

**A RESPONSE TO *BEYOND SEPARATION*: PROFESSOR COPELAND'S  
AMBITIOUS PROPOSAL FOR "INTEGRATIVE" FEDERALISM**

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Professor Charlton Copeland offers a wide-ranging, ambitious critique of what he characterizes as federalism jurisprudence's dominant models of "separation" and "allocation" of authority between the respective federal and state spheres.<sup>1</sup> Judicial resolution of federalism questions, he suggests, turns inappropriately and incompletely on the moment of a law's enactment.<sup>2</sup> This "obsession with the legislative process as the object of federalism enforcement"<sup>3</sup> ignores the more nuanced interactive processes between federal and state authorities that occur after a statute is enacted and as it is implemented through administrative channels. Particularly in the context of cooperative federal-state programs, such as Medicaid, Congress enacts the broad requirements with which states must comply in order to receive federal funding or avoid federal preemption. Congress also typically delegates rulemaking authority to an executive branch agency to flesh out the details and supervise state implementation of the program. Necessarily, then, the federal agency will engage in ongoing monitoring, negotiation, and enforcement of state authorities. It is this sub-congressional, continual interaction between federal and state authorities that Copeland finds inadequately captured in existing federalism scholarship and doctrine.

The omission matters, Copeland suggests, because courts' myopic focus on the initial exercise of congressional authority may "allow[] for continued interactions where substantive regulatory authority may

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<sup>1</sup> Charlton C. Copeland, *Beyond Separation in Federalism Enforcement: Medicaid Expansion, Coercion, and the Norm of Engagement*, 15 U. PA. J. CONST. L. 91 (2012).

<sup>2</sup> *Id.* at 101.

<sup>3</sup> *Id.* at 103.

not exist.”<sup>4</sup> In other words, a statute that was easily constitutional at the time of enactment might “become” unconstitutional when the court considers the larger life of the program over the course of time. Accordingly, to accurately determine whether a federal statute violates structural limits on federal power, courts must consider the considerable role of administrative agencies in federalism practice and policymaking. Copeland’s characterization of the ongoing federal-state interaction in cooperative federalism programs is undoubtedly descriptively accurate. But it is less clear what constitutional work that observation is doing, how courts deciding federalism cases would implement his insight, or why agency-level interactions, even between federal and state officials, are not otherwise adequately captured in administrative law doctrine.

As far as how courts might implement Copeland’s insight, perhaps they would draw lines between federal and state authority in different places if they considered how the challenged federal program has been implemented. Under the predominant separation and allocation models, Copeland suggests that a federal statute “privilege[d]” as constitutional at the time of enactment is thereafter forever shielded from federalism challenges, regardless of any post-enactment policymaking at the agency level.<sup>5</sup> Future interactions between federal and state officials “do[] not appear to impact the assessment of whether a statute is consistent with the Constitution’s federalism dictates.”<sup>6</sup> But might those interactions nevertheless be constitutionally significant for separation of powers purposes relevant to administrative law?

More fundamentally, it is not clear that Copeland’s observation changes the underlying question. Accepting the premise that courts cannot accurately judge the constitutionality of a statute without considering the actual life of the program, rather than just the static moment of passage, the ultimate question is still allocation and separation: whether federal power has *crossed the line* into states’ reserved powers. Under Copeland’s suggestion, that inquiry would be determined not simply on the face of the statute but as actually carried out by a federal agency. The analytical method and relevant “evidence” for resolving the question would be more nuanced. But courts would still *be drawing lines*: separating and allocating power between the respective federal and state spheres. The suggestion that courts merely consider additional evidence in resolving federalism questions, while

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4 *Id.* at 100.

5 *Id.* at 117.

6 *Id.* at 117–18.

not without controversy, is more modest than the one that Copeland wants to make.

Copeland seems to want to say something more revolutionary, something that will shake up the dominant separation and allocation models of federalism, as a theoretical, and not just jurisprudential, matter. Even accepting the descriptive accuracy of Copeland's observations, it is not clear what the alternative model would look like. What would the "interactive" or "integrative" model do? Would it question the hard-wired constitutional design that explicitly enumerates federal power and reserves all unenumerated powers to states? Surely it could not. Would it soften the inquiry, finding fewer areas of unconstitutional conflict and fewer federal programs challengeable on federalism grounds? Perhaps the actual course of dealings between federal and state authorities would reveal more room for exercise of state power than the statutory design suggests, thereby rebutting the federalism challenge to the law. Would Copeland's alternative model suggest, as the Framers did and recent commentators have,<sup>7</sup> that friction and jarring between federal and state authorities is actually consistent with the constitutional design? Or would the course of dealing reveal statutes previously considered clearly within congressional power as now unconstitutional? Copeland's concern about federal statutes being forever "privileged" and the Supreme Court's recent Medicaid decision in *National Federation of Independent Business v. Sebelius* (*NFIB*)<sup>8</sup> both suggest that final possibility.

#### INTEGRATIVE FEDERALISM IN *NFIB* V. *SEBELIUS*

Copeland's signal example of the dominance of the separation model in federalism jurisprudence is the Supreme Court's recent decision in *NFIB*. In a series of "June surprises,"<sup>9</sup> the Court struck down a federal conditional spending program, namely, the Patient Protection and Affordable Care Act's (ACA's) expansion of Medicaid eligi-

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<sup>7</sup> See Elizabeth Weeks Leonard, *Rhetorical Federalism: The Value of State-Based Dissent to Federal Health Reform*, 39 HOFSTRA L. REV. 111, 122 (2010) (citing THE FEDERALIST NO. 70, at 426–27 (Alexander Hamilton) (Clinton Rossiter ed., 1961)); CASS R. SUNSTEIN, WHY SOCIETIES NEED DISSENT 145 (2003); James A. Gardner, *State Constitutional Rights as Resistance to National Power: Toward a Functional Theory of State Constitutions*, 91 GEO. L.J. 1003, 1007 (2003); Heather K. Gerken, *Dissenting by Deciding*, 57 STAN. L. REV. 1745, 1752–59 (2005); and others).

<sup>8</sup> 132 S. Ct. 2566 (2012).

<sup>9</sup> See Charles Fried, *The June Surprises: Balls, Strikes, and the Fog of War*, SCOTUSBLOG (Aug. 2, 2012, 12:19 PM), <http://www.scotusblog.com/2012/08/the-june-surprises-balls-strikes-and-the-fog-of-war/>.

bility to all low-income adults.<sup>10</sup> To be precise, the *NFIB* Court did not actually strike any provision of the ACA but instead held that a long-standing provision of the 1965 Medicaid Act, authorizing the Secretary to withhold federal funds from noncompliant states, could not constitutionally be applied to states that declined to implement the ACA's Medicaid expansion.<sup>11</sup> Copeland characterizes *NFIB*'s Medicaid decision as a missed opportunity to employ his integrative vision of federalism.

To be sure, *NFIB* represents "a sharp break from past precedent."<sup>12</sup> It is the Court's first decision since the New Deal to strike down a federal spending power enactment and also the Court's first application of, as opposed to dicta reference to, the "coercion doctrine" as a limit on federal conditional spending power.<sup>13</sup> Copeland struggles to make a case for how the *NFIB* decision perpetuates the separation and allocation dominant paradigm. What makes his argument tough to swallow is that the justices, in fact, do a pretty good job of acknowledging the course of dealing between federal and state officials over the life of the Medicaid program and infusing their reasoning with those observations. Justice Ginsburg offers the most accurate, nuanced discussion of the program,<sup>14</sup> but the other justices' opinions have moments of insight as well.

The highly fractured decision in *NFIB* produced three separate opinions: the Roberts plurality, holding that states could not be required to expand Medicaid but must be given the option;<sup>15</sup> the Ginsburg dissent, concluding that Congress was well within its spending power to require Medicaid expansion;<sup>16</sup> and the unsigned joint dissent, which would have held Medicaid expansion unconstitutional and nonseverable, and therefore the whole of the ACA unconstitutional.<sup>17</sup> For Copeland, all three opinions adhere disappointingly to the established allocation/separation model of federalism.<sup>18</sup> He notes that each opinion does, in fact, describe and consider the on-

10 *NFIB*, 132 S. Ct. at 2607 (opinion of Roberts, C.J., joined by Breyer & Kagan, JJ.); *id.* at 2666 (joint dissent).

11 *Id.* at 2608 (majority opinion).

12 Copeland, *supra* note 1, at 96.

13 See Nicole Huberfeld, Elizabeth Weeks Leonard & Kevin Outtersen, *Plunging into Endless Difficulties: Medicaid and Coercion in National Federation of Independent Business v. Sebelius*, 93 B.U.L. REV. 1, 2–3 (2013).

14 Accord Nicole Huberfeld, *Heed Not the Umpire: Justice Ginsburg Called NFIB*, 15 U. PA. J. CONST. L. HEIGHT. SCRUTINY 43 (2013) (explaining how "Justice Ginsburg's nuanced approach to the facts in *NFIB* led her to the correct constitutional analysis").

15 132 S. Ct. at 2608 (opinion of Roberts, C.J., joined by Breyer & Kagan, JJ.).

16 *Id.* at 2642 (Ginsburg, J., concurring in part and dissenting in part).

17 *Id.* at 2668 (joint dissent).

18 Copeland, *supra* note 1, at 154.

going federal-state interactions in the Medicaid program, offering a glimmer of hope for his alternative thesis but ultimately failing to embrace it.<sup>19</sup> On closer examination, however, the opinions hew closer to Copeland's ideal norm of engagement than his analysis suggests.

Copeland faults both the Roberts plurality and the Ginsburg dissent for improperly focusing on a static moment of congressional action: for Roberts, the enactment of the ACA and "new Medicaid" in 2010; for Ginsburg, the enactment of the original Medicaid Act in 1965.<sup>20</sup> Both approaches ignore the ongoing federal agency involvement with the states to implement fifty different state Medicaid Plans over almost thirty years.<sup>21</sup> Copeland notes that State Plans are characterized by wide variation among covered groups, covered services, insurance models, reimbursement methodologies, and coordination with other federal and state programs.<sup>22</sup> Each unique State Plan is the product of extensive interaction and negotiation between the federal agency and the individual state authorities.<sup>23</sup> Each State Plan, accordingly, expresses policy choices and priorities, more tailored and more detailed than the broad congressional design.<sup>24</sup> The justices' analyses are incomplete for failing to reflect those integrative processes, Copeland concludes.<sup>25</sup>

Copeland highlights features of the Medicaid program that the justices' opinions overlooked, including the history of the program and its current operation.<sup>26</sup> He finds particularly telling a relatively recent development in the administration of the program that allows states considerable flexibility to waive otherwise mandatory federal requirements.<sup>27</sup> Although the waiver process has become an important feature of the Medicaid program, Copeland paints a picture of a much more fluid, flexible program than Medicaid truly is. Waivers do allow states to expand or modify coverage for certain groups of people and certain types of services. But for the bulk of the "deserving" poor historically served by the Medicaid program,<sup>28</sup> federal statutory and regulatory requirements with which states must comply to

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19 *Id.* at 158, 162–67.

20 *Id.* at 102.

21 *Id.*

22 *Id.* at 130–31.

23 *See id.* at 132–34.

24 *See id.* at 132.

25 *Id.* at 102.

26 *Id.* at 126–39.

27 *Id.* at 135–36.

28 *See* Huberfeld, Leonard & Outtersson, *supra* note 13, at 13–17 (describing the history of Medicaid and the "deserving" poor).

receive federal dollars remain fairly rigid and nonnegotiable.<sup>29</sup> Indeed, the ACA's expansion of Medicaid was enacted as a mandatory requirement on states, not a flexible option (although the Roberts opinion effectively rewrote this). In focusing on Medicaid waivers, Copeland overplays his hand, suggesting greater incongruity between his preferred approach to federalism and the justices' reasoning in *NFIB*.

A couple of clarifications are warranted. First, Copeland understates the mandatoriness of the ACA's Medicaid expansion, suggesting there is an "underlying threat"<sup>30</sup> that the federal government might terminate states' federal funding for noncompliance. He dismisses that possibility as impractical and unlikely, given the enmeshment of federal and state bureaucratic structures in the Medicaid arena.<sup>31</sup> While it is true that the federal government has never actually withheld all of a state's federal Medicaid dollars for noncompliance,<sup>32</sup> there is more than an "underlying threat." That sanction is expressly authorized in the original 1965 Medicaid Act.<sup>33</sup> The fact that the provision reserves discretion to the federal agency whether to impose the ultimate sanction or to negotiate an alternative remedial plan with a state<sup>34</sup> actually supports Copeland's thesis, demonstrating that Congress clearly anticipated an interactive process between federal and state authorities.

Copeland loses sight of that point with a second misstatement. He asserts that the "ACA [as opposed to the original Medicaid Act] delegated authority to the Secretary to withhold all federal Medicaid reimbursement funds for states failing to expand Medicaid eligibility."<sup>35</sup> But the ACA does no such thing; it added no new penalties but merely expanded Medicaid *eligibility* in step with numerous prior amendments over the life of the program.<sup>36</sup> Each prior expansion,<sup>37</sup> like the ACA expansion,<sup>38</sup> has been subject to the same potential sanction of loss of all federal funds for states that fail to comply. The 1965 statu-

29 See *id.* at 17–20 (describing mandatory and optional coverage categories).

30 Copeland, *supra* note 1, at 133.

31 *Id.*

32 See Huberfeld, Leonard & Outterson, *supra* note 13, at 17.

33 See 42 U.S.C. § 1396c (2006).

34 See *id.*; 42 C.F.R. §§ 430.15, 430.18, 430.20, 430.60 *et seq.* (2011) (detailing process for resolving state noncompliance).

35 Copeland, *supra* note 1, at 138.

36 See 42 U.S.C. § 1396(a)(k)(1) (Supp. IV 2010).

37 See Copeland, *supra* note 1, at 137 (noting that the ACA Medicaid expansion "is only the latest in a line of expansions of the program since its enactment, but primarily in the late 1980s and 1990s"); see also Huberfeld, Leonard & Outterson, *supra* note 13, at 20–24 (detailing how "Congress has repeatedly expanded Medicaid").

38 See 42 U.S.C. § 1396(a)(k)(1) (Supp. IV 2010).

tory sanction figured prominently in the justices' opinions,<sup>39</sup> suggesting, contrary to Copeland's concern, that courts can, and, here in fact did, consider the ongoing interactions of federal administrative agencies and regulated states in evaluating federalism questions.

For Copeland, the locus of the *NFIB* opinions' failure to employ an integrative model of federalism is the "notice" prong.<sup>40</sup> "Clear notice" was one of the *South Dakota v. Dole*<sup>41</sup> commandeering limits, which the *NFIB* Court incorporated into the coercion analysis.<sup>42</sup> The notion is that cooperative federalism programs are "in the nature of a contract"<sup>43</sup> and, as such, one party cannot unilaterally change the terms of the contract without providing notice to the other party. To Copeland's view, the notice and contract analogy perpetuates the jurisprudential focus on the initial enactment of a statute, rather than future implementation and federal-state interaction.<sup>44</sup> For Ginsburg, the contract, *i.e.*, the 1965 statute, is valid because it expressly reserved Congress's unilateral right to repeal, amend, and revise the statute<sup>45</sup> and clearly specified funding withdrawal as a potential penalty for state noncompliance with program requirements.<sup>46</sup> For Roberts, the ACA's expansion of Medicaid represented an entirely new contract, which failed to provide states with clear notice of its terms, including the possibility of loss of all federal Medicaid funding, old and new.<sup>47</sup> Copeland concludes that the justices' "depiction of Spending Clause legislation as an offer to contract emphasizes the independence and voluntary choice of the state governments,"<sup>48</sup> thereby perpetuating the separation/allocation model.

But it seems just as consistent with the analogy to consider the parties' course of dealing as relevant to the contract interpretation. In the Medicaid context, for example, courts might consider the federally approved State Plan, and the negotiation process that occurs between federal agency and each respective state's authorities in ap-

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39 See *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566, 2603–05 (2012) (opinion of Roberts, C.J., joined by Breyer & Kagan, JJ.); *id.* at 2629–30 (Ginsburg, J., concurring in part and dissenting in part); *id.* at 2657 (joint dissent).

40 Copeland, *supra* note 1, at 153–54.

41 483 U.S. 203, 207 (1987).

42 See Huberfeld, Leonard & Outterson, *supra* note 13, at 51–55 (explaining the "clear notice" requirement and examining its role in the *NFIB* opinions).

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

44 Copeland, *supra* note 1, at 153–54.

45 42 U.S.C. § 1304 (2006).

46 Copeland, *supra* note 1, at 159.

47 *Id.* at 162–65.

48 *Id.* at 157.

proving that State Plan on an annual basis,<sup>49</sup> as the relevant contract, rather than the statute enacted by Congress. Even if the Medicaid Act is viewed as the contract, that statute, like so many other federal statutes, expressly delegated implementation to a federal agency. That delegation, along with other terms of the statutory contract, clearly apprised both parties that further interactions would occur and binding requirements would be added over time. Even if notice were the only limit animating the *NFIB* decision, that point is not necessarily inconsistent with Copeland’s integrative view of federalism.

Moreover, all three opinions consider various additional factors besides clear notice, with key reasoning turning on the ongoing interaction between federal and state authorities. Chief Justice Roberts, for example, concluded that the ACA’s Medicaid expansion crossed the line from pressure to compulsion because of the amount of money that states now have at stake in the program, after nearly three decades of involvement.<sup>50</sup> He noted, by contrast, that the federal government could offer an equally large quantum of *new* conditional funding to states without violating the coercion doctrine.<sup>51</sup> The preexisting state participation and potential loss of all Medicaid funding—old and new—was what rendered the ACA expansion unconstitutional.<sup>52</sup>

As Copeland notes, the Chief Justice also highlighted the “intricate statutory and administrative regimes over the course of many decades.”<sup>53</sup> But Copeland understands the Chief Justice’s reasoning to stall on the notice issue, concluding that Congress failed to provide adequate notice of sweeping new conditions to Medicaid, rather than considering the course of dealing between federal and state actors.<sup>54</sup> But clear notice is just one of at least three prongs of reasoning that animate the Roberts opinion.<sup>55</sup> The Chief Justice’s observation about

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49 See 42 C.F.R. §§ 430.10, 430.12 (2011); Huberfeld, Leonard & Outterson, *supra* note 13, at 17; see also Copeland, *supra* note 1, at 135–36 (describing the interactive process around Medicaid waivers).

50 Nat’l Fed’n of Indep. Bus. v. Sebelius, 132 S. Ct. 2566, 2603 (2012) (opinion of Roberts, C.J., joined by Breyer & Kagan, JJ.).

51 *Id.* at 2607 (“Nothing in our opinion precludes Congress from offering funds under the Affordable Care Act to expand the availability of health care, and requiring that States accepting such funds comply with the conditions on their use.”).

52 *Id.* (“What Congress is not free to do is to penalize States that choose not to participate in that new program by taking away their existing Medicaid funding.”).

53 Copeland, *supra* note 1, at 164 (quoting *NFIB*, 132 S. Ct. at 2604 (opinion of Roberts, C.J., joined by Breyer & Kagan, JJ.)).

54 *Id.* at 164–65.

55 See Huberfeld, Leonard & Outterson, *supra* note 13, at 55–67 (also discussing the Roberts opinion’s use of relatedness and quantitative and qualitative coercion).



the decades of entanglement demonstrates why, as a practical matter, states can no longer opt out. The amount of money at stake further leaves them with no real choice.

According to Copeland, Justice Ginsburg also caves to the clear notice rationale, relying on the fact that the Medicaid statute has, since 1965, reserved Congress's right to repeal, amend, or change the program.<sup>56</sup> As Copeland accurately notes, Ginsburg describes in detail various amendments to the program over time, some of which significantly increased the number and categories of individuals eligible for the program.<sup>57</sup> But he does not see her observations doing any real work in the Ginsburg analysis. She notes the interaction between states and the federal government over time<sup>58</sup> but does not infuse that observation with constitutional significance. Yet it seems very much to her clear notice point that Congress not only reserved the right to amend the program but, in fact, has used it repeatedly over the years with no state objection or at least no finding of constitutional violation.

That history of Medicaid expansion and amendments over the years also supports Justice Ginsburg's broader point that the ACA does not create a "new" conditional spending program,<sup>59</sup> as Chief Justice Roberts maintained. Accordingly, she found it inapt to suggest that Congress was penalizing states that refuse to participate in a "new" program by withdrawing funds for an existing federal program.<sup>60</sup> "Congress is simply requiring States to do what States have long been required to do to receive Medicaid funding: comply with the conditions Congress prescribes for participation,"<sup>61</sup> conditions which were always, in law and in fact, subject to change.

The joint dissenters, too, consider the on-the-ground operation of the Medicaid program, not merely its moment of statutory enactment. In particular, they highlight states' budgetary realities in support of the conclusion that the ACA expansion would be coercive.<sup>62</sup> The dissenters note that federal Medicaid funding represents one-fifth of the average state's budget.<sup>63</sup> Given that reality, the possibility of loss of all existing Medicaid funding for states that do not agree to expand as required by the ACA would be coercive.<sup>64</sup> The centrality of

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56 Copeland, *supra* note 1, at 158.

57 *Id.* at 158–59.

58 *NFIB*, 132 S. Ct. at 2629–30 (Ginsburg, J., concurring in part and dissenting in part).

59 *Id.* at 2631.

60 *Id.* at 2635–36.

61 *Id.* at 2630.

62 *Id.* at 2662–63 (joint dissent).

63 *Id.* at 2657.

64 *Id.*

that fact in the dissent's analysis reflects a clear recognition of the enmeshment and interdependence of federal and state authorities under the Medicaid program, seemingly consistent with Copeland's thesis.

That perspective is further reflected in the dissent's practical politics "double taxation" argument. The argument suggests that states, as a practical matter, cannot expect their citizens to pay federal taxes to support the Medicaid program, only to have their own state opt out of the conditional funding program and then have to exact state taxes to support an alternative, fully state-funded indigent health care program.<sup>65</sup> Copeland notes that argument but concludes that the dissent ultimately refracts it through the lens of separation and allocation, defining the respective spheres of federal and state taxing authority.<sup>66</sup> He finds the dissent's reasoning to overlook "the ways in which fiscal federalism entangles the state and the national government."<sup>67</sup> His argument becomes strained, however, and the path of less resistance would be to cite the reality of tax politics as an example of the justices' acknowledgement of the interactive process of federal and state governance.

Copeland's disappointment with the *NFIB* opinions is that they are descriptively accurate of the dynamic process of federal-state cooperation but fail to give constitutional significance to his (and their) observations that federalism issues are more nuanced and fact-based than the face of a particular federal statute reflects. It remains unclear, however, just how Copeland would have the Court decide differently. The final part of his paper draws on administrative law as a promising source of a "norm of engagement."<sup>68</sup>

#### ADMINISTRATIVE LAW LESSONS FOR INTEGRATIVE FEDERALISM

The federal-state interactions that Copeland identifies, even if not constitutionally significant for federalism, are constitutionally significant for separation of powers, which structural limit underlies administrative law. Federalism allocates power vertically between the federal government and the states, while administrative law allocates power horizontally among the legislative, executive, and judicial branches. To be sure, federal statutory enactments do not stop at the steps of the Capitol, and courts are frequently called upon to review whether an executive branch agency has exceeded the scope of its congress-

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<sup>65</sup> *Id.* at 2661–62.

<sup>66</sup> Copeland, *supra* note 1, at 166–67.

<sup>67</sup> *Id.* at 167.

<sup>68</sup> *Id.* at 167.

sional delegation. In addition to those separation of powers questions, there is ample literature on the role of administrative agencies in policymaking and their entanglement with (or capture by) the industries they regulate.<sup>69</sup>

Federal programs that call for state participation necessarily place federal agencies in ongoing relationships with state officials. Copeland offers a federalism overlay to administrative law topics, noting the role of federal agencies, through interaction and negotiation with states as regulated “industries,” in developing or altering congressional policies. In addition to Medicaid, Copeland offers the Occupational Safety and Health Act, the No Child Left Behind Act, and the REAL ID Act, as examples of the “entanglement between state and national policy makers that exemplifies cooperative federalism.”<sup>70</sup> Those examples are descriptively compelling but do not necessarily lead to the conclusion that federalism issues must be infused with administrative law principles, or explain why federalism and administrative law cannot operate in tandem to protect constitutional values.

Copeland’s answer is that courts play a critical role in enforcing the administrative law “norm of engagement,” and could do the same in the federalism context.<sup>71</sup> He cites the Court’s drug and pharmaceutical device preemption cases, including *Wyeth v. Levine*,<sup>72</sup> as examples of the way that courts “can protect federalism values in the policy-implementation stage in ways by forcing agency engagement.”<sup>73</sup> In *Wyeth*, the Court rejected the Food and Drug Administration’s independent determination that its labeling requirements preempted state tort law not because federalism questions are outside the prevue

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69 See, e.g., Thomas W. Merrill, *Capture Theory and the Courts: 1967–1983*, 72 CHI.-KENT L. REV. 1039, 1043 (1997) (suggesting that “the courts’ assertiveness during the period from roughly 1967 to 1983 can be explained by judicial disenchantment with the idea of policymaking by expert and nonpolitical elites. . . . The principal pathology emphasized during these years was ‘capture,’ meaning that agencies were regarded as being uniquely susceptible to domination by the industry they were charged with regulating”); Richard B. Stewart, *The Reformation of American Administrative Law*, 88 HARV. L. REV. 1667, 1683 (1975) (noting that “the exercise of agency discretion is inevitably seen as the essentially legislative process of adjusting the competing claims of various private interests affected by agency policy”); Peter L. Strauss, *From Expertise to Politics: The Transformation of American Rulemaking*, 31 WAKE FOREST L. REV. 745, 755–60 (1996) (noting transition from expertise to politics as a justification for agency rulemaking); Cass R. Sunstein, *Factions, Self-Interest, and the APA: Four Lessons Since 1946*, 72 VA. L. REV. 271, 286 (1986) (discussing agency capture); John Shepard Wiley, Jr., *A Capture Theory of Antitrust Federalism*, 99 HARV. L. REV. 713 (1986); see generally MANCUR OLSON, *THE LOGIC OF COLLECTIVE ACTION: PUBLIC GOODS AND THE THEORY OF GROUPS* (1965).

70 Copeland, *supra* note 1, at 150. See also *id.* at 141–53 (describing the statutory schemes).

71 *Id.* at 105–06.

72 555 U.S. 555 (2009).

73 Copeland, *supra* note 1, at 106.

of federal agencies but because the agency failed to involve stakeholders, including states, in the determination.<sup>74</sup> The Court's decision, then, pushed for a "norm of engagement" between federal and state authorities.<sup>75</sup>

Another example that Copeland might have considered is *Douglas v. Independent Living Center of Southern California*,<sup>76</sup> also from the Court's last term and also raising significant federalism questions in the context of the Medicaid program. In *Douglas*, a group of California Medicaid beneficiaries and providers challenged two amendments to the state's Medicaid program that reduced provider reimbursement.<sup>77</sup> The plaintiffs argued that the amendments conflicted with a federal Medicaid requirement that states offer reasonable reimbursement, sufficient to uphold the Medicaid program's "equal access" guarantee.<sup>78</sup> Recognizing the Court's recent restrictions on the availability of § 1983 causes of action,<sup>79</sup> the plaintiffs brought their claim under the federal Supremacy Clause, arguing that the California reimbursement rules were preempted by the federal Medicaid Act's reasonable reimbursement requirement.<sup>80</sup>

A federal district court and the Ninth Circuit agreed, enjoining the State of California from implementing the new state statutory amendments.<sup>81</sup> Meanwhile, California had already submitted the amendments to the federal administrative agency, the Centers for Medicare & Medicaid Services (CMS), for final approval.<sup>82</sup> During the pendency of the appeal to the U.S. Supreme Court, CMS in fact approved the California rate changes.<sup>83</sup> Given the change in posture of the case, the Court declined to resolve the question presented: whether a party challenging the constitutionality of a state law could bring a cause of action under the Supremacy Clause.<sup>84</sup> Because the agency had acted, the proper question now was under the Adminis-

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74 *Id.* at 177 (explaining *Wyeth*).

75 *See id.* at 179–80.

76 132 S. Ct. 1204 (2012).

77 *Id.* at 1208.

78 *Id.* at 1209.

79 *See Gonzaga Univ. v. Doe*, 536 U.S. 273 (2002) (emphasizing that, absent exceptional circumstances, "federal funding provisions provide no basis for private enforcement by § 1983").

80 *Douglas*, 132 S. Ct. at 1208–09.

81 *Id.* at 1209.

82 *Id.*

83 *Id.*

84 *Id.* at 1210.

trative Procedure Act<sup>85</sup>: whether the federal agency acted within its delegated authority to approve the rates.<sup>86</sup>

Applying Copeland's insights, *Douglas* began as a separation and allocation question but, through the course of dealing between the state, the federal agency, and the judiciary, was transformed into an interactive administrative law case. The shift may cause some heartache for the plaintiffs, who lost the opportunity for judicial resolution under the de novo standard of review in exchange for administrative adjudication with judicial review only after exhaustion and under deferential arbitrary and capricious review.<sup>87</sup> But the case does seem to "offer a unique perspective on federalism's bureaucratic life"<sup>88</sup> and exemplifies Copeland's preference for an integrative, dynamic approach to federalism. The Court's ultimate refusal to decide the larger federalism question forced a re-engagement of federal and state authorities. In sum, *NFIB* and *Douglas*, two seminal federalism decisions from last term, suggest that the Supreme Court may not be as far away from Copeland's preferred norm of engagement than even he suggests.

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85 5 U.S.C. § 701 *et seq.* (2006).

86 *Douglas*, 132 S. Ct. at 1210.

87 *Id.*

88 Copeland, *supra* note 1, at 168.

