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Ghostwriting Federalism

ABSTRACT. Notwithstanding the Supreme Court’s admonition that federal authorities should not “unduly interfere” with state government, federal agencies frequently write state laws. They draft model state acts. They comment on pending state bills. And behind the scenes, they quietly advise state legislators and governors’ offices on proposed state legislation. Some agencies dedicate special divisions to work with states and track their legislation. Others work informally with state policymakers in overlapping areas of regulation and enforcement. Agencies have done this since the earliest days of our modern administrative state. Yet this function is mostly overlooked in canonical accounts of agencies’ work and the vast literature on administrative law.

This Article systematically maps this vital but unexamined aspect of the federal administrative state. Drawing on interviews and historical accounts from dozens of agencies, this Article charts how federal agencies shape state legislation and assesses the implications for administrative law and federalism. Federal-agency involvement in state legislation offers an important avenue for regulatory policymaking, but also one that bypasses the traditional constraints of administrative process, judicial review, anti-lobbying laws, and presidential oversight that apply to administrative agencies. Such involvement thus could prompt concerns about regulatory capture, partisanship, and drift inside the administrative state. Evidence from this Article suggests, however, that these concerns may be mitigated—and the benefits of federal-agency collaboration enhanced—when agencies adopt transparent and accountable practices that some federal agencies already observe.

Understanding agencies’ role in the statehouse also complicates the traditional account of state and federal government in our federalist system. The conventional account of American federalism assumes that when federal agencies act, they make uniform policies for the nation and that states separately make policies for their local constituencies, thereby providing testing grounds for programs that other states can adopt. The federal agencies described here flip that script. They participate in state policymaking while building state expertise and power; they develop subnational rather than uniform nationwide policies; and they transmit popular state legislation downward into the states and across them. Even as the Supreme Court has restricted agency demands on states in the name of federalism, this Article shows that federal agencies can use statehouses to further the values of federalism—among them, enhanced accountability, greater deliberation, and productive experimentation in the way we govern ourselves.

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INTRODUCTION

Conventional wisdom holds that federal agencies and state legislatures write separate bodies of law.¹ Torts, property, contracts, health, and family law – these and countless other fields are shaped by state legislatures that make policy on the basis of local conditions, allowing the states to serve as “laboratories” of democracy.² Federal agencies, meanwhile, make national policies pursuant to grants of statutory authority and subject to rules that hold them accountable – including internal procedures, judicial review, and federal oversight in the political branches.³ If you want a driver’s license, state law is the place to look. If you want to know whether a company has “created a new ‘active moiety’ by joining a previously approved moiety to lysine through a non-ester covalent bond,” federal administrative law has the answer.⁴

But, in important respects, that story is incomplete. Although long overlooked by scholars, federal agencies shape state legislation across virtually every field of law. They write model state acts, both by themselves and with organizations like the Uniform Law Commission (ULC).⁵ They comment on pending state bills.⁶ And behind the scenes, they quietly advise state legislators,

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1. See generally Edward S. Corwin, *The Passing of Dual Federalism*, 36 VA. L. REV. 1 (1950) (describing the relationship between the federal government and state legislatures as separate and often in tension).
 2. *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting); see, e.g., Heather K. Gerken, *The Supreme Court, 2009 Term – Foreword: Federalism All the Way Down*, 124 HARV. L. REV. 4, 12 (2010); Larry D. Kramer, *Putting the Politics Back into the Political Safeguards of Federalism*, 100 COLUM. L. REV. 215, 222 (2000). But see Jessica Bulman-Pozen, *From Sovereignty and Process to Administration and Politics: The Afterlife of American Federalism*, 123 YALE L.J. 1920, 1932 (2014) (“[S]tates do not enjoy a realm in which to set their own policies; instead, they set national policy together with federal politicians and bureaucrats.”).
 3. See Brian Galle & Mark Seidenfeld, *Administrative Law’s Federalism: Preemption, Delegation, and Agencies at the Edge of Federal Power*, 57 DUKE L.J. 1933, 2020–21 (2008); Catherine M. Sharkey, *Federalism Accountability: “Agency-Forcing” Measures*, 58 DUKE L.J. 2125, 2127–28 (2009).
 4. *Kisor v. Wilkie*, 139 S. Ct. 2400, 2410 (2019) (offering several illustrations – including this one – of uniform, national regulations that raise questions well within the specialized policy-making expertise of federal agencies).
 5. See, e.g., Nat’l Highway Traffic Safety Admin., *Automated Driving Systems 2.0: A Vision for Safety*, U.S. DEP’T OF TRANSP. 19, 21 (Sept. 2017), https://www.nhtsa.gov/sites/nhtsa.gov/files/documents/13069a-ads2.0_090617_v9a_tag.pdf [https://perma.cc/RH84-GN9J] (describing a two-year effort with the American Association of Motor Vehicle Administrators to “assist jurisdictions in enhancing their current [Automated Driving System] regulations or considering developing new legislation”); see also *infra* Parts II and III (describing the different ways federal agencies influence state legislation).
 6. See, e.g., Letter from Marcus J. Beauregard, Dir., Def. State Liaison Off., to Hon. Chris Tuck, Majority Leader, Alaska House of Reps. (Jan. 11, 2017) (on file with author) (“We greatly

regulators, and governors' offices on proposed legislation.⁷ Some agencies dedicate special divisions to working with states and tracking their legislation.⁸ Others work informally on state legislation in overlapping areas of regulation and enforcement.

At first blush, the very idea that federal agencies would “ghostwrite” state legislation may seem at odds with our dual system of government.⁹ This Article shows, however, that such practices date back to the earliest days of the modern administrative state and continue to this day.¹⁰ Not only are they lawful, but when used appropriately, they may further many values long associated with administrative law and federalism – including more accountability, greater deliberation, and productive experimentation in the way we govern ourselves.

Both liberal and conservative policymakers inside federal agencies have long understood that their regulatory missions turned on how well they cultivated and influenced state legislative power. Consider two examples from different eras. In 2021, as the Supreme Court appeared ready to overturn the national eviction moratorium,¹¹ federal agencies raced against time to form a plan for the

appreciate that the Alaska legislature has been a champion in addressing our key military family quality of life issues these past ten years. As always, . . . our Northwest Regional Liaison[] stands ready to support where he can.”); *see also* *FTC Staff Comments to the Nebraska State Senate Regarding a Number of Proposed Senate Bills That Would Loosen or Eliminate Certain Occupational Licensing Requirements in Nebraska*, FED. TRADE COMM'N (Mar. 16, 2017), <https://www.ftc.gov/legal-library/browse/advocacy-filings/ftc-staff-comments-nebraska-state-senate-regarding-number-proposed-senate-bills-would-loosen-or> [<https://perma.cc/ZH6K-G2KK>] (compiling a series of letters addressing occupational licensing requirements).

7. *See infra* Section II.C.

8. *See, e.g.*, Off. of the Assistant Legal Adviser for Priv. Int'l L., *Our Mission*, U.S. DEP'T STATE, <https://www.state.gov/bureaus-offices/secretary-of-state/office-of-the-legal-adviser/office-of-the-assistant-legal-adviser-for-private-international-law> [<https://perma.cc/G4J2-U LRN>]; Pub. Health L. Program, *About Us*, CTRS. FOR DISEASE CONTROL & PREVENTION (Mar. 3, 2023), <https://www.cdc.gov/phlp/about> [<https://perma.cc/VEV5-VGJZ>].

9. To be sure, many of the officials involved in the processes described here would not characterize their own work as “ghostwriting” state policy. As evidenced below, I use the word expansively to include the wide variety of ways agencies advise, inform, educate, and coordinate with state policymakers about matters that fall within their federal mission and expertise.

10. *See, e.g.*, DANIEL P. CARPENTER, *THE FORGING OF BUREAUCRATIC AUTONOMY: REPUTATION, NETWORKS, AND POLICY INNOVATION IN EXECUTIVE AGENCIES, 1862-1928*, at 86 (2001) (“Perhaps never before in the history of the Republic had a career federal officer so openly (and successfully) lobbied for the expansions of his authority, not only in Congress but also in state legislatures.”); *id.* at 84-85, 104-06; KIMBERLY S. JOHNSON, *GOVERNING THE AMERICAN STATE: CONGRESS AND THE NEW FEDERALISM, 1877-1929*, at 110 (2007).

11. *Ala. Ass'n of Realtors v. Dep't of Health & Hum. Servs.*, 141 S. Ct. 2320, 2320 (2021) (Kavanaugh, J., concurring) (denying motion to vacate stay but agreeing with conservative members of the Court that “the Centers for Disease Control and Prevention exceeded its existing statutory authority by issuing a nationwide eviction moratorium”).

nation's statehouses to avert an "eviction tsunami" as COVID-19 cases began to surge.¹² The Treasury Department reached out to state policymakers with "promising practices" and "data-driven operational analyses" to help them perform outreach in their communities and draft new legislation to protect tenants.¹³ Treasury also shared successful models from other states to provide financial aid and reduce eviction proceedings.¹⁴ The result was a resounding success, with thirty-one states passing new laws to protect tenants, pause evictions, secure the right to counsel, and seal eviction records.¹⁵ Instead of a sharp increase in evictions, nationwide eviction filings remained twenty-six percent below historical averages.¹⁶

In 2003, the federal Small Business Administration (SBA) developed a very different kind of plan for state legislatures to reduce regulations. President George W. Bush had ordered federal agencies to ease regulations on businesses

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12. See, e.g., Susan D. Bennett, *Making the Second Pandemic: The Eviction Tsunami, Small Landlords, and the Preservation of "Naturally Occurring" Affordable Housing*, 29 J. AFFORDABLE HOUS. & CMTY. DEV. L. 157, 157-59 (2020).
 13. *Promising Practices for ERA Programs*, U.S. DEP'T TREASURY, <https://home.treasury.gov/policy-issues/coronavirus/assistance-for-state-local-and-tribal-governments/emergency-rental-assistance-program/promising-practices> [<https://perma.cc/qq9g-7fhy>]. Authority to do so was grounded in two emergency relief statutes that Congress passed during the COVID-19 epidemic, the Consolidated Appropriations Act of 2021 and the American Rescue Plan. See American Rescue Plan Act of 2021, Pub. L. No. 117-2, 135 Stat. 4, 228; Consolidated Appropriations Act of 2021, Pub. L. No. 116-260, 134 Stat. 1182, 2127. Each tasked the Treasury Department with administering over \$25 billion in housing aid to state, local, and tribal governments. Without additional guidance from Treasury, policymakers feared renters would lose their housing before aid could reach them through state government. For background on Treasury's efforts, see generally GRANT A. DRIESSEN, MAGGIE MCCARTY & LIBBY PEARL, CONG. RSCH. SERV., R46688, PANDEMIC RELIEF: EMERGENCY RENTAL ASSISTANCE PROGRAM (2023).
 14. *Emergency Rental Assistance Data Shows Programs Ramping Up, but States and Localities Must Do More to Accelerate Aid*, U.S. DEP'T OF THE TREASURY 3 (July 2, 2021), <https://home.treasury.gov/system/files/136/2021-07-02-ERA-Data-Blog-Post-vF.pdf> [<https://perma.cc/gsk7-u9em>] (pointing to successes in Virginia and Texas and urging states to adopt similar practices).
 15. Press Release, The White House, Fact Sheet: White House Summit on Building Lasting Eviction Prevention Reform (Aug. 2, 2022), <https://www.whitehouse.gov/briefing-room/statements-releases/2022/08/02/fact-sheet-white-house-summit-on-building-lasting-eviction-prevention-reform> [<https://perma.cc/ws2x-q42y>] (describing successful push by the Treasury Department to spur thirty-one states to adopt new legislation after the Supreme Court's decision in *Alabama Association of Realtors*).
 16. Peter Hepburn, Olivia Jin, Joe Fish, Emily Lemmerman, Anne Kat Alexander & Matthew Desmond, *Preliminary Analysis: Eviction Filing Patterns in 2021*, EVICTION LAB (Mar. 8, 2022), <https://evictionlab.org/us-eviction-filing-patterns-2021> [<https://perma.cc/nx7l-pmx7>] (estimating 1.36 million eviction cases were prevented in 2021 nationwide).

across the administrative state.¹⁷ But small businesses complained about many regulations imposed by states and cities, which fell well outside the control of the federal government.¹⁸ So, the SBA's Office of Advocacy drafted model state legislation that would curb regulations on small businesses modeled after its own organic law, the Regulatory Flexibility Act. It sent in "regional advocates" to "see the bill through the [state] legislative process" by educating policymakers, meeting with stakeholders, and testifying in state legislatures.¹⁹ It posted color-coded maps of the law's progress in states on its website and secured support from the conservative American Legislative Exchange Council (ALEC).²⁰ In one year, ten states introduced the model legislation; by the end of the sixth year, forty-four would adopt similar laws of their own in support of the SBA's mission.²¹

Two sets of agencies, with distinct regulatory agendas, faced similar questions about the reach of their federal power. And had they proceeded to adopt new federal regulations on their own, they would have been subject to a variety of rules and institutional checks designed to hold them accountable—including the Administrative Procedure Act (APA), judicial review, and White House oversight. Each instead avoided those constraints by pursuing an unorthodox route:

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17. Exec. Order No. 13272, 67 Fed. Reg. 53461 (Aug. 13, 2002).
 18. The Small Business Administration (SBA) issued a report on these "regulatory burdens" at the state level. Off. of Advoc., *Analysis of State Efforts to Mitigate Regulatory Burdens on Small Businesses*, U.S. SMALL BUS. ADMIN. 3 (June 1, 2002), <https://www.sba.gov/sites/default/files/files/rs219tot.pdf> [<https://perma.cc/YYD3-NV8W>]. Authority to do so was grounded in the SBA Office of Advocacy's organic statute, the Small Business Act, Pub. L. No. 94-305, 90 Stat. 663, 668-70 (1976), which to this day gives the office broad "flexibility" and "independence" to conduct economic research, represent small-business interests before federal agencies, and publish studies without prior clearance from "any other Federal agency or executive department." 15 U.S.C. § 634f (2018).
 19. Off. of Advoc., *Research on State Regulatory Flexibility Acts*, U.S. SMALL BUS. ADMIN., at ii (May 2013) [hereinafter SBA May 2013 Report], <https://advocacy.sba.gov/wp-content/uploads/2019/05/Research-on-State-Regulatory-Flexibility-Acts-Report.pdf> [<https://perma.cc/PH6U-LNFK>] (describing successful efforts to implement model regulatory flexibility acts in over forty jurisdictions); Off. of Advoc., *Report on the Regulatory Flexibility Act FY 2008*, U.S. SMALL BUS. ADMIN. 39 (Jan. 2009) [hereinafter SBA FY 2008 Report], <http://www.sba.gov/advo/laws/flex/o8regflx.pdf> [<https://perma.cc/U9N2-EE95>] (describing efforts by state regional advocates); Interview with Officer #7, U.S. Small Bus. Admin. (Apr. 18, 2018).
 20. Off. of Advoc., *State Regulatory Flexibility Model Legislative Initiative: 2007 Legislative Activity*, U.S. SMALL BUS. ADMIN. (Feb. 2007), http://www.sba.gov/advo/laws/model_map1.pdf [<https://perma.cc/5KVN-M3TS>]; SBA May 2013 Report, *supra* note 19, at 7; Press Release, U.S. Small Bus. Admin., Off. of Advoc., State Legislator Organization Endorses Small Business Friendly Regulation: Rare Endorsement of Federal Agency Sponsored State Model Legislation by American Legislative Exchange Council (Sept. 9, 2003) (on file with author).
 21. SBA FY 2008 Report, *supra* note 19, at 37.

helping legislatures write their own state laws. Yet while these approaches could prompt concerns of unrestrained federal administrative power, they also facilitated legislative processes critical to achieving important state objectives. Agencies not only launched new programs consistent with federal policies, but they also lent sorely needed expertise to shorthanded state legislatures while cultivating new state institutions to act as partners in carrying out shared goals for the future.

This Article maps the ways that federal agencies shape state legislation and assesses their implications for administrative law and our divided system of government. First, it gathers early stories of federal-agency involvement in state lawmaking and the ways in which those early projects influenced other agencies. It then brings the account forward to the present with interviews from officials in fourteen agencies describing the variety of ways that federal agencies shape state law. In the process, this Article offers new descriptive and theoretical insights for administrative law and for our federal system of government.

On a descriptive level, this Article offers a comprehensive look into the variety of procedures and tools agencies use to influence state legislation. Despite the proliferation of statutes requiring federal and state governments to collaborate since the Progressive Era, few accounts have canvassed the myriad ways that federal agencies actually influence, craft, and occasionally write state laws.²² Those who have examined this phenomenon generally focused on specific agencies or on a specific subset of important federal activity with states: federally funded programs and mandates, where agencies exercise direct legal or financial power, subject to at least some federal judicial review.²³ But beyond that cluster

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22. Some contemporaneous New Deal studies chart the way federal agencies developed state legislation. See JANE PERRY CLARK, *THE RISE OF A NEW FEDERALISM: FEDERAL-STATE COOPERATION IN THE UNITED STATES* 28 (1938); W. Brooke Graves, *Federal Leadership in State Legislation*, 10 *TEMP. L.Q.* 385, 385-88 (1936); W. Brooke Graves, *The Future of the American States*, 30 *AM. POL. SCI. REV.* 24, 34-38 (1936) [hereinafter Graves, *The Future of the American States*] (cataloguing state legislation written with the assistance of New Deal agencies); see also KAREN M. TANI, *STATES OF DEPENDENCY* 47 (2016) (describing model state bills written in close consultation with the Social Security Board (SSB) during the New Deal). More recent analysis has either focused on federal funding programs or discrete agency programs. See, e.g., Bridget A. Fahey, *Coordinated Rulemaking and Cooperative Federalism's Administrative Law*, 132 *YALE L.J.* 1320, 1333 (2023); Abbe R. Gluck & Nicole Huberfeld, *What Is Federalism in Healthcare For?*, 70 *STAN. L. REV.* 1689, 1703 (2018); Erin Ryan, *Negotiating Federalism*, 52 *B.C. L. REV.* 1, 28-29 (2011). This study builds upon a related literature that tracks how federal agencies can spur experimentation in government in federal spending programs. See, e.g., Michael C. Dorf & Charles F. Sabel, *A Constitution of Democratic Experimentalism*, 98 *COLUM. L. REV.* 267, 288 (1998).
23. See *infra* Section I.B. Of course, there are obstacles to litigating challenges to federal agencies that approve or deny federal grants, too, but they are not insurmountable. See, e.g., Mila

of activity, there is a sphere of agency action that is *not subject to any* federal judicial review. This Article focuses on these unreviewable federal-agency actions where, at least ostensibly, agencies act more like partners in state legislative reform.

This broader account shows that federal agencies use far more than federal funds and legal mandates to shape state legislation. Agencies also leverage their unique policymaking capacity to promote new programs, much like matching grants of federal dollars. “Policymaking capacity” refers to all the institutional resources a government institution needs to make law—including agenda setting, expertise, institution building, and policy coordination.²⁴ State legislatures, many of which meet on a part-time basis, are notoriously lacking in this capacity.²⁵ As detailed here, agencies help set agendas by convening public forums and openly testifying before state legislative committees; they lend their expertise in science, policy, and law; they build state institutions that share the same expertise as their own; and they promise needed interstate cooperation where states lack incentives to act by themselves.²⁶ Perhaps because these activities involve softer forms of power than direct edicts, they receive very little political and judicial oversight. But they are extremely effective. In fact, as private interest groups have learned, offering these resources is critical to advancing national policies through part-time state legislatures, which often lack the staff, time, and attention to develop policies themselves.²⁷

On a theoretical level, state legislative strategies may offer surprising benefits for administrative law and federalism, despite their potential risks. For administrative law, the big risk is that agencies will create new binding policies outside

Sohoni, *On Dollars and Deference: Agencies, Spending, and Economic Rights*, 66 DUKE L.J. 1677, 1707 (2017) (describing the challenges federal spending programs pose to judicial review but identifying areas where states still may press their claims in federal courts); *Gresham v. Azar*, 950 F.3d 93, 98 (D.C. Cir. 2020) (“Although the Secretary has considerable discretion to grant a [Medicaid spending] waiver, we reject the government’s contention that such discretion renders his waiver decisions unreviewable.”), *vacated and remanded on other grounds sub nom. Arkansas v. Gresham*, 142 S. Ct. 1665 (2022) (mem.).

24. See, e.g., Richard L. Hall & Alan V. Deardorff, *Lobbying as Legislative Subsidy*, 100 AM. POL. SCI. REV. 69, 69 (2006) (observing how businesses influence policymaking by providing “policy resources” to legislators, including not just money, but “matching grants” of information, talking points, and polling).
25. See, e.g., Charles W. Tyler & Heather K. Gerken, *The Myth of the Laboratories of Democracy*, 122 COLUM. L. REV. 2187, 2199 (2022) (documenting the limited policymaking capacity of state legislatures).
26. See *infra* Section III.B.
27. See JACOB M. GRUMBACH, *LABORATORIES AGAINST DEMOCRACY: HOW NATIONAL PARTIES TRANSFORMED STATE POLITICS* 97 (2022); Alexander Hertel-Fernandez, *Who Passes Business’s “Model Bills”? Policy Capacity and Corporate Influence in U.S. State Politics*, 12 PERSPS. ON POL. 582, 595-96 (2014).

of the traditional constraints of administrative law.²⁸ Agencies have always had a variety of tools to make policy – including rulemaking, adjudication, and guidance to private parties.²⁹ But the assumption in those cases is that agencies adopt the policies themselves – or with another federal agency and Congress³⁰ – subject to the APA’s procedural requirements, formal judicial review, congressional oversight, or presidential control.³¹ Administrative forays into state law, by contrast, involve policymaking that a *different sovereign body* then adopts without review by federal courts, Congress, or the White House. The absence of traditional administrative oversight thus could prompt concerns about unchecked power, influence, and partisanship in the administrative state.

The findings here, however, suggest that these concerns may be mitigated – and the benefits of federal-agency collaboration enhanced – when agencies adopt transparent and accountable protocols that some federal agencies already observe. And, if those fail, many practical and political safeguards exist to prevent agency overreach – including the fact that new laws only go into effect after a vote by elected officials. In the process, agencies may even provide a public counterweight to the outsized influence private interests already exert on our state legislatures while promoting better dialogue between federal and state government.

With respect to federalism, federal agencies’ work with statehouses may further federalism values, notwithstanding the risks. To be sure, if Washington-based federal agencies dominated the state legislative process, they could upset values of individual experimentation, accountability, liberty, and decentralized power that form the basis for our system of dual sovereignty.³² As the Supreme Court warned in another context, “a more direct affront to state sovereignty is not easy to imagine” than “if federal officers were installed in state legislative

28. See Mila Sohoni, *The Administrative Constitution in Exile*, 57 WM. & MARY L. REV. 923, 963-65 (2016); Daniel A. Farber & Anne Joseph O’Connell, *The Lost World of Administrative Law*, 92 TEX. L. REV. 1137, 1140 (2014).

29. M. Elizabeth Magill, *Agency Choice of Policymaking Form*, 71 U. CHI. L. REV. 1383, 1386 (2004).

30. See, e.g., Daphna Renan, *Pooling Powers*, 115 COLUM. L. REV. 211, 243-45, 255 (2015); Christopher J. Walker, *Legislating in the Shadows*, 165 U. PA. L. REV. 1377, 1383-84 (2017).

31. See Magill, *supra* note 29, at 1385, 1392, 1404 n.70; Renan, *supra* note 30, at 266-68. Agencies also must clear their substantive views about federal legislation with the White House’s Office of Management and Budget (OMB). See OFF. OF MGMT. & BUDGET, EXEC. OFF. OF THE PRESIDENT, OMB CIRCULAR NO. A-19, LEGISLATIVE COORDINATION AND CLEARANCE § 10 (1979). No similar administrative process exists for state legislation.

32. See, e.g., Gerken, *supra* note 2, at 6, 47-48 (explaining ways that, under traditional accounts, federalism “promotes choice, competition, participation, [and] experimentation”); David E. Adelman & Kirsten H. Engel, *Adaptive Federalism: The Case Against Reallocating Environmental Regulatory Authority*, 92 MINN. L. REV. 1796, 1800 (2008); Gregory v. Ashcroft, 501 U.S. 452, 458 (1991).

chambers and were armed with the authority to stop legislators from voting on any offending proposals.”³³

Many examples highlighted in this study, however, offer support for a different story. They suggest that state legislative strategies instead can *promote* those same federalism values on the ground. Some federal agencies have become clearinghouses for policy experiments, sharing successful state legislation with other states and frequently consulting with state officials, legal organizations, and counterparts before opining on state legislative proposals.³⁴ Federal agencies may promote state legislation designed to build state institutions and agencies, which, in turn, may advance state power and independence.³⁵ Federal-agency involvement in state legislation may also be more transparent and thorough than when states proceed on their own,³⁶ creating more opportunities for citizens to understand and petition their own state government.³⁷ In this way, federal agencies can become important “network entrepreneurs” – organizations that help assemble new ideas, interest groups, and other government actors across public and private divides to build state policymaking capacity.³⁸

To be clear, although this Article highlights these unexplored benefits of ghostwritten federalism, my primary goal is not to extol or criticize this phenomenon. Instead, I hope to document its many forms, draw attention to its unexplored advantages and risks, and make the case for why such agency collaborations with state sovereigns deserve more study alongside more well-known forms of policymaking inside the administrative state.

This Article proceeds in five Parts. Part I describes how traditional accounts of administrative law and federalism do not address agencies that shape state law. Parts II and III then provide an alternative account of the many ways federal agencies influence state legislation. Relying on interviews and history, Part II highlights the varying procedures federal agencies must observe when they work

33. *Murphy v. Nat’l Collegiate Athletic Ass’n*, 584 U.S. 453, 474 (2018).

34. See *infra* Sections III.B and III.C.

35. See *infra* Section V.B.

36. See *infra* Section III.C (describing the use of federal advisory committees and exhaustive procedures for uniform lawmaking); see also Miriam Seifter, *Further from the People? The Puzzle of State Administration*, 93 N.Y.U. L. Rev. 107, 111 (2018) (explaining drawbacks of state administration as opposed to federal administration); David Schleicher, *Federalism and State Democracy*, 95 TEX. L. REV. 763, 764 (2017) (arguing that “research on second-order elections reveals the emptiness of several prominent theories about federalism, particularly work about the ‘political safeguards of federalism’”).

37. See *infra* Section V.A.

38. Cf. Ronald S. Burt, *The Network Structure of Social Capital*, 22 RSCH. ORG. BEHAV. 345, 362 (2000) (describing “network entrepreneurs” in organizational sociology who “bridg[e] structural holes” across different divides to facilitate the spread of “new ideas” and policies).

with state legislatures, including how transparently they pursue legislation, whether they rely on formal or informal departments to do so, and with whom they interact in state government. Part III then turns from the internal procedures that govern agencies to the kinds of influence they bring to bear. It presents a taxonomy of five distinct ways agencies influence state legislatures using their policymaking capacity: setting agendas, lending expertise, building institutions, coordinating policy, and funding new initiatives. These diverse strategies shape state policymaking in many ways. But the larger point is that agencies have many different tools beyond legal mandates and federal spending to affect state law.

Parts IV and V turn to normative and theoretical questions. Part IV focuses on the challenge to administrative law posed when federal-agency activity in the statehouse occurs outside established administrative processes, including the APA, federal judicial review, anti-lobbying restrictions, and presidential oversight.³⁹ Part V turns to what this approach means for federalism. Even as the Supreme Court has warned about the impact of the administrative state on our divided system of government, federal agencies may actually promote many values federalism serves using state legislative strategies – including more participation, accountability, and democratic experimentation in state government.

I. SELF-GOVERNANCE IN ADMINISTRATIVE LAW AND FEDERALISM

Traditional accounts of administrative law and federalism doctrine do not examine how agencies write state laws. Each body of law broadly seeks to promote participation, accountability, and policy innovation⁴⁰ while preventing any one government institution from *aggrandizing* too much lawmaking power for itself.⁴¹ But these bodies of law do not address ways that government agencies

39. See generally Christopher J. Walker, *Administrative Law Without Courts*, 65 U.C.L.A. L. REV. 1620 (2018) (discussing seven categories of agency action that are insulated from judicial review).

40. See Robert A. Kagan, *Do Lawyers Cause Adversarial Legalism? A Preliminary Inquiry*, 19 L. & SOC. INQUIRY 1, 5 (1994) (explaining that law in the United States is “open to parties’ novel legal and policy arguments” and that “legal formalities” in regulatory decision-making “are designed to enhance interest group participation and review by courts”); Paul R. Verkuil, *The Emerging Concept of Administrative Procedure*, 78 COLUM. L. REV. 258, 280 (1978) (“[T]he courts are coming to view administrative procedure as a function of the values of fairness, efficiency, and satisfaction.”); Gerken, *supra* note 2, at 6 (explaining that the benefits of federalism include “promot[ing] choice, competition, participation, experimentation, and the diffusion of power”).

41. See, e.g., Daryl J. Levinson, *Empire-Building Government in Constitutional Law*, 118 HARV. L. REV. 915, 917-18 (2005); Lynn A. Baker & Ernest A. Young, *Federalism and the Double Standard of Judicial Review*, 51 DUKE L.J. 75, 112-17 (2001) (arguing that judicial review is required to

diffuse power by persuading other sovereign bodies, like state legislatures, to adopt their preferred initiatives. The few accounts that have discussed federal agencies' impact on state legislation have largely focused on federal spending programs and mandates, where states act as "servants" or "negotiators" inside the boundaries of a larger federal program.⁴² They do not account for other kinds of federal-agency actions, where at least ostensibly, they act more like partners in state legislative reform.

This Part lays out the foundation for this Article's study of agencies that influence, craft, and write state law. It details the ways that administrative law and federalism doctrines advance their central goals, without accounting for other ways federal agencies use softer forms of power to influence different sovereign bodies and institutions.

A. *Administrative-Law Constraints*

A central assumption behind much of our constitutional law and administrative process is that government institutions, left unchecked, will use their power to get bigger. Traditional constitutional theory often aims to combat the perceived "hardwir[ing]" of government institutions: the idea that Congress, the President, and our courts will expand power for themselves at the expense of "competing government bodies—and, ultimately, at the expense of the citizenry."⁴³ And the same motivations also explain our "administrative constitution," the APA, which—along with a body of rules, theories, and oversight mechanisms in administrative law—constrains the federal bureaucracy.⁴⁴ The APA was a compromise brokered after the New Deal that aimed to preserve flexible opportunities for policymaking while curbing administrative overreach with

check the "aggrandizement" of the federal government over state government); Abner S. Greene, *Checks and Balances in an Era of Presidential Lawmaking*, 61 U. CHI. L. REV. 123, 126, 155-56 (1994) (asserting that separation-of-powers jurisprudence has upheld congressional efforts to curb executive power over the administrative state that check "presidential aggrandizement without the concomitant risk of congressional aggrandizement").

42. See Jessica Bulman-Pozen & Heather K. Gerken, *Uncooperative Federalism*, 118 YALE L.J. 1256, 1258 (2009) ("When states are implementing federal mandates, we generally think they should act as cooperative servants."); see also Gerken, *supra* note 2, at 14 (providing a theoretical account of states as "servants," arguing that "[t]heir insider status [as federal servants, not state sovereigns] enables them not just to speak, but to act—to administer national policy as they see fit, even to resist its implementation"). See generally Ryan, *supra* note 22 (examining a variety of modes of negotiation between state and federal actors, including in the context of federal spending programs).
43. Levinson, *supra* note 41, at 917.
44. See Emily S. Bremer, *The Unwritten Administrative Constitution*, 66 FLA. L. REV. 1215, 1237, 1249-53 (2015); Nicholas Bagley, *The Procedure Fetish*, 118 MICH. L. REV. 345, 352 (2019) ("[A]dministrative law has been built on a bedrock of distrust").

procedural rules to promote civic engagement and judicial checks to promote more accountable government decision-making.⁴⁵ As a result, the APA has different rules to promote public participation, deliberation, and transparency, regardless of whether agencies choose to make policy through hearings,⁴⁶ rule-making procedures,⁴⁷ or regulatory guidance and interpretation.⁴⁸ However, the APA's strict procedural limits only apply when agencies directly act with the force of law.⁴⁹ Its guidelines rarely apply when agencies use their power to *persuade other institutions* to do very similar things.⁵⁰

Beyond internal rules, agencies are also usually subject to external oversight when they make policy.⁵¹ Federal courts set ground rules for who can sue, when, and under what standard by “intensifying the standard of review, permitting a party to sue at a particular point, or shaping the procedures that [agencies]

45. See Cass R. Sunstein & Adrian Vermeule, *Libertarian Administrative Law*, 82 U. CHI. L. REV. 393, 466 (2015) (“The APA itself reflects a compromise between the New Dealers, enthusiastic about the emergence of new regulatory institutions, and the New Deal critics, seeking to strengthen procedural and judicial checks on those institutions.”); George B. Shepherd, *Fierce Compromise: The Administrative Procedure Act Emerges from New Deal Politics*, 90 NW. U. L. REV. 1557, 1680 (1996) (discussing New Deal politics as “the fundamental force that created the APA compromise,” with the administration seeking “agencies’ ability to implement New Deal programs quickly, without interference from either cumbersome procedural requirements or intrusive judicial review,” and conservatives seeking to ensure that agencies must “jump[] through numerous procedural hoops and receive[] the blessing of a conservative federal judge”); DANIEL R. ERNST, *TOCQUEVILLE’S NIGHTMARE: THE ADMINISTRATIVE STATE EMERGES IN AMERICA, 1900-1940*, at 7-8 (2014) (explaining that progressive reformers “designed the principles of individual rights, limited government, and due process into the administrative state”).
46. See 5 U.S.C. §§ 554, 556, 557 (2018).
47. See *id.* § 553; *Motor Vehicle Mfrs. Ass’n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 52-55 (1983).
48. See 5 U.S.C. § 553(b)(3)(A) (2018); Nicholas R. Parrillo, *Federal Agency Guidance and the Power to Bind: An Empirical Study of Agencies and Industries*, 36 YALE J. REG. 165, 168 (2019); *Clarian Health W., LLC v. Hargan*, 878 F.3d 346, 359 (D.C. Cir. 2017) (“An agency election to adopt a policy statement rather than promulgate a legislative rule simply determines how, when, and under what standard the criteria might be reviewed.”).
49. See *Perez v. Mortg. Bankers Ass’n*, 575 U.S. 92, 104 (2015). An agency’s specific organic statute also could impose constraints beyond those contained in the APA. But as discussed in Section IV.A, they rarely, if ever, address federal-agency interactions with state government.
50. Even the Freedom of Information Act’s rules for government records may not apply to such collaborations. The D.C. Circuit, for example, has said that agency drafting assistance for federal legislation is not subject to disclosure under the Freedom of Information Act because the communications involve *congressional*, and not *agency*, records. *United We Stand Am., Inc. v. IRS*, 359 F.3d 595, 597 (D.C. Cir. 2004).
51. See Michael D. Sant’Ambrogio & Adam S. Zimmerman, *The Agency Class Action*, 112 COLUM. L. REV. 1992, 2020 (2012); Jeffrey J. Rachlinski, *Rulemaking Versus Adjudication: A Psychological Perspective*, 32 FLA. ST. U. L. REV. 529, 532, 537 (2005).

must . . . follow[.]”⁵² And when courts do not review those decisions, at least in theory, Congress or the White House will by setting agendas and conducting ongoing oversight.⁵³ Together, internal rules and external oversight promote public involvement in governmental decisions while also subjecting agencies to review by the federal judiciary, Congress, and the executive branch. But, in general, this review extends only to agency action at the federal level; no federal judicial review, presidential oversight, or congressional oversight applies for agencies that influence state institutions to adopt new policies.⁵⁴

Other examples of such accountability rules are anti-lobbying laws and congressional appropriations riders that bar agencies from rallying the public to adopt their preferred policies.⁵⁵ At first blush, many of these rules seem like they are designed to curb agency influence. But they principally exist to avoid a “tail-wagging-the-dog” problem – ensuring agencies remain accountable to Congress and the Executive, which are the political branches, and not the other way around. For example, the Government Accountability Office (GAO) has explained that these rules are less about curbing agency influence than agency “*self-aggrandizement*.”⁵⁶ That is, these rules prevent agencies from engaging in grassroots campaigning to build political support for themselves and from exerting pressure on elected officials.⁵⁷ The limits of these rules are discussed more in Part

52. Magill, *supra* note 29, at 1385.

53. Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245, 2248, 2277-81 (2001); Farber & O’Connell, *supra* note 28, at 1167-70 (describing the strength of the Office of Information and Regulatory Affairs as a tool of presidential oversight); Barry R. Weingast & Mark J. Moran, *Bureaucratic Discretion or Congressional Control? Regulatory Policymaking by the Federal Trade Commission*, 91 J. POL. ECON. 765, 768-70 (1983) (proposing a model of “congressional dominance” through “direct and continuous” informal monitoring by congressional oversight committees); Matthew D. McCubbins, Roger G. Noll & Barry R. Weingast, *Structure and Process, Politics and Policy: Administrative Arrangements and the Political Control of Agencies*, 75 VA. L. REV. 431, 432-34 (1989).

54. See *infra* Section IV.A (describing a lack of oversight for state legislative strategies).

55. 18 U.S.C. § 1913 (2018) (preventing agencies from using appropriated funds in ways “intended or designed to influence in any manner a Member of Congress”); see also H.R. REP. NO. 107-685, at 177 (2002) (Conf. Rep.) (discussing the expansion of a bar on agencies’ seeking to influence “state and local government units on policies, legislation or appropriations”).

56. Dep’t of Health & Hum. Servs., *Use of Appropriated Funds for Medicare Brochure*, B-319834, 2010 WL 3523169, at *5 (Comp. Gen. Sept. 9, 2010) (emphasis added).

57. See, e.g., *Applicability of Antilobbying Statute* (18 U.S.C. § 1913) – Fed. Judges, 2 Op. O.L.C. 30, 31 (1978) (observing that this provision was “intended to bar the use of official funds to underwrite agency public relations campaigns”); 58 CONG. REC. 403 (1919) (statement of Rep. James Good) (noting that a deficiency appropriation bill would prohibit the “practice of a bureau chief or the head of a department writing letters throughout the country . . . for this man, for that company to write his Congressman, to wire his Congressman, on behalf of this or that legislation”).

IV. But for now, it is worth noting that all of these rules from administrative law (a) aim to promote democratic accountability and (b) prevent agencies from exercising too much power on their own. They do not account for ways federal agencies might persuade other sovereign bodies to adopt their preferred policies.⁵⁸

This is not to say that administrative law does not worry about government actions that diffuse responsibility for making decisions. Courts, policymakers, and scholars have long described agencies that shirk, burrow, or overdelegate their bureaucratic authority.⁵⁹ In a series of decisions dating back to 2010, the Supreme Court has been obsessed with administrative diffusion—rejecting provisions that insulate officials from the President and national oversight, sternly warning that the “diffusion of power carries with it a diffusion of accountability.”⁶⁰ Again, however, these doctrines often focus on diffusion *inside* the administrative state and not among agencies and other sites of governance.⁶¹

B. Federalism Constraints

When it comes to relations between the federal and state governments, defenders of the traditional account of “dual federalism” tell a similar story about

58. As discussed in Section IV.A, agencies always have been permitted to facilitate an open dialogue between the agencies, departments, and officials in the various branches of government. See *infra* notes 279–283 and accompanying text.

59. See, e.g., Jennifer Nou, *Subdelegating Powers*, 117 COLUM. L. REV. 473, 473–81 (2017); Nina A. Mendelson, *Agency Burrowing: Entrenching Policies and Personnel Before a New President Arrives*, 78 N.Y.U. L. REV. 557, 589 (2003).

60. *Free Enter. Fund v. Pub. Co. Acct. Oversight Bd.*, 561 U.S. 477, 486 (2010); see also *Collins v. Yellen*, 141 S. Ct. 1761, 1770 (2021) (holding that the Federal Housing Finance Agency’s single-director, for-cause-removal structure “violates the separation of powers”); *Seila L. LLC v. Consumer Fin. Prot. Bureau*, 140 S. Ct. 2183, 2191–92 (2020) (finding that the Consumer Financial Protection Bureau’s similar structure “violates the separation of powers”); Nou, *supra* note 59, at 514–15 (discussing courts’ analysis of agency leadership and structure); Brian D. Feinstein & Jennifer Nou, *Submerged Independent Agencies*, 171 U. PA. L. REV. 945, 945–54 (2023) (raising similar concerns about “subdelegated power” and “submerged independent agencies” inside federal agencies themselves).

61. Perhaps one area where diffusion outside the administrative state is a concern is the *private* delegation doctrine, which limits Congress’s ability to delegate power away from administrative agencies to private entities. See *Carter v. Carter Coal Co.*, 298 U.S. 238, 311 (1936); *Dep’t of Transp. v. Ass’n of Am. R.Rs.*, 575 U.S. 43, 57 (2015) (Alito, J., concurring) (“One way the Government can regulate without accountability is by passing off a Government operation as an independent private concern.”). Even in that area of law, the Court has struggled to draw neat lines when agencies share responsibilities with others. See, e.g., Gillian E. Metzger, *Privatization as Delegation*, 103 COLUM. L. REV. 1367, 1438–40 (2003) (“[W]hile *Carter*’s constitutional prohibition on private delegations thus remains alive in theory, it is all but dead in practice.”).

why federal agencies often cannot tell states what to do.⁶² States promote participation by offering a more convenient means for local populations to petition government bodies;⁶³ they assure that state lawmakers cannot point the finger of blame at federal officials when their policies fail;⁶⁴ and they create important “laboratories” for democracy – or policy innovation.⁶⁵ For that reason, the Court has warned against administrative action that undercuts state power by reducing “state[s] [into] regulatory agencies” of the federal government.⁶⁶

Together, these values of participation, accountability, and innovation have consequences for the ways federal agencies make policies that impact states. In a body of doctrines and rules that some have dubbed “administrative federalism,”⁶⁷ particular principles and features of the administrative state aim to promote participation and accountability while protecting state authority.⁶⁸ Agencies, for example, cannot preempt state laws without (a) observing certain formalities,⁶⁹

62. See *New York v. United States*, 505 U.S. 144, 168–69 (1992); Corwin, *supra* note 1, at 4.
63. Cf. Michael W. McConnell, *Federalism: Evaluating the Founders’ Design*, 54 U. CHI. L. REV. 1484, 1510 (1987) (reviewing RAOUL BERGER, *FEDERALISM: THE FOUNDERS’ DESIGN* (1987)); *Gregory v. Ashcroft*, 501 U.S. 452, 458 (1991) (observing how a federalist structure “increases opportunity for citizen involvement in democratic processes”). *But see* Larry Kramer, *Understanding Federalism*, 47 VAND. L. REV. 1485, 1499 n.27 (1994) (questioning the extent to which states continue to protect liberty under modern understandings of federalism).
64. See *Murphy v. Nat’l Collegiate Athletic Ass’n*, 584 U.S. 453, 473–74 (2018) (“[T]he anticommandeering rule promotes political accountability. . . . By contrast, if a State imposes regulations only because it has been commanded to do so by Congress, responsibility is blurred.”); *New York*, 505 U.S. at 169 (“[W]here 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. . . .”).
65. See *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting); *Gregory*, 501 U.S. at 458 (positing that federalism “allows for more innovation and experimentation in government”); Gerken, *supra* note 2, at 47 n.171 (citing various “accounts of federalism that cast states as laboratories of democracy that inform national policymaking”); Adelman & Engel, *supra* note 32, at 1800, 1847–48.
66. See, e.g., *New York*, 505 U.S. at 163.
67. See, e.g., Stuart Minor Benjamin & Ernest A. Young, *Tennis with the Net Down: Administrative Federalism Without Congress*, 57 DUKE L.J. 2111, 2130–44 (2008); Miriam Seifter, *States, Agencies, and Legitimacy*, 67 VAND. L. REV. 443, 450–55 (2014).
68. Seifter, *supra* note 67, at 450; Gillian E. Metzger, *Administrative Law as the New Federalism*, 57 DUKE L.J. 2023, 2055–58 (2008); Sharkey, *supra* note 3, at 2128 (calling for reforms grounded in traditional administrative-law principles designed to “embrace the primacy of federal agencies” so as to ensure that “they can become a rich forum for participation by state governmental entities”).
69. *Carson v. Monsanto Co.*, 39 F.4th 1334, 1339 (11th Cir. 2022) (finding that the Environmental Protection Agency’s “registration process [was] not sufficiently formal to carry with it the force of law” to preempt a state tort claim); *Wyeth v. Levine*, 555 U.S. 555, 576, 580 (2009) (same, for the Food and Drug Administration’s preamble to a new rule to preempt state tort claims).

(b) adhering to clear statements from Congress,⁷⁰ or (c) following executive orders that require consultation with state attorneys general and other officials.⁷¹ But notably, this literature has focused on the input states have – and the corresponding judicial review that should apply – when agencies write their own regulations.⁷² It has not grappled with whether agencies that use their power to persuade state legislatures to adopt laws – but without any federal judicial, congressional, or presidential oversight – further or frustrate the values of our federal system.

To be sure, commentators have questioned the extent to which state governments really do serve these goals of federalism, particularly given the way private national organizations have grown to dominate state legislative agendas. With a renewed focus by both major political parties and corporate lobbying in state governments, an expanding literature documents how private organizations, including political parties, have taken advantage of states' limited resources to draft their own bills, creating an accountability deficit,⁷³ while others have noted that their presence has turned states into new sites for national politics.⁷⁴ In some cases, organizations have spread state bills that target and surveil vulnerable populations – a form of “vigilante federalism” that further threatens individual participation in self-government.⁷⁵ But despite the increased focus on states in

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70. See, e.g., *Gonzales v. Oregon*, 546 U.S. 243, 267 (2006) (“The idea that Congress gave the Attorney General such broad and unusual authority through an implicit delegation in the [Controlled Substances Act’s] registration provision is not sustainable.”); *Gregory*, 501 U.S. at 459–60 (“Congressional interference with this decision of the [state voters] . . . would upset the usual constitutional balance of federal and state powers. For this reason, ‘it is incumbent upon the federal courts to be certain of Congress’ intent before finding that federal law overrides’ this balance.” (quoting *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 243 (1985))).
71. See, e.g., Exec. Order No. 13,132, 3 C.F.R. §§ 206, 208–10 (2000); Catherine M. Sharkey, *Inside Agency Preemption*, 110 MICH. L. REV. 521, 569 (2012) (providing an account of how federal agencies implemented Obama-era guidance to consult with states).
72. See, e.g., Nina A. Mendelson, *Chevron and Preemption*, 102 MICH. L. REV. 737, 741–42 (2004); Sharkey, *supra* note 3, at 2127–28 (calling for judicial hard-look review); Ernest A. Young, *Executive Preemption*, 102 NW. U. L. REV. 869, 870 (2008).
73. See ALEXANDER HERTEL-FERNANDEZ, *STATE CAPTURE* 64–77 (2019); Seifter, *supra* note 36, at 143.
74. See GRUMBACH, *supra* note 27, at 22–24; Jessica Bulman-Pozen, *Partisan Federalism*, 127 HARV. L. REV. 1077, 1081–82 (2014).
75. See generally Jon D. Michaels & David L. Noll, *Vigilante Federalism*, 108 CORNELL L. REV. 1187 (2023) (discussing the concept of “vigilante federalism,” which refers in part to recent laws that seek to provide private citizens with the means to enforce state laws, thus undermining individual rights and participation in national government). Others offer a more cautiously optimistic assessment, documenting how with tweaks to existing doctrine, such organizations could help states spread new policy experiments rather than stifling them. Tyler & Gerken, *supra* note 25, at 2204–22.

our national politics, few have addressed the role federal agencies play in influencing state legislative language, as well as how agencies may overlap, combat, or extend beyond these private organizational efforts in the statehouses.

Those who have examined this phenomenon have generally focused on a specific, but very important, band of federal activity with states: federally funded programs and mandates, where agencies exercise direct legal or financial power. Some have highlighted the significant impact of officials inside the Department of Health and Human Services (HHS) on the rollout of state legislation to implement the Affordable Care Act (ACA).⁷⁶ Others, drawing on the literature of negotiation, offer detailed and nuanced accounts of federal agencies haggling with states over state legislation in a variety of funding programs.⁷⁷ In some cases, states may even resist federal directives despite participating in federal programs, a form of “uncooperative federalism.”⁷⁸ But, as Jessica Bulman-Pozen and Heather K. Gerken observe, in federal funding programs and mandates, the state acts more like a “servant” than a potential partner with the federal government, enjoying at most “microspheres of autonomy, embedded within a federal system and subject to expansion or contraction by a dominant master.”⁷⁹

This inside look at how agencies develop state legislation expands these more recent discussions to provide a comprehensive look at how federal agencies influence state lawmaking. In the process, this account also highlights how federal agencies use a variety of other tools, unconstrained by administrative law and *beyond federal funding and mandates*, to influence state legislation. This includes, most notably, promoting, lending, replicating, and channeling their unique policymaking capacity inside understaffed statehouses. Although this softer form of regulation raises new risks, it also offers surprising benefits for both administrative law and our federalism.

76. Gluck & Huberfeld, *supra* note 22, at 1752-57 (describing ways President Obama’s Department of Health and Human Services (HHS) acted as a “serial negotiator” of state efforts to implement the Affordable Care Act (ACA)).

77. Ryan, *supra* note 22, at 28-31; *see also* Fahey, *supra* note 22, at 1324 (characterizing such strategies as “coordinated rulemaking” between state and federal agencies); Hannah J. Wiseman & Dave Owen, *Federal Laboratories of Democracy*, 52 U.C. DAVIS L. REV. 1119, 1146-82 (2018) (evaluating federal experiments largely designed and administered by federal agencies in funding programs, sometimes with the assistance of state actors).

78. Bulman-Pozen & Gerken, *supra* note 42, at 1258-59, 1271-72.

79. *Id.* at 1268.

II. UNPACKING THE PROCESS OF FEDERAL-STATE LAWMAKING: THE FTC CASE STUDY

Against this backdrop, federal agencies' interventions in state legislative processes represent an important mode of agency policymaking with the potential both to threaten and further administrative-law and federalism values. To explore the extent to which federal agencies shape state legislation, I conducted a series of in-depth interviews between 2017 and 2018 which included twenty-five officials in fourteen federal agencies and three former members of state and nongovernmental organizations that write model laws.⁸⁰ This included political appointees and career officials serving in both Democratic and Republican administrations. Agencies included a wide range of both independent and executive agencies involved in regulation, enforcement, and public benefits—from those like the Securities and Exchange Commission (SEC), State Department, and Centers for Disease Control and Prevention (CDC) to the Federal Trade Commission (FTC), Department of Homeland Security (DHS), HHS, and Department of Transportation (DOT).⁸¹

My primary goal was broadly to map the areas in which agencies wrote state legislation, the procedures and protocols they followed, and their reasons for

80. I conducted semistructured interviews to unearth practices not easily captured by broad survey methods. See Svend Brinkmann, *Unstructured and Semi-Structured Interviewing*, in THE OXFORD HANDBOOK OF QUALITATIVE RESEARCH 277, 286 (Patricia Leavy ed., 2014). To do so, I sent over 100 blind solicitations to forty different federal agencies and nongovernmental organizations and then relied on a “snowball” approach to identify others. That is, I contacted officials who worked in agencies and nongovernmental organizations, requested interviews, and asked to be recommended to others. See generally Leo A. Goodman, *Snowball Sampling*, 32 ANN. MATHEMATICAL STATS. 148 (1961) (explaining the statistical usefulness of snowball sampling). I also spoke to two former commissioners of the Uniform Law Commission (ULC) as well as other officers in the Council of State Governments who connected me with agency officials who had participated in model state legislation.

81. Agencies included the Federal Trade Commission (FTC), SBA, Federal Reserve System, Federal Bank of New York, State Department, Securities and Exchange Commission (SEC), Department of Defense (DOD), HHS, Centers for Disease Control and Prevention (CDC), Department of Transportation, Department of Homeland Security (DHS), Department of Education, Federal Highway Administration (FHA), and Federal Railroad Administration. Interviewees also performed a range of different jobs inside government. Eight officials served in different legislative counsel offices. Another eight served in “intergovernmental” policy roles, which placed them in regular contact with state, local, and tribal organizations. Nine had subject-matter expertise in other specialized divisions. Interviews were also conducted with two former commissioners in the ULC and the North American Securities Administrators Association (NASAA). For each interview, I took notes and then typed them up with my impressions afterwards. Cf. Tom Baker, *Where's the Insurance in Mass Tort Litigation?*, 101 TEX. L. REV. 1569, 1572-73 (2023) (describing a similar approach). On occasion, interviewees afterwards graciously shared archival documents, publications, and websites, some of which also appear in Parts II and III, *infra*.

doing so.⁸² I also found that agencies influenced state law in many ways without directly writing or funding state-government action. After the COVID-19 pandemic began, I reviewed federal-agency websites, archives, and historical accounts to identify patterns and trends across different presidential administrations and administrative agencies. My conclusion that unfunded agency work with state governments also represents a form of administrative “policymaking” was not a view expressed by interviewees. Instead, it resulted from my own ongoing engagement with my interview materials, historical accounts, and political-science literature.⁸³

This Part and the next present a descriptive account of how federal agencies have shaped, and continue to shape, state law. After briefly outlining federal agencies’ authority to collaborate with state government institutions, this Part canvasses the different internal procedures federal agencies observe when they shape state law, using the FTC as a point of departure.⁸⁴ It shows that the process agencies follow when they work with state governments – its formality, transparency, internal organization, and oversight – varies tremendously. Some agencies require express invitations by state legislators, convene public forums, or publish their testimony and views about state legislation on their websites or through “notice and comment” processes – all subject to very public, institutional oversight. On the other end of the spectrum, some agencies may operate much more discreetly, particularly given the sensitivity of the advice involved, without much external oversight at all. Part III then moves from the *process* to take a more comprehensive look at the *types of influence* that agencies exercise in state law – from agenda setting to expertise lending to policy coordination – to

82. Interviews ranged between forty-five to ninety minutes. Because of the wide variety of agency activity, authority, and approaches for working with states, I did not rely on a standardized protocol. Instead, I aimed to address the following topics during the discussion: (1) specific examples and areas where agencies had worked with state policymakers to adopt new state legislation, (2) their reasons for doing so, (3) the nature of their work and involvement, (4) their internal organization and structure, (5) their methods for performing outreach and engaging stakeholders, and (6) their primary contacts inside states: state officials or other third-party organizations.

83. For similar approaches, see Anya Bernstein & Cristina Rodríguez, *The Accountable Bureaucrat*, 132 *YALE L.J.* 1600, 1613 (2023), which states, “Through this process, we recognized that our respondents described everyday work practices that corresponded to the values that scholarship and political discourse often demand”; and Antony Bryant & Kathy Charmaz, *Introduction: Grounded Theory Research: Methods and Practices*, in *THE SAGE HANDBOOK OF GROUNDED THEORY* 1, 1 (Antony Bryant & Kathy Charmaz eds., 2007), which states, “The iterative process of moving back and forth between empirical data and emerging analysis makes the collected data progressively more focused and the analysis successively more theoretical.”

84. As explained below, the FTC’s long history with state legislation makes it a particularly good case study for drawing comparisons across federal agencies. See *infra* Sections II.B and II.C.

show how they form an important, but long overlooked, part of policymaking in administrative law and our federal system.

This account offers new insights into federal agencies' work with state legislatures, but it is also subject to limitations that deserve mention up front. First, most of the discussion that follows identifies procedures and practices from the perspective of *federal agencies* and nongovernmental organizations responsible for model state legislation. However, I did not attempt to interview many *state policymakers* because of the difficulty of identifying and organizing a study of policymakers in fifty different states across different issues over time. Second, interviews took place with mostly *former* agency officials under conditions of anonymity.⁸⁵ Accordingly, their accounts may not fully represent changed practices. Finally, this study likely *understates* the full range of tools agencies use to work with states. I identified many other federal agencies with state legislative programs but did not obtain interviews with officials in those programs.⁸⁶ For some of those agencies, I relied on press releases, official speeches, historical materials, and secondhand sources to provide a fuller account of the ways federal agencies interact with state legislation.

All broad surveys necessarily involve difficult editorial choices about source materials and scope. But an account of the manifold ways *agencies* shape state legislation presents additional challenges because of the complexity of the administrative state writ large. Administrative agencies have long relied upon a wide range of authority, organization, procedures, and methods to effect regulatory policy. My hope is that this overview offers a tentative, albeit broad, map of the topic that future scholars – undertaking deeper or more structured examinations of specific agencies and programs – can employ as a guide.

A. Agency Authority to Shape State Legislation

Unlike federal agencies that frequently draft legislation for Congress, no express constitutional provision governs how federal agencies should work with *state legislatures*. Federal agencies that advise Congress have done so as an extension of the President's constitutional duty to recommend to Congress "such

85. Many sitting officials employed during the time period I examined did not respond to my inquiries.

86. Such initiatives include the Department of Labor (DOL)'s innovative "State Exchange on Employment and Disability" program, the Office of National Drug Control Policy (ONDCP)'s work on model drug laws, the Department of Justice's (DOJ) Office of Justice Programs and other efforts on model human-trafficking legislation, and the Federal Communications Commission's proposed model legislation to promote broadband access.

Measures as he shall judge necessary and expedient.”⁸⁷ This kind of advice is supposed to be formally coordinated inside the agency (but not always) through a legislative counsel’s office as well as through the White House Office of Management and Budget (OMB).⁸⁸

Federal agencies that advise state legislatures, by contrast, rely on different forms of constitutional authority. First, agencies work with state legislation under their obligation to “take Care” that the federal laws they implement are faithfully executed.⁸⁹ Sometimes Congress expressly delegates power to federal agencies to write model state laws.⁹⁰ For example, Congress has told the Federal Railroad Administration (FRA) to prepare model state legislation for traffic violations, trespassing, and obstructions on rail lines across states.⁹¹ It has authorized SEC to “cooperate” with “duly constituted representatives of State governments” for the purpose of streamlining securities regulations within and across state lines.⁹² And it has instructed the Department of Labor (DOL) to “assist in coordinating the State public employment services throughout the country and in increasing their usefulness by developing and proscribing minimum standards.”⁹³

But, in many cases, agencies rely on less explicit authority from Congress to advise state legislatures. This can include authority Congress has given some federal agencies, like DOT or HHS, to oversee federal funding programs to states where agencies might have broad authority to define or waive conditions state

87. U.S. CONST. art. II, § 3; J. Gregory Sidak, *The Recommendation Clause*, 77 GEO. L.J. 2079, 2081–82 (1989). As a result, a large literature has tracked the substantial role that federal agencies play in offering substantive advice to Congress. See, e.g., Walker, *supra* note 39, at 1636–37; Jerrod Shobe, *Agencies as Legislators: An Empirical Study of the Role of Agencies in the Legislative Process*, 85 GEO. WASH. L. REV. 451, 476–78 (2017); Abbe R. Gluck & Lisa Schultz Bressman, *Statutory Interpretation from the Inside—An Empirical Study of Congressional Drafting, Delegation, and the Canons: Part I*, 65 STAN. L. REV. 901, 998–1011 (2013).

88. See Walker, *supra* note 30, at 1388–89.

89. U.S. CONST. art. II, § 3; see also Andrew Kent, Ethan J. Leib & Jed Handelsman Shugerman, *Faithful Execution and Article II*, 132 HARV. L. REV. 2111, 2192 (2019) (concluding that faithful execution is a requirement imposed on both high- and low-level officeholders and officers).

90. See, e.g., *infra* Section III.A (describing the express authority delegated to old agencies, like the United States Industrial Commission (USIC)).

91. See 49 U.S.C. § 20151 (2018) (requiring the Secretary of Transportation prepare model state legislation for traffic violations).

92. 15 U.S.C. § 77s(d) (2018).

93. 29 U.S.C. § 49b(a) (2018); see also *id.* § 49c (further mandating the creation of a state agency as a condition of receiving appropriations under the statute).

legislation must meet.⁹⁴ The same is true where federal regulatory and state legislative authority overlap or require coordination, like law enforcement or emergency management at DHS, banking regulation by the Federal Reserve, international policy coordination by the State Department, or drug-control efforts by the Office of National Drug Control Policy (ONDCP).⁹⁵ Congress also may delegate broad authority to agencies to educate, publicize, or inform the public about issues falling within the agency's expertise, including the FTC, the "Office of Advocacy" divisions of the SBA and SEC, or the public-health divisions of the CDC.⁹⁶

Beyond these explicit or implicit delegations of authority, federal agencies also work with states as an extension of their constitutional commitment to, and interpretation of, our federal system of government. Presidents Reagan and Clinton, for example, issued executive orders identifying basic federalism principles for how agencies create policy and designate specific procedures for inter-governmental consultation.⁹⁷ The orders apply to all federal agencies—except for independent regulatory agencies, which are nonetheless encouraged to comply voluntarily.⁹⁸ These procedures are principally designed to apply when agencies write policies themselves to avoid needlessly preempting state law. But, in the process, they invoke principles of federalism to create informal channels for federal agencies and states to communicate with each other and search for novel federal and state solutions.⁹⁹

As a result, the internal organization, oversight, and transparency requirements for federal agencies that work with state legislatures are far more varied than those that control their recommendations to Congress. To illustrate how agencies operate, Section II.B begins with a case study of the Federal Trade Commission, relying on interviews, archival material, and articles written by agency officials to contrast its state legislative strategies with other federal agencies. The

94. See, e.g., 3 U.S.C. § 158 (2018) (requiring that states enact laws meeting the federal minimum drinking age according to the National Highway Traffic and Safety Administration (NHTSA) to receive federal funds); Social Security Act § 1115, 42 U.S.C. § 1315 (2018) (affording discretion to the Centers for Medicare & Medicaid Services to provide waivers in the administration of the federal Medicaid program); see also *infra* Section III.E (describing spending oversight by HHS, NHTSA, FHA, and DOL, among others).

95. See, e.g., Anti-Drug Abuse Act of 1988, Pub. L. 100-690, 102 Stat. 4181 (establishing ONDCP).

96. Thomas W. Merrill & Kathryn Tongue Watts, *Agency Rules with the Force of Law: The Original Convention*, 116 HARV. L. REV. 467, 549-52 (2002) (mapping early agencies with such authority).

97. See, e.g., Exec. Order No. 13,132, 3 C.F.R. § 206 (2000); Exec. Order No. 12,612, 52 Fed. Reg. 41685 (Oct. 30, 1987).

98. Exec. Order No. 13,132 §§ 6(a), 9, 3 C.F.R. §§ 206, 209-11 (2000).

99. See Sharkey, *supra* note 71, at 529-31.

FTC is a particularly helpful agency to use as an illustration. Like its early twentieth-century counterparts, the FTC was created to make policy using tools that extended well beyond direct regulation, adjudication, or enforcement.¹⁰⁰ The FTC would use soft power to influence lawmaking as “an indispensable instrument of information and publicity”¹⁰¹ – gathering data, convening leading experts, and sharing its expertise on a wide variety of proposed laws and regulations. It also offers a helpful point of comparison to examine how other agencies organize, advocate, conduct outreach, and respond to political oversight as they work with state governments across the ideological spectrum, outside of federal spending programs and mandates.

B. *The FTC’s Office of Policy Planning*

Meet the FTC’s Office of Policy Planning (OPP). The FTC has enjoyed a broad, 100-year-old mandate to protect consumers and combat unfair competition.¹⁰² And consistent with that mandate, the FTC’s OPP testifies on a breathtaking array of state laws that fall under the umbrella of “competition policy.” Topics run the gamut. They include laws in North Carolina that bar online

100. See WILLIAM J. NOVAK, *NEW DEMOCRACY* 206 (2022) (describing the role of early twentieth-century administrative bodies, like USIC, the Bureau of Corporations, and the FTC in investigating, studying, and diffusing new policy ideas); Merrill & Watts, *supra* note 96, at 549-52 (challenging whether Congress ever gave the FTC power to issue regulations “with the force of law” and highlighting the historic role of FTC “Trade Practice Conferences” to overcome shortcomings in regulation). *But see* Nat’l Petroleum Refiners Ass’n v. FTC, 482 F.2d 672, 674, 676 (D.C. Cir. 1973) (holding the FTC could issue binding rules, in addition to “gather[ing] and compil[ing]” information under Section 6 of the Federal Trade Commission Act).

101. Rohit Chopra & Lina M. Khan, *The Case for “Unfair Methods of Competition” Rulemaking*, 87 U. CHI. L. REV. 357, 364-65 (2020) (quoting Daniel A. Crane, *Debunking Humphrey’s Executor*, 83 GEO. WASH. L. REV. 1835, 1859 (2015)); G. HENDERSON, *THE FEDERAL TRADE COMMISSION: A STUDY IN ADMINISTRATIVE LAW AND PROCEDURE* 24 (1924) (quoting Woodrow Wilson, President of the U.S., Address to a Joint Session of Congress on Trusts and Monopolies (Jan. 20, 1914)).

102. The Office of Policy Planning (OPP), and their interactions with state government, are well known to those who follow antitrust policy and the FTC. For more information on OPP, see generally Arnold C. Celnicker, *The Federal Trade Commission’s Competition and Consumer Advocacy Program*, 33 ST. LOUIS U. L.J. 379 (1989), which surveys the history and effectiveness of the FTC’s OPP initiatives; and James C. Cooper, Paul A. Pautler & Todd J. Zywicki, *Theory and Practice of Competition Advocacy at the FTC*, 72 ANTITRUST L.J. 1091, 1094-98 (2005), which collects and analyzes OPP advocacy filings from 1980 to 2002. For more on the history and mission of the FTC, see generally J. Howard Beales III & Timothy J. Muris, *FTC Consumer Protection at 100: 1970s Redux or Protecting Markets to Protect Consumers?*, 83 GEO. WASH. L. REV. 2157 (2015); and David C. Vladeck, *Charting the Course: The Federal Trade Commission’s Second Hundred Years*, 83 GEO. WASH. L. REV. 2101 (2015).

companies from selling legal advice, laws in Washington State that curb telehealth,¹⁰³ occupational licensing laws in Ohio and Kansas for nurses,¹⁰⁴ and laws in Massachusetts that prevent podiatrists from treating more than feet.¹⁰⁵

As its website observes, one of OPP's "primary roles involves advocacy."¹⁰⁶ Between 1975 and 2020, OPP routinely submitted testimony "supporting competition and consumer protection principles to state legislatures."¹⁰⁷ Its website lists hundreds of formal submissions to state legislatures over the past thirty-five years.¹⁰⁸ OPP's current office is staffed by seventeen attorney advisors who coordinate with other divisions and professionals in the Commission – as well as administrative agencies and the Department of Justice (DOJ).¹⁰⁹ Together, they share their expertise with state policymakers, particularly those in understaffed state legislatures that often lack full-time staff themselves. This Section describes the historical origins, internal operations, and formal outreach of OPP to highlight how an agency like the FTC may use state advocacy as a form of policymaking.

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103. Fed. Trade Comm'n Staff, Comment Letter to Washington State Rep. Paul Graves, Regarding S.S.B. 5411/H.B. 1473 (Feb. 9, 2018), <https://www.ftc.gov/legal-library/browse/advocacy-filings/ftc-staff-comment-washington-state-rep-paul-graves-regarding-ssb-5411hb-1473> [<https://perma.cc/G6VT-NJW8>].
104. Fed. Trade Comm'n Staff, Comment Letter to the Kansas House of Representatives Concerning Kansas House Bill 2412 (Jan. 13, 2020), <https://www.ftc.gov/legal-library/browse/advocacy-filings/ftc-staff-comment-kansas-house-representatives-concerning-kansas-house-bill-2412> [<https://perma.cc/C7D5-CVPJ>] ("[W]e urge the Kansas legislature to enact H.B. 2412 and . . . we urge you not to adopt the proposed amendment regarding regulation by the Board of Healing Arts."); Fed. Trade Comm'n Staff, Comment Letter to the Ohio House of Representatives Concerning Ohio House Bill 177 (Jan. 13, 2020), <https://www.ftc.gov/legal-library/browse/advocacy-filings/ftc-staff-comment-ohio-house-representatives-concerning-ohio-house-bill-177> [<https://perma.cc/H9VD-XKAY>].
105. Fed. Trade Comm'n Staff, Comment Letter to Massachusetts Rep. Paul J. Donato Regarding HB 1869 and SB 1329 (Nov. 13, 2019), <https://www.ftc.gov/legal-library/browse/advocacy-filings/comment-staff-federal-trade-commission-massachusetts-rep-paul-j-donato-regarding-hb1869-sb1329> [<https://perma.cc/R4MU-M4DQ>] (supporting the "procompetitive goals of" the legislation that "would update current Massachusetts statutory language to allow podiatrists to treat not just the foot, but also the ankle, or lower leg").
106. *Office of Policy Planning*, FED. TRADE COMM'N, <https://www.ftc.gov/about-ftc/bureaus-offices/office-policy-planning> [<https://perma.cc/AG6A-ZLRB>].
107. *Id.*
108. For a searchable collection of all OPP's filings dating back to May 1985, see *Legal Library: Advocacy Filings*, FED. TRADE COMM'N, <https://www.ftc.gov/legal-library/browse/advocacy-filings> [<https://perma.cc/YN5N-SXC8>].
109. *Office of Policy Planning: Organization Chart*, FED. TRADE COMM'N (Jan. 2021), <https://www.ftc.gov/about-ftc/bureaus-offices/office-policy-planning/organization-chart> [<https://perma.cc/UT25-ERNY>]; Interview with Officer #1, Fed. Trade Comm'n (July 24, 2017); Interview with Officer #3, Fed. Trade Comm'n (Sept. 19, 2017).

1. *Background*

The FTC's involvement in state legislation dates back to the 1960s, and its work on broader federal policy, to its very inception. Section 6 of the Federal Trade Commission Act broadly instructs the FTC to "gather and compile information" about people subject to the Act and to publicize "such portions of information obtained" that it finds "in the public interest."¹¹⁰ As such, it began sharing its expertise with Congress on a wide variety of federal legislation between the 1910s and 1930s.¹¹¹

The FTC's work on state legislation began in earnest much later, in April 1965, when it created a formal department called the "Office of Federal-State Cooperation."¹¹² The Office wrote model state legislation, offered technical expertise, and routinely testified in state legislatures. At the time, the FTC described the new office to Congress as a way to promote a "system of effective cooperation" with states so as to "correct unfair methods of competition or deceptive acts or practices which occur at State level."¹¹³ Working with the Council for State Governments, the Office helped draft model state legislation based on the Federal Trade Commission Act in 1967.¹¹⁴ It then testified and informally advised policymakers inside state legislatures, encouraging states to adopt versions of the model law in the 1960s and 1970s. These so-called "little FTC Acts" gave state attorneys general broad authority to enforce consumer-protection law in their own states.

Within the Office's first year, the FTC boasted to Congress that eleven states enacted consumer-protection laws, twenty-five more had laws "of a consumer

110. 15 U.S.C. § 46(a)-(f) (2018).

111. The FTC offered input to Congress on a wide variety of proposals, from international trade and radio communications to energy policy. *See, e.g.*, Webb-Pomerene Act, ch. 50, 40 Stat. 516 (1918); Radio Act of 1927, ch. 169, 44 Stat. 1162 (1927); Federal Water Power Act, ch. 285, 41 Stat. 1063 (1920).

112. Interview with Officer #2, Fed. Trade Comm'n (July 27, 2017); Paul R. Dixon, Comm'r, Fed. Trade Comm'n, Remarks Before the Florida Department of Agriculture and Consumer Services: Federal-State Cooperation to Combat Unfair Trade Practices: A Review (Mar. 8, 1974), <https://www.ftc.gov/news-events/news/speeches/federal-state-cooperation-combat-unfair-trade-practices-review> [<https://perma.cc/CYS5-HEW3>].

113. *Annual Report of the Federal Trade Commission*, FED. TRADE COMM'N 39 (June 30, 1967), https://www.ftc.gov/sites/default/files/documents/reports_annual/annual-report-1967/ar1967_o.pdf [<https://perma.cc/4D5A-4N2E>].

114. COUNCIL OF STATE GOV'TS, SUGGESTED STATE LEGISLATION 5 (1967) (describing the Unfair Trade Practices and Consumer Protection Law); *see also* Henry N. Butler & Joshua D. Wright, *Are State Consumer Protection Acts Really Little-FTC Acts?*, 63 FLA. L. REV. 163, 173-74 (2011) (describing differences between state consumer-protection acts and FTC consumer protection).

protective character,” and there was “local action in many States to obtain new laws.”¹¹⁵ As states embraced consumer-protection laws, the FTC learned from its experiences with state governments and shared other state laws with state legislators eager to adopt stronger versions of the model act, including provisions that today allow private parties to sue.¹¹⁶ Forty-seven states would ultimately adopt some form of consumer-protection legislation between the late 1960s and 1975.¹¹⁷

By 1975, FTC Commissioner Stephen Nye deemed the effort such a success that he proposed turning the FTC’s attention to new kinds of model legislation.¹¹⁸ Among other things, he proposed model legislation to combat “many existing state laws” that were “injurious to competition.”¹¹⁹ Since that time, OPP has traveled under different names, but it has regularly focused on that second mission: public and private barriers to competition.¹²⁰ OPP’s formal organization, advocacy, and public outreach to interested stakeholders has made a crucial difference in this regard. In surveys of state legislators and other officials, respondents often said they gave “more weight than they otherwise would” to comments because they were made by the FTC’s OPP.¹²¹

2. *OPP’s Organization, Advocacy, and Outreach*

OPP tracks pending state legislation to identify areas where its expertise in competition law may be of use, often relying on formal FTC workshops and informal discussions with lawmakers, private associations, and other experts for

115. *Annual Report of the Federal Trade Commission*, *supra* note 113, at 40.

116. “Illinois, apparently sensing that these two acts were inadequate to meet the demands of consumer protection, acted on the suggestions of the F.T.C.” by passing H.B. 1548 in October 1973. Richard A. Shulman, *Little F.T.C. Act: The Neglected Alternative*, 9 J. MARSHALL J. PRAC. & PROC. 351, 353 (1975).

117. *Id.*

118. Stephen Nye, Comm’r, Fed. Trade Comm’n, Address at FBA-BNA Briefing Conference on FTC Litigation (Jan. 24, 1975) [hereinafter Nye Address] (“Since that mission has now largely been discharged, . . . [i]t should begin drafting and supporting specific model laws, whose content would be dictated by the Commission’s long experience in the commercial bramble patch.”).

119. *Id.* This echoed then-Chairman Lewis Engman’s views that competition policy could substitute for some regulation. Robert Metz, *F.T.C. Chief Calls Role of Agencies Inflationary*, N.Y. TIMES, Oct. 8, 1974, at 1.

120. Cooper, Pautler & Zywicki, *supra* note 102, at 1093 (mapping historical trends in FTC filings in federal and state government); Celnicker, *supra* note 102, at 379 n.3 (observing the unit was sometimes just called the “Intervention Program”).

121. James C. Cooper & William E. Kovacic, *U.S. Convergence with International Competition Norms: Antitrust Law and Public Restraints on Competition*, 90 B.U. L. REV. 1555, 1583 (2010).

guidance.¹²² OPP convenes workshops itself to provide “neutral territory” for academics, business interests, and consumer groups to exchange ideas.¹²³ Beyond workshops, OPP conducts its own research, coordinating with other experts and divisions across the FTC.¹²⁴ As part of its efforts, it will often try to identify proponents and opponents of proposed state legislation to understand their perspectives.¹²⁵ In the process, it also has become a clearinghouse for policy ideas in part-time state legislatures. State legislators certainly have no obligation to listen to – much less defer to – OPP. But OPP has been successful, in part, because state policymakers often lack staff and expert advice required to craft state legislation likely to affect business competition.¹²⁶ Oftentimes, OPP’s testimony in state legislatures is not only laden with detailed policy analysis but will identify similar state legislation on which it has already commented.¹²⁷

One former FTC official told me that although most people do not realize the power of this tool, some interest groups have learned that the FTC’s support can help advance their ideas in their own state legislatures.¹²⁸ Electric-car manufacturers that sell directly to consumers online, for example, have benefited from the FTC’s efforts to push to repeal state dealership laws that require patrons

122. Tara Isa Koslov, *Competition Advocacy at the Federal Trade Commission: Recent Developments Build on Past Successes*, CPI ANTITRUST CHRON. 6 (Aug. 2012), <https://www.competition-policyinternational.com/assets/Uploads/KoslovAug-121.pdf> [<https://perma.cc/9Y4M-YHBL>].

123. Interview with Officer #1, *supra* note 109.

124. Interview with Officer #2, *supra* note 112; Interview with Officer #3, *supra* note 109.

125. Koslov, *supra* note 122, at 5.

126. Interview with Officer #3, *supra* note 109.

127. See, e.g., Fed. Trade Comm’n Staff & Antitrust Div., Comment Letter to North Carolina State Senator Bill Cook on North Carolina HB 436 Concerning Online Legal Forms and the Practice of Law, at 8 n.29 (June 10, 2016), https://www.ftc.gov/system/files/documents/advocacy_documents/comment-federal-trade-commission-staff-antitrust-division-addressing-north-carolina-house-bill-436/160610commentncbill.pdf [<https://perma.cc/T8WC-72PB>] (“The legislature may wish to consider the experience of Texas in this regard.”); Fed. Trade Comm’n Staff, Comment Letter to South Carolina Representative Jenny A. Horne Regarding House Bill 3508 and 3078 on Advanced Practice Registered Nurse Regulations, at 5 (Nov. 2, 2015), https://www.ftc.gov/system/files/documents/advocacy_documents/ftc-staff-comment-south-carolina-representative-jenny.horne-regarding-house-bill-3508-3078-advanced-practice-registered-nurse-regulations/151103scaprn.pdf [<https://perma.cc/4282-Z8HY>] (observing that “16 states and the District of Columbia allow [advanced practice registered nurses] to practice and prescribe independently, and that no differences in safety and quality had been associated with the adoption of” those state laws).

128. Interview with Officer #1, *supra* note 109.

to purchase cars in person.¹²⁹ Nurse practitioners have benefited from the FTC's efforts to reduce what they see as anticompetitive state limits on their practice. To determine when and how to get involved in pending legislation, OPP principally considers whether there is "a precompetitive story to be told," whether the subject matter falls within its expertise, and whether sufficient time exists to address the pending state bill.¹³⁰

OPP follows a formal process before completing and submitting testimony to states. To avoid undermining policy positions of the FTC's other branches, it typically cross-checks its draft testimony with other divisions inside the FTC, like the Bureau Director at the Bureau of Consumer Protection, before seeking the Commission's approval.¹³¹ Then, before filing its comments with a state legislature, OPP often confers with the state attorney general, who are frequent partners of the FTC in consumer and antitrust actions.¹³² If a state attorney general objects, the FTC will generally not file.¹³³

OPP's formal, deliberative, and public process highlights the FTC's commitment to using state advocacy as a form of policymaking. But it also was a response to concerns raised by Congress in the 1980s, when a House Committee Report bristled at the OPP's "unseemly" public intervention in statehouses. At one point, House Committee members complained the FTC interfered with "states' rights" and proposed to bar OPP from offering comments on state legislation absent an express request from a legislator and assurances its comments remained private.¹³⁴ That bill never passed, and the FTC's state legislative efforts

129. Fed. Trade Comm'n Staff, Comment Letter Supporting Michigan Senate Bill 268, and Recommending that the Michigan Legislature Consider Expanding the Bill to Permit Automobile Manufacturers to Sell New Motor Vehicles Directly to Consumers (May 11, 2015), https://www.ftc.gov/system/files/documents/advocacy_documents/ftc-staff-comment-regarding-michigan-senate-bill-268-which-would-create-limited-exception-current/150511michiganautocycle.pdf [<https://perma.cc/4FKH-K3LN>]; Fed. Trade Comm'n Staff, Comment Letter Before the New Jersey General Assembly Regarding Assembly Bills 2986, 3096, 3041, and 3216, Which Would Create Limited Exceptions to New Jersey's Prohibition on Direct-to-Consumer Sales by Manufacturers of Automobiles (May 16, 2014), https://www.ftc.gov/system/files/documents/advocacy_documents/ftc-staff-comment-new-jersey-general-assembly-regarding-assembly-bills-2986-3096-3041-3216-which/140516nj-autoadvocacy.pdf [<https://perma.cc/L5RU-4YNN>].

130. Interview with Officer #1, *supra* note 109.

131. *See id.*; *see also* DELEGATION OF U.S. TO THE COMPETITION COMM., NOTE SUBMITTED FOR OECD ROUNDTABLE ON EVALUATION OF THE ACTIONS AND RESOURCES OF COMPETITION AUTHORITIES 7-8 (May 25, 2007) (describing OPP's internal process).

132. Interview with Officer #1, *supra* note 109; Interview with Officer #3, *supra* note 109.

133. Interview with Officer #1, *supra* note 109.

134. Celnicker, *supra* note 102, at 395 n.92 (collecting objections in the House to FTC comments in state legislatures arguing "it is important that the FTC not intrude unnecessarily into areas in which the states have primary responsibility").

still stand out as some of the most public and continuous forms of state testimony in the administrative state. But, since that time, the FTC will not submit testimony without a request from a state legislator, governor's office, or in rarer cases, a state attorney general.¹³⁵

Aside from Congress, presidential administrations have exerted *some* influence over OPP's agenda. Even though the FTC is an independent agency, and its members are bipartisan, the focus of OPP can shift with different presidential administrations. Just as administrators during the Johnson Administration promoted consumer protection,¹³⁶ those during the Ford, Reagan, and Trump Administrations trained their attention more vigorously on state laws that they believed stifled competition.¹³⁷ Comments on anticompetitive laws in state legislatures accelerated dramatically in the 1980s during the Reagan Administration, exceeding those OPP filed in Congress by four to one. More recently, under the Trump Administration, OPP launched an "Economic Liberty Task Force," submitting comments on state-licensing hurdles to job growth to the Nebraska Senate,¹³⁸ aiming to limit the use of state "certificate of need" laws in medicine,¹³⁹ and organizing interagency workshops studying ways to curb state laws that limit innovation in healthcare. After President Biden appointed Lina Khan to the Chair in 2021, the FTC's comments have focused more on consumer protection, and most recently, on state laws that would bar noncompete clauses in

135. Interview with Officer #1, *supra* note 109.

136. Nixon, however, embraced the FTC's "little FTC Acts" shortly after taking office in 1969, touting their ability to help states "improve their consumer protection activities." Caspar W. Weinberger, Chairman, Fed. Trade Comm'n, Address at the Commonwealth Club of California: A Reorganized Federal Trade Commission for the '70s, at 11 (June 17, 1970) (transcript on file with author).

137. Chairman Engman was seen by the Ford White House as a staunch advocate for deregulation. See Memorandum from Dean Burch to President Gerald Ford (Oct. 14, 1974), <https://www.fordlibrarymuseum.gov/library/document/0005/1561402.pdf> [<https://perma.cc/3CUY-4GQQ>] ("Lew Engman is to be commended for his very forceful recent speech on the elimination of regulatory practices that tend to inhibit the free play of the marketplace.").

138. Press Release, Fed. Trade Comm'n, FTC Staff Issues Comment on Occupational Licensing Reforms in Nebraska (Mar. 16, 2017), <https://www.ftc.gov/news-events/news/press-releases/2017/03/ftc-staff-issues-comment-occupational-licensing-reforms-nebraska> [<https://perma.cc/A6L8-HXJG>]; *FTC Staff Comments to the Nebraska State Senate Regarding a Number of Proposed Senate Bills That Would Loosen or Eliminate Certain Occupational Licensing Requirements in Nebraska*, FED. TRADE COMM'N (Mar. 16, 2017), <https://www.ftc.gov/legal-library/browse/advocacy-filings/ftc-staff-comments-nebraska-state-senate-regarding-number-proposed-senate-bills-would-loosen-or> [<https://perma.cc/5KPH-CZBA>].

139. Press Release, Fed. Trade Comm'n, FTC and DOJ Support Reform of Alaska Laws That Limit Competition in the Health Care Sector (Apr. 12, 2017), <https://www.ftc.gov/news-events/news/press-releases/2017/04/ftc-doj-support-reform-alaska-laws-limit-competition-health-care-sector> [<https://perma.cc/SA5A-WQVU>].

employment contracts—relying on analysis the FTC used to support its own proposed nationwide rule.¹⁴⁰

C. *How FTC Process Compares to that of Other Agencies*

The FTC's experience with legislation over the past seventy years highlights just some of the different forms of organization, advocacy, public participation, and external oversight that agencies engaging with state-level actors rely on to advance their own regulatory mission.

1. *Organization*

The FTC is far from the only agency that operates this way. Many others have specialized formal departments that focus on engaging with state legislators, coordinating with their regional officers to understand and track developments on the ground.¹⁴¹ For example, the Department of Defense (DOD) has a "State Liaison Office" that routinely monitors and testifies in state legislatures on issues of state law that frequently impact military families.¹⁴² The CDC has a "Public Health Law Program" that works to improve the health of the public by developing law-related tools and providing legal technical assistance to public-health practitioners and policymakers in state, tribal, local, and territorial jurisdictions.¹⁴³ DOL's "State Exchange on Employment and Disability" program

140. For example, in November 2023, OPP shared data in support of a proposed New York bill that would ban noncompete clauses based on the FTC's own proposed regulation to do the same nationwide. See Off. Pol'y Plan., Fed. Trade Comm'n, Comment Letter to New York Governor Kathy Hochul Regarding New York's Bill on Non-Compete Clauses (Nov. 28, 2023), <https://www.ftc.gov/legal-library/browse/advocacy-filings/letter-federal-trade-commissions-office-policy-planning-re-s3100a> [<https://perma.cc/D9PC-HYDT>]. A full list of all FTC comment letters can be found at *Legal Library: Advocacy Filings*, *supra* note 108.

141. In my correspondence with agencies that work with state governments, roughly one-third acknowledged they had departments dedicated to working with state governments. Such agencies include: the FTC, SBA, State Department, DOL, DHS, HHS, DOD, and CDC. Still others include DOJ's Office of Justice Programs and ONDCP.

142. Interview with Officers #13 & #14, Dep't of Def. (May 7, 2018); *DOD Progress Working with States, Highlights of the Week*, DEP'T OF DEF. (May 3, 2018), <https://www.womenlegislators.org/wp-content/uploads/2018/08/DSLO-dashboard-8-16-18.pdf> [<https://perma.cc/4BTJ-X38T>] (summarizing progress in thirty-five state legislatures); David Vergun, *DOD Makes Progress in Trans-State Professional License Agreements for Military Spouses*, DOD NEWS (Feb. 24, 2020), <https://www.defense.gov/News/News-Stories/Article/Article/2092375/dod-makes-progress-in-trans-state-professional-license-agreements-for-military> [<https://perma.cc/WL9T-VR6L>].

143. Pub. Health L. Program, *About Us*, CTNS. FOR DISEASE CONTROL AND PREVENTION (Mar. 3, 2023), <https://www.cdc.gov/php/about> [<https://perma.cc/4GBZ-8D35>].

provides testimony and policy analysis for state legislatures to improve employment opportunities for people with disabilities.¹⁴⁴ Some other organizations use centralized departments.¹⁴⁵ Such departments allow officers to coordinate with experts and policymakers across the agency, formulate consistent positions, and track and share state legislation.

More agencies do not use formal departments for state legislation, but instead, informally assign officials with different subject-matter expertise to work with state policymakers on different forms of state legislation. Many different agencies work with nonpartisan, nongovernmental organizations designed to advise, collect, and advance state institutional interests, like the Council of State Governments, the National Conference of State Legislatures (NCSL), or the ULC. Treasury, for example, has advised on model ULC laws for virtual currencies because of its unique expertise with anti-money laundering.¹⁴⁶ Banking lawyers at the New York Federal Reserve Bank, with deep knowledge of payment systems, flyspecked changes to the Uniform Commercial Code (UCC), amidst the chaos following the mortgage-foreclosure crisis of 2008, to help usher in a new federal registry for mortgage holders (which they also helped write).¹⁴⁷

Regardless of whether federal agencies have a formal department, they rely on regional directors, outside organizations, and even other agencies heavily when formulating their positions, much like the FTC. Some federal agencies working on state laws see their federal regional officers not just as a way to further a mission, but to check the pulse on the broader goings-on in state legislatures.¹⁴⁸ In some cases, regional officers can be an important tool to identify how,

144. Off. of Disability Emp. Pol’y, *Policy Assistance*, U.S. DEP’T LABOR, <https://www.dol.gov/agencies/odep/state-policy/policy-assistance> [<https://perma.cc/RSB5-E8EZ>] (describing recent examples in Alaska, Kentucky, New Mexico, Pennsylvania, and Tennessee).

145. Other organizations have specialized departments, but perhaps the most natural place for agencies to work with states are divisions known as the agencies’ Office of Intergovernmental Affairs (IGA). For example, DHS’s IGA follows state legislation that may have an operational impact on its own activities, while also soliciting state and local input on its own initiatives. Those include state laws impacting driver’s licenses, criminal enforcement, drug controls, and election infrastructure. Interview with Officer #22, U.S. Dep’t of Homeland Sec. (June 1, 2018).

146. Interview with Officer #20, U.S. Dep’t of Treasury (May 23, 2018); Lalita Clozel, *How Treasury Is Trying to Shape State Digital Currency Regs*, AM. BANKER (Mar. 30, 2016, 11:51 AM EDT), <https://www.americanbanker.com/news/how-treasury-is-trying-to-shape-state-digital-currency-regs> [<https://perma.cc/ZMP5-VVEN>].

147. Interview with Officer #19, Fed. Rsrv. Bank of N.Y. (May 17, 2018); Interview with Comm’r #2, Unif. L. Comm’n (Apr. 25, 2018); Interview with Comm’r #1, Unif. L. Comm’n (Apr. 18, 2018).

148. Interview with Officers #13 & #14, *supra* note 142; Interview with Officer #7, *supra* note 19. A report of the SBA’s Office of Advocacy identified a drop-off in state legislative activity between

if at all, to communicate and understand how state legislative concerns interact with an agency's mission: "What I do with my team is to turn them into a research group—trying to identify what's happening in different regions at the state level, figure out whether they raise more than just regional, but national concerns."¹⁴⁹

2. *Forms of Agency-State Interaction*

The FTC's experience also highlights some of the ways in which agencies communicate their positions on policy. Some agencies develop model legislation on their own when traditional areas of state law impact interstate travel and communications, including the National Highway and Transportation Administration (NHTSA) (automated vehicles), the Federal Communications Commission (FCC) (rural access to broadband), and FRA (negligence and nuisance laws for rail obstructions).¹⁵⁰ Some federal agencies even have formal, standing relationships with the ULC, like the Federal Reserve and the State Department.¹⁵¹ Still others work frequently with associations of state agencies to develop model legislation.¹⁵²

Many federal agencies also follow the FTC's practice of testifying and advising on discrete pieces of state legislation in response to requests from state legislators. NHTSA will testify in state legislatures in response to specific requests to clarify what kinds of state drinking age, blood alcohol levels, or speeding limits comply with federal laws.¹⁵³ DOL works with states on legislation to review

2008 and 2010, ascribing it to the failure to appoint new regional officers. SBA May 2013 Report, *supra* note 19, at 2 ("Most of the Regional Advocate positions, which were key links in the [Model Legislation] Initiative, became vacant and many remained so into 2010, so that continuity was lost.").

149. Interview with Officers #13 & #14, *supra* note 142.

150. See, e.g., Nat'l Highway Traffic Safety Admin., *supra* note 5; Broadband Deployment Advisory Comm., *State Model Code for Accelerating Broadband Infrastructure Deployment and Investment*, FED. COMM'NS COMM'N 1 n.1 (Dec. 6, 2018), <https://www.fcc.gov/sites/default/files/bdac-12-0607-2018-model-code-states-final-approved-sections.pdf> [<https://perma.cc/AD45-R6N5>]; Fed. R.R. Admin., *Model State Legislation—Railroad Vandalism Prevention*, U.S. DEP'T TRANSP. (Jan. 1, 1997), <https://railroads.dot.gov/elibrary/model-state-legislation-railroad-vandalism-prevention> [<https://perma.cc/27WD-4VKE>].

151. Interview with Comm'r #2, *supra* note 147; Interview with Comm'r #1, *supra* note 147.

152. Interview with Officers #15 & #16, Ctrs. for Disease Control & Prevention (May 8, 2018); Interview with Officer #11, Fed. Rsrv. Bd. (Apr. 27, 2018).

153. Email from Off. of Chief Couns., Nat'l Highway Traffic Safety Admin., to author (Mar. 14, 2018) (on file with author) (noting that subject to statutory restrictions, "we provide technical assistance to States that provide proposed legislation for our review in order to inform them whether a particular bill meets grant requirements or where it falls short"); Email from Off.

eligibility requirements, training, and reemployment programs for federal unemployment insurance.¹⁵⁴

As noted, in the process, agencies that actively monitor and work with states will circulate legislation from other states. The CDC, for example, developed web-based tools to invite questions from state policymakers and to study, track, and circulate state legislation.¹⁵⁵ The Federal Aviation Administration did not adopt formal model rules, but instead circulated “fact sheets” designed to guide state legislatures considering nuisance regulations that may disturb federal drone regulations.¹⁵⁶ Circulating already-adopted legislation creates additional benefits as states learn from and build upon each other’s legislative efforts.¹⁵⁷

3. *Public Participation*

Agencies follow very different practices for communicating their views. More sensitive, technical questions might be communicated with state lawmakers without any publicity. For example, DHS and many of its component agencies have policies against testifying over state legislation, but will discuss state policies they perceive as having an adverse impact on federal enforcement. A former official joked that a frequent question for DHS before meeting with state policymakers is: “What are your walls made of?” – a reference to a promised closed-door meeting over high-profile state legislation, where members of the media managed to take pictures just outside walls made of glass.¹⁵⁸

of Gen. Couns., Dep’t of Transp., to author (Mar. 14, 2018) (on file with author) (“NHTSA deals constantly with States over such things as maximum allowable ‘blood alcohol level’ for drivers and mandatory motorcycle helmet use.”).

154. IMPAQ Int’l, *Impact of the Reemployment and Eligibility Assessment (REA) Initiative*, U.S. DEP’T OF LAB. (June 2011), https://wdr.doleta.gov/research/FullText_Documents/ETAOP_2012_o8_Impact_of_the_REA_Initiative.pdf [<https://perma.cc/ZY8K-7E4Z>] (presenting a controlled study commissioned by DOL of four states implementing “reemployment” programs and recommending reform).
155. See, e.g., Pub. Health L. Program, *Prescription Drugs*, CTRS. FOR DISEASE CONTROL & PREVENTION (June 15, 2018), <https://www.cdc.gov/phlp/publications/topic/prescription.html> [<https://perma.cc/DHK7-D8LM>] (containing menus summarizing some of the legal strategies states have used to “address prescription drug misuse, abuse, and overdose”).
156. See Off. of the Chief Couns., *State and Local Regulation of Unmanned Aircraft (UAS) Fact Sheet*, FED. AVIATION ADMIN. (Dec. 17, 2015), https://www.faa.gov/sites/faa.gov/files/uas/public_safety_gov/public_safety_toolkit/UAS_Fact_Sheet_Final.pdf [<https://perma.cc/5N2M-SA44>] (warning against a “patchwork quilt” of local regulations).
157. Interview with Officers #15 & #16, *supra* note 152; Interview with Officers #13 & #14, *supra* note 142.
158. Interview with Officer #22, *supra* note 145.

The same is true for more legal and technical matters involving the intersection of a federal and state regulatory regime—whether the state law complied with conditions for federal funding, whether federal law preempted state law, or whether a state law qualified for an exemption or waiver under an agency’s interpretation of its own rule. For example, in negotiating state healthcare plans under Obamacare, officers from HHS avoided publicly testifying in state legislatures so as to avoid the appearance of interfering in state funding decisions.¹⁵⁹ This led to iterative policymaking, where private negotiations with one state produced updated guidance for other states, followed by even more private, individualized negotiations with each individual state.¹⁶⁰ Negotiations over legislative language often “played out in 51 to 56 different ways, depending on how you count.”¹⁶¹

Others, like FCC, the State Department, and DOD rely on federal advisory committees comprised of a wide array of federal, state, local and nongovernmental interests to advise them.¹⁶² For example, DOD frequently works with Military Family Readiness Council, a federal advisory committee, to talk about issues frequently facing military families. It also holds “town halls” and informal conversations with military-services organizations to identify obstacles for veterans.¹⁶³

In sum, agencies use a wide variety of internal organization, state-based contacts, and public participation to effect state law and policy. Such procedures can vary from agency to agency—or, in some cases, from situation to situation. Although agencies may use both obvious and unseen processes when interacting with state governments to sometimes achieve the same results, the means agencies use to achieve their objectives have broader implications for democratic values. These issues are explored in more depth in Parts IV and V.

159. Interview with Officer #25, Dep’t of Health & Hum. Servs. (July 9, 2018).

160. *Id.* This account accords with what Nicole Huberfeld and Abbe Gluck found in their studies of the behind-the-scenes negotiations behind the Obamacare rollout. See Gluck & Huberfeld, *supra* note 22, at 1733-45; Interview with Officer #25, *supra* note 159; Abbe Gluck & Nicole Huberfeld, *The New Health Care Federalism on the Ground*, 15 IND. HEALTH L. REV. 1, 10 (2018) [hereinafter Gluck & Huberfeld, *New Health Care Federalism*].

161. Interview with Officer #25, *supra* note 159.

162. Interview with Officer #18, Dep’t of State (May 10, 2018) (describing the federal advisory-committee process prior to international negotiations likely to impact state policy); Interview with Officers #13 & #14, *supra* note 142.

163. Interview with Officers #13 & #14, *supra* note 142.

III. A TYPOLOGY OF AGENCY COLLABORATIONS WITH STATE LEGISLATURES

The previous Part revealed how agencies from the FTC, SBA, and CDC to DOD and DOL have leveraged centralized departments to persuade state legislatures to adopt new policies, even without ever promising funds or issuing directives with the “force of law” that are governed by the APA.¹⁶⁴ While agencies’ collaborations with state legislatures do not involve the kind of formal lawmaking that administrative-law doctrine and scholarship have long focused on, they nevertheless involve meaningful choices about how administrative agencies allocate resources to influence new policies across the country. Federal agencies devote valuable personnel and funding to tracking state laws, identifying policy outcomes, shaping law behind closed doors, and testifying in state legislatures about the merits of such legislation. And, just as national parties and private interest groups have learned,¹⁶⁵ offering these resources is an extremely effective way to advance national policies through part-time state legislatures that often lack the staff, time, and attention to develop policies themselves.¹⁶⁶

This Part draws on historical accounts and interviews to develop a typology of how agencies influence the state legislative process. As set forth below, federal agencies use their policymaking capacity in five overlapping, but conceptually distinct ways to help shape state legislation: (1) agenda setting, (2) expertise lending, (3) institution building, (4) policy coordination, and (5) direct funding. First, agencies help *set agendas* by using their governmental office to conduct research, hold conventions, and offer public testimony in state legislatures.

164. See Merrill & Watts, *supra* note 96, at 476–78 (documenting procedures that apply to federal agencies with authority to promulgate rules with the force of law); Jacob E. Gersen, *Legislative Rules Revisited*, 74 U. CHI. L. REV. 1705, 1708–10 (2007) (distinguishing legislative rules issued “via notice and comment rulemaking” that “establish new policy that has the binding force of law” from other rules exempted from the APA’s procedural requirements).

165. See, e.g., HERTEL-FERNANDEZ, *supra* note 73, at 9–10, 78–112; Hall & Deardorff, *supra* note 24, at 69; Hertel-Fernandez, *supra* note 27, at 583.

166. The political science literature on policy diffusion offers rich accounts of how external actors — including trade groups, corporate lobbyists, political organizations, and other factions — can facilitate the spread of policy innovations across states by meeting these policymaking-capacity crises in state legislatures. See Charles R. Shipan & Craig Volden, *Policy Diffusion: Seven Lessons for Scholars and Practitioners*, 72 PUB. ADMIN. REV. 788, 788, 791–92 (2012) [hereinafter Shipan & Volden, *Seven Lessons*] (“Over the past 50 years, scholars have published nearly 1,000 research articles in political science and public administration journals about ‘policy diffusion.’”); Steven J. Balla, *Interstate Professional Associations and the Diffusion of Policy Innovations*, 29 AM. POL. RSCH. 221, 229–33, 235–42 (2001). For similar discussions of policy diffusion across cities, see Charles R. Shipan & Craig Volden, *The Mechanisms of Policy Diffusion*, 52 AM. J. POL. SCI. 840, 841, 853 (2008); and Robert L. Crain, *Fluoridation: The Diffusion of an Innovation Among Cities*, 44 SOC. FORCES 467, 467–69, 476 (1966).

Second, they *lend expertise* with policy to state institutions that lack staff, resources, and time. Third, they can *build institutions*—not just loaning expertise, but helping states create institutions themselves and, in the process, replicate similar versions of their own programs in state governance. Fourth, they *coordinate policy* across state lines to reduce competitive races to the bottom, facilitate financial and technological networks, and respond to international agreements. Fifth, they offer *federal funds*—assuring state programs receive funding in more tailored and flexible ways than nationwide congressional rulemaking.

Each influence mechanism offers unique policymaking opportunities for federal agencies, but they carry risks as well—including increased potential distrust, myopia, entrenchment, homogeneity, and coercion in government programs. Together, these different state legislative strategies and roles highlight how federal agencies can cultivate power outside traditional administrative-law constraints.

A. Agenda Setting

Agencies can help promote agendas by using their governmental office to help turn policy ideas into legislative priorities. State legislators often lack needed resources to determine which problems government should prioritize or solve.¹⁶⁷ Political scientists have tracked how states sometimes borrow laws wholesale—typos and all—from other sophisticated, politically similar states.¹⁶⁸ Similarly, when a federal agency backs a particular policy issue, interest groups may no longer expend the same effort and political capital to convince states to become first movers.¹⁶⁹ Agendas can then spread ideas across state lines with each success. One official described the benefits of sharing actual legislative

167. See Tyler & Gerken, *supra* note 25, at 2199 (“Governance in the modern era is more than a full-time job, leaving hardly any time to formulate innovative ideas.”); Pamela J. Clouser McCann, Charles R. Shipan & Craig Volden, *Top-Down Federalism: State Policy Responses to National Government Discussions*, 45 *PUBLIUS: J. FEDERALISM* 495, 500 (2015).

168. See, e.g., Julianna Pacheco, *The Social Contagion Model: Exploring the Role of Public Opinion on the Diffusion of Antismoking Legislation Across the American States*, 74 *J. POL.* 187, 187–90, 199–200 (2012); Jason L. Jensen, *Policy Diffusion Through Institutional Legitimation: State Lotteries*, 13 *J. PUB. ADMIN. RSCH. & THEORY* 521, 523–24 (2003); Rob O’Dell & Nick Penzenstadler, *Copy, Paste, Legislate: You Elected Them to Write New Laws. They’re Letting Corporations Do It Instead.*, *USA TODAY* (Apr. 3, 2019), <https://www.usatoday.com/in-depth/news/investigations/2019/04/03/abortion-gun-laws-stand-your-ground-model-bills-conservatives-liberal-corporate-influence-lobbyists/3162173002> [<https://perma.cc/B9LC-GVMG>] (finding “at least 10,000 bills almost entirely copied from model legislation” over eight years, over 2,100 of which were signed into law).

169. See, e.g., Susan Rose-Ackerman, *Risk Taking and Reelection: Does Federalism Promote Innovation?*, 9 *J. LEGAL STUD.* 593, 593–96 (1980) (describing weak incentives of states to invest in creating new policies when they can copy them from other innovative states).

successes with different state legislatures over untested model language or policies: “If a jurisdiction wants to go down that road, it’s better to say ‘here’s how 27 other jurisdictions have done it.’”¹⁷⁰

Agencies contribute to state agenda setting in a number of ways. First, agencies hold public conventions and commissions designed to raise the prominence of persistent problems, acquire information, and legitimate new policy ideas. This is a frequent technique used by the FTC, whose officers can provide “cover” for state legislators concerned about facing down powerful industries at home.¹⁷¹ But the practice arguably dates to the early 1900s, when many contemporaneous administrative bodies worked on uniform laws, sometimes acting as clearinghouses for new policy ideas. One of the earliest examples included the United States Industrial Commission (USIC), which, in 1898, was one of the first federal bodies specifically designed to promote new state laws.¹⁷² Congress mandated that USIC “furnish such information and suggest such laws as may be made a basis for uniform legislation by the various States of the Union.”¹⁷³ After hearing proposals from a variety of business, labor, and other interest groups, the new federal agency generated multivolume studies for state legislatures—from factory safety laws to child safety and maximum-hour and wage laws.¹⁷⁴

A more modern example of this phenomenon is the collaboration between the 9/11 Commission and the CDC, which wrote a Model State Emergency Health Powers Act in the wake of the September 11 terrorist attacks. The CDC’s Model Act, in turn, provided a framework for states to respond to public-health

170. Interview with Officers #15 & #16, *supra* note 152.

171. See Cooper & Kovacic, *supra* note 121, at 1582 (former OPP officials observing that OPP “can provide ‘political cover’ for public-spirited politicians seeking to benefit consumers but opposed by a powerful industry”); Cooper, Pautler & Zywicki, *supra* note 102, at 1103 (same).

172. USIC was a culmination of efforts by labor and their congressional allies in the 1890s to study the changing relationships between labor, large businesses, and capital. See CLARENCE E. WUNDERLIN, JR., *VISIONS OF A NEW INDUSTRIAL ORDER: SOCIAL SCIENCE AND LABOR THEORY IN AMERICA’S PROGRESSIVE ERA* 28–30 (1992).

173. Act of June 18, 1898, ch. 466, § 3, 30 Stat. 476, 476.

174. See, e.g., INDUS. COMM’N, *REPORT OF THE INDUSTRIAL COMMISSION ON PRISON LABOR* (1900); INDUS. COMM’N, *REPORT OF THE INDUSTRIAL COMMISSION ON LABOR LEGISLATION* (1900); INDUS. COMM’N, *REPORT OF THE INDUSTRIAL COMMISSION ON THE RELATIONS AND CONDITIONS OF CAPITAL AND LABOR EMPLOYED IN THE MINING INDUSTRY* (1901). As one observer found, proposed forms of model state legislation became “the political system’s single most important structural and procedural problem-solving mechanism from 1900 through 1914, and it continued to be a viable approach to social legislation in the 1920s and 1930s.” William Graebner, *Federalism in the Progressive Era: A Structural Interpretation of Reform*, 64 J. AM. HIST. 331, 332 (1977).

emergencies and bioterrorism attacks,¹⁷⁵ including new powers to governors and public-health officers. The powerful signal sent by the CDC led thirty-nine states to adopt it, and it became the basis for the public-emergency framework that exists today, including the recent response to the COVID-19 pandemic in 2020.¹⁷⁶

Second, agencies have teamed up with other state organizations and other agencies to propose model legislation. Historically, such partnerships gave reformers opportunities to strengthen professional networks and offered new platforms to shape national responses to an increasingly interconnected economy, without constraining state legislatures' freedom to experiment with new policies.¹⁷⁷ Today, the State Department and Federal Reserve's permanent positions at the ULC allow them to play a role in changes to the UCC, custody laws, and other state commercial laws. In the process, they lend their legitimacy as the nation's representatives in foreign trade and banking.¹⁷⁸

"Interagency task forces" that promote model legislation play a similar role in elevating new policies. For example, businesses concerned about increasing insurance premiums encouraged the Commerce Department to convene an interagency task force to study changes to state product-liability laws. Commerce openly considered several courses of action: leaving the problem entirely to the states, creating a uniform federal law, or fashioning a model state law.¹⁷⁹ After receiving extensive comments, the Commerce Department went with a "Draft Uniform Product Liability Law," which itself produced 1,500 pages of comments.¹⁸⁰ It ultimately recommended a regulatory-compliance defense that would allow defendants to defeat tort lawsuits when their defective products complied with state safety regulations.¹⁸¹ Although only three states adopted the

175. See LAWRENCE O. GOSTIN & LINDSAY F. WILEY, *PUBLIC HEALTH LAW: POWER, DUTY, RESTRAINT* 394, 399-400 (3d ed. 2016).

176. Yanbai Andrea Wang & Justin Weinstein-Tull, *Pandemic Governance*, 63 B.C. L. REV. 1949, 1960-63 (2022).

177. For example, in response to a growing opium epidemic, the Treasury Department and the Bureau of Drug Enforcement openly worked with states to draft state narcotic legislation. See Bureau of Narcotics, *Traffic in Opium and Other Dangerous Drugs for the Year Ended December 31, 1935*, U.S. DEP'T TREASURY, at v (1936); see also *infra* note 217 and accompanying text (discussing the adoption of the resulting Uniform State Narcotic Act across thirty-nine states).

178. See *supra* notes 170-171 and accompanying text.

179. Options Paper on Product Liability and Accident Compensation Issues, 43 Fed. Reg. 14612, 14616-17 (April 6, 1978) (proposing options).

180. See Model Uniform Product Liability Act, Preamble, 44 Fed. Reg. 62714, 62714 (Oct. 31, 1979); Victor E. Schwartz, *The Uniform Product Liability Act—A Brief Overview*, 33 VAND. L. REV. 579, 580 (1980) (drawing from author's experience as the Chair of the Interagency Task Force).

181. See Model Uniform Product Liability Act § 108(A), 44 Fed. Reg. 62714, 62730 (Oct. 31, 1979).

model law at first, the public attention later drew new allies; some conservative legislative organizations would later encourage states to adopt similar laws in the 1990s.¹⁸²

Finally, direct legislative testimony in state legislatures can add new momentum to policy ideas, while enhancing the credibility of state legislators themselves. For example, although the Equal Employment Opportunity Commission is rarely involved in state legislation, some of its officers offered testimony concerning state workplace-harassment laws in state legislatures based on its own influential 2015 report.¹⁸³ Following alleged accounts of sexual assault in legislatures themselves and the rise of the #MeToo Movement, the Maryland Women's Legislative Caucus invited EEOC officials to testify in the Maryland legislature.¹⁸⁴ As the Women's Legislative Caucus circulated the guidance in other state legislatures, Minnesota and Illinois solicited similar testimony in 2018, producing similar statehouse reforms.¹⁸⁵

Even as federal participation in state legislation helps build momentum for new policies, agencies also risk fomenting distrust in government, particularly in increasingly polarized state legislatures. Association with a federal agency, in some states, can be a scarlet letter for certain bills. That has led legislators and policymakers to quietly seek their advice, but only behind closed doors — a tactic Abbe Gluck and Nicole Huberfeld have dubbed “secret boyfriend” federalism.¹⁸⁶ As noted, the FTC will not offer direct testimony when an otherwise sympathetic state attorney general warns that its presence will hurt the chances of a policy it favors.¹⁸⁷ Intervening in pitched battles over state law can also hurt the agency's legitimacy. A recent March 2022 report by the Congressional Research Service concluded that the SBA Office of Advocacy's involvement in federal and state legislation placed it in very difficult political positions: “Advocacy often finds itself involved in ideological and partisan disputes concerning the outcome of federal regulatory policies for which it does not have the final say.”¹⁸⁸

182. See Bernard Bell, *Fortieth Anniversary: The Commerce Department's Foray into Re-Writing Products Liability Law*, NOTICE & COMMENT (Oct. 29, 2019), <https://www.yalejreg.com/nc/fortieth-anniversary-the-commerce-departments-foray-into-re-writing-products-liability-law> [https://perma.cc/DMD6-WVZ8] (describing how the UPLA inspired the American Legislative Exchange Council's Model Product Liability Act of 1995).

183. See Interview with Officers #4 & #5, Equal Emp. Opportunity Comm'n (Mar. 22, 2018).

184. See *id.*

185. See *id.*

186. Gluck & Huberfeld, *supra* note 22, at 1771.

187. Interview with Officer #1, *supra* note 109.

188. ROBERT JAY DILGER & R. CORINNE BLACKFORD, CONG. RSCH. SERV., R43625, SBA OFFICE OF ADVOCACY: OVERVIEW, HISTORY, AND CURRENT ISSUES 17 (Mar. 30, 2022).

B. Lending Expertise

Federal agencies also lend unique expertise to usher in state legislative initiatives. Today, many states have only part-time legislators with little pay, very limited permanent and paid legislative staff, and who are deluged with information about potential policies and priorities.¹⁸⁹ The result is that state lawmakers often are overwhelmed by the hectic pace of annual sessions and rely on outside organizations and lobbyists.¹⁹⁰ Political scientists have observed that the policymaking deficit in states impedes their ability to learn and adapt to policies.¹⁹¹ Others have explored how some organizations, perhaps most formidably ALEC, have stepped into the breach, exerting tremendous influence on state legislatures by filling the gaps in their own policymaking capacity with model state legislation.¹⁹²

Less well known is that federal agencies have long, albeit intermittently, played a role in lending their technical expertise in particular subject areas. As early as 1914, the Secretary of Agriculture created a Food Standards Committee, comprising members from the Food and Drug Administration; the Association of American Dairy, Food and Drug Officials; and the Association of Agricultural Chemists. The purpose of the Committee was to formulate uniform food purification and labeling standards to the states for adoption.¹⁹³ And even though the New Deal is frequently associated with the expansion of federal legislation

189. See *2021 Legislator Compensation*, NAT'L CONF. STATE LEGISLATURES (Sept. 21, 2021), <https://www.ncsl.org/about-state-legislatures/2021-legislator-compensation> [<https://perma.cc/M5J8-ADKS>] (itemizing average pay in each state legislatures in 2021); Barbara Rodriguez, *Most State Lawmakers Earn Low Salaries. It Impacts Who Can Afford to Be One.*, THE 19TH (Nov. 22, 2021), <https://19thnews.org/2021/11/state-lawmakers-salaries-affordability> [<https://perma.cc/E3Z7-QDDD>] (noting that "in 1970, lawmakers made an inflation-adjusted average of \$43,521," which is higher than average salaries in 2021); *Size of State Legislative Staff*, NAT'L CONF. STATE LEGISLATURES, <https://www.ncsl.org/about-state-legislatures/size-of-state-legislative-staff> [<https://perma.cc/YLJ9-9MPM>] (highlighting permanent state legislative staff totals from 1979 to 2021).

190. See Hertel-Fernandez, *supra* note 27, at 583; Hall & Deardorff, *supra* note 24, at 69.

191. See Shipan & Volden, *Seven Lessons*, *supra* note 166, at 790 ("Time-pressed policy makers, those with limited staff support, and those generalists who have not had the opportunity to gain specialized expertise will not be able to take full advantage of others' policy experiences.").

192. See Hertel-Fernandez, *supra* note 27, at 585 ("[The American Legislative Exchange Council (ALEC)], according to that publication, was becoming the 'first' and 'last' call for state legislators when researching policy.").

193. See JOHNSON, *supra* note 10, at 110.

and regulation,¹⁹⁴ the New Deal also ushered in a new level of federal-expert guidance in state legislatures themselves. For example, the National Emergency Council, beginning in 1934, presided over state “coordination meetings” attended by field agents of all various agencies, encouraging exchanges of information that permitted the federal government to advise states.¹⁹⁵ According to one contemporaneous observer, federal agencies were “better organized, kn[e]w better what they want[ed], and [we]re more insistent upon getting it than in any previous year in which the majority of the state legislatures were in session.”¹⁹⁶ The result was the rapid spread of state legislative successes at the urging of Congress. For example, by 1937, forty-two states had passed legislation to implement features of the Federal Housing Act, while thirty-two states did so for the Farm Credit Administration.¹⁹⁷

Today, agencies may assist states in crafting policy that reflects an agency’s own expertise in federal laws, policy, and science. With its extensive experience in commercial transactions, the Federal Reserve Bank of New York has built a unique expertise in banking-transaction law. Accordingly, it worked hand in hand with the ULC to rewrite the UCC to help create an electronic mortgage registry better able to respond to confusion and litigation arising from the 2008 mortgage-foreclosure crisis.¹⁹⁸ As the New York Federal Reserve worked to draft a federal statute for a national registry,¹⁹⁹ it also recognized that many standard provisions of state UCC statutes also required a wholesale revision because they

194. See, e.g., Orly Lobel, *The Renew Deal: The Fall of Regulation and the Rise of Governance in Contemporary Legal Thought*, 89 MINN. L. REV. 342, 344 (2004); Dorf & Sabel, *supra* note 22, at 270.

195. See JAMES T. PATTERSON, *THE NEW DEAL AND THE STATES: FEDERALISM IN TRANSITION* 106-07 (1969) [hereinafter PATTERSON, *FEDERALISM IN TRANSITION*]; James T. Patterson, *The New Deal and the States*, 73 AM. HIST. REV. 70, 71 (1967) [hereinafter Patterson, *The New Deal and the States*].

196. See Graves, *The Future of the American States*, *supra* note 22, at 27.

197. See Patterson, *The New Deal and the States*, *supra* note 195, at 71.

198. See Interview with Comm’r #2, *supra* note 147; Interview with the Officer #11, *supra* note 152; see also Dale A. Whitman, *Proposal for a National Mortgage Registry: MERS Done Right*, 78 MO. L. REV. 1, 48 n.179 (2013) (explaining that in 2011 the American Law Institute and the National Conference of Commissioners on Uniform State Laws sponsored a stakeholders meeting “to discuss proposals for resolving some of the uncertainties that have generated litigation surrounding the secondary market and foreclosures,” which was “attended by representatives of most of the major federal agencies and trade organizations that deal with the mortgage market”).

199. Richard T. Cassidy, *2016 Drafting Season Is Over*, UNIF. L. COMM’N (Dec. 20, 2016), <https://uniformlaws.wordpress.com/2016/12/20/2016-drafting-season-is-over> [https://perma.cc/QYF6-SH2R] (discussing the New York Federal Reserve’s work drafting a new federal law for an electronic mortgage database).

were written for a paper-based, pre-internet world.²⁰⁰ So, lawyers from the New York Federal Reserve worked collaboratively with the ULC to change those rules, too.²⁰¹ Aside from its perspective as a regulator, a large benefit of the New York Federal Reserve's involvement was its own expertise in state payment law: "[W]e're the payment plumbers for the financial system. . . . We like to think that we're the best payment law firm in the country."²⁰²

Some agencies develop expertise in the public impact of state legislation itself. For example, a division of the CDC Public Health Law Program studies the impact of law on public-health outcomes, also known as "legal epidemiology."²⁰³ The CDC's legal epidemiological unit studies state laws' impact on disease, gathers information from state-level partners, and shares legislation with proven results. Examples include state broadband-access and telehealth laws,²⁰⁴ prescription drug control laws,²⁰⁵ vaccine-exemption laws on public health in schools,²⁰⁶ state "doctor shopping" laws designed to reduce opioid abuse,²⁰⁷ and the

200. See Interview with Comm'r #2, *supra* note 147. Article 3, for example, required physical documents to prove ownership, but the entire mortgage registry was premised on electronic exchanges. In a new world of electronic transfers, the model bill's authors had to identify a set of "electronic intangibles." *Id.*

201. See Interview with Officer #19, *supra* note 147; Interview with Comm'r #1, *supra* note 147; Interview with Comm'r #2, *supra* note 147.

202. Interview with Officer #19, *supra* note 147.

203. See, e.g., Betsy L. Thompson, Lindsay K. Cloud & Lance Gable, *Advancing Legal Epidemiology: An Introduction*, 26 J. PUB. HEALTH MGMT. & PRAC. S1, S1 (2020); Tara Ramanathan, Rachel Hulkower, Joseph Holbrook & Matthew Penn, *Legal Epidemiology: The Science of Law*, 45 J.L. MED. & ETHICS 69, 69 (2017); Scott Burris, Marice Ashe, Donna Levin, Matthew Penn & Michelle Larkin, *A Transdisciplinary Approach to Public Health Law: The Emerging Practice of Legal Epidemiology*, 37 ANN. REV. PUB. HEALTH 135, 139 (2016) (defining legal epidemiology as "the scientific study and deployment of law as a factor in the cause, distribution, and prevention of disease and injury in a population").

204. See Brittney Crock Bauerly, Russell F. McCord, Rachel Hulkower & Dawn Pepin, *Broadband Access as a Public Health Issue: The Role of Law in Expanding Broadband Access and Connecting Underserved Communities for Better Health Outcomes*, 47 J.L. MED. & ETHICS 39, 39-42 (2019).

205. See Pub. Health L. Program, *Prescription Drugs*, CTRS. FOR DISEASE CONTROL & PREVENTION, <https://www.cdc.gov/phlp/publications/topic/prescription.html> [<https://perma.cc/E6FK-KVYZ>] (including menus summarizing some of the legal strategies states have used to address prescription "drug misuse, abuse, and overdose," including state laws designed to limit doctor shopping, bottle tampering, fake IDs, refills, dosage, and time using prescription drugs).

206. See Pub. Health L. Program, *State School Immunization Requirements and Vaccine Exemption Laws*, CTRS. FOR DISEASE CONTROL & PREVENTION (Feb. 2022), <https://www.cdc.gov/phlp/docs/school-vaccinations.pdf> [<https://perma.cc/H5NN-BZLQ>].

207. See Pub. Health L. Program, *Doctor Shopping Laws*, CTRS. FOR DISEASE CONTROL & PREVENTION (Sept. 2012), <https://www.cdc.gov/phlp/docs/menu-shoppinglaws.pdf> [<https://>

effectiveness of state “social distancing” laws.²⁰⁸ Twelve attorneys at the CDC focus on legal epidemiology and, at any particular time, the office may work on forty to fifty assigned study areas of state law.²⁰⁹ The CDC’s expertise in state legislation promotes shared goals between the CDC, state health officials, and the public-health community.²¹⁰

Of course, relying *too much* on federal expertise also has downsides, including myopic or balkanized policymaking. A substantial literature suggests that state legislatures that overly rely on specialized agencies to make policy may lose sight of the bigger picture.²¹¹ Although accounts of the connections that federal agencies forge with state and local governments remain mostly theoretical,²¹² many federal officials working with state governments seemed to acknowledge these concerns when working with a state legislative process. Some saw a “disconnect” between their expertise in a particular area of law and the precise “legal mechanism [a legislature should use] for that intervention.”²¹³ Others

perma.cc/ZPK8-VWGZ]. State doctor-shopping laws evolved from provisions of the Uniform Narcotic Drug Act, originally drafted with the Treasury in 1932 to prevent the use of fraud or deceit to procure drugs. *Id.* at 1-2. See also *The Early Years*, U.S. DRUG ENF’T ADMIN. 17 (2018), <https://www.dea.gov/sites/default/files/2018-05/Early%20Years%20p%2012-29.pdf> [<https://perma.cc/6DEG-7ETZ>] (describing Commissioner Harry Anslinger’s “chosen vehicle” for “extending narcotics control to areas that could not otherwise be reached” by federal law as “the National Conference of Commissioners on Uniform State Laws”).

208. See Karen Leeb, Denise Chrysler & Richard A. Goodman, *The Social Distancing Law Project Template: A Method for Jurisdictions to Assess Understanding of Relevant Legal Authorities*, 4 *DISASTER MED. & PUB. HEALTH PREPAREDNESS* 74, 74 (2010); Social Distancing L. Project, Mich. Dep’t of Cmty. Health, *After Action Report*, CTRS. FOR DISEASE CONTROL & PREVENTION (2007), <https://www.cdc.gov/phlp/docs/Social-Distancing-Law-Projectafterexerciserpt.pdf> [<https://perma.cc/5Z4K-4NZL>] (assessing the sufficiency of Michigan’s legal authority to respond to a public-health crisis).
209. Interview with Officers #15 & #16, *supra* note 152.
210. The Public Health Law Program website provides a portal for state health workers to obtain technical advice “consulting, editing, and planning” new state laws and policies. See Pub. Health L. Program, *Technical Assistance*, CTRS. FOR DISEASE CONTROL & PREVENTION (Dec. 1, 2022), <https://www.cdc.gov/phlp/technicalassistance/index.html> [<https://perma.cc/SXK9-CZTU>]; Interview with Officers #15 & #16, *supra* note 152.
211. See, e.g., Roderick M. Hills, Jr., *The Eleventh Amendment as Curb on Bureaucratic Power*, 53 *STAN. L. REV.* 1225, 1227 (2001) (noting the tendency of state bureaucrats in cooperative regimes to identify with their federal analogues more readily than the rest of their state-elected counterparts); Samuel H. Beer, *Federalism, Nationalism, and Democracy in America*, 72 *AM. POL. SCI. REV.* 9, 18 (1978).
212. Bridget A. Fahey, *Data Federalism*, 135 *HARV. L. REV.* 1007, 1050 n.204 (2022) (“Federalism scholars have periodically mentioned ‘picket-fence federalism’—a term used to capture the axis of interconnection that administrative agents (the *pickets*) forge between federal, state, and local governments (the *rails*), but those accounts remain largely theoretical.”).
213. Interview with Officers #15 & #16, *supra* note 152.

referenced and took steps to avoid concerns about “meddling” in state affairs.²¹⁴ Still others noted there was an important line to draw between the agency and the state legislature’s roles when working together: “I think there’s a credibility issue,” said one intergovernmental affairs officer.²¹⁵ “We build our credibility because we know [our mission]. [But] we don’t know what’s happening enough in a state to tell Kentucky what to do.”²¹⁶

C. *Institution Building*

Institution building refers to the way federal agencies influence state law-making by not just lending their expertise, as described above, but helping states create it themselves. One approach—drafting “little acts”—can help agencies replicate similar versions of their own programs in state governance that reshape how state institutions interact with each other.

Although less common today, such work with state-government legislation served as a way for federal officers in the 1920s and 1930s to extend their own federal enforcement and policy agendas, while building institutional support inside states. In response to a growing opium epidemic, Treasury and the Bureau of Drug Enforcement coordinated with states in drafting state narcotic legislation that gave state licensing boards information to help them distribute prescribed drugs lawfully.²¹⁷ The Bureau of Public Roads (BPR) similarly benefited as states adopted its model legislation calling for the creation of state highway departments. By helping form state agencies, BPR “created and strengthened a set of institutionalized supports for the agency.”²¹⁸

During the Great Depression, federal agencies also helped write a raft of “little” state acts designed to create state-level partners who could help federal authorities enforce law. Some, like the National Recovery Administration (NRA), created special divisions of state relations in Washington, D.C., to write model laws, pushing states to adopt “Little NRAs” designed to forge intrastate industrial codes.²¹⁹ Such “little acts” not only helped extend federal enforcement into

214. Interview with Officer #25, *supra* note 159.

215. Interview with Officers #13 & #14, *supra* note 142.

216. *Id.*

217. See Bureau of Narcotics, *supra* note 177, at v (“We have been successful in securing the adoption of the Uniform State Narcotic Act in 18 additional states during the year . . . [and] splendid results have already been obtained in several States through the cooperation thus made possible . . .”). Working with the states, a uniform law was eventually sponsored by the National Conference of Commissioners on Uniform State Laws, and by 1937, thirty-nine states had adopted the law. See CLARK, *supra* note 22, at 14 n.7.

218. JOHNSON, *supra* note 10, at 124.

219. See PATTERSON, *FEDERALISM IN TRANSITION*, *supra* note 195, at 112.

states, but at less cost and without the same resistance federal agencies confronted in federal court. General Hugh Johnson, the leader of NRA, emphasized the benefits of relying on state programs because they were reviewed by *state courts*.²²⁰ The strategy would help prosecute “chisel[ing]” companies that paid low wages and violated other industrial codes, noting that “little” state agencies would not impose any additional expense on the federal government.²²¹ “Decentralization,” he concluded, “is . . . very desirable.”²²²

More recent variants of agencies supporting their own “little acts” include the SBA, FTC, and ONDCP. After declaring success with a “little FTC Act,” the FTC considered whether states should adopt their own boards to expand state capacity to police anticompetitive practices. Observing that the Commission could not by itself “pass judgment one-by-one” on anticompetitive licensing laws, Commissioner Nye proposed model legislation to install “public watchdog[s]” on state licensing boards.²²³ Later, a 2013 SBA report proposed something very similar: model legislation strengthening independent panels to review and hear business concerns before other state agencies adopted new regulations.²²⁴

Last year, ONDCP funded research for the development of a “Model Opioid Litigation Proceeds Act.”²²⁵ The 2021 model bill creates state oversight boards to ensure that settlement funds from the nationwide opioid litigation reaches hard-hit cities and counties.²²⁶ ONDCP produced the Act after convening hundreds of government actors, litigators, and experts in opioid policy.²²⁷ Collectively, this kind of federal agency action in state legislation extends national priorities into

220. *See id.*

221. *Id.*

222. *Id.* at 113.

223. Nye Address, *supra* note 118, at 18–19.

224. *See* SBA May 2013 Report, *supra* note 19, at ii–v.

225. *See Model Opioids Litigation Proceeds Act*, LEGIS. ANALYSIS & PUB. POL’Y ASS’N 1 (Sept. 2021), <https://legislativeanalysis.org/wp-content/uploads/2021/11/Model-Opioid-Litigation-Proceeds-Act-FINAL.pdf> [<https://perma.cc/B4LQ-6PDK>] (“The Legislative Analysis and Public Policy Association . . . is grateful to the Office of National Drug Control Policy . . . for its support in funding, enabling, and contributing to this Model Act.”).

226. *See Model Opioids Litigation Proceeds Act*, *supra* note 225; Press Release, Off. of Nat’l Drug Control Pol’y, ONDCP Announces Model Law for States to Help Ensure Opioid Litigation Settlements Funds Address Addiction and Overdose (Oct. 21, 2021), <https://www.whitehouse.gov/ondcp/briefing-room/2021/10/21/ondcp-announces-model-law-for-states-to-help-ensure-opioid-litigation-settlements-funds-address-addiction-and-overdose> [<https://perma.cc/PCL7-ZRWL>]. In the interest of full disclosure, I participated in this summit.

227. *See* Press Release, Off. of Nat’l Drug Control Pol’y, *supra* note 226 (describing an ONDCP-hosted “convening that brought together more than 300 State, local, and Tribal leaders from all 50 States”).

states, builds state capacity to respond to those concerns, and reshapes institutions inside the state, including state courts, agencies, and municipalities.

Helping states build policymaking capacity can strengthen their independence, but that assistance also may be viewed as entrenching federal policies and programs into state governance.²²⁸ Regional offices of the Environmental Protection Agency (EPA), for example, frequently must negotiate with states in response to citizen petitions complaining that states fail to comply with the Clean Water Act.²²⁹ One study found that “inadequate state legal authorities were the focus of petitions more often than any other complaint.”²³⁰ In more than forty citizen petitions filed over twenty years, regional EPA officers directly worked with state legislators to ensure that the states’ own environmental officers had sufficient resources to carry out federal environmental requirements.²³¹

But whether such actions *entrench* federal policymaking, or instead, *enable* state policymaking, rests within the eye of the beholder. Such petitions also proved to be an effective way for local interest groups to effect change inside their own state governments by enlisting aid from EPA. Moreover, they helped secure legislation giving their state environmental authorities more power to independently investigate environmental violations and crimes.²³²

D. Policy Coordination

Federal agencies also offer new opportunities to coordinate policies across state lines. States may want to streamline law enforcement, avoid races to the bottom in state social-welfare and insurance programs, and benefit from national and foreign policies that implicate states’ traditional police powers.

228. Sara E. Light, *Regulatory Horcruxes*, 67 DUKE L.J. 1647, 1647 (2018) (observing that “much like the horcruxes Lord Voldemort created by placing portions of his soul into multiple external objects in order to ensure his immortality,” regulators can immunize their own programs from reversal by dispatching them beyond their own walls). *But see* Richard J. Lazarus, *Super Wicked Problems and Climate Change: Restraining the Present to Liberate the Future*, 94 CORNELL L. REV. 1153, 1156 (2009) (“[W]hat Congress and the President give, they can just as easily take away.”).

229. See 40 C.F.R. § 123.64(b)(1) (2022) (“The Administrator may order the commencement of withdrawal proceedings . . . in response to a petition from an interested person . . .”).

230. Emily Hammond & David L. Markell, *Administrative Proxies for Judicial Review: Building Legitimacy from the Inside-Out*, 37 HARV. ENV'T L. REV. 313, 345 (2013).

231. See *id.* at 351–53.

232. See *id.* at 358.

Federal agency collaboration with state legislators holds out the promise of more coordination that stops short of preemptive federal laws and regulations.²³³

Coordination of state laws dates back over 130 years, reflecting values embodied in the growing uniform-law movement in the early 1890s.²³⁴ As government officials and social activists tried to address inhumane labor conditions, patchwork corporate regulations, and other problems that crossed state lines, they encouraged expert policymakers and lawyers to find coherent solutions in state government.²³⁵ Uniform legislation attempted to respect innovative local policymaking by giving state officials a single legislative framework, with sufficient flexibility to tailor any final details to the needs of the local community.²³⁶ For that reason, a number of agencies in the early twentieth century consulted with the ULC and other third-party organizations to write model legislation in areas of shared interest. In the 1920s, for example, the Secretary of Commerce, working with the ULC, helped establish model legislation to license and register over fifty-three million cars.²³⁷

The modern analogy to Commerce's efforts in the 1920s has been NHTSA in the 2020s. NHTSA has put into place a number of regulations to ensure state stakeholders have a seat in major automotive regulations.²³⁸ But when it was tasked with considering new rules for automated vehicles, it did not impose a single, preemptive federal regulation. Recognizing that some questions fell traditionally inside the boundaries of state tort law, it proposed model state laws for state legislatures to adopt.²³⁹ Other federal agencies charged with coordinating networks, utilities, cryptocurrencies, and airspace that necessarily implicate state laws and registration requirements have adopted a similar approach.²⁴⁰

233. See Michael A. Livermore, *The Perils of Experimentation*, 126 YALE L.J. 636, 644 (2017); Hannah J. Wiseman, *Regulatory Islands*, 89 N.Y.U. L. REV. 1661, 1713-14 (2014); Edward L. Rubin & Malcolm Feeley, *Federalism: Some Notes on a National Neurosis*, 41 UCLA L. REV. 903, 924 (1994).

234. See ROBERT A. STEIN, *FORMING A MORE PERFECT UNION: A HISTORY OF THE UNIFORM LAW COMMISSION 1* (2013).

235. Graebner, *supra* note 174, at 333-34.

236. See WALTER P. ARMSTRONG, *A CENTURY OF SERVICE: A CENTENNIAL HISTORY OF THE NATIONAL CONFERENCE OF COMMISSIONERS OF UNIFORM STATE LAWS* 41-42 (1991).

237. 36 HANDBOOK OF THE NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS AND PROCEEDINGS OF THE ANNUAL CONFERENCE MEETING 19 (1926).

238. See, e.g., Sharkey, *supra* note 71, at 538-40 (detailing meetings between NHTSA and the National Conference of State Legislatures and the National Associations of Attorneys General over the preemptive scope of its automobile regulations).

239. See, e.g., Nat'l Highway Traffic Safety Admin., *supra* note 5, at 19, 21.

240. See, e.g., Broadband Deployment Advisory Comm., *supra* note 150, at 1 n.1 ("The Working Group encourages each State to review the Model Code and adopt those portions of the Model

Federal agencies also help coordinate state laws that impact national and foreign policy. The State Department's Private International Law (PIL) department, for example, has long negotiated international instruments or agreements that can only practically be given effect through state contract or family law.²⁴¹ Accordingly, State Department officials frequently work with the ULC, participating in model laws governing standby letters of credit and other private contracts, as the "international community has come to address things in the private sector that are primarily addressed in the United States through state law."²⁴² For example, when PIL negotiated new rules governing international custodial arrangements as part of the Hague Convention in 2007, it worked with the ULC to create the Uniform International Family Support Act—a model law that states would adopt governing support obligations, state enforcement of custodial arrangements, and other state family laws.²⁴³ PIL concluded that the most practical, and least disruptive, course of action was to develop uniform state laws that would bring the United States into compliance with its international obligations.²⁴⁴

In all of these cases, agencies found coordination with states preferable to federal laws or regulations that preempted state law. Otherwise, more sweeping national regulation would stifle variation from state to state or create confusion among organizations responsible for interpreting and applying long-established local rules. But too much coordination can still spur blind imitation and homogeneity. Recent studies suggest government bodies will imitate others without

Code which best address the realities on the ground in each respective State.”); Fed. R.R. Admin., *supra* note 150, at 1; Dan Brecher, *Potential Solution to Patchwork of State Virtual Currency Laws*, SCARINCI HOLLENBEC, LLC (June 29, 2018), <https://scarincihollenbeck.com/law-firm-insights/state-virtual-currency-laws> [https://perma.cc/G26Q-CT6V] (describing adoption of the Uniform Regulation of Virtual-Currency Businesses Act in consultation with Treasury and the Federal Reserve of New York).

241. See *Office of the Assistant Legal Adviser for Private International Law*, U.S. DEP'T STATE, <https://www.state.gov/bureaus-offices/secretary-of-state/office-of-the-legal-adviser/office-of-the-assistant-legal-adviser-for-private-international-law> [https://perma.cc/J7AN-8GM9]; Interview with Officer #17, Dep't of State (May 10, 2018); Interview with Officer #18, Dep't of State (May 10, 2018).

242. Interview with Officer #17, *supra* note 241; see also William H. Henning, *The Uniform Commission and Cooperative Federalism: Implementing Private International Law Conventions Through Uniform Laws*, 2 ELON L. REV. 39, 54-55 (2011) (providing a description of the close relationship between the State Department's Private International Law unit and the Uniform Law Commission by the former ULC Executive Director).

243. See UNIF. INTERSTATE FAM. SUPPORT ACT (UNIF. L. COMM'N 2008).

244. Interview with Officer #17, *supra* note 241; Interview with Comm'r #2, *supra* note 151.

sufficient deliberation or tailoring to local needs.²⁴⁵ These concerns could grow when federal agencies believe that coordinating state legislation is preferable to stalemates in Congress.²⁴⁶

E. Federal Funding

Perhaps the most well-documented rationale for agency involvement in state legislation is their role in overseeing federal spending.²⁴⁷ As Congress has adopted a variety of programs that fund state-level initiatives, federal agencies have assumed a significant role in helping states understand how to draft laws that comply with federal funding requirements. This is a particularly important function when a new federal spending program requires not only action by a governor's office, but also state legislation.

Federal funding has been a powerful tool in reshaping relationships inside and outside the states. For example, a classic study surveying fifty-seven different state policies – from health and education to environmental laws and housing – found that federally funded programs were adopted two to four times faster than state policies without federal matches.²⁴⁸ Accordingly, direct guidance from federal officials over what state legislation qualifies for funding can be a powerful inducement to change. Agencies hold keys to information that state policymakers need before ushering bills through legislative chambers and a state governor's office.

Scholars of cooperative federalism have traced this kind of federal involvement with state legislation to some of Congress's earliest "grant-in-aid" programs in the 1910s and 1920s. For example, federal grants for highways,

245. See, e.g., R. M. Dorrell, Jr. & J. M. Jansa, *Copy, Paste, Legislate, Succeed? The Effect of Policy Plagiarism on Policy Success*, 50 POL'Y & POL. 605 (2022) (finding that higher levels of plagiarism of state organ donation, vaping, and anti-bullying laws result in significantly less success).

246. One former official acknowledged that passing laws and treaties in the Senate was sometimes as cumbersome, if not more so, than a state legislative strategy: "You need treaties with zero controversy to get things through the Senate. You can't have even one or two saying you don't want it. It won't move. Two-thirds isn't enough. It's essentially unanimity." Interview with Officer #17, *supra* note 241.

247. See *supra* Section I.B (summarizing literature of federal involvement in state legislation in federal-spending programs).

248. See Susan Welch & Kay Thompson, *The Impact of Federal Incentives on State Policy Innovation*, 4 AM. J. POL. SCI. 715, 723 (1980) (finding that "[o]ver twice as many federally affected as state preserve policies diffuse totally" with funding); Brian Galle & Joseph Leahy, *Laboratories of Democracy? Policy Innovation in Decentralized Governments*, 58 EMORY L.J. 1333, 1370, 1398 (2009) (concluding that "absent outside intervention, state and local governments will on the whole innovate at well below the socially optimal level"); see also TANI, *supra* note 22, at 16-19 (describing role of federal welfare programs in "state building").

agricultural stations, and welfare programs required federal agencies to work with states to adopt legislation to build state agencies that oversaw funds, examined state laws, and performed audits.²⁴⁹ In the New Deal era, the trend accelerated as federal administrators crafted new state unemployment laws²⁵⁰ and the Social Security Board wrote new model welfare laws.²⁵¹ Federal field agents worked behind the scenes to ensure that state legislatures passed laws consistent with national priorities²⁵²—consolidating state control over the welfare process, ensuring more consistent and uniform welfare hearing rules, and eliminating requirements that excluded people on the margins of the community from receiving benefits.²⁵³

Today, many federal agencies work with states applying to federal funding programs, like federal highway programs and Medicaid, to reduce uncertainty in the process. The Federal Highway Administration, for example, may offer states advice about how they interpret vague statutory requirements or federal regulations.²⁵⁴ DOL, for its part, works with states on legislation to review eligibility requirements, training, and reemployment programs for federal unemployment insurance.²⁵⁵

Some officials inside DOT have noted that they carefully limit advice or testimony in state legislatures to “defining” federal law without opining on the specifics of what state legislation should look like.²⁵⁶ But other federal officials provided more specific guidance. After Congress passed the ACA, officers inside HHS frequently provided detailed advice over whether state laws complied with requirements to qualify for Medicaid expansion. They actively tracked state

249. See JOHNSON, *supra* note 10, at 47.

250. See CLARK, *supra* note 22, at 28–29; see also Graves, *The Future of the American States*, *supra* note 22, at 35–38 (cataloguing state legislation written with the assistance of New Deal agencies).

251. TANI, *supra* note 22, at 47 (describing model state bills written in close consultation with SSB).

252. See, e.g., Karen M. Tani, *Welfare and Rights Before the Movement: Rights as a Language of the State*, 122 YALE L.J. 314, 322 (2012) (arguing that, in the welfare context, federal administrators used “rights language” as “an administrative tool, a substitute for more formal mechanisms of influencing the myriad administrative decisions occurring on the ground”).

253. See, e.g., TANI, *supra* note 22, at 47–49; PATTERSON, *FEDERALISM IN TRANSITION*, *supra* note 195, at 74–101 (describing the myriad effects of federal intervention into state welfare schemes).

254. Interview with Officer #23 (June 1, 2018).

255. See Eileen Poe-Yamagata, Jacob Benus, Nicholas Bill, Hugh Carrington, Marios Michaelides & Ted Shen, *Impact of the Reemployment and Eligibility Assessment (REA) Initiative*, IMPAQ INT’L, LLC 1–5 (2011), https://wdr.doleta.gov/research/FullText_Documents/ETAOP_2012_08_Impact_of_the_REA_Initiative.pdf [<https://perma.cc/VC3G-K53Q>] (reporting the results of a study commissioned by DOL of four states implementing “reemployment” programs and recommending reform).

256. Interview with Officer #23, *supra* note 254.

legislative efforts around the country, in order to ensure that states had the flexibility they sought without sacrificing the central goal of the program—to expand access to health insurance.²⁵⁷ This produced active negotiations between state and federal officials over the statutory language used in state legislation—negotiations that others have documented in other federal funding programs.²⁵⁸ In the process, federal officials openly pointed to legislation passed in certain states as models for other states to follow.²⁵⁹

One worry is that federal aid will not build state independence, as much as coerce states to commit to programs that limit flexible policymaking and spending.²⁶⁰ A federal agency’s power to exercise the “nuclear option”—to totally cut off needed federal funds—could cudgel states into accepting legislation they do not like. Some Idaho legislators, for example, complained that HHS coerced them into supporting the 2008 modifications to the Uniform Interstate Family Support Act, arguing that the Act would force Iowa’s courts to adopt “sharia law.”²⁶¹ (In fact, the Act only required states to recognize support orders in other jurisdictions, consistent with the United States’ obligations under the Hague Convention.²⁶²) Adoption of the Uniform Act has been required in exchange for continued federal funding for child-support enforcement since 1996.²⁶³ In the end, to avoid losing federal funding, the governor’s office called an extraordinary session of the Idaho legislature, pointing to letters from HHS that threatened to

257. Interview with Officer #25, *supra* note 159.

258. See Bridget A. Fahey, *Consent Procedures and American Federalism*, 128 HARV. L. REV. 1561, 1564-65 (2015); Gluck & Huberfeld, *New Health Care Federalism*, *supra* note 160, at 10; Ryan, *supra* note 22, at 24-28.

259. See Interview with Officer #25, *supra* note 159.

260. Whether state decisions to accept funding are “voluntary” or “coercive” is the subject of a voluminous literature. See, e.g., Abbe R. Gluck, *Our [National] Federalism*, 123 YALE L.J. 1996, 2030-31 (2014); Samuel R. Bagenstos, *The Anti-Leveraging Principle and the Spending Clause After NFIB*, 101 GEO. L.J. 861, 916-20 (2013); Mitchell N. Berman, *Coercion, Compulsion, and the Medicaid Expansion: A Study in the Doctrine of Unconstitutional Conditions*, 91 TEX. L. REV. 1283, 1284 (2013).

261. Jeff Selle, *Sharia Law Fears Sink Child Support Bill*, BONNER CNTY. DAILY BEE (Apr. 11, 2015), <https://bonnercountydailybee.com/news/2015/apr/11/sharia-law-fears-sink-child-support-bill-7> [<https://perma.cc/JLZ6-KRH9>]; *Sharia Law Concerns Jeopardize Child Support Collection Bill*, IDAHO REPS. (Apr. 9, 2015), <https://blog.idahoreports.idahoptv.org/2015/04/09/sharia-law-concerns-jeopardize-child-support-collection-bill> [<https://perma.cc/S4LR-WCJ3>] (quoting the Idaho Freedom Foundation, a libertarian think tank, arguing that “Senate Bill 1067 subverts the sovereignty of both the state and the nation”).

262. UNIF. INTERSTATE FAM. SUPPORT ACT, Prefatory Note II.C (UNIF. L. COMM’N 2008).

263. See Preventing Sex Trafficking and Strengthening Families Act, Pub. L. No. 113-183, § 301, 128 Stat. 1919, 1944-45 (2014) (requiring adoption of UIFSA amendments and written in collaboration with the State Department and HHS).

cut off aid to a variety of state child-support services.²⁶⁴ With that being said, although the Supreme Court has emphasized that requiring whole new programs may result in the unlawful “economic dragooning” of state legislatures, it has said little about federal agency’s more routine authority to negotiate over specific language, or require the adoption of model legislation, as a condition of federal funding.²⁶⁵

* * *

All the collaborations described above highlight the subtle ways in which federal agencies work with state legislatures to influence state policy. Seen in this light, earlier studies of federal involvement in state law – which have largely focused on the last category of federal funding programs – can be seen as the endpoint of a spectrum. At one end, federal agencies can help elevate new policy ideas onto state legislative agendas through model laws or state testimony. Agencies’ influence may grow as they farm out technical, scientific, legal, or professional expertise to state legislatures that lack it; build state institutions with similar missions; and coordinate with them across state lines to help them endure and succeed. Finally, at the other end are large cooperative spending programs that can fund as much as ninety percent of new federal-state initiatives.²⁶⁶ Some of the examples described here may plausibly cause one to wonder whether more robust agency efforts in state legislation could impede independent state policymaking. But these examples also highlight that, as the federal government offers more, expertise, institutional support, and the promise of nationwide coordination, federal agencies help make new policies while also strengthening state governments’ own policymaking capacity.

264. See Letter from the Admin. for Child. & Fams., Dep’t of Health & Human Servs., to Kandace Yearsley, Dir., Idaho Child Support Program (Apr. 10, 2015), https://legislature.idaho.gov/wp-content/uploads/sessioninfo/2015/standingcommittees/150409_hjud_0130PM_Attachment_2.pdf [<https://perma.cc/6QUA-KME5>]; Samantha Wright, *Idaho Lawmakers Pass Child Support Legislation in Special Session*, BOISE STATE PUB. RADIO (May 18, 2015), <https://www.boisestatepublicradio.org/politics-government/2015-05-18/idaho-lawmakers-pass-child-support-legislation-in-special-session> [<https://perma.cc/L5MP-DLLP>].

265. See *Nat’l Fed’n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 577–582 (2012) (Roberts, C.J., joined by Breyer & Kagan, JJ.); *id.* at 681 (Scalia, Kennedy, Thomas & Alito, JJ., dissenting) (describing the high bar for establishing such claims, acknowledging that “[w]hether federal spending legislation crosses the line from enticement to coercion is often difficult to determine, and courts should not conclude that legislation is unconstitutional on this ground unless the coercive nature of an offer is unmistakably clear”).

266. For recent examples of generous matching-funding grants, see, for example, Infrastructure Investment and Jobs Act, Pub. L. No. 117–58, §§ 21201, 40701, 60102, 135 Stat. 429, 663, 1091, 1182 (2021) (setting matching-funding requirements for infrastructure, broadband, reclamation projects, and other programs); American Rescue Plan Act of 2021, Pub. L. No. 117–2, 135 Stat. 4 (2021) (establishing funding requirements for state COVID-19 relief efforts).

One could also ask if these forms of federal action involve administrative policymaking at all. After all, many of the agencies described above participate in an informal consensus-building process, which the agency itself never adopts, interprets, or enforces. And given that some model policies are never adopted by states, one could even argue that some of these efforts are instead a form of “federalism theater” – an opportunity for agencies to appear like they honor state sovereignty but one in which success is very far from assured.

But the reality of policymaking is far more complex than that. Policymaking, broadly defined, has always been “the struggle over ideas” – a mode of influence that political scientists have aptly characterized as “more powerful than money, votes, and guns.”²⁶⁷ Policymaking cannot occur without stakeholders and institutions who can define problems and set agendas. Framing those issues, in turn, requires resources and expertise. And additional resources and personnel are often vital when translating ideas into collective action so that political institutions can and will act.

In this way, the different collaborations between federal agencies and state government reflect real policy choices. In some cases, work on legislation reflects agencies’ substantive views about what makes for good policy based on their expertise, research, and collaboration with other interest groups.²⁶⁸ A number of agencies devote valuable personnel and funding to tracking state laws, identifying general policy outcomes, shaping law behind closed doors, or testifying in state legislatures about the merits of such legislation.²⁶⁹ Some commit considerable resources to studying the impact of state law on their own missions and share those insights with other state policymakers.²⁷⁰ The technical questions regarding state legislation that arise throughout this process can raise important policy considerations, as they often accompany an agency’s work on new federal legislation or an agency’s adoption of a new federal rule.²⁷¹ Finally, agencies stand to benefit as well. Some agencies affirmatively choose to work on implementing policies through the states to avoid the political constraints associated with encouraging new federal legislation.²⁷²

267. DEBORAH STONE, *POLICY PARADOX: THE ART OF POLITICAL DECISION MAKING* 11 (2002).

268. *See supra* Section II.B.2.

269. *See supra* Section II.C.1.

270. *See supra* Section II.C.2.

271. *See supra* Section III.A.

272. *See supra* notes 11-23 and accompanying text.

IV. IMPLICATIONS FOR ADMINISTRATIVE PROCESS

Understanding state legislative strategies as another form of policymaking carries important implications for classic debates in administrative law and federal governance. This Part highlights some potential issues for administrative procedure, while the next turns to those for “our federalism.” As discussed above, the descriptive findings in this Article cannot offer conclusive answers to these competing accounts and more work remains to be done. But the questions they raise underscore the importance of additional attention, inquiry, and examination into agency collaboration with state legislatures.

Traditional accounts of administrative policymaking often assume that agencies make policy subject to rules and oversight by judges, congressional committees, or the White House.²⁷³ To be sure, commentators have often criticized *non-binding* forms of agency conduct—like policy guidance, interpretative rules, and agency “jawboning” of private actors to act in particular ways²⁷⁴—for the dramatic effects they have on people’s lives without external oversight. But when agencies work with states to adopt *binding* new legal policies, they present as-yet unexplored ways that agencies govern in our polity, without the usual constraints meant to assure democratic participation, accountability, and deliberation.

For example, when an agency adopts a regulation under Section 553 of the APA, it is subject to elaborate procedural requirements that are intended to ensure that “interested parties” are aware of what the agency is doing, have the opportunity to submit evidence and argument, and can alert allies in Congress and the White House to the agencies’ activities.²⁷⁵ If the agency skirts these procedural requirements, courts, the White House, and, in some circumstances, Congress can undo its work.²⁷⁶ As a formal legal matter, none of these requirements apply to agencies’ work with state legislatures, even though these interactions also can result in changes to the law that can eclipse the practical importance of these safeguards. And because new state laws cannot be easily undone by a new presidential administration or by Congress, they theoretically could raise even more concerns than reversible guidance documents, interpretive rules, and other unreviewable agency actions. It is therefore natural to ask whether state policymaking is an end-run around structural and procedural

273. See Sohoni, *supra* note 28, at 931-36; Farber & O’Connell, *supra* note 28, at 1141-44.

274. See Parrillo, *supra* note 48, at 168-70; Derek E. Bambauer, *Against Jawboning*, 100 MINN. L. REV. 51, 57 (2015); Paul R. Verkuil, *Jawboning Administrative Agencies: Ex Parte Contacts by the White House*, 80 COLUM. L. REV. 943, 943 (1980).

275. See notes 46-47 and accompanying text.

276. See note 53 and accompanying text; *see also* Bechtel v. FCC, 10 F.3d 875, 878 (D.C. Cir. 1993) (“Sooner or later, the agency must meet its obligation to respond to criticisms.”).

controls that, in other settings, promote political accountability and reasoned decision-making.

As Section IV.A explains, for some, the lack of external controls certainly could prompt worries about capture, politicization, and presidential overreach when federal agencies work with state legislatures to usher binding new policies. But, as Section IV.B details, some of the findings here suggest these concerns can be mitigated without foregoing the benefits of agency-state collaboration, particularly for scholars who may favor such initiatives as a way to incrementally pilot, learn from, and expand new policies. Some agencies have already adopted procedures that may shield the core administrative-law values of inclusive, accountable, and flexible government decision-making. Moreover, several practical constraints prevent agencies from overreaching. In the process, the public may benefit from agency collaborations with state legislatures – promoting more visible and accountable policymaking inside the executive branch and the states.

A. *Challenges for Administrative Procedure and Administrative Law*

Agencies have always had a variety of tools to make policy, whether through rulemaking, adjudication, or guidance to private parties.²⁷⁷ But the assumption in those cases is that agencies adopt the policies themselves – or with another federal agency – subject to congressional limits, presidential oversight, or judicial review.²⁷⁸ Few traditional administrative controls exist to police agency work with state legislation. For administrative proceduralists, this legal lacuna could aggravate traditional concerns about capture, politics, and the President’s expanding role in making policy without Congress.

1. *No Legislative, Executive, and Judicial Limits*

No formal legislative, executive, or judicial oversight applies to the soft power and influence that federal agencies exercise over state legislation. First, although a variety of anti-lobbying statutes and appropriations riders exist to ensure that agencies are both politically neutral and politically accountable, none of them seem to apply directly to this kind of activity. In 2002, the Anti-Lobbying Act was extended to bar agencies that sought to influence “state or local

277. Magill, *supra* note 29, at 1386.

278. *Id.* at 1385. Agencies must clear their substantive views about federal legislation with the White House’s OMB. See Walker, *supra* note 30, at 1385-87 (describing OMB oversight of agency interactions with Congress); OMB CIRCULAR NO. A-19, *supra* note 31.

government units, on policies, legislation or appropriations.”²⁷⁹ Around that same time, Congress started attaching riders to the annual appropriations of a number of agencies, including HHS, DOT, and the CDC, that similarly limit federal officials from taking steps “designed to aid” state legislation or policy.²⁸⁰

However, both DOJ and GAO have interpreted these prohibitions very narrowly.²⁸¹ So long as they do not engage in “‘grass roots’ lobbying” of the public,²⁸² agencies can communicate directly with public officials “to facilitate an open dialogue between the agencies, departments, and officials in the various branches of government”²⁸³ This is because, as the Justice Department has explained, federal agencies simply cannot avoid talking to other government bodies if they are to remain effective and accountable. Nevertheless, it is important to note that almost no literature explains where these limits on state legislative involvement came from. Nor has Congress or any court ever taken steps to clarify what limits, if any, should exist when agencies communicate with state-government institutions.

Federal laws specific to some agencies also can define how agencies collaborate with states. As noted, Congress sometimes expressly requires administrative agencies to develop model state legislation, assist states’ policymakers applying for federal grants, or to convene joint conferences with state policymakers to address new priorities.²⁸⁴ But, even the most specific statutes are broadly written

279. CONG. RSCH SERV., R441154, LOBBYING CONGRESS WITH APPROPRIATED FUNDS: RESTRICTIONS ON FEDERAL AGENCIES AND OFFICIALS 1 (2015) (describing 18 U.S.C. § 1913, as amended by Pub. L. No. 107-273, § 205(a), 116 Stat. 1758, 1777-78 (2002)).

280. See generally Medicare Prescription Drug, Improvement, & Modernization Act of 2003—Use of Appropriated Funds for Flyer & Print & Television Advertisements, B-302504, 2004 WL 523435, at *5 (Comp. Gen. Mar. 10, 2004) (discussing the history of “publicity or propaganda” riders).

281. In guidance to agencies, the Justice Department observes that the Constitution itself contemplates “that there will be an active interchange between Congress, the Executive Branch, and the public concerning matters of legislative interest.” Anti-Lobbying Restrictions Applicable to Cmty. Servs. Admin. Grantees, 5 Op. O.L.C. 180, 185 (1981).

282. An example of a “grass roots” lobbying campaign would be letters, emails, social media, or “other forms of private communication” that directly ask the public to contact and pressure “Members of Congress to support Administration or Department legislative or appropriations proposals.” See Application of 18 U.S.C. § 1913 to “Grass Roots” Lobbying by Union Representatives, 29 Op. O.L.C. 179, 179 (2005) (“Central to our analysis is the distinction between direct and ‘grass roots’ lobbying.”).

283. See CONG. RSCH SERV., *supra* note 279, at Summary; see also Mem. Op. for the Gen. Couns. Dep’t of Com., *supra* note 282, at 179 (“[W]e have stated that 18 U.S.C. § 1913 ‘does not apply to direct communications between Department of Justice officials and Members of Congress and their staffs . . . in support of Administration or Department positions,’ but that the statute ‘may prohibit substantial “grass roots” lobbying campaigns”).

284. See *supra* notes 90-93 and accompanying text.

and do not address the important “how” questions for administrative procedure: How transparently should agencies act? How should agencies hear from, weigh, and respond to various stakeholders? How much should agencies account for differences between states when they interpret their own obligations under federal law? These questions become murkier for agencies operating under more indirect grants of congressional power—to communicate administrative expertise and priorities to the public or as an extension of the agencies’ primary mission in areas that frequently cross state or international lines. Although it has long been perfectly appropriate to communicate with states for these reasons,²⁸⁵ little legislative guidance exists to guard against mission creep.²⁸⁶ Without federal judicial review, the boundaries of appropriate agency action in these areas could fall to the executive branch alone.

Moreover, no direct relationship appeared to exist between the kinds of processes agencies used when working with state governments and the directness of the statutory authority Congress granted agencies to do so. For example, federal transportation-department agencies and DHS arguably carry similar authority to work with state governments in effectuating the Real ID Act in state governments. But they historically have operated under very different levels of transparency. Officials from the National Safety Transportation Board frequently publicly testify in state legislatures; DHS has a policy *against* public testimony in state legislatures.²⁸⁷

In other cases, agencies with less direct legal authority to work with state governments may work with other federal agencies who possessed more explicit legal authority to do so—a fascinating illustration of how agencies may sometimes “pool” their federal powers to yield changes through *state* law.²⁸⁸ For

285. The Justice Department, for example, has broadly viewed direct communications between executive branch agencies, legislators, and the public as important to ensure a “general open dialogue with the public on the Administration’s programs and policies.” Constraints Imposed by 18 U.S.C. § 1913 on Lobbying Efforts, 13 Op. O.L.C. 300, 304 (Sept. 28, 1989).

286. In the rare case that direct interaction somehow falls outside the scope of one agency’s organic statute, examples of interagency coordination by the State Department and the Department of Commerce described in Part III highlight that sometimes agencies can enlist help from others with more direct authority—an unusual illustration of “pooling” federal powers to yield changes through state law. See *supra* Part III. See generally Renan, *supra* note 30 (documenting pooling of federal powers across a range of agencies).

287. Compare *supra* note 158 and accompanying text, with *Operating a Vehicle While Impaired/.05 Blood Alcohol Concentration: Hearing on S.B. 160 Before the Comm. on Judiciary*, 32d Leg., Sess. 2 (Haw. 2023) (written statement of Thomas Chapman, Bd. Member, Nat’l Transp. Safety Bd.) (“[W]e rely on the persuasive power of our comprehensive investigations and research to encourage the recipients of our recommendations to act to improve safety.”).

288. See Renan, *supra* note 30, at 211 (“This Article documents pooling across a range of policy domains, identifies its mechanisms, explores its structural and analytic implications, exposes legal questions that it raises, and provides a preliminary normative assessment.”).

example, as discussed in Part III, the State Department and HHS collaborated in the development and implementation of model state legislation to bring U.S. child-custody arrangements into compliance with the Hague Convention, after Congress required states to work with HHS to receive federal funding for state child-support and welfare programs.²⁸⁹

Gaps also exist in the executive branch. No centralized oversight exists in the White House to coordinate agencies that work with state governments. The White House's OMB reviews agencies that offer substantive opinions on federal legislation.²⁹⁰ No similar structure exists for the review of agency involvement in state legislation. The White House Office of Intergovernmental Affairs theoretically exists to cooperate with state and local governments. But even if it could dramatically expand its resources, staff, and operations, it could not respond to every agency, working with every state, city, and tribe in the nation.²⁹¹ And without formal departments inside agencies to gather, organize, and share information, executive oversight is likely to be sporadic, inconsistent, and difficult.²⁹²

Finally, unlike traditional agency policymaking, almost no federal judicial oversight applies to the ways that agencies formulate policies with state legislatures. When agencies help states adopt rules, the policies that agencies encourage states to adopt are not reviewed directly in federal court. Rather, those policies will be mostly challenged in state courts, under state law, aggravating opportunities for "bureaucratic drift" — the idea that agencies will diverge from

289. See Preventing Sex Trafficking and Strengthening Families Act, Pub. L. No. 113-183, 128 Stat. 1919 (2014) (requiring HHS to "ensure compliance" with any "multilateral child support conventions"); Interview with Officer #17, Dep't of State (May 10, 2018); William H. Henning, *The Uniform Law Commission and Cooperative Federalism: Implementing Private International Law Conventions Through Uniform State Laws*, 2 ELON L. REV. 39, 54-55 (2011) (describing the close relationship between the State Department's Private International Law unit and the ULC).

290. Legislative proposals by federal agencies qualify as a form of "advice" when the proposals include "any proposal for or endorsement" of federal law to Congress or "any study group, commission, or the public." OMB CIRCULAR NO. A-19, *supra* note 31, §§ 4-5. Substantive advice also includes "[a]ny written expression of official views" that agencies prepare on pending bills or "testimony before a congressional committee." *Id.* § 5. OMB does not review agencies offering technical advice, although the line between the two is not always clear. See Walker, *supra* note 30, at 1388-89.

291. See Tina Trenkner, *Office of Intergovernmental Affairs: More Influential Than Ever*, GOVERNING (Sept. 29, 2011), <https://www.governing.com/topics/politics/white-house-office-intergovernmental-affairs-more-influential.html> [<https://perma.cc/7QLA-DTCG>] ("The small size of the IGA — its staff consists of fewer than a dozen people — belies its enormous mission: serving as the administration's liaison to every elected official in the country, outside of Congress.")

292. See *supra* Section II.C.1 (describing agencies without formal departments that coordinate with states).

their missions, particularly without oversight by federal courts, who supposedly act as “faithful agents” of Congress’s will.²⁹³

2. *Danger for Capture, Politics, and Presidential Power*

The lack of any consistent administrative process here, in turn, raises traditional concerns about capture, politics, and presidential power in administrative law. First, a pervasive concern in administrative law is “capture,” where regulators cater to the very groups they regulate.²⁹⁴ However, when federal agencies influence state legislation, they create the prospect of capture *all the way down*, where private interests stand just behind the curtains of an agency initiative, pursuing reform throughout all fifty states. When the FTC submits formal testimony to eliminate state laws that bar car manufacturers from selling their products over the internet,²⁹⁵ the impact of its decisions might be felt not only in new federal regulations, which can always be reversed in a new administration, but also in states and, by extension, city governments. Opponents of a bill that would have expanded the SBA’s Office of Advocacy’s jurisdiction and authority to weigh in on legislation impacting small businesses have made similar

293. See, e.g., Amy Coney Barrett, *Substantive Canons and Faithful Agency*, 90 B.U. L. REV. 109, 110 (2010) (explaining the tension between courts employing statutory canons that require restraint and courts adopting more aggressive canons that “advanced policies independent of those expressed in the statute”); Matthew C. Stephenson, *Legislative Allocation of Delegated Power: Uncertainty, Risk, and the Choice Between Agencies and Courts*, 119 HARV. L. REV. 1035, 1043 (2006) (applying slack-minimization theory to legislative delegation, explaining why legislators might prefer delegating to an agency rather than a court); Jerry L. Mashaw, *Norms, Practices, and the Paradox of Deference: A Preliminary Inquiry into Agency Statutory Interpretation*, 57 ADMIN. L. REV. 501, 505 (2005) (noting that the role of “faithful agents” of the legislature is more complicated for courts than for agencies as courts “must somehow balance their position as faithful agents of the Constitution and Congress, [while] agencies seem to enjoy a less conflicted constitutional role”).

294. See George J. Stigler, *The Theory of Economic Regulation*, 2 BELL J. ECON. & MGMT. SCI. 3, 3 (1971) (arguing that regulation is “designed and operated primarily for [an industry’s] benefit”); Richard B. Stewart, *The Reformation of American Administrative Law*, 88 HARV. L. REV. 1667, 1713 (1975) (noting widespread recognition of the phenomenon of overrepresentation of regulated interests leading to persistent policy bias in favor of said interests); Rachel E. Barkow, *Insulating Agencies: Avoiding Capture Through Institutional Design*, 89 TEX. L. REV. 15, 21-24 (2010) (explaining factors causing the agency-capture phenomenon); Michael A. Livermore & Richard L. Revesz, *Regulatory Review, Capture, and Agency Inaction*, 101 GEO. L.J. 1337, 1343 (2013) (“Agency capture is a special case, where regulators within the bureaucracy have been influenced by organized special-interest groups to adopt policies that are out of line with the broad public interest.”).

295. See *supra* Section II.B.2 (describing FTC testimony benefiting online car dealers).

arguments, claiming it “merely aggrandizes the power . . . of the professional lobbying class in Washington.”²⁹⁶

Relatedly, involvement in state politics could also sow new distrust in agencies that pride themselves on their insulation from politics,²⁹⁷ particularly as their officials testify and reach out to increasingly partisan statehouses. Experiments with legislation, state-by-state, not only create a laboratory for new policy innovations, but in our increasingly polarized politics, could pave a way for agencies to road-test increasingly pitched partisan ones as well.²⁹⁸

In high-profile cases, one could even imagine presidential administrations — with increasing power over the structure and personnel in the administrative state²⁹⁹ — unilaterally avoiding Congress to make policies with only friendly state legislatures from the same party.³⁰⁰ To be sure, Presidents have already exhibited many of the administrative techniques that then-Professor Elena Kagan captured in *Presidential Administration* in their work with state legislation.³⁰¹ Kagan herself featured President Clinton’s work with the Secretary of Labor as a paradigmatic form of presidential control over the administrative state, highlighting when the President and the Secretary appeared together to jointly unveil new rules expanding state unemployment insurance for family medical leave.³⁰² Notably,

296. H.R. REP. NO. 114-12, pt. 1, at 74-75 (2015).

297. See RONALD N. JOHNSON & GARY D. LIBECAP, *THE FEDERAL CIVIL SERVICE SYSTEM AND THE PROBLEM OF BUREAUCRACY: THE ECONOMICS AND POLITICS OF INSTITUTIONAL CHANGE* 7 (1994) (“[Career employees] have strict tenure guarantees, have no expressed ties to the administration or to Congress, and by law are to be politically neutral.”). For broader discussions of the federal administrative state’s insulation from partisan politics, see generally Jon D. Michaels, *An Enduring, Evolving Separation of Powers*, 115 COLUM. L. REV. 515 (2015); and Jennifer Nou, *Agency Self-Insulation Under Presidential Review*, 126 HARV. L. REV. 1755 (2013).

298. See Livermore, *supra* note 233, at 638-39.

299. See, e.g., *United States v. Arthrex*, 141 S. Ct. 1970, 1982 (2021) (“The activities of executive officers may ‘take “legislative” and “judicial” forms, but they are exercises of—indeed, under our constitutional structure they *must be* exercises of—the “executive Power,” for which the President is ultimately responsible.” (quoting *Arlington v. FCC*, 569 U.S. 290, 305 n.4 (2013))).

300. In this way, writing state legislation creates some of the same possibilities and concerns as agencies that waive federal funding requirements for state education and insurance programs. See Bulman-Pozen, *supra* note 2, at 1944.

301. See Kagan, *supra* note 53, at 2284-85 (discussing three modes of presidential control used by President Clinton).

302. See *id.* (“Although the public comment period on this proposal had yet to begin, Clinton spoke of the plan . . . as essentially consummated.”).

shortly after her article was published, the Labor Department would publish that rule with a model state law included in its appendix.³⁰³

This is not a criticism of presidential power over the administrative state. More consistent oversight in the executive branch could enhance deliberation inside and across agencies with overlapping missions. But it highlights the stakes state legislative strategies present for broader debates in administrative law, including whether Presidents, experts, courts, Congress, or interest groups offer better ways to control the administrative state.³⁰⁴ Presidential control—or control by any other kind of political or nonpolitical actor—does not just mean more power over federal law. Whoever commands more control over federal agencies can assume a greater role inside state legislative agendas as well.³⁰⁵

B. *Possibilities for Administrative Law*

All of these concerns—capture, politics, and presidential power—stand in tension with a model of administration governed by formalized rules designed to promote public participation, accountability, and flexible, innovative policy-making.³⁰⁶ But as explained below, agencies do not act free of constraints simply because the APA does not apply or because federal judges or top executive-branch officials do not review what they do. Some agencies have adopted a blend of procedures for working with state governments that could provide models for others.³⁰⁷ Such a process may hold promise for scholars who believe that agencies can offer a public counterweight to capture in state legislatures while

303. Birth and Adoption Unemployment Compensation, 65 Fed. Reg. 37,210, 37,210 (June 13, 2000) (to be codified at 20 C.F.R. 604) (describing the model legislation in Appendix A and additional commentary on the model law in Appendix B).

304. See, e.g., Matthew C. Stephenson, *Optimal Political Control of the Bureaucracy*, 107 MICH. L. REV. 53, 64 (2008); Kagan, *supra* note 53, at 2260-64; Richard B. Stewart, *The Reformation of American Administrative Law*, 88 HARV. L. REV. 1667, 1676-81 (1975) (describing the persistence of different models of agency oversight and legitimacy).

305. See Bulman-Pozen, *supra* note 2, at 1938; Seifter, *supra* note 67, at 447-48 (describing the tension between presidential control and greater collaboration with state government).

306. See Peter L. Strauss, *From Expertise to Politics: The Transformation of American Rulemaking*, 31 WAKE FOREST L. REV. 745, 753 (1996); Barkow, *supra* note 294, at 20 (“Related to the goal of expertise is a desire to insulate agency decisions from the sort of political horse-trading that is anathema to impartial decision making.”).

307. See Elizabeth Magill, *Agency Self-Regulation*, 77 GEO. WASH. L. REV. 859, 860 (2009) (describing how agencies “limit their procedural freedom by committing to afford additional procedures . . . not required by any source of authority”).

promoting needed dialogue with states in ways that are even more accountable to national and local concerns.³⁰⁸

1. *Internal Procedures and External Constraints*

First, many agencies have adopted internal procedures to hear from stakeholders, promote transparency, and ensure more formal oversight inside and outside the agency, which others could easily adopt. These procedures carry the potential to, in turn, foster more transparency, public input, and deliberation in state legislative action. For example, NHTSA, FCC, the Federal Railway Commission, and DOL have all voluntarily subjected their guidance for states to notice and comment procedures when considering model legislation.³⁰⁹ Third-party organizations, like the ULC and the North American Association of Securities Administrators, also provide robust levels of participation and deliberation when adopting model laws.³¹⁰

These procedures, which also exist in the APA, have long been embraced to promote more open, consistent, and deliberative forms of decision-making for legislation likely to impact large interests.³¹¹ But they have their downsides. Notice-and-comment rulemaking is onerous. Agencies must prepare a detailed notice of proposed rules, wait for comments from stakeholders, review and weigh the merits of those comments, adjust their positions accordingly, broker internal politics inside and across agencies, and finally, publicly explain why they adopted the rule they did. As a result, critics have complained that notice-and-comment rulemaking can be rigid, favor wealthy organized interests,³¹² and unnecessarily

308. See, e.g., NOVAK, *supra* note 100, at 237 (“Though today ‘regulatory capture’ by special interests is usually associated with administrative agencies, it must be remembered that modern administration originally developed as an explicit response to the ‘capture’ of supposedly democratic legislatures . . .”).

309. See *supra* Section II.C.3.

310. See *id.*; see also *Request for Comment Archive 2007-2014*, N. AM. SEC. ADM’RS ASS’N, <https://www.nasaa.org/policy/regulatory-policy/request-for-comment-archive> [https://perma.cc/H4WL-D8WP] (listing proposals to adopt, amend, or repeal NASAA Model Rules and Statements of Policy).

311. See William Funk, *Public Participation and Transparency in Administrative Law—Three Examples as an Object Lesson*, 61 ADMIN. L. REV. 171, 174 (2009) (chronicling and criticizing procedures used to promote transparency in administrative law).

312. MANCUR OLSON, *THE LOGIC OF COLLECTIVE ACTION: PUBLIC GOODS AND THE THEORY OF GROUPS* 53-65 (1965) (explaining that small, organized groups are usually more effective than larger groups in shaping policy); Richard B. Stewart, *The Reformation of American Administrative Law*, 88 HARV. L. REV. 1667, 1684-85 (1975) (“[A]gencies unduly favor organized interests, especially the interests of regulated or client business firms and other organized groups at the expense of . . . comparatively unorganized interests such as consumers, environmentalists, and the poor.”).

consume precious time and resources, especially when subject to additional judicial and congressional review.³¹³ And even when notice-and-comment rulemaking works, one may wonder if the process might work *too well* when it comes to state legislation – sweeping in the voices of the nation, rather than only those people in the particular state the agency ultimately influences.

Those risks, however, may be outweighed by the benefits rulemaking offers for deliberative democratic policymaking.³¹⁴ Rulemaking can offer more deliberative, reasoned, data-driven, and transparent decisions, especially given the substantial influence sophisticated players already exert when state legislatures act on their own. By proposing model state legislation – which can then be modified in statehouses over time – agencies have offered states a form of policymaking that can evolve more incrementally than traditional uniform legislation. As such, this particular form of rulemaking offers additional opportunities for experimentation, learning, and local tailoring.³¹⁵ It is notable that some forms of agency action, like those used in EPA citizen petitions,³¹⁶ actually *can* respond specifically to local organization and stakeholders.

Finally, notice and comment need not be the default, given that agencies will not adopt proposed state laws themselves. Agencies have taken other steps to promote participation and inclusion given the influential role their comments can have on proposed state legislation.³¹⁷ Some agency officials connect with more hard-to-reach populations using roundtables, outreach, conventions, and Federal Advisory Committees (which are often comprised of different

313. Richard J. Pierce, Jr., *Judicial Review of Agency Actions in a Period of Diminishing Agency Resources*, 49 ADMIN. L. REV. 61, 85-87 (1997) (“[L]ooking only at the short-term effects of the alternatives available to the courts, there is little doubt that a flexible, forgiving judicial approach is vastly superior to . . . rigid adherence to doctrine . . .”); Mark Seidenfeld, *Demystifying Deossification: Rethinking Recent Proposals To Modify Judicial Review of Notice and Comment Rulemaking*, 75 TEX. L. REV. 483, 520-21 (1997) (discussing uncertainty resulting from agencies’ inability to predict the depth of analysis that a reviewing court would deem sufficient).

314. JERRY L. MASHAW, REASONED ADMINISTRATION AND DEMOCRATIC LEGITIMACY: HOW ADMINISTRATIVE LAW SUPPORTS DEMOCRATIC GOVERNMENT 157-58 (2018) (“For deliberative democrats, coercive government action is justified in impinging on individual liberty to the extent that government can give public-regarding reasons that all citizens might accept.”).

315. See, e.g., *supra* notes 159-161 and accompanying text (describing incremental experimentation in the ACA rollout).

316. See *supra* notes 230-232 and accompanying text.

317. See Brian D. Feinstein & Daniel J. Hemel, *Outside Advisers Inside Agencies*, 108 GEO. L. J. 1139, 1203-04 (2020) (describing the increased responsiveness of federal advisory committees to electoral politics and presidential administration); Brian D. Feinstein, *Identity-Conscious Administrative Law: Lessons from Financial Regulators*, 90 GEO. WASH. L. REV. 1, 15-38 (2022) (describing tools to increase representation and consultation in agency decision-making outside federal rulemaking).

stakeholders).³¹⁸ The CDC Public Health Program not only shares other state laws on its website and in individual discussions with states but often subjects its assessments to peer review.³¹⁹ Others will share their thoughts with state associations, conducting weekly calls or appearances at the National Governor's Association, the NCSL, and other organizations to explain what other states were doing.³²⁰ Even as some critiqued HHS for its approach to Obamacare, for example, HHS received praise for creating opportunities for states to share information about their approved legislation with each other.³²¹

Another set of options are more internal forms of oversight. Internal oversight may be particularly important in independent agencies, which are not subject to direct oversight by the President. Moreover, given that many regulatory bodies have internal departments with obligations that exist in tension with one another. For example, OPP's view about whether state law promotes "competitiveness" could raise tensions with a competing division of the FTC that promotes consumer protection.³²² Before submitting state legislative testimony, it circulates statements to its major divisions, as well as to all Commissioners.³²³ The FTC and SBA have also periodically used surveys and other measures to test the effectiveness of their advocacy on state legislatures.³²⁴

318. Interview with Officers #13 & #14, *supra* note 148; Interview with Officer #18, *supra* note 162 (describing the federal advisory-committee process prior to international negotiations likely to impact state policy); see *supra* notes 163-163 and accompanying text.

319. See *supra* notes 203-209 and accompanying text.

320. See Interview with Officer #25, *supra* note 159.

321. See Gluck & Huberfeld, *New Health Care Federalism*, *supra* note 160, at 12 ("Even federal officials were . . . singled out by our interviewees for establishing mechanisms for states to share information about Medicaid expansion.").

322. See Interview with Officer #2, *supra* note 112 (acknowledging the possibility of interagency tension but unable to identify a specific example of that occurring).

323. See *supra* notes 123-125 and accompanying text. SEC's Office of Investor Advocate takes a different approach. It remains totally separate from SEC. Accordingly, when it submits comments on model state legislation, the Commission affirmatively disclaims responsibility for its statements and findings. See, e.g., Off. of Inv. Advoc., Comment Letter on NASAA's Proposed Model Legislation or Regulation to Protect Vulnerable Adults from Financial Exploitation 1 n.1 (Oct. 29, 2015), <https://www.sec.gov/about/offices/investorad/comment-letter-nasaa-investor-advocate-102915.pdf> [<https://perma.cc/X4UU-HM3D>] (noting that the letter "does not necessarily reflect the views of the Commission, the Commissioners, or staff of the Commission, and the Commission disclaims responsibility for this letter").

324. See Cooper, Pautler & Zywicki, *supra* note 102, at 1093, 1105-11 (tracking OPP comments and surveying results); Celnicker, *supra* note 102, at 391-93 (reporting results of a survey with federal and state legislators); SBA May 2013 Report, *supra* note 19, at 7 (observing that the SBA had measured state legislative advocacy through 2011 where it resulted in state legislation, but would drop future efforts).

Such everyday agency safeguards could mean that an agency's organic statute – which often defines competing goals, modes of analysis, and topics of investigation – may facilitate accountable decision-making, even in the absence of external review by courts or the political branches. The limited case studies in this Article align with others that find that agencies' substantive legal missions and internal structures demand “ideas to be reviewed, vetted, and tested” by others with different “judgment and expertise . . . in the policymaking process.”³²⁵ For example, a branch of the CDC frequently works with other national organizations of healthcare workers, including the Association of State Territorial Health Officials, to understand and share state laws. Although a small program, a big benefit of the CDC program is that it has helped “organize a community” across different actors and groups across the country.³²⁶ DOD identified similar benefits from debate between and among government officials over novel legal questions and policies.³²⁷ Even when multiple agencies combine their powers from different statutory authorities to influence state law, they may also generate more publicity, participation, and input than when they work alone. For example, in the context of child custody obligations, HHS frequently issues “information memoranda” to educate the public about model state legislation, while the State Department convenes groups of stakeholders for the purposes of negotiating and integrating U.S. treaty obligations into state law.³²⁸

It is worth noting that, even in the absence of internal procedures, many practical, judicial, and political safeguards exist. How an agency is organized, financed, and staffed can also impose very real practical constraints on federal interactions with states. Even the most formal departments and budgets can be slim and tight. The SBA's ten regional officers frequently testify in state legislatures. But, with a budget of approximately \$10 million and a limited team of lawyers, it cannot be everywhere at once.³²⁹ With tight budgets and small staffs, many agencies simply lack the infrastructure to overreach when dealing with

325. Bernstein & Rodríguez, *supra* note 83.

326. Interview with Officers #15 & #16, *supra* note 152.

327. Interview with Officers #13 & #14, *supra* note 142.

328. See, e.g., Off. of Child Support Servs., *Uniform Interstate Family Support Act (2008) and Hague Treaty Provisions, IM-15-01*, U.S. DEP'T OF HEALTH & HUM. SERVS. (Apr. 13, 2015), <https://www.acf.hhs.gov/css/policy-guidance/uniform-interstate-family-support-act-2008-and-hague-treaty-provisions> [<https://perma.cc/C9MN-UBRU>] (describing “consensus among the Uniform Law Commission (ULC), the U.S. Department of State, the Federal Office of Child Support Enforcement (OCSE), and state and local child support practitioners” for integrating international obligations through model state legislation).

329. See Off. of Advoc., *FY 2024 Congressional Budget Justification and FY 2022 Annual Performance Report*, U.S. SMALL BUS. ADMIN. 175 (Mar. 13, 2024), https://www.sba.gov/sites/default/files/2023-08/FY_2024_CBJ_2023.08-508.pdf [<https://perma.cc/88LG-HHG5>] (averaging roughly \$9-10M between 2017 and 2023).

state governments. And frequently, other factors beyond federal agencies' control, such as federal funding, support from outside interest groups, and raw politics can play as much a role in the successful diffusion of new state legislation.³³⁰

Second, while federal judges would not review federal agency action, state judges often can review regulatory programs once they are adopted by state legislatures. And, in some cases, state courts will hear even more actions,³³¹ conduct stricter review,³³² defer less to agency independence,³³³ and impose more sweeping remedies for state regulatory programs than those available in federal courts.³³⁴ Federal judicial review may also exist—at least for challenges that relate to some federally funded programs or those that touch on other federal statutory or legal rights.³³⁵

Finally, to this end, one also cannot ignore that, after agencies adopt a model rule, it is still subject to meaningful democratic constraint: a vote in a state legislature. Of course, once written, it can be difficult for those outside of the drafting process to change legislative bills.³³⁶ But model laws and other forms of agency policymaking will have gone through far more vetting than many other forms of legislation in statehouses that operate part-time. And collaborations between agencies and legislatures carry the potential to draw more attention to

330. See, e.g., Erin N. Kauffman, *The Uniform Act on Prevention of and Remedies for Human Trafficking: State Law and the National Response to Labor Trafficking*, 41 J. LEGIS. 291, 299 (2015) (describing hurdles to state adoption of the Justice Department's model state law to prevent human trafficking, after outside groups criticized "its gaps and inconsistencies"); Patterson, *The New Deal and the States*, *supra* note 195, at 76-79 (describing partisan timing and funding obstacles to successful adoption of "little New Deal Acts" in the states).

331. See Helen Hershkoff, *State Courts and the "Passive Virtues": Rethinking the Judicial Function*, 114 HARV. L. REV. 1833, 1844, 1886-91 (2001) (describing the comparative willingness of state courts to issue advisory opinions, resolve moot disputes, and decide political questions).

332. See Aaron J. Saiger, *Chevron and Deference in State Administrative Law*, 83 FORDHAM L. REV. 555, 557 (2014) (collecting surveys of states' "mixed reception" to *Chevron* deference of state agencies); Aaron-Andrew P. Bruhl & Ethan J. Leib, *Elected Judges and Statutory Interpretation*, 79 U. CHI. L. REV. 1215, 1249-54, 1277-82 (2012) (explaining that elected judges in state courts have less reason to defer to administrative agencies than unelected federal judges).

333. See Miriam Seifter, *Understanding State Agency Independence*, 117 MICH. L. REV. 1537, 1543 (2019) (observing states courts take a less categorical approach to the independence of state agencies).

334. See L. JAFFE, *JUDICIAL CONTROL OF ADMINISTRATIVE ACTION* 162-64 (1965) (collecting a wide variety of state-court approaches to reversing agency actions through mandamus).

335. See, e.g., Sohoni, *supra* note 23, at 1707 (describing the challenges to litigating federal spending programs, but observing that after *Massachusetts v. EPA*, "Article III standing sometimes materializes in unexpected ways").

336. See Shipan & Volden, *Seven Lessons*, *supra* note 166, at 791 (describing the tendency for blind imitation of policies in some states); Balla, *supra* note 166, at 229-33, 235-42.

those policies than when either acts on their own.³³⁷ For example, even though Congress never formally restrained the FTC from “meddling” in state affairs, the fear that a future Congress or state delegation might lead it to dial back its work in state legislatures and reform its procedures for doing so.³³⁸ Such formal and informal constraints seem to have kept many agencies in check, creating yet another “political safeguard” against federal overreach.³³⁹

2. *Combatting Capture While Promoting Dialogue and Accountability*

To the extent these internal political, judicial, and democratic constraints exist, state legislative strategies could offer an intriguing way to combat capture, promote dialogue, and expand democratic accountability.

First, agency involvement in state legislation could counter the enormous influence of special interests in the statehouses.³⁴⁰ There is historical support for this: public agencies originally emerged as a way to protect the democratic process from large cartels and railroads that dominated state legislative machines in the early twentieth century.³⁴¹ Today, those concerns still resonate. Without assistance from federal agencies, many state legislative bodies remain prone to capture by organized interests lobbying for their own model laws.³⁴² And states with less policymaking staff, sessions, and pay tend to be more swayed by less visible, highly organized interests.³⁴³ Federal agencies themselves have argued that their own presence is needed to even the scales.³⁴⁴ To be sure, the idea of what

337. Cf. Bulman-Pozen, *supra* note 2, at 1944 (“There is, for instance, more likely to be public visibility and debate when both the states and the federal executive are cohabiting a statutory scheme.”).

338. See *supra* note 135 and accompanying text.

339. Kramer, *supra* note 2, at 283 (describing how states have been able to use their position in the administrative system to protect state institutional interests in Congress).

340. For an old survey describing the authority state-agency officials enjoy over private lobbyists with state legislators, see, for example, Glenn Abney, *Lobbying by the Insiders: Parallels of State Agencies and Interest Groups*, 48 PUB. ADMIN. REV. 911, 912 (1988), which found that nearly half of state legislators surveyed saw public lobbyists for agencies as serving a more trusted “informant” role than private lobbyists.

341. See NOVAK, *supra* note 100, at 238–39.

342. See Tyler & Gerken, *supra* note 25, at 2204–06; Hertel-Fernandez, *supra* note 27, at 583; Shipan & Volden, *Seven Lessons*, *supra* note 166, at 790; Martin Gilens & Benjamin I. Page, *Testing Theories of American Politics: Elites, Interest Groups, and Average Citizens*, 12 PERSPS. ON POL. 564, 565 (2014).

343. See Hall & Deardorff, *supra* note 24, at 73–76; Hertel-Fernandez, *supra* note 27, at 585; Seifter, *supra* note 36, at 111.

344. See Interview with Officer #1, *supra* note 109; Cooper, Pautler & Zywicki, *supra* note 102, at 1092 (containing the insights of former OPP officers who observed the same phenomenon).

constitutes a “special interest” or “capture” rests in the political eyes of the observer. ALEC’s endorsement of model legislation by the SBA and Commerce Department, for some, will show that agencies may be allies with business interests as often as they are combatants in statehouses.³⁴⁵ However, with the internal controls, monitoring, and political checks described above, agencies could promote more transparency, analysis, and deliberation in state politics, regardless of who they collaborate with.³⁴⁶

Moreover, it is unclear that state legislative strategies will promote more distrust in government than there already is. Agency efforts to write and influence state law certainly have not attracted a lot of attention, even though they have continued for the past century. Agency officials already resist political spotlight, and many of the issues raised by agencies in these cases fall outside our political radar in areas that often enjoy widespread bipartisan support—like human trafficking, opioid regulations, consumer protection, small-business interests, and veterans’ families.³⁴⁷ And the upsides of more open dialogue between federal and

345. See Options Paper on Product Liability and Accident Compensation Issues, 43 Fed. Reg. 14612, 14616-17 (Apr. 6, 1978) (proposing legislation to limit tort suits when defendants comply with government regulations); Bell, *supra* note 182 (describing ALEC’s involvement in promoting the Commerce Department’s proposed tort-reform legislation).

346. See, e.g., Sharkey, *supra* note 3, at 2127-28 (arguing that federal agencies are better-equipped than Congress to make decisions protecting state regulatory interests and advocating for reforms for more deliberation with and participation by state governmental entities). A recent example of such transparency, analysis, and deliberation is the Labor Department’s State Exchange on Employment & Disability (SEED). See Daniel Weissbein, Lester Coffey, Michelle Yin, Cynthia Overton, Deeza-Mae Smith & Dong Hoon Lee, *State Exchange on Employment and Disability (SEED) Formative Evaluation, Final Report*, U.S. DEP’T OF LABOR (Feb. 2019), <https://www.dol.gov/sites/dolgov/files/OASP/evaluation/pdf/Coffey-Consulting-SEED-Final-Report-508-2-19-2019.pdf> [<https://perma.cc/63LC-7852>]. The Labor Department launched SEED in 2015 to help state governments develop legislation to improve employment options for people with disabilities. *Id.* at ii. Collaborating with the National Conference of State Legislatures and the Council of State Governments, SEED assembled a bipartisan task force of sixty state policymakers, subject-matter experts, and advisors. *Id.* In a wide-ranging and detailed study, SEED identified barriers to employment across technical areas ranging from education and hiring-retention strategies to transportation and tax incentives. SEED then launched a series of “awareness events” to educate state policymakers. *Id.* Its final report collected 240 bipartisan disability initiatives that had been successfully adopted across a number of state legislatures, distributing them to more than 7,000 state legislators. *Id.* at 3. Since this time, the SEED initiative has led to the enactment of more than 350 new state laws. See *State Exchange on Employment & Disability (SEED)*, CONCEPTS COMM’NS, <https://conceptscommunications.com/case-studies/state-exchange-on-employment-and-disability> [<https://perma.cc/ECL5-X8R3>].

347. See *supra* Part III.

state bodies may turn out to outweigh the downsides.³⁴⁸ State legislative strategies described here are arguably more collaborative than executive orders that permit agencies to unilaterally preempt state laws after consulting with state representatives.³⁴⁹

Finally, only time will tell whether White House officials will embrace state legislative strategies as a new form of “Presidential Administration,” as suggested above in Section IV.A. I only identified a handful of modern examples in this Article that involved White House organization or endorsement.³⁵⁰ Future study may find that the White House might prefer to avoid micromanaging agencies involved in state legislation precisely because they often involve so much expertise, complexity, localized knowledge, and risk. And with a federal workforce that encompasses more than two million people, no office in the White House has the capacity and expertise to keep tabs on all of the interactions between federal agencies and state government.³⁵¹

But, at least in theory, some additional White House oversight could make state legislative strategies more open and accountable. This is one reason why OMB already reviews “substantive advice” that agencies provide to Congress.³⁵² As Jessica Bulman-Pozen has observed in a closely related context, direct appeals to state legislatures by the Executive “not only frame disputes about the powers and intentions of the branches of the federal government,” but they can also spur new national conversations about the reach of federal law.³⁵³ Seen in this light, presidential oversight, combined with democratic checks from state government, could generate more analytic deliberation, electoral accountability, and local experiments than if agencies, presidential administrations, or states were to act on their own.

348. See George W. Bush, *The Department of Homeland Security*, U.S. DEP’T OF HOMELAND SEC. 16 (June 2002), <https://www.dhs.gov/xlibrary/assets/book.pdf> [<https://perma.cc/J96K-AQSU>] (describing goals of state, local, and private coordination).

349. See, e.g., Exec. Order No. 13,132, 3 C.F.R. 206, 208-11 (2000).

350. See, e.g., *supra* notes 136-138 (describing past presidential involvement in FTC legislative initiatives); notes 12-16 (describing the White House’s endorsement of model state legislation designed to curb evictions during the COVID-19 pandemic); *supra* notes 225-226 (describing White House publicity of model state legislation designed to respond to the opioid epidemic).

351. See Trenkner, *supra* note 291 (describing limits of the White House Office of Intergovernmental Affairs).

352. See *supra* note 278 and accompanying text.

353. Bulman-Pozen, *supra* note 2, at 1944.

V. AGENCY STATE LAWMAKING AND “OUR FEDERALISM”

Canvassing the many ways that agencies participate in state legislation continues to complicate the idea that federal agencies and state legislatures operate in “separate spheres.”³⁵⁴ That idea continues to be embraced by Congress, agency officials, and the Supreme Court.³⁵⁵ The raft of legislative riders adopted by Congress in the late 1990s to prevent agencies from taking steps “designed to influence” state legislatures seems to reflect the view that agency officials should mind their words when they appear in statehouses.³⁵⁶ Inside some agencies, officials similarly felt that it was awkward or improper for federal agencies to “endorse” a particular form of legislation.³⁵⁷

A unifying theme behind these accounts is that when federal agencies exercise too heavy a hand in state legislative processes, they may upset values of (1) individual accountability, (2) decentralized power, and (3) experimentation that form the basis for our system of dual sovereignty.³⁵⁸ Some may view the examples recounted here as support for those ideas—blurring lines over who authors law, entrenching federal priorities, and suppressing innovation. But, as set forth in more detail below, even as the Supreme Court has limited agency involvement in state law to protect federalism, this Article offers evidence that federal-agency collaboration can also further many values federalism serves.

A. *Can Agencies Promote Liberty and Accountability?*

Federal intervention in state law theoretically could threaten individual “liberty” (the ability to meaningfully participate in one’s own governance) and “accountability” (the ability to observe and understand local-government representatives and institutions).³⁵⁹ When Congress or agencies themselves regulate,

354. See Heather K. Gerken, *Federalism and Nationalism: Time for a Détente*, 59 ST. LOUIS U. L.J. 997, 1038 (2015) (describing the “outdated” concept of separate-spheres federalism); Corwin, *supra* note 1, at 1-2 (observing the passing of dual federalism and the emergence of consolidated national power).

355. See *Murphy v. Nat’l Collegiate Athletic Ass’n*, 584 U.S. 453, 474-75 (2018); *New York v. United States*, 505 U.S. 144, 149 (1992); see also Barry Friedman, *Valuing Federalism*, 82 MINN. L. REV. 317, 389-404 (1997) (explaining how state and local governments serve as breeding grounds for democracy and public participation).

356. See *supra* Section IV.A.

357. See *supra* notes 213-216 and accompanying text.

358. See *Gregory v. Ashcroft*, 501 U.S. 452, 458 (1991).

359. See *Murphy*, 584 U.S. at 473 (“[T]he [anticommandeering principle] serves as ‘one of the Constitution’s structural protections of liberty.’” (quoting *Printz v. United States*, 521 U.S. 898, 921 (1997))); *Gregory*, 501 U.S. at 458 (observing that federalism “increases opportunity for citizen involvement in democratic processes”).

according to the Supreme Court, “[v]oters who like or dislike the effects of the regulation know who to credit or blame.”³⁶⁰ But when states impose regulations because they have been “commanded to do so,” then “responsibility is blurred.”³⁶¹

Nevertheless, there are a number of reasons why agency collaborations with state legislatures do not necessarily threaten accountability but may instead improve it. First, many Supreme Court cases warning that federal involvement in state legislatures “blurred” lines of responsibility, like *New York v. United States*, generally involved allegations that the federal government “coerced” or “commandeered” the state legislative process.³⁶² But those concerns are not as significant in many of the cases here, when others draft legislation (which is often the case anyway),³⁶³ and legislators freely choose to sign it. Justice O’Connor, the author of *New York v. United States*, herself emphasized the value of collaborative, uniform rulemaking as a way to balance local accountability against nationwide consistency: “The Uniform Law Commission plays an integral role in both preserving our federal system and keeping it vital.”³⁶⁴

Second, efforts that improve transparency and reasoned decision-making may provide an important role in promoting accountability, particularly given weak voter engagement in state politics.³⁶⁵ In that sense, federal agency involvement in state legislation can be more accountable to the public than when states go it alone—particularly when legislation develops through federal advisory committees or sophisticated procedures for uniform legislation. Agencies frequently work with associations of state regulators and the ULC, which means websites include posted comments on drafts, with joint sessions often attended by even more state actors and stakeholders with a variety of perspectives and expertise. As commentators have observed in other contexts, when “multiple officials are involved,” the risks of myopia are reduced because of “the safeguards provided by diverse perspectives.”³⁶⁶

Finally, federal agencies may arguably enhance “liberty” by creating more opportunities for individuals to participate in their own state government. Agencies frequently rely on nationwide committees that include individuals, businesses, and nonprofits without a voice in local government.³⁶⁷ Some state-law

360. *Murphy*, 584 U.S. at 473.

361. *Id.* at 474.

362. 505 U.S. 144, 169 (1992).

363. See, e.g., *supra* notes 164-166 and accompanying text.

364. Sandra Day O’Connor, *Foreword* to STEIN, *supra* note 234, at i (emphasis omitted).

365. See Seifter, *supra* note 36, at 111; Schleicher, *supra* note 36, at 764.

366. Cass R. Sunstein, *The Most Knowledgeable Branch*, 164 U. PA. L. REV. 1607, 1624-25 (2016).

367. See, e.g., *supra* notes 160-161 and accompanying text.

changes brought about by EPA, DOD, and the SBA produced new procedures for individuals to register complaints with state governments while increasing states' capacity to respond to citizen complaints.³⁶⁸ The Department of Education has similarly worked with states, in response to requests from students, on legislation designed to ensure state governments possess the tools they need to authorize new schools and respond to student complaints about predatory educational practices.³⁶⁹ Although it may seem odd to imagine federal interlocutors bridging the divide between states and their own constituencies, these accounts suggest that federal agencies may help individuals understand, organize, and petition their own state legislatures much like others have observed in interactions between federal agencies and Congress.³⁷⁰

B. *Can Agencies Promote State Power?*

The Supreme Court has suggested that agency involvement in state legislation could undercut state power by “shifting the costs” of policymaking and law enforcement onto the states.³⁷¹ Relatedly, as federal agencies pursue more uniform, national policies inside states, they could entrench those policies in ways that are out of step with the desires of the local community.³⁷² Federal regional officers in many of the agencies studied here maintain close relationships with state officials, and they frequently collaborate to remake state legislation toward the same end. As they do so, they may build alliances within a state more committed to federal regulatory goals than the general interests of the local community.³⁷³ Federal involvement with state legislation can ultimately build an ecosystem where “[w]hat emerges is a cross-cutting web of vertical, horizontal, and

368. See, e.g., *supra* text accompanying notes 162-163 (describing DOD's efforts to hear from military families in town halls and promote their voices in state legislatures); *supra* text accompanying note 224 (describing the SBA's efforts to persuade states to adopt boards that heard the concerns of small businesses); *supra* note 226 and accompanying text (describing ONDCP's proposed model legislation for “opioid boards” to protect the voices of cities and counties in funding to combat the opioid crisis).

369. See Interview with Officer #24, Dep't of Educ. (June 6, 2018).

370. See Maggie McKinley, *Petitioning and the Making of the Administrative States*, 127 YALE L.J. 1538, 1603 (2018); Robert M. Cover & T. Alexander Aleinikoff, *Dialectical Federalism: Habeas Corpus and the Court*, 86 YALE L.J. 1035, 1036 (1977).

371. See *Murphy v. Nat'l Collegiate Athletic Ass'n*, 584 U.S. 453, 474 (2018) (“[T]he anticommandeering principle prevents Congress from shifting the costs of regulation to the States. If Congress enacts a law and requires enforcement by the Executive Branch, it must appropriate the funds needed to administer the program.”).

372. See *supra* notes 228-232 and accompanying text (discussing entrenchment).

373. See Hills, *supra* note 211, at 1241-42.

intrastate executive and legislative relationships that together may strengthen support for the statute on which they all are focused.”³⁷⁴

However, in many cases described here, federal agencies have worked with states and often fought to assure that states possessed sufficient independent legal authority and resources necessary to enforce similar laws. And state actors have, in turn, used their independent authority to contest different actors in the federal government.

First, federal agencies have opened up new opportunities for states to enforce the law independently. Just as Congress can “open[] up new outlets for state-centered policy” when it confers authority on states’ attorneys general to enforce federal law,³⁷⁵ federal agencies can play a similar role in state legislatures by promoting “little” uniform acts, which governors’ offices and state attorneys general can interpret and enforce as a matter of their own state law and politics.³⁷⁶ As popularly elected officials for an entire state, governors and state attorneys general – as well as the agencies they oversee – may sometimes respond more readily to statewide concerns than individual state legislators themselves.³⁷⁷

Second, federal authorities often seek to assure states have necessary discretion and information they might not otherwise have. For example, after SEC updated its rules for crowdfunding, state legislatures needed to know how to write new laws consistent with the new federal exemption for local businesses.³⁷⁸ Working with the North American Association of Securities Administrators, SEC helped facilitate the exchange of state laws that complied with the new

374. Abbe R. Gluck, *Intrastatutory Federalism and Statutory Interpretation: State Implementation of Federal Law in Health Reform and Beyond*, 121 YALE L.J. 534, 571 (2011).

375. Margaret H. Lemos, *State Enforcement of Federal Law*, 86 N.Y.U. L. REV. 698, 702 (2011).

376. See *supra* Section III.C (describing “little Acts”).

377. See Miriam Seifter, *Gubernatorial Administration*, 131 HARV. L. REV. 483, 532 (2017) (observing that generally elected governors’ increased ability to direct state agencies protects statewide interests from national actors).

378. Most state crowdfunding laws were linked to the federal “intrastate” offering exemption – Section 3(a)(11) of the Securities Act of 1933 (“Securities Act”) – and its corresponding Rule 147, which required that states make offers in-state under a strict test. See 17 C.F.R. § 230.147 (1974). Although that was possible in a paper world, where a business could simply direct offers to people intrastate, businesses and states argued that the limitation was outdated because internet and social-media platforms circulate offers without respect to state lines. See Anya Coverman, *Intrastate Equity Crowdfunding: Exempt Offerings-Post JOBS Act Implementation*, N. AM. ASS’N SEC. ADM’RS (Nov. 19, 2015), <https://www.sec.gov/info/smallbus/sbforum119015-coverman-presentation.pdf> [<https://perma.cc/L4C6-UW6D>].

rules.³⁷⁹ “It was helpful for states to see how others take that initial step.”³⁸⁰ Treasury’s comments on virtual-currency laws primarily sought to ensure that *both* federal and state authorities possessed the flexibility to respond to new kinds of electronically exchanged currencies, as they evolved.³⁸¹

Third, even seemingly “entrenched” federal priorities do not always last. Model legislation and public testimony in states have backfired or been reversed.³⁸² Entrenchment of one priority also can displace another or, in the case of “regulatory flexibility” laws, reverse other allegedly “entrenched” regulations. To be sure, in some cases, empowering some state institutions to serve a national interest can come at the expense of other institutions.³⁸³ This can occur whenever the federal government designates or empowers one state actor to represent “the state” over another in discussions with the federal government over the shape of a new state law.³⁸⁴ But empowering state authorities does not lead to permanently reliable state partners in regulation.³⁸⁵ Newly empowered states have opposed or contested the federal government in a variety of ways, from promulgating divergent regulations over health insurance to litigation over state

379. SEC’s work with states on new state crowdfunding laws grew specifically out of presentations made by state securities regulators in 2014. SEC, under Section 19(d) of the 1934 Securities Act, meets annually with state securities regulators to discuss ongoing enforcement issues. 15 U.S.C. § 77s(d) (2018). And cryptocurrency regulations have been hot topics for Section 19(d) Conferences. See Interview with Comm’r #3, N. Am. Sec. Admin. Ass’n (May 10, 2018).

380. Interview with Comm’r #3, *supra* note 379.

381. See Interview with Officer #20, *supra* note 146; see also Clozel, *supra* note 146 (explaining that the Treasury Department has “lobb[ied] for the model law to leave regulators discretion about which activities are covered”).

382. See, e.g., Patterson, *The New Deal and the States*, *supra* note 195, at 76-78 (describing reversals of the “little New Deals,” the “[l]ittle NRA,” and state NLRB acts in state legislatures in the 1930s); TANI, *supra* note 22, at 70 (describing state legislatures’ resistance to and “home-rule influence” on SSB personnel-merit legislation for public-welfare administrators).

383. See TANI, *supra* note 22, at 67 (describing battles over state legislation that threatened local municipal interests); Gregory Ablavsky, *Empire States: The Coming of Dual Federalism*, 128 YALE L.J. 1792, 1815 (2019) (describing rise of federal- and state-government power over competing diffuse interests, including those of corporations, municipalities, separatists, and Native Americans).

384. See Fahey, *supra* note 258, at 1564-65. For example, one study documents intrastate disputes between governors, state legislatures, insurance commissioners, and others over who held power to expand Medicaid under the ACA. Gluck & Huberfeld, *New Health Care Federalism*, *supra* note 160, at 13.

385. See Bulman-Pozen & Gerken, *supra* note 42, at 1281-82.

privacy regulations.³⁸⁶ As a result, sometimes state adoption can destabilize national policies more than they solidify them.³⁸⁷

C. *Can Agencies Promote State Experimentation?*

Agencies that quietly write state legislation could theoretically constrain policy innovation that “our federalism” hopes to promote. First, when agencies promote an agenda across all fifty states, they risk overlooking regional differences, local voter preferences, or states with well-developed specialized bodies of desirable state regulation.³⁸⁸ Agency decisions are sometimes prone to “groupthink” or tunnel vision,³⁸⁹ which, in turn, could exert a particularly strong influence on part-time state legislatures and state agencies with limited resources. Some of these concerns were raised as objections to the adoption of uniform legislation in the Progressive Era—as well as when federal administrators during the New Deal circulated around statehouses to provide needed legislative assistance to state legislatures.³⁹⁰

Second, agencies’ pursuit of uniform state legislation could just be a quiet, first step towards greater nationalization. One could cynically view model state legislation as a form of stealth nationalism, where federal agencies pursue uniform state legislation in areas where the states historically possessed substantial experience, infrastructure, and private contracts to effectuate nationwide control in the long run. Over time, these kinds of incremental moves may “work a subtle shift in the public understanding of the traditional state-federal boundaries.”³⁹¹ An increased public tolerance for federal involvement in state legislation may, over time, mean less resistance to federal involvement in state governance.

386. See, e.g., Gluck & Huberfeld, *supra* note 22, at 1752-57 (discussing the range of plans adopted under Medicaid waivers and even federal programs for insurance); Butler & Wright, *supra* note 114, at 173-76 (describing different consumer rights protected under various Little-FTC Acts adopted by states).

387. See Gluck, *supra* note 374, at 572; Bulman-Pozen & Gerken, *supra* note 42, at 1278-80.

388. See *supra* Section III.D; see also Jonathan R. Macey, *Federal Deference to Local Regulators and the Economic Theory of Regulation: Toward a Public-Choice Explanation of Federalism*, 76 VA. L. REV. 265, 268 (1990) (describing the general situations in which Congress will “franchise” the right to regulate in a particular area to the states).

389. See CASS R. SUNSTEIN & REID HASTIE, *WISER: GETTING BEYOND GROUPTHINK TO MAKE GROUPS SMARTER* 6 (2015).

390. See, e.g., Patterson, *The New Deal and the States*, *supra* note 195, at 77 (documenting complaints from state legislators that “too many requests for legislation are coming from the various branches of the Federal Government”).

391. Gluck, *supra* note 374, at 574.

Finally, some have questioned whether information produced by state experiments will be good or meaningful.³⁹² Small localities may not appreciate the diffuse benefits of a particular environmental policy for their own communities. And few metrics exist for how governmental agents assess the success of a particular plan. In other cases, states may roll out new laws with federal encouragement not to test policies, but to express political messages purely designed to resonate with extreme political bases—a hard-edge partisan strategy *The Daily Show*'s Jon Stewart once called “Meth Labs of Democracy.”³⁹³

Certainly, those concerned about the rise of national parties, the decline of local news outlets, and the growing polarization in state legislatures could imagine a system where, as discussed above, the president bypasses Congress to adopt new policies with preferred state legislatures of the same party. This would raise some of the same concerns discussed in Part IV—increased distrust in administrative decision-making—while also frustrating federalism values of dissensus, participation, and localization.³⁹⁴ To be sure, agencies' influence over state law has not attracted the same attention as other forms of model legislation, like laws involving abortion, immigration, guns, and what has been aptly described as “vigilante federalism” advanced by partisan networks.³⁹⁵ Anti-lobbying regulations described above also prevent federal agencies from the kinds of grassroots organizing and campaign contributions that private interest groups offer state legislators. But because of their unique policy expertise, government initiatives promoted by federal agencies could be more far-ranging and impactful than initiatives promoted by private organizations.³⁹⁶

Many of the agencies considered here, however, also paint a different picture about experimentation, uniformity, and politicization. Instead of approaching states from the top down, many federal decision-making processes appeared to

392. See Livermore, *supra* note 233, at 645.

393. *The Daily Show with Jon Stewart: The States: Meth Labs of Democracy* (Comedy Central television broadcast Feb. 20, 2014) (discussing proposed state legislation that would allow parents to spank their children harder in the course of disciplining them), <https://www.cc.com/video/f9okh1/the-daily-show-with-jon-stewart-the-states-meth-labs-of-democracy> [<http://perma.cc/V725-P8MW>].

394. See Bulman-Pozen, *supra* note 74, at 1081.

395. See Hertel-Fernandez, *supra* note 27, at 582. See generally Michaels & Noll, *supra* note 75 (coining the term).

396. The political fights over Medicaid workfare requirements offer just one recent example. See Robert Pear, *Trump Administration Says States May Impose Work Requirements for Medicaid*, N.Y. TIMES (Jan. 11, 2018), <https://www.nytimes.com/2018/01/11/us/politics/medicaid-work-requirements.html> [<https://perma.cc/BU38-M8ES>]; Sarah Kliff & Margot Sanger-Katz, *Biden Administration Moves to End Work Requirements in Medicaid*, N.Y. TIMES (Feb. 12, 2021), <https://www.nytimes.com/2021/02/12/upshot/biden-medicaid-reversing-trump.html> [<https://perma.cc/Q42M-Y4QD>].

afford an outsized role to states and their citizens in the formulation of model state legislation. In many cases, agencies' efforts on legislation arose out of joint conferences, advisory committees, and meetings with state and national organizations. Finally, as noted, many agencies frequently circulated state legislation, adopted in other states, as models.³⁹⁷ Far from imposing a uniform rule on states, in these cases, agencies assisted in the state legislative process and created opportunities for states to experiment. They then gathered, evaluated, and shared results with other states. In so doing, agencies helped states learn from their own experiments, filling a gap that, to date, has generally been filled by private-interest groups and lobbyists.³⁹⁸ These accounts suggest that federal agencies could offer another site for sharing innovative state policies consistent with "democratic experimentalism" in state and local government.³⁹⁹

Second, evidence suggests that agencies may have pragmatic reasons to introduce policies into states incrementally, without deeper designs to rewrite state law. In the area of child support, for example, states had forged contractual relationships with private services and nongovernmental organizations for over two decades when the State Department negotiated the Hague Convention. Rather than upset the network of relations that states had forged, the State Department, HHS, and ULC believed that the less disruptive path was a uniform state child-support law designed to comply with new international requirements.⁴⁰⁰ These pragmatic concerns explain why compliance with new international-law obligations occurred principally through the coordinated actions of federal agencies and state governments to forge and adopt new model rules.⁴⁰¹ Local interests and networks in charge of administering family arrangements could adapt the model rule to suit their own needs.

Finally, notwithstanding poor information and the growth of hardball politics, it is not clear that federal agencies make things worse by working with state

397. See *supra* notes 127, 155, 321 and accompanying text (describing circulation of state legislation by the FTC, CDC, and HHS).

398. See Tyler & Gerken, *supra* note 25, at 2206-20 (mapping ways third parties help states overcome obstacles to innovation).

399. See Dorf & Sabel, *supra* note 22, at 323 (arguing that agencies can help parties get "past blockages in local decision making . . . by suggesting how features of apparently irreconcilable alternatives have been combined into new hybrids elsewhere"); Charles F. Sabel & William H. Simon, *Minimalism and Experimentalism in the Administrative State*, 100 *GEO. L.J.* 53, 55 (2011); Wiseman & Owen, *supra* note 77, at 1123.

400. See *supra* notes 241-244 and accompanying text.

401. *Id.*

legislatures.⁴⁰² It may be that, for very politically charged debates, agency collaborations with states cannot avoid fanning the flames of partisan federalism. But many have observed that states may be worse off *without* the information agencies can provide about technical, scientific, and legal programs.⁴⁰³ And outside the partisan spotlight, federal agencies' unique policymaking capacity in highly technical areas may cross partisan divides, in areas ranging from opioid treatment, child support, and consumer protection to the banking-reform, veteran's-assistance, and eviction-diversion initiatives described here—all of which have been adopted across red- and blue-state lines. On this account, agencies can still be important drivers of horizontal federalism and experimentation, gathering, evaluating, and sharing lessons learned with other states.

CONCLUSION

The traditional portrayal of federal administrative agencies depicts an expert bureaucrat laboring on regulations that, if not set aside by the courts, will immediately bind an entire industry. But agencies, like nation-states, exercise soft power too. Surveying dozens of federal programs, the findings in this Article suggest that federal agencies can use that soft power with state legislatures to promote important values of administrative law and federalism. Used responsibly, these statehouse strategies offer tools to gradually roll out important national policies, while possibly even enhancing the accountability of agencies to the public. Over time, this form of policymaking also may turn out to further values that federalism aims to serve, such as experimentation, participation, and accountability in our public institutions.

Focusing on these state legislative strategies could not come at a more critical time. Partisan jockeying and paralysis in Congress have left the big policy issues of the day to our busy, part-time, and understaffed state legislatures.⁴⁰⁴ Given

402. This study, which has primarily focused on federal-agency officials from past to present, can only scratch the surface of this phenomenon. I cannot draw conclusions about politicization by focusing primarily on a single group, which may be less inclined to discuss partisan motivations. Further examination of state policymakers, partisan organizations, lobbyists, and other stakeholders, however, could reveal more about what such agency-state collaborations mean for the growing scholarship on partisan federalism.

403. See Wiseman, *supra* note 233, at 1674; Dorf & Sabel, *supra* note 22, at 323; Rose-Ackerman, *supra* note 169, at 610-11; Galle & Leahy, *supra* note 248, at 1351, 1355 (arguing state officials might even have incentives to conceal information).

404. See Gabrielle Gurley, *The Critical Power of State Legislatures*, AM. PROSPECT (Jan. 6, 2022), <https://prospect.org/politics/the-critical-power-of-state-legislatures> [<https://perma.cc/K7QT-MCKL>].

the Supreme Court's newfound willingness to strike down federal regulations,⁴⁰⁵ these kinds of collaborations could provide federal agencies with opportunities to use their policymaking expertise to develop vital policies across the country with newly engaged state partners.⁴⁰⁶ These actions, of course, also come with risks—including the potential for even more capture, partisanship, entrenchment, and unaccountability. But these often-overlooked strategies also offer substantial tools for administrative policymaking and governance in a federal system. They deserve sustained consideration alongside the traditional regulatory tools that occupy administrative-law scholarship, including rulemaking, adjudication, guidance, and enforcement.

On a theoretical level, state legislative strategies raise new questions for the big debates about what federalism is for—particularly in our increasingly intertwined federal and state system of government. When federal agencies make room to give states more voice in federal government, but then turn around to shape state legislation, it almost no longer makes sense to debate whether federalism serves national interests or state interests.⁴⁰⁷ Some intergovernmental actions do not turn on any abstract concept of national or state power, but instead on how government institutions collectively can facilitate open, deliberative, accountable, and innovative policy.

405. See Blake Emerson, *The Binary Executive*, 132 *YALE L.J. F.* 756, 783 (2022); Mila Sohoni, *The Major Questions Quartet*, 136 *HARV. L. REV.* 262, 267–68 (2022).

406. See, e.g., Press Release, White House, ONDCP Announces Model Law for States to Help Ensure Opioid Litigation Settlements Funds Address Addiction and Overdose (Oct. 21, 2021), <https://www.whitehouse.gov/ondcp/briefing-room/2021/10/21/ondcp-announces-model-law-for-states-to-help-ensure-opioid-litigation-settlements-funds-address-addiction-and-overdose> [<https://perma.cc/V7E6-KVNP>]; Press Release, U.S. Climate All., U.S. Climate Alliance Responds to Harmful U.S. Supreme Court Decision in *West Virginia v. Environmental Protection Agency* (June 30, 2022), <http://www.usclimatealliance.org/publications/2022/6/30/wv-epa> [<https://perma.cc/2D2W-2C5A>] (describing the pledge of twenty-four states to reduce climate emissions after the Supreme Court struck down EPA's authority to do so directly in *West Virginia v. EPA*).

407. Compare Heather K. Gerken, *Federalism as the New Nationalism: An Overview*, 123 *YALE L.J.* 1889, 1893 (2013) (“[Federalism] improv[es] national politics, strengthen[s] a national polity, better[s] national policymaking, entrench[es] national norms, consolidat[es] national policies, and increas[es] national power.”), and Bulman-Pozen, *supra* note 74, at 1081 (discussing how federalism “provides durable and robust scaffolding for partisan conflict”), with Galle & Seidenfeld, *supra* note 3, at 2020 (“[P]revailing doctrine and defenders of it somewhat overstate the degree to which federalism norms need judicial protection against the conduct of federal agencies.”), and Metzger, *supra* note 68, at 2029 (describing how administrative law can promote local voices and make states’ sovereign interests more visible).