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Bradford R. Clark
George Washington University Law School, bclark@law.gwu.edu

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Preemption Choice: The Theory, Law, and Reality of Federalism's Core Question

Edited by

WILLIAM W. BUZBEE

Emory University School of Law

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Bradford R. Clark*

INTRODUCTION

The question of preemption arises because the Constitution establishes a federal system with two governments (one federal and one state) that have overlapping power to regulate the same matters involving the same parties in the same territory. To succeed, such a system requires a means of deciding when federal law displaces state law. The Founders chose the Supremacy Clause (reinforced by Article III) to perform this function. Although seemingly one-sided, the Clause actually incorporates several important political and procedural safeguards designed to preserve the proper balance between the governance prerogatives of the federal government and the states. It does this by recognizing only three sources of law as "the supreme Law of the Land": the "Constitution," "Laws," and "Treaties" of the United States.[1] Elsewhere, the Constitution prescribes precise and cumbersome procedures to govern the adoption of each source of supreme federal law. These procedures establish the exclusive means of adopting "the supreme Law of the Land." By requiring the participation and assent of multiple actors subject to the political safeguards of federalism, these procedures make supreme federal law relatively difficult to adopt. More importantly, these procedures suggest exclusivity because the Constitution guarantees states (regardless of size or population) equal suffrage in the Senate and gives the Senate (or the states) an absolute veto over the adoption of each and every source of law recognized by the Supremacy Clause. This means that courts must identify an applicable provision of the "Constitution," "Laws," and "Treaties" of the

* For insightful comments and suggestions, I thank David Barron, Bill Buzbee, John Manning, Trevor Morrison, Amanda Tyler, and participants at the Conference on Federalism in the Overlapping Territory held at Duke Law School on November 10, 2006.

[1] U.S. Const., art. VI, cl. 2.

United States adopted pursuant to specified procedures before they may preempt state law. By operation of the Supremacy Clause, these three sources override contrary state law. The negative implication of the Clause, however, is that state law continues to govern in the absence of "the supreme Law of the Land."

This process-based understanding of preemption has potential implications for two related federalism doctrines: the presumption against preemption and the more controversial clear statement requirement. The traditional presumption against preemption maintains "that the historic police powers of the States [are] not to be superseded by [a] Federal Act unless that was the clear and manifest purpose of Congress."[2] A clear statement rule is similar in function but requires that Congress make its intent to preempt state law clear on the face of the statute. In addition, some formulations go farther by suggesting that "if Congress intends to alter the usual constitutional balance between the States and the Federal Government, it must make its intention to do so *unmistakably* clear in the language of the statute."[3] Critics of these doctrines argue that the presumption against preemption contradicts the Supremacy Clause,[4] and that clear statement rules "amount to a 'backdoor' version of the constitutional activism."[5] Although certainly subject to abuse, both doctrines – if properly limited – may play a useful role in implementing the Constitution's political and procedural safeguards of federalism.

One recent example suggests how these doctrines may operate to ensure that preemption decisions are made in accordance with federal lawmaking procedures. In *Gonzales v. Oregon*, the Supreme Court arguably employed a clear statement rule of sorts by refusing to interpret an "obscure grant" in the Controlled Substances Act to "authorize the Attorney General to bar dispensing controlled substances for assisted suicide in the face of a state medical regime permitting such conduct."[6] Although the confines of this chapter do not permit a complete examination of the problem, several features of the

[2] RICE V. SANTA FE ELEVATOR CORP., 331 U.S. 218, 230 (1947). Nontextualist judges might find the requisite purpose by looking outside the enacted text of the statute.

[3] GREGORY V. ASHCROFT, 501 U.S. 452, 460 (1991) (emphasis added).

[4] Caleb Nelson, "Preemption," VIRGINIA LAW REVIEW 86, no. 2 (2000): 225, 290.

[5] William N. Eskridge Jr. and Philip P. Frickey, "Quasi-Constitutional Law: Clear Statement Rules as Constitutional Lawmaking," VANDERBILT LAW REVIEW 45, no. 3 (1992): 593, 598. More recently, Professor Eskridge has explored the implications of legislative vetogates and concluded that the Supreme Court should permit Congress to delegate preemptive authority to an agency only by enacting a clear statement to that effect. See William N. Eskridge Jr., "Vetogates, CHEVRON, Preemption," NOTRE DAME LAW REVIEW 83, no. 4 (2008): 1441, 1467–72.

[6] GONZALES V. OREGON, 546 U.S. 243, 274–5 (2006).

constitutional structure suggest that the Court's use of either a presumption against preemption or a modest clear statement rule in cases like *Gonzales v. Oregon* may guard against excessive federal preemption of state law at a time when states are increasingly adopting innovative measures to protect public health, safety, and the environment.

THE DUAL FUNCTION OF THE SUPREMACY CLAUSE

The Founders made the fundamental decision at the outset of the Constitutional Convention to preserve "the states as separate sources of authority and organs of administration" rather than attempt to abolish them in favor of a consolidated central government.[7] At the same time, the Founders decided to abandon the constraints of the Articles of Confederation and create a federal government capable of acting, within its assigned powers, "directly on the population rather than mediately through the states."[8] As a consequence of these decisions, there are two governments – one state and one federal – frequently operating at the same time, within the same territory, on the same people. Such a system inevitably gives rise to conflicts between state and federal law. Thus, establishing a mechanism for resolving such conflicts was essential to the success of the Convention.

As I have explained elsewhere in greater detail,[9] the Founders considered three potential mechanisms: (1) military force to coerce state adherence to federal law; (2) congressional power to negative state law; and (3) judicial enforcement of "supreme" federal law over contrary state law.[10] The Founders quickly dismissed coercive force. As James Madison put it, "[a] Union of the States containing such an ingredient seemed to provide for its own destruction."[11] The Founders initially embraced, but ultimately rejected, the congressional negative.[12] Delegates from the smaller states objected strongly and repeatedly to this mechanism. For example, Elbridge Gerry of Massachusetts

[7] Herbert Wechsler, "The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Government," COLUMBIA LAW REVIEW 54, no. 4 (1954): 543.

[8] Jack N. Rakove, ORIGINAL MEANINGS: POLITICS AND IDEAS IN THE MAKING OF THE CONSTITUTION (New York: A. A. Knopf, 1996), 169.

[9] See Bradford R. Clark, "Separation of Powers as a Safeguard of Federalism," TEXAS LAW REVIEW 79, no. 6 (2001): 1321, 1346–67.

[10] See ibid., 1348–55; see also Bradford R. Clark, "The Supremacy Clause as a Constraint on Federal Power," GEORGE WASHINGTON LAW REVIEW 71, no. 1 (2003): 91, 105–11.

[11] James Madison, "The Records of the Federal Convention (May 31, 1787)," in THE RECORDS OF THE FEDERAL CONVENTION OF 1787, vol. 1, ed. Max Farrand (New Haven, CT: Yale University Press, 1911), 45, 54 (hereinafter FARRAND'S RECORDS).

[12] See Clark, "Separation of Powers," 1349–53.

remarked that "[t]he Natl. Legislature with such a power may enslave the States" and predicted that "[s]uch an idea as this will never be acceded to."[13]

The Founders initially considered and rejected the third option – a Supremacy Clause – as part of the New Jersey Plan.[14] After the small states secured equal suffrage in the Senate,[15] however, the Convention embraced the Supremacy Clause.[16] The Clause performs the familiar function of instructing courts to prefer "the supreme Law of the Land" to contrary state law. The Clause, however, is something of a double-edged sword. The Clause recognizes only three sources of law as "the supreme Law of the Land": "This *Constitution*, and the *Laws* of the United States which shall be made in Pursuance thereof; and all *Treaties* made, or which shall be made, under the Authority of the United States."[17] The negative implication of the Clause is that, in the absence of these sources, state law continues to govern. Thus, the Clause both secures the supremacy of those sources of federal law it recognizes and preserves the states' prerogative to govern in their absence.

In order to apply the Supremacy Clause, it is necessary to identify "the supreme Law of the Land" with precision. The Constitution prescribes precise procedures to govern the adoption of each source of such law – that is, the "Constitution," "Laws," and "Treaties" of the United States.[18] Although different in important respects, these procedures all assign responsibility for adopting "the supreme Law of the Land" solely to actors subject to the "political safeguards of federalism."[19] These actors include the president, the House of Representatives, and the Senate. As Madison explained, the constitutionally assigned role of the states in the selection and composition of these entities would ensure that "each of the principal branches of the federal government will owe its existence to the favor of the State governments."[20] In this way, the Constitution was structured to retard "new intrusions by the center on the domain of the states."[21]

[13] James Madison, "The Records of the Federal Convention (June 8, 1787)," in 1 FARRAND'S RECORDS, 162, 165.

[14] See Clark, "Separation of Powers," 1351–2.

[15] James Madison, "The Records of the Federal Convention (July 16, 1787)," in FARRAND'S RECORDS, vol. 2, 13, 15–16.

[16] James Madison, "Notes on the Constitutional Convention (July 17, 1787)," in ibid., 22.

[17] U.S. Const., art. VI, cl. 2 (emphasis added).

[18] Ibid.

[19] Professor Wechsler used the phrase "political safeguards of federalism" to refer to "the role of the states in the composition and selection of the central government." Wechsler, "Political Safeguards of Federalism," 543.

[20] Clinton Rossiter, ed., THE FEDERALIST, no. 45 (James Madison) (New York: New American Library, 1961), 291.

[21] Wechsler, "Political Safeguards of Federalism," 558.

The Constitution magnified the effect of the political safeguards by singling out the Senate to participate in adopting all forms of supreme federal law. As discussed in the following text, the Senate was designed to represent the states and to give smaller states disproportionate power in the lawmaking process. By including the Senate in all types of federal lawmaking, the Constitution gives the Senate an absolute veto over every attempt to adopt "the supreme Law of the Land." For example, the Constitution provides that constitutional amendments ordinarily receive the approval of two-thirds of the House and the Senate and three-fourths of the states.[22] Similarly, the Constitution requires federal statutes to be approved by the House, the Senate, and the president or by two-thirds of both houses in the case of a presidential veto.[23] Finally, the Constitution specifies that treaties be submitted by the president and approved by two-thirds of the senators present.[24] The Founders understood that these internal constraints would make "the supreme Law of the Land" more difficult to adopt but thought that "[t]he injury which may possibly be done by defeating a few good laws will be amply compensated by the advantage of preventing a number of bad ones."[25]

Although the effectiveness of the political safeguards of federalism has waned over the years,[26] federal lawmaking procedures continue to constrain federal lawmaking simply by establishing multiple "veto gates,"[27] which effectively impose a supermajority requirement[28] and thus raise the cost of

[22] See U.S. Const., art. V. Alternatively, art. V requires Congress to call a convention for proposing amendments on the application of two-thirds of the state legislatures. Ibid.

[23] See ibid., art. I, § 7.

[24] See ibid., art. II, § 2, cl. 2.

[25] THE FEDERALIST, no. 73 (Alexander Hamilton), 444; see William N. Eskridge Jr. and John Ferejohn, "The Article I, Section 7 Game," GEORGETOWN LAW JOURNAL 80, no. 3 (1992): 523, 528 (explaining that the bicameralism and presentment model of legislation "reflects a carefully considered judgment by the Framers about how lawmaking should be structured").

[26] The Seventeenth Amendment has reduced the states' influence in the Senate by replacing appointment of senators by state legislatures with popular elections. See U.S. Const., amend. XVII. Changes in constitutional law have also limited the states' ability to influence the House of Representatives through control over voter qualifications and districting. See ibid., amend. XV (race); ibid., amend. XIX (sex); ibid., amend. XXIV (poll tax); ibid., amend. XXVI (age). Finally, the states' modern practice of appointing presidential electors on the basis of winner-take-all popular elections has reduced the role of state legislatures in selecting the president and all but eliminated the possibility that the president will be selected by the House of Representatives voting by states.

[27] See McNollgast, "Positive Canons: The Role of Legislative Bargains in Statutory Interpretation," GEORGETOWN LAW JOURNAL 80, no. 3 (1992): 705, 707 n. 5.

[28] See John F. Manning, "Textualism and the Equity of the Statute," COLUMBIA LAW REVIEW 101, no. 1 (2001): 1, 74–5; William T. Mayton, "The Possibilities of Collective Choice: Arrow's Theorem, Article I, and the Delegation of Legislative Power to Administrative Agencies," DUKE LAW JOURNAL 1986, no. 6 (1986): 948, 956; Michael B. Rappaport, "Amending the Constitution to Establish Fiscal Supermajority Rules," JOURNAL OF LAW AND POLITICS 13, no. 3 (1997): 705, 712.

lawmaking. If any of the specified veto players withholds its consent, then no new supreme law is created, and state law remains in force.[29] Thus, the Constitution is carefully structured to restrict both who may exercise lawmaking power on behalf of the United States (actors subject to the political safeguards of federalism) and how they may exercise it (only in accordance with precise procedures that require the participation and assent of the states or their representatives in the Senate).

The constitutional structure suggests, moreover, that the lawmaking procedures established by the Constitution are the exclusive means of adopting "the supreme Law of the Land."[30] The Senate is the only federal institution specified by these procedures to participate in adopting all forms of supreme federal law. In response to the demands of small states, the Constitutional Convention designed the Senate to represent the states in the new federal government. Under the original Constitution, states were guaranteed equal suffrage in the Senate and senators were appointed by state legislatures. By requiring the participation and assent of the Senate to adopt all three sources of "the supreme Law of the Land," the Founders agreed to the supremacy of federal law only on the condition that the states (through their representatives in the Senate) have the opportunity to veto each and every federal proposal capable of overriding state law under the Supremacy Clause. This arrangement gave the small states disproportionate power in the lawmaking process. As George Mason explained at the Constitutional Convention:

> The State Legislatures . . . ought to have some means of defending themselves against encroachments of the Natl. Govt. In every other department we have studiously endeavored to provide for its self-defense. Shall we leave the States alone unprovided with the means for this purpose? And what better means can we provide than the giving them some share in, or rather to make them a constituent part of, the Natl. Establishment.[31]

[29] See Ernest A. Young, "Making Federalism Doctrine: Fidelity, Institutional Competence, and Compensating Adjustments," WILLIAM AND MARY LAW REVIEW 46, no. 5 (2005): 1733, 1792 ("A national government that can act only with difficulty, after all, will tend to leave considerable scope for state autonomy."). Today the status quo contains a substantial body of federal law built up over two centuries. Just as federal lawmaking procedures make it difficult for Congress and the president to add to this body of law, these procedures make it difficult to subtract from such law as well. See Clark, "Separation of Powers," 1340 n. 90.

[30] See INS v. CHADHA, 462 U.S. 919, 951 (1983). ("It emerges clearly that the prescription for legislative action in Art. I, §§ 1, 7, represents the Framers' decision that the legislative power of the Federal Government be exercised in accord with a single, finely wrought and exhaustively considered, procedure.")

[31] James Madison, "Notes on the Constitutional Convention (June 7, 1787)," in 1 FARRAND'S RECORDS, 155–6 (statement of George Mason).

If the federal government were free to adopt "the supreme Law of the Land" outside the constitutionally prescribed lawmaking procedures, then it could effectively deprive the states' representatives in the Senate of their essential gate-keeping role and deprive the small states of the primary benefit of equal suffrage in the Senate.[32]

The composition and role of the Senate were central issues at the Constitutional Convention of 1787.[33] Although the Convention agreed that state legislatures would appoint senators,[34] it initially deadlocked over the proper basis for representation in the Senate. The large states favored proportional representation[35] while the small states insisted on equal representation.[36] The debate was protracted, and disagreement over the issue brought the Convention to the brink of collapse.[37] The delegates ultimately broke the impasse only by reaching a compromise that granted the states equal suffrage in the Senate.[38] In addition, the proponents of equal suffrage even succeeded in exempting this feature of the constitutional structure from future amendment by ordinary means.[39] As Jack Rakove has observed, following these developments, "no one could deny that the Senate was intended to embody the equal sovereignty of the states and to protect their rights of government against national encroachment."[40]

The day after approving the states' equal suffrage in the Senate, the Convention adopted the Supremacy Clause.[41] The Clause was originally suggested by supporters of equal suffrage in the Senate as an alternative to the congressional negative[42] and reflects an important, if overlooked, compromise embedded in the constitutional structure. By conferring supremacy only on sources of law that require the approval of either the states or the Senate (i.e.,

[32] The Founders understood that the Senate's essential role in the lawmaking process would not only preserve the governance prerogatives of the states, see THE FEDERALIST, no. 62 (James Madison), 378 (noting "that the equal vote allowed to each State is at once a constitutional recognition of the portion of sovereignty remaining in the individual States and an instrument for preserving that residuary sovereignty"), but also provide an "additional impediment . . . against improper acts of legislation," ibid.

[33] See Clark, "Separation of Powers," 1360–3.

[34] Ibid., 1359.

[35] Ibid., 1360.

[36] Ibid.

[37] Ibid., 1362–3.

[38] Ibid., 1363–4. In exchange for equal suffrage, the Convention decided that bills for raising revenue must originate in the House.

[39] Ibid., 1366. See U.S. Const., art. V (providing that "no State, without its Consent, shall be deprived of its equal Suffrage in the Senate").

[40] Rakove, "Original Meanings," 170.

[41] See "Journal of the Constitutional Convention (July 17, 1787)," in 2 FARRAND'S RECORDS, 22.

[42] See Clark, "Separation of Powers," 1348–55.

the "Constitution," "Laws," and "Treaties" of the United States), the Supremacy Clause restricts federal supremacy to measures approved by the states or their representatives in the Senate. Those who drafted and ratified the Constitution agreed to the supremacy of federal law (and the corresponding displacement of state law) only on the condition that the Senate (structured to represent the states equally) would have the opportunity to veto all forms of supreme federal law as part of the lawmaking process.[43] Treating federal law adopted outside that process as "supreme" would deprive the small states of the fruits of their hard-won bargain and undermine an important feature of the constitutional structure. To be sure, direct election of senators under the Seventeenth Amendment reduced the states' influence in the Senate, but this shift neither altered the small states' disproportionate influence in the Senate nor disturbed the Senate's right to veto all forms of "the supreme Law of the Land" in accordance with federal lawmaking procedures. Recognizing the relationship between these procedures and preemption has potential implications for how courts should conceptualize and use the traditional presumption against preemption and the related clear statement requirement.

OBJECTIONS TO PRESUMPTIONS AND CLEAR STATEMENT RULES

The Supreme Court has long endorsed, if not always followed, a presumption against preemption. In *Rice v. Santa Fe Elevator Corp.*, the Court declared that when Congress legislates in a "field which the States have traditionally occupied," courts "start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress."[44] Although inconsistent in applying the presumption,[45] the Court invokes it frequently.[46] For example, the Court recently explained that the presumption against preemption applies in all preemption cases, both "to the question whether Congress intended any

[43] See ibid., 1339; see also Bradford R. Clark, "Constitutional Compromise and the Supremacy Clause," NOTRE DAME LAW REVIEW 83, no. 4 (2008): 1421.

[44] 331 U.S. at 230.

[45] See, e.g., BUCKMAN CO. V. PLAINTIFFS' LEGAL COMMITTEE, 531 U.S. 341, 348 (2001) (declining to apply the presumption against preemption to a matter outside the historic primacy of state regulation).

[46] See, e.g., BATES V. DOW AGROSCIENCES LLC, 544 U.S. 431, 449 (2005) ("In areas of traditional state regulation, we assume that a federal statute has not supplanted state law unless Congress has made such an intention clear and manifest." [internal quotation marks omitted]); MEDTRONIC, INC. V. LOHR, 518 U.S. 470, 485 (1996) (stating that the Court starts with the presumption against preemption in "all pre-emption cases").

pre-emption at all" and "to questions concerning the *scope* of its intended invalidation of state law."[47]

At least in some cases, the Supreme Court has used a clear statement rule in lieu of the presumption against preemption. At a minimum, the former requires a clear statement on the face of a federal statute, and the Court sometimes suggests that even more is required. For example, in *Gregory v. Ashcroft*, the Court confronted the question whether the Age Discrimination in Employment Act ("ADEA") preempted a Missouri constitutional requirement that state judges retire at age seventy.[48] The ADEA prohibits employers from discharging any employee who is at least forty years of age "because of such individual's age."[49] The act defines employers to include states but defines *employee* to exclude "an appointee on the policymaking level."[50] The question before the Court was whether appointed state judges fall within this exception. The Court discussed various arguments as to whether state judges make policy within the meaning of the exception but found it unnecessary to resolve the question. Because the exception arguably applied, the Court found it "at least ambiguous whether Congress intended that appointed judges . . . be included" within the protection of the ADEA.[51] The Court refused to preempt state law on the basis of such statutory ambiguity. To the contrary, the Court said that it would "read the ADEA to cover state judges" only if "Congress had made it clear that judges are included."[52] Because it was not "plain to anyone reading the Act that it covers judges,"[53] the Court concluded that the plaintiffs' claims fell outside the scope of the statute.[54] Given

[47] MEDTRONIC, 518 U.S. at 485; but see CIPOLLONE v. LIGGETT GROUP, INC., 505 U.S. 504, 545 (1992) (Scalia, J., concurring in the judgment in part, and dissenting in part) (arguing that the presumption dissolves "once there is conclusive evidence of intent to pre-empt in the express words of the statute," and that the scope of preemption should be determined using "ordinary principles of statutory construction").

[48] 501 U.S. 452.

[49] 29 U.S.C. §§ 623(a), 631(a).

[50] 29 U.S.C. § 630(f).

[51] 501 U.S. at 470.

[52] Ibid., 467 (emphasis omitted). Although there is language in GREGORY suggesting that a clear statement requirement was necessary to avoid the question as to whether Congress has constitutional power to regulate state judges in this way, the Court had arguably already resolved this question in favor of broad congressional power to regulate "states as states" in GARCIA v. SAN ANTONIO METROPOLITAN TRANSIT AUTHORITY, 469 U.S. 528 (1985). Thus, the question in GREGORY was really just one of preemption turning on statutory interpretation: Does the ADEA cover state judges?

[53] GREGORY, 501 U.S. at 467.

[54] See also BFP v. RESOLUTION TRUST CORP., 511 U.S. 531, 539–40, 544 (1994) (invoking clear statement requirement).

its language, *Gregory* has been taken to impose not merely a clear statement requirement but also a more controversial *super*-clear statement requirement.

Commentators have questioned the presumption against preemption but have objected most strenuously to the Supreme Court's use of a heightened clear statement requirement in preemption cases. Leading commentators raise essentially three objections to the Court's "creation of a series of new 'super strong clear statement rules' protecting constitutional structures, especially structures associated with federalism."[55] First, they argue that such rules are incoherent because they frequently protect underenforced constitutional norms that the Court does not enforce directly because of a lack of judicially manageable standards. For example, they find *Gregory v. Ashcroft* problematic in light of the Court's previously "stated reasons for *un*enforcement of structural constitutional norms."[56] They stress that in *Garcia*, the Court announced that federalism-based limits on national power are unenforceable against Congress because the Court has been unable to develop "principled constitutional limitations" from the Tenth Amendment and the Commerce Clause and because "the principal means chosen by the Framers to ensure the role of the States in the federal system lies in the structure of the Federal Government itself."[57] In their view, these "reasons for unenforcement of federalism norms through judicial review are equally valid arguments for the unenforcement of federalism norms through statutory interpretation."[58] They suggest that once the Court decided to leave enforcement of federalism to Congress and the president, "the Court's creation of super-strong clear statement rules [is] a backdoor way for the Court to take these issues back from the political process."[59]

Second, commentators argue that clear statement rules represent "under-the-table constitutional lawmaking" and thus constitute a particularly questionable form of countermajoritarian judicial activism.[60] They maintain that "if the Court overruled *Garcia* and sought once again to enforce the Tenth Amendment, it would face a lot of political heat."[61] Because the Court may have "more freedom to interpret statutes to thwart legislative expectations

[55] Eskridge and Frickey, "Quasi-Constitutional Law," 597.

[56] Ibid., 633.

[57] Ibid. (quoting GARCIA V. SAN ANTONIO METROPOLITAN TRANSIT AUTHORITY, 469 U.S. 528, 550 [1985]).

[58] Ibid.

[59] Ibid., 635.

[60] Ibid., 636; see also ibid., 598 (stating that "the Court's new canons amount to a 'backdoor' version of the constitutional activism that most Justices on the current Court have publicly denounced").

[61] Ibid., 637.

than it does to strike them down,"[62] the Court's use of a clear statement rule in *Gregory* may amount to greater activism than direct enforcement of a constitutional rule. These concerns are amplified, they point out, because clear statement rules cannot "be rebutted through reference to the circumstances of the legislation, including legislative history."[63] Rather, such rules "require rebuttal on the face of, or by implication from, the statute itself."[64] For this reason, they believe that "the Court's new super-strong clear statement rules are extraordinarily countermajoritarian."[65]

Third, commentators argue that the modern clear statement rules cannot be "defended as justifiable activism"[66] because they "reflect an overall constitutional vision that is strikingly old-fashioned."[67] As relevant to this discussion, they argue that under modern clear statement rules, "[o]rdering by private elites is preferred over governmental intrusion," and "state power is preferred over national power."[68] On the first point, they believe that clear statement rules favoring private ordering reflect "*Lochner*-era baselines, in which governmental regulation was the exception rather than the rule."[69] On the second point, they maintain that "the Court has not grappled with the truly difficult issue of why federalism . . . should not be sacrificed when individual rights and public policies are at stake."[70] For these reasons, they regard the values protected by modern clear statement rules as "constitutionally unworthy."[71]

Other scholars have raised distinct concerns based on originalism and textualism. For example, one scholar has marshaled impressive historical evidence that the Supremacy Clause was designed to be a "*non obstante* clause," signaling judges to give a federal "statute its natural meaning and let it displace whatever law it contradicted."[72] This understanding, he maintains, "undermines the artificial presumption against preemption."[73] A leading textualist has also questioned the propriety of clear statement rules on

[62] Ibid.
[63] Ibid., 637–8.
[64] Ibid., 638.
[65] Ibid.
[66] Ibid., 640.
[67] Ibid.
[68] Ibid.
[69] Ibid., 642.
[70] Ibid., 643–4.
[71] Ibid., 598. Professors Eskridge and Frickey do not foreclose the use of clear statement rules altogether. Rather, they suggest that they should be used only to protect "particularly important constitutional values." Ibid., 597.
[72] Nelson, "Preemption," 232.
[73] Ibid.

grounds of legislative supremacy. The argument is that "clear statement rules sometimes require judges to reject the most natural reading of a statute in favor of a plausible but less conventional interpretation."[74] Such an approach is arguably inconsistent with a central premise of textualism that judges should accept the semantic meaning of the enacted text as written if it is sufficiently clear in context, without regard to extratextual considerations such as the statute's underlying purpose or legislative history.[75] "If textualists believe . . . that statutes mean what a reasonable person would conventionally understand them to mean, then applying a less natural (though still plausible) interpretation is arguably unfaithful to the legislative instructions contained in the statute."[76] Arguably, textualist judges have not adequately addressed these concerns, and "there is room to demand further justification for the textualists' selection and application of particular clear statement rules."[77]

A PROCESS-BASED APPROACH

At least some of the objections to the presumption against preemption and a limited clear statement requirement can be alleviated by tying these doctrines more closely to the Supremacy Clause and the procedural safeguards of federalism that it incorporates. Critics charge that presumptions and clear statement rules further a set of substantive values that cannot be readily defended on their merits. Although these devices certainly may be (mis)used in this way, the constitutional structure appears to support a narrower, yet important, conception of these devices as a means of ensuring compliance with the exclusive federal lawmaking procedures established by the Constitution for adopting "the supreme Law of the Land." Using constitutionally prescribed lawmaking procedures to understand – and limit – these doctrines avoids many of the most serious objections associated with their more ambitious counterparts. At the same time, the constitutional structure suggests that courts should take care not to use process-based presumptions or clear statement rules in ways that distort the legislative process or undermine legislative supremacy.

[74] Manning, "Textualism," 123.

[75] See John F. Manning, "What Divides Textualists from Purposivists?" COLUMBIA LAW REVIEW 106, no. 1 (2006): 70, 91.

[76] Manning, "Textualism," 124. Similarly, some scholars have suggested that clear statement rules undermine legislative supremacy by encouraging willful misconstructions of federal statutes. See Jerry L. Mashaw, GREED, CHAOS, AND GOVERNANCE: USING PUBLIC CHOICE TO IMPROVE PUBLIC LAW (New Haven, CT: Yale University Press, 1997), 105.

[77] Manning, "Textualism," 126.

The first objection raised is that clear statement rules lack coherence because they protect underenforced or even unenforced constitutional norms. Commentators cite *Gregory v. Ashcroft* as an example because that case contains language suggesting that the Court used a clear statement rule to "avoid a potential constitutional problem" arising from federal regulation of state judges under the Commerce Clause.[78] As others have pointed out, this suggestion makes little sense in light of *Garcia*'s suggestion that there are few, if any, judicially enforceable limits on Congress's exercise of the Commerce power to regulate states. *Gregory*, however, also offered a second, more persuasive rationale for applying a limited, process-based clear statement rule.

The Court suggested that, in the face of statutory ambiguity, a clear statement requirement is necessary in order to ensure compliance with federal lawmaking procedures and to protect the residual authority of the states under the Supremacy Clause. As the Court explained, "inasmuch as this Court in *Garcia* has left primarily to the political process the protection of the States against intrusive exercises of Congress' Commerce Clause powers, we must be absolutely certain that Congress intended such an exercise."[79] Quoting Professor Laurence Tribe, the Court explained that "to give the state-displacing weight of federal law to mere congressional *ambiguity* would evade the very procedure for lawmaking on which *Garcia* relied to protect states' interests."[80] Thus, as Tribe subsequently observed, *Gregory*'s clear statement rule "ensures the efficacy of the procedural political safeguards that were *Garcia*'s focus."[81] As discussed in the following text, however, *Gregory* arguably went too far by suggesting that Congress must speak with absolute clarity.

Understood – and limited – in this way, *Gregory*'s clear statement rule is not only coherent, but also arguably necessary to implement the operation of the procedural and political safeguards of federalism built into the Supremacy Clause. The Court found that the text of the ADEA was ambiguous as to whether it applied to state judges. The question for the Court, therefore, was whether to allow an ambiguous federal statute to preempt state law or to conclude that mere ambiguity is not enough to trigger the operation of the Supremacy Clause. A clear statement rule ensures that courts will reach the latter conclusion. If judges permit an ambiguous provision of a federal statute to preempt state law, they risk circumventing federal lawmaking procedures and the political safeguards they

[78] 501 U.S. at 464.

[79] Ibid.

[80] Ibid. (quoting Laurence H. Tribe, AMERICAN CONSTITUTIONAL LAW § 6-25 [Mineola, NY: Foundation Press, 2nd ed., 1988]).

[81] Laurence H. Tribe, 1 AMERICAN CONSTITUTIONAL LAW § 5-11 (New York: Foundation Press, 3rd. ed., 2000).

incorporate. As one commentator put it, process rules of this kind reinforce "institutional checks by requiring Congress to make the decision, with all the procedural hurdles and roadblocks that process entails."[82]

This understanding of *Gregory*'s clear statement rule requires courts to undertake the difficult task of deciding when a statute is sufficiently clear to trigger preemption and when it is so ambiguous as to leave state law undisturbed. As applied to novel or unanticipated circumstances, all laws are more or less indeterminate.[83] Thus, in the course of applying statutes, courts necessarily engage in some degree of interstitial norm elaboration. The need for such elaboration, however, does not give courts free reign to engage in open-ended federal lawmaking.[84] Unlike Congress and the president, federal courts are structured to be independent of the political safeguards of federalism and are given no express role in federal lawmaking by the Constitution. For these reasons, courts should arguably be "confined from molar to molecular motions"[85] in expanding the scope of potentially applicable, but ambiguous, federal statutes. Although deciding where legitimate interpretation ends and improper lawmaking begins may be a difficult task, drawing some distinction of this kind is required by the constitutional structure and does not appear to be beyond judicial competence. Courts already perform an analogous task in deciding whether to give agency interpretations of federal statutes *Chevron* deference[86] and could borrow the analysis from *Chevron* step one for these purposes.

[82] Ernest A. Young, "Two Cheers for Process Federalism," VILLANOVA LAW REVIEW 46, no. 5 (2001): 1349, 1385.

[83] See H. L. A. Hart, THE CONCEPT OF LAW (Oxford, UK: Clarendon Press, 2nd ed., 1994), 127–8; see also THE FEDERALIST, no. 37 (James Madison), 229. ("All new laws, though penned with the greatest technical skill and passed on the fullest and most mature deliberation, are considered as more or less obscure and equivocal, until their meaning be liquidated and ascertained by a series of particular discussions and adjudications.")

[84] Professor Meltzer has recently questioned the Supreme Court's "selective judicial passivity," involving contemporaneous efforts to reduce the role of judicial lawmaking in some areas while expanding it in others. He observes that in decisions involving statutory preemption, "the Supreme Court has been willing to recognize in the federal courts a broad lawmaking power, based upon policy judgments about how best to further the purposes of federal enactments." Daniel J. Meltzer, "The Supreme Court's Judicial Passivity," SUPREME COURT REVIEW (2002): 343–4.

[85] SOUTHERN PACIFIC CO. V. JENSEN, 244 U.S. 205, 221 (1917) (Holmes, J., dissenting). ("I recognize without hesitation that judges do and must legislate, but they can do so only interstitially; they are confined from molar to molecular motions.")

[86] See CHEVRON U.S.A., INC. V. NATURAL RESOURCES DEFENSE COUNCIL, INC., 467 U.S. 837 (1984). Federal courts also routinely decide whether state law is so unclear as to warrant certification to the state's highest court. See Bradford R. Clark, "Ascertaining the Laws of the Several States: Positivism and Judicial Federalism after ERIE," UNIVERSITY OF PENNSYLVANIA LAW REVIEW 145, no. 6 (1997): 1459, 1544–9.

A second objection to clear statement rules is that they represent a form of countermajoritarian judicial activism. It may be useful to break this objection down into its constituent parts. The charge of judicial activism holds when the Court uses clear statement rules to import extraconstitutional values into their decisions. *Gregory* is open to this charge to the extent that the Court imposed a clear statement requirement simply as a means of circumventing *Garcia*. To the extent that *Gregory* used a clear statement rule to ensure the operation of the procedural and political safeguards of federalism, however, such use is harder to characterize as judicial activism. After all, the Constitution prescribes these safeguards, and the *Garcia* Court premised its decision on the assumption that they continue to perform their intended function.[87] From this perspective, a narrowly tailored, process-based clear statement rule does not further extraconstitutional values but merely fosters compliance with constitutionally prescribed lawmaking procedures.

Critics also object that clear statement rules are countermajoritarian. Inherent in this objection is the notion that such rules make it harder for Congress and the president to change the status quo. Clear statement rules encourage legislative commands to appear with clarity on the face of a duly-enacted statute. The constitutionally prescribed process of bicameralism and presentment creates multiple "veto gates" that make it difficult for clear statements to become law. Accordingly, commentators point out that "the legislative process offers numerous opportunities for determined minorities to thwart" legislative efforts to enact clear statements that would satisfy the Supreme Court.[88] In addition, they stress that when the president and the Court are aligned on issues "against the preferences of Congress, an override of a Supreme Court statutory decision requires the same supermajorities in Congress that a constitutional amendment requires."[89] Thus, commentators stress that "even ordinary clear statement rules are particularly countermajoritarian, because they permit the Court to override probable congressional preferences in statutory interpretation in favor of norms and values favored by the Court."[90]

To be sure, super-clear statement requirements are open to this charge because they make it harder for Congress and the president to legislate. It is useful to keep in mind, however, that even the ordinary procedures established by the Constitution for enacting "Laws" are countermajoritarian by

[87] See Tribe, 1 AMERICAN CONSTITUTIONAL LAW, § 5-11 (stating that "GREGORY set out the constitutional principles assumed by GARCIA and used them to justify its clear statement rule").

[88] Eskridge and Frickey, "Quasi-Constitutional Law," 640.

[89] Ibid., 639.

[90] Ibid., 638.

design. The House of Representatives is the most representative participant in the lawmaking process, but the Constitution does not permit it to enact laws on its own. It must obtain the assent of the Senate (the least-representative participant in the process) and ordinarily the president as well. The Senate was designed to represent the states, not the people. Each state has equal suffrage in the Senate regardless of population,[91] and this feature of the Constitution cannot be amended by ordinary means.[92] Thus, any process that requires the Senate's approval will necessarily be countermajoritarian because it gives disproportionate power to senators from small states.

This countermajoritarian effect is only enhanced by the constitutional requirement of bicameralism and presentment. Giving three actors a role – and therefore a veto – in the lawmaking process creates the effect of a powerful supermajority requirement that frequently operates to thwart the will of the majority. As the Supreme Court explained in affirming the exclusivity of these procedures, however, the Founders adopted these procedures precisely because they are countermajoritarian: "The choices we discern as having been made in the Constitutional Convention impose burdens on governmental processes that often seem clumsy, inefficient, even unworkable, but those hard choices were consciously made by men who had lived under a form of government that permitted arbitrary governmental acts to go unchecked."[93] In addition, the Founders assumed that states would continue to play their traditional and complementary role of providing background rules to govern society in the absence of applicable federal law. Under these circumstances, courts cannot be accused of improperly thwarting the will of the majority by using clear statement rules solely to ensure compliance with federal lawmaking procedures.

A third objection to at least some clear statement rules is that they reflect old-fashioned constitutional values unworthy of protection: "Ordering by private elites is preferred over governmental intrusion[, and] state power is preferred over national power."[94] To be sure, a super-clear statement requirement may overprotect these values. To some extent, however, the constitutional design protects these values. The interaction of the Supremacy Clause and federal lawmaking procedures creates a significant burden of inertia and makes it difficult for the federal government to adopt "the supreme Law of the Land." These procedures necessarily favor the status quo by frequently rendering the federal government incapable of adopting federal law.

[91] U.S. Const., art. I, § 3, cl.1.
[92] Ibid., art. V.
[93] CHADHA, 462 U.S. at 959.
[94] Eskridge and Frickey, "Quasi-Constitutional Law," 640.

Historically, the status quo tended to consist of state law and private ordering.[95] Today, the status quo increasingly includes preexisting federal law. Thus, to the extent that a clear statement rule ensures compliance with federal lawmaking procedures, it necessarily favors the status quo, which still reflects private ordering and state law in many areas. But this phenomenon is attributable not to the operation of a process-based clear statement rule but to the underlying constitutional procedures upheld by the rule. The Founders put these procedures in place specifically to guard against excessive federal regulation. In this sense, the status quo may be old-fashioned, but it is not necessarily illegitimate.

Using a process-based approach to define – and limit – clear statement rules also helps to alleviate the concerns raised by originalists and textualists. There is a strong argument that the Supremacy Clause precludes application of an "artificial presumption against preemption" – that is, application of the presumption "even to federal statutory provisions that plainly *do* manifest an 'inten[t] to supplant state law.' "[96] Such (mis)use of the presumption against preemption is not required – or even permitted – by federal lawmaking procedures. Rather, such procedures favor applying state law only when a federal statute is ambiguous as to whether Congress and the president meant to override state law. "[W]hen it is clear that Congress *is* entering a field traditionally occupied by the states, there is no automatic reason to adopt a 'narrow reading' of the words that Congress enacts."[97] In such cases, the Supremacy Clause requires state law to yield, and presumptions and clear statement rules are inapposite.

For similar reasons, a heightened clear statement requirement "is arguably unfaithful to the legislative instructions contained in the statute."[98] As discussed, process-based clear statement rules should be used only to the extent necessary to ensure compliance with constitutionally prescribed lawmaking procedures. If the statute is clear in context, then courts should apply the statute faithfully and disregard contrary state law under the Supremacy Clause. A *super*-clear statement (of the kind *Gregory* suggests) is not required by federal lawmaking procedures and seems to contradict them by imposing unwarranted decision costs. The goal of interpretation is to determine whether the enacted text reveals that the participants in the lawmaking process faced the relevant question and resolved it in an intelligible way. Imposing "a

[95] See Frank H. Easterbrook, "Statutes' Domains," UNIVERSITY OF CHICAGO LAW REVIEW 50, no. 2 (1983): 533, 549. ("Those who wrote and approved the Constitution thought that most social relations would be governed by private agreements, customs, and understandings, not resolved in the halls of government.")

[96] Nelson, "Preemption," 291.

[97] Ibid., 301.

[98] Manning, "Textualism," 124.

super clear statement, 'magic words' requirement" is neither required by nor consistent with federal lawmaking procedures.[99]

By contrast, when a federal statute is not sufficiently clear to conclude that lawmakers have faced and resolved the relevant issue through the legislative process, a court might reasonably conclude that the statute does not supply an applicable rule of decision and thus does not preempt state law.[100] It is now widely acknowledged that certain types of ambiguity can only be resolved through a form of subsidiary lawmaking. This is the central premise of *Chevron*. One can argue about where ambiguity ends and clarity begins, but some judgments necessarily require interpreters to exercise a significant degree of policy-making discretion – that is, to fill in large gaps left by the statute. In such cases, courts should ask themselves whether attempts to answer such questions risk circumventing the political and procedural safeguards built into the Supremacy Clause. This is not the occasion to resolve all facets of this problem, but the question goes to the heart of the interpretive enterprise in a federal system.

Several cases suggest how courts might employ a process-based presumption against preemption or similarly limited clear statement rule. As discussed, in *Gregory v. Ashcroft*, the Supreme Court confronted the question whether the ADEA preempted a state constitutional requirement that state judges retire at age seventy.[101] The case turned on whether state judges were exempt as appointees "on the policymaking level" – a question susceptible of more than one reasonable answer. Historically, state judges were not thought of in these terms, but modern conceptions – informed by the rise of positivism and legal realism – recognize that state judges exercise substantial policy-making discretion. Had the *Gregory* Court allowed this ambiguous federal statute to override the state's retirement age for judges, it would have risked circumventing the political and procedural safeguards of federalism built into the Supremacy Clause. There simply appeared to be insufficient evidence on the face of the ADEA to conclude that the House, the Senate, and the president had decided to cover state judges. In *Gregory*, application of the traditional presumption against preemption arguably would have sufficed to ensure that actors subject to the political safeguards of federalism – rather than judges – make the crucial decision to override state

[99] IMMIGRATION AND NATURALIZATION SERVICE v. ST. CYR, 533 U.S. 289, 327 (2001) (Scalia, J., dissenting). The Court sometimes uses heightened clear statement rules to avoid difficult constitutional questions or to further particular substantive constitutional values. These practices are controversial and whatever their merits, they cannot be justified simply as a means of implementing federal lawmaking procedures.

[100] Cf. Easterbrook, "Statutes' Domains," 544. ("Unless the party relying on the statute could establish either express resolution or creation of the common law power of revision, the court would hold the matter in question outside the statute's domain.")

[101] 501 U.S. 452.

law. The Court's language, however, went considerably farther by suggesting that the ADEA need not be merely clear, but "unmistakably" clear "to anyone reading the Act." Such a super-strong clear statement rule not only is unnecessary to implement federal lawmaking procedures but also threatens legislative supremacy by unduly curtailing the ordinary effect of clear federal statutes.

The use of process-based presumptions and clear statement rules to evaluate administrative interpretations of federal statutes is somewhat more complex. In *Chevron*, the Supreme Court announced its familiar two-step analysis. "If the intent of Congress is clear," then "the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress."[102] However, "if the statute is silent or ambiguous with respect to the specific issue," then courts must defer to the agency's reasonable interpretation of the statute.[103] Such *Chevron* deference is arguably inconsistent with a process-based presumption against preemption or limited clear statement rule because, as originally conceived, *Chevron* treats statutory ambiguity as an implied delegation to the agency to fill in the gap.[104] Although the Court has yet to resolve many issues relating to regulatory preemption,[105] it may be moving away from the implied delegation model and toward what Cass Sunstein sees as a constitutionally inspired nondelegation cannon – "the idea that administrative agencies will not be allowed to interpret ambiguous provisions so as to preempt state law."[106]

[102] CHEVRON, 467 U.S. at 842–3.

[103] Ibid., 843.

[104] See ibid., 844. One might conclude, as Judge Easterbrook has, that courts should declare "legislation inapplicable unless it either expressly addresses the matter or commits the matter to the common law (or administrative) process." Easterbrook, "Statutes' Domains," 552. Such express delegations might raise questions under the nondelegation doctrine but would at least ensure that Congress and the president made a conscious decision to delegate the matter. Alternatively, Nina Mendelson has suggested retaining the presumption against preemption in the administrative context by replacing CHEVRON deference with SKIDMORE deference. See Nina A. Mendelson, "CHEVRON and Preemption," MICHIGAN LAW REVIEW 102, no. 5 (2004): 737. Professors Verchick and Mendelson, in Chapter 1, and Professor Funk, in Chapter 10, offer further reflections on the question of judicial deference to agency assertions of preemptive power.

[105] See Catherine M. Sharkey, "Preemption by Preamble: Federal Agencies and the Federalization of Tort Law," DEPAUL LAW REVIEW 56, no. 2 (2007): 227, 243–5. Many observers thought that the Supreme Court would address some of these questions in WATTERS V. WACHOVIA BANK, N.A., 127 S. Ct. 1559 (2007), but the Court declined to consider "the dangers of vesting preemptive authority in administrative agencies" because it concluded that the underlying statute preempted state law, ibid., 1572 n. 13.

[106] Cass R. Sunstein, "Nondelegation Canons," UNIVERSITY OF CHICAGO LAW REVIEW 67, no. 2 (2000): 315, 331; see also Eskridge, "Vetogates" (exploring the relationship between legislative vetogates and CHEVRON deference). Cf. MEDTRONIC, 518 U.S. at 512 (O'Connor, J., concurring in part and dissenting in part). ("Apparently recognizing that CHEVRON deference is unwarranted here, the Court does not admit to deferring to these regulations, but merely permits them to 'infor[m]' the Court's interpretation.")

For example, in *United States v. Mead Corp.*,[107] the Supreme Court refused to give *Chevron* deference to a tariff classification ruling by the U.S. Customs Service because there was "no indication that Congress intended such a ruling to carry the force of law."[108] The Court subsequently relied on *Mead* in *Gonzales v. Oregon*[109] to reject federal regulatory preemption of state law. There, the Court considered "whether the Controlled Substances Act ['CSA'] allows the U.S. Attorney General to prohibit doctors from prescribing regulated drugs for use in physician-assisted suicide, notwithstanding a state law permitting the procedure."[110] Under the act, physicians must obtain a "registration" from the attorney general in order to issue lawful prescriptions of Schedule II drugs.[111] The act authorizes the attorney general to deny, suspend, or revoke this registration if such registration would be "inconsistent with the public interest."[112] Attorney General Ashcroft issued an Interpretive Rule stating that assisting suicide is not a legitimate medical purpose, and that "[s]uch conduct by a physician . . . may 'render his registration . . . inconsistent with the public interest' and therefore subject to possible suspension or revocation."[113] The state of Oregon, joined by medical professionals, challenged this Interpretive Rule.

Notwithstanding the broad language of the act, the Supreme Court refused to give the Interpretive Rule *Chevron* deference on the ground that the CSA "does not authorize the Attorney General to bar dispensing controlled substances for assisted suicide in the face of a state medical regime permitting such conduct."[114] In reaching "this commonsense conclusion," the Court stated that it was unnecessary "to consider the application of clear statement requirements or presumptions against pre-emption."[115] Elsewhere in its

[107] UNITED STATES V. MEAD CORP., 533 U.S. 218 (2001).

[108] Ibid., 221. The Court held that the agency's ruling was entitled only to so-called SKIDMORE deference, under which "the ruling is eligible to claim respect according to its persuasiveness." Ibid. (*citing* SKIDMORE V. SWIFT AND CO., 323 U.S. 134 [1944]).

[109] 546 U.S. 243.

[110] Ibid., 248–9.

[111] 21 U.S.C. § 822(a)(2).

[112] 21 U.S.C. § 824(a)(4); § 822(a)(2). In making this determination, the act provides that the attorney general "shall" consider five statutory factors. See ibid. § 823(f).

[113] 66 FEDERAL REGISTER 56,608 (2001).

[114] 546 U.S. at 274–5; see also ibid., 268 (stating that "the CSA does not give the Attorney General authority to issue the Interpretive Rule as a statement with the force of law"). For this reason, the Court thought that the Interpretive Rule was entitled only to SKIDMORE deference, and ultimately found the attorney general's opinion to be unpersuasive.

[115] Ibid., 274 (internal citations omitted).

opinion, however, the Court seemed to be influenced by considerations of just this kind.[116] For example, according to the Court, the attorney general's interpretation would have read the CSA to delegate "to a single Executive officer the power to affect a radical shift of authority from the States to the Federal Government."[117] The Court required a delegation of this magnitude to be explicit – rather than implicit – in the text of the statute.[118] The Court invoked the "importance of the issue" to suggest that Congress did not have the requisite intent to delegate the authority in question.[119] Similarly, near the end of its opinion the Court noted that "the background principles of our federal system also belie the notion that Congress would use such an obscure grant of authority to regulate areas traditionally supervised by the States' police power."[120] The absence of clearer statutory language authorizing the attorney general to issue an Interpretive Rule with the force of federal law led the Court to reject *Chevron* deference in this context.[121]

Although the Court offered a variety of reasons as to why the CSA should not be interpreted to authorize the attorney general's action, one suspects that the Court ultimately concluded that the decision by the federal government to outlaw assisted suicide in the states should be made by the House, the Senate, and the president pursuant to federal lawmaking procedures rather than by the attorney general acting alone. In this sense, *Gonzales v. Oregon* illustrates process-based preemption and appears to be defensible on that very basis. Because a duly-enacted statute did not clearly authorize the attorney general to preempt state assisted-suicide laws, the Court refused to interpret –

[116] See ibid., 270 (stating that the act's failure to manifest any intent to regulate the practice of medicine generally "is understandable given the structure and limitations of federalism, which allow the States great latitude under their police powers to legislate as to the protection of the lives, limbs, health, comfort, and quiet of all persons") (internal quotations omitted).

[117] Ibid., 275.

[118] Ibid., 267. ("The idea that Congress gave the Attorney General such broad and unusual authority through an implicit delegation in the CSA's registration provision is not sustainable.")

[119] Ibid. ("The importance of the issue of physician-assisted suicide, which has been the subject of an 'earnest and profound debate' across the country, . . . makes the oblique form of the claimed delegation all the more suspect." [quoting WASHINGTON V. GLUCKSBERG, 521 U.S. 702, 735 (1997)]).

[120] Ibid., 274.

[121] The Court seemed to acknowledge that the attorney general's "understanding of medicine's boundaries is at least reasonable," ibid., 272, but thought that Congress must legislate more specifically in order to extend the CSA's regulation, ibid., 273–5. In dissent, Justice Scalia argued that "the Attorney General's independent interpretation of the statutory phrase 'public interest'" is entitled to CHEVRON deference. Ibid., 276 (Scalia, J., dissenting).

or allow the attorney general to interpret – the statute to do so.[122] From this perspective, *Gonzales v. Oregon* is consistent with *Gregory v. Ashcroft* – Attorney General Ashcroft lost for the same reason that Governor Ashcroft won in the earlier case. As Professor Sunstein observes, the federal government has power to preempt state law in areas like these, but "the preemption decision must be made legislatively, not bureaucratically."[123] In his view, "[t]he constitutional source of this principle is the evident constitutional commitment to a federal structure, a commitment that may not be compromised without a congressional decision to do so – an important requirement in light of the various safeguards against cavalier disregard of state interests created by the system of state representation in Congress."[124]

CONCLUSION

The presumption against preemption and the related clear statement requirement have been criticized on the grounds that they constitute judicial activism, and that they undermine legislative supremacy. Properly limited, however, such interpretive devices may be used to implement constitutionally prescribed lawmaking procedures by ensuring that Congress and the president – rather than judges – make the crucial decision to override state law. The Constitution prescribes cumbersome and exclusive procedures to govern the adoption of all forms of supreme federal law. By design, these procedures rely solely on actors – the House, the Senate, and the president – subject to the political safeguards of federalism. A presumption against preemption and a limited, process-based clear statement requirement arguably prevent judges from circumventing these safeguards by limiting the ability of ambiguous federal statutes to displace state law.

[122] See Eskridge, "Vetogates," 1469–72 (discussing and defending the outcome in GONZALES V. OREGON); see also Clark, "Separation of Powers," 1438. ("Applying CHEVRON deference in this context . . . risks circumventing the very lawmaking procedures that the Constitution prescribes to adopt 'the supreme Law of the Land' and safeguard federalism.")

[123] Sunstein, "Nondelegation Canons," 331.

[124] Ibid.