Bureau to institute a rulemaking when requested by a majority of states, *id.* § 5551. *See also* Metzger, *supra* note 13, at 581–87 (describing state role in regulating and enforcing issues addressed by Dodd-Frank).

15. Scholars routinely observe that environmental law provides a particularly rich resource for observing state-federal interactions. *See, e.g.*, Ryan, *supra* note 12, at 9 (noting "in environmental law, . . . jurisdictional overlap is particularly acute and . . . the federalism discourse is most driven to extremes"); Catherine M. Sharkey, *Inside Agency Preemption*, 110 MICH. L. REV. 521, 569 (2012) (describing the "uniqueness" of the EPA's relationship with states and noting that the "EPA and the states have developed a collaborative relationship as coregulators, particularly over the past twenty years"). Moreover, the EPA traditionally promulgates among the highest number of rules of any federal agency, increasing the opportunities for interaction and study. *See, e.g.*, OFFICE OF INFO. & REGULATORY AFFAIRS, REVIEW COUNTS, www.reginfo.gov (last visited Dec.. 18, 2013).

16. *See, e.g.*, William E. Cox, *Evolution of the Safe Drinking Water Act: A Search for Effective Quality Assurance Strategies and Workable Concepts of Federalism*, 21 WM. & MARY ENVTL. L. & POL'Y REV. 69, 90 (1997) (describing state involvement in development of the EPA's groundwater rule); *see also infra* Part II.C.

17. *See, e.g.*, Bill Becker & Amy Royden-Bloom, *TOGAs: The Fabric of Our Democracy*, 40 ENVTL. L. REP. NEWS & ANALYSIS 10,776, 10,777 (2010) (describing state persuasion of the EPA to decrease the scope of the greenhouse gas permitting program); OFFICE OF POLICY, ECON., & INNOVATION, ENVTL. PROT. AGENCY, EPA-231-F-06-004, SOLVING ENVIRONMENTAL PROBLEMS THROUGH COLLABORATION (2006), *available at* http://www.epa.gov/nscep/index.html (discussing EPA collaboration with states in developing the nonroad diesel rule).

18. *See infra* text accompanying notes 243–46 (describing the listing of the polar bear under the Endangered Species Act).

19. *See infra* Part III.A.2 (describing proposals to regulate coal ash).

administrative process could be reformed to better comport with existing legitimacy models. This approach should be most attractive to those who value the reigning legitimacy models; it would call for some limits on state access to agency decisionmaking and greater transparency regarding state involvement. Second, legitimacy models could be updated to accommodate state involvement. A new model might, for example, emphasize decentralized control and checks on agency decisionmaking, to which states could contribute.

The Article proceeds in four Parts. Part II describes existing state involvement in federal agency decisionmaking. Part II first explains how federalism scholars and some judicial decisions have advocated a special role for states in the administrative process in the name of state autonomy. The Part then explains how that vision has started to play out in practice, detailing who represents states in the federal regulatory process, what interests they tend to pursue, and through what channels they operate. This marks an independent contribution to the administrative law literature, which has not yet focused on the state role. Part II concludes by identifying reasons to believe the view of some federalism scholars that states are influential in the administrative process.

Part III explains the implications of a strong state-consultation role for administrative legitimacy. It describes the prevailing descriptive and normative accounts of administrative legitimacy and explores the implications of state consultation for each, with emphasis on the significant tensions that special state access creates. Part IV sketches two possible paths forward, identifying potential reforms to state involvement in agency decisionmaking and proposing new directions for administrative legitimacy.

II. THE SPECIAL STATE ROLE IN FEDERAL AGENCY DECISIONMAKING

This Part explains the existing treatment of states in the regulatory process. It turns first to the academy: Part II.A explains how new scholarship on "administrative federalism" has praised a state voice in the federal regulatory process. This new work generally takes a sanguine view of state involvement in federal regulation and seeks access for states that is not given to other interested parties. According to this view, agencies should consult states early and often, courts should tailor administrative deference to ensure that agencies work with states, and states should be "partners" in the regulatory process. Because these scholars have focused on the goal of advancing federalism values, they have not had occasion to consider the costs that a special state-consultation role may have for administrative

legitimacy values. Part II.B explains who represents states and what interests those actors tend to pursue. Part II.C then synthesizes existing practice, focusing on channels of special state access to the federal regulatory process that have not yet been considered as a whole. Finally, Part II.D considers the plausible case that states have some influence in the administrative process.

A. Administrative Federalism

"Administrative federalism" has captured significant attention in recent years.[20] This emerging literature has arisen from twin

20. A brief etymology may be in order. "Administrative federalism" historically has been used to describe the vertical structure of cooperative federalism. *See, e.g.*, 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, 942–43 & n.422 (1998) (using "administrative federalism" to mean "a theory of nonfederal governments' entitlements that assumes that such governments will administer federal law but then ensures that they will enjoy a certain minimum of discretion in such implementation," such as existed in the Articles of Confederation). Hills notes that the term derives from the German system, where it describes an arrangement in which "the central government is forced to use the bureaucracy of the local governments to implement national law." *See id.* at 923 n.422 (citing ARTHUR B. GUNLICKS, LOCAL GOVERNMENT IN THE GERMAN FEDERAL SYSTEM 203 (1986)); *see also* Frank R. Strong, *The Future of Federalism in the United States*, 22 TEX. L. REV. 255, 275 (1944) (associating administrative federalism with "the passing down through administration of centrally-determined policy").

A new era of administrative federalism has a more particular focus: to find ways within the administrative process and administrative law doctrine to further values associated with federalism and, in particular, the protection of state autonomy. *See* Stuart Minor Benjamin & Ernest A. Young, *Tennis with the Net Down: Administrative Federalism Without Congress*, 57 DUKE L.J. 2111, 2131–32 (2008) (describing the "surprising amount of interest" devoted to administrative federalism); Brian Galle & Mark Seidenfeld, *Administrative Law's Federalism: Preemption, Delegation, and Agencies at the Edge of Federal Power*, 57 DUKE L.J. 1933, 1939 (2008) (concluding that agencies "outperform" other branches in "allocating policymaking power" between federal and state governments); Scott A. Keller, *How Courts Can Protect State Autonomy from Federal Administrative Encroachment*, 82 S. CAL. L. REV. 45, 48 (2008) (opining that "[i]t may be most important to protect federalism in the administrative law context" because "federal administrative regulations" can "reduce state autonomy without Congress ever addressing these federalism concerns"); Wayne A. Logan, *The Adam Walsh Act and the Failed Promise of Administrative Federalism*, 78 GEO. WASH. L. REV. 993, 1005, 1013 (2010) (canvassing existing administrative federalism literature and offering a case study in which "the posited federalism benefits of agency rulemaking did not come to fruition"); Nina A. Mendelson, Chevron *and Preemption*, 102 MICH. L. REV. 737, 741–42 (2004) (observing that although agencies "generally have significant incentives to take state concerns seriously," they are inferior to the other branches at valuing broader federalism values, such that courts should not grant *Chevron* deference to agency preemption decisions); Gillian E. Metzger, *Administrative Law as the New Federalism*, 57 DUKE L.J. 2023, 2028 (2008) [hereinafter Metzger, *New Federalism*] (examining the possibilities of judicial use of administrative law "as a vehicle for addressing federalism concerns"); Metzger, *supra* note 13, at 570 (noting "the central importance of the administrative sphere to modern-day federalism," because agencies, as opposed to Congress or the courts, will make "[c]ritical decisions about the actual scope of state powers and autonomy"); Catherine M. Sharkey, *Federalism Accountability: "Agency-Forcing" Measures*, 58 DUKE L.J. 2125, 2127–28

perceptions: (1) that many federalism-affecting decisions are being made by agencies,[21] and (2) that administrative law potentially provides important tools for protecting federalism values.[22] The vigor behind this effort flows from the view that existing constitutional doctrines impose few limits on the scope of federal action. If the Commerce Clause and Tenth Amendment, for example, fail to restrict meaningfully the scope of federal legislative authority, and the toothless nondelegation doctrine does not prevent Congress from giving agencies sweeping discretion, then administrative law becomes an important backstop.

The goal of administrative federalism is to seize opportunities in the administrative process and administrative law doctrine to promote federalism values. There are many such values, of course; administrative federalism scholarship generally refers to those of protecting state power and of enhancing respect for state interests. Gillian Metzger, for example, uses both "federalism" and "state interests" to "refer primarily to protecting the ability of the states to exercise meaningful regulatory power in their own right."[23] Others pursue similar goals.[24] Catherine Sharkey focuses on the related, more

(2009) (concluding that "federal agencies . . . surprisingly emerge as the best possible protectors of state regulatory interests" and that agencies should be "reform[ed] . . . to ensure they can become a rich forum for participation by state governmental entities"); Amy Widman, *Advancing Federalism Concerns in Administrative Law Through a Revitalization of State Enforcement Powers: A Case Study of the Consumer Product Safety and Improvement Act of 2008*, 29 YALE L. & POL'Y REV. 165, 167–68 (2010) (exploring tools that promote state enforcement of federal regulatory law as a means of "restoring the federalism balance"); Ernest A. Young, *Executive Preemption*, 102 NW. U. L. REV. 869, 869 (2008) (noting that "[f]ederal administrative action is, in important ways, considerably more threatening to state autonomy than legislation is" and recommending ways to limit administrative preemption); *cf.* Gillian E. Metzger, *Federalism and Federal Agency Reform*, 111 COLUM. L. REV. 1, 7 (2011) [hereinafter Metzger, *Federal Agency Reform*] (exploring the possibility that recent Supreme Court preemption decisions might "assign the states a special role in policing and reforming federal administration"). By using the term here, I refer to this more recent incarnation of administrative federalism.

21. *See, e.g.*, Keller, *supra* note 20, at 45 ("[T]he hard questions about federalism now appear in administrative law cases. Courts and commentators are becoming wary of the ability of federal agencies to encroach on state autonomy, given the underenforced constitutional norms of federalism and the nondelegation doctrine."); Metzger, *supra* note 13, at 610 (noting "the critical importance of federal administrative agencies in determining the terms of state involvement and extent of state authority").

22. *See* Metzger, *New Federalism*, *supra* note 20, at 2109 ("[G]iven the breadth of Congress's constitutional powers today, the future of federalism lies in integrating protections for the states into agency deliberations and judicial review of agency action.").

23. *See id.* at 2109 n.4 (noting that other scholars "have similarly identified preserving state regulatory autonomy as central to the project of federalism" (citing Ernest A. Young, *The Rehnquist Court's Two Federalisms*, 83 TEX. L. REV. 1, 13–15, 23–36 (2004))).

24. *See* Mendelson, *supra* note 20, at 741 (noting the article's assumption "that federalism values, such as ensuring core state regulatory authority and autonomy, are important"); Young, *supra* note 20, at 880–81 (proposing ways to use preemption doctrine to protect state autonomy).

specific value of "giving heed to state regulatory interests and how they interact with federal regulatory schemes."[25] She identifies a goal of making agencies "accountable" to "state regulatory interests" and proposes reforms to "transform the existing relationship between states and federal agencies into a true partnership."[26]

Although these scholars identify a variety of ways to implement their goals,[27] they tend implicitly or explicitly to agree that a greater state role in federal agency decisionmaking would advance their project.[28] Sharkey has been perhaps the most emphatic on this point. She views Executive Order 13,132,[29] the Clinton-era order that establishes executive branch policies regarding federalism ("the Federalism Order"), as providing a critical "blueprint" for relations between the states and federal agencies, and she praises its vision of "a cooperative partnership between states and agencies in the development of rules and regulations."[30] She specifically seeks not only compliance with the Order but also consultation on "a regular basis, even when the agency thinks that there is no federalism impact," and notice to states early in the rulemaking process so that they can help shape the rule's substance.[31] Metzger is less pointed in

25. Sharkey, *supra* note 20, at 2147–48.

26. *Id.* at 2170, 2191–92. In a forthcoming work, I disaggregate the goals of administrative federalism. *See* Miriam Seifter, *States as Interest Groups in the Administrative Process*, 99 VA. L. REV. (forthcoming September 2014). For purposes of this Article, it suffices to describe the objectives most commonly stated by leading scholars.

27. In particular, it is worth noting here that the procedural mechanisms I focus on in this Article are not necessarily the prime focus of most administrative federalism scholars. Much administrative federalism literature, for example, has focused on the level of deference (if any) that agencies should receive when taking actions that would preempt state law. *See generally* Nina A. Mendelson, *A Presumption Against Agency Preemption*, 102 NW. U. L. REV. 695, 706 (2008); Robert R.M. Verchick & Nina A. Mendelson, *Preemption and Theories of Federalism*, *in* PREEMPTION CHOICE 13, 26–27 (William W. Buzbee ed., 2009) (noting concern that federal agencies are "focused on federal needs and powers" and are consequentially "ill-suited to weigh . . . state and local interests in the course of accomplishing federal goals"); Young, *supra* note 20, at 886 (arguing that courts should not defer to an agency's conclusions regarding a statute's preemptive effect). That said, the preference for consultations between states and federal agencies is a consistent thread in the literature.

28. While administrative federalism scholars have not considered the legitimacy of agency-state consultation, they have considered "legitimacy" of another sort—the permissibility of courts imposing heightened standards when agency decisions implicate federalism values. *Compare* Metzger, *New Federalism*, *supra* note 20, at 2091–100 (arguing that courts can legitimately use both ordinary and special administrative law doctrines to serve federalism values), *with* Benjamin & Young, *supra* note 20, at 2136–40 (arguing that an approach to administrative federalism focused on agencies rather than Congress is illegitimate).

29. Exec. Order No. 13,132, 3 C.F.R. 206 (2000). The Order requires agencies, inter alia, to consult with states when developing regulations that would have implications for federalism. *See infra* Part II.B.

30. Sharkey, *supra* note 20, at 2129–30.

31. *Id.* at 2170–71.

her prescriptions, but she too accepts that federal agencies' consideration of state interests or concerns would be in line with federalism goals—and that administrative law doctrines could be modified to require agencies to undertake such consultations.[32] Others writing in this area also embrace the import of state input,[33] with some suggesting that judicial deference might be conditioned on agencies' engagement in meaningful consultations with states.[34]

As Metzger has noted, some recent Supreme Court cases might be understood as embracing administrative federalism values, in part because the cases indicate concern when agencies shut states out of the decisionmaking process.[35] First, such concern is evident in *Gonzalez v. Oregon*,[36] which held that the Controlled Substances Act did not authorize an interpretive rule effectively proscribing Oregon's dispensation of substances to assist suicide.[37] The Court noted, among other problems, that the U.S. Attorney General had failed to consult with Oregon's attorney general before issuing the rule, despite the latter's request for a meeting.[38] Second, in *Wyeth v. Levine*, the Court rejected the FDA's preemptive rule in part because of the agency's blatant bait and switch in response to state inquiries regarding the rule's effect.[39] Third, *Massachusetts v. EPA*, the 2007 climate change

32. Metzger, *New Federalism*, *supra* note 20, at 2086.

33. *See* Mendelson, *supra* note 20, at 777 (describing the potential for state participation in agency decisionmaking to "increase the chances that an agency hears and takes seriously arguments relating to federalism values and state interests").

34. *See* Young, *supra* note 20, at 891–92 (describing a potential preemption-specific version of *Skidmore* deference). In a related vein, many scholars who oppose or wish to limit preemption decisions by federal agencies do so in part because they believe agencies are not sufficiently sensitive to state interests. *See, e.g.*, Cass R. Sunstein, *Nondelegation Canons*, 67 U. CHI. L. REV. 315, 331 (2000) (discussing the idea that preemption decisions "must be made legislatively, not bureaucratically" because of "the various safeguards against cavalier disregard of state interests created by the system of state representation in Congress").

35. *See* Metzger, *New Federalism*, *supra* note 20, at 2031–39 (analyzing administrative federalism principles in *ADEC v. EPA*, *Gonzales v. Oregon*, and *Massachusetts v. EPA*). Metzger also describes other federalism-related concerns evident in Supreme Court decisions, including concerns that decisions substantively intruded upon state interests. *See id.* at 2058–60.

36. 546 U.S. 243 (2006).

37. *Id.* at 269–70.

38. *Id.* at 253–54, 270; *see* Metzger, *New Federalism*, *supra* note 20, at 2056 & n.123 ("[L]ack of consultation is a theme the *Oregon* majority returned to frequently, noting in particular that the attorney general [sic] failed to consult with Oregon notwithstanding Oregon's express request . . . ."). The Court also stated that the interpretive rule intruded on the traditionally "local concern" of health and safety regulation. *See Gonzales*, 546 U.S. at 271 (quoting Hillsborough Cnty. v. Automated Med. Labs., Inc., 471 U.S. 707, 719 (1985)).

39. Wyeth v. Levine, 555 U.S. 555, 577 (2009) (deeming the FDA's "views on state law . . . inherently suspect in light of [its] procedural failure" to "offer[] states or other interested parties notice or opportunity for comment" on the rule's preemptive effect); *see also* Metzger, *Federal Agency Reform*, *supra* note 20, at 17 (noting "the majority's criticism of the FDA's failure

decision,[40] might be understood as suggesting that federal agencies have not merely procedural obligations to hear state views but also substantive obligations to heed them, at least where states face collective action problems. These factors gave Massachusetts "special solicitude" in the Court's standing analysis.[41] Four years later, in *American Electric Power Co. v. Connecticut*, a case decided after Metzger's study, the Court underscored the state-consultation role when it described *Massachusetts v. EPA*, explaining that it is "altogether fitting" that the EPA—and not the judiciary—is the "primary regulator of greenhouse gas emissions" in part because the EPA can consult with state regulators when reaching a decision.[42] These opinions do not, or perhaps do not yet, establish a doctrinal rule grounded in administrative federalism. Still, they develop a theme resonating with Justice Stevens's dissenting position in *Geier v. American Honda Motor Co.*—that "dialogue" between states and agencies through the notice-and-comment process is critical to bridging agencies' "political accountability gap" and addressing federalism concerns.[43]

The next two Sections describe how some of the ideals of administrative federalism have already gained traction in practice through state access to the regulatory process.[44]

B. States and Their Interests

Legal literature often elides the question of who represents states in the federal regulatory process, treating "the states" as a

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to provide states with notice and an opportunity to comment on its changed preemption views or a detailed defense of that change").

40. 549 U.S. 497, 520 (2007).

41. Justice Stevens's opinion for the Court makes heavy reference not only to Massachusetts's "procedural right," but also to the EPA's duty and responsibility to "protect Massachusetts" in light of the "sovereign prerogatives" that states gave up when they joined the union. *See id.* at 519, 520, 527; *see also* Metzger, *New Federalism*, *supra* note 20, at 2057 (describing the role of administrative procedure in the Court's standing analysis).

42. *See* Am. Elec. Power Co., Inc. v. Connecticut, 131 S. Ct. 2527, 2539–40 (2011) (noting that the agency can "seek the counsel of regulators in the states where the defendants are located").

43. *See* Geier v. Am. Honda Motor Co., 529 U.S. 861, 908 (2000) (Stevens, J., dissenting).

44. Some administrative law scholars not writing about federalism issues have occasionally mentioned the possibility of a state role in agency decisionmaking, but only in passing. *See, e.g.*, Anne Joseph O'Connell, *Political Cycles of Rulemaking: An Empirical Portrait of the Modern Administrative State*, 94 VA. L. REV. 889, 911 n.72 (2008) ("Other agencies and states can also pressure agencies."); Wendy Wagner et al., *Rulemaking in the Shade: An Empirical Study of EPA's Air Toxic Emission Standards*, 63 ADMIN. L. REV. 99, 141 (2011) (noting that empirical results indicate substantial state participation in rulemaking and stating that further study is warranted "to better understand . . . the role of the states").

generic category, or as fifty monoliths. Yet in order to assess the effect of state involvement on administrative legitimacy, one must have some sense of who the relevant state actors are in the federal regulatory process and what interests they tend to advocate. This Section addresses those two questions.

1. Who Represents States in the Federal Regulatory Process?

Two players work most closely with federal agencies: state administrators and state lobbying associations, which I call "state interest groups."[45] Consider first state administrators. Due mainly to the interdependent structure of federal programs, described in more detail below, administrators—more so than elected officials—tend to be knowledgeable about particular regulatory issues and immersed in the details of the relevant programs. They often develop relationships with their federal counterparts based on their common work and shared professional experiences. To be sure, other state actors sometimes interface with agencies; state legislators or governors might comment on high-profile rulemakings, and the Federalism Order calls for agencies to consult with elected state officials on qualifying proposals. But as the guidance governing the Federalism Order recognizes, interactions between federal and state administrators are the norm.[46]

When consulting with federal agencies, state administrators often function through state interest groups. Although these groups receive little attention, they play a central coordinating role in

45. *See, e.g.*, DANIEL ELAZAR, FEDERALISM 161–65 (2d ed. 1972) (describing relationships that federal administrators have with state administrators and state interest groups).

Donald Haider's useful volume adopts the term "government interest groups," see HAIDER, *supra* note 12, at 90; another group of authors has used the label "translocal organizations of government actors" (TOGAs). *See* Judith Resnik et al., *Ratifying Kyoto at the Local Level: Sovereigntism, Federalism, and Translocal Organizations of Government Actors (TOGAs)*, 50 ARIZ. L. REV. 709, 709–10 (2008). This Article focuses on the role of state officials and their associations, saving for another day examination of associations of local officials, which feature prominently in Haider and Resnik's studies.

46. The EPA's implementing guidance states that administrators should, "[o]f course, . . . continue to work with your professional S/L government counterparts." ENVTL. PROT. AGENCY, EPA'S ACTION DEVELOPMENT PROCESS, GUIDANCE ON EXECUTIVE ORDER 13132, at 20 (2008), *available at* http://www.govexec.com/pdfs/111908rb1.pdf. Similarly, the OMB guidance states, "We understand that many agencies consult routinely with their professional counterparts in State and local governments (often civil servants, not elected officials)," and that while agencies must include elected officials in the consultation process, they should also "continue to work with their professional counterparts." OFFICE OF MGMT. & BUDGET, EXEC. OFFICE OF THE PRESIDENT, M-00-02, GUIDANCE FOR IMPLEMENTING E.O. 13132, at 4 (Oct. 28, 1999), *available at* http://www.whitehouse.gov/sites/default/files/omb/assets/regulatory_matters_pdf/m00-02.pdf.

interactions between states and federal agencies, and their involvement can affect consultations in meaningful ways. In a separate work, I analyze state interest groups in detail.[47] This Article describes only briefly the groups' identities and procedural and substantive roles.

State interest groups are an interesting breed, with qualities both public and private—public because they exist to represent members of state government, private because they are not part of state government or accountable to a public constituency.[48] The oldest and most well-known state interest groups represent generalist state officials and are known as the "Big Seven."[49] Many other groups comprise specialized state administrators, and these interact even more often with federal agencies. In the environmental context, the key groups include the Environmental Council of the States, which represents heads of state environmental protection agencies, as well as dozens of subject-specific associations, like the National Association of Clean Air Agencies and the Association of Safe Drinking Water Administrators. State interest groups also exist in nearly every other area of federal regulation. For example, the National Association of Insurance Commissioners and the National Association of Regulated Utility Commissioners play prominent roles in the areas of insurance and utility regulation, respectively.

Procedurally, state interest groups help direct state input into each of the channels described below in Part II.C. The groups push agencies to hold formal consultations pursuant to the Federalism Order, and the groups' staff members usually participate in consultations. They also coordinate and occupy informal channels, conveying their members' views through calls and letters, organizing and managing agency-state workgroups, and developing agendas and resolutions that the groups' members wish to pursue with the agency. Furthermore, state interest groups hold regular (usually biannual) conferences that both state and federal administrators attend, further facilitating ongoing dialogue.[50]

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47. *See* Seifter, *supra* note 26.

48. *See* Resnik et al.*, supra* note 45, at 729 ("As one scholar of municipal associations put it, they are 'part interest groups, part associations, part institutions of government.' " (quoting Bertram Johnson, *Associated Municipalities: Collective Action and the Formation of the State Leagues of Cities*, 29 SOC. SCI. HIST. 549, 550 (2005))).

49. The "Big Seven" includes the National Governors Association, the National Conference of State Legislatures, the National Association of Counties, the U.S. Conference of Mayors, the Council of State Governments, the National League of Cities, and the International City/County Management Association. DAVID S. ARNOLD & JEREMY F. PLANT, PUBLIC OFFICIAL ASSOCIATIONS AND STATE AND LOCAL GOVERNMENT 15 n.1 (1994).

50. *See* ELAZAR, *supra* note 45, at 164–65 (describing the groups' influence).

Substantively, state interest groups share structural common ground that shapes the content of their interactions with federal agencies. Each group aims to represent a single state interest to federal agencies on a given regulatory issue. Yet each group consists of numerous, diverse state members, often with divergent views. As the next Section explores further, the need to find common ground often pushes the groups toward defenses of state fiscs and state autonomy—and, in turn, frequently translates into resistance to federal regulatory initiatives.

2. An Overview of State Interests

This Section sketches the interests these state actors tend to pursue. Of course, there is no exclusive explanation of what motivates states in the regulatory process. "[A] single-explanation theory of regulatory politics," James Q. Wilson wrote, "is about as helpful as a single explanation of politics generally, or of disease."[51] But existing literature on public administration and intergovernmental relations, as well as existing state practices, do point to certain prevalent interests of state administrators. Significantly for this Article's analysis, the interests they pursue do not necessarily correspond to the behaviors and values that legitimacy models have long directed agencies to follow. Instead, the incentives and governance structures that shape interactions between states and federal agencies suggest that states frequently work at cross purposes with those values.

First, home-state politics constrain and motivate the policy positions of individual state administrators; far from eschewing politics or taking the pulse of a national majority, as dominant administrative legitimacy theories contemplate, individual states' input is heavily political. As scholarship on principal-agent dynamics in administration explains, agencies, including state agencies, answer to their elected political principals.[52] As a result, on issues important

51. JAMES Q. WILSON, THE POLITICS OF REGULATION 393 (1980); *see also* Jacob Gersen, *Designing Agencies*, *in* RESEARCH HANDBOOK ON PUBLIC CHOICE AND PUBLIC LAW 333, 335 (Daniel A. Farber & Anne Joseph O'Connell eds., 2010) (noting the "general consensus in the literature that we simply do not know what the typical bureaucratic objective function looks like").

52. *See* Daryl J. Levinson, *Empire-Building Government in Constitutional Law*, 118 HARV. L. REV. 915, 934 (2005) (explaining that most recent models of bureaucratic behavior suggest that bureaucrats are very responsive to politicians' preferences). The starting point for predicting bureaucratic behavior was William Niskanen's model of budget maximization. *See generally* WILLIAM A. NISKANEN, JR., BUREAUCRACY AND REPRESENTATIVE GOVERNMENT, 36–42 (1971). In years since, Niskanen's account has been critiqued and updated, with emphasis on principal-agent accounts. *See* KENNETH A. SHEPSLE, ANALYZING POLITICS 407–41 (2d. ed. 2010) (collecting sources).

to state elected officials' platforms or to state constituencies, a state agency's stance will be guided by its elected principals. Indeed, the political scientist John Nugent has shown that state governors often shape their agencies' positions[53] and sometimes actively vet or dictate the positions state agencies take vis-à-vis the federal government.[54] Even absent such active controls, the positions of elected state principals tend to confine their administrative agents. In states where the governor or legislature does not acknowledge climate change,[55] for example, state environmental administrators are unlikely to advocate greenhouse gas regulation to the EPA, regardless of what their independent positions might be. Nor would state administrators in pro-fracking states lobby the EPA to regulate the practice.[56]

Though home-state politics often guide state officials' advocacy, state officials also have concerns for their regulatory autonomy and fiscal stability. These concerns, which resonate with federalism goals, can be understood as flowing from the need for what Wilson called "organizational maintenance"—assuring "the necessary flow of resources to the organization," including capital, labor, and political support.[57] State agencies need enough money to perform their duties and enough breathing room to discharge those duties in an orderly and sensible way. Studies reflect that states are frequently concerned by "one-size-fits-all" federal programs[58] that leave states with "limited flexibility"[59] as well as by federal regulation that imposes new costs

53. *See* JOHN D. NUGENT, SAFEGUARDING FEDERALISM 26–28 (2009) ("As heads of executive branches, governors can more easily articulate and enforce fealty to their administration's message.").

54. *See id.* at 26–27 (describing controls that governors exert over the positions of other state officials).

55. *See, e.g.*, Seth Cline, *Global Warming Text Was Removed from Virginia Bill on Rising Sea Levels*, U.S. NEWS & WORLD REPORTS (June 13, 2012), http://www.usnews.com/news/articles/2012/06/13/global-warming-text-was-removed-from-virginia-bill-on-rising-sea-levels (describing recent legislative efforts in Virginia to remove climate change language from a proposed bill).

56. *See* Ellen Burford, *The Need for Federal Regulation of Hydraulic Fracturing*, 44 URB. LAW. 577, 583–85 (2012) (describing the incentives for states to loosely enforce their regulations on fracking and the advantages of federal regulation).

57. JAMES Q. WILSON, BUREAUCRACY 181 (1991).

58. *See* NUGENT, *supra* note 53, at 45 (noting that state officials seeking flexibility "complain about cookie-cutter and one-size-fits-all federal solutions to problems that manifest themselves differently in different states").

59. *See* US GOV'T ACCOUNTABILITY OFFICE, GAO-07-883, EPA-STATE ENFORCEMENT PARTNERSHIP HAS IMPROVED, BUT EPA'S OVERSIGHT NEEDS FURTHER ENHANCEMENT 10 (2007) ("Many state officials expressed concerns about having limited flexibility, too much EPA control, and excessively detailed EPA oversight.").

(like unfunded mandates).[60]

These institutional concerns frequently take a back seat to politics when states interact individually with federal agencies, but they are channeled forcefully by state interest groups, which must find common ground among their diverse members and often must settle for lowest common denominator positions.[61] Because states can often agree on preserving their existing authority, discretion, and funds, and because states often perceive federal regulation as imposing unwelcome burdens, state interest group resolutions often resist federal regulatory initiatives.[62] State interest groups tend to either oppose a regulation altogether[63] or seek more lenient standards,[64] more time to comply,[65] greater funding for federal programs that involve states,[66] or greater flexibility.[67]

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60. *See* NUGENT, *supra* note 53, at 40–44 (describing the concern state officials have for their state's fiscal security).

61. *See, e.g.*, HAIDER, *supra* note 12, at 214; Elizabeth Garrett, *Enhancing the Political Safeguards of Federalism? The Unfunded Mandates Reform Act of 1995*, 45 U. KAN. L. REV. 1113, 1124 (noting that states often can only agree on vague policy statements).

62. To be sure, states do not perceive all federal regulations as entailing unwelcome burdens, and even when they do, states may regard a particular federal regulation as providing a net benefit (or a necessary evil) if it comes with funding. *See, e.g.*, Levinson, *supra* note 52, at 941 (stating federal spending is often desired by state officials). Still, it is not the norm for state interest groups to *advocate* for new or more stringent federal regulation. In one instance where such advocacy occurred, a contingent of the group's members ultimately revolted and started their own alternative group. *See* Jeremy P. Jacobs, *Officials From 17 States Launch Splinter Group of Regulatory Agencies*, GREENWIRE (Jan. 23, 2013), http://www.eenews.net/stories/1059975195 (describing rift within the National Association of Clean Air Agencies, which had been urging the federal government to take action on greenhouse gas regulation and to protect EPA's regulatory authority from proposed legislation that would have reduced it).

63. *See, e.g.*, *infra* notes 204–12 and accompanying text (discussing state opposition to regulation of coal ash).

64. *See, e.g.*, *infra* note 149 and accompanying text (describing state lobbying of the EPA to set more lenient thresholds for greenhouse gas permitting under federal "tailoring" rule).

65. *See, e.g.*, Revision to Ambient Nitrogen Dioxide Monitoring Requirements, 77 Fed. Reg. 64,244, 64,244–49 (Oct. 19, 2012) (explaining that, based on state input, the EPA was proposing to delay the deadlines for states to establish monitors for near-road nitrogen dioxide emissions).

66. *See id.* (explaining state complaints of insufficient funding to implement EPA rule); *see also* ENVTL. COUNCIL OF THE STATES, RES. 09-5, FUNDING FOR CLEAN AIR ACT PROGRAMS UNDER SECTIONS 103 AND 105 (2012) (recommending $301 billion to be made available to states through grants); ENVTL. COUNCIL OF THE STATES, RES. 06-9, NATIONAL TRAINING STRATEGY IMPLEMENTATION AND FUNDING (Aug. 28, 2012) (requesting the EPA use any available funds to provide training for state air officials).

67. *See* NUGENT, *supra* note 53, at 46–50 (describing survey concluding that National Governors Association and National Association of State Legislatures most commonly took positions seeking to protect their administrative interests in flexibility); *see also, e.g.*, ENVTL. COUNCIL OF THE STATES, RES. 00-1, ON ENVIRONMENTAL FEDERALISM (Mar. 20, 2012) (expressing the organization's "support for the concept of flexibility" and urging that, "to the maximum extent possible, the means of achieving [federal] goals should be left primarily to the states").

These interests in home-state politics and state regulatory authority bear no necessary connection to the duties with which Congress charges federal agencies. Moreover, as elaborated in Part III, asking agencies to honor state interests often operates in tension with the values thought to legitimate federal agency action. Giving states special access to the administrative process, then, sets a collision course with administrative legitimacy.

C. States' Privileged Access to the Federal Regulatory Process

States have come to hold privileged yet oft-overlooked access to the federal regulatory process. States may engage in formal consultations pursuant to transsubstantive legal instruments that require agencies to consider state views, like the Unfunded Mandates Reform Act of 1995 and the Federalism Order, or pursuant to subject-specific statutes and agreements that give states a consultation role. Even more of the action appears to come through states' informal and largely subterranean consultations with agencies—through agency-state "workgroups," meetings, and regular conference calls arising from states' status as "co-regulators" in federal programs.

In describing the mechanisms of consultation between states and federal agencies, this Section focuses primarily on one agency, the EPA. Like environmental law more generally, the EPA provides a particularly rich context for studying state-federal interactions.[68] The EPA consistently generates among the most major rules of any federal agency, and it administers "cooperative" statutory programs that require sustained interaction with states.[69] The channels of agency-state consultation are thus particularly visible at the EPA.[70] For

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Scholars of intergovernmental relations have offered similar accounts of the interests states pursue vis-à-vis the federal government. In a 1972 article, the political scientist Richard Lehne identified three categories of these interests: (1) obtaining money to benefit their state; (2) advocating national policies that will be popular in their home state; and (3) autonomy—the ability to determine how policies will be implemented. *See* Richard Lehne, *Benefits in State-National Relations*, 2 PUBLIUS 75, 80–81 (1972) (citing SUZANNE FARKAS, URBAN LOBBYING (1970) (explaining the three objectives of state officials in defining their relationship with the federal government)).

68. *See supra* note 15 and accompanying text (describing the value of using the EPA as an example of broader interactions between state and federal government officials).

69. *See id.; see also infra* notes 103–13 (discussing examples of "cooperative" statutory programs and the EPA's participation in such programs).

70. This Article's focus on the EPA is consistent with the approach of generating insights by focusing study on a specific institution. *See* Edward L. Rubin, Commentary, *The New Legal Process, the Synthesis of Discourse, and the Microanalysis of Institutions*, 109 HARV. L. REV. 1393, 1425–30 (1996) (discussing the concept of microanalysis as a way to study how specific

reasons explained below, there is also cause to suppose that other agencies, particularly those that likewise administer cooperative statutes, follow similar consultation practices.

Why have the seminal accounts of the administrative process not zeroed in on the relationship between states and agencies before? One reason may be historical. Although agency-state relations are not new, their rise has been facilitated by executive and legislative developments that postdate most classic accounts of the administrative process. Moreover, while the statutes that created federal-state cooperative governance have been on the books for decades, they have now "grayed with middle age,"[71] and time has hardwired working relationships that took some time to get off the ground.

Second, most of the important exchanges between states and federal agencies occur prior to the proposal of a rule, making the relationship difficult to study. Indeed, notwithstanding judicial characterizations of the notice-and-comment process as the means through which states can share views with federal agencies,[72] states seldom rely on the official comment process as a way to make themselves heard (though submitting comments provides both a second bite at the apple and a way to create a record for posterity and subsequent litigation).[73] Because the interactions that precede a notice of proposed rulemaking seldom appear in the Federal Register,[74] it is often difficult to detect the state role.[75]

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institutions create and apply law); *see also* Vandenbergh, *supra* note 4, at 2034 & n.15 (citing Rubin in explaining the article's focus on environmental law).

71. RICHARD LAZARUS, THE MAKING OF ENVIRONMENTAL LAW 254 (2004).

72. Geier v. Am. Honda Motor Co., Inc., 529 U.S. 861, 909–10 (Stevens, J., dissenting) (mentioning that states are assured a "dialog" with agencies before regulations are passed through the notice-and-comment rulemaking procedures).

73. *See, e.g.*, E. Donald Elliott, *Re-Inventing Rulemaking*, 41 DUKE L.J. 1490, 1492–93 (1992) (famously comparing notice-and-comment rulemaking to Japanese Kabuki Theater and stating that "[n]o administrator in Washington turns to full-scale notice-and-comment rulemaking when she is genuinely interested in obtaining input from interest parties").

74. Many sources note that the same is true of presidential influence on agency decisions. *See, e.g.*, Kagan, *supra* note 3, at 2283 (noting that "rules, as a historic matter, very rarely have" mentioned the President's role); Kathryn A. Watts, *Proposing A Place for Politics in Arbitrary and Capricious Review*, 119 YALE L.J. 2, 23 (2009) (noting that "agencies . . . either fai[l] to disclose or affirmatively hid[e] political influences").

75. One important exception comes from a recent study. *See* Wagner et al., *supra* note 44, at 139–42. The authors tracked pre–Notice of Proposed Rulemaking ("NPRM") consultations on ninety rulemakings on hazardous air pollution by examining the EPA's docket index. Although the EPA is not required to document pre-NPRM consultations, it "recorded extensive communications" in the rulemakings at issue. The study found that states had fewer pre-NPRM communications with the EPA than industry, but twice as many as citizen groups. The authors

The absence of an administrative-process account of relations between states and agencies may also flow, perhaps counterintuitively, from the dominance of federalism discourse. Virtually any mention of state-federal relations tends to be cast in a federalism frame.[76] This focus may crowd out attention to other dimensions of those relations, including their implications for administrative legitimacy.

The following description of state access foreshadows the insight explored in the rest of the Article: the state-consultation role implicates the legitimacy of administrative decisionmaking, not just state autonomy. State consultations affect the substantive input that federal agencies receive, the transparency with which that input occurs, and the pressure agencies feel to accommodate various demands. State consultations also affect agencies' accountability: states might provide an additional checking function against broad federal agency power, but in doing so, they may blur lines of responsibility and reduce agencies' responsiveness to national preferences.

1. "Formal" Consultations

First, agencies may consult with states under the auspices of formal legal instruments: the Unfunded Mandates Reform Act ("UMRA"),[77] the Federalism Order, and subject-specific statutes and agreements.

The UMRA, enacted at a time when opposition to alleged federal overreaching ran so high that state and local officials staged a "National Unfunded Mandates Day" in Washington, was intended to limit federal impositions on state budgets.[78] The Act requires federal agencies, inter alia, to consult with state and local officials on regulations that would impose intergovernmental mandates[79] and to

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concluded that "[g]iven their relatively high level of engagement throughout the process," further study is warranted to better understand the role that states play. *See id.* at 141.

76. *Cf.* Edward L. Rubin & Malcolm Feeley, *Federalism: Some Notes on A National Neurosis*, 41 UCLA L. REV. 903, 906 (1994) ("We Americans love federalism . . . . It conjures up images of Fourth of July parades down Main Street, drugstore soda fountains, and family farms with tire swings in the front yard.").

77. Unfunded Mandates Reform Act of 1996, Pub. L. No. 104-4, 1996 U.S.C.C.A.N. (109 Stat.) 48, (codified at 2 U.S.C. §§ 1501 et seq. (2012)).

78. *See* S. REP. 104-1, at 2 (1995), *reprinted in* 1995 U.S.C.C.A.N. 4, 5 (discussing the concern among state and local officials over unfunded mandates).

79. 2 U.S.C. § 1534(a). Federal intergovernmental mandates are defined to include federal statutes or regulations that "impose an enforceable duty" on state or local governments, except certain conditions of federal funding, as well as federal statutes or regulations that decrease funding or strengthen conditions in certain existing federal programs. *Id.* § 658(5).

conduct a detailed analysis for any rules that may result in state or local burdens over $100 million.[80] Because the definition of intergovernmental mandates is complex and manipulable, relatively few rules have triggered the Act's formal requirements.[81] Still, some rules have done so,[82] and familiarity with the Act's requirements may well facilitate less formal communications with states.

The Federalism Order—itself issued only after "extensive consultations" with state and local representatives"[83]—requires agencies to, inter alia, "consult[ ] with State and local officials early in the process of developing" any proposed regulation with "federalism implications." The Order defines federalism implications as those with "substantial direct effects on the states, on the relationship between the national government and the states, or on the distribution of power and responsibilities among the various levels of government."[84] The consultation is supposed to occur before a rule is proposed[85]—before other parties have an opportunity to comment—and should involve "elected officials of State and local governments or their representative national organizations," which the Office of

80. For such rules, the agency must prepare a written statement—before a notice of proposed rulemaking and before promulgating a final rule—that analyzes the rule's "qualitative and quantitative costs," effects on states and the national economy, and opinions expressed by states. *Id.* § 1532(a).

81. *See Few Rules Trigger Unfunded Mandates Reform Act: Hearing Before the Subcomm. on Tech., Info. Policy, Intergovernmental Relations & Procurement Reform, Comm. on Oversight & Gov't Reform,* 111th Cong. 2 (2011) (statement of Denise M. Fantone, Dir. Strategic Issues), *available at* http://www.gao.gov/assets/130/125488.pdf.

82. *See, e.g.*, Utility MACT for Coal and Oil-Fired Electric Utility Units, 77 Fed. Reg. 9304, 9438–39 (Feb. 16, 2012) (stating that the rule "may result in expenditures of $100 million or more for state, local, and tribal governments" and thus triggered the UMRA's requirements).

83. NUGENT, *supra* note 53, at 65. The Federalism Order's back story reveals state influence. Revoking the previous Reagan order on federalism, President Clinton issued a much less state-oriented Executive Order 13,083. *See* Exec. Order No. 13,083, Federalism, 3 C.F.R. 146, 148 (1999) (revoking Executive Orders 12,612 and 12,875). States were outraged; the order was perceived as a step backward for state sovereignty, and the administration had failed to consult the states in developing it. *See* David S. Broder, *Executive Order Urged Consulting, but Didn't; State, Local Officials Want Federalism Say*, WASH. POST, July 16, 1998, at A15 (stating representatives of state and local governments wrote a letter to President Clinton demanding the Order be withdrawn); *see also* NUGENT, *supra* note 53, at 65 (describing the concerns leading to Executive Order 13,132). Three months later, President Clinton suspended Executive Order 13,083 and called for "full and adequate consultation" with states and other interested parties. *See* Exec. Order No. 13,095, 3 C.F.R. 202 (1999) (suspending Executive Order 13,083). Executive Order 13,132 followed. Exec. Order No. 13,132, 3 C.F.R. 206 (2000); *see* David S. Broder, *Federalism's New Framework; Revised Order Satisfies State and Local Officials*, WASH. POST, Aug. 5, 1999, at A21.

84. *See* Exec. Order No. 13,132, 64 Fed. Reg. 43,255, at 43,257–58 (outlining the consultation process); *id.* at 43,255 (defining "[p]olicies that have federalism implications").

85. *See id.* at 43,258 (requiring a consultation with state or local officials before official promulgation of the rule if practicable).

Management and Budget ("OMB") has construed to mean the core "Big Seven" state interest groups described above in Part II.B.[86] The consultation is meant to obtain state input not only on potential alternatives to national standards but also on the content of standards that are set.[87] Before promulgating any regulation with federalism implications, a federal agency must prepare a "federalism summary impact statement" describing the consultation process, state concerns, and the extent to which the concerns have been addressed.[88] Although early studies indicated that the Federalism Order was largely ignored,[89] more recent developments suggest that the Order matters.

First, in 2008, the EPA promulgated its own guidance for implementing the Order.[90] Developed in consultation with state officials, the EPA guidance goes further than the Order or other federal law requires. Whereas the UMRA sets the consultation threshold at $100 million in costs to state or local governments, the EPA guidance calls for consultation where costs may reach just $25 million.[91] Moreover, the guidance directs agency officials to take seriously the consultation process and prescribes detailed steps and flow charts for compliance. In the years since the guidance was issued, the EPA has conducted twelve formal consultations, dwarfing the previous consultation rate.[92] And in 2013, the EPA conducted its first

86. *See* White House Letter on Consultation and List of 'Representative National Organizations' Contacts to Donald J. Borut, Executive Director of the National League of Cities (Mar. 9, 2000), *reprinted in* ENVTL. PROT. AGENCY, *supra* note 46 (Attachment C), *available at* http://www.govexec.com/pdfs/111908rb1.pdf.

87. *See* 64 Fed. Reg. at 43,256 (requiring agencies to consult with state and local officials when considering the development of and alternatives to national standards).

88. *Id.* at 43,258. The agency must also supply the OMB with written communications that state officials submitted to the agency. *Id.*

89. *See* Mendelson, *supra* note 20, at 784 (finding that federalism impact analyses pursuant to the Order were completed at a rate of "one in a hundred or less"). While noting that bottom-line conclusions are difficult without knowing whether other rules in fact had federalism implications, Mendelson also observes that "the data raise a concern that agencies may not consider federalism impacts in every appropriate case." *Id.* A 1999 GAO Report reached similar findings, reporting that only five federalism impact analyses had been done for the over 11,000 rules issued between 1996 and 1998. *See Federalism: Implementation of Executive Order 12612 in the Rulemaking Process: Testimony Before the S. Comm. on Governmental Affairs*, 106th Cong. 1 (1999) (statement of L. Nye Stevens, Director, Federal Management and Workforce Issues) (stating that federalism assessments were rarely conducted).

90. *See* ENVTL. PROT. AGENCY, *supra* note 46, at 21 (discussing the EPA's consultation policy). Sharkey has observed that the EPA "stands apart" from other agencies in its track record on agency-state relations. Sharkey, *supra* note 15, at 532.

91. *See* ENVTL. PROT. AGENCY, *supra* note 46, at 6 (defining what the EPA considers to be "substantial compliance costs").

92. The contemplated (preproposal) rules at issue and dates of consultation included proposals regarding Coal Combustion Residuals (October 2009); the Boiler Area Source Rule (March 2010); NSPS Sewage Sludge Incinerators (May 2010); Water Quality Standards Rule

state consultation based solely on a rule's likelihood of preempting state law—a long-ignored criterion for consultation under the Order.[93]

In addition, the Obama administration has expressed support for the Federalism Order's requirements, a development which may increase other federal agencies' commitment to state consultations. An empirical study conducted by Catherine Sharkey concluded that an Obama administration memorandum on preemption issued in 2009,[94] which, inter alia, reaffirmed the Order's requirements, has caused a "policy shift" within agencies.[95] Furthermore, nearly all of the recent rulemakings under the Affordable Care Act have involved consultations with states.[96]

In addition to the transsubstantive consultation requirements imposed by the UMRA and the Federalism Order, subject-specific statutes and agreements require agencies to consult with states. The Endangered Species Act, for example, requires the Fish and Wildlife Service ("FWS") to invite and consider state comments on proposed decisions to list species as threatened or endangered. It additionally requires the FWS to provide a written justification for failing to heed the state comments.[97] The Affordable Care Act requires the relevant

(September 2010); NPDES Electronic Reporting Rule (September 2010); Utility MACT, coal and oil-fired (September 2010); Storm Water Discharges from Developed Sites (December 2010); Greenhouse Gas Emissions from Electric Utility Steam Generating Units, (April 2011) Steam Electric Utility Effluent Limitations Guidelines (October 2011); Waters of the U.S. Rule. (October – December 2011); Lead and Copper in Drinking Water (November 2011); Uniform National Discharge Standards for Military Vessels (April 2013).

93. *See* Letter from EPA to Intergovernmental Associations (Mar. 1, 2013) (on file with author); *see also* Exec. Order No. 13,132, 64 Fed. Reg. 43,255, 43,258 (requiring agencies to consult with state or local officials prior to promulgating a rule that preempts state or local laws).

94. *See* Preemption: Memorandum for the Heads of Executive Departments and Agencies, 74 Fed. Reg. 24,693, 24,693–94 (May 20, 2009) (directing agencies to limit their preemption attempts and to conduct a ten-year retrospective review of preemptive provisions to determine their compliance with federalism principles).

95. *See* Sharkey, *supra* note 15, at 531–32 (describing the change in agency policy caused by the preemption memorandum); *see also* Metzger, *supra* note 13, at 594–95 (mentioning agencies that "adopted notably more cautious positions on preemption").

96. Examples of Affordable Care Act rulemakings that involved consultations with states include: Health Insurance Market Rules, Rate Review, 77 Fed. Reg. 70,584, 70,610 (Nov. 26, 2012) (to be codified at 45 C.F.R. pts. 144, 147, 150, 154 & 156); Establishment of Exchanges and Qualified Health Plans, Exchange Standards for Employers, 77 Fed. Reg. 18,310, 18,443 (Mar. 27, 2012) (to be codified at 45 C.F.R. pts. 155–57); Establishment of the Multi-State Plan Program for the Affordable Insurance Exchanges, 77 Fed. Reg. 72,582, 72,599–600 (Dec. 5, 2012) (to be codified at 45 C.F.R. 800).

97. 16 U.S.C. § 1533(i) (2012); *see also In re* Polar Bear Endangered Species Act Listing & Section 4(d) Rule Litig.–MDL No. 1993, 709 F.3d 1, 17–18 (D.C. Cir.) (describing an agency's obligation under the Act to respond to a state's comments), *cert. denied sub nom.*, Safari Club Int'l v. Jewell, 2013 WL 3948014 (U.S. 2013).

federal agencies to consult with a state interest group in the development of several regulations, and it instructs the group to establish certain substantive standards under the Act, subject to agency approval.[98] And where statutes do not impose consultation requirements, agencies have sometimes conducted them voluntarily, entering into formal agreements with state officials or state interest groups to collaborate on various federal regulatory programs.[99]

To varying degrees, all of these legal instruments require the expenditure of resources and adherence to formal rules to satisfy consultation requirements.[100] By contrast, various channels of informal consultation allow agencies to hear state views in contexts that are less visible, less expensive, and less restricted. As the next Section describes, states and agencies commonly use these informal channels.

2. Informal Consultations

Much of the interaction between states and federal agencies occurs through informal consultations. This Section begins by describing two reasons that states succeed at obtaining an agency audience: First, the responsibilities of state and federal administrators intertwine under many federal programs. Second, because state consultation is legally required, and states are not regarded with the

98. *See* 42 U.S.C. § 18053 (creating interstate "health care choice compacts"); *id.* § 300gg (defining the "permissible age bands" for rate-setting purposes); *id.* § 300gg-15(a) (setting standards for explanation of benefits and coverage); *id.* § 18061(b) (requiring the Secretary to consult the NAIC while creating the "transitional reinsurance" program; *id.* § 18041(a) (describing the process for establishment and operation of health insurance exchanges). These requirements are described in Timothy Stoltzfus Jost, *Reflections on the National Association of Insurance Commissioners and the Implementation of the Patient Protection and Affordable Care Act*, 159 U. PA. L. REV. 2043, 2045 (2011) (describing the NAIC's role in implementing the Affordable Care Act).

99. *See, e.g.*, Agreement between CFPB and CSBS, CFPB-State Supervisory Coordination Framework (May 7, 2013), *available at* http://www.csbs.org/regulatory/Cooperative-Agreements/Documents/2013-CFPB.pdf (outlining a supervisory agreement between the Consumer Financial Protection Bureau and the Conference of State Bank Supervisors); *cf.* Mendelson, *supra* note 20, at 774 (noting "countless examples" of MOUs that "may delegate federal implementation responsibility to states, result in cooperative enforcement efforts, or devise cooperative procedures for resolving issues").

100. At the EPA, agency staff must report to the EPA's Office of General Counsel before undertaking a consultation pursuant to Executive Order 13,132 and must ultimately report to the OMB on correspondence related to rules with federalism implications. ENVTL. PROT. AGENCY, *supra* note 46, at 9, 22. Before commencing the official consultation, administrators are instructed to work preliminarily with state officials to establish a consultation plan. *Id.* at 22–24 (stating that EPA administrators are "strongly encouraged to consult with potentially affected S/L leaders or their national organizations before deciding how much consultation would be appropriate and before preparing a final consultation plan").

same suspicion as are private parties, state consultation possesses an aura of validity that does not attach to federal agency consultations with other interested groups. This Section then describes the channels and mechanisms of informal consultation.

a. Informal Consultations as Facilitated by Intertwined Regulatory Roles

As literature on cooperative federalism illuminates, the intertwined, "marble cake" responsibilities of state and federal regulators within many federal programs contribute to states' prominent voice in federal agency decisionmaking.[101] The overlapping structure of regulatory programs creates a co-regulator relationship between state and federal administrators and thereby affords states special access to the federal regulatory process.[102]

This state-federal interdependence is most salient under classic cooperative federalism statutes such as the Clean Air Act[103] and Medicaid,[104] which delegate the implementation of federal programs to states.[105] But state-federal interdependence also occurs in nondelegated federal programs, for states often still play critical roles in monitoring,[106] enforcement,[107] or other program support. Under the

101. *See* Morton Grodzins, *The Federal System* (1960), *reprinted in* AMERICAN INTERGOVERNMENTAL RELATIONS 54 (Laurence O'Toole ed., 4th ed. 2007); *see also* ELAZAR, *supra* note 45, at 50–53. By invoking marble cake rather than layer cake, Grodzins's classic account conveyed that there are no strictly state or federal policy areas in modern government. Instead, all important functions involve federal, state, and local governments. Even the "most local of local functions" like law enforcement, or the "purest central government activities" like foreign affairs, involve important roles for both the federal and state governments. Grodzins, *supra*, at 54–55.

102. CAMMISA, *supra* note 12, at 22–23; *see also* HAIDER, *supra* note 12 at 228–33.

103. 42 U.S.C. §§ 7401–642.

104. *Id.* §§ 1396–1396v.

105. Another example is the Telecommunications Act of 1996, which allows states to oversee implementation agreements between telecommunications carriers. *See* Philip J. Weiser, Chevron*, Cooperative Federalism, and Telecommunications Reform*, 52 VAND. L. REV. 1, 19 (1999). An extensive legal literature documents the dynamics and implications of cooperative federalism regimes. *See, e.g.*, *id.*; Jessica Bulman-Pozen & Heather K. Gerken, *Uncooperative Federalism*, 118 YALE L.J. 1256 (2009) (describing phenomenon of states challenging federal authority when implementing statutes); Abbe R. Gluck, *Intrastatutory Federalism and Statutory Interpretation: State Implementation of Federal Law in Health Reform and Beyond*, 121 YALE L.J. 534 (2011) (addressing statutory interpretation questions raised by statutes that designate states as implementers).

106. *See* EPA & ECOS, ENVIRONMENTAL POLLUTANT REPORTING DATA IN EPA'S NATIONAL SYSTEMS: DATA COLLECTION BY STATE AGENCIES 1 (Sept. 30, 1999) (study finding that "states are responsible for 83 to 99 percent of the environmental pollutant data contained in six key EPA data systems").

few federal environmental statutes in which states do not have "primacy" in running the regulatory program, for example, states are first-line enforcers, recipients of infrastructure grants, and collectors of a tremendous portion of the data upon upon which federal decisionmakers rely.[108] Similar stories play out in many other substantive areas, including criminal law,[109] immigration,[110] and financial regulation.[111] In all of these contexts, the federal government depends on states for the programs' success, and that interdependence impels agencies to consult with states before setting federal regulations in the first instance.[112] EPA officials have explicitly stated that the Agency is "very respectful" of states' implementation role in cooperative federalism schemes and recognizes the "need to coordinate with the states," to "talk to them very thoroughly" before rules are proposed, and to act "in a collaborative way" with states.[113]

Furthermore, the shared nature of regulatory programs also leads federal and state regulators to develop close bonds and loyalty.[114] State and federal regulators work together often, and over time their working relationships become hardwired. They also grow to share a sense of a common ground and mission.[115] Unlike other entities with whom federal agencies deal, state administrators are regulators too, with the expertise, stature, and common understanding that their positions bring. Consulting with state counterparts may therefore be a matter of respect and camaraderie as well as necessity.

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107. *See* Margaret H. Lemos, *State Enforcement of Federal Law*, 86 N.Y.U. L. REV. 698, 737 (2011) (arguing that state enforcement of federal law allows states to shape policy).

108. *See* EPA & ECOS, *supra* note 106, at 1 ("states have the primary responsibility for the collection of environmental pollutant data"); Jonathan H. Adler, *Judicial Federalism and the Future of Federal Environmental Regulation*, 90 IOWA L. REV. 377, 454 (2005) ("[M]ost environmental monitoring and enforcement occur at the state and local level.").

109. *See, e.g.*, Ryan, *supra* note 12, at 31 (describing collaborative strike force agreements and other interjurisdictional partnerships in the criminal context).

110. *See id.* at 34–35 (describing Immigration and Nationality Act ACCESS Program, which delegates to state and local officers enforcement of certain immigration matters).

111. *See, e.g.*, Mark Totten, *Credit Reform and the States: The Vital Role of Attorneys General After Dodd-Frank*, IOWA L. REV. (forthcoming), *available at* http://ssrn.com/abstract=2207726 (discussing the role of state attorneys general under the Dodd-Frank Act).

112. Larry D. Kramer, *Putting the Politics Back into the Political Safeguards of Federalism*, 100 COLUM. L. REV. 215, 278 (2000) [hereinafter Kramer, *Political Safeguards*]; Larry D. Kramer, *Understanding Federalism*, 47 VAND. L. REV. 1485, 1493 (1994) [hereinafter Kramer, *Understanding Federalism*].

113. *Inside EPA*, Interview with EPA Air & Radiation Office Chief Gina McCarthy (Jan. 24, 2013).

114. *See* Kramer, *Understanding Federalism*, *supra* note 112, at 1554 (discussing how alliances form between federal and state officials).

115. ELAZAR, *supra* note 45, at 162–63.

b. Informal Consultations as Facilitated by the Limited Restrictions on State Involvement

States' privileged access to federal agency decisionmaking also flows from the absence of opposition to or limitations on state consultations. The legal instruments described in Part II.C.1 do not just permit agencies to consult with states but affirmatively require such consultations early in the regulatory process. Moreover, whereas agencies often receive criticism for working too closely with private entities, state consultations seldom arouse the public's suspicion or disapproval. Indeed, while a deep literature documents the perils of agency capture by private entities, neither courts nor commentators use the language of capture to describe state influence on agencies.

Furthermore, another feature of the earlier-discussed Unfunded Mandates Reform Act facilitates informal state consultations. The Act exempts all consultations between states and federal agencies, whether required or not, from the requirements of the Federal Advisory Committee Act ("FACA").[116] To appreciate the import of this exemption, it is worth pausing to note the tremendous burden that FACA, despite receiving little scholarly attention, ordinarily imposes on agency communications. FACA's definition of an advisory committee is "sweeping,"[117] and the involvement of even one nonfederal advisor can bring a consultation within the statute's reach.[118] When FACA is triggered, the agency must ensure that any advisory committee represents a balance of viewpoints,[119] file a detailed charter,[120] publicize meetings in advance and allow public attendance,[121] disclose meeting minutes and any materials the committee relies upon,[122] and ensure the committee exercises independent judgment.[123] In fiscal year 2010, the estimated total cost to operate existing advisory committees—nearly 1,000 committees with roughly 80,000 members—was nearly $400 million, including approximately $180 million in federal salaries and expenses needed to

116. 2 U.S.C. § 1534(b) (2012).
117. Ass'n of Am. Physicians & Surgeons, Inc. v. Clinton, 997 F.2d 898, 903 (D.C. Cir. 1993).
118. *See* 5 U.S.C. § 1.
119. *Id.* § 5(b)(2).
120. *Id.* § 9(c).
121. *Id.* § 10(a).
122. *Id.* § 10(b), (c).
123. *Id.* § 5(b)(3).

support committee operations.[124] Agencies and presidents alike dread these expenses.[125]

The FACA exemption for federal-state meetings, then, is a boon for states. This is all the more so because both the OMB's implementing guidelines and the courts have interpreted it broadly. The OMB's guidelines emphasize that the FACA exemption must be "construed broadly" and must "not . . . act as a hindrance to full and effective intergovernmental consultation." They provide that the exemption applies "to the entire range of intergovernmental responsibilities or administration,"[126] including meetings called for "any purpose relating to intergovernmental responsibilities or administration."[127] Exempt consultations need not occur with state elected officers but may instead involve state "officials, employees," and state interest groups.[128] The courts have embraced this expansive construction.[129]

c. Avenues of Informal Consultation

Shaped by deeply intertwined state-federal regulator relationships and liberated by the lack of legal limitations or public opposition, the EPA's informal consultations with states proceed through several mechanisms.

First, there are numerous state-EPA "workgroups" that collaborate on specific rules and policy issues.[130] Current practice under the Safe Drinking Water Act ("SDWA") provides one example. Pursuant to a written set of "guiding principles" for state-federal interactions in rulemaking (which was itself developed by a state-EPA

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124. CONG. BUDGET OFFICE, COST ESTIMATE FOR H.R. 3124, FEDERAL ADVISORY COMMITTEE ACT AMENDMENTS OF 2011, at 2 (2012), *available at* http://www.cbo.gov/sites/default/files/cbofiles/attachments/hr3124.pdf.

125. President Clinton ordered agencies to terminate at least one-third of FACA-covered advisory committees and to strictly limit the formation of any new committees. *See* Exec. Order No. 12,838, 58 Fed. Reg. 8207 (Feb. 10, 1993).

126. *See* OFFICE OF MGMT. & BUDGET, EXEC. OFFICE OF THE PRESIDENT, M-95-20, GUIDELINES AND INSTRUCTIONS FOR IMPLEMENTING SECTION 204 (Sept. 21, 1995), *available at* http://www.gsa.gov/portal/content/101011.

127. OFFICE OF MGMT. & BUDGET, *supra* note 46. Similarly, state-federal consultations pursuant to Executive Order 13,132 are not subject to FACA. *See id.*

128. *See* OFFICE OF MGMT. & BUDGET, *supra* note 126. I discuss state interest groups in Part II.B.

129. Thus, consultations under a historic preservation plan among a group that included federal officials as well as state, local, and tribal officials were not subject to FACA. *See* Wyo. Sawmills, Inc. v. U.S. Forest Serv., 179 F. Supp. 2d 1279, 1304–05 (D. Wyo. 2001), *aff'd*, 383 F.3d 1241 (10th Cir. 2004).

130. *See generally* EPA-STATE/ECOS JOINT ACTIVITIES, CALENDAR YEAR 2013 (on file with author) (listing active workgroups).

workgroup), the EPA is to identify state experts to sit on rule-specific workgroups; the state experts can then participate in a rule's development until the EPA formally closes the group and commences final agency review.[131] State-EPA workgroups must stay in regular contact during the development of potential proposed rules. Similar processes play out under other statutes that the EPA administers. Under the Clean Water Act, for example, states recently took part in "extensive EPA-state discussions" and participated in a months-long "EPA-state workgroup process" that "informed the development of draft guidelines" for the EPA's nonpoint source program.[132]

State-EPA workgroups address a range of topics, from relatively technical issues to the major terms of important rulemakings. The EPA does not catalog these workgroups, so determining their quantity and scope is difficult. However, the record of recent rulemaking efforts suggests that agencies convene workgroups frequently, providing states a significant opportunity to have a voice in developing rules that concern them.[133] On the technical side, for example, a state-EPA workgroup collaborated for approximately two years to develop guidance allowing the Consumer Confidence Reports required under the SDWA—once identified by former EPA Administrator Carol Browner as the "single most effective action we can take to protect the environment"[134]—to be distributed by e-mail rather than post.[135] State-EPA workgroups have also worked to

131. *See* ENVTL. PROT. AGENCY, GUIDING PRINCIPLES FOR RULE DEVELOPMENT (May 31, 2002) (on file with author). The stated purpose of the principles is "to guide the State/EPA co-regulator partnership in the development of better, more common sense drinking water regulations." *Id.*

132. Comment Letter from Steven Gunderson, ACWA, to Denise Keeher, USEPA (Dec. 14, 2012), *available at* http://www.acwa-us.org/#!__letters.

133. *See, e.g.*, ENVTL. COUNCIL OF THE STATES, ECOS ANNUAL REPORT (2012), *available at* http://www.ecos.org/files/4866_file_2012_Annual_Report.pdf; Ass'n of Clean Water Admins., Weekly Wrap, Nov. 12–16 (2012) (on file with author); State/EPA Workgroup on Work Prioritization (2011), *available at* http://www.westar.org/Docs/Business%20Meetings/Fall11/06.3%20Top%2010%20Opportunities%20for%20Greater%20Efficiency%20or%20Reduced%20Burden%20Without%20Compromising%20Public%20Health.pdf.

134. Rena I. Steinzor, *Unfunded Environmental Mandates and the "New (New) Federalism": Devolution, Revolution, or Reform?*, 81 MINN. L. REV. 97, 216 (1996).

135. *See* EPA Interpretive Memorandum, Consumer Confidence Report Rule Delivery Options (Jan. 3, 2013) (allowing electronic delivery), *available at* http://water.epa.gov/lawsregs/rulesregs/sdwa/ccr/upload/ccrelectronicdeliveryppt.pdf; *see also* ENVTL. PROT. AGENCY, CONSIDERATION OF REGULATORY REVISIONS IN SUPPORT OF THE SECOND SIX-YEAR REVIEW OF THE NATIONAL PRIMARY DRINKING WATER REGULATIONS, at B-7 to B-8 (2009), *available at* http://water.epa.gov/lawsregs/rulesregs/regulatingcontaminants/sixyearreview/second_review/upload/Consideration-of-Other-Regulatory-Revisions-in-Support-of-the-Second-Six-Year-Review.pdf (describing "joint EPA/State workgroup").

develop proposed rules in the context of air pollution,[136] water pollution,[137] and waste.[138]

Beyond the workgroups, there are many other ongoing communications between state and federal administrators—sometimes organized, sometimes ad hoc. State interest groups, which Part II.B described, channel many of these communications. Federal environmental administrators often attend the annual or biannual meetings of these groups, including the Environmental Council of the States ("ECOS"), the national group of state environmental commissioners, as well as specific groups devoted to air, water, and waste.[139] In addition, each of these interest groups holds a variety of regular meetings and conference calls with EPA officials to discuss ongoing developments in specific subject areas. For example, ECOS holds quarterly conference calls with the EPA's Deputy Administrator, quarterly (or more frequent) calls between ECOS's subject-specific committee heads and the corresponding EPA Assistant Administrator, and an annual ECOS-EPA meeting to discuss the EPA's budget.[140] The EPA and state interest groups also hold additional ad hoc meetings—for example, ECOS visits the EPA every few months to discuss pending joint initiatives and issues of common interest.[141]

d. The Plausibility of State Influence

The foregoing account sets forth states' often-overlooked *access* to federal agency decisionmaking. What of their *influence*? Empirical studies are scarce,[142] and measuring regulatory influence in any

136. *See* State/EPA Workgroup on Work Prioritization, *supra* note 133.

137. *See, e.g.*, Ass'n of Clean Water Admins., *supra* note 133 ("Monthly State/EPA Stormwater Call: The monthly State/EPA Stormwater Workgroup (SWWG) conference calls continued this week with further discussion of options for the draft stormwater rule.").

138. *See, e.g.*, ENVTL. PROT. AGENCY, SUSTAINABLE MATERIALS MANAGEMENT (2009) (discussing state-EPA workgroup conclusions regarding waste and materials management).

139. *See supra* Part II.B.

140. EPA-STATE/ECOS JOINT ACTIVITIES, *supra* note 130.

141. Agenda, ECOS meeting with EPA officials (June 2012) (on file with author). Nina Mendelson identifies an additional way that states may participate in the development of federal regulation: by meeting with the OMB after an agency has submitted a proposal for centralized review. Mendelson, *supra* note 20, at 778.

142. Others have recognized both the dearth of existing empirical evidence regarding state influence and the difficulty in obtaining it. *See* Mendelson, *supra* note 20, at 758 (noting that "not much evidence has been presented" and that it "may be difficult to collect in a reliable form"); *see also* Metzger, *New Federalism*, *supra* note 20, at 2085 & n.225 (stating that "surprisingly little empirical evidence exists on federal-state interactions in rulemaking," and noting that "useful quantifiable data may be hard to produce"). As Mendelson notes, in the absence of empirical evidence, the extent of state access to agency decisionmaking and the incentives of agencies to listen constitute useful data points. *See id.* at 760.

context is notoriously difficult. Still, leading federalism scholars have opined that states do exert significant influence over federal agencies. Daniel Elazar's seminal work posits that "many of the ostensibly 'Federal' rules applied to the states are really 'federal' in origin—shaped by the associations of professionals serving the states and localities as well as the federal government, whose responsibility it is to implement the very same programs."[143] In the legal literature, Larry Kramer's leading scholarship explaining how federalism works describes numerous reasons that states and state interest groups are influential in Washington and with agencies in particular.[144] And in the administrative federalism literature, although scholars have not taken a uniform view on state influence,[145] some have recognized that agencies have "significant incentives" to consider state interests.[146] Several factors make these conclusions quite plausible.

First, the regulatory interdependence described in Part II.C.2 often pushes agencies to heed states' input or to compromise with them because agencies need to keep both their programs and their relationships with states running smoothly.[147] State implementation is often the federal government's only realistic option—as Kramer notes, an agency cannot afford to take over all shared programs itself.[148] Nor can a federal agency afford a dysfunctional relationship

143. ELAZAR, *supra* note 45, at 164; *see also, e.g.*, Galle & Seidenfeld, *supra* note 20, at 1973 ("The states have proven to be effective at influencing agencies to preserve their state prerogatives.").

144. *See* Kramer, *Political Safeguards*, *supra* note 112, at 284–85 (explaining that states have influence over federal officials because the federal government depends on state officials to implement federal programs); Kramer, *Understanding Federalism*, *supra* note 112, at 1522 (listing "factors and processes that influence lawmakers to take the interests of state officials and state institutions into account").

145. To the extent that administrative federalism scholars have expressed skepticism regarding agencies' likelihood to heed to state input, it stems primarily from agencies' track record of flouting the Federalism Order's consultation requirements. *See* Sharkey, *supra* note 20, at 2138–39 (describing "a sufficiently entrenched pattern of disregard for state interests," and noting studies showing agency failures to prepare federalism summary impact statements pursuant to the Order); *see also* Metzger, *New Federalism*, *supra* note 20, at 2085–86 (pointing to the studies reflecting agencies' poor track record with the Federalism Order as a possible reason that "notice-and-comment rulemaking may not actually yield significant federalism benefits," and concluding that "the jury is still out"). As noted earlier, scholars have recognized that this pattern may be starting to change, and in any event, there are numerous other channels for state interaction with federal agencies.

146. *E.g.*, Mendelson, *supra* note 20, at 769.

147. *See* ELAZAR, *supra* note 45, at 162.

148. Kramer explains:

> [B]ecause the federal government depends so heavily on state officials to help administer its programs,"—and because, "[r]ealistically speaking, Congress can neither abandon these programs nor 'fire' the states and have federal bureaucrats assume full responsibility for them, . . . [t]he federal government needs the states as

with states; frequent disputes and litigation are disruptive and costly, and they may imperil cooperation on shared tasks. Consider the EPA's recent "tailoring rule," a regulation establishing a greenhouse gas emissions threshold above which states must issue permits. States argued that the rule was feasible for them only at a higher threshold than the EPA had proposed, leaving the EPA a choice between standing its ground and risking noncooperation by states, and accommodating state concerns. The EPA chose the latter.[149]

Second, state and federal administrators often share similar backgrounds and experiences that foster greater federal sensitivity to state concerns. Many leaders in federal agencies previously worked in state executive branches as governors or heads of state agencies.[150] At the EPA, for example, numerous recent administrators and their deputies were previously governors or heads of state environmental agencies.[151] At the Department of Health and Human Services, Secretary Kathleen Sebelius is both a former governor and a former state insurance commissioner, and she has touted her familiarity with state concerns throughout the implementation of the Affordable Care Act.[152]

Third, federal administrators' political principals—the President and Congress—are sometimes vocal spokespersons for state interests in federal regulation. Scholars have well explored why this occurs:[153] Presidents need to win state support in order to succeed in the Electoral College, and many Presidents were themselves former

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much as the reverse, and this mutual dependency guarantees state officials a voice in the process.

Kramer, *Understanding Federalism*, *supra* note 112, at 1544.

149. *See* Prevention of Significant Deterioration and Title V Greenhouse Gas Tailoring Rule Step 3 and GHG Plantwide Applicability Limits, 77 Fed. Reg. 41,051 (July 12, 2012) (explaining the need to set a higher emissions threshold because a lower one would not be feasible for states); Becker & Royden-Bloom, *supra* note 17, at 10,777 (explaining state lobbying of the EPA to set a threshold higher than originally proposed).

150. *See* Kramer, *Understanding Federalism*, *supra* note 112, at 1551–52.

151. *See, e.g.*, Barry G. Rabe, *Racing to the Top, the Bottom, or the Middle of the Pack? The Evolving State Government Role in Environmental Protection*, *in* ENVIRONMENTAL POLICY 30, 49 (8th ed. 2013) (noting that former EPA Administrator Lisa Jackson and current Administrator Gina McCarthy, both former state environmental commissioners, "repeatedly emphasized their desire to work collaboratively with each state rather than impose one approach from Washington").

152. *See, e.g.*, Letter from Sec'y Kathleen Sebelius, Health & Human Servs., to Governors (Dec. 10, 2012), *available at* http://www.cms.gov/CCIIO/Resources/Files/Downloads/gov-letter-faqs-12-10-2012.pdf ("As both a former governor and state insurance commissioner, I believe that states are in the best position to make decisions about their health insurance marketplaces.").

153. *See* ELAZAR, *supra* note 45, at 163; Kramer, *Understanding Federalism*, *supra* note 112, at 1528–42; Kramer, *Political Safeguards*, *supra* note 112, at 278–87; Mendelson, *supra* note 20, at 769–77.

governors.[154] And individual members of Congress have obvious incentives to bring rewards to their home state and to avoid negative impacts on home-state interests. This was the phenomenon at work, for example, when a Wisconsin representative obtained an exemption from restrictions on diesel emissions for ships on the Great Lakes.[155] In addition, "states' rights" sometimes becomes its own tagline,[156] with both Congress and the President trying to accommodate state interests for political advantage.[157] At least on politically salient issues, pressure from Congress or the President may well constrain federal agencies from ignoring or rejecting state positions.

Finally, there is the threat of judicial review. Although the Federalism Order is not judicially enforceable, the key reviewing courts—the D.C. Circuit and the Supreme Court—are plainly sensitive to state interests and federalism concerns.[158] As previously noted, recent Supreme Court cases suggest that the Court may not look kindly on agencies shutting states out of the regulatory process or ignoring state comments.[159] Indeed, that issue lurks in the background of a case the Supreme Court will decide this Term involving the EPA's high-profile Cross-State Air Pollution Rule (commonly called "CSAPR"), which the D.C. Circuit struck down.[160] The states' circuit court briefs and public statements argued, inter alia, that the EPA had failed to consult them in setting the standards and that the resulting rules were an unfair surprise.[161] Although the D.C. Circuit's

154. *See* Mendelson, *supra* note 20, at 770.

155. *See, e.g.*, Control of Emissions from New Marine Engines, 75 Fed. Reg. 22,896, 22,916 (Apr. 30, 2010) (granting certain exemptions to "existing steamships operating exclusively on the Great Lakes"); Diana Marrero, *Obey Measure Could Block New EPA Ship Pollution Regulations*, MILWAKUEE J.-SENTINEL (Oct. 12, 2009), http://www.jsonline.com/news/wisconsin/64057622.html (describing efforts by congressman David Obey to exempt Great Lakes ships from vessel air pollution regulations).

156. *See, e.g.*, Timothy Zick, *Statehood As the New Personhood: The Discovery of Fundamental "States' Rights,"* 46 WM. & MARY L. REV. 213, 216 (2004) (discussing the "renaissance" of states' rights in modern constitutional scholarship).

157. Mendelson, *supra* note 20, at 769.

158. *Cf.* Galle & Seidenfeld, *supra* note 20, at 1978 (opining that judicial review "can create rather higher-powered incentives" for "agency deliberation about federalism," whereas executive orders "offer at most rather low-powered incentives").

159. *See supra* Part II.A.

160. *See* EME Homer City Generation, L.P. v. EPA, 696 F.3d 7, 37 (D.C. Cir. 2012) (holding that the EPA exceeded its statutory authority in its regulation of states' "good neighbor obligations"), *cert. granted*, 133 S. Ct. 2857 (2013).

161. State and Local Petitioners' Opening Brief at 42–56, *Homer City*, 696 F.3d 7 (No. 11-1302), 2012 WL 4754613; *see also* Press Release, Tex. Att'y Gen., Texas Scores Another Victory Against EPA (Aug. 21, 2012), *available at* https://www.oag.state.tx.us/oagnews/release.php?id=4126 (commenting on the D.C. Circuit's ruling on EPA's Cross-State Air Pollution Rule).

decision was framed on statutory grounds—that the Clean Air Act does not authorize the EPA to set the standards at issue—the opinion was sympathetic to the states' complaints, emphasizing the cooperation necessary for "cooperative federalism" and accusing the EPA of supplying insufficient notice and leeway to states.[162] Immediately following the decision, House Science Committee Chairman Ralph Hall released a statement applauding the ruling, accusing the agency of basing the rule on an "EPA-knows-best" approach and failing to consult with states or industry.[163] Agencies, then, can refuse to consult with and heed the states when developing a federal rule, but they do so at some peril.

For all of these reasons, one can plausibly conclude that states' special access to agencies through myriad structures and avenues for state-federal interaction translate into at least some influence. The Article turns next to the implications of that possibility.

III. TESTING THE LEGITIMACY OF THE STATE-CONSULTATION ROLE

This Part maps the state-consultation role in federal regulation onto the leading models of administrative legitimacy. The analysis shows how a strong version of the state role—one in which, as its supporters advocate, agencies listen to states—runs counter to the two most dominant models of legitimacy, presidential control and expertise, as well as two earlier models.

Although administrative law scholarship has long fixated on legitimacy,[164] the term's meaning has not always been clearly defined.[165] For some scholars, the principal legitimacy concern is whether bureaucratic decisionmaking is consistent with democratic values; some even conflate legitimacy and democracy, or refer to the inquiry as one of "democratic legitimacy."[166] Others express concern that agency decisionmaking is incompatible with constitutional values, in part because agencies wield unseparated powers of

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162. *Homer City*, 696 F.3d at 33.

163. *See* Press Release, Chairman Hall Statement on the Cross-State Air Pollution Rule (Aug. 21, 2012), *available at* http://science.house.gov/press-release/chairman-hall-statement-cross-state-air-pollution-rule (applauding the invalidation of the rule).

164. *See supra* note 4 and accompanying text; *see also* Lisa Schultz Bressman, *Beyond Accountability: Arbitrariness and Legitimacy in the Administrative State*, 78 N.Y.U. L. REV. 461, 462 (2003) ("From the birth of the administrative state, we have struggled to describe our regulatory government as the legitimate child of a constitutional democracy.").

165. *See, e.g.*, Fallon, *supra* note 8; Freeman, *supra* note 8.

166. Glen Staszewski, *Political Reasons, Deliberative Democracy, and Administrative Law*, 97 IOWA L. REV. 849, 856 (2012).

lawmaking, adjudication, and enforcement.[167] Some commentators combine these concerns.[168] Perhaps the most encompassing understanding of legitimacy links the term to public acceptance of agencies and their authority.[169]

Over the past century, attempts to resolve the perceived legitimacy problems have yielded four central accounts, or "models," of administrative legitimacy, each focused on the involvement of a key actor: Congress, bureaucrats, interest groups (and courts), and the President. Each model has both descriptive facets, sketching particular aspects of administrative decisionmaking, as well as normative facets, identifying attributes or values that purportedly legitimate the decisionmaking they describe.

The basic progression of the models, set forth in Richard Stewart's seminal account and updated to the present, is familiar,[170] and this Part will recount that progression only briefly. In the early era of administrative law, commentators depicted agency decisionmaking as a "transmission belt" that merely carried congressional intent into action; legitimacy stemmed from Congress and the social contract with voters.[171] When open-ended New Deal delegations to agencies made the transmission belt concept implausible, a second approach cast administration as a science.[172] Under this expertise model, the discipline inherent in the objective work of bureaucrats legitimated agencies from within. But this model too emerged as inapt; few administrative decisions were purely technical, and administrators were susceptible to influence—particularly industry influence—as they made value judgments. That observation spurred reforms toward a third model of "interest representation," in which legitimacy stems from a quasi-legislative process that accounts for all interests, not just those of powerful regulated entities.[173] Yet scholars quickly realized that interest participation did not solve (and could exacerbate) the power imbalance among interested parties. Finally, in the most recent model, attention

167. *See* Allen, *supra* note 4.

168. *See, e.g.*, David Arkush, *Democracy and Administrative Legitimacy*, 47 WAKE FOREST L. REV. 611, 612 (2012) (connecting legitimacy to "public perceptions of legality, propriety, and efficacy").

169. *See* James O. Freedman, *Crisis and Legitimacy in the Administrative Process*, 27 STAN. L. REV. 1041, 1043 (1975); *see also* Freeman, *supra* note 8, at 557 ("At its core, the quest for legitimacy might be understood as the pursuit of public acceptance of administrative authority.").

170. *See generally* Kagan, *supra note* 3; Stewart, *supra* note 4.

171. *See* Stewart, *supra* note 4, at 1675.

172. *See* Kagan, *supra* note 3, at 2260–64; Stewart, *supra* note 4 at 1678.

173. *See* Kagan, *supra* note 3, at 2264–69.

has shifted to the President and the legitimacy that stems from centralized decisionmaking responsive to a national majority.[174]

As described further below, each model and its associated values still survives to varying degrees.[175] Most scholars now agree that the presidential control model is dominant, such that the legitimacy of administrative action turns on agency adherence to the President's direction and, by extension, to the preferences of the national majority. In some tension with the presidential model, variations of the expertise model place second: notwithstanding the reverence for political control, many courts and scholars continue to demand objective, apolitical decisionmaking by agencies. The values associated with the models of congressional control and interest representation also retain purchase, often as supplementary sources of legitimacy. In addition to expertise or presidential control, agencies must heed congressional will where that will is ascertainable, and they must maintain, within reason, decisionmaking procedures open and accessible to all. Figure 1 summarizes the four models of legitimacy and the values associated with each.

174. *See id.* at 2246.

175. On the continued existence of the various models, see, for example, Bressman, *supra* note 164, at 469 ("[E]ach model still exists today in some combination with the other models"); Kagan, *supra* note 3 (same); Gerald E. Frug, *The Ideology of Bureaucracy in American Law*, 97 HARV. L. REV. 1276, 1284 (1984) (noting that "current legal theorists often merge all four models together"); Richard B. Stewart, *Administrative Law in the Twenty-First Century*, 78 N.Y.U. L. REV. 437, 443–44 (2003) ("The earlier approaches have not disappeared. Administrative law has been profoundly conserving.").

Figure 1: Summary of Standard Models and Values of Administrative Legitimacy

Model:	**Transmission Belt**	**Expertise**	**Interest Representation**	**Presidential Control**
Description	Agencies are a mere extension of Congress	Decisionmaking by experts (as opposed to politicians) is intrinsically legitimate	Bargaining among groups confers the legitimacy of a quasi-legislative process	Presidential oversight makes agencies responsive and accountable to the will of the People
Values	Fidelity to congressional command	Apolitical, independent, expert reasoning	Transparency and accessibility to all groups, which helps avoid capture	Accountability to the majority; avoidance of minority faction; transparency
Key actor	Congress	Bureaucrats	Interest groups (and courts)	President

This Part tests a strong form of the state-consultation role against each model of legitimacy. The analysis focuses on the two reigning models of presidential control and expertise; it then briefly attends to interest representation and congressional control. Like private actors, states will often act in ways that work at cross purposes with the traits thought to make agencies legitimate. States will often act in tension with the President, not merely in concert with him; they will push political decisions, not merely expert ones; and they will align themselves with private interests, not merely public ones. And though states will not *always* undermine legitimacy models, there is no way to tell ex ante, or often even at the time of state consultation, whether they will do so. Administrative law scholars should be clear-eyed about the risks to existing legitimacy models posed by granting states special and often invisible access to the federal regulatory process. It is time either to revisit the state-consultation role or to update the models of legitimacy.

A word on methodology is in order. First, the assumptions and values of each model are subject to some variation. The analysis herein thus utilizes a streamlined version of each model that will not necessarily track the views of all scholars associated with the model. Second, for analytic clarity, this Article portrays each model sharply and emphasizes the ways in which a strong state-consultation role

undermines the model's key commitments. One might reasonably object that any model can tolerate imperfections, such that the tension created by state consultation is not fatal. The purpose here, however, is to expose the disconnect between the project of making states partners in federal agency decisionmaking and the conventional understandings of legitimate bureaucratic action.

A. Presidentialism: Accountability and Responsiveness to National Preferences

1. Tenets of the Presidential Control Model

The dominant model of administrative legitimacy is presidential control.[176] Described and defended powerfully by then-Professor Kagan's article proclaiming the era of presidential administration, this model ties legitimacy to democratic accountability and to the will of the people.

Presidential control is thought to achieve accountability through interrelated propositions of majoritarian responsiveness and transparency. First, the President is responsive to the majority of the American people because he caters to a national constituency—not "merely parochial interests"[177]—and cares about building his base.[178] Second, the transparency of presidential control makes accountability meaningful. The public can observe and understand administrative action because the President himself is a visible, familiar actor whose work occurs largely under the public eye.[179] If the public does not like what it sees, the "clear lines of command" of presidential

176. *See, e.g.*, Nina A. Mendelson, *Agency Burrowing: Entrenching Policies and Personnel Before A New President Arrives*, 78 N.Y.U. L. REV. 557, 580 (2003) ("[T]he dominant version of the principal-agent approach to the democratic legitimacy of administrative agencies is now the presidential control model . . . ."); Staszewski, *supra* note 167, at 851; Bressman, *supra* note 164, at 463; Farina, *supra* note 4, at 988.

177. Kagan, *supra* note 3, at 2335.

178. *See id.*; *see also* Steven G. Calabresi, *Some Normative Arguments for the Unitary Executive*, 48 ARK. L. REV. 23, 35 (1995) (discussing the incentive of the President, as the only nationally elected official, to address the needs of the majority of the American people). Although this view is widely accepted, it is not without critics. Matthew Stephenson, for example, has argued that presidentialism does *not* increase the majoritarian responsiveness of bureaucratic policy. *See* Matthew C. Stephenson, *Optimal Political Control of the Bureaucracy*, 107 MICH. L. REV. 53, 64 (2008); *see also* Jide Nzelibe, *The Fable of the Nationalist President and the Parochial Congress*, 53 UCLA L. REV. 1217, 1231–46 (2006) (challenging the conventional wisdom that the President has a more national and less parochial outlook than Congress).

179. *See* Kagan, *supra* note 3, at 2332.

administration make more feasible citizens' ability to check their leaders.[180]

As the foregoing suggests, the accountability that animates the presidentialist understanding of legitimacy prizes majoritarian adherence.[181] The model's most important premise and value is that federal agencies *should* respond to "majoritarian preferences and interests."[182] And the model posits that the President, far better than other overseers, achieves responsiveness.

A robust state-consultation role threatens the presidentialist version of accountability-based legitimacy. It undermines the model's two core assumptions: that agency decisions will track national preferences and that agency decisionmaking will be transparent and easy for the public to follow.

2. The Threat of State Consultation

a. Responsiveness to Majority Preferences

State influence jeopardizes agency responsiveness to the public majority because states, unlike the President, necessarily respond to locally bounded constituencies. Adding state influence to the work of federal agencies therefore portends the opposite effect of centralizing control under a nationally sensitive President. State consultation creates the risk of faction or parochial interests that were thought to plague earlier phases of the administrative process, on which the presidential model sought to improve.

Two tendencies already discussed underscore the possibility that state consultations will pull agencies away from majority positions. First, political considerations will often lead individual states to pursue home-state interests. In many cases, affected states will be the only states to participate meaningfully in the federal administrative process; even with broader participation, affected states may speak loudest. Where vocal states diverge from the preferences of a national majority, state influence is a force pushing agencies toward factional positions and away from the national will. Imagine, for example, that the President has determined in the wake of high-profile coal-ash disasters that the nation wants regulation of the waste product (a proposal discussed in greater detail below).[183] Or

180. *Id.*

181. Bressman, *supra* note 164, at 490; Kagan, *supra* note 3, at 2335.

182. Kagan, *supra* note 3, at 2336.

183. *See infra* notes 214–26 and accompanying text.

imagine that the President believes that a majority of the national populace wants some federal regulation of fracking.[184] The input of coal and fracking states may be (and indeed has proven to be) a powerful check against such executive action.[185] Because less affected states have less incentive to participate vocally in the process, the industry-aligned state positions demand more attention. State interest groups could, in theory, serve as a filter and channel only national majority preferences to the agencies, but that correction does not occur in practice.[186]

Second, even when state consultation conveys the considered view of a majority or more of state officials, filtering state input through state interest groups will often lead to positions that do not track the preferences of the national public. State interest groups are set up to represent states as institutions, not the interests of state constituents. As discussed, when states within these groups disagree on the merits of a proposal, they often converge on opposition to new costs or restrictions on state government flexibility.[187] These concerns often will not be shared by the general public, which tends to care more about substantive policies than details of cost allocation or administration.[188] Accordingly, state interest groups may impose checks on federal regulation even when the public prefers a federal regulatory initiative. At the least, there is no logical or necessary connection between state influence on agencies and the national will.[189]

The presidential model's majoritarian commitment has been substantially attacked, yet the state-consultation role would not

184. *See* Oil and Gas; Well Stimulation, Including Hydraulic Fracturing on Federal and Indian Lands, 77 Fed. Reg. 27,691 (proposed May 11, 2012) (to be codified at 43 C.F.R. pt. 3160) (proposing to regulate hydraulic fracturing on public lands).

185. *See, e.g.*, John M. Broder, *Regulations on Fracking Are Revised*, N.Y. TIMES (Jan. 18, 2013), http://www.nytimes.com/2013/01/19/us/regulations-on-fracking-are-revised.html?_r=0 (noting that the Department of Interior will revise its proposed hydraulic fracturing regulations, which were "opposed by oil companies and state officials"); *see infra* notes 214–26 and accompanying text.

186. This is true for multiple reasons that I explore in a separate work. First, there appears to be a tendency for states with little on the line not to oppose resolutions supported by affected states, even if the people of those states likely would vote against the resolution. Second, because state interest groups are one-state, one-vote, national majorities (measured by population) are not necessarily represented by their votes in any event.

187. *See supra* Part III.A.

188. *See* Mendelson, *supra* note 20, at 764 (noting the view that "[i]ndividual voters may be insensitive to the 'governance needs' of state and local institutions").

189. Pushing agencies away from majority preferences on the front end does not wholly destroy the presidential model of responsiveness; it still leaves an ex post electoral check on the President as a means to rein in undesirable agency action. But this alone is a weak and likely unrealistic mechanism for responsiveness. *See* Staszewski, *supra* note 167, at 868.

please even the model's critics. Lisa Bressman has articulated a dominant critique, arguing that the presidential model's focus on majoritarianism has harmfully decreased attention to the value of rational decisionmaking and the absence of arbitrariness.[190] A presidential model reformed in light of this critique might require agency decisions not only to track majority will but also to make sense and protect minority rights.[191] State consultation is unlikely to help. State parochialism may counteract the perceived tyranny of the majority, but there is no reason to believe it will do so in a way that safeguards rights or rationality. Instead, state pressure may simply bestow outsized voice to powerful minority interests, replacing majority faction with minority faction.[192] State consultation might then yield the worst of the presidential model: decreased accountability *and* decreased rationality.

b. Transparency

Moving beyond majoritarian values, state consultation also imperils the transparency values central to the executive control model of legitimacy. Rather than facilitating clarity about how agency decisions are made, state consultation adds layers of opacity. Indeed, state consultation is not only less transparent than the presidential model envisions but also less transparent than conventional interest group input. State consultation occurs largely out of public view, and the parochial interests states pursue are easily masked by federalism language.

First, because agency-state interactions occur mostly in the period before the rulemaking process begins and when ex parte contacts need not be recorded, they exist largely in the rulemaking "shade."[193] The phenomenon of opaque communications before a rule proposal is not unique to states, to be sure—as many accounts recognize, interested parties often avail themselves of the pre-rulemaking stage to conduct more private (and thus more frank) conversations with regulators.[194] Still, without a record of interactions

190. *See* Bressman, *supra* note 164, at 463–64.

191. *See id.* at 555.

192. *See* Neil K. Komesar, *A Job for the Judges: The Judiciary and the Constitution in a Massive and Complex Society*, 86 MICH. L. REV. 657, 671 (1988) (defining and distinguishing majoritarian and minoritarian bias).

193. *See* Wagner et al., *supra* note 44, at 109 (discussing pre-NPRM interactions as a form of "rulemaking in the shade").

194. *See, e.g.*, Kagan, *supra* note 3, at 2360.

between states and federal agencies, the public cannot separate the desirable interactions from the bad.

Second, the FACA exemption means that agencies can consult with states without adhering to the notice and disclosure requirements that apply to other outside consultations. This exemption produces an incongruity. Whereas agencies feel paralyzed by time-consuming, expensive protocols when they seek input from industry, scientists, or other groups, states can meet freely with state leaders and receive input on regulatory proposals without disclosure. Consequently, absent media attention, citizens will not know whether it was state consultation that pushed the agency in a particular direction. Nor will citizens know what positions their own state officials advocated, since state officials can "bend the ears of federal decisionmakers without publicity."[195]

Third, the capacious rhetoric of federalism, and the sensitivity of judges and lawmakers to federalism values, may create a different sort of transparency problem by obscuring states' underlying interests. States will almost always be able to frame their positions in terms of federalism values and may thereby garner respect or deference.[196] Under the cover of those values, states may take positions designed to protect home-state industry or politics without needing to fully air their actual interests.[197] A state may use its comparably stronger access to the agency, and its stronger credibility, to advance the views, interests, and arguments of home-state industries.

State involvement in the debate over coal-ash regulation provides an example of this transparency challenge. State opposition to federal regulation of coal ash is almost certainly driven by home-state politics and industry, but states are able to couch their positions in federalism language. In what Douglas Kysar has called "the most hotly contested environmental, health, and safety issue in the Obama Administration to date,"[198] the EPA proposed in 2010 to regulate coal

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195. Steven P. Croley & William F. Funk, *The Federal Advisory Committee Act and Good Government*, 14 YALE J. ON REG. 451, 466 (1997).

196. *See, e.g.*, Evan H. Caminker, *Judicial Solicitude for State Dignity*, 574 ANNALS AM. ACAD. POL. & SOC. SCI. 81, 83 (2001) (describing the Supreme Court's "focus on state dignitary interests").

197. This might be reason to worry about a form of the "conduit communications" Judge Wald famously discussed in the renowned smoke-scrubbing case, *Sierra Club v. Costle*, 657 F.2d 298, 405 n.520 (D.C. Cir. 1981). There, the fear was that "administration or inter-agency contacts serve as mere conduits for private parties in order to get the latter's off-the-record views into the proceeding." *Id.*

198. Douglas A. Kysar, *Commentary: Politics by Other Meanings: A Comment on "*Retaking Rationality *Two Years Later,"* 48 HOUS. L. REV. 43, 52 (2011); *see also* Thomas O. McGarity & Rena I. Steinzor, *The End Game of Deregulation: Myopic Risk Management and the Next*

ash, also known as coal combustion residuals ("CCRs"), the waste matter that remains after pulverized coal is burned to generate power. Electricity plants generate over 100 million tons of CCRs annually in the United States, and the EPA has concluded that their accumulation threatens surface and groundwater as well as human health.[199] These health concerns arise not only due to unlined waste units but also from high-profile disasters. In the most significant recent example, the Tennessee Valley Authority's Kingston Fossil Plant released over a billion gallons of waste into a nearby community.[200]

After the Kingston disaster, the EPA heeded calls to take action and proposed to regulate coal ash as a hazardous waste.[201] After OMB review, the EPA publicly proposed two alternative options: regulation of coal ash as a hazardous waste under Subtitle C of the Resource Conservation and Recovery Act or as a nonhazardous waste under Subtitle D of the Act.[202] The hazardous waste alternative generated a firestorm of opposition from a coalition of states and industry groups. Among their most emphatic claims, these groups argued that designation of coal ash as hazardous would disastrously impede "beneficial reuse" of the waste in concrete and other products. This was so, the opponents argued, even though the proposal would continue to exempt beneficially reused products from the hazardous designation. According to these critics, the mere existence of a hazardous designation for coal ash would "stigmatize" beneficial reuse of the product. Critics attacked the stigma argument as mere pretext for industry self-interest. Meanwhile, legislators have proposed at least four bills in Congress—all framed as responses to the Obama Administration's "war on coal"—to preclude a hazardous designation.

Catastrophe, 23 DUKE ENVTL. L. & POL'Y F. 93, 112–36 (2012) (presenting case study of attempts to regulate coal ash).

199. *See* LINDA LUTHER, CONG. RESEARCH SERV., R42570, PROPOSALS TO AMEND RCRA: ANALYSIS OF PENDING LEGISLATION APPLICABLE TO THE MANAGEMENT OF COAL COMBUSTION RESIDUALS 3–4 (2012) (noting that as much as 130 million tons of CCRs were generated in 2010, and that the EPA's data showed potential threats to human health and the environment "when the waste was managed in a way that lacked basic controls").

200. *See id.* at 3 (detailing the Kingston accident, where a breach in a surface impoundment pond released 1.1 billion gallons of coal fly ash slurry over more than 300 acres); *see also* Shaila Dewan, *At Plant in Coal Ash Spill, Toxic Deposits by the Ton*, N.Y. TIMES, Dec. 30, 2008, at A14 (chronicling the breach and EPA's response).

201. *See* McGarity & Steinzor, *supra* note 198, at 114 (describing original EPA proposal and OIRA review).

202. *See* Disposal of Coal Combustion Residuals from Electric Utilities, 75 Fed. Reg. 35,128, 35,133–34 (proposed June 21, 2010) (to be codified at 40 C.F.R. pts. 257, 261, 264, 265, 268, 271 & 302) (describing two alternative proposals for regulating coal combustion residuals under the Act).

The EPA, beleaguered by the controversy, has announced that there is still no "definitive time" for release of a final rule.[203]

States have been remarkably active in the coal-ash debate. In addition to official consultations with the EPA pursuant to the Federalism Order and the UMRA in 2009,[204] state interest groups have submitted numerous comment letters,[205] enacted resolutions,[206] and lobbied for legislative intervention.[207] The groups frame many of these comments in terms of regulatory burden and the desire for state autonomy. Hazardous waste regulation would be more costly for states, they argue, and would needlessly intrude upon existing state programs.[208] States have also embraced and repeated the concerns of the coal and cement industries, echoing the "stigma" argument[209] and describing crippling economic effects the regulation could have on important state industries.[210] Given the broader political picture and

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203. *See No Time Frame Set for Completing Final Coal Ash Regulations, EPA Says*, 44 ENV'T REP. (BNA) 91 (Jan. 11, 2013) (quoting EPA assistant administrator Mathy Stanislaus).

204. *See* Disposal of Coal Combustion Residuals from Electric Utilities, 75 Fed. Reg. 35,226 (describing meetings).

205. *See, e.g.*, *Comment Letters*, ASS'N ST. & TERRITORIAL SOLID WASTE MGMT. OFFICIALS, http://www.astswmo.org/Pages/Policies_and_Publications/ASTSWMO_Comment_Letters.html (last visited Oct. 10, 2013) (collecting the Association's comments); *Policy Letters*, ENVTL. COUNCIL STATES, http://ecos.org/section/policy/letters (last visited Oct. 10, 2013) (collecting letters written by the Council to various political actors).

206. *See Resolution 08-14, The Regulation of Coal Combustion Residuals*, ENVTL. COUNCIL STATES, http://dl.dropboxusercontent.com/u/8005220/Resolutions/Resolution%20Number%2008-14%20CCR%20v2013.pdf (last modified Mar. 5, 2013) (arguing that "additional federal CCR regulations would be duplicative of most state programs").

207. *See, e.g.*, Letter of Support for the Coal Residuals Re-use and Management Act from R. Steven Brown, Exec. Dir., Envtl. Council of the States, to John Shimkus, Chairman, House Subcomm. on Env't & Econ. (Oct. 12, 2011), *available at* http://www.ecos.org/files/4594_file_ECOS_Letter_to_Shimkus_on_CCR.pdf (asserting that proposed changes to the Coal Residuals Re-use and Management Act will afford states "a maximum of flexibility" in regulating coal combustion residuals and will "assure the quickest implementation").

208. *See, e.g.*, documents cited *infra* notes 209–10.

209. *See* Comment Letter on Proposed Rulemaking for Disposal of Coal Combustion Residuals from Electric Utilities from R. Steven Brown, Exec. Dir., Envtl. Council of the States, to EPA (Nov. 19, 2010), *available at* http://ecos.org/files/4303_file_CCW_Comment_Letter_to_EPA_November_2010.pdf (contending that additional federal regulation of coal combustion residuals "should not be adopted" because state-level regulation is sufficient).

210. The legislative history of the proposed coal-ash bills in the House and Senate are replete with such remarks. *See, e.g.*, *Rhetoric vs. Reality: Does President Obama Really Support an "All-of-the-Above" Energy Strategy?: Hearing Before the H. Comm. on Oversight & Gov't Reform*, 112th Cong. 6 (2012) (statement of Sec'y Michael Krancer, Dep't of Envtl. Prot., Commw. of Pa.) (stating that hazardous waste classification of coal ash would be "devastating in my State, and other States, too. . . . There is no scientific justification for it; there is no legal justification for it. It would cause the loss of between 180,000 jobs and 316,000 jobs and cost between $78 billion and $110 billion over 20 years."); Jason Fordney, *Investor Groups Say Coal Ash Is Hazardous*, ELECTRIC POWER DAILY, Sept. 16, 2010, at 2, *available at* 2010 WLNR 19407122:

the remarks of state officials, the debate appears to be motivated, in large part, by states' consideration of their politics, economies, and major industries. (It seems particularly unlikely that administrators in coal states would have been free to *support* the EPA's hazardous waste proposal, at odds with their political principals.) Yet framing the discourse in terms of state autonomy and flexibility masks states' underlying agendas.

One might respond to all of these transparency concerns by noting that so long as the President continues to make the ultimate decisions, the model's transparency is preserved. But this response misses an important component of the presidential model: meaningful transparency must allow not only visibility of the ultimate decision but also comprehensibility—the ability to see not only *what* decision is made, but also *how* and *why*. The presidential model's own adherents would likely agree. As then-Professor Kagan explained in defending the model, transparency fosters accountability when it allows the public to understand how government actors have reached a given decision.[211] This value is compromised if a visible executive makes decisions to accommodate invisible interests.

B. Expertise: Objectivity and Apolitical Decisionmaking

1. Tenets of Expertise-Based Legitimacy

Although the presidential model of legitimacy now dominates, administrative law theory still celebrates the values of the expertise model.[212]

The expertise model traces back to James Landis, who famously viewed administration as a scientific, objective endeavor in

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> In late July, Boucher and a majority of the House Energy and Commerce Committee wrote EPA Administrator Lisa Jackson expressing concerns about the effect on jobs and electricity rates of EPA regulation of coal ash. Reiterating arguments made by coal industry interests in the long-running debate, the 31 Democrats and Republicans from 22 states said EPA should not regulate coal ash as hazardous waste.

Press Release, Rep. Ed Whitfield, Whitfield Supports Kentucky Coal and Jobs, Votes to Reuse Coal Ash Responsibly (Oct. 14, 2011), *available at* http://whitfield.house.gov/press-release/whitfield-supports-kentucky-coal-and-jobs-votes-reuse-coal-ash-responsibly (proposing legislation that would bar EPA from reclassifying coal ash as a hazardous waste, and stating that "[c]ountless people across Kentucky make their living from Kentucky's coal industry and this commonsense bill would ensure that we keep those jobs in place").

211. *See* Kagan, *supra* note 3, at 2332 (stating that "a fundamental precondition of accountability in administration" is "the degree to which the public can understand the sources and levers of bureaucratic action").

212. *See, e.g.*, Watts, *supra* note 74, at 15–30 (describing continued judicial and scholarly emphasis on expertise-driven decisionmaking, notwithstanding the widespread acceptance of the presidential control model).

which legitimacy flowed from administrators' professional expertise.[213] In a strong version of the expertise model, bureaucrats know how to craft policies that advance the public interest, and this ability makes political oversight unnecessary and undesirably constraining; the constraints imposed by expertise suffice.[214] Such faith in expertise rests on "characterizing agency decisions as technical and therefore value-neutral."[215] Indeed, a perceived dichotomy between expertise and politics is a defining thread of expertise-based legitimacy.[216] The fear is that politics will "displace the long-term view, 'scientific knowledge[,] and professional experience' that seasoned bureaucratic officials bring to the administrative enterprise."[217]

To be sure, the expertise model has its limits. Scholars no longer share either Landis's view that administrative decisions are wholly objective or his view that administration is a science.[218] Perhaps more importantly, the expertise model sometimes conflicts with the presidential model: politically based decisionmaking is anathema to the former but generally palatable to the latter. Administrative law theorists have acknowledged, though not resolved, this tension.[219]

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213. *See* JAMES M. LANDIS, THE ADMINISTRATIVE PROCESS 154–55 (1938).

214. Bressman, *supra* note 164, at 471 ("[R]ather than employing external constraints . . . , the [expertise] model relied on internal ones."); Kagan, *supra* note 3, at 2261 (describing the expertise model and objections raised by its critics).

215. Mark Seidenfeld, *A Syncopated* Chevron*: Emphasizing Reasoned Decisionmaking in Reviewing Agency Interpretations of Statutes*, 73 TEX. L. REV. 83, 90 (1994).

216. *See, e.g.*, Peter L. Strauss, *From Expertise to Politics: The Transformation of American Rulemaking*, 31 WAKE FOREST L. REV. 745, 753 (1996) (noting that, in the mid-twentieth century, "[t]he dominant understanding was that agency action was 'expert,' intended to operate at some remove from politics"); *see also* Rachel E. Barkow, *Insulating Agencies: Avoiding Capture Through Institutional Design*, 89 TEX. L. REV. 15, 20 (2010) ("Related to the goal of expertise is a desire to insulate agency decisions from the sort of political horse-trading that is anathema to impartial decision making. In this sense, expertise and nonpartisanship can be seen as two sides of the same coin." (footnote omitted)).

217. Kagan, *supra* note 3, at 2353 (quoting Bruce Ackerman, *The New Separation of Powers*, 113 HARV. L. REV. 633, 696 (2000)). Kagan explains this fear but mostly rejects it, explaining why political influence and administrative expertise can operate harmoniously. *See id.* at 2353–58.

218. *See, e.g.*, *id.* at 2261 (noting that, while Landis viewed these questions as "matters of fact and science," his critics found they involved "value choices and political judgment"); Stewart, *supra* note 4, at 1678 (remarking that "many lawyers remained unpersuaded" by the expertise model and "attacked the delegation of broad discretion to administrators"). Some have argued further that administrative decisions are *predominantly* political. *See* Lawrence Lessig, *Understanding Changed Readings: Fidelity and Theory*, 47 STAN. L. REV. 395, 435 (1995) (describing a view that "administrative action" is "now seen by all to be essentially 'political' ").

219. *See* Nina A. Mendelson, *Disclosing "Political" Oversight of Agency Decision Making*, 108 MICH. L. REV. 1127, 1129 (2010) (describing scholars' arguments that administrative policy "may not be particularly defensible and may even be outright tainted" if executive influence is

Despite these limitations, vestiges of the expertise model remain prominent in administrative law.[220] Many modern scholars praise expertise as a necessary administrative virtue and contrast it with the corrosive effect of raw politics. Justice Stephen Breyer is the most well-known, arguing that highly trained bureaucrats should guide the regulatory state, insulated from politics and permitted to deploy their expertise to improve public policymaking.[221] Courts, too, have placed great value on administrative expertise, both by identifying it as a basis for judicial deference[222] and by rejecting decisions that seem inadequately expert or excessively political. The Supreme Court's seminal decision in *Motor Vehicle Manufacturers Ass'n v. State Farm Mutual Auto Insurance Co.*[223] has been "widely read over time to represent the triumph of expertise to the exclusion of politics,"[224] and the Court's decision in *Massachusetts v. EPA*[225] is best understood as an attempt "to ensure that agencies exercise expert judgment free from outside political pressures."[226] The D.C. Circuit, known for its expertise in administrative law, also calls for agency decisionmaking to deploy expertise to the exclusion of political pressure.[227]

States have the potential to enhance expertise, but they should also be expected to undermine the expertise model's values by advancing political agendas. A particular trouble, owing to the

involved); Watts, *supra* note 74, at 73–85 (detailing "objections to giving politics a place" in agency decisionmaking but concluding that "ultimately, none of them prove insurmountable").

220. *See, e.g.*, Lawrence Lessig & Cass R. Sunstein, *The President and the Administration*, 94 COLUM. L. REV. 1, 99–100 (1994) (noting that "the importance of expertise in providing the foundation for sound public judgments" remains "an enduring theme in administrative law"); Watts, *supra* note 74, at 30 (noting that "many scholars seem to accept the desirability of our current system's focus on expertise and science," and others "have spoken affirmatively about the virtues of expertise and insulation and the negative aspects of politics").

221. *See* STEPHEN BREYER, BREAKING THE VICIOUS CIRCLE 61 (1993).

222. *See* Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 865–66 (1984); *cf.* Balt. Gas & Elec. Co. v. Natural Res. Def. Council, Inc., 462 U.S. 87, 103 (1983) (stating that a court should be "at its most deferential" when an agency makes decisions "within its area of special expertise, at the frontiers of science"). For commentary, see generally Emily Hammond Meazell, *Presidential Control, Expertise, and the Deference Dilemma*, 61 DUKE L.J. 1763, 1771 (2012) (describing the "important role" of expertise "as an anchor of regulatory legitimacy that has shaped the relationship between courts and agencies").

223. 463 U.S. 29 (1983).

224. Watts, *supra* note 74, at 19.

225. *See* 549 U.S. 497, 533 (2007) (rejecting the EPA's "laundry list of reasons not to regulate," which included the President's priorities).

226. Jody Freeman & Adrian Vermeule, Massachusetts v. EPA*: From Politics to Expertise*, 2007 SUP. CT. REV. 51, 52.

227. *See* Aera Energy LLC v. Salazar, 642 F.3d 212, 220 (D.C. Cir. 2011) (describing a line of cases in which "politics has impermissibly infected an agency decision"). I discuss *Aera Energy infra* notes 247–53.

transparency challenges noted earlier, is that the public cannot easily discern which type of input states are providing.

2. The Perils of State Influence for Expertise-Based Legitimacy

In the abstract, state consultations should be a gold mine for the expertise ideal. Courts and scholars celebrate the notion that states' local knowledge and experiences as "laboratories of democracy"[228] can improve decisionmaking. In the context of the federal regulatory process, the hope is that state input will enhance agency expertise by helping federal administrators understand the ins and outs of problems that manifest differently in different states,[229] as well as the costs and viability of potential solutions.[230] Moreover, states can speak from their own regulatory experience in devising solutions, a form of expertise that most other interested groups lack, and their status as "policy entrepreneurs" may enrich their input.[231] For example, California has educated the federal government and

228. *See* 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 . . . serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.").

229. *See, e.g.*, DENISE SCHEBERLE, FEDERALISM AND ENVIRONMENTAL POLICY 2–7 (2d ed. 2004); *cf.* Michael C. Dorf & Charles F. Sabel, *A Constitution of Democratic Experimentalism*, 98 COLUM. L. REV. 267, 374 (1998) ("[I]t is necessary to take full account of local topography, wind conditions, and economic activity to determine the exposure of a particular population to various environmental risks.").

230. *See generally* Young, *supra* note 20, at 889 ("[T]here are likely to be some questions—such as how to adapt general directives to local conditions—on which state regulators have an edge."). The importance of local knowledge is paradigmatic in environmental regulation, in which "local conditions like wind patterns and geographical terrain matter in establishing environmental policy," yet often "[n]ational standards fail to capture the nuances of these local conditions." Ann E. Carlson, *Iterative Federalism and Climate Change*, 103 NW. U. L. REV. 1097, 1106 (2009) (summarizing arguments of devolution proponents). *See also* Alaska Dep't of Envtl. Conservation v. EPA, 540 U.S. 461, 488 (2004) ("A state agency, no doubt, is best positioned to adjust for local differences in raw materials or plant configurations . . . .").

231. *See* Roderick M. Hills, Jr., *Against Preemption: How Federalism Can Improve the National Legislative Process*, 82 N.Y.U. L. REV. 1, 19–22 (2007) (describing key role of state and local politicians as "natural policy entrepreneurs who can significantly influence what sorts of conditions are publicly recognized as problems"). One standard explanation for state innovation is that states are said to compete with one another for residents and capital. *See, e.g.*, Michael W. McConnell, *Federalism: Evaluating the Founders' Design*, 54 U. CHI. L. REV. 1484, 1498 (1987) (reviewing RAOUL BERGER, FEDERALISM: THE FOUNDERS' DESIGN (1987)) (describing the phenomenon of innovation through competition). Hills offers several additional reasons: state politicians need to make a name for themselves in order to challenge federal incumbents in political races, state politicians have greater innovative flexibility because they can more easily externalize the costs of their policies to other states, and different constituencies and interest groups in different states lead to policies that are not coextensive with the federal policy agenda. *See* Hills, *supra*, at 19–22.

other states in air pollution regulation,[232] and Wisconsin has been a leader in the welfare context.[233]

In practice, however, state consultation and expertise-based legitimacy are on a collision course. First, states acting individually are naturally driven by their home-state interests,[234] prioritizing politics over expertise where the two conflict. As Denise Scheberle observes in her study of state and federal interactions in the implementation of environmental laws, states often advocate to the federal government the interests of "economically important industries within state boundaries."[235] States' concern for home-state industries does not itself imply capture or wrongdoing, since industry interests may align with the state's democratic will or a public interest, but state advocacy of industry interests may nonetheless draw agencies away from expert decisions. Second, state interest groups tend to submerge the diversity of state knowledge and experience in favor of uniform, lowest common denominator positions. Because the expertise model of legitimacy prizes expertise and information gathering, and eschews reliance on extrastatutory, politically rooted considerations, both of these tendencies undermine the model.[236]

A few examples will illustrate. Consider instances of states advocating individually regarding agency decisions that implicated only their state. In *Alaska Department of Environmental Conservation v. EPA*,[237] a dispute regarding a Clean Air Act permit for Alaska's Red Dog Mine, the career engineering staff at Alaska's environmental agency initially found that the Act required use of a stringent technology. The mine, however, disagreed, and the state agency ultimately rejected the staff's view and sided with the mine. As the Court observed, the mine was "the region's largest private employer,"

232. On California's extensive experience as an air pollution "super-regulator," see Carlson, *supra* note 230, at 1110.

233. *See, e.g.*, Young, *supra* note 23, at 55 & n.262 (collecting sources describing Wisconsin's welfare program as a precursor to federal welfare reform). Young and the sources he cites also identify dozens of other areas, from public education to election procedures, in which state policy innovation has informed federal programs. *See id.* at 55 & n.264 (citing Barry Friedman, *Valuing Federalism*, 82 MINN. L. REV. 317, 399 (1997), and DAVID L. SHAPIRO, FEDERALISM 87–88 (1995)).

234. *See supra* Part III.B.

235. SCHEBERLE, *supra* note 229, at 39; *see also id.* ("In the face of pressure from these regional or state economic powerhouses, it is no surprise that state officials are likely to be more sensitive to the costs associated with regulatory compliance than are their federal colleagues.").

236. *See, e.g.*, Freeman & Vermeule, *supra* note 226, at 64 (describing concern over whether the EPA decision at issue in *Massachusetts v. EPA* was "in fact the product of expertise—a decision supported by the scientific evidence—or whether it was an instance of politics overriding scientific judgment").

237. 540 U.S. 461 (2004).

supplying "a quarter of the area's wage base."[238] During a protracted back-and-forth debate with the EPA over the permissibility of the state agency's decision, the Court noted, the state agency "candidly stated" that it aimed "[t]o support" the mine's "Production Rate Increase Project, and its contributions to the region."[239] The state agency's conclusion rested not on a technical judgment regarding feasibility or costs—indeed, the agency conceded that it had made "no judgment . . . as to the impact of . . . [the technology] on the operation, profitability, and competitiveness of the Red Dog Mine"[240]—but rather on the influence of the mine and the needs of the region.[241]

Another high-profile example of a state advancing local-industry interests to federal regulators based apparently on state political (nonexpert) considerations involves the listing of the polar bear as threatened under the Endangered Species Act. Ever since the plight of the snail darter halted construction of the Tellico Dam, listing a species under the Act has tended to evoke opposition from industry and developers.[242] Likely fearing development constraints, state environmental officials in Alaska discouraged the Fish and Wildlife Service from listing the polar bear. That attempt was unsuccessful, but the in-state dynamics were telling. The state officials told a local newspaper that "Congress should reform [the Act] by giving states equal deference in listing decisions rather than single federal agencies with biologists who might have agendas."[243] Environmental advocates see Alaska's opposition to the listing decision as "clearly show[ing] how close the state's ties are to the resource extraction industry."[244] The D.C. Circuit ultimately rejected Alaska's challenge to the listing.[245]

Another example reflects that state politics will not always favor industry. Consider here the fascinating case of *Aera Energy v.*

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238. *Id.* at 474.

239. *Id.* at 497–98.

240. *Id.* at 497.

241. *See, e.g.*, Carrie Gombos, Alaska Department of Environmental Conservation v. E.P.A., 28 HARV. ENVTL. L. REV. 537, 545–46 (2004):

> ADEC's selection of Low NOx technology for the Mine demonstrates how state agencies can succumb to industry pressure. . . . ADEC supported the Mine's choice of the less stringent and less costly technology because of Cominco's economic clout, even though ADEC was aware that it did not have an adequate justification for its choice.

242. TVA v. Hill, 437 U.S. 153 (1978).

243. Dan Joling, *Alaska Officials Pan Endangered Species Law*, ANCHORAGE DAILY NEWS (Nov. 15, 2011), http://www.adn.com/2011/11/15/2173091/alaska-officials-pan-endangered.html.

244. *Id.* (quoting Rebecca Noblin of the Center for Biological Diversity).

245. *See In re* Polar Bear Endangered Species Act Listing & Section 4(d) Rule Litig.–MDL No. 1993, 709 F.3d 1, 17–18 (D.C. Cir.), *cert. denied sub nom.*, Safari Club Int'l v. Jewell, 2013 WL 3948014 (U.S. 2013).

Salazar,[246] which featured unusually frank disclosures by both state and federal regulators of the interests they sought to advance. In that case, the now-eliminated Minerals Management Service within the Department of Interior was required to decide whether to extend certain oil and gas leases off the coast of California. Reportedly "[a]s a result of increasing hostility in California toward offshore oil development,"[247] California officials urged the agency to terminate the leases. Specifically, "[California's] Governor, other State and local officials, including California Coastal Commission members, and various Congressional members expressed opposition to or concern over development of the" leases.[248] The governor "had expressed strong opposition" to further development of the leases and supported a moratorium; Senator Diane Feinstein further urged termination of the leases on the ground that "Californians strongly oppose oil drilling off our coast."[249]

The Minerals Management Service's Pacific Regional Director charged with making the decision testified later that "his decision was based not on the merits, but on politics."[250] As the D.C. Circuit retold the tale, the Regional Director's supervisor informed him that "it 'would be politically very important to cancel some of the tracts' as a show of 'good faith to California officials,' " and that terminating the leases in question would help the supervisor "in carrying on the credibility of the region and her work in Washington."[251] The Regional Director "explained that absent these political considerations, he would have reached the opposite decision."[252]

State consultations may also undermine the expertise model when states are in conflict with one another, because they may pressure the agency to broker a deal based on politics rather than through neutral expertise. Consider here the example of emissions regulation, where states' interests vary with their upwind or downwind status, or based on their dominant industry. In *Sierra Club v. Costle*,[253] the D.C. Circuit reviewed the EPA's attempt to regulate

246. 642 F.3d 212, 215–16 (D.C. Cir. 2011).

247. Opening Brief of Appellants at 23, *Aera Energy*, 642 F.3d 212 (Nos. 10–5101, 10–5110), 2010 WL 4234745.

248. *Aera Energy*, 642 F.3d at 216–17.

249. Opening Brief of Appellants, *supra* note 248, at 23–24.

250. *Aera Energy*, 642 F.3d at 216 (quoting the Regional Director's deposition).

251. *Id.* (internal quotation marks omitted).

252. *Id.* The court ultimately upheld the agency's decision because a neutral internal review body, the Interior Board of Land Appeals, had later reached the same decision for apolitical reasons.

253. 657 F.2d 298 (D.C. Cir. 1981).

emissions of sulfur dioxide and particulate matter from certain stationary sources. As Justice Scalia glibly remarked, "[W]hat was really going on was a dispute between the high-sulphur states and the low-sulphur states. . . . I mean, if you thought that formula was scientifically arrived at and was not the product of a political compromise between the high-sulphur states and the low-sulphur states, you believe in Santa Claus."[254]

The foregoing examples highlight the parochial, politically motivated input of individual states that participate in the regulatory process. When agency rulemakings implicate the interests of many or all states, and state interest groups get involved, state consultations may present a different type of problem for the expertise model. As I address elsewhere, the groups' governance structure and need to advocate a singular position steer them away from conveying the localized information and detail valued by the expertise model.[255] Instead, the groups tend to cohere around more general positions focused on "the autonomy, fiscal viability, and integrity of the particular level of government they speak for."[256]

Again, this critique does not make state involvement in rulemaking necessarily more problematic for the expertise model than the involvement of other interest groups. The "battle between expertise and politics"[257] is a familiar legitimacy problem, not a novel one. Yet if state involvement will deepen rather than resolve the battle between expertise and politics, and will raise the same legitimacy problems that administrative law has long feared from other interest groups, affording states *privileged* access to agency decisionmaking is a fraught proposition. The expertise-based critique of state consultation thus urges reflection upon the call for a special state role in the federal regulatory process.

Moreover, some aspects of the state-consultation role may present unique concerns to legitimacy scholars who fear the elevation of politics over expertise. The prescription for that fear is usually sunshine: if courts and citizens can view and identify the inputs to agency decisionmaking, they can then distinguish the political from the expert. But as described in the earlier discussion of transparency, the state-consultation role does not afford such monitoring. Not only

254. Antonin Scalia, *The Role of the Judiciary in Deregulation*, 55 ANTITRUST L.J. 191, 197–98 (1986).

255. *See* Seifter, *supra* note 26.

256. HAIDER, *supra* note 12, at 214–15.

257. Rachel E. Barkow, *Sentencing Guidelines at the Crossroads of Politics and Expertise*, 160 U. PA. L. REV. 1599, 1601 (2012).

do state consultations occur largely invisibly, off the record, and without the disclosure that FACA requires for other consultations, but the language of federalism and state autonomy often masks *when* state input is based on political considerations.[258] Federalism values, respected throughout government and across political parties, tend to protect state input from critique.[259]

C. Fidelity to Congressional Command

Although presidential control and expertise now dominate the legitimacy landscape, administrative law retains values from two earlier models of legitimacy: congressional control and interest representation. This Section briefly addresses the implications of state consultation for each of these models and their associated values, taking congressional fidelity first.

The "traditional" model of agency behavior posits that Congress controls agency decisionmaking; agencies are mere "transmission belts" that channel congressional preferences into regulatory outputs.[260] According to this view, administrative action is legitimate because it merely operationalizes decisions by Congress, whose legitimacy is established by social contract theory.[261] The broad statutory delegations of the New Deal era plainly rendered this model inapt, because Congress entrusted vast discretion to agencies.[262] It is

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258. One might argue that even this problem is not unique to states. Private interest groups may not be able to advance their positions in terms of federalism values, but they often argue based on science or other ostensibly apolitical values. The underlying interests of private groups, however, are more often apparent, and scientific or other apparently apolitical input coming from private interest groups is often treated with skepticism.

259. Nor are there discrete subject areas in which state lobbying can be assumed to be apolitical. One might argue that highly technical areas are most conducive to state-federal expert collaboration. But even in the context of drinking water standards, which are often overwhelming in their technical detail, states take political positions—in the sense that they are driven by sensitivity to economic impacts on their home industry rather than on the effects on human health. *See generally* SCHEBERLE, *supra* note 229 (describing state opposition to tightening of the arsenic standard); Cass R. Sunstein, *The Arithmetic of Arsenic*, 90 GEO. L.J. 2255, 2257 (2002) (describing controversy over the regulation of arsenic).

260. The "transmission belt" phrase was coined by Richard Stewart in his seminal account of administrative law's evolution. *See* Stewart, *supra* note 4, at 1675 (stating that the traditional model of administrative law envisions agencies as a transmission belt for implementing congressional directives).

261. *See id.* at 1672 (discussing association of the "traditional" model with the contractarian work of Hobbes and Locke).

262. *See id.* at 1677 (stating that the sweeping powers delegated to agencies by New Deal legislation made obvious the breadth of agency discretion); *see also* Mashaw, *supra* note 4, at 22–23 (noting that "the vacuity of statutory terms stretches the thread that binds administrative action to electoral preferences virtually to the breaking point").

now implausible to expect, as the transmission belt model envisions, a "one-to-one correlation . . . between congressional intent and agency action."[263]

In recent years, some scholars have renovated the transmission belt model to create a new story of congressional control of agency decisionmaking. Positive political theorists, in particular, have described mechanisms—referred to as police patrols and fire alarms—by which Congress can control agencies to produce desired policy outcomes.[264] Other scholars posit that Congress is more involved in administration than even the positive political theorists suggest.[265] Although this work is rich and provocative, it has not restored congressional control as the dominant view of agency legitimacy, perhaps because its plausibility remains contested.[266]

Notwithstanding the abandonment of the transmission belt account and the continued debate over congressionally designed control mechanisms, the basic underlying value—that agencies should adhere to congressional will—is uncontroversial. Disregard of congressional will is understood as illegitimate both in the sense of being unlawful or ultra vires,[267] and also in the sense of being undemocratic. Thus, fidelity to congressional command remains a key starting point for inquiries into administrative legitimacy. Any force driving agencies away from what Congress has required is problematic for administrative law theorists.

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263. Merrick B. Garland, *Deregulation and Judicial Review*, 98 HARV. L. REV. 505, 586 (1985).

264. *See* Matthew D. McCubbins & Thomas Schwartz, *Congressional Oversight Overlooked: Police Patrols Versus Fire Alarms*, 28 AM. J. POL. SCI. 165, 165 (1984) (describing congressional control over agencies); *see also* Matthew D. McCubbins et al., *Structure and Process, Politics and Policy: Administrative Arrangements and the Political Control of Agencies*, 75 VA. L. REV. 431, 432 (1989) (discussing the importance of administrative structures in assuring that administrative adherence to congressional preferences).

265. *See, e.g.*, Jack M. Beermann, *Congressional Administration*, 43 SAN DIEGO L. REV. 61, 67 (2006) (detailing Congress's oversight and involvement in administration, including through periodic reports from agencies to Congress, numerous hearings, and the efforts of the Government Accountability Office (GAO) to uncover problems).

266. *See, e.g.*, David B. Spence, *Managing Delegation Ex Ante: Using Law to Steer Administrative Agencies*, 28 J. LEGAL STUD. 413, 418–19 (1999) (describing the lack of empirical support for the structure and process hypothesis, and the difficulty of obtaining it); JERRY L. MASHAW, GREED, CHAOS, AND GOVERNANCE 23–30 (1997) (describing challenges to positive political theory).

267. *See* La. Pub. Serv. Comm'n v. FCC, 476 U.S. 355, 374 (1986) (an agency "literally has no power to act . . . unless and until Congress confers power upon it"). This, of course, is also a pillar of *Chevron* and its progeny. Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 842–43 (1984) ("First, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress.").

This does not bode well for a strong version of state consultation. The interests states pursue in the federal regulatory process do not necessarily connect to the content of congressional commands. To be sure, states are sometimes motivated by organizational mandates or missions that happen to align with congressional design. If, for example, California's Air Resources Board, known for its environmental protection achievements, vigorously presses tighter emission restrictions, one might argue it does so in harmony with the purpose of the Clean Air Act.[268] But state administrators' mandates and missions often point against congressional intent. Moreover, states can be expected to pursue home-state political agendas and defend their regulatory authority, neither of which has any logical link to the content of the federal statute. A state agency's desire for less onerous monitoring requirements may well undermine a federal statutory program, and industry-driven state politics may do the same. Whatever the alignment in a particular case, all of this is to say that state interests should not be expected to track, and may often diverge from, congressional commands.

D. Interest Representation: Openness and the Struggle Against Capture

Like the transmission belt model, the interest representation model is now mostly described as a stage in administrative law's history, not a live theory. Yet its values, too, retain a place in administrative law dialogues. State consultation has the potential to advance those values, but it often threatens them—and it will be difficult to tell ex ante which will occur.

The model was a response to fears of agency capture in the 1960s—fears that regulated entities acquired control of (or at least heavily influenced) agency decisions to the detriment of intended regulatory beneficiaries.[269] Reformers rooted in ideals of pluralism and

268. Jessica Bulman-Pozen has described how states may sometimes check "a wayward federal executive branch" by "cast[ing] themselves as faithful agents of Congress, seeking to carry out a statute as Congress intended." Jessica Bulman-Pozen, *Federalism as a Safeguard of the Separation of Powers*, 112 COLUM. L. REV. 459, 489 (2012).

269. *E.g.*, Merrill, *supra* note 9, at 1043 (stating that judicial fears of agency capture in the late 1960s prompted judges to seek out ways to "force[ ] agencies to open their doors—and their minds—to formerly unrepresented points of view"); *see also, e.g.*, Garland, *supra* note 263, at 510–11 (noting that concern that the intended beneficiaries of regulatory programs were "grossly underrepresented in the process of agency decisionmaking" was a motivation behind the interest representation model.). Capture continues to receive scholarly attention, including in a recently published volume. *See* PREVENTING REGULATORY CAPTURE: SPECIAL INTEREST INFLUENCE AND HOW TO LIMIT IT (Carpenter & Moss eds., Cambridge Univ. Press 2013).

openness hoped to achieve legitimacy through a "surrogate political process" that would "ensure the fair representation of a wide range of affected interests."[270] The goal, similar to that of John Hart Ely in the constitutional context,[271] was to give voice to those who had previously not been heard.[272] Reforms took shape in judicial developments, including expanded standing for regulatory beneficiaries,[273] and in federal statutes aimed at public access to administrative process, including the Freedom of Information Act, FACA, and the Government in the Sunshine Act.[274]

Interest representation was soon rejected as a unifying legitimacy model, for the surrogate political process only replicated existing power imbalances and gave unappealing weight to private bargaining.[275] Still, courts and commentators continue to insist on (1) decisionmaking that gives consideration to any interested party, particularly those diffuse public beneficiaries who traditionally have had less voice in the administrative process, and (2) transparency, a value shared with the presidential model.[276] Each of these commitments safeguards against capture. Many worry that the administrative process falls short of these goals and that disparities in

270. Stewart, *supra* note 4, at 1670, 1712.

271. JOHN HART ELY, DEMOCRACY AND DISTRUST 135 (1980).

272. Mashaw, *supra* note 4, at 115; *see also* Bressman, *supra* note 164, at 484 (comparing interest representation to Ely's approach). Thus, the interest representation model, like the presidential model discussed earlier, and unlike the expertise model discussed previously, links legitimacy to majority will. Because the interest representation model was particularly focused on eliminating the ills of capture, however, I focus on that value in this discussion.

273. *See* Stewart, *supra* note 4, at 1729–30 (describing expansion of standing doctrine). For a discussion of other judicial developments, see, for example, Garland, *supra* note 263, at 576.

274. *See* William Funk, *Public Participation and Transparency in Administrative Law-Three Examples as an Object Lesson*, 61 ADMIN. L. REV. 171, 174 (2009) (discussing statutes intended to increase transparency and public participation).

275. Sunstein, *Factions*, *supra* note 9, at 283–84:

> [The interest representation model] foundered in light of four considerations: the fact that the relevant representatives were self-selecting; the weaknesses in the notion that the purpose of administration is to aggregate preferences; the unlikelihood that, even if preference-aggregation were desirable, it would be accomplished by a judicially-administered system of interest-representation; and the possibility that such procedures would impose costs not justified by improvements in administrative outcomes.

See also Kagan, *supra* note 3, at 2359 (noting that the "relegation of government officials to the status of brokers . . . transforms administration into a dispenser of rents and amplifies all that Americans find most distasteful in government").

276. Wendy Wagner et al. have gone so far as to state that "there are few disagreements that [interest representation] is currently the method of choice in administrative law." Wagner et al., *supra* note 44, at 100–01.

influence corrupt regulation.[277]

In the abstract, states could potentially allay interest representation theorists' fear of capture and the underrepresentation of "public interests"[278] in the regulatory process.[279] States, after all, represent an entire populace, including the diffuse interests thought to be underrepresented in federal administration. But such representation proves unreliable when states enter into the administrative process. As noted earlier, political pressure frequently pushes state administrators to lobby federal agencies for the interests of home-state industry.[280] Returning to the coal-ash example, it should not be surprising that coal states vociferously oppose classification of their core industry's waste product as hazardous. The coal industry is essential to the economy in those states. So too with the examples in *Alaska Department of Environmental Conservation* and the polar bear listing. A similar story could play out in states dominated by farming or the auto industry.[281] And when state interest groups come together in favor of state autonomy, they may form ad hoc coalitions with like-minded industry groups. All of this behavior in the federal regulatory process can exacerbate, not cure, the disparities between "public" and private interests.

Relaxing the assumption of state officials' democratic responsiveness to their constituents heightens the risk that states will exacerbate inequality in federal regulatory participation. Public choice theory posits that administrators are engaged in a system of private bargains with powerful groups, dispensing regulatory benefits in exchange for political support.[282] According to public choice theory, states would systematically side with affluent, well-organized industry groups, thereby creating powerful coalitions opposed to regulations that benefit the diffuse public. This tendency may be more pronounced

277. *See, e.g.*, Steinzor & McGarity, *supra* note 198, at 98 (arguing "that regulated industries dominate regulatory debates on Capitol Hill and at the federal agencies to an unprecedented extent").

278. Following convention, I use "public interest" to refer to interests in the general welfare that are often underrepresented in the political process. For a discussion of the phrase's meaning, see, for example, STEVEN P. CROLEY, REGULATION AND PUBLIC INTERESTS 57 & n.11 (2008).

279. *See* Wagner et al., *supra* note 44, at 141 (noting that, "[g]iven [states'] higher rate of activity" in commenting on proposed rules, "if states are serving predominantly as public interest advocates, then this . . . suggests a more formidable public interest presence than is revealed by considering public interest group engagement, standing alone").

280. *See supra* note 197 and accompanying text.

281. *Cf.* Levinson, *supra* note 52, at 941 (providing an example involving farm states and farm subsidies).

282. *See, e.g.*, MASHAW, *supra* note 266, at 13–22.

among state rather than federal officials; some scholars have suggested that states are more likely to be dominated by a particular industry group, and less likely to hear from strong "public-interest" groups, than the federal government.[283]

IV. CONCLUSION: REFORMS, CONVERGENCE, AND THE PATH AHEAD

Administrative law, commentators have noted, is always one step behind.[284] That proves to be the case for the relationship between states and federal agencies. Although the administrative federalism literature has insightfully contemplated ways in which these relationships may advance federalism values or state autonomy, scholars of the administrative process have yet to grapple with how state involvement in agency decisionmaking comports with the values long believed to make administrative decisions legitimate.

This Article has shown that states already possess significant and privileged access to federal agency decisionmaking, and it has posited that there are reasons to believe that states possess some influence in those decisions. Further, the Article has shown that there is tension between a strong state role in shaping federal agency decisions and the dominant understandings of administrative legitimacy. States may drive agencies away from national preferences, and may do so in opaque or invisible ways; they may give input based on politics, not expertise; and they may channel special interests, not just public interests.

This final Part begins to illuminate the way forward by briefly sketching two types of reforms. First, this Part identifies changes that could move the state-consultation role closer to conventional legitimacy values. Second, this Part identifies the possibility of new legitimacy values that might better accommodate a state role. To some extent, choosing which of these paths to follow, and how far down them to proceed, will depend on one's normative commitments. A federalism proponent who cares only about advancing state power

283. *See* Richard B. Stewart, *Pyramids of Sacrifice? Problems of Federalism in Mandating State Implementation of National Environmental Policy*, 86 YALE L.J. 1196, 1213 (1977) (suggesting that environmental groups are often more effective at the national level); Carlson, *supra* note 230, at 1104 ("Observers have suggested that the federal government is less subject to public choice pathologies than many states, which may be dominated by a particular industry group and may lack the strong presence of environmental advocacy groups."). *But see* Richard L. Revesz, *Federalism and Environmental Regulation: A Public Choice Analysis*, 115 HARV. L. REV. 553, 636–41 (2001) (rejecting the position that public choice pathologies are less serious at the federal level).

284. *See generally* MARTIN SHAPIRO, WHO GUARDS THE GUARDIANS (1988) (describing the reactive nature of administrative law).

might favor a strong state-consultation role in spite of its potential costs to legitimacy, whereas some dedicated legitimacy proponents might seek to limit the state role to safeguard legitimacy, regardless of the potential impact on state interests. Yet the tension between state access to the regulatory process and legitimacy values does not necessarily mark an impasse; modest reforms in both directions are likely to be widely palatable.

Enhancing transparency would begin to harmonize state consultations with existing legitimacy values. There are several ways to achieve this reform. Congress could eliminate the state FACA exemption altogether or could scale it back. Even if consultations between states and federal agencies need not satisfy the full advisory committee protocol of balanced perspectives and charters, agencies ought to docket and document state consultations. On this point, proposals for greater state transparency might be informed by scholarship seeking to increase the visibility of the President's role in agency decisionmaking. Nina Mendelson, for example, has argued that disclosure requirements might require an agency "to docket and make publicly available written rulemaking materials" it has received from the OMB, "to summarize the critical details of" key conversations with reviewing executive officials, "and [to] explain the extent to which those positions are connected to the agency's ultimate decision."[285] Similar requirements, imposed by statute or executive order, could require documentation and disclosure of agency input from states.

State-centered reforms, too, could advance transparency goals. The National Governors' Association, or a federal entity like the Administrative Conference of the United States, could develop a set of best practices for transparency in agency-state interactions. These practices might involve state disclosure to constituents of the positions that states advocate to agencies, perhaps through a state executive branch website.

These reforms would alleviate some transparency concerns but would not resolve them fully. As this Article has described, the merits and motivations underlying state advocacy are easily submerged in federalism rhetoric and can therefore be difficult to tease out. Judicial review provides another tool to address this problem. "Hard look" review, in particular, might help separate reasonable agency acceptance of state input from agency surrender to raw politics—and might in turn incentivize more deliberative agency decisionmaking.[286]

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285. Mendelson, *supra* note 219, at 1164.

286. *See* Seidenfeld, *supra* note 4, at 1547 (advancing a civic republican model under which "the court's proper function is to ensure that the agency interpreted the statute in a deliberative

Rather than awarding deference *because* agencies have consulted with states, as some administrative federalism literature suggests,[287] courts might advance legitimacy more effectively by hinging deference on an agency's meaningful explanation of its response to state input.

It is worth noting that all of these reforms are likely to inhibit somewhat the advancement of state power. As I explain elsewhere, state interest groups' sturdy commitment to defending state power is facilitated by the fact that the groups are not subject to public scrutiny; member states need not worry about disapproval from their constituents or political party.[288] Submitting the entire state-consultation process to the public eye may introduce political inhibitions that discourage states from pursuing a purely states-rights agenda. Still, this incremental change seems likely to be widely acceptable as a limited price to pay for a more accountable process.

Approaching the tension from the other side, scholars should also begin to discuss new approaches to administrative legitimacy that would incorporate values of administrative federalism. A new model might focus not on apolitical expertise or majority responsiveness but instead on checking the power of federal agencies.[289] Outside the administrative context, of course, a traditional argument for federalism is that the diffusion of power limits tyranny and protects individual rights. Perhaps recreating Madison's "double security"[290] within the administrative process would hold similar appeal; legitimacy would come not from centralized control but from decentralized control—not from the agility and responsiveness of a single overseer, but from the competition of multiple overseers with different perspectives.[291] States might check the federal administration and thereby guard against excessive executive

manner"); *see also* Sunstein, *Interest Groups*, *supra* note 9, at 61 (describing how the "hard-look" doctrine has transformed administrative decisionmaking).

287. *See supra* note 34 (describing suggestions that judicial deference should depend in part on whether the agency engaged in meaningful consultations with states).

288. *See* Seifter, *supra* note 26.

289. *Cf.* Staszewski, *supra* note 166, at 862–63 (critiquing the use of majority rule as a guiding principle for administrative legitimacy).

290. THE FEDERALIST NO. 51, at 291 (James Madison) (Clinton Rossiter ed., 1999).

291. *Cf.* Peter L. Strauss, *The Place of Agencies in Government: Separation of Powers and the Fourth Branch*, 84 COLUM. L. REV. 573, 625 (1984) (emphasizing the importance of checks and balances in administrative government).

power;[292] they might also offer the sort of "second opinion" often thought to improve decisionmaking.[293]

To be sure, this new vision would face substantial dissent, particularly from those who lament that the rulemaking process is already too ossified.[294] A defining feature of a bureaucracy, they might note, is its ability to act more swiftly than the legislature. Resolving this debate is well beyond the scope of this Article, but the possible lines of argument highlight the need for future work to explore and challenge the disconnect between the normative commitments of federalism and administrative legitimacy, and to seek points of convergence.

What we can say for now is that the calls for a greater state role in the work of federal agencies, and the special role that states already play in the federal agency decisionmaking process, sit uneasily with the legitimacy values that have defined administrative law for the past century.

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292. *Cf.* Bulman-Pozen, *supra* note 268, at 460 (explaining how states can check executive power, casting themselves as agents of Congress).

293. *See* Adrian Vermeule, *Second Opinions and Institutional Design*, 97 VA. L. REV. 1435, 1448–67 (2011) (identifying costs and benefits of second opinions in institutional design).

294. *See, e.g.*, Thomas O. McGarity, *Some Thoughts on "Deossifying" the Rulemaking Process*, 41 DUKE L.J. 1385, 1386 (1992) (noting that "many observers from across the political spectrum agree . . . that [ossification] is one of the most serious problems currently facing regulatory agencies").