
YALE LAW & POLICY REVIEW

Advancing Federalism Concerns in Administrative Law Through a Revitalization of State Enforcement Powers: A Case Study of the Consumer Product Safety and Improvement Act of 2008

Amy Widman*

INTRODUCTION	166
I. THE STATES IN ADMINISTRATIVE LAW	173
A. <i>States (and Their Citizens) Are Often Powerless When Agencies Fail To Enforce Their Own Regulations</i>	175
B. <i>(Un)cooperative Federalism</i>	176
II. THE CONSUMER PRODUCT SAFETY COMMISSION CASE STUDY	179
A. <i>The Regulatory Players and Recent Agency Inaction</i>	180
B. <i>A Legislative Solution: The Consumer Product Safety Improvement Act of 2008</i>	184
C. <i>Overcoming Agency Failures Through a Renewed Federalism Approach to Enforcement</i>	189
III. DO ENFORCEMENT PROVISIONS PROMOTE THE PUBLIC INTEREST? A LOOK AT STATE ATTORNEY GENERAL ENFORCEMENT	191
A. <i>State Lawsuits Using State Laws</i>	192
B. <i>Other Tools Available to State Attorneys General</i>	194
C. <i>Using a State Enforcement Power</i>	196
IV. THE EXPANSION OF STANDING AND LIMITATION OF PREEMPTION	197
A. <i>Judicial Review of Agency Inaction: Heckler v. Chaney</i>	199
B. <i>The Court's Recent Opinions on State Access to Judicial Remedies and Federalism in Administrative Law: Massachusetts v. EPA and Cuomo v. Clearinghouse Association</i>	201
1. <i>Massachusetts v. EPA</i>	201
2. <i>Cuomo v. Clearing House Ass'n</i>	204

* Legal Director, Center for Justice & Democracy. Former law clerk to the Hon. Theodore H. Katz, U.S. Magistrate Judge, Southern District of New York. J.D., *cum laude*, New York University, 2002; B.A., Northwestern University, 1996.

C. <i>How the State Enforcement Power Differs from the Court's Approach</i>	205
V. OTHER LEGISLATIVE DELEGATIONS OF EXPANDED ENFORCEMENT POWER.....	206
A. <i>Past Use of State Enforcement Powers</i>	206
B. <i>Congress Returns to State Enforcement Powers</i>	207
C. <i>The Web Approach</i>	207
VI. IMPLICATIONS OF STATE ENFORCEMENT IN RESPONSE TO FEDERAL AGENCY INACTION.....	209
A. <i>Criticisms</i>	209
B. <i>Benefits</i>	213
CONCLUSION	214

INTRODUCTION

In the areas of health and safety regulation, environmental protection, and consumer protection, the states often fill in for federal regulators through the use of traditional state common-law doctrines, like negligence or nuisance, or their own consumer protection statutes. Often, state laws echo the corresponding federal laws and can be enforced by state attorneys general and private citizens. However, over the past decade, federal agencies have aggressively preempted concurrent enforcement of state statutes and regulations,¹ and sometimes state common law as well.² This preemption creates a vast unregulated domain when federal agencies do not enforce their regulations. If, as Pro-

-
1. Elizabeth Cabraser, *Due Process Preempted: Stealth Preemption as a Consequence of Agency Capture*, 65 ANN. SURV. AM. L. 449 (2010) (providing a case study of the Food and Drug Administration's (FDA) preemption preamble and subsequent overruling by the Supreme Court in *Wyeth v. Levine*, 129 S. Ct. 1187 (2009)); Nina A. Mendelson, *A Presumption Against Agency Preemption*, 102 NW. U. L. REV. 695, 699 (2008) (describing agency preemption by preamble and arguing that the Court should employ a presumption against this particular type of preemption); Catherine M. Sharkey, *Preemption by Preamble: Federal Agencies and the Federalization of Tort Law*, 56 DEPAUL L. REV. 227, 229 (2007) (discussing the recent phenomenon of agencies' declaring preemption in preambles and noting that, "[a]t the extreme, a disconcerting scenario emerges, whereby aggressive regulatory preemption, combined with a renewed vigor for eviscerating federal private causes of action, could lead to a nearly complete substitution of public for private enforcement of the law").
 2. Sharkey, *supra* note 1, at 232-33 (discussing the Consumer Product Safety Commission's mattress flammability rule, which preempted both state statutory and common law).

fessor Gillian Metzger claims, administrative law is the new federalism,³ it appears to be a federalism strongly weighted in favor of the federal government.

Agency inaction, an understudied problem, is mostly immune to judicial review.⁴ Through inaction, an agency can neglect its public-interest mandate.⁵ The doctrine of nonreviewability governs which claims a court may hear, while the doctrine of standing governs which parties may bring suit. Both doctrines are used to bar judicial review of agency inaction.⁶ Where a state is given authority to bring an enforcement action under federal law, however, the issue of judicial review of agency inaction does not arise.⁷ Instead, the relevant policy concerns relate to federalism: Specifically, does harnessing the power of the states to aid, but also check, federal agencies result in more equitable enforcement and advance the agencies' public-interest mandate?

One approach to restoring the federalism balance (i.e., the balance between the federal and state governments) in administrative law is to employ a web of mechanisms that promote regulatory enforcement. Such a strategy would employ federal legislation that: (1) operates as a floor to state regulation (with little or no preemption of stricter state regulation);⁸ (2) grants a private right of action;⁹ and (3) grants state attorneys general the power to enforce federal regula-

-
3. Gillian E. Metzger, *Administrative Law as the New Federalism*, 57 DUKE L.J. 2023 (2008).
 4. For more on the doctrine of judicial review of agency inaction, see *infra* Section I.A.
 5. Robert L. Glicksman, *Nothing Is Real: Protecting the Regulatory Void Through Federal Preemption by Inaction*, 26 VA. ENVTL. L.J. 5, 8 (2008).
 6. See, e.g., *Norton v. S. Utah Wilderness Alliance*, 542 U.S. 55 (2004) (finding that environmental groups may not challenge the Bureau of Land Management's decision not to manage off-road vehicles in federal lands); *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992) (holding that environmental organizations lacked standing to challenge administrative regulations relating to the Endangered Species Act).
 7. Thus, with concurrent state enforcement there is less of the concern stated by the Supreme Court in *Norton v. Southern Utah Wilderness Alliance*, which explained the Court's reluctance to review cases of agency inaction because of a need "to protect agencies from undue judicial interference with their lawful discretion, and to avoid judicial entanglement in abstract policy disagreements which courts lack both expertise and information to resolve." *Norton*, 542 U.S. at 66.
 8. See William W. Buzbee, *Federal Floors, Ceilings, and the Benefits of Federalism's Institutional Diversity*, in *PREEMPTION CHOICE: THE THEORY, LAW, AND REALITY OF FEDERALISM'S CORE QUESTION* (William W. Buzbee ed., 2009) (analyzing the implications of preemption choices for regulatory regimes and concluding that limited floor preemption allows for maximum innovation and state and citizen involvement).
 9. David R. Hodas, *Enforcement of Environmental Law in a Triangular Federal System: Can Three Not Be a Crowd When Enforcement Authority Is Shared by the United States, the States, and Their Citizens?*, 54 MD. L. REV. 1552, 1651-55 (1995)

tions. Such a web approach is modeled after some original pollution-control statutes.¹⁰ The web synthesizes tort and administrative law and realizes the federalism benefits of encouraging innovation, investigation, and dynamic regulation. While preemption and private rights of action have received much scholarly attention, there has been little analysis of the importance of concurrent state enforcement of federal law.¹¹

I want to make sure that this Article does not overstate the effectiveness of a concurrent state enforcement power. States already play other roles in enforcement through state agencies funded with federal money¹² or through their own statutes and political processes.¹³ The state enforcement power is most effective

(examining the particular role of the citizen suit in closing a governmental enforcement gap).

10. See *id.* at 1555-56 (discussing the web approach of the Clean Water Act); see also Richard B. Stewart & Cass R. Sunstein, *Public Programs and Private Rights*, 95 HARV. L. REV. 1193 (1982) (arguing for the need to blend both public and private rights in order to maximize enforcement of agency regulations, focusing on the importance of judicially created private rights of enforcement). However, even in environmental enforcement, limitations remain. See, e.g., *California v. U.S. Dep't of the Navy*, 845 F.2d 222 (9th Cir. 1988) (holding that state authorities may not enforce civil penalties against the federal government for violation of the Clean Water Act).
11. For an excellent discussion of the use of private rights of action to enforce federal regulations, see Stewart & Sunstein, *supra* note 10. See also Hodas, *supra* note 9 (arguing that citizen suits are a critical supplement to federal and state enforcement of environmental laws). For a discussion of regulatory capture in the environmental arena under the Reagan administration, and subsequent analysis of the role of citizen suits in combating it, see Barry Boyer & Errol Meidinger, *Privatizing Regulatory Enforcement: A Preliminary Assessment of Citizen Suits Under Federal Environmental Laws*, 34 BUFF. L. REV. 833 (1985).
12. Many of the environmental statutes, for example, allow the states to implement the federal environmental laws through state-run agencies that are then monitored by the federal agency. See, e.g., Resource Conservation and Recovery Act of 1976, Pub. L. No. 94-580, 90 Stat. 2795 (codified as amended in scattered sections of 42 U.S.C.); see also William W. Buzbee, *Contextual Environmental Federalism*, 14 N.Y.U. ENVTL. L.J. 108, 121-26 (2005) (discussing the "parallel, overlapping, and cooperative" structure of environmental laws and pointing to state attorney general enforcement, along with a significant citizen role, as a particular benefit).
13. A different set of issues arises where state regulatory agencies fall capture to the same lobbying influences as the federal agencies—a problem recently noted in the enforcement of the Clean Water Act. See, e.g., Charles Duhigg, *Clean Water Laws Are Neglected, at a Cost*, N.Y. TIMES, Sept. 13, 2009, at A1 (examining West Virginia's history underenforcement of the Clean Water Act and its ties to the coal industry, and finding that "similar problems exist in other states, where critics say regulators have often turned a blind eye to polluters. Regulators in five other states, in interviews, said they had been pressured by industry-friendly politicians to drop continuing pollution investigations"). This problem might be more likely

as part of a regime of several consumer protection mechanisms, including limited or no preemption, and private rights of action. However, the power to step in for federal agencies and enforce violations of federal regulations in federal court allows states to aid the agencies and hold them accountable when they fail to act.¹⁴

Recent expansion of administrative preemption has upset the federalism balance, making concurrent state enforcement powers more important.¹⁵ This is not to argue that independent state regulatory authority is secondary, let alone superfluous; states depend almost exclusively on their statutes and common law to protect the health and welfare of their citizens.¹⁶ This Article merely argues that recently expanded preemption has highlighted the problem of agency inaction and the inability of states to remedy it. States must not only be granted a concurrent enforcement power but must also remain free to enact their own regulations where appropriate.¹⁷

to arise when a state has incentives to advance its parochial interests—e.g., when a state under-regulates polluters in its jurisdiction in order to lure more industry and thus create more jobs for its residents. See Buzbee, *supra* note 12, at 111-12.

14. Questions about the relationship between federalism and separation-of-powers doctrines are certainly relevant to state enforcement of federal law, but such questions are beyond the scope of this Article. Debates about Congress's delegation of enforcement power to the states first surfaced in the 1980s and 1990s but receded as political shifts prompted Congress to abandon the practice over the past decade. This Article attempts to revive the practice and to synthesize previous scholarly debates with current federalism trends in administrative law. The enforcement provisions examined in this Article contain the requisite executive supervision—through the notice requirement and the requirement that the state not bring an action if the agency is already pursuing legal action. Whether this satisfies separation-of-powers and unitary-executive-theory concerns is a matter of scholarly debate, but it is worth noting that previous statutes have included a state enforcement power. For more on separation-of-powers issues, see *infra* Section VI.A. See also Evan Caminker, *The Unitary Executive and State Administration of Federal Law*, 45 U. KAN. L. REV. 1075 (1997) (exploring the connection between the unitary executive theory and state administration of federally defined law); 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) (conceding that federalism concerns may be enough to trump separation-of-powers concerns with congressional delegations of enforcement power to states).
15. See Metzger, *supra* note 3, at 2025-26.
16. But cf. Henry Butler & Jason Johnston, *Reforming State Consumer Protection Liability: An Economic Approach*, 2010 COLUM. BUS. L. REV. 1 (arguing that in the wake of the federal development of a Consumer Financial Protection Agency, state consumer protection acts are redundant).
17. There are important distinctions between a state's using a concurrent enforcement power to enforce federal regulations in federal court and a state's relying on its own statutory or common law to enforce its own regulations in its own courts.

Legal scholarship¹⁸ has echoed Congress's proposals¹⁹ and language in recent Supreme Court opinions,²⁰ suggesting growing support for a more robust state role in administrative enforcement.²¹ The question, then, is whether an enlarged role for state enforcement can help to correct the federalism imbalance and curb unfettered executive discretion—problems that have recently preoccupied administrative law scholars.²² This Article attempts a more detailed analysis of legislatively created state enforcement powers as a response to agency inaction, and considers how such powers differ from judicially created rights to access the courts.

While states have frequently enforced federal antitrust and environmental laws,²³ this Article instead focuses on consumer protection law for four reasons.

For the great majority of fraudulent or otherwise harmful consumer practices, a state will rely on its own laws in its own courts. Granting concurrent enforcement power to strengthen federal agency enforcement increases the accountability of federal agencies, but does not address state independence and innovation. In order to achieve maximum accountability, the states should retain their autonomous regulatory authority along with a concurrent enforcement power.

18. See Metzger, *supra* note 3, at 2029 (suggesting “that the Court should employ administrative law with an eye to reinforcing agencies’ sensitivity and responsiveness to state interests”); Sharkey, *supra* note 1, at 229 (“[A]gencies might emerge as effective representatives of state interests, the situs for a rich, deliberative dialogue regarding the interplay of state law and federal regulatory schemes.”).
19. See *infra* Section V.B.
20. See, e.g., *Massachusetts v. EPA*, 549 U.S. 497, 520 (2007) (“Given . . . Massachusetts’ stake in protecting its quasi-sovereign interests, the Commonwealth is entitled to special solicitude in our standing analysis.”).
21. Recent legislation and debates have renewed focus on language expressly granting state attorneys general the right to bring enforcement suits. See, e.g., Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, § 1042, 124 Stat. 1376, 2012 (2010) (to be codified at 12 U.S.C. § 5552); Consumer Product Safety Improvement Act of 2008, 15 U.S.C. § 2073(b) (Supp. II 2009). Similar enforcement language has also been discussed in recent proposed climate change legislation. See American Clean Energy and Security Act of 2009 (Waxman-Markey), H.R. 2454, 111th Cong. (2009).
22. Metzger, *supra* note 3, at 2029; see also Jody Freeman & Adrian Vermeule, *Massachusetts v. EPA: From Politics to Expertise*, 2007 SUP. CT. REV. 51, 54 (“In a broader perspective, *MA v EPA* can be seen, along with *Gonzales* and *Hamdan*, as one in a series of rebukes to the administration, an expression of the Court’s growing concern about potential executive overreaching. Viewed in this light, political interference with agency decision making is a species of a larger problem. Our main suggestion for administrative law, then, is that *MA v EPA* is part of a trend in which the Court has at least temporarily become disenchanted with executive power and the idea of political accountability and is now concerned to protect administrative expertise from political intrusion.”).
23. Statutory grants of enforcement were first seen in the 1970s, principally in environmental and antitrust laws. See, e.g., Hart-Scott-Rodino Antitrust Improve-

First, consumer protection agencies have arguably fallen prey to egregious political capture over the past decade, prompting a series of congressional overhauls.²⁴ Second, these agencies have mounted an aggressive preemption campaign.²⁵ Third, the media have devoted considerable attention to consumer protection issues, giving the states a potent weapon that helps to offset practical limitations such as small state staffs and budgets.²⁶ Fourth, consumer protection falls within the traditional state common-law realms of health and safety. Like environmental protection, products liability originated in tort and has become more regulatory—a transformation that explains much of the federal-state regulatory overlap in the environmental arena.²⁷ However, unlike environmental

ments Act of 1976, Pub. L. No. 94-435, 90 Stat. 1383 (codified as amended in scattered sections of 15 U.S.C.); Clean Water Act of 1977, Pub. L. No. 95-217, 91 Stat. 1566 (codified as amended in scattered sections of 33 U.S.C.); Clean Air Act, ch. 360, 69 Stat. 322 (1955) (codified as amended in scattered sections of 42 U.S.C.). These grants are structured as part of a complex cooperative federalism statutory regime. While this structure is informative to a discussion of federalism in administrative law, the focus of this Article is areas where state enforcement is carved out of a mostly federal statutory regime. Such a structure can create the federal-state tension distinctive of “uncooperative federalism.” See *infra* Section I.B.

24. See Sidney A. Shapiro & Rena Steinzor, *Capture, Accountability, and Regulatory Metrics*, 86 TEX. L. REV. 1741, 1742 (2008).
25. See Sharkey, *supra* note 1, at 227, 229-42. In addition, this preemption campaign led to a Senate hearing on preemption. See *Regulatory Preemption: Are Federal Agencies Usurping Congressional and State Authority?*, Hearing Before the S. Comm. on the Judiciary, 110th Cong. 2-3 (2007) (statement of Sen. Patrick J. Leahy, Chairman, Senate Committee on the Judiciary).
26. For more on the role of the media in consumer protection, see *infra* Part III, which examines state enforcement actions and their relationship to the media.
27. See Alexandra B. Klass, *State Innovation and Preemption: Lessons from State Climate Change Efforts*, 41 LOY. L.A. L. REV. 1653, 1656 (2008) (“The use of statutory and regulatory standards to create duties of care for purposes of negligence per se is an early, obvious example of how the regulatory state influences tort law. Other examples include the recent tort reform movement for statutory caps on certain types of damages and legislative efforts to create regulatory compliance defenses to common law tort claims.”); see also JOHN C.P. GOLDBERG ET AL., *TORT LAW: RESPONSIBILITIES AND REDRESS*, at xix, 33, 325, 1020 (2004) (noting that modern tort law operates in an increasingly complex statutory and regulatory environment). The federal-state regulatory overlap leads to a tension that has to do with the collective nature of the benefits at issue—that is, cleaner air, safer products, and a safer food supply all have collective benefits, and it is difficult to quantify each person’s individual share. The beneficiaries of such goods tend to be less organized and may encounter more barriers to challenging threats to these goods in court.

Environmental regulation in particular has seen significant experimentation with federal-state regulatory balancing. While many of the pollution control statutes contain a version of the “public interest triangle,” environmental laws also

statutory structures, the state and federal consumer protection laws remain independent of each other.²⁸ For this reason, the state enforcement power takes on an element of oversight, or accountability forcing. A state power to enforce federal regulations may work best in the realms of health and safety and consumer protection because of the state's traditional role in these areas.

Part I of this Article reviews the history of state enforcement of federal administrative law and traditional doctrines governing judicial review of agency inaction. Part II examines the recent history of the Consumer Product Safety Commission (CPSC) as a case study of these larger institutional patterns: the Agency's apparent capture by industry or an industry-sympathetic executive branch, the Agency's simultaneous weakened enforcement, and Congress's response with the Consumer Product Safety Improvement Act of 2008 (CPSIA). Part III examines pre-CPSIA enforcement actions taken by state attorneys general and explores how federalism can inform a new framework of administrative law through state enforcement provisions. Part IV evaluates recent Supreme Court decisions considering other state mechanisms for challenging federal agency inaction—namely, an expanded state standing doctrine and a limited preemption doctrine. Part IV also compares the public-law nature of a state enforcement power to the Court's focus on expanding or protecting private-law rights. Part V considers examples of congressional delegations of enforcement powers to states aside from the CPSIA. It concludes that Congress is

have complex federal-state implementation mechanisms. See Will Reisinger et al., *Environmental Enforcement and the Limits of Cooperative Federalism: Will Courts Allow Citizen Suits To Pick up the Slack?*, 20 DUKE ENVTL. L. & POL'Y F. 1, 2 (2010). For example, in many cases the states are required to design and implement their own regulations under the federal law, regulations for which they retain primary enforcement responsibility. *Id.* at 2 n.6 ("Federal regulations establish national standards, but individual states (or Indian tribes) may implement their own programs and gain the primary authority and responsibility to enforce the law. For example, to date forty-six states have [Clean Water Act] implementation programs that have been approved by the federal EPA."). The environmental issues such laws are meant to address are local in nature; that is, issues involving a specific pollution source located within a state's boundaries. The physicality of pollution in some ways necessitates such a complex web of federal-state enforcement. See Jonathan H. Adler, *Jurisdictional Mismatch in Environmental Federalism*, 14 N.Y.U. ENVTL. L.J. 130, 135-36 (2005) (discussing the most efficient environmental roles for federal and state governments). However, many times the federal government retains primary enforcement authority for pollution that is interstate in nature. *Id.* While the consumer protection laws discussed in this Article have a local element (the placement of defective products on local store shelves), the business interests and suppliers of the defective products tend to be national or multinational corporations, a fact that obviates state concerns about keeping those businesses active in the state.

28. For example, while many states have enacted their own bevy of state consumer protection laws, these state laws and state agencies remain independent of the federal agencies and laws governing consumer protection.

increasingly turning to the state enforcement power to counter lax regulatory oversight and preemption of state consumer protection laws. Part VI explores the implications of using the states to hold federal agencies accountable and shows how this approach supplements private-law enforcement mechanisms. Finally, the Article concludes that state attorneys general play an important role in revitalizing public trust in federal administrative agencies.

I. THE STATES IN ADMINISTRATIVE LAW

The Administrative Procedure Act (APA) governs the operation of the many federal agencies.²⁹ Rulemaking, the process by which agencies create regulations, was at first an afterthought but eventually became a significant form of agency action. In the late 1960s and early 1970s, Congress began creating agencies with direct rulemaking powers.³⁰ To ensure fairness in the promulgation and enforcement of regulations, the APA requires notice-and-comment procedures and evidence of reasoned decision making.³¹ Along with deference and other review doctrines,³² these are some of the most studied features of administrative law.³³ Enforcement mechanisms are a less recognized and studied means

-
29. Administrative Procedure Act, Pub. L. No. 79-404, 60 Stat. 237 (1946) (codified as amended in scattered sections of 5 U.S.C.). The administrative agency system was the result of a New Deal attempt to create an expert bureaucracy better equipped to regulate specialized areas, like food and drugs. See George Shepard, *Fierce Compromise: The Administrative Procedure Act Emerges from New Deal Politics*, 90 NW. U. L. REV. 1557, 1559 (1996). But see David Rubenstein, 'Relative Checks': Towards Optimal Control of Administrative Power, 51 WM. & MARY L. REV. 2169, 2176 (2010) ("Administrative policy-making is now understood to be as much or more about politics as it is about expertise and science.").
 30. The expansion in agency rulemaking renewed the debate about how much power these agencies might have to regulate business. Recent executive administrations, like many business interests since the passage of the APA, recognized the economic and political power of these agencies. One response was to weaken the agencies in order to undermine regulation. For example, corporate lobbyists and their allies started securing agency positions, which they used to weaken safety standards meant to protect Americans from harm. See Evan J. Criddle, *Fiduciary Foundations of Administrative Law*, 54 UCLA L. REV. 117, 147-48 (2006).
 31. Administrative Procedure Act, 5 U.S.C. § 553(b)-(c) (2006) (describing the notice-and-comment procedures required by the Act).
 32. For more on the standards of review and deference in administrative law, see David Zaring, *Reasonable Agencies*, 96 VA. L. REV. 135, 135-36 (2010), which describes the six main standards of review of agency action in administrative law.
 33. Yehonatan Givati, *Strategic Statutory Interpretation by Administrative Agencies*, 12 AM. L. & ECON. REV. 95, 97 (2010) (explaining that questions about appropriate standards of judicial review and deference dominate administrative law scholarship).

of ensuring fairness in administrative procedure.³⁴ However, all of these doctrines are relevant for assessing the balance of power between federal agencies and states.³⁵

This Article will focus on one particular agency, its history and enforcement record, and Congress's responses to the agency's failures. Congress created the Consumer Product Safety Commission (CPSC) in 1972 to closely regulate product safety.³⁶ The CPSC has the authority to set safety standards, require labeling, order recalls, ban products, collect death and injury data, inform the public about consumer product safety, and contribute to the process by which voluntary standards are set. The executive branch nominates commissioners to run the CPSC.³⁷

The executive branch also exerts less formal control over agency action through the Office of Management and Budget's Office of Information and Regulatory Affairs (OIRA), which reviews agency rules according to a cost-benefit analysis and for general compliance with the administration's policy goals.³⁸ Such executive control can greatly affect the actions taken, or not taken, by the agencies.³⁹ Since lobbyists need only focus on one branch—the executive—in order to undercut regulation, the current configuration is ripe for capture.⁴⁰ Recently, under an executive administration particularly favorable to-

34. To the extent that enforcement schemes are examined, the focus tends to be on supplemental private remedies, like citizen suits. *See, e.g.,* Reisinger et al., *supra* note 27.

35. *See Metzger, supra* note 3, at 2055-62 (examining the implications of administrative law doctrines for federalism).

36. *See* Consumer Product Safety Act, Pub. L. No. 92-573, § 4, 86 Stat. 1207, 1210 (1972) (codified as amended at 15 U.S.C. § 2053 (2006)).

37. *See infra* Part II.

38. *See* Exec. Order No. 12,866, 3 C.F.R. 638 (1994). For more on the issues affecting the consumer protection agencies in regard to this Clinton administration executive order, which is currently being reevaluated, see Letter from Rena Steinzor, President, Ctr. for Progressive Reform, to Peter Orszag, Dir., Office of Mgmt. & Budget (Feb. 20, 2009), available at <http://www.progressivereform.org/articles/PreliminaryCommentsonNewEO-Orszag.pdf>.

39. Some studies point to this control as operating to curtail aggressive regulation. *See* Lisa Schultz Bressman & Michael P. Vandenbergh, *Inside the Administrative State: A Critical Look at the Practice of Presidential Control*, 105 MICH. L. REV. 47, 49-50, 75 (2006).

40. *Cf.* Nina A. Mendelson, *Disclosing 'Political' Oversight of Agency Decision-Making*, 108 MICH. L. REV. 1127 (2010) (examining the role of executive politics in agency rulemaking and proposing more disclosure of this role as a means of enhancing the legitimacy of agencies).

ward industry, the CPSC suffered from lack of leadership and inadequate funding.⁴¹

A. States (and Their Citizens) Are Often Powerless When Agencies Fail To Enforce Their Own Regulations

Sections 701 and 706 of the APA govern agency enforcement.⁴² According to the traditional understanding of these sections, agency decisions not to prosecute are not subject to judicial review.⁴³ Although some forms of inaction, like the failure to promulgate regulations, are not “presumptively unreviewable,”⁴⁴ failures to enforce regulations are unreviewable.⁴⁵ Opponents of judicially mandated enforcement cite prosecutorial discretion based on limited resources and the concern that public priorities should not be set by private parties.⁴⁶ Similarly, some argue that the judicial branch is not competent to compel agency action since agency enforcement decisions are based on science and policy, areas that are better addressed by a politically accountable executive branch.⁴⁷ But it is also problematic to allow agencies to succumb to the political agenda of a captured executive branch and underenforce their own regulations.

Existing administrative mechanisms afford states some voice in the federal administrative structure. Federal agencies often depend on states to implement

41. See *Hearing of the Consumer Product Safety Commission: Hearing Before the Subcomm. on Consumer Affairs, Ins. & Auto. Safety of the S. Comm. on Commerce, Sci. & Transp.*, 110th Cong. (2007) (statement of Rachel Weintraub, Director of Product Safety and Senior Counsel, Consumer Federation of America), available at http://www.consumerfed.org/pdfs/CFA_Test_Senate_Commerce_32107.pdf (detailing the CPSC’s limited budget and resulting enforcement shortcomings).

42. Administrative Procedure Act, 5 U.S.C. §§ 701, 706 (2006).

43. See, e.g., *Heckler v. Chaney*, 470 U.S. 821, 831-33 (1985) (holding that agency failures to enforce regulations are “presumed immune to judicial review”).

44. *Id.* at 832. Some examples of inaction that have been subject to judicial review are refusals to initiate rulemaking, see, e.g., *Nat’l Customs Brokers v. United States*, 883 F.2d 93 (D.C. Cir. 1989); *Am. Horse Prot. Ass’n v. Lyng*, 812 F.2d 1 (D.C. Cir. 1987), and inaction due to claims of lack of jurisdiction, see, e.g., *Mont. Air Chapter No. 29 v. FLRA*, 898 F.2d 753 (9th Cir. 1990). Even in these cases of inaction, however, judicial review is extremely limited and deferential. See, e.g., *Norton v. S. Utah Wilderness Alliance*, 542 U.S. 55, 64 (2004).

45. *Heckler*, 470 U.S. at 832 (“We of course only list the above concerns to facilitate understanding of our conclusion that an agency’s decision not to take enforcement action should be presumed immune from judicial review under § 701(a)(2). For good reasons, such a decision has traditionally been ‘committed to agency discretion,’ and we believe that the Congress enacting the APA did not intend to alter that tradition.”).

46. This concern is also implicated by citizen suits and other private rights of action.

47. See, e.g., Rubenstein, *supra* note 29, at 2189, 2227.

agency regulations (through state laws, regulations, or otherwise),⁴⁸ and states can provide input during agency rulemaking.⁴⁹ However, efforts to increase transparency and consideration of state input in agency rulemaking cannot remedy the problem of agency inaction.⁵⁰ And saving clauses, clear statements by Congress that states may continue to enforce their own laws in conjunction with a new federal statute, have proved less definitive than their language would predict.⁵¹

Thus, because of doctrines preventing judicial review, aggressive preemption of state laws, and ignored saving clauses, states and their citizens are often powerless when federal agencies do not enforce their own regulations.

B. (Un)cooperative Federalism

The state enforcement power can counter the increasing influence of the executive branch on the regulatory agenda and can ensure stronger enforcement.⁵² The early environmental administrative regimes commonly provided for state enforcement. Federal laws such as the Clean Air Act allowed the states to create and enforce their own regulations under State Implementation Plans (SIPs), which were subject to approval by the Environmental Protection Agency (EPA).⁵³ Other laws, such as the Clean Water Act, gave states the authority to

-
48. Nina A. Mendelson, *Chevron and Preemption*, 102 MICH. L. REV. 737, 774 (2004) (describing the myriad ways that federal agencies hear state voices and rely on state implementation).
 49. Catherine Sharkey argues that the rulemaking process should be reformed to take further account of state regulatory interests. Catherine M. Sharkey, *Federalism Accountability: Agency-Forcing Measures*, 58 DUKE L.J. 2125, 2163-71 (2009).
 50. Cf. Lisa Schultz Bressman, *Judicial Review of Agency Inaction: An Arbitrariness Approach*, 79 N.Y.U. L. REV. 1657, 1661 (2004) (arguing for a reconceptualization of administrative law that looks to the arbitrariness of an agency's inaction, rather than just whether a political branch is accountable).
 51. See, e.g., *Geier v. Am. Honda Motor Co.*, 529 U.S. 861 (2000) (holding that the saving clause in the National Traffic and Motor Vehicle Safety Act did not foreclose preemption).
 52. Cf. William W. Buzbee, *Asymmetrical Regulation: Risk, Preemption, and the Floor/Ceiling Distinction*, 82 N.Y.U. L. REV. 1547 (2007) (discussing how federal floors encourage robust regulation). But see Krent, *supra* note 14 (arguing that cooperative federalism is contrary to Article II).
 53. Clean Air Act, 42 U.S.C. § 7410(a)(1) (2006) ("Each State shall, after reasonable notice and public hearings, adopt and submit to the Administrator, within 3 years (or such shorter period as the Administrator may prescribe) after the promulgation of a national primary ambient air quality standard (or any revision thereof) under section 7409 of this title for any air pollutant, a plan which provides for implementation, maintenance, and enforcement of such primary standard in each air quality control region (or portion thereof) within such State.").

amend or reverse federal permitting decisions.⁵⁴ The superfund law allows for state enforcement of clean-up standards.⁵⁵ This model became known as “cooperative federalism.”⁵⁶ The cooperation often consisted of parallel state administrative regimes with local expertise working under the auspices of the federal agency. The state regimes would issue permits, investigate violations, and issue sanctions, but with varying degrees of federal oversight. The goal of the pollution control statutes, and of the scholars who champion cooperative federalism, is that states support and aid the federal government by providing necessary local information and expertise. Cooperative federalism also requires states to obtain federal approval before exercising their authority and receiving federal funds to implement their programs. Cooperative federalism in environmental laws has experienced its share of problems over the decades, including overfiling,⁵⁷ capture,⁵⁸ and judicial limitations on citizen suits.⁵⁹

Congress appears to have embraced cooperative federalism, but not because of its ability to check under-responsive agencies by creating federal-state tension.⁶⁰ More commonly, benefits of cooperative federalism are described as

-
- 54. Clean Water Act, 33 U.S.C. § 1365 (2006).
 - 55. Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C. § 9621(e)(2) (2006).
 - 56. See *New York v. United States*, 505 U.S. 144, 167 (1992) (describing cooperative federalism). For a scholarly overview of the development of cooperative federalism, see Philip J. Weiser, *Towards a Constitutional Architecture for Cooperative Federalism*, 79 N.C. L. REV. 663, 668-73 (2001).
 - 57. Overfiling occurs when the federal government steps in to modify state action to address an environmental regulatory violation under the state’s purview. Ellen R. Zahren, *Overfiling Under Federalism: Federal Nipping at State Heels To Protect the Environment*, 49 EMORY L.J. 373, 373 (2000).
 - 58. Some of the capture problems in the environmental arena come out of the cooperative angle of these statutory regimes, in that the state agencies set up to implement and enforce the federal laws are then subject to the same types of capture as the federal agency itself. They become, in essence, local branches of the federal agency. See David Freeman Engstrom, *Drawing Lines Between Chevron and Pennhurst: A Functional Analysis of the Spending Power, Federalism, and the Administrative State*, 82 TEX. L. REV. 1197, 1228-29 (2004).
 - 59. While instructive for other regulatory areas, the cooperative federalism model in environmental laws and its attendant problems are not entirely transferable. See, e.g., Reisinger et al., *supra* note 27, at 16-28 (describing the failures of cooperative federalism in the environmental arena). Thus, this Article acknowledges these laws as the closest existing model, but refrains from pressing the analogy too far.
 - 60. See Philip J. Weiser, *Federal Common Law, Cooperative Federalism, and the Enforcement of the Telecom Act*, 76 N.Y.U. L. REV. 1692, 1698 (2001) (“In particular, there are at least three related reasons why the federal government has decided to promote diversity in federal regulatory regimes: (1) to allow states to tailor federal regulatory programs to local conditions; (2) to promote competition within a fed-

allowing for local, targeted solutions within a common regulatory framework; increasing manpower; and allowing for policy experimentation.⁶¹ However, cooperative federalism has its limits. While shared enforcement can offer more manpower and local expertise, something more might be needed to increase the accountability of federal agencies. According to “uncooperative federalism,” a new understanding of federal-state relations, states can and should challenge federal decisions.⁶² This “uncooperative” function of cooperative federalism merits scholarly attention, especially given the current state of agency accountability and aggressive agency preemption. Incorporating this tension between the states and the federal agencies into a new regulatory framework that focuses on shared enforcement powers can help to make agencies more accountable for inaction.⁶³

Private rights of action allow states and citizens to sue agencies under certain circumstances⁶⁴ and force judicial review of some types of federal inaction. However, private rights of action are limited in their ability to enforce the regulations in the absence of agency action.⁶⁵ Although private rights of action can sometimes encourage enforcement through extra-judicial pressure (in many cases, by generating media attention), the concurrent state enforcement power

eral regulatory framework; and (3) to permit experimentation with different approaches that may assist in determining an optimal regulatory strategy.”).

61. *Id.*

62. Jessica Bulman-Pozen & Heather K. Gerken, *Uncooperative Federalism*, 118 YALE L.J. 1256, 1259 (2009) (“We see examples of uncooperative federalism in such varied arenas as immigration, healthcare, and education. In each of these fields, states use regulatory power conferred by the federal government to tweak, challenge, and even dissent from federal law.”).

63. *Cf.* Andrew Gavil, *Reconstructing the Jurisdictional Foundation of Antitrust Federalism*, 61 GEO. WASH. L. REV. 657, 661-62 (1993) (“Then came the Reagan revolution, an unprecedented period of antitrust non-enforcement by federal regulators. That revolution breathed new life into the debate over the role of the states in the enforcement of competition laws. Armed with the *parens patriae* powers conferred upon the states by the Hart-Scott Rodino Act in 1976, a rejuvenated alliance among state antitrust enforcement officials emerged.”).

64. For example, citizen suit provisions are common in environmental legislation. *E.g.*, Toxic Substances Control Act, 15 U.S.C. § 2619 (2006); Clean Water Act, 33 U.S.C. § 1365(a) (2006); Safe Drinking Water Act, 42 U.S.C. § 300j-8 (2006); Resource Conservation and Recovery Act, 42 U.S.C. § 6972 (2006); Clean Air Act, 42 U.S.C. § 7604(a) (2006); Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C. § 9659(a) (2006); Emergency Planning and Community Right To Know Act, 42 U.S.C. § 11046(a)(1) (2006).

65. *See Heckler v. Chaney*, 470 U.S. 821, 832-33 (1985) (discussing the possibility of review if Congress has clearly prescribed certain actions or priorities that the agency has not taken); *see also Massachusetts v. EPA*, 549 U.S. 497, 527 (2007) (explaining that an agency denial of a petition for rulemaking, while technically inaction, differs from nonenforcement and is subject to limited review).

goes further and allows states to enforce regulations when the agency does not.⁶⁶ The resulting tension between the state and federal governments leads to better enforcement because the state is not threatening judicial review of the agency's decision not to enforce, which could lead to judicially mandated enforcement. Instead, the state is stepping in for the federal agency. Thus, the state enforcement power and the resulting "two master phenomenon" might address political capture more directly and quickly than private rights of action.⁶⁷ This is not to say that the state enforcement power should replace private rights of action; each mechanism addresses different concerns in administrative law.⁶⁸

II. THE CONSUMER PRODUCT SAFETY COMMISSION CASE STUDY

Capture of agencies has been a concern since their creation.⁶⁹ Executive administrations in some cases have appointed lobbyists or people with industry ties to ensure that regulatory agencies advance industry priorities. These appointments compromise the appearance and reputation of administrative agencies.⁷⁰ The Bush Administration appointed enough lobbyists to positions of power within administrative agencies that special interests appeared to dominate politics.⁷¹ A 2004 *CBS News/New York Times* poll found that 64% of Ameri-

66. See, e.g., Consumer Product Safety Improvement Act of 2008, 15 U.S.C. § 2073(b) (Supp. II 2009).

67. Bulman-Pozen & Gerken, *supra* note 62, at 1270-71 (describing the two-master phenomenon and how this can increase federal-state tension).

68. Some scholars have addressed how limited preemption can encourage state innovation and ultimately regulatory efficiency, see, e.g., Klass, *supra* note 27, while others have focused on expansion of judicial review, see, e.g., Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245, 2380 (2001); Kathryn A. Watts, *Proposing a Place for Politics in Arbitrary and Capricious Review*, 119 YALE L.J. 2, 83 (2009), and private rights of action, see, e.g., Reisinger et al., *supra* note 27. All of these mechanisms are important and address particular areas of agency inaction. However, state enforcement of federal law in federal court seems to address the concern of agency underenforcement directly—an area heretofore ignored.

69. According to President Roosevelt, "Great interests . . . which desire to escape regulation rightly see that if they can strike at the heart of modern reform by sterilizing the administrative tribunal which administers them they will have effectively destroyed the reform itself." Veto Message, Walter-Logan Bill, 86 Cong. Rec. 13,943 (1940).

70. For more on the role executive appointments play in agency action and the corresponding appearance of agency unaccountability, see Evan J. Criddle, *Fiduciary Administration: Rethinking Popular Representation in Agency Rulemaking*, 88 TEX. L. REV. 441, 453-63 (2010).

71. The Revolving Door Working Group—a broad-based coalition of organizations ranging from Public Citizen and Common Cause to Farm Aid and Public Employees for Environmental Responsibility—examined this history in its report, *A Matter of Trust*. REVOLVING DOOR WORKING GRP., *A MATTER OF TRUST: HOW*

cans agreed with the statement that “government is pretty much run by a few big interests looking out for themselves.”⁷² The experience of the CPSC was reflective of the Bush Administration’s general approach to administrative oversight.⁷³ An examination of the failures of the CPSC and the congressional response to those failures shows how lax enforcement compromised consumer protection and weakened the Agency.

A. *The Regulatory Players and Recent Agency Inaction*

In 2007, President George W. Bush nominated Michael Baroody as chair of the CPSC. For thirteen years, Mr. Baroody had been chief lobbyist at the National Association of Manufacturers (NAM), an industry trade group representing the largest manufacturing firms.⁷⁴ He withdrew his nomination

THE REVOLVING DOOR UNDERMINES PUBLIC TRUST IN GOVERNMENT—AND WHAT TO DO ABOUT IT (2005), available at <http://www.policyarchive.org/handle/10207/10857>. According to the study, the appointment of corporate executives and business lobbyists to key posts in federal agencies “tends to create a pro-business bias in policy formulation and regulatory enforcement. . . . [A] corporate executive or lobbyist joining the government might not only tend to favor a previous private-sector employer but might also be ideologically inclined to shape policy to benefit business in general, as opposed to the broader public interest.” *Id.* at 14.

72. *Id.* at 10 (citing *Major Institutions: Government*, POLLING REPORT.COM, <http://www.pollingreport.com/institut.htm#Government> (last visited May 25, 2010)).
73. Cf. Sidney A. Shapiro & Richard W. Murphy, *Eight Things Americans Can’t Figure Out About Controlling Administrative Power*, 61 ADMIN. L. REV. 5, 28 (2009) (“The combination of a Republican president and Congress in the Bush Administration, for example, resulted in no meaningful oversight of the White House. Our point is not partisan; while we largely do not believe that the inaction of the Bush Administration was justified, we fully recognize that the election of Republicans will lead to different regulatory policies than the election of Democrats. But the election of either party does not justify inaction—ignoring statutory mandates—instead of seeking their repeal or amendment. When this happens, both the judicial and electoral accountability mechanisms fail.”).
74. In his tenure with NAM, Mr. Baroody attempted to weaken the CPSC and undermine safety proposals. For example, Mr. Baroody “[o]pposed a CPSC proposal to improve safety standards for baby walkers,” “[o]pposed a petition by consumer organizations to improve the way that consumers find out about recalls of dangerous children’s products,” and “supported diluting guidelines companies used to determine whether they must report substantial product hazards.” EMILY GOTTLIEB, CTR. FOR JUSTICE & DEMOCRACY, *CORPORATE EMPOWERMENT AND THE DECLINE OF PUBLIC SAFETY* 5 (2007), available at <http://www.centerjd.org/archives/studies/SafetyWhitePaper.pdf>; Press Release, Ctr. for Envtl. Health et al., Michael Baroody Is the Wrong Person for the Job, Consumer Groups Warn (Apr. 26, 2007), available at <http://www.citizen.org/pressroom/release.cfm?ID=2421>.

after his \$150,000 severance package from NAM was publicized.⁷⁵ President Bush never nominated another chair, leaving Nancy Nord, one of the CPSC commissioners he had appointed, as acting chair until the Obama Administration nominated Inez Moore Tenenbaum as chair in May of 2009.⁷⁶

Ms. Nord also had ties to corporate lobbying groups, having served as executive director of the American Corporate Counsel Association and Director of Consumer Affairs for the U.S. Chamber of Commerce.⁷⁷ Senate Democrats and consumer groups repeatedly called for her resignation after she opposed a bill that would have directed more money and resources to the Agency after numerous product recalls in 2007.⁷⁸

Meanwhile, the CPSC was not keeping dangerous products out of the marketplace. After nine-month-old Liam Johns suffocated in his Simplicity crib,⁷⁹ the CPSC did nothing. Despite Liam's death, two more infant deaths, seven

75. For criticism of Mr. Baroody's severance package, see Press Release, Office of Senator Richard Durbin, Durbin, Nelson, Obama Continue To Press for Withdrawal of Baroody Nomination (May 18, 2007), available at <http://durbin.senate.gov/record.cfm?id=274677>. For general criticism of Mr. Baroody's nomination, see Press Release, Pub. Citizen, Bush Nominee for Product Safety Agency Was Top Lobbyist for Industry Group That Pressed To Weaken Key Safeguards (May 8, 2007), available at <http://www.citizen.org/pressroom/pressroomredirect.cfm?ID=2430>.

76. Press Release, The White House, President Obama Fills New CPSC Posts (May 5, 2009), available at http://www.whitehouse.gov/the_press_office/President-Obama-Fills-New-CPSC-Posts/. In 2006, the CPSC had only two commissioners and therefore was constrained in what it could do for lack of a quorum. However, in 2007, the CPSC passed an Interim Delegation of Authority establishing a two-person quorum. Memorandum, Consumer Prod. Safety Comm'n, Record of Commission Action: Interim Delegation of Authority in the Absence of a Quorum (Jan. 10, 2007), available at <http://www.cpsc.gov/library/foia/ballot/balloto7/absencequorum.pdf>. The CPSIA reestablished this Interim Delegation. Consumer Product Safety Improvement Act of 2008, 15 U.S.C. § 2053 (Supp. II 2009).

77. See *Biographical Information*, Nancy A. Nord, Commissioner, CONSUMER PRODUCT SAFETY COMMISSION, <http://www.cpsc.gov/cpscpub/bios/nord.html> (last visited Aug. 3, 2010).

78. See *Consumer Safety Chief Says She Won't Quit*, CBS NEWS, Oct. 31, 2007, <http://www.cbsnews.com/stories/2007/10/31/national/main3434914.shtml>; see also Editorial, *Is That Fabulous New Toy Safe?*, N.Y. TIMES, Feb. 17, 2009, at A26; Jayne O'Donnel & Liz Szabo, *Lawmakers Want CPSC's Chief To Step Down*, USA TODAY, Feb. 5, 2009, at 2B.

79. Maurice Possley, *Missteps Delayed Recall of Deadly Cribs*, CHI. TRIB., Sept. 24, 2007, <http://www.chicagotribune.com/news/chi-070922cribs-story,0,48214.story>. The drop rail had separated from its plastic track and formed a gap, which Liam slipped into feet-first. Instead of falling to the floor, Liam's head became wedged between the broken drop rail and the mattress, trapping him in a hanging position where he was smothered to death. *Id.*

nonfatal infant injuries, and fifty-five other incidents, all involving Simplicity's drop rail, the CPSC did nothing for over two years.⁸⁰ This delay alone is a violation of CPSC regulations.⁸¹ It took a series of articles by the *Chicago Tribune* and pressure from Illinois's attorney general for the Agency to investigate and recall nearly one million Simplicity cribs in September 2007.⁸²

The CPSC's missteps continued even after the cribs were recalled, however. Despite the fact that the CPSC is required to ensure that the remedy chosen by the manufacturer makes the product safe,⁸³ the Agency did not compel Simplicity to make repair kits immediately available to parents wanting to fix their defective cribs; nor did it bar Simplicity from sending out non-CPSC-approved replacement parts without installation instructions.⁸⁴ Even five months after the

80. Maurice Possley, *Deaths Spur Huge Crib Recall*, CHI. TRIB., Sept. 22, 2007, http://www.chicagotribune.com/services/newspaper/edition/chicribs_for_satsep22,0,2588630.story; see also Letter from Senator Richard Durbin to Nancy Nord, Acting Chair, Consumer Prod. Safety Comm'n (Sept. 25, 2007), available at <http://durbin.senate.gov/showRelease.cfm?releaseId=284250> ("At several points in the process, the CPSC sent investigators to look into the deaths of these young children. Dozens of reports were submitted to the CPSC. In addition, families were pursuing legal action against the manufacturer of these products. The fact that it has taken more than four years from the date of the first incident report and more than two years since the first report of an infant's death to announce a recall of these products is alarming. It is unacceptable for the public to have to rely on journalists for this Commission to act in a timely fashion.").

81. See, e.g., Press Release, Consumer Prod. Safety Comm'n, CPSC Earns Hammer Award for Fast Track Product Recall Program (Feb. 6, 1998), available at <http://www.bhsi.org/cpscacts.htm> ("By law, companies are required to report the discovery of a potential product defect to CPSC. . . . If there is a defect, the staff then negotiates a voluntary recall or repair program with the company. This process can take 90 to 120 days.").

82. See Possley, *supra* note 79 ("We get so many cases," explained Michael Ng, the CPSC investigator assigned to look into Liam's death. "Once I do a report, I send it in and that's it. I go to the next case. We could spend more time, but we are under the gun. We have to move on."); Maurice Possley, *Madigan Urges New Cribs or Refunds in Recall*, CHI. TRIB., Sept. 26, 2007, <http://www.chicagotribune.com/news/local/southsouthwest/chicribs26sep26,0,1791767.story> [hereinafter Possley, *Madigan Urges*]. Two years after the CPSC was first informed of the dangerous defect in these cribs, but within a week of the *Tribune's* sharing its investigative findings with the agency, a CPSC spokesman stated: "We want parents to know . . . [w]e do not want your child in that crib tonight." Possley, *supra* note 80.

83. See Annys Shin, *Infant Deaths Lead to Big Crib Recall; Actions of CPSC Face New Criticism*, WASH. POST, Sept. 22, 2007, <http://www.washingtonpost.com/wp-dyn/content/article/2007/09/21/AR2007092101057.html>.

84. See Possley, *Madigan Urges*, *supra* note 82. The CPSC has issued a handful of recalls of other cribs and bassinets since the Simplicity recall, with each recall shedding a bit more light on the immense regulatory gap created by Reagan-era poli-

recall, the CPSC “refuse[d] to release information on the progress of the Simplicity recall, . . . [including] refus[ing] to say if kits [had] been mailed out, if further injuries [had] taken place or what actions Simplicity is [had taken] to remedy the situation.”⁸⁵ This is one example of many where the CPSC failed to follow its own recall and investigatory protocols.⁸⁶

The crib problems were not isolated regulatory failures. Throughout these years of inadequate leadership, the CPSC failed to keep dangerous and defective products off the shelves and had a poor investigatory and enforcement response once dangerous products were discovered.⁸⁷ For example, from 2005 to 2007, there were, on average, 62,900 emergency injuries each year linked to products marketed for children younger than five, like baby carriers, car seats, and cribs.⁸⁸ Recalls came late, as with the recall of Evenflo high chairs after 1140 reports of injuries.⁸⁹ In another example, the dangers posed by magnets in toys were reported to the CPSC as early as 2005, yet no action was taken until March of 2006, and even then the CPSC “issued a weak, confusing recall, leaving dangerous products on store shelves. It wasn’t until almost two years later that a full recall was announced.”⁹⁰ Fines were virtually nonexistent, even for companies

cies requiring the CPSC to defer to voluntary industry standards and the industry push to cut costs. Patricia Callahan, *Hidden Crib Dangers*, CHI. TRIB., Nov. 15, 2008, <http://www.chicagotribune.com/news/nationworld/chicago/081115cribs,0,4984240.story>.

85. KIDS IN DANGER, 2007: THE YEAR OF THE RECALL: AN EXAMINATION OF CHILDREN’S PRODUCT RECALLS IN 2007 AND THE IMPLICATIONS FOR CHILD SAFETY 12 (2008), *available at* http://www.kidsindanger.org/publications/reports/2008_Year_of_the_recall.pdf.
86. Section 15 of the Consumer Product Safety Act gives the CPSC the authority to recall a product if that product is a substantial hazard. 15 U.S.C. § 2064 (2006). The Agency also has the authority to govern the refund and repair processes for defective products already in people’s homes. *Id.* In contrast to its initial dangerously slow response, after much media attention, the CPSC has now recalled over seven million cribs. *See* Press Release, Consumer Prod. Safety Comm’n, CPSC Issues Warning on Drop-Side Cribs (May 7, 2010), *available at* <http://www.cpsc.gov/cpscpub/prerel/prhtml10/10225.html>. Under new leadership and the guidance of stronger legislation, the current CPSC has now gone so far as to draft new standards for cribs, effectively banning the drop-side cribs. *Id.*
87. *See, e.g.*, KIDS IN DANGER, TOXIC TOYS AND FAULTY CRIBS: AN EXAMINATION OF CHILDREN’S PRODUCT RECALLS IN 2008, RECALL EFFECTIVENESS AT CPSC AND THE IMPLICATIONS FOR CHILD SAFETY 10-12 (2009), *available at* <http://www.kidsindanger.org/publications/reports/toxictoyfaultycribsreport.pdf>.
88. RISANA T. CHOWDHURY, CONSUMER PROD. SAFETY COMM’N, NURSERY PRODUCT-RELATED INJURIES AND DEATHS AMONG CHILDREN UNDER AGE FIVE, at 4 (2009), *available at* <http://www.cpsc.gov/library/nursery08.pdf>.
89. KIDS IN DANGER, *supra* note 87, at 7.
90. KIDS IN DANGER, *supra* note 85, at 4.

with repeated recalls.⁹¹ The CPSC showed a tendency to settle with manufacturers rather than prosecute violations of safety regulations.⁹²

In 2007, some states determined it was time to attempt to fill the vast federal regulatory void. Media investigations and public outcry spurred a few state attorneys general to act.⁹³ States such as Oregon, New Jersey, Washington, Maryland, and Illinois passed their own laws governing the recall process in 2008.⁹⁴ Although it is unclear whether these recent CPSC failures were due to a regulatory failure, an enforcement failure, an institutional failure resulting from a lack of funding and political support, or some combination of the three, Congress would soon enact comprehensive reform.

B. A Legislative Solution: The Consumer Product Safety Improvement Act of 2008

Recognizing both the massive regulatory failure to protect consumers and the corresponding increase in state actions to address this failure, Congress overwhelmingly passed the Consumer Product Safety Improvement Act of 2008 (CPSIA) in July 2008,⁹⁵ and President Bush signed it into law the following month. This landmark legislation gives the CPSC more power and funding, creates stricter safety standards,⁹⁶ and gives state attorneys general authority to enforce product safety laws. It also grants significant protections to whistleblowers, who often alert authorities to unsafe products and practices.⁹⁷

91. *Id.* at 12.

92. KIDS IN DANGER, SMOLDERING HAZARDS: FIRE AND BURN HAZARDS OF CHILDREN'S PRODUCT RECALLS, 2002-2007, at 14 (2007), available at http://www.kidsindanger.org/publications/reports/2007_Burn_Report.pdf.

93. *See infra* Part III.

94. Joseph Pereira, *States Alter Rules of the Game on Safety for Toy Makers*, WALL ST. J., Mar. 25, 2008, at B1.

95. Consumer Product Safety Improvement Act of 2008, Pub. L. No. 110-314, 122 Stat. 3016 (to be codified in scattered sections of 15 U.S.C.) (amending the Consumer Product Safety Act, Pub. L. No. 92-573, 86 Stat. 1207 (1972) (codified as amended in scattered sections of 15 U.S.C.)).

96. Specifically, lead is essentially banned from toys and children's products, *see id.* § 101; toxic phthalates (plastic softeners) are banned from children's products, *id.* § 108; children's products must meet rigorous mandatory standards and safety testing, *id.* §§ 102, 104, 106; the CPSC must establish new safety standards for all-terrain vehicles, *id.* § 232; consumers will have access to a public database on unsafe products, *id.* § 212; children's products must have tracking labels so officials can trace a recalled product back to its factory, *id.* § 103; and the CPSC will see substantial increases in funding and other resources and enhanced authority to conduct recalls and levy higher civil penalties, *id.* §§ 201, 214, 217.

97. *See id.* § 219.

The CPSIA allows a state attorney general to bring a suit in federal court for injunctive relief on behalf of the residents in that state against parties violating the statute.⁹⁸ Under section 218(b), state attorneys general may sue on behalf of their states' residents in order to stop the sale of products that have been recalled, banned, or are not certified as tested under the Act's requirements; that lack tracking labels or contain unauthorized safety markings; or that otherwise violate the CPSC's requirements. States were also empowered to enforce prohibitions against stockpiling products before the law's changes took effect. The CPSIA explicitly permits private counsel to assist state attorneys general and limits the private counsel's use of privileged information.⁹⁹

The Commission must be notified thirty days before a state files any enforcement suit, unless the state determines that the product constitutes a "substantial product hazard."¹⁰⁰ Before the CPSIA was passed, only the Commission could determine that a product constituted a substantial product hazard.¹⁰¹ Now, if a state independently determines that a substantial product hazard exists, it may file suit, but must notify the Commission. The Commission retains the right to intervene in any such action.¹⁰²

The CPSIA contains limited preemption language,¹⁰³ exempting more stringent state labeling requirements like California's Proposition 65, while preempting recent state legislation attempting to address the same area as the CPSIA.¹⁰⁴ Notably, states may apply for an exemption from the preemption provision.¹⁰⁵ The CPSIA also explicitly prohibits the Commission from modify-

98. *See id.* § 218(b)(1) ("State Attorney General Enforcement—(1)Right of Action— Except as provided in paragraph (5), the attorney general of a State, or other authorized State officer, alleging a violation of 19(a)(1),(2),(5),(6),(7),(9), or (12) of this Act that affects or may affect such State or its residents may bring an action on behalf of the residents of the State in any United States district court for the district in which the defendant is found or transacts business to obtain appropriate injunctive relief.").

99. *See id.* § 218(b)(6). The CPSIA does not address fee arrangements between state attorneys general and private counsel.

100. *Id.* § 218(b)(2)(A)-(E).

101. *See* 16 C.F.R. § 1115.4 (2010).

102. *See* Consumer Product Safety Improvement Act § 218(b)(3).

103. *Id.* § 231(b) ("Nothing in this Act or the Federal Hazardous Substances Act shall be construed to preempt or otherwise affect any warning requirement relating to consumer products or substances that is established pursuant to State law that was in effect on August 31, 2003.").

104. *Id.* Proposition 65, passed in 1986, contains very stringent labeling requirements regarding the content of lead, phthalate, and many other chemicals in all products sold in California. Proposition 65, Safe Drinking Water and Toxic Enforcement Act of 1986, CAL. HEALTH & SAFETY CODE § 25249.6 (West 2006).

105. To be eligible for an exemption from preemption, the state law must have been in effect on August 13, 2008 and the state must have applied by November 12, 2008.

ing these preemption provisions through a rule, regulation, preamble, policy statement, or executive branch statement.¹⁰⁶ There is also a saving clause protecting the right of state attorneys general to sue under state laws.¹⁰⁷

Such a major regulatory overhaul was not passed easily. The Bush Administration and the CPSC, led by Nancy Nord, fought hard to curtail state enforcement mechanisms, remove whistle-blower protections, and remove the phthalate ban.¹⁰⁸ Lobbyists for Exxon Mobil, the world's largest manufacturer of phthalates, led the charge against the phthalate ban.¹⁰⁹ NAM lobbied strongly against whistleblower protections and state enforcement powers.¹¹⁰

For more on which state laws are exempt from preemption, see FAQs for Section 231: Preemption, CONSUMER PRODUCT SAFETY COMMISSION (Jan. 7, 2009), <http://www.cpsc.gov/about/cpsia/faq/231faq.html>.

106. Consumer Product Safety Improvement Act § 231(a).

107. See *id.* § 218(b)(4) ("Nothing in this section. . . shall be construed . . . to prevent the attorney general of a State, or other authorized State officer, from exercising the powers conferred on the attorney general, or other authorized State officer, by the laws of such State; or to prohibit the attorney general of a State, or other authorized State officer, from proceeding in State or Federal court on the basis of an alleged violation of any civil or criminal statute of that State.").

108. CONSUMER FED'N OF AM. ET AL., *TOTAL RECALL: THE NEED FOR CPSC REFORM NOW 1* (2008), available at http://www.consumerfed.org/elements/www.consumerfed.org/file/health/TOTAL_RECALL.pdf; see also *Natural Res. Def. Council v. U.S. Consumer Prod. Safety Comm'n*, 597 F. Supp. 2d 370, 392 (S.D.N.Y. 2009) (finding that an opinion letter by Acting Commissioner Nord attempting to delay the phthalate ban after it was passed by Congress "fails to consider the vast majority of the relevant language of the statute and all of the relevant statutory context, is not well reasoned, and reaches a result that undermines the purpose of the CPSA and the CPSIA").

109. Joseph S. Enoch, *Consumer Advocates Blame Lobbyists for Delays in New Toy Safety Rules*, CONSUMERAFFAIRS.COM (July 23, 2008), http://www.consumeraffairs.com/newso4/2008/07/cpsc_congresso5.html (quoting Public Citizen's Ed Mierzwinski as saying that "'Exxon has spent \$8 million on lobbying so far this year, much of which is lobbying against this consumer safety bill'"). Phthalates, a group of chemicals added to polyvinyl chloride (PVC) to make it pliable, are known endocrine disruptors and possible carcinogens. Many studies have shown the toxic effects of phthalates. See, e.g., Statement of Jane Houlihan, Vice President for Research, Env'tl. Working Grp., to the Nat'l Research Council Comm. on the Health Risks of Phthalates, Protecting Public Health from Phthalates Will Require Consideration of Cumulative Risks (December 18, 2007), available at <http://www.ewg.org/files/NASphthalatefinal.pdf>. Baby boys and pregnant women are among the most vulnerable to its effects and the most laden with the chemical. *Id.* Not enough research has been done on the cumulative effects of exposure to these chemicals, but it is known that infants and small children are more susceptible to overload. See N.Y. PUB. INTEREST GRP., *TROUBLE IN TOYLAND: THE 24TH ANNUAL SURVEY OF TOY SAFETY 16-19* (2009), available at <http://www.uspirg.org/home/reports/>

Industry lobbyists and the CPSC continued to resist the CPSIA even after it was passed. The CPSC refused to issue implementing regulations and regulatory guidelines, especially those carving out exceptions to the law's lead requirements,¹¹¹ claiming that it was powerless to draft guidelines. Although Congress stressed the need for the CPSC to quickly define exceptions to the lead provisions, the Agency claimed that the required process was too burdensome.¹¹² The CPSC also argued that since any exceptions needed to be based on sound science, the process would take time.¹¹³

The Agency also managed to thwart congressional intent by quickly exempting existing stock from the phthalate ban.¹¹⁴ The Natural Resources Defense Council and Public Citizen filed a lawsuit,¹¹⁵ and the district court agreed that the CPSC action violated the CPSIA and was therefore void.¹¹⁶

The CPSC's refusal to carry out its mandate led to confusion in the marketplace and prompted a significant public relations campaign against the CPSIA. Manufacturers and corporate lobbyists, concerned primarily with the law's whistleblower protections and state enforcement powers, organized an Internet-fueled campaign against the CPSIA.¹¹⁷ Using the CPSC's seemingly deli-

report-archives/healthy-communities/healthy-communities/trouble-in-toyland-the-24th-annual-survey-of-toy-safety.

110. Enoch, *supra* note 109.

111. Letter from Thomas H. Moore, Comm'r, U.S. Consumer Prod. Safety Comm'n, to Senators John D. Rockefeller, IV, Mark L. Pryor, and Representatives Henry A. Waxman and Bobby L. Rush 3-4 (Feb. 3, 2009), available at <http://www.cpsc.gov/PR/Moore020309.pdf>.

112. Letter from Nancy Nord, Comm'r, U.S. Consumer Prod. Safety Comm'n, to Senators John D. Rockefeller, IV, and Mark L. Pryor and Representatives Henry A. Waxman and Bobby L. Rush 2 (Jan. 30, 2009), available at <http://www.cpsc.gov/pr/nord013009.pdf>.

113. *Id.*

114. *Natural Res. Def. Council v. U.S. Consumer Prod. Safety Comm'n*, 597 F. Supp. 2d 370, 377 (S.D.N.Y. 2009). In November 2008, the CPSC received a request from unidentified lobbyists that the phthalate ban apply only to production of new toys and that remaining stocks be allowed to be stockpiled and sold to customers indefinitely, so long as they were manufactured before the date the law was to take effect. *See id.* at 370. Days later, the CPSC issued a legal opinion permitting the stockpiling of products containing the banned chemical. *Id.* at 388-89.

115. *See id.* at 370.

116. *Id.* at 388-89.

117. Throughout the "CPSIA blogging day" (which no particular group claims responsibility for organizing), an "informational post" widely circulated around the blogosphere contained links to articles written by Manhattan Institute Fellow Walter Olson. *See* Walter Olson, *Tomorrow (Wed.) CPSIA Blogging Day*, OVERLAWYERED (Jan. 27, 2009), <http://overlawyered.com/2009/01/tomorrow-wed-cpsia-blogging-day/>. Olsen then organized and compiled these blog entries in his own blog, *Over-*

berate failure to clarify the impact of the law on small businesses as a catalyst, industry groups like the Manhattan Institute reached out to small business owners and fomented significant Internet-based resistance to the law.¹¹⁸ The groups focused on the compliance deadlines to anger merchants who were never contemplated as the main targets of the law.¹¹⁹ Small business owners, book publishers, secondhand retailers, and librarians had legitimate concerns about testing and certification requirements, concerns that Congress always intended the CPSC to address. According to Commissioner Thomas Moore:

[T]here are orchestrated campaigns to undermine the Act. They are sowing the seeds of confusion that are upsetting so many small businesses. They are seizing on the Commission's lack of positive guidance to cause some Members of Congress who voted for the legislation to forget why they voted for it in the first place—to protect children and families who cannot protect themselves from defective or hazardous products. Some of the very businesses who are now behind the campaigns to change the Act were the ones whose actions led to its passage.¹²⁰

After the Internet campaign reached a high decibel, Ms. Nord's CPSC stayed the testing and certification requirements for one year and began to draft exemptions for certain industries and materials.¹²¹ However, the CPSC's stay did not nullify state enforcement powers under the new law, a development that further highlights the importance of such powers. While industry lobbyists were able to influence the Agency, such lobbying generally does not reach the offices of all fifty state attorneys general.

lawyered. See Walter Olson, *CPSIA Blog Day #1, OVERLAWYERED* (Jan. 28, 2009), <http://overlawyered.com/2009/01/cpsia-blog-day-1-past-cpsia-bloggers/>; cf. Roderick M. Hills, *Against Preemption: How Federalism Can Improve the National Legislative Process*, 82 N.Y.U. L. REV. 1, 33 (2007) (describing the tendency of business interests, like the U.S. Chamber of Commerce, to strongly oppose state enforcement).

118. For more on both the industry ties and the history of “junk” scholarship from the Manhattan Institute, see *Fact Sheet: Manhattan Institute*, CENTER FOR JUSTICE & DEMOCRACY, http://www.centerjd.org/archives/issues-facts/stories/MB_manhattan.php (last visited June 6, 2010).

119. Letter, *supra* note 111.

120. *Id.*

121. Press Release, U.S. Consumer Prod. Safety Comm’n, Statement of Acting Chairman Nancy Nord on the Stay of Enforcement of Certain Testing and Certification Requirements of the Consumer Product Safety Improvement Act of 2008 (Jan. 30, 2009), available at <http://www.cpsc.gov/cpscpub/prerel/prhtml/09/115nord.pdf>.

C. *Overcoming Agency Failures Through a Renewed Federalism Approach to Enforcement*

The CPSC failures are typical and could serve as an indictment of the administrative system in its entirety.¹²² However, another way to understand this story is as an instance where Congress attempted to assert control over a captured agency that was no longer regulating in the public interest.¹²³ This effort reflects a renewed focus on enforcement mechanisms and access to courts as a means of forcing agencies to uphold the public interest.¹²⁴

Defining “public interest” is difficult. Some scholars define it as regulation that “improves social welfare” and, more specifically, regulation that does not allow special interests to collect “supercompetitive returns” that in turn create losses that harm the remainder of society.¹²⁵ In the context of consumer protection, the public interest largely consists of the health and safety of consumers, and anti-public-interest behavior is the absence of regulation or enforcement.¹²⁶ Thus, this Article is less concerned with the deliberative process by which regulators produce regulations¹²⁷ than with the types of enforcement mechanisms available to the public to hold an agency accountable for not enforcing its own regulations, to ensure regulations are enforced, and to act when the agency has chosen not to regulate.

The Court’s long-standing reluctance to review instances where agencies have chosen not to act, even when not enforcing their own interpretations of

122. Cf. Shapiro & Steinzor, *supra* note 24, at 1751-56 (providing an overview of the scholarly literature on capture and administrative regimes).

123. Cf. Richard B. Stewart, *The Reformation of American Administrative Law*, 88 HARV. L. REV. 1669, 1682-83 (1975) (describing the problem of an agency no longer functioning in the public interest due to capture by the regulated industry).

124. See Rubenstein, *supra* note 29, at 2214; see also Shapiro & Steinzor, *supra* note 24, at 1755 (discussing the legislative and lobbying history of the CPSIA and suggesting that the media attention and publicity surrounding dangerous toys helped public interest groups defeat business lobbyists).

125. STEVEN P. CROLEY, *REGULATION AND PUBLIC INTERESTS: THE POSSIBILITY OF GOOD REGULATORY GOVERNMENT* 10 (2007).

126. This has been described as the “activist theory of regulation.” See Barry Boyer & Errol Meidinger, *Privatizing Regulatory Enforcement: A Preliminary Assessment of Citizen Suits Under Federal Environmental Laws*, 34 BUFF. L. REV. 833, 884-89 (1985).

127. Examples of such institutional concerns and reforms would be regulations affecting transparency measures during the notice-and-comment phase, clear preemption statements, whistleblower immunity, the expansion of public databases, and other sunshine measures. While these examples are all relevant to increasing agency accountability and public trust in the role of agencies generally, such measures go to the process of rulemaking rather than the enforcement of congressional mandates or even established regulations.

violations of their own regulations, is often criticized.¹²⁸ The Court often refers to the independent role of the executive branch in making enforcement decisions.¹²⁹ The doctrines of nonreviewability and standing reinforce the importance of the executive in holding agencies accountable.¹³⁰ However, recent history shows a breakdown of accountability and demonstrates the need to reevaluate the understanding of the executive as a “proxy” for democratic accountability.¹³¹ Spreading accountability across multiple parties (i.e., including a substantial role for states) could help to counter industry capture and other sources of underenforcement. In addition, courts should consider whether an agency’s inaction is arbitrary, instead of avoiding this question through unreviewability doctrines; doing so would encourage regulation and strengthen agency legitimacy.¹³² One remaining problem is that the harms of inaction are

128. See, e.g., Bressman, *supra* note 50, at 1658 (“The Supreme Court’s reluctance to allow judicial review of such inaction rests, implicitly, on a theory of agency legitimacy that is inconsistent with the founding principles of the administrative state.”).

129. But see Mary Cheh, *When Congress Demands a Thing To Be Done: An Essay on Marbury v. Madison, Executive Inaction, and the Duty of the Courts To Enforce the Law*, 72 GEO. WASH. L. REV. 253, 265 (2003) (“[C]ourt intervention no longer turns on whether an executive official has discretion to act. In the agency context, Congress has directed that discretion itself is reviewable.”).

130. See Cass Sunstein, *Reviewing Agency Inaction After Heckler v. Chaney*, 52 U. CHI. L. REV. 653, 669-70 (1985) (“Indeed, it is sometimes suggested that a court engaging in judicial review of executive inaction or issuing an order compelling an agency to act would be undertaking to ‘take Care that the Laws be faithfully executed’—an executive rather than a judicial task. The suggestion is based on the understanding that enforcement activity is entrusted to the executive, not to the courts, and that judicial involvement—in the form of a decree compelling prosecution—would violate the separation of powers.” (footnotes omitted)).

131. Criddle, *supra* note 30, at 461 (criticizing the notion of the President as a “proxy” for democratic accountability in agency decision making); see also Bressman & Vandenberg, *supra* note 39, at 53-56 (examining the theoretical history of the “presidential control” model of administrative law and questioning its political reality); Cheh, *supra* note 129, at 265 (“[J]udicial review of agency decisions may be viewed as a usurpation of power by the less democratically accountable branch, the judiciary, to the injury of the more democratically accountable body, the administrative agency. The agency is more accountable, it is said, because it answers to the oversight of an elected Congress and is more immediately controlled by the elected executive. But these are inaccurate portrayals in the case of congressional commands and politically inspired executive inaction.” (footnotes omitted)); Rubenstein, *supra* note 29, at 2186 (“[M]any criticize the notion that the President is meaningfully held accountable for administrative action, thus derailing the agency’s best claim to a democratic pedigree superior to courts.”).

132. Bressman, *supra* note 50, at 1657 (“[A]gency inaction raises a concern for administrative arbitrariness because it is susceptible to the same narrow influences that derail agency action from public purposes. Agency inaction that reflects such in-

sometimes distributed throughout society in a way that frustrates political accountability because of organizational problems,¹³³ information gaps,¹³⁴ or timing issues.¹³⁵ In these cases, providing both state and federal mechanisms can help overcome some of these collective action problems because smaller groups might better mobilize the political force needed to provide accountability.¹³⁶

III. DO ENFORCEMENT PROVISIONS PROMOTE THE PUBLIC INTEREST? A LOOK AT STATE ATTORNEY GENERAL ENFORCEMENT

State attorneys general have long-standing relationships with federal agencies. Cooperative federalism regulatory regimes, first appearing in the 1970s, have become increasingly common.¹³⁷ Such regimes create creative combinations of federal and state authority, and many times the state enforcement authority is not granted directly, but rather implied or swallowed up into a host of state regulatory functions.¹³⁸ Cooperative federalism regimes also assume that preemption of concurrent state laws and regulations will be limited, with feder-

fluences, though often rational from a political standpoint, nonetheless is arbitrary and objectionable from a democratic perspective.”).

133. Hills, *supra* note 117, at 11 (describing such problems and how they appear in administrative agency decision making).
134. Shapiro & Steinzor, *supra* note 24, at 1783 (proposing information gathering and sharing as a means to promote agency accountability).
135. By the time the electorate can change the executive branch, irrevocable harm may have occurred.
136. Cf. Hills, *supra* note 117, at 11 (“The national government would be dominated by narrow interest groups that seek concentrated and homogenous private benefits for their constituents at the expense of the less cohesive, more numerous general public.” (citing MANCUR OLSON, *THE LOGIC OF COLLECTIVE ACTION: PUBLIC GOODS AND THE THEORY OF GROUPS* 3 (1971))).
137. Weiser, *supra* note 60, at 1694.
138. *Id.* Examples of the “classic” cooperative federalism statutes are the Clean Water Act of 1977, Pub. L. No. 95-217, 91 Stat. 1566 (codified as amended in scattered sections of 33 U.S.C.), which authorizes states to administer and enforce the National Pollutant Discharge Elimination System permit program; the Clean Air Act, ch. 360, 69 Stat. 322 (1955) (codified as amended in scattered sections of 42 U.S.C.), which authorizes states to create State Implementation Plans (SIPs) that guide the states’ enforcement of the federal law; and the Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (codified as amended in scattered sections of 47 U.S.C.), which gives state agencies authority to regulate under the FCC’s oversight. The Telecommunications Act especially, however, is vague about state enforcement of federal law, resulting in a situation where the “the federal courts have failed to appreciate this feature of the Act’s cooperative federalism design.” Philip Weiser, *Cooperative Federalism and Its Challenges*, 2003 MICH. ST. L. REV. 727, 731.

al regulations serving as a floor, not a ceiling.¹³⁹ During the 1990s, Congress increasingly delegated to states the power to enforce agency regulations, most notably in laws governing telecommunications and credit.¹⁴⁰ Recently, the laws and proposed bills that include such state enforcement powers concern today's most controversial areas of regulatory reform.¹⁴¹

It is unclear whether recent judicial and congressional attempts to restore the federalism balance in administrative law were prompted by increasingly aggressive administrative preemption or shifting political agendas.¹⁴² The trend, however, offers an opportunity to fix an ailing regulatory system. A look at state actions intended to do the work of the CPSC in its absence reveals how a state enforcement power might improve consumer protection.

A. State Lawsuits Using State Laws

Because states are rarely granted the power to enforce federal law in federal courts, the majority of state enforcement actions are brought under state law.

-
139. Cf. Susan Bartlett Foote, *Administrative Preemption: An Experiment in Regulatory Federalism*, 70 VA. L. REV. 1429, 1430-31 (1984) (explaining that, during the early 1980s, states responded to the decrease in federal regulatory action with stricter regulation, which, in turn, elicited more administrative preemption).
 140. See, e.g., Telephone Consumer Protection Act of 1991, 15 U.S.C. § 227(f) (2006); Home Ownership and Equity Protection Act, 15 U.S.C. § 1640(e) (2006); Credit Repair Organizations Act, 15 U.S.C. § 1679h (2006); Telemarketing and Consumer Fraud and Abuse Prevention Act, 15 U.S.C. § 6103 (2006).
 141. Legislation in areas of consumer product safety, financial reform, and health insurance reform have all included statutory grants of state power to enforce the federal law. See Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, § 1042, 124 Stat. 1376, 2012 (2010) (to be codified at 12 U.S.C. § 5552); Consumer Product Safety Improvement Act of 2008, 15 U.S.C. § 2073(b) (Supp. II 2009); American Recovery and Reinvestment Act of 2009, 42 U.S.C.A. § 1320d-5(d) (West 2010) (expressly authorizing state attorneys general to enforce the Health Insurance Portability and Accountability Act of 1996 through civil enforcement actions). Proposals in areas of climate change regulation and mortgage regulation have also included such grants. See American Clean Energy and Security Act of 2009, H.R. 2454, 111th Cong. (2009); Mortgage Reform and Anti-Predatory Lending Act, H.R. 1728, 111th Cong. (2009).
 142. Cf. Matthew R. Cody, *Special Solicitude for States in the Standing Analysis: A New Type of Federalism*, 40 McGEORGE L. REV. 149 (2009) (asserting that federal preemption of state regulation of greenhouse gases prompted liberalized standing doctrine espoused in *Massachusetts v. EPA*). A change in presidential administrations also precipitated a new shift away from aggressive preemption. See Memorandum from the President of the United States to the Heads of Exec. Dep'ts & Agencies, 74 Fed. Reg. 24,693 (May 22, 2009) (requiring all administrative agencies to revisit every preemption decision made over the past ten years and mandating both that future preemption decisions not be announced in preambles and that the agencies otherwise conform to "legal principles governing preemption").

Such actions can address dangerous or deceptive practices. For example, states attorneys general in New York, California, and Vermont have successfully sued or threatened to sue under state laws to prevent dangerous products from reaching consumers. In 2007, New York Attorney General Andrew Cuomo relied on state law, which imposed mandatory limits on lead levels (as opposed to the voluntary limits imposed by the federal government), to reach a national settlement with retailers of recalled jewelry.¹⁴³ California Attorney General Jerry Brown sued manufacturers of toys¹⁴⁴ and a manufacturer of synthetic turf¹⁴⁵ for violating strict lead regulations in California's Proposition 65,¹⁴⁶ eventually reaching settlements to reduce lead levels in those products.¹⁴⁷ And Vermont Attorney General William Sorrell sued Dollar Tree under the state consumer fraud act for selling lead- and cadmium-laced jewelry that had been recalled,

-
143. Press Release, Office of the N.Y. Att'y Gen., *Cuomo Reaches Settlements with Major Retailers To Remove Lead-Contaminated Children's Jewelry from Stores Nationwide* (Nov. 21, 2007), available at http://www.ag.ny.gov/media_center/2007/nov/nov21a_07.html. The settlement allowed the attorney general's office to assess penalties if the retailers continued to sell tainted products. See Louise Story, *New York Aids in Jewelry Recall*, N.Y. TIMES, Nov. 21, 2007, <http://www.nytimes.com/2007/11/21/business/21cnd-recall.html>.
 144. Press Release, Office of the Cal. Att'y Gen., *Brown Sues Toy Companies for Lead* (Nov. 19, 2007), available at <http://ag.ca.gov/newsalerts/release.php?id=1497>. In announcing the lawsuit, Attorney General Brown stated: "Companies must take every reasonable step to assure that the products they handle are safe for children and their families and fully comply with the laws of California. Despite the lengthening global supply chain, every company that does business in this state must follow the law and protect consumers from lead and other toxic materials." *Id.*
 145. Press Release, Office of the Cal. Att'y Gen., *Brown Reaches Settlement To Reduce Children's Lead Exposure in Artificial Turf* (July 16, 2010), available at <http://ag.ca.gov/newsalerts/release.php?id=1953>.
 146. Proposition 65, Safe Drinking Water and Toxic Enforcement Act of 1986, CAL. HEALTH & SAFETY CODE § 25249.6 (West 2006) (requiring manufacturers to provide warnings before placing certain chemicals, including lead, into the stream of commerce).
 147. California reached an agreement with the toy companies to adopt stricter standards for their products than those provided in the federal law. Marc Lifsher, *Toy Makers Settle Lead Lawsuit*, L.A. TIMES, Dec. 5, 2008, <http://articles.latimes.com/2008/dec/05/business/fi-lead5>. The settlement, reached after passage of the CPSIA, required these manufacturers to meet the new federal standards under the CPSIA by December 2008 in California (rather than the February 2009 deadline provided by the federal law). *Id.* The agreement also stipulated that the companies would pay \$550,000 for lead testing and improved customer information. *Id.* The settlement with the manufacturer of artificial turf fined and penalized the manufacturer and required it to remove lead from the turf as well as to notify previous buyers. Marc Lifsher, *Astro Turf Will Get the Lead Out*, L.A. TIMES, Aug. 15, 2009, <http://articles.latimes.com/2009/aug/15/business/fi-astroturf-lead15>.

eventually reaching a settlement in 2010 that called for Dollar Tree to pay a \$100,000 fine.¹⁴⁸

Federal agencies have used expansive preemption to target these kinds of state actions. For example, in 2006, the CPSC passed an unprecedented regulation that preempted state laws and regulations governing mattress flammability requirements.¹⁴⁹ Once an agency preempts all state laws, or even state common law, state attorneys general are no longer able to enforce consumer protections in these areas, even if federal agencies are not enforcing their own regulations.

B. Other Tools Available to State Attorneys General

Even before the CPSIA, states attempted to hold the CPSC accountable through various extra-legal tools, such as writing letters to the CPSC, launching media campaigns, investigating consumer dangers, and building coalitions with other states. Although these tools can increase consumer awareness and influence industries, they are less effective than a full enforcement power under state or federal law.

The CPSC's failures with crib safety, for example, prompted Illinois Attorney General Madigan to publicly call on the CPSC to provide consumers with refunds or new cribs instead of repair kits after the cribs had been recalled.¹⁵⁰ The CPSC at the time opposed Attorney General Madigan's public proposals, arguing that her office was doing a "disservice to consumers."¹⁵¹

The Illinois Attorney General also began to investigate resales of recalled cribs, publicly criticizing the CPSC for allowing this loophole and noting that a federal recall does not increase safety if the cribs continue to be sold on the Internet and in the secondary market.¹⁵²

Connecticut Attorney General Richard Blumenthal wrote a charged public letter to the Agency regarding what he termed "a grossly inadequate and badly

148. *Vt. Settles Complaint with Dollar Tree Stores*, BOSTON.COM (Feb. 8, 2010), http://www.boston.com/news/local/vermont/articles/2010/02/08/vt_settles_complaint_with_dollar_tree_stores/.

149. See Final Rule: Standard for the Flammability (Open-Flame) of Mattress Sets, 71 Fed. Reg. 13,472, 13,496 (Mar. 15, 2006) (codified at 16 C.F.R. pt. 1633 (2010)) ("The Commission intends and expects that the new mattress flammability standard will preempt inconsistent state standards and requirements, whether in the form of positive enactments or court created requirements."). For more on both the weakening of the CPSC and its simultaneous preemption of state law, see Sharkey, *supra* note 1, at 230-33.

150. Possley, *Madigan Urges*, *supra* note 82.

151. Megan Twohey, *Maker: Repair Kit Isn't Ready for Recalled Cribs: Company Sends Parts Without Instructions*, CHI. TRIB., Sept. 29, 2007, at 1.

152. Press Release, Office of Ill. Att'y Gen. Lisa Madigan, *Madigan Calls on CPSC To Create Secondary Market Recall Strategy* (Oct. 1, 2008), available at http://www.illinoisattorneygeneral.gov/pressroom/2008_10/20081001.html.

flawed study in declaring synthetic turf safe to install and play on.”¹⁵³ The letter urged the CPSC to retract its earlier announcement that such turf was safe and revise its “crudely cursory” investigation of the possible effects of artificial turf.¹⁵⁴ Moreover, Blumenthal announced that Connecticut would conduct its own state investigation as to whether artificial turf was safe.¹⁵⁵

Massachusetts spearheaded a multistate investigation of toy safety, resulting in a consent decree between Massachusetts, thirty-eight other states, and Mattel that required the company to pay \$12 million to the states and to meet the new CPSIA standards by August 2009.¹⁵⁶

In November 2007, the CPSC recalled over 500,000 pieces of children’s jewelry due to high lead levels, prompted by information given to the federal agency by New York Attorney General Andrew Cuomo.¹⁵⁷

153. Press Release, Office of Conn. Att’y Gen. Richard Blumenthal, Attorney General Calls Synthetic Turf Study Dangerously Defective, Urges Its Removal and Revision (Aug. 19, 2008), *available at* <http://www.ct.gov/ag/cwp/view.asp?Q=421480&A=2795>; *see also id.* (“For the sake of public health and safety, Blumenthal said the CPSC has a moral and possibly legal obligation to immediately remove and revise its synthetic turf report from its website. ‘This report and release are as deceptive as some of the advertising and marketing of consumer products prosecuted by the Federal Trade Commission and state attorneys general,’ Blumenthal said.”).

154. *Id.*

155. *Id.* Days after Attorney General Blumenthal’s public criticism, the California attorney general filed a lawsuit against artificial turf makers for violations of California lead safety limit laws. *See* Marc Lifsher, *Suit Sets Stage for Artificial Turf War*, L.A. TIMES, Sept. 4, 2008, <http://articles.latimes.com/2008/sep/04/business/fi-turf4>.

156. Press Release, Office of the Att’y Gen. of Mass., Massachusetts Attorney General Martha Coakley and 38 other AGs Reach \$12 Million Settlement with Mattel Regarding Toys Recalled for Excessive Lead Paint (Dec. 15, 2008), *available at* http://www.mass.gov/?pageID=cagopressrelease&L=1&Lo=Home&sid=Cago&b=pressrelease&f=2008_12_15_mattel_multistate_agreement&csid=Cago. Although Massachusetts eventually filed a lawsuit under its state consumer protection laws, the multistate investigation into the practices of Mattel in regards to lead in toys was brought under the common-law powers of investigation possessed by all state attorneys general, which are not tied to any specific state or federal law. *Cf. Florida ex rel. Shevin v. Exxon Corp.*, 526 F.2d 266, 268 (11th Cir. 1976) (“[T]he attorneys general of our states have enjoyed a significant degree of autonomy. Their duties and powers typically are not exhaustively defined by either constitution or statute but include all those exercised at common law. There is and has been no doubt that the legislature may deprive the attorney general of specific powers; but in the absence of such legislative action, he typically may exercise all such authority as the public interest requires.”).

157. Press Release, *supra* note 143.

C. Using a State Enforcement Power

A state enforcement power allows a state to enforce regulations even when the state's laws are preempted, the agency fails to enforce its regulations, and a captured executive branch does not reprimand the agency. Two state actions taken under the CPSIA's grant of enforcement power to the states illustrate the importance of this power. After the CPSC drafted a guideline clarifying that the CPSIA's phthalate limits applied only to toys manufactured after February 10, 2009, Connecticut Attorney General Richard Blumenthal both wrote to the CPSC¹⁵⁸ and later filed a brief in a federal district court, challenging the agency's interpretation.¹⁵⁹ Once the court agreed that the CPSC had misinterpreted Congress's intent to ban all toys that could not meet the phthalate limits, Attorney General Blumenthal issued a press release claiming that the Agency had chosen to "protect[] profits over public health," and that his office would "take whatever steps are necessary to ensure that the phthalate ban is enforced."¹⁶⁰ The state enforcement power within the CPSIA gave him the authority to threaten such future action, thus creating an incentive for the Agency to enforce the ban going forward.

Also after the CPSIA was enacted, California Attorney General Brown wrote a letter to Target regarding its sale of lead-laced teddy bears. Brown argued that sale of the bears violated federal law, and the bears were immediately removed from the shelves.¹⁶¹ With the power to enforce federal law, state attorneys general can step in when a federal agency is under-regulating and a violation of federal law is left unaddressed, resulting in greater enforcement.

The CPSC's failure to initiate enforcement actions throughout this period highlights the importance of state-initiated enforcement actions and private rights of action. In the cases noted above, the states proved more effective than the CPSC due to a combination of stricter state laws like California's Proposition 65 and a more focused political will to hold industries accountable for their faulty and defective products. State innovation and initiative in the consumer protection domain are on the rise.¹⁶² Expanding the arsenal of enforcement

158. Press Release, Office of Conn. Att'y Gen. Blumenthal, Attorney General Praises Decision Blocking Manufacturers from Allowing Sale of Toxic Toys (Feb. 6, 2009), available at <http://www.ct.gov/ag/cwp/view.asp?a=3673&Q=433514> (referencing a letter to the CPSC).

159. Brief for the State of Connecticut as Amicus Curiae Supporting Plaintiffs, *Natural Res. Def. Council v. U.S. Consumer Prod. Safety Comm'n*, 597 F. Supp. 2d 370 (S.D.N.Y. 2009) (No. 08 Civ. 10507), available at <http://www.citizen.org/documents/AmicusCT.pdf>.

160. Press Release, *supra* note 158.

161. *California: Target Recalls Valentine Bears*, N.Y. TIMES, Feb. 9, 2010, http://www.nytimes.com/2010/02/10/us/10brfs-TARGETRECALL_BRF.html.

162. Alexandra B. Klass, *Tort Experiments in the Laboratories of Democracy*, 50 WM. MARY L. REV. 1501, 1503 (2009).

weapons also allows attorneys general in states with fewer consumer protection laws to enforce federal laws in federal court. Conferring such power upon the state attorneys general can place consumer protection issues higher on the states' political agendas. Granting states a co-enforcement power strengthens tools already at the states' disposal. Finally, the exercise of state enforcement powers does not raise complex jurisprudential issues, including the limits of judicial review and an unclear standing doctrine. Any meaningful overhaul of the CPSC needed to include a state enforcement power to counter the Agency's underenforcement.

IV. THE EXPANSION OF STANDING AND LIMITATION OF PREEMPTION

In the CPSIA example, the legislative decision to grant state attorneys general enforcement powers reflects a larger institutional goal of agency renewal and stronger consumer protection. Administrative and constitutional law doctrines often track each other, and recent Supreme Court decisions expanding state standing to challenge federal agency inaction and limiting agency preemption of state remedies coincide with the legislative trends.¹⁶³ However, although Congress and the Court seem to focus on a similar problem of agency inaction and a federalism-based accountability solution, the legislative grant focuses on a public-law right to enforce regulations. In contrast, expanding the standing doctrine to allow states more power to challenge agency inaction is a private-law mechanism focused on challenging agencies for their inaction.¹⁶⁴ These parallel yet distinct trends perhaps signal a renewed focus on the "public interest concern of agencies."¹⁶⁵

163. See, e.g., *Massachusetts v. EPA*, 549 U.S. 497 (2007) (finding that Massachusetts had standing to petition for review of the EPA's decision not to regulate greenhouse gasses); *Gonzales v. Oregon*, 546 U.S. 243 (2006) (holding that Congress did not intend to alter the federal-state balance with respect to the Controlled Substances Act). But see *Hein v. Freedom from Religion Found., Inc.*, 551 U.S. 587 (2007) (plurality opinion) (appearing to pull back from a relaxing of standing rules).

164. Christopher J. Sprigman, Comment, *Standing on Firmer Ground: Separation of Powers and Deference to Congressional Findings in the Standing Analysis*, 59 U. CHI. L. REV. 1645, 1647 (1992) (describing the parallel development of private standing doctrines and enforcement of public-law rights).

165. Stewart, *supra* note 123, at 1682-83; see also Bressman, *supra* note 50, at 1661 (examining how judicial review can help create democratically reasonable regulations, given the possibility that an "agency is susceptible to corrosive influences when it refuses to act, just as when it decides to act," and that "these influences may produce administrative decision making that is arbitrary from a democratic perspective, no matter how rational or accountable it may be from a political standpoint"). At least one scholar has called for the judicial branch to articulate a constitutional model embracing cooperative federalism, a development that would further unify these two mechanisms. See Nancy C. Staudt, *Modeling Standing*, 79 N.Y.U. L. REV. 663 (2004).

Recent Supreme Court decisions have explored this perception of imbalance, expanding and protecting state standing to challenge federal administrative inaction—especially in the area of consumer protection, which has been subject to unprecedented federal preemption and tort-reform challenges.¹⁶⁶ Also, some state attorneys general have increased private enforcement in cases of lax regulatory oversight¹⁶⁷ or expanded state consumer fraud statutes.¹⁶⁸ Taken together, these developments signal a change in the nature of federal and state roles in negotiating an increasingly blurred line between state tort law and federal regulation.¹⁶⁹ Such a change provides an opportunity to revisit the basic progressive tradition of consumer protection and the question of how best to allocate enforcement powers.

Though distinct trends, the expansion of state enforcement powers and the expansion of judicial review of agency failures to promulgate rules coincide. The Supreme Court and Congress appear to be working in parallel and addressing similar federalism concerns in administrative law.¹⁷⁰ Enlarging the states' role in the regime seems to be a common solution.

166. See Metzger, *supra* note 3, at 2027.

167. See, e.g., *Connecticut v. Am. Elec. Power Co.*, 582 F.3d 309 (2d Cir. 2009).

168. Klass, *supra* note 162, at 1521-25.

169. This change in defining traditional state tort law as federal regulatory law can be seen through a line of pro-preemption Supreme Court cases. See Klass, *supra* note 27, at 1658-59; see also Catherine M. Sharkey, *Products Liability Preemption: An Institutional Approach*, 76 GEO. WASH. L. REV. 449, 459 (2008) ("The Court has oscillated between competing conceptions of tort as either primarily regulatory or compensatory, with the regulatory view justifying preemptive results and the compensatory view compelling the opposite.").

170. See, e.g., *Wyeth v. Levine*, 129 S. Ct. 1187, 1205 (2009) (Thomas, J., concurring) ("The Framers adopted this constitutionally mandated balance of power, to reduce the risk of tyranny and abuse from either front, because a federalist structure of joint sovereigns preserves to the people numerous advantages, such as a decentralized government that will be more sensitive to the diverse needs of a heterogeneous society and increase[d] opportunity for citizen involvement in democratic processes." (alteration in original) (citations omitted) (internal quotation marks omitted)); *Massachusetts v. EPA*, 549 U.S. 497, 518 (2007) ("It is of considerable relevance that the party seeking review here is a sovereign State and not, as it was in *Lujan*, a private individual."); see also *S.D. Warren Co. v. Me. Bd. of Envtl. Prot.*, 547 U.S. 370, 386 (2006) (respecting Congress's original cooperative federalism regime for the Clean Water Act permitting process). But see *Riegel v. Medtronic, Inc.*, 552 U.S. 312 (2008) (holding that state common-law claims were preempted under the Medical Device Amendments to the Food, Drug, and Cosmetic Act). After the Court issued its pro-preemption ruling in *Riegel*, however, Congress responded with a draft bill to overturn the ruling and restore state liability claims for Medical Devices. See Medical Device Safety Act of 2009, H.R. 1346, 111th Cong. (2009).

Some commentators point to the apparent ability of many interested parties to bring lawsuits checking agency inaction.¹⁷¹ State attorneys general do bring consumer protection lawsuits under state laws that incorporate or otherwise look similar to their federal counterparts. Sometimes state attorneys general have also been given investigatory or enforcement powers under federal agency regulations.¹⁷² Recent scholarly work has examined state regulatory and common-law innovation in the area of consumer protection, and at least one scholar has argued that such innovation should count as a factor against agency preemption.¹⁷³ However, a gap remains where a federal agency chooses not to enforce its own regulations and the state is preempted from addressing the violation through its own laws.¹⁷⁴

A. *Judicial Review of Agency Inaction: Heckler v. Chaney*

The Administrative Procedure Act provides judicial review of “final agency action for which there is no other adequate remedy in a court.”¹⁷⁵ Further, the APA provides that a reviewing court must “hold unlawful and set aside” agency action that is “not in accordance with law.”¹⁷⁶ But traditionally there is no judicial remedy for agency inaction.¹⁷⁷ According to the dominant account of administrative law, the executive branch, not the judiciary, is responsible for remedying agency inaction.

171. See, e.g., CROLEY, *supra* note 125, at 282.

172. See, e.g., NAT’L ASS’N OF ATT’YS GEN., INTERIM BRIEFING PAPER, PREPARED FOR: PRESIDENT-ELECT BARACK OBAMA TRANSITION TEAM 4 (2009), available at http://www.naag.org/assets/files/pdf/policy/Transition_Team_Briefing_Paper_20090110.pdf (“For example, in the area of antitrust law, under the Clayton, Sherman and Hart-Scott-Rodino Acts, states may file suit in federal court for various reasons and there is no preemption for states to file suit under state antitrust laws. Similarly, the FTC’s administrative rule in the enforcement of telemarketing allows state Attorneys General to file suit in federal courts after FTC waiver of jurisdiction.”).

173. Klass, *supra* note 27.

174. For examples of this loophole, see Jonathan Remy Nash, *Null Preemption*, 85 NOTRE DAME L. REV. 1015 (2010), which examines areas where states are preempted from acting and the relevant federal agency chooses not to act.

175. 5 U.S.C. § 704 (2006).

176. *Id.* § 706(2)(A).

177. *Heckler v. Chaney*, 470 U.S. 821, 831 (1985) (“This Court has recognized on several occasions over many years that an agency’s decision not to prosecute or enforce, whether through civil or criminal process, is a decision generally committed to an agency’s absolute discretion.”).

The leading case discussing the limits of judicial review of agency inaction is *Heckler v. Chaney*.¹⁷⁸ In *Heckler*, prisoners who had been sentenced to death by lethal injection sued the Food and Drug Administration (FDA) for failing to approve the drugs as “safe and effective” for lethal injection. The Court considered whether such inaction was within the agency’s prosecutorial discretion and decided that there is a presumption against judicial review when an agency chooses not to enforce. This presumption rests primarily on acknowledgment of the “complicated balancing of a number of factors” including agency resources, overall policies, whether enforcement will be successful, and the Court’s belief that inaction is less coercive than action.¹⁷⁹

However, inaction can be coercive, as it was when the CPSC refused to draft guidelines due to political forces attempting to undermine a bill passed by Congress.¹⁸⁰ A private-law remedy to address the CPSC’s failure to draft appropriate guidelines and exemptions following the passage of the CPSIA would allow the states some power to hold the agency accountable to its mandate. But allowing a state to determine how an agency should allot its resources, and dictating fact-finding issues like determining guidelines runs afoul of exactly the Court’s concern in *Heckler*.

A failure to draft guidelines and create regulations differs from a failure to enforce existing regulations. Congress delegates a check on this type of agency inaction to the state attorneys general with its legislative expansion of enforcement powers. For example, under the CPSIA, if the CPSC refused to enforce the phthalate ban, the states would be able to do so using their enforcement power. Thus, the “complicated balancing of factors”¹⁸¹ that a court performs when deciding whether to prosecute a particular violation would now be shared with fifty state attorneys general. By expanding the state enforcement power, Congress effectively addressed one of the main reasons given by the Court for not reviewing agency decisions not to enforce—namely, that an agency should not be forced to expend its limited resources on addressing any particular violation

178. *Id.*

179. *Id.* at 832.

180. See *supra* Section II.B; cf. Cheh, *supra* note 129, at 265 (“There are many reasons why an administrative agency might fail to act. The agency may simply be defaulting in its obligations, it may lack the resources to do its job, it may be too cozy with the would-be objects of its regulatory powers, or it may be dragging its feet because of a change in the party controlling the presidency or a division between Congress and the president over domestic policy.”).

181. *Heckler*, 470 U.S. at 831 (“[A]n agency decision not to enforce often involves a complicated balancing of a number of factors which are peculiarly within its expertise. Thus, the agency must not only assess whether a violation has occurred, but whether agency resources are best spent on this violation or another, whether the agency is likely to succeed if it acts, whether the particular enforcement action requested best fits the agency’s overall policies, and, indeed, whether the agency has enough resources to undertake the action at all.”).

rather than another, while simultaneously ensuring that the public is protected. The state enforcement power obviates this concern by leaving the agency's resources untouched. A state attorney general who decides to sue for injunctive relief for a violation of the CPSIA will have to use the state's resources.

B. *The Court's Recent Opinions on State Access to Judicial Remedies and Federalism in Administrative Law: Massachusetts v. EPA and Cuomo v. Clearinghouse Association*

Judicially created private rights of action are another somewhat parallel solution to the problem of agency inaction. The Supreme Court struggled with the boundaries of this judicial remedy in its decision to grant state standing to challenge the EPA's refusal to regulate greenhouse emissions in *Massachusetts v. EPA*.

1. *Massachusetts v. EPA*

In 2007, the Supreme Court issued a decision that radically altered standing doctrine: *Massachusetts v. EPA*.¹⁸² Finding that the states and cities bringing the suit had standing to challenge the EPA's refusal to regulate greenhouse gas emissions, the Court went on to allude to an imbalance in administrative law.¹⁸³ The Court also found that greenhouse gases from new vehicle emissions were indeed covered under the Clean Air Act and that the EPA was required either to regulate them or offer a reasonable argument for why it would not do so.¹⁸⁴

It is clear the Court expanded state standing to challenge agency inaction in this case.¹⁸⁵ In affording a "special solicitude" to Massachusetts, the Court acknowledged that the state had relinquished "certain sovereign prerogatives" to the federal government.¹⁸⁶ This transfer of power requires the federal govern-

182. 549 U.S. 497 (2007).

183. *Id.* at 533-34 ("Although we have neither the expertise nor the authority to evaluate these policy judgments, it is evident they have nothing to do with whether greenhouse gas emissions contribute to climate change. Still less do they amount to a reasoned justification for declining to form a scientific judgment. In particular, while the President has broad authority in foreign affairs, that authority does not extend to the refusal to execute domestic laws.").

184. *Id.*

185. See, e.g., Bradford Mank, *Should States Have Greater Standing Rights than Ordinary Citizens?: Massachusetts v. EPA's New Standing Test for States*, 49 WM. & MARY L. REV. 1701, 1704-05 (2008); Dru Stevenson, *Special Solicitude for State Standing: Massachusetts v. EPA*, 112 PENN ST. L. REV. 1, 4-5 (2007).

186. *Massachusetts*, 549 U.S. at 519-20; see also *id.* at 519 ("When a State enters the Union, it surrenders certain sovereign prerogatives. Massachusetts cannot invade Rhode Island to force reductions in greenhouse gas emissions, it cannot negotiate an emissions treaty with China or India, and in some circumstances the exercise

ment to protect the states by regulating air pollutants that endanger the health and welfare of the states' citizens. The absence of regulation at the federal level creates a procedural right¹⁸⁷ to challenge agency action as arbitrary and capricious—a means of vindicating “Massachusetts’ stake in protecting its quasi-sovereign interests.”¹⁸⁸

It is important for the state to be able to challenge the decisions of federal agencies not to promulgate regulations, especially in the area of consumer protection. Scholars have argued that that right realizes public goods,¹⁸⁹ promotes a more balanced view of federalism,¹⁹⁰ and checks excessive preemption.¹⁹¹ Other scholars have pointed out the connection between preemption and expanded state standing, arguing that by aggressively preempting state common-law remedies as well as state statutes, the agencies themselves may have given rise to the state’s injury and therefore the ability of the state to challenge agency inaction.¹⁹² Whatever the precise benefits, expanded state standing is an important response to the recent weakening of agencies as well as the federalization of consumer protection.

of its police powers to reduce in-state motor-vehicle emissions might well be preempted.”).

187. *Cf. Lujan v. Defenders of Wildlife*, 504 U.S. 555, 572 n.7 (1992) (“There is this much truth to the assertion that ‘procedural rights’ are special: The person who has been accorded a procedural right to protect his concrete interests can assert that right without meeting all the normal standards for redressability and immediacy. Thus, under our case law, one living adjacent to the site for proposed construction of a federally licensed dam has standing to challenge the licensing agency’s failure to prepare an environmental impact statement, even though he cannot establish with any certainty that the statement will cause the license to be withheld or altered, and even though the dam will not be completed for many years.”). *But see Citizens Against Ruining the Env’t v. EPA*, 535 F.3d 670, 676 (7th Cir. 2008) (finding that a state did not have standing to challenge agency inaction without concrete injury).
188. *Massachusetts*, 549 U.S. at 519-20; *see also Alfred L. Snapp & Son, Inc. v. Puerto Rico*, 458 U.S. 592, 607 (1982) (“[A] State has a quasi-sovereign interest in the health and well being—both physical and economic—of its residents in general.”).
189. Robert A. Weinstock, *The Lorax State: Parens Patriae and the Provision of Public Goods*, 109 COLUM. L. REV. 798, 799-800 (2009).
190. Stevenson, *supra* note 185, at 40-41 (describing the federalism effects of enlarged state standing).
191. Cody, *supra* note 142, at 174-75.
192. *Id.*; *cf. Elizabeth Magill, Standing for the Public: A Lost History*, 95 VA. L. REV. 1131 (2009) (examining the rise and fall of standing doctrine relative to the birth of public-interest ideological challenges to agency decisions, which exploded in the 1970s). *But cf. Hein v. Freedom from Religion Found., Inc.*, 551 U.S. 587 (2007) (plurality opinion) (signifying deep disagreements within the Court as to the role and limits of standing).

It is also noteworthy that the Court chose to focus on a state's standing to challenge an agency's decision not to regulate rather than more traditional administrative law doctrines such as the level of deference to afford such a decision.¹⁹³ The Court underscored exactly the types of federalism concerns raised by agency inaction—in particular, the inadequacy of federal oversight of federal agencies—rather than avoiding the federalism concern and instead focusing on a more administrative-oriented correction through greater scrutiny of agency action.¹⁹⁴ This language in the opinion connects the Court and Congress in their attempt to find a federalism balance in administrative law, and reflects the uncooperative federalism impulse specifically.¹⁹⁵

However, *Massachusetts v. EPA* is only one recent case, and it is unclear how any new standing rule will be applied in the future.¹⁹⁶ The particular inaction at issue—the refusal to regulate greenhouse gases based on the agency's determination that the Clean Air Act did not cover such emissions—falls under the area of limited judicial review of agency inaction.¹⁹⁷ But even *Massachusetts v. EPA*'s expanded standing doctrine would probably not cover an agency's decision not to enforce its regulations.

The CPSIA could be seen as a congressional attempt to expand on the Supreme Court's decision in *Massachusetts v. EPA* by giving state attorneys general a special power to enforce federal regulations. If administrative law is the new federalism, expanding state enforcement mechanisms is as important to instilling a federal-state balance as limiting preemption of state law and expanding private rights of action. These three reforms should not be understood as mutually exclusive; rather, they form a web of consumer protection, each responding to slightly different forms of agency inaction.

193. Metzger, *supra* note 3, at 2062-63. But see *id.* at 2064 (pointing out that the Court possibly applied a heightened scrutiny in its *Chevron* analysis of the agency's decision).

194. See Lisa Schultz Bressman, *Procedures as Politics in Administrative Law*, 107 COLUM. L. REV. 1749, 1803 (2007) (discussing the Court's unwillingness to accept the executive policy reasons not to regulate in *Massachusetts v. EPA*).

195. Cf. Freeman & Vermeule, *supra* note 22, at 54.

196. Compare *Connecticut v. Am. Elec. Power Co.*, 582 F.3d 309, 344 (2d Cir. 2009) (finding standing for states to bring nuisance claims with respect to climate change), with *California v. Gen. Motors Corp.*, No. C06-05755 MJJ, 2007 WL 2726871 (N.D. Cal. Sept. 17, 2007) (rejecting special standing for a state to bring a public nuisance claim).

197. *Massachusetts v. EPA*, 549 U.S. 497, 527-28 (2007) (explaining that an agency decision not to promulgate regulations differs from a decision not to enforce violations, which is subject to very limited judicial review).

2. *Cuomo v. Clearing House Association*

The Court's recent decision in *Cuomo v. Clearing House Ass'n*¹⁹⁸ also expresses concerns about administrative federalism and the sense that agency preemption may have gone too far. In *Clearing House*, the Office of the Comptroller of the Currency (OCC) claimed that New York Attorney General Andrew Cuomo did not have visitorial powers¹⁹⁹ to investigate alleged violations of New York State's fair lending laws by national banks.²⁰⁰ The Court, while agreeing that the National Banking Act delegates visitorial powers to the federal government alone, invoked federalism principles to distinguish a state's exercise of its sovereign ability to enforce its own state laws from an exercise of visitorial powers.²⁰¹ The decision focused on the seeming inequity that results from allowing states to retain their state laws while curtailing the means to enforce those laws; as the Court put it, "The bark remains, but the bite does not."²⁰²

The Court also signaled a desire to rein in aggressive agency preemption and emphasized the important balance between federal administrative control and continued state enforcement of state substantive law.²⁰³ While *Clearing House* addressed the preemption of state law rather than a state's ability to enforce federal regulations, the two issues are interwoven through a larger federalism framework.²⁰⁴ In particular, both issues highlight the importance of allowing innovative state responses to federal regulatory lapses.²⁰⁵

198. 129 S. Ct. 2710 (2009).

199. Visitorial powers allow inspection of a bank and its records. 12 C.F.R. § 7.4000(a)(2) (2005) ("For purposes of this section, visitorial powers include: (i) Examination of a bank; (ii) Inspection of a bank's books and records; (iii) Regulation and supervision of activities authorized or permitted pursuant to federal banking law; and (iv) Enforcing compliance with any applicable federal or state laws concerning those activities.").

200. *Clearing House*, 129 S. Ct. at 2714.

201. *Id.* at 2717-20.

202. *Id.* at 2718.

203. *Id.* ("Channeling state attorneys general into judicial law-enforcement proceedings (rather than allowing them to exercise 'visitorial' oversight) would preserve a regime of exclusive administrative oversight by the Comptroller while honoring in fact rather than merely in theory Congress's decision not to pre-empt substantive state law. This system echoes many other mixed state/federal regimes in which the Federal Government exercises general oversight while leaving state substantive law in place." (citing *Wyeth v. Levine*, 129 S. Ct. 1187 (2009))).

204. *Cf. Metzger*, *supra* note 3, at 2030-39 (describing recent Supreme Court opinions addressing administrative law issues through a federalism lens).

205. *Cf. David Streitfeld & John Collins Rudolph, States Are Pondering Fraud Suits Against Banks*, N.Y. TIMES, Nov. 3, 2009, at B1 ("For the better part of eight years, the federal regulators were not being aggressive, and at the same time we were dis-

C. How the State Enforcement Power Differs from the Court's Approach

The CPSIA authorizes state attorneys general to initiate the same enforcement actions as federal agencies.²⁰⁶ This public-law enforcement mechanism differs from the expanded private right of states to protect their citizens. Most importantly, a state enforcement power allows for oversight of those areas where an agency chooses not to prosecute a violation—not just those areas of inaction currently subject to judicial review. If the goal is to increase oversight of agency inaction and encourage agencies to enforce their regulations consistently, a co-enforcement model might have advantages over expanded state standing to challenge agency inaction.

Unlike expanded judicial review of agency inaction, the state enforcement power does not implicate separation-of-powers concerns. In exercising that power, a state does not ask a court to review an agency's decision not to enforce its regulations; rather, the state enforces the regulations for itself. This arrangement addresses many of the Court's concerns in *Heckler v. Chaney*, as well as those of the dissenters in *Massachusetts v. EPA*.²⁰⁷

The Court's recent decisions regarding state standing and regulatory preemption are important components of a larger trend toward restoring the federalism balance in administrative law. But these decisions do not obviate the need for a state enforcement power. Such powers offer a remedy in an area that is immune to judicial review even under a liberalized state standing doctrine: agency discretion not to prosecute a particular violation.

abled,' said the Ohio Attorney General, Richard Cordray. 'There was nothing holding back irrational and irresponsible practices.'"). And less than one month after the Court's ruling in *Clearing House*, Illinois Attorney General Madigan filed suit alleging violations of state laws. See Complaint for Injunctive and Other Relief, *People v. Wells Fargo & Co.*, No. 09CH26434 (Ill. Dist. Ct. July 31, 2009), available at http://www.illinoisattorneygeneral.gov/pressroom/2009_07/WELLS%20FARGO%20COMPLAINT_07-31-2009_13-44-30.pdf.

206. Consumer Product Safety Improvement Act of 2008, 15 U.S.C. § 2073(b) (Supp. II 2009) ("State Attorney General Enforcement—(1)Right of Action—Except as provided in paragraph (5), the attorney general of a State, or other authorized State officer, alleging a violation of 19(a)(1),(2),(5),(6),(7),(9), or (12) of this Act that affects or may affect such State or its residents may bring an action on behalf of the residents of the State in any United States district court for the district in which the defendant is found or transacts business to obtain appropriate injunctive relief.").

207. Both the *Heckler v. Chaney* and *Massachusetts v. EPA* dissenters expressed concern that a state or citizen should not be able to force the executive branch to act. See *Massachusetts v. EPA*, 549 U.S. 497, 549-51 (2007) (Scalia, J., dissenting); *Heckler v. Chaney*, 470 U.S. 821, 832 (1985).

V. OTHER LEGISLATIVE DELEGATIONS OF EXPANDED ENFORCEMENT POWER

A. *Past Use of State Enforcement Powers*

Congress has granted state enforcement powers since the mid-1970s, with a burst of such grants in the 1990s and again in recent years. For example, the Hart-Scott-Rodino Act of 1976 authorized states to bring actions for monetary damages for violations of the Sherman Act,²⁰⁸ and some environmental laws allowed for state enforcement of certain aspects of those laws.²⁰⁹

Other statutes, such as the Telecommunications Act of 1996²¹⁰ and the Medicaid Act²¹¹ are often cited as incorporating many of the ideals of cooperative federalism, yet do not contain explicit grants of state enforcement power. In many of these earlier statutes, the federal and state roles are complex and interwoven; there is no clear delegation of state enforcement power as seen in the CPSIA. State enforcement powers were part of larger state regulatory duties and sometimes the enforcement power was only implied or cabined to specific state programs under federal law.²¹² This differs from the CPSIA and other recent regulatory overhauls that leave most of the regulating under the federal agency's purview yet allow for co-enforcement of the federal law.²¹³

208. See Hart-Scott-Rodino Antitrust Improvements Act of 1976, 15 U.S.C. § 15c (2006).

209. See Clean Water Act of 1977, Pub. L. No. 95-217, 91 Stat. 1566 (codified as amended in scattered sections of 33 U.S.C.) (authorizing states to administer and enforce the National Pollutant Discharge Elimination System permit program); Clean Air Act, ch. 360, 69 Stat. 322 (1955) (codified as amended in scattered sections of 42 U.S.C.) (authorizing each state to create a State Implementation Plan (SIP) that guides the state's enforcement of the federal law).

210. Pub. L. No. 104-104, 110 Stat. 56 (codified as amended in scattered sections of 47 U.S.C.); see *P.R. Tel. Co. v. Telecomm. Regulatory Bd.*, 189 F.3d 1, 14 (1st Cir. 1999) ("The [Telecom] Act exemplifies a cooperative federalism system, in which state commissions can exercise their expertise about the needs of the local market and local consumers, but are guided by the provisions of the Act and by the concomitant FCC regulations."). But see Weiser, *supra* note 138, at 730-31 (discussing the cooperative federalism elements in the Telecommunications Act but noting the reluctance of federal courts to permit a greater role for states).

211. 42 U.S.C. § 1396a(10)(A) (2006).

212. See *supra* note 138 and accompanying text.

213. See *supra* note 141 and accompanying text.

B. *Congress Returns to State Enforcement Powers*

Congress considered the state enforcement power in recent high-profile consumer protection bills besides the CPSIA.²¹⁴ Unlike the previous incarnations of cooperative federalism regimes, the new crop of state enforcement powers tends to represent isolated areas of state authority within a predominantly federal regulatory structure. Given the states' traditional jurisdiction over health and welfare and the history of consumer protection actions by state attorneys general, these recent legislative proposals have the "uncooperative federalism" effect of increasing the tension between states and federal agencies and thereby strongly discouraging political or otherwise arbitrary agency inaction.

Like the consumer protection failures of the last decade, the recent financial crisis spurred an extensive regulatory overhaul of the financial sector. Representative Barney Frank, the Democratic Chairman of the House Financial Services Committee, introduced legislation that reforms many consumer protection areas in the financial sector.²¹⁵ Testimony directed toward rectifying particular financial agency abuses, such as nonenforcement, focused on expanding state enforcement powers and limiting preemption of state law.²¹⁶ The final bill embraced state enforcement powers.²¹⁷

C. *The Web Approach*

A state enforcement power is sometimes created in exchange for the absolute preemption of state laws, as in the proposed Data Accountability and Trust Act of 2009,²¹⁸ and the Fair Credit and Reporting Act of 2003.²¹⁹ Such compromises have become more common, perhaps as preemption has become more of

214. State enforcement powers were introduced in early versions of climate change legislation. See American Clean Energy and Security Act of 2009, H.R. 2454, 110th Cong. (2009); cf. American Recovery and Reinvestment Act of 2009, 42 U.S.C.A. §§ 17938-40 (West 2010) (expressly authorizing state attorneys general to enforce the Health Insurance Portability and Accountability Act (HIPAA) through civil enforcement actions).

215. Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1376 (2010) (to be codified in scattered sections of 12 U.S.C.).

216. See, e.g., *The Proposed Consumer Protection Financial Agency: Implications for Consumers and the FTC: Hearing Before the H. Comm. on Energy & Commerce*, 111th Cong. (2009) (statement of Prentiss Cox, Associate Professor, University of Minnesota Law School).

217. See Dodd-Frank Wall Street Reform and Consumer Protection Act § 1042.

218. See H.R. 2221, 111th Cong. §§ 4(c), 6 (2009).

219. See 15 U.S.C. §§ 1681(s)(c), 1681(t) (2006).

a political tool.²²⁰ However, by preempting state experimentation with stricter legislation, Congress forgoes a celebrated benefit of federalism: states' acting as innovative laboratories. The CPSIA, by contrast, addresses consumer protection through a web of accountability- and federalism-promoting mechanisms.²²¹

Do the CPSIA and the Wall Street Reform Act signal a new congressional approach to administrative law? Both of these overhauls were prompted by underenforcement. Both strengthen consumer protection by expanding the state enforcement power, seemingly echoing the Court's expressions of expanded avenues of judicial review of some types of agency inaction.²²² Unlike previous legislation, however, the CPSIA did not expand the state enforcement power

220. The first generations of state enforcement grants were much less likely to contain strong preemption language. In fact, many of them contained express saving clauses making clear that the new legislation in no way limited state law. *See, e.g.*, Home Ownership and Equity Protection Act, 15 U.S.C. § 1640(e) (2006). While some of the newer legislation incorporating these grants also incorporate saving clauses, preemption language has been more common in the last ten years. *See, e.g.*, 15 U.S.C. §§ 1681(s)(c), 1681(t); Personal Data Privacy and Security Act of 2009, S. 1490, 111th Cong. §§ 318-19 (2009); H.R. 2221 §§ 4(c), 6 (2009).

221. The Federal Trade Commission Reauthorization Act of 2008, S. 2831, 110th Cong. (2008), would have also granted state enforcement powers while allowing for more stringent state law. So, too, would recent amendments to HIPAA passed in the economic stimulus bill incorporate this new "web" of consumer protection. *See* American Recovery and Reinvestment Act of 2009, 42 U.S.C.A. § 1320d-5(d) (West 2010) (expressly authorizing state attorneys general to enforce HIPAA through civil enforcement actions).

222. Other recent legislation attempts to revitalize the use of citizen suits, presumably as a similar check on agency inaction. Citizen suit provisions were originally proposed in recent legislation addressing climate change, *see* American Clean Energy and Security Act of 2009, H.R. 2454, 111th Cong. (2009), as well as in recent attempts to overhaul the existing food safety regime and the FDA, *see, e.g.*, Food Safety Modernization Act of 2009, H.R. 875, 111th Cong. (2009). Citizen suits, important components of a legislative web of consumer protection tools, raise their own constitutional and doctrinal questions, which are outside the scope of this Article. *See* Cass Sunstein, *What's Standing After Lujan? Of Citizen Suits, "Injuries" and Article III*, 91 MICH. L. REV. 163, 166 (1992) (arguing that there is not a constitutional issue with such citizen suit grants). *Compare* Myriam E. Gilles, *Representational Standing: U.S. ex rel. Stevens and the Future of Public Law Litigation*, 89 CALIF. L. REV. 315, 365-67 (2001) (arguing that some Article II problems could be overcome with the right legislative grants of executive oversight over citizen suits), *with* Stephen M. Johnson, *Private Plaintiffs, Public Rights: Article II and Environmental Citizen Suits*, 49 U. KAN. L. REV. 383 (2001) (noting possible Article II implications of such citizen suits). Empirical studies have shown that citizen suits in the environmental arena both encourage and aid governmental enforcement as well as private compliance. *See, e.g.*, Kristi M. Smith, *Who's Suing Whom?: A Comparison of Government and Citizen Suit Environmental Enforcement Actions Brought Under EPA Administered Statutes, 1995-2000*, 29 COLUM. J. ENVTL. L. 359 (2004).

while simultaneously strengthening preemption, or as part of a larger state implementation program. Instead, the state enforcement power in the CPSIA is a distinct power, allowing for a particular “uncooperative” role for the states.²²³ Through their enforcement powers, the states are encouraged to monitor agency inaction, serving as a check against political or otherwise arbitrary nonenforcement. The “uncooperative federalism” model is uniquely suited to rectify recent abuses of agency authority and general agency weakening. Unlike earlier conceptions of cooperative federalism, this newer model is instead born from the tension-creating mechanisms of concurrent enforcement powers.

VI. IMPLICATIONS OF STATE ENFORCEMENT IN RESPONSE TO FEDERAL AGENCY INACTION

A. Criticisms

The greatest objections to judicial review of agency inaction are rooted in theories of prosecutorial discretion and separation of powers.²²⁴ According to the Court in *Heckler v. Chaney*, prosecutorial discretion relies on “a complicated balance of a number of factors which are peculiarly within its expertise . . . [including] whether a violation has occurred, . . . [and] whether the particular enforcement action requested best fits the agency’s overall policies.”²²⁵ Despite these factors, however, the Court acknowledges that Congress has the power to limit agencies’ prosecutorial discretion.²²⁶

Although there has been very little scholarly discussion of concurrent state enforcement of federal law, there has been some discussion of state attorneys general “regulating through litigation.”²²⁷ In those cases, the focus of the criticism is on the use of the state to change federal law through coordinated multis-

223. See *supra* Section V.B.

224. See *Heckler v. Chaney*, 470 U.S. 821, 831-32 (1985).

225. *Id.* at 831.

226. *Id.* at 833 (“Congress may limit an agency’s exercise of enforcement power if it wishes, either by setting substantive priorities, or by otherwise circumscribing an agency’s power to discriminate among issues or cases it will pursue.”).

227. Donald Gifford, *Impersonating the Legislature: State Attorneys General and Parens Patriae Product Litigation*, 49 B.C. L. REV. 913 (2008) (explaining this common rationale against state attorneys general bringing tort claims in areas also regulated by federal agencies); see also Timothy Meyer, *Federalism and Accountability: State Attorneys General, Regulatory Litigation and the New Federalism*, 95 CALIF. L. REV. 885 (2007) (arguing that state attorneys general multistate actions in effect undermine principles of federalism). But see Jason Lynch, *Federalism, Separation of Powers, and the Role of State Attorneys General in Multistate Litigation*, 101 COLUM. L. REV. 1998 (2001) (arguing that multistate actions by state attorneys general do not implicate separation-of-powers and federalism concerns).

tate actions using *parens patriae* authority.²²⁸ While such actions are discussed briefly in Section III.B of this Article, they are completely different from a congressionally delegated power to enforce existing federal regulations and laws.

Such powers instead supplement executive enforcement. Although one could theoretically imagine an instance in which dual enforcement strategies could vary,²²⁹ the fact that Congress has legislated for such a regime, and retains the right to revoke state enforcement powers, renders arguments about state encroachment on executive prosecutorial discretion moot to this particular instance of enforcement by state attorneys general.²³⁰

Some scholars, adopting a unitary executive theory, might argue that Congress may not delegate federal executive functions to the states.²³¹ The unitary executive theory states, in essence, that the president retains complete control over the bureaucracy.²³² There is only one case of such a theory being considered as a possible basis for precluding state enforcement of federal law, and in that case the delegation of enforcement power to the states was upheld.²³³

228. *Black's Law Dictionary* describes *parens patriae* as "a concept of standing utilized to protect those quasi-sovereign interests such as health, comfort and welfare of the people, interstate water rights, general economy of the state." BLACK'S LAW DICTIONARY 1114 (6th ed. 1990).

229. See Lynch, *supra* note 227, at 2014-15 (2001) (describing this exact scenario with the consolidation of the state and federal enforcement suits of antitrust provisions against Microsoft).

230. *Id.* at 2015 ("While dual enforcement of some federal laws by the state and federal governments may be inefficient, the fact that Congress chose to establish such a regime and retains the power to end it undermines the argument that states are usurping federal power.").

231. *Id.* at 2029 (exploring the possibility of an argument against state enforcement of federal law from those who espouse the unitary executive theory).

232. See Steven G. Calabresi & Saikrishna B. Prakash, *The President's Power To Enforce the Laws*, 104 YALE L.J. 541, 570 (1994) (laying out the case for the unitary executive theory); Sanford Levinson & Jack Balkin, *Constitutional Dictatorship: Its Dangers and Its Design*, 94 MINN. L. REV. 1789, 1842 (2010) ("[T]he unitary executive theory arose during a period when the President and Congress were usually controlled by opposite parties: defenders of a strong presidency viewed increased control over the bureaucracy as the best way to promote their policy goals without interference from opponents of the President.").

233. Lynch, *supra* note 227, at 2032 (citing *Tennessee v. Highland Mem'l Cemetery, Inc.*, 489 F. Supp. 65, 65 (E.D. Tenn. 1980)); see also *AT&T Corp. v. Iowa Util. Bd.*, 525 U.S. 366, 411 (1999) (Thomas, J., dissenting) ("I do not know of a principle of federal law that prohibits the States from interpreting and applying federal law. Indeed, basic principles of federalism compel us to presume that States are competent to do so.")). For more on the limits of unitary executive theory, see Caminker, *supra* note 14; and Lawrence Lessig & Cass R. Sunstein, *The President and the Administration*, 94 COLUM. L. REV. 1 (1994). See also *The Supreme Court, 2006 Term, Leading Cases, Federal Statutes and Regulations*, 121 HARV. L. REV. 335, 421

State enforcement powers also do not implicate separation-of-powers concerns. For example, in the CPSIA, Congress created numerous controls over the state enforcement power, requiring the state to notify the agency of the planned litigation (except in the case of a “substantial product hazard”), and allowing the agency to intervene in any state enforcement action.²³⁴ This may serve as enough executive oversight to allay any fears of an improper delegation.²³⁵ The state is also subject to its own political and budgetary limits on enforcement.²³⁶ This is not to say that such powers are not politically controversial; in fact they absolutely are.²³⁷ It is the tension-creating and accountability-forcing potential

(2007) (“But despite the general acceptance of presidential control theory and its corollary of judicial deference, in recent years the Supreme Court has looked with suspicion on politically motivated administration, and it has taken a few unmistakable steps that signal executive authority is not unbounded and will be held externally accountable.”).

234. Consumer Product Safety Improvement Act of 2008, 15 U.S.C. § 2073(b) (Supp. II 2009); *see also* Lynch, *supra* note 227, at 2015 n.89 (“Note that the same statutory and case law binding federal enforcement authorities would still bind the states. The divergence would be in how each enforcement actor—state or federal—chooses to exercise its significant discretion in starting investigations and filing actions in court.”).
235. *Cf.* Calabresi & Prakash, *supra* note 232, at 639 (“[I]f one accepts the proposition that the President is the only individual constitutionally granted the executive power and that this authority includes the ability to direct the execution of federal law, then . . . the President could direct state officers in their execution of federal law . . .”).
236. *See* Lynch, *supra* note 227, at 2031 (“Justice Scalia himself suggested that voluntary enforcement by the states of federal law could be an exception to unitarian doctrine: ‘The dissent is correct that control by the unitary Federal Executive is also sacrificed when States voluntarily administer federal programs, but 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.’” (quoting *Printz v. United States*, 521 U.S. 898, 923 n.12 (1997))).
237. The introduction of an amendment that would remove the state enforcement grant in the Wall Street Reform Act by Senator Thomas Carper set off a flurry of political debate between industry and consumer advocates. *See, e.g.*, Letter from Ams. for Fin. Reform to the U.S. Senate, Oppose Carper #3949 Giving National Banks Immunity from Compliance with Federal and State Consumer Protection Laws (May 12, 2010), available at <http://ourfinancialsecurity.org/2010/05/oppose-carper-3949-giving-national-banks-immunity-from-compliance-with-federal-and-state-consumer-protection-laws/>; Editorial, *U.S., Not States, Should Have Lead Role In Consumer Financial Protection*, WASH. POST, May 18, 2010, <http://www.washingtonpost.com/wpdyn/content/article/2010/05/17/AR2010051703456.html> (arguing for the amendment); Patricia Zengerie, *White House Touts States’ Role in Bank Overhaul*, REUTERS, May 13, 2010, <http://www.reuters.com/article/idUSTRE64C50U20100513>.

of such powers that drives political rhetoric, however, not legal doctrine.²³⁸ With the CPSIA, Congress has made clear its decision to sanction violators, and increasing the likelihood of enforcement is a necessary means of ensuring industry compliance with regulations.²³⁹

Another criticism of concurrent enforcement powers focuses on the political incentives and motivations of state attorneys general.²⁴⁰ Attorneys general often run for higher office, and certain high-profile actions can enhance their political standing.²⁴¹

However, one need not see state attorneys general as apolitical in order to champion concurrent state enforcement; one need only assume that different political incentives apply to the federal and state governments and that concurrent enforcement thus ensures enforcement even when the regulated industry may strongly lobby against it.²⁴² Moreover, the political ambitions of many state attorneys general may in fact encourage them to challenge a status-quo agency that is under-enforcing.²⁴³ Thus, the political motivations of the attorneys general may offset those of the federal agencies.

Some commentators cite the relationship between state attorneys general and private counsel as a reason to scale back the states' authority.²⁴⁴ Such critics charge that the use of outside counsel in state enforcement actions enriches those private attorneys, compromising the public-interest nature of the enforcement actions. Such criticisms tend to focus on public nuisance cases, such

238. For an example of opposition to legislative grants of state enforcement powers, see Victor E. Schwartz & Christopher E. Appel, *The Plaintiff's Bar's Covert Effort To Expand State Attorney General Federal Enforcement Power*, WASH. LEGAL FOUND. LEGAL BACKGROUNDER, July 10, 2009, at 1, available at http://www.wlf.org/Upload/legalstudies/legalbackgrounder/071009Schwartz_LB.pdf.

239. Cf. Hodas, *supra* note 9, at 1604 ("Effective enforcement is based on the theory of deterrence, which holds that a strong enforcement program deters the regulated community from violating in the first place.").

240. See, e.g., Gifford, *supra* note 227, at 967 (discussing the relationship between state attorneys general and the plaintiffs' bar); see also Robert W. Hahn & Anne Layne-Farrar, *Federalism in Antitrust*, 26 HARV. J.L. & PUB. POL'Y 877, 883 (2003) (describing rent-seeking actions by states in the Microsoft antitrust litigation).

241. Meyer, *supra* note 227, at 895 ("Assuming that the attorney general is a self-interested politician seeking to maintain or advance his political career, the attorney general has an incentive to drive policy change.").

242. Cf. Hills, *supra* note 117, at 23 ("The point is not that state politicians are somehow immune to 'capture' by regulated interests. The point is that they are captured by a different set of interests than those dominant in Washington, D.C., because state constituencies contain a different mix of interests than the nation as a whole.").

243. *Id.* at 22-23 (arguing that state politicians are "sufficiently ambitious for higher office that they will undertake the risks of enacting new policies rather than wait for some other politician to take the initiative").

244. See, e.g., Gifford, *supra* note 227, at 920.

as the highly publicized actions by attorneys general against tobacco advertising and lead paint pollution.²⁴⁵ Attorneys general explain that these arrangements with private counsel are necessary given limited public funding and resources.²⁴⁶ However, in the CPSIA, Congress acknowledged this relationship and prescribed guidelines for arrangements between state attorneys general and private counsel, including specifying that any information learned while assisting the state could not be shared with counsel in other private civil actions arising out of the same facts.²⁴⁷

B. Benefits

The benefits of state enforcement powers include a greater balance among the three branches of the federal government, with Congress reasserting some control over agencies recently controlled by a captured executive branch, as well as a greater balance—and a productive tension—between the federal and state governments. State enforcement powers create little risk of judicial overreaching. In reviewing an enforcement action under a state enforcement power, a court need not compel an agency to prioritize a particular violation over others. The dynamic between federal agencies and the states is slightly less antagonistic than it would be if a state were directly challenging an agency's lack of enforcement through administrative law doctrines, yet the states' enforcement power still holds the agencies accountable for enforcing violations of their regulations. The enhanced accountability comes from increased public awareness of an agency's underenforcement through state enforcement and subsequent media coverage. In this way, the use of a state enforcement power can begin to change traditional understandings of political accountability mechanisms, increasing awareness of underenforcement and providing political pressure to enforce,

245. *Id.* at 920-21.

246. See, e.g., EMILY GOTTLIEB & AMY WIDMAN, CTR. FOR JUSTICE & DEMOCRACY, STATE ATTORNEYS GENERAL: THE PEOPLE'S CHAMPION 2 (2008), available at <http://www.centerjd.org/archives/studies/AGWhitePaperF.pdf> ("As West Virginia's Chief Deputy Attorney General Fran Hughes put it, with contingency arrangements, 'the attorney general retains control of the case, all the documents are available under the state Freedom of Information Act, and taxpayers end up better off because the legal fees 'are paid by the companies that break the law.'"); see also Marc Dann, Att'y Gen. of Ohio, Address to the City Club of Cleveland 5 (June 29, 2007), available at <http://www.legalnewslines.com/content/img/f197459/dannspeech.pdf> ("[Industry groups] know that public officials don't have the resources to finance complicated law suits that often take years to work their way through the courts. . . . If these groups get their way, attorneys general around the country will be disarmed.").

247. See Consumer Product Safety Improvement Act of 2008, 15 U.S.C. § 2073(b)(6) (Supp. II 2009).

while also increasing the number of enforcement actions in a political environment where the executive branch may be averse to more regulation.²⁴⁸

Giving states enforcement power encourages more information gathering, compensates for limited agency budgets, and creates a necessary tension between the states and the federal government to ultimately encourage robust enforcement of federal law.²⁴⁹ Political and funding considerations are relevant to deciding which cases to prosecute, and not all states will be able to take advantage of state enforcement provisions; nor will states always need to, especially when they have parallel laws. Nevertheless, an expanded state enforcement power holds the promise of addressing a particular type of agency inaction: underenforcement of regulations whose purpose is to maximize intangible yet necessary goods, like health and safety, environmental protection, food and drug safety, or economic stability.²⁵⁰ Enhanced state enforcement powers can address the arbitrariness of recent agency inaction,²⁵¹ the lack of judicial review of such inaction, and the preemption of state remedies.

CONCLUSION

The CPSC case study highlights the problem of agency underenforcement—in this case, the product of a captured executive branch coupled with limited judicial review of agency inaction. Under-enforcement has distorted the federal-state balance previously achieved in administrative law through rule-

248. Cf. Gifford, *supra* note 227, at 947 (“The recent regulatory climate, at least at the federal level, has been more pro-business and antiregulatory than at any time in recent memory. The judicial branch appears, to many of those committed to addressing public health problems, to be the last hope for what they perceive to be sound environmental and product regulation.”).

249. See Weinstock, *supra* note 189, at 836 (“States, as social aggregates, experience the proper incentives to watchdog the provision of public goods by the federal government.”); see also Meyer, *supra* note 227, at 908 (“The [states attorneys general’s] ability to use litigation to regulate industries can also spur federal action. To illustrate, following both the [states attorneys general’s] success against the tobacco companies in the 1990s and Eliot Spitzer’s success against Wall Street in the wake of the Enron scandal, federal agencies responded by upping their enforcement efforts.”); cf. Sunstein, *supra* note 130, at 656 (arguing that the availability of judicial review changes behavior).

250. See, e.g., J.B. Ruhl & James Salzman, *Climate Change, Dead Zones, and Massive Problems in the Administrative State: A Guide for Whittling Away*, 98 CALIF. L. REV. 59, 66 (2010) (discussing how agencies can best manage these types of “massive problems” and encouraging cooperative regimes between agencies and localities).

251. See Bressman, *supra* note 50, at 1659–61 (arguing that arbitrariness is an important problem to address and that the Court’s doctrines of standing and nonreviewability restrict review of agency inaction when more review for arbitrariness is necessary).

making procedures meant to increase transparency and greater review of agency actions. Regulatory underenforcement and preemption of state laws have highlighted the federalism imbalance.

One underutilized and underanalyzed way to combat such imbalance is to empower states to enforce agency regulations. Congress is experimenting once again with this tool. Indeed, there may be a renewed appreciation of the value of concurrent state and federal regulatory enforcement and the tension it creates between states and federal agencies. The state enforcement power can improve the legitimacy of the regulatory system. And the political effects of enhanced enforcement powers can hold agencies more accountable for promoting the public interest through robust enforcement, especially in areas in which the agencies might be vulnerable to capture.

There is a risk that an expanded state enforcement power will be purchased at the price of more aggressive agency preemption and more limited citizen suits and other private rights of action. Thus, an expanded state enforcement power should be part of a larger web of protections. It is not enough to merely empower the states to enforce federal regulations; rather, state enforcement powers must always exist alongside more traditional forms of state innovation in the areas of health and safety. And federal enforcement must operate as a floor below the state enforcement power. Combining the state enforcement power with more limited preemption of state innovation will allow the federalism balance to be restored.

The states' ability to enforce federal regulations, particularly when an agency has chosen not to act, is one important aspect of a robust federal-state enforcement system. While congressional grants of enforcement powers to the states are not necessarily new, understanding their importance to ongoing federalism and administrative law debates, and encouraging their future use, is central to strengthening consumer protection.

