Dissenting by Enforcing: Using State Consumer Protection Statutes to Enforce Federal Law

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Introduction

States are increasingly adept at challenging the president's agenda. State governors and legislatures enact laws and policies at the state level that the president and Congress refuse to enact at the federal level.[1] State attorneys general (AGs) sue to block the federal laws and policies that they believe violate Americans' rights.[2] But states tend to overlook possible state rejoinders to an administration's enforcement decisions.[3] This is a major oversight because those decisions can have a sweeping public impact.

The oversight may stem from the structural impediments states face when trying to challenge the president's enforcement decisions directly. The traditional checks and balances in the American political system are not designed to check presidential inaction and underenforcement.[4] The president can stop enforcing federal law without involving Congress.[5] Unless the enforcement decisions are "so extreme as to amount to an abdication" of the president's duties under the law or the Constitution, they are generally unre-

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[1] For example, when the United States was slow to adopt or abandoned international climate agreements, states and cities pledged to follow the agreements themselves. *See, e.g.*, Hiroko Tabuchi & Henry Fountain, *Bucking Trump, These Cities, States and Companies Commit to Paris Accord*, N.Y. Times (June 1, 2017), https://www.nytimes.com/2017/06/01/climate/american-cities-climate-standards.html [https://perma.cc/P94N-S5NL]; Eli Sanders, *Rebuffing Bush, 132 Mayors Embrace Kyoto Rules*, N.Y. Times (May 14, 2005), http://www.nytimes.com/2005/05/14/us/rebuffing-bush-132-mayors-embrace-kyoto-rules.html [https://perma.cc/W3XE-52BE]. Similarly, when the federal government reduced health care insurance coverage, some states enacted their own health care plans. *See, e.g.*, 2006 Mass. Acts ch. 58 ("An Act Providing Access to Affordable, Quality, Accountable Health Care").

[2] *See, e.g.*, Washington v. Trump, 847 F.3d 1151 (9th Cir. 2017); State v. Trump, 871 F.3d 646 (9th Cir. 2017); Nat'l Fed'n of Indep. Bus. v. Sebelius, 567 U.S. 519 (2012) (thirteen states in addition to NFIB); Massachusetts v. Envtl. Prot. Agency, 549 U.S. 497 (2007); *see generally* Erica Newland, Note, *Executive Orders in Court*, 124 Yale L.J. 2026 (2015) (discussing executive orders challenged in court).

[3] *But see* Texas v. United States, 809 F.3d 134 (5th Cir. 2015), *aff'd sub nom.* United States v. Texas, 136 S. Ct. 2271 (2016) (per curiam).

[4] *See* Jeffrey A. Love & Arpit K. Garg, *Presidential Inaction and the Separation of Powers*, 112 Mich. L. Rev. 1195, 1197 (2014); Peter H.A. Lehner, *Judicial Review of Administrative Inaction*, 83 Colum. L. Rev. 627, 633–34 (1983).

[5] *See* Love & Garg, *supra* note 4; Lehner, *supra* note 4.

viewable by the courts.[6] As a result, even though states receive "special solitude" in establishing their standing to challenge federal inaction,[7] they still face an uphill battle in demonstrating that inaction constitutes an abdication of the president's duty.[8]

To challenge the president's enforcement decisions indirectly, states can adjust the extent to which they enforce federal law. For example, most federal environmental statutes have citizen suit provisions that let states sue to enforce the statute.[9] But not all federal statutes allow state enforcement: most federal civil rights statutes lack citizen suit provisions.[10] This Note proposes a strategy that can fill that critical gap.

The strategy allows states to enforce federal law using a state law cause of action, often in state court. The concept is as simple as it is novel. Some state consumer protection statutes grant the state AG the power to sue a person who engages in "unlawful" or "illegal" action. In states where the courts interpret "unlawful" or "illegal" to include violations of federal law, state AGs can sue a person who violates federal law for violating the state consumer protection statute. In effect, state AGs can enforce federal law with the state consumer protection statute providing the cause of action.[11]

This state enforcement strategy lets AGs "dissent by enforcing."[12] When the president decides not to enforce crucial federal law, this strategy allows state AGs both to fill the president's enforcement gap and to make a broader political statement. They can highlight and attack the president's potentially unnoticed enforcement decisions. They can indirectly make the case that the president is abdicating his or her duty to "take [c]are" that the laws

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[6] Heckler v. Chaney, 470 U.S. 821, 833 n.4 (1984); *see also* U.S. CONST. art. II, § 3; Lehner, *supra* note 4, at 627–28.

[7] *Massachusetts v. Envtl. Prot. Agency*, 549 U.S. at 520.

[8] *See Heckler*, 470 U.S. at 828–35.

[9] *See, e.g.*, 42 U.S.C. § 7604 (2012); 33 U.S.C. § 1365 (2012); 42 U.S.C. § 6972 (2012). Citizen suit provisions are a powerful tool for environmental enforcement because they allow a state, city, nonprofit, or individual person to sue to enforce the law. *See* Peter H. Lehner, *Act Locally: Municipal Enforcement of Environmental Law*, 12 STAN. ENVTL. L.J. 50, 71–72 (1993). They form the basis of many environmental suits brought by state AGs. *See State Attorneys General Environmental Actions*, SABIN CTR. FOR CLIMATE CHANGE LAW, COLUM. L. SCH., http://columbiaclimatelaw.com/resources/state-ag-environmental-actions [https://perma.cc/N7J2-RJ89].

[10] *See, e.g.*, Title IX, 20 U.S.C. § 1681 (2012); Title VI, 42 U.S.C. § 2000d (2012). In *Cannon v. University of Chicago*, the Supreme Court held that there is a private right of action under Title IX. 441 U.S. 677, 709 (1979). But a private right of action allows a much narrower range of suits than does a citizen suit provision. *See generally Alexander v. Sandoval*, 532 U.S. 275 (2001).

[11] City attorneys can also sue to enforce federal law under some state consumer protection statutes, *see infra* note 37, and many city attorneys are eager to challenge the federal government, *see, e.g.*, Cty. of Santa Clara v. Trump, 250 F. Supp. 3d 497 (N.D. Cal. 2017); City of Chicago v. Sessions, 264 F. Supp. 3d 933 (N.D. Ill. 2017); Administrative Motion for Leave to File Brief of Amici Curiae, Regents of Univ. of Cal. v. U.S. Dep't of Homeland Sec., No. 3:17-CV-05211-WHA (N.D. Cal. Nov. 1, 2017). But the Note focuses on state AGs because they are empowered to enforce consumer protection statutes in more states, *see, e.g.*, *infra* note 38, and may be more comfortable acting as plaintiffs, *see* Lehner, *supra* note 9, at 51–55.

[12] See Heather K. Gerken, *Dissenting by Deciding*, 57 STAN. L. REV. 1745, 1746 (2005), for the inspiration for the term.

are faithfully implemented.[13] And by articulating the human harms of the abdication in the facts of a state enforcement suit, the AGs may spur action by others: other states, reactive federal agencies, and even wary potential defendants.

The Note examines this state enforcement strategy and its benefits. Part I describes the approach as a form of "overcooperative federalism" and situates it in the broader conversation about uncooperative federalism and state resistance to the federal government. Part II provides the statutory authority and judicial interpretations that make the strategy feasible in California and New York. Part III pulls the pieces together, outlining a hypothetical suit by a state AG using the strategy. Part IV further develops the benefits of the strategy, including dissenting by enforcing.

I. Overcooperative Federalism

States engage in "overcooperative federalism" when they intentionally enforce federal law more rigorously than the federal government.[14] Ernest Young and Heather Gerken popularized the term "overcooperative federalism," but they explicitly left analysis of it to future scholars.[15] This Note takes up that invitation in part. It explains how the state enforcement strategy proposed here offers one way to implement overcooperative federalism—a concept which, to date, has been discussed largely in theoretical terms.[16] Viewing the strategy as a practical example of overcooperative federalism reveals the previously unrecognized scope and power of state-based overcooperative federalism.

The traditional view of federalism emphasizes states' ability to protect their residents by acting independently of the federal government, based on the states' sovereign authority.[17] "Uncooperative federalism," by contrast, highlights how states can protect their residents using a combination of their sovereign authority and the power conferred on them by the federal govern-

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[13] U.S. Const. art. II, § 3; *see, e.g.*, Abbe Gluck, *President Trump Admits He's Trying to Kill Obamacare. That's illegal.*, Vox (Oct. 17, 2017), https://www.vox.com/the-big-idea/2017/10/17/16489526/take-care-clause-obamacare-trump-sabotage-aca-illegal [https://perma.cc/DR8V-EBLA].

[14] *See* Ernest A. Young, *A Research Agenda for Uncooperative Federalists*, 48 Tulsa L. Rev. 427, 428, 446 (2013); Heather K. Gerken, *The Loyal Opposition*, 123 Yale L.J. 1958, 1983–84 (2014).

[15] Young, *supra* note 14, at 447; Gerken, *supra* note 14, at 1983–84.

[16] See Margaret H. Lemos, *State Enforcement of Federal Law*, 86 N.Y.U. L. Rev. 698 (2011), for a discussion of federally-authorized state enforcement of federal law in practical terms. Because Lemos focuses on federally-authorized state enforcement, she highlights state enforcement as a tool of cooperative federalism. *See id.* at 716. This Note, by contrast, focuses on state-authorized enforcement of federal law as a form of uncooperative federalism and a tool of dissent.

[17] *See* Jessica Bulman-Pozen & Heather K. Gerken, *Uncooperative Federalism*, 118 Yale L.J. 1256, 1284–86 (2009); Bond v. United States, 564 U.S. 211, 221–22 (2011); *see also* William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 Harv. L. Rev. 489, 491 (1977).

ment.[18] When the federal government requires states to implement a federal program (as it does with many federal programs[19]), it empowers states to shape that program.[20] States employ uncooperative federalism when they implement the program in a way that promotes state goals and hinders federal ones.[21] Essentially, states use their role in implementing federal priorities to shape and even contest those priorities.[22]

In overcooperative federalism, states similarly derive their power to protect their residents from a combination of their sovereign authority and the federal government's authority: states protect their residents by enforcing a law that Congress enacted. This seems cooperative with the federal government and, at times, it may be. But overcooperative federalism can also be uncooperative, intended as a challenge to the federal government's priorities and particularly the president's decision not to enforce what the state views as crucial federal law.[23]

Some federal laws create an opportunity for overcooperative federalism. For example, most federal environmental statutes have citizen suit provisions that allow states to prosecute violations if the federal government chooses not to prosecute them.[24] In the early 2000s, the AGs of New Jersey, New York, and Connecticut (the tristate AGs) initiated a number of enforcement actions under the citizen suit provision of the Clean Air Act (CAA).[25] At the time, the Environmental Protection Agency (EPA) was seeking to weaken CAA regulations.[26] The AGs alleged that coal-fired power plants in

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[18] *See* Bulman-Pozen & Gerken, *supra* note 17, at 1284–86; *see also* David Schleicher, *From Here All-the-Way-Down, or How to Write A Festschrift Piece*, 48 TULSA L. REV. 401, 410 (2013).

[19] *See, e.g.*, Abbe R. Gluck, *Intrastatutory Federalism and Statutory Interpretation: State Implementation of Federal Law in Health Reform and Beyond*, 121 YALE L.J. 534, 576–77 (2011) (discussing the Affordable Care Act); Bulman-Pozen & Gerken, *supra* note 17, at 1274–80 (discussing the Aid to Families with Dependent Children welfare program, Clean Air Act, and Patriot Act); Peter B. Edelman, *A Conversation On Federalism And The States: The Balancing Act of Devolution*, 64 ALB. L. REV. 1091, 1100–01 (2001) (discussing environmental laws).

[20] *See* Bulman-Pozen & Gerken, *supra* note 17, at 1265–71.

[21] *See id.* at 1258–59.

[22] *See id.*

[23] *See* Young, *supra* note 14, at 446.

[24] *See, e.g.*, 42 U.S.C. § 7604 (2012); 33 U.S.C. § 1365 (2012); 42 U.S.C. § 6972 (2012); *see also* Lehner, *supra* note 9; SABIN CTR. FOR CLIMATE CHANGE LAW, COLUM. L. SCH., *supra* note 9.

[25] *See* Peter H. Lehner, *Clean Air Litigation in a Restructuring Electricity World*, 18 PACE ENVTL. L. REV. 309, 310–312 (2001); Andrew C. Revkin, *In New Tactic, State Aims to Sue Utilities Over Coal Pollution*, N.Y. TIMES (Sept. 15, 1999), http://www.nytimes.com/1999/09/15/nyregion/in-new-tactic-state-aims-to-sue-utilities-over-coal-pollution.html [https://perma.cc/MW4H-C9PB]; *see, e.g.*, United States v. Ohio Edison Co., 276 F. Supp. 2d 829 (S.D. Ohio 2003).

[26] *See* Jennifer 8. Lee, *7 States to Sue E.P.A. Over Standards on Air Pollution*, N.Y. TIMES (Feb. 21, 2003), http://www.nytimes.com/2003/02/21/us/7-states-to-sue-epa-over-standards-on-air-pollution.html [https://perma.cc/7HKE-RVGD]; Press Release, New York State Office of the Attorney General, Statement by A.G. Eliot Spitzer Regarding the Federal Government's Weakening of the Clean Air Act (Mar. 19, 2002), https://ag.ny.gov/press-release/statement-ag-

Ohio and other upwind states had violated the CAA and had caused soot and smog pollution that was leading to high levels of respiratory disease in the tristate area.[27] The EPA failed to respond to the states' request that it sue or impose stricter regulations on these upwind polluters.[28] So the tristate AGs sued the upwind power plants under the CAA.[29] As a result of the suits, the power plants installed billions of dollars of pollution controls,[30] and the EPA promulgated new regulations on emissions from upwind power plants.[31]

Some state laws also create an opportunity for overcooperative federalism.[32] This Note focuses on an unfamiliar but particularly effective state-created opportunity: the use of state consumer protection statutes to enforce federal law. This form of state-based overcooperative federalism allows AGs to be even more independent from the federal government because it allows them to contest the president's enforcement decisions without the express authorization of Congress and often in state court. And, unlike citizen suit provisions applicable only to the statute in which they are included, consumer protection statutes tend to be written in broad language and used to protect a wide range of rights. In effect, the state legislatures and state courts decide when the state AG can enforce federal law.

This is a powerful but unexamined tool. States and scholars have not considered the possibilities unleashed by state-based overcooperative federalism and, perhaps for that reason, overlook its theory and practice.[33] This Note develops the theoretical and practical foundation of one form of state-

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eliot-spitzer-regarding-federal-governments-weakening-clean-air-act [https://perma.cc/NCQ7-E8HF].

[27] *See* Lehner, *supra* note 25, at 310–13.

[28] *See* Lemos, *supra* note 16, at 743–44.

[29] *See* Lehner, *supra* note 25, at 310, 312; *see, e.g.*, *Ohio Edison Co*., 276 F. Supp. 2d at 833 (consolidated suits after New York, New Jersey, and Connecticut moved to compel discovery, and the United States did the same a day later); New York v. Am. Elec. Power Serv. Corp., Nos. 2:04-cv-1098, 2:05-cv-360, 2007 WL 539536 (S.D. Ohio Feb. 15, 2007) (consolidated cases involving alleged Clean Air Act violations); Press Release, U.S. Dep't of Justice, U.S. Announces Settlement of Landmark Clean Air Act Case Against Ohio Edison (Mar. 18, 2005), https://www.justice.gov/archive/opa/pr/2005/March/05_enrd_129.htm [https://perma.cc/BY2M-F56Y].

[30] *See American Electric Power Agrees to Largest Enforcement Settlement Ever*, 18 AIR POLLUTION CONSULTANT 3.8 (2008) (reporting on size and scope of settlement); Matthew L. Wald & Stephanie Saul, *Big Utility Says It Will Settle 8-Year-Old Pollution Suit*, N.Y. TIMES (Oct. 9, 2007), http://query.nytimes.com/gst/fullpage.html?res=9F01E1D7113FF93AA35753C1A9619C8B63 [https://perma.cc/234T-3XUX] (announcing $4.6 billion clean up); Press Release, U.S. Dep't of Justice, United States and New York Reach Agreement with Virginia Electric Utility to Reduce Air Pollution (Nov. 16, 2000), https://www.justice.gov/archive/opa/pr/2000/November/662enrd.htm [https://perma.cc/6QG7-DU84] (earlier settlement).

[31] *See* 40 C.F.R. § 51 (2005) (final Clean Air Interstate Rule (CAIR)); *Clean Air Interstate Rule: Regulatory Action*, ENVTL. PROT. AGENCY, https://archive.epa.gov/airmarkets/programs/cair/web/html/index.html [https://perma.cc/2AFV-U3L5] (history of regulatory actions on CAIR).

[32] *See* Young, *supra* note 14, at 446–47 (discussing example of Arizona's attempt to enforce federal immigration law by enacting state legislation); *infra* Part II.

[33] *See* Lemos, *supra* note 16, at 701 ("[W]e lack an account of state enforcement of federal law—what it is and how it affects citizens, states, and the federal system."); Gluck, *supra* note 19, at 551 (stating the pervasive "misconception" that "only federal actors imple-

based overcooperative federalism with the hope that this foundation can advance its practice.

II. State Consumer Protection Statutes

State consumer protection statutes enable the form of state-based overcooperative federalism proposed in this Note. In two states, California and New York, the statutes and their judicial interpretations create a cause of action for AGs to use to enforce federal law. Although there are some barriers to using consumer protection statutes in this way, none are insurmountable.

In California, California Business and Professions Code § 17200 permits the AG to sue entities that engage in "any unlawful . . . business act or practice."[34] The definition of "unlawful" includes violations of federal laws and regulations, so "[v]irtually any law—federal, state or local—can serve as a predicate for a[ ] [§ 17200] action."[35] To ease the procedural requirements of such a suit, the statute gives the AG standing on behalf of "the People" of California and allows him or her to enjoin or seek civil penalties for "each violation."[36] Thus, when suing under § 17200, the AG does not need to prove most of the common elements of standing or damages.[37]

New York has a similar statute. New York Executive Law § 63(12) allows the AG "in the name of the people of the state" to seek an injunction against or damages for "repeated fraudulent or illegal acts."[38] It has "long"

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ment federal statutes"); Lehner, *supra* note 9, at 51–55 (describing local governments' underenforcement of federal environmental laws).

[34] Cal. Bus. & Prof. Code § 17200 (West 2017).

[35] Ticconi v. Blue Shield of Cal. Life & Health Ins. Co., 72 Cal. Rptr. 3d 888, 895 (Ct. App. 2008); *see also* Munson v. Del Taco, Inc., 208 P.3d 623, 676 (Cal. 2009) (holding that violations of the Americans with Disabilities Act's (ADA) accessibility mandate can be remediated through § 17200); *In re* Late Fee & Over-Limit Fee Litig., 741 F.3d 1022, 1027 (9th Cir. 2014) (making other state and federal laws actionable); Davis v. HSBC Bank Nevada, N.A., 691 F.3d 1152, 1168 (9th Cir. 2012) (using federal regulation as basis for suit); Rose v. Bank of Am., N.A., 304 P.3d 181, 185 (Cal. Ct. App. 2013) (holding that a claim of unlawful business practice under § 17200 may be based on violations of a federal statute).

[36] Cal. Bus. & Prof. Code § 17204 (West 2017) (injunctive relief); Cal. Bus. & Prof. Code § 17206 (West 2017) (civil penalties up to $2500 for "each violation").

[37] Section 17204 also authorizes city attorneys in California to sue under § 17200 if the city they represent has a population over 750,000. Cal. Bus. & Prof. Code § 17204. City attorneys in California use this cause of action frequently and effectively. *See* Complaint, California v. Badger Mountain Supply, No. CGC 17-557010, 2017 WL 543558 (Cal. Super. Ct., Feb. 9, 2017) (San Francisco City Attorney); California v. Wells Fargo Bank, No. BC611105, 2016 WL 1264005 (Cal. Super. Ct., Mar. 28, 2016) (Trial Order) (Los Angeles City Attorney); California v. IntelliGender, LLC, 771 F.3d 1169 (9th Cir. 2014) (San Diego City Attorney). However, because most state consumer protection statutes do not empower city attorneys as §§ 17200 and 17204 do, this Note focuses on state AGs and their use of state consumer protection laws.

[38] N.Y. Exec. Law § 63(12) (West 2014).

been recognized that § 63(12) "affords the Attorney-General broad authority to enforce federal as well as state law."[39]

As California and the Ninth Circuit illustrate, many state courts take an expansive view of consumer protection statutes. According to the California Supreme Court, the range of conduct included within § 17200 is "broad."[40] "[B]usiness act" is also "expansive[ly]" interpreted.[41] As a result, § 17200 applies to a wide range of contexts beyond traditional consumer protection, such as employment practices[42] and civil rights claims about disability discrimination,[43] health status discrimination,[44] and age discrimination.[45] For example, in California, HIV-positive job applicants sued American Airlines under § 17200 after it withdrew their employment offers upon learning that they were HIV-positive.[46] The applicants alleged that American Airlines acted "unlawfully" under § 17200 by violating the federal Americans with Disabilities Act (ADA).[47] The Ninth Circuit granted the applicants relief under § 17200 based on the ADA violation.[48]

With these statutes and interpretations, state AGs in California and New York can enforce a range of federal civil rights and health laws. When they do so in response to an administration's failure to enforce those laws, they engage in state-based overcooperative federalism. They can deploy a power they already have to protect their residents and to highlight and counter the president's abdication of his or her duty to enforce the laws.

Although federal law can at times preempt state law, preemption is unlikely in this context. Consumer protection is an area traditionally regulated by the states and the Supreme Court applies a strong presumption against preemption in such areas.[49] The California Supreme Court does as well.[50] For

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[39] Oncor Commc'ns, Inc. v. New York, 626 N.Y.S.2d 369, 369 (Sup. Ct. 1995), *aff'd*, 636 N.Y.S.2d 176 (App. Div. 1996).

[40] Korea Supply Co. v. Lockheed Martin Corp., 63 P.3d 937, 1144 (Cal. 2003); *see also* Kasky v. Nike, Inc. 45 P.3d 243, 249 (Cal. 2002).

[41] *Korea Supply Co.*, 63 P.3d at 1144 n.5; WILLIAM L. STERN, BUSINESS AND PROFESSIONS CODE SECTION 17200 PRACTICE (THE RUTTER GROUP, CIVIL LITIGATION SERIES) Ch. 3-D, Part D (2017).

[42] *See* Sullivan v. Oracle Corp., 254 P.3d 237, 248 (Cal. 2011) (Fair Labor Standards Act); *Korea Supply Co.*, 63 P.3d at 1144 n.5 (Foreign Corrupt Practices Act).

[43] *See* Munson v. Del Taco, Inc., 208 P.3d 623, 676 (Cal. 2009); Goldman v. Standard Ins. Co., 341 F.3d 1023, 1036 (9th Cir. 2003) (ADA).

[44] *See* Leonel v. Am. Airlines, Inc., 400 F.3d 702, 714 (9th Cir. 2005).

[45] *See* Alch v. Superior Court, 19 Cal. Rptr. 3d. 29, 77 (Ct. App. 2004) (state age discrimination laws).

[46] *See Leonel*, 400 F.3d at 705.

[47] *See id.*

[48] *See id.* at 714. (The two plaintiffs who filed only § 17200 actions filed in state court, but American Airlines removed them to federal court based on diversity jurisdiction. *Id.* at 707.)

[49] *See* CTS Corp. v. Waldburger, 134 S. Ct. 2175, 2189 (2014). *But see* Geier v. Am. Honda Motor Co., 529 U.S. 861, 868 (2000) (adopting a broader view of implied preemption in a different context).

[50] *See, e.g.*, People *ex rel.* Harris v. Pac Anchor Transp., 329 P.3d 180, 184 (Cal. 2014); Viva! Int'l Voice for Animals v. Adidas Promotional Retail Operations, Inc., 162 P.3d 569, 583 (Cal. 2007).

example, it held that, even though the federal Organic Foods Protection Act preempted state labeling standards on use of the term "organic," the federal law did not preempt a § 17200 suit alleging that the defendants engaged in unfair business practices by misusing the word "organic" on their labels.[51]

The Supreme Court has also avoided holding that federal law preempts state enforcement actions. For example, Arizona attempted to enforce federal immigration laws by passing state statutes that mirrored federal ones and gave state officials the authority to enforce the state laws.[52] In reviewing this action, the Supreme Court held only that the state *statutes* were preempted and did not address the state *enforcement* issue.[53]

The expansive use of consumer protection statutes proposed here may prompt courts to view preemption more broadly and Congress to expressly prohibit state enforcement of federal statutes. But to date, Congress has not been too bothered by state enforcement,[54] and both judicial and legislative change would emerge slowly. So it is unlikely that preemption will become a major barrier, at least in the near future.

This cause of action is limited, however, because, while almost all states have consumer protection statutes, few states have as expansive statutes, or as broad interpretations of them, as California and New York.[55] For now, state-based enforcement of federal law will not protect residents of some states. In the future, the AGs of those unprotected states can lobby their state legislatures for broader consumer protection statutes and can argue for more expansive judicial interpretations of those statutes.[56]

At the same time, actions in just California and New York can be significant, as these states have been among the most active in challenging the president.[57] State-based enforcement in just a few states could change a policy applicable in many states, because it may prompt a defendant that acts

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[51] *See* Quesada v. Herb Thyme Farms, Inc., 361 P.3d 868, 877 (Cal. 2015).

[52] *See* Young, *supra* note 14, at 447.

[53] *See* Arizona v. United States, 567 U.S. 387 (2012). Relatedly, the Supreme Court has held that federal statutes displace federal common law, but may not displace state common law. *See* Am. Elec. Power Co. v. Connecticut, 564 U.S. 410, 429 (2011).

[54] Lemos, *supra* note 16, at 712–14.

[55] *See* Carolyn L. Carter, Nat'l Consumer Law Ctr., Consumer Protection in the States: A 50-State Report on Unfair and Deceptive Acts and Practices Statutes (2009), https://www.nclc.org/images/pdf/car_sales/UDAP_Report_Feb09.pdf [https://perma.cc/55QZ-4NSY]; Kathleen S. Morris, *Expanding Local Enforcement of State and Federal Consumer Protection Laws*, 40 Fordham Urb. L.J. 1903, 1928 (2013) (fifty-state survey of state consumer protection laws).

[56] *See, e.g.*, Josh Hicks, *Maryland lawmakers give AG blanket authority to sue Trump administration*, Wash. Post (Feb. 15, 2017), https://www.washingtonpost.com/local/md-politics/maryland-lawmakers-give-ag-blanket-authority-to-sue-trump-administration/2017/02/15/26d33dee-f303-11e6-a9b0-ecee7ce475fc_story.html?utm_term=.d4a4640ac5e5 [https://perma.cc/NQ2M-FD2G] (describing the Maryland legislature's decision to expand the ability of Maryland's AG to sue the federal government).

[57] *See id.*; *supra* notes 1, 2, 11 (including examples of California and New York's challenges to the federal government).

across jurisdictions to change its policies nationwide. Alternatively, it may prompt the president to reconsider a decision not to enforce the law.[58]

In sum, broad consumer protection statutes can provide a powerful cause of action that is unlikely to be preempted. AGs in states with broad consumer protection laws can act now, while those in states in which consumer protection laws are not as expansively drafted or interpreted can either judicially or legislatively seek broader authority.

III. Putting the Pieces Together

The Note has outlined the idea of overcooperative federalism and the statutory authority for enacting it. It now puts these two elements of the state enforcement strategy—considered only separately so far—together and imagines a hypothetical suit using the strategy.

No AG has brought a suit with the exact procedural posture proposed here. But AGs and private plaintiffs have brought suits that depend on the three foundational elements of the proposed suit. First, as the tristate AGs' enforcement action demonstrated, *state AGs* have used federal causes of action to *enforce federal law* when the president has refused to do so. Second, as the American Airlines suit illustrates, private plaintiffs have used *state consumer protection statutes* to enforce rights-protecting *federal law*. Third, *state AGs* have used *state causes of action* to enforce substantive state law in spheres generally governed by federal law, illustrating some state AGs' willingness to use state law to challenge the president's enforcement decisions. For example, New York AG Eliot Spitzer relied on a state shareholder fraud statute[59] to subpoena Wall Street banks and evaluate their business practices for fraud after the Securities and Exchange Commission (SEC) failed to investigate the banks for violations of federal law.[60] The SEC ultimately joined the resulting lawsuits and the banks paid approximately $1.4 billion in fines.[61] These three examples illustrate that each of the elements of the proposed strategy is legally and practically feasible.

The state enforcement strategy pulls these foundational elements together into one suit. It proposes that *state AGs* use *state consumer protection statutes* to *enforce federal law* that the president has failed to enforce. A hypothetical example makes this proposal more concrete and illustrates why a state AG may want to bring such a suit. The example is a hypothetical suit to enforce Title IX, the federal law that prohibits sex-based discrimination in federally-funded schools.[62]

Imagine that a federally funded, for-profit college in California violates Title IX by failing to adopt procedures that provide for the "prompt and

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[58] *See supra* notes 24–31 and accompanying text; *infra* Part IV.
[59] N.Y. Gen. Bus. Law § 352 (West 2017).
[60] *See* Young, *supra* note 14, at 447; Lemos, *supra* note 16, at 725–26.
[61] *See* Lemos, *supra* note 16, at 725–26.
[62] 20 U.S.C. §§ 1681, 1687 (2012).

equitable" resolution of students' complaints of sexual assault, as the Title IX regulations require.[63] Student survivors alert the Department of Education (DOE) to their college's Title IX violation. But the DOE decides not to investigate the college.[64] The California AG researches whether the college is violating state laws. But to date no state law requires colleges to adopt equitable grievance procedures. (Even a state that supports this policy may not have enacted such protections in reliance on Title IX or out of concern that they would be preempted.[65]) As more students complain,[66] the California AG decides to sue the college under § 17200 for acting unlawfully by violating the Title IX regulations.[67] In this case, the state enforcement strategy lets the AG protect California residents by enforcing the unique protections of Title IX despite the DOE's decision not to.

As this hypothetical suit illustrates, putting the pieces of the state enforcement strategy together is not too great a leap and can be crucial to protecting state residents. State AGs use federal causes of action to enforce federal law and private plaintiffs use § 17200 to enforce federal law. If state AGs put these pieces together, they can protect their residents and resist the president's enforcement decisions, which are otherwise hard to challenge for structural reasons.

IV. Dissenting by Enforcing and Other Benefits

There are at least four benefits of the state enforcement strategy proposed in this Note. First, the strategy enables state AGs to dissent by enforc-

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[63] 34 C.F.R. § 106.8(b) (West 2017). Title IX forbids sexual assault and harassment perpetrated by teachers against students and by students against other students on campus or otherwise within the school's control. *See* Jackson v. Birmingham Bd. of Educ., 544 U.S. 167, 174 (2005); Franklin v. Gwinnett Cty. Pub. Sch., 503 U.S. 60, 63 (1992).

[64] *See, e.g.*, Complaint, Nat'l Women's Law Ctr. v. U.S. Dep't of Educ., No. 1:17-cv-01137 (D.C. Cir. June 12, 2017). Even if DOE did investigate, the process would be long. At the height of Title IX enforcement in 2015, the Department received 766 complaints about sexual harassment and gender-based violence and resolved only 458 of them. *See* Catherine E. Lhamon, U.S. Dep't of Educ., Delivering Justice: Report to the President and Secretary of Education 27–29 (2016), http://www2.ed.gov/about/reports/annual/ocr/report-to-president-and-secretary-of-education-2015.pdf [https://perma.cc/3DH7-CPH5]. The average duration of a sexual violence investigation was 1032 days. *See* Alyssa Peterson & Olivia Ortiz, *A Better Balance*, 125 Yale L.J. 1820, 2132 (2016).

[65] *See* Lemos, *supra* note 16, at 715.

[66] Around twenty percent of female students are sexually assaulted while in college and over fifty percent of LGBT students are threatened or harassed because of their sexual orientation or gender identity. *See* Catharine A. MacKinnon, *In Their Hands: Restoring Institutional Liability for Sexual Harassment in Education*, 125 Yale L.J. 2038, 2050–53 (2016) (on female students); Adele P. Kimmel, *Title IX: An Imperfect but Vital Tool To Stop Bullying of LGBT Students*, 125 Yale L.J. 2006, 2010 (2016) (on LGBT students).

[67] *See* Wells v. One2One Learning Found., 141 P.3d 225, 246 (Cal. 2006) (concluding that § 17200 covers charter school students); *see generally* Marquez v. Weinstein, Pinson & Riley, P.S., 836 F.3d 808, 810 (7th Cir. 2016) (applying a borrower-protective statute to students as consumers of student debt); Fla. Int'l Univ. Bd. of Trustees v. Fla. Nat'l Univ., Inc., 830 F.3d 1242, 1265 (11th Cir. 2016) (describing students as consumers in an unfair competition and trademark infringement case).

ing. Second, it allows state courts to collaterally review nonbinding agency guidance. Third, it empowers the state AG, who is often independently elected, to respond to the president's enforcement decisions. Fourth, as mentioned in the Title IX hypothetical, it allows AGs to enforce federal law that preempts state law and, in doing so, it safeguards AGs' ability to fulfill their obligations to protect the public.

First and foremost, the state enforcement strategy empowers AGs to dissent by enforcing. The benefit of the "enforcing" component is evident: the state residents are protected as they would not be otherwise. The benefit of the "dissenting" component may be less obvious, but it is just as powerful. State enforcement suits are a way for AGs both to alert the public to the importance of the vanishing federal protections and to hinder the president's attempt to remove them. If the federal statute lacks a citizen suit provision or private right of action, the president may assume that he or she can, in effect, erase the law by halting its federal enforcement. But if state AGs can enforce the law, the president's calculation may change. Sometimes, such as with the New York AG's prosecution of Wall Street banks, the AG's suit may generate outrage at the agency's inaction and prompt the agency to reconsider and ultimately, to enforce the law.[68] Other times, when an administration's platform depends on the erasure of the law, the suits may compel the president to go through the polarizing, public, and often lengthy process of repealing the laws or rescinding the regulations in order to achieve the administration's policy agenda.[69] Either way, the suits thwart the president's use of discretionary under-enforcement as a tool of quick and quiet policy change.

Second, in one of these suits, a state AG can invite a court to scrutinize nonbinding federal guidance that a state court normally cannot review directly.[70] Here, too, enforcing can be a form of dissent because it offers the state court an opportunity to interpret federal law in a way that may conflict with a federal agency's proposed interpretation. A court evaluating a suit to enforce federal law may look to federal agency guidance for instruction on how to interpret the law. As always, though the guidance may be binding on the agency, it is not binding on the court.[71] A state court could find the guidance persuasive and follow it, or could find the guidance unpersuasive and decline to follow it.[72] If a state court were to find the guidance unpersua-

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[68] *See* Lemos, *supra* note 16, at 725.

[69] *See, e.g.*, Robert Pear & Thomas Kaplan, *In Major Defeat for Trump, Push to Repeal Health Law Fails*, N.Y. Times (July 27, 2017), https://www.nytimes.com/2017/07/27/us/politics/obamacare-partial-repeal-senate-republicans-revolt.html [https://perma.cc/5PTA-M7PM]; William N. Eskridge, Jr., *Vetogates, Chevron, Preemption*, 83 Notre Dame L. Rev. 1441, 1442–43 (2008) (describing the inherently conservative process of enacting and repealing statutes).

[70] *See generally* Lemos, *supra* note 16, at 737–41 (State enforcement can "change the federal 'law in the books' by generating judicial decisions that clarify the scope of the law.").

[71] *See* United States v. Mead Corp, 533 U.S. 218 (2001); Auer v. Robbins, 519 U.S. 452 (1997).

[72] *See Mead*, 533 U.S. 218; Lemos, *supra* note 16, at 738–40.

sive, the federal agency would remain bound by it, but other institutions, such as other state courts, may defer to it less.[73] In effect, this creates a form of indirect judicial review of guidance that is otherwise largely unreviewable.

As an illustration, recall the California AG and the hypothetical Title IX suit. Now, before the AG brings suit, the DOE issues new guidance on the standard of proof that colleges must use in Title IX adjudications. The guidance states that colleges must use the same standard of proof in Title IX adjudications and in all other disciplinary hearings.[74] It permits colleges to use either the preponderance of the evidence or the clear and convincing standard—whichever renders their standards consistent across all disciplinary hearings.[75] The California AG understands the new guidance as giving colleges too much leeway and concurs with the instruction in the previous guidance that only the preponderance of the evidence standard meets the regulation's demand for procedures that resolve complaints equitably.[76] So, the AG adds to the § 17200 suit the allegation that the for-profit college acts unlawfully by using the clear and convincing standard of proof.

In this case, a California court could hold that the college has to use the preponderance of the evidence standard to comply with Title IX and thus § 17200. According to the Supreme Court, nonbinding agency guidance lacks the "force of law."[77] Section 17200 authorizes the state AG to prosecute violations of law.[78] It says nothing about the enforcement of nonbinding agency guidance. In light of this, California courts have held that they are not bound in § 17200 suits to adhere to nonbinding agency guidance,[79] particularly when the guidance is at odds with the clear language of the binding laws and regulations.[80] Thus, if the court found that the word "equitable" in

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[73] *See* Lemos, *supra* note 16, at 738–40.

[74] *See, e.g.*, U.S. DEP'T OF EDUC., Q&A ON CAMPUS SEXUAL MISCONDUCT (2017), https://www2.ed.gov/about/offices/list/ocr/docs/qa-title-ix-201709.pdf [https://perma.cc/TY5K-9VGE] [hereinafter DEP'T OF EDUC. Q&A]. At the time of publication, this guidance was the only instruction from the DOE regarding the appropriate standard of proof to use in Title IX adjudications. It is likely, though, that there will be more binding instruction soon. *See* U.S. DEP'T OF EDUC., DEPARTMENT OF EDUCATION ISSUES NEW INTERIM GUIDANCE ON CAMPUS SEXUAL MISCONDUCT (2017), https://www.ed.gov/news/press-releases/department-education-issues-new-interim-guidance-campus-sexual-misconduct [https://perma.cc/L47A-PVWZ]. If new regulations are promulgated, they likely would affect the hypothetical suit described here.

[75] *See* DEP'T OF EDUC. Q&A, *supra* note 74.

[76] 34 C.F.R. § 106.8(b) (2017); *see* U.S. DEP'T OF EDUC., DEAR COLLEAGUE LETTER: SEXUAL VIOLENCE (2011), https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201104.pdf [https://perma.cc/C768-4SAA].

[77] Perez v. Mortg. Bankers Ass'n, 135 S. Ct. 1199, 1204 (2015); Clark v. Fed. Labor Relations Auth., 782 F.3d 701, 706 (D.C. Cir. 2015).

[78] *See, e.g.*, Rose v. Bank of Am., N.A., 304 P.3d 181, 185 (Cal. Ct. App. 2013).

[79] *See, e.g.*, Von Koenig v. Snapple Beverage Corp., 713 F. Supp. 2d 1066, 1073–74 (E.D. Cal. 2010) (finding the Food and Drug Administration's policy on the term "natural," which was not a regulation or law, did not preempt the California safe harbor for § 17200 actions because it was not binding); Hofmann v. Fifth Generation, Inc., 2015 WL 7430801, at *7 (S.D. Cal. Nov. 20, 2015).

[80] *See* McKell v. Wash. Mut., Inc., 49 Cal. Rptr. 3d 227, 245 (Ct. App. 2006).

the Title IX regulations unambiguously required it, the court could require that the college use the preponderance of the evidence standard. This is true even if the guidance said that either standard was appropriate.[81] In short, a second benefit of the strategy is that it creates a way for a state AG to invite a state court to evaluate an agency's nonbinding guidance.

Third, and more practically, the state enforcement strategy empowers the state AG to act independently of the governor and state legislature.[82] The state AG has fewer ways than the governor or legislature to challenge the president's enforcement decisions. But in forty-three states, the AG is independently elected and can act mostly without the governor's approval.[83] When relying on federal statutes as the substantive predicates for suits, the AG gains independence from the state legislature as well. The AG can enforce federal laws that the state legislature may not enact. Since many states have divided governments where the AG and legislative majority are from different parties, empowerment of the AG expands the number of states in which a state official can resist the president's agenda. Where the AG is independently elected, this strategy does not give power to an unelectable and unaccountable actor. Instead, it just gives one elected official another tool for state-based resistance.

Fourth, the state enforcement strategy helps AGs fulfill their obligations to protect the public even when certain protections are enshrined only in federal law. The suits are not a needless insertion of state politicians into the federal regime. Rather, they are a necessary tool for AGs to "serve[ ] as the guardian of the legal rights of the citizens," even when those legal rights stem from both federal and state law.[84] When the president refuses to enforce federal laws, AGs are put in a bind. Under the field preemption doctrine, courts block state laws that are too similar to federal laws.[85] But if the federal laws are not enforced, there are no protections for those rights. To fill this gap, AGs must be able to enforce the federal laws that protect their state residents. That is just what the state enforcement strategy allows them to do.

Conclusion

State consumer protection statutes can empower state AGs to enforce federal law. In doing so, the statutes provide a concrete mechanism for state AGs to engage in state-based overcooperative federalism—that is, to enforce

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[81] *See* Dep't of Educ. Q&A, *supra* note 74. Again, this would change if the DOE promulgated binding regulation that was irreconcilable with the court's instruction.

[82] *See* Lemos, *supra* note 16, at 702, 742–44.

[83] *See* William P. Marshall, *Break Up the Presidency? Governors, State Attorneys General, and Lessons from the Divided Executive*, 115 Yale L.J. 2446, 2448 n.3, 2455–62 (2006).

[84] *Our Office*, N.Y. State Office of the Att'y Gen., https://ag.ny.gov/our-office [https://perma.cc/P98X-VHSH]; *see also About the Office of the Attorney General*, State of Cal. Dep't of Justice, https://oag.ca.gov/office [https://perma.cc/L22H-JDG7].

[85] *See* Lemos, *supra* note 16, at 715.

federal law in order to protect their residents and to dissent from the president's failure to do so.

There is much more to explore about the theory and practice of overcooperative federalism and the state enforcement strategy proposed here. But states need not wait for further development before bringing suit. With the statutory authority that exists today in California, New York, and perhaps other states, state AGs can sue under state consumer protection statutes to enforce crucial federal law. Doing so will help states refine their use of overcooperative federalism as a strategy. More importantly, it will protect the rights that the president takes from Americans when he or she fails to enforce the laws that generations of Americans enacted to protect those rights.