

## EXECUTIVE PREEMPTION

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## INTRODUCTION

Preemption of state regulatory authority by national law is the central federalism issue of our time. Most analysis of this issue has focused on the preemptive effects of federal statutes. But as Justice White observed in *INS v. Chadha*,<sup>1</sup> “[f]or some time, the sheer amount of law . . . made by the [administrative] agencies has far outnumbered the lawmaking engaged in by Congress through the traditional process.”<sup>2</sup> Whether one views this development as a “bloodless constitutional revolution”<sup>3</sup> or as a necessary “renovation” of the constitutional structure in response to the complexity of modern society,<sup>4</sup> the advent of the administrative state has profound implications for the Constitution’s core commitments to federalism and separation of powers in general and for preemption doctrine in particular. Specifically, preemption doctrine has yet to resolve the extent to which executive action should be treated differently from legislation, or to grapple with the considerable range of diverse governmental activities that march under the banner of executive agency action.

Federal administrative action is, in important ways, considerably more threatening to state autonomy than legislation is. As the constitutional limits on national action fade into history, the primary remaining safeguards for state autonomy are political, stemming from the representation of the states in Congress, and procedural, arising from the sheer difficulty of navigating the federal legislative process. These safeguards have little purchase on executive action. The states have no direct role in the “composition and

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<sup>1</sup> 462 U.S. 919 (1983).

<sup>2</sup> *Id.* at 985–86 (White, J., dissenting).

<sup>3</sup> Gary Lawson, *The Rise and Rise of the Administrative State*, 107 HARV. L. REV. 1231, 1231 (1994).

<sup>4</sup> See CASS R. SUNSTEIN, *AFTER THE RIGHTS REVOLUTION: RECONCEIVING THE REGULATORY STATE* 227 (1990).

selection” of federal administrative agencies,<sup>5</sup> and much of the point of such agencies is to be more efficient lawmakers than Congress.<sup>6</sup> Agency action thus evades both the political and the procedural safeguards of federalism.

It remains true, of course, that “an agency literally has no power to act, let alone pre-empt the validly enacted legislation of a sovereign State, unless and until Congress confers power upon it.”<sup>7</sup> But as Colin Diver observes, “a defining characteristic of the administrative state [is] that most statutes are not direct commands to the public enforced exclusively by courts, but are delegations to administrative agencies to issue and enforce such commands.”<sup>8</sup> Preemption doctrine has developed primarily as a doctrine of statutory construction, focused on the intent of Congress, and transporting that doctrine into the administrative law context raises a number of difficult problems of translation. The Supreme Court’s preemption jurisprudence, unfortunately, has tended to ignore these problems. Instead of structuring preemption doctrine to account for the distinct position and characteristics of administrative agencies, the Court has tended to say simply that “[f]ederal regulations have no less pre-emptive effect than federal statutes.”<sup>9</sup>

I try to do a little better than that in this Article by addressing two basic sets of problems. The first involves questions of *interpretation* arising from an agency’s determination that congressional action has preemptive effect. The most prominent issue here is whether, where Congress’s own preemptive intent is ambiguous, courts should defer to the agency’s conclusion that a statute preempts state law under *Chevron U.S.A. Inc. v. National Resources Defense Council*.<sup>10</sup> Such deference would create an important exception to the normal presumption articulated most famously in *Rice v. Santa Fe Elevator Corp.* that statutory ambiguity is resolved in favor of *preserving* state regulatory authority.<sup>11</sup> I argue that although courts may continue to defer to agency interpretations of what the relevant statute *does*,

<sup>5</sup> See Herbert Wechsler, *The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Government*, 54 COLUM. L. REV. 543 (1954).

<sup>6</sup> See, e.g., Richard J. Pierce, Jr., *Political Accountability and Delegated Power: A Response to Professor Lowi*, 36 AM. U. L. REV. 391, 404 (1987) (“Given the nature and level of government intervention that Congress now authorizes, it could not possibly make the hundreds, or perhaps thousands, of important policy decisions that agencies make annually.”).

<sup>7</sup> *La. Pub. Serv. Comm’n v. FCC*, 476 U.S. 355, 374 (1986).

<sup>8</sup> Colin S. Diver, *Statutory Interpretation in the Administrative State*, 133 U. PA. L. REV. 549, 551 (1985).

<sup>9</sup> *Fid. Fed. Sav. & Loan Ass’n v. De la Cuesta*, 458 U.S. 141, 153 (1982). See generally Paul E. McGreal, *Some Rice With Your Chevron?: Presumption and Deference in Regulatory Preemption*, 45 CASE W. RES. L. REV. 823, 826 (1995) (complaining that “the Court merely has applied statutory preemption rules to *regulatory* preemption cases” without reflecting on the differences between Congress and the agencies).

<sup>10</sup> 467 U.S. 837, 843–44 (1984).

<sup>11</sup> 331 U.S. 218, 230–31 (1947).

*Chevron* should not be construed to require similar deference to agency conclusions about the law's preemptive effect.<sup>12</sup>

The second set of issues arises when preemption is asserted on the basis of regulations, orders, or other agency activity, rather than grounded in the relevant statute itself. These instances of preemption are problematic because they seem to shift preemptive authority from Congress to the agency—a result that contravenes both the text of the Supremacy Clause and the structural safeguards of federalism and separation of powers. As a result, I suggest that we may wish to restrict the agencies' role in preemption to interpreting what *Congress* has done. Failing that, however, I suggest a series of possible limiting principles, each of which would restrict administrative preemption to at least some extent beyond present law.

My discussion proceeds in three parts. Part I offers a brief account of preemption doctrine and situates the issue of executive preemption within that account. Part II addresses the question of statutory interpretation and deference. Part III then turns to the independent preemptive force of agency action.

#### I. EXECUTIVE PREEMPTION AND FEDERALISM DOCTRINE

An important and intuitively appealing genre of preemption scholarship seeks to allocate regulatory authority among national and state governmental institutions so as to achieve optimal regulation, as measured by the goals of the overall regulatory scheme. This is the approach that my friend Catherine Sharkey takes, for example, in her recent work on products liability preemption.<sup>13</sup> My perspective is considerably different and, as a result, requires brief elaboration. I view preemption doctrine not as a tool of regulatory policy but rather as the most significant contemporary manifestation of what Justice O'Connor describes as “our oldest question of constitutional law”—that is, “the proper division of authority between the Federal Government and the States.”<sup>14</sup> Although the policy concerns of efficiency, safety, and the like inherent in particular regulatory schemes are hardly irrelevant to the decision of individual preemption cases, the general rules of preemption doctrine—such as the preemptive effect of executive action—should be set with an eye firmly focused on the constitutional imperatives of federalism doctrine.

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<sup>12</sup> For a similar argument, see Damien J. Marshall, Note, *The Application of Chevron Deference in Regulatory Preemption Cases*, 87 GEO. L.J. 263 (1998).

<sup>13</sup> See, e.g., Catherine M. Sharkey, *Products Liability Preemption: An Institutional Approach*, 76 GEO. WASH. L. REV 449 (2008) [hereinafter Sharkey, *Products Liability Preemption*]; Catherine M. Sharkey, *The Fraud Caveat to Agency Preemption*, 102 NW. U. L. REV. 841, 862–66 (2008) [hereinafter Sharkey, *Fraud Caveat*].

<sup>14</sup> *New York v. United States*, 505 U.S. 144, 149 (1992).

At the core of that doctrine is a general commitment to balance between national and state authority.<sup>15</sup> That commitment is grounded not in the capacity of federalism to promote various policy values—although I believe that it *does* promote such values<sup>16</sup>—but rather in constitutional fidelity.<sup>17</sup> The federal balance has shifted over time, as has the role of the courts in seeking to maintain it. In the early Republic, the Marshall Court acted to shore up a fledgling national government by curbing centrifugal impulses in the states.<sup>18</sup> In the present time, by contrast, the center of gravity has plainly shifted to the national government, and the courts' obligation, accordingly, is to protect a meaningful role for the states.<sup>19</sup> Fidelity to the Constitution thus requires courts to make compensating doctrinal adjustments in the direction of limiting national power, even if the institutional limitations of courts and the uncertainty of locating any fixed ideal point make “restoring” the original balance unlikely.<sup>20</sup>

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<sup>15</sup> See generally Ernest A. Young, *Making Federalism Doctrine: Fidelity, Institutional Competence, and Compensating Adjustments*, 46 WM. & MARY L. REV. 1733, 1764–71 (2005) [hereinafter Young, *Making Federalism Doctrine*].

<sup>16</sup> See, e.g., Barry Friedman, *Valuing Federalism*, 82 MINN. L. REV. 317 (1997).

<sup>17</sup> See *New York*, 505 U.S. at 157 (“Our task would be the same even if one could prove that federalism secured no advantages to anyone. It consists not of devising our preferred system of government, but of understanding and applying the framework set forth in the Constitution.”). To be sure, the Constitution does not set forth specific rules for executive preemption or any number of other contemporary federalism issues, and where there is play in the joints, other values—such as efficiency—become relevant. But I do insist that the ultimate question must remain how to preserve and enforce the basic federal balance embodied in the Constitution, not whether other institutional forms might be better. Stuart Benjamin and I have defended this constitutionalist orientation in the specific context of administration elsewhere. See Stuart M. Benjamin & Ernest A. Young, *Tennis with the Net Down: Administrative Federalism Without Congress*, 57 DUKE L.J. (forthcoming 2008). For the contrary view that administrative federalism doctrine should focus on achieving an optimal regulatory structure for today, see Brian D. Galle & Mark Seidenfeld, *Admin Law’s Federalism: Preemption, Delegation, and Agencies at the Edge of Federal Power*, 57 DUKE L.J. (forthcoming 2008). See also Jacob E. Gersen, *Overlapping and Underlapping Jurisdiction in Administrative Law*, 2006 SUP. CT. REV. 201 (arguing that authority should be allocated between federal agencies and state regulators so as to create optimal incentives for regulatory innovation and expertise).

<sup>18</sup> See, e.g., *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 436–37 (1819) (holding that Maryland lacked authority to tax the Bank of the United States); *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 239–240 (1824) (invalidating New York’s attempt to grant an exclusive license to operate a ferry in interstate commerce). See generally ROBERT G. MCCLOSKEY, *THE AMERICAN SUPREME COURT* 17 (4th ed. 2005) (“From 1789 until the Civil War, the dominant interest of the Supreme Court was in . . . the nation-state relationship. And the dominant judicial value . . . was the value of preserving the American Union.”).

<sup>19</sup> The modern Court has recognized this obligation only sporadically. For two examples, see *United States v. Lopez*, 514 U.S. 549, 567–68 (1995), which held that the federal Gun Free School Zones Act exceeded Congress’s authority under the Commerce Clause, and *Printz v. United States*, 521 U.S. 898, 935 (1997), which held that Congress may not “commandeer” state executive officials by requiring them to enforce federal law.

<sup>20</sup> See Young, *Making Federalism Doctrine*, *supra* note 15, at 1775–1815.

Preemption doctrine is a particularly important vehicle for promoting balance between national and state authority.<sup>21</sup> Although the fact is frequently overlooked, preemption played a crucial role in the Marshall Court's early federalism cases. *Gibbons v. Ogden* held that New York's effort to grant an exclusive steamship license under state law was preempted by Congress's grant of a federal license to a competitor.<sup>22</sup> And in *McCulloch v. Maryland*, the Court held Maryland's tax on out-of-state banks preempted on the ground that it interfered with the federal policy embodied in the National Bank Act.<sup>23</sup> For most of the next century, however, preemption doctrine took a back seat to the Court's effort to define and police a constitutional boundary, primarily under the Commerce Clause, between exclusive spheres of national and state power. In a world of exclusive regulatory spheres, federal and state laws do not generally interact in the same regulatory space (at least in theory), and preemption issues as we now know them arise only rarely.<sup>24</sup>

The collapse of this "dual federalism" regime after 1937,<sup>25</sup> however, means that, as a practical matter, the national and state governments enjoy concurrent regulatory authority over most issues. Such a concurrent regime vastly magnifies the potential for clashes between state and federal regulation. As Stephen Gardbaum notes, the Supreme Court accorded broad preemptive effect to federal legislation within the relatively narrow sphere allowed by the pre-1937 Commerce Clause; once Congress's potential authority expanded to cover most areas of state regulation, however, the Court came to define the preemptive effect of federal legislation much more nar-

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<sup>21</sup> See generally Ernest A. Young, *Federal Preemption and State Autonomy*, in FEDERAL PREEMPTION: STATES' POWERS, NATIONAL INTERESTS 249 (Richard A. Epstein & Michael S. Greve eds., 2007) [hereinafter Young, *Federal Preemption*]; David A. Dana, *Democratizing the Law of Federal Preemption*, 102 NW. U. L. REV. 507, 507 (2008) ("[H]ow the federal courts respond to preemption challenges affects how vibrant a role the states can have in democratic governance, and thus affects how vibrant a role the people . . . can have in democratic governance.").

<sup>22</sup> See 22 U.S. (9 Wheat.) at 220–21.

<sup>23</sup> See 17 U.S. (4 Wheat.) at 436. Both *McCulloch* and *Gibbons* involved the supremacy effect of federal law—i.e., the fact that federal law trumps state law in the event of a conflict. Stephen Gardbaum has drawn a sharp line between that effect and Congress's power to displace state law in the absence of such a conflict. See generally Stephen Gardbaum, *Congress's Power to Preempt the States*, 33 PEPP. L. REV. 39 (2005). Although I find that distinction useful for some purposes, in this Essay I will follow conventional usage in referring to both phenomena as "preemption."

<sup>24</sup> See Stephen A. Gardbaum, *The Nature of Preemption*, 79 CORNELL L. REV. 767, 785 (1994) ("For most of the nineteenth century, the Court typically decided cases involving the relationship between state and federal power not on preemption grounds, but on grounds of exclusivity or supremacy alone.").

<sup>25</sup> See, e.g., *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937) (ending an era of relatively strict judicial enforcement of enumerated limits on national authority by upholding the Wagner Act); Edward S. Corwin, *The Passing of Dual Federalism*, 36 VA. L. REV. 1, 17 (1950) (describing the system of "dual federalism," which postulated a sharp and enforceable division of enumerated authority between the nation and the states, and observing that "[t]his entire system of constitutional interpretation touching the Federal System is today in ruins" after 1937).

rowly.<sup>26</sup> Without meaningful constitutional limits on national authority, moreover, the effective “boundary” between state and national spheres consists largely of the limits of the regulatory schemes erected by Congress.<sup>27</sup> It thus becomes terribly important to determine how much regulatory territory Congress has appropriated for itself and how much it has left to the states. This is a question of statutory construction, and it is the issue at the heart of every preemption case.<sup>28</sup>

The Rehnquist Court’s “federalist revival” did little to alter this situation. Recent cases striking federal legislation as outside the commerce power have sought simply to prevent the doctrine of enumerated powers from disappearing entirely, not to revive that doctrine as a significant check on the mainstream of federal regulation.<sup>29</sup> Some critics of doctrines limiting preemption suggest that the Court should focus on limiting the authority of Congress more directly, through restrictive constructions of the Commerce Clause and other national powers.<sup>30</sup> But for any number of reasons—such as the Court’s historical failure to develop coherent limits on the commerce power,<sup>31</sup> the sheer weight of all the national statutes and institutions estab-

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<sup>26</sup> See Gardbaum, *supra* note 24, at 801–07. This shift is the genesis of the modern “presumption against preemption.” See *id.* at 806–07; see also *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230–31 (1947) (articulating this presumption).

<sup>27</sup> See generally Ernest A. Young, *The Constitution Outside the Constitution*, 117 YALE L.J. 408 (2007) (discussing the importance of statutes in defining the boundary between state and federal authority).

<sup>28</sup> Justice Breyer captured this dynamic in his dissent in *Egelhoff v. Egelhoff*:

[T]he Court has recognized the practical importance of preserving local independence, at retail, i.e., by applying pre-emption analysis with care, statute by statute, line by line, in order to determine how best to reconcile a federal statute’s language and purpose with federalism’s need to preserve state autonomy. Indeed, in today’s world, filled with legal complexity, the true test of federalist principle may lie, not in the occasional constitutional effort to trim Congress’ commerce power at its edges, *United States v. Morrison*, 529 U.S. 598 (2000), or to protect a State’s treasury from a private damages action, *Board of Trustees of Univ. of Ala. v. Garrett*, 531 U.S. 356 (2001), but rather in those many statutory cases where courts interpret the mass of technical detail that is the ordinary diet of the law, *AT&T Corp. v. Iowa Utilities Bd.*, 525 U.S. 366, 427 (1999).

532 U.S. 141, 160–61 (2001) (Breyer, J., dissenting).

<sup>29</sup> See, e.g., *United States v. Lopez*, 514 U.S. 549 (1995) (striking down the Gun Free School Zones Act); *United States v. Morrison*, 529 U.S. 598 (2000) (striking down portions of the Violence Against Women Act).

<sup>30</sup> See, e.g., Viet Dinh, *Reassessing the Law of Preemption*, 88 GEO. L.J. 2085, 2117 (2000) (“Redefining the proper balance of legislative powers between Congress and the states is better accomplished directly, through an insistence on the limits of Congress’s enumerated and limited powers under Article I, rather than circuitously and ineffectually through some vague and ill-conceived presumption against preemption under the Supremacy Clause.”).

<sup>31</sup> See, e.g., Jenna Bednar & William N. Eskridge, Jr., *Steadying the Court’s “Unsteady Path”*: *A Theory of Judicial Enforcement of Federalism*, 68 S. CAL. L. REV. 1447, 1462 (1995) (“Each line of cases described in this part (constitutional limits on federal regulation, constitutional limits on federal regulation of the states, and constitutional limits on state regulation) might be characterized as internally incoherent—shifting directions erratically and containing hard-to-explain inconsistencies over time.” (emphasis omitted)).

lished in reliance on a broad Commerce Clause,<sup>32</sup> and the ultimate allegiance of the federal courts to federal power<sup>33</sup>—the Supreme Court is unlikely ever to limit the Commerce Clause in a very meaningful way.<sup>34</sup> Preemption doctrine offers a much more viable avenue for protecting state autonomy without disrupting settled law or providing damaging judicial confrontations with Congress.<sup>35</sup>

The “federalist revival” has been disappointing on this score. The Rehnquist Court held state law preempted more often than not, and ironically the politically conservative leaders of that revival tended to abandon the cause when litigation shifted from the Commerce Clause and the Eleventh Amendment to matters of statutory preemption.<sup>36</sup> The early Roberts Court has largely continued this pro-preemption stance, with decisions that are sometimes remarkably insensitive to legitimate concerns for state regulatory autonomy. Its recent decision in *Rowe v. New Hampshire Motor Transport Ass’n*,<sup>37</sup> for example, continued the Court’s crusade against state efforts to protect children from tobacco.<sup>38</sup> Federal law deregulates the trucking business and preempts state laws “related to a price, route, or service of any motor carrier.”<sup>39</sup> *Rowe* held that this provision preempted a Maine law requiring shippers to verify that persons receiving tobacco shipments were old enough to use tobacco legally—notwithstanding that Congress’s primary concerns were with state economic regulation directed at the trucking industry itself and that Congress had affirmatively encouraged the states to regulate tobacco use by minors.<sup>40</sup> Justice Breyer’s opinion for

<sup>32</sup> See, e.g., Henry Paul Monaghan, *Stare Decisis and Constitutional Adjudication*, 88 COLUM. L. REV. 723, 745 (1988) (concluding that “many of the fundamental transformations in our governmental structure legitimated by the Supreme Court in this century are unquestionably above challenge”).

<sup>33</sup> See, e.g., Frank B. Cross, *Realism About Federalism*, 74 N.Y.U. L. REV. 1304, 1315–20 (1999) (arguing that because federal judges are officers of the federal government, they have strong incentives to favor national over state authority).

<sup>34</sup> Any doubt on this score should have been resolved by the Court’s subsequent decision upholding Congress’s authority to regulate the noncommercial use of marijuana grown and consumed within a single state. See *Gonzales v. Raich*, 545 U.S. 1 (2005). For an assessment of *Raich*, see Ernest A. Young, *Just Blowing Smoke? Politics, Doctrine, and the Federalist Revival after Gonzales v. Raich*, 2005 SUP. CT. REV. 1 [hereinafter Young, *Blowing Smoke*].

<sup>35</sup> See Ernest A. Young, *The Rehnquist Court’s Two Federalisms*, 83 TEX. L. REV. 1, 130–34 (2004) [hereinafter Young, *Two Federalisms*].

<sup>36</sup> See generally Richard H. Fallon, Jr., *The “Conservative” Paths of the Rehnquist Court’s Federalism Decisions*, 69 U. CHI. L. REV. 429, 462 (2002); Calvin Massey, *Federalism and the Rehnquist Court*, 53 HASTINGS L.J. 431, 502–12 (2002); Daniel J. Meltzer, *The Supreme Court’s Judicial Passivity*, 2002 SUP. CT. REV. 343, 362–78; Young, *Two Federalisms*, *supra* note 35, at 30–32.

<sup>37</sup> 128 S. Ct. 989 (2008).

<sup>38</sup> See also *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525 (2001) (holding that federal law requiring warning labels on cigarette packages preempted a Massachusetts law forbidding sign and poster advertising of tobacco products near schools).

<sup>39</sup> 49 U.S.C. § 14501(c)(1) (2000).

<sup>40</sup> See *Rowe*, 128 S. Ct. at 999 (Ginsburg, J., concurring) (noting that Congress had provided funding incentives for state regulation of tobacco sales to minors, and that Internet sales make such regula-

the Court made short work of Maine's public health concerns, finding that health regulation would simply make the world too complicated for trucking companies.<sup>41</sup>

Nonetheless, preemption doctrine retains significant potential as a vehicle for protecting state autonomy. In a world of concurrent regulatory authority, the primary protections for state autonomy are political and procedural. The political safeguard is the representation of the states in Congress.<sup>42</sup> Although there are all sorts of reasons to question the efficacy of this safeguard, it seems to operate to some effect, some of the time.<sup>43</sup> The procedural safeguard, on the other hand, lies in the sheer difficulty of getting proposals on the national legislative agenda and then pushing them through the multiple veto gates of approval by two houses of Congress and the President.<sup>44</sup> The critical variables when the national government acts in a way that may intrude on state autonomy are thus the clarity of the action (so that potential defenders of state interests are aware of the threat and can respond to it), the particular national institution that acts (which determines the extent to which state advocates have a voice in that action), and the difficulty of the procedure by which the action is taken (because national inertia favors state autonomy).

Consider, for example, the classic preemption case in which an ambiguous federal statute must be construed to determine whether it preempts state law. The somewhat beleaguered centerpiece of current doctrine is the "presumption against preemption," which holds that "the historic police

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tion difficult without age verification by shippers). Justice Ginsburg "doubt[ed] that the drafters of the [Federal Aviation Administration Authorization Act of 1994], a statute designed to regulate the carriage of goods, anticipated the measure's facilitation of minors' access to tobacco," *id.*, but deferred to "the breadth of [the Act]'s preemption language" and prior decisions "closely in point." *Id.* at 998 (citing *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374 (1992); *Am. Airlines, Inc. v. Wolens*, 513 U.S. 219 (1995)).

<sup>41</sup> See *id.* at 997 (majority opinion) ("[T]o allow Maine directly to regulate carrier services would permit other States to do the same. Given the number of States through which carriers travel, the number of products, the variety of potential adverse public health effects, the many different kinds of regulatory rules potentially available, and the difficulty of finding a legal criterion for separating permissible from impermissible public-health-oriented regulations, Congress is unlikely to have intended an implicit general 'public health' exception broad enough to cover even the shipments at issue here."). Note the scare quotes in the original around Maine's "public health" rationale.

<sup>42</sup> See, e.g., Wechsler, *supra* note 5. For an earlier version, see THE FEDERALIST NOS. 45, 46 (James Madison) (noting the states' institutional representation in Congress, but emphasizing the broader competition between the states and the national government for the loyalty of the people).

<sup>43</sup> Compare *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 564-67 (1985) (Powell, J., dissenting) (rejecting the majority's "political safeguards" argument), and Lynn A. Baker & Ernest A. Young, *Federalism and the Double Standard of Judicial Review*, 51 DUKE L.J. 75, 106-33 (2001) (collecting arguments against exclusive reliance on political safeguards to protect federalism), with *Printz v. United States*, 521 U.S. 898, 957-58 (1997) (Stevens, J., dissenting) (citing the Unfunded Mandates Reform Act of 1995, Pub. L. No. 104-4, 109 Stat. 48, as evidence that Congress acts to protect the interests of state governments).

<sup>44</sup> See, e.g., Bradford R. Clark, *Separation of Powers as a Safeguard of Federalism*, 79 TEX. L. REV. 1321 (2001).



powers of the States [are] not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress.<sup>45</sup> The effect of this clear statement rule is to ensure notice that state interests are threatened by proposed legislation, to oblige *Congress* to make the preemption decision itself rather than leaving it to a court to determine by implication, and to require that an explicit preemption decision survive the difficult enactment procedure for statutory text.<sup>46</sup> The efficacy of these requirements in safeguarding state autonomy can be readily confirmed simply by looking to the number of significant preemption cases in which they are not satisfied, leaving the courts to rely upon more amorphous notions of implied conflict preemption.<sup>47</sup> Consistent enforcement of the presumption against preemption would require upholding state regulation in this large category of cases; it seems likely, as a result, that such enforcement would be a far more meaningful check on expansions of national regulatory authority at the ex-

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<sup>45</sup> *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230–31 (1947). Commentators have criticized the presumption against preemption, *see, e.g.,* Dinh, *supra* note 30, at 2087–97 (arguing that the presumption is illegitimate because it may generate results contrary to the most likely intent of Congress); Caleb Nelson, *Preemption*, 86 VA. L. REV. 225, 235–44 (2000) (arguing that the presumption is inconsistent with the original understanding of the Supremacy Clause), and important debates are in progress concerning its scope, *compare, e.g.,* *United States v. Locke*, 529 U.S. 89, 103–04 (2000) (suggesting that the presumption applies only in areas of traditional state regulatory authority), *with* *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996) (plurality opinion) (suggesting that the presumption applies “in all preemption cases”). These debates are largely outside the scope of this Article. My short answers, developed at greater length elsewhere, are that the presumption is a normative canon of construction that protects constitutional federalism values rather than seeking to gauge the unexpressed intent of Congress with regard to particular statutes, *see* Young, *Federal Preemption*, *supra* note 21, at 265; Ernest A. Young, *Constitutional Avoidance, Resistance Norms, and the Preservation of Judicial Review*, 78 TEX. L. REV. 1549, 1585–99 (2000) (defending normative canons of construction) [hereinafter Young, *Constitutional Avoidance*]; that this canon is legitimate, notwithstanding its inconsistency with the Framers’ original strategy for protecting federalism, as a judicial compensating adjustment to reflect the demise of the enumerated powers and dual federalism doctrines, *see* Young, *Making Federalism Doctrine*, *supra* note 15, at 1848–50; and that the presumption should not be confined to particular fields because it is virtually impossible to define spheres of traditional state or federal regulatory authority in a consistent and principled way, *see* Ernest A. Young, *Dual Federalism, Concurrent Jurisdiction, and the Foreign Affairs Exception*, 69 GEO. WASH. L. REV. 139 (2001) [hereinafter Young, *Dual Federalism*].

<sup>46</sup> *See* Matthew C. Stephenson, *The Price of Public Action: Constitutional Doctrine and the Judicial Manipulation of Legislative Enactment Costs*, 118 YALE L.J. (forthcoming Fall 2008) (describing how clear statement rules enforce constitutional values by increasing the enactment costs of particular types of legislation).

<sup>47</sup> *See, e.g.,* *Am. Ins. Ass’n v. Garamendi*, 539 U.S. 396, 413–27 (2003) (holding that California’s Holocaust Victims Insurance Relief Act was preempted because it conflicted with the implicit purpose of a federal executive agreement with Germany, despite the lack of any federal legislation on point or preemptive language in the agreement itself); *Geier v. Am. Honda Motor Co.*, 529 U.S. 861, 869–74 (2000) (holding that the National Traffic and Motor Safety Act of 1966 preempted state tort suits, despite a textual savings clause for common law actions, on the ground that the state tort suits in question conflicted with the purpose of federal standards); *Locke*, 529 U.S. at 116–17 (finding conflict preemption despite the lack of a clear statement of Congress’s preemptive intent in the statute); *see also* Dana, *supra* note 21, at 532–34 (discussing how preemption doctrine will determine the fate of California’s efforts to limit greenhouse gases).

pense of the states than the Court's recent and largely symbolic efforts to put teeth in the Commerce Clause.<sup>48</sup>

Executive preemption, by contrast, is particularly problematic in terms of all three variables that I highlight above. When executive actors add preemptive mandates not clearly set forth in the underlying statute, the notice and deliberation facilitated by clear textual statement is lacking. This is true even if the agency proceeds by notice and comment because the deliberation assumed by "political safeguards" theories of federalism takes place among the states' representatives in Congress, not among interest groups submitting comments to federal bureaucrats. Federal agencies, after all, have no mandate to represent state interests and possess strong countervailing incentives to maximize their own power and jurisdiction.<sup>49</sup> Justice Stevens has observed, in this vein, that "[u]nlike Congress, administrative agencies are clearly not designed to represent the interests of States, yet with relative ease they can promulgate comprehensive and detailed regulations that have broad pre-emption ramifications for state law."<sup>50</sup> The political and procedural safeguards of federalism are thus readily circumvented through executive action. It is hardly surprising that so much federal pre-

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<sup>48</sup> See, e.g., *United States v. Lopez*, 514 U.S. 549 (1995); Daniel J. Meltzer, *The Seminole Decision and State Sovereign Immunity*, 1996 SUP. CT. REV. 1, 63 ("I am inclined to view *Lopez* less as a fundamental recasting of relations between nation and state than as a warning shot across the bow . . .").

<sup>49</sup> See, e.g., Nina A. Mendelson, *Chevron and Preemption*, 102 MICH. L. REV. 737, 794-95 (2004) [hereinafter Mendelson, *Chevron*] ("While an agency would not directly expand its own jurisdiction in reading an ambiguous statute to preempt state law, it could, through a preemption decision, indirectly lay the groundwork for an increase in the agency's importance by making itself the primary regulator—as a practical matter, the only game in town. This would enable it to demand a larger budget and more employees in order to properly regulate the field. Alternatively, to the extent one accepts a public choice view of agency regulation, an agency's power to preempt conflicting state law would make it better able to deliver on 'deals' with well-organized interest groups." (footnotes omitted)); see also Jonathan R. Macey, *Positive Political Theory and Federal Usurpation of the Regulation of Corporate Governance: The Coming Preemption of the Martin Act*, 80 NOTRE DAME L. REV. 951, 953-56 (2005) (describing political dynamics that encourage federal agencies to seek expanded jurisdiction). But see Gersen, *supra* note 17, at 235 (suggesting that concerns about agency overreaching rest "on unproven background assumptions about the behavior of administrative agencies"); Daryl Levinson, *Empire-Building Government in Constitutional Law*, 118 HARV. L. REV. 915, 922 (2005) (arguing more generally that "the risks of government self-aggrandizement" are "both exaggerated and anachronistic"). I offer no empirical demonstration of agency incentives in the preemption context here. I do think that, given the centrality to our constitutional structure of the idea that politicians are motivated by "ambition," and that "the interest of the man" can be "connected with the constitutional rights of the place," THE FEDERALIST NO. 51, at 322 (James Madison) (Clinton Rossiter ed., 1961), both the theoretical and empirical burdens of proof ought to lie with those who would reorient our thinking around a different set of assumptions. Indeed, one is tempted to say that the steady historical expansion of federal agency authority vis-à-vis the states is *res ipsa loquitur*.

<sup>50</sup> *Geier*, 529 U.S. at 908 (Stevens, J., dissenting); see also Richard B. Stewart, *Federalism and Rights*, 19 GA. L. REV. 917, 963 (1985) (observing that in the administrative state, "battles among factions are resolved not on the floors of Congress but in the hallways of bureaucracies and, ultimately, the chambers of federal judges" and that "[t]his system of policymaking circumvents many of the political safeguards that are supposed to make national policies sensitive to state and local concerns").

emption now rests on executive action rather than explicit statutory command.

One possible objection to this line of argument would hold that administrative agencies themselves form a “political safeguard of federalism.” Many, if not most, federal regulatory programs involve the cooperation of state officials in implementation.<sup>51</sup> As Professor Larry Kramer has observed,

[T]he federal government depends . . . heavily on state officials to help administer its programs. Realistically speaking, Congress can neither abandon these programs nor “fire” the states and have federal bureaucrats assume full responsibility for them. The federal government needs the states as much as the reverse, and this mutual dependency guarantees state officials a voice in the process. Not necessarily an equal voice: because federal law is supreme and Congress holds the purse strings, the federal government is bound to prevail if push comes to shove. But federal dependency on state administrators gives federal officials an incentive to see that push doesn’t come to shove, or at least that this happens as seldom as possible, and that means taking state interests into account.<sup>52</sup>

Professor Kramer concedes that, in recent years, “the federal government has shown greater willingness to take matters into its own hands and administer without help from the states,”<sup>53</sup> and his more recent work has emphasized the role of political parties, rather than administrators, in protecting federalism.<sup>54</sup> With respect to the latter, he concludes that “while this particular safeguard may not be sufficient, standing alone, to protect the interests of state institutions, it would be a mistake to assume that it counts for nothing.”<sup>55</sup>

I am willing to concede that much, but it is important to note two additional points. First, the interrelationship of state and federal administrators may work to enhance national power as easily as it protects the states. Professor Kramer’s argument about administrators is similar to his argument about political parties; in both contexts, he insists that the need for state and national officials to work together encourages each set of officials to take the other’s interests into account. It has been demonstrated, however, that party allegiance may cause members of Congress to put loyalty to the

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<sup>51</sup> See generally Philip J. Weiser, *Towards a Constitutional Architecture for Cooperative Federalism*, 79 N.C. L. REV. 663 (2001).

<sup>52</sup> Larry Kramer, *Understanding Federalism*, 47 VAND. L. REV. 1485, 1544 (1994); see also Mendelson, *Chevron*, *supra* note 49, at 774–77 (making a similar point).

<sup>53</sup> Kramer, *supra* note 52, at 1544 n.142.

<sup>54</sup> See Larry D. Kramer, *Putting the Politics Back into the Political Safeguards of Federalism*, 100 COLUM. L. REV. 215, 278–87 (2000). For criticism of the political parties argument, see Lynn A. Baker, *Putting the Safeguards Back into the Political Safeguards of Federalism*, 46 VILL. L. REV. 951, 956–72 (2001); Saikrishna B. Prakash & John C. Yoo, *The Puzzling Persistence of Process-Based Federalism Theories*, 79 TEX. L. REV. 1459, 1480–89 (2001).

<sup>55</sup> Kramer, *supra* note 52, at 1544 n.142.

party's national program over their states' autonomy interests,<sup>56</sup> and one would expect a similar dynamic where state administrators sometimes "buy in" to the national regulatory program and do not vigorously defend state prerogatives.<sup>57</sup> Second, the interaction of state and federal administration may have distorting effects on politics in general, and separation of powers in particular, at the state level. This phenomenon has been noted in the European Union, where the executive branches of the member states may actually favor action at EU level because they control the member state's representation at that level. Centralization thus becomes a useful tool for circumventing opposition from the legislative or judicial branch within the state.<sup>58</sup> The same dynamic may occur within the U.S. federal system—particularly in states, like Texas, in which the executive itself is not unitary. State governments are not monolithic, and it is often a mistake to assume that one particular class of state officials will always represent the general autonomy interests of the state.

To return to the basic point, preemption doctrine is a well-suited vehicle for preserving federalism in a world where the national and state governments enjoy concurrent regulatory jurisdiction rather than exclusive spheres of constitutional authority. It is critical to recognize, moreover, the dearth of plausible alternative doctrinal instruments that might plausibly play this role. The Commerce Clause is likely to prove an extremely limited vehicle going forward, and other constitutional principles—like the principle of state sovereign immunity that has garnered so much attention of late<sup>59</sup>—tend to create conflict in the federal system without effectively protecting the autonomy of the states to make their own policy choices.<sup>60</sup> There is a hydraulic quality to federalism doctrine: weakening one set of constraints on national power tends to create pressure to tighten others if the overall objective of meaningful balance is to be maintained. Hence, if limits on preemption are to be sacrificed in the name of greater efficiency or expertise, one ought to ask what *other* instruments are to be found to protect

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<sup>56</sup> See Note, *No Child Left Behind and the Political Safeguards of Federalism*, 119 HARV. L. REV. 885, 893–97 (2006) (demonstrating how party allegiance to the President led Republican members of Congress to sacrifice the interests of their states and vote in favor of federal intervention in education, notwithstanding federalism-based misgivings).

<sup>57</sup> One might expect persons choosing to become state environmental officials, for example, to be more committed to environmental regulation than the public at large. In some circumstances, such state officials might well view federal regulators as welcome allies against antiregulatory forces in their home states.

<sup>58</sup> See, e.g., DAVID P. CALLEO, *RETHINKING EUROPE'S FUTURE* 270 (2001); Giandomenico Majone, *Europe's 'Democratic Deficit': The Question of Standards*, 4 EUR. L.J. 5, 7 (1998).

<sup>59</sup> See, e.g., *Alden v. Maine*, 527 U.S. 706, 730–54 (1999) (holding that Congress may not abrogate the states' immunity even when suits are brought in state court); *Seminole Tribe v. Florida*, 517 U.S. 44, 55–73 (1996) (holding that Congress may not abrogate the states' immunity from private damages suits when it acts pursuant to its Article I powers).

<sup>60</sup> See generally Young, *Two Federalisms*, *supra* note 35, at 154–60 (criticizing the Court's emphasis on state sovereign immunity as a vehicle for protecting federalism).

state autonomy. My own view is that the preemption doctrine remains the best tool, and my discussion of the particularly vexing problem of executive preemption in the following Parts proceeds from that perspective.

## II. DEFERENCE TO AGENCY INTERPRETATIONS OF PREEMPTIVE FEDERAL STATUTES

Federal administrative agencies raise questions for preemption doctrine in two distinct capacities: through the agencies' power to *interpret* the statutes they administer, and through the agencies' delegated authority to *act* in furtherance of the statutory scheme. The interpretive problem, which I discuss in this Part, actually has two dimensions of its own. The first involves the rules of construction to be applied by the agency itself, while the second concerns the proper approach that courts should take when reviewing agency interpretations of potentially preemptive federal statutes.

### A. Interpretation by the Agency

Like courts, of course, executive agencies must interpret the statutes that they administer and enforce. And also like courts, they will often have to construe the degree to which the statute in question preempts state law. Agencies deciding preemption issues should follow the presumption against preemption.<sup>61</sup> If that presumption were a descriptive canon of construction, reflecting a best guess as to the enacting Congress's likely intent,<sup>62</sup> then an agency that had been involved in the statute's drafting might have a plausible argument for ignoring the *Rice* presumption.<sup>63</sup> But *Rice* is best defended as a *normative* canon protecting constitutional values of federalism apart from Congress's intent in drafting the statute at issue.<sup>64</sup> The argument, in a nutshell, is that any interpreter needs some sort of default principle in the face of statutory ambiguity, and when constitutional norms are otherwise underenforced, normative canons of statutory construction are an appealing way to mitigate that enforcement gap.<sup>65</sup> Nothing in this argument for federalism-protecting canons of construction suggests that those canons should be applied only by *courts*; indeed, the likelihood that many agency interpre-

<sup>61</sup> Sometimes they do. See, e.g., *Air Pollution Control; Preemption of State Regulation for Nonroad Engine and Vehicle Standards*, 59 Fed. Reg. 36,969, 36,974 (July 20, 1994) (codified at 40 C.F.R. pt. 85 (1995)).

<sup>62</sup> See, e.g., Daniel B. Rodriguez, *The Presumption of Reviewability: A Study in Canonical Construction and Its Consequences*, 45 VAND. L. REV. 743, 749 (1992) (describing "descriptive canons" as "implement[ing] what Congress really wanted, but expressed inartfully or incompletely").

<sup>63</sup> See, e.g., *Zuber v. Allen*, 396 U.S. 168, 192–93 (1969) (courts should defer to agency construction of ambiguous acts that the agency participated in drafting).

<sup>64</sup> See Rodriguez, *supra* note 62, at 749 ("[N]ormative canons may or may not coincide with legislators' values or intentions.").

<sup>65</sup> See Young, *Federal Preemption*, *supra* note 21, at 264–67; see also Young, *Constitutional Avoidance*, *supra* note 45, at 1593–1601 (arguing for the general legitimacy of normative canons of construction like the presumption against preemption).

tations may go unreviewed, and that any reviewing court will accord the agency's view some level of deference, simply underscores the need for agencies to apply the *Rice* presumption in the first instance.

President Clinton's Executive Order on federalism<sup>66</sup> appears to *require* agencies to apply a similar presumption when evaluating the preemptive effect of federal statutes. The Order provides:

Agencies shall construe . . . a Federal statute to preempt State law only where the statute contains an express preemption provision or there is some other clear evidence that the Congress intended preemption of State law, or where the exercise of State authority conflicts with the exercise of Federal authority under the Federal statute.<sup>67</sup>

Given the language of the Order, it is not clear that federal agencies have the authority to follow the federal courts in limiting the presumption against preemption to fields of traditional state authority.<sup>68</sup> The Order, after all, seems to require "clear evidence" of preemptive intent in all cases.<sup>69</sup> This may reflect an implicit acknowledgement that "the category of traditional arenas of state regulation is so subject to manipulation that almost any state law or regulation could be characterized as falling or not falling within a traditional arena."<sup>70</sup>

On the other hand, the Order does leave agencies free to find conflict preemption; it does not by its terms reinforce its requirement of a clear textual statement for express preemption with a requirement that the existence of a significant practical conflict be equally clear. This highlights a basic weakness of the *Rice* presumption as a constraint on federal preemption: the presumption is generally stated as a lens to employ in construing a statutory text, but many preemption debates lack an explicit textual provision to construe. Instead, analysis by both agencies and courts focuses on issues of functional conflict.<sup>71</sup> To be truly effective, the *Rice* approach to textual

<sup>66</sup> See Exec. Order No. 13,132, 64 Fed. Reg. 43,255 (Aug. 4, 1999).

<sup>67</sup> *Id.* at 43,257.

<sup>68</sup> Compare *United States v. Locke*, 529 U.S. 89, 107–08 (2000) (suggesting that the *Rice* presumption applies only in areas of traditional state regulation), with *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996) (plurality opinion) (stating that the presumption applies "in all pre-emption cases").

<sup>69</sup> At least some agencies, however, seem to have limited the presumption's scope anyway. See, e.g., *Cleveland, Ohio Requirements for Transportation of Hazardous Materials*, 66 Fed. Reg. 29,867, 29,870 (June 1, 2001) (gutting the effect of the Order through an expansive interpretation of *Locke*).

<sup>70</sup> Dana, *supra* note 21, at 515; see also *id.* at 515–16 (demonstrating how regulation of greenhouse gases can plausibly be characterized as either a federal or a state issue); *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 539 (1985) (rejecting the category of "traditional state functions" as hopelessly indeterminate and therefore unworkable). As Professor Dana points out, limiting the *Rice* presumption to areas of traditional state concern—even if we could identify those areas in a principled and consistent way—is also "inconsistent with [a] conception of the states as central to changing paradigms and practices in governance." Dana, *supra* note 21, at 517.

<sup>71</sup> See Dana, *supra* note 21, at 509–11.

construction must be paired with an analogous “thumb on the scale” in evaluating the degree of conflict required for preemption.

In any event, there is little evidence that agencies have paid much attention to the Federalism Order. As Nina Mendelson points out, the Order also requires federal agencies to analyze the impact of their decisions on federalism values, but compliance with the formal requirement is rare, and the quality of the analysis highly perfunctory.<sup>72</sup> She concludes that “agency rulemaking staff is not especially sensitive to the sorts of concerns that have motivated federalism advocates.”<sup>73</sup> It might be possible to put teeth in the Federalism Order, and its invocation of the *Rice* presumption, through the oversight functions of congressional committees or centralized executive review by the Office of Management and Budget (OMB).<sup>74</sup> A more aggressive option would be to amend the Order to make noncompliance an independent ground for judicial evaluation of the agency action in question.<sup>75</sup> As I suggest in the next Section, however, the most promising route would be to make compliance a variable in calibrating the degree of deference that agency interpretations receive on judicial review.<sup>76</sup> To the extent that federal agencies have strong incentives to supplant state regulations, review by the Article III Judiciary is likely to be the more promising means of limiting agency preemption.<sup>77</sup>

### B. Judicial Review of Agency Interpretations

The more difficult questions arise when courts must *review* an agency’s interpretation of a federal statute’s preemptive effect. Here, the presumption against preemption may conflict with the *Chevron* rule, which requires courts to defer to agency interpretations of the statute the agency

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<sup>72</sup> Mendelson, *Chevron*, *supra* note 49, at 782–86.

<sup>73</sup> *Id.* at 785.

<sup>74</sup> *See generally* Exec. Order No. 12,866, 58 Fed. Reg. 51,735 (Oct. 4, 1993) (providing for centralized OMB review of agency action).

<sup>75</sup> The current version of the Order disclaims any right of private enforcement. *See* Exec. Order No. 13,132, 64 Fed. Reg. 43,255, 43,259 (Aug. 4, 1999) (“This order is intended only to improve the internal management of the executive branch, and is not intended to create any right or benefit, substantive or procedural, enforceable at law by a party against the United States, its agencies, its officers, or any person.”).

<sup>76</sup> *See infra* text accompanying note 124.

<sup>77</sup> *See* Susan Bartlett Foote, *Administrative Preemption: An Experiment in Regulatory Federalism*, 70 VA. L. REV. 1429, 1441 (1984) (“The agency is an interested party, not an independent arbiter. This conflict of interest . . . exacerbates the federal bias inherent in the agency’s non-representative character.”). The federal courts, of course, are not wholly uninterested parties either; their paychecks come from the federal government, and they are likely to prefer dealing with federal law to state law. *See* Steven G. Calabresi, “A Government of Limited and Enumerated Powers”: *In Defense of United States v. Lopez*, 94 MICH. L. REV. 752, 808 (1995); Cross, *supra* note 33, at 1315–20 (1999). But there is no truly neutral tribunal available, and the courts are likely to be far preferable to federal agencies in this regard. The tendency of the federal courts to favor federal law can be disciplined somewhat, moreover, by interpretive presumptions.

administers if (1) the statute is ambiguous and (2) the agency's interpretation is reasonable.<sup>78</sup> Again, not all scenarios raise equal difficulties. Sometimes the agency will find state law *not* preempted so that *Rice* and *Chevron* will press in the same direction.<sup>79</sup> If anything, the *Rice* anti-preemption canon ought to add an additional presumption that a nonpreemptive agency interpretation is a *reasonable* construction of the statute at step two of the *Chevron* analysis.

We can set aside a second not-so-difficult case by distinguishing between agency interpretations of what the underlying statute actually *does* or *requires* and interpretations of the statute's effects on state law. In *Smiley v. Citibank*,<sup>80</sup> the Court construed section 30 of the National Bank Act, which permits national banks to charge their loan customers "interest at the rate allowed by the laws of the State . . . where the bank is located."<sup>81</sup> The Court had previously held that this provision allows a national bank headquartered in, say, South Dakota to charge its credit card customers in other states the interest rate permitted by South Dakota, regardless of the rules in the customers' own states.<sup>82</sup> In effect, the Bank Act preempted the ability of the customers' home states to regulate the interest paid by their citizens to out-of-state banks. The question in *Smiley* was whether late payment fees on credit card debts counted as "interest" under the statute. The Court unanimously deferred to the conclusion of the Comptroller of the Currency (who is charged with regulating national banks) on this question, rejecting the argument that the preemptive effect of section 30 foreclosed *Chevron* deference.<sup>83</sup> Justice Scalia wrote for the Court:

This argument confuses the question of the substantive (as opposed to preemptive) *meaning* of a statute with the question of *whether* a statute is preemptive. We may assume (without deciding) that the latter question must always be decided *de novo* by the courts. That is *not* the question at issue here; there is no doubt that [the Act] pre-empts state law.<sup>84</sup>

*Smiley* thus makes clear that agency interpretations of what a statute means, does, or requires are not excluded from *Chevron* simply because those interpretations may have preemptive implications. As the D.C. Circuit had

<sup>78</sup> *Chevron U.S.A. Inc. v. Natural Res. Def. Council*, 467 U.S. 837, 842–44 (1984).

<sup>79</sup> *See, e.g., Medtronic, Inc. v. Lohr*, 518 U.S. 470, 495–96 (1996) (giving "substantial weight" to the FDA's construction of the Medical Devices Amendments *not* to preempt the Lohrs' claims); *Hillsborough County v. Automated Med. Labs.*, 471 U.S. 707, 714–15 (1985) (holding that the FDA's statement of its intent *not* to preempt state law in the relevant regulation was "dispositive . . . unless either the agency's position is inconsistent with clearly expressed congressional intent . . . or subsequent developments reveal a change in that position" (citation omitted)).

<sup>80</sup> 517 U.S. 735 (1996).

<sup>81</sup> 12 U.S.C. § 85 (2000); *Smiley*, 517 U.S. at 787.

<sup>82</sup> *See Marquette Nat'l Bank of Minneapolis v. First of Omaha Serv. Corp.*, 439 U.S. 299, 307–19 (1978).

<sup>83</sup> *Smiley*, 517 U.S. at 739–40.

<sup>84</sup> *Id.* at 744.



earlier observed, “with the exception of negative exercises of federal authority, all agency legal interpretations have some preemptive effect; no state law in direct contradiction will survive. Petitioner’s special nondeference principle would therefore have to be applied almost universally, overturning *Chevron*.”<sup>85</sup> Deference becomes problematic only when the agency is addressing the preemption question itself by, for example, construing a preemption clause in the federal statute or considering whether a given state statute conflicts with a federal statute’s underlying purpose.

This problematic set, of course, contains a fairly significant universe of cases. Where the agency does decide the preemption question itself and, in fact, interprets its statute to preempt state law, *Rice* and *Chevron* are in conflict. Judge Kravitch has put the conflict this way:

[T]o say that a court should defer to an agency’s determination that state law is preempted is seemingly paradoxical: the agency would command deference under *Chevron* only if the federal statute were ambiguous; but if the federal statute were ambiguous, then Congress’s intent to preempt seemingly would not be “clear and manifest.”<sup>86</sup>

This view has not always carried the day, however. Some lower courts have deferred under *Chevron* to agency conclusions that the statutes they administer preempt state law.<sup>87</sup> The Supreme Court has not definitively resolved the issue; *Smiley* left open the question of how courts should resolve an outright conflict between the centralizing force of deference to an agency’s preemptive interpretation of a federal statute and the decentralizing thrust of the presumption against preemption.<sup>88</sup> In the most recent case

<sup>85</sup> Okla. Natural Gas Co. v. Fed. Energy Regulatory Comm’n, 28 F.3d 1281, 1284 (D.C. Cir. 1994).

<sup>86</sup> Teper v. Miller, 82 F.3d 989, 998 (11th Cir. 1996) (Kravitch, J.); see also McGreal, *supra* note 9, at 843 (outlining the conflict between *Rice* and *Chevron*). Judge Calabresi recently reached a similar conclusion, observing that “whatever deference would be owed to an agency’s view in contexts where a presumption against federal preemption does apply, an agency cannot supply, on Congress’s behalf, the clear legislative statement of intent required to overcome the presumption against preemption.” *Desiano v. Warner-Lambert & Co.*, 467 F.3d 85, 97–98 n.9 (2d Cir. 2006), *aff’d by an equally divided court*, 128 S. Ct. 1168 (2008).

<sup>87</sup> See, e.g., *Freeman v. Burlington Broadcasters, Inc.*, 204 F.3d 311, 322 (2d Cir. 2000). *But cf.* *Am. Airlines, Inc. v. Dep’t of Transp.*, 202 F.3d 788, 804–05 (5th Cir. 2000) (treating the choice as one between de novo review of the agency’s preemption ruling and *Chevron* deference and noting that this choice was an unresolved question).

<sup>88</sup> See *Mass. Ass’n of Health Maint. Orgs. v. Ruthardt*, 194 F.3d 176 (1st Cir. 1999). As Judge Selya pointed out in *Ruthardt*, “[t]he intervening decision in *Medtronic [v. Lohr]*, 518 U.S. 470 (1996) only complicates matters.” *Ruthardt*, 194 F.3d at 182. Five justices in *Medtronic* did give some sort of deference to the agency’s determination on the preemption question, see 518 U.S. at 494–96 (giving “substantial weight” to the agency’s view on the preemption question); *id.* at 505 (Breyer, J., concurring in part and in the judgment) (suggesting that the agency “possesses a degree of leeway” in resolving preemption issues), but Justice O’Connor’s dissent read them as *not* applying *Chevron*. See *id.* at 511 (O’Connor, J., concurring in part and dissenting in part). More importantly, *Chevron* and *Rice* pressed in the same direction in that case, as the agency had interpreted the statute *not* to preempt state law. *Medtronic* thus had no occasion to address the question that arises when the two rules of construction cut in different directions.

that might have addressed the issue, *Watters v. Wachovia Bank, N.A.*, the Court avoided the question by basing its holding that state law was preempted on its own independent reading of the underlying statute.<sup>89</sup>

My own view is that, in this case of direct conflict between *Rice* and *Chevron*, *Rice*'s presumption against preemption should prevail.<sup>90</sup> *Chevron* typically is justified on three different grounds. First, the Court has suggested that Congress, by writing an ambiguous statute, should be held to have delegated the policy choices within the zone of statutory ambiguity to the administering agency.<sup>91</sup> Second, policy choices resulting from ambiguity should be made by the decisionmaker with the greater claim to democratic legitimacy, which favors executive agencies—accountable to voters through the President—over courts.<sup>92</sup> Third, some have justified *Chevron* on the ground “that agencies have greater policy expertise than courts.”<sup>93</sup> The case against allowing *Chevron* to trump *Rice* becomes clear when we consider these justifications in the special context of preemption.

Delegation, as I have suggested, is problematic from the perspective of federalism because it circumvents the political and procedural safeguards that ordinarily protect state autonomy. *Chevron* exacerbates the problem by presuming delegations where there is little evidence of actual congressional intent to support them,<sup>94</sup> and by minimizing the extent to which the statutory

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The Court likewise had no occasion to consider this question in *Geier*. Justice Breyer's majority opinion did “place some weight” upon the agency interpretation in that case, *see Geier v. Am. Honda Motor Co.*, 529 U.S. 861, 883 (2000), but the agency was interpreting the preemptive effect of its own regulations—not that of the underlying statute itself. *Geier* thus raised the issue of the preemptive effect of agency action per se, not the weight to be accorded an agency interpretation of a congressional enactment.

<sup>89</sup> 127 S. Ct. 1559, 1572 (2007).

<sup>90</sup> The most reliable proponent of this view on the current Court is Justice Stevens—may he live long and prosper. *See, e.g., Watters*, 127 S. Ct. at 1584 (Stevens, J., dissenting) (“No case from this Court has ever applied such a deferential standard [as *Chevron*] to an agency decision that could so easily disrupt the federal-state balance. . . . [W]hen an agency purports to decide the scope of federal preemption, a healthy respect for state sovereignty calls for something less than *Chevron* deference.”).

<sup>91</sup> *See Chevron U.S.A. Inc. v. Natural Res. Def. Council*, 467 U.S. 837, 843–44 (1984); Cass R. Sunstein, *Chevron Step Zero*, 92 VA. L. REV. 187, 197–98 (2006) (arguing that the delegation rationale has won out).

<sup>92</sup> *See Chevron*, 467 U.S. at 866 (“When a challenge to an agency construction of a statutory provision, fairly conceptualized, really centers on the wisdom of the agency's policy, rather than whether it is a reasonable choice within a gap left open by Congress, the challenge must fail. In such a case, federal judges—who have no constituency—have a duty to respect legitimate policy choices made by those who do.”). *See generally* Cynthia R. Farina, *Statutory Interpretation and the Balance of Power in the Administrative State*, 89 COLUM. L. REV. 452, 466–67 (1989) (discussing the delegation and democratic accountability justifications for *Chevron*).

<sup>93</sup> Einer Elhauge, *Preference-Estimating Statutory Default Rules*, 102 COLUM. L. REV. 2027, 2135 (2002) (noting this as “[t]he leading alternative theory for *Chevron*” but ultimately finding it unsatisfactory).

<sup>94</sup> *See* Stephen Breyer, *Judicial Review of Questions of Law and Policy*, 38 ADMIN. L. REV. 363, 370 (1986) (stating that “legislative intent to delegate the law-interpreting function” is “a kind of legal

text can constrain the exercise of delegated power.<sup>95</sup> The vesting of legislative power in Congress under Article I ought to limit delegations, but that norm is chronically underenforced.<sup>96</sup> It seems odd in general to respond to that problem of underenforcement by adding an interpretive rule—*Chevron*—that *extends* the effect of delegations even further. That is particularly true when *Chevron* undermines attempts to protect another underenforced constitutional norm—state autonomy—through the *Rice* presumption against preemption.<sup>97</sup>

The second justification for *Chevron*—that agencies are more politically accountable than courts—may make sense when those are the only two institutions in the picture. But the context of preemption adds a third decisionmaker: the state governmental institution responsible for the rule that is being preempted. The state institution is likely to be both closer to the people and, in the case of state legislatures (as well as some state courts and executive officials), directly accountable to them.<sup>98</sup> In these circumstances, the democratic legitimacy justification for deferring to the federal agency simply does not apply.<sup>99</sup> Nor should we forget that state institutions have their own basis of constitutional legitimacy as separate sovereigns in the federal system.<sup>100</sup>

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fiction”); Elhauge, *supra* note 93, at 2132 (“[I]t seems dubious to conclude that the enactment of a vague statute itself indicates a congressional intent to give agencies discretion over its interpretation.”).

<sup>95</sup> See Farina, *supra* note 92, at 498 (suggesting that judicial deference to an agency interpretation of a statute limits Congress’s ability to delegate narrowly).

<sup>96</sup> See, e.g., *Am. Trucking Ass’ns v. Whitman*, 531 U.S. 457, 474–75 (2001) (“[W]e have ‘almost never felt qualified to second-guess Congress regarding the permissible degree of policy judgment that can be left to those executing or applying the law.’” (quoting *Mistretta v. United States*, 488 U.S. 361, 416 (1989) (Scalia, J., dissenting))).

<sup>97</sup> See generally Young, *Constitutional Avoidance*, *supra* note 45, at 1552–53 (arguing that interpretive presumptions are a good way to protect underenforced constitutional norms).

<sup>98</sup> See, e.g., *Gregory v. Ashcroft*, 501 U.S. 452, 458 (1990) (observing that federalism “assures a decentralized government that will be more sensitive to the diverse needs of a heterogeneous society” and “increases opportunity for citizen involvement in democratic processes”); Deborah Jones Merritt, *The Guarantee Clause and State Autonomy: Federalism for a Third Century*, 88 COLUM. L. REV. 1, 3–10 (1988).

<sup>99</sup> It is true that state institutions are democratically accountable only to the people of the state, and not to the nation as a whole, and that in some cases such state institutions will have incentives to favor local interests at the expense of national ones. *Cf. McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 326–30 (1819) (holding that Maryland could not tax the Bank of the United States, in part because the Maryland legislature did not account for the national interests embodied by the Bank). This observation might suggest a narrower scope for the *Rice* presumption in cases where a holding of nonpreemption would significantly disadvantage out-of-state interests vis-à-vis in-state interests. But if the state law in question really is discriminatory in this way, then it likely is unconstitutional under the dormant commerce clause without recourse to statutory preemption analysis. See, e.g., *Or. Waste Sys., Inc. v. Dep’t of Env’tl. Quality*, 511 U.S. 93, 99 (1994) (“If a restriction on commerce is discriminatory, it is virtually *per se* invalid.”). In any event, many preemption cases will involve regulatory burdens falling on in-staters and out-of-staters alike.

<sup>100</sup> See, e.g., *Danforth v. Minnesota*, 128 S. Ct. 1029, 1041 (2008) (emphasizing that “States are independent sovereigns with plenary authority to make and enforce their own laws”); *New York v. United*

Finally, there is the question of agency expertise.<sup>101</sup> As an initial matter, it is considerably harder to tie the expertise rationale to constitutional values than it is to ground arguments from delegation (which rely on Congress's primary lawmaking authority) or democratic accountability (which claim constitutional legitimacy for the agency itself). American law has never been quite so deferential to technocratic expertise as, say, European legal culture.<sup>102</sup> It is easy to cite instances, moreover, in which agencies appear to act politically rather than as experts, even in the teeth of their own experts' advice.<sup>103</sup> This expertise question, moreover, is frequently addressed in terms of the agency's expertise concerning the particular question of regulatory policy under the relevant statute: Is the federal agency or the state legislature (or even worse, *fifty* state legislatures) more competent to formulate efficient product safety rules?<sup>104</sup>

This approach, however, elides a second expertise question: Which institution (the federal agency or the reviewing court) is more expert at interpreting a statute's preemptive effect and, more broadly, at bringing constitutional concerns about federalism to bear on that question? Federal agencies have only limited expertise with regard to *that* issue.<sup>105</sup> Indeed, the sporadic and perfunctory compliance of federal administrators with the Federalism Executive Order, which requires explicit analysis of federalism concerns, consultation with state officials, and a narrow approach to preemption, suggests that federal agencies have little desire or competence in addressing issues of state-federal balance.<sup>106</sup>

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States, 505 U.S. 144, 167–69 (1992) (grounding the anti-commandeering doctrine in the need to make sure that state governmental officials remain accountable to their own citizens).

<sup>101</sup> Although expertise is sometimes cited as a basis for *Chevron* deference, *see, e.g.*, Kaganovich v. Gonzales, 470 F.3d 894, 897 (9th Cir. 2006), it is more frequently associated with lesser forms of deference, *see, e.g.*, Fed. Express Corp. v. Holowecki, 128 S. Ct. 1147, 1156–58 (2008); Skidmore v. Swift & Co., 323 U.S. 134, 140 (1944); Thomas W. Merrill & Kristin E. Hickman, *Chevron's Domain*, 89 GEO. L.J. 833, 855 (2001) (“Under *Skidmore*, . . . it does not matter whether Congress has delegated authority to an agency to administer the statute as long as the agency has relevant expertise.”).

<sup>102</sup> *See, e.g.*, Paul W. Kahn, *Marbury in the Modern Era: Comparative Constitutionalism in a New Key*, 101 MICH. L. REV. 2677, 2699 (2003) (“The norms of Europe are bureaucratic, not democratic.”); Jed Rubenfeld, *Unilateralism and Constitutionalism*, 71 N.Y.U. L. REV. 1971, 1995–96 (2004) (noting the “faith in an expert, neutral bureaucratic rationality” in European political thought); Eric Stein, *International Integration and Democracy: No Love at First Sight*, 95 AM. J. INT’L L. 489, 516 (2001) (“The European Community was conceived as an essentially technocratic organization, and has moved gradually toward greater democracy.”).

<sup>103</sup> *See, e.g.*, Juliet Eilperin, *EPA Tightens U.S. Smog Standards But Agency Ignored Advisers’ Guidance*, WASH. POST, Mar. 13, 2008, at A1.

<sup>104</sup> *See, e.g.*, Sharkey, *Products Liability Preemption*, *supra* note 13, at 485–86.

<sup>105</sup> *See, e.g.*, Thomas W. Merrill, *Preemption and Institutional Choice*, 102 NW. U. L. REV. 727, 755–56 (2008); *see also, e.g.*, Colo. Pub. Util. Comm’n v. Harmon, 951 F.2d 1571, 1579 (10th Cir. 1991) (refusing to defer to an agency conclusion that a federal statute preempted state law on the ground that “a preemption determination involves matters of law—an area more within the expertise of the courts than within the expertise of the [agency]”).

<sup>106</sup> *See* Mendelson, *Chevron*, *supra* note 49, at 782–86.

To be sure, the agency has a greater familiarity with “its” statute than does a generalist court, but I have already said that courts *should* defer to an agency’s determination of what its statute actually does. The further question of whether the federal statute preempts state law, however, is not a policy judgment within the agency’s expertise. That question, rather, is not only one of statutory interpretation but, in a broader sense, one of allocating power between the federal and state governments. On this issue, the agency has strong incentives to overread its own authority and little reason to be sensitive to the broader constitutional question. As Thomas Merrill observes, agencies are likely to have “tunnel vision”; they “know a great deal about one federal regulatory scheme, . . . [b]ut they are unlikely to have much knowledge—or even care—about larger questions concerning the division of authority between the federal government and the states.”<sup>107</sup> And allowing agencies to define the scope of their own authority runs headlong into the venerable constitutional principle that “foxes should not guard hen-houses.”<sup>108</sup>

The presence of the states as a third alternative decisionmaker, moreover, complicates the expertise picture much as it does the issue of democratic accountability. Federal regulators may enjoy expertise advantages on many matters, but there are likely to be some questions—such as how to adapt general directives to local conditions—on which state regulators have an edge. Likewise, expertise is not always a static quality. To the extent that state regulators are confident that they can remain active in a field—that is, that they are not about to be preempted—they will have incentives to invest in developing expertise in the area.<sup>109</sup> Indeed, Jacob Gersen has suggested that Congress may prefer to permit both federal and state regulators to exercise jurisdiction in the same field in order to spur regulatory competition that, in turn, might maximize regulatory expertise.<sup>110</sup> In any event, expertise hardly makes a clear-cut case for *Chevron* deference to federal regulators in the preemption context.

If *Chevron* deference is inappropriate, then how should courts review agency interpretations of the preemptive scope of the statutes they administer? Interestingly, the three other contributions to this Symposium that address that question display quite distinct attitudes—Professor Merrill seems quite skeptical of agencies;<sup>111</sup> Professor Sharkey positively adores them;<sup>112</sup>

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<sup>107</sup> Merrill, *supra* note 105, at 755.

<sup>108</sup> See Cass R. Sunstein, *Interpreting Statutes in the Regulatory State*, 103 HARV. L. REV. 405, 446 (1989).

<sup>109</sup> Cf. Gersen, *supra* note 17, at 213 (arguing that expertise is often a function of different administrators’ incentives to invest in developing it).

<sup>110</sup> See *id.* at 235–36.

<sup>111</sup> See Merrill, *supra* note 105, at 759 (concluding that “it would disserve the cause of constitutional government” to “transfer broad authority from courts to agencies to decide when to displace state law”).

and Professor Mendelson is somewhere in the middle<sup>113</sup>—but all converge in their prescriptions on the notion of *Skidmore* deference.<sup>114</sup> Under *Skidmore*, “[t]he weight of [an agency’s] judgment in a particular case will depend 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, if lacking power to control.”<sup>115</sup>

I suspect that my three copanelists have converged on *Skidmore* not because that standard brilliantly harmonizes the concerns of each, but rather because it is a standard that can mean different things to different people. Or even to the *same* people: As Kristin Hickman and Matthew Krueger have pointed out,<sup>116</sup> the Supreme Court itself has offered two quite different versions of *Skidmore* in its decisions in *Christensen v. Harris County*<sup>117</sup> and *United States v. Mead Corp.*<sup>118</sup> Professors Hickman and Krueger read *Christensen* as employing an “independent judgment” model that amounts to “no deference at all.”<sup>119</sup> *Mead*, on the other hand, represents a model of “deference varying along a sliding scale,” depending on a variety of contextual factors having to do with the agency’s decision.<sup>120</sup> One need not accept the specific definitions or boundaries of these categories to take the more basic point that *Skidmore* is something of a juridical chameleon. Advocating *Skidmore* as a standard for considering executive preemption thus

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<sup>112</sup> See Sharkey, *Fraud Caveat*, *supra* note 13, at 844 (presenting a model of “complementary agency-court action in combating fraud” though “reserving a role for state law tort claims to handle enforcement and remedial responsibilities”).

<sup>113</sup> Professor Mendelson’s contribution to the current Symposium comes down fairly firmly in favor of limiting agency preemption. See generally Nina A. Mendelson, *A Presumption Against Agency Preemption*, 102 NW. U. L. REV. 695, 698–99 (2008) [hereinafter Mendelson, *Presumption*]. Her prior entry in the field, while reaching similar conclusions, emphasized the presence of arguments on both sides of the question. See, e.g., Mendelson, *Chevron*, *supra* note 49, at 794–98 (arguing that agency self-interest weighs against *Chevron* deference on preemption questions, but only “weakly”).

<sup>114</sup> See Mendelson, *Chevron*, *supra* note 49, at 797–98 (arguing that the application of *Skidmore* deference to agency interpretation of preemption could present fewer problems than does *Chevron* deference); Merrill, *supra* note 105, at 774–76; Sharkey, *Products Liability Preemption*, *supra* note 13, at 491–98. Professor Merrill’s embrace of *Skidmore* is more equivocal than Sharkey’s or Mendelson’s. He states:

If forced to choose between the three established standards of review (*Chevron*, *Skidmore*, *de novo*), I would urge adoption of the *Skidmore* standard for preemption cases. For several reasons, however, I think the best course of action is to eschew any of the established three standards and instead adopt an approach to agency views about preemption that is *sui generis* to preemption cases.

Merrill, *supra* note 105, at 775 (footnote omitted).

<sup>115</sup> *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944).

<sup>116</sup> See Kristin E. Hickman & Matthew D. Krueger, *In Search of the Modern Skidmore Standard*, 107 COLUM. L. REV. 1235, 1252–59 (2007).

<sup>117</sup> 529 U.S. 576 (2000).

<sup>118</sup> 533 U.S. 218 (2001).

<sup>119</sup> Hickman & Krueger, *supra* note 116, at 1252–53.

<sup>120</sup> *Id.* at 1255–56.

merely *begins* a conversation about how preemptive agency interpretations should be evaluated.

Under *Skidmore*'s traditional formula, a court will defer to an agency's interpretation if that interpretation is persuasive, for all the reasons that such interpretations typically *might* be persuasive: expertise, procedural thoroughness, consistency, etc. This posture is so elemental as to seem inevitable. In practice, however, *Skidmore* deference represents a powerful thumb on the scale in favor of agency interpretations. After analyzing 106 applications of *Skidmore* by the federal courts of appeal between 2001 and 2006, Professors Hickman and Krueger found that "*Skidmore* review is highly deferential—less so than *Chevron*, but still weighted heavily in favor of government agencies over their challengers."<sup>121</sup> What any version of *Skidmore* appears to rule out, moreover, is any sort of presumption *against* the agency's interpretation, such as that which the *Rice* presumption against preemption would impose if the agency's interpretation displaced state law. For that reason, I am unwilling to jump on the *Skidmore* bandwagon; my own view is that the *Rice* presumption is sufficiently important and sufficiently tied to constitutional values that it should override even agency interpretations that might otherwise be persuasive.<sup>122</sup>

In principle, however, it is not impossible to imagine giving some degree of weight to the fact that a preemptive interpretation comes from an expert agency while also holding that such interpretations bear a heightened burden of proof for federalism reasons. Admonishing courts to assess the relative weights of competing "thumbs on the scale" does not seem all that promising, but there may be other ways to resolve these contradictory interpretive imperatives. One way to improve on the *Skidmore* approach would be to specify a list of factors favoring deference to the agency that is more particular to the preemption context.<sup>123</sup> A preemption-specific version of *Skidmore* might prescribe deference to the agency's interpretation of federal law if:

- the agency itself considered the *Rice* presumption in the first instance, as required by Executive Order 13,132;<sup>124</sup>
- the agency's analysis includes a "federalism impact statement," also required by the Federalism Order, that is nonperfunctory;<sup>125</sup>

<sup>121</sup> *Id.* at 1280–81.

<sup>122</sup> As a practical matter, it seems to me that Professors Merrill's and Mendelson's embrace of *Skidmore* fails to do justice to their persuasive identification of reasons not to trust federal agencies in preemption cases. As Mendelson points out, "judges regularly defer to agency interpretations under *Skidmore*." Mendelson, *Chevron*, *supra* note 49, at 798. If we really wish to limit agency preemption, stronger medicine is indicated.

<sup>123</sup> Cf. Scott M. Sullivan, *Rethinking Treaty Interpretation*, 86 TEX. L. REV. 777, 779 (2007) (proposing more specific factors to guide *Skidmore* deference in the treaty interpretation context).

<sup>124</sup> Exec. No. 13,132, 64 Fed. Reg. 43,255, 43,257 (Aug. 4, 1999).

<sup>125</sup> *See id.* at 43,258 (section 6(c)(2)); *see also id.* at 43,258 (section 8(a)) (requiring that "any draft final regulation that has federalism implications" shall include, on submission to the Office of Manage-

- the preemption determination turns on the existence of policy conflicts, which the agency may have special expertise in identifying, rather than on pure statutory construction;
- state officials had prior notice that the agency was considering a preemption finding, and those officials participated in the agency's preemption determination, by notice and comment or otherwise;<sup>126</sup>
- the agency's preemption finding includes a limiting principle preserving meaningful areas of state regulatory authority; and/or
- the agency in question has a moderate history—that is, it sometimes finds *against* preemption rather than always expanding its own authority at the expense of the states.

These suggested criteria would help ensure compliance with existing law within the executive branch and help replicate, within the agency process, at least some aspects of the political and procedural safeguards of federalism that characterize legislative action. Moreover, articulating a more specific list of factors under *Skidmore* should enhance the Supreme Court's ability to control the lower courts' approach to deference.

The turn from *Chevron* to *Skidmore* (or *Skidmore*-like) deference opens up an additional and intriguing possibility. *Chevron* proceeded on the theory that Congress had delegated interpretive authority to a particular actor—the federal agency. *Skidmore*, by contrast, proceeds on the very different (and very basic) principle that certain qualities of an interpretation and its maker make it more or less persuasive.<sup>127</sup> The key difference is that those qualities emphasized by *Skidmore* are not unique to the federal agency. This is particularly true in agency preemption cases, which typically measure the decision of one governmental actor (the federal agency) against another (the state legislature, state administrative agency, or state court) that formulated the rule to be preempted. In many cases, the *state* action may display the same sorts of decisional qualities—thorough consideration, consistency with past practice, thoughtful reasoning, or even policy expertise—that counsel deference under *Skidmore*. *Skidmore* deference, in other words, is not in principle confined to *federal* governmental entities. A court applying *Skidmore* could well conclude that a state agency's interpretation of the underlying federal statute as *not* preempting the state law possessed greater indicia of reliability than did a contrary decision by a federal agency, with the result that the court should defer to the *state* decision-maker.

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ment and Budget, a certification of compliance with the Order's requirement to consider federalism values).

<sup>126</sup> See *id.* at 43,257–58 (section 6). Some lower courts have refused to defer to agency interpretations finding statutory preemption when these consultation requirements have not been met. See, e.g., *Jackson v. Pfizer, Inc.*, 432 F. Supp. 2d 964, 968 & n.3 (D. Neb. 2006).

<sup>127</sup> See, e.g., Hickman & Krueger, *supra* note 116, at 1249 (noting that *Chevron* deference rests on a “presumption that Congress chose an agency rather than the courts to be the primary interpreter of a given statutory scheme,” while *Skidmore* deference “merely reflects a policy of judicial prudence”).



This may feel like an unnatural posture for federal courts to adopt, but requiring federal courts to defer to interpretations by state entities is hardly unheard of. Federal courts routinely defer to state court interpretations of state law,<sup>128</sup> and some statutory schemes even require deference to state interpretations of *federal law*.<sup>129</sup> Preemption cases often require the interpreter to resolve ambiguities in both federal and state law; after all, one must construe state law to determine whether it conflicts with federal policy.<sup>130</sup> In this situation, of course, neither federal nor state interpreters have a categorical claim to interpretive supremacy.

To the extent that preemption cases also involve technical expertise in a general regulatory field, such as environmental protection, *both* state and federal agencies may have legitimate claims to deference.<sup>131</sup> It may be true that the quality of expertise, and perhaps of deliberation, is generally greater at the federal level. But that is an empirical question that ought not be decided by mere assumption. As I suggest above, federal agencies do not always act deliberately or enjoy superior expertise,<sup>132</sup> and state agencies may bring impressive competence to the table in particular areas. Moreover, the comparative competence of state and federal actors need not be decided across the board for all possible institutional permutations and subject areas. The virtuous side of *Skidmore*'s ambiguity, after all, is that it permits the level of deference to be adjusted to the circumstances of particular situations.<sup>133</sup>

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<sup>128</sup> See, e.g., *King v. United Order of Commercial Travelers*, 333 U.S. 153, 158 (1948) (“[W]hen the issue confronting a federal court has previously been decided by the highest court in the appropriate state[,] the *Erie R. Co.* case decided that decisions and opinions of that court are binding on federal courts.”); *Cent. Union Tel. Co. v. Edwardsville*, 269 U.S. 190, 195 (1925) (stating that, even where a federal right turns upon a state court’s construction of state law, the construction “declared by the state court . . . should bind [the U.S. Supreme Court] unless so unfair or unreasonable in its application to those asserting a federal right as to obstruct it”).

<sup>129</sup> See, e.g., 28 U.S.C. § 2254(d) (2000) (holding that a federal court may grant habeas corpus relief to a person in state custody only if the state court’s prior adjudication of the petitioner’s claims “was contrary to, or involved an unreasonable application of, clearly established Federal law”); *Williams v. Taylor*, 529 U.S. 362, 410–11 (2000) (construing § 2254(d) to require some degree of deference to state court interpretations of federal law involving mixed questions of law and fact).

<sup>130</sup> See, e.g., *Pac. Gas & Elec. Co. v. State Energy Res. Conservation & Dev. Comm’n*, 461 U.S. 190, 213–14 (1983) (construing a state statute restricting building of nuclear plants to determine whether it fell within the field preempted by federal law).

<sup>131</sup> Cf. *Hickman & Krueger*, *supra* note 116, at 1263 (observing that “*Skidmore*’s attention to agency expertise might suggest that it should apply to state agencies,” but recognizing that “the Court has never suggested that *Skidmore* extends that far”). Professors Hickman and Krueger focus on deference to state agency interpretations of *state law* only, and that may explain the paucity of Supreme Court authority. After all, the Supreme Court’s jurisdiction to resolve questions of state law is considerably narrower than that of the lower federal courts. For a federal court of appeals decision according *Skidmore* deference to a state agency’s construction of state law, see, for example, *Ace Electrical Contractors, Inc. v. International Brotherhood of Electrical Workers*, 414 F.3d 896, 903 (8th Cir. 2005).

<sup>132</sup> See *supra* text accompanying note 103.

<sup>133</sup> Cf. *Barnhart v. Walton*, 535 U.S. 212, 222 (2002) (suggesting that even *Chevron* deference should be tailored case by case).

The broader point is that federalism analysis all too often considers federal law and federal decisions in a vacuum, without any reference to the quality of state decisionmaking.<sup>134</sup> Nothing in the Supremacy Clause requires this sort of willful blindness. Federal agencies often are not the only institutional actors with expertise in preemption cases, and a standard that took this into account would be salutary. Even this latitudinarian version of *Skidmore*, however, must be tempered with some mechanism—like the *Rice* presumption—for giving independent weight to the constitutional values disfavoring broad preemption of state law.<sup>135</sup>

### III. AGENCY ACTIONS WITH INDEPENDENT PREEMPTIVE EFFECT

An even more difficult set of problems arises when federal administrative agencies preempt state law through their own independent actions rather than through their interpretations of the statutes they administer. Sometimes Congress explicitly delegates the authority to preempt state law.<sup>136</sup> Other times, agencies have interpreted broad statutory statements of their regulatory authority as authorizing agency preemption of state law.

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<sup>134</sup> See, e.g., *Gonzales v. Raich*, 545 U.S. 1, 29 (2005) (ignoring the effects of the California regulatory regime in assessing the federal government's interests in regulating medical marijuana); see also Young, *Blowing Smoke*, *supra* note 34, at 33–37 (criticizing the Court's approach).

<sup>135</sup> Professor Dana's contribution to this Symposium suggests a different means of calibrating judicial application of the presumption against preemption. His approach would weigh the clarity of Congress's preemptive intent against the "weight of democratic support for nonfederal alternatives" at the state level. Dana, *supra* note 21, at 527. This approach is appealing for its recognition that state governments are themselves a font of democratic legitimacy. See *id.* at 518–22. I am troubled, however, by Dana's suggestion that courts should give more weight to the policies adopted by large or multiple states, as opposed to the policies of small or singular states. See *id.* at 522–23 (discussing *Atkins v. Virginia* and *Roper v. Simmons* as examples of Supreme Court precedents informed by the number of states rejecting the practices at issue in those cases). Such an approach obviously runs counter to the traditional notion that states are sovereign equals—a notion reflected, for example, in the "equal footing" doctrine. See, e.g., *Coyle v. Smith*, 221 U.S. 559, 567 (1911); *Escanaba & Lake Mich. Transp. Co. v. City of Chicago*, 107 U.S. 678, 689 (1883) ("Equality of constitutional right and power is the condition of all the states of the Union, old and new.").

To be sure, valid federal legislation does sometimes treat different states differently, and indeed such legislation sometimes exempts certain states from preemption but not others. See, e.g., 42 U.S.C. § 7543(b)(1) (allowing California a special exemption to set more stringent vehicle emissions standards than would otherwise be allowed under the federal Clean Air Act). But such disparities illustrate that significant differences in majoritarian heft among state policies will often be reflected in the terms of legislation; building such differences into the judicial test for preemption as well seems like double-counting. Moreover, such an approach would likely exacerbate the phenomenon of "horizontal aggrandizement," whereby groups of powerful states use the federal government as an instrument to impose their preferences on other states. See Baker & Young, *supra* note 43, at 117–28. My own view is that preemption doctrine should be attuned to protecting Justice Brandeis's "single courageous state," *New State Ice Co. v. Liebman*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting), as well as large and populous state coalitions.

<sup>136</sup> See Foote, *supra* note 77, at 1429 ("[In many federal health and safety statutes,] Congress delegated to federal administrative agencies the responsibility for deciding whether to preempt . . . state laws or to exempt them from preemption under the governing federal statute.").

The Communications Act, for instance, confers upon the Federal Communications Commission (FCC) broad authority to determine what the “public convenience, interest, or necessity requires” in the communications field, including the authority to “[m]ake such rules and regulations and prescribe such restrictions and conditions, not inconsistent with law, as may be necessary to carry out [the communications laws in Title 47 of the U.S. Code].”<sup>137</sup> The FCC has read this broad grant of authority—which itself says nothing about preemption—as conferring general authority on the agency to preempt state law whenever the agency feels that federally imposed uniformity will best further the policy of the Communications Act.<sup>138</sup> Under this authority, the FCC has issued orders that purport to preempt state law of their own force, rather than as an interpretation of a congressional directive.<sup>139</sup>

The Supreme Court recently sidestepped the issue of an agency’s independent preemptive authority in *Watters*. In that case, the Office of the Comptroller of the Currency (OCC) asserted that one of its regulations preempted state law, but the majority held that the question of the OCC’s authority to enact such a regulation was “beside the point, for under our interpretation of the statute, . . . [the regulation] merely clarifies and confirms what the [underlying statute] already conveys.”<sup>140</sup> As Professor Mendelson’s contribution to this Symposium notes, however, “[f]ederal agencies are increasingly taking aim at state law, even though state law is not expressly targeted by the statutes the agencies administer.”<sup>141</sup> The problem is thus likely to return to the Court before long.

This sort of preemption is extremely problematic for reasons that should be obvious. There is, for instance, the small matter of the constitutional text. Article VI confers supremacy over state law only on “[t]his Constitution, and the Laws of the United States which shall be made in Pursuance thereof”<sup>142</sup>—not on administrative actions taken pursuant to procedures that do not appear in the founding document.<sup>143</sup> Although an agency’s interpretive power to say when a federal *statute* preempts state law is troubling, at least its decision to preempt in that scenario is grounded in a con-

<sup>137</sup> 47 U.S.C. § 303(r) (2000); *see also id.* § 154(i) (“The Commission may perform any and all acts, make such rules and regulations, and issue such orders, not inconsistent with this Act, as may be necessary in the execution of its functions.”).

<sup>138</sup> *See, e.g.*, Cable Television Report and Order, 49 F.C.C.2d 470, 480 (1974).

<sup>139</sup> *See, e.g.*, Technical and Operational Requirements of Part 76 Cable Television, 50 Fed. Reg. 52,462, 52,464–65 (Dec. 24, 1985) (codified at 47 C.F.R. pt. 76 (1986)) (preempting local regulation of technical signal quality standards for cable television).

<sup>140</sup> *Watters v. Wachovia Bank, N.A.*, 127 S. Ct. 1559, 1572 (2007).

<sup>141</sup> Mendelson, *Presumption*, *supra* note 113, at 695.

<sup>142</sup> U.S. CONST. art. VI, cl. 2. The same provision also recognizes treaties as supreme federal law. *See id.*

<sup>143</sup> *See generally* Clark, *supra* note 44, at 1330 (emphasizing that the text of the Supremacy Clause limits the forms of federal law that can trump state law).

gressional enactment, and the agency's interpretation of that enactment must at least be reasonable under *Chevron's* step two.

It is probably too late in the day to insist that federal agency action cannot create supreme federal law.<sup>144</sup> But that concession simply strengthens the need to look closely at the way that preemptive actions by agencies fit into the structure of contemporary federalism. When the agency has independent preemptive authority, the preemption decision is made outside the political and procedural constraints in which modern federalism doctrine places its primary hope. Moreover, as I suggest above, we can expect agencies to have strong incentives to maximize their own power by supplanting state autonomy more often than not.<sup>145</sup>

The Supreme Court has nonetheless upheld these independent exercises of preemptive power, stating that "a federal agency acting within the scope of its congressionally delegated authority may pre-empt state regulation."<sup>146</sup> Statements like this could be read to permit preemption by agencies on their own initiative only where Congress has explicitly delegated *preemptive* authority. Yet the Court has recognized a far broader power to preempt state law wherever the subject matter of the agency's action (considered apart from its impact on state law) is within the scope of the agency's delegated power.<sup>147</sup> In other words, if the Communications Act authorizes the FCC to regulate cable television, then it also presumptively authorizes a corollary preemptive power. Agency action will thus be held to preempt state law if (1) the agency intended it to do so, and (2) the agency's preemptive action is within the scope of its delegated authority.<sup>148</sup> Given the broad scope of delegations, such as that in the Communications Act, the external constraints on agency preemptive action appear to be minimal indeed.

The preemptive authority of administrative agencies could be limited in a number of ways, some of which would represent a more substantial shift away from present law than others. One obvious limitation would be to hold that Congress may not delegate the authority to preempt state law. This would certainly be consistent with *Garcia's* principle that, within the broad range of concurrent jurisdiction shared by the federal government and the states, the basic decisions about the allocation of authority are to be

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<sup>144</sup> The most ardent anti-preemption member of the current Supreme Court, Justice Stevens, did not dispute in *Watters* that Congress may delegate preemptive power; instead, he disputed "whether Congress has delegated to the Comptroller of the Currency the authority to preempt the laws of a sovereign State . . . , and if so, whether that authority was properly exercised here." *Watters*, 127 S. Ct. at 1582 (Stevens, J., dissenting).

<sup>145</sup> See *supra* note 49 and accompanying text.

<sup>146</sup> *La. Pub. Serv. Comm'n v. FCC*, 476 U.S. 355, 369 (1986).

<sup>147</sup> See, e.g., *City of New York v. FCC*, 486 U.S. 57, 63-64 (1988) (citing *La. Pub. Serv. Comm'n*, 476 U.S. at 368-69).

<sup>148</sup> See *id.* at 64-66; *Capital Cities Cable, Inc. v. Crisp*, 467 U.S. 691, 700 (1984); *Fid. Fed. Sav. & Loan Ass'n v. De la Cuesta*, 458 U.S. 141, 154 (1982).

made by Congress.<sup>149</sup> Such a limitation, however, would be easier to state in theory than to implement in practice. Every agency action, after all, potentially preempts state law in the sense that a state law in direct conflict with that action will not stand under the Supremacy Clause. A hard and fast rule barring all preemptive agency action would thus sweep too broadly.

A more limited alternative would bar agency preemption that goes beyond the direct supremacy effect of the agency's substantive actions.<sup>150</sup> For example, the Department of Justice's final rule on communications by DOJ attorneys with represented persons<sup>151</sup> (now repealed) did two distinct things: It set forth a federal rule of professional ethics, and it "preempt[ed] and supersede[d] the application of state laws and rules . . . to the extent that they relate to contacts by attorneys for the government, and those acting at their direction or under their supervision, with represented parties or represented persons in criminal or civil law enforcement investigations or proceedings."<sup>152</sup> The second aspect of the rule—its preemptive effect—went well beyond preempting only those state rules in direct conflict with the federal pronouncement; rather, the DOJ rule was "designed to preempt the entire field of rules concerning such contacts."<sup>153</sup> This sort of preemptive authority is not necessary in order to allow federal agencies to act at all; rather, it is an *additional* power that operates on state law beyond the scope of the agency's substantive actions themselves.<sup>154</sup> A constitutional rule foreclosing this power would be perfectly consistent with permitting broader forms of express and implied preemption emanating from the underlying statute itself. But the agency would not have its own freestanding powers of express and implied preemption, aside from the preemption necessary to give its own substantive actions effect as supreme federal law. Such a rule would not be without its line-drawing difficulties, but it seems no less administrable than many other rules of constitutional law.

A different sort of limit would focus on the clarity with which Congress has delegated the authority to take preemptive action. Such a limit might take either of two forms, which parallel the distinction just discussed between agency authority to take action that happens to preempt state law and independent preemptive authority that goes beyond the supremacy effect of agency lawmaking. We might insist that, in order to take action with the effect of preempting state law, the agency be exercising authority dele-

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<sup>149</sup> *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 554 (1985).

<sup>150</sup> In Stephen Gardbaum's terms, this position would allow agencies to create federal law that is *supreme* in the event of a conflict, but deny to the agency the additional power to *preempt* or displace state law in the absence of such a conflict. See generally Gardbaum, *supra* note 23, at 40–43 (distinguishing "preemption" from "supremacy").

<sup>151</sup> Communications with Represented Persons, 59 Fed. Reg. 39,910 (Aug. 4, 1994). A subsequent statute mandated that DOJ attorneys comply with state ethical rules. See 28 U.S.C. § 530B (2000).

<sup>152</sup> Communications with Represented Persons, 59 Fed. Reg. at 39,931.

<sup>153</sup> *Id.*

<sup>154</sup> See Gardbaum, *supra* note 23, at 46–48.

gated by Congress with a heightened degree of clarity. If that rule were too broad, as it might be, we might instead insist that any *independent* preemptive authority must be clearly delegated to the agency by Congress. In particular, such a rule would require that the preempting agency point to some delegation more specific than a general grant of authority like the FCC's "necessary and proper clause" quoted previously.<sup>155</sup>

This sort of clarity requirement would be consistent with the general drift of the modern delegation doctrine, which tends not to impose hard limits on congressional delegations but rather manifests in various "nondelegation canons" of statutory construction.<sup>156</sup> It would also be consistent with the most recent turn in the Court's federalism clear statement jurisprudence in *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers (SWANCC)*.<sup>157</sup> That case involved the Corps' "migratory bird rule," an interpretation of the Corps' delegated authority to protect wetlands under the Clean Water Act that extended the Corps' jurisdiction to all waters used by migratory birds.<sup>158</sup> Confronted with what it deemed a close question concerning whether the rule exceeded the federal commerce power, the Court instead held that the Corps' rule exceeded the scope of its delegated authority:

Where an administrative interpretation of a statute invokes the outer limits of Congress' power, we expect a clear indication that Congress intended that result. . . . This requirement stems from our prudential desire not to needlessly reach constitutional issues and our assumption that Congress does not casually authorize administrative agencies to interpret a statute to push the limit of congressional authority. . . . This concern is heightened where the administrative interpretation alters the federal-state framework by permitting federal encroachment upon a traditional state power.<sup>159</sup>

This sort of nondelegation canon, like the basic presumption against preemption itself, is a resistance norm: It raises the threshold for congressional delegations of authority that encroach on state autonomy, without attempting to set a hard limit on such delegations. A clear statement requirement for delegations of independent preemptive authority would protect similar values of state autonomy in a similar way.

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<sup>155</sup> See *supra* note 137.

<sup>156</sup> See generally Cass R. Sunstein, *Nondelegation Canons*, 67 U. CHI. L. REV. 315, 315 (2000) ("Rather than having been abandoned, the [nondelegation] doctrine has merely been renamed and relocated. Its current home consists of a set of nondelegation canons, which forbid executive agencies from making certain decisions on their own.").

<sup>157</sup> 531 U.S. 159 (2001).

<sup>158</sup> See *id.* at 163–64. The rule itself may be found at Final Rule for Regulatory Programs of the Corps of Engineers, 51 Fed. Reg. 41,217 (Nov. 13, 1986).

<sup>159</sup> *SWANCC*, 531 U.S. at 172–73. In support of this reasoning, the Court cited the rule favoring statutory constructions that avoid constitutional doubts. *Id.* at 173 (citing *Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988)).

A fallback position would not require Congress to address preemption specifically, but would limit the scope of agency preemption powers in precisely the same way that current doctrine limits the scope of *Chevron* deference. In *Christensen v. Harris County*<sup>160</sup> and *United States v. Mead Corp.*,<sup>161</sup> the Supreme Court held that *Chevron* deference applies only where Congress has delegated authority to act, and the agency has in fact acted, with the “force of law.”<sup>162</sup> This rule means that the most authoritative agency actions will generally be taken through procedures, such as notice and comment rulemaking, that foster deliberation; moreover, the requirement that such authority be specially delegated raises the threshold for such delegations.<sup>163</sup> Both these aspects of *Christensen* and *Mead* seem equally salutary in preemption situations. Procedures such as notice and comment offer some opportunity for state governmental input into the rulemaking process, both directly and through federal representatives. The additional burdens imposed on the agency by such procedures, moreover, increase the enactment costs of preemptive regulation.<sup>164</sup> And a heightened delegation threshold will reduce the sheer number of instances in which courts find preemptive authority.<sup>165</sup>

A final, minimal requirement would not limit the ability of Congress to delegate preemptive authority to agencies at all, but rather would insist that the agency actually *exercise* that authority before preemption can be found. One might think such an obvious requirement would go without saying. But in *Crosby v. National Foreign Trade Council*,<sup>166</sup> the Court held (unanimously) that the mere delegation of authority to the President to preempt state trade sanctions signaled that such sanctions were in conflict with federal policy, even though the President had not actually exercised his pre-

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<sup>160</sup> 529 U.S. 576 (2000).

<sup>161</sup> 533 U.S. 218 (2001).

<sup>162</sup> *Christensen*, 529 U.S. at 587; *Mead*, 533 U.S. at 226–27. See generally Thomas W. Merrill & Kathryn Tongue Watts, *Agency Rules with the Force of Law: The Original Convention*, 116 HARV. L. REV. 467 (2002) (exploring the history of judicial interpretation of agency preemption); Sunstein, *supra* note 91.

<sup>163</sup> See *Mead*, 533 U.S. at 230 (“It is fair to assume generally that Congress contemplates administrative action with the effect of law when it provides for a relatively formal administrative procedure tending to foster the fairness and deliberation that should underlie a pronouncement of such force.”).

<sup>164</sup> Cf. Stephenson, *supra* note 46 (describing ways in which increasing enactment costs may protect constitutional values).

<sup>165</sup> *Mead* and *Christensen* have created difficult line-drawing questions of their own because it is not always easy to distinguish between congressional delegations of authority to make legislative rules, on the one hand, and merely interpretive rules, on the other. See Sunstein, *supra* note 91, at 222 (complaining that “the ‘force of law’ test introduces considerable complexity into the *Chevron* analysis”). For one effort to recover a convention for interpreting Congress’s intent on this question, see generally Merrill & Watts, *supra* note 162. The important point for my purposes, however, is that *Chevron* already requires this difficult line-drawing enterprise. The limit on executive preemption proposed here would thus require no *new* doctrinal formula for preemption cases; preemption analysis would instead piggyback on *Chevron* doctrine.

<sup>166</sup> 530 U.S. 363 (2000).

emptive authority.<sup>167</sup> That result *has* to be wrong.<sup>168</sup> When an executive official acts to preempt state law, she is not accountable to the states in the same way as a senator or a representative, but *some* level of political accountability remains. Indeed, the likely reason that the President had *not* acted to preempt Massachusetts's sanctions on Burma in *Crosby* is that such an action would have been politically unpopular, perhaps especially with Massachusetts's own senators, who were important supporters of the President. That is simply the political safeguards of federalism at work. To say that the mere *delegation* of authority to act can have preemptive effect, without requiring a political decision *to* act for which the Executive may be held accountable, is to disembowel the notion of process federalism entirely.

The last point is that the possibility of preemptive agency action is not without its potential upside for state autonomy. One of the best arguments for broad implied conflict and obstacle preemption is that it is difficult for Congress both to predict the potential conflicts with state law that may arise and to revisit the statutory text if courts underprotect the congressional purpose. That concern recedes somewhat if a federal administrative agency is positioned to respond with explicit action to unforeseen conflicts. In *Hillsborough County v. Automated Medical Laboratories, Inc.*,<sup>169</sup> for example, the Court rejected an argument that local regulations on blood plasma donations should be held preempted on the ground that they threatened the national plasma supply. The Court relied in part on its assumption that, if those local regulations turned out to be more burdensome than the Court expected, the Food and Drug Administration could then issue new preemptive regulations. According to the Court, "the FDA possesses the authority to promulgate regulations pre-empting local legislation that imperils the supply of plasma and can do so with relative ease."<sup>170</sup> If the availability of agency preemption prompted courts to ease up on conflict and obstacle preemption more generally, then the agency role might yield significant benefits for state autonomy. Unfortunately, there seems to be little evidence—*Hillsborough* itself aside—that the potential for agency preemption has this effect.

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<sup>167</sup> See *id.* at 388; see also Young, *Dual Federalism*, *supra* note 45, at 168–77 (criticizing this aspect of the preemption argument in *Crosby*).

<sup>168</sup> It would be unfair to suggest that the existence of the unused delegations was the *only* argument for preemption in *Crosby*. See *Crosby*, 530 U.S. at 377–80 (employing a more traditional statutory preemption argument). But it does seem to have played an important role in the analysis. See generally Edward T. Swaine, *Crosby as Foreign Relations Law*, 41 VA. J. INT'L L. 481 (2001) (reading *Crosby*'s preemption analysis as strongly influenced by more general concerns about state involvement in foreign affairs). My argument is that such a delegation ought not to count at all—or indeed count *against* preemption, as I explain below—until it is actually exercised.

<sup>169</sup> 471 U.S. 707 (1985).

<sup>170</sup> *Id.* at 721.



## CONCLUSION

Executive preemption represents a major threat to state autonomy. It is a threat, moreover, that the dominant paradigm of contemporary federalism doctrine—relying as it does on political and procedural safeguards in Congress—is ill-equipped to combat. Because of the widely perceived need for agency action, on the one hand, and the wide variety of ways in which agencies act, on the other, we are unlikely to find any single doctrinal formulation that can reconcile agency preemption with process federalism. Instead, I have tried to offer a series of limiting options of varying structure and efficacy. What will *not* work, however, is for the Court to continue to pretend that every federal agency action is equivalent to a congressional statute for purposes of preemption analysis.

