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COOPERATIVE FEDERALISM, THE NEW FORMALISM, AND THE SEPARATION OF POWERS REVISITED: *FREE ENTERPRISE FUND* AND THE PROBLEM OF PRESIDENTIAL OVERSIGHT OF STATE-GOVERNMENT OFFICERS ENFORCING FEDERAL LAW

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ABSTRACT

Formalism has returned, displacing the flexible, functionalist separation-of-powers analysis that often characterized the Supreme Court's separation-of-powers decisions during the Rehnquist Court. Free Enterprise Fund v. Public Co. Accounting Oversight Board *provides powerful evidence of this emerging trend. Moreover, a reliable majority of the Justices have strongly embraced formalism in other important separation-of-powers decisions as well. A new formalism now appears to govern the Court's contemporary separation-of-powers jurisprudence—with the defenders of more flexible, functional approaches to separation-of-powers questions relegated to writing dissents. The Roberts Court, however, has failed to elucidate fully the precise scope and meaning of its new formalist*

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vision for separation-of-powers doctrine. Even so, if the Roberts Court's decisions mean what they appear to say, serious constitutional questions exist about the constitutional validity of cooperative-federalism programs in which states have primary responsibility for the administration of important federal labor, environmental, and healthcare programs. Simply put, the new formalism renders such programs open to serious constitutional attack on separation-of-powers grounds because the president arguably lacks sufficient direct oversight and control of the state-government officers who administer and enforce federal law on a day-to-day basis. But the Supreme Court need not follow the logic of its more recent separation-of-powers decisions to this ultimate conclusion; plausible arguments exist to support the claim that cooperative-federalism programs do not violate separation-of-powers doctrine even under a demanding formalist analysis. Until the full implications of the Roberts Court's embrace of the new formalism are known, legal scholars, federal judges, and administrative-law practitioners should consider carefully whether cooperative-federalism programs can successfully be reconciled with the imperatives of the unitary executive and its requirement of direct presidential control and oversight of the administration of federal law.

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INTRODUCTION

The Supreme Court has vacillated between strictly enforcing separation-of-powers principles—often denominated formalism—and balancing the potential policy benefits of a novel governmental structure against derogation from the assignment of legislative, executive, and judicial tasks under the Constitution—often denominated functionalism.[1] As Professor Martin Redish and his coauthor Elizabeth Cisar aptly note,

> [T]he [Rehnquist] Court . . . evinced something of a split personality, seemingly wavering from resort to judicial enforcement with a formalistic vengeance to use of a so-called "functional" approach that appear[ed] to be designed to do little more than rationalize incursions by one branch of the federal government into the domain of another.[2]

1. *See* Linda D. Jellum, *"Which Is To Be Master," the Judiciary or the Legislature? When Statutory Directives Violate Separation of Powers*, 56 UCLA L. REV. 837, 854–55, 860–62, 870–78 (2009) (discussing formalism and functionalism and providing a comprehensive survey of the relevant legal literature); *see also* M. Elizabeth Magill, *The Real Separation in Separation of Powers Law*, 86 VA. L. REV. 1127, 1136–47 (2000) (discussing the common ground between formalism and functionalism and describing that common ground as incoherent and inadequate); John F. Manning, *Separation of Powers as Ordinary Interpretation*, 124 HARV. L. REV. 1939, 1950–62 (2011) (discussing formalism and functionalism and questioning the utility of the dichotomy in resolving arguments about administrative structure).

2. Martin H. Redish & Elizabeth J. Cisar, *"If Angels Were To Govern": The Need for Pragmatic Formalism in Separation of Powers Theory*, 41 DUKE L.J. 449, 450 (1991) (footnote

The Roberts Court's separation-of-powers decisions, however, reflect a strong, pronounced, and consistent turn toward formalism.

This new formalism casts renewed doubt on the constitutionality of laws that vest the enforcement of federal statutes outside the executive branch of the federal government.[3] Such systems include cooperative-federalism programs, in which state agencies take primary responsibility for the enforcement of federal laws,[4] and federal administrative regimes that vest enforcement powers in private entities.[5] As Dean Evan Caminker notes, "Congress frequently encourages states to become regulatory partners in federal programs, sometimes by threatening to preempt the existing regulations of non-participating states, and other times by rewarding participating states with substantial monetary subsidies."[6]

This Article focuses largely on cooperative-federalism schemes and the separation-of-powers problems they present. I pay particular attention to whether the delegation of administrative authority to state officers—who are accountable to governors, state legislatures, or a state's electorate, rather than the president—can be reconciled with the Supreme Court's emerging new formalism in separation-of-

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omitted). Professors Redish and Cisar state that "[t]he Court has gone from one extreme to the other, with the assertion of what are at best tenuous distinctions." *Id.*

3. *See* Harold J. Krent, *Federal Power, Non-Federal Actors: The Ramifications of* Free Enterprise Fund, 79 FORDHAM L. REV. 2425, 2427 (2011) (noting that the decision in *Free Enterprise Fund v. Public Co. Accounting Oversight Board*, 130 S. Ct. 3138 (2010), "provides renewed reason to consider whether congressional delegations outside the federal government" present separation-of-powers problems).

4. *See* CLIFFORD RECHTSCHAFFEN & DAVID L. MARKELL, REINVENTING ENVIRONMENTAL ENFORCEMENT AND THE STATE/FEDERAL RELATIONSHIP 43 (2003) ("Congress established a 'cooperative federalism' structure that makes EPA ultimately responsible for program delivery while reserving the primary front lines implementation role for willing and capable states."); *see also* William L. Andreen, *Delegated Federalism Versus Devolution: Some Insights from the History of Water Pollution Control*, *in* PREEMPTION CHOICE: THE THEORY, LAW, AND REALITY OF FEDERALISM'S CORE QUESTION 257, 258 (William W. Buzbee ed., 2009) (noting that the Clean Water Act, 33 U.S.C. §§ 1251–1387 (2006 & Supp. IV 2010), is an example of cooperative federalism because the enforcement "structure is not just federal but also involves overlapping and intertwined federal and state roles"); Robert V. Percival, *Environmental Federalism: Historical Roots and Contemporary Models*, 54 MD. L. REV. 1141, 1174 (1995) ("The cooperative federalism model seeks to . . . establish[] national environmental standards while leaving their attainment to state authorities subject to federal oversight.")

5. *See* Harold J. Krent, *The Private Performing the Public: Delimiting Delegations to Private Parties*, 65 U. MIAMI L. REV. 507, 507 (2011) ("Private parties discharge critical roles in the Obama Administration, as they have in administrations past.").

6. Evan Caminker, *The Unitary Executive and State Administration of Federal Law*, 45 U. KAN. L. REV. 1075, 1075 (1997).

powers theory and practice. Some federal laws feature delegations of administrative authority to nongovernmental, private entities, such as professional associations and organizations, and, in some instances, even to private corporations.[7] To be sure, delegations to nongovernmental entities are far less common, and generally are less important, than cooperative-federalism programs that use a federal/state government partnership model. Even so, they are no less susceptible to separation-of-powers objections under the Supreme Court's emerging new formalism. For the most part, however, my argument focuses on the use of state governments to enforce federal law, rather than on delegations of administrative responsibilities to private entities.[8]

Even when a state volunteers to enforce federal law—thus avoiding federalism pitfalls[9]—a separate, and entirely different, separation-of-powers question exists regarding the decision to vest executive authority over federal regulatory programs in the states. Article II of the Constitution provides that all of the executive powers

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7. *See* Krent, *supra* note 3, at 2427, 2436–37 (describing delegations to various professional organizations and private corporations, including the National Academy of Sciences, the Internet Corporation for Assigned Names and Numbers (ICANN), and the American Institute of Certified Public Accountants); *see also* A. Michael Froomkin, *Wrong Turn in Cyberspace: Using ICANN To Route Around the APA and the Constitution*, 50 DUKE L.J. 17, 20, 34–35, 168–69 (2000) (discussing ICANN, a private corporation vested with the power to regulate Internet domain names).

8. To be clear, the federal government regularly contracts with private enterprises to provide essential goods and services; the potential separation-of-powers objection to delegations of administrative responsibilities to private, nongovernmental entities *would not* extend to this commonplace use of contracting to achieve various federal objectives. For example, when Lockheed Martin contracts with the Department of Defense to design and build military equipment for the U.S. military, it is not involved in the *administration* of federal law. *Cf.* Krent, *supra* note 5, at 518 (noting that "President Obama has continued his predecessors' practice of outsourcing a multitude of tasks to the private sector," including border security, modernization of the Coast Guard's fleet, and the preparation of "proposed rules and respon[ses] to congressional inquiries"). But if Congress attempted to delegate to Lockheed Martin the power to establish combat regulations to govern the use of military forces in the field, a delegation of core executive power would exist—and, moreover, would present a serious constitutional question. *See infra* Parts II, IV; *see also* Krent, *supra* note 3, at 2427, 2438, 2454 ("The question remains where to draw the line between impermissible and valid exercises of authority by private parties. Eliciting advice from private parties does not violate Article II, but directing private parties to set trade policy would contravene presidential power.").

9. *See* Printz v. United States, 521 U.S. 898, 910–11 (1997) (stating that problems arise when Congress attempts to impose "responsibilities *without the consent of the States*"); New York v. United States, 505 U.S. 144, 166 (1992) (identifying "a variety of methods, short of outright coercion, by which Congress may urge a State to adopt a legislative program with federal interests").

"shall be vested in a President of the United States of America"[10] and that the president "shall take Care that the Laws be faithfully executed."[11] Cooperative-federalism programs may offend separation-of-powers principles by encroaching on the president's duty to superintend the implementation of federal law.[12] Legal scholarship has considered the potential costs and benefits of these schemes,[13] but it has largely ignored the separation-of-powers issue.

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10. U.S. CONST. art. II, § 1, cl. 1. For a comprehensive overview of the unitary-executive theory, see generally Steven G. Calabresi & Saikrishna B. Prakash, *The President's Power To Execute the Laws*, 104 YALE L.J. 541 (1994).

11. U.S. CONST. art. II, § 3.

12. *See* Evan H. Caminker, Printz*, State Sovereignty, and the Limits of Formalism*, 1997 SUP. CT. REV. 199, 230–32 ("Given the President's inability to exercise 'meaningful control' over state officials' implementation decisions, the principle of executive unity would seem to invalidate all conventional joint federal-state programs."); Caminker, *supra* note 6, at 1075–79 ("Almost lost in this federalism debate is the fact that these congressional efforts to induce or coerce state administration of federal law implicate intriguing and difficult separation of powers principles as well."); Krent, *supra* note 3, at 2425–38 ("[T]he congressional structure—in particular, the double layer of tenure insulation—undermined the Article II imperative that all exercises of significant executive authority be subject to strong supervision by the President."); Harold J. Krent, *Fragmenting the Unitary Executive: Congressional Delegations of Administrative Authority Outside the Federal Government*, 85 NW. U. L. REV. 62 (1990) ("[B]y vesting responsibilities in officials independent of the President's authority, Congress has attempted to restrict the Executive's involvement in executing such laws . . . .").

13. *See generally* Jessica Bulman-Pozen & Heather K. Gerken, *Uncooperative Federalism*, 118 YALE L.J. 1256 (2009) (positing that states may use their role as "servant[s]" to and "insider[s]" of the federal government to act as "rivals and challengers" in some instances—what the authors call "uncooperative federalism" (emphasis omitted)); Abbe R. Gluck, *Intrastatutory Federalism and Statutory Interpretation: State Implementation of Federal Law in Health Reform and Beyond*, 121 YALE L.J. 534 (2011) (arguing that the different roles played by states should impact how statutes are interpreted and understood from a federalism perspective); Michael S. Greve, *Against Cooperative Federalism*, 70 MISS. L.J. 557 (2000) (criticizing cooperative federalism as a means to reduce political transparency and accountability); Margaret H. Lemos, *State Enforcement of Federal Law*, 86 N.Y.U. L. REV. 698 (2011) (describing how states can gain some control over federal power by adjusting enforcement levels and "pressing their own interpretations of federal law"); Neil S. Siegel, *Commandeering and Its Alternatives: A Federalism Perspective*, 59 VAND. L. REV. 1629 (2006) (discussing how the anticommandeering rule can harm federalism and state autonomy by triggering preemption). Counterexamples exist, however, and some legal scholars have squarely addressed the separation-of-powers question. *See* Neil Kinkopf, *Of Devolution, Privatization, and Globalization: Separation of Powers Limits on Congressional Authority To Assign Federal Power to Non-Federal Actors*, 50 RUTGERS L. REV. 331, 366–70, 377–81 (1998) (arguing that general separation-of-powers principles should apply when examining the assignment of federal power to nonfederal actors); Philip J. Weiser, *Towards a Constitutional Architecture for Cooperative Federalism*, 79 N.C. L. REV. 663, 711–19 (2001) (arguing that courts will have to confront the separation-of powers concerns that arise under the growing use of cooperative-federalism regulatory programs).

In the immediate aftermath of the *Printz v. United States*[14] decision, a few legal scholars posited separation-of-powers-based limits on cooperative-federalism programs.[15] Most legal scholarship, however, has focused on the normative and public-policy implications of such arrangements, rather than on their constitutionality—a point that has been taken more or less as a given.[16] Thus far, the Supreme Court has not addressed the implications of a broad reading of Justice Scalia's majority opinion in *Printz*. And in the meantime, Congress has continued to create programs that rely not only on cooperative federalism, but also on the use of private entities to administer federal regulatory programs.[17] This Article challenges the status quo and posits the existence of separation-of-powers-based limits on cooperative-federalism programs.

The Roberts Court's separation-of-powers decisions reflect a pronounced trend toward formalism.[18] Formalists believe that a

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14. Printz v. United States, 521 U.S. 898 (1997).

15. *See, e.g.*, Jay S. Bybee, Printz*, The Unitary Executive, and the Fire in the Trash Can: Has Justice Scalia Picked the Court's Pocket?*, 77 NOTRE DAME L. REV. 269, 286 (2001) ("The broadest implications of the separation-of-powers argument in *Printz* are for those creative arrangements in which Congress has committed the enforcement of federal law to non-governmental (or at least non-federal and non-state) entities."); Caminker, *supra* note 6, at 1076 ("Almost lost in this federalism debate is the fact that these congressional efforts to induce or coerce state administration of federal law implicate intriguing and difficult separation of powers principles as well.").

16. *See, e.g.*, Andreen, *supra* note 4, at 259–65 (discussing the normative implications of cooperative-federalism programs); Bulman-Pozen & Gerken, *supra* note 13, at 1307 ("[This Article] begins to sketch a normative argument for why uncooperative federalism might be useful in a well-functioning federal system."); Lemos, *supra* note 13, at 699–702, 739–44, 756 (discussing the costs and benefits of state enforcement of federal law); Percival, *supra* note 4, at 1173–74 ("This model is consistent with constitutional principles of federalism outlined in *New York v. United States*, [505 U.S. 144 (1992),] where the Court expressly approved Congress's use of its spending power to encourage states to implement federal programs."); David A. Super, *Against Flexibility*, 96 CORNELL L. REV. 1375, 1390–97 (2011) (examining concurrent legal decisionmaking by various actors and considering "which timing arrangements [for making legal decisions] would best serve social needs across the range of policy areas").

17. *See, e.g.*, Froomkin, *supra* note 7, at 34–35 (2000) (noting that ICANN is a private corporation that "has been making domain name policy under contract with the Department of Commerce"); Krent, *supra* note 5, at 508–09, 513–18 (providing examples of congressional delegations to nongovernmental entities and questioning the constitutional permissibility of such delegations); Krent, *supra* note 12, at 84–91 (examining congressional delegations to outside parties as potentially inconsistent with separation-of-powers doctrine).

18. *See* Stern v. Marshall, 131 S. Ct. 2594, 2601 (2011) (vacating a bankruptcy court's final judgment because it had exercised judicial power that is granted only to "the judges of such courts [that] enjoy" Article III protection); Free Enter. Fund v. Pub. Co. Accounting Oversight Bd., 130 S. Ct. 3138, 3147 (2010) ("Here the President cannot remove an officer who enjoys more than one level of good-cause protection, even if the President determines that the officer

reviewing court should establish clear lines separating legislative, executive, and judicial functions and enforce those lines to prohibit any novel power-sharing arrangements that reallocate and mismatch powers among the three branches.[19] This trend represents a major jurisprudential shift in the Supreme Court's approach to analyzing separation-of-powers questions.

Significantly, this is not the Supreme Court's first embrace of formalism in its separation-of-powers analysis. Many of the Burger Court's landmark separation-of-powers decisions reflected and incorporated highly formalist reasoning.[20] The Burger Court also strictly enforced the separation of powers based on fidelity to the Framers' structural design of the federal government.[21]

By contrast, the Rehnquist Court tended to utilize functionalist reasoning when deciding separation-of-powers questions. A functionalist approach considers what benefits might be associated with a novel reallocation of responsibilities among the branches and will sustain a reallocation of duties if (1) the arrangement conveys significant benefits and (2) the reallocation of functions does not

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is neglecting his duties or discharging them improperly. . . . This contravenes the President's 'constitutional obligation to ensure the faithful execution of the laws.'" (quoting Morrison v. Olson, 487 U.S. 654, 693 (1988))); New Process Steel, L.P. v. NLRB, 130 S. Ct. 2635, 2638 (2010) (holding that two NLRB members could not, alone, exercise the NLRB's statutory authority because they would not satisfy the statute's quorum requirement). For a discussion of these cases and the Supreme Court's strong embrace of formalism in separation-of-powers analysis, see *infra* Part II.

19. For an overview of the concepts of formalism and functionalism, see generally Jellum, *supra* note 1, at 854–62, 870–78; Ronald J. Krotoszynski, Jr., *On the Danger of Wearing Two Hats:* Mistretta *and* Morrison *Revisited*, 38 WM. & MARY L. REV. 417, 475–84 (1997).

20. *See, e.g.*, Bowsher v. Synar, 478 U.S. 714, 736 (1986) (invalidating the Balanced Budget and Emergency Deficit Control Act of 1985, Pub. L. No. 99-177, 99 Stat. 1037, also known as the Gramm-Rudman-Hollings Act, because it vested executive duties in an officer subject to congressional appointment and control); INS v. Chadha, 462 U.S. 919, 957–59 (1983) (invalidating, on separation-of-powers grounds, the use of line-item-veto provisions that vested in Congress or some part of it the power to superintend the execution of laws); N. Pipeline Constr. Co. v. Marathon Pipe Line Co., 458 U.S. 50, 87 (1982) (invalidating portions of the Bankruptcy Act of 1978, Act of Nov. 6, 1978, Pub. L. No. 95-598, 92 Stat. 2549), because they vested core Article III powers in non-Article III bankruptcy judges).

21. *See, e.g.*, *Bowsher*, 478 U.S. at 721–28 ("The structure of the Constitution does not permit Congress to execute the laws."); *Chadha*, 462 U.S. at 944–52 ("The very structure of the Articles delegating and separating powers under Arts. I, II, and III exemplifies the concept of separation of powers . . . ."); *N. Pipeline Constr. Co.*, 458 U.S. at 57–62, (maintaining that powers are distributed among the three branches according "to the constitutional structure established by the Framers"); *see also* Bernard Schwartz, *Curiouser and Curiouser: The Supreme Court's Separation of Powers Wonderland*, 65 NOTRE DAME L. REV. 587, 597–608 (1990) (describing and criticizing "the Burger Court's increasingly formalistic approach to the separation of powers").

"unduly" aggrandize one branch at the expense of another or otherwise encroach on a "core" function of a particular branch.[22] Cases from the Rehnquist Court that incorporated functionalism in their separation-of-powers analysis include *Mistretta v. United States*,[23] *Morrison v. Olson*,[24] and *Commodity Futures Trading Commission v. Schor*.[25]

The Roberts Court appears to be engaged in a broad revival of formalism in its separation-of-powers analysis; indeed, its decisions consistently reject balancing the costs and benefits of novel reallocations of power and instead favor articulating and enforcing bright-line rules.[26] For example, in *Free Enterprise Fund v. Public Co. Accounting Oversight Board*,[27] Chief Justice Roberts explained that "[t]he Constitution requires that a President chosen by the entire Nation oversee the execution of the laws."[28] Moreover, the president "is not limited, as in Harry Truman's lament, to 'persuad[ing]' his unelected subordinates 'to do what they ought to do without persuasion.'"[29] This is strikingly formalist language and reasoning.

Furthermore, this new formalist turn in separation-of-powers law and theory seems to reflect a stronger embrace of the unitary-executive theory. This theory posits that the president must have the ability to oversee personally the execution of federal law, regardless of whether Congress vested the execution of a particular law with an

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22. *See* Commodity Futures Trading Comm'n v. Schor, 478 U.S. 833, 851–52, 856–57 (1986) (espousing a functionalist test in which "due regard must be given in each case to the unique aspects of the congressional plan at issue and its practical consequences in light of the larger concerns"); *see also Stern*, 131 S. Ct. at 2625–26 (Breyer, J., dissenting) (arguing that a delegation of power should only constitute a violation if it "constitutes a significant encroachment" by one branch of the government onto another); Jellum, *supra* note 1, at 870–71, 873, 877 (describing and discussing the functionalist concepts of core functions and encroachment or aggrandizement).

23. Mistretta v. United States, 488 U.S. 361 (1989).

24. Morrison v. Olson, 487 U.S. 654 (1988).

25. Commodity Futures Trading Comm'n v. Schor, 478 U.S. 833 (1986).

26. *See, e.g.*, *Stern*, 131 S. Ct. at 2601 (Scalia, J., concurring) ("[A]n Article III judge is required for *all* federal adjudications . . . ."); Free Enter. Fund v. Pub. Co. Accounting Oversight Bd., 130 S. Ct. 3138, 3154 (2010) ("[The dual for-cause removal] arrangement is contrary to Article II's vesting of the executive power in the President. Without the ability to oversee the Board, or to attribute the Board's failings to those whom he *can* oversee, the President is no longer the judge of the Board's conduct.").

27. Free Enter. Fund v. Pub. Co. Accounting Oversight Bd., 130 S. Ct. 3138 (2010).

28. *Id.* at 3155–56.

29. *Id.* at 3157 (alteration in original) (quoting CLINTON ROSSITER, THE AMERICAN PRESIDENCY 154 (2d rev. ed. 1960)).

independent federal agency, with the states, or with a private entity.[30] As Professors Calabresi and Prakash observe, "Because the President alone has the constitutional power to execute federal law, it would seem to follow that, *notwithstanding the text of any given statute*, the President must be able to execute that statute, interpreting it and applying it to concrete circumstances."[31] Adherents of this theory of executive power believe that "the President alone possesses *all* of the executive power and that he therefore can direct, control, and supervise inferior officers or agencies who seek to exercise discretionary executive power."[32]

The unitary-executive theory, coupled with this new formalism, could require Congress to reconsider major aspects of environmental, labor, and healthcare regulation. Under the unitary-executive theory, all tasks associated with the execution of federal laws are subject to presidential superintendence, if not complete presidential control. Professor Steven Calabresi and his coauthor Kevin Rhodes strongly endorse this theory, arguing that "[t]he President could not possibly be said to have all of the executive power in order to be able to take care that the laws be faithfully executed if he could not tell his subordinates what to do."[33] The implications of this construction of presidential authority are quite significant; as Calabresi and Rhodes note, the construction "renders unconstitutional independent agencies and counsels to the extent that they exercise discretionary executive power."[34]

The unitary-executive theory, at least in its strongest iteration, would nullify all limits on presidential control of independent

30. Calabresi & Prakash, *supra* note 10, at 593.

31. *Id.* at 595 (emphasis added); *see also* Steven G. Calabresi & Kevin H. Rhodes, *The Structural Constitution: Unitary Executive, Plural Judiciary*, 105 HARV. L. REV. 1153, 1165–66 (1992) (describing the "strong form" of the unitary-executive theory and positing the legality of direct presidential usurpation of duties delegated to another executive-branch entity, such as the Federal Trade Commission, or by parity of logic, the Federal Reserve Bank); Caminker, *supra* note 12, at 205 (noting that the unitary-executive theory "demands that the President oversee the execution of all federal law"); Saikrishna Bangalore Prakash, Note, *Hail to the Chief Administrator: The Framers and the President's Administrative Powers*, 102 YALE L.J. 991, 992 (1993) (arguing that "[w]henever an official is granted statutory discretion, the Constitution endows the President with the authority to control that discretion").

32. Calabresi & Rhodes, *supra* note 31, at 1165 (footnote omitted).

33. *Id.* at 1207.

34. *Id.* at 1165–66 (footnote omitted). To be clear, the advocates of the unitary executive do not argue that the president may order a subordinate to refuse to perform a mandatory ministerial task. *See id.* at 1166 n.53 ("The unitary executive debate concerns only presidential control over *discretionary* exercise of executive power by subordinates.").

agencies that exercise policymaking authority, such as the Federal Communications Commission or the Federal Reserve Bank of the United States.[35] Delegations *outside* the executive branch would be even more objectionable; if a state or private entity undertakes primary responsibility for securing particular federal environmental, labor, or healthcare objectives, the president's ability to directly supervise the execution of the law becomes at best attenuated, if not completely absent. For example, the president cannot fire a state employee or even directly manage that employee's work. The same would be true of delegations of executive responsibility to nongovernmental private entities, such as professional associations or organizations, or to private corporations, at least insofar as such entities administer federal regulatory programs.[36] Dean Harold Krent cogently argues that "the President would not be able to oversee" the exercise of such delegated authority; that "the President must be permitted the discretion to accept, reject, or modify the standards selected by private entities"; and that "[a]fter *Free Enterprise Fund*, such delegations may be permissible only if the government can exercise exacting review before [the standards established by a private regulator become effective]."[37]

Accordingly, if the Vesting[38] and Take Care[39] Clauses of Article II require that the president enjoy a meaningful ability to direct the execution of federal laws,[40] then federal laws that export these duties to state and private entities raise serious separation-of-powers problems. Federal courts have some relatively easy ways to avoid these implications. A federal court might, for example, characterize state enforcement of a state law enacted to comply with a federal statute as involving only state enforcement of state law.[41] Alternatively, cooperative-federalism schemes usually have a variety

35. *See* Calabresi & Rhodes, *supra* note 31, at 1166 (noting that under the strong form of the unitary-executive theory, the president "might have the direct power to supplant any discretionary executive action taken by a subordinate with which he disagrees, notwithstanding any statute that attempts to vest discretionary executive power only in the subordinate").

36. *See* Krent, *supra* note 5 (describing and critiquing the delegation of administrative responsibilities to private, nongovernmental entities).

37. Krent, *supra* note 3, at 2439–40.

38. U.S. CONST. art. II, § 1.

39. *Id.* art. II, § 3.

40. *See id* art. II, § 1 ("The executive Power shall be vested in a President of the United States of America."); *id.* art. II, § 3 ("[The President] shall take Care that the Laws be faithfully executed . . . .").

41. *See infra* Part IV.C.

of direct and indirect forms of federal oversight; a federal court could hold that these oversight mechanisms, even if imperfect, satisfy the requirements of the separation-of-powers doctrine. Examples of this oversight include the use of funding and grants to secure state compliance with federal enforcement priorities; the power to suspend a state's primacy status with respect to enforcing federal law within its borders; and the ability, in some cases, to duplicate, by "overfiling," state enforcement activities.[42]

But all of these forms of indirect presidential control involve *displacing* rather than *directing* state enforcement activities. In addition, the existence of these forms of federal oversight tends to undercut rather severely the notion that states are simply enforcing state laws; in general, the federal government does not fund, audit, or have the ability to duplicate a state's enforcement of its own state laws.[43] Thus, if the Roberts Court really means what it says about the centrality of direct presidential oversight to the separation-of-powers doctrine, it should invalidate cooperative-federalism programs on the ground that they unconstitutionally delegate the enforcement of federal law outside the executive branch.

In Part I, this Article explains the meaning and implications of formalism and functionalism. Part II makes the case for the emergence of a new formalism in the Supreme Court's analysis of separation-of-powers questions. In particular, the majority opinions in *Free Enterprise Fund*, *Stern v. Marshall*,[44] and *New Process Steel,*

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42. *See infra* Part IV.A.

43. *See* Roderick M. Hills, Jr., *The Political Economy of Cooperative Federalism: Why State Autonomy Makes Sense and "Dual Sovereignty" Doesn't*, 96 MICH. L. REV. 813, 816 (1998) (proposing a "functional theory of cooperative federalism" that nevertheless "maintains that state and local governments should have 'autonomy'—that is, immunity from federal demands for regulatory services"). As one commentator notes, "The general notion that the United States might force a State to enforce its own law or regulations strikes a discordant cord under America's doctrine of dual sovereignty." Alfred R. Light, *The Myth of the Everglades Settlement*, 11 ST. THOMAS L. REV. 55, 60 n.37 (1998) (citing New York v. United States, 505 U.S. 144, 188 (1992)). Moreover, the rule that the federal courts will not review a state court decision if that decision rests on independent and adequate state law grounds reflects and incorporates the more general principle that the federal government does not superintend the enforcement of state laws by state governments. *See* Michigan v. Long, 463 U.S. 1032, 1037–42 (1983) (noting the "Court's refusal to decide cases where there is an adequate and independent state ground"); Minnesota v. Nat'l Tea Co., 309 U.S. 551, 558–59 (1940) (Hughes, C.J., dissenting) ("The fact that provisions of the state and federal constitutions may be similar or even identical does not justify us in disturbing a judgment of a state court which adequately rests upon its application of the provision of its own constitution.").

44. Stern v. Marshall, 131 S. Ct. 2594 (2011).

L.P. v. NLRB[45] all incorporate and reflect strongly formalist reasoning. Part III examines the structure of several important cooperative-federalism programs and the integral role of states in implementing federal labor, environmental, and healthcare programs. Part IV considers the implications of the new formalism for cooperative-federalism programs and argues that serious separation-of-powers questions exist regarding the limited role of presidential oversight of the administration of such programs. Part V discusses some rejoinders to these potential separation-of-powers objections to cooperative-federalism programs, including the notion that cooperative-federalism programs involve only state enforcement of state law and, alternatively, that federal oversight of these programs satisfies the constitutional imperative for presidential control. This Article concludes that the full scope of the Roberts Court's formalist jurisprudence remains uncertain and posits that the precise meaning and implications of the new formalism are yet to be determined.

I. RECONSIDERING FORMALISM AND FUNCTIONALISM IN SEPARATION-OF-POWERS ANALYSIS: SOME DEFINITIONAL CONSIDERATIONS

Before considering the Roberts Court's return to formalism, some definitional work is essential. Precisely what do formalism and functionalism mean? Moreover, are the categories even coherent as a means of framing and resolving separation-of-powers questions? Although legal scholars have raised serious concerns about the viability of the formalism/functionalism dichotomy,[46] the distinction retains significant explanatory force.

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45. New Process Steel, L.P. v. NLRB, 130 S. Ct. 2635 (2010).

46. Elizabeth Magill, *Beyond Powers and Branches in Separation of Powers Law*, 150 U. PA. L. REV. 603, 609 (2001); *see also* Jellum, *supra* note 1, at 878–79 ("Rigidly dividing separation of powers analysis into these two categories, formalism and functionalism, is imperfect."); Magill, *supra* note 1, at 1132–38, 1148–49 ("[N]either of the dominant approaches provides a consistent account of the methodology applied or the outcome of the cases."); Manning, *supra* note 1, at 1972 ("New thinking about the legitimacy of strongly purposive reasoning reveals difficulties with the approach that underlies both strands of modern separation of powers doctrine."). Although I have adopted the nomenclature of formalism and functionalism, I fully recognize that some prominent legal scholars have questioned the utility of traditional separation-of-powers analysis and thinking in light of the modern reality of blended functions shared among the three branches of the federal government. *See, e.g.*, EDWARD L. RUBIN, BEYOND CAMELOT: RETHINKING POLITICS AND LAW FOR THE MODERN STATE 12 (2005) (proposing abandonment of the outdated concepts used to analyze the government and instead approaching the administrative government with an updated conceptual framework); Bruce Ackerman, *The New Separation of Powers*, 113 HARV. L. REV. 633, 634 (2000) (opposing

Professor Elizabeth Magill notes that "[o]ne approach [to separation-of-powers analysis], often dubbed formalist, emphasizes that the Constitution divides governmental power into three categories and, with some explicit textual exceptions, assigns those powers to three different branches of government."[47] She adds that "[f]or the formalist, questions of horizontal governmental structure are to be resolved by reference to a fixed set of rules and not by reference to some purpose of those rules."[48] Formalism is a categorical approach that does not consider the potential utility of a novel administrative structure in determining that structure's constitutionality. Accordingly, "[w]hen confronting an institutional arrangement, a formalist, following a rule-like approach, identifies the type of power exercised and asks whether it is exercised by the appropriate department in the appropriate way."[49]

Professor Linda Jellum notes that "[t]he formalist approach emphasizes the need to maintain three distinct branches of government based on function."[50] Formalists "assume[] that all exercises of power must fall into one of these categories and take[] no ostensible account of the practicalities of administration in arriving at this determination."[51] "Formalism is, thus, a textually literal approach that relies primarily on the vesting clauses to define categories of power—legislative, executive, and judicial—and to identify the owner of each power."[52]

"the export of the American system [of separation of powers as a model for constitutions of other countries] in favor of an approach based on the constitutional practice of . . . many other nations.").

47. Magill, *supra* note 46, at 608.

48. Magill, *supra* note 1, at 1138; *see also* Gary Lawson, *Territorial Governments and the Limits of Formalism*, 78 CALIF. L. REV. 853, 857–58 (1990) (noting that a formalist approach to separation-of-powers analysis utilizes a process of categorization derived from the three vesting clauses of the Constitution, which do not permit open-ended balancing exercises to justify a reallocation of powers among the three branches); Redish & Cisar, *supra* note 2, at 454–55 (noting that in a formalist analysis, "the Court's rule in separation of powers cases should be limited to determining whether the challenged branch action falls within the definition of that branch's constitutionally derived powers—executive, legislative, or judicial"—and enforcing these boundaries).

49. Magill, *supra* note 46, at 608–09; *see also* Lee S. Liberman, Morrison v. Olson*: A Formalistic Perspective on Why the Court Was Wrong*, 38 AM. U. L. REV. 313, 343 (1989) ("A formalist decision uses a syllogistic, definitional approach to determining whether a particular exercise of power is legislative, executive, or judicial.").

50. Jellum, *supra* note 1, at 854.

51. Liberman, *supra* note 49, at 343.

52. Jellum, *supra* note 1, at 861.

Finally, under formalism, "[o]verlap is permitted only when constitutionally prescribed."[53] Professor John Manning observes that "[f]ormalist theory presupposes that the constitutional separation of powers establishes readily ascertainable and enforceable rules of separation."[54]

The primary competing vision utilizes overt balancing: the functionalist asks whether a particular administrative structure undermines a "core" function of a particular branch and whether the benefits of a given administrative structure offset its separation-of-powers cost.[55] Professor Jellum observes that "[t]he functionalist approach emphasizes the need to maintain pragmatic flexibility to respond to modern government."[56] Professor Manning adds that "[f]unctionalists believe that the Constitution's structural clauses ultimately supply few useful details of meaning."[57] Moreover, "functionalists view the Constitution as emphasizing the balance, and not the separation, of powers."[58] Under a functionalist approach, "overlap beyond the core functions is practically necessary and even desirable."[59] Professor Jellum adds that "[f]unctionalists' core concern is that one branch not take away or be given too much constitutionally assigned power from another branch."[60]

Professor Magill, quoting Professor Thomas Merrill, emphasizes that "[w]here a formalist is committed to rule-based decisionmaking, a functionalist would resolve structural disputes 'not in terms of fixed rules but rather in light of an evolving standard designed to advance

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53. *Id*. at 860.

54. Manning, *supra* note 1, at 1958. *But cf.* Magill, *supra* note 46, at 649–54, 660 (questioning whether it is possible reliably to define and categorize specific government tasks as legislative, executive, or judicial and suggesting that "[t]here are no clean answers . . . about the great questions—the appropriate division of policymaking between the Congress and the executive, or the proper role of the judiciary in a representative democracy").

55. Magill, *supra* note 46, at 609; *see also* Harold H. Bruff, *Presidential Power and Administrative Rulemaking*, 88 YALE L.J. 451, 488 (1979) ("[T]he flexible approach must be characterized by estimations of the balance in given circumstances between the President's concerns and the countervailing interests of the other branches and of the people."). As Professor Magill puts it, "[T]he key question is whether an institutional arrangement upsets the overall balance among those branches by permitting one of them to compromise the 'core' function of another." Magill, *supra* note 46, at 609.

56. Jellum, *supra* note 1, at 854–55.

57. Manning, *supra* note 1, at 1950.

58. *Id.* at 1952.

59. Jellum, *supra* note 1, at 861.

60. *Id.* at 870.

the ultimate purposes of a system of separation of powers.'"[61] Not surprisingly, when the Supreme Court utilizes a functionalist analysis, more often than not, the reallocation of powers survives constitutional review.[62] When the Supreme Court relies on formalist analysis, however, the reverse holds true: the Supreme Court usually finds that the novel administrative structure at issue violates the separation of powers.[63]

The Supreme Court has not definitively embraced either formalism or functionalism in a consistent and predictable fashion. Instead, the Court has "vacillate[d] back and forth between the two dominant approaches, relying on something resembling the formalist approach to invalidate certain arrangements—the line-item veto and legislative vetoes—and something similar to functionalism to validate other arrangements—the independent counsel statute, the exercise of adjudicatory authority by administrative agencies."[64] As Professor

61. Magill, *supra* note 1, at 1142 (quoting Thomas W. Merrill, *The Constitutional Principle of Separation of Powers*, 1991 SUP. CT. REV. 225, 231).

62. *See, e.g.*, Mistretta v. United States, 488 U.S. 361, 378–79, 396 (1989) (upholding the Federal Sentencing Guidelines); Morrison v. Olson, 487 U.S. 654, 695–97 (1988) (upholding a statute creating an independent counsel, despite the fact that the president could not directly fire the officer); Commodity Futures Trading Comm'n v. Schor, 478 U.S. 833, 844–45 (1986) (holding that the Commodity Futures Trading Commission can adjudicate state-law counterclaims in reparations proceedings). Professor Magill notes, "As if to reaffirm that fear about the nature of a functionalist inquiry, opinions characterized as functionalist . . . have invariably sustained the challenged arrangement." Magill, *supra* note 1, at 1145.

63. *See, e.g.*, Stern v. Marshall, 131 S. Ct. 2594, 2620 (2011) (holding that the bankruptcy court lacked the Article III authority to enter a final judgment on a counterclaim); Free Enter. Fund v. Pub. Co. Accounting Oversight Bd., 130 S. Ct. 3138, 3147 (2010) (holding that the good–cause-removal provision protecting members of the Public Company Accounting Oversight Board (PCAOB), created by the Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, 116 Stat. 745 (codified in scattered sections of 11, 15, 18, 28, and 29 U.S.C.), when viewed in conjunction with a similar good-cause-removal protection insulating members of the Securities and Exchange Commission from presidential removal from office, violated separation-of-powers principles because the dual limitations on the president's removal power operated to deprive the president of sufficient ability to oversee and supervise the PCAOB); Bowsher v. Synar, 478 U.S. 714, 736 (1986) (holding that the powers vested in the comptroller general by Congress violated the separation of powers by giving Congress a direct role in the execution of the laws); INS v. Chadha, 462 U.S. 919, 956–57 (1983) (holding that a legislative-veto provision violated separation of powers by creating a loophole for legislation to bypass bicameralism and presentment to the president); N. Pipeline Constr. Co. v. Marathon Pipe Line Co., 458 U.S. 50, 85–87 (1982) (holding that Congress may not transfer core judicial powers from Article III courts to a non-Article III court).

64. Magill, *supra* note 46, at 609–10; *see also* Jellum, *supra* note 1, at 870 ("Rather, the Court has oscillated between formalism and functionalism throughout its history.").

Redish and Cisar note, "The Court has gone from one extreme to the other, with the assertion of what are at best tenuous distinctions."[65]

Some legal scholars suggest that the formalism/functionalism dichotomy is not particularly helpful in analyzing difficult separation-of-powers issues. For example, Professor Magill argues that "[t]he debate over formalism and functionalism is a distraction, masking a robust consensus to which nearly all participants in the debate subscribe."[66] She posits that "matching the exercise of certain types of government authority with specific types of government decisionmakers" would constitute a better approach.[67] In her view, "a reconstructed separation of powers doctrine must ask a different set of questions than it does now when it is seeking to match the exercise of classes of government authority with corresponding decisionmakers."[68] Although "achingly" familiar, existing separation-of-powers doctrine and theory, which emphasize the distinct nature of legislative, executive, and judicial powers and duties, constitute "an unhelpful way to evaluate whether an institutional arrangement is constitutional."[69]

II. THE ROBERTS COURT AND THE NEW FORMALISM

In three separation-of-powers decisions from the 2009 and 2010 Terms, the Supreme Court has eschewed functionalist reasoning in favor of formalist analysis of separation-of-powers questions. *Free Enterprise Fund* provides, by far, the clearest and strongest example of this jurisprudential shift. The two other cases, *Stern* and *New Process Steel*, also plainly reflect formalist reasoning.

A. Free Enterprise Fund

Free Enterprise Fund is the most important of the formalist trilogy of separation-of-powers decisions from the Roberts Court. In *Free Enterprise Fund*, the majority invalidated a two-tiered system of for-cause removal that insulated members of the Public Company Accounting Oversight Board (PCAOB) from removal by the president.[70] The PCAOB, a creation of the Sarbanes-Oxley Act of

65. Redish & Cisar, *supra* note 2, at 450.
66. Magill, *supra* note 1, at 1129.
67. Magill, *supra* note 46, at 650.
68. *Id.* at 660.
69. *Id.*
70. Free Enter. Fund v. Pub. Co. Accounting Oversight Bd., 130 S. Ct. 3138, 3147 (2010).

2002,[71] exercises the power to conduct investigations, initiate prosecutions, and write regulations necessary to implement the statute.[72] Under that Act, the Securities and Exchange Commission (SEC) was to appoint the PCAOB's members, who could only be removed for good cause by the SEC.[73] All parties to the *Free Enterprise Fund* litigation stipulated that the president's power to remove a sitting commissioner of the SEC was limited to good cause as well.[74] Thus, if the president objected to an administrative decision of the PCAOB and the SEC refused to act, he would have had to produce good-cause reasons to remove at least three SEC members and hope that their replacements would either successfully intervene with the PCAOB or, in the alternative, use good-cause grounds to advance the president's agenda by removing the uncooperative members of the PCAOB.

The Supreme Court invalidated the good-cause-removal protection for members of the PCAOB,[75] excising it from the statute and holding that this two-tiered system of good-cause protection denied the president sufficient oversight power over the exercise of core executive functions, "contrary to Article II's vesting of the executive power in the President."[76] In doing so, the Court rejected the lower appellate court's functionalist analysis in the case. The D.C. Circuit had sustained the two-tiered limitation on the theory that

71. Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, 116 Stat. 745 (codified as amended in scattered sections of 11, 15, 18, 28, and 29 U.S.C.); *id.* § 101(e)(6), 116 Stat. at 750 (codified at 15 U.S.C. § 7211(e)(6) (2006)).

72. 15 U.S.C. §§ 7213(a), 7215 (2006 & Supp. IV 2010).

73. *Id.* § 7211(e)(6) (2006).

74. *See Free Enter. Fund*, 130 S. Ct. at 3148–49 ("The parties agree that the Commissioners cannot themselves be removed by the President except under the . . . standard of 'inefficiency, neglect of duty, or malfeasance in office' . . . ." (quoting Humphrey's Ex'r v. United States, 295 U.S. 602, 621 (1935))).

75. *Id.* at 3147; *see also* 15 U.S.C. § 7211(e)(6) (providing that PCAOB members may be removed only "for good cause shown"); *id.* § 7217(d)(3) (noting that good cause in 15 U.S.C. § 7211(e)(6) includes willful violation of "any provision of th[e] Act, the rules of the Board, or the securities laws"; willful abuse of authority; or "without reasonable justification or excuse, [failure] to enforce compliance with any such provision or rule, or any professional standard by any registered public accounting firm or any associated person thereof"). Although the SEC's organic act, the Securities Exchange Act of 1934, 15 U.S.C. §§ 78a–78pp (2006 & Supp. IV 2010), does not directly state that SEC commissioners may only be removed for good cause, the *Free Enterprise Fund* majority assumed that the commissioners enjoy protection from removal from office absent a good-cause basis for the removal action, *see supra* note 74.

76. *Free Enter. Fund*, 130 S. Ct. at 3147; *see also id*. at 3151 ("We hold that the dual for-cause limitations on the removal of Board members contravene the Constitution's separation of powers.").

most of the PCAOB's powers were subject to oversight by the SEC and, thus, that the PCAOB did not really exercise any core executive functions.[77] Chief Justice Roberts disagreed with this reasoning, explaining that the two-tiered system of job protection resulted in "a Board that is not accountable to the President, and a President who is not responsible for the Board."[78]

Under the PCAOB's structure, "[n]either the President, nor anyone directly responsible to him, nor even an officer whose conduct he may review only for good cause, has full control over the Board."[79] Chief Justice Roberts explained,

> That arrangement is contrary to Article II's vesting of the executive power in the President. Without the ability to oversee the Board, or to attribute the Board's failings to those whom he *can* oversee, the President is no longer the judge of the Board's conduct. He is not the one who decides whether Board members are abusing their offices or neglecting their duties. He can neither ensure that the laws are faithfully executed, nor be held responsible for a Board member's breach of faith. This violates the basic principle that the President "cannot delegate ultimate responsibility or the active obligation to supervise that goes with it," because Article II "makes a single President responsible for the actions of the Executive Branch."[80]

This language strongly suggests that the president must have the ability not merely to fire persons with responsibility for executing federal laws, but also to supervise those with responsibility for enforcing federal law on a day-to-day basis.

Even though formalism, as noted earlier, utilizes a process of categorization and line drawing, rather than open-ended balancing, to analyze novel administrative structures,[81] practical concerns still animated the Chief Justice's analysis. Notably, Chief Justice Roberts argued that presidential oversight materially advances an important interest in securing the political accountability of administrative actions. He explained that "[t]he diffusion of power carries with it a

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77. Free Enter. Fund v. Pub. Co. Accounting Oversight Bd., 537 F.3d 667, 681–83 (D.C. Cir. 2008), *rev'd*, 130 S. Ct. 3138 (2010).

78. *Free Enter. Fund*, 130 S. Ct. at 3153.

79. *Id.* at 3154.

80. *Id.* (quoting Clinton v. Jones, 520 U.S. 681, 712–13 (1997) (Breyer, J., concurring in the judgment)).

81. *See supra* notes 48–54 and accompanying text.

diffusion of accountability."[82] According to Chief Justice Roberts, a "clear and effective chain of command" makes it possible for the public to hold government accountable.[83] Hence, "[b]y granting the Board executive power without the Executive's oversight, this Act subvert[ed] the President's ability to ensure that the laws are faithfully executed—as well as the public's ability to pass judgment on his efforts."[84] Accordingly, "[t]he Act's restrictions [were] incompatible with the Constitution's separation of powers."[85]

Free Enterprise Fund contains broad language that appears to require the president to have not only the ability to *replace* those enforcing federal law, but also the ability to *supervise* and *monitor* their actions. "The Constitution requires that a President chosen by the entire Nation oversee the execution of the laws."[86] And, according to the Court, the power to destroy the Board is not the same thing as the power to supervise the Board.[87] At a minimum, the Constitution requires that the president enjoy "the authority to remove those who assist him in carrying out his duties" because "[w]ithout such power, the President could not be held fully accountable for discharging his own responsibilities; the buck would stop somewhere else."[88] In sum, "[i]n its pursuit of a 'workable government,' Congress cannot reduce the Chief Magistrate to a cajoler-in-chief."[89]

The implications of this analysis are quite staggering. If the separation of powers requires direct presidential supervision of the execution of federal law, cooperative-federalism programs stand on very shaky legal ground. Delegations to nongovernmental entities also appear utterly inconsistent with Chief Justice Roberts's vision of

82. *Free Enter. Fund*, 130 S. Ct. at 3155.

83. *Id.*

84. *Id.*

85. *Id.*

86. *Id.* at 3155–56; *see also id.* at 3164 ("The Constitution that makes the President accountable to the people for executing the laws also gives him the power to do so.").

87. *See id.* at 3159 ("The Commission cannot wield a free hand to supervise individual members if it must destroy the Board in order to fix it. . . . But the Act nowhere gives the Commission effective power to start, stop, or alter individual Board investigations, executive activities typically carried out by officials within the Executive Branch.").

88. *Id.* at 3164.

89. *Id.* at 3157. Indeed, if the ability to remove personnel who enforce federal law is essential to securing the president's authority under Article II, the options for finding a statutory cure seem at best remote. *See* Caminker, *supra* note 12, at 229–30 ("If one believes both that Article II requires meaningful presidential control and that meaningful control requires a removal power, then it follows that [an act's] Article II violation can be remedied only through invalidation of the commandeering provisions.").

an accountable president with the ability to directly superintend the execution of federal law.[90]

B. Stern v. Marshall

In *Stern*, the Supreme Court invalidated provisions of the Bankruptcy Act[91] that permitted bankruptcy judges to adjudicate certain common-law claims,[92] constrained only by very circumscribed review in the Article III courts.[93] The Bankruptcy Act permitted bankruptcy courts to "hear and enter final judgments in 'core proceedings' in a bankruptcy case."[94] But this statutory authorization did not resolve the constitutional question: May a non-Article III tribunal adjudicate common-law claims when the specific common-law claims are integral to resolution of a pending bankruptcy case?[95] Chief Justice Roberts answered this question with a resounding "no."[96] Writing for the 5–4 majority, Chief Justice Roberts explained that "[a]lthough [the Court] conclude[d] that § 157(b)(2)(C) permits the Bankruptcy Court to enter final judgment on [the petitioner's common-law] counterclaim, Article III of the Constitution does not."[97]

The majority's analysis was unabashedly formalist in tone and approach. First, Chief Justice Roberts characterized adjudication of a common-law claim as a judicial function that falls within "the judicial Power" of the Article III federal courts, a power that "shall be vested

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90. *See* Krent, *supra* note 3, at 2438 ("Viewed through an Article II lens, congressional determinations to delegate significant authority outside the President's control are suspect. . . . [T]he key here is that the Supreme Court's recent decision makes it far more likely that congressional delegations of authority to private parties will elicit closer scrutiny by the Supreme Court should such challenges arise in the future."). Professor Krent argues that "*Free Enterprise Fund* may well have sounded the death knell for delegations of significant authority to private parties." *Id.*; *cf.* Caminker, *supra* note 12, at 225–26 (noting that the unitary-executive theory, if broadly applied, "could call into question, at the least, the constitutionality of both 'independent' agencies and various delegations of authority to private individuals and groups").

91. Bankruptcy Amendments and Federal Judgeship Act of 1984, Pub. L. No. 98-353, 98 Stat. 333, 340 (codified as amended in scattered sections of 5, 7, 11, 28, and 45 U.S.C.); *id.* § 157(b)(2)(C), 98 Stat. at 340.

92. Stern v. Marshall, 131 S. Ct. 2594, 2608 (2011).

93. *Id.* at 2603–04. In "core proceedings," a district court can review the bankruptcy court's findings of fact only "under traditional appellate standards," rather than de novo. *Id.* at 2604.

94. *Id.* at 2601–02.

95. *See id.* at 2600–01, 2608–09, 2619–20 (considering the constitutionality of non-Article III court adjudication of common-law claims).

96. *Id.* at 2608.

97. *Id.*

in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish."[98] According to the majority, "Article III could neither serve its purpose in the system of checks and balances nor preserve the integrity of judicial decisionmaking if the other branches of the Federal Government could confer the Government's 'judicial Power' on entities outside Article III."[99]

Absent from the *Stern* majority's constitutional analysis was any consideration of the potential benefits of permitting a bankruptcy court to resolve a core proceeding involving a common-law claim. Factors related to efficiency, cost, and the like were simply irrelevant to the Court's separation-of-powers analysis.[100] Moreover, functionalist counterarguments got short shrift because "[i]t goes without saying that 'the fact that a given law or procedure is efficient, convenient, and useful in facilitating functions of government, standing alone, will not save it if it is contrary to the Constitution.'"[101]

By contrast, the dissenting opinion, authored by Justice Breyer and joined by Justices Ginsburg, Sotomayor, and Kagan, analyzed the case through a functionalist lens and found that the benefits associated with the administrative structure more than justified any inherent risk to the integrity of Article III courts.[102] Urging a "pragmatic approach to the constitutional question," Justice Breyer argued that a reviewing court should "determine whether, in the particular instance, the challenged delegation of adjudicatory authority posed a genuine and serious threat that one branch of Government sought to aggrandize its own constitutionally delegated authority by encroaching upon a field of authority that the Constitution assigns exclusively to another branch."[103] Moreover, Justice Breyer repeatedly invoked the need for pragmatism in

98. *Id.* (quoting U.S. CONST. art. III, § 1) (internal quotation mark omitted).

99. *Id.* at 2609.

100. *See id.* at 2619 (rejecting the claim that the Court's ruling would "create significant delays and impose additional costs on the bankruptcy process").

101. *Id.* (quoting INS v. Chadha, 462 U.S. 919, 944 (1983)).

102. *See id.* at 2630 (Breyer, J., dissenting) ("[A] constitutionally required game of jurisdictional ping-pong between courts would lead to inefficiency, increased cost, delay, and needless additional suffering among those faced with bankruptcy.").

103. *Id.* at 2624.

separation-of-powers analysis[104] and decried undue formalism or formalistic analysis.[105]

The dissent proposed an open-ended balancing test to analyze separation-of-powers questions involving novel reallocations of core Article III duties.[106] This approach stood in stark contrast to the majority's eschewal of balancing in favor of a simple categorical approach.[107] For Justice Breyer, however, the controlling consideration was the disutility of "a constitutionally required game of jurisdictional ping-pong between courts [that] would lead to inefficiency, increased cost, delay, and needless additional suffering among those faced with bankruptcy."[108]

If one reads *Stern* in tandem with *Free Enterprise Fund*, it becomes reasonably clear that a majority of the Roberts Court has embraced formalism and has done so with gusto. The question of methodological approach no longer remains open—formalism is in ascendancy. The only remaining questions to be decided are (1) the strength of the commitment that the five-Justice conservative bloc has to formalism and (2) the willingness of the conservative majority to follow formalism to its logical conclusions, even when doing so will upset existing administrative structures.

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104. *See, e.g.*, *id*. ("In [two previous] cases the Court took a more pragmatic approach to the constitutional question."); *id*. ("The Court pointed out that the right in question was created by a federal statute, it 'represent[s] a pragmatic solution to the difficult problem of spreading [certain] costs . . . .'" (alterations in original) (quoting Thomas v. Union Carbide Agric. Prods. Co., 473 U.S. 568, 590 (1985)) (internal quotation mark omitted)); *id*. at 2625–26 ("This case law, as applied in [*Thomas v. Union Carbide Agricultural Products Co.*, 473 U.S. 568 (1985),] and *Schor*, requires us to determine pragmatically whether a congressional delegation of adjudicatory authority to a non-Article III judge violates the separation-of-powers principles inherent in Article III.").

105. *See, e.g.*, *id*. at 2625 (advocating the avoidance of "formalistic and unbending rules" (quoting Commodity Futures Trading Comm'n v. Schor, 478 U.S. 833, 851 (1986))); *id*. at 2626 (criticizing the majority for "apply[ing] more formal standards" and "disregard[ing] recent, controlling precedent").

106. *See id*. at 2626 ("[W]e must determine through an examination of certain relevant factors whether that delegation constitutes a significant encroachment by the Legislative or Executive Branches of Government upon the realm of authority that Article III reserves for exercise by the Judicial Branch of Government.").

107. *See id*. at 2600–01, 2609–10, 2615, 2619–20 (majority opinion) (considering only whether non-Article III bankruptcy judges were deciding common-law claims that would otherwise fall squarely within the judicial power of the United States, rather than engaging in a cost/benefit analysis of permitting non-Article III judges to decide such cases in the context of a bankruptcy proceeding); *cf. id*. at 2625–26 (Breyer, J., dissenting) (applying a multifactor balancing test to analyze adjudication of common-law claims by bankruptcy judges).

108. *Id*. at 2630 (Breyer, J., dissenting).

C. New Process Steel, L.P. v. NLRB

In *New Process Steel*, the Roberts Court rejected an effort to authorize two members of the National Labor Relations Board (NLRB) to act for the agency during an extended period in which the board had only two members, pursuant to a prior delegation made by a three-member NLRB.[109] Just before the NLRB lost its quorum of three voting members, the agency had voted to delegate the power to decide future cases to the two remaining board members, provided that both voting members agreed to the disposition of the case.[110] Under this procedure, a 2 to 0 vote of the two remaining NLRB members would constitute the decision of the agency in pending administrative adjudications.[111]

The NLRB defended the delegation to a two-member panel as one born out of necessity. Absent a delegation of decisional authority to a panel composed of the two remaining NLRB members, the agency would simply have ceased to function, and adjudications would have come to a complete halt until the president and the Senate resolved an impasse over the confirmation of new NLRB members.[112] Because of this delegation, the two-member Board instead managed to decide almost six hundred cases during the twenty-seven months in which it lacked a third member.[113]

Disallowing this delegation nullified hundreds of NLRB adjudications. Despite the consequences of the decision, the *New Process Steel* majority was emphatic that an administrative agency could not delegate its authority to anything less than a quorum.[114] To hold otherwise would have permitted the agency to redefine the

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109. New Process Steel, L.P. v. NLRB, 130 S. Ct. 2635, 2639–40 (2010).

110. *Id*. at 2638–39.

111. *Id*.

112. *See id*. at 2644–45 (discussing and rejecting the NLRB's necessity defense for delegating the NLRB's adjudicative powers to the two remaining board members).

113. *Id*. at 2639.

114. *See id.* at 2645 ("Congress' decision to require that the Board's full power be delegated to no fewer than three members, and to provide for a Board quorum of three, must be given practical effect rather than swept aside in the face of admittedly difficult circumstances. [National Labor Relations Act § 3(b), 29 U.S.C. § 153(b)(2006),] as it currently exists, does not authorize the Board to create a tail that would not only wag the dog, but would continue to wag after the dog died."). The NLRB's organic act defines a quorum of the five-member board as three members. 29 U.S.C. § 153(b) (2006).

scope of its authority, something that only Congress may do.[115] The Court expressly found "that the Board quorum requirement and the three-member delegation clause should not be read as easily surmounted technical obstacles of little to no import."[116]

The majority opinion by Justice Stevens embraced a formalist analysis, notwithstanding the fact that strict enforcement of the three-member-quorum requirement could mean that the NLRB would be unable to conduct adjudications for very long periods of time. The practical implications of the decision were of little import to the *New Process Steel* majority. Instead, the core issue involved fealty to Congress's institutional design for the NLRB.[117] Embracing the complete incapacity of the NLRB for twenty-seven months required a very strong commitment not only to separation-of-powers doctrine, but also to the nondelegation doctrine.[118]

D. Lujan *and* Printz*: Earlier Examples of Formalism and the Unitary-Executive Theory*

As noted, a specific subset of formalism in separation-of-powers analysis involves the unitary-executive theory. As expounded by its chief proponent on the Supreme Court, Justice Scalia, the unitary-executive theory requires that the president, and not state or nongovernmental entities, execute federal laws.[119] In *Lujan v. Defenders of Wildlife*,[120] Justice Scalia invoked the separation of powers to justify his rejection of the concept of generic citizen standing conferred by Congress, a concept that would have empowered any would-be private attorney general to seek redress for so-called "procedural injur[ies]" in the federal courts.[121]

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115. *See New Process Steel*, 130 S. Ct. at 2641 ("[I]f Congress had intended to authorize two members alone to act for the Board on an ongoing basis, it could have said so in straightforward language.").

116. *Id.* at 2644.

117. *See supra* note 114.

118. *See generally* Ronald J. Krotoszynski, Jr., *Reconsidering the Nondelegation Doctrine: Universal Service, the Power To Tax, and the Ratification Doctrine*, 80 IND. L.J. 239, 241–45, 260–68 (2005) (discussing the nondelegation doctrine, its origins, and its functions).

119. *See* Lujan v. Defenders of Wildlife, 504 U.S. 555, 577 (1991) (explaining that the "Chief Executive's most important constitutional duty" is to "take Care that the Laws be faithfully executed" (quoting U.S. CONST. art. II, § 3) (internal quotation marks omitted)).

120. Lujan v. Defenders of Wildlife, 504 U.S. 555 (1991).

121. *See id.* at 571 ("The Court of Appeals found that respondents had standing . . . because they had suffered a 'procedural injury.'" (quoting Defenders of Wildlife v. Lujan, 911 F.2d 117,

To permit such a cause of action would have made the federal judiciary, in conjunction with private litigants, the president's auditor; private litigants, in tandem with federal courts, would have exercised a general warrant to superintend the president's enforcement of particular laws.[122] Such an arrangement, Justice Scalia claimed, could not be squared with the president's "faithful execution" powers.[123]

Using similar reasoning, Justice Scalia invoked the unitary-executive concept in *Printz* to prohibit Congress from delegating to state executive officers mandatory duties to enforce federal laws.[124] Such "commandeering" of state executive officers would have had an impermissible effect on "the separation and equilibration of powers between the three branches of the Federal Government itself."[125]

State officers—who are not accountable to the president—may not enforce federal law on a mandatory basis because of the unitary nature of the federal executive power. As Justice Scalia explained, "[U]nity would be shattered, and the power of the President would be subject to reduction, if Congress could act as effectively without the President as with him, by simply requiring state officers to execute its laws."[126] The anticommandeering principle accordingly constitutes an iteration and application of the unitary-executive theory of the presidency as much as an application of federalism principles.[127]

Oddly, however, Justice Scalia indicated in a footnote that the problem of presidential control over the execution of federal laws is not implicated when a state government volunteers to perform a particular federal task.[128] He conceded, "The dissent is correct that

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121 (8th Cir. 1990))); *id.* at 576–78 (rejecting the possibility that the respondents had suffered a "procedural injury" as a rationale for establishing Article III standing).

122. *See id.* at 576–77 (noting that "[v]indicating the *public* interest (including the public interest in Government observance of the Constitution and laws) is the function of Congress and the Chief Executive," not of the federal courts and the general public, and arguing that "to permit Congress to transfer from the President to the courts" and private litigants the duty to oversee execution of federal laws would violate the separation of powers by encroaching on a core executive-branch duty).

123. *See id.* at 577 (explaining that permitting generic citizen standing "would enable the courts . . . 'to assume a position of authority over the governmental acts of another and co-equal department'" and noting that the Supreme Court has "always rejected that vision" of the courts (quoting Massachusetts v. Mellon, 262 U.S. 447, 489 (1923))).

124. Printz v. United States, 521 U.S. 898, 922–23 (1997).

125. *Id.* at 922.

126. *Id.* at 923.

127. *See* Caminker, *supra* note 12, at 205 (noting that under the unitary-executive theory, Article II "demands that the President oversee the execution of all federal law").

128. *Printz*, 521 U.S. at 923 n.12.

control by the unitary Federal Executive is also sacrificed when States voluntarily administer federal programs, but the condition of voluntary state participation significantly reduces the ability of Congress to use this device as a means of reducing the power of the Presidency."[129] This is nonsensical as a matter of separation of powers.

Regardless of whether the transfer of the authority over the execution of federal law to state officials takes place on a voluntary or involuntary basis, the net diminution of the president's ability to oversee the administration of federal law remains exactly the same. As Dean Caminker notes, "Arguably, the requirement of presidential supervision should run to *all* forms of state administration of federal programs, even when the state voluntarily enacts state regulations designed specifically to serve federal objectives or satisfy federal standards."[130] Moreover, "[g]iven the President's inability to exercise 'meaningful control' over state officials' implementation decisions, the principle of executive unity would seem to invalidate all conventional joint federal-state programs."[131]

Congress is quite capable of establishing incentives that virtually ensure that most state governments will volunteer to execute federal programs by adopting state laws incorporating the federal statute's means and ends.[132] If presidential control over all aspects of the day-to-day execution of federal law is essential to the separation of powers, cooperative-federalism schemes rest on decidedly shaky constitutional ground.

E. Seeing the Forest in the Trees: The Emerging New Formalism in Separation-of-Powers Jurisprudence

Since the 1970s, Congress has made frequent use of cooperative-federalism programs, under which states are given the option of adopting and enforcing standards at least as demanding as the federal standards. Accepting these responsibilities constitutes a state's agreement to be a "plan" state with "primacy" over enforcement of

129. *Id.* (citation omitted).

130. Caminker, *supra* note 12, at 230–31.

131. *Id.* at 231.

132. *But see* Annie Gowen, *A Small-Government 'Revolution' in Kansas*, WASH. POST, Dec. 22, 2011, at A1 (noting that Governor Sam Brownback "rejected a $31.5 million federal grant for a new health-insurance exchange because he oppose[d] President Obama's health-care law").

these standards.[133] If a particular state declines to adopt and enforce a law that incorporates the terms of the federal statute, the federal government will enforce the federal law directly within that particular jurisdiction.[134] The Occupational Safety and Health Act (OSH Act)[135] provides a prominent example of a statute under which a plan state may take primary responsibility for protecting worker safety within its jurisdiction.[136] Many federal environmental laws also follow this cooperative-federalism model; the Clean Air Act[137] and the Clean Water Act (CWA)[138] are two examples.[139]

If, under the logic of *Free Enterprise Fund*, a two-tiered for-cause limitation on removal power within a federal agency violates the separation of powers,[140] how can a cooperative-federalism scheme, in which primary responsibility for enforcing federal mandates falls on state officers, pass constitutional muster? When a state enforces a federal regulatory program, the president has absolutely no power or authority to control or direct, much less remove, a state officer

133. *See* Gluck, *supra* note 13, at 551–52 (explaining that cooperative federalism has become more in vogue over the past forty years because of the increased competency of state agencies and because "each federal program that gives money and implementation authority to the states makes those states more reliable, and relied-upon, partners with the federal government"); Jason Scott Johnston, *On the Market for Ecosystem Control*, 21 VA. ENVTL. L.J. 129, 158–59 & n.57 (2002) (discussing "the great late twentieth century American Environmental movement" as an example of cooperative federalism and explaining that "'cooperative federalism' in environmental and resource regulation . . . originated . . . during the 1920's to extend . . . principles of scientific management to private and state-owned forests . . . ."). *But cf.* Gluck, *supra* note 13, at 552 ("[A]ctually, cooperative federalism existed well before the 1960s."). As it happens, dating back to the 1920s, federal forest-control programs involved joint federal/state regulatory efforts. Johnston, *supra* note 133, at 159 n.57. That said, however, massive growth in the visibility and importance of cooperative-federalism regulatory programs took place in the 1960s and 1970s. Greve, *supra* note 13, at 577. For a succinct history of cooperative-federalism programs, see *id.* at 576–78.

134. *See* Gade v. Nat'l Solid Wastes Mgmt. Ass'n, 505 U.S. 88, 96–97, 101–03 (1992) (describing in some detail how the federal government will directly enforce federal standards if a state elects not to assume such responsibilities by seeking and obtaining "plan state" status under the OSH Act); Percival, *supra* note 4, at 1174 (noting that under most major federal environmental cooperative-federalism laws "[i]n states that choose not to apply for program delegation, the federal programs are operated and enforced by federal authorities").

135. Occupational Safety and Health Act of 1970, Pub. L. No. 91-596, 84 Stat. 1592 (codified as amended at 29 U.S.C. §§ 651–678 (2006 & Supp. IV 2010)).

136. *See infra* notes 155–59 and accompanying text.

137. Clean Air Amendments of 1970, Pub. L. No. 91-604, 84 Stat. 1676 (codified as amended at 42 U.S.C. §§ 7401–7642 (2006 & Supp. III 2009)).

138. Federal Water Pollution Control Act Amendments of 1972, Pub. L. No. 92-500, 86 Stat. 816 (codified as amended at 33 U.S.C. §§ 1251–1387 (2006 & Supp. IV 2010)).

139. *See infra* Part III.

140. *See supra* notes 75–90 and accompanying text.

enforcing the federal program. As Dean Caminker notes, "Unless these state officials are subject to presidential supervision, Congress violates Article II by cutting the President out of the execution loop."[141] From this vantage point, "principles of separation of powers, in addition to principles of federalism, govern the validity of state administration of federal law."[142]

It is true, of course, that the Environmental Protection Agency (EPA) could suspend a plan state's certification and undertake direct responsibility for enforcing federal law,[143] but the power to suspend the state agency from enforcing federal law is not really the same thing as the power to direct its day-to-day operations. Similarly, the power to suspend a state's primacy status does not involve the power to remove and replace an incompetent or corrupt state officer who executes a federal environmental, labor, or healthcare law. If, as *Free Enterprise Fund* holds,[144] more direct forms of presidential oversight and control are essential to effectuating the imperatives of Article II's Vesting and Take Care Clauses, state enforcement of federal law presents a serious separation-of-powers problem. In fact, such programs appear to be unconstitutional.

Professor Roderick Hills suggests that "one can regard systems of cooperative federalism as akin to the regime installed by the Articles of Confederation: Congress enacts general policies, and state and local governments carry them out."[145] The problem with this analogy, however, is glaringly obvious: no federal executive existed under the Articles of Confederation.[146] Article II, by way of contrast,

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141. Caminker, *supra* note 6, at 1077.

142. *Id.*

143. *See infra* notes 155–70, 197–221 and accompanying text.

144. *See* Free Enter. Fund v. Pub. Co. Accounting Oversight Bd., 130 S. Ct. 3138, 3164 (2010) ("The Constitution that makes the President accountable to the people for executing the laws also gives him the power to do so. That power includes, as a general matter, the authority to remove those who assist him in carrying out his duties. Without such power, the President could not be held fully accountable for discharging his own responsibilities . . . .").

145. Roderick M. Hills, Jr., *Federalism in Constitutional Context*, 22 HARV. J.L. & PUB. POL'Y 181, 185 (1998).

146. ARTICLES OF CONFEDERATION OF 1781, art. IX (failing to create or empower a national executive authority); Saikrishna Prakash, *New Light on the Decision of 1789*, 91 CORNELL L. REV. 1021, 1028 (2006); *see also* Saikrishna B. Prakash & Michael D. Ramsey, *The Executive Power over Foreign Affairs*, 111 YALE L.J. 231, 277 (2001) (noting that the Continental Congress undertook executive duties, such as foreign affairs, in light of the absence of a national executive under the Articles of Confederation); John C. Yoo, *The Continuation of Politics by Other Means: The Original Understanding of the War Powers*, 84 CALIF. L. REV. 167, 218 (1996) ("State governments provided working examples of a separate executive branch,

establishes a unitary executive, vests the complete executive power in the office of the president,[147] and requires the president to "take care that the Laws be faithfully executed."[148]

A model that exports the administration of federal law outside the executive branch arguably departs too far from the Framers' design. Nevertheless, "non-federal implementation of federal law persists despite such absence of a constitutional framework, simply because of its practical advantages."[149] Practical advantages, however, are relevant only to a functionalist separation-of-powers analysis, not to the more categorical approach of formalism.[150]

Moreover, as Professor Peter Strauss cogently argues, only the president brings a truly national perspective to bear when administering federal laws, and only the president can serve as an effective institutional counterweight to Congress.[151] In a cooperative-federalism scheme, local interests inevitably will skew the implementation and enforcement of federal law to favor local interests.[152] No national standard will apply in fact, even if such standards exist in theory.

This disunity occurs by design and intention and has the effect of greatly enhancing Congress's de facto power over execution of federal law at the expense of the president and the executive branch. Congress is much better positioned than the president to dictate

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which the Articles of Confederation lacked."). In fact, the national government established under the Articles of Confederation also lacked federal courts. *See* Jack L. Goldsmith, *Federal Courts, Foreign Affairs, and Federalism*, 83 VA. L. REV. 1617, 1643 (1997) ("The Articles of Confederation lacked an effective supremacy clause, executive, or judiciary, and Congress lacked adequate power to raise revenue or to control the states in foreign relations.").

147. *See* U.S. CONST. art. II, § 1, cl. 1 ("The executive Power shall be vested in a President of the United States of America.").

148. *Id.* art. II, § 3.

149. Hills, *supra* note 145, at 185.

150. *See supra* notes 46–65, 70–128 and accompanying text.

151. *See* Peter L. Strauss, *The Place of Agencies in Government: Separation of Powers and the Fourth Branch*, 84 COLUM. L. REV. 573, 596–97, 649–50, 662–64, 668–69 (1984) ("[O]ne must remain able to characterize the President as the unitary, politically accountable head of all law-administration, sufficiently potent in his own relationships with those who actually perform it to serve as an effective counter to a feared Congress.").

152. *See, e.g.*, Dina ElBoghdady, *FDA Faulted over State Inspections*, WASH. POST, Dec. 15, 2011, at A2 (noting the problems with the Food and Drug Administration's (FDA's) increasing reliance on state-government agencies to inspect food-packaging and food-processing facilities and reporting on a "common problem" involving state agencies' "inability to identify violations" of federal food-safety regulations); *see also* Bulman-Pozen & Gerken, *supra* note 13, at 1258–59, 1265–70, 1289–91 (observing that states often intentionally and blatantly ignore federal standards when state officials oppose federal policies).

outcomes to fifty-one disparate administrative entities, most of which rely heavily on federal funding. This situation presents precisely the conditions that lead Professor Strauss, a pragmatic and principled functionalist, to insist on meaningful presidential control over all federal administrative agencies.[153] As he states the proposition, "Only the President can supply these services."[154]

To be sure, a less principled functionalist than Professor Strauss would not be unduly troubled by these issues. There are, after all, meaningful forms of federal control, such as suspension of plan-state status for serial failures to enforce federal law, and the benefits of cooperative federalism are potentially quite significant. From a formalist perspective, however, the efficiency, convenience, and utility of cooperative-federalism enforcement schemes should be *entirely irrelevant* to their constitutional status. And from a principled functionalist perspective, very good, perhaps even compelling, reasons undergird the imperative of presidential control of the execution of federal law.

To be very clear, I am not saying that I have reached a firm conclusion that after *Free Enterprise Fund* cooperative-federalism schemes are unconstitutional on separation-of-powers grounds. I am saying instead that these creative arrangements of shared responsibility for the enforcement of federal laws require reconsideration in light of the formalist principles articulated in *Free Enterprise Fund*. I would also assert, whatever the ultimate outcome of the analysis, that a rule that requires some measure of reasonably direct presidential removal power places a strain on any enforcement scheme that vests the execution of federal laws in the hands of officers who serve entirely outside the federal government.

III. COOPERATIVE FEDERALISM IN ACTION: THREE EXAMPLES

To analyze properly the constitutional status of cooperative federalism post-*Free Enterprise Fund*, a working knowledge of actual cooperative-federalism programs is useful, perhaps even essential.

153. *See* Strauss, *supra* note 151, at 663 ("The power to balance competing goals—and the concomitant power to influence at least to some degree the agencies' exercise of discretion—can only be the President's; leaving the balancing functions in the agencies would create multiheaded government, government with neither the capacity to come to a definitive resolution nor the ability to see that any resolution is honored in all agencies to which it may apply.").

154. *Id.*

This Part provides three brief sketches of current cooperative-federalism programs and outlines some design elements that are common to many such programs.

A. The OSH Act of 1970 and the Occupational Safety and Health Administration

State-plan provisions have been integral to the work of the Occupational Safety and Health Administration (OSHA) since the agency's inception.[155] John H. Stender, former assistant secretary of labor for OSHA, stated that Congress would not have enacted the OSH Act had the bill not included state-plan provisions.[156] Under these provisions, states have the ability to develop state standards that preempt the federal OSHA standards.[157] First, a state must submit to the secretary of labor a proposal to assume responsibility for the enforcement and development of occupational safety and health standards.[158] The secretary must then approve the plan if, under his judgment, it meets eight criteria under the OSH Act designed to ensure that the state regulation is "at least as effective as" its federal counterpart.[159]

A state plan must provide satisfactory assurances that the state agency will have the legal authority and personnel to administer and enforce the standards and that the state will "devote adequate funds to the administration and enforcement of such standards."[160] To ensure sufficient oversight by the secretary, the state plan must require employers in the state to submit reports to the secretary, just as they would if the state plan were not in effect.[161] In addition, the state plan must provide for the state occupational safety and health agency to make reports to the secretary "in such form and containing such information, as the Secretary shall from time to time require."[162] Any state regulation of occupational safety and health that the

155. Occupational Safety and Health Act of 1970, Pub. L. No. 91-596, § 18, 84 Stat. 1592, 1608 (codified as amended at 29 U.S.C. § 667 (2006)).

156. John H. Stender, *An OSHA Perspective and Prospective*, 26 LAB. L.J. 71, 73 (1975).

157. 29 U.S.C. § 667(b) (2006).

158. *Id.*

159. *Id.* § 667(c).

160. *Id.* § 667(c)(4)–(5).

161. *Id.* § 667(c)(7).

162. *Id.* § 667(c)(8).

secretary has not approved is preempted if there is a federal standard in effect.[163]

Even if the secretary approves the state plan, he retains the right to exercise authority "with respect to comparable standards promulgated under section 655 of [title 29]" until, based on the actual operations under the state plan, he determines that the state plan meets the standards described in the preceding paragraph.[164] The secretary cannot make this determination until at least three years after his initial approval of the state plan.[165] Twenty-one states and Puerto Rico have OSHA-approved state plans covering private- and public-sector employees.[166] Four states and the Virgin Islands have approved plans covering only state- and local-government employees.[167]

The OSH Act requires the secretary continuously to evaluate the administration and enforcement of the state plan based on the state-agency reports and the secretary's own inspections.[168] If, during the continuing evaluation, the secretary finds, after due notice and hearing, that the state is failing to "comply substantially" with any part of the state plan, he must notify the state agency of his withdrawal of approval of the plan, at which point the plan will cease to be in effect.[169] The secretary's withdrawal of approval—or rejection in the first instance—of a state plan is subject to review by the local federal court of appeals, if the state petitions the court for such review.[170]

B. The Clean Water Act and the EPA

Professor Robert Percival notes that "[t]he predominant approach to environmental federalism currently employed by federal

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163. *See* Gade v. Nat'l Solid Wastes Mgmt. Ass'n, 505 U.S. 88, 98–99 (1992) ("[W]e hold that nonapproved state regulation of occupational safety and health issues for which a federal standard is in effect is impliedly preempted as in conflict with the full purposes and objectives of the OSH Act." (citation omitted)).

164. 29 U.S.C. § 667(e); *see also id.* § 655 (providing for promulgation of national standards).

165. *Id.* § 667(e).

166. *State Occupational Safety and Health Plans*, OCCUPATIONAL SAFETY & HEALTH ADMIN., U.S. DEP'T OF LABOR, http://www.osha.gov/dcsp/osp/index.html (last visited Jan. 31, 2012).

167. *Id.*

168. 29 U.S.C. § 667(f).

169. *Id.*

170. *Id.* § 667(g).

environmental statutes is the 'cooperative federalism' model."[171] He adds, "The principal federal pollution control statutes make federal agencies responsible for establishing national environmental standards that state authorities then may qualify to administer and enforce."[172] Other commentators note that "[t]he states have made ample use of the offer, and 75 percent of the major federal environmental programs are now administered by the states."[173]

For example, under the CWA, the federal government is the default administrator of the industrial discharge-permitting program known as the National Pollution Discharge Elimination System (NPDES).[174] The EPA may delegate its enforcement power to a state if the proposed state program gives the state the power to issue permits in compliance with the federal standards.[175]

The EPA administrator retains the power to withdraw administration and enforcement authority from a state if the administrator finds that the state is not administering the approved state program in accordance with the federal NPDES.[176] If the EPA administrator makes this determination after a public hearing, she must notify the state and allow the state a reasonable amount of time—up to ninety days—to take appropriate corrective action.[177] When a state subsequently fails to take such action, the administrator must withdraw approval of the state program, notify the state, and provide a public explanation in writing for the withdrawal.[178] The administrator also has the option of taking enforcement action against a person who violates a permit issued by a state under an approved permit program by ordering compliance or bringing a civil action.[179]

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171. Percival, *supra* note 4, at 1174. For a historical overview of federal environmental programs, see generally *id.* at 1146–65.

172. *Id.* at 1174; *see also id.* at 1143–45 (discussing the architecture and mechanics of cooperative federalism in the context of environmental protection).

173. Markus G. Puder & Michel J. Paque, *Tremors in the Cooperative Environmental Federalism Arena: What Happens When a State Wants To Assume Only Portions of a Primacy Program or Return a Primacy Program?—The Underground Injection Control Program Under the Safe Drinking Water Act as a Case Study*, 24 TEMP. J. SCI. TECH. & ENVTL. L. 71, 72 (2005).

174. 33 U.S.C. § 1342(a)(1) (2006).

175. *Id.* § 1342(b).

176. *Id.* § 1342(c)(1).

177. *Id.* § 1342(c)(3).

178. *Id.*

179. *Id.* § 1319(a)(1); *see also id.* § 1342(i) ("Nothing in this section shall be construed to limit the authority of the Administrator to take action pursuant to section 1319 of this title.").

If the administrator finds that "violations . . . are so widespread" that they appear to be the result of a state's failed enforcement, then the administrator must provide notice to the state.[180] If the enforcement failures continue for more than thirty days after this notification, the administrator must enforce the permit conditions or limitations until the state satisfies the administrator that it will enforce the conditions or limitations itself.[181]

C. The Patient Protection and Affordable Care Act, Health and Human Services, and the States

The Patient Protection and Affordable Care Act (ACA)[182] provides a timely example of delegation of federal administrative power to the states. The ACA is a significant and controversial piece of healthcare-reform legislation that was signed into law in 2010.[183] It contains provisions for an individual mandate,[184] guaranteed health insurance regardless of most preexisting conditions,[185] and the establishment of state health-insurance exchanges.[186]

Perhaps the most troublesome of the provisions from a separation-of-powers perspective is the health-insurance-exchange

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180. *Id.* § 1319(a)(2).

181. *Id.*

182. Patient Protection and Affordable Care Act (ACA), Pub. L. No. 111-148, 124 Stat. 119 (2010) (to be codified in scattered sections of the U.S. Code).

183. *See* Bryan J. Leitch, *Where Law Meets Politics: Freedom of Contract, Federalism, and the Fight over Health Care*, 27 J.L. & POL. 177 (2011) (detailing the constitutional challenges to the ACA and the political values underlying them); Brendan S. Maher, *The Benefits of Opt-In Federalism*, 52 B.C. L. REV. 1733, 1733–34 (2011) (noting that "[f]ew national debates have rivaled the intensity of those regarding the Patient Protection and Affordable Care Act" and positing that "[t]he constitutional dispute is part of a larger argument that is perhaps America's oldest: what is the proper role of the federal government?"); Ruth Mason, *Federalism and the Taxing Power*, 99 CALIF. L. REV. 975, 979 (2011) ("More controversially, as part of the Patient Protection and Affordable Care Act (ACA), Congress recently inserted into the tax law a provision that has come to be known as the 'individual mandate.' This provision imposes a penalty on certain people who fail to buy private medical insurance."); John Copeland Nagle, *Saxe's Aphorism*, 79 GEO. WASH. L. REV. 1505, 1519–25 (2011) (reviewing JOHN F. MANNING & MATTHEW C. STEPHENSON, LEGISLATION AND REGULATION (2010)) (noting the "controversy surrounding the congressional enactment of the ACA and the debate about the role of the administrative agencies responsible for implementing the Act" and discussing the main substantive provisions of the ACA, which involve a national plan for universal healthcare coverage and access).

184. ACA § 1501(a), 124 Stat. at 242–44 (to be codified at 42 U.S.C. § 18091).

185. *Id.* § 1101, 124 Stat. at 141–43 (to be codified at 42 U.S.C. § 18001).

186. *Id.* §§ 1321–1333, 10104(*l*)–(q), 124 Stat. at 186–208, 902–06 (to be codified at 42 U.S.C. §§ 18041–18054).

section. An insurance exchange is a competitive marketplace for health insurance that allows individuals and small businesses to compare insurance options based on price, quality, and other variables.[187] Each state has the ability to establish an exchange if it adopts the ACA standards or if it passes a state law implementing the federal standards.[188] If a particular state does not establish a health-insurance exchange, the secretary is required to establish and operate an exchange within the state.[189] If the state chooses to establish an exchange, the exchange must be either (1) a governmental agency, meaning a state executive-branch agency or an independent public agency, or (2) a state-established nonprofit corporate entity.[190] The ACA's implementing regulations provide that "[s]tates should consider the costs and benefits of utilizing the accountability structure within an existing agency versus the need to establish a governing body for an independent agency."[191] Moreover, the regulations provide that "[n]on-profit entities may be able to operate without some of the restrictions that can limit the flexibility of governmental agencies."[192]

Regardless of the type of administrative entity established as the exchange, the management structure must be accountable for the performance and oversight of the exchange.[193] Oversight of a private nonprofit corporate entity would be particularly difficult; even state control of such an entity could prove attenuated. Moreover, control and oversight becomes even more challenging if a state elects to establish multiple exchanges within its borders to cover different geographic areas of the state.[194]

If a state later decides that it no longer wants to operate an exchange, it may voluntarily elect to have the federal government

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187. Patient Protection and Affordable Care Act; Establishment of Exchanges and Qualified Health Plans, 76 Fed. Reg. 41,866, (July 15, 2011) (to be codified at 45 C.F.R. pts. 155–56).

188. *Id.* at 41,867.

189. *Id.*

190. *Id.* at 41,870. HHS announced in late 2011 that it would delegate the specific design of health-insurance plans to the states, thereby "giv[ing] states broad latitude to define the minimum benefits that many health insurance policies will be required to offer under the 2010 health-care law." N.C. Aizenman, *States Will Have Flexibility in Defining Required Health Coverage*, WASH. POST, Dec. 17, 2011, at A5.

191. Patient Protection and Affordable Care Act, 76 Fed. Reg. at 41,870.

192. *Id.*

193. *Id.*

194. *See id.* at 41,870–71 (explaining how a series of regional exchanges would work).

establish and operate an exchange within the state.[195] The state must notify the federal government of its intention to cease operation of the state exchange at least twelve months prior to ceasing operation, in order to give the federal government time to establish its exchange.[196] This could mean, in practice, that a federally mandated exchange program could be inoperable for up to twelve months if a state fails to administer the exchange properly and a federal intervention proves necessary.

D. Common Oversight Provisions and Problems in Cooperative-Federalism Programs

A state's commitment to actually enforcing federal law is often lackluster. "At least twelve states have enacted legislation either forbidding their programs from promulgating standards that are tougher than federal minimum requirements or imposing additional procedures that must be satisfied before such requirements become effective."[197] States also undermine the efficacy of the CWA "through weaker environmental standards, lax implementation, and lethargic enforcement."[198] In turn, "[t]he crude tools available for enforcing such standards, for example, a withdrawal of federal funds or a federal takeover of state environmental programs, have added even more aggravation to the federal-state maelstrom."[199] As Professor Bill Andreen argues, "It seems as if many states would prefer not to vigorously enforce or implement even the basic requirements of the [CWA]."[200]

In other words, the formal promises made in the state implementation plan (SIP), and in agreements put forward to secure conditional-funding grants are not always kept.[201] Resource limitations make the EPA's task of enforcing state promises very difficult, if not impossible.[202] Moreover, the EPA lacks both the ability

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195. *Id.* at 41,872.

196. *Id.*

197. Andreen, *supra* note 4, at 260.

198. *Id*. at 261.

199. Percival, *supra* note 4, at 1144–45.

200. Andreen, *supra* note 4, at 276.

201. Percival, *supra* note 4, at 1144–45.

202. Stephen C. Robertson, Note, *State Permitting:* United States v. Smithfield Foods, Inc. *and Federal Overfiling Under the Clean Water Act*, 23 WM. & MARY ENVTL. L. & POL'Y REV. 593, 606 (1999); *cf.* ElBoghdady, *supra* note 152 (noting that resource constraints have led the FDA increasingly to rely on state inspections of food-industry plants).

to take over the enforcement of federal environmental laws directly, even if it were inclined to rescind a state's primacy status, and sufficient resources to routinely audit a state environmental agency's performance. In consequence, "[f]ederal environmental officials have had great difficulty ensuring that states meet minimum federal standards."[203] State intransigence is accordingly difficult to address effectively.

On paper, the oversight provisions that govern state administration of the OSH Act, the CWA, and the ACA appear to create strong and effective federal superintendence over the state administration of these programs. In theory, "[c]ooperative federalism bridges the federal and state spaces" by enabling states "to gain the lead responsibility or primacy for day-to-day program implementation and enforcement through a transfer process known as delegation, authorization, and approval."[204] In practice, however, primary oversight mechanisms—such as formal SIPs that require regular reporting, subject states to random audits, and establish conditions for funding of states' enforcement activities—do not result in meaningful supervision of state agencies on a day-to-day basis.[205] Moreover, state regulators are well aware that federal agencies simply could not replace them because federal entities lack the staff, resources, and even the experience necessary to operate major regulatory programs on a day-to-day basis.[206]

The federal government uses three main mechanisms to rein in state resistance and to overcome the obstacles to effective implementation of regulatory programs: "vetoing" particular state-agency decisions, withdrawing a state's primacy status, and overfiling in the context of a state enforcement proceeding. Unfortunately, all three of these devices have major shortcomings and, in general, fail to ensure that states reliably serve as faithful agents of the federal government.

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203. Percival, *supra* note 4, at 1144.

204. Puder & Paque, *supra* note 173, at 71–72 (footnote omitted).

205. *See, e.g.*, RECHTSCHAFFEN & MARKELL, *supra* note 4, at 98–101 (discussing various EPA oversight, compliance, and enforcement activities).

206. *See* ElBoghdady, *supra* note 152 (reporting that the FDA has failed to adequately monitor state inspection and enforcement of federal food-safety regulations because the agency lacks the resources necessary to audit state compliance effectively). For example, the FDA has failed to audit state inspection programs for such lackluster reasons as a dearth of "trained auditors" and something as basic as a lack of "travel funds." *Id*. Even in cases identifying recurring problems, the difficulties "were not always addressed," and the FDA took corrective action "in only four of the 10 states where systemic problems were [found]." *Id*.

The first potential oversight tool is the ability to second-guess specific state decisions that implement federal statutes. In the context of the CWA, for example,

> [i]n addition to setting uniform effluent standards, EPA is given veto power over state-issued permits, the power in extreme instances to withdraw state permitting authority, the power to review and disapprove state water-quality standards, concurrent enforcement authority, and the power to shape state programs through the provision of federal financial assistance and the promulgation of EPA's program regulations.[207]

The second major oversight mechanism is the federal government's power to withdraw a state's primacy status. Unfortunately, this mechanism is not credible because the potential costs to the federal government are too large. Federal agencies simply do not revoke state authority to administer federal programs in practice, no matter how lackluster or poor a state agency's performance. Taking over a state's enforcement effort would require a significant expenditure of resources. Moreover, suspension requires prior notice to both the state and the public, so it often takes a significant amount of time to implement.[208] These delays are only worsened by a state agency's decision to seek judicial review of a suspension of its primacy status. As Professor Markus Puder and environmental-policy expert Michel Paque observe, "In light of the high thresholds for withdrawal and the significant resources and costs involved with direct implementation," a federal agency "usually resorts to 'golden reign' sanctions, negotiations of new deadlines, or overfilings, rather than revocation of a state program."[209]

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207. Andreen, *supra* note 4, at 259 (footnotes omitted).

208. *See, e.g.*, Clean Water Act § 309(a)(2), 33 U.S.C. § 1319(a)(2) (2006) (requiring notice of ninety days before suspending a state's primacy status under the Act); Clean Air Act § 113(a)(2), 42 U.S.C. § 7413(a)(2) (2006) (requiring a thirty-day waiting period and public notice before suspension); Resource Conservation and Recovery Act § 3006(e), 42 U.S.C. § 6926(e) (2006) (requiring the EPA to assume responsibility for enforcing the statute if a state defaults on its obligations "within a reasonable time," which the statute defines as ninety days); *see also* Ellen R. Zahren, Comment, *Overfiling Under Federalism: Federalism Nipping at State Heels To Protect the Environment*, 49 EMORY L.J. 373, 381 (2000) ("The biggest sanction in all of the Acts is withdrawal of a state's delegation and implementation of a federal program.").

209. Puder & Paque, *supra* note 173, at 87 (footnotes omitted); *see also* RECHTSCHAFFEN & MARKELL, *supra* note 4, at 106–07 (discussing alternatives to termination of state primacy status). Another commentator reported in 1999 that "the EPA ha[d] never revoked a state program." Robertson,*supra* note 202, at 606.

In fact, when a state did voluntarily offer to turn over responsibility for administration of just a portion of a major federal environmental program—the Underground Injection Control (UIC) Program—the EPA reacted with abject horror and "negotiated a last-minute deal with the Illinois EPA to abort the return process."[210] Massachusetts successfully returned delegated UIC authority to the EPA in 2003.[211] This, however, is the exception that proves the rule. As Steven Robertson argues, "Given that the states perform the vast majority of site inspections, the practical reality of the EPA's taking over an entire state's inspection program is 'more theoretical than real' . . . ."[212]

A third mechanism of oversight known as overfiling involves duplicating a state agency's actions in a particular enforcement proceeding. Robertson explains that "[i]n rare circumstances, the EPA will use its authority to prosecute a polluter even though the state in which the polluter is situated has already initiated prosecution. This action is called an 'overfiling.'"[213] Ellen Zahren adds, "Overfiling occurs when the EPA either steps in to fix, change, undo, or add to what a state already has done or takes action after a state fails to act."[214]

Overfiling, however, requires the EPA to find that a state has failed to take "timely and appropriate action" and that a state agency's enforcement effort has been "clearly inadequate."[215] Thus, the EPA will not overfile simply because it disagrees with a state agency's general approach to a particular case; the state agency's action must constitute a gross dereliction of duty, not mere negligence or ineffectiveness. Also, overfiling does not involve any power over or direct supervision of a state agency implementing federal law. Instead, "overfiling is an action taken against a regulated entity, not the state itself."[216]

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210. Puder & Paque, *supra* note 173, at 89–90.

211. *Id*. at 90–91.

212. Robertson, *supra* note 202, at 606 (footnote omitted) (quoting David R. Hodas, *Enforcement of Environmental Law in a Triangular Federal System: Can Three Not Be a Crowd When Enforcement Authority Is Shared by the United States, the States, and Their Citizens?*, 54 MD. L. REV. 1552, 1582–83 (1995)); *see also* Zahren, *supra* note 208, at 373–86 (describing and discussing the process of overfiling).

213. Robertson, *supra* note 202, at 600.

214. Zahren, *supra* note 208, at 373.

215. Memorandum from A. James Barnes, Deputy Adm'r, U.S. Envtl. Prot. Agency, to Reg'l Adm'rs, U.S. Envtl. Prot. Agency 1–2 (May 19, 1986).

216. Zahren, *supra* note 208, at 416.

Overfiling represents a highly imperfect form of federal supervision for three main reasons. First, "[s]elected prosecution of notable offenders is more likely than a federal takeover of an entire state program, but even such selected targeting is rare."[217] Second, an agency "must give the state and the violator adequate notice, an action that has 'the practical effect of [providing] more state control over enforcement actions.'"[218] Third, and finally, even in the rare instances when a federal agency overfiles a state agency with primacy status, the regulated entity or the overfiled state agency usually may seek federal court review and, accordingly, a federal judge ultimately will decide whether a state agency's failure to act satisfies the statutory and regulatory criteria for overfiling.[219]

In sum, "the threat of withdrawal is almost completely unrealistic, creates too much tension, and might discourage some states from adopting a program at all."[220] At the same time, "[s]anctions and overfiling are the only 'sticks' given to the EPA by the statutes."[221] Other indirect forms of supervision, such as the conditional funding of state agencies administering federal law, regular reporting requirements, random audits, and the like also provide relatively attenuated forms of federal oversight and control.[222] In consequence, cooperative-federalism programs essentially transfer broad and effectively unsupervised responsibility for the administration of federal law to state agencies; whether by design or by default, Congress has not established an administrative structure that provides effective and meaningful oversight powers to the federal entities that ostensibly supervise state agencies enforcing federal law.

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217. Robertson, *supra* note 202, at 606.

218. Zahren, *supra* note 208, at 416 (alteration in original) (quoting Hubert H. Humphrey III & LeRoy C. Paddock, *The Federal and State Roles in Environmental Enforcement: A Proposal for a More Effective and More Efficient Relationship*, 14 HARV. ENVTL. L. REV. 7, 15 (1990)).

219. *See* United States v. Smithfield Foods, Inc., 965 F. Supp. 769, 791–95 (E.D. Va. 1997) (granting the EPA authority over the defendant because Virginia's sanctions were not comparable to those under the CWA); *see also* Robertson, *supra* note 202, at 610–14 (discussing the holding of *United States v. Smithfield Foods, Inc.*, 965 F. Supp. 769 (E.D. Va. 1997)).

220. Zahren, *supra* note 208, at 418.

221. *Id.*

222. *See* RECHTSCHAFFEN & MARKELL, *supra* note 4, at 13–21, 91–124; Zahren, *supra* note 208, at 418.

IV. RECONSIDERING COOPERATIVE FEDERALISM AND THE SEPARATION OF POWERS

If one takes seriously the importance of constitutional architecture, then the asserted practical benefits of cooperative federalism should not outweigh and overbear the negative consequences that cooperative federalism entails: damage to presidential control over the execution of federal law, the loss of accountability of the federal government to the citizenry, and the fracturing of federal law. Instead, "the centrality of the separation of powers concept to American political theory should be recognized, and . . . the [Supreme] Court's enforcement of that concept needs to become considerably more vigorous than it [was under the Rehnquist Court]."[223]

This Part returns to consideration of the constitutional text and its application to cooperative-federalism programs. In the first Section, I consider the explicit provisions that seem, on their face, to vest executive authority in a sole executive. In the next two Sections, I discuss the ways in which cooperative-federalism schemes threaten the government accountability and the uniformity of enforcement that would otherwise be achieved by a unitary executive.

A. The Constitutional Imperative of Presidential Oversight of the Execution of Federal Law

As discussed at the beginning of this Article, the constitutional text mandates that a single, unitary executive officer will oversee the implementation of federal law.[224] Professor Strauss observes that "[a]ll will agree that the Constitution creates a unitary chief executive officer, the President, at the head of the government Congress defines

223. Redish & Cisar, *supra* note 2, at 452.

224. *See* U.S. CONST. art. II, § 1, cl. 1 ("The executive Power shall be vested in a President of the United States of America."); *id.* art. II, § 3 ("[H]e shall take Care that the Laws be faithfully executed, and shall Commission all the Officers of the United States."). This language plainly indicates that the executive power *must* be vested in a single, national officer—the president—and that the president must enjoy the power to oversee personally the execution of federal laws. The Opinions Clause, *id.* art. II, § 2, cl. 1, lends further textual support to the argument that the president must be able to directly supervise the enforcement of federal law, *see id.* art. II, § 2, cl. 1 ("The President . . . may require the Opinion, in writing, of the principal Officer in each of the executive Departments, upon any Subject relating to the Duties of their respective Offices . . . ."). For a discussion of the meaning and importance of the Opinions Clause, see *infra* notes 235–42 and accompanying text.

to do the work its statutes detail."[225] Thus, "[w]hatever arrangements are made, one must remain able to characterize the President as the unitary, politically accountable head of all law-administration, sufficiently potent in his own relationships with those who actually perform it to serve as an effective counter to a feared Congress."[226] Moreover, this constitutional structure reflects careful and considered choices—not mere accidents of history. As Professor Redish and Cisar explain, "In structuring their unique governmental form, the Framers sought to avoid undue concentrations of power by resort to institutional devices designed to foster three political values: checking, diversity, and accountability."[227]

Unlike the legislative and judicial branches, which are headed by collegial institutions, Article II squarely vests the executive power of the United States in the president: "The executive Power shall be vested in a President of the United States of America."[228] Some judges and legal academics argue that, in combination with the Take Care Clause,[229] the Vesting Clause of Article II requires that the president enjoy plenary control over the activities of the executive branch.[230] As

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225. Peter L. Strauss, *Foreword: Overseer, or "The Decider"? The President in Administrative Law*, 75 GEO. WASH. L. REV. 696, 696 (2007).

226. Strauss, *supra* note 151, at 597.

227. Redish & Cisar, *supra* note 2, at 451.

228. U.S. CONST. art. II, § 1.

229. *See id.* art. II, § 3 ("[The President] shall take Care that the Laws be faithfully executed . . . .").

230. Calabresi & Rhodes, *supra* note 31, at 1165–67, 1207–08; Prakash, *supra* note 31, at 992; *see also* Geoffrey P. Miller, *Independent Agencies*, 1986 SUP. CT. REV. 41, 44 ("The President retains the constitutional power to direct the officer to take particular actions . . . or to refrain from acting . . . ."); Susan M. Davies, Comment, *Congressional Encroachment on Executive Branch Communications*, 57 U. CHI. L. REV. 1297, 1300 (1990) ("[The Framers] created a unitary executive, popularly elected and politically accountable: a single person in whom all executive power would reside."). The Framers, of course, did not provide for popular election of the president. *See* U.S. CONST. art. II, § 1, cl. 2 ("Each State shall appoint, in such Manner as the Legislature thereof may direct, a Number of Electors, equal to the whole Number of Senators and Representatives to which the State may be entitled in the Congress . . . ."). The equal voting rights of the states in the Senate make the Electoral College's composition deeply undemocratic (for example, Wyoming and Alaska enjoy grossly disproportionate voting strength); thus, the House of Representatives has more democratic legitimacy than the president, if democratic legitimacy requires respect for the principle of equal voting power among citizens. *See* Reynolds v. Sims, 377 U.S. 533, 576 (1964) ("[T]he Equal Protection Clause requires both houses of a state legislature to be appointed on a population basis . . . ."); Baker v. Carr, 369 U.S. 186, 207–08 (1962) (recognizing the validity of a claim under the Equal Protection Clause, U.S. CONST. amend. XIV, § 1, alleging an "irrational disregard of the standard of apportionment prescribed in the State Constitution or of any standard, effecting a gross disproportion of representation to voting population" and holding that "[a] citizen's right to a vote free of arbitrary impairment by

Justice Scalia has explained, "It is not for [the Court] to determine, and we have never presumed to determine, how much of the purely executive powers of government must be within the full control of the President. The Constitution prescribes that they *all* are."[231]

Both the Vesting and Take Care Clauses indicate that the Framers intended to create a unitary national officer with the ability and the duty to take primary responsibility for the implementation of federal law. As Professor Strauss notes, "Of the decisions clearly taken, perhaps none was as important as the judgment to vest the executive power in a single, elected official, the President."[232] Moreover, whether "the President is to be a decider or a mere overseer, or something between, [the Constitution] requires that he have significant, ongoing relationships with all agencies responsible for law-administration."[233]

In addition, the Opinions Clause[234] supports the claim that the president must enjoy the ability to oversee the execution of federal law, even when Congress places particular administrative tasks in the hands of specific agencies or departments. The Opinions Clause provides that "[t]he President . . . may require the Opinion, in writing, of the principal Officer in each of the executive Departments, upon any Subject relating to the Duties of their respective Offices."[235] Note that this power is facially limited to the "principal Officer" within an executive department; it does not encompass inferior officers within an executive department or mere employees. If the Framers intended Article II to give the president virtually unfettered authority over presidential appointees, why did they include a specific clause granting the president the power to require his appointees to provide written opinions regarding matters falling within "the Duties of their respective Offices"?

As one astute legal scholar argues, "A reasonable interpretation of the Opinions Clause is that it exists because it was not assumed, or at the very least not obvious, that the President had absolute power

state action has been judicially recognized as a right secured by the Constitution, when such impairment resulted from a dilution by a false tally").

231. Morrison v. Olson, 487 U.S. 654, 709 (Scalia, J., dissenting).

232. Strauss, *supra* note 151, at 599.

233. *Id.* at 648.

234. U.S. CONST. art. II, § 2, cl. 1.

235. *Id.*

over heads of departments."[236] Thus, the existence of the Opinions Clause perhaps suggests that the president's authority over subordinates could be somewhat circumscribed; even if the president possesses the power to fire an appointee, he might not necessarily have the power to otherwise control or compel an appointee to do a particular task, even a task as innocuous as offering the president an opinion, in writing, about the operations of the department.[237]

Nevertheless, the Opinions Clause is "expressive of the President's necessary relationship with those parts of government responsible for administering its laws" and "[has] sharp implications for congressional controls."[238] As Professor Strauss explains, "No agency could be made so independent of presidential oversight as to deny that relationship."[239] And "the strong implication" of the Opinions Clause "is that the communication the President may demand would be one made to him in private and made in time for relevant action or response on his part (that is, prior to the agency's own final decision)."[240] This duty of timely communication on the part of those implementing federal law "would obtain whether the President were entitled to direct the outcome, only to speak to it, or merely to be informed what is likely to occur."[241] After-the-fact communication would not be sufficient because such an approach "would deny any effective President-agency relationship and would inhibit the President's capacity to mobilize the remainder of government to respond to the measure being taken."[242]

Thus, even if Article II calls merely for presidential oversight, rather than direct presidential control, of the administration of federal law, constitutional problems would exist in the delegation of

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236. Morton Rosenberg, *Congress's Prerogative over Agencies and Agency Decisionmakers: The Rise and Demise of the Reagan Administration's Theory of the Unitary Executive*, 57 GEO. WASH. L. REV. 627, 689 (1989).

237. *See* Rosenberg, *supra* note 236, at 689–90 ("A broad reading of the Take Care Clause would have the effect of reducing the Opinions Clause—which appears among the grant of major presidential powers in section two—to surplusage."); A. Michael Froomkin, Note, *In Defense of Administrative Agency Autonomy*, 96 YALE L.J. 787, 800–01 (1987) (arguing that the Opinions Clause refutes the inference that the president should enjoy plenary power over all executive-branch officers and asking "[i]f the President has so much control over the executive that he can fire at will, why put the power to request written opinions in the Constitution?").

238. Strauss, *supra* note 151, at 647.

239. *Id.*

240. *Id.*

241. *Id.*

242. *Id.*

federal executive authority to non-Article II officials. Professor Strauss observes that "[e]ffective presidential power to control subordinates may be substantially a function of his ability to enforce his wishes, to remove persons in whom he lacks political confidence or, less broadly, who disobey his valid directives."[243] The president, however, lacks *any* direct supervisory powers over state officers enforcing federal laws, including any power to set enforcement priorities or to remove state officers in whom he lacks confidence.[244] With respect to delegations outside of the government entirely, to private entities such as the Internet Corporation for Assigned Names and Numbers,[245] the president's powers are even more attenuated and, as a consequence, the separation-of-powers problem is particularly acute.

When Congress chooses to export the enforcement of federal law to state and private entities, it denies the president any direct power to oversee the enforcement of federal law. "Such a mechanism, if permitted here, would quickly teach Congress how to avoid presidential controls, and would sacrifice the unitary character of the Presidency."[246] Moreover, as Professor Redish and Cisar observe, "[T]he separation of powers must operate in a prophylactic manner—in other words as a means of preventing a situation in which one branch has acquired a level of power sufficient to allow it to subvert popular sovereignty and individual liberty."[247]

Unlike more fluid concepts such as equal protection or the prohibition against cruel or unusual punishment, which incorporate evolving standards of morality and decency, structural devices aimed

243. *Id.* at 607. Though he is a functionalist, even Professor Strauss acknowledges that the president must enjoy some power of oversight over the implementation of federal law.

244. *See* Camkiner, *supra* note 6, at 1082–83 ("More narrowly, there is scant historical support for the originalist claim that presidential supervision of federal law implementation necessarily extends beyond federal officials to encompass state officials and private individuals as well." (footnotes omitted)); Krent, *supra* note 12, at 71–73 ("In choosing to vest in the states the authority to implement federal programs, Congress has placed significant segments of federal law enforcement and implementation . . . outside the executive branch's practical control."). *But cf.* Calabresi & Prakash, *supra* note 10, at 595–96, 598, 639–41 (arguing that the president may constitutionally claim a unilateral power to direct or remove state officers when such officers enforce federal law).

245. *See supra* notes 7, 17 and accompanying text.

246. Strauss, *supra* note 151, at 652.

247. Redish & Cisar, *supra* note 2, at 463.

at protecting individual liberty[248] through careful institutional checks and balances are not obviously meant to evolve with time. "No critic has adequately demonstrated either that the fears of undue concentrations of political power that caused the Framers to impose separation of powers are unjustified, or that separation of powers is not an important means of deterring those concentrations."[249]

Finally, cooperative-federalism programs may also raise serious constitutional issues under the Appointments Clause[250] of Article II. Principal officers must be appointed by the president with the advice and consent of the Senate, and inferior officers must be either (1) appointed by the president with the advice and consent of the Senate or (2) appointed by the president alone, the courts of law, or the head of an executive department.[251] A state official charged with enforcing federal workplace-safety or environmental standards is not appointed in either fashion. Given that the state agencies that administer cooperative-federalism programs engage in investigation and prosecution, actions that are quintessentially executive in nature, there is an argument to be made, at least post-*Free Enterprise Fund*, that these officers must be appointed in a fashion that complies with the Appointments Clause. If this objection is valid, then the Constitution requires the president to have not just removal, but also appointment, authority over a significant number of state and private employees.

B. Government Accountability

Government accountability is diminished, not enhanced, through the enforcement of federal law by nonfederal agents.[252] As Professor Strauss observes, "Individual agencies almost necessarily lack the political accountability and the intellectual and fiscal resources

248. *See* Rebecca L. Brown, *Separated Powers and Ordered Liberty*, 139 U. PA. L. REV. 1513, 1515–17 (1991) (noting that the protection of individual rights is the goal of the separation of powers).

249. Redish & Cisar, *supra* note 2, at 471.

250. U.S. CONST. art. II, § 2, cl. 2.

251. *Id.*; *see also* Free Enter. Fund v. Pub. Co. Accounting Oversight Bd., 130 S. Ct. 3138, 3162–64 (2010) (discussing the power of an independent agency to appoint "inferior officers" and the Appointments Clause more generally).

252. *See, e.g.*, Super, *supra* note 16, at 1461–64 (discussing the shortcomings and pitfalls of divided responsibility in the context of disaster-response efforts, including delegations of responsibility to state government, local government, and even private entities and arguing that "[f]ragmentation of responsibility across levels of government . . . has undermined disaster management efforts in the United States").

necessary to achieve such balancing and coordination."[253] What is true of *federal* agencies holds doubly true of state administrative agencies and private entities.

The president is a unique national officer, the only person selected by the people as a whole and accountable to the people as a whole, who brings national concerns to bear when executing the duties of his office.[254] As then-Professor Elena Kagan notes, "Presidential administration promotes accountability" by "enhanc[ing] transparency, enabl[ing] the public to comprehend more accurately the sources and nature of bureaucratic power" and by "establish[ing] an electoral link between the public and the bureaucracy, increasing the latter's responsiveness to the former."[255]

Professor Strauss echoes these views, writing, "The unitary responsibility thus expressed, and sharply intended, does not admit relationships in which the President is permitted so little capacity to engage in oversight that the public could no longer rationally believe in that responsibility."[256] Professor Strauss suggests that "an agency over which the President's control went no further than the power to appoint its heads should be found deficient."[257] Yet the president lacks even this power with respect to the state agencies that implement federal laws.

The same concept holds true when Congress delegates administrative responsibilities to private organizations over which the president lacks any meaningful powers of appointment, supervision and control, or removal. But, as Professor Strauss powerfully argues, "[T]he presidential oversight function must in some sense be recognized; even an administrator has power and is not merely a

253. Strauss, *supra* note 151, at 663.

254. WOODROW WILSON, CONSTITUTIONAL GOVERNMENT IN THE UNITED STATES 67–68 (Transaction Publishers 2002) (1908); *see also* FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 190 (2000) (Breyer, J., dissenting) ("[T]he President and Vice President are the *only* public officials whom the entire Nation elects."); Saikrishna B. Prakash, *Branches Behaving Badly: The Predictable and Often Desirable Consequences of the Separation of Powers*, 12 CORNELL J.L. & PUB. POL'Y 543, 546 (2003) ("[M]any people welcome the President's relatively recent and much larger role in tax and spending policy because they believe that the President is the only elected federal official who considers the welfare of the entire country in making tax and spending decisions."); Robert J. Reinstein, *The Limits of Executive Power*, 59 AM. U. L. REV. 259, 335 (2009) ("The nation looks to the President, and not to Congress, for leadership in dealing with crises, and for good reason. The President is the only national official who is elected by the entire country.").

255. Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245, 2331–32 (2001).

256. Strauss, *supra* note 151, at 648–49 (footnote omitted).

257. *Id.* at 649.

clerk."[258] Thus, an "effective, unitary executive" implies "the need for a substantial presidential relationship *with any agency performing a significant government duty*."[259]

If executive responsibility is fractured through congressional delegations to state governments or private entities that will act free and clear of any direct day-to-day supervision by the president, then accountability will be the poorer for it. For example, citizens displeased with environmental enforcement, labor regulation, or the like, will be hard pressed to determine where to place blame or fault. As Justice O'Connor observed in *New York v. United States*,[260] "[W]here the Federal Government compels States to regulate, the accountability of both state and federal officials is diminished."[261] Justice O'Connor further explained,

> If the citizens of New York, for example, do not consider that making provision for the disposal of radioactive waste is in their best interest, they may elect state officials who share their view. That view can always be pre-empted under the Supremacy Clause if it is contrary to the national view, but in such a case it is the Federal Government that makes the decision in full view of the public, and it will be federal officials that suffer the consequences if the decision turns out to be detrimental or unpopular. But where the Federal Government directs the States to regulate, it may be state officials who will bear the brunt of public disapproval, while the federal officials who devised the regulatory program may remain insulated from the electoral ramifications of their decision.[262]

This concept of political accountability requires clear lines of responsibility, so that citizens may fix responsibility for programs—whether popular or unpopular—at the appropriate level of government. Notably, "[a]ccountability is . . . diminished when, due to federal coercion, elected state officials cannot regulate in accordance with the views of the local electorate in matters not pre-empted by federal regulation."[263]

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258. *Id.*

259. *Id.* at 641 (emphasis added).

260. New York v. United States, 505 U.S. 144 (1992).

261. *Id.* at 168.

262. *Id.* at 168–69.

263. *Id.* at 169; *see also* Kagan, *supra* note 255, at 2332 (noting that "presidential control of administration at the least possesses advantages over any alternative control device in advancing . . . core democratic values").

Justice O'Connor, like Justice Scalia in *Printz*, nevertheless asserted that a state's voluntary adoption of a federal responsibility, by undertaking primary responsibility for enforcement of a federal program, does not present *any* serious accountability problems[264]: "Where Congress encourages state regulation rather than compelling it, state governments remain responsive to the local electorate's preferences; state officials remain accountable to the people."[265] But a state that volunteers to enforce regulations established by the federal government may not know precisely what rules it has agreed to enforce within its jurisdiction. And when a state enforces an unpopular federal mandate, state citizens are likely to be confused about where to fix the political blame—with state legislators in the local state capitol, with state executive officers, with members of Congress, or with the president and the administration. The problem of fuzzy lines of responsibility, and hence of diminished political accountability, simply does not turn on whether the state's assumption of federal duties is voluntary or coerced.

The other problem with Justice O'Connor's reliance on voluntary state participation in cooperative-federalism programs as a panacea for potential accountability problems is the possibility that participation may not actually be voluntary. To a tremendous degree, states have become financially dependent on the federal largesse that flows from ostensibly voluntary agreements to enforce federal laws.[266] For example, almost two dozen states have joined a lawsuit seeking the invalidation of the ACA, while at the same time, many of these very same state governments accept federal grants to administer state-sponsored insurance exchanges, a key provision of the ACA.[267]

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264. *Compare* Printz v. United States, 521 U.S. 898, 929 (1997) (noting that previous cases "upheld the statutory provisions at issue precisely because they did *not* commandeer state government, but merely imposed preconditions to continued state regulation of an otherwise pre-empted field"), *with infra* text accompanying note 265.

265. *New York*, 505 U.S. at 168.

266. ALICE M. RIVLIN, REVIVING THE AMERICAN DREAM: THE ECONOMY, THE STATES, AND THE FEDERAL GOVERNMENT 82–100 (1992); Rena I. Steinzor, *Unfunded Environmental Mandates and the "New (New) Federalism": Devolution, Revolution, or Reform?*, 81 MINN. L. REV. 97, 116–20 (1996); *see also* DAVID B. WALKER, THE REBIRTH OF FEDERALISM: SLOUCHING TOWARD WASHINGTON 8, 92–150, 139, 234–40 (1995) (discussing several federal-subsidy programs and the conditions that Congress attaches to such financial aid to the states); Samuel R. Bagenstos, *Spending Clause Litigation in the Roberts Court*, 58 DUKE L.J. 345, 372–73 (2008) (noting that states have become dependent on "federal largesse").

267. Brandon Stewart, *List of 27 States Suing over Obamacare*, HERITAGE FOUND. (Jan. 17, 2011, 4:00 PM), http://blog.heritage.org/2011/01/17/list-of-states-suing-over-obamacare; *see also State Actions To Implement Health Insurance Exchanges*, NAT'L CONFERENCE OF STATE

There is a deep irony in states' volunteering to create the administrative structures necessary to implement the ACA at the same time that they are asking the federal courts to invalidate the law in whole or in part.[268]

In *New York*, Justice O'Connor observed that "[s]tates are not mere political subdivisions of the United States" and that "[s]tate governments are neither regional offices nor administrative agencies of the Federal Government."[269] These observations are accurate, but also highly problematic for the project of cooperative federalism, at least if the president is to have a meaningful role in supervising and directing the day-to-day work of state agencies engaged in enforcing federal law. Divided responsibility for the administration of federal law means divided accountability that even the most politically astute citizen cannot ascertain with certainty or confidence. Indeed, the whole raison d'être of cooperative federalism is avoiding clear political responsibility for the specific iteration of federal labor, environmental, and healthcare programs administered by the states.[270]

The notion that the president could control and directly supervise state officers is also problematic because the states are supposedly governmental entities that enjoy "residuary and inviolable sovereignty."[271] The level of control and supervision necessary to successfully satisfy the Vesting and Take Care Clauses seems entirely incompatible with the notion of meaningful state sovereignty. Thus, cooperative federalism seems inconsistent with a strong iteration of the unitary-executive theory, and its flaws cannot be fixed without doing significant violence to core federalism principles.

Perhaps Congress could require by statute, and states could voluntarily accept, a general federal executive supervisory power over

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LEGISLATURES, http://www.ncsl.org/issues-research/health/state-actions-to-implement-the-health-benefit-exch.aspx (last updated Mar. 1, 2012).

268. *But cf.* Strauss, *supra* note 151, at 642 ("The day-to-day course of national affairs generates new issues to which a coherent response must be made . . . .").

269. *New York*, 505 U.S. at 188.

270. *See* Greve, *supra* note 13, at 559 ("Cooperative federalism undermines political transparency and accountability, thereby heightening civic disaffection and cynicism; diminishes policy competition among the states; and erodes self-government and liberty."); *see also id.* at 603–07 (objecting to cooperative-federalism programs because they diminish political accountability). Professor Michael Greve suggests that "[t]he sooner we can think of viable means to curtail cooperative programs and to disentangle government functions, the better off we shall be." *Id.* at 559.

271. *Id.* (quoting THE FEDERALIST NO. 39, at 245 (James Madison) (Clinton Rossiter ed., 1961)) (internal quotation marks omitted).

state officials charged with administering federal programs incident to a cooperative-federalism scheme. But even if a state's own constitution and courts would permit this outcome,[272] concerns about blurred lines of accountability would still exist. To use a state government as a kind of administrative hand puppet of the federal government would seem to invite the kind of blurred lines of responsibility that the *New York* majority found objectionable in the first place.

Thus, the separation-of-powers/federalism dilemma comes into much clearer focus: Preserve the real independence of the state governments that administer federal programs, and the arrangement does violence to the separation of powers by transferring core executive functions outside the federal executive branch. Secure meaningful presidential oversight of state government officials when they execute federal law, and the arrangement does violence to the principles of federalism that treat states as fully sovereign and independent entities.

As then-Professor Kagan has previously noted, the Take Care Clause, "[a]lthough framed in the language of duty rather than power, . . . may imply some minimum amount of presidential oversight authority, on the theory that the President could not perform this function if unable to require information from and engage in consultations with agency officials."[273] And, as Professor Strauss argues, "The President's responsibility to coordinate the activities of all government, however, sets him apart from private and congressional actors."[274] The duty and responsibility for coordinating the enforcement of federal law cannot be undertaken by fifty different governments without a significant loss of accountability.

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272. *Cf.* William Van Alstyne, *"Thirty Pieces of Silver" for the Rights of Your People: Irresistible Offers Reconsidered as a Matter of State Constitutional Law*, 16 HARV. J.L. & PUB. POL'Y 303, 305 (1991) (noting that "there is good reason for the renewed interest in the independent efficacy of state constitutional law as a set of restrictions on what state and local government may presume to do"); *id*. at 307 (arguing that "state and local governments may not accept federal funds when, were they to do so, they would at once put at risk such rights as they are forbidden by state constitutional law to abridge").

273. Kagan, *supra* note 255, at 2324 n.311. Then-Professor Kagan also notes that "the President may have what Peter Strauss and Cass Sunstein have called 'procedural' supervisory authority over administrative officers, enabling the President to demand information from and engage in consultation with them." *Id.* at 2324 (quoting Peter L. Strauss & Cass R. Sunstein, *The Role of the President and OMB in Informal Rulemaking*, 38 ADMIN. L. REV. 181, 200 (1986)).

274. Strauss, *supra* note 151, at 660.

Professor Strauss aptly explains the problems with dividing and separating the entities charged with enforcing federal law:

> The power to balance competing goals—and the concomitant power to influence at least to some degree the agencies' exercise of discretion—can only be the President's; leaving the balancing functions in the agencies would create multiheaded government, government with neither the capacity to come to a definitive resolution nor the ability to see that any resolution is honored in all agencies to which it may apply. This outcome does not vary with whether or not the agencies are denominated independent. Once one has acknowledged that any discretion conferred must be exercised within the legal bounds set for it, failure to recognize the President's claim to shape its exercise would deny central premises of constitutional structure as sharply as would a denial of Congress's claim to set the legal bounds.[275]

Dean Caminker seconds these concerns, observing that "[o]nly a unitary President can ensure that nationally enacted policies are administered in such a way that national rather than parochial interests are truly served."[276]

The centralization of presidential review of agency work product also bears at least a brief mention in this context because this systematic review process constitutes an essential bulwark of securing accountable governance at the federal level. All federal administrative agencies, whether "independent" or not, provide information about their activities to the Office of Information and Regulatory Affairs (OIRA), a division of the White House's Office of Management and Budget (OMB).[277] In turn, OIRA maintains a centralized listing of major agency actions and engages in systematic oversight of agency activities—and particularly agency rulemaking.[278]

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275. *Id.* at 663; *see also* Super, *supra* note 16, at 1409–27 (providing reasons commonly advanced in support of the federal government's creation of administrative systems that maximize discretion in various constituent parts, but questioning whether any of these rationales are ultimately persuasive).

276. Caminker, *supra* note 6, at 1108–09.

277. Steven Croley, *White House Review of Agency Rulemaking: An Empirical Investigation*, 70 U. CHI. L. REV. 821, 824–30 (2003); *see also* Robert W. Hahn & Cass R. Sunstein, *A New Executive Order for Improving Federal Regulation?: Deeper and Wider Cost-Benefit Analysis*, 150 U. PA. L. REV. 1489, 1489–1510 (2002) (comparing and describing the Reagan and Clinton OIRA review programs); Strauss & Sunstein, *supra* note 273, at 182–83, 189–90, 193, 197–202 (discussing, describing, and advocating OIRA review of pending regulatory proposals).

278. *See* Exec. Order No. 13,422, § 1(a), 3 C.F.R. 191, 191 (2008) (requiring each agency to identify and explain the required agency action so that the president could determine "whether

Through this centralized OIRA review process, the president and administration bring a unified and national perspective to bear on the myriad policies that federal regulatory statutes implicate. As Professor Strauss notes, "The President has used executive orders and OMB directives (the OMB being the principal although hardly the only instrument of his coordinating activities) to create supplementary coordinating regimes of a generally uncontroversial character."[279] This centralized review process permits a uniform, national approach to both substantive and procedural issues; presidential oversight facilitates the development and implementation of "government-wide initiatives ranging from electronic government to energy policy."[280]

State constitutional officers and state agencies do not appear anywhere on the federal government's organizational chart.[281] Precisely because state constitutional officers and administrative agencies are not part of the federal government, the president's ability to oversee, much less control, the actions of such officers and entities is, at best, highly attenuated. Indeed, the president cannot even specify the procedures that a state agency must use when exercising delegated federal authority.[282]

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any new regulation is warranted" (internal quotation mark omitted)); Exec. Order No. 12,866, 3 C.F.R. 638, 638 (1994), *reprinted in* 5 U.S.C. § 601 app. at 745, 745 (2006) ("The objectives of this Executive order are to enhance planning and coordination with respect to both new and existing regulations . . . ."). For helpful and comprehensive reviews of the contemporary practice of White House review of agency activities, see generally James Blumstein, *Regulatory Review by the Executive Office of the President: An Overview and Policy Analysis of Current Issues*, 51 DUKE L.J. 851 (2001); Christopher C. DeMuth & Douglas H. Ginsburg, *White House Review of Agency Rulemaking*, 99 HARV. L. REV. 1075 (1986); Lawrence Lessig & Cass R. Sunstein, *The President and the Administration*, 94 COLUM. L. REV. 1 (1994).

279. Strauss, *supra* note 225, at 718 (footnote omitted).

280. *Id.*

281. New York v. United States, 505 U.S. 144, 188 (1992).

282. *Cf.* Schaffer v. Weast, 546 U.S. 49, 69–71 (2005) (Breyer, J., dissenting) (noting that the federal statute at issue in the case permitted the states to determine procedure for actions brought under the statute); Andreen, *supra* note 4, at 259–60 (noting that states determine the operational details and procedures governing their state environmental laws); Lisa Brodoff, *Lifting Burdens: Proof, Social Justice, and Public Assistance Administrative Hearings*, 32 N.Y.U. REV. L. & SOC. CHANGE 131, 163–64 (2008) (noting that states may apply their local administrative procedure acts or other procedures in the context of public-assistance hearings, including assignment of the burden of proof in such hearings); Robert L. Fischman, *Cooperative Federalism and Natural Resources Law*, 14 N.Y.U. ENVTL. L.J. 179, 190–93 (2005) (noting that states develop and apply their own implementation programs and procedures in federal environmental cooperative-federalism programs); Joseph R. Oliveri, Note, *Converse*-Erie*: The Key to Federalism in an Increasingly Administrative State*, 76 GEO. WASH. L. REV. 1372, 1383–87, 1389–91 (2008) (noting that in the absence of a federal statute requiring a particular

This lack of oversight and control, in turn, has profound implications for facilitating governmental accountability. Cooperative federalism splits responsibility—both with respect to procedural and substantive questions—without providing any means of securing real-time centralized presidential superintendence of state enforcement of federal law. Thus, shared responsibility means, in practice, blurred lines of accountability. Whether the loss of political accountability, standing alone, would justify the judicial invalidation of such programs is an open question. The loss of accountability, however, in tandem with the departure from the structural imperatives of Article II, could work to support a formalist separation-of-powers jurisprudence that disallows, on constitutional grounds, contemporary cooperative-federalism practices.

C. The Problem of Nonuniformity in Federal Law

A comprehensive policy analysis of the costs and benefits of cooperative-federalism programs lies beyond the scope of this Article. Nevertheless, one specific aspect of the literature on cooperative federalism seems particularly salient in thinking about the constitutionality of cooperative-federalism programs in light of *Free Enterprise Fund*: "uncooperative federalism."

Professors Jessica Bulman-Pozen and Heather Gerken coined the phrase "uncooperative federalism" to describe how states use the power to administer federal laws to depart in significant ways from both congressional and presidential policies. They explain,

> Uncooperative federalism occurs when states carrying out the Patriot Act refuse to enforce the portions they deem unconstitutional, when states implementing federal environmental law use that power to push federal authorities to take a new position, or when states relying on federal funds create welfare

procedure, states are free to establish their own administrative procedures, subject only to due-process constraints). Indeed, given *Printz* and *New York*, which together establish a strong federalism-based anticommandeering rule that insulates state executive and legislative officers from any general duty to directly implement federal law, *see* Printz v. United States, 521 U.S. 898, 935 (1997) (prohibiting commandeering of state executive officers); New York v. United States, 505 U.S. 144, 168–69, 188 (1992) (prohibiting the commandeering of state legislative officers), it is not entirely clear whether Congress could impose particular procedural rules on state agencies enforcing state-law programs enacted to enforce federal labor, environmental, or healthcare objectives.

> programs that erode the foundations of the very policies they are being asked to carry out.[283]

In these cases, and many others like them, "states use regulatory power conferred by the federal government to tweak, challenge, and even dissent from federal law."[284] Despite the ubiquity of states' going rogue, as it were, "we do not have a vocabulary for describing it, let alone a fully developed account of why it happens, what it means, and what implications it holds for the doctrinal debates in which federalism scholars routinely engage."[285]

Professors Bulman-Pozen and Gerken identify serious nonuniformity problems with cooperative-federalism programs that should greatly concern the conservative majority on the Supreme Court. For example, a "state's leverage over the federal government only increases after the federal government has devolved regulatory power to the state."[286] They explain that, "[h]aving taken on the states as partners, the national government's threat to exit becomes less credible."[287] Thus, states possess "an additional set of leverage points that state officials use to push their agenda."[288] Indeed, the empirical reality is that federal agencies almost *never* suspend state primacy, once it is established.[289] Professors Bulman-Pozen and Gerken speculate, "As the years go by, we would expect federal dependence to increase as state bureaucrats develop institutional competence and area-specific expertise."[290] From a separation-of-powers perspective, however, the notion of a coequal relationship is problematic, for it implies an absence of effective or meaningful federal executive control and oversight.

Moreover, if the federal government's dependence on state officials to administer federal law deepens over time, it would seem that meaningful federal supervision will become largely impossible—quite illusory in fact—because the federal government will not know

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283. Bulman-Pozen & Gerken, *supra* note 13, at 1258–59.

284. *Id*. at 1259.

285. *Id*.

286. *Id*. at 1268.

287. *Id*.

288. *Id*. at 1286.

289. Robertson, *supra* note 202, at 606; *see also* Puder & Paque, *supra* note 173, at 86 ("Few case studies involving program termination scenarios exist."); Zahren, *supra* note 212, at 418 ("However, the threat of withdrawal is almost completely unrealistic, creates too much tension, and might discourage some states from adopting a program at all.").

290. Bulman-Pozen & Gerken, *supra* note 13, at 1268.

precisely what the states are doing, how they are doing it, or the reasons why. "Faithful execution" becomes largely, if not completely, inverted. Indeed, "[o]ne might wonder if we have come full circle, claiming that the servant has power because it possesses the same autonomy enjoyed by the sovereign."[291] In the context of state administration of federal environmental laws, for example, Professor Andreen argues that some states "are engaging, at least in part, in a race to the bottom to attract and retain industry through weaker environmental standards, lax implementation, and lethargic enforcement."[292] Yet the purpose of federal environmental standards is precisely to avoid the race to the bottom that entirely local state standards would inevitably produce.[293]

Without belaboring the point, Professors Bulman-Pozen and Gerken identify other problems with existing cooperative-federalism practice and formalist separation-of-powers-theory orthodoxy. For example, "[e]ven when state officials carry out federal programs, their constituencies are based within the state," which, in practice, means that "those voters may have put in place political elites who have quite different views of federal policy than voters nationally, thus creating pressure for state officials not to go along with federal authority."[294] Moreover, incentive will almost certainly be married with opportunity: "The fact that state officials serve two masters gives states not only a reason to challenge federal policy, but also the power to do so."[295] Thus, the presence of an alternative power base renders state agency officials much less accountable to the president than their federal agency counterparts would be.

Finally, states can serve as flashpoints for organized opposition to federal programs. "Forcing state officials to participate in a federal scheme they oppose may generate *more* allies for the citizens who oppose the scheme."[296] Thus, "it may be that federal-state integration, rather than autonomy, creates more incentives for state governments to check the federal government."[297]

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291. *Id.*

292. Andreen, *supra* note 4, at 261.

293. *See* RECHTSCHAFFEN & MARKELL, *supra* note 4, at 22 ("The 'race-to-the-bottom' theory posits that federal regulation is needed to prevent states from competing for industrial development by reducing their environment standards to 'sub-optimal levels.'").

294. Bulman-Pozen & Gerken, *supra* note 13, at 1270 (footnote omitted).

295. *Id.*

296. *Id.* at 1291.

297. *Id.*

From this perspective, commandeering or coercive voluntary cooperative-federalism programs are a good thing because "[i]f states can simply opt out of a program with which they disagree, they may not have much incentive to devote the resources needed to mount an effective challenge to federal policy."[298] This goes beyond merely co-opting a federal program and redeploying it along more congenial lines; instead, the notion is that a state government could participate in a federal program with the hope of ultimately either crippling or destroying it. To the extent that the Framers sought to create an effective, dynamic, and energetic national executive,[299] the shortcomings of a system that permits entrenched opposition from within should be self-evident. States should not be free to "ride with the cops and cheer for the robbers."[300]

Professor Margaret Lemos identifies yet another area in which state government freelancing occurs: state enforcement of federal law.[301] She correctly notes that "[i]f enforcement controls the effective meaning of the law, it matters a great deal who controls the enforcement."[302] In theory, under the doctrine established in *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*,[303] the national executive branch is best suited to fill in statutory gaps left by Congress; a reviewing federal court faced with a statutory ambiguity will defer to any reasonable agency interpretation of the statutory text.[304] And even in circumstances in which *Chevron* deference does not apply, *Skidmore v. Swift & Co.*[305] requires that a reviewing court

298. *Id.*

299. *See* THE FEDERALIST NO. 70, at 423 (Alexander Hamilton) (Clinton Rossiter ed., 1961) (noting that "[e]nergy in the executive is a leading character in the definition of good government"); *see also* Calabresi & Prakash, *supra* note 10, at 581–85, 614–15, 639–42 (arguing that the Framers anticipated and provided for comprehensive and effective presidential oversight of all aspects of the administration of federal law). Hamilton adds that "[t]he ingredients which constitute energy in the Executive are unity; duration; an adequate provision for its support; and competent powers." THE FEDERALIST NO. 70, *supra*, at 424.

300. Rankin v. McPherson, 483 U.S. 378, 394 (1987) (Scalia, J., dissenting) (quoting petitioner) (internal quotation marks omitted).

301. *See* Lemos, *supra* note 13, at 699–701 (noting that the practical effects of federal law will vary depending on state-enforcement practices).

302. *Id*. at 700.

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

304. *See id*. at 844 ("Sometimes the legislative delegation to an agency on a particular question is implicit rather than explicit. In such a case, a court may not substitute its own construction of a statutory [provision] for a reasonable interpretation made by the administrator of an agency.").

305. Skidmore v. Swift & Co., 323 U.S. 134 (1944).

still accord substantial deference to a federal agency's interpretation of its organic act.[306]

State enforcement of federal law shatters this model and permits state officials—often state attorneys general—to pursue an independent vision of the meaning and substantive goals of federal laws. Accordingly, as Professor Lemos suggests, "[E]nforcement authority can serve as a potent means of state influence by enabling states to adjust the intensity of enforcement and to press their own interpretations of federal law."[307] Nevertheless, as Professor Abbe Gluck notes, "For all the focus in recent statutory interpretation doctrine and theory on the administrative state and on dialogic interpretation, we have virtually no doctrines or theories that acknowledge, much less account for, the role of state implementers in the hermeneutical project of federal statutory construction."[308]

In this respect, the more room Congress leaves for gap filling through policymaking, the greater the risk to uniformity in federal law and to the president's ability to oversee federal law's execution and enforcement. Professor Lemos correctly notes that "[t]he potential for divergence between state and federal law approaches to enforcement is even greater in areas where federal law is written in broad terms—particularly where no federal agency has authority to narrow and clarify the law through binding regulations."[309] Moreover, it would be a mistake to assume that this gap-filling authority would necessarily be used wisely to advance national objectives. As

306. *See id.* at 140 ("We consider that the rulings, interpretations and opinions of the Administrator under this Act, while not controlling upon the courts by reason of their authority, do constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance."). *See generally* Ronald J. Krotoszynski, Jr., *Why Deference?: Implied Delegations, Agency Expertise, and the Misplaced Legacy of* Skidmore, 54 ADMIN. L. REV. 735, 739–49 (2002) (discussing the interplay between *Chevron* and *Skidmore* and arguing that expertise, rather than an implied—perhaps entirely fictional—delegation of policymaking authority, better justifies federal court deference to agency statutory interpretations).

307. Lemos, *supra* note 13, at 702. Professor Lemos draws a distinction between state "enforcement" of federal law and state "implementation" of federal law. *Id.* at 715 (emphasis omitted). A state "implements" federal law when it adopts and enforces standards established by the federal government, whereas a state "enforces" federal law when it directly applies federal laws free and clear of any direct federal supervision by executive-branch personnel. *See id.* at 715–19. State enforcement of federal law "breaks that link" between the sovereign that makes the law and the sovereign that enforces the law "by authorizing state actors to enforce the law of a different sovereign." *Id.* at 715. Thus, in at least some cases, states may find themselves enforcing a federal law that they lack the authority to enact in the first place.

308. Gluck, *supra* note 13, at 537.

309. Lemos, *supra* note 13, at 739.

Professor Lemos observes, "Decentralized regulatory authority creates risks as well as rewards, as regulations tailored to state interests may interfere with the broader national interest."[310]

Congress's decision to vest either the administration or enforcement of federal law with the states may "reflect[] a judgment that the benefits of decentralized decision making outweigh the possible costs to uniformity."[311] But is this a choice that Congress is free to make in the first place? If the Constitution mandates that the power to administer and enforce federal law must rest in hands ultimately accountable to the president, Professor Lemos's description of the effects of state enforcement of federal law should be deeply unsettling.[312]

Presidential oversight directly addresses and helps to resolve the problem of nonuniformity in the enforcement of federal law and avoids the problem of local, parochial interests' trumping the achievement of national objectives in areas such as environmental protection, worker safety, and access to healthcare. As Justice Kagan astutely notes, "[B]ecause the President has a national constituency, he is likely to consider, in setting the direction of administrative policy on an ongoing basis, the preferences of the general public, rather than merely parochial interests."[313] Moreover, "[p]residential administration . . . advances political accountability by subjecting the bureaucracy to the control mechanism most open to public examination and most responsive to public opinion."[314] And, perhaps most importantly, presidential oversight of the administration of federal law "furthers regulatory effectiveness by providing not only the centralization necessary to achieve a range of technocratic goals but also the dynamic charge so largely missing today from both the administrative sphere and the surrounding political system."[315]

Because "[s]tates use their power as federal servants to resist, challenge, and even dissent from federal policy,"[316] the need for effective forms of federal executive control should be self-evident.

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310. *Id.* at 744.

311. *Id.* at 756.

312. *See* Greve, *supra* note 13, at 559 ("Cooperative federalism undermines political transparency and accountability, thereby heightening civic disaffection and cynicism; diminishes policy competition among the states; and erodes self-government and liberty.").

313. Kagan, *supra* note 255, at 2335.

314. *Id.* at 2384.

315. *Id.*

316. Bulman-Pozen & Gerken, *supra* note 13, at 1307.

States are not simply "'cooperative' friends and allies to the federal government," but also can be and are "rival[s], challenger[s], and dissenter[s]."[317] The alternative to centralized federal control is a potpourri of divergent, perhaps even conflicting, policies pursued in the name of federal laws that ostensibly established uniform standards for workplace safety, the environment, and access to healthcare services.

V. POTENTIAL OBJECTIONS AND REJOINDERS TO A BROAD READING OF *FREE ENTERPRISE FUND*

The arguments I present in favor of finding a separation-of-powers problem with cooperative-federalism programs can be answered—perhaps even effectively. First, the entire problem could be avoided if the Supreme Court were to hold that when states participate in cooperative-federalism programs, they enforce only state law. Second, the Supreme Court could invoke the various forms of indirect control that federal executive agencies possess over states participating in cooperative-federalism programs and hold that these oversight devices fully satisfy the requirements of Article II. Third, and finally, the Supreme Court could simply refuse to follow the broader implications of *Free Enterprise Fund* to their logical conclusion; this solution would largely constitute a reprise of the Justices' treatment of the broad statements in *Printz* and *Lujan* about the essential nature of presidential control and oversight of the execution of all federal laws.

A. States Do Not Enforce Federal Law in Cooperative-Federalism Programs

The most potent response to a separation-of-powers objection to cooperative-federalism programs is that the states simply do not enforce federal law at all, but only state law. Dean Caminker makes this argument in some detail, suggesting that "the better understanding of the unitary executive theory is that it applies, at most, only to state administration of federally-defined law, not to state administration of state laws designed to serve federal regulatory objectives."[318] If state enforcement of state laws enacted to comply

317. *Id.*

318. Caminker, *supra* note 6, at 1078; *cf.* Krent, *supra* note 12, at 83–84 (suggesting that cooperative-federalism programs violate the separation of powers by exporting enforcement of federal law outside the executive branch).

with federal cooperative-federalism statutes does not really constitute state enforcement of federal law, then no separation-of-powers problem arises. As Dean Caminker states, "One can certainly imagine a construction of Article II unity according to which the President's supervisory duties extend only to federal law execution by subordinate *federal* officers."[319]

As Dean Caminker notes, if formalist reasoning creates the problem of insufficient presidential oversight over cooperative-federalism programs, "the same formalist reasoning suggests that state creation or implementation of what is formally state law—even if designed to further federal objectives—lies *outside* of Article II supervisory jurisdiction."[320] He also argues that it would be anomalous for the executive branch to superintend discretionary state decisions embedded within state-enacted programs that meet federal standards: "The unitary executive extends to the reach of what is technically federal law, and not beyond to state laws even if intentionally tailored to meet federal objectives."[321]

But one can question whether this is truly a formalist, rather than a functionalist, argument. The traditional rationales for cooperative federalism—efficiency,[322] the benefit of local expertise,[323] and the like—speak in functionalist, not formalist, terms. Moreover, to say

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319. Caminker, *supra* note 12, at 226.

320. Caminker, *supra* note 6, at 1102.

321. *Id.* at 1103.

322. *See* Stephen Breyer, *Our Democratic Constitution*, 77 N.Y.U. L. REV. 245, 258 (2002) ("Modern efforts to create more efficient regulation recognize the importance of that local involvement. They seek a kind of cooperative federalism that would, for example, have federal officials make expertise available to state and local officials while seeking to separate expert and fact-related matters from more locally based questions of value.").

323. *See* P.R. Tel. Co. v. Telecomm. Regulatory Bd., 189 F.3d 1, 14 (1st Cir. 1999) ("The [Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (codified as amended in scattered sections of 47 U.S.C.),] exemplifies a cooperative federalism system, in which state commissions can exercise their expertise about the needs of the local market and local consumers, but are guided by the provisions of the Act and by the concomitant FCC regulations . . . ."); *see also* Keith Cunningham-Parmeter, *Forced Federalism: States as Laboratories of Immigration Reform*, 62 HASTINGS L.J. 1673, 1685 (2011) ("In theory, states working under an agreement with [Immigration and Customs Enforcement] should be able to serve federally defined goals while developing unique enforcement techniques based on local expertise."); Amy Widman, *Advancing Federalism Concerns in Administrative Law Through a Revitalization of Enforcement Powers: A Case Study of the Consumer Product Safety and Improvement Act of 2008*, 29 YALE L. & POL'Y REV. 165, 177–78 (2010) ("The cooperation often consisted of parallel state administrative regimes with local expertise working under the auspices of the federal agency. The state regimes would issue permits, investigate violations, and issue sanctions, but with varying degrees of federal oversight.").

In other words, state enforcement in the context of cooperative-federalism schemes is radically different from state enforcement of ordinary state laws, a context in which the federal government almost never plays any significant supervisory role and has no powers to displace state-government decisionmakers. Even Dean Caminker, a legal scholar who generally rejects the broadest potential applications of the unitary-executive theory for cooperative-federalism programs, concedes that "there is something intuitively plausible about the claim" that administration of state-enacted law in cooperative-federalism programs is really federal law, because "even though these activities technically generate state and not federal law, they nevertheless enjoy a sufficiently 'quasi-federal' status so as to trigger presidential supervision."[328] In consequence, Dean Caminker deems the claim "sufficiently plausible to deserve the focused attention of unitarians."[329]

Dean Krent argues that cooperative-federalism programs involve state enforcement of federal law.[330] And Dean Krent is not alone in taking this position—Professor Hills also embraces this view: "[N]on-federal governments serve as agencies of the federal government by enforcing federal law with administrative actions and by promulgating regulations to fill the gaps in federal statutes."[331] Professor Hills also notes that "it is common for federal executive officials to exercise only minimal oversight of such non-federal execution of federal law."[332] He characterizes cooperative federalism as, "[i]n effect, state and local governments serv[ing] as a kind of 'fourth branch' of the federal government, even more so than so-called independent federal regulatory agencies."[333] Finally, even Dean Caminker concedes that "[a]s a formal matter, unitary executive theory seems to call for presidential supervision of all state execution of 'sources of federal law' as conventionally understood."[334]

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328. Caminker, *supra* note 6, at 1104–05.

329. *Id.* at 1105.

330. *See* Krent, *supra* note 3, at 2440 ("Congress long has delegated to state as well as private entities. . . . Congress has authorized state officials to enforce a wide range of federal laws . . . ."); Krent, *supra* note 12, at 96 ("[C]ongressional delegations to states under the [Social Security Act, 42 U.S.C. §§ 301–1397mm (2006 & Supp. IV 2010),] and Clean Air Act[] reflect a cooperative partnership . . . .").

331. Hills, *supra* note 145, at 182.

332. *Id.*

333. *Id.*

334. Caminker, *supra* note 6, at 1102.

In sum, although a colorable argument exists that states participating in cooperative-federalism programs are merely enforcing state law, the better argument seems to be that when states act as agents of the federal government, they are administering federal law. The alternative approach would, in fact, authorize Congress to cannibalize federal executive authority by simply asking states to administer federal functions, such as defense, foreign relations, immigration, or the enforcement of federal criminal laws, on a voluntary basis. The use of voluntary cooperative-federalism programs could, in effect, deny the president any meaningful role in the day-to-day operation of core executive duties. If such programs do not violate the separation of powers, it must be because the means of supervision and control provided by statute, or implied as constitutional requirements, satisfy the requirements of Article II.

B. Adequate Mechanisms of Presidential Oversight Exist To Satisfy Separation-of-Powers Concerns

Another response to a separation-of-powers attack on cooperative-federalism programs is to assert that existing forms of presidential oversight of state enforcement of federal law satisfy Article II. State enforcement of federal law takes place only if the relevant federal agency first approves the state's proposed enforcement plan and grants the state's request for primacy status.[335] If a state systematically fails to meet its commitments, the federal agency has the option of withdrawing the state's primacy status or, under some statutes, simply overfiling the state's enforcement action and creating a duplicative federal proceeding.[336] In addition, the federal government funds much of the state's enforcement activity through conditional grants; the federal government can condition future funding of state agencies on adequate prior execution of the state's enforcement plan.[337] State programs are also subject to federal

335. *See supra* notes 158–70 and accompanying text.

336. *See supra* notes 209–21 and accompanying text.

337. *See* David Freeman Engstrom, *Drawing Lines Between* Chevron *and* Pennhurst*: A Functional Analysis of the Spending Power, Federalism, and the Administrative State*, 82 TEX. L. REV. 1197, 1267 (2004) ("[S]ome of the more important conditional preemption programs within the American system of cooperative federalism provide federal funds to states in return for implementation and administration of a state-level plan."); Richard B. Stewart, *Federalism and Rights*, 19 GA. L. REV. 917, 957 (1985) ("Cooperative federalism creatively blends the[] powers [of state and national governments], using the federal fisc to harness state and local capacities to national objectives while allowing for a measure of decentralized flexibility in implementation."); *see also* Weiser, *supra* note 13, at 679 ("[T]he United States Supreme Court

audits and inspections.[338] In sum, multiple and important forms of federal oversight of state enforcement of federal law exist.[339]

The Supreme Court, were it so inclined, could hold that these forms of indirect oversight and ultimate control sufficiently placate any lingering separation-of-powers concerns. Indeed, it seems very likely that at least four members of the current Supreme Court—the Justices dissenting in *Free Enterprise Fund*—would so hold. There are, in fact, strong functionalist arguments to support both this analysis and this outcome.

For example, Dean Krent advances quite plausible functionalist arguments that these forms of indirect control, coupled with the accountability of state governments to their state citizens, should be sufficient to protect cooperative-federalism programs from invalidation post-*Free Enterprise Fund*.[340] He notes, first, that "[s]ome delegations to state entities facilitate efficient implementation of the laws;"[341] second, that historical precedents exist for seeking state assistance in enforcing federal law, such as the Fugitive Slave Act;[342] and, third, that "[i]n contrast to private entities, state officials are politically accountable" and "remain subject to the checks and balances in the respective states."[343] Dean Krent also notes that

has at least twice concluded that state receipt of a federal grant requires the state to comply with the conditions of the grant, even where they conflict with state law."); Zahren, *supra* note 208, at 417–18 ("The 'carrot' to induce the states to participate in the delegated programs [in cooperative federalism] is federal aid and some flexibility in developing and implementing state programs. The 'stick' is the threat of withdrawal of the entire program itself.").

338. *See, e.g.*, Robert F. Rich, Cinthia L. Deye & Elizabeth Mazur, *The State Children's Health Insurance Program: An Administrative Experiment in Federalism*, 2004 U. ILL. L. REV. 107, 115–16 (noting that "[t]here are also yearly audits of the program and specific reporting requirements" in the context of federal support for state children's health-insurance programs); Zahren, *supra* note 208, at 407–11, 424–25 (discussing federal audit and inspection programs in the environmental-law context).

339. *See, e.g.*, Andreen, *supra* note 4, at 259 (discussing EPA controls over state agencies enforcing federal environmental statutes).

340. *See* Krent, *supra* note 3, at 2440–46 (arguing that federal delegations to state entities are less problematic under the reasoning of *Free Enterprise Fund* than delegations to private entities because "the Constitution anticipates congressional sharing of power with state far more than private entities"; because "state officials are more accountable to the electorate—whether directly or indirectly—than are private entities"; and because "there is far less danger of congressional aggrandizement in the context of delegation to state entities").

341. *Id.* at 2442.

342. Fugitive Slave Act, ch. 7, § 1, 1 Stat. 302, 302 (1793).

343. Krent, *supra* note 3, at 2442, 2445.

delegations to the states, although perhaps encroaching on the federal executive branch, do not directly aggrandize Congress.[344]

These are all credible arguments, but they sound almost entirely in functionalist terms. The *Free Enterprise Fund* majority—and the conservatives on the Supreme Court more generally—have consistently eschewed functionalist analysis in favor of more categorical, formalist analysis in cases raising separation-of-powers issues.[345] From a formalist perspective, the real question is whether the president has sufficient direct control and oversight to conclude that executive power remains vested in the federal executive branch and that presidential "faithful execution" remains possible. Thus, "[t]he broader implications of [*Free Enterprise Fund*] . . . ultimately may rest with constricted opportunities for Congress to delegate authority to state and private entities."[346]

A potential formalist cure for the problem of insufficient presidential control would be for Congress to require states to give the president some measure of direct control over state officers enforcing federal laws. Alternatively, the president could unilaterally assert such authority directly under the Constitution. But could a state government, consistent with its own state constitution, vest the supervision, much less removal, of a state officer in a federal officer? Professors Calabresi and Prakash strongly embrace this solution, claiming that the president must enjoy supervisory powers over state officials when state officials implement federal law[347]: "[T]he President could direct state officers in their execution of federal law or extract their federal authority from them" because "when these state officers execute federal law, they act on behalf of the President, the federal Chief Executive."[348] These principles are consistent with the professors' more general claim that "[b]ecause the President alone has the constitutional power to execute federal law, it would seem to follow that, notwithstanding the text of any given statute, the President must be able to execute that statute, interpreting and applying it in concrete circumstances."[349]

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344. *Id.* at 2446.

345. For a discussion of Supreme Court cases that reflect a strong renewed commitment to formalism with respect to the separation of powers, see *supra* Part II.

346. Krent, *supra* note 3, at 2454.

347. Calabresi & Prakash, *supra* note 10, at 639–42.

348. *Id.* at 639.

349. *Id.* at 595.

From this vantage point, it necessarily follows that "since the President may remove purely federal officers who fail to carry out their duties, the President may also 'remove' state officers who fail to perform their duties adequately."[350] When state officers implement federal law, "[t]here is no difference" in the president's direct powers of supervision and control,[351] notwithstanding the federalism issues that arise when the federal government exercises a power of plenary control over state officers who volunteer to enforce federal regulatory programs.[352] Thus, for Professors Calabresi and Prakash, no constitutionally permissible alternative exists to direct presidential control over the implementation of federal law.[353]

By contrast, Dean Caminker views it as virtually unthinkable that the president could direct, much less fire, state officers who implement federal law: "While the President may, under the robust conception [of the unitary executive], remove from their posts all federal executive officials, principles of federalism preclude the President from similarly removing from their posts *state* officials administering federal law."[354] In other words, even if Congress created statutory forms of presidential control over cooperative-federalism programs, and state governments voluntarily acceded to these controls, the controls themselves would be invalid based on core federalism principles.[355] This is so because, "as a practical matter, presidential supervision of state officials cannot realistically secure the values of centralized authority that drive the [unitary-executive] theory."[356]

In some ways, creating comprehensive executive supervisory powers over state officers who enforce federal law is the inverse of

350. *Id.* at 639 (footnote omitted).

351. *Id.*

352. *See id.* at 639–40 (dismissing Professors Lessig and Sunstein's conclusion that the president does not have the power to remove state executives as question-begging (citing Lessig & Sunstein, *supra* note 278, at 19, 31, 69)); *see also* Caminker, *supra* note 6, at 1082–87, 1091–98 ("The application of the unitary executive theory to state administration of federal law has significant, if contested, implications for American federalism . . . .").

353. *See* Calabresi & Prakash, *supra* note 10, at 664 ("As the Framers, ratifiers, ratification opponents, members of the First Congress, and President Washington understood, the Constitution grants the President the authority to superintend the administration of federal law. There are no caveats. There are no exceptions." (footnote omitted)).

354. Caminker, *supra* note 6, at 1091 (footnote omitted).

355. *See id.* at 1096 (noting that presidential control over state officials "might involve . . . frequent or continuous supervision disrupting the daily operations of the state" and thus might "blur the lines of political accountability between federal and state officials").

356. *Id.* at 1078.

the problem presented in *McCulloch* v. *Maryland*.[357] In that case, Maryland attempted to regulate an agent of the United States.[358] Chief Justice John Marshall rejected this attempt, explaining that it was not feasible for a part to enjoy the ability to regulate and control an agent of the whole.[359] But the opposite proposition should also hold true: The whole, or national government, should not be entitled to control the government of the part. Because of the Supremacy Clause,[360] the federal government has the power to displace state law through the exercise of its enumerated powers,[361] but there is a world of difference between directly displacing state law with federal law and attempting to mask federal law *as* state law.[362]

When a federal executive officer exercises supervisory control over a state officer, the whole attempts to control the agent of the part. But state agents derive their authority from the part, rather than from the whole. In a federal system that maintains dual sovereigns, the notion of a federal officer's enjoying power to remove a state official seems deeply problematic, perhaps even unthinkable.[363]

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357. McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316 (1819).

358. *See id.* at 319–22 (describing the Maryland tax scheme and reprinting the Maryland statute that purported to tax notes issued by the Bank of the United States); *see also id*. at 377, 398 (argument of William Pinkney) ("Congress exercises the power of the people. The whole acts on the whole. But the state tax is a part acting on the whole.").

359. *Id.* at 435–36 (majority opinion) ("[T]he difference is that which always exists, and always must exist, between the action of the whole on a part, and the action of a part on the whole . . . .").

360. U.S. CONST. art. VI, cl. 2.

361. *See McCulloch*, 17 U.S. (4 Wheat.) at 405–06 ("If any one proposition could command the universal assent of mankind, we might expect it would be this—that the government of the Union, though limited in its powers, is supreme within its sphere of action. . . . The government of the United States, then, though limited in its powers, is supreme; and its laws, when made in pursuance of the constitution, form the supreme law of the land, 'any thing in the constitution or laws of any State to the contrary notwithstanding.'" (quoting U.S. CONST. art. VI, cl. 2)); *see also* Crosby v. Nat'l Foreign Trade Council, 530 U.S. 363, 372 (2000) ("A fundamental principle of the Constitution is that Congress has the power to preempt state law."). For a comprehensive overview of the Supremacy Clause's history and meaning, and the relevant Supreme Court case law applying it, see generally Caleb Nelson, *Preemption*, 86 VA. L. REV. 225 (2000).

362. *But cf.* Siegel, *supra* note 13, at 1633–35, 1681–83 (arguing that the commandeering of state executive officials can sometimes be less offensive to core federalism principles than the direct displacement of state law via preemption).

363. *Cf.* Caminker, *supra* note 6, at 1078, 1091–94 ("According to Calabresi and Prakash, the President enjoys a hierarchical relationship to state executives implementing federal law that is analogous to the Supreme Court's supervisory authority over state courts adjudicating federal claims. This vision of President-State relations represents a radical departure from the conventional view today." (footnote omitted) (citing Calabresi & Prakash, *supra* note 10, at 640)).

Moreover, serious practical problems related to government accountability also would exist: "If the President is legally responsible for supervising state officials' execution of federal law, and yet practical constraints render this authority largely illusory, the President might be held responsible by the populace for state administrative decisions over which he has no true control."[364]

In sum, creating stronger and more direct forms of executive oversight of state officers who administer federal law would create new constitutional problems grounded in federalism, even as it resolved others grounded in the separation of powers. The Supreme Court, accordingly, would have to choose from among the options of accepting the attenuated forms of executive oversight that presently exist as sufficient to satisfy the separation of powers, compromising core federalism principles to create more direct forms of day-to-day control, or simply invalidating longstanding cooperative-federalism programs.

C. The Supreme Court Does Not Really Mean What It Seems To Say

The Supreme Court is not required to follow the implications of its decisions to their logical conclusions. Accordingly, *Free Enterprise Fund* could prove to have no greater impact on the constitutional status of cooperative-federalism programs than did *Printz*. Perhaps the imperatives of presidential oversight and control do not extend to state or private enforcement of federal law. But as Professor Hills notes, "[I]t only has been in the last half-century that the Court has accepted the notion that the states can play a significant role in carrying out federal law."[365] Moreover, according to Professor Hills, "it is fair to say that the Court has not fully explored the implications of cooperative federalism for the rest of its constitutional jurisprudence."[366]

In consequence, at least for the present, it is impossible to know whether the Roberts Court has a comprehensive commitment to securing presidential oversight of the administration of federal law when such administration occurs outside the executive branch of the federal government. If it does not, it is possible that the Supreme Court will embrace functionalist arguments to sustain cooperative-federalism programs or simply pretend that the problem does not

364. *Id*. at 1097.

365. Hills, *supra* note 145, at 183.

366. *Id.*

exist. The Supreme Court could avoid the hard constitutional question through recourse to the potential solutions described earlier[367] or through the simple expedient of never asking the question.

CONCLUSION

Free Enterprise Fund and the Roberts Court's embrace of new formalism more generally suggest that reconsidering the constitutional foundations of cooperative federalism—and particularly the separation-of-powers issue that arises from state enforcement of federal law—should be a priority for administrative-law and constitutional-law scholars, as well as for federal judges. To be clear, I do not claim that *Free Enterprise Fund* squarely disallows cooperative-federalism programs; my claim is more limited. In my view, the majority opinion, along with its formalist cousins, raises important questions about the need for sufficiently direct forms of presidential oversight and control over state-government implementation of federal administrative programs.

Important questions exist, but remain unanswered, regarding the constitutional status of cooperative-federalism programs. As Professor Hills observes, "Non-federal implementation of federal law has slipped into American constitutional practice with relatively little theoretical explanation or justification."[368] Article II's Vesting and Take Care Clauses create an imperative for meaningful presidential oversight over the implementation of federal law, yet whether cooperative-federalism structures provide sufficient presidential oversight to overcome potential separation-of-powers objections very much remains an open question. If *Free Enterprise Fund* means what it expressly says, however, cooperative-federalism programs violate the separation-of-powers doctrine by unconstitutionally exporting the execution of federal law to state-government officers.

367. *See supra* notes 41–42, 318–64 and accompanying text.

368. Hills, *supra* note 145, at 183.