

# THE YALE LAW JOURNAL

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## Coordinated Rulemaking and Cooperative Federalism's Administrative Law

**ABSTRACT.** “Cooperative federalism” is not just a model of federalism; it is a model of administration. From health care to air quality to emergency management, transportation, immigration, national security, and more, cooperative federalism is the regulatory model of choice. But scholars have yet to conceptualize a cooperative administrative law for cooperative federalism. As this Article shows, however, federal and state bureaucracies have devised intricate strategies for coordinating their implementation of the programs they jointly administer.

The Article begins to elaborate cooperative federalism's unseen administrative apparatus by focusing on its distinctive form of legislative rulemaking, the workhorse of administrative law. I show that inside cooperative programs, federal and state agencies jointly promulgate binding legislative rules through a cross-governmental process I call “coordinated rulemaking.” Because it crisscrosses governmental boundaries, this novel form of rulemaking has a legal logic, process, and mode of codification that diverges from the notice-and-comment rulemaking model so scrutinized within the federal administrative state.

After documenting the use of coordinated rulemaking in some of our largest and most important cooperative regulatory programs—including Medicaid, the Clean Air Act, public education, highway construction, and national-security surveillance, among many others—I argue that these rich practices resist the standard heuristics used to conceptualize the administrative relationship between the federal government and states within cooperative programs. In their place, I develop an alternative conception of the administrative scaffolding in cooperative federalism programs. Finally, I sketch out some of the puzzles and promises of coordinated rulemaking—its implications for black-letter administrative doctrines, including *Chevron* deference, arbitrary-and-capricious review, and the like—and, by setting the practice I document here in theoretical frame, asking what it reveals about how federalism reshapes the legal architecture of administrative law when our governments pursue regulatory projects together.

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## ARTICLE CONTENTS

INTRODUCTION	1323
I. COORDINATED RULEMAKING IN PRACTICE	1330
A. Medicaid and Coordinated Rulemaking: The Basic Template	1333
1. Rulemaking in Context	1334
2. Parameters	1336
3. Proposals	1337
4. Approvals	1341
B. Coordinated Rulemaking: Intragovernmental Variations	1343
1. The Clean Air Act	1345
2. Public Education	1347
3. National Highways	1349
4. Fusion Centers	1351
C. How Coordinated Rules Bind: Promulgation by Concurrence	1352
II. THE LAW OF COORDINATED RULEMAKING	1355
A. Existing Models	1358
1. States as Agencies	1358
2. Administrative Dual Federalism	1361
3. Picket-Fence Federalism	1362
B. Constitutional Law	1363
C. Positive Law	1366
D. Soft Law	1367
III. ADMINISTRATIVE PROBLEMS IN COORDINATED RULEMAKING	1369
A. Interpretive Deference	1371
B. Standards of Review	1375
C. Disclosure and Deliberative Process	1377
D. Nondelegation	1379
IV. THEORIZING COORDINATED RULEMAKING	1381
	1321



A. Interdependency in Federalism and Administrative Law	1381
B. Federalism's New Legal Ordering	1387
<b>CONCLUSION: BEYOND COORDINATED RULEMAKING</b>	<b>1389</b>

## INTRODUCTION

“Cooperative federalism” is not just a model of federalism; it is a model of administration.<sup>1</sup> Many of our nation’s largest regulatory programs—from government health insurance to pollution control to transportation, public education, social welfare, disaster relief, policing, immigration enforcement, and more—are administered jointly by federal and state bureaucracies. Scholars have critically evaluated how cooperative federalism advances policy goals,<sup>2</sup> whether cooperative federalism is consistent with federalism values<sup>3</sup> and democratic principles, and how the Constitution enables and constrains cooperative federalism.<sup>4</sup> But despite the scale and sweep of these programs, our understanding of how they work at a more basic administrative level is stubbornly thin. We have yet to conceptualize a *cooperative administrative law* for our cooperative federalism programs.

As this Article shows, however, our governments have, in practice, forged intricate forms of administrative coordination to bring cooperative programs to fruition. But that coordination is not centrally structured by the federal Administrative Procedure Act (APA) or its like; there is no cross-jurisdictional equivalent of the APA. Rather, the coordination I document in this Article has arisen organically over time, program by program and interaction by interaction. The

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1. “Cooperative federalism” can be a murky term. I use it flexibly and functionally to encompass the full range of modern collaborations—from high-profile programs like Medicaid and the Clean Air Act to less scrutinized joint initiatives in areas like policing, national security, and immigration. My goal is to capture programs whose implementation draws federal and state administrative apparatuses together—and to consider, in turn, what law shapes their activities where they meet and interconnect.
  2. See, e.g., Abbe R. Gluck & Nicole Huberfeld, *What Is Federalism in Healthcare For?*, 70 STAN. L. REV. 1689 (2018); Erin Ryan, *Negotiating Federalism*, 52 B.C. L. REV. 1, 84-86 (2011) (assessing how cooperative federalism shapes health care); William W. Buzbee, *Federalism Hedging, Entrenchment, and the Climate Challenge*, 2017 WIS. L. REV. 1037 (climate change); Philip J. Weiser, *Federal Common Law, Cooperative Federalism, and the Enforcement of the Telecom Act*, 76 N.Y.U. L. REV. 1692 (2001) (telecommunications).
  3. See, e.g., Heather K. Gerken, *Federalism as the New Nationalism: An Overview*, 123 YALE L.J. 1889, 1893 (2014) (arguing that federalism promotes a “well-functioning national democracy”); Cristina M. Rodríguez, *Negotiating Conflict Through Federalism: Institutional and Popular Perspectives*, 123 YALE L.J. 2094 (2014) (describing federalism’s capacity to negotiate deeply seated differences); Jessica Bulman-Pozen, *Federalism as a Safeguard of the Separation of Powers*, 112 COLUM. L. REV. 459 (2012) (elaborating on federalism’s role in interbranch power balancing); Roderick M. Hills, Jr., *The Political Economy of Cooperative Federalism: Why State Autonomy Makes Sense and “Dual Sovereignty” Doesn’t*, 96 MICH. L. REV. 813 (1998) (developing federalism’s contributions to political accountability and policymaking efficiency).
  4. Ernest Young’s Taft Lecture provides a concise overview of the cases, debates, and principles animating conversations about federalism doctrine. See Ernest Young, *Federalism as a Constitutional Principle*, 83 U. CIN. L. REV. 1057 (2015).

practices that comprise cooperative federalism's administrative law exist, but we lack the terms and templates to recognize them.

This Article focuses on just one part of cooperative federalism's administrative law: the cooperative equivalent of binding *legislative rules*—the workhorse of administrative practice.<sup>5</sup> In the federal system, agencies enact legislative rules pursuant to the APA's straightforward notice-and-comment process.<sup>6</sup> In cooperative programs, I show that our governments have devised an alternative form of rulemaking, which I term "coordinated rulemaking." Distinctive and widely used, coordinated rulemaking stitches together federal and state agency action to produce rules binding on both those governments and the third parties they regulate. Because it crosses governmental boundaries, however, it has a legal logic, process, and form of "codification" that diverges from the more familiar legislative rulemaking familiar to observers of the federal administrative state. To take just one profound difference: I show that notice and comment, the process so central to federal rulemaking and a chief determinant of whether it is binding, is neither *necessary* nor *sufficient* to give coordinated rules the force and effect of law. Instead, coordinated rules are binding because of a logic distinct to the constitutional structure of federal-state interactions but not previously articulated, which I call "promulgation by concurrence."<sup>7</sup>

To see the unusual administrative form that coordinated rulemaking can take, consider Medicaid—not only one of the largest cooperative federalism programs but also among our nation's largest regulatory programs of any form. Some aspects of Medicaid are brought to fruition by federal or state regulations. But many of the binding rules that serve the function of regulations in the Medicaid context—the rules that shape the basic medical benefits to which millions of Americans are entitled—are not codified in either the Code of Federal Regulations or a state equivalent. Neither are they made through a process prescribed by the APA. Rather, they are agreed to by federal and state agencies in a more diffuse manner.<sup>8</sup> And only once they have achieved that concurrence do they become binding on the governmental counterparties to Medicaid's bargain and, more importantly, on the program's millions of beneficiaries and service providers. Those rules are, in turn, codified, but in an unorthodox location. Each state's Medicaid partnership with the federal government is initiated through an inter-governmental agreement—a treaty-like document between the federal government and each state—called the "Medicaid state plan."<sup>9</sup> Coordinated rules are

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5. See *infra* notes 28–29 and accompanying text (defining "legislative rule").

6. See 5 U.S.C. § 553 (2018).

7. See *infra* Section I.C.

8. See *infra* notes 73–78 and accompanying text.

9. See Bridget A. Fahey, *Federalism by Contract*, 129 YALE L.J. 2326, 2340–41 (2020).

codified as “addenda” to those state plans. Medicaid is not unique. Many other major and minor cooperative programs use a similar form of coordinated rulemaking to implement their joint programs.<sup>10</sup>

That coordinated rulemaking, and the cooperative administrative law that facilitates it, has largely escaped public notice is so striking that it presents a puzzle of its own.<sup>11</sup> One explanation might resist the premise: perhaps cooperative programs are more like nonbinding “political commitments” between nation-states, in which nations agree to work independently toward common objectives. Following that model, our governments would agree to shared goals but would then pursue those goals in separate state and federal administrative processes, each structured by that government’s ordinary administrative law. This would be something of a limited-purpose reprise of the mostly defunct “dual federalism,” in which the federal government and states are assumed to separately oversee discrete areas of jurisdiction.<sup>12</sup> As this Article shows, cooperative programs

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10. See *infra* note 35 (tracing cooperative rulemaking and its variations across other programs); see also *infra* Section I.B (same). To be clear, my claim is not that *all* rulemaking in cooperative programs is coordinated rulemaking. As in any major regulatory initiative, agencies use a variety of administrative techniques to implement cooperative programs, including both independent and coordinated rulemaking, guidance, adjudication, enforcement actions, and others. My claim is only that coordinated rulemaking is a central and overlooked piece of that broader toolkit.

11. The rich literature on “administrative federalism” is less relevant to this inquiry than the name suggests. That literature, first and foremost, is about the *federal* administrative state and asks how federal agencies should take stock of state interests when executing federal regulatory programs. See Stuart Minor Benjamin & Ernest A. Young, *Tennis with the Net Down: Administrative Federalism Without Congress*, 57 DUKE L.J. 2111, 2131–33 (2008) (summarizing this literature). For instance, it assesses compliance with directives like Exec. Order No. 13,132, 64 Fed. Reg. 43,255 (Aug. 4, 1999), which requires the consideration of state interests when setting federal policy. See, e.g., Miriam Seifter, *States as Interest Groups in the Administrative Process*, 100 VA. L. REV. 953, 971–74 (2014). And it confronts doctrinal questions such as whether federal agencies can use their rulemaking powers to preempt state laws. See, e.g., Gillian E. Metzger, *Federalism and Federal Agency Reform*, 111 COLUM. L. REV. 1, 2 (2011) (“Preemption has emerged as the contemporary federalism battleground.”); Nina A. Mendelson, *A Presumption Against Agency Preemption*, 102 NW. U. L. REV. 695 (2008); Thomas W. Merrill, *Preemption and Institutional Choice*, 102 NW. U. L. REV. 727 (2008). These questions are compelling and important ones, but they are largely orthogonal to the subject of this Article, which is the administrative law of *cooperative* federalism. Questions of preemption arise precisely because Congress has created an exclusive federal regulatory program and wishes to preclude state participation in the regulatory project. Cooperative federalism does the opposite. It invites states to jointly regulate with the federal government. This Article asks not how federal agencies should be cognizant of state interests when deciding whether to displace state authority, but how federal and state agencies should coordinate their activities when they choose to regulate together.

12. See Edward S. Corwin, *The Passing of Dual Federalism*, 36 VA. L. REV. 1, 4 (1950).

are not administered separately; they are administered, as federalism's general trends would predict, jointly and interdependently.

Part I provides an account of the mechanics of "coordinated rulemaking" across programs and, in so doing, refutes the idea that cooperative federalism has no administrative integration to document or theorize. The states and the federal government do not just align on policy objectives and pursue them separately. They also create bespoke and deeply integrated administrative structures to implement them.

These structures have been long visible in bits and pieces to the many scholars, agency officials, practitioners, and interested parties who routinely interface with individual cooperative programs. But they are surprisingly invisible in the aggregate. We lack a vocabulary that can capture legal similarities in cooperative programs that each use their own technical language and can bring conceptual precision to the administrative characteristics that are common across them. Cooperative programs are so dazzlingly complex—so institutionally sprawling, jurisdictionally intricate, administratively taxing, and fiscally demanding—that it is easy to see them as sui generis beasts. The goal of this account is to notice their common oddities and theorize their common logics.

By distilling patterns across diverse programs, Part I identifies a standard cross-governmental template that our governments use to jointly author a wide range of important legislative rules. First, the federal agency sets *parameters* within which it will approve a proposed state regulation; next, state agencies seize the pen and formulate specific *proposals* within those parameters; finally, the federal agency provides feedback and comments on those proposals and *approves* or disapproves them.<sup>13</sup> Once a state proposal is approved, it becomes binding not only on the governmental parties but also on the individuals and firms that the program regulates and serves. This final rule is importantly bilateral: it cannot be changed by one participating party and retain its legal status as a binding rule executing the shared program.

But the actions that crisscross governments—and form an *intergovernmental process*—do not tell the full story. How each government completes its respective tasks within that template—and what *intragovernmental process* they use—significantly shapes coordinated rules and how they come to be. Scholars of federal or state administrative law might hypothesize that a state or federal agency completes its respective tasks within the cross-governmental template using that government's standard administrative process. As I show, however, the way they

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13. I use these three italicized terms—parameters, proposals, and approves—to begin to develop a consistent vocabulary for identifying similar administrative actions across cooperative programs.

set parameters, draft proposals, and issue approvals is deeply shaped by the cooperative context and, as a result, frequently takes its own unconventional administrative form. Strikingly, for instance, the internal administrative processes that state agencies use to formulate their proposed rules are routinely dictated by the federal government's parameters; the federal agency simply states that it will not approve a state's proposal unless it accords with the federal government's preferred administrative process. These internal processes show that cooperative federalism in fact begets a deep form of administrative integration.<sup>14</sup>

Seeing the use of coordinated rulemaking across a range of programs, in turn, reveals principles of administrative law that are peculiar to cooperative programs. Part I concludes by interrogating a question of great significance to legislative rulemaking: when and why coordinated rules become binding.<sup>15</sup> In ordinary federal administrative law, legislative rules gain the force of law because they have gone through the notice-and-comment process prescribed by the APA.<sup>16</sup> In some programs, federal parameters, state proposals, and federal approvals are each conducted through a version of notice and comment.<sup>17</sup> But in others, federal and state agencies use bespoke, informal, and unstructured internal administrative processes. This dramatic variation yields an important insight about the legal logic of coordinated rulemaking. Coordinated rules gain their binding force not because the federal or state agencies use specific internal administrative processes but because the substance of the rule has achieved the concurrence of both governmental parties to the cooperative program. These rules, I argue, become legally binding because of a functional intergovernmental understanding that I call *promulgation by concurrence*. This principle, which I explore further in Part II, is unfamiliar to federal administrative law but is a common way of coauthoring binding legal texts in other contexts, most obviously in the law of contracts and treaties.

Part II examines the legal forces – of constitutional federalism, legislation, and administrative law – that facilitate coordinated rulemaking and cooperative federalism's administrative state more generally. As an initial matter, the practices of coordinated rulemaking cannot be explained by, and in fact contradict, the existing heuristics that scholars use to gloss the legal relationships created by

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14. The influence of federal statutes and agency action on state-level administrative processes elaborates on the small, but important, literature on state-level administration. See, e.g., Jim Rossi, *Politics, Institutions and Administrative Procedure: What Exactly Do We Know from the Empirical Study of State Level APAs, and What More Can We Learn?*, 58 ADMIN. L. REV. 961 (2007); Miriam Seifter, *Further from the People? The Puzzle of State Administration*, 93 N.Y.U. L. REV. 107 (2018).

15. See *infra* Section I.C.

16. See 5 U.S.C. § 553 (2018).

17. See *infra* Section I.B.1 (describing coordinated rulemaking within the Clean Air Act).



cooperative federalism. The most common such heuristic, cited over and over again, imagines states implementing cooperative programs as if they were federal agencies.<sup>18</sup> In this states-as-agencies analogy, Congress makes the law, and states are assumed to become “agencies of the federal government by enforcing federal law with administrative actions and by promulgating regulations to fill the gaps in federal statutes.”<sup>19</sup>

This Article’s account of coordinated rulemaking resists that influential analogy as a framework for understanding the administrative structure of cooperative federalism programs. By mapping the day-to-day interactions within these programs, it reveals far thicker interdependence between federal agencies (which the states-as-agencies analogy tends to ignore) and state agencies.<sup>20</sup> In turn, it collects a cross-program body of practice from which to theorize a more nuanced administrative scaffolding of cooperative federalism.

I argue that in place of the stylized hierarchical relationship between Congress and state agencies that is so often recited, cooperative federalism begets administrative spaces more akin to the *shared regulatory spaces* that Jody Freeman and Jim Rossi have identified in collaborations among federal agencies.<sup>21</sup> This reframing enables a deeper interrogation of the ways that cooperative federalism’s administrative law—including its constitutional, positive law, and soft law determinants—deviates from ordinary federal administrative law.<sup>22</sup>

Part III considers the administrative-law complexities posed by the practice of coordinated rulemaking. Black-letter administrative law assumes a vertically integrated administrative agency: the same agency gathers data, develops models, drafts regulations, solicits comments, and promulgates them. Because coordinated rulemaking diffuses these tasks across federal and state agencies, it creates conceptual problems that courts have addressed only intermittently, stymied by the lack of consistent terminology to identify similar issues across programs

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18. See *infra* Section II.A.1.

19. Roderick M. Hills, Jr., *Federalism in Constitutional Context*, 22 HARV. J.L. & PUB. POL’Y 181, 182 (1998); see also sources cited *infra* Section II.A.1 (tracing the frequency with which this analogy is invoked).

20. In theorizing the implications of cooperative federalism for the federal separation of powers, Jessica Bulman-Pozen has correctly faulted the states-as-agencies analogy for its erasure of federal agencies. See Bulman-Pozen, *supra* note 3, at 477-78.

21. Jody Freeman & Jim Rossi, *Agency Coordination in Shared Regulatory Space*, 125 HARV. L. REV. 1131, 1138-55 (2012) (describing the spaces of overlapping jurisdiction between agencies within the federal administrative state and the complex coordination problems (and solutions) that they beget).

22. See *infra* Sections II.B-D. This account also resists or complicates other possible ways of conceptualizing the federal-state administrative relationship. See *infra* Section II.A.2 (refuting the “dual federalist” model of administrative implementation); Section II.A.3 (describing the implications for the “picket-fence” model elaborated in political-science literatures).

and the infrequency of judicial review in this area. I canvass a range of issues – from how *Chevron* deference operates in this context, to whether federal-state interactions should be shielded as part of the agencies’ deliberative-process privilege, to ways that coordinated rulemaking might insulate cooperative programs from challenges under the nondelegation doctrine.

Part IV places coordinated rulemaking in theoretical perspective, examining its implications for both administrative law and federalism. Coordinated rulemaking demonstrates the possibility of legal and procedural innovation in a field often disparaged for its ossification. At the same time, the interdependence between federal and state agencies creates unique opportunities for collusion, insulation, and atrophy in the federal-state administrative process. Scholars of federalism, for their part, have long plumbed the policy, politics, and constitutional principles that arise from cooperative programs. But coordinated rulemaking reveals another axis of analysis: federalism has its own administrative law and practice. Federalism scholars, to the chagrin of some, have generally not focused on our *subconstitutional* legal ordering, a practice that, I argue, warrants revisiting.<sup>23</sup>

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At the dawn of the New Deal, as agitation grew for the reform of federal administrative law (agitation that ultimately culminated in the enactment of the APA), scholars set out to map existing administrative practice and its legal influences.<sup>24</sup> James M. Landis, one of the leading voices of that moment, explained that federal administration had emerged as a “new instrument of government,” propelled not by central blueprinting or the kind of incrementalism characteristic of the common law, but by a more diffuse cross-institutional “striving to adapt governmental technique . . . to modern needs.”<sup>25</sup> As a consequence, despite its long history, federal administrative law was a hazy field. It was animated by complex patterns, longstanding norms, and common legal principles, but scholars and practitioners alike lacked the wide-angle lens needed to reveal them.

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23. An exception is Ernest A. Young, who has been a vocal proponent of studying federalism’s “law” outside the Constitution, arguing that “[m]uch – perhaps even *most* – of the ‘constitutional’ work in our legal system is in fact done by legal norms existing outside what we traditionally think of as ‘the Constitution.’” Ernest A. Young, *The Constitution Outside the Constitution*, 117 YALE L.J. 408, 411 (2007) [hereinafter Young, *The Constitution Outside the Constitution*]; Ernest A. Young, *A Research Agenda for Uncooperative Federalists*, 48 TULSA L. REV. 427, 431 (2013) [hereinafter Young, *Research Agenda*].

24. See George P. Shepherd, *Fierce Compromise: The Administrative Procedure Act Emerges from New Deal Politics*, 90 NW. U. L. REV. 1557, 1561–80 (1996).

25. JAMES M. LANDIS, *THE ADMINISTRATIVE PROCESS* 1 (1938).

Cooperative federalism's administrative law is similarly positioned today – a deficit this Article begins to remedy.

## I. COORDINATED RULEMAKING IN PRACTICE

This Part gathers and systemizes the practices of coordinated rulemaking. It begins with the basic observation that cooperative programs are implemented not only by federal rules (promulgated through ordinary federal administrative processes) and state rules (promulgated through standard state administrative processes) but also – in fact, primarily – by rules promulgated by both governments acting in coordination. A regulated party or interested constituent would be unable to learn the full set of binding rules in cooperative programs by scanning the Code of Federal Regulations and its state equivalents for implementing regulations. She would also need to look in unexpected places and to documents unique to cooperative federalism – like the addenda to the intergovernmental agreements that formally structure cooperative programs – to find the coordinated rules that these programs use to bind individuals and firms.

Consider, for instance, a regulatory question of exceeding importance to Medicaid beneficiaries: whether a beneficiary is required, as a condition of receiving state-funded health insurance, to pursue or secure employment. Whether to require work of benefit recipients is a central and recurring policy question not just in Medicaid but across social welfare programs.<sup>26</sup> How is this consequential decision about the obligations of Medicaid recipients made? Not through a federal statute alone – Title XIX of the Social Security Act neither imposes nor by direct terms prohibits work requirements – but through a regulatory process. Yet, neither federal nor state action by itself has supplied the determinative process. Instead, when work requirements have been attempted for state Medicaid programs, that consequential choice has been made through a coordinated rulemaking process. Only once federal and state agencies have lawfully used their discretion to a consistent end – and achieved something of a regulatory meeting of the minds – can their shared understanding be “promulgated” into an addendum to the Medicaid state plan and bind program beneficiaries.<sup>27</sup>

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26. See generally Noah D. Zatz, *What Welfare Requires from Work*, 54 UCLA L. REV. 373 (2006) (discussing work requirements in social welfare regimes).

27. As with many contentious regulatory choices, efforts to impose work requirements on Medicaid beneficiaries through coordinated rulemaking have been met with significant political and legal hurdles. Indeed, after the Obama Department of Health and Human Services (HHS) declined to approve state work-requirement proposals because it viewed them as inconsistent with the federal Medicaid statute, the Trump HHS approved eight such proposals

As that example illustrates, my focus in this Article is the rules that serve the functions in cooperative programs that binding legislative rules serve in the federal system. Even within the federal system, the boundaries of legislative rule-making can be elusive,<sup>28</sup> but the basic bones are these: a “legislative rule” is a binding “[a]gency action that creates new rights or imposes new obligations on regulated parties or narrowly limits administrative discretion.”<sup>29</sup> The rules canvassed in this Article are rule-like in both of those respects—they profoundly shape government offerings to and impositions upon individuals and firms and they constrain within precisely articulated boundaries the conduct available to federal and state administrative officials. As I elaborate, however, the confluence of formal and informal forces that allow them to bind are, at least in part, distinct to the cross-governmental context.<sup>30</sup>

As in the federal system, taking stock of coordinated rulemaking inside cooperative federalism programs requires us to look past formalities, especially terminological ones, like whether something is styled or labeled as a “rule.” We must instead ask whether the joint administrative text in question *functions* like a rule, as federal courts have long done when evaluating would-be rules in the

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before they were found “arbitrary and capricious” by the D.C. District Court in a case later affirmed by the D.C. Circuit, granted review by the Supreme Court, and ultimately remanded as moot after the Biden HHS withdrew the approvals. *Gresham v. Azar*, 363 F. Supp. 3d 165 (D.D.C. 2019), *aff’d*, 950 F.3d 93 (D.C. Cir. 2020), *vacated and remanded sub nom.* *Becerra v. Gresham*, 142 S. Ct. 1665 (2022), *vacated and remanded sub nom.* *Arkansas v. Gresham*, 142 S. Ct. 1665 (2022) (mem.). Although attempts were made, in short, to promulgate coordinated rules, substantive legal defects precluded their enforcement.

28. This is especially true for the task of distinguishing binding legislative rules from nonbinding guidance. See *Cnty. Nutrition Inst. v. Young*, 818 F.2d 943, 946 (D.C. Cir. 1987) (“The distinction between legislative rules and interpretative rules or policy statements has been described at various times as ‘tenuous,’ ‘fuzzy,’ ‘blurred,’ and, perhaps most picturesquely, ‘enshrouded in considerable smog.’” (internal citations omitted)).
29. *Ass’n of Flight Attendants-CWA v. Huerta*, 785 F.3d 710, 717 (D.C. Cir. 2015). This definition is a gloss on the definition contained in the federal Administrative Procedure Act (APA), which is remarkably similar to many state equivalents. See 5 U.S.C. § 551(4) (2018) (defining “rule” as “an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or describing the organization, procedure, or practice requirements of an agency”). Commentators have distilled three central elements in this definition: “generalized nature, policy orientation, and [] prospective applicability.” 1 CHARLES H. KOCH, JR., *ADMINISTRATIVE LAW & PRACTICE* § 2.11 (1997). The same elements appear in many state definitions of rules and regulations. See, e.g., MASS. GEN. LAWS ch. 30A, § 1 (2022); HAW. REV. STAT. § 91-1 (2022). Some states use similar definitions in practice but imply, rather than expressly state, that rules must have future effect. See, e.g., WIS. STAT. § 227.01 (2023); ME. STAT. tit. 5, § 8002 (2022); NEB. REV. STAT. § 84-901(2) (2022).
30. See *infra* Section I.C. and Part II; see also Fahey, *supra* note 9, at 2399 (elaborating the sometimes unorthodox law-creating force of domestic intergovernmental commitments).

federal administrative system.<sup>31</sup> Does the “rule” narrowly limit federal and state agency discretion in the implementation of a cooperative program? Does it define the contours of benefits or entitlements for cooperative program participants? Does it require obligatory action from parties regulated by the federal-state collaboration?

This functional approach is doubly appropriate in the cooperative federalism context because there is no cross-governmental equivalent to the federal APA to supply a standardized vocabulary—like the term “rule” and its general definition—for actions taken jointly by federal and state administrative agents.<sup>32</sup> Rather, the templates for coordinated administrative action must be deduced from patterns and practices.

Section I.A uses Medicaid, our largest cooperative program, to elaborate the basic cross-governmental template of coordinated rulemaking. It also notes many other programs that follow this template. Section I.B draws on a range of other cooperative programs to document the variety of internal processes our governments use to complete their respective tasks within that template. These processes are often shaped not by that government’s own law alone but by the partner government as well. And they can range from highly formal, as when one or both governments use processes resembling notice and comment, to procedures that are highly informal and unstructured, and lots in between. Finally, Section I.C develops the legal logic of coordinated rulemaking, exploring, in particular, when and why the rules it produces gain the force of law. In standard federal rulemaking, rules gain legal force upon the completion of the APA’s notice-and-comment process.<sup>33</sup> But in the cooperative federalism context, I show that notice and comment is neither necessary nor sufficient to give coordinated rules the force of law. Rather, they become binding only once they have achieved—indeed, *because* they have achieved—the concurrence of both participating governments.

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31. *See* Ctr. for Auto Safety v. Nat’l Highway Traffic Safety Admin., 710 F.2d 842, 846 (D.C. Cir. 1983) (“The mere fact that [an agency] did not denominate its [action] a ‘rule’ is not determinative . . . . [I]t is the substance of what the [agency] has purported to do and has done which is decisive.” (quoting *Columbia Broad. Sys., Inc. v. United States*, 316 U.S. 407, 416 (1942))); *Chamber of Com. v. Occupational Safety & Health Admin.*, 636 F.2d 464, 467 n.4 (D.C. Cir. 1980) (looking past the agency’s own characterization to the alleged rule’s function).

32. *See* 5 U.S.C. § 551(4) (2018).

33. *See id.* § 553.

### A. Medicaid and Coordinated Rulemaking: The Basic Template

Across a wide range of federal programs, federal and state agencies employ a basic template to issue coordinated rules—rules that govern firms, beneficiaries, service providers, and participants in cooperative programs.<sup>34</sup> That template has three basic steps: (i) the federal agency articulates *parameters*, (ii) the state agency exercises discretion within those parameters to make regulatory *proposals*, and (iii) the federal agency *approves* (or disapproves) the state's proposals, sometimes providing formal or informal feedback. We can think of the moment of approval—when the federal government and the states can be said to concur in the shared text—as the rule's “promulgation.”

This form of coordinated rulemaking is a commonly used regulatory technique in cooperative federalism programs large and small.<sup>35</sup> To illustrate how it

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34. These programs include both conditional preemption programs—in which the federal government offers states the chance to collaboratively regulate, but threatens to preempt state jurisdiction and regulate in their place if they decline—and federal grant programs—in which the federal government offers states funding in exchange for their participation in the collaborative effort. For the latter category, in particular, coordinated rulemaking makes clear that these programs are far more administratively nuanced than a simple exchange of funding and grant conditions. Indeed, the administrative text that comprises what some see as conditions to the federal grant is, as the Medicaid example shows, the core set of administrative rules that governs the program—a set of rules that deserves its own administrative genealogy.
  35. For instance, as is characteristic of programs supported by significant federal funding, we can see evidence of coordinated rulemaking in parts of all ten of the largest cooperative programs measured in federal outlays, each of which exceeds \$10 billion. See ROBERT JAY DILGER & MICHAEL H. CECIRE, CONG. RSCH. SERV., R40638, FEDERAL GRANTS TO STATE AND LOCAL GOVERNMENTS: A HISTORICAL PERSPECTIVE ON CONTEMPORARY ISSUES 6 (2019) (listing programs). These include: (i) Medicaid, *see infra* Section I.A; (ii) Federal-Aid Highways, *see infra* Section I.B.3; (iii) Child Nutrition, *see, e.g.*, 7 C.F.R. § 235.5(b)-(c) (2022) (outlining the annual budgeting process for state administrative expenses that follows the coordinated rulemaking template); (iv) Public Housing, *see, e.g.*, 24 C.F.R. § 903.6-903.7 (2022) (setting federal parameters), *id.* § 903.4 (outlining state proposals in the form of “public housing agency plans”), *id.* § 903.23 (requiring federal review and approval); (v) Children's Health Insurance Fund (CHIP), *see, e.g.*, 42 C.F.R. § 457.60 (2022) (describing coordinated rulemaking via amendments to state CHIP plans); *CHIP State Program Information*, CTRS. FOR MEDICARE & MEDICAID SERVS., <https://www.medicaid.gov/chip/state-program-information/index.html> [<https://perma.cc/VF4G-T8XS>] (collecting recently approved CHIP state plan amendments); (vi) Education for the Disadvantaged, *see infra* Section I.B.2; (vii) Temporary Assistance for Needy Families (TANF), *see, e.g.*, 45 C.F.R. § 201.3 (2022) (outlining coordinated rulemaking process via amendments to TANF state plan); (viii) State Children and Families Services Programs, *see, e.g.*, 42 U.S.C. § 1320a-9 (2018) (authorizing demonstration projects related to foster placement programs created by Title IV-E of the Social Security Act); *id.* § 1320a-9(e) (setting parameters); *id.* § 1320a-9(a) (requiring approvals); (ix) Urban Mass Transportation Grants, *see, e.g.*, 49 U.S.C. § 5307(b)-(c) (2018) (outlining federal parameters and state proposals); *id.* § 5307(c)(2) (requiring federal approval); and (x) the Disaster Relief



works—how it stitches together federal and state administrative action, how it produces one legally unified work product, and how it fits into the broader regulatory scheme—this Section focuses on Medicaid, dollar-for-dollar our nation's largest cooperative federalism program and the paradigmatic example of coordinated rulemaking.<sup>36</sup>

### 1. Rulemaking in Context

Medicaid is a \$627 billion program of public insurance that claims double-digit shares of state and federal budgets, enrolls seventy-four million people, and has an administrative footprint to match.<sup>37</sup> Its goal is to provide health insurance to needy populations, but each state's collaboration with the federal government is distinctive.<sup>38</sup> Federal and state statutes authorize their respective governments to participate in Medicaid.<sup>39</sup> Those statutes, however, permit each government to pursue a range of programmatic goals. To initiate a state Medicaid program, therefore, the federal Department of Health and Human Services (HHS) and a state Medicaid agency designated by the state's governor must negotiate a state program that complies with each agency's legislative authorization. Those negotiations are memorialized in another important legal device: a type of "intergovernmental agreement" called the "Medicaid state plan."<sup>40</sup>

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Fund, in which the process for securing disaster declarations from the President follows the basic coordinated rulemaking template, *see* 44 C.F.R. § 206.33 (2022) (describing the "preliminary damage assessment," which form parameters for assessing potential disasters); *id.* § 206.35-206.36 (detailing state proposals for disaster emergency and disaster declarations); *id.* § 206.38 (discussing residential disaster declarations or approvals).

36. *See* DILGER & CECIRE, *supra* note 35, at 6 ("Medicaid . . . has, by far, the largest budget of any federal grant-in-aid program.").
37. Harris v. McRae, 448 U.S. 297, 308 (1980) (describing Medicaid as a "system of 'cooperative federalism'" (quoting King v. Smith, 392 U.S. 309, 316 (1968))); *see* CONG. RSCH. SERV., R42640, MEDICAID FINANCING AND EXPENDITURES 1 (2020); *State Expenditure Report*, NAT'L ASS'N OF STATE BUDGET OFFICERS 54 (2022), <https://www.nasbo.org/reports-data/state-expenditure-report> [<https://perma.cc/TMQ7-VVCC>] ("Medicaid spending accounted for 27.2 percent of total state spending in fiscal 2021, the single largest component of *total* state expenditures, and 17.8 percent of general fund expenditures . . . ."); *Options for Reducing the Deficit: 2019 to 2028*, CONG. BUDGET OFF. 43 (Dec. 2018), <https://www.cbo.gov/system/files/2019-06/54667-budgetoptions-2.pdf> [<https://perma.cc/AMF4-E8VU>] ("CBO estimates that Medicaid's share of federal noninterest spending will rise from 10 percent in 2017 to 11 percent in 2028.").
38. *See* Medicaid, CTRS. FOR MEDICARE & MEDICAID SERVS., <https://www.medicaid.gov/medicaid/index.html> [<https://perma.cc/AT7G-A9S9>].
39. *See, e.g.*, 42 U.S.C. § 1396 (2018); *see also, e.g., Medicaid*, NAT'L CONF. OF STATE LEGISLATURES, <https://www.ncsl.org/research/health/medicaid-home-page.aspx> [<https://perma.cc/4UGF-XAZ5>] (collecting state Medicaid statutes).
40. Fahey, *supra* note 9, at 2339-40.

Intergovernmental agreements are hardly unique to Medicaid. As I have shown elsewhere, intergovernmental agreements operate as a kind of structuring document that performs several functions for federal-state relations. First, they act as a promissory instrument, serving the functions that treaties perform in international law and contracts serve in private law.<sup>41</sup> They commit their government parties to a specific program, specifying its objectives, processes, approaches, and requirements.<sup>42</sup> Second, and distinctive to federalism's constitutional architecture, they memorialize the state's voluntary participation in the program so that the federal government cannot be said to have unconstitutionally obtained that participation by force – or “commandeered” it.<sup>43</sup> Intergovernmental agreements, as I have shown, initiate almost every federal-state program.<sup>44</sup> Like treaties, intergovernmental agreements like Medicaid state plans occupy a kind of neutral, interstitial legal space between their signatories. They allow both governments to pursue a joint initiative without making the plan wholly federal or wholly state and ensuring that it is not subjected wholesale to either government's absolute legal control.

The intergovernmental agreement is only the beginning – something akin in federal administrative law to an “enabling act,” which sets a regulatory program in motion. After our governments agree to the general program, administrative implementers in each government must take a range of regulatory actions that are the classic terrain of legislative rulemaking. Within the Medicaid program, to take just a few examples, our governments must decide who is eligible for the program, what they are eligible to receive, and how eligibility will be determined. Our governments also have to set and revise reimbursement rates for providers of health services to Medicaid beneficiaries. They have to determine how Medicaid, which focuses on people experiencing poverty, will integrate with other programs that provide related and sometimes overlapping services. They have to detail quality controls not only for private parties like hospitals, who treat Medicaid patients, but also for the states' line-level bureaucrats who interact with Medicaid recipients and shape their engagement with the program.

But where would beneficiaries and firms find the regulations that accomplish these programmatic objectives? The answer is not obvious. Were the program wholly federal, we would consult the federal enabling act – the statute that cre-

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41. *Id.* at 2330.

42. *Id.*

43. *Id.* at 2339 (“[A]lthough the federal government may not ‘force[]’ the states to participate in these programs, it may invite the states to voluntarily participate ‘on a contractual basis.’” (quoting *Printz v. United States*, 521 U.S. 898, 936 (1997) (O’Connor, J., concurring))).

44. *Id.* at 2336–43.



ates the program and delegates specific authority to the federal agency—to understand what regulations Congress directed HHS to enact. We would consult the APA to understand how those regulations would be crafted. Assuming the APA’s standard notice-and-comment rulemaking model applied, we would consult the Federal Register to find the relevant notices of proposed rulemaking and the final rules themselves. And, of course, we would ultimately find the program’s rules codified in the Code of Federal Regulations.

But the Federal Register and the Code of Federal Regulations do not contain the full range of regulations that implement Medicaid—or even most of them. Many of the program’s implementing regulations are made instead through coordinated rulemaking and styled as amendments to the state Medicaid plan. These amendment-rules are “codified” only in the sense that they are appended to the state’s Medicaid plan, where they become intricately numbered supplements, appendices, and attachments.<sup>45</sup> On some level, that kind of codification makes sense because these rules are neither federal nor state in character: they reflect the bilateral agreement of both governments, not the unilateral will of the federal government (or the state). But it raises questions and presents practical and conceptual difficulties. To start, I examine the process by which these coordinated rules are created: the process of parameters, proposals, and approvals.

## 2. Parameters

First, the federal government sets parameters. Think of these as statements of the conditions under which the federal government will agree to a state’s proposed implementing regulations.<sup>46</sup> Some parameters are statutory. Medicaid’s federal authorizing statute, Title XIX of the Social Security Act, contains over

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45. For examples of rules “codified” in the Medicaid state plan, see, for example, *State Plan Under Title XIX of the Social Security Act Medical Assistance Program*, COLO. attach. 2.2-A, 2.6-A, supp. 1 to attach. 2.2-A, supp. 2 to attach. 2.2-A, supp. 3 to attach. 2.2-A, supp. 3 to attach. 2.6-A (Aug. 21, 2021), <https://hcpf.colorado.gov/sites/hcpf/files/Colorado%20Medicaid%20State%20Plan%20-%20Aug%2031%202021.pdf> [<https://perma.cc/Q3VY-DDGK>], which elaborates Colorado’s Medicaid eligibility requirements; *id.* at 19-28(a), attach. 3.1-A, supp. 3 to attach. 3.1A, which sets forth the covered services; *id.* at attach. 4.19-A, attach. 4.19-B, supp. 1 to attach. 4.19-B, which establishes the state plan’s rates; and *id.* at attach. 4.16-A, which describes the plan’s integration with other services.

46. *Beno v. Shalala*, 30 F.3d 1057, 1068 (9th Cir. 1994) (describing the Medicaid statute as setting forth the “minimum requirements which Congress has determined are necessary prerequisites to federal funding”).

eighty separate parameters within which states must make programmatic proposals.<sup>47</sup> Others are articulated through federal regulations or in guidance documents.<sup>48</sup>

Importantly, parameters can be *substantive* or *procedural*. The federal agency can indicate that it will disapprove any state proposal not formulated through its preferred state-level procedures. In that sense, the regulatory process is not pre-defined. It is shaped by the federal government's opening invitation, along with the procedural terms specified in that invitation. (I discuss many of these procedural parameters for Medicaid below as I explain how states formulate their proposals.<sup>49</sup>) Or the federal agency may say that it will disapprove any state proposal that fails to accomplish particular substantive objectives, contain specific substantive analyses, or meet substantive criteria.<sup>50</sup>

### 3. *Proposals*

After the federal government sets parameters, the state formulates proposals. In Medicaid, these take the form of “state plan amendments” that exercise the state's regulatory discretion within the parameters set by HHS. Indeed, any change to a state's Medicaid program, including to its “policy” or “program operation,” must be proposed as an amendment to the existing plan.<sup>51</sup>

Before examining the processes that states use to craft proposed legislative rules, it is worth pausing on the processes they do *not* use – namely, those prescribed by the federal APA. The APA, of course, does not apply to state agencies.

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47. *Gresham v. Azar*, 363 F. Supp. 3d 165, 169 (D.D.C. 2019) (“To be approved, state plans must comply with certain minimum parameters set out in the Medicaid Act.” (citing 42 U.S.C. § 1396a (2018))).

48. See, e.g., 42 C.F.R. §§ 430.12-.25 (2022) (federal Medicaid amendment parameters). The parameters elaborated through guidance documents are voluminous, but for just a few examples, see *Implementation Guide: Medicaid State Plan Eligibility, Individuals Eligible for Family Planning Services – Presumptive Eligibility*, U.S. DEP'T OF HEALTH & HUM. SERVS. (2017) <https://www.hhs.gov/guidance/document/implementation-guide-medicaid-state-plan-eligibility-presumptive-eligibility-individuals> [<https://perma.cc/D99T-DUR8>]; and Letter from Cindy Mann, Dir., Ctrs. for Medicare & Medicaid Servs., to State Health Officials (July 2, 2010), <https://downloads.cms.gov/cmsgov/archived-downloads/SMDL/downloads/SMD10013.pdf> [<https://perma.cc/ZYW8-5C86>], which provides guidance on family-planning proposals.

49. See *infra* Section I.A.3.

50. For just a few examples, see parameters discussed *infra* notes 96-99, 110-113, and 119, and their accompanying text.

51. See 42 C.F.R. § 430.12(c) (2022) (providing that states must amend their plans, and seek federal approval, “whenever necessary to reflect – (i) Changes in Federal law, regulations, policy interpretations, or court decisions; or (ii) Material changes in State law, organization, or policy, or in the State's operation of the Medicaid program”).

Nor could it be applied by federal fiat without running afoul of the Constitution's anticommandeering rule, which prohibits Congress from simply instructing states how to regulate.<sup>52</sup> The federal government could require that states voluntarily use the APA's procedures as a condition of participation in a cooperative program, but I am aware of no programs in which Congress or a federal agency has sought to do so. Instead, the federal government uses program-specific parameters to shape state administrative processes. Here, the federal Medicaid statute and federal regulations require an almost dizzying array of state processes when crafting proposals for the Medicaid program.

To start, the state agency responsible for implementing Medicaid must submit its proposals to the governor for review and forward the governor's comments to HHS to consider as part of its decision whether to approve the state proposal.<sup>53</sup> For proposals related to premiums and cost-sharing, the state must also use a notice-and-comment process (although of the state's own choosing).<sup>54</sup> For proposals related to demonstration projects, the state must also conduct at least two public hearings on the proposal.<sup>55</sup> Some proposals require even more process: when states propose changes to the rates they pay Medicaid providers, among the highest-profile regulatory decisions made by state agencies in administering the program, the federal government requires them to expressly "consider" input "from beneficiaries, providers and other affected stakeholders" and to "maintain a record of the public input and how it responded to such input."<sup>56</sup> They must also provide notice in one of several federally specified locations – the

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52. See also *infra* Section II.B (discussing the anticommandeering rule's broader influence on the administrative practice of cooperative federalism programs).

53. 42 C.F.R. § 430.12(b)(ii)-(iii) (2022) (providing that the initial state "plan must provide that the Governor will be given a specific period of time to review State plan amendments, long-range program planning projections, and other periodic reports on the Medicaid program, excluding periodic statistical, budget and fiscal reports" and that "[a]ny comments from the Governor must be submitted to CMS with the plan or plan amendment"). The governor can avoid direct engagement only by designating representatives within the state Medicaid agency to review the plan on her behalf. Either way, the process places significant power in the hands of the governor, allowing her to either substantively review the state's proposals or to designate the people who create it. *Id.* § 430.12(b)(2).

54. *Id.* § 447.57(c) (specifying that the state "must provide the public with advance notice of the [proposed amendment]," allow "a reasonable opportunity to comment on" it, and "submit documentation" to the federal government in its approval package "to demonstrate that these requirements were met").

55. For "demonstration project[s]" – trial programs more popularly known as "waivers" because federal law authorizes HHS to waive certain otherwise applicable statutory requirements to facilitate state experimentation – federal parameters require states to provide thirty days of notice, a comment period, and two or more public hearings. *Id.* § 431.408(a)(1)(iii)-(iv).

56. *Id.* § 447.204(a)-(a)(2).

state's public registrar, newspapers with wide circulation, or a specially formatted website.<sup>57</sup>

But the processes specified in federal regulations are only the start. In many (but not all) states, state law, too, requires state agencies to employ specific processes in crafting proposals. For instance, in some states, changes to the state Medicaid plans must be subjected to the procedural requirements of the state's version of the Administrative Procedure Act.<sup>58</sup> In other states, by contrast, state high courts have excluded plan amendments from the requirements of the state APA because of their cooperative character.<sup>59</sup> Some states layer other forms of process atop the minimum prescriptions. Mississippi, for instance, requires its state Medicaid agency to submit proposals for plan changes to a committee of the state legislature for review and, where necessary, for "legislative recommendations."<sup>60</sup>

Even seemingly mundane procedural parameters can raise hard questions about the political relationship coordinated rulemaking envisions. What happens, for instance, when a state legislature decides to draft its own coordinated rulemaking proposals rather than leave that task to state agencies? Should the federal government require legislatures to comply with the procedural parameters it designed with state agencies in mind – and so make them layer the federal government's preferred notice, comment, or disclosure requirements into their lawmaking processes? Or should the federal agency treat a state legislature's lawmaking processes as an adequate substitute for those procedures – and cheer on their popular involvement – even if the legislature does not comply with the strict letter of the applicable parameter?

Consider, in this context, the state practice of legislatively specifying Medicaid reimbursement rates. As described above, federal parameters have generally required rate-related proposals to be formulated according to a detailed administrative notice regime, which includes disclosure in a state administrative registrar, a specially formatted state administrative website, or a newspaper of wide

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57. *Id.* § 447.205(d).

58. *Senn Park Nursing Ctr. v. Miller*, 470 N.E.2d 1029, 1034 (Ill. 1984) ("Just because HHS approves the overall State plan, and reimbursement procedures are part of the State plan, does not mean that the [state Medicaid agency] does not have to follow the proper procedures under the Illinois Administrative Procedure Act for adopting a rule.").

59. *Methodist Specialty Care Ctr. v. Miss. Div. of Medicaid*, 305 So.3d 1088, 1102 (Miss. 2020) ("[The] State Plan is not a rule that must comply with the notice requirements of the Mississippi APA."); *Women's & Child's Hosp. v. State*, 2 So.3d 397, 407 (La. 2009) (similar).

60. H.B. 421, ch. 530, § 5, Reg. Sess. (Miss. 2012).

circulation.<sup>61</sup> Although most state legislative work is open to the public, legislatures do not ordinarily provide formal notice – whether in administrative circulars or newspapers – before passing laws.

A handful of courts have grappled with those deviations.<sup>62</sup> Some courts have expressed the intuition that because the legislative process is generally public, it functionally meets or exceeds whatever notice objective the federal administrative parameter may have. If a state proposal has “gone through a public process,” it should not need a further prolonged notice period before finalization.<sup>63</sup> Others have been more skeptical, reasoning that in specifying a specifically *administrative* notice mechanism, the federal parameter was after a more technical objective – not the kind of diffuse political engagement with the public that is characteristic of a lawmaking process, but a more technical kind of administrative disclosure.<sup>64</sup> Still others have attempted a middle ground, differentiating between state legislative proposals that must be nondiscretionarily implemented by state administrative agencies, for which legislative publicity is an adequate substitute for administrative notice, and those that permit state agencies to exercise discretion in choosing among modes of implementation, for which there is more justification for standing firm on the administrative notice requirements.<sup>65</sup>

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61. See 42 C.F.R. § 447.205 (2022).

62. That issue can arise, for instance, in cases where a state concedes that it did not comply with the letter of the notice procedure because the legislature enacted a rate regime through legislation, the federal HHS approved the rate proposal, and the challenger contested HHS’s approval as inconsistent with its own parameter regulations. Legislative proposal making also arises in other programs. See, e.g., *Cal. Cmty. Against Toxics v. EPA*, 688 F.3d 989, 992 (9th Cir. 2012) (describing proposals formulated through state statutes in the Clean Air Act).

63. *Himes v. Sullivan*, 779 F. Supp. 258, 270 (W.D.N.Y. 1991), *aff’d*, 956 F.2d 1159 (2d Cir. 1992) (emphasis added); see also *id.* (“Where, as here, the change was caused by the legislature, rather than by an agency’s interpretation of the law, the detailed public notice requirements are often rendered unnecessary.”); *Cal. Ass’n of Bioanalysts v. Rank*, 577 F. Supp. 1342, 1348 (C.D. Cal. 1983) (suggesting that an exception to the notice requirements would be based on the “rationale that changes mandated by a legislature ‘have already gone through a public process,’ and, as a result, the objectives of the notice requirements – i.e., to secure public comment and to promote accountability among decisionmakers – already have been satisfied in the legislative process” (internal citation omitted)).

64. *E.g.*, *Mission Hosp. Reg’l Med. Ctr. v. Shewry*, 85 Cal. Rptr. 3d 639, 659 (Cal. Ct. App. 2008) (“A state can develop whatever type of public process it chooses, including a legislative process for establishing and revising reimbursement rates. However, Congress clearly imposed a duty on a state participating in Medicaid to ensure that whatever process it develops and uses at a minimum satisfies the publication and comment requirements of the [federal regulations].”).

65. *E.g.*, *Claus v. Smith*, 519 F. Supp. 829, 833 (N.D. Ind. 1981) (“Were no interpretation or discretion required of [the state Medicaid agency] by a given state statute, [the agency] could satisfy its procedural duties by complying with the notice publication requirement . . . and the

These intuitions about why it might make sense to encourage and accommodate legislative involvement, on the one hand, or subordinate it to the letter of the federal regulation, on the other, provide a small taste of the larger political-administrative problems that coordinated rulemaking can generate.

#### 4. *Approvals*

But state proposals, however crafted, are just that—proposals. Even if the state agency formulated the proposal according to the state’s standard rulemaking process or the state legislature enacted it as a statute, it is not binding on third parties until it has been approved by the federal agency. The proposed rule must, in short, cross governmental boundaries one more time to achieve the concurrence needed to gain legal force.

Approvals are, in my view, one of the major neglected forms of federal administrative activity and play a significant role in both federalism and administrative law. As with the other aspects of coordinated rulemaking, no scholarship that I am aware of has identified approvals as a discrete and recurring category of administrative action, even though federal agencies across a wide range of programs routinely evaluate state proposals and decide whether to approve them. And this is so even though approvals are the one slice of coordinated rulemaking that is repeatedly subject to a degree of judicial review.<sup>66</sup>

In Medicaid, federal law tells HHS to approve state proposals only if they “fulfill[] the conditions specified” in the Medicaid statute.<sup>67</sup> But it offers only limited guidance on how the agency should evaluate a state’s proposal for that consistency.<sup>68</sup> To see why that judgment is complicated for substantive parameters, consider the rates that states pay medical providers for services to Medicaid

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recipient informing requirement [only]. . . . But, where, as in this case, a state statute requires interpretation and discretion, [the agency] must satisfy every notice requirement and every hearing requirement . . .”).

66. The approvals of federal agencies can sometimes be challenged as “final agency action” pursuant to 5 U.S.C. § 704 (2018) and subject to review under the APA’s usual “arbitrary and capricious” standard. *See, e.g., supra* note 27. However, what it means for an approval to be “arbitrary and capricious” is unsettled.
67. 42 U.S.C. § 1396a(b) (2018) (“Approval by Secretary: The Secretary shall approve any plan which fulfills the conditions specified in subsection (a) . . .”).
68. *Id.* For proposals pursuant to Section 1115 of the Social Security Act, which allows the Secretary of HHS to suspend otherwise applicable statutory requirements to facilitate experimental initiatives within the states, federal regulations do require HHS to observe a public notice-and-comment process. *See* 42 C.F.R. § 431.416(b)-(d) (2022). The regulations provide, however, that HHS “will not provide written responses to public comments.” *Id.* § 431.416(d)(2). And the culmination of that process is not the promulgation of a federal rule, but the issuance



beneficiaries. The federal Medicaid statute prohibits HHS from approving any state proposal that does not use “methods and procedures . . . as may be necessary . . . to assure that payments are consistent with efficiency, economy, and quality of care and sufficient to enlist enough providers so that care and services are available under the plan.”<sup>69</sup> Students of federal administrative law will easily spot the ambiguities. What do “efficiency, economy, and quality of care” mean? How do we balance between them? What does it mean to be “sufficient” to enlist services?

The nuances of coordinated action complicate these questions further.<sup>70</sup> Should HHS or state agencies define these terms? Once generally defined, should specific state rates be reviewed *de novo* or deferentially? Should HHS approve the state rates if they are not “arbitrary and capricious”?<sup>71</sup> Should HHS obtain and scrutinize the state administrative record? Or should it create its own record, gather its own data, build its own models, and seek notice and comment all over again? The devil, it quickly becomes clear, is in the details.

Surprisingly, HHS’s own view on these important questions is not always clear. HHS has long taken the position that it is *not* required to follow the APA’s notice-and-comment process when evaluating state plans for approvals.<sup>72</sup> One consequence of that decision for Medicaid is that we lack the record of agency thinking that notice and comment ordinarily provides. Still, HHS manuals and guidance documents suggest that the agency uses an informal, diffuse, and negotiated process to review and approve state proposals. The State Medicaid Manual, a federal guidance document that consolidates federal Medicaid policy

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of a state approval letter. In litigation, HHS has cited this specific exemption from responding to comments to argue that it has “no obligation to offer any explanation of [its] decision to approve” a state proposal. *Gresham v. Azar*, 363 F. Supp. 3d 165, 178 (D.D.C. 2019). For potential issues with this approach, see *Rodway v. U.S. Department of Agriculture*, 514 F.2d 809, 817 (D.C. Cir. 1975), which explains that the APA’s standard notice-and-comment provision requires agencies to “respond in a reasoned manner to the comments received, to explain how the agency resolved any significant problems raised by the comments, and to show how that resolution led the agency to the ultimate rule.” States can also seek reconsideration of the Administrator’s disapproval. See 42 C.F.R. § 430.1 (2022).

69. 42 U.S.C. § 1396a(a)(30)(A) (2018).

70. See *infra* Part III (exploring the administrative-law principles that are implicated by coordinated rulemaking).

71. Recall that the APA does not apply to states, so HHS would have to draw on that standard only as inspiration.

72. See 42 C.F.R. § 430.15 (2022); CTRS. FOR MEDICARE & MEDICAID SERVS., STATE MEDICAID MANUAL § 13026(D) (2000). Other agencies, as we shall see, do use notice and comment when reviewing and approving state proposals in the context of other cooperative federalism programs. See *infra* notes 88–91 and accompanying text.

and regulations, outlines different opportunities for engagement and negotiation between the federal and state agencies.<sup>73</sup> The state first submits its proposals to the regional office of HHS's Centers for Medicare and Medicaid Services for review. While the Manual does not set out how this review should be undertaken, it does encourage the regional office to "initiate discussion with the State agency on clarification of significant aspects of the plan which come to their attention in the course of this review."<sup>74</sup> When necessary, the regional office can solicit from the "central office" (i.e., the head honchos in D.C.) "suggestions . . . for use . . . in negotiations with the State agency."<sup>75</sup> And HHS routinely asks for additional information from the states.<sup>76</sup>

Generally, HHS invests significant effort in evaluating proposed plan amendments. But it can, if it chooses, even approve state proposals by *nonaction*.<sup>77</sup> If a proposed plan amendment sits with HHS for more than ninety days and HHS neither disapproves it nor requests additional information, then that proposal shall be "considered approved" or "deemed" approved.<sup>78</sup>

### B. Coordinated Rulemaking: Intragovernmental Variations

But this is by no means just a story about Medicaid. Instead, as I elaborate further in this Section, many of our major cooperative federalism programs share the basic structural template I have described, in which a federal agency sets out

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- 73. This is the legal side of what political scientists call "picket-fence" federalism. In the political-science literature, the focus is on how federal and state agents network and form political bonds through their participation in cooperative programs. Here, however, we can see that those bonds are legally structured, as I elaborate *infra* notes 140-141 and accompanying text.
  - 74. STATE MEDICAID MANUAL, *supra* note 72, § 13026(B). Federal regulations specify less. 42 C.F.R. § 430.14 (2022) ("CMS regional staff reviews State plans and plan amendments, discusses any issues with the Medicaid agency, and consults with central office staff on questions regarding application of Federal policy.").
  - 75. STATE MEDICAID MANUAL, *supra* note 72, § 13026(B).
  - 76. See 42 C.F.R. § 430.16(a)(ii) (2022); see also Brian Neale, *State Plan Amendment and 1915 Waiver Process Improvements to Improve Transparency and Efficiency and Reduce Burden*, CTR. FOR MEDICAID & CHIP SERVS. 2 (Nov. 6, 2017), <https://www.medicaid.gov/federal-policy-guidance/downloads/cib110617-2.pdf> [<https://perma.cc/BP32-KBB8>] (summarizing the average time required to return information after requests).
  - 77. See 42 C.F.R. § 430.16(a) (2022) ("A State plan or plan amendment will be considered approved unless CMS, within 90 days after receipt of the plan or plan amendment in the regional office, sends the State – (i) Written notice of disapproval; or (ii) Written notice of any additional information it needs . . .").
  - 78. *Id.*; see also STATE MEDICAID MANUAL, *supra* note 72, § 13026(E) ("The State plan or plan amendment will be deemed approved unless the Secretary within the 90-day period, either approves, disapproves or requests additional information, in writing . . .").



parameters, a state agency makes a proposal, and the federal government reviews, revises, and ultimately approves the text of a coordinated rule.

This basic template is *relational*: it structures how federal and state agencies regard, review, contribute to, and approve one another's work. But for regulated parties, the most significant aspects of a rulemaking process are, I suggest, those elements that are *public facing*—those parts of the process in which each government seeks its polity's input on the terms of proposed rules. Accordingly, in this Section, I examine variations on the basic template from program to program, focusing primarily on how different programs structure the process of obtaining and incorporating comments—from layers of notice and comment to peer review to local hearings to an absence of any procedural structuring at all.

An account of these variations is important for several reasons. If a regulated party or other stakeholder wishes to track and provide input on a coordinated rulemaking, they need to understand not just how the rule moves across governments but also the internal processes that the cross-governmental template stitches together. By tracing how federal and state agencies perform their respective parameter-setting, proposal, and approval functions, moreover, we can begin to assess the costs and benefits of different forms of coordinated rulemaking. We can also see the deep interdependence between governments that exists even when each is conducting its separate steps in the coordinated rulemaking process. Finally, the procedural variation within governments reveals an important legal difference between federalism's coordinated rulemaking and the notice-and-comment rulemaking required by the APA: whereas the binding quality of legislative rulemaking in the federal system stems from *process*, in coordinated rulemaking it stems from *agreement*.

### 1. *The Clean Air Act*

The cooperative federalism program set in motion by the federal Clean Air Act is among our most analyzed and most sprawling federal-state regulatory initiatives.<sup>79</sup> One of its central objectives is to set and enforce national air-quality standards—a goal implemented in large measure by coordinated rules.<sup>80</sup>

The Act's strategy for cooperatively regulating air quality is complex. One of its centerpieces is for the federal Environmental Protection Agency (EPA) to set National Ambient Air Quality Standards and the states to develop their own plans for achieving those standards (termed "state implementation plans," or SIPs).<sup>81</sup> The Clean Air Act, along with a large body of federal regulations, forms the parameters for coordinated rulemaking, and the SIPs themselves, once approved by EPA, become the body of regulations that directly bind third parties.<sup>82</sup>

After a state establishes an initial plan, as all fifty states did by 1972,<sup>83</sup> subsequent programmatic changes take the form of "SIP revisions" and follow the

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79. I try, where possible, not to refer to cooperative programs by the name of the corresponding federal statute, though doing so is common in the federalism literature. I resist that practice because it overstates the legal role of the federal statute and understates the legal role of the state authorizing statute and the subsequent federal-state agreement, which legally initiates the joint program. See *infra* Section II.C. But there are some programs, like the Clean Air Act, that are so widely known by their corresponding federal statute that referring to them in any other way would be more confusing than clarifying.

80. See 42 U.S.C. § 7401(a)(3)-(4) (2018) (finding that "air pollution control at its source is the primary responsibility of States and local governments," but that "[f]ederal financial assistance and leadership is essential for the development of cooperative . . . programs to prevent and control air pollution").

81. See *id.* § 7409. These air quality standards include "primary" standards (focused on protecting public health) and secondary standards (focused on protecting public welfare more broadly). *Id.* § 7409(b)(1)-(2); *id.* § 7410 (describing state implementation plans (SIPs)). Other provisions of the Act take a different approach to pollution control but use the same basic federal-state structure. See, e.g., *id.* § 7411(d)(1) (indicating that in addressing new stationary sources, Environmental Protection Agency (EPA) "shall prescribe regulations which shall establish a procedure similar to that provided by section 7410"); *id.* § 7412(d)(1), (5) (addressing parameters, proposals, and approvals for hazardous air pollutants).

82. See, e.g., *id.* § 7410(a)(2) (specifying statutory parameters); *id.* § 7410(a)(2)(F) (authorizing the Administrator to "prescribe[]" additional parameters, within which states must make proposals); see also *id.* § 7410(a)(5) (specifying conditions the Administrator may *not* consider when approving the state's proposals). If a state declines to submit a SIP to EPA, or submits an inadequate one, the agency must establish and impose its own standards for that state. *Id.* § 7410(c)(1) (instructing the administrator of EPA to "promulgate a Federal implementation plan" for states without approved regulatory strategies).

83. Approval and Promulgation of Implementation Plans, 37 Fed. Reg. 10842 (May 31, 1972).

same cross-governmental proposal-and-approval template we saw in Medicaid.<sup>84</sup> For example, the high-profile Clean Power Plan – a first-of-its-kind effort by President Obama to use the Clean Air Act to combat climate change – was treated in some popular coverage as a freestanding federal regulation.<sup>85</sup> But it did not directly bind regulated parties. Although it was promulgated as a rule within the federal system, the Plan served only as the parameters for subsequent state proposals. As EPA explained in its notice of proposed rulemaking, “In this action, [EPA] is proposing emission *guidelines* for states to follow in *developing plans* to address greenhouse gas emissions from exiting fossil fuel-fired electric generating units.”<sup>86</sup> The Clean Power Plan also terminated at the parameter stage when the Supreme Court construed the Clean Air Act not to support the Plan.<sup>87</sup>

But the Clean Air Act deviates from Medicaid in significant ways. Most importantly, the Clean Air Act establishes a highly *formal* process for both EPA and state agencies, one characterized by multiple internal notice-and-comment-style processes. The Act instructs EPA to review its existing air-quality standards for each regulated pollutant using a notice-and-comment process every five years, thus setting new parameters within which states must make regulatory proposals.<sup>88</sup> States must, in turn, use a notice-and-comment-like process to propose all SIP revisions.<sup>89</sup> EPA must, finally, approve those proposed SIPs through yet

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84. See *Nat. Res. Def. Council, Inc. v. EPA*, 16 F.3d 1395, 1399 (4th Cir. 1993) (“EPA sits in a reviewing capacity of the state-implemented standards, with approval and rejection powers . . . .”); *Ala. Env’t Council v. EPA*, 711 F.3d 1277, 1280 (11th Cir. 2013) (“Once approved, a SIP may not be unilaterally modified by either the state or the EPA . . . .”).

85. See, e.g., Robert Barnes & Dino Grandoni, *Supreme Court Limits EPA’s Power to Combat Climate Change*, WASH. POST (June 30, 2022), <https://www.washingtonpost.com/politics/2022/06/30/supreme-court-epa-climate-change> [<https://perma.cc/MBS9-VH95>] (discussing the Clean Power Plan in federally focused terms after the Supreme Court found it unlawful in *West Virginia v. EPA*, 142 S. Ct. 2587 (2022)).

86. Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units, 79. Fed. Reg. 34830 (June 18, 2014) (emphasis added).

87. *West Virginia v. EPA*, 142 S. Ct. 2587, 2616 (2022).

88. 42 U.S.C. § 7409(d)(1) (2018).

89. *Id.* § 7410(a)(1) (“Each State shall, after reasonable notice and public hearings, adopt and submit to the Administrator, within 3 years (or such shorter period as the Administrator may prescribe) after the promulgation of a national primary ambient air quality standard (or any revision thereof) . . . .”); *id.* § 7410(a)(2) (“Each implementation plan submitted by a State under this chapter shall be adopted by the State after reasonable notice and public hearing.”).

another notice-and-comment process.<sup>90</sup> One commentator has described these layers of notice and comment as a “double-key” obstacle to regulation.<sup>91</sup>

Although these notice-and-comment processes formally mirror similar processes in the federal administrative state, in practice they take on features distinctive to the intergovernmental context. For instance, EPA’s internal documents suggest its deep involvement in the *state* administrative process. A document outlining EPA’s “framework of ‘early engagement’” urges states to allow EPA to engage “early enough in the [state] air agency’s SIP development process that there is sufficient time for EPA to review and provide feedback on the content, and for the air agency to make changes, all prior to the public notice-and-comment period at the state/local level.”<sup>92</sup> EPA practice is also to “submit[] official comments during [the state] public comment period” and, where necessary, to “present testimony at Public Hearing” so that the state can “respond[] to public and EPA comments and modif[y] SIP” before officially submitting it to EPA.<sup>93</sup> States and EPA have even at times negotiated individualized “protocols” to add nonbinding state-specific detail to the proposal-and-approval process.<sup>94</sup> The Clean Air Act thus only begins to illustrate the deep formal and informal interdependence between federal and state agencies beget by the general cross-governmental template.

## 2. Public Education

Other major cooperative programs stitch their own unique processes—different than notice and comment—into the coordinated rulemaking template.

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- 90. See, e.g., Air Plan Approval; Illinois; Permit-by-Rule Provisions, 83 Fed. Reg. 50854 (Oct. 10, 2018) (codified at 40 C.F.R. § 52.720(c) (2022)); *Hall v. EPA*, 273 F.3d 1146, 1161 (9th Cir. 2001) (“The EPA’s approval of the [proposal under review] is an informal rulemaking subject to the notice-and-comment requirements of the Administrative Procedure Act . . .”).
  - 91. William F. Pedersen, Jr., *Why the Clean Air Act Works Badly*, 129 U. PA. L. REV. 1059, 1060 (1981).
  - 92. *State Implementation Plan (SIP) Lean Toolkit for Collaboration Between EPA and Air Agencies*, U.S. ENV’T PROT. AGENCY 3 (Dec. 6, 2019) [hereinafter *EPA Lean Toolkit for Collaboration*], [https://www.epa.gov/sites/default/files/2019-12/documents/sip\\_lean\\_toolkit\\_for\\_collaboration\\_between\\_epa\\_and\\_air\\_agencies.pdf](https://www.epa.gov/sites/default/files/2019-12/documents/sip_lean_toolkit_for_collaboration_between_epa_and_air_agencies.pdf) [<https://perma.cc/3SMU-3FX3>]; *id.* at 3-5 (describing several points at which federal and state agencies will engage in informal discussions—ranging from “initial conceptual discussions” to “regular meetings” to “informal review” opportunities).
  - 93. *What Is a SIP?*, U.S. ENV’T PROT. AGENCY, <https://cfpub.epa.gov/oarwebadmin/sipman/sipman/mContent.cfm?chap=1&filePos=4> [<https://perma.cc/Q8WU-BDSV>].
  - 94. See, e.g., *Joint Protocol for Processing State Implementation Plan (SIP) Submittals* “SIP Protocol,” IND. DEP’T ENV’T MGMT. & U.S. ENV’T PROT. AGENCY (2006), [https://www.epa.gov/sites/default/files/2015-08/documents/sip\\_protocol.pdf](https://www.epa.gov/sites/default/files/2015-08/documents/sip_protocol.pdf) [<https://perma.cc/BRA6-HLBG>].

Coordinated rulemaking is, for example, central to the many cooperative programs related to public education. Take Title I of the Elementary and Secondary Education Act of 1965, the central vehicle through which the federal government funds primary and secondary education for disadvantaged students.<sup>95</sup> The \$17.5 billion program requires participating states to have “challenging State academic standards” in effect in order to receive grant funding.<sup>96</sup> The statute does not require that states work cooperatively with federal agencies to craft those standards; indeed, it protects that traditional state function from any federal oversight at all.<sup>97</sup> A state need only provide “assurance” that it has challenging standards in place.<sup>98</sup>

But the federal statute *does* envision a program in which each state’s system of assessments and accountability for meeting those rigorous academic standards are crafted cooperatively.<sup>99</sup> And the process of doing so is the familiar coordinated rulemaking template I have described. The state’s proposed system must be assembled via a state administrative process largely prescribed by the federal government’s parameters. It must, for instance, be “developed by the State educational agency with timely and meaningful consultation with the Governor, members of the State legislature and State board of education,” among other stakeholders.<sup>100</sup> The state must also make its plan “available for public comment” for at least thirty days and “provide an assurance that public comments were taken into account in the development” of the plan.<sup>101</sup>

What is unusual about Title I, however, is the federal government’s process for *approving* state proposals. The Secretary of Education must review and approve the state’s assessment and accountability system using a “peer-review pro-

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95. Pub. L. No. 89-10, 79 Stat. 27 (codified as amended at 20 U.S.C. § 6301).

96. 20 U.S.C. § 6311(b)(1)(A) (2018) (specifying that state plans must “provide an assurance that the State has adopted challenging academic content standards and aligned academic achievement standards”); REBECCA R. SKINNER, CONG. RSCH. SERV., R45977, THE ELEMENTARY AND SECONDARY EDUCATION ACT (ESEA), AS AMENDED BY THE EVERY STUDENT SUCCEEDS ACT (ESSA): A PRIMER 24-27 (2022) (listing ESEA appropriations for fiscal year 2022).

97. See 20 U.S.C. § 6311(b)(1)(G)(ii) (2018) (instructing the Secretary of Education not to “mandate, direct, control, coerce, or exercise any direction or supervision over any of the challenging State academic standards adopted or implemented by a State”).

98. *Id.* § 6311(b)(1)(A) (“Each State . . . shall provide an assurance that the State has adopted challenging academic content standards and aligned academic achievement standards . . . . A State shall not be required to submit such challenging State academic standards to the Secretary.”).

99. *Id.*; see also *id.* § 6311(c)(1) (requiring state plans to include a statewide accountability system).

100. *Id.* § 6311(a)(1)(A).

101. *Id.* § 6311(a)(8).

cess” designed to “conduct an objective review” by educational experts, including “parents, teachers, principals,” “researchers,” and others.<sup>102</sup> The peer-review “evaluations inform the decision by [the Department of Education] as to whether the State has sufficiently demonstrated that its assessment system addresses each” federal requirement.<sup>103</sup> This peer-review process is quite involved: the assessment template promulgated by the Department details the evidence that the peer reviewers should evaluate and the basis upon which they should assess that evidence.<sup>104</sup>

Perhaps out of respect for the detailed submissions states must make to facilitate the peer-review process, the federal statute prohibits the Secretary from disapproving a state proposal unless the federal agency (i) offers the state an “opportunity to revise and resubmit its State plan,” (ii) provides the state with “technical assistance” in those revisions, (iii) sends the state “in writing, all peer-review comments, suggestions, recommendations, or concerns,” and (iv) holds a hearing, unless the state waives that entitlement.<sup>105</sup> Once approved, the plan is binding and “remain[s] in effect for the duration of the State’s participation” in the federal-funding program.<sup>106</sup>

### 3. *National Highways*

Coordinated rulemaking is not new: our cherished interstate highways were mapped, designed, and constructed with cross-governmental rules promulgated through coordinated rulemaking.<sup>107</sup> Like the programs discussed above, highway development also uses a federally prescribed state administrative process. This one, however, is distinctive for its procedural emphasis on “hearings” conducted by state and local agencies and the devil-in-the-detail difficulty of bringing those hearings to fruition. The federal statute specifies that the Federal Highway Administration will not approve a highway-project proposal unless the local agency assesses its “economic and social effects[,] . . . its impact on the environment, and its consistency with the goals and objectives of such urban planning as has been promulgated by the community.”<sup>108</sup> The state planning agency must

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<sup>102</sup> *Id.* § 6311(a)(4)(A)-(C).

<sup>103</sup> Off. of Elementary and Secondary Educ., *A State’s Guide to the U.S. Department of Education’s Assessment Peer Review Process*, U.S. DEP’T OF EDUC. 10 (Sept. 24, 2018), <https://www2.ed.gov/admins/lead/account/saa/assessmentpeerreview.pdf> [<https://perma.cc/X5D3-R9RM>].

<sup>104</sup> *Id.* at 29-74 (outlining dozens of assessment areas).

<sup>105</sup> 20 U.S.C. § 6311(a)(4)(A)(vi) (2018).

<sup>106</sup> *Id.* § 6311(a)(6).

<sup>107</sup> See *Lathan v. Brinegar*, 506 F.2d 677, 685 (9th Cir. 1974).

<sup>108</sup> 23 U.S.C. § 128(a) (2018).

forward a transcript of the hearing to the Secretary of Transportation for consideration during the federal approval process.<sup>109</sup>

But what counts as an appropriate “public hearing,” a term not defined in the statute, has been highly contested.<sup>110</sup> In those discussions, we see how intimately involved federal agencies and federal courts can become in the details of the *state*-level administrative procedure. One federal court, for instance, set aside the federal approval of a Wisconsin highway-related proposal because the court found that the Wisconsin Department of Transportation’s “open house” was an inadequate “public hearing.” Held in a church, the event resembled a gallery show in which “[a]ttendees could also walk around the room and view exhibits about the project”—and fell short of the hearing requirement because it did not give participants a chance to express their views on the proposals.<sup>111</sup> Another court acknowledged “serious questions about whether” an “open house” format, in which the local transportation agency rented a “storefront . . . for two weeks to facilitate the taking of comments,” constituted a “public hearing” for purposes of the federal parameter.<sup>112</sup> By contrast, still, another court turned back a challenge to a so-called “hybrid hearing,” in which a formal hearing was convened in a school auditorium, but the agency also held other, allegedly distracting events in the school simultaneously, thus depriving “the citizens who attended the auditorium hearing . . . the opportunity to influence a fellow citizen who chose to be in another room.”<sup>113</sup>

Yet, the definition of a hearing is not what is important for our purposes. These debates are important because of what they reveal about the thick administrative interdependence within these programs, including in aspects of them that could easily be mistaken for the acts of state agencies alone. Here, the federal government intimately shapes the precise contours of how the state agency makes decisions: it has to use “public hearings” rather than an alternative mode of administrative deliberation, but it also has to conform those hearings to the scrutiny of federal courts. In short, within coordinated rulemaking, a state’s process is not totally its own.

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109. *Id.* § 128(b).

110. *See* *Sierra Club v. DOT*, 310 F. Supp. 2d 1168, 1206 (D. Nev. 2004) (noting that Section 128(a) is “ambiguous in the sense that it provides no definition of the terms ‘public hearing’ or ‘transcript’” and “does not indicate what format the hearings must take”).

111. *Highway J Citizens Grp., U.A. v. DOT*, 656 F. Supp. 2d 868, 895 (E.D. Wis. 2009); *id.* at 896 (“[A] ‘public hearing’ requires, at the least, an opportunity for citizens to make their views generally known to the agency and the community.”).

112. *City of S. Pasadena v. Slater*, 56 F. Supp. 2d 1106, 1132 (C.D. Cal. 1999); *see also* *Sierra Club*, 310 F. Supp. 2d at 1206 (addressing similar questions).

113. *Waukesha Cnty. Env’t Action League v. DOT*, 348 F. Supp. 3d 869, 878 (E.D. Wis. 2018).



#### 4. *Fusion Centers*

Coordinated rulemaking is also used in unexpected places. Take “fusion centers,” the more than seventy institutions created after the September 11, 2001 terrorist attacks to consolidate terrorism-related information held by federal, state, and local law-enforcement agencies.<sup>114</sup> Today, fusion centers use their information-pooling infrastructures to draw together vast stores of information that reach far beyond national security. Most federalism scholarship focuses on cooperative programs structured by elaborate federal and state statutes—statutes that provide an important window into the complexities of programs whose cross-governmental administrative details can be hard to glean even under the best circumstances. Fusion centers, by contrast, have less statutory grounding. They gain their authority largely from the general powers granted to federal and state police and from the authority these entities generate through agreements intended to combine and magnify their complementary powers.<sup>115</sup>

Without detailed statutory authorization (or constraint) for federal and state participation in fusion centers, the respective agencies—the Department of Homeland Security (DHS) and Federal Bureau of Investigation on the federal side, and police, fire, parole, and other agencies on the state side—have wide discretion to form binding rules for the management of fusion centers. One of the most controversial aspects of fusion centers is their amplified surveillance capabilities, making policies articulating their civil-rights and civil-liberties guardrails of central importance. Although fusion centers are highly secretive, a national association that represents their interests collects and publishes their civil-rights and civil-liberties policies.<sup>116</sup>

The puzzle is how these policies come to be. Two federal statutes are generally understood to provide what thin federal statutory authorization exists for the federal government’s participation in fusion centers. The first directs the federal government to establish a horizontal and vertical “information sharing environment,” which should “incorporate[] protections for individuals’ privacy and civil liberties” and comply with related “legal standards.”<sup>117</sup> A separate statute allocated grant funding for “establishing, enhancing, and staffing with appropriately qualified personnel State, local, and regional fusion centers” and required the Department of Justice (DOJ) and DHS to provide guidance as to the

<sup>114</sup>. See Bridget A. Fahey, *Data Federalism*, 137 HARV. L. REV. 1007, 1024, 1045-46 (2022).

<sup>115</sup>. See *id.* at 1036 (citing CONST. PROJECT, RECOMMENDATIONS FOR FUSION CENTERS: PRESERVING PRIVACY & CIVIL LIBERTIES WHILE PROTECTING AGAINST CRIME AND TERRORISM 6 (2012)).

<sup>116</sup>. See *Privacy Policies*, NAT’L FUSION CTR. ASS’N, <https://nfcausa.org/privacy-policies> [<https://perma.cc/EKQ8-NU63>].

<sup>117</sup>. 6 U.S.C. § 485(b)(1)(A), (b)(2)(H) (2018).



creation of those centers, including the issuance of “privacy and civil liberties polic[ies] consistent with Federal, State, and local law.”<sup>118</sup> DOJ and DHS, in turn, have issued and consistently updated a template as guidance for state and local fusion centers to use in the development of those policies and instructed state and local entities to submit their policies for approval.<sup>119</sup> No federal parameters required fusion centers to develop their policies using particular state-level administrative processes, nor could I find any evidence of any state law so requiring. Fusion centers drastically multiply state surveillance capacity by pooling data and personnel across law-enforcement agencies and levels of government.<sup>120</sup> As their power grows, the civil-rights and civil-liberties policies are one of the few constraints standing between them and the individuals they surveil. But the content of these consequential and apparently binding policies was forged through administrative processes in the states and federal government that for each acting alone would yield only nonbinding guidance.

### C. *How Coordinated Rules Bind: Promulgation by Concurrence*

In the federal system, agencies generally promulgate legislative rules with the force and effect of law by complying with the APA’s notice-and-comment-rulemaking procedure.<sup>121</sup> The APA requires notice and comment unless it exempts the rule’s subject matter,<sup>122</sup> the agency finds “good cause” to forego those procedures,<sup>123</sup> or the agency’s enabling act makes the APA’s notice-and-comment requirement inapplicable.<sup>124</sup> Federal agencies can also act without notice and comment—as they do when they are making interpretive rules, guidance

118. *Id.* §§ 607(a)(2)(G), 124h(i)(5).

119. See Bureau of Just. Assistance, *Fusion Center Privacy, Civil Rights, and Civil Liberties Policy Development Template*, U.S. DEP’T OF JUST. (Mar. 2019), [https://bja.ojp.gov/sites/g/files/xyckuh186/files/media/document/fusion\\_center\\_pcrcl\\_policy\\_development\\_template\\_v\\_3.o\\_march\\_2019.pdf](https://bja.ojp.gov/sites/g/files/xyckuh186/files/media/document/fusion_center_pcrcl_policy_development_template_v_3.o_march_2019.pdf) [<https://perma.cc/A4WT-NELS>].

120. See Fahey, *supra* note 114, at 1012.

121. 5 U.S.C. § 553 (2018); *Chrysler Corp. v. Brown*, 441 U.S. 281, 295 (1979) (“[P]roperly promulgated, substantive agency regulations have the ‘force and effect of law.’”). The terminology can get thorny, but “regulation,” “substantive rule,” and “legislative rule” are generally used interchangeably in administrative law and in this Article. See *Am. Hosp. Ass’n v. Bowen*, 834 F.2d 1037, 1045 (D.C. Cir. 1987).

122. 5 U.S.C. § 553(a) (2018) (exempting the military, foreign affairs, “agency management or personnel,” and “public property, loans, grants, benefits, or contracts”).

123. *Id.* § 553(b)(3)(B) (excepting rules for which the agency finds “good cause” that notice-and-comment procedures are “impracticable, unnecessary, or contrary to the public interest”).

124. See, e.g., 42 U.S.C. § 7607(d) (2018) (exempting certain EPA actions from Section 553 and prescribing an alternative rulemaking procedure).

documents, and rules of internal organization—but those forms of agency rules are, as a legal matter, nonbinding as a result.<sup>125</sup>

The basic reason for these requirements is straightforward. As the Supreme Court has explained: “The Administrative Procedure Act was adopted to provide . . . that administrative policies affecting individual rights and obligations be promulgated pursuant to certain stated procedures so as to avoid the inherently arbitrary nature of unpublished *ad hoc* determinations.”<sup>126</sup> Notice and comment thus serves a dual role. It enables public engagement and, by imposing “procedural requirements which ‘assure fairness and mature consideration,’” limits agency discretion to promulgating only those rules that can be fairly justified in light of all relevant inputs.<sup>127</sup>

Yet, notice and comment is neither necessary nor sufficient to give a coordinated rule binding force within a cooperative program. In the Clean Air Act, for instance, state implementation plans must undergo a notice-and-comment-like process supervised by state agencies, but they do not bind regulated entities until EPA undergoes its own distinct notice-and-comment process to approve them.<sup>128</sup> In Medicaid, likewise, rules on many subjects require states to undergo something like notice and comment. But those proposals are not binding by dint of that process alone; here, too, states must also secure federal approval. But HHS, unlike EPA, does not render that approval through notice and comment. Still, the rules made through this process are no less binding on Medicaid beneficiaries and firms than are the Clean Air Act’s SIPs. Notice and comment, then, is not *sufficient* in this context to give a coordinated rule the force of law.

Nor is notice and comment *necessary* to bind parties. Indeed, some coordinated rules do not undergo notice and comment or equivalent procedures at any step of their promulgation process. Consider the rulemaking process for fusion centers, in which neither state proposals nor the federal government’s approvals undergo notice and comment.<sup>129</sup> Once a state’s fusion center has issued a proposed civil-rights and civil-liberties policy and DHS has approved it, the ensuing

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125. 5 U.S.C. § 553(b)(3)(A) (2018) (excepting “interpretative rules, general statements of policy, or rules of agency organization, procedure, or practice”). The line between “substantive” rules, which do have the force of law, and “interpretive” rules, which do not, is notoriously uncertain. But this much is clear: “[I]nterpretive rules’ and ‘general statements of policy’ do not have the force and effect of law.” *Chrysler Corp.*, 441 U.S. at 302 n.31 (quoting the ATTORNEY GENERAL’S MANUAL ON THE ADMINISTRATIVE PROCEDURE ACT 30 (1947)).

126. *Morton v. Ruiz*, 415 U.S. 199, 232 (1974).

127. *Chrysler Corp.*, 441 U.S. at 303 (quoting *NLRB v. Wyman-Gordon Co.*, 394 U.S. 759, 764 (1969)).

128. See *supra* notes 88–94.

129. See *supra* text accompanying notes 118–120.

rule “narrowly limits administrative discretion” and arguably creates rights in the populations being surveilled, thus giving it functional indicia of a rule.<sup>130</sup>

Instead, the key legal determinant of a coordinated rule’s ability to bind is something else: it is the less-theorized concurrence between the federal and state agency on the regulatory text. It is, put another way, the fact that both governments engaged in the cooperative endeavor have agreed that the rule is the law of their joint program and that both will abide by it. Whatever the process employed by the federal and state agencies to set parameters, make proposals, or issue approvals, the rules they author do not bind, generate obligations, or create rights within the program unless and until the agencies agree on those rules.<sup>131</sup> Coordinated rules, in short, are *promulgated by concurrence*.

This source of legal authority might be unfamiliar to federal administrative law, but it is not foreign to joint projects in other contexts. In the law of contracts, a legal text binds the contracting parties precisely because the parties express a willingness to be bound. And when called upon to enforce contracts, courts do not usually consider the process that yielded the agreement unless there is a claim, subject to a high burden of proof, that the process of negotiation was so coercive as to cast doubt on the authenticity of a party’s consent to the agreement.<sup>132</sup> Coordinated rules, this initial account suggests, follow the same legal

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130. *Ass’n of Flight Attendants-CWA v. Huerta*, 785 F.3d 710, 717 (D.C. Cir. 2015). As with so many aspects of fusion centers, the approval of civil-rights and privacy policies is not conspicuously disclosed in real time, but information shared with Congress suggests that all or nearly all centers have approved policies. See *Majority Staff Report on the National Network of Fusion Centers*, U.S. HOUSE OF REPRESENTATIVES COMM. ON HOMELAND SEC. 50 (July 2013), <https://www.archives.gov/files/isoo/oversight-groups/sltps-pac/staff-report-on-fusion-networks-2013.pdf> [<https://perma.cc/262K-MPJK>] (noting that at the time of the report “all of the current 78 fusion centers have approved privacy policies in place”).

131. One or the other participating government could, of course, treat the substance of its part of the coordinated rule as binding within that government’s legal system alone. A state could agree to offer a particular health benefit articulated in a state Medicaid plan amendment as a state-funded and state-administered benefit. But what’s important is that the benefit would not be part of the Medicaid program; it could not legally be funded with Medicaid funds; a program beneficiary could not sue to enforce it in any forum other than a state’s own courts and regulatory bodies. It would be a freestanding state regulation with no status beyond that. A federal agency could, likewise, treat a federal parameter as a freestanding federal regulation, but it would be unable to rely on a state partner to enforce or implement that regulation. And it is easy to surmise that both levels of government have reasons for pursuing the cooperative goals only in coordination—when, for instance, state policy can be supported by federal funds and federal objectives can be achieved through state enforcement, and when each government can rely on and enforce the commitments of the other. Regulations, then, are *promulgated by concurrence* for the purpose of creating a law of the *joint program*, in the same way that contracts exist to create a law for a joint private project.

132. See RESTATEMENT (SECOND) OF CONTRACTS § 208 (AM. L. INST. 1981).

structure. They become binding for a simple reason, but not one commonly discussed in administrative law: two governments have decided to be mutually bound by them.<sup>133</sup>

Return, then, to notice and comment. Although notice and comment is the default way of creating legislative rules in the federal system, it is not the only way – an agency can proceed without notice and comment if it satisfies the APA’s “good cause” exception or if Congress specifies a procedural substitute for notice and comment in enabling legislation. What is remarkable about the legal mechanism of *promulgation by concurrence* as an alternative for notice and comment in giving rules binding force is its analytical differences from both “good cause” and congressionally specified alternatives to notice and comment. It is not a simple expedient that exists within the aegis of the APA, as is the “good cause” exception. Nor is it dictated by congressional statute, as are notice-and-comment alternatives. Promulgation by concurrence is a legal mechanism for allowing two distinct governments, each with its own regulation-making powers, to conjoin those powers without the aid of a general structuring statute like the APA or a relationship-dictating enabling act. This legal logic of intergovernmental administrative interaction is shaped instead by a distinct constitutional law, positive law, and soft law, as the next Part elaborates.

## II. THE LAW OF COORDINATED RULEMAKING

The administrative practice of coordinated rulemaking described in the last Part reveals a far deeper bureaucratic interdependence between federal and state administrative agencies, and a much more consistent practice of cooperative administration, than has been previously documented. That interdependence is clear in the cross-governmental process used to craft coordinated rules. But it is also revealed in the common practice of promulgation by concurrence – in the creation of a legal continuity between federal and state agency action that can give their joint rules a legal significance that neither government’s administrative process could confer alone.

This procedural and legal interdependence is unmistakable, but it is not inevitable. The federal and state administrative apparatuses are distinct bureaucracies, developed within constitutionally separate jurisdictions and seemingly subject to distinct legal frameworks. Given these formal legal separations, we might have expected that if our governments wished to jointly author a rule, they

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133. Cf. Lon L. Fuller, *Consideration and Form*, 41 COLUM. L. REV. 799, 806-07 (1941) (“When a court enforces a promise it is merely arming with legal sanction a rule or *lex* previously established by the party himself. This power of the individual to effect changes in his legal relations with others is comparable to the power of a legislature.”).

would have avoided the complexity that comes with legal integration of their bureaucratic apparatuses and opted instead for a technique more akin to what is known as “joint rulemaking” in the federal system.<sup>134</sup> In federal joint rulemaking, two or more agencies conduct *independent* rulemaking processes but coordinate aspects of their work, like timelines for crucial steps, and engage in informal ways to share strategy and expertise.<sup>135</sup> The goal is to “harmonize” the separate rules that each agency produces, not to create a single legally binding rule.<sup>136</sup> Coordinated rulemaking across federal and state agencies, by contrast, does not merely harmonize legally separate administrative actions. It produces a single integrated regulatory text that legally belongs to both governments.

This Part begins to map the administrative law that is distinctive to cooperative federalism programs and that allows that kind of thick legal and procedural integration. To do that, I examine the administrative law of cooperative federalism by considering its component legal parts. In many ways, administrative law is an amalgam field, characterized by elements of constitutional law, positive law, and soft law. The constitutional-law principles that govern federal administrative law include legal doctrines governing congressional delegation,<sup>137</sup> presidential removal,<sup>138</sup> and legislative process.<sup>139</sup> The positive law of the federal administrative state includes the “organic acts” that charter administrative agencies and create the programs those agencies administer, as well as the APA, which dictates administrative process across programs and agencies.<sup>140</sup> And administrative soft law in the federal system is comprised of the durable, if nonbinding, documents, norms, and conventions that structure day-to-day administrative activity from

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134. Freeman & Rossi, *supra* note 21, at 1166–69 (summarizing the literature).

135. *E.g.*, U.S. GOV’T ACCOUNTABILITY OFF., GAO-10-336, VEHICLE FUEL ECONOMY: NHTSA AND EPA’S PARTNERSHIP FOR SETTING FUEL ECONOMY AND GREENHOUSE GAS EMISSIONS STANDARDS IMPROVED ANALYSIS AND SHOULD BE MAINTAINED 19–22 (2010) (describing coordination between EPA and the National Highway Transportation and Safety Administration in setting greenhouse gas emissions standards).

136. *Id.*

137. *See, e.g.*, *J.W. Hampton, Jr., & Co. v. United States*, 276 U.S. 394, 409 (1928) (holding that Congress may delegate “legislative” power to the executive branch as long as it specifies an “intelligible principle” by which that power must be exercised and constrained).

138. *See, e.g.*, *Seila L. LLC v. Consumer Fin. Prot. Bureau*, 140 S. Ct. 2183, 2203 (2020) (declaring unconstitutional the structure of the Consumer Financial Protection Bureau because Congress made the agency head unremovable by the President at-will in contravention of the removal power).

139. *See, e.g.*, *INS v. Chadha*, 462 U.S. 919, 952–59 (1983) (declaring unconstitutional Congress’s effort to participate in the federal administrative process by empowering one house of Congress to veto and reverse decisions made by the Attorney General).

140. 5 U.S.C. §§ 551–559 (2018).

within federal agencies.<sup>141</sup> This Part asks how each of these areas of the law functions differently for cooperative federalism programs.

Existing scholarship does not, for the most part, confront detailed questions about the administrative law of cooperative programs. But because so much contemporary federalism activity is regulatory in nature, even federalism scholarship that addresses adjacent questions also engages aspects of (or makes assumptions about) the administrative law of these programs. The most common way that current scholarship gestures at those questions is to stylize the federal-state administrative relationship that cooperative programs create.

Existing federalism scholarship generally rests on three common heuristics used to gloss the federal-state administrative relationship. Some academic work sees that relationship as *hierarchical*: Congress develops a regulatory program, then delegates power to the states to “implement” it. On the opposite end of the spectrum is a *parallel-tracks* relationship, in which state and federal agencies act in administratively discontinuous ways toward common political or policy objectives. Still others borrow from the political-science literature on “picket-fence federalism” and note the *thick social bonds* formed between state and federal bureaucrats as they work together to administer joint programs. But picket-fence federalism is not a legal theory, and both it and the legal scholars who cite it largely bracket the detailed legal structuring of those intergovernmental social and professional relationships.

But, as I explain, none of these heuristics can justify practices like coordinated rulemaking or accurately capture its legal scaffolding. Indeed, none take seriously, on a fundamental level, the idea that there even *is* an administrative law of cooperative federalism, much less the project of identifying it and the legal forces that shape it. On the substance, cooperative programs do not create strict administrative *hierarchy* between federal and state agencies, as if one administrative apparatus were incorporated into the other. Nor do they rest on legal *separation*, as if federal and state administrators acted entirely independently. They reflect instead the creation of a “shared regulatory space,” crafted by separate governments and their distinct administrative apparatuses but designed to allow those agencies to perform joint legal actions.<sup>142</sup>

This idea of integrated administration across regulatory institutions is not unfamiliar to legal scholarship. Anne-Marie Slaughter has identified similar

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141. For an overview of “soft law” in American public law, see generally Jacob E. Gersen & Eric A. Posner, *Soft Law: Lessons from Congressional Practice*, 61 STAN. L. REV. 573 (2008). For a discussion of soft law within federal agencies, see JERRY L. MASHAW, CREATING THE ADMINISTRATIVE CONSTITUTION: THE LOST ONE HUNDRED YEARS OF AMERICAN ADMINISTRATIVE LAW 223 (2012).

142. Freeman & Rossi, *supra* note 21, at 1138–55.



spaces in the international sphere in what she calls “networked governance.”<sup>143</sup> The literature on private contracts, too, has revealed that private firms weave together “managerial structures” to better oversee their joint projects.<sup>144</sup> But “shared regulatory spaces” have an even more direct analog in the federal administrative state itself. Indeed, I borrow the term from Jody Freeman and Jim Rossi, who have identified similar legal spaces in the federal administrative state that are created when Congress delegates overlapping power to multiple agencies. Federalism’s “shared regulatory spaces” have some of the features Freeman and Rossi identify in federal administration: agencies have no inherent hierarchical relationship; they work together, but they do not collapse into one another; they devise many of their own coordination mechanisms – but they are also different in one critical respect.<sup>145</sup> The federal government’s shared regulatory spaces are the creation of Congress. They exist because Congress, the central manager and designer of the federal administrative state, decrees it.<sup>146</sup> Federalism’s shared regulatory spaces, by contrast, are not hierarchically ordered. As I discuss below, they are the product of mutual agreement among the participating governments – a requirement of our constitutional structure of federalism.

### A. Existing Models

#### 1. States as Agencies

The dominant way that scholars and courts gesture at the administrative aspects of cooperative programs is hierarchical. It analogizes states to federal agencies: Congress enacts federal law structuring a cooperative program, and states assume a role as Congress’s agents, stepping into shoes that might otherwise be filled by federal agencies to administer or implement that law. In Roderick M. Hills, Jr.’s influential framing, states and local governments are “administrative arms of the federal government.”<sup>147</sup> They assume their roles as “agencies of the federal government by enforcing federal law with administrative actions and by promulgating regulations to fill the gaps in federal statutes.”<sup>148</sup> The same idea

<sup>143</sup>. ANNE-MARIE SLAUGHTER, A NEW WORLD ORDER 31 (2004); see also Danielle Keats Citron & Frank Pasquale, *Network Accountability for the Domestic Intelligence Apparatus*, 62 HASTINGS L. REV. 1441, 1449 (2011) (describing domestic agency networks in the intelligence context).

<sup>144</sup>. Lisa Bernstein & Brad Peterson, *Managerial Contracting: A Preliminary Study 2* (Feb. 19, 2022) (unpublished manuscript), <https://ssrn.com/abstract=4036051> [<https://perma.cc/W3R4-UFQR>].

<sup>145</sup>. Freeman & Rossi, *supra* note 21, at 1155-78.

<sup>146</sup>. *Id.* at 1138-44.

<sup>147</sup>. Hills, *supra* note 19, at 181.

<sup>148</sup>. *Id.* at 182.

gains expression in various other ways as well and by some of the most thoughtful scholars in the field. The states “carry out federal programs.”<sup>149</sup> They serve as “frontline federal-law implementers.”<sup>150</sup> They “act almost as contractors carrying out a federal mission.”<sup>151</sup>

The states-as-agencies analogy has been used to tease apart a range of contemporary federalism dynamics.<sup>152</sup> But although it sounds in administrative law, it has not been used as the basis of a systematic analysis of the administrative law that applies to the activities of federal and state agencies within these programs. And nor could it. Pressed to answer some of the basic descriptive and legal questions about how these programs are administered, it quickly runs aground. Taken literally, for instance, the states-as-agencies analogy would suggest that when states administer cooperative programs, they follow the same legal frameworks federal agencies do: those articulated in the federal APA. But the descriptive reality of coordinated rulemaking elaborated in Part I refutes that idea. A stakeholder who wishes to engage in the rulemaking process for cooperative programs has to consult federal, state, and intergovernmental legal sources in order to ascertain the rules and processes that these programs erect.

The states-as-agencies analogy, as Jessica Bulman-Pozen has pointed out, also tends to minimize the role of *federal* agencies in cooperative programs.<sup>153</sup> As Part I shows, by participating in parameter setting and approvals, federal agencies are deeply engaged in the process of shaping the binding rules that implement cooperative programs. And many of the most challenging administrative

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149. Jessica Bulman-Pozen & Heather K. Gerken, *Uncooperative Federalism*, 118 YALE L.J. 1256, 1258 (2009).

150. Abbe R. Gluck, *Our [National] Federalism*, 123 YALE L.J. 1996, 2007 (2014).

151. Josh Bendor & Miles Farmer, Note, *Curing the Blind Spot in Administrative Law: A Federal Common Law Framework for State Agencies Implementing Cooperative Federalism Statutes*, 122 YALE L.J. 1280, 1289 (2013).

152. For instance, Jessica Bulman-Pozen and Heather K. Gerken argue that this hierarchical role gives states an unexpected source of power – the power of the “servant” – “within federal programs.” Bulman-Pozen & Gerken, *supra* note 149, at 1265–71. And Roderick M. Hills, Jr. uses this dynamic as the basis of his “economic analysis of intergovernmental transactions” in which “Congress purchases the services of the states in the marketplace of intergovernmental relations” so that it “can use each state’s regulatory machinery to implement federal law.” Hills, *supra* note 3, at 855, 872.

153. Bulman-Pozen, *supra* note 3, at 477–78 (“To understand how state administration of federal law safeguards the separation of powers, one must consider not only congressional grants of authority to *either* the states or the federal executive, but also grants of authority to *both* the states and the federal executive.”). Whereas Bulman-Pozen presses the insight that federal and state agencies are both engaged in the administration of cooperative programs upward to the federal separation-of-powers dynamics that engagement shapes, this Article presses the same insight downward, into the programs themselves and their more detailed administrative logic.



questions in these programs arise precisely because they require coordination between these two bureaucratic apparatuses.

Nor does the states-as-agencies analogy accurately describe, even at a high level, the relationship between federal and state administrative activity within these programs and the “law” the states are understood to implement through them. The analogy incorrectly envisions cooperative programs as hierarchically *federal*—created and governed by “federal laws” with the states as “servants”—mere agents of another sovereign’s law.<sup>154</sup> Even scholars like Philip J. Weiser, who readily agree that “cooperative federalism envisions a sharing of regulatory authority between the federal government and the states,” posit that this regulatory sharing happens “within a framework delineated by *federal law*.”<sup>155</sup>

But, as I have elaborated elsewhere, cooperative programs are not constituted by the federal statute alone or even primarily. They are constituted in principal part by the later-in-time intergovernmental agreement, which memorializes the state’s voluntary commitment to participate and the terms on which it has agreed to the partnership.<sup>156</sup> Those terms sometimes reflect verbatim the terms of the federal statute, and so, for those provisions, it is true that states are implementing the programmatic substance articulated in federal law. But other times, the federal government opts to claim as its own and enforce *state* law, as happens in the Clean Air Act, Clean Water Act, and other programs.<sup>157</sup> And even when the federal statute dictates the terms of the program, the state is not literally implementing that law. It is implementing its promise to follow that law. That scenario is unusual, in any event: As Part I illustrates, many federal statutes that charter cooperative programs set out broad terms that enable federal agencies to enter

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<sup>154</sup>. See, e.g., Bulman-Pozen & Gerken, *supra* note 149, at 1265–71.

<sup>155</sup>. Philip J. Weiser, *Towards a Constitutional Architecture for Cooperative Federalism*, 79 N.C. L. REV. 663, 665 (2001) (emphasis added).

<sup>156</sup>. Fahey, *supra* note 9, at 2340–41.

<sup>157</sup>. *Arkansas v. Oklahoma*, 503 U.S. 91, 110 (1992) (noting that, pursuant to the Clean Water Act, “state water quality standards—promulgated by the States with substantial guidance from EPA and approved by the Agency—are part of the federal law of water pollution control”); *Everett v. Schramm*, 772 F.2d 1114, 1119 (3d Cir. 1985) (noting that in Aid to Families with Dependent Children—a now-repealed cash welfare program—“federal law incorporates by reference requirements established by state law”); *Safe Air for Everyone v. EPA*, 488 F.3d 1088, 1091 (9th Cir. 2007) (noting that the Clean Air Act creates a system in which “states submit, subject to [EPA’s] review and approval, proposed methods for maintaining air quality,” and that “[o]nce approved . . . these plans have the force and effect of federal law” (internal alterations and quotation marks omitted)).

into a range of different initiatives with the states, including programs with significant features designed by state agencies or proposed by state legislatures.<sup>158</sup> It is therefore more accurate (as I elaborate below) to understand these programs as *joinders* of federal and state authority and the “law” they implement.<sup>159</sup>

At best, in other words, the states-as-agencies analogy so simplifies the relationship that it cannot be helpful in answering important administrative questions about the operation of cooperative programs. At worst, it distorts the relationship by centering federal laws, sidestepping acts of joint lawmaking, casting the states as subservient, minimizing the role of federal agencies, and diverting attention from the bureaucratic integration that occurs between federal and state agencies.

## 2. *Administrative Dual Federalism*

As I alluded to in the Introduction, a second way of thinking about the legal scaffolding of cooperative federalism programs is to envision the states and federal government performing their separate tasks in legally discrete ways – a “dual federalism” model of cooperative federalism’s administration. This idea is implicit in scholarly references to federal and state administrative processes that do not also consider the continuities between them.<sup>160</sup> Our governments might achieve a meeting of the minds about the general programmatic or political objectives of cooperative programs, but, the thought would go, the governments proceed to divvy up the program into discrete tasks and return to their respective bureaucracies to execute those tasks themselves. Federal agencies would act according to federal administrative law and state agencies according to state law, making cooperative administrative law unnecessary.

But the practices I have canvassed in Part I refute this idea. State administrative processes are heavily shaped (and even directly choreographed) by the fed-

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158. A popular example of this is Medicaid’s 1915 waiver provision, which authorizes the federal agency to participate in certain Medicaid programs suggested by the states that depart from otherwise applicable federal law. See *supra* note 55; Neale, *supra* note 76 (discussing the 1915 waiver process).

159. Neale, *supra* note 76.

160. For instance, one of the few works to confront the intersection of cooperative federalism and administrative law head on, a student note by Josh Bendor and Miles Farmer, *supra* note 151, assumes that what happens within federal agencies, on the one hand, and state agencies, on the other, is generally separate and discrete. They do not take note of how federal law shapes state administrative process or the legal continuities between the actions of federal and state agencies.

eral government, with federal agencies sometimes participating, formally or informally, in those state-level processes.<sup>161</sup> Federal agencies also exercise significant power and discretion in approving or disapproving state regulatory proposals, a role that allows them to peer deeply into state administrative processes and make judgments that can have profound implications for state agencies and jointly authored programs.<sup>162</sup> Even the basic legal effect of agency action is shaped by the concurrence of federal and state agencies in a shared legal text.<sup>163</sup>

To believe in a “dual federalism” model for the administration of those programs, we would have to see no evidence of cross-governmental administrative process. Nor would we see evidence of relational administrative activity—of federal administrative activities that are responsive to state administrative activities or the other way around. And we would have to see no legal consequences flow from federal and state interactions, or ways that the legal meaning of each government’s activity is shaped by the involvement of the counterparty government. But none of those assumptions withstand scrutiny.

### 3. *Picket-Fence Federalism*

The final way that scholars conceive of federal-state agency action borrows a vivid analogy from the political-science literature on intergovernmental relations. That literature envisions cooperative federalism as a kind of “picket fence”: the horizontal rails are federal and state governments that form our basic layers of government and the vertical pickets are federal and state agencies that build connections across governments as they work together to implement those cooperative programs.<sup>164</sup> It shows empirically that federal and state bureaucrats form “close alliance[s]” within cooperative programs because of their “similar educational backgrounds and outlooks” and their devotion to their shared policy missions.<sup>165</sup> The basic idea is that the bonds of expertise in public health insurance, education, or highway construction beget thick social and managerial networks that defy governmental boundaries. Some legal scholarship approvingly cites this idea, but the literature remains institutional, not legal, and largely does

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161. See, e.g., *supra* notes 59–64, 92–94, and 108–113 and accompanying text.

162. See, e.g., *supra* notes 66–78.

163. See *supra* notes 121–132.

164. See Fahey, *supra* note 114, at 1050 n.204 (citing sources discussing picket-fence federalism).

165. See Frank J. Thompson, *The Rise of Executive Federalism: Implications for the Picket Fence and IGM*, 43 AM. REV. PUB. ADMIN. 3, 4 (2013); Samuel H. Beer, *Federalism, Nationalism, and Democracy in America*, 72 AM. POL. SCI. REV. 9, 9–10 (1978). Former North Carolina Governor Terry Sanford is generally credited with developing the picket-fence metaphor. See TERRY SANFORD, *STORM OVER THE STATES* 80 (1967).

not elaborate the administrative law that enables it.<sup>166</sup> Moreover, as developed by political scientists, picket-fence federalism is not a *legal* theory. It does not explain the administrative law that permits federal and state agents, acting within cooperative programs, to develop the close bonds political scientists document. Nor does it elaborate the legal permissions and limits that constrain or channel those interactions. Nor does it detail the implications for federal and state administrative law of cross-governmental bureaucratic ties. The picket-fence metaphor, in short, raises rather than answers the legal questions that this Part examines.

### B. Constitutional Law

To build out the administrative law of cooperative federalism programs, we can begin with constitutional law. The constitutional rules that structure the federal administrative state make federal agencies creatures of Congress. Administrative agencies are, after all, “necessary and proper” means for exercising a wide range of powers the Constitution vests in Congress.<sup>167</sup> Congress decides what jurisdiction they have, how they are structured, and what procedures they use to conduct their work.<sup>168</sup> When Congress and the states envision a regulatory program that conjoins federal and state constitutional power (as when the states and federal government coregulate public education in ways that Congress could not

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166. See, e.g., Roderick M. Hills, Jr., *The Eleventh Amendment as Curb on Bureaucratic Power*, 53 STAN. L. REV. 1225, 1227 (2001) (describing how picket-fence relationships between federal and state bureaucrats can undermine the “policymaking discretion of . . . state legislators”); Ryan, *supra* note 2, at 82 (noting how relationships among federal and state administrators facilitate productive intergovernmental policy bargaining); see also Gillian E. Metzger, *Agencies, Polarization, and the States*, 115 COLUM. L. REV. 1739, 1767 (2015) (theorizing that the “authority delegated to states in cooperative federalism contexts can allow states and federal agencies to work together to expand their powers at Congress’s expense, for example by agreeing to operate programs under different terms and requirements than specified in governing statutes”); Bulman-Pozen & Gerken, *supra* note 149, at 1270 (mentioning the “powerful . . . connections that state and federal administrators of a single program may” develop “on the basis of their functional specialties and bureaucratic culture”); Larry D. Kramer, *Putting the Politics Back into the Political Safeguards of Federalism*, 100 COLUM. L. REV. 215, 283–84 n.269 (2000) (arguing that the “mixed structure of modern bureaucratic federalism affords state officials significant opportunities to protect themselves in and from national politics”).

167. See *INS v. Chadha*, 462 U.S. 919, 955 n.19 (1983).

168. Of course, the President appoints and removes the heads of agencies and, by controlling their personnel, substantially influences their operations within the scope of discretion allowed by Congress. See Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245, 2272–2383 (2001).

alone) or simply wish to pool their administrative capacity to achieve consistency, multiply their power, or concentrate expertise, the Constitution's federalism rules structure the terms of those administrative relationships.

Most importantly, federal-state collaborations must be voluntary. Congress cannot compulsorily delegate power to state governments or state agencies. The anticommandeering rule prohibits the federal government from "compel[ling] the States to regulate according to Congress' instructions."<sup>169</sup> As if anticipating the idea that states might otherwise be made into regulatory agents of Congress, Justice O'Connor emphasized in *New York v. United States*, the first case to formally recognize the anticommandeering principle, that "[s]tate governments are neither regional offices nor administrative agencies of the Federal Government."<sup>170</sup> In cooperative programs, roles and responsibilities must be assumed by the states willingly, not simply conferred upon them by Congress.

The voluntariness principle at the center of the anticommandeering cases arises in other related federalism doctrines as well. The anti-coercion rule, which prohibits Congress from coercing states to participate in cooperative programs, is an important extension: Congress not only cannot commandeer state regulatory capacity, but it also cannot induce states to surrender it through improper influence, which, no less than outright command, renders the states' commitment to participate involuntary.<sup>171</sup> The voluntariness principle is likewise reflected in the *Pennhurst* clear-statement rule, which requires Congress to state the conditions on federal grants "unambiguously" so that states can decide to participate "voluntarily and knowingly."<sup>172</sup> What Congress may not commandeer or secure through coercive influence, it may not obtain through deception either.

The theoretical aspects of those rules, which I have previously argued form the Constitution's "rules of engagement" for cooperative programs, have received serious and sustained attention as a doctrinal matter, but their influence on the basic workings of cooperative programs has gone largely unexplored.<sup>173</sup>

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169. *New York v. United States*, 505 U.S. 144, 170 (1992).

170. *Id.* at 188.

171. See *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 577 (2012) (noting that the same "insight" that "led this Court to strike down federal legislation that commandeers a State's legislative or administrative apparatus for federal purposes . . . has also led us to scrutinize Spending Clause legislation to ensure that Congress is not using financial inducements to exert a 'power akin to undue influence'" (first citing *Printz v. United States*, 521 U.S. 898, 933 (1997); then citing *New York*, 505 U.S. at 174-75; and then citing *Steward Machine Co. v. Davis*, 301 U.S. 548, 590 (1937))).

172. *Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1, 17 (1981).

173. See Fahey, *supra* note 9, at 2335 (citing Robert A. Schapiro, *Toward a Theory of Interactive Federalism*, 91 IOWA L. REV. 243, 285 (2005)).

Much in the way that legal doctrine shapes private ordering across a range of contexts, these constitutional principles likewise shape the *subconstitutional* administrative ordering of cooperative federalism programs.<sup>174</sup>

First, these principles defuse the kind of hierarchical relationship envisioned in some uses of the states-as-agencies analogy, most notably by giving the states a right of refusal as to any cooperative program. But rights of refusal are rarely exercised in their bluntest form, especially in this context. Although states frequently agree to participate in cooperative programs—with high-profile exceptions, like the highly politicized move by states not to expand Medicaid—the ability of states to decline participation gives them significant leverage not just to extract policy concessions, as others have documented, but to shape by demand or by practice the modes of power-sharing within cooperative programs.<sup>175</sup> The states, in short, have both the formal entitlement and the functional leverage to craft shared regulatory spaces rather than be made passive recipients of congressional largesse.

Second, and more concretely, we can also see how the long shadow of the voluntariness principle shapes the practices of coordinated rulemaking. In large part, the process of coordinated rulemaking is a way of continuously renewing the state and federal government's voluntary participation in their shared program. Rather than delegating the inevitable gray areas in any regulatory program to the gap-filling authority of the federal government or the states, coordinated rulemaking places those gaps in shared hands. Moreover, it recognizes the precarity of voluntary programs on which both governments rely by, as Chief Justice Roberts has explained, “develop[ing] intricate statutory and administrative regimes over the course of many decades.”<sup>176</sup> It protects reliance by creating everyday and evolving opportunities for coordination and influence, mitigating the need for either government to exercise the nuclear option of exit.

Third, the influence of the voluntariness principle is visible in the binding force that comes from the agreement of federal and state agencies to a shared regulatory text—in the necessity of promulgation by concurrence. Consent, in this context, is not just a legal shield, a way of opting out of dispreferred actions or programs. It is also a generative force; it has, as we know from the private law of contract, the possibility of creation. Coordinated rules are binding because our

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174. See, e.g., Robert H. Mnookin & Lewis Kornhauser, *Bargaining in the Shadow of the Law: The Case of Divorce*, 88 YALE L.J. 950, 951–52 (1979). What happens in the shadow of constitutional federalism rules is a rich, but largely unplumbed, terrain. Cf. Young, *The Constitution Outside the Constitution*, *supra* note 23, at 411 (arguing that “much—perhaps even most—of the ‘constitutional’ work in our legal system is in fact done by legal norms existing outside what we traditionally think of as ‘the Constitution’”).

175. See Hills, *supra* note 3, at 869 n.197.

176. *Nat'l Fed'n of Indep. Bus.*, 567 U.S. at 581.



governments have agreed to them. And our governments are relationally positioned to construct by agreement because of the voluntariness principle.

### C. *Positive Law*

Federal administrative law is anchored by positive law—specifically, by the APA, which establishes transsubstantive law that governs agency action unless it is displaced or made inapplicable in an individual case.<sup>177</sup> The APA is supplemented by the organic acts that establish and institutionally structure federal agencies and the statutes (and so-called super-statutes) that create individual programs and empower agencies to implement them.<sup>178</sup>

But the APA, of course, does not apply by its own terms to the joint actions of federal and state agencies.<sup>179</sup> As a result, the APA and the procedures it enacts cannot and do not comprehensively structure administrative activity in cooperative federalism programs. Nor could the APA command the activity of state agencies consistent with the anticommandeering rule.<sup>180</sup>

Federal organic acts and other structuring statutes, like the Clean Air Act, Federal-Aid Highway Act, and Title XIX of the Social Security Act, do substantially influence cooperative programs, but they do not serve the core legal constituting device for cooperative programs that they serve for solely federal programs. Rather, federal and state legislation can only authorize each government, and its respective agents, to participate in the shared project. But just as the law of one nation authorizing a treaty is not the same as the law produced by the treaty itself, neither federal nor state law that authorizes participation in a joint program constitutes the law of the program. The participating governments need a connective thread—a meeting of the minds.

As I have shown, in the same way that private parties use contracts to scaffold their joint projects and nation-states use treaties for the same purpose in international law, our domestic governments use contract-like instruments—what I have called “intergovernmental agreements”—to mutually commit to cooperative federalism programs. These agreements complement the constitutional voluntariness principle and further scaffold the idea that cooperative programs sit

177. See 5 U.S.C. §§ 551–559 (2018).

178. See William N. Eskridge, Jr. & John Ferejohn, *Super-Statutes*, 50 DUKE L.J. 1215, 1216 (2001) (describing federal statutes that, in normative or institutional ways, are uniquely influential).

179. See 5 U.S.C. § 551(1) (2018) (defining “agency” as “each authority of the Government of the United States,” excluding certain federal institutions); see also *id.* §§ 552–559 (laying out procedures for “agencies” as defined in Section 551(1)).

180. *Nat’l Fed’n of Indep. Bus.*, 567 U.S. at 577 (reciting the accepted rule that the federal government cannot “commandeer[] a State’s legislative or administrative apparatus for federal purposes” (emphasis added)).



not in a hierarchical arrangement or in legal silos but in a shared legal space of their own creation. Indeed, just as treaties allow their respective nation-states to meet in a neutral space and to commit to a joint project without subjecting their agreement to either partner government's domestic law, so, too, should we understand intergovernmental agreements as devices for charting neutral legal spaces in which the states and federal government can create shared programs.

#### D. *Soft Law*

Central to scholarship on federal administrative law is the role of nonbinding documents, conventions, and norms in structuring agency activities.<sup>181</sup> Borrowing from international law, in which the study of these “soft law” mechanisms is well developed, domestic public-law scholars have increasingly focused on forms of informal regulation. The study of soft ordering generally requires extensive documentary work of the type that this initial effort cannot pursue. But cooperative programs, and coordinated rulemaking, have similarities to three robustly documented soft-law literatures. Together, they provide strong indicators that intergovernmental administration has a rich and influential soft law.

First is the soft law of *norms*. The political-science literature provides robust empirical evidence that federal and state agents form deep social bonds within cooperative federalism programs of the type that can undergird rich informal convention—or what Robert C. Ellickson famously dubbed “order without law.”<sup>182</sup> The challenge for legal scholars is to identify the legal determinants of those relationships and how law might interact with them to constrain or promote particular forms of intergovernmental interaction. Part I begins to answer some of those questions by elaborating the standard templates that our governments use to structure their cross-governmental interactions and the legal frames that guide federal and state agents in pursuing those interactions (that of making a “proposal” to another government or granting an “approval” of another government, and the like).

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181. For just a few examples of this extensive literature, see Nicholas R. Parrillo, *Federal Agency Guidance and the Power to Bind: An Empirical Study of Agencies and Industries*, 36 YALE J. ON REGUL. 165 (2019), which assesses empirically the influence of nonbinding guidance documents; David Zaring, *Best Practices*, 81 N.Y.U. L. REV. 294, 307-12 (2006); Freeman & Rossi, *supra* note 21, at 1190-92, which outlines the informal tools federal agencies use to coordinate shared projects; and Jennifer Nou, *Intra-Agency Coordination*, 129 HARV. L. REV. 421, 452-82 (2015), which describes, in addition to formal legal mechanisms, informal and norm-based mechanisms of internal agency structuring.

182. ROBERT C. ELICKSON, *ORDER WITHOUT LAW: HOW NEIGHBORS SETTLE DISPUTES* (1991); see sources cited *supra* note 165 (discussing this literature).

Second is the soft law of *nonbinding* documents. These documents, variously styled “advisories, circulars, bulletins, memos, interpretive letters, enforcement manuals, fact sheets, FAQs, highlights, you name it,” are the conventional and much-analyzed form of soft law used to wide effect in federal agencies.<sup>183</sup> Peter L. Strauss has informally measured the library space occupied by significant non-binding guidance documents within agencies relative to the corresponding formal rules on the same subject and found that guidance swallows the formal instruments by many multiples.<sup>184</sup> As Part I shows, much of what can be publicly gleaned about coordinated rulemaking is elaborated in “state” program manuals, intergovernmental memos, suggested templates, and other nonbinding guidance documents tailored to the federal-state relationship.<sup>185</sup>

Cooperative programs likewise have indicators of a third kind of soft law, one less familiar to federal administrative law: that which is characteristic of *relational contracting*. As contract scholars like Ian R. Macneil, Lisa Bernstein, Stewart Macaulay, and others have documented, a distinctive form of soft law arises in complex and mutually dependent contracting relationships.<sup>186</sup> These relational conventions are forged over time through repeated interaction and are strongest when the contracting (or coordinating) parties cannot easily exit the relationship. For instance, Macneil emphasizes the norms of “contractual solidarity,” which arise to preserve an ongoing contractual relationship, even at the cost of extracting maximum value in any discrete transaction.<sup>187</sup> In institutional register, Lisa Bernstein and Brad Peterson note the elaborate managerial structures that complex contracting parties use to develop “inter-firm trust” and to resolve disputes without resort to courts.<sup>188</sup> As one court explained of coordinated rulemaking in the highway context: “In theory, the Administration evaluates state compliance with federal standards through a review of documentary evidence; in practice the [federal agency] cooperates to help the state highway

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183. Parrillo, *supra* note 181, at 167.

184. Peter L. Strauss, *The Rulemaking Continuum*, 41 DUKE L.J. 1463, 1469 (1992).

185. See, e.g., STATE MEDICAID MANUAL, *supra* note 72; EPA *Lean Toolkit for Collaboration*, *supra* note 92, at 2 (styling itself as a collection of “non-binding tools for state and local air agencies to support coordination and collaboration”).

186. IAN R. MACNEIL, *THE NEW SOCIAL CONTRACT: AN INQUIRY INTO MODERN CONTRACTUAL RELATIONS* (1980); Lisa Bernstein, *Merchant Law in a Merchant Court: Rethinking the Code’s Search for Immanent Business Norms*, 144 U. PA. L. REV. 1765 (1996); Stewart Macaulay, *Non-Contractual Relations in Business: A Preliminary Study*, 28 AM. SOCIO. REV. 55 (1963).

187. MACNEIL, *supra* note 186, at 14-15.

188. Bernstein & Peterson, *supra* note 144, at 2, 38-49.

department ‘improve its planning and engineering capabilities through a process of continuous and close working liaison.’”<sup>189</sup>

I have previously drawn out the significant parallels between the intergovernmental agreements that structure cooperative programs and contracts,<sup>190</sup> as, frequently, have courts.<sup>191</sup> But scholars of relational contracts would expect to see evidence of relational norms – of trust, longevity, accommodation, solidarity, and the like – not in the written text of the intergovernmental agreements that form cooperative programs but in the subsequent collaborating activity that brings those programs to fruition. And we do, indeed, see those norms present in the processes like coordinated rulemaking through which our governments consistently renew their agreement to important programmatic amendments, interpretations, and evolutions. The hard law of constitutional voluntariness and the positive law of intergovernmental agreement-making can create a shared regulatory space or network together federal and state agencies in the formal sense. But the more nuanced practices documented in Part I are too specific to be traced back to constitutional prescription. Indeed, they seem, as I noted above, more likely the result of the shadow cast by the Constitution’s federalism rules than our governments’ collective conviction that these specific procedures are constitutionally mandatory.

### III. ADMINISTRATIVE PROBLEMS IN COORDINATED RULEMAKING

Coordinated rulemaking, it is clear by now, confounds black-letter administrative law. In ordinary federal administrative law, the rulemaking process is vertically integrated: one agency gathers data, develops models, makes computations, interprets the relevant statute, drafts rules, collects and responds to comments, and ultimately promulgates final rules.<sup>192</sup> But coordinated rulemaking spreads those tasks across federal and state agencies, requiring each to rely

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189. *Nat’l Wildlife Fed’n v. Snow*, 561 F.2d 227, 233 (D.C. Cir. 1976) (quoting Jerry L. Mashaw, *The Legal Structure of Frustration: Alternative Strategies for Public Choice Concerning Federally Aided Highway Construction*, 122 U. PA. L. REV. 1, 15 (1973)).

190. See Fahey, *supra* note 9.

191. See, e.g., *Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1, 17 (1981) (“[L]egislation enacted pursuant to the spending power is much in the nature of a contract; in return for federal funds, the States agree to comply with federally imposed conditions.”).

192. Not always, of course. Jody Freeman and Jim Rossi describe circumstances in which agencies conduct joint rulemaking exercises, see Freeman & Rossi, *supra* note 21, at 1166–73, and Bijal Shah describes cases in which agencies work together to conduct adjudication, see Bijal Shah, *Uncovering Coordinated Interagency Adjudication*, 128 HARV. L. REV. 805 (2015).

on the other to fulfill its respective role. That cross-governmental diffusion complicates a range of basic administrative-law concepts, both doctrinal and theoretical.

To begin documenting these complexities, I draw from the sources cited in Part I but also from the limited number of federal and state cases in which courts have reviewed aspects of coordinated rulemaking. Those lawsuits have some probative value, but they also have significant limitations. They are probative in enriching the factual record of coordinated rulemakings, in disclosing issues and complications in assimilating those rules into ordinary administrative-law doctrine, and, by providing agencies an opportunity to explain their actions in their own words, in offering a window into how the principal actors understand their own role in coordinated rulemaking.

But, for at least two reasons, they are not reliable indicators of the “law” or “doctrine” of coordinated rulemaking. First, neither federal nor state courts can review the full lifecycle of a coordinated rule—the combined actions of federal and state agencies or what happens in between them. Federal and state administrative procedure acts allow their respective courts to review, at most, that government’s administrative activities. Litigants at times challenge the *parameters* set by federal agencies, especially if they were set through notice and comment, before states make proposals pursuant to them.<sup>193</sup> And litigants also sometimes challenge federal *approvals* as “arbitrary and capricious.” But finding a federal cause of action for either form of challenge has become increasingly difficult as the Supreme Court has narrowed opportunities for nongovernmental parties to challenge many aspects of cooperative programs.<sup>194</sup> State courts, for their part, typically only review the *proposals* of state agencies or state legislatures, but even then, exemptions from judicial review are not uncommon.<sup>195</sup> Judicial review of coordinated rulemaking is so balkanized, in short, that it cannot present a complete picture of the rules or norms that shape agency behavior in creating coordinated rules.

Second, when courts do encounter aspects of coordinated rulemakings, they rarely *understand* themselves to be confronting a transsubstantive set of administrative practices with distinctive federalism stakes. Neither courts nor commentators have previously understood cooperative federalism to alter the logical architecture of administrative doctrine. As a result, they have not devised a ter-

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193. See, e.g., *West Virginia v. EPA*, 142 S. Ct. 2587, 2615–16 (2022) (describing a challenge to the Clean Power Plan).

194. See, e.g., *Armstrong v. Exceptional Child Ctr., Inc.*, 575 U.S. 320, 332 (2015); see also Fahey, *supra* note 9, at 2381–87 (describing the history of this contraction).

195. See *supra* note 59 and accompanying text (describing state-court decisions that exempt proposals from their state APA).

minology to delineate, group, and cite actions distinct to coordinated rulemaking across programs (in the way that, in federal administrative law, courts routinely cite cases from various programs to establish a transsubstantive doctrine). Although federal *approvals* appear in dozens of major programs, for instance, courts have yet to notice that pattern. Nor, in states, do courts consider common forms of, or legal complexities in, state administrative *proposals* to federal agencies.<sup>196</sup> Judicial review is therefore both uneven and incomplete.

This Section, therefore, consults cases not to feign a complete doctrinal picture where none exists but to spot new doctrinal and theoretical issues that can arise when our governments work together to promulgate rules.

### A. Interpretive Deference

Coordinated rulemaking's diffusion of administrative activity creates a new web of administrative-law questions about how our bureaucracies should regard, review, and rely upon one another's work product. Consider a riff on a canonical administrative-law question: the question of judicial deference to an agency's interpretation of the law it administers—or *Chevron* deference.<sup>197</sup> To draft proposals, states must interpret and fill in the gaps of the parameters enumerated by federal statutes or regulations. In federal administrative law, when an agency reasonably interprets a statute or regulation, its interpretations are typically accorded deference.<sup>198</sup> The question for coordinated rulemaking is whether state proposals, to the extent that they require interpretations of federal regulations or federal law, should be accorded similar deference.

This is one of the few administrative-law questions unique to cooperative programs to have previously attracted notice. One reason might be that a version of this issue is apparent even accepting the states-as-agencies heuristic: understanding states as receiving delegations of power from Congress, in the same way federal agencies do, positions them to do the same statutory interpretation that federal agencies would.<sup>199</sup> Abbe R. Gluck, most notably, has faulted the Supreme Court for failing to “recognize any kind of interpretive deference for state

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196. Indeed, one of the goals of this Article is to supply the terms that could draw like cases and like considerations together.

197. *Chevron U.S.A., Inc. v. Nat. Res. Def. Council*, 467 U.S. 837 (1984).

198. *Id.* at 842-43 (holding that a federal court should defer to an agency's interpretation of an ambiguous statute); *Auer v. Robbins*, 519 U.S. 452, 461 (1997) (holding that a court should defer to an agency's interpretation of its own regulations).

199. Philip J. Weiser has argued for *Chevron* deference in the context of the Telecommunications Act, which, in his reading, allows state agencies “discretion to interpret the Telecom Act subject only [to federal] judicial review.” Philip J. Weiser, *Chevron, Cooperative Federalism, and Telecommunications Reform*, 52 VAND. L. REV. 1, 45 (1999).

implementers of federal law, despite indications that Congress sometimes does intend for states to have discretion.”<sup>200</sup> Gluck’s intuition that some deference is appropriate for state agencies is forceful in light of the significant role that state agencies play in cooperative programs. But conversations about deference for state agencies have largely run aground there. State agencies deserve a seat at the interpretive table, but how much, when, and in what circumstances depends in part on the precise role states play in making interpretive choices. Coordinated rulemaking helps clarify that role. Most importantly, in the ordinary warp and waft of coordinated rulemaking, courts generally do not review a state agency’s interpretation of federal law directly, nor, in the absence of judicial review, does such an interpretation govern third parties without subsequent scrutiny by another important player—the *federal* agency. Indeed, in the coordinated rulemaking process, states typically interpret federal statutes when making their regulatory proposals. Those proposals, along with the interpretive choices on which they rely, are then subjected to a successive level of administrative review by the federal agency when it decides whether to *approve* the state proposal and effectively endorse its understanding of federal law. This complicates the question of federal deference to state interpretations in several ways.

First, it introduces a new federal actor that must make a deference decision. Existing conversations about federal deference to state interpretation of federal law assume that it is federal *courts* that are in a position to make consequential deference choices. But a preliminary, and perhaps higher impact question, is what deference federal *agencies* owe to their state counterparts. Are they, as federal actors, in a superior position to interpret federal law, or are states—because of their role in the shared rulemaking process—also well positioned to offer insight into the ambiguities of federal law, which federal agencies can or should recognize and credit?

Second, when deference questions related to coordinated rulemakings do come before courts, these multiple layers of administrative interpretation may complicate the judicial inquiry. When reviewing coordinated rules, courts should not understand themselves to be reviewing a state interpretation made in isolation. Rather, they must evaluate whether to defer to interpretations of federal law that are shared by *both* state and federal agencies. One central justification for deferring to state interpretations of the federal laws is their frontline role in bringing these programs to fruition. That justification may only strengthen when a federal agency also endorses the state’s construction of federal law. For as Part I shows, that consensus would draw together the judgment of both institutions that oversee the program’s shared regulatory space. On the other hand,

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200. Gluck, *supra* note 150, at 204 (“[T]he Court has never considered anything like deference to state (or private) implementers of federal law, even though some lower courts have granted such deference.”).



there may be grounds for caution. Scholars of picket-fence federalism have theorized that state and federal agencies may act together to contravene each agency's fidelity to its respective legislature. A joint interpretation may, therefore, risk being more collusive than inclusive. These questions deserve more attention. For now, it suffices to highlight the importance of including coordinated rule-making in emerging deference conversations about cooperative federalism and the on-the-ground dynamics of how states interface with federal law.

Indeed, some courts have already begun to recognize these nuances. In many cases about deference to state agencies, it can be difficult to disaggregate the question of deference to the state alone from the question of deference to the state and federal agency's shared interpretation. The federal agency will have approved the state's interpretation in the ordinary course of the rule's enactment after all and it may not specify whether it concurred in that interpretation or simply extended deference to the state's judgment. But in a recent case in the Second Circuit, unusual facts gave the court an opportunity to consider the distinction between those forms of deference.<sup>201</sup> The Natural Gas Act allows the Federal Energy Regulatory Commission (FERC) to issue permits for the construction of natural gas pipelines. Before seeking a permit from FERC, however, the Act requires pipeline companies to obtain from a *state environmental agency* a certification that the pipeline complies with a separate federal statute, the Clean Water Act—a cooperative program implemented by states and the federal EPA. The Clean Water Act, in turn, specifies that a state agency has one year from its “receipt of [the certification] request” to grant or deny a certification or its role in the certification process is “waived.”<sup>202</sup> The pipeline company finally submits its application and certification (or its uncertified application if the one-year period expired with no action by the state agency) to FERC for review and approval.

Here, a company requested a Clean Water Act certification from the New York State Department of Environmental Conservation, but the Department was slow to act. It exchanged letters with the company but neither issued nor denied certification within a year of receiving the request. When the Department later attempted to deny the certification, it defended its tardiness by interpreting the Clean Water Act (for reasons unnecessary to elaborate here) to grant additional time without risking waiver. FERC disagreed. It argued that the Act required strict compliance with the one-year certification timeline and that New York had, therefore, waived its right to deny certification.

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201. N.Y. State Dep't of Env't Conservation v. Fed. Energy Regul. Comm'n, 884 F.3d 450 (2d Cir. 2018).

202. 33 U.S.C. § 1341(a) (2018).



The New York agency and FERC each pressed the Second Circuit for *Chevron* deference for its construction of the certification timeline. The court denied deference to both agencies. For FERC's part, the Second Circuit cited the basic *Chevron* principle that an agency is entitled to deference only if it is responsible for administering the statute in question.<sup>203</sup> Although the Natural Gas Act requires FERC to comply with the Clean Water Act, EPA is the agency responsible for administering the Clean Water Act, not FERC.<sup>204</sup>

For New York's part, the court indicated that "a state agency's interpretation of a federal statute does not receive deference unless the federal agency charged with administering that statute has expressly approved the state's interpretation."<sup>205</sup> The problem, of course, is that *EPA* did not endorse New York's interpretation of the Clean Air Act. *EPA* was not involved in the interpretation at all.<sup>206</sup> In effect, therefore, the Court held that deference is appropriate only when cooperative programs facilitate cooperative statutory interpretations by the state and the appropriate federal administrator, as does coordinated rulemaking.

That holding, however, only raises more questions. For instance, if a federal agency chooses to defer to a state's interpretation of federal law but would not have independently adopted that interpretive judgment, should a federal court defer? Or does the federal agency have to in effect independently earn deference by redoing the state's analytical work and arriving at a consistent conclusion?

Existing conversations, moreover, have focused on whether *state* agencies should receive deference when interpreting *federal law*. But coordinated rulemaking also positions *federal* agencies as interpreters of *state law*, as when state proposals take the form of legislative enactments or formal regulations. Should federal agencies receive such deference for their interpretations of those state laws? And would that deference be justified by federal administrative-law principles—like the notion that Congress intended federal agencies to issue definitive interpretations of state proposals when deciding whether to approve them? Would it be justified by state administrative-law principles—like whether the state intended the federal agency to play that kind of interpretative role? Or by cooperative principles—perhaps predicated deference on the kind of interpretive agreement between federal and state agencies we saw above?

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203. *Chevron*, 467 U.S. at 842.

204. *N.Y. State Dep't of Env't Conservation*, 884 F.3d at 455 ("We review FERC's interpretation of the Clean Water Act, a statute that it does not administer, *de novo*.").

205. *Id.*

206. *Id.* ("[T]he federal agency charged with administering the Clean Water Act (the Environmental Protection Agency) is not involved in reviewing or approving the Department's interpretation of the waiver period.").

These questions are not wholly abstract. When the Fifth Circuit was confronted with a version of this question—whether a federal agency should receive *Chevron* deference for its interpretation of ambiguities in a state proposal that impacted its approval decision—the court answered *no*.<sup>207</sup> But it did not elaborate or meaningfully justify its views, instead resting on the intuitive oddity of federal agencies assuming the role of binding interpreter of state law and leaving for another day the rich theoretical questions posed by that interpretive exercise.

Canvassing the many ways that *Chevron*-like deference might arise in coordinated rulemaking is beyond the scope of this Article. What is important is seeing the degree to which federal-state collaboration alters the descriptive and theoretical contours of interpretive deference in cooperative programs.

### B. Standards of Review

Coordinated rulemaking also raises deference questions beyond *Chevron* and beyond courts. Most pressingly, questions of deference and scrutiny arise within the federal-state relationship—about the degree to which federal agencies should defer to or scrutinize the *factual* and *policy* judgments on which state proposals rely, and the factual-legal *representations* that states make about their compliance with federal parameters, including procedural parameters. Because judicial review of coordinated rules is comparatively rare, this internal scrutiny can be the only form of review state proposals receive. To evaluate state proposals, then, federal agencies have to adopt (whether expressly or implicitly) a standard of review—or a portfolio of standards of review—for the judgments and data that go into state proposals.

Should the standard of review be *de novo*, in effect requiring the federal agency to redo the state's analytics, reassess its data, reconsider its responses to public comments, and reexamine its interpretive judgments? Or should the federal agency defer to some or all aspects of the state's administrative labor? This is another area of limited information because agencies frequently do not formally explain or publicize why they are approving or disapproving state proposals. Nor are standards of review typically mandated in statute or regulation. But many different review models are apparent.

Some federal agencies have adopted a two-step review, first scrutinizing a state's compliance with their procedural parameters and, upon finding rigorous

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207. *Texas v. EPA*, 690 F.3d 670, 677 (5th Cir. 2012) (“Before approval by the EPA, a SIP revision is state law for which the EPA’s interpretation is not authoritative. We need not, therefore, accept that Major NSR evasion is probable based solely on deference to the EPA’s interpretation of the Texas law that forms the basis of this petition.” (internal citations omitted)).

compliance, “vest[ing the state] with substantial discretion” with respect to policy and legal judgments.<sup>208</sup> Others grant states leeway in complying with parameters by, for instance, borrowing the deferential contract-law standard of “substantial compliance” or using a general “reasonableness” standard.<sup>209</sup> There is, perhaps surprisingly, little evidence of federal agencies expressly appropriating standards of review from the two obvious sources of inspiration: federal appellate review of federal district courts (de novo for law, clearly erroneous for facts, and abuse of discretion for discretionary judgments) or federal court review of federal agencies (generally deferential for law, substantial evidence for facts, and arbitrary and capricious for discretionary judgments).

Related questions have also arisen through proxy debates. For instance, federal agencies must generally submit a “full” administrative record to the court so that it can base its “review of an agency’s actions on the materials that were before the agency at the time its decision was made.”<sup>210</sup> In deciding what components of the state administrative record must be submitted to the federal court as part of the “full” administrative record, federal courts have indirectly gestured at the degree to which federal agencies should assess, use, and scrutinize state administrative materials in their approval decisions.

Consider an early Clean Air Act case. EPA argued that it was not required to include any state records in the administrative record filed with the federal court.<sup>211</sup> The court was skeptical. Peering further into the coordinated rulemak-

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208. *Americare Props., Inc. v. Whiteman*, 891 P.2d 336, 343 (Kan. 1995) (“Once a state agency has complied with the procedural requirements of the Boren Amendment, [a now repealed parameter relating to Medicaid rates,] it is vested with substantial discretion in choosing among reasonable methods of calculating rates.”).

209. *Christ the King Manor, Inc. v. Sec’y U.S. Dep’t of Health & Hum. Servs.*, 730 F.3d 291, 317 (3d Cir. 2013) (“HHS could readily conclude that Pennsylvania had *substantially complied* with federal notice requirements, which is all that is necessary for the Secretary to reasonably accept a state’s assurances to that effect.” (internal alterations and quotation marks omitted) (emphasis added)); *Oklahoma v. Shalala*, 42 F.3d 595, 600 (10th Cir. 1994) (noting HHS’s submission in its brief that “ultimately, [it] must judge the reasonableness of a state’s characterizations of amendments to its plan” (citation omitted)); see also *Indep. Acceptance Co. v. California*, 204 F.3d 1247, 1252 (9th Cir. 2000) (holding that “in accepting the State’s assurances, the Secretary was not required to hold the State to absolutely literal compliance with the notice requirements” but “had discretion to determine whether the State had given sufficient assurance that its notice was in substantial compliance”).

210. *IMS, P.C. v. Alvarez*, 129 F.3d 618, 623 (D.C. Cir. 1997); *Citizens to Pres. Overton Park, Inc. v. Volpe*, 401 U.S. 402, 420 (1971) (“[Judicial] review is to be based on the full administrative record that was before the Secretary at the time he made his decision.”).

211. *Appalachian Power Co. v. EPA*, 477 F.2d 495, 505 (4th Cir. 1973) (“[T]he Administrator argues that, in the exercise of judicial review of his action in approving the state plans, the Court shall

ing process (though, of course, without that terminology), the court was skeptical that the administrator's approval decision did not use or evaluate state administrative records. It highlighted the intimacy and interdependence between the state and federal agencies in the development of the rule in question:

[T]he Administrator's connection with the proceedings before the state authority is considerably more intimate than he suggests . . . . At the outset he provided the state authorities with the guidelines to be used by them in preparing state plans and in identifying the factors to be weighed by them . . . . He made available to the state agencies throughout the formulation of their state plans technological advice . . . . In order to keep himself informed of the manner in which the state authorities were proceeding, he required them to give him notice of all hearings so that, if he desired, he might have observers present.<sup>212</sup>

Needless to say, the court rejected the idea that it should limit its review to the "four corners" of the state's proposal and the federal decision, and ordered EPA to turn over extensive documents from the state administrative record, including "the record of expert views and opinions, the technological data and other relevant material, including the state hearings, on which the Administrator himself acted."<sup>213</sup> The implication, of course, is that EPA must itself have scrutinized those opinions, data, and hearings—not just accepted the proposal on its face. Other cases have likewise instructed the federal agency to turn over state documents.<sup>214</sup>

### C. Disclosure and Deliberative Process

One of the core principles of administrative law is that an agency must disclose the reasons for its decision so that courts may evaluate agency action on the basis of contemporaneous justifications rather than post hoc rationalizations.<sup>215</sup>

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look simply to his order of approval and the state plan itself and make its determination on those two documents as the sole record in the case. He goes farther and asserts that his authority in this area is largely ministerial.").

<sup>212</sup> *Id.* at 505-06.

<sup>213</sup> *Id.* at 506-07.

<sup>214</sup> See, e.g., *Ohio Valley Env't Coal. v. Whitman*, No. Civ. A. 02-0059, 2003 WL 43377, at \*3 (S.D. W. Va. Jan. 6, 2003) (reciting EPA's argument that because "its only statutory duty—and the only action subject to challenge here—was to evaluate and approve or disapprove [the state's] actual submission[,] . . . comments submitted during the state process of formulating the [state's] proposal are not relevant").

<sup>215</sup> *Overton Park*, 401 U.S. at 419-20.

One of the largest descriptive and conceptual gaps in our understanding of coordinated rulemaking concerns the back-and-forth between federal and state agencies. Although we probably cannot fully understand the details of the “soft law” of coordinated rulemaking without deeper ethnographic research, my research for this Article suggests that our governments have at least a soft norm of confidentiality for their informal intergovernmental communications. This is visible in the many references to, but exceedingly rare disclosure of, informal comments, edits, conversations, and markups.

It is possible that our governments regard their cross-governmental conversations as something akin to “deliberative process” — a category of agency activity and material that in the federal administrative state is statutorily exempt from disclosure under the Freedom of Information Act and can be excluded from the administrative record submitted to federal courts.<sup>216</sup> The goal of the privilege is to “enhance the quality of agency decisions by protecting open and frank discussion among those who make them within the Government”<sup>217</sup> and to avoid “misleading the public by dissemination of documents suggesting reasons and rationales for a course of action which were not in fact the ultimate reasons for the agency’s action.”<sup>218</sup>

But federalism values complicate the use of deliberative process concepts to shield cross-governmental communications from disclosure. Federalism is centrally concerned with attributional accountability — that is, a constituent’s ability to discern the level of government to which a particular policy should be attributed so that he or she knows whom to hold accountable. That idea is the central rationale for the anticommandeering rule first announced in *New York v. United States*.<sup>219</sup> When the federal government forces states to enact laws, the Court observed, constituents may believe the state, as the most immediate law-maker, is responsible for the policy in question and overlook the federal government’s superintending role.<sup>220</sup> In the administrative process, a record of federal-

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216. 5 U.S.C. § 552(b)(5) (2018) (exempting from Freedom of Information Act disclosure “inter-agency or intra-agency memorandums or letters that would not be available by law to a party other than an agency in litigation with the agency”); *Overton Park*, 401 U.S. at 420 (“[I]nquiry into the mental processes of administrative decisionmakers is usually to be avoided.”); *San Luis Obispo Mothers for Peace v. U.S. Nuclear Regul. Comm’n*, 789 F.2d 26, 45 (D.C. Cir. 1986) (“There may be cases where a court is warranted in examining the deliberative proceedings of the agency. But such cases must be the rare exception if agencies are to engage in uninhibited and frank discussions during their deliberations.”).

217. *Dep’t of Interior v. Klamath Water Users Protective Ass’n*, 532 U.S. 1, 9 (2001) (internal citation omitted).

218. *Coastal States Gas Corp. v. Dep’t of Energy*, 617 F.2d 854, 866 (D.C. Cir. 1980).

219. 505 U.S. 144, 168 (1992).

220. *Id.* at 169.

state communications is essential to the regulatory version of administrative accountability. In this world, it is not voters, but regulated parties and stakeholders, who need to know which level of government is exerting what influence in order to know how to participate usefully in the regulatory process.

This is an area, moreover, in which we can see the payoff of collecting the programs that conduct coordinated rulemaking in one place to search for models and best practices. The Clean Air Act, for instance, allows *formal* opportunity for the federal agency to participate in the state's notice-and-comment process, making transparent EPA's views on the state plan during the state administrative process so that interested parties can engage with EPA's views—to question or defend them—when the state still has a chance to alter its proposals.<sup>221</sup> (Even then, however, EPA's SIP manual advises states to presubmit their proposals to EPA for review and revision *before* the state holds its public hearings, calling into question whether the formal, public process fully captures the agency's internal views.<sup>222</sup>)

#### D. Nondelegation

The practice of coordinated rulemaking may cast new light not only on administrative-law doctrine but also on some of today's most pressing constitutional conversations about administrative agencies. The Supreme Court appears poised to revive long-dormant constitutional constraints on congressional delegation to federal agencies in the form of the nondelegation doctrine.<sup>223</sup> It is black-letter law that Congress can empower agencies to pass regulations that carry the force and effect of law provided that it limits their discretion with an "intelligible principle."<sup>224</sup> Applying that framework, the Court has routinely upheld significant regulatory programs and on only two occasions struck down

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221. See, e.g., Bureau of Air Mgmt., *Response to Comments Regarding State Implementation Plan Revisions Concerning Visibility Protection*, CONN. DEP'T OF ENERGY & ENV'T PROT. (Nov. 16, 2021), <https://portal.ct.gov/-/media/DEEP/air/comments/Regional-Haze-Sip-Comments/Response-to-Comments.pdf> [<https://perma.cc/AA8Y-UQAW>] (describing and responding to comments submitted by EPA in the state SIP hearing).

222. See *supra* notes 89–92 and accompanying text.

223. See *Gundy v. United States*, 139 S. Ct. 2116 (2019) (rejecting a nondelegation challenge). *But see id.* at 2130 (Alito, J., concurring) ("The Constitution confers on Congress certain 'legislative [p]owers,' Art. I, § 1, and does not permit Congress to delegate them to another branch of the Government."); *id.* at 2145 (Gorsuch, J., dissenting, joined by Roberts, C.J., and Thomas, J.) (dissenting and expressing interest in reviving the nondelegation doctrine); *Paul v. United States*, 140 S. Ct. 342, 342 (2019) (Kavanaugh, J., concurring in denial of certiorari) ("I write separately because Justice Gorsuch's scholarly analysis of the Constitution's nondelegation doctrine in his *Gundy* dissent may warrant further consideration in future cases.").

224. *J.W. Hampton, Jr., & Co. v. United States*, 276 U.S. 394, 409 (1928).



congressional enactments.<sup>225</sup> But interest in the doctrine has increased in recent years, setting programs that delegate broad powers to federal agencies on uncertain footing.<sup>226</sup>

To simplify, the concern is that some significant regulatory programs—both federal-only initiatives and cooperative programs, like the Clean Air Act—confer so much unconstrained discretion on federal administrative agencies that they are tantamount to a cession of Congress’s legislative power. Scholars have provided many persuasive answers, grounded in historical practice, to that concern.<sup>227</sup> For cooperative programs, however, the practice of coordinated rule-making provides an additional retort. In empowering federal agencies to participate in coordinated rulemaking within cooperative programs, Congress is doing much less than adherents of the nondelegation doctrine fear.

To see why, let us accept that federal enumerated powers are constitutionally limited and that the powers reserved to states are constitutionally expansive.<sup>228</sup> As Part II establishes, cooperative programs should be understood not as the states-as-agencies analogy casts them—as delegations of *federal* power to the states—but instead as *joinders* of limited federal authority to expansive state authority. When Congress delegates power to federal agencies to fulfill the federal parameter-setting and approval role in coordinated rulemakings, in other words, it is not delegating power to make binding rules for the full scope of the program.

Instead, Congress is delegating a narrower and more controlled power: that of deciding whether a state’s proposal about how *it* will exercise *its own* constitutional power is a sufficiently attractive offer for the federal government to accept. The nondelegation revival is too new, for now, to predict its evolution. But I am not aware of scholarship that confronts the difference that the cooperative federalism context should make to the doctrine. Future conversations about nondelegation should at least include an assessment of the constitutional differences between delegations to federal agencies to formulate cooperative programs—and the cooperative rules that power them—and delegations to federal agencies to regulate alone.

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225. See Cass R. Sunstein, *Nondelegation Canons*, 67 U. CHI. L. REV. 315, 318 (2000).

226. See sources cited *supra* note 223; see also Julian Davis Mortenson & Nicholas Bagley, *Delegation at the Founding*, 121 COLUM. L. REV. 277, 282 (2021) (describing the “rise and fall and rise again of the modern nondelegation doctrine”).

227. See, e.g., Nicholas R. Parrillo, *A Critical Assessment of the Originalist Case Against Administrative Regulatory Power: New Evidence from the Federal Tax on Private Real Estate in the 1790s*, 130 YALE L.J. 1288, 1305 (2021) (arguing that the 1798 “direct tax” is an early example of delegation).

228. U.S. CONST. amend. X.



## IV. THEORIZING COORDINATED RULEMAKING

The classic federalism debate is over what powers to allocate to the national government and what powers to allocate to the states. But practice has, in many ways, eclipsed that debate. Justice Jackson's famous interdiction about the federal separation of powers now captures federalism just as crisply: "While the Constitution diffuses power the better to secure liberty, it also contemplates that practice will integrate the dispersed powers into a workable government."<sup>229</sup> Federalism is on a relentless path toward integration, and we are just beginning to bring into focus the legal ordering of those integrated spaces. What the practices of coordinated rulemaking and their legal determinants reveal is that federalism has reshaped the legal architecture of administrative law for cooperative programs. Seeing how these two fields intersect in cooperative spaces deepens conversations in both fields.

A. *Interdependency in Federalism and Administrative Law*

Although redundancy is often seen as a dirty word, scholars of both federalism and administrative law have rehabilitated the benefits of overlapping institutional structures. Federalism scholars have long since abandoned the idea that American federalism is designed to allocate authority to jurisdictionally discrete entities for each to exercise separately.<sup>230</sup> Scholarship has focused instead on how to harness integration to enrich federalism's capacity to advance American governance. Heather K. Gerken has gone as far as to christen federalism a new form of "nationalism."<sup>231</sup> However we style it, though, federalism is a governmental system of interdependency and overlap, one in which the states and federal government are interwoven gears in the same machinery. Coordinated rulemaking deepens accounts of federalism's integration and interdependency by taking it deep within the administrative process. Almost three decades ago, Judith Resnik argued that "participants within [American federalism]—judges, lawyers, legislators, businesses, and residents—are chafing against [rigid jurisdictional] boundaries."<sup>232</sup> As interdependent administration has become the federalism of the twenty-first century, coordinated rulemaking suggests that we would not

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229. *Youngstown Sheet & Tube Co. v. Sawyer (Steel Seizure)*, 343 U.S. 579, 635 (1952) (Jackson, J., concurring).

230. Fahey, *supra* note 9, at 2334 nn.14-15 and accompanying text (explaining that "[o]urs . . . is a porous federalism" and collecting sources).

231. Gerken, *supra* note 3, at 1889.

232. Judith Resnik, *Afterword: Federalism's Options*, 14 YALE L. & POL'Y REV. 465, 487 (1996).

have to look hard to see a similar blurring of boundaries among administrators as well.

In federal administrative law, a similar swell of interest in institutional interdependencies is afoot. From Jody Freeman and Jim Rossi's "shared regulatory spaces" to Daphna Renan's "pooling powers" to many others, scholars have trained attention on the many sites of overlap among federal administrative agencies.<sup>233</sup> Admitting that "[r]edundancy conjures up images of inefficiency and waste," Neal Kumar Katyal has theorized that Congress can encourage salutary administrative competition among or within federal agencies by using redundant delegations of power to produce better information, more innovative ideas, and less capture.<sup>234</sup> For Katyal, redundancies within the federal administrative state produce a desirable "internal separation of powers."<sup>235</sup> Coordinated rulemaking brings these conversations about institutional porousness together. As Part I develops, cooperative federalism begets a new layered form of administrative law, as federal and state agencies interweave their processes into a joint, interdependent, and — yes — sometimes redundant one.

The distinctive features of this sphere of multigovernmental administrative redundancy deserve more study. Future work could begin by assessing coordinated rulemaking, along with its variations, against the existing frameworks for evaluating institutional redundancy in administrative law. These include how duplication channels diverse forms of expertise;<sup>236</sup> whether duplication broadens an agency's constituencies to counteract capture;<sup>237</sup> whether the institutional form of duplication channels friction to delay the bad and create time for the good;<sup>238</sup> whether the competition duplication triggers can be harnessed to encourage responsiveness to congressional (or, here, state legislative) interests;<sup>239</sup>

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233. See Freeman & Rossi, *supra* note 21, at 1133; Daphna Renan, *Pooling Powers*, 115 COLUM. L. REV. 211, 213 (2015). See generally Anne Joseph O'Connell, *The Architecture of Smart Intelligence: Structuring and Overseeing Agencies in the Post-9/11 World*, 94 CALIF. L. REV. 1655, 1726-27 (2006) (discussing the overlap between federal agencies managing counterterrorism); Shah, *supra* note 192 (defining and discussing the phenomenon of "coordinated interagency adjudication").

234. Neal Kumar Katyal, *Internal Separation of Powers: Checking Today's Most Dangerous Branch from Within*, 115 YALE L.J. 2314, 2324-25 (2006).

235. *Id.* at 2317.

236. Rachel E. Barkow, *Insulating Agencies: Avoiding Capture Through Institutional Design*, 89 TEX. L. REV. 15, 49-56 (2010).

237. *Id.* at 49-58.

238. Katyal, *supra* note 234, at 2317.

239. Jacob E. Gersen, *Overlapping and Underlapping Jurisdiction in Administrative Law*, 2006 SUP. CT. REV. 201, 212.

and whether the benefits of duplication can outweigh the inevitable “inconsistency, waste, confusion, and systemic failure to deliver on the putative statutory goals.”<sup>240</sup>

But the distinctive institutional overlap brought about by coordinated rulemaking may also raise a new series of questions:

1. *Partisanship*. Federalism’s most simplified justification is the idea that dividing power will prevent tyranny. The states to whom power is diffused, the story goes, will have an inherent incentive to protect their independence and governing prerogatives. Their desire for power will fuel their resistance to federal overreach, whatever the merits of the federal policy objective. But politics scrambles that neat story: “Republican-led states challenge the federal government when it is controlled by Democrats, while Democratic-led states challenge the federal government when it is controlled by Republicans.”<sup>241</sup> Whatever interest a state has qua state, those interests can be made to give way to a federal project aligned with the state’s partisan leadership. We should expect that what Jessica Bulman-Pozen memorably styled “partisan federalism” will play some role in shaping the substance and the process of coordinated rulemaking.<sup>242</sup>

But that cannot be the end of the account, for alternative institutional analysis points in the other direction. As the political scientists who write about the picket-fence dynamics of cooperative programs have suggested, the bowels of the cooperative administrative state might *insulate* administrators from political forces – and perhaps, most especially, “partisan federalism” – by creating an alternative axis of organized power: the power of the program expert. Fidelity to the Medicaid program may supersede both devotion to the abstract idea of the “state” or the “federal government” and allegiance to a particular political party.<sup>243</sup>

Cooperative administrative law, then, creates new and textured political terrain with nonobvious partisan dynamics. It has the potential to variously magnify, channel, and dampen partisan dynamics. For scholars of administrative law, the more interesting question is how the structure of federal-state interactions – the details we are only beginning to understand about processes through which they coauthor rules, engage with one another and their respective publics, and

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240. Freeman & Rossi, *supra* note 21, at 1182.

241. Jessica Bulman-Pozen, *Partisan Federalism*, 127 HARV. L. REV. 1077, 1080 (2014); see also Larry Kramer, *Understanding Federalism*, 47 VAND. L. REV. 1485, 1522–42 (1994) (discussing the role of political parties in shaping federal-state relations).

242. Bulman-Pozen, *supra* note 241, at 1080–81.

243. Roderick M. Hills, Jr. has elaborated some of the dynamics of this possibility. See Hills, *supra* note 166, at 1227; cf. Metzger, *supra* note 166, at 1769 (noting the possibility that cooperative federalism may temper partisanship in states that exert less partisan control over administrative agents).

assign legal meaning to their joint actions—contribute to the magnification, channeling, and dulling of federal-state partisan dynamics.

2. *Transparency.* The interdependence forged by coordinated rulemaking also raises basic questions about transparency—questions of growing importance as the full extent of governance in federalism’s interstitial spaces comes increasingly into view. Coordinated rulemaking lacks many of the public features of federal administrative law: there is little or no comprehensive judicial review; rulemaking processes are generally not formally documented (or even, in some cases, centrally controlled); there are no standard disclosure requirements; and the resulting rules are often not made public or, at the very least, are not easily accessible. All this makes the scholarly project of understanding coordinated rulemaking a difficult one. It makes the same project for stakeholders, regulated parties, and even elected officials even more challenging. Basic transparency is a must. To start, organizations like the Administrative Conference of the United States should consider how to systematize existing materials and output produced by federal and state officials in cooperative programs.

But we also need more scholarly work on how federal and state agents interact within the coordinated rulemaking process. The political-science literature on picket-fence federalism theorizes that federal and state agents develop such close bonds that their loyalties may shift away from their respective governments and the program they jointly implement. The legal structure of coordinated rulemaking only creates more cause for concern that, in their tight collaborations, agents will locate additional opportunities to “shirk.” They may even find opportunities to effectively collude to expand their joint power at the expense of the constituencies they mutually serve.<sup>244</sup>

3. *Rulemaking Ossification.* Administrative procedure—what it requires, who imposes it, and whether it evolves—is a central concern, some say a “fetish,” of administrative-law scholars and observers.<sup>245</sup> Many think that the federal notice-and-comment rulemaking process is hopelessly “ossified”—its requirements too inflexible, cumbersome, and slow without offsetting gain.<sup>246</sup> But, as Nicholas Bagley has argued, proposals for procedural reform, which generally seek still more central management and standardization over the rulemaking process,

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244. See Bridget A. Fahey, *Consent Procedures and American Federalism*, 128 HARV. L. REV. 1561, 1616 (2015) (noting these incentives in the formation of cooperative programs).

245. See Nicholas Bagley, *The Procedure Fetish*, 118 MICH. L. REV. 345, 348 (2019).

246. Thomas O. McGarity, *Some Thoughts on “Deossifying” the Rulemaking Process*, 41 DUKE L.J. 1385, 1436 (1992) (describing these debates).

may get the tonic backward: they may make matters worse by “pil[ing] procedure on procedure” and “creat[ing] a thicket so dense that agencies will either struggle to act or give up before they start.”<sup>247</sup>

Coordinated rulemaking presents a new frontline for the ossification debates. On the one hand, it resists rigidity: it is diffused, variable, and, in many cases, only loosely controlled. Although the basic cross-governmental template has now become standard, each government generally retains wide variation in how it performs its respective tasks. The thick “soft law” that shapes coordinated rulemaking—the many phone calls, in-person interactions, exchanges of drafts, and prenegotiations between federal and state agents—adds flexibility, allowing our governments to more easily alter how they exchange knowledge, share information, and negotiate regulatory content.<sup>248</sup> But that informality may also carry risks, most notably reducing transparency and accountability and creating opportunities for collusion. By the same token, though, those programs that have formalized the process of cross-governmental interaction—most notably the Clean Air Act, which requires multiple layers of formal public notice and comment (or the equivalent)—risk increasing ossification, creating the procedural thicket that Bagley describes.

Whether coordinated rulemaking ossifies or deossifies the rulemaking process, of course, will vary by program. And it depends on an empirical assessment of how much the final rule is relatively shaped by the flexible intergovernmental interactions, on the one hand, and the at times inflexible intragovernmental processes used by federal and state actors to complete their respective tasks.

4. *Procedural Atrophy.* Too much interdependence, of course, can yield a kind of unhealthy codependence. Consider the way fusion centers developed civil-rights and civil-liberties policies using a federal template. The federal template directed centers to incorporate certain terms and provisions in their policies essentially verbatim.<sup>249</sup> But it also suggested many areas in which states were expected to tailor the template to state-specific contexts.<sup>250</sup> For example, it advised fusion centers to “insert a list of applicable state and federal privacy, civil rights, and civil liberties laws.”<sup>251</sup> It also told them to include appendices enumerating federal laws that applied, either because those statutes applied to all states across

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247. Bagley, *supra* note 245, at 346.

248. See, e.g., *supra* note 185 (describing the informal process articulated in program manuals).

249. Bureau of Just. Assistance, *supra* note 119, at 7, 10, 11, 14 (incorporating definitions from Appendix A into the template).

250. *Id.* at 3 (“It is important to note that this updated P/CRCL policy development template . . . is not intended to be used *as is*, without modification.”).

251. *Id.* at 8.

the board or because they were made applicable to a state through “funding conditions” or “binding agreement[s] between a federal agency and [the state] agency.”<sup>252</sup> Some states assembled those lists in detail, as envisioned by the template. Delaware’s state-law appendix, for instance, ran eighteen pages.<sup>253</sup> Other states did not. Texas, for instance, glossed its state laws in one sentence.<sup>254</sup> And it copy-pasted the template’s invitation to develop an appendix with a “list [of state-specific] laws, regulations, and policies” without actually enumerating those laws or policies.<sup>255</sup> (The federal government approved that policy, clunky copy-paste notwithstanding.) Thus, although federal support for state administrative proposals can, of course, help improve a state’s thinking, it might also atrophy the state’s own administrative process.

5. *Accountability as Centralization or Diffusion.* Among the important future questions in the study of coordinated rulemaking will be the question of accountability. Accountability is a central concern of scholars of both administrative law and federalism.<sup>256</sup> But those literatures point in two different directions, complicating assessments of the current status of coordinated rulemaking’s accountability health as well as pathways to future reform. Administrative law relies in large part on mechanisms of centralized “managerial supervision” — most importantly, the Office of Management and Budget’s Office of Information and Regulatory Affairs (OIRA) — to “guarantee both that low-level personnel enforce politically determined policy and that important information about administrative activity reaches high-level political officials.”<sup>257</sup> In turn, presidential supervision of those officials is said to “promote[] accountability” by “establish[ing] an electoral link between the public and the bureaucracy, increasing the latter’s responsiveness to the former.”<sup>258</sup>

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252. *Id.* at 45.

253. William D. Crotty, *Privacy Policy*, DEL. INFO. & ANALYSIS CTR. 41-58 (Aug. 2018), <https://nfcausa.wpengine.com/wp-content/uploads/2020/09/Delaware-Information-and-Analysis-Center-DIAC.pdf> [<https://perma.cc/XTB3-WCZT>].

254. *Privacy, Civil Rights, and Civil Liberties Policy*, TEX. FUSION CTR. 1, 2, 4, 7 (Nov. 30, 2010), <https://nfcausa.wpengine.com/wp-content/uploads/2020/09/Texas-Joint-Crime-Information-Center-TJCIC.pdf> [<https://perma.cc/RL78-PZCC>].

255. *Id.* at 25.

256. See Edward Rubin, *The Myth of Accountability and the Anti-Administrative Impulse*, 103 MICH. L. REV. 2073, 2073-75 (2005) (describing the concept of accountability in federalism and administrative-law conversations); see also Bagley, *supra* note 245, at 369 (discussing the role played by accountability in justifying administrative procedures).

257. Gillian E. Metzger, *The Supreme Court, 2016 Term — Foreword: 1930s Redux: The Administrative State Under Siege*, 131 HARV. L. REV. 1, 78 (2017).

258. Kagan, *supra* note 168, at 2331-32.



Scholars of federalism, by contrast, have long focused on (and contested, too) the myriad accountability benefits of less centralization and more devolution—from placing governance closer to the people to simply creating opportunities for contestation and dissent by introducing additional power centers into governance decisions.<sup>259</sup> When rulemaking power passes from federal agencies to state agencies and back, the states disrupt the federal government’s mechanisms of popular supervision through the President and OIRA. But the state’s involvement has at least the potential to provide a distinct institutional pathway for a popularly elected body to exert influence over the content of rules, as the discussion of Medicaid’s legislatively prescribed state plan amendments suggests.<sup>260</sup>

### B. *Federalism’s New Legal Ordering*

Coordinated rulemaking and its window into cooperative federalism’s administrative law also deepens vibrant conversations about federalism by shining a light on the existence of a rich *subconstitutional* law that orders what can otherwise look like a hopelessly messy plane of federal-state interactions. Federalism conversations tend to focus on formal constitutional doctrine on the one hand, or functional institutional, political, or policy dynamics on the other.<sup>261</sup> But the idea that there is a functional *subconstitutional* law, like administrative law, distinctive to federal-state collaborations has been a missing ingredient (or, at best, a tertiary one) in those discussions.

Take one of the most influential modern insights about how our system of federalism works: Jessica Bulman-Pozen and Heather K. Gerken’s account of “uncooperative federalism.” When Bulman-Pozen and Gerken first theorized “uncooperative federalism,” federalism scholarship was generally divided into

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259. Heather K. Gerken, *The Supreme Court, 2009 Term—Foreword: Federalism All the Way Down*, 124 HARV. L. REV. 4, 11 n.9 (2010) (collecting sources).

260. See *supra* notes 51-57 and accompanying text.

261. On the one hand, see the debates nicely summarized in Gerken, *supra* note 259, at 15-16. On the other hand, see Bulman-Pozen, *supra* note 3, at 486-98, who argues that federalism can act as a safeguard of the separation of powers; Rodríguez, *supra* note 3, at 2097, who argues that federalism creates a framework for the “ongoing negotiation of disagreements large and small”; and Bulman-Pozen & Gerken, *supra* note 149, at 1271-78, who detail the power dynamics within federal-state programs. Scholars like Ernest A. Young and Abbe R. Gluck have tried to bridge this divide. See Young, *The Constitution Outside the Constitution*, *supra* note 23, at 415-26 (describing federalism’s subconstitutional law); Gluck, *supra* note 150, at 2022-43 (collecting new doctrinal questions raised by contemporary federalism conversations); Abbe R. Gluck, *Intrastatutory Federalism and Statutory Interpretation: State Implementation of Federal Law in Health Reform and Beyond*, 121 YALE L.J. 534, 551-60 (2011) (assessing the statutory determinants of current federalism dynamics).



two camps: scholars who advocated *dual federalism* and imagined the states acting as bulwarks against the tyranny of concentrated power by offering alternatives to federal policy; and scholars who advocated for *cooperative federalism* and imagined the states as “supportive insiders” and productive “allies to the federal government” but, in so doing, largely waived their role as challengers of federal policy.<sup>262</sup>

Bulman-Pozen and Gerken theorized a third path by highlighting the power states had to resist federal policy from *within* cooperative programs – what they dubbed the “power of the servant.”<sup>263</sup> Their account has been rightly influential because it offers the possibility of capturing the conventional benefits of federalism’s divided power, as well as the benefits that stem from coordinating federal and state action on shared problems. But the examples Bulman-Pozen and Gerken focus on in their initial account are largely expressed in terms of policy design and politics, not law.<sup>264</sup> As Ernest A. Young observed in a symposium honoring Gerken’s contributions, “[M]uch work remains to be done to determine the precise mechanisms . . . of state-centered dissent in the interstices of federal programs.”<sup>265</sup>

Institutional design, administrative doctrine, and rulemaking process have immense influence on substantive outcomes. Coordinated rulemaking, therefore, enriches our understanding of cooperative and *uncooperative* federalism by showing how cooperative federalism’s administrative law structures the paths states have to express their policy preferences – and their pushback. The process of coordinating rulemaking, for instance, gives states the “power of the pen.” They draft the proposals that federal agencies review and approve, and in so doing, they have the capacity to anchor the conversation around the text they have drafted. Return to one of Bulman-Pozen and Gerken’s central examples: the Aid to Families with Dependent Children waiver program.<sup>266</sup> That program allowed states to apply for waivers to generally applicable federal requirements in cooperative programs. In the language of this Article, certain federal parameters are only recommended – and can be waived in appropriate circumstances. But ap-

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<sup>262</sup>. Bulman-Pozen & Gerken, *supra* note 149, at 1258.

<sup>263</sup>. *Id.* at 1259, 1265.

<sup>264</sup>. *Id.* at 1274 (noting the Aid to Families with Dependent Children waiver program’s allowance for “experimental, pilot, or demonstration project[s]” (alteration in original)); *id.* at 1277 (describing California’s ability to win special concessions under the Clean Air Act to account for its “unique problems” (quoting H.R. REP. NO. 90-728, at 1957 (1967), *reprinted in* 1967 U.S.C.C.A.N. 1938, 1958)); *id.* at 1278 (calling attention to state behavior “akin to civil disobedience” in the administration of the USA Patriot Act, which relied on state cooperation).

<sup>265</sup>. Young, *Research Agenda*, *supra* note 23, at 431.

<sup>266</sup>. Bulman-Pozen & Gerken, *supra* note 149, at 1274.

preciating that states take the pen in formulating proposals for waivers only expands our understanding of the forms of power that states, and state constituencies who participate in their administrative processes, can exercise in cooperative programs.

The Rehnquist Court's federalism revival represented an unprecedented reprise of formal constraint on federal power, epitomized in cases like *United States v. Lopez*.<sup>267</sup> The Court's raft of new federalism rules, however, only shifted scholarly attention further *away* from formal law as a chief determinant of power in contemporary federalism. For even faced with major doctrinal shifts, our governments found equally significant functional workarounds. For the classic debate between formalists and functionalists, functionalism won out. A bevy of important conversations about federalism over the last two decades has, to that end, focused on the functional aspects of federalism: its politics and policy. But coordinated rulemaking and federalism's administrative spaces present an opportunity to revive the significance of *law* in shaping intergovernmental interactions by noticing the importance of a *functional* form of law: one that has arisen more organically through informal interaction and less formally through legislative act or judicial decree. Federalism's administrative law is, in many ways, like the functionalist common-law subjects of contracts, torts, and property, which evolve over time, are highly sensitive to practice, and are shaped not just by the rules that courts decree but by the shadows cast by those rules – shadows under which individuals and firms structure their interactions to avoid the need for judicial intervention at all. It should go without saying that there is considerably more of this functional law to discover in federalism's interstitial spaces.

## CONCLUSION: BEYOND COORDINATED RULEMAKING

A central claim of this Article is that courts and scholars have overlooked the existence of a transsubstantive body of administrative law and practice – the administrative law of cooperative federalism. In doing so, I have focused on rulemaking in cooperative programs, which I suggest generally proceeds from a common template: coordinated rulemaking.

But coordinated rulemaking is just the tip of the administrative-law iceberg. For instance, instead of layering a coordinated rulemaking process atop existing federal and state administrative-law bureaucracies, some cooperative programs have created freestanding and integrated “cross-governmental bureaucracies,” which draw together federal and state officials into a shared institution.<sup>268</sup> The

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<sup>267</sup>. 514 U.S. 549, 553–59 (1995).

<sup>268</sup>. See Fahey, *supra* note 114, at 1047–50.

towering example is the National Crime Information Center (NCIC) – the largest cooperative program no one (or, at least, very few people) has ever heard of, which pools and manages policing data from across federal, state, and local law-enforcement agencies.<sup>269</sup> Inside cross-governmental bureaucracies, processes like coordinated rulemaking are unnecessary because federal and state officials are already “in the same room,” as it were. Instead, NCIC uses a model of rule-making in which federal and state officials confer in working groups and on a joint council, then vote as one to adopt rules.<sup>270</sup> Joint administrative activity within cooperative programs can also resemble something more akin to non-binding guidance, as when joint policing task forces (most prominently, Joint Terrorism Task Forces) adopt guidelines to govern their partnerships.

There is, in short, considerably more to be learned about cooperative federalism’s administrative law and practice. A central goal of this Article has been to invite courts and scholars into that broader conversation.

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<sup>269</sup>. *Id.*

<sup>270</sup>. *Id.* at 1047-49.