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Federal Power, Non-Federal Actors: The Ramifications of Free Enterprise Fund

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Of Free Enterprise Fund

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

In the Court's view, the congressional structure – in particular, the double layer of tenure insulation -- undermined the Article II imperative that all exercises of significant executive authority be subject to strong supervision by the President. As the Court explained, "the

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[1]130 S. Ct. 3138 (2010).

[2]The Supreme Court so concluded on basis of the parties' stipulation. *Id.* at 3148-49, 3182.

[3]Pub. L. No. 107-204, 116 Stat. 745.

[4]15 U.S.C. § 1712-13.

diffusion of power carries with it a diffusion of accountability . . . Without a clear effective chain of command, the public cannot 'determine on whom the blame or punishment of a pernicious measure or series of pernicious measures ought really to fall.'"[6] Given the departure from clear lines of authority, "the result is a Board that is not accountable to the President, and a President who is not responsible for the Board."[7] The dissenters questioned why removal should be viewed as so central to the question of accountability under Article II, as opposed to other supervisory tools, such as rulemaking, funding, and the like.[8] The dissent expressed concern for the fate of analogous agency structures, such as for administrative law judges who are also shielded from at will dismissal[9] that the majority decision placed in jeopardy.

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

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[5] 15 U.S.C. § 7214.

[6] *Id.* at 3155 (citing Federalist No. 70).

[7] *Id.* at 3153.

[8] *Id.* at 3179, Appendix A (Breyer, J., dissenting).

[9] *Id.* at 3180 (Breyer, J., dissenting).

therefore may toll congressional experimentation to vest executive authority in private and state hands.

Ironically, Congress by its own terms created the PCAOB outside of the federal government. Congress provided that members of the Board were not to be considered "officer[s] . . . or agent[s of] the Federal Government."[10] Moreover, Congress determined that the Board "shall not be an agency or establishment of the United States Government."[11] Congress also determined that the salary of Board members should be set in accordance with the private market.[12] Congress presumably wished to ensure that individuals with wide experience in public accounting could be persuaded to participate in the regulatory initiative.[13] Had the Court taken Congress at its word, then its path in the *Free Enterprise Fund* case might have been much simpler. It could have assessed whether Congress could have delegated the accounting and inspection duties to an outside entity and thereby avoided its more controversial decision that the double layer of tenure insulation violated Article II. The logic of the majority's decision in the case seemingly would have militated for invalidation on the ground that such significant authority could not, consistent with Article II, be vested in a private entity.[14] Indeed, much of

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[10] 15 U.S.C. § 7211(b).

[11] *Id.*

[12] *Id.* § 7219(b)-(d).

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

[14] Justice Roberts confusingly observed with respect to the removal provision that "[t]he rigorous standard that must be met before a Board member may be removed was drawn from statutes concerning private organizations like the New York Stock Exchange. . . While we need not decide the question here, a removal standard appropriate for limiting Government control over private bodies may be inappropriate for officers wielding the executive power of the United States." 130 S. Ct. at 3158. The relevant question rather should be whether the individual is exercising significant authority under the laws of the United States.

the early controversy surrounding creation of the PCAOB focused on whether a private entity could discharge the regulatory role that Congress in fact assigned to the Board.[15] The Court dismissed that line of inquiry in part because it accepted the parties' stipulations that the Board, despite Congress's labeling to the contrary, should be considered a public entity and in part because of prior precedents rejecting congressional labeling at face value.[16]

The Obama administration has seemed willing to share power with both private and state entities. Congress, with the President's acquiescence, has proposed that a private entity – the National Academy of Sciences – play a determinative role in setting global warming policy.[17] In addition, the administration agreed to a proposal creating a private Cybersecurity Advisory Panel that could have vetoed the Department of Commerce's contract with the Internet Company for Assigned Names and Numbers (ICANN).[18] Moreover, the health care reform bill included a delegation to a state entity, the National Association of Insurance Commissioners (NAIC), to determine medical loss ratio standards which, to some extent, are binding on the Department of Health and Human Services.[19] These initiatives have received scant attention.

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

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[15]See Donna M. Nagy, *The SEC at 70: Playing Peekaboo With Constitutional Law: The PCAOB and Its Public/Private Status*, 80 NOTRE DAME L. REV. 975, 1000-03 (2005).

[16]*Id.* at 3148. See Brief for the United States, Free Enterprise Fund v. PCAOB at 29.n.8, cited by the Court at 3148. The Court relied on *Lebron v. National Railroad Passenger Corp.*, 513 U.S. 374 (1995), in stating that the congressional labeling was not dispositive.

[17]Section 707 of Waxman Markey bill.

[18]S. 773, 111th Cong., 1st Sess.§ 8 (2010).

[19]Section 2718 of the Public Health Service Act (or 1001 of Patient Protection Act).

reasoning in the recent Supreme Court decision should apply to delegations outside as well as inside the federal government. I summarize reasons that I have previously presented for why delegations to private parties should be cabined.[20] *Free Enterprise Fund*, in my view, strongly supports that view and suggests that the roles accorded to private entities in the Cybersecurity and National Academy of Sciences examples would be unconstitutional, admittedly despite prior Supreme Court precedents that seemingly countenance such delegations.

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

I. Delegation Jurisprudence and *Free Enterprise Fund*

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

[20]Harold J. Krent, *The Private Performing the Public: Delimiting Delegation to Private Parties*, 65 U. MIAMI L. REV. 901 (forthcoming 2011).

A. *Prior Judicial Precedents*

Although most such efforts have gone unchallenged in the courts, courts have reviewed challenges to a number of congressional schemes. The canonical case is *Carter v. Carter Coal Co.*[21] There, the Supreme Court considered a statutory scheme in which a majority of miners and producers of two-thirds of the annual tonnage of coal established working conditions that would bind the entire group. The maximum hours of work could be set, as well as the minimum wage. The Court explained that "the effect, in respect to wages and hours, is to subject the dissentient minority . . . to the will of the stated majority."[22] In other words, "[t]he power conferred upon the majority is, in effect, the power to regulate the affairs of an unwilling minority."[23] The Court concluded that "[t]his is legislative delegation in its most obnoxious form, for it is not even delegation to an official or an official body, presumptively disinterested, but to private persons whose interests may be and often are adverse to the interests of others in the same business."[24] To the Court, the private status of the decisionmakers rendered the delegation more suspect.

In *A.L.A. Schechter Poultry Corp. v. United States*,[25] as well, the Court questioned Congress's reliance on private parties to establish codes of fair competition under the National Industrial Recovery Act. Under the Act, trade groups proposed codes of fair competition for ultimate approval by the President. The Court struck down those sections of the NIRA on both

[21] 298 U.S. 238 (1936).

[22] *Id*. at 311.

[23] *Id.*

[24] *Id.*

[25] 295 U.S. 495 (1935).

nondelegation and Commerce Clause grounds.[26]

In so doing, the Court noted the sweeping power exercised by private entities, even though the proposed codes were subject to presidential authorization. The Court asked, "would it be seriously contended that Congress could delegate its legislative authority to trade or industrial associations or groups so as to empower them to enact the laws they deem to be wise and beneficent for the rehabilitation and expansion of their trade?"[27] Although acknowledging that Congress understandably might wish to delegate to private parties "because such associations or groups are familiar with the problems of their enterprises," the Court emphatically stated that "[s]uch a delegation of legislative power is unknown to our law and is utterly inconsistent with the constitutional prerogatives and duties of Congress."[28]

No delegation to private parties after *Carter Coal* and *Schechter*, however, has been invalidated. Courts subsequently have upheld powers delegated to producer groups under the Agricultural Marketing Agreement Act of 1937[29] and similar statutes.[30] In *Sunshine Anthracite*

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[26]Other examples of delegation to private parties exist. Congressional delegations to private parties have, on occasion, been more direct. In 1893, Congress delegated authority to the American Railway Association to establish a mandatory height for drawbars on railroad cars, and legislated that failure to comply with the height requirement subjected the railroad companies to civil penalties. The Supreme Court upheld the delegation with little discussion. St. Louis Iron Mountain & S. Ry. v. Taylor, 210 U.S. 281, 285-87 (2008). Further, private parties have served on governmental agencies such as the Federal Open Market Committee (FOMC), which operates as part of the Federal Reserve System. 12 U.S.C. § 263. The private members are elected annually by the boards of directors of the twelve regional Federal Reserve Banks, which are privately owned. The FOMC as a whole discharges the critical policymaking function of determining sales and purchases of government securities in the open market.

[27]295 U.S. at 584.

[28]*Id.*

[29]7 U.S.C. § 601 et seq.

[30]See, e.g., 7 U.S.C. § 2901 et seq (beef); 7 U.S.C. § 2102 et seq. (cotton); 7 U.S.C. § 4501 et seq. (dairy products).

Coal v. Adkins[31] for example, the Supreme Court held that the advisory role private producers played in recommending coal prices did not constitute an unlawful delegation of executive power to private individuals because the private members "function[ed] subordinately to the [public] Commission. It, not the [private producers], determines the prices."[32] Evidence that the Commission rubberstamped the determinations made by private producers was not dispositive.[33] In other words, the Court reasoned that private groups do not exercise problematic authority if the executive branch holds the formal power to approve whatever is forwarded by the private entity. Even though the private groups in effect make law, the required governmental approval makes the delegation acceptable.[34] The Supreme Court has reasoned, therefore, that no untoward delegation of private authority exists if sufficient oversight can be exercised by federal governmental officials.

The Supreme Court manifested an even more lenient approach in *Schweiker v. McClure*.[35] There, the Court considered a Due Process challenge to private adjudication under the Medicare Part B program. Under the Part B Program, Congress authorized the Secretary to contract with private insurance carriers to review and pay out deserving claims. Carrier

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[31]310 U.S. 381 (1940). See also Cospito v. Heckler, 742 F.2d at 86-87); Chiglades Farm v. Butz, 485 F.2d 1125 (5th Cir. 1973); cf. Correctional Services Corp. v. Matesko, 534 U.S. 61, 74 (2001).

[32]*Id.* at 399.

[33]As Justice Cardozo stated in concurrence in Schechter, "[i]t is the imprimatur of the President that begets the quality of law, not the plans forwarded for approval by the trade groups." 295 U.S. at 592.

[34]United States v. Rock Royal Cooperative, 307 U.S. 533, 577-78 (1939); H.P. Hood & Sons v. United States, 307 U.S. 588 (1939); Currin v. Wallace, 306 U.S. 1, 6 (1939) (designation of tobacco growing areas); United State v. MacMullen, 262 F.2d 499 (2d Cir. 1958) (wheat quotas); United States v. Frame, 885 F.2d 1119 (3d Cir. 1989) (beef program).

[35]456 U.S. 188 (1982).

determinations are subject to a limited right to review by hearing officers who are also appointed by the carrier.[36] As a practical matter, the decision of the private hearing officer is conclusive. The lower court invalidated the system of private adjudication, reasoning that due process required additional procedural safeguards.[37] Accordingly, it ordered de novo hearings before an administrative judge of the Social Security Administration.[38]

The Supreme Court, however, reversed, finding that, as long as the Secretary directs the carriers to appoint only "an attorney or other qualified individual with the ability to conduct formal hearings and with a general understanding of medical matters and terminology," no risk of erroneous deprivation existed.[39] The fact that the hearing officers were private did not create any untoward risk of self-dealing, particularly because the funds used to satisfy the judgments came from the United States Treasury as opposed to the carriers (and hearing officers) themselves.

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

Lower courts have so construed those precedents, permitting delegations to private

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[36]*Id.* at 191 (citing 42 C.F.R. §§ 405.807-812 (1980)). See also Bowen v. Michigan Academy of Family Physicians, 476 U.S. 667 (1986) (sketching limited availability of judicial review under Part B).

[37]*See* 456 U.S. at 195.

[38]See *Id.*

[39]*Id.* at 199.

entities for varied purposes. In *Cospito v. Heckler*,[40] for instance, the question raised was whether Congress could delegate to a private group, the Joint Commission on Accreditation of Hospitals (JCAH), the power to determine whether a hospital was eligible for Medicaid and Medicare reimbursement.[41] The private group assessed the quality of care at health care institutions to determine eligibility for participation in the Medicare and Medicaid programs. One pertinent provision with respect to psychiatric hospitals provided that such hospitals could be certified "if such distinct part meets requirements equivalent to such [JCAH] accreditation requirements as determined by the Secretary."[42] The court of appeals held that the Secretary's power under the Acts to bypass determinations made by the JCAH salvaged the delegation.[43] Accordingly, "[s]ince, in effect, all actions of JCAH are subject to full review by a public official who is responsible and responsive to the political process, we find that there has been no real delegation of authority to JCAH."[44] Judge Becker in dissent scoffed at the majority's reasoning, stating that the JCAH at the relevant time "might 'define' a 'psychiatric hospital' however it chose, and might use whatever procedures it wished in developing that definition . . . and the JCAH regulations were not subject to judicial or administrative review... The JCAH's freedom to apply its regulations to individual hospitals was also unfettered."[45] He concluded that "courts should not permit Congress to delegate to private bodies, that are not required by statute to listen

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[40]742 F.2d 72 (3d Cir. 1984).

[41]For other examples, see City of Dallas v. FCC, 165 F.3d 341 (5th Cir. 1999) (upholding delegation to determine whether particular cable operators could access video systems); Geo-Tech Reclamation Indus. v. Hamrick, 886 F.2d 662 (4th Cir. 1989) (upholding delegation to communities in effect to veto landfill permits if sufficient opposition were voiced).

[42]42 U.S.C. § 1395x(f).

[43]742 F.2d at 88.

[44]*Id.* at 89.

to affected parties in making their regulations, and whose regulations are not subject to review under the Administrative Procedure Act."[46]

Similarly, in *Todd & Co. v. SEC*[47] the court of appeals considered whether Congress's delegation of authority to the National Association of Securities Dealers (NASD) constituted an unconstitutional delegation to a private entity. The Maloney Act authorized the self-regulatory entity to promulgate rules protecting against fraudulent and unethical practices, and to discipline members who failed to conform to the standards promulgated.[48] Congress authorized the SEC to review the NASD's findings upon appeal. A brokerage house contested a NASD investigation of its activities on the ground that the Maloney Act constituted an undue delegation to a private entity. The court rejected the challenge because the SEC retained the power "to approve or disapprove the Association's rules," to make additional findings if necessary, and "make an independent judgment on the violation and penalty."[49] Accordingly, the court found no impermissible exercise of authority by the self-regulatory entity. Even when Congress eliminated the SEC's right to make additional findings to add to the record, the court in a subsequent case similarly sustained the delegation to the self-regulatory entity.[50] Much as in *Schweiker v. McClure*, the Court was not concerned, from an Article II vantage point, with the authority exercised by private decisionmakers.

Based on cases prior to *Free Enterprise Fund*, the proposed delegations to the National

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[45] *Id.* at 90.

[46] *Id.* at 91.

[47] 557 F.2d 1008 (3d Cir. 1977).

[48] *Id.* at 1012.

[49] *Id.*

[50] First Jersey Securities v. Bergen, 605 F.2d 690 (3d Cir. 1979) (following Todd, even

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

B. *Free Enterprise Fund* and Article II.

The analysis in *Free Enterprise Fund* likely shifts the analysis. From the perspective of the majority, delegations to private parties arguably threaten the Constitution by circumventing the executive branch control that was designed to protect all individuals from governmental overreaching. The President's appointment and removal authorities are both implicated, for, as discussed in *Free Enterprise Fund*, they provide the "key constitutional means" for the President to retain control over authority delegated by Congress.[51]

1. The Appointment Authority

Although *Free Enterprise Fund* pinned its decision on the President's removal authority under Article II, an understanding of the Appointments Clause, from which the removal authority is drawn, sets the stage.[52] Under the Appointments Clause, presidents enjoy the power

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though Congress had subsequently weakened SEC oversight of the NASD's findings).

[51]130 S. Ct. at 3157.

[52]See also Virginia v. EPA, 108 F.3d 1397 (D.C. Cir. 1997) (noting Appointments Clause issue that would arise from permitting federal government to delegate decisionmaking authority

to appoint all superior officers of the United States. Through the appointment power, presidents can ensure that only officers they approve of are enforcing the law. Article II provides that the President must appoint all superior officers, and that Congress can decide whether to vest appointment authority over inferior officers in the President, heads of departments, or courts of law.[53] There have been disagreements over linedrawing particularly between superior and inferior officers,[54] but consensus exists over the role that the Appointments Clause plays under the Constitution. The President's choice of officer influences the exercise of delegated authority.[55]

In *Buckley v. Valeo*,[56] the Court chose "significant authority" as a threshold for triggering the Appointments Clause, and explained that the term encompassed "broad administrative powers: rulemaking, advisory opinions, and eligibility for funds."[57] Although investigation and information gathering did not rise to the significant authority level,[58] all individuals exercising more formal power to affect the rights of third parties must be considered officers of the United States and subject to Article II limitations.[59]

In addition, all officers of the United States must take an oath of office to uphold the

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to states over pollution attainment policy).

[53]U.S.C. Const. Art. II § 2, cl. 2.

[54]See Edmond v. U.S., 520 U.S. 651, 662-63 (1997); Morrison v. Olson, 487 U.S. 654, 671-72.

[55]Buckley v. Valeo, 424 U.S. 1, 118-41; Myers v. United States, 272 U.S. 52, 117, 163-64 (1926).

[56]424 U.S. 1 (1976).

[57]*Id.* at 140.

[58]*Id.*

[59]Individuals exercising authority that is only intermittent, however, may fall outside the *Buckley* rule. See Krent, *supra* note .

Constitution. That oath signifies a more profound obligation to the public trust than a mere contractual duty. For serious malfeasance in office, officers can be impeached.[60]

Congressional delegations of authority to private parties – whether to a producer group, single individual or National Academy of Sciences – bypass the presidential appointment authority. If Congress vested significant authority in the Cybersecurity Panel, the resulting execution of the law could not be as readily traced to the President, and his appointment authority would be circumvented.[61] As the Supreme Court stressed in *Edmond v. United States*[62] "the Appointments Clause . . . is more than a matter of 'etiquette or protocol'; it is among the significant structural safeguards of the constitutional scheme. By vesting the President with exclusive power to select the principal (noninferior) officers of the United States, the Appointments Clause prevents congressional encroachment."[63]

Moreover, the Supreme Court has insisted that Congress play no direct role in the appointment of officers. In *Buckley* the Court considered a congressional measure empowering

[60]The Obama Administration appointed Kenneth Feinberg, a New York attorney, to set the compensation that executives of entities receiving TARP funds can earn. 74 Fed. Reg. 28394. The Administration, however, did not submit Feinberg's name to the Senate for confirmation. Thus, appointment of Feinberg can only comport with the Constitution if he is not considered an "officer of the United States." Given that Feinberg issued binding orders affecting private rights, his status as an officer seems relatively clear and yet Congress did not provide for his appointment – as an inferior officer – in the heads of any department. See Michael W. McConnell, *The Pay Czar is Unconstitutional*, WALL ST. J., Oct. 29, 2009, at Opinion.

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

[62]520 U.S. 651 (1997).

[63]*Id.* at 660.

the Speaker of the House and the president pro tempore of the Senate to appoint four members of the newly created electoral commission under the Federal Election Campaign Act of 1971.[64] The Court held that Congress could neither participate in the appointment process directly nor indirectly, and noted that the "debates of the Constitutional Convention, and the Federalist Papers, are replete with expressions of fear that the Legislative Branch of the national government will aggrandize itself at the expense of the other two branches."[65] Respecting the President's appointment authority was critical to ensuring that Congress take no part in execution of the law through appointment of officers. If Congress retained close supervision of the private delegate, then Congress in essence would oversee execution of its own laws, a role that the Supreme Court has held would conflict with the Constitution.[66]

Similarly, in *Metropolitan Washington Airports Authority v. Citizens for the Abatement of Aircraft Noise*,[67] the Court considered whether Congress, in establishing a compact to oversee administration of D.C. area airports, could subject major decisions of that compact to a board of review, consisting of nine members of Congress in their individual capacities as users of the airports.[68] The Court held that the board of review, through its veto power, exercised significant authority pursuant to the laws of the United States and hence invalidated the continuing congressional role on the Board.[69] In the eyes of the Court, the Board was "a blueprint for

[64]*Id.* at 11.

[65]*Id.* at 128.

[66]See *infra* text accompanying notes .

[67]501 U.S. 252, 264-65 (1991).

[68]*Id.*

[69]*Id.* at 277.

extensive expansion of the legislative power."[70] Congressional delegation of power to private individuals outside the purview of the Appointments Clause cannot easily be reconciled with *Free Enterprise Fund*.

At times, congressional delegation to private parties may permit the President to exercise the appointment power. Consider Congress's creation of the United States Railway Association to monitor CONRAIL and issue bonds, among other duties.[71] In so doing, Congress provided that a majority of the entity's members were to be drawn by the President from lists of private individuals supplied by the AFL-CIO and Association of American Railroads.[72] The vast majority of congressional delegations, however, whether to producer groups or the National Academy of Sciences, bypasses the President's appointment power.

2. The Removal Authority

The Supreme Court also has recognized under Article II the President's inherent right to remove any executive branch officer subject to his appointment power. Although there has been much litigation over whether that removal authority should be plenary,[73] the Court repeatedly has held that the removal power follows the appointment authority.[74] In *Myers*, the Supreme Court stated that "Article II grants the President the executive power of the Government, the power of appointment and removal of executive officers – a conclusion confirmed by his obligation to take

[70]*Id.*

[71]Pub. L. No. 93-236.

[72]Pub. L. No. 93-236 § 201(d).

[73]Morrison v. Olson, 487 U.S. 654 (1988) (questioning the adequacy of the President's authority over the independent counsel); Bowsher v. Synar, 478 U.S. 714 (1986) (questioning the adequacy of the President's removal authority over the Comptroller General).

[74]Morrison, 487 U.S. 654; Bowsher, 478 U.S. 714; Weiner v. U.S., 357 U.S. 349 (1985); Humphrey's Executor v. U.S., 295 U.S. 602 (1935); Myers v. U.S., 272 U.S. 52 (1926).

care that the laws be faithfully executed."[75] The President must be able to remove a superior officer "on the ground that the discretion regularly entrusted to that officer by statute has not been on the whole intelligently or wisely exercised."[76] Presidents cannot superintend administration of the laws effectively if they cannot, as a last resort, threaten to discharge officials, at least if the officers are neglectful of their duties. Again, in *Morrison v. Olson*, the Court stressed the importance of the removal provision in permitting the President "sufficient control over the independent counsel to ensure that the president be able to perform his constitutionally assigned duties."[77] Although the Court concluded in the independent counsel case that the removal authority need not be plenary, some form of removal authority was constitutionally required and, together with other control mechanisms, must ensure that the President retain sufficient control to exercise his constitutionally assigned duties.

The *Free Enterprise Fund* decision reinforces the focus on hierarchical authority flowing from Article II: the "executive power included a power to oversee executive officials through removal."[78] To the Court, exercise of close removal authority was critical to ensuring presidential supervision under Article II. Otherwise, the President's "ability to execute the laws – by holding his subordinates accountable for their conduct – is impaired."[79] The fact that neither the President nor the SEC could remove members of the PCAOB at will, while members of the SEC were themselves protected from at will dismissal, was determinative. The Court concluded that, without sufficient removal authority, "the President could not be held fully

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[75] *Id.* at 163.

[76] *Id.* at 135.

[77] 487 U.S. 654, 658.

[78] 130 S. Ct. at 3151-52.

[79] *Id.* at 3154.

accountable for discharging his own responsibilities."[80]

Congressional delegations to private parties may deprive presidents of the removal power. If Congress lodges the power to set standards in a private group, for example, the President cannot remove members of that group from office.[81] Congressional delegation to a private accounting group such as the American Institute of Certified Public Accountants (AICPA) to set standards binding on the public would be problematic. The private group could formulate binding standards, yet the members could not be removed even if the President disagreed with the standards selected. Moreover, under the global warming bill, the President could not remove members of the National Academy of Science even if he believed they engaged in misconduct. Similarly, if Congress designates an insurance company to resolve Medicare claims, the President would not be able to remove the insurance company if he determined that the company's handling of claims was wasteful or inefficent. Private parties largely are "immune from Presidential oversight, even as they exercise[] power in the people's name."[82] As the Court summarized in *Free Exercise Fund*, "[t]he diffusion of power carries with it a diffusion of accountability."[83]

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

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[80]*Id.* at 3164.

[81]Contrast to Mistretta v. U.S., 488 U.S. 361, 412 (1989), in which the President could remove Article III judges sitting on the Sentencing Commission from their administrative duties, although he could not affect their roles as judges.

[82]130 S. Ct. at 3154.

Of course, the President may wield substantial control even aside from the appointment and removal authorities. Justice Breyer in dissent addressed the controls that can stem from funding, rulemaking, ex ante or ex post review of policies, and other mechanisms.[84] To the dissent, the question was whether, taken as a whole, the President exerted enough influence to assure that the essential attributes of the executive power remained vested in the executive.[85] But, to the majority, the removal authority was talismanic – in the absence of such formal linkage, the President could not be assured effective oversight.

More problematically, a congressional threat to withdraw delegation from a particular person or entity may be tantamount to congressional exercise of a removal authority. The officeholder would look only to Congress for direction. The Supreme Court categorically has determined that Congress itself can play no role in the removal of individuals exercising significant authority under the laws of the United States.[86] A congressional threat to withdraw authority from a private entity like the AICPA would be tantamount to a removal from office.[87]

The Supreme Court's decision in *Bowsher v. Synar*[88] is illustrative. In invalidating the Comptroller General's role under the Gramm-Rudman-Hollings Act,[89] the Court focused on the

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[83]*Id.* at 3155.

[84]*Id.* at 3169.

[85]*Id.* at 3169-73.

[86]Justice Breyer in dissent stressed that congressional arrangements that can result in congressional aggrandizement of executive power are most likely to violate the separation of powers doctrine. *Id.* at 3167.

[87] Congress can always zero out funding for an executive branch agency, but the threat to withdraw authority from a private standard setting group that may be dependent entirely under federal funds, as with the FASB, can give Congress substantial functional control over that group.

[88]478 U.S. 714 (1986).

[89]2 U.S.C. §§ 901-07.

critical importance of the removal authority. Although the President appoints the Comptroller General to a fifteen-year term of office, Congress made the Comptroller General removable at the initiative of Congress for any one of several causes. The Court held that "Congress cannot reserve for itself the power of removal of an officer charged with execution of the laws."[90] The Court explained that "once Congress makes its choice in enacting legislation, its participation ends."[91] Otherwise, Congress would both be able to exercise a de facto appointment and removal authority, permitting it to influence the exercise of delegated authority. Indeed, in Myers the Court invalidated Congress's participation in removal of the postmaster.[92]

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

The question remains where to draw the line between impermissible and valid exercises of authority by private parties. Eliciting advice from private parties does not violate Article II, but directing private parties to set trade policy would contravene presidential power. The analysis in *Free Enterprise Fund* does not illuminate how to set the constitutional test. The

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[90] 478 U.S. at 726.

[91] *Id.* at 733.

[92] 272 U.S. 52, 177.

rulemaking, inspection and enforcement duties of the PCAOB fell on the wrong side of the line because all parties recognized that, in the aggregate, the PCAOB exercised significant authority pursuant to the laws of the United States and could only be appointed and removed in conformance with Article II. Although I have argued elsewhere that the doctrinal test for delegation to private parties should focus on whether the private party's acts bind other private parties backed by the coercive power of the government,[93] the key here is that the Supreme Court's recent decision makes it far more likely that congressional delegations of authority to private parties will elicit closer scrutiny by the Supreme Court should such challenges arise in the future. *Free Enterprise Fund* may well have sounded the death knell for delegations of significant authority to private parties.

Indeed, the majority in *Free Enterprise Fund* might have bolstered its reasoning by pointing to the dearth of government-wide regulations applicable to the PCAOB. Congress not only declared that the PCAOB should not considered an "agency" but, unlike almost all other governmental entities, it specifically exempted the PCAOB from FOIA.[94] Thus, in comparison to other agencies, fewer government-wide controls constrained the conduct of the entity's work. As a consequence, the argument for enhanced centralized control of the type advocated by the majority is more compelling. In fashioning the PCAOB more like a private entity, Congress inadvertently bolstered the case for greater presidential control.

Consider as well the self-regulatory model that Congress rejected in creating the PCAOB. Prior to enactment of the PCAOB, the SEC in effect delegated standard setting to the AICPA.[95]

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[93]Krent, *supra* note 19.

[94]15 U.S.C. § 7215(b)(5)(A).

[95]Lawrence A. Cunningham, *Private Standards in Public Law: Copyright, Lawmaking and the Case of Accounting*, 104 MICH. L. REV. 291 (2005); In essence, Congress had delegated

After *Free Enterprise Fund,* such delegations to private entities are suspect – the President would not be able to oversee development of such standards through the threat of exercising the removal authority.[96] The President must be permitted the discretion to accept, reject, or modify the standards selected by private entities.

Similarly, the *Free Enterprise Fund* case calls into question other congressional delegations to private parties. Congress has authorized self-regulatory organizations such as the Financial Industry Regulatory Authority (FINRA) to investigate and prosecute violations of federal law.[97] Firms wishing to trade have no choice but to join a self-regulatory organization.[98] Firms and individuals disciplined, whether through fines or withdrawal of trading privileges, have a right of appeal to the SEC, but the SEC cannot add any findings to the record.[99] There is some disagreement as to whether the SEC's standard of review of FINRA's findings is de novo.[100] Does FINRA in investigating and then adjudicating violations of federal law exercise

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comparable authority to the AICPA through the middle of the twentieth century. Nagy, *supra*. Since 1973, the SEC recognized the Financial Accounting Standards Board as the official entity setting standards for public company accounting. Communication Statement of Policy Reaffirming the Status of the FASB as a Designated Private-Sector Standard Setter, Securities Act Release 8221; Exchange Act Release No. 477743, 80 SEC Docket 139 (Apr. 25, 2003); Accounting Series Release NO. 150, 3 SEC Docket 275 (1973). Note that if Congress merely adopted preexisting AICPA standards, no constitutional problem would arise.

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

[97]See, e.g., 15 U.S.C. § 780-3(b)(7).

[98]15 U.S.C. § 78o(b)(8).

[99]15 U.S.C. § 78s(e)(1), (f).

[100]Compare Whiteside v. SEC, 883 F.2d 7 (5th Cir. 1989) (asserting that review of findings by the self regulatory organization is de novo) with Seaton v. SEC, 670 F.2d 309 (D.C.

significant authority pursuant to the statutes authorizing the self-regulatory mechanism?[101] After *Free Enterprise Fund*, such delegations may be permissible only if the government can exercise exacting review before exchange determinations become final.[102]

Free Enterprise Fund teaches that delegation outside the federal government may undermine the President's Article II obligation to superintend law enforcement by robbing him of his powers to appoint and remove from office those exercising significant authority under the laws of the United States. How one defines the quantum of authority that only can be exercised subject to presidential direction becomes pivotal. Although the Court has yet to tackle that challenge, it is likely that private entities such as the American Bar Association can evaluate nominees for office[103] without transgressing the line, but that permitting private entities to resolve federal claims without exacting review by a governmental agency would contravene the animating spirit of *Free Enterprise Fund*.

II. Delegations to State Entities

Congress long has delegated to state as well as private entities. Congress has approved state compacts to address issues of federal interest and specified goals to be accomplished. Congress has also encouraged states to take responsibility to enforce federal standards such as

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Cir. 1982) (utilizing preponderance of the evidence standard). See also MBH Commodity Advisors v. CFTC, 250 F.3d 1052 (7th Cir. 2001) (suggesting that each agency may construe statutory provision providing for review of sro's findings differently, depending on mission of agency).

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

[102]Moreover, *Free Enterprise Fund* squarely places the status of the adjudicators in *Schweiker v. McClure* in doubt. Those adjudicators resolved claims between private parties and the government without meaningful review by HHS.

[103]Public Citizen v. Dept. of Justice, 491 U.S. 440 (1989).

under the EPA.[104] Moreover, Congress has authorized state officials to enforce a wide range of federal laws, most notoriously, under the Fugitive Slave and Volstead Acts.[105] Congress has also incorporated state law as federal policy as under the Federal Tort Claims Act,[106] which signifies that federal rules of decision automatically shift with changes in state law. Finally, Congress has delegated specific enforcement tasks to state entities as in the NAIC example.

Much of the analysis in *Free Enterprise Fund* logically should apply to the above contexts in which Congress delegates authority to state entities. Two key components of presidential control are absent. The President likely neither appoints nor removes the state entity that is implementing or enforcing federal law. In the health care reform statute, the President does not appoint state insurance commissioners, nor can he remove them from the NAIC. In addition, the President does not enjoy the power unilaterally to withdraw the delegation from the NAIC. Congress therefore may leave execution of federal law outside the President's control by dint of delegation to state entities. Lines of accountability unquestionably can become muddled, as responsibility for the ultimate policy pursued is shared among Congress, which consented to the compact, the individual states that are in the compact, and the state officials who are acting to implement the policy selected.[107]

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[104]See, e.g., Train v. NRDC, 421 U.S. 60 (1975).

[105]Fugitive Slave Act of 1789, 1 Stat. 303; Volstead Act of 1919, 41 Stat. 305.

[106]28 U.S.C. § 2674 ("the United States shall be liable, respecting the provisions of this title relating to tort claims, in the same manner and to the same extent as a private individual under like circumstance").

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

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

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

A. The Case for Upholding Delegation to State Entities.

As with delegations generally, Congress may have a myriad reasons to recruit state entities to help implement federal law. Congress, for example, may wish to elicit the expertise of officials in state government. The NAIC example illustrates this rationale – state insurance commissioners presumably have greater familiarity and experience with medical loss ratios than does HHS. Similarly, delegations to states to fashion rules to implement federal mandates under the EPA reflect efforts to enlist the help of officials with more immediate knowledge of the conditions affecting each respective state.[108]

Delegations to state entities also can ensure that those closest to the dispute have a more direct say in governance. Cases involving boundary disputes among the states provide a clear example, as do the compacts among states operating port authorities or other transportation hubs. States may find congressional delegation more palatable when they can participate in shaping the rules that affect them so directly. Similarly, in the *Free Enterprise Fund*[109] case, Justice Breyer in dissent cited the delegation to the Delta Regional Authority.[110] By dint of that delegation, states living in that region make the development decisions critical to future economic growth within their jurisdictions.

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

Finally, some congressional delegations to state entities presumably stem from congressional reluctance to discharge the responsibilities itself. Law enforcement under the Fugitive Slave Act provides one example, as may congressional delegation of the power to run

[108]See, e.g., Train v. Natural Resources Defense Council, 421 U.S. 60 (1975).

[109]130 S. Ct. at 3168.

[110]7 U.S.C. 2009aa-1.

DC area airports or to determine where low level radioactive waste should be stored.[111] As with delegations more generally, Congress may wish to duck responsibility for tough political choices. In all, Congress has many understandable reasons for delegating authority to state entities and officials.

1. The Constitutional Plan

To some degree the constitutional system of federalism contemplates such congressional sharing of power with state entities. Article I provides that Congress can consent to state decisions to levy "duty of tonnage, keep troops, or ships of war in time of peace, [or] enter into an[] agreement with another state or with a foreign power."[112] The Compact Clause has been utilized frequently, and Congress long has delegated to groups of states the power to regulate over subjects such as transportation,[113] energy,[114] and tax matters.[115] The resulting rules of the compacts are to be treated as federal law,[116] even if the interstate commissions are not considered federal agencies.[117] The fact that the Founders authorized Congress to consent to state compacts whose authority could reach issues of national or regional import strongly calls into question the view that congressional delegation of authority to state entities should be categorically

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[111] See, e.g., EnergySolutions v. Utah, 625 F.3d 1261 (10th Cir. 2010).

[112] Article I, section 10.

[113] See, e.g., Washington Metropolitan Airports Authority v. Citizens for the Abatement of Aircraft Noise, 501 U.S. 252 (1991).

[114] See, e.g., Seattle Master Builders Assoc. v. Pacific Nw. Elec. Power & Conservation, 786 F.2d 1359 (9th Cir. 1986).

[115] See, e.g., U.S. Steel Corp. v. Multistate Tax Comm'n, 434 U.S. 452 (1978).

[116] Cuyler v. Adams, 449 U.S. 433 (1981).

[117] New York v. Atlantic States Marine Fisheries Commission, 609 F.3d 524 (2d Cir. 2010).

prohibited.[118]

Moreover, Congress since the Founding has recruited state officials to help enforce federal laws. Congress has authorized state officials to arrest and punish individuals for violation of federal laws.[119] As the Supreme Court summarized in *United States v. Jones*,[120] "from the time of its establishment [the federal] government has been in the habit of using, with the consent of the States, their officers, tribunals, and institutions as agents."[121] The Court noted that "their use has not been deemed violative of any principle or in any manner derogating from the sovereign authority of the federal government."[122] Thus, the Constitution contemplates far more exercise of executive authority by state than by private entities.[123]

To be sure, the Supreme Court has counseled that Congress cannot *compel* state entities to enforce or implement federal law. For example, in *New York v. United States*[124] the state challenged Congress' requirement under the Low-Level Radioactive Waste Policy Act[125] that states take ownership of all internally generated waste upon the request of the waste's generator. This regulation arose out of Congress's effort to provide an incentive to ensure sufficient disposal sites for low level radioactive waste. The Court summarized that "Congress may not

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

[119]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).

[120]109 U.S. 513 (1883) (upholding statute authorizing states to determine compensation in takings cases).

[121]*Id.* at 519.

[122]*Id.*

[123]See also AT&T v. Iowa Utilities Board, 525 U.S. 366, 411-12 (1998) (Thomas, J., concurring in part).

[124]505 U.S. 144 (1992).

simply commandeer the legislative processes of the States by directly compelling them to enact and enforce a federal regulatory program."[126] Furthermore, "[w]e have always understood that even where Congress has the authority under the Constitution to pass laws requiring or prohibiting certain acts, it lacks the power directly to compel the States to require or prohibit those acts."[127]

The Court justified its conclusions in part on the ground that, "where the Federal Government compels States to regulate, the accountability of both state and federal officials is diminished."[128] State officials might bear the political ill will from following Congress's policy even though it was Congress that devised the law. The Court elaborated upon this rationale in *Printz v. United States*.[129] There, the question for resolution concerned whether Congress could force state officials to conduct background checks on those seeking to buy handguns. The Court stressed that, to individuals purchasing handguns, the regulations would appear to come from the state officials implementing the congressional plan as opposed to Congress.[130] As a result, the goal of accountability was undermined.

The Court's commandeering doctrine, however, permits states and state officials *voluntarily* to implement federal law. When state officials decide on their own to conduct background checks or to take title to waste sites, they remain accountable for their acts within our federalist scheme. Even if Congress has set the policy framework, state implementation

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[125] 42 U.S.C. § 2021e(d)(2)(C).

[126] *Id.* at 161 (citation omitted).

[127] *Id.* at 166.

[128] *Id.*

[129] 521 U.S. 898 (1997).

[130] *Id*. at 930.

efforts, as long as voluntary, do not obfuscate lines of authority.

State exercise of delegated federal authority undoubtedly strains the structure of our constitutional system as conventionally understood. Indeed, Justice Scalia recognized that cost in *Printz*, noting that widespread delegations by Congress to state officials would permit such officials "to implement the program without meaningful Presidential control (if indeed meaningful Presidential control is possible without the power to appoint and remove)."[131] He continued more forcefully that the unified executive branch enforcement "would be shattered and the power of the President would be subject to reduction, if Congress could act as effectively without the President as with him, by simply requiring state officials to execute its laws."[132]

Yet, the impact on Article II should be the same whether state officials implement federal law on command or license from Congress – the President's appointment and removal powers would be circumvented in either case. Justice Scalia noted the problem and could only offer that "the condition of voluntary state participation significantly reduces the ability of Congress to use this device as a means of reducing the power of the Presidency."[133] Delegation to state entities can be reconciled only by dint of the overriding role of states in the plan of convention. The Founders anticipated that state entities could play a meaningful role in execution of federal law. Delegation to state entities may be upheld even where they would be invalidated if directed toward private entities.

2. Political Accountability

In contrast to private entities, state officials are politically accountable. They remain

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[131] *Id.* at 923.

[132] *Id.*

[133] *Id.* at 923 n.12. The dissent noted the weakness in Justice Scalia's argument as well. Id. at 960.

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

Consider the delegation to the Delta Regional Authority[134] cited by Justice Breyer in dissent.[135] The Authority, which is funded equally by the Federal Government and the states, is composed of a federal member and the Governor (or a designee of the Governor) of each State in the region that elects to participate in the Authority."[136] The Authority approves project and grant proposals "for the economic development of the region."[137] Although the Authority plainly exercises significant authority in approving projects for economic development of the region, political accountability is not lost. Participating Governors can tout accomplishments of the Authority and burnish their records, and failures to husband resources wisely may well impair chances at the next election. The "public" nature of the exercise of authority provides some support for implementation of federal tasks by state entities.

3. Potential for Congressional Aggrandizement

There is less danger of congressional aggrandizement when Congress delegates to states

[134] 7 U.S.C. § 2009aa-1.

[135] 130 S. Ct. at 3168 (Breyer, J., dissenting).

[136] 7 U.S.C. § 2009aa-1(a)(2)(B).

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

In contrast, consider congressional delegation to an insurance company that Congress has designated to handle Medicaid claims. The insurance company recognizes that, should its claim resolution displease Congress – whether for reasons of inefficiency or error rates – Congress may well withdraw the delegation. The insurance company might be dependent on congressional funding for its corporate livelihood. Indeed, self-regulatory organizations recognize that Congress may impose greater centralized control over the private sector should it be displeased with the lack of fervor of its regulatory initiatives as happened with the AICPA.[138] In contrast, congressional delegation to state entities carries with it much less risk of continuing oversight or aggrandizement.

Indeed, one of the most critical protections against undue delegation to administrative agencies by Congress in general is that Congress must be willing to give up the reins of power.

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[137]*Id.* at (d).

[138]A similar example is the International Swaps and Derivatives Association (ISDA), formed in the mid-1980s by industry members trading in swaps and derivatives. *See* Sean M. Flanagan, *The Rise of a Trade Association: Group Interactions Within the International Swaps and Derivatives Association*, 6 Harv. Negotiation L. Rev. 211, 234-238 (2001). The ISDA lobbied to keep the industry self-regulated. *Id.* at 245-47. However, presumably because of the role that swaps played in the market blow up and collapse of Lehman Brothers and AIG in 2008, swaps are now regulated by the SEC and CFTC under the Dodd-Frank Act. Pub. L. No. 111-

Congressional delegation, in other words, comes with a price – the loss of control over the shape of the final policy implemented. That check on congressional delegations, while absent for many delegations to private entities, exists when Congress delegates to state entities

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

B. Limitations on Delegation to State Entities

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

1. Independent Article II Powers

Congressional delegation to state entities may, at times, rob the President of an Article II power other than law enforcement. Although the constitutional design and history suggest that the President must share some enforcement authority with state entities and officials, the President should not necessarily brook congressional delegation of other of his constitutionally

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203, §§ 701-74, 124 Stat. 1367, 1641-802 (2010).

grounded powers. For instance, congressional delegation to the NAIC of the power to appoint the head of Medicare would plainly contravene the Appointment power in Article II. Similarly, congressional delegation to a state entity of the power to "require the Opinion, in writing, of the principal officer in each of the executive Departments"[139] would be invalid.

Moreover, consider a hypothetical congressional delegation to a state compact comprising the border states of the authority to enter into trade agreements with Latin America. Tariff and trade policy might thereby be executed outside the watch of the President. A few states together, upon delegation from Congress, would have the power to bind the entire country in setting relations abroad. Needless to say, the interests of respective states in terms of international relations vary. Indeed, Congress approved a provision in the Great Lakes Basin Compact establishing that "the Province of Ontario and the Province of Quebec, or either of them, may become states party to this compact by taking such action as their laws and the laws of the Government of Canada may prescribe for adherence thereto."[140] Congress empowered the compact to pursue measures with a palpable impact on foreign affairs.

The Constitution recognizes the potential conflict, but only in part. Article I itself forbids states from "enter[ing] into any Treaty, Alliance, or Confederation; grant letters of Marque and Reprisal."[141] That prohibition suggests a constitutional awareness that Article II at times trumps federalism. But, Article I does not limit congressionally approved compacts that do not fall within the category of "Treaty, Alliance or Confederation," even those with foreign states.[142]

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[139] Article II, section 2.

[140] Article II, B. See MARIAN E. RIDGEWAY, INTERSTATE COMPACTS: A QUESTION OF FEDERALISM 156-57 (1971).

[141] Article I, section 10.

[142] *Id.*

The line between "Treaty, Alliance or Confederation" and compacts with foreign states is not self-evident, and the Supreme Court has stated that any such distinction in the minds of the Framers has been lost to history.[143] Article II must be accommodated with Article I in some fashion.

Although a congressional stamp of approval can authorize states to execute the law, Congress cannot resort to delegation to state entities to strip the President of his role in foreign affairs.[144] The Constitution may not sort out the overlap between federalism and separation of powers concerns, but it plants the seeds for an accommodation.

Indeed, comparable concerns have led the Supreme Court to strike down state laws that have interfered with the United States' foreign policy, even absent a delegation from Congress. In *Zschernig v. Miller*,[145] for example, Oregon law had prohibited any non-U.S. citizen from inheriting property if his or her home nation denied U.S. citizens that right. After losing in Oregon's courts, an East German citizen successfully sought review in the U.S. Supreme Court, which reversed the Oregon decision on the ground that the state statute impermissibly intruded into the President's foreign affairs power. For another example, Massachusetts in 1996 established a restrictive purchasing list targeting companies doing business with Burma (Myanmar) to protest the dictatorship's policies. That action placed the United States in the awkward position of defending the Massachusetts approach before the World Trade Organization while attempting behind the scenes to pressure Massachusetts to change the law.

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[143] See United States v. Multistate Tax Comm'n, 434 U.S. 452 (1978) (distinction between alliances and other agreements lost in history).

[144] Cf. Barron v. City Council of Baltimore, 32 U.S. 243 (1833) (commenting that state cannot enter into any agreements with foreign powers).

[145] 389 U.S. 429 (1968) ("state involvement in foreign affairs and international relations [are] matters which the Constitution entrusts solely to the Federal Government").

Firms doing business in Burma challenged the law, and the courts invalidated the measure. In particular, the Supreme Court in *Crosby v. National Foreign Trade Council*[146] stressed that Massachusetts' action interfered with subsequent congressional delegation of authority to the President to impose sanctions on Burma.

Although Congress in the above examples had not sanctioned the state interference in foreign affairs, from a presidential perspective, the question of congressional interference is immaterial. In either scenario state entities' conduct undermines the President's constitutionally grounded authority over foreign affairs. Perhaps congressional authorization can alter the boundaries in which states are free to act, but congressional delegation can no more vest in states the power to manage aspects of foreign relations than it can authorize states to enter into treaties.

Consider the Supreme Court's decision in *Holmes v. Jennison*.[147] The Supreme Court confronted the question whether Vermont could agree with Canadian authorities to extradite fugitives in the absence of congressional sanction. A majority of the eight Justices participating evidently concurred in Chief Justice Taney's reasoning that the extradition agreement was illegal, but could be rectified by congressional consent.[148] The Court ignored the potential separation of powers ramifications of Vermont's unilateral determination to enter into an extradition agreement with a sovereign nation. In light of the President's constitutionally grounded powers over foreign relations – the power to propose treaties, appoint ambassadors,

[146]530 U.S. 363 (2000); see also American Ins. Ass'n v. Garamendi, 539 U.S. 396 (2003) (striking down California's facilitation of Holocaust era insurance claims);Von Saher v. Norton Simon Museum, 592 F.3d 954 (9th Cir. 2010) (California cannot extend the statute of limitations for recovering art stolen during the Holocaust).

[147]39 U.S. (14 Pet.) 540 (1840).

[148]*Id.* at 540.

and be commander-in-chief of the armed forces – the *Holmes v. Jennison* Court should have struck down Vermont's arrangement on Article II grounds as well. Congress cannot enlist particular states to forge foreign policy. As *Zschernig* and *Crosby* demonstrate in the related context sketched above, there will be line drawing issues, but state delegations should be judicially policed to ensure that the delegations do not permit intrusion into the President's powers other than in law enforcement. The historic understanding of shared power between states and the federal government does not extend that far. *Free Enterprise Fund* suggests that delegation to state entities should be scrutinized at least to determine whether the President exercises sufficient control over foreign affairs.

2. Delegations Permitting Discrimination Against Nonparticipating States

Arguably, Congress should also be limited in delegating to state entities when the delegation permits states to infringe the interests of states that have been excluded from the delegation.[149] Although delegations to a wide swath of state officials as in the NAIC example would not be problematic, delegations to a compact of states could visit harm on nonparticipating states. As a theoretical matter, the President's Article II powers are designed in part to ensure accountability for a national constituency. As the Court in *Free Enterprise Fund* framed it, the "Constitution requires that a president chosen by the entire Nation oversee execution of the laws."[150] If congressional delegations to state entities result in injury to nonparticipating states, then bypassing the President causes an independent harm in precluding the check of presidential oversight – oversight from the only politically elected official beholden

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

[150]130 S. Ct. at 3155-56.

to a national constituency.[151] As Professor Steven Calabresi expresses the presidential advantage in a slightly different context, "the only official with any incentive under our present electoral structure to stop this [effort to impose costs on others] is the President who is (along with the Vice President) our only nationally elected official."[152] Similar sentiments support presidential line item vetoes – only the President arguably has the national perspective to stop earmarks that redound to the benefit only of particular sectors of the country.[153]

The Supreme Court on occasion has stated that the congressional consent requirement in the Compact Clause was designed in part to avoid states shifting costs or harms to nonparticipating ones. Compacts must be submitted for congressional approval in part to guard against, in Justice White's words in *United States Steel v. Multistate Tax Commission*, "encroachments upon non-compact States."[154] Consider congressional delegation to a compact of states to regulate production of coal in the Northeastern states. In making its determination, the compact might be tempted to shift costs of externalities such as pollution to states in the Midwest.[155] Similarly, states may urge Congress to set up conditional funding programs that

[151]See Steven G. Calabresi, *Some Normative Arguments for the Unitary Executive*, 48 ARK. L. REV. 23, 65-66 (1995). Calabresi argues in part that the unitary executive is designed to prevent members of Congress from legislating purely to benefit particular geographic sectors. For a response, see Evan Caminker, *Federalism in the 21st Century: States in a Federal System: The Unitary Executive and State Administration of Federal Law*, 45 KAN. L. REV. 1075, 1110 (1997), doubting that such concerns should lead to curbing delegations to state officials, as long as citizens within the states are affected.

[152]Calabresi, *supra* note 147, at 35.

[153]See, e.g., J. Gregory Sidak, The Petty Larceny of the Police Power,86 Calif. L. Rev. 655 (1998); Aaron D. Zibart, Note: *Eulogizing the Line Item Veto Act: Clinton v. City of New York and the Wisdom of Presidential Legislating*, 88 KY. L. J. 505 (2000).

[154]United States Steel v. Multistate Tax Commission, 434 U.S. 452, 494 (1978). See also Rhode Island v. Massachusetts, 12 Pet. 657, 726 (1838).

[155]Cf. West Virginia ex rel. Dyer v. Sims, 341 U.S. 22 (1951) (rejecting challenge to compact addressing discharge into Ohio River); see also discussion in Virginia v. EPA, 108 F.3d

they know other states cannot take advantage of.[156] In the *United States Steel v. Multistate Tax Commission* case, itself, plaintiffs challenging the compact argued that the states participating in the compact might agree to particular tax formulas to draw businesses from nonparticipating states.[157]

The continuing litigation over disposal of low level radioactive waste manifests the risk of state v. state friction. Congress authorized compacts to encourage states to determine among themselves which states would create and maintain waste sites, and how other members of the compact would furnish sufficient incentives to the state in which the site is located. The states involved in the compact have little interest in permitting waste generated *outside* the compact to be stored in their sites.[158]

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

In such cases, the congressional consent requirement might be insufficient to prevent encroachment on interests of states outside the compact. Although the prospect of a presidential veto of the law setting up the compact exists, establishment of a compact itself would rarely reveal any intent to harm nonparticipating states. Congress could seize upon the delegation to

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1397 (D.C. Cir. 1997) (addressing the difficulty of confining impact of pollution to states within a single compact or alliance).

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

[157]434 U.S. at 473.

[158]See, e.g., EnergySolutions, supra note 107, in which an operator of a waste site resorted to the courts in an effort to permit waste from outside the compact states to be stored at

accomplish a goal that it could not accomplish directly – subordination of a disfavored state or group of states, whether in the context of pollution or energy.[159] Indeed, there is some evidence that participating states have utilized compacts to shift costs to those states not included,[160] although empirical evidence as to the incidence of cost shifting is extremely limited.

To be sure, states may always lose in Congress. On some issues, agrarian states may win, on others, it may be coal producing states, and for still others, it may be states in which federal military bases are located. The genius of the Virginia Plan was to minimize the potential that small states would lose out consistently in the legislative process. Given the shifting coalitions, a state with an adverse interest today might become an ally tomorrow, and that possibility restrains larger states from encroaching too much on smaller or disfavored states' interests.

The need to present each proposed bill to the President also works to minimize the potential for states to exact too much benefit at the expense of others in the system. The threat of a veto can squelch any such power play.

In the congressional delegation context, however, there is no presentment to the President. Indeed, there often is no supervision by the President. State compacts may well

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the site.

[159]For evocative examples, consider the Bonneville Power Pact in the Northwest and the Columbia River Compact of 1925, 68th Cong., 2d Sess. Pub. L. No. 609, both of which set to ration energy use in ways that can have profound impacts on the rest of the country.

[160]See generally Michael S. Greve, *Compacts, Cartels and Congressional Consent*, 68 MO. L. REV. 285, 317 (2003). Greve cites several examples, such as the Northeast Dairy Compact, 7 U.S.C. § 7526, to demonstrate the potential for state compacts to result in harm to nonparticipating states. See also Joseph J. Spengler, *The Economic Limitations to Certain Uses of Interstate Compacts*, 31 AM. POL. SCI REV. 41, 42 (1937) ("[C]ontrol by compacting state may injure the inhabitants of non-compacting states"). Spengler uses the example of a compact designed to control production of cotton. Cotton producing states would benefit, while those outside the compact whose citizens purchase cotton would have to pay more for the cotton. *Id.* at 44.

decide to visit the burdens of regulation on nonparticipating states. Congressional delegation reallocates the burden of overcoming inertia – a new majority would be needed to withdraw the delegation to the states or to overturn the policymaking by the compact. In essence, Congress might be tempted to delegate to particular states for many of the same reasons it delegates to administrative agencies – to accomplish an objective that it could not attain directly through legislation.[161]

Contrast the delegation context to Congress's role in a Dormant Commerce Clause challenge. There, as well, Congress has the opportunity to ratify one state's efforts to impose costs on businesses or citizens living outside its borders.[162] As the Court summarized in *Associated Industries v. Lohman*[163] the Dormant Commerce Clause "prohibits economic protectionism . . . regulatory measures designed to benefit in-state economic interests by burdening out-of-state competitors."[164] The prospect of a presidential veto exists to temper any inclinations by members of Congress to sustain a discriminatory measure.[165] Although a congressional override of a veto can enact a discriminatory measure into law,[166] the requirement

[161]For a cynical summary of delegation in general, see David Schoenbrod, POWER WITHOUT RESPONSIBILITY: HOW CONGRESS ABUSES THE PEOPLE THROUGH DELEGATION (1995).

[162]See Western & Southern Life Insurance co. v. State Board of Equalization of California, 451 U.S. 648 (1981); Lewis v. BT Investment Managers, Inc., 447 U.S. 27, 44 (1980); H.P. Hood & Sons v. Du Mond, 336 U.S. 525, 542-43 (1940). The only congressional constraints may be the Equal Protection and Privileges and Immunities Clauses. Western & Southern, supra, at 656.

[163]511 U.S. 641 (1994).

[164]Id. at 647.

[165]Exploitation of nonparticipating states by those in compacts is so likely "that Congress is called in to review the arrangement at the outset." Saul Levmore, *Interstate Exploitation and Judicial Intervention*, 69 VA. L. REV. 563, 570 n.1 (1983).

[166]As the Court state in Maine v. Taylor, 477 U.S. 131, 138 (1986), "it is well established that Congress may authorize the States to engage in regulation that the Commerce Clause would

of presentment mutes that concern. Moreover, it is doubtful that a supermajority in Congress would wish to sanction burdens on commerce against a minority of states given the need for continued coalition building in Congress.

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

The theoretical risk of encroachment among the states, however, does not suggest an easily enforceable line to draw.[167] Tests would have to be forged, as under the Dormant Commerce Clause, to determine when states' exercise of delegated authority, particularly through compacts, results in an unacceptable harm to an unrepresented state. The contours of this newly devised subpart of the Nondelegation Doctrine would be difficult to derive. Courts presumably would consider whether to focus principally on the intent underlying the challenged

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otherwise forbid."

[167]Whitman v. Am. Trucking Ass'n, 531 U.S. 457, 474-75 (2001) ("we have almost never felt qualified to second-guess Congress regarding the permissible degree of policy judgment that can be left to those executing or applying the law." (citation omitted). For a discussion of the Tenth Amendment as underenforced, see Garcia v. San Antonio Metropolitan Transit Authority, 469 U.S. 528 (1985). For an argument that the Due Process Clause is also underenforced, see Harold J. Krent, *The Supreme Court as an Enforcement Agency*, 55 WASH. LEE L. REV. 149 (1998).

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

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

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

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

Finally, the difficulty of reviewing the exercise of authority delegated to compacts reinforces the importance of the ex ante decision to approve the initial delegation or formation of a compact. Congress and the President should be aware of the potential that states may exercise delegated authority in a way that disadvantages other states' interests. Moreover, that possibility may well prove reason for courts to construe the terms of congressional delegations to states narrowly.[168] Courts should be stinting when reviewing challenges to authority exercised by congressionally approved compacts given that the policy formulated after such delegations evades presidential superintendence, which was designed to ensure that states do not take advantage of others. Such strict construction reflects an accommodation between the federalism and Article II principles underlying our Constitution.

CONCLUSION

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

The broader implications of the decision, however, ultimately may rest with constricted opportunities for Congress to delegate authority to state and private entities. Congress typically leaves the President with no removal authority when delegating outside the federal government. The logic of *Free Enterprise Fund* strongly suggests that Congress may not, consistent with

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

Article II, delegate significant authority to private and state entities. Although the decision does not elaborate on what constitutes "significant authority," it imperils a wide range of structures permitting private and state entities to participate in shaping federal law, including the Federal Open Market Committee, self-regulated organizations that have received Congress's imprimatur, and congressionally approved state compacts.

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

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