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A PRESUMPTION AGAINST AGENCY PREEMPTION

Nina A. Mendelson[*]

I. INTRODUCTION

Federal agencies are increasingly taking aim at state law, even though state law is not expressly targeted by the statutes the agencies administer. Starting in 2001, the Office of the Comptroller of the Currency (OCC) issued several notices saying that state laws would apply to national bank operating subsidiaries (incorporated under state law) to the same extent as those laws applied to the parent national bank. In 2003, the OCC specifically mentioned state consumer protection laws and took the position that the state laws were preempted and did not apply to mortgage lenders owned by national banks.[1] In December 2006, the Department of Homeland Security declared its own authority to preempt state law on high-risk chemical plant security, announcing a procedure by which interested parties could apply to see if state law would be preempted.[2] In both cases, states responded angrily. In the OCC case, the attorneys general of every state filed Supreme Court briefs opposing the agency's position in *Watters v. Wacho-*

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[*] Professor of Law, University of Michigan Law School. This Article benefited greatly from participants' comments at a conference at Duke University School of Law, "Federalism and the Overlapping Territory," cosponsored by the Center for Progressive Reform and the American Constitution Society, and a symposium at Northwestern University School of Law, "Ordering State-Federal Relations Through Federal Preemption Doctrine." The author gives special thanks for useful comments and discussions to Michael Barr, William Buzbee, Riyaz Kanji, Gillian Metzger, and Catherine Sharkey. Thanks to Jessica Berry for excellent research assistance and to the Cook Fund at the University of Michigan Law School for research support.

[1] *See* Investment Securities; Bank Activities Operations; Leasing, 66 Fed. Reg. 34,784, 34,788 (July 2, 2001) (codified at 12 C.F.R. pts. 1, 7, 23 (2002)); Preemption Determination and Order, 68 Fed. Reg. 46,264, 46,264 (Aug. 5, 2003) (specifically stating that Georgia consumer protection law is preempted). The OCC has taken the position that it was merely consolidating earlier guidance or other statements on preemption, *see, e.g.*, Bank Activities and Operations, 69 Fed. Reg. 1895 (Jan. 13, 2004) (codified at 12 C.F.R. § 7.4000 (2005)) (visitorial powers); Bank Activities and Operations; Real Estate Lending and Appraisals, 69 Fed. Reg. 1904 (Jan. 13, 2004) (codified at 12 C.F.R. §§ 7.4007–7.4009, 34.3–34.4 (2005)) (national bank activities).

[2] *See* Chemical Facility Anti-Terrorism Standards, 71 Fed. Reg. 78,276, 78,293 (Dec. 28, 2006) (proposed rule). In the Homeland Security Appropriations Act of 2007, Congress had provided the Department of Homeland Security with interim authorization to regulate the security of high-risk chemical facilities by setting "risk-based" standards, but that legislation dodged the question whether state authority to regulate those facilities would be affected. *See* Department of Homeland Security Appropriations Act, 2007, Pub. L. No. 109-295, § 550, 120 Stat. 1355 (2006).

via Bank, N.A.[3] A joint brief filed by the National Conference on State Legislatures and the National Governors Association, also opposing the agency's position, argued that federal counterparts to state consumer protection laws were not adequate.[4] In response to the Department of Homeland Security, the state of New Jersey asserted its right to address risks presented by the seven high-risk chemical facilities located within its borders, more facilities than in any other state.[5] Recent events have overtaken both agency actions. In the OCC case, the Supreme Court ruled that the relevant banking statutes were preemptive, mooting the impact of the agency action.[6] The Department of Homeland Security backed off its preemptive position to some degree in response to congressional pressure, especially from the New Jersey delegation, and ultimately Congress legislated a limited savings clause for state chemical facility security laws.[7] The examples nonetheless remain significant because the agencies attempted to preempt state law.

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[3] 127 S. Ct. 1559 (2007). The state of Michigan challenged the agency's position directly; the other forty-nine states and Puerto Rico filed a joint amicus brief in support of Michigan's position. *See* Brief of States of New York, Alabama, et al. as Amici Curiae Supporting Petitioner, *Watters*, 127 S. Ct. 1559 (No. 05-1342), 2006 WL 2570992.

[4] *See* Brief of the National Conference of State Legislatures, National Governors' Association, et al., as Amici Curiae Supporting Petitioner at 17, *Watters*, 127 S. Ct. 1559 (No. 05-1342), 2006 WL 2570993 (describing the OCC's record on consumer protection as "lax" and "unimpressive" (citations and internal quotation marks omitted)); *see also* Brief of American Association of Retired Persons, et al., as Amici Curiae Supporting Petitioner at 11–12, *Watters*, 127 S. Ct. 1559 (No. 05-1342), 2006 WL 2570989 (arguing that OCC consumer protection enforcement is "extremely weak" compared with state enforcement). Admittedly, the OCC has issued some nonbinding guidance to national banks on predatory practices. *See* Guidelines for National Banks to Guard Against Predatory and Abusive Lending Practices, OCC Advisory Letter 2003-2 (Feb. 21, 2003), *available at* http://www.occ.treas.gov/ftp/advisory/2003-2.pdf; Avoiding Predatory and Abusive Lending Practices in Brokered and Purchased Loans, OCC Advisory Letter 2003-3 (Feb. 21, 2003), *available at* http://www.occ.treas.gov/ftp/advisory/2003-3.pdf; OCC Guidelines Establishing Standards for Residential Mortgage Lending Practices, 70 Fed. Reg. 6329, 6330 (Feb. 7, 2005) (citing both advisory letters).

[5] For example, in congressional debate regarding whether to adopt the bill authorizing the Department of Homeland Security to regulate chemical-facility-related terrorism risks, which lacked a savings clause protecting state law, New Jersey Congressman Frank Pallone, Jr. noted that the bill "fails to protect the rights of States like my own, New Jersey, to implement stronger security requirements at chemical plants." 152 CONG. REC. H7911 (daily ed. Sept. 29, 2006). After the Department of Homeland Security issued its rule, Senator Frank R. Lautenberg of New Jersey commented, "Last year, New Jersey required that chemical facilities adopt a practice known as inherently safer technology. . . . But last week, the Bush administration sent a signal that it wants to override the right of States to require inherently safer technology. . . . This approach is wrong." 152 CONG. REC. S2606 (daily ed. Mar. 30, 2006).

[6] The Supreme Court ruled in the OCC case that congressional intent was to preempt state consumer protection laws, so the agency's ruling merely "clarif[ied] and confirm[ed]" existing law. *Watters*, 127 S. Ct. at 1572.

[7] Responding to sharp congressional pressure, the U.S. Secretary of Homeland Security wrote Congress that the Department would drop its claim to authority to preempt state law. Associated Press, *U.S. Won't Override State Rules on Plants*, N.Y. TIMES, Apr. 2, 2007, at A17 (reporting on a letter from the U.S. Secretary of Homeland Security, Michael Chertoff, which indicated that the Department of Homeland Security would not seek to preempt "stricter state rules already in place"). At the very end of 2007,

Meanwhile, agencies have increasingly included preemptive statements in preambles to agency rulemaking documents. These have ranged from a January 2006 Food and Drug Administration (FDA) statement that failure-to-warn claims against pharmaceutical manufacturers are preempted because such claims could require more information on a drug label than the FDA requires, to a Transportation Department statement that states could not require any greater safety than its own "roof crush" standards for automobiles.[8] In all of these cases, the statute includes no language preempting state law.

The agency statements are, of course, aimed at limiting the application of state statutes, regulations, and common law. In so doing, the agencies are staking a claim to federal authority over safety, health, the environment, or consumer protection. Federal preemption of state law is nothing new. Congress has long acted to preempt the application of state law and to limit state authority. In deciding preemption cases, as well as cases under the Commerce Clause, Tenth Amendment, and Eleventh Amendment, courts have refereed the distribution of authority between the federal government and the states.[9]

Congress amended its earlier enactment authorizing the Department to regulate chemical plant security to save state law. The amendment stated:

> This section shall not preclude or deny any right of a State or political subdivision thereof to adopt or enforce any regulation, requirement, or standard of performance with respect to chemical facility security that is more stringent than a regulation, requirement, or standard of performance issued under this section, or otherwise impair any right or jurisdiction of any State with respect to chemical facilities within that State, unless there is an actual conflict between this section and the law of that State.

Consolidated Appropriations Act, 2008, Pub. L. No. 110-161, § 534, 121 Stat. 1844, 2075 (2007) (amending Department of Homeland Security Appropriations Act, § 550) (to be codified at 6 U.S.C. § 121 note).

[8] *See* Requirements on Content and Format of Labeling for Human Prescription Drug and Biological Products, 71 Fed. Reg. 3922, 3934 (Jan. 24, 2006) (codified at 21 C.F.R. pts. 201, 314, 601 (2007)) ("FDA approval of labeling under the [A]ct, whether it be in the old or new format, preempts conflicting or contrary State law."); Federal Motor Vehicle Safety Standards; Roof Crush Resistance, 70 Fed. Reg. 49,223, 49,245–46 (Aug. 23, 2005) (proposed rule) ("[T]he agency believes that either a broad State performance requirement for greater levels of roof crush resistance or a narrower requirement mandating that increased roof strength be achieved by a particular specified means, would frustrate the agency's objectives by upsetting the balance between efforts to increase roof strength and reduce rollover propensity. . . . [I]f the proposal were adopted as a final rule, it would preempt all conflicting State common law requirements, including rules of tort law."); *see also* Sunscreen Drug Products for Over-the-Counter Human Use, 72 Fed. Reg. 49,070, 47,109–10 (Aug. 27, 2007) (suggesting that proposed sunscreen regulation will preempt both state regulations and state common law claims); Passenger Equipment Safety Standards; Front End Strength of Cab Cars and Multiple-Unit Locomotives, 72 Fed. Reg. 42,016, 42,036 (Aug. 1, 2007) (suggesting that its equipment safety standards should preempt state statutory, regulatory, and common law standards).

[9] *E.g.*, Solid Waste Agency of N. Cook County v. U.S. Army Corps of Eng'rs, 531 U.S. 159, 173 (2001) (declining to find that agency is authorized to regulate isolated waters because of concerns of "alter[ing] the federal-state framework by permitting federal encroachment upon a traditional state power."); Alden v. Maine, 527 U.S. 706, 756–57 (1999) (defining which state institutions can assert sovereign immunity under the Eleventh Amendment); Printz v. United States, 521 U.S. 898, 933 (1997)

The recent events described above, however, suggest a change. In the context of preemption, federal administrative agencies increasingly seem to claim for themselves the authority to distribute power between the federal government and the states. Agencies have sought to preempt state law in notice-and-comment rules and have also issued statements with the apparent goal of influencing later judicial decisions on whether state law is preempted by a federal statute.

These recent events bring home the need to address whether agency preemption of state law is legitimate. Congress might directly answer the question by expressly confirming or limiting the authority of agencies to preempt state law.[10] Congress has occasionally explicitly done just this, as with its express delegation of authority to the Secretary of Transportation to determine whether particular state standards bearing on hazardous materials transportation are preempted.[11]

Courts have tended to treat agency statements on preemption as already-authorized "legal interpretations" to which some level of deference might be due.[12] In an earlier article, *Chevron and Preemption*, I argued that agency interpretations of preemptive statutory language should not receive a presumption of deference under the doctrine of *Chevron U.S.A. Inc. v. Natural Resources Defense Council*,[13] but that deference should instead be much more limited, following the approach of *Mead v. United States*[14] and *Skidmore v. Swift*.[15] Despite agencies' expertise in implementing their own programs, no presumptive deference should be due because agencies lack both institutional expertise on important issues of state autonomy and federalism and adequate statutory guidance regarding preemption questions.[16]

Where, as in these cases, the authorizing statute only delegates authority generally, and does not contain language specifically addressing preemption of state law, an antecedent question ought to be examined: Does the agency possess the authority to preempt state law? The answer to this

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(striking down legislation as commandeering state resources in violation of the Tenth Amendment); United States v. Lopez, 514 U.S. 549, 554–55 (1995) (characterizing the Commerce Clause as critical to ensuring some "limit to the federal power"); Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528, 547–55 (1985) (adopting "political safeguards" approach to Tenth Amendment analysis).

[10] Under the Supremacy Clause, U.S. CONST. art. VI, cl. 2, Congress may "preempt state law if it chooses." Cass Sunstein, *Nondelegation Canons*, 67 U. CHI. L. REV. 315, 331 (2000).

[11] *See* 49 U.S.C. § 5125(d) (2000). That section authorizes the Secretary of Transportation to hear and decide applications on whether a particular state standard is "substantively the same" as federal law and thus exempt from statutory preemption provisions. *Id.*

[12] The Sixth Circuit's opinion in *Watters v. Wachovia Bank, N.A.* took this line. *See* 431 F.3d 556, 560 (6th Cir. 2005) (declining an invitation to examine a specific authorization to an agency to preempt and instead using the *Chevron* framework), *aff'd on other grounds*, 127 S. Ct. 1559 (2007).

[13] 467 U.S. 837 (1984).

[14] 533 U.S. 218 (2001).

[15] 323 U.S. 134 (1944). *See* Nina Mendelson, *Chevron and Preemption*, 102 MICH. L. REV. 737, 789 & n.214, 797–98 (2004).

[16] Mendelson, *supra* note 15, at 779–94.

question should both resolve whether a notice-and-comment rule can effect state law preemption and relate to whether deference is due to a less formal agency position. For example, the Department of Homeland Security claimed in its chemical plant security rule that it did not need express statutory authorization to declare state law preempted.[17]

For these sorts of problems, especially with respect to a statute that contains no explicit preemptive language, I suggest that courts should apply not only a presumption against preemption, but also an additional presumption against *agency* preemption. We should not assume that Congress authorized a federal agency to preempt state law unless that authority is clearly delegated.

Some of the arguments I developed in *Chevron and Preemption* support a presumption against agency preemption. For example, the institutional focus of agencies makes them particularly ill-suited to consider state autonomy to regulate or federalism concerns. Further, agencies may have a particular stake in validating their own policy decisions that makes them less willing to consider the validity of a different balance struck by state regulators.[18]

Beyond the lack of institutional competence, I suggest some additional reasons in support of a presumption against agency preemption. Current approaches to so-called obstacle preemption,[19] in the context of modern regulatory law, could give an agency the discretion to preempt nearly any state law relevant to the agency's regulatory program. Besides undermining state regulatory autonomy and the functions it may serve, such an outcome seems very unlikely to have been intended by Congress. Moreover, not only would agencies that preempt state law lack appropriate institutional competence, they would also do so in the absence of adequate guidance from Congress regarding state interests and federalism. This risks excessive interference with state regulatory autonomy. Finally, this outcome risks undermining the legitimacy of administrative agency decisions. Part II of this Article describes recent agency efforts to preempt state law. Part III presents arguments in favor of a presumption against agency preemption. Part IV briefly concludes.

II. RECENT AGENCY EFFORTS TO PREEMPT STATE LAW

The various preemptive efforts by agencies can be most easily understood by placing them in the context of the current judicial approach to preemption. Under current preemption analysis, state law yields to federal

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[17] *See* Chemical Facility Anti-Terrorism Standards, 72 Fed. Reg. 17,688, 17,726 (Apr. 9, 2007) (to be codified at 6 C.F.R. pt. 27) (final rule) (suggesting that, despite congressional inaction on the preemption question, agencies are empowered to "fill those gaps" (citing *Chevron*, 467 U.S. at 843)).

[18] Mendelson, *supra* note 15.

[19] *See infra* text accompanying note 23 (describing obstacle preemption).

law, consistent with the Supremacy Clause,[20] if the federal statute contains explicit language preempting the state law.[21] Besides such "express preemption," a court may also find state law preempted if Congress has suggested that the federal government will "occupy the field," as it does with regulation of immigration.[22] Finally, a court may find state law impliedly preempted if it directly conflicts with federal law—if compliance with both state and federal law is a physical impossibility—or if state law stands as an obstacle to the accomplishment of federal goals, which I term "obstacle preemption."[23]

The types of preemption that raise the greatest concern about agency authority are agency declarations either of field preemption or of obstacle preemption. In both cases, there may have been no direct congressional consideration of state interests or federalism in the underlying statute. By contrast, when an agency interprets express preemption language in a statute, Congress has already expressly made some sort of preemption decision, so the agency is not writing on a blank slate.[24] Direct conflict preemption between state law and an agency rule also raises less concern. When it is physically impossible to comply with both a substantive agency rule and state law, it is reasonable to assume that Congress would want a properly authorized agency action to be effective, and thus to trump directly conflicting state law.[25] For the most part, agencies have not attempted to declare that federal law "occupies the field." Instead, their actions have been of the obstacle preemption variety—a statement by the agency that a particular state law stands as an obstacle to the accomplishment of federal goals.[26] As

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[20] U.S. CONST. art. VI, cl. 2.

[21] *See, e.g.*, Medtronic, Inc. v. Lohr, 518 U.S. 470, 484 (1996) ("[T]he pre-emptive language of [the relevant statute] means we need not go beyond that language to determine whether Congress intended the MDA to pre-empt at least some state law . . . , [though] we must nonetheless 'identify the domain expressly pre-empted' by that language . . . ." (citations omitted)).

[22] *See* Hines v. Davidowitz, 312 U.S. 52, 62–63 (1941).

[23] *See* Geier v. Am. Honda Motor Co., 529 U.S. 861, 873–74 (2000).

[24] I argue elsewhere that agency interpretations of preemptive language nonetheless should not receive *Chevron* deference from courts. *See* Mendelson, *supra* note 15, at 797–98.

[25] Properly authorized federal agency rules are deemed to have the "force of law," just like a statute does. *See* Batterton v. Francis, 432 U.S. 416, 425 n.9 (1977) (declaring that courts must give the force of law to properly issued substantive agency regulations). Under the Supremacy Clause, state law accordingly must yield. *E.g.*, Fid. Fed. Sav. & Loan v. de la Cuesta, 458 U.S. 141, 153 (1982) ("Federal regulations have no less pre-emptive effect than federal statutes."); United States v. Shimer, 367 U.S. 374, 382 (1961) (holding that a validly issued Veterans' Administration regulation preempted conflicting state law). An interesting question, but one beyond the scope of this Article, is whether special evidence of congressional intent might be required to evaluate an agency's authority in the case where the agency could have chosen between two equally effective approaches to implement a statute, and one approach preempts state law while the other does not.

[26] An agency declaration of "field preemption" is not out of the question, however. The Department of Homeland Security, for now, has declined to claim that its chemical plant security regulations occupy the field. *See* Chemical Facility Anti-Terrorism Standards, 72 Fed. Reg. 17,688, 17,727 (Apr. 9, 2007)

discussed in greater detail below, such claims of obstacle preemption can eventually amount to complete preemption of related state laws.

It is worth looking at a few such agency actions in detail. As the Introduction mentions, in late December 2006, the Department of Homeland Security issued a proposed chemical plant security rule stating that it possessed the authority to declare a state law preempted, despite Congress's initial decision not to resolve the question whether the agency possessed preemption authority.[27] The underlying statute, the Homeland Security Appropriations Act of 2007, gave the Department of Homeland Security interim authorization to regulate the security of high-risk chemical facilities by setting "risk-based" standards; prior to the addition of a savings clause the following year, the statute did not speak expressly to state law preemption.[28] New Jersey, meanwhile, which has seven high-risk chemical plants within its borders, is requiring a wide variety of chemical plant operators to consider using "inherently safer technologies" in order to minimize the impact of any successful terrorism effort.[29] In the proposed rule, the Department of Homeland Security took the position that it needed to be able to balance terrorism risk reduction against flexibility, and it reserved the right (on request from a chemical facility or a state) to declare preempted any state law striking a different balance.[30] The rule incorporated a "preemption procedure."[31] Clearly contemplated in the rule was the prospect of a state terrorism risk reduction law being preempted because it is not adequately "flexible." In response to political pressure from the New Jersey congressional delegation, the Department of Homeland Security, in its interim final rule, issued in April 2007, backed off to some degree[32] by stating, "While we have not canvassed all existing state laws and regulations, currently we have no reason to conclude that any such non-Federal measure is being applied in a way that would impede the performance standards or other provi-

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(to be codified at 6 C.F.R. pt. 27) (final rule) ("The Department does not view its regulatory scheme as one which so fully occupies the field as to pre-empt any state law . . . .").

[27] *See* Chemical Facility Anti-Terrorism Standards, 71 Fed. Reg. 78,276, 78,293 (Dec. 28, 2006) (proposed rule).

[28] *See* Department of Homeland Security Appropriations Act, 2007, Pub. L. No. 109-295, § 550, 120 Stat. 1355 (2006). A savings clause was added in the 2008 appropriations legislation. *See supra* note 7.

[29] *See* Ben Geman, *N.J. Sets New Rules, as Congress Eyes Federal Authority*, E&E NEWS, Mar. 16, 2007.

[30] *See* Chemical Facility Anti-Terrorism Standards, 71 Fed. Reg. at 78,293.

[31] *See id.* at 78,302 (proposed language for 6 C.F.R. § 27.405).

[32] This course of events might perhaps illustrate a different point as well. Perhaps any truly significant federalism issues raised by federal preemption can simply be raised through the political process, and no presumption against preemption is required to protect state regulatory autonomy from agency incursion. If so, however, this argument would also eliminate the basis for a presumption against preemption.

sions of Section 550 and this Interim Final Rule."[33] The Department declined to state with any greater clarity what sort of state law might be preempted in the future, but it nonetheless set up a submissions procedure that would result in the Department issuing opinions on whether particular state laws might, among other things, "frustrate" federal objectives.[34]

In 2001, the Office of the Comptroller of the Currency issued a rule stating that state laws generally would not apply to national bank operating subsidiaries, including subsidiaries engaged in real estate lending.[35] It amplified that with more particular statements, including a 2003 determination that the Georgia Fair Lending Act, as well as state consumer protection laws more generally, would not apply to national banks' real estate lending, and finally, a 2004 notice-and-comment rule specifying which state laws would and would not apply to national banks and operating subsidiaries.[36] Many states had enacted predatory mortgage lending laws, in addition to other consumer protection laws, and they wished to apply these laws to all entities engaged in mortgage lending, including national bank subsidiaries (incorporated under state law). Meanwhile, the OCC's own regulation of banks to protect consumers had faced some sharp criticism.[37] In issuing the 2003 preemption notice, the agency did not rely on the structure or language of the National Bank Act but instead on its general statutory authority to prescribe "restrictions and requirements" on real estate lending by regulation or order.[38] The OCC reasoned that it already regulated "predatory and abusive lending practices,"[39] and that permitting further state law requirements would "obstruct, or for practical purposes, prevent, national banks from making certain types of real estate loans, causing an overall reduction in credit available to subprime borrowers. . . . [possibly including] creditworthy subprime borrowers."[40] The agency struck its own balance be-

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[33] *See* Chemical Facility Anti-Terrorism Standards, 72 Fed. Reg. 17,688, 17,727 (Apr. 9, 2007) (to be codified at 6 C.F.R. pt. 27) (final rule).

[34] *Id.* at 17,739 (to be codified at 6 C.F.R. 27.405).

[35] *See* Investment Securities; Bank Activities Operations; Leasing, 66 Fed. Reg. 34,784, 34,788 (July 2, 2001) (codified at 12 C.F.R. pts. 1, 7, 23 (2002)).

[36] *See* Preemption Determination and Order, 68 Fed. Reg. 46,264, 46,264 (Aug. 5, 2003); Bank Activities and Operations; Real Estate Lending and Appraisals, 69 Fed. Reg. 1904 (Jan. 13, 2004) (codified at 12 C.F.R. §§ 7.4007–7.4009, 34.3–34.4 (2005)) (national bank activities).

[37] *See, e.g.*, Arthur E. Wilmarth, Jr., *The OCC's Preemption Rules Exceed the Agency's Authority and Present a Serious Threat to the Dual Banking System and Consumer Protection*, 23 ANN. REV. BANKING & FIN. L. 225, 350–56 (2004) (suggesting that the OCC has not adequately acted on consumers' behalf). The OCC itself acknowledged the criticism in its 2001 rule. *See* Investment Securities; Bank Activities Operations; Leasing, 66 Fed. Reg. at 34,788 (reporting comments that federal oversight of national bank operating subsidiaries is perceived as inadequate).

[38] 12 U.S.C. § 371(a) (2000) (allowing real estate lending by national banking associations but "subject to . . . such restrictions and requirements as the Comptroller of the Currency may prescribe by regulation or order").

[39] *See* Preemption Determination and Order, 68 Fed. Reg. at 46,269.

[40] *See id.* at 46,271.

tween increasing consumer protection and reducing the availability of credit, and decided that state laws striking a different balance should be preempted. As mentioned above, the Supreme Court held that the National Bank Act was sufficient to preempt these state laws to the extent they might apply to national bank operating subsidiaries, including subsidiaries incorporated under state law.[41] The OCC's reasoning is nonetheless an instructive example.

Other such efforts at agency preemption have followed a similar sort of analysis, although they may have appeared in preambles or other statements without the legal force of a notice-and-comment rule. In January 2006, the Food and Drug Administration slipped a preemptive statement into the preamble of its rulemaking on the format of prescription drug labels. The statement says that the federal pharmaceutical regime preempts state agencies and courts from requiring any additional information from pharmaceutical companies besides what is on the federally approved label, whether through regulatory requirements for supplemental pharmaceutical safety information, such as disclosure of clinical test results, or through tort claims for failure to warn.[42] The authorizing statute says nothing about preemption, and earlier FDA regulations contemplated manufacturers going beyond the initially approved label to strengthen warnings.[43] In taking its 2006 preemption position, however, the FDA reasoned that it was "expert," and that its regulation was "comprehensive" and based on a thorough scientific investigation of pharmaceutical risks.[44] The FDA argued that it "interprets the [A]ct to establish both a 'floor' and a 'ceiling,'" barring states from requiring any further information not already on the FDA-approved label.[45] The FDA suggested that more information might not necessarily be

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[41] *See* Watters v. Wachovia Bank, N.A., 127 S. Ct. 1559, 1570–73 (2007).

[42] *See* Requirements on Content and Format of Labeling for Human Prescription Drug and Biological Products, 71 Fed. Reg. 3922, 3934 (Jan. 24, 2006) ("FDA approval of labeling under the [A]ct, whether it be in the old or new format, preempts conflicting or contrary State law."); *see also id.* at 3935 ("Given the comprehensiveness of FDA regulation of drug safety, effectiveness, and labeling under the [A]ct, additional [disclosure] requirements . . . are not necessarily more protective of patients. Instead, they can erode and disrupt the careful and truthful representation of benefits and risks that prescribers need to make appropriate judgments about drug use.").

[43] *See* 21 C.F.R. § 201.57(e) (2005) (revised 2006) ("The labeling shall be revised to include a warning as soon as there is reasonable evidence of an association of a serious hazard with a drug . . . ."); *see also* 21 C.F.R. 201.80(e) (2007) (same).

[44] Requirements on Content and Format of Labeling for Human Prescription Drug and Biological Products, 71 Fed. Reg. at 3934.

[45] *Id.* at 3935. The preamble statement contains careful caveats: "FDA believes that State laws conflict with and stand as an obstacle to achievement of the full objectives and purposes of [f]ederal law when they purport to compel a firm to include in labeling or advertising a statement that FDA has considered and found scientifically unsubstantiated." *Id.* In this case, the drug might be considered misbranded. Even if a drug would not be misbranded as a result of state law obligations, and even if the FDA has not specifically considered particular evidence that a state might wish a pharmaceutical company to include on a label, the FDA's position appears to be that federal law preempts state claims "that a sponsor breached an obligation to warn by failing to include contraindications or warnings that are not

"protective of patients," but instead could "erode and disrupt the careful and truthful representation of benefits and risks that prescribers need to make appropriate judgments about drug use. Exaggeration of risk could discourage appropriate use of a beneficial drug."[46]

In August 2005, the FDA wrote a letter to the California Attorney General. The letter concerned the Attorney General's lawsuit under California's Proposition 65 against tuna companies. The lawsuit sought warning labels on tuna cans regarding mercury in tuna. The FDA's letter, which was copied to the judge in the suit, stated that although the FDA had posted warnings regarding mercury in tuna on its website, the FDA had deliberately exercised its authority in a "nuanced" way in order to avoid "overexposing consumers to warnings."[47] It then took the position that California was federally preempted from requiring any further warnings because extra "Proposition 65 warnings [would] frustrate this . . . approach."[48] The judge deferred to the FDA's position and dismissed the suit.

That same month, the Transportation Department issued a proposed rule setting new "roof crush" safety standards for automobiles.[49] In the preamble to that proposed rule, the agency took the position that its proposed safety standards represented a "careful balance . . . among a variety of considerations and objectives regarding rollover safety," including other safety measures and costs.[50] As a consequence, the agency reasoned that any different requirements at the state level—including state tort law—would undermine agency goals and would thus be preempted.[51]

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supported by evidence that meets the standards set forth in this rule," including 21 C.F.R. §§ 201.57(c)(5) and (c)(7). Requirements on Content and Format of Labeling for Human Prescription Drug and Biological Products, 71 Fed. Reg. at 3936. The former section requires inclusion of "known hazards"; the latter the inclusion of the "overall adverse reaction profile of the drug." The FDA's position assumes that "given the comprehensiveness of FDA regulation of drug safety, effectiveness, and labeling under the [A]ct, additional requirements for the disclosure of risk information are not necessarily more protective of patients." *Id.* at 3935.

[46] Requirements on Content and Format of Labeling for Human Prescription Drug and Biological Products, 71 Fed. Reg. at 3935.

[47] *See* Letter from U.S. Food & Drug Administration to Bill Lockyer re a Suit Filed on June 21, 2004, *People of the State of California v. Tri-Union Seafoods* (Aug. 12, 2005), *available at* www.cfsan.fda.gov/~dms/fl-ltr65.html.

[48] *Id.* The letter also argued that the tuna cans might be considered misbranded under federal law if California required the labels, *see id.*, a dubious position in view of the FDA's own consumption advisories posted on the Internet for canned tuna. The FDA has taken a similar position in a tort lawsuit brought by a mercury-poisoned woman, and the district court accepted the FDA's view that state common law claims were preempted. *See* Fellner v. Tri-Union Seafoods LLC, No. 07-1238, 2007 WL 87633, at *6–7 (D.N.J. Jan. 9, 2007), *appeal filed*, No. 07-1238 (3d Cir. Jan. 23, 2007) (pending; argued February 2008).

[49] *See* Federal Motor Vehicle Safety Standards; Roof Crush Resistance, 70 Fed. Reg. 49,223 (Aug. 23, 2005) (proposed rule).

[50] *Id.* at 49,245.

[51] *See id.* at 49,245–46; *see also* Final Rule: Standard for the Flammability (Open Flame) of Mattress Sets, 71 Fed. Reg. 13,472, 13,496–97 (Mar. 15, 2006) (codified at 16 C.F.R. pt. 1633 (2007)) (tak-

In my earlier article, *Chevron and Preemption*, I argued that an agency's interpretation of the scope of expressly preemptive statutory language should not receive *Chevron* deference in the courts, largely because of concerns about institutional expertise.[52] I did not, however, address the antecedent question that these cases present regarding the agency's authority to preempt. In the examples above, the statute contains no language directly relating to the question of preemption, and there is no direct conflict, in the sense that compliance with both federal and state law is not a physical impossibility.[53] The agency nonetheless declares through a rule or some other statement (such as a preamble or interpretive rule) that state law is impliedly preempted because it frustrates federal objectives.[54] The primary aim of these rules and preambles is to "settle the scope of federal preemption."[55]

On review, courts have sometimes framed the relevant question as whether these actions merit application of the *Chevron* doctrine.[56] Implicit in this framing is a judicial characterization of the agency's decision (sometimes matched by the agency's own express characterization) as an authorized legal interpretation to which some form of judicial deference—either *Chevron* or *Mead-Skidmore* deference—is due. That was the case both in the lower court opinion and in the briefing filed in *Watters v. Wachovia Bank, N.A.*, the 2006 case involving the OCC preemption of the application of state law to non-bank operating subsidiaries chartered under state law.[57] (As noted, the *Watters* Court did not, however, reach the question of what effect the agency interpretation should be given, finding instead that the statute clearly preempted state law.[58]).

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ing position that the mattress standard preempts not only state "standards," as provided by statute, but also state common law).

[52] *See* Mendelson, *supra* note 15, at 779–91.

[53] *E.g.*, Gade v. Nat'l Solid Wastes Mgmt. Assoc., 505 U.S. 88, 98 (1992) (defining conflict preemption as including the situation where compliance with both state and federal law is a physical impossibility).

[54] *E.g.*, Geier v. Am. Honda Motor Co., 529 U.S. 861, 881 (2000) (accepting the agency's argument that a tort claim for failure to install airbags would interfere with the federal goal of encouraging manufacturers to develop a "variety and mix" of safety devices); *see also Gade*, 505 U.S. at 102 (finding state worker safety laws impliedly preempted as conflicting with the federal goal of avoiding duplicative regulation, though not the federal goal of encouraging worker safety). The contrast here is direct conflict preemption—where compliance with both a federal rule and a state law is impossible. Under those circumstances, the federal rule clearly prevails. This outcome seems consistent with congressional intent that an agency's regulations be effective.

[55] Watters v. Wachovia Bank, N.A., 127 S. Ct. 1559, 1583 n.24 (2007) (Stevens, J., dissenting).

[56] *E.g.*, Wachovia Bank, N.A. v. Watters, 431 F.3d 556, 560 (6th Cir. 2005) (framing the issue as a *Chevron* question), *aff'd on other grounds*, 127 S. Ct. 1559 (2007).

[57] *See supra* text accompanying notes 1, 3–4.

[58] *See Watters*, 127 S. Ct. at 1571–72. The Department of Homeland Security expressly took this line in its proposed chemical plant security rulemaking. *See* Chemical Facility Anti-Terrorism Standards, 71 Fed. Reg. 78,276, 78,292–93 (Dec. 28, 2006) (proposed rule) (arguing that the "gap" in the statute is to be filled as the agency interprets the "ambiguit[ies]," and that *Chevron* deference is due).

This approach, however, too readily makes the assumption that an agency has some intrinsic power to preempt state law. Before reaching the question whether an agency's decision (or "interpretation") should receive deference, a court should examine whether the agency is even authorized to preempt state law. The approach would be analogous to that taken by the Supreme Court in *Gonzalez v. Oregon*,[59] the medical marijuana case. In that case, the Court declined to defer to the agency, but instead concluded that the Attorney General's rule prohibiting the use of prescribed drugs in connection with physician-assisted suicide was not authorized under the Controlled Substance Act's limited rulemaking provisions.[60]

Even for a preemptive statement that does not, like a rule, have the "force and effect of law," the authority question is also relevant to how much attention a court should pay the agency statement. For example, in *United States v. Mead*, the Supreme Court named the "agency's generally conferred authority" as relevant to the extent of deference an agency's legal interpretation will receive in court.[61]

As discussed in greater detail below, the best approach is a presumption against agency preemption. I turn now to an examination of congressional intent, institutional competence, and other concerns that, in my view, warrant the adoption of such a presumption.

III. AGAINST THE AUTHORITY TO PREEMPT

Let us begin by focusing on congressional intent. In that case, the combination of statutory preemption language with a broad delegation of rulemaking authority to an agency might lead us to conclude that Congress meant the agency to be able to define the preemptive scope of the statute. But what if a statute grants an agency broad rulemaking authority but includes no language regarding preemption? Should we read the plain language of a general delegation of rulemaking authority as subsuming anything an agency chooses to do, including declaring that state law frustrates federal goals? I suggest that we adopt a presumption against agency preemption. Such a presumption makes sense because it reduces the risk that agencies will possess excessive power to preempt state law; it also is most consistent with Congress's likely intent.

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[59] 546 U.S. 243 (2006).

[60] *See id.* at 257–60. The court reasoned that the agency had only limited powers to issue rules relating to "registration" and "control," and that the agency accordingly lacked the authority to define standards of medical practice.

[61] *See* United States v. Mead, 533 U.S. 218, 228–29 (2001); *see also* Barnhart v. Walton, 535 U.S. 212, 222 (2002) (mentioning an agency's "power" as relevant to the extent of judicial deference afforded to agency legal interpretations).

A. First-Line Arguments from Congressional Intent

First, one might infer that an agency lacks authority to preempt state law from the lack of express statutory language authorizing the agency to do so. The argument would be that Congress's failure to expressly authorize an agency to preempt state law generally is going to be a deliberate decision. For example, with respect to preemption in general, if a regulatory statute does not include preemption language, chances are that Congress either intended not to preempt state law or did not debate the issue. Indeed, the U.S. Advisory Commission on Intergovernmental Relations (ACIR) reported in the early 1990s that express preemption statutes far outnumber express savings clauses.[62] That statistic supports the ACIR's conclusion that statutory preemption is on the rise.[63] Further, as Roderick Hills has argued, regulated entities often press for express preemption language, as with federal motor vehicle safety standards and fuel efficiency standards.[64] These facts suggest that the default legislative expectation—when explicit language is lacking—is no preemption. That same assumption should carry over to the agency setting: if Congress does not intend preemption, Congress should be held not to intend agency preemption. The Supreme Court has applied a similar approach in the setting of the avoidance canon. In general, the Supreme Court declines to "lightly assume that Congress intended to . . . usurp power constitutionally forbidden it,"[65] and thus will choose an available constitutional construction of a statute over an unconstitutional one. That canon has been extended to assume that just as Congress generally does not intend to usurp constitutionally forbidden power, "Congress [also] does not casually authorize administrative agencies to interpret a statute to push the limit of congressional authority," especially where the interpretation "alters the federal-state framework."[66]

We might draw similar conclusions from the characteristics of the legislative process. If the widespread understanding of general delegations to federal agencies was that agencies would thereby obtain the authority to

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[62] *See* U.S. ADVISORY COMM'N ON INTERGOVERNMENTAL RELATIONS, FEDERAL STATUTORY PREEMPTION OF STATE AND LOCAL AUTHORITY: HISTORY, INVENTORY, AND ISSUES 14–15 (1992), *available at* http://www.library.unt.edu/gpo/acir/Reports/policy/a-121.pdf (identifying 439 federal preemptive statutes, compared with 34 statutes either clarifying state and local authority where preemption might otherwise result or reducing preexisting federal preemption).

[63] *See id.*

[64] *See* Roderick M. Hills, Jr., *Against Preemption: How Federalism Can Improve the National Legislative Process*, 82 N.Y.U. L. REV. 1, 29 (2007).

[65] Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Const. Trades Council, 485 U.S. 568, 575 (1988).

[66] Solid Waste Agency of N. Cook County v. U.S. Army Corps of Eng'rs, 531 U.S. 159, 172–73 (2001). Admittedly, that case involved both a potential alteration of the state-federal framework and a constitutional question involving Congress's Commerce Clause authority. As with the "clear statement" doctrine, however, where Congress is assumed, absent a clear statement, not to wish to present a court with a constitutional question, the presumption against preemption amounts to an assumption that Congress does not wish the courts to preempt state law absent a clear statement.

preempt state law, state agencies and state organizations likely would seek savings clauses more often, just as they get involved when statutory provisions expressly preempt state law.[67] The relatively small number of savings clauses suggests that such an understanding of the meaning of these general delegations is not the widely held one. Finally, Congress drafts legislation against the backdrop of the presumption against preemption, which has been a well-established canon of construction in judicial opinions for several decades.[68] It is reasonable to think that legislative drafters would be aware of and attentive to the operation of such a canon.[69] Accordingly, if the legislative default is not to preempt state law, it seems reasonable to assume that Congress would not wish agencies to preempt state law either.[70]

B. General Delegations of Authority and Institutional Competence

Although these arguments weigh in favor of carrying the presumption against preemption into the agency setting, there is surely a serious response based on the general delegation itself. One might say that in delegating general power to an agency, Congress must have intended for the agency to make the choices required to implement the program successfully. If state law preemption would make the program better achieve congressional goals, so the argument would go, perhaps it makes sense to assume that the agency—a specialized, knowledgeable institution—should be able to declare the law preempted. So, on the one hand, Congress likely does not intend to preempt state law; on the other hand, Congress wants its agencies to carry out its programs effectively, which might sometimes mean the preemption of state law.

It does not answer the question simply to say that because such a delegation of authority to an agency is general, it should be read to cover any sort of agency authority, including preemption. Despite their phrasing, as discussed in greater detail below, general delegations of authority have never been read as truly limitless.[71]

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[67] *E.g.*, *supra* note 5 and accompanying text (discussing the debate around a bill authorizing the Department of Homeland Security to set chemical plant security standards).

[68] *See* Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 231 (1947); Napier v. Atl. Coast R.R. Line Co., 272 U.S. 605, 611 (1926) ("The intention of Congress to exclude states from exerting their police power must be clearly manifested.").

[69] *See also* Victoria Nourse & Jane Schacter, *The Politics of Legislative Drafting*, 77 N.Y.U. L. REV. 575, 600–05 (2002) (suggesting that legislation is often drafted with knowledge of the various canons of construction).

[70] As I have discussed elsewhere, the presumption against preemption could be defended as an assumption about the median legislator's preferences, but it also may well represent the Judiciary's own emphasis on preserving state regulatory autonomy and federalism, and the related goal of avoiding incidental statutory interference with state regulatory autonomy. Mendelson, *supra* note 15, at 747–50, 758. Similarly, reading an agency's authorization broadly to allow it to preempt state law would risk the same sort of incidental interference with state regulatory autonomy and with the balance of state and federal power.

[71] *See infra* text accompanying notes 111–15.

There are several strong reasons not to stretch a broad delegation to include the authority to declare a state law preempted. To see this, first consider some of the justifications for the presumption against preemption of state law. Federalism advocates suggest several reasons to protect state autonomy to regulate. First, we may value the authority of states to respond to particular preferences held by their residents.[72] For example, a state's residents may value highly the ability to be informed of potential dangers presented by consumer products. Second, federalism, including a state's enactment of its own laws, also may stimulate citizen participation in self-governance, on the theory that it is easier to participate at a level of government closer to one's home.[73] Third, state policymaking experiments can be a useful source of information to other states and to the federal government.[74] For example, to address climate change, seven northeastern states have formed the Regional Greenhouse Gas Initiative to limit power plant carbon dioxide emissions.[75] Continuing its historic leadership in regulating automotive pollution, the California legislature has voted to institute the first-ever limits on greenhouse gas emissions from cars.[76] Sixteen states—representing a third of the new car market—have stated that they will adopt the California standards.[77] Besides the other states that are following California's lead, the federal government has begun to consider regulating mo-

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[72] *See, e.g.*, Larry D. Kramer, *Putting the Politics Back into the Political Safeguards of Federalism*, 100 COLUM. L. REV. 215, 222 (2000) (arguing that federalism is best justified "because preferences for governmental policy are unevenly distributed among the states and regions of the nation, [so] more people can be satisfied by decentralized decisionmaking").

[73] *See, e.g.*, Fed. Energy Reg. Comm'n v. Mississippi, 456 U.S. 742, 789 (1983) (O'Connor, J., concurring in part and dissenting in part) ("[F]ederalism enhances the opportunity of all citizens to participate in representative government."); Michael W. McConnell, *Federalism: Evaluating the Founders' Design*, 54 U. CHI. L. REV. 1484, 1510 (1987) ("The federal government is too distant and its compass too vast to permit extensive participation by ordinary citizens . . . ."). *But see* Frank Cross, *The Folly of Federalism*, 24 CARDOZO L. REV. 1, 1–2 (2002) (suggesting that "federalist" values are really values of localism).

[74] *E.g.*, New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting) (describing states as "laborator[ies]").

[75] The states are Connecticut, Delaware, Maine, New Hampshire, New Jersey, New York, and Vermont. *See* Lucy Kafanov, *Climate, Deluge of Comments Delays Release of RGGI Rule*, GREENWIRE, July 24, 2006.

[76] *See* Dan Berman, *Supreme Court "Pre-Emption" Cases Cast Shadow over Enviro Regs*, GREENWIRE, Oct. 5, 2007. Shortly before this Article went to press, the Environmental Protection Agency denied California the required waiver for its motor vehicle greenhouse gas emissions standards under the Clean Air Act. *See* Environmental Protection Agency, California State Motor Vehicle Pollution Standards; Notice of Decision Denying a Waiver of Clean Air Act Preemption for California's 2009 and Subsequent Model Year Greenhouse Gas Emission Standards for New Motor Vehicles, 73 Fed. Reg. 12,156 (Mar. 6, 2008). California is seeking judicial review. *See* Alex Kaplun, *Climate: Calif., Groups Sue EPA over Waiver Decision*, E&E NEWS PM, Jan. 2, 2008.

[77] See Pew Center on Global Climate Change, Vehicle Greenhouse Gas Emissions Standards, *available at* http://www.pewclimate.org/what_s_being_done/in_the_states/vehicle_ghg_standard.cfm (last visited May 11, 2008). This covers over one-third of the new car market. *See* Berman, supra note 76.

tor vehicle greenhouse gas emissions.[78] Fourth, preserving a significant degree of autonomy for state governments divides power and can be seen as part of the Framers' efforts to ensure that no single government institution accumulates too much authority.[79]

Beyond these arguments in favor of state regulatory autonomy, a number of scholars argue that state regulators serve as participants in a national dialogue on appropriate policy, spawning a sort of competition between federal and state governments.[80] By drawing attention to problems missed by national regulators and by choosing solutions different from those of national regulators, state regulators can prompt the public to hold the national government more accountable for its chosen solutions or for inaction.[81] For example, the actions of states on climate change, where the federal government has lagged, have not only helped inform national action, but also have prompted a louder call by the public for such action.[82]

By requiring a showing that Congress clearly wishes to preempt state law, the presumption against preemption erects an additional barrier before state law can be held to be preempted and thus gives some protection to state regulatory autonomy. Beyond this, the presumption also helps assure that legislative decisions to preempt are thoughtful and deliberate rather than simply "incidental."[83] The presumption thus increases the chance that interested parties—especially state governments or associations of state officials—will be involved in any process that results in the preemption of state law. Where does agency preemption fit in? Compared with statutory preemption, the sort of agency preemption I describe above could result in a far quieter, but still highly significant, interference with state autonomy to regulate. Moreover, agencies possess great discretion to implement their programs under current regulatory statutes. Combining that statutory discretion with current approaches to preemption could result in an agency possessing the authority to preempt nearly any relevant state law that makes a policy choice different from that made by the agency. The potential

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[78] *See, e.g.*, Alex Kaplun, *Energy Policy: White House Fuels Plan Not Likely to Alter Congressional Agenda*, ENV'T & ENERGY DAILY, May 15, 2007.

[79] *E.g.*, THE FEDERALIST NO. 51 (James Madison) (the rights of the people are best protected in a system in which federal and state governments control each other); Evan H. Caminker, *Judicial Solicitude for State Dignity*, ANNALS AM. ACAD. POL. & SOC. SCI., Mar. 2001, at 81, 89 (noting the argument that the existence of states serves as a check against the excessive assertion of power by Congress).

[80] *See generally* Robert Schapiro, *Polyphonic Federalism: State Constitutions in the Federal Courts*, 87 CAL. L. REV. 1409 (1999); Hills, *supra* note 64, at 2–3.

[81] *See, e.g.*, Kirsten H. Engel, *Harnessing the Benefits of Dynamic Federalism in Environmental Law*, 56 EMORY L.J. 159, 163 (2006) ("[States can] 'check' the interest group capture of policymakers at the federal level.").

[82] *See* Hills, *supra* note 64, at 2–3; Schapiro, *supra* note 80; *cf.* Erwin Chemerinsky, *Empowering States: The Need to Limit Federal Preemption*, 33 PEPP. L. REV. 69, 74 (2005) ("The genius in having multiple levels of government is that if one fails to act, another can step in to solve the problem."); Engel, *supra* note 81, at 168–69.

[83] *See* Mendelson, *supra* note 15, at 755.

breadth of that power, combined with the typical lack of agency expertise on federalism issues, strongly supports the adoption by courts of a presumption against agency preemption.

Consider current statutes delegating power to federal agencies. Federal agencies typically are not tasked with single-mindedly following one goal, but instead are instructed to balance that goal against other concerns (such as cost minimization). For example, under the Safe Drinking Water Act, the EPA is to set maximum contaminant levels in drinking water. The EPA is to identify not only the "goal"—the level at which "no known or anticipated adverse effects on the health of persons occur"—but to identify a standard that comes as close as possible to that goal after feasibility and cost are taken into account.[84]

These sorts of standards are widely recognized as increasing the agency's discretion to choose among possible regulatory standards. Where a statute requires that, for example, both health benefits and costs be considered, an agency decision will be upheld by the courts as long as the agency gave actual consideration to the particular goals.[85] An agency's discretion is broad even under the most determinate-sounding requirement a statute could set—that calculated benefits of a particular standard exceed calculated costs. The agency can set a standard that provides a large benefit (perhaps accompanied by a large cost, but one that is less than the benefit) or a small benefit (accompanied by a small cost that is less than the benefit). For example, in setting effluent limits for conventional water pollution, the EPA is directed to base the limits on the best conventional pollutant control technology by considering a laundry list of factors: the "reasonableness of the relationship between the costs of attaining a reduction in effluents and the effluent reduction benefits derived, . . . the age of equipment and facilities involved, the process employed, . . . and such other factors as the Administrator deems appropriate."[86] Under many circumstances, an agency might have more overall discretion under such a statute than under a provision such as section 109 of the Clean Air Act, which requires the EPA to set national ambient air quality standards "requisite to protect public health" with "an adequate margin of safety."[87]

Not all goals, of course, have equal status. For example, the primary goal of Clean Water Act pollution limits is to improve environmental qual-

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[84] *See* 42 U.S.C. 300g-1(b)(4)(A) (2000).

[85] *See* Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402, 416–17 (1971).

[86] 33 U.S.C. § 1314(b)(4)(B) (2000).

[87] 42 U.S.C. § 7409(b)(1) (2000). That reconciling a multiplicity of goals can increase, rather than reduce, an agency's discretion was recognized by the D.C. Circuit. *E.g.*, Int'l Union v. OSHA, 37 F.3d 665, 668 (D.C. Cir. 1994) (looking at safety and feasibility does not adequately "cabin[] the agency's discretion" for nondelegation doctrine purposes).

ity.[88] One could not say that the goal of the Act is to reduce cost or increase flexibility.[89] These latter goals are best understood as subsidiary, selected to moderate the primary one. Similarly, although the Federal Food, Drug and Cosmetic Act does place limits on the FDA's ability to set food safety standards, the primary goal is to increase food safety.[90]

Even when a statute contains a clear primary goal, agencies are often asked to moderate their implementation of it. For example, the Occupational Safety and Health Administration is charged with promulgating occupational safety and health standards that are "*reasonably necessary* or *appropriate* to provide safe or healthful employment and places of employment."[91] And the Clean Air Act section quoted above does not authorize the single-minded pursuit of public health, but instead requires the agency to temper its standard—only that standard "necessary" to protect public health, and no more.[92]

The sorts of agency preemption analyses described above are notable because the agency declares the state law preempted based on these countervailing or moderating goals of the statute, rather than the primary ones. An early example of this sort of approach—an approach followed in many of the examples cited above[93]—is the Department of Transportation's successful Supreme Court argument in favor of preempting state tort law in *Geier v. American Honda Motor Co.*[94] In the *Geier* case, the Transportation Department argued to the Supreme Court that in not requiring airbags in all cars and instead requiring a "gradual passive restraint phase-in," it had balanced safety (the primary goal of the statute) with flexibility to use alternative restraint systems, hence increasing public acceptance of the new requirements and (relatedly) reducing costs to consumers by reducing manufacturer costs. Even though the more stringent demands of state tort law might serve the statutory goal of safety, the Department of Transportation argued successfully for the first time in litigation—the argument did not appear in the rulemaking—that a state tort claim for defective design would undermine the (conflicting) goal of flexibility.[95] The argument that

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[88] *See* 33 U.S.C. § 1251(a) (2000) ("The objective of this chapter is to restore and maintain the chemical, physical, and biological integrity of the Nation's waters. . . . [I]t is the national goal that the discharge of pollutants into the navigable waters [is to] be eliminated by 1985 . . . .").

[89] *Cf. id.* (mentioning neither cost nor flexibility).

[90] *E.g.*, 21 U.S.C. § 342(a) (2000) (defining adulterated food, which can be the subject of FDA enforcement, as bearing any "poisonous or deleterious substance which may render it injurious to health").

[91] 29 U.S.C. § 652(8) (2000) (emphasis added).

[92] Whitman v. Am. Trucking Ass'ns, Inc., 531 U.S. 457, 475–76 (2001) (noting that the standard requires protection "not lower or higher than is necessary").

[93] *See supra* text accompanying notes 28–51.

[94] 529 U.S. 861 (2000). *See also* Buckman Co. v. Plaintiffs' Legal Comm., 531 U.S. 341 (2001). In *Buckman*, the Supreme Court found a state law claim based on fraud-on-the-FDA to be preempted in part because it might interfere with the FDA's ability to take a "measured" response to monitoring the information filed with the agency. *Id.* at 349–53.

[95] *Geier*, 529 U.S. at 881–82.

state tort law served as an "obstacle" to the goals of federal law and was thus preempted succeeded despite an express statutory savings clause for common law.[96]

If agencies are permitted to follow the approach of *Geier*, they could freely preempt relevant state law by pointing to *any* statutory goal that might be undermined by state law. An agency can nearly always identify some statutory goal—perhaps opposed to or in tension with the statute's primary goal—with which the state law will conflict. For example, imagine that the Consumer Product Safety Commission (CPSC), in order to serve its statutory mission of protecting consumer safety, recalls all garden hoses leaching levels of lead over fifteen parts per billion into water.[97] Lead can present a threat to people who might drink from the hose or swim in pools filled with water from it. The CPSC might take the position that the recall level balances the need for flexibility in garden hose manufacturing with the need to protect people from the neurological effects of lead ingestion. One could imagine that the CPSC, *if* it possessed a general delegation of rule-making authority, could attempt to declare preempted a state law that undermines consumer safety, for example, by allowing companies to credit costs of required recalls against their state income taxes. If a *Geier*-type approach were followed, though, one could also imagine a hypothetical CPSC attempting to preempt a more protective state law—say one that seeks, as California law does, to require labeling of garden hoses that leach more than five parts per billion lead[98]—on the ground that it undermines a federal choice in favor of garden hose manufacturing flexibility.

The examples given above all represent *Geier*-type approaches. For example, in the FDA's pharmaceutical labeling preamble statement, the FDA argued that its regulatory goal was to inform consumers (the thrust of the Federal Food, Drug, and Cosmetic Act labeling provisions), but only in a reasonable way.[99] Too much information, the FDA reasoned, could be bad by possibly deterring consumer use of valuable drugs. Because state tort law could require more information, albeit in the service of safety, it thus would undermine this goal.[100]

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[96] The relevant savings clause appears at 15 U.S.C. § 1397(k) (2000) and states that "[c]ompliance [with the federal standard] 'does not exempt any person from any liability under common law.'"

[97] *E.g.*, ABC News, *Dangerous Lead Levels Found in Some Garden Hoses*, July 12, 2007, *available at* http://abcnews.go.com/GMA/Consumer/story?id=3369894; *see also* Louise Story, *Lead Paint Prompts Mattel to Recall 967,000 Toys*, N.Y. TIMES, Aug. 2, 2007, at C1 (describing manufacturer's voluntary recall).

[98] *See, e.g.*, News Release, Center for Environmental Health, Lawsuit Wins Protection for Children from Lead Risks in Garden Hoses (Aug. 9, 2004), http://www.cehca.org/news.htm.

[99] *See* Requirements on Content and Format of Labeling for Human Prescription Drug and Biological Products, 71 Fed. Reg. 3922, 3930–31 (Jan. 24, 2006) (codified at 21 C.F.R. pts. 201, 314, 601 (2007)).

[100] The FDA's goal of avoiding misbranding, which it also identified, does not justify implied preemption. While false labeling claims surely are to be avoided, they are already prohibited by federal misbranding requirements. To the extent state tort law or state labeling requirements could be under-

In the Transportation Department's "roof crush" rulemaking, the Transportation Department argued that state tort law, although it might conceivably increase roof safety, would subvert secondary goals against which the Transportation Department was balancing safety, including minimizing costs and dedicating resources to other automobile safety issues.[101] And in the Department of Homeland Security's proposed rule on antiterrorism chemical plant safety, the agency argued that although state law could conceivably increase chemical plant security notwithstanding the threat of terrorist attacks, state law could undermine the federal interest in preserving chemical facility flexibility.[102]

Of course, the agency would have to meet the usual requirements of reasoned decisionmaking.[103] Because statutes often contain significant numbers of "moderating" goals to which an agency could point, however, that might not be a strong constraint. Again, the Transportation Department's argument in *Geier* supplies an example.[104] In short, under this sort of reasoning and these sorts of statutes, federal agencies would have the power to preempt nearly any state law operating in the same arena as the federal law, as long as the agency can explain how the state law strikes a different balance of statutory objectives than the federal approach does. The result would be that at the agency's option, nearly any federal regulatory decision could become a unitary standard. The agency's program, rule by rule, could systematically come to occupy the field. Any state standard stronger than the federal one might be too costly, too informative, too overprotective, or possibly "unreasonable" (because, of course, the agency will say its own decision is "reasonable" within the meaning of any such statutory requirement). The agency would thereby transform a federal standard that otherwise might leave space for *some* state law into one that eventually leaves space for none.[105] This is particularly striking in areas such as con-

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stood to require misbranding, they would be preempted in any event as directly conflicting with federal law.

[101] *See* Federal Motor Vehicle Safety Standards; Roof Crush Resistance, 70 Fed. Reg. 49,223, 49,245–46 (Aug. 23, 2005) (proposed rule).

[102] *See* Chemical Facility Anti-Terrorism Standards, 71 Fed. Reg. 78,276, 78,293 (Dec. 28, 2006) (proposed rule) ("A state measure frustrating this balance [between security and flexibility] will be preempted."). The final rule was less explicit, but still preserved the Department's ability to make future arguments of this type. Chemical Facility Anti-Terrorism Standards, 72 Fed. Reg. 17,688, 17,727 (Apr. 9, 2007) (to be codified at 6 C.F.R. pt. 27) (final rule).

[103] *Cf.* Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29 (1983) (vacating a Transportation Department decision for failure to consider options developed in earlier rulemaking documents).

[104] *See supra* text accompanying notes 94–96.

[105] *See also* Robert R. Gasaway, *The Problem of Federal Preemption*, 33 PEPP. L. REV. 25, 36 (2005) (arguing that courts should find obstacle preemption of state law when the state law upsets a "delicate federal balance" set by Congress or by federal regulators in ratemaking, labor, and pharmaceutical cases).

sumer safety and regulation of in-state facilities, areas where states traditionally have been active.

The risk of interference with state regulatory autonomy imposed by agency preemption thus is especially pronounced. For example, courts consider "field preemption" claims, where a state is foreclosed from regulating altogether, to be very significant. A court will only rarely find that Congress has "occupied the field"—when the federal regulatory scheme is "so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it."[106] The agency decisions discussed so far do not claim "field preemption." As a practical matter, however, the decisions do, one by one, amount to a slow occupation of the field. This interference with state regulatory autonomy is significantly broader and more pronounced than it is, for example, in the case where it is impossible to comply with both state and federal regulation.

Moreover, this sort of complete preemption particularly impedes the usefulness of state regulatory autonomy. For example, recent scholars writing on federalism point out the value of having overlapping state and federal regulatory regimes.[107] There, the benefit claimed for federalism includes the overall improvement in policy that can come from state and federal regulators "competitively" attempting to address a particular problem.[108] The agency "obstacle" preemption described above, however, cuts back on that interaction. The agency takes the position that it has struck the correct balance among all the countervailing matters of policy, and so any different position taken by a state government is preempted as an "obstacle" to federal law. Voilà, no competition. As William Buzbee has argued, even partial "floor" preemption of state law still leaves significant room for states to respond to their citizens' different policy preferences and to reduce the ill effects of regulatory process pathologies at the federal level.[109] Complete preemption, of course, leaves no room.

States can, of course, complain that their regulatory autonomy is being cut back, as all fifty states publicly did in *Watters v. Wachovia Bank, N.A.*[110] However, even when states can raise the visibility of the preemption issue, what they continue to lose (or partially lose) while a preemption question is being determined is their ability to demonstrate their preferred policies by example. For instance, states might otherwise have been able to write consumer protection laws that apply to mortgage lenders, require more exten-

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[106] Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947) (citations omitted).

[107] *See supra* notes 72–82 and accompanying text.

[108] *See supra* notes 72–82; *see also* Hills, *supra* note 64.

[109] *See generally* William Buzbee, *Asymmetrical Preemption: Risk, Regulation, and the Floor/Ceiling Question*, 82 N.Y.U. L. REV. 1547 (2007) (arguing that while floor preemption still allows states to respond to poor federal regulatory decisions, complete preemption eliminates the states' ability to respond).

[110] *See supra* note 3 (noting that Michigan challenged the agency's position directly, and the other forty-nine states' attorneys general filed amicus briefs).

sive labeling for risks presented by consumer products, or, through the tort system, hold manufacturers responsible for failing to disclose more information to consumers about foods or drugs.

Beyond interference with state autonomy, the breadth of this agency preemption also raises legitimate questions about whether Congress can be assumed to have intended it. It seems hard to imagine that Congress would wish a general rulemaking delegation to include the power to do away with any relevant state law. A general delegation of authority to an agency is never intended to be completely limitless, of course. For example, a general statutory delegation to an agency would not carry with it an authorization to the agency to bypass other federal laws (or to interpret them as impliedly repealed by the general statutory delegation), no matter how effective that might make the program.[111] Nor would a general statutory delegation be perceived to carry with it the power to regulate in a way that raises constitutional questions.[112] The Supreme Court has stressed that an agency's general authority to issue such interpretations is particularly dubious where an "administrative interpretation alters the federal-state framework by permitting federal encroachment upon a traditional state power."[113] Indeed, courts have sometimes found that general delegations of authority represent less power for the agency than a specific (and presumably more thoughtfully contemplated) delegation represents.[114] Moreover, if state organizations anticipated that statutory language generally delegating authority to an agency could also grant the power to preempt state law, they would likely object vociferously during the legislative process.[115]

These sorts of agency actions are inconsistent with the concerns underlying the presumption against preemption because of the quality of agency deliberation. One might say that agency preemption does not raise the same sorts of concerns as statutory preemption because agencies, unlike Con-

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[111] *E.g.*, *In re* Stock Exchs. Options Trading Antitrust Litig., 317 F.3d 134, 149–50 (2d Cir. 2003) (declining to defer, under *Chevron*, to agency views on implied repeal); *cf.* Tyler v. United States, 929 F.2d 451, 456 (9th Cir. 1991) (declining to defer to an agency interpretation that would work an implied repeal); Monongahela Power Co. v. Alexander, 507 F. Supp. 385, 392 (D.D.C. 1980) (holding that the Army Corps lacked jurisdiction to act under section 404 of the Clean Water Act because the Clean Water Act did not impliedly repeal the Federal Power Commission Act).

[112] *See, e.g.*, Solid Waste Agency of N. Cook County v. U.S. Army Corps of Eng'rs, 531 U.S. 159, 172 (2001) ("Where an administrative interpretation of a statute invokes the outer limits of Congress'[s] power, we expect a clear indication that Congress intended that result.").

[113] *Id.*

[114] *See* United States v. Vogel Fertilizer Co., 455 U.S. 16, 24 (1982) (noting that for a regulation relying only on general authority to "'prescribe all needful rules' . . . . [,] 'we owe the interpretation less deference than a regulation issued under a specific grant of authority to define a statutory term or prescribe a method of executing a statutory provision'" (quoting 26 U.S.C. § 7805(a) (2000); Rowan Cos., Inc. v. United States, 452 U.S. 247, 253 (1981))); *see also* Chrysler Corp. v. Brown, 441 U.S. 281, 309 (1979).

[115] *Cf.* Hills, *supra* note 64, at 28 ("Any default rule, whether in favor of or against preemption, might create incentives for the interest groups hurt by the rule to reverse it in Congress.").

gress, could thoughtfully deliberate every time an issue of state law preemption arises. As a consequence, we might not need a presumption against preemption to prompt deliberation. To the contrary, however, the evidence suggests that agency preemption is not likely to be well considered. Again, one reason for the presumption against preemption is to ensure that states and the federal government participate in a real dialogue over whether state law should yield to federal law. I have argued elsewhere that agencies have some incentives to consider state interests in deciding whether state laws should be preempted. To summarize my analysis, agencies may have political incentives to respond to state interests because they are accountable to the President, the winner in a national election.[116] Further, because agency rulemaking is generally done through a notice-and-comment process, state organizations possess a formal ability to comment on agency rulemaking.[117]

However, agency deliberations on preemption are impeded by some important obstacles. Although state institutions have the opportunity to comment on rulemaking through the notice-and-comment process, those comments are likely to be lower-visibility, both to decisionmakers and to the public, than objections raised by a member of Congress to a legislative proposal.[118] For example, the objections of the New Jersey congressional delegation to the Department of Homeland Security receiving the authority to preempt state law may have ultimately resulted in the statute containing no language preempting state law[119]—compared with the less successful comments of state organizations received in opposition to the Department of Homeland Security's *regulatory* proposal that claimed the authority to preempt state law.[120]

Possibly more importantly, agencies, unlike Congress and the courts, are specialized institutions that are not set up to consider state autonomy concerns.[121] This may be partly because an agency exercising a general

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[116] *See* Mendelson, *supra* note 15, at 769–77.

[117] *See id.* at 777–78.

[118] *E.g.*, *Hearings on Regulatory Preemption: Are Federal Agencies Usurping Congressional and State Authority Before the Sen. Comm. on the Judiciary*, 110th Cong. (2007), *available at* http://judiciary.senate.gov/hearing.cfm?id=2935 [hereinafter *Hearings*] (statement of Sen. Patrick Leahy) (calling administrative preemption "little known").

[119] Perhaps reflecting the lack of consensus on the Department's preemption authority, the legislative history contains equally opposing statements from individual members of Congress. *See, e.g.*, 152 CONG. REC. H7967 (daily ed. Sept. 29, 2006) (statement of Rep. Sabo) ("The intention is not to preempt the ability of the States."); 152 CONG. REC. S10,619 (daily ed. Sept. 29, 2006) (statement of Sen. Voinovich) ("I feel strongly that this provision sets that uniform set of rules and in so doing, impliedly preempts further regulation by State rules or laws.").

[120] The final rule, of course, maintained the Department's claim to authority to preempt state law. *See* Chemical Facility Anti-Terrorism Standards, 72 Fed. Reg. 17,688, 17,727 (Apr. 9, 2007) (to be codified at 6 C.F.R. pt. 27) (final rule). Again, Congress revised the rule by statute. *See supra* note 7.

[121] I argued in *Chevron and Preemption* that despite Congress's regional structure, the political incentive of agencies—supervised, as they are, by the only nationally elected officials in the federal gov-

delegation of authority simply is not given guidance on how to weigh state regulatory autonomy against other concerns. Agency authorizing statutes are, instead, generally focused on the specific goals of the program the agency is asked to implement.

Federal agencies do, of course, possess considerable program-related expertise, and that can be relevant to the question of state law preemption. Agencies may be in a good position to see issues that might justify preempting state law in favor of a federal one, such as cross-border effects.[122] Agencies might also be able to see whether multiple state laws—such as laws involving design standards—might lead to an unworkable system for regulated entities. Finally, agencies have an incentive to and actually do consult with state and local entities on many aspects of their proposed policies, including the workability of particular proposals and special regional issues.

Despite possessing a national vantage point and specialized expertise on issues of program compliance and implementation, agencies typically appear to lack competence on broader aspects of state interests. As an institution with a specialized focus, an agency is not likely to possess the broader institutional mission, or the expertise necessary, to consider the appropriate balance of authority between the federal government and the states or the benefits of preserving some degree of state autonomy. In my earlier article, I argue that this lack of expertise weighs against according agency interpretations presumptive deference under a doctrine such as *Chevron*.[123]

Arguments about the lack of institutional competence apply with equal force where the issue is the authority of agencies to preempt state law. Because agencies lack an institutional focus on the value of retaining an independent state role and preserving state sovereignty, courts should be reluctant to read a statute to authorize an agency to declare state law preempted.

In my earlier article, I presented evidence that although federal executive agencies are required to prepare "federalism impact analyses" by Executive Order No. 13132, "Federalism," and its predecessor executive orders, the agencies' record in doing so is quite poor. To briefly reiterate

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ernment—to take federalism issues into account is not distinctively poorer than Congress and might, in some respects, be superior. For reasons of institutional competence and expertise, however, I nonetheless conclude that *Chevron* deference should not be available for agency interpretations of a statute's preemptive scope. *See* Mendelson, *supra* note 15, at 779–90.

[122] For example, there are strong reasons for federal minimum standards in the environmental area, such as the prospect of interstate effects and the possibility that states may "race to the bottom" to attract new business. And state law preemption may be warranted when, for example, high capital costs make it prohibitively expensive for an industry to comply with multiple design standards. Federal motor vehicle safety standards are expressly exclusive; states generally have no authority to set different standards.

[123] *See* Mendelson, *supra* note 15, at 780–82 (also noting that agencies typically do not look for employees with general knowledge of governmental structure).

that evidence, rulemaking analyses of federalism issues are rare; a 1999 Government Accountability Office analysis suggested that agencies had prepared only five federalism impact assessments in connection with 11,000 final rules issued between April 1996 and April 1998.[124] My own analysis of 600 proposed and final rulemaking documents during one quarter in 2003 revealed only six federalism impact analyses prepared by agencies. Nearly all were of low quality, failing to analyze state interests in providing additional protection for residents, state autonomy, or any of the other federalism values described above. Instead, each ended with the agency's conclusion that it possessed statutory authority to preempt.[125]

An updated analysis performed after that article was published suggests that the trend has not improved significantly. In May 2006, a search among 485 proposed and final rulemaking documents revealed six rules or proposed rules with preemptive effect on state laws. Only three of the six documents concluded that any federalism impact assessment was required. Only one of those impact assessments went beyond stating either that the agency concluded that it possessed statutory authority to preempt or that the document had been made available for comment, including to state officials.[126] On the positive side, however, three of the rulemaking documents did indicate some special effort made by the federal agency to contact state agencies for comment.[127] However, at least one state organization recently commented that "there is no incentive for agencies to adhere . . . [to the Executive Order, and] overall agency adherence to its provisions has been spotty at best."[128] The examples described in Part II also do not show any significant inclination by agencies to take state interests seriously. Take the FDA labeling preamble.[129] The FDA prepared a "federalism impact analysis," but that analysis primarily focuses on the FDA's position that it pos-

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[124] *See* U.S. GEN. ACCOUNTING OFFICE, FEDERALISM: IMPLEMENTATION OF EXECUTIVE ORDER 12612 IN THE RULEMAKING PROCESS 1 (May 5, 1999), *available at* http://www.gao.gov/archive/1999/gg99093t.pdf.

[125] *See* Mendelson, *supra* note 15, at 783–85.

[126] The document concerned credentials for transportation workers in industries handling hazardous materials. *See* Transportation Worker Identification Credential (TWIC) Implementation in the Maritime Sector; Hazardous Materials Endorsement for a Commercial Drivers' License, 71 Fed. Reg. 29,396 (May 22, 2006) (proposed rule). The Department later decided not to preempt state law. *See* Transportation Worker Identification Credential (TWIC) Implementation in the Maritime Sector; Hazardous Materials Endorsement for a Commercial Drivers' License, 72 Fed. Reg. 3492, 3575–76 (Jan. 25, 2007) (to be codified in scattered sections of C.F.R.) (final rule).

[127] *See* Health Claims; Soluble Dietary Fiber from Certain Foods and Coronary Heart Disease, 71 Fed. Reg. 29,248, 29,250 (May 22, 2006) (codified at 21 C.F.R. pt. 101 (2007)); Hazardous Materials Endorsement for a Commercial Drivers' License, 71 Fed. Reg. at 29,436; Taking of Marine Mammals Incidental to Commercial Fishing Operations; Atlantic Large Whale Take Reduction Plan (ALWTRP), 71 Fed. Reg. 26,702, 26,704 (May 8, 2006) (temporary rule).

[128] *Hearings*, *supra* note 118 (testimony of Rep. Donna Stone, President, National Conference of State Legislatures).

[129] *See supra* text accompanying notes 42–46.

sesses "considerable institutional expertise" and "comprehensive statutory authority," and that different (e.g., more protective) state rules would "disrupt" the federal program.[130] It contains no discussion of state government concerns that state law preemption issues might raise.[131] Indeed, some critics have indicated that states could not reasonably have anticipated the preemption and submitted comment because the FDA's proposed rule stated that it would have no implications for federalism or state law.[132] The National Conference of State Legislatures has further complained that the FDA resisted its requests to consult and file comments.[133] The FDA's failure to consider these issues is particularly striking given recent concern regarding the quality of the FDA's performance. At the time of this writing, for example, the FDA has been sharply criticized for inadequate enforcement of food and drug laws;[134] for failing to adequately monitor postapproval information about pharmaceutical side effects;[135] and for granting a number of premarket drug approvals.[136] One might argue that state regulatory autonomy would be especially valuable to help generate a public dialogue on pharmaceutical regulation or to supplement the FDA's efforts.

By the same token, the Department of Homeland Security's draft chemical security rules have been criticized for not requiring facility owners to consider safer chemicals and practices—referred to as "inherently safer technology."[137] Nonetheless, not only did the agency take the position that it could declare preempted more protective state standards, but the agency also gave no consideration to state interests. Instead, the agency reasoned only that the threat of terrorist attacks "remains a significant national threat," implying that state regulatory autonomy is limited to issues that are

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[130] *See* Requirements on Content and Format of Labeling for Human Prescription Drug and Biological Products, 71 Fed. Reg. 3922, 3969 (Jan. 24, 2006) (codified at 21 C.F.R. pts. 201, 314, 601 (2007)).

[131] The FDA noted that states had not commented on the proposed rule document, but that document contained no agency position that state tort law would be preempted. *See id.*

[132] *See, e.g.*, *Hearings*, *supra* note 118, at 7 n.13 (testimony of Prof. David Vladeck); *see* Requirements on Content and Format of Labeling for Human Prescription Drugs and Biological Products, 65 Fed. Reg. 81,082, 81,103 (Dec. 22, 2000) (proposed rule).

[133] *See Hearings*, supra note 118 (testimony of Rep. Donna Stone, President, National Conference of State Legislatures).

[134] *See* U.S. HOUSE OF REPRESENTATIVES, SPECIAL INVESTIGATIONS DIV., PRESCRIPTION FOR HARM: THE DECLINE IN FDA ENFORCEMENT ACTIVITY (2006).

[135] *See* U.S. GOV'T ACCOUNTABILITY OFFICE, DRUG SAFETY: IMPROVEMENT NEEDED IN FDA'S POSTMARKET DECISION-MAKING AND OVERSIGHT PROCESS (2006).

[136] The nonprofit Public Citizen has argued that the FDA has inappropriately approved several drugs or failed to withdraw them from the market promptly. *See* Public Citizen, FDA Fails to Protect Americans from Dangerous Drugs & Unsafe Food, Watchdog Groups Say (June 27, 2006), http://www.citizen.org/pressroom/release.cfm?ID=2227; *see also Hearings*, *supra* note 118, at 11–15 (testimony of Prof. David Vladeck) (discussing shortcomings in the FDA's program).

[137] *See Democrats Oppose DHS Plan to Preempt State Chemical Security Rules*, ENVTL. POL'Y ALERT, Jan. 17, 2007.

uniquely local, not national.[138] It then cited the Supremacy Clause for the position that state law must "give way to federal statutes and regulatory programs."[139] The agency gave no consideration to whether states might have legitimate interests in stricter standards, interests including a concentrated population, a large number of chemical plants, or simply a stronger preference for more safety. This is particularly striking in view of strong opposition to state law preemption articulated by the state of New Jersey.[140] In the final rule, although the Department of Homeland Security said it did not intend any current law to be preempted, and although it engaged in an extensive discussion of its own authority to preempt state law and "conflict preemption" principles, it did not pay any particular attention to state interests as such.[141]

Finally, the Office of the Comptroller of the Currency was criticized by the Government Accountability Office for failing to consult adequately with state officials prior to taking the position that federal law preempted the application of state consumer protection laws to state-chartered subsidiaries of national banks engaged in mortgage lending.[142]

The failure of agencies to consider the value of state autonomy and involvement unfortunately appears to be typical. That suggests we should be concerned about the institutional competence of agencies to make the call about the correct balance of power between the federal and state governments. Even if agencies possessed more internal expertise on such issues, their authorizing statutes typically do not give them criteria regarding how to balance these concerns against the goals of the programs they implement. This makes an agency's task far more difficult and nearly precludes meaningful judicial or congressional oversight.

Of course, it is possible that Congress might wish to give an agency the specific authority to preempt state law, along with guidance on when and how to do it. Congress has, on rare occasions, done so.[143] Without such clear authority and guidance, however, agencies do not seem to possess the expertise or institutional focus to decide when state laws are appropriately preempted.

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[138] *See* Chemical Facility Anti-Terrorism Standards, 71 Fed. Reg. 78,276, 78,292 (Dec. 28, 2006) (proposed rule).

[139] *Id.*

[140] *See supra* note 5.

[141] *See* Chemical Facility Anti-Terrorism Standards, 72 Fed. Reg. 17,688, 17,726–28 (Apr. 9, 2007) (to be codified at 6 C.F.R. pt. 27) (final rule) (containing federalism impact analysis, but not discussing either particular state interests or more general state interests in maintaining regulatory autonomy).

[142] *See* U.S. GOV'T ACCOUNTABILITY OFFICE, OCC PREEMPTION RULEMAKING: OPPORTUNITIES EXISTED TO ENHANCE THE CONSULTATIVE PROCESS AND BETTER DOCUMENT THE RULEMAKING PROCESS 19–20 (2005).

[143] *See supra* note 11 and accompanying text (referencing 49 U.S.C. § 5125(d) (2000)).

Agency consideration of state interests is likely to be impeded for other reasons as well, including the prospect of agency bias.[144] By deciding that state law is impliedly preempted by its regulatory decisions, an agency might thereby make itself the sole regulator. Perhaps it could then demand a larger budget or be better able to deliver on its promises to special interest groups. Although agency tendencies in this direction might be outweighed by the desire of officials to limit the agency's bureaucratic workload—or to serve public interest—the possibility of agency bias still weakly weighs against readily finding agencies authorized to preempt state law.[145]

Relatedly, to find state law not preempted using the implied preemption analyses described above, an agency would have to confront the possibility that it has struck a less-than-perfect balance of the statute's regulatory objectives. Although self-examination and revisiting one's own decisions are, of course, features of good decisionmaking processes,[146] an agency may be unwilling to concede or to recognize the prospect that its own regulatory efforts are imperfect. This embarrassing position could be avoided if the agency simply elects not to discuss preemption at all. Where, however, an agency faces pressure to preempt state law, the strong incentive is for it to take the position consistent with defending its own substantive regulatory decision as correct. Indeed, an agency might be concerned that recognizing the virtues of different state approaches would expose its own decisions to challenge as arbitrary and capricious.[147] Consequently, we should be concerned that an agency's institutional focus and mission may not equip it to fully consider state interests.

Finally, the lack of statutory guidance to agencies is worth special mention. If courts read general delegations of statutory authority to authorize agencies to impliedly preempt state law, that authority could be extremely broad. This is not to say, of course, that the agency would have completely unbounded authority to preempt state law. The agency would still have to exercise its authority in a reasoned way, consistent with the relevant concerns of the statute, and its action would still be subject to judicial review to ensure that it is not "arbitrary" or "capricious" under the Administrative Procedure Act.[148] Thus, an agency could not preempt a

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[144] This argument builds on the position I took earlier in *Chevron and Preemption*, Mendelson, *supra* note 15, at 794–97. In that article, I argued that self-interest weakly weighs against giving *Chevron* deference to an agency interpretation of preemptive statutory language.

[145] Arthur Wilmarth has made this argument with respect to the OCC's efforts to preempt state laws that might apply to national banks. *See* Wilmarth, *supra* note 37, at 295 (arguing against application of *Chevron* deference).

[146] *See* Buzbee, *supra* note 109, at 1596–97 & nn.170–71 (discussing "experimentalist" approaches that can minimize regulatory pathologies).

[147] *Cf.* Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29 (1983) (vacating a Transportation Department decision for failure to consider options developed in earlier rulemaking documents).

[148] *See* 5 U.S.C. § 706 (2000).

particular state's law because, say, the governor happens to be a political opponent.[149]

Nonetheless, these general delegations of rulemaking authority do not provide adequate guidance to agencies on when to declare state law preempted. As I argued earlier in opposition to *Chevron* deference to agency interpretations of preemptive statutory language, without express preemptive language, statutes generally do not give guidance to agencies on how to evaluate state interests in regulatory autonomy or on the need to preserve a division of regulatory authority between the federal and state governments.[150] This lack of statutory guidance is reflected in agency analyses that largely fail to consider these interests.

Nor do the statutes give judges adequate criteria with which to review the agency action. This problem is particularly pronounced when an agency declares that state law stands as an "obstacle" to federal goals. With conflict preemption, by contrast, a court can review to see if compliance with both state and federal standards is indeed a physical impossibility. But with implied preemption of the *Geier* type, all the agency need say is that it believes it has struck the right balance of the statutory goals, including moderating or countervailing goals. Any different position taken by a state might "undermine" federal policy and hence be preempted. As long as the agency's own regulatory decision is not arbitrary, capricious, or contrary to law, it is hard to imagine any implied preemption position that would not be immune from judicial vacatur. All this will tend to significantly reduce agency accountability for decisions to preempt state law, and with it, the legitimacy of the agency actions themselves.[151]

In theory, accountability might be had in other quarters. For example, on occasion, Congress could respond to agency preemption as it did when the Department of Homeland Security staked out a claim to preempting, among other things, New Jersey's approach to increasing security of chemical plants. (Ultimately, however, the response primarily just protected New Jersey law; the federal agency appears to be maintaining its claim to declare a state law preempted.) Both White House and congressional checks on agency activity, however, tend to be ad hoc and unsystematic.[152]

By contrast, if courts applied a presumption against agency preemption, agencies would be more likely to function with greater statutory guid-

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[149] *Cf.* Nat'l Coalition Against Misuse of Pesticides v. Thomas, 809 F.2d 875, 877–78 (D.C. Cir. 1987) (overturning the EPA's setting for pesticide tolerance in mangoes due to its reliance on the irrelevant factor of the health of foreign economies).

[150] *See* Mendelson, *supra* note 15, at 791–94.

[151] *See* Gerald E. Frug, *The Ideology of Bureaucracy in American Law*, 97 HARV. L. REV. 1276, 1284 (1984) (observing that various models of administrative agencies are aimed at characterizing bureaucracies as being "under control").

[152] *See* Nina A. Mendelson, *Agency Burrowing: Entrenching Policies and Personnel Before a New President Arrives*, 78 N.Y.U. L. REV. 557, 570–71 (2003) (discussing the ad hoc nature of congressional oversight).

ance and thus with more accountability for their actions. A presumption against agency preemption would, of course, mean that an agency could not be assumed to have the authority to preempt state law unless there is clear evidence that Congress so intended. In the course of drafting express language, Congress would be more likely to supply criteria to the agency regarding *when* state law should be preempted.[153] That would tend to protect state laws and state regulatory autonomy from "incidental" interference. In addition, it would contribute importantly to guiding the work of agencies, increasing the extent to which agencies can be held accountable for their decisions, and in turn, the increasing the legitimacy of administrative actions. Some statutes already expressly authorize agencies to preempt state law; in the absence of such language, courts would need to determine whether Congress clearly intended agencies to preempt state law under the circumstances at hand.

Suppose preemption approaches changed, and *Geier*-type arguments were no longer acceptable justifications for finding that a state law stands as an obstacle to federal law. Perhaps, one might argue, state law should be preempted—by a federal agency, for example—only if it stands as an obstacle to the *primary* goal of the federal statute. For example, a court of appeals found that a Pennsylvania law barring attorneys who were not members of the state bar from opening offices in the state was preempted as an "obstacle" to an attorney's federal authorization to practice law in federal courts located in that state.[154] And a Texas law disallowing the sale or possession of horsemeat for human consumption was found not to be preempted by the primary purpose of the federal meat inspection laws, even though those laws allow the sale of horsemeat.[155] Unlike *Geier*, these analyses focus on the primary goal of the federal law (or authorization) in deciding whether state law is preempted as an "obstacle" to federal law. In such a world, an agency presumably could find state law preempted only if the state law would undermine the *primary* federal regulatory goal (for example, disclosure of pharmaceutical risks in the FDA case and automobile safety in the roof crush standards example and in *Geier* itself). This type of analysis would limit agency discretion to preempt state law and thus reduce concerns about the extent of the agency's discretion. To the extent an agency declared state law preempted as interfering with a primary goal of federal law, such preemption would be closer to "floor" preemption, still

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[153] Indeed, a flat delegation of authority to an agency to preempt state law without guidance could under some circumstances be unconstitutional as an invalid delegation of legislative power. *See generally* Whitman v. Am. Trucking Ass'ns, Inc., 531 U.S. 457, 472 (2001) (discussing "intelligible principle" required to find valid delegation). Even if the nondelegation doctrine poses no bar, the presence of preemption authority likely would motivate state organizations to seek specific criteria to guide and limit agency decisions.

[154] Surrick v. Killion, 449 F.3d 520 (3d Cir. 2006).

[155] Empacadora de Carnes de Fresnillo, S.A. de C.V. v. Curry, 476 F.3d 326 (5th Cir. 2007).

leaving some regulatory autonomy to states.[156] On the other hand, such a regime still would permit agencies to preempt state law without guidance from a statute, and preemption decisions still might be made by institutions without any institutional focus upon the value of state autonomy. The application of a presumption against agency preemption, by contrast, still might usefully prompt Congress to more explicitly guide agency preemption decisions.

IV. CONCLUSION

Adopting a presumption against reading statutes to authorize agency preemption is, of course, facially consistent with the presumption against preemption. In addition, without such a presumption, these special purpose institutions may possess virtually limitless discretion to declare state law preempted as an obstacle to federal goals, a result Congress did not likely intend. Moreover, agencies may be rendering these decisions notwithstanding their lack of institutional competence. Finally, placing this discretion in the hands of federal agencies is consistent with neither adequate respect for state regulatory autonomy nor a vital state-federal dialogue on regulatory policy. By comparison, a presumption against agency presumption is likely to result in more explicit congressional decisions on when agency preemption decisions are appropriate and what criteria should guide them. Asking Congress for that guidance may not only result in a more thoughtful focus on state regulatory autonomy, but may also help improve the administrative process.

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[156] One could, in theory, argue that some statutes privilege multiple primary goals. Suppose some of the banking statutes have the purposes of both protecting consumers and preserving financial market liquidity. If so, an agency might have greater latitude to "balance" those goals and preempt state law that strikes a different approach. Such a regime still would be problematic, however, because of the lack of statutory guidance addressing the importance to be placed upon state regulatory autonomy.