

ADMINISTRATIVE LAW AS THE NEW FEDERALISM

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ABSTRACT

Despite the recognized impact that the national administrative state has had on the federal system, the relationship between federalism and administrative law remains strangely inchoate and unanalyzed. Recent Supreme Court case law suggests that the Court is increasingly focused on this relationship and is using administrative law to address federalism concerns even as it refuses to curb Congress's regulatory authority on constitutional grounds. This Article explores how administrative law may be becoming the new federalism and assesses how well-adapted administrative law is to performing this role. It argues that administrative law has important federalism-reinforcing features and represents a critical approach for securing the continued vibrancy of federalism in the world of administrative governance. It further defends this use of administrative law as constitutionally legitimate. The Article concludes with suggestions for how the Court should develop administrative law's federalism potential.

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INTRODUCTION

Few doubt the tremendous impact that the modern administrative state has had on the nation’s federal system. Congress and the president have long acknowledged the relationship between federalism and administrative government, incorporating the states as central players in major federal regulatory schemes.¹ Scholars, too, have taken heed. In particular, federalism scholarship’s growing fixation with preemption has underscored the effect of federal administrative action on the states.² Recent aggressive efforts by federal agencies to preempt state law, especially state tort law, have brought to the fore the crucial link between federalism and administrative government.³ Such administrative preemption

1. *See, e.g.*, 42 U.S.C. § 7410 (2000) (granting states the primary responsibility for implementing the Clean Air Act); *see also infra* text accompanying notes 111–13 (discussing congressional and executive measures aimed at protecting states from federal agency intrusions).

2. As evidence of this fixation, the period 2007–2008 has witnessed publication of three prominent works on preemption: *FEDERAL PREEMPTION: STATES’ POWERS, NATIONAL INTERESTS* (Richard A. Epstein & Michael S. Greve eds., 2007), *PREEMPTION CHOICE: THE THEORY, LAW, AND REALITY OF PREEMPTION’S CORE QUESTIONS* (William W. Buzbee ed., forthcoming 2008), and *THOMAS O. MCGARITY, THE PREEMPTION WAR* (forthcoming 2008), in addition to numerous articles on the topic from a variety of perspectives (empirical, doctrinal, historical).

3. *See, e.g.*, 6 C.F.R. § 27.405(a) (2008) (stating, in a provision of a Department of Homeland Security regulation on Chemical Facility Anti-Terrorism Standards, that any state law, regulation, administrative action, or state court decision based on state law that “conflicts

threatens to impose significant burdens on the ability of states to exercise independent regulatory authority, a core concern of federalism.⁴

Nonetheless, the relationship between federalism and federal administrative law remains strangely inchoate and unanalyzed. Administrative law's constitutional dimensions—in particular, doctrines of separation of powers and procedural due process—are generally recognized to have significant federalism implications.⁵ But more run-of-the-mill administrative law concerns—such as whether an agency adequately followed required procedures, engaged in reasoned decisionmaking, or deserves judicial deference with respect to its statutory interpretations—are rarely viewed through a federalism lens. This is all the more surprising given the current focus on preemption because despite their importance to federalism, preemption determinations are understood as turning on questions of

with, hinders, poses an obstacle to or frustrates the purposes of this regulation” is preempted); 12 C.F.R. § 7.4006 (2006) (stating in effect, in an Office for the Comptroller of the Currency (OCC) rule, that state supervision of state-chartered subsidiaries of national banks is preempted); Final Rule: Standard for the Flammability (Open Flame) of Mattress Sets, 71 Fed. Reg. 13,472, 13,496–97 (Mar. 15, 2006) (codified at 16 C.F.R. pt. 1633) (stating, in the preamble to a final Consumer Products Safety Commission (CPSC) rule on mattress safety, that the standard would preempt “non-identical state requirements which seek to reduce the risk of . . . mattress fires”); Requirements on Content and Format of Labeling for Human Prescription Drug and Biological Prods., 71 Fed. Reg. 3,922, 3,933–36 (Jan. 24, 2006) (codified at 21 C.F.R. pts. 201, 314, and 601) (stating in the preamble to a final Food and Drug Administration (FDA) rule on drug labeling that the FDA views its approval of a prescription drug label as preempting not just state regulations but also state tort law); Federal Motor Vehicle Safety Standards; Roof Crush Resistance, 70 Fed. Reg. 49,223, 49,246 (Aug. 23, 2005) (codified at 49 C.F.R. pt. 571) (containing a proposed National Highway Traffic Safety Administration (NHTSA) rule for improving roof strength performance in rollover crashes and stating that, if adopted, the rule “would preempt all conflicting State common law requirements, including rules of tort law”). A number of articles have discussed these regulations. See, e.g., William W. Buzbee, *Asymmetrical Regulation: Risk, Preemption, and the Floor/Ceiling Distinction*, 82 N.Y.U. L. REV. 1547, 1553–54, 1573–75 (2007); Catherine M. Sharkey, *Preemption by Preamble: Federal Agencies and the Federalization of Tort Law*, 56 DEPAUL L. REV. 227, 227, 229–42 (2007). In addition, these regulations led to a Senate hearing on preemption. See *Regulatory Preemption: Are Federal Agencies Usurping Congressional and State Authority?: Hearing Before the S. Comm. on the Judiciary*, 110th Cong. 2–3 (2007).

4. In this Article, I use “federalism,” “federalism concerns,” and “state interests” to refer primarily to protecting the ability of the states to exercise meaningful regulatory power in their own right. Others have similarly identified preserving state regulatory autonomy as central to the project of federalism. See, e.g., Ernest A. Young, *The Rehnquist Court's Two Federalisms*, 83 TEX. L. REV. 1, 13–15, 23–36 (2004).

5. See, e.g., *Sandin v. Conner*, 515 U.S. 472, 482–83 (1995); Bradford R. Clark, *Separation of Powers as a Safeguard of Federalism*, 79 TEX. L. REV. 1321, 1328–31, 1430–33 (2001).

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statutory interpretation rather than constitutional law.⁶ To be sure, the focus on preemption has sparked much discussion of the extent to which administrative agencies should be able to determine the preemptive scope of federal law. Yet few legal scholars have gone beyond the administrative preemption debate to consider the broader relationship between federalism and federal administrative law. Moreover, within this debate the focus has been on the tensions between federalism and administrative law, with little attention paid to the potential synergies between the two.⁷

Recent Supreme Court case law suggests that this curtain on the relationship between federalism and administrative law may be lifting. In a number of decisions, the Court has demonstrated an unwillingness to impose significant constitutional limits on the substantive scope of Congress's regulatory powers. Yet it has also indicated that federalism concerns about protecting the states' independent regulatory role retain traction. The vehicle by which the Court appears to be addressing such concerns, however, is administrative law. Acting ostensibly through the rubric of standard administrative law doctrines, such as reasoned decisionmaking requirements and the established framework for review of agency statutory interpretations, the Court has ensured that the impact of challenged agency decisions on the states is considered. As a result, administrative law may be becoming the home of a new federalism.

These moves toward transforming administrative law into a federalism vehicle remain largely undeveloped. The Court has not yet articulated a coherent account of how federalism and administrative law should be integrated; indeed, it has not acknowledged that such an account may be needed or even explicitly viewed its recent efforts in this light. Suggestions that administrative law may be the new federalism are present in only a handful of decisions, too few to draw any reliable inferences of a new doctrinal trend. Moreover, all of these decisions were highly contentious and may turn out to be essentially fact dependent and result driven. At a minimum, however, the Court appears to be increasingly aware of administrative law's importance to federalism.⁸ Exploring the relationship between

6. See Young, *supra* note 4, at 133.

7. See *infra* Part II.D.

8. On the Court's docket for the October 2007 Term were two cases addressing the preemptive effect of federal administrative determinations. Warner-Lambert Co. v. Kent, 128 S.

federalism and administrative law seems particularly useful at this early juncture, when the Court's jurisprudence on the question is still in a formative state.

My aim in this Article is twofold: first, to examine how the Court may be employing administrative law as a vehicle for addressing federalism concerns; and second, to assess how well administrative law performs this role and how the Court should understand the relationship between federalism and administrative law. I conclude that administrative law has important federalism-reinforcing features, but that the Court's decisions to date have failed to fully develop administrative law's federalism potential. I also argue that the best approach—not only for the functioning of federal agencies but, critically, for the continued vibrancy of federalism in the world of the modern national administrative state—is for the Court (and Congress and the president) to advance federalism concerns within the overall rubric of administrative law.

The Article consists of four parts. Part I contains an analysis of recent Supreme Court precedent, focusing in particular on six decisions addressing the intersection of federalism and administrative law. Part II advances the claim that administrative law may be becoming the locus of a new federalism. Here I contend that the Court is unwilling to curb Congress on federalism grounds and is instead addressing federalism concerns through an administrative law framework. I then examine two ways in which this phenomenon is occurring: application of ordinary administrative law to the benefit of the states, and development of more extraordinary federalism-inspired administrative law analyses. I also discuss the current administrative preemption debate, which I contend approaches the relationship between federalism and administrative law in overly narrow terms.

Ct. 1168 (2008) (mem.), *aff'g by an equally divided Court* Desiano v. Warner-Lambert & Co., 467 F.3d 85, 87 (2d Cir. 2006) (holding that a state product liability action against a federally-approved drug was not preempted); Riegel v. Medtronic, Inc., 128 S. Ct. 999, 1007 (2008) (holding state tort law action preempted by the FDA's premarket scrutiny and approval of the challenged medical device). In addition, in the October 2008 Term, the Court will hear another preemption case, *Levine v. Wyeth*, 944 A.2d 179 (Vt. 2006), *cert. granted*, 128 S. Ct. 1118 (2008), which raises the question of whether the FDA's approval of a drug label preempts a state tort suit alleging that a drug manufacturer failed to provide adequate warning of a drug's dangers. See *infra* text accompanying notes 86–92.

Part III turns to a more normative and theoretical perspective. I begin by examining whether administrative law is likely to prove an effective mechanism for addressing federalism concerns. In addition to rejecting claims that administrative agencies are categorically ill-suited to protecting state regulatory autonomy, I emphasize the need to distinguish between administrative agencies and administrative law. I argue that three features of administrative law hold strong potential to protect state interests: administrative law's procedural and substantive requirements, in particular its provisions for notice-and-comment rulemaking and the demand for reasoned decisionmaking; its doctrinal and institutional capaciousness; and its very status as nonconstitutional and generally applicable law. I then turn to analyzing whether using administrative law as a vehicle for advancing federalism is a legitimate judicial undertaking or instead an instance of courts unjustifiably intruding on congressional power. I conclude that this use is legitimate and underscore the benefits of such an administrative law approach over alternative federalism doctrines.

Finally, in Part IV, I assess the implications of this analysis of administrative law's federalism potential. One implication is that the Court should employ administrative law with an eye to reinforcing agencies' sensitivity and responsiveness to state interests. A second is that federalism concerns raised by federal agency action may be best advanced through ordinary administrative law, albeit with express recognition of how state interests factor into judicial review. Although the Court's recent decisions take some helpful steps in this direction, their lack of clarity and reflection on how federalism concerns should factor into application of administrative law limit their generative potential.

I. A FEDERALISM AND ADMINISTRATIVE LAW SEXTET

Federalism and federal administrative law are an unfamiliar couple, particularly in Supreme Court precedent. Although the Court regularly decides cases involving one or the other of these topics, and both are sometimes present in cases before it, for the most part the two remain doctrinally and analytically separate. But in six recent, highly charged decisions, issued over a four-year period, the relationship of federalism and administrative law has repeatedly risen to the fore. Most prominently this has taken the form of an injection

of federalism into administrative law challenges of federal agency action. Yet the reverse has also occurred, with administrative law surfacing in more straightforward federalism challenges. Studying this sextet of decisions offers insights into the Court's growing awareness of the intersection between federalism and administrative law.

A. *Federalism's Appearance in Administrative Law Challenges*

Challenges to actions by federal agencies are a regular staple of the Court's docket. Of late, the Court's administrative law jurisprudence has focused overwhelmingly on determining when agency statutory interpretations should receive *Chevron* deference.⁹ The three federal agency challenges discussed in this Section—*Alaska Department of Environmental Conservation (ADEC) v. EPA*,¹⁰ *Gonzales v. Oregon*,¹¹ and *Massachusetts v. EPA*¹²—share that focus; each involves a challenge to agency interpretation of a governing statute.¹³ What differentiates them—aside from being high profile,

9. *E.g.*, *Long Island Care at Home, Ltd. v. Coke*, 127 S. Ct. 2339, 2344 (2007); *Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 125 S. Ct. 2688, 2700 (2005); *Barnhart v. Walton*, 535 U.S. 212, 215 (2002). "*Chevron* deference" refers to deference under the well-known framework for reviewing agency statutory interpretations laid out in *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842–43 (1984). For a description of the *Chevron* framework, see Cass R. Sunstein, *Chevron Step Zero*, 92 VA. L. REV. 187, 191–92 (2006).

10. *Alaska Dep't of Env'tl. Conservation (ADEC) v. EPA*, 540 U.S. 461 (2004).

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

12. *Massachusetts v. EPA*, 127 S. Ct. 1438 (2007).

13. A fourth decision that might be included in this category is *Rapanos v. United States*, 126 S. Ct. 2208 (2006) (plurality opinion). There, in rejecting the Army Corps of Engineers' view of its jurisdiction under the Clean Water Act (CWA) as too broad, *id.* at 2220, the plurality opinion by Justice Scalia emphasized that "the Corps' interpretation stretches the outer limits of Congress's commerce power" and intruded on "the States' traditional and primary power over land and water use" [by] . . . authoriz[ing] the Corps to function as a *de facto* regulator of immense stretches of intrastate land," *id.* at 2224 (citations omitted) (quoting *Solid Waste Agency of N. Cook County (SWANCC) v. U.S. Army Corps of Eng'rs*, 531 U.S. 159, 174 (2001)). The plurality relied on these federalism concerns to justify its refusal to defer to the Corps' statutory interpretation under *Chevron*, emphasizing that it "would expect a clearer statement from Congress to authorize an agency theory of jurisdiction that presses the envelope of constitutional validity." *Id.* Justice Scalia also emphasized that Congress's policy in the CWA intended to have the states play the primary role in pollution reduction and regulating use of land and water resources. *Id.* Yet the extent to which the plurality opinion in *Rapanos* actually rests on federalism concerns is unclear. The opinion also contended that the Corps' interpretation was contrary to the text of the CWA, *id.* at 2220, and Justice Scalia's invocation of federalism at the end of the opinion has an air of gilding the lily. In addition, Chief Justice Roberts argued in his concurrence that had the EPA and the Corps gone forward with a proposed rulemaking on the jurisdictional question, their views of the CWA's "broad [and] somewhat ambiguous" terms would have been entitled to deference—suggesting that federalism

very contentious decisions—is the way that members of the Court invoked federalism concerns in determining whether to uphold the challenged agency action.

1. *ADEC v. EPA*. The first decision in this series, *ADEC*, was issued in 2004 and involved the Environmental Protection Agency's (EPA) implementation of the Clean Air Act (CAA).¹⁴ Under that Act, no source emitting more than 250 tons of nitrogen oxides a year can be constructed or modified without obtaining a permit,¹⁵ and no permit can be issued “unless the facility uses the ‘best available control technology’ (BACT)” for each CAA pollutant it emits.¹⁶ States can obtain permitting authority from the EPA. If states do so, they have primary responsibility for implementing the CAA within their territory, including the responsibility for issuing permits and making BACT determinations.¹⁷

The question in *ADEC* was whether the EPA had authority to supervise a state's BACT determinations.¹⁸ The EPA read the CAA as granting it authority to block construction of a facility permitted by a state when it determined that the state's BACT determination was unreasonable.¹⁹ In a 5–4 decision, the Court agreed, arguing that the EPA's interpretation, although “not qualify[ing] for the dispositive force described in *Chevron*”²⁰ because promulgated in internal guidance memoranda that lacked the force of law, “nevertheless warrant[s] respect.”²¹ The Court further upheld the EPA's conclusion

was not determinative of his view of the case either. *Id.* at 2236 (Roberts, C.J., concurring). In any event, Justice Kennedy dismissed the plurality's invocation of the avoidance canon on federalism grounds, *see id.* at 2246, 2249–50 (Kennedy, J., concurring), and his vote concurring in the judgment was determinative of the result in the case.

14. *ADEC*, 540 U.S. at 468.

15. *Id.* at 472 (citing 42 U.S.C. § 7475(a)(1) (2000) (requiring a “major emitting facility” to obtain a permit); 42 U.S.C. § 7479 (defining “major emitting facility” as one “with the potential to emit two hundred and fifty tons per year or more of any air pollutant”)).

16. *Id.* at 468 (quoting 42 U.S.C. § 7475(a)(4)).

17. 42 U.S.C. § 7410 (describing the states' responsibility in implementing the CAA); *id.* § 7661a (establishing the procedure for delegating “permitting authority” to states); *id.* § 7479(3) (giving the “permitting authority” the ability to make “best available control technology” (BACT) determinations).

18. *ADEC*, 540 U.S. at 469.

19. *Id.* at 485.

20. *Id.* at 487.

21. *Id.* at 488 (quoting *Wash. State Dep't of Soc. & Health Servs. v. Guardianship Estate of Keffeler*, 537 U.S. 371, 385 (2003)).

that the state environmental agency had acted unreasonably in finding the facility met the CAA's BACT requirements and issuing a permit.²²

From the majority's perspective, *ADEC* was simply an ordinary administrative challenge, one in which federalism figured hardly at all and instead the expertise and enforcement needs of the federal agency charged with implementation dominated. By contrast, Justice Kennedy in dissent viewed the case fundamentally in federalism terms. He argued vociferously that the Court's decision remitted "[t]he federal balance . . . to a single agency official"²³ and "relegat[ed] States to the role of mere provinces or political corporations, instead of coequal sovereigns entitled to the same dignity and respect."²⁴ The majority responded that the federal courts were available to protect the states against EPA overreaching, suggesting that it was not rejecting potential federalism concerns wholesale but instead simply did not find such concerns implicated in the specific agency action before it.²⁵ For the most part, however, the majority and dissent in *ADEC* talked past one another rather than attempting to resolve the tension between their federalism and administrative law rubrics.

As a result, *ADEC* offers little guidance about how the Court believes federalism and administrative law principles should be integrated. Yet it is an early signal of the Court's awareness of the potential connections between these two areas of doctrine.

2. *Gonzales v. Oregon*. In *Oregon*, the relationship between federalism and administrative law, hinted at in *ADEC*, assumed

22. *Id.* at 496.

23. *Id.* at 517 (Kennedy, J., dissenting).

24. *Id.* at 518.

25. *Id.* at 495 (majority opinion). The facts of the case offer support for the majority's view. The CAA assigned the EPA an oversight role regarding state permitting decisions and implementation decisions, *see id.* at 468-69, and no one disputed that the EPA had authority to prohibit a facility's construction or modification in some circumstances, *see id.* at 484-85. The EPA had long asserted the power over BACT determinations it claimed here, had raised its concerns with the state agency beforehand, and had suggested ways the state agency could justify its determination. *See id.* at 478-81. In addition, the state agency's final BACT determination does seem to be motivated by reluctance to impose costs on a major employer in northwest Alaska rather than environmental concerns; notably, the state agency never explained the inconsistency between its ultimate BACT determination and its initial assessment that greater emissions control was economically feasible. *Id.* at 498-500.

center stage. Decided in 2006, *Oregon* involved a challenge to Attorney General John Ashcroft's implementation of the Controlled Substances Act (CSA).²⁶ Under the CSA, physicians can lawfully dispense controlled substances only if they are registered to do so with the attorney general.²⁷ In 2001, Ashcroft issued an interpretive rule stating that prescribing controlled substances to assist suicide was grounds for suspending or revoking a doctor's CSA registration because assisting suicide was not a legitimate medical purpose.²⁸ As a practical matter, this rule would have nullified Oregon's Death with Dignity Act, which legalized prescribing drugs to allow terminally ill patients to commit suicide;²⁹ doctors would be unwilling to issue such prescriptions if by doing so they risked losing their right to prescribe controlled substances altogether. Indeed, preventing assisted suicide under the Oregon act was the primary motivation behind the rule's promulgation.³⁰

In *Oregon*, the Court held that Ashcroft's interpretive rule violated the CSA and was thus invalid.³¹ The majority decision, written by Justice Kennedy, portrayed its resolution of Oregon's challenge as an ordinary assessment of whether an executive official had exceeded statutory authority—"an inquiry familiar to the courts" that was guided by "familiar principles" of administrative law.³² In particular, the majority relied on the Court's 2001 decision in *United States v. Mead Corp.*,³³ which had limited *Chevron* deference to instances when Congress had delegated authority to issue rules with the force of law to the agency.³⁴ The *Oregon* majority held that

26. *Gonzales v. Oregon*, 126 S. Ct. 904, 911 (2006).

27. 21 U.S.C. § 822(a)(2) (2000).

28. *Oregon*, 126 S. Ct. at 911.

29. *Id.* at 911, 914 (describing OR. REV. STAT. §§ 127.800–.897 (2003)).

30. *Oregon*, 126 S. Ct. at 913.

31. *Id.* at 925.

32. *Id.* at 911, 914.

33. *United States v. Mead Corp.*, 533 U.S. 218 (2001).

34. *Oregon*, 126 S. Ct. at 915 (citing *Mead*, 533 U.S. at 226–27). The *Oregon* majority also cited precedent that precludes application of *Chevron* deference in contexts in which more than one agency is given sole interpretive authority under a statute, *see id.* at 922, and noted that the CSA grants the secretary of Health and Human Services a central role when medical judgments are involved, *id.* at 921; *see also* Jacob E. Gersen, *Overlapping and Underlapping Jurisdiction in Administrative Law*, 2006 SUP. CT. REV. 201, 215–16, 242–44 (emphasizing the importance of Congress's decision to delegate to multiple agents in the CSA). Interestingly, the Court did not rely on the suggestion in *Mead* that *Chevron* deference generally should apply only to agency statutory interpretations promulgated through agency procedures such as notice-and-comment

Congress had not delegated authority to determine what constitutes legitimate medical practice to the attorney general, and thus that the interpretive rule did not merit *Chevron* deference.³⁵ More generally, the majority's opinion was animated by concerns of executive branch overreaching and self-aggrandizement. The danger it invoked was of a single executive official, lacking professional expertise and motivated by politics, imposing on the nation that official's personal views of what constituted legitimate medical practice.³⁶ *Oregon* thus stands as a prime example of administrative law's longstanding concerns with politics trumping law and unchecked executive authority.³⁷

Yet the decision also plainly turns on federalism concerns. It was not simply concentrated power in the attorney general that troubled the majority, but more specifically that "a single Executive officer [would have] the power to effect a radical shift of authority from the States to the Federal Government to define general standards of medical practice in every locality."³⁸ Such a result was at odds with usual practice, under which "regulation of health and safety is 'primarily, and historically, a matter of local concern.'"³⁹ Reading the CSA against this federalism backdrop, the majority rejected the idea that through the statute Congress had intended to assert "expansive

rulemaking, *Mead*, 533 U.S. at 226–27, perhaps because that aspect of *Mead* has proven more contentious for some members of the Court, *see, e.g.*, *Barnhardt v. Walton*, 535 U.S. 212, 221 (2002).

35. *Oregon*, 126 S. Ct. at 916; *see also id.* at 922 (holding that the attorney general's interpretation also was not due *Skidmore* deference).

36. *Id.* at 924 ("The primary problem with the Government's argument . . . is its assumption that the CSA impliedly authorizes an Executive officer to bar a use simply because it may be inconsistent with one reasonable understanding of medical practice."); *see also id.* at 913–14, 922 (emphasizing the attorney general's lack of any medical expertise and failure to consult before issuing the interpretive rule—either with *Oregon* or others in the executive branch—as well as noting Ashcroft's prior efforts to prevent *Oregon*'s experiment with assisted suicide when he was a member of the Senate).

37. *See* Jody Freeman & Adrian Vermeule, *Massachusetts v. EPA: From Politics to Expertise*, 2007 SUP. CT. REV. 51, 95. Professor Lisa Bressman has offered a slightly different take on *Oregon*, arguing that it was the profoundly undemocratic aspect of the interpretive rule that made the Court reluctant to defer. *See* Lisa Schultz Bressman, *Deference and Democracy*, 75 GEO. WASH. L. REV. 761, 765, 776–80 (2007).

38. *Oregon*, 126 S. Ct. at 925. The similarity between this language and that of the *ADEC* dissent is more than just coincidence, as Justice Kennedy was the author of both.

39. *Id.* at 923 (quoting *Hillsborough County v. Automated Med. Labs, Inc.*, 471 U.S. 707, 719 (1985)).

federal authority to regulate medicine.”⁴⁰ Instead, it portrayed the CSA as having a far more limited aim, preventing drug abuse and drug trafficking, and as relying on state regulation of medical practice.⁴¹

Oregon therefore represents an instance in which the Court directly linked federalism to federal administrative law.⁴² On the surface the majority’s integration of these two appears smooth; according to the majority, the federalism implications of the interpretive rule provided reason to doubt the attorney general’s claim of delegated authority and to refuse to defer to his view of the CSA.⁴³ But tensions exist underneath this superficial doctrinal consistency. A difficult question left open by the majority opinion is whether the result would have been different had the attorney general’s rejection of assisted suicide emerged from a more consultative, formal process in which views of the secretary of the Department of Health and Human Services (HHS) were solicited and given determinative weight. Put differently, was the real problem here a violation of federalism norms or deviation from appropriate administrative process?⁴⁴ Answering this question was not necessary to resolve the case, but leaving it open obscures the import of *Oregon* regarding how federalism and administrative law intersect. In addition, the contrast between *Oregon* and *ADEC* is noteworthy; in *Oregon*, the Court invoked federalism as a reason not to defer to a

40. *Id.* at 924.

41. *Id.* at 922–23. For a similar invocation of federalism to justify a narrower reading of a federal statute than that offered by the federal agency charged with its implementation, see *Rapanos v. United States*, 126 S. Ct. 2208, 2223–24 (2006) (plurality opinion).

42. This linkage was already present in the case, as the Ninth Circuit had heavily stressed federalism in invalidating the interpretive rule. See *Oregon v. Ashcroft*, 368 F.3d 1118, 1124 (9th Cir. 2004), *aff’d sub nom.* *Gonzales v. Oregon*, 126 S. Ct. 904 (2006).

43. *Oregon*, 126 S. Ct. at 923–24.

44. The decision’s narrow view of the CSA appears to preclude the latter possibility, as does its emphasis on Congress’s role in maintaining the federal-state balance and the statute’s express restriction on preemption. *Id.* at 922–25. But that conclusion is somewhat at odds with the opinion’s repeated emphasis on “the Secretary’s primacy in shaping medical policy under the CSA,” and its assertion that “no question” exists that the federal government has constitutional authority to regulate medical practice. *Id.* at 925; see also Gersen, *supra* note 34, at 242–45 (noting emphasis on role of both HHS and the states in the opinion). Moreover, given the majority’s recognition that “legitimate medical purpose” is ambiguous, it is unclear why such a joint, administratively proper determination by the federal officials delegated authority in this area by Congress should not be given deference. *Oregon*, 126 S. Ct. at 916 (quoting 21 U.S.C. § 830(b)(3)(A)(ii) (2000)).

federal agency's assertion of authority, whereas in *ADEC* the Court did defer notwithstanding the troubling federalism implications of doing so. Although largely fueled by factual differences between the two cases,⁴⁵ this unexplained discrepancy in results reinforces the sense that the Court lacks a consistent understanding of the relationship between federalism and administrative law.

3. *Massachusetts v. EPA*. Federalism and administrative law were again expressly linked one year later in *Massachusetts*. There, in a 5–4 decision, the Court held that the Commonwealth of Massachusetts had standing to challenge the EPA's refusal to regulate carbon dioxide and other greenhouse gases as air pollutants,⁴⁶ and that the reasons the EPA gave to justify this refusal violated the CAA.⁴⁷ As presented to the Court, *Massachusetts* appeared to be a straightforward administrative law challenge—indeed, federalism was almost entirely absent from the case as it was briefed to the Court and in the decision below.⁴⁸ The majority opinion in *Massachusetts* imbued the case with federalism implications, however, by emphasizing Massachusetts's status as a sovereign state in holding that Massachusetts had standing to sue. According to the majority, “[i]t is of considerable relevance that the party seeking review here is a sovereign State”.⁴⁹

When a State enters the Union, it surrenders certain sovereign prerogatives. Massachusetts cannot invade Rhode Island to force reductions in greenhouse gas emissions, it cannot negotiate an emissions treaty with China or India, and in some circumstances the

45. The EPA's actions in *ADEC* lacked many of the indicia of abuse and federal agency overreaching that characterized the attorney general's interpretive rule in *Oregon*. See *supra* note 25.

46. *Massachusetts v. EPA*, 127 S. Ct. 1438, 1454–55 (2007).

47. *Id.* at 1463.

48. Federalism concerns surfaced in only one amicus brief submitted by Arizona and other states on behalf of Massachusetts. See Brief of the States of Arizona et al. as Amici Curiae in Support of Petitioners at 22–24, *Massachusetts*, 127 S. Ct. 1438 (No. 05-1120), 2006 WL 2563380; Dru Stevenson, *Special Solitude for State Standing: Massachusetts v. EPA*, 112 PENN ST. L. REV. 1, 5 & n.18, 30–31 (2007) (noting that the issue of “special standing” for states was absent from the briefs except for the amicus brief filed by Arizona). Nor was the case an obvious vehicle for raising federalism concerns, given that it arose from a rulemaking petition filed with the EPA by private environmental groups; Massachusetts and other governments intervened in the case only after the rulemaking petition was denied. *Massachusetts*, 127 S. Ct. at 1449–51.

49. *Massachusetts*, 127 S. Ct. at 1454.

exercise of its police powers to reduce in-state motor-vehicle emissions might well be pre-empted.

These sovereign prerogatives are now lodged in the Federal Government, and Congress has ordered EPA to protect Massachusetts (among others) by prescribing [air pollutant] standards Congress has moreover recognized a concomitant procedural right to challenge the rejection of its rulemaking petition as arbitrary and capricious. Given that procedural right and Massachusetts' stake in protecting its quasi-sovereign interests, the Commonwealth is entitled to special solicitude in our standing analysis.⁵⁰

Despite taking the initiative to invoke federalism concerns, the majority was quite imprecise with respect to how Massachusetts's sovereignty interests were implicated.⁵¹ Massachusetts was not claiming that its own regulatory efforts were unduly preempted by the EPA or that the federal government was exceeding its constitutional powers—on the contrary, Massachusetts's central allegation was that the federal government was not asserting its authority enough.⁵² The majority never explained why, having ceded regulatory authority to the federal government over an area of activity, a state would continue to have a *sovereignty* interest in forcing the federal government to exercise that authority in a particular manner.

50. *Id.* at 1454–55 (citations omitted).

51. The majority sought to draw an analogy to *parens patriae* precedent involving interstate pollution, in which the Court had emphasized the “quasi-sovereign” state interest “in all the earth and air within its domain” and in having “the last word as to whether its mountains shall be stripped of their forests and its inhabitants shall breathe pure air.” *Id.* at 1454 (quoting *Georgia v. Tenn. Copper Co.*, 206 U.S. 230, 237 (1907)). Insofar as the majority was using these cases to establish that Massachusetts had a cognizable interest in “preserv[ing] its sovereign territory” which was being lost due to rising water levels, the invocation of Massachusetts's state status seems unnecessary, given that Massachusetts actually owned a “great deal” of coastal property in the state. *Id.* at 1454. If, on the other hand, the majority sought to draw a connection to Massachusetts's regulatory interest in controlling pollutant emissions within its borders, then—as Chief Justice Roberts argued in dissent—the federal-state context of the dispute before the Court rendered this interstate precedent inapplicable. *See id.* at 1465–66 (Roberts, C.J., dissenting). States did not cede regulatory authority over their territory to each other by joining the union, but they did grant such power to the federal government. Not surprisingly, therefore, existing precedent is far less sympathetic to a state's assertion of quasi-sovereign interests on behalf of its citizens against the federal government. *See, e.g.*, *Alfred L. Snapp & Son v. Puerto Rico ex rel. Barez*, 458 U.S. 592, 610 n.16 (1982); *Massachusetts v. Mellon*, 262 U.S. 447, 485–86 (1923).

52. *See Massachusetts*, 127 S. Ct. at 1449, 1451 (majority opinion).

One possible explanation focuses on preemption. Section 209(a) of the CAA prohibits any state or political subdivision from adopting or enforcing “any standard relating to the control of emissions from new motor vehicles or new motor vehicle engines.”⁵³ This prohibition arguably gives states distinct sovereign interests in ensuring that the EPA fulfills its statutory duties. On this view, given that Congress has disabled them from asserting regulatory authority in their own right, the states have a sovereign interest in ensuring that the federal government performs its regulatory responsibilities so that regulatory gaps are avoided.⁵⁴ Such an argument for state standing is open to a variety of objections—among others, that allowing states access to federal court based solely on sovereignty interests fails to accord with

53. 42 U.S.C. § 7543(a) (2000). Section 209(b) provides that the EPA must grant a waiver for emissions controls promulgated by any state that had standards for emissions from new automobiles prior to March 30, 1966—which means California, as it was the only state to have such standards—provided the state determines that its “standards will be, in the aggregate, at least as protective of public health and welfare” as the federal standards and the EPA does not find that this state determination is arbitrary and capricious, that the state does not need the standards to meet “compelling and extraordinary conditions,” or that the state’s standards are inconsistent with Section 202(a). *Id.* § 7543(b)(1); *Motor Vehicle Mfrs. Ass’n v. N.Y. State Dep’t of Env’tl. Conservation*, 17 F.3d 521, 526 (2d Cir. 1994); *see also* Kathryn A. Watts & Amy J. Wildermuth, *Massachusetts v. EPA: Breaking New Ground on Issues Other than Global Warming*, 102 NW. U. L. REV. COLLOQUY 1029, 1037 (2008) (discussing the special role California plays in setting new automobile emission standards). In addition, the 1977 Clean Air Act Amendments provided that other states could adopt standards identical to California standards that have received a waiver. *See* Clean Air Act Amendments of 1977, Pub. L. No. 95-95, sec. 129(b), § 177, 91 Stat. 685, 750 (codified as amended at 42 U.S.C. § 7543(e)(2)(B)); *Motor Vehicle Mfrs. Ass’n*, 17 F.3d at 525. California issued such emission standards for greenhouse gases, which were then adopted by eleven other states. *See* J.R. DeShazo & Jody Freeman, *Timing and Form of Federal Regulation: The Case of Climate Change*, 155 U. PA. L. REV. 1499, 1526–27 (2000). California sought a waiver for these standards, which the EPA denied in December 2007, two years after the request was filed. *See* Letter from Stephen Johnson, EPA Administrator, to Arnold Schwarzenegger, Governor of Cal. (Dec. 19, 2007), available at <http://www.epa.gov/otaq/climate/20071219-slj.pdf>. For analysis of California’s waiver request, *see* Jonathan H. Adler, *Hothouse Flowers: The Vices and Virtues of Climate Federalism*, 19 TEMP. POL. & CIV. RTS. L. REV. (forthcoming 2008) (manuscript at 15–29), available at <http://ssrn.com/abstract=1096571>; Nina A. Mendelson, *The California Greenhouse Gas Waiver Decision and Agency Interpretation: A Response to Professors Galle and Seidenfeld*, 57 DUKE L.J. 2157, 2161 (2008).

54. *See* Bradford Mank, *Should States Have Greater Standing Rights than Ordinary Citizens?*, 49 WM. & MARY L. REV. 1701, 1774 (2008); Watts & Wildermuth, *supra* note 53, at 1034. In addition, the CAA embodies a cooperative regulatory framework under which states bear responsibility in the first instance for devising plans to ensure that air pollutant emissions within their borders meet federal air quality standards. 42 U.S.C. § 7410. The special role the states play in implementing the CAA could also be thought to give them added ability to challenge determinations the EPA makes under the Act.

the Constitution's limitation of the federal judicial power to "cases" and "controversies" and thus to legal as opposed to political disputes. But it at least offers an explanation of why state sovereignty interests might be seen as implicated by the administrative challenge before the Court.

This alternative account is not, however, one offered by the *Massachusetts* majority.⁵⁵ Instead, although it indicates that the Court perceived a connection between federalism and this challenge to federal agency action, the opinion—like the opinions in *ADEC* and *Oregon*—leaves the nature of this connection quite opaque. Perhaps the majority's emphasis on state status is a signal of the Court developing a deeper understanding of the role that states can play in overseeing federal program administration. Or perhaps this emphasis was simply a way of garnering Justice Kennedy's vote and is a rule good for one case only, with the ultimate significance of *Massachusetts* being simply its forgiving application of the standard *Lujan v. Defenders of Wildlife*⁵⁶ standing analysis to force the government to address global warming.⁵⁷ A third, equally plausible view is that *Massachusetts* will serve to undermine private groups' access to the courts to challenge regulatory inaction, with the looser application of *Lujan*'s demands of injury, causation, and redressability being limited to instances in which states are plaintiffs.

B. Administrative Law's Appearance in Federalism Challenges

Just as federalism has surfaced in administrative law challenges, so too has administrative law appeared in the Court's federalism decisions, albeit to date playing a more tangential role. Here three

55. Although the majority insisted that *Massachusetts* was simply asserting "its rights under [the CAA]," *Massachusetts*, 127 S. Ct. at 1455 n.17, the rights it was referring to were simply *Massachusetts*'s rights to petition the EPA to engage in a rulemaking regarding new motor vehicle emissions of greenhouse gases and to challenge the EPA's violation of statutory requirements. The problem is that these rights were in no way unique to *Massachusetts* as a state. See 42 U.S.C. § 7607(b)(1) (providing that a petition seeking review of the administrator's action in promulgating a standard under § 7521 or any final action taken by the administrator must be filed in the D.C. Circuit, but not limiting who can file such a petition); see also *id.* § 7604 (authorizing "any person" to bring a suit against the administrator to challenge the administrator's failure to undertake a nondiscretionary duty).

56. *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992).

57. See *Freeman & Vermeule*, *supra* note 37, at 67.

decisions are particularly noteworthy: *Gonzales v. Raich*,⁵⁸ *Watters v. Wachovia Bank*,⁵⁹ and *Riegel v. Medtronic*.⁶⁰

1. *Gonzales v. Raich*. Decided a year before *Oregon*, *Raich* also involved the CSA, but it focused on whether the CSA fell within Congress's commerce power. In 1996 California passed a medical marijuana initiative, legalizing personal medical use and possession of marijuana.⁶¹ The California law conflicted with the CSA, which lists marijuana as a Schedule I drug and therefore prohibits all use of it.⁶² Two women who used marijuana under the terms of the California measure brought suit, arguing that the CSA's ban exceeded Congress's commerce power as applied to the cultivation, possession, and use of marijuana for personal medical purposes.⁶³ By a 6–3 vote, the Court rejected this claim.⁶⁴ The *Raich* majority was unsympathetic to the plaintiffs' as-applied challenge, emphasizing that Congress has "power to regulate purely local activities that are part of an economic 'class of activities' that have a substantial effect on interstate commerce."⁶⁵ Describing the activities regulated by the CSA as "quintessentially economic,"⁶⁶ the majority held that "Congress had a

58. *Gonzales v. Raich*, 125 S. Ct. 2195 (2005).

59. *Watters v. Wachovia Bank, N.A.*, 127 S. Ct. 1559 (2007).

60. *Riegel v. Medtronic*, 128 S. Ct. 999 (2008). In addition, in a few cases involving challenges to state actions in the context of cooperative federal-state programs, the Court emphasized the importance of the views of the federal agency involved. *See, e.g.*, *S.D. Warren Co. v. Me. Bd. of Env'tl. Prot.*, 126 S. Ct. 1843, 1849 (2006); *Pharm. Research & Mfrs. of Am. v. Walsh*, 538 U.S. 644, 666–68 (2003); *Wash. State Dep't of Soc. & Health Servs. v. Guardianship Estate of Keffeler*, 537 U.S. 371, 385 (2003). Interestingly, however—and consistent with developments in administrative law generally—the Court generally gave little weight to federal views when those views were simply presented in amicus briefs in court, as opposed to officially adopted by the agency in the course of its implementation of the relevant statute. *See, e.g.*, *Ark. Dep't of Health & Human Servs. v. Alhborn*, 126 S. Ct. 1752, 1764–65 (2006); *Bates v. Dow Agrosciences*, 125 S. Ct. 1788, 1801 (2005); *see also Engine Mfrs. Ass'n v. S. Coast Air Quality Mgmt. Dist.*, 541 U.S. 246, 252 (2004) (making no reference to the United States' views in favor of preemption presented only in amicus briefs, notwithstanding that the Court agreed that California's fleet rules were preempted).

61. Compassionate Use Act of 1996, CAL. HEALTH & SAFETY CODE § 11362.5(d) (West 2007).

62. *See Raich*, 125 S. Ct. at 2199, 2204.

63. *Id.* at 2199–200.

64. *Id.* at 2209. Justice Scalia, concurring in the judgment, agreed with the five-Justice majority that application of the CSA here was constitutional. *Id.* at 2215 (Scalia, J., concurring in the judgment).

65. *Id.* at 2205 (majority opinion).

66. *Id.* at 2211.

rational basis for believing that failure to regulate the intrastate manufacture and possession of marijuana would leave a gaping hole in the CSA” and undermine that statute’s comprehensive regulatory scheme.⁶⁷ By contrast, the dissent insisted that the relevant activity was the cultivation, possession, and use of marijuana for personal medical purposes, which it deemed noneconomic and outside the scope of the commerce power.⁶⁸

Raich is overwhelmingly a federalism decision, centered squarely on the scope of Congress’s constitutional powers. But administrative law also surfaces here, with the Court repeatedly noting that under the CSA the attorney general has authority to change a drug’s schedule classification.⁶⁹ Moreover, despite protesting that the specifics of how marijuana is regulated had “no relevance” to the question of congressional power, the majority went so far as to suggest that administrative denial of a petition to reschedule marijuana might well be overturned on appeal: “We acknowledge that evidence proffered by respondents in this case regarding the effective medical uses for marijuana, if found credible after trial, would cast serious doubt on the accuracy of the findings that require marijuana to be listed in Schedule I.”⁷⁰

Although administrative law played only a marginal role in the majority opinion and was largely relegated to the footnotes, the interesting question is why it appeared at all. The most plausible explanation is that it offered some solace against the specter of unlimited federal power. The majority wanted to underscore that finding an activity to fall within the scope of Congress’s constitutional authority did not mean that the resulting federal regulation was free of all legal constraints against federal overreaching.⁷¹ The rescheduling option may have been “irrelevant” to the constitutional question of the scope of congressional authority, but it was quite relevant on an operational federalism level as a means states could exploit to preserve the ability to experiment with medical care and

67. *Id.* at 2209.

68. *Id.* at 2224–29 (O’Connor, J., joined by Rehnquist, C.J., & Thomas, J., dissenting).

69. *Id.* at 2204 & n.23, 2211 n.25 (majority opinion).

70. *Id.* at 2211 n.37.

71. Nor did such a finding mean that the regulation was free from political constraints. *See id.* at 2215 (“[P]erhaps even more important than these legal avenues is the democratic process, in which the voices of voters allied with these respondents may one day be heard in the halls of Congress.”).

obtain judicial scrutiny of federal determinations. Like *ADEC*, however, the *Raich* majority failed to spell out the relationship it saw between federalism and administrative law, thereby limiting the decision's impact on future cases.

2. *Watters v. Wachovia Bank, N.A.* The *Watters* decision was handed down just two weeks after *Massachusetts*. *Watters* involved the interplay between federal and state banking authorities, and in particular the extent of supervision the latter could assert over state-chartered subsidiaries of national banks. Under the National Bank Act (NBA), national or federally chartered banks are subject to oversight by the federal Office of the Comptroller of the Currency (OCC), with states generally being denied any supervisory or oversight authority.⁷² Ordinarily, state-chartered banking institutions are subject to state oversight, which in the case of Michigan's law meant that institutions had to obtain a state license, file reports with the state, and submit to state audits.⁷³ In 2001, the OCC promulgated a regulation providing that "State laws apply to national bank operating subsidiaries to the same extent that those laws apply to the parent national bank."⁷⁴ Given that state supervisory laws do not apply to national banks under the NBA absent an express statutory provision to the contrary, the import of the regulation was to preempt state supervision in regard to all national bank operating subsidiaries.⁷⁵

Watters appeared to be the occasion on which the Court would resolve a recurrent question in preemption challenges that directly engages the relationship between federalism and administrative law: to what extent should courts defer to administrative agencies'

72. See 12 U.S.C. §§ 24, 93a, 371(a) (2000) (granting the OCC authority to issue rules and regulations regarding the powers of national banking associations); *NationsBank of N.C., N.A. v. Variable Annuity Life Ins. Co.*, 513 U.S. 251, 256–57 (1995) ("As the administrator charged with supervision of the National Bank Act . . . the Comptroller bears primary responsibility for surveillance of 'the business of banking' authorized by § 24 . . ." (citation omitted)). The NBA refers to such supervisory authority as "visitorial powers" and provides that "[n]o national bank shall be subject to any visitorial powers except as authorized by Federal law." 12 U.S.C. § 484(a); see also *Clearing House Ass'n v. Cuomo*, 510 F.3d 105, 114–17 (2d Cir. 2007) (discussing the meaning of "visitorial powers").

73. *Watters v. Wachovia Bank, N.A.*, 127 S. Ct. 1559, 1565–66 (2007).

74. 12 C.F.R. § 7.4006 (2008).

75. See *id.*; see also 12 U.S.C. §§ 5.34(e), 24a(g)(3)(A). The OCC also argued in favor of broad preemption of substantive state law as applied to national banks. See *infra* note 84.

interpretations of the preemptive scope of the statutes they administer?⁷⁶ On the one hand, federalism concerns with intruding on a traditional area of state regulation, augmented by the presumption against preemption, counseled against granting deference to the OCC's regulation.⁷⁷ On the other, from a purely administrative law perspective, the OCC's views deserved deference: the NBA did not expressly address the question of state supervision of national bank subsidiaries, the OCC was the federal agency charged with implementing the NBA, and the OCC had promulgated its regulation using notice-and-comment rulemaking. Ordinarily, these features would suffice to trigger *Chevron* deference.⁷⁸

The Supreme Court, however, held in a 5–3 decision that the NBA itself preempted state supervision over national bank subsidiaries, concluding therefore that the degree of deference due the OCC's regulation was “an academic question” it need not address.⁷⁹ But that the majority foreswore the need to discuss *Chevron* deference does not mean that the decision bypassed administrative law. On the contrary, its analysis fell well within the administrative law ambit: like *Massachusetts*, in administrative law terms the *Watters* decision represents a *Chevron* step one determination to the effect that the NBA unambiguously preempted the state supervisory and licensing requirements at issue.⁸⁰

Watters represents an expansive approach to preemption. The majority treated the possibility of both state and federal oversight of

76. For earlier decisions presenting but not resolving this question, see cases cited *infra* note 177.

77. See *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996) (describing the presumption against preemption set out in *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947)).

78. See, e.g., *Long Island Care at Home, Ltd. v. Coke*, 127 S. Ct. 2339, 2350–51 (2007); *United States v. Mead Corp.*, 533 U.S. 218, 226–27 (2001). All of the appellate courts that considered challenges to state efforts to exercise oversight over national bank subsidiaries had invoked *Chevron* in upholding the OCC's regulation. See *Nat'l City Bank of Ind. v. Turnbaugh*, 463 F.3d 325, 331–33 (4th Cir. 2006); *Wachovia Bank, N.A. v. Watters*, 431 F.3d 556, 560–63 (6th Cir. 2005), *aff'd* 127 S. Ct. 1559 (2007); *Wells Fargo Bank, N.A. v. Boutris*, 419 F.3d 949, 958–67 (9th Cir. 2005); *Wachovia Bank, N.A. v. Burke*, 414 F.3d 305, 315–16 (2d Cir. 2005).

79. *Watters v. Wachovia Bank, N.A.*, 127 S. Ct. 1559, 1572–73 & n.13 (2007). Justice Thomas did not participate. *Id.* at 1573. Justice Stevens disagreed with the majority's view of the NBA and also argued that *Chevron* deference was inappropriate. See *id.* at 1578–79, 1581–85 (Stevens, J., dissenting).

80. See *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842–43 (1984) (“First, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter.”).

state-chartered subsidiaries as an unjustified regulatory burden rather than as a common feature of a federal system—and one national banks could have avoided by not utilizing state-chartered subsidiaries.⁸¹ Indeed, the majority denied that a subsidiary's state-chartered status gave states any more legitimate interest in overseeing the subsidiary's actions than the states would have in overseeing the subsidiary's parent national bank. To a large extent, the majority's unsympathetic stance to the states stemmed from the fact that the case involved the NBA, a statute the Court has consistently read as creating a presumption against state regulation of national banks and in favor of exclusive federal control.⁸² Yet application of the NBA presumption here was certainly contestable, given the importance of state- versus federal-chartered status to the nation's dual banking system, as well as the lack of clear authorization in the NBA for either national banks' use of state-chartered operating subsidiaries or the displacement of state supervision of such subsidiaries.⁸³

Perhaps more importantly, the majority never addressed the states' concern that, absent some independent oversight role, they would lack the ability to enforce state laws to which the subsidiaries at issue were subject. Although such state laws were enforceable by the OCC, Michigan and its amici expressed concern that the OCC

81. *Watters*, 127 S. Ct. at 1568, 1572–73.

82. *See, e.g., id.* at 1567 (“We have ‘interpreted grants of . . . powers to national banks as grants of authority . . . ordinarily pre-empting, contrary state law.’” (quoting *Barnett Bank of Marion City, N.A., v. Nelson*, 517 U.S. 25, 32 (1996) (internal quotation marks omitted))); *id.* at 1571 (“Security against significant interference by state regulators is a characteristic condition of the business of banking conducted by national banks” (internal quotation marks omitted)). Their different understandings of the NBA and banking in general may explain the interesting lineup of Justices in the case: Justice Ginsburg, often solicitous of state regulatory authority, wrote the majority opinion, in which she was joined by Justice Kennedy, *id.* at 1564, a frequent advocate of state interests. On the other hand, Justice Scalia, usually insistent on full-scale application of *Chevron*—including in *Gonzales v. Oregon*, 126 S. Ct. 904, 926 (2006) (Scalia, J., dissenting) (arguing for application of *Chevron* to agency action that preempted a state regulation)—joined Justice Stevens' dissent that seemed to suggest *Chevron* was never applicable to preemptive agency action absent express statutory authorization, *Watters*, 127 S. Ct. at 1573 (Stevens, J., joined by Roberts, C.J., & Scalia, J., dissenting).

83. Elizabeth R. Schiltz, *Damming Watters: Channeling the Power of Federal Preemption of State Consumer Banking Laws*, 35 FLA. ST. U. L. REV. (forthcoming 2008) (manuscript at 35), available at <http://ssrn.com/abstract=1028886> (arguing that *Watters* reversed the presumptions that previously governed preemption determinations in the banking context); *infra* text accompanying notes 154–58 (discussing ambiguity in the NBA); *see also* Kenneth E. Scott, *The Dual Banking System: A Model of Competition in Regulation*, 30 STAN. L. REV. 1, 3–6 (1977) (describing the dual banking system and noting the importance played by the chartering entity).

was aggressively seeking to free national banks from state control and would prove unwilling to enforce state consumer protection laws in the place of state agencies.⁸⁴ Yet the *Watters* majority opinion nowhere discusses the relationship between federal and state regulatory agencies, directing its attention instead solely to the relationship between federal and state legislation.

Thus, despite being decided in close succession, *Watters* and *Massachusetts* are polar opposites in their approach to state interests. In *Massachusetts*, the Court injected federalism into what had previously been thought a purely administrative law case and underscored the legitimacy of undefined state sovereignty interests. By contrast, in *Watters* it declared federalism essentially irrelevant and gave little weight to a concern seemingly central to state sovereignty: ensuring adequate enforcement of state laws.⁸⁵ The striking contrast between *Massachusetts* and *Watters* suggests confusion on the Court with respect to how to structure the relationship between federalism and administrative law.⁸⁶

84. See Brief of Petitioner at 31–39, *Watters*, 127 S. Ct. 1559 (No. 05-1342), 2006 WL 2570336; Brief for the States of New York et al. as Amicus Curiae Supporting Petitioner at 8, *Watters*, 127 S. Ct. 1559 (No. 05-1342), 2006 WL 2570992; see also Arthur E. Wilmarth, *The OCC's Preemption Rules Exceed the Agency's Authority and Present a Serious Threat to the Dual Banking System and Consumer Protection*, 23 ANN. REV. BANKING & FIN. L. 225, 275–76, 292, 296–97 (2004) (arguing that the OCC is too self-interested on the question of preemption because of its reliance on fees from banks with national charters and describing the OCC's advocacy of freedom from state laws as an advantage of a national charter). Conflicts between the OCC and the states were not limited to the state-chartered subsidiary context, but instead had also arisen in regard to enforcement of state consumer protection laws generally. See *Clearing House Ass'n v. Cuomo*, 510 F.3d 105, 109–10 (2d Cir. 2007) (discussing OCC preemption of state enforcement of antidiscrimination laws relating to real estate lending practices); Nicholas Bagley, Note, *The Unwarranted Regulatory Preemption of Predatory Lending Laws*, 79 N.Y.U. L. REV. 2274, 2284–86 (2004) (discussing OCC preemption of state predatory lending laws). Adding substance to the states' fears are the OCC's own statements indicating that it believes most substantive state laws are preempted as applied to national banks. See OCC, *Bank Activities and Operations*, 69 Fed. Reg. 1,895, 1,912–13 (Jan. 13, 2004); Wilmarth, *supra*, at 233.

85. The contrast is even starker if *Massachusetts's* special rules for state standing are viewed as tied to preemption of state authority. On that view, *Massachusetts's* logic would suggest that states should have standing to sue the OCC to enforce state laws if the OCC refuses to do so and the states are preempted from doing so themselves. But the Court never linked the two decisions or suggested that *Massachusetts's* standing analysis offered a remedy for any enforcement gap *Watters* might create.

86. The Court may be forced to confront the administrative preemption issue head on in *Levine v. Wyeth*, 944 A.2d 179 (Vt. 2006), *cert. granted*, 128 S. Ct. 1118 (2008), a case on its calendar for the October 2008 Term addressing the extent to which approval of a prescription drug label by the FDA preempts state tort law actions based on that labeling. The FDA has

3. *Riegel v. Medtronic*. The most recent member of the sextet, *Riegel*, was decided in the spring of 2008. *Riegel* arose out of a state tort suit involving a medical device that had received premarket approval from the Food and Drug Administration (FDA) under the premarket approval process created by the Medical Device Amendments of 1976 (MDA).⁸⁷ Characterizing this process as “rigorous”⁸⁸ and emphasizing the extent of the FDA’s scrutiny, the Court held that the MDA expressly preempted application of common-law tort duties to a device that had received such approval and was in compliance with FDA requirements.⁸⁹

Although much less contentious,⁹⁰ *Riegel* is in many ways a *Watters* redux, with the Court again eschewing the need to determine what level of deference to accord an administrative preemption determination by finding preemption clearly mandated by text of the relevant statute.⁹¹ Interestingly, the Court also referenced in passing standard administrative deference doctrines,⁹² suggesting that the Court did not view the preemption and federalism-laden posture of

taken the position, in a preamble to a recent rule on drug labeling, that its labeling determinations are preemptive. Requirements on Content and Format of Labeling for Human Prescription Drug and Biological Products, 71 Fed. Reg. 3,922, 3,967 (Jan. 24, 2006) (codified at 21 C.F.R. pts. 201, 314, 601). In the decision in *Wyeth* below, the Vermont Supreme Court did not defer to the FDA’s view, concluding that the state law failure-to-warn claim at issue was clearly not preempted by the relevant federal statute and thus the FDA’s position failed *Chevron* step one. *Levine*, 944 A.2d at 192–93.

87. *Riegel v. Medtronic, Inc.*, 128 S. Ct. 999, 1005–06 (2008).

88. *Id.* at 1004 (internal quotation marks omitted).

89. *Id.* at 1007–09, 1011. On the same day as it decided *Riegel*, the Court also upheld preemption claims in two other cases, neither involving actions by federal agencies. *See* *Rowe v. N.H. Motor Transp. Ass’n*, 128 S. Ct. 989, 995 (2008); *Preston v. Ferrer*, 128 S. Ct. 978, 987 (2008). The Court additionally affirmed, by an equally divided court, a Second Circuit decision holding that a state tort suit against an FDA-approved drug was not preempted. *Warner-Lambert Co. v. Kent*, 128 S. Ct. 1168 (2008) (mem.), *aff’g* by an equally divided Court *Desiano v. Warner-Lambert & Co.*, 467 F.3d 85 (2d Cir. 2006). The suit had been brought under a Michigan statute that granted drug manufacturers immunity against product liability suits for drugs receiving FDA approval and marketed in compliance with FDA requirements, unless the manufacturer intentionally withheld or misrepresented information that would have affected the FDA’s approval. MICH. COMP. LAWS § 2946(5) (2003). The Second Circuit had held that suit under this exception was distinguishable from “fraud on the FDA” claims that the Supreme Court had previously ruled preempted in *Buckman Co. v. Plaintiffs’ Legal Committee*, 531 U.S. 341, 348 (2001). *Desiano v. Warner-Lambert & Co.*, 467 F.3d 85, 94–96 (2d Cir. 2006).

90. Only Justice Ginsburg dissented. *See Riegel*, 128 S. Ct. at 1013 (Ginsburg, J., dissenting).

91. *Id.* at 1009 (majority opinion).

92. *Id.* at 1009–10.

the case to displace otherwise applicable administrative law. But it is hard to read much into these passing invocations, as the decision plainly turned on the Justices' independent assessment of the MDA's import and not on the position of the FDA. Indeed, *Riegel* reinforces the impression that the Court is not approaching these cases with an eye to the relationship of federalism and administrative law writ large, but instead is focused on the details of the specific statutory and regulatory schemes at issue.

II. ADMINISTRATIVE LAW AS A FEDERALISM VEHICLE

Six decisions are too few in number to do more than hint at possible trends in the Court's understanding of how federalism and administrative law intersect. This is particularly true of decisions such as *Massachusetts* and *Oregon*, given their highly politicized content and the evident perception by the majority in each of egregious agency overreaching. *Watters* and *ADEC*, by contrast, demonstrate the Justices' willingness to uphold what they view as more reasonable agency positions, whereas *Raich*'s invocations of administrative rescheduling are largely window dressing on a strong affirmation of national power. From one perspective then, these are highly fact-bound decisions with limited general import. Moreover, a striking feature of all six decisions is the largely undeveloped nature of the Court's analysis. In none did the Court offer an account of the relationship between federalism and administrative law that went beyond the case at hand. Indeed, as the comparisons above suggest, the decisions at times appear almost inconsistent in approach, particularly in the degree to which the Court gave weight to state sovereignty concerns. Hence, it seems fair to say that the Court has yet to arrive at a coherent understanding of what the relationship between federalism and administrative law should be.

Nonetheless, these decisions share some common if inchoate themes. One is their unwillingness to curb congressional regulatory authority, whether by means of straightforward constitutional federalism restrictions or subconstitutional federalism doctrines requiring clear authorization for federal agency action that substantially impacts the states. Another is their recurrent reliance on administrative law as a vehicle for addressing federalism concerns. Whether the Court is intentionally using administrative law in this way is unclear. But at least as a practical matter, in these decisions

administrative law operates to mitigate the impact of federal agency decisions on the states and to protect the states against federal agency overreaching. This use of administrative law as a vehicle for addressing federalism concerns is obscured in the current debate over administrative preemption, which tends to underscore the tensions between federalism and administrative law rather than their potential symbiosis.

A. *Administrative Law as the New Federalism*

1. *The Absence of Constitutional Federalism Curbs on Congress.* An important initial point to note is the Court's unwillingness to curb congressional regulatory authority on constitutional federalism grounds. This unwillingness is most apparent in *Raich*, with its deference to Congress on the question of what constitutes the relevant class of activities against which a Commerce Clause challenge is assessed, its broad definition of economic activity, and its lack of concern with protecting state regulatory experiments.⁹³ Little will fall outside of Congress' regulatory purview under *Raich*.⁹⁴ No doubt, some measures may go too far in regulating intrastate activity,⁹⁵ and constraints such as the anticommandeering rule⁹⁶ and

93. *Gonzales v. Raich*, 125 S. Ct. 2195, 2210 (2005); see also Ernest A. Young, *Just Blowing Smoke? Politics, Doctrine, and the Federalist Revival After Gonzales v. Raich*, 2005 SUP. CT. REV. 1, 33–37 (critiquing *Raich*'s failure to take state experimentation seriously).

94. See *Raich*, 125 S. Ct. at 2222–23 (O'Connor, J., dissenting) (arguing that *Raich*'s deference to congressional class of activity determinations transformed the decisions in *United States v. Lopez*, 514 U.S. 549 (1995) and *United States v. Morrison*, 529 U.S. 598 (2000), which had upheld commerce power challenges, into “nothing more than a drafting guide” that warned Congress about the consequences of regulating too narrowly). Others have expressed similar views of *Raich*. See Jonathan Adler, *Is Morrison Dead? Assessing a Supreme Drug (Law) Overdose*, 9 LEWIS & CLARK L. REV. 751, 762–66 (2005); Ilya Somin, *Gonzales v. Raich: Federalism as a Casualty of the War on Drugs*, 15 CORNELL J. L. & PUB. POL'Y 507, 513–19 (2006); see also Young, *supra* note 93, at 38–40 (arguing that “[o]ne can identify plausible federal statutes . . . that would be exceptionally hard to justify on any of the theories offered in *Raich*,” but adding that “*Raich* most likely marks the outer bound of the Court's ambition in Commerce Clause cases” and that “[a] rollback of the national regulatory state was never in the cards”).

95. Cf. *Rapanos v. United States*, 126 S. Ct. 2208, 2224 (2006) (finding that federal jurisdiction over “ephemeral flows of water” under the CWA “stretches the outer limits of Congress's commerce power” and would require a clearer statement from Congress); *Solid Waste Agency of N. Cook County (SWANCC) v. U.S. Army Corps of Eng'rs*, 531 U.S. 159, 172–73 (2001) (limiting federal jurisdiction under the CWA to navigable waters to avoid Commerce Clause issues).

protections for state sovereign immunity⁹⁷ will continue to apply to congressional exercises of the commerce power. Nonetheless, *Raich* establishes that the expansive view of the commerce power, in place since the New Deal, will largely continue to govern.⁹⁸ The other five decisions echo this same theme; in none did the Court suggest that Congress had overstepped its constitutional authority by enacting the regulatory scheme in question. Indeed, even the *Watters* and *ADEC* dissents agreed that Congress had power to authorize federal agencies to preempt state action or review state administrative determinations.⁹⁹

This lack of constitutional curbs on congressional regulatory authority is hardly unique to these six decisions. The Court has signaled similar reluctance to limit other forms of congressional power, in particular the spending power and the Necessary and Proper Clause, that underlie many federal regulatory programs.¹⁰⁰ Equally important, in its 2001 decision in *Whitman v. American Trucking Associations*¹⁰¹ the Court refused to curtail Congress's ability to delegate power broadly to administrative agencies, stating it has

96. See *Printz v. United States*, 521 U.S. 898, 933 (1997); *New York v. United States*, 505 U.S. 144, 188 (1992).

97. See *Alden v. Maine*, 527 U.S. 706, 712 (1999); *Seminole Tribe v. Florida*, 517 U.S. 44, 64–66, 72–73 (1996).

98. Nor will the Court's recent changes in membership likely effect this conclusion, given that Justices Kennedy and Scalia both voted to uphold congressional power in *Raich*. *Raich*, 125 S. Ct. 2198, 2209 (majority opinion); *id.* at 2215 (Scalia, J., concurring in the judgment).

99. The *Watters* dissent is clearest on this, rejecting out of hand Michigan's suggestion that granting federal agencies the power of preemption violated the Tenth Amendment. See *Watters v. Wachovia Bank, N.A.*, 127 S. Ct. 1559, 1585 (2007) (Stevens, J., dissenting). Justice Kennedy was more oblique in *ADEC*, in particular noting constitutional limits on the commerce power such as the anticommandeering rule, but ultimately he too appears to accept that Congress's "vast legislative authority" would allow it to authorize federal agency review of state agency and state court determinations. *Alaska Dep't of Envtl. Conservation (ADEC) v. EPA*, 540 U.S. 461, 512–13 (2004) (Kennedy, J., dissenting). As discussed above, three Justices in *Raich* did assert that application of the CSA to personal medical use and cultivation of marijuana was outside Congress's power. See *supra* note 68 and accompanying text.

100. *Sabri v. United States*, 541 U.S. 600, 605 (2004) (upholding a federal bribery statute that covers any employee of an entity that receives more than \$10,000 in federal funds, including a state or local government, under the spending power and Necessary and Proper Clause); see also *United States v. Am. Library Ass'n*, 539 U.S. 194, 203 (2003) (plurality opinion) (discussing the federal government's ability to broadly impose conditions on federal grants). The Court has been much more willing to impose limits on Congress's authority under Section 5 of the Fourteenth Amendment, but the commerce power is far more important to the modern federal administrative state.

101. *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457 (2001).

“almost never felt qualified to second-guess Congress regarding the permissible degree of policy judgment that can be left to those executing or applying the law.”¹⁰² To be sure, the scope of congressional delegations is still subject to scrutiny, as *Oregon* demonstrates, but critically such scrutiny focuses on issues of statutory interpretation rather than constitutional limits on Congress. Congress’s constitutional ability to delegate broadly is accepted, and judicial inquiry centers instead on determining whether Congress in fact did so.¹⁰³

2. *The Absence of Subconstitutional Federalism Doctrines.* Interestingly, in the six decisions the Court also eschewed overt reliance on subconstitutional federalism doctrines, such as the presumption against preemption or clear statement requirements.¹⁰⁴ Often dubbed “process federalism,” these doctrines represent a subconstitutional form of federalism in that they seek to protect states from federal incursions not by means of direct constitutional limits on congressional authority, but rather through federalism-inspired canons of statutory construction.¹⁰⁵ The extent to which these doctrines, in particular the presumption against preemption, actually

102. *Id.* at 474–75 (2001) (quoting *Mistretta v. United States*, 488 U.S. 361, 416 (1989) (Scalia, J., dissenting)).

103. Constitutional concerns may, however, inform the Court’s approach in determining how a delegation of authority is read. In particular, Professor Cass Sunstein has argued that the Court’s unwillingness to enforce constitutional restrictions on delegation has not meant the death of nondelegation doctrine, but rather its relocation to the field of statutory interpretation, wherein concerns about the scope of authority wielded by administrative agencies are addressed through a series of “nondelegation canons” of construction. Cass R. Sunstein, *Nondelegation Canons*, 67 U. CHI. L. REV. 315, 315–16 (2000).

104. *See, e.g.,* *Gregory v. Ashcroft*, 501 U.S. 452, 460–61 (1991) (clear statement requirement before Congress will be read as regulating the states); *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 242 (1985) (clear statement requirement for abrogating state sovereign immunity); *Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1, 17 (1981) (conditions on state receipt of federal funds must be clearly stated); *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947) (presumption against preemption).

105. *See* William N. Eskridge, Jr., & Philip P. Frickey, *Quasi-Constitutional Law: Clear Statement Rules as Constitutional Lawmaking*, 45 VAND. L. REV. 593, 636–37 (1992); *see also* Ernest A. Young, *Two Cheers for Process Federalism*, 46 VILL. L. REV. 1349, 1357–61, 1386–90 (2001) (describing process federalism and emphasizing its status as a form of constitutional review). For further discussion of process federalism, see *infra* notes 257–59 and accompanying text.

drive judicial decisionmaking is a matter of some debate.¹⁰⁶ In its recent preemption jurisprudence the Court has often taken a “freewheeling” approach to preemption,¹⁰⁷ not even requiring a clear and direct conflict between federal and state law but instead upholding preemption claims based on the determination that state law would be an obstacle to achieving the underlying purposes of federal regulation.¹⁰⁸ On the other hand, the Court invokes some of its other federalism canons more consistently, such as the requirements that conditions on federal funds and abrogation of state sovereign immunity must be clearly stated.¹⁰⁹

None of these subconstitutional federalism doctrines surfaced in the federalism–administrative law sextet, despite the fact that Congress’s constitutional power to regulate was for the most part unquestioned, precisely the context in which such doctrines are designed to operate. In *Watters*, for example, the majority found preemption based on a pragmatic assessment of the impact of state involvement on the federal regulatory scheme. The majority never referred to the presumption against preemption, notwithstanding the dissent’s insistence that the presumption should have been determinative.¹¹⁰ The absence of the federalism canons in *Oregon* is especially noteworthy, given that the canons had provided one of the

106. See John F. Manning, *Lessons from a Nondelegation Canon*, 83 NOTRE DAME L. REV. (forthcoming 2008) (manuscript at 118–20, 122, on file with the *Duke Law Journal*).

107. Daniel J. Meltzer, *The Supreme Court’s Judicial Passivity*, 2002 SUP. CT. REV. 343, 369.

108. See *id.* at 362–68; see also Samuel Issacharoff & Catherine M. Sharkey, *Backdoor Federalization*, 53 UCLA L. REV. 1353, 1372 (2006); Young, *supra* note 4, at 30–32, 130–34. For a discussion of different forms of preemption, see Viet D. Dinh, *Reassessing the Law of Preemption*, 88 GEO. L.J. 2085, 2100–12 (2000); Caleb Nelson, *Preemption*, 86 VA. L. REV. 225, 226–31 (2000). As many have noted, the Court’s preemption jurisprudence, particularly relating to preemption of state tort law, is marked by inconsistencies. See, e.g., Dinh, *supra*, at 2085; Jack Goldsmith, *Statutory Foreign Affairs Preemption*, 2000 SUP. CT. REV. 175, 178; Roderick M. Hills, Jr., *Against Preemption: How Federalism Can Improve the National Legislative Process*, 82 N.Y.U. L. REV. 1, 17–36 (2007); Nelson, *supra*, at 233. Although generally expansive in its preemption inquiry in recent years, the Court has also occasionally read the preemptive effect of federal statutes more narrowly. See, e.g., *Bates v. Dow Agrosciences LLC*, 125 S. Ct. 1788, 1801–02 (2005); Young, *supra* note 4, at 40–41.

109. See, e.g., *Arlington Cent. Sch. Dist. Bd. of Educ. v. Murphy*, 126 S. Ct. 2455, 2459 (2006); *Kimmel v. Fla. Bd. Regents*, 528 U.S. 62, 73 (2000).

110. *Watters v. Wachovia Bank, N.A.*, 127 S. Ct. 1559, 1579, 1585–86 (2007) (Stevens, J., dissenting). Similarly, in his *ADEC* dissent, Justice Kennedy argued to no avail that “the Court should at least insist upon a clear instruction from Congress” before finding that the EPA had power to oversee state BACT determinations. *Alaska Dep’t of Env’tl. Conservation (ADEC) v. EPA*, 540 U.S. 461, 513 (2004) (Kennedy, J., dissenting).

bases on which the Ninth Circuit below had invalidated the attorney general's interpretive rule.¹¹¹ By contrast, the Supreme Court viewed the challenge solely through an administrative law lens, holding that it was "unnecessary even to consider" application of such federalism-inspired canons to conclude that the CSA did not delegate to the attorney general the authority that he claimed.¹¹²

I believe the Court's general failure to invoke such federalism doctrines in these decisions reflects (at least in part) the fact that the decisions involved agency-administered statutes. Canons of constructions that require Congress to speak clearly whenever it is authorizing an agency to restrict state regulatory authority or otherwise substantially burden the states, even if justifiable on federalism grounds, stand in sharp contrast to the Court's usual approach to agency delegations. As *Whitman* demonstrates, the Court ordinarily does not require Congress to clearly specify the bounds of administrative authority, and it usually reads delegations of agency rulemaking authority quite generously.¹¹³ *Chevron* epitomizes this generous stance, with its identification of ambiguities and gaps in agency-administered statutes as implicit delegations.¹¹⁴ Moreover, in a world of concurrent authority, restrictions on state regulation and activity seem a predictable and common result of broad delegations of implementing authority to federal agencies—and thus hard to view as categorically outside of Congress's contemplation.¹¹⁵

111. See *Oregon v. Ashcroft*, 368 F.3d 1118, 1125 (9th Cir. 2004), *aff'd sub nom.* *Gonzales v. Oregon*, 126 S. Ct. 904 (2006).

112. *Gonzales v. Oregon*, 126 S. Ct. 904, 925 (2006). *But see* Gersen, *supra* note 34, at 207 (arguing that, in effect, the *Oregon* majority relied on a modified presumption against preemption that focuses on whether Congress has delegated authority to preempt state law).

113. See Thomas W. Merrill & Kathryn Tongue Watts, *Agency Rules with the Force of Law: The Original Convention*, 116 HARV. L. REV. 467, 471–73 (2002) (noting that grants of authority to agencies to adopt rules and regulations are read broadly as including power to issue rules with the force of law, although criticizing this practice as at odds with original congressional understandings). A recent example of such a generous reading is *AT&T Corp. v. Iowa Utilities Board*, 525 U.S. 366 (1999), in which the Court relied on a general grant of rulemaking authority to authorize the Federal Communications Commission (FCC) to issue rules governing state implementation of the 1996 Telecommunications Act, notwithstanding that the effect was to subject the states to federal agency oversight in a traditional area of state control and concern, *id.* at 377–85; see also *id.* at 402–04 (Thomas, J., dissenting) (documenting the states' longstanding role in regulating intrastate communications).

114. See *Chevron U.S.A. Inc., v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842–44 (1984).

115. In this regard, federalism canons of construction may differ from other nondelegation canons, such as requirements that Congress speak clearly before agencies will be deemed

3. *Administrative Law as a Federalism Vehicle.* The Court's unwillingness to impose constitutional or subconstitutional federalism limits on Congress does not mean a lack of concern with the implications of federal regulatory action for the states. On the contrary, such concern surfaces repeatedly in the six decisions, in challenges to federal agency action as well as in more traditional federalism contexts such as preemption litigation. Critically, however, the Court chose to address its federalism concerns from within the broad analytic rubric of administrative law rather than through more straightforward federalism doctrines.

The contrast between *Raich* and *Oregon* is singularly illustrative of this point. Although unsympathetic in *Raich* to claims that the CSA exceeded Congress's constitutional authority, the Court proceeded in *Oregon* to give voice to concerns about the impact of the CSA on the states through its administrative law analysis. This reliance on administrative law in lieu of constitutional law helps explain the striking change in position of many of the Justices between *Raich* and *Oregon*.¹¹⁶ It also sparked a plaintive complaint

authorized to apply statutes retroactively or extraterritorially, which Professor Cass Sunstein has maintained are used to narrow agency delegations. Sunstein, *supra* note 103, at 331–35 (listing these and other examples). Sunstein identifies the principle that “administrative agencies will not be allowed to interpret ambiguous provisions so as to preempt state law” as one such canon, *id.* at 331, but evidence of such a principle in current case law is lacking, as demonstrated by the continuing debate over administrative preemption, *see infra* note 177 (collecting cases); *see also AT&T Corp.*, 525 U.S. at 378 n.6, 397 (rejecting the claim that a presumption against preemption should apply against the FCC's assertion of jurisdiction to regulate state commission implementation of the 1996 Telecommunications Act on the grounds that with the Act, Congress “unquestionably” had limited state control over local telecommunications, and arguing that ambiguities in the statute should yield deference to the agency's views of its jurisdiction under *Chevron*). The Court recently invoked a federalism-inspired clear statement rule in an administrative context in *Nixon v. Mo. Municipal League*, 541 U.S. 125 (2004). But *Nixon* stands out from the mine run of most administrative action in that the case addressed whether a federal statute preempted a state's regulation of local governments, rather than its regulation of private parties—a feature that had led even the federal agency involved, the FCC, to conclude that clear evidence of a congressional desire to preempt was required. *Id.* at 130–31, 141.

116. Justices Stevens, Kennedy, Souter, Ginsburg, and Breyer all supported the claims of federal power in *Raich*, 125 S. Ct. 2195, 2198, 2209 (2005), and rejected them in *Oregon*, 126 S. Ct. 904, 910, 925 (2006), whereas Justice Thomas rejected the claim of federal power in *Raich*, 125 S. Ct. at 2222 (O'Connor, J., joined by Rehnquist, C.J., & Thomas, J., dissenting), and upheld it in *Oregon*, 126 S. Ct. at 926 (Scalia, J., joined by Roberts, C.J., & Thomas, J., dissenting). Justice Scalia was the lone member to affirm federal power in both cases, *see id.*; *Raich*, 125 S. Ct. at 2215 (Scalia, J., concurring in the judgment), and Justice O'Connor was the only one to vote against federal power on both occasions, *see Oregon*, 126 S. Ct. at 910, 925; *Raich*, 126 S. Ct. at 2221 (O'Connor, J., dissenting). Chief Justice Roberts, who dissented in

from Justice Thomas, who remarked in *Oregon* that though he was sympathetic to the federalism argument, “that is now water over the dam. The relevance of such considerations was at its zenith in *Raich*. . . . [but such] considerations have little, if any relevance where, as here, we are merely presented with a question of statutory interpretation, and not the extent of constitutionally permissible federal power.”¹¹⁷

Yet given the constitutional backdrop outlined earlier in this Section, the Court’s move to addressing federalism concerns through an administrative law framework makes sense. Administrative law offers a means by which the Court can raise such concerns while still respecting Congress’s ultimate regulatory authority. Under an administrative law framework, the Court’s scrutiny targets not Congress but federal agencies. The central question is whether a federal agency has overstepped its boundaries—whether by exercising broader authority than Congress delegated, violating statutory requirements, ignoring procedural mandates, or failing to adequately justify its decisions. Indeed, in the administrative law context the courts can position themselves as faithful agents of Congress, enforcing legislative will against a recalcitrant executive branch. Moreover, scrutinizing federal agency determinations is an activity in which federal courts frequently engage and for which they can draw on an established body of doctrine that also applies outside of federalism contexts.

The decisions are less clear about exactly how administrative law serves as a vehicle for advancing federalism concerns. Two seemingly distinct models emerge. In one, the Court stays well within the contours of “ordinary” administrative law, with the connection to federalism lying simply in the fact that application of standard doctrines redounds—or might redound—to the benefit of the states. In the other, the Court appears to be giving federalism concerns special salience in its administrative law analysis, deviating from standard doctrines in ways that help protect states against federal agency overreaching. This divergence in approach makes it difficult to reach any firm conclusions about how the Court envisions administrative law’s federalism role—as well as about whether the

Oregon, 126 S. Ct. at 926 (Scalia, J., joined by Roberts, C.J., & Thomas, J., dissenting), was not on the Court when *Raich* was decided.

117. *Oregon*, 126 S. Ct. at 941 (Thomas, J., dissenting).

Court is consciously employing administrative law to address federalism concerns at all. Yet this divergence should not obscure the more important point, which is the dominance of administrative law paradigms instead of federalism doctrines in these decisions. Thus, whether or not the Court perceives administrative law as serving a federalism function, it is at least approaching these cases in a manner that allows administrative law to play such a role.

B. Ordinary Administrative Law and Federalism

The decisions are notable for their frequent invocation of ordinary administrative law principles. In particular, three standard features of administrative law surface repeatedly: an emphasis on administrative procedure, the requirement of reasoned decisionmaking, and doctrines for reviewing agency statutory interpretations. For the most part, these staples of administrative law analysis are not overtly connected to federalism. In practice, however, their application served the interests of the states involved.

1. *Administrative Procedure: Redress and Participation.* Administrative procedure appears often in these decisions. In some cases, the procedures emphasized were administrative routes by which states could seek to alter federal requirements. Thus, for example, *Raich* emphasized the option of petitioning the attorney general to have marijuana removed from Schedule I and relisted as a Schedule II drug,¹¹⁸ and *Massachusetts* stressed that under the CAA Massachusetts had the right to petition the EPA to issue rules regulating greenhouse gas emissions.¹¹⁹ Similar emphasis on the importance of agency-level means of redress is evident in *ADEC*. There, the Court underscored that the EPA was willing to reconsider its rejection of ADEC's BACT determination if the state submitted additional evidence, dismissing the dissent's fears that this amounted to a "piling of process upon process."¹²⁰

Administrative procedure also surfaces occasionally in these decisions as a means of ensuring state participation and consultation in federal agency decisions. Again *ADEC* is illustrative: the majority described in detail the EPA's repeated communications with ADEC

118. *Raich*, 125 S. Ct. at 2215 (majority opinion).

119. *Massachusetts v. EPA*, 127 S. Ct. 1438, 1454-55 (2007).

120. *Alaska Dep't of Env'tl. Conservation (ADEC) v. EPA*, 540 U.S. 461, 502 n.21 (2004).

over the proposed permit and the BACT determination. These communications, it should be noted, were procedurally deficient and unnecessarily oblique.¹²¹ What appeared to matter more to the majority, however, was that the EPA had raised its concerns when the state agency was formulating the permit and had suggested specific ways that the state could satisfy them.¹²² By contrast, lack of consultation is a theme the *Oregon* majority returned to frequently, noting in particular that the attorney general failed to consult with Oregon notwithstanding Oregon's express request to meet "with Department of Justice officials should the Department decide to revisit the application of the CSA to assisted suicide."¹²³

Procedure—its use or nonuse—thus matters to the Court, especially the opportunities states enjoy to express their concerns to federal agencies and potentially obtain relief. The Court is not alone in emphasizing administrative procedure as a means of ensuring that federal agencies consider state interests. On occasion Congress has required that a federal agency engage in notice-and-comment rulemaking or analogous participatory procedures before displacing state regulatory authority.¹²⁴ Even more common are requirements that federal agencies consult with state and local officials in

121. The EPA submitted its first letter on the proposed permit outside the window of the public comment period, and appeared to act in response to points made by the National Park Service. *See id.* at 508 (Kennedy, J., dissenting). And the majority itself characterized the EPA's orders against the state agency and the facility involved as "skeletal" and "surely . . . not composed with ideal clarity." *Id.* at 477–78, 497 (majority opinion).

122. *See id.* at 480, 493–94, 501.

123. *Oregon*, 126 S. Ct. at 913; *see also id.* at 922 (noting "the apparent absence of any consultation with anyone outside of the Department of Justice who might aid in a reasoned judgment" as a factor weighing against granting the attorney general's views any deference).

124. *See, e.g.*, Riegle-Neal Interstate Banking and Branching Efficiency Act of 1994, 12 U.S.C. § 43(a) (2000); 30 U.S.C. § 1254(c) (2000) (requiring that the secretary of the interior provide for notice and hearing in the affected state before promulgating or implementing a federal program in lieu of state control under the Surface Mining Control and Reclamation Act); 47 U.S.C. §§ 253(a), (d) (2000) (authorizing the FCC to preempt state law in certain contexts but requiring that the agency proceed using notice-and-comment rulemaking); *see also* Unfunded Mandates Reform Act of 1995 (UMRA), 2 U.S.C. §§ 1531–32, 1535 (2006) (requiring agencies to consider impacts on state, local, or tribal governments or the private sector for rules that might result in an annual expenditure of \$100 million or more, and for such rules to consider alternatives and select the alternative that is "least costly, most cost-effective, or least burdensome" or explain why such an alternative was not chosen). On the UMRA's effect, see Elizabeth Garrett, *Framework Legislation and Federalism*, 83 NOTRE DAME L. REV. (forthcoming 2008) (manuscript *passim*).

formulating policy.¹²⁵ In like vein, Executive Order 13,132, which in substance dates back to President Reagan, imposes consultation and impact assessment requirements on agencies before they issue regulations with certain federalism implications.¹²⁶ A separate executive order requires that regulations “specif[y] in clear language, the preemptive effect, if any,” they are to be given.¹²⁷

Yet the six decisions give little guidance as to why exactly administrative procedure matters from a federalism perspective. Only in *Massachusetts* did the Court expressly draw a connection between procedure and federalism, with the majority emphasizing that Massachusetts was seeking to assert its statutory procedural rights in arguing that the state was “entitled to special solicitude in our standing analysis.”¹²⁸ By contrast, the *Raich* majority insisted that the administrative rescheduling procedure had “no relevance” to its assessment of the federalism challenge raised there.¹²⁹ Moreover, the *Raich* majority nowhere mentioned that the rescheduling route was available to the state of California (as opposed to the individual plaintiffs in the case), which would have more clearly indicated an intent to use administrative procedures to alleviate federalism tensions. In *ADEC* and *Oregon*, meanwhile, use or nonuse of procedures appears to factor primarily in the Court’s assessment of the reasonableness of the agency actions at stake, rather than providing an independent basis for invalidation of agency action.

125. See, e.g., 5 U.S.C. § 8508 (2006) (unemployment compensation regulations); 15 U.S.C. § 717b-1(b) (2006) (siting of natural gas facilities); 19 U.S.C. §§ 3512, 3312 (2006) (dispute settlements under GATT and NAFTA); 21 U.S.C. § 1703 (2006) (implementation of national drug control policy); see also Sharkey, *supra* note 3, at 254.

126. See Exec. Order No. 13,132 § 6, 3 C.F.R. 206 (2000), reprinted in 5 U.S.C. § 601, 3 C.F.R. 206, 209–10 (2006) (requiring, “to the extent practicable and permitted by law,” that an agency submit an impact statement whenever a proposed regulation has federalism implications and imposes substantial direct compliance costs on states that are not statutorily required or preempts state law). Executive Order No. 13,132 also emphasizes the importance of early consultation with state and local officials and of federal agencies’ relying on state standards and regulation in policymaking generally. See *id.* § 3, 3 C.F.R. at 208.

127. See Exec. Order No. 12,988 § 3(b)(2), 3 C.F.R. 157 (1996), reprinted in 28 U.S.C. § 519 (2000); see also Exec. Order No. 12,866, 3 C.F.R. 638 (1993), reprinted in 5 U.S.C. § 601 (2006) (requiring agencies to “respect the role of State, local, and tribal governments” by, when feasible, consulting states before imposing federal regulatory requirements and seeking to minimize those burdens).

128. *Massachusetts v. EPA*, 127 S. Ct. 1438, 1454–55 (2007).

129. *Gonzales v. Raich*, 125 S. Ct. 2195, 2212 n.37 (2005).

The lack of emphasis on notice-and-comment rulemaking further complicates efforts to understand the role procedure plays in these decisions. Unlike other recent administrative law precedent in which such rulemaking is given central importance,¹³⁰ in these decisions the Court put little weight on its use (in *Watters* and *Massachusetts*) or its nonuse (in *Oregon*, *ADEC*, and *Riegel*). Yet, as discussed in greater depth in Part III.A,¹³¹ notice-and-comment rulemaking seems particularly conducive to ensuring that states can force federal agencies to respond to their concerns. The lack of emphasis on it in these decisions is thus surprising.

2. *Reasoned Decisionmaking.* More “substantive” administrative law doctrine also features prominently in these decisions.¹³² Perhaps the most fundamental substantive administrative law demand is that an agency must engage in reasoned decisionmaking—in the Court’s words, an agency must “examine the relevant data and articulate a satisfactory explanation for its action including a rational connection between the facts found and the choice made.”¹³³ The requirement of reasoned decisionmaking appears in some form in all but one of six decisions.¹³⁴ Even

130. See *Long Island Care at Home, Ltd., v. Coke*, 127 S. Ct. 2339, 2350–51 (2007); *Nat’l Cable & Telecomms. Ass’n v. Brand X Internet Servs.*, 125 S. Ct. 2688, 2699 (2005); *United States v. Mead Corp.*, 533 U.S. 218, 231 (2001).

131. See *infra* text accompanying notes 219–30.

132. Some would classify what I am calling substantive dimensions of administrative law—the reasoned decisionmaking demand and deference doctrines—as procedural. See, e.g., Lisa Schultz Bressman, *Procedures as Politics in Administrative Law*, 107 COLUM. L. REV. 1749, 1760, 1765 (2007). Probably the most accurate characterization is to acknowledge that these administrative law requirements are *both* substantive and procedural: substantive, because their most direct target is the substance of an agency’s decisions; procedural, because scrutiny of substance will indirectly affect an agency’s procedural choices and because in some cases the strength of scrutiny turns on the procedures an agency used. Indeed, substance and procedure are rarely far apart in administrative law. My intent in classifying these aspects of administrative law as substantive is simply to contrast them with instances wherein the courts focus more directly on procedures, not to deny they also have procedural implications.

133. *Motor Vehicle Mfrs. Ass’n v. State Farm Mut. Auto Ins. Co.*, 463 U.S. 29, 43 (1983) (internal quotation marks omitted).

134. The exception is *Watters*. The omission of reference to the reasoned decisionmaking requirement reflects *Watters*’s status as a preemption suit against state agency action rather than a challenge to federal agency action, and the fact that *Watters* was decided on *Chevron* step one grounds based on the Court’s independent reading of the statutory provisions involved, with the Court insisting that it was not relying on the agency’s views. *Watters v. Wachovia Bank, N.A.*, 127 S. Ct. 1559, 1566, 1572 (2007).

Massachusetts, which focused primarily on questions of statutory interpretation, repeatedly criticized the EPA on this front, concluding that the EPA had “offered no reasoned explanation for its refusal to decide whether greenhouse gases cause or contribute to climate change.”¹³⁵ The majority’s willingness to rely on this ground is particularly striking given that the case arose out of a rulemaking petition denial, a context in which agency policy choices usually receive great deference.¹³⁶ Reasoned decisionmaking is also an important underlying theme in *ADEC*, in which the majority repeatedly characterized the EPA’s actions in terms traditionally associated with reasoned agency determinations.¹³⁷

Here too, the decisions do not expressly link application of the reasoned decisionmaking requirement to federalism. *Raich* perhaps comes closest, with the majority’s suggestion that marijuana’s continued listing as a Schedule I drug under the CSA might be arbitrary at the same time as it rejected a straightforward federalism challenge to the CSA.¹³⁸ Nonetheless, in practice, application of this

135. *Massachusetts v. EPA*, 127 S. Ct. 1438, 1463 (2007); *see also id.* at 1463 (arguing that factors identified by the EPA do not “amount to a reasoned justification for declining to form a scientific judgment” and that “[i]f the scientific uncertainty is so profound that it precludes EPA from making a reasoned judgment as to whether greenhouse gases contribute to global warming, EPA must say so”). *Oregon* is more devoted to parsing statutory text than *Massachusetts*, yet here too the Court makes note of factors traditionally associated with reasoned decisionmaking—consistency, coherence, thoroughness, expertise, openness to contrary views—in finding that the attorney general’s interpretation did not merit deference under *Skidmore*. *Gonzales v. Oregon*, 126 S. Ct. 904, 922 (2006). In *Riegel*, the reasoned decisionmaking requirement’s appearance was far more fleeting, reflecting that like *Watters* the case did not involve a direct challenge to an agency action and the Court insisted it was not relying on the agency’s views. *Riegel v. Medtronic, Inc.*, 128 S. Ct. 999, 1005–06, 1011 (2008). Even so, the Court noted in passing that it found the FDA’s reading of one of its own regulations “less than compelling” and that inconsistency in the agency’s views might undercut any deference due. *Id.* at 1010.

136. *Massachusetts*, 127 S. Ct. at 1459; *see infra* text accompanying note 148.

137. *See, e.g.*, *Alaska Dep’t of Env’tl. Conservation (ADEC) v. EPA*, 540 U.S. 486, 487–91 (2004) (emphasizing the cogency and consistency of the EPA’s interpretation as well as the limited authority the EPA claimed); *id.* at 495–502 (determining that the EPA’s rejection of Alaska’s BACT determination was not arbitrary and capricious).

138. *Gonzales v. Raich*, 125 S. Ct. 2195, 2212 n.37 (2005). The Court’s 2002 decision in *New York v. FERC*, 535 U.S. 1 (2002), offered an even more direct linkage between reasoned decisionmaking requirements and federalism, with the Court invoking federalism implications in support of the agency’s policy choice. The Court there ruled that even if FERC could assert jurisdiction over bundled retail transmissions, the agency’s discretionary choice not to do so in part because of the “implication for the States’ regulation of retail sales” was justified. *Id.* at 27–28.

basic administrative law demand served to protect state interests by guarding against federal agency overreaching at the states' expense. This dynamic is evident in *ADEC*, even though the state was not successful on its claims; there, the majority emphasized that the federal courts were available to protect states against inequitable agency conduct and then reviewed the basis for the EPA's decision fairly closely before sustaining it.¹³⁹

The lack of a more overt connection between the reasoned decisionmaking requirement and state interests again leaves a number of questions unanswered. Most importantly, does the fact that an agency decision will substantially intrude on the states lead to a higher burden of justification or greater scrutiny of the decision's underlying basis? Or to put the point in the context of *Raich*, does the fact that a number of states have legalized medical use of marijuana mean that the attorney general's refusal to reschedule it deserves more searching scrutiny than lower courts had so far applied?¹⁴⁰ The majority perhaps suggested as much by reaching out to call into question marijuana's Schedule I status, but it never said so directly.

3. *Statutory Interpretation Doctrines.* Equally evident in these decisions is reliance on general administrative law doctrines regarding when agency statutory interpretations trigger deference. *Oregon* is the most prominent example here, with the majority insisting that "familiar principles" guided its inquiry into the degree of deference due the attorney general's interpretive rule.¹⁴¹ But all the decisions employed standard doctrinal frameworks to some extent in their assessments of the merits of agency statutory interpretations. Thus, in current administrative law parlance, *Oregon* is a *Chevron* step zero determination because it focuses on determining whether the attorney general was delegated authority to act with legal force on the question of acceptable medical practice.¹⁴² *Massachusetts*, *Watters*, and

139. See *ADEC*, 540 U.S. at 495–502.

140. If so, *Raich* may signal a willingness to subject agency reasoning to greater scrutiny than usual when it significantly burdens the states. See *infra* text accompanying note 166.

141. *Gonzales v. Oregon*, 126 S. Ct. 904, 914–15 (2006).

142. Professor Cass Sunstein has characterized *Mead* as adding a new step zero to the *Chevron* framework. Sunstein, *supra* note 9, at 191 & n.20; see also Thomas W. Merrill, *The Mead Doctrine: Rules and Standards, Meta-Rules and Meta-Standards*, 54 ADMIN. L. REV. 807, 812–13 (2002).

Riegel, in turn, represent *Chevron* step one determinations.¹⁴³ *Skidmore* deference, the amorphous category of deference accorded agency statutory interpretations not qualifying for deference under *Chevron*, is invoked in *ADEC*, *Oregon*, and *Riegel*.¹⁴⁴ *Riegel* also references the substantial deference ordinarily accorded an agency's interpretations of its own rules.¹⁴⁵

Once again, however, no opinion expressly describes these standard deference doctrines as means for addressing federalism concerns. Here, it is *Oregon* that comes closest, with its invocation of federalism concerns as one reason not to defer, under either *Chevron* or *Skidmore*, to the attorney general's interpretation of "legitimate medical purpose" as excluding assisted suicide.¹⁴⁶ More importantly, in these decisions the Court subjected agency statutory interpretations to unusually searching scrutiny, despite its invocation of standard deference frameworks.¹⁴⁷ Whether the Court was actually creating a distinct approach to reviewing agency statutory interpretations for use when agency interpretations substantially impact the states is a question I discuss in the next Section. But that possibility does not remove the significance of the fact that the Court

143. See *Riegel v. Medtronic, Inc.*, 128 S. Ct. 999, 1009 (2008) (finding preemption clearly mandated by the text of the MDA); *Massachusetts v. EPA*, 127 S. Ct. 1438, 1459–62 (2007) (concluding that the CAA unambiguously includes carbon dioxide as an air pollutant and that the EPA's policy reasons for refusing to regulate carbon dioxide conflict with "the clear terms" of the CAA); *Watters v. Wachovia Bank, N.A.*, 127 S. Ct. 1559, 1572–73 (2007) (holding that the NBA itself preempts state law and thus the question of deference to the OCC's view did not arise). Even *ADEC*, notwithstanding its statement that *Chevron* did not apply (and its subsequent references to the reasonableness of the EPA's view of an ambiguous provision) has a step one air, with language suggesting the majority believed the EPA's interpretation was the only plausible reading of the statute:

We fail to see why Congress, having expressly endorsed an expansive surveillance role for EPA in two independent CAA provisions, would then implicitly preclude the Agency from verifying substantive compliance with the BACT provisions and, instead, limit EPA's superintendence to the insubstantial question whether the state permitting authority had uttered the key words "BACT."

ADEC, 540 U.S. at 490.

144. *Riegel*, 128 S. Ct. at 1009 (noting that *Skidmore* deference would apply were the statute ambiguous); *Oregon*, 126 S. Ct. at 921–22; *ADEC*, 540 U.S. at 487–88, 493, 496. The *ADEC* majority itself did not expressly invoke *Skidmore*, but cited to other recent precedent that did so. See *id.* at 488 (citing *Wash. State Dep't of Soc. & Health Servs. v. Guardianship Estate of Keffeler*, 537 U.S. 371, 385 (2003); *United States v. Mead Corp.*, 533 U.S. 218, 234 (2001)).

145. See *Riegel*, 128 S. Ct. at 1009. For discussions of how this same deference doctrine surfaced (or not) in *Oregon*, see *infra* text accompanying notes 159–60.

146. *Oregon*, 126 S. Ct. at 921–25.

147. See *infra* text accompanying notes 151–66.

is invoking standard administrative law doctrines for reviewing agency statutory interpretations. At a minimum, this reinforces the point that the Court sees these decisions predominantly through an administrative law rubric, notwithstanding their federalism implications.

C. Special Federalism-Inspired Administrative Law

Ordinary administrative law thus surfaces regularly in these decisions and generally operates to protect state interests, whether or not states prove victorious on their claims. Yet the Court's failure to expressly link federalism to federal administrative law raises the possibility that this state-protective impact was unintended by the Court. Moreover, as several of these decisions took the form of administrative law challenges to federal agency action, the dominance of administrative law in the decisions is not surprising. Hence, although the connections between federalism and administrative law in these decisions are noteworthy, it remains open whether the Court is consciously using administrative law as a federalism surrogate.

Stronger evidence that the Court may be seeking to address federalism concerns through administrative law comes from a number of instances in which the decisions give special weight to federalism concerns in their application of administrative law doctrines. The contrast between the decisions and the more usual application of these doctrines is striking, and federalism concerns appear to be what explains the variation. Yet although supporting the conclusion that the Court is using administrative law to protect state interests, it is less clear whether these examples portend development of a distinct form of administrative law for use when federal agency action raises serious federalism concerns.

1. *Massachusetts and Special Rules for State Standing.* The most readily ascertainable instance of the Court giving special weight to federalism concerns is *Massachusetts's* suggestion of distinct standing rules for states. As noted in Part I.A, exactly what the majority intends by its invocation of "special solicitude" for the states in standing analysis is not obvious; such solicitude might mean a generous stance in determining whether the traditional trio of requirements for standing is met, or exempting the states from the traditional analysis altogether when their sovereignty interests are

implicated. What is plain, however, is the majority's willingness to treat the states differently from other plaintiffs in challenging federal administrative action and to do so because of the states' status as sovereign entities within the federal union. In short, *Massachusetts* seems to represent a federalism-inspired deviation from standard administrative law.

Interestingly, however, the majority made no mention of federalism in addressing another administrative law issue centrally implicated in the case—the standard for reviewing denials of rulemaking petitions. Although the Court stated that review of rulemaking denials “is ‘extremely limited’ and ‘highly deferential,’” it nonetheless took a fairly aggressive interpretive stance in concluding that section 202(a)(1) of the CAA prohibited the EPA from refusing to regulate carbon dioxide on general policy grounds.¹⁴⁸ Moreover, the Court elsewhere has expressed concerns about subjecting agency nonenforcement decisions to judicial scrutiny.¹⁴⁹ The majority could have justified undertaking more rigorous review of the rulemaking denial at issue with limited precedential impact by again invoking *Massachusetts's* status as a sovereign state. Having lost its sovereign power to regulate through statutory preemption, *Massachusetts* arguably has a special right to demand review of whether the federal government's refusal to act accords with the governing statute. That the majority did not make this argument raises a real question about the extent to which it intended to create a distinct administrative law to govern when federal action impinges on the states.

2. *Heightened Substantive Scrutiny to Protect State Interests.*
Aside from *Massachusetts*, none of the decisions expressly invoked

148. *Massachusetts v. EPA*, 127 S. Ct. 1438, 1459 (2007). For a defense of this assessment of *Massachusetts's* statutory reasoning, see *infra* text accompanying notes 151–53.

149. See *Heckler v. Chaney*, 470 U.S. 821, 831–32 (1985). Review of rulemaking denials is somewhat different than review of other agency inaction, in particular agency refusal to take enforcement action in a specific case. Agencies must offer some explanation for denying a rulemaking petition and such denials are often accompanied by additional formalities—including, when the agency seeks public comment on a rulemaking petition (as the EPA did in *Massachusetts*), the presence of an agency record. See *Massachusetts*, 127 S. Ct. at 1459; *Am. Horse Prot. Ass'n v. Lyng*, 812 F.2d 1, 3–4 (D.C. Cir. 1987). Nonetheless, the practical effects of searching judicial review of rulemaking denials are quite similar: agencies potentially would need to devote substantial resources to justifying denials, and might be forced to undertake rulemakings that they deemed less pressing than others. For a discussion of how resource allocation is implicated by judicial review of agency action, see Eric Biber, *The Importance of Resource Allocation in Administrative Law*, 60 ADMIN. L. REV. 1, 16–51 (2008).

federalism as a reason to adopt new doctrinal rules. Yet most appeared to deviate from standard administrative law, in particular involving exceptionally searching scrutiny of governing statutes and agency decisionmaking.¹⁵⁰

Massachusetts is one example. Section 202(a)(1), the provision centrally at issue there, combines reference to the administrator's judgment with mandatory language stating that the administrator shall set standards and seeming to significantly limit the grounds on which the administrator can refuse to do so.¹⁵¹ Although the majority's interpretation of section 202(a)(1) as requiring that the administrator reach a judgment on whether to set standards based on particular factors may well be the best reading, it is hard to claim that the provision is not ambiguous regarding the extent of the agency's discretion.¹⁵² Yet the Court reversed the agency on *Chevron* step one grounds, concluding that the agency's interpretation was "divorced from the statutory text."¹⁵³

150. An exception is *Riegel*, in which eight Justices agreed that the MDA's express preemption clause plainly required preemption of the state tort suit in question. *See Riegel*, 128 S. Ct. at 1006–09; *id.* at 1011–12 (Stevens, J., concurring) (emphasizing the clarity of statutory language as mandating preemption).

151. 42 U.S.C. § 7521(a)(1) (2000).

152. *See* Freeman & Vermeule, *supra* note 37, at 53, 93 (noting the ambiguity in section 202(a)(1) regarding whether the administrator could refuse to make a judgment, and suggesting that the EPA's claim for *Chevron* deference was stronger than that of the government agencies in *Gonzales v. Oregon*, 126 S. Ct. 904 (2006), or *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120 (2000)); Watts & Wildermuth, *supra* note 53, at 1041 (arguing that the Court's "review of the EPA's reasons for declining to regulate . . . was meticulous and probing"). *But see* Jonathan H. Adler, *Massachusetts v. EPA Heats Up Climate Policy No Less Than Administrative Law: A Comment on Professors Watts and Wildermuth*, 102 NW. U. L. REV. COLLOQUY 32, 36 (2008), <http://www.law.northwestern.edu/lawreview/Colloquy/2007/20/LRColl2007n20Adler.pdf> (arguing that the Court's review of the EPA's decision was not "particularly searching or severe").

153. *Massachusetts*, 127 S. Ct. at 1462–63. The majority also rejected the EPA's conclusion that carbon dioxide was not a pollutant on *Chevron* step one grounds, concluding "the statutory text forecloses EPA's reading." *Id.* at 1459–60. Here the Court's determination of statutory clarity has more basis, for as the majority noted, *see id.*, the statutory definition of air pollutant is extremely broad, *see* 42 U.S.C. § 7602(g). Yet viewing the definitional section in the context of the regulatory scheme as a whole arguably undermines this clarity somewhat. As Justice Scalia argued, the focus of the CAA regulatory scheme in general is on limiting ambient air pollutants whose presence in the air varies geographically. *See Massachusetts*, 127 S. Ct. at 1475–77 (Scalia, J., dissenting); *see also* Adler, *supra* note 152, at 40 (noting the majority's rejection in *Massachusetts* that "the NAAQS regulatory regime is fundamentally ill-suited to greenhouse gas control"); Freeman & Vermeule, *supra* note 37, at 72 ("The NAAQS system does not seem workable for greenhouse gases in part because states could never ensure compliance with

The Court's statutory analysis in *Watters* is another instance of an expansive *Chevron* step one inquiry. The authorization for operating subsidiaries in the NBA is oblique, resting on the statute's grant of "incidental powers" and a separate statute's distinction between financial subsidiaries and other subsidiaries.¹⁵⁴ More importantly, accepting that the NBA authorized national banks' use of operating subsidiaries, a point Michigan did not challenge, further inferences are required to conclude that the NBA authorizes the use of state-chartered operating subsidiaries or displacement of state supervision of such subsidiaries. Notably, § 484(a), the NBA provision restricting state oversight powers, only refers expressly to national banks themselves.¹⁵⁵ Perhaps, as the majority argued, the close identification of national banks and their operating subsidiaries (embodied in a statutory prescription that operating subsidiaries engage only in activities national banks can engage in and conduct such activities "subject to the same terms and conditions that govern the conduct of such activities by national banks"¹⁵⁶) justifies reading § 484(a) as extending to operating subsidiaries. But that move is not textually mandated.¹⁵⁷ Instead, as the appellate courts addressing the question had generally concluded, the NBA appears ambiguous on the question of whether states can exercise supervisory authority over state-chartered subsidiaries of national banks.¹⁵⁸

Oregon is a third example of the Court subjecting federal agency actions to unusually searching scrutiny. Notably, the requirement that prescriptions of controlled substances must serve a "legitimate medical purpose" was imposed by an earlier attorney general regulation and ordinarily administrative agencies' interpretations of their own rules receive substantial deference.¹⁵⁹ But the majority

federally established concentration limits; those gases are emitted from many world-wide sources not under their control.").

154. 12 U.S.C. § 24a(g)(3)(A) (2006).

155. *Id.* § 484(a) ("No national bank shall be subject to any visitorial powers except as authorized by Federal law . . .").

156. *Id.* § 24a(g)(3)(A).

157. *See id.*; *Watters v. Wachovia Bank, N.A.*, 127 S. Ct. 1559, 1570–72 (2007).

158. *See Nat'l City Bank v. Turnbaugh*, 463 F.3d 325, 331–32 (4th Cir. 2006); *Wachovia Bank, N.A. v. Burke*, 414 F.3d 305, 315–18 (2d Cir. 2005); *Wachovia Bank, N.A. v. Watters*, 431 F.3d 556, 561 (6th Cir. 2005), *aff'd* 127 S. Ct. 1559 (2007); *Wells Fargo Bank, N.A. v. Boutris*, 419 F.3d 949, 959 n.12 (9th Cir. 2005).

159. *E.g.*, *Thomas Jefferson Univ. v. Shalala*, 512 U.S. 504, 512 (1994) ("We must give substantial deference to an agency's interpretation of its own regulations."). Such deference

refused to grant deference here on the novel ground that the regulation at issue merely parroted statutory language.¹⁶⁰ Similarly, the CSA expressly delegated authority to the attorney general to “promulgate rules and regulations . . . relating to the registration and control of the . . . dispensing of controlled substances.”¹⁶¹ Such express delegations are usually read expansively, but the majority here was far less generous, concluding that the attorney general’s authority was limited to changing a substance’s classification schedule and guarding against diversion.¹⁶² In addition, the CSA authorizes the attorney general to deny, suspend, or revoke a physician’s registration if the registration is “inconsistent with the public interest.”¹⁶³ Terms such as “the public interest” are frequently viewed as conveying broad policymaking authority—indeed, the more commonly voiced concern is that such a delegation leaves the responsible agency official essentially unconstrained in setting policy.¹⁶⁴ The majority, however, viewed this provision narrowly and rejected Attorney General Ashcroft’s claim that the provision authorized him to determine that assisted suicide was not in the public interest.¹⁶⁵

Even *Raich* can be understood as an instance of unusually searching scrutiny of agency decisionmaking. No petition to

today is often referred to as *Auer* deference, based on the decision in *Auer v. Robbins*, 519 U.S. 452, 461 (1997). See, e.g., *Gonzales v. Oregon*, 126 S. Ct. 904, 915 (2006).

160. *Oregon*, 126 S. Ct. at 915–16. Although perhaps a good reason not to grant deference, this antiparroted rule was not an established “familiar principle” but instead a creation of the *Oregon* majority.

161. 21 U.S.C. §§ 821, 871(b) (2000).

162. *Oregon*, 126 S. Ct. at 917.

163. 21 U.S.C. §§ 824(a)(4), 822(a)(2).

164. See, e.g., *Whitman v. Am. Trucking Ass’n*, 531 U.S. 457, 468, 474–75 (2001) (noting the often-wide scope of authority given to agencies in determining the reach of statutory terms, including “statutes authorizing regulation in the public interest,” but emphasizing that even such broad delegations have been found to contain constitutionally required minima of an “intelligible principle” to guide agency discretion and thus are constitutional (internal quotation marks omitted)); *Nat’l Broad. Co. v. United States*, 319 U.S. 190, 225–26 (1943) (considering the claim that “the standard of ‘public interest’ governing the exercise of the powers delegated to the Commission by Congress is so vague and indefinite that, if it be construed as comprehensively as the words alone permit, the delegation of legislative authority is unconstitutional,” but ultimately rejecting this argument).

165. Although deviating from administrative law precedent in these ways, the result in *Oregon* is nonetheless defensible as a straightforward exercise in statutory interpretation. The attorney general’s broad assertion of power ill fits the CSA as a whole, which intended the secretary of HHS and the states to play a major role in regulating medical practice. Cf. Bressman, *supra* note 37, at 787 (arguing that *Oregon* could have been decided on *Chevron* step two grounds as representing an unreasonable agency interpretation).

reschedule marijuana was before the Court. Moreover, as the majority noted, prior challenges to the federal government's refusal to reschedule marijuana had been rebuffed—not surprisingly, as the proper listing of marijuana would seem to be the type of determination requiring scientific expertise and touching on safety concerns to which the courts usually are quite deferential.¹⁶⁶ Yet the Court went out of its way to suggest that the evidence of marijuana's medicinal potential might require rescheduling.

Not only did the Court undertake fairly exacting scrutiny in these decisions, its doing so appears driven in large part by federalism concerns.¹⁶⁷ For example, the *Watters* majority's reliance on independent scrutiny of the NBA instead of deferring to the OCC's interpretation—particularly given that both approaches produced the same result—seems only explained as an effort to avoid the federalism implications of administrative preemption. And the *Oregon* majority was plainly concerned that the interpretive rule undermined the federal-state balance embodied in the CSA.¹⁶⁸ Similarly, it is hard to explain why the Court in *Raich* would suggest that marijuana's listing as a Schedule I drug was unsupported except to signal that administrative relisting represented a means of navigating the specific federalism tensions in that case.

Thus, the searching scrutiny in these decisions provides evidence that the Court is using administrative law analysis to address federalism concerns. But use of such scrutiny in these decisions does not clearly put them outside the pale of ordinary administrative law. *Watters* and *Massachusetts* are hardly alone in embodying vigorous

166. For example, the courts repeatedly refused to overturn the FAA's Age Sixty Rule, despite their concerns about the agency's continued adherence to the rule. *See, e.g.*, *Yetman v. Garvey*, 261 F.3d 664, 672 (7th Cir. 2001); *Prof'l Pilots Fed. v. FAA*, 118 F.3d 758, 769–70 (D.C. Cir. 1997) (upholding the FAA's Age Sixty Rule). Congress recently enacted legislation raising the mandatory retirement age to sixty-five. Fair Treatment for Experienced Pilots Act, Pub. L. 110-135, § 2(a), 121 Stat. 1450, 1450 (2007) (to be codified as amended at 49 U.S.C. § 44729).

167. *Massachusetts* may be an exception; what seemed to be driving the Court in that decision were instead separation of powers concerns—specifically, the belief that the Bush administration was failing to comply with a clear congressional instruction because of its differing policy views. Of course, given the importance of representation of the states in Congress to the federalism system, it is not difficult to translate the Court's insistence on the executive branch's fidelity to congressional lawmaking into federalism terms. But it is not apparent from the decision, even with the reference to special state standing, that the Court itself did so.

168. For a similar assessment, see Gersen, *supra* note 34, at 245.

Chevron step one inquiries,¹⁶⁹ and indeed the appropriate scope of step one has long been a source of debate.¹⁷⁰ Courts also vary in the strength of their scrutiny of agency reasoning, often applying more intense “hard look” review to notice-and-comment rulemaking, the type of procedure involved in rescheduling decisions under the CSA and emissions setting under the CAA.¹⁷¹ Moreover, courts sometimes undertake more intensive scrutiny of agency decisionmaking when a basis exists to conclude that politics or ideology led an agency to ignore contrary facts.¹⁷² Nor, finally, has the Court only required detailed evidence of an agency’s authority to regulate in federalism contexts.¹⁷³ In short, whatever its doctrinal formulae state, as a practical matter administrative law embraces a range of deference;

169. See, e.g., *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 159–61 (2000); *MCI Telecomms. Corp. v. AT&T Co.*, 512 U.S. 218, 225–29 (1994). *Brown & Williamson* is a particularly interesting precursor to the Court’s approach in the federalism–administrative law decisions. As John Manning has argued, in *Brown & Williamson* the Court took a narrow view of the underlying statute, in part it appears out of constitutional nondelegation concerns regarding the breadth of authority asserted by the agency. See John F. Manning, *The Nondelegation Doctrine as a Canon of Avoidance*, 2000 SUP. CT. REV. 223, 233–37. Yet the Court claimed to be operating within the *Chevron* framework. *Brown & Williamson*, 529 U.S. at 159.

170. See, e.g., Kristin E. Hickman & Matthew D. Krueger, *In Search of the Modern Skidmore Standard*, 107 COLUM. L. REV. 1235, 1264–67 (2007); Thomas Miles & Cass Sunstein, *Do Judges Make Regulatory Policy? An Empirical Investigation of Chevron*, 73 U. CHI. L. REV. 823, 828–29, 838 n.26 (2006); Sunstein, *supra* note 9, at 207, 237–42.

171. See 21 U.S.C. § 811(a) (2000) (CSA); 42 U.S.C. § 7409(a) (2000) (CAA); *infra* note 292 and accompanying text (commenting on the varying approaches taken by courts with respect to the “hard look” review).

172. See *Motor Vehicle Mfrs. Ass’n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 49 (1983) (suggesting that the agency may have been unduly swayed by the preferences of the automobile industry in the course of closely scrutinizing and rejecting the agency’s decision to repeal passive restraint requirements); see also Freeman & Vermeule, *supra* note 37, at 87–89 (viewing *Massachusetts* as hearkening back to a pre-*Chevron* vision of administrative law under which independence and expertise are prized over political accountability). On the relationship between law and politics in agency decisionmaking, see Peter L. Strauss, *When the Judge Is Not the Primary Official with Responsibility to Read: Agency Interpretation and the Problem of Legislative History*, 66 CHI.-KENT L. REV. 321, 322, 335 (1990).

173. See, e.g., *Brown & Williamson*, 529 U.S. at 159–60 (holding that the FDA lacked authority to regulate tobacco use, emphasizing that the FDA was “assert[ing] jurisdiction to regulate an industry constituting a significant portion of the American economy” and concluding that “Congress could not have intended to delegate a decision of such economic and political significance to an agency in so cryptic a fashion”).

the divide between ordinary and extraordinary here is far from stark.¹⁷⁴

D. Administrative Preemption

The current debate over administrative preemption merits special note, for it is in this context that the relationship between federalism and administrative law has surfaced most prominently. Doctrinally, it is well established that substantive requirements imposed by federal agencies, for example through legislative rules, can preempt state law.¹⁷⁵ But disagreement exists over who should have primary authority to interpret the preemptive scope of agency rules or the statutes agencies are charged with implementing. Ordinarily, such agency interpretations would qualify for *Chevron* deference or its equivalent, assuming that the statute or rule at issue was ambiguous. However, the dramatic increase in agency interpretations of statutes and rules as broadly preempting state law (including state tort law)—a trend that became pronounced in 2006—has led a number of scholars and jurists to conclude that agency preemption interpretations should receive more limited *Skidmore* deference or perhaps no deference at all.¹⁷⁶ Put differently, they argue

174. For an empirical investigation documenting the range of deference the Court employs in reviewing agency statutory interpretations, see generally William N. Eskridge, Jr., & Lauren E. Baer, *The Continuum of Deference: Supreme Court Treatment of Agency Statutory Interpretations from Chevron to Hamdan*, 96 GEO. L.J. 1083 (2008).

175. See, e.g., *City of New York v. FCC*, 486 U.S. 57, 64 (1988); *Fidelity Fed. Sav. & Loan Ass'n. v. de la Cuesta*, 458 U.S. 141, 154, 159–67 (1982); *United States v. Shimer*, 367 U.S. 374, 381, 383 (1961). In the past, the power of agencies to preempt state law through their substantive enactments has also not been a source of much scholarly dispute. See, e.g., Nina A. Mendelson, *Chevron and Preemption*, 102 MICH. L. REV. 737, 753–55 (2004) [hereinafter Mendelson, *Chevron and Preemption*]. But see Clark, *supra* note 5, at 1342–46 (arguing that only laws adopted pursuant to Article I, Section 7 qualify as “Laws of the United States” for purposes of the Supremacy Clause, a test that administrative regulations fail). More recently, however, some scholars have voiced concerns about agencies’ power to preempt state law even through their substantive enactments. See Nina A. Mendelson, *A Presumption Against Agency Preemption*, 102 NW. U. L. REV. 695, 698, 706 (2008) [hereinafter Mendelson, *A Presumption Against Agency Preemption*]; Thomas W. Merrill, *Preemption and Institutional Choice*, 102 NW. U. L. REV. 727 (2008).

176. See *Watters v. Wachovia Bank, N.A.*, 127 S. Ct. 1559, 1584 (2007) (Stevens, J., dissenting); Mendelson, *Chevron and Preemption*, *supra* note 175, at 740–42; Merrill, *supra* note 175, at 775; Catherine M. Sharkey, *Products Liability Preemption: An Institutional Approach*, 76 GEO. WASH. L. REV. 449, 491–98 (2008); Ernest A. Young, *Executive Preemption*, 102 NW. U. L. REV. 869, 886–92 (2008).

for development of a special federalism-inspired deference doctrine for preemption contexts.

Whether (and in what way) courts should defer to agency preemption determinations is the question the Court evaded in *Watters*. The *Watters* majority's reliance on an expansive *Chevron* step one inquiry in lieu of deferring to the OCC might signal that these Justices, as well as the dissenters, had doubts about the appropriateness of *Chevron* deference in the preemption context.¹⁷⁷ On the other hand, the majority's failure to acknowledge the unusual breadth of its statutory investigation may indicate some ambivalence about devising special administrative law doctrines to reflect federalism concerns.

Although punting on this deference question, *Watters* and the other decisions in the federalism-administrative law sextet carry important implications for the administrative preemption debate. In particular, the decisions reveal the theoretical limitations of this debate, which tends to portray federalism and ordinary administrative law as inherently in conflict. One effect is to downplay the possibility that administrative law could serve as a means of reinforcing federalism—and vice versa.¹⁷⁸ Although tensions exist between

177. On several prior occasions the Court has similarly avoided taking a position on the level of deference due agency interpretations, although specific Justices have voiced positions. *Geier v. Am. Honda Motor Co.*, 529 U.S. 861, 883–86 (2000) (stating that the Department of Transportation's position that a federal regulatory standard preempted the state tort action at issue should be accorded "some weight," but holding deference unnecessary to conclude that preemption was appropriate); *id.* at 911 (Stevens, J., dissenting) (arguing that deference to agency views raised for the first time in a legal brief is inappropriate); *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 495–96 (1996) (stating that its determination that a statute did not preempt state tort claims was "substantially informed" by federal regulations and that the agency's views of the statute should be given "substantial weight"); *id.* at 505 (Breyer, J., concurring) (arguing that agencies should have "a degree of leeway" to determine the preemptive effect of ambiguous statutes); *id.* at 512 (O'Connor, J., dissenting) ("It is not certain that an agency regulation determining the pre-emptive effect of any federal statute is entitled to deference."); *Smiley v. Citibank (S.D.), N.A.*, 517 U.S. 735, 744 (1996) (assuming *arguendo* that the question of whether a statute is preemptive "must always be decided *de novo* by the courts").

178. Professors Brian Galle and Mark Seidenfeld are exceptions here, with their emphasis on the way that judicial scrutiny can reinforce agency attentiveness to federalism concerns. See Brian Galle & Mark Seidenfeld, *Administrative Law's Federalism: Preemption, Delegation, and Agencies at the Edge of Federal Power*, 57 DUKE L.J. 1922, 1995–99 (2008); see also Kenneth A. Bamberger, *Normative Canons in the Review of Administrative Policymaking*, 118 YALE L.J. (forthcoming 2008) (manuscript at 5), available at <http://ssrn.com/abstract=1116782> (emphasizing the importance of "provid[ing] incentives for robust norm-protection by agencies in the first instance"). In addition, Professor Richard Nagareda has argued that concerns about a regulatory scheme's impact on the states could be used to reinforce the quality and efficacy of

federalism and administrative law mindsets, the six decisions demonstrate that the relationship between these two doctrinal lines is much more complicated than one of straightforward conflict.

The decisions additionally suggest that the administrative preemption debate is unduly narrow insofar as it focuses specifically on the appropriateness of granting *Chevron* deference to agency preemption interpretations. Such a focus ignores the opportunities for addressing federalism concerns within the full *Chevron* inquiry, which includes investigation of an agency's delegated authority at step zero (as in *Oregon*) and independent assessment of statutory meaning at step one (as in *Massachusetts*, *Watters*, and *Riegel*). It similarly overlooks the potential for ensuring that agencies are attentive to the impact of their decisions on the states through arbitrary and capriciousness review (as in *ADEC* and *Raich*). The *Chevron* focus additionally means that the administrative preemption debate centers on judicial review, when other mechanisms, such as procedural requirements on agencies or structuring federal programs to incorporate reliance on state administration, may well prove better means of ensuring that federalism concerns are incorporated into federal agency decisionmaking.¹⁷⁹

Finally, the focus on administrative preemption also obscures the fact that such preemption is simply one of several instances in which administrative law and federalism intersect. Why, for example, should courts deny deference to express agency assessments of a statute's preemptive scope but then defer to agency substantive determinations that restrict state regulatory choices? Such a bifurcated approach would simply provide agencies with an incentive to achieve preemption impact through substantive requirements imposed by legislative rules instead of statutory interpretations.¹⁸⁰ One alternative would be to apply similar restrictions whenever federal agency action preempts state authority. Some scholars adopt

federal regulation. See Richard A. Nagareda, *FDA Preemption: When Tort Law Meets the Administrative State*, 1 J. TORT L. art. 4, 6 (2006), available at <http://www.bepress.com/jtl/vol1/iss1/art4> (stating that "the real concern over FDA preemption is not the broad-brush one that it would shut off tort litigation but, more precisely, that it might do so for too little in return" and arguing that tort preemption concerns should be repackaged as arguments for forcing information disclosure to the FDA).

179. See Buzbee, *supra* note 3, at 1565–66.

180. Recognition of this potential for manipulation has led my colleague Professor Tom Merrill to argue for an approach that limits agency power to preempt through substantive determinations as well as through interpretations. See Merrill, *supra* note 175, at 773–75.

this view, arguing that agencies' ability to issue preemptive determinations—interpretive or substantive—should be limited to instances in which Congress has clearly and specifically granted them that authority.¹⁸¹ But such an approach would create extraordinary obstacles to federal administrative governance. Given the overlapping character of federal and state regulatory power, most substantive determinations by federal agencies hold the potential to displace state law; nor does it seem likely that clear congressional authorization frequently exists for agency actions to have this preemptive effect. Hence, this approach could threaten much of the deference currently accorded substantive agency determinations. At a minimum, determining whether such a radical change is justified requires situating administrative preemption against a full assessment of the relationship between federalism and administrative law.

III. ASSESSING THE USE OF ADMINISTRATIVE LAW AS A FEDERALISM VEHICLE

The discussion heretofore has focused on establishing that the Court is increasingly attentive to the relationship between federalism and administrative law, and further, that it may be using administrative law as a vehicle by which to address federalism concerns raised by federal administrative action. I now switch focus and assess how well suited administrative law is to playing this role. Two questions are central to such an assessment. First, how likely is administrative law to be an adequate means of advancing federalism concerns? Second, is it legitimate for the Court to advance state interests through administrative law, particularly if it is not willing to impose direct constitutional limits on the scope of federal authority?

A. *Is Administrative Law an Adequate Vehicle for Addressing Federalism Concerns?*

Assessing whether federal administrative law can offer adequate protection to state regulatory interests necessitates an account of what adequate protection of such interests entails. In particular, does adequacy here require success in derailing proposed administrative

181. *Id.* at 767 (arguing for a “super-strong clear statement rule” before “permit[ting] agencies to preempt on their own authority”). This also is Professor Nina Mendelson’s view. *See* Mendelson, *Presumption Against Agency Preemption*, *supra* note 175, at 700–01 (arguing for a presumption against agency preemption).

actions that adversely impact the states, or is it sufficient to ensure that state regulatory interests receive careful consideration by federal officials? Although a lack of any bottom-line success would call into question the ability of administrative law to offer meaningful protection to federalism concerns, success cannot be the only criterion. Such a measure is too much at odds with the basic presumption underlying the administrative law approach, namely that Congress has constitutional authority to regulate an activity even at the cost of preempting or otherwise burdening the states. Instead, the focus here, as with process federalism, necessarily must be on ensuring that federal officials adequately consider and justify decisions that harm state interests, not that they forego such decisions altogether.

How well, then, does administrative law function in ensuring sufficient agency consideration of the state interests in playing a regulatory role and being free of federal regulatory impositions? The record from the federalism–administrative law sextet is mixed, but offers some basis for optimism.¹⁸² A fuller picture emerges from taking a step back from these decisions and assessing administrative law’s adequacy as a federalism surrogate from a more abstract perspective. Reasons exist to be skeptical of the extent to which agencies will protect state regulatory prerogatives. As discussed in this Section, scholars have identified a number of institutional

182. *Oregon* is clearest in cautioning agencies that they must give due heed to the regulatory role played by states in federal statutes. *Massachusetts*, in turn, grants states an important role in challenging federal policy. Moreover, although the Court ruled against the state or against state authority in the other four decisions, those decisions also preserve some openings for state regulation. *ADEC*, for example, emphasized the broad discretion states exercises over granting permits, see *Alaska Dep’t of Env’tl. Conservation (ADEC) v. EPA*, 540 U.S. 461, 490 (2004) (emphasizing the “considerable leeway” to be accorded to the “permitting authority”), whereas technically *Watters* precluded only state enforcement and oversight efforts, leaving the states free “to regulate the activities of national banks where doing so does not prevent or significantly interfere with the national bank’s or national bank regulator’s exercise of its powers,” *Watters v. Wachovia Bank, N.A.*, 127 S. Ct. 1559, 1567 (2007). More to the point, the fact that the Court ultimately ruled against the states in these decisions does not mean that the administrative law approach failed to ensure that states’ interests received sufficient consideration. Nor should the agencies’ evident lack of sympathy for state concerns in these decisions be taken as grounds for condemning the administrative law approach as inadequate; not only does that mistakenly conflate agencies and administrative law, but it also ignores the way that the Court’s development of the administrative law approach might affect agencies’ attitudes in the future. This is not to deny that deficiencies existed in the Court’s analysis in these decisions, or that the administrative law approach would need to be strengthened to have meaningful future effect. See *infra* Part IV.

features and failings of federal administrative agencies that may undermine their sensitivity to state interests, such as agencies' lack of direct political accountability, their potential proclivity to tunnel vision and capture by industry, and their lack of expertise on matters of constitutional structure or values. Yet it is also easy to underestimate the influence that the states can wield administratively and the extent to which debates about the appropriate balance of federal-state regulatory authority turn on questions that agencies are particularly well qualified to answer.

Critically, moreover, administrative agencies and administrative law are not the same thing. Administrative law involves deference to agency decisionmaking, to be sure, but it encompasses significantly more than that, including procedural limits on agencies and independent judicial scrutiny in some contexts. As a result, administrative law represents an important mechanism for improving federal agencies' responsiveness to state regulatory interests. More generally, administrative law's capaciousness and nonconstitutional, generic character can yield important benefits for the advancement of federalism.

1. *Political Accountability and State Influence on Federal Agencies.* Skeptics of administrative preemption have identified several reasons to doubt the extent to which agencies can adequately protect a regulatory role for the states. First among these is the claimed lack of political safeguards for federalism in the administrative context. As Justice Stevens put it, "[u]nlike Congress, administrative agencies are clearly not designed to represent the interests of States."¹⁸³ Moreover, although presidential oversight may render agencies politically accountable to some degree, that fact does not necessarily tie agencies to state interests. Quite to the contrary, the president is often identified as representing national interests

183. *Geier v. Am. Honda Motor Co.*, 529 U.S. 861, 908 (2000) (Stevens, J., dissenting); see also Jack W. Campbell IV, *Regulatory Preemption in the Garcia/Chevron Era*, 59 U. PITT. L. REV. 805, 832 (1998); Sunstein, *supra* note 103, at 331; Damien J. Marshall, Note, *The Application of Chevron Deference in Regulatory Preemption Cases*, 87 GEO. L.J. 263, 277-78 (1998). For contrary views, see Mendelson, *Chevron and Preemption*, *supra* note 175, at 758-60; Richard J. Pierce, *Regulation, Deregulation, Federalism, and Administrative Law: Agency Power to Preempt State Regulations*, 46 U. PITT. L. REV. 607, 664 (1985).

against the more parochial views of members of Congress.¹⁸⁴ That nationalist focus may make agencies more inclined to value regulatory uniformity over state variation and more likely to heed the cries of national industrial groups bemoaning the burdens of state regulation.¹⁸⁵ The hierarchical aspect of agencies also plays a role here as it may serve to restrict states' access to federal decisionmakers, particularly compared to the multiple points of entry the states enjoy in Congress.¹⁸⁶

Concerns about the states' loss of influence in the executive branch have some merit. But it is also easy to exaggerate the extent of this loss. Numerous factors, such as congressional oversight, federal officials' ties to state regulators, lobbying by state political organizations, and dependence on state implementation, can all serve to give state regulatory interests leverage in federal agency decisionmaking.¹⁸⁷ The influence states wield by virtue of their role in federal regulatory programs merits particular note. Studies of joint federal-state regulatory programs indicate that the extent of state power in these contexts has varied over the years, reflecting changes in political climate, regulatory approaches, and perceptions of state regulatory competence.¹⁸⁸ These studies also document a trend toward

184. See, e.g., Jerry Mashaw, *Prodelegation: Why Administrators Should Make Political Decisions*, 1 J. L. ECON. & ORG. 81, 95 (1985). But see Jede Nzebile, *The Fable of the Nationalist President and the Parochial Congress*, 53 UCLA L. REV. 1217, 1217–23 (2006).

185. See, e.g., *La. Pub. Serv. Comm'n v. FCC*, 476 U.S. 355, 362–68 (1986) (describing agency arguments of the need for uniformity); see also Buzbee, *supra* note 3, at 1590–99.

186. On the importance of such multiple power bases in Congress, see generally Carol F. Lee, *The Political Safeguards of Federalism? Congressional Responses to Supreme Court Decisions on State and Local Liability*, 20 URB. LAW. 301 (1988). For a more skeptical view of states' access to Congress, see Galle & Seidenfeld, *supra* note 178, at 1979–81.

187. See Galle & Seidenfeld, *supra* note 178, at 1965–68; Larry Kramer, *Putting the Politics Back into Political Safeguards*, 100 COLUM. L. REV. 215, 278–86 (2000); Mendelson, *Chevron and Preemption*, *supra* note 175, at 768–69.

188. See DAVID B. WALKER, *THE REBIRTH OF FEDERALISM: SLOUCHING TOWARD WASHINGTON* 129–70 (1995) (providing an overview of changes in federal-state relations from 1960 through the early 1990s); Barry Rabe, *Environmental Policy and the Bush Era: The Collision Between the Administrative Presidency and State Experimentation*, 37 PUBLIUS 413, 415–18, 420–22 (2007) (detailing the changed federal-state relationships in the environmental arena under the Bush I, Clinton, and Bush II administrations); Denise Scheberle, *The Evolving Matrix of Environmental Federalism and Intergovernmental Relationships*, 35 PUBLIUS 69, 75, 77–84 (2005) (describing the changed managerial approaches in federal environmental programs that delegated greater managerial control to implementing states); Michael J. Scicchitano & David M. Hedge, *From Coercion to Partnership in Federal Partial Preemption: SMCRA, RCRA, and OSH Act*, PUBLIUS, Fall 1993, at 107, 109 (noting that the initial implementation of several federal environmental and health statutes was largely coercive toward the states but changed by

more coercive federal-state relationships since the 1960s, with states increasingly facing mandates and federal preemption.¹⁸⁹ Nonetheless, responsibility for program implementation and enforcement appears to enhance state influence over federal agency decisionmaking.¹⁹⁰ Agency structure also appears relevant, with regional offices offering an opportunity for developing closer state-federal relationships and sensitivity to state interests.¹⁹¹ Such close relationships may create internal agency support for paying attention to state needs that could counterbalance the states' loss of external access to federal decisionmakers as a result of the shift of policy setting to the agency context and away from Congress.¹⁹²

the mid- to late 1990s, with the federal and state governments coming to share responsibility over implementation).

189. See John Kincaid, *From Cooperative to Coercive Federalism*, 509 ANNALS OF THE AM. ACAD. OF POL. & SOC. SCI. 139, 148–49 (1990); Paul Posner, *The Politics of Coercive Federalism in the Bush Era*, 37 PUBLIUS 390, 390–92, 400 (2007). But see Tim Conlan, *From Cooperative to Opportunistic Federalism: Reflections on the Half-Century Anniversary of the Commission on Intergovernmental Relations*, 66 PUB. ADMIN. REV. 663, 666–68 (2006) (arguing that the current federal-state system is more opportunistic than coercive or cooperative because “actors . . . pursue their immediate interests with little regard for the institutional or collective consequences”); Joseph F. Zimmerman, *Congressional Preemption During the George W. Bush Administration*, 37 PUBLIUS 432, 446–47 (2007) (arguing that federal-state relationships demonstrate a continuous metamorphosis and are more complex and nuanced than descriptions such as “coercive” or “cooperative” convey).

190. See Robert Agranoff, *Managing Within the Matrix: Do Collaborative Intergovernmental Relations Exist?*, PUBLIUS, Fall 2001, at 31, 45–54; Scheberle, *supra* note 188, at 75–77; Scicchitano & Hedge, *supra* note 188, at 114–15; Philip J. Weiser, *Federal Common Law, Cooperative Federalism, and the Enforcement of the Telecom Act*, 76 N.Y.U. L. REV. 1692, 1738–41 (2001) (describing the influence and role of states under the 1996 Telecom Act).

191. DENISE SCHEBERLE, *FEDERALISM AND ENVIRONMENTAL POLICY: TRUST AND THE POLITICS OF IMPLEMENTATION* 159–80, 182–83, 188 (1997).

192. State and federal regulators' shared policy goals and professional expertise may also work to defend a state regulatory role, but the impact of these ties is more contentious. In particular, Professor Roderick Hills has argued that substantive policy ties between state and federal administrators may mean that state administrators will put substantive federal policy goals with which they agree above state institutional interests in preserving an independent state regulatory role. See Roderick M. Hills, Jr., *The Eleventh Amendment as Curb on Bureaucratic Power*, 53 STAN. L. REV. 1225, 1236–37 (2001). But the same should hold true of federal administrative officials: when state regulation may offer substantive policy benefits, federal officials should seek to protect state regulatory authority. In this vein, Professor Nina Mendelson has argued that federal agency officials may be particularly likely to appreciate the national benefits that can accrue from state regulatory autonomy, for example in the way that one state's experimentation can yield new regulatory solutions which other states and the national government can then pursue. See Mendelson, *Chevron and Preemption*, *supra* note 175, at 767–68; see also Scheberle, *supra* note 188, at 73–75. In the end, it seems likely that whether substantive and personal ties between federal and state administrative officials serve to protect state regularly authority or instead undermine it will vary according to the specific program and

2. *Potential Pitfalls of Federal Agencies: Aggrandizement, Tunnel Vision, Capture, and Lack of Expertise.* Public choice and institutional competency arguments are also raised against federal agencies' ability to serve as reliable representatives for state regulatory interests. One such argument asserts that agencies are primarily interested in expanding their own policymaking power and achieving their programmatic goals, which sets them in conflict with state regulatory autonomy. Another contends that agencies are overly responsive to particular industry or other constituencies and will privilege those constituencies' interests over state claims to regulatory authority.¹⁹³ A third maintains that federal agencies' specific programmatic focus makes them ill equipped to consider general issues of the appropriate federal-state balance.¹⁹⁴ Relatedly, some scholars contend that agencies lack expertise on such questions of constitutional values and general government structure.¹⁹⁵

Again, these arguments have some intuitive attraction. It is hard to dispute the risk that federal agencies will privilege their specific programmatic goals over more general concerns relating to government structure, or may be unduly beholden to particular regulated entities. After all, administrative tunnel vision and agency capture are hardly unknown phenomena.¹⁹⁶ It is similarly plausible

issue involved. This is not to deny, as a number of commentators have argued, that "close cooperation among experts at the state and federal level . . . undermines the power of elected officials at both levels," Kramer, *supra* note 187, at 283 n.269, but rather to question whether policy and professional ties necessarily work to the benefit of federal bureaucrats over state bureaucrats.

193. See, e.g., Jonathan R. Macey, *Positive Political Theory and Federal Usurpation of the Regulation of Corporate Governance: The Coming Preemption of the Martin Act*, 80 NOTRE DAME L. REV. 951, 951–53 (2005) (describing the Security and Exchange Commission (SEC) as interested in "maximizing its own power and prestige" and as captured by "investment bankers and their lawyers"); Wilmarth, *supra* note 84, at 295–97 (arguing that the OCC's preemption of state oversight and regulation resulted from the agency's desire to expand its jurisdiction and obtain benefits for national banks, its core constituency).

194. See Marshall, *supra* note 183, at 279–81; Mendelson, *Chevron and Preemption*, *supra* note 175, at 793–97; Merrill, *supra* note 175, at 755–56.

195. See Mendelson, *Chevron and Preemption*, *supra* note 175, at 779–91; Merrill, *supra* note 175, at 755; see also Mendelson, *Chevron and Preemption*, *supra* note 175, at 793–94 (arguing that allowing agencies to consider general federalism concerns untethered to a particular statutory scheme raises a danger of unconstrained and thus potentially arbitrary agency decisionmaking).

196. See, e.g., Mendelson, *Chevron and Preemption*, *supra* note 175, at 781; Merrill, *supra* note 175, at 727. *But see* Matthew C. Stephenson, *Public Regulation of Private Enforcement: The*

that at least in some contexts federal agencies view state regulators as competitors and seek to use preemption to advance their institutional interests.¹⁹⁷ The spate of aggressive preemption efforts by numerous different agencies during the Bush administration—the OCC, FDA, Consumer Product Safety Administration, the National Highway Safety Administration, and the Federal Railroad Administration—raises real concerns about the potential for federal bureaucratic empire building at the expense of the states.¹⁹⁸

Yet public choice accounts of agency motivation become unduly simplistic, to the extent that they portray federal agency officials as motivated solely by desire for greater resources and power without consideration of what represents the best regulatory policy.¹⁹⁹ It also is mistaken to think that agency self-interest always lies on the side of expanding federal regulatory power at state expense. Even in public choice terms that account rings hollow, as the potential for congressional retaliation or the desire to avoid new responsibilities may lead rational agency officials to a different account of where their parochial interests lie.²⁰⁰ The view that agencies will advance the interests of favored regulatory constituencies at the expense of the states is similarly oversimplified.²⁰¹ Too many instances exist of

Case for Expanding the Role of Administrative Agencies, 91 VA. L. REV. 93, 130–32 (2005) (arguing that fears of agency capture are often exaggerated).

197. See, e.g., Wilmarth, *supra* note 84, at 276–77 (providing evidence supporting the claim that recent OCC preemption efforts were affected by the OCC’s desire to expand the number of banks with national bank charters and thereby expand the fees the OCC collects).

198. For a description of these proposals, see Sharkey, *supra* note 3, at 230–42. For a discussion of bureaucratic empire building more generally, see Daryl J. Levinson, *Empire-Building Government in Constitutional Law*, 118 HARV. L. REV. 915, 942 (2005).

199. See Steven P. Croley, *Public Interested Regulation*, 28 FLA. ST. U. L. REV. 7, 26–31 (2000); David B. Spence & Frank Cross, *A Public Choice Case for the Administrative State*, 89 GEO. L.J. 97, 121–23 (2000); Stephenson, *supra* note 196, at 129–35.

200. Levinson, *supra* note 198, at 923–37; Mendelson, *Chevron and Preemption*, *supra* note 175, at 796; Quincy M. Crawford, Comment, *Chevron Deference to Agency Interpretations that Delimit the Scope of the Agency’s Jurisdiction*, 61 U. CHI. L. REV. 957, 982 (1994).

201. See, e.g., John C. Coffee, Jr., *The Spitzer Legacy and the Cuomo Future*, N.Y.L.J., Mar. 20, 2008, at 5 (arguing that regulatory capture accounts of the SEC fail to adequately describe the agency); see also Stephenson, *supra* note 196, at 131 (stating that “recent research suggests that the ‘agency capture’ problem has been wildly overstated” and that “[t]he risk of capture is also less acute when an agency has a broad jurisdiction, as such agencies respond to (and draw their personnel from) multiple constituencies with competing interests”). At a minimum, whether agency capture works to the detriment of state regulatory interests seems likely to turn on the extent to which states are an important constituency of the agency. See *supra* note 190 and accompanying text; see also Buzbee, *supra* note 3, at 1565–66.

federal agencies refusing to preempt or seeking to expand state regulatory autonomy to conclude that federal agencies are categorically insensitive or hostile to preserving a state regulatory role.²⁰² This is not to deny that federal agencies are able to aggrandize themselves at the expense of the states when so inclined. But the fact that federal agencies frequently are not so inclined merits emphasis, and underscores that the explanation for federal agency behavior is more complicated.

One crucial variable the public choice account omits is politics. An agency's political agenda is likely to affect whether the agency will seek to accord states a regulatory role or instead centralize control in Washington. Thus, recent efforts to preempt state tort actions are in line with the Bush administration's support for tort reform and restrictions.²⁰³ At least some of these preemption efforts were rejected under prior presidential administrations with different political agendas.²⁰⁴ Indeed, politics rather than institutional position often

202. See Gersen, *supra* note 34, at 235; Michael S. Greve & Jonathan Klick, *Preemption in the Rehnquist Court: A Preliminary Empirical Account*, 2006 SUPREME CT. ECON. REV. 43, 73 (noting that during the Rehnquist Court, the solicitor general only took "a pro-preemption position in 39 of 95 preemption cases, or about 40 percent"); Sharkey, *supra* note 176, at 475–76.

203. Opponents of these regulatory measures see them in terms of the administration's general support for limits on tort actions. See, e.g., William Funk et al., *The Truth About Torts; Using Agency Preemption to Undercut Consumer Health and Safety*, CENTER FOR PROGRESSIVE REFORM PUBLICATION, Sept. 2007, at 1, available at http://www.progressivereform.org/articles/Truth_Torts_704.pdf ("In recent years, the Bush administration has launched an unprecedented aggressive campaign to persuade the courts to preempt state tort actions."); Stephen Labaton, 'Silent Tort Reform' Is Overriding States' Powers, N.Y. TIMES, Mar. 10, 2006, at C5. The White House, not surprisingly, denies the charge that these preemption proposals "reflect a concerted administrative policy." Caroline E. Mayer, *Rules Would Limit Lawsuits*, WASH. POST, Feb. 16, 2006, at D1. It is worth noting that some of the regulations involve agencies headed by independent commissions rather than simply agencies led by presidential political appointees, complicating the claim that they represent a Bush administration initiative. On the other hand, the use of preemption appeared to grow significantly since 2006, a time by which President Bush would have been able to significantly affect the membership of most independent agencies, and independent agencies are often quite responsive to presidential policy preferences. See Bressman, *supra* note 132, at 1807–08 (describing presidential influence over independent agencies).

204. See OCC, *Investment Securities; Rules, Policies, and Procedures for Corporate Activities; Bank Activities and Operations*, 64 Fed. Reg. 60,092, 60,095 (Nov. 4, 1999) (refusing to state in rulemaking under the Clinton administration that the OCC's supervisory jurisdiction over national bank operating subsidiaries is exclusive, a position the OCC subsequently adopted under the Bush administration, see OCC, *Bank Activities and Operations*, 60 Fed. Reg. 1,895, 1,900–01 (2004) (codified at 12 C.F.R. §§ 5.34(e)(3), 7.4006 (2008))); 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, 463 (2008) (emphasizing that the FDA's current view that state failure-to-warn

seems to be the driving force behind federal administrative limitations on (or deference to) the states. In that regard, agencies appear little different from Congress or even the courts.²⁰⁵

As that suggests, the real issue here is one of comparative institutional competency. Which institution—Congress, federal agencies, or the courts—is best situated to make the relevant political choices? Which will give greatest weight to preserving a meaningful state regulatory role?²⁰⁶ Constitutionally, Congress is the federal institution with primary policy-setting responsibility, and Congress is also the institution most structured to represent state interests.²⁰⁷ Yet it is not clear that Congress offers significantly more sensitivity to

cases involving drugs are preempted represents “a seismic shift in FDA policy”); *see also* *Massachusetts v. EPA*, 127 S. Ct. 1438, 1449–50 (2007) (noting that the EPA’s general counsels in 1998 and 1999, during the Clinton administration, had taken the view that the EPA had authority to regulate carbon dioxide under the CAA, a view the agency subsequently rejected in 2003 under the Bush administration); *Gonzales v. Oregon*, 126 S. Ct. 904, 913–14 (2006) (noting that President Clinton’s attorney general, Janet Reno, in response to a request for enforcement made by (among others) then-Senator John Ashcroft, had concluded that the Department of Justice lacked authority to determine that assisted suicide did not constitute legitimate medical practice—a view that Ashcroft later reversed when he became attorney general under President Bush). *But see* Coffee, *supra* note 201 (expressing skepticism that politics alone determines the level of SEC enforcement).

The Bush administration’s greater responsiveness to these preemption proposals compared to the Clinton administration underscores that traditional identifications of Republicans as favoring state rights and Democrats as advocating national power are becoming outdated. *See generally* Tim Conlan & John Dinan, *Federalism, the Bush Administration, and the Transformation of American Conservatism*, 37 *PUBLIUS* 279 (2007) (identifying the Bush administration as supportive of centralization over federalism and tying this to ascendancy of social and economic conservatism domestically and neoconservatism in foreign affairs).

205. On politics dominating over federalism principles in Congress, *see* Conlan, *supra* note 189, at 667, 671; Hills, *supra* note 108, at 36. On politics dominating over federalism principles in courts, *see* Richard Fallon, *The “Conservative” Paths of the Rehnquist Court’s Federalism Decisions*, 69 *U. CHI. L. REV.* 429, 432, 469 (2001). Additionally, one study found “a significant ideological component” in judicial federalism decisions, although it also noted that “honest federalism” could be playing a strong role. Frank B. Cross & Emerson H. Tiller, *The Three Faces of Federalism: An Empirical Assessment of Supreme Court Federalism Jurisprudence*, 73 *S. CAL. L. REV.* 741, 768 (2000).

206. Scholarship on administrative preemption has emphasized the centrality of this point concerning comparative institutional competency. *See, e.g.*, Galle & Seidenfeld, *supra* note 178, at 1948–84; Mendelson, *Chevron and Preemption*, *supra* note 175, at 779–94; Merrill, *supra* note 175, at 753–58. *See generally* NEIL K. KOMESAR, *IMPERFECT ALTERNATIVES: CHOOSING INSTITUTIONS IN LAW, ECONOMICS, AND PUBLIC POLICY* (1994) (emphasizing the need to assess institutional competence in comparative perspective).

207. *See* Merrill, *supra* note 175, at 753; *see also* Clark, *supra* note 5, at 1331.

state regulatory prerogatives than federal agencies do.²⁰⁸ In any event, insisting that Congress itself resolve all federal-state questions is a nonstarter. Congress simply lacks the resources and foresight to resolve all the federalism issues that can arise in a given regulatory scheme. Requiring Congress to do so would impose a significant obstacle to federal regulation, something the Court's delegation cases indicate it is not prepared to do.²⁰⁹

As a result, in many ways the critical comparison is between federal agencies and federal courts; given that Congress will delegate broadly, one of the other institutions will need to resolve the federalism disputes that inevitably will arise.²¹⁰ Moreover, it is hard to contest that of these two, agencies are more competent to make overt political choices.²¹¹ Yet a case nonetheless could be made that the courts have a comparative advantage over agencies in resolving federalism questions. Unlike specialized, program-focused agencies,

208. See Mendelson, *Chevron and Preemption*, *supra* note 175, at 768, 759–69 (arguing that Congress's regional structure gives it “no special advantage in considering . . . more ‘national’ federalism benefits” and that “it is unclear why members of Congress would have any special incentive (beyond their incentive to respond to officials of their particular state) to respond to the . . . views” of state organizations like the National Governors' Association); see also Note, *New Evidence on the Presumption Against Preemption: An Empirical Study of Congressional Responses to Supreme Court Preemption Decisions*, 120 HARV. L. REV. 1604, 1605 (2007) (noting that “Congress almost never responds to the Court's preemption decisions”); *supra* text accompanying notes 187–92 (describing state influence over agencies).

209. The fact that in none of the federalism–administrative law sextet of decisions did the Court expressly rely on devices such as clear statement rules or the presumption against preemption reinforces this point, as these devices might be thought of as means to ensure that Congress itself resolve federalism disputes. See Eskridge & Frickey, *supra* note 105, at 619–29, 631 (describing clear statement rule devices); Mendelson, *Chevron and Preemption*, *supra* note 175, at 759 (arguing that the presumption against preemption could be seen “as a method of ensuring that Congress itself makes the preemption decision”); see also *supra* Part II.B.

210. See Sharkey, *supra* note 3, at 251–52.

211. Even scholars who advocate treating courts “as the primary institution for resolving preemption controversies” agree. Merrill, *supra* note 175, at 759; see also Bamberger, *supra* note 178 (manuscript at 33–34) (arguing that agencies are more aware and sensitive to congressional policy preferences than courts); Galle & Seidenfeld, *supra* note 178, at 1981–85 (emphasizing agencies' susceptibility to influence by the political branches). Although administrative law scholars dispute the role that presidential political priorities should play in agency decisionmaking, the debate is over how much weight to give such priorities, rather than over whether politics should have any influence on agency decisionmaking. See, e.g., Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245, 2331–46 (2001) (arguing in favor of strong presidential oversight); Peter L. Strauss, *Foreword: Overseer, or “The Decider”?* *The President in Administrative Law*, 75 GEO. WASH. L. REV. 696, 697–705, 738–60 (2007) (emphasizing the distinction between presidential guidance and oversight and presidential assertion of primary decisional responsibility and arguing against the latter).

the federal courts are generalist institutions that have special responsibilities to enforce constitutional structures and values.²¹² In practice, however, it is not at all clear that the federal courts have been more sensitive to state regulatory interests than agencies have been, and at times courts have been strong enforcers of federal uniformity over state control.²¹³ Indeed, several commentators have noted the Rehnquist Court's willingness to curtail state regulatory authority in a variety of contexts.²¹⁴

This leaves for consideration the claim that agencies simply lack expertise in determining the proper balance between federal and state regulation, particularly as compared to courts. Here, much turns on how the question of expertise is framed. Agencies have no special claim to expertise in assessing the proper federal-state balance in the abstract, divorced from a particular regulatory scheme or statute. But federalism disputes are unlikely to surface in such a form—whether before agencies, the federal courts, or Congress. Instead, as the federalism–administrative law sextet suggests, these questions arise in particular regulatory contexts. In such contexts, questions about the appropriate federal-state balance are not easily separated from substantive policy determinations on which agencies do have expertise.²¹⁵ *ADEC* is illustrative: The strength and legitimacy of the

212. See Mendelson, *Chevron and Preemption*, *supra* note 175, at 787–88; Merrill, *supra* note 175, 757–58.

213. See Issacharoff & Sharkey, *supra* note 108, at 1356–57; Weiser, *supra* note 190, at 1705–08.

214. See, e.g., Ruth Colker & Kevin M. Scott, *Dissing States?: Invalidation of State Action During the Rehnquist Era*, 88 VA. L. REV. 1301, 1306–07 (2002); Fallon, *supra* note 205, at 432, 469 (noting the lack of a consistent state prerogative thread in Rehnquist Court decisions and concluding that the driving force was instead conservatism); Meltzer, *supra* note 107, at 367–68, 376; see also Young, *supra* note 4, at 23–32 (arguing that the Rehnquist Court emphasized formal sovereignty over substantive power).

215. See Bamberger, *supra* note 178 (manuscript at 32–33); Galle & Seidenfeld, *supra* note 178, at 1967–68. This seems to me equally true of preemption decisions; all that is needed to translate a preemption question into a clear policy choice is consideration of whether state regulation is an obstacle to achieving federal regulatory goals. As Professor Catherine Sharkey has written, “[w]ith respect to answering the key regulatory policy issue at the heart of the preemption query—namely, whether there in fact should be a uniform federal regulatory policy—federal agencies emerge as the institutional actor best equipped to provide the answer.” Sharkey, *supra* note 176, at 477; see also *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 506 (1996) (Breyer, J., concurring) (arguing that agency responsibility for administering a statute “means informed agency involvement and, therefore, special understanding of the likely impact of both state and federal requirements, as well as an understanding of whether (or the extent to which) state requirements may interfere with federal objectives”). *But see* Merrill, *supra* note 175, at

state dignity concerns asserted there cannot be assessed in isolation from the importance of EPA oversight of state BACT determinations to achieving the CAA's goals, a question on which the EPA has the relevant expertise. Indeed, framed in terms of particular contexts, agencies likely will have greatest expertise on the specific question of how best to balance federal-state regulatory roles.²¹⁶ The difficulty in separating substantive policy and federalism also undermines the institutional competency arguments in favor of courts, for courts are comparatively ill-equipped to assess the substantive impact that preserving a state role may have on a particular regulatory regime.²¹⁷

3. *Administrative Law's Procedural and Substantive Requirements.* The foregoing suggests that claims of agency insensitivity to state interests may well be exaggerated. Instead, a real possibility exists that agencies might in fact play a federalism-enforcing role—and even do so comparatively more effectively than courts. Equally important is the distinction between agencies and administrative law. Administrative law traditionally has served as a basic mechanism for policing against agency capture and self-aggrandizement, as well as against the excessive politicization of administrative decisionmaking.²¹⁸ Thus the issue is not simply whether

749–50 (emphasizing the extent to which preemption determinations involve general constitutional questions of the proper balance between federal and state governments).

216. While this may be particularly true in regard to cooperative regulatory schemes, which by their nature entail substantial interaction between the two levels of government, it is also true even when federal and state regulation is largely independent. *See* Gersen, *supra* note 34, at 233; Pierce, *supra* note 183, at 664; Sharkey, *supra* note 176, at 485–90 (discussing federal expertise on regulatory impact of state tort law). Nor can federal insensitivity to state authority be presumed in contexts in which federal and state regulators are rivals. State regulation may in fact serve federal interests, for example by allowing federal regulators to redirect their oversight activities or save on enforcement costs. Whether federal administrators can benefit from state efforts depends on the regulatory policy and goals of federal and state governments being similar—but conflicting policies would seem to be a fair (as in jurisdictionally neutral) grounds for federal officials to be concerned about state actions. And even when policy conflict exists, other factors, such as congressional oversight or political ramifications more generally, may ensure that federal agencies accommodate state concerns.

217. *See* Galle & Seidenfeld, *supra* note 178, at 1968; Merrill, *supra* note 175, at 758.

218. *See* Freeman & Vermeule, *supra* note 37, at 60, 87 (arguing that *Massachusetts* represented an attempt to check “politicization of [agency] expertise” and arguing that this expertise-forcing approach “hearkens back to an older, pre-*Chevron* vision of administrative law in which independence and expertise are seen as opposed to, rather than defined by, political accountability”); *see also* Thomas W. Merrill, *Capture Theory and the Courts: 1967-1983*, 72 CHI.-KENT L. REV. 1039, 1050–52 (1997) (describing the development of agency capture concerns and their influence on the courts in the period 1967–1983); Robert L. Rabin,

agencies will be appropriately sensitive to state interests on their own, but rather whether administrative law offers adequate protection against agency failure to take federalism concerns seriously.

One central means by which administrative law may do so is in the procedural requirements it imposes on agency action, in particular the opportunities for state notification and participation created by notice-and-comment rulemaking procedures and amplified by substantive requirements of agency explanation and reasoned decisionmaking.²¹⁹ From a political perspective, notice-and-comment rulemaking offers a means by which states can learn of pending agency action that might harm their interests and inform their political allies in Congress.²²⁰ Especially interesting here is Congress's inclusion in several statutes of notice-and-comment rulemaking or its equivalent as a prerequisite before an agency can displace a state regulatory role.²²¹ This suggests that, at a minimum, members of Congress—or state groups lobbying Congress—consider such procedures to offer some protection against encroachments on state regulatory authority. From a more legal and agency-functioning viewpoint, notice-and-comment rulemaking offers a means of ensuring agencies are informed of and respond to state concerns.²²² The relative formality and centralized aspect of notice-and-comment

Federal Regulation in Historical Perspective, 38 STAN. L. REV. 1189, 1300, 1308–09, 1315 (1986) (linking the emergence of more searching judicial scrutiny of administrative decisions to suspicions about agency good faith and competency).

219. See 5 U.S.C. § 553 (2006). For similar views, see Bamberger, *supra* note 178 (manuscript at 35–36); Galle & Seidenfeld, *supra* note 178, at 2006–11; Mendelson, *Chevron and Preemption*, *supra* note 175, at 777–78; Merrill, *supra* note 175, at 755, 764–65.

220. Positive political theory views administrative procedure as a means of assisting congressional oversight and protecting against bureaucratic drift. See Bressman, *supra* note 132, at 1767–76 (describing positive political theory and noting some criticisms of its account); Matthew D. McCubbins, Roger G. Noll & Barry R. Weingast, *Administrative Procedures as Instruments of Political Control*, 3 J. L. ECON. & ORG. 243, 259–60 (1987); 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).

221. See *supra* note 124.

222. See Galle & Seidenfeld, *supra* note 178, at 1949–55; Paul E. McGreal, *Some Rice with Your Chevron? Presumption and Deference in Regulatory Preemption*, 45 CASE W. RES. L. REV. 823, 874 (1995); Mendelson, *Chevron and Preemption*, *supra* note 175, at 777–78; Merrill, *supra* note 175, 764–65.

rulemaking also helps ensure that agency determinations are made after considerable deliberation and review.²²³

Professor Nina Mendelson has correctly insisted that the ability of states to protect their regulatory interests through notice-and-comment rulemaking is largely an empirical question, as are claims about the extent of state influence on federal agency decisionmaking.²²⁴ Although public administration scholarship offers studies of many aspects of federal-state relationships, surprisingly little empirical evidence exists on federal-state interactions in rulemaking and other procedural contexts of particular relevance to administrative law.²²⁵ Studies do exist documenting federal agencies' failure to take seriously the federalism assessment obligations imposed by Executive Order 13,132, which suggests that notice-and-comment rulemaking may not actually yield significant federalism benefits.²²⁶ On the other hand, the executive order expressly states that it is "not intended to create any right or benefit, substantive or procedural, enforceable at law,"²²⁷ which makes it a poor basis on which to draw conclusions about the federalism impact of judicially enforceable requirements.²²⁸

223. See Lisa Schultz Bressman, *Beyond Accountability: Arbitrariness and Legitimacy in the Administrative State*, 78 N.Y.U. L. REV. 461, 541–42 (2003); Nagareda, *supra* note 178, at 45–46.

224. Mendelson, *Chevron and Preemption*, *supra* note 175, at 758–59.

225. See *id.* Moreover, useful quantifiable data may be hard to produce, given that some quantifiable measures, such as agency responses to state comments in the preambles of final rules, *id.* at 776 n.164, may be prone to agency manipulation. As a result, detailed case studies of states' influence on particular regulatory initiatives might prove the most profitable.

226. See L. NYE STEVENS, U.S. GEN. ACCOUNTING OFFICE, FEDERALISM: IMPLEMENTATION OF EXECUTIVE ORDER 12612 IN THE RULEMAKING PROCESS 1 (1999), available at <http://www.gao.gov/archive/1999/gg99093t.pdf> (reporting that only five federalism impact statements were prepared in conjunction with issuance of 11,000 final rules between April 1996 and December 1998); Mendelson, *Chevron and Preemption*, *supra* note 175, at 783–85 (sampling 600 proposed or final rulemakings in a three-month period and finding that only six federalism impact statements had been prepared by agencies, with none of these acknowledging the "value of preserving state regulatory prerogatives"); Mendelson, *A Presumption Against Agency Preemption*, *supra* note 175, at 695 (sampling 485 proposed and final rulemakings in a three-month period and finding only three in which the agency concluded that a federalism impact assessment was required); see also Exec. Order No. 13,132, 3 C.F.R. 206 (2000), reprinted in 5 U.S.C. § 601 (2006) (requiring impact statements).

227. Exec. Order No. 13,132 § 11, 3 C.F.R. at 211. Whether such an order could create enforceable rights need not be considered here.

228. Anecdotal evidence also exists of notice-and-comment requirements having a state-protective impact. For example, the Department of Homeland Security retracted its initial broad preemption position regarding the security at chemical plants after receiving a number of critical comments. See Galle & Seidenfeld, *supra* note 178, at 2014–15.

Hence, perhaps the fairest conclusion is that the jury is still out with respect to whether notice-and-comment rulemaking procedures in practice yield significant federalism-enforcing benefits. Nonetheless, this potential exists at least in theory and could be reinforced by other means, such as the substantive requirements administrative law imposes on agency decisionmaking. Agencies must respond to significant comments not simply to fulfill the Administrative Procedure Act's (APA) procedural demands, but also to avoid having courts find their determinations arbitrary and capricious. The effect is to create significant obligations of explanation for agencies.²²⁹ Express invocation of state interests is also relatively easily included within an administrative law framework, as a presumptively relevant factor that agencies must consider in their decisionmaking. The states' constitutional significance alone seems sufficient ground on which to require that agencies consider and justify the impact of a proposed regulation on the states' regulatory role, at least absent indication that Congress intended agencies to ignore this factor.²³⁰ But at a minimum, statutory provision for a state regulatory role—for instance, in cooperative regulatory schemes or savings clauses limiting preemption—provides a firm basis for requiring that agencies take seriously the impact a proposed regulation will have on the states. Finally, these procedural and substantive requirements may create incentives for an agency to consult with states early on, before the agency has promulgated a proposed rule and at a time when it may be most receptive to alternatives.²³¹

4. *The Capaciousness of Administrative Law.* A second important advantage of administrative law is its institutional and doctrinal capaciousness. Administrative law is institutionally capacious because it includes rules that govern the actions of multiple institutions—controlling not only internal agency actions, but also external review of agency actions by courts. Indeed, administrative law in some ways even encompasses Congress, as it addresses

229. See *supra* text accompanying notes 132–37.

230. See *infra* text accompanying notes 257–59. As noted above, agencies are required to assess and justify impact on the states under Executive Order No. 13,132, see *supra* note 126, but the Executive Order is not itself judicially enforceable, Exec. Order No. 13,132, § 11, 3 C.F.R. at 211.

231. See Galle & Seidenfeld, *supra* note 178, at 2011.

Congress's constitutional ability to design agencies and control their decisionmaking and also contains elaborate doctrines of statutory interpretation. Administrative law is also doctrinally capacious, and in particular includes prescriptions for both deference and searching scrutiny. Courts need not step outside existing doctrinal frameworks to rein in agencies perceived to be overreaching or insufficiently sensitive to significant state interests.

This institutional and doctrinal breadth allows administrative law to draw on the federalism-reinforcing aspects of both agencies and courts. For example, by independently scrutinizing the scope of power Congress has delegated to an agency, courts can guard against agency overreaching at the expense of the states. Substantive scrutiny of agency reasoning can flush out instances of agency capture and other failures in agency functioning. Yet requiring that courts defer to well-reasoned administrative determinations within this range of delegated authority also allows room for agencies to exercise some discretion on federalism matters. Moreover, by forcing an agency to provide notice of actions it plans to take, procedural requirements empower congressional oversight and thus reinforce such political safeguards as Congress has to offer.

Extolling administrative law's doctrinal capaciousness as a federalism virtue is more than a little ironic. It is precisely this feature—the fact that administrative law offers judges a number of doctrinal options—that many administrative law scholars identify as its fundamental flaw. Their complaint is that this breadth translates into essentially unconstrained power in reviewing courts.²³² That complaint is very relevant here, because it suggests that in practice

232. These complaints are raised, for example, in commentary on *Chevron* and ossification of rulemaking. The former tends to stress the danger that judges will impose their own preferred policies in lieu of the agencies', thereby undermining political accountability and principled decisionmaking. See ADRIAN VERMEULE, *JUDGING UNDER UNCERTAINTY: AN INSTITUTIONAL THEORY OF LEGAL INTERPRETATION* 208–11 (2006); Frank B. Cross, Essay, *Realism About Federalism*, 74 N.Y.U. L. REV. 1304, 1304–05, 1308–10 (1999); see also Merrill, *supra* note 142, at 819–21 (arguing for a clearer rule-based approach to determining when *Chevron* applies); Miles & Sunstein, *supra* note 170, at 825–27. The latter tends to focus on the harmful effects potentially broad-ranging judicial review has on agency functioning, such as requiring agencies to devote substantially greater resources to rulemaking or forego it altogether, as well as on how judges' lack of substantive knowledge and expertise undermines their ability to review agency action intelligently. See Cross, *supra*, at 1332; Thomas O. McGarity, *Some Thoughts on "Deossifying" the Rulemaking Process*, 41 DUKE L.J. 1385, 1387–96, 1400–03 (1992); Richard J. Pierce, Jr., *Seven Ways to Deossify Agency Rulemaking*, 47 ADMIN. L. REV. 59, 60–62 (1995).

administrative law is not that institutionally capacious at all; in the end, the courts call the shots across the board. Some might contest the claim that administrative law is capacious even if courts do succeed (at least sometimes) in combining independent scrutiny with deferential review. The problem is that on any given issue one institution—court or agency—will dominate.

Despite these objections, administrative law's breadth still offers a potential federalism payoff. Much scholarship has identified the ways that judicial review—for better or worse—indirectly influences how agencies operate,²³³ and even if *Chevron* is only softly constraining, it nonetheless may lead judges to defer to agency policy choices in some contexts.²³⁴ Limited impacts such as these suffice to conclude that some potential exists to harness the federalism-reinforcing aspects of both courts and agencies through administrative law.

In any event, judicial ability to manipulate administrative law doctrine seems unlikely to work significantly *against* the regulatory interests of the states. Consider in this regard the Court's decision in *Watters*. *Chevron's* malleability, specifically the potential expansiveness of the step one inquiry, is prominently on display. But it is harder to imagine the Court reading the NBA so expansively had the OCC concluded preemption was inappropriate. Indeed, in none of the six decisions did the Court use its independent judgment to undermine state regulatory interests in the face of state-protective

233. For arguments that judicial review improves agency decisionmaking, see William F. Pedersen, *Formal Records and Informal Rulemaking*, 85 YALE L.J. 38, 59–60 (1975); Mark Seidenfeld, *Cognitive Loafing, Social Conformity, and Judicial Review of Agency Rulemaking*, 87 CORNELL L. REV. 486, 490–91, 522–26, 543–47 (2001). For arguments that judicial review is harmful, see JERRY L. MASHAW & DAVID L. HARFST, *THE STRUGGLE FOR AUTO SAFETY* 224–28 (1990); Pierce, *supra* note 232, at 65–66, and see also R. SHEP MELNICK, *REGULATION AND THE COURTS: THE CASE OF THE CLEAN AIR ACT* 294–98 (1983).

234. See Miles & Sunstein, *supra* note 170, at 856–58 (noting that although judges often vote with their political preferences, panels including at least one judge nominated by a Republican president and one judge nominated by a Democratic president exhibit a tendency to vote less along party lines in *Chevron* cases); Anne Joseph O'Connell, *Political Cycles of Rulemaking: An Empirical Portrait of the Modern Administrative State*, 94 VA. L. REV. 889, 911 n.71 (2008) (summarizing scholarship on *Chevron's* effect and noting studies “suggest[ing] that courts overwhelmingly defer to agency action”); Peter H. Schuck & E. Donald Elliot, *Studying Administrative Law: A Methodology for, and Report on, New Empirical Research*, 42 ADMIN. L. REV. 519, 533 (1990) (reporting early evidence of *Chevron's* effect and concluding that courts were more likely to affirm agency decisions after *Chevron*); see also Pauline T. Kim, *Lower Court Discretion*, 82 N.Y.U. L. REV. 383, 385–86 (2007) (emphasizing the limits of purely political accounts of judicial behavior).

agency action. Empirical studies of preemption offer further support. Notably, the federal government's opposition significantly reduces the likelihood that the Court will find preemption.²³⁵

Put somewhat differently, if assertions of the federal courts' greater institutional competency and sensitivity on federalism matters are true, then the courts' ability to manipulate deference doctrines should operate in federalism's favor. The real danger is that these assertions may not be true and that, on the contrary, states' interests would be best advanced by more thoroughgoing judicial deference to agency decisionmaking. If so, however, that would merely underscore the importance of the administrative component of administrative law, rather than call the possibility of administrative law serving as a federalism surrogate into question.

5. *The Normalizing Function of Administrative Law.* A final advantage of administrative law as a means for advancing federalism concerns is administrative law's nonconstitutional and generic character. Many administrative law doctrines reflect constitutional values and concerns, such as fears of unchecked and irrational exercises of coercive power.²³⁶ Nonetheless, these doctrines are rarely understood to be constitutionally mandated, but instead are viewed as largely subject to alteration by Congress.²³⁷ Administrative law is also generic, in that (absent congressional specification to the contrary) it applies to all federal agency actions, not simply those actions that raise federalism concerns.

As suggested in Part II.A, both of these traits may well make courts more willing to enforce federalism values through an administrative law lens than through a more overtly constitutional or

235. See Michael S. Greve & Jonathan Klick, *Preemption in the Rehnquist Court: A Preliminary Empirical Account*, 14 SUPREME CT. ECON. REV. 43, 57, 73-74 (2006) (noting that the probability of "an anti-preemption outcome is highly likely . . . when the [solicitor general] argues *against* preemption," although "preemption litigation in the Supreme Court [was] by and large a fifty-fifty proposition" during the period); see also Sharkey, *supra* note 176, at 455 ("[T]he influence of the relevant federal agency's position may be a better predictor of outcome."); David B. Spence & Paula Murray, *The Law, Economics, and Politics of Federal Preemption Jurisprudence: A Quantitative Analysis*, 87 CAL. L. REV. 1127, 1177-78 (1999) (noting that although federal agencies rarely took a position on preemption challenges before the federal appeals courts, "[w]hen they did . . . they appear to have swayed the courts").

236. See Bressman, *supra* note 223, at 497-503.

237. See *id.* at 462-63, 494-95.

federalism-driven analysis.²³⁸ To begin with, raising federalism concerns through the administrative law rubric does not erect a permanent barrier to federal administrative action; instead, at most it triggers a requirement of additional congressional enactment. More significantly, judicial rejection of an agency decision often does not serve to take decisional authority away from the agency at all, but rather results in a remand for further administrative consideration. The generic nature of ordinary administrative law may reinforce judicial willingness to scrutinize federal actions that burden the states because it allows courts to bypass questions about the legitimacy of limiting federal regulation on federalism grounds. Instead, like the *Oregon* majority, courts can claim to be motivated by “familiar principles” that are not tied to the subject of federal-state relations.²³⁹

This nonconstitutional and generic character makes administrative law also particularly well suited for addressing the central challenge of contemporary federalism: ensuring the continued relevance of states as regulatory entities in contexts marked by concurrent federal-state authority and an extensive national administrative state. As argued in Part II.A, under current constitutional doctrines, little private activity falls outside the federal government’s regulatory power and what does is reachable through federal conditional spending.²⁴⁰ Thus, if federalism is to succeed in preserving a regulatory role for the states, it has to come into play in contexts of concurrent authority.²⁴¹ In such contexts, however, direct constitutional challenges are unlikely to do much work other than at the margins.²⁴² Combine all this with judicial unwillingness to impede Congress’s ability to delegate responsibility for policy setting to

238. See *supra* Part II.A.3.

239. See *Gonzales v. Oregon*, 126 S. Ct. 904, 914 (2006).

240. See *supra* Part II.A.1.

241. For similar views that ensuring federalism’s relevance in instances of concurrent authority is critical, see Stephen Gardbaum, *Rethinking Constitutional Federalism*, 74 TEX. L. REV. 795, 796–99 (1996); Hills, *supra* note 108, at 4; Robert A. Schapiro, *Toward a Theory of Interactive Federalism*, 91 IOWA L. REV. 243, 248, 287 (2005); Young, *supra* note 4, at 41, 106–07.

242. The anticommandeering rule is an example. Although this rule prohibits the federal government from forcing state officials to implement federal programs, see *Printz v. United States*, 521 U.S. 898, 935 (1997), its practical effect is more limited given the ability of the federal government to make such state implementation a condition of funding, see *South Dakota v. Dole*, 483 U.S. 203, 206 (1987). See generally Roderick M. Hills, Jr., *The Political Economy of Cooperative Federalism: Why State Autonomy Makes Sense and “Dual Sovereignty” Doesn’t*, 96 MICH. L. REV. 813, 871–75 (1998) (discussing the relationship between the anticommandeering rule and spending doctrine).

administrative agencies, and it seems that federalism will play a quite limited role if kept to the form of a constitutional or subconstitutional trump on federal action.

Instead, for federalism to have continued vibrancy as a governing principle, it needs to be “normalized” and consciously incorporated into the day-to-day functioning of the federal administrative state. Using administrative law to ensure that federalism concerns are met represents a central mechanism for achieving this incorporation. If successful, federalism becomes an everyday consideration, one that agencies must take seriously and accommodate yet also one they have authority to override provided they adequately justify the need to do so. Federalism loses trumping status, but gains everyday relevancy. Given federalism’s limited trumping success, this trade-off seems worthwhile.

B. The Legitimacy of Administrative Law’s Use as a Federalism Vehicle

Administrative law thus holds significant federalism-enforcing potential, offering a mechanism for ensuring that agencies seriously consider state regulatory interests. But that administrative law may prove to be a particularly effective vehicle for addressing federalism concerns does not mean that using administrative law in this fashion is a legitimate judicial undertaking. In particular, the administrative approach is open to criticism as an unjustified intrusion on congressional power, given that the Court is unwilling to curb Congress’s regulatory authority on constitutional grounds. Arguably, if Congress acts within its constitutional powers in regulating an area and in delegating responsibility to administrative agencies to implement its regulatory scheme, then courts lack a basis for imposing additional federalism-inspired restrictions on subsequent agency determinations.²⁴³ Several critics have raised similar legitimacy concerns regarding the presumption against preemption,²⁴⁴ clear

243. See Eskridge & Frickey, *supra* note 105, at 633–36 (describing the argument against enforcing federalism indirectly through clear statement rules). The classic statement of this line of argument, raised in conjunction with the constitutional avoidance canon, is in RICHARD A. POSNER, *THE FEDERAL COURTS: CHALLENGE AND REFORM* 285 (1985).

244. See, e.g., Dinh, *supra* note 108, at 2097–100; Jack Goldsmith, *Statutory Foreign Affairs Preemption*, 2000 SUP. CT. REV. 175, 182–87; Nelson, *supra* note 108, at 290–303. Of course, the presumption against preemption also has its defenders. See, e.g., Gardbaum, *supra* note 241, at

statement rules,²⁴⁵ and other process requirements imposed on Congress in the name of federalism.²⁴⁶ Albeit analytically distinct in important ways, given its primary focus on agency action, the administrative law approach is similarly cognizable as a species of subconstitutionalism: it represents an effort to promote constitutional federalism values through means other than direct imposition of constitutional prohibitions.

This legitimacy complaint has little force if the administrative law approach only involves the Court employing ordinary administrative law in a manner that redounds to the states' benefit. In such a case, invocation of federalism is not necessary to justify the results the Court reaches,²⁴⁷ and the basis for the Court's actions is the same as that which underlies its review of administrative action generally.²⁴⁸ Even express invocation of federalism, if kept within the established parameters of ordinary administrative law, seems unproblematic. To

798–99; Young, *supra* note 105, at 1385–86; *see also* Hills, *supra* note 108, at 17–36 (defending a clear statement antipreemption rule).

245. *See, e.g.*, Cross, *supra* note 232, at 1329 (arguing that “process-based clear evidence/clear statement” approaches threaten “judicial cooptation of political authority at the expense of Congress”); Eskridge & Frickey, *supra* note 105, at 633–39 (noting the danger that clear statement rules represent “backdoor curtailment” of congressional power and underscoring the countermajoritarian impact such rules can have in practice).

246. *See, e.g.*, A. Christopher Bryant & Timothy J. Simeone, *Remanding to Congress: The Supreme Court's New “On the Record” Constitutional Review of Federal Statutes*, 86 CORNELL L. REV. 328, 369–89 (2001) (arguing that the Court's imposition of procedural requirements on Congress violates separation of powers and ignores how Congress operates); William W. Buzbee & Robert A. Schapiro, *Legislative Record Review*, 54 STAN. L. REV. 87, 90–91 (2001) (characterizing the imposition of legislative record requirements on Congress as an “unjustified and unworkable judicial arrogation of legislative authority”); Ruth Colker & James J. Brudney, *Dissing Congress*, 100 MICH. L. REV. 80, 116–23 (2001) (contending that judicially imposed legislative record requirements undermine Congress's status as a coequal branch and curtail congressional effectiveness and accountability). Some commentators draw a distinction between clear statement requirements, which they support, and legislative record or deliberation requirements, which they view as undesirable and inconsistent with how Congress functions. *See, e.g.*, Philip P. Frickey & Steven S. Smith, *Judicial Review, the Congressional Process, and the Federalism Cases: An Interdisciplinary Critique*, 111 YALE L.J. 1707, 1740–50 (2002).

247. *Cf.* Manning, *supra* note 169, at 254 (“[The] canon of constitutional avoidance does no work unless used to depart from the most likely or natural meaning of a statute.”).

248. Of course, judicial review of administrative action can also be critiqued as lacking basis in constitutional or statutory text—and sometimes is. John F. Duffy, *Administrative Common Law in Judicial Review*, 77 TEX. L. REV. 113, 118 (1998). For examples, see *United States v. Mead Corp.*, 533 U.S. 218, 241–43 (2001) (Scalia, J., dissenting); *Vt. Yankee Nuclear Power Corp. v. Natural Res. Def. Council*, 435 U.S. 519, 547–48 (1978). But such criticisms are not unique to review of administrative action that implicates federalism concerns, and so are (largely) outside the scope of this Article.

conclude that any express invocation of federalism in review of agency action represents judicial usurpation of Congress's policy-setting role requires the highly dubious presumption that, unless it says otherwise, Congress prefers that agencies not take state interests into account at all.

But the legitimacy critique is also unpersuasive in regard to the creation of special administrative law doctrines to protect state interests, notwithstanding that here federalism values are used to justify imposition of unusual constraints on agency action. To begin with, subconstitutionalism is a common feature of the American legal landscape. Numerous clear statement requirements and constitutionally derived statutory presumptions exist outside the federalism area, with the perhaps most prominent example being the practice of construing statutes narrowly to avoid constitutional concerns.²⁴⁹ That descriptive fact alone may not be a very satisfying justification for continuing the practice of advancing constitutional values through such subconstitutional means, but it is important to recognize what a full-scale rejection of this practice might entail.²⁵⁰

A number of normative arguments can also be made in subconstitutionalism's defense. It minimizes head-on constitutional clashes between the Court and the elected branches and potentially offers greater room for constitutional dialogue.²⁵¹ True, clear statement and other process requirements can pose real obstacles for Congress, given the difficulty involved in getting new clarifying

249. See, e.g., *Spector v. Norwegian Cruise Line Ltd.*, 125 S. Ct. 2169, 2182 (2005) (invoking the canon that statutes will not be read to apply extraterritorially unless Congress clearly states otherwise); *Jones v. United States*, 526 U.S. 227, 239–40 (1999) (describing the practice of construing statutes to avoid constitutional doubts as “beyond debate”); see also Eskridge & Frickey, *supra* note 105, at 598–628 (documenting numerous examples arising in the form of clear statement rules and presumptions). See generally Trevor W. Morrison, *Constitutional Avoidance in the Executive Branch*, 106 COLUM. L. REV. 1189 (2006) (analyzing invocations of the avoidance canon within the executive branch).

250. The point can be made even stronger: arguably, all statutory interpretation contains dimensions of subconstitutionalism, insofar as theories of statutory interpretation are ultimately rooted to some extent in constitutional values and concerns. See Jerry L. Mashaw, *Textualism, Constitutionalism, and the Interpretation of Federal Statutes*, 32 WM. & MARY L. REV. 827, 839 (1991). I thank Professor Trevor Morrison for this point.

251. See Philip P. Frickey, *Getting from Joe to Gene (McCarthy): The Avoidance Canon, Legal Process Theory, and Narrowing Statutory Interpretation in the Early Warren Court*, 93 CAL. L. REV. 399, 452–54 (2005).

legislation enacted.²⁵² Even so, this impact is less restrictive than direct judicial invalidation of a measure on constitutional grounds because Congress at least retains the option of reenactment.²⁵³ In addition, a subconstitutional approach may be better at ensuring that constitutional values are given weight in governmental decisionmaking, as courts may be more reluctant to enforce such values when doing so entails invalidating congressional or executive action.²⁵⁴ Indeed, the strength of this last point often fuels the attack on subconstitutionalism as an abuse of judicial authority: courts can play fast and loose with constitutional review because they do not have to resolve constitutional challenges decisively or face the full consequences of their constitutional rulings.²⁵⁵ The persuasiveness of this critique turns on whether one views underenforcement or overenforcement of constitutional norms as the prime danger. But it is hard to insist that subconstitutionalism *necessarily* enlarges judicial power beyond proper limits; whether it does so turns a great deal on factors such as the degree to which the constitutional concerns invoked by courts are well established, the extent of clarity courts require from other branches, and judicial transparency and care in specifying why constitutional concerns are implicated.

What all of this suggests is that subconstitutionalism's legitimacy cannot really be established as a general matter; rather, this determination rests on the particular constitutional values and doctrines at issue.²⁵⁶ The question then becomes assessing the legitimacy of the specific practice of devising special administrative law doctrines to enforce federalism. This, in turn, implicates two separate issues: Should federalism values be judicially enforced

252. See Eskridge & Frickey, *supra* note 105, at 638–40; Manning, *supra* note 169, at 254–55; Frederick Schauer, *Ashwander Revisited*, 1995 SUP. CT. REV. 71, 94–95.

253. *But see* JERRY L. MASHAW, GREED, CHAOS, AND GOVERNANCE 105 (1997); Schauer, *supra* note 252, at 94–95.

254. Frickey, *supra* note 251, at 455–59; Sunstein, *supra* note 103, at 337–400 (defending nondelegation canons despite the lack of direct enforcement of constitutional limits on delegation); Ernest A. Young, *Constitutional Avoidance, Resistance Norms, and the Preservation of Judicial Review*, 78 TEX. L. REV. 1549, 1593–99 (2000) (defending subconstitutional doctrines as an appropriate means of enforcing constitutional principles that operate more as resistance norms than as clear prohibitions on governmental action).

255. See Eskridge & Frickey, *supra* note 105, at 637; Manning, *supra* note 169, at 255; Schauer, *supra* note 252, at 87–89; Adrian Vermeule, *Saving Constructions*, 85 GEO. L.J. 1945, 1960–61 (1997).

256. *Cf.* Manning, *supra* note 169, at 256 (assessing the canon of constitutional avoidance specifically as it is used to address nondelegation concerns).

through subconstitutional means? And if so, is adapting administrative law in this fashion appropriate, or should the Court rely on alternative doctrinal mechanisms?

The first of these, whether federalism merits subconstitutional enforcement, has received substantial attention elsewhere. A number of scholars have defended a role for the courts in ensuring that Congress takes state interests seriously, even when Congress has constitutional authority to trump state regulation or impose burdens on the states. As a result they have defended judicial imposition of process requirements, such as clear statement or deliberation demands, on Congress. Rather than being at odds with reliance on political safeguards as the central federalism protection, imposition of such requirements is portrayed as necessary to ensure that Congress is aware of and adequately considers the federalism implications of its actions.²⁵⁷ Professor Ernest Young has offered perhaps the most elaborate justification for process federalism as a supplement to (if not in lieu of) direct constitutional enforcement of enumerated power limits. Acknowledging that the Court has little taste for curtailing the constitutional scope of congressional power, and that such curtailment ill fits the development of a nationally integrated economy, Young argues that process federalism represents a justified attempt to recreate the federalism principle of balance and division between federal and state governments in current realities.²⁵⁸ Although no constitutional provision imposes such process

257. See, e.g., Clark, *supra* note 5, at 1323–25, 1425–30; Philip P. Frickey, *The Fool on the Hill: Congressional Findings, Constitutional Adjudication, and United States v. Lopez*, 46 CASE W. RES. L. REV. 695, 720–22 (1996) (defending process elements of *Lopez* and arguing for a judicial approach in which “the serious federalism problems would be addressed through judge-created techniques of statutory, rather than constitutional, interpretation”); Gardbaum, *supra* note 241, at 795, 799–800; Vicki C. Jackson, *Federalism and the Uses and Limits of Law: Printz and Principle?*, 111 HARV. L. REV. 2180, 2240 (1998); Young, *supra* note 105, at 1358–59.

258. See Young, *supra* note 93, at 31–32; Ernest A. Young, *Making Federalism Doctrine: Fidelity, Institutional Competence, and Compensating Adjustments*, 46 WM. & MARY L. REV. 1733, 1762–64, 1775–99, 1836 (2005); Young, *supra* note 4, at 123–31. Professor Young takes an expansive view of what should count as process federalism, including within that category “hard” rules that Congress lacks power to remove but that he views as ultimately serving to enforce political safeguards of federalism, such as the anticommandeering rule. Young, *supra* note 4, at 127–28.

requirements, that is true generally of federalism, which manifests as a background structural principle more than as a clear textual limit.²⁵⁹

These arguments demonstrate that, in theory, subconstitutional federalism can accord well with our constitutional structure. The more serious concern is that, in practice, operation of federalism-based clarity or deliberation requirements seriously impedes Congress's exercise of its enumerated powers and leads to excessive judicial regulation of the functioning of a coequal branch. Here, an important point to emphasize is that this concern with illegitimately burdening Congress is considerably abated when federalism is enforced through administrative law. As the sextet of decisions demonstrates, the administrative law framing will often include scrutiny of congressional action to determine whether Congress authorized or prohibited a challenged agency action that harms state interests.²⁶⁰ But such statutory scrutiny occurs within the standard frameworks applicable to judicial review of agency-administered statutes and thus avoids imposition of additional procedural requirements that can create a significant obstacle for Congress to overcome.

More importantly, unlike Congress, federal administrative agencies are already required to seek and respond to comments and explain their policy choices.²⁶¹ Judicial scrutiny of agency functioning is a constant and everyday aspect of administrative agency existence, and courts regularly invalidate agency actions when agency actions exceed their authority or when agencies have failed to satisfy procedural requirements or to provide an adequate justification for their decisions. To be sure, such invalidations can create significant obstacles for agencies, and attacks on judicial review for ossifying

259. *Principality of Monaco v. Mississippi*, 292 U.S. 313, 322 (1934) (“Behind the words of the constitutional provisions are postulates which limit and control.”); Young, *supra* note 258, at 1748, 1754.

260. *See, e.g., Gonzales v. Oregon*, 126 S. Ct. 904, 916 (2006) (emphasizing the need to determine if Congress had delegated power to the attorney general to issue the interpretive rule in question).

261. *See Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto Ins. Co.*, 463 U.S. 29, 48–49 (1983); *see also Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 125 S. Ct. 2688, 2699–700 (2005) (stating that an agency can change its regulatory approach provided it explains why). Indeed, the Court's decisions imposing process-based limits on Congress are often attacked on the grounds that Congress is not an administrative agency. *See Bryant & Simeone, supra* note 246, at 337, 370; *Buzbee & Schapiro, supra* note 246, at 90–91, 97, 120; *see also Cross, supra* note 232, at 1331–32.

agency rulemaking are a well-worn component of the administrative law oeuvre.²⁶² But the burdens of notice-and-comment rulemaking are in practice considerably less onerous than bicameralism and presentment.²⁶³ In any event, federalism-inspired requirements seem unlikely to add significantly to the burdens that agencies already face in the rulemaking context. And agencies may be better able to overcome any burdens and costs imposed from such requirements than Congress is.²⁶⁴

In their response to this Article, Professors Stuart Benjamin and Ernest Young contend to the contrary that this agency focus renders the administrative law approach profoundly illegitimate because the Constitution requires that choices about the federal-state balance be “meaningfully traceable to Congress.”²⁶⁵ Much depends on the degree of clarity that “meaningful traceability” requires. No one disputes that “an agency literally has no power to act, let alone pre-empt the validly enacted legislation of a sovereign State, unless and until

262. See, e.g., Cross, *supra* note 232, at 1331–32 (“APA review has been quite destructive of the regulatory process.”); McGarity, *supra* note 232, at 1419 (“The predictable result of stringent ‘hard look’ judicial review of complex rulemaking is ossification.”). *But see* William Jordan, *Ossification Revisited: Does Arbitrary and Capricious Review Significantly Interfere with Agency Ability to Achieve Regulatory Goals Through Informal Rulemaking?*, 94 NW. U. L. REV. 393, 442 (2000) (“[T]he hard look doctrine has not caused a crisis of agency inability to achieve regulatory goals through informal rulemaking.”); O’Connell, *supra* note 234, at 964 (stating that new “empirical findings suggest that the administrative state is not greatly ossified”).

263. See Young, *supra* note 4, at 69; see also Merrill, *supra* note 175, at 750 (noting that agencies face lesser procedural obstacles to acting in the context of concluding that, compared to Congress and the courts, “[a]gencies are the fast track to preemption”). Indeed, the extent to which judicial review restricts agency rulemaking is a matter of debate. Compare Jordan, *supra* note 262, at 443–44 (arguing that “hard look review” does not “seriously hinder agency rulemaking efforts,” but conceding that more research is needed to truly understand the impact of judicial review on agency rulemaking), and O’Connell, *supra* note 234, at 932 (concluding from review of data from the Unified Agenda of Federal Regulatory and Deregulatory Actions that “the procedural costs to rulemaking (from the agency’s perspective) are not so high as to prohibit considerable rulemaking activity by agencies” but also documenting an increase in interim rulemaking techniques, which might suggest that traditional notice-and-comment rulemaking is costly for agencies), with McGarity, *supra* note 232, at 1387–96, 1400–03, 1410–26 (arguing that judicial review (as well as legislative and executive branch impositions) has resulted in a significant ossification of rulemaking, with agencies avoiding promulgating new rules or revisiting existing rules because of the burdens involved), and Pierce, *supra* note 232, at 60–66 (same).

264. See, e.g., *Hillsborough County v. Automated Med. Labs., Inc.*, 471 U.S. 707, 721 (1985) (“[I]t is more difficult for Congress to make its intentions known—for example by amending a statute—than it is for an agency to amend its regulations or to otherwise indicate its position.”).

265. Stuart Minor Benjamin & Ernest A. Young, *Tennis with the Net Down: Administrative Federalism Without Congress*, 57 DUKE L.J. 2111, 2134 (2008).

Congress confers power upon it.”²⁶⁶ Indeed, that principle formed the basis for the decision in *Oregon*, in which the Court invalidated Attorney General Ashcroft’s interpretive rule on the grounds that Congress had not delegated authority to determine what constitutes legitimate medical practice to the attorney general.²⁶⁷ More generally, the dominance of questions of statutory interpretation in the federalism–administrative law sextet demonstrates that Congress is far from absent under the administrative law approach, notwithstanding this approach’s primary focus on agencies. Statutory scrutiny under *Chevron*’s step zero and step one—at times, as noted in Part II.C, quite searching scrutiny²⁶⁸—ensures that agency impositions on the states reflect congressional intent. Thus, administrative law enforcement of federalism does not lose the political safeguards justification that animates process federalism, but instead amplifies the political safeguards available by giving weight to states in executive branch policy debates and by rendering the effects of agency decisions more transparent and more amenable to congressional oversight.²⁶⁹

What the administrative law approach does not demand is a clear statement rule to the effect that Congress must clearly authorize burdens that administrative agencies impose on the states. But demanding clear or express congressional authorization for specific agency actions goes well beyond simply requiring that choices about the appropriate federal-state balance be made by—or be meaningfully traceable to—Congress. Moreover, any claim that federalism-based clear statement doctrines are constitutionally mandated, as opposed to simply constitutionally justified, is quite

266. *La. Pub. Serv. Comm’n v. FCC*, 476 U.S. 355, 374 (1986); *see also* Thomas W. Merrill, *Rethinking Article I, Section 1: From Nondelegation to Exclusive Delegation*, 104 COLUM. L. REV. 2097, 2109 (2004) (“[I]t is hornbook law among administrative lawyers that ‘an agency has the power to issue binding legislative rules only if and to the extent Congress has authorized it to do so.’” (quoting 1 KENNETH CULP DAVIS & RICHARD J. PIERCE, JR., *ADMINISTRATIVE LAW TREATISE* § 6.3, at 234 (3d ed. 1994)). Embodied in this requirement of congressional delegation is “an anti-inherency principle . . . that agencies have no inherent authority to act with the force of law.” *Id.* at 2109. My discussion here leaves to the side the question of whether and to what extent the president has any inherent lawmaking authority, and thus whether in some contexts agencies might be able to act based solely on presidential delegation.

267. *Gonzales v. Oregon*, 126 S. Ct. 904, 916 (2006).

268. *See supra* text accompanying notes 151–65.

269. *See supra* text accompanying note 220.

contentious.²⁷⁰ Current nondelegation doctrine establishes that such specification by Congress is not thought generally required to respect Congress's constitutional role—far from it.

Thus, the claim that the administrative law approach is at odds with the Constitution misses its mark.²⁷¹ In fact, this approach is arguably more consistent with constitutional federalism principles than doctrinal rubrics that seek to give trumping priority to either national or state interests. As discussed earlier in this Section, federalism concerns retain validity even when the federal government acts within its constitutional powers.²⁷² Yet according state interests trumping priority may unduly underweigh the national side of the constitutional equation by erecting too great a burden for the federal government to overcome in seeking to exercise its constitutional powers. By contrast, the administrative law approach insists on the need to take account of both national and state interests in administrative contexts. State interests are given weight, but through an administrative law framework that also allows for consideration of other relevant factors. This seems not only more reflective of the national-state balance that informs the constitution, but also more in keeping with Congress's likely intent in enacting the regulatory scheme at issue.

A final objection to using administrative law to advance federalism concerns is more straightforwardly normative. It challenges the idea that state regulation *per se* adds value to national policy. From this perspective, the relevant issue for agencies should be simply designing the best national policy for a given regulatory context. If a decentralized approach is the most appropriate, then state regulation (perhaps pursuant to national standards) may have a role to play. But preserving state regulatory authority deserves no weight independent of such a beneficial impact on policy.²⁷³

270. Indeed, Professors Benjamin and Young candidly acknowledge that they themselves disagree on the appropriateness of such clear statement rules. See Benjamin & Young, *supra* note 265, at 2148.

271. I am, however, deeply indebted to Professors Benjamin and Young for showing me that poetry and administrative law can be linked. See Benjamin & Young, *supra* note 265, at 2114.

272. See *supra* notes 257–59.

273. Cf. Galle & Seidenfeld, *supra* note 178, at 1949 (emphasizing that the relevant focus should be on “improving the regulatory process, not the preservation of state regulatory prerogatives *per se*”); Thomas W. Merrill, *Preemption in Environmental Law: Formalism, Federalism Theory, and Default Rules*, in FEDERAL PREEMPTION, *supra* note 2, at 166, 167–69, 173, 175, 179 (noting a lack of constitutional justification for privileging state regulation across

Underlying this view is often suspicion of state regulation as creating opportunities for parochialism, as well as skepticism that federalism in fact yields the advantages of experimentation, diversity, and liberty enhancement often invoked on its behalf.²⁷⁴

This objection can be faulted for failing to appreciate the constitutional underpinnings for preserving a state regulatory role, and for its dim view of the value of state regulation. But it also fails on its own pragmatic and functionalist terms because it does not adequately acknowledge the continued relevance that federalism has for the courts. The disappearance of meaningful judicially enforced constitutional restrictions on the scope of federal regulatory authority has not meant the disappearance of judicial concern with preserving state authority. From a pragmatic perspective, the question therefore is not *whether* to protect state regulatory authority, but rather *how* to do so. Moreover, an administrative law approach would seem more attractive to those concerned with achieving the best policy outcome in specific contexts than the alternative of subconstitutional federalism doctrines. Instead of across-the-board restrictions, such as presumptions against preemption or clear statement requirements, an administrative law analysis focuses on the specifics of a statutory scheme and on how well an agency justifies a burden it is imposing on the states. As a result, it allows agencies greater leeway to advance their understanding of the best federal-state regulatory mix in a given area.

IV. ENHANCING ADMINISTRATIVE LAW'S EFFECTIVENESS AS A FEDERALISM VEHICLE

This defense of using administrative law as a vehicle for addressing federalism concerns holds implications for the Court's future jurisprudence. One central implication is that the Court should apply administrative law doctrines with an eye toward reinforcing agency attentiveness to state interests in regulatory autonomy. Another is that addressing federalism concerns through ordinary

the board and advocating a subject-matter-specific default-rule approach that would identify instances in which values of uniformity should have priority).

274. For a classic statement of arguments against federalism, see Edward Rubin & Malcolm Feeley, *Federalism: Notes on a National Neurosis*, 41 UCLA L. REV. 903, 927–52 (1994). For responses, see Barry Friedman, *Valuing Federalism*, 82 MINN. L. REV. 317, 380–406 (1997); Jackson, *supra* note 257, at 2216–23.

administrative law may often prove more effective than devising special federalism-inspired doctrines. Perhaps most importantly, the Court must discuss much more openly how federalism should factor into agency decisionmaking and judicial review if it intends administrative law to include a federalism component.

A. Reinforcing Agency Attentiveness to State Interests

One implication of the foregoing analysis is that the Court should seek to reinforce agency incentives to take state regulatory interests into account. To some extent, the federalism-administrative law sextet does this. For example, *Massachusetts's* “special solicitude for the states” in standing analysis makes it more likely that federal agencies will face federal court litigation by states who disagree with the result of administrative proceedings. As a result, agencies may well become more attentive to state interests in the course of administrative proceedings, whether in the hope of reaching compromises that would allay state suits or with an eye toward judicial review and the need to demonstrate that state concerns were adequately considered. In addition, a theme that emerges from the decisions read as a whole is that the absence of careful agency consideration of state interests may make searching judicial scrutiny more likely. To contrast *ADEC* and *Oregon*: limited federal trumping of the states will receive more deference than wholesale overruling, particularly when the circumstances of agency decisionmaking signal that ideology and politics rather than expertise were at work.²⁷⁵ Yet the impact of these decisions on agency behavior is likely to be muted as a result of their fact-dependent character and the Court’s failure to articulate a more general account of why agencies need to take state interests seriously.

The Court’s jurisprudence to date is additionally deficient in two key areas: developing the federalism-reinforcing potential of administrative procedure, and insisting that agencies better justify and explain decisions and policies that intrude significantly on state regulatory endeavors.

1. *Federalism and Administrative Procedure.* As mentioned, although procedures surface in several decisions, their precise role in

275. See Freeman & Vermeule, *supra* note 37, at 93–96.

the Court's analysis is never clearly identified.²⁷⁶ This omission is particularly unfortunate given that administrative procedure may offer important protection for state interests for the reasons described in Part III.A. Greater empirical evidence that administrative procedure in fact serves this role would be desirable. But if it does, one option for strengthening administrative law's role as a federalism vehicle would be to enhance procedural protections accorded states.

A move by the courts to impose new procedural obligations on their own initiative would encounter significant doctrinal obstacles, in the form of the Court's instruction in *Vermont Yankee Nuclear Power Corp. v. Natural Resource Defense Council*²⁷⁷ that "[a]bsent constitutional constraints or extremely compelling circumstances the 'administrative agencies should be free to fashion their own rules of procedure.'"²⁷⁸ Yet *Vermont Yankee*'s prohibition on new judicial procedural impositions leaves courts free to enforce the procedural requirements contained in statutes and agency rules, an escape hatch courts have exploited by crafting expansive interpretations of the procedural mandates contained in the APA.²⁷⁹ Such a route seems equally available here, as courts could strengthen administrative law's sensitivity to federalism through vigorous enforcement of the APA's requirements for notice-and-comment rulemaking and other statutory procedural requirements. For example, courts could relax their substantive scrutiny when agencies utilized procedures (whether notice-and-comment rulemaking or other measures) intended to ensure adequate attention to state interests, thereby creating incentives for agencies to impose such procedural requirements on themselves.²⁸⁰ In addition, courts could police the distinction between

276. See *supra* text accompanying notes 128–30.

277. *Vt. Yankee Nuclear Power Corp. v. Natural Res. Def. Council*, 435 U.S. 519 (1978).

278. *Id.* at 543 (internal quotation marks omitted). That said, it is possible to justify new judicial procedural impositions on the ground that constitutional federalism values should outweigh or at least temper the separation of powers and functional considerations that led the Court in *Vermont Yankee* to reject judicial development of administrative procedure. See *id.* at 546–48. Such new procedural requirements would represent a form of special federalism-inspired administrative law.

279. See Gillian E. Metzger, *The Story of Vermont Yankee: A Cautionary Tale of Judicial Review and Nuclear Waste*, in *ADMINISTRATIVE LAW STORIES* 124, 126 (Peter L. Strauss ed., 2006).

280. See Sharkey, *supra* note 3, at 256–57 (recommending the imposition of consultation and notice-and-comment requirements in administrative preemption contexts); Matthew C. Stephenson, *The Strategic Substitution Effect: Textual Plausibility, Procedural Formality, and Judicial Review of Agency Statutory Interpretation*, 120 *HARV. L. REV.* 528, 552–53 (2006).

legislative and nonlegislative rules tightly, insisting on notice-and-comment procedures whenever an agency interpretive rule or policy statement had significant legal or practical effect on a state.²⁸¹ Alternatively, courts could strictly enforce notice and explanation requirements, requiring that federal agencies carefully identify and justify the preemptive or other effects of a proposed rule on the states. This latter option could have considerable practical relevance today. Some agencies recently have included statements in their explanation of final rules stating that they viewed the rules as broadly preempting state regulation and tort actions, despite having initially stated in the proposed rule notice that the rules would not be preemptive or would preempt more narrowly.²⁸² Arguably, such position changes on preemption made the original notices inadequate, because the final rules were not a “logical outgrowth” of the proposed rule.²⁸³ Or, even if standard notice requirements were

281. Given the lack of a clear doctrinal distinction between these two types of rules, *see* John F. Manning, *Nonlegislative Rules*, 72 GEO. WASH. L. REV. 893, 915–27 (2004), such an approach would not require much by way of change in current practice, and, though not directly judicially enforceable, similar notice-and-comment requirements are imposed by executive order, *see, e.g.*, Exec. Order No. 13,132 § 6, 3 C.F.R. 206, 209–10 (2000), *reprinted in* 5 U.S.C. § 601 (2006); Exec. Order No. 12,988 § 3(b)(2), 3 C.F.R. 157 (1996), *reprinted in* 28 U.S.C. § 519 (2000). Arguably, increased court policing of this kind would have offered yet another basis for invalidating the interpretive (nonlegislative) rule in *Oregon* given the significant legal effects—loss of license or criminal punishment—the rule imposed on doctors who used controlled substances to assist suicide, and the practical nullification of Oregon’s Death with Dignity Act that the rule would have effected.

282. *See* Sharkey, *supra* note 3, at 254 (describing the FDA’s inclusion of a broad preemption statement in a recent prescription drug labeling rule, despite having initially stated in the notice of proposed rulemaking that the rule would not be preemptive); *compare* Final Rule: Standard for the Flammability (Open Flame) of Mattress Sets, 71 Fed. Reg. 13,472, 13,496–97 (Mar. 15, 2006) (codified at 16 C.F.R. pt. 1633) (stating that the CPSC rule would preempt all inconsistent state standards and requirements, including court-created requirements imposed through tort suits), *with* Notice of Proposed Rulemaking, Standard for the Flammability (Open Flame) of Mattress Sets, 70 Fed. Reg. 2,470, 2,493 (Jan. 13, 2005) (stating that the proposed rule would preempt “non-identical state or local mattress flammability standards” and not indicating that the rule would preempt common law tort actions).

283. *See* Long Island Care at Home, Ltd. v. Coke, 127 S. Ct. 2339, 2351 (2007) (describing the “logical outgrowth” requirement as “one of fair notice”). It could be argued that states and other commentators nonetheless had “fair notice” that the agencies were considering preemption. *See id.* (finding no notice violation when an agency changed position during rulemaking on the substantive scope of a rule). But the fact that the rules in question here were addressed to substantive topics other than preemption makes that conclusion harder to justify. Indeed, the fact that preemption is addressed solely in the preambles of these rules complicates assessment of whether failure to provide adequate notice of preemption would make the final rules invalid or simply would justify a court in failing to grant *Chevron* deference to the agency’s

satisfied in these instances, courts might conclude that additional notice is required before a federal rule can have a preemptive effect, at least when state law is not plainly in conflict with the rule.²⁸⁴

2. *Greater Scrutiny of Agency Decisions that Burden State Interests.* A second technique for protecting state interests, this time more evident in the six decisions, is subjecting agency decisions that burden state interests to greater substantive scrutiny than usually applied. Interestingly, the form in which this technique most clearly appears in the decisions—specifically, the Court’s use of independent scrutiny of statutory meaning—may be most problematic from an agency-incentivizing perspective. After all, why should agencies pay careful heed to federalism concerns in interpreting statutes if courts are unlikely to defer to their decisions?²⁸⁵ That said, lack of such scrutiny—and instead willingness to apply strong *Chevron* deference to agency interpretations that significantly displace state authority—could remove a powerful check on federal agency overreaching at the states’ expense. For this reason, as noted, some scholars have argued against granting any deference to agency statutory interpretations that preempt state action or at most granting lesser *Skidmore* deference.²⁸⁶

More beneficial, I believe, would be to approach the question from a perspective that emphasizes the quality of agency reasoning

position on preemption; the latter would seem the correct result as an agencies’ failure to include a statement on preemption in the body of the rule suggests it does not intend such statements to have legal force and effect. See *United States v. Mead Corp.*, 533 U.S. 218, 229 (2001); Sharkey, *supra* note 3, at 257–58; Sharkey, *supra* note 176, at 496–97.

284. Preemption of state law that actually conflicts with federal regulations is not contentious; what has sparked substantial debate is instead efforts to preempt state laws not directly in conflict on the grounds that they create an obstacle to the federal regulatory scheme (as in *Watters*), or more rarely, that federal regulation indicates an intent to occupy the field. See Mendelson, *A Presumption Against Agency Preemption*, *supra* note 175, at 695; see also *supra* note 108 and accompanying text (noting an increase in findings of obstacle preemption).

285. Even the adoption of *Skidmore* may have such a deterrent effect, given that *Skidmore* ties deference to the degree to which an agency has succeeded in persuading a court that the agency’s view is correct and thus in practice may not differ much from independent scrutiny. But as *Skidmore* emphasizes the quality and reliability of agency decisions in deciding whether to defer, adoption of *Skidmore* as the standard under which to review agency preemption decisions seems better keyed to influencing agency decisionmaking than simply substituting independent judicial review.

286. See sources cited *supra* note 176.

and explanation.²⁸⁷ Agencies should face a greater burden of persuasion and explanation when their decisions substantially restrict state experimentation and traditional state functions. The doctrinal rubric most amenable to such an approach is arbitrary and capriciousness review, in part because it applies to all agency decisionmaking, whether involving matters of statutory interpretation or more straightforward policy setting. As a result, it avoids the odd dichotomy of denying deference to agency preemptive interpretations yet reviewing agency substantive determinations quite deferentially, notwithstanding that the latter can impact the states as harshly. Arbitrary and capriciousness review also seems particularly well suited to curbing agency decisions that are unduly driven by executive branch politics at the expense of governing statutes.²⁸⁸

The downside of relying on arbitrary and capriciousness review is that the impact on agency decisionmaking is harder to cabin. Agencies make a multitude of policy and implementation decisions that burden the states, far more than the number of preemptive interpretations they may issue. Imposing a greater justificatory burden when agency decisions impact negatively on state interests would create a substantial counterbalance to any tendency on the part of federal agencies to underweigh state interests. But arguably it does so by tilting the scales too much in favor of the states, at least if applied across the board, undermining the important uniformity and expertise benefits that federal regulation can offer and that Congress may have sought to achieve by delegating implementation responsibility to an administrative agency.²⁸⁹ This is not simply a question of national interests versus state interests, because national regulation can reinforce state authority by protecting states against

287. Professors Brian Galle and Mark Seidenfeld also identify their preferred approach for ensuring agencies take state interests adequately into account as a species of hard look review. See Galle & Seidenfeld, *supra* note 178, at 2001–02 (“[T]he solution is that the appropriate level of deference is something of an amalgam of *Skidmore* and hard look review.”). Kenneth Bamberger has similarly advocated that courts use review of the reasonableness of agency determinations to ensure adequate agency consideration of general normative concerns, such as federalism, although he locates *Chevron* step two as the appropriate doctrinal home for such review. See Bamberger, *supra* note 178 (manuscript at 46–57).

288. It has been used in this way before. See *Motor Vehicle Mfrs. Ass’n v. State Farm Mut. Auto Ins. Co.*, 463 U.S. 29, 40–44 (1983).

289. Cf. Schapiro, *supra* note 241, at 288–93 (discussing potential harms as well as benefits of concurrent federal and state regulation).

harmful externalities caused by sister state regulation (or lack thereof).²⁹⁰

As a result, a contextual approach appears more appropriate, with greater justification perhaps required only in some circumstances—for example, when the burden on states is quite significant, or when governing statutes and historical practice have long tolerated a substantial role for state regulation.²⁹¹ Here another advantage of the arbitrary and capriciousness review comes to fore, which is that such review already encompasses a broad range of scrutiny. As Professor Peter Strauss has noted, searching hard look scrutiny is more common with respect to notice-and-comment rulemakings, which produce generally applicable standards, than in less consequential informal adjudications.²⁹² This particular pattern of scrutiny appears less appropriate in instances when agency actions significantly impact the states; given the potential federalism benefits that may accrue from use of notice-and-comment procedures, it would be odd to subject agency decisionmaking burdening the states outside those procedures to lesser review. But the fact that such variation already exists demonstrates the possibility of tailoring arbitrary and capricious review to federalism concerns.

Interestingly, this is the approach implicitly suggested but never developed in *Raich*, and medical marijuana represents a prime context for its application. In light of strong state commitment to

290. See Issacharoff & Sharkey, *supra* note 108, at 1370–71; Merrill, *supra* note 273, at 173–76.

291. See Bamberger, *supra* 178 (manuscript at 43); Galle & Seidenfeld, *supra* note 178, at 2019–20. For arguments regarding the importance of a contextual approach to federalism, see William W. Buzbee, *Contextual Environmental Federalism*, 14 N.Y.U. ENVTL. L.J. 108, 114–20 (2005); Merrill, *supra* note 273, at 166, 167–68; Sharkey, *supra* note 176, at 514 (“Courts should scrutinize the regulatory process itself, relying on the FDA as a source of relevant information regarding the precise contours of the risks that it has considered.”).

292. See Peter L. Strauss, *Overseers or ‘The Deciders’?: The Courts in Administrative Law*, 75 U. CHI. L. REV. (forthcoming 2008) (manuscript at 5), available at <http://ssrn.com/abstract=1031822>. Compare, e.g., *Motor Vehicle Mfrs.*, 463 U.S. at 43 (hard look review in informal rulemaking), with *Pension Benefit Guar. Corp. v. LTV Corp.*, 496 U.S. 633, 645–47 (1990) (deferential review in informal adjudication context), and *Balt. Gas & Elec. Co. v. Natural Res. Def. Council*, 462 U.S. 87, 101–04 (1983) (greater deference in light of uncertainty). Professors Thomas Miles and Cass Sunstein’s recent empirical analysis of arbitrariness review supports this claim that arbitrary and capriciousness review encompasses a range of scrutiny, although they trace this variation to the ideology of the reviewing judges and the ideological content of the underlying decisions. See generally Thomas J. Miles & Cass R. Sunstein, *The Real World of Arbitrariness Review*, 75 U. CHI. L. REV. (forthcoming 2008), available at <http://ssrn.com/abstract=1089076>.

experimenting with medical marijuana, and the CSA's provision for rescheduling of controlled substances based on medical purpose, the federal government should face a significant justificatory burden if it refuses to relist marijuana or undertake a sustained investigation of a rescheduling petition.²⁹³ Another context in which greater scrutiny might be appropriate concerns federal agency denial of state waiver requests. Waiver requests are often reviewed quite deferentially,²⁹⁴ but greater scrutiny appears warranted when waiver authority is sought by a state and the waiver denial significantly restricts state regulatory autonomy.²⁹⁵

B. Ordinary or Extraordinary Administrative Law?

A final issue concerns whether administrative law's federalism potential is best enhanced by developing special requirements applicable only when agency action impacts state interests, or instead by seeking to protect state interests from within the paradigms of ordinary administrative law. Given the capaciousness of ordinary federal administrative law, such special federalism-inspired rules do not seem necessary. Neither of the two proposals advanced in the preceding Section, for example, necessarily requires going outside of the paradigms of ordinary administrative law. Moreover, developing an extraordinary administrative law for federalism contexts may in fact undermine administrative law's federalism potential insofar as it suggests that federalism concerns are not a legitimate focus of ordinary administrative law. Equally concerning, devising special federalism-inspired rules could erode the normalizing aspect of the administrative law approach, transforming it into something more

293. Cf. Young, *supra* note 93, at 33–37. A petition seeking such rescheduling appears to have been pending with the Drug Enforcement Agency since 2004, and an effort under the Information Quality Act to force HHS to correct information it provided on marijuana was recently dismissed on the ground that the Act is not judicially enforceable. *Ams for Safe Access v. U.S. Dep't of Health & Human Servs.*, No. C 07-01049 WHA, 2007 WL 4168511 at *2, *4 (N.D. Cal. Nov. 20, 2007).

294. See, e.g., *INS v. Yueh-Shaio Yang*, 519 U.S. 26, 31–32 (1996); *BellSouth Corp. v. FCC*, 162 F.3d 1215, 1222, 1224–25 (D.C. Cir. 1999).

295. Such an approach could be relevant to several disputes in which the federal government has denied state waiver requests with important federalism implications. See, e.g., *Connecticut v. Spellings*, 453 F. Supp. 2d 459, 494–95 (D. Conn. 2006) (challenging denial of waiver under the No Child Left Behind Act); see also *supra* note 53 (discussing the EPA's denial of waiver to California under section 209 of the CAA).

exceptional like constitutional or subconstitutional federalism doctrines.

The practical import of this caution against developing extraordinary administrative law doctrines is limited. The distinction between extraordinary and ordinary administrative law is far from bright-line. Most importantly, staying within the broad confines of ordinary administrative law does not mean foregoing express invocation of federalism concerns in administrative law decisions. Indeed, express acknowledgment of the need for agencies to seriously consider state regulatory interests is essential for administrative law to fulfill its federalism role, as well as needed for judicial accountability and agency-court dialogue more generally. A practice of vindicating state regulatory interests only tacitly is too easily discarded and too hidden to clearly instruct agencies or lower courts. Unless the Supreme Court is explicit about administrative law's role as a federalism vehicle, the traditional view of these doctrines as analytically separate may make lower courts resistant to injecting federalism concerns into administrative law analysis.

In some ways, the federalism-administrative law sextet accords with this caution against developing extraordinary administrative law. As discussed above, ordinary administrative law surfaces in all the decisions and none of the decisions, even *Massachusetts*, is necessarily beyond standard administrative law fare. But the decisions fail significantly on the factor of transparency. Even when the Court emphasized the impact of federal administrative decisions on the states, it offered little clarity on how that impact factored into its analysis. As a result, lower courts and agencies are left without much guidance on how to approach intersections of federalism and administrative law.

Greater acknowledgment of the connection between federalism and administrative law is as important from an administrative law perspective as from a federalism one. The sextet of decisions indicates that, faced with federalism concerns, the Court may apply more searching scrutiny and in other ways push ordinary administrative law to extremes. From an administrative law perspective, the danger is that these more extreme approaches will spill over into contexts in which federalism concerns are absent. And the more frequently they are invoked, the more these approaches move from the margin to the core of established administrative law analysis. The net effect might be a general erosion of the deference accorded agency

determinations, not limited to contexts that implicate state regulatory interests. This suggests that, viewed purely from an agency-centered standpoint, developing special requirements limited to federalism contexts might be preferable to reliance on ordinary administrative law to address federalism concerns. But at a minimum, express discussion of how federalism concerns factor into a court's application of ordinary administrative law requirements is important to limit such spillover effects.

CONCLUSION

Federalism and federal administrative law are increasingly intersecting. Indeed, given the breadth of Congress's constitutional powers today, the future of federalism lies in integrating protections for the states into agency deliberations and judicial review of agency action. Until recently, the relationship between federalism and administrative law had not received the judicial and academic attention it deserves. That omission may be changing. As I have argued here, the Supreme Court may be using administrative law as a means of addressing federalism concerns, and at a minimum is becoming more aware of the intersections between these two doctrinal areas. That development, I believe, is an auspicious one, as administrative law has significant potential to advance state interests within the framework of the national administrative state.

In the end, however, ensuring federalism's continuing relevance within the world of administrative governance turns as much on creation of regulatory regimes that emphasize a continuing state regulatory role as on doctrinal adaptation. Using administrative law, the courts can ensure that federal agencies give due weight to considering state interests. But administrative law doctrine can only take federalism so far. Ultimately, the success of efforts to integrate federalism and the modern federal administrative state hinges on agencies—and their political masters in the executive branch and Congress—being willing to trade off some degree of uniformity for the benefits of diversity, experimentation, and localism in setting regulatory policy.²⁹⁶

296. For interesting efforts at identifying when such trade-offs may be merited, see Robert B. Ahdieh, *Dialectical Regulation*, 38 CONN. L. REV. 863, 914–26 (2006); Buzbee, *supra* note 3, at 1599–613; Merrill, *supra* note 273, at 22–33.