

THE CALIFORNIA GREENHOUSE GAS WAIVER DECISION AND AGENCY INTERPRETATION: A RESPONSE TO PROFESSORS GALLE AND SEIDENFELD

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INTRODUCTION

Professors Brian Galle and Mark Seidenfeld add some important strands to the debate on agency preemption, particularly in their detailed documentation of the potential advantages agencies may possess in deliberating on preemption compared with Congress and the courts.¹ As they note,² the quality of agency deliberation matters to two different debates. First, should an agency interpretation of statutory language to preempt state law receive *Chevron* deference in the courts, as other agency interpretations may, or should some lesser form of deference be given? Second, should a general statutory authorization to an agency to administer a program and to issue rules be read broadly to include the authority to declare state law preempted if the agency views that as an appropriate way to implement the program? (I have previously argued for both limited deference and a presumption against agency preemption.³)

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† Professor of Law, University of Michigan Law School. I am grateful to the other symposium participants, Professors Stuart Benjamin, Brian Galle, Gillian Metzger, Mark Seidenfeld, and Ernest Young, for a lively and helpful discussion of the issues, and to the *Duke Law Journal* for the opportunity to participate in the Symposium.

1. Brian Galle & Mark Seidenfeld, *Administrative Law's Federalism: Preemption, Delegation, and Agencies at the Edge of Federal Power*, 57 DUKE L.J. 1933, 1948–85 (2008).

2. *See id.* at 1943.

3. *See* Nina A. Mendelson, *Chevron and Preemption*, 102 MICH. L. REV. 737, 797–98 (2004) [hereinafter Mendelson, *Chevron and Preemption*]; Nina A. Mendelson, *A Presumption*

Galle and Seidenfeld argue for the superiority of agency decisionmaking because, as a formal matter, it may be comparatively transparent and accountable.⁴ An agency, unlike Congress, must comply with notice and comment requirements, at least for rulemaking, and must explain its reasons for taking an action on judicial review.⁵ Galle and Seidenfeld suggest that agency preemption decisions might be even better reasoned if the judiciary engaged in a harder “hard look” on judicial review.⁶ As a preliminary matter, I want to point out that the level of agreement among commentators writing in this area is striking. Professors Galle, Seidenfeld, Catherine Sharkey, Thomas Merrill, and I all agree that agencies should not be categorically prohibited from preempting state law.⁷ We agree further that agencies have valuable information to offer about how a particular federal program functions, the issues it is designed to address, and how regulated entities may fare if faced with multiple standards.⁸ Finally, however—and despite Galle and Seidenfeld’s claims on behalf of agency decisionmaking—we apparently also agree that more controls are needed on agency interpretations that preempt state law than can be provided by the *Chevron*⁹ doctrine alone.¹⁰ Under that doctrine, courts uphold a “reasonable” agency

Against Agency Preemption, 102 NW. U. L. REV. 695, 706–24 (2008) [hereinafter Mendelson, *Presumption*].

4. Galle & Seidenfeld, *supra* note 1, at 1949–61 (transparency); *id.* at 1979–85 (accountability).

5. *Id.* at 1956.

6. *Id.* at 2001–02. The judicial “hard look” refers to review applying the Administrative Procedure Act’s “arbitrary and capricious” review standard. See 5 U.S.C. § 706(2)(A) (2006) (requiring courts to set aside agency actions, findings, and conclusions if courts find them to be “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law”).

7. Professor Merrill has opposed *Chevron* deference in his amicus brief filed in *Watters v. Wachovia*. Brief of the Center for State Enforcement of Antitrust and Consumer Protection Laws, Inc. as Amici Curiae Supporting Petitioner at 6–8, 16–19, *Watters v. Wachovia Bank*, N.A. 127 S. Ct. 1559 (2006) (No. 05-1342), 2006 WL 2570991. He argues, however, that an agency could properly receive a delegation to preempt state law if Congress expressly authorized the agency to do so. Thomas W. Merrill, *Preemption and Institutional Choice*, 102 NW. U. L. REV. 727, 767 (2008). Professor Sharkey has advocated *Skidmore* deference in her piece, *Products Liability Preemption: An Institutional Approach*, 76 GEO. WASH. L. REV. 449, 492–93 (2008).

8. See Galle & Seidenfeld, *supra* note 1, at 1971–74; Thomas W. Merrill, *Preemption and Institutional Choice*, 102 NW. U. L. REV. 727, 755–56 (2008); Sharkey, *supra* note 7, at 485–90.

9. See *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 865–66 (1984).

10. See Galle & Seidenfeld, *supra* note 1, at 1999 (“We doubt *Chevron* is flexible enough to capture all the nuances of our test.”); Merrill, *supra* note 8, at 775 (arguing for *Skidmore* rather than *Chevron* deference); Sharkey, *supra* note 7, at 491–98 (same).

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interpretation of ambiguous statutory language.¹¹ No one wants to give away the store here.

Professor Sharkey and I both recommend a *Skidmore* deference standard for agency preemption decisions (and I also advocate for a presumption against reading a statute to grant an agency the power to preempt state law).¹² Under the *Skidmore* standard, agency interpretations receive a measure of deference, but one weaker than *Chevron* deference, that depends on whether the court finds the agency's reasoning persuasive.¹³ Despite their lengthy defense of agency preemption processes, Professors Galle and Seidenfeld ultimately take only a modified version of this position, because they advocate enhanced judicial review of agency reasoning on state law preemption that bears a strong resemblance to the sort of review courts conduct using *Skidmore*.¹⁴

So, at least about the bottom line, we do not disagree about very much. Yet, given the arguments they make, why do Professors Galle and Seidenfeld hesitate as much as they do about deferring even more to agencies? Their hesitation stems, I suggest, from the fact that even good procedures and judicial review may not be sufficient for agencies to properly consider the range of issues, including federalism values, that should be part of a state law preemption decision. A 2008 agency decision on preemption is an excellent case in point—the EPA's interpretation of Clean Air Act Section 209(a) in its decision finding California preempted from regulating automobile greenhouse gas emissions.¹⁵ The EPA's interpretation of statutory language on preemption failed to consider important relevant issues. These issues,

11. *Chevron*, 467 U.S. 837, 843–44 (1984).

12. See Mendelson, *Chevron and Preemption*, *supra* note 3, at 797–98; Sharkey, *supra* note 7, at 492–93.

13. See *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944) (holding that an agency interpretation may receive deference depending upon the “thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade”).

14. They advocate “an amalgam of *Skidmore* and hard-look review.” See Galle & Seidenfeld, *supra* note 1, at 2001–02. Their only apparent hesitation about *Skidmore* review is that because of the doctrine of *stare decisis*, it seems to limit an agency's flexibility to change its mind. *Id.* at 2000–01; see also, e.g., *United States v. Mead Corp.*, 533 U.S. 218, 247 (2001) (Scalia, J., dissenting) (arguing that a *Skidmore* approach will lead to “ossification” of statutory law). On the other hand, this seems to present the greatest problem when the Supreme Court has spoken. For example, a court of appeals may revisit precedent or disagree with another appellate court. Moreover, an agency can seek a legislative amendment from Congress.

15. See discussion *infra* Part II.

which Galle and Seidenfeld term “abstract federalism,”¹⁶ include the extent to which preservation of state autonomy can lead to more national dialogue and experimentation on policies and counterbalance federal authority.

What explains this? In my view, the ability of agencies to deliberate on preemption suffers from distinctive limitations that Galle and Seidenfeld do not adequately consider. I discuss two such shortcomings. First, as I have elsewhere argued, agencies lack expertise in federalism values that can figure in state law preemption questions. As with the EPA’s decision on the California greenhouse gas regulations, agencies show a consistent unwillingness to take these issues into account.

Second, a federal agency with a policy in hand would seem comparatively unlikely to concede the need for further experimentation or policy development by other governments. Professors Galle and Seidenfeld argue that enhanced judicial review might prompt better analysis of these issues. Under current law, however, judicial review of agency decisionmaking may have the contrary incentive, instead *detering* agencies from considering abstract federalism concerns. Accordingly, judges should not presumptively defer to agency decisions in this area.

THE EPA’S DECISION ON CALIFORNIA AUTOMOBILE GREENHOUSE GAS EMISSIONS

The authority to set emissions standards for automobiles is primarily federal, and states are generally preempted from setting their own tailpipe standards.¹⁷ By statute, however, preemption of state law is not complete. Under Clean Air Act Section 209(b), the EPA administrator “shall” grant a waiver of preemption to California for state standards that are at least as protective of public health and welfare as the federal standards.¹⁸ The section provides three exceptions that might justify a waiver denial.¹⁹ Most importantly, the administrator must deny a waiver of preemption if the administrator finds that “such State does not need such State standards to meet

16. Galle & Seidenfeld, *supra* note 1, at 2012.

17. 42 U.S.C. § 7543(a) (2000) (“No State or any political subdivision thereof shall adopt or attempt to enforce any standard relating to the control of emissions from new motor vehicles . . .”) (this section is commonly referred to as Clean Air Act § 209(a)).

18. *Id.* § 7543(b).

19. *Id.*

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compelling and extraordinary conditions.”²⁰ The EPA has considered over fifty waiver applications and apparently has granted most, if not all, to date.²¹

California’s leadership in regulating automotive air pollution is well recognized. According to the Congressional Research Service, California’s regulation has served to demonstrate “cutting edge emission control technologies,” including, among other things, catalytic converters and cleaner fuels.²²

In response to global warming concerns, California’s legislature mandated the first-ever greenhouse gas standards for automobiles in 2002; regulations were promulgated in 2004, and California filed a petition for waiver of preemption with the EPA on December 21, 2005.²³ The Clean Air Act permits other states to elect to follow California standards in lieu of federal standards,²⁴ and sixteen states have indicated their intent to adopt the California greenhouse gas standards.²⁵

The EPA took two full years to decide the petition.²⁶ Keeping a commitment to California Governor Arnold Schwarzenegger that it would render a decision by the end of 2007,²⁷ the EPA declared in December 2007 that it would deny the petition.²⁸ The EPA issued the

20. *Id.* § 7543(b)(1).

21. Since 1967, when the preemption and preemption waiver provisions were adopted, California has submitted and EPA has granted over fifty waivers of preemption in compliance with statutory terms. JAMES E. MCCARTHY & ROBERT MELTZ, CONG. RESEARCH SERV., CALIFORNIA’S WAIVER REQUEST TO CONTROL GREENHOUSE GASES UNDER THE CLEAN AIR ACT 2 (2007), available at <http://www.azclimatechange.gov/download/082007.pdf>.

22. *Id.*

23. Notice of Decision Denying a Waiver of Clean Air Act Preemption for California’s Greenhouse Gas Emission Standards for New Motor Vehicles, 73 Fed. Reg. 12,156, 12,157 (Mar. 6, 2008).

24. *See* 42 U.S.C. § 7507.

25. *See* Pew Center on Global Climate Change, Vehicle Greenhouse Gas Emissions Standards, http://www.pewclimate.org/what_s_being_done/in_the_states/vehicle_ghg_standard.cfm (last visited May 31, 2008).

26. The EPA initially took the position that decision on the waiver petition would be inappropriate prior to the Supreme Court’s decision in *Massachusetts v. EPA*, 127 S. Ct 1438 (2007). Notice of Decision Denying a Waiver of Clean Air Act Preemption for California’s Greenhouse Gas Emission Standards for New Motor Vehicles, 73 Fed. Reg. at 12,157. In *Massachusetts*, the EPA argued that greenhouse gases were not “air pollutants” within the meaning of the Clean Air Act. *Massachusetts*, 127 S. Ct., at 1450. In April 2007, the Supreme Court rejected the EPA’s arguments. *See id.* 1462.

27. Notice of Decision Denying a Waiver of Clean Air Act Preemption for California’s Greenhouse Gas Emission Standards for New Motor Vehicles, 73 Fed. Reg. at 12,157.

28. *Id.*

supporting opinion in February 2008, and it was published in the Federal Register on March 6, 2008.²⁹

That decision is notable because, to carry out its statutory responsibility to decide the petition, the EPA had to offer an interpretation of the scope of Section 209(b)(1)(B) of the Clean Air Act. That section says that no waiver can be granted “if the Administrator finds . . . that such State does not need such State standards to meet compelling and extraordinary conditions.”³⁰ The EPA construed this waiver exception to mean that the California standards at issue must be aimed at addressing a distinctively *local* problem.³¹ Otherwise, the EPA reasoned, the waiver must be denied and the California standards preempted by federal law.³² The EPA then applied the standard and found that the California standards did not meet the requirement because greenhouse gases represent global causes of a global problem of warming.³³ Even if warming might worsen California’s local air pollution problems, the agency reasoned, greenhouse gases causing that warming might come from anywhere and so must be addressed through a national approach, rather than locally.³⁴

Whatever answer the agency might have offered to the interpretive question, a thorough examination of it raises all the sorts of issues Professors Galle and Seidenfeld would predict. One would expect an expert interpreter of the scope of the waiver provisions to consider not only congressional intent reflected in the language, but also purposive issues. These would include the statutory goal of protecting air quality; concern with the cost of implementing multiple standards; and the value of some state regulatory autonomy to address local concerns, to experiment with policy, and to counterbalance federal authority.³⁵

Professors Galle and Seidenfeld suggest that normally this is the sort of job an agency should be able to undertake: “[A]gencies are well suited for evaluating the benefits of both localism and the need

29. *See id.* at 12,156–57.

30. 42 U.S.C. § 7543(b)(1)(B) (2000).

31. Notice of Decision Denying a Waiver of Clean Air Act Preemption for California’s Greenhouse Gas Emission Standards for New Motor Vehicles, 73 Fed. Reg. at 12,160.

32. *Id.*

33. *Id.*

34. *See id.* at 12,162–63.

35. *See Mendelson, Chevron and Preemption, supra* note 3, at 756–57 (summarizing federalism concerns that might be supported by a presumption against preemption).

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for experimentation within the programs they regulate . . . [including] the extent of problems with all existing regulatory paradigms that might warrant using states as laboratories to develop new approaches.”³⁶

One might see the California waiver as a sort of test case for their arguments. Given the existing controversies about how to regulate climate change, coupled with California’s past leadership on automotive air emissions, this is the sort of case in which an agency ought to be well suited at least to consider (if not ultimately to place dispositive weight upon) the “problems with . . . existing regulatory paradigms” and thus the value of state policy experimentation.

Moreover, four features of the California waiver decision process make it a particularly good test case for Professors Galle and Seidenfeld’s views. Because of the formal procedural advantages of rulemaking, Galle and Seidenfeld would like to see agencies take positions on preemption through rulemaking.³⁷ Admittedly, the decision on California’s waiver petition is not a “rule” and thus was not made through “rulemaking.” Nonetheless, in nearly all relevant procedural respects, the decision resembled a rulemaking, and a highly visible one at that.

First, the EPA held public hearings,³⁸ as required by statute,³⁹ and, as with rulemaking, conducted a notice and comment process.⁴⁰ As Administrator Stephen Johnson explained in his decision letter to Governor Schwarzenegger,

As you know, EPA undertook an extensive public notice and comment process with regard to the waiver request. The Agency held two public hearings: one on May 22, 2007 in Washington, D.C. and one in Sacramento, California on May 30, 2007. We heard from over 80 individuals at these hearings and received thousands of written comments during the ensuing public comment process from parties representing a broad set of interests, including state and local

36. Galle & Seidenfeld, *supra* note 1, at 1977.

37. *See id.* at 2011 (“This suggests that the agency should displace state law only by clearly stated legislative rules.”).

38. Notice of Decision Denying a Waiver of Clean Air Act Preemption for California’s Greenhouse Gas Emission Standards for New Motor Vehicles, 73 Fed. Reg. at 12,157.

39. *See* 42 U.S.C. § 7543(b)(1) (2000) (requiring “notice and opportunity for public hearing” prior to decision on a waiver application).

40. Notice of Decision Denying a Waiver of Clean Air Act Preemption for California’s Greenhouse Gas Emission Standards for New Motor Vehicles, 73 Fed. Reg. at 12,157. This, and other procedural requirements for rulemaking, are detailed in 5 U.S.C. § 553 (2006).

governments, public health and environmental organizations, academia, industry and citizens. The Agency also received and considered a substantial amount of technical and scientific material submitted after the close of the comment deadline on June 15, 2007.⁴¹

Second, the EPA's decision is subject to judicial review, as a rule would be, under the arbitrary and capricious standard.⁴² Third, though Office of Management and Budget clearance was not required for this decision,⁴³ EPA officials reportedly consulted with the White House on the decision anyway.⁴⁴ Fourth, given the amount of press coverage and congressional attention given to the December 2007 announcement of denial,⁴⁵ not to mention California's immediate filing of a lawsuit challenging the denial,⁴⁶ the EPA could reasonably

41. Letter from Stephen Johnson, EPA Administrator, to Arnold Schwarzenegger, Governor of Cal. (Dec. 19, 2007), available at <http://www.epa.gov/otaq/climate/20071219-slj.pdf>.

42. See 5 U.S.C. § 706(2)(A) (stating that judicial review standards for agency action include review to confirm that the action is not "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law"). One requirement applicable to rulemaking would not seem to apply here: an obligation to respond to "significant comments" that courts have imposed as a gloss on Section 553 of the APA. *E.g.*, *United States v. Nova Scotia Food Prods. Corp.*, 568 F.2d 240, 249–50 (2d Cir. 1977) ("We think that to sanction silence in the face of such vital questions [raised in the comments] would be to make the statutory requirement of a "concise general statement" less than an adequate safeguard against arbitrary decision-making.); *Am. Mining Cong. v. EPA*, 965 F.2d 759, 771 (9th Cir. 1992). Nonetheless, the other environmental features of the decision should have given EPA ample incentive to engage all relevant arguments.

43. See Exec. Order No. 13,422, 72 Fed. Reg. 2,763 (Jan. 18, 2007); Exec. Order No. 12,866, 3 C.F.R. 638 (1993), reprinted in 5 U.S.C. § 601 (2006) (requiring Office of Management and Budget clearance only of agency rules).

44. A March 2008 Senate appropriations committee hearing transcript contained the following colloquy between California Senator Dianne Feinstein and EPA Administrator Stephen Johnson:

FEINSTEIN: Did you discuss it with the White House?

JOHNSON: As I have said in previous testimonies, yes, I discuss major issues with the White House. I think that's good government. I discussed it with my colleagues across the administration. But again, the decision, the final decision rests with me and I made the decision . . .

Fiscal Year 2009 Budget for the EPA: Hearing Before the Subcomm. on Interior, Environmental, and Related Agencies of the S. Comm. on Appropriations, 110th Cong. (Mar. 4, 2008), 2008 WL 607187.

45. *E.g.*, John M. Broder & Felicity Barringer, *E.P.A. Says 17 States Can't Set Emission Rules*, N.Y. TIMES, Dec. 20, 2007, http://www.nytimes.com/2007/12/20/washington/20epa.html?_r=1&oref=slogin; Alex Kaplun, *Senate Panel to Probe Decision on Calif. Waiver*, GREENWIRE, Dec. 21, 2007 (on file with the *Duke Law Journal*).

46. See Alex Kaplun, *Calif., Groups Sue EPA Over Waiver Decision*, GREENWIRE, Jan. 2, 2008 (on file with the *Duke Law Journal*).

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expect a high degree of public accountability. The EPA could anticipate that the opinion explaining the denial would slip beneath no one's radar screen. And indeed, immediately after the EPA issued the opinion supporting the waiver denial, EPA Administrator Johnson was questioned in Congress regarding the decision.⁴⁷

Despite these seemingly optimal conditions for deliberation, the EPA's consideration of abstract federalism concerns was inadequate. The EPA interpreted the statute to require preemption of California standards unless the standards address "compelling and extraordinary" *local* air pollution conditions, in which the causes, too, are "local to California."⁴⁸

Again, my focus here is not on the result, but on the analysis the EPA used to get there. The EPA's opinion largely focused on what it believed Congress intended in enacting the words "compelling and extraordinary."⁴⁹ The Administrator's opinion stated in relevant part,

I believe that . . . Section 209(b) was a compromise measure that allowed disruption of the introduction of new motor vehicles into interstate commerce by allowing California to have its own motor vehicle program, but limited this to situations where the air pollution problems have their basic cause, and therefore their solution, locally in California.⁵⁰

Interestingly, the EPA opinion contained no discussion of the practical implications of its interpretation, either for automobile manufacturers or for the environment. Instead, it reads primarily as an exercise in pure statutory interpretation.

In that vein, even in a case that very clearly raised the value of state experimentation given California's history of regulating air pollution, the EPA did not discuss this core federalism value. The opinion did not consider the value of permitting California to continue to serve as a "laboratory" in developing climate change policies. Discussing this issue would have been appropriate in light of

47. Administrator Johnson was questioned in appropriations hearings, as well as in other settings. *E.g.*, *Fiscal Year 2009 Budget for the EPA*, *supra* note 44; *Fiscal Year 2009 Budget for the EPA: Hearing Before the Subcomm. on Interior, Environmental, and Related Agencies of the S. Comm. on Appropriations*, 110th Cong. (Feb. 26, 2008), 2008 WL 526941.

48. *See* Notice of Decision Denying a Waiver of Clean Air Act Preemption for California's Greenhouse Gas Emission Standards for New Motor Vehicles, 73 Fed. Reg. 12,156, 12,163 (Mar. 6, 2008).

49. *See id.*

50. *Id.*; *see also id.* (discussing "the unique problems faced in California as a result of its climate and topography" (citing H.R. REP. NO. 90-728, at 21 (1967))).

the statute's silence on whether "compelling and extraordinary" issues were to be local, in light of the legislative history, and, for that matter, in light of the arguments made to the EPA.⁵¹

To be fair, the EPA's analysis did consider the value of California's ability to respond to local concerns.⁵² In that respect, it is something of an improvement over other agency preemption decisions. For example, the opinion explicitly considered the value of California being able to address its distinctively local air pollution problems.⁵³

The EPA's failure, however, to consider the value of state policy experimentation in this best case scenario is consistent with my earlier documentation of agency failure to consider these values. In *Chevron and Preemption*, I have documented agency failures to comply with the "federalism impact statement" requirements of Executive Order 13,132.⁵⁴ In *A Presumption Against Agency Preemption*, I updated this research and also examined several examples of agency preemption declarations.⁵⁵ The EPA's failure in the California greenhouse gas waiver denial to thoroughly examine what Professors Galle and Seidenfeld term "abstract federalism"⁵⁶ issues is typical of past agency interpretations. I argued in those articles that this failure is largely a function of lack of agency expertise.⁵⁷

I agree with Professors Galle and Seidenfeld, however, that the analysis cannot simply be a critique of agency capabilities without

51. The EPA opinion *did*, a few pages earlier, note that "part of [the] benefit" to California of the 209(b) waiver was to allow the state to serve as a "laboratory for potential federal motor vehicle controls." *Id.* at 12,162. In simply mentioning this issue, the EPA opinion represents a substantial advance over most other agency actions relating to the extent of state law preemption. *See, e.g.*, Mendelson, *Chevron and Preemption*, *supra* note 3, at 784 (describing other examples of agency preemption discussions); Mendelson, *Presumption*, *supra* note 3, at 718–32 & nn 122–30. It may be that agencies will eventually develop some consistent expertise on these questions. For this potential to be fully realized, however, legislation is required. *See infra* text accompanying note 81 (arguing that statutory criteria are required to guide both agencies and reviewing judges). Ultimately, however, this issue appeared to play no role whatsoever in the EPA's reasoning. Indeed, that sentence could have been omitted from the opinion, while making no difference at all either to the analysis or to the outcome.

52. Notice of Decision Denying a Waiver of Clean Air Act Preemption for California's Greenhouse Gas Emission Standards for New Motor Vehicles, 73 Fed. Reg. 12,159–60.

53. *Id.* at 12,162.

54. Mendelson, *Chevron and Preemption*, *supra* note 3, at 783–86.

55. Mendelson, *Presumption*, *supra* note 3, at 719–21.

56. Galle & Seidenfeld, *supra* note 1, at 2012.

57. Mendelson, *Chevron and Preemption*, *supra* note 3, at 780–82; Mendelson, *Presumption*, *supra* note 3, at 718.

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considering how agencies stack up against other institutions. I have elsewhere considered, in more general terms, judicial expertise on federalism concerns.⁵⁸

And how does the EPA's discussion on this issue of "abstract federalism" compare with that of Congress? In a word, poorly. When Congress enacted the Air Quality Act of 1967, including Section 209 of the Clean Air Act, both House and Senate committee reports discussing the question of preemption considered the value of uniform national standards in addition to California's need to respond to local conditions, its status as a leader in regulating air pollution, and the value to the country of California's "policy experiments." The House Report, for example, contained discussion of the need for uniformity: "The ability of those engaged in the manufacture of automobiles to obtain clear and consistent answers concerning emission controls and standards is of considerable importance so as to permit economies in production."⁵⁹ It also considered "the unique problems facing California as a result of its climate and topography,"⁶⁰ and the value to the entire country of the state's leadership and its service as a model for regulating air pollution.⁶¹ Similarly, the Senate Committee Report focused on California's "unique problems and pioneering efforts," and stated,

The Nation will have the benefit of California's experience with lower standards which will require new control systems and design. In fact California will continue to be the testing area for such lower standards. . . [and if successful] it is expected that the Secretary will . . . give serious consideration to strengthening the Federal standards.⁶²

Both committees discussed these federalism issues although they arrived at different conclusions. The Senate committee adopted a version of the preemption provisions closer to their current form—allowing California to draft the standards, subject to an EPA waiver determination.⁶³ The House committee, however, reported a bill with

58. Mendelson, *Chevron and Preemption*, *supra* note 3, at 787–88.

59. H.R. REP. NO. 90-728, at 21 (1967).

60. *Id.* at 22.

61. *Id.* at 96 (separate statement Mssrs. John E. Moss & Lionel Van Deerlin) ("California has led the Nation in promulgating strict emission control requirements . . ."); *id.* ("California has been a model for the Nation in this critical field.").

62. S. REP. NO. 90-403, at 33 (1967).

63. *See id.*

no role preserved for California—instead, the bill authorized the federal government to set special standards *for* California.⁶⁴

In 1977, similar strains appeared in congressional discussions on amendments to the Clean Air Act. The House Report explained Section 209 with reference both to local issues and California's service as an example to the rest of the country: "California was afforded special status due to that State's pioneering role in regulating automobile-related emissions, which pre-dated the Federal effort. In addition, California's air pollution problem was then, and still appears to be, among the most pervasive and acute in the Nation."⁶⁵

In oversight hearings in 2007 and 2008, discussion among members of Congress has included consideration of these abstract federalism issues. In March 2008, during EPA budget hearings in the Senate, for example, a number of Senators commented on the states' rights issues raised by the EPA's treatment of the California waiver petition.⁶⁶ In House of Representatives hearings in November 2007 and February 2008, members of Congress mentioned the value of states as "laboratories of democracy, the places where innovative solutions to the nation's challenges are developed,"⁶⁷ as well as expressing concern with the EPA stopping states from leading the nation on difficult policy questions.⁶⁸ In January 2008 Senate hearings on climate change policy, in questioning a top administration official on its climate change policies compared with those of the states, another Senator observed the value of the "whole concept of

64. H.R. REP. NO. 90-728, at 9.

65. H.R. REP. NO. 95-294, at 301 (1977).

66. See *Fiscal Year 2009 Budget for the EPA: Hearing Before the Subcomm. on Interior, Environmental, and Related Agencies of the S. Comm. on Appropriations*, 110th Cong. (2008), 2008 WL 607187 (statement of Sen. Allard) ("I do not necessarily agree on all aspects of the greenhouse debate, but . . . I'm also troubled by the suggestion that the state of California's rights may have been curtailed."); *id.* (statement of Sen. Feinstein) ("I mean, it seems to me if Congress intended for waivers to be limited to problems unique to California, why did it give other states the right to adopt the same standards?").

67. *State Efforts Toward Low-Carbon Energy: Hearing Before the H. Select Comm. on Energy Independence and Global Warming*, 110th Cong. (2007), 2007 WL 3389741 (statement of Rep. Markey); see also *id.* (statement of Rep. McCollum) ("We have California, Wyoming, Washington, and the northern states coming up with creative ideas.").

68. *Hearing on the EPA Before the Subcomm. on Interior, Environmental, and Related Agencies of the H. Comm. on Appropriations*, 110th Cong. (2008), 2008 WL 526941 (statement of Rep. Moran) ("I was stunned that—where I would think that EPA would be encouraging state and local efforts. You pulled the rug out from under California, which was attempting to show the lead, because of the lack of leadership on the federal government's part.").

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federalism. We can learn in the [process] of doing.”⁶⁹ In short, congressional deliberations on state law preemption seem clearly superior to those of the EPA, despite the advantages of procedural rigor and greater transparency Professors Galle and Seidenfeld would claim for the agency.

So, why did the EPA not do a better job? It is impossible to know for sure, but procedural irregularities can be ruled out given the extensive process that accompanied the decision. Similarly, lack of political accountability likely also can be ruled out given the apparent (though informal) White House involvement.⁷⁰ For purposes of this discussion, I also assume the agency was not captured by rent-seeking interest groups or otherwise malfunctioning dramatically. Although a contrary assumption could, in theory, explain the outcome, there is little reason to think it would explain the quality of analysis.⁷¹

I suggest two possible explanations for the agency’s impoverished exploration of abstract federalism issues. First, as I have argued in greater detail elsewhere, assessing the abstract issues implicated in the distribution of federal and state power is not typically within the core expertise of a federal regulatory agency.⁷² The EPA is a specialized institution focused, in the setting of the Clean Air Act, on how best to protect health and the environment by regulating air pollution. Implementing that act only raises some of the many questions relevant to preemption, such as interstate issues and the burdens upon regulated entities that must comply with multiple standards. Congress has given the agency no specific guidance on how to interpret Clean Air Act preemption language. As the EPA itself notes, past waiver decisions have been far more cursory in analyzing the scope of this statutory language.⁷³

⁶⁹ *Climate Change: Hearing Before the S. Comm. on Foreign Relations*, 110th Cong. (2008) (statement of Sen. Cardin), 2008 WL 219099.

⁷⁰ See *supra* note 44 and accompanying text.

⁷¹ Capture could, of course, explain the result here. I have elsewhere argued that if one accepts a public choice view of agency regulation, state law preemption can allow an agency to more effectively “deliver on ‘deals’ with well-organized interest groups.” Mendelson, *Chevron and Preemption*, *supra* note 3, at 795.

⁷² See *id.* at 779-91.

⁷³ See Notice of Decision Denying a Waiver of Clean Air Act Preemption for California’s Greenhouse Gas Emission Standards for New Motor Vehicles, 73 Fed. Reg. 12,156, 12,159 (Mar. 6, 2008) (“EPA’s review of this criterion has typically been cursory due to California needing its motor vehicle emission program due to fundamental factors leading to local and regional air pollution problems (as discussed below).”). For an example of the EPA’s cursory review, see California State Motor Vehicle Pollution Control Standards; Waiver of Federal

Further, job postings at the EPA as of this writing, for program analysts and senior program officials, seek candidates with expertise in relevant environmental laws rather than on broader issues of governmental structure.⁷⁴ Even an EPA posting for a Congressional Liaison Specialist in the Office of Congressional and Intergovernmental Relations (EPA's point of contact for Congress and state and local governments) mentions only skills working with congressional staff, rather than, say, knowledge of state-federal relations or general governmental structure.⁷⁵ The job postings are only suggestive, but they indicate that the agency's focus is far more on its specialized mission than on broader issues of the distribution of power among different levels of the government.

Second, an agency may face particular disincentives to thorough consideration of abstract federalism values. Fully engaging a primary abstract value of federalism—the value of states serving as “laboratories of democracy”⁷⁶—requires an agency to acknowledge, either implicitly or explicitly, that its own decision and implementation plans may be incomplete, flawed, or at best not fully informed. Professors Galle and Seidenfeld argue that agencies are aware of “problems with all existing regulatory paradigms.”⁷⁷ This could presumably include shortcomings in federal standards or their prospects for implementation.

Others have commented, however, on an agency's tendency not to thoroughly revisit a proposal which it has developed in a notice of

Preemption—Notice of Waiver Decision and Within the Scope Determinations, 64 Fed. Reg. 42,689, 42,690 (Aug. 5, 1999) (“CARB has continually demonstrated the existence of compelling and extraordinary conditions justifying the need for its own motor vehicle pollution control program, which includes the subject standards and procedures. No information has been submitted to demonstrate that California no longer has [such] a compelling and extraordinary need . . .”).

74. *E.g.*, USAJobs, EPA Supervisory Environmental Program Analyst posting, <http://jobsearch.usajobs.opm.gov/getjob.asp?JobID=71190618@brd=387...rt=rv&vw=b&Logo=0&FedPub=Y&lid=316&FedEmp=N&ss=0&TabNum=3&rc=> (last visited May 31, 2008) (copy on file with author).

75. The posting does not mention knowledge of state-federal relations or general governmental structure.

76. *See New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting) (“It is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.”).

77. Galle & Seidenfeld, *supra* note 1, at 1977.

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proposed rulemaking.⁷⁸ Similarly, an agency's failure to fully value alternative regulatory strategies does not seem all that surprising if the agency has already committed to a different policy approach.

For example, in his letter to Governor Schwarzenegger announcing the waiver denial, Administrator Johnson stresses not only the statutory grounds for the waiver denial, but also the substantive content of the preferred national policy:

Congress has recognized the need for very aggressive yet technical feasible national standards to address greenhouse gases and energy security by passing the Energy Independence and Security Act. Just today the President signed these national standards into law, providing environmental benefits and economic certainty for Californians and all Americans. I strongly support this national approach⁷⁹

Conceivably, discussing California's pioneering efforts in developing strict greenhouse gas automotive emissions standards might have required some implicit acknowledgment from EPA that the proposed national solution to global warming might be incomplete or inadequate.

Professors Galle and Seidenfeld suggest that enhanced judicial review might help prompt agencies to more fully consider these abstract federalism concerns.⁸⁰ In my view, however, such enhanced judicial review cannot take place without Congress enacting a statute that guides agencies on when to interpret statutes to preempt state law and that thus gives courts criteria with which to review agency interpretations. Despite Galle and Seidenfeld's arguments, judges are highly unlikely simply to import into a "hard look" analysis factors that are not anchored in an authorizing statute itself. They typically look to the underlying statute as the source of the relevant factors that an agency must examine.⁸¹ Galle and Seidenfeld also mention

78. *E.g.*, Stephanie Stern, *Cognitive Consistency: Theory Maintenance and Administrative Rulemaking*, 63 U. PITT. L. REV. 589, 591 (2002) ("After agency members have devoted months, or even years, to preparing a proposed rule and made highly visible public commitments endorsing that proposal, the attitude maintenance bias suggests suboptimal processing of later public inputs.").

79. Letter from Stephen Johnson, EPA Administrator, to Arnold Schwarzenegger, Governor of Cal., *supra* note 41, at 1–2.

80. Galle & Seidenfeld, *supra* note 1, at 2012–13.

81. *See, e.g.*, *Whitman v. Am. Trucking Ass'ns, Inc.*, 531 U.S. 457, 471 n.4 (2001) (refusing to allow an agency to consider cost when the statute did not mention it). *See generally* Mendelson, *Chevron and Preemption*, *supra* note 3, at 793–94.

Executive Order 13,132 on federalism as a possible source of relevant values.⁸² That executive order, however, is explicitly unenforceable; noncompliance with it thus cannot serve as the basis for judicial review of an agency action.⁸³ Congressional action is clearly required here. Further, rather than prompting better consideration of federalism issues, current judicial review of agency action may actually serve to *deter* agencies from fully considering them. An agency that chooses a particular implementation path must defend its decision as fully reasoned to survive “hard look review.”⁸⁴ Acknowledging that states may have something significant and valuable to add to regulatory approaches, however, is not altogether consistent with an agency fully defending its own decision as the best option. Under some circumstances, fully valuing state approaches might undermine the agency’s position that its decision is well reasoned. An agency could, in theory, value states as “laboratories,” while still defending its own (perhaps preliminary) choice as well reasoned. Nonetheless, an agency is not likely to favor such a strategy. When an agency is required to consider alternatives to a particular decision, such as under the National Environment Policy Act or other statutes, the information on alternatives the agency has developed arguably can prompt more litigation on whether the agency has fully considered an alternative or made the right choice.⁸⁵ Though agencies do generally win these lawsuits, the prospect of more litigation may discourage an agency from meaningfully considering the value of divergent state policy alternatives.

The incentive from judicial review, of course, does not apply to Congress. Professors Galle and Seidenfeld argue that Congress, too,

82. See Galle & Seidenfeld, *supra* note 1, at 1983 n.21l.

83. Exec. Order No. 13,132 § 11, 3 C.F.R. 206, 211 (2000), *reprinted in* 5 U.S.C. § 601 (2006).

84. See, e.g., *Motor Vehicle Mfrs. Ass’n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29 (1983) (applying arbitrary and capricious standard to require agency to provide reasoned analysis of policy choice).

85. See, e.g., *Nevada Land Action Ass’n v. U.S. Forest Service*, 8 F.3d 713 (9th Cir. 1993) (denying a challenge to agency action for failure to justify chosen land management alternative in comparison to others considered); *Md. Wildlife Fed’n v. Dole*, 747 F.2d 229 (4th Cir. 1984) (dismissing a challenge to failure to adequately consider highway alternatives under NEPA), *vacated sub. nom.*, *Md. Wildlife Fed’n v. Lewis*, 22 ERC 1910 (4th Cir. 1985) (No. 83-1429); *United States v. Bell Petroleum Servs.*, 734 F. Supp. 771 (W.D. Tex. 1990) (ruling on a challenge to agency’s decision to install a drinking water system, rather than taking no action or supplying bottled water under CERCLA); see also *Motor Vehicle Mfrs. Ass’n*, 463 U.S. 29 (applying arbitrary and capricious standard to require agency to provide a reasoned analysis of its policy choice).

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faces some unique disincentives to fully considering state interests. Citing my work, they argue that “[s]tate lobbying in favor of general state prerogatives typically is weak as a result of free rider effects.”⁸⁶ To clarify matters somewhat, lobbying of this sort is more often undertaken by the multiple organizations that represent states as a whole. These include national organizations such as the National Governors’ Association or the National Conference of State Legislatures.⁸⁷ Contrary to Galle and Seidenfeld’s suggestion, these organizations thus are likely to fully value general state prerogatives. As I have argued in earlier work, however, an individual state *congressional* delegation may not fully value broader federalism interests such as the value of experimentation, because those values accrue to the nation as a whole, not only to the state the delegation represents. On the other hand, individual state delegations in Congress may have a particular interest in valuing local interests—for example, the Michigan delegation is known for voting against measures that would harm the automobile industry and local employment. This may devolve into the pathology of trying to export costs of a regulatory scheme from one region to another.⁸⁸ (For example, one could imagine the California delegation pressing for improved fuel efficiency standards, conceivably disproportionately impacting Michigan, but perhaps resisting sizeable fuel tax increases.) And indeed, I have argued that if incentives created by political structure are important, the EPA, as an executive branch agency that reports to the nationally elected chief executive, may be in a better position than Congress to fully appreciate federalism benefits that accrue nationally.⁸⁹

What the California waiver example suggests, however, is that despite Congress’s fewer procedural demands and the mixed political incentives to fully consider state autonomy, the EPA faces unique

86. Galle & Seidenfeld, *supra* note 1, at 1965.

87. For example, the National Conference of State Legislatures maintains the “Preemption Monitor” webpage. Law and Criminal Justice, Preemption Monitor, http://www.ncsl.org/standcomm/sclaw/PreemptionMonitor_Index.htm (last visited May 31, 2008); *see also* Nat’l Governors Ass’n, Importance of Federalism, <http://www.nga.org/portal/site/nga/menuitem.5cd31a89efe1f1e122d81fa6501010a0/?vgnextoid=817486c0f1c61010VgnVCM1000001a01010aRCRD> (last visited May 31, 2008).

88. *See* Galle & Seidenfeld, *supra* note 1, at 1966; Roderick M. Hills, Jr., *Against Preemption: How Federalism Can Improve the National Legislative Process*, 82 N.Y.U. L. REV. 1, 26–27 (2007).

89. Mendelson, *Chevron and Preemption*, *supra* note 3, at 769–73.

constraints that may undermine its ability to fully consider “federalism values” in its discussions on preemption.

If Congress were to provide agencies with clear guidance about how to evaluate preemption claims, that might prompt greater development of institutional competence on these federalism values. Such legislation also might provide more guidance for courts reviewing agency interpretations for consistency with the law and under the APA’s arbitrary and capricious standard. That might facilitate greater accountability of the sort Professors Galle and Seidenfeld envision.

Absent such legislative action, however, what is the best approach? Courts should not afford *Chevron* deference to agency preemption interpretations. At most, the interpretations should receive *Skidmore* deference—granted if the court finds the agency interpretation “persuasive.” Under *Skidmore*, a court evaluating an agency interpretation could examine the “thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control.”⁹⁰ Such an approach would allow a court to pay heed to an agency’s relevant expertise, such as on the difficulty of complying with multiple standards or the extent to which state law might undermine an important federal goal. At the same time, it would permit a court to disregard an agency’s conclusions if, for example, it failed to take important federalism issues into account in a preemption decision. If an agency’s interpretation is completely unpersuasive and thus receives little deference from a reviewing court, the court thus will rely primarily on its *own* reading of the statutory language. Congress can respond to the court’s reading of the language with clarification or greater specificity. Professors Galle and Seidenfeld worry that a judicial mistake on preemption may be difficult to correct because of the obstacles to enacting legislation.⁹¹ It is worth noting, however, that if the administrative agency disagrees with the judicial reading, the agency can join other interested parties in seeking a statutory amendment. This is likely to be a powerful combination.

90. *Id.* at 797–98 (quoting *Skidmore v. Swift*, 323 U.S. 134, 140 (1944)).

91. *See* Galle & Seidenfeld, *supra* note 1, at 1984.

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CONCLUSION

Professors Galle and Seidenfeld are surely correct that neither an administrative agency nor Congress faces a perfect set of political incentives to fully consider the values of state autonomy. They fail to recognize, however, distinct limitations on agency capacity to examine state law preemption questions. The California waiver case study suggests that despite an advantageous procedural setting, an agency's deliberation on preemption still may be impaired by a relative lack of expertise and the need for the agency to justify its own preferred policy. An agency thus may not adequately consider important federalism values. In sum, Congress and the judiciary currently appear to be more promising places in which to locate difficult questions of state law preemption.