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## DELEGATION ENFORCEMENT BY STATE ATTORNEYS GENERAL

*Jonathan David Shaub* \*

*“[T]hat really pits the States against every Federal agency. And any harm . . . that indirectly flows from a change in policy would be subject to attack.”*<sup>1</sup>

State attorneys general have taken on an increasingly active role in challenging the actions of the federal government, and, in particular, the actions of the President. During the Obama Administration, state attorneys general began suing the federal government at an increasing rate,<sup>2</sup> and these actions resulted in some of the most consequential judicial decisions of the time period—as both a matter of judicial precedent and a matter of policy impact. State-initiated action against the Obama Administration resulted in a new doctrine preventing state coercion, the implications of which are only starting to be recognized.<sup>3</sup> It also resulted in court-ordered cessation of significant policy initiatives of the Administration, including, among others, nullifying the Deferred Action for Parents of Childhood Arrivals (“DAPA”) program,<sup>4</sup> halting in part

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1. Transcript of Oral Argument at 64, *United States v. Texas*, 579 U.S. \_\_\_, 136 S. Ct. 2271 (2016) (per curiam) (No. 15-674).

2. See Paul Nolette, *State Attorneys General Have Taken Off as a Partisan Force in National Politics*, WASH. POST (Oct. 23, 2017), <https://www.washingtonpost.com/news/monkey-cage/wp/2017/10/23/state-attorneys-general-have-taken-off-as-a-partisan-force-in-national-politics/?utmterm=.493e6601bf13> (describing the acceleration and providing a graph of the statistics).

3. Nat’l Fed’n of Indep. Bus. v. Sebelius, 567 U.S. 519, 585 (2012); *City of Philadelphia v. Sessions*, No. 17-3894, 2017 U.S. Dist. LEXIS 188954, at \*160–61, \*170–71 (E.D. Pa. Nov. 15, 2017).

4. *Texas v. United States*, 809 F. 3d 134, 146 (5th Cir. 2015), *aff’d per curiam*, 579 U.S.

the Waters of the United States Rule,<sup>5</sup> and the Clean Power Plant initiative.<sup>6</sup>

This trend has continued in the Trump Administration. State attorneys general have been at the forefront of challenging the Administration's actions in federal court,<sup>7</sup> and have similarly achieved significant results, among other things, prevailing numerous times in challenges to the Executive Order banning immigration and refugees from particular countries and forcing the Administration to rewrite the travel ban twice to date<sup>8</sup> and preventing the Administration, at least temporarily, from ending the Deferred Action for Childhood Arrivals ("DACA") program.<sup>9</sup> Other suits on fundamental issues, such as net neutrality and sanctuary cities, are only in their beginning stages.<sup>10</sup>

Actions by a state or multiple states against the federal government are not a new phenomenon. But a number of developments have led to the emerging prominence of state attorneys general in checking executive power. The keynote speech at the 2017 *University of Richmond Law Review* Symposium details many of them,<sup>11</sup>

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\_\_\_, 136 S. Ct. 2271 (2016).

5. North Dakota v. EPA, 127 F. Supp. 3d 1047, 1051 (D.N.D. 2015).

6. West Virginia v. EPA, 577 U.S. \_\_\_, \_\_\_, 136 S. Ct. 1000, 1000 (2016).

7. See Alan Neuhauser, *State Attorneys General Lead the Charge Against President Donald Trump*, U.S. NEWS & WORLD REP. (Oct. 27, 2017, 12:01 AM), <https://www.usnews.com/news/best-states/articles/2017-10-27/state-attorneys-general-lead-the-charge-against-president-donald-trump>; Nolette, *supra* note 2.

8. See Hawaii v. Trump, 859 F.3d 741, 789 (9th Cir.), *vacated as moot and appeal dismissed*, 874 F.3d 1112 (9th Cir. 2017) (mem.); Washington v. Trump, 847 F.3d 1151, 1156 (9th Cir. 2017) (per curiam); see also Steve Almasy & Darran Simon, *A Timeline of President Trump's Travel Bans*, CNN (Mar. 30, 2017, 4:01 AM ET), <http://www.cnn.com/2017/02/10/us/trump-travel-ban-timeline/index.html>; Tara Golshan, *The Trump Administration Just Made Its Travel Ban Permanent*, VOX (Sept. 28, 2017, 10:15 AM EDT), <https://www.vox.com/policy-and-politics/2017/9/25/16360496/trump-travel-ban-permanent>; Garrett Hinck et al., *Litigation Documents & Resources Related to Trump Executive Order on Immigration*, LAWFARE, <https://lawfareblog.com/litigation-documents-resources-related-trump-executive-order-immigration> (last visited Feb. 12, 2018) (collecting litigation documents from the various challenges to the travel ban executive orders).

9. Vidal v. Nielsen, No. 16-CV-4756 (NGG) (JO), 2018 U.S. Dist. LEXIS 23547, at \*86 (E.D.N.Y. Feb. 13, 2018); Regents of the Univ. of Cal. v. U.S. Dep't of Homeland Sec., No. C 17-05211 WHA, 2018 U.S. Dist. LEXIS 4036, at \*91 (N.D. Cal. Jan. 9, 2018).

10. See Taylor Hatmaker, *New York Attorney General Announces a Multi-State Lawsuit Challenging the Net Neutrality Vote*, TECHCRUNCH (Dec. 14, 2017), <https://techcrunch.com/2017/12/14/new-york-attorney-general-announces-a-multi-state-lawsuit-challenging-the-net-neutrality-vote/>; Vivian Yee, *California Sues Justice Dept. over Funding for Sanctuary Cities*, N.Y. TIMES (Aug. 14, 2017), <https://www.nytimes.com/2017/08/14/us/california-sues-trump-administration-over-sanctuary-city-policy.html>.

11. Mark L. Earley, Former Attorney General of Virginia and Virginia State Senator, "Special Solicitude": The Growing Power of State Attorneys General, Keynote Address at

which include the wildly successful multistate litigation against the tobacco industry in the 1980s that led to the largest monetary settlement ever recorded,<sup>12</sup> the nationalization of the two dominant political parties and increased political spending, and the Supreme Court's *Massachusetts v. EPA* decision adopting "special solicitude" for states in the Court's standing analysis.<sup>13</sup> Others have pointed to these factors, as well as increased political contributions and the growing power of the two national, partisan state attorneys general organizations: the Republican Attorneys General Association ("RAGA") and the Democratic Attorneys General Association ("DAGA").<sup>14</sup> Additionally—whether because of a desire for public service, disenchantment with large law firms, or a growing emphasis on living in a desired location—talented young lawyers steeped in federal law, including Supreme Court clerks, have been populating positions with offices of state attorneys general and solicitors general at a higher rate than in the past.<sup>15</sup>

These developments have led some, including former Virginia Attorney General Mark Earley in his keynote address at the 2017 *University of Richmond Law Review* Symposium, to claim that "the most powerful elected position in the United States today with respect to checking any perceived overreach of presidential or federal power is not in Congress, the House of Representatives or the Senate, but among the fifty state attorneys general."<sup>16</sup> Although that statement at first appears extreme, the evidence in support of it is quite compelling.<sup>17</sup> But even if the state attorney general is simply

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the *University of Richmond Law Review* Symposium: Defining the Constitution's President Through Legal & Political Conflict (Oct. 27, 2017), in 52 U. RICH. L. REV. 561, 563–65 (2018).

12. See *15 Years Later, Where Did All the Cigarette Money Go?*, NPR (Oct. 13, 2013, 5:52 PM ET), <https://www.npr.org/2013/10/13/233449505/15-years-later-where-did-all-the-cigarette-money-go>; Alan Greenblatt, *The Story Behind the Prominent Rise of State AGs*, GOVERNING (June 2015), <http://www.governing.com/topics/politics/gov-attorneys-general-lawsuits-policy-making.html>; Kathleen Michon, *Tobacco Litigation: History & Recent Developments*, Nolo, <https://www.nolo.com/legal-encyclopedia/tobacco-litigation-history-and-development-32202.html> (last visited Feb. 12, 2018).

13. 549 U.S. 497, 520 (2007).

14. Rachel M. Cohen, *The Hour of the Attorneys General*, AM. PROSPECT (Mar. 22, 2017), <http://prospect.org/article/hour-attorneys-general>.

15. See Tony Mauro, *Sollicitous Behavior*, AM. LAW., Aug. 2003, 63, 63–64; David Lat, *A Hot New Trend: State Solicitors General*, ABOVE THE L. (Aug. 19, 2008, 11:09 AM), <https://abovethelaw.com/2008/08/a-hot-new-trend-state-solicitors-general/>.

16. Earley, *supra* note 11, at 561 (emphasis added).

17. To note but one recent example, United States Representative Keith Ellison was rumored to be considering a run for Minnesota Attorney General because he had "grown listless and bored in the House," and the Attorney General position "could give [him] a prominent spot alongside other state attorneys general who've taken the lead in fighting the

an important actor, the question remains how to think about its role in the constitutional system and how to evaluate whether its emerging prominence is something to be cheered or lamented.

This article suggests that, despite the problems that potentially accompany this escalating role of the state attorney general, this development benefits the constitutional structure and separation of powers of the federal government. That is because one way to conceive of some actions by state attorneys general against the federal government is as a necessary constitutional check on the modern executive branch: what this article calls “delegation enforcement.” Almost all domestic actions of the executive branch occur pursuant to statutory authority, and many pursuant to a delegation of lawmaking discretion to the executive branch from Congress. Some are delegations to a particular agency, while others are delegations to the President himself. The exercise of this delegated authority—particularly when it is the President exercising it—can be difficult to challenge in federal court for a variety of reasons, not the least of which are justiciability doctrines. States, however, have unique institutional characteristics that make them ideally positioned to challenge executive action and to challenge it in the most effective manner.

Congress conceivably has the authority to rescind or limit delegations when it believes the executive branch has exceeded the scope of the delegation or to annul the executive branch’s interpretation of a statutory delegation in a statute that may not have been intended to provide it. However, Congress rarely has the power or will to do so. This lack of congressional delegation enforcement arises out of a number of factors, including the difficulty of passing legislation, the two-party system, and the inability to recognize the institutional interests.<sup>18</sup> Congress also has very little ability to challenge or stop executive action implementing statutory law through other means. Congress’s oversight authority is largely impotent in current practice, and the Court has severely restricted Congress’s and its members’ abilities to bring suit on their own behalf.<sup>19</sup>

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Trump administration.” Edward-Isaac Dove, *Ellison Exploring Minnesota AG Run*, POLITICO (Jan. 26, 2018, 5:00 AM EST), <https://www.politico.com/story/2018/01/26/keith-ellison-minnesota-attorney-general-370849>.

18. See *infra* Part I.C.

19. See *infra* Part I.C.3.

As a result, the executive branch at times has the ability to broadly interpret delegations of authority or to take liberty with statutory requirements on which the exercise of delegated authority is conditioned with little fear that opposition from Congress or private litigants will be a significant obstacle. Similarly, the executive branch may interpret a statutory provision to include a delegation of discretion where Congress may not have intended one. Internal checks may mitigate the danger of unreasonable interpretations in some circumstances, but the most effective delegation “enforcers” in the current climate are the states. In some cases, they may be the *only* potential avenue for delegation enforcement.

Some may see a problem inherent in the idea that officials, elected or appointed to represent a single state, could function as a check on the authority of the President and executive branch.<sup>20</sup> But the state attorneys general are not themselves checking the authority of the executive branch. Instead, they are the medium through which the cases can get to the judicial branch. Although there are both additional problems with the judiciary acting as the final arbiter and legitimate objections to doctrines, such as the nationwide injunction that further empowers the judiciary, a regime in which executive actions undertaken pursuant to congressional delegations are subject to review by the judicial branch is preferable to one in which there is no threat of review by an outside party. State attorneys general are an important, and in some cases necessary, means to such review. They are, at times, the only mechanism for delegation enforcement.

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20. Of course, state attorneys general represent the citizens and governments of their states and are often better positioned than individuals to challenge federal action that has an impact on those citizens. States acting as a check on the power of the federal government is a core principle of the Constitution and its separation of powers. See *Clinton v. City of New York*, 524 U.S. 417, 452 (1998) (Kennedy, J., concurring) (noting that “[s]eparation of powers operates on a vertical axis” as well as “a horizontal axis”); *United States v. Lopez*, 514 U.S. 549, 576 (1995) (Kennedy, J., concurring) (“The different governments will control each other, at the same time that each will be controlled by itself.” (quoting *THE FEDERALIST* NO. 51, at 323 (James Madison) (Clinton Rossiter ed., 1961))); *Gregory v. Ashcroft*, 501 U.S. 452, 458–59 (1991) (“Just as the separation and independence of the coordinate branches of the Federal Government serve to prevent the accumulation of excessive power in any one branch, a healthy balance of power between the States and the Federal Government will reduce the risk of tyranny and abuse from either front. . . . In the tension between federal and state power lies the promise of liberty.”). And the vertical separation of powers in the Constitution cannot be separated from the horizontal separation of powers among the branches; each is part of a single dynamic system. See Victoria Nourse, *The Vertical Separation of Powers*, 49 *DUKE L.J.* 749, 778 (1999) (“Shifts at the horizontal level may thus affect shifts typically seen as vertical—the relative power of the state and national governments.”).

## I. DELEGATION DOCTRINE AND CONGRESSIONAL IMPOTENCE

Much of the “law” that governs the country is not made by Congress but by the executive branch.<sup>21</sup> That law is made pursuant to the delegation doctrine, which allows Congress to delegate the authority to make rules—a legislative power—to the executive branch so long as Congress provides an “intelligible principle” to guide the exercise of that delegated authority.<sup>22</sup> The premise of the doctrine, more commonly known as the “nondelegation doctrine,” is that Article I, Section 1 of the Constitution, which vests “All legislative Powers herein granted . . . in a Congress of the United States,”<sup>23</sup> “permits no delegation of those powers.”<sup>24</sup> The framers believed this separation of legislative authority from executive authority was essential to the Constitution because “[t]here can be no liberty, where the legislative and executive powers are united in the same person, or body of magistrates.”<sup>25</sup>

The reality of the modern administrative state, however, has left considerable “legislative” authority in the hands of the President and the executive branch.<sup>26</sup> Although the Supreme Court struck down two early pieces of New Deal legislation on the basis of the nondelegation doctrine,<sup>27</sup> the Court has not since struck down any legislative delegation as lacking an intelligible principle.<sup>28</sup> As Justice Thomas said, the Court has largely “abandoned all pretense of enforcing a qualitative distinction between legislative and executive power.”<sup>29</sup> That is because the Court has “almost never felt

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21. See generally Abner S. Greene, *Checks and Balances in an Era of Presidential Lawmaking*, 61 U. CHI. L. REV. 123, 123–24 (1994) (arguing that a discussion of separation of powers today must account for both original constitutional principles as well as this new “era of presidential lawmaking,” which permits “delegation of substantial lawmaking power to the President, who executes the laws he makes”).

22. *Whitman v. Am. Trucking Ass'ns, Inc.*, 531 U.S. 457, 472 (2001) (quoting *J.W. Hampton, Jr., & Co. v. United States*, 276 U.S. 394, 409 (1928)); David Schoenbrod, *The Delegation Doctrine: Could the Court Give It Substance?*, 83 MICH. L. REV. 1223, 1224–25 (1985).

23. U.S. CONST. art. I, § 1.

24. *Whitman*, 531 U.S. at 472 (citing *Loving v. United States*, 517 U.S. 748, 771 (1996)).

25. THE FEDERALIST NO. 47, at 251 (James Madison) (George W. Carey & James McClellan eds., 2001) (quoting BARON DE MONTESQUIEU, THE SPIRIT OF LAWS 154 (Thomas Nugent trans., 1792)).

26. See Greene, *supra* note 21, at 123–24.

27. *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 529–30, 541–42 (1935); *Panama Ref. Co. v. Ryan*, 293 U.S. 388, 421 (1935).

28. *Whitman*, 531 U.S. at 474.

29. *Dep't of Transp. v. Ass'n of Am. R.Rs.*, 575 U.S. \_\_\_, \_\_\_, 135 S. Ct. 1225, 1250 (2015) (Thomas, J., concurring).

qualified to second-guess Congress regarding the permissible degree of policy judgment that can be left to those executing or applying the law.”<sup>30</sup>

Under the delegation doctrine, then, Congress may delegate enormous authority to the President and executive branch to exercise discretion in making particular policy choices. The existence or scope of a delegation, however, may not be entirely clear; the President or executive branch might misinterpret the scope of a statutory delegation, or determine Congress has delegated discretion where it has not actually done so. Or the delegation may be conditioned on the existence of a particular fact, the occurrence of an event, or the determination of a particular balancing test, and there are questions about whether that condition has been satisfied. In such cases, delegation enforcement is necessary and appropriate. But under the current workings of our system, Congress has no way to effectively enforce statutory delegations, or the lack thereof.

#### A. *Delegation Doctrine*

The intelligible-principle test originates in the Court’s decision in *J.W. Hampton, Jr. & Co. v. United States*, which involved a statute permitting the President to increase or decrease a tax if he determined that the tax did “not equalize . . . differences in costs of production [of the item] in the United States and the principal competing country.”<sup>31</sup> This type of legislation, so-called conditional legislation, conditions some effect “upon the action of the President based upon the occurrence of subsequent events, or the ascertainment by him of certain facts.”<sup>32</sup> The intelligible-principle test in its current vintage allows the delegation of discretion based on far more than the occurrence of an event or the ascertainment of a particular fact. The Court has upheld legislation as incorporating an intelligible principle when it requires the executive branch merely to act in the “public interest,”<sup>33</sup> to determine what is “unfair,”<sup>34</sup> to make specific policy judgments about what actions will

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30. *Whitman*, 531 U.S. at 474–75 (quoting *Mistretta v. United States*, 488 U.S. 361, 416 (1989) (Scalia, J., dissenting)).

31. 276 U.S. 394, 401, 409 (1928).

32. *Field v. Clark*, 143 U.S. 649, 683 (1892).

33. *Whitman*, 531 U.S. at 474 (citing *Nat’l Broad. Co. v. United States*, 319 U.S. 190, 225–26 (1943); *N.Y. Cent. Sec. Corp. v. United States*, 287 U.S. 12, 24–25 (1932)).

34. *Ass’n of Am. R.Rs.*, 575 U.S. at \_\_\_, 135 S. Ct. at 1251 (Thomas, J., concurring) (citing



best “effectuate” the purposes of a piece of legislation,<sup>35</sup> and to determine a standard that is “requisite to protect the public health.”<sup>36</sup>

The nondelegation doctrine is thus essentially “moribund,”<sup>37</sup> and is instead a doctrine permitting extensive delegation to the executive branch, the limit of which is, according to Justice Scalia, “not an element readily enforceable by the courts.”<sup>38</sup> Under the existing delegation doctrine, Congress may grant as much or as little discretion to the executive branch as it sees fit under a particular statutory scheme. Arguably, every grant of authority is a delegation because “a certain degree of discretion, and thus of lawmaking, *inheres* in most executive . . . action.”<sup>39</sup> In each enactment, therefore, Congress determines, “by the relative specificity or generality of its statutory commands,” how much discretion to convey on the executive branch.<sup>40</sup> The question is whether Congress’s *ex ante* determination, embedded in statutory requirements and intelligible principles, is enforceable.

### B. *Delegation Enforcement*

Given that the Court has declined to place any real limit on the delegation of legislative authority to the executive branch, legal challenges typically focus on the limits and exercise of the authority itself. This type of challenge can be, in essence, a type of delegation enforcement, ensuring that the executive branch’s interpretation or action complies with the terms and intelligible principle of the delegation.<sup>41</sup> The Administrative Procedure Act (“APA”) applies to all executive branch agencies, including independent agencies, and provides a waiver of sovereign immunity and a cause of

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Am. Power & Light Co. v. SEC, 329 U.S. 90, 104–05 (1946)).

35. *Id.* at \_\_\_, 135 S. Ct. at 1251 (quoting *Yakus v. United States*, 321 U.S. 414, 420 (1944)).

36. *Whitman*, 531 U.S. at 472.

37. *Synar v. United States*, 626 F. Supp. 1374, 1384 (D.D.C. 1986), *aff’d sub nom.* *Bowsher v. Synar*, 478 U.S. 714, 736 (1986) (“[W]hile the delegation doctrine may be moribund, it has not yet been officially interred by the Court.”).

38. *Mistretta v. United States*, 488 U.S. 361, 415 (1989) (Scalia, J., dissenting).

39. *Id.* at 417.

40. *Id.*

41. *See Hawaii v. Trump*, 878 F.3d 662, 690 (9th Cir. 2017) (per curiam) (“Reading [8 U.S.C.] § 1182(f) to permit the Proclamation’s sweeping exercise of authority would effectively render the statute void of a requisite ‘intelligible principle’ delineating the ‘general policy’ to be applied and ‘the boundaries of th[e] delegated authority.’” (alterations in original) (quoting *Mistretta*, 488 U.S. at 372–73)), *cert. granted*, *Trump v. Hawaii*, No. 17-965, 2018 U.S. LEXIS 759 (Jan. 19, 2018).

action permitting challenges to final agency action.<sup>42</sup> The APA also establishes several procedural requirements with which agencies must comply in their exercise of delegated authority.<sup>43</sup> Courts review the merits of agency decisions to ensure they are not “arbitrary [and] capricious.”<sup>44</sup> They also review the process by which the agency reached its decision to ensure its compliance with the APA and due process.<sup>45</sup>

At times, parties also challenge whether the President or a particular agency has exceeded its authority under the relevant authorizing statute. This type of challenge is, in many cases, delegation enforcement: the Court has permitted Congress to delegate legislative authority to executive branch entities to act in furtherance of an intelligible principle, but the President or agency has either ignored or exceeded the intelligible principle or exercised legislative power absent any statutory delegation. The executive branch has thus violated the premise of the delegation doctrine. While challenges to the merits of executive branch action or the procedure by which the agency undertook such action focuses on internal agency actions, challenges to the statutory authority of an agency to take a particular action are, in essence, delegation enforcement: an attempt to enforce the terms of statutory delegation from Congress to the agency. The *Chevron* doctrine fits well with that understanding because an ambiguous statute “delegates” interpretive authority to the agency, and the agency may exercise that authority so long as it does so in a reasonable, non-arbitrary way that does not exceed the scope of the delegated authority.<sup>46</sup> This is known as the *Chevron* two-step inquiry.<sup>47</sup> But where the text of the statute plainly contradicts the agency’s action, the

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42. 5 U.S.C. § 551(1) (2012 & Supp. IV 2013–2017); *id.* § 701 (2012 & Supp. IV 2013–2017); *id.* §§ 702–06 (2012).

43. *See, e.g., id.* § 553 (2012); *Perez v. Mortg. Bankers Ass’n*, 537 U.S. \_\_\_, \_\_\_, 135 S. Ct. 1199, 1203–04 (2015) (discussing the notice-and-comment rulemaking requirement imposed on agency rulemaking).

44. 5 U.S.C. § 706 (2012); *see, e.g., FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 513 (2009); *id.* at 548 (Breyer, J., dissenting).

45. *See, e.g., Perez*, 537 U.S. at \_\_\_, 135 S. Ct. at 1203–04, 1206–07; *Mathews v. Eldridge*, 424 U.S. 319, 325–26 (1976).

46. *Chevron U.S.A., Inc. v. Nat’l Res. Def. Council*, 467 U.S. 837, 843–44 (1984).

47. *See Nat’l Cable & Telecomms. Ass’n v. Brand X Internet Servs.*, 545 U.S. 967, 986 (2005).

agency has exceeded its delegation (perhaps by acting where there has been no delegation).<sup>48</sup>

A number of circumstances can make this type of traditional delegation enforcement extremely difficult. Most notably, where the President is the one taking a particular action, the APA no longer provides a mechanism for bringing suit because the President is not an “agency” subject to the provisions and judicial review of the APA.<sup>49</sup> An entity wishing to challenge a President’s actions as exceeding his or her delegated authority must independently establish standing to sue, a cause of action, and that the courts have the authority and expertise to address the question. Those requirements are particularly difficult to meet when the plaintiff is alleging a *statutory*, as opposed to a constitutional, violation.<sup>50</sup> Similarly, even if an agency takes a particular action that the President *directs*, leaving the agency no discretion to decide for itself, the action may be immune from challenge under the APA and other statutes.<sup>51</sup> Second, executive branch actions that confer benefits on a particular class of individuals are often difficult to challenge since few, if any, people or organizations suffer an injury in fact sufficient to confer standing from a benefit-granting action. Finally, statutory delegations are rarely precise, particularly when they are delegations to the President. Indefinite delegations, such as that the President may act when in the national interest, make it almost impossible to determine what the limits of the delegation should be, given the vagueness of the term “interest.”<sup>52</sup> There are innumerable statutes that condition the President’s exercise of extraordinary authority upon a nebulous finding such as the national

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48. See *United States v. Home Concrete & Supply, LLC*, 566 U.S. 478, 488 (2012) (plurality opinion) (“*Chevron* and later cases find in unambiguous language a clear sign that Congress did *not* delegate gap-filling authority to an agency.”).

49. *Franklin v. Massachusetts*, 505 U.S. 788, 800–01 (1992) (“Out of respect for the separation of powers and the unique constitutional position of the President, we find that textual silence is not enough to subject the President to the provisions of the APA.”).

50. In *Franklin*, the Court noted that “the President’s actions may still be reviewed for constitutionality.” *Id.* at 801. But the Court refused to apply that exception to “claims simply alleging that the President has exceeded his statutory authority.” *Dalton v. Specter*, 511 U.S. 462, 473 (1994). Questioning whether “claims that the President has violated a statutory mandate are [ever] judicially reviewable,” *Dalton* held that “such review is not available when the statute in question commits the decision to the discretion of the President.” *Id.* at 474.

51. See *Nat. Res. Def. Council v. U.S. Dep’t of State*, 658 F. Supp. 2d 105, 112–13 (D.D.C. 2009); see also *Dep’t of Transp. v. Pub. Citizen*, 541 U.S. 752, 766 (2004).

52. See, e.g., *Zemel v. Rusk*, 381 U.S. 1, 7–8 (1965) (explaining that language of an act allowing the President to “designate and prescribe” rules “on behalf of the United States” was broad and legislative history did not indicate any restrictions on the grant of authority).

interest.<sup>53</sup> And given such an express delegation of discretion to the President and the President's relative institutional advantages in making policy determinations, courts are likely to defer to the politically accountable President.<sup>54</sup>

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53. For example, the International Emergency Economic Powers Act ("IEEPA") grants the President numerous authorities, including the authority to block "any transactions in foreign exchange" and

block . . . regulate, direct and compel, nullify, void, prevent or prohibit, any acquisition, holding, withholding, use, transfer, withdrawal, transportation, importation or exportation of, or dealing in, or exercising any right, power, or privilege with respect to, or transactions involving, any property in which any foreign country or a national thereof has any interest by any person, or with respect to any property, subject to the jurisdiction of the United States.

50 U.S.C. § 1702(a)(1)(A)(i), (a)(1)(B) (2012). The President may exercise these authorities "only . . . to deal with an unusual and extraordinary threat" when the President has declared the threat a "national emergency." *Id.* § 1701(a), (b). The President has the sole authority to determine what constitutes such a threat, and courts have upheld this as a proper delegation of authority to the President. *See, e.g., Dames & Moore v. Regan*, 453 U.S. 654, 670–72, 675, 677 (1981); *United States v. Amirnazmi*, 645 F.3d 564, 576–77 (3d Cir. 2011). The Supreme Court has reviewed the President's actions pursuant to his IEEPA authority for compliance with the statute. *See, e.g., Dames & Moore*, 453 U.S. at 672–78. However, the Court and lower courts have largely "deferred to expansive interpretations" of that authority. Harold Hongju Koh & John Choon Yoo, *Dollar Diplomacy/Dollar Defense: The Fabric of Economics and National Security Law*, 26 INT'L LAW. 715, 746 (1992); *see also United States v. McKeeve*, 131 F.3d 1, 10 (1st Cir. 1997) ("IEEPA codifies Congress's intent to confer broad and flexible power upon the President to impose and enforce economic sanctions against nations that the President deems a threat to national security interests."); *Chas. T. Main Int'l, Inc. v. Khuzestan Water & Power Auth.*, 651 F.2d 800, 807 (1st Cir. 1981) ("The language of IEEPA is sweeping and unqualified."); *Beacon Prods. Corp. v. Reagan*, 633 F. Supp. 1191, 1195 (D. Mass. 1986) (finding that whether a particular country "poses sufficient threat to trigger the President's IEEPA" declaration of national emergency constitutes a nonjusticiable political question), *aff'd*, 814 F.2d 1 (1st Cir. 1987).

Another example is the Federal Property and Administrative Services Act of 1949 ("FPASA"), which gives the President the authority to "prescribe policies and directives that the President considers necessary to carry out" the Act. 40 U.S.C. § 121(a) (2012 & Supp. IV 2013–2017). FPASA also requires that the policies implemented by the President be "consistent with" the Act. *Id.* The general purpose of FPASA is to "provide the Federal Government with an economical and efficient system" for procurement, the use of property, disposing of property, and records management. *Id.* § 101. Presidents have used this authority to further policy goals by imposing requirements on all federal contractors and agencies upon a presidential determination that they will promote economy and efficiency in government procurement. *E.g., Auth. to Issue Exec. Order on Gov't Procurement*, 19 Op. O.L.C. 90, 90 (1995); *Exec. Order No. 13,706*, 3 C.F.R. 367 (2015 Comp.) (requiring federal contractors to provide paid sick leave); *Exec. Order No. 13,279*, 3 C.F.R. 258 (2002 Comp.) (implementing protection for faith-based and community organizations).

54. One notable exception has been the litigation in the Ninth Circuit over President Trump's executive orders and proclamation barring the entry into the United States of nationals of particular countries. *Hawaii v. Trump*, 878 F.3d 662, 673–74 (9th Cir. 2017) (describing the history and issues), *cert. granted*, *Trump v. Hawaii*, No. 17-965, 2018 U.S. LEXIS 759 (Jan. 19, 2018). The relevant provision of the Immigration and Nationality Act is another example of a statute that delegates authority to the President conditioned on his finding that a vague condition has been satisfied. *See* 8 U.S.C. § 1182(f) (2012). Section 1182(f) allows the President to suspend the entry of all aliens or a class of aliens if he finds

Delegation enforcement through private lawsuits thus faces significant legal hurdles, particularly when the challenge is to the President's actions. It also faces practical difficulties. Private parties not only have to establish legal standing sufficient to satisfy Article III, they also have to be motivated and willing to bring such a suit in the first place. Assuming a private entity has standing and wants to challenge a particular exercise of delegated authority by the President or executive branch, the entity must *maintain* that standing and motivation throughout the course of what will likely be a very long legal process, including numerous appeals.<sup>55</sup> To succeed, the party will have to resist any potential efforts by the executive branch to moot the case by eliminating the particular plaintiff's injury,<sup>56</sup> and maintaining the legal challenge must be valuable enough to justify the continued legal costs and energy. Whereas advocacy and political organizations may be motivated to bring such challenges, they may have difficulty establishing standing.<sup>57</sup>

### C. Congressional Impotence

The most obvious candidate to enforce the metes and bounds of a statutory delegation to the executive branch is the institution that conferred the delegation and has the most institutional and

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that their entry "would be detrimental to the interests of the United States." *Id.* The state of Hawaii challenged the merits of the President's determination that entry of the banned aliens would be "detrimental" to the national interest, and, on review of the President's second executive order, the Ninth Circuit refused to defer to the President's determination. *Hawaii v. Trump*, 859 F.3d 741, 770–74 (9th Cir. 2017). Recognizing the President was exercising delegated authority, the court noted the President's authority was "not unlimited" and cited two past cases recognizing that the exercise of delegated authority was subject to scrutiny and must accord with an intelligible principle. *Id.* at 770 (citing *Kent v. Dulles*, 357 U.S. 116, 129 (1958); *J.W. Hampton, Jr., & Co. v. United States*, 276 U.S. 394, 409 (1928)). The Ninth Circuit concluded that the President "did not satisfy [the] precondition" required for him to exercise delegated authority, and thus found he had exceeded his statutory authority. *Id.* at 776. In the subsequent litigation over the third travel ban, this time a proclamation, the Ninth Circuit again found the President had failed to satisfy the precondition requiring him to find that allowing entry of the banned aliens would be detrimental to the United States and had also exceeded his statutory authority by imposing a *permanent ban* on entry when the statute gave him authority only to "suspend" entry of aliens. *Hawaii v. Trump*, 878 F.3d at 684–98.

55. See *Arizonaans for Official English v. Arizona*, 520 U.S. 43, 68 n.22 (1997).

56. See, e.g., *Int'l Refugee Assistance Proj. v. Trump*, 265 F. Supp. 3d 570, 594 n.2 (D. Md. 2017) (noting one of the plaintiff's claims had been mooted because the government issued a visa).

57. Cf. *Citizens for Responsibility & Ethics in Wash. v. Trump*, No. 17 Civ. 458 (GBD), 2017 U.S. Dist. LEXIS 210326, at \*26–28 (S.D.N.Y. Dec. 21, 2017) (finding that an ethics organization lacked "organizational standing").

constitutional authority at stake: Congress. But, in the current environment, Congress cannot do so effectively. Limitations inherent in or imposed by each of the three branches have led to this state of affairs. First, the constitutional structure combined with the two-party system make it almost impossible for Congress to pass legislation enforcing a prior delegation. Second, congressional oversight authority is also exceptionally weak as a result of the two-party system and by the policies and legal positions developed by the executive branch. Third, the Supreme Court has rejected the concept of legislative standing and has largely prohibited Congress from utilizing the courts to enforce its delegations.

### 1. Legislation

Subsequent legislation, though perhaps the most natural way of clarifying or limiting a prior statutory delegation, is not typically a viable option. Simply passing *any* legislation is notoriously hard. It requires consent from a majority of both houses of Congress, overcoming a potential filibuster in the Senate, and the signature of the President.<sup>58</sup> In *INS v. Chadha*, the Supreme Court rejected Congress's primary attempt to check the executive branch without having to go through the entire cumbersome legislative process.<sup>59</sup> *Chadha*, in essence, can be thought of in delegation doctrine terms: Congress suggested it could condition the exercise of delegated authority on receiving approval from a congressional committee, but the Court rejected that type of limited or conditioned delegation and delegation enforcement by legislative veto.<sup>60</sup>

The enforcement of delegation through legislation is even less possible given the dominance of the two-party system and the sharply, but almost evenly, divided political climate.<sup>61</sup> If the President is of the same party as both houses of Congress, then the policy judgements the executive branch makes in exercise of its

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58. *The Legislative Process*, U.S. HOUSE OF REPRESENTATIVES, <http://www.house.gov/the-house-explained/the-legislative-process> (last visited Feb. 12, 2018); *Filibuster and Cloture*, U.S. SENATE, [https://www.senate.gov/artandhistory/history/common/briefing/Filibuster\\_Clature.htm](https://www.senate.gov/artandhistory/history/common/briefing/Filibuster_Clature.htm) (last visited Feb. 12, 2018).

59. 462 U.S. 919 (1983).

60. See *id.* at 956–58; Emily S. McMahon, Note, *Chadha and the Nondelegation Doctrine: Defining a Restricted Legislative Veto*, 94 YALE L.J. 1493, 1510–11 (1985).

61. See Greg Giroux, *In Congress, the Center Hasn't Held*, BLOOMBERG GOV'T (Oct. 18, 2017), <https://perma.cc/CJG4-SRV2> (describing congressional partisanship and gridlock).

statutory delegations are likely to align with the majority of Congress, eliminating most policy reasons to attempt to curb the executive branch. If the executive branch's policy is out of line with the majority of his or her party in Congress and policy reasons exist to restrict the executive branch's exercise of delegated authority, the political climate would still have to favor a challenge to a President or appointed officials of one's own party before legislation would be politically viable.

If the President and one or both houses of Congress are of opposite parties, legislative delegation enforcement is still not viable in most circumstances. Most obviously, the President retains veto power and can veto any proposed legislation.<sup>62</sup> In today's political climate, a veto override by two-thirds of both houses is almost impossible; the veto is thus incredibly effective at preserving executive authority.<sup>63</sup> Even if both houses could pass such legislation and find a way to ensure it is not vetoed—either by override or by some other tactic such as attaching it to a larger piece of must-pass legislation—they may not want to do so for political reasons. If the administration's actions have resulted in benefits to individuals, Congress may be hesitant to pass legislation taking those benefits away. From a political standpoint, it might be preferable to have a court strike down the executive branch's actions as illegal or unconstitutional than to take the political heat for removing a benefit from a group of individuals.

In short, legislation is rarely a viable option for enforcing, clarifying, or limiting a prior statutory delegation by which the executive branch has implemented significant policies. Only in extreme circumstances—where the actions of the executive branch are opposed by a supermajority of Congress and by the public, *and* the political calculus favors reining in that exercise of authority

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62. *Vetoes*, U.S. SENATE, [https://www.senate.gov/reference\\_index\\_subjects/Vetoes\\_vrd.htm](https://www.senate.gov/reference_index_subjects/Vetoes_vrd.htm) (last visited Feb. 12, 2018); *see, e.g.*, Greene, *supra* note 21, at 182–83 (discussing the abortion regulation at issue in *Rust v. Sullivan*, 500 U.S. 173 (1991), which the Supreme Court upheld as a valid exercise of delegated authority, and noting that Congress, disagreeing with the executive branch's interpretation of the delegation, was unable to correct it due to vetoes by President George H.W. Bush and insufficient votes to override those vetoes).

63. *See* Charles L. Black, Jr., *Some Thoughts on the Veto*, 40 LAW & CONTEMP. PROBS. 87, 98 (1976) (“[T]he President, with what might be thought meager textual powers, is institutionally almost untrammled, since he may veto disapproving action by the very body to which he is supposedly subject, while that body, textually empowered to an enormous degree, is institutionally bound toe and neck by the veto.”); Greene, *supra* note 21, at 180–84 (arguing that the use of the veto to “entrench[] presidential power” gives the executive branch “extraordinary lawmaking power”).

through political means—will legislation be a potential vehicle for delegation enforcement.

## 2. Other Congressional Powers

Congress has means for advancing its interests and checking the executive branch other than by legislation, of course. The Senate must approve the President's nominees,<sup>64</sup> and the Senate can utilize that authority to gain concessions from the administration and from the nominee himself or herself. Unhappiness with a claim of executive authority has led to the delay of numerous nominees, and senators have asked nominees to opine on or make pledges about policy during the nomination process.<sup>65</sup> The House of Representatives must appropriate all money used by the executive branch in furtherance of its actions, including those that may test the limits of statutory delegations.<sup>66</sup> Congress can include conditions in appropriations bills in order to enforce prior delegations of authority to the executive branch,<sup>67</sup> but the executive branch can also resist some conditions as unconstitutionally limiting the President or executive branch.<sup>68</sup> Congress also has authority to oversee the oper-

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64. U.S. CONST. art. II, § 2.

65. For example, during her United States Attorney General confirmation proceedings, Loretta Lynch faced a number of questions about President Obama's immigration actions, and several senators indicated an intent to oppose her as a result of the Administration's immigration actions. *See Hearing on the Nomination of Loretta Lynch for Attorney General Before the S. Comm. on the Judiciary*, 114th Cong. (2015) (questions of Sens. Ted Cruz & Mike Lee); Seung Min Kim, *The GOP Plan for Lynch: It's All About Immigration*, POLITICO (Nov. 10, 2014), <https://www.politico.com/story/2014/11/loretta-lynch-nomination-gop-112765>. President Trump's nominees have faced similar questioning. *See, e.g.*, Adam Goldman & Michael S. Schmidt, *Trump's Nominee to Lead F.B.I. Pledges to Resist White House Pressure*, N.Y. TIMES (July 12, 2017), <https://www.nytimes.com/2017/07/12/us/politics/christopher-wray-fbi-confirmation-hearing.html>; Carl Hulse, *Democrats Perfect Art of Delay While Republicans Fume Over Trump Nominees*, N.Y. TIMES (July 17, 2017), <https://www.nytimes.com/2017/07/17/us/politics/senate-democrats-art-of-delay-trump-nominees.html>; Ian Ostrander, *Senate Democrats Are Battling Every Trump Nomination. Here's How That Can Hurt Trump's Policies*, WASH. POST (Feb. 15, 2017), [https://www.washingtonpost.com/news/monkey-cage/wp/2017/02/15/senate-democrats-are-battling-every-trump-nomination-heres-how-that-hurt-trumps-policies/?utm\\_term=.9abff24a25ce](https://www.washingtonpost.com/news/monkey-cage/wp/2017/02/15/senate-democrats-are-battling-every-trump-nomination-heres-how-that-hurt-trumps-policies/?utm_term=.9abff24a25ce).

66. U.S. CONST. art. I, § 7, cl. 1; *id.* art. I, § 9, cl. 7.

67. *See, e.g.*, H.R. 5538, 114th Cong. §§ 112, 114, 120–21 (as passed by House on July 14, 2016) (prohibiting the EPA and Department of the Interior from implementing Administration policies opposed by the House); Jonathan Weisman, *Republicans Aim to Hamper Obama's Policies with Spending Bills*, N.Y. TIMES (July 7, 2015), <https://www.nytimes.com/2015/07/08/us/republicans-aim-to-hamper-obamas-policies-with-spending-bills.html>.

68. *See, e.g.*, Barack Obama, Statement on Signing the National Defense Authorization Act for Fiscal Year 2017 (Dec. 23, 2016), <http://www.presidency.ucsb.edu/ws/?pid=11>



ations of the executive branch, requesting or subpoenaing documents or testimony about the actions of the President and executive branch as part of its constitutional function.<sup>69</sup>

These seem like a considerable array of powers by which to enforce delegations to the President and executive branch. But, at the outset, all require that the party opposite the President's party have a majority of at least one house of Congress. All nominations can now be approved by a majority of the Senate with a single-vote majority.<sup>70</sup> Appropriations laws go through the normal legislative process and require a majority of both houses to pass.<sup>71</sup> Both the executive branch and Congress agree that only the chairman of a congressional committee, i.e., a member of the majority, has the authority to issue a subpoena to the executive branch compelling the production of particular information in the course of oversight.<sup>72</sup> The minority party can request documents and information, but, lacking enforcement authority, it lacks any ability to conduct meaningful oversight of actions about which the executive branch does not wish to share information.<sup>73</sup> The executive branch's position is that minority members of Congress have *no* constitutional authority to conduct oversight at all.<sup>74</sup> Thus, all of these secondary checks are dependent on divided government. If Congress and the President are of the same party, there is little chance that a President's interpretation of existing statutory delegations will face significant challenge aside from questions and letters from minority members to executive branch officials and nominees that the executive branch considers itself under no legal compulsion to answer.

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9931 (objecting to various provisions and noting constitutional defects); Barack Obama, Statement on Signing the Consolidated Appropriations Act, 2012 (Dec. 23, 2011), <http://www.presidency.ucsb.edu/ws/?pid=97996>.

69. *Eastland v. U.S. Servicemen's Fund*, 421 U.S. 491, 504 n.15 (1975) (discussing Congress's broad power to investigate); see *McGrain v. Daughtrey*, 273 U.S. 135, 173-74 (1927); ALISSA M. DOLAN ET AL., CONG. RESEARCH SERV., RL30240, CONGRESSIONAL OVERSIGHT MANUAL 23 (2014).

70. CHRISTOPHER M. DAVIS & MICHAEL GREENE, CONG. RESEARCH SERV., RL30959, PRESIDENTIAL APPOINTEE POSITIONS REQUESTING SENATE CONFIRMATION AND COMMITTEES HANDLING NOMINATIONS 3-4 (2017).

71. See *A Brief Guide to the Federal Budget and Appropriations Process*, AM. COUNCIL ON EDUC., <http://www.acenet.edu/news-room/Pages/A-Brief-Guide-to-the-Federal-Budget-and-Appropriations-Process.aspx> (last visited Feb. 12, 2018).

72. Auth. of Individual Members of Cong. to Conduct Oversight of the Exec. Branch, 41 Op. O.L.C. 1, 3 (2017); DOLAN ET AL., *supra* note 69, at 65.

73. See *Auth. of Individual Members of Cong. to Conduct Oversight of the Exec. Branch*, 41 Op. O.L.C. at 3-4.

74. See *id.*

Even if the party opposite the President holds a majority in one or both houses, these additional checks are rarely sufficient for delegation enforcement. An administration that is intent on achieving a particular policy goal may be willing to sacrifice a particular nominee or go without an appointed official if the Senate holds up a nomination on the basis of the administration's actions. Appearing obstructionist to all nominees in an attempt to change the administration's actions may have unwanted political consequences. Spending conditions must go through the legislative process and suffer the same problems inherent in legislative enforcement. The veto power still applies,<sup>75</sup> and the President may be willing to use it to preserve policy initiatives. Even where Congress utilizes its full oversight authority and issues repeated subpoenas to the executive branch, the executive branch rarely complies in full or in a timely manner. The executive branch also may assert privileges—such as the presidential communications privilege,<sup>76</sup> the deliberative process privilege,<sup>77</sup> and the attorney client privilege<sup>78</sup>—without any independent review or neutral arbiter of their validity, unless Congress files suit, which only initiates a process that likely takes years to resolve. Although Congress could theoretically hold members of the administration in contempt of Congress, it has done so very rarely.<sup>79</sup> And the practical, as opposed to political, impact of such a determination is largely meaningless since the executive branch refuses to prosecute officials for contempt of Congress where there has been an assertion of executive privilege by the President to cover the withheld information.<sup>80</sup>

Congress's other institutional powers are thus not much better than legislation in enforcing the limits of prior delegations of authority to the executive branch. Utilizing all its institutional powers aside from legislation, Congress may be able to make a political

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75. See *A Brief Guide to the Federal Budget and Appropriations Process*, *supra* note 71.

76. See Ian Millhiser, *Executive Privilege 101*, CTR. FOR AM. PROGRESS (June 1, 2010, 9:00 AM), <http://www.americanprogress.org/issues/courts/news/2010/06/01/7909/executive-privilege-101>.

77. See *id.*

78. See Aziz Huq, *Background on Executive Privilege*, BRENNAN CTR. FOR JUST. (Mar. 23, 2007), <http://www.brennancenter.org/analysis/background-executive-privilege>.

79. See TODD GARVEY, CONG. RESEARCH SERV., RL34097, CONGRESS'S CONTEMPT POWER AND THE ENFORCEMENT OF CONGRESSIONAL SUBPOENAS: LAW, HISTORY, PRACTICE, AND PROCEDURE 74–75 (2017) (collecting historical examples of congressional contempt showing the frequency since 1980).

80. Prosecution for Contempt of Cong. of an Exec. Branch Official Who Has Asserted a Claim of Exec. Privilege, 8 Op. O.L.C. 101, 102 (1984); Todd D. Peterson, *Contempt of Congress v. Executive Privilege*, 14 U. PENN. J. CONST. L. 77, 158 (2011).

issue out of an exercise of delegated authority or may be able to impair the administration by holding up nominees or requiring the production of documents and witnesses. But even an opposing party in control of both houses of Congress willing to wield Congress's power to its maximum extent is essentially impotent to stop an exercise of delegated authority by the President or executive branch in any timely way, particularly where the administration is also willing to use its constitutional authorities in a manner to achieve a particular policy.

### 3. Legislative Standing

Congress, like a private party, can, of course, turn to the courts. But Congress and individual legislators fare little better in utilizing the judicial branch to achieve delegation enforcement. In *Raines v. Byrd*, the Supreme Court effectively put an end to individual legislators' Article III standing to challenge the executive branch's determination of how to enforce the laws.<sup>81</sup> *Raines* involved a constitutional challenge by six legislators to the Line Item Veto Act, which expressly allowed for such a challenge.<sup>82</sup> The Supreme Court held that, despite the express statutory authorization, the legislators lacked Article III standing because they had "alleged no injury to themselves as individuals" and "the institutional injury they allege[d] [was] wholly abstract and widely dispersed."<sup>83</sup> Further, the Court concluded that the legislators' attempt to sue was "contrary to historical experience" because "analogous [historical] confrontations between one or both Houses of Congress and the Executive Branch" had not resulted in such lawsuits.<sup>84</sup>

The Court in *Raines* did "attach some importance to the fact that" the individual plaintiffs had not been authorized by their respective houses of Congress to file the suit, but it did not decide whether that circumstance would alter the Article III analysis.<sup>85</sup>

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81. 521 U.S. 811, 830 (1997); see Nat Stern, *The Indefinite Deflection of Congressional Standing*, 43 PEPP. L. REV. 1, 31 (2015) ("Construing *Raines* as tacitly imposing a virtual blanket ban on legislator standing finds support in both precedent and the tenor of the Court's opinion.").

82. *Raines*, 521 U.S. at 814.

83. *Id.* at 829.

84. *Id.* at 826–29.

85. *Id.* at 829.

In decisions following *Raines*, the Court has left that question undecided,<sup>86</sup> but *Raines*'s rejection of the asserted injury as "wholly abstract and widely dispersed," and its admonition that historical clashes between the two branches had not been resolved pursuant to direct litigation between the branches cast a significant question about whether a single house, or Congress as a whole, would have Article III standing to challenge the executive branch's interpretation of a particular law.<sup>87</sup> The Court continues to suggest such disputes belong exclusively to the political processes.<sup>88</sup>

During the Obama Administration, the House of Representatives did succeed in convincing a district court it had standing to challenge the Administration's determination that it had legal authority to make cost-sharing reduction payments pursuant to the Affordable Care Act.<sup>89</sup> But the district court's decision, which analyzed *Raines* at length, demonstrates why delegation enforcement through litigation is nearly impossible for Congress.<sup>90</sup> The district court found standing to pursue only the claim that the Administration was making cost-sharing reduction payments without an appropriation because that claim "allege[d] a violation of the specific, constitutional prohibition in Article I, § 9, cl. 7 that is meant to safeguard the House's role in the appropriations process and keep the political branches of government in equipoise."<sup>91</sup> The court distinguished all of the other claims, including those asserting injury to the House's constitutional legislative authority, as ultimately alleging a *statutory* injury, and rejected the House's standing to pursue them.<sup>92</sup> The district court thus found no Article III standing for claims that "concern the implementation, interpretation, or execution of federal statutory law" because permitting such claims "would contradict decades of administrative law and precedent, in which courts have guarded against 'the specter of 'general legisla-

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86. See *Ariz. State Legislature v. Ariz. Indep. Redistricting Comm'n*, 576 U.S. \_\_, \_\_, 135 S. Ct. 2652, 2665 n.12 (2015) ("The case before us does not touch or concern the question whether Congress has standing to bring a suit against the President.").

87. *Raines*, 521 U.S. at 829; see Stern, *supra* note 81, at 32–33.

88. See *United States v. Windsor*, 570 U.S. \_\_, \_\_, 133 S. Ct. 2675, 2689 (2013) ("The integrity of the political process would be at risk if difficult constitutional issues were simply referred to the Court as a routine exercise.").

89. *U.S. House of Representatives v. Burwell*, 130 F. Supp. 3d 53, 57–58 (D.D.C. 2015).

90. *Id.* at 67.

91. *Id.* at 74.

92. *Id.* at 74–76.

tive” standing based upon claims that the Executive Branch is misinterpreting a statute or the Constitution.”<sup>93</sup>

Because delegation enforcement is *limited* to the “implementation, interpretation, [and] execution of federal statutory law” by definition, the district court’s broader interpretation of congressional standing in *Burwell* does not alter the fact that neither individual legislators, a house of Congress, or Congress itself has standing to pursue delegation enforcement after *Raines*.<sup>94</sup> Moreover, the district court’s standing analysis was challenged vigorously on appeal,<sup>95</sup> and its logic has been the subject of criticism.<sup>96</sup>

Depending on the relationship between the majority party and the President, Congress is thus either unmotivated or impotent to enforce legislative delegations to the executive branch. The two-party system encourages a presidential administration aligned with Congress to interpret statutory delegations in a manner most consistent with their shared policy, and the minority party has little ability to challenge those interpretations if they push the limits or violate the intelligible principle of the delegation. The President and his appointees, during a divided government, are both motivated to interpret delegations in an aggressive manner because of the inability to get legislation passed and unlikely to fear any effective retaliation by the opposite party in Congress. Even if Congress utilizes its institutional checks, oversight authority, and judicial options as effectively and aggressively as possible, they are unlikely to result in any practical change to the administration’s

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93. *Id.* at 74–75 (quoting *U.S. House of Representatives v. U.S. Dep’t of Commerce*, 11 F. Supp. 2d 76, 89–90 (D.D.C. 1998)) (“Where the dispute is over true implementation, Congress retains its traditional checks and balances—most prominently its purse strings.”).

94. *Id.* at 74.

95. See Brief for Appellants at 1–3, 19–38, *U.S. House of Representatives v. Burwell*, 676 Fed. App’x 1 (D.C. Cir. 2016) (mem.) (No. 16-5202) (arguing the district court’s decision on standing was “the first time in our Nation’s history” such a suit had been allowed to proceed).

96. *U.S. House of Representatives v. Burwell*, 185 F. Supp. 3d 165, 168, 188–89 (D.D.C. 2016); see ALISSA M. DOLAN, CONG. RESEARCH SERV., R44450, *HOUSE OF REPRESENTATIVES V. BURWELL AND CONGRESSIONAL STANDING TO SUE* 16–18 (2016); Nicholas Bagley, *Oh Boy. Here We Go Again*, INCIDENTAL ECONOMIST (Sept. 9, 2015, 9:34 PM), <https://theincidentaleconomist.com/wordpress/oh-boy-here-we-go-again/> (characterizing the standing decision as “untenable” and its reasoning as “incoherent” and asserting “confiden[ce] that the court of appeals won’t let the judge’s decision stand”); Walter Dellinger, *House Republicans’ Misguided Obamacare Lawsuit*, WASH. POST (Aug. 16, 2015), [https://www.washingtonpost.com/opinions/the-houses-misguided-obamacare-lawsuit/2015/08/16/4d95e3ca-34a8-11e5-94ce-834ad8f5c50e\\_story.html?utm\\_term=.19af1cfa3151](https://www.washingtonpost.com/opinions/the-houses-misguided-obamacare-lawsuit/2015/08/16/4d95e3ca-34a8-11e5-94ce-834ad8f5c50e_story.html?utm_term=.19af1cfa3151) (characterizing a resolution in favor of congressional standing as “the single most radical expansion of the authority of federal judges in more than 200 years”).

policy in a timely manner. The *Burwell* litigation in the district court alone, for example, went on for almost two years while the Obama Administration continued to make payments, and the district court, after ruling for the House of Representatives, stayed its injunction pending appeal.<sup>97</sup> The most that a Congress of the opposite party can hope for, in reality, is to make it a political issue that benefits their party in the next election. The Justice Department, under administrations of both parties, has challenged congressional standing in all forms, relying on *Raines*.<sup>98</sup> Therefore, delegation enforcement through the courts is not likely to occur through litigation by Congress or its members unless there is a radical change in Article III standing doctrines.

## II. STATE DELEGATION ENFORCEMENT

Enter the states. Given the difficulties of delegation enforcement by private parties, particularly where the President's actions are at issue, and the general impotence of Congress in delegation enforcement, states have emerged as the preeminent enforcers of statutory delegations to the executive branch. And not without reason. States have numerous institutional advantages over private parties, including creative and exclusive ways to establish standing and a right to relief, and they share many of the institutional motivations of Congress and its individual legislators without the accompanying limitations. Just a sample of the numerous lawsuits brought by state attorneys general against the last two Administrations demonstrates both the power of states to enforce statutory delegations and their willingness to do so. For this reason, state attorneys general are now the most important actors in the country in checking the executive branch's exercise of delegated authority.<sup>99</sup> Although that prominence is new, the principle is not. Suits by state attorneys general against the executive branch have emerged to perform a function envisioned by the framers, and fill a gap in our system of checks and balances that has formed as our constitutional system, and particularly the two-party system, has evolved. Ironically, it is the increased alignment of the state attorneys general with these national parties that has been part of the

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97. *Burwell*, 185 F. Supp. 3d at 189.

98. See *Comm. on the Judiciary v. Miers*, 558 F. Supp. 2d 53, 59, 65–78 (D.D.C. 2008) (rejecting the standing arguments of the Department of Justice under appointees of George W. Bush); Brief for Appellants at 1–3, 19–38, *Burwell*, 676 Fed. App'x 1 (No. 16-5202).

99. Earley, *supra* note 11, at 561.

impetus for their rise to prominence. There are, of course, dangers and potential harms of state attorneys general wielding such power. And there are theoretical arguments about why this role is not appropriate in our federal system.<sup>100</sup> But there are mechanisms for guarding against the dangers, and the theoretical objections do not fully account for the current operation of our constitutional and federal system. In the end, these potential harms and objections do not outweigh the benefit: delegation enforcement.

#### A. *States Are Uniquely Positioned for Delegation Enforcement*

States are the perfect hybrid. Not only do they have myriad ways to establish standing to sue the President or an executive branch agency, and exclusive doctrines by which to frame those suits in a favorable manner, but their participation is also controlled ultimately by the public interest, not private or corporate interests. Accordingly, states are not only *able* to bring a delegation enforcement action before federal court, they have the motivation and resources to do so and to pursue the action to a conclusion.

The Article III standing of states is a highly contested and somewhat “muddled” area,<sup>101</sup> and is one that has received an enormous amount of scholarly attention over the past several years, fueled in part by the rise of the state attorney general.<sup>102</sup> Almost every recent discussion, however, starts and, in a sense, ends with the Supreme Court’s most recent word on the issue: *Massachusetts v. EPA*.<sup>103</sup> In that case, the Supreme Court determined Massachu-

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100. These theoretical arguments must account for the role of states in checking the federal government, however. *See supra* note 20 (discussing the vertical separation of powers).

101. Jonathan R. Nash, *Sovereign Preemption State Standing*, 112 NW. U.L. REV. 201, 203 (2017).

102. *See, e.g.*, Tara Leigh Grove, *When Can a State Sue the United States?*, 101 CORNELL L. REV. 851, 895–96 (2016) (arguing that states have standing to protect state interests and that state attorneys general do not have incentives to protect the national public interest); Shannon M. Roesler, *State Standing to Challenge Federal Authority in the Modern Administrative State*, 91 WASH. L. REV. 637, 641 (2016) (arguing that injuries to state governance are ways to challenge federal authority); Stephen I. Vladeck, *States’ Rights and State Standing*, 46 U. RICH. L. REV. 845, 848 (2012) (asserting that a state has standing to challenge the federal government when the state is a federal stakeholder); Ann Woolhandler, *Governmental Sovereignty Actions*, 23 WM. & MARY BILL RTS. J. 209, 210–11 (2014) (observing how states can challenge the federal government to “vindicate sovereignty interests”); Ann Woolhandler & Michael G. Collins, *State Standing*, 81 VA. L. REV. 387, 394–95 (1995) (labeling the expansion of state standing as a “dynamic [period] in which the Court began to allow standing in state-as-plaintiff cases based on a broader array of litigable interests”).

103. 549 U.S. 497 (2007); *see* Nash, *supra* note 101, at 203.

setts had Article III standing to pursue a claim against the Environmental Protection Agency (“EPA”) for failing to regulate greenhouse gas emissions.<sup>104</sup> Before analyzing Massachusetts’s injury and potential remedy, the Court found it to be “of considerable relevance that the party seeking review here is a sovereign State,” and described a history of recognizing “that States are not normal litigants for the purposes of invoking federal jurisdiction.”<sup>105</sup> As Professor Jonathan Nash has described, the Supreme Court’s current jurisprudence establishes three potential bases for state standing: (1) an injury to sovereign interests, which include the “ability to enact and enforce its own laws”; (2) a direct injury, which Nash defines to include Article III injuries typically asserted by private parties as well as injuries grounded in constitutional provisions granting states specific rights, such as the Tenth Amendment; and (3) an injury to “quasi-sovereign . . . interests,” which are interests in the well-being of the state’s populace.<sup>106</sup>

For Nash, however, the decision in *Massachusetts v. EPA* “defies classification” and “leaves unclear the precise nature of the state injury that justified standing.”<sup>107</sup> Writing in the wake of this ambiguity, some scholars have argued that standing doctrine should give states “no special license to oversee the federal executive’s implementation of federal law” because states have no interest outside of their sovereign interests in preserving state law.<sup>108</sup> Other scholars have written in favor of a special standing doctrine for states, granting them “special solicitude” to challenge federal executive action.<sup>109</sup> But regardless of one’s favored theory for state standing or one’s interpretation of *Massachusetts v. EPA*, as a *descriptive* matter, the standing of a state to sue the federal government is, under current law, undoubtedly a *distinct* inquiry from the inquiry into a private party’s standing, and a more complex

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104. *Massachusetts v. EPA*, 549 U.S. at 526.

105. *Id.* at 518.

106. Nash, *supra* note 101, at 214–17.

107. *Id.* at 224.

108. Grove, *supra* note 102, at 886–87.

109. Calvin Massey, *State Standing After Massachusetts v. EPA*, 61 FLA. L. REV. 249, 249, 276 (2009) (arguing that broad state standing “does no more than ensure that executive discretion is confined within the boundaries of the Constitution and federal law”); Gillian E. Metzger, *Federalism and Federal Agency Reform*, 111 COLUM. L. REV. 1, 67–68 (2011) (suggesting a role for Congress in determining when states should have standing to challenge executive branch action).



one. By utilizing the “special solicitude” as well as the lack of clarity in *Massachusetts v. EPA*,<sup>110</sup> states are able to craft theories to establish standing in many ways unavailable to private parties.

These sovereign and quasi-sovereign theories of standing are not available to states as an *alternative* to the traditional ways that a private entity may establish standing; they are available *in addition* to traditional Article III injuries, what Nash includes in the category of “direct injuries.”<sup>111</sup> States have long maintained actions for direct injuries unrelated to their sovereignty.<sup>112</sup> And because a state, for purposes of litigation is in reality a collection of agencies and subdivisions that are subject to executive branch action, there are a host of ways in which a state may suffer such a direct injury. Like the United States Attorney General, most state attorneys general represent both the state *qua* state and state agencies, subdivisions, and officials in litigation.<sup>113</sup> Whereas private parties, including associations that include a number of entities, are typically limited to one industry or injury and thus no single entity is likely to be able to sue the executive branch across a wide range of regulatory frameworks, states are financial entities, healthcare entities, property owners, educational institutions, and many more things. In reality, almost any domestic action, or nonaction, by the executive branch will have some impact on a state entity, and that impact may be sufficient in and of itself to establish standing, even without resorting to “special solicitude.”

When states challenge federal executive action that could also be, or is, the subject of a challenge from a private party, their advantage continues. Whereas a private party may be limited to a particular cause of action, typically one arising under the APA, a state may be better positioned to assert challenges grounded in the Spending Clause, Tenth Amendment,<sup>114</sup> or other state-specific protections, and the states’ argument may have a better prospect of success on the merits due to their unique status. States have both exclusive constitutional rights on which to base a claim and quasi-sovereign interests to add to the calculus. States thus enjoy, both

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110. 549 U.S. at 520.

111. Nash, *supra* note 101, at 216–17.

112. *Id.*; Woolhandler & Collins, *supra* note 102, at 493–94.

113. See Vladeck, *supra* note 102, at 848; *What Does an Attorney General Do?*, NAT’L ASS’N OF ATT’YS GEN., [http://www.naag.org/naag/about\\_naag/faq/what\\_does\\_an\\_attorney\\_general\\_do.php](http://www.naag.org/naag/about_naag/faq/what_does_an_attorney_general_do.php) (last visited Feb. 12, 2018).

114. *But see* Bond v. United States, 564 U.S. 211, 220 (2011) (permitting an individual plaintiff to bring a Tenth Amendment claim).

in the standing analysis and in the analysis of the merits, a distinct advantage over private parties. For the most part, they can raise all the injuries and claims that a private party can, aside from those requiring personhood, and add to those the injuries and claims exclusively available to states. On top of both the traditional injuries and claims and the state-specific ones, a state can throw in elements of its unique sovereign and quasi-sovereign interests to add additional heft. In short, a state attorney general who desires to challenge a particular executive branch action as contrary to its statutory authorization will likely be able to come up with a reasonable theory to establish standing and a viable claim. And the state's theory will be more likely to succeed than a private party suit. In almost all circumstances, the state is better positioned than a private party for delegation enforcement.

Several cases demonstrate both the creativity and flexibility a state can employ to challenge actions that no other entity may have ultimately been able to bring or challenge in a more effective manner. When the Obama Administration issued its memorandum establishing the DAPA program, the objections were immediate but the potential for a judicial challenge was unclear.<sup>115</sup> Texas and several other States brought suit relying on a mix of traditional direct injuries in addition to the “special solicitude” for states, and they ultimately prevailed in the Fifth Circuit.<sup>116</sup> Although the Supreme Court ultimately split 4-4 and issued no opinion on the merits of the States' standing,<sup>117</sup> the States' brief on standing in the Supreme Court is a powerful display of the advantages a state has in suing the executive branch. The States cited no less than four bases for standing: (1) direct injury based on increased costs to issue driver's licenses to the unlawful immigrants who qualified for deferred action; (2) injury due to increased costs to provide social services, such as education, healthcare, and law enforcement, because immigrants who otherwise would have left will now remain; (3) injury to quasi-sovereign interests in protecting citizens from labor-

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115. See, e.g., Jan Ting, *President Obama's 'Deferred Action' Program for Illegal Aliens Is Plainly Unconstitutional*, CTR. FOR IMMIG. STUD. (Dec. 2, 2014), <https://cis.org/Report/President-Obamas-Deferred-Action-Program-Illegal-Aliens-Plainly-Unconstitutional> (noting that “access to judicial relief” to remedy what the author contended were the “plainly unconstitutional” actions of President Obama would be “hampered by the difficulties of showing that any particular citizen or group of citizens has ‘standing’ to challenge” the actions).

116. *Texas v. United States*, 809 F. 3d 134, 151–54 (5th Cir. 2015).

117. *United States v. Texas*, 579 U.S. \_\_\_, \_\_\_, 136 S. Ct. 2271, 2272 (2016) (per curiam).

market distortions due to the additional population eligible for work permits; and (4) standing based on the “special solicitude” given states in *Massachusetts v. EPA*.<sup>118</sup> The first two are traditional direct injuries similar to injuries a private party may allege; the third and fourth are sovereign injuries uniquely available to states. The fourth basis asserted by the States, “special solicitude,” was not necessarily asserted as an independent basis for standing, but as a kind of bonus added to the entirety of the standing analysis that is available exclusively to states.<sup>119</sup>

The threatened and actual litigation over the related DACA program demonstrates the power of state attorneys general. No matter what decision the Administration reached, it would have to defend it in court against plaintiffs who were motivated and whose claims could not be mooted—state attorneys general. At the beginning of the Trump Administration, most of the states that had sued to stop the DAPA program threatened to sue to stop the DACA program on similar grounds.<sup>120</sup> President Trump ultimately announced he would wind down the DACA program, mooting that lawsuit.<sup>121</sup> But, shortly thereafter, other state attorneys general,

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118. Brief for the State Respondents at 14–15, *United States v. Texas*, 579 U.S. \_\_\_, 136 S. Ct. 2271 (No. 16-674).

119. See *id.* at 18 (“But States are not ordinary litigants; they are due ‘special solicitude’ in the standing analysis.” (emphasis added)); see also *id.* at 34 (arguing that the United States’ argument that states are less likely to have standing than a private party “is thus precisely backwards” and is, in reality, a request “to overrule *Massachusetts*”).

120. On June 29, 2017, after the Secretary of Homeland Security had rescinded the DAPA program but left intact, at that time, the DACA program, the Attorney General of Texas, along with ten other state attorneys general, threatened to challenge the DACA program if it was not rescinded by September 5, 2017. Letter from Ken Paxton, Attorney Gen. of Tex., to the Honorable Jeff Sessions, Attorney Gen. of the U.S. (June 29, 2017), [https://www.texasattorneygeneral.gov/files/epress/DACA\\_letter\\_6\\_29\\_2017.pdf](https://www.texasattorneygeneral.gov/files/epress/DACA_letter_6_29_2017.pdf). The Attorney General of Tennessee later decided not to participate because of the “human element” and accomplishments of the DACA recipients despite continuing to believe the DACA program suffered the “same constitutional infirmities” as the DAPA program. Letter from Herbert H. Slatery III, Attorney Gen. & Reporter of Tenn., to Lamar Alexander and Bob Corker, U.S. Senators (Sept. 1, 2017), <http://i2.cdn.turner.com/cnn/2017/images/09/01/dacaletter9-1-2017.pdf>.

121. On September 5, 2017, Attorney General Sessions announced that the Administration would rescind the DACA program. Attorney Gen. Jeff Sessions, Remarks on DACA (Sept. 5, 2017), <https://www.justice.gov/opa/speech/attorney-general-sessions-delivers-remarks-daca>. Attorney General Sessions wrote a letter to the Acting Secretary of the Department of Homeland Security concluding that the DACA program was “an open-ended circumvention of immigration laws” and “an unconstitutional exercise of authority by the Executive Branch.” Letter from Honorable Jeff Sessions, Attorney Gen. of the U.S., to Elaine Duke, Acting Sec’y, Dep’t of Homeland Sec. (Sept. 4, 2017), <https://www.justice.gov/opa/speech/file/994651/download>; see also *Vidal v. Duke*, No. 17-cv-5228 (NGG) (JO), 2017 U.S. Dist. LEXIS 186349, at \*15–16 (E.D.N.Y. Nov. 9, 2017) (recounting this history).

along with individual plaintiffs, filed suit in two different district courts asserting that the Department of Homeland Security had acted arbitrarily in *rescinding* DACA and asking the federal courts to enjoin the Trump Administration from ending the program.<sup>122</sup> The federal government sought to dismiss both suits on justiciability grounds, but both courts found that the States had standing and that the issue was reviewable and not committed to the sole discretion of the executive branch.<sup>123</sup> In the New York litigation, which included fifteen States plus the District of Columbia, the court found that the “State Plaintiffs ha[d] amply alleged and documented that the rescission of DACA would harm the states’ proprietary interests as employers and in the operation of state-run colleges and universities.”<sup>124</sup> The court also noted that part of the government’s rationale for ending the program—that it could not be defended in court in light of the DAPA decision—“necessarily assumes that at least one of the plaintiff states in the [DAPA] litigation has standing” to challenge the DACA program.<sup>125</sup> In the California litigation, the district court relied on similar injuries to find that the States had standing.<sup>126</sup> Ultimately, both district courts concluded that the rescission had been arbitrary because it was based wholly on an incorrect view of the law, and enjoined the executive branch from ending the DACA program.<sup>127</sup> The Department of Justice took the highly unusual step of asking the Supreme Court to review one of the decisions immediately and skip an appeal to the Ninth Circuit.<sup>128</sup> But this litigation, like *Massachusetts v. EPA*, shows that state attorneys general may also sue to *force*

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122. *Vidal*, 2017 U.S. Dist. LEXIS 186349, at \*19–21; *Regents of the Univ. of Cal. v. U.S. Dep’t of Homeland Sec.*, No. C 17-05211 WHA, 2018 U.S. Dist. LEXIS 4036, at \*34–35 (N.D. Cal. Jan. 9, 2018).

123. *Vidal*, 2017 U.S. Dist. LEXIS 186349, at \*33–35, \*37–38, \*52–53, \*55–58, \*61–65; *Regents of the Univ. of Cal.*, 2018 U.S. Dist. LEXIS 4036, at \*43–48, \*58–59. In the California litigation, Maine’s and Minnesota’s claims under the APA were dismissed for lack of standing with leave to amend. *Regents of the Univ. of Cal.*, 2018 U.S. Dist. LEXIS 4036, at \*59.

124. *Vidal*, 2017 U.S. Dist. LEXIS 186349, at \*61–62.

125. *Id.* at \*64.

126. *Regents of the Univ. of Cal.*, 2018 U.S. Dist. LEXIS 4036, at \*51–54 (noting the injuries to the states as employers, the injuries to their public universities, and the injuries to tax revenue and public health programs).

127. *Vidal v. Nielsen*, No. 16-CV-4756 (NGG) (JO), 2018 U.S. Dist. LEXIS 23547, at \*14–15 (E.D.N.Y. Feb. 13, 2018); *Regents of the Univ. of Cal.*, 2018 U.S. Dist. LEXIS 4036, at \*86, \*91.

128. See Amy Howe, *Trump Administration Asks Supreme Court to Intervene on DACA*, SCOTUSBLOG (Jan. 18, 2018, 9:02 PM), <http://www.scotusblog.com/2018/01/trump-administration-asks-supreme-court-intervene-daca/>.

the executive branch to act in accordance with statutory mandates that accompany the exercise of delegated authority.<sup>129</sup>

The litigation over President Trump's travel ban similarly shows the unique ability of states to bring and maintain suits against the executive branch. Whereas Texas and other States sued the Obama Administration under the APA because the DAPA memorandum was issued by an agency, the travel ban litigation involved executive orders and a presidential proclamation, which are typically not subject to APA challenge. Washington and Minnesota, and later Hawaii, all sued the Administration, successfully, claiming the second executive order caused both direct and sovereign injuries.<sup>130</sup> The direct injuries on which they relied were numerous—injuries to tax revenues, state universities, businesses operating within the state, and tourism, among others.<sup>131</sup> They also relied on sovereign injuries; Hawaii, for example, asserted that it had a sovereign interest in enforcing its laws and policies related to refugees, equal rights, and diversity, and that the travel ban interfered with its sovereign ability to enforce these laws and policies.<sup>132</sup> The travel ban challenges, which also involved numerous private plaintiffs, demonstrate the advantage states have in the standing analysis. While the challenges that worked their way through the Fourth Circuit faced numerous questions about the continued viability of some of the plaintiffs,<sup>133</sup> and the claim of any individual plaintiff could potentially be mooted by allowing that individual or

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129. Another example of this action-forcing litigation by state attorneys general is the recent suit filed by ten States and the District of Columbia seeking to force the Administration to implement the Waters of the United States ("WOTUS") Rule promulgated under the Obama Administration after the EPA and Army Corps of Engineers promulgated a new rule delaying its effective date for two years. *See* Complaint, *New York v. Pruitt*, No. 1:18-cv-01030-JPO (S.D.N.Y. filed Feb. 6, 2018); Jenna R. Mandell-Rice et al., *EPA and Corps Amend Effective Date of WOTUS Rule, Open Door to Legal Challenges*, NAT'L L. REV. (Feb. 13, 2018), <https://www.natlawreview.com/article/epa-and-corps-amend-effective-date-wotus-rule-open-door-to-legal-challenges>.

130. *Hawaii v. Trump*, 859 F.3d 741, 763, 789 (9th Cir. 2017); *Washington v. Trump*, 847 F.3d 1151, 1156 (9th Cir. 2017) (per curiam).

131. *Hawaii v. Trump*, 859 F.3d at 763; *see also* Complaint for Declaratory and Injunctive Relief at 1–2, *Washington v. Trump*, No. 2:17-cv-00141-JLR, 2017 U.S. Dist. LEXIS 16012 (W.D. Wash. Feb. 3, 2017); Response to Application for Stay Pending Appeal to the United States Court of Appeals for the Ninth Circuit at 16–18, *Trump v. Hawaii*, 582 U.S. \_\_\_, 137 S. Ct. 2080 (2017) (No. 16-1540).

132. *Hawaii v. Trump*, 859 F.3d at 765.

133. *Int'l Refugee Assistance Project v. Trump*, 857 F.3d 554, 581 (4th Cir.), *vacated as moot*, 583 U.S. \_\_\_, \_\_\_, 138 S. Ct. 353 (2017).

his or her family member into the United States, the state challenges faced no such difficulties. They had such a varied basis for standing that mooted the challenge would have been impossible.

A recent complaint by the State of Texas and a private party filed against the United States Department of the Interior similarly displays both the advantage states have in establishing standing, as well as the advantage states have by being able to bring additional theories for relief. The case originates in a Texas family court decision that denied an adoption petition submitted by a couple who had cared for a two-year-old Native American child since he was ten months old, based on a rule issued by the Bureau of Indian Affairs to implement the Indian Child Welfare Act, 25 U.S.C. §§ 1901-1963.<sup>134</sup> The couple challenged the rule under the APA and the Constitution, but the State also added claims alleging the rule violated the Spending Clause, the non-delegation doctrine, the anti-commandeering principle, and the Tenth Amendment.<sup>135</sup> No matter the ultimate resolution of the claim or the view one has of state challenges to the federal government, that particular challenge to a federal agency's exercise of its delegated authority is in a much stronger position given the state's participation. There are, of course, numerous other examples of states using the "special solicitude" they enjoy or their unique state sovereignty claims to challenge the exercise of statutory authority.<sup>136</sup>

### B. *In Furtherance of a Constitutional Principle*

Statutory delegations to the executive branch, and particularly the President, have few, if any, inherent constitutional constraints and are difficult, or even impossible, for Congress or a private party to enforce. Even when it may be possible, Congress and private parties who are affected by the executive branch's action may simply not want to enforce the delegation's limits. States, however, are uniquely suited to bring the executive branch's actions before the judiciary. Given the two-party system and the multitude of

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134. Complaint at 1–2, *Brackeen v. Zinke*, No. 4:17-cv-00868 (N.D. Tex. filed Oct. 25, 2017).

135. *Id.* at 2, 40, 55–57.

136. See, e.g., *Wyoming v. United States*, 539 F.3d 1236, 1238–39 (10th Cir. 2008) (including Wyoming's challenge to an ATF explosives rule); *Oregon v. Ashcroft*, 192 F. Supp. 2d 1077, 1078–79 (D. Or. 2002) (challenging the Attorney General's exercise of authority under the Controlled Substances Act), *aff'd sub nom.* *Gonzales v. Oregon*, 546 U.S. 243, 274–75 (2006).

state attorneys general, there will almost always be a group of states or state attorneys general from the opposite party of the President who are more than willing to challenge the actions, to further either the national policy supported by the majority of the state, inherent state interests or policies, or even personal political gain. State attorneys general are thus at the forefront of delegation enforcement in the current constitutional climate. The question remains whether that climate is a desirable one.

This article suggests that it is. The immediate inclination may be that it is not desirable, for a number of reasons. State attorneys general are state officials, are charged with enforcing state interests, and some assert they should have no formal role to play in the federal government. As Professor Tara Leigh Grove argues, “state attorneys general are not likely to be particularly savvy overseers of the federal executive’s implementation of federal law” because they ultimately “serve the interests of [their] State” and have “little incentive to focus on the national public interest.”<sup>137</sup> Further, these suits are undeniably driven by politics, both with respect to the policy aspects and the individual political esteem that a state attorney general can achieve by bringing the suit.<sup>138</sup> Finally, a number of these suits will not involve what are typically thought of as “state” interests. Although states claim sovereign and quasi-sovereign injuries and raise state-based claims, such as the Tenth Amendment or Spending Clause challenges, they are in many instances suing the federal government for *national* policy reasons, or at least in part due to those reasons, and using their sovereign status as an advantage.

These concerns may be valid to some degree, and there are numerous dangers and concerns that arise out of the newfound prominence of state attorneys general, several of which are discussed below. But, ultimately, the benefit of state delegation enforcement to our constitutional system outweighs the cost and the potential danger. As Professor Abner Greene argued over two decades ago in proposing that *Chevron* and *Chadha* be revised, the modern administrative state, which has ushered in an “era of presidential lawmaking” has, in combination with the veto power, left our con-

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137. Grove, *supra* note 102, at 897–98.

138. *See id.* at 897.

stitutional system void of a check on the executive branch's exercise of delegated authority.<sup>139</sup> Greene suggested that his proposals, though "far from the specific structure that the framers envisioned" were "far closer to their underlying principles than the present system, which allows the President to make policy while effectively preventing Congress from doing anything about it."<sup>140</sup> The same is true of delegation enforcement by state attorneys general. State attorneys general are fulfilling a need that has emerged in the constitutional framework as a result of three circumstances: (1) the development of the administrative state; (2) the weakening of Congress as an institution as a result of gridlock and partisanship; and (3) the executive branch's willingness to go to the limit of vague statutory boundaries where necessary to achieve policy gains, particularly during divided government. In some circumstances, without state attorneys general, there may be no effective check on executive branch action aside from internal legal advisors.

The best evidence of this comes, ironically, in areas in which states enjoy no special advantages and, like private parties, have little power to challenge executive action: war powers. During the Obama Administration, former Assistant Attorney General Jack Goldsmith, among others, criticized President Obama's asserted war power authority, claiming that future historians will "puzzle over how Barack Obama, the prudent war-powers constitutionalist, transformed into a matchless war-powers unilateralist."<sup>141</sup> Professor Bruce Ackerman opined that "[n]othing attempted by [President Obama's] predecessor, George W. Bush, remotely compare[d] in imperial hubris" with President Obama's actions.<sup>142</sup> Although President Obama based his assertions of authority on a *statute*, namely the 2001 Authorization for the Use of Military Force, and the Bush Administration had been the subject of considerable criticism for positions it had taken on the unilateral *constitutional* powers of the President, these criticisms were expressly based on

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139. See Greene, *supra* note 21, at 124, 184–96.

140. *Id.* at 196.

141. Jack Goldsmith, *Obama's Breathtaking Expansion of a President's Power to Make War*, TIME (Sept. 11, 2014), <http://time.com/3326689/Obama-isis-war-powers-bush/>; see Jack Goldsmith & Matthew Waxman, *Obama, Not Bush, Is the Master of Unilateral War*, NEW REPUBLIC (Oct. 14, 2014), <https://newrepublic.com/article/119827/obamas-war-powers-legacy-he-must-look-for-congressional-authorization>.

142. Bruce Ackerman, Opinion, *Obama's Betrayal of the Constitution*, N.Y. TIMES (Sept. 11, 2014), <https://www.nytimes.com/2014/09/12/opinion/obamas-betrayal-of-the-constitution.html>.



the danger presented to the separation of powers by broad interpretations of statutory authorization.<sup>143</sup> As Goldsmith put it: “The President’s gambit is, at bottom, presidential unilateralism masquerading as implausible statutory interpretation.”<sup>144</sup> The President’s exercise of his war powers—whether grounded in the Constitution or in a statute—is unlikely to be challenged, except possibly in the context of detention.<sup>145</sup> By locating the power in a *statutory* authorization, the Obama Administration claimed congressional approval and authorization of its actions.<sup>146</sup> The executive branch’s legal position thus rested, and continues to rest in the current Administration, on its interpretation of a statute passed by Congress,<sup>147</sup> an interpretation that scholars and experts from both parties consider highly questionable.<sup>148</sup> But no outside entity has ever had the opportunity to test it.

Whatever one thinks of the lack of an outside entity analyzing the statutory interpretations of the executive branch in the context of war powers, the lack of any check in the context of domestic legal policies adopted pursuant to delegated authority should be cause for concern. In the context of war powers and foreign relations, the President has considerable constitutional authority, though its relation to congressional authorities is a longstanding constitutional debate. The President and executive branch more broadly have *no* constitutional power to make law domestically. When they do so pursuant to delegation, some outside check on that exercise of authority is both appropriate and necessary to the constitutional system.

The fundamental premise of this article is that the executive branch’s interpretation of its statutory authority to act domestically should never be unchallengeable. As Justice Scalia rightly

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143. *See id.*

144. Goldsmith, *supra* note 141.

145. *Hamdi v. Rumsfeld*, 542 U.S. 507, 552 (2004).

146. Goldsmith & Waxman, *supra* note 141.

147. *See* Letter from Charles Faulkner, U.S. Dept. of State, to Bob Corker, Chairman, Sen. Comm. on Foreign Relations (Aug. 2, 2017), <https://www.politico.com/f/?id=0000015d-a3bf-d43a-a3dd-b3bf14170000>; Sarah Grant & Jack Goldsmith, *The Scope of the Endless War After One Year Under Trump*, LAWFARE (Jan. 19, 2018, 2:38 PM), <https://www.lawfareblog.com/scope-endless-war-after-one-year-under-trump>.

148. *See, e.g.*, Bruce Ackerman, *The War Against ISIS Is Unconstitutional*, LAWFARE (May 5, 2016, 2:10 PM), <https://www.lawfareblog.com/war-against-isis-unconstitutional>; Amanda Taub, *Experts: Obama’s Legal Justification for the War on ISIS Is “a Stretch,”* VOX (Sept. 12, 2014, 8:20 AM EDT), <https://www.vox.com/iraq-crisis/2014/9/12/6134159/is-obam-as-new-isis-strategy-legal>; *see also* Ackerman, *supra* note 142; Goldsmith, *supra* note 141.

noted, the execution of the law, which is entrusted to the President and, in the modern administrative state, executive branch agencies, inherently involves some interpretation and, hence, each statutory authority is some delegation of a “legislative” authority.<sup>149</sup> In many cases, private individuals, organizations, and corporate bodies challenge the execution of these legislative authorities. But in some cases, such challenges are unlikely. Given Congress’s impotence, a President faced with legislative gridlock and wanting to achieve some policy or political gains has every incentive to interpret the “legislative” authority given to the executive branch in a particular statute as broadly or loosely as possible to achieve those gains. That temptation is only amplified in situations where private party challenges are unlikely to be viable in a court.

The possibility, or at this point, the inevitability, of a legal challenge by state attorneys general, despite the potential dangers and formalist objections, is likely to give pause to an administration tempted in this manner. State attorneys general have demonstrated an increasing willingness to utilize their resources on such challenges, to bring on talented people willing and able to engage in litigation with the federal government about fundamental issues related to the separation of powers, and to hire top-flight litigators to help them bring specific challenges when warranted.<sup>150</sup> The existence of this group of highly motivated, able, and diverse individuals and institutions ensures that the executive branch takes the limits of statutory delegations seriously and does not lightly interpret statutes to have such delegation. In other words, state attorneys general serve as a check on the executive branch where one otherwise may not exist. The existence of their threat is ever-present and obvious as the executive branch chooses its actions. State attorneys general thus further a fundamental principle of our constitutional system by acting as an outside check on the exercise of executive authority in order to protect individuals and their liberty from a government in which the powers have not been separated. Although state attorneys general are not a formal part of the Constitution’s separation of legislative and executive powers, they have become vital to protecting it in light of the evolution of the

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149. *Mistretta v. United States*, 488 U.S. 361, 416–17 (1989) (Scalia, J., dissenting).

150. For example, in the litigation over President Trump’s travel ban, the State of Hawaii has been represented by former Acting Solicitor General Neal Katyal, now the head of the Supreme Court and Appellate Practice at Hogan Lovells U.S. LLP. See Brief in Opposition, *Trump v. Hawaii*, No. 17-965 (9th Cir. filed Jan. 12, 2018).

administrative state and statutory delegation. Without them, delegation enforcement may be impossible.

### C. *Objections and Potential Dangers*

The National Association of Attorneys General (“NAAG”) is not referred to in jest as the “National Association of Aspiring Governors” without reason.<sup>151</sup> Forty-three of the fifty-one state attorneys general (including the District of Columbia) are elected to their position,<sup>152</sup> and a significant percentage of state attorneys general go on to run for political office, either in the state or nationally. An attorney general of a particular party wishing to bolster his or her credentials for future political office can do nothing better than sue a President from the opposite party to oppose a policy or regulatory decision. A prominent example, of course, was then-Attorney General, now-Governor of Texas Greg Abbott, who boasted his job as attorney general consisted of “go[ing] into the office” and “su[ing] the federal government” during the Obama Administration.<sup>153</sup> Similarly, numerous state attorneys general have gained national prominence during the Trump Administration based on their outspoken intent to challenge the Administration in court.<sup>154</sup> Of course, such suits may also be motivated by the state attorney general’s desire to alter policy on behalf of his or her state, not for future electoral gain, but for the policy outcome itself, which reflects the political inclination of the attorney general’s state.<sup>155</sup>

Some may criticize the emerging prominence of state attorneys general and lament the fact that policy matters are often ultimately decided by the judicial, rather than the political, branches. Also open to attack are related doctrines that facilitate this type of suit or add to its efficacy, doctrines such as the “special solicitude”

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151. Larry J. Sabato, *The AG: Attorney General as Aspiring Governor*, U. VA. CTR. FOR POL.: SABATO’S CRYSTAL BALL (Apr. 22, 2010), <http://www.centerforpolitics.org/crystallball/articles/ljs2010042201/>.

152. *About NAAG*, NAT’L ASS’N OF ATT’YS GEN., [http://www.naag.org/naag/about\\_naag.php](http://www.naag.org/naag/about_naag.php) (last visited Feb. 12, 2018).

153. Josh Blackman, *SCOTUS After Scalia*, 11 N.Y.U.J.L. & LIBERTY 48, 126 (2017).

154. *See* Neuhauser, *supra* note 7.

155. Grove, *supra* note 102, at 897–98.

or state standing adopted in *Massachusetts v. EPA*<sup>156</sup> or the concept of the nationwide injunction.<sup>157</sup> These criticisms have some merit, and there are many unanswered questions about the proper role of state attorneys general and the judiciary in the context of national policy. If state attorneys general begin operating as the mouth of national political parties rather than of their individual states, the more likely it becomes that the doctrines that afford them their unique status may be changed. The perception of the nature of the position, and the nature of subordinate career positions within the offices of state attorneys general, may shift from one of legal deference and prominence to one of pure politics.<sup>158</sup> Moreover, if state attorneys general focus primarily on the interests of the dominant political party in their state, they may overlook or not prioritize structural state interests, or bipartisan cooperation in support of these state interests may become more difficult.

The increased money that has begun flowing to state attorney general elections and to the national organizations aligned with the two major political parties—RAGA and DAGA—adds to the potential dangers associated with the emergence of the state attorney general. The *New York Times* published a series of pieces detailing the explosion of lobbying of state attorneys general by corporate interests and the attendant money.<sup>159</sup> The recent revelations emerging out of the emails of EPA Administrator Scott Pruitt when he was the Oklahoma Attorney General have raised concerns about the relationship of state attorneys general and industry actors in developing legal challenges to the federal government.<sup>160</sup>

Ultimately, though, these objections are premised on the idea that state attorneys general should not be influenced, or at least overly influenced, by money or politics in their objections to the

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156. 549 U.S. 497, 520 (2007).

157. See generally Samuel L. Bray, *Multiple Chancellors: Reforming the National Injunction*, 131 HARV. L. REV. 417 (2017); Michael T. Morley, *Nationwide Injunctions Rule 23(B)(2), and the Remedial Powers of the Lower Courts*, 97 B.U.L. REV. 615 (2017).

158. See Neuhauser, *supra* note 7.

159. See Eric Lipton, *Courting Favor*, N.Y. TIMES, [www.nytimes.com/interactive/2015/us/politics/attorneys-general.html](http://www.nytimes.com/interactive/2015/us/politics/attorneys-general.html) (publishing a series of articles regarding lobbying of state attorneys general) (last visited Feb. 12, 2018).

160. See, e.g., Brady Dennis & Steven Mufson, *Thousands of Emails Detail EPA Head's Close Ties to Fossil Fuel Industry*, WASH. POST. (Feb. 22, 2017), [https://washingtonpost.com/news/energy-environment/wp/2017/02/22/oklahoma-attorney-generals-office-releases-7500-pages-of-emails-between-scott-pruitt-and-fossil-fuel-industry/?utm\\_term=.dbba5d8a1639](https://washingtonpost.com/news/energy-environment/wp/2017/02/22/oklahoma-attorney-generals-office-releases-7500-pages-of-emails-between-scott-pruitt-and-fossil-fuel-industry/?utm_term=.dbba5d8a1639) (discussing the close relationship between Scott Pruitt and actors in the fossil fuel industry).

federal government. There are certainly good reasons from the perspective of the office of state attorneys general to hold that view, and there are reasons to argue that state attorneys general have many areas of bipartisan agreement and shared state interests that may be hindered as sharper divisions develop among political lines mirroring the federal government. Moreover, state attorneys general, like any government agency, have limited resources and a focus on suing the federal government may take resources away from more state-oriented tasks, such as consumer protection or law enforcement.

All of these objections, however, are directed at the potential harms to the role of the state attorney general. They all likely have some validity, some perhaps significant enough to warrant reconsideration of aspects of state attorneys general, such as their popular election, and rules to combat the influence of industry money and lobbying. None of these objections, however, originate from the perspective of the *national, constitutional* system of government. From that perspective, it is hard to see why the fact that state attorneys general may be influenced by outside political money or considerations is detrimental to the operation of the federal government. To the contrary, this article asserts that this aspect of state attorneys general may be *beneficial* to our constitutional system. If state attorneys general were not aligned with national political parties, they would have less motivation to challenge executive actions, particularly those of an opposite-party President. Professor Grove asserts that state attorneys general are “not likely to be particularly savvy overseers of the federal executive’s implementation of federal law,” in part, because “we should expect these state officials to bring suits against federal agencies that serve state, not national, interests.”<sup>161</sup> But that neglects the current reality of state attorneys general associated with national parties who often sue to serve state interests that mirror the national interests of that party, in opposition to the executive branch of the other party.

Contrary to Professor Grove’s assertion, this article asserts that state attorneys general are *likely* to be “savvy overseers” of the executive branch’s exercise of delegated authority. Or, if not “overseers,” they are savvy monitors able to raise a question where one may exist. State attorneys general can allege injuries and rights

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161. Grove, *supra* note 102, at 897–98.

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unavailable to private parties to bring executive actions before a court, and they are motivated and equipped to do so vigorously and effectively. In many cases, the alternative is that the executive actions are not subject to outside review, or, if so, a more limited one. State delegation enforcement is preferable to that alternative, even if it comes at the cost of enabling state political figures to function as a part of the checks and balances in the federal separation of powers.