Fordham Law Review

Volume 79 | Issue 6 Article 3

November 2011

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Recommended Citation
Harold J. Krent, *Federal Power, Non-Federal Actors: The Ramifications of Free Enterprise Fund*, 79 Fordham L. Rev. 2425 (2011).
Available at: https://ir.lawnet.fordham.edu/flr/vol79/iss6/3

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FEDERAL POWER, NON-FEDERAL ACTORS: THE RAMIFICATIONS OF *FREE ENTERPRISE FUND*

*Harold J. Krent**

In *Free Enterprise Fund v. Public Company Accounting Oversight Board*[1] the U.S. Supreme Court invalidated Congress's decision to protect members of the Public Company Accounting Oversight Board (PCAOB) from at will removal by the Securities and Exchange Commission, whose members in turn are protected from at will removal at the hands of the President.[2] The case arose out of Congress's establishment of the Board as part of the Sarbanes-Oxley Act[3] to regulate accounting methods and procedures for publicly traded companies.[4] Accounting firms must register with the Board and comply with its regulatory standards.[5] In addition, the PCAOB conducts inspections of registered accounting firms, both on a regular basis and in response to allegations of noncompliance with its standards.[6] *Free Enterprise Fund* is the first decision in almost a century to prohibit Congress from cushioning an executive branch official from removal, and the decision, as a consequence, will refuel debate over the scope and nature of independent agencies.

In the Court's view, the congressional structure—in particular, the double layer of tenure insulation—undermined the Article II imperative that all exercises of significant executive authority be subject to strong supervision by the President. As the Court explained, "[t]he diffusion of power carries with it a diffusion of accountability. . . . Without a clear and effective chain of command, the public cannot 'determine on whom the blame or the punishment of a pernicious measure, or series of pernicious measures ought really to fall.'"[7] Given the departure from clear lines of authority, "[t]he result is a Board that is not accountable to the President, and a President

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1. 130 S. Ct. 3138 (2010).
2. *Id.* at 3164. The Supreme Court so concluded on the basis of the parties' stipulation. *Id.* at 3148–49; *id.* at 3182 (Breyer, J., dissenting).
3. Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, 116 Stat. 745.
4. *Free Enter. Fund*, 130 S. Ct. at 3147–49.
5. *See* 15 U.S.C. §§ 7212–7213 (2006).
6. *Id.* § 7214.
7. *Free Enter. Fund*, 130 S. Ct. at 3155 (2010) (quoting THE FEDERALIST NO. 70 (Alexander Hamilton)).

who is not responsible for the Board."[8] The dissenters questioned why removal should be viewed as so central to the question of accountability under Article II, as opposed to other supervisory tools, such as rulemaking, funding, and the like.[9] The dissent expressed concern for the fate of analogous agency structures that the majority decision placed in jeopardy, such as for administrative law judges shielded from at will dismissal at the hands of agency officials who themselves also are removable only for cause.[10]

Curiously, the dissenting opinion only tangentially considered the impact of the majority's decision on delegations *outside* the executive branch. The Court's insistence in *Free Enterprise Fund* on formal presidential control over an inferior executive branch entity should cast grave doubt on the constitutionality of comparable congressional delegations to private entities. Should Congress delegate to a private or state entity, *no* removal is likely possible, let alone the removal for cause found insufficient in *Free Enterprise Fund*. Had Congress delegated the same financial oversight duties scrutinized in *Free Enterprise Fund* to a commission comprised of the heads of Deloitte, PricewaterhouseCoopers, KPMG, and Ernst & Young, the President's removal authority would be further eroded, as would be the case if Congress had delegated that authority to a commission of state secretaries of the Treasury. The recent Supreme Court decision therefore may toll congressional experimentation to vest executive authority in private and state hands.

Ironically, Congress by its own terms created the PCAOB outside of the federal government. Congress provided that members of the Board were not to be considered "officer[s] . . . or agent[s of] the Federal Government."[11] Moreover, Congress determined that the Board "shall not be an agency or establishment of the United States Government."[12] Congress also determined that the salary of Board members should be set in accordance with the private market.[13] Congress presumably wished to ensure that individuals with wide experience in public accounting could be persuaded to participate in the regulatory initiative.[14] Had the Court taken Congress at its word, then its path in *Free Enterprise Fund* might have been much simpler. The Court could have assessed whether Congress had the

8. *Id.* at 3153.

9. *Id.* at 3179–80 (Breyer, J., dissenting); *see also id.* app. A, at 3184–92.

10. *Id.* at 3180–81.

11. 15 U.S.C. § 7211(b) (2006).

12. *Id.*

13. *See* Donna M. Nagy, *Is the PCAOB A "Heavily Controlled Component" of the SEC?: An Essential Question in the Constitutional Controversy*, 71 U. PITT. L. REV. 361, 372 (2010) (noting that PCAOB Board members' "salaries are almost four times the amount received by the SEC's Chairman and Commissioners, but are comparable to those commanded in the private sector."); *see also* S. REP. NO. 107-205, at 7 (2002) (stating that competitive salaries for PCAOB staff members were essential to ensure that the "Board have a strong, well-trained, and experienced staff, of sufficient size to carry out its responsibilities").

14. *See* Richard H. Pildes, *Separation of Powers, Independent Agencies, and Financial Regulation: The Case of the Sarbanes-Oxley Act*, 5 N.Y.U. J. L. & BUS. 485, 504–06 (2009).

power to delegate the accounting and inspection duties to an outside entity and thereby avoided its more controversial decision that the double layer of tenure insulation violated Article II. The logic of the majority's decision seemingly would have militated for invalidation on the ground that such significant authority could not, consistent with Article II, be vested in a private entity.[15] Indeed, much of the early controversy surrounding the creation of the PCAOB focused on whether a private entity could discharge the regulatory role that Congress in fact assigned to the Board.[16] The Court in part dismissed that line of inquiry only because it accepted the parties' stipulations that the Board, despite Congress's labeling to the contrary, should be considered a public entity.[17]

The Obama administration has seemed willing to share power with both private and state entities. Congress, with the President's acquiescence, has proposed that a private entity—the National Academy of Sciences—play a determinative role in setting global warming policy.[18] In addition, the administration agreed to a proposal creating a private Cybersecurity Advisory Panel that could have vetoed the Department of Commerce's contract with the Internet Corporation for Assigned Names and Numbers (ICANN).[19] Moreover, the health care reform bill includes a delegation to a state entity, the National Association of Insurance Commissioners (NAIC), to determine medical loss ratio standards which, to some extent, are binding on the Department of Health and Human Services.[20] These initiatives have received scant attention.

The Supreme Court's decision in *Free Enterprise Fund*, therefore, provides renewed reason to consider whether congressional delegations outside the federal government pose the same threat to accountability as does delegation to the PCAOB. In Part I, I argue that the reasoning in the recent Supreme Court decision should apply to delegations outside, as well

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15. With respect to the removal provision, Chief Justice Roberts confusingly observed that,

> The rigorous standard that must be met before a Board member may be removed was drawn from statutes concerning private organizations like the New York Stock Exchange. While we need not decide the question here, a removal standard appropriate for limiting Government control over private bodies may be inappropriate for officers wielding the executive power of the United States.

Free Enter. Fund, 130 S. Ct. at 3158 (citation omitted). Rather, the relevant question should be whether the individual to be removed is exercising significant authority under the laws of the United States.

16. *See* Donna M. Nagy, *Playing Peekaboo with Constitutional Law: The PCAOB and Its Public/Private Status*, 80 NOTRE DAME L. REV. 975, 1000–03 (2005).

17. *Free Enter. Fund*, 130 S. Ct. at 3148 (citing Brief for Petitioners, *Free Enter. Fund*, 130 S. Ct. 3138 (No. 08-861) 2009 WL 2247130, at *9 n.1; Brief for the U.S, *Free Enter. Fund*, 130 S.Ct. 3138 (No. 08-861) 2009 WL 3290435, at *29 n.8). The Court also posited that congressional labeling was not dispositive, relying on its prior opinion in *Lebron v. National Railroad Passenger Corp.*, 513 U.S. 374 (1995). *Free Enter. Fund*, 130 S. Ct. at 3148.

18. American Clean Energy and Security Act of 2009 (Waxman-Markey Bill), H.R. 2454, 111th Cong. § 707.

19. S. 773, 111th Cong. § 8 (2010).

20. Patient Protection and Affordable Care Act, Pub. L. No. 111-148, § 2715, 124 Stat. 119, 885–87 (2010) (to be codified at 42 U.S.C. § 300gg-15).

as inside, the federal government. I summarize reasons that I have previously presented for why delegations to private parties should be cabined.[21] *Free Enterprise Fund*, in my view, strongly supports that view and suggests that the roles accorded to private entities in the Cybersecurity and National Academy of Sciences examples would be unconstitutional, admittedly despite prior Supreme Court precedents that seemingly countenance such delegations.

In Part II, however, I conclude that a similar delegation to a state entity should survive the *Free Enterprise Fund* analysis. Although the same concern for executive branch control exists, our structure of federalism presupposes that the federal government can share power with the states. Even though lines of accountability can become blurred, as in the NAIC example, accountability nonetheless can be attained through the political process in the respective states. Moreover, the fear of congressional aggrandizement is much reduced when Congress delegates to state as opposed to private entities. Accordingly, this Essay concludes that *Free Enterprise Fund* should bar delegations of significant authority to private individuals and groups, but leave untouched most congressional efforts to share power with state governmental entities.

I. DELEGATION JURISPRUDENCE AND *FREE ENTERPRISE FUND*

Congress at times has experimented by delegating a range of duties to private parties. Indeed, Presidents largely have acquiesced in such delegations. As with the congressional creation of the PCAOB, eliciting private party participation more directly can ensure greater expertise in governing and provide political cover for potentially unpopular regulatory initiatives.

A. Prior Judicial Precedents

Although most delegations to private parties have gone unchallenged by litigants, courts have reviewed challenges to a number of congressional schemes. The canonical case is *Carter v. Carter Coal Co.*[22] There, the Supreme Court considered a statutory scheme in which a majority of miners, and the producers of two-thirds of the annual tonnage of coal, established working conditions that would bind the entire group.[23] The maximum hours of work could be set, as well as the minimum wage.[24] The Court explained that "[t]he effect, in respect to wages and hours, is to subject the dissentient minority . . . to the will of the stated majority."[25] In other words, "[t]he power conferred upon the majority is, in effect, the power to regulate the affairs of an unwilling minority."[26] The Court

21. *See* Harold J. Krent, *The Private Performing the Public: Delimiting Delegation to Private Parties*, 65 U. MIAMI L. REV. 507 (2011).
22. 298 U.S. 238 (1936).
23. *Id.* at 310–11.
24. *Id.*
25. *Id.* at 311.
26. *Id.*

concluded that "[t]his is legislative delegation in its most obnoxious form; for it is not even delegation to an official or an official body, presumptively disinterested, but to private persons whose interests may be and often are adverse to the interests of others in the same business."[27] To the Court, the private status of the decisionmakers rendered the delegation more suspect.

In *A. L. A. Schechter Poultry Corp. v. United States*,[28] as well, the Court questioned Congress's reliance on private parties to establish codes of fair competition under the National Industrial Recovery Act (NIRA).[29] Under the Act, trade groups proposed codes of fair competition for ultimate approval by the President.[30] The Court struck down those sections of the NIRA on both nondelegation and Commerce Clause grounds.[31]

In so doing, the Court noted the sweeping power exercised by private entities, even though the proposed codes were subject to presidential authorization. The Court asked, "would it be seriously contended that Congress could delegate its legislative authority to trade or industrial associations or groups so as to empower them to enact the laws they deem to be wise and beneficent for the rehabilitation and expansion of their trade or industries?"[32] Although acknowledging that Congress understandably might wish to delegate to private parties "because such associations or groups are familiar with the problems of their enterprises," the Court emphatically stated that "[s]uch a delegation of legislative power is unknown to our law and is utterly inconsistent with the constitutional prerogatives and duties of Congress."[33]

No delegation to private parties after *Carter Coal* and *Schechter*, however, has been invalidated. Courts subsequently have upheld powers delegated to producer groups under the Agricultural Marketing Agreement Act of 1937[34] and similar statutes.[35] In *Sunshine Anthracite Coal Co. v. Adkins*[36] for example, the Supreme Court held that the advisory role private

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27. *Id.*

28. 295 U.S. 495 (1935).

29. Act of June 16, 1933, ch. 90, 48 Stat. 195, *invalidated by Schechter*, 295 U.S. 495.

30. *Schecter,* 295 U.S. at 521–22.

31. *Id.* at 551. Congress has delegated to private parties in numerous other contexts and these delegations have, on occasion, been more direct. In 1893, Congress delegated authority to the American Railway Association to establish a mandatory height for drawbars on railroad cars, and legislated that failure to comply with the height requirement subjected all railroad companies to civil penalties. Act of Mar. 2, 1893, ch. 196, 27 Stat. 531. The Supreme Court upheld the delegation with little discussion. *See* St. Louis, Iron Mountain & S. Ry. v. Taylor, 210 U.S. 281, 285–87 (1908). Further, private parties have served on governmental agencies such as the Federal Open Market Committee (FOMC), which operates as part of the Federal Reserve System. *See* 12 U.S.C. § 263 (2006). The private members are elected annually by the boards of directors of the twelve regional Federal Reserve Banks, which are privately owned. *Id.* The FOMC as a whole discharges the critical policymaking function of determining sales and purchases of government securities in the open market. *See id.*

32. *Schechter*, 295 U.S. at 537.

33. *Id.*

34. Ch. 296, 50 Stat. 246 (codified as amended in scattered titles of U.S.C.).

35. *See, e.g.*, 7 U.S.C. §§ 2101–2118 (2006) (cotton); *id.* §§ 2901–2911 (beef); *id.* §§ 4501–4514 (dairy).

36. 310 U.S. 381 (1940).

producers played in recommending coal prices did not constitute an unlawful delegation of executive power to private individuals because the private members "function[ed] subordinately to the [public] Commission. It, not the [private producers], determines the prices."[37] Evidence that the Commission rubberstamped the determinations made by private producers was not dispositive.[38] In other words, the Court reasoned that private groups do not exercise problematic authority if the executive branch holds the formal power to approve whatever is forwarded by the private entity. Even though the private groups in effect make law, the required governmental approval makes the delegation acceptable.[39] The Supreme Court has reasoned, therefore, that no untoward delegation of private authority exists if sufficient oversight can be exercised by federal governmental officials.

The Supreme Court manifested an even more lenient approach in *Schweiker v. McClure*.[40] There, the Court considered a Due Process challenge to private adjudication under the Medicare Part B program.[41] Under the Part B Program, Congress authorized the Secretary to contract with private insurance carriers to review and pay out deserving claims.[42] Carrier determinations are subject to a limited right of review by hearing officers who are also appointed by the carrier.[43] As a practical matter, the decision of the private hearing officer is conclusive. The lower court invalidated this system of private adjudication, reasoning that due process required additional procedural safeguards.[44] Accordingly, it ordered de novo hearings before an administrative judge of the Social Security Administration.[45]

The Supreme Court, however, reversed, finding that, as long as the Secretary directs the carriers to appoint only "an attorney or other *qualified* individual with the ability to conduct formal hearings and with a general understanding of medical matters and terminology," no risk of erroneous

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37. *Id.* at 399; *see also* Cospito v. Heckler, 742 F.2d 72, 86–87 (3d Cir. 1984); Chiglades Farm, Ltd. v. Butz, 485 F.2d 1125, 1133–34 (5th Cir. 1973); *cf.* Correctional Servs. Corp. v. Malesko, 534 U.S. 61, 74 (2001) (refusing to extend a *Bivens* cause of action to private prison operator).

38. As Justice Benjamin N. Cardozo stated in concurrence in *Schechter*, "it is the *imprimatur* of the President that begets the quality of law," not the plans forwarded for approval by the trade groups. 295 U.S. at 552 (Cardozo, J., concurring).

39. *See* Currin v. Wallace, 306 U.S. 1, 6 (1939) (designation of tobacco marketing areas); United States v. Rock Royal Co-operative, Inc., 307 U.S. 533, 577–78 (1939); H.P. Hood & Sons, Inc. v. United States, 307 U.S. 588, 595 (1939); United States v. Frame, 885 F.2d 1119, 1125–29 (3d Cir. 1989) (beef program); United States v. MacMullen, 262 F.2d 499, 500–01 (2d Cir. 1958) (wheat quotas).

40. 456 U.S. 188 (1982).

41. *Id.* at 192.

42. *Id.* at 190.

43. *Id.* at 191 (citing 42 C.F.R. §§ 405.807–.812 (1980)); *see also* Bowen v. Mich. Acad. of Family Physicians, 476 U.S. 667 (1986) (sketching the limited availability of judicial review under Part B).

44. *Schweiker*, 456 U.S. at 195.

45. *Id.*

deprivation existed.[46] The fact that the hearing officers were private did not create any untoward risk of self-dealing, particularly because the funds used to satisfy the judgments came from the United States Treasury as opposed to the carriers (and hearing officers) themselves.[47]

Taken together, *Sunshine Anthracite* and *Schweiker v. McClure* suggest a wide ambit for the private exercise of delegated authority. Private parties can exercise authority, backed by the coercive power of the state, as long as the authority is confined to a relatively narrow scope (as in *Sunshine Anthracite* and *Schweiker*) or is subject to review by executive branch officials (as in *Sunshine Anthracite*).

Lower courts have so construed those precedents, permitting delegations to private entities for varied purposes. In *Cospito v. Heckler*,[48] for instance, the question raised was whether Congress could delegate to a private group, the Joint Commission on Accreditation of Hospitals (JCAH), the power to determine whether a hospital was eligible for Medicaid and Medicare reimbursement.[49] The private group assessed the quality of care at health care institutions to determine eligibility for participation in the Medicare and Medicaid programs.[50] One pertinent provision with respect to psychiatric hospitals provided that such hospitals could be certified "if such distinct part meets requirements equivalent to such [JCAH] accreditation requirements as determined by the Secretary."[51] The U.S. Court of Appeals for the Third Circuit held that the Secretary's power under the Acts to bypass determinations made by the JCAH salvaged the delegation.[52] Accordingly, "[s]ince, in effect, all actions of JCAH are subject to full review by a public official who is responsible and responsive to the political process, we find that there has been no real delegation of authority to JCAH."[53] Judge Edward R. Becker in dissent scoffed at the majority's reasoning, stating that the JCAH at the relevant time "might 'define' a 'psychiatric hospital' however it chose, and might use whatever procedures it wished in developing that definition . . . . and the JCAH regulations were not subject to judicial or administrative review . . . . The JCAH's freedom to apply its regulations to individual hospitals was also unfettered."[54] He concluded that "courts should not permit Congress to delegate to private bodies, that are not required by statute to listen to affected parties in making

46. *Id.* at 199 (internal quotations omitted).
47. *Id.* at 196.
48. 742 F.2d 72 (3d Cir. 1984).
49. *Id.* at 74–75, 79; *see also, e.g.*, City of Dallas v. FCC, 165 F.3d 341, 359–60 (5th Cir. 1999) (upholding delegation to determine whether particular cable operators could access video systems); Geo-Tech Reclamation Indus., Inc. v. Hamrick, 886 F.2d 662, 666 (4th Cir. 1989) (upholding delegation to communities in effect to veto landfill permits if sufficient opposition were voiced).
50. *Cospito*, 742 F.2d at 75–77.
51. *Id.* at 76.
52. *Id.* at 88.
53. *Id.* at 89.
54. *Id.* at 90 (Becker, J., dissenting).

their regulations, and whose regulations are not subject to review under the Administrative Procedure Act."[55]

Similarly, in *Todd & Co., Inc. v. SEC*[56] the Third Circuit considered whether Congress's delegation of authority to the National Association of Securities Dealers (NASD) constituted an unconstitutional delegation to a private entity.[57] The Maloney Act authorized the self-regulatory entity to promulgate rules protecting against fraudulent and unethical practices, and to discipline members who failed to conform to the standards promulgated.[58] Congress authorized the SEC to review the NASD's findings upon appeal.[59] A brokerage house contested an NASD investigation of its activities on the ground that the Maloney Act constituted an undue delegation to a private entity.[60] The court rejected the challenge because the Securities and Exchange Commission (SEC) retained the power "to approve or disapprove the Association's rules," to make additional findings if necessary, and "make an independent decision on the violation and penalty."[61] Accordingly, the court found no impermissible exercise of authority by the self-regulatory entity. Even when Congress eliminated the SEC's right to make additional findings to add to the record, the court in a subsequent case similarly sustained the delegation to the self-regulatory entity.[62] Much as in *Schweiker v. McClure*, the court was not concerned, from an Article II vantage point, with the authority exercised by private decisionmakers.

Based on cases prior to *Free Enterprise Fund*, the proposed delegations to the National Academy of Sciences and the Cybersecurity Panel would likely be upheld.[63] In both cases, the ambit of authority delegated is narrow—in one case concerning only attainment of particular carbon emission standards and, in the other, the ICANN contract. Moreover, executive branch officials must act in conjunction with the private parties in both cases before effecting national policy. In the global warming setting, the President must issue a presidential order to cut emissions further and, with respect to cybersecurity, the Department of Commerce retains the power to re-craft any subsequent ICANN contract. The private parties may shape or nudge executive branch action, but their acts do not replace it. As the next part argues, however, *Free Enterprise Fund* destabilizes any such assumption.

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55. *Id.* at 91.
56. 557 F.2d 1008 (3d Cir. 1977).
57. *Id.* at 1011–12.
58. *Id.* at 1012.
59. *Id.*
60. *Id.*
61. *Id.*
62. *See* First Jersey Secs. Inc. v. Bergen, 605 F.2d 690, 697–700 (3d Cir. 1979) (following *Todd*, even though Congress had subsequently weakened SEC oversight of the NASD's findings).
63. *See supra* notes 18–19 and accompanying text.

B. Free Enterprise Fund *and Article II*

From the perspective of the *Free Enterprise Fund* majority, delegations to private parties threaten the Constitution by circumventing the executive branch control that was designed to protect all individuals from governmental overreaching. The President's appointment and removal authorities are both implicated, for, as discussed in *Free Enterprise Fund*, they provide the "key constitutional means" for the President to retain control over authority delegated by Congress.[64]

1. The Appointment Authority

Although *Free Enterprise Fund* pinned its decision on the President's removal authority under Article II, an understanding of the Appointments Clause, from which the removal authority is drawn, sets the stage for the Court's reasoning.[65] Under the Appointments Clause, Presidents enjoy the power to appoint all superior officers of the United States.[66] Through the appointment power, Presidents can ensure that only officers they approve of are enforcing the law. Article II provides that the President must appoint all superior officers, and that Congress can decide whether to vest appointment authority over inferior officers in the President, heads of departments, or courts of law.[67] There have been disagreements over line drawing, particularly between superior and inferior officers,[68] but consensus exists over the role that the Appointments Clause plays under the Constitution. The President's choice of officer influences the exercise of delegated authority.[69]

In *Buckley v. Valeo*,[70] the Court chose "significant authority" as a threshold for triggering the Appointments Clause, and explained that the term encompassed "broad administrative powers: rulemaking, advisory opinions, and determinations of eligibility for funds."[71] Although investigation and information gathering did not rise to the significant authority level,[72] all individuals exercising more formal power to affect the rights of third parties must be considered officers of the United States and subject to Article II limitations.[73] In addition, all officers of the United

64. Free Enter. Fund v. Pub. Co. Accounting Oversight Bd., 130 S. Ct. 3138, 3157 (2010) (internal quotation marks omitted).

65. *See* Virginia v. EPA, 108 F.3d 1397, 1405 (D.C. Cir. 1997) (noting Appointments Clause issue that would arise from permitting federal government to delegate decisionmaking authority to states over pollution attainment policy).

66. U.S. CONST. art. II, § 2, cl. 2.

67. *Id.*

68. *See* Edmond v. United States, 520 U.S. 651, 662–63 (1997); Morrison v. Olson, 487 U.S. 654, 671–72 (1988).

69. Buckley v. Valeo, 424 U.S. 1, 118–41 (1976); Myers v. United States, 272 U.S. 52, 117, 163–64 (1926).

70. 424 U.S. 1.

71. *Id.* at 126, 140.

72. *Id.* at 137.

73. *Id.* at 138–43. Individuals exercising authority that is only intermittent, however, may fall outside the *Buckley* rule. *See* Krent, *supra* note 21, at 536.

States must take an oath of office to uphold the Constitution.[74] That oath signifies a more profound obligation to the public trust than a mere contractual duty. For serious malfeasance in office, officers can be impeached.[75]

Congressional delegations of authority to private parties—whether to a producer group, single individual, or the National Academy of Sciences—bypass the presidential appointment authority. If Congress vested significant authority in the Cybersecurity Panel, the resulting execution of the law could not be as readily traced to the President, and his appointment authority would be circumvented.[76] As the Supreme Court stressed in *Edmond v. United States*,[77] "the Appointments Clause . . . is more than a matter of 'etiquette or protocol'; it is among the significant structural safeguards of the constitutional scheme. By vesting the President with exclusive power to select the principal (noninferior) officers of the United States, the Appointments Clause prevents congressional encroachment . . . ."[78]

Moreover, the Supreme Court has insisted that Congress play no direct role in the appointment of officers. In *Buckley*, the Court considered a congressional measure empowering the Speaker of the House and the President Pro Tempore of the Senate to appoint four members of the newly created electoral commission under the Federal Election Campaign Act of 1971.[79] The Court held that Congress could neither participate in the appointment process directly nor indirectly, and noted that the "debates of the Constitutional Convention, and the Federalist Papers, are replete with expressions of fear that the Legislative Branch of the National Government will aggrandize itself at the expense of the other two branches."[80] Respecting the President's appointment authority was critical to ensuring that Congress would take no part in executing the law through appointing

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74. U.S. CONST. art. VI, cl. 3.

75. U.S. CONST. art. II, § 4. The Secretary of Treasury appointed Kenneth Feinberg, a New York attorney, to set the compensation that executives of entities receiving Troubled Asset Relief Program (TARP) funds can earn. *See* 74 Fed. Reg. 28,394 (June 15, 2009) (to be codified at 31 C.F.R. pt. 30); Eric Dash, *The Walking Wounded*, N.Y. TIMES, June 11, 2009, at B1. Given that Feinberg issued binding orders affecting private rights, his status as an officer seems relatively clear, yet Congress did not lodge his appointment in the Secretary of Treasury as would be required under Article II to legitimate the appointment. Thus, appointment of Feinberg can only comport with the Constitution if he is not considered an "officer of the United States." *See* Michael W. McConnell, Op-Ed., *The Pay Czar Is Unconstitutional*, WALL ST. J., Oct. 29, 2009, at A25.

76. For those embracing a theory of directory authority, the lack of presidential appointment is not fatal. Rather, if the President can order state officials to take particular positions or substitute state officials' decisions for his own, or so the argument goes, then fidelity to Article II is maintained. Not only do I challenge the existence of such directory authority, see Harold J. Krent, *From a Unitary to a Unilateral Presidency*, 88 B.U. L. REV. 523 (2008), but any presidential bossing of state officials would almost surely violate the federalism principles built into the Tenth Amendment. *See infra* text accompanying notes 148–54

77. 520 U.S. 651 (1997).

78. *Id.* at 659.

79. *Buckley*, 424 U.S. at 113.

80. *Id.* at 129.

officers. If Congress retained close supervision of the private delegate, then Congress in essence would oversee execution of its own laws, a role that the Supreme Court has held would conflict with the Constitution.[81]

Similarly, in *Metropolitan Washington Airports Authority v. Citizens for the Abatement of Aircraft Noise, Inc.*,[82] the Court considered whether Congress, in establishing a compact to oversee the administration of D.C. area airports, could subject major decisions of that compact to a board of review, consisting of nine members of Congress in their individual capacities as users of the airports.[83] The Court held that the board of review, through its veto power, exercised significant authority pursuant to the laws of the United States and hence invalidated the continuing congressional role on the board.[84] In the eyes of the Court, the board was "a blueprint for extensive expansion of the legislative power."[85] Congressional delegation of power to private individuals outside the purview of the Appointments Clause cannot easily be reconciled with *Free Enterprise Fund*.

At times, congressional delegation to private parties may permit the President to exercise the appointment power. Consider Congress's creation of the United States Railway Association to monitor the Consolidated Rail Corporation (CONRAIL) and issue bonds, among other duties.[86] In so doing, Congress provided that a majority of the Association's members were to be drawn by the President from lists of private individuals supplied by the AFL-CIO and Association of American Railroads.[87] The vast majority of congressional delegations, however, whether to producer groups or the National Academy of Sciences, bypass the President's appointment power.

2. The Removal Authority

The Supreme Court also has recognized the President's inherent right under Article II to remove any executive branch officer subject to his appointment power. Although there has been much litigation over whether that removal authority should be plenary,[88] the Court repeatedly has held that the removal power follows the appointment authority.[89] In *Myers v.*

81. *See infra* text accompanying notes 106–14.
82. 501 U.S. 252 (1991).
83. *Id.* at 255.
84. *Id.* at 277.
85. *Id.*
86. Regional Rail Reorganization Act of 1973, Pub. L. No. 93-236, § 210(a), 87 Stat. 985, 1000 (1974).
87. *Id.* § 201(d), 87 Stat. at 988.
88. *E.g.*, Morrison v. Olson, 487 U.S. 654, 675–76 (1988) (questioning the adequacy of the President's authority over the independent counsel); Bowsher v. Synar, 478 U.S. 714, 723 (1986) (questioning the adequacy of the President's removal authority over the Comptroller General).
89. *Morrison*, 487 U.S. at 671; *Bowsher*, 478 U.S. at 726; Weiner v. United States, 357 U.S. 349, 353 (1985); Humphrey's Ex'r v. United States, 295 U.S. 602, 629–30 (1935); Myers v. United States, 272 U.S. 52, 126–27 (1926).

United States, the Supreme Court stated that "Article II grants the President the executive power of the Government, . . . the power of appointment and removal of executive officers—a conclusion confirmed by his obligation to take care that the laws be faithfully executed."[90] The President must be able to remove a superior officer "on the ground that the discretion regularly entrusted to that officer by statute has not been on the whole intelligently or wisely exercised."[91] Presidents cannot superintend the administration of laws effectively if they cannot, as a last resort, threaten to discharge officials, at least if the officers are neglectful of their duties. Again, in *Morrison v. Olson*, the Court stressed the importance of the removal provision in permitting the President "sufficient control over the independent counsel to ensure that the President is able to perform his constitutionally assigned duties."[92] Although the Court concluded in the case of the independent counsel that the removal authority need not be plenary, some form of removal authority was constitutionally required and, together with other control mechanisms, must ensure that the President retain sufficient control to exercise his constitutionally assigned duties.[93]

The *Free Enterprise Fund* decision reinforces the focus on hierarchical authority flowing from Article II: the "executive power included a power to oversee executive officers through removal."[94] To the Court, exercise of close removal authority was critical to ensuring presidential supervision under Article II. Otherwise, the President's "ability to execute the laws—by holding his subordinates accountable for their conduct—is impaired."[95] The fact that neither the President nor the SEC could remove members of the PCAOB at will, while members of the SEC were themselves protected from at will dismissal, was determinative.[96] The Court concluded that, without sufficient removal authority, "the President could not be held fully accountable for discharging his own responsibilities."[97]

Congressional delegations to private parties may deprive Presidents of the removal power. If Congress lodges the power to set standards in a private group, for example, the President cannot remove members of that group from office.[98] Congressional delegation to a private accounting group such as the American Institute of Certified Public Accountants (AICPA) to set standards binding on the public would be problematic. The private group could formulate binding standards, yet the members could not be removed even if the President disagreed with the standards selected.

90. *Myers*, 272 U.S. at 163–64.
91. *Id.* at 135.
92. *Morrison*, 487 U.S. at 658.
93. *Id.* at 695–96.
94. Free Enter. Fund v. Pub. Co. Accounting Oversight Bd., 130 S. Ct. 3138, 3152 (2010).
95. *Id.* at 3154.
96. *See id.*
97. *Id.* at 3164.
98. Contrast to *Mistretta v. United States*, 488 U.S. 361 (1989), in which the President could remove Article III judges sitting on the Sentencing Commission from their administrative duties, although he could not affect their roles as judges. *Id.* at 411.

Moreover, under the global warming bill, the President could not remove members of the National Academy of Sciences even if he believed they engaged in misconduct.[99] Similarly, if Congress designates a particular insurance company to resolve Medicare claims, the President would not be able to switch insurance companies if he determined that the company's handling of claims was wasteful or inefficient. Private parties largely are "immune from Presidential oversight, even as they exercise[] power in the people's name."[100] As the Court summarized in *Free Enterprise Fund*, "[t]he diffusion of power carries with it a diffusion of accountability."[101]

On occasion, Congress may permit the President to remove a private individual from a multi-member commission as in the prior United States Railway Association example.[102] But, the vast majority of such delegations seemingly confound the *Free Enterprise Fund* imperative that the President wield sufficiently direct removal authority over all entities exercising federal law.

Of course, the President may wield substantial control even aside from the appointment and removal authorities. Justice Breyer in dissent addressed the controls that can stem from funding, rulemaking, ex ante or ex post review of policies, and other mechanisms.[103] To the dissent, the question was whether, taken as a whole, the President exerted enough influence to assure that the essential attributes of the executive power remained vested in the executive.[104] But, to the majority, the removal authority was talismanic—in the absence of such formal linkage, the President could not be assured effective oversight.[105]

In addition, although Congress may remove an individual in the executive branch from office by abolishing the entire office, it can effect removal of a private entity more directly merely by switching delegates. A congressional threat to withdraw authority or funding from a private entity like the AICPA can influence behavior—the private officeholder may attempt to placate Congress to retain its power.[106] The Supreme Court categorically has determined that Congress itself can play no role in the removal of individuals exercising significant authority under the laws of the United States.[107]

99. *See supra* note 18 and accompanying text.

100. *Free Enter. Fund*, 130 S. Ct. at 3154.

101. *Id.* at 3155.

102. *See supra* notes 86–87 and accompanying text.

103. *Id.* at 3169 (Breyer, J., dissenting).

104. *Id.* at 3169–73.

105. *See id.* at 3155 (majority opinion) ("By granting the Board executive power without the Executive's oversight, this Act subverts the President's ability to ensure that the laws are faithfully executed—as well as the public's ability to pass judgment on his efforts.").

106. If Congress eliminated the funding mechanism under which the Financial Accounting Standards Board (FASB) currently operates, the private standard setting group could no longer function.

107. Justice Breyer in dissent stressed that congressional arrangements that can result in congressional aggrandizement of executive power are most likely to violate the separation of powers doctrine. *Id.* at 3167 (Breyer, J., dissenting).

The Supreme Court's decision in *Bowsher v. Synar*[108] is illustrative. In invalidating the Comptroller General's role under the Gramm-Rudman-Hollings Act,[109] the Court focused on the critical importance of the removal authority.[110] Although the President appoints the Comptroller General to a fifteen-year term of office, Congress made the Comptroller General removable at the initiative of Congress for any one of several causes.[111] The Court held that "Congress cannot reserve for itself the power of removal of an officer charged with the execution of the laws."[112] The Court explained that "once Congress makes its choice in enacting legislation, its participation ends."[113] Otherwise, Congress would both be able to exercise a de facto appointment and removal authority, permitting it to influence the exercise of delegated authority. Indeed, in *Myers* the Court invalidated Congress's participation in removal of the postmaster.[114]

Viewed through an Article II lens, congressional determinations to delegate significant authority outside the President's control are suspect. The President's Article II powers of appointment and removal are designed not merely to augment executive power, but to protect individual liberty. To ensure that public power is exercised in a responsible way, the President should stand formally accountable for the exercise of authority delegated by Congress. Congressional delegations to trade groups and others can rob the President of his power to coordinate law implementation efforts and, at the same time, permit Congress too much influence in the execution of law.

The question remains where to draw the line between impermissible and valid exercises of authority by private parties. Eliciting advice from private parties does not violate Article II, but directing private parties to set trade policy would contravene presidential power. The analysis in *Free Enterprise Fund* does not illuminate how to set the constitutional test. The rulemaking, inspection, and enforcement duties of the PCAOB fell on the wrong side of the line because all parties recognized that, in the aggregate, the PCAOB exercised significant authority pursuant to the laws of the United States and could only be appointed and removed in conformance with Article II. Although I have argued elsewhere that the doctrinal test for delegation to private parties should focus on whether the private party's acts bind other private parties backed by the coercive power of the government,[115] the key here is that the Supreme Court's recent decision makes it far more likely that congressional delegations of authority to private parties will elicit closer scrutiny by the Supreme Court should such challenges arise in the future. *Free Enterprise Fund* may well have sounded the death knell for delegations of significant authority to private parties.

108. 478 U.S. 714 (1986).
109. 2 U.S.C. §§ 901–07 (2006).
110. *Bowsher*, 478 U.S. at 727.
111. *Id.* at 720; *id.* at 785 n.4 (Blackmun, J., dissenting).
112. *Id.* at 726 (majority opinion).
113. *Id.* at 733.
114. Myers v. United States, 272 U.S. 52, 177 (1926).
115. *See generally* Krent, *supra* note 21.

Indeed, the majority in *Free Enterprise Fund* might have bolstered its reasoning by pointing to the dearth of government-wide regulations applicable to the PCAOB. Congress declared that the PCAOB should not be considered an "agency" and therefore it absolved the entity of the need to comply with the APA.[116] Moreover, Congress specifically exempted the PCAOB unlike almost all other governmental entities from the Freedom of Information Act (FOIA).[117] Thus, in comparison to other agencies, fewer government-wide controls constrained the conduct of the entity's work. As a consequence, the argument for enhanced centralized control of the type advocated by the majority is more compelling. In fashioning the PCAOB more like a private entity, Congress inadvertently strengthened the case for greater presidential control.

Consider as well the self-regulatory model that Congress rejected in creating the PCAOB. Prior to enactment of the PCAOB, the SEC in effect delegated standard setting to the AICPA.[118] After *Free Enterprise Fund*, such delegations to private entities are suspect—the President would not be able to oversee development of such standards through the threat of exercising the removal authority.[119] The President must be permitted the discretion to accept, reject, or modify the standards selected by private entities.

Similarly, the *Free Enterprise Fund* case calls into question other congressional delegations to private parties. Congress has authorized self-regulatory organizations such as the Financial Industry Regulatory Authority (FINRA) to investigate and prosecute violations of federal law.[120] Firms wishing to trade securities have no choice but to join a self-regulatory organization.[121] Firms and individuals disciplined, whether through fines or withdrawal of trading privileges, have a right of appeal to the SEC, but the SEC cannot add any findings to the record.[122] There is

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116. See 5 U.S.C. § 551(1) (2006) (limiting applicability of APA to agencies (i.e., authorities) of the United States).

117. 15 U.S.C. § 7215(b)(5)(A) (2006).

118. Lawrence A. Cunningham, *Private Standards in Public Law: Copyright, Lawmaking and the Case of Accounting*, 104 MICH. L. REV. 291, 294 (2005). In essence, Congress had delegated comparable authority to the American Institute of CPAs (AICPA) through the middle of the twentieth century. Nagy, *supra* note 16, at 985–87. Since 1973, the SEC has recognized the Financial Accounting Standards Board as the official entity setting standards for public company accounting. *See* Commission Statement of Policy Reaffirming the Status of the FASB as a Designated Private-Sector Standard Setter, Securities Act Release No. 8221, 80 SEC Docket 139 (Apr. 25, 2003); Exchange Act Release No. 47,743, 80 SEC Docket 139 (Apr. 25, 2003); Accounting Series Release No. 150, 3 SEC Docket 275 (Dec. 20, 1973). Note that if Congress merely adopted preexisting AICPA standards, no constitutional problem would arise.

119. To be sure, there is a fine line between standard setting that represents the exercise of significant authority within the meaning of *Buckley*, and classifications that the government can contract out to private contractors to formulate. *See* Practice Mgmt. Info. Corp. v. Am. Med. Ass'n, 121 F.3d 516 (9th Cir. 1997) (addressing Congress's instruction to the Health Care Financing Administration to establish uniform code for assessing reimbursement for physician services), *amended by* 133 F.3d 1140 (9th Cir. 1998).

120. *See, e.g.*, 15 U.S.C. § 78*o*-3(b)(7) (2006).

121. *Id.* § 78*o*(b)(8).

122. *Id.* § 78s(e)(1), (f).

some disagreement as to whether the SEC's standard of review of FINRA's findings is de novo.[123] Does FINRA, in investigating and then adjudicating violations of federal law, exercise significant authority pursuant to the statutes authorizing the self-regulatory mechanism?[124] After *Free Enterprise Fund*, such delegations may be permissible only if the government can exercise exacting review before exchange determinations become final.[125]

Free Enterprise Fund teaches that delegation outside the federal government may undermine the President's Article II obligation to superintend law enforcement by robbing him of his powers to appoint and remove from office those exercising significant authority pursuant to the laws of the United States. How one defines the quantum of authority that only can be exercised subject to presidential direction becomes pivotal. Although the Court has yet to tackle that challenge, private entities such as the American Bar Association can evaluate nominees for office and offer advice[126] without transgressing the line, but permitting private entities to resolve federal claims without exacting review by a governmental agency would constitute the exercise of significant authority and therefore contravene the animating spirit of *Free Enterprise Fund*.

II. DELEGATIONS TO STATE ENTITIES

Congress long has delegated to state as well as private entities. Congress has approved state compacts to address issues of federal interest and specified goals to be accomplished. Congress has also encouraged states to take responsibility to enforce federal standards such as those under the Environmental Protection Agency (EPA).[127] Moreover, Congress has authorized state officials to enforce a wide range of federal laws, most notoriously under the Fugitive Slave and Volstead Acts.[128] Congress has also incorporated state law as federal policy, such as under the Federal Tort Claims Act,[129] which signifies that federal rules of decision automatically

123. *Compare* Whiteside & Co. v. SEC, 883 F.2d 7, 9 (5th Cir. 1989) (asserting that review of findings by the self regulatory organization is de novo), *with* Seaton v. SEC, 670 F.2d 309, 311 (D.C. Cir. 1982) (utilizing preponderance of the evidence standard). *But see* MBH Commodity Advisors v. CFTC, 250 F.3d 1052, 1062–64 (7th Cir. 2001) (suggesting that each agency may construe statutory provision providing for review of self-regulatory organizations' findings differently, depending on mission of agency).

124. *See generally* Roberta S. Karmel, *Should Securities Industry Self-Regulatory Organizations Be Considered Government Agencies?*, 14 STAN. J.L. BUS. & FIN. 151 (2008).

125. Moreover, *Free Enterprise Fund* squarely places the status of the adjudicators in *Schweiker v. McClure* in doubt. Those adjudicators resolved claims between private parties and the government without meaningful review by the Department of Health and Human Services.

126. *See* Pub. Citizen v. Dep't of Justice, 491 U.S. 440, 455–65 (1989).

127. *See, e.g.*, Train v. Nat'l Res. Def. Council, Inc., 421 U.S. 60 (1975).

128. National Prohibition Act (Volstead Act), ch. 85, 41 Stat. 305 (1919); Fugitive Slave Act of 1793, ch. 7, § 1, 1 Stat. 302, 302.

129. 28 U.S.C. § 2674 (2006) ("The United States shall be liable, respecting the provisions of this title relating to tort claims, in the same manner and to the same extent as a private individual under like circumstances . . . .").

shift with changes in state law. Finally, Congress has delegated specific enforcement tasks to state entities as in the NAIC example.

Much of the analysis in *Free Enterprise Fund* logically should apply to the above contexts in which Congress delegates authority to state entities. Two key components of presidential control are absent. The President likely neither appoints nor removes the state entity that is implementing or enforcing federal law. In the health care reform statute, the President does not appoint state insurance commissioners, nor can he remove them from the NAIC.[130] In addition, the President does not enjoy the power unilaterally to withdraw the delegation from the NAIC. Congress therefore may leave execution of federal law outside the President's control by dint of delegation to state entities. Lines of accountability unquestionably can become muddled, as responsibility for the ultimate policy pursued is shared among Congress, which consented to the compact, the individual states that are in the compact, and the state officials who are acting to implement the policy selected.[131]

Nonetheless, I argue that delegations to state entities fundamentally differ from those to private entities for three principal reasons. First, the Constitution anticipates congressional sharing of power with state far more than private entities. Second, state officials are more accountable to the electorate—whether directly or indirectly—than are private entities. Third, there is far less danger of congressional aggrandizement in the context of delegation to state entities.

Delegations to state entities, however, should not be immune from Article II analysis of the type articulated in *Free Enterprise Fund*. In the final section, I examine two contexts in which delegations to state entities raise distinctive constitutional problems: first, when the delegation impinges on a presidential power separate from this "take care" authority, such as in foreign relations; and second, when Congress delegates to favored states the power to impose costs on others. I tentatively conclude that judicial review is relatively cost free in the first setting and that limits on delegation accordingly should be enforced, but that judicial review is not worth the costs in the second. Thus, although a particular delegation to a state entity might violate the Constitution, the *Free Enterprise Fund* analysis should not apply as strictly as in the private delegate context. As a consequence, the delegation to the NAIC likely comports with the constitutional structure.

130. *See supra* note 20 and accompanying text.

131. If the President could supervise state entities' and officials' exercise of delegated authority, the constitutional problem would recede, and so Professor Steven G. Calabresi has argued. *See* Steven G. Calabresi & Saikrishna B. Prakash, *The President's Power to Execute the Laws*, 104 YALE L.J. 541 (1994). It is difficult to conceive, however, how Presidents could oversee or alter implementation efforts by state officials and entities. Indeed, the prospect that Presidents could reverse decisions made by state officials would turn federalism principles on their head. *See also supra* note 76.

A. The Case for Upholding Delegation to State Entities

As with delegations generally, Congress may have myriad reasons to recruit state entities to help implement federal law. Congress, for example, may wish to elicit the expertise of officials in state government. The NAIC example illustrates this rationale—state insurance commissioners presumably have greater familiarity and experience with medical loss ratios than does the Department of Health and Human Services (HHS).[132] Similarly, delegations to states to fashion rules to implement federal mandates under the EPA reflect efforts to enlist the help of officials with more immediate knowledge of the conditions affecting each respective state.[133]

Delegations to state entities also can ensure that those closest to the dispute have a more direct say in governance. Cases involving boundary disputes among the states provide a clear example, as do the compacts among states operating port authorities or other transportation hubs. States may find congressional delegation more palatable when they can participate in shaping the rules that affect them so directly. Similarly, in the *Free Enterprise Fund* case, Justice Breyer in dissent cited the delegation to the Delta Regional Authority.[134] By dint of that delegation, states within the lower Mississippi delta region make the development decisions critical to their future economic growth.

Some delegations to state entities facilitate efficient implementation of the laws. State officials should be able to detect some federal law violations with less expense than federal enforcement officials. State officials investigating state crimes may well learn of conduct that gives rise to federal law violations. And, by predicating the Federal Tort Claims Act on state law, Congress need not fashion independent standards of care and rules of recovery. State legislatures and courts have been setting standards of care for generations.

Finally, some congressional delegations to state entities presumably stem from congressional reluctance to discharge the responsibilities. Law enforcement under the Fugitive Slave Act provides one example, as may congressional delegations of the power to run D.C. area airports or to determine where low level radioactive waste should be stored.[135] As with delegations more generally, Congress may wish to duck responsibility for tough political choices. In all, Congress has many understandable reasons for delegating authority to state entities and officials.

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132. *See supra* note 20 and accompanying text.

133. *See, e.g.*, Train v. Nat. Res. Def. Council, Inc., 421 U.S. 60 (1975).

134. Free Enter. Fund v. Pub. Co. Accounting Oversight Bd., 130 S. Ct. 3138, 3168 (2010) (Breyer, J., dissenting) (citing 7 U.S.C. § 2009aa-1 (2006)).

135. *See, e.g.*, EnergySolutions, LLC v. Utah, 625 F.3d 1261, 1265–68 (10th Cir. 2010) (discussing Congress's delegation of low-level radioactive waste disposal policy to the states).

1. The Constitutional Plan

To some degree the constitutional system of federalism contemplates such congressional sharing of power with state entities. Article I provides that Congress can consent to state decisions to levy "duty of Tonnage, keep Troops, or Ships of War in time of Peace, [or] enter into [an] Agreement or Compact with another State, or with a foreign Power."[136] The Compact Clause has been utilized frequently, and Congress long has delegated to groups of states the power to regulate over subjects such as transportation,[137] energy,[138] and tax matters.[139] The resulting rules of the compacts are to be treated as federal law,[140] even if the interstate commissions are not considered federal agencies.[141] The fact that the Founders authorized Congress to consent to state compacts whose authority could reach issues of national or regional import strongly calls into question the view that congressional delegation of authority to state entities should be categorically prohibited.[142]

Moreover, Congress since the Founding has recruited state officials to help enforce federal laws. Congress has authorized state officials to arrest and punish individuals for violation of federal laws.[143] As the Supreme Court summarized in *United States v. Jones*,[144] "from the time of its establishment [the federal] government has been in the habit of using, with the consent of the States, their officers, tribunals, and institutions as agents."[145] The Court noted that "[t]heir use has not been deemed violative of any principle or as in any manner derogating from the sovereign authority of the federal government."[146] Thus, the Constitution contemplates far more exercise of executive authority by states than by private entities.[147]

To be sure, the Supreme Court has counseled that Congress cannot *compel* state entities to enforce or implement federal law. For example, in *New York v. United States*[148] the state challenged Congress's requirement

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136. U.S. CONST. art. I, § 10, cl. 3.

137. *See, e.g.*, Metro. Wash. Airports Auth. v. Citizens for the Abatement of Aircraft Noise, Inc., 501 U.S. 252, 255 (1991).

138. *See, e.g.*, Seattle Master Builders Assoc. v. Pac. Nw. Elec. Power & Conservation Planning Council, 786 F.2d 1359, 1363 (9th Cir. 1986).

139. *See, e.g.*, U.S. Steel Corp. v. Multistate Tax Comm'n, 434 U.S. 452, 459–72 (1978).

140. Cuyler v. Adams, 449 U.S. 433, 440 (1981).

141. New York v. Atl. States Marine Fisheries Comm'n, 609 F.3d 524, 531 (2d Cir. 2010).

142. Similarly, there is no constitutional impediment to incorporating evolving state law as the governing rule of decision, as in the FTCA example.

143. Harold J. Krent, *Fragmenting the Unitary Executive: Congressional Delegations of Administrative Authority Outside the Federal Government*, 85 NW. U. L. REV 62, 80–84 (1990).

144. 109 U.S. 513 (1883) (upholding statute authorizing states to determine compensation in takings cases).

145. *Id.* at 519.

146. *Id.*

147. *See also* AT&T Corp. v. Iowa Utils. Bd., 525 U.S. 366, 411–12 (1999) (Thomas, J., concurring in part).

148. 505 U.S. 144 (1992).

under the Low-Level Radioactive Waste Policy Act that states take ownership of all internally generated waste upon the request of the waste's generator.[149] This regulation arose out of Congress's effort to provide an incentive to ensure sufficient disposal sites for low level radioactive waste. The Court summarized that "Congress may not simply commandeer the legislative processes of the States by directly compelling them to enact and enforce a federal regulatory program."[150] Furthermore, "[w]e have always understood that even where Congress has the authority under the Constitution to pass laws requiring or prohibiting certain acts, it lacks the power directly to compel the States to require or prohibit those acts."[151]

The Court justified its conclusions in part on the ground that, "where the Federal Government compels States to regulate, the accountability of both state and federal officials is diminished."[152] State officials might bear the political ill will from following Congress's policy even though it was Congress that devised the law. The Court elaborated upon this rationale in *Printz v. United States*.[153] There, the question for resolution concerned whether Congress could force state officials to conduct background checks on those seeking to buy handguns. The Court stressed that, to individuals purchasing handguns, the regulations would appear to come from the state officials implementing the congressional plan as opposed to Congress.[154] As a result, the goal of accountability was undermined.

The Court's commandeering doctrine, however, permits states and state officials *voluntarily* to implement federal law. When state officials decide on their own to conduct background checks or to take title to waste sites, they remain accountable, at least in part, for their acts within our federalist scheme. Even if Congress has set the policy framework, state implementation efforts, as long as voluntary, do not fully obfuscate lines of authority.

State exercise of delegated federal authority undoubtedly strains the structure of our constitutional system as conventionally understood. Indeed, Justice Scalia recognized that cost in *Printz*, noting that widespread delegations by Congress to state officials would permit such officials "to implement the program without meaningful Presidential control (if indeed meaningful Presidential control is possible without the power to appoint and remove)."[155] He continued more forcefully that the unified executive branch enforcement "would be shattered, and the power of the President would be subject to reduction, if Congress could act as effectively without the President as with him, by simply requiring state officers to execute its laws."[156]

149. *Id.* at 149, 153 (citing 42 U.S.C. § 2021e(d)(2)(C) (2006)).
150. *Id.* at 161 (citation and internal quotation marks omitted).
151. *Id.* at 166.
152. *Id.* at 168.
153. 521 U.S. 898 (1997).
154. *Id*. at 930.
155. *Id.* at 922.
156. *Id.* at 923.

Yet, the impact on Article II should be the same whether state officials implement federal law on command or license from Congress—the President's appointment and removal powers would be circumvented in either case. Justice Scalia noted the problem and could only offer that "the condition of voluntary state participation significantly reduces the ability of Congress to use this device as a means of reducing the power of the Presidency."[157] Delegation to state entities can be reconciled only by dint of the overriding role of states in the plan of convention. The Founders anticipated that state entities could play a meaningful role in execution of federal law. Delegation to state entities may be upheld even where they would be invalidated if directed toward private entities.

2. Political Accountability

In contrast to private entities, state officials are politically accountable. They remain subject to the checks and balances in the respective states and can be held to account by the electorate, or at least by their superiors within the state government. Should state insurance commissioners adopt medical loss ratio standards that are unreasonable, they can be chastened by state chief executives, and if the sheriffs harass citizens over gun registration, they may see repercussions at the ballot box. Particularly if state officials' exercise of delegated authority focuses on citizens within their states, political checks within those states seem adequate to constrain their authority. Moreover, under Article VI of the Constitution, state legislators—unlike private parties—must take an oath of office to support the Constitution.[158]

Consider the delegation to the Delta Regional Authority[159] cited by Justice Breyer in his *Free Enterprise Fund* dissent.[160] The Authority, which is funded equally by the Federal Government and the states, is composed of a federal member and "the Governor (or a designee of the Governor) of each State in the region that elects to participate in the Authority."[161] The Authority approves project and grant proposals "for the economic development of the region."[162] Although the Authority plainly exercises significant power in approving projects for economic development of the region, political accountability is not lost. Participating Governors can tout accomplishments of the Authority and burnish their records, and failures to husband resources wisely may well impair chances at the next election. The "public" nature of the exercise of authority provides some support for implementation of federal tasks by state entities.

157. *Id.* at 923 n.12. The dissent noted the weakness in Justice Scalia's argument as well. *Id.* at 960 (Stevens, J., dissenting).
158. U.S. CONST. art. VI, cl. 3.
159. 7 U.S.C. § 2009aa-1 (2006).
160. Free Enter. Fund v. Pub. Co. Accounting Oversight Bd., 130 S. Ct. 3138, 3168 (2010) (Breyer, J., dissenting).
161. 7 U.S.C. § 2009aa-1(a)(2).
162. *Id.* § 2009aa-1(d)(1).

3. Potential for Congressional Aggrandizement

The Supreme Court has weighed the potential for aggrandizement heavily in resolving separation of powers disputes. There is less danger of congressional aggrandizement when Congress delegates to states as opposed to private entities. A delegation to a state is much less in the nature of an appointment—state officials are less likely to feel beholden to Congress than would private individuals similarly selected. State officials do not likely stand to gain salary or status from exercising delegated responsibilities. They seldom would endeavor to placate congressional views in order to retain their jobs—after all, they owe their authority principally to the state, not the federal government.

In contrast, consider congressional delegation to an insurance company that Congress has designated to handle Medicaid claims. The insurance company recognizes that, should its claim resolution displease Congress—whether for reasons of inefficiency or error rates—Congress may well withdraw the delegation. The insurance company might be dependent on congressional funding for its corporate livelihood. Indeed, self-regulatory organizations recognize that Congress may impose greater centralized control over the private sector should it be displeased with the lack of fervor of its regulatory initiatives as happened with the AICPA.[163] In contrast, congressional delegation to state entities carries with it much less risk of continuing oversight or aggrandizement.

Indeed, one of the most critical protections against undue delegation to administrative agencies by Congress in general is that Congress must be willing to give up the reins of power. Congressional delegation, in other words, comes with a price—the loss of control over the shape of the final policy implemented. That check on congressional delegations, while absent for many delegations to private entities, exists when Congress delegates to state entities.

The constitutional recognition for federalism, the comparable accountability of state as opposed to private officials, and the limited potential for aggrandizement combine to strengthen the case for permitting Congress to delegate particular functions to state entities. State officials can enforce federal law, as with the Brady Bill, without violating the constitutional structure. Similarly, they can in effect make federal law as part of a compact consistent with Article II. Our system of federalism presupposes some limitation on presidential control over authority delegated from Congress to state entities.

163. A similar example is the International Swaps and Derivatives Association (ISDA), formed in the mid-1980s by industry members trading in swaps and derivatives. *See* Sean M. Flanagan, *The Rise of a Trade Association: Group Interactions Within the International Swaps and Derivatives Association*, 6 HARV. NEGOT. L. REV. 211, 234–38 (2001). The ISDA lobbied to keep the industry self-regulated. *Id.* at 245–46. However, presumably because of the role that swaps played in the market blow up and the collapse of Lehman Brothers and AIG in 2008, swaps are now regulated by the SEC and CFTC under the Dodd-Frank Act. Pub. L. No. 111-203, §§ 701–74, 124 Stat. 1376, 1641–802 (2010).

B. Limitations on Delegation to State Entities

At the same time, delegations to state entities should not be immune from separation of powers scrutiny. Without teasing out an elaborate theory, let me suggest two contexts in which Article II concerns arguably trump those of federalism: first, when Congress delegates authority that diminishes another of the President's authorities explicit or implied under Article II, such as the foreign affairs power; second, and more tentatively, when state entities' exercise of authority permits one block of states to foist costs on states disfavored by the congressional majority.

1. Independent Article II Powers

Congressional delegation to state entities may, at times, rob the President of an Article II power other than law enforcement. Although the constitutional design and history suggest that the President must share some enforcement authority with state entities and officials, the President should not necessarily brook Congress's delegation of other constitutionally grounded powers. For instance, congressional delegation to the NAIC of the power to appoint the head of Medicare would plainly contravene the Appointment power in Article II. Similarly, congressional delegation of the pardon power[164] to a state entity would be invalid.

Moreover, consider a hypothetical congressional delegation to a state compact comprising the border states of the authority to enter into trade agreements with Latin America. Tariff and trade policy might thereby be executed outside the watch of the President. A few states together, upon delegation from Congress, would have the power to bind the entire country in setting relations abroad. Needless to say, the interests of respective states in terms of international relations vary. Indeed, Congress approved a provision in the Great Lakes Basin Compact establishing that "the Province of Ontario and the Province of Quebec, or either of them, may become states party to this compact by taking such action as their laws and the laws of the Government of Canada may prescribe for adherence thereto."[165] Congress empowered the compact to pursue measures with a palpable impact on foreign affairs.

The Constitution recognizes the potential conflict, but only in part. Article I itself forbids states from "enter[ing] into any Treaty, Alliance, or Confederation; [or] grant[ing] Letters of Marque and Reprisal."[166] That prohibition suggests a constitutional awareness that Article II at times trumps federalism. But, Article I does not limit congressionally approved compacts that do not fall within the category of "Treaty, Alliance, or Confederation," even those with foreign states.[167] The line between

164. U.S. CONST. art. II, § 2, cl. 2.

165. Great Lakes Basin Compact, Pub. L. No. 90-419, art. II(B), 82 Stat. 414, 414 (1968); *see* MARIAN E. RIDGEWAY, INTERSTATE COMPACTS: A QUESTION OF FEDERALISM 156–57 (1971).

166. U.S. CONST. art. I, § 10, cl. 1.

167. *Id.*

"Treaty, Alliance, or Confederation" and compacts with foreign states is not self-evident, and the Supreme Court has stated that any such distinction in the minds of the Framers has been lost to history.[168] Article II must be accommodated with Article I in some fashion.

Although a congressional stamp of approval can authorize states to execute the law, Congress cannot resort to delegation to state entities to strip the President of his role in foreign affairs.[169] The Constitution may not sort out the overlap between federalism and separation of powers concerns, but it plants the seeds for an accommodation.

Indeed, comparable concerns have led the Supreme Court to strike down state laws that have interfered with the United States' foreign policy. In *Zschernig v. Miller*,[170] for example, Oregon law had prohibited any non-U.S. citizen from inheriting property if his or her home nation denied U.S. citizens that right.[171] After losing in Oregon's courts, an East German citizen successfully sought review in the Supreme Court, which reversed the Oregon decision on the ground that the state statute impermissibly intruded into the President's foreign affairs power.[172] For another example, Massachusetts in 1996 established a restrictive purchasing list targeting companies doing business with Burma (now named Myanmar) to protest the dictatorship's policies.[173] That action placed the United States in the awkward position of defending the Massachusetts approach before the World Trade Organization while attempting behind the scenes to pressure Massachusetts to change the law.[174] Firms doing business in Burma challenged the law, and the courts invalidated the measure. The Supreme Court in *Crosby v. National Foreign Trade Council*[175] stressed in reviewing the Massachusetts measure that the state's action interfered with subsequent congressional delegation of authority to the President to impose sanctions on Burma.[176]

In the above examples, Congress did not sanction the state interference in foreign affairs. Congressional approval of such state actions, however, nonetheless might intrude into the President's constitutionally grounded authority to superintend relations with foreign states. Perhaps congressional authorization can alter the boundaries in which states are free

168. *See* U.S. Steel Corp. v. Multistate Tax Comm'n, 434 U.S. 452, 460–72 (1978) (distinguishing between alliances and other agreements lost in history).

169. *Cf.* Barron v. Mayor & City Council of Balt., 32 U.S. (7 Pet.) 243, 249 (1833) (commenting that states cannot enter into any agreements with foreign powers).

170. 389 U.S. 429 (1968).

171. *Id.* at 430–31 & n.1.

172. *Id.* at 436 ("[S]tate involvement in foreign affairs and international relations [are] matters which the Constitution entrusts solely to the Federal Government . . . .").

173. *See* Crosby v. Nat'l Foreign Trade Council, 530 U.S. 363, 366–68 (2000).

174. *See id.* at 383–84.

175. 530 U.S. 363.

176. *Id.* at 374–77; *see also* Am. Ins. Ass'n v. Garamendi, 539 U.S. 396, 413–29 (2003) (striking down California's facilitation of Holocaust era insurance claims); Von Saher v. Norton Simon Museum, 592 F.3d 954, 968 (9th Cir. 2010) (holding that California cannot extend the statute of limitations for recovering art stolen during the Holocaust).

to act, but congressional delegation can no more vest in states the power to initiate hostilities abroad than it can authorize states to enter into treaties.

Consider the Supreme Court's decision in *Holmes v. Jennison*.[177] The Supreme Court confronted the question of whether Vermont could agree with Canadian authorities to extradite fugitives in the absence of congressional sanction. A majority of the eight Justices participating evidently concurred in Chief Justice Roger B. Taney's reasoning that the extradition agreement was illegal, but could be rectified by congressional consent.[178] The Court ignored the potential separation of powers ramifications of Vermont's unilateral determination to enter into an extradition agreement with a sovereign nation. In light of the President's constitutionally grounded powers over foreign relations—the power to propose treaties, appoint ambassadors, and be commander-in-chief of the armed forces—the *Holmes* Court should have struck down Vermont's arrangement on Article II grounds as well. Congress cannot enlist particular states to forge foreign policy. As *Zschernig* and *Crosby* demonstrate in the related context sketched above, there will be line drawing issues, but state delegations should be judicially policed to ensure that the delegations do not permit intrusion into the President's powers other than in law enforcement. The historic understanding of shared power between states and the federal government does not extend that far. *Free Enterprise Fund* suggests that delegation to state entities should be scrutinized at least to determine whether the President exercises sufficient control over foreign affairs.

2. Delegations Permitting Discrimination Against Nonparticipating States

Arguably, Congress should also be limited in delegating to state entities when the delegation permits states to infringe the interests of states that have been excluded from the delegation.[179] Although delegations to a wide swath of state officials as in the NAIC example would not be problematic, delegations to a compact of states could harm nonparticipating states. As a theoretical matter, the President's Article II powers are designed in part to ensure accountability for a national constituency. As the Court in *Free Enterprise Fund* framed it, the "Constitution requires that a President chosen by the entire Nation oversee the execution of the laws."[180] If congressional delegations to state entities result in injury to nonparticipating states, then bypassing the President causes an independent harm in precluding the check of presidential oversight—oversight from the only

177. 39 U.S. (14 Pet.) 540 (1840).

178. *Id.* at 570 ("The power of deciding whether a fugitive from a foreign nation should or should not be surrendered . . . is one of the powers that the states are forbidden to exercise without the consent of Congress.").

179. In essence, the concern is that the political safeguards of federalism do not protect the interests of states that cannot exert sufficient influence in Congress as a whole.

180. Free Enter. Fund v. Pub. Co. Accounting Oversight Bd., 130 S. Ct. 3138, 3155–56 (2010).

politically elected official beholden to a national constituency.[181] As Professor Calabresi expresses the presidential advantage in a slightly different context, "[t]he only official with any incentive under our present electoral structure to stop this [effort to impose costs on others] is the President who is (along with the Vice President) our only nationally elected official."[182] Similar sentiments support presidential line item vetoes—only the President arguably has the national perspective to stop earmarks that redound to the benefit only of particular sectors of the country.[183]

The Supreme Court on occasion has stated that the congressional consent requirement in the Compact Clause was designed in part to prevent participating states from shifting costs or harms to nonparticipating ones. Compacts must be submitted for congressional approval in part to guard against, in Justice Byron White's words in *United States Steel Corp. v. Multistate Tax Commission*, "encroachments upon non-compact States."[184] Consider congressional delegation to a compact of states to regulate production of coal in the Northeastern states. In making its determination, the compact might be tempted to shift costs of externalities such as pollution to states in the Midwest.[185] Similarly, states may urge Congress to set up conditional funding programs that they know other states cannot take advantage of.[186] In *U.S. Steel* itself, plaintiffs challenging the compact argued that the states participating in the compact might agree to particular tax formulas to draw businesses from nonparticipating states.[187]

The continuing litigation over disposal of low level radioactive waste manifests the risk of state v. state friction. Congress authorized compacts to encourage states to determine among themselves which states would create and maintain waste sites, and how other members of the compact would furnish sufficient incentives to the state in which the site is located. The

181. *See* Steven G. Calabresi, *Some Normative Arguments for the Unitary Executive*, 48 ARK. L. REV. 23, 65–66 (1995). Calabresi argues in part that the unitary executive is designed to prevent members of Congress from legislating purely to benefit particular geographic sectors. For a response, see Evan Caminker, *The Unitary Executive and State Administration of Federal Law*, 45 U. KAN. L. REV. 1075, 1110 (1997), doubting that such concerns should lead to curbing delegations to state officials, as long as only citizens within the states are affected.

182. Calabresi, *supra* note 181, at 35.

183. *See, e.g.*, J. Gregory Sidak, *The Petty Larceny of the Police Power*, 86 CALIF. L. REV. 655 (1998) (reviewing FRED S. MCCHESNEY, MONEY FOR NOTHING: POLITICIANS, RENT EXTRACTION, AND POLITICAL EXTORTION (1997)); Aaron D. Zibart, Note, *Eulogizing the Line Item Veto Act:* Clinton v. City of New York *and the Wisdom of Presidential Legislating*, 88 KY. L.J. 505 (2000).

184. U.S. Steel Corp. v. Multistate Tax Comm'n, 434 U.S. 452, 494 (1978); *see also* Rhode Island v. Massachusetts, 37 U.S. (12 Pet.) 657, 726 (1838).

185. *Cf.* West Virginia *ex rel.* Dyer v. Sims, 341 U.S. 22, 30–31 (1951) (rejecting challenge to compact addressing discharge into Ohio River). See also the discussion in *Virginia v. EPA*, 108 F.3d 1397 (D.C. Cir. 1997), addressing the difficulty of confining impact of pollution to states within a single compact or alliance.

186. *See* Lynn A. Baker, *Putting the Safeguards Back into the Political Safeguards of Federalism*, 46 VILL. L. REV. 951, 963 (2001).

187. *U.S. Steel*, 434 U.S. at 473.

states involved in the compact have little interest in permitting waste generated *outside* the compact to be stored in their sites.[188]

At times, consumer interests within the states may restrain state efforts to impose costs on businesses outside the state because of the concern for price increases. The compact, however, may override such objections, particularly if the states can ensure that much of the costs of any development flow downstream.

In such cases, the congressional consent requirement might be insufficient to prevent encroachment on interests of states outside the compact. Although the prospect of a presidential veto of the law setting up the compact exists, establishment of a compact itself would rarely reveal any intent to harm nonparticipating states. Indeed, there is some evidence that participating states have utilized compacts to shift costs to those states not included,[189] although empirical evidence as to the incidence of cost shifting is extremely limited.

To be sure, states may always lose in Congress. On some issues, agrarian states may win, on others, it may be coal-producing states, and for still others, it may be states in which federal military bases are located. The genius of the Virginia Plan[190] was to minimize the potential that small states would lose out consistently in the legislative process. Given the shifting coalitions, a state with an adverse interest today might become an ally tomorrow, and that possibility restrains larger states from encroaching too much on smaller or disfavored states' interests. Moreover, the need to present each proposed bill to the President also works to minimize the potential for states to exact too much benefit at the expense of others in the system. The threat of a veto can squelch any such power play.

After congressional delegation to a compact,[191] however, there is no ongoing supervision by the President. State officials need not comply with presidential circulars; nor are they subject to the President's removal authority. State compacts may well decide to visit the burdens of regulation on nonparticipating states.

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188. *See, e.g.*, EnergySolutions, LLC v. Utah, 625 F.3d 1261 (10th Cir. 2010) (involving an operator of a waste site resorting to the courts in an effort to permit waste from outside the compact states to be stored at the site).

189. *See generally* Michael S. Greve, *Compacts, Cartels and Congressional Consent*, 68 MO. L. REV. 285, 289 (2003). Greve cites several examples, such as the Northeast Dairy Compact, 7 U.S.C. § 7526 (2006), to demonstrate the potential for state compacts to result in harm to nonparticipating states. *See also* Joseph J. Spengler, *The Economic Limitations to Certain Uses of Interstate Compacts*, 31 AM. POL. SCI. REV. 41, 42 (1937) ("[C]ontrol by compacting state may injure the inhabitants of non-compacting states."). Spengler uses the example of a compact designed to control production of cotton. *Id.* at 44. Cotton-producing states would benefit, while those outside the compact whose citizens purchase cotton would have to pay more for the cotton. *Id.*

190. *See* THE DEBATES IN THE FEDERAL CONVENTION OF 1787 WHICH FRAMED THE CONSTITUTION OF THE UNITED STATES OF AMERICA REPORTED BY JAMES MADISON 23–26 (Gaillard Hunt & James Brown Scott eds., int'l ed. 1920).

191. For a cynical summary of delegation in general, see DAVID SCHOENBROD, POWER WITHOUT RESPONSIBILITY: HOW CONGRESS ABUSES THE PEOPLE THROUGH DELEGATION (1993).

Contrast the delegation context to Congress's role in a Dormant Commerce Clause challenge. There, as well, Congress has the opportunity to ratify one state's efforts to impose costs on businesses or citizens living outside its borders.[192] As the Court summarized in *Associated Industries of Missouri v. Lohman*[193] the Dormant Commerce Clause "prohibits economic protectionism . . . regulatory measures designed to benefit in-state economic interests by burdening out-of-state competitors."[194] The prospect of a presidential veto exists to temper any inclinations by members of Congress to sustain a discriminatory measure.[195] Although a congressional override of a veto can enact a discriminatory measure into law,[196] the requirement of presentment mutes that concern.

Yet, one critical distinction exists—in the Dormant Commerce Clause context, Congress directly assesses the benefits and drawbacks of the state law that allegedly burdens out of state interests. In contrast, the potential burden or encroachment on disfavored states arises at a different stage in the delegation context—only after Congress and the President have agreed to the delegation. The state compact's action need not be channeled through Congress or the President before becoming law. As with other delegations of administrative authority, there are political checks before the delegation, but not afterwards. Just as legislation is subject to greater formal political checks than authority exercised by administrative agencies, so the protections for states are greater for legislation than for authority exercised by other states pursuant to a congressional delegation.

The theoretical risk of encroachment among the states, however, does not suggest an easily enforceable line to draw.[197] Tests would have to be forged, as under the Dormant Commerce Clause, to determine when states' exercise of delegated authority, particularly through compacts, results in an unacceptable harm to an unrepresented state. The contours of this newly devised subpart of the Nondelegation Doctrine would be difficult to derive. Courts presumably would consider whether to focus principally on the

192. *See* W. & S. Life Ins. Co. v. State Bd. of Equalization of Cal., 451 U.S. 648 (1981); Lewis v. BT Inv. Managers, Inc., 447 U.S. 27, 44 (1980); H.P. Hood & Sons, Inc. v. Du Mond, 336 U.S. 525, 542–43 (1949). The only congressional constraints may be the Commerce Clause, Equal Protection, and Privileges and Immunities Clauses. *W. & S. Life Insurance*, 451 U.S. at 655–56.

193. 511 U.S. 641 (1994).

194. *Id.* at 647 (internal quotation marks omitted).

195. Exploitation of nonparticipating states by those in compacts is so likely "that Congress is called in to review the arrangement at the outset." Saul Levmore, *Interstate Exploitation and Judicial Intervention*, 69 VA. L. REV. 563, 570 n.17 (1983).

196. As the Court stated in *Maine v. Taylor*, 477 U.S. 131 (1986), "[i]t is well established that Congress may authorize the States to engage in regulation that the Commerce Clause would otherwise forbid." *Id.* at 138.

197. *See* Whitman v. Am. Trucking Ass'ns, 531 U.S. 457, 474–75 (2001) ("[W]e have almost never felt qualified to second-guess Congress regarding the permissible degree of policy judgment that can be left to those executing or applying the law." (internal quotation marks omitted)). For a discussion of the Tenth Amendment as underenforced, see *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528 (1985). For an argument that the Due Process Clause is also underenforced, see Harold J. Krent, *The Supreme Court as an Enforcement Agency*, 55 WASH. & LEE L. REV. 1149 (1998).

intent underlying the challenged measure or, rather, its results, whether a new hydroelectric plant or standard setting for coal production. One of the problems of any test is that nonparticipating states always are injured if the participating states help themselves financially through the compact and, as a consequence, make their venues more attractive for business. Courts would have to determine which measures aimed at advancing the economic wealth of participating states impermissibly target nonparticipating states and which reflect run of the mill efforts aimed toward economic development of the region.

More problematically, there is no remedy to apply unless courts step into the shoes of the President to determine if the President would have approved the measure had he been afforded the opportunity to review the policy set by the compact. In essence, courts would have to second-guess presidential policy in determining which state measures—pursuant to congressionally delegated authority—unconstitutionally burden interests of other states.

But that very second-guessing of presidential policy would itself be problematic, for the President would have no direct way to review the judicial decision to determine whether to permit the delegation to stand. In the Dormant Commerce Clause setting, by contrast, Congress can consent to state initiatives that burden interstate commerce. In the delegation context, however, the President would not have the final say.

Judicial enforcement itself, therefore, would intrude into Article II prerogatives. Judges cannot effectively evaluate policies implemented by state entities pursuant to congressional delegations. In short, courts can review states' exercise of congressionally delegated authority to determine if the delegate's action is ultra vires, but courts cannot realistically step into the shoes of the President and invalidate exercises of authority that impose costs on other states.

Finally, the difficulty of reviewing the exercise of authority delegated to compacts reinforces the importance of the ex ante decision to approve the initial delegation or formation of a compact. Congress and the President should be aware of the potential that states may exercise delegated authority in a way that disadvantages other states' interests. Moreover, that possibility may well prove reason for courts to construe the terms of congressional delegations to states narrowly.[198] Courts should be stinting when reviewing challenges to authority exercised by congressionally approved compacts given that the policy formulated after such delegations evades the presidential superintendence designed to ensure that states do not take advantage of others. Such strict construction reflects an accommodation between the federalism and Article II principles underlying our Constitution.

198. *Cf.* Kent v. Dulles, 357 U.S. 116, 129 (1958) (construing delegation narrowly to avoid constitutional question). *See also* Hampton v. Mow Sun Wong, 426 U.S. 88, 112 (1976) (construing delegation to Civil Service Commission narrowly to limit power to exclude resident aliens from federal workforce).

CONCLUSION

To date, discussion of *Free Enterprise Fund* has focused on its potential impact to rigidify structures of administrative agencies. If the President must supervise administrative officials through the removal authority, then Congress cannot innovate as much in creating administrative entities that are outside the political influence of the President. Justice Breyer's dissent vividly illustrates the ramifications of the decision if applied outside the narrow setting of the PCAOB.

The broader implications of the decision, however, ultimately may rest with constricted opportunities for Congress to delegate authority to state and private entities. Congress typically leaves the President with no removal authority when delegating outside the federal government. The logic of *Free Enterprise Fund* strongly suggests that Congress may not, consistent with Article II, delegate significant authority to private and state entities. Although the decision does not elaborate on what constitutes "significant authority," it imperils a wide range of structures permitting private and state entities to participate in shaping federal law, including the Federal Open Market Committee, self-regulated organizations that have received Congress's imprimatur, and congressionally approved state compacts.

Free Enterprise Fund should prompt reconsideration of authority delegated by Congress to private entities. Executive branch oversight not only comports with Article II, but can protect private parties from overreaching. Preventing Congress from delegating to private parties ensures that public authority will be implemented in a way that can be traced to the President. In particular, Congress after *Free Enterprise Fund* may not be able to delegate decision-making authority to groups such as the National Academy of Sciences or enforcement authority to self-regulatory organizations unless there is sufficiently stringent oversight by Article II entities.

In contrast to private actors, however, state actors in large part are politically accountable, and there is little risk of congressional aggrandizement from delegation to state entities. State officials should be able to enforce federal law, Congress should be able to incorporate state law by reference, and state compacts should be able to fashion federal policy. Courts should intervene only when compacts or other state entities infringe upon a distinct presidential power under Article II, such as the power to supervise foreign affairs. Thus, while delegations to private individuals and entities should be curtailed in light of the lack of presidential oversight, *Free Enterprise Fund* should leave untouched most delegations to state entities: our federalist structure presupposes a limitation on the President's Article II responsibility to superintend enforcement of delegated authority.