

# Delegating Supremacy?

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## INTRODUCTION

The Supreme Court has long held that federal agencies may preempt state law in much the same way as Congress: either by issuing binding administrative rules that conflict with state law or by asserting exclusive federal control over a regulatory domain.<sup>1</sup> Under this sweeping conception of the Supremacy Clause, agencies wield an extraordinary power in our federalist system. Specifically, agencies may displace the laws of all fifty states without the political and procedural safeguards inhering in the legislative process.<sup>2</sup> The administrative-preemption power rests on the undertheorized doctrinal assumption that Congress may, in effect, “delegate supremacy” to agencies. This Article challenges the constitutionality of that premise and normatively defends an imagined federalist

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1. See, e.g., *PLIVA, Inc. v. Mensing*, 131 S. Ct. 2567 (2011); *Geier v. Am. Honda Motor Co.*, 529 U.S. 861 (2000); *City of New York v. FCC*, 486 U.S. 57 (1988); *Fidelity Fed. Sav. & Loan Ass’n v. de la Cuesta*, 458 U.S. 141 (1982).

2. For example, just last term the Court held that regulations issued by the Food and Drug Administration preempted state tort failure-to-warn claims against generic drug manufacturers. *PLIVA*, 131 S. Ct. at 2575–78.

system in which agencies are stripped of the power to create supreme federal law.

There are several problems with delegated supremacy. The first is constitutional. The Supremacy Clause extends preemptive effect to “Laws” of the United States “made in Pursuance” of the Constitution.<sup>3</sup> This provision’s context and drafting history strongly suggest that such “Laws” are *statutes* promulgated pursuant to the finely wrought legislative process.<sup>4</sup> By negative implication, *administrative policies* crafted by unelected agency officials are beyond the Supremacy Clause’s purview. Second—and relatedly—administrative preemption subverts Congress’s critical role in preemption decisions. The legislative process provides a political forum for states to air objections both to the substance of federal law and to its potentially displacing effect on state law.<sup>5</sup> Congressional delegation of supremacy, however, substitutes the legislative forum with an administrative one, thus effectively circumventing these political and procedural safeguards.<sup>6</sup> Third, administrative supremacy threatens the values of federalism,<sup>7</sup> insofar as the practice distorts the federal-state balance of power, undermines the democratic ideal of representative governance, and stifles regulatory experimentation.<sup>8</sup>

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

4. Bradford R. Clark, *Separation of Powers as a Safeguard of Federalism*, 79 TEX. L. REV. 1321, 1334–36 (2001) [hereinafter Clark, *Separation of Powers*] (contending that this provision of the Supremacy Clause should be limited to congressional statutes); Bradford R. Clark, *The Procedural Safeguards of Federalism*, 83 NOTRE DAME L. REV. 1681 (2008) [hereinafter Clark, *Procedural Safeguards*]; Ernest A. Young, *Executive Preemption*, 102 NW. U. L. REV. 869, 895 (2008) (same). *But cf.* Peter L. Strauss, *The Perils of Theory*, 83 NOTRE DAME L. REV. 1567, 1563–73 (2008) (offering a competing interpretation allowing for administrative preemption).

5. See Robert R.M. Verchick & Nina Mendelson, *Preemption and Theories of Federalism*, in PREEMPTION CHOICE 13, 20 (William W. Buzbee ed., 2009); Young, *supra* note 4, at 877; see also Brief of Vermont et al. as Amici Curiae Supporting Respondent at 25, *Wyeth v. Levine*, 129 S. Ct. 1187 (2009) (No. 06-1249), 2008 WL 3851613, at 25 (“States cannot protect their interests through the political process if Congress has not signaled that it intends to trench on the states’ domain.”).

6. See Young, *supra* note 4, at 869–70; 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”).

7. For discussion and commentary on traditionally asserted values of federalism, see generally Erwin Chemerinsky, *The Values of Federalism*, 47 FLA. L. REV. 499 (1995), and Barry Friedman, *Valuing Federalism*, 82 MINN. L. REV. 317 (1997).

8. See Thomas W. Merrill, *Preemption and Institutional Choice*, 102 NW. U. L. REV. 727, 756 (2008) (observing that “transferring preemption authority to agencies would increase the capacity of the legal system to displace state law, which would probably result in a further shift in the direction of more federal authority”); see also Ashutosh Bhagwat, *Wyeth v. Levine and Agency Preemption: More Muddle, or Creeping to Clarity?*, 45 TULSA L. REV. 197, 225–26 (2009) (noting that administrative preemption stifles state regulatory competition).

The surging stakes of administrative supremacy have drawn exponential judicial<sup>9</sup> and academic attention in recent years.<sup>10</sup> Reacting to perceived failings in the Court's doctrine, several scholars press in favor of requiring Congress to clearly delegate supremacy as a prerequisite to administrative preemption.<sup>11</sup> Others propose heightened judicial scrutiny of substantive agency decisions that have preemptive effect,<sup>12</sup> while still others favor enhanced agency procedures to ensure that state interests are adequately considered in the administrative forum.<sup>13</sup> To be sure, these academic proposals are well intended and carefully crafted. Each would move the law toward limiting administrative preemption, though often for different reasons and with different effect. What these other proposals share, however, is the seemingly fatal premise that Congress may delegate supremacy so long as it chooses to. Each of these proposals also expressly or impliedly assumes that it would be infeasible and otherwise undesirable to foreclose administrative supremacy.<sup>14</sup> It is for these reasons that I leave the buffet table feeling unsatisfied.

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9. See, e.g., *PLIVA, Inc. v. Mensing*, 131 S. Ct. 2567 (2011); *Williamson v. Mazda Motor of Am., Inc.*, 131 S. Ct. 1131 (2011); *Bruesewitz v. Wyeth*, 131 S. Ct. 1068 (2011); *Cuomo v. Clearing House Ass'n*, 557 U.S. 519 (2009); *Wyeth v. Levine*, 555 U.S. 555 (2009).

10. See, e.g., Gillian Metzger, *Federalism and Federal Agency Reform*, 111 COLUM. L. REV. 1, 9–10 nn.26–28 (2011) (collecting academic sources, and noting that administrative preemption has taken center stage in preemption debates); see also Nina A. Mendelson, *A Presumption Against Agency Preemption*, 102 NW. U. L. REV. 695, 695 (2008) (remarking that “[f]ederal agencies are increasingly taking aim at state law, even though state law is not expressly targeted by the statutes the agencies administer”); see also *infra* notes 11–13, 167–68 and accompanying text.

11. See, e.g., Stuart Minor Benjamin & Ernest A. Young, *Tennis with the Net Down: Administrative Federalism Without Congress*, 57 DUKE L.J. 2111, 2154 (2008); William Funk, *Preemption by Federal Agency Action*, in *PREEMPTION CHOICE*, *supra* note 5, at 215; Mendelson, *supra* note 10, at 698; Merrill, *supra* note 8, at 760; Cass R. Sunstein, *Nondelegation Canons*, 67 U. CHI. L. REV. 315, 335 (2000); Young, *supra* note 4, at 897–98. *But cf.* Brian Galle & Mark Seidenfeld, *Administrative Law's Federalism: Preemption, Delegation, and Agencies at the Edge of Federal Power*, 57 DUKE L.J. 1933, 1940 (2008) (arguing against a blanket clear statement rule); Gillian E. Metzger, *Administrative Law as the New Federalism*, 57 DUKE L.J. 2023, 2071–72 (2008) (arguing that a clear statement rule “would create extraordinary obstacles to federal administrative governance” and generally endorsing administrative preemption).

12. See, e.g., William W. Buzbee, *Preemption Hard Look Review, Regulatory Interaction, and the Quest for Stewardship and Intergenerational Equity*, 77 GEO. WASH. L. REV. 1521, 1524–25 (2009); Karen A. Jordan, *Opening the Door to “Hard-Look” Review of Agency Preemption*, 31 W. NEW ENG. L. REV. 353, 353 (2009); Nina Mendelson, *Chevron and Preemption*, 102 MICH. L. REV. 737 (2004); Metzger, *supra* note 11, at 2106; Catherine Sharkey, *Federalism Accountability: Agency Forcing Measures*, 58 DUKE L.J. 2125, 2185–86 (2009).

13. See, e.g., Buzbee, *supra* note 12; Galle & Seidenfeld, *supra* note 11; Young, *supra* note 4.

14. Although Professor Young has expressed great concern with administrative preemption, he notes that a “hard and fast rule” that completely forecloses it would “sweep too broadly.” Young, *supra* note 4, at 897.

My first thesis posits that a system without delegated supremacy is not only most consistent with the framers' vision but is also conceptually feasible today. The framers never intended that policy choices of unelected administrative bureaucrats would reign supreme over state law. Indeed, the thought of this undoubtedly would have been a deal breaker at the Constitutional Convention.<sup>15</sup> Stripped of historical mooring, the Court's administrative-preemption doctrine may be best understood as the product of misguided inertia. Having condoned Congress's horizontal delegation of policymaking to the executive branch, the Court has assumed the vertical preemption power to follow. As highlighted herein, however, Congress's well-entrenched authority to *delegate policymaking* to agencies is conceptually severable from the more limited and undertheorized power to *delegate supremacy*. Foreclosing delegated supremacy thus still leaves Congress free to delegate policy decisions to agencies. The only important difference, under my proposal, is that the resulting administrative policy would operate as a federal default without preemptive effect. To be sure, this could result in more federal-state overlap and, thus, in more regulatory disuniformity. Yet there is nothing inherently valuable about uniformity; it depends on the regulatory issue (and who is asked).<sup>16</sup> Indeed, our current system tolerates or promotes regulatory disuniformity in any number of contexts.<sup>17</sup> Under my proposal, *if* uniformity is desired with respect to an issue, Congress of course remains free to make that choice.

My second thesis builds on these points to argue that a system without delegated supremacy is not only conceptually feasible but, on balance, may be preferred to the Court's current approach. My proposal offers two principal advantages. First, it necessarily channels preemption decisions to Congress, thereby reinforcing the political and procedural safeguards of federalism.<sup>18</sup> This result is consistent with the underenforced maxim that Congress is to be the master of preemption. Second, foreclosing delegated supremacy would likely enhance agency incentives to consider state interests when promulgating substantive policies. Because agency policies would

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15. See generally Bradford R. Clark, *Constitutional Compromise and the Supremacy Clause*, 83 NOTRE DAME L. REV. 1421, 1422–23 (2008).

16. See, e.g., ROBERT A. SCHAPIRO, POLYPHONIC FEDERALISM: TOWARD THE PROTECTION OF FUNDAMENTAL RIGHTS (2009) (discussing values of regulatory disuniformity); William W. Buzbee, *Asymmetrical Regulation: Risk, Preemption and the Floor/Ceiling Distinction*, 82 N.Y.U. L. REV. 1547, 1578 (2007) (same).

17. See *infra* notes 257–77 and accompanying text.

18. See Benjamin & Young, *supra* note 11, at 2136 (“[W]e reject the notion that administrative federalism should focus on the agencies rather than Congress.”).

operate as a national default, states would hold a temporary trumping power, exercisable through the promulgation of competing standards. This would offer states critical bargaining leverage in the administrative rulemaking process. Not too much leverage, I contend, because the federal Congress holds the ultimate trump in the form of preemption.

My proposal to disenfranchise agencies of the supremacy power will no doubt be controversial because of the implications it holds for the operation of modern government. Some of the more significant ones include the displacement of agency policy by conflicting state law (rather than vice-versa) and requiring Congress to decide more preemption questions than it might reasonably be expected to.<sup>19</sup> This Article, however, generally embraces these and other implications as natural by-products of a more appropriately orchestrated federalism. Still, perhaps the greatest conceptual obstacle to foreclosing delegated supremacy is that it rattles a foundational precept of modern government—namely, Congress's general authority to delegate policy choices to federal agencies.<sup>20</sup> The mere thought of stifling agency policymaking tends to be met with tremendous resistance, from the Court<sup>21</sup> and commentators<sup>22</sup> alike. Yet, as noted, the general policymaking and preemption powers are severable. This conceptual reordering leaves the sleeping giant of the “nondelegation doctrine” at rest,<sup>23</sup> thus clearing the analytic space necessary to forge a system

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19. Cf. Sharkey, *supra* note 12, at 2157 (“Any response to federal agency overreaching in the preemption context that calls for simply pushing the decision back to Congress is misguided on normative grounds and untenable for practical purposes.”); accord Galle & Seidenfeld, *supra* note 11, at 1936.

20. See *Mistretta v. United States*, 488 U.S. 361, 372 (1989) (“[I]n our increasingly complex society, replete with ever changing and more technical problems, Congress simply cannot do its job absent an ability to delegate power under broad general directives.”).

21. See Young, *supra* note 4, 870 (noting that the Court has ignored the theoretical problems of administrative preemption); see also 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 agencies) (emphasis added).

22. Clark, *Separation of Powers*, *supra* note 4, at 1433–34 (seeking to reconcile his interpretation of the Supremacy Clause with the nondelegation doctrine); Strauss, *supra* note 4, at 1591 (linking the fates of the nondelegation doctrine with administrative preemption and defending both); see Young, *supra* note 4, at 896 (lamenting that “[i]t is probably too late in the day to insist that federal agency action cannot create supreme federal law”).

23. The nondelegation doctrine generously holds that Congress may delegate policymaking power, so long as it provides an “intelligible principle” in the statutory scheme to guide the agency’s discretion. See, e.g., *J.W. Hampton, Jr., & Co. v. United States*, 276 U.S. 394, 409 (1928) (formulating the intelligible-principle test). The nondelegation doctrine is chronically, and notoriously, underenforced by the Court. See Sunstein, *supra* note 11, at 338 (noting that “the ban on unacceptable delegations is a judicially underenforced norm”).

that is more consistent with our constitutional structure and the values of federalism.

This Article proceeds in five parts. First, in order to contextualize both the practice of and the problems with delegated supremacy, Part I offers a brief overview of the Court's general federalism and preemption doctrines. Part II describes the delegation model upon which the modern administrative state is built. Part III explains the various modes of administrative preemption and contextualizes the stakes of delegated supremacy. Part IV then exposes the various conceptual and practical problems with the Court's existing doctrine. As will be seen, some of the problems are translational, resulting from the Court's uneasy grafting of the general preemption doctrine onto the congressional-delegation model. Other problems, however, trace back to federalism's core values. Finally, Part V proposes severing the Gordian knot of delegated supremacy. After anticipating the foreseeable implications and critiques of my proposal, I explain how the implications are not only tolerable for the operation of modern government, but may also be desired.

## I. FEDERALISM'S FRONTS

"Federalism" is a loaded term. Descriptively, it simply connotes the division of authority between federal and state government.<sup>24</sup> Really, however, federalism is a normative discourse about how this authority *should* be divided.<sup>25</sup> The federalism debate hosts two conceptual fronts. The first concerns the constitutional limits on Congress's sphere of authority relative to the states (the "boundaries front"). The second concerns the preemptive scope and effect of federal law on state law (the "preemption front"). This Part provides an overview of these separate, though related, federalism dimensions. As will become apparent, the practice and problems of delegating supremacy are best appreciated within this larger federalism frame.

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24. See, e.g., *New York v. United States*, 505 U.S. 144, 149 (1992); see also BLACK'S LAW DICTIONARY 687 (9th ed. 2009) (defining "federalism" as the "legal relationship and distribution of power between the national and regional governments within a federal system of government").

25. See Ann Althouse, *Variations on a Theory of Normative Federalism: A Supreme Court Dialogue*, 42 DUKE L.J. 979, 980 (1993) (discussing "normative federalism").

*A. The Boundaries Front*

## 1. Delineating Zones

Attempts to delineate zones of federal and state authority on federalism's boundaries front are frustrated by the absence of bright constitutional lines.<sup>26</sup> The Tenth Amendment tends to be of little or no help. It provides that "the powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively . . . ."<sup>27</sup> The Supreme Court has vacillated between two competing conceptions of this provision.<sup>28</sup> The conventional understanding expressed by the Court in *United States v. Darby* is that the Tenth Amendment is a "truism"; it merely reinforces the parallel principles elsewhere reflected in the Constitution that (1) Congress may act only within its enumerated authority and (2) states may act unless the Constitution prohibits the conduct.<sup>29</sup> Under this conception, the Tenth Amendment provides no headway in defining the federal-state boundary. At other times, however, the Court has construed the Tenth Amendment as reserving an enclave of exclusive state sovereignty.<sup>30</sup> Most notably, the Court has invoked the Tenth Amendment to prevent Congress from "commandeering" state officials to "enact or administer a federally regulated program."<sup>31</sup> But beyond this rather limited context, the boundary between federal and state authority is conceptually elusive.<sup>32</sup>

In turn, this blurring yields two important federalism consequences. First, the space provides a medium for federal regulatory growth that might otherwise be tempered by competing

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26. See Erwin Chemerinsky, *Formalism and Functionalism in Federalism Analysis*, 13 GA. ST. U. L. REV. 959, 983 (1997) (recognizing the difficulty of drawing useful lines between federal and state zones of authority).

27. U.S. CONST. amend. X.

28. See Chemerinsky, *supra* note 7, at 535.

29. 312 U.S. 100, 123–24 (1941); see Chemerinsky, *supra* note 7, at 535 (finding no general commitment to state sovereignty in the Tenth Amendment).

30. See, e.g., *New York v. United States*, 505 U.S. 144, 167–68 (1992); *Nat'l League of Cities v. Usery*, 426 U.S. 833 (1976); see also *Gregory v. Ashcroft*, 501 U.S. 452, 458 (1991) (using the Tenth Amendment as a background rule of construction requiring Congress to speak clearly if it intends to regulate important state government activities).

31. See *Printz v. United States*, 521 U.S. 898, 933 (1997) (quoting *New York*, 505 U.S. at 188).

32. See *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 556–57 (1985) (expressly overruling *Nat'l League of Cities*, and declaring that the Tenth Amendment would not be used as a basis for invalidating federal legislation).



state sovereignty.<sup>33</sup> Second, and relatedly, the lack of clear delineations of authority means that federal and state power may (and now often do) overlap.<sup>34</sup> In the post-New Deal era, the Court eschewed earlier notions of a “dual federalism” under which “state and national governments enjoy[ed] exclusive and non-overlapping spheres of authority.”<sup>35</sup> In its place, the Court embraced a model of “concurrent federalism” under which federal and state governments are understood to share zones of overlapping power.<sup>36</sup>

The federal-state boundaries are potentially refined by Congress’s enumerated powers in Article I of the Constitution. In particular, Article I limits Congress’s powers to only those enumerated therein.<sup>37</sup> However, the limits inhering in these enumerated powers eroded in the same inertial tide that swept away “dual federalism” in the post-New Deal era.<sup>38</sup> “Revolutionary changes in the national economy” caused the Court to construe Congress’s enumerated powers broadly enough to allow it to regulate virtually any activity.<sup>39</sup>

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33. See Chemerinsky, *supra* note 7, at 506–07 (noting the “Court’s refusal to use state sovereignty to limit congressional powers”).

34. Young, *supra* note 4, at 877 (noting that “as a practical matter, the national and state governments enjoy concurrent regulatory authority over most issues”); see also Buzbee, *supra* note 16, at 1550 (“Congress has repeatedly chosen to create regulatory schemes that involve federal, state, and sometimes even local governments.”).

35. Robert A. Schapiro, *Toward a Theory of Interactive Federalism*, 91 IOWA L. REV. 243, 246 (2006); see Edward S. Corwin, *The Passing of Dual Federalism*, 36 VA. L. REV. 1, 17 (1950) (referring to how the “system of constitutional interpretation touching this Federal System is today in ruins”).

36. See, e.g., Robert A. Schapiro, *Monophonic Preemption*, 102 NW. U. L. REV. 811, 812 (2008) (contrasting “dual federalism” and “polyphonic federalism,” which “understands state and federal power as largely concurrent”).

37. U.S. CONST. art. I.

38. In earlier times, the Court was more willing to construe the Commerce Clause strictly to prevent the expansion of federal power. See, e.g., *United States v. E.C. Knight*, 156 U.S. 1, 17 (1895) (narrowly construing “commerce” to exclude manufacturing, notwithstanding that the manufactured product was headed for interstate commerce); *Hammer v. Dagenhart*, 247 U.S. 251 (1918) (invalidating a federal statute that prohibited the interstate transportation of goods produced in factories that employed children); *Carter v. Carter Coal Co.*, 298 U.S. 238 (1936) (invalidating a federal statute that had authorized an agency to regulate the hours and wages of workers in coal mines and set minimum prices for coal).

39. H. Geoffrey Moulton, Jr., *The Quixotic Search for a Judicially-Enforceable Federalism*, 83 MINN. L. REV. 849, 893 (1999). The Rehnquist Court’s (in)famous “New Federalism” decisions in *Lopez* and *Morrison* portended an invigorated judicial effort to police the bounds of federal power. See *United States v. Morrison* 529 U.S. 598, 613 (2000) (invalidating a section of the Violence Against Women Act that created a federal cause of action for victims of violent attacks motivated by gender bias); *United States v. Lopez*, 514 U.S. 549, 551 (1995) (striking down a provision of the Gun Free School Zones Act that forbade gun possession in close proximity to schools). But, as others have observed, the Court’s subsequent decision in *Gonzales v. Raich* deflated much of that promise. 545 U.S. 1, 9 (2005) (holding that Congress may ban the intrastate production and consumption of marijuana for medical use notwithstanding a state statute legalizing such activity); see also Gil Seinfeld, *Article I, Article III, and the Limits of*

## 2. "Political Safeguards" of Federalism

Andrzej Rapaczynski explains that "[t]he most plausible explanation of the repeated frustration of judicial intervention in the area of state-national relations is the failure of judges and scholars to produce a viable theory of federalism that would help to develop workable principles for the judicial resolution of federalism-related disputes."<sup>40</sup> Ultimately, it is not that there are no boundaries; rather, it is the inability of the Court to identify them with enough precision to legitimize a judicial intrusion into Congress's judgment to regulate a particular activity.<sup>41</sup>

The Court openly renounced any meaningful role in enforcing the federal-state boundary in *Garcia v. San Antonio Metropolitan Transit Authority*.<sup>42</sup> Prior judicial attempts to police the divide, the *Garcia* Court explained, were "unsound in principle and unworkable in practice."<sup>43</sup> In surrendering its own role, the Court instead placed its hope in the so-called "political safeguards" of federalism.<sup>44</sup> Relying on Herbert Wechsler's seminal work, the Court explained that "the political process ensures that laws that unduly burden the states will not be promulgated."<sup>45</sup> In theory, at least, the role of states in selecting federal elected officials provides the "built-in restraints"

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*Enumeration*, 108 MICH. L. REV. 1389, 1403 (2010); Ilya Somin, *A False Dawn for Federalism: Clear Statement Rules After Gonzales v. Raich*, 2006 CATO SUP. CT. REV. 113, 118 (explaining that the "apparent limitations on federal authority established by *Lopez* and *Morrison* were virtually eviscerated in *Gonzalez v. Raich*"). *But cf.* Randy E. Barnett, *Foreword: Limiting Raich*, 9 LEWIS & CLARK L. REV. 743, 750 (2005) (suggesting that *Raich* is a mere "setback" in the New Federalism revolution); George D. Brown, *Counterrevolution? National Criminal Law After Raich*, 66 OHIO ST. L.J. 947, 974–82 (2005) (reasoning that the concept of New Federalism embodied in *Lopez* and *Morrison* may still retain its validity, despite *Raich*).

40. Andrzej Rapaczynski, *From Sovereignty to Process: The Jurisprudence of Federalism After Garcia*, 1985 SUP. CT. REV. 341, 345.

41. 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, 559 (1954) (arguing that "the Court is on weakest ground when it opposes its interpretation of the Constitution to that of Congress in the interest of the states").

42. *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 547–56 (1985); see also Peter L. Strauss, *Formal and Functional Approaches to Separation-of-Powers Questions—A Foolish Inconsistency?*, 72 CORNELL L. REV. 488, 514 (1987) (observing that the Court in *Garcia* "abandoned to the federal political process any effort to define the proper interpenetration of federal and state authority").

43. *Garcia*, 469 U.S. at 546–47 (rejecting as "unsound in principle and unworkable in practice, a rule of state immunity from federal regulation that turns on a judicial appraisal of whether a particular government function is 'integral' or 'traditional'"), *overruling* *Nat'l League of Cities v. Usery*, 426 U.S. 833 (1976); see also Rapaczynski, *supra* note 40, at 341–42 (discussing the significance of *Garcia*).

44. *Garcia*, 469 U.S. at 556 (citing Wechsler, *supra* note 41, at 558).

45. *Id.*

against federal overreaching.<sup>46</sup> Because members of Congress are elected by district or state, these federal politicians have sufficient incentive to take state interests into account.<sup>47</sup> Despite important academic critiques of the political-safeguards model,<sup>48</sup> it “remains at the core of the conventional belief” that Congress reigns supreme over matters of federalism.<sup>49</sup>

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Critically, debates about the proper judicial role (or lack thereof) in policing the federal-state boundary are only the first front of the federalism discussion. As the battle appears mostly lost for those seeking to curb congressional growth, the dialogue increasingly turns to federalism’s second front—preemption of state law through the Supremacy Clause. The preemption debate may thus be understood as a second-order federalism defense, where the stakes are exacerbated due to the ground lost on the boundaries front.<sup>50</sup>

### *B. The Preemption Front*

It is one thing for the Court to embrace a system of “concurrent federalism,” which potentially pits federal law against state regulatory programs occupying the same field. It is quite another matter, however, when federal law displaces—rather than merely overlaps—state regulation. The Supremacy Clause is the Constitution’s most

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46. *Id.*

47. Verchick & Mendelson, *supra* note 5, at 20.

48. See, e.g., 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 the political safeguards of federalism); Larry D. Kramer, *Putting the Politics Back Into the Political Safeguards of Federalism*, 100 COLUM. L. REV. 215, 218 (2000) (remarking that “however convincing Wechsler’s reasoning may have been in its original context, subsequent experience and later developments have robbed his analysis of much, if not all, of its force”); see also Chemerinsky, *supra* note 7, at 510 (arguing that “the assumption that states’ interests are adequately represented in the national political process seems highly questionable”); William W. Van Alstyne, *The Second Death of Federalism*, 83 MICH. L. REV. 1709, 1724 (1985) (“[I]f it is part of the constitutional plan that the constitutional boundaries of federalism are to be politically settled, rather than judicially maintained until altered by amendment, then the Court should, in decency, respect its assigned (non)role in such matters.”); John C. Yoo, *The Judicial Safeguards of Federalism*, 70 S. CAL. L. REV. 1311, 1318 (1997) (finding that Wechsler’s reasoning lacked historical evidence).

49. Sharkey, *supra* note 12, at 2144.

50. See Young, *supra* note 4, at 875 (recognizing that “[p]reemption doctrine offers a much more viable avenue for protecting state autonomy without disrupting settled law or providing damaging judicial confrontations with Congress”).

explicit provision concerning preemption (and arguably the only constitutional provision directly addressed at federalism).<sup>51</sup>

### 1. The Supremacy Clause

As relevant here, the Supremacy Clause provides that the “Constitution” and “Laws . . . made in pursuance thereof . . . shall be the supreme law of the land . . . anything in the constitution or laws of any state to the contrary notwithstanding.”<sup>52</sup> At minimum, the Supremacy Clause provides a choice-of-law rule in the event that state law *directly conflicts* with a qualifying federal law.<sup>53</sup> Because the founders established a system enabling both federal and state governments “to operate within the same territory and upon the same individuals,” the Supremacy Clause was an essential mechanism for resolving the inevitable conflicts.<sup>54</sup>

But, beyond this point of unanimity, there is much debated about the Supremacy Clause’s scope. A critical point of contention, central to this Article’s focus, is what types of federal law *qualify* to preempt state law, and, in particular, whether administrative policies make the cut. That issue is tabled for later discussion below, however, because important groundwork must first be laid.

Another disputed issue is whether the Supremacy Clause should operate (1) only to trump *directly conflicting* state law or (2) also to *displace* state law that is not directly conflicting.<sup>55</sup> The Court’s current doctrine, however, clearly holds that state law may be

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51. See Chemerinsky, *supra* note 26, at 975. As discussed *supra* at notes 29–30 and accompanying text, it is debated whether the Tenth Amendment is also directed at federalism.

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

53. See, e.g., Viet D. Dinh, *Reassessing the Law of Preemption*, 88 GEO. L.J. 2085, 2088 (2000) (explaining that the “Supremacy Clause prescribed a constitutional choice of law rule, one that gives federal law precedence over [directly] conflicting state law”) (alteration in original); see also Caleb Nelson, *Preemption*, 86 VA. L. REV. 225, 228 (2000) (recognizing this as a “ubiquitous” point on which “[e]veryone agrees”).

54. Clark, *Separation of Powers*, *supra* note 4, at 1347.

55. The former interpretation, advanced by Steven Gardbaum and Caleb Nelson, is more protective of state prerogatives insofar as it would cabin federal supremacy to the rather rare instances of direct conflicts between federal and state law (i.e., where it would be physically impossible to comply with both the federal and state standard). See Stephen A. Gardbaum, *The Nature of Preemption*, 79 CORNELL L. REV. 767, 770–73 (1994) (stating that state law is only trumped when conflicting state and federal laws would apply); Nelson, *supra* note 53, at 234 (arguing that the Supremacy clause “requires courts to ignore state law if (but only if) state law contradicts a valid rule established by federal law, so that applying the state law would entail disregarding the valid federal rule”).

preempted in both ways.<sup>56</sup> Under this sweeping conception, Congress wields “an extraordinary power in a federalist system.”<sup>57</sup>

## 2. The Court’s Preemption Taxonomy

The Court’s jurisprudence recognizes two general categories of preemption: “express” and “implied.”<sup>58</sup> Express preemption occurs when a federal statute explicitly withdraws state power. Such provisions are sometimes referred to as “jurisdictional” preemption clauses to distinguish them from substantive statutes that may have preemptive effect but do not expressly call for preemption.<sup>59</sup> Assuming that Congress is authorized to legislate in the field (which it almost invariably is),<sup>60</sup> express preemption cases turn on statutory interpretation.<sup>61</sup> Implied preemption likewise turns on statutory interpretation. But unlike express preemption, the requisite congressional intent is implied from substantive statutes outside of any jurisdictional preemption provision.<sup>62</sup>

Implied preemption may occur in a variety of ways. First, when Congress enacts sufficiently pervasive and detailed legislation targeting a particular industry or type of conduct, the Court may infer Congress’s intent to occupy the entire field to the exclusion of the

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56. See, e.g., *Gade v. Nat’l Solid Wastes Mgmt. Ass’n*, 505 U.S. 88, 98 (1992) (“Absent explicit pre-emptive language, we have recognized at least two types of implied pre-emption . . . .”); *Pac. Gas & Elec. Co. v. State Energy Res. Conservation & Dev. Comm’n*, 461 U.S. 190, 203 (1983); see also Christopher H. Schroeder, *Supreme Court Preemption Doctrine*, in PREEMPTION CHOICE, *supra* note 5 (discussing the Court’s preemption doctrine).

57. *Gregory v. Ashcroft*, 501 U.S. 452, 460 (1991).

58. Cf. *Nelson*, *supra* note 53, at 226 (“The Court’s taxonomy recognizes three different types of preemption: ‘express’ preemption, (implied) ‘field’ preemption, and ‘conflict’ preemption.”).

59. LAURENCE H. TRIBE, 1 AMERICAN CONSTITUTIONAL LAW § 6–28, at 1177 (3d ed. 2000); Gardbaum, *supra* note 55, at 771 (describing this type of preemption as a “jurisdiction-stripping” concept).

60. See *supra* notes 37–39 and accompanying text (addressing Congress’s sweeping regulatory power).

61. See *Gade*, 505 U.S. at 98 (“Our ultimate task in any pre-emption case is to determine whether state regulation is consistent with the structure and purpose of the statute as a whole.”); *Pac. Gas*, 461 U.S. at 203 (supporting the argument with legislative history). Although express preemption decisions are tethered to a search for congressional intent, see for example, *Chamber of Commerce v. Whiting*, 131 S. Ct. 1968, 1977 (2011), “the outcome frequently turns on the resolution of statutory ambiguities.” Merrill, *supra* note 8, at 744.

62. *Crosby v. Nat’l Foreign Trade Council*, 530 U.S. 363, 388 (2000) (“[T]he existence of conflict cognizable under the Supremacy Clause does not depend on express congressional recognition that federal and state law may conflict.”); see also Bhagwat, *supra* note 8, at 200 (noting that in implied preemption cases “the Court is discerning congressional intent from the broader structure of statutes”).

states ("field preemption").<sup>63</sup> Second, implied preemption occurs in the event of a conflict between federal and state law ("conflict preemption").<sup>64</sup> In turn, conflict preemption may occur in one of two ways: either when a state law would frustrate or pose an obstacle to the accomplishment of a federal objective ("obstacle preemption")<sup>65</sup> or when it would be impossible for a party to comply with both federal and state law ("impossibility preemption").<sup>66</sup>

In sum, with all its subparts, the Court's taxonomy recognizes four forms of preemption: (1) express; (2) implied field; (3) implied obstacle; and (4) implied impossibility. Although distinguishing among these categories can sometimes be difficult in application,<sup>67</sup> they usefully reflect the various ways that state law can be displaced.

### 3. Congressional Intent and the Antipreemption Presumption

As already noted, questions of preemption—whether express or implied—turn on questions of statutory interpretation. Ernest Young explains that because the Court has generally failed to identify the "boundary between state and federal spheres of power," it "becomes terribly important to determine how much regulatory territory Congress has appropriated for itself and how much it has left to the states."<sup>68</sup>

Congressional intent is thus said to be the "touchstone in every preemption case."<sup>69</sup> Gauging Congress's preemptive intent, however, is

63. See, e.g., *Gade*, 505 U.S. at 98 (indicating that field preemption exists "where the scheme of federal regulation is 'so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it'").

64. See, e.g., *id.*

65. See, e.g., *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941) ("Our primary function is to determine whether, under the circumstances of this particular case, Pennsylvania's law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.").

66. See, e.g., *Fla. Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142–43 (1963) ("A holding of federal exclusion of state law is inescapable and requires no inquiry into congressional design where compliance with both federal and state regulations is a physical impossibility for one engaged in interstate commerce.").

67. Paul Wolfson, *Preemption and Federalism: The Missing Link*, 16 HASTINGS CONST. L.Q. 69, 70–71 (1988) ("Although the Supreme Court has referred to four categories of preemption in almost every one of its recent preemption cases, the categories are useless in difficult cases.").

68. Young, *supra* note 4, at 874.

69. See, e.g., *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996) ("[O]ur analysis of the scope of the statute's pre-emption is guided by our oft-repeated comment . . . that '[t]he purpose of Congress is the ultimate touchstone' in every pre-emption case.") (citation omitted). For critical commentary on this point, see Merrill, *supra* note 8, at 741, stating, "The Court's preemption doctrine . . . systematically exaggerates the role of congressional intent, attributing to Congress judgments that are in fact grounded in judicial perceptions about the desirability of displacing state law in any given area." See also *id.* at 740 ("[I]t is somewhat anomalous to say that

seldom easy. In addition to the usual complications attending statutory interpretation (e.g., what tools of construction to use, whether and to what extent to consider legislative history, etc.),<sup>70</sup> preemption questions shoulder federalism's normative discourse about the appropriate allocation of federal and state power. Thus, although statutory interpretation is the starting point in preemption cases,<sup>71</sup> such decisions also tend to “entail a discretionary judgment about the permissible degree of tension between federal and state law.”<sup>72</sup> As might be expected, though to the chagrin of many, the infusion of judicial discretion into the preemption calculus yields a “muddled,” “haphazard,” and unpredictable jurisprudential landscape.<sup>73</sup>

In deciding preemption cases, the Court generally invokes a “presumption against preemption,” which favors application of state law unless a federal statute reflects “the clear and manifest purpose of Congress” to displace such law.<sup>74</sup> Professor Young describes this antipreemption presumption as a type of federalism-enhancing “resistance norm.”<sup>75</sup> The most obvious effect of the canon is to make it more difficult for Congress to displace state law.<sup>76</sup> Beyond that, however, requiring Congress to clearly evidence its preemptive intent reinforces Congress's institutional primacy in federalism decisions.<sup>77</sup> This channeling toward Congress is consistent with the political-

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legislative intent or purpose is the ‘touchstone’ of a doctrine in which implied preemption plays such a large role.”).

70. See Carlos Manuel Vázquez, *The Separation of Powers as a Safeguard of Nationalism*, 83 NOTRE DAME L. REV. 1601, 1627 (2008) (“What the best or ‘correct’ theory is for interpreting statutes in general, or federal statutes in particular, is highly contested.”).

71. Young, *supra* note 4, at 874.

72. Merrill, *supra* note 8, at 729; accord Ernest Young, *The Rehnquist Court's Two Federalisms*, 83 TEX. L. REV. 1, 8–13, 132 (2004).

73. S. Candice Hoke, *Preemption Pathologies and Civic Republican Values*, 71 B.U. L. REV. 685, 687–88 (1991) (lamenting the Court's haphazard approach); Nelson, *supra* note 53, at 232 (“Modern preemption jurisprudence is a muddle.”).

74. *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947); see also, e.g., *Wyeth v. Levine*, 555 U.S. 555, 564–65 (2009) (applying the presumption); *Medtronic*, 518 U.S. at 485 (same); *Maryland v. Louisiana*, 451 U.S. 725, 746 (1981) (“Consideration under the Supremacy Clause starts with the basic assumption that Congress did not intend to displace state law.”).

75. See Young, *supra* note 4, at 898; see also Ernest A. Young, *Constitutional Avoidance, Resistance Norms, and the Preservation of Judicial Review*, 78 TEX. L. REV. 1549, 1585 (2000) (proposing “the concept of ‘resistance norms’—that is, constitutional rules that raise obstacles to particular governmental actions without barring those actions entirely”).

76. See Mendelson, *supra* note 12, at 752 (observing that the presumption against preemption reduces the likelihood of legislation preempting state law); see also Matthew C. Stephenson, *The Price of Public Action: Constitutional Doctrine and the Judicial Manipulation of Legislative Enactment Costs*, 118 YALE L.J. 2 (2008) (describing how clear statement rules enforce constitutional values by increasing the enactment costs of particular types of legislation).

77. Clark, *Separation of Powers*, *supra* note 4, at 1427–28; Ernest A. Young, *Two Cheers for Process Federalism*, 46 VILL. L. REV. 1349, 1385 (2001).

safeguards theory advanced by the Court in *Garcia*.<sup>78</sup> Indeed, in applying a rather strong version of the presumption in *Gregory v. Ashcroft*, the Court expressed a need to be “absolutely certain that Congress intended” to displace state law, inasmuch as the Court has left the protection of state interests “primarily to the political process.”<sup>79</sup>

The antipreemption presumption has been sharply criticized as an artificial and unjustified judicial incursion that might actually undermine Congress’s preemptive intent.<sup>80</sup> Still, however, the canon is generally defended on normative grounds. Roderick Hills, for example, endorses the presumption insofar as it may effectuate “an open and vigorous [preemption] debate on the floor of Congress,” thus improving legislative deliberation on preemption as a whole.<sup>81</sup> Meanwhile, Bradford Clark draws support for the presumption directly from the Supremacy Clause and the constitutional structure.<sup>82</sup> According to Professor Clark, “the constitutional structure appears to favor a presumption against preemption because the Constitution gives states a role in selecting Congress and the President, but not federal courts.”<sup>83</sup> Professor Young also generally endorses the presumption, but for different reasons.<sup>84</sup> He asserts that while the presumption is inconsistent with the framers’ original strategy for protecting federalism, it is nevertheless a legitimate (and desirable) judicial “compensating adjustment” to reflect the demise of the enumerated-powers and dual-federalism doctrines.<sup>85</sup>

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78. See Clark, *Separation of Powers*, *supra* note 4, at 1427 (claiming that the clear statement requirement essentially requires Congress to decide preemption questions); Scott Keller, *How Courts Can Protect State Autonomy From Federal Administrative Encroachment*, 82 S. CAL. L. REV. 45, 57 (2008) (observing that clear statement rules are appropriate under a political safeguards theory). For a discussion of the political safeguards theory, see *supra* notes 42–49 and accompanying text.

79. *Gregory v. Ashcroft*, 501 U.S. 452, 464 (1991).

80. Dinh, *supra* note 53, at 2096 (arguing that the “constitutional text, structure, and history does not support the application of the [presumption] in all contexts”); Nelson, *supra* note 53, at 291 (noting that it would be improper for courts to apply an “artificial presumption against preemption” to constrain “federal statutory provisions that plainly *do* manifest an inten[t] to supplant state law”); cf. Vázquez, *supra* note 70, at 1627 (asserting that “the original understanding of the constitutional structure does not support a rule under which ambiguities are always resolved in favor of state law or the status quo,” but not foreclosing the possibility that such a rule might otherwise be normatively defensible).

81. Roderick M. Hills, Jr., *Against Preemption: How Federalism Can Improve the National Legislative Process*, 82 N.Y.U. L. REV. 1, 28 (2007).

82. Clark, *Separation of Powers*, *supra* note 4, at 1429.

83. *Id.*

84. See Ernest A. Young, *Making Federalism Doctrine: Fidelity, Institutional Competence, and Compensating Adjustments*, 46 WM. & MARY L. REV. 1733, 1848–50 (2005).

85. *Id.*



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The foregoing discussion sketched the *vertical* relationship between the federal and state governments. The next Part provides additional groundwork, changing gears to the *horizontal* relationship between Congress and the executive branch as expressed through the administrative state. If the boundaries front is federalism's first line of defense, and the preemption front is the second, administrative preemption may be understood as a third federalism battleground.<sup>86</sup>

## II. THE CONGRESSIONAL-DELEGATION MODEL

Congressional delegation of policymaking power to administrative agencies is a hallmark of our modern government.<sup>87</sup> This Part outlines the practical appeal of the congressional-delegation model and, relatedly, the model's resilience to constitutional challenge. This discussion will set the stage for later discussions about the manner in which agencies preempt state law (Part III); the problems that arise when the Court's general federalism doctrine is cast upon the delegation model's frame (Part IV); and the conceptual imperative to sever Congress's preemption power from the general delegation model (Part V.C).

The first tenet of administrative law is that an agency "literally has no power to act . . . unless and until Congress confers power upon it."<sup>88</sup> Nothing in the Constitution itself vests authority in administrative agencies *per se*; rather, such authority is born of congressional grace. Congress, however, has been characteristically generous in this regard.<sup>89</sup> For some time now, "[t]he sheer amount of law" made by administrative agencies has "far outnumber[ed]" statutory lawmaking by Congress.<sup>90</sup>

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86. Cf. Metzger, *supra* note 11, at 2025 ("[F]ederalism scholarship's growing fixation with preemption has underscored the effect of federal administrative action on the states.").

87. See Gary Lawson, *The Rise and Rise of the Administrative State*, 107 HARV. L. REV. 1231, 1237–41 (1994).

88. See *La. Pub. Serv. Comm'n v. FCC*, 476 U.S. 355, 374 (1986).

89. Colin S. Diver, *Statutory Interpretation in the Administrative State*, 133 U. PA. L. REV. 549, 551 (1985) ("For it is a defining characteristic of the administrative state 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."); see also GUIDO CALABRESI, *A COMMON LAW FOR THE AGE OF STATUTES* 45 (1982) (describing the twentieth-century shift toward increased delegations of authority to administrative agencies).

90. *INS v. Chadha*, 462 U.S. 919, 985–86 (1983) (White, J., dissenting); accord David B. Spence, *Administrative Law and Agency Policymaking: Rethinking the Positive Theory of*

A composite of factors feeds this phenomenon of modern government.<sup>91</sup> First and foremost, Congress is “handicapped in its lawmaking function by the Constitution’s requirements that identical legislation be passed by both houses and presented to the President for potential veto.”<sup>92</sup> As compared to statutory lawmaking, delegation of policymaking to administrative agencies offers a path of less resistance. Second, the sheer size of the regulatory domain staked by Congress makes it increasingly difficult for Congress to decide all the necessary details.<sup>93</sup> Statutory lawmaking entails significant transaction costs, which include the time, money, and resources needed to collect and digest relevant information.<sup>94</sup> Agencies offer the resources that Congress, by comparison, lacks. Third, concerns of “political expediency” might lead Congress to leave discreet or difficult policy choices to regulators, while taking credit for more broadly worded symbolic legislative gestures.<sup>95</sup> Fourth, legislators may perceive delegation as a solution to legislative impasse.<sup>96</sup> Fifth, Congress may delegate because of its inability to foresee issues that may later arise in implementing a statute.<sup>97</sup> Sixth, Congress may delegate out of naked recognition that agency officials may be better

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*Political Control*, 14 YALE J. ON REG. 407, 425 (1997) (“The number of policy issues addressed in legislation is a small fraction of the number addressed by agencies.”).

91. Morris P. Fiorina, *Legislative Choice of Regulatory Forms: Legal Process or Administrative Process?*, 39 PUB. CHOICE 33, 47 (1982) (examining congressional incentives to delegate decisionmaking power to agencies); David S. Rubenstein, “*Relative Checks*”: *Towards Optimal Control of Administrative Power*, 51 WM. & MARY L. REV. 2169, 2179–80 (2010) (describing the various reasons Congress delegates authority, and collecting sources).

92. Rubenstein, *supra* note 91, at 2179. In addition to the bicameralism and presentment requirements of Article I, a number of additional “vetogates”—such as the Senate filibuster and the Rules Committee in the House—plague the legislative process. William N. Eskridge, Jr., *Vetogates*, Chevron, *Preemption*, 83 NOTRE DAME L. REV. 1441, 1444–48 (2008). Each of the vetogates present an opportunity for opponents of the measure to kill (or maim) a bill. *Id.*

93. 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.”). *See generally* RANDALL RIPLEY & GRACE FRANKLIN, CONGRESS, THE BUREAUCRACY, AND PUBLIC POLICY 17 (1984) (observing that the size and complexity of federal regulation prevents Congress from implementing it on its own).

94. David B. Spence & Frank Cross, *A Public Choice Case for the Administrative State*, 89 GEO. L.J. 97, 135 (2000) (“The transaction cost explanation [for delegations] involves the need for information.”).

95. *Id.* at 138 (“Legislators wish to please the public by taking action, but are well are [sic] aware . . . that all policies have some negative consequences for which they may be blamed.”); *see also* Richard J. Pierce, Jr., *The Role of the Judiciary in Implementing an Agency Theory of Government*, 64 N.Y.U. L. REV. 1239, 1245 (1989).

96. Spence, *supra* note 90, at 426–27.

97. *Id.* (“This foreseeability problem goes to the heart of the delegation issue and is the key reason why politicians delegate policy-making authority to agencies in the first place.”).

suited to formulate sound public policy.<sup>98</sup> In short, the conflation of some or all of these factors often leads Congress to delegate policymaking to agencies. This remains true—indeed, sometimes especially true—for important policy matters.<sup>99</sup>

None of this is (yet) to say that congressional delegation of policymaking authority to agencies is constitutionally legitimate or desirable. Indeed, both subjects are contested.<sup>100</sup>

Regarding legitimacy, nothing in the constitutional text expressly forecloses congressional delegation of policymaking power to agencies.<sup>101</sup> However, structural arguments rooted in separation-of-powers principles and democratic theory arguably prohibit the practice.<sup>102</sup> Specifically, because Article I of the Constitution vests “[a]ll legislative Powers herein granted” to Congress, some argue that the legislature may not in turn delegate that power to the executive branch. Delegating lawmaking authority, the argument goes, not only upsets structural separation-of-powers principles, but it also threatens democratic ideals by leaving policy choices to unelected representatives.<sup>103</sup> But *if* this constitutional deduction is correct, then the operation of our modern government—characterized as it is by broad delegations—is illegitimate.<sup>104</sup> Perhaps for this reason alone,

98. See Pierce, *supra* note 95, at 1245.

99. Spence, *supra* note 90, at 427 (“The temptation to ‘pass the buck’ . . . means not only that agencies face many policy questions on which legislation is silent, but also that many of these policy questions will be important, or at least controversial.”).

100. On the issue of constitutional legitimacy, compare, for example, Spence & Cross, *supra* note 94, at 131–33 (defending constitutional legitimacy), and Peter M. Shane, *Legislative Delegation, the Unitary Executive, and the Legitimacy of the Administrative State*, 33 HARV. J.L. & PUB. POL’Y 103, 107–08 (2010), with DAVID SCHOENBROD, POWER WITHOUT RESPONSIBILITY: HOW CONGRESS ABUSES THE PEOPLE THROUGH DELEGATION (1993) (offering a scathing critique of congressional delegations). On whether delegations are normatively desirable, compare, for example, Jerry L. Mashaw, *Prodelegation: Why Administrators Should Make Political Decisions*, 1 J.L. ECON. & ORG. 81, 91–98 (1985) (defending delegations as promoting public preferences and public welfare), with Peter H. Aranson et al., *A Theory of Legislative Delegation*, 68 CORNELL L. REV. 1, 43, 62–63 (1982) (maintaining that a reinvigorated delegation doctrine would enhance the public welfare).

101. Gary Lawson, *Delegation and Original Meaning*, 88 VA. L. REV. 327, 335 (2002); *see also* Whitman v. Am. Trucking Ass’ns, 531 U.S. 457, 489 (2001) (Stevens, J., concurring) (noting that nothing in the text of Article I purports to limit Congress’s authority to delegate policymaking power).

102. Cynthia R. Farina, *Statutory Interpretation and the Balance of Power in the Administrative State*, 89 COLUM. L. REV. 452, 478–79 (1989); *see also* SOTIRIOS A. BARBER, THE CONSTITUTION AND THE DELEGATION OF CONGRESSIONAL POWER 24 (1975) (noting that nondelegation arguments are most often linked with separation-of-powers principles).

103. Spence & Cross, *supra* note 94, at 131–33 (summarizing but disagreeing with this position).

104. See Thomas W. Merrill, *Rethinking Article I, Section 1: From Nondelegation to Exclusive Delegation*, 104 COLUM. L. REV. 2097, 2099 (2004) (noting the “difficulty of squaring” the

the foregoing assault on delegations *cannot* be right.<sup>105</sup> (“Cannot” in the sense of not being a viable option.)

Apart from the consequentialist sense that impugning delegations “*cannot*” be right, a slurry of normative claims have been advanced in favor of the congressional power to delegate policymaking to agencies.<sup>106</sup> These prodelegation accounts are often propped upon the bundle of institutional advantages that agencies generally hold over Congress, including topical expertise, better deliberative methods, greater access to information, and enhanced flexibility to respond to changing information and societal values.<sup>107</sup> That is, by comparison, “[w]e should not want . . . Congress to [be] the role of primary policymaker” because “[g]iven the scale and complexity of the federal government . . . Congress is not the optimal institution to make federal policy on many and perhaps most issues.”<sup>108</sup> Prodelegation advocates also stress that the most likely alternative to congressional delegations to agencies is delegation to *courts*, which is even worse.<sup>109</sup> Agencies not only fare better than courts along the institutional dimensions just noted, but they also offer a degree of democratic accountability through the President that courts lack.<sup>110</sup>

Those in the antidelegation camp, by contrast, generally stress that broad delegations to nonpolitical agencies are dangerous for one or more reasons. First, congressional delegation violates the norms of representative governance given the accountability deficit of agencies relative to Congress.<sup>111</sup> Second, delegation arguably “leads to an

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postulate that “Congress may not delegate legislative power” with “the fact that Congress has massively delegated legislative rulemaking authority to administrative agencies”).

105. Cf. Richard J. Pierce, Jr., *The Role of Constitutional and Political Theory in Administrative Law*, 64 TEX. L. REV. 469, 490 (1985) (“The abstract appeal of the [nondelegation] doctrine vanishes rapidly . . . when it is tested in the crucible of reality.”).

106. See generally Mashaw, *supra* note 100 (making the normative case in favor of administrative delegations).

107. See, e.g., *id.*; Merrill, *supra* note 104, at 2151, 2154–55 (remarking on “the desirability of having policy formulated by persons who have expertise in the subject matter” and explaining that the value of “deliberation . . . generally favors broad delegation”); Spence, *supra* note 90, at 131 (noting the “information benefits of delegation”).

108. Merrill, *supra* note 104, at 2164.

109. See Spence & Cross, *supra* note 94, at 138–41.

110. *Id.*; see also Mashaw, *supra* note 100, at 95 (making the case for administrative accountability); Cass R. Sunstein, *Beyond Marbury: The Executive’s Power to Say What the Law Is*, 115 YALE L.J. 2580, 2608 (2006) (noting administrative accountability relative to courts).

111. See, e.g., JOHN HART ELY, *DEMOCRACY AND DISTRUST* 130–32 (1980) (discussing why much law is left to be made by unelected administrators and commenting that this is an undemocratic escape from accountability); MARTIN H. REDISH, *THE CONSTITUTION AS POLITICAL STRUCTURE* 141–43 (1995) (noting that the “broad legislative delegation to administrative agencies threatens to dilute the principle of electoral accountability” by removing policy choices from those who are most representative); SCHOENBROD, *supra* note 100, at 8–12, 17 (noting, inter

overall reduction in public welfare” insofar as it becomes easier to pass legislation that most often serves narrow private interests as opposed to the general welfare. This critique reflects the public-choice conception that agencies are more susceptible to “capture” by minority interest groups than Congress is.<sup>112</sup> Third, delegation circumvents the cumbersome legislative process, a process that tends to filter “ill-conceived” and “faction-driven” law.<sup>113</sup> This is a nod to the advantages inhering in slow and deliberative lawmaking, which tends to deflate misguided policy preferences.<sup>114</sup>

Despite these antidelegation critiques, the Court’s trophy of approval has sat on the prodelegation mantle (virtually undisturbed) throughout our history. Under the Court’s long-standing “nondelegation doctrine,” all that Congress must do to keep within constitutional bounds is to provide an “intelligible principle” in its statutes by which to guide administrative enforcement of the law.<sup>115</sup> So, there is a *conceptual* limit to congressional delegation—but it’s virtually toothless in application.<sup>116</sup> To appreciate the practical generosity of the intelligible-principle standard, one need only note that: “(1) the Court has found an unconstitutional delegation in exactly two cases, both decided in 1935 at the height of judicial contempt for the New Deal; and (2) delegations to agencies to create binding rules in the ‘public interest’ and of similar breadth have been

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alia, how delegation can shield elected representatives from blame); Marci A. Hamilton, *Representation and Nondelegation: Back to Basics*, 20 CARDOZO L. REV. 807, 820 (1999) (noting the diminished accountability of agency officials).

112. See Spence & Cross, *supra* note 94, at 121–23 (discussing and challenging “agency capture” theory). *But cf.* PAUL J. QUIRK, *INDUSTRY INFLUENCE IN FEDERAL REGULATORY AGENCIES* 4–21 (1981) (challenging “agency capture” theory on empirical grounds); Mark Kelman, *On Democracy-Bashing: A Skeptical Look at the Theoretical and “Empirical” Practice of the Public Choice Movement*, 74 VA. L. REV. 199, 230, 238–68 (1988) (same).

113. Mashaw, *supra* note 100, at 82–91 (summarizing and rebuking the arguments of antidelegation proponents); *see also* Merrill, *supra* note 104, at 2141–51 (summarizing these and other antidelegation normative claims).

114. See John F. Manning, *The Nondelegation Doctrine as a Canon of Avoidance*, 2000 SUP. CT. REV. 223, 238–40 (noting that the creation of a cumbersome legislative process diminishes the influence of special interest groups and “momentary passions” and filters out bad laws); *see also* John O. McGinnis & Michael B. Rappaport, *Our Supermajoritarian Constitution*, 80 TEX. L. REV. 703, 769–80 (2002) (conceiving of the bicameralism and presentment requirement as a type of supermajority rule that filters legislation with merely majoritarian support).

115. *J.W. Hampton, Jr., & Co. v. United States*, 276 U.S. 394, 409 (1928) (formulating the intelligible principle test); *see Whitman v. Am. Trucking Ass’ns*, 531 U.S. 457, 472 (2001) (applying the intelligible principle test); *Mistretta v. United States*, 488 U.S. 361, 374–75, 379 (1989) (same).

116. See, e.g., Merrill, *supra* note 104, at 2099 (observing that the “nondelegation doctrine, while still formally considered part of our structural Constitution, is effectively unenforceable”).

upheld by the Court against nondelegation attack.”<sup>117</sup> In this sense, the so-called nondelegation doctrine is a misnomer<sup>118</sup>—or, if one prefers the finesse, an “underenforced constitutional norm.”<sup>119</sup>

The Court’s reasons for tolerating congressional delegation are twofold. The first looks outward to the pragmatic needs of modern government. For example, in *Loving v. United States*, the Court observed that “[t]o burden Congress with all federal rulemaking would divert that branch from more pressing issues, and defeat the [f]ramers’ design of a workable National Government.”<sup>120</sup> The Court’s second reason looks inward, as a self-recognition that it is not well positioned to second-guess Congress’s delegation decisions.<sup>121</sup> Were the Court to police that line with gumption, the illegitimacy concern over delegated authority might simply be substituted with another constitutional problem—namely, undue judicial incursions into Congress’s discretion.<sup>122</sup> This point was expressed by the Court in *Whitman v. American Trucking Associations*: “[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.’”<sup>123</sup> The Court, waiving a banner of institutional respect, thus effectively defers to Congress’s choice to delegate.

117. Rubenstein, *supra* note 91, at 2182. The infamous New Deal cases striking down Congress’s delegations are *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 534–42 (1935), and *Panama Refining Co. v. Ryan*, 293 U.S. 388, 429–30 (1935). For paradigmatic examples of the Court’s tolerance for broad delegations, see, for example, *American Power & Light Co. v. SEC*, 329 U.S. 90, 105 (1946); *Yakus v. United States*, 321 U.S. 414, 426 (1944); *National Broadcasting Co. v. United States*, 319 U.S. 190, 225–26 (1943).

118. Lisa Schultz Bressman, *Beyond Accountability: Arbitrariness and Legitimacy in the Administrative State*, 78 N.Y.U. L. REV. 461, 517 (2003) (observing that this point has been made by too many to mention).

119. William N. Eskridge, Jr. & Philip P. Frickey, *Quasi-Constitutional Law: Clear Statement Rules as Constitutional Lawmaking*, 45 VAND. L. REV. 593, 630 (1992); *accord* Sunstein, *supra* note 11, at 338 (noting that “the ban on unacceptable delegations is a judicially underenforced norm”).

120. 517 U.S. 748, 758 (1996); *accord* *Mistretta*, 488 U.S. at 372.

121. Merrill, *supra* note 104, at 2099 (remarking on “judicial attitude of great deference in determining whether any particular statute confers too much discretion”).

122. *Cf.* Sunstein, *supra* note 11, at 327 (contending that “judicial enforcement of the doctrine would produce ad hoc, discretionary rulings” that would “suffer from the appearance, and perhaps the reality, of judicial hostility to the particular program at issue”).

123. 531 U.S. 457, 474–75 (2001) (quoting *Mistretta*, 488 U.S. at 416 (Scalia, J., dissenting)); *see also* Bradford R. Clark, *Federal Lawmaking and the Role of Structure in Constitutional Interpretation*, 96 CALIF. L. REV. 699, 716–17 (2008) (noting that this concern leads the Court to effectively uphold broad legislation); John F. Manning, *Lessons from a Nondelegation Canon*, 83 NOTRE DAME L. REV. 1541, 1544 (2008) (further exploring how the Court’s reticence grants more power to the other branches).

In sum, “[i]t seems that delegation, like death and taxes, is inevitable.”<sup>124</sup> Congress has any number of incentives to delegate policymaking power to agencies, and, absent any meaningful resistance from the Court, Congress has typically embraced the invitation.

### III. ADMINISTRATIVE PREEMPTION

The previous discussions have sketched the dynamics of vertical preemption and horizontal delegation. This Part describes how the Court’s preemption doctrine operates when it is grafted upon the congressional-delegation model. What results is an administrative-preemption schematic that roughly divides into four parts: (1) “interpretive”; (2) “jurisdictional”; (3) “substantive”; and (4) “mixed.” After describing these categories of administrative preemption, this Part then contextualizes the stakes of delegated supremacy within federalism’s larger frame.

#### *A. Types of Administrative Preemption*

##### 1. “Interpretive” Preemption

One way that agencies become involved in preemption issues is by interpreting a congressional statute or statutory scheme as having preemptive effect. Though not directly my focus here, I include a brief discussion of “interpretive” preemption because it offers a useful contrast to what I will later argue is the improper role of agencies in our federalist system.

Importantly, the ultimate issue in interpretive preemption cases is whether an applicable *statute* preempts state law. In such cases, the agency is not claiming any independent preemption authority but rather is merely interpreting a statutory scheme as having that effect.<sup>125</sup> In this context, preemption ultimately turns on what *Congress* intended—the agency simply offers its interpretive view.

Interpretive preemption invokes the questions of whether, and to what extent, the Court should defer to the agency’s interpretation.

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124. Spence & Cross, *supra* note 94, at 142; see also Peter B. McCutchen, *Mistakes, Precedent, and the Rise of the Administrative State: Toward a Constitutional Theory of the Second Best*, 80 CORNELL L. REV. 1, 36 (1994) (“Open [e]nded [d]elegations of [l]egislative [p]ower are [h]ere to [s]tay.”).

125. See Merrill, *supra* note 8, at 759–60 (providing an overview of the roles of agencies in preemption, specifically discussing the role of agency statutory interpretation in preemption).

The ever-growing literature targeting this issue features a comparative institutional analysis pitting courts against agencies.<sup>126</sup> Such institutional considerations figure into my challenge of “jurisdictional” and “substantive” administrative preemption and will later be explored. But the *practice* of agencies opining on questions of what Congress intended (as opposed to the question of whether and to what extent the Court should *defer* to the agency’s view) is not generally objectionable.<sup>127</sup>

## 2. “Jurisdictional” Preemption<sup>128</sup>

Jurisdictional preemption involves an agency’s assertion of *its own* power and intent to preempt state law.<sup>129</sup> In such cases, the agency’s preemptive intent is generally made explicit in a binding regulation or order. Rather than (or in addition to) expressing a view that *Congress* intended to displace state law, as is the case for interpretative preemption, jurisdictional preemption reflects the *agency’s* declaration of independent preemptive authority. Stated otherwise, absent the agency’s invocation of preemptive authority, there would be no independent basis for preemption under the relevant statutory scheme.

There are two flavors of jurisdictional preemption. First, Congress may explicitly delegate to an agency the power to preempt state law as well as the decision of whether to invoke the power.<sup>130</sup> An example of such delegation is 30 U.S.C. § 1254(g), which expressly authorizes the Secretary of the Interior to identify state laws

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126. See, e.g., Eskridge, *supra* note 92; Galle & Seidenfeld, *supra* note 11, at 1948–83; McGreal, *supra* note 21, at 823–31; Mendelson, *supra* note 12, at 737–43; Merrill, *Preemption*, *supra* note 8, at 727–30, 755–59; Young, *supra* note 4, at 894–901; see also Gregory M. Dickenson, *Calibrating Chevron for Preemption*, 63 ADMIN. L. REV. 667 (2011).

127. Cf. Young, *supra* note 4, at 895–96 (“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 congressional enactment . . .”).

128. I use the term “jurisdictional preemption” to track the terminology sometimes used to describe analogous express statutory preemption clauses. See *supra* note 59 and accompanying text; see also Clark, *Separation of Powers*, *supra* note 4, at 1434 (referring to “[j]urisdictional” regulations”).

129. See, e.g., Bhagwat, *supra* note 8, at 201 (drawing this distinction); Merrill, *supra* note 8, at 759–60 (same).

130. Susan Bartlett Foote, *Administrative Preemption: An Experiment in Regulatory Federalism*, 70 VA. L. REV. 1429, 1429 (1984) (noting that 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”).



preempted by the Surface Mining Control and Reclamation Act.<sup>131</sup> Putting aside, for now, whether such delegations are constitutionally legitimate, what *is* clear is that Congress intends to delegate the preemption decision. Agencies, in turn, are generally receptive to these grants of authority. For example, the agency administering §1254(g) relied on its delegated authority to preempt a Tennessee statute that interfered with the federal regulatory scheme.<sup>132</sup>

Second, and more commonly, Congress grants general rulemaking authority to an agency, and the agency invokes that authority to promulgate a binding regulation or order that expressly preempts state law.<sup>133</sup> A useful example is *City of New York v. FCC*.<sup>134</sup> There, Congress authorized the Federal Communications Commission (“FCC”) to “establish technical standards relating to the facilities and equipment of cable systems which a franchising authority may require in the franchise.”<sup>135</sup> Responding, the FCC promulgated regulations establishing technical standards for cable-signal quality.<sup>136</sup> It also promulgated a regulation expressly preempting any state law in the same field, although the Act at issue did not expressly empower the FCC to do so.<sup>137</sup> New York and other cities challenged the FCC’s authority to preempt the cities’ ability to “impose stricter technical standards than those imposed by the Commission.”<sup>138</sup> However, the Court rejected this challenge. The Court began by reiterating its well-entrenched doctrine that administrative agencies, no less than Congress, may preempt state law under the Supremacy Clause.<sup>139</sup>

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131. For additional examples of express grants of preemptive authority, see 47 U.S.C. § 253(d) (2006) (authorizing the Federal Communications Commission to preempt the enforcement of state and local statutes, regulations, or legal requirements interfering with the development of competitive telecommunications services) and 49 U.S.C. § 5125(d) (2006) (authorizing the Secretary of Transportation to determine whether particular state, local, or tribal requirements respecting the transportation of hazardous materials are preempted).

132. Preemption Determination No. 21(r), 64 Fed. Reg. 54,474 (Dep’t of Transp. Oct. 6, 1999); *see also* Tennessee v. U.S. Dep’t of Transp., 326 F.3d 729, 730 (6th Cir. 2003) (holding that the Department of Transportation’s preemption of Tennessee law was valid).

133. *See* Bhagwat, *supra* note 8, at 201 (providing a brief overview of this potential agency authority and mentioning that the Supreme Court has never explicitly weighed in on the constitutionality of this practice); Merrill, *supra* note 8, at 759–60 (discussing the possibility of agency preemption based on its own authority).

134. 486 U.S. 57 (1988).

135. *Id.* at 61 (quoting 47 U.S.C. § 544(e) (Supp. IV 1982)).

136. *Id.* at 61–62.

137. *Id.* at 62–63.

138. *Id.* at 62.

139. *Id.* at 63–64.

Furthermore, it found in the case before it “no room for doubting that the [agency] intended to preempt state technical standards.”<sup>140</sup>

Thus, the absence of any express delegation of preemptive authority from Congress to the administering agency is of no concern to the Court. The power to preempt is *impliedly* transmitted alongside the delegation of general rulemaking authority.<sup>141</sup> So long as (1) the agency intends to preempt state law and (2) that action is within the scope of the agency’s authority, the conditions for jurisdictional preemption are satisfied.<sup>142</sup> Indeed, the Court has explained that “in a situation where state law is claimed to be preempted by federal regulation, a ‘narrow focus on Congress’[s] intent to supersede state law [is] misdirected,’ for ‘[a] preemptive regulation’s force does not depend on express congressional authorization to displace state law.’”<sup>143</sup>

### 3. “Substantive” Preemption

Substantive preemption occurs when an agency promulgates a nonjurisdictional rule that sufficiently conflicts with state law.<sup>144</sup> Comparing substantive to jurisdictional preemption brings the character of each into sharper relief. They are similar insofar as the displacement of state law stems most directly from administrative (rather than statutory) authority. Unlike jurisdictional preemption, however, substantive preemption is not triggered by an agency’s express statement or intent to preempt state law. Rather, substantive preemption occurs as the result of a conflict between administrative and state policies.<sup>145</sup>

The Court has repeatedly endorsed this type of administrative preemption.<sup>146</sup> Its decision in *Geier v. American Honda Motor*

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140. *Id.* at 65.

141. *See id.* (upholding an agency’s preemption in the absence of a direct congressional delegation); *see also* *Fidelity Fed. Sav. & Loan Ass’n v. de la Cuesta*, 458 U.S. 141, 154 (1982) (“A pre-emptive regulation’s force does not depend on express congressional authorization to displace state law . . .”).

142. *De la Cuesta*, 458 U.S. at 154.

143. *City of New York*, 486 U.S. at 64 (quoting *de la Cuesta*, 458 U.S. at 154).

144. *See Geier v. Am. Honda Motor Co.*, 529 U.S. 861, 883 (2000) (noting that an agency statement of intent to preempt was not a prerequisite to conflict preemption).

145. *See Bhagwat, supra* note 8, at 201–02.

146. *See, e.g., Geier*, 529 U.S. at 867–68 (holding that a regulation concerning passive restraints in automobiles impliedly preempted a state tort law claim); *CSX Transp., Inc. v. Easterwood*, 507 U.S. 658, 674–75 (1993) (holding that a regulation governing train speed preempted a common law negligence claim); *City of New York*, 486 U.S. at 66–67 (holding that a regulation concerning cable television signals preempted a more stringent state regulation); *de la Cuesta*, 458 U.S. at 170 (holding that a regulation permitting federally chartered banks to

*Company* provides a useful example.<sup>147</sup> There, the petitioner asserted a tort claim against Honda alleging that it had negligently designed a car without an airbag.<sup>148</sup> Honda, however, asserted that the common law claim was preempted on at least one of two grounds. First, Honda claimed that Congress preempted petitioner's claim in an express statutory preemption provision. Second, Honda claimed that a Department of Transportation regulation that permitted a "phase-in" period of passive restraints, which included but was not limited to airbags, "conflict" preempted the petitioner's tort claim.<sup>149</sup> The Court disagreed with the first assertion, holding that Congress itself had not directly preempted the claim in a statutory jurisdictional preemption clause or otherwise.<sup>150</sup> Honda's second preemption defense, however, carried the day. Specifically, the Court held that the state law claim against Honda was preempted because the claim posed an obstacle to the federal regulation's purpose of allowing alternatives to airbags at the time the car in question was designed.<sup>151</sup> The Court stressed that the absence of a formal statement of preemptive intent by the agency was not necessary because the actual conflict between the regulation and state law was sufficient to displace state law.<sup>152</sup>

#### 4. Mixed Bag

Although the categories of "interpretive," "jurisdictional," and "substantive" administrative preemption are analytically distinct, they may be, and often are, joined in application. For example, an agency may promulgate a substantive regulatory scheme and then claim in a jurisdictional regulation that the regulatory scheme preempts state law. That was the case in *City of New York v. FCC*, where the agency promulgated not only substantive regulations establishing technical standards for cable-signal quality, but also a

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exercise the due-on-sale clause of mortgages preempts a contrary state common law rule); *United States v. Shimer*, 367 U.S. 374, 381–85 (1961) (holding that a regulation governing the calculation of foreclosure deficiency judgments preempted a contrary state rule); *see also* *Hillsborough Cnty. v. Automated Med. Labs., Inc.*, 471 U.S. 707, 713 (1985) ("We have held repeatedly that state laws can be pre-empted by federal regulations as well as by federal statutes.").

147. *Geier*, 529 U.S. at 883.

148. *Id.* at 865.

149. *Id.* at 867, 874–75.

150. *Id.* at 867–74.

151. *Id.* at 874–82.

152. *Id.* at 884 (stating that "conflict pre-emption is different [than field preemption] in that it turns on the identification of 'actual conflict' and not on an express statement of pre-emptive intent").

jurisdictional regulation forbidding localities from adopting additional requirements.<sup>153</sup>

Another mixed example is when an agency promulgates a substantive regulation and then offers an informal interpretation of the regulation (e.g., in an amicus brief or regulatory preamble) as having preemptive effect. That was the case in *Wyeth v. Levine*, where the court did not disturb the substance of the regulation but declined to defer to the agency's view of the regulation's preemptive effect.<sup>154</sup> Admixtures of this type complicate the analysis, but they do not disturb the base elements of administrative preemption.

### *B. The Stakes of Administrative Preemption*

William Buzbee nicely captures the significant stakes of administrative preemption:

In one fell swoop, a federal agency can seek to displace or nullify the laws of fifty states, regardless of how closely federal and state laws actually match or conflict. And if the agency's preemption claim also involves displacing state common law regimes, it is even more centrally displacing a body of law that, by its nature, is the traditional domain of states. Furthermore, because so few federal regulatory regimes establish their own compensatory schemes, an agency preemption declaration threatens to leave any injured person remediless, unable to secure compensation for injuries.<sup>155</sup>

Thus, the potential effects of administrative preemption are "massive."<sup>156</sup> More so, the stakes must be understood in their larger context. In some respect, battles on the administrative preemption front may be understood as an extension—or trickle down—of those on federalism's boundaries and preemption fronts.<sup>157</sup> But the critical difference is that the rules of the game change in the administrative context.<sup>158</sup> Congress's role is marginalized insofar as agencies assert preemptive effect on their own authority. Meanwhile, the judicial check may be somewhat diluted. In particular, courts may defer to administrative input on the nature and extent of a regulatory

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153. *City of New York v. FCC*, 486 U.S. 57, 59 (1988).

154. 555 U.S. 555, 580–81 (2009). For an excellent discussion of this case, see Bhagwat, *supra* note 8.

155. Buzbee, *supra* note 12, at 1568.

156. *Id.*

157. *Cf. Metzger, supra* note 11 (generally endorsing administrative preemption).

158. *Cf. Young, supra* note 4, at 869–70 (noting that the political and procedural safeguards have "little purchase" in the administrative preemption context).

conflict<sup>159</sup> or defer to the substance of administrative policies that, in turn, conflict with state law.<sup>160</sup>

#### IV. THE PROBLEMS WITH ADMINISTRATIVE PREEMPTION

The foregoing Part provided a descriptive account of the many ways that agencies may influence or control preemptive outcomes. It further contextualized the stakes of administrative preemption within federalism's larger frame. This Part offers a critique of the Court's administrative-preemption doctrine. As will be seen, some of the difficulties are attributable to the rather uneasy fit between the Court's general preemption doctrine and the congressional-delegation model.<sup>161</sup> Other problems, however, trace back to federalism's core principles.

##### A. *The Translation Problem*

##### 1. Constitutional Legitimacy?

The Court has yet to satisfactorily explain how it is that agencies constitutionally arrive at the power to preempt state law.<sup>162</sup> The most the Court has seemed to offer comes from *City of New York v. FCC*:

The Supremacy Clause of the Constitution gives force to [administrative preemption] by stating that 'the Laws of the United States which shall be made in Pursuance' of the Constitution 'shall be the supreme Law of the Land.' The phrase 'Laws of the United States' encompasses both federal statutes themselves and federal regulations that are properly adopted in accordance with statutory authorization. For this reason, at the same time that our decisions have established a number of ways in which Congress can be understood to have preempted state law, we have also recognized that 'a federal agency acting within the scope of its congressionally delegated authority may preempt state regulation' . . . .<sup>163</sup>

Because the Court has offered virtually no explanation of why it treats administrative regulations like statutes for purposes of the

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159. *Cf. Wyeth*, 555 U.S. at 576–77 (“The weight we accord the agency’s explanation of state law’s impact on the federal scheme depends on its thoroughness, consistency, and persuasiveness.”).

160. *See, e.g., Smiley v. Citibank N.A.*, 517 U.S. 735, 744–45 (1996) (deferring under *Chevron* to substantive agency policy that had the effect of preempting state law).

161. *Young*, *supra* note 4, at 870 (“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.”).

162. *See Merrill*, *supra* note 8, at 762 (observing that the Court has provided “no explanation” of how its administrative preemption doctrine “can be squared with the constitutional text”); *Young*, *supra* note 4, at 870.

163. 486 U.S. 57, 63–64 (1988) (citations omitted).

Supremacy Clause, it is difficult to know whether the Court's approach to the issue is *formalistic* (i.e., "Laws" include regulations, therefore they preempt state law) or *tacitly functional* (i.e., regulations should preempt state law, therefore they are "Laws"). If the former, then the Court's administrative-preemption doctrine may be wrong simply because the premise is wrong. If the latter—that is, if the Court's result is driven by pragmatism—it has failed to explain why administrative supremacy is preferable to a federalist system without it.

Bradford Clark has argued that the term "Laws" in the Supremacy Clause refers only to *statutes* and that the only way that such "Laws" can be "made in Pursuance" of the Constitution is "by complying with the bicameralism and presentment requirements" set forth in Article I.<sup>164</sup> His interpretation draws support from the text of Article I, which provides: "Every Bill which shall have passed the House of Representatives and the Senate, shall, before it become[s] a *Law*, be presented to the President of the United States."<sup>165</sup> And if a bill is vetoed by the President, it can become a "*Law*" only "if approved by two thirds of" both Houses.<sup>166</sup>

Professor Clark's interpretation is also consistent with early drafts of the Supremacy Clause. Before being amended by the Committee of Detail, the Clause read: "*The Acts of the Legislature* of the United States made in pursuance of this Constitution . . . shall be the supreme law of the several States."<sup>167</sup> There can be no doubt that this original phrasing referred to congressional statutes. Nor is there any evidence in the drafting history to suggest that the Committee's decision to replace "Acts of the Legislature" with "Laws" was anything other than stylistic.<sup>168</sup> As Professor Clark explains, the Supremacy Clause was part of the "Great Compromise" reached between the large and small states that enabled the Constitution's ratification.<sup>169</sup>

Although the small states could not persuade the delegates to embrace the New Jersey Plan, they did convince them to incorporate three concrete proposals into the new Constitution—equal suffrage in the Senate, a Supremacy Clause that limited supremacy to three specific sources of law [i.e., the Constitution, "Laws," and Treaties], and federal lawmaking procedures that required the participation of the Senate to adopt each of these sources. The combined effect of these carefully crafted provisions was to give small

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164. Clark, *Separation of Powers*, *supra* note 4, at 1334.

165. U.S. CONST. art. I, § 7, cl. 2 (emphasis added).

166. *Id.* (emphasis added).

167. James Madison, *Notes on the Constitutional Convention* (May 29, 1787), in *THE RECORDS OF THE FEDERAL CONVENTION OF 1787*, at 183 (Max Farrand ed., rev. ed. 1937) (emphasis added).

168. Clark, *Procedural Safeguards*, *supra* note 4, at 1687–88.

169. *See generally* Clark, *supra* note 15, at 1422–23.

states—through the Senate—disproportionate power to block any and all attempts by the federal government to override state law. This was the price that the large states had to pay to secure the small states' assent to the new Constitution.<sup>170</sup>

It requires too great a leap in logic to assume that, without any debate on the point, the Committee of Detail meant to upset the delicate compromises upon which the Constitution's ratification was made contingent.<sup>171</sup>

As Professor Clark explains, the Supremacy Clause's effect of channeling preemption decisions to Congress affords states procedural safeguards that complement the political safeguards of federalism discussed in Part I.A.<sup>172</sup> Specifically, "the Supremacy Clause safeguards federalism by conditioning supremacy on adherence to constitutionally prescribed lawmaking procedures."<sup>173</sup> The finely wrought legislative process "preserves the governance prerogatives of the states by making federal law relatively difficult to adopt."<sup>174</sup>

Professor Clark's understanding of the Supremacy Clause has significant implications for administrative preemption. If only federally enacted statutes can have preemptive effect, then, by negative implication, administrative policies cannot.<sup>175</sup> Beyond that, however, the implications of Professor Clark's theory run deeper to congressional delegations more generally.<sup>176</sup> In this regard, Peter Strauss fears that Professor Clark's account of the Supremacy Clause would necessitate abandoning the "delegation doctrine as we know it in any context impacting state law."<sup>177</sup>

For Professor Strauss, these implications are too much to bear. He contends that an interpretation of the Supremacy Clause that upsets congressional delegations should be jettisoned because, functionally, it fails to comport with the needs or realities of modern government.<sup>178</sup> Though he concedes that earlier drafts of the Supremacy Clause support Clark's interpretation,<sup>179</sup> Professor Strauss finds sufficient ambiguity in the final constitutional text to afford the

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170. *Id.* at 1436.

171. *Id.* at 1435.

172. *Id.* at 1438–39; see *supra* notes 42–49 and accompanying text.

173. Clark, *Separation of Powers*, *supra* note 4, at 1422.

174. *Id.*

175. See Young, *supra* note 4, at 895 (observing that the text of Article VI limits the types of federal law that can displace state law and that administrative actions are not included in the set).

176. Clark, *Separation of Powers*, *supra* note 4, at 1374.

177. Strauss, *supra* note 4, at 1591.

178. *Id.* at 1574 ("Whatever the drafters' theoretical expectations may have been . . . the passage of time has overcome them.").

179. *Id.* at 1568.

interpretive space necessary to permit administrative supremacy. In particular, Professor Strauss first observes that the term “Laws” is used elsewhere in the Constitution to refer to things other than congressional statutes.<sup>180</sup> He recognizes that these other usages of the term “Law” do not share the Supremacy Clause’s important qualifying language—“made in Pursuance” of the Constitution.<sup>181</sup> But, for Professor Strauss, this qualifying language is satisfied in the administrative context when Congress delegates lawmaking power to agencies.<sup>182</sup>

Seemingly out of concern (or respect) for the congressional-delegation model, Professor Clark effectively concedes that the Supremacy Clause may be read to encompass at least certain administrative assertions of preemption. In particular, Professor Clark suggests that when Congress delegates policymaking power, it is effectively *Congress* that preempts state law, thus potentially alleviating any Supremacy Clause problem.<sup>183</sup> He further explains:

[E]xecutive agencies are bound by the terms of a duly enacted statute that both confers and limits their discretion. The statute itself, of course, is adopted by Congress and the President using the procedures set forth in Article I, Section 7, and thus qualifies as “the supreme Law of the Land.” In constitutional terms, therefore, it is the statute, rather than the agency’s implementation of the statute, that provides the ultimate rule of decision and preempts state law.<sup>184</sup>

Thus conceived, Professor Clark tinkers with the theoretical underpinning of administrative preemption, yet he ultimately leaves the corpus of the practice intact. According to Professor Clark, substantive administrative preemption is permissible provided that “the regulation falls within the terms of the agency’s organic statute.”<sup>185</sup> Professor Clark finds jurisdictional administrative preemption “somewhat more problematic” insofar as it has the effect

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180. In particular, Professor Strauss points to usages of the term “Law”: (1) elsewhere in the Supremacy Clause, referring to the “Law of the States”; (2) in Article III, referring to the Court’s jurisdiction over cases and controversies arising under the “Laws of the United States”; and (3) in Article II, referring to the President’s duty to take care that the “Laws be faithfully executed.” *Id.* at 1568–69. Each of these references connotes a meaning of “Law” that is broader than congressional statutes alone. *Id.*

181. *Id.* at 1570–71.

182. *Id.* (arguing that “for regulations, just as for statutes, the power of the action to command state obedience depends on its having been made in pursuance of—that is to say, under the substantive authority conferred on federal officers by—the Constitution”); accord Merrill, *supra* note 8, at 764 (“[I]f Congress has delegated authority to an agency to act with the force of law, and if the agency has exercised this delegated power by taking action intended to have the force of law, then the agency edict can serve as a source of preemption.”).

183. Clark, *Separation of Powers*, *supra* note 4, at 1375, 1433.

184. *Id.* at 1433.

185. *Id.* at 1434.



of displacing (rather than merely trumping) state law in the same regulatory field.<sup>186</sup> According to Professor Clark, however, any constitutional impediment to jurisdictional preemption may be overcome in cases where Congress clearly delegates displacement authority to the agency.<sup>187</sup>

Professor Clark's sensitivity to the nondelegation doctrine is illuminating; it demonstrates the ends to which even staunch supporters of congressional primacy may go in order to preserve the office of administrative preemption. Yet his account is also unsatisfying insofar as it falls short of closing the constitutional loop.<sup>188</sup> Specifically, in instances of substantive administrative preemption, there is nothing in the statutory scheme itself that speaks to preemption.<sup>189</sup> To say that Congress preempts in such cases is too far a stretch. Moreover, Professor Clark's prerequisite for substantive administrative preemption—namely, that a regulation fall within the terms of a statute—subtracts nothing from an agency's preemptive power under the current scheme. That is because an ultra vires regulation is unenforceable and thus could not provide a basis for preemption in any event.

In regards to jurisdictional administrative preemption, Professor Clark's promotion of a clear statement requirement chips away at the jurisprudential status quo and is thus more promising. Indeed, others have urged clear statement restrictions for substantive and jurisdictional administrative preemption alike, which in either application would require Congress to clearly manifest its intent to delegate preemption authority.<sup>190</sup> One intended effect of this approach is to put interested parties on notice during the legislative process

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186. *Id.*

187. *Id.*

188. Strauss, *supra* note 4, at 1592.

189. *Id.*

190. See, e.g., Funk, *supra* note 11, at 215 (arguing in favor of a clear statement restriction that would require Congress to clearly manifest its intent to delegate preemption authority); Mendelson, *supra* note 10 (urging a clear statement restriction and noting that “[f]ederal agencies are increasingly taking aim at state law”); Merrill, *supra* note 8, at 759–60 (“Agencies can preempt state law on their own authority only insofar as Congress has expressly delegated to them the authority to do so.”); Young, *supra* note 4, at 897–98 (“We might insist that, in order to take action with the effect of preempting state law, the agency be exercising authority delegated by Congress with a heightened degree of clarity, . . . [or] we might instead insist that any independent preemptive authority must be clearly delegated to the agency by Congress.”); see also Eskridge, *supra* note 92, at 1472 (“The preemption-specific clear statement requirement, as I propose it, creates a higher burden for the agency to meet when it claims *Chevron* deference.”). But cf. Metzger, *supra* note 11, at 2071–72 (arguing that a clear statement rule “would create extraordinary obstacles to federal administrative governance” and generally endorsing administrative preemption).

that Congress intends to delegate preemption authority.<sup>191</sup> This notice, in turn, could provide opponents of preemption an opportunity to air concerns before preemption is delegated to, or exercised by, agencies. A second effect of a clear statement requirement would be to slow the pace and scope of preemption on the assumption that Congress often will not meet the challenge of clearly expressing its intent to delegate preemption authority.<sup>192</sup>

Forcing Congress's hand to clearly delegate supremacy seeks to plug a theoretical gap in the Court's current doctrine. To be sure, I share the view of others that a clear statement rule could mark an improvement in the law.<sup>193</sup> However, in my estimation, a clear statement rule may concede too much because it assumes that Congress is empowered to delegate supremacy. It simply will not do to require a clear intent to delegate preemption authority if the resulting delegation is unconstitutional.<sup>194</sup> Beyond this formalistic concern, however, clear statement rules provide only half-baked redress for the political and procedural safeguards lost in the administrative rulemaking process. Requiring Congress to deliberate and decide whether to delegate supremacy offers states far less protection than requiring Congress to both deliberate and decide for itself to displace state law.

## 2. Congressional Intent?

As explained in Part I.B, "Congress's intent" is supposed to be the "ultimate touchstone" in preemption cases.<sup>195</sup> But this maxim is mostly a stranger to administrative preemption. One must only recall why congressional intent is so important to appreciate why its general absence from administrative preemption is so troubling. The Court placed federalism's hope in Congress when, on the "boundaries front," the Court effectively surrendered policing the line between federal and

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191. See Merrill, *supra* note 8, at 768 (discussing cases that deal with congressional intent to delegate preemption authority); see also Young, *supra* note 77, at 1359 ("In other words, Congress should be making the call on governmental action that affects the states—not some administrative agency or other governmental institution in which the states have virtually no voice.").

192. See Young, *supra* note 4, at 899.

193. *But cf.* Galle & Seidenfeld, *supra* note 11, at 2009 (arguing that a clear statement rule would unnecessarily frustrate the benefits of administrative preemption); Metzger, *supra* note 11, at 2071–72 (arguing that a clear statement rule "would create extraordinary obstacles to federal administrative governance").

194. See *supra* notes 164–76 and accompanying text.

195. See *supra* note 69 and accompanying text.

state spheres of authority.<sup>196</sup> The Court subsequently reinforced Congress's primacy on federalism's "preemption front" through adoption of the antipreemption presumption, which is designed to have the dual effects of channeling preemption decisions to Congress while generally limiting the instances of preemption.<sup>197</sup> As Congress's role is erased or diluted in the administrative preemption context, however, federalism's hope is placed instead in the hands of unelected agency officials.<sup>198</sup> Putting aside for the moment whether this result is desirable, there is first the matter of whether it is doctrinally sound.

Congress very often has formed no intent on the policy issues ultimately decided by agencies. Indeed, the absence of congressional intent on regulatory details is one of the principal reasons why Congress delegates to agencies in the first place.<sup>199</sup> The same generally holds true on questions of preemption.<sup>200</sup> Either for political reasons or due to foreseeability problems, Congress often expressly or impliedly delegates preemption decisions to agencies or courts through statutory gaps and ambiguities.<sup>201</sup> Nevertheless, in the contexts of both jurisdictional and substantive administrative preemption, the Court either (1) does not require an expression of Congress's preemptive intent or (2) presumes such preemptive intent. Yet either is problematic: the former erases congressional intent from the equation and the latter merely fictionalizes it.

In sum, the Court's grafting of the general preemption doctrine upon the congressional-delegation frame yields two related translational problems. First, the Court's assumption that Congress can effectively delegate supremacy is at best constitutionally suspect and at worst totally illegitimate. Second, the maxim that Congress's intent is to be the "touchstone" in preemption cases has no purchase in the "jurisdictional" and "substantive" administrative preemption contexts.

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196. *See supra* Part I.A.

197. *See supra* notes 74–85 and accompanying text.

198. Metzger, *supra* note 11, at 2027 (describing administrative law as a new frontier for promoting federalism values); *see also* Galle & Seidenfeld, *supra* note 11, at 1936 (to similar effect).

199. *See supra* notes 91–99 and accompanying text.

200. *See* Jamelle C. Sharpe, *Legislating Preemption*, 53 WM. & MARY L. REV. 163, 167–68 (2011) ("Given that preemption involves a host of detailed, context-specific, and often unanticipated policy judgments, Congress has no choice but to delegate some responsibility for its development and management to other governmental departments.").

201. *See* Catherine Fisk, *The Last Article About the Language of ERISA Preemption?: A Case Study of the Failure of Textualism*, 33 HARV. J. ON LEGIS. 35, 40–41 (1996); Sharpe, *supra* note 200, at 180–81.

*B. The Compounding Problem*

Apart from the foregoing, administrative preemption has a compounding effect on the federalism balance. The expanse of congressional power on federalism's boundaries front, coupled with the displacing effect of preemption, already suggests to some observers that the framing era's fear of "the national . . . swallow[ing] up the State Legislatures" has been realized.<sup>202</sup> Administrative preemption only exacerbates the problem, for two related reasons. First, the sheer volume of agency rulemaking significantly increases the instances of federal-state conflict. If it is any useful measure, the ratio of administrative rules to statutes adopted annually is approximately ten to one.<sup>203</sup> As Justice White observed in *INS v. Chadha*, "the sheer amount of law . . . made by the [administrative] agencies has far outnumbered the lawmaking engaged in by Congress through the traditional process."<sup>204</sup> In short, more federal law leads to more preemptive conflicts with state law.

Second, delegating supremacy makes displacement of state law too easy. Legislating is purposefully difficult. In order to become federal law, a statutory proposal must not only survive the bicameralism and presentment filters,<sup>205</sup> but it also must pass through multiple "vetogates" erected by the rules and customs of both chambers of Congress.<sup>206</sup> The states directly benefit from the screening mechanism of the legislative process "because the federal government's inability to adopt 'the supreme Law of the Land' leaves states free to govern by default."<sup>207</sup> Administrative preemption, however, bypasses the legislative dam. For a Congress seeking to expand its regulatory power at the expense of state interests, all that Congress need do is delegate.<sup>208</sup> The absence of any meaningful

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202. THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 167, at 160 (statement of George Mason); *see also* Dinh, *supra* note 53, at 2117.

203. Strauss, *supra* note 4, at 1591 n.118.

204. 462 U.S. 919, 985–86 (1983) (White, J., dissenting).

205. On bicameralism and presentment, see U.S. CONST. art. I, § 7.

206. *Id.* For discussions on how vetogates operate, *see also* William N. Eskridge, Jr. & John Ferejohn, *The Article I, Section 7 Game*, 80 GEO. L.J. 523, 528–33 (1992); McNollgast, *Positive Canons: The Role of Legislative Bargains in Statutory Interpretation*, 80 GEO. L.J. 705, 716–27 (1992).

207. Clark, *Separation of Powers*, *supra* note 4, at 1325.

208. *Cf.* Stewart, *supra* note 6, at 963 (observing that "battles among factions are resolved not on the floors of Congress but in the hallways of bureaucracies . . . . This system of policymaking circumvents many of the political safeguards of federalism that are supposed to make national policies sensitive to state and local concerns.").

constitutional limits on such delegations results in disproportionate federalism.

### *C. Subversion of Federalism's Values*

Finally, administrative supremacy subverts the values of federalism. As traditionally expressed, the values of federalism are threefold: (1) to resist tyrannical rule; (2) to enhance the opportunity for representative politics at the state level; and (3) to promote the utility of states as laboratories for regulatory experimentation.<sup>209</sup> Delegating supremacy undermines these values in ways not engendered outside of the administrative context. Some of the problems identified in this Section are simply iterations of the compounding problems discussed above. Beyond that, however, the subversion of federalism's values also trace to the fact that agencies—as compared to Congress—have relatively little incentive to protect state interests.<sup>210</sup>

#### 1. Resisting Tyranny

The first of federalism's values is to stave off tyrannical rule by the federal government.<sup>211</sup> The framers' constitutional response to threats of governmental tyranny was principally structural—namely, to separate and offset government power through a system of checks and balances.<sup>212</sup> Federalism guards against tyranny by dispersing power vertically between the federal and state governments (just as separation of powers operates horizontally to prevent the accumulation of excessive power in any one branch).<sup>213</sup> In short, “federalism positions the national government and the states to counter the excesses of each other.”<sup>214</sup>

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209. See, e.g., Chemerinsky, *supra* note 7, at 525 (discussing the three traditionally recognized values of federalism).

210. Bhagwat, *supra* note 8, at 204; Mendelson, *supra* note 12, at 779–91; Mendelson, *supra* note 10, at 717–18; Merrill, *supra* note 8, at 755–56; see also *Geier v. Am. Honda Motor Co.*, 529 U.S. 861, 908 (2000) (Stevens, J., dissenting) (“Unlike Congress, administrative agencies are clearly not designed to represent the interests of States . . . .”); Young, *supra* note 4, at 878 (observing that “[f]ederal agencies . . . have no mandate to represent state interests and possess strong countervailing incentives to maximize their own power and jurisdiction”).

211. Chemerinsky, *supra* note 7, at 525.

212. *Id.* (noting the relatively few protections for individual rights in the original Constitution and the framers' resort to structural protections instead).

213. *Id.*; Rapaczynski, *supra* note 40, at 380–83 (discussing horizontal and vertical separation of powers as safeguards against tyranny).

214. Keith Werhan, *Checking Congress and Balancing Federalism: A Lesson from Separation-of-Powers Jurisprudence*, 57 WASH. & LEE L. REV. 1213, 1220 (2000).

Drawing administrative agencies into the mix, however, significantly alters this federalism equation. States do not enjoy the same type of political and procedural protections in the administrative forum as they do in the legislative one. Thus, administrative supremacy significantly compromises states' ability to resist misguided federal intrusion.

## 2. Representative Governance

The second federalism value hails the enhanced opportunity for representative politics at the state level.<sup>215</sup> David Shapiro explains that "government is brought closer to the people, and democratic ideals are more fully realized" when political structure is small and decentralized.<sup>216</sup> This not only allows for the creation of policy to meet localized needs, but it also fosters greater local participation in the policy's execution.<sup>217</sup>

It is true, of course, that localized interests may have a voice in the federal administrative process. But administrators are not beholden, in any political sense, to such localized interests.<sup>218</sup> Rather, unelected administrators are politically accountable—at most—through the President, whose constituency is *national* in scope. In this sense, at least, administrative policymaking is the antithesis of localized representation.

## 3. States as Laboratories

Finally, federalism promotes the utility of states as "laboratories" for regulatory experimentation.<sup>219</sup> Justice Brandeis first articulated this ideal when he noted that "a single courageous state may . . . try novel social and economic experiments without risk to the rest of the country."<sup>220</sup> In turn, such experimentation offers the

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215. *Gregory v. Ashcroft*, 501 U.S. 452, 458 (1991) (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").

216. DAVID L. SHAPIRO, *FEDERALISM: A DIALOGUE* 91–92 (1995); accord Friedman, *supra* note 7, at 391 (arguing that "state and local governments appear to serve as breeding grounds for democracy").

217. See Verchick & Mendelson, *supra* note 5, at 20 (discussing how federalism leads to the creation of policy tailored to local needs and enhances local involvement in implementing policy).

218. See Foote, *supra* note 130, at 1441 (noting that agencies' staffs are insulated from state political pressures); see also Bhagwat, *supra* note 8, at 203 ("States are obviously not represented within agencies, which are purely national, unelected institutions . . .").

219. Chemerinsky, *supra* note 7, at 528–29.

220. *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting).

citizenry an opportunity to compare regulatory options and “hold government officials accountable for an inadequate response.”<sup>221</sup>

Administrative supremacy, however, tends to stifle state experimentation.<sup>222</sup> Agencies tend to have a national focus, generally because it is their statutory mission to do so.<sup>223</sup> Moreover, regulated industries generally prefer uniformity and will lobby agencies to achieve it.<sup>224</sup> Though industries also lobby Congress for uniformity, the ability of agencies to displace competing state law provides industries an alternative (and generally far easier) outlet for achieving this end. Simply put, “[a]gencies are the fast track to preemption.”<sup>225</sup> It is not that administrative agencies cannot or never consider the benefits of regional or decentralized regulation; they do. The point, rather, is that institutional forces tend to push agencies toward uniformity and thus away from the experimental benefits that might otherwise be realized through decentralized regulation.<sup>226</sup>

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In short, there are several problems with administrative supremacy. It has dubious constitutional legitimacy, marginalizes congressional intent, circumvents the political and procedural safeguards in the process, has a distorting and dangerous effect on the federal-state balance of power, undermines representative governance, and stifles regulatory experimentation.

## V. SEVERING THE GORDIAN KNOT

Other commentators have proffered a smorgasbord of ameliorative solutions targeting some of the perceived problems with administrative preemption. These proposals may be summarized as

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221. Verchick & Mendelson, *supra* note 5, at 17.

222. See Bhagwat, *supra* note 8, at 225 (listing experimentation by the states as one of the benefits of federalism).

223. See, e.g., Mendelson, *supra* note 10, at 717–18 (discussing national orientation of agencies); Merrill, *supra* note 8, at 755–56 (same).

224. See THOMAS O. MCGARITY, *THE PREEMPTION WAR: WHEN FEDERAL BUREAUCRACIES TRUMP LOCAL JURIES* 21 (2008) (“The preemption war is a manifestation of the latest and, in many ways, most threatening attempt to change state common law by replacing it with a body of regulatory law that is kinder and gentler to the regulated entities.”).

225. Merrill, *supra* note 8, at 750.

226. Cf. Young, *supra* note 4, at 878 (observing that “[f]ederal agencies . . . have no mandate to represent state interests and possess strong countervailing incentives to maximize their own power and jurisdiction”). For further discussion on the benefits of decentralized regulation, see *infra* Part V.

follows: (1) requiring Congress to speak clearly if it intends to delegate supremacy; (2) ramping up judicial scrutiny of administrative preemption decisions; and/or (3) infusing additional procedural safeguards for state interests into the administrative decisionmaking process.<sup>227</sup>

What these proposals share, however, is the contestable premise that Congress may delegate supremacy so long as it chooses to. These proposals also expressly or impliedly assume that it would be impracticable and otherwise undesirable to foreclose administrative preemption. This Part challenges these assumptions and argues that severing the Gordian knot of delegated supremacy may be preferred. To be sure, the simplicity of this proposed solution is easier to articulate than to defend. The implications are significant. And I readily admit that, in seeking to curb the problems with delegating supremacy, my proposal potentially gives rise to a host of others. Sensitive to these concerns, my ambitions herein are tiered.

My first thesis posits that a system without delegated supremacy is not only more consistent with the framers' vision but also conceptually feasible today. My second thesis builds on these points to argue that a system without delegated supremacy may, on balance, be desirable for federalism.

Professor Young laments that "[i]t is probably too late in the day to insist that federal agency action cannot create supreme federal law."<sup>228</sup> Yet that is my principal objective here.

### *A. Implications*

Imagining a federalist system without delegated supremacy is a bit like looking into an abyss. That is partly because my proposal is foreign to our current system. But mostly it is because, on first blush, the implications of my proposal may seem dangerously vast. Before concluding, I hope to demonstrate that the implications are neither as dangerous, nor as vast, as first impulse might suggest. My initial step toward that objective, however, is to articulate the foreseeable implications of an unfolding system without delegated supremacy. That way, the implications may be brought to light and confronted on their own terms.

The substantive implications of my proposal include the following:

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227. See *supra* notes 10–13 and accompanying text (discussing proposed solutions to administrative preemption problems).

228. Young, *supra* note 4, at 897.



1. Only Congress may preempt state law through duly enacted statutes. While the courts will continue to have a role in construing those statutes, preemption must be linked to an express or implied congressional intent to displace state law.
2. Agency action cannot trump a conflicting state law. Depending on the nature of the conflict, a state law will either supplement or trump conflicting agency standards within that state's jurisdiction.
3. Agencies cannot field-preempt state law. Agencies may opine that a relevant *statutory* scheme has field-preemptive effect, but the agency can neither use its regulatory scheme to form the basis of field preemption nor otherwise independently assert field preemption of its own authority.

These substantive implications also give rise to a host of procedural by-products, including:

1. Potentially calling on Congress to decide more preemption questions than it has the time, resources, or political will to decide.
2. Potentially diluting the institutional expertise and flexibility that agencies bring to preemption questions.
3. Potentially relegating more preemption authority to courts, assuming that Congress will not decide any more preemption questions than it currently does.

Three critical points are worth highlighting before proceeding further. First, Congress would still remain the primary institution for making preemption decisions; my proposal simply channels *more* decisions to that primary actor. Second, Congress may still delegate substantive policy choices to agencies, and agencies may exercise that authority. However, an agency's substantive policy will serve as a national default, displaceable within a jurisdiction by state law. Third, if the disuniformity of regulation caused by conflicting state and federal regulation is undesirable, Congress may still address and fix the problem by enacting a preemptive statute, either *ex ante* or *ex post*. Alternatively, if Congress is concerned with regulatory variances, it may utilize more indirect means, such as conditioning federal funding on a state's adherence to administratively prescribed standards. Ultimately—and critically—eliminating administrative preemption does not eliminate federal preemption; it just makes displacement of state law *Congress's* decision and thus potentially more difficult to accomplish. In this sense, foreclosing delegated

supremacy extends the tradition of “process federalism” into the administrative context.<sup>229</sup>

*B. Do Implications Matter?*

Having sketched the implications, it is worth pausing to consider whether implications even matter.<sup>230</sup> If they do not, my project is significantly made easier. From an originalist perspective, at least, administrative preemption is a hard sell. For reasons well articulated by Professor Clark, the text, drafting history, and structure of the Constitution favor construing the Supremacy Clause’s reference to “Laws” as being limited to congressional statutes. Though Professor Clark himself seems to retreat somewhat from the negative implications of his own construct as it relates to administrative preemption, his concession seems unnecessary: the framers did not intend for delegated supremacy.<sup>231</sup>

Still, implications flowing from constitutional interpretations are difficult to escape when they threaten the operation of modern government. Thus, my normative claim—insofar as it disfavors the jurisprudential status quo—almost demands a functional accounting. The question, then, is how much relative weight to afford the various constitutional and pragmatic considerations. Obviously, there is no quantifiable or objective measure. For some consequentialists, implications are the *only* things that matter.<sup>232</sup> That approach, however, strikes a disquieting chord. Though the Constitution may not provide the analytical starting point, it minimally should provide the conceptual stopping point. Ignoring the Constitution in the name of pragmatism is, in the words of Professors Benjamin and Young, like “playing tennis with the net down.”<sup>233</sup> Sensitive to this constitutional net, yet pressed by the ambitions of my theses, I thus chart a somewhat intermediate course—one that tracks functionalism’s pragmatic imperative but also preserves constitutional legitimacy as an important element of the doctrinal calculus.

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229. See generally Young, *supra* note 77, at 1349 (promoting the use of process federalism as a surrogate for protecting state interests on the lost boundaries front).

230. For a useful discussion of the competing views of whether, and to what extent, implications should shape the federalism dialogue more generally, see Garrick B. Pursley, *Federalism Compatibilists*, 89 TEX. L. REV. 1365, 1365 (2011) (book review).

231. See *supra* notes 164–75 and accompanying text.

232. Benjamin & Young, *supra* note 11, at 2199 (criticizing this approach); see also Pursley, *supra* note 230, at 1367–68 (describing the “compatibilist” approach to federalism).

233. Benjamin & Young, *supra* note 11, at 2127–28.

*C. Let the Nondelegation Giant Sleep*

A threshold pragmatic objection to my proposal is the (false) perception that foreclosing administrative supremacy might unhinge the congressional-delegation model upon which our modern government depends. Judges and commentators alike tend to exhibit a sense of hyperurgency to preserve and defend Congress's delegation power whenever it is called into doubt.<sup>234</sup> For this reason, the viability of a theory foreclosing administrative preemption depends—in fair measure—on keeping the sleeping giant of the nondelegation doctrine at rest. Only by severing the specific preemption power from the general delegation power can the dialogic space be cleared for more critical work.

Severing delegation's policymaking and supremacy strands is possible because the two are not inexorably tied. To begin, Congress's power to delegate substantive policy decisions to agencies hails from a different constitutional source than the power to pass laws with preemptive effect. In particular, the preemption power is both generated and limited by Article VI's Supremacy Clause,<sup>235</sup> whereas the power (or tolerance) for congressional delegation of policy stems from various constructions of Articles I and II.<sup>236</sup> It may be, in Justice Scalia's terms, that "a certain degree of discretion, and thus of policymaking, inheres in most executive action."<sup>237</sup> But nothing in the constitutional text or structure suggests that *preemption*, in particular, inheres in executive action. As the Court itself recognizes, "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>238</sup> Thus, while Congress might ultimately seek to *deliver* preemptive effect to administrative agencies via the Necessary and Proper Clause, my initial point is only that the preemption power stems from a source that is independent of the Article I power to delegate lawmaking and/or the Article II executive power to fill in the blanks.

Further, the purposes served by preemption and delegation are conceptually discreet. As described earlier, Congress delegates policy decisions for a host of reasons, but it generally does so for the ultimate purpose of authorizing agencies to make substantive decisions on

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234. See *supra* notes 177–79 and accompanying text.

235. See *supra* notes 52–56 and accompanying text.

236. See *Whitman v. Am. Trucking Ass'n*, 531 U.S. 457, 475 (2001) (quoting *Mistretta v. United States*, 488 U.S. 361, 417 (1989) (Scalia, J., dissenting)).

237. *Id.*

238. *La. Pub. Serv. Comm'n v. FCC*, 476 U.S. 355, 374 (1986).

regulatory details.<sup>239</sup> By contrast, the purpose of preemption is to clear a space for federal exclusivity.<sup>240</sup> To be sure, Congress may have both purposes in mind when delegating. The point, however, is that these purposes are severable: Congress can preempt without delegating and can delegate without preempting.

Finally, the regulatory ends of delegation and preemption are not mutually dependent. The end of delegation is administrative policy, whereas the end of preemption is the displacement of state law. Again, these ends may at times overlap—for example, where the administrative policy *is* to displace state law. But they are not dependent. The agency may make policy, and yet it *need not* displace state law (regardless of an agency's *preference* that it have such effect).

In short, the preemption and delegation strands are severable in terms of their constitutional sources, legislative purposes, and regulatory ends. None of this is yet to say that the delegation and preemption powers should be severed; it only suggests that they *may* be severed without striking a blow to the heart of the nondelegation doctrine.

My stronger claim, that the delegation and preemption powers *should* be severed, is mostly the work of the sections below. Still, one normative point is worth making here. A pragmatic necessity almost dictates the answer to the constitutional question of whether Congress may delegate substantive policymaking decisions to agencies.<sup>241</sup> Indeed, eviscerating this power would be so unbearable that even many formalists are content to concede the point.<sup>242</sup> However, the same cannot—and need not—be said of the constitutional authority to delegate the power to create supreme law. The operation of modern government might be more difficult and less convenient without this tool. But foreclosing delegated supremacy would not strike an impossible blow to the operation or legitimacy of the administrative state (in the way that foreclosing congressional delegation of policymaking might).<sup>243</sup> In both horizontal and vertical separation-of-

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239. See *supra* notes 91–99 and accompanying text.

240. Young, *supra* note 72, at 130 (observing that “[t]he whole point of preemption is generally to force national uniformity on a particular issue”).

241. See *supra* Part II.

242. In writing for the majority in *Whitman v. American Trucking Associations, Inc.*, 531 U.S. 457 (2001), Justice Scalia defended the nondelegation doctrine in formalist terms. *But see id.* at 488 (Thomas, J., concurring) (expressing willingness to revisit “the question whether our delegation jurisprudence has strayed too far from our Founders’ understanding of separation of powers”).

243. On this point I am grateful to Gary Lawson for his helpful comments on an earlier draft. Cf. Gary Lawson, *Prolegomenon to Any Future Administrative Law Course: Separation of Powers and the Transcendental Deduction*, 49 ST. LOUIS U. L.J. 885, 888 (2005) (arguing that four

powers contexts, the Court has invalidated government practices that may have been convenient but were not necessary.<sup>244</sup> When delegated supremacy emerges from the protective shadow of the general delegation power, it may more readily be conceived as a practice of convenience than an indispensable element of modern governance.

#### *D. Imagining a World Without Delegated Supremacy*

This Section imagines and defends what an unfolding system without delegated supremacy might portend for federalism and the administrative state. This is a significant undertaking insofar as it provides a theoretically descriptive account of an otherwise mostly overlooked doctrinal possibility. Though a degree of speculation necessarily inheres in the challenge, existing practices and the ongoing federalism dialogue provide useful mooring.

Foreclosing the congressional option to delegate supremacy yields three potential legislative responses. Congress may (1) decide preemption questions *ex ante*; (2) remain silent; or (3) decide preemption questions *ex post* after first remaining silent. The first and third alternatives—both of which entail congressional action—generate questions about Congress’s institutional capacity to address preemption issues. The second and third alternatives—both of which involve congressional silence—yield a different set of inquiries directed at both operational logistics and a cost-benefit analysis of overlapping federal-state regulatory schemes.

This Section begins by exploring the effects of congressional silence. I start there because, as will be seen, the defaulting system resulting from silence informs the alternative congressional scenarios of deciding preemption questions *ex ante* (at the time of the original

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propositions define the modern administrative state, one of which is that Congress has near-plenary power to delegate its near-plenary legislative power to other actors and that if one rejects any of these propositions, one will inflict major damage on modern institutions of governance).

244. The Court’s abolition of the legislative veto in *INS v. Chadha* provides a useful example. 462 U.S. 919 (1983). There, after several decades of practice and hundreds of statutes on the books, the Court invalidated the “legislative veto” power. This power was conceptually tied to the delegation power, insofar as Congress hoped to provide itself with an easy mechanism to override executive exercises of delegated power. Yet, according to the Court, this model of efficiency had no place within the constitutional structure: “the fact that a given law or procedure is efficient, convenient, and useful in facilitating functions of government, standing alone, will not save it if it is contrary to the Constitution.” *Id.* at 944; *see also* *New York v. United States*, 505 U.S. 144, 187 (1992) (striking down a statutory scheme on federalism grounds, noting that the Constitution “divides power among sovereigns and among branches of government precisely so that we may resist the temptation to concentrate power in one location as an expedient solution to the crisis of the day”).

legislative enactment) and ex post (as a statutory amendment in response to preemption questions as they arise).

### 1. Congressional Silence

Under the current system, Congress often remains silent on preemption questions either because it does not foresee the potential conflicts with state law, or because it otherwise prefers agencies and/or courts to deal with preemption problems ad hoc.<sup>245</sup> As will later be considered in further detail, vitiating Congress's option to delegate supremacy could promote Congress's ability and desire to decide more preemption questions than it currently does.<sup>246</sup> Still, if existing practice is the benchmark, a substantial number of preemption questions are likely to be unaddressed by Congress for some indeterminate period of time.<sup>247</sup> Such legislative silence may, in itself, reflect a form of congressional solicitude for the defaulting effects of *not* deciding preemption questions.<sup>248</sup> The point for present purposes, however, is that abrogating administrative supremacy will not invariably result in congressional action. An important question, then, is how the system might operate when Congress is silent.

#### *a. Overlapping Federal-State Regulation*

State law that is not preempted by a congressional statute can interact in any number of ways with administrative standards. State law can either (1) be silent on the issue; (2) be more demanding; (3) be less demanding; (4) directly conflict, in the sense that it would be impossible to simultaneously comply with both state and administrative standards; or (5) mirror administrative standards.

The first of these is worth highlighting. States with the freedom to regulate in a field may simply choose not to. Regulation takes expertise, resources, and money that states may not either have or care to expend. Moreover, states may abstain from regulatory competition in the comfort (perhaps a false one) that the federal regime is adequately addressing relevant market-failure risks.<sup>249</sup> In

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245. See Merrill, *supra* note 8, at 754 (noting the foreseeability problem); Sharpe, *supra* note 200, at 181–83 (discussing political forces).

246. See *infra* Part V.D.2.

247. See Michele E. Gilman, *Presidents, Preemption, and the States*, 26 CONST. COMMENT. 339, 342 (2010) (“Congress often does not and cannot address preemption issues ex ante.”).

248. See *infra* notes 260–77 and accompanying text (discussing the potential benefits of federal-state regulatory overlap).

249. Cf. Buzbee, *supra* note 12, at 1537–41 (discussing a regulatory-commons dynamic in which overlapping jurisdiction may lead to regulatory gaps).

short, leaving states the space to regulate will not necessarily entail state regulation on a given issue.

The regulatory terrain becomes more complicated, however, under the second and third iterations above—where state law is either more or less demanding than an agency’s standard. Under my proposal, state law in these scenarios would not be preempted. Before turning to a normative assessment of this dynamic, two important points must be made. First, variances between state and federal rules are likely to be relatively common (as they currently are).<sup>250</sup> Such variances may reflect state preferences or concerns not adequately captured by the federal standard or may simply be the product of divergent lobbying successes at the federal and state levels. The second point is that regulated entities can generally comply with both federal and state standards (either within a jurisdiction or nationally) by complying with the most demanding requirement.<sup>251</sup> That is, if state law demands more than federal law, a regulatory target can comply with state law and satisfy both standards. And conversely, if federal law demands more than state law, then complying with federal law will satisfy both. Of course, regulated entities—if given a choice—will usually prefer one standard over another, or they will prefer just *one* standard regardless of which. For now, however, my descriptive point is only that when states require either more or less than a federal standard, it is possible for the regulated target to comply with both.

The fourth iteration involves direct conflicts between federal agency and state standards, such that it is impossible to comply with both. For example, if a state requires X and the federal agency requires not-X, then the regulated entity cannot comply with both federal and state standards without being in violation of one or the other.<sup>252</sup> Again, using the existing system as a benchmark, such impossibility conflicts are likely to be relatively rare.<sup>253</sup> When they do occur, however, state law would trump federal administrative policies under my proposal. The regulated entity must abstain from operating in that jurisdiction or risk the consequences of noncompliance with at

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250. Cf. *id.* at 1538 (noting that federal-state regulatory overlap is currently the norm); Schapiro, *supra* note 35, at 289 (same).

251. Mark Seidenfeld, *Who Decides Who Decides: Federal Regulatory Preemption of State Tort Law*, 65 N.Y.U. ANN. SURV. AM. L. 611, 626 n.64 (2010) (observing that “[i]f the issue is one of how stringent a standard is, then a manufacturer can meet all standards by meeting the most stringent one”).

252. Cf. Robert S. Peck, *A Separation-of-Powers Defense of the “Presumption Against Preemption,”* 84 TUL. L. REV. 1185, 1193 (2010) (describing impossibility conflicts).

253. *Id.* (observing that “impossibility preemption is a rare creature”).

least one of the conflicting standards. This is perhaps one of the more troubling aspects of my hypothesis; at least it is the one that summons its underlying tensions into sharpest relief.<sup>254</sup> But as will be explored in later sections, the reasons for quashing administrative preemption apply with near equal force in the impossibility-conflicts context as it does in others.

Finally, under the fifth iteration, part or all of a state's regulatory scheme may mirror a federally administered one. Here, the only variance between the federal and state rule (if any) stems from their divergent enforcement. For example, variance may exist if the federal rule is underenforced by the administering agency, while the identical local rule is more rigorously enforced by the state authority.<sup>255</sup>

The foregoing discussion is intended to offer a value-neutral description of the effects of congressional silence in a hypothetical system without delegated supremacy. Such neutrality is worth emphasizing. As explored further below, a uniform system may be preferable to a decentralized one for certain regulatory issues but not for others.<sup>256</sup> Indeed—though the point is often overlooked—*disuniformity* is the current system's norm.<sup>257</sup> Moreover, while a federal standard in a given context may best promote "public welfare" (however defined), it is also possible that a federal rule will be worse along that dimension than state alternatives.<sup>258</sup> Professor Buzbee observes, for example, that in recent years "states have been zealous investigators of financial wrongdoing and also more active and innovative than the federal government in addressing climate change."<sup>259</sup> Similarly, a federal agency may have more expertise than a state in regard to a specific issue, or the inverse may be true. The point is that *it will depend*. And because it depends, there is nothing *inherently* dangerous about either Congress remaining silent on the

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254. Given the stakes, one reaction might be to foreclose administrative supremacy *except* in cases of a direct conflict. Young, *supra* note 4, at 887–88.

255. See generally Trevor W. Morrison, *The State Attorney General and Preemption*, in PREEMPTION CHOICE, *supra* note 5, at 81, 81–97 (discussing the role of state attorneys general in picking up the slack of federal underenforcement).

256. See Schapiro, *supra* note 35, at 288 (observing that "[s]ome solutions may work better when imposed nationally, while others function more efficiently on a local scale").

257. Buzbee, *supra* note 12, at 1544–45; see Schapiro, *supra* note 35, at 288 (noting that with "the overlap of federal and state power comes the possibility of multiple approaches to a particular problem").

258. See Buzbee, *supra* note 12, at 1542–44 (arguing that the federal government has a "greater capacity to handle risk and environmental challenges" than the state governments; however "[t]hese pro-federal factors . . . do not add up to an inevitability of more progressive federal regulations and state laxity").

259. *Id.* at 1544.



preemption question or the resulting tension caused by an overlap in agency standards and nonpreempted state law.

Having established that value-neutral baseline, the discussion now proceeds to the potential costs and benefits of federal-state regulatory overlap. This discussion is usefully informed by the work of others in the related subjects of “polyphonic federalism,”<sup>260</sup> “cooperative” and “uncooperative” federalism,<sup>261</sup> “democratic experimentalism,”<sup>262</sup> and the “floor/ceiling” preemption choice.<sup>263</sup> Each of these perspectives—in various ways and degrees—embrace the potential virtues of overlapping federal-state authority.

The principal advantage of overlapping regulatory jurisdiction is the valuable opportunity for dialogue it affords.<sup>264</sup> Policy innovation and improvement is most likely to come with some disagreement. As Jessica Bulman-Pozen and Heather Gerken observe, “[I]t is desirable to have some level of friction, some amount of state contestation, some deliberation-generating froth in our democratic system.”<sup>265</sup> In a similar vein, Robert Schapiro explains that “[a] state law can provide an important protest—a powerful criticism of the federal approach” that may in time help to produce a change in federal policy.<sup>266</sup> That change “might take the form of adopting a state alternative, or the federal government might simply allow local variance.”<sup>267</sup> Moreover,

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260. See generally SCHAPIRO, *supra* note 16; Buzbee, *supra* note 12, at 1544 (analyzing federalism and preemption jurisprudence).

261. On cooperative federalism, see Philip J. Weiser, *Towards a Constitutional Architecture for Cooperative Federalism*, 79 N.C. L. REV. 663, 668–70 (2001), which describes the history and examples of cooperative federalism, and Roderick M. Hills, Jr., *The Political Economy of Cooperative Federalism: Why State Autonomy Makes Sense and “Dual Sovereignty” Doesn’t*, 96 MICH. L. REV. 813, 816–17 (1998). On “uncooperative federalism,” see Jessica Bulman-Pozen & Heather K. Gerken, *Uncooperative Federalism*, 118 YALE L.J. 1256 (2009), which explores the potential benefits of uncooperative state regimes.

262. For a sampling of the scholarship in this field, see, for example, Michael C. Dorf & Charles F. Sabel, *A Constitution of Democratic Experimentalism*, 98 COLUM. L. REV. 267 (1998); Jody Freeman, *Collaborative Governance in the Administrative State*, 45 UCLA L. REV. 1 (1997).

263. See, e.g., Buzbee, *supra* note 16, at 1548 (promoting “floor preemption” which “constitutes a partial displacement of state choice in setting a minimum level of protection, but leaves room for other actors and additional regulatory action”).

264. Schapiro, *supra* note 35, at 288.

265. Bulman-Pozen & Gerken, *supra* note 261, at 1284.

266. Schapiro, *supra* note 35, at 289.

267. SCHAPIRO, *supra* note 16, at 98–104, 135–36, 168–70 (“Dialogue magnifies the value of plurality. Not only can each government try different responses to common problems, but the different regulators can learn from each other.”); Ann E. Carlson, *Iterative Federalism and Climate Change*, 103 NW. U. L. REV. 1097, 1128–34 (2009) (noting the influence that state activity has on certain federal environmental policy); Kristen H. Engel, *Harnessing the Benefits of Dynamic Federalism in Environmental Law*, 56 EMORY L.J. 159, 170–73 (2006) (citing regulatory examples where federal-state interaction led both “to adopt policy positions

as Professors Buzbee, McGarity, and Seidenfeld separately observe, unitary regulatory schemes that are insulated from competition also tend to be suboptimally static.<sup>268</sup> That is because any incentive to change regulatory course tends to be overcome by the inertial status quo and the general administrative incentive to tackle fresh (rather than already “resolved”) regulatory issues.<sup>269</sup> To be sure, states are always free to air their views on federal regulation. But that voice has greater tenor when coupled with a threatened, or actual, dissenting state action.<sup>270</sup>

Another potential advantage of overlapping regulatory jurisdiction is redundancy.<sup>271</sup> Professor Schapiro explains that “redundancy constitutes a fail-safe mechanism—an additional source of protection if one or the other government should fail to offer adequate safeguards” arising from a failure either to address an issue or to enforce applicable regulations.<sup>272</sup> Erwin Chemerinsky finds regulatory redundancy to be the “greatest beauty of federalism.”<sup>273</sup>

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significantly different from the positions they would have adopted had they been regulating in a vacuum”); Schapiro, *supra* note 35, at 289.

268. Buzbee, *supra* note 16, at 1548 (“Vesting all decisionmaking power in one institution can freeze regulatory developments.”); Thomas O. McGarity, *The Regulation-Common Law Feedback Loop in Nonpreemptive Regimes*, in PREEMPTION CHOICE, *supra* note 5, at 235; Seidenfeld, *supra* note 251, at 634–35 (noting that an agency “has little interest in continuing to develop or monitor information about product safety once it has taken its initial regulatory action . . . [but] [t]he prospect of large awards can motivate plaintiffs and their attorneys to discover information about the risks of harm posed by a product that an agency might not have the ability or incentive to uncover”); *see also* Thomas O. McGarity, *Some Thoughts on ‘Deossifying’ the Rulemaking Process*, 41 DUKE L.J. 1385, 1436 (1992) (generally noting that “few agencies are anxious to revisit [the rulemaking process]” on decisions already made).

269. *See* Buzbee, *supra* note 16, at 1578 (noting that “a major weakness in experimentalist [regulatory] regimes [is] the ordinary lack of incentives for regulators to engage in reflection, reexamination of past actions, admission of error, and unsettling of the status quo”); Seidenfeld, *supra* note 251, at 634–35 (explaining the institutional forces that give an agency “little incentive . . . to revisit an issue it has already resolved”).

270. *See* Bulman-Pozen & Gerken, *supra* note 261, at 1287, 1293–94 (advancing a theory of “uncooperative federalism” that highlights the ability and potential value of state dissent).

271. *See* Schapiro, *supra* note 35, at 290 (“The potential regulatory redundancy constitutes a fail-safe mechanism—an additional source of protection if one or the other government should fail to offer adequate safeguards.”); *see also* Buzbee, *supra* note 16, at 1555 (favoring federal floors over federal ceilings because the former “retains the benefits of multiple regulatory voices, protections, and diverse regulatory modalities . . . [that can] serve as important antidotes to common forms of regulatory dysfunction”).

272. Schapiro, *supra* note 35, at 290; *see also* William W. Buzbee, *Contextual Environmental Federalism*, 14 N.Y.U. ENVTL. L.J. 108, 122–26 (2005) (detailing benefits of “overlapping and interactive structures that pervade current federal environmental laws,” including the reduced risk of regulatory inattention to environmental dangers); Robert M. Cover, *The Uses of Jurisdictional Redundancy: Interest, Ideology, and Innovation*, 22 WM. & MARY L. REV. 639, 656–57 (1981) (introducing values of redundancy).

273. Chemerinsky, *supra* note 7, at 538.

Insofar as each level of government “will recognize that in particular instances the other levels . . . are better suited to deal with a problem[,] there is a great benefit in preserving the ability of each to act when it is necessary or desirable.”<sup>274</sup>

The values of dialogue and redundancy, however, do not enjoy a monopoly of consideration. As Professor Schapiro pithily observes, “[S]ometimes too many regulatory chefs spoil the broth.”<sup>275</sup> In certain contexts, regulatory uniformity will be preferable.<sup>276</sup> Uniformity both simplifies and fosters certainty by relieving conflicting duties.<sup>277</sup> Largely for these reasons, both administrators and regulatory targets tend to prefer a unified regulatory system.<sup>278</sup>

Uniformity also serves to counteract “race-to-the-bottom” and “negative-externality” pathologies. Race-to-the-bottom dynamics occur when interstate competition causes states to lower their standards, often with the hope of attracting business.<sup>279</sup> For example, states left to choose an environmental standard might opt for a lenient one to attract industry. Then, as other states compete for the business, each might lower their own standards, spiraling to suboptimal regulatory laxity.<sup>280</sup> The negative-externality problem, by contrast, is captured by the concern that states may create suboptimally stringent standards when the benefits of regulation fall within the state, but the regulatory burdens fall elsewhere.<sup>281</sup> For example, “[r]egulators or jurors in a . . . state lacking producers . . . may be more willing to punish or regulate risk creators than would a state with such producers.”<sup>282</sup> Though both the nature and extent of race-to-the-bottom and interstate-exploitation pathologies are debated,<sup>283</sup> even the

274. *Id.* at 538–39.

275. See Schapiro, *supra* note 35, at 290.

276. *Id.* at 288, 290, 292.

277. *Id.* at 290–91.

278. See *id.*; see also Seidenfeld, *supra* note 251, at 623 (“Producers prefer certainty for at least two reasons: first, they are risk averse, and second, they seek to protect reliance interests.”).

279. See Buzbee, *supra* note 16, at 1610.

280. See William W. Buzbee, *Federal Floors, Ceilings, and the Benefits of Federalism’s Institutional Diversity*, in PREEMPTION CHOICE, *supra* note 5, at 98, 104.

281. See Samuel Issacharoff & Catherine M. Sharkey, *Backdoor Federalization*, 53 UCLA L. REV. 1353, 1385–89 (2006) (discussing the ability of differing state tort law regimes to benefit in-state residents at the expense of out-of-state residents); see also Michael S. Greve, *Federalism’s Frontier*, 7 TEX. REV. L. & POL. 93, 101 (2002) (exploring the risk of “interstate exploitation”).

282. Buzbee, *supra* note 16, at 1608 n.216.

283. See, e.g., *id.* (contending that the “idea of exportation of regulatory or common law costs to other jurisdictions has intuitive appeal but rests on somewhat shaky foundations”); Richard B. Stewart, *Environmental Quality as a National Good in a Federal State*, 1997 U. CHI. LEGAL F. 199, 207–08 (concluding that adherents to a race-to-the-bottom rationale for federal

perception of these threats can influence, and has influenced, important preemption decisions.<sup>284</sup>

Disuniformity is perhaps the most important, but not the only, cost associated with overlapping federal-state regulatory systems. In particular, Professor Schapiro explains that jurisdictional overlap may also upset the values of finality and hierarchical accountability.<sup>285</sup> Overlap threatens finality because “[t]he resolution of federal issues may be the prelude to protracted state proceedings” or vice-versa.<sup>286</sup> Of course, this can be of significant concern to regulatory targets, which may face uncoordinated and duplicative liability exposure. Meanwhile, regarding accountability, the concern is that “[t]he overlap of state and federal authority prevents citizens from understanding where ultimate responsibility lies.”<sup>287</sup> In instances of regulatory lapse, both federal and state levels of government may simply point an accusatory finger against the other, leaving constituents unsure where to direct their grievances.<sup>288</sup>

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The foregoing discussion of the potential costs and benefits of overlapping regulatory jurisdiction cannot by itself resolve specific preemption questions. In some contexts, but not others, the values of regulatory overlap will outweigh the costs. Critically, this paves the way for a later discussion about the need and desire for a *congressional* choice on preemption questions. But, first, the discussion now turns to the dynamics between federal and state administrators when Congress is silent.

### *b. In the Shadow of Congressional Silence*

When Congress is silent under the current system, agencies often make the initial preemption decision by default. In doing so, the

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environmental regulation have failed to carry their “burden of proof”); *see also* Kirsten H. Engel, *State Environmental Standard-Setting: Is There a “Race” and Is It “To the Bottom”?*, 48 HASTINGS L.J. 271 (1997); Richard L. Revesz, *Federalism and Environmental Regulation: A Public Choice Analysis*, 115 HARV. L. REV. 553 (2001).

284. *See* Buzbee, *supra* note 16, at 1579–80 (noting that certain environmental regulations were motivated by concerns of a race to the bottom).

285. Schapiro, *supra* note 35, at 288, 290–92.

286. *Id.* at 291.

287. *Id.* A similar accountability problem animates the Court’s anticommandeering doctrine. *Cf.* *New York v. United States*, 505 U.S. 144, 168 (1992) (“[W]here the Federal Government compels States to regulate, the accountability of both state and federal officials is diminished.”).

288. *See* Schapiro, *supra* note 35, at 291.

responsible agency may—but generally need not—consult with members of Congress. Presidential directives now generally require executive agencies to consult with state representatives when issuing rules having preemptive effect.<sup>289</sup> Empirical accounts, however, highlight the surprising irregularity of the process.<sup>290</sup> And foreclosing administrative supremacy could meaningfully improve it.

Under my proposal, states would hold a temporary trump card over agency policies, exercisable through a state's adoption of standards that diverge from administrative ones. States of course need not play the card; the potential alone in many cases will be enough to guarantee states a meaningful seat at the regulatory bargaining table. Agencies that ignore state interests in the policymaking process would do so at their own peril. I do not mean to suggest that agencies will always be able to appease the myriad of state interests. But when the agencies' incentive to listen to state interests is enmeshed in the bargaining structure, it may be expected that agencies will respond to more state interests more of the time.

Some will object that this goes too far. Giving states a regulatory trump card may offer states *too much* leverage in the administrative process. Yet this would seem to be a matter of taste. *If* there is an “optimal” degree of state leverage in the administrative process, the first question must be whether the current system meets that ideal. I have yet to see that claim. Rather, commentators tend to give agencies very low marks on the subject of protecting state interests.<sup>291</sup> Many scholars argue for greater state protection in the administrative process,<sup>292</sup> while none seem to argue for less.<sup>293</sup> Still, it

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289. Exec. Order No. 13,132, 64 Fed. Reg. 43,255 (Aug. 4, 1999); Memorandum for the Heads of Executive Departments and Agencies re: Preemption, 74 Fed. Reg. 24,693, 24,693–94 (May 20, 2009). For recent discussions of the efficacy of these presidential directives, see generally CATHERINE M. SHARKEY, *FEDERAL AGENCY PREEMPTION OF STATE LAW* (2010), *available at* <http://www.acus.gov/wp-content/uploads/downloads/2010/12/Sharkey-Draft-ACUS-Report-2010-11-27.pdf>.

290. *See, e.g.*, Gilman, *supra* note 247, at 349; Mendelson, *supra* note 12, at 783–84. *But cf.* Sharkey, *supra* note 12, at 2165–69 (signaling a trend toward improvement).

291. Merrill, *supra* note 8, at 755–56.

292. *See, e.g.*, Buzbee, *supra* note 12 (urging heightened judicial scrutiny as a backdoor incentive for agencies to more adequately consider state interests); Mendelson, *supra* note 12 (claiming that agencies should not be entitled to traditional *Chevron* deference on preemption questions, in part because they tend to insufficiently consider state interests); Young, *supra* note 4 (to similar effect); *see also* Geier v. Am. Honda Motor Co., 529 U.S. 861, 908 (2000) (Stevens, J., dissenting) (“Unlike Congress, administrative agencies are clearly not designed to represent the interests of States . . .”).

293. Even those such as Professors Galle and Seidenfeld, who generally favor agencies over Congress (and the courts) in deciding preemption questions, do not contend that agencies optimally consider state interests under the current structure. *See generally* Galle & Seidenfeld, *supra* note 11.

may be that my proposal swings the pendulum too far in the opposite direction. But there are two principal reasons why I believe my proposal may strike the proper balance—or at least come closer to it.

First and foremost, states will not compete with agencies in a vacuum. In particular, Congress holds the ultimate trump in the form of statutory preemption. This, in turn, should give *states* an important incentive to cooperate with agencies in the policymaking process. States that push too hard—by actual or threatened counter-regulatory action—are more likely to land their issue on the legislative agenda. And, in that event, an administering agency pushed to the brink is likely to have Congress's ear. Of course, state interests may also be heard in any ensuing legislative melee. In a head-to-head tangle with the responsible agency, however, states face a significant risk that Congress will choose preemption. So the state trump card effectively comes with the following instructions: "play at your own risk." There will no doubt be instances of state dissent, and in appropriate cases there will be great value in it.<sup>294</sup> The point, however, is that because outlier state initiatives carry the additional risk of a negative congressional response, states may be expected to exercise some judgment in choosing their spots. In this way, the threat of legislative preemption provides a type of structural check on the states' power to temporarily trump administrative standards.

Second, and relatedly, agencies and states may generally be expected to cooperate a great deal of the time simply because it will be in their respective interests to do so. Under several major government programs—including environmental and, most recently, financial and health-care reform—federal and state administrators share regulatory responsibility.<sup>295</sup> These cooperative programs tend to yield a form of mutual dependency anchored in critical working relationships.<sup>296</sup> This mutual dependency currently exists with agencies holding a temporary trump. Insofar as cooperation is rooted in the forces of mutual dependency, redistributing the temporary trump card into state hands could enhance the federal-state dialogue without unduly distorting the system.

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294. See *supra* notes 264–270 and accompanying text.

295. See, e.g., Buzbee, *supra* note 272, at 122–26 (discussing the cooperative aspects of these environmental schemes); Gillian E. Metzger, *Federalism Under Obama*, 53 WM. & MARY L. REV. 567, 599–600 (2011) (discussing the cooperative aspects of the financial and health-care reform movements).

296. Larry Kramer, *Understanding Federalism*, 47 VAND. L. REV. 1485, 1544 (1994) ("The federal government needs the states as much as the reverse, and this mutual dependency guarantees state officials a voice in the process."); Mendelson, *supra* note 12, at 774–77 (discussing the interdependency of federal and state officials); Metzger, *supra* note 11, at 2076.

Thus, in response to concerns that states may have too much leverage in a system without administrative supremacy, I emphasize the larger picture. A *federal* Congress holds the ultimate trump to displace state law. Meanwhile, mutual dependency may continue to influence the daily dynamics between federal and state administrators. This is power offset by counteracting power; it is federalism working in modern government.

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The foregoing discussion sketched the landscape of a system without delegated supremacy when Congress is silent on preemption issues. Congressional silence is the appropriate starting point in the analysis because it represents the defaulting system against which congressional decisions to act must be measured. To the extent that defaulting to overlapping federal-state jurisdiction is undesirable in any given context, Congress remains free to take positive action on preemption questions *ex ante* or *ex post*. The discussion now turns to that congressional choice.

## 2. Congressional Action

For reasons already discussed, there may be great value in congressional silence.<sup>297</sup> Moreover, for reasons explained below, there generally is value in Congress deciding preemption questions *ex post*.<sup>298</sup> Still, depending on context, it may be preferred that Congress decide preemption issues *ex ante*. If for no other reason, legislative certainty helps to reduce litigation risks and promotes the reliance interests of both regulatory targets and beneficiaries.

Foreclosing delegated supremacy may mitigate some of the causal forces of congressional silence, which might in turn foster *ex ante* preemption decisions. In particular, even when the condition of congressional will exists in a given context, Congress often does not address preemption questions *ex ante* because it cannot anticipate or foresee the specific issues that might later arise.<sup>299</sup> However, to the extent that congressional inaction derives from information gaps, a properly incentivized player—whether it be an agency, state, or a regulatory target or beneficiary—may help to furnish some or all of the necessary information. Eliminating administrative preemption

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297. See *supra* notes 264–77 and accompanying text.

298. See *infra* note 300 and accompanying text.

299. See Merrill, *supra* note 8, at 754 (noting the foreseeability problem).

provides that incentive. If the default is overlapping federal-state regulation in which agency action does not trump, and if that result is a priori beneficial or harmful, then one might expect the appropriate player to press its respective view in Congress prior to legislative enactment.

To be sure, the ability to lobby Congress *ex ante* on preemption issues currently exists and occurs. But the incentive structure tends to disfavor its utility. In particular, a nonagency's lobbying effort in Congress is more likely to fall on deaf ears when referral to the appropriate agency is an available option. Moreover, the responsible agency—which may be best positioned to opine on preemption issues—may have less incentive to voluntarily fill information gaps during the legislative process if it may later accomplish preemption itself administratively. I do not mean to suggest that eliminating administrative supremacy will cure Congress's foreseeability problems. Rather, my point is that the resulting structural dynamics may enhance Congress's *ex ante* opportunities for more meaningful deliberation and choice.

Foreclosing administrative supremacy may also be expected to have positive effects on Congress's *ex post* preemption decisions. As earlier discussed, the inability of agencies to trump state law would serve to increase the potential for regulatory overlap and experimentation. Premature administrative preemption may stifle regulatory competition, thereby limiting the spectrum of potential regulatory solutions from which Congress may choose.<sup>300</sup> In short, eliminating the option of administrative preemption offers Congress more opportunity to make *ex post* preemption decisions based on real-world regulatory experiments, rather than based on interested parties' self-serving speculative projections that uniformity is necessary or preferable with respect to a given matter.

### 3. Channeling Preemption to Congress

A primary effect—if not purpose—of quashing administrative supremacy is to channel more preemption decisions to Congress. Skeptics will immediately object that Congress has neither the time nor the inclination to decide most preemption questions, and my proposal will only make matters worse.<sup>301</sup>

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300. *Cf.* Bulman-Pozen & Gerken, *supra* note 261, at 1294 (making a similar claim in support of “uncooperative federalism” and observing that “[r]eal-world examples are quite useful in policy debates”).

301. *See, e.g.,* Sharkey, *supra* note 12, at 2157 (“[A]ny response to federal agency overreaching in the preemption context that calls for simply pushing the decision back to



In response to these concerns, however, it must first be observed that Congress can, and does, decide preemption questions. It does so expressly either in jurisdictional preemption provisions<sup>302</sup> or in so-called “savings” clauses that overtly disclaim legislative displacement of state regulation.<sup>303</sup> So it is not that Congress *cannot* engage preemption issues; rather, Congress simply might choose not to do so because of competing priorities or lack of political gumption.

Second, along both democratic and constitutional dimensions, Congress is generally deemed to be the most appropriate institutional actor to decide preemption questions.<sup>304</sup> For reasons explained, preemption decisions often require sensitive policy and political judgments about whether to displace state law.<sup>305</sup> Indeed, it is in part for this reason that the Court invokes its antipreemption presumption<sup>306</sup> and otherwise defers to congressional intent on preemption questions.<sup>307</sup> Insofar as Congress is the institution that *must* decide preemption, objections that Congress does not have either the time or the interest may simply be beside the point.

Third, objections that highlight the lack of congressional time or interest serve only to uncover one of the *purposes* of abrogating delegated supremacy. Channeling preemption decisions to Congress serves to give effect to the political and procedural safeguards of federalism.<sup>308</sup> If Congress cannot muster the political will to decide a preemption question, so be it. As explained earlier, there is nothing

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Congress is misguided on normative grounds and untenable for practical purposes.”); *see also* JAMES T. O'REILLY, *FEDERAL PREEMPTION OF STATE AND LOCAL LAW: LEGISLATION, REGULATION, AND LITIGATION* § 7.3 (2006) (concluding that a focus on congressional intent is suboptimal because federal legislators are generally unconcerned with preemption).

302. *See supra* note 59 and accompanying text.

303. For examples of savings clauses, see Federal Insecticide, Fungicide and Rodenticide Act § 24, 7 U.S.C. § 136v(a) (2006) (permitting state regulation of federally registered pesticides provided that such regulation does not conflict with federal law); McCarran-Ferguson Act § 2(b), 15 U.S.C. § 1012(b) (2006) (generally providing that federal law does not preempt certain state laws regulating the insurance industry); Toxic Substances Control Act § 18(a)(1), 15 U.S.C. § 2617(a)(1) (2006) (preserving state authority to regulate chemical substances subject to certain limitations); Clean Water Act § 510, 33 U.S.C. § 1370 (2006) (preserving state authority to adopt and enforce pollution regulations that are more stringent than federal law); Resource Conservation and Recovery Act of 1976 § 3009, 42 U.S.C. § 6929 (2006) (preserving state authority to impose solid waste disposal requirements more stringent than those created by the Act).

304. *See, e.g.*, Merrill, *supra* note 8, at 753–54.

305. *See supra* notes 257–89 and accompanying text.

306. *See supra* notes 74–85 and accompanying text.

307. *See supra* notes 40–49 and accompanying text.

308. *See supra* notes 42–49 and accompanying text (political safeguards); *supra* notes 173–75 and accompanying text (procedural safeguards); *see also* Young, *supra* note 4, at 869–70 (observing that administrative preemption circumvents these federalism safeguards).

inherently unsavory about the resulting federal-state regulatory overlap; depending on context, such overlap may be beneficial.<sup>309</sup> In any event, the failure of congressional action is simply one of the by-products of the constitutional bargains enshrined in the Supremacy Clause and our constitutional structure.<sup>310</sup>

Fourth, it must be recalled that Congress is silent on preemption at least some of the time precisely because it prefers that administrative agencies make the choice.<sup>311</sup> That is, the deficit of congressional interest in preemption is owed in part to the availability of an administrative outlet. Removing the administrative safety net raises the stakes of congressional inaction and thus could sharpen political will to address preemption issues.

Finally, an appreciation by the respective players that Congress cannot resolve all preemption problems could serve to foster meaningful federal-state cooperation. As posited earlier, overly aggressive state initiatives may be tempered by the threat of legislative preemption. At the same time, an agency's threat to take the problem to Congress may be parried with the realization that Congress is not likely to engage the less significant conflicts. This self-correcting bargaining structure offers a catalyst for federal-state dialogue.

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The forgoing account minimally demonstrates that a world without delegated supremacy may be realized without the heavens (or worse, the administrative state) collapsing. Beyond that, I have offered a favorable account of a federalist system in which agencies are disempowered from creating supreme federal law. Still, even insofar as these accounts may be convincing, it will nevertheless be objected that my proposal needlessly squanders the institutional benefits that agencies bring to federalism's equation. It is to this fundamental concern that the discussion now turns.

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309. See *supra* notes 257–60 and accompanying text.

310. See generally Clark, *supra* note 15; Clark, *Separation of Powers*, *supra* note 4.

311. Quantification of how often congressional silence can be attributed to the existence of the administrative safety net would be difficult if not impossible to determine. Sometimes Congress expressly delegates the preemption decision to agencies. See *supra* notes 130–31 and accompanying text. Beyond that metric, however, inference is required. But, there is no disputing that Congress knows that when it is silent on preemption under the current system administrative agencies may decide the question.

*E. Is There a Baby in the Bathwater?*

Recent scholarship focuses not so much on the first-order question of whether displacement of state law is warranted in any specific context, but rather on the second-order inquiry of which institution is generally best positioned to make the preemption choice.<sup>312</sup> Conventional wisdom is that Congress is the federal institution that *should* decide preemption questions, but that it often does not because of institutional forces (e.g., lack of foreseeability, time, political will, etc.).<sup>313</sup> In cases where Congress is silent, some believe that agencies are a better second choice than the courts. Others, such as Professors Galle and Seidenfeld, have gone even further to argue that agencies may even be favored over Congress to make first-order preemption decisions.<sup>314</sup> Such institutional comparative analyses generally focus on considerations of (1) accountability, (2) regulatory expertise, and (3) flexibility. Certainly, these are important considerations. Yet on balance they do not upset my theses and, in some respects, support them.

My proposal is structured to foster congressional choice by removing the outlet of delegating supremacy.<sup>315</sup> My proposal also generally does not fear the effects of a congressional failure to meet the first-order challenge of making a specific preemption decision.<sup>316</sup> This approach not only endorses the political and procedural safeguards of federalism but also embraces the potential values of regulatory overlap inhering in congressional silence. Still, the following question remains: By foreclosing an administrative gap-filling function on preemption, is the baby being thrown out with the bathwater?

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312. See Galle & Seidenfeld, *supra* note 11, at 1936, 1938–40; Merrill, *supra* note 8, at 727 (“Public law scholarship is increasingly turning from questions about the content of law to questions about which institution should determine the content of the law—that is, to ‘deciding who decides.’”) (citation omitted). For a seminal treatment of this movement in public law more generally, see NEIL K. KOMESAR, IMPERFECT ALTERNATIVES: CHOOSING INSTITUTIONS IN LAW, ECONOMICS, AND PUBLIC POLICY (1994).

313. See, e.g., Gilman, *supra* note 247, at 360–61; Merrill, *Preemption*, *supra* note 8, at 753–54.

314. Galle & Seidenfeld, *supra* note 11, at 2006–21 (contending that it is sufficient that Congress expressly make the decision to delegate the decision to federal agencies, in part because agencies have institutional advantages over Congress in making the first-order preemption decision).

315. See *supra* notes 299–01 and accompanying text.

316. See *supra* notes 257–75 and accompanying text.

## 1. Accountability

Arguments sounding in accountability are no reason to save administrative supremacy. Institutional comparative assessments on the “accountability” plane tend to depend on the meaning of that term. If it means *political* accountability, the conventional view is that Congress holds the advantage over agencies.<sup>317</sup> Unlike elected members of Congress, administrative officials are appointed.<sup>318</sup> Thus, at a minimum, the *potential* exists to hold Congress politically accountable. It may be that Congress is not *practically* held accountable for many or most of its preemption decisions, inasmuch as congressional elections generally do not turn on that metric.<sup>319</sup> But if that is the objection, any claim to agency political accountability through the President must likewise be surrendered because presidential elections are even less likely to turn on preemption decisions made by unelected agency officials.<sup>320</sup>

Arguments that promote administrative accountability thus tend to stress a different brand of “accountability”—one that values responsiveness to hierarchical controls.<sup>321</sup> In this respect, agencies are generally the agents of both Congress and the President, each of which in turn is accountable directly to the polity.<sup>322</sup> The theory is that through political oversight, agencies are responsively accountable in the practical sense. But these arguments work better in head-to-head institutional contests between agencies and *courts*, when the question is whether unelected judges should defer to unelected bureaucrats in instances of congressional silence or ambiguity. As between courts (which are subject to no political controls) and agencies (which are subject to both congressional and presidential oversight), the accountability arrow tends to favor agencies. However, when the comparison is instead between agencies and *Congress*, one might prefer a legislative choice (or, even the lack of one) over haphazard political oversight.

In short, arguments sounding in “accountability” (however defined) are not in my estimation persuasive reasons for saving administrative supremacy.

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317. See, e.g., Merrill, *supra* note 8, at 757.

318. See U.S. CONST. art. II, § 2, cl. 2 (Appointments Clause).

319. See Galle & Seidenfeld, *supra* note 11, at 1979–80.

320. See Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245, 2334 (2001) (challenging the extent to which agencies are democratically accountable).

321. See Galle & Seidenfeld, *supra* note 11, at 1981–82; Mendelson, *supra* note 12, at 769–72.

322. See Galle & Seidenfeld, *supra* note 11, at 1981.

## 2. Expertise

From an institutional comparative perspective, however, agencies generally do enjoy greater expertise than Congress. But, here, a critical distinction must be drawn between substantive expertise over regulatory details and the separate (though sometimes related) expertise to make preemption decisions.

### *a. Substantive Expertise*

Fundamentally, my proposal does not directly upset the ability of agencies to make substantive regulatory policy.<sup>323</sup> Agencies can harness whatever topical expertise they may have, whether in response to express congressional delegations of authority or in filling the interstices of statutory silence and ambiguity. The anticipated objection to my proposal, therefore, must be that agency substantive expertise will be *indirectly* diluted or derailed by competing state initiatives. If that is the concern, however, my response is twofold.

First, this line of argument dangerously pre-assumes that federal agencies are the preferred regulatory experts over states. That is not necessarily the case, however, especially in regulatory fields traditionally occupied by the states. Indeed, state expertise was recognized by Congress in its recent financial and health-care reform efforts inasmuch as the states were afforded significant authority to shape and enforce several aspects of these programs.<sup>324</sup>

Second, Congress has a number of tools available to counteract undue state interference with agency expertise. In particular, Congress can legislatively create regulatory “floors” or “ceilings,” thus limiting the spectrum of competing state options without completely displacing state initiatives.<sup>325</sup> For example, when the Department of Homeland Security sought to preempt New Jersey’s higher safety standards for chemical plants, Congress intervened by passing a statute affirming a state’s right to establish security standards that were equal or greater (but no less) than the federally prescribed

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323. See *supra* notes 235–40 and accompanying text.

324. See Metzger, *supra* note 295, at 568–70, 599–602 (discussing congressional choices to give states significant regulatory responsibility in the recent financial and health reform legislation and noting that this devolution may have been owing to existing state expertise in the fields); see also Bulman-Pozen & Gerken, *supra* note 261, at 1271–84 (discussing examples of state trailblazing in cooperative federal-state regulatory schemes).

325. See generally Buzbee, *supra* note 16 (discussing how congressional uses of preemptive floors and ceilings curb state variances).

ones.<sup>326</sup> Moreover, Congress can tie discretionary state funding to compliance with administrative standards,<sup>327</sup> as it has recently done in its health-care reform legislation.<sup>328</sup> Through these platforms, Congress can rather easily harness agencies' substantive expertise to the extent that Congress feels is necessary or desirable.

### *b. Preemption Expertise*

Apart from substantive expertise, there is the separate (albeit often related) expertise necessary to gauge whether, in a particular context, preemption is to be preferred over regulatory disuniformity.<sup>329</sup> In this regard, Professors Galle and Seidenfeld contend that agencies hold an edge over both courts and Congress.<sup>330</sup> Again, this point is debatable. Indeed, for what it may be worth, the Court has recently held that agencies do *not* have any expertise worth deferring to on the ultimate question of preemption.<sup>331</sup>

However, even *assuming* that agencies are the most expert bodies to gauge whether a regulatory program should trump state law, my proposal does not surrender that potential. It simply redirects it to the legislative forum. Simply put, if an agency holds the view that state law should be preempted—or, conversely, that it should not be—the agency can and should make its position known to Congress. Though Congress would ultimately be required to make the decision, nothing prevents an agency from sharing its “expert” opinion to inform that choice.

## 3. Flexibility

Related to expertise is the institutional “advantage” of procedural flexibility. To be sure, it is far easier for agencies to

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326. See Consolidated Appropriations Act of 2008, Pub. L. No. 110-161, 121 Stat. 1844, 2075 (codified at 6 U.S.C. § 121 note) (West 2012); see also DANA A. SHEA & TODD B. TATELMAN, CONG. RESEARCH SERV., RL33847, CHEMICAL FACILITY SECURITY: REGULATION AND ISSUES FOR CONGRESS 8–9 (2008).

327. See *New York v. United States*, 505 U.S. 144, 166–68 (1992) (holding that Congress may threaten preemption or condition receipt of federal funds on compliance with federal policies as a means to achieve regulation in the states).

328. See, e.g., Patient Protection and Affordable Care Act, Pub. L. No. 111-148, §§ 1002, 1323, 124 Stat. 119, 138–39, 192–99 (2010).

329. Galle & Seidenfeld, *supra* note 11, at 1976–77.

330. *Id.*

331. See *Wyeth v. Levine*, 555 U.S. 555, 576–77 (2009) (holding that agencies may be entitled to some deference on the question of whether and how state law conflicts with a federal standard, but that no deference would be given on the ultimate question of whether state law is preempted).

preempt state law than to achieve the same end legislatively. As favored by Professors Galle and Seidenfeld, administrative flexibility provides agencies the means to respond to changing information and conditions with more precision than Congress.<sup>332</sup> In turn, this flexibility may portend preemption decisions that hue closest to polity preferences and/or best advance the general welfare.<sup>333</sup>

In many ways, however, administrative flexibility is precisely the rub. When preemption is made easy, it threatens to occur too often—and not *necessarily* in line with polity preferences or the public good. The threat of agency “capture,” for example, entails a risk of preemption decisions that unduly cater to industry preferences.<sup>334</sup> Moreover, it must be recalled that agencies enjoy flexibility precisely because the legislative process does not constrain their choices. At the same time, however, that also means that the political and procedural safeguards of federalism are compromised. In addition, forcing agencies to tolerate greater degrees of disuniformity may, in some instances, lead to the realization that uniformity in a given context is neither desirable nor necessary. Just as Ulysses bound himself to the mast in order to resist the siren’s song,<sup>335</sup> foreclosing administrative supremacy may save agencies from needlessly succumbing to preemption’s temptation.

Finally, it bears noting that while my proposal sacrifices a degree of procedural flexibility (though, I submit, for good reason), it also offers a measure of self-correction. In particular, we might presume that Congress will prioritize its preemption agenda around the most salient and pressing concerns, just as it tends to do with other legislative issues.<sup>336</sup> That is, Congress may be expected to resolve the more important or pressing regulatory conflicts, while allowing the lesser ones to wait in the queue (perhaps indefinitely). At least at the margins then—that is, with respect to the issues of

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332. Galle & Seidenfeld, *supra* note 11, at 1983–84.

333. *Id.*

334. See Rachel E. Barkow, *Insulating Agencies: Avoiding Capture Through Institutional Design*, 89 TEX. L. REV. 15, 21 n.23 (2010) (defining “capture” as “responsiveness to the desires of the industry or groups being regulated”); Janelle C. Sharpe, *Toward (A) Faithful Agency in the Supreme Court’s Preemption Jurisprudence*, 18 GEO. MASON L. REV. 367, 429–30 (2011) (discussing agency capture as it relates to preemption choices); see also Thomas W. Merrill, *Capture Theory and the Courts: 1967–1983*, 72 CHI.-KENT L. REV. 1039, 1050–52 (1997) (describing agency capture as a “pathology of agency government”).

335. See HOMER, THE ODYSSEY 276 (Robert Fagles trans., Penguin Books 1996).

336. Cf. Lisa Schultz Bressman, *Procedures as Politics in Administrative Law*, 107 COLUM. L. REV. 1749, 1816 (2007) (noting that Congress tends to focus on politically salient issues); William N. Eskridge, Jr., *Dynamic Statutory Interpretation*, 135 U. PA. L. REV. 1479, 1531 (1987) (same).

greatest import—legislative action may sufficiently match administrative responsiveness. For example, Congress rather quickly intervened in response to lobbying efforts when the Department of Homeland Security sought to preempt New Jersey's higher safety standards for chemical plants.<sup>337</sup> Meanwhile, for preemption issues of lesser congressional concern, there may also be less concern for alarm. Indeed, the failure of *political* will to resolve a preemption issue only serves to reinforce concerns over an agency's *apolitical* treatment of the same. An oft-invoked criticism of the Bush Administration, for example, was its attempt to administratively preempt state common law when its efforts for tort-reform failed in Congress.<sup>338</sup> To be sure, congressional unresponsiveness entails a risk of suboptimal regulatory conflict.<sup>339</sup> Still, there is also potential value in harvesting only the lower-hanging fruit. Those out of Congress's reach, so to speak, may be given time to ripen through additional federal-state dialogue. Then, if and when the issue reaches the legislative agenda *ex post*, Congress will have a market of real-world regulatory options to select from.

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Thus, while the administrative state offers some potential benefits in resolving preemption questions, administrative expertise is not surrendered. Moreover, administrative flexibility may not necessarily afford optimal preemption decisions and on balance may upset more important federalism values.

#### *F. Welcoming In the Vampire?*

Somewhat related to the foregoing institutional analysis, my proposal has potentially troubling implications for judicial review. In particular, if agencies cannot independently preempt state law, the concern may be that more preemption decisions would be channeled by default to Congress's "other delegate"—the courts.<sup>340</sup> That is, one may prefer that Congress decide preemption questions, but when it does not, may alternatively prefer agencies over courts to fill the legislative voids. The perceived danger, here, is that courts will infuse

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337. See *supra* note 327 and accompanying text.

338. Buzbee, *supra* note 12, at 1547–53 (chronicling the rise of administrative preemption under the Bush Administration). See generally Funk, *supra* note 11, at 226–31.

339. See *supra* notes 275–288 and accompanying text.

340. Cf. Margaret H. Lemos, *The Other Delegate: Judicially Administered Statutes and the Nondelegation Doctrine*, 81 S. CAL. L. REV. 405 (2008) (exploring the practice of congressional delegation to the judiciary).



their own misguided sensibilities into preemption debates. And if that is the case, the democratic shortcomings of administrative supremacy will simply have been transferred, rather than solved.

These are fair concerns. But they probably rest on an exaggerated pairing of skepticism toward the courts and optimism for the administrative machine. It is beyond my purpose here to demonstrate that courts are *at least* as well positioned as agencies to decide preemption questions or *at least* as likely as agencies to hue closest to an unspoken, ambiguous, or perhaps absent congressional intent. Again, such analyses turn heavily on institutional comparative assessments. Others have carefully undertaken the task, and the rather unsurprising result is a quilt work of competing conclusions.<sup>341</sup>

Rather than rehash that debate, I offer a more focused account as it relates to my proposal. First, it must be recognized that if the court is a “vampire,” it is already in the preemption house. The Supreme Court, itself, has decided a spate of preemption cases in recent years—many of which involved claims of administrative preemption.<sup>342</sup> Moreover, delegating supremacy results in more potentially preemptive federal-state conflicts. Foreclosing agencies’ preemptive attempts thus might actually decrease the number of preemption cases on the judicial docket. Regardless of any speculative quantitative impact, however, eliminating administrative supremacy will serve to channel the qualitative focus in preemption cases to what *Congress* intended. And resolving that issue—difficult as it may be—is already the daily diet of judicial decisionmaking.<sup>343</sup>

Second, the Court may be aided and limited in its judicial function by the antipreemption presumption. This may be of scant consolation for those viewing the presumption as a doctrinally empty shell. In this regard, many have lamented the Court’s dissonance in what it says (i.e., that it is applying the presumption) and what it does (i.e., nevertheless finding preemption).<sup>344</sup> Yet this dynamic would only be made worse if foreclosing delegated supremacy somehow fueled the Court’s dissonance. There is simply no reason, however, to suspect that would be the case. If anything, eliminating administrative

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341. *E.g.*, Galle & Seidenfeld, *supra* note 11; Mendelson, *supra* note 12; Merrill, *supra* note 8; Young, *supra* note 4.

342. *See, e.g.*, PLIVA, Inc. v. Mensing, 131 S. Ct. 2567 (2011); Chamber of Commerce v. Whiting, 131 S. Ct. 1968 (2011); Williamson v. Mazda Motor of Am., Inc., 131 S. Ct. 1131 (2011); Bruesewitz v. Wyeth LLC, 131 S. Ct. 1068 (2011); Cuomo v. Clearing House Ass’n, 129 S. Ct. 2710 (2009); Wyeth v. Levine, 555 U.S. 555 (2009); Riegel v. Medtronic, Inc., 552 U.S. 312 (2008).

343. *See* Egelhoff v. Egelhoff, 532 U.S. 141, 160–61 (2001) (Breyer, J., dissenting).

344. *See, e.g.*, Hoke, *supra* note 73, at 733 (describing the Court’s application of the presumption as “fickle”); Merrill, *supra* note 8, at 741 (remarking that “the presumption against preemption is honored as much in the breach as in observance”).

supremacy supports the conceptual underpinnings of the antipreemption presumption and may promote its appropriate use in more cases. Both my proposal and the presumption—at least in theory—seek to channel preemption decisions to Congress and thus away from agencies and courts.<sup>345</sup> Judicial deferral to Congress is a rather futile gesture, however, if Congress can simply delegate the preemption decision to agencies. Eliminating administrative preemption gives more meaning, and potentially more effect, to the antipreemption presumption.

### CONCLUSION

There are any number of reasons to disenfranchise agencies of their assumed power to create supreme federal law. Delegated supremacy (1) is of dubious constitutional legitimacy; (2) marginalizes congressional intent; (3) circumvents the political and procedural safeguards of federalism; (4) has a distorting and dangerous effect on the federal-state balance of power; (5) undermines representative governance; and (6) stifles the potential virtues of regulatory experimentation and redundancy. This Article injects new perspectives into an already robust and still growing literature directed at some or all of these concerns. In imagining a federalist system without delegated supremacy, I have hoped to depict a system that is conceptually feasible, operationally tolerable, and—indeed—perhaps desirable. Still, a lingering question remains: Is foreclosing delegated supremacy the “best” solution, or does it go *too* far? Fortunately, that is a project for another day. My objective in this Article is not to propound a definitive solution to the problems with delegated supremacy, but rather to broaden the field of doctrinal possibility.

Looking ahead, however, it will be useful to contextualize my proposal within the greater body of work on the subject. Others have suggested (1) requiring Congress to speak with clarity if it intends to delegate supremacy, (2) ramping up judicial review of administrative preemption decisions, and/or (3) infusing additional procedural safeguards for state interests into the administrative decisionmaking process.<sup>346</sup> Importantly, what my proposal shares is the directional path toward limiting administrative preemption. But I part ways from other proposals insofar as they assume (or concede) that Congress may delegate supremacy so long as it chooses to. I further dissent from the

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345. See *supra* notes 74–81 and accompanying text.

346. See *supra* notes 11–13 and accompanying text.

wholesale view that administrative supremacy is necessary, or even necessarily best, for the operation of our modern government.

I grant that my colleagues' proposals may be more palatably moderate. Yet, in response to the question of whether my proposal goes too far, I for now return the favor—do theirs go far enough?