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To Delegate Or Not To Delegate-That Is Preemption: The Lack Of Political Accountability In Administrative Preemption Defies Federalism Constraints On Government Power

David A. Herrman*

I. INTRODUCTION

When unelected bureaucrats in administrative agencies exercise their delegated powers to preempt state laws that protect individual rights and liberties, this action poses a problem of constitutional dimensions. Congress primarily derives the authority to enact preemptive legislation from its enumerated power under the Commerce Clause of the Constitution.¹ Then, by applying preemption within our federalist system, the federal government can usurp state autonomy by displacing state laws.² In this way preemption has a direct impact on the federal-state balance of power, and, therefore, federalism restraints inherent within the structure of the federal government are particularly applicable in that area.³

When congressional action, undertaken pursuant to the Commerce Clause, threatens to infringe upon state sovereignty, the states' interests in preserving the individual liberties of their citizens are enforced through the procedural safeguards embodied in the political process and exercised when voters disfavor elected representatives responsible for unfavorable legislation.⁴ Through this mechanism, the states retain a voice in congressional lawmaking.⁵

However, in certain situations, specifically when Congress delegates preemptive power to unelected and unaccountable agency staffers, this federalism restraint is in danger of being overlooked.⁶ Within this context, it is difficult for voters to locate a politically sensitive representative, and the built-in checks on the federal system are unable to function properly.⁷ This type of deficiency in our constitutional structure necessitates that congressional delegations of preemptive authority to administrative

* J.D., University of the Pacific, McGeorge School of Law, to be conferred 1998; B.A., University of Washington, 1994. I would like to thank Professor Tim Hurley for his invaluable comments and Professor Leslie Jacobs for her helpful suggestions.

1. See *infra* notes 41-47 and accompanying text (explaining that the Commerce Clause is the primary source of congressional authority for federal statutes that preempt state laws).

2. See *infra* notes 48-66 and accompanying text (discussing the doctrine of preemption).

3. See *infra* notes 103-06 and accompanying text (describing the federalism restraints applicable in the area of preemption).

4. See *infra* notes 91-98 and accompanying text (discussing the restraints on federal government action).

5. See *infra* notes 97-98, 195-98 and accompanying text (explaining the states' role in the political process).

6. See *infra* notes 106, 206-08 and accompanying text (explaining that within the administrative preemption context, the political process is unable to function properly).

7. See *infra* notes 282-315 and accompanying text (discussing the difficulties in locating a politically accountable decision-maker when Congress delegates preemptive authority to administrative agencies).

agencies should be scrutinized with the utmost precaution to prevent the subversion of federalism principles and individual rights. Because, inevitably, administrative preemption can detrimentally affect the individual rights of the American people, precisely those whom both the state and federal government should protect.

An illustrative example of the individual liberties at stake, and the potential dangers that exist when delegated preemptive power goes unchecked by the constituency, is epitomized by the recent controversy surrounding the Federal Medical Device Amendment's (MDA)⁸ preemptive effects on state tort laws.⁹

8. 21 U.S.C.A. § 360k(a) (West 1996). This provision preempts state requirements with regard to medical devices when the state requirements differ from or add to a previously established Federal Food and Drug Administration requirement and are associated with the safety of the regulated medical device. *Id.*

9. Before the Supreme Court decision in *Medtronic, Inc. v. Lohr*, 116 S. Ct. 2240 (1996), courts had held with near uniformity that the Medical Device Amendments preempted at least some of the state common law tort claims that injured consumers could bring against device manufacturers. *See, e.g.*, *Martin v. Telectronics Pacing Sys., Inc.*, 70 F.3d 39, 42 (6th Cir. 1995) (holding that plaintiff's claims, involving a heart pacemaker, for products liability and breach of warranty, were preempted by the MDA), *vacated and remanded for reconsideration*, 116 S. Ct. 2576 (1996); *Mitchell v. Collagen Corp.*, 67 F.3d 1268, 1278 (7th Cir. 1995) (holding that plaintiff's claims, involving an anti-wrinkle skin implant, for strict liability, negligence, mislabeling, fraud, and implied warranty, were preempted by the MDA), *vacated and remanded for reconsideration*, 116 S. Ct. 2576 (1996); *English v. Mentor Corp.*, 67 F.3d 477, 483 (3d Cir. 1995) (holding that plaintiff's claims, involving a penile implant, for strict products liability, negligence, and breach of implied warranty, were preempted by the MDA), *vacated and remanded for reconsideration*, 116 S. Ct. 2575 (1996); *Becker v. Optical Radiation Corp.*, 66 F.3d 18, 20-21 (2d Cir. 1995) (holding that plaintiff's claims, involving an intraocular lens, for defective design, defective manufacture, failure to warn, and failure to test, were preempted by the MDA); *Duvall v. Bristol-Meyers-Squibb Co.*, 65 F.3d 392, 401 (4th Cir. 1995) (holding that plaintiff's claims, involving a penile implant, for defective design, defective manufacture, failure to warn, implied warranties of merchantability, and negligent design, manufacture, marketing, testing, and promotion, were all preempted by the MDA), *vacated and remanded for reconsideration*, 116 S. Ct. 2575 (1996); *Lohr v. Medtronic, Inc.*, 56 F.3d 1335, 1352 (11th Cir. 1995) (holding that plaintiff's claims, involving a heart pacemaker, for negligent manufacture and negligent failure to warn, were preempted by the MDA), *vacated and remanded for reconsideration*, 116 S. Ct. 806 (1996); *Michael v. Shiley, Inc.*, 46 F.3d 1316, 1336 (3d Cir.) (holding that plaintiff's claims, involving a replacement heart valve, for negligence, strict liability, breach of implied warranties, and fraud on the FDA, were preempted by the MDA), *cert. denied*, 116 S. Ct. 67 (1995); *Reeves v. Acromed Corp.*, 44 F.3d 300, 307 (5th Cir. 1995) (holding that plaintiff's claims, involving a metal bone implant in the spine, for failure to warn, were preempted by the MDA), *cert. denied*, 115 S. Ct. 2251 (1995); *Martello v. Ciba Vision Corp.*, 42 F.3d 1167, 1169 (8th Cir. 1994) (holding that plaintiff's claims, involving a contact lens disinfectant system, for products liability, were preempted by the MDA), *cert. denied*, 115 S. Ct. 2614 (1995); *Gile v. Optical Radiation Corp.*, 22 F.3d 540, 545 (3d Cir. 1994) (holding that plaintiff's claims, involving an intraocular lens, for products liability and negligence, were preempted by the MDA), *cert. denied*, 115 S. Ct. 429 (1994); *Mendes v. Medtronic, Inc.*, 18 F.3d 13, 18-19 (1st Cir. 1994) (holding that plaintiff's claims, involving a heart pacemaker, for breach of implied warranty, negligent failure to warn, and negligent manufacture, were preempted by the MDA); *Stamps v. Collagen Corp.*, 984 F.2d 1416, 1425 (5th Cir. 1993) (holding that plaintiff's claims, involving an anti-wrinkle skin implant, for defective design, inadequate warning, and negligent failure to warn, were preempted by the MDA), *cert. denied*, 114 S. Ct. 86 (1993); *King v. Collagen Corp.*, 983 F.2d 1130, 1139 (1st Cir.) (holding that plaintiff's claims, involving an anti-wrinkle skin implant, for failure to warn and that defendant fraudulently obtained FDA approval of the product and labeling, were preempted by the MDA), *cert. denied*, 114 S. Ct. 84 (1993). *But see Kennedy v. Collagen Corp.*, 67 F.3d 1453, 1459, 1462 (9th Cir. 1995) (holding that the MDA does not preempt any common law claims against makers of anti-wrinkle skin implant). Although the Court in *Medtronic* held that state common law tort claims were not preempted by the MDA, that decision has not precluded other courts from finding that some common law tort claims are still preempted by the MDA. *See, e.g.*, *Papike v. Tambrands Inc.*, 107 F.3d 737 (9th Cir. 1997) (holding that failure to warn claim was preempted by the

In 1988, Eunice Beavers died while undergoing an angioplasty procedure when a heart catheter failed to deflate after being inserted into one of her coronary arteries.¹⁰ When Mrs. Beavers's survivors sued the manufacturer, C.R. Bard, Inc., for wrongful death, alleging several tort claims, the First Circuit ruled that the 1976 Medical Device Amendments preempted all state tort claims and dismissed the complaint.¹¹

The *Talbott* court relied heavily upon the Federal Food and Drug Administration's (FDA) interpretation of the MDA in concluding that Congress intended the MDA to preempt state common law tort claims.¹² The court felt compelled to effectuate what it believed was the "clearly expressed" intent of Congress that the "public interest will be best served by relying exclusively on the FDA to strike the proper balance between reasonably assuring safety and promoting innovation with regard to new devices that have the potential both to enhance and injure human health."¹³ However, in that case, the FDA did not tip the scale in favor of Mrs. Beavers' family, so recovery was denied.¹⁴

Other circuits, including the Eleventh and Ninth Circuits, had also addressed the issue of the preemptive scope of the MDA on state tort law and had come to different results than the First Circuit in *Talbott*, some courts preempting claims and others finding no preemption.¹⁵ Yet, the simple fact remains that the FDA's interpretation and recommendations as to the preemptive effects of the MDA have deprived many people of the opportunity to recover for serious injuries.¹⁶

The Supreme Court, in *Medtronic, Inc. v. Lohr*,¹⁷ finally resolved the split among the federal circuits on the extent to which the MDA preempts state tort claims.¹⁸ The Court in *Medtronic* held that defective design, manufacturing, and warning claims, were not preempted under the MDA.¹⁹ However, this decision was based on the Court's statutory interpretation of the MDA, that Congress had really not intended

MDA); *Berish v. Richards Med. Co.*, 937 F. Supp. 181 (N.D.N.Y. 1996) (finding the state common law claims of negligence, strict liability, and breach of express and implied warranty were preempted by the MDA).

10. *Talbott v. C.R. Bard, Inc.*, 63 F.3d 25, 26 (1st Cir. 1995).

11. *Id.* at 26-27.

12. *See id.* at 30 (stating that "the FDA is in the best position to determine whether the provisions of the MDA have in fact been violated").

13. *Id.*

14. *See id.* at 31 (affirming the district court's dismissal of Eunice Beavers' heirs' lawsuit).

15. *Compare Lohr v. Medtronic, Inc.*, 56 F.3d 1335, 1352 (11th Cir. 1995) (relying on the FDA regulations to hold that the MDA preempted some common law claims but failed to preempt others) with *Kennedy v. Collagen Corp.*, 67 F.3d 1453, 1459 (9th Cir. 1995) (holding that the MDA did not preempt state common law claims).

16. *See supra* notes 9-14 and accompanying text (illustrating examples of state tort claims that were preempted by the MDA).

17. 116 S. Ct. 2240 (1996).

18. *See id.* at 2259 (concluding that no common law tort claims were preempted under the MDA).

19. *Id.* at 2258.

to preempt existing state tort law.²⁰ The Court, in sharp contrast to the FDA, concluded that the MDA did not preempt state tort law.²¹

This situation, involving the FDA's broad discretion to preempt state laws and have a detrimental impact on citizens, illustrates the danger of the power wielded by administrative agencies in the preemption context.²² Although the Supreme Court in *Medtronic* resolved the controversy in favor of providing a remedy for state tort claims,²³ an overriding problem was not addressed: the extent to which unaccountable administrative decision-makers are able to usurp state protection of individual rights.²⁴ The decision in *Medtronic* did not answer this broader question of whether agency staffers, who are not politically accountable, and who are insulated from the procedural safeguards of federalism, should have broad authority to exercise the preemptive power that the Constitution grants to Congress.

This Comment addresses the problems that exist when administrative agencies, staffed with unelected and unaccountable bureaucrats, preempt state law while side-stepping the procedural safeguards implicit in our federal system.²⁵ Specifically, this Comment points out that one of the main reasons administrative preemption is able to avoid federalism restraints is because Congress blurs its own responsibility for controversial lawmaking by delegating this responsibility away.²⁶ This practice, which manipulates voter perception of governmental accountability, coupled with inadequate congressional oversight of administrative rule-making, illustrates the absence of an effective mechanism for imposing accountability upon elected law-makers.²⁷ Therefore, agency officials promulgate powerful regulations without subjecting themselves to political repercussions.²⁸ Thus, the federal system is subverted and congressional delegations of preemptive authority lack the political and procedural checks that legitimize this type of administrative lawmaking.²⁹

Part II of this Comment examines the preemption doctrine established by the Constitution's Supremacy Clause and exercised through Congress's Commerce Clause power.³⁰ In Part III, this Comment provides an overview of federalism and the mechanisms implicit within the federal system that protect state sovereignty.³¹ Next, Part IV focuses on the nondelegation doctrine, both the historical limits

20. *Id.* at 2257-58.

21. *Id.* at 2258.

22. *See supra* notes 9-14 and accompanying text (discussing the preemptive effect of the MDA on state tort claims).

23. *Medtronic*, 116 S. Ct. at 2258.

24. *See discussion infra* Part VI. (examining the need for politically accountable decision-makers in the context of administrative preemption).

25. *See infra* notes 187-315 and accompanying text.

26. *See discussion infra* Part VI.C.

27. *See discussion infra* Part VI.C.

28. *See discussion infra* Part VI.C.

29. *See discussion infra* Part VII.

30. *See discussion infra* Part II.

31. *See discussion infra* Part III.

restraining congressional delegation and the reemergence of those limitations in opinions of the Court.³² Part V of this Comment describes the protections available through the federal system when accountable decision-makers preempt state laws.³³ Part VI explains the importance of having politically accountable decision-makers, and demonstrates that congressional oversight of administrative rule-making is not a sufficient tool for making elected officials in Congress accountable for agency actions.³⁴ Finally, this Comment concludes that in light of Congress's hidden agendas, which are epitomized when it tries to blur its own accountability through delegation and then fails to provide sufficient oversight of rule-making, there is no accountability in administrative preemption and the political processes cannot restore the proper balance between state and federal authority.³⁵ Thus, delegation of preemptive power to administrative agencies should be carefully scrutinized or proscribed unless there is a means of holding a political body responsible to the American People for preemptive decisions.

II. THE DOCTRINE OF PREEMPTION

A. *The Constitutional Foundations for the Preemption Doctrine*

The foundation of the Supremacy Clause of the Constitution, which gave rise to the doctrine of preemption, was colored by the concerns of the Framers that the Constitution would strike an unworkable balance between federal and state interests.³⁶ The power of federal law to displace state law commanded the attention of the delegates at the Constitutional Convention of 1787, who finally settled on a proposal weighing in favor of small state interests at the expense of an overreaching federal government.³⁷ The Framers arrived at a carefully derived compromise bet-

32. See discussion *infra* Part IV.

33. See discussion *infra* Part V.

34. See discussion *infra* Part VI.

35. See discussion *infra* Part VII.

36. Kenneth Starr et al., *The Law of Preemption*, 1991 A.B.A. SEC. OF ANTI-TRUST L. 6 (report of the United States Appellate Judges Conference synthesizing the law concerning federal preemption of state law) (recounting discussions by the Founders concerning different proposals for the Supremacy Clause and their impact on the federal-state balance of power).

37. *Id.* at 8. At the Constitutional Convention of 1787, the Framers debated two proposals for the Supremacy Clause. 1 THE RECORDS OF THE CONVENTION OF 1787, at 160 (M. Farrand ed., rev. ed. 1996) [hereinafter Farrand] (records of June 7, 1787). The "Virginia Plan" included the power to "negative" all laws passed by the states contravening, in the opinion of the National Legislature, the articles of the Union. This plan was crafted by James Madison and represented a powerful federal government with broad powers over the states. *Id.* at 20-23 (records of May 29, 1787). The "New Jersey Plan" set forth "that all Acts of the United States shall be the supreme law of the respective states." It was introduced by William Paterson, a proponent for the smaller states, and was a far less expansive version of the Supremacy Clause than the Virginia Plan. *Id.* at 245 (records of June 15, 1787). The Convention adopted the New Jersey proposal on July 17, 1787, and this small states' plan without the congressional "negative" provision was enshrined in Article VI of the Constitution after several changes. 2 Farrand, at 28 (records of July 17, 1787).

ween the goals of nationally uniform laws and the particular needs of individual states.³⁸ This balance was realized by vesting supreme legislative power in a representative Congress by means of the Supremacy Clause which states:

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, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.³⁹

Because the Framers understood that of the three branches of government the Congress alone represents the states as states, the Framers gave the Congress the authority and responsibility to balance federal and state power by choosing whether to preempt state laws with federal legislation.⁴⁰

Congress exercises its authority to create federal law that supersedes state law pursuant to its constitutionally enumerated powers.⁴¹ The power of Congress under the Commerce Clause⁴² has been the primary foundation supporting the creation of federal statutes that preempt state and local laws under the Supremacy Clause of the Constitution.⁴³ Due to the expansive interpretation of the federal commerce power prevailing since *United States v. Darby*,⁴⁴ Congress's commerce clause power

38. Starr et al., *supra* note 36, at 6-8; see Paula A. Sinozich et al., *Project: The Role of Preemption in Administrative Law*, 45 ADMIN. L. REV. 107, 111 (1993) (stating that, although the Framers understood that supreme federal power was essential to a coherent national government, they were concerned with the preservation of state autonomy).

39. U.S. CONST. art. VI, cl. 2.

40. Susan B. Foote, *Administrative Preemption: An Experiment in Regulatory Federalism*, 70 VA. L. REV. 1429, 1432-33 (1984) (describing Congress's unique role among the three branches of government as the representative of the states as states, and therefore concluding it is the best suited body of government to balance the competing interests of federal power and states' rights); see THE FEDERALIST NO. 58, at 389 (J. Madison) (B. Wright ed. 1961) ("one branch of the legislature is a representation of citizens, the other of the states. . ."); JESSE CHOPER, JUDICIAL REVIEW AND THE NATIONAL POLITICAL PROCESS 176-79 (1980). Choper expounds that numerous structural aspects of the national political system safeguard states' rights and individual autonomy. *Id.* at 176. Specifically, Choper illustrates that "the Senate - a body 'in which the smallest state has as much weight as the greatest'—was originally intended to be a national legislative guardian against usurpation of state interests." *Id.* Although this may not carry the same force as in the past when senators were elected by the state legislatures, the popularly elected House of Representatives has a state-related base and therefore is still a mechanism for state representation. *Id.* at 177. In addition, Choper concludes that the demographics of Congress and the backgrounds of its members, which usually includes service in state and municipal offices, ensure their concern with state and local issues. *Id.* at 178-79.

41. Paul Wolfson, *Preemption and Federalism: The Missing Link*, 16 HASTINGS CONST. L.Q. 69, 90-91 (1988).

42. U.S. CONST. art. I, § 8, cl. 3 ("The Congress shall have Power . . . To regulate Commerce with foreign Nations, and among the several States . . .").

43. Russell Chapin, *Harmonizing Federal Preemption Doctrine with Garcia's Cession of State and Local Interests to the Political Process*, 23 URB. LAW. 45, 45-46 (1991).

44. 312 U.S. 100 (1941).

presents a potent tool within the preemption context.⁴⁵ Within recent years, the courts have shown a great reluctance to strike down any exercise of Congress's commerce power as being beyond its enumerated powers.⁴⁶ Thus, the preemption doctrine today, under the enumerated-power lines set forth in Article I, Section 8, poses practically no limits at all on Congress's ability to effectuate preemptive federal legislation.⁴⁷

B. *The Development of the Doctrine of Preemption*

Preemption is deeply rooted in the decisional law of the United States, beginning with the landmark case of *Gibbons v. Ogden*.⁴⁸ In *Gibbons*, the rights of steamboats to navigate the waters of New York presented a conflict between a federal license granted under the authority of an Act of Congress and a state monopoly conferred upon a single steamboat operator, Aaron Ogden.⁴⁹ In *Gibbons v. Ogden*, the Supreme Court first resolved this tension between state and federal legislation.⁵⁰ Chief Justice Marshall articulated the Court's reasoning in the initial statement of the preemption doctrine:

Since . . . the States may sometimes enact laws, the validity of which depends on their interfering with, and being contrary to, an act of Congress passed in pursuance of the constitution, the Court will enter upon the inquiry, whether the laws of New York, as expounded by the highest tribunal of that State, have, in their application to this case, come into collision with an act of Congress Should this collision exist, it will be immaterial whether those laws were passed in virtue of a concurrent power "to regulate commerce with foreign nations and among the several states," or, in virtue of a power to regulate their own domestic trade and police. In one case and the other, the acts of New York must yield to the law of congress⁵¹

45. See *id.* at 114 (expanding the scope of Congress's commerce power so that Congress is free to impose whatever conditions it wishes upon the privileges of engaging in an activity that substantially affects interstate commerce, so long as the conditions themselves violate no independent constitutional right); see also Wolfson, *supra* note 41, at 91. But see *United States v. Lopez*, 115 S. Ct. 1624, 1631-32 (1995) (invalidating a federal statute prohibiting guns in a school zone as beyond Congress's commerce clause power).

46. Wolfson, *supra* note 41, at 91.

47. Wolfson, *supra* note 41, at 91.

48. 22 U.S. (9 Wheat.) 1 (1824).

49. *Id.* at 1-2.

50. *Id.* at 209-10.

51. *Id.*

Marshall's approach focused on whether there was a "collision" between state and federal authority.⁵² This was the original application of the preemption rubric; however, due to an expanding centralized government, the doctrine has developed into its more complex, modern form.⁵³

The Supreme Court has upheld the proposition that the determination as to whether a federal statute preempts state law is entirely a question of congressional intent.⁵⁴ The intent may be expressly stated⁵⁵ or implied in the federal statute.⁵⁶ Express preemption results when Congress directs in the language of the statute its explicit intention to supersede state legislation.⁵⁷ The use of express language to preempt state law is the clearest example of preemption because there is no interpretive difficulty in defining Congress's purpose.⁵⁸

The more difficult cases emerge when there is no clear statement of intent to displace state law. However, even in the absence of an express statutory provision, the courts will imply preemption in three circumstances: First, when Congress passes legislation that is so comprehensive that it occupies a particular field, leaving no room for supplementary state legislation;⁵⁹ second, when the federal interest predominates the state interest to such a degree that it prevents the enforcement of state

52. *Id.*; see Starr et al., *supra* note 36, at 9 (articulating that a collision existed because Gibbons, the federal licensee, was being excluded from navigating the New York waters by the state monopoly conferred upon Aaron Ogden).

53. Starr et al., *supra* note 36, at 14. Relatively few preemption cases invoke express provisions or actual conflicts of the *Gibbons's* variety. *Id.* Supremacy Clause cases more often involve preemption based on comprehensive federal regulations, the nature of the regulated subject matter, the impact of state law on federal purposes, and, in the cases of preemption by administrative agencies, the scope of authority delegated to an agency by Congress. *Id.* at 14-15.

54. *Retail Clerks v. Schermerhorn*, 375 U.S. 96, 103 (1963) ("The purpose of Congress is the ultimate touchstone" of preemption.). The Supreme Court has continually reiterated the principle that the purpose of Congress is the "ultimate touchstone of preemption analysis." *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 516 (1992). See *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 146-47 (1963) ("[W]e are not to conclude that Congress legislated the ouster of this [state] statute . . . in the absence of an unambiguous congressional mandate to that effect.").

55. See *Hillsborough County v. Automated Medical Lab., Inc.*, 471 U.S. 707, 713 (1985) ("[W]hen acting within constitutional limits, Congress is empowered to pre-empt state law by so stating in express terms.").

56. See *id.* ("In the absence of express pre-emptive language, Congress's intent to pre-empt . . . state law . . . may be inferred . . .").

57. *CSX Transp., Inc. v. Easterwood*, 507 U.S. 658, 663-64 (1993).

58. *Weber v. Heaney*, 995 F.2d 872, 875 (8th Cir. 1993). Express preemption by a congressional provision must "focus on the plain wording of the [provision], which necessarily contains the best evidence of Congress's [affirmative] preemptive intent." *CSX Transp., Inc.*, 507 U.S. at 664; see Paul McGreal, *Some Rice with Your Chevron?: Presumption and Deference in Regulatory Preemption*, 45 CASE W. RES. L. REV. 823, 831 (1995) (stating that express intent poses the simplest case for preemption because Congress has explicitly directed that state law is preempted).

59. *Hillsborough County*, 471 U.S. at 713; see *Cipollone*, 505 U.S. at 516 (finding state law is preempted if the federal law "so thoroughly occupies a legislative field" that Congress allowed no additional room to regulate); *Pacific Gas & Elec. Co. v. Energy Resources Conservation & Dev. Comm'n*, 461 U.S. 190, 203-04 (1983) (explaining that congressional intent to supersede state law may be inferred from a federal regulatory scheme that leaves no room to supplement it).

laws;⁶⁰ and, finally, when a direct conflict exists between the federal statute and state law, making it impossible to comply with both.⁶¹

Although preemption, simply stated, prevents a state from enforcing its own laws, the preemption cases do not indicate the extensive implications of the doctrine on “the very structure of federalism established by the Constitution.”⁶² Courts continually dictate the notion that preemption cases are decided solely by the intent of Congress.⁶³ Commentators attempt to assure us that preemption cases “may pose complex questions of statutory construction, but raise no controversial issues of power.”⁶⁴ Yet preemption does raise controversial issues of power because not only was it born amidst a highly debated struggle between a large national government and state autonomy,⁶⁵ but within our complex constitutional framework, it sometimes threatens to undermine the political safeguards of federalism.⁶⁶

III. FEDERALISM

The values of federalism are recognized through many sources of law and are deeply rooted in the foundation of our republican form of government.⁶⁷ Upon the creation of our governmental structure, the Framers were not anticipating multiple clashes as a result of having federal and state power operate concurrently.⁶⁸ Instead, the federal government was limited to the powers specifically enumerated in the Constitution, while state power extended to subjects proper for local government

60. *Hillsborough County*, 471 U.S. at 713 (quoting *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230, *rev'd sub nom. Rice v. Board of Trade*, 331 U.S. 247 (1947)).

61. *Hillsborough County*, 471 U.S. at 713; see *Florida Lime & Avocado Growers, Inc.*, 373 U.S. at 142-43 (finding that implied preemption occurs when state law conflicts and frustrates the purpose and goals of the federal law).

62. Wolfson, *supra* note 41, at 88.

63. *Id.*; see, e.g., *Fort Halifax Packing Co. v. Coyne*, 482 U.S. 1, 8-9 (1987) (stating that the preemption doctrine focuses on congressional intent); *Metropolitan Life Ins. Co. v. Massachusetts*, 471 U.S. 724, 738 (1985) (“In deciding whether a federal law preempts a state statute, our task is to ascertain Congress’s intent in enacting the federal statute at issue.”); *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 248 (1984) (pointing to congressional intent to occupy a given field, and state law conflicts with federal law, as two general ways to preempt state law).

64. See Wolfson, *supra* note 41, at 88 (quoting Professor Laurence Tribe as stating that as long as Congress acts within an area delegated to it, preemption cases are based solely on statutory construction and flow directly from a substantive source of congressional power coupled with the Supremacy Clause).

65. See Starr et al., *supra* note 36, at 5-8 (articulating the debate at the Constitutional Convention of 1787 between those favoring a Supremacy Clause granting large national government the power to “negative” state law and those representatives of smaller states seeking to protect state autonomy with a more restrictive version of the Supremacy Clause).

66. See *infra* notes 206-08 and accompanying text (explaining that the safeguards of the federal system are unable to function effectively within the context of administrative preemption).

67. See generally Rex E. Lee, *Federalism, Separation of Powers, and the Legacy of Garcia*, 1996 B.Y.U. L. REV. 329 (1996) (describing the division of governmental authority under the Constitution); Starr et al., *supra* note 36, at 43 (explaining that the Constitution is the most direct source of law that recognizes the continued importance of federalism values).

68. Wolfson, *supra* note 41, at 92.

regulation, such as matters of health, safety, morals, and welfare.⁶⁹ In *The Federalist*, some of the Framers suggested that state and federal authority would not likely conflict, but instead each would operate separate and distinct from one another.⁷⁰

In contrast to state power, while the reach of federal authority may only extend to those powers enumerated in the Constitution, federal authority has a preemptive effect on conflicting state laws.⁷¹ Throughout American history legislative instruments such as the Commerce,⁷² Taxing,⁷³ and Spending⁷⁴ Clauses have acted to expand federal power while decreasing the areas in which states can govern.⁷⁵ But, the Framers, in creating our federalist system, did not intend the federal government to have unbridled authority to usurp state autonomy.⁷⁶ These limitations are evidenced in the constitutional design of our national government that expressly provides that states are also vested with established powers.⁷⁷ The Constitution directly affirms the states as the source of its development; the states not only were the forum for the adoption of the Constitution, but remain integral today in deliberating over constitutional amendments and numerous aspects of influence in the political pro-

69. *Lee, supra* note 67, at 335.

70. *Wolfson, supra* note 41, at 92; *see THE FEDERALIST* No. 32, *supra* note 40, at 241 (A. Hamilton) (“[A]s the plan of the convention aims only at a partial union or consolidation, the State governments would clearly retain all the rights of sovereignty which they before had, and which were not, by that act, *exclusively* delegated to the United States.”); *id.* No. 41 at 293 (J. Madison) (“The Constitution proposed by the convention may be considered under two general points of view. The first relates to the sum or quantity of power which it vests in the government, including the restraints imposed on the States.”); *id.* No. 46 at 330 (J. Madison) (“The federal and state governments are in fact but different agents and trustees of the people, constituted with different powers, and designed for different purposes.”).

71. *Lee, supra* note 67, at 335.

72. *See, e.g., Wickard v. Filburn*, 317 U.S. 111, 113-15, 118-29 (1942) (upholding Congress’s power under the Commerce Clause to regulate the production of wheat that is never shipped from the grower’s farm); *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 30-32 (1937) (sustaining Congress’s power to regulate, through the National Labor Relations Act, labor relations that affect interstate commerce). *But see Printz v. United States*, 117 S. Ct. 2365, 2384 (1997) (limiting the scope of Congress’s Commerce Clause power by concluding that Congress cannot order state officials to conduct background checks pursuant to the Brody Act); *United States v. Lopez*, 115 S. Ct. 1624, 1629-30, 1634 (1995) (holding that the Gun-Free School Zone Act exceeded the scope of Congress’s Commerce Clause power because the possession of a firearm in or near a school does not “substantially affect” interstate commerce).

73. *See, e.g., United States v. Kahriger*, 345 U.S. 22 (1953) (holding that Congress has the authority under the Taxing Clause to implement a ten percent tax on gambling wagers and that all those persons engaged in wagering must report with the Internal Revenue Service); *Sonzinsky v. United States*, 300 U.S. 506 (1937) (holding that Congress has the power to implement a yearly license tax on dealers in firearms under the Taxing Power).

74. *See, e.g., South Dakota v. Dole*, 483 U.S. 203 (1987) (holding that Congress has the power to make federal highway funds to the states contingent on the states passing a minimum drinking age of twenty-one years as appropriate under the spending clause); *Steward Mach. Co. v. Davis*, 301 U.S. 548 (1937) (holding that provisions of the Social Security Act that pressured states to implement unemployment compensation were an appropriate exercise of the spending power).

75. *Lee, supra* note 67, at 336.

76. *See Starr et al., supra* note 36, at 43 (stating that the Constitution affirms the states as integral parts of the national system).

77. *Starr et al., supra* note 36, at 43.

cess.⁷⁸ In particular, the Tenth Amendment recognizes the importance of state government and federalism principles.⁷⁹ It directs that “[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.”⁸⁰ Other provisions dictate the importance of the states’ ability to control aspects of the country’s affairs: those limiting congressional power;⁸¹ limiting state participation in decidedly national regulation;⁸² and directing the way states affect the rights, duties, and livelihood of their citizens.⁸³

In order for preemption to serve the goals of federalism, “it should secure to both the federal government and the states the right to regulate in their proper fields of authority.”⁸⁴ Where both Congress and the states act legitimately, there are several aspects of federalism illustrating the importance of its place in our system of government.⁸⁵ States are able to control the fundamental liberties and rights of their citizens by exercising power over political factions and movements that might advocate an overreaching centralized government.⁸⁶ The states can also serve as a laboratory for novel social and economic innovations, while avoiding any risk to the rest of the country.⁸⁷ Perhaps most importantly, federalism provides citizens the opportunity to impact government on a local level, helping to make it more responsive to the immediate needs and evolving values of individual communities, and less susceptible to bureaucratic inertia and elitism that exists on the federal level.⁸⁸

78. See U.S. CONST. art. V (constitutional amendment); *id.* art. VII (ratification of amendments); *id.* art. I, § 2 (states’ regulation of elections); *id.* art. I, § 4 (dual regulation); see also *Oregon v. Mitchell*, 400 U.S. 112, 125-26 (1970) (“Amendments Fourteen, Fifteen, Nineteen and Twenty-Four, each . . . has assumed that the States had general supervisory power over state elections . . .”); Starr et al., *supra* note 36, at 43.

79. See U.S. CONST. amend. X.

80. *Id.*

81. See, e.g., U.S. CONST. art. I, §§ 8, 9 (limiting congressional authority by enumerating its powers); see also Starr et al., *supra* note 36, at 43.

82. See, e.g., U.S. CONST. art. I, § 10 (limiting the states’ power to engage in aspects of national regulation); see also Starr et al., *supra* note 36, at 43.

83. See, e.g., U.S. CONST. art. IV, § 1 (“Full Faith and Credit shall be given in each state to the public Acts . . . of every other State . . .”); *id.* art. IV, § 2 (“The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States.”); *id.* art. IV, § 4 (“The United States shall guarantee to every State in this Union a Republican Form of Government . . .”); see also Starr et al., *supra* note 36, at 43-44.

84. Wolfson, *supra* note 41, at 96.

85. See Wolfson, *supra* note 41, at 96 (explaining the importance of using the states as laboratories for regulatory innovation because such diversity allows for experimentation on a local level without risking harm to the nation as a whole).

86. See Starr et al., *supra* note 36, at 42-43 (directing that the continued vitality of state and local governments exercises a check over the national government by exerting organized public pressure over centripetal political forces).

87. See Starr et al., *supra* note 36, at 42-43 (quoting Justice Brandeis, who stated that one of the advantages of the federal system is the ability of the states to experiment on a local level) (quoting *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting)).

88. See Starr et al., *supra* note 36, at 42 (explaining that the ability of state and local governments to respond directly and amenably to citizens within its specific jurisdiction is an important advantage of the federal system).

In order to maintain the great advantages embodied in the federalist system, the national government must not intrude so far into local interests and the states' sphere of control as to usurp their powers.⁸⁹ But, equilibrium between these two factions can only be maintained if Congress engages in clear and explicit legislative deliberation, allowing the mechanisms inherent in our representational system to strike a balance between national uniformity and state autonomy.⁹⁰

The Court renounced any significant role in policing federalism with its decision in *Garcia v. San Antonio Metropolitan Transit Authority*.⁹¹ In *Garcia*, the Court considered the extent to which the San Antonio Metropolitan Transit Authority could be subjected to the minimum wage and overtime provisions of the Fair Labor Standards Act.⁹² The Supreme Court overruled *National League of Cities v. Usery*,⁹³ thus abandoning the four part test articulated in that case for determining when federal legislation under the commerce power exceeds the independent limitations imposed by the Tenth Amendment.⁹⁴ Instead, the Court concluded that state sovereign interests are protected from Congress's power to regulate under the Commerce Clause by "procedural safeguards inherent in the structure of the federal government," not by "judicially created limitations on federal powers."⁹⁵ *Garcia* reaffirmed the belief that the Framers specifically designed our federal government in part to protect the states from overreaching by Congress.⁹⁶ The Court recognized that the true, fundamental limitations inherent in all congressional action are the built-in restraints provided by our system through state participation in federal government action, not by judicial intervention.⁹⁷ The political process is the device ensuring that laws excessively impairing the autonomy of the states, or the rights of the citizens of those states, will not be promulgated, and if enacted, will be repealed.⁹⁸

Thus, limits still do exist on all congressional action. As *Garcia* emphasized, it is the vital importance of the states' representation in Congress, the procedural safeguards, that function through each state's constituency to restrain the ability of the

89. Thomas H. Odom, *The Tenth Amendment After Garcia: Process-Based Procedural Protections*, 135 U. PA. L. REV. 1657, 1670-71 (1987).

90. See *infra* notes 195-98 and accompanying text (explaining that the constituency must be able to locate a politically accountable decision-maker in order to prevent the federal government from overreaching into state authority).

91. 469 U.S. 528 (1985).

92. *Id.* at 533.

93. 426 U.S. 833 (1976).

94. *Garcia*, 469 U.S. at 531, 546-47.

95. *Id.* at 552.

96. *Id.* at 550-51.

97. *Id.* at 556.

98. *Id.*

federal government to reach beyond its enumerated powers.⁹⁹ According to the Supreme Court, the political process warrants that unduly burdensome laws will be corrected by electing representatives responsive to the needs of their own constituents.¹⁰⁰ Through this system, the states retain a voice in our federalist system, by holding accountable duly elected decision-makers.

The theory set forth in *Garcia* simply reiterated a basic tenet established by the Founders. In correspondence leading up to the Constitutional Convention of 1787, George Washington clearly expressed the necessary role of the American people, and the states, in maintaining an equal balance in our federal system.¹⁰¹ In a letter to Bushrod Washington, his nephew and future Supreme Court Justice, George Washington wrote:

The power under the Constitution will always be in the People. It is entrusted for certain defined purposes, and for a certain limited period, to representatives of their own choosing; and whenever it is executed contrary to their Interest, or not agreeable to their wishes, then Servants can, and undoubtedly will be, recalled.¹⁰²

These ideas, reestablished in *Garcia*, are just as important to the proper functioning of today's government as they were to the Framers in fashioning the Constitution.

Because of the constitutional nature of preemption, the firmly rooted principle of balancing state and federal interests through the political processes is particularly applicable in that area.¹⁰³ Therefore when Congress acts directly in the field of preemption, it must do so in clear and direct language as to its intentions to preempt that particular field.¹⁰⁴ Using a distinctly recognizable legislative purpose insures that the implicit protections built into the federal system can adequately respond to those responsible for unpopular lawmaking.¹⁰⁵ But in an era of expanded governmental authority, where congressional delegations place lawmaking and preemptive power in other, less responsible hands, the clear and direct voice of Congress becomes

99. See *id.* at 551-52 (noting that the composition of the federal government was designed to protect the states from overreaching by Congress through the states' role in the selection of both the Executive and the Legislative branches).

100. *Id.*

101. THE ORIGINS OF THE AMERICAN CONSTITUTION 81-84 (Michael Kammen ed., 1986) (correspondence of George Washington to Bushrod Washington, Nov. 10, 1787).

102. *Id.* at 83.

103. See Wolfson, *supra* note 41, at 96-102 (describing the interrelationship between the preemption doctrine and federalism); see also LAURENCE TRIBE, AMERICAN CONSTITUTIONAL LAW § 6-25, at 480 (2d ed. 1988) (pointing out that state sovereignty is protected by the procedural safeguards implicit in the federal system).

104. See Starr et al., *supra* note 36, at 50 (expressing Professor Tribe's view that a clear statement of Congress's intent to displace state law is necessary to ensure that the political safeguards work).

105. *Id.*

muffled, and the states are no longer afforded the distinct protections against preemption that are implicit in the federalist structure.¹⁰⁶

The importance of federalism restraints within the context of administrative preemption are further highlighted by the questionable support for broad congressional transfers of power that frequently vest preemptive authority in administrative agencies. Both commentators and legislators have voiced concern in this area and advocate a resurgence of scrutiny over delegations by the legislative branch to administrative agencies.¹⁰⁷

IV. LIMITS ON BROAD CONGRESSIONAL DELEGATIONS OF POWER TO ADMINISTRATIVE AGENCIES

A. *The Framers Intended Article I to Limit Congressional Delegations*

Congressional ability to delegate powers to agencies is limited both by the Constitution and by inherent democratic principles.¹⁰⁸ Allowing administrative agencies to become lawmakers through rule-making and independent interpretations of congressional statutes weakens the governmental structure of “checks and balances.”¹⁰⁹ Administrative agency staffers are unelected and are not politically accountable; therefore, they should not be given unrestrained freedom to formulate policy and law.¹¹⁰ In addition, the process of approving grants of broad rule-making

106. See Wolfson, *supra* note 41, at 110 (explaining the need for a similar set of safeguards on the administrative process as are available when Congress legislates).

107. See, e.g., DAVID SCHOENBROD, *POWER WITHOUT RESPONSIBILITY: HOW CONGRESS ABUSES THE PEOPLE THROUGH DELEGATION passim* (1993) (exploring the real-world causes and consequences of congressional delegation of lawmaking power to administrative agencies); Nick Smith (R.-Mich.), *Restoration of Congressional Authority and Responsibility Over the Regulatory Process*, 33 HARV. J. ON LEGIS. 323 (1996) (illustrating that administrative agency staffers, to whom enormous lawmaking power is delegated by Congress, are not politically accountable to the American People who are affected by these regulations).

108. See Aranson et al., *A Theory on Legislative Delegation*, 68 CORNELL L. REV. 1, 2-5 (1982) (stating that separation of powers principles and John Locke’s Contractarian view of government limited Congress’s authority to delegate away its legislative powers); Gary Lawson, *Changing Images of the State: The Rise and Rise of the Administrative State*, 107 HARV. L. REV. 1231, 1233 (1994) (explaining that congressional delegations contravene the constitutional principles of limited powers); see also U.S. CONST. art. I, § 1 (expounding that “[a]ll legislative Powers herein granted shall be vested in [] Congress”).

109. See Odom, *supra* note 89, at 1675-76 (proposing that, in order to increase national government accountability for intrusion into areas of state interest, and to impose checks on the congressional practice of delegating authority to administrative agencies, decisions on whether to usurp state autonomy should be made by a “political” branch of government).

110. See, e.g., Christopher T. Handman, Note, *The Doctrine of Political Accountability and Supreme Court Jurisdiction: Applying a New External Constraint to Congress’s Exceptions Clause Power*, 106 YALE L.J. 197, 200 (1996) (stating that Congress’s increased delegations to administrative agencies and its own diminished accountability has led many courts and commentators to conclude that unaccountable legislation is unconstitutional legislation); Smith, *supra* note 107, at 327 (pointing out that delegation subverts our representational system of government because, although the people confer legitimate lawmaking power on Congress through elections, they do not extend this power to unelected bureaucrats); Wolfson, *supra* note 41, at 110 (explaining that because agency officials lack the political sensibilities of members of Congress, they do not have the “appropriate instinct to

authority enables Congress to detach itself from unpopular decisions and avoid its own constitutionally mandated accountability.¹¹¹

Congress stretches the boundaries of its constitutional duty to make the law when it delegates to agencies. The constitutional foundation of this country embodies the original contract between the American people and the government, which specifically granted lawmaking power to Congress.¹¹² The Constitution provides for a system of separation of powers, spelling out the role of the legislative, executive, and judiciary.¹¹³ In particular, Article I ordains that “[a]ll legislative Powers herein granted shall be vested in a Congress.”¹¹⁴ This specific provision has always been read by the Supreme Court as implicitly providing some limits to the delegation of Congress’s lawmaking authority.¹¹⁵ This limitation principle makes Congress adhere to its role as the governmental body that attempts to provide the most effective and efficient representation of the American people.¹¹⁶ Failure to follow this constitutionally grounded principle encourages arbitrary policy decisions, and results in congressional delegations of lawmaking power to agencies through broad and often ambiguous statutes.¹¹⁷ Once an agency without significant political accountability for its decisions has been given broad authority through a congressional delegation, that agency can implement its own policy choices free from significant incentives “to abide by the People’s mandate which is to provide reasonable decisions that are in the nation’s best interests.”¹¹⁸

When the Framers developed our republican form of government, they were influenced by the wisdom of political theorists. Perhaps the most influential force behind the formation of our republican form of government was John Locke, who articulated one of the important boundaries of legislative authority to be that:

accommodate state interests”).

111. *Testimony of Jerry Taylor to the Subcomm. on Commercial and Administrative Law Committee on the Judiciary* 16 (Sept. 12, 1996) [hereinafter *Testimony of Jerry Taylor*]; see also Peter Marra, Comment, *Have Administrative Agencies Abandoned Reasonability?*, 6 SETON HALL CONST. L.J. 763, 785 (1996) (arguing that delegation of lawmaking power to administrative agencies enables Congress to take credit for addressing popular issues while detaching itself from unpopular issues).

112. See Aranson et al., *supra* note 108, at 4-5 (explaining the Contractarian view that law derives its legitimacy from the consent of the governed); see also Marra, *supra* note 111, at 787-88 (describing the contract between the American people and the government, in which the people gave up absolute control over their own affairs in exchange for a limited government composed of elected representatives).

113. Aranson et al., *supra* note 108, at 779.

114. U.S. CONST. art. I, § 1.

115. See *J.W. Hampton, Jr., & Co. v. United States*, 276 U.S. 394, 409 (1928) (stating that the applicable test constraining the national legislature’s authority to delegate congressional power to others was whether Congress has laid “down by legislative act an intelligible principle to which the person or body authorized to fix such rates is directed to conform”).

116. See SCHOENBROD, *supra* note 107, at 99-106 (discussing that Congress, and to a lesser extent the President, provide accountability to the American people); see also Marra, *supra* note 111, at 786-88 (arguing that members of Congress, as elected representatives of the People, are more responsive than governmental bodies insulated from accountability to our Nation’s constituency).

117. See SCHOENBROD, *supra* note 107, at 786-87.

118. See SCHOENBROD, *supra* note 107, at 789.

The Legislative cannot transfer the Power of Making Laws to any other hands. For it being but a delegated Power from the People, they who have it, cannot pass it over to others¹¹⁹

Following these ideals, the Framers developed a government by which the American people exchanged absolute control over their own affairs, in return for a government composed of elected representatives.¹²⁰ Through this system, the people maintained power to control the law and lawmakers who governed them by duly electing the officials.¹²¹ Broad delegations to administrative agencies frustrate this carefully designed system because the lawmaking power is no longer vested in elected officials.¹²² Therefore, this type of delegation is weakly rooted in our democratic scheme that promised congressional constituents influence over the laws and lawmakers.¹²³

The American people, through the Framers, have by means of Article I placed the power to legislate solely in the hands of Congress. Congress must act carefully so as not to upset the governmental balance between the branches by removing the necessary checks on this authority. Keeping this objective in mind, excessive delegation of power to agencies by Congress is only weakly grounded in the constitutional scheme, if justified at all. Such excessive delegation not only violates the ideas of separation of powers,¹²⁴ but also breaches the contract with the American people by allowing unaccountable administrative agency staffers to create policy.¹²⁵ When Congress gives away lawmaking power, it defaults on the bargained for exchange upon which the Framers justified Congress's claim of authority over the laws that govern the citizenry; that right was expressly conditioned upon an elected body of decision-makers.¹²⁶ Thus, depending on the nature of the delegation,

119. JOHN LOCKE, *THE SECOND TREATISE ON GOVERNMENT* 79 (Prometheus Books, 1986); *see also* SCHOENBROD, *supra* note 107, at 155-56 (expressing John Locke's view that all legislative power should be vested in Congress alone and that this was probably the intent of the Framers as well).

120. *See* Marra, *supra* note 111, at 787 (stating that the Framers developed our republican form of government with the idea that the American People would relinquish complete control over their own lives to the government, in exchange for the power to elect lawmakers and thus retain some influence over the lawmaking process); *see also* Ernest Gellhorn, *Returning to First Principles*, 36 AM. U. L. REV. 345, 347-48 (1985) (discussing the theoretical basis for the view that legislators are accountable for their decisions).

121. *See* SCHOENBROD, *supra* note 107, at 99 (illustrating that, by refusing to reelect a legislator who has voted for unfavorable laws, the constituents exercise control over the lawmaking process).

122. *See* Smith, *supra* note 107, at 323, 325-26 (explaining that agency officials, consisting of unelected civil servants and political appointees, are seldom personally affected by their own rule-making or accountable to those affected).

123. *See* Handman, *supra* note 110, at 214 (stating that when policy does not emanate from a politically accountable body such as Congress, the legislative product is not only corrupt, but also unconstitutional because the lawmaking is not predicated on popular support).

124. *See supra* notes 113-16 and accompanying text (discussing the constitutional limits on lawmaking power).

125. *See supra* note 112 and accompanying text (describing the original contract between the American people and the government).

126. *See* Aranson et al., *supra* note 108, at 4-5.

Congress can stretch the limits of its constitutionally mandated duty to make the law. However, the real danger of unconstitutional congressional action emerges when Congress delegates the power to preempt state laws to administrative agencies.¹²⁷ In that context, not only is Article I extended to the limits of the Constitution, but the procedural safeguards of federalism that inherently maintain the federal-state balance of power become unworkable absent the People's ability to locate politically accountable decision-makers responsible for preemptive legislation.¹²⁸

B. The Treatment of the Nondelegation Doctrine in the Courts

1. Early Judicial Interpretation of the Doctrine

Early decisions by the Supreme Court reflect an interpretation of Article I and the nondelegation doctrine to bar giving others the power to make the law.¹²⁹ In *Field v. Clark*,¹³⁰ the Court upheld the Tariff Act of 1890, which placed a tariff on imported goods if the country sending the goods imposed a tariff on American goods that was viewed as "reciprocally unequal and unreasonable."¹³¹ Although under the Tariff Act the decision was left to the President to determine whether the other nation's goods were reciprocally unequal, this finding was allowed only because the President's authority was classified as purely nonlegislative.¹³² The Court permitted the delegation on the grounds that the President's authority was solely a fact-finding power and not a lawmaking power.¹³³

The opinion of the Court, written by the first Justice Harlan, illustrated the idea that only non-legislative grants of authority were permissible under the Constitution:

That Congress cannot delegate legislative power to the President is a principle universally recognized as vital to the integrity and maintenance of the system of government ordained by the Constitution.¹³⁴

Although recognizing the importance of keeping structural integrity, *Field* at the same time recognized that practical government involves some delegation as a necessity to preserving the functioning role of a constantly growing, and increasingly

127. See *infra* notes 206-08 and accompanying text (explaining that delegation of preemptive authority to administrative agencies is a dangerous proposition because this type of delegation undermines federalism restraints on federal government power).

128. See *infra* notes 206-08 and accompanying text (discussing the inability of the political process to function effectively within the context of administrative preemption).

129. SCHOENBROD, *supra* note 107, at 3.

130. 143 U.S. 649 (1892).

131. *Id.* at 692.

132. *Id.* at 693.

133. *Id.*

134. *Id.* at 692.

complex, system of legislation.¹³⁵ However, acquiescence to administrative agency decisions should not be founded merely on the basis of technical competence and efficiency.¹³⁶ In order to preserve the structural integrity of the Constitution, which establishes a government based on separation of powers and popular representation, delegation must be confined within our constitutional structure, by placing the power to make laws in the hands of the elected members of Congress.¹³⁷

The Supreme Court first explicitly applied limits on congressional delegations in *J.W. Hampton, Jr., & Co. v. United States*.¹³⁸ In *J.W. Hampton, Jr.*, the Court upheld as constitutional the flexible provisions of the Tariff Act of 1922, which gave the President discretion not only when to apply the tariff on imports, but to set the tariff rate as well.¹³⁹ However, the Court expressed its view that such delegations were intended to be limited, specifically stating that delegation is only permissible “[i]f Congress shall lay down by legislative act an intelligible principle to which the person or body authorized to fix such rates is directed to conform.”¹⁴⁰

Under the “intelligible principle” standard, the Court sought to ensure that Congress would give adequate guidance to the behavior of the delegate.¹⁴¹ Thus, the legislature would be sure to retain control over policy decisions, the power of “making the law.”¹⁴² The Court impressed this model on delegation to counter the fear that, absent congressional direction, agency staffers would use their own discretion when deciding issues that directly affect the livelihood of the American people.¹⁴³ In essence, the administrative rule-maker would function as a legislator, constituting an unconstitutional exercise of Article I power by a body restricted to the interpretation and execution of the law.¹⁴⁴

135. Lisa Cahill & J. Russell Jackson, Note, *Nondelegation After Mistretta: Phoenix or Phaethon?*, 31 WM. & MARY L. REV. 1047, 1054 (1990) (“Justice Harlan acknowledged that ‘[t]here are many things upon which wise and useful legislation must depend which cannot be known to the law-making power, and, must, therefore, be a subject of inquiry and determination outside the halls of legislation.’”) (quoting *Field v. Clark*, 143 U.S. 649, 694 (1892)).

136. See Wolfson, *supra* note 41, at 110 (observing that although administrative agencies promote uniformity and efficiency, these are only a few aspects of the delegation process).

137. See Wolfson, *supra* note 41, at 110 (stating that the states rely on political and procedural safeguards to retain an equal balance between federal and state interest in the administrative process).

138. 276 U.S. 394 (1928).

139. *J.W. Hampton, Jr., & Co.*, 276 U.S. at 401.

140. *Id.* at 409.

141. Cahill & Jackson, *supra* note 135, at 1056.

142. Cahill & Jackson, *supra* note 135, at 1056.

143. *United States v. Robel*, 389 U.S. 258, 276 (1967). The Court in *Robel* noted that “[f]ormulation of policy is a legislature’s primary responsibility, entrusted to it by the electorate, and to the extent Congress delegates authority under indefinite standards, this policy-making function is passed on to agencies, often not answerable or responsive in the same degree to the people.” *Id.*; see Cahill & Jackson, *supra* note 135, at 1056 (explaining that under the “intelligible principle” standard set forth in *J.W. Hampton, Jr., & Co.*, the judiciary ensured that the legislature would retain the power to make the law, and delegates would not be able to implement their own policy choices).

144. Cahill & Jackson, *supra* note 135, at 1056.

Soon after the decision in *J.W. Hampton, Jr.*, in which the “intelligible principle” standard was articulated, the Court faced the question of how broadly its rationale could be construed. Without warning, the Court brought the nondelegation doctrine to life, turning it against congressional efforts to implement the New Deal.¹⁴⁵ In particular, the doctrine was initially aimed at the National Industrial Recovery Act (NIRA) enacted by Congress in 1933,¹⁴⁶ which, under the authority of hasty legislation, gave the President almost total control of the nation’s economy.¹⁴⁷

In *Panama Refining Company v. Ryan*,¹⁴⁸ the Court considered section 9(c) of the NIRA, which authorized the President to prohibit the interstate transportation of petroleum products that were either produced or withdrawn from storage contrary to state law.¹⁴⁹ Writing the opinion for the Court, Chief Justice Hughes found section 9(c) to be an unlawful delegation of congressional power because it failed to articulate legislative criteria to guide the President when deciding whether to invoke the statutorily authorized prohibitions.¹⁵⁰

Soon after the decision in *Panama Refining*, the Court again used the non-delegation doctrine to invalidate more New Deal legislation. In *A.L.A. Schechter Poultry Corp. v. United States*,¹⁵¹ the Court reviewed the NIRA’s provisions allowing trade unions to create their own codes of fair competition.¹⁵² Once again, Chief Justice Hughes, writing the opinion of the Court, invalidated the delegation.¹⁵³ But perhaps Justice Cardozo, who had dissented in *Panama Refining* but now concurred in the judgment in *Schechter*, best articulated the importance of this decision:

The delegated power of legislation which has found expression in this code is not canalized within banks that keep it from overflowing. It is unconfined and vagrant Here . . . is an attempted delegation not confined to any single act nor to any class or group of acts identified or described by reference to a standard. Here in effect is a roving commission to inquire into evils and upon discovery correct them.¹⁵⁴

145. Aranson et al., *supra* note 108, at 8.

146. National Industrial Recovery Act, ch. 90, 48 Stat. 195 (1933) (codified at 15 U.S.C.A. §§ 701, 702 (1935)).

147. Aranson et al., *supra* note 108, at 8.

148. 293 U.S. 388 (1935).

149. *Id.* at 406.

150. *Id.* at 433.

151. 295 U.S. 495 (1935).

152. *Id.* at 521-27.

153. *Id.* at 551.

154. *A.L.A. Schechter Poultry Corp.*, 295 U.S. at 551 (Cardozo, J., concurring).

Justice Cardozo addressed the fear that administrative agencies, which are supposed to enforce the laws made by Congress, would instead become the lawmakers if they were given unrestrained power through overly broad delegations.¹⁵⁵

Soon after the decisions in *Schechter* and *Panama Refining*, however, the Supreme Court changed direction, upholding delegation of powers to administrative agencies.¹⁵⁶ Thereafter, the nondelegation doctrine all but disappeared as a constraint on the delegation of authority to administrative agencies for the next thirty to forty years.¹⁵⁷ Routinely, courts began to validate expansive delegations without hesitation.¹⁵⁸ Congress encountered no limits on its ability to delegate lawmaking power as long as the legislation was guided by goals the delegate should seek to attain.¹⁵⁹ The Court upheld broad delegations in traditionally regulated fields, postulating the rationale that delegated agencies were adequately guided by experience and prior rulings.¹⁶⁰ In justifying these broad post-*Schechter* and *Panama Refining* delegations, the Court has stated that delegation, in those circumstances, was consistent with the constitutional goals of both democracy and liberty.¹⁶¹ But as delegation has become even more prominent in our system of a large centralized government, this unquestioned tool for efficiency and uniformity has again begun to find skeptics.¹⁶²

155. *Id.* at 551-55 (Cardozo, J., concurring).

156. Cahill & Jackson, *supra* note 135, at 1057-58.

157. Cahill & Jackson, *supra* note 135, at 1057-58; see SCHOENBROD, *supra* note 107, at 41 (stating that the postwar Congresses were not limited by the judiciary in their ability to delegate lawmaking to federal officials as long as the statutes reflected "something about the goals that the agency laws should seek to attain").

158. See, e.g., *Lichter v. United States*, 334 U.S. 742, 785-86 (1948) (providing for the recovery of "excessive profits" earned from war contracts); *Yakus v. United States*, 321 U.S. 414, 420-21 (1944) (authorizing the President to appoint a price administrator to set the maximum prices during times of war "in the interest of the national defense and security"); *Federal Power Comm'n v. Hope Natural Gas Co.*, 320 U.S. 591, 600 (1944) (authorizing the Federal Power Commission to set "just and reasonable" rates on natural gas); *National Broadcasting Co. v. United States*, 319 U.S. 190, 225-27 (1943) (licensing of radio communications systems "as public convenience, interest, or necessity requires"); *United States v. Rock Royal Co-op*, 307 U.S. 533, 545 n.4 (1939) (sustaining delegations under the Agricultural Marketing Agreement Act which permitted the Secretary of Agriculture to set prices for agricultural products); *New York Cent. Secs. Corp. v. United States*, 287 U.S. 12, 24 (1932) (permitting the consolidation of carriers when "in the public interest"). For an extensive supplementary list of judicial ratifications of broad delegations, see Synar v. United States, 626 F. Supp. 1374, 1383 n.9 (D.D.C. 1996), *aff'd sub nom.* *Bowsher v. Synar*, 478 U.S. 714 (1986).

159. SCHOENBROD, *supra* note 107, at 41.

160. SCHOENBROD, *supra* note 107, at 41; see, e.g., *United States v. Southwestern Cable Co.*, 392 U.S. 157, 172-73 (1968) (holding that the Federal Communications Commission (FCC) had authority to regulate cable television even though that technology did not exist at the time the FCC's enabling legislation was enacted); *Fahey v. Mallonee*, 332 U.S. 245, 250 (1947) (holding that the statute authorizing the Federal Home Loan Bank Board to regulate reorganization, consolidation, merger, or liquidation of building and loan associations with power to appoint conservator or receiver, is not an unconstitutional delegation of legislative functions, since it involves mere regulation in a well-established field).

161. See *Yakus v. United States*, 321 U.S. 414, 429-31 (1944) (sustaining a wartime measure that gave the Office of Price Administration extensive powers to fix commodity prices); see also *Amalgamated Meat Cutters v. Connally*, 337 F. Supp. 737, 758 (D.D.C. 1971) (three judge panel) (upholding the 1970 Economic Stabilization Act's broad grant of discretion to the President to limit wage and prices increases).

162. See, e.g., SCHOENBROD, *supra* note 107 *passim* (discussing the problems with congressional delegations to administrative agencies).

2. Continued Vitality of the Nondelegation Doctrine in Judicial Decisions

Distrust of delegation has once again emerged in the last thirty years because of the growing sentiment that independent agencies and the executive branch were no longer merely implementing the law but making it.¹⁶³ Professor Richard Stewart stated in reference to a "period of renewed respectability" for the nondelegation doctrine in the 1960's that:

It is no accident that the revival of interest in the delegation doctrine in recent years has coincided with a sweeping expansion of centralized federal command and control regulation. We have become addicted to federal rules and orders that attempt to minutely prescribe conduct throughout our complexly differentiated society. This addiction has created severe decisionmaking and political overload at the center. In turn, overload has resulted in a massive transfer of decisional power to federal administrative bureaucracies, provoking calls for vigorous enforcement by the courts of the delegation doctrine in order to restore "juridical democracy."¹⁶⁴

These ideas are implicated in post *Schechter* and *Panama Refining* decisions. Although the Court has not specifically relied upon the nondelegation doctrine as the foundation for a decision, it has also refused to repudiate it.¹⁶⁵ In a number of opinions of the Court, and in the separate opinions of individual justices, the nondelegation principle has received favorable mention.¹⁶⁶ In *Kent v. Dulles*,¹⁶⁷ for instance, the Court referred to the doctrine in an effort to support a narrow statutory construction of a seemingly broad congressional statute.¹⁶⁸ Specifically, the Court interpreted a regulation permitting the Secretary of State to refuse to issue a passport because of an applicant's membership in the Communist party as not authorized by statute.¹⁶⁹ Writing for the majority, Justice Douglas explained his narrow interpretation of the statute by reasoning that if he had read it any broader the text of the statute might be considered to be an overly broad, and thus invalid, delegation.¹⁷⁰

163. SCHOENBROD, *supra* note 107, at 42.

164. Richard Stewart, *Beyond Delegation Doctrine*, 36 AM. U. L. REV. 323, 329 (1987).

165. Aranson et al., *supra* note 108, at 12.

166. *See, e.g.*, *American Textile Mfrs. Inst. v. Donovan*, 452 U.S. 490, 548 (1981) (Rehnquist, J., joined by Burger, C.J., dissenting) (arguing that the rule-making power conferred upon the OSHA to promulgate workplace safety and health standards for limiting workers' exposure to cotton dust was unconstitutionally broad); *Industrial Union Dep't v. American Petroleum Inst.*, 448 U.S. 607, 687 (1980) (Rehnquist, J., concurring) (arguing that section 6(b)(5) of the Occupational Safety and Health Act constituted an invalid delegation to the Secretary of Labor).

167. 357 U.S. 116 (1958).

168. *Id.* at 129.

169. *Id.* at 129-30.

170. *Id.* at 129; *see* Aranson et al., *supra* note 108, at 12.

Individual justices have also signaled the continuing validity of the doctrine in concurring and dissenting opinions that refer to nondelegation.¹⁷¹ Then Justice Rehnquist's concurrence in *Industrial Union Department v. American Petroleum Institute*¹⁷² illustrates this point. That case involved a challenge to the Occupational Safety and Health Act's (OSHA) new health standard, which limited occupational exposure to airborne concentrations of benzene.¹⁷³ Justice Rehnquist, in his concurrence, argued that section 6(b)(5) of the OSHA constituted a broad, invalid delegation to the Secretary of Labor.¹⁷⁴ He attributed the confusion in interpreting the statute's legislative history, and the widely disparate views of the other justices and the litigants, as an indication that Congress had not done its job, but had instead impermissibly delegated its legislative authority to the executive branch.¹⁷⁵ Justice Rehnquist summed up his point when he complained that the "governmental body best suited and most obligated to make the choice confronting us in this litigation, . . . has improperly delegated that choice to the Secretary of Labor and, derivatively, to this Court."¹⁷⁶

Similarly, in his dissent in *American Textile Manufacturers Institute v. Donovan*,¹⁷⁷ Justice Rehnquist articulated the same nondelegation argument. In that case, the Occupational Safety and Health Act of 1970 required OSHA to conduct a cost-benefit analysis in promulgating workplace safety standards for limiting workers' exposure to cotton dust.¹⁷⁸ Justice Rehnquist, joined in the dissent by then Chief Justice Burger, reiterated his conviction that the nondelegation doctrine mandated that the Court find the statute unconstitutionally broad.¹⁷⁹

These are just a few illustrations of the recognition of the nondelegation doctrine in recent judicial decisions. Each of these individual opinions, along with *Panama Refining* and *Schechter*, represent the continuing view that, when Congress delegates overly broad authority to administrative agencies, it has exercised powers that have a weak foundation in the constitutional design.

171. See, e.g., *American Textile Mfrs. Inst.*, 452 U.S. at 548 (Rehnquist, J., joined by Burger, C.J., dissenting); *Industrial Union Dep't*, 448 U.S. at 687 (Rehnquist, J., concurring).

172. 448 U.S. 607 (1980) (Rehnquist, J., concurring).

173. *Id.* at 607.

174. *Id.* at 675 (Rehnquist, J., concurring).

175. *Id.* (Rehnquist, J., concurring).

176. *Id.* at 672 (Rehnquist, J., concurring).

177. 452 U.S. 490 (1981).

178. *Donovan*, 452 U.S. at 493-95.

179. *Donovan*, 452 U.S. at 548 (Rehnquist, J., and Burger, C.J., dissenting).

C. Broad Delegations of Power by Congress Subvert the Constitutional Principles of Separation of Powers and Proper Congressional Authority

As discussed in Part IV.A above, the doctrine of nondelegation derives its support from both the text and history of the Constitution.¹⁸⁰ Both the Framers, and the political theorists who influenced the ideals the Founders embodied in the Constitution, expounded principles of separation of powers and a binding contract between the American people that does not allow Congress to delegate broad powers to unaccountable bureaucrats.¹⁸¹ In order for representative government to function properly, the constituency must retain its influence over the laws that govern it.¹⁸²

This principle that overly broad delegations are not firmly rooted in the Constitution was represented in Court decisions invalidating New Deal legislation.¹⁸³ In addition, the idea of nondelegation has retained potential validity through the opinions of individual justices in recent cases.¹⁸⁴ Although the doctrine's foundation in both our history and jurisprudence is not absolutely rooted to the text of the Constitution or Supreme Court precedent, it appears undeniable that when Congress combines statutory ambiguity with delegations to administrative agencies, the constitutionality of Congress's power is not at its strongest point.¹⁸⁵ Further, when Congress is not expressly empowered to act by the Constitution, as in the case of delegating legislative powers, its actions should be closely scrutinized in order to preserve the principles inherent in the Constitution and protect individual liberties.¹⁸⁶

In the area of preemption, Congress's decisions should be closely monitored to prevent the subversion of federalism restraints and infringement into the states' sphere of control. And when both the concept of delegation and preemption are implemented simultaneously through administrative preemption, both federalism and Article I concerns are in danger of being overlooked. This type of challenge to our constitutional structure necessitates that the utmost precaution must be exercised in congressional delegations of power to agencies and their staffers, because unelected bureaucrats often interpret this authority to give them the ability to displace state laws.

180. See discussion *supra* Part IV.A.

181. Aranson et al., *supra* note 108, at 2-5.

182. SCHOENBROD, *supra* note 107, at 99.

183. See *supra* notes 145-55 and accompanying text.

184. See *supra* notes 166-79 and accompanying text.

185. See SCHOENBROD, *supra* note 107, at 99-164 (discussing constitutional prohibitions and the weakening of democracy that is effectuated by delegation).

186. See SCHOENBROD, *supra* note 107, at 155-64 (emphasizing the unconstitutionality of delegating Article I powers).

V. FEDERALISM RESTRAINTS ON ADMINISTRATIVE PREEMPTION

Preemption is a carefully balanced constitutional device epitomizing the need for political checks to avoid congressional overreaching. Congress has not been endowed with unlimited power to preempt state law.¹⁸⁷ In fact, because Congress rarely intrudes upon the sensitive balance between federal and state authority as much in favor of the federal government as it does when it preempts state law, this constitutional domain, in particular, must have restraints.¹⁸⁸ As federal power grows, state autonomy shrinks. In order to give meaning to the intent of the Framers of our federal government and thus, the People themselves, there must be some constraints on the power to preempt or delegate preemptive power.¹⁸⁹ Judicial limits on preemption were voiced by the Supreme Court in *Rice v. Santa Fe Elevator Corp.*¹⁹⁰ This decision announced a presumption against congressional preemption.¹⁹¹ Specifically, *Rice* presumes that Congress does not intend to preempt areas of traditional state concern, such as public health and safety, without clear congressional intent to do so.¹⁹² Therefore, because of this presumption, Congress is required to think hard and speak clearly before displacing state law.¹⁹³ By articulating this preliminary statutory construction, the Court protects the states' autonomy by enforcing limits on how Congress can preempt, and reflects the judicial attempts to restore balance in our federalist system.¹⁹⁴

In addition to judicial limits on the extent of Congress's power to preempt state law, some commentators, building on *Garcia's* principles, have expounded the concept that the practical boundaries confining the usurpation of state authority exist within the enforcement of the political process.¹⁹⁵ This theory dictates that relying on the states' voices in our federal system, and representative democracy, will constrain Congress from overreaching the bounds the Framers intended by the Commerce Clause and the Supremacy Clause.¹⁹⁶ At the core of this type of protection is the touchstone that constituents are capable of locating the root of political accountability

187. See *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947) (dictating the presumption that a federal statute will not preempt well-established areas of state law unless Congress explicitly conveys an intent to do so).

188. Mcgreal, *supra* note 58, at 823-24.

189. Mcgreal, *supra* note 58, at 823.

190. *Rice*, 331 U.S. at 230.

191. *Id.*

192. *Id.*; see Mcgreal, *supra* note 58, at 824.

193. See Mcgreal, *supra* note 58, at 826 (stating that the *Rice* presumption against preemption requires a court to reject preemption without the presence of clear congressional intent to displace state law).

194. *Id.* at 824.

195. See, e.g., Wolfson, *supra* note 41, at 110 (explaining that, when both Congress legislates and administrative agencies regulate, the states rely on procedural safeguards to protect their interests).

196. See Starr et al., *supra* note 36, at 48 (stating that states' regulatory powers are protected from excessive intrusion by the federal government because members of Congress are drawn from the states and responsive to the concerns of their constituents).

within the federal-state balance of power.¹⁹⁷ Then, by disfavoring state representatives responsible for the disproportionate or overly intrusive legislation, states exercise control over their own laws and liberties.¹⁹⁸

Congress often entrusts a federal agency with the administration of a wide variety of federal statutes, and administrative preemption in that context "is predicated solely upon the agency's express statement that it intends (by federal regulation) to displace state law."¹⁹⁹ An illustrative example of this process appeared in *City of New York v. Federal Communications Commission*,²⁰⁰ in which the Court held that the FCC's technical standards for cable systems superseded the stricter local standards as to the quality of cable television signals.²⁰¹ The Court limited its judicial inquiry, stating that federal regulations, if consistent with the federal statute, will act to preempt state law.²⁰² The opinion further explained that the federal agency has broad discretion in this context and that "a narrow focus on Congress's intent to supersede state law [is] misdirected," for "[a] preemptive regulation's force does not depend on express Congressional authorization to displace state law."²⁰³ In other words, once Congress delegates authority to a federal agency to regulate through a broad statute, difficult policy determinations including preemption of state law are within that agency's discretion.²⁰⁴

This broad power of administrative preemption allows federal agencies to make political decisions affecting the federal-state balance of power implicit in preemption. Therefore, at a minimum, the same limits that apply to congressional preemption should apply to preemption by federal agencies because both affect individual liberties in the same way.²⁰⁵

However, when Congress delegates authority to an administrative agency and its government officials thereafter preempt state law, political accountability fails to

197. See Wolfson, *supra* note 41, at 112 (explaining that, in order to simultaneously protect both the political safeguards of federalism and give congressional action deference, Congress must be clear whenever it preempts state laws outside those areas the Constitution reserved to Congress alone).

198. See Odom, *supra* note 89, at 1675 (proposing that the national political process identified in *Garcia* would prevent federal overreaching by administrative agencies if decisions that expanded national government's authority into areas of state interests were made by a branch of government subject to the political constraints of federalism, instead of by agency officials who are not politically accountable).

199. See Starr et al., *supra* note 36, at 31 (stating that administrative preemption is founded upon an agency's explicit statement that it intends to displace state law); see also Foote, *supra* note 40, at 1445 (describing FDA regulations promulgated to preempt state tort claims under the Medical Device Amendments, even though the regulations failed to accurately implement Congress's preemptive intent).

200. 108 S. Ct. 1637 (1988).

201. *Id.* at 1642-43.

202. *Id.* at 1642.

203. *Id.* (quoting *Fidelity Fed. Sav. & Loan Ass'n v. De la Cuesta*, 458 U.S. 141, 154 (1982)).

204. Starr et al., *supra* note 36, at 32.

205. Wolfson, *supra* note 41, at 110; see Chapin, *supra* note 43, at 60-61 (articulating that just as lawmaking authority is limited by the Constitution, regulatory preemption authority of federal agencies should be limited by express grants of preemptive authority within the relevant federal legislation; only through this type of clear statement of congressional accountability can the political process be employed by the state governments to protect their interests in regulatory preemption matters).

provide the states with a means to fairly balance the competing interests.²⁰⁶ Administrative preemption decisions are made without facing the constraints of the democratic process because independent agencies are virtually insulated from political forces.²⁰⁷ The protections of the political process available to state constituents when preemption decisions are made by a responsible legislature are not available when Congress delegates to agencies, and they, in turn, preempt state laws.²⁰⁸ Without the applicability of this procedural safeguard for the states, Congress's power to delegate preemptive authority to administrative agencies runs counter to the theory of federalism that the Framers intended. In the delegation situation, decisions made by unelected agency officials provide no recourse for the governed through politically accountable decision-making.

VI. POLITICAL ACCOUNTABILITY IN ADMINISTRATIVE RULE-MAKING

A. *Rationale for Political Accountability*

One of the fundamental safeguards of our federalist system is a watchful, responsible constituency.²⁰⁹ When important policy choices are made by Congress, or another governmental body, without the external constraint of public scrutiny, the legislation bears less assurance of legitimacy.²¹⁰ If the lawmaking or rule-making process lacks political accountability, "the public generally is denied the benefits that are derived from the making of important societal choices through the open debate of the democratic process."²¹¹ Political accountability firmly establishes one of the important tenets of representative government: that Congress must make the important choices and endure the consequences of those choices.²¹² Therefore, Congress may not delegate the power to decide salient policy issues to another organ of government, particularly in the area of preemption, where delegation may disable the functioning of federalism restraints on the federal-state balance of power.²¹³

As strongly as the American political system demands political accountability in congressional decision-making, legislators have similarly strong reasons for

206. See Wolfson, *supra* note 41, at 110 (stating that no administrative safeguards can function as well as the threat of impending congressional elections).

207. See Smith, *supra* note 107, at 323 (pointing out that agency staffers are seldom truly accountable to those affected by the regulations they write).

208. See SCHOENBROD, *supra* note 107, at 103 (directing attention to the fact that when Congress delegates, it does not have to cast a recorded vote on the particular issue and open up its individual members to criticism for their decision).

209. Handman, *supra* note 110, at 212.

210. Handman, *supra* note 110, at 212.

211. Handman, *supra* note 110, at 212 (quoting *Cannon v. University of Chicago*, 441 U.S. 677, 743 (1979) (Powell, J., dissenting)).

212. SCHOENBROD, *supra* note 107, at 103.

213. Handman, *supra* note 110, at 212.

avoiding responsibility.²¹⁴ The ability of members of Congress to insulate divisive policy choices from public scrutiny will not only avoid a dissatisfied constituency, but it will more likely sustain a majority of votes by not antagonizing different ideological factions with difficult policy decisions.²¹⁵

Political accountability, a by-product of constitutional legislation, functions to check the legislative process against an overreaching centralized government, and implements rights-protective government policy because it ensures that policies emanating from Congress are founded on popular support.²¹⁶ But when Congress or another body is able to escape the political ramifications of the policy it establishes, the legitimacy of the law is suspect.²¹⁷

Our system of federalism developed by this country's Founders never considered that the lawmaking process would raise the elements implicit in large government delegations, such as an agency's efficiency and expertise, above individual liberties and careful policy choices.²¹⁸ The Framers specifically created political checks and balances; they understood that this process would be laborious and somewhat inefficient, but in return understood that it would reap the benefits of societal input and minimize the possibility of tyranny.²¹⁹ As the Supreme Court, affirming the Framers' goals for the legislative process, has stated:

[I]t is crystal clear from the records of the Convention, contemporaneous writings and debates, that the Framers ranked other values higher than efficiency. The records of the Convention and debates in the states preceding ratification underscore the common desire to define and limit the exercise of the newly created federal powers affecting the states and the people. There is unmistakable expression of a determination that legislation by the National Congress be a step-by-step, deliberate and deliberative process.²²⁰

In responding to statements of the Framers and the Supreme Court, many commentators in the area of delegation contend that, although deference to the wisdom

214. Handman, *supra* note 110, at 212; *see* discussion *infra* Part VI.C.1 (discussing the reasons Congress attempts to blur the responsibility for promulgating divisive legislation).

215. Handman, *supra* note 110, at 212.

216. Handman, *supra* note 110, at 212-14.

217. Handman, *supra* note 110, at 213.

218. Handman, *supra* note 110, at 213.

219. *Id.*; *see* THE FEDERALIST NO. 51, *supra* note 40, at 359 (James Madison) ("In the extended republic of the United States, and among the great variety of interests, parties, and sects which it embraces, a coalition of a majority of the whole society could seldom take place on any other principles than those of justice and general good . . ."); THE FEDERALIST NO. 10, *supra* note 40, at 129 (James Madison) ("Among the numerous advantages promised by a well-constructed Union, none deserves to be more accurately developed than its tendency to break and control the violence of faction."); THE FEDERALIST NO. 49, *supra* note 40, at 348 (James Madison) ("The several departments being perfectly co-ordinate by the terms of their common commission, none of them, it is evident, can pretend to an exclusive or superior right of settling the boundaries between their respective powers . . . without an appeal to the people themselves . . .").

220. *INS v. Chadha*, 462 U.S. 919, 958-59 (1983).

of agency experts may be more efficient, “ultimate wisdom compels deference to the original constitutional design.”²²¹

Allowing Congress to avoid responsibility through the delegation of its essential lawmaking power, particularly in the area of preempting state governmental functions, thwarts the federalism aspect implicit in our constitutional design.²²² Although defenders of broad agency powers argue that administrative bodies are accountable to the legislature through congressional oversight,²²³ this argument runs counter to the legislators’ goal of blurring their own accountability and preventing divisive legislation.²²⁴ Thus, the important restraints on federal power fail to protect the states from an overreaching government where Congress delegates the power to preempt to federal agencies.²²⁵

Unfortunately, in the area of preemption, the view that political accountability exists as the last defense to state sovereignty is more theory than actuality. By delegating the power of regulatory preemption, Congress has subverted the constitutional scheme.²²⁶

B. *The Theory of Administrative Agency Accountability Through Congress*

Accountability for those who make decisions is both critical to the maintenance of democracy²²⁷ and the legitimacy of rule-making.²²⁸ Only when people can be secure in the knowledge that administrative rule-making is being conducted under the watchful eye of elected officials is rule-making validated.²²⁹ Perhaps the most important link in the accountability chain, especially in relation to administrative preemption, exists between Congress and the agencies. Because the hallmark of preemption is the search for clear congressional intent to displace state law, any attempt to expand federal power at the expense of the states must be responsible through the

221. Handman, *supra* note 110, at 213.

222. Wolfson, *supra* note 41, at 100-01.

223. See discussion *infra* Part VI.B. (discussing whether congressional oversight is a sufficient source of accountability for administrative rule-making).

224. See Testimony of Jerry Taylor, *supra* note 111, at 16-17 (stating that one of the main reasons Congress delegates its lawmaking power is to manipulate voter perceptions about who is making the unpopular laws).

225. See Testimony of Jerry Taylor, *supra* note 111, at 16 (“[E]verybody’ is accountable and nobody is accountable under the way Congress is setting it up, but the legislators have got a designated whipping boy.”); see also Wolfson, *supra* note 41, at 114 (maintaining that excessive deference to administrative agencies’ decisions to preempt the states fails to protect the political and judicial safeguards of federalism).

226. Wolfson, *supra* note 41, at 114.

227. See SCHOENBROD, *supra* note 107, at 100-01 (illustrating that delegation of rule-making authority by Congress weakens democracy because agency accountability through Congress is a weak proposition).

228. See Handman, *supra* note 110, at 216 (supporting the proposition that “political accountability sets a minimum standard for legislative responsibility” and quoting Chief Justice Rehnquist saying that “when fundamental policy decisions underlying important legislation about to be enacted are to be made, the buck stops with Congress”); see also CORNELIUS M. KERWIN, RULEMAKING 215 (1994) (maintaining that rule-making is legitimized when those responsible for the rules are politically accountable).

229. KERWIN, *supra* note 228, at 215.

Legislature.²³⁰ Only in this type of system can poor decisions, extending too far into the traditional domain of the states via preemption, be counteracted through new legislation or new representatives.²³¹ Congressional accountability in a federalist system serves as the backbone for rights-protective legislation, especially in the preemption context where state laws and state autonomy is displaced by federal statutes.²³²

Logically, policy decisions and lawmaking power usurped by administrative agencies must also adopt this dimension of the constitutional scheme.²³³ The only way to make administrative bodies accountable to voters is by clearly indicating the role of legislators in the administrative rule-making process, thus making elected officials responsible for the actions taken by agency staffers.²³⁴ Therefore, Congress must fulfill the role of overseeing the rule-making process.²³⁵ Although in theory Congress exerts controls and checks over agency staffers, in reality, members of Congress have alternative agendas such as avoiding the blame for unpopular decisions that may jeopardize their stays in office.²³⁶ By failing to provide this check in the context of administrative preemption, Congress has defeated the constitutional mandates of representative democracy and federalism.²³⁷

Many theories attribute congressional accountability to the decisions of administrative agencies,²³⁸ and at the foundation of each is the assumption that Congress can eradicate the issue of accountability simply by taking care in the drafting of

230. See McGreal, *supra* note 58, at 851 (indicating that federalism is enforced through the states' influence in Congress only when Congress uses clear and deliberate language when preempting state law); see also Wolfson, *supra* note 41, at 113-14 (explaining that the clear congressional intent standard acts to protect federalism).

231. See D. Bruce La Pierre, *Political Accountability in the National Political Process—The Alternative to Judicial Review of Federalism Issues*, 80 Nw. U. L. Rev. 577, 624-26 (1985) (referring to Justice Blackmun's argument that states' sovereign interests are protected and congressional overreaching is limited by the "structure" of the national government and "state participation in federal governmental action.").

232. See Handman, *supra* note 110, at 212-13 (stating that political accountability functions as a check to ensure rights-protective government policy); see also Wolfson, *supra* note 41, at 112 ("[T]he courts can . . . simultaneously protect the political safeguards of federalism and afford the necessary deference to Congress by requiring that Congress speak clearly and explicitly whenever it preempts state legislation . . .").

233. See Handman, *supra* note 110, at 212 (arguing that the principles underlying political accountability should apply in the context of congressional delegations because core constitutional values are implicated); see also Wolfson, *supra* note 41, at 110 (stating that states' reliance on political safeguards when Congress legislates are applicable to administrative agencies because of their prominent role in regulation today).

234. See SCHOENBROD, *supra* note 107, at 100 (analyzing whether agency lawmaking is made politically accountable through congressional oversight).

235. SCHOENBROD, *supra* note 107, at 100.

236. See Testimony of Jerry Taylor, *supra* note 111, at 16 (stating that manipulation of voter perception is one of the main reasons Congress delegates); see also KERWIN, *supra* note 228, at 220 (listing reelection as one of a representative's main objectives).

237. See Wolfson, *supra* note 41, at 114 (concluding that within the context of administrative preemption Congress has been able to exercise power almost certainly denied it by the Framers and administrative agencies have been able to circumvent the political safeguards of federalism).

238. See *infra* notes 244-81 and accompanying text (discussing theories of congressional accountability for the decisions of administrative agencies).

statutes.²³⁹ Legislators are capable of writing precise and complete legislation, so that no rules are necessary to achieve the purpose of the statute.²⁴⁰ But this is hardly ever done, due to conflicting interests, time constraints, and a refusal to take responsibility for lawmaking.²⁴¹ Instead, advocates of delegation contend that Congress implements the numerous direct and indirect oversight techniques available to it, and thereby legitimizes administrative agency power.²⁴²

1. Statutory Controls

The primary method to ensure accountability of those agency staffers who write rules is for Congress to restrict their discretion by placing specific guidelines on the rule-making process.²⁴³ These include procedures for public participation, certain types of mandatory analysis for decisions, and specifically identifiable standards.²⁴⁴ By creating this type of interactional relationship, the public can locate a politically accountable decision-maker more easily.

Each additional procedure restricts freedom in administrative rule-making by making the designated agency take into consideration certain information in creating the substance of a rule.²⁴⁵ However, there is little evidence this procedure works on a regular basis.²⁴⁶ Even congressionally enacted procedural requirements, as well as the loose provisions of the Administrative Procedure Act,²⁴⁷ are often not observed by agencies.²⁴⁸ Thus when procedures are implemented to shape rule-making a

239. KERWIN, *supra* note 228, at 216.

240. KERWIN, *supra* note 228, at 216.

241. See Testimony of Jerry Taylor, *supra* note 111, at 16-17 (explaining that Congress has enough time to make rules binding on private conduct but it would rather not take responsibility for divisive policy choices); see discussion *infra* Part VI.C.2.

242. SCHOENBROD, *supra* note 107, at 99; see KERWIN, *supra* note 228, at 217 (stating that Congress has numerous direct and indirect oversight techniques at its disposal).

243. SCHOENBROD, *supra* note 107, at 99.

244. SCHOENBROD, *supra* note 107, at 99.

245. SCHOENBROD, *supra* note 107, at 99.

246. SCHOENBROD, *supra* note 107, at 99.

247. 5 U.S.C.A. §§ 551-559, 701-706 (West 1996 & Supp. 1997). The Administrative Procedure Act provides that agency rule-making at a minimum be preceded by notice in the Federal Register and by consideration of public commentary on the agency's proposal. *Id.* at § 553(b), (c). Agency adjudications that are to be conducted "on the record" are subject to trial-type procedural requirements, such as an impartial hearing examiner, a right to bring counsel, an opportunity to bring witnesses and to cross-examine opposing witnesses, preparation of a hearing transcript, and the like. *Id.* at § 554(a). By specifying these degrees of required formality or by including additional requirements in an agency's authorizing statute, Congress can use procedural requirements to influence agency action. However, such restrictions have fallen on hard times because agencies are frequently turning to unreviewable forms of policy-making. See *id.* at § 553(b)(A)-(d)(2) (listing interpretive rules and statements of policy as exempt from APA procedural requirements). In addition, courts are refusing to impose any procedural requirements on agencies beyond those laid out in the Constitution, the APA, or the agency's organic statute. See, e.g., Vermont Yankee Nuclear Power Corp. v. NDRC, 435 U.S. 519 (1978).

248. KERWIN, *supra* note 228, at 217.

certain way, the task of creating a link between administrative agencies and accountable legislators is not necessarily accomplished.²⁴⁹

The power of money functions as another potential mechanism of accountability available to Congress.²⁵⁰ Budgets can reflect rule-making projects that members of Congress support, or penalize those agencies which do not provide the types of rules that were expected of them.²⁵¹ Theoretically, this would serve as a good indicator to the public of which members of Congress favor agencies or agency rules, but there is no real evidence suggesting favoritism in Congress's expenditures.²⁵² Thus, while the power of appropriating funds may sometimes be used to influence agency rule-making, "congressional control of regulatory policy through the budget tends to be sporadic and very particularized."²⁵³ Although this process potentially acts as an effective means of control, there are no solid assurances that Congress exercises this power in any significant way.²⁵⁴

At the core of most suspect mechanisms is the fact that the silent agenda of Congress, to remain uncontroversial, collides with the theory of congressional accountability for administrative rule-making.²⁵⁵ This friction is consistently exemplified by statutes and procedural complexity that purposely make it very difficult to determine which interests Congress is seeking to protect or advance.²⁵⁶ At the center of these types of broad, confusing statutes is the fact that members of Congress, by acting ambiguously, can deny responsibility for agency decisions that might disappoint the expectations of their voters.²⁵⁷

249. KERWIN, *supra* note 228, at 217-18.

250. KERWIN, *supra* note 228, at 219.

251. KERWIN, *supra* note 228, at 219.

252. KERWIN, *supra* note 228, at 219.

253. Cynthia R. Farina, *Statutory Interpretation and the Balance of Power in the Administrative State*, 89 COLUM. L. REV. 452, 508 (1989); Frederick Kaiser, *Congressional Action to Overturn Agency Rules: Alternatives to the "Legislative Veto,"* 32 ADMIN. L. REV. 667, 687-89, 710 (1980). Abner J. Mikva, formerly a judge and a congressman, proposes that the budget power is too powerful to be an effective control mechanism: "Congress must destroy a regulatory regime to control it. The power of the purse is a very blunt tool at best. It can halt agency action, but only at a high price." Abner J. Mikva, *The Changing Role of Judicial Review*, 38 ADMIN. L. REV. 115, 120 (1986).

254. KERWIN, *supra* note 228, at 220 (questioning the effectiveness of the budget process as a mechanism of accountability).

255. See SCHOENBROD, *supra* note 107, at 102 (illustrating the difficulties that face the public when it tries to hold Congress accountable for agency actions due to the legislators' ability to accede to controversial law without assuming responsibility for creating it).

256. See *infra* notes 292-300 and accompanying text (depicting as an example the circumstances surrounding the 1988-89 congressional pay-raise controversy).

257. See *infra* notes 282-90 and accompanying text (describing the advantages gained by Congress by manipulating voters' perceptions).

2. Principal-Agent Theory

The principal-agent theory of legislative-bureaucratic relations rests on the model that the principals are the elected officials in Congress; their agents are the administrative bureaucrats who supposedly carry-out their wishes.²⁵⁸ This theory acknowledges the different goals of each body and the tools at their disposal to put them into effect.²⁵⁹ The primary goal of elected representatives is to stay in office and make policy that reflects the ideals of their constituency.²⁶⁰ Therefore, in order to accomplish these tasks, they must provide for their constituents and avoid the blame when they fail to do so.²⁶¹ Agency staffers have a more diverse agenda, varying between objectives such as work-avoidance, responding to outside pressure, or pursuing personal policy-making.²⁶² Thus, the theory of principal-agent rests on how well the principal is able to control the agent amidst seemingly irreconcilable goals.²⁶³

Some commentators argue that the statutory controls and procedures influence this relationship, as well as different degrees of congressional oversight.²⁶⁴ However, as discussed earlier, statutory controls and procedures are not indicative of constraint,²⁶⁵ and, later in this paper, I will illustrate that the reliance on congressional oversight as a basic check is misplaced.²⁶⁶ There is no clear answer indicating that Congress plays a significant role in the oversight relationship.²⁶⁷ Practically speaking, although those who write rules may be influenced by Congress, absent agents faithful to legislators, there is no meaningful control mechanism on rule-makers.²⁶⁸

3. Oversight of Rule-making Performance

The last broad categorical theory of Congressional accountability to administrative agencies is the extent to which Congress oversees rule-making performance. In this context, there are several ways that Congress provides a check on agency regulations.

258. KERWIN, *supra* note 228, at 220.

259. KERWIN, *supra* note 228, at 220.

260. KERWIN, *supra* note 228, at 220.

261. KERWIN, *supra* note 228, at 220.

262. KERWIN, *supra* note 228, at 220.

263. KERWIN, *supra* note 228, at 220.

264. KERWIN, *supra* note 228, at 221.

265. *See supra* notes 243-57 and accompanying text.

266. *See infra* notes 282-315 and accompanying text.

267. KERWIN, *supra* note 228, at 221.

268. *See* KERWIN, *supra* note 228, at 221 (predicating the effectiveness of the principal-agent theory of accountability on the extent to which bureaucrats are influenced and faithful agents of the legislators).

Congress can always revoke or narrow the authority it has granted through subsequent legislation; however, this might not be a practical method of patrolling rule-making agencies.²⁶⁹

There are also statutory devices available to Congress, but the most prominent, the legislative veto, no longer exists.²⁷⁰ This device had directed agencies to transmit final administrative rules to Congress for review before they became effective.²⁷¹ The legislative veto was invalidated by the Supreme Court in 1983 in the case of *Immigration and Naturalization Service v. Chadha*.²⁷² The Court, in *Chadha*, concluded that the legislative veto violated the Presentment Clause of Article I,²⁷³ because the resolution used to invoke the veto was not presented to the President for his signature.²⁷⁴ A legislative veto implemented by a one-house resolution was additionally held unconstitutional, because it violated the bicameral provision²⁷⁵ of the Constitution.²⁷⁶ The legislative veto was also perceived to be unconstitutional because it violated the principle of separation of powers by allowing Congress to intrude too far into executive branch activities.²⁷⁷ Thus, a method which once served as a key means for accountability through congressional oversight no longer remains a constitutional alternative.²⁷⁸

Finally, congressional oversight hearings by special committees can influence agency staffers by subjecting them to harassment and embarrassment as the hearing committee demands the agency's explanation of a proposed or final rule.²⁷⁹ In this way, administrative personnel can at least temporarily be persuaded to comply with the wishes of the relevant oversight committee.²⁸⁰ However, these types of informal control mechanisms tend to represent the views of the individual legislators participating in the oversight hearing, and are neither a practical nor constitutional equivalent to clear policy direction by Congress.²⁸¹

269. See *infra* notes 304-15 and accompanying text (illustrating the impracticality of overriding agency rule-making due to both supermajority provisions and political obstacles within the Senate and the House).

270. See Smith, *supra* note 107, at 329 (explaining the repercussions from the loss of the legislative veto).

271. Smith, *supra* note 107, at 329.

272. 462 U.S. 919 (1983).

273. U.S. CONST. art. I, § 7, cl. 2 ("Every Bill which shall have passed the House of Representatives and the Senate, shall, before it becomes a Law, be presented to the President of the United States . . .").

274. *Chadha*, 462 U.S. at 956-59.

275. U.S. CONST. art I, §§ 1, 7 (requiring both the House of Representatives and the Senate to pass a bill before it can become law).

276. *Chadha*, 462 U.S. at 958.

277. *Id.* at 956-58.

278. *Id.*

279. Farina, *supra* note 253, at 509.

280. See Farina, *supra* note 253, at 509 (stating that subjecting agency staffers to sufficient harassment makes them at least temporarily "come[] to heel").

281. Farina, *supra* note 253, at 509-10.

C. The Realities of Administrative Accountability Through Congress

1. Blurring Accountability

Although many checks and balances seem to be in place to make administrative rule-makers accountable through congressional oversight, one of the main reasons members of Congress delegate is to manipulate voter perception by blurring accountability for their actions.²⁸² Delegation allows legislators to represent their support for an action to those constituents in favor of it, and as opposing the same action to others.²⁸³ While the notion of accountability in congressional lawmaking requires the majority to take direct responsibility for a law, there is no such link when Congress delegates the power to make rules to an administrative agency.²⁸⁴ Article I of the Constitution requires "the Yeas and Nays of the members of either house . . . be entered on the Journal."²⁸⁵ Through this record-taking it is easy to discern who is responsible for unpopular decisions by Congress.²⁸⁶ In contrast, the oversight notion of accountability allows Congress to sustain agency law by inaction, enabling accession to controversial law without suffering negative consequences.²⁸⁷

Obscuring responsibility is sometimes useful for reelection and always useful to deflate animosity created by unpopular decision-making.²⁸⁸ Without the power to delegate, legislators have to record their vote for the statutory laws and open themselves up to attack by their rivals.²⁸⁹ This vulnerability becomes avoidable when Congress does not make the law, but instead delegates its lawmaking authority to less accountable agencies.²⁹⁰

The notion that legislators have a tendency to cover their tracks through delegation illustrates the friction between the theory that administrative agencies are accountable through Congress, and the reality that members of Congress want to

282. Testimony of Jerry Taylor, *supra* note 111, at 16; SCHOENBROD, *supra* note 107, at 102-03.

283. See Marra, *supra* note 111, at 785 (stating that through delegation Congress is able to detach itself from politically unpopular decision-making); see also Thomas Sargentich, *The Delegation Debate and Competing Ideals of the Administrative Process*, 36 AM. U. L. REV. 419, 430 (1987) (discussing the ability of Congress to appear to respond to whatever constituent interests support the legislation while at the same time distancing itself from unpopular policies implemented by agencies).

284. SCHOENBROD, *supra* note 107, at 102.

285. U.S. CONST. art. I, § 5, cl. 3.

286. See SCHOENBROD, *supra* note 107, at 102 (indicating that controversial law can only take effect if a sufficient number of legislators support it on the record).

287. SCHOENBROD, *supra* note 107, at 102.

288. See Handman, *supra* note 110, at 212 (explaining that when Congress can insulate itself from divisive policy decisions and avoid public scrutiny it is more likely to sustain majority votes); see also SCHOENBROD, *supra* note 107, at 102 (stating that the oversight notion of accountability allows Congress to accede to agency law through inaction, thus avoiding any repercussions associated with taking a stance on controversial legislation).

289. SCHOENBROD, *supra* note 107, at 102.

290. SCHOENBROD, *supra* note 107, at 102.

avoid accountability for their decisions.²⁹¹ A good example of the typical penchant for covering up their tracks was epitomized by the congressional pay-raise controversy of 1988-89.²⁹² Congress passed legislation delegating to the Commission on Executive, Legislative, and Judicial Salaries the ability to set the pay of the members of Congress and other officials, such as federal judges, whose pay was linked to their own.²⁹³ Congress attempted, through this use of delegation, to give its members a fifty percent pay raise without losing votes in the following election from constituents who did not agree with this allocation of taxpayer money.²⁹⁴ A condition of this specific legislation was that if the commission was to grant a pay increase, only a statute passed before the increase went into effect could counteract the increase.²⁹⁵ Therefore, when the commission recommended a fifty percent increase in pay, some members introduced bills to cancel it.²⁹⁶ However, this was only a guise in which key members of Congress would prevent a vote on the bills designed to stop the pay-raise until it was too late.²⁹⁷ Thus, legislators could suggest to their constituents that they were against the pay raise, in fact even as having recorded their opposition to it.²⁹⁸ But, the reality was that, through delegation and blurring the public's perception of accountability, members of Congress could reap the benefit of a pay raise while receiving credit for opposing it.²⁹⁹ Although this specific legislation was foiled due to public outrage and protest, it is a vivid example of the extreme manipulation that can be effectuated on the public through delegation of power to administrative rule-makers.³⁰⁰

The problem with the lack of political accountability by agency staffers is neither theoretical nor a reflection of poor values in our nation's legislators. Rather, it is a problem with our system. If one of the greatest sources of accountability for administrative lawmakers is supposed to be linked with congressional monitoring and oversight, then the chain is not secure. Congress cannot intend both to blur accountability through delegation, and intend to be a responsible monitor over the agencies.³⁰¹ It is not possible to do both. By delegating an enormous amount of

291. See Testimony of Jerry Taylor, *supra* note 111, at 16 (stating that Congress does not delegate to ease its workload or to avoid addressing issues of broad public concern, but primarily to manipulate voter perceptions).

292. Testimony of Jerry Taylor, *supra* note 111, at 16; see, e.g., SCHOENBROD, *supra* note 107, at 11-12 (describing the congressional pay-raise controversy).

293. Testimony of Jerry Taylor, *supra* note 111, at 71.

294. Testimony of Jerry Taylor, *supra* note 111, at 71.

295. Testimony of Jerry Taylor, *supra* note 111, at 71.

296. Testimony of Jerry Taylor, *supra* note 111, at 71.

297. Testimony of Jerry Taylor, *supra* note 111, at 71.

298. Testimony of Jerry Taylor, *supra* note 111, at 71.

299. Testimony of Jerry Taylor, *supra* note 111, at 71.

300. Testimony of Jerry Taylor, *supra* note 111, at 71; see, e.g., *Michigan Canners & Freezers Ass'n v. Agricultural Marketing & Bargaining Bd.*, 467 U.S. 461 (1984) (avoiding the use of preemptive language in the Agricultural Fair Practices Act suggested that Congress had attempted to "hoodwink" lobbyists by purposely obscuring whether the federal statute was or was not the final word on the matter).

301. See *supra* notes 282-300 and accompanying text (discussing Congress's ability to blur its accountability for divisive legislation).

lawmaking responsibility to the agency staffers who write regulations, Congress has effectively empowered government employees, who are seldom affected by those rules, to formulate policy.³⁰² Meanwhile Congress enjoys the credit for dealing with tough problems, but by not actually voting on unpopular legislation, does not suffer any detrimental consequences.³⁰³ In the end, Congress is content, and the American people do not know who to blame when agencies enact powerful rules that directly affect their livelihood.

2. Congress Does Not Override Agency Law

Once an agency makes a law, Congress seldom will repeal it even if it embodies policy that would have never been enacted by Congress.³⁰⁴ Although proponents of administrative rule-making legitimize the practice by stressing that Congress always retains the power to rescind or modify an agency's decisions, this concept is predominately theoretical.³⁰⁵

In practice, the process operates as follows: initially broad authority is ceded to an agency; the regulation promulgated is then law unless new legislation by Congress overrides it.³⁰⁶ The current procedure evinces a clear bias toward regulation, since what amounts to a large burden is on Congress to alter the status quo.³⁰⁷ Even if an agency enacts a rule against the wishes of the relevant subcommittee and declines to rescind it, the subcommittee is likely to fail in an attempt to promulgate a statute nullifying the agency action.³⁰⁸

Since Presidential appointees, as heads of administrative agencies, have endorsed the regulation, there is a presumption that the President supports it as well.³⁰⁹ Therefore, in order for the Legislature to override the regulation, it may well take a two-thirds majority in both houses.³¹⁰ In addition, even more problematic is the fact that those in favor of a statutory override must sometimes overcome substantial

302. See Smith, *supra* note 107, at 325 (pointing out the fact that regulations are laws and govern the lives of people the same as statutes).

303. See *supra* notes 282-300 and accompanying text (describing Congress's ability to blur its accountability for divisive legislation); see also *Printz*, 117 S. Ct. at 2382 (stating that "[b]y forcing state governments to absorb the financial burden of implementing a federal regulatory program, members of Congress can take credit for 'solving' problems without have to ask their constituents to pay for the solutions with higher federal taxes.>").

304. SCHOENBROD, *supra* note 107, at 101.

305. See Smith, *supra* note 107, at 326 (describing the practice of administrative rule-making as ceding much authority to agencies).

306. Smith, *supra* note 107, at 326.

307. Smith, *supra* note 107, at 326.

308. SCHOENBROD, *supra* note 107, at 101.

309. Smith, *supra* note 107, at 326.

310. U.S. CONST. art. I, § 7, cls. 2-3 ("Every Order Resolution, or Vote to which the Concurrence of the Senate and House of Representatives may be necessary shall be presented to the President of the United States; and before the Same shall take Effect, shall be approved by him, or being disapproved by him, shall be repassed by two thirds of the Senate and House of Representatives . . .").

obstacles to getting the bill to the floor in the House and Senate.³¹¹ As Congressman Nick Smith (R.-Mich.) acknowledged:

[P]ractically speaking, only regulations that are so flawed that they attract substantial attention or that offend senior members of Congress are likely to command the floor time and general legislative effort needed to enact a statute.³¹²

In essence, the Constitution has operated through Article I's supermajoritarian requirement so as to insulate agency action from oversight.³¹³

If one of the foundations for direct accountability to a representative democracy lies in Congress's ability to enact new legislation and exert power over administrative rule-making, this protection seems misplaced.³¹⁴ Even if theoretically sound, government practice hardly ever mimics this theory. In this situation, practicality points out that Congress's direct power to counter administrative agency rules, making it the responsible watchdogs, does not hold true to form.³¹⁵ Once again, the national constituency lacks an outlet for their discontent because, as far as they know, their congressional representatives were not a party to the implementation of the burdensome legislation.

3. *Addressing the Problem*

The majority of the 104th Congress understood that it needed to do more to monitor administrative rule-making.³¹⁶ This concern for a system of government, seemingly unchecked by traditional constitutional constraints, was embodied in a series of bills aimed at curbing this process.³¹⁷ Representative Nick Smith (R.-Mich.) introduced a bill on February 28, 1996, the "Significant Regulation Oversight Act of 1996,"³¹⁸ that would have required "significant new rules to be affirmatively

311. Smith, *supra* note 107, at 326.

312. Smith, *supra* note 107, at 326.

313. SCHOENBROD, *supra* note 107, at 101.

314. See *supra* notes 304-13 and accompanying text (discussing the problems with overriding agency law).

315. See *supra* notes 304-13 and accompanying text (illustrating the constitutional obstacles that prevent Congress from overriding agency law).

316. Smith, *supra* note 107, at 323; see Rogelio Garcia, Cong. Res. Serv. Issue Brief IB95035, Federal Regulatory Reform Summary (1995) ("[Republicans] introduced bills designed to minimize costly and onerous regulations."). The Republican majority of the House was elected upon a platform entitled *Contract with America* [hereinafter the Contract]. Signed by 367 of the 421 Republican House candidates, the Contract contained 10 legislative initiatives upon which Republicans guaranteed the full House would vote upon during the first hundred days of the 104th Congress. See NEWT GINGRICH ET AL., *CONTRACT WITH AMERICA* 6-12 (Ed Gillespie & Bob Schellhas eds., 1994).

317. See *infra* notes 318-43 and accompanying text (describing the provisions of the "Significant Regulation Oversight Act of 1996" and the provisions of the "Congressional Responsibility Act of 1995").

318. H.R. 2990, 104th Cong. § 1 (1996).

approved by both houses of Congress before going into effect.”³¹⁹ The bill defined a “significant rule” as “any rule proposed by an agency that is specified or described as such in the Act that authorizes the rule.”³²⁰ Thus, under this proposed statute, the members of Congress, enacting the initial statute providing for regulation by an administrative agency, would determine which rules were considered “significant.”³²¹ Ultimately, Congress would make the initial and final determination as to which type of rules could be promulgated by agencies through the processes outlined in the Administrative Procedure Act, and which rules could only be passed by a legislative act of Congress.³²² In the case of “significant” regulations, the agency would have to send a drafted proposal of the rules to Congress for approval.³²³

The “Significant Regulation Oversight Act” also included provisions for both revoking and revising rules passed prior to its enactment.³²⁴ The bill outlined a procedure whereby “[a] petition to change or repeal such a regulation would be accepted when signed by 30 senators or 120 members of the House of Representatives.”³²⁵ This type of petition would require the Majority Leader to introduce a joint resolution revising or repealing prior regulations.³²⁶ This provision would allow members of Congress who favor reform of regulations to “force floor votes on controversial regulation.”³²⁷ Thus, where once substantial obstacles stood in the way of overriding agency rule-making, through this provision “a minority of reformers in either house could force their colleagues to take publicly recorded stands on issues that they might prefer to duck.”³²⁸

Overall, Nick Smith’s proposed bill takes great strides to legitimize rule-making by making the lawmakers in Congress, who are politically accountable, responsible for significant decisions that affect personal liberties and state autonomy.³²⁹ Representative Smith proclaimed that “[b]y placing the regulatory power once more into the hands of officials that ordinary citizens could speak with, influence, and vote for, those citizens would retain more control over their lives.”³³⁰ In other proposed legislation aimed to reform the agency regulators, Representative J.D. Hayworth (R.-Ariz.), Chairman of the House Constitutional Caucus, introduced the “Congressional Responsibility Act of 1995.”³³¹ In contrast to Smith’s bill, the Hayworth bill was

319. H.R. 2990, 104th Cong. § 4 (1996); Testimony of Jerry Taylor, *supra* note 111, at 82.

320. H.R. 2990, 104th Cong. § 6 (1996).

321. Testimony of Jerry Taylor, *supra* note 111, at 20.

322. Testimony of Jerry Taylor, *supra* note 111, at 20.

323. H.R. 2990, 104th Cong. § 4 (1996); Testimony of Jerry Taylor, *supra* note 111, at 82.

324. H.R. 2990, 104th Cong. § 5 (1996).

325. *Id.*; Testimony of Jerry Taylor, *supra* note 111, at 82.

326. H.R. 2990, 104th Cong. § 5 (1996).

327. Testimony of Jerry Taylor, *supra* note 111, at 82.

328. Testimony of Jerry Taylor, *supra* note 111, at 82.

329. Testimony of Jerry Taylor, *supra* note 111, at 82.

330. Testimony of Jerry Taylor, *supra* note 111, at 82.

331. H.R. 2727, 104th Cong. § 1 (1995).

much more sweeping, leaving almost nothing to the agencies' discretion.³³² The purpose of this Act was to end Congress's practice of delegating "responsibility for making regulations to unelected, unaccountable officials of the executive branch" and instead to "require[] that regulations proposed by agencies of the executive branch be affirmatively enacted by Congress before they become effective."³³³ The only regulations that the "Congressional Responsibility Act" would leave within the sole discretion of administrative agencies are "regulations pertaining to agency organization, personnel, and the like."³³⁴

The Hayworth bill would operate so that agencies must submit proposed regulations to Congress, whereupon the Majority Leader of each House would introduce a bill to enact the proposed regulation.³³⁵ Under the procedures outlined in the "Congressional Responsibility Act," any member of a respective house could move to consider the regulations, the bill would be unamenable, and the debate would be limited to one hour.³³⁶ These bills proposing new regulations would have to be voted on within sixty days from their date of introduction, with the only exception being that a majority of each house could vote to suspend the "fast track," in which case the bill would be considered in the same way as other bills.³³⁷

Representative Hayworth's bill represents the efforts taken by some members of Congress to curb the constitutional crisis that has grown in proportion to the unrestrained delegations of authority to administrative agencies.³³⁸ While the Smith bill would allow congressional discretion when to delegate by deciding initially which regulations are "significant," the "Congressional Responsibility Act" would put anything that could be construed as lawmaking power back into the hands of the elected and accountable members of Congress.³³⁹

The Hayworth bill is a more extreme proposal than the Smith bill, and presents a few concerns that likely make the Smith bill more desirable.³⁴⁰ Under Representative Hayworth's proposed legislation, delegations that occurred before its enactment are not affected; thus it would not have the same effect on the "tyranny of the status quo" that the Smith bill addresses by proposing a mechanism to repeal or revoke prior regulations.³⁴¹ Also, while the Hayworth proposal abolishes congressional delegations to administrative agencies, Smith's bill recognizes the political benefits of delegation by only necessitating congressional review of "significant"

332. Testimony of Jerry Taylor, *supra* note 111, at 20.

333. H.R. 2727, 104th Cong. § 2 (1995).

334. H.R. 2727, 104th Cong. § 5 (1995); Testimony of Jerry Taylor, *supra* note 111, at 21.

335. H.R. 2727, 104th Cong. § 3 (1995).

336. H.R. 2727, 104th Cong. § 4 (1995).

337. *Id.*

338. Testimony of Jerry Taylor, *supra* note 111, at 21.

339. Testimony of Jerry Taylor, *supra* note 111, at 21.

340. Testimony of Jerry Taylor, *supra* note 111, at 21.

341. H.R. 2990, 104th Cong. § 5 (1996); H.R. 2727, 104th Cong. § 6 (1995); Testimony of Jerry Taylor, *supra* note 111, at 21.

regulations promulgated by administrative agencies.³⁴² Although the “Significant Regulation Oversight Act” may be more acceptable to those who favor delegations, overall both the Smith and Hayworth bills represent significant attempts to reaffirm lawmaking as an Article I power, specifically granted by the Constitution to elected representatives.³⁴³

The problem of unaccountable decision-making in delegation has not only been addressed by lawmakers but has drawn the attention of some of our most influential jurists. In a lecture given by then Judge and future Supreme Court Justice Stephen Breyer in 1983, the year the legislative veto was declared unconstitutional in *INS v. Chadha*,³⁴⁴ he presented a plan for a “veto substitute” that would allow Congress to retain control of the law, while following the criteria of *Chadha*.³⁴⁵ Breyer’s proposal would have replaced the legislative veto with statutory language making “the agency’s exercise of the authority to which the veto is attached . . . ineffective unless Congress enacts a confirmatory law within say, sixty days.”³⁴⁶ Under this proposal, the executive would be relieved of its lawmaking power because, while the agencies would recommend specific regulations, their proposed rules “would not have the effect of law until they passed the normal constitutional channels.”³⁴⁷ Thus, Breyer’s scheme would allow Congress to follow the mandate of *Chadha*, while still retaining the power of a veto provision.³⁴⁸ Under this plan, if one House disagrees with a regulation created by an administrative agency, it can essentially veto it.³⁴⁹ However, with the confirmatory law requirement in Breyer’s plan, “[t]he veto substitute imposes on Congress a degree of visible responsibility for the actions it confirms, a burden that the veto system allows it to avoid.”³⁵⁰ This provides both a check on administrative agency rule-making, as well as accountable elected officials who are responsible to their constituencies.³⁵¹

Congress and the judiciary are obviously concerned about the broad discretion and lack of control over administrative rule-makers. Without the proper constraints, there is no constitutionally mandated check on the agencies.³⁵² In the arena of

342. H.R. 2990, 104th Cong. § 6 (1996); H.R. 2727, 104th Cong. § 5 (1995); Testimony of Jerry Taylor, *supra* note 111, at 21.

343. Testimony of Jerry Taylor, *supra* note 111, at 21.

344. 462 U.S. 919 (1983).

345. Testimony of Jerry Taylor, *supra* note 111, at 19; see *supra* notes 270-78 and accompanying text (discussing the abolition of the legislative veto in *INS v. Chadha*).

346. Testimony of Jerry Taylor, *supra* note 111, at 19.

347. Testimony of Jerry Taylor, *supra* note 111, at 19.

348. Testimony of Jerry Taylor, *supra* note 111, at 19.

349. Testimony of Jerry Taylor, *supra* note 111, at 19.

350. Testimony of Jerry Taylor, *supra* note 111, at 19.

351. See Testimony of Jerry Taylor, *supra* note 111, at 19 (stating that under the Breyer proposal requiring a confirmatory law by members of Congress, the political dynamic of delegation would change considerably by making Congress visibly responsible for agency regulations).

352. See Wolfson, *supra* note 41, at 110 (drawing the parallelism that because federalism checks are necessary for the legitimacy of congressional action they are just as necessary for the legitimacy of agency actions).

administrative preemption, the only guardian of unrestrained interference into traditional state domains are the built-in checks of our federalist system.³⁵³ These checks are best represented by removing those responsible for poor policy decisions. When accountability is lost through delegation, the safeguard is removed, and the federal government tips the scales of federalism into its favor in unconstitutional proportions.

VII. CONCLUSION

A necessary premise to our system of federalism is the notion that administrative rule-making must somehow be accountable to the American people in order to preserve a constitutionally mandated balance in the area of preemption.³⁵⁴ Two realities exist in the field of administrative rule-making that fail to support this absolute foundation. First, Congress has a tendency to blur its accountability for agency regulations by insulating itself from public record and unfavorable agency policy decisions.³⁵⁵ Therefore, it is not logical to say that staffers and unelected bureaucrats are in any substantial way accountable through Congress, where Congress itself constantly attempts to sever any ties between the two.³⁵⁶ Secondly, the theory that agency decisions are made to be politically accountable by direct congressional review and reaction is not valid.³⁵⁷ Practically speaking, Congress itself is impeded by both constitutional supermajority provisions and other political constraints within each house from serving this function, even assuming any unsubstantiated willingness to do so.³⁵⁸ A logical progression leads to the conclusion that agency staffers make decisions and policy choices insulated from the political process because they are, at most, only tentatively accountable through Congress to the national constituency. The truth of this assertion is reflected in the recent and growing concern among the elected legislators, as reflected by the bills proposing to counteract this unchecked lawmaking.³⁵⁹

The concern central to this discussion is the precarious effect this type of decision-making has on the safeguards to our federal system when administrative agencies seek to preempt in areas occupied by the states. There is no context where the states are more vulnerable to an overreaching federal government than when

353. See Wolfson, *supra* note 41, at 97 (reiterating the holding in *Garcia* mandating that the proper safeguards of federalism are established in the political branches of government through the states' representation in the Senate).

354. See KERWIN, *supra* note 228, at 215 ("Holding those who write rules accountable for the decisions they make and the manner in which they make them is critical to the maintenance of our democracy.").

355. See discussion *supra* Part VI.C.1.

356. See discussion *supra* Part VI.C.1.

357. See discussion *supra* Part VI.C.2.

358. See discussion *supra* Part VI.C.2.

359. See *supra* notes 316-43 and accompanying text.

Congress displaces state law.³⁶⁰ *Garcia* dictated that states are protected by the checks inherent in the federal system of a democratic government.³⁶¹ Accountable legislators must answer to their constituents for all policy decisions.³⁶² Logically, administrative preemption must be governed by the same ideals.³⁶³ But, that situation only points to a lack of accountability, because Congress does not or cannot properly exercise the oversight with the mechanisms presently available to it.³⁶⁴ Administrative rule-making sidesteps the sole protections that the judiciary in *Garcia*, and the Constitution in its clearly defined federal and state spheres of authority, made available to the states.³⁶⁵ Without these protections, the authority to delegate preemptive power threatens to defy federalism and the basic tenets of representative government.³⁶⁶ Therefore, the ability of Congress to delegate in the area of preemption, an already tenuous proposition, should be closely scrutinized not only by the substance of the delegation, but, more importantly, as to whether the initial act is in accordance with the constitutional scheme.³⁶⁷ In order to restore equilibrium between the states and federal government, Congress should reaffirm itself as the arbiter of the federal-state balance of power by bearing the responsibility of drafting significant preemptive legislation, rather than delegating that task to administrative agencies. Concomitantly, if Congress fails to legislate with requisite clarity, or if Congress delegates the job of preemption to administrative agencies, the courts should not presume that preemption was intended absent clear language indicating a congressional attempt to preempt.

360. See McGreal, *supra* note 58, at 823-24 (preempting state law tips the federal-state balance heavily in favor of the federal government).

361. *Garcia*, 469 U.S. at 551.

362. See LaPierre, *supra* note 231, at 646 (“[W]hen the political checks are effective, congressional political decisions satisfy the fundamental principle that those with the power to make decisions should bear, to the fullest extent possible, the costs and benefits and the credit and blame for their decisions.”).

363. See Handman, *supra* note 110, at 212 (stating that “logic offers no reasons why the same principles” that apply to congressional accountability should not apply “where Congress has implemented . . . innovative measures to bypass public scrutiny in contexts that implicate core constitutional values”).

364. See *supra* notes 238-315 and accompanying text.

365. *Garcia*, 469 U.S. at 551.

366. See Wolfson, *supra* note 41, at 114 (arguing that administrative agencies have been able to avoid the political safeguards of federalism).

367. See Wolfson, *supra* note 41, at 72 (establishing the thesis that “courts should view preemption invoked by administrative agencies more critically”).