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## PREEMPTION AND INSTITUTIONAL CHOICE

Thomas W. Merrill\*

### INTRODUCTION

Public law scholarship is increasingly turning from questions about the content of law to questions about which institution should determine the content of the law—that is, to “deciding who decides.”<sup>1</sup> Implicit in this turn is the understanding that public law—including broadly not just constitutional law, but also administrative law and statutory interpretation—consists of norms that are contestable and changing. In a world of normative flux, the question naturally occurs: Who should be responsible for “say[ing] what the law is?”<sup>2</sup> The answer traditionally given by American legal academics—the federal courts, and especially the Supreme Court—may or may not be the best choice in any given context. Other possible agents of norm articulation—the constitutional amendment process, Congress, the President, administrative agencies, state governments, world organizations, markets—also need to be considered and evaluated on a comparative basis.

The law of preemption is ripe for reconsideration in light of this kind of comparative institutional analysis.<sup>3</sup> At least two broad trends support this

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<sup>1</sup> NEIL K. KOMESAR, *IMPERFECT ALTERNATIVES: CHOOSING INSTITUTIONS IN LAW, ECONOMICS, AND PUBLIC POLICY* 3 (1994). A notable recent example is ADRIAN VERMEULE, *JUDGING UNDER UNCERTAINTY: AN INSTITUTIONAL THEORY OF LEGAL INTERPRETATION* (2006). Comparative institutional analysis in law is not new. A prominent work from an earlier generation is HENRY M. HART & ALBERT M. SACKS, *THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW* (William N. Eskridge, Jr. & Philip P. Frickey eds., 1994).

<sup>2</sup> *Marbury v. Madison*, 5 U.S. (3 Cranch) 137, 177 (1803).

<sup>3</sup> For a preliminary consideration of the value of an institutional choice perspective in resolving questions of federalism, with brief comments about preemption, see Ernest A. Young, *Making Federalism Doctrine: Fidelity, Institutional Competence, and Compensating Adjustments*, 46 WM. & MARY L. REV. 1733, 1816–53 (2005) [hereinafter Young, *Compensating Adjustments*]; see also Ernest A. Young, *The Rehnquist Court's Two Federalisms*, 83 TEX. L. REV. 1, 8–13, 65–121 (2004) [hereinafter Young, *Two Federalisms*]. I have also previously suggested, without extensive analysis, that the institutional choice perspective could illuminate disputes having a federalism dimension. See Thomas W. Merrill, *Institutional Choice and Political Faith*, 22 LAW & SOC. INQUIRY 959, 981–82 (1997).

inference. First, a number of Supreme Court decisions have suggested, at least implicitly, that preemption questions should be redirected from the courts to Congress. In *Cipollone v. Liggett Group, Inc.*,<sup>4</sup> for example, Justice Stevens's opinion for the Court stated that when Congress has enacted an express preemption clause, this should provide the exclusive basis for decision, rather than any doctrine of implied preemption.<sup>5</sup> This proposition, if consistently applied, would promote the view that preemption should be primarily a matter of legislative determination. Other decisions have applied a presumption against preemption unless a "clear and manifest purpose of Congress" to preempt can be discerned.<sup>6</sup> This presumption, if consistently applied, would also shift authority for making preemption decisions from the courts to Congress.

A second trend suggesting the need for an institutional choice analysis is a growing controversy about whether courts should defer to the views of administrative agencies on the preemptive effect of statutes and regulations.<sup>7</sup> The Supreme Court dodged the issue in *Watters v. Wachovia Bank, N.A.*,<sup>8</sup> which presented the question whether a preemptive regulation issued by the Office of the Comptroller of the Currency (OCC) was entitled to *Chevron* deference by reviewing courts.<sup>9</sup> Five Justices, speaking through Justice Ginsburg, concluded that it was unnecessary to reach this question because the statute itself compelled preemption.<sup>10</sup> Three dissenting Justices—Justice Stevens joined by Chief Justice Roberts and Justice Scalia—would have decided the question and held that agencies are not entitled to *Chevron* deference for preemption determinations.<sup>11</sup> Controversy has also been stirred by the practice of federal agencies offering advisory opinions about the preemptive effect of federal statutes and regulations.<sup>12</sup> Products liability defendants have urged courts to defer to these views. The Supreme Court again recently avoided determining how much weight courts should give such views as advanced by the Food and Drug Administration (FDA), but has granted review in yet another case which now may require

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<sup>4</sup> 505 U.S. 504 (1992).

<sup>5</sup> *Id.* at 517.

<sup>6</sup> The presumption was initially articulated in *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947), and has been irregularly applied ever since. See *infra* notes 61–64 and accompanying text.

<sup>7</sup> See generally Paul E. McGreal, *Some Rice with Your Chevron?: Presumption and Deference in Regulatory Preemption*, 45 CASE W. RES. L. REV. 823 (1995); Nina A. Mendelson, *Chevron and Preemption*, 102 MICH. L. REV. 737 (2004); Catherine M. Sharkey, *Preemption by Preamble: Federal Agencies and the Federalization of Tort Law*, 56 DEPAUL L. REV. 227 (2007).

<sup>8</sup> 127 S. Ct. 1559 (2007). I filed a brief amicus curiae in *Watters* on behalf of the Center for State Enforcement of Antitrust and Consumer Protection Laws, Inc., arguing against application of *Chevron* deference when reviewing agency declarations of preemption.

<sup>9</sup> *Id.* at 1566; see *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984).

<sup>10</sup> *Watters*, 127 S. Ct. at 1572 n.13.

<sup>11</sup> *Id.* at 1582–85 (Stevens, J., dissenting).

<sup>12</sup> See Sharkey, *supra* note 7.

that it revisit the issue in the FDA context.<sup>13</sup> Obviously, a general practice of deferring to administrative agencies on questions of preemption would shift authority for resolving preemption controversies away from courts toward agencies.

We can perceive in these two developments a broader set of questions about preemption and institutional choice. Although preemption controversies have traditionally been decided by courts in accordance with judge-made preemption doctrine, at least two other institutional actors—Congress and federal administrative agencies—might also be enlisted to make or participate in these decisions. To be sure, no one is suggesting the wholesale displacement of courts in resolving preemption controversies. The questions that have come to the fore involve “institutional competence writ small,”<sup>14</sup> in the sense that they ask how much weight courts should give to the views of other institutions in resolving preemption controversies. This Article offers some reflections on how this more constrained, second-order inquiry into comparative institutional choice should be resolved in the context of preemption.

I begin in Part I by reconsidering the nature of preemption. Here, I endorse Stephen Gardbaum’s view that preemption entails far more than the idea that federal law prevails over state law in cases of conflict.<sup>15</sup> Instead, preemption typically involves a decision to displace state law in some area in order to advance perceived federal policy goals. Part II argues that the current doctrinal framework for resolving preemption controversies significantly misdescribes what occurs in preemption cases. The current framework attempts to assimilate preemption to ordinary statutory interpretation; however, the key question in most preemption cases entails a discretionary judgment about the permissible degree of tension between federal and state law, a question that typically cannot be answered using the tools of statutory interpretation. Part III outlines, in a preliminary fashion, some consid-

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<sup>13</sup> The issue was avoided in *Riegel v. Medtronic, Inc.*, 128 S. Ct. 999 (2008), a case involving FDA-approved medical devices. Review has been granted in *Levine v. Wyeth*, No. 2004-384, 2006 WL 3041078 (Vt. Oct. 27, 2006), *cert. granted*, 128 S. Ct. 1118 (2008), which involves the adequacy of warnings in drug package inserts. For lower court decisions responding to requests for deference to FDA views about preemption, see *Prohios v. Pfizer, Inc.*, 490 F. Supp. 2d 1228, 1234–35 (S.D. Fla. 2007); *Sykes v. Glaxo-SmithKline*, 484 F. Supp. 2d 289, 313–17 (E.D. Pa. 2007); *In re Bextra & Celebrex Mktg. Sales Practices & Prod. Liab. Litig.*, No. M: 05-1699 CRB, 2006 WL 2374742, at \*6–7 (N.D. Cal. Aug. 16, 2006); *Colacicco v. Apotex, Inc.*, 432 F. Supp. 2d 514, 525–35 (E.D. Pa. 2006); and *Conte v. Wyeth, Inc.*, No. CGC-04-437382, 2006 WL 3939262, at \*1 (Cal. Super. Ct. Sept. 25, 2006). See also *In re Vioxx Prod. Liab. Litig.*, 501 F. Supp. 2d 776, 786 (E.D. La. 2007) (“[T]he majority of courts continue to find that state-law claims against prescription drug manufacturers are not preempted, affording little to no deference to the FDA’s recent statements.”).

<sup>14</sup> Cass R. Sunstein & Adrian Vermeule, *Interpretation and Institutions*, 101 MICH. L. REV. 885, 938 (2003).

<sup>15</sup> Stephen A. Gardbaum, *The Nature of Preemption*, 79 CORNELL L. REV. 767 (1994) [hereinafter Gardbaum, *Nature*]; see also Stephen Gardbaum, *Congress’s Power to Preempt the States*, 33 PEPP. L. REV. 39 (2005); Stephen Gardbaum, *Rethinking Constitutional Federalism*, 74 TEX. L. REV. 795 (1996).

erations that are relevant in considering preemption from an institutional choice perspective, including constitutional, interpretational, and pragmatic variables. Although no institution is ideally suited to make preemption decisions, I conclude that courts are the least-worse choice, although it would be desirable to supplement the judicial process with input from agencies on selected variables.

Part IV offers three normative propositions about the role of agencies in preemption designed to advance the conclusions of Part III: (1) the only type of agency action that can serve as a source of a preemption determination by a court is one that has the force of law; (2) agencies can make preemption determinations on their own authority only if this power has been expressly delegated to them by Congress; and (3) courts should develop a preemption-specific doctrine for considering agency views about preemption that focuses on the pragmatic dimensions of preemption controversies and seeks to encourage agencies to permit public participation in proceedings that implicate preemption.

#### I. THE NATURE OF PREEMPTION—RECONSIDERED

Preemption is one of the most widely applied doctrines in public law, yet it remains surprisingly underanalyzed. Before we can embark on a consideration of the proper division of institutional roles in resolving preemption controversies, we need to specify more clearly what it means for federal law to “preempt” state law and from whence the authority for making these determinations comes.

In a provocative article entitled *The Nature of Preemption*, Stephen Gardbaum sought to clarify the analytics of preemption.<sup>16</sup> He advanced three claims. First, preemption is different from and much more intrusive upon state autonomy than supremacy. Second, preemption cannot be derived from the Supremacy Clause, but must be grounded in the Necessary and Proper Clause. Third, because preemption is grounded in a power granted exclusively to Congress, preemption controversies should be resolved solely in terms of an inquiry into legislative intent. I believe Gardbaum was right in the first claim but mistaken about the second and third.

Gardbaum’s first claim distinguished between two ideas, which he called preemption and supremacy. His analysis here, I believe, provides the proper starting point for consideration of preemption from an institutional choice perspective. In order to avoid begging any questions about constitutional foundations, I use different names for the two ideas: “displacement” and “trumping.” But the distinction is essentially the same as that posited by Gardbaum between preemption and supremacy.

*Displacement* occurs when state law in a particular area is nullified or wiped out, leaving federal law as the sole source of legal obligation. Dis-

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<sup>16</sup> Gardbaum, *Nature*, *supra* note 15.

placement is an offensive doctrine in the sense that federal law attacks and eliminates state law. Displacement is like an eraser that rubs out state law in a given area, leaving only federal law standing. The opposite of displacement would be the understanding that federal law in a particular area is nullified or wiped out, leaving state law as the sole source of legal obligation. *Trumping* occurs when the wiping out or displacement of federal law by state law is prohibited. Trumping is therefore a defensive doctrine, shielding federal law from attack by state law. The most commonly recognized example of trumping would be where federal law and state law are mutually exclusive, as when federal law requires *A* and state law requires not-*A*. If state law were to be applied, this would rub out federal law. But trumping would also come into play in any circumstance in which state law is alleged to nullify federal law.<sup>17</sup>

Consider an example. Suppose a state has a law that makes the maximum permissible speed on primary highways sixty-five miles per hour. Then, in order to promote fuel conservation, Congress enacts a law that makes the maximum permissible speed on primary highways fifty-five miles per hour. Hot Rod is clocked by a state trooper doing seventy-four miles per hour on a primary highway. At his trial in state court for violating the state speed limit, Hot Rod argues that the enactment of the federal speed limit has preempted any state authority to punish him under state law for excessive speeding, and thus he cannot be punished. This is an argument for *displacement*. It posits that the federal government's entry into the field of speed limits has rubbed out any state authority over this subject. Alternatively, suppose that Lead Foot is clocked doing sixty-four miles per hour on a primary highway. At his trial, Lead Foot maintains that the only applicable legal standard is the state speed limit, under which his conduct was lawful. If the court rejects this claim, it is engaged in *trumping*. In rejecting the claim, the court establishes that both the federal and the state speed limits are applicable to Lead Foot's conduct, such that they impose cumulative requirements. If he has violated either one of these standards—in this case the lower federal standard—he can be punished.

The relevance of the distinction between displacement and trumping to our present inquiry is as follows. Preemption controversies, as they are framed today, nearly always involve displacement. What is being fought over in the name of preemption is whether federal law displaces state law, leaving federal law the exclusive source of legal rights and obligations in the area in question. Trumping is almost never an issue.<sup>18</sup> Hence, when we

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<sup>17</sup> In *Howlett v. Rose*, 496 U.S. 356 (1990), for example, a state court ruled that state statutory immunity barred consideration of a federal civil rights claim. The Supreme Court held that this nullification of federal law by state law violated the Supremacy Clause. *Id.* at 376–78.

<sup>18</sup> See Caleb Nelson, *Preemption*, 86 VA. L. REV. 225, 228 (2000) (noting that the class of cases in which compliance with both federal and state law is impossible is “vanishingly narrow”). It is unclear whether this rarity is because cases of conflict in the strong sense of mutual exclusivity are rare or be-

ask which institution should make decisions about preemption, we are asking which institution should make judgments about the propriety of displacement.

It is worth pausing to consider the implications of this. Displacement is strong medicine. It radically simplifies the regulatory structure in any given area, replacing a *mélange* of federal, state, and local requirements with a single set of federal rules. This is why business corporations and free market advocates tend to be pro-preemption.<sup>19</sup> Displacement has significant deregulatory consequences: it is almost always easier and less costly to comply with one standard than to attempt to comply with multiple standards that vary depending on the jurisdiction. Displacement also has dramatic consequences for the scope of state authority. From the perspective of the state and local governments, displacement is little different than a judgment holding state law unconstitutional. Once state law is declared to be displaced, state actors no longer have any authority to regulate in the area declared to be displaced. Their only recourse is to petition Congress for legislation overturning the displacement ruling. This, to be sure, is an easier barrier to overcome than a judgment holding state laws unconstitutional, which would require a constitutional amendment. However, given the difficulties of building a coalition among all affected states, squeezing onto Congress's limited agenda for action, and surmounting the bicameral and presentment requirements for legislation, displacement decisions are rarely overturned and usually have permanent consequences for the scope of state authority.<sup>20</sup> This explains why state and local governments are increasingly agitated about preemption rulings.<sup>21</sup>

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cause when such conflicts arise, everyone recognizes that federal law prevails, so such conflicts virtually never result in litigation.

<sup>19</sup> See Michael S. Greve & Jonathan Klick, *Preemption in the Rehnquist Court: A Preliminary Empirical Assessment*, 14 SUP. CT. ECON. REV. 43, 53 (2006) (finding that preemption cases are "overwhelming[ly]" initiated by business or private parties); Roderick H. Hills, Jr., *Against Preemption: How Federalism Can Improve the National Legislative Process*, 82 N.Y.U. L. REV. 1, 29–30 (2007) (noting that industry interest groups will often favor regulatory uniformity even when that uniformity results in more stringent controls); David B. Spence & Paula Murray, *The Law, Economics, and Politics of Federal Preemption Jurisprudence: A Quantitative Analysis*, 87 CAL. L. REV. 1125, 1158 (1999) (suggesting that "Coasean" commentators favor broad preemption to encourage "a national market in externalities").

<sup>20</sup> See Note, *New Evidence on the Presumption Against Preemption: An Empirical Study of Congressional Responses to Supreme Court Preemption Decisions*, 120 HARV. L. REV. 1604, 1613–14 (2007) (finding that Congress overrode only two out of 127 preemption decisions rendered by the Supreme Court over a recent twenty-year period).

<sup>21</sup> For example, the National Conference of State Legislatures maintains a "preemption monitor" on its website. National Conference of State Legislatures, Preemption Monitor, [http://www.ncsl.org/standcomm/sclaw/PreemptionMonitor\\_Index.htm](http://www.ncsl.org/standcomm/sclaw/PreemptionMonitor_Index.htm) (last visited Dec. 2, 2007). In a recent empirical survey of Supreme Court cases, Greve and Klick found "extensive and still-growing state amicus participation in preemption cases—predictably, almost exclusively on the anti-preemption side." Greve & Klick, *supra* note 19, at 69.

Given these features, we can also see that preemption in the sense of displacement closely resembles, and effectively works in tandem with, the dormant commerce clause doctrine. Both doctrines work to preserve the United States as a single integrated commercial market in the face of state legislation that threatens to create multiple markets of suboptimal scale.<sup>22</sup> Like the dormant commerce clause, displacement nullifies or wipes out state law in a given area, subject to potential override by Congress. And (as we shall see) displacement, like the dormant commerce clause, requires a discretionary judgment about the benefits and costs of legal uniformity that is largely unguided by the text of any authoritative enactment. The principal differences between the doctrines are that the dormant commerce clause rests on an imputation of intent to the Constitution and focuses on whether state laws discriminate against or unduly burden interstate commerce;<sup>23</sup> preemption in the sense of displacement rests on an imputation of intent to Congress and focuses on whether federal law requires exclusivity in order to be fully effective.

Gardbaum's second claim was that the Supremacy Clause<sup>24</sup> authorizes only what I call trumping and does not provide any authority for what I call displacement. Instead, he claimed, displacement should come about only if Congress has exercised its power to displace under the Necessary and Proper Clause.<sup>25</sup> Here, I disagree. Certainly as a descriptive matter about contemporary doctrine, the proposition is not true. The Supreme Court has repeatedly identified the Supremacy Clause as the source of its authority to declare state law displaced (preempted).<sup>26</sup> As far as I have been able to determine, the Court has never mentioned the Necessary and Proper Clause in this context. Gardbaum's claim to the contrary appears to be a conceptual one. His argument is that when we speak of one body of law as being "supreme" to another body of law, what this means, definitionally, is that the

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<sup>22</sup> For insightful commentary that recognizes this common theme in "federalizing" decisions, see Samuel Issacharoff & Catherine M. Sharkey, *Backdoor Federalization*, 53 UCLA L. REV. 1353 (2006).

<sup>23</sup> See, e.g., *City of Philadelphia v. New Jersey*, 437 U.S. 617 (1978) (invalidating discriminatory state legislation); *Pike v. Bruce Church, Inc.*, 397 U.S. 137 (1970) (invalidating state law disproportionately burdening interstate commerce).

<sup>24</sup> The Supremacy Clause provides: "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." U.S. CONST. art. VI, cl. 2.

<sup>25</sup> *Id.* art. I, § 8, cl. 18.

<sup>26</sup> See, e.g., *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 540–41 (2001) (identifying the Supremacy Clause as the "relatively clear and simple mandate" that allows Congress to "pre-empt[] state action in a particular area"); *Nw. Cent. Pipeline Corp. v. State Corp. Comm'n*, 489 U.S. 493, 509 (1989) (referring to Congress's "power under the Supremacy Clause . . . to preempt state law"); *Fid. Fed. Sav. & Loan Ass'n v. de la Cuesta*, 458 U.S. 141, 152 (1982) (declaring that the "pre-emption doctrine . . . has its roots in the Supremacy Clause"); *Morris v. Jones*, 329 U.S. 545, 553 (1947) (proclaiming that when state law "collides with the federal Constitution or an Act of Congress . . . the action of a State under its police power must give way by virtue of the Supremacy Clause").



superior law prevails over the inferior in the event of a conflict between the two in the strong sense of mutual exclusivity (*A* or not-*A*). In my terms, Gardbaum maintains that the concept of supremacy entails only trumping: blocking the subordinate law from nullifying the superior law.

I fail to see how it is analytically true that the concept of supremacy entails only trumping. Certainly, the Supremacy Clause could be read in this minimalist sense. But it could also be read more expansively, as meaning that federal law displaces state law whenever state law would frustrate the purposes or policies underlying federal law. To say that federal law is “the supreme law of the land” in this broader sense would mean that the purposes and policies reflected in federal law are entitled to full vindication, even if this requires the displacement of state law. Constitutional history is filled with examples in which clauses that could be interpreted either narrowly or broadly have been favored with a broader interpretation over time.<sup>27</sup> The point is not that the broad meaning is always, or even usually, the correct one. It is simply that one cannot declare one of two or more meanings necessarily correct as a conceptual matter.

When we turn to the conventional sources of constitutional interpretation—text, drafting history, and precedent—we find that each in fact supports the proposition that the Supremacy Clause authorizes something broader than trumping. As for the text, Caleb Nelson has pointed out that the last phrase of the Supremacy Clause, which makes federal law supreme “any Thing in the Constitution or Laws of any State to the Contrary notwithstanding,” tracks the phrasing of clauses generally known as *non obstante* clauses.<sup>28</sup> These clauses, which were common at the time of the Founding, were designed to disavow the canon against repeals by implication. In the context of conflicts between federal and state law, Nelson persuasively argues, this means that the Framers did not want federal statutes to be interpreted narrowly in order to “save” state law from invalidation. In other words, courts were not to strain the meaning of federal law “in order to harmonize it with state law.”<sup>29</sup> This in turn suggests that the Supremacy Clause was understood to have a broader significance than mere trumping.

The drafting history of the Supremacy Clause also supports a broad reading. As Jack Rakove and others have recounted, the Constitutional Convention had before it three potential mechanisms for assuring that fed-

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<sup>27</sup> Thus, for example, “commerce” might mean buying and selling goods, it might mean all economic activity, or it might even mean any form of “intercourse,” see AKIL REED AMAR, *AMERICA’S CONSTITUTION: A BIOGRAPHY* 107–08 (2005); “freedom of speech” might refer to verbal utterances about politics, or it might refer to any human action having some communicative function, including commercial advertising and nude dancing. See *Schad v. Borough of Mt. Ephraim*, 452 U.S. 61, 66 (1981) (stating that nude dancing is “not without . . . First Amendment protections”); *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council*, 425 U.S. 748, 761–70 (1976) (holding commercial advertising entitled to intermediate degree of protection as “speech”).

<sup>28</sup> Nelson, *supra* note 18, at 254–57.

<sup>29</sup> *Id.* at 255.

eral law would prevail in the face of opposition grounded in state law: (1) the use of coercive force against defiant states, (2) Madison's proposal that Congress be given an unrestricted power to "negative" any state law by federal legislation, or (3) the use of the courts to control individuals "who violated or interfered with national law."<sup>30</sup> The Convention rejected the first two mechanisms in favor of the Supremacy Clause, which was seen as incorporating the third option.<sup>31</sup> Since the Supremacy Clause was the only specific mechanism agreed upon by the Framers for resolving federal-state conflicts, this suggests that they envisioned the Clause as applying over a broader range of controversies than those involving outright nullification of federal law, that is, trumping.

I am not suggesting that the Framers envisioned the Supremacy Clause as conferring a power as broad as Madison's proposed "negative," which would have given a federal institution (Congress) unfettered discretion to displace any state law it did not like. The Supremacy Clause makes federal policy dominant only insofar as there is some perceived incompatibility between state law and "[t]his Constitution," "the Laws of the United States which shall be made in Pursuance thereof," or federal treaties made before or after the ratification of the Constitution.<sup>32</sup> But since the Supremacy Clause was expressly adopted as a substitute for Madison's sweeping "negative," it is doubtful that the Clause was regarded as being limited to cases of mutual exclusivity or trumping. The Framers must have also contemplated some degree of displacement power.

As for precedent, we need look no further than Chief Justice John Marshall's foundational decisions construing the Supremacy Clause. In *McCulloch v. Maryland*,<sup>33</sup> Marshall stated that under the Clause "States have no power . . . to retard, impede, burden, or in any manner control, the operations of the constitutional laws enacted by Congress."<sup>34</sup> And in *Gibbons v. Ogden*,<sup>35</sup> he construed the Clause to require displacement of any state law "interfering with" or "contrary to" federal law.<sup>36</sup> These statements impute significance to the Supremacy Clause far beyond being a mere rule of decision to apply in cases of mutual exclusivity. They were of course motivated by Marshall's ardent nationalism, which probably went beyond

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<sup>30</sup> JACK N. RAKOVE, ORIGINAL MEANINGS: POLITICS AND IDEAS IN THE MAKING OF THE CONSTITUTION 171–72 (1996); see also Bradford R. Clark, *Separation of Powers as a Safeguard of Federalism*, 79 TEX. L. REV. 1321, 1348–72 (2001); S. Candice Hoke, *Transcending Conventional Supremacy: A Reconstruction of the Supremacy Clause*, 24 CONN. L. REV. 829, 856–75 (1992); James S. Liebman & William F. Ryan, "Some Effectual Power": *The Quantity and Quality of Decisionmaking Required of Article III Courts*, 98 COLUM. L. REV. 696, 709–13 (1998).

<sup>31</sup> Hoke, *supra* note 30, at 865–70.

<sup>32</sup> See Clark, *supra* note 30, at 1355 (citing U.S. CONST. art VI, cl. 2).

<sup>33</sup> 17 U.S. (4 Wheat.) 316 (1819).

<sup>34</sup> *Id.* at 436.

<sup>35</sup> 22 U.S. (9 Wheat.) 1 (1824).

<sup>36</sup> *Id.* at 210.

the preferences of the median ratifier of the Constitution. It would be impossible, however, to maintain that these precedents have not permanently conditioned our perceptions of the meaning and significance of the Supremacy Clause or that they are not cornerstones of American constitutional law as it is practiced and functions today.

Gardbaum's third claim flowed directly from his second. If the Supremacy Clause supports only trumping, then the power to displace must be found elsewhere in the Constitution. Gardbaum argued that the proper locus of displacement is the Necessary and Proper Clause.<sup>37</sup> I think he was undoubtedly correct that the Necessary and Proper Clause is a potential source of authority for displacement. Thus, for example, Congress, pursuant to its power to regulate interstate commerce, could decide to prescribe a federal speed limit on all highways used in interstate commerce and could further decide that in order to "carry into execution" this exercise of power it is necessary and proper to displace all state laws prescribing a speed limit. Where I disagree with Gardbaum is his claim that the Necessary and Proper Clause is the exclusive source of authority for displacement. Constitutional text, drafting history, and precedent all suggest that the Supremacy Clause also provides this authority.

The source of authority for displacement has important implications for questions of preemption and institutional choice. If the Necessary and Proper Clause is the sole source of authority to displace, then Congress—and only Congress—may make the determination whether to displace state law in any given context. No one has claimed, to my knowledge, that Congress may delegate the power conferred by the Necessary and Proper Clause to either courts or agencies.<sup>38</sup> Thus, if this is the sole source of authority for displacement, Congress itself must make all decisions to displace. Courts would be limited to construing duly enacted statutes of Congress evincing an intention to displace, most commonly as reflected in an express preemption clause. And Congress would not have the authority to delegate to administrative agencies the power to displace.

If the power to displace is also or alternatively grounded in the Supremacy Clause, however, then the institutional choice possibilities are much more open-ended. The Supremacy Clause, unlike the Necessary and Proper Clause, is not directed solely to Congress. It is found in Article VI

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<sup>37</sup> The Necessary and Proper Clause provides: "The Congress shall have Power . . . To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers [of Article I, § 8], and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof." U.S. CONST. art. I, § 8, cl. 18.

<sup>38</sup> Indeed, the Necessary and Proper Clause is plausibly read as the source of constitutional authority for Congress to make delegations of *other* powers. See Thomas W. Merrill, *Rethinking Article I, Section 1: From Nondelegation to Exclusive Delegation*, 104 COLUM. L. REV. 2097, 2129–31 (2004). Cf. Larry Alexander & Saikrishna Prakash, *Delegation Really Running Riot*, 93 VA. L. REV. 1035 (2007) (imagining a host of powers that might be delegated under the Necessary and Proper Clause but not suggesting that the Clause itself could be delegated).

of the Constitution, which is directed at *all* governmental actors at both the federal and state levels. Indeed, the Oath Clause of the Constitution, which appears immediately after the Supremacy Clause, and is closely related to it, expressly requires that *all* governmental actors take an oath “to support this Constitution.”<sup>39</sup> This Clause specifically names legislative, executive, and judicial officers of both the federal government and the states.

It is true that the Supremacy Clause makes specific mention of courts and that the history of the Clause, as recounted by Rakove and others, suggests that the Framers viewed the Supremacy Clause as adopting the judicial option (as opposed to the coercion or legislative negative options) for resolving conflicts between the federal government and the states.<sup>40</sup> But the only courts that are specifically alluded to in the Clause are *state* courts (“the Judges in every State”), not federal courts. It would be extremely unlikely for the framers to have assumed that conflicts between federal and state law were to be resolved exclusively by state courts. The most plausible explanation for the reference is that state judges were thought to be most at risk of construing federal law narrowly in order to save state law from displacement.<sup>41</sup> Since they were most at risk, the Founders singled them out for special admonition. It does not follow, however, that the Framers assumed that other governmental actors would not enforce the principle reflected in the Supremacy Clause.<sup>42</sup>

If we construe the Supremacy Clause as the source of authority for displacement, and if that Clause is properly read as applying to all governmental actors, then the institutional choice question becomes urgent. The text of the Constitution, on this reading, says that all governmental actors—federal and state, executive, legislative, and judicial—have potential constitutional authority to decide whether the vindication of federal law requires displacement of state law. Without some supplementary set of principles to narrow the choice among the various governmental institutions that could wield this power, we could have endless cycling. A federal court could decide that displacement is required, and a state legislature or state governor could decide that it is not, and each could cite its oath to support the Constitution and the Supremacy Clause as the source of authority for their respective judgments. This would invite chaos.

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<sup>39</sup> U.S. CONST. art. VI, cl. 3 (“The Senators and Representatives before mentioned, and the Members of the several State Legislatures, and all executive and judicial Officers, both of the United States and of the several States, shall be bound by Oath or Affirmation, to support this Constitution.”).

<sup>40</sup> See *supra* note 30 and accompanying text.

<sup>41</sup> See RAKOVE, *supra* note 30, at 173–77; Nelson, *supra* note 18, at 249; Saikrishna Bangalore Prakash, *Field Office Federalism*, 79 VA. L. REV. 1957, 2011–12 (1993); Martin H. Redish & Steven G. Sklaver, *Federal Power to Commandeer State Courts: Implications for the Theory of Judicial Federalism*, 32 IND. L. REV. 71, 85–86 (1998).

<sup>42</sup> The Supreme Court has in fact held that state officials other than state judges are bound by the Supremacy Clause. See, e.g., *Missouri v. Jenkins*, 495 U.S. 33, 56–57 (1990); *Cooper v. Aaron*, 358 U.S. 1, 18–19 (1958).

What is needed, in other words, is a constitutional doctrine that supplements the text and original understanding of the Constitution and that allocates authority among governmental institutions to determine when federal law requires displacement of state law—constitutional common law, if you will.<sup>43</sup> The Supreme Court has in fact developed such a doctrine, some familiarity with which is required to consider the institutional choice questions implicit in any decision to displace.

## II. DISPLACEMENT AND PREEMPTION DOCTRINE

At this point, it makes sense to review briefly the preemption doctrine that has been developed by the Supreme Court in the course of deciding hundreds of preemption cases over a span of nearly two hundred years. Like much constitutional common law, preemption doctrine is highly formulaic, although no one seems to believe that the formal categories provide significant guidance to courts and litigants in resolving particular cases.<sup>44</sup> The doctrine is also dominated by maxims about the importance of congressional intent and the presumption against preemption, neither of which seems to play a consistent role in determining how particular controversies are resolved.

The formulaic aspect of preemption law consists of a judge-made categorization of different “types” or varieties of preemption. Here the cases nearly always begin with a root distinction between “express” and “implied” preemption.<sup>45</sup> Express preemption applies when Congress has addressed the question of displacement of state law in the text of a statute, either by including a preemption clause (a clause that specifies some degree of displacement), a savings clause (a clause that disclaims some or all displacement), or both. As previously noted, Justice Stevens attempted in *Cipollone* to establish that an express preemption clause, where it applies, should be the exclusive basis for deciding whether to displace state law.<sup>46</sup> But his effort to constrain judicial discretion in this fashion collapsed in

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<sup>43</sup> See generally Henry P. Monaghan, *The Supreme Court, 1974 Term, Foreword: Constitutional Common Law*, 89 HARV. L. REV. 1, 3 (1975).

<sup>44</sup> See Nelson, *supra* note 18, at 232 (noting a general consensus that “[m]odern preemption jurisprudence is a muddle”); Spence & Murray, *supra* note 19, at 1146 (noting that preemption cases have proven to be “vexing to the courts” and have produced a “conflicted and fractured body of case law”).

<sup>45</sup> See, e.g., *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 541 (2001) (“State action may be foreclosed by express language in a congressional enactment, by implication from the depth and breadth of a congressional scheme that occupies the legislative field, or by implication because of a conflict with a congressional enactment.” (citations omitted)); *Fid. Fed. Sav. & Loan Ass’n v. de la Cuesta*, 458 U.S. 141, 152–53 (1982) (“Pre-emption may be either express or implied, and ‘is compelled whether Congress’ command is explicitly stated in the statute’s language or implicitly contained in its structure and purpose.’” (quoting *Jones v. Rath Packing Co.*, 430 U.S. 519, 525 (1977))).

<sup>46</sup> *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 517 (1992). See *supra* notes 4–5 and accompanying text.

subsequent cases,<sup>47</sup> and the campaign to adopt this limitation appears to have been dropped.

The other branch of preemption doctrine consists of implied preemption doctrines. The Court has insisted that “the existence of conflict cognizable under the Supremacy Clause does not depend on express congressional recognition that federal and state law may conflict.”<sup>48</sup> Accordingly, the Court has held state law displaced without regard to whether an express preemption clause exists<sup>49</sup> and has held state law displaced even when the statute contains an express saving clause.<sup>50</sup>

We thus have multiple categories of implied preemption, the exact number depending on who is doing the counting.<sup>51</sup> One category that appears on everyone’s list is called field preemption. This applies when “federal law so thoroughly occupies a legislative field ‘as to make reasonable the inference that Congress left no room for the States to supplement it.’”<sup>52</sup> The idea here is that if federal law is sufficiently comprehensive so as to constitute a complete code of regulation, then the court will attribute an intention to Congress to displace state law.

Two other categories of implied preemption are conflict preemption and frustration of purpose or obstacle preemption. Some writers collapse these two categories into one, which they tend to call conflict preemption—the point being that the difference between conflict and frustration of purpose relates only to how sharp the tension is between federal and state law.<sup>53</sup> Given the above discussion regarding the distinction between displacement and trumping,<sup>54</sup> however, there is some virtue in maintaining conflict preemption and frustration of purpose preemption as distinct categories of implied preemption. Conflict preemption can be regarded as equivalent to what I call trumping: application of state law would nullify federal law and hence state law must give way. In contrast, frustration of purpose or obstacle preemption (frustration preemption for short), clearly results in displacement. State law is wiped out in order to provide for more effectual

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<sup>47</sup> See *Geier v. Am. Honda Motor Co.*, 529 U.S. 861, 868, 884–86 (2000) (finding implied preemption in the face of an express preemption clause that the majority construed as not calling for preemption); *Freightliner Corp. v. Myrick*, 514 U.S. 280, 287–89 (1995) (dismissing as “without merit” the notion that “implied pre-emption cannot exist when Congress has chosen to include an express pre-emption clause in a statute” and concluding that “[a]t best, *Cipollone* supports an inference that an express pre-emption clause forecloses implied pre-emption; it does not establish a rule”).

<sup>48</sup> *Crosby v. Nat’l Foreign Trade Council*, 530 U.S. 363, 388 (2000).

<sup>49</sup> *Buckman Co. v. Plaintiffs’ Legal Comm.*, 531 U.S. 341, 348, 352 (2001).

<sup>50</sup> *Geier*, 529 U.S. 861.

<sup>51</sup> See Hoke, *supra* note 30, at 851 n.103 (noting Supreme Court cases listing between three and six different categories of preemption).

<sup>52</sup> *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 516 (1992) (quoting *Fid. Fed. Sav. & Loan Ass’n v. de la Cuesta*, 458 U.S. 141, 153 (1982)).

<sup>53</sup> See, e.g., Nelson, *supra* note 18, at 265–90 (urging the abandonment of frustration of purpose or obstacle preemption).

<sup>54</sup> See *supra* note 17 and accompanying text.

vindication of the perceived purposes or objectives of federal law. As in the case of field preemption, conflict and frustration preemption are frequently couched in terms of congressional intent: Congress, it is said, would not want to see federal law nullified by state law and would not want the policies and purposes reflected in its enactments undermined by the application of state law.<sup>55</sup>

Putting this together, we have four categories of preemption: express, field, conflict, and frustration. The primary tool courts use in deciding preemption cases is to determine whether a particular controversy falls into one of these categories. If yes, then state law is preempted. If no, then state law survives.

In addition to the formulaic categorization process, preemption doctrine is characterized by two general maxims that have been invoked many times by the modern Court. The first, which dates from 1963, says that "[t]he purpose of Congress is the ultimate touchstone" in every preemption case.<sup>56</sup> We find this bromide endlessly repeated or paraphrased in subsequent decisions.<sup>57</sup> This is so even though it is somewhat anomalous to say that legislative intent or purpose is the "touchstone" of a doctrine in which implied preemption plays such a large role.<sup>58</sup> The maxim is even more anomalous in view of the accepted understanding that agency action can have preemptive effect.<sup>59</sup> Such action often issues pursuant to general grants of regulatory authority and in response to developments that Congress could have no way of anticipating when such authority was granted. Nevertheless, we find the Court uttering the maxim about congressional intent even in decisions in which displacement of state law is based on an

<sup>55</sup> See, e.g., *Barnett Bank v. Nelson*, 517 U.S. 25, 33 (1996) (noting that cases involving the implied preemption of state banking laws "take the view that normally Congress would not want States to forbid, or to impair significantly, the exercise of a power that Congress explicitly granted").

<sup>56</sup> *Retail Clerks Int'l Ass'n, Local 1625 v. Schermerhorn*, 375 U.S. 96, 103 (1963).

<sup>57</sup> See, e.g., *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996) ("[O]ur analysis of the scope of the statute's pre-emption is guided by our oft-repeated comment, initially made in *Retail Clerks v. Schermerhorn*, that '[t]he purpose of Congress is the ultimate touchstone' in every pre-emption case." (citation omitted) (quoting *Retail Clerks*, 375 U.S. at 103)); *Hawaiian Airlines, Inc. v. Norris*, 512 U.S. 246, 252 (1994) ("Whether federal law pre-empts a state law . . . is a question of congressional intent."); *English v. Gen. Elec. Co.*, 496 U.S. 72, 78-79 (1990) ("Pre-emption fundamentally is a question of congressional intent."); *La. Pub. Serv. Comm'n v. FCC*, 476 U.S. 355, 369 (1986) ("The critical question in any pre-emption analysis is always whether Congress intended that federal regulation supersede state law."); *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 95 (1983) ("In deciding whether a federal law pre-empts a state statute, our task is to ascertain Congress' intent in enacting the federal statute at issue.").

<sup>58</sup> As Justice Frankfurter pointed out in his *Rice* dissent, the idea of searching for a "clear and manifest" congressional intent through doctrines of implied preemption is inherently contradictory. See *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 242-45 (1947) (Frankfurter, J., dissenting).

<sup>59</sup> See S. Candice Hoke, *Preemption Pathologies and Civic Republican Values*, 71 B.U. L. REV. 685, 736 (1991).

agency regulation and the Court's determination that the *agency* intended the regulation to have preemptive effect.<sup>60</sup>

The other maxim, which has become controversial, dates from 1947. This is the notion that courts should apply a presumption against preemption. In its canonical formulation, courts should "start with the assumption that the historic police powers of the States [are] not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress."<sup>61</sup> Like the maxim about the importance of congressional intent, the presumption against preemption is honored as much in the breach as in observance.<sup>62</sup> One problem is that the presumption fails to account for the fact that governmental powers are necessarily divided in a federal system. Some powers are assigned to the federal government, others to state and local governments, and some (such as the power of taxation) are exercised concurrently. It might make sense to apply a presumption against preemption in areas traditionally assigned to the states,<sup>63</sup> but there is no apparent justification for such a presumption in areas traditionally dominated by the federal government, such as the conduct of foreign affairs. The presumption is at the very least overbroad, as the Court seems to have recognized in recent decisions.<sup>64</sup>

The Court's preemption doctrine, with its formulaic characterizations and its oft unheeded maxims, suffers from two pervasive failings. First, the doctrine persistently misdescribes what happens in preemption cases. It systematically exaggerates the role of congressional intent, attributing to Congress judgments that are in fact grounded in judicial perceptions about the desirability of displacing state law in any given area. As Ernest Young has observed, "Many, if not most, preemption cases are not about the interpretation of ambiguous statutory text, but rather about how to identify the

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<sup>60</sup> *Fid. Fed. Sav. & Loan Ass'n v. de la Cuesta*, 458 U.S. 141, 152–53, 159 (1982).

<sup>61</sup> *Rice*, 331 U.S. at 230.

<sup>62</sup> *See, e.g., Engine Mfrs. Ass'n v. S. Coast Air Quality Mgmt. Dist.*, 541 U.S. 246 (2004) (finding preemption without mentioning the presumption while the dissent applies the presumption and would find no preemption); *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525 (2001) (finding that federal legislation prescribing mandatory health warnings for cigarette packaging and advertising preempts a state prohibition of outdoor cigarette advertising near schools and playground while the dissent argues that the presumption, properly applied, would have spared state regulation concerning the location, as opposed to the content, of cigarette advertising from preemption); *Buckman Co. v. Plaintiffs' Legal Comm.*, 531 U.S. 341 (2001) (declining to apply the presumption in holding state law claims of fraud on a federal agency preempted). As Professor Hoke has observed, the Supreme Court's devotion to its preemption presumptions "can only be described as fickle." Hoke, *supra* note 59, at 733.

<sup>63</sup> In fact, the decision now cited as the canonical statement of the presumption against preemption suggests just such a limitation. *See Rice*, 331 U.S. at 230 (noting that the presumption applies where Congress has "legislated . . . in a field which the States have traditionally occupied").

<sup>64</sup> *See, e.g., United States v. Locke*, 529 U.S. 89 (2000) (declining to apply the presumption to a state regulation of international shipping, an area where the federal interest is well established). For critiques of the presumption, see Viet D. Dinh, *Reassessing the Law of Preemption*, 88 *GEO. L.J.* 2085, 2092–96 (2000); and Marin R. Scordato, *Federal Preemption of State Tort Claims*, 35 *U.C. DAVIS L. REV.* 1, 29–31 (2001).



underlying purposes of federal statutes and to assess the acceptable degree of conflict between those purposes and state regulatory measures.”<sup>65</sup> The doctrine also exaggerates the judicial reluctance to displace state law. While continuing to invoke the presumption against preemption, federal courts apply preemption more than any other constitutional doctrine.<sup>66</sup> The Supreme Court, architect of a “states’ rights revolution” in recent years, sets the pace.<sup>67</sup> Perhaps most importantly, preemption doctrine misdescribes what happens in preemption cases because it downplays the degree to which preemption results in the displacement of state law, rather than merely preserving federal law against nullification. The Court’s doctrine and its rhetoric in most preemption cases seek to portray preemption as being little different from a routine exercise in statutory interpretation. The interpretation of a federal statute does not ordinarily entail a judgment nullifying state law, yet that far-reaching result is precisely what happens when courts apply preemption doctrine.

A second failing of the Court’s preemption doctrine is that it provides an inadequate basis for bringing information and analysis to bear on the issues implicated by decisions to displace state law. The Court’s categories of preemption and its presumption against preemption suggest that the same formal analysis is appropriate without regard to whether the issue under consideration has historically been undertaken by the federal government or the states.<sup>68</sup> And nowhere does the Court’s doctrine invite litigants or judges to consider pragmatic arguments for or against federal uniformity or state diversity, which many commentators believe are of paramount importance in resolving displacement decisions.<sup>69</sup> In a word, the Court’s preemption doctrine is substantively empty. This emptiness helps mask the fact that courts are actually making substantive decisions in the name of preemption. The very emptiness of this doctrine also impoverishes the type of record that litigants develop for courts in preemption cases, which plausibly means that these cases are not as well decided as they would have been under a different kind of doctrine.

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<sup>65</sup> Young, *Two Federalisms*, *supra* note 3, at 132.

<sup>66</sup> See Gardbaum, *Nature*, *supra* note 15, at 768.

<sup>67</sup> See Richard H. Fallon, Jr., *The “Conservative” Paths of the Rehnquist Court’s Federalism Decisions*, 69 U. CHI. L. REV. 429, 462–63 (2002) (noting the high instance of Supreme Court cases finding state law preempted since the creation of the “current pro-federalism five-member majority”). Although the Court’s caseload has fallen in recent years, the percentage of preemption cases on the docket has remained constant (at about 8%), and the Court’s tendency to reach pro-preemption outcomes has risen, at least in contested cases. Greve & Klick, *supra* note 19, at 49–50, 57.

<sup>68</sup> See Thomas W. Merrill, *Preemption in Environmental Law: Formalism, Federalism Theory, and Default Rules*, in FEDERAL PREEMPTION: STATES’ POWERS, NATIONAL INTERESTS 166, 166–68 (Richard A. Epstein & Michael S. Greve eds., 2007).

<sup>69</sup> See Spence & Murray, *supra* note 19, at 1162 (concluding, based on empirical survey, that “because judicial norms proscribe citing political pressures or policy preferences as the basis for judicial decisions, all (or nearly all) preemption opinions are cloaked in the language of [formal] sets of decision rules, regardless of the actual basis of the decision”).

A better characterization of the judicial undertaking in preemption cases would begin by recognizing that preemption controversies involve three inquiries, which are interwoven but analytically distinct.<sup>70</sup> First, there is a question about the meaning of federal law: what does the federal statute or regulation at issue require? Second, there is a question about the meaning or characterization of state law: what does state law require? Third, there is the judgment as to whether federal law, as interpreted, is in tension with state law, as interpreted, and whether this tension is sufficiently severe to warrant the displacement of state law in light of all relevant factors that bear on this decision. These factors include both larger traditions about the appropriate division of authority between the federal government and the states, and the pragmatics of the particular issue under consideration, most notably determining whether the application of state law would interfere with maintaining a single national market.

Resolution of the first question is of course a matter of interpretation of federal law. Here, it is appropriate that courts should apply conventional standards of interpretation. These include the understanding that the intent or purpose of Congress is key in any case in which the meaning of a federal statute is involved. By and large, the first inquiry in every preemption case bears the closest similarity to the rhetoric of conventional preemption doctrine.

The second question, involving the correct interpretation or characterization of state law, is rarely acknowledged in preemption cases. As should be obvious, however, preemption is required only where there is some kind of *problem* with state law. A problem should not be assumed, but must be demonstrated. This in turn demands that the requirements of state law be accurately ascertained. Since state courts have the final authority in articulating the requirements of state law, the second step in the inquiry may entail the application of *Erie* precepts<sup>71</sup> or perhaps even certification to state courts.<sup>72</sup>

The final step in preemption controversies involves a judgment about the degree of tension between the objectives of federal and state law, and another judgement about whether this tension is too great to permit the parallel application of both sets of law. This third step cannot be discharged by

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<sup>70</sup> Cf. Hoke, *supra* note 30, at 889 (recognizing that preemption entails separate inquiries into the meaning of federal statutory law and a determination grounded in the Supremacy Clause as to whether state law is contrary to federal statutory law).

<sup>71</sup> See *Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938).

<sup>72</sup> On certification procedures, see Bradford R. Clark, *Ascertaining the Laws of the Several States: Positivism and Judicial Federalism After Erie*, 145 U. PA. L. REV. 1459 (1997); Judith S. Kaye & Kenneth I. Weissman, *Interactive Judicial Federalism: Certified Questions in New York*, 69 FORDHAM L. REV. 373 (2000); and Kathryn A. Watts, *Adapting to Administrative Law's Erie Doctrine*, 101 NW. U. L. REV. 997 (2007). Of course, preemption often arises in state court proceedings, see, e.g., *Viva! Int'l Voice for Animals v. Adidas Promotional Retail Operations, Inc.*, 162 P.3d 569 (Cal. 2007), in which case the tribunal is well positioned to ascertain the requirements of state law.

laying the requirements of federal law down next to the requirements of state law and seeing if they conflict. Sometimes, of course, Congress expressly determines by legislation that certain state laws are preempted.<sup>73</sup> But even in express preemption cases, the outcome frequently turns on the resolution of statutory ambiguities such as whether state law can be said to “relate to” a subject covered by federal law or to impose a “requirement” or “standard” subject to federal control, and no consistent jurisprudence has developed about the proper understanding of these terms.<sup>74</sup> The displacement decision includes, at least implicitly, general structural considerations, both constitutional and pragmatic, about the division of authority between the federal government and the states, neither of which will usually be revealed by the particular federal and state legal texts at issue. And it also includes, at least implicitly, an evaluation of the real-world impact of state regulation on maintaining a national commercial market, which also will not usually be illuminated by the texts at issue.<sup>75</sup> The decision to displace, in short, is a multifaceted, high-stakes discretionary policy judgment that requires considerable sophistication if it is to be exercised properly. It is a fair question whether any legal institution is up to the task.

### III. THE VARIABLES OF INSTITUTIONAL CHOICE

In order to assess the strengths and weaknesses of different institutions in regard to their capacity to decide whether to displace state law, it will be useful to step back and consider the constitutional framework in which displacement decisions are made. Having done that, we can next identify, at least in a preliminary fashion, some of the variables that might be invoked in evaluating the performance of any institution asked to make such a determination. Then we can offer a general assessment of how our candidate institutions—Congress, the courts, and federal agencies—stack up against these variables.

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<sup>73</sup> See, e.g., *Aetna Health Inc. v. Davila*, 542 U.S. 200 (2004) (construing the scope of ERISA’s express preemption clause).

<sup>74</sup> The “relate to” formulation is found in the notorious ERISA preemption provision. See 29 U.S.C. § 1144(a) (2000) (preempting “any and all State laws insofar as they may now or hereafter relate to any employee benefit plan”). Although the Supreme Court initially thought it could resolve cases arising under this clause by simply enforcing its plain meaning, this proved unworkable, with the result that we now have an elaborate jurisprudence of ERISA preemption. See JOHN H. LANGBEIN ET AL., *PENSION AND EMPLOYEE BENEFIT LAW* 758–841 (4th ed. 2006). For examples of the Court’s struggles over terms like “requirement” or “standard,” see *Bates v. Dow Agrosciences LLC*, 544 U.S. 431, 442–54 (2005); *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 494–503 (1996); and *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 520–24 (1992).

<sup>75</sup> As one commentator has written: “The task [in preemption decisions] is to determine *what a ‘successful’ implementation of the federal scheme should look like.*” McGreal, *supra* note 7, at 838 (emphasis added).

### A. *The Architecture of Displacement*

Preemption in the sense of displacement is a key mechanism for ordering relations among different levels of government within our federated system. Other mechanisms include judicial review of federal action claimed to exceed the scope of federal power, the dormant commerce clause doctrine, the use of conditional spending and conditional regulation to induce states to regulate in a manner that conforms to federal policy, the delegation of authority to state courts and agencies to enforce federal law, the adoption of federal law designed to backstop state law, doctrines governing the choice between federal common law and state common law, and provisions allowing states to opt out of federal law. These mechanisms exist against a backdrop of shared assumptions about the nature of the American federal system. These assumptions can be briefly stated and serve as a starting point for any consideration of the variables that inform an analysis of which institution should make displacement determinations.

One important assumption is that the state governments are the locus of general sovereignty in the American federal system. The states inherited the general authority of the Crown and Parliament when the colonies broke free from England.<sup>76</sup> The federal government was created only later and was to engage in functions that the states were regarded as collectively or individually incompetent to perform.<sup>77</sup> Over time, the powers of the federal government have greatly expanded through a process of reinterpretation of the enumerated powers in which the states and the courts have generally acquiesced.<sup>78</sup> But it remains generally true that the states are the repository of general sovereignty and that federal authority to act must be traced to some specific grant of power set forth in the Constitution.<sup>79</sup>

A second important assumption is that “our economic unit is the Nation.”<sup>80</sup> The Constitution is pervasively concerned with establishing and maintaining the United States as a single integrated commercial market. State experimentation with diverse police power measures is permitted—even encouraged—when it does not balkanize the national commercial

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<sup>76</sup> See, e.g., *Martin v. Waddell*, 41 U.S. (16 Pet.) 367, 410–11 (1842).

<sup>77</sup> Article 6 of the Virginia Plan, agreed to by the Constitutional Convention on July 29, 1787, provided that the new national legislature would have authority to “legislate in all cases for the general interests of the union, and also in those to which the states are separately incompetent, or in which the harmony on the United States may be interrupted by the exercise of individual legislation.” RAKOVE, *supra* note 30, at 177 (quoting 1 RECORDS OF THE FEDERAL CONVENTION OF 1787, at 21 (Max Farrand ed., rev. ed. 1966) (1911)). This general statement of principle was then replaced by the list of enumerated powers drafted by the committee of detail, which was viewed as reflecting these principles. *Id.* at 178.

<sup>78</sup> See, e.g., *United States v. Morrison*, 529 U.S. 598, 607 (2000) (“[O]ur interpretation of the Commerce Clause has changed as our Nation has developed.”).

<sup>79</sup> See U.S. CONST. amend. X; THE FEDERALIST NO. 45, at 241 (James Madison) (George W. Carey and James McClellan eds., 2001).

<sup>80</sup> *H.P. Hood & Sons, Inc. v. DuMond*, 336 U.S. 525, 537 (1949).

market, threaten economic retaliation, or trigger destructive interstate competition. But the Constitution is centrally concerned with establishing a "federal free trade unit."<sup>81</sup> This meta-principle is reflected not only in doctrines like the dormant commerce clause, but also plays a significant role in determining whether displacement of state law is warranted in order to effectuate the purposes of federal law.<sup>82</sup>

A third important assumption is that Congress is the critical institution in determining whether to activate federal authority. All mechanisms for ordering relations among levels of government, including preemption in the sense of displacement, accept the premise of congressional supremacy.<sup>83</sup> Provided it acts within the scope of its enumerated powers, Congress has authority to displace state law, and when it has clearly done so, all other actors must acquiesce in this decision.<sup>84</sup> Similarly, if Congress disagrees with a displacement decision made by some other institution like an agency or a court, Congress can, by enacting appropriate legislation, overturn such a decision, and all other actors must acquiesce in this decision.

A fourth important assumption is that federal power, once activated, is paramount to the authority of the states. This assumption, of course, is made explicit by the Supremacy Clause.<sup>85</sup> Thus, although the constitutional framework implies that federal law is "interstitial" and state law "general,"<sup>86</sup> federal law, once activated, dominates state law. The central question in preemption law is whether this supremacy should be construed narrowly or broadly. However this question is resolved, all concede that federal law, once it is activated by Congress acting within its proper sphere, operates at a higher order than state law.

These assumptions provide the essential backdrop to any consideration of institutional roles in determining when state law is displaced by federal law. Any analysis of comparative institutional competences must remain faithful to these assumptions and must be designed to build on these assumptions in constructing a workable federal system.

### B. Variables of Evaluation

Against this background, what sorts of criteria should we adopt for assessing the capacity of different institutions to make displacement decisions? I offer here eight suggested variables for evaluating institutions.

<sup>81</sup> *Id.* at 538.

<sup>82</sup> Significantly, the Court's modern preemption doctrine evolved out of and shares common roots with the dormant commerce clause doctrine. See Gardbaum, *Nature*, *supra* note 15, at 801-05.

<sup>83</sup> Thus, Congress may consent to state regulation the Court has previously found preempted or to violate the dormant commerce clause. See, e.g., *Prudential Ins. Co. v. Benjamin*, 328 U.S. 408 (1946).

<sup>84</sup> See, e.g., *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 92-93 (1824).

<sup>85</sup> U.S. CONST. art. VI, cl. 2; see also *supra* text accompanying notes 24-32.

<sup>86</sup> Henry M. Hart, Jr., *The Relations Between State and Federal Law*, 54 COLUM. L. REV. 489, 499-515 (1954).

These variables derive from different elements of the constitutional architecture that serves as a backdrop to the inquiry. Although some variables sound more in constitutional legitimacy and others more in social utility, all are factors that matter to participants in our legal system. The aspiration is to draw some preliminary and general conclusions about the relative strengths and weaknesses of the three principal candidate institutions—Congress, agencies, and the courts—by considering how they rate relative to variables that are widely regarded as being relevant by participants in the legal order.

One set of variables can be called constitutional. Ideally, an institution deciding whether to displace state law would do so in a manner that (1) is faithful to the Constitution's division of powers between the federal government and the states, (2) creates stability of expectations about the relevant distribution of authority among the levels of government, (3) allows all affected actors to express their views about whether displacement is required before a decision is rendered, and (4) promotes a proper balance of authority between the central government and the states. Another set of variables for assessing institutions can be called interpretative. Ideally, the decisionmaker would also decide when to displace state law based on (5) an accurate interpretation of federal law, including, most importantly, congressional pronouncements bearing on the decision to displace, and (6) a fair characterization of the state legal regime. A final set of variables can be called pragmatic. The decisionmaker should also have (7) a sophisticated understanding of how uniformity as opposed to diversity in legal standards will affect the objective of maintaining a national commercial market, and (8) the capacity to develop and assess the facts that bear on this analysis of uniformity versus diversity in the context at issue.

I offer a few words of additional explanation about each of these variables and then undertake a preliminary assessment of how the three principal institutions under consideration should be evaluated in light of these variables.

*1. Fidelity to the Constitution.*—We live in a nation that prides itself on being governed by a written constitution. Our Constitution expressly addresses the division of authority between the federal government and the states by enumerating specific powers given to the federal government, limiting state power to regulate in certain areas, and stating in the Tenth Amendment that all powers not enumerated are reserved to the states or the people. Preemption in the sense of displacement unquestionably implicates the division of authority between the federal government and the states. Thus, it would seem desirable that displacement decisions remain faithful to the general architecture of federalism and track the more specific allocation of authority established by the Constitution.

Admittedly, the division of authority between the federal government and the states we witness today is significantly different from the one envi-

sioned at the time of the framing of the Constitution. I am not suggesting that preemption decisions should strictly enforce the original understanding of the Constitution's division of authority. Such an aspiration would appeal to no more than a small minority of the legal community.<sup>87</sup> But this does not mean that federal-state relations are not constitutionally grounded. Any conception of federal-state relations must remain faithful to the fundamental assumptions about the constitutional framework outlined in Section A. The institution that makes displacement decisions should have an intuitive grasp of this framework and its implications. In addition, there is unquestionably an established geography of federal-state relations. For example, the federal government is understood to have dominant authority in the fields of foreign relations, immigration, and Indian affairs, whereas the states are acknowledged to have primacy in domestic relations law and the laws of inheritance.<sup>88</sup> The roots of this geography are also found in the Constitution, and the institution that makes displacement decisions should also have a clear conception of the contours of this geography.

In short, although the division of authority between the federal government and the states has evolved significantly, some attempt at "translation" of the Constitution's basic postulates and specific grants of authority, to use Larry Lessig's term,<sup>89</sup> should be attempted in the preemption context. What I mean by fidelity is roughly what Lessig means, which is that a conscientious effort should be made to link preemption decisions to the language and received traditions of the Constitution bearing on the vertical division of authority.

2. *Stability*.—It is also important that decisions to displace state law reflect a pattern that is stable over time.<sup>90</sup> Cumulatively, displacement decisions trace a structure defining the specific boundaries between the authority of the federal government and the state and local governments. In so doing, these decisions fine-tune the landscape of federal-state authority beyond the general geography grounded in the Constitution. Stability in this structure is desirable because it allows affected persons to know which level of government is primarily responsible for which problems. Government

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<sup>87</sup> See, e.g., *United States v. Lopez*, 514 U.S. 549, 584–602 (1995) (Thomas, J., concurring).

<sup>88</sup> See, e.g., *Am. Ins. Ass'n v. Garamendi*, 539 U.S. 396, 413–15 (2003) (foreign relations); *Boggs v. Boggs*, 520 U.S. 833, 840 (1997) (laws of inheritance); *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324, 333–34 (1983) (Indian law); *Hisquierdo v. Hisquierdo*, 439 U.S. 572, 581 (1979) (domestic relations); *Hines v. Davidowitz*, 312 U.S. 52, 66 (1941) (immigration law).

<sup>89</sup> Lawrence Lessig, *Translating Federalism*: *United States v. Lopez*, 1995 SUP. CT. REV. 125, 127; cf. Bradford R. Clark, *Translating Federalism: A Structural Approach*, 66 GEO. WASH. L. REV. 1161, 1171 (1998) (stressing that any translation must be "consistent with the constitutional text").

<sup>90</sup> A variety of commentators have recognized the importance of promoting stability in determining the allocation of authority among legal institutions. See, e.g., Larry Alexander & Frederick Schauer, *On Extrajudicial Constitutional Interpretation*, 110 HARV. L. REV. 1359, 1372–81 (1997); Jonathan T. Molot, *Reexamining Marbury in the Administrative State: A Structural and Institutional Defense of Judicial Power over Statutory Interpretation*, 96 NW. U. L. REV. 1239, 1292–1320 (2002).

requires long-term investments in laws, in institutions, and in the human expertise to implement them. It is important that all affected persons, including government officials, the regulated community, and individual citizens, know where they should make these investments in order to avoid wasteful and frustrating duplication of effort.

3. *Representation.*—A number of commentators have emphasized the importance of having the interests of all affected parties represented in the process that determines the vertical division of power between the federal government and the states.<sup>91</sup> The most common source of concern here has been the interests of the states. Concern for representation of the interests of the states intersects with the literature about whether the states are adequately represented in the political process, making judicial review of federalism questions redundant or unnecessary.<sup>92</sup> But representation of other interests, including the interests of the federal government and those affected by regulation, is important too.

I do not propose to arbitrate or even review the debate about whether, or to what extent, different interests are represented in federalism decisions. It is enough to say that in a democratic society, allowing affected interests to give voice to their concerns before important decisions are made is generally regarded as being a good thing. This is why, for example, decisions by administrative agencies taken after notice and comment are generally entitled to greater respect than decisions taken by agencies without public input.<sup>93</sup> Therefore, decisions to displace state law should be made by institutions capable of granting a hearing to all parties affected by such decisions.

4. *Balance.*—A number of commentators, most prominently perhaps Ernest Young, have argued that recent federalism decisions by the Supreme Court can be justified as an effort to restore balance to the relationship between the federal government and the states.<sup>94</sup> The idea here is that the federal government, especially in the decades since the New Deal, has grown extremely powerful, to the point that it dominates the states and threatens to turn them into subordinate administrative units of a unitary national government. This is said to be an imbalance of power that justifies an effort to restore some measure of dignity and independence to the states. Those who espouse this position naturally believe that the need for balance should be also reflected in preemption decisions.

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<sup>91</sup> Mendelson, *supra* note 7, at 759–78; Sharkey, *supra* note 7, at 251–56; Ernest A. Young, *Two Cheers for Process Federalism*, 46 VILL. L. REV. 1349, 1352–66 (2001).

<sup>92</sup> See, e.g., Larry D. Kramer, *Putting the Politics Back into the Political Safeguards of Federalism*, 100 COLUM. L. REV. 215 (2000); Saikrishna B. Prakash & John C. Yoo, *The Puzzling Persistence of Process-Based Federalism Theories*, 79 TEX. L. REV. 1459 (2001).

<sup>93</sup> See, e.g., *United States v. Mead Corp.*, 533 U.S. 218, 229–30 (2001).

<sup>94</sup> See Young, *Compensating Adjustments*, *supra* note 3.



I must confess to some ambivalence about the demand for a restoration of balance. My unease relates to the difficulty of identifying the baseline against which one is to make a judgment about whether the division of power requires rebalancing.<sup>95</sup> The federal government has unquestionably expanded its power at the expense of the states in the decades since the New Deal. But there are many causes of this, including technological changes that have created a much more integrated national economy and have brought about greater external threats to national security. Some of these same technological changes may also have made it easier for interest groups to capture the federal regulatory process in an effort to subordinate the authority of the states, including through displacement. It is very difficult to distinguish the fraction of federal expansion that is a necessary and appropriate response to a changing economic and national security environment and the fraction that may be the by-product of new technologies of political influence.

Yet notwithstanding the difficulties of making ultimate normative judgments about balance, there is no question that the choice of institutions for making preemption determinations can have a significant impact on the balance of power between the federal government and the states. The principal point I would make here is that different institutions face different constraints in terms of the *rate* at which they can process decisions about whether to preempt. Other things being equal, the faster decisions can be made, the more displacement of state law there will be. Given a strong underlying demand for preemption—based on greater economic integration, greater need for economies of scale and scope, and more urgent perceptions of external threats to the nation—increasing the rate at which preemption decisions are processed will result in more preemption in the aggregate; conversely, slowing down the processing rate will result in less preemption in the aggregate.

Congress, which can act only through the cumbersome bicameral and presentment requirements, would proceed most slowly in resolving preemption questions. We can predict that leaving all preemption decisions to Congress would yield the lowest level of preemption, simply because Congress would not get around to resolving preemption questions very often. Courts present an intermediate case. There are many more courts than congresses, so courts collectively have a much greater decisional capacity. But litigation is expensive and time-consuming, and achieving preemption on a national scale requires either a uniformly successful litigation campaign or a judgment by the U.S. Supreme Court, which is tightly constrained in terms of the number of decisions that it can render. Judges also have a tendency to rule narrowly when matters are controversial, which may require multiple trips to the courthouse before the contours of preemption in any given field are resolved. Agencies are the fast track to preemption. Agen-

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<sup>95</sup> If the baseline is the written Constitution, then this variable is redundant of the first.

cies have nationwide jurisdiction and can usually act by rulemaking. Rulemaking uses informal procedures, which are probably cheaper to invoke than litigation. And rulemaking allows multiple issues to be resolved in one fell swoop. So at least in terms of decisional capacity, agencies have the greatest potential to resolve preemption decisions.<sup>96</sup>

In short, although it is difficult to say with confidence that any particular balance of authority between the federal government and the states is optimal, one can say with much more confidence that shifting the power to preempt from courts to some other institution would have important implications for that balance in the future. Shifting authority to Congress would slow down the rate of preemption, causing the balance of authority to tilt more toward the states. Shifting authority to agencies would speed up the rate of preemption, causing the balance to tilt further toward the federal government.

5. *Interpretation (Federal)*.—The decision to displace state law unquestionably requires, as a predicate, the interpretation of federal law. Congress always has the first and last word about preemption. This means the institution that decides whether to displace state law should be adept at interpreting congressional legislation. Here, we encounter a number of controversial issues about what constitutes good interpretation. Some believe that interpretation should seek to enforce the objectives of the enacting body.<sup>97</sup> Others believe that interpretation should reflect the political values of contemporary representative institutions.<sup>98</sup> Still others believe that interpretation should reflect the “best” normative ideals that can be supported by the language of the text and other conventional sources of meaning.<sup>99</sup>

Again, I will not attempt to arbitrate or even summarize the dispute. Instead, I will note that whatever substantive theory of interpretation we adopt, interpretation can be carried out in a more or less principled fashion.<sup>100</sup> Principled interpretation is that which accounts for the text and other material conventionally regarded as bearing on questions of interpretation, responds to objections from others grounded in these materials, and offers a reasoned justification for the conclusion it adopts. Principled interpretation,

<sup>96</sup> My point is not that agencies are systematically biased in favor of preemption, although some commentators believe this is a concern and I address this possibility briefly below, *infra* notes 110–12 and accompanying text. The point here is only that agencies have the capacity to process more preemption controversies at greater speed than courts or Congress.

<sup>97</sup> William M. Landes & Richard A. Posner, *The Independent Judiciary in an Interest-Group Perspective*, 18 J.L. & ECON. 875, 885 (1975); John F. Manning, *Textualism and the Equity of the Statute*, 101 COLUM. L. REV. 1, 105–26 (2001); Richard A. Posner, *Statutory Interpretation—In the Classroom and in the Courtroom*, 50 U. CHI. L. REV. 800, 817–22 (1983).

<sup>98</sup> See WILLIAM N. ESKRIDGE, JR., *DYNAMIC STATUTORY INTERPRETATION* (1994).

<sup>99</sup> RONALD DWORKIN, *LAW’S EMPIRE* 225–75, 313–54 (1986); RICHARD A. POSNER, *LAW, PRAGMATISM, AND DEMOCRACY* 57–96 (2003).

<sup>100</sup> For a sensible and subtle analysis that provides an example of what I mean by principled interpretation, see HART & SACKS, *supra* note 1, at 1111–1380, noting particularly pages 1374–80.

in this sense, should have a degree of predictability and stability that unprincipled interpretation will lack. Nearly all would agree that it is desirable that interpretation be principled.

6. *Interpretation (State).*—The decision to displace also requires an accurate understanding and characterization of state law. Since state political actors, including state courts, have the final say about the content and meaning of state law, this variable requires a slightly different set of skills than interpretation of federal law. The primary qualification here is good faith in ascertaining the requirements of state law. Familiarity with the sources and traditions of state law will be an advantage, as will be a willingness to consult with states or otherwise engage in appropriate investigations into state law when its requirements are unclear.

7. *Understanding Uniformity and Diversity.*—The decision to displace, at bottom, requires a judgment about the degree of tension between federal and state law. This is not simply a mechanical exercise in discerning “conflict,” either in the sense of mutual exclusivity or frustration of purpose. Sometimes Congress will spell out whether displacement is required. But usually, determining whether displacement is necessary entails an inquiry into the pragmatic consequences of either uniformity or diversity in legal standards in a given area.<sup>101</sup> The central concern here, as under the dormant commerce clause, is whether uniformity is needed in order to preserve a single national commercial market. This meta-principle, constitutional in its origins, pervades nearly all preemption controversies. It operates, in effect, as an unacknowledged canon of interpretation in determining whether federal law requires displacement of state law. Applying this canon requires a sophisticated understanding of the relevant market and whether application of diverse state and local laws will have the effect of carving that market up into submarkets of inefficient scope.

The point is not that the institution that determines whether to displace state law should engage in a freewheeling analysis of the benefits and costs of uniformity or of diversity in legal standards. It is also important to calibrate the relative dominance of federal and state law in the area in question and to ascertain the purposes of the federal statute said to justify preemption. Still, in making a final determination whether the tension between federal and state law warrants displacement, the decisionmaker should be sensitive to the pervasive meta-principle favoring the maintenance of a single integrated commercial market. Explicit consideration of this factor will

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<sup>101</sup> For overviews of the policy factors bearing on the choice between diversity and uniformity in regulation, see DAVID L. SHAPIRO, *FEDERALISM: A DIALOGUE* (1995); Steven G. Calabresi, “*A Government of Limited and Enumerated Powers*”: *In Defense of United States v. Lopez*, 94 MICH. L. REV. 752, 774–84 (1995); Jacques LeBoeuf, *The Economics of Federalism and the Proper Scope of the Federal Commerce Power*, 31 SAN DIEGO L. REV. 555 (1994); and Michael W. McConnell, *Federalism: Evaluating the Founders’ Design*, 54 U. CHI. L. REV. 1484 (1987).

lead to a more sophisticated analysis of the pluses and minuses of displacement. This in turn will generate outcomes that are both more consistent with congressional objectives and will do more to secure the objective of preserving our nation as a single economic unit.

8. *Factfinding*.—In order to understand the different effects of uniformity versus diversity, it is also necessary to understand the facts as they apply to different institutions, industries, and markets. These are “legislative facts”: facts about society and about how different institutions and incentives influence the behaviour of different actors within society. They are not facts about who did what when and where in some historical episode (“adjudicative facts”). Ideally, the institution that decides to displace will have the ability to both gather the necessary legislative facts and analyze these facts in order to make an informed decision.

### C. *A Preliminary Comparative Analysis*

We are now in a position to apply, at least in a preliminary fashion, the foregoing evaluative variables to our three principal candidate institutions: Congress, the federal agencies, and the courts.

1. *Congress*.—Congress obviously has many strengths as an institution for deciding whether to displace state law. The constitutional architecture of displacement makes Congress the critical institution in activating federal authority. Since Congress has both the first and last word about preemption, it makes sense that we should look to Congress to ascertain whether it has resolved the displacement question. Congress is also the institution in which the interests of the states and other affected parties are probably best represented. State regulators are likely to have easy access to members of their congressional delegation, and state officials will have no trouble securing invitations to testify at hearings that precede the enactment of preemptive legislation.<sup>102</sup> Members of Congress, and some of their staff, have an intuitive appreciation of the factors that should influence the choice between uniformity and diversity. And Congress as an institution has the capacity to investigate legislative facts.

On other variables, however, Congress is likely to perform relatively poorly. Although members of Congress take an oath to support the Constitution, Congress in recent decades has tended to cede questions of constitutionality to the courts, and we are not likely to see much of a serious effort by Congress to square displacement decisions with the division of authority established by the Constitution.<sup>103</sup> Congress’s production of regulatory legislation also tends to proceed in episodic bursts, which may not be condu-

<sup>102</sup> Larry Kramer, *Understanding Federalism*, 47 VAND. L. REV. 1485, 1542–46, 1551–59 (1994).

<sup>103</sup> On the general problem of evisceration of congressional engagement with constitutional values, see MARK TUSHNET, *TAKING THE CONSTITUTION AWAY FROM THE COURTS* (1999).

cive to stability in the division of authority. And, as previously discussed, transferring primary authority to Congress for preemption decisions would slow down the pace of preemption, shifting the balance of regulatory authority to the states. If one believes the federal government has grown too powerful relative to the states, this would be regarded as a good thing, but if one believes that a globalizing world calls for fewer, rather than more, layers of domestic regulation, then it would be a cause for concern.

When we come to the interpretative and pragmatic variables, however, we begin to see how impossible it is for Congress to play any kind of exclusive or even dominant role in determining whether to displace state law. The problem is not that Congress is institutionally incapable of spelling out whether displacement should or should not occur. The problem, rather, is that Congress cannot anticipate when it legislates all the situations in which questions of displacement will arise.<sup>104</sup> Legislation operates *ex ante*, before particular disputes about implementation and enforcement emerge. Given the limits of human knowledge, Congress cannot predict at the time it legislates every question of federal preemption that will arise in the future. Moreover, since displacement involves assessing the degree of tension between federal and state law, Congress would have to analyze and interpret the common law and statutory rules of fifty states and thousands of municipalities. This would include not only those statutes and ordinances in existence at the time it legislated, but also all those that might be enacted in the future. This is beyond impossible.<sup>105</sup>

The important conclusion to be drawn from this is that the decision to displace, by its very nature, must be one that is made largely *ex post* rather than *ex ante*. Consequently, it is necessary to identify an institution that can resolve the questions of interpretation and displacement after the sources of tension between federal and state law have been identified. The two most obvious candidates for undertaking such *ex post* inquiries are courts and the agencies charged with administration of federal statutes.<sup>106</sup>

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<sup>104</sup> See Daniel J. Meltzer, *The Supreme Court's Judicial Passivity*, 2002 SUP. CT. REV. 343, 376–77.

<sup>105</sup> See Spence & Murray, *supra* note 19, at 1190–91 (arguing that congressional resolution of preemption questions would result either in very general provisions that would require extensive interpretation by courts, making courts the *de facto* institution of decision, or very specific provisions that would produce unintended consequences).

<sup>106</sup> In addition to the problem of capacity constraints on congressional action, commentators have disagreed about what type of decisional rule is more likely to force Congress to act. Rick Hills has recently argued that a strong presumption against preemption is more likely to induce a congressional response because business interests will lobby to overturn rules that inefficiently disrupt economies of scope and scale. See Hills, *supra* note 19, at 16–39. Alan Schwartz, focusing more narrowly on preemption of tort causes of action, argues that a rule of broad preemption is more likely to elicit a congressional response, at least when Congress prefers that federal law set only a floor rather than a ceiling. See Alan Schwartz, *Statutory Interpretation, Capture, and Tort Law: The Regulatory Compliance Defense*, 2 AM. L. & ECON. REV. 1 (2000). However one resolves this dispute, Adrian Vermeule has recently offered an additional reason why any strategy predicated on forcing Congress to act is unlikely to succeed. VERMEULE, *supra* note 1, at 118–48. Such a strategy will work only if judges achieve a high degree of

2. *Federal Agencies.*—Agencies compensate for many of the institutional weaknesses of Congress. In particular, agencies can act in a variety of procedural formats, including rulemaking, adjudication, and the issuance of more informal interpretative rulings and policy advice. Thus, agencies are capable of addressing displacement controversies *ex post*, after they have crystallized, in a way that Congress cannot. Agencies also excel on the pragmatic variables. Given their ability to draw upon the expertise of economists and other types of regulatory specialists, agencies almost certainly have a better grasp of the impact of uniformity and diversity on a national commercial market than does either Congress or the courts. Similarly, given their ability to undertake wide-ranging investigations of industry structure and other types of relevant legislative facts, agencies have factfinding abilities that surpass those of either Congress or the courts.<sup>107</sup>

On the interpretation variables, the verdict is mixed. Agencies interpret federal legislation all the time, and with respect to the type of federal interpretation that is particularly relevant in preemption controversies—the interpretation of detailed federal regulatory statutes administered by the agency—the agency may well have superior capacity to engage in principled interpretation relative to the courts. However, in terms of their capacity to engage in good faith interpretation of state regulatory law, including both state common law and state legislation, it is doubtful that agencies can match the capabilities of the courts.<sup>108</sup>

On the constitutional variables, the agencies clearly fall short. The critical problem here is one of tunnel vision. Agencies know a great deal about one federal regulatory scheme, and they may know quite a bit about the pros and cons of making that particular scheme the exclusive source of legal obligation, as opposed to one that exists concurrently with state and local regulation. But they are unlikely to have much knowledge—or even care—about larger questions concerning the division of authority between the federal government and the states. There is little reason to think that agency officials are steeped in the framework assumptions that govern preemption or that they have given much thought to the general geography that demarcates the line between federal and state authority (outside their narrow area of expertise). Insofar as the resolution of preemption controversies implicates legal variables that go beyond narrow specialization, “the

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coordination, such that they send a uniform signal to Congress that decisional responsibility has been shifted upstream to the legislative branch. *Id.* at 123–29. Given the independence and diversity of views among Supreme Court Justices and the inability of the Justices to police any more than a fraction of lower federal court and state court decisions, it is unrealistic to expect that any such degree of coordination can be achieved. *Id.* at 131–32.

<sup>107</sup> See Spence & Murray, *supra* note 19, at 1191–93 (concluding that the preferred solution for resolving preemption controversies on a basis that reflects sound policy analysis would be for Congress to delegate authority to make such decisions to expert federal agencies).

<sup>108</sup> See, e.g., *infra* sources cited note 110.

law ought to be applied by an agency whose main business is to know the law, rather than to enforce some part of it."<sup>109</sup>

In particular, agencies know little about constitutional law and usually disclaim any authority to opine on questions like the scope of the commerce power or other constitutional provisions bearing on the division of authority between the federal government and the states. Agencies may also pose a greater threat to stability in the division of authority, given that they are prone to policy shifts with changes in administration and can act to implement policy shifts much more quickly than Congress or the courts. In terms of balance, transferring preemption authority to agencies would increase the capacity of the legal system to displace state law, which would probably result in a further shift in the direction of more federal authority.

There are also reasons to worry about bias on the part of agencies in favor of exclusive federal regulation.<sup>110</sup> Not every agency is bent on empire building or is captured by the firms it regulates. But these phenomena are not unheard of and warrant caution before automatically deferring to agency judgments about the need for preemption. Agencies may also resent the implicit competition from other sources of regulatory authority like states. Certainly it is hard to see agencies reining in Congress and the President when both are bent on the expansion of federal authority at the expense of the states. Even when directed by presidential executive order to consider the federalism implications of their actions, agencies have generally sought to avoid such an obligation.<sup>111</sup> When they have undertaken such an analysis, it has often been conducted in a rote fashion, frequently justifying preemption of state law primarily, if not solely, in terms of the bare existence of statutory authority to do so.<sup>112</sup>

Only with respect to representation do agencies fare well along the constitutional variables. At least if agencies were required to engage in notice and comment procedures before issuing declarations of preemption, this would afford all affected parties, including states, an opportunity to be heard before state law is displaced. Much of the current controversy about the role of agencies in preemption concerns statements in the preambles of

<sup>109</sup> JOHN DICKINSON, *ADMINISTRATIVE JUSTICE AND THE SUPREMACY OF LAW IN THE UNITED STATES* 124 (1927).

<sup>110</sup> See Mendelson, *supra* note 7, at 794–97. Courts have long worried about trusting agencies to determine the scope of their own jurisdiction. See Timothy K. Armstrong, *Chevron Deference and Agency Self-Interest*, 13 CORNELL J.L. & PUB. POL'Y 203, 209–11 (2004); Ernest Gellhorn & Paul Verkuil, *Controlling Chevron-Based Delegations*, 20 CARDOZO L. REV. 989, 992–94 (1999).

<sup>111</sup> As Nina Mendelson notes:

The rate of federalism impact statements . . . appears to be quite low. In 1999, the General Accounting Office reported that only five federalism impact statements had been prepared for the over 11,000 final rules agencies issued between April 1996 and December 1998. A sampling of 600 proposed and final rules during one quarter in 2003 revealed six federalism impact statements prepared by agencies.

Mendelson, *supra* note 7, at 783.

<sup>112</sup> *Id.* at 784–85.

regulations for which neither advance notice nor opportunity to comment was afforded.<sup>113</sup> But at least in principle, agency determinations of preemption could be structured in such a way as to provide significant representation. This is not to say that agencies would be as responsive to the interests of affected parties as Congress would be. Agencies are only indirectly accountable to the public, and their greater degree of political insulation may make them more attuned to the interests of the industries they regulate and less responsive to the states and other interests than Congress would be.

3. *Courts.*—The strengths and weaknesses of courts are something of a mirror image to those of Congress. The courts perform best on the constitutional variables. This is not to say that they have performed especially well here. As I have previously noted, the Court’s preemption doctrine makes no reference to the constitutional division of authority between the federal government and the states, and it exaggerates the role that statutory interpretation plays in preemption decisions. The relevant point, however, is that the courts have the potential to perform better on constitutional variables than either of the other two institutions. The Supreme Court has shown a willingness to incorporate concerns about constitutional structure in various statutory interpretation contexts,<sup>114</sup> and in theory, it could move preemption doctrine in this direction in the future. In any event, there is little doubt that courts are more sensitive to the federalism dimensions of preemption than either Congress or federal agencies are likely to be.

The division of authority established by judicial preemption decisions is also likely to be more stable than any pattern of displacement established by Congress or the federal agencies.<sup>115</sup> This is because courts give significant weight to stare decisis in the preemption context. This is one respect in which the false consciousness of courts about the nature of preemption has produced unintended but salutary results. By portraying preemption as largely a matter of statutory interpretation, courts have extended to preemption decisions the strong version of stare decisis ordinarily applied to statutory interpretation decisions, rather than the weak version applied to constitutional decisions.<sup>116</sup> Given the lock-in effect of the strong version of

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<sup>113</sup> See Sharkey, *supra* note 7, at 229–42.

<sup>114</sup> See, e.g., *Solid Waste Agency of N. Cook County v. U.S. Army Corps of Eng’rs*, 531 U.S. 159, 174 (2001) (holding that the definition of “navigable waters” in the Clean Water Act should not be interpreted to include intrastate waters because such an interpretation would unnecessarily invoke the outer limits of Congress’s power under the Commerce Clause); *Gregory v. Ashcroft*, 501 U.S. 452, 470 (1991) (concluding that given federalism concerns, the Federal Age Discrimination in Employment Act should not be interpreted as including state judges).

<sup>115</sup> Molot, *supra* note 90, at 1310 (“Whereas interpretation by political officials is likely to vary with the political climate, interpretation by judges tends to be comparatively more stable and consistent over time.”); David L. Shapiro, *Courts, Legislatures, and Paternalism*, 74 VA. L. REV. 519, 551–56 (1988) (detailing constraints that make judicial decisions more predictable than legislative decisions).

<sup>116</sup> See Thomas W. Merrill, *Originalism, Stare Decisis and the Promotion of Judicial Restraint*, 22 CONST. COMMENT. 271, 284–85 (2005) (“The Court generally follows a weak theory of precedent in



stare decisis, judicial control over preemption creates a relatively stable division of authority that allows different actors to make efficient investments in reliance on that structure.

One area in which the courts fall short, relative to other institutions, is with regard to representation. To be sure, states and other affected parties can and do file *amicus curiae* briefs in major preemption cases.<sup>117</sup> But courts are not required to respond to these briefs or even to read them. Moreover, federal courts are the most politically insulated of all our candidate institutions. Thus, there is reason to think that courts are likely to be much less responsive to the interests of states and other actors than Congress and probably also less responsive than agencies.

On the interpretation variables, the courts have a strong tradition of engaging in principled interpretation. Agencies may be superior interpreters of the complicated federal statutes they administer, especially insofar as the interpretational issues raise policy questions, but courts specialize in interpretation. Insofar as issues arise that agencies have not addressed, courts are always regarded as appropriate institutions to resolve these issues. Courts are also by far the most preferred institution for determining questions about the meaning of state law. Neither Congress nor the federal agencies have any relevant competence or training here.

Courts come up short most noticeably on the pragmatic variables.<sup>118</sup> Some judges may have ideas about the factors that should influence choices between uniformity and diversity in regulatory standards. But it is reasonable to assume that most do not and, if they do, that their ideas are fragmentary and quite likely outdated.<sup>119</sup> Courts also have very limited capacities to engage in finding legislative facts such as would inform a pragmatic decision to favor uniformity over diversity or vice versa. Thus, one would expect that insofar as judges consider pragmatic factors in deciding whether to displace state law, it is usually at an intuitive and relatively poorly informed level.

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constitutional cases, but at least purports to follow a strong theory of precedent with respect to statutory decisions.”)

<sup>117</sup> See Greve & Klick, *supra* note 19, at 69–74.

<sup>118</sup> Adrian Vermeule is especially harsh in his assessment of the shortcomings of courts on this dimension. See, e.g., VERMEULE, *supra* note 1, at 158 (“[J]udges must make interpretative choices in the face of impoverished information, have only limited capacity to generate the needed information by postponing interpretative choices or by conducting experiments, and have limited capacity to accurately process the information they do obtain.”).

<sup>119</sup> See Spence & Murray, *supra* note 19, at 1189–90 (suggesting, based on an empirical survey of federal preemption decisions, that judges do a poor job of distinguishing between cost-exporting and cost-internalizing regulations).

Taking all these factors into consideration, I believe courts should continue to function as the institution that has the last word on whether to displace state law through preemption. To recapitulate the principal considerations that enter into this judgment: Congress cannot perform the role of resolving all or even most preemption questions because it cannot anticipate when it legislates what preemption controversies will arise in the future. Agencies have a stronger claim to play this role, but they are systematically weak on constitutional variables, may be unduly biased in favor of exclusive federal regulation, and are only doubtfully superior on interpretational variables, certainly with respect to state law interpretation. Given these weaknesses, it would be a mistake to transfer broad authority from courts to agencies to decide when to displace state law. Whatever improvements this might bring in terms of pragmatic variables, it would disserve the cause of constitutional government. The division of authority within the federal government would drift further from its constitutional foundations, would become more unstable, and would probably become more unbalanced in favor of federal power at the expense of the states. The courts' primary weaknesses are on the representational and pragmatic variables. These weaknesses render courts less than ideal decisionmakers, but they are offset by strengths on all other constitutional and interpretational variables—strengths not matched by any other institution.

The best solution would seem to be to rely on courts as the primary institution for resolving preemption controversies and to augment their representational and pragmatic capacities by drawing upon other institutions, notably the federal agencies. This conclusion, of course, is only a general one, based on a global consideration of characteristics of courts and agencies across all fields of regulation. It is entirely conceivable that a different allocation of institutional roles would make sense in particular contexts. But this only brings us back to where we started: who is to decide who decides if the identity of the optimal decisionmaker is to vary from one context to the next? In particular, who is to decide if agencies rather than courts should play the leading role in determining whether state law is displaced in some areas, even if courts remain the default institution? As it happens, defining the appropriate role of agencies in preemption cases is one of the most vexed issues of public law currently confronting the Supreme Court.

#### IV. THE ROLE OF AGENCIES IN PREEMPTION

Complicating any resolution of the proper role of agencies in preemption decisions is the fact that agencies perform multiple functions that are relevant here. In two very different senses, agencies can be a source of federal legal obligations that lead to preemption. They can make federal law, by rulemaking for example, that a court later concludes is in sufficient tension with state law that the state law must be declared preempted. Or, a

federal agency can issue a proclamation declaring state law preempted on its own authority. In addition, agencies engage in interpretations of federal law in order to determine whether state law has been preempted. In this Part, I argue for three propositions, each of which corresponds to one of these three functions that agencies play with respect to preemption. These propositions are designed to move the law in the direction of the conclusions preliminarily drawn from the institutional choice analysis in Part III. They are also constrained by precedent, in the sense that the Supreme Court could endorse any or all of them without doing any violence to its existing decisional law.

The three propositions are: (1) Agency action can serve as a source of a preemption determination by a court only insofar as this action has the force of law. (2) Agencies can preempt state law on their own authority only insofar as Congress has expressly delegated to them the authority to do so. (3) Agency interpretational rulings about the preemptive effect of federal law should be subject to a deference doctrine that is *sui generis* to preemption law. This doctrine would defer to agency assessments of the need for or the practical consequences of displacing state law in an area in which the agency has expertise and to agency findings of fact bearing on these assessments, but not otherwise. These three propositions would preserve courts as the primary institution for deciding whether state law should be displaced, but would allow courts to draw upon the superior capacity of agencies to make pragmatic judgments about the need for displacement. They would also establish that Congress is the institution that has the authority to decide whether to elevate agencies to a position of primary decisionmaker in any given context.

#### A. Agency Law as a Source of Preemption

The Supreme Court has held that agency action can serve as a source of federal law that requires preemption of state law. The most recent ruling to this effect is *Watters v. Wachovia Bank, N.A.*, where the Court determined that certain regulations of the Office of the Comptroller of the Currency—permitting national banks to use operating subsidiaries and authorizing those subsidiaries to perform the functions of national banks—required preemption of state banking regulations that otherwise would have applied to such subsidiaries.<sup>120</sup> In this regard, *Watters* builds on what is now a substantial line of precedent.<sup>121</sup>

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<sup>120</sup> 127 S. Ct. 1559, 1570–71 (2007).

<sup>121</sup> See, e.g., *Geier v. Am. Honda Motor Co.*, 529 U.S. 861, 867–68 (2000) (holding that a regulation mandating the phase-in of passive restraints in automobiles impliedly preempts a state tort law claim predicated on the proposition that installation of air bags was mandatory); *CSX Transp., Inc. v. Easterwood*, 507 U.S. 658, 674–75 (1993) (holding that a federal regulation governing maximum train speed preempts a negligence claim that a speed under the federal maximum was excessive); *City of New York v. FCC*, 486 U.S. 57, 66–67 (1988) (holding that an FCC regulation establishing technical stan-

One can question as an original matter whether this is correct. Recall that preemption is grounded in the Supremacy Clause. The Supremacy Clause specifies that displacement of state law can flow from one of three sources: “[t]his Constitution,” “the Laws of the United States which shall be made in Pursuance thereof,” and “Treaties made, or which shall be made, under the Authority of the United States.”<sup>122</sup> I take it that agencies cannot enact constitutional provisions or adopt treaties. The question, therefore, is whether they can promulgate edicts that qualify under the phrase “Laws of the United States which shall be made in Pursuance [of the Constitution].” The natural assumption is that the phrase refers to federal statutes duly enacted by Congress pursuant to the procedures of Article I, Section 7; in accordance with the grants of legislative powers in Article I, Section 8 and elsewhere; and not transgressing the limitations set forth in Article I, Section 9 and elsewhere.<sup>123</sup> As Brad Clark has pointed out, all three forms of federal action that are denominated “the supreme Law of the Land” entail a high degree of concurrence by representative institutions. In particular, the concurrence of the Senate (which was thought to represent the interests of the small states) appears to be required for each form of “supreme” law-making.<sup>124</sup> Action by federal administrative agencies would seem not to meet this requirement. The Supreme Court has expressly held to the contrary, concluding that “[t]he phrase ‘Laws of the United States’ encompasses both federal statutes themselves and federal regulations that are properly adopted in accordance with statutory authorization.”<sup>125</sup> But the fact that the Court has offered no explanation for how this conclusion can be squared with the constitutional text reinforces disquiet about this proposition.

Nevertheless, it is possible to construct an argument in support of the idea that agency action can qualify as “Laws of the United States” for Su-

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dards to govern the quality of cable television signals preempts a more stringent state regulation); *Hillsborough County v. Automated Med. Labs., Inc.*, 471 U.S. 707, 713 (1985) (“We have held repeatedly that state laws can be pre-empted by federal regulations as well as by federal statutes.”); *Capital Cities Cable, Inc. v. Crisp*, 467 U.S. 691, 698–711 (1984) (holding that an FCC regulation prohibiting the deletion or alteration of out-of-state television broadcast signals preempts a state ban on television advertisements for alcoholic beverages); *Fid. Fed. Sav. & Loan Ass’n v. de la Cuesta*, 458 U.S. 141, 170 (1982) (holding that the Federal Home Loan Bank Board’s regulation permitting federally chartered savings and loan associations to exercise the due-on-sale clause of mortgages preempts a contrary state common law rule); *United States v. Shimer*, 367 U.S. 374, 381–85 (1961) (holding that a Veterans’ Administration regulation governing the calculation of deficiency judgments upon foreclosure of a government-insured mortgage preempts a contrary state rule).

<sup>122</sup> U.S. CONST. art. VI, cl. 2.

<sup>123</sup> See *Printz v. United States*, 521 U.S. 898, 922–25 (1997); Bradford R. Clark, *The Supremacy Clause as a Constraint on Federal Power*, 71 GEO. WASH. L. REV. 91, 109–11 (2003) (noting that earlier versions of the Supremacy Clause unambiguously referred to congressional legislation rather than “Laws”).

<sup>124</sup> See Clark, *supra* note 30, at 1355–67.

<sup>125</sup> *City of New York*, 486 U.S. at 63.

premacly Clause purposes. An agency pronouncement must satisfy two conditions in order to come within the language of the Supremacy Clause. First, it must have the force and effect of federal law. Second, it must have been adopted “in Pursuance” of the Constitution.

The meaning of the word “Laws” in the phrase “Laws of the United States” is uncertain. Sandwiched as it is between “this Constitution” and “all Treaties,” the initial impulse is to say “Laws” must refer to federal statutes—duly enacted and constitutionally valid statutes (those “made in Pursuance” of the Constitution). As my colleague Peter Strauss has pointed out, however, the word “Laws” pops up again in the very same clause, with the admonition that federal supremacy is to be respected by the judges in every state, “any Thing in the Constitution or *Laws* of any State to the Contrary notwithstanding.”<sup>126</sup> One could argue that “Laws” here must also refer to statutes, namely state statutes, just as “Laws” earlier in the clause refers to federal statutes. But notice the consequence of this reading: state common law, the most complete body of legal regulation in effect when the Constitution was adopted, might be insulated from preemption under the Supremacy Clause.<sup>127</sup> Thus, if “Laws” in the second appearance of the word were limited to statutes, the effect would be profoundly dysfunctional. And if, to avoid dysfunction, “Laws” must include more than statutes in the part of the Clause that speaks of the “Laws of any State,” why should “Laws” not carry a signification broader than statutes in the context of the “Laws of the United States”?

Other structural arguments enter into the picture here too. The meaning of “Laws” in the Supremacy Clause undoubtedly must be harmonized with the same word in virtually the same phrase in Article III of the Constitution.<sup>128</sup> In that context, it is well established that “Laws of the United States” include not just federal statutes, but also decisional rules adopted by courts as a matter of federal law.<sup>129</sup> This suggests that “Laws of the United States” are not limited to federal statutes, but include other rules of decision that have the force and effect of binding federal law. And indeed, we find

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<sup>126</sup> Peter L. Strauss, *The Perils of Theory*, 83 NOTRE DAME L. REV. (forthcoming 2008) (manuscript at 2–3, on file with the Northwestern University Law Review), available at <http://ssrn.com/abstract=1018982>.

<sup>127</sup> Unless one argues that state common law has legal force only because of the enactment of state laws receiving the common law of England as the law of the state. See Thomas W. Merrill, *The Judicial Prerogative*, 12 PACE L. REV. 327, 346 (1992).

<sup>128</sup> U.S. CONST. art. III, § 2 (“The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the *Laws of the United States*, and Treaties made, or which shall be made, under their Authority” (emphasis added)); see Akhil Reed Amar, *Intratextualism*, 112 HARV. L. REV. 747, 766 (1999).

<sup>129</sup> See *Illinois v. City of Milwaukee*, 406 U.S. 91, 99–100 (1972) (holding that the “laws of the United States” for purposes of arising under jurisdiction include federal common law); see also *Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 78–80 (1938) (holding that “law” as used in the Rules of Decision Act includes state common law).

that federal common law has been recognized as being preemptive.<sup>130</sup> If federal decisional rules reached by courts can have preemptive effect as “Laws of the United States,” there is no reason in principle why rules adopted by federal agencies cannot be regarded as “Laws of the United States” for Supremacy Clause purposes.

Similarly, consider the appearance of the word “Laws” in the provision of Article II of the Constitution admonishing the President to “take Care that the Laws be faithfully executed.”<sup>131</sup> We could again insist that this refers only to statutes enacted by Congress. But surely the President was also expected to see that judicial judgments are faithfully executed, including those that rest on common law.<sup>132</sup> And it is settled that both subordinate executive branch agencies and the President himself must follow duly promulgated agency regulations unless and until they are rescinded.<sup>133</sup> If agency-made “law” is included in the “Laws” that the President must faithfully execute, why should it not also be included in the “Laws” referenced in the Supremacy Clause?

To be sure, the word “Laws” cannot be stretched beyond all recognition. Laws must refer, at a minimum, to explicit or implicit rules that bind the future exercise of governmental authority.<sup>134</sup> Thus, for example, a “sense of the Senate” resolution or a dictum in an opinion of a court should not be regarded as “Laws” for Supremacy Clause purposes. In the agency context, only agency action that has the force of law should be regarded as providing a predicate for preemption. Legislative regulations and self-executing orders have this quality; policy statements and interpretative regulations do not.

Demonstrating that agency action with the force of law has been adopted “in Pursuance” of the Constitution is also challenging. Yet if we can construe the Necessary and Proper Clause as authorizing the delegation of legislative powers to agencies, as I believe we can,<sup>135</sup> then there is a way out. If Congress has made such a delegation and an agency has fulfilled the

<sup>130</sup> See *City of Milwaukee v. Illinois*, 451 U.S. 304, 312–14 (1981); Thomas W. Merrill, *The Common Law Powers of Federal Courts*, 52 U. CHI. L. REV. 1, 36–39 (1985). The Court has construed judicial judgments as being included within the scope of the Supremacy Clause. *Chesapeake & Ohio Ry. Co. v. Martin*, 283 U.S. 209, 220–21 (1931).

<sup>131</sup> U.S. CONST. art. II, § 3.

<sup>132</sup> The President’s duty to enforce final judicial judgments was acknowledged by President Lincoln in his first Inaugural Address in attacking the decision in *Dred Scott v. Sandford*. 4 COLLECTED WORKS OF ABRAHAM LINCOLN 268 (Roy P. Basler ed., 1953); see also Frank H. Easterbrook, *Presidential Review*, 40 CASE W. RES. L. REV. 905, 926 (1990). For an extreme view to the contrary, see Michael Stokes Paulsen, *The Most Dangerous Branch: Executive Power to Say What the Law Is*, 83 GEO. L.J. 217, 276–84 (1994).

<sup>133</sup> See *United States v. Nixon*, 418 U.S. 683, 696 (1974); Thomas W. Merrill, *The Accardi Principle*, 74 GEO. WASH. L. REV. 569 (2006).

<sup>134</sup> For some preliminary thoughts about what sorts of decisional rules have the force of law, see Merrill, *supra* note 133, at 596–99.

<sup>135</sup> For details, see Merrill, *supra* note 38, at 2120–39.

conditions for exercising that delegated power, then it is possible to speak of the resulting edict as being one that has been made “in Pursuance” of the Constitution, to wit, in pursuance of a legislative delegation of lawmaking authority permitted by the Necessary and Proper Clause. Thus, if Congress has delegated authority to an agency to act with the force of law, and if the agency has exercised this delegated power by taking action intended to have the force of law, then the agency edict can serve as a source of preemption.<sup>136</sup>

Together, these arguments, if accepted, carry with them a significant limitation on the *type* of agency pronouncement that can qualify as a source of preemption for Supremacy Clause purposes. Of the various types of action agencies can take, only agency action having the force of law can qualify as a source of preemption consistent with the language of the Supremacy Clause. Legislative regulations satisfy both conditions implied by the Clause for identifying the type of agency action that can serve as a source of preemption. Such regulations take the form and effect of a statute, and they are issued pursuant to a delegation of authority from Congress to act with the force of law.<sup>137</sup> Agency orders issued pursuant to an adjudication that have self-executing legal force also qualify as having the force of law.<sup>138</sup> Other types of agency action, such as policy statements, interpretative rules, and opinion letters, fail to meet either or both of the conditions imposed by the Clause.<sup>139</sup>

Limiting agency action that can serve as the source of preemption to that which has the force of law also has beneficial consequences in terms of the institutional choice analysis outlined in Part III. Under the Administrative Procedure Act (APA), the issuance of legislative regulations generally requires that the agency comply with notice and comment procedures.<sup>140</sup> This creates an opportunity for states and other interested parties to express their views before potentially preemptive regulations are adopted. Simi-

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<sup>136</sup> An express delegation of authority from Congress to make binding adjudications and the exercise of this power would also satisfy the “in Pursuance” requirement.

<sup>137</sup> See, e.g., *Am. Postal Workers Union, AFL-CIO v. U.S. Postal Serv.*, 707 F.2d 548, 558 (D.C. Cir. 1983) (“A rule can be legislative only if Congress has delegated legislative power to the agency and if the agency intended to use that power in promulgating the rule at issue.”); see also *Gonzales v. Oregon*, 546 U.S. 243, 255–56 (2006); *Nat’l Cable & Telecomm. Ass’n v. Brand X Internet Servs.*, 545 U.S. 967, 980–81 (2005); *United States v. Mead Corp.*, 533 U.S. 218, 226–27 (2001). For a recognition of the need for a delegation of legislative authority in the preemption context, see *Louisiana Public Service Commission v. FCC*, 476 U.S. 355, 374 (1986). See also *New York v. Fed. Energy Regulatory Comm’n*, 535 U.S. 1, 18 (2001) (reaffirming that courts must “interpret the statute to determine whether Congress has given [the agency] the power to act as it has” before upholding regulation that intrudes into areas traditionally regulated by the states).

<sup>138</sup> See Thomas W. Merrill & Kristin E. Hickman, *Chevron’s Domain*, 89 GEO. L.J. 833, 890–92, 901–02 (2001).

<sup>139</sup> *Id.* at 901–02.

<sup>140</sup> 5 U.S.C. §§ 553(b), (c) (2000); cf. 5 U.S.C. § 553(a)(2); *Mead*, 533 U.S. at 244 (Scalia, J., dissenting).

larly, agency adjudications that lead to binding orders are subject to significant hearing requirements, either under the APA or due process decisional law.<sup>141</sup> Limiting the sources of agency preemption to action with the force of law thus reinforces the representational variable in our institutional choice analysis.

Modern administrative law norms also require that agencies disclose relevant data and provide a reasoned response to material objections raised in the rulemaking process.<sup>142</sup> These disclosure and reason-giving requirements can help supply information that bears on the choice between uniform federal rules or diverse state rules. Presidential executive orders requiring that agencies prepare federalism impact statements before issuing major rules,<sup>143</sup> if followed,<sup>144</sup> would do even more to generate information relevant to the decision to preempt. Accordingly, limiting agency action that can be the source of preemption to legislative rules would also help generate more information and analysis that bears on what I call the pragmatic variables implicated in any decision to displace state law.

Finally, limiting agency action that can provide the source for preemption to that which has the force of law is consistent with, although admittedly not compelled by, the Supreme Court's preemption decisions. The Court's decisions drawing upon agency action as a source of preemption include both agency regulations and orders.<sup>145</sup> In both contexts, the Court has been inattentive to whether the regulation at issue is legislative as opposed to something else, like interpretative,<sup>146</sup> or to whether the order is legally binding as opposed to something else, like advisory. But the decisions all implicitly treat the regulations and orders that serve as a source of preemption as legally binding, which suggests they were at least implicitly understood by the Court to have the force of law. Thus, a future decision limiting

<sup>141</sup> See 5 U.S.C. §§ 556–557; *Mathews v. Eldridge*, 424 U.S. 319 (1976).

<sup>142</sup> See, e.g., *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 42–44 (1983); *Small Refiner Lead Phase-Down Task Force v. EPA*, 705 F.2d 506, 519–21 (D.C. Cir. 1983); *Greater Boston Television Corp. v. FCC*, 444 F.2d 841, 850–53 (D.C. Cir. 1970).

<sup>143</sup> See, e.g., Exec. Order No. 12,988, 61 Fed. Reg. 4729, 4731 (Feb. 5, 1996), *supplemented by* Exec. Order No. 13,132, 64 Fed. Reg. 43,255 (Aug. 4, 1999).

<sup>144</sup> See *Mendelson*, *supra* note 7, at 782–86 (providing data suggesting low levels of compliance with these requirements).

<sup>145</sup> For examples of agency regulations held to have preemptive effect, see cases cited *supra* note 121; for some agency orders held to be preemptive, see *Entergy Louisiana, Inc. v. Louisiana Public Service Commission*, 539 U.S. 39, 49–50 (2002) (holding that an order of a state utility commission adopting an allocation of wholesale power different from the allocation permitted by an order of the Federal Energy Regulatory Commission is preempted); *Mississippi Power & Light Co. v. Mississippi ex rel. Moore*, 487 U.S. 354, 369–70 (1988) (similar); and *Nantahala Power & Light Co. v. Thornburg*, 476 U.S. 953, 966 (1986) (similar).

<sup>146</sup> See Thomas W. Merrill & Kathryn Tongue Watts, *Agency Rules with the Force of Law: The Original Convention*, 116 HARV. L. REV. 467, 545–70 (2002) (noting the casual attitude of courts about whether regulations are legislative or nonlegislative); see also *Am. Hosp. Ass'n v. NLRB*, 499 U.S. 606, 609–10 (1991).



the types of agency pronouncements that serve as a source of preemption to action having the force of law would not appear to require overruling or even questioning any existing decision. And it would be correct, both in terms of the requirements of the Supremacy Clause and of institutional choice.

### B. Agency Authority to Preempt

A second question regarding the role of agencies in preemption is whether and in what circumstances agencies should be allowed to preempt state law on their own authority. The Supreme Court has assumed that Congress has the power to delegate such authority to agencies,<sup>147</sup> although the Court has never (to my knowledge) addressed the question whether such delegations are constitutional. Congress has also assumed that it has the power to make these sorts of delegations, as it has passed a number of statutes authorizing agencies to make binding determinations of preemption.<sup>148</sup>

One can again question whether, as an original matter, the Constitution should be read as permitting Congress to delegate the authority to preempt to agencies. As previously discussed, the history of the Supremacy Clause and some of the language of that Clause suggest that the Founders originally understood that *courts* would make decisions about the need to displace state law.<sup>149</sup> If the Founders understood displacement determinations to be judicial in nature, then arguably it is a violation of the Supremacy Clause—or of Article III, which confers the judicial power on federal courts—to confer primary authority to make such determinations on agencies.

Nevertheless, everyone apparently assumes that Congress itself can preempt state law by appropriate legislation adopted under the authority of the Necessary and Proper Clause.<sup>150</sup> If Congress can expressly preempt, and if it also has the power under the Necessary and Proper Clause to delegate legislative authority to agencies, then it would seem to follow that Congress can delegate legislative authority to agencies to preempt. Delegated power

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<sup>147</sup> *City of New York v. FCC*, 486 U.S. 57, 63–64 (1988) (“[A] federal agency acting within the scope of its congressionally delegated authority may pre-empt state regulation’ . . . .” (quoting *La. Pub. Serv. Comm’n v. FCC*, 476 U.S. 355, 369 (1986))); *Hillsborough County v. Automated Med. Labs.*, 471 U.S. 707, 713 (1985) (“[S]tate laws can be pre-empted by federal regulations as well as by federal statutes.”).

<sup>148</sup> See 30 U.S.C. § 1254(g) (2000) (authorizing the Secretary of the Interior to identify state laws and regulations preempted by the Surface Mining Control and Reclamation Act); 47 U.S.C. § 253(d) (2000) (authorizing the Federal Communications Commission to preempt the enforcement of state and local statutes, regulations, or legal requirements interfering with the development of competitive telecommunications services); 49 U.S.C. § 5125(d) (2000) (authorizing the Secretary of Transportation to determine whether particular state, local, or tribal requirements respecting the transportation of hazardous materials are preempted).

<sup>149</sup> See *supra* text accompanying note 40.

<sup>150</sup> See *supra* text immediately following note 37.

to preempt thus flows from the Necessary and Proper Clause, not from the Supremacy Clause. Moreover, allowing Congress to delegate authority to agencies to preempt under the Necessary and Proper Clause injects some flexibility into the allocation of institutional roles. The default position is that courts have the final word about whether state law is displaced, but if Congress concludes in any particular context that an agency would do a better job of making these determinations, Congress can override the default by delegating power to preempt an agency.

The critical question is how explicit such a delegation of authority from Congress must be in order to permit agencies to preempt on their own authority. I would argue that a super-strong clear statement rule is appropriate here; in other words, Congress must expressly delegate such authority in the language of the statute itself.<sup>151</sup> The primary reason for this flows from the conclusion of Part III that courts are *as a rule* better institutions to resolve preemption questions than agencies. If we allow agencies to preempt based on a general grant of rulemaking authority, or an ambiguous grant of rulemaking authority, then the institutional choice question would in effect be decided by agencies and courts in collaboration. Agencies could assert power to preempt based on such a general or ambiguous grant, and courts would then decide whether to uphold such an assertion of authority based on the court's reading of implied congressional intent. Given that agency power to preempt flows from the Necessary and Proper Clause, and given that there are general reasons to prefer courts to agencies in determining whether to preempt, it is better to leave the decision to substitute agencies for courts squarely with Congress. Requiring a super-strong clear statement from Congress secures this result.

This conclusion—that an express delegation of authority to preempt is required in order to permit an agency to displace state law on its own authority—is reinforced by other considerations of institutional choice discussed in Part III. Requiring an express delegation from Congress would in effect require a double consideration of the need for preemption: once by Congress in granting such authority to the agency and again when and if the agency decides to exercise this authority. Such a double consideration would afford enhanced opportunities for the states and other interested parties to weigh in on the issue, thereby magnifying the degree of representation beyond what they would receive if any single institution decided the issue alone. This double consideration would also increase the likelihood of generating information bearing on the pragmatic dimensions of preemption.

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<sup>151</sup> See William N. Eskridge, Jr. & Philip P. Frickey, *Quasi-Constitutional Law: Clear Statement Rules as Constitutional Lawmaking*, 45 VAND. L. REV. 593, 619–29 (1992) (describing an array of clear statement rules and super-strong clear statement rules developed by the Court between 1981 and 1991). On the general utility of requiring clear statement rules to enforce federalism values, see generally Thomas W. Merrill, *Rescuing Federalism After Raich: The Case for Clear Statement Rules*, 9 LEWIS & CLARK L. REV. 823 (2005), and the sources therein cited.

This limitation on the role of agencies, like the first, is consistent with, but not compelled by, existing Supreme Court precedent. There are statements in some decisions from the 1980s implying that an agency can preempt state law simply by exercising its general regulatory authority and issuing a regulation that reflects the agency's intention to preempt. The source of this mischief is *Fidelity Federal Savings & Loan Association v. de la Cuesta*.<sup>152</sup> The question in *de la Cuesta* was whether a regulation of the Federal Home Loan Bank Board permitting due-on-sale clauses in mortgages initiated by federally chartered savings and loan associations had the effect of preempting a California common law decision prohibiting due-on-sale clauses.<sup>153</sup> The case presented a relatively rare instance of straightforward conflict preemption: the federal agency said *A* and the state courts said *not-A*, and the determination that the state law was preempted was made by the Court, not the federal agency. At one point in his opinion for the unanimous Court, however, Justice Blackmun said the following:

A pre-emptive regulation's force does not depend on express congressional authorization to displace state law . . . . Thus, the Court of Appeal's narrow focus on Congress' intent to supersede state law was misdirected. Rather, the questions upon which resolution of this case rests are whether the Board meant to pre-empt California's due-on-sale law, and, if so, whether that action is within the scope of the Board's delegated authority.<sup>154</sup>

The Court in *de la Cuesta* was surely correct that congressional intent to preempt is not necessary when an agency's legislative regulation conflicts with state law. As we have seen, an agency regulation having the force of law, no less than a federal statute, is entitled to protection against contrary state law under the Supremacy Clause. And the two conditions that must be satisfied in any case for a regulation to have the force of law are (1) a delegation of authority from Congress to act with the force of law, and (2) the agency's intention to exercise such authority.<sup>155</sup> The problem is that the quoted passage above can also be read to imply that agencies have authority to preempt state law through legislative regulations issued under their *general* rulemaking authority, without regard to whether there has been a specific delegation of this authority. This implied proposition was completely unnecessary to the decision, however, which rested on a conventional finding of conflict preemption *by the Court*, not any determination that the agency could preempt on its own authority.

More recently, the Court has signalled that something like a super-strong clear statement is required before agencies can issue legislative regulations that preempt state law on their own authority. In *Gonzales v. Ore-*

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<sup>152</sup> 458 U.S. 141 (1982).

<sup>153</sup> *Id.* at 151.

<sup>154</sup> *Id.* at 154 (citation omitted).

<sup>155</sup> See *supra* note 137 and accompanying text.

gon,<sup>156</sup> the Court observed that a delegation of authority to an agency to promulgate standards for regulated entities does not entail “the authority to decide the pre-emptive scope of the federal statute” unless a *separate delegation* of such authority is evident in the statute.<sup>157</sup> And in *Watters*, the three Justices who reached the question of agency preemption indicated that something like a very clear intention to delegate is required before concluding that Congress has given an agency the authority to preempt on its own authority.<sup>158</sup> These recent statements reflect a more fully considered view of the question than the Court gave to the issue in *de la Cuesta* and represent a sounder resolution of the issue.<sup>159</sup>

### C. *Judicial Deference to Agency Interpretations Concerning Preemption*

The third question concerns the degree of deference courts should give to agency views about whether federal statutes and regulations require preemption. Here we are not concerned with the source of federal law said to

<sup>156</sup> 546 U.S. 243 (2006).

<sup>157</sup> *Id.* at 263. The Court’s exact words were more opaque, but I believe I have translated their meaning correctly. The Court said that a general delegation of authority to an agency does not entail “the authority to decide the pre-emptive scope of the federal statute because “[n]o such delegation regarding [the statute’s] enforcement provisions is evident in the statute.” *Id.* (quoting *Adams Fruit Co. v. Barrett*, 494 U.S. 638, 649–50 (1990)).

<sup>158</sup> Justice Stevens observed that “Congress knows how to authorize executive agencies to preempt state laws,” citing three statutes in which the power to preempt had been expressly delegated. *Watters v. Wachovia Bank, N.A.*, 127 S. Ct. 1559, 1582 & n.21 (2007) (Stevens, J., dissenting). He further observed that “there is a vast and obvious difference between rules authorizing or regulating conduct and rules granting immunity from regulation.” *Id.* at 1583. After reviewing the statutes delegating authority to the OCC to authorize or regulate the conduct of national banks, he concluded that these should not be read as “expressly or implicitly grant[ing] the OCC the power to immunize banks or their subsidiaries from state regulation.” *Id.* at 1582–83.

<sup>159</sup> Several decisions in the 1980s influenced by *de la Cuesta* contain language suggesting that agencies have authority to preempt under their general rulemaking authority. See, e.g., *City of New York v. FCC*, 486 U.S. 57, 64 (1988) (“[I]n proper circumstances the agency may determine that its authority is exclusive and pre-empts any state efforts to regulate in the forbidden area.”); *Hillsborough County v. Automated Med. Labs., Inc.*, 471 U.S. 707, 714–16 (1985) (implicitly assuming that the FDA can legitimately declare its regulations preemptive); *Capital Cities Cable, Inc. v. Crisp*, 467 U.S. 691, 699 (1984) (“When the administrator promulgates regulations intended to pre-empt state law . . . [i]f [h]is choice represents a reasonable accommodation of conflicting policies that were committed to the agency’s care by the statute, we should not disturb it unless it appears from the statute or its legislative history that the accommodation is not one that Congress would have sanctioned.” (citations omitted)). But in one case the statement was dicta (the Court found no agency intention to preempt), see *Hillsborough County*, 471 U.S. at 716, and in the others the Court indicated that Congress had ratified the agency’s power to preempt by subsequent legislation, see *City of New York*, 486 U.S. at 66–69. The ratifying statute in *City of New York*, the Cable Communications Policy Act of 1984, also applied to the authority exercised in *Crisp*. Most importantly, in none of these cases did the Court address the question whether an express delegation of preemptive authority is required. So none of these decisions should bar a decision by the Court holding that agencies have authority to preempt on their own authority only if they are expressly delegated such power by Congress.

require preemption. That source, as we have seen, can be either a federal statute or agency action having the force of law or some combination of both. Moreover, we are assuming away the possibility that Congress has expressly delegated authority to an agency to make preemption determinations on its own authority. The question here is what happens if an agency, not exercising an expressly delegated power to preempt, offers the legal opinion that federal law warrants the conclusion that state law is preempted? How much deference is such an opinion entitled to receive from a court?

We must begin by tracing the legal landscape as it exists today with regard to the degree of deference courts give to agency conclusions of law. The Supreme Court has identified three standards of review for evaluating agency interpretations of statutes: the *Chevron* standard, the *Skidmore* standard, and de novo review.<sup>160</sup> These three standards rest on different rationales for affording deference to agency interpretations of ambiguous statutes. “A precondition to deference under *Chevron* is a congressional delegation of administrative authority.”<sup>161</sup> This delegation, in turn, creates a presumption that Congress intended the agency, rather than the courts, to exercise primary interpretational authority under the statute.<sup>162</sup> Under *Skidmore*, in contrast, no particular delegation of power to the agency is required before it is entitled to deference.<sup>163</sup> Deference under *Skidmore* is grounded not on delegated power, but rather on the desirability of drawing upon the “specialized experience and broader investigations and information” available to the agency<sup>164</sup> and on the need to preserve uniformity between administrative and judicial understandings of the requirements of a national program.<sup>165</sup> De novo review is the default that applies where the circumstances for attributing some special competence to agencies are altogether missing. De novo review generally applies when courts interpret laws that are designed to hold agency power in check, including provisions of the Constitution and of general statutes like the APA. It also applies when courts address legal requirements as to which agencies have no claim to expertise, such as federal laws administered by the courts or other agencies, or state law administered by state courts.

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<sup>160</sup> See generally *United States v. Mead Corp.*, 533 U.S. 218, 227–28, 234–35 (2001).

<sup>161</sup> *Adams Fruit Co. v. Barrett*, 494 U.S. 638, 649 (1990); see *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 843–44 (1984) (stating that deference rests on either express or implied delegation of power to an agency).

<sup>162</sup> See *Dunn v. Commodity Futures Trading Comm’n*, 519 U.S. 465, 479 n.14 (1997) (noting that *Chevron* deference “arises out of background assumptions of congressional intent” (citing *Smiley v. Citibank (S.D.), N.A.*, 517 U.S. 735, 740–41 (1996))); *Smiley*, 517 U.S. at 740–41 (noting that *Chevron* rests on the “presumption” that Congress meant for the agency to “possess whatever degree of discretion” statutory ambiguity allows).

<sup>163</sup> *Skidmore v. Swift & Co.*, 323 U.S. 134, 139–40 (1944).

<sup>164</sup> *Id.* at 139.

<sup>165</sup> *Id.* at 140.

Given these differences in the legal underpinnings of *Chevron*, *Skidmore*, and de novo review, the standards with which they are associated impose different degrees of constraint on the courts. *Chevron* deference, when it applies, is mandatory, in the sense that courts must accept any agency interpretation that is consistent with the statute and is otherwise “permissible” or “reasonable.”<sup>166</sup> *Skidmore* deference, in contrast, rests in the sound discretion of the court. “The weight of such a judgment in a particular case will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control.”<sup>167</sup> As the Court put it in *Mead*, an agency opinion evaluated under *Skidmore* receives the degree of deference appropriate to “the merit of its writer’s thoroughness, logic, and expertness, its fit with prior interpretations, and any other sources of weight.”<sup>168</sup> De novo review, of course, gives no weight to the interpretational views of the agency, and it may even require that the agency view be discounted on the ground that the agency may have a conflict of interest in interpreting constraints on its own authority.

In light of the analysis of the previous Section, the *Chevron* standard should apply to agency opinions about preemption in only one circumstance: where Congress has expressly delegated authority to the agency to preempt and the agency has exercised this delegated authority. *Chevron* is grounded in a delegation of authority from Congress to an agency to determine certain unresolved questions of federal law. If Congress has delegated authority to an agency to make binding determinations of preemption and the agency has invoked that authority in offering its view about the preemptive effect of federal law, then the preconditions for *Chevron* deference have been established. But if these stringent conditions are not satisfied, then courts should not apply the *Chevron* standard to agency views about preemption.

In particular, generic grants of rulemaking authority should not be construed as conferring authority on agencies to issue declarations of preemption entitled to *Chevron* deference.<sup>169</sup> If these sorts of grants of rulemaking authority were sufficient to delegate authority to agencies to make binding determinations of preemption, then virtually every federal administrative

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<sup>166</sup> *Chevron*, 467 U.S. at 844 (holding that a reasonable agency interpretation is given “controlling weight”).

<sup>167</sup> *Skidmore*, 323 U.S. at 140.

<sup>168</sup> *United States v. Mead Corp.*, 533 U.S. 218, 235 (2001).

<sup>169</sup> See *Merrill & Watts*, *supra* note 146, at 493–526; cf. *Chrysler Corp. v. Brown*, 441 U.S. 281, 309–10 (1979) (holding that 5 U.S.C. § 301, which confers authority on the heads of executive departments to prescribe regulations for the “government of his department,” does not confer authority to make legislative rules); *ICC v. Cincinnati, New Orleans & Tex. Pac. Ry.*, 167 U.S. 479, 494–95 (1897) (holding that an agency cannot be given legislative rulemaking authority by implication, only by express grant).

agency would be empowered to make such determinations—and logically, would be entitled to *Chevron* deference for its legal opinions in exercising this authority. If in contrast, as argued in the last Section, agencies can preempt on their own authority only if they have been expressly delegated the authority to do so, then the universe of *Chevron*-eligible agency preemption decisions shrinks dramatically. Moreover, even if the express delegation limitation is rejected, an agency's statement of its opinion about the preemptive effect of a regulation set forth in the preamble of a regulation or an amicus curiae brief should certainly not be eligible for *Chevron* deference. "Opinion letters" and "interpretative rules" are nonbinding forms of agency action, offering only advice to the regulated community about an agency's understanding of the law's requirements.<sup>170</sup> They do not have the force of law and hence are not eligible for *Chevron* deference—whether or not preemption is in the picture.<sup>171</sup>

*Chevron* is also the wrong standard for reviewing agency opinions about preemption from an institutional choice perspective. Superficially considered, the rationale for *Chevron* deference might seem to be applicable here. *Chevron* rests on the observation that resolving ambiguities in federal statutes entails making policy judgments, and Congress generally delegates authority to make policy judgments to the agency that administers the statute, not to the courts.<sup>172</sup> As we have seen in Part II, the resolution of preemption controversies also entails making policy judgments, in this case judgments about whether the degree of tension between policies discerned in federal statutes and the persistence of diverse state rules on the same subject requires displacement of state law. If agencies are generally preferred over courts as resolvers of policy disputes, why not here too?

The answer reverts again to the discussion in Part III. We saw there that although preemption entails the resolution of policy disputes, those disputes have significant dimensions along which courts are likely to perform better than agencies—dimensions such as preserving fidelity to the Constitution's division of powers, the need for preserving stability in that division, the desirability of preserving an overall balance between state and federal authority, and the need to discern accurately the nature and content of the state law alleged to be in tension with federal law.<sup>173</sup> On balance, these dimensions are sufficiently important in the overall assessment of institutional strengths and weaknesses that courts are probably a better institution for making preemption decisions than agencies. It follows from this conclusion that to require courts to give conclusive weight to reasonable agency judg-

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<sup>170</sup> See, e.g., 1 RICHARD J. PIERCE, JR., ADMINISTRATIVE LAW TREATISE § 6.4 (4th ed. 2002).

<sup>171</sup> See *Mead*, 533 U.S. at 234; *Christensen v. Harris County*, 529 U.S. 576, 587 (2000).

<sup>172</sup> *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842–45 (1984); Richard J. Pierce, Jr., *Chevron and its Aftermath: Judicial Review of Agency Interpretations of Statutory Provisions*, 41 VAND. L. REV. 301, 307–08 (1988).

<sup>173</sup> See *supra* text accompanying notes 114–17.

ments about the desirability of preemption under the *Chevron* doctrine would represent a transfer of decisional authority to an institution that is not as well positioned to make these judgments.

What about splitting the atom of preemption?<sup>174</sup> In particular, what about granting *Chevron* deference to agencies on the meaning of federal statutes while reserving for courts a larger measure of independent authority to determine whether a federal statute, as construed, requires preemption of state law? Justice Scalia suggested such an approach in *Smiley v. Citibank (South Dakota), N.A.*<sup>175</sup> His opinion for the Court cautioned against confusing “the question of the substantive (as opposed to pre-emptive) meaning of a statute with the question of whether a statute is pre-emptive.”<sup>176</sup> And he added: “We may assume (without deciding) that the latter question must always be decided *de novo* by the courts.”<sup>177</sup> Recall too the discussion in Part II, suggesting that there are three distinct inquiries in preemption controversies: the meaning of federal law, the characterization of state law, and whether the degree of tension between them requires displacement of state law. Why not pull these inquiries apart and apply different degrees of deference to agency opinions about each?

Although I was initially drawn to such an atom-splitting resolution, I now think it would be a mistake. First, it would probably be unworkable. As noted in Part II, although the three inquiries in preemption cases are analytically distinct, they are in practice interwoven. Indeed, with rare exceptions like *Smiley*, courts do not acknowledge that there are distinct inquiries at all. Asking courts to begin distinguishing between “meaning” and “displacement” would probably produce a mass of confusion. There is also a very legitimate concern about excessive complexity in the formulation of standards of review. The *Chevron* doctrine, thanks primarily to the poorly executed *Mead* decision, is now burdened by a vague and unworkable set of precepts about when it does and does not apply, which has magnified the costs of litigation with little discernible benefit.<sup>178</sup> Carving up preemption cases into multiple inquiries with different standards of review applicable to each issue would represent an analogous type of complication, generating new fights about the correct application of standards of review and having only a marginal impact on the ultimate resolution of preemption controversies.

In addition to being unworkable, drawing a line between meaning and displacement would be vulnerable to agency manipulation. Suppose an

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<sup>174</sup> Cf. *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 838 (1995) (Kennedy, J., concurring) (observing that in adopting federalism the “Framers split the atom of sovereignty”).

<sup>175</sup> 517 U.S. 735 (1995).

<sup>176</sup> *Id.* at 744.

<sup>177</sup> *Id.*

<sup>178</sup> See VERMEULE, *supra* note 1, at 215–23; see also Thomas W. Merrill, *The Mead Doctrine: Rules and Standards, Meta-Rules and Meta-Standards*, 54 ADMIN. L. REV. 807 (2002).



agency supports the conclusion that state law should be preempted, but instead of offering the legal opinion that displacement is warranted, which on the proposed approach would be subject to some standard of review lesser than *Chevron*, the agency instead interprets the federal statute it administers (by hypothesis entitled to *Chevron* deference) in such a way that a court is virtually compelled to make a finding of preemption. Given the interrelated nature of the questions presented by preemption controversies, what is to prevent agencies from ratcheting the *Chevron* deference they get for questions of statutory meaning into de facto *Chevron* deference for questions of displacement?

The preemption issue in *Watters*<sup>179</sup> provides an illustration of the potential for manipulation that the atom-splitting approach would create. There, the Office of the Comptroller of the Currency asserted multiple pathways to the conclusion that state authority to regulate the financial condition of operating subsidiaries of national banks was preempted. One pathway relied on the OCC's Rule 7.4006, which provided that "[u]nless otherwise provided by Federal law or OCC regulation, State laws apply to national bank operating subsidiaries to the same extent that those laws apply to the parent national bank."<sup>180</sup> Here the regulation makes express reference to the application of state law, and thus the regulation can be readily identified as a declaration of preemption. This would be entitled to something less than *Chevron* deference under the atom-splitting approach. But the OCC also argued that preemption was required by another regulation, Rule 5.34(e)(3), which provided that an operating subsidiary shall engage in activities "pursuant to the same authorization, terms and conditions that apply to the conduct of such activity by its parent national bank."<sup>181</sup> Here, there was no explicit reference to the application of state law, and so on its face the regulation would not present itself as speaking to preemption.<sup>182</sup> Yet if this regulation were given *Chevron* deference on the ground that it speaks to the meaning of federal law rather than the need for displacement, the result would be exactly the same: by equating operating subsidiaries with the parent national bank, the regulation would compel the conclusion that operating subsidiaries, like the parent bank, are exempt from state regulatory requirements because the parent bank is governed by an express preemption provision.<sup>183</sup>

<sup>179</sup> *Watters v. Wachovia Bank, N.A.*, 127 S. Ct. 1559 (2007).

<sup>180</sup> *Id.* at 1572-73; 12 C.F.R. § 7.4006 (2007).

<sup>181</sup> *Watters*, 127 S. Ct. at 1569-72; 12 C.F.R. § 5.34(e)(3).

<sup>182</sup> Nor did the OCC suggest that this regulation had preemptive effect when it was adopted; the OCC did not even see the need to provide a federalism summary impact statement. See *Financial Subsidiaries and Operating Subsidiaries*, 65 Fed. Reg. 12,905 (Mar. 10, 2000) (codified at 12 C.F.R. pt. 5 (2001)).

<sup>183</sup> See 12 U.S.C. § 484 (2000) (expressly preempting state visitorial powers as applied to national banks). Similarly, the OCC argued that preemption follows from its Rule 34.4(a), which provides that "a national bank may make real estate loans" without regard to state law requirements for "licensing"

I am not suggesting that the OCC was engaged in conscious manipulation in *Watters*. I use the case only to illustrate the potential for manipulation that would arise if agencies were given strong deference on a critical input into the inquiry about preemption—the meaning of federal law—and a lesser degree of deference or no deference on the resolution of whether preemption is warranted. An agency bent on preemption could interpret federal law, including its own legislative regulations, in such a way as to handcuff the courts from reaching any conclusion other than preemption. This too would reflect a transfer of institutional authority in a manner contrary to the analysis of Part III.

What then about *Skidmore* deference? As suggested in Part III, what is needed is a conception of the agency role that allows courts to draw upon the strengths of agencies in terms of the interpretational and pragmatic variables while preserving the role of the courts insofar as the constitutional variables are concerned. Of the three established standards of review—*Chevron*, *Skidmore*, and *de novo*—*Skidmore* seems to come closest to striking the right balance. *Skidmore* would appear to instruct courts to consider carefully agency views, grounded in experience, on the meaning of federal law and the need for preemption. Yet it would require courts to follow these views only to the extent they are persuasive, thereby preserving judicial authority to maintain a uniform jurisprudence of preemption that is sensitive to the constitutional variables discussed in Part III that make courts the preferred institution for making the final determination whether to displace state law.

If forced to choose between the three established standards of review (*Chevron*, *Skidmore*, *de novo*), I would urge adoption of the *Skidmore* standard for preemption cases.<sup>184</sup> For several reasons, however, I think the best course of action is to eschew any of the established three standards and instead adopt an approach to agency views about preemption that is *sui generis* to preemption cases. That standard would treat preemption controversies as a special category, distinct from judicial review of agency action in which the usual menu of standards of review has been developed. It might instruct courts to give “significant weight” to agency views about the practical impact of diverse state rules on the implementation of federal regulatory schemes that they administer or as to which they have significant experience and expertise. It might give even more weight to agency views

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and “registration,” 12 C.F.R. § 34.4(a), in combination with Rule 34.1(b), which provides that “[t]his part applies to national banks and their operating subsidiaries as provided in 12 CFR 5.34,” 12 C.F.R. § 34.1(b). *Watters*, 127 S. Ct. at 1571. Again, by equating operating subsidiaries with national banks, the rule in effect mandates that operating subsidiaries enjoy the same preemption status as national banks. *Id.*

<sup>184</sup> Other commentators have advocated adoption of the *Skidmore* standard for reviewing agency preemption decisions. See Mendelson, *supra* note 7; Sharkey, *supra* note 7. This was also the position urged in the amicus brief I filed on behalf of the Center for State Enforcement of Antitrust and Consumer Protections Laws in *Watters*. See *supra* note 8.

on these issues—perhaps even “conclusive weight”—when the agency has developed its assessment in a proceeding in which the states and other interested parties have been allowed to participate through notice and comment proceedings. Such a differentiation would be designed to give further encouragement to agencies to use more consultative procedures like notice and comment rulemaking in addressing preemption questions. But the standard would reserve for independent judicial judgment all other issues that bear on the ultimate decision of whether state law is preempted.

Why apply such a *sui generis* approach to preemption rather than simply borrow the established *Skidmore* test? First and most importantly, the *Skidmore* test does not focus on the variables in preemption where input from agencies would be most helpful. *Skidmore* cites a list of factors that tend to make any official decision more or less persuasive, such as the “thoroughness evident in its consideration,” the “validity of its reasoning,” whether it is consistent with earlier and later pronouncements on the subject, the expertise of the decisionmaker on the subject in question, and so forth.<sup>185</sup> This does nothing to channel attention to those aspects of the preemption decision where the agency can provide the most help to the court, namely in assessing the practical impact of diverse state rules on the objective of maintaining a single integrated commercial market.

Another reason relates to the previous discussion about why the atom-splitting approach should be rejected as unworkable and subject to manipulation. If atom-splitting is rejected, then presumably a single standard of review should apply to all questions of law presented in any preemption case. Suppose that it is the *Skidmore* standard. Yet it is conceivable that similar questions of statutory meaning would also arise in some other context, such as ordinary judicial review of agency action, in which case the *Chevron* standard presumably would apply if the preconditions for *Chevron* deference were otherwise met. We would thus have the prospect of the same question of law being subject to either the *Chevron* standard or the *Skidmore* standard, depending on whether the question arose in a preemption context or some other context. This would lead to conundrums about how *Skidmore* conclusions should be treated when they later arise in a *Chevron* context and vice versa.<sup>186</sup> These sorts of doctrinal convolutions are best avoided.<sup>187</sup>

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<sup>185</sup> *Skidmore v. Swift & Co.*, 323 U.S. 134, 139–40 (1944); see also *United States v. Mead Corp.*, 533 U.S. 218, 234–35 (2001). See generally Kristin E. Hickman & Matthew D. Krueger, *In Search of the Modern Skidmore Standard*, 107 COLUM. L. REV. 1235, 1250–59 (2007).

<sup>186</sup> This is analogous to the puzzles created by the possibility of courts interpreting statutes in original proceedings (where *de novo* review or *Skidmore* deference applies), followed by agencies construing the same statute in agency proceedings (where *Chevron* applies). See Nat'l Cable & Telecomm. Ass'n v. Brand X Internet Servs., 545 U.S. 967 (2005); Watts, *supra* note 72.

<sup>187</sup> The convolutions would be avoided in my proposed approach because judicial preemption rulings would be a species of *de novo* review, which would supersede or pretermitt any agency interpretation otherwise entitled to *Chevron* deference.

Finally, the *Skidmore* test at this point has a certain degree of negative baggage that carries over from the Court's internal debates about the proper scope of the *Chevron* standard. Justice Scalia, in particular, has a strong aversion to *Skidmore*, given its open-ended, all-things-considered overtones, which he regards as providing inadequate guidance.<sup>188</sup> Given this antipathy to *Skidmore* from one of the Court's administrative law experts, the process of building consensus for a standard of review in preemption cases is likely to proceed more effectively if the Court considers preemption as a discrete category, rather than if it feels it has to import some preestablished standard of review from existing administrative law materials.

The Supreme Court's various pronouncements about the role of agencies in preemption controversies are largely consistent with the conclusion that the Court should adopt a *sui generis* standard of review that focuses on the agency's assessment of the practical impact of diverse state standards. One can mine the Court's decisions for a variety of conflicting propositions about the degree of deference owed to administrative agencies in determining questions of preemption. There are statements appearing to presuppose that courts should give strong deference to agency views about preemption,<sup>189</sup> statements appearing to contemplate an intermediate degree of deference to agency views,<sup>190</sup> and statements suggesting that the question of preemption should be decided *de novo* without giving any weight to agency views.<sup>191</sup> Taken as a whole, however, the pronouncements by the Justices on this subject are highly supportive of the proposed approach.

Consider the Court's discussion in *Geier v. Am. Honda Motor Co., Inc.*,<sup>192</sup> the airbag preemption case. The Court concluded that it would give "some weight" to the agency's interpretation of its regulation as impliedly preempting state tort liability.<sup>193</sup> The Court noted:

Congress has delegated to DOT authority to implement the statute; the subject matter is technical; and the relevant history and background are complex and extensive. The agency is likely to have a thorough understanding of its own regulation and its objectives and is "uniquely qualified" to comprehend the likely impact of state requirements. And DOT has explained FMVSS 208's objectives, and the interference that "no airbag" suits pose thereto, consistently over time.<sup>194</sup>

Considering these factors, the Court concluded that "the agency's own views should make a difference."<sup>195</sup> This is consistent with the proposed

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<sup>188</sup> *Mead*, 533 U.S. at 245–46 (Scalia, J., dissenting).

<sup>189</sup> See *City of New York v. FCC*, 486 U.S. 57, 64 (1988).

<sup>190</sup> See *Geier v. Am. Honda Motor Co.*, 529 U.S. 861, 883 (2000).

<sup>191</sup> See *La. Pub. Serv. Comm'n v. FCC*, 476 U.S. 355, 369 (1986).

<sup>192</sup> 529 U.S. 861.

<sup>193</sup> *Id.* at 883.

<sup>194</sup> *Id.* (citations omitted).

<sup>195</sup> *Id.*

approach, especially the Court's statement about the agency's unique qualification to assess the "likely impact of state requirements."<sup>196</sup>

A similar conclusion follows from the discussion of agency views on preemption in *Medtronic, Inc. v. Lohr*.<sup>197</sup> The Medical Device Amendments include a provision expressly preempting any requirement different from the federal requirements applicable to medical devices, as well as an unusual provision delegating authority to the FDA to "exempt" particular state requirements from this express preemption.<sup>198</sup> The Court did not regard this express delegation to the FDA to mean that courts had to defer to any reasonable agency interpretation of the express preemption statute, as would be required by *Chevron*. To the contrary, the Court independently interpreted the ambiguities in the statute, in particular the uncertainty about the meaning of "requirement."<sup>199</sup> Only after this extensive consideration of the interpretative issues did the Court turn to the FDA's views. The Court cited a number of factors that caused it to give those views "substantial weight," including the FDA's general familiarity with the requirements of the Act, the process the FDA had instituted for offering "advisory opinions" to interested parties about whether particular state requirements are preempted, and Congress's specific delegation to the agency of authority to exempt state requirements from preemption.<sup>200</sup> There is no suggestion in the opinion that the Court was applying *Chevron*'s framework or that it regarded the agency's views as controlling as long as they were reasonable. Instead, the Court said only that its independent conclusion was "substantially informed" by the FDA's view about preemption.<sup>201</sup>

The opinion of the dissenting Justices in *Watters* is further consistent with the proposed approach. The dissenters rejected *Chevron* deference on the ground that it would too "easily disrupt the federal-state balance," noting that agencies are not designed to represent the interests of states and are unlikely to show sufficient respect for state sovereignty.<sup>202</sup> But the dissenters added: "To be sure, expert agency opinions as to which state laws conflict with a federal statute may be entitled to 'some weight,' especially when 'the subject matter is technical' and 'the relevant history and background are complex and extensive.'"<sup>203</sup> This statement is particularly significant given that the dissenters in *Watters*—who were the only Justices to address this issue—represent an unusual cross-section of the Court. Their spokesman, Justice Stevens, is probably the Court's most anti-preemption

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<sup>196</sup> *Id.*

<sup>197</sup> 518 U.S. 470 (1996).

<sup>198</sup> 21 U.S.C. § 360k(a)-(b) (2000).

<sup>199</sup> *Medtronic*, 518 U.S. at 486-91.

<sup>200</sup> *Id.* at 496.

<sup>201</sup> *Id.* at 495.

<sup>202</sup> *Watters v. Wachovia Bank, N.A.*, 127 S. Ct. 1559, 1584 (2007) (Stevens, J., dissenting).

<sup>203</sup> *Id.* (quoting *Geier v. Am. Honda Motor Co.*, 529 U.S. 861, 883 (2000)).

Justice; yet he was joined by Justice Scalia, who is probably its most pro-preemption Justice,<sup>204</sup> and by a new Chief Justice who will probably be around for quite some time. If these three can agree on a formula that gives “weight” to agency views but that does not afford *Chevron* deference, then it is not difficult to foresee a majority of the Court coming around to a similar view in the near future.

#### CONCLUSION

Institutional choice analysis is difficult to undertake. It rests ultimately on empirical judgments about the capabilities of different legal institutions. These judgments are handicapped by the lack of relevant information and because the inquires are so complex.<sup>205</sup> The analysis is especially difficult when the criteria for evaluation include both variables sounding in legitimacy (the constitutional and interpretational variables) and consequences (the pragmatic variables), which are incommensurate. Nevertheless, I hope this exercise has suggested that institutional choice can be a valuable heuristic, especially when considering a discrete issue like preemption where there is increasing controversy over the assignment of institutional roles.

In terms of the larger picture, the conclusions I reach are fairly conventional. Absent resolution of the question by Congress, courts are the best (that is, the least worst) institution to decide whether to displace state law in order to further federal policy objectives, but courts should draw on the expertise of agencies in helping to understand the pragmatic variables that bear on the preemption decision.

When we focus in more closely on the problem, however, the institutional choice perspective yields some more unconventional payoffs. The analysis suggests that the Court’s official preemption doctrine does a poor job of isolating the relevant variables for decision and could be profitably recast to better highlight what needs to be decided in order to determine whether to displace state law.<sup>206</sup> In particular, the background assumption favoring the maintenance of a single commercial market has been obscured by the Court’s attempt to cast preemption as an ordinary exercise in statutory interpretation. The analysis also suggests that a good dose of formalism in approaching the role of agencies in preemption, in particular differentiating more sharply between legislative and other types of regulations, would advance the correct allocation of institutional roles in this context. Specifically, courts should require that agency action have the force of law before it can serve as a source of preemption and should demand an express legislative statement by Congress delegating authority to preempt be-

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<sup>204</sup> Greve & Klick, *supra* note 19, at 82.

<sup>205</sup> See VERMEULE, *supra* note 1; Merrill, *supra* note 3.

<sup>206</sup> I have set forth one proposal for such a recasting in Merrill, *supra* note 68, which argues for the adoption of area-specific default rules in lieu of the current set of categories and presumptions.

fore agencies can preempt on their own authority. Finally, the analysis suggests that a sui generis review standard that focuses on the agency's assessment of pragmatic variables will provide a better way of drawing on the strengths of agencies in regard to preemption than simply adopting any one of the options from the usual menu of review standards: *Chevron* versus *Skidmore* versus de novo. These are conclusions that cannot be reached using doctrinal analysis alone and are suggestive of the kinds of benefits that might be obtained by refocusing on "deciding who decides" in other contexts as well.