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### ADMINISTRATIVE LAW'S FEDERALISM: PREEMPTION, DELEGATION, AND AGENCIES AT THE EDGE OF FEDERAL POWER

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#### ABSTRACT

*This Article critiques the practice of limiting federal agency authority in the name of federalism. Existing limits bind agencies even more tightly than Congress. For instance, although Congress can regulate to the limits of its commerce power with a sufficiently clear statement of its intent to do so, absent clear congressional authorization an agency cannot, no matter how clear the language of the agency's regulation. Similarly, although Congress can preempt*

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*state law, albeit only when its intent to do so is clear, some commentators have read a line of Supreme Court decisions to hold that agencies cannot, except upon Congress's clear authorization.*

*A number of leading commentators have hailed this combination of rules on the ground that congressional control over questions of federalism should be preferred to agency decisionmaking. Congress, they claim, is more deliberative, more transparent to the public, and more accountable than the executive. Additionally, given the relative ease of enacting regulations rather than statutes, those who favor Congress fear that lower barriers to federal expansion in the executive would lead to runaway federal power.*

*We argue that both these sets of claims are, at best, only occasionally accurate. In many instances agencies are—or with wise doctrines of judicial review can be made to be—more democratic and deliberative than Congress. Although regulating almost always is easier than legislating, in many instances the need for additional speed bumps under the wheels of the executive is negligible or downright counterproductive. Thus, we argue for a more nuanced set of rules that would permit agencies in many instances to preempt or regulate without the need for express congressional approval.*

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## INTRODUCTION

There are few policy areas in the United States in which decisions are made wholly either at the federal or state and local level. States have taken up issues such as immigration reform and the global climate once thought to be exclusively in the realm of the federal government.<sup>1</sup> Similarly, federal regulators have aired views, sometimes said to be authoritative, on subjects once traditionally in the realm of states, such as tort liability for defective products.<sup>2</sup> Thus,

1. See, e.g., Cristina M. Rodríguez, *The Significance of the Local in Immigration Regulation*, 106 MICH. L. REV. 567, 567 (2007) (revealing how the “federal-state-local dynamic operates as an integrated system to manage contemporary immigration”); Editorial, *The Immigration Wilderness*, N.Y. TIMES, Nov. 23, 2007, at A36; Raymond Hernandez, *Republicans in Congress Propose Bills on Licenses*, N.Y. TIMES, Nov. 9, 2007, at B5; Andrew C. Revkin & Jennifer S. Lee, *White House Attacked for Letting States Lead on Climate*, N.Y. TIMES, Dec. 11, 2003, at A32.

2. See, e.g., Michael S. Greve & Jonathan Klick, *Preemption in the Rehnquist Court: A Preliminary Empirical Assessment*, 14 SUPREME CT. ECON. REV. 43, 49–58 (2006) (surveying the landscape of the Rehnquist Court’s preemption decisions); David A. Kessler & David C. Vladeck, *A Critical Examination of the FDA’s Efforts to Preempt Failure-to-Warn Claims*, 96 GEO. L.J. 461, 462–67, 473–74 (2007) (discussing significant shift in FDA policy to preemption of state law failure-to-warn claims); Catherine M. Sharkey, *Preemption by Preamble: Federal*

the regulatory enterprise confronts the constant question of how best to divide up authority among different levels of government.

That problem, of course, raises a question of its own: who best to decide how best to divide? With some modest exceptions, most courts and commentators have looked to Congress.<sup>3</sup> Federal courts have done little to limit federal power directly. Instead, they have insisted on rules that give primacy to Congress, but also impose some burden on Congress to make good decisions. We argue in this Article that this allocation is a mistake, and that instead federal agencies should often be the preferred institutions in which to vest the authority to allocate power between states and the federal government.

To be more precise, we take issue with the important claim, advanced by Professors Thomas Merrill, Cass Sunstein, and others, that agency power to displace state lawmaking should be more limited than Congress's power to do so.<sup>4</sup> Merrill and Sunstein both assert that these additional limits are necessary for two basic reasons. First, they aver that the work of agencies is less deliberative, democratic, and transparent than legislation.<sup>5</sup> Second, because agency rulemaking is easier than legislating, executive action, absent judicial oversight, would upset the balance of federalism.<sup>6</sup>

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*Agencies and the Federalization of Tort Law*, 56 DEPAUL L. REV. 227, 227–41 (2007) (highlighting the trend of deferring to agency preemption determinations).

3. See *infra* text accompanying notes 32–63.

4. See, e.g., Nina A. Mendelson, *A Presumption Against Agency Preemption*, 102 NW. U. L. REV. 695, 699 (2008) (supporting a presumption against agency preemption and arguing that it seems unlikely that Congress intended such preemption); Thomas W. Merrill, *Rescuing Federalism After Raich: The Case for Clear Statement Rules*, 9 LEWIS & CLARK L. REV. 823, 826, 833–34 (2005) [hereinafter Merrill, *Rescuing Federalism After Raich*] (arguing that “[i]n order to rescue federalism after *Raich*, the Court should return to the clear statement strategy for determining the scope of congressional power,” which protects federalism and separation of powers values); Thomas W. Merrill, *Rethinking Article I, Section 1: From Nondelegation to Exclusive Delegation*, 104 COLUM. L. REV. 2097, 2141–51, 2170 (2004) (arguing that only Congress can exercise “legislative” power); Cass R. Sunstein, *Law and Administration After Chevron*, 90 COLUM. L. REV. 2071, 2110, 2120 (1990) [hereinafter Sunstein, *Law and Administration After Chevron*] (arguing that substantive norms against constitutionally doubtful legislation should trump ordinary deference to agencies); Cass R. Sunstein, *Nondelegation Canons*, 67 U. CHI. L. REV. 315, 317–18 (2000) [hereinafter Sunstein, *Nondelegation Canons*] (arguing that Congress should make highly sensitive decisions); Ernest A. Young, *Executive Preemption*, 102 NW. U. L. REV. 869, 871 (2008) (“[W]e may wish to restrict the agencies’ role in preemption to interpreting what *Congress* has done.”).

5. Sunstein, *Law and Administration After Chevron*, *supra* note 4, at 2111–15.

6. Thomas W. Merrill, *Preemption and Institutional Choice*, 102 NW. U. L. REV. 727, 755–56, 759 (2008); Sunstein, *Law and Administration After Chevron*, *supra* note 4, at 2111–13; Sunstein, *Nondelegation Canons*, *supra* note 4, at 320–21.

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These concerns arise in two significant controversies in administrative law. The first is preemption. Congress can preempt state law by statute so long as the statute is within the bounds of Congress's powers under the Constitution and Congress clearly indicates that the statute has preemptive effect.<sup>7</sup> According to Professor Merrill, however, agency regulations cannot preempt state law, no matter how clearly the regulation is written, because any interference with state law should require action by Congress itself. Merrill has gone so far as to argue in an *amicus* brief to the Supreme Court that courts should not grant deference<sup>8</sup> to any agency interpretation of a statute that potentially could result in the preemption of state law, including any law a state may decide to adopt in the future.<sup>9</sup>

The second controversy in modern administrative law addressed by Professors Merrill and Sunstein is nondelegation.<sup>10</sup> For example, in *Solid Waste Agency of Northern Cook County (SWANCC) v. United States Army Corps of Engineers*,<sup>11</sup> the Court struck down Army Corps of Engineers regulations applying the Clean Water Act to intrastate bodies of water hydrologically connected to navigable waters.<sup>12</sup> Because the Court found that Congress had not clearly authorized the Army Corps of Engineers to exercise jurisdiction so broadly, and because regulating waters that are remote from (although hydrologically connected to) navigable waters arguably expanded federal power at the expense of the states, the Court struck down the Army Corps of Engineers regulation as beyond its delegated statutory authority.<sup>13</sup> Merrill and Sunstein applaud this approach,

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7. *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 484 (1996); *La. Pub. Serv. Comm'n v. FCC*, 476 U.S. 355, 368 (1986).

8. *Chevron U.S.A. Inc. v. Nat'l Res. Def. Council, Inc.* 467 U.S. 837 (1984).

9. Brief for the Center for State Enforcement of Antitrust and Consumer Protection Laws, Inc. as Amici Curiae Supporting Petitioner at 6–8, 16–19, *Watters v. Wachovia Bank, N.A.*, 127 S. Ct. 1559 (2006) (No. 05-1342), 2006 WL 2570991.

10. The nondelegation doctrine is a set of rules of administrative law limiting the scope of decisionmaking authority that Congress can validly grant to an agency. For a thorough background in the theory and practice of nondelegation, see generally Lisa Schultz Bressman, Schechter Poultry *at the Millennium: A Delegation Doctrine for the Administrative State*, 109 *YALE L.J.* 1399 (2000); Sunstein, *Nondelegation Canons*, *supra* note 4.

11. *Solid Waste Agency of N. Cook County (SWANCC) v. U.S. Army Corps of Eng'rs*, 531 U.S. 159 (2001).

12. *Id.* at 173–74.

13. *Id.* We note, though, that there are alternative readings of *SWANCC* under which the nondelegation rationale would be only an alternative holding.

apparently on the ground that it requires any federal action implicating federalism concerns to come directly from Congress.<sup>14</sup>

We argue that these claims at best sit uneasily with the realist approach to administrative law. Notably, *Chevron* recognized statutory interpretation as a political act that might be performed as well, if not better, by agencies than by courts.<sup>15</sup> *Motor Vehicle Manufacturers Association, Inc. v. State Farm Mutual Automobile Insurance Co.*<sup>16</sup> justified that assumption by giving the judiciary the power to closely inspect the openness and deliberativeness of rulemaking—a critical shift from the easily met 1946 standard.<sup>17</sup> *Commodity Futures Trading Commission (CFTC) v. Schor*<sup>18</sup> also blurred the roles of courts and agencies by limiting the earlier formalistic decision in *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*<sup>19</sup> that had suggested that agencies could not adjudicate common law causes of action because they were not Article III courts.<sup>20</sup>

This move to realism is significant because the claims of congressional primacy can be defended, we argue, only on formalist grounds. For example, we show that, in the wake of *State Farm* and in light of the realities we sketch below, the claim that agencies are not sufficiently transparent or deliberative is often mistaken. Further, we argue that concerns about the relative ease of rulemaking compared to legislation cannot justify an absolute rule against agency expansions of federal power, as in *SWANCC* (although we acknowledge that they might justify lesser or occasional restraints). Rather, the basis for such a rule would have to lie in some sort of claim about exclusive judicial or congressional power to decide the

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14. See Sunstein, *Nondelegation Canons*, *supra* note 4, at 317–18 (“[H]ighly sensitive decisions should be made by Congress, and not by the executive pursuant to open-ended legislative instructions.”).

15. See *Chevron U.S.A. Inc. v. Nat’l Res. Def. Council, Inc.*, 467 U.S. 837, 866 (1984) (“When a challenge to an agency construction of a statutory provision, fairly conceptualized, really centers on the wisdom of the agency’s policy . . . the challenge must fail.”).

16. *Motor Vehicle Mfrs. Ass’n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29 (1983).

17. Compare *id.* at 30–31 (requiring courts to ensure that the agency considered relevant factors), with *Pac. States Box & Basket Co. v. White*, 296 U.S. 176, 185 (1935) (holding that courts presume the existence of facts justifying a particular regulation that is within the scope of the agency’s delegated authority).

18. *Commodity Futures Trading Comm’n (CFTC) v. Schor*, 478 U.S. 833 (1986).

19. *N. Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50 (1982).

20. *CFTC*, 478 U.S. at 854, 862–63; *N. Pipeline Constr. Co.*, 458 U.S. at 80, 84–87.

appropriate scope of national authority, an exclusivity we believe cannot be squared with the basic rationales of federalism.

In short, the best approach to these questions turns on a functional analysis of which branch is most likely to best perform the task of allocating policymaking power.<sup>21</sup> We readily admit that if it proves true that agencies do not perform as well as Congress or courts at allocating authority—if they are not as transparent, deliberative, or accountable—they deserve closer scrutiny. Accordingly, much of our project here is devoted to comparing the relative institutional competence of the three branches. We find that, for the most part, agencies outperform the others.

For example, there are strong indications that agency actions, especially notice-and-comment rulemaking, are more transparent than congressional actions. Agencies are required to publish notices of their proposed actions and to allow interested persons to participate in rulemaking proceedings. Hence, interest groups concerned about regulatory issues will know of any prospective agency action before it happens, and interest group entrepreneurs can inform their public constituencies of the proposed action. By contrast, Congress has the ability to hide actions in unrelated legislation, and if a bill is complex enough even the members of Congress may be unaware of what provisions have been inserted.<sup>22</sup>

In addition, there are even stronger arguments that agencies act more deliberatively than Congress.<sup>23</sup> Unlike Congress, an agency must at least provide a meaningful justification for an action, explain why suggested alternative actions are less desirable in terms of the agency's statutory mandate, and respond to criticisms of its action by those who disagree with it.<sup>24</sup> Moreover, in light of the uncertainty agencies face about the individual judge who may review any agency action, agencies are also forced to consider different ideological and social perspectives and to respond to how those with differing

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21. We are hardly the first to argue for a functional approach to these questions. For examples of scholars that seem to rely on a functional approach, see *infra* note 55. Professor Catherine Sharkey advocates an approach that considers the “institutional dimension” in preemption decisions. Catherine M. Sharkey, *Products Liability Preemption: An Institutional Approach*, 76 GEO. WASH. L. REV. 449, 452 (2008).

22. See Neal Devins, *Congress, the FCC, and the Search for the Public Trustee*, 56 LAW & CONTEMP. PROBS. 145, 167 (Autumn 1993) (noting that members of Congress are not always aware of what is in the bills on which they vote).

23. See *infra* text accompanying notes 117–44.

24. See *infra* text accompanying notes 117–44.

viewpoints may react to their action.<sup>25</sup> The best argument that Congress should control in questions of federalism is that members of Congress, unlike agency personnel, are directly elected. This argument is ultimately unpersuasive, however, because political oversight creates strong incentives for agencies to avoid actions that are at odds with popular sentiment. Moreover, Congress has its own weaknesses, such as a propensity to enact legislation that benefits one region at the expense of many others.

Turning to the claim that agencies can enact rules too easily, we argue not that all agency rulemaking is difficult, but rather that the degree of difficulty that courts should demand can vary. Courts justify frustrating congressional efforts to enact legislation or to delegate authority to agencies as necessary to protect underlying constitutional values that the enactment or delegation might infringe. But the need to defend a value depends on the force of the constitutional concern, the extent to which a particular piece of legislation threatens a constitutional value, and the degree to which other rules already protect that value. Such protection could take the form of either direct judicial constitutional enforcement or the increased transparency and deliberation that we argue comes from agency consideration of the constitutional value. Many of these considerations depend on the kind of policy judgments at which agencies are most skilled. A uniform rule prohibiting all but very clearly authorized agency actions does not accurately reflect the complexity of these underlying tradeoffs. Our more nuanced balancing test, although perhaps more complex, is also much truer to the spirit both of the Constitution and the realist core of administrative law.

Thus, we conclude that any doctrinal trend toward requiring in all cases clear congressional authorization for preemption or other expansions of federal power is mistaken. The underlying justifications for these clear statement rules would at best be relevant in only a small fraction of all agency decisions to preempt or regulate at the outer limits of federal authority—although, as we concede, they

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25. See Mark Seidenfeld, *Cognitive Loafing, Social Conformity, and Judicial Review of Agency Rulemaking*, 87 CORNELL L. REV. 486, 517 (2002) (stating that uncertainty about reviewing judges is a necessary antidote to agencies tailoring their decisions to a particular ideology).



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would justify rejecting certain controversial agency preemption claims.<sup>26</sup>

Part I of this Article explains federalism and the realist balancing that underlies its modern judicial enforcement. We conclude that more demanding rules for agency expansions of federal power are sensible only to the extent that agencies are less capable than other branches of reaching the best balancing of federalism interests. Accordingly, Part II compares the performance of the different branches on several important metrics—transparency, deliberativeness, and accountability. In Part III we set out our argument that although agency rulemaking may be easier than legislation, ease alone does not justify greater resistance to rulemaking to resolve federalism issues, especially in those cases in which federal intervention is consistent with federalism values. Part IV applies the lessons of our earlier analysis to preemption and nondelegation and to the specific examples of federal preemption of local chemical plant safety laws and federal regulation of local wetlands.

### I. FEDERALISM AND RESISTANCE NORMS

Although the foundational statute of the administrative state, the Administrative Procedure Act,<sup>27</sup> offers little direct guidance about federal-state relations, federal agencies are hemmed in on all sides by federalism. The Constitution's text and structure embody a respect for state autonomy, or at least a respect for the benefits presumably derived from having politically independent states.<sup>28</sup>

In this respect there is really not one federalism but two. One form, which some commentators have termed “abstract federalism,” can be thought of as political or rights oriented.<sup>29</sup> In this conception,

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26. As our emphasis on the agency's choice to preempt suggests, we take no position here on preemption in situations in which an agency has not evinced some intent to preempt.

27. Pub. L. No. 79-404, 60 Stat. 237 (1946) (codified as amended in scattered sections of 5 U.S.C.).

28. See Roderick M. Hills, Jr., *Against Preemption: How Federalism Can Improve the National Legislative Process*, 82 N.Y.U. L. REV. 1, 5 (2007) (noting that the two main arguments against preemption are the importance of federalism in the “American constitutional scheme” and in nationwide efficiency).

29. See Nina A. Mendelson, *Chevron and Preemption*, 102 MICH. L. REV. 737, 741 (2004) (“[F]ederalism values, such as ensuring core state regulatory authority and autonomy, are important and can be protected through political processes.”); A. Dan Tarlock, *The Future of Environmental “Rule of Law” Litigation and There Is One*, 19 PACE ENVTL. L. REV. 611, 613

federalism preserves the states as a source of power that rivals the federal government, so that competition between the two for the loyalty of the public constrains any tendency toward tyranny or other bad behavior.<sup>30</sup> The second, economic, conception values federalism because—and only to the extent that—it may tend to increase overall national welfare or utility.<sup>31</sup>

Under either theory, there are few direct constitutional limits on the power of the national government.<sup>32</sup> For a variety of familiar reasons, federal courts are reluctant directly to invoke the Constitution in curtailing the power of their coordinate branches.<sup>33</sup> For example, state autonomy is not always an unmitigated good, and courts may not be particularly well suited for answering the question of how best to balance competing interests, many of which may shift over time.<sup>34</sup>

The courts have supplemented outright constitutional invalidation with a sort of second-best set of constitutional

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(2002) (criticizing abstract federalism as “divorced from how power is actually exercised, shared and constrained”).

30. Gregory v. Ashcroft, 501 U.S. 452, 458–59 (1991); Erwin Chemerinsky, *The Assumptions of Federalism*, 58 STAN. L. REV. 1763, 1768 (2006); Hills, *supra* note 28, at 4, 25; Ernest A. Young, *The Rehnquist Court's Two Federalisms*, 83 TEX. L. REV. 1, 63 (2004).

31. Wallace E. Oates, *An Essay on Fiscal Federalism*, 37 J. ECON. LIT. 1120, 1121–23 (1999); Larry E. Ribstein & Bruce H. Kobayashi, *The Economics of Federalism* 3 (U. Ill. Law & Econ. Research Paper No. LE 06-001, 2006), available at <http://papers.ssrn.com/abstract=875626>; see also Gregory, 501 U.S. at 458 (“This federalist structure of joint sovereigns preserves to the people numerous advantages.”). For the classic critique of this argument in favor of federalism, see Edward L. Rubin & Malcolm Feeley, *Federalism: Some Notes on a National Neurosis*, 41 UCLA L. REV. 903 (1994).

32. Richard H. Fallon, Jr., *The “Conservative” Paths of the Rehnquist Court's Federalism Decisions*, 69 U. CHI. L. REV. 429, 451–61, 474–85, 490–91 (2002) (outlining an evolution of doctrine in which, other than protections against federally created claims for money damages, constitutional doctrine *per se* does little to restrict federal power, but noting that subconstitutional federalism-promoting doctrines are more extensive); see also Vicki C. Jackson, *Narratives of Federalism: Of Continuities and Comparative Constitutional Experience*, 51 DUKE L.J. 223, 280 (2001) (“[T]he Court’s record of activism on behalf of the states as against national power is neither impressive nor durable.”); Mark Tushnet, *Judicial Enforcement of Federalist-Based Constitutional Limitations: Some Skeptical Comparative Observations*, 57 EMORY L.J. 135, 143 n.28 (2008) (“The so-called ‘federalism revolution’ of the 1990s was on its own terms quite modest, and even that revolution appears to have been limited . . .”).

33. *E.g.*, Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528, 550–52 (1985). *Garcia* famously rejected an earlier and more aggressive approach to judicial enforcement of federalism norms on the grounds that there are other avenues for defending those norms, that judges are poorly equipped to reach correct decisions, and that courts only have a remote connection to popular preferences for a given outcome. *Id.*

34. See *id.*

limitations—what Professor Ernest Young has termed “resistance norms.”<sup>35</sup> What the courts do, in effect, is to make it more difficult for other actors to achieve ends the courts think infringe on constitutional values. Because resistance norms take the form of statutory interpretation, they can be overridden, albeit at some cost, within the ordinary political process.<sup>36</sup> The fact that these resistance decisions are subject to political revision has several benefits: it lowers the danger of highly countermajoritarian holdings, it increases the ease with which courts may foster deliberation and invite political actors into their own decisional processes, and it perhaps expands courts’ institutional capacity to do other work.<sup>37</sup>

Thus, it is unsurprising that the Supreme Court has done much of its work in protecting the values of federalism not through outright invalidation but rather through a variety of statutory presumptions against federal power.<sup>38</sup> Congress cannot diminish the core of state power,<sup>39</sup> approach the constitutional boundaries of its authority,<sup>40</sup> or subject states to any kind of private liability<sup>41</sup> unless it does so through extraordinarily clear language. Courts must read conditions attached to federal grants to states strictly against the federal government.<sup>42</sup> And, when federal and state law conflict, courts must begin with the presumption that the federal legislation does not preempt state law.<sup>43</sup>

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35. Ernest A. Young, *Constitutional Avoidance, Resistance Norms, and the Preservation of Judicial Review*, 78 TEX. L. REV. 1549, 1585 (2000) (defining “resistance norms” as “constitutional rules that raise obstacles to particular governmental actions without barring those actions entirely”).

36. *Id.* at 1552 (noting that resistance norms “may . . . [yield] to governmental action, depending on the strength of the government’s interest, the degree of institutional support for the challenged action, or the clarity of purpose that the legislature has expressed”).

37. John F. Manning, *The Nondelegation Doctrine as a Canon of Avoidance*, 2000 SUP. CT. REV. 223, 242–43, 252–53; Cass R. Sunstein, *Foreword: Leaving Things Undecided*, 110 HARV. L. REV. 4, 88 (1996); Young, *supra* note 35, at 1606–08. That is, if cooperative decisions lower popular resistance to the Court as a whole, they may allow the Court to be more effective even when it acts alone.

38. Sharkey, *supra* note 2, at 252 n.126.

39. *Gregory v. Ashcroft*, 501 U.S. 452, 460–61 (1991).

40. *Clark v. Martinez*, 543 U.S. 371, 380–82 (2005).

41. *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62, 73 (2000).

42. *Arlington Cent. Sch. Dist. v. Murphy*, 126 S. Ct. 2455, 2459 (2006); *Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1, 17 (1981).

43. For careful examinations of the evolution of the presumption, see Professor Mary Davis’s discussion of preemption in the context of food and drug regulation, Mary J. Davis, *The Battle Over Implied Preemption: Products Liability and the FDA*, 48 B.C. L. REV. 1089, 1111–32 (2007), and Professor Allison Eid’s description of the Court’s “[p]resumption against

All of these rules have a resistance norm effect—although they do not outright prohibit federal expansions, they make it more difficult for the federal government to displace state power.

These presumptions are especially potent as against federal agencies. Although Congress can, with sufficiently clear language, press up against the outer bounds of its authority to displace the states, the executive branch cannot do so on its own. Any regulation that raises constitutional doubts is invalid unless Congress clearly authorized that result.<sup>44</sup> We term that view the *SWANCC* rule, after the prominent decision applying it.<sup>45</sup> Similarly, much as federal statutes are presumed not to preempt state law absent clear language to the contrary, Justice Stevens has argued, albeit thus far in dissent, for a prohibition on any preemption by an agency unless expressly authorized by Congress.<sup>46</sup> And there is considerable doubt whether other federalism-inspired clear statement rules, such as the rules against private challenges to state action<sup>47</sup> and the expansive reading of conditional grants,<sup>48</sup> can be satisfied by clear language supplied by agencies.

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[p]reemption” and commentators’ discussion of it, Allison H. Eid, *Preemption and the Federalism Five*, 37 RUTGERS L.J. 1, 32–37 (2005).

For an argument that the presumption against preemption should not be lumped together with other forms of federalism-inspired interpretive principles, see Viet Dinh, *Reassessing the Law of Preemption*, 88 GEO. L.J. 2085, 2092–97 (2000).

44. Solid Waste Agency of N. Cook County (*SWANCC*) v. U.S. Army Corps of Eng’rs, 531 U.S. 159, 172 (2001); *see also* Rust v. Sullivan, 500 U.S. 173, 191 (1991) (applying the rule that agency regulations raising “grave and doubtful constitutional questions” are invalid but finding no violation in the case).

45. *SWANCC*, 531 U.S. at 172–74.

46. *Watters v. Wachovia Bank, N.A.*, 127 S. Ct. 1559, 1579, 1585–86 (2007) (Stevens, J., dissenting); *see also* *Bates v. Dow Agrosciences LLC*, 544 U.S. 431, 452 (2005) (holding, in a majority opinion written by Justice Stevens, that a federal pesticide regulation scheme did not preempt state common law damages claims that were “fully consistent with federal requirements”). On some readings, there is even stronger authority for such a rule. *See, e.g.*, Merrill, *supra* note 6, at 769 (arguing that in *Gonzales*, “[t]he Court observed . . . a delegation of authority to an agency to promulgate standards for regulated entities does not entail ‘the authority to decide the pre-emptive scope of the federal statute’ unless a *separate delegation* of such authority is evident in the statute” (quoting *Gonzales v. Oregon*, 126 S. Ct. 904, 919 (2006))).

47. *E.g.*, Brian D. Galle, *Can Federal Agencies Authorize Private Suits Under Section 1983? A Theoretical Approach*, 69 BROOK. L. REV. 163, 172 (2003) (summarizing doctrinal uncertainty).

48. *E.g.*, Peter J. Smith, Pennhurst, Chevron, and the Spending Power, 110 YALE L.J. 1187, 1188–90 (2001) (noting that it is unclear whether clear agency regulations satisfy *Pennhurst* clear statement rule).

Commentators often overlook the extent to which these resistance norms, like other forms of constitutional adjudication, are matters of degree. As Professor Lawrence Sager explains, ordinary constitutional decisions have evolved to comprise at least two separate logical steps.<sup>49</sup> First, the court must determine the content of a constitutional norm; then it must determine to what extent that norm will be enforced.<sup>50</sup> By varying its levels of scrutiny, or, in the model of Professor James Thayer and his twenty-first-century followers,<sup>51</sup> its degree of deference to others, a court can increase the amount of political activity it will permit even if some of that activity contravenes an idealized version of the constitutional norm.<sup>52</sup> Indirect constitutional reasoning of the kind we have just described is simply an extension of this sliding scale. Thus, resistance norms, like all constitutional judgments, call for the court to decide the importance of the underlying norm, whom to protect it against, and how best that protection can be achieved to the desired level. To make this last judgment, courts must undertake a careful evaluation of the incentives and behavior of the actors they wish to influence.<sup>53</sup>

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49. Lawrence Gene Sager, *Fair Measure: The Legal Status of Underenforced Constitutional Norms*, 91 HARV. L. REV. 1212, 1221–26 (1978).

50. *Id.*

51. James B. Thayer, *The Origin and Scope of the American Doctrine of Constitutional Law*, 7 HARV. L. REV. 129, 144 (1893). A number of latter-day scholars agree to some degree with Thayer on this point. *E.g.*, ROBIN WEST, *PROGRESSIVE CONSTITUTIONALISM: RECONSTRUCTING THE FOURTEENTH AMENDMENT* 290–318 (1994); Steven D. Smith, *Moral Realism, Pluralistic Community, and the Judicial Imposition of Principle: A Comment on Perry*, 88 NW. U. L. REV. 183, 192 (1993); Mark Tushnet, *Policy Distortion and Democratic Debilitation: Comparative Illumination of the Countermajoritarian Difficulty*, 94 MICH. L. REV. 245, 299–301 (1995).

52. Sager, *supra* note 49, at 1221–26; *see also* Richard H. Fallon, Jr., *Judicially Manageable Standards and Constitutional Meaning*, 119 HARV. L. REV. 1274, 1321–31 (2006) (surveying different degrees of judicial scrutiny of political actors). Sager's key example is the scope of equal protection rights; as he observes, the Court had acknowledged that truly equal treatment might impose one set of demands, but for institutional reasons, the Court opted to enforce another, less imposing set instead. Sager, *supra* note 49, at 1217–18.

53. *See* MARK TUSHNET, *TAKING THE CONSTITUTION AWAY FROM THE COURTS* 26–29 (1999) (arguing that empirical questions about the functioning of different branches are critical in deciding how to allocate power of constitutional interpretation); Philip P. Frickey & Steven S. Smith, *Judicial Review, the Congressional Process, and the Federalism Cases: An Interdisciplinary Critique*, 111 YALE L.J. 1707, 1716 (2002) (“[S]ome legislative judgments on fundamental values may be more trustworthy than others, and courts might be able to assist Congress in this process.”); Mendelson, *supra* note 29, at 750–52 (“Nor does it fully resolve normative difficulties to argue . . . that Congress, rather than the judiciary, will be the sole decisionmaker on the value-laden question.”).

Perhaps, then, the incremental protections that federalism doctrine affords against agency action could be defended based on a comparative analysis of institutions.<sup>54</sup> If the executive branch is a greater threat to state power, or otherwise is unable to fully cooperate with courts, it ought to face greater resistance before it can act. We are unaware of any comprehensive effort to make that case, and indeed one of our aims for this project is to show that it is unpersuasive.

Recently, though, several commentators have offered thoughtful defenses of both the presumption against preemptive regulation and the *SWANCC* rule. These defenses have been based on claims regarding institutional behavior that in effect rely on the kind of resistance analysis we have just set out.<sup>55</sup> For example, Professor Thomas Merrill argues that “Congress must expressly delegate [preemption] authority [to the agency] in the language of the statute itself.”<sup>56</sup> He also notes that requiring clear congressional authorization will result in greater deliberation before reducing state authority. This would be the case, he writes, because there would then be two bodies, rather than one, that would have to consider whether to preempt.<sup>57</sup> Similarly, Merrill elsewhere defends *SWANCC*, again claiming that agencies expand federal authority too readily and with too little consideration of the value of state autonomy.<sup>58</sup>

Professor Merrill’s comments are typical of the bulk of the commentary in the field. Several other leading commentators have argued, like Merrill, that demanding a clear statement from Congress is desirable because Congress’ deliberations about federalism will likely be superior to those of an agency.<sup>59</sup> For instance, Professor

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54. When we do not expressly distinguish between them, our references to “federalism” in this Article refer both to abstract and economic versions of federalism.

55. Bernard Bell, *Interpreting and Enacting Statutes in the Constitution’s Shadows: An Introduction*, 32 U. DAYTON L. REV. 307, 310–11 (2007); John O. McGinnis, *Presidential Review as Constitutional Restoration*, 51 DUKE L.J. 901, 946–47 (2001); Mendelson, *supra* note 29, at 742–43; Merrill, *supra* note 6, at 729–30; Sunstein, *Nondelegation Canons*, *supra* note 4, at 317; Ernest A. Young, *Making Federalism Doctrine: Fidelity, Institutional Competence, and Compensating Adjustments*, 46 WM. & MARY L. REV. 1733, 1848–50 (2005).

56. Merrill, *supra* note 6, at 767.

57. *See id.* at 772–73.

58. *See* Merrill, *Rescuing Federalism After Raich*, *supra* note 4, at 848–49 (arguing that “[t]he Court was . . . correct to invalidate” the statute at issue in *SWANCC* because “Congress never articulated an intention to permit regulation on that theory”).

59. Jonathan H. Adler, *The Ducks Stop Here? The Environmental Challenge to Federalism*, 9 SUPREME CT. ECON. REV. 205, 221 (2001); Bell, *supra* note 55, at 310–11; Mendelson, *supra* note 4, at 710–11, 718; Sunstein, *Law and Administration After Chevron*, *supra* note 4, at 2112–

Sunstein describes the *SWANCC* rule as a form of “democracy-forcing minimalism, designed to ensure that judgments are made by the democratically preferable institution.”<sup>60</sup> Others assert that, because agencies can reach decisions without the series of veto gates that slow Congress—majority votes, filibusters, bicameralism, and presentment—it is appropriate for courts to limit agencies to that power granted them expressly by Congress.<sup>61</sup>

Finally, some authors have suggested a more formalist approach. Professor Merrill notes, without developing an elaborate argument, that in his view the text of Article I limits agency power to displace state authority absent clear congressional authorization.<sup>62</sup> Professor Sunstein similarly does not defend formalism as such, but notes that the formalist view of legislative power, under which Congress cannot delegate its lawmaking authority to the executive, is most attractive in those instances in which the executive approaches the limits of Congress’s own power.<sup>63</sup>

It is useful to emphasize the distinction between the questions we address in this Article, which go to the authority of an agency to even reach a decision, and the similar debate over the degree of deference courts owe to such decisions. Many of the commentators we have mentioned have addressed both questions, typically in very similar terms.<sup>64</sup> That is understandable; the modern notion of judicial deference to executive decisions is grounded explicitly on comparisons of institutional competence.<sup>65</sup> But the fact that these

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13. *But cf.* William K. Kelley, *Avoiding Constitutional Questions as a Three-Branch Problem*, 86 CORNELL L. REV. 831, 891–92 (2001) (arguing that avoidance does not enhance democracy because it replaces the legislature’s views with the court’s).

60. Sunstein, *Nondelegation Canons*, *supra* note 4, at 335.

61. Mendelson, *supra* note 4, at 723–24; Merrill, *supra* note 6, at 750, 753–57; Sunstein, *Law and Administration After Chevron*, *supra* note 4, at 2112; Sunstein, *Nondelegation Canons*, *supra* note 4, at 320.

62. Merrill, *supra* note 6, at 761–63. For a critique of Professor Merrill’s formalist argument, see Gillian Metzger, *Administrative Law as the New Federalism*, 57 DUKE L.J. 2023, 2061–65 (2008).

63. Sunstein, *Nondelegation Canons*, *supra* note 4, at 319. Professor Young has also argued that courts should defend federalism out of fidelity to the Constitution, even if there is no strong instrumentalist case in federalism’s favor. Young, *supra* note 55, at 1764–75.

64. *E.g.*, Mendelson, *supra* note 4, at 698–99. *But see* Metzger, *supra* note 62, at 2030. Like us, Professor Metzger emphasizes the role of administrative law in the determination of federalism questions, *id.*, though her specific approach and conclusions are somewhat different.

65. *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 865 (1984); *see also* Julian Ku & John Yoo, *Hamdan v. Rumsfeld: The Functional Case for Foreign Affairs Deference to the Executive Branch*, 23 CONST. COMMENT. 179, 201 (2006) (arguing that the

commentators have seen the two questions in essentially identical terms suggests to us that something is missing. Institutional behavior does not exist in a vacuum. Agencies, for instance, behave differently depending on the rules courts set for review of agency determinations.<sup>66</sup> Thus, the relationship between deference and institutional competence to handle federalism concerns is a dynamic one; a change in deference rules may change how one ought to view the prior question of bare agency authority.

Accordingly, our goal in the ensuing Parts is to evaluate the relative competence of the three branches to best resolve federalism questions, and to do so apart from but mindful of the correlative rules for judicial review of the decisions of other branches. If it is true that agency decisions should face higher resistance than those of Congress, then one should be more sympathetic to rules that tend to reduce agencies' ability to expand federal power. We think, however, that there is a more persuasive case in the opposite direction.

## II. COMPARATIVE INSTITUTIONAL CAPACITY TO CONSIDER FEDERALISM CONCERNS IN REGULATORY MATTERS

This Part presents an exercise in comparative institutional competence. As we have set out in Part I, other commentators argue that the role of agencies in determining the scope of federal power should be minimized because of inherent limitations on the executive's capacity to take federalism concerns into account. For example, these critics maintain that Congress is more democratic and deliberative than are agencies.<sup>67</sup> In our view these claims are rather oversimplified. For each of the classic elements of representational democracy—accountability, transparency, and deliberativeness—agencies are in many contexts better suited to consider federalism concerns than are Congress or the federal judiciary.<sup>68</sup>

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central question of which branch should resolve ambiguities in foreign affairs law is the comparative competence of courts to the other branches of government).

66. See *infra* text accompanying notes 171–79.

67. *E.g.*, Mendelson, *supra* note 4, at 716–17.

68. For a description of the relationship between accountability and representative democracy, see HANNA FENICHEL PITKIN, *THE CONCEPT OF REPRESENTATION* 56 (1967). Professor Mark Fenster argues that the work of philosophers Locke, Rousseau, Mill, Bentham, Rawls, and Kant, as well as the founders of the United States, all support the contention that “open government is an essential element of a functional liberal democracy.” Mark Fenster, *The Opacity of Transparency*, 91 IOWA L. REV. 885, 895–96 (2006); see also Cass R. Sunstein,



At the outset, it deserves mention that this Article views the aims of federalism, whether in its abstract or economic sense, as improving the regulatory process, not the preservation of state regulatory prerogatives per se. Hence, the issue is not which institution best enables state influence over regulation, but rather which institution fosters state influence that will enhance public welfare, and not simply state officials' opportunities for rent seeking.<sup>69</sup> This view, however, does not universally discount the value of having a sovereign independent of the federal government with the power to regulate. Rather, it credits the availability of dual sovereignty only as a functional matter—that is, only when that availability is related to regulatory outcomes and not simply out of some posited formalistic preference for protection of dual sovereignty.

*A. Transparency of Legislative, Judicial and Federal Administrative Processes*

Transparency refers to the ease with which the public can discern both the outcome of legal decisions and the inputs that lead to such decisions.<sup>70</sup> Outside of a few areas in which government maintains the secrecy of its operations, such as national security, the ultimate outcome of decisions by all branches of the U.S. government is made public.<sup>71</sup> The same is not true, however, about the processes that lead to those decisions. Transparency of process depends on the ability of the public to know that an issue is being considered, to be involved in the decisionmaking process, to know who else is involved and in what ways, and to understand how a final decision is reached.

1. *Congressional Transparency.* Commentators often assert that Congress is the most transparent branch,<sup>72</sup> and there is some

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*Beyond the Republican Revival*, 97 YALE L.J. 1539, 1559 (1988) (noting that the framers of the Constitution embraced the traditional republican belief in deliberation).

69. For more on the problem of rent seeking by public officials, see *infra* note 128 and accompanying text.

70. See ADRIAN VERMEULE, *MECHANISMS OF DEMOCRACY: INSTITUTIONAL DESIGN* WRIT SMALL 187 (2007) (labeling inputs and outputs as the two aspects of transparency); Fenster, *supra* note 68, at 888 (defining transparency as “a governing institution’s openness to the gaze of [the public]”).

71. See, e.g., Freedom of Information Act, 5 U.S.C. § 552 (2006) (requiring the executive branch to provide information upon request unless the information falls within a particular exemption).

72. See, e.g., Peter Raven-Hansen, *Detaining Combatants by Law or by Order*, 64 LA. L. REV. 831, 832 n.5 (2004) (opining that Congress does not need procedures like those imposed

merit to that intuition. Congress's actions tend to attract media and other public attention because Congress is the sole issuer of binding legislative determinations, it acts less frequently than the collective federal regulatory apparatus, and its processes are relatively common knowledge. Accordingly, members of the public who track Congress can learn what Congress is considering, at least once hearings are scheduled or a bill is introduced. Moreover, acts of Congress not only attract attention but also are accomplished by members meeting and voting publicly, which would seem to add to transparency. Nonetheless, some traits of the legislative process actually decrease congressional transparency.

Although public awareness of congressional outcomes may be high, the public is rather less informed about congressional processes. Legislators often trade votes or vote strategically.<sup>73</sup> For that reason, a member of Congress's voting record does not necessarily reflect how the member stands on an issue. Members of Congress may vote contrary to their preferences or those of their constituents on one issue to ensure a vote from another legislator on a different and more important issue. Similarly, members of Congress may vote on an amendment to a bill that they do not really support to make the bill less attractive to the median voter in Congress and thereby decrease the likelihood that the entire bill will pass.<sup>74</sup> Legislators may vote and make statements meant to convince voters of their position on an issue when their position actually may be more nuanced.<sup>75</sup> By doing

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on agencies because Congress's "process is substantially transparent, it often allows for public input, and its law is published"); David A. Wirth, *The President, the Environment, and Foreign Policy: The Globalization of Environmental Policy*, 24 J. LAND RESOURCES & ENVTL. L. 393, 403-04 (2004) (stating that Congress's "normal law-making processes" are "designed to insure the accountability and transparency of the legislative process"); Rebecca E. Zietlow, *To Secure These Rights: Congress, Courts and the 1964 Civil Rights Act*, 57 RUTGERS L. REV. 945, 953 & n.40 (2005) (asserting that Congress's "constitutional construction deliberations are more transparent than those of judges").

73. See Saul Levmore, *Voting with Intensity*, 53 STAN. L. REV. 111, 143 (2000) ("Legislators can normally engage in logrolling, or perhaps rely on repeat play, to control strategic behavior.").

74. See Daniel A. Farber & Philip P. Frickey, *The Jurisprudence of Public Choice*, 65 TEX. L. REV. 873, 905 (1987) (noting that strategic voting can mislead constituents who do not recognize that the vote was not sincere). Proponents of Title VII opposed the addition of "sex" to Title VII's provisions, seeing it as a strategic ploy to defeat the entire bill. See, e.g., 110 CONG. REC. 2578 (1964) (statement of Rep. Celler); *id.* at 2581-82 (statement of Rep. Green). This led to the anomalous situation that many representatives who voted for Title VII opposed the amendment that became part of the statute. *Id.*

75. WILLIAM N. ESKRIDGE, JR., DYNAMIC STATUTORY INTERPRETATION 222 (1994); Frickey & Smith, *supra* note 53, at 1744; Harold Hongju Koh, *The Fast Track and United States*

so, the legislator may hope to avoid a negative reaction from voters while maintaining support from individuals and entities who are large campaign donors and who can more accurately assess the actual position of the legislator.<sup>76</sup>

Additionally, the mechanisms by which Congress reaches decisions are relatively obscured from public view. Conference committee meetings—perhaps the most crucial of all the steps leading to enactment—are not meaningfully open to the public.<sup>77</sup> It is true that the antecedent hearings, testimony, and debate are publically available, even if they are of low salience. But ultimately, individual legislators do not need to give an explanation for their votes, leaving concerned voters uncertain how or when to hold their representatives accountable.

Thus, although voters may be aware of the general behavior of Congress, they may not have sufficient information to monitor the behavior of any particular legislator. This point implies that the legislative process is conducive to opacity. It also creates the potential for differential transparency because the public and more diffuse interest groups are often less able to discern the true machinations of legislators' actions than are focused interest groups.<sup>78</sup> Further, it may be in the interest of members of Congress to manipulate this differential opacity, at least for some issues.<sup>79</sup> Consistent with public

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*Trade Policy*, 18 BROOK. J. INT'L L. 143, 166–67 (1992) (noting that ordinary legislative processes are not as transparent as some assume because of opportunities for members of Congress to engage in obfusatory tactics).

76. See Elizabeth Garrett, *Harnessing Politics: The Dynamics of Offset Requirements in the Tax Legislative Process*, 65 U. CHI. L. REV. 501, 546 (1998) (describing how legislatures can adopt statutes that satisfy public demand for symbolic action while appeasing special interest demand for concrete benefits).

77. Frickey & Smith, *supra* note 53, at 1733. For a discussion of the importance of the conference committee and reports, see ROBERT A. KATZMANN, *COURTS AND CONGRESS* 62–64 (1997).

78. Sophisticated repeat players who interact directly with members of Congress and their staffs are more likely to learn of and understand the motivations behind legislators' votes than are members of the general public. See Randall S. Kroszner & Thomas Stratmann, *Corporate Campaign Contributions, Repeat Giving, and the Rewards to Legislator Reputation*, 48 J.L. & ECON. 41, 45 (2005) (concluding that a special interest group is able to develop more accurate information about how a legislator will act the longer the legislator serves on a committee relevant to the group).

79. See Elizabeth Garrett, *Term Limitations and the Myth of the Citizen Legislator*, 81 CORNELL L. REV. 623, 686–87 (1996) (describing the economic theory of legislation that would predict such manipulation); Jonathan R. Macey, *Promoting Public-Regarding Legislation Through Statutory Interpretation: An Interest Group Model*, 86 COLUM. L. REV. 223, 227–29 (1986) (same). The economic theory of legislation views the legislative process as aimed at

choice critiques of the government, this differential opacity gives focused interest groups greater influence than they are entitled to under a theory of representative democracy that counts the interests of each citizen equally.<sup>80</sup>

States, however, generally are well represented on Capitol Hill, and their lobbyists have access to legislators.<sup>81</sup> Hence, a possible implication of the public choice concern is that the legislature may be too protective of state interests vis-à-vis the public interest. To the extent that states' interests in sovereign autonomy compete with the interests of other well-organized groups, however, states' undue advantage may be eliminated.<sup>82</sup>

In short, congressional transparency is only skin deep. If transparency is to have any purpose other than as an end in itself,<sup>83</sup> it must be a mechanism for voters to gather information necessary to their own participation in the political process. On that measure, the public's window into Congress looks fairly clouded.

2. *Judicial Transparency.* At the outset, judicial matters may attract less attention than legislative matters. The public may not be aware that a court is considering a matter that has not already attracted public attention prior to judicial consideration. If, however, a federal circuit court decides to consider a case en banc, and even more so if the Supreme Court decides to consider a case, that case will often attract the attention of the media and consequently general public. Although Supreme Court cases involving issues of federalism

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providing rents to special interest groups that then repay legislators with support for their reelection. See FRED S. MCCHESENEY, MONEY FOR NOTHING: POLITICIANS, RENT EXTRACTION, AND POLITICAL EXTORTION, at x (1997) (noting that the book "explains how political extortion via 'rent extraction' figures in politicians' maximization of their own welfare personally, to the detriment of society generally"); Fred S. McChesney, *Rent Extraction and Rent Creation in the Economic Theory of Regulation*, 16 J. LEGAL STUD. 101, 102 (1987) (noting ways that politicians can actively seek rents from private actors).

80. See Jonathan R. Macey, *Public and Private Ordering and the Production of Legitimate and Illegitimate Legal Rules*, 82 CORNELL L. REV. 1123, 1139 (1997) (describing how informational advantages give focused interest groups an advantage over the general public in securing favorable legislative outcomes).

81. Mendelson, *supra* note 29, at 762–63.

82. Hills, *supra* note 28, at 5–6. Whether states' interests are over- or underrepresented in terms of accepted theories of democracy is an empirical question. We explore that question in more depth in Part II.B.

83. Fenster, *supra* note 68, at 895–902 (detailing the benefits of transparency for democracy as well as other instrumental benefits).

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are likely well covered by the media,<sup>84</sup> similar cases in the lower courts may escape media and public attention simply because of the large number of potential decisions and their smaller jurisdictional reach. Of course, lower court cases that have national significance often do attract significant media attention.

Independent of public awareness of federalism issues decided by lower courts, those who are interested can discern how individual judges vote on cases because votes are publicly announced. Moreover, each judge either writes or signs onto an opinion that at least purports to explain the judge's decision in the case. Hence, judicial decisionmaking, unlike congressional action, seems to be highly transparent in that those who wish to influence judicial decisions can readily ascertain the grounds on which they must engage the court.

On the other hand, the actual conferences at which judges vote are not open to the public; even if they were, only the judge knows what actually motivates that judge to vote one way or another on a particular case. Legal academics are fond of accusing judges of being result oriented—essentially of caring about which outcome they prefer rather than which decision the law requires.<sup>85</sup> From this accusation, one might surmise that one cannot rely on a judge's opinion to give any meaningful insight into that judge's position on the law. But such an inference is unjustifiably pessimistic for at least two reasons.

First, judges get some satisfaction from engaging in their craft. That craft involves discerning the law established prior to any particular case and determining how it is best interpreted and applied to the particular case. Under prevailing norms, it appears that if judges want to be recognized (by others as well as by themselves) as

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84. Metzger, *supra* note 62, at 2106–07; *see also* Sunstein, *Law and Administration After Chevron*, *supra* note 4, at 2088 (suggesting that “administrators are in a far better position” to deal with changing circumstances than courts or the legislature); *cf.* Mariano-Florentino Cuéllar, *Rethinking Regulatory Democracy*, 57 ADMIN. L. REV. 411, 485 (2005) (claiming that empirical evidence supports the notion that the notice-and-comment process changes regulatory outcomes).

85. *See, e.g.*, Frank B. Cross & Stephanie Lindquist, *The Scientific Study of Judicial Activism*, 91 MINN. L. REV. 1752, 1766 (2007) (“There is considerable empirical support for claims that the Supreme Court has engaged in result-oriented judging.”); *see also* Jesse Choper, *Why the Supreme Court Should Not Have Decided the Presidential Election of 2000*, 18 CONST. COMMENT. 335, 346 n.44 (2001) (citing numerous legal scholars who accused the Supreme Court of being result oriented in deciding *Bush v. Gore*, 591 U.S. 98 (2000)).

skilled legal craftsmen, they must give reasons for outcomes that are cogent to both author and audience.<sup>86</sup>

Second, even if one were to attribute outcome-preference motives to a judge, the opinion the judge writes would still articulate legal principles and advance the law in a way the judge prefers. Law is built on precedent. Accordingly, a judge who favors a particular outcome in a case can make it more likely that judges in future cases raising similar issues will decide those cases as the first judge would.<sup>87</sup> Because of these motivations, the judicial process seems to be relatively transparent.

If the ultimate goal of transparency is to assure some sort of democratic accountability, transparency might be less meaningful because federal judges are appointed and protected by lifetime tenure. Judicial transparency, however, is not irrelevant. Even if the public's opinion about the judge's performance does not influence that judge, it influences the judicial system as a whole. On an issue like federalism, if resistance norms created by the courts are not too great, the legislature can overrule any judicial decision that proves sufficiently unpopular. If resistance norms are effective at deterring legislation, a deviation of judges' legal preferences from those of the polity could still stimulate the appointment of future judges whose views accord with those of the polity. Transparency therefore does permit the public to better influence the judiciary or to enact legislation that constrains the influence of courts. Finally, of course, actual litigants can use the information in judicial opinions.

3. *Agency Transparency.* Agency proceedings are more transparent than intuition might suggest. The public may not be aware of every agency proceeding that potentially could affect the

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86. Craft is related to wanting to succeed in one's own eyes as well as others' at the "game" of judging. See Richard A. Posner, *What Do Judges and Justices Maximize? (The Same Thing Everybody Else Does)*, 3 SUPREME CT. ECON. REV. 1, 28–29 (2003) (discussing how, among other things, judges value playing the game of judging); see also Brian Galle, *The Justice of Administration: Judicial Responses to Executive Claims of Independent Authority to Interpret the Constitution*, 33 FLA. ST. U. L. REV. 157, 212–13, 222–23 (2005) (arguing that modern norms of judging oblige judges to defend their opinions based on reasoned and internally consistent elaborations from existing law); Amnon Reichman, *The Dimensions of Law: Judicial Craft, Its Public Perceptions, and the Role of Scholars*, 95 CAL L. REV. 1619, 1628–29 (2007) (discussing the role of judicial craft in helping the courts maintain their perceived legitimacy).

87. See Tonja Jacobi & Emerson H. Tiller, *Legal Doctrine and Political Control*, 23 J.L. ECON. & ORG. 326, 326 (2007) (modeling legal doctrine as a means for higher courts to constrain the discretion of lower courts).

allocation of sovereign power between states and the federal government.<sup>88</sup> Agency decisions affecting federalism values, however, usually are made as part of legislative rulemaking proceedings. These proceedings are more salient than formal adjudications and informal agency proceedings and are governed by procedures that facilitate public awareness of the matter.<sup>89</sup> By Executive Order, the president requires every agency to include in the Unified Regulatory Agenda of the United States an agency regulatory agenda providing both a brief summary and contact information for “all regulations under development or review” by that agency.<sup>90</sup> The Unified Regulatory Agenda also includes every agency’s “Regulatory Plan . . . of the most important significant regulatory actions that the agency reasonably expects to issue in proposed or final form in that fiscal year or thereafter.”<sup>91</sup> Once an agency is ready to propose a rule, the Administrative Procedure Act as well as other statutes and Executive Orders impose numerous procedural constraints on agency rulemaking that further increase the visibility of the rulemaking process.<sup>92</sup>

Before adopting a rule, an agency must notice its intent to do so in the federal register and identify the subject of the regulation.<sup>93</sup> For most rules, the agency actually proposes a specific rule as part of its Notice of Proposed Rulemaking (NPR)<sup>94</sup> Any interested person can

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88. Cary Coglianese & Margaret Howard, *Getting the Message Out: Regulatory Policy and the Press*, 3 HARV. INT’L J. PRESS/POL. 39, 40–41 (1998) (noting how the press tends not to cover regulatory politics).

89. Agencies potentially could affect federalism values through adjudication and guidance documents, see 5 U.S.C. §§ 553(b), 554 (2006), although the more limited reach and force of such actions compared to legislative rules decreases the prospect of agencies using them to affect federalism values. In any case, we suggest that courts should be more hesitant to allow agencies to interfere with state regulatory prerogatives through these processes because they are less transparent, deliberative, and politically accountable. See *infra* note 310 and accompanying text.

90. Exec. Order No. 12,866 § 4(b), 3 C.F.R. 638 (1993), *reprinted in* 5 U.S.C. § 601 (2006).

91. Exec. Order No. 12,866 § 4(c), 3 C.F.R. at 641 (as amended by Exec. Order 13,422 § 4, 72 Fed. Reg. 2,763, 2,764 (Jan. 18, 2007)).

92. 5 U.S.C. § 553 (providing for notice in the federal register, a public comment period, and publication in the federal register of a final rule thirty days prior to its taking effect); Mark Seidenfeld, *A Table of Requirements for Federal Administrative Rulemaking*, 27 FLA. ST. U. L. REV. 533, 533–35 (2000).

93. 5 U.S.C. § 553(b).

94. See Jack Beermann & Gary Lawson, *Reprocessing Vermont Yankee*, 75 GEO. WASH. L. REV. 856, 892 (2007) (“A typical notice of proposed rulemaking today contains extensive background on the agency’s activity prior to issuing the notice, a summary of the evidence in the agency’s possession and what it hopes to acquire during the rulemaking, and a proposed rule.”).

then comment on the NOPR.<sup>95</sup> In the NOPR, the agency must reveal information on which it relied in formulating the proposed rule to ensure that the public has a meaningful opportunity to comment on the rule.<sup>96</sup> Likewise, if a private person provides information to or otherwise communicates with an agency about a proposed rule outside of the notice-and-comment process, the agency generally documents the ex parte contact and makes the information and a summary of the communications available as part of the rulemaking docket.<sup>97</sup>

Public awareness of a rule and the agency process for developing it before the rule is formally proposed is a crucial component to administrative transparency. By the time an agency issues an NOPR, it has already invested much time and effort in developing the proposed rule and often does not change it in fundamental ways in response to comments.<sup>98</sup> Thus, public awareness at the time the agency issues the notice of proposed rulemaking may be too late. Generally, an agency considering whether to propose a rule appoints a team of staff members to formulate the proposed rule.<sup>99</sup> Team members, each with different professional backgrounds and contacts outside the agency, collect and filter information within their ambit of expertise. By the time a potential rulemaking proposal reaches an agency head, the agency has amassed considerable information, the alternative avenues for action have narrowed, and the arguments that the agency presents to the agency head regarding the proposal have

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95. 5 U.S.C. § 553(c).

96. *Engine Mfrs. Ass'n v. EPA*, 20 F.3d 1177, 1181 (D.C. Cir. 1994) (holding that the Administrative Procedure Act “requires an agency to make available to the public, in a form that allows for meaningful comment, the data the agency used to develop the proposed rule”); see also Richard J. Pierce, Jr., *Waiting for Vermont Yankee III, IV, and V: A Response to Beermann and Lawson*, 75 GEO. WASH. L. REV. 902, 903 (2007).

97. Cary Coglianese, Richard Zeckhauser & Edward Parson, *Seeking Truth for Power: Informational Strategy and Regulatory Policymaking*, 89 MINN. L. REV. 277, 323 (2004).

98. See Cuéllar, *supra* note 85, at 424–25 (discussing agency responses to public comments); E. Donald Elliott, *Re-Inventing Rulemaking*, 41 DUKE L.J. 1490, 1492–93 (1992) (noting that the function of notice-and-comment rulemaking has shifted from providing information to the agency to creating a record for judicial review); Stephanie Stern, *Cognitive Consistency: Theory Maintenance and Administrative Rulemaking*, 63 U. PITT. L. REV. 589, 621–23 (2002) (presenting a psychological explanation for agencies “locking in” rules prior to the comment period).

99. Thomas O. McGarity, *The Internal Structure of EPA Rulemaking*, 54 LAW & CONTEMP. PROBS. 57, 90–91 (Autumn 1991) (describing the “team model” of rulemaking at the EPA); Seidenfeld, *supra* note 25, at 527–28 (calling the team model “[t]he idealized embodiment of the [agency] work group”).



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largely been developed. Thus, well before an agency proposes a rule, awareness that the agency is developing the rule is a crucial component of administrative transparency.

Even prior to the issuance of the NOPR, however, agency processes are relatively transparent. Representatives of interest groups, even those with diffuse interests, do have access to the staff members in each of the offices represented on a rulemaking team.<sup>100</sup> Each office is likely to have different professional training and norms, different perspectives, and different constituents outside the agency with whom they communicate about what is occurring in the agency. Thus, agency economists may communicate with economists outside the agency regarding economic issues that a possible rulemaking raises; the same is true for engineers, environmentalists, health scientists, and virtually every profession from which a member of the rulemaking team comes. As with the legislative process, repeat players in the policy formulation process who have the ear of agency staff generally know what the agency is considering.<sup>101</sup> These players can provide input into the rulemaking process even at a very early stage.<sup>102</sup>

Presidents dating back to Reagan have issued executive orders that, although intended to increase the president's power to oversee agency policymaking, have also opened the rulemaking process to public scrutiny. Thus, in addition to their Regulatory Plan,<sup>103</sup> agencies must file a host of analyses and reports with the Office of Information and Regulatory Affairs (OIRA) on such matters as the costs and benefits of rules.<sup>104</sup> Much of the interaction between the agency and

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100. See Mark Seidenfeld, *Bending the Rules: Flexible Regulation and Constraints on Agency Discretion*, 51 ADMIN. L. REV. 429, 463 (1999) (noting that awareness of interest group politics has facilitated access to agencies by representatives of diffuse interests); Wendy E. Wagner, *Congress, Science, and Environmental Policy*, 1999 U. ILL. L. REV. 181, 283 n.358 ("Accessing members of Congress can be much more difficult than communicating lay concerns to bureaucrats.").

101. See Cary Coglianese, *Citizen Participation in Rulemaking: Past, Present, and Future*, 55 DUKE L.J. 943, 949–50, 965 (2006).

102. *Id.*

103. See *supra* note 89 and accompanying text. Regulatory plans are incorporated into the Unified Regulatory Agenda that the Office of the Federal Register National Archives and Records Administration publishes biannually. The Unified Regulatory Agendas are available online. U.S. Gov't Printing Office, Unified Agenda: Main Page, <http://www.gpoaccess.gov/ua/index.html> (last visited May 31, 2008).

104. The Office of Information and Regulatory Affairs (OIRA) is part of the president's Office of Management and Budget and is responsible for monitoring agency compliance with

OIRA is made public.<sup>105</sup> In addition, agencies are subject to Freedom of Information Act (FOIA) requests, which require that the agency reveal to a requester any information that it maintains in its records unless the information comes within one of the limited exceptions provided by FOIA.<sup>106</sup> Although FOIA does not require an agency to reveal its plans and strategy regarding future action, one can often glean from information in the agency records just where an agency is headed on a particular issue.

Despite these mechanisms that increase the transparency of agency decisionmaking, the rulemaking process does create some barriers to transparency. As we have noted, proposed rules are formulated early in the process, prior to any statutory requirements for public involvement. The formulation of rulemaking is a complex process that involves staff members from various agency offices and potentially complex interactions with politically appointed agency managers.<sup>107</sup> Thus, as in the legislative process, the potential for confusion and obfuscation by the agency about who is responsible for what aspects of an agency rule is significant. Although the rulemaking process provides critical early stage access for some constituents, it does restrict access for others who are not as well organized and connected.<sup>108</sup>

Nonetheless, the agency process likely is more transparent than the legislative process primarily because the costs of gaining access to agency staff members who can explain the agency's deliberations is lower than the cost to gain access to legislators.<sup>109</sup> The obstacles to gaining access to members of Congress stem in large part from

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requirements imposed under various Executive Orders. *See, e.g.*, Exec. Order No. 12,866 § 4(d), 3 C.F.R. 638, 642 (1993), *reprinted in* 5 U.S.C. § 601 (2006).

105. *See* Steven Croley, *White House Review of Agency Rulemaking: An Empirical Investigation*, 70 U. CHI. L. REV. 821, 828 (2003) (discussing how OIRA is required to publish details about all substantial oral communications between OIRA personnel and outside parties).

106. 5 U.S.C. § 552 (2006).

107. *See* Coglianese, *supra* note 102, at 949–52.

108. *See* Cuéllar, *supra* note 85, at 414–15 (observing that some scholars have found that the notice-and-comment process often fails to include concerns of the “lay public”).

109. Peter H. Schuck, *Delegation and Democracy: Comments on David Schoenbrod*, 20 CARDOZO L. REV. 775, 781 (1999) (“[T]he costs of participating in the rulemaking and more informal agency processes, where many of the most important policy choices are in fact made, are likely to be lower than the costs of lobbying or otherwise seeking to influence Congress.”). The term “agency deliberations” refers to considerations of the various offices in the decisionmaking process rather than the thought processes of the agency head.

members' wide portfolio of matters under consideration.<sup>110</sup> Members of Congress also spend a majority of their time doing constituent service and fundraising.<sup>111</sup> The implication of these two realities is that members of Congress and their personal staff have little time to meet with individual members of the public or representatives of diffuse interest groups to discuss general substantive policy.

Congressional committee staff members may be more accessible than members or personal staff, but they lack the expertise and professional connections of agency staff.<sup>112</sup> And although committee staff members are technically in the employ of their committee, members of Congress generally hire the committee staff, with the number of staff positions varying depending on which party is in power.<sup>113</sup> Committee staff members thus have an incentive structure similar to that of legislators, so that they too are focused on reelection and party supremacy. If they seek or grant outside access, they do so largely to the extent that it advances those ends. In contrast, as a career bureaucrat, an agency staff member on a rulemaking team generally focuses on one particular aspect of a rulemaking, has already established a network of professional relationships, and does not have to spend time protecting a boss who is constantly seeking reelection.<sup>114</sup>

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110. See Cuéllar, *supra* note 85, at 420 n.31 (“Legislators must vote on foreign policy, campaign among their constituencies, evaluate tax law changes, and supervise staff. They cannot afford to supervise every regulatory development, so they must develop techniques for deploying scarce attention and resources.”).

111. See MORRIS P. FIORINA, CONGRESS: KEYSTONE OF THE WASHINGTON ESTABLISHMENT 44–45 (2d ed. 1989) (arguing that Congress delegates to agencies to stimulate demand for constituent service); Heather K. Gerken, *Second-Order Diversity*, 118 HARV. L. REV. 1099, 1135 (2005) (describing how representatives use constituent service to gain political support).

112. See Kathleen Clark, *The Ethics of Representing Elected Representatives*, 61 LAW & CONTEMP. PROBS. 31, 35 (Spring 1998) (noting that Senate staff members “tend to have responsibility for quite a wide range of issues, and therefore do not usually have the opportunity to develop expertise in a particular subject area”). In correspondence, David Vladeck points out that congressional staff's lack of resources might be a basis for greater opportunities for outsiders because Congress and its staff may be dependent on outside sources of information. As we argue in the main text, though, any such access is likely to be selective and politically driven. That suggests that individuals with viewpoints inconsistent with the members' goals are unlikely to obtain access.

113. See CHARLES TIEFER, CONGRESSIONAL PRACTICE AND PROCEDURE: A REFERENCE, RESEARCH AND LEGISLATIVE GUIDE 87–103 (1989) (reporting that party representation on committees in each house is proportional to the percentage of seats the party controls in that house of Congress).

114. For a description of the career bureaucrat, see JAMES Q. WILSON, BUREAUCRACY: WHAT GOVERNMENT AGENCIES DO AND WHY THEY DO IT 118–19 (1989). For overviews of

Agency staff members also have a greater incentive than their legislative counterparts to encourage meaningful rather than merely self-serving public access. Because Congress and the staff it directs have no clear incentives to consider all relevant facts before acting,<sup>115</sup> any outside support Congress seeks for its conclusions will likely be based on the members' existing objectives instead of a real need for information gathering. Often, these existing objectives will discourage any access. For instance, as we have noted, members of Congress can often use opacity about where they stand on certain issues to placate voters while benefiting special interest groups that may make major campaign contributions.

Conversely, agency staff members facing hard look judicial review must know all the potential objections to a rule the agency is proposing and obtain as much information about those objections as possible to facilitate the defense of any rule if it is challenged in court.<sup>116</sup> For these reasons, access to the early stages of agency formulations of rules, although not entirely open, probably is open to a broader range of interest groups than are the behind the scenes aspects of the legislative process. Moreover, because of the availability of FOIA discovery, information about early steps in the agency rulemaking process is more likely to be reported to the public than is information about back room deals in the legislative process.

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the professional networks to which career bureaucrats belong, see A. Grant Jordan, *Iron Triangles, Woolly Corporatism and Elastic Nets: Images of the Policy Process*, 1 J. PUB. POL'Y 95, 99-103 (1981); James A. Thurber, *Dynamics of Policy Subsystems in American Politics*, in INTEREST GROUP POLITICS 319, 323-24 (Allan J. Cigler & Burdett A. Loomis eds., 3d ed. 1991).

115. See Galle, *supra* note 86, at 173-75 (claiming that reasoned deliberation in lawmaking is a public good and therefore produces no political rewards for politicians).

116. See Mark Seidenfeld, *Hard Look Review in a World of Techno-Bureaucratic Decisionmaking: A Reply to Professor McGarity*, 75 TEX. L. REV. 483, 564-65 (1997) [hereinafter Seidenfeld, *Hard Look Review*]. Hard look review requires that

agencies offer detailed explanations for their actions. The agency's explanation must address all factors relevant to the agency's decision. A court may reverse a decision if the agency fails to consider plausible alternative measures and explain why it rejected these for the regulatory path it chose. If an agency route veers from the road laid down by its precedents, it must justify the detour in light of changed external circumstances or a changed view of its regulatory role that the agency can support under its authorizing statute. The agency must allow broad participation in its regulatory process and not disregard the views of any participants. In addition . . . , courts have, on occasion, . . . remand[ed] decisions that the judges believed the agency failed to justify adequately in light of information in the administrative record.

Mark Seidenfeld, *Demystifying Deossification: Rethinking Recent Proposals to Modify Judicial Review of Notice and Comment Rulemaking*, 75 TEX. L. REV. 483, 491-92 (1997) [hereinafter Seidenfeld, *Demystifying Deossification*] (footnotes omitted).

On balance, then, when it comes to federalism, agencies are the most transparent of the branches. Although the public may be more aware of statutes or Supreme Court decisions than of obscure federal regulations, true transparency entails not only knowledge of outcomes but also knowledge of the rationales on which decisionmakers rely and the ability to influence the decisionmaker's deliberations. Here, agencies outperform their rivals, as they offer more sources of insight about their decisionmaking as well as information about how to influence it.

*B. Deliberation of Congressional, Judicial and Administrative Processes*

To be deliberative, the decisionmaking processes of a government institution must not simply translate preferences of the relevant polity into outcomes as would an economic market. Rather, outcomes must allow for self-reflection and changes in individual preferences as a result of the decisionmaking process.<sup>117</sup> Outcomes must therefore reflect consideration of the interests of all affected groups and a reasoned justification for why the decisionmaker weighs those interests as it does in arriving at a final decision. In considering interests, the decisionmaker should be receptive to the concerns of various members of the public and should not weight some preferences *a priori* as more deserving or important than others. Ultimately, however, when deliberation is complete and the time comes for action, the importance of an interest to the decisionmaking process should increase with both the importance of the interest to those who hold it and the number of individuals sharing the interest.<sup>118</sup>

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117. See AMY GUTMANN & DENNIS THOMPSON, *DEMOCRACY AND DISAGREEMENT* 93, 135 (1996) (stating that the aim of the deliberative process is to "encourage [citizens] to discover what aspects of [their first-order moral] beliefs could be accepted as principles and policies by other citizens with whom they fundamentally disagree"); Mark Seidenfeld, *A Civic Republican Justification for the Bureaucratic State*, 105 HARV. L. REV. 1511, 1529 (1992); Cass R. Sunstein, *Beyond the Republican Revival*, 97 YALE L.J. 1539, 1549 (1988) ("[R]epublicans will attempt to design political institutions that promote discussion and debate among the citizenry . . .").

118. This follows if the ultimate goal of deliberation is the maximization of societal welfare. See Daryl J. Levinson, *Market Failures and Failures of Markets*, 85 VA. L. REV. 1745, 1750 (1999) (describing a voting system that allows for reflection of preferences in the aggregation of votes as desirable in some aspects); Gordon Tullock, *Problems of Majority Voting*, 67 J. POL. ECON. 571, 572 (1959) ("Permitting the citizens who feel very strongly about an issue to compensate those whose opinion is only feebly held can result in a great increase of the well-being of both groups, and prohibiting such transactions is to prohibit a movement toward the optimum surface.").

1. *Congressional Deliberation.* The legislative process generally is not as conducive to deliberation as it is to compromise and division of spoils. These problems are exacerbated by the incentives at play in decisions affecting state interests. And, in the federalism context, at least, courts apparently have abandoned as fruitless attempts to force legislatures to justify their outcomes in terms of effects on various interests of the public.<sup>119</sup>

*a. Veto Gates, Logrolling, and the Structural Obstacles to Deliberation.* On individual issues, because of the multitude of veto gates, legislative decisionmaking often results in no action when the median voter would prefer some action.<sup>120</sup> On other issues, however, logrolling and vote trading allow Congress to pass laws that may not reflect the preferences of the electorate.<sup>121</sup> Both these outcomes are inconsistent with deliberation's aim of reaching results that are best for the public.

Committee chairs and party leaders within each house of Congress constitute one set of veto gates that are not necessarily responsive to the preferences of the overall polity. Committee chair control over legislative agendas can force a majority of legislators to grant statutory favors to a minority of legislators who are well

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119. See Frickey & Smith, *supra* note 53, at 1710–11 (concluding that courts cannot efficaciously require legislatures to justify their outcomes in a way similar to the justification that courts require for administrative agencies); Merrill, *Rescuing Federalism After Raich*, *supra* note 4, at 836–37 (arguing that *Lopez* really reflected a rejection of congressional findings as a factor in the determination of the statute's constitutionality); *cf.* United States v. Morrison, 529 U.S. 598, 614–15 (2000) (rejecting Congress's findings of impact on interstate commerce as insufficient to sustain the constitutionality of the challenged legislation). Others argue that because Congress is entitled to control over its own proceedings, efforts to direct congressional deliberation are illegitimate. See, e.g., Ruth Colker & James J. Brudney, *Dissing Congress*, 100 MICH. L. REV. 80, 86–87 (2001); Harold J. Krent, *Turning Congress into an Agency: The Propriety of Requiring Legislative Findings*, 46 CASE W. RES. L. REV. 731, 733 (1996) (predicting that if the requirement for legislative findings becomes anything more than a formality, it will “denigrate” the tripartite system of government).

120. See Jane S. Schacter, *Metademocracy: The Changing Structure of Legitimacy in Statutory Interpretation*, 108 HARV. L. REV. 593, 605 (1995) (arguing that Congress is apt to leave in place court holdings with which most legislators disagree rather than risk the political costs and spend the time to reverse them); Mark Seidenfeld, *Pyrrhic Political Penalties: Why the Public Would Lose Under the “Penalty Default Canon,”* 72 GEO. WASH. L. REV. 724, 733–34 (2004).

121. See Daniel H. Lowenstein, *California Initiatives and the Single-Subject Rule*, 30 UCLA L. REV. 936, 954–55 (1983) (contending that logrolling can “subvert[] the will of the majority” (quoting *Schmitz v. Younger*, 577 P.2d 652, 655–56 (Cal. 1978))).

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situated to block consideration of an issue.<sup>122</sup> Party leaders' ability to control the entire body's agenda, and in the House of Representatives to control voting procedures, provides them with similar influence.<sup>123</sup> There is evidence that members of Congress self-select committee membership to afford themselves more influence over legislation than their constituents and supporters find most important.<sup>124</sup>

On the other hand, the fact that leaders and chairs are elected and appointed, respectively, imposes limits on the extent to which they can deliver such benefits. For instance, the legislative process constrains committee chairs from providing the general body with inaccurate information on bills because a committee chair who is found repeatedly to provide inaccurate or incomplete material information in a committee report may be removed. Such constraints are themselves limited, however, because the large number of issues that Congress faces at any one time makes monitoring of veto gates imperfect at best. Further, the system does not seriously question committee chairs' entitlement to stop legislation they oppose.<sup>125</sup> In short, veto gates may result in too much influence for the interests that support committee chairs' and other legislative leaders' preferences, which imposes costs on the national polity.

This combination of inertia and vote trading creates an environment in which deliberation is scarce. Veto gates and bicameralism can create legislative inertia that virtually obliges legislators to engage in logrolling and vote trading to pass any statutes. There are few obvious incentives for any individual lawmaker to supply or demand a reasoned explanation for any given

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122. See Jacob E. Gersen & Eric A. Posner, *Timing Rules and Legal Institutions*, 121 HARV. L. REV. 543, 568 (2007) (describing one theory proposing that by "delegating power to committee chairs, Congress gives them an incentive to invest in expertise, since committee members also have greater control of legislative outcomes and thus can obtain extra rents that justify the investment"); cf. Elizabeth Garrett, *The Purposes of Framework Legislation*, 14 J. CONTEMP. LEGAL ISSUES 717, 759-63 (2005) (describing framework legislation as a means for Congress to limit the power of committees with outlier preferences from acting contrary to the preferences of the body as a whole).

123. See Neal Devins, *The Academic Expert Before Congress: Observations and Lessons from Bill Van Alstyne's Testimony*, 54 DUKE L.J. 1525, 1537-38 (2005) (describing the trend toward greater party control over Congress's agenda).

124. Mark Seidenfeld, *The Psychology of Accountability and Political Review of Agency Rules*, 51 DUKE L.J. 1059, 1076-77 (2001).

125. See Garrett, *supra* note 122, at 759-63 (describing framework legislation as a means for Congress to limit the power of committees with outlier preferences from acting contrary to the preferences of the body as a whole but noting the imperfection of these limitations).

outcome.<sup>126</sup> As a result, most legislation that Congress passes represents a compromise of coalitions rather than a consensus of all legislators—a triumph of bargaining over deliberation.<sup>127</sup> The opacity of the logrolling system, which facilitates rent seeking and conceals the absence of considered justifications, may further exacerbate this tendency.<sup>128</sup> Thus, logrolling often enables legislation that is unexplained and does not promote the public interest.<sup>129</sup>

*b. Legislative Deliberation about States' Interests.* Having discussed the nondeliberative influences of the legislative process, it is enlightening to consider how states' interests are likely to fare in that process. Here we disagree somewhat with Professor Mendelson's thorough examination of congressional and executive consideration of federalism. Mendelson argues that although both Congress and agencies do an adequate job considering federalism interests with national benefits, Congress is superior at considering local effects.<sup>130</sup> The structure of Congress, she claims, allows states' influence to protect their own interests.<sup>131</sup>

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126. See Galle, *supra* note 86, at 173–75 (claiming that reasoned deliberation in lawmaking is a public good and therefore produces no political rewards for politicians).

127. Frickey & Smith, *supra* note 53, at 1740–45; see also Colker & Brudney, *supra* note 119, at 119 (“There are, in short, political dimensions when members of Congress promote, or oppose, a given legislative proposal. The business of trying both to influence and to anticipate the public makes for messy and unpredictable legislative history.”).

128. Peter H. Aranson et al., *A Theory of Legislative Delegation*, 68 CORNELL L. REV. 1, 44–45 (1982); William H. Riker & Steven J. Brams, *The Paradox of Vote Trading*, 67 AM. POL. SCI. REV. 1235, 1240 (1973). *But see* Michael D. Gilbert, *Single Subject Rules and the Legislative Process*, 67 U. PITT. L. REV. 803, 866–67 (2006) (noting that logrolling can decrease transparency of legislation but opining that voters get cues from sophisticated political observers who will not be confused by these practices). Rent seeking is conduct aimed at the transfer of wealth rather than the creation of wealth. STEPHEN J. SPURR, *ECONOMIC FOUNDATIONS OF LAW* 26 (2006).

129. From a pluralist perspective, logrolling can be beneficial because it allows legislative outcomes to reflect intensities of preferences. Richard L. Hasen, *Vote Buying*, 88 CAL. L. REV. 1323, 1343 (2000); Tomas J. Philipson & James M. Snyder, Jr., *Equilibrium and Efficiency in an Organized Vote Market*, 89 PUB. CHOICE 245, 245 (1996). From a public choice perspective, however, logrolling facilitates legislative action that is likely to represent a deal about how to distribute monopoly rents. See Mark Tushnet, *Fear of Voting: Differential Standards of Judicial Review of Direct Legislation*, 1996 ANN. SURV. AM. L. 373, 383 (“Log-rolling is condemned by those who see the legislative process as a forum for rent-seeking by organized interest groups . . .”); see also Edward J. McCaffery & Linda R. Cohen, *Shakedown at Gucci Gulch: The New Logic of Collection Action*, 84 N.C. L. REV. 1159, 1173 (2006) (“Logrolling among members of Congress . . . mudd[ies] the trail of rent seeking.”).

130. Mendelson, *supra* note 29, at 768; see also Adler, *supra* note 59, at 221 (making the same claim).

131. Mendelson, *supra* note 29, at 768.



To the contrary, we think that Congress is unlikely to be a consistent defender of local interests. Opportunities for rent seeking give individual members of Congress incentive to enlarge federal power.<sup>132</sup> Such rent-extracting legislative activity is limited by the fact that once Congress passes legislation, an agency invariably implements the legislation, and therefore it is the threat of agency action that creates the potential for political contributions. Hence, to cash in the long-term rents generated, Congress would have to create a regulatory structure in which it retained significant influence over agency implementation of matters of importance to political contributors.<sup>133</sup> But this barrier hardly seems insuperable.<sup>134</sup>

Another limitation on the rent-seeking incentive may arise if the local interests at issue pertain uniquely to one state or region. State lobbying in favor of general state prerogatives typically is weak as a result of free-rider effects.<sup>135</sup> When the positive externality from defending state power is small, however, local interests may offer their congressional representatives rents large enough to warrant logrolling with others in Congress to defeat federal expansion.<sup>136</sup> Note, though, that these local rents would have to be so large as to buy out the federalizing rent value of a national majority. We expect such dramatic local interests will be relatively rare.<sup>137</sup>

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132. Hills, *supra* note 28, at 26–27.

133. See, e.g., DAVID EPSTEIN & SHARYN O'HALLORAN, *DELEGATING POWERS* 24–25, 29–30 (1999); Jacob E. Gersen, *Overlapping and Underlapping Jurisdiction in Administrative Law*, 2006 SUP. CT. REV. 201, 211; cf. McCaffery & Cohen, *supra* note 129, at 1179 (noting that a “salient feature” of rent extraction is that Congress will resist resolving the threat that allows it to extract contributions).

134. See Brian Galle, *Designing Interstate Institutions: The Example of the Streamlined Sales and Use Tax Agreement (SSUTA)*, 40 U.C. DAVIS L. REV. 1381, 1420–23 (2007) (summarizing tools for continuing congressional oversight of its delegates).

135. See Mendelson, *supra* note 29, at 767–68. That is, as in public choice theory generally, the fact that lobbying efforts by one state benefit all of them inclines each state to depend on the efforts of others rather than expending its own resources.

136. *Id.* at 768. For example, Florida may have a strong enough interest in keeping its beaches and waters in the Gulf of Mexico free from oil spills that it has sufficient incentives to trade its support for legislation favored by members of Congress from other states for their promises not to allow the federal government to issue oil leases for this region. More generically, if a federal-expanding enactment would give member of congress A rents of ten, but impose harms of one hundred on B's district, B may be willing to offer A votes later that would have present discounted value of greater than ten.

137. For instance, in our examples *supra* note 136, to obtain a majority vote in, say, the Senate, B would have to offer total rents of at least 500—fifty times larger than the individual gains from empire building. Florida's members of Congress would have to agree to provide rents to favorite entities of a majority of other legislators, which not only would cost Florida's

To the extent that local interests do triumph, they may do so at the cost of the nationwide welfare. Local interests can just as easily lobby to create or preserve the opportunity to export costs to their neighbors as to defend their own prerogatives.<sup>138</sup> This scenario is especially plausible if the negative spillovers on other jurisdictions are small and diffuse, so that there is little political reward for representatives of other states in preventing them.<sup>139</sup>

*c. Problems with Congress Informing Itself and Acting on Accurate Information.* Finally, even if Congress does manage to produce deliberative outcomes that reflect state influence, those outcomes may quickly become obsolete. The legislative process imposes large costs on collecting accurate information. Congress has authority over all national matters, which significantly consumes members' time. Neither members nor their staff develop expertise about programmatic details, and most generally do not come from professions that could help inform them about the options for and the implications of regulatory decisions. Congress therefore likely depends on outsiders to gather information about the need to update a statute.<sup>140</sup> But, as we already noted, members of Congress and their

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citizens greatly but also could result in its members of Congress being identified as regular supporters of pork barrel legislation.

Congressional incentives for expansion may also be constrained if expansion carries other costs for enacting members. For example, in the case of federal-power-expanding conditions attached to federal grants, any enhancement of federal power necessarily reduces the funds available for a legislator's other projects. Because the grant recipient has the power to refuse a grant and its attendant conditions, thereby driving up the size of the grant, conditional grants may on balance be a very poor vehicle for obtaining greater legislative rents. Thus, in the limited circumstance in which Congress cannot regulate directly due to constitutional restraints and must depend on conditional spending, we would agree with Mendelson that local autonomy is relatively safe from congressional expansions.

138. See Hills, *supra* note 28, at 26; McGinnis, *supra* note 55, at 926–27.

139. Professor Jide Nzelibe argues that legislative logrolling enhances national welfare, claiming that lobbyists from the negatively affected area block efforts to redistribute from one region to another. Jide Nzelibe, *The Fable of the Nationalist President and the Parochial Congress*, 53 UCLA L. REV. 1217, 1244–46 (2006). This analysis overlooks the possibility, as we sketch in the text, that burdens may affect more than one region, raising the possibility that all of the affected groups will remain passive in an attempt to free ride on one another. Moreover, Professor Nzelibe's claim assumes that the burdened regions are even aware of the burden; again, we would expect individuals to free ride on the efforts of others in monitoring Congress to ward against redistribution.

140. Cf. Arthur Lupia & Matthew McCubbins, *Learning from Oversight: Fire Alarms and Police Patrols Reconstructed*, 10 J.L. ECON. & ORG. 96, 97–98, 112 (1994) (describing congressional dependence on monitoring by outside groups in order to assure continuing effectiveness of statutes).

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staffs have little incentive to ensure that the information they receive is balanced or entirely accurate.<sup>141</sup> Moreover, even outside groups face the dilemma of either free riding on the efforts of others or spending the costs to hold together an effective coalition.<sup>142</sup>

The episodic nature of statutory enactment also impedes the process of turning even the most recent information into updated legislation. Congress may adopt legislation based on an assessment of the impact of regulations that is accurate when it acts, but that assessment becomes less accurate as time passes and Congress fails to update the statute.<sup>143</sup> Congress does have some ability to change the interpretation of statutes in a more continuous manner than by statutory amendment. It can do so by delegating a matter to a court or agency and then influencing that agency or court by direct oversight or through the appropriations process.<sup>144</sup> Both of these mechanisms, however, operate through an intermediary and hence rely on a fairly broad delegation of the matter to the court or agency. In sum, the costs of participation in the congressional process and the barriers to translating that process into statutory enactments imply that if the scope of states' regulatory authority depends primarily on Congress passing statutes, then the extent of that authority often reflects an inaccurate or unduly broad assessment of the need for federal authority.

2. *Judicial Deliberation.* Judicial decisionmaking is the quintessential example of a deliberative process. Judges explain their decisions in written opinions. Explanations are based on law, which includes precedents, binding texts, and reasoning about how those sources of law bear on the issue presented to the court. The passions that can drive either personal preferences of judges or the immediate

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141. See *supra* note 115 and accompanying text.

142. Cf. Saul Levmore, *Precommitment Politics*, 82 VA. L. REV. 567, 571–72, 581 (1996).

143. See Glen Staszewski, *Avoiding Absurdity*, 81 IND. L.J. 1001, 1024 (2006) (observing that inaccuracy of legislative classifications is exacerbated as statutes age); Cass R. Sunstein, *Problems with Rules*, 83 CAL. L. REV. 953, 993 (1995) (noting that new developments make rules anachronistic over time).

144. See JOEL D. ABERBACH, *KEEPING A WATCHFUL EYE: THE POLITICS OF CONGRESSIONAL OVERSIGHT 2* (1990); Julian Ku & John Yoo, *Beyond Formalism in Foreign Affairs: A Functional Approach to the Alien Tort Statute*, 2004 SUP. CT. REV. 153, 192 (“Holding oversight hearings and threatening budget cuts present a far less difficult method to change incorrect agency interpretations than does the enactment of specific override legislation.”); Mathew D. McCubbins & Thomas Schwartz, *Congressional Oversight Overlooked: Police Patrols Versus Fire Alarms*, 28 AM. J. POL. SCI. 165, 165–67 (1984).

demands of the polity are not directly relevant to the judicial process. As the “least dangerous branch,” the judiciary depends on the persuasiveness of its justifications under the law for its legitimacy.<sup>145</sup> Therefore the influence of the branch depends on the deliberative nature of judicial decisions.

In terms of deliberative democracy, however, judicial decisionmaking is wanting in several respects. Deliberative democracy demands that the decisionmaker translate the values held by the polity at some deep level into an outcome that is at least acceptable to all (if not preferred by all) in terms of a broadly conceived public interest.<sup>146</sup> Because individual federal judges are insulated from the pressures of politics, courts are well suited to make decisions that avoid simply acquiescing to the impassioned demands of a current majority. But judges’ political insulation and the reactive nature of the judicial process equip courts poorly to ensure that their decisions comport with well-established basic values of the public.

Court decisions can deviate from these basic values for two reasons. First, the courts’ viewpoint is limited. A court’s duty is to resolve a dispute between the parties, and the parties are unlikely to represent all the various backgrounds and perspectives that may be relevant to a determination.<sup>147</sup> Although federalism cases often involve a government litigant, it is unclear that a government attorney litigating a particular case has more than a highly attenuated connection to the views and interests of the public. Moreover, judges tend to approach these issues from a legal perspective, which may predispose them to overemphasize structural constitutional concerns and to shortchange the pragmatic effects of the lines drawn in any particular case. This structural emphasis is especially likely if the judge sees making “law” as a unique aspect of the judicial role.<sup>148</sup>

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145. See Seidenfeld, *supra* note 117, at 1543 (citing ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH* 24–27 (1962); HERBERT WECHSLER, *PRINCIPLES, POLITICS, AND FUNDAMENTAL LAW* 27–28 (1961)).

146. *Id.* at 1539 (expressing hope that civic republicanism will yield consensus).

147. *Id.* at 1544 (“Parties to litigation ordinarily do not adequately represent many potentially affected interest groups.”).

148. Cf. Elizabeth V. Foote, *Statutory Interpretation or Public Administration: How Chevron Misconceives the Function of Agencies and Why It Matters*, 59 ADMIN. L. REV. 673, 691 (2007) (“Unlike the judiciary, agencies implement their enabling acts with a combination of expertise, practicality, interest-group input, and political will—not with a strictly legal, neutral, judicial-style methodology that would be principally attentive to the text and structure of the [controlling legal document].”).

To the extent that a federalism issue arises solely out of the meaning of a statute or the Constitution, courts frequently get input from amicus briefs, which provide an avenue for nonparties with differing perspectives to be heard. But even amicus briefs are limited by the fact that an entity must first learn of the issue on which it wishes to inform the courts of its view, and then must hire a lawyer to write a brief on the issue. For matters that are sufficiently important that they are heard by the Supreme Court, interested groups might have enough interest to incur the costs of filing amicus briefs. In lower courts, however, interest groups face both higher costs of learning about relevant cases and lesser benefits of prevailing in those cases. Therefore, the costs of participation relative to the potential payoff from influencing the outcome of the case create a significant barrier to participation.

In addition, the issues related to federalism involve more than simply reading texts and legal precedents. Decisions about federalism are often a choice of institutions—for example, a choice between uniform federal regulation and more diverse but more complex and costly state-by-state implementation.<sup>149</sup> Choosing the best institution to carry out policy or preserve rights is a complex policy judgment. That judgment is informed not only by legal analyses but also by technical knowledge relating to a regulatory program and political knowledge about how various members of society will be affected by the ultimate determination of whether and how states can regulate.<sup>150</sup> Further, amici do not participate in creating the record on which the court must base its decision;<sup>151</sup> therefore, participation as an amicus is insufficient to provide the courts with all the relevant information that various interest groups have to offer.

Second, courts are reactive, which can lead them to shortchange the programmatic considerations related to federalism.<sup>152</sup> To illustrate, consider a situation in which it is unclear whether a statute authorizes

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149. See Merrill, *supra* note 6, at 733 (illustrating a similar choice of institution in another federalism context).

150. See Hills, *supra* note 28, at 6; McGinnis, *supra* note 55, at 949.

151. See Barbara M. Yarnold, *Do Courts Respond to the Political Clout of Groups or to Their Superior Litigation Resources/"Repeat Player" Status?*, 18 JUST. SYS. J. 29, 31–32 (1995) (reporting that interest groups prefer to bring cases rather than file amicus briefs because that allows them to choose test cases and create the record for appeal).

152. See Neal Devins & Alan Meese, *Judicial Review and Nongeneralizable Cases*, 32 FLA. ST. U. L. REV. 323, 328 (2005) (“[B]ecause courts almost always play a reactive role, they lack meaningful control of either the facts or legal issues before them.”).

an agency to displace state law that would affect the agency's program. Suppose in addition that the courts had adopted the position, suggested by some commentators,<sup>153</sup> that an agency may not displace state law unless the statute authorizing such action clearly indicates that the agency has the authority to preempt. In such a situation, the agency could not assert its authority to displace state law because the statute is not sufficiently clear on the question until the courts resolve its meaning. Therefore, the issue of whether regulations under the statute displace state law would arise, if at all, only through a case in which an entity adversely affected by state law argues that the law is preempted by federal regulation.

One might argue that this is the preferred mechanism for raising a regulatory preemption case because such cases usually arise in state court. This avenue for raising the preemption issue therefore allows state courts to clarify the bounds of state law, allowing the Supreme Court to assess better whether preemption is warranted.<sup>154</sup>

By the time a case is brought in state court, however, the federalism decision will come too late for most entities. From a federal agency's perspective, the ideal shape of federal regulation may depend on related state laws. For example, an agency that deems uniformity of paramount importance—and would therefore prefer to displace state law—would adopt different regulations if it could not provide for such displacement than if it could be certain of preemption. Similarly, deferring resolution of the preemption decision to a court challenge may come too late for many regulated entities; out of the fear of penalty under state law, these entities will comply with that law even if they have a good faith belief that state law has been preempted. If every entity subject to regulation acquiesces, the federalism issue may never get to court at all.<sup>155</sup>

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153. *E.g.*, Mendelson, *supra* note 4, at 707; Merrill, *supra* note 6, at 767.

154. Merrill, *supra* note 6, at 767.

155. *Cf.* *Brockett v. Spokane Arcades, Inc.*, 472 U.S. 491, 503–04 (1985) (explaining that the Court sometimes permits individuals “whose own speech or expressive conduct may be validly prohibited or sanctioned” to facially challenge statutes that impose overbroad restraints on free speech because “those who desire to engage in legally protected expression but who may refrain from doing so rather than risk prosecution”); Mark Seidenfeld, *Playing Games with the Timing of Judicial Review: An Evaluation of Proposals to Restrict Pre-Enforcement Review of Agency Rules*, 58 OHIO ST. L.J. 85, 126–27 (1997) (arguing that if the penalty is sufficiently great, all entities will comply with the rule even if its validity is suspect).

3. *Agency Deliberation.* Agencies have the potential to be both deliberative and responsive to political preferences, both because of their relationship to the courts and the political branches and because of their composition and the motivation of their staff members.

*a. Strengths and Limitations on Agencies' Abilities to Address Constitutional Matters.* Agencies have not to date explicitly focused on federalism issues in most rulemakings.<sup>156</sup> But under hard look review, courts could demand that agencies include such analyses or face reversal of a policy or rule.<sup>157</sup> It is possible, as Professor Mendelson suggests, that having agencies consider federalism values would move decisions away from the best accommodation of state and federal interests.<sup>158</sup> We agree with Mendelson's account with respect to those aspects of federalism that accrue from the mere availability of an alternative independent sovereign but that are unrelated to the program that the agency regulates—what we term “abstract federalism.”<sup>159</sup> We think, however, that agencies are better suited to consider all other aspects of federalism, and in our view those other aspects are considerably more important.

Abstract federalism involves issues of general constitutional structure, such as the desirability of maintaining a robust state regulatory apparatus to counter potential power grabs by the federal government that could threaten individual liberties. Such issues involve an appreciation not only for the structure of the constitution regarding state-federal relations, but also an appreciation of other structural constraints on the federal government that the Constitution mandates. Again, we concede that agencies are not experts in factoring into their decisions the potential benefits of abstract federalism—protection against tyranny by either sovereign—that are unrelated to agencies' programmatic mandates. The fear is that agencies would simply get the evaluation of benefits wrong, or, worse, would abuse consideration of abstract federalism by trotting it out to

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156. See Mendelson, *supra* note 29, at 782–83 (noting that agencies have not prepared federalism impact analyses of rules as required by Executive Order).

157. See Metzger, *supra* note 62, at 2077–88 (suggesting that arbitrary and capricious review be used to compel agencies to consider impacts of proposed regulation on states).

158. Mendelson, *supra* note 29, at 779.

159. *Id.* at 779–80; Mendelson, *supra* note 4, at 724–25; cf. Jerry L. Mashaw, *Norms, Practices, and the Paradox of Deference: A Preliminary Inquiry into Agency Statutory Interpretation*, 57 ADMIN. L. REV. 501, 510 (2005) (doubting that agencies would be expert in interpreting background constitutional norms).

justify decisions made on nonlegitimate grounds such as partisan politics.<sup>160</sup> In essence, the impacts from the consideration of abstract federalism are external to the agency program. Given that the agency would not bear most of any costs it creates if it gets such considerations wrong, the agency would have little motivation, absent any incentives supplied by judicial doctrine, to ensure that it gets these considerations right.<sup>161</sup> By not considering such benefits, agencies would undervalue the instrumental benefits of abstract federalism (especially compared to courts and the legislature). We note, however, that there is a silver lining to this critique of the limitations of agency considerations of abstract federalism: for the same reason agencies would undervalue abstract federalism, they also would be less likely than their legislative or judicial counterparts to attribute some inherent, noninstrumental value to state autonomy that might inflate the importance of federalism beyond what the public interest justifies.

Simultaneously, however, courts are inferior to agencies in factoring into their decisions the day-to-day impacts that autonomous state regulators would have on a federal program.<sup>162</sup> The agency is the one familiar with the programmatic details and real-world consequences of allowing competing sources of law on a regulatory issue. Here, the abilities and motivations of the courts and the agency are exactly reversed. Because courts are not well grounded in the technical details of agency regulatory programs, they may fail to comprehend the significance of state and local authority on the effective implementation of an agency program. Moreover, although courts are free to consider such impacts, it is the agency and not the courts that would have to live with the day-to-day fallout from any arrangement that incorporates local and state governmental influences on a particular regulatory scheme.<sup>163</sup> Accordingly, we do

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160. Mendelson, *supra* note 29, at 781; Merrill, *supra* note 6, at 755–56.

161. Mendelson, *supra* note 29, at 781, 786; *see also* Hills, *supra* note 28, at 15 (doubting that agencies give weight to abstract federalism values); Merrill, *supra* note 6, at 756 (same); Metzger, *supra* note 62, at 2063–65 (noting arguments on both sides of the question).

162. Metzger, *supra* note 62, at 2062–63; Sharkey, *supra* note 21, 485–90.

163. David R. Woodward & Ronald M. Levin, *In Defense of Deference: Judicial Review of Agency Action*, 31 ADMIN. L. REV. 329, 332 (1979) (observing that an agency's immersion in day-to-day administrative operations exposes to it the practical consequences of statutory interpretation).



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not trust courts to take into account these considerations to the extent warranted by the public interest.<sup>164</sup>

Additionally, given that states retain viable regulatory capacity over virtually all areas in which they have a legitimate interest, the concerns that are the focus of abstract federalism are more remote than programmatic federalism concerns.<sup>165</sup> It seems a bit far-fetched to think that states will not be sufficiently influential generally to exercise their police powers. The states have proven to be effective at influencing agencies to preserve their state prerogatives.<sup>166</sup> More specifically, “the expansion of federal power into areas that were previously the exclusive province of the states has generally involved the sharing of power between federal and state officials.”<sup>167</sup> For example, the Fish and Wildlife Service and National Marine Fisheries Service has authority essentially to engage in land use regulation when approving “habitat conservation plans.”<sup>168</sup> This authority has resulted in “something akin to a collaborative local/federal land use planning process” rather than simply replacing local land use regulation.<sup>169</sup>

On balance, then, the costs of shortchanging abstract federalism in most cases will be small compared to the effect of federalism on programmatic effectiveness. Hence, in most cases, we suspect that agencies’ abilities to assess programmatic federalism values more accurately than courts or Congress will outweigh any bias in their federalism considerations, even if we assume that Congress is

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164. One of us has observed that

[we] conceive the public interest as deriving from the fulfillment of the preferences of a fully informed polity in a context that encourages consideration of the experiences and interests of others. Although that fuzzy definition provides no operational measure by which to determine which of several outcomes better serves the public interest . . . [we] believe one can argue that certain outcomes clearly fall far outside the public interest even without providing a precise operational measure.

Seidenfeld, *supra* note 120, at 727 (footnote omitted).

165. See Rubin & Feeley, *supra* note 31, at 930 (“The political power of the states, whether cultural or constitutional in origin, is not under attack.”).

166. See Mendelson, *supra* note 29, at 774–75.

167. Rubin & Feeley, *supra* note 31, at 934.

168. Holly Doremus, *Biodiversity and the Challenge of Saving the Ordinary*, 38 IDAHO L. REV. 325, 350 (2002). *But cf.* Robert L. Fischman, *Cooperative Federalism and Natural Resources Law*, 14 N.Y.U. ENVTL. L.J. 179, 195 (2005) (noting that habitat conservation plans need not involve state or local government in what is essentially a bargain between the federal government and private entities).

169. Doremus, *supra* note 169, at 350.

unbiased.<sup>170</sup> In essence, the other branches' relative disadvantage in deliberation means that their protections of federalism in any given situation will vary greatly around voters' preferred level of protection. The assumption that Congress and courts are not biased only means that such variations average to the preferred level of protection, but the deviation for individual cases is likely to be large. In individual cases, agencies frequently underprotect federalism values by a little, whereas Congress either over- or underprotects them greatly.<sup>171</sup> Moreover, even if we are wrong in our conclusion that abstract federalism is likely less important to the electorate than programmatic federalism, it may still be the case that voters will prefer some agency involvement in the selection of the level of protection for federalism.<sup>172</sup>

*b. The Potential for Judicial and Political Oversight to Enhance Deliberation about Federalism.* Perhaps the most significant influence on agency deliberation has been the prospect of judicial review and increased political oversight of agency policymaking processes. Courts demand that an agency give reasons for its decisions, forcing the agency to explain its decisions in terms that do not simply reduce to ideological or political preferences but rather can be connected to legislatively specified criteria or broadly accepted public values.<sup>173</sup> This demand, along with demands from the political branches for

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170. Based on our public choice critique applied to federalism issues, *see supra* notes 132–38 and accompanying text, we think that Congress is more likely biased in favor of well-organized interest groups than are agencies. Because states are a well-organized interest group—one that is even given a special preferential status as comprised of sovereign entities—there is a strong likelihood that Congress is biased in favor of state interests, at least vis-à-vis more diffuse interests. This adds to our preference for agency resolution of federalism issues.

171. *See* Matthew C. Stephenson, *Optimal Political Control of the Bureaucracy* 22 (Harvard Law Sch. Faculty Scholarship Series, Paper No. 5, 2007), available at <http://lsr.nellco.org/cgi/viewcontent.cgi?article=1007&context=harvard/faculty> (illustrating how slightly biased outcomes are preferable to greatly variable but unbiased outcomes when the concern is the average of each outcome's distance from the ideal outcome). This point illustrates the potentially misleading notions of information that averages supply. More accessible illustrations include that when Bill Gates frequents a bar, the average wealth of patrons in the bar is extremely high, but this says nothing about the wealth of the individuals in the bar.

172. *See id.* at 33 (proposing a model of federal regulatory decisionmaking in which “majoritarian interests are often best served not by maximizing the influence of an electorally accountable politician, but rather by ensuring a degree of bureaucratic insulation that makes political control of agencies costly but not impossible”).

173. Richard J. Pierce, *How Agencies Should Give Meaning to the Statutes They Administer: A Response to Mashaw and Strauss*, 59 ADMIN. L. REV. 197, 203–04 (2007); *see also* Metzger, *supra* note 62, at 2036–40 (making this point about agency consideration of federalism).

various types of regulatory analyses, has forced agencies to change their structure.<sup>174</sup> Most agencies are not populated by staff members from one industry or profession that dominates the agency decisionmaking process. Rather, to satisfy judicial review, agencies need staff members from a multitude of professions who can understand the views of all greatly affected interest groups.

Just as judicial review has prompted agencies to consider a myriad of other concerns, courts can force agencies at least to consider issues of federalism as part of judicial review for reasoned decisionmaking.<sup>175</sup> For example, contrary to some commentators' views, courts do have ready standards on which to gauge agency decisions, so that review is not simply a naked assertion of judicial preferences.<sup>176</sup> Recall that clear statement rules are meant to enforce the Constitution.<sup>177</sup> Thus, the yardstick for measuring agency deliberation on federalism values is the extent to which those deliberations give proper regard to those substantive constitutional norms the courts would choose if they were to enforce federalism directly.

State courts may also influence administrative outcomes. For many federalism issues, once an agency has decided the extent to assert federal authority or to displace state authority, the reach of that decision will arise through an action in state court. This allows the states to have input in determining the precise bounds of the agency determination. For example, an entity asserting that federal regulation has displaced state law could raise that assertion as a defense to enforcement of state law in a state administrative or judicial proceeding. This allows states an opportunity to clarify both how their laws operate and to communicate their regulatory interests

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174. See generally Philippe Aghion & Jean Tirole, *Formal and Real Authority in Organizations*, 105 J. POL. ECON. 1 (1997) (setting out the relationship between outside influences, including judicial review, and internal agency decisions); Mathew D. McCubbins et al., *Administrative Procedures as Instruments of Political Control*, 3 J. L. ECON. & ORG. 243 (1987) (same).

175. See *Motor Vehicle Mfrs. Ass'n v. State Farm Auto. Mut. Ins. Co.*, 463 U.S. 29, 43–44 (1983) (holding that an agency rule could only be upheld if the court concluded that it was the product of reasoned decisionmaking); cf. Gersen, *supra* note 133, at 233 (noting that agencies can develop expertise in preemption questions); Sharkey, *supra* note 2, at 256–58 (noting that courts might condition deference to preemption decisions on compliance with measures aimed at increasing state influence in the agency's decisionmaking process).

176. For the contrary views, see Mendelson, *supra* note 29, at 794. For a detailed example of this point in the discussion of preemption, see *infra* Part IV.A.3.

177. See *supra* text accompanying notes 32–43.

in the context of a particular concrete controversy. Ultimately, state courts can, and do, resist broad assertions of preemption by a federal agency, forcing the agency to clarify the issue by subsequent action (for example, a rule amendment or interpretive rule).<sup>178</sup> In short, the relationship between the agency and the federal system would constrain the agency from dictating its view to states without any state involvement and would facilitate a dialogue about the precise extent of the need for state regulatory authority.

Judicial review also changes agency deliberation by changing the makeup of agency personnel. Because the agency must demonstrate its reasoned consideration of relevant issues, its staff includes a professionally diverse corps of experts who generally share a norm of nonpartisanship.<sup>179</sup> That is not to say that agency decisions do not reflect politics. But the politics reflected in an agency's decisions generally is dictated by the agency's political overseers—Congress and the president—either directly or through the political appointees that head the agency.<sup>180</sup> Professional agency staff members tend to see their role as implementing programs consistently with the political values of agency heads.<sup>181</sup>

These factors support our view that, contrary to Professor Mendelson's suggestion, agencies ought to serve as the primary institution for considering programmatic federalism values. Whatever their skill at interpreting abstract federalism, agencies are well suited for evaluating the benefits of both localism and the need for experimenting within the programs they regulate.<sup>182</sup> Agencies are

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178. See Catherine M. Sharkey, *Federalism in Action: FDA Regulatory Preemption in Pharmaceutical Cases in State Versus Federal Courts*, 15 J.L. & POL'Y 1013, 1035–36 (2007) (detailing one state court's total lack of respect for an FDA preemption policy and explaining why state courts are apt to be less deferential to federal agencies than federal courts).

179. See JOHN BREHM & SCOTT GATES, *WORKING, SHIRKING, AND SABOTAGE: BUREAUCRATIC RESPONSE TO A DEMOCRATIC PUBLIC* 196–99 (1999); MARISSA MARTINO GOLDEN, *WHAT MOTIVATES BUREAUCRATS? POLITICS AND ADMINISTRATION DURING THE REAGAN YEARS* 155–56 (2000).

180. See GOLDEN, *supra* note 179, at 31–32 (describing how the Reagan “administrative presidency” constrained bureaucrats to cooperate with the political agenda of agency heads).

181. See Mark Seidenfeld, *Why Agencies Act: A Reassessment of the Ossification Critique of Judicial Review*, 69 OHIO ST. L.J. (forthcoming 2009) (manuscript at 22 & n.79, on file with authors) (“[S]taff members in most agencies will act to support the policies of their politically appointed overseers, whether or not the members agree with these policies.”).

182. See McGinnis, *supra* note 55, at 920, 926 (arguing that the president is more likely than Congress to maximize national welfare); Mendelson, *supra* note 29, at 788 (acknowledging superior agency capabilities on this front); Metzger, *supra* note 62, at 2041 (noting avenues for state influence on agencies).

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informed of the extent to which geographic variations warrant different regulatory approaches, as well as the extent of problems with all existing regulatory paradigms that might warrant using states as laboratories to develop new approaches. In addition, the agency is keenly aware of the potential for state regulation to interfere with its federal regulatory program. Courts, Congress, and the president do not have a sufficiently intricate understanding of federal regulatory programs to fully appreciate the potential costs of lack of uniformity or of local resistance to federal regulatory policy.

Nor do states often strike the right federalism balance. States tend to want to expand their own power and autonomy even when uniformity or less spillover would be theoretically preferable.<sup>183</sup> Allowing agencies to evaluate federalism issues, coupled with a demand by courts that agencies deliberate and explicitly give reasons for any federalism decisions they make, thus promises to factor programmatic federalism values more accurately into regulatory decisions than would reliance on the legislature and courts to make such decisions.

One might reason that courts can factor agency input about programmatic federalism values into their decisions and therefore that courts should be the institution ultimately responsible for deciding how to accommodate states' interests in federal regulatory programs. But the relationship between courts and agencies is not symmetrical. Unlike agencies, courts not only have limited knowledge of pragmatic day-to-day concerns about federal regulatory programs, but they also have little incentive to pay sufficient heed to such concerns.<sup>184</sup>

Administrative deliberation is also enhanced by the various types of analyses that the president and Congress require agencies to perform. Executive orders require agencies to consider a variety of impacts—the most noted of which mandates cost-benefit analyses for

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183. Cf. Steven G. Calabresi, *Some Normative Arguments for the Unitary Executive*, 48 *ARK. L. REV.* 23, 98–99 (1994) (arguing that local jurisdictions will self-interestedly draw resources from national commons, whereas executives, with a national constituency, will not).

184. For federal judges, who enjoy life tenure, politics is irrelevant to their pecuniary interests, and the success of agency programs is relevant to the nonpecuniary rewards, such as recognition for their craft, that motivate most judges' decisions. For a discussion of judicial motivations, see *supra* text accompanying notes 85–86.

Courts, however, can force themselves to take agency views into account by creating rules of deference to agency views. See *infra* Part III.C., which takes up the question of the appropriate rule of deference further.

major rules.<sup>185</sup> But other less well-known mandates in executive orders include the requirement that agencies evaluate the impact of their regulations on state, local, and tribal government.<sup>186</sup> In fact, Executive Order 12,866 explicitly invokes involvement of the public, and State, Local, and Tribal officials in regulatory planning as one purpose of its mandated Planning Mechanism.<sup>187</sup>

Professor Mendelson asserts that agencies generally ignore the mandate to consider impacts on state and local government, noting that few agency analyses include federalism impact assessments.<sup>188</sup> This, however, is not surprising. The mandate is internal to the executive branch, and presidents are unlikely to hold agencies to comply with it when they are the force pushing for federal usurpation of state and local government functions. In essence, Executive Orders offer at most rather low-powered incentives for agency staff.<sup>189</sup>

Courts, however, can create rather higher-powered incentives for agency deliberation. For instance, under *State Farm* and other rules of hard look review, a court can reject an agency decision outright, or reciprocally (by relaxing the stringency of review) greatly lower the effort an agency must invest in any given decision.<sup>190</sup> Thus, to the extent that agency deliberation about federalism may appear at first to lag, courts can adjust doctrine to spur it.

Because agencies and courts each have their strengths when considering federalism, the best institution for allocating power between the federal government and the states depends on the precise circumstances of the regulatory matter. If issues of abstract federalism seem paramount, courts are the superior forum; if the programmatic federalism issues predominate, agencies are the preferable forum. We suspect that for most issues, agencies are the better forum. Abstract federalism concerns are relatively insignificant

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185. See McGinnis, *supra* note 55, at 923–26.

186. See *id.* at 923–24.

187. Exec. Order No. 12,866 § 1(b)(9), 3 C.F.R. 638, 638 (1993), *reprinted in* 5 U.S.C. § 601 (2006).

188. Mendelson, *supra* note 29, at 783–86; Mendelson, *supra* note 4, at 718–19.

189. For a discussion of the president's tools for agency oversight, see *supra* Part II.C.2.

190. See Thomas O. McGarity, *Some Thoughts on "Deossifying" the Rulemaking Process*, 41 DUKE L.J. 1385, 1411 (1992); Richard J. Pierce, Jr., *Seven Ways to Deossify Agency Rulemaking*, 47 ADMIN. L. REV. 59, 67–68 (1995); Mark Seidenfeld, *Demystifying Ossification*, *supra* note 116, at 514. On the rewards side, see Gersen, *supra* note 133, at 215; Metzger, *supra* note 62, at 2054–56.

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in the modern era, and courts can strengthen agency deliberation through doctrines of review.

*C. Political Accountability of Legislative, Judicial and Agency Processes*

Finally, opponents of agency control of federalism determinations have sometimes maintained that Congress is more accountable than agencies.<sup>191</sup> Administrative law scholars are likely already familiar with the various reasons to doubt this claim, but we review the reasons herein, and apply them to this discussion.

In comparing accountability of the three institutions of government, at first blush it appears that Congress enjoys a distinct advantage because its members are directly elected, while agency and judicial decisionmakers are not. But elections are fraught with imperfections that potentially interfere even with basic accountability; simultaneously, there are extrapolitical mechanisms that keep administrative and even judicial decisionmaking from straying too far from public sentiments. These complications demand careful analysis of the relative accountability of Congress and agencies.<sup>192</sup>

1. *Legislative Accountability.* Legislators are directly elected. If they stray too far from the preferences of their constituents and supporters, they will not likely be reelected.<sup>193</sup> Because voters must incur costs to discern the true position of candidates on policy issues, however, the correlation between the positions of members of Congress and their constituents is attenuated.<sup>194</sup> Moreover, accepted

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191. Jack W. Campbell IV, *Regulatory Preemption in the Garcia/Chevron Era*, 59 U. PITT. L. REV. 805, 832 (1998); Merrill, *supra* note 6, at 757; Sunstein, *Nondelegation Canons*, *supra* note 4, at 331. *But see* Mendelson, *supra* note 29, at 741–42.

192. We think the debate about judicial accountability is familiar enough, and, in light of *Chevron's* acceptance of the superior accountability of agencies, settled enough, that we omit further discussion of it.

193. See David W. Brady et al., *Differences in Legislative Voting Behavior Between Winning and Losing House Incumbents*, in CONTINUITY AND CHANGE IN HOUSE ELECTIONS 178, 181–89 (David W. Brady et al. eds., 2000) (contending that representatives who take extreme positions relative to their district's preferences increase their probability of electoral defeat); Robert S. Erskson & Gerald C. Wright, *Representation of Constituency Ideology in Congress*, in CONTINUITY AND CHANGE IN HOUSE ELECTIONS, *supra*, at 149, 177 (asserting that members of Congress “lose votes—and sometimes elections—if they stray too far ideologically [from their constituents]”).

194. See Einer R. Elhauge, *Does Interest Group Theory Justify More Intrusive Judicial Review?*, 101 YALE L.J. 31, 102 n.270 (1991) (explaining that voters are likely to engage in probabilistic voting—sometimes voting for alternatives contrary to their personal preferences—

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wisdom holds that incumbents in Congress enjoy a huge advantage over challengers.<sup>195</sup> The relative safety that incumbents seeking reelection enjoy, all else being equal, illustrates the extent to which assessments of the merits of the candidates' positions on issues do not drive many congressional elections.

Congressional inertia in adopting legislation also can drive a wedge between current constituent preferences and legislative outcomes. Even if the political market worked perfectly in all respects except inertia, one could conclude only that statutes reflect public preferences at the time they are passed.<sup>196</sup> Circumstances change, however, and with them the propriety of a particular regulatory structure changes as well.

Congress has ways other than legislating to influence the power of the federal government relative to the states—for example by threatening to limit agency appropriations,<sup>197</sup> which must be passed every year for programs other than entitlement programs, or by hauling an agency head into hearings.<sup>198</sup> Because these mechanisms do

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when information costs discourage voters from being fully informed about the alternatives). Political parties and special interest groups provide information about candidates that help voters reduce information costs, but do not provide a perfect proxy for knowledge of candidates' true position on policy issues. Jeffrey J. Rachlinski & Cynthia R. Farina, *Cognitive Psychology and Optimal Government Design*, 87 CORNELL L. REV. 549, 565 (2002) (discussing interest group influence); Ernest A. Young, *Protecting Member State Autonomy in the European Union: Some Cautionary Tales from American Federalism*, 77 N.Y.U. L. REV. 1612, 1700–01 (2002) (explaining that voters use parties as proxies for information on issues).

195. Incumbents have several advantages in overcoming voter information costs. They have greater name recognition; garner more press coverage; and enjoy a monopoly in delivering rents to interest groups, which yields contributions that fund communication with voters. See Ronald A. Cass, *Money, Power, and Politics: Governance Models and Campaign Finance Regulation*, 6 SUPREME CT. ECON. REV. 1, 46–47 (1998) (discussing the “incumbency advantage”); Linda Cohen & Matthew Spitzer, *Term Limits*, 80 GEO. L.J. 477, 479–80 (1992) (listing some of the “tremendous advantages [that] incumbents enjoy over challengers”); Einer Elhauge, *Are Term Limits Undemocratic?*, 64 U. CHI. L. REV. 83, 154–55 (1997) (discussing the advantages that incumbents have over their challengers in contested elections). Especially for representatives and less so for senators, the ability to garner votes by constituent service provides another advantage to incumbents. See Jack M. Beermann, *Congressional Administration*, 43 SAN DIEGO L. REV. 61, 139 (2006) (describing how casework for constituents gives incumbents an electoral advantage).

196. See Martin H. Redish & Theodore T. Chung, *Democratic Theory and the Legislative Process: Mourning the Death of Originalism in Statutory Interpretation*, 68 TUL. L. REV. 803, 836 (1994) (commenting that legislative inertia is inherent in the political process and “severely limits Congress’s ability to bring outdated statutes in line with the times”).

197. See LOUIS FISHER, *THE POLITICS OF SHARED POWER: CONGRESS AND THE EXECUTIVE* 100 (4th ed. 1998).

198. See Beermann, *supra* note 196, at 71–143 (surveying techniques, including committee hearings, for congressional control over executive).



not exhibit the same inertia as the substantive legislative process, one might think that they provide alternatives by which Congress can exert its will on federalism issues without having to authorize agencies to address these issues. But except for appropriation riders, which have the potential to cause members of Congress to incur political costs,<sup>199</sup> spending provisions and hearings do not limit or authorize state regulatory authority or otherwise affect the reach of state law. Rather, spending provisions work as carrots and sticks for agencies to translate congressional will into regulatory reality. In other words, for Congress pragmatically to maintain its influence over federalism, it must grant agencies discretion over the reach of state regulatory matters on programs that they administer.<sup>200</sup>

2. *Administrative Accountability.* Although agencies are not elected, they are subject to congressional and presidential oversight. Some scholars contend that Congress can largely dictate important agency decisions,<sup>201</sup> whereas other scholars assert that the president dictates the policies that agencies pursue and the regulations that they

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199. Often appropriation riders “fly below the political radar,” and legislators may not even be aware of riders in bills on which they vote. Beermann, *supra* note 195, at 88–89. Commentators generally criticize riders for circumventing legislative accountability. *See, e.g., id.* at 88 (summarizing why appropriation riders are problematic from the standpoint of the legislative process); Thomas O. McGarity & Sidney A. Shapiro, *OSHA's Critics and Regulatory Reform*, 31 WAKE FOREST L. REV. 587, 643–44 (1996) (same). But their introduction can usually be traced back to particular legislators who then can take heat for attempting to force their colleagues to approve provisions that the entire body would not approve. *See* Carl Tobias, *Natural Resources and the White Commission Report*, 79 OR. L. REV. 619, 629–30 (2000) (reporting criticism by House leaders of an appropriation rider added by West Coast senators that would have bifurcated the Ninth Circuit Court of Appeals).

200. The extent to which Congress is willing to delegate depends on relative costs to its members of creating policy themselves versus the agency cost that results from delegation. *See* EPSTEIN & O'HALLORAN, *supra* note 133, at 49 (describing the cost-benefit analysis involved in Congress's decisionmaking process regarding the delegation of authority to agencies).

201. *See, e.g.,* McCubbins et al., *supra* note 174, at 257 (“Administrative procedures, however, can be used to guide agencies to make decisions that are broadly consistent with the policy preferences of political principals.”); *see also* Matthew D. McCubbins, Roger G. Noll & Barry R. Weingast, *Structure and Process, Politics and Policy: Administrative Arrangements and the Political Control of Agencies*, 75 VA. L. REV. 431, 440–44 (1989) (describing mechanisms that limit agencies' ability to pursue policies different than those supported by politicians); Charles Tiefer, *Congressional Oversight of the Clinton Administration and Congressional Procedure*, 50 ADMIN. L. REV. 199, 200 (1998) (suggesting that congressional oversight of agencies helps to ensure that agencies' actions are aligned with the wishes of congressional committees); Barry R. Weingast & Mark J. Moran, *Bureaucratic Discretion or Congressional Control? Regulatory Policymaking By the Federal Trade Commission*, 91 J. POL. ECON. 765, 777–78 (1983) (describing the congressional influence on Federal Trade Commission policy implementation).

adopt.<sup>202</sup> We do not believe that either congressional or presidential influence on agencies is such that agencies have no significant discretion even with respect to fundamental policy issues such as the relationship between federal and state authority over regulatory matters. We do, however, believe that both political branches of government sufficiently constrain agencies that their decisions generally do not deviate greatly from the postdeliberation preferences of the polity.<sup>203</sup> In contrast to courts or Congress, agency decisions comport more closely with popular values because the political branches can flexibly influence agency action and agencies then can respond quickly to those influences.<sup>204</sup>

As we have noted, Congress oversees agencies using a variety of mechanisms from formal passage of substantive legislation to informal threats of distracting and potentially embarrassing committee hearings.<sup>205</sup> The need for Congress to rely on “fire alarms” to monitor agencies’ agendas provides a substantial advantage to focused interest groups in the oversight process.<sup>206</sup> Nonetheless, the influence of interest groups on Congress does not fully translate into equal influence on agencies because congressional influence favoring interest groups is attenuated by Congress’s imperfect control over agencies.<sup>207</sup> In other words, slack in congressional control of agencies reduces the impact of the kinds of antideliberative biases that would affect congressional determinations of federalism issues.

Like Congress, the president also has an array of formal and informal mechanisms for influencing agencies. Formally, the president, with the advice and consent of the Senate, appoints and often can fire an agency head unilaterally.<sup>208</sup> The president can greatly

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202. See, e.g., Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245, 2281 (2001) (asserting that during the Clinton years “presidential control of administration . . . [moved] to the center of the regulatory landscape”).

203. Seidenfeld, *supra* note 117, at 1554.

204. Mashaw, *supra* note 159, at 512–13.

205. See *supra* notes 197–98 and accompanying text.

206. See McCubbins & Schwartz, *supra* note 144, at 172 (noting that fire-alarm oversight “arguably emphasizes the interests of individuals and interest groups more than those of the public at large”).

207. Because legislative control over agencies is probably greater when one party controls both the White House and Congress, Neal Devins, *Signing Statements and Divided Government*, 16 WM. & MARY BILL RTS. J. 63, 71–73 (2007), one-party rule increases the likelihood that interest group influence over Congress will spill over to agencies.

208. This power is not unlimited. See McGinnis, *supra* note 55, at 918 (“[F]iring an agency head is politically costly to the president.”).

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influence the budget of agencies through the appropriations process and can employ the power of the bully pulpit and the press to focus on an agency and the popular support for agency programs.<sup>209</sup> The president thus can influence particular agency decisions and perhaps even dictate outcomes for salient regulatory issues.

Although the precise effect of the president's influence on an agency decision depends on the preferences of the president regarding that decision, the president is accountable to the electorate in every state. In addition, a president up for reelection has to receive votes from the electoral college, and state legislators are influential in what is essentially a state-by-state presidential election as well as in how the electoral votes for the state are allocated. Therefore, overall one should expect that presidential influence would make agencies more receptive to state concerns about their power over regulatory matters.<sup>210</sup>

3. *Comparative Responsiveness to Contemporaneous Values of the Polity.* One distinct advantage of agencies over courts and legislatures is that agencies are more responsive than either to current political preferences. Because of legislative inertia, Congress passes statutes infrequently. A court remaining true to the intent of the adopting Congress may be implementing old public preferences if the statute has not been revamped in years. Agencies, through both congressional and presidential influences, are more apt to be influenced by current political pressures because political influences on agencies are ongoing and flexible.<sup>211</sup>

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209. See Thomas H. Hammond & Jack H. Knott, *Who Controls the Bureaucracy?: Presidential Power, Congressional Dominance, Legal Constraints, and Bureaucratic Autonomy in a Model of Multi-Institutional Policy-Making*, 12 J.L. ECON. & ORG. 119, 124 (1996) (reporting that many studies support the theory that the president plays "an agenda-setting role for congressional deliberations on agency appropriations"); Terry M. Moe, *Control and Feedback in Economic Regulation: The Case of the NLRB*, 79 AM. POL. SCI. REV. 1094, 1101 (1985) (discussing the president's influence over agencies, through the use of such mechanisms as the appointment process and the agency budget).

210. It is not surprising that every president since Ronald Reagan has issued or at least maintained an executive order requiring agencies specifically to consider state and local government concerns when regulating. See, e.g., Exec. Order No. 13,132, 3 C.F.R. 206 (2000), *reprinted in* 5 U.S.C. § 601 (2006) (requiring that federal agencies avoid conflict with state laws and keep preemption of state law to the "minimum level necessary"); Exec. Order No. 12,372, 47 Fed. Reg. 30,959 (July 14, 1982) (requiring that federal agencies consult with local and state officials before proposing to limit state regulatory authority).

211. Metzger, *supra* note 62, at 2040-41; see also Sunstein, *Law and Administration After Chevron*, *supra* note 4, at 2088 (suggesting that "administrators are in a far better position" to

Whereas private litigants can be expected to keep courts aware of live controversies, litigants by themselves can do little to update the court about the preferences of the current polity. Over a long enough period of time, the political nature of the judicial appointment process ensures that the courts are not woefully out of touch with popular sentiments.<sup>212</sup> But because judicial appointments happen infrequently and many judges sit for decades, one would expect that judicial outcomes would sometimes lag the preferences of the polity.<sup>213</sup>

As with deliberativeness, courts have doctrinal options for overcoming their own shortcomings. Most significantly, a court can deal with change by incorporating into its own processes the dynamic judgment of agencies.<sup>214</sup> But this partnership can only arise if judicial doctrine is open to agency consideration of the shifting field of federalism.

### III. FEDERALISM

In addition to the claim that Congress is institutionally superior to agencies, the second major rationale underlying the preference for congressional action is, as we have said, the claim that it represents a sort of second-best enforcement mechanism for constitutional values the Supreme Court is reluctant to defend directly. By demanding a clear statement from both houses of Congress together with the

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deal with changing circumstances than courts or the legislature); *cf.* Cuéllar, *supra* note 85, at 485 (claiming that empirical evidence supports the notion that the notice-and-comment process changes regulatory outcomes).

212. See David E. Bernstein, *Lochner Era Revisionism, Revised: Lochner and the Origins of Fundamental Rights Constitutionalism*, 92 GEO. L.J. 1, 51 (2003) (opining that lack of public support doomed the *Lochner* era jurisprudence but its demise still required a change in the Justices on the Supreme Court); Neal Devins, *How Constitutional Law Casebooks Perpetuate the Myth of Judicial Supremacy*, 3 GREEN BAG 259 (2000) (stating that “populist resistance to Court decisionmaking often prompts the Court to recalibrate its position”).

213. The *Lochner* era is probably the most notorious example of judicial policy falling behind popular preferences. See Paul Finkelman, *Civil Rights in Historical Context: In Defense of Brown*, 118 HARV. L. REV. 973, 990 (2005) (reviewing MICHAEL J. KLARMAN, *FROM JIM CROW TO CIVIL RIGHTS: THE SUPREME COURT AND THE STRUGGLE FOR RACIAL EQUALITY* (2004)) (stating that during the *Lochner* era, the Court “was notorious for thumbing its nose at the will of the people”).

214. See, e.g., *Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 125 S. Ct. 2688, 2700 (2005) (allowing an agency to overrule a lower federal court's interpretation of a statute in certain circumstances to allow courts to consider the agency position on that interpretation); *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 866 (1984) (creating doctrine under which courts are to defer to reasonable agency interpretations of ambiguous statutes).

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consent of the president (or a supermajoritarian agreement of the two houses alone) before federal power can displace state power, the Court increases the systemic resistance to expanded federal influence.<sup>215</sup>

As a descriptive matter, this account seems hard to dispute. We could not seriously contend that it is more difficult to enact regulations than to enact clear legislation.

Our method in this Part accordingly is a bit different from our approach in the last. Although we accept the factual premise behind the preference for Congress, we question its uniform application. Why should all expansions of federal power be equally difficult to implement? In some cases, we argue, federal agency action is consistent with, rather than at odds with, federalism values—for example, where the agency is a better arena for state influence than Congress alone. Moreover, the normative justification behind sheltering the states may be stronger or weaker in varying circumstances. A realist view of federalism should account for these differences, rather than imposing a single, blanket presumption.

#### A. *The Case for Nuanced Evaluation of Federalism Effects*

Federalism is not a constitutional monolith, but instead a composite of somewhat related values, some of which at times rest uneasily together. In preserving local autonomy against a single, national rule, federalism offers citizens with differing preferences the opportunity to craft a local rule that most nearly accords with their values.<sup>216</sup> Local choices may prove impossible or counterproductive,

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215. See Mendelson, *supra* note 4, at 709–11 (discussing “justifications for the presumption against preemption of state law”); Mendelson, *supra* note 29, at 753 (“[C]ourts effectively make congressional deliberation a prerequisite to preemption.”); see also McGinnis, *supra* note 55, at 902–03 (describing the relative ease of administrative enactments).

216. See Gregory v. Ashcroft, 501 U.S. 452, 457–58 (1991) (describing federalism and the importance of preserving the powers of state governments); Michael W. McConnell, *Federalism: Evaluating the Founders’ Design*, 54 U. CHI. L. REV. 1484, 1498–99 (1987) (reviewing RAOUL BERGER, *FEDERALISM: THE FOUNDERS’ DESIGN* (1987)) (discussing why local governments are more likely to pursue various policies that are popular with the electorate than is the national government); Oates, *supra* note 31, at 1122–23 (proposing that one rationale for a decentralized provision of goods and services is that local governments “possess knowledge of both local preferences and cost conditions”). Although we accept this efficiency-related value of federalism for the sake of argument, we note that one could reach the same goal using a centralized system that permitted but guided local experiments. Cf. Rubin & Feeley, *supra* note 31, at 919–20 (“If we are truly serious about providing people with the exit option of choice, or the voice option of participation, we should provide those options universally, through a national, decentralized program.”).

however, when the results of a decision in one jurisdiction spill over to affect others.<sup>217</sup> Similarly, although decentralization permits efficiency-enhancing competition, it may also result in higher political rents and compliance and lobbying costs, as well as a sacrifice of some potential economies of scale.<sup>218</sup> Variety permits experimentation, but when new ideas result in positive externalities to other jurisdictions, innovation is likely to be produced at a socially suboptimal level.<sup>219</sup> Finally, local governments may be a political counterweight to the national government, so that even if they are fruitless on their own they nonetheless help to preserve liberty or good government in the nation as a whole;<sup>220</sup> the existence of multiple layers of government,

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217. Oates, *supra* note 31, at 1121. Additionally, the existence of beneficial spillovers suggests that local governments would produce public goods at a level below the social optimum because the benefits of the good are not realized by the provider. *Id.*; see also Tom Stacy & Kim Dayton, *The Underfederalization of Crime*, 6 CORNELL J.L. & PUB. POL'Y 247, 289–90 (1997) (noting that states underenforce criminal laws because they fail to consider the benefits such enforcement provides to other states).

218. Rents, lobbying, and compliance costs can increase simply because, under a federal system, regulated entities have to monitor and lobby numerous local governments and comply with numerous standards that may be inconsistent with one another. See Jonathan R. Macey, *Federal Deference to Local Regulators and the Economic Theory of Regulation: Toward a Public-Choice Explanation of Federalism*, 76 VA. L. REV. 265, 271–73 (1990) (offering high transaction costs as grounds for why interest groups prefer regulation at the national level); Daniel Shaviro, *An Economic and Political Look at Federalism in Taxation*, 90 MICH. L. REV. 895, 919–21, 925–26 (1992) (describing costs of diversity in local taxing systems). *But see* Barry R. Weingast, *The Economic Role of Political Institutions: Market-Preserving Federalism and Economic Development*, 11 J.L. ECON. & ORG. 1, 5 (1995) (contending that federalism usually induces competition among jurisdictions that might drive down monopoly rents demanded by local governments). Weingast's prediction seems to us difficult to reconcile with the observed behavior of multijurisdictional businesses, which appear to prefer uniform rules to multifaceted competition. See, e.g., John A. Swain & Walter Hellerstein, *The Political Economy of the Streamlined Sales and Use Tax Agreement*, 58 NAT'L TAX J. 605, 613 (2005) (describing efforts of nationwide retailers to force states to harmonize their sales tax regimes).

219. For well-articulated statements of the proposition that jurisdictional variety leads to fruitful, competitive experimentation, see PAUL E. PETERSON, *THE PRICE OF FEDERALISM* 18–19 (1995); William W. Bratton & Joseph A. McCahery, *The New Economics of Jurisdictional Competition: Devolutionary Federalism in a Second-Best World*, 86 GEO. L.J. 201, 208–09 (1997). A number of critics argue that externalities will result in suboptimal experimentation if the government is committed to subnational actors. E.g., David Lazer, *Regulatory Capitalism as a Networked Order: The International System as an Informational Network*, 598 ANNALS AM. ACAD. POL. & SOC. SCI. 52, 60 (2005); Susan Rose-Ackerman, *Risk Taking and Reelection: Does Federalism Promote Innovation?*, 9 J. LEGAL STUD. 593, 594 (1980); Rubin & Feeley, *supra* note 31, at 925; Koleman Strumpf, *Does Government Decentralization Increase Policy Innovation?*, 4 J. PUB. ECON. THEORY 207, 208 (2002).

220. See Randy E. Barnett, *The Ninth Amendment: It Means What It Says*, 85 TEX. L. REV. 1, 21 (2006) (“[A] principal end of federalism is the protection of the liberties of the people, both personal and political.”).

however, may make the whole more opaque, reducing the responsiveness of elected officials both locally and nationally.<sup>221</sup>

A key implication of these cross-cutting currents is that some apparent expansions of national power may actually better protect federalism values than the status quo. Spillovers are the readiest source of examples.<sup>222</sup> Lax regulations in one state—be they on handguns, fireworks, or abortions—can make restrictions in nearby states largely fruitless.<sup>223</sup> Upwind pollution makes East Coast clean-air efforts prohibitively expensive,<sup>224</sup> for example, and tax havens siphon funds away from states with preferences for more government services.<sup>225</sup> Federal regulation can adjust state autonomy to a level at which it is more nearly Kantian—that is, more consistent with the greatest freedom for all.<sup>226</sup> Alternatively, the federal government might take the lead in policy setting in an area in which there is a need for experiment so that the decisionmakers would internalize the nationwide benefits of the information that would result.<sup>227</sup> There are similar stories we could tell for each of federalism's many tradeoffs.

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221. *New York v. United States*, 505 U.S. 144, 168–69 (1992); Matthew D. Adler & Seth F. Kreimer, *The New Etiquette of Federalism*: New York, Printz, and Yeskey, 1998 SUP. CT. REV. 71, 110.

222. See Barry Friedman, *Valuing Federalism*, 82 MINN. L. REV. 317, 405–09 (1997) (discussing economic rationales for federal control, including addressing externalities); Samuel Issacharoff & Catherine M. Sharkey, *Backdoor Federalization*, 53 UCLA L. REV. 1353, 1371–72 (2006) (explaining that interstate externalities can be solved either by interstate compacts or uniform national standards).

223. See Daniel Abrams, *Ending the Other Arms Race: An Argument for a Ban on Assault Weapons*, 10 YALE L. & POL'Y REV. 488, 516 (1992) (concluding that crimes committed with guns bought outside of a local jurisdiction make it difficult to assess the direct impact of local gun control laws); Kristin A. Goss, *Policy, Politics, and Paradox: The Institutional Origins of the Great American Gun War*, 73 FORDHAM L. REV. 681, 700 (2004) (noting the position of the National Council to Control Handguns that local laws are ineffective).

224. See Richard L. Revesz, *Federalism and Interstate Environmental Externalities*, 144 U. PA. L. REV. 2341, 2349–54 (1996) (recognizing externalities as a justification for federal environmental regulation, but arguing that the federal government has used its authority inefficiently); Richard B. Stewart, *Pyramids of Sacrifice? Problems of Federalism in Mandating State Implementation of National Environmental Policy*, 86 YALE L.J. 1196, 1215–16 (1977) (arguing that negative externalities of pollution justifies federal environmental regulation).

225. See Reuven S. Avi-Yonah, *Globalization, Tax Competition, and the Fiscal Crisis of the Welfare State*, 113 HARV. L. REV. 1573, 1586–99 (2000) (describing how tax havens prevent other nations from setting optimal tax levels); Robin Boadway et al., *The Consequences of Overlapping Tax Bases for Redistribution and Public Spending in a Federation*, 68 J. PUB. ECON. 453, 453–54 (1998) (discussing spillover effects resulting from individual states' tax policies).

226. IMMANUEL KANT, *THE METAPHYSICAL ELEMENTS OF JUSTICE* 35 (John Ladd trans., 1965) (1797).

227. See Michael C. Dorf & Charles F. Sabel, *A Constitution of Democratic Experimentalism*, 98 COLUM. L. REV. 267, 321–22 (1998) (offering an elaborate set of tools for

The likelihood that state autonomy sometimes undermines federalism in turn suggests that any rule throwing up broad barriers around that autonomy is probably ill advised. To be sure, it is possible that, notwithstanding the exceptions we identify, a general presumption against federal encroachments benefits the nation on net. But the overall benefits of the resulting rule could be further improved by raising the costs, not of all national regulation, but rather of only that federal regulation inconsistent with the best interests of the public. The only case in which that might not be true would be if the costs of adding nuance to the rule outweigh the benefits of greater precision. We return to that question shortly.

First, though, to make our point as plainly as possible: on the assumption that resistance to national norms should be increased only when those norms disserve beneficial federalism, a clear statement of federal authority from an agency should often be as or more authoritative in a court's eyes as a clear statement from Congress to the same effect.<sup>228</sup> Although Congress has its strengths, such as its ability to consider more abstract federalism questions, agencies frequently are in a better position to assess the programmatic costs and benefits of federalism, as we have demonstrated in Part II.C.<sup>229</sup> Their greater accuracy in this assessment in most instances will swamp the likely effects of underprotection of abstract federalism values. Again, the premise of the preference for congressional action is that it serves federalism values by increasing the cost and decreasing the volume of rules that reduce state autonomy. It would be counterproductive to increase the cost or reduce the volume of agency decisions that actually serve the proper goals of federalism.

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incentivizing information sharing and innovation by local governments); Rose-Ackerman, *supra* note 219, at 615–16 (suggesting that the central government could offer grants or prizes to spur localities to innovate, but might be better off just contracting directly with private firms or having federal agencies create innovative policy).

228. In this respect we agree with Professor Merrill that the extent to which a regulation displaces state law might vary depending on the subject of the regulation, although we would also consider an array of other factors. Merrill, *supra* note 6, at 738–44; *see also* Dinh, *supra* note 43, at 2098–99 (arguing that presumption against preemption applies only “where concern for state regulation properly plays a role”). *But see* Hills, *supra* note 28, at 6–8 (noting that Professor Merrill’s approach has some virtues but ultimately rejecting it as too difficult for courts to apply). As we explain in the next paragraph of the main text, Professor Hills’s criticism of the more nuanced approach is weaker against our version of judicial decisionmaking, because in our vision agency participation strengthens judicial capacity to find facts, analyze institutions, and adapt as those facts and institutions change.

229. *See supra* text accompanying notes 119–44.



It might be argued in response that, taking into account decision and error costs, a bright-line rule requiring legislative action is still superior to one with exceptions for “good” regulations. For example, suppose that courts have limited resources, and that determining whether a given regulation is good for federalism values consumes a great deal of time and judicial effort.<sup>230</sup> Improving the performance of the federalism-enhancing rule at the margins might then result in fewer resources for other court projects, including efforts to enforce federalism more directly. Even if federalism were the only value in play, a more nuanced rule might reduce the overall achievement of federalism’s ends. Further, a critic might contend that even in the event that courts’ resources are not especially limited, the court is more likely to sometimes reach the wrong results—allowing the federal government to expand too easily—because the nuanced rule is more difficult to apply.<sup>231</sup>

Although these are empirical questions, one can get some sense of the size of the expected costs by considering the likely performance of agencies. As we have argued, agencies are highly skilled at most of the tasks that comprise a decision about federalism, and they often have incentives to exercise those skills on behalf of states.<sup>232</sup> To the extent that agencies are relatively disinclined to examine closely the federalism implications of their decisions, courts can offer them additional incentives to do so through rules of review and deference that increase or decrease the agency’s cost and reward structure.<sup>233</sup> Granting a higher degree of deference for thoroughly reasoned agency-federalism decisions therefore serves two dovetailing ends for the court: it reduces the court’s cost of conducting its own independent research and analysis while increasing the likelihood that the agency decision is right.<sup>234</sup>

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230. For a discussion of these forms of judicial calculations in dealing with judicially-manageable standards, see Fallon, *supra* note 52, at 1310–13.

231. Some have argued against “atom-splitting” analysis of these questions. See, e.g., Hills, *supra* note 28, at 56 (defending the presumption against preemption on the ground that it conserves judicial resources); Merrill, *supra* note 6, at 773–74; Jonathan H. Adler, *Reckoning with Rapanos: Revisiting “Waters of the United States” and the Limits of Federal Wetland Regulation*, 14 MO. ENVTL L. & POL’Y REV. 1, 24 (2006) (arguing that an uncertain federalism doctrine limits state autonomy).

232. See *supra* Part II.B.3.a.

233. See *supra* notes 175–80 and accompanying text.

234. This is not to say that we endorse *Chevron* deference to agency federalism decisions. Our view is that the most sensible deference approach is a sliding scale. See *infra* Part III.C.

Moreover, the court's own performance is likely to be weaker without the benefit of agency consideration. From time to time Congress will overcome the resistance norm and enact clear legislation. On those occasions the courts may have to outright decide the question of the appropriate scope of national authority. They will be far better positioned to do so if they can draw on the extensive analysis and research of an agency that has already considered the question, experimented with alternative outcomes, and updated its results as the world changes.<sup>235</sup> Indeed, the Supreme Court's performance in balancing on its own the competing interests that federalism entails have been so uninspiring that both commentators and Justices themselves have often called for it to give up the project.<sup>236</sup>

Although Congress too can deliberate, courts should prefer to encounter federalism questions in the context of agency, rather than congressional, enactments. As we have argued, there is little mechanism in the legislative branch for *ongoing* reevaluation of a policy, and the very high costs of legislative change decrease the likelihood that Congress will respond definitively to new events.<sup>237</sup> True deliberation may be rare in an institution that strikes internal bargains to overcome its own inertia. And courts would have more influence over agency deliberation, helping ensure that agencies took great care before displacing state law so that the expected outcome would be less likely to displace state law when that would be bad policy.

On the other hand, there may be some policy decisions in which Congress, because of its structure, provides unique information for the courts to appraise. This is arguably more likely to be the case when abstract federalism concerns loom larger than economic ones.<sup>238</sup> Thus, for example, it could make sense for the courts to look for clear

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235. JERRY L. MASHAW, GREED, CHAOS, AND GOVERNANCE: USING PUBLIC CHOICE TO IMPROVE PUBLIC LAW 164–80 (1997); *see also* Dorf & Sabel, *supra* note 227, at 363 (stating that in a regime led by agency experimentation, “courts [would] decide administrative law cases against a detailed backdrop of fact”).

236. Hills, *supra* note 28, at 6.

237. We acknowledge that the superior adaptability of agencies depends to some extent on the rules for judicial review of agency decisions, some of which have the potential to “ossify” the regulatory process. For a discussion of the optimal set of rules of judicial review, see *infra* Part III.C.

238. Again, by “abstract” federalism we mean rights-preserving federalism, in which divided government reduces the likelihood of tyranny. Professor Galle would like to note here that he finds this argument considerably less persuasive than does Seidenfeld.

congressional authorization of agency action before crediting a determination of the Bureau of Alcohol, Tobacco and Firearms on states' rights to regulate guns, notwithstanding the Second Amendment.<sup>239</sup> In those instances, a congressional clear statement rule might be more defensible because without the information Congress provides, the court could be unable to determine whether the policy serves or diserves abstract federalism values.<sup>240</sup>

Congress may also be epistemically superior to agencies when there is some question whether a policy is on net nationwide welfare enhancing.<sup>241</sup> For instance, imagine that widgets can be manufactured to be either red or green. There are some economies of scale in production and distribution if all widgets nationwide are the same color, which would generate a modest amount of consumer and producer surplus. Federalism—in this case, the instrumental goal of federalism to enhance nationwide welfare through diversification of local choices—would thus be served by maintaining a local choice of widget color if, but only if, welfare losses for those consumers who would prefer to purchase widgets in the alternative color would exceed the size of this surplus.

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239. That is, because the Second Amendment is sometimes said to be a structural device for resisting government encroachments, abstract federalism concerns would likely loom larger in that context.

240. On the other hand, as we have noted, we think the significance of abstract federalism is minimal in the modern world, where there seems no serious danger that the states will disappear as rival sources of political authority to the federal government.

241. To our mind this is the main significance of the suggestion, which we think implicit in Sunstein's work, that the congressional clear statement rule is appealing because Congress is more "democratic" than are agencies. Although Sunstein does not outright assert this argument, he notes that the superior democratic pedigree of legislatures is one of the points usually offered in favor of nondelegation. Sunstein, *Nondelegation Canons*, *supra* note 4, at 319–20. He then suggests that the nondelegation arguments he canvasses are more persuasive in the instance of constitutional avoidance. *Id.* at 321; *see also* Cass R. Sunstein, *Beyond Marbury: The Executive's Power to Say What the Law Is*, 115 YALE L.J. 2580, 2610 (2006) (stating that the avoidance canon "grants the executive exactly the degree of discretion that it deserves to possess"). This seems a tentative endorsement of the democracy argument.

As a general proposition, we think the argument for representativeness *per se* is incoherent. We agree with Professor Edward Rubin that there is no persuasive account of representation that specifies the proper degree of representativeness of government. *See* Edward L. Rubin, *Getting Past Democracy*, 149 U. PA. L. REV. 711, 713–15 (2001) (proposing that a government should be analyzed in terms of its interactions with its citizens, as opposed to generalized notions of democracy). Democracy's value must lie either in its power to enable individual participation in government or in its epistemic qualities—that is, its ability to reach better results because of the quality of deliberation it entails. Thus, we take Sunstein's point to be a claim that Congress, because of the way in which it provides for representation, can better be relied on to produce welfare-enhancing outcomes.

One might argue that Congress is better designed to produce information about these kinds of net welfare determinations.<sup>242</sup> If agency costs are small, majority voting by representatives elected regionally, combined with logrolling, should permit those groups whose disutility would exceed any national gain from uniformity to kill the legislation.<sup>243</sup> If the bill passes, therefore, it is relatively easy for a court to conclude that it is welfare increasing for the nation as a whole. The agency's decision to regulate does not signal welfare maximization as strongly. True, the president heads the executive branch and is elected nationally.<sup>244</sup> Still, even if agency costs are quite low, and the president truly represents every state (rather than, say, "swing" states), it remains possible that the president's position more nearly represents the median national voter than the total national welfare.<sup>245</sup> The executive has no built-in internal logrolling mechanism for trading off stronger for weaker preferences. Thus, the agency decision to regulate may or may not increase welfare. An agency might have to rely on relatively complex and controversial tools, such as contingent valuation surveys, to assure the court that its decision was as good as the legislature's.<sup>246</sup>

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242. See McGinnis, *supra* note 55, at 942–43 (conceding that because the executive is more "centralized," it may be less skilled at correctly estimating the costs and benefits of regulation).

243. In other words, if a bill would cost 25 percent of the nation 100 utils per person but gain the other three-quarters 5 utils, the bill will fail because representatives of the disfavored quarter will be able to trade their votes on less important matters to defeat the proposed bill.

244. Calabresi, *supra* note 184, at 35 (arguing that a national election of the president renders the president more likely to maximize national welfare); Kagan, *supra* note 202, at 2335 (same).

245. That is, the president might maximize votes rather than derive a policy based on the intensity of voter preferences. Thus, it is possible that the president would favor a policy that was weakly favorable for 51 percent of the nation and strongly unfavorable to the other 49 percent. Political science suggests that this outcome is unlikely, but it does so only by relaxing the assumption that there are little or no agency costs. *E.g.*, George J. Stigler, *The Theory of Economic Regulation*, 2 BELL J. ECON. & MGMT. SCI. 3, 11–12 (1971) (explaining that policy outcomes depend on expression of preferences, not simply votes). On the question whether the president may target swing voters in swing states rather than the welfare of the whole nation, see Nzelibe, *supra* note 139, at 1235–39.

246. A fine overview of the challenges of demonstrating that a regulatory policy is optimal in some sense, such as overall well being, can be found in Matthew D. Adler & Eric A. Posner, *Rethinking Cost-Benefit Analysis*, 109 YALE L.J. 165, 172–87, 225–43 (1999). For examples of discussion on the use of citizen surveys in making these determinations, see William H. Desvousges et al., *Measuring Natural Resource Damages with Contingent Valuation: Tests of Validity and Reliability*, in CONTINGENT VALUATION: A CRITICAL ASSESSMENT 91, 91–93, 113–114 (Jerry A. Hausman ed., 1993); Peter A. Diamond & Jerry A. Hausman, *Contingent Valuation: Is Some Number Better Than No Number?*, 8 J. ECON. PERSP. 45, 47–48 (1994).

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This argument, however, fails under a straightforward application of public choice theory.<sup>247</sup> For instance, when there are agency costs, the opacity of the logrolling process may facilitate welfare-diminishing bargains.<sup>248</sup> There is no scholarly consensus whether Congress is more or less subject to interest group pressures than the Executive; we tend to side with those who say “more,” but we recognize that the debate is still open.<sup>249</sup> In any event, in order to justify a demand for a clear statement from Congress under this rationale, one would have to believe that Congress’s failure to act sends a meaningful signal about national welfare. Thanks to the high costs of any definitive congressional action, though, relying on congressional *inaction* as a signal of anything meaningful is dubious—a familiar point to students of the dormant commerce clause.<sup>250</sup>

In sum, there is little reason to believe that a bright-line rule prohibiting executive expansions of federal power serves beneficial federalism better than a more nuanced one. Without agency assistance, courts are more likely to draw the borders of state autonomy wrongly, and the court can design rules for reviewing agency deliberations that both increase accuracy and reduce judicial effort. We would add further that even if the considerations were in equipoise, false negatives (wrongly rejecting some good policies as bad for state autonomy) are just as bad as false positives (wrongly

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247. Cf. Mendelson, *supra* note 29, at 772 (“[T]he President may be better able than Congress to register the full intensity of the public’s preferences.”).

248. See *supra* note 128 and accompanying text.

249. Compare MASHAW, *supra* note 235, at 152 (“The President has no particular constituency to which he or she has special responsibility to deliver benefits. Presidents are hardly cut off from pork-barrel politics. Yet issues of national scope and the candidates’ positions on those issues are the essence of presidential politics.”), and MANCUR OLSON, *THE RISE AND DECLINE OF NATIONS: ECONOMIC GROWTH, STAGFLATION, AND SOCIAL RIGIDITIES* 50–52 (1982) (“[I]ndividual members of Congress are overwhelmingly influenced by the parochial interests of their particular districts and by special-interest lobbies.”), and Frank H. Easterbrook, *The State of Madison’s Vision of the State: A Public Choice Perspective*, 107 HARV. L. REV. 1328, 1341 (1994) (“A President may resist claims by factions . . . by adding other items to the agenda.”), and Daniel B. Rodriguez, *Management, Control, and the Dilemmas of Presidential Leadership in the Modern Administrative State*, 43 DUKE L.J. 1180, 1193–96 (1994) (discussing the comparative advantage resulting from the president’s national constituency), with Nzelibe, *supra* note 139, at 1249 (acknowledging “that individual legislators may be primarily concerned with their constituents” but concluding that Congress has “a comparative advantage over the president in understanding the potential costs and tradeoffs involved in any specific legislation”).

250. Martin H. Redish & Shane V. Nugent, *The Dormant Commerce Clause and the Constitutional Balance of Federalism*, 1987 DUKE L.J. 569, 588–90; see also Hills, *supra* note 28, at 12 (describing causes of congressional gridlock).

permitting some policies that are bad for state autonomy).<sup>251</sup> As we have shown, many false negatives would themselves undermine federalism values. Therefore, even if one wanted to choose the position that was most likely to minimize federalism-damaging errors, it is quite possible that ours is that position.

*B. Formalism Strikes Back: Must the Judiciary Have Exclusive Control Over Deliberations About Federalism?*

The story we have given so far depends on a willingness to acknowledge that the legal realism that animates administrative law also should inform constitutional doctrine. If constitutional outcomes turn on complex questions of fact and political judgment, it is sensible that agencies should play at least some role in their resolution. Indeed, our argument depends on the stricture that, before agencies can approach constitutional boundaries between state and federal governments, they must first deliberate about the wisdom of their choice to do so. This logic has one significant sticking point. At the time of this writing, the Supreme Court seems somewhat hostile to constitutional legal realism, and clings instead to a more formalist claim that in constitutional matters it must remain solely for the Court to say what the law is.<sup>252</sup> In this Section we briefly consider whether formalism has any appeal. In fact, we concede that it has its place, but we argue that the most sensible application of the principles that would justify it suggests that formalism should only rarely bar an agency from deliberating about and affecting state authority.<sup>253</sup>

To begin with the points in favor of limiting agency authority to consider the Constitution, claims that constitutional reasoning is different from other legal interpretation and that it is uniquely the realm of judges may serve to reinforce the uniqueness of the judicial role. This in turn offers two somewhat distinct advantages for the

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251. For an argument that the presumption is an effort to avoid erroneous preemptions, see William N. Eskridge, Jr., *Public Values in Statutory Interpretation*, 137 U. PA. L. REV. 1007, 1024–25 (1989).

252. *United States v. Georgia*, 126 S. Ct. 877, 880–82 (2006); *City of Boerne v. Flores*, 521 U.S. 507, 519–20, 529, 532 (1997) (citing *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803)); see also Galle, *supra* note 86, at 165 (describing the Court's claims to exclusive power to interpret the Constitution).

253. Others have taken a stronger stand in favor of constitutional deliberation in the executive branch. *E.g.*, Kelley, *supra* note 59, at 886–91; Gary Lawson & Christopher D. Moore, *The Executive Power of Constitutional Interpretation*, 81 IOWA L. REV. 1267, 1269–70 (1996); Michael Stokes Paulsen, *The Most Dangerous Branch: Executive Power to Say What the Law Is*, 83 GEO. L.J. 217, 264 (1994).

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judiciary. For one, as others have noted, it may be a way of deflecting popular discontent over countermajoritarian outcomes.<sup>254</sup> If constitutional law is “law” whereas all else is simply part of “politics,” then judges can assert that their constitutional rulings are not the product of their own preferences but instead the result of following the law wherever it leads. Reserving this law-giving power to judges might signal to the populace that the judiciary is uniquely qualified for that role, so that its views are legitimate and ought to be accepted. Relatedly, the signal of judicial uniqueness may help to shape the internal psychological norms of judging, so that in fact judges do behave differently than other political actors.<sup>255</sup>

Neither of these points persuades us that agencies should be prohibited from or presumed incompetent at reasoning about federalism. Exclusivity—barring Congress and agencies from relying on their own constitutional reasoning—cannot be an effective means of reducing political resistance to the judicial project, because a court acting alone is necessarily not minimalist but maximalist.<sup>256</sup> Not only must it achieve all its goals with no assistance from the political branches—and thus with no partner to guide it to better outcomes or to share political heat—but it must also act often to defend its supposedly unique prerogatives. The claim that there is something distinctive about constitutional law is difficult to maintain against the fact that many decisions with constitutional overtones, such as the rules for access to the courthouse, are often politically crafted.<sup>257</sup> Although the courts could take over all such decisions (including their own budgets, presumably), that too is the path of maximalism.

On the other hand, both aspects of judicial uniqueness can arguably be made cogent in limited circumstances. If the key to reinforcing the judiciary’s own professional norms is a claim to eliteness, judges could achieve that by staking a claim even to a small slice of constitutional law, such as particularly fundamental or central rules. And when constitutional rights are in conflict, the Supreme Court may want to limit competing interpretations that could inspire greater political resistance to its resolution (although this would come

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254. LARRY D. KRAMER, *THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW* 237 (2004); Neal Devins & Louis Fisher, *Judicial Exclusivity and Political Instability*, 84 VA. L. REV. 83, 93–94 (1998).

255. Galle, *supra* note 252, at 202–09.

256. Keith E. Whittington, *Extrajudicial Constitutional Interpretation: Three Objections and Responses*, 80 N.C. L. REV. 773, 796 (2002).

257. See Galle, *supra* note 252, at 199.

at the cost of losing potential insights about alternative solutions). Even if applied selectively, the claim of uniqueness could buttress a court that says its balancing on some particularly fundamental issues has special moral status.<sup>258</sup>

The other potential justification for a formalist approach similarly has strong appeal only when applied narrowly. Some proponents of the formalist approach have contended that exclusive judicial control over the Constitution allows the Court to settle controversial social issues.<sup>259</sup> That explanation seems strained as to the more practical, nuts-and-bolts aspects of constitutional law, or as to those, such as federalism, in which the underlying issues are based on fluid facts rather than enduring value debates.<sup>260</sup> Moreover, given the possibility that cooperative interpretation produces better results, settlement seems foolish; it encourages courts to lock in inferior solutions.<sup>261</sup> Still, there might be occasions in which an attractive answer seems evident and settlement would indeed be appealing.

Therefore, we again see that the strongest arguments against agency determinations of federal power have force only occasionally. A formalist view of constitutional deliberation cannot explain, for example, a blanket presumption against preemption, or an all-encompassing avoidance doctrine. At most, the formalist could *at times* rule out the sort of agency deliberation we invoke here. In the next Section, we sketch when those kinds of formalist complaints, combined with other considerations, could most forcefully limit agency action.

### C. Deference and Other Details

Having proposed a more complex balancing test in place of a bright-line rule, we should explain how we expect our test to operate. We envision the central question as “should this agency action be

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258. For more extensive discussion of the tradeoffs inherent in partial claims of judicial exclusivity, see Galle, *supra* note 252, at 209–16.

259. Larry Alexander & Frederick Schauer, *On Extrajudicial Constitutional Interpretation*, 110 HARV. L. REV. 1359, 1360–62, 1371–81 (1997); see also Merrill, *supra* note 6, at 757–58 (arguing that a strong stare decisis rule for preemption would permit private actors to invest efficiently).

260. See Whittington, *supra* note 256, at 791 (arguing that exclusivity undermines the possibility that doctrine can adapt to change).

261. Robert C. Post & Reva B. Siegel, *Equal Protection by Law: Federal Antidiscrimination Legislation After Morrison and Kimel*, 110 YALE L.J. 441, 467, 514–15 (2000).



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permitted to displace state authority?”<sup>262</sup> To our minds, the main factors at play should be the strength of the underlying interest in state autonomy, the agency’s decision process, the court’s need for information from the agency, the evidence of congressional authorization, the need for exclusive judicial control over fundamental constitutional issues, and the possibility of political externalities.

The most fundamental factor for the court to consider would be the degree to which the underlying federalism norm needs shelter. As we have explained, not all encroachments on state power contravene the interests of federalism. In other situations, an agency decision taken in isolation might diminish state prerogatives, but a host of other surrounding factors bolster them. For instance, one small, detailed change to state tort law, in the context of a tort system that states overwhelmingly control, deserves less scrutiny than a preemption on the scale of the Employment Retirement Income Security Act.<sup>263</sup> Alternatively, it may be that a preemption or other state-displacing system provides other channels for state influence, such as the State Implementation Plan process common in environmental legislation.<sup>264</sup> If the court is largely convinced that federal authority is consistent with federalism or makes only a small dent in it, then the “resistance” the court should provide ought to diminish accordingly.

The process behind the federal decision is nearly as important as its substance. A thorough, deliberative decision, in which state and private stakeholders have a place at the table and a meaningful voice in outcomes, should command substantial respect. Again, we have explained why that is so: it both increases the likelihood that the outcome is a reasonable balancing and also influences future administrative actions further toward that end.

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262. As we have suggested, there are a number of different situations that would present this question, including agency interpretation of a statute in a manner that raises an issue about Congress’s power to involve the federal government in matters traditionally regulated by states, *e.g.*, Clean Water Act, 33 U.S.C. §§ 1251–1387 (2000), as well as agency regulations that explicitly displace state regulations through preemption.

263. *E.g.*, *Aetna Health Inc. v. Davila*, 542 U.S. 200, 208–09 (2006) (discussing the “expansive” preemptive effect of the Employment Retirement Income Security Act). We note that we do not think of a complete prohibition on private tort suits as a “small, detailed” change; we have in mind here something like statutes of limitations or rules for the admissibility of evidence.

264. *See Alaska Dep’t of Env’tl. Conservation v. EPA*, 540 U.S. 461, 470 (2004) (describing the State Implementation Plan process and the state role in it).

A troublesome issue on this front is the state of administrative law deference doctrine. On the understanding prevailing in some influential places, such as the D.C. Circuit, courts and agencies have a distasteful set of choices.<sup>265</sup> One option is *Chevron* deference, which is typically costlier in procedure for the agency, but which offers the agency extensive control over the legal outcome and the opportunity to change its finding over time in response to new developments or leadership.<sup>266</sup> Alternatively, under *Skidmore v. Swift & Co.*,<sup>267</sup> and its progeny, the agency can opt for procedurally simpler enactment but surrenders interpretive primacy to courts.<sup>268</sup> The resulting holding is frozen as the definitive meaning of the statute until Congress revisits it or the agency expends the effort to enact regulations deserving of *Chevron* deference.<sup>269</sup>

We doubt *Chevron* is flexible enough to capture all the nuances of our test.<sup>270</sup> Perhaps the balancing we describe here could be

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265. See Jonathan T. Molot, *Ambivalence About Formalism*, 93 VA. L. REV. 1, 40–42 (2007); Peter H. Schuck & E. Donald Elliot, *To the Chevron Station: An Empirical Study of Federal Administrative Law*, 1990 DUKE L.J. 984, 1059 (noting that the D.C. Circuit has affirmed agency decisions at a far lower rate than other circuits).

266. Kenneth A. Bamberger, *Provisional Precedent: Protecting Flexibility in Administrative Policymaking*, 77 N.Y.U. L. REV. 1272, 1318–20 (2002); Schuck & Elliot, *supra* note 265, at 1047 (finding that agencies frequently change their interpretations of statutes that have been judicially affirmed under *Chevron* review).

267. *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944).

268. *Chevron* and *Skidmore* deference represent differing methods for coordinating statutory meaning between two different interpreters, courts and agencies. Under a regime of *Chevron* deference, a court treats any reasonable agency interpretation of an uncertain statutory provision as the correct interpretation. *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 844 (1984). In contrast, *Skidmore* deference is a matter of judicial prudence, under which an agency interpretation has at most the “power to persuade, if lacking power to control.” *Skidmore*, 323 U.S. at 140. Although the Supreme Court has left open some question as to when each mode is triggered, in general, agency determinations that issue after relatively formal notice-and-comment procedures receive binding, *Chevron* deference, whereas those that are issued informally by low-level agency officials receive only *Skidmore* regard. For further discussion of all these points, see Thomas W. Merrill & Kristin E. Hickman, *Chevron’s Domain*, 89 GEO. L.J. 833, 838–63 (2001).

269. See *Nat’l Cable & Telecomm. Ass’n v. Brand X Internet Servs.*, 125 S. Ct. 2688, 2700 (2005) (holding that an agency can alter lower court interpretations of ambiguous statutes by proceeding in a manner that triggers *Chevron* deference).

270. A court’s review of an agency interpretation under *Chevron* deference comprises two steps. First, the court determines whether Congress has clearly indicated its intended outcome. *Chevron*, 467 U.S. at 842–43. If so, that outcome prevails, regardless of the agency’s views. *Id.* If Congress has not clearly resolved the issue at hand, however, then at Step Two, the court asks whether the agency’s interpretation is reasonable. *United States v. Mead Corp.*, 533 U.S. 218, 227 (2001). If so, it is controlling. *Id.* Agencies can alter their views of what is the most reasonable view of an ambiguous statute and still command *Chevron* deference from courts.

shoehorned into a kind of Step One question inquiry—does the statute, in light of the background norms and other factors we describe, clearly prohibit expanded federal authority?<sup>271</sup> But because an agency cannot alter Step One interpretations, any judicial holding that the statute does not grant authority to an agency would, through *stare decisis*,<sup>272</sup> lock the court into its position. Yet one of the key advantages of involving agencies in the federalism decision is their ability to help update the accuracy of a legal decision over time. And even a holding that the agency did have authority would leave the court without future flexibility to incentivize agency deliberation about federalism concerns.

Similarly, it is uncertain whether a rule that determines when the *Chevron* framework applies to an agency interpretation—the so-called “Step Zero” question—can be changed absent intervening congressional action.<sup>273</sup> On our reading of *Barnhart v. Walton*,<sup>274</sup> Step Zero holdings could be changed by courts in response to new information alone.<sup>275</sup> In our view, that decision makes the deference determination turn on what look to be fluctuating factors, such as the thoroughness and quality of agency deliberation.<sup>276</sup> But there are those who disagree with our view on that point.<sup>277</sup>

Finally, we think placing our test at Step Two would likely water it down hopelessly. Step Two is intended to be highly deferential to

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*Brand X*, 125 S. Ct. at 2701. A court’s determination of Congress’s intent at Step One, however, is a definitive reading of the statute that the agency is not free to alter. *Id.*

271. See Mendelson, *supra* note 29, at 745–46 (discussing this possibility).

272. The Court is reluctant to revisit its own interpretations of statutes. *Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 127 S. Ct. 2705, 2720 (2007) (“[C]oncerns about maintaining settled law are strong when the question is one of statutory interpretation.”).

273. See Gersen, *supra* note 133, at 207, 217, 226, 235, 243. For the origin of the term and its explication, see Merrill & Hickman, *supra* note 268, at 912–13; Cass Sunstein, *Chevron Step Zero*, 92 VA. L. REV. 187 *passim* (2006).

274. *Barnhart v. Walton*, 535 U.S. 212 (2002).

275. See *id.* at 222 (holding that the question of whether or not to grant an agency interpretation *Chevron* deference turns on “the interstitial nature of the legal question, the related expertise of the Agency, the importance of the question to administration of the statute, the complexity of that administration, and the careful consideration the Agency has given the question over a long period of time”).

276. See Gersen, *supra* note 133, at 218–19. Others offer this view of *Mead* as well. *E.g.*, Lisa Schultz Bressman, *How Mead Has Muddled Judicial Review of Agency Action*, 58 VAND. L. REV. 1443, 1457 (2005).

277. See *United States v. Mead Corp.*, 533 U.S. 218, 226–27 (2001) (tying *Chevron* deference to congressional intent about whether the means an agency chose to make an interpretation has the “force of law”); see also Merrill & Hickman, *supra* note 268, at 882 (advocating a formal rather than fact driven test for when agency has power to issue binding regulations).

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agencies, and we doubt courts would be willing under that rubric to impose fairly rigorous restraints on regulations that seriously distort federalism norms.<sup>278</sup>

If *Chevron* is too inflexible, then granting only *Skidmore* deference to agencies' federalism-tinged decisions would be inflexible in spades.<sup>279</sup> That is, because *National Cable & Telecommunications Ass'n v. Brand X Internet Services (Brand X)*<sup>280</sup> seems to make entitlement to *Chevron* deference a precondition for an agency's power to overturn a prior judicial interpretation,<sup>281</sup> a regime in which agencies can earn only *Skidmore* deference would mean that once a court interprets a statute, the agency cannot change that interpretation. That inflexibility defeats nearly all of the objectives of our test. In addition to sacrificing adaptability and ongoing ties to a more democratic decisionmaker, inflexibility also diminishes the rewards to the agency for following the court's proscribed

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278. See Ronald M. Levin, *The Anatomy of Chevron: Step Two Reconsidered*, 72 CHI.-KENT. L. REV. 1253, 1261 & n.35 (1997) (noting that in the first thirteen years applying *Chevron*, the Supreme Court never struck down an agency interpretation at Step Two, but also reporting D.C. Circuit Court of Appeals cases that applied something akin to hard look review at Step Two); Mark Seidenfeld, *A Syncopated Chevron: Emphasizing Reasoned Decisionmaking in Reviewing Agency Interpretations of Statutes*, 73 TEX. L. REV. 83, 96 (1994) ("[O]nce [a court] reaches step two, it rarely reverses an agency interpretation as unreasonable."). By our count, which is admittedly not comprehensive, after twenty-four years of living with *Chevron*, the Supreme Court has reversed an agency at Step Two only once, in that case because the agency interpretation fell outside the bounds of the ambiguity in the statute. See *AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366, 388–89 (1999) (holding that the requirements that network elements be necessary for them to be subject to open access requirements under the 1996 Telecommunications Act could not support a rule opening access to all network elements).

279. *Mead*, 533 U.S. at 249–50 (Scalia, J., dissenting). Some commentators have suggested that *Skidmore* is the more malleable of the two deference doctrines, in that it offers courts more factors to consider in deciding whether or not to defer to an agency than the putatively wooden *Chevron* Step One analysis. See, e.g., Dan M. Kahan, *Is Chevron Relevant to Federal Criminal Law?*, 110 HARV. L. REV. 469, 509 n.198 (1996) (suggesting that *Skidmore* is malleable enough to support strong *Chevron*-type deference in appropriate situations); Merrill & Hickman, *supra* note 268, at 913 (noting the pragmatic nature of the *Skidmore* inquiry). If, however, one takes seriously the Court's opinion in *Barnhart*, then *Chevron* deference too can depend on a sliding scale of factors.

For advocates of *Skidmore* deference in the context of agency efforts to preempt state law, see Mendelson, *supra* note 29, at 797 (suggesting *Skidmore* deference for federalism issues of interpretation); Sharkey, *supra* note 21, 491–98 (suggesting *Skidmore* deference at least to agency determination of facts and policy considerations that would support or undermine preemption).

280. *Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 125 S. Ct. 2688 (2005).

281. See *Brand X*, 125 S. Ct. at 2701.

procedures.<sup>282</sup> *Skidmore* also fails on the incentives front by making the rewards to the agency for good and open deliberation too uncertain. Considering the costs of the form of decisionmaking we recommend, the rewards to the agency must be correspondingly large. Accordingly, courts must have flexibility to commit to a level of deference that, if short of what *Chevron* offers, is nonetheless more than the empty tautology into which some courts have made *Skidmore*.<sup>283</sup>

To us, then, the solution is that the appropriate level of deference is something of an amalgam of *Skidmore* and hard look review.<sup>284</sup> Under this modification, the courts should look not only at the institutional factors that justify deference to the agency but also at the procedural posture in which the decision was made and at the agency reasoning explicitly explaining its determination on federalism values. Courts could grant something close to binding deference to well-crafted federalism decisions. Moreover, as with *Chevron*, agency determinations to which a court defers should probably be provisional—that is, subject to change by the agency itself.<sup>285</sup>

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282. See Jody Freeman, *Collaborative Governance in the Administrative State*, 45 UCLA L. REV. 1, 28–29, 93 (1997); Gersen, *supra* note 133, at 215 (noting that deference is a form of positive incentive courts can offer to agencies).

283. See Kristin E. Hickman & Matthew D. Krueger, *In Search of the Modern Skidmore Standard*, 107 COLUM. L. REV. 1235, 1252–53 (2007) (describing one judicial interpretation of *Skidmore* that “in effect . . . directs courts to treat the agency’s view just as it would the view of any litigant”).

284. At bottom, then, our approach may at times be similar to Professor Merrill’s and Professor Young’s. Merrill suggests that although agencies ought not have *any* power to preempt absent clear congressional authorization, when such authorization has been given, courts should grant a *Skidmore*-like sliding scale of deference to the agency’s views, depending on agency expertise and the quality of its deliberations. Merrill, *supra* note 6, at 775. Our main qualm with that approach is that we would grant deference regardless of what Congress had expressly said. Professor Young, like us, would tie the level of deference to a variety of factors, although our list of factors is rather different than his. See Young, *supra* note 4, at 891–92. He shares with Merrill, however, the view that federal law should cabin agency power to preempt in a variety of ways we would not. *Id.* at 896–900.

To be clear, though we describe the deference we advocate as akin to *Skidmore*, our test would trigger greater deference based on factors unique to federalism rather than those set out by Justice Jackson. Moreover, we at times would grant binding or near-binding deference to an agency’s views when our factors suggest that such deference is appropriate. Thus, we disagree with Professor Mendelson’s suggestion in her contribution to this symposium, Nina A. Mendelson, *The California Greenhouse Gas Waiver Decision and Agency Interpretation: A Response to Galle and Seidenfeld*, 57 DUKE L.J. 2157, 2158–59 (2008), that our bottom line is the same as hers.

285. Cf. Richard W. Murphy, *A “New” Counter-Marbury: Reconciling Skidmore Deference and Agency Interpretive Freedom*, 56 ADMIN. L. REV. 1, 5, 41–42 (2004) (arguing for agency power to revisit interpretations that have received *Skidmore* deference). One of us (Professor

Flexibility is crucial because, as Professor Merrill himself has argued, much of what goes into a decision about the appropriate national or state character of a program is highly fact dependent and prone to change over time.<sup>286</sup> To the extent that this flexibility imposes some planning costs on parties, courts could use other tools to increase the costs or diminish the rewards of change at the agency level.<sup>287</sup>

That wraps up our detour into deference doctrine; we move on now to the third significant factor at play in the decision to permit agencies to expand federal power, specifically, the need for more information. This factor is tied closely to the considerations we have sketched on agency procedure. If a court needs more information before it can determine confidently the federalism or other interests at stake in a given policy, the court may need to allow the policy to go forward to observe what transpires. If there is flexibility in the decision to uphold an agency's action, as we think there must be, the court (at the invitation of a litigant) can always revisit its earlier decision should events show that the experiment has harmed either abstract or economic federalism. Additionally, as we have noted for factor two, thorough agency proceedings often produce information that would improve the quality of the court's decision even before a policy is implemented.<sup>288</sup> For questions that would predictably require such information, the court would have to provide some incentive to the agency to develop it. Thus, at least initially, courts would likely want to offer more deference to enactments whose federalism effects are uncertain.

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Galle) views this as a minor development in administrative law because he believes it is inevitable that there soon will be a *Brand X* for the *Skidmore* doctrine. Given the disadvantages of complete inflexibility for courts, agencies, and the public, and the sheer doctrinal complexity of determining which of the courts' hundreds of pre-*Chevron* decisions should be subject to *Brand X*, the Supreme Court will face enormous pressure to treat both forms of deference similarly. On the other hand, the other of us (Professor Seidenfeld) thinks that because some of these disadvantages can be overcome if the agency responds to a *Skidmore* decision with a regulation earning it *Chevron* deference, change is neither inevitable nor necessarily welcome. But it might be said in turn that the additional effort of promulgating more formal regulations is precisely what agencies hope to avoid. In any event, we reserve a more extended debate for another forum.

286. Merrill, *supra* note 6, at 742–44.

287. See Galle, *supra* note 252, at 187 (identifying mechanisms, such as expanded availability of private suits and higher penalties for error, that might enhance private reliance on agency outcomes); McGarity, *supra* note 190, at 1387–436 (cataloging judicial review techniques that tend to slow rate of change of agency rules).

288. See *supra* note 235 and accompanying text.

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The last factor that should weigh in favor of agency action is evidence of congressional authorization. For one thing, congressional approval would indicate that proponents have paid some of the costs of overcoming the needed level of constitutional resistance. For another, to the extent we are mistaken here about the appeal of agency deliberation relative to that of Congress, deliberation in both branches greatly mitigates our errors.<sup>289</sup> And if both Congress and the executive are aligned, the political costs to the court of resisting is higher.

On the other side, there are several factors that would indicate that a court should be more dubious of agency action. One set of considerations arises from the arguments we have set out concerning the need for exclusive judicial control over the Constitution. The case for a formalist divide between constitutional and statutory interpretation seems strongest on matters of bedrock importance, particularly when there are conflicts between bedrock values. The case is also stronger when there are divisive social conflicts that would benefit from settlement. For example, *Rust v. Sullivan*<sup>290</sup> for us represents a classic case in which it made sense for the Court to reserve meaningful interpretive power to itself; therefore it was a situation in which it may have been appropriate to prohibit the agency from approaching constitutional boundaries.<sup>291</sup> Whether these kinds of considerations are ever at play in federalism cases is an open question. Arguably, though, these arguments may have played some role in decisions such as *Gonzales v. Oregon*,<sup>292</sup> the physician-assisted suicide case.<sup>293</sup>

A final factor, and another one that might cut against agency determinations, is the presence of political externalities. That is, when it appears that an agency is not bearing a significant part of the political cost of its decisions, a court might suspect that the decision does not represent good policy. As one of us has detailed elsewhere,

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289. Merrill, *supra* note 6, at 753–57.

290. *Rust v. Sullivan*, 500 U.S. 173 (1991).

291. *Rust* dealt with Health and Human Services regulations barring physician recipients of federal funds from offering abortion counseling services. *Id.* at 178–81.

292. *Gonzales v. Oregon*, 126 S. Ct. 904 (2006).

293. *Id.* at 923 (stating that the Court would yield no deference to agency interpretation that “displaces the States’ general regulation of medical practice”); *see also* Gersen, *supra* note 133, at 244 (claiming that *Oregon* involved the application of the clear statement rule to trump deference to the agency); Metzger, *supra* note 62, at 2032–36 (explaining that *Oregon* is difficult to justify on the ground of administrative law alone).

this may drive the Supreme Court's apparent hostility to private rights of action.<sup>294</sup> Congress, or at times agencies, authorizes judicial resolution of disputes, sometimes with the effect of shifting the political cost of that resolution to the courts. In resisting private rights of action, the Court may be demanding that the political branches accept full responsibility for the rules they make. Similarly, scholars have read the Court's anticommandeering and sovereign immunity jurisprudence as a prohibition on externalities: the federal government must bear the costs of implementing and enforcing its own laws.<sup>295</sup> We play out some examples of how this might work in practice in the next Part.

In addition to all of these factors, courts have some other tools they can use to modulate the appropriate amount of resistance they offer against federal expansions. For example, the Supreme Court could change the degree of clarity in the underlying statute that is needed to meet the congressional clear statement requirement.<sup>296</sup> For maximal resistance, the Court might demand that Congress authorize any expansion with a tremendous amount of specificity. For instance, in the § 1983 context, the Supreme Court has taken to claiming that private litigants must point to statutory language expressly granting the class to which they belong an entitlement to private relief for the exact right they seek to enforce before suit can be said to have been "authorized by the . . . laws of the United States."<sup>297</sup> A lower tier of resistance might find clear language in a generic provision stating that an agency is authorized to regulate in an area with the potential for displacement of state law. Somewhere in the middle would be statutes permitting the agency to preempt state law when it deems preemption appropriate.

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294. Brian Galle, *Getting Spending: How to Replace Clear Statement Rules with Clear Thinking About Conditional Grants of Federal Funds*, 37 CONN. L. REV. 155, 222–27 (2004).

295. *E.g.*, H. Geoffrey Moulton, Jr., *The Quixotic Search for a Judicially Enforceable Federalism*, 83 MINN. L. REV. 849, 876 (1999); Post & Siegel, *supra* note 261, at 512; *see also* D. Bruce La Pierre, *Political Accountability in the National Political Process—The Alternative to Judicial Review of Federalism Issues*, 80 NW. U. L. REV. 577, 664 (1985) (arguing that a requirement that Congress pay for the cost of federal expansions is a significant limit on federal power).

296. *See* Nicholas Quinn Rosenkranz, *Federal Rules of Statutory Interpretation*, 115 HARV. L. REV. 2085, 2122–23 (2002) (explaining that the Court demands several different tiers of "clarity" to satisfy various presumptions against legislative outcomes).

297. 48 U.S.C. § 1983 (2000); *City of Rancho Palos Verdes v. Abrams*, 125 S. Ct. 1453, 1458 (2005).



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We do not suggest that integrating all of these considerations would be uniformly simple or predictable. Again, however, in a regime in which agencies perceive significant benefits from careful deliberation and in which courts are willing to grant deference to create incentives to deliberate, a great number of these kinds of federalism decisions would be fairly straightforward once or if they reach the courts.

One final word about state courts: the bulk of the literature to date has focused on preemption and avoidance decisions in federal court. As Professor Sharkey has pointed out, though, a significant number of preemption decisions happen in state court under the rubric of state court application of federal Supremacy Clause doctrine.<sup>298</sup> She notes that states are more hostile to preemption than their federal counterparts.<sup>299</sup> This perhaps is unsurprising if one expects state judges to engage in empire building or to prefer to be able to apply the law that their constituents enacted rather than federal law.<sup>300</sup> Another explanation more generous to state judges might posit that state courts are, maybe rightfully, suspicious of the judgments of federal agencies whose behavior they know little about and have little influence over. Our account here suggests a close relationship between the ability of a federal court to review and incentivize agency decisions and that court's confidence in deferring to the agency's outcomes.

Paradoxically, then, it may be that the best way to increase the influence of federal law in state courts is to give state courts more control over federal agencies. If our analysis were made a question not merely of administrative law but also of Supremacy Clause doctrine, then state courts would be authorized to invoke it when determining whether state law, such as state tort or contract law, is preempted by federal regulation. That would give agencies reason to give heed to the views of state judges. And that, in turn, would give state judges some reason to give heed to the view of federal agencies.

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298. Catherine M. Sharkey, *Federalism in Action: FDA Regulatory Preemption in Pharmaceutical Cases in State Versus Federal Courts*, 15 J.L. & POL'Y 1013, 1014 (2007).

299. *See id.* at 1017–18, 1030, 1035–36.

300. *See* Sharkey, *supra* note 298, at 1030 (arguing that state judges “as creatures of state law,” are predisposed toward state law). *But see* Bradley W. Joondeph, *Exploring the “Myth of Parity” in State Taxation: State Court Decisions Interpreting Public Law 86-272*, 13 WASH. U. J.L. & POL'Y 205, 217–18, 225–26 (2003) (summarizing studies finding no support for claim that state courts favor their own litigants).

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There are downsides to such an arrangement, but we offer it as a policy possibility that deserves more study.

#### IV. SOME APPLICATIONS: PREEMPTION AND AVOIDANCE

Our call for a more flexible approach to agency participation in federalism issues that arise within their regulatory ambit provides a coherent framework for structuring the resolution of regulatory federalism issues. In particular, it leads to concrete suggestions about the role courts should allow agencies to play in two contentious areas of regulatory federalism: preemption and resolution of federalism-related constitutional matters.

##### A. *Agency Preemption of State Law*

Agency preemption<sup>301</sup> of state law raises three related but nonetheless distinct questions: first, whether Congress should have authority to delegate preemption of state law to administrative agencies; second, assuming Congress can delegate such authority to preempt state law, when should a statute to be read to provide an agency with that authority; third, assuming that a statute does authorize the agency to preempt state law, when is an agency justified in using that authority.

1. *Congressional Power to Delegate Authority to Preempt State Law.* Although no commentators have directly proposed that the Constitution limits Congress's power to delegate authority to preempt state regulation, commentators who would require Congress to use clear language when statutorily preempting state authority to regulate implicitly suggest such a restriction. Both Professors Young and Hills propose such a clear statement rule for preemption for the purpose of improving the legislative process, essentially forcing the legislature to squarely face issues of preemption.<sup>302</sup> One might reasonably infer

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301. In this Section, we use the term "preemption" to mean displacement of state authority to regulate in an area in which it would otherwise be able to do so. Thus, we use the term to include more than merely requiring state regulations not to conflict with legitimately issued federal statutes and regulations. For a more detailed discussion, see Mendelson, *supra* note 4, at 700-01. We think that an agency's authority to prohibit states from adopting laws inconsistent with federal regulations follows directly from the Supremacy Clause and recognition that Congress can give agencies the power to adopt legally binding rules.

302. Hills, *supra* note 28, at 17, 32-39; Ernest A. Young, *Federal Preemption and State Autonomy*, in *FEDERAL PREEMPTION: STATES' POWERS, NATIONAL INTERESTS* 249, 250 (Richard A. Epstein & Michael S. Greve eds., 2007); *see also* Bradford R. Clark, *Separation of*

from these arguments that Congress should not be able to avoid its obligation to decide preemption issues by passing the buck to administrative agencies either.

The arguments of these proponents of clear statement rules, however, do not convince us that delegating to agencies poses a significant problem. Professor Hills, for example, premises his proposal on the reasonable assumption that industry groups influence Congress to preempt too often because these groups have organizational advantages over groups that tend to oppose uniform national standards.<sup>303</sup> He recognizes that states are subject to their own biases in the opposite direction in that they adopt inefficient provincial laws to export regulatory costs.<sup>304</sup> But he argues that the burden should be on industry to overcome congressional inertia if it desires preemption.<sup>305</sup> Our arguments about the benefits of agency action, however, suggest that the nation can have its cake and eat it too by using agencies to determine when federal law should displace state law.

First, for the reasons we have set out, agencies' decisions about whether to preempt are likely superior to Congress's.<sup>306</sup> Moreover, if the presumption is that agency regulation does not displace state regulation unless the agency clearly indicates its intent to do so in a proceeding that is open and invites participation by those affected by the agency action, then agencies too can motivate diffuse interest groups to mobilize in opposition to preemption. Our analysis suggests, in fact, that the costs of meaningfully participating in agency

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*Powers as a Safeguard of Federalism*, 79 TEX. L. REV. 1321, 1425 (2001) (viewing clear statement requirement as "ensur[ing] compliance with federal lawmaking procedures").

303. Hills, *supra* note 28, at 17.

304. *Id.* at 24.

305. *Id.* at 18–19. Professor Hills argues that allowing states to regulate as the default rule under legislation that does not clearly preempt regulation is more likely to induce Congress to act, which in turn will motivate diffuse interest groups to react, propelling the entire system closer to efficient and politically desired outcomes. *Id.*; *see also* Scott Baker & Kimberly D. Krawiec, *The Penalty Default Canon*, 72 GEO. WASH. L. REV. 663, 664 (2004) (suggesting an approach to interpretation in which courts stimulate Congress to fill in statutes with incomplete terms). *But see* Seidenfeld, *supra* note 120, at 733–34 (doubting whether Congress would respond and actually undo the penalizing interpretation).

306. Decisions whether to preempt depend on detailed factual matters and predictions that agencies are well suited to address. *See supra* text accompanying notes 171–214; *see also* William W. Buzbee, *Asymmetrical Regulation: Risk, Preemption, and the Floor/Ceiling Distinction*, 82 N.Y.U. L. REV. 1547, 1606–11 (2007) (detailing the richness of the information about regulatory cost and risks posed by regulated behavior that should factor into the decision whether to preempt state law).

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proceedings are lower for diffuse interest groups. That fact suggests that these groups' influence on the outcomes of agency proceedings vis-à-vis their industry counterparts is likely greater than their influence would be in the federal legislative process.<sup>307</sup> If our analysis is correct, so long as courts require agencies clearly and transparently to state when their regulations displace state law, delegating responsibility for preemption to agencies reduces the costs of federal inertia, minimizes inefficient state regulation, and is likely to lead to outcomes that more optimally balance federalism interests against the need for efficacious regulatory programs.

2. *Agency Authority to Preempt.* At first blush, our position with respect to agency authority to displace state law also seems in tension with the general clear statement rule requiring Congress to express itself unmistakably when it wishes to displace state law. If Congress must act with openness and clarity in preempting, it arguably also is obliged to speak clearly and openly when it delegates that authority. But our position is quite consistent with underlying profederalism rationales for a clear statement rule and follows from our conclusions about the relative abilities of Congress, courts, and agencies both to address federalism issues and to force coordinate institutions of government to address them meaningfully.

Agencies can legitimately make preemption determinations because agencies are both deliberative and politically accountable. Our analysis suggests that, in most instances, agencies should be the institution that in the first instance decides whether to displace state law because their processes are more deliberative and more responsive to changes in both political preferences and endogenous circumstances, such as the state of technology, that influence the appropriate balance between federalism interests and interests in efficient regulation. In addition, having agencies make the initial decision on preemption involves the other branches of government in the dialogue about federalism values in a fact- and law-specific context through congressional oversight and judicial review.

Consider a likely scenario in which Congress passes a statute authorizing agency action that, when passed, does not seem to require displacement of state law. Hence, the statute is silent about agency

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307. See *supra* notes 78–80 and accompanying text.

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authority to order such displacement.<sup>308</sup> Several years later, as the agency learns more concretely the issues raised by the regulatory program, the agency comes to believe that there are net benefits to displacement. If courts would not allow the agency to preempt without a clear statement, then the ball is in Congress's court to amend the statute. But given the inertia involved in Congress's law making process, it is unlikely that Congress will return the volley.

If instead courts allowed agencies to preempt when statutes did not explicitly deny agencies that authority, the agency would be free to consider and change the extent of preemption as the regulatory situation warranted. Congress would remain a player in shaping the ultimate rule, by monitoring and constraining agencies on issues that legislators find sufficiently important. Monitoring involves fewer veto gates, so congressional inertia is less of an impediment to oversight than to statutory enactment.<sup>309</sup> And courts can demand that agencies take into account the programmatic values of federalism and explain why uniformity in the particular preemptive context is more important than the values of experimentation and diversification.

One might object that once an agency decides to preempt, it is unlikely to reconsider that determination with an open mind if new circumstances or arguments come to light subsequent to the agency's initial decision. In essence, this objection reflects the concern that even if an agency decision to preempt is warranted at any given time, the agency has no incentive to revisit the issue later if circumstances change so as to warrant revising the preemptive effect of federal regulations.<sup>310</sup>

But this objection fails to consider the ways in which preemptive rules are enforced. Often the issue of enforcement of a preemption

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308. Professor Mendelson advocates reading such silence as a failure to authorize an agency to preempt, because "Congress drafts legislation against the backdrop of the presumption against preemption, which has been a well-established canon of construction . . ." Mendelson, *supra* note 4, at 709. But existing doctrine is at best ambiguous as to whether agencies can preempt with a clear statement of their own, regardless of congressional authorization. *See supra* note 45 and accompanying text. So there is no clear background rule against which to read Congress' intent. And any assumption on this front would not settle the normative debate over what the best background rule ought to be.

309. Congress can check agency action by oversight hearings and budget cuts, which do not have to pass through the same veto gates as substantive legislation. *See supra* note 144 and accompanying text.

310. *Cf.* Freeman, *supra* note 282, at 13–14 (arguing that agencies may resist changes to their institutional purpose); Stern, *supra* note 98, at 621 (applying cognitive dissonance theory to explain why agencies might unreasonably resist changing rules even once the rules are simply proposed).

provision arises in a proceeding alleging that an entity has violated some state regulation or transgressed some duty leading to liability under state law. Such claims, however, are addressed primarily in state court,<sup>311</sup> and state judges seem to apply federal preemption clauses narrowly.<sup>312</sup> Hence it is quite likely that if changes in circumstances give the states new reasons to regulate, state courts would credit those reasons and apply the preemption clauses restrictively. If a state court does so, and the Supreme Court does not reverse its application of the preemption clause, then effectively the state court has forced the agency to reconsider its displacement of state law.<sup>313</sup> In this way states are themselves guardians against administrative inertia. Lastly, if responsiveness to change is an important concern, then this factor should favor agencies because they are more responsive to change than any of the alternatives.<sup>314</sup> In short, allowing agencies to address preemption would be more conducive to an ongoing dialogue about the propriety of any regulatory preemption that involves all the branches of the federal government and, most likely, state regulators and courts as well.

3. *Particular Agency Decisions to Displace State Law.* Our position regarding how agencies can displace state law reflects our

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311. See *Metro. Life Ins. Co. v. Taylor*, 481 U.S. 58, 63 (1987) (noting that federal preemption is a federal defense and does not provide federal district courts jurisdiction to try state law claims); see also, e.g., *Ramanathan v. Bank of Am.*, 66 Cal. Rptr. 3d 471, 472 (Ct. App. 2007) (considering a bank's defense of federal preemption against a state employment discrimination suit); *City of Chicago v. Comcast Cable Holdings, L.L.C.*, 872 N.E.2d 368, 380 (Ill. App. Ct. 2007) (holding that a city's suit for franchise fees from a cable company was not preempted by federal communications law).

312. See Sharkey, *supra* note 298, at 1017 (reporting one study which concluded that "federal courts are considerably more likely to find preemption than are state courts" (quoting Keith N. Hylton, *Preemption and Products Liability: A Positive Theory* 20 (Aug. 2006) (unpublished manuscript), available at <http://ssrn.com/abstract=422661>)).

313. See Todd E. Pettys, *State Habeas Relief for Federal Extrajudicial Detainees*, 92 MINN. L. REV. 265, 298 (2007) ("When state courts *do* go astray and interpret federal law inappropriately, the ordinary remedy is the same remedy that applies when the lower *federal* courts go astray: the Supreme Court can take the case on direct review and correct the error."). Thus, an agency cannot limit a state court ruling on the extent of the preemptive force of its regulations except by making the scope of preemption sufficiently clear and the issue of preemption sufficiently salient that the Supreme Court might, in a subsequent case, overrule an inhospitable state court decision.

314. One could respond to this point by advocating resisting all preemptions, including those by agencies, because any initial preemption decision may be hard to change over time. But that presumes that the costs of false positives exceed those of false negatives—that it is better to avoid an incorrect preemption than to permit an incorrect preemption. As we have argued, that is not necessarily the case. See *supra* note 251 and accompanying text.

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determination that agencies can be more transparent, deliberative and accountable to the polity at any given time than courts and Congress, but only under certain circumstances. Transparency depends on the agency allowing the public to know in advance that the agency is planning to act on an issue with federalism implications. This suggests that the agency should displace state law only by clearly stated legislative rules, which by current Executive Order the agency must include in its regulatory plan.<sup>315</sup> Deliberation depends on interest group access to the agency decisionmaking process, which also suggests that displacement of state law should occur only by legislative rule or its equivalent.

Deliberation also requires judicial oversight of the agency decision to ensure that the agency meaningfully considered the information provided and position taken by representatives of each group affected by the decision. This suggests that courts should review particular decisions displacing state law using hard look review. Although the benefits of hard look review are debatable, it can induce agencies to address such crucial issues as the impact of subjecting regulated entities to fifty different state standards, the efficacy of the agency's particular regulatory approach, the predictability of the continued efficiency of that approach, and the fluidity of regulatory circumstances and the concomitant need for a flexible regulatory system that allows for regulatory experimentation.<sup>316</sup> And particular inquiries aside, such review has seemed to encourage agencies to include in their decisionmaking processes members of different professions who are likely to entertain different perspectives about the various regulatory goals that are affected by the agency decision under review.<sup>317</sup> Also, hard look review, buttressed by political oversight, seems to be well structured to induce the agency to take greater care in making the judgments about political preferences that would undergird any analysis of a decision to displace state law.<sup>318</sup>

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315. Thus, we would reject Justice Breyer's suggestion that less formal agency mechanisms might also have preemptive effect. *See Medtronic, Inc. v. Lohr*, 518 U.S. 470, 506 (1996) (Breyer, J., concurring in part and concurring in the judgment).

316. Under the hard look test, any factor is potentially relevant; agencies must address those factors that the reviewing courts consider sufficiently important. Seidenfeld, *Demystifying Deossification*, *supra* note 116, at 496-97.

317. *Id.* at 510.

318. *See* Seidenfeld, *Hard Look Review*, *supra* note 116, at 562 (suggesting that institutional checks, including hard look review, "help ensure . . . that agencies . . . implement some

One possible objection to our optimism that oversight and procedural structure can adequately constrain agencies from simply trampling federalism values is the assertion that judicial oversight requires an enumeration of the relevant factors and how they fit together to make review a meaningful constraint on agency preemption. In particular, it may be difficult for courts to police agency balancing between relatively incommensurable values, such as abstract federalism and more concrete cost savings.<sup>319</sup>

We agree that the trade-offs involving abstract federalism concerns do raise issues about incommensurable values that might not be constrained by hard look review. Even if direct review is difficult, agencies still would be unlikely to make decisions that are extremely biased by their failure to account for such values. First, the procedural protections we have suggested would limit agency discretion to compromise abstract federalism issues. Second, hard look review at least would force the agency to identify the precise trade-off it makes between program efficacy and the maintenance of state sovereign capacity that is implicated by the agency displacement decision. Although courts could not directly react to a balance by the agency of these two factors that the court thinks is wrong, the political process, motivated by the saliency of decisions that are subject to hard look review, could.<sup>320</sup> Hence, once the agency, facing potentially hard look review, reveals what it has done, political reaction would constrain the extent to which agencies can downplay abstract federalism values. In short, so long as agencies ordered displacement of state law by clear language in legislative rulemaking subject to hard look review, they would be unlikely to give such short credence to abstract federalism values as to outweigh the benefits that would accrue from more accurate and deliberative agency resolution of the displacement issue.

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commonly accepted view of the public good”); *see also* Seidenfeld, *supra* note 100, at 491 (noting that hard look review forces an agency to publicly state its reasons for a decision, which facilitates interest group monitoring and political oversight of such decisions).

319. *See* Mendelson, *supra* note 29, at 794 (claiming that courts cannot adequately consider values, like federalism, that are not explicitly connected to the agency decision by statute); *see also* McGinnis, *supra* note 55, at 934 (arguing that hard look doctrine may give courts too much discretion in their review of agency decisions).

320. By some accounts, judicial review of the National Highway and Transportation Safety Administration’s automobile safety standards program in the early 1970s motivated the political reaction to the program that essentially killed it several years later. *See* Seidenfeld, *supra* note 181 (manuscript at 50).



Other commentators have asserted that courts cannot easily review agency determinations about federalism values at all.<sup>321</sup> We think that the objection to hard look review is incorrect in its apparent assertion that programmatic federalism values are independent and incommensurate with other regulatory values. Every regulatory regime necessarily balances achievement of regulatory goals against the costs of achieving them.<sup>322</sup> Hence, whenever an agency decides on the extent to which it will regulate a matter and the means that it will choose to do so, it must identify at least implicitly the costs that decision will impose on society.<sup>323</sup> Programmatic concerns, however, merely lead an agency to use different means to achieve stated regulatory goals. Uniformity often reduces industry cost, albeit at the potential expense of statutorily stated regulatory goals.<sup>324</sup> Regulatory experimentation may provide a means of reducing long-run costs of regulation, especially if the current regulatory scheme is both relatively ineffective and the current regulatory environment highly volatile.<sup>325</sup> In short, programmatic federalism concerns do not pose any different issues for agencies and reviewing courts than other decisions about regulatory means.

The controversy over the Department of Homeland Security's displacement of state law in its regulation of chemical plant security provides a good example to illustrate how agency preemption might play out under our framework.<sup>326</sup> The department proposed that its

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321. See, e.g., Mendelson, *supra* note 29, at 794.

322. Decisions regarding trade-offs between devoting resources to one program or another necessarily involve cost considerations, whether explicitly or not. Richard J. Pierce, Jr., *The Appropriate Role of Costs in Environmental Regulation*, 54 ADMIN. L. REV. 1237, 1255 (2002).

323. Even under environmental statutes that preclude an agency from factoring regulatory costs into its decisions, agencies necessarily consider such costs, even if indirectly. Otherwise, until the nation lowered its pollution to a level that the agency could determine definitively did not pose any risk to human health, it would have to spend all of society's resources on cleaning up pollution. This is not where the EPA draws the regulatory line:

It is hard to imagine any explanation for the EPA's choice of any particular standard that can provide a rational basis for choosing one standard over any lower alternative if the substance at issue is characterized by the absence of a zero-effect threshold and a linear dose-response curve, and if the EPA is not allowed to consider costs in any way.

*Id.* at 1259.

324. See Hills, *supra* note 28, at 19–20 (discussing the industry's general preference for uniform regulation).

325. See Friedman, *supra* note 222, at 399–400 (describing regulatory experimentation as more like evolution).

326. Chemical Facility Anti-Terrorism Standards, 72 Fed. Reg. 17,688 (Apr. 9, 2007) (to be codified at 6 C.F.R. pt. 27). For a description of the controversy, see Buzbee, *supra* note 306, at

rules have preemptive effect despite the silence of authorizing legislation on the preemption question. In its Notice of Proposed Rulemaking, the agency proposed that its regulations would preempt all conflicting state law, including common law suits.<sup>327</sup> It went on to note that its regulations reflected a balance between assuring security and “preserv[ing] chemical facilities’ flexibility to choose security measures to reach the appropriate security outcome.”<sup>328</sup> The NOPR suggested that state laws requiring greater levels of security, and perhaps even state health, safety, and environmental regulations that might affect security, would upset this balance and therefore were preempted.<sup>329</sup> The press reported on this proposed rule quite negatively, noting that the proposed rules were weak and would override state regulations that require greater security measures than those which the department mandated.<sup>330</sup>

In its explanation of the interim final rule it adopted, the department responded to these press reports and potential congressional concern about the preemption provisions by conceding that its language about the need to maintain a balance in its discussion of preemption was too broad.<sup>331</sup> It indicated that its rules would mandate conflict, not field, preemption.<sup>332</sup> It took a broad view of conflict preemption, however, indicating that its discussion of preemption “is only meant to indicate that the regulation is not to be conflicted by, interfered with, hindered by or frustrated by State measures, under long-standing legal principles.”<sup>333</sup> It explicitly stated that general health and safety regulation by states would not be

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1573–75 & n.90; Leticia M. Diaz, *Chemical Homeland Security, Fact or Fiction: Is the U.S. Ready for an Attack on Our Chemical Facilities? An Examination of State and Federal Laws Aimed at Immediate Remediation*, 56 CATH. U. L. REV. 1171, 1187–89 (2007).

327. Chemical Facility Anti-Terrorism Standards, 71 Fed. Reg. 78,276, 78,293 (proposed Dec. 28, 2006) (to be codified at 6 C.F.R. pt. 27).

328. *Id.*

329. *Id.*

330. *See, e.g.*, Editorial, *Chemical Insecurity*, N.Y. TIMES, Jan. 23, 2007, at A18.

331. Chemical Facility Anti-Terrorism Standards, 72 Fed. Reg. at 17,727.

332. *Id.* at 17,726. Under field preemption, states are not allowed to regulate the domain which federal regulation occupies because federal regulation is meant to be the exclusive regulation for that domain. Paul S. Weiland, *Federal and State Preemption of Environmental Law: A Critical Analysis*, 24 HARV. ENVTL. L. REV. 237, 253–55 (2000). Under conflict preemption, states may regulate the domain as long as state regulation does not conflict with federal regulation. *Id.* at 255.

333. Chemical Facility Anti-Terrorism Standards, 72 Fed. Reg. at 17,727.

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precluded, but that regulations and laws aimed specifically at the security of chemical facilities were more likely to be preempted.<sup>334</sup>

It warrants noting that the department's explicit proposal of preemption in its NOPR generated public awareness and public dialogue on this issue.<sup>335</sup> Thus, the department reacted to this dialogue by at least purporting to scale back and make less definitive the extent of preemption.<sup>336</sup> Congress then entered the fray by amending the authority of the department, limiting preemption of state laws to those that are in "actual conflict" with the department's chemical plant security regulations.<sup>337</sup> This demonstrates that agency preemption in the face of congressional silence is capable of generating the public dialogue called for by many critics of agency preemption.

Under the framework we envision, even without congressional intervention, the department's explanation of its decision to preempt would fall far short of what hard look review requires. Again, our test would proceed in several steps. We would ask, first, whether an agency has adequately deliberated, in a transparent and relatively accountable way, the important federalism issues at stake. Although we urge lowered resistance to agency preemption, we do so only on the condition that there is exacting deliberation. We then would examine the extent to which underlying federalism concerns warrant higher or lower resistance.

The chemical plant regulations would fail at the first step of our test. In light of the likely severe implications of a terrorist attack on a chemical facility, the need for minimum security measures is undeniable. But it is unclear why the balance between security and flexibility must be fixed once and for all, and for the whole nation, at this time. Under the hard look doctrine, the department therefore should have to predict the likely impact of regulations that may be more strict or inflexible than it considers optimal and to support that prediction with some credible evidence. In addition, given the then-nascent state of understanding about security measures and their potential effects on plant productivity, as well as the possibility that

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334. *Id.*

335. *Id.* at 17,717.

336. *Id.* at 17,727.

337. Consolidated Appropriations Act of 2008, Pub. L. No. 110-161, § 534, 121 Stat. 1844, 2075 (to be codified at 6 U.S.C. § 121 note) (amending Section 550 of the Department of Homeland Security Appropriations Act of 2007, 6 U.S.C. § 121 note (2006) (Regulations)).

the industry involves different types of facilities, the department would have to explain why it would be inappropriate to allow the states to function as laboratories to test different approaches to security. To the extent that the designs of facilities change relatively rapidly, the agency should also have to explain why it is best to cement the single balance between security and productivity that its rules instate.<sup>338</sup> We do not know whether the agency could meet such a burden given the nature of the chemical industry, but an inability to do so would be a strong indication to the public and the courts that the agency's preemption prescription is not justified.<sup>339</sup>

Assuming that there were more adequate deliberations, the department regulation would also have posed problems at the latter steps of our test. First, there was no evident support in the original statute for preemption.<sup>340</sup> Second, it is hard to characterize state regulation here as an attempt to externalize costs from the state to the nation as a whole, a characterization that would support preemption. The benefit of increased security would fall on local communities, which would be less at risk of the escape of toxic chemicals, whereas the increased costs would be borne by consumers of the plants' products. But this characterization is far from convincing given that the state and local community also bear costs from resulting decreases in employment and economic activity if the plant moves out of state or curtails its production, and some forms of terrorist sabotage might affect consumers.

One point that might have supported preemption is that the nebulous nature of the regulation's stated scope would open an avenue for state court input into a dialogue on whether any particular state regulation or common law duty was displaced.<sup>341</sup> In our

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338. See Buzbee, *supra* note 306, at 1606.

339. Similarly, a court applying our test would refuse to grant preemptive effect to a regulation where the agency expressly claimed during notice and comment that the regulation would not preempt state law, as in the Food and Drug Administration example Mendelson notes. Mendelson, *supra* note 4, at 704. In that situation, there was no transparent, deliberative consideration of the preemption question.

340. See 6 U.S.C. § 121 (note).

341. The explanation of the interim final rule rather vaguely preempts state laws that frustrate or hinder the department's regulations. Had Congress not precluded regulatory preemption, it would have fallen on state courts to determine whether any particular state regulation or tort duty interfered with or hampered the department's administration of its regulations. Cf. Merrill, *supra* note 6, at 743 & n.72. The state court would make its decision in the fact-specific context of a particular facility. If the department did not like the ultimate outcome of the state court proceeding, it would retain the option of revising its regulation to clarify its position using notice-and-comment proceedings. In this way, the determination of

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framework, that might be a reason to think that the underlying federalism norm was in need of somewhat less protection, as with our example of State Implementation Plans.

Overall, it is unclear whether a reviewing court should have deemed department preemption warranted under the latter part of our test, although most of the signs seem to point against preemption. We note that the task would be easier if the agency had engaged in a deliberation about federalism values.

### *B. Constitutional Avoidance*

We next apply our analysis to the debate over constitutional avoidance. More precisely, we unpack the question whether Congress should be presumed not to have delegated to agencies the authority to approach the limits of Congress's constitutional powers.

Here, again, because our test is sensitive to the precise context in which federalism questions arise, we cannot say as a general rule that agencies should always be permitted to tread on policy ground when Congress's own step would be dubious. We can say, though, that if federalism limits are to rest on realist grounds, the reverse is false. That is, agencies should at least sometimes be permitted to enact policy that would be constitutionally dubious, even absent clear congressional authorization.<sup>342</sup> The absolute bar adopted by the Court, we have shown, cannot be defended on the basis of the real-world characteristics of agencies.<sup>343</sup> To justify this greater license, however, courts ought to hold agencies to a high standard of deliberativeness and transparency—one that can likely only be met through more formal rulemaking.

Before we turn to applying these general rules to a specific example, though, we should note one additional objection that is somewhat unique to the avoidance question. In our arguments, we have focused on identifying the set of doctrines that would best effectuate the goals of federalism. For the most part these doctrines

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whether preemption would have covered the precise state law could have generated a renewed dialogue that would necessarily reflect the views of the state (at least as reflected in its own court's decision) as well as the views of the agency and the affected interest groups, public and private. In many cases that would be a perfectly valid avenue, in our view, for state participation. This route is of little avail, however, if most litigation proceeds in federal court.

342. That is, we argue that cases holding that any constitutional doubt invalidates an agency decision, no matter how clearly enacted by the agency, *see supra* note 44, are wrong.

343. *See supra* text accompanying notes 216–62.

would have to be enacted by judges. What effect, if any, would our suggestions have on the task of judging?

Even if it is true that rejecting the congressional clear statement rule is better for federalism, it may not be better for federal judges, who might prefer to economize on political capital. Conceivably, if that capital is spread too thinly, the thinning might diminish all kinds of federal rights, including federalism. The clear statement rule preserves judicial capital, this argument might go, for the traditional reasons Professor Bickel offered in favor of avoidance: because it reduces the occasions on which courts must issue an almost irreversible constitutional ruling rather than a decision that keeps the political process in play.<sup>344</sup>

But that considers only one side of the scales. The congressional clear statement rule obliges courts to strike down even those agency decisions that would ultimately survive constitutional scrutiny.<sup>345</sup> By hypothesis, there are many more of those decisions than there are clear statements issued by Congress. And, if the resistance norm functions as it should, on many occasions the rule will never be reinstated by Congress. As Professor Frederick Schauer has pointed out, avoidance can thus be equally effective at closing off popular will.<sup>346</sup> Even if the populace is less frustrated by (theoretically) defeasible quasi-constitutional avoidance decisions than by outright constitutional holdings, the numbers of avoidance decisions should be larger.

In addition, some agency decisions that approach the borders of state autonomy may relieve other, larger political pressures on courts.<sup>347</sup> For instance, agencies may at times themselves promote state respect for constitutional values, relieving some of the political “heat” from a court that would otherwise have been left alone to defend them. To take one example, the Department of Justice has issued elaborate regulations instructing state and local governments

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344. We think this is what Professor Sunstein means to say when he hails the “minimalism” of the rule against constitutionally dubious agency enactments. Sunstein, *Nondelegation Canons*, *supra* note 4, at 335.

345. Kelley, *supra* note 59, at 868.

346. Frederick Schauer, Ashwander *Revisited*, 1995 SUP. CT. REV. 71, 74; *see also* Kelley, *supra* note 59, at 834, 847, 852–57 (criticizing the avoidance doctrine as a form of judicial lawmaking); Manning, *supra* note 37, at 255 (“[T]he avoidance canon may enshrine a result that could not have been adopted *ex ante*.”).

347. *See* Post & Siegel, *supra* note 261, at 516–17 (arguing that permitting constitutional interpretation outside the courts allows courts to share the burdens of defending and defining rights).

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how best to accommodate the particular needs of individuals with disabilities, which greatly reduces the pressure on the Supreme Court to recognize a strong Fourteenth Amendment right to the same.<sup>348</sup>

Thus, it is theoretically indeterminate whether avoidance on net economizes on political frustration with the judicial branch. We welcome suggestions as to how Professor Bickel's theory could ever be subjected to empirical test. In the meanwhile, although we view this objection as a serious one, we largely set it aside in our analysis.

Turning, then, to some specifics, under our analysis the federal agency would have won in *SWANCC* and similar cases. Recall that the *SWANCC* Court invalidated an Army Corps of Engineers regulation implementing the Clean Water Act, on the ground that the regulation's effort to govern waters only "hydrologically" connected to the navigable waters of the United States raised a serious constitutional question.<sup>349</sup> The mere fact that the regulation was constitutionally questionable ended the case; the Court presumed that Congress would not have delegated to the Army Corps of Engineers any authority to reach a constitutionally dubious outcome.<sup>350</sup>

Our approach would reject that presumption and move on instead to ask whether there were any particular features of the regulation that would make it particularly deserving of resistance. We see no danger of political externalities. The issue of federal authority to regulate waters hydrologically connected to navigable waters is extremely unlikely to involve a general question of federal power under the Commerce Clause that might affect any agency other than the Army Corps of Engineers. Nor do we perceive any conflict between federalism and other core rights that might best be reserved to judicial control. In addition, Congress defined navigable waters in the Clean Water Act to include all navigable waters within the nation as that term is constitutionally construed.<sup>351</sup> By writing the statute with this language, it appears that Congress fully expected the Army Corps of Engineers to regulate up to the limitation on navigable waters that the Supreme Court would ultimately adopt, and therefore that

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348. See 28 C.F.R. §§ 36.101–.608 (2007).

349. *Solid Waste Agency of N. Cook County (SWANCC) v. U.S. Army Corps of Eng'rs*, 531 U.S. 159, 174 (2001).

350. *Id.*

351. *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 133 (1985) (citing S. REP. NO. 92-1236, at 144 (1972) (Conf. Rep.)).

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Congress intended to authorize the Army Corps of Engineers to raise this constitutional question. Moreover, given Congress's apparent determination to test constitutional limits, the Court is likely well served by the opportunity to benefit from the agency's ongoing deliberation over and experience with expansive federal Clean Water Act authority.<sup>352</sup>

The result of this analysis is that the Court would then have been obliged to confront the constitutional question. If its conclusion at that stage was that the regulation was invalid, it would not have much opportunity to observe further agency deliberations, depending on prevailing ripeness doctrines.<sup>353</sup> But the point is that, in the absence of our approach, the Court usually is obliged to approach the constitutional question without the benefit of any agency efforts at all.

#### CONCLUSION

We have argued that the realist view of federalism recognizes that the principle of limited federal power is an instrumental one. Courts should choose the set of rules, including rules of administrative law, that best achieve the ends sought by federalism. On this view, it appears that prevailing doctrine and defenders of it somewhat overstate the degree to which federalism norms need judicial protection against the conduct of federal agencies. On most measures, agencies are usually a better forum for resolving questions of the state-federal balance than Congress. Given the right combination of judicial rules, the quality of agency deliberation is superior, and more transparent and accountable to interested parties.

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352. We note some kinship between our method here and the approach that appears to have implicitly been adopted by the Second Circuit in *Fox Television Stations, Inc. v. FCC*, 489 F.3d 444 (2007), *cert. granted*, 76 U.S.L.W. 3255 (U.S. Mar. 17, 2008), the "fleeting expletives" case. The court claimed that it applied ordinary administrative law principles to its review of the FCC's decision to change its policy on isolated swear words on broadcast television. *See id.* at 454–67. But it seems that the degree and kind of explanation the court expected was ratcheted up by the possibility that the FCC's ruling might exceed federal authority—might violate the First Amendment. *See id.*

353. That is, ripeness doctrine determines when an agency determination can be subjected to judicial review. If the law of ripeness is open to court challenges very early in the administrative process, courts have relatively little opportunity to observe the agency's views. Similarly, if ripeness caselaw permits preenforcement challenges, then the court does not have the chance to see the real-world effects of the agency's decision before it must evaluate it. Richard J. Pierce, Jr., *Agency Authority to Define the Scope of Private Rights of Action*, 48 ADMIN. L. REV. 1, 2 (1996).



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Although the ease of enacting agency rules in theory threatens to make federal expansion too easy, in many cases it would be easy to balance this danger against the need for federal intervention.

Thus, we disagree with those who have urged that agency authority either to preempt state law or to enact regulations at the edges of federal authority should be limited to instances in which there is a clear statutory mandate. We acknowledge that there are instances in which agency action needs close supervision, direct authorization, or both. But there also are a wide variety of agency decisions in which such tight reins cannot be justified on realist grounds. That leaves, at most, some form of formalist explanation for prevailing doctrinal limits on agency action—an explanation we have seen floated but never defended thoroughly in the existing literature.

Although we have focused here on preemption and avoidance, the question of institutional competence is pervasive throughout nearly all important federalism controversies. Thus, as we suggested at the outset, our analysis could also be applied to the interpretation both of federal private rights of action and conditions on federal grants. In both instances, Supreme Court doctrine seems to demand a clear statement from Congress before imposing obligations against states, while leaving it highly doubtful whether agencies can be the source of that clear statement.<sup>354</sup> Our theory suggests that, to the extent that the preference for Congress is grounded in realist terms, agencies should often be a perfectly acceptable source of clear authorization.<sup>355</sup>

Ranging farther afield, our work here also could have implications for areas of federalism doctrine that do not presently touch on agencies at all. For example, a central conundrum of the Court's dormant commerce clause jurisprudence has been its struggle to decide whether it can reach defensible answers on the balance between federal interests and state autonomy, or whether instead it ought to force Congress to act in its place.<sup>356</sup> If we are right that agencies are often the best positioned of the three branches to make

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354. See *supra* text accompanying notes 46–47.

355. Cf. Sharkey, *supra* note 2, at 249–50 (suggesting that an analysis of preemption and private right of action questions should produce results more similar than those provided by existing doctrine).

356. *Camps Newfound/Owatonna, Inc. v. Town of Harrison*, 520 U.S. 564, 610 (1997) (Thomas, J., dissenting); Redish & Nugent, *supra* note 250, at 591–95, 617; Edward A. Zelinsky, *Restoring Politics to the Commerce Clause: The Case for Abandoning the Dormant Commerce Clause Prohibition on Discriminatory Taxation*, 29 OHIO N.U. L. REV. 29, 29–32, 84–87 (2002).

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these kinds of decisions, then the critical—and so far neglected—question the Court ought to face is how it can best promote some kind of executive role in reviewing state burdens on national and international trade.

Relatedly, scholars have begun to consider whether Congress ought to have unlimited power to authorize state discrimination against interstate commerce or migration.<sup>357</sup> We humbly suggest that our analysis here implies that Congress should be encouraged to share its deliberations with the executive. Just as agencies are sometimes granted greater license when authorized by Congress, so too Congress might be granted greater freedom to reach federalism-implicating outcomes when those outcomes are triggered by the sort of transparent, deliberative agency decision we describe here.

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357. *E.g.*, Gillian E. Metzger, *Congress, Article IV, and Interstate Relations*, 120 HARV. L. REV. 1468, 1470–78 (2007); Norman R. Williams, *Why Congress May Not “Overrule” the Dormant Commerce Clause*, 53 UCLA L. REV. 153, 155–59 (2005).