

# BLOC PARTY FEDERALISM

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## INTRODUCTION

The first year of Donald J. Trump's presidency has produced numerous heated controversies that implicate two central constitutional themes of U.S. politics: federalism and the separation of powers. The Trump administration's immigration policies regarding travel from predominantly Muslim countries, "sanctuary" jurisdictions, and the suspension of the Obama administration's "Dreamers" program have all been met with vehement resistance and litigation, often led by Democratic state attorneys general.<sup>1</sup> The Environmental Protection Agency's (EPA) initiatives to rescind, revoke, or rewrite a raft of environmental regulations have likewise generated intense state opposition.<sup>2</sup> And state officials have sharply protested against what they view as the administration's deliberate efforts to un-

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1. See, e.g., Abbie Bennett & Anne Blythe, *NC Attorney General Stein supports lawsuit against Trump immigration ban*, NEWS OBSERVER (updated Feb. 7, 2017 6:05 PM), <http://www.newsobserver.com/news/politics-government/state-politics/article131140734.html> [<http://perma.cc/KUN3-2WRF>]; Josh Gerstein, *California files suit over Trump sanctuary city policy*, POLITICO (updated Aug. 15, 2017 6:05 AM), <https://www.politico.com/story/2017/08/14/california-trump-sanctuary-city-grant-lawsuit-241623> [<https://perma.cc/L927-D2RH>]; Dan Levine, *California, three other states sue over Trump action on 'Dreamer' immigrants*, REUTERS (Sept. 11, 2017, 1:01 PM), <https://www.reuters.com/article/us-usa-immigration-lawsuit/california-three-other-states-sue-over-trump-action-on-dreamer-immigrants-idUSKCN1BM2IY> [<https://perma.cc/6TAZ-YKEC>].

2. Richard Valdmanis, *States Challenge Trump over Clean Power Plan*, SCI. AM. (Apr. 6, 2017), <https://www.scientificamerican.com/article/states-challenge-trump-over-clean-power-plan/> [<https://perma.cc/RLH8-W98H>].

dermine the Patient Protection and Affordable Care Act (ACA).<sup>3</sup>

All those controversies have been shaped to some extent by President Trump's idiosyncratic style of leadership and communication. But the controversies also signal the rising dominance of the executive branch and especially the White House, rather than Congress, over federalism relations. And all have played out under conditions of intense partisan polarization. Those joint tendencies—the rise of executive government, and partisan polarization—have driven federalism's development for well over three decades.

Scholars broadly agree that an “executive federalism” has replaced the legislative, “cooperative” federalism of the post-New Deal era.<sup>4</sup> In a presidential system, they observe, partisan polarization is naturally conducive to executive government.<sup>5</sup> Institutional mechanisms that generate cooperation and exchange in a system of divided powers break down, and a deadlocked, “dysfunctional” legislature yields power to the executive.<sup>6</sup> And because most domestic policies are embedded in intergovernmental statutes and arrangements, polarization and the attendant rise of executive government have naturally produced an executive-dominated federalism.<sup>7</sup> Its contours are

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3. See Rachel Roubein, *18 states sue over Trump-halted ObamaCare payments*, HILL (Oct. 13, 2017 3:09 PM), <http://thehill.com/policy/healthcare/355360-15-states-sue-over-trump-halted-obamacare-payments> [<https://perma.cc/8BAE-XME7>]; see also Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 (2010) (codified as amended in scattered sections of 26 and 42 U.S.C.).

4. Jessica Bulman-Pozen, *Executive Federalism Comes to America*, 102 VA. L. REV. 953, 954–55 (2016); Jessica Bulman-Pozen & Gillian E. Metzger, *The President and the States: Patterns of Contestation and Collaboration Under Obama*, 46 PUBLIUS: J. FEDERALISM 308, 308–10 (2016); Gillian E. Metzger, *Agencies, Polarization, and the States*, 115 COLUM. L. REV. 1739 (2015). For an earlier, excellent and remarkably prescient contribution see Thomas Gais & James Fossett, *Federalism and the Executive Branch*, in INSTITUTIONS OF AMERICAN DEMOCRACY: THE EXECUTIVE BRANCH 486, 487 (Joel D. Aberbach & Mark A. Peterson, eds., 2005).

5. Daryl J. Levinson & Richard H. Pildes, *Separation of Parties, Not Powers*, 119 HARV. L. REV. 2312, 2314–15 (2006).

6. See, e.g., Jack M. Balkin, *The Last Days of Disco: Why the American Political System Is Dysfunctional*, 94 B.U. L. REV. 1159, 1165 (2014); Sarah Binder, *The Dysfunctional Congress*, 18 ANN. REV. POL. SCI. 85, 95 (2015); Neal Devins, *Presidential Unilateralism and Political Polarization: Why Today's Congress Lacks the Will and the Way to Stop Presidential Initiatives*, 45 WILLAMETTE L. REV. 395 396–97 (2009).

7. See Bulman-Pozen, *supra* note 4, at 953. Arguably, the forces that have propelled the rise of executive government have been especially virulent in the federalism arena. Only the executive, not Congress, can hope to cajole and rein in in-

shaped by the EPA, the Department of Health and Human Services (HHS), and the Department of Education; by agencies that until recently had little if any truck with federalism, such as the Internal Revenue Service;<sup>8</sup> by nominally private, quasi-governmental agencies;<sup>9</sup> and through legal settlements between federal regulators, state prosecutors, and private enterprises.<sup>10</sup> These law- and policymaking initiatives have taken decidedly “unorthodox” forms.<sup>11</sup> Federal agencies exercise broad waiver authority, generate entire federalism programs from whole cloth, commandeer vast revenue streams to state and local governments at their discretion, and endeavor to entice or cajole ornery states into some form of cooperation with federal programs and ambitions.<sup>12</sup> Key federalism decisions are made not by bureaucrats in the context of a routinized regulatory process but by high-level political officials, acting in close concert with the White House.<sup>13</sup>

For the most part, the executive federalism literature has stressed the potent effects of partisan polarization at the national level.<sup>14</sup> This Essay complements the picture by examining the effects of partisan, ideological polarization at the state level. “Red” and “blue” states divide sharply over highly salient questions of public policy, and they act as blocs. Concur-

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creasingly ornery states. It has many more tools at its disposal than the legislature, is relatively nimbler, can act on individual states, and can act strategically across program areas. Gais & Fossett, *supra* note 4, at 507.

8. See Kristin E. Hickman, *The (Perhaps) Unintended Consequences of King v. Burwell*, 2015 PEPP. L. REV. 56, 68–69 (“[T]he IRS is now one of the government’s principal welfare agencies, on par with the Department of Health and Human Services and the Social Security Administration.”).

9. See Ann Joseph O’Connell, *Bureaucracy at the Boundary*, 162 U. PA. L. REV. 841, 846–49 (2014).

10. See PAUL NOLETTE, *FEDERALISM ON TRIAL: STATE ATTORNEYS GENERAL AND NATIONAL POLICYMAKING IN CONTEMPORARY AMERICA* 91–95 (2015); Christopher C. DeMuth, Sr. & Michael S. Greve, *Agency Finance in the Age of Executive Government*, 24 GEO. MASON L. REV. 555, 567–72 (2017).

11. Abbe R. Gluck et al., *Unorthodox Lawmaking, Unorthodox Rulemaking*, 115 COLUM. L. REV. 1789, 1794–97 (2015).

12. See *infra* Part II.

13. See Bulman-Pozen, *supra* note 4, at 962 (“Polarized parties more closely link the President and agencies and offer the White House additional leverage over administration.”).

14. For a notable exception see Timothy J. Conlan & Paul L. Posner, *American Federalism in an Era of Partisan Polarization: The Intergovernmental Paradox of Obama’s “New Nationalism,”* 46 PUBLIUS: J. FEDERALISM 281, 282–83 (2016) (examining state-level polarization).

rently, the ideological divide between the national executive and the “dissident” state bloc has also widened. Partisan, ideological polarization in this geographic, state-level dimension is a form of political sectionalism—that is, a political cleavage that is too deep to be overcome through ordinary, transactional politics and bargaining.<sup>15</sup> U.S. federalism has been “sectional” in this sense for most of our history. What is new is the interplay with an executive-dominated national government. The conjunction has produced a distinctive institutional pattern of federal-state relations. It has a distinctive political economy, and it operates largely without meaningful legal and especially constitutional constraints.

Part I of the Essay places our contemporary, sectional, executive federalism in historical perspective. Part II describes some of its central features: asymmetric treatment of individual states, policymaking at the outer limits of statutory and constitutional law, and litigiousness. Part III sketches contemporary federalism’s political economy. Very roughly: the blue states’ quasi-European business model of expansive (and expensive) social and environmental protections is difficult to sustain. So long as capital and labor can migrate to hospitable states, the blue-state model requires high federal fiscal transfers and, moreover, an extensive system of federal regulation that raises the red-state rivals’ cost and curtails their competitive and comparative advantages. This conflict has shaped federalism in highly salient policy arenas, and it has reinforced the executive’s dominance over federalism relations. Part IV notes the dearth of effective legal and constitutional controls: The Supreme Court’s separation of powers and federalism jurisprudence is seriously mismatched with current institutional realities.

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15. In its strictest sense “sectionalism” refers to a constellation of rival, *contiguous* state jurisdictions that divide along a political line of existential salience (exemplified by the Confederacy and the Union). See RICHARD FRANKLIN BENSEL, SECTIONALISM AND AMERICAN POLITICAL DEVELOPMENT, 1880–1980, at 3–4 (1984). By some measures, contemporary federalism is sectional even in that strict sense. For example, it is entirely possible to travel—without detours—from Florida to Canada without going anywhere near a blue state. In other respects, contemporary federalism is “sectional” in a more attenuated sense—for example, the very real divide between coastal states and flyover country. To my mind, not much hangs on this difference in terms of federalism’s political economy once political identity comes to be defined by party and ideology. Thanks to Jessica Bulman-Pozen for urging me to clarify this point.

The Conclusion briefly speculates about sectional, executive federalism's prospects and possibilities. On a cheerful view, federalism's contentiousness suggests that our politics, far from collapsing into a centralized autocracy, remain vibrant and that states—unlike, perhaps, Congress and arguably the judiciary—remain an effective check on the executive.<sup>16</sup> On a more pessimistic note, federalism's dynamics signal an acute danger of institutional corruption—not so much petty quid pro quo bargains, but a pattern that the Founders associated with the term “corruption”: the systematic mobilization of the governmental machinery for purposes of partisan gain and oppression.

### I. STATES OF POLARIZATION

Over the past decades, states have followed the national pattern of increasing partisan and ideological polarization.<sup>17</sup> By and large, increased partisan homogeneity *within* states has been accompanied by increased heterogeneity across and *among* states. The number of states under one-party control has risen markedly: in over two-thirds of the states, one party governs the executive and both houses of the legislature.<sup>18</sup> Meanwhile, the ideological distance between red and blue states, and between “dissident” state and the federal government, has increased sharply on many key policy questions. Red and blue states have formed and act as stable blocs over a wide range of issues, many of them of near-existential interest to states on both sides. Controversies over environmental and energy policy, immigration, the ACA, and tax policy are examples.<sup>19</sup>

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16. In the aftermath of President Trump's election, liberal scholars and pundits have emphasized that potential and urged like-minded constituencies and state officials to act accordingly. See, e.g., Cristian Farias, *A New Romance: Trump Has Made Progressives Fall in Love With Federalism*, NEW YORK: DAILY INTELLIGENCER (Aug. 24, 2017, 8:00 AM), <http://nymag.com/daily/intelligencer/2017/08/trump-has-made-progressives-fall-in-love-with-federalism.html> [<https://perma.cc/W2SE-Y8UK>]; Heather K. Gerken & Joshua Revesz, *Progressive Federalism: A User's Guide*, DEMOCRACY (Spring 2017), <https://democracyjournal.org/magazine/44/progressive-federalism-a-users-guide/> [<https://perma.cc/2GQP-97UL>].

17. Boris Shor & Nolan McCarty, *The Ideological Mapping of American Legislatures*, 105 AM. POL. SCI. REV. 530, 546, 549–50 (2011).

18. *Gubernatorial and Legislative Party Control of State Government*, BALLOTPEDIA, [https://ballotpedia.org/Gubernatorial\\_and\\_legislative\\_party\\_control\\_of\\_state\\_government](https://ballotpedia.org/Gubernatorial_and_legislative_party_control_of_state_government) [<https://perma.cc/Z5XE-899B>].

19. See *infra* notes 48–49 and accompanying text.

Political scientists have described this form of geographic polarization as “sectionalism.”<sup>20</sup> In varying shapes and with varying intensity, sectionalism has been the rule in U.S. politics, and it has powerfully shaped the contours of our federalism. A very brief survey helps to put its present-day, uniquely *executive* manifestation in context.

Throughout the nineteenth century, U.S. politics were intensely sectional. The central cleavage, of course, was slavery and, after the Civil War, its enduring legacy. Sectional politics were then conducive to a “dual” federalism, characterized by limited federal authority and a low level of fiscal transfers. For example, the Supreme Court—even in its most nationalist moments—never embraced a federal commerce power that would have entailed federal authority to regulate slavery within the states.<sup>21</sup> Similarly, fiscal transfers and other “cooperative” federalism arrangements could come about only rarely, due to intractable disagreements over the distribution of federal spending.<sup>22</sup>

The Progressive and pre-New Deal Era—like ours, a time of high partisan polarization and sectional politics—produced some cooperative federalism programs through federal statutes.<sup>23</sup> Such statutes were enacted in domains where states’ interests were homogeneous (for example, federal aid for road construction)<sup>24</sup> or where Congress was able to compartmentalize political authority along state lines, as with liquor regulation.<sup>25</sup> But Congress steered clear of enacting statutes that would have threatened the racial caste structure in the South.<sup>26</sup> Only the massive dislocations and the unusually high partisan consensus of the New Deal broke the sectional alignments and

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20. See BENSEL, *supra* note 15 at 4.

21. See, e.g., *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 206–07 (1824).

22. See JONATHAN A. RODDEN, *HAMILTON’S PARADOX: THE PROMISE AND PERIL OF FISCAL FEDERALISM* 59–63 (2006).

23. Frank R. Strong, *Cooperative Federalism*, 23 *IOWA L. REV.* 459, 461–62 (1938).

24. See, e.g., Federal-Aid Road Act of 1916, Pub. L. No. 64-156, 39 Stat. 355 (repealed 1958).

25. See Webb-Kenyon Act, Pub. L. No. 62-398, 37 Stat. 699 (1913) (codified as amended at 27 U.S.C. §§ 122–122b (2016)).

26. The child labor statutes struck down by the Supreme Court in *Hammer v. Dagenhart*, 247 U.S. 251, 277 (1918), and *Child Labor Tax Case*, 259 U.S. 20, 44 (1922), are the conspicuous exceptions.

generated stable, broad-scale patterns of cooperative federalism.<sup>27</sup>

Initially, that emergent federalism had a distinctly executive hue. The emergency programs of the early New Deal years conferred virtually unlimited spending discretion on the executive, and President Roosevelt's confidants (led by Harry Hopkins) roamed the country and sought to entice local politicians to adopt relief programs on a one-off basis.<sup>28</sup> Cooperative federal entitlement programs—so called because they created legislative entitlements *for the states*—were enacted when and because Congress, the executive, and state and local politicians all shared an interest in greater regularity.<sup>29</sup> While those programs—for example, the 1935 Social Security Act—left a great deal to administrative discretion, they also established general funding formulas and ensured legislative budget and program control through appropriations as well as continuous committee oversight.<sup>30</sup>

The post-New Deal, post-World War II era was a time of high partisan consensus, chiefly because Southern whites ended up in the wrong party.<sup>31</sup> The sectional cleavage over race, however, remained. There could be no cooperative federalism in education or healthcare because for the South, there was nothing to negotiate. It took the Great Society, another episode of convulsion and single-party dominance, to break that pattern. The cooperative achievements of that period—the Elementary and Secondary Education Act of 1965,<sup>32</sup> the accompa-

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27. Jenna Bednar et al., *A Political Theory of Federalism*, in CONSTITUTIONAL CULTURE AND DEMOCRATIC RULE 223, 258–59 (John Ferejohn et al., eds. 2001).

28. See James T. Patterson, *The New Deal and the States*, 73 AM. HIST. REV. 70, 71, 74 (1967).

29. John Joseph Wallis, *The Political Economy of New Deal Fiscal Federalism*, 29 ECON. INQUIRY 510, 512 (1991).

30. See, e.g., Social Security Act of 1935, Pub. L. No. 74-271, §§ 501–505, 49 Stat. 620, 629–31 (granting discretion to the Secretary of Labor to allot grants to the states for maternal and child health services.); see also Joel D. Aberbach, *Changes in Congressional Oversight*, 22 AM. BEHAV. SCI. 493, 493 (1979); Andrew M. Wright, *Constitutional Conflict and Congressional Oversight*, 98 MARQ. L. REV. 881, 906, 931 (2014).

31. See Hahre Han & David W. Brady, *A Delayed Return to Historical Norms: Congressional Party Polarization after the Second World War*, 37 BRIT. J. POL. SCI. 505, 509–16 (2007).

32. Pub. L. No. 89-10, 79 Stat. 27 (codified as amended at 20 U.S.C. §§ 6301–8961 (2012)).

nying civil rights mandates of Title VI of the Civil Rights Act of 1964,<sup>33</sup> and Medicaid<sup>34</sup>—reshaped the federalism landscape profoundly and with amazing speed. At the same time, though, the Great Society era also induced the collapse of the New Deal coalition and, over time, produced partisan realignment and polarization that now dominates U.S. politics at all levels.<sup>35</sup>

Racial attitudes still play an important role in our politics, and in more recent decades, “social” issues (such as the death penalty, abortion, or same-sex marriage) have proven beyond the scope of monetized, congressional bargains.<sup>36</sup> Central to contemporary politics, however, is an ideological confrontation between red states’ low-tax, production-oriented policy commitments (exemplified by Texas) and the quasi-European model embraced by New York, California, and other blue states, which reflects a high domestic demand for social services and environmental amenities and a relatively high tolerance for accompanying tax payments.<sup>37</sup> Two prominent federalism scholars have described the attendant transformation in intergovernmental relations with admirable clarity and precision:

Unlike the previous era of cooperative federalism and national expansion, gridlock in Washington is now matched by equally trenchant conflicts among the states. Rather than respond to pent up policy demands for public action on broadly agreed goals and concerns, states instead have cleaved to radically different policies and agendas mirroring the conflicts in Washington. Rather than acting as a relief valve for national policy paralysis, states have now tended collectively to ratify and intensify those conflicts.<sup>38</sup>

The conflicts, to repeat, play out in a national political process that is dominated by the executive. The following Part de-

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33. Pub. L. No. 88-352, §§ 601–605, 78 Stat. 241, 252–53 (codified as amended at 42 U.S.C. §§ 2000d to 2000d-4a (2012)).

34. Social Security Amendments of 1965, Pub. L. No. 89-97, § 121(a), 79 Stat. 286, 343–52 (codified as amended 42 U.S.C. §§ 1396 to 1396w-5 (2012)).

35. MATTHEW LEVENDUSKY, *THE PARTISAN SORT: HOW LIBERALS BECAME DEMOCRATS AND CONSERVATIVES BECAME REPUBLICANS* 1-11 (2009).

36. For this reason, the Supreme Court—rather than the Congress—locked dissident states into a kind of national, postmodern morals cartel. See MICHAEL S. GREVE, *THE UPSIDE-DOWN CONSTITUTION* 268–72 (2012).

37. See *infra* Part III.

38. Conlan & Posner, *supra* note 14, at 299.



scribes some of the key features and dynamics of our sectional, executive federalism.

## II. BARGAINING, REGULATION, LITIGATION

Under the Supreme Court's interpretation of the Constitution and as a practical matter, the federal government cannot *compel* a state to accept federal funds or to administer a federal program.<sup>39</sup> For this reason, the "cooperative" federalism programs of the New Deal and the Great Society aimed to produce uniform state cooperation through some combination of (often fiscal) carrots and sticks, coupled with an assurance of state flexibility.<sup>40</sup> The programs were structured so as to make it nearly impossible for any individual state to resist the federal "incentives."

That mode of "cooperative" federal integration works where and when states are tolerably homogeneous. It breaks down when a substantial number of states, *acting as a bloc*, refuse cooperation or affirmatively work to thwart federal objectives. This is true even where the federal statute provides for a fallback in the form of direct federal regulation in non-compliant states: no federal agency is built to administer its programs directly in more than a handful of states. State-level polarization has produced such blocs and, consequently, a distinctive set of bargaining incentives and dynamics.<sup>41</sup>

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39. See *Printz v. United States*, 521 U.S. 898, 935 (1997); *New York v. United States*, 505 U.S. 144, 188 (1992) ("The Federal Government may not compel the States to enact or administer a federal regulatory program.").

40. Cf. *New York*, 505 U.S. at 151 (framing the monetary, access, and the "take title" provisions of the Low-Level Radioactive Waste Policy Amendments Act, Pub. L. No. 99-240, 99 Stat. 1842 (1986) (codified as amended at 42 U.S.C. §§ 2021b–2021j (2012)), as incentives meant to "encourage the States to comply with their statutory obligation to provide for the disposal of waste generated within their borders").

41. The dynamics described in this Part predominantly unfold in areas of *new* major policy commitments, such as the Affordable Care Act's mandates and Medicaid expansion, the clean power plan, and immigration reform. Elsewhere (for example, in the education sector), federalism programs are embedded in a maze of ancient statutes and unwieldy regulations. See J.B. Ruhl & James Salzman, *Mozart and the Red Queen: The Problem of Regulatory Accretion in the Administrative State*, 91 GEO. L.J. 757, 782–88 (2003). They are administered by an entrenched intergovernmental machinery, and they have produced a vast ecology of supportive—and dependent—contractors, consultants, and constituencies. None of that can be undone under normal political conditions, and political fights usually concern incremental adjustments in the vertical and horizontal distribution of bene-

On the federal side, the attainment of national objectives under sectional conditions demands a strategy of picking off or subduing recalcitrant states, one at a time. That is necessarily an executive undertaking. Congress can bargain with the states so long as they have a broadly consensual position—for instance, against federal preemption or for more generous funding (and fewer “strings”). By contrast, Congress is institutionally incapable of bargaining with *individual* states whose interests run in opposite directions or with blocs of states whose demands are effectively non-negotiable.<sup>42</sup> To the extent that federalism maintenance demands such negotiations, the executive’s dominance increases. Stateside, the objective for dissident states becomes to hold and hang together—either by thwarting the central government’s “divide and conquer” strategy *ex ante* (that is, by blocking the legislative or executive creation of “cooperative” programs), or by preventing defections after the fact. Those bilateral incentives produce an executive federalism that is asymmetric, “unorthodox,” and litigious.

*First*, executive federalism is highly asymmetric: nominally federal policies take on entirely different contours in individual states. Even in cooperative federalism’s heyday, the interplay between federal law, agency discretion, and state and local administration produced a great deal of state-to-state variation. Especially over the past decade, however, the variance has become much greater. The use of executive waivers has increased greatly in scale and scope. Medicaid, which accounts for the largest share of federal transfer payments to state and local governments,<sup>43</sup> is an oft-cited example of asymmetric executive federalism.<sup>44</sup> Administrations under presidents of both parties

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fits and burdens within those policy silos. “Cooperative” federalism continues to operate, albeit under increased stress. Conlan & Posner, *supra* note 14, at 299.

42. Gais & Fossett, *supra* note 4, at 507.

43. Compare OFFICE OF MGMT. & BUDGET, EXEC. OFFICE OF THE PRESIDENT, BUDGET OF THE UNITED STATES GOVERNMENT, FISCAL YEAR 2018, HISTORICAL TABLES, tbl.15.1 (2017) (showing Medicaid spending by the federal government totaling \$349.8 billion in 2015 and \$368.3 billion in 2016), *with id.* at tbl.12.1 (showing outlays for grants to the state and local governments totaling \$565.1 billion in 2015 and \$593.5 billion in 2016).

44. Frank J. Thompson & Courtney Burke, *Executive Federalism and Medicaid Demonstration Waivers: Implications for Policy and Democratic Process*, 32 J. HEALTH POL. POL’Y & L. 971, 972–73 (2007); *see also* Frank J. Thompson & Michael K. Gusmano, *The Administrative Presidency and Fractious Federalism: The Case of Obamacare*, 44 PUBLIUS: J. FEDERALISM 426, 430 (2014).

have routinely issued broad “Section 1115” waivers under Medicaid, to the point where none of the actual state programs has much to do with the statutory parameters.<sup>45</sup> In an effort to expand Medicaid as envisioned under the ACA, the Obama administration’s Department of Health and Human Services (HHS) negotiated “Memoranda of Understanding” with individual states and extended funding for programs ranging from Vermont’s single-payer system to quasi-privatized systems in Republican-led states.<sup>46</sup> The Trump administration has changed the political but not the institutional dynamics.<sup>47</sup>

*Second*, federalism has become highly “unorthodox.” Administrative efforts to implement federal policy have often taken the form of extra-statutory accommodation: states have been granted asymmetric treatment by executive edict even where federal statutory law quite obviously forbids it or on conditions well outside the statutory parameters.<sup>48</sup> Under the Obama administration, the implementation of the Affordable Care Act, immigration reform, and climate change programs all proceeded through presidential initiative and at the outer limits of statutory law, without and often in defiance of the authority of Congress.<sup>49</sup> The Trump administration has reversed course on

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45. See Jonathan R. Bolton, *The Case of the Disappearing Statute: A Legal and Policy Critique of the Use of Section 1115 Waivers to Restructure the Medicaid Program*, 37 COLUM. J.L. & SOC. PROBS. 91, 163 (2003).

46. See Shanna Rose & Cynthia J. Bowling, *The State of American Federalism 2014–15: Pathways to Policy in an Era of Party Polarization*, 45 PUBLIUS: J. FEDERALISM 351, 361–62 (2015).

47. See Nicholas Bagley, *Are Medicaid Work Requirements Legal?*, 319 J. AM. MED. ASSOC. 763, 763–64 (2018) (discussing Trump administration’s proposed waivers for state-imposed work requirements under Medicaid).

48. Nicholas Bagley, *Legal Limits and the Implementation of the Affordable Care Act*, 164 U. PA. L. REV. 1715, 1716 (2016) (“To secure his principal achievement, President Obama has repeatedly tested the limits of executive authority in implementing the [Affordable Care Act].”); David J. Barron & Todd D. Rakoff, *In Defense of Big Waiver*, 113 COLUM. L. REV. 265, 277–99 (2013) (analyzing this phenomenon in several contexts). On occasion, executive federalism has created something resembling reverse preemption. For example, states that have legalized the use of marijuana have been granted a *de facto* exemption from the Controlled Substances Act and other federal regulatory statutes. See Bulman-Pozen, *supra* note 4, at 979–82, and references cited *id.*

49. See, e.g., Nicholas Bagley, *The Legality of Delaying Key Elements of the ACA*, 370 NEW ENG. J. MED. 1967 (2014) (the ACA); Michael S. Greve & Ashley C. Parrish, *Administrative Law Without Congress*, 22 GEO. MASON L. REV. 501, 507–11 (2015) (climate regulation); Zachary S. Price, *Enforcement Discretion and Executive Duty*, 67 VAND. L. REV. 671, 759–61 (2014) (immigration).

all those fronts, again—and despite a GOP majority in both Houses of Congress—almost exclusively through unilateral administrative action.<sup>50</sup>

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50. In several instances, the Trump administration has explained drastic policy reversals on the grounds that in its view, the executive lacked legal authority to administer programs inherited from the Obama administration. *See, e.g.*, Repeal of Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units, 82 Fed. Reg. 48,035, 48,036 (proposed Oct. 16, 2017) (“Under the interpretation proposed in this notice, the CPP exceeds the EPA’s statutory authority and would be repealed.”). Two of those reversals were accompanied by calls for congressional intervention and, on that account, productive of considerable irony. In September 2017, President Trump terminated the Obama administration’s “Dreamers” program. *See* Statement on the Deferred Action for Childhood Arrivals Policy, 2017 Daily Comp. Pres. Doc. No. 00609, at 1 (Sept. 5, 2007), <https://www.gpo.gov/fdsys/pkg/DCPD-201700609/pdf/DCPD-201700609.pdf> [<https://perma.cc/645Z-TLL5>]. At the same time, the President called upon Congress to provide legislation to preserve the program in some form. *See* Michael D. Shear & Julie Hirschfeld Davis, *Trump Moves to End DACA and Calls on Congress to Act*, N.Y. TIMES (Sept. 5, 2017), <https://www.nytimes.com/2017/09/05/us/politics/trump-daca-dreamers-immigration.html> [<https://nyti.ms/2x7xOo2>] (quoting Donald J. Trump (@realDonaldTrump), TWITTER (Sept. 5, 2017, 5:38 PM), <https://twitter.com/realDonaldTrump/status/905228667336499200> [<https://perma.cc/9BBD-S6C7>]) (referring to a late-evening tweet in which Mr. Trump called on Congress to “legalize DACA,” something his administration’s officials had declined to do earlier in the day). And in October 2017, the administration terminated certain subsidy payments to insurers under the ACA on the ground that Congress had failed to appropriate the requisite funds. *See* Jessica Chia, *Trump to Scrap Obamacare Subsidies Designed to Help Low-Income Americans*, N.Y. DAILY NEWS (Oct. 13, 2017, 12:24 AM), <http://www.nydailynews.com/news/politics/trump-scrap-obamacare-subsidies-blow-health-care-article-1.3559497> [<https://perma.cc/X4UP-ZDUB>]. That reversal, too, was accompanied by a call for remedial legislation. *See id.* At the time this Essay went to print, proposed legislation on both items has stalled, chiefly because the President’s own party has declined to act on them. *See id.* In each instance, the administration’s claims of lacking statutory authority had a good measure of plausibility and support. *See* *West Virginia v. EPA*, 136 S. Ct. 1000, 1000 (2016) (per curiam) (granting a temporary stay of EPA’s Clean Power Plan); *U.S. House of Representatives v. Burwell*, 185 F. Supp. 3d 165, 171–74, 188 (D.D.C. 2016) (holding that the Obama administration’s payments to insurers constituted spending of unappropriated funds); *cf. Texas v. United States*, 809 F.3d 134, 146, 149, 170, 178, 186, 188 (5th Cir. 2015) (affirming a district court’s preliminary injunction against a different deferred action immigration program on the ground that the program likely violated procedural requirements and was likely beyond the Administration’s statutory authority), *aff’d by an equally divided court*, 136 S. Ct. 2271, 2272 (2016). To that extent the Trump administration’s posture differs from some of the preceding administration’s bold “We Can’t Wait” initiatives. *Cf.* Remarks in Las Vegas, Nevada, 2011 Daily Comp. Pres. Doc. No.00787, at 1 (Oct. 24, 2011), <https://www.gpo.gov/fdsys/pkg/DCPD-201100787/pdf/DCPD-201100787.pdf> [<https://perma.cc/M2LU-THL5>]. The common theme is congressional passivity even as major federal programs are being made and unmade.

In this institutional environment, statutory constraints matter only at the outer margins; the principal policy instrument is “big waiver.”<sup>51</sup> Nominally, the parties bargain in the shadow of the statutory default regime. However, when neither the federal agency nor the individual state actually wants that regime to kick in, the parties negotiate on an open field. In that increasingly common scenario, the contours of the bargains are shaped by politicians and parties, not (as under legislative federalism) by professionals and bureaucracies.<sup>52</sup> Outcomes are contingent on partisan constellations, the individual parties’ bargaining leverage, the states’ ability to maintain sectional coalitions, and perceived political necessities. A couple of examples are the Obama administration’s need to make the ACA work and the Trump administration’s need to show toughness on “sanctuary” jurisdictions.<sup>53</sup>

*Third*, executive, sectional federalism is litigious. With striking frequency, intergovernmental bargaining has broken down entirely and given way to litigation. The organization and coordination of state blocs in this domain is supplied by partisan associations (the Republican Attorneys General Association and the Democratic Attorneys General Association) or through more informal, ad hoc arrangements. The long-running controversy over climate change policy, fought at shifting fronts for well over a decade, illustrates the partisan-sectional dynamics. The lawsuit that effectively compelled the EPA to regulate carbon dioxide as a “pollutant” under the Clean Air Act, duly captioned *Massachusetts v. EPA*,<sup>54</sup> was brought by a coalition of liberal state attorneys general and environmental groups.<sup>55</sup> Conservative attorneys general, most from energy-producing states, were on the opposite side.<sup>56</sup> Since then, the two blocs

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51. The term was coined by Barron & Rakoff, *supra* note 48, at 267.

52. See Conlan & Posner, *supra* note 14, at 301 (“[T]he partisan pathway has come to life in policy implementation, where elected officials have vaulted to the lead in determining intergovernmental positioning and bargaining strategies.”).

53. See Exec. Order No. 13768, 82 Fed. Reg. 8799 (Jan. 25, 2017).

54. 549 U.S. 497 (2007).

55. See *id.* at 502–05.

56. For example, ten Republican state attorneys general—representing Alaska, Idaho, Kansas, Michigan, Nebraska, North Dakota, Ohio, South Dakota, Texas, and Utah—submitted a brief in opposition to certiorari. See Brief in Opposition for the Respondent States of Michigan, Texas, et al., *Massachusetts v. EPA*, 549 U.S. 497 (2007) (No. 05-1631), 2006 WL 950756.

have opposed each other in numerous clean air and climate change controversies, both in the regulatory process and, with dreary regularity, in the Supreme Court.<sup>57</sup> The most consequential engagement is the controversy over the Obama administration's "Clean Power Plan," an ambitious attempt to reconfigure the energy structure of all fifty states under a rarely used section of the Clean Air Act.<sup>58</sup> Even before the plan was published in the Federal Register, the EPA sought to advance its objectives by promising compliant states and industries a great deal of flexibility, while at the same time signaling its resolute commitment to regulatory demands that would entail draconian impositions on the hold-outs.<sup>59</sup> A cohesive bloc of Republican states and energy industries, formed and battle-tested in earlier engagements over the administration's climate change initiatives, arrested the EPA's divide-and-conquer strategy by suing for a preliminary injunction against the EPA.<sup>60</sup> While the litigation remained pending, President Trump took office. In October 2017, the EPA issued a Notice of Proposed Rulemaking, explaining its intent to repeal the Clean Power Plan on the grounds that it exceeds the agency's statutory authority.<sup>61</sup> Naturally, the state bloc that championed the Obama administration's plan has threatened suit.<sup>62</sup>

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57. See, e.g., *West Virginia v. EPA*, 136 S. Ct. 1000, 1000 (2016) (per curiam); *Michigan v. EPA*, 135 S. Ct. 2699, 2704 (2015); *Util. Air Regulatory Grp. v. EPA*, 573 U.S. 302, 305–06 (2014); *EPA v. EME Homer City Generation, L.P.*, 572 U.S. 489, 493–94 (2014).

58. See *Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units*, 80 Fed. Reg. 64,662, 64,663 (Oct. 23, 2015) (codified at 40 C.F.R. §§ 60.5700–5880 (2017)) (invoking section 111(d) of the Clean Air Act); see also 42 U.S.C. § 7411(d) (2012) (directing the EPA Administrator to establish procedures for setting "standards of performance for any existing source for any air pollutant" meeting certain criteria).

59. See James W. Coleman, *Policymaking by Proposal: How Agencies Are Transforming Industry Investment Long Before Final Rules Can Be Tested in Court*, 24 GEO. MASON L. REV. 497, 523–24 (2017).

60. See *West Virginia*, 136 S. Ct. at 1000.

61. See *Repeal of Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units*, 82 Fed. Reg. 48,035, 48,037 (proposed Oct. 16, 2017) ("[T]he [Clean Power Plan] exceeds the bounds of the statute. Consistent with this proposed interpretation, we propose to repeal the [Clean Power Plan] and rescind the accompanying legal memoranda.").

62. See Devin Henry, *Dem AG Vows to Sue over Clean Power Plan Repeal*, HILL (Oct. 9, 2017, 2:08 PM), <http://thehill.com/policy/energy-environment/354572-dem-ag-vows-to-sue-over-clean-power-plan-repeal> [<https://perma.cc/9MTT-MHFC>].

As the Clean Power Plan controversy illustrates, partisan state lawsuits either to compel federal action or to block it do not pit “the states” collectively against the federal government. They pit blocs of states against each other, and one of the blocs against the federal government. Bloc-driven litigation has accompanied the implementation of the ACA, immigration policies, and environmental and energy regulation on an ongoing basis.

Bipartisan state litigation has not ceased entirely. For example, New Jersey’s challenge to a federal statute that effectively bars states (other than Nevada) from permitting or tolerating sports gambling has been supported by an eclectic, bipartisan group of states,<sup>63</sup> and defenses against legal theories that would expose state and local governments to liability (for example, private rights of action implied under federal statutes or the Constitution) continue to enjoy near-unanimous state support.<sup>64</sup> However, to an astounding extent and over a wide range of highly salient issues, state litigation has become partisan and sectional.<sup>65</sup>

### III. POLITICAL ECONOMY AND FISCAL TRANSFERS

Contemporary sectional federalism has a discernible political economy. Under competitive conditions—that is, so long as labor and capital remain highly mobile in the United States—the blue-state bloc’s European model of expansive social benefits and “quality of life” amenities is difficult to sustain. It requires some means of dampening and disguising the true cost of high transfer payments. “Cooperative” fiscal programs (such as Medicaid) are an essential means to that end: they help to sustain social programs that citizen-taxpayers would not agree to finance at comparable levels from own-source revenues. Moreover, the blue state model requires some means of eviscerating red states’ potential gains from adopting policies that

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63. See Brief of Amici Curiae State of West Virginia, 17 Other States et al. in Support of Petitioners at 28–30, *Christie v. NCAA*, 138 S. Ct. 464 (2017) (No. 16-476), 2017 WL 394184.

64. See, e.g., Brief of Texas, Alabama, et. al. as Amici Curiae in Support of Petitioners, *Armstrong v. Exceptional Child Ctr., Inc.*, 135 S. Ct. 1378 (2015) (No. 14-15), 2014 WL 6679371 (involving a broadly bipartisan group of twenty-six states).

65. See Paul Nolette, *State Litigation during the Obama Administration: Diverging Agendas in an Era of Polarized Politics*, 44 *PUBLIUS: J. FEDERALISM* 451, 452 (2014).

are calculated to attract capital and labor. Federal minimum regulatory standards are a principal means of raising red-state rivals' costs.<sup>66</sup>

Such near-existential conflicts among state blocs cannot be resolved through compromise by a polarized Congress. Thus, state blocs have turned to the executive and to the courts to advance or to protect their interests. The federalism transactions in turn play out in the context of an executive-centered party system. The parties have ceased to fight over the size of government; instead, they fight over its control,<sup>67</sup> and they rely on "presidents to pronounce party doctrine, raise campaign funds, campaign on behalf of their partisan brethren, mobilize grass roots support and advance party programs."<sup>68</sup> Accordingly, partisan calculations have begun to shape the national government's and especially the executive's distribution of federal funds and of regulatory burdens among and between rival state blocs. Both the Obama administration and the early Trump administration have mobilized the executive's vast discretion for the benefit of "their" respective state bloc, by regulatory as well as fiscal means.

Sectional politics is particularly pronounced in regulatory arenas where states are able to offer and exploit comparative or competitive advantages—most viscerally, over questions of energy and climate change policy. The blue-state bloc has consistently urged national policies that would raise red, energy-producing states' cost of doing business.<sup>69</sup> The red-state bloc

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66. Another means to that end is the unilateral state regulation of production conditions in other, more pro-competitive states. Cf. James W. Coleman, *Importing Energy, Exporting Regulation*, 83 *FORDHAM L. REV.* 1357, 1390–92 (2014) (discussing the potential of state energy regulations to influence the cost structure of producers in other states).

67. See Sidney M. Milkis & Nicholas Jacobs, "I Alone Can Fix It": Donald Trump, the Administrative Presidency, and Hazards of Executive-Centered Partisanship, 15 *FORUM* 583, 586 (2017) ("With the development of executive-centered partisanship, political contestation in the United States is no longer a struggle over the size of the State; rather it is a struggle between liberals and conservatives, to seize and deploy the State and its resources.").

68. See Kenneth S. Lowande & Sidney M. Milkis, "We Can't Wait": Barack Obama, Partisan Polarization and the Administrative Presidency, 12 *FORUM* 3, 4 (2014); see also Sidney M. Milkis & Jesse H. Rhodes, *George W. Bush, the Republican Party and the "New" Party System*, 5 *PERS. ON POL.* 461, 461–62 (2007) (analyzing the interplay between presidential party leadership and executive-centered government).

69. See Jason Scott Johnston, *A Positive Political Economic Theory of Environmental Federalization*, 64 *CASE W. RES. L. REV.* 1549, 1550–51 (2014).



has vehemently resisted those initiatives. The Obama administration's policies were consistent with the blue state bloc's agenda. In very short order, the Trump administration has reversed course at every front. It has undertaken a raft of initiatives that benefit energy-producing and unfailingly red states: a rescission of the Clean Power Plan and several additional EPA rules,<sup>70</sup> the green-lighting of the Keystone pipeline and the Dakota Access pipeline,<sup>71</sup> and a sharp reduction of protected National Monument areas in Utah.<sup>72</sup> For good measure, the 2017 tax reform opened certain protected areas in Alaska to oil exploration and drilling.<sup>73</sup>

If regulation illustrates the executive's vast capacity configure federal programs in accordance with a supportive state bloc's interests and demands, the same has become increasingly true of fiscal affairs. Federal transfers to state and local governments exceed \$600 billion per year, or roughly a quarter of state and local spending.<sup>74</sup> The system has become increasingly open to partisan manipulation. It has also come under acute sectional and fiscal stress.

The cooperative fiscal federalism of the New Deal and the Great Society rested on a rough, somewhat uneasy but durable political consensus: prosperous states (more precisely, states with disproportionate numbers of high-income taxpayers) supported poorer states.<sup>75</sup> Moreover, the system was built for expansion and ever-increasing cash infusions. It proved stable and served its self-reinforcing tendencies chiefly on account of

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70. See, e.g., Repeal of Emission Requirements for Glider Vehicles, Glider Engines, and Glider Kits, 82 Fed. Reg. 53,442, 53,443 (proposed Nov. 16, 2017) (to be codified at 40 C.F.R. §§ 1037.150, 1037.801, 1068.120) (proposing to exempt "glider vehicles" from EPA regulations).

71. See Remarks on the Keystone XL Pipeline Project, 2017 Daily Comp. Pres. Doc. No.00191, at 1 (Mar. 24, 2017), <https://www.whitehouse.gov/briefings-statements/remarks-president-transcanada-keystone-xl-pipeline-announcement/> [<https://perma.cc/Z2TL-5KLG>].

72. See Proclamation No. 9682, 82 Fed. Reg. 58,089, 58,093 (Dec. 4, 2017) (reducing the area of Utah's Grand Staircase-Escalante National Monument from 1.7 million acres to 1 million acres.).

73. See Tax Cuts and Jobs Act, Pub. L. No. 115-97, § 20001, 131 Stat. 2054, 2235-37 (2017).

74. For fiscal data and discussion, see Conlan & Posner, *supra* note 14, at 284-88, 286 fig.1.

75. Cf. David A. Super, *Rethinking Fiscal Federalism*, 118 HARV. L. REV. 2544, 2571-79 (2005).

its built-in fiscal illusion—that is, the effect of lowering the perceived tax price of public programs both at the federal and at the state level.

Invariably, though, fiscal transfers prompt moral hazard and overspending at the state and local level. Federally funded programs tend to crowd out non-funded or less generously funded programs. When state tax capacity reaches a limit, the cash must come from the federal government. For this reason (among others), Medicaid has been made progressively more generous. Far from relieving states' fiscal distress, however, those expansions—a form of undercover debt relief<sup>76</sup>—have made Medicaid consume a yet greater share of state budgets.<sup>77</sup>

Very likely, state-level polarization has further increased fiscal federalism's price. Dissident states' reservation price goes up. States whose preferences are aligned with the federal government's will ask why they should accept conditions less generous than those extended to renegade states. The Affordable Care Act responded to this difficulty—in a fashion—by offering a 100 percent reimbursement, declining in later years to 90 percent, for states that agree to participate in the ACA's expansion of Medicaid.<sup>78</sup> Amazingly, about half the states responded to this unprecedented offer—far and away the most generous bargain ever offered to the states under any major federal pro-

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76. Cf. RODDEN, *supra* note 22, at 55–67 (explaining that more generous fiscal transfers benefitting all states are often a form of debt relief). For a recent example, the 2009 American Recovery and Reinvestment Act, though advertised as a “stimulus” response to an acute fiscal and economic crisis, was principally aimed at state and local debt relief. See Conlan & Posner, *supra* note 14, at 284–85; see also American Recovery and Reinvestment Act of 2009, Pub. L. No. 111-5, 123 Stat. 115 (codified as amended in scattered sections of the U.S. Code).

77. See NAT'L ASS'N OF STATE BUDGET OFFICERS, THE FISCAL SURVEY OF STATES 1 (Fall 2017), [https://higherlogicdownload.s3.amazonaws.com/NASBO/9d2d2db1-c943-4f1b-b750-0fca152d64c2/UploadedImages/Fiscal%20Survey/NASBO\\_Fall\\_2017\\_Fiscal\\_Survey\\_\\_S\\_.pdf](https://higherlogicdownload.s3.amazonaws.com/NASBO/9d2d2db1-c943-4f1b-b750-0fca152d64c2/UploadedImages/Fiscal%20Survey/NASBO_Fall_2017_Fiscal_Survey__S_.pdf) [<https://perma.cc/KW4H-Z9TY>] (reporting that, for estimated fiscal year 2017, Medicaid accounted for 29% of total state spending and 20.3% of “general fund” spending).

78. See 42 U.S.C. § 1396d(y)(1) (Supp. IV 2016); 42 U.S.C.A. § 1396a(a)(13) (West 2018); Nat'l Fed'n of Indep. Bus. v. Sebelius (*NFIB*), 567 U.S. 519, 636 (2012) (Ginsburg, J., concurring in part, concurring in the judgment in part, and dissenting in part) (citation omitted) (“Under pre-ACA Medicaid, the Federal Government pays up to 83% of the costs of coverage for current enrollees; under the ACA, the federal contribution starts at 100% and will eventually settle at 90%.”).

gram—by suing.<sup>79</sup> By a 7-2 vote, the Supreme Court held in *NFIB v. Sebelius* that despite the terms of the statute, the government could not condition the states' receipt of "old" Medicaid funds on their participation in the ACA's expansion.<sup>80</sup> To this day, many Republican-led states have declined to expand Medicaid—despite the short-term fiscal attractions, the federal government's exceptionally accommodating posture, and massive public and interest group pressures.<sup>81</sup>

Sectional conditions and calculations also shape the executive's fiscal policies. Federal spending programs provide enormous room to steer fiscal resources in accordance with partisan, electoral calculations. The conventional prediction is that resources will disproportionately end up in "swing" states and districts, especially in years preceding a presidential election.<sup>82</sup> Partisan polarization both facilitates and exacerbates that tendency: as the number of swing jurisdictions shrinks, the cost of identifying such jurisdictions decreases and target accuracy increases.<sup>83</sup> Under an intensely partisan, deal-oriented administration, the trend is bound to accelerate.

It also assumes a new dimension. "Presidential pork"—an oft-used moniker for discretionary executive grant distribution—carries parochial, localist connotations and invites comparisons to congressional earmarks or appropriation riders. That picture may accurately describe the dynamics of executive grant-making for infrastructure, emergency relief, and similar discretionary programs. However, entitlement programs also afford the executive enormous fiscal maneuvering room in the form of waiver authority and the manipulation of grant conditions. Exercises of spending authority under such programs are

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79. See *NFIB*, 567 U.S. at 540 (majority opinion) (noting that the challenge to the ACA was supported by twenty-six states).

80. See *id.* at 585, 588 (opinion of Roberts, C.J.).

81. See Bulman-Pozen & Metzger, *supra* note 4, at 1783; see also John Dinan, *Implementing Health Reform: Intergovernmental Bargaining and the Affordable Care Act*, 44 *PUBLIUS: J. FEDERALISM* 399, 409–10 (2014).

82. The United States experienced that pattern in the early New Deal years. See John Joseph Wallis et al., *Politics, Relief, and Reform: Roosevelt's Efforts to Control Corruption and Manipulation During the New Deal*, in *CORRUPTION AND REFORM: LESSONS FROM AMERICA'S ECONOMIC HISTORY* 343, 355–57 (Edward L. Glaeser & Claudia Goldin eds., 2006). For a contemporary discussion, see JOHN HUDAK, *PRESIDENTIAL PORK: WHITE HOUSE INFLUENCE OVER THE DISTRIBUTION OF FEDERAL GRANTS* 26 (2014).

83. See HUDAK, *supra* note 82, at 26.

subject to minimal, or minimally effective, congressional and judicial oversight.<sup>84</sup> Under sectional conditions, the executive is bound to its discretionary authority not merely for electoral purposes but also for more systematic ends—at the limit, the resolute fiscal repression of the opposing state bloc.<sup>85</sup>

The evidence suggests that we are approximating that form of executive-dominated fiscal federalism. One could detect “telltale signs of an election-year strategy and partisan slant in the development of the [Obama administration’s] We Can’t Wait program”: crucial initiatives were timed for the 2012 elections and disproportionately aimed at large swing states.<sup>86</sup> Under the early Trump administration, executive federalism’s partisan orientation has become more pronounced and systematic. In 2017, Congress considered (but eventually declined to enact) a Medicaid “block grant” reform that was plainly designed to benefit Republican states that had declined to accept the ACA Medicaid bargain.<sup>87</sup> The proposal stalled in Congress, but the administration has the means and perhaps the will to accomplish a very similar objective by executive action.<sup>88</sup> Of potential-

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84. See Mila Sohoni, *On Dollars and Deference: Agencies, Spending, and Economic Rights*, 66 DUKE L.J. 1677, 1685 (2017).

85. Executive *fiscal* repression is a highly plausible strategy for a Republican administration. It is not readily available to a Democratic administration, which needs red states to accept federal funds to implement its policies. See, e.g., Bulman-Pozen & Metzger, *supra* note 4, at 330 (noting the Obama administration’s flexibility vis-à-vis Republican states in implementing the ACA). Instead, a Democratic administration will tend to resort to *regulatory* repression of the opposing state bloc. The Obama administration’s energy policies and especially the Clean Power Plan were widely perceived in those terms. See, e.g., Sterling Burnett, *Trump and the End of Obama’s Bitter “War on Coal,”* THE HILL (Sept. 30, 2017, 12:00 PM), <http://thehill.com/opinion/energy-environment/353232-trump-and-the-end-of-obamas-bitter-war-on-coal> [https://perma.cc/P3WB-GGF4]; Michael Grunwald, *Inside the War on Coal*, POLITICO (May 26, 2015, 11:45 PM), <https://www.politico.com/agenda/story/2015/05/inside-war-on-coal-000002> [https://perma.cc/M7AB-KWQC].

86. Lowande & Milkis, *supra* note 68, at 13.

87. See David Weigel & Amy Goldstein, *GOP Tries One More Time to Undo ACA with Bill Offering Huge Block Grants to States*, WASH. POST (Sept. 13, 2017), [https://www.washingtonpost.com/powerpost/gop-bill-to-block-grant-major-parts-of-the-aca-unveiled/2017/09/13/bdcd1872-988b-11e7-87fc-c3f7ee4035c9\\_story.html?utm\\_term=.7b842905c1e4](https://www.washingtonpost.com/powerpost/gop-bill-to-block-grant-major-parts-of-the-aca-unveiled/2017/09/13/bdcd1872-988b-11e7-87fc-c3f7ee4035c9_story.html?utm_term=.7b842905c1e4) [https://perma.cc/JBB7-3BTV] (“The . . . bill . . . would turn the billions of dollars spend on the ACA’s Medicaid expansion, tax credits and subsidies into grants managed by each state.”).

88. Milkis & Jacobs, *supra* note 67, at 603 (“[I]t may be that the [Trump] White House will achieve unilaterally what several Republican senators . . . hoped to accomplish with legislation: turn [Medicaid] funds and policy discretion over to

ly greater consequence, Congress enacted a comprehensive tax reform that severely limits taxpayers' ability to deduct state and local taxes from their federal income tax.<sup>89</sup> While sharply progressive (and in that respect consonant with Democratic preferences and at variance with Republican ideology), the reform strikes with near-surgical precision at the tax capacity of high-income, high-tax, Democratic states. On most accounts, the effect is intended.<sup>90</sup>

To note the implications of these policies is not to say that they are driven entirely by partisan calculations. But they map those calculations, and they illustrate both sectionalism's pull and executive federalism's enormous potential for political manipulation and mobilization. While presidents of both parties have increasingly availed themselves of their fiscal and regulatory authority, federalism's potential for unilateral partisan exploitation and constituency-building purposes has yet to be fully realized.

#### IV. CONSTITUTIONALISM AND THE COURT

Executive federalism is litigious federalism. The executive as well as the states have tested the boundaries of lawful, constitutional government, and those disputes have routinely ended up in the Supreme Court. The justices have been sharply split in those cases. A judicial divide once marked primarily by ideological rifts over abortion, gay rights, and other "social" issues has also come to characterize executive federalism questions, in cases over the Affordable Care Act, energy and the environment, immigration, and even in cases involving far more hum-

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the States. It is highly unlikely, however, that this devolution will succeed without national standards that impose conservative policies on state and local governments." (footnote omitted).

89. See H.R. 1, 115th Cong. § 11042 (2017) (enacted) (limiting the deduction for state and local taxes to \$10,000).

90. See, e.g., Sasha Abramsky, *The GOP Tax Bill Was a Deliberate Attack on Blue States—and California Plans to Fight Back*, NATION (Jan. 6, 2018), <https://www.thenation.com/article/the-gop-tax-bill-was-a-deliberate-attack-on-blue-states-and-california-plans-to-fight-back/> [https://perma.cc/VMM7-28EH]; Laila Kearney & Karen Pierog, *Republican Tax Plan a Blow to Democratic States, Officials Say*, REUTERS (Nov. 2, 2017, 8:35 PM), <https://www.reuters.com/article/us-usa-tax-states/republican-tax-plan-a-blow-to-democratic-states-officials-say-idUSKBN1D300Q> [https://perma.cc/6JDN-G5D6].

drum federalism questions over the Federal Arbitration Act or federal preemption.<sup>91</sup>

The judiciary's precarious ideological balance and its central role on the executive federalism front have figured prominently in highly partisan, polarized fights over judicial nominations. During the second Obama Administration, then-Senate Majority Leader Harry Reid undertook a dramatic and eventually successful campaign to appoint reliably liberal judges to the Court of Appeals for the District of Columbia Circuit, which hears most administrative law cases. The stated objective of the campaign was to clear the way for the executive's ambitious regulatory agenda;<sup>92</sup> it was accomplished by changing long-standing Senate rules to permit judicial appointments (except to the Supreme Court) by simple majority.<sup>93</sup> Republicans repaid the favor by bottling up President Obama's nomination of Judge Merrick Garland for the late Justice Scalia's seat on the Supreme Court.<sup>94</sup> The open seat and, more broadly, political control over judicial appointments loomed large in the 2016 presidential campaign. Both sides warned in often apocalyptic tones that their opponent's victory would produce an executive-dominated judiciary, operating at the President's beck and call.<sup>95</sup>

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91. See Michael S. Greve et al., *Preemption in the Rehnquist and Roberts Courts: An Empirical Analysis*, 23 SUP. CT. ECON. REV. 353, 378 (2015) (documenting increased bloc voting in preemption cases).

92. See Juliet Eilperin, *Obama Seeks to Shift Conservative Tilt of D.C. Circuit*, WASH. POST (Apr. 2, 2013), [https://www.washingtonpost.com/politics/2013/04/02/d0cdde58-9bc3-11e2-a941-a19bce7af755\\_story.html](https://www.washingtonpost.com/politics/2013/04/02/d0cdde58-9bc3-11e2-a941-a19bce7af755_story.html) [<https://perma.cc/E4FX-EST4>].

93. See Russell Berman, *How Democrats Paved the Way for the Confirmation of Trump's Cabinet*, ATLANTIC (Jan. 20, 2017), <https://www.theatlantic.com/politics/archive/2017/01/democrats-trump-cabinet-senate/513782/> [<https://perma.cc/P2T8-YRZ7>].

94. See Nina Totenberg, *170-Plus Days And Counting: GOP Unlikely To End Supreme Court Blockade Soon*, NAT'L PUB. RADIO (Sept. 6, 2016, 4:30 PM), <https://www.npr.org/2016/09/06/492857860/173-days-and-counting-gop-unlikely-to-end-blockade-on-garland-nomination-soon> [<https://perma.cc/X6EH-A2TK>].

95. See, e.g., Carl Hulse, *Supreme Court Showdown Could Shape Fall Elections*, N.Y. TIMES (Mar. 16, 2016), <https://www.nytimes.com/2016/03/17/us/politics/supreme-court-nomination-obama-congress.html> [<https://nyti.ms/1R2PAHT>]; Amita Kelly, *McConnell: Blocking Supreme Court Nomination "About A Principle, Not A Person"*, NAT'L PUB. RADIO (Mar. 16, 2016, 12:31 PM), <https://www.npr.org/2016/03/16/470664561/mcconnell-blocking-supreme-court-nomination-about-a-principle-not-a-person> [<https://perma.cc/L2JL-CLQR>]; Peter Roff, *Opinion, GOP Is Right to Wait on Supreme Court Hearings*, U.S. NEWS (Mar. 16, 2016, 5:05 PM), <https://www.usnews.com/opinion/blogs/peter-roff/articles/2016-03->

The frightening prospect of a *lasting* executive-judicial alliance, with a jurisprudence to match, seems unlikely so long as the parties remain competitive. (Even judges who are firmly intent on dancing with the administration that brought them will have to consider what their doctrinal commitments might entail under a different administration.) A more realistic apprehension is that the judiciary may entrench executive government and federalism by default, for want of constitutional doctrine and institutional legitimacy. The Court has inherited doctrines and modes of thinking that are mismatched to executive federalism's operation, and especially under polarized conditions it has no plausible means of adjusting those doctrines to the current "crises of human affairs."<sup>96</sup>

Executive federalism implicates the separation of powers, and federalism. In both dimensions, the Supreme Court's jurisprudence rests on institutional assumptions that have become untenable and in some ways conducive to executive assertions of power. Separation-of-powers doctrine paints a picture of rival, empire-building institutions: Congress versus the executive.<sup>97</sup> That conceptual framework is poorly matched to a separation of parties, not powers.<sup>98</sup> Moreover, governing doctrine treats the Congress as a unitary, self-aggrandizing actor; thus, the pervasive phenomenon of congressional *abdication* finds no systematic recognition.<sup>99</sup> The lack of institutional realism extends to administrative law.<sup>100</sup> Its dogmatic premise is legislative supremacy: the will of Congress must prevail. But Congress need not express that will with any kind of clarity or precision. The executive is permitted to exercise ample discre-

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16/republicans-are-right-not-to-take-up-obamas-nomination-of-merrick-garland [https://perma.cc/WD53-KA7C].

96. Cf. *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 415 (1819) (emphasis omitted).

97. See, e.g., *INS v. Chadha*, 462 U.S. 919, 951 (1983) ("The hydraulic pressure inherent within each of the separate Branches to exceed the outer limits of its power, even to accomplish desirable objective, must be resisted.").

98. See Levinson & Pildes, *supra* note 5, at 2314.

99. See Neomi Rao, *Administrative Collusion: How Delegation Diminishes the Collective Congress*, 90 N.Y.U. L. REV. 1463, 1471 (2015).

100. See, e.g., Daniel Farber & Anne Joseph O'Connell, *The Lost World of Administrative Law*, 92 TEX. L. REV. 1137, 1152 (2014) (noting the Court's "emphasis on congressional primacy and on the agency head (not the executive branch as a whole) as the key decision maker"); see also Greve & Parrish, *supra* note 49, at 502.

tion so long as Congress has stated an “intelligible principle.”<sup>101</sup> And while executive action remains subject to judicial review, the coin of that realm is judicial deference: when a statute is ambiguous, the Court presumes that Congress wanted the agency’s judgment to carry the day.<sup>102</sup> Such doctrines are hardly calculated to constrain executive power, and recent cases have raised the specter of executive “re-writes” of entire federal statutes.<sup>103</sup> The pressing question of executive “under-reach”—a wholesale dispensation or suspension of the law—is a matter of intense scholarly debate in a virtually doctrine-free environment.<sup>104</sup>

Federalism jurisprudence presents the same picture of doctrinal mismatch. “The states” appear as unitary actors with a set of uniform and symmetrical institutional interests; and those interests and the states’ “dignity” are deemed to warrant judicial protection against congressional impositions.<sup>105</sup> While the Supreme Court routinely invokes a wide range of federalism “values,”<sup>106</sup> virtually all federalism canons serve to protect states “as states”—that is, as quasi-sovereign political actors.<sup>107</sup> Just as the Court has no separation-of-powers doctrine that accounts for congressional abdication, though, it simply assumes states have empire-building motives and thus fails to account for the pervasive state *demand* for federal intervention.

In its present shape and deployment, federalism jurisprudence misses entirely the starkly asymmetric and sectional fea-

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101. See, e.g., *Whitman v. Am. Trucking Ass’ns*, 531 U.S. 457, 472 (2001) (quoting *J.W. Hampton, Jr., & Co. v. United States*, 276 U.S. 394, 409 (1928)); *Mistretta v. United States*, 488 U.S. 361, 372 (1989).

102. Antonin Scalia, *Judicial Deference to Administrative Interpretations of Law*, 1989 DUKE L.J. 511, 516 (explaining *Chevron* deference as an “across-the-board presumption that, in the case of ambiguity, agency discretion is meant”).

103. See Greve & Parrish, *supra* note 49, at 505; see also Sohoni, *supra* note 84, at 1681.

104. See, e.g., Price, *supra* note 49, at 679; Barron & Rakoff, *supra* note 48, at 272 (noting the paucity of doctrines to govern “big waivers”).

105. See, e.g., *Alden v. Maine*, 527 U.S. 706, 714–15 (1999).

106. See, e.g., *Gregory v. Ashcroft*, 501 U.S. 452, 458 (1991).

107. Those canons include the protection of state sovereign immunity, see e.g., *Seminole Tribe v. Florida*, 517 U.S. 44, 47 (1996), a clear statement rule for federal statutes that threaten to upset the “usual balance” of federalism, see, e.g., *Gregory*, 501 U.S. at 460–61 (quoting *Will v. Mich. Dep’t of State Police*, 491 U.S. 58, 65 (1989)), and a strong presumption against implied private rights of action under federal statutes, including 42 U.S.C. § 1983 (2012), see, e.g., *Gonzaga Univ. v. Doe*, 536 U.S. 273, 276 (2002); *Alexander v. Sandoval*, 532 U.S. 275, 293 (2001).



tures of our federalism. Thus, the Court has described the ACA's Medicaid expansion as a "gun to the head"—without any evident recognition that numerous states nearly demanded the imposition.<sup>108</sup> In the same fashion, the Court speaks confidently of the authentic position and interests of "the states" even when state blocs oppose each other in that very case.<sup>109</sup> The sectional dynamics that drive such state disagreements should prompt systematic judicial attention to federalism's "horizontal," state-to-state dimension. Such doctrines, however, are virtually extinct, and the Court has shown little interest in reconstructing them.<sup>110</sup>

Finally, federalism jurisprudence lacks a systematic comprehension of our federalism's *executive* nature. In administrative law cases, federalism canons come and go, more often than not without explanation.<sup>111</sup> Judicial opinions provide no framework and rarely even a hint that harmonizing administrative law and federalism canons—both very unsettled in their own right—demands sustained attention.<sup>112</sup>

This mismatch between judicial doctrine and institutional reality has worrisome implications. A judicial attempt to develop doctrines compatible with executive federalism but *in opposition* to the government in power may come to look like a *de facto* coup: if no pre-existing, tolerably clear and settled doctrines

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108. Nat'l Fed'n of Indep. Bus. v. Sebelius (*NFIB*), 567 U.S. 519, 642 (2012).

109. See, e.g., Massachusetts v. EPA, 549 U.S. 407, 518 ("Well before the creation of the modern administrative state, we recognized that States are not normal litigants for the purposes of invoking federal jurisdiction."); *Alden*, 527 U.S. at 715 ("[The States] are not relegated to the role of mere provinces or political corporations, but retain the dignity, though not the full authority, of sovereignty.").

110. See, e.g., GREVE, *supra* note 36, at 287–307; Daniel Francis, *The Decline of the Dormant Commerce Clause*, 94 DENVER L. REV. 255, 257 (2017) (tracing "the remarkable decline of the dormant Commerce Clause"). But see Heather K. Gerken & Ari Holtzblatt, *The Political Safeguards of Horizontal Federalism*, 113 MICH. L. REV. 57, 59 (2014) (arguing that political safeguards may adequately protect states against horizontal externalities and exploitation).

111. See, e.g., William N. Eskridge Jr., *Vetogates, Chevron, Preemption*, 83 NOTRE DAME L. REV. 1441, 1477 (2008); Gillian E. Metzger, *Administrative Law as the New Federalism*, 57 DUKE L.J. 2023, 2026 (2008) ("[M]ore run-of-the-mill administrative law concerns . . . are rarely viewed through a federalism lens."); Connor N. Raso and William N. Eskridge, Jr., *Chevron as a Canon, Not a Precedent: An Empirical Study of What Motivates Justices in Agency Deference Cases*, 110 COLUM. L. REV. 1727, 1732 (2010) (highlighting the difficulty of anticipating what motivates the Supreme Court in agency interpretation cases).

112. See, e.g., Metzger, *supra* note 111, at 2047–48.

govern the cases, then the new doctrines must surely be made up. Conversely, executive federalism doctrines developed *in harmony* with the government-in-power will be perceived as a judicial surrender to the executive. The Supreme Court's predicament in the two Affordable Care Act cases<sup>113</sup> was widely discussed in these terms, and its rulings were widely understood as maneuvering between the horns of the dilemma. Neither of the cases has been viewed as a source of stable doctrine; overwhelmingly, the question has been whether the decisions are one-offs for the ACA line of cases only or whether they further unsettle doctrines once tolerably well understood.<sup>114</sup>

Under any interpretation, the cases illustrate the difficulty of developing a coherent set of doctrines that would constitutionally constrain and regularize executive, sectional federalism. An attempt to do so would either mean a confrontation that the Court cannot hope to win, or else an adjustment to the demands of executive government. Most likely, the Court will continue to muddle through. But if the Court cannot speak with a clear voice for the Constitution, it will come to speak for the executive.

## V. CONCLUSION

The rise of executive government, high levels of partisan polarization at the national and state level, dire fiscal conditions, weak-to-nonexistent constitutional constraints, and an ideologically divided Court—we have never before encountered that confluence. The obvious, urgent question—where will this end?—has prompted intense public and scholarly debate. Shrill alarms over executive imperialism, lawless government, institutional corruption, and the deliberate use of central executive authority to suppress opposing states and their citizens often

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113. *King v. Burwell*, 135 S. Ct. 2480 (2015); *NFIB*, 567 U.S. at 519.

114. See *King*, 135 S. Ct. at 2507 (Scalia, J., dissenting) (“The somersaults of statutory interpretation [the Court’s two decisions on the Patient Protection and Affordable Care Act] have performed . . . will be cited by litigants endlessly, to the confusion of honest jurisprudence. And the cases will publish forever the discouraging truth that the Supreme Court of the United States favors some laws over others, and is prepared to do whatever it takes to uphold and assist its favorites.”); Samuel R. Bagenstos, *The Anti-Leveraging Principles and the Spending Clause After NFIB*, 101 GEO. L.J. 861, 906 (2013).

have sounded against the Obama administration and the early Trump administration alike.<sup>115</sup>

In full acknowledgment of such apprehensions, Jessica Bulman-Pozen has supplied a qualified defense of executive federalism.<sup>116</sup> In a polarized environment, she argues, executive federalism may offer a path to national policymaking and bipartisan cooperation, and a way of re-gaining the government legitimacy that comes from getting things done. While policy outcomes may rarely conform to the ideal order of a rational planner, improvisation and state-to-state variegation are among federalism's virtues. Moreover, executive federalism's inherently federal nature may help to dampen fears of autocracy that naturally attend a poorly constrained national executive.

Professor Bulman-Pozen's account has much to commend it. It resonates with urgent calls to revive a more parochial and transactional style of politics at the national level;<sup>117</sup> and, especially against the background of federalism's trajectory over the past century, it appears to be a plausible description of reality. The states that anchor the red bloc, by and large, are the states of the old Confederacy. From the Progressive Era and the New Deal to the Great Society and beyond, that bloc resisted and retarded cooperative federalism's expansion. One way or another, though, the center has always found ways to drag the recalcitrant, sectional South into modernity. That has usually been the work of decades, often marked by contention. But this

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115. See, e.g., Veronique de Rugy, *Obama's Imperial Presidency*, NAT'L REV. (Jan. 12, 2017), <https://www.nationalreview.com/corner/obama-imperial-presidency/> [<https://perma.cc/V77Y-Y4ZR>]; Jeet Heer, *Don't Just Impeach Trump. End the Imperial Presidency.*, NEW REPUBLIC (Aug. 12, 2017), <https://newrepublic.com/article/144297/dont-just-impeach-trump-end-imperial-presidency> [<https://perma.cc/QL3C-6G6T>]; John Wagner, *Trump and Republicans Bolster Red States, Punish Blue*, WASH. POST (Sept. 25, 2017), <https://www.washingtonpost.com/politics/this-is-hardball-trump-and-republicans-bolster-red-states-punish-blue/2017/09/25/e114cea4-9ef5-11e7-8ea1-ed975285475e> [<https://perma.cc/C96B-FS3P>]; David A. Graham, *How Obama Left Red States Deeper in the Red*, ATLANTIC (Jan. 29, 2015), <https://www.theatlantic.com/politics/archive/2015/01/how-obama-has-left-red-states-deeper-in-the-red/384911/> [<https://perma.cc/E5Z4-ZXFF>].

116. Bulman-Pozen, *supra* note 4, at 993–1015. For a similar, equally judicious assessment see Bulman-Pozen & Metzger, *supra* note 4, at 325–32.

117. See, e.g., Jonathan Rauch, *Political Realism: How Hacks, Machines, Big Money, and Back-Room Deals Can Strengthen American Democracy*, BROOKINGS (May 1, 2015), <https://www.brookings.edu/book/political-realism/> [<https://perma.cc/57XA-4N5P>].

general, integrative tendency has persisted, and it may yet prevail. Grim, sectional confrontations over energy policy, health care, or immigration might merely manifest the kind of hold-out resistance that has always accompanied our increasingly national federalism. Several reasons, however, counsel caution against such a prediction.

The scenario just sketched—a gradual submission of red-state sectionalism by means of transfer payments and regulation—might well have come to pass under a Clinton administration. Under the Trump administration, in contrast, all signs point to fiscal repression of blue states on the tax side and retrenchment on the spending side.<sup>118</sup> Beyond electoral contingencies, moreover, federalism's changed political economy suggests a very different, centrifugal story. A bloc of modernizing industrial states, with the resources and the will to pull the backward periphery into its policies (for example, through federal transfer payments) largely drove the past unfolding of cooperative federalism. Integration on *those* terms is very likely a thing of the past. Many once-backward states, mostly in the South, are now among the most modern and competitive in the nation, while once-dominant states such as New York, New Jersey, Connecticut, California, and Illinois must contend with out-migration,<sup>119</sup> often perilous fiscal conditions,<sup>120</sup> and a high and perhaps unsustainable demand for social services and consumption. Especially under conditions of severe fiscal stress and high indebtedness at all levels of government, it is hard to see how the blue-state bloc can maintain political dominance. Instead, the core dynamic of contemporary federalism is the interplay between executive dominance under one or the other party and a sectional divide that runs along partisan, ideologi-

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118. See *supra* notes 85–86 and accompanying text.

119. Joel Kotkin & Wendell Cox, *The States Gaining and Losing the Most Migrants—and Money*, FORBES (Sept. 6, 2016), <https://www.forbes.com/sites/joelkotkin/2016/09/06/the-states-gaining-and-losing-the-most-migrants-and-money/> [https://perma.cc/4MY6-3QMK].

120. Despite a booming stock market and a moderately but steadily growing economy the pension systems of many states—especially such large blue states as Connecticut, New Jersey, Illinois, and California—are more precariously underfunded now than they were in the fiscal crisis a decade ago. Steven Malanga, *The Public Pension Problem: It's Much Worse Than It Appears*, MANHATTAN INST. (July 22, 2016), <https://www.manhattan-institute.org/html/public-pension-problem-its-much-worse-it-appears-9095.html> [https://perma.cc/4GEJ-ZHL8].

cal lines. For good or ill, our sectional, executive federalism may prove durable.