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Chevron and Preemption

Nina A. Mendelson

University of Michigan Law School, nmendel@umich.edu

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I. INTRODUCTION

To one who values federalism, federal preemption of state law may significantly threaten the autonomy and core regulatory authority of
When an unelected federal agency official is the one interpreting the unclear federal statute, the potential threat to state autonomy may seem even greater. As the administrative state’s authority has increased, however, agencies administer a substantial number of statutes that raise preemption issues, including statutes bearing on health care, banking, communications, and the environment, just to name a few. A statute may be unclear as to whether it preempts state law at all, or else the statute may contain language that expressly preempts state law, but the extent of that preemption may remain unclear.

Courts deciding that a statute preempts state law have defined the question largely as one of congressional intent. At least since Rice v. Santa Fe Elevator Corp., however, the Supreme Court has employed a presumption that state powers are not lightly to be superseded. Apparently motivated by a desire to protect state regulatory prerogatives and sovereignty, the Court thus generally has required a “clear statement” or other strong evidence of a “clear and manifest

1. A number of scholars have taken this view. E.g., Roderick M. Hills, Jr., The Political Economy of Cooperative Federalism: Why State Autonomy Makes Sense and “Dual Sovereignty” Doesn’t, 96 Mich. L. Rev. 813, 817-18 (1998) (noting that federal demands for state or local services “at least preserve some role for [state] officials” while “preemption eliminates their role entirely”); Ernest Young, Two Cheers for Process Federalism, 46 Vill. L. Rev. 1349, 1384 (2001) (arguing that preemption threatens the core regulatory authority of state governments, thereby undermining their ability to win popular loyalty necessary to make political safeguards work); see also Adam Cox, Expressivism in Federalism: A New Defense of the Anti-Commandeering Rule, 33 Loy. L.A. L. Rev. 1309 (2000) (arguing that “state dignity” may be reason for rule against commandeering). But see Viet Dinh, Reassessing the Law of Preemption, 88 Geo. L.J. 2085 (2000) (suggesting that in most cases, despite preemption, state still retains essential functions); infra text accompanying notes 63-64 (distinguishing among different kinds of preemption).


4. See infra text accompanying notes 72-74.
purpose of Congress” before holding state law preempted.\(^5\) On its own terms, the *Rice* presumption would seem to apply to any interpretation of a statute’s preemptive effect, perhaps even where an administrative agency has rendered the first interpretation.

Meanwhile, the doctrine of *Chevron v. Natural Resources Defense Council* calls generally for judicial deference to agency statutory interpretations.\(^6\) Unless Congress has clearly answered the question at hand, *Chevron* instructs a court to defer to the agency’s reasonable interpretation of a statute it administers.\(^7\) The *Chevron* doctrine does not expressly take account of state interests. Instead, *Chevron* presumes that Congress has implicitly delegated interpretive authority to the agency because it is more expert and more politically accountable than the courts. Given *Chevron*’s application even to “pure questions of law,”\(^8\) where one might expect courts to be the experts, there might seem little reason to distinguish questions of state law preemption.

When faced with an agency interpretation addressing a statute’s preemptive effect, courts have trod unevenly in reconciling *Chevron* deference with the *Rice* presumption against preemption.\(^9\) Within a single case, *Smiley v. Citibank (South Dakota)*, N.A.,\(^10\) for example, the Supreme Court assumed without deciding that courts should resolve de novo the threshold question whether a federal banking statute preempted state law, notwithstanding a federal agency interpretation

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\(^5\) *Rice*, 331 U.S. at 230, quoted in *Medtronic*, 518 U.S. at 485; see also Solid Waste Assocs. of N. Cook County v. U.S. Army Corps of Eng’rs, 531 U.S. 159, 172-73 (2001) [hereinafter *SWANCC Case*] (seeking congressional “clear statement” that agency was authorized to “invoke the outer limits” of congressional authority and commenting that “[t]his concern [about the scope of agency interpretive authority] is heightened where the administrative interpretation alters the federal-state framework by permitting federal encroachment upon a traditional state power”).

Although the presumption seems motivated by the Court’s desire to protect state regulatory prerogatives and sovereignty, even the Court’s presumption against preemption has been seen as inadequately protective of state interests by some members of Congress. To further reduce judicial findings of federal statutory preemption, they introduced a bill known as the Federalism Accountability Act. The bill was reported from committee in 1999 but was never subject to a floor vote. See S. 1214, 106th Cong. (1999); S. REP. No. 106-159, at 1 (1999).

\(^6\) *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984); see infra text accompanying notes 31-34 (discussing limits of *Chevron*).

\(^7\) *Chevron*, 467 U.S. at 843.


\(^9\) In theory, courts might try to preserve both doctrines, by applying the *Rice* presumption at Step One of *Chevron* to conclude that Congress has directly addressed the preemption question. *See infra* text accompanying notes 35-37 (arguing that courts have generally not done so, and that in any event, such an approach would not relieve them of the obligation of explaining why the *Rice* presumption should trump *Chevron*).

— but then paid Chevron deference to the agency interpretation of a single word in the statute: “interest,” despite arguments that the agency interpretation effectively broadened the statute’s preemption of state law. Elsewhere, the Court, citing Chevron, has claimed to accord “substantial weight” to an agency’s interpretation of a statute to preempt state law, but does not appear to have conducted the usual Chevron inquiry. The lower appellate courts have wavered between applying only Chevron and interpreting a statute de novo notwithstanding an agency interpretation, following Rice.

Some scholars have argued that granting Chevron deference to agency interpretations regarding preemption is inappropriate because important questions of state sovereignty would be resolved by

11. For example, in Lawrence County v. Lead-Deadwood School Dist. No. 40-1, 469 U.S. 256, 262 (1985), and in Medtronic, Inc. v. Lohr, 518 U.S. 470, 496 (1996), the Court stated it would give “substantial deference” and “substantial weight,” respectively, to an Interior Department interpretation finding preempted a state law governing the distribution of federal funds and to an FDA interpretation finding state common law claims preempted by the federal Medical Devices Act. The Court also cited Chevron in Medtronic, 518 U.S. at 496. In both Lawrence County and Medtronic, however, the Court appeared to independently assess the statute’s meaning. See Lawrence County, 469 U.S. at 262 (stating Interior Department interpretation is “entitled to substantial deference, if it is a sensible reading of the statutory language . . . and if it is not inconsistent with the legislative history, an inquiry that we now undertake” (citations omitted)); Medtronic, 518 U.S. at 496; id. at 505-06 (Breyer, J., concurring) (allowing the agency a “degree of leeway”); see also Massachusetts Ass’n of HMOs v. Ruthardt, 194 F.3d 176, 182 (1st Cir. 1999) (characterizing Medtronic as according “intermediate level of deference” to FDA interpretation). In Geier v. American Honda, 529 U.S. 861 (2000), the Court stated that it would give “some weight” to the view of the Department of Transportation (DOT) that state tort law would conflict with the National Traffic and Motor Vehicle Safety Act, as implemented by DOT regulations imposing passive restraint requirements on car manufacturers, id. at 883, but then independently analyzed the statute and relevant regulations to find preemption. See id. at 886 (finding state tort law to be an “‘obstacle’” to federal regulation even without giving DOT’s view “special weight”).

Most recently, Justice Thomas suggested that given an agency interpretation that state law did not present an obstacle to the goals of federal law, Chevron “imposes a perhaps-insurmountable barrier to a claim of obstacle preemption.” Pharm. Research & Mfrs. of Am. v. Walsh, 538 U.S. 681, 123 S. Ct. 1855, 1877 (2003) (Thomas, J., concurring) (“Obstacle pre-emption’s very premise is that Congress has not expressly displaced state law, and thus not ‘directly spoken’ to the pre-emption question.”).

12. In Center for Legal Advocacy v. Hammons, 323 F.3d 1262 (10th Cir. 2003), the court applied Chevron in its review of an agency’s interpretation of a federal statute’s preemptive effect upon a state law that barred patient advocates conducting an investigation from obtaining access to peer-review records of a mental health facility. The court ultimately rejected the agency interpretation as unreasonable and found the state law preempted. Id. at 1269 (“The statutory language cannot be reasonably construed [as the agency wishes to construe it].”).

13. For one example of many, in Massachusetts Ass’n of HMOs v. Ruthardt, 194 F.3d 176 (1st Cir. 1999), despite the presence of an agency interpretation, the First Circuit independently analyzed a federal Medicare statutory provision as precluding a state from requiring each of its HMOs to offer at least one plan including full outpatient prescription drug coverage. The court ultimately agreed with an agency determination that the preemption clause of the Medicare + Choice Act did preempt the state law at hand.
institutions that are not properly politically accountable. Some Justices have expressed similar reservations about agency interpretations that "alter[] the federal-state framework," or suggested that "agencies are clearly not designed to represent the interests of States." The contrast is with Congress, whose members are elected from particular districts or states. The arguments founded on political accountability concerns, however, have been largely conclusory. They have included little in the way of detailed comparisons of the institutional structure of agencies and of Congress as they relate to the consideration of state interests.

This Article takes a more functional approach to reconciling preemption doctrine with Chevron when Congress has not expressly delegated preemptive authority to an agency, an approach that considers a variety of concerns, including political accountability, institutional competence, and related concerns. The Article assumes that federalism values, such as ensuring core state regulatory authority and autonomy, are important and can be protected through political processes. It argues that although Congress's "regional structure" might hint at great sensitivity to state concerns, it actually may lead Congress to undervalue some federalism benefits that are more national in nature. Meanwhile, executive agencies generally have significant incentives to take state concerns seriously. Agencies are politically accountable through the President and also may wish to maintain cooperative relationships with states.

Although the political accountability of agencies for considering state interests is not significantly inferior to that of Congress, the


15. See SWANCC Case, 531 U.S. at 172 (citing United States v. Bass, 404 U.S. 336, 349 (1971)) (majority opinion authored by Rehnquist, J.); see also Federalism: Hearings Before the S. Comm. on Governmental Affairs, 106th Cong. 15 (1999) [hereinafter Senate Hearings on Federalism] (statement of Gov. Thompson) ("I like dealing with you and I can usually convince you to go part way with the position of the States, but once it leaves your hands and goes over to a department, to some bureaucrat there that is going to promulgate the rules, like they have in TANF, we are left out. We have no recourse whatsoever.").

16. See Geier, 529 U.S. at 908 (Stevens, J., dissenting).

17. For greater detail on these assumptions, see infra text accompanying notes 75-81.
Article argues that *Chevron* deference to agency interpretations of the preemptive effect of statutes is nonetheless inappropriate. An agency may expertly assess the extent to which a particular state statute interferes with the achievement of a federal goal. Other institutions, however, may better assess issues such as the overall distribution of governmental authority and the intrinsic value of preserving core state regulatory authority. In addition to institutional competence concerns, granting *Chevron* deference to agency preemption decisions may result in inadequately constrained decisionmaking processes. Finally, granting deference also might increase the risk that agencies would inappropriately expand their own authority at the expense of the states.

Instead, a preferable regime would not include *Chevron* deference. A court should retain not only the ability to apply the *Rice* presumption against preemption, but also the discretion to take account of an agency interpretation on preemption under a regime such as *Skidmore v. Swift.* The court might do so when it views the interpretation as possessing particular "power to persuade" in view of, say, particular agency expertise.

Reconciling the *Rice* presumption with *Chevron* has broader implications for statutory interpretation. The presumption against preemption is only one of a number of "value-based" or "substantive" canons of statutory construction that potentially conflict with *Chevron.* Meanwhile, by reserving interpretive questions to the agencies with responsibility for administering the statute at hand, the *Chevron* doctrine suggests an institutional, rather than a substantive, solution to statutory ambiguity. Courts have yet to articulate a consistent framework to reconcile substantive canons with *Chevron*, leaving the status of the canons murky.

Drawing in part on the reconciliation of the presumption against preemption with *Chevron*, this Article takes issue with the position of some scholars that courts should be able to use a substantive canon in

19. See infra text accompanying notes 248-255.
20. E.g., PETER L. STRAUSS ET AL., GELLHORN AND BYSE'S ADMINISTRATIVE LAW 1049-50 (10th ed. 2002) (giving examples of such canons, including presumption against extraterritorial application of statutes, tribal canon, and construction to avoid constitutional question); see also WILLIAM N. ESKRIDGE, JR., DYNAMIC STATUTORY INTERPRETATION 277 (1994) (providing example of canon against extraterritorial application of statutes); id. at 294 (giving further example of canon to protect "interests of groups that had been subordinated in the political process, including African Americans, women, native Americans, noncitizens, and nonmarital children"); id. at 301 (listing canons such as "a presumption against implied causes of action from federal statutes; a rule that federal jurisdiction be narrowly construed, [and] a presumption against federal common law in an area occupied by statute" (citations omitted)).
preference to Chevron deference because the values of the canon are, in some measure, "important."22 It argues for a more structured framework to reconcile substantive canons with Chevron. Such a structured framework should include examination of not only political accountability, but also legal accountability, institutional competence, and related concerns.

Part II presents some background on the rationales for both Chevron and the presumption against preemption. Part III seeks to offer a closer examination of political accountability — the issue on which most scholars have focused — and concludes that agencies, like Congress, may have significant incentives to take state interests into account.23 Part III also considers questions of institutional competence, legal accountability, and agency self-interest. Part III concludes that Chevron deference is unwarranted, and attempts to assess the weaknesses of the alternative approach. Finally, Part IV concludes by considering the implications of this Article's framework for the tension between Chevron and value-based canons of statutory interpretation.

II. SOME BACKGROUND ON CHEVRON AND PREEMPTION

To better understand the stakes of a resolution of the tension between Chevron deference and the presumption against preemption, it is worth providing some additional background on each doctrine and its underlying rationale.

A. Chevron and Value-Based Interpretive Canons

Under the familiar rule of Chevron, unless Congress has directly answered the interpretive question at hand (as a court may conclude in "Step One"), a court must defer to an agency's reasonable interpretation of a statute it administers (in Chevron "Step Two").24 Chevron seems best read as resting on the notion of an implicit congressional delegation. The Chevron Court held that Congress can be assumed to have delegated interpretive authority to agencies in view of their superior policy expertise and political accountability

22. See infra text accompanying notes 49-50; Sunstein, Nondelegation Canons, supra note 14, at 338 (arguing that "nondelegation canons have the salutary function of ensuring that certain important rights and interests will not be compromised unless Congress has expressly decided to compromise them," though noting that content of such canons is open to debate).

23. See infra Section III.A.2.

relative to the judiciary. Agencies are likely to have greater expertise regarding the "force of the statutory policy," and so presumably are able to "reconcil[e] conflicting policies" inherent in questions of the "meaning or reach of a statute." Moreover, so the argument goes, these types of policy choices are more appropriately left to a politically accountable branch (such as the executive branch, accountable via the presidential election), rather than to unelected judges. Consequently, when a statute is ambiguous, courts should defer to the agency's interpretation.

Although its antecedents were cases in which courts thought it best to defer to expert agencies on mixed legal and factual questions, such as whether a newsboy is an "employee" in *NLRB v. Hearst Publications, Inc.*, and whether waiting in a firehouse for the alarm bell to ring is "working time" in *Skidmore v. Swift & Co.*, *Chevron* itself involved a question of law that implicated policy concerns (how best to achieve certain environmental goals). The Supreme Court has consistently indicated that the *Chevron* approach applies even to pure questions of law, about which courts might appear to have a strong claim of superior expertise.

*Chevron* does not completely eliminate the judicial role, of course. A court may refuse *Chevron* deference, and answer an interpretive question itself, if the agency has rendered its interpretation in an unsuitable form. An interpretation in an agency opinion letter, for

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25. *Chevron*, 467 U.S. at 844, 865; see also *Smiley v. Citibank* (S.D.), N.A., 517 U.S. 735, 740-41 (1996) (granting *Chevron* deference to agencies because of "presumption that Congress . . . understood that [statutory] ambiguity would be resolved, first and foremost, by the agency, and desired the agency (rather than the courts) to possess whatever degree of discretion the ambiguity allows"). The implicit delegation view of *Chevron* is the dominant, but by no means the exclusive, view. See, e.g., Curtis A. Bradley, *Chevron Deference and Foreign Affairs*, 86 VA. L. REV. 649, 670 (2000) (characterizing *Chevron* as based "partly on the court's sense of what Congress would have wanted if it had thought about the issue and partly on institutional considerations relating to separation of powers and democratic accountability"); David Hasen, *The Ambiguous Basis of Judicial Deference to Administrative Rules*, 17 YALE J. ON REG. 327 (2000); Thomas W. Merrill & Kristin E. Hickman, *Chevron's Domain*, 89 GEO. L.J. 833, 867-71 (2001) (discussing other justifications of *Chevron* and noting that seeing *Chevron* as a judge-made rule, like a canon, would conflict with APA's instruction, 5 U.S.C. § 706, that courts are to decide "all relevant questions of law").


27. See id. at 865.


29. 323 U.S. 134 (1944).


31. The court retains the discretion to draw on the administrative interpretation to the extent it finds appropriate under the *Skidmore* doctrine. United States v. Mead Corp., 533 U.S. 218, 233 (2001).
example, may be judged beyond the limits of the implicit delegation of interpretive authority from Congress.  

Most relevant for our purposes, a court applying *Chevron* decides in "Step One," using "traditional tools of statutory construction," whether Congress itself has clearly answered the interpretive question presented. Step One includes considering the language of the relevant provision, the language and design of the entire statute, and, occasionally, legislative history. If the court finds that Congress has clearly answered the question, the agency interpretation is beside the point.  

Because of the large number of canons of construction predating *Chevron*, courts have repeatedly had to reconcile *Chevron* with canons ranging from "textual canons," including rules of syntax, to substantive canons encoding some sort of value judgment. Despite *Chevron*, for example, courts generally have applied rules of syntax in preference to agency interpretations on the ground that the syntax rules represent traditional tools of statutory construction by which courts can discern whether Congress has directly answered a statutory question under *Chevron* Step One.  

Reconciling "value-based" canons with *Chevron* has proven more difficult. A court might reconcile such a substantive canon with *Chevron* by folding it into the Step One inquiry, as it would a textual

32. Id. at 228 ("A very good indicator of delegation meriting Chevron treatment is express congressional authorizations to engage in the rulemaking or adjudication process that produces ... rulings for which deference is claimed."); see, e.g., Christensen v. Harris County, 529 U.S. 576 (2000) (refusing deference to agency opinion letter). See generally Merrill & Hickman, supra note 25, at 836 (describing this aspect of doctrine as *Chevron* "Step Zero").  

33. See *Chevron*, 467 U.S. at 843 n.9 ("traditional tools of statutory construction"); see also, e.g., K-Mart Corp. v. Cartier, Inc., 486 U.S. 281 (1988) (using language, legislative history, and historical context); INS v. Cardoza-Fonseca, 480 U.S. 421, 448 (1985) (using "ordinary" textual canons to construe statute). As discussed infra note 37, substantive canons generally are not — and should not be — incorporated into the Step One analysis. See also Antonin Scalia, *Judicial Deference to Agency Interpretations of Law*, 1989 DUKE L.J. 511 (arguing that "'traditional tools of statutory construction' include the consideration of policy consequences").  

34. As a number of scholars have noted, the increasing use of textualist approaches to statutory interpretation to eke every bit of possible meaning out of a statutory text of course renders *Chevron* less useful. E.g., Scalia, supra note 33, at 521 ("One who finds more often (as I do) that the meaning of a statute is apparent from its text and from its relationship with other laws, thereby finds less often that the triggering requirement for *Chevron* deference exists."); see also Ronald M. Levin, *Mead and the Prospective Exercise of Discretion*, 54 ADMIN. L. REV. 771, 780-784 (2002) (suggesting that courts' findings that statutes are unclear under Step One, so that agency interpretation receives deference, largely depends upon prudential considerations "such as judgments about the comparative qualifications of courts and agencies").  

canon. In that case, the court might apply the canon, find the statute unambiguous, and never proceed to considering the agency interpretation. Such an approach, however, seems inappropriate. Substantive presumptions or canons really represent a judicial resolution of a statutory question where the evidence of what Congress meant is unclear. As Daniel Halberstam has argued in the context of the presumption against preemption, the presumption is better understood as helping resolve a situation involving conflicting evidence on statutory meaning. Consequently, such a presumption or canon fits more naturally as an alternative to the entire Chevron regime. Moreover, incorporating substantive canons into Step One implies the survival of the Chevron doctrine. Chevron does not actually survive this approach, however, because when it is taken, the substantive canon will always dictate the result. Respect to Chevron should oblige a court at least to explain why substantive canons should prevail over an approach in which courts defer to agency interpretations.

As a practical matter, courts generally have not applied substantive canons at Chevron Step One to statutory language that is otherwise ambiguous. Instead, they have chosen the alternative path—that of considering substantive or value-based canons as alternatives to the use of Chevron deference. Besides the presumption against

36. See Daniel Halberstam, The Foreign Affairs of Federal Systems, A National Perspective on the Benefits of State Participation, 46 VILL. L. REV. 1015, 1061 (2001) (presenting alternative views of presumption, ranging from evidentiary "tie-breaker" to "systematic bias coloring the interpretation of... evidence" to view that "interpretations suggesting Congress had the intent to preempt the States are disfavored whenever there are other minimally plausible constructions of the evidence").

37. While the Supreme Court has not defined precisely what it means by "traditional tools of statutory construction" applicable in Chevron Step One, see Chevron, 467 U.S. at 843 n.9, its cases suggest that rather than substantive canons, it is aiming at textual canons, "which set forth inferences that are usually drawn from the drafter's choice of words, their grammatical placement in sentences, and their relationship to other parts of the 'whole' statute." WILLIAM N. ESKRIDGE, JR. ET AL., CASES AND MATERIALS ON LEGISLATION 818 (3d ed. 2001); see, e.g., K-Mart, 486 U.S. at 290-95 (using language, legislative history, and historical context); Cardoza-Fonseca, 480 U.S. at 448 (using "ordinary" textual canons to construe statute).

One Supreme Court opinion seems to be a notable exception, however. In INS v. St. Cyril, 533 U.S. 289, 320 n.45 (2001), the Court applied the presumption against retroactivity at Step One of Chevron, stating, "Because a statute that is ambiguous with respect to retroactive application is construed under our precedent to be unambiguously prospective... there is, for Chevron purposes, no ambiguity in such a statute for an agency to resolve." St. Cyril could be explained as motivated by constitutional concerns, see infra note 48. Further, it is in tension with the preemption cases discussed supra notes 12-13 and accompanying text.

Perhaps more to the point, however, respect for the Chevron doctrine should have required the Court to more directly reconcile the presumption against retroactivity with Chevron. Canons such as the presumption against retroactivity, unlike textual canons, incorporate a value choice, so they are in tension with Chevron's rationale that the agency's choice of values should inform the reading of an otherwise ambiguous statute.
preemption, for example, courts have not adequately addressed whether the so-called Indian canon — that an ambiguous statute should be construed to favor Native American tribes — should trump *Chevron*.

On the one hand, *Chevron* suggests as a general matter that agencies, not courts, are to use their understanding of policies and values to inform statutory interpretation in cases where statutory language is unclear. And in interpreting statutes, agencies cannot avoid facing value-laden legal and policy questions. This reasoning might prompt a judge to abandon all value-based canons in favor of *Chevron* whenever a case involves an agency interpretation.

On the other hand, the existence of a substantive canon, especially one that is well established, may represent a judicial commitment to some set of values. A number of scholars have argued judges are competent to identify and incorporate public values into statutory interpretation. The existence of the canon might also signify something about congressional intention. For example, Congress actually may have legislated against the backdrop of the canon at hand or the canon might represent a reasonable set of assumptions about what Congress might mean in passing statutory language, akin to the syntactic canons courts use in *Chevron* Step One analysis. Finally, substantive or value-based canons may be seen as a source of

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38. See, e.g., Williams v. Babbitt, 115 F.3d 657, 660 (9th Cir. 1997) (finding *Chevron* to trump Indian canon); Ramah Navajo Chapter v. Lujan, 112 F.3d 1455, 1461-62 (10th Cir. 1997) (rejecting Ninth Circuit approach); Albuquerque Indian Rights v. Lujan, 930 F.2d 49, 58-59 (D.C. Cir. 1991) (same). For other examples of value-based canons that may be in tension with *Chevron*, see Sunstein, *Nondelegation Canons*, supra note 14, at 334 (discussing “nondelegation canons” inspired by “perceived public policy”); supra note 20 (citing examples).


40. Cf. Caminker, supra note 1 (arguing that judicial reliance on state “dignity” may represent judicial effort to set new social norm); Sunstein, *Nondelegation Canons*, supra note 14, at 334 (“The most sympathetic understanding of these canons rests on the view that the relevant policies are not the judges’ own, but have a source in widely held social commitments.”).


continuity — as establishing a regime that generally guides the understanding of citizens and legislators of particular statutes. 43

Sunstein has suggested that a judicial choice to employ value-based canons to construe otherwise unclear statutes, rather than deferring to agency interpretations, might be understood as a sort of nondelegation principle — a view that a particular result requires congressional, rather than agency, deliberation. 44 This means that the agency decision, if contrary to the canon, will stand only if the decision's proponents can navigate the institutional processes of Congress. 45 According to Sunstein, these issues require congressional deliberation because of Congress's "superior democratic pedigree." 46 That argument has been explicit as well in the particular context of the presumption against preemption. 47

So which values are entitled to democratically superior congressional deliberation? Outside of constitutional interpretation questions, 48 Sunstein has suggested, at least descriptively, that value-

43. See David L. Shapiro, Continuity and Change in Statutory Interpretation, 67 N.Y.U. L. REV. 921, 927 (1992) (describing canons that "aid in reading statutes against the entire background of existing customs, practices, rights, and obligations...[and] that emphasize the importance of not changing existing understandings any more than is needed to implement the statutory objective").


45. Sunstein, Nondelegation Canons, supra note 14, at 339 (2000) ("Certain controversial or unusual actions will occur only with respect for the institutional safeguards introduced through the design of Congress."); id. at 335 (arguing that nondelegation canons should be understood as way of ensuring "that judgments are made by the democratically preferable institution"); see also Campbell, supra note 14, at 832 (arguing that administrative preemption is in tension with presumption against preemption because agencies can more easily make law than Congress).

46. See Sunstein, Nondelegation Canons, supra note 14, at 317.

47. See supra notes 14-16 and accompanying text.

48. "Constitutional" canons such as the rule of lenity are beyond the scope of this Article. It is worth noting, however, that the Court has generally declined to defer under Chevron where the agency interpretation would conflict with such a canon. See generally Sunstein, Law and Administration, supra note 35. The Court has also found agency rules that would present a court with a constitutional question to be unauthorized unless Congress clearly authorized the agency to issue the rule (the "avoidance" canon). E.g., SWANCC Case, 531 U.S. 159 (2001) (finding agency interpretation unauthorized because it raised significant constitutional issue and stating, "Where an administrative interpretation of a statute invokes the outer limits of Congress' power, we expect a clear indication that Congress intended that result."); Merrill & Hickman, supra note 25 (arguing that avoidance canon would enlarge scope of agency policymaking by presenting court with constitutional questions). See generally Ashwander v. TVA, 297 U.S. 288, 347-48 (1936) (Brandeis, J., concurring); Frederick Schauer, Ashwander Revisited, 1995 SUP. CT. REV. 71. The basis for the "avoidance" canon is unclear; it might be seen as part of a strategy to minimize judicial intrusion into the majoritarian legislative process. See, e.g., Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council, 485 U.S. 568, 575 (1988) (noting "prudential concern" that constitutional issues not be needlessly confronted"); William N. Eskridge, Jr., & Philip P. Frickey, Quasi-Constitutional Law: Clear Statement Rules as Constitutional
based canons require such deliberation and therefore trump *Chevron* when they represent "important" values.\textsuperscript{49} The presumption against preemption might be one such canon.\textsuperscript{50}

This approach, however, is normatively unsatisfying.\textsuperscript{51} In the first place, saying that a value is "important" does not help resolve the question whether ambiguous statutory provisions implicating the value should be interpreted in the first instance by courts, using the canon, or by agencies.\textsuperscript{52} The thrust of *Chevron*, of course, is that agencies have superior political accountability and technical policy expertise, relative to courts, in deciding value-laden policy questions. Even with regard to detecting congressional preferences, agencies may have

\textit{Lawmaking}, 45 VAND. L. REV. 593, 632 (1992) (noting theorized consequences from “Court's concern about the countermajoritarian difficulties in striking down statutes enacted by popularly elected legislatures”). \textit{But see} Schauer, supra, at 74 (“[I]t is by no means clear that a strained interpretation of a federal statute that avoids a constitutional question is any less a judicial intrusion than the judicial invalidation on constitutional grounds of a less strained interpretation of the same statute.”). Alternatively, the avoidance canon could be justified by assuming that Congress is sensitive to constitutional concerns. Congress would thus hesitate to pass an unconstitutional statute and would avoid presenting the Court with constitutional questions. \textit{See}, e.g., DeBartolo Corp., 485 U.S. at 575; Eskridge, supra note 41, at 1018-20. Finally, however, a court's decision not to defer to an agency's statutory interpretation that raises constitutional concerns could be justified based on an assumption that agencies lack competence on constitutional questions. \textit{E.g.}, Williams v. Babbitt, 115 F.3d 657, 662 (9th Cir. 1997) (“When agencies adopt a constitutionally troubling interpretation, however, we can be confident that they not only lacked the expertise to evaluate the constitutional problems, but probably didn’t consider them at all.”).

49. Sunstein, Nondelegation Canons, supra note 14, at 338.

50. Although state law preemption is rooted in the Supremacy Clause, no constitutional source has been offered for the presumption against preemption. This fact has led Caleb Nelson to argue for abandoning the presumption itself. \textit{See} Caleb Nelson, Preemption, 86 VA. L. REV. 225 (2000); \textit{see also} Dinh, supra note 1, at 2092, 2094 (arguing that the preemption question is statutory, not constitutional, in nature). \textit{But see} Sunstein, Nondelegation Canons, supra note 14, at 331 (arguing that presumption against preemption has foundation in constitutional structure).

51. Apart from the sources cited supra note 45, scholars have offered relatively few normative arguments to resolve the tension between *Chevron* and the value-based canons. An important exception is Bradley’s argument that *Chevron* deference should be afforded to agency analyses of treaty obligations. \textit{See} Bradley, supra note 25.

52. For example, take two alternative explanations for the canon favoring Indian tribes, each offered by Sunstein: first, that the canon is designed to require clear congressional action before a statute will be construed against a “group that has been mistreated in the past,” see Sunstein, Law and Administration, supra note 35, at 2115, or second, that it grows out of the “complex history of relations” between tribes and the United States. Sunstein, Nondelegation Canons, supra note 14, at 333. Both assertions seem to support only the argument that tribal relations make the positive treatment of tribes an important value; neither helps resolve the question whether ambiguous statutory provisions raising tribal issues should be decided by courts or agencies. Nor do they provide any principled basis for, say, selecting other value-based canons that might trump *Chevron*. \textit{See also} Roderick M. Hills, Jr., Against Preemption: How Federalism Can Improve the National Legislative Process 3 (Univ. of Mich. Public Law & Legal Theory, Working Paper No. 27, Univ. of Mich. Law Sch. Olin Ctr. for Law & Econ. Discussion, Paper No. 2003-007, 2003) (arguing that the “notion that federalism is an important value” is “too general to bake any legal bread”).

some advantages over courts, as they are often involved in the process of drafting new legislation.\textsuperscript{53}

Nor does it fully resolve normative difficulties to argue that the canon is somehow neutral and that Congress, rather than the judiciary, will be the sole decisionmaker on the value-laden question. This argument relies on an assumption that Congress’s democratic credentials are clearly superior to those of the agencies, and the question thus would be resolved by the decisionmaker with superior democratic credentials.

This argument has two problems. First, judicial values are likely to intrude. Judicial use of an interpretive canon does not simply return a question to Congress. Instead, the default answer is supplied by the court, rather than an agency, and the burden is on Congress to reverse it.\textsuperscript{54} Rather than functioning neutrally, each canon incorporates a value judgment in the sense of raising the agency’s cost of a decision contrary to the default result under the canon.\textsuperscript{55} To the extent the canon is informed by the judiciary’s choice of values or assessment of publicly held values, it is in tension with the goal of having the value resolved by a relatively democratic institution.

A canon could conceivably be seen as dictated by the need for some background rule against which Congress is to legislate.\textsuperscript{56} In that case, the selection of the default rule might be seen as somewhat less troubling, closer to a rule of syntax, and hence more “neutral.”\textsuperscript{57}


\textsuperscript{54} Sunstein argues that these “nondelegation canons” are less intrusive than the use of the nondelegation doctrine because as long as Congress is specific, it is not barred from legislating. Sunstein, Nondelegation Canons, supra note 14, at 335 (arguing that such canons are “a species of judicial minimalism”). But the nondelegation doctrine, though it completely invalidates a particular statutory provision, does not bar Congress from legislating, as long as Congress supplies an “intelligible principle.” From the standpoint of whether corrective legislative action can be obtained at all, it is simply unclear whether Congress faces more obstacles in responding to a judicial decision striking down a statutory provision on nondelegation grounds or in correcting a judicial interpretation in reliance on a nondelegation canon.

Moreover, Mashaw has argued strongly that even if a legislature may be able to overturn an erroneous interpretation, that interpretation will affect the legislature’s ability to reinstate its original goal. Because interpretation “rearrange[s] the status quo,” “it is most unlikely that [the legislature] will ever be able to reverse an interpretation such that it reinstates the precise policy that was adopted originally.” See JERRY L. MASHAW, GREED, CHAOS AND GOVERNANCE: USING PUBLIC CHOICE TO IMPROVE PUBLIC LAW 103 (1997).

\textsuperscript{55} As Sunstein has acknowledged, the content of the canons that might be applied notwithstanding a contrary agency interpretation is properly open to debate. See Sunstein, Nondelegation Canons, supra note 14, at 341.

\textsuperscript{56} E.g., ESKRIDGE, supra note 20, at 276-77 (arguing for efficiency of canons because of difficulty of drafting complete statutes that cover all contingencies).

\textsuperscript{57} See Sunstein, Nondelegation Canons, supra note 14, at 335-36 (noting that such canons erect “decisive barrier” to resolution of issue by executive institution). It also might
leads to the second problem, however. Even assuming canons are somehow "neutral" and merely return a value-laden question to Congress, Congress may not always have a clear advantage over agencies in terms of political responsiveness or political accountability. While political accountability is surely relevant under a Chevron-based framework, it seems inadequate to argue that Congress is always more "politically accountable" than an agency because its members are directly elected. Political accountability and responsiveness are discussed from a more functional perspective below.58

Finally, allowing value-based canons regularly to trump Chevron, without a reasoned approach to when or whether this should occur, would reduce the predictability of the legal regime for litigants. Similarly, as Congress drafts new statutes, it would not know whether ambiguous statutory language might be interpreted by a court applying a substantive canon or by an agency.59 Accordingly, proponents of the value-based canons are under an obligation to explain why particular canons should trump Chevron. At the same time, the canons signal some judicial or congressional commitment to the values they embody. Rather than dismiss the canon out of hand, that commitment suggests that we should carefully consider whether the canon should survive Chevron.

Consistent with retaining Chevron, a reconciliation of a value-based canon with Chevron should go beyond asking the question whether the value is "important." At a minimum, such a reconciliation should attempt to respect the concerns motivating Chevron. In

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58. See infra Section III.A.

59. E.g., Scalia, supra note 33, at 516-17 (arguing that under Chevron approach, Congress knows that its ambiguities will be resolved by particular agency). As discussed below, a canon-by-canon approach to determining whether a value-based canon trumps Chevron arguably increases unpredictability for litigants relative to a scheme of either pure Chevron or pure canons. But a clear framework that guides such an approach would be preferable both to an ad hoc approach that chooses between Chevron and a canon on a case-by-case basis and to an approach based on the "importance" of the value at stake.

This analysis assumes that the use of canons increases predictability for Congress, an assumption that is obviously not shared by all. For example, Karl Llewellyn famously argued that "there are two opposing canons on almost every point." Karl Llewellyn, Remarks on the Theory of Appellate Decision and the Rules or Canons about How Statutes Are to Be Construed, 3 VAND. L. REV. 395, 401 (1950). On the other hand, William Eskridge and Philip Frickey's collection of canons used by the Rehnquist Court suggests that even if this proposition were completely accepted, not all canons would be in equal use. See William N. Eskridge, Jr., & Philip Frickey, The Supreme Court, 1993 Term — Foreword: Law as Equilibrium, 108 HARV. L. REV. 26, 97-108 (1994).
addition to political accountability, such a reconciliation thus should also include institutional concerns. More specifically, a reconciliation should assess an institution’s expertise in a particular interpretive task and its legal accountability for rendering the interpretation. The analysis might also include assessing the incentives facing and possible responses of other institutions. For example, would a particular approach raise decision costs because of greater uncertainty, or give a particular institution unbridled discretion? An approach that depends more directly upon relative institutional competence on the issues at hand, as well as the agency’s relative political and legal accountability for the relevant decisions, would be a more thorough one. It would also be more faithful to the concerns justifying *Chevron*.

**B. The Presumption Against Preemption**

I now turn briefly to the preemption doctrine, including its application to agency actions. Assuming Congress is exercising its enumerated powers, there is no constitutional obstacle to preemption. The Supremacy Clause entitles Congress “to preempt state law if it chooses.” Influenced by concerns about state sovereignty and state regulatory prerogatives, however, the Supreme Court has in this century generally applied a presumption against preemption, requiring a “clear statement” or its equivalent from Congress before being willing to conclude that a federal statute preempts state law.

Statutory preemption breaks down into a few basic categories, any of which might be implicated by an agency interpretation. It includes express preemption, where Congress has explicitly stated its intention to preempt state law. Preemption also subsumes implied preemption, where Congress’s intent to preempt may be inferred from the conflict of federal and state law (such that compliance with both is a physical impossibility) or where the state law stands as an obstacle to the full application of federal law.

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62. *See, e.g.*, Eskridge, *supra* note 41, at 1023-25 (describing preemption doctrine and arguing that canon may be justified by relative institutional competence or to protect local values from “inadvertent federal interference”). *But see, e.g.*, Buckman Co. v. Plaintiffs’ Legal Comm., 531 U.S. 341, 348 (2001) (declining to apply presumption against preemption to a claim regarding fraudulent misrepresentation to federal agency, on ground that issues raised did not “implicat[e] ‘federalism concerns and the historic primacy of state regulation of matters of health and safety’” (quoting Medtronic, Inc. v. Lohr, 518 U.S. 470, 485 (1996))); Nelson, *supra* note 50, at 230 n.19 (2000) (noting sources arguing that Court has not consistently applied presumption).
accomplishment of Congress’s goals and purposes, and field preemption, where one may infer from the breadth and depth of federal regulation that Congress meant to occupy the field and preempt the states from regulating in that area.

By applying a presumption against preemption, courts effectively make congressional deliberation a prerequisite to preemption. That reduces the likelihood of legislation preempting state law. Partly this is simply because new legislation is difficult to enact. A clear statement rule puts the burden on groups seeking legislative preemption to place the issue on the congressional agenda and obtain passage. Further, with a clear statement rule, a state (or other interested group) is more likely to receive notice before the fact of a possible legislative decision that could negatively affect the scope of state lawmaking, giving it a greater opportunity to express its views.

1. **Agency Actions and Preemption**

How might an agency affect the scope of federal preemption of state law? An agency might interpret the statute to communicate a congressional intent to preempt state law or to “occupy the field.” It also might read the statute as communicating goals to which a state statute might present an obstacle. Finally, the agency might interpret the scope of an express preemption clause to, say, preempt state statutory law but not state tort law. The relevant agency interpretations are those eligible for *Chevron* deference — hence those reached in a rulemaking or formal adjudication.

This Article will not, however, discuss another form of preemption that involves agencies, so-called regulatory preemption. For example, to the extent an agency regulation is appropriately authorized and issued, it preempts directly conflicting state law, on the theory that

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63. See, e.g., Geier v. Am. Honda Motor Co., 529 U.S. 861, 873-74 (2000) (noting in context of assessing statutory savings clause that both “‘obstacle’ ” and impossibility cases are forms of “conflict” with state law that Congress would not have wanted to tolerate (quoting Hines v. Davidowitz, 312 U.S. 52, 67 (1941))).

64. See Hines, 312 U.S. at 67 (describing “field preemption” and “conflict” preemption as forms of implied preemption).

65. Rick Hills argues in support of the clear statement rule for this reason, on the ground that the interest groups that would support preemption are better organized. Consequently an incorrect judicial ruling under the clear statement rule is more likely to evoke vigorous debate and correction in the legislature than an incorrect ruling made under a different rule. See HILLS, supra note 52. But see Dinh, supra note 1 (arguing that clear statement rule is simply a method of detecting likely congressional preferences).

66. Although *United States v. Mead Corp.*, 533 U.S. 218 (2001), refused deference to an interpretation rendered in an informal adjudication, the unusual circumstances of that case suggest that some interpretations rendered in informal adjudications may still be eligible for deference. See id. at 233 (“Any suggestion that rulings intended to have the force of law are being churned out at a rate of 10,000 a year at an agency’s 46 scattered offices is simply self-refuting.”).
Congress would want its agency's decision to be effective. Also beyond the scope of this paper is how a court should review other agency decisions to preempt state law when Congress has already delegated the agency preemptive authority. This sort of preemption

67. It is now widely agreed that where a validly issued administrative rule directly conflicts with state law (i.e., compliance with both is a physical impossibility), the Supremacy Clause requires the agency rule to take precedence. United States v. Shimer, 367 U.S. 374, 382 (1961); see also Fid. Fed. Sav. & Loan v. de la Cuesta, 458 U.S. 141, 153-54 (1982). See, e.g., Paul A. McGreal, Some Rice with Your Chevron?: Presumption and Deference in Regulatory Preemption, 45 CASE W. RES. L. REV. 823, 866 (1995) (arguing that rulings may best be justified by seeing Congress's delegation of administrative authority as "intending preemption of state law directly conflicting with agency regulations"). As a general matter, assuming the agency was exercising properly delegated authority, Congress would have wanted the agency's decision to be effective and to control. Benjamin Heineman & Carter Phillips, Federal Preemption: A Comment on Regulatory Preemption After Hillsborough County, 18 URB. LAW. No. 3, at 589, 592 (Summer 1986); see, e.g., Medtronic, 518 U.S. at 485.

Language in some Supreme Court cases decided after Shimer suggested that an express regulatory statement by an agency would suffice to preempt state law, even without a specific delegation of preemptive authority by Congress. See City of New York v. FCC, 486 U.S. 57, 64 (1988) (stating that beyond conflict preemption, "in proper circumstances the agency may determine that its authority is exclusive"); Capital Cities Cable, Inc. v. Crisp, 467 U.S. 691 (1984); de la Cuesta, 458 U.S. at 154 (stating that relevant question is whether "Board meant to pre-empt" state law). The language in these cases could imply that Congress "intend[ed] to include [the power to preempt] along with a general grant of discretionary authority." Walthall, supra note 14, at 732; see also, e.g., Louisiana Pub. Serv. Comm'n v. FCC, 476 U.S. 355, 369 (1986) (stating that agency may preempt state law if "acting within the scope of its congressionally delegated authority"). But cf. Blum v. Bacon, 457 U.S. 132, 140 n.8 (1982) (in finding federal regulation preemptive of state law, noting "broad rule-making powers" of agency (quoting Thorpe v. Hous. Auth., 393 U.S. 268, 277 n.28 (1969))). On the other hand, both Crisp and de la Cuesta involved direct conflicts, and in City of New York, the Court found evidence of congressional approval in a later-passed statute. See City of New York, 486 U.S. at 66; Crisp, 467 U.S. at 698; de la Cuesta, 458 U.S. at 158 n.13, 158 n.14 (noting directness of conflict). Another reading of these cases might be that an agency statement of intent to preempt is necessary, though not sufficient, to preempt, so that absent such a direct statement, even an agency regulation in conflict with state law would not be read to preempt state law. But cf. Shimer, 367 U.S. at 381 & n.8 (finding preemption without statement from agency of intent to preempt). Ultimately, in Geier, the Supreme Court made clear that at least in the context of conflict between a federal regulation and state law, the critical issue was whether a duly authorized regulation actually conflicted with state law, rather than whether the agency made a statement indicating intent to preempt state law. See Geier, 529 U.S. at 883 (noting that statement of intent to preempt was not a prerequisite to preemption).

Whether an agency's express statement that it (as opposed to Congress) seeks to preempt state law is sufficient to preempt without a direct conflict with state law is beyond the scope of this paper, though the analysis presented here would suggest that a prerequisite to such a holding should be a congressional delegation that specifically includes the authority to preempt. See, e.g., City of New York, 486 U.S. at 66 (finding congressional affirmation of FCC assertion of authority to preempt in Congress's enactment of 1984 Cable Act "against a background of federal pre-emption on this particular issue").

68. For example, City of New York v. FCC concerned the FCC's preemption of state and local technical standards governing the quality of cable television signals, even though there was no direct conflict between state and federal rules. The court approved it in light of Congress's ratification of the FCC's authority in a later statute, "acting against a background of federal preemption on this particular issue." 486 U.S. at 66. There is some uncertainty in the case law regarding just how far agency power of this type extends. See,
by agencies is seen as "backed up by a congressional grant of authority to do so," unlike Chevron's implicit delegation of authority. It raises distinct concerns regarding the nature, scope, and application of the authority received by the agency. With respect to these types of actions, courts apply no presumption against preemption, but assess only whether the agency was exercising properly delegated authority.

2. The Concerns of Preemption Doctrine

Preemption questions may incorporate both issues of how best to implement a federal statute and what might be termed "federalism values." So-called obstacle preemption analysis, for example, raises the question whether a state law interferes with the accomplishment of federal purposes, an assessment that could be fairly technical in nature. The preemption question, at least currently, also incorporates a general concern with the appropriate balance of power between the federal and state governments and with maintaining core attributes of state sovereignty.

The presumption against preemption, as exemplified by Hillsborough and Rice, could be justified by the theory that it reflects the probable assumption of the median legislator, or that the canon is arguably "democracy-enhancing" by encouraging congressional debate on preemption. More likely, the canon represents a reluctance to risk incidental statutory interference with federalism values and with state sovereignty. In part, courts could be reluctant to assume that Congress has made a conscious decision that particular state laws should be preempted to best implement federal statutory goals.

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69. Walthall, supra note 14, at 758; see also id. ("These cases, unlike Chevron, are based on actual congressional delegations of authority.").

70. For example, the Supreme Court analyzed these questions as distinct in New York v. Fed. Energy Regulatory Comm'n, 535 U.S. 1, 18 (2002), saying that it would analyze the regulatory preemption questions "without any presumption one way or the other." See also id. (distinguishing between cases raising "presumption against preemption" and those not implicating the presumption, in which Congress may have directly authorized agency to preempt state law).

71. See ESKRIDGE, supra note 20, at 279; Dinh, supra note 1.

72. See, e.g., ESKRIDGE, supra note 20, at 286 (describing theory under which canons such as presumption against preemption are arguably democracy-enhancing); HILLS, supra note 52, at 18-21 (arguing based on assumptions regarding interest group configuration and entrepreneurial activity of nonfederal lawmakers that anti-preemption presumption is more likely to create dialogue than pro-preemption presumption).

73. See Eskridge, supra note 41, at 1024-25 (describing "meta-rule" of avoiding preemption of traditional state functions as motivated by desire "to protect important local values from inadvertent federal interference").
The presumption, however, appears to be based on more than either an assumption regarding the median legislator's preferences or an assumption that Congress thought only in general terms about implementation. Instead, courts appear to be attaching substantive value to federalism goals (or doing their own detection of "public values"). The Medtronic Court, for example, described potential federal preemption of state common law remedies as a "serious intrusion into state sovereignty." 74

Although there is a significant debate on the benefits of federalism, 75 its advocates typically articulate the following set of advantages. Very briefly stated, federalism may be seen as favoring government responsiveness and stimulating citizen participation in self-governance, since citizens are presumed to be able to participate more directly in policymaking at the state level. State regulation also may be more efficient than federal, in the sense that policies developed at the state level may be more responsive to regional variability in preferences compared with nationally uniform policies, and states may have the incentive to compete for citizens, who have the choice to move elsewhere. 76 Moreover, state involvement in policymaking can facilitate numerous policy "laboratories" that can develop and test a variety of policies, to the ultimate benefit of all. 77

74. Medtronic, Inc. v. Lohr, 518 U.S. 470, 488 (1996). Similarly, in Buckman Co. v. Plaintiffs' Legal Committee, 531 U.S. 341 (2001), a "fraud-on-the-FDA" case in which the Court found no presumption against preemption of state law, it grounded its decision on its view that "[p]olicing fraud against federal agencies is hardly 'a field which the States have traditionally occupied.' " Id. at 347 (quoting Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947)).

75. For a recent argument that federalism fails to serve its articulated values, see Frank Cross, The Folly of Federalism, 24 CARDOZO L. REV. 1 (2002) (arguing that "federalist" values are really values of localism). See also Edward L. Rubin & Malcolm Feeley, Federalism: Some Notes on a National Neurosis, 41 UCLA L. Rev. 903, 907 (1994) ("[F]ederalism in America achieves none of the beneficial goals that the Court claims for it").

76. See Gregory v. Ashcroft, 501 U.S. 452, 458 (1991) (discussing federalism benefits); Steven G. Calabresi, "A Government of Limited and Enumerated Powers:" In Defense of United States v. Lopez, 94 MICH. L. REV. 752, 774 (1995); Caminker, supra note 1, at 89 (discussing "structural values" of federalism); Larry D. Kramer, Putting the Politics Back into the Political Safeguards of Federalism, 100 COLUM. L. REV. 215, 222 (2000) [hereinafter Kramer, Putting Politics Back] (arguing that the best reason to care about federalism is "because preferences for governmental policy are unevenly distributed among the states and regions of the nation, more people can be satisfied by decentralized decisionmaking"). But see E. Donald Elliott et al., Toward a Theory of Statutory Evolution: The Federalization of Environmental Law, 1 J.L. ECON. & ORG. 313, 330-31 (1985) (arguing state regulation is often inefficient because its effects can be externalized to other states).

77. See, e.g., New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting) (describing states as "laborator[ies]"); Elizabeth Garrett, Enhancing the Political Safeguards of Federalism? The Unfunded Mandates Reform Act of 1995, 45 KAN. L. REV. 1113 (1997); see also HILLS, supra note 52, at 18, 20-21 (arguing that state regulators may motivate business and industry groups to place issues on federal agenda, thereby generating "vigorous congressional debate").
Finally, some argue that protecting state authority as a counterbalance to federal authority was part of the Framers’ scheme of separation of powers, “the division, dispersion, and assignment of power to various entities.” 78

While there is, similarly, a debate on how federalism values can be best protected, the Court and a significant group of scholars have argued that federalism values can be adequately protected by “political safeguards.” 79 The argument is that national political structures such as political parties and participation opportunities in the national political process afford states the ability to ensure that the state role and state autonomy receive thorough consideration.80

Rather than focusing upon whether federalism values are normatively justified, I wish to take as a given the Court’s arguments on federalism’s behalf and then to proceed to assessing whether it makes sense to defer presumptively, under Chevron, to administrative agency decisions on state law preemption. I thus take as a given that federalism supports the values described above; that the Court is appropriately attaching importance to protecting federalism, both generally and in the context of preemption; and finally, that federalism can be appropriately protected through “political safeguards.”81

78. See Caminker, supra note 1, at 89 (noting argument that existence of states serves as check against “Congress [either asserting] power that does not lawfully belong to it or wield[ing its power] too frequently or indiscriminately”); Marci A. Hamilton, The Elusive Safeguards of Federalism, 574 ANNALS AM. ACAD. POL. & SOC. SCI. 93, 95 (Mar. 2001) (“From the Framers’ perspective, the nature of the constitutional division of power between the federal government and the states is not different from the divisions between the federal branches . . . .”).

79. See Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528 (1985); Kramer, Putting Politics Back, supra note 76; Herbert Wechsler, The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Government, 54 COLUM. L. REV. 543 (1954). Although it has never expressly questioned its commitment to “political safeguards,” the Court’s jurisprudence is not completely consistent. See, e.g., ESKRIDGE, supra note 20, at 288 (arguing that use of super-strong clear statement rules seems in tension with Garcia “unless the Court has second thoughts about how well protected state and local governments are at the federal level”); Jenna Bednar & William N. Eskridge, Jr., Steadying the Court’s “Unsteady Path”: A Theory of Judicial Enforcement of Federalism, 68 S. CAL. L. REV. 1447, 1463 (1995) (“Does Garcia, which reasons that federalism limits on Congress are best enforced by the political process, survive the Court’s decision in Lopez, which insists that the Court remain as a monitor of congressional power?”). Even the presumption against preemption seems somewhat inconsistent with the idea that protection of state interests should be left completely to the political process.

80. As to this as well, there is a significant debate. Cross and Hamilton both argue that if federalism is to be protected, political safeguards are inadequate. See Cross, supra note 75, at 8-12; Hamilton, supra note 78, at 94 (“Their trust in the invisible hand of politics is misplaced.”). Baker and Young also argue that rather than supporting state autonomy, some states may support the use of federal authority in order to gain advantages over other states. See Lynn A. Baker & Ernest A. Young, Federalism and the Double Standard of Judicial Review, 51 DUKE L.J. 75 (2001).

81. Even if federalism could be adequately protected through political safeguards, the safeguards would not eliminate disputes in the courts about the meaning of an ambiguous
Assuming for the moment that judicial values play no part, we might see the presumption against preemption as a background rule incorporating an assumption about congressional intent — that the median legislator might generally prefer that state law not be preempted. However, the *Chevron* doctrine too is based on assumptions regarding likely congressional preferences — that Congress would prefer the agencies to resolve interpretive ambiguities in statutes they administer. The next section attempts to resolve this conflict.

III. AGAINST CHEVRON DEFERENCE ON PREEMPTION QUESTIONS

Despite *Chevron*, considerations of political accountability and institutional expertise, as well as legal accountability, suggest that an agency’s interpretation of federal law to preempt state law generally should not be presumptively entitled to deference. This conclusion does not, however, rest on the reason suggested by some scholars — that agency political accountability for considering state interests is inadequate. As discussed in greater detail below, the political accountability of agencies for considering the interests of states does not seem clearly inferior to that of Congress. After looking at political accountability, this Section then considers agency expertise, self-interest, and the prospect of increased arbitrariness in decisionmaking, and concludes that all weigh against an across-the-board presumption of deference to the agency interpretation.

Before continuing with the analysis, it is worth noting that much of the literature assessing the value of federalism and the extent to which “political safeguards” can protect federalism depends on claims of an empirical nature. As a general matter, however, not much evidence has been presented in support of these claims. Some evidence also may be difficult to collect in a reliable form. For example, while it may

statute, though courts might apply a different decision rule. The presence of “adequate” political safeguards does not guarantee that a state will always win a legislative battle, for example, and losers in the political process may wish to attempt to invoke judicial intervention, even with only a small chance of victory.


83. Of course, there is always the possibility that what Congress actually wants is to leave a question ambiguous, permit an agency to resolve it, and thereby escape the political costs that might accompany passing a preemptive statutory provision. See, e.g., *Campbell*, *supra* note 14, at 829 (“[P]olitical sidestepping is precisely the type of congressional behavior that post-*Garcia* federalism jurisprudence seeks to prevent”).

84. See *supra* text accompanying notes 14-16.
be easy to document the frequency with which state officials or representatives of state organizations testify before Congress, proving that Congress actually considers state interests is difficult because of the absence of readily available evidence on less formal participation and of a baseline against which to measure enacted statutes. Nonetheless, I attempt in this Article to take some concrete steps toward assembling available evidence and to identify further evidence that, if gathered, would be relevant to the inquiry.

A. Political Safeguards for States in Congress and the Agencies

Consider political accountability under the view of the presumption against preemption that the presumption represents a judicial choice of values. Because agencies are politically accountable through the President, however, and federal judges are not elected, agencies would seem to be more politically accountable than courts. Certainly that is the reasoning of Chevron.

On the other hand, suppose the presumption against preemption is seen as a method of ensuring that Congress itself makes the preemption decision. On this view, the presumption against preemption might be characterized as more neutral and dictated not so much by judicial values as by the need to have some background rule against which Congress can legislate. In that case, comparing agency political accountability with that of courts is insufficient. Instead, agency political accountability must be compared with that of Congress.

Turning to Congress, the political safeguards theory referenced above provides some content to "political accountability" by suggesting that federalism values are protected if they are fully expressed and adequately considered in the legislative process. Although scholars have sometimes argued about the extent of federalism's protection in Congress based on the outcomes of votes on individual bills, it cannot be that federalism advocates must win every

85. See Mashaw, supra note 54, at 153.

86. See supra text accompanying note 27; see also supra text accompanying notes 40-43 (discussing defenses of courts as detectors of public values).

87. Some have argued that as a general matter, members of Congress raise federalism concerns only when it is convenient, and are not generally driven to do so either by voters or organizations. E.g., Interview with Lynn Rivers, former U.S. Representative, in Ann Arbor, Mich. (Apr. 16, 2003). As others have noted, despite encroachments on traditional areas of state regulation, Congress has regulated state laws impinging on religious freedom (Religious Freedom Restoration Act of 1993, Pub. L. No. 103-141, 107 Stat. 1488 (codified in scattered sections of 5 U.S.C. & 42 U.S.C.)), elementary and secondary education (No Child Left Behind Act of 2001, Pub. L. No. 107-110, 115 Stat. 1425 (codified in scattered sections of 20 U.S.C.)) and has attempted to regulate third-trimester abortion, see Hamilton, supra note 78, at 99-100. If so, then perhaps we should see states as ineffective advocates in the legislative process. On the other hand, Congress also has passed important legislation
vote in Congress to show that such values have been adequately considered. That would imply that Congress must always do what states want. If inferences regarding political safeguards are to be drawn from legislative outcomes, those outcomes must be measured against the outcomes of a baseline legislative process, a process in which state groups have some measurably different involvement.

In the absence of reliable outcome-based evidence for or against political safeguards, it makes sense at least to examine the decisionmakers’ incentives to thoroughly consider state interests, their processes for doing so, as well as the ability of states and aligned interest groups to participate in and to present information in the decisionmaking process, issues I discuss in greater detail below.\(^8\) The extent to which “political safeguards” in Congress adequately protect state interests has been the subject of extensive debate. My concern in the following Section, however, is primarily comparative: how do political safeguards for state participation in the administrative process compare with those supplied by the federal legislative process?

1. **Political Safeguards for States in Congress**

In this Section, I will begin by sketching the current debate over representation of state interests in Congress and then turn to assessing Congress’s incentives to consider arguments for state autonomy. Scholars are generally agreed that prior to the Seventeenth Amendment’s adoption in 1913, state legislatures had direct influence in Congress because they selected Senators, though whether that influence served any useful end is unclear.\(^9\) After 1913, in any event, protecting state interests, such as the Unfunded Mandates Reform Act of 1995, Pub. L. No. 104-4, 109 Stat. 48 (codified in scattered sections of 2 U.S.C.); it has also given serious consideration to the Federalism Accountability Act. See supra note 5 (discussing Act’s consideration in full committee); see also George A. Bermann, *Regulatory Federalism: European Union and the United States*, in 263 RECUEIL DES COURS 48, 94-95 (Academy of International Law 1997) (discussing Unfunded Mandates Reform Act). Further, Carol Lee has described examples where states have both succeeded and failed in obtaining congressional intervention following an adverse judicial decision. See Carol F. Lee, *The Political Safeguards of Federalism*, 20 URB. L. W. 301, 337 (1988). But without any baseline against which to measure legislative outcomes, the extent to which states, state associations, and allied interest groups can be seen as “effective” in obtaining legislative results raises a possibly intractable empirical question.

\(^8\) *E.g.*, Kramer, *Putting Politics Back*, supra note 76. Hills focuses not on the participation of state groups in the preemption context, but on aligned interest groups. HILLS, *supra* note 52, at 18-19.

\(^9\) See Kramer, *Putting Politics Back*, supra note 76, at 224 n.33 (arguing that “contrary to popular belief, the power of state legislators to select Senators had lost most of its significance for federalism long before adoption of the 17th Amendment in 1913”).
state legislatures were "cut out of the electoral loop." Nonetheless, some scholars have argued that a variety of substitute means ensure that Congress is highly motivated to consider state interests.

Wechsler and others, for example, have argued that even without the Seventeenth Amendment the regional nature of congressional elections is sufficient to supply members of Congress with a strong incentive to represent state interests in congressional deliberations. On this view, individual voters serve as the intermediary for the interests of states. One reason might be that voters' substantive concerns, regional in nature, overlap with those of their state government. For example, the positions of federal lawmakers in the debate over the future of electric power following the large Northeastern and Midwestern power blackouts of August 2003 look likely to follow regional lines, serving the interests of both states and of voters within those states. Voters may also prefer governance by their state rather than by the federal government, though polling data on this score are inconclusive at best. For example, polled voters have given essentially equivalent "grades" to the performance of federal, state, and local governments. Finally, it might be because state governments persuade voters to carry their water at the polls, though how this might be empirically proven is unclear. Young, for example, has argued that state governments will attempt to mobilize their citizens to express governmental concerns, such as the desire to preserve core regulatory authority, at the polls.


91. See, e.g., Wechsler, supra note 79; see also, e.g., Bermann, supra note 87, at 53 ("The most obvious candidate [for representing the interests of the States and "championing" the principles of federalism] is the Congress, whose members are elected by territorial units and may therefore be expected to show sensitivity to the interests of States and local governments and to the values of federalism."); Peter J. Smith, Pennhurst, Chevron, and the Spending Power, 110 YALE L.J. 1187, 1202 (2001) ("Because representation in Congress is state-based, state constituencies have a voice in Congress through their elected federal representatives, whom the voters may remove from office if they fail adequately to respect state prerogatives.").


93. See, e.g., ADVISORY COMM'N ON INTERGOVERNMENTAL RELATIONS, CHANGING PUBLIC ATTITUDES ON GOVERNMENTS AND TAXES 24-26 (1990) (essentially equivalent "grades" given to performance of federal, state, and local governments). Young has argued that an essential core of state authority must be protected so that states can compete for the affection of voters. See Young, supra note 1. Pettys has argued that the increase in federal authority can be understood as the federal government winning a "vertical competition for the people's affection" with state governments. Todd Pettys, Competing for the People's Affection: Federalism's Forgotten Marketplace, 56 VAND. L. REV. 329, 333 (2003).

94. See Young, supra note 1, at 1356 (arguing that some advantages, such as the core regulatory authority of state government, are likely to be valued more by the government itself than by voters, although arguing that states will mobilize their citizens to express state-government-related views at the polls).
Besides voters, state organizations also transmit the interests of states to members of Congress. As a general matter, state organizations seem well-positioned to have their voices heard in legislative decisionmaking. The “Big Seven” — the state interest groups, including such organizations as the National Governors’ Association, the National Association of Attorneys General, and the National Conference of State Legislatures — are well organized and have overcome the usual free-rider-type obstacles that usually impede interest groups from presenting their views in the legislative process. Along with state governors and other state and local officials, these organizations regularly testify before Congress (although some scholars have complained that state organizations are not always invited to testify).

In doing so, state organizations have expressly supported the more abstract values of federalism. For example, the head of the Council of State Governments, one of the “Big Seven,” testified before Congress in 1999 regarding the role of states as “laboratories of democracy” and sources of “innovation.” The head of the National Governors’ Association similarly testified regarding people’s “need... to be governed [by the entities] closest to them.”

Lobbyists very often raise issues in other ways as well. For example, virtually all organizations, including those representing state interests, contact officials directly or talk shop with them in informal

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95. See S. REP. NO. 106-159, at 10 n.52 (1999) (“The ‘Big 7’ includes the National Governors’ Association, the National Conference of State Legislatures, the National Association of Counties, the U.S. Conference of Mayors, the Council of State Governments, the National League of Cities, and the International City/County Management Association.”); Bermann, supra note 87, at 96-97 (describing these organizations as influential both in legislative and administrative settings and as “develop[ing] a federalism ‘constituency’ of unprecedented political strength”); Garrett, supra note 77, at 1131 (noting that state interest groups provide solidary and special benefits that facilitate organizing and overcoming free rider problems).

96. For example, Marci Hamilton notes that no states or state organizations were invited to testify on the Religious Freedom Restoration Act. Hamilton, supra note 78, at 99; see also Johanna Hartwig, No State Left Behind? Protection of State Interests in the Passage of the No Child Left Behind Act of 2001 (2003) (unpublished manuscript, on file with author) (documenting extent of state participation in No Child Left Behind Act).

97. See Senate Hearings on Federalism, supra note 15, at 5 (statement of Tommy G. Thompson, Governor, State of Wis., and President, Council of State Governments); see also id. at 6 (“Time and time again, we have developed and passed legislation to deal with our unique problems ...”); id. at 22 (statement of Daniel T. Blue, Jr., Majority Leader, N.C. H.R., and President, Nat’l Conf. of State Legs.) (“State and local governments [can] experiment, [can] figure out specific solutions for specific problems, [and] ... are better suited to ... deal with their unique nature.”).

98. See Senate Hearings on Federalism, supra note 15, at 12 (statement of Michael O. Leavitt, Governor, State of Utah, and Vice Chair, Nat’l Governors’ Ass’n); id. at 14-15 (arguing that states and national government must have ability to balance each other).
settings. 99 Both a member of Congress and her legislative staff will typically make time to meet with state organizations, especially organizations from the member's home state. 100 A number of state organizations met extensively with members of Congress in 2000 to encourage them to support normalized trade relations with China. 101 A member of Congress might have an incentive to consider the views of these organizations to the extent their views are shared by the member's home state or by the state's voters (or reflect the member's own ideological preferences). 102

As Kramer has argued, another set of "extraconstitutional" safeguards may ensure congressional consideration of state interests. These include national political parties, which, he argues, serve to link the electoral success of federal politicians with that of state politicians, 103 and the dependence of the federal government on state administrators to carry out programs, which creates a natural incentive for Congress to listen to state views as it makes policy decisions. 104 Further, many members of Congress may have a particular affinity for state interests, because they began their career in state governments. 105 Finally, members of Congress are free to advocate federalist values based on their personal ideological views.

Some scholars have suggested state interests are underrepresented because the groups and individuals discussed above may not consistently advocate federalist — or anti-preemption — positions.


104. See Bednar & Eskridge, supra note 79, at 1478 ("Political scientists have documented the remarkable extent to which national programs (especially New Deal ones) depend upon state administrators for their success."); Kramer, Putting Politics Back, supra note 76, at 280; Kramer, Understanding Federalism, supra note 103, at 1543-54.

105. See, e.g., Senate Hearings on Federalism, supra note 15, at 3 (statement of Sen. Levin) ("Many of us in the Senate... have served as either governors, mayors, or State legislators before coming to the Senate.").
Individual voters may be insensitive to the "governance needs" of state and local institutions. Moreover, Hamilton, Cross, and Calabresi have all questioned the view that state and local politicians, given the opportunity, would consistently espouse federalist values, largely because their personal political ambitions may cause them to focus on seeking federal largesse or on cozying up with federal officials in the hopes of joining their ranks. To press these analyses further, even if state governors or state legislatures would favor preserving state autonomy for its own sake, state agency officials — often consulted by Congress — may sympathize with, or desire, federal regulatory action. A state official may "welcome[] rather than fear federal... mandates, because they comport with his or her own thinking about governmental priorities." For example, in August 2003, the Environmental Council of the States, an association representing the heads of state environmental agencies, passed a resolution noting the difficulties states would have reducing mercury contamination in their waters under the current state-centered approach, instead calling on the Environmental Protection Agency (EPA) to "develop a National Mercury Reduction Strategy... so that States and EPA may use the strategy... to assure attainment of water

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106. See Kramer, Putting Politics Back, supra note 76, at 222. Kramer nonetheless defends the "extraconstitutional safeguards" described as an adequate substitute. See supra text accompanying notes 103-104. See also Steven Calabresi, supra note 76, at 795-96 (arguing that participation of local voters creates incentive for members of Congress to expand national power so as to increase ability to distribute federal "'pork,' " rather than attending to federalism concerns).

107. Calabresi argues that state and local politicians will be more interested in "federal largesse" than constitutional structure. Calabresi, supra note 76, at 798. Hamilton argues that because state politicians want to become national politicians, they will "kowtow" to federal officials rather than confront them, and thus cannot be trusted to take state-supportive positions. See Hamilton, supra note 78, at 98. But see HILLS, supra note 52, at 19-20 (arguing that state officials' political ambitions will make them policy entrepreneurs). Cross argues that state politicians are typically beholden to federal officials for electoral assistance rather than the other way around. See Cross, supra note 75, at 9. Meanwhile, others argue that voters alone may not be sensitive to state government interests. E.g., Young, supra note 1 (arguing that state government regulatory prerogatives are essential to governments' developing loyalty from citizens).

108. See also Roderick M. Hills, Jr., Dissecting the State: The Use of Federal Law to Free State and Local Officials from State Legislatures' Control, 97 MICH. L. REV. 1201, 1218 (1999) ("[E]lected officials will have a greater incentive to divert federal funds... much more than the nonelected policy professionals employed by state and local agencies — so-called 'policy specialists.' ").


110. The Clean Water Act currently asks each individual state to develop a "total maximum daily load" for mercury in each of its waters and then provides the state with the discretion to decide which parties will reduce mercury discharges. See 33 U.S.C. § 1313(d)(1) (2000).
quality standards."\textsuperscript{111} State agency officials also may prefer more uniform regulatory regimes among states, because it maintains their personal marketability and job options between states. Federal regulation, of course, would further these goals.

Further, state associations, such as the National Governors' Association and others, may not consistently espouse federalist values, because state views may differ on whether federal regulation is appropriate.\textsuperscript{112} Baker and Young have suggested that some states may prefer national regulation in areas such as environmental protection, which may give them advantages over other states or protect them from externalities imposed by neighboring states' regulation.\textsuperscript{113}

Finally, Hills has argued that pro-state autonomy views may be blunted by the advocacy of well-organized interest groups, such as business trade associations. He argues that these groups are likely to strongly prefer uniform national rules.\textsuperscript{114} To the extent private groups that raise anti-preemption views tend to be poorly organized and to "lack the unifying interest in regulatory diversity for its own sake,"\textsuperscript{115} state interests could further be seen as underrepresented in Congress.\textsuperscript{116}

These arguments about the ambivalence of states and allied groups are meant to suggest that Congress, in response, might inappropriately reduce the value it attaches to a strong, independent state role.\textsuperscript{117}


\textsuperscript{112.} See Baker & Young, supra note 80. Garrett also notes the possibility that divergent views within state organizations will impede states from defining a uniform position on some issues. Garrett, supra note 77, at 1123 ("Disagreement can stem not only from ideological or policy differences; it can also occur because some national policies affect individual states and localities in different ways . . ." (citations omitted)).

\textsuperscript{113.} See Baker & Young, supra note 80.

\textsuperscript{114.} HILLS, supra note 52, at 15 (hypothesizing that "regulated industries that support preemption have a greater capacity to elicit congressional debate on these issues than the interest groups that oppose preemption"). Hills compiles significant anecdotal support. \textit{But see} Felicity Barringer, Some Rules We Like, WASH. POST, Jan. 4, 1982, at A15 (quoting former head of Federal Insurance Association saying that industry "'would rather be regulated by 50 monkeys than King Kong.'"); \textit{see also} Helen Dewar, Panel Votes to Cut Power of FTC Over Professions, WASH. POST, Sep. 24, 1982, at A2 (noting that organized professions prefer state regulation to FTC).

\textsuperscript{115.} HILLS, supra note 52, at 24. \textit{But see} Baker & Young, supra note 80 (arguing that some states will seek preemption in order to avoid effects of other state laws).

\textsuperscript{116.} Hills accordingly argues that in order to encourage legislative debate, courts should use the presumption against preemption to place the burden on the well-organized groups to seek favorable legislation, rather than on the states or on more poorly organized groups. HILLS, supra note 52, at 16 (arguing that state legislation "prods the regulated interests to seek federal legislation preempting the states").

\textsuperscript{117.} \textit{E.g.}, Hamilton, supra note 78.
However, it is not clear why states would be poor representatives of "federalism"-type views, or why we should view preferences expressed by state groups as tainted. There is, of course, a view, subject to longstanding debate, that we should doubt a government decision that merely serves expressed preferences.\textsuperscript{118} Expressed preferences may, for example, stem from fleeting passions or be unreasoned.\textsuperscript{119} That position seems to have little force with respect to states and state organizations, however. Presumably the position a state organization expresses to Congress is taken only after some reasoned deliberation has already occurred within the organization.\textsuperscript{120}

In any event, this Article generally assumes that the National Governors' Association and other state associations, state officials, state voters, and allied groups, if given the opportunity to do so and if adequately organized, will express preferences that will reasonably include federalist values.\textsuperscript{121} This assumption is generally more consistent with the "political safeguards" view, which does not dictate a particular set of outcomes, but instead relies on the opportunity to present views in the political process. Further, to the extent state officials or state organizations do not press state-related views or anti-preemption groups are not well-organized, any resulting "problems" in the representation of state interests would afflict not only congressional deliberations, but also agency consideration of these views.\textsuperscript{122}

Assuming, therefore, that federalism values are important and that states and state organizations will express them if given the opportunity, does Congress have a greater incentive than agencies to consider state interests? My focus is upon the feature of congressional structure most relied upon by opponents of deference to administrative preemption interpretations: that members of Congress are elected in regional or state-based elections. This turns out,

\textsuperscript{118} Cf. Bermann, \textit{supra} note 87, at 146 ("[I]f as many different and important values rest on regulatory federalism as we are inclined to believe, then it does not seem that simple mood swings and impulses can possibly ever be an adequate safeguard.").

\textsuperscript{119} Cf. \textsc{The Federalist} No. 10 (James Madison), at 58-59 (Jacob E. Cooke ed., 1961) (noting fallibility of "reason of man" and prospect that mankind will be "inflamed . . . with mutual animosity" as sources of faction problem).

\textsuperscript{120} \textit{But see} Hills, \textit{supra} note 52, at 9-10 (suggesting that Big Seven may have difficulty formulating consistent positions).

\textsuperscript{121} \textit{See supra} text accompanying notes 106-111 (noting substantial debate on this point). Truly poor representation of state-centered interests by state groups, state officials, and state voters might, of course, lead supporters of federalism values to argue that judicial protection is necessary.

\textsuperscript{122} Hills's complaint that anti-preemption groups are less well-organized might have slightly more purchase in the legislative context, since the level of organization of a group might be relevant not only to its ability to provide information and communicate preference intensity to the decisionmaking officials, but also to its ability to supply campaign contributions, which has less direct relevance to agency officials.
however, to give Congress no special advantage with respect to a number of important federalism values, and may result in Congress undervaluing these interests relative to the agencies.\textsuperscript{123}

In particular, some federalism benefits may be national in nature. For example, consider the argument that states can serve as "laboratories" for testing different approaches to national policy problems. Even an individual voter or state official fully committed to preserving her state's regulatory role may value having the state retain flexibility to develop an individual approach to a policy problem, as well as valuing the particular approach the home state wishes to take. However, that flexibility also creates benefits outside the state's boundaries. Providing the rest of the states and the federal government an opportunity to learn from a particular state's unique attempts to solve its local problems is a value that accrues nationally. Independent of one's ideological views on welfare policy, for example, the State of Wisconsin's experimentation with its welfare programs in the mid-1990s unquestionably not only affected Wisconsin residents, but also supplied valuable information to policymakers both in the federal government and in other states.\textsuperscript{124} As a general rule, the intensity of an individual voter's preferences, or even those of a particular state official, that the state government retain autonomy on a particular issue may not signal the full benefits of autonomy to members of their state delegations in Congress. Those members in turn are unlikely to fully value these sorts of benefits.\textsuperscript{125} Consequently,

\textsuperscript{123} Consistent with other arguments regarding representation of state interests in Congress, my view implicitly takes a view of congressional and agency decisionmaking that is more pluralist in nature. See also, e.g., Bermann, \textit{supra} note 87; Wechsler, \textit{supra} note 79. If one sees Congress and the agencies as fitting a more deliberative model, then the process might be viewed as sufficient to represent state interests if those interests are effectively advocated within the context of the process. Then legislators (in the case of Congress) would choose the appropriate outcome following a vigorous debate. Similarly, agency officials would choose the appropriate result following a full airing of the issues. See, e.g., Mark Seidenfeld, \textit{A Civic Republican Justification for the Bureaucratic State}, 105 \textit{Harv. L. Rev.} 1511 (1992) (arguing the administrative state can be conceptualized as a civic republican institution).

If the institutions are conceptualized in this way, then any comparative advantage either has over the other would largely disappear. The critical issue would be whether state views are adequately presented. As discussed below, they appear to be presented in both processes. Even with a deliberative conception, therefore, Congress would not have a clear political accountability advantage over the agencies.


\textsuperscript{125} Neighboring state officials or voters could conceivably signal the benefits they receive from such flexibility to their representatives in Congress. But neighboring state officials or voters may have only a limited amount of "political capital," making it less likely that Ohio and its voters, say, would try to motivate the Ohio delegation on an issue that is centrally of interest to Indiana. See, e.g., Bermann, \textit{supra} note 87, at 115 (arguing that members of Congress likely to be guided primarily by factors other than "[f]ederalism values
the regional structure offers no pronounced advantage over a national perspective in ensuring that members fully consider federalism values. Federalism's claimed advantage of dividing power among the different structures of American government similarly has national aspects. Some states may seek protection of their regulatory perquisites in areas such as health or education, but benefits from the resulting reduction of national power will accrue more widely than simply to the citizens of those states. To the extent a reduction in national power reduces the risks to liberty presented by overly concentrated federal authority, all citizens benefit, not simply those in the state seeking regulatory autonomy.

Although the regional structure will give Congress no special advantage in considering these more "national" federalism benefits, the fact that members of Congress come from particular districts and states probably does give them a particular incentive to focus on state interests that have especially regional aspects. For example, Michigan state officials may well perceive better opportunities in Congress, rather than within the executive branch, for the consideration of Great Lakes environmental issues or issues affecting the automobile industry and its employees. They may reasonably expect vigorous representation from members of their congressional delegation. The Michigan congressional delegation, including both Democrats and Republicans, has delivered such representation in its recent opposition to more stringent fuel economy standards for new cars.126

Congress may, of course, hear from state organizations such as the National Governors' Association that deliberate internally before formulating their positions. These organizations may fully value federalism benefits, including those more national in nature, and may transmit their views to members of Congress. However, these organizations can present their views to administrative agencies as well. Assuming that these organizations are interested in benefits that accrue nationally, such as benefits from the dispersion of power or the preservation of states as centers of democracy and policy experimentation, it is unclear why members of Congress would have any special incentive (beyond their incentive to respond to the officials of their particular state) to respond to the organizational views.127

as such," particularly "the substantive policy interests of their constituency on [a given] issue and . . . the content and weight of the national interest on that issue.")

126. See, e.g., Danny Hakim, Pitting Fuel Economy Against Safety, N.Y. TIMES, June 28, 2003, at C1 ("In 1999, Michigan's senators, [Democratic] Carl Levin and [Republican] Spencer Abraham . . . wrote to colleagues that higher [corporate average fuel economy] standards would equal more vehicle deaths because cars would be made too light.").

127. A state official can oppose a member of Congress running for reelection, but such opposition seems likely to be most persuasive to voters if it is centered on the value (or lack thereof) to the state's voters of having the member represent the state in Congress. As
Similarly, while members of Congress also may be motivated by ideological concern for federalism, Congress would seem to have no structural advantage over the President and executive branch agencies in considering such values.\textsuperscript{128}

2. \textit{Agency Incentives to Consider State Interests}

How might agency "political safeguards" for federalism compare with those provided by the congressional process? Though scholars have not spelled it out in great detail, the argument in favor of congressional superiority essentially would be that federal agency administrators are not elected, and hence have no particular incentive to be responsive to individual states or regions.\textsuperscript{129}

A closer examination suggests, however, that despite this portrayal, agencies have some significant incentives to consider federalism values, and even some comparative advantages over Congress in considering values more national in nature. Certainly, like Congress post-Seventeenth Amendment, the head of an executive branch agency is not state-chosen. Nor are agency officials elected directly by voters who might value federalism. Still, even without a direct electoral process, agencies have significant incentives, created both directly and through presidential oversight, to consider interests articulated by states or state groups.\textsuperscript{130}

First, executive branch agencies are accountable not only to Congress, but to the President, herself an elected official.\textsuperscript{131} The President and Vice President are the only federal officials that must appeal to a national constituency to win or retain office. The President's desire for reelection supplies an incentive both for the President and for administrative agencies reporting to her to respond to public preferences.

Recent administrative law commentary has relied very heavily on presidential control over executive branch agencies as a means of ensuring their democratic responsiveness, and as a more general

\textsuperscript{128} See Bermann, supra note 87, at 115; infra text accompanying notes 139-142 (discussing President's national perspective on issues).

\textsuperscript{129} See supra text accompanying notes 14-16.

\textsuperscript{130} As I argue below, there may be other reasons to confine agency attention to those factors clearly defined by statute, rather than encouraging agencies to consider broad issues of politics and governmental structure. See infra text accompanying notes 225-238.

\textsuperscript{131} See Peter L. Strauss, \textit{When the Judge Is Not the Primary Official with Responsibility to Read: Agency Interpretation and the Problem of Legislative History}, 66 CHI.-KENT L. REV. 321, 329 (1990) (noting that agency officials spend much time "responding to inquiries or demands from the President, members of Congress or assorted presidential or congressional offices").
source of administrative agency legitimacy.\textsuperscript{132} Even if she is not herself seeking reelection, the President may wish to be perceived as attentive to national interests in order to satisfy ambitions for achievement, to assure a historical legacy, or to have a role in selecting her successor.\textsuperscript{133}

Presidents also often have particular incentives to respond to the interests of states qua states. One reason is the electoral college’s role in the presidential election. That electoral college votes matter is evidenced in part by the state-by-state nature of presidential campaigning.\textsuperscript{134} Although a President may not need to garner a majority of the popular vote to win election, “elections over the last thirty years suggest that virtually every state in the nation is in fact in play in these contests.”\textsuperscript{135}

Moreover, presidents often are former governors, with an innate appreciation for the challenges faced by states.\textsuperscript{136} Presidents regularly make statements suggesting their close identification with the role of governors.\textsuperscript{137} Further, U.S. presidents are regular speakers at conferences of state officials, such as the National Governors’ Association and the National Conference of State Legislatures.\textsuperscript{138}

\begin{footnotes}
\item[132.\textsuperscript{132}] Cynthia R. Farina, The Consent of the Governed: Against Simple Rules for a Complex World, 72 CHI.-KENT L. REV. 987, 988 (1997) [hereinafter Farina, Consent of the Governed] (“Increasingly, scholars (and, at times, the judiciary) look to the President not only to improve the managerial competence and efficiency with which regulation occurs but also, and more deeply, to supply the elusive essence of democratic legitimation.”). See generally Lisa Schultz Bressman, Beyond Accountability: Arbitrariness and Legitimacy in the Administrative State, 78 N.Y.U. L. REV. 461, 485 (2003) (discussing presidential control theorists’ “vision of administration”).
\item[133.\textsuperscript{133}] See Elena Kagan, Presidential Administration, 114 HARV. L. REV. 2245, 2335 (2001).
\item[134.\textsuperscript{134}] See Steven G. Calabresi, Some Normative Arguments for the Unitary Executive, 48 ARK. L. REV. 23, 35 (1994) (“[M]ost modern presidents probably see their potential electoral base as comprehending up to 60% of all voters and perhaps as many as 90% of all state electoral college votes.” (citations omitted)) Of course, the presidential candidates are attempting to show their attentiveness to state concerns by appealing not only to state officials, but also to individual voters.
\item[135.\textsuperscript{135}] Id.
\item[136.\textsuperscript{136}] Four of the most recent five presidents (George W. Bush, Clinton, Reagan, and Carter) served as state governors.
\item[137.\textsuperscript{137}] See, e.g., George W. Bush, Remarks to the National Conference of State Legislatures, 37 WEEKLY COMP. PRES. DOC. 386 (Mar. 2, 2001) (in searching for cabinet members, “I looked . . . for fellow Governors, because I strongly believe that there needs to be appropriate balance between the Federal Government and the State governments.”); George W. Bush, Remarks at the National Governors’ Association Meeting, 37 WEEKLY COMP. PRES. DOC. 343 (Feb. 26, 2001) (“I’ve sat where you’re sitting, and I know what it’s like to have a good idea and then to wait on the Federal Government to tell you whether you can try it or not.”); William J. Clinton, Statement on the Executive Order on Federalism, 35 WEEKLY COMP. PRES. DOC. 1561 (Aug. 9, 1999) (“As a former Governor, I know how important it is for the American people that the Federal Government and State and local governments work together as partners.”).
\item[138.\textsuperscript{138}] See Address at the National Governors’ Conference, 1969 PUB. PAPERS 694 (Sept. 1, 1969) (remarks of President Nixon); sources cited supra note 137.
\end{footnotes}
Apart from the fact that she is an official with a national constituency and, like members of Congress, may have a particular cultural affinity for state interests, the President also is likely to respond to informal congressional pressure to consider states’ interests in order to avoid political costs and to forestall binding legislative action. For example, when President Clinton revised the presidential executive order on federalism — aimed at assuring that agencies consider state interests — in a way that was perceived to be less protective of state prerogatives, he withdrew the new order and revised it in response to pressure both from state groups and from House hearings.\(^\text{139}\) Michael Graetz has argued that “uniform opposition of governors and mayors was an important — perhaps even decisive — factor in dissuading President Nixon from proposing a value-added tax.”\(^\text{140}\) In 1996, President Clinton suggested that he had signed welfare reform legislation in response to demands from governors, which included a 1995 National Governors’ Association policy statement seeking flexibility.\(^\text{141}\) Although the lack of a baseline makes it difficult to precisely document just how much influence states have with the President, the President appears to have a significant incentive to consider the interests of states.

In addition to possessing incentives to respond to state interests, the President may possess a comparative advantage over Congress in the ability to fully consider federalism benefits that are more national in nature. Compared with congressional campaigns, Presidential campaigns are generally more focused on issues that resonate nationally. As Mashaw puts it, rather than responding to merely parochial interests, “issues of national scope and the candidates’ positions on those issues are the essence of presidential politics.”\(^\text{142}\) A

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139. See generally S. REP. NO. 106-159, at 10-11 (1999) (describing congressional demand, at behest of states, that order be withdrawn and revised and noting that state organizations found “the new order was a substantial improvement over” the old one); Senate Hearings on Federalism, supra note 15, at 17 (statement of Michael O. Leavitt, Governor, State of Utah, and Vice Chair, Nat’l Governors’ Ass’n) (describing negotiations, ongoing at the time, between White House and Big Seven).


142. MASHAW, supra note 54, at 152; see also id. (“The president has no particular constituency to which he or she has special responsibility to deliver benefits.”); Terry M. Moe, The Politics of Bureaucratic Structure, in CAN THE GOVERNMENT GOVERN? 267, 279 (John E. Chubb & Paul E. Peterson eds., 1989) (“[P]residents have incentives to think in grander terms about what is best for society as a whole, or at least broad chunks of it, and they have their own agendas . . . .”); Farina, Consent of the Governed, supra note 132, at 991;
voter's choice of a particular candidate may not necessarily send a clear message on a particular policy issue (such as how to set drinking water standards), but may well be decided "in accordance with [the voter's] perception of a candidate's general ideology." The size of the federal government and its responsibilities relative to states are themes that recur frequently in presidential campaigns.

Due to this national perspective, to the extent a policy preferred by one state may have some positive consequences for another, the President may be better able than Congress to register the full intensity of the public's preferences. As a consequence, the President may be more apt to consider the "national" benefits of federalism, such as the extent to which states can serve as centers of policy experimentation or democracy or serve as a means of dividing power among units of government. As Steven Calabresi has argued, the national election makes more likely the prospect that the "President will turn into the spokesperson of a centrist majority coalition, composed of numerous shifting minority elements," even protecting the "national commons from regional selfishness." The President's national constituency will give the President an ability and incentive not only to more fully consider policies that will benefit the nation as a whole, but to encourage agencies reporting to her to do so.

Concededly, particularly regional concerns that are not shared with states across the nation, such as Great Lakes management concerns of the State of Michigan, may be more likely to receive direct expression in Congress (say, by the Michigan delegation) than in a presidential electoral process or by a presidential candidate. To the extent we see these sorts of regional concerns as most important in a regime that assures a significant degree of autonomy to states, we might conclude that Congress's comparative advantages in considering these interests dominate the advantages offered by presidential decisionmaking. However, federalism advocates place considerable emphasis upon federalism benefits that are more national in nature.

Cynthia R. Farina, Faith, Hope, and Rationality or Public Choice and the Perils of Occam's Razor, 28 FLA. ST. U. L. REV. 109, 125-26 (2000) ("Enhanced presidential control over regulatory policymaking is advocated as the means through which the interests of the nation can triumph over the geographical parochialism and special-interest pandering that drive the rest of the political process."); Kagan, supra note 133, at 2335 ("[B]ecause the President has a national constituency, he is likely to consider, in setting the direction of administrative policy on an ongoing basis, the preferences of the general public, rather than merely parochial interests.").

143. Seidenfeld, supra note 123, at 1568-69.

144. Calabresi, supra note 134, at 98-99 (discussing presidential role, especially in protecting "budgetary commons" from regional raids).

145. See Mashaw, supra note 54, at 131-57 (discussing President's service to national constituency). See generally Kagan, supra note 133 (discussing presidential means of holding agencies accountable).

146. See supra text accompanying notes 75-78.
As to these, it would seem that the President would have the advantage over Congress.

One indication of presidential willingness to credit federalism values (though not necessarily of agency expertise or commitment to considering such values, as discussed below147), is the series of executive orders beginning with the 1982 Executive Order No. 12,372,148 "Intergovernmental Review of Federal Programs," and culminating in the series of federalism executive orders. Since Reagan, each President has maintained such an order in one form or another. Executive Order No. 13,132, "Federalism," in effect since August 1999, requires an agency to consult with state and local officials to avoid conflicts between federal and state laws and before proposing to limit state policymaking discretion.149 Among other key requirements, the Executive Order also instructs agencies to restrict regulatory preemption of state law to the "minimum level necessary."150 Finally, an agency promulgating any regulation with federalism implications or that preempts state law is to submit a federalism impact statement to the Office of Management and Budget (OMB), including a report on consultation with state and local officials.151 In this most recent Executive Order, the President (Clinton, in this case) declares that agencies "shall be guided" by a number of "fundamental federalism principles," including that "issues that are not national in scope or significance are most appropriately addressed by the level of government closest to the people," that the states can serve as "laboratories of democracy," and that states can experiment with a variety of public policy approaches.152

It could be objected that presidents do not wholly control agencies, in part due to resource constraints, and thus cannot guarantee the

147. See infra text accompanying notes 173-203.
151. Id. at § 6(c). Opinions vary on whether the federalism impact assessment requirements are making any practical difference to rulemaking. See U.S. GEN. ACCOUNTING OFFICE, FEDERALISM: IMPLEMENTATION OF EXECUTIVE ORDER 12612 IN THE RULEMAKING PROCESS 1 (May 5, 1999) (reporting rare preparation of federalism impact statements), available at http://www.gao.gov/archive/1999/ge99093t.pdf; Hills, supra note 109, at 1244 ("Most legislative or administrative devices for the avoidance of federal mandates have been widely acknowledged to be toothless failures."). As with evidence of state "success" or "failure" in the congressional process, reaching an empirical conclusion is very difficult, because there is little against which to compare either the agency decisionmaking process or the substantive outcome.
consideration of particular interests.\textsuperscript{153} For example, the federalism executive orders have not been terribly successful in getting agencies to consider more generalized federalism values.\textsuperscript{154} Even so, it is reasonable to think that presidential policies have \textit{some} effect on agency decisionmaking. As discussed below, although agencies may not have incorporated the more abstract benefits of "federalism" into their decisionmaking, agencies do appear to have systematically consulted with states. Thus, they may be honoring state interests as states have expressed them.

Even with significant slack in the president-agency relationship, agencies possess some independent incentives to hear from states and state organizations and to fully consider state interests as the agencies formulate policy. First, independent of incentives created by reporting to the President, federal agency officials may recognize their dependence on state institutions and officials to successfully implement federal programs. As other scholars have argued, Congress depends to some degree on states to carry out federal programs.\textsuperscript{155} By comparison, agencies constantly have states as partners in implementation. Under a number of federal programs, for example, states enforce their own laws "in lieu of" federal laws.\textsuperscript{156} Beyond this, there are countless examples of informal federal agency cooperation with state and local agencies in the form of "memoranda of understanding" or "memoranda of agreement," which may delegate federal implementation responsibility to states, result in cooperative enforcement efforts, or devise cooperative procedures for resolving issues.\textsuperscript{157} The presence of these ongoing cooperative relationships and

\textsuperscript{153} See, \textit{e.g.}, Kagan, supra note 133, at 2334 (noting prospect that "considerable swaths" of agency decisionmaking would, even in best case, remain "impervious to presidential direction"); Bressman, supra note 132, at 505 (noting limitations on presidential ability to control agencies).

\textsuperscript{154} See Bermann, supra note 87, at 93 ("By all accounts, the Executive Orders on federalism are of limited utility....A study by the Advisory Commission on Intergovernmental Relations reports that the Reagan federalism order was in fact routinely ignored."); infra text accompanying notes 200-203.

\textsuperscript{155} See \textit{supra} text accompanying note 104.

\textsuperscript{156} See, \textit{e.g.}, 42 U.S.C. § 6926(b) (2000) (provision of Resource Conservation and Recovery Act permitting state, if approved by EPA Administrator, to carry out own hazardous waste program "in lieu of the Federal program under this subchapter in such State," including issuance and enforcement of permits to disposal facilities).

the desire of federal agency officials to maintain them creates a strong incentive for agency officials to listen to state views even in areas where no formal cooperative arrangement presently exists.

Second, agency officials recognize the political costs that may come — often through the congressional process — from not taking state concerns into account. For example, EPA administers schemes under which it may delegate federal authorities to state governments or authorize them to enforce their own laws in lieu of federal requirements. EPA has rarely, if ever, revoked a delegation of responsibility to a state government (though it has a few times threatened to do so). In part this is because the agency depends on state governments to carry the burden of administering the air and water pollution and solid waste disposal permitting programs and does not want, by revoking the program of one state, to create an atmosphere of uncertainty for other state programs. In part it is because EPA unquestionably recognizes the prospect of a political backlash in Congress from states, a backlash that might cause Congress to limit the agency's own administrative authority.

Third, federal agency officials — like some members of Congress — also may be willing to consider state viewpoints, especially if they or their colleagues have worked in state governments. Kramer has asserted that for this reason, federal officials may be "culturally sensitive" to state institutional concerns. The cultural sensitivity may


158. See Clifford Rechtshaffen & David Markell, Improving State Environmental Enforcement Performance Through Enhanced Government Accountability and Other Strategies, 33 ENVTL. L. REP. 10,559 (2003) ("EPA has rarely if ever actually withdrawn a state's authorization (although... it did quasi-revoke Maryland's Title V authority in 2001.").

159. For example, even a decision by EPA to file environmental enforcement litigation in a single case after a state has already resolved a claim can create significant political tension. See Erik R. Lehtinen, Virginia as a Case Study: EPA Should Be Willing to Withdraw NPDES Permitting Authority from Deficient States, 23 WM. & MARY ENVTL. L. & POL'Y REV. 617, 629 (1999) ("The rare instances of overfiling that are initiated by [the] federal government can strain relations between EPA and states to the breaking point.").

160. See supra note 105 (quoting Sen. Levin's statement at Senate hearing on federalism).

161. See Kramer, Understanding Federalism, supra note 103, at 1551-52. But see S. REP. No. 106-159, at 18 (1999) (arguing that "unelected staff and career civil servants... may have little knowledge or concern for the states and localities that may be affected by the federal statutes... for which they are responsible").
be enhanced by the geographic proximity of state and federal agency officials. For example, the vast majority of federal agencies, if not all, maintain regional offices, including EPA and the Departments of Labor, Agriculture (including the U.S. Forest Service), Justice, Housing and Urban Development, and Health and Human Services. These regional offices were probably created partly in order to “ma[k]e it possible for governors and mayors to do their business with those agencies at one time and in one place.”

That agencies actually respond to these incentives to consider state interests seems anecdotally confirmed by public agency reports of meetings with state organizations during a policy making process. Agencies regularly report either that they solicited state government input prior to developing a policy or that they have “worked closely with . . . State Government agencies . . . in developing [the policy at hand].” Numerous agencies also have reported responding specifically to state comments during rulemaking and other policy development processes. Further, some agencies, such as the EPA,


maintain particular policies of soliciting comments from state and local governments before issuing rules or taking other actions.\textsuperscript{166}

Thus, contrary to the perception that agencies are not structured to represent the interests of states, they may have significant incentives to consider those interests.\textsuperscript{167} Due both to their accountability to the President and their national structure, agencies may also possess a comparative advantage in considering federalism benefits that are national in nature, such as the value of encouraging state policy experimentation and the value of dividing power between different levels of government.

3. State Opportunity to Participate in Agency Decisionmaking

Besides the advantages noted above, under the Administrative Procedure Act,\textsuperscript{168} states and state organizations may possess procedural advantages in agency decisionmaking that are unavailable in Congress. These procedural advantages may increase the chances that an agency hears and takes seriously arguments relating to federalism values and state interests. In formal agency adjudication, a state that is a party to the adjudication is entitled to submit briefs and present evidence.\textsuperscript{169} Further, as with any other entity interested in

\textsuperscript{165} For a few of the numerous examples, see Truck Size and Weight, 49 Fed. Reg. 23,302, 23,306 (June 5, 1984) (to be codified at 23 C.F.R. pt. 658) (request for comments on final DOT rule discussing participation by states in development of approved highways list for large commercial vehicles); Rules and Regulations Implementing the Telephone Consumer Protection Act (TCPA) of 1991, 68 Fed. Reg. 44,144, 44,154 (July 25, 2003) (to be codified at 47 C.F.R. pts. 64 & 68) ("In an effort to reconcile the state and federal roles [in regulating telemarketing], we have conducted several meetings with the states and FTC."); Notice: FEMA Guidance for the Use of Portable (Hand-Held) Radiological Instruments, 68 Fed. Reg. 6745, 6746 (Feb. 10, 2003) (responding to state comments regarding time required to monitor individual for radiological contamination by "provid[ing] suggestions on how state and local governments may address this issue"); Rio Grande Electric Cooperative, Inc.; Finding of No Significant Impact, 52 Fed. Reg. 44,618, 44,618 (Nov. 20, 1987) (reporting that finding by Rural Electrification Administration of no significant environmental impact followed receipt of "input from the public and Federal and State agencies").

\textsuperscript{166} See, e.g., National Pollutant Discharge Elimination System Permit Regulation and Effluent Limitation Guidelines and Standards for Concentrated Animal Feeding Operations (CAFOs), 68 Fed. Reg. 7176, 7257 (Feb. 12, 2003) (to be codified at 40 C.F.R. pts. 9, 122, 123 & 412) (noting that EPA solicited comment on proposed rule from state and local officials, "consistent with EPA's policy to promote communications between EPA and State and local governments").

\textsuperscript{167} See supra text accompanying notes 156-157 (on cooperative agency-state relationships). Evan Caminker, however, has argued in the context of Eleventh Amendment jurisprudence that generally permitting only federal lawsuits against state governments, rather than private ones, relies incorrectly on assumptions that federal officials will be concerned about state interests. See Evan H. Caminker, \textit{State Immunity Waivers for Suits by the United States}, 98 Mich. L. Rev. 92, 122 (1999) (arguing, among other things, that "federal prosecutors have no duty of loyalty to states per se").


notice-and-comment rulemaking, a state or state organization can receive notice of a proposed agency action and have the opportunity to submit comments. Moreover, states also benefit from the judicially enforced requirement that agencies must respond to significant comments, which requires reasoned agency consideration of the issues raised. In Congress, by comparison, a state or state organization must persuade a Congressman to carry its water in legislative deliberations. Though she may do so in anticipation of an upcoming election, the Congressman has no formal legal obligation to explain her decision not to argue (or to vote) on behalf of a state's interest.

Executive Order 13,132, "Federalism," also requires administrative agencies considering preemption to provide affected states notice and an opportunity to participate. Finally, states avail themselves of the OMB regulatory review process by requesting meetings with OMB. Based on rulemaking data collected and analyzed by Steven Croley, states appear to be regular participants in meetings with OMB at the time of regulatory review.

In short, viewed from a functional perspective, the argument that Congress is more politically accountable than administrative agencies and thus better able to resolve preemption issues seems a weak one. Despite arguments that agencies are "not designed' to represent state interests, Congress's structure appears to give it no special advantage in considering federalism values more national in nature. Meanwhile, agencies appear to have significant incentives, including both institutional reasons and presidential control, to afford states an opportunity to participate in agency decisionmaking and to fully consider state interests.


171. See Exec. Order No. 13,132, § 4(e), 64 Fed. Reg. 43,255, 43,257 (Aug. 4, 1999). States may now assert Eleventh Amendment immunity to formal adjudications. See Fed. Mar. Comm'n v. South Carolina State Ports Auth., 535 U.S. 743, 760 (2002). Admittedly, the mechanism for enforcement of the Executive Order provision is unclear at best, though to the extent the agency action involves rulemaking, the Office of Management and Budget can ensure that the agency has complied with the order at the time of regulatory review. But see U.S. GEN. ACCOUNTING OFFICE, supra note 151, at 1 (noting that "OMB officials told us that they have taken no specific actions to implement" Executive Order 12,612).

172. See generally Steven Croley, White House Review of Agency Rulemaking: An Empirical Perspective, 70 U. CHI. L. REV. 821, 843-45 (2003) (describing method of data collection). Within a data set of 153 proposed and final rules that underwent regulatory review during the Clinton administration that appeared in the OMB "log," id. at 854, OMB conducted solely "intergovernmental" meetings on 8 rules. Id. at 860 tbl.3. OMB also held meetings on 42 rules that Croley characterizes as "pluralistic." Id. These were rules in which a number of outside groups expressed an interest and attended meetings. While the data do not reveal whether state government representatives attended meetings on all these "pluralistic" rules, the meetings presumably sometimes included state government or state organization representatives. While this is not a majority of the meetings, it is a higher frequency than the apparent frequency of preparation of federalism impact analyses by agencies. See infra note 187 and accompanying text.
B. Agency Expertise on Preemption Questions

The evidence suggests that the political accountability of agencies for considering state interests is likely not worse — and may be significantly better — than that of either courts or Congress. Nevertheless, courts should still perceive strong reasons not to defer to agency decisions on preemption questions. In particular, the relative institutional competence of agencies in considering federalism values weighs against deferring to agency interpretations on preemption questions.\(^ {173} \)

If an agency were to take into account only those values implicated by the regulatory scheme it administers, institutional competence would be hard to question. Many issues raised by states with agencies appear to implicate the details of regulatory implementation and thus engage core areas of agency competence. For example, in designing a national data collection system to address health care fraud and abuse, the Department of Health and Human Services consulted with state agencies on the best ways to share and use state-collected data and modified its proposed system accordingly.\(^ {174} \) And in developing a standard for radon in drinking water, EPA has sought to adjust its proposal to take account of state and municipal agency comments regarding how local circumstances might affect compliance.\(^ {175} \)

Moreover, questions of state law preemption do raise some issues within agency expertise. For example, an agency is likely to be well-suited to assess the effect of nonuniform state standards upon program

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I continue to assume that consideration of federalism values should be part of the preemption determination. *But cf.* McGreal, *supra* note 67, at 872 (arguing that agency's identification of "obstacle preemption" as justification for regulatory preemption should carry considerable weight because "agency could reliably infer that Congress intended its regulatory scheme to succeed").


175. See, e.g., *National Primary Drinking Water Regulations; Radon-222*, 64 Fed. Reg. 59,246, 59,362-63 (proposed Nov. 2, 1999) (to be codified at 40 C.F.R. pts. 141-142) (responding to commenters' argument that standards should be nonuniform across nation's drinking water supply to take account of local circumstances).
goals and the level of compliance with a program.\textsuperscript{176} Consider whether states may set more stringent environmental standards than those set by federal law. An environmental agency could assess not only the effect on the environment, but the likely incentives for regulated entities as well.

However, relative institutional competence becomes a more significant issue if we wish agencies to evince concern with preserving state prerogatives for their own sake. The extent of an administrative agency’s institutional competence on federalism issues, compared with that of either Congress or the courts, is, of course, an empirical question that cannot be definitively resolved in any easy way.\textsuperscript{177} Nonetheless, several factors suggest the inappropriateness of an across-the-board assumption, such as that made in \textit{Chevron}, that agencies are engaging these issues or developing particular institutional competence.

First, agencies are specialized, not generalized, institutions. Within the realm of a program delegated by Congress, an agency can reasonably be expected to have considerable expertise in how its program functions and experience with entities regulated under the program. Agencies generally are closely focused on the purposes of a particular program, as set forth by the statute.\textsuperscript{178} That expertise has led courts to defer to agency interpretations aimed at accomplishing a statutory purpose, even when the interpretations have departed significantly from statutory text. Sunstein and Vermeule discuss, for example, how judges upheld EPA’s interpretation of the Safe Drinking Water Act to give it the discretion to refuse to set a “maximum contaminant level” standard for lead in drinking water. The statute required that such a standard be set as close as “feasible” to the goal of zero.\textsuperscript{179} However, EPA’s view was that setting such a standard, while technologically “feasible,” might result in public water systems having to use aggressive corrosion control treatment that

\textsuperscript{176} See, e.g., Sunstein & Vermeule, \textit{supra} note 60, at 928 (arguing that agencies can assess whether interpretive departures from statutory text will “seriously diminish predictability or otherwise unsettle the statutory scheme”).

\textsuperscript{177} As discussed elsewhere in this Article, a decision by Congress to expressly delegate the authority to preempt state law to an agency would require respect by the courts. \textit{See infra} text accompanying notes 217-221.

\textsuperscript{178} Strauss, \textit{supra} note 131, at 327 (“Agencies are almost wholly the creature[s] of their statutes, with an overlay of practices and understandings built on them and of judgments made and acted upon within the discretion that the statute is understood to confer.”) (arguing that within the context of administering particular programs, an agency’s understanding of authorizing statute may evolve); Jerry L. Mashaw, \textit{Agency Statutory Interpretation}, in \textit{3 Issues in Legal Scholarship: Dynamic Statutory Interpretation} art. 9, at 6 (2002) (arguing that rather than administrative agencies, “other legal institutions have responsibilities for coherence and balance”), at www.bepress.com/ils/iss3/art9.

\textsuperscript{179} 42 U.S.C. 300g-1(b)(4)(B) (2000).
would increase the level of other contaminants in drinking water.\textsuperscript{180} Less flattering, the agency penchant for focusing on particular programmatic goals to the exclusion of other concerns has led to "tunnel vision" criticisms. For example, environmental agencies have been criticized for devoting considerable government resources to removing the last little bit of risk presented by an identified hazardous waste site rather than directing those resources to identifying and addressing other, more significant environmental risks.\textsuperscript{181}

Meanwhile, federalism values raise a distinct category of questions generally separate from the goals of a particular national program. In addressing state law preemption, an agency might also consider concerns of state autonomy, the overall design of government, the allocation of authority among different levels of government, and in doing all this, consider the relationship with other legal fields and the need to maintain a coherent legal order.\textsuperscript{182} For example, an agency might consider the cost that regulatory preemption of a state's banking or environmental standards might impose upon a state's dignity or a state's function as a policy "laboratory" or center of democratic activity. Such a question would raise issues that are abstract, political, and likely far afield from the other issues implicated by a federal banking or environmental law. Hence, the federal agency may be less likely to develop experience or expertise in these questions.\textsuperscript{183}

Moreover, regulators generally are hired for their scientific and technical expertise. For example, the Office of Personnel Management's standard listing of qualifications for policy analysis and


\textsuperscript{181} See, e.g., \textit{Stephen G. Breyer, Breaking the Vicious Circle} 11-13 (1993) (discussing "tunnel vision" in hazardous waste cleanup); Posner, supra note 173, at 967 (noting "deformities" in agency decisionmaking "resulting from specialization"); see also Sunstein, \textit{Nondelegation Canons, supra} note 14, at 335 (arguing that "tunnel vision" critique may explain new canon forbidding agencies to require very large expenditures for trivial gains).


\textsuperscript{183} Mashaw, supra note 178, at 6 (2002) ("[A]n agency interpretive posture that seeks to harmonize its actions with the whole of the legal order risks forgetting that agencies are created precisely to carry out special purpose missions."); see Campbell, supra note 14, at 832 (discussing lack of agency expertise beyond details of particular program). A similar argument might be made about agency interpretations raising pure legal issues, regarding which the Supreme Court has confirmed that \textit{Chevron} deference is appropriate. See Young v. Cmty. Nutrition Inst., 476 U.S. 974 (1986). The federalism issues, however, are generally not only more abstract than the legal issues, but also far afield from the thrust of the authorizing statute the agency is administering. Cf. Bradley, supra note 25, at 694-96 (arguing that while the Department of State and President have foreign relations expertise, other agencies, such as the EEOC, probably do not).
administrative analysis positions, for use in all federal executive branch agencies, focuses on "knowledge of a pertinent professional subject-matter field," "public policy issues related to [the] subject-matter field," and a variety of other skills. Knowledge of general governmental structure, however, is not on the list. By contrast, a rare government office, such as the Department of Justice's Office of Legal Counsel, may explicitly require of its new civil servants knowledge of governmental structure and constitutional law. While an agency may consider this sort of knowledge in deciding whom to hire in drafting regulations, it does not appear to be an overt focus of hiring. Nor are issues of state autonomy normally considered in the ordinary course of writing rules.

Concededly, agencies have had to function under an increasing number of mandates requiring them to conduct broader analyses in making regulatory or other policy decisions and to consider factors such as paperwork burdens, regulatory flexibility, and costs for small businesses. In general, these types of requirements are statutory and require very focused deliberation on an agency decision at hand. For example, an agency may have to consider certain sorts of costs and regulatory burdens accompanying a proposed agency standard or requirement.

The federalism executive order does ask agencies to consider the more abstract federalism implications of their actions and to refrain from preemptioning state law. This aspect of the order, however, does not seem reflected in published agency analyses of federalism impacts or to have generated development of agency expertise on federalism.


186. See Office of Legal Counsel, U.S. Dep't of Justice, Opportunities at OLC, at www.usdoj.gov/olc/opportunities.htm (last modified Sept. 4, 2003) ("Applicants must have a J.D. degree.... The ideal candidate will have exceptional academic credentials, judicial clerkship or comparable experience, strong background in constitutional law, and outstanding legal research and writing skills."). Most agencies, however, do not advertise for qualifications of this sort.


This is in part shown by the poor quality of agency analyses, discussed below, and in part because it is unclear what an agency is to do if it concludes that a proposal otherwise important to achieving its statutory goals will injure state prerogatives. Even with the federalism executive order requirements, agencies tend to identify possible federalism implications only rarely. Even when federalism implications are identified, agencies tend not to focus upon federalism values, such as the need to preserve “core regulatory functions” of state governments. The rate of federalism impact assessments, for example, appears quite low. In 1999, the General Accounting Office reported that only five federalism impact assessments had been prepared for the over 11,000 final rules agencies issued between April 1996 and December 1998. A sampling of 600 proposed and final rules during one quarter in 2003 revealed six federalism impact analyses prepared by agencies. Five were included in the Federal Register notice of the rule or proposed rule that each accompanied, and the sixth was reported as on file with the agency.

189. See Hills, supra note 52.

190. See infra text accompanying notes 230-234 (suggesting that an agency’s statutory authority may not permit it to change its decisions based on state law prerogatives).

191. These 600 proposed and final rules were issued during the months of April, May, and June 2003. Rules for which the agency claimed no impact upon federalism and hence prepared no federalism impact assessment were partially excluded through the use of the following July 2003 Westlaw search: “Executive Order 13132” and not (%) ((no or not) /s federalism).” This search did not exclude rules and proposed rules where the agency phrased its decision not to prepare a federalism impact assessment by explaining that the rule did not affect the distribution of power between the state and federal government. The remaining rules were evaluated individually, yielding six where the agency either included a federalism impact assessment of some sort (five), see Controlled Negative Pressure REDON Fit Testing Protocol, 68 Fed. Reg. 33,887 (proposed June 6, 2003) (to be codified at 29 C.F.R. pt. 1910) (notice of OSHA proposed rulemaking about respiratory protection standards); Assigned Protection Factors, 68 Fed. Reg. 34,036 (proposed June 6, 2003) (to be codified at 29 C.F.R. pts. 1910, 1915 & 1926) (OSHA proposed rule and request for comments about respiratory protection standards); Hazardous Materials: Requirements for Maintenance, Requalification, Repair, and Use of DOT Specification Cylinders; Response to Appeals and Extension of Compliance Dates, 68 Fed. Reg. 24,653 (May 8, 2003) (to be codified at 49 C.F.R. pts. 107, 171, 173, 177 & 178) (DOT rule about cylinders for containing hazardous materials); Transportation of Hazardous Materials; Unloading of Intermodal (IM) and UN Portable Tanks on Transport Vehicles, 68 Fed. Reg. 32,409 (May 30, 2003) (to be codified at 49 C.F.R. pts. 171, 173, 177 & 178) (DOT rule about transporting hazardous materials); Transportation of Household Goods; Consumer Protection Regulations, 68 Fed. Reg. 35,064 (June 11, 2003) (to be codified at 49 C.F.R. pts. 375 & 377) (DOT interim final rule on transportation of household goods), or mentioned that it had prepared one and would make it available to the public on request (one), see Taking of Marine Mammals Incidental to Commercial Fishing Operations; Atlantic Large Whale Take Reduction Plan (ALWTRP), 68 Fed. Reg. 35,386 (June 13, 2003) (National Marine Fisheries Service, Department of Commerce, notice of voluntary limitations on certain types of commercial fishing gear). See also U.S. GEN. ACCOUNTING OFFICE, supra note 151 (containing analogous figures for 1996 to 1998).
The data suggest that, at a rate of one-in-a-hundred or less, federalism impact analyses are scarce at best. They also suggest that agencies might not be fully complying with the federalism executive order. That conclusion would be further supported if it were confirmed that other rules have unanalyzed federalism implications. On the other hand, the data represent a small sample of rulemakings, and a larger sample might reveal more such analyses. Moreover, what is reported in the *Federal Register* might understate the impact of the federalism impact assessment requirement. If an agency’s preparation of the assessment leads it to forgo a rulemaking altogether, for example, that decision is unlikely to be reported in the *Federal Register*. Nonetheless, the data raise a concern that agencies may not consider federalism impacts in every appropriate case.

Besides the rate of assessment preparation, the quality of the analysis in assessments also suggests that agencies are not especially sensitive to federalism-type values. The 2003 rules with federalism impact analyses came from the Department of Labor’s Occupational Safety and Health Administration, the Department of Transportation, and the National Marine Fisheries Service, part of the Department of Commerce. All five of the impact analyses involved the preemption of state law.

All of them, however, justified the agency’s preemption of state law primarily or solely in terms of the agency’s statutory authority to do so. Each analysis ended following the agency’s claim of statutory authority to preempt state law. Only one of the five — concerning Department of Transportation regulation of interstate transportation of household goods — even acknowledged the interests of states in protecting their in-state residents through such laws as deceptive trade practices. None of the five impact analyses acknowledged the values — endorsed by the executive order — of preserving state policymaking prerogatives, where possible, or any of the other federalism values mentioned either in the executive order or in legal commentary generally.

192. The rate of federalism impact assessment seemed even lower in earlier calendar quarters, though higher than that reported by the General Accounting Office. In the fourth calendar quarter of 1998, for example, for 2546 agency rules, I located 9 federalism impact assessments. To locate the assessments, I ran the following July 2003 Westlaw search in the *Federal Register* database, together with a date restriction, to electronically exclude rulemakings for which no federalism impact assessment was prepared: PR( RULE ) & ( "EXECUTIVE ORDER 13132" "FEDERALISM ASSESSMENT" "FEDERALISM IMPACT ASSESSMENT") % ( "NOT HAVE FEDERALISM IMPLICATIONS" "NOT HAVE SIGNIFICANT FEDERALISM IMPLICATIONS" "NOT HAVE A SUBSTANTIAL DIRECT EFFECT ON STATES" "NOT HAVE SUFFICIENT FEDERALISM"). I then sifted through the remaining rulemakings by hand.

193. See Transportation of Household Goods; Consumer Protection Regulations, 68 Fed. Reg. at 35,089 (rejecting suggestion that rule should announce that it is “supplementary law only” to state rules such as deceptive trade practices laws).
Two other recent examples suggest agency insensitivity: First, the Department of Transportation, in issuing regulations on school bus safety that would preempt state rules, concluded that the regulations would have no substantial direct effects on states or the relationship between the states and the federal government. "The reason is that this final rule applies to manufacturers of school buses and to school buses, and not to the States or local governments." 194 Neither agency writers of rules nor reviewers at OMB seemed sensitive to the fact that the rule preempted state authority to regulate.

Further, the Coast Guard issued a well-publicized navigational safety regulation intended to conform its rules to the International Convention for Safety of Life at Sea and to reflect current technology. 195 Along with other Coast Guard regulations, that regulation's preemption of numerous more stringent Washington State regulations was challenged by both Washington State and private tanker owners. Washington State wished to preserve its regulations to protect the quality of its large inland sea, Puget Sound. Ultimately, the Supreme Court upheld the federal regulations and their preemptive effect. 196 Despite the obvious state government interest, the Coast Guard had concluded in its rulemaking that the rule "does not have sufficient implications for federalism to warrant the preparation" of a federalism impact assessment, because "[t]he authority to issue regulations on [] navigational safety" is "committed to the Coast Guard by Federal statute." 197

In short, while it is a small sample, the quality of the reported assessments suggests that agency rulemaking staff is not especially sensitive to the sorts of concerns that have motivated federalism advocates. 198 This conclusion is empirical, of course. Agencies conceivably could still someday develop expertise in the core values underlying state autonomy. For example, agencies could be directed to hire regulators whose training includes strong backgrounds in governmental structure. In this regard, however, it is worth noting that

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198. In addition to the argument regarding agency expertise, the data also might support an argument that agency decisionmaking simply is not adequately deliberative in nature. Cf. ESKRIDGE, supra note 20, at 161 (arguing that Chevron deference might not be warranted for new agency interpretation if "the agency does not seriously consider the variety of interests at stake in the policy it adopts").
the General Accounting Office reports of apparent administrative failure to consider federalism issues in federalism impact analyses followed multiple presidential orders to agencies to do so. Further, the federalism impact assessments from 2003 were all prepared following relatively recent congressional oversight as well, undertaken when Congress was considering the proposed Federalism Accountability Act.199 Why agencies have nonetheless not developed expertise in this area is mysterious. Agency lack of expertise might be explained by lack of resources. Training employees in implementing the agency’s national programs may be sufficient to exhaust agency resources. Or perhaps agencies are attending to expressed state concerns, as required by the federalism executive order, but states and state associations are not greatly concerned by the “federalism benefits” on which scholars have focused.200 Perhaps scholars that emphasize states, for example, as “laboratories” of experimentation are focusing on the wrong values, and the core federalism value — which agencies are honoring — is simply ensuring that states have an opportunity to be heard.201

Alternatively, perhaps the agencies perceive a very low probability of cost or penalty for not fully considering federalism issues. Perhaps the agencies did not expect the congressional oversight, mentioned above, to result in the passage of binding legislation and had little incentive otherwise to conform their behavior to congressional desires. Perhaps the Office of Management and Budget, entrusted to review proposed and final agency rules prior to publication, has not been particularly interested in compelling agencies to perform more in-depth assessments of state and local concerns, as suggested by the executive orders.202 And, of course, those executive orders give rise to no rights enforceable in court. The precise reasons are unclear. The

199. See supra note 5 (discussing Federalism Accountability Act).

200. If this is the reason, then additional demands to attend to state interests might have little effect on the content of agency analyses. Similarly, states would be unlikely to demand extensive congressional oversight of seemingly inadequate agency analyses. To the extent we wish to commit as a nation to supporting federalism values, this might suggest that we should not rely on political safeguards alone.

201. Admittedly, the agency focus would then seem inconsistent with the “fundamental federalism principles” endorsed by the federalism executive order, which include the ideas that states can function as “laboratories of democracy,” can experiment with policy approaches, and can vary their policies to serve local needs. See Exec. Order No. 13,132, § 2, 64 Fed. Reg. 43,255 (Aug. 4, 1999) (“Fundamental Federalism Principles”).

202. The lack of federalism impact assessments that are better than perfunctory does appear to undermine arguments that agencies are politically accountable for considering the interests of states. If agencies were fully responsive to state interests, one might expect to see evidence of that, if not in regulatory outcomes, at least in executive-order-mandated regulatory deliberative processes. But see supra note 87 and accompanying text (suggesting that Congress also does not give substantial and systematic consideration to state interests).
lack of agency attention to more abstract federalism concerns, however, even after agency consultation with states and congressional and presidential oversight does suggest the presence of some persistent institutional obstacles to the development of expertise. 203

By comparison, the institutional competence of both Congress and the judiciary with respect to more abstract federalism benefits seems superior to that of agencies. As Sunstein and Vermeule argue, for example, Congress possesses expertise on large-scale interpretive issues. 204 Several standing committees in the House and Senate have jurisdiction that relates to the division of authority between state governments and the federal government, as well as federalism issues. 205 Several congressional hearings have been held on federalism and states’ rights. 206 Debates following the Supreme Court’s Garcia decision “showed that many members of Congress were responsive to arguments based on concepts of federalism [including] local autonomy [and] the fundamental role of the states.” 207

Similarly, judges appear to have a strong claim to institutional expertise in questions involving the overall distribution of governmental power, based both on training and tradition. Federal

203. Using detailed statutory requirements, Congress could, of course, require agencies to properly consider the federalism benefits discussed supra text accompanying notes 75-78 in preempting state law, and make that requirement judicially enforceable. In that case, either states or other entities that would benefit from more federalism-respecting agency rules could take an agency to court. The reduction of statutory ambiguity and increase in judicial oversight of this type, however, would amount to a regime very similar to the one I advocate in Section III.E — one with optional judicial deference to agency conclusions.

204. See Cass R. Sunstein & Adrian Vermeule, A Reply to Posner, 101 MICH. L. REV. 972, 976 (2003) (arguing that legislators are also well qualified to decide interpretive questions and possess “better information about real-world consequences than judges”).


207. See Lee, supra note 87, at 337.
judges are generally, if not always, attorneys, and upon appointment, usually receive training in legal theory, constitutional law, and other abstract issues that would tend to equip them to consider abstract issues such as the benefits of federalism.  

Further, by tradition, as Posner has argued, the involvement of judges in the "'political history of the United States," not to mention their experience in assessing the overall distribution of governmental authority in countless opinions, gives them an institutional advantage in addressing such questions. As discussed above, some scholars may view the courts as having gone astray in attaching great importance to state sovereignty. Nonetheless, agencies would seem no more expert in assessing these questions.

Again, let us assume that we want the more general federalism benefits to be considered in deciding preemption questions. A *Chevron* deference regime seems to raise a real risk that in many cases, agencies will fail to meaningfully consider them at all. That could be for the reasons discussed above or simply because agencies generally tend to be focused on the specific, contextual features of a problem as they decide, on a case-by-case basis, whether state law should be preempted.

This is not to say that agencies have no relevant expertise whatsoever. Whether a particular state law should be preempted may raise not only federalism-type questions, such as the potential cost to state autonomy, but very practical questions of the extent of potential interference with a federal statutory goal. For example, a claim of obstacle preemption requires a court to decide whether state law stands as an obstacle to congressional goals. As to these generally more technical and practical questions, we might reasonably suppose agencies to possess significant expertise, superior to that of judges.

Further, even if the more general questions of federalism values were critical in many cases of potential state law preemption, they


210. See Caminker, *supra* note 1; Cross, *supra* note 75; Rubin & Feeley, *supra* note 75.

211. See *supra* text accompanying notes 200-203 (discussing potential reasons for agency failures to consider federalism values in federalism impact analyses).
might not be so in all cases. We might think, for example, that some substantive areas are more part of the “core” of state regulatory authority than others. Perhaps education regulation is part of core state regulatory authority, but not so with regulation of representations made to federal agencies. Alternatively, particular agencies might have varying levels of expertise in considering the federalism values.

Consequently, we might not conclude that judges always have superior institutional expertise in the issues implicated by a particular preemption question. Even so, that does not suggest we should apply Chevron in the context of preemption. The choice here is not between sole reliance on agency expertise and sole reliance on judicial expertise. As discussed in greater detail below, even without Chevron and with Rice, a judge would retain the discretion to take an agency interpretation into account when the judge found it appropriate under a doctrine such as Skidmore. Judges could take agency expertise into account in deciding whether an agency interpretation possessed the “power to persuade.” Agencies thus could still apply their “specialized experience and broader investigations and information” on the practical consequences of dual state and federal regulation (or preemption) for regulated entities and the achievement of the specific federal statutory goals. The remaining risk would be that a judge might inappropriately refuse to defer to an expert agency interpretation rendered on a preemption question.

This analysis of institutional competence also assumes that Congress has not explicitly delegated interpretive authority on questions of state law preemption. Congress may agree that agencies do not have the institutional advantage in considering federalism questions. For example, one congressional committee that has recently deliberated on the issue appears to have concluded that Chevron deference should yield in favor of a strict presumption against preemption. However, Congress is not precluded from explicitly delegating interpretive authority on preemption questions to an agency, subject to whatever constraints the nondelegation principle

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215. Skidmore, 323 U.S. at 140.
217. See supra note 5 (discussing Federalism Accountability Act).
might impose.\textsuperscript{218} Congress has occasionally delegated such authority by statute.\textsuperscript{219} Any such decision would be made publicly in a participatory process, so that interested groups and individuals could lobby Congress, and Congress would bear any resulting political costs for its decision.\textsuperscript{220} To the extent the requirements are statutory and “directed specifically at agency action,” a “‘faithful agency’” would, of course, have to adhere to them.\textsuperscript{221}

In explicitly delegating preemptive authority, Congress can weigh for itself arguments regarding institutional competence and whether a particular delegation might make preemption more or less likely.\textsuperscript{222} Congress might believe an agency to possess, or instruct it to develop, relevant expertise, and would presumably supply appropriate guidelines or constraints. An authority-delegating statute could require the agency to consider, say, the value of state autonomy, if Congress thought that appropriate.\textsuperscript{223} Alternatively, an explicit delegation of interpretive authority to an agency along with a national

\textsuperscript{218} Sunstein has argued that \textit{Hampton v. Mow Sun Wong} might constrain a congressional delegation of interpretive authority clearly beyond agency expertise, see infra note 232 (discussing \textit{Mow Sun Wong}), although he acknowledges that the prospect is “most unlikely” except if a “constitutional right is plausibly at stake.” Sunstein, \textit{Nondelegation Canons}, supra note 14, at 337.

\textsuperscript{219} For example, Congress provided for federal surface mining program rules to be preempted “insofar as they interfere with the achievement of the purposes and the requirements of this chapter and the Federal program,” and authorized the Secretary of Interior to “set forth any State law or regulation which is preempted and superseded by the Federal program.” \textit{30 U.S.C. § 1254(g)} (2000). In this case, Congress’s primary goal was achieving national programmatic purposes; this provision seems fairly read as authorizing the Secretary to preempt state law despite possible state interests in autonomy. See also \textit{49 U.S.C. § 5125(d)} (2000) (authorizing Secretary of Transportation to determine whether hazardous materials transportation statute preempts particular state, local, or tribal requirements); \textit{id. § 31,141(c)(4)} (providing Secretary of Transportation with three criteria to consider in deciding whether state law or regulation is preempted). Congress also has occasionally provided special procedures governing agency interpretations that preempt state laws. See, e.g., \textit{12 U.S.C. § 43} (2000) (requiring special notice-and-comment procedures for interpretations rendered by federal banking agencies).

\textsuperscript{220} See Sunstein, \textit{Nondelegation Canons}, supra note 14, at 332.

\textsuperscript{221} See Mashaw, supra note 178, at 6.

\textsuperscript{222} See Sunstein, \textit{Nondelegation Canons}, supra note 14, at 339 (“But a requirement that Congress make the decision on its own is certainly likely to make abuses less common, if they are legitimately characterized as abuses at all.”).

\textsuperscript{223} As some have argued, of course, an increase in the number of criteria an agency must consider may have the paradoxical effect of increasing the agency’s discretion, especially if the criteria point in different directions. One example of this phenomenon is found in the \textit{National Forest Management Act, 16 U.S.C. §§ 1600-1614} (2000), which authorizes national forests to be managed for any of a long list of potential uses, some of which conflict with one another. As a consequence, the Forest Service has considerable discretion in prioritizing uses. See generally Nina A. Mendelson, \textit{Agency Burrowing: Entrenching Policies and Personnel Before a New President Arrives}, \textit{78 N.Y.U. L. REV.} 557, 620-21 (2003) (discussing discretion resulting from inclusive NFMA language).
program to implement might be understood as Congress devaluing federalism values compared with the program's goals.\(^{224}\)

In the absence of an express congressional delegation, however, the evidence suggests that courts should make no across-the-board assumption, as implicit in *Chevron*, of agency expertise to consider these types of state interests.

C. *The Risk of Arbitrary Decisionmaking and Tension with the "Rule of Law"*\(^{225}\)

Federalism values of preserving state autonomy and core regulatory functions also generally will be beyond the statutory criteria an agency is to apply.\(^{226}\) Ensuring that an agency functions under the "rule of law" is a key aspect of holding it legally accountable and ensuring that its authority is exercised in a nonarbitrary manner.\(^{227}\) This requires the agency to operate "within identifiable and determinate bounds."\(^{228}\) Otherwise, agency decisionmakers would be freer to serve narrow private interests or their own ideological views.\(^{229}\)

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\(^{224}\) To the extent one rejects the argument that political safeguards are adequate to protect federalism values, one might, of course, argue at this point that judicial intervention is necessary. *See supra* text accompanying notes 103-120 (discussing debate over "political safeguards").


\(^{226}\) Again, this analysis assumes no explicit congressional delegation of authority to preempt.


\(^{228}\) Bressman, *supra* note 132, at 470.

\(^{229}\) *See*, e.g., Bressman, *supra* note 129, at 530; Mashaw, *supra* note 178, at 6 (arguing that agencies are created to carry out "special purpose missions"). For a few examples of agency creation to serve focused missions, see Message of the President Transmitting Reorg. Plan No. 3 of 1970, 5 U.S.C.A. app. 1 (West 1996) (creating EPA, stating that the "principal roles and functions of the EPA would include [t]he establishment and enforcement of protection standards consistent with national environmental goals," research, and assisting others through grants in arresting pollution, and stating that EPA will "focus on setting and enforcing pollution control standards"); 15 U.S.C. § 653 (2000) (creating Office of Rural Affairs of Small Business Administration and designating its purposes as focusing upon economic opportunities available in rural areas); 42 U.S.C. § 901 (2000) (creating Social
The concern with ensuring adequately bounded agency decisions also is central to the Administrative Procedure Act, which, of course, provides that an agency decision may be vacated by a court if it is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." As the courts have explicated, determining whether an agency decision is appropriately bounded requires identifying the relevant factors that an agency must apply in rendering its decision and then assuring that the agency has assessed those factors. Identification of the relevant criteria helps assure not only that agency discretion is bounded, but that agencies can be held accountable for their exercise of authority and checked by outside institutions, such as courts.

For example, in National Coalition Against Misuse of Pesticides v. Thomas, the Court of Appeals for the D.C. Circuit reviewed EPA's increase in pesticide tolerance levels for imported mangoes. EPA had reasoned that a lower tolerance level would harm the economies of less-developed mango-exporting nations. The D.C. Circuit invalidated the decision, noting that the statute EPA was administering authorized it to promulgate tolerance levels based on public health concerns and some other relevant factors, but that protecting the economic welfare of foreign nations was not among them, and the factor was simply too far afield for EPA to rely on it.

Similarly, in Chevron Step Two cases, the courts have assessed the reasonability of an agency statutory interpretation by considering whether the agency has relied on factors made relevant under the

230. 5 U.S.C. § 706 (2000). It is also, of course, a concern of the nondelegation doctrine, though that doctrine is sufficiently weak to present no bar to delegating even poorly defined authority to agencies. See, e.g., Whitman v. Am. Trucking Ass'ns, 531 U.S. 457, 474-75 (2001) (stating that Court has "‘almost never felt qualified to second-guess Congress regarding the permissible degree of policy judgment that can be left to those executing or applying the law.’") (quoting Mistretta v. United States, 488 U.S. 361, 416 (1989) (Scalia, J., dissenting)).

231. See, e.g., Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402 (1971) (holding that an agency must apply relevant factors in rendering its decision and avoid applying irrelevant factors).

232. Nat'l Coalition Against Misuse of Pesticides v. Thomas, 809 F.2d 875, 878 (D.C. Cir. 1987). Similar concerns appeared to animate the Supreme Court's decision in Hampton v. Mow Sun Wong, 426 U.S. 88 (1976), where, despite the government's offer of a variety of justifications, the Court invalidated, on due process grounds, a Civil Service Commission regulation requiring that most federal civil service jobs be filled by citizens. The Court invalidated the regulation in part because it was "not willing to presume that the Chairman of the Civil Services Commission ... was deliberately fostering an interest [such as providing an expendable token for treaty negotiating purposes or an incentive for aliens to become naturalized] so far removed from his normal responsibilities." Id. at 105; see also Garrett, supra note 77, at 1175 (discussing Mow Sun Wong and arguing that the Court was concerned that decision be made by entity "that could legitimately consider all the factors that might be relevant to the decision").
statute. For example, in Verizon Communications v. FCC, the Supreme Court upheld as reasonable an FCC rule requiring incumbent telephone carriers to combine elements of their networks at the request of entering companies who cannot themselves combine the elements. The Court found the rule to be reasonable after concluding that the FCC had appropriately considered the statutory goal of removing practical barriers to competitive entry into local telephone markets. Finally, the Supreme Court has recently suggested in Whitman v. American Trucking that agency consideration of compliance costs, where the statute did not mention cost, would be grounds for vacating the agency decision altogether because "the administrator had not followed the law."

An agency's reliance on federalism concerns apparently uncontemplated by the statutory scheme thus could present legal problems. If a court were to find that federalism values such as preserving a state's core regulatory functions were irrelevant under the agency's authorizing federal statute, the court might be compelled to invalidate an agency's interpretation of the statute's preemptive effect as arbitrary, capricious or contrary to law under the Administrative Procedure Act (or unreasonable under Chevron Step Two).

Whether or not the agency's decision would pass legal muster under the APA, this issue signals a more serious theoretical problem with deference to agencies on preemption issues. Agencies necessarily retain some flexibility in applying their statutory criteria. When an agency is to consider the "cost" of a rule, for example, considering overall social cost, cost to regulated entities, or cost to the government all seem fair game. Further, agencies often must confront questions of value in administering statutes. For example, as Sunstein and Vermeule suggest, when a statute calls upon the agency to regulate food additives that "cause cancer," the agency must make determinations of value in deciding which substances are carcinogenic enough to be deemed to cause cancer within the meaning of the statute.

Generally, however, those values have a fairly direct connection to statutory purposes; they are not simply pulled out of the air or out of some set of concerns external to the statute. That is not the case for


235. Sunstein & Vermeule, supra note 60, at 885.
many issues implicated by preemption questions. Federalism issues are not only typically distant from the statute an agency is entrusted to administer, but also are an especially broad-ranging and poorly defined set.

For example, suppose an agency is considering whether Congress meant to "preempt the field" in enacting a particular statute. If acting as a court normally would, an agency engaging in such an inquiry might have to consider the relative breadth or depth of federal regulation, and consequently where a particular federal regulatory regime fits, relative to state regulation, in the "whole of the legal order." Similarly, suppose an agency were to assess whether a state law was an "obstacle" to federal purposes. In both inquiries, the agency might attach value to a variety of functions served by state role and autonomy.

Assuming, again, that we wish preemption decisions to incorporate these sorts of considerations, permitting an agency to be the primary decisionmaker would encourage an administrative decisionmaking process that is inadequately bounded. This is an especial problem where Congress has not explicitly spoken to state regulatory role; Congress is unlikely to have specified or even hinted at what issues an agency should consider in evaluating a statute's preemptive scope. An agency could pick and choose considerations far outside those reasonably suggested by the statute it is expounding. Because courts would lack ascertainable standards against which to measure agency conduct, such an approach would make adequate judicial review of the agency's decision very difficult. Courts might have a difficult time distinguishing legitimate agency interpretations from those that represent abuse of the agency's authority — or might be tempted to insert their own values in making that distinction. Similarly, congressional oversight would be more difficult.

It may be that having agencies interpret a statute with reference to interference with core state regulatory functions is beyond agency authority. Even if it is not, judicial deference to such agency interpretations appears inconsistent with the goal of holding agencies legally accountable for the authority they exercise.

D. Agency Self-Interest

Finally, the prospect of agency bias weakly weighs against the application of Chevron deference. While an agency would not directly

236. Cf. Bermann, supra note 87, at 93 (noting that federalism executive orders are limited in that "they cannot override any clear mandate to the agencies coming from Congress").

237. E.g., Dinh, supra note 1; Mashaw, supra note 178, at 6.

238. Mashaw, supra note 178, at 6.
expand its own jurisdiction in reading an ambiguous statute to preempt state law, it could, through a preemption decision, indirectly lay the groundwork for an increase in the agency's importance by making itself the primary regulator — as a practical matter, the only game in town.\textsuperscript{239} This would enable it to demand a larger budget and more employees in order to properly regulate the field.\textsuperscript{240} Alternatively, to the extent one accepts a public choice view of agency regulation, an agency's power to preempt conflicting state law would make it better able to deliver on "deals" with well-organized interest groups. For one example, journalists suggested that an OSHA chief in the Reagan administration might be responding to industry by arguing for the preemption of state law by "weaker Federal labeling regulation."\textsuperscript{241} Either self-interest or interest-group capture could conceivably lead an agency to discount state interests in rendering preemption decisions.

The focus on agency self-interest as a reason to deny deference to agency preemption interpretations is linked to the debate over whether an agency interpretation of its own jurisdiction is entitled to 	extit{Chevron} deference. In that context, a few Justices have weighed in against 	extit{Chevron} deference to agency interpretations of their own jurisdiction,\textsuperscript{242} consistent with the view that "those limited by law [should] generally not [be] empowered to decide on the meaning of the limitation."\textsuperscript{243} However, the dominant view is that 	extit{Chevron}

\textsuperscript{239} Cf. Sunstein, Law and Administration, supra note 35, at 2100.

\textsuperscript{240} By comparison, the "block-granting" of a variety of programs, including welfare, to the states, justified sharply reducing the size of the federal bureaucracy in these areas. 	extit{See also} David Hoffman, Reagan Continues Shift of Priorities; News Analysis, WASH. POST, Feb. 6, 1986, at A1 (noting Presidential budget proposal to "'get out of the business of . . . local sewage treatment systems, local airports, local law enforcement' " and its motivation by "deficit targets in the balanced-budget law Congress passed last year").

\textsuperscript{241} 	extit{See}, e.g., Ben A. Franklin, OSHA Regulatory Changes: Departing Chief Proud, but Criticism Persists, N.Y. TIMES, Apr. 9, 1984, at B16 (discussing criticisms of OSHA chief Thorne G. Auchter as unduly responsive to industry and inadequately protective of industry workers and noting his "insistence that . . . weaker Federal labeling regulation must pre-empt [stronger] state laws [already in force]"). In litigation, private litigants have similarly sought preemption because they wish to preserve financial advantages gained in the federal administrative process. Louisiana Pub. Serv. Comm'n v. FCC, 476 U.S. 355, 376 (1986) ("What is really troubling respondents [AT&T and others arguing that FCC orders respecting telephone plant and equipment depreciation preempt state rules], of course, is their sense that state regulators will not allow them sufficient revenues.").

\textsuperscript{242} Mississippi Power & Light Co. v. Mississippi ex rel. Moore, 487 U.S. 354, 387 (1988) (Brennan, J., dissenting, joined by Marshall & Blackmun, JJ.) ("[T]his Court has never deferred to an agency's interpretation of a statute designed to confine the scope of its jurisdiction.").

\textsuperscript{243} Sunstein, Law and Administration, supra note 35, at 2097; 	extit{see also} Louisiana Pub. Serv. Comm'n, 476 U.S. at 374-75 ("To permit an agency to expand its power [by preempting state law] in the face of a congressional limitation on its jurisdiction would be to grant to the agency power to override Congress. This we are both unwilling and unable to do."); Eric Braun, Note, Coring the Seedless Grape: A Reinterpretation of Chevron U.S.A. Inc. v. N.R.D.C., 87 COLUM. L. REV. 986 (1987); Quincy Crawford, Comment, Chevron Deference
deference is generally appropriate, largely because there is no "discernible line" between an agency's interpretation of its own authority under a statute and an agency's interpretation of what statutory applications are authorized.244

Implicitly, Justices and scholars appear to have concluded that withdrawing *Chevron* deference from jurisdiction-related interpretations might create two overly high costs. First, a court might erroneously identify a run-of-the-mill interpretive question as a jurisdiction-related question not deserving of deference. Second, such a rule would introduce great uncertainty to the legislative process, as Congress could no longer be sure whether its language, if ambiguous, would be interpreted by an agency or by a judge.

By comparison, denying deference to agency interpretations on state law preemption issues because of self-interest does not seem to impose the same sorts of costs. Preemption questions are relatively easy to distinguish, ex ante, from other categories of interpretive questions, so withdrawing deference on preemption issues would not introduce significant new uncertainty-based costs into the legislative process. Similarly, the risk of erroneously confusing some other sort of interpretive question with a preemption question seems relatively low.

Empirical questions of course remain. For example, how often is an agency's decision on whether a statute preempts state law really likely to be tainted by the agency's desire to expand its regulatory turf? As some have noted, rather than seeking to expand their powers, agencies have often interpreted statutes to limit the bureaucratic workload.245 Alternatively, an agency might interpret a statute in a purely public interested way, without regard for the scope of its own responsibility following the interpretation.246 Nonetheless, agency decisions on state law preemption questions present at least some risk of an agency power grab. That risk seems increased to the extent one

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244. See Oklahoma Natural Gas Co. v. FERC, 28 F.3d 1281, 1283-84 (D.C. Cir. 1994) (explicitly deciding in favor of deference and arguing that Supreme Court and D.C. Circuit have, as a practical matter, deferred to agency determinations of jurisdiction); see also Dole v. United States, 494 U.S. 26, 53-54 (1990) (White, J., dissenting); Mississippi Power & Light Co., 487 U.S. at 380 (1988) (Scalia, J., concurring); Crawford, *supra* note 243, at 968-83 (arguing in favor of deference); Einer Elhauge, *Preference-Estimating Statutory Default Rules*, 102 COLUM. L. REV. 2027, 2153-54 (2002) ("But the problem with that claim is that every statutory interpretation implicates the scope of agency jurisdiction by defining what comes within the statutes over which the agency has uncontested jurisdiction."); Hasen, *supra* note 25, at 336 n.47 (citing appellate cases pointing in different directions on deference issue).

245. See, e.g., Crawford, *supra* note 243, at 982 (citing cases in which agency acted to "restrict the scope of its authority").

accepts Hills's position that anti-preemption forces are less well organized than pro-preemption forces, since an incorrect agency decision finding preemption presumably would be both easier for pro-preemption groups to procure and more difficult to reverse.\textsuperscript{247}

E. A Regime Without Chevron Deference

Without \textit{Chevron} deference, a court could apply the \textit{Rice} presumption against preemption in deciding whether a statute preempted state law, even if an administrative agency had attempted to address the preemption question. This is not to say, however, that a court would afford an administrative agency interpretation no deference whatsoever. Even under \textit{Rice}, the court could continue to follow the agency interpretation on a case-by-case basis to the extent the court finds the agency interpretation persuasive under the doctrine of \textit{Skidmore} v. \textit{Swift}.\textsuperscript{248} Under \textit{Skidmore}, a court evaluating an agency interpretation could examine the "thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control."\textsuperscript{249}

For example, an agency interpretation may be based in part on judgments about specific, contextual policy issues, the details of a statutory scheme's implementation, or the response of regulated entities to particular policies. For such issues, agencies may have expertise superior to that of judges. Consider whether California should be permitted to ban a particular fuel additive that has contaminated its groundwater, despite a federal statutory scheme aimed at air quality that contemplates the use of such additives to reduce motor vehicle emissions. The preemption issue may raise not only questions of state autonomy (and statutory authority), but the question whether the state law interferes with the achievement of federal environmental protection goals. The agency might consider other environmental impacts and the availability of alternative additives.\textsuperscript{250} Further, a court could consider an agency assessment of

\textsuperscript{247} See \textit{supra} text accompanying notes 114-116 (discussing \textit{Hills}, \textit{supra} note 52).


\textsuperscript{249} \textit{Id.} at 140. Ronald Levin argues that as a practical matter, \textit{Skidmore}-like considerations are buried beneath the surface of the \textit{Chevron} Step One analysis of whether Congress's intent is "clear." \textit{E.g.}, Levin, \textit{supra} note 34, at 779-80 ("[S]tep one deference . . . . evidently rests upon prudential considerations that are akin to, if not identical to, the policies underlying \textit{Skidmore}."). If this position is accepted, there would be little practical difference between \textit{Chevron} and \textit{Skidmore} (and little need to "reconcile" \textit{Chevron} with \textit{Rice}). However, if one accepts \textit{Chevron} at face value, then having judges expressly apply \textit{Skidmore} in preference to \textit{Chevron} seems at least a more candid exercise of judicial authority.

\textsuperscript{250} The Ninth Circuit handled a similar question and found no preemption in \textit{Oxygenated Fuels Ass'n v. Davis}, 331 F.3d 665 (9th Cir. 2003), but without the benefit of an agency interpretation.
effects upon the core regulatory functions and sovereignty of states, to
the extent the analysis has the "power to persuade." 251

A couple of concerns might be raised about withdrawing *Chevron*
deferece on preemption questions and replacing it with judicial
discretion to defer under *Skidmore.* 252 First, Congress might, in theory,
face greater uncertainty in anticipating who will interpret an
ambiguous statutory provision. However, because preemption issues
are relatively easy to identify ex ante, 253 the increase in uncertainty and
decision costs from reserving judicial authority over these issues is
likely to be small. (This concern might be more significant for other
issues more difficult to identify.) Further, as one scholar has argued
more generally, these sorts of costs may pale in comparison to the
difficulty of predicting whether a particular interpretive question will
be resolved under *Chevron* Step One or *Chevron* Step Two. 254

Second, a judge might inappropriately decline to defer to an
agency’s interpretation. The judge might do so even if the agency’s
expertise and political accountability on the particular preemption
question are superior to that of the judge. However, judges regularly
defer to agency interpretations under *Skidmore.* 255 Further, assuming
that we wish preemption decisions generally to take into account
federalism concerns of the type discussed above, the risk of error of
this type seems less significant than potential problems created by
affording *Chevron* deference across the board to agency preemption
interpretations.

**IV. CONCLUSION**

The answer to whether *Chevron* should yield to the presumption
against preemption depends in part on empirical questions that this
paper cannot conclusively resolve, including the extent to which state
interests are truly considered in either the congressional or

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251. *Skidmore*, 323 U.S. at 140.

252. Another, less significant concern might be that refusing *Chevron* deference could
raise the cost of agency operations. Agencies might expend more on rendering an
interpretation in anticipation of a more searching judicial review, for example, even if those
added resources and analysis do not ultimately affect the decision. However, even without
*Chevron* deference, an agency could still present an interpretation to a court and expect it to
receive some weight under the *Skidmore* doctrine, depending on the interpretation’s
thoroughness, consistency, validity of reasoning, and other factors giving it “power to
persuade.” *Skidmore*, 323 U.S. at 140; see Christensen v. Harris County, 529 U.S. 576, 587
(2000).

253. See supra text accompanying note 245.


255. See, e.g., Donna M. Nagy, *Judicial Reliance on Regulatory Interpretations in SEC*
No-Action Letters: Current Problems and a Proposed Framework, 83 CORNELL L. REV. 921,
974 n.241, 999 (1998) (describing cases of *Skidmore* deference even prior to Supreme Court’s
2000 reaffirmation of doctrine in *Christensen*).
administrative process, the extent to which agencies could develop expertise in questions of overall governmental structure, and the extent to which an agency decision may be biased by an agency desire to increase its own authority.

Nonetheless, the analysis suggests several factors that, taken together, weigh against *Chevron* deference to administrative interpretations of state law preemption. Contrary to the analysis of some other scholars, political accountability is not a significant factor weighing against deference. Especially when the interests of a state are at stake, congressional representation does not seem to have substantial advantages over the agency process.

However, even if agencies have greater political accountability and a greater incentive to consider state interests than they typically are credited with, they also generally lack expertise in questions of the overall balance of government authority. Assuming we view these sorts of questions as intrinsic to a preemption determination, the expertise factor weighs strongly against *Chevron* deference. Further, from an administrative process standpoint, encouraging agencies to consider nonstatutory factors at will in rendering an interpretation may undermine the legal accountability of agencies. Finally, because preemption issues are relatively easy to identify ex ante as a class, withdrawing across-the-board deference should not significantly raise decision costs for Congress.

More closely analyzing whether *Chevron* deference should apply in preemption cases has implications for other administrative law problems as well. First, the analysis suggests some limits to *Chevron* itself. *Chevron* is predicated on presuming that Congress would have wanted agencies, rather than courts, to retain primary interpretive authority over statutes agencies administer, based on superior political accountability and institutional competence. What an assessment of preemption-related interpretations suggests, however, is that while we might properly presume that an agency generally possesses institutional competence in administering its statutory programs, there are limits. One such limit may be with respect to broad questions of the distribution of governmental authority.

Moreover, analysis of preemption suggests a more general framework for resolving the conflict between value-based canons and *Chevron*. An approach where a court reconciles canons with *Chevron* by withdrawing at will matters the court deems “important” from the *Chevron* framework fails to respect the concerns underlying that doctrine. An approach more faithful to *Chevron* should address not only the political accountability of agencies, but their legal accountability and their expertise on the issues at hand, as well as the possible decision costs that might be faced by agencies and Congress under a particular approach.
Ultimately, the source of the tension between *Chevron* and the presumption against preemption is that Congress has failed to define explicitly whether it believes a statute preempts state law or whether it wishes an administrative agency to decide that question. An agency could seek explicit interpretive authority from Congress, which Congress has sometimes granted. The agency's efforts might be assisted by the well-organized interest groups that often seek uniform national standards. Congress could also provide the agency with guidance for determining when a state law is preempted. Such a delegation of preemptive authority might address a number of the issues discussed above. It might represent Congress's considered judgment that the agency already possesses or should develop the expertise to balance programmatic issues against state interests in autonomy and self-regulation. It might also represent a judgment that Congress does not wish an agency to consider state interests at all while carrying out programmatic goals. In the meantime, however, when a statute is ambiguous, a court should be free to apply the *Rice* presumption against preemption, as well as to exercise its discretion to take an agency interpretation into account when the court deems it appropriate, based on a factor such as agency expertise. In short, a court should exercise its own judgment to resolve questions of state law preemption, even when an agency has issued an interpretation.

256. See supra note 219 (listing explicit statutory delegations of interpretive authority).
257. See *Hills*, supra note 52.
258. See, e.g., Sunstein & Vermeule, *supra* note 60, at 926 ("It is generally agreed that courts must follow congressional instructions on the question of deference . . . to agency interpretations of law . . . ").