

THE PARADOX OF ADMINISTRATIVE PREEMPTION

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INTRODUCTION

The Supreme Court's administrative preemption doctrine holds that federal agencies may displace state law much like Congress.¹ Administrative preemption is a convenience and contrivance for modern government. But, as hypothesized here, it is also a constitutional paradox. Administrative preemption requires that agency action simultaneously qualify as (1) "Law" for federalism purposes and (2) "not Law" for separation of powers.²

More specifically, the Court treats agency action as preemptive under the Supremacy Clause, which provides that certain federal "Laws" shall be supreme over state law.³ However, if agency action qualifies as "Law," then it is arguably void under separation-of-powers principles (and thus ineligible to preempt state law).⁴ Meanwhile, if agency action does not qualify as

1. See, e.g., *Geier v. Am. Honda Motor Co.*, 529 U.S. 861 (2000); *City of New York v. FCC*, 486 U.S. 57 (1988); *Fid. Fed. Sav. & Loan Ass'n v. De la Cuesta*, 458 U.S. 141 (1982); see also *infra* Part I.B.2 (discussing the contours of the Court's existing doctrine).

2. I first introduced this paradox in David S. Rubenstein, *Immigration Structuralism: A Return to Form*, 8 DUKE J. CONST. L. & PUB. POL'Y 81 (2013), in the context of reviewing whether nonbinding immigration enforcement policies can preempt competing state law. This Article's treatment of the paradox moves beyond the particulars of immigration and beyond nonbinding agency action.

3. See U.S. CONST. art. VI, cl. 2 (providing that "Laws . . . made in Pursuance" of the Constitution shall be supreme Law).

4. See U.S. CONST. art. I, § 1 (vesting "all legislative power" in Congress); *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 472 (2001) (stating that Article I "permits no

“Law” (thus avoiding a separation-of-powers problem), then it arguably falls beyond the Supremacy Clause’s purview.⁵ How is it that agency action *is Law* for federalism purposes, yet simultaneously *is not Law* for separation of powers purposes? Of more concern, why is this structural contradiction possible? The Court has never answered these questions.

The paradox raises new challenges for the Court’s administrative preemption doctrine. Of equal intrigue, the paradox summons doubt over the Court’s legitimating theories of modern government. If the Court’s premise behind administrative preemption is that agencies make “Law,” then how should we understand the Court’s longstanding insistence that Congress cannot delegate lawmaking authority?⁶ And, if unelected administrative officials can displace state law in Congress’s stead, what are we to make of the Court’s political safeguards theory of federalism?⁷

These questions underscore the difficulty of settling on a constitutional premise that is both broad enough to justify administrative preemption yet narrow enough to preserve the Court’s legitimating theories of modern government.⁸ Perhaps administrative preemption is right, and the Court’s legitimating glosses for modern government are wrong. Or perhaps the inverse is true. This Article’s insight is that these cannot *all* be right—at least not without a new constitutional bargain.

delegation of [legislative] power”); *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 587–88 (1952) (holding that the President has no inherent constitutional authority to make domestic law). See generally *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1 (1824) (explaining that only a valid federal law can preempt a state law).

5. See U.S. CONST. art. VI, cl. 2.

6. See, e.g., *City of Arlington v. FCC*, 133 S. Ct. 1863, 1873 n.4 (2013) (“[a]gencies make rules . . . [that] take ‘legislative’ . . . forms, but they are exercises of—indeed, under our constitutional structure they *must be* exercises of—the ‘executive Power.’”); *Field v. Clark*, 143 U.S. 649, 692 (1892) (“That Congress cannot delegate legislative power to the President is a principle universally recognized as vital to the integrity and maintenance of the system of government ordained by the Constitution.”).

7. Cf. Ernest A. Young, “*The Ordinary Diet of the Law*”: *The Presumption Against Preemption in the Roberts Court*, 2011 SUP. CT. REV. 253, 280 (“[S]hifting preemptive authority away from Congress to . . . executive institutions that do not represent the states . . . amounts to a significant threat to state autonomy.”).

8. The obsession with legitimizing the administrative state has produced an enormous literature. See, e.g., Cynthia R. Farina, *Statutory Interpretation and the Balance of Power in the Administrative State*, 89 COLUM. L. REV. 452, 465 (1989) (collecting sources); Thomas O. Sargentich, *The Reform of the American Administrative Process: The Contemporary Debate*, 1984 WIS. L. REV. 385 (synthesizing much of the literature).

Whether the paradox exists, and, if so, what to do about it, may depend on one's interpretive and normative preferences. Rather than resist these analytic variables, this Article aims to navigate the reader through them. It employs textual, historical, structural, doctrinal and pragmatic modes of interpretation to accommodate—as much as possible—originalists⁹ and non-originalists¹⁰ alike. Although administrative preemption will likely be of more concern to originalists,¹¹ I hope to make the case for why non-originalists should be concerned too: administrative preemption is incompatible with the written Constitution *and* the Court's legitimating theories of modern government.¹² Non-originalists might thus be willing to revisit administrative preemption to avoid reopening the book on nondelegation and enumerated powers.

Part I canvasses the Court's administrative preemption doctrine. Part II conceives of administrative preemption as a paradox using textual, historical, and structural modes of constitutional interpretation. Although these modes tend to be associated with originalism, my purpose is not to defend or promote that interpretive methodology.¹³ Rather, I start with

9. Originalism “comes in a bewildering variety of colors and flavors.” CHRISTOPHER L. EISGRUBER, *CONSTITUTIONAL SELF-GOVERNMENT* 26 (2001). Here, I use the term originalism in its most generic sense. As Keith Whittington describes it, “[t]he two crucial components of originalism are the claims that constitutional meaning was fixed at the time of the textual adoption and that the discoverable historical meaning of the constitutional text has legal significance and is authoritative in most circumstances.” Keith E. Whittington, *Originalism: A Critical Introduction*, 82 *FORDHAM L. REV.* 375, 402 (2013). See also Lawrence B. Solum, *District of Columbia v. Heller and Originalism*, 103 *NW. U. L. REV.* 923, 954 (2009) (positing that originalism consists of a “fixation” and “contribution” thesis; the former reflecting the idea that the meaning of the Constitution was fixed when adopted, and the latter reflecting the idea that the “linguistic meaning of the Constitution constrains the content of constitutional doctrine”).

10. Like originalism, the non-originalism tent hosts a splintering array of interpretive approaches. I use the term here to include “living constitutionalism” and “common law constitutionalism.” In general, however, I employ the term non-originalism in its simplest form—to wit, something other than originalism.

11. See *infra* Part II.

12. See *infra* Part IV.

13. See, e.g., Akhil Reed Amar, *The Supreme Court 1999 Term: Forward: The Document and the Doctrine*, 114 *HARV. L. REV.* 26, 30 (2000) (identifying arguments from text, structure and history as “documentarian” instruments, “aiming to mine as much meaning as possible from the Constitution itself”); Whittington, *supra* note 9, at 377–478. For treatments of the modes of constitutional argumentation more generally, see PHILIP BOBBITT, *CONSTITUTIONAL FATE: THEORY OF THE CONSTITU-*

text, history, and structure simply because these interpretive inputs are generally acceptable to most non-originalists as well.¹⁴

Part III then lays the groundwork for a doctrinal assessment of administrative preemption, which may be more appealing to non-originalists. It surveys the structural concessions made for modern government during the New Deal era and beyond.¹⁵ Critically, however, the account advanced here emphasizes the doctrinal “contingencies” that ushered in and legitimated our modern structural arrangements. Most notably, the Framers’ separation of powers model was conceded on the theoretic contingencies that agencies cannot make “Law”¹⁶ and that agency action would be sufficiently kept in check.¹⁷ Separately, the Framers’ federalism strategy of enumerated (and limited) fed-

TION (1982) and Richard H. Fallon, Jr., *A Constructivist Coherence Theory of Constitutional Interpretation*, 100 HARV. L. REV. 1189 (1987).

14. See, e.g., Daniel A. Farber, *The Originalism Debate: A Guide for the Perplexed*, 49 OHIO ST. L.J. 1085, 1086 (1989) (“Almost no one believes that the original understanding is wholly irrelevant to modern-day constitutional interpretation.”); David A. Strauss, *Common Law Constitutional Interpretation*, 63 U. CHI. L. REV. 877, 881 (1996) (observing that “[v]irtually everyone would agree that sometimes the text is decisive”); see also Mitchell N. Berman, *Originalism is Bunk*, 84 N.Y.U. L. REV. 1, 25 (2009) (“[E]ven those scholars most closely identified with non-originalism . . . explicitly assign original meaning or intentions a significant role in the interpretive enterprise.”); Sanford Levinson, *The Limited Relevance of Originalism in the Actual Performance of Legal Roles*, 19 HARV. J.L. & PUB. POL’Y 495, 495 (1996) (“[A]lmost everyone is an originalist in at least some limited sense.”).

15. See Gary Lawson, *The Rise and Rise of the Administrative State*, 107 HARV. L. REV. 1231, 1249 (1994) (observing that “[t]he actual structure and operation of the national government today has virtually nothing to do with the Constitution”); Cass R. Sunstein, *Constitutionalism After the New Deal*, 101 HARV. L. REV. 421, 446 (1987) (“At least since the 1940’s, many observers have invoked the traditional concerns underlying the distribution of national powers to challenge the role and performance of administrative agencies.”); see also *FTC v. Ruberoid Co.*, 343 U.S. 470, 487 (1952) (Jackson, J., dissenting) (“The rise of administrative bodies . . . has deranged our three-branch legal theories . . .”).

16. For a recent expression, see *City of Arlington v. FCC*, 133 S. Ct. 1863, 1873 n.4 (2013) (“Agencies make rules . . . [that] take ‘legislative’ . . . forms, but they are exercises of—indeed, under our constitutional structure they *must be* exercises of—the ‘executive Power.’”).

17. See Gerald E. Frug, *The Ideology of Bureaucracy in American Law*, 97 HARV. L. REV. 1276, 1284 (1984) (observing that various models of administrative agencies are aimed at characterizing bureaucracies as being “under control”); Kristin E. Hickman, *Unpacking the Force of Law*, 66 VAND. L. REV. 465, 518–19 (2013) (“The modern administrative state reflects an implicit compromise of allowing Congress to delegate expansive lawmaking power to agencies in exchange for imposing substantial procedural requirements as agencies exercise those powers, with courts serving as the enforcer thereof.”); see also *infra* Part IV.A.

eral power has mostly been conceded, but on the theoretic contingency that state interests would be adequately protected through the legislative process.¹⁸

Part IV advances a normative “contingency principle” that builds on this doctrinal assessment. The contingency principle’s animating idea is rather straightforward: The contingencies are the legitimating strings that attach to the Court’s concessional doctrines for modern government. Thus, inasmuch as the Court seeks to legitimate Congress’s delegation of policymaking on the ground that the administrative output cannot be Article I, Section 7 “Law,” we can and should hold the Court to that conception when evaluating the legitimacy of administrative preemption. And inasmuch as the Court has declined to police the federal-state boundary on the legitimating theory that state interests are adequately protected in the legislative process, we can and should insist on the Court’s assurance to “compensate for possible failings” in that process.¹⁹

As applied here, the contingency principle suggests that the Court’s administrative preemption doctrine is not nearly as protective of state interests as it arguably should be. If agency action qualifies as “Law,” then it is conceptually void under the non-delegation doctrine (and should thereby be ineligible to preempt state law). Meanwhile, if agency action does not qualify as “Law” (thus avoiding a nondelegation violation), then it is difficult to comprehend why that action can or should bind sovereign states. As the Court itself has recognized, the states’ most meaningful protection against federal encroachment is the so-called political and procedural safeguards of federalism.²⁰ But neither of these safeguards attach administratively. This is simply a manifestation of the paradox in doctrinal terms.

Part V brings pragmatic claims to the fore. Some argue, for instance, that agencies are better equipped than Congress to make decisions about preemption, and that a system with administrative preemption is better than a system without it (putting aside,

18. See *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 554 (1985); see also *infra* Part III.C and Part IV.A.

19. *Garcia*, 469 U.S. at 554; see also *infra* Part III.C.

20. On the political safeguards, see *infra* Part IV.C.1. On the procedural safeguards, see *infra* Part IV.C.2.

for now, what “better” means here).²¹ In prior work I have questioned the merits of these pragmatic claims.²² But my purpose here is different; it is only to isolate the pragmatic claims. The reader can decide whether the pragmatic claims are enough to justify the paradox of administrative preemption—constitutionally or otherwise. What seems evident, however, is that something must give. As matters stand, administrative preemption is incompatible with the written Constitution *and* the Court’s legitimating theories of modern government. Saving administrative preemption on pragmatic grounds shades over, but does not resolve, this incoherence.

To be clear, I do not mean to impugn appeals to pragmatism. Indeed, they give expression to the puzzle this Article concludes with: if the paradox exists, what now?²³ This question appreciates that more is at stake here than the Framers’ original strategies for securing liberty. Also at stake are the values that birthed the modern administrative state.

On this recognition the analysis returns full circle. It explains my preference for a bottom-up approach to the question of administrative preemption; and more generally, why my preoccupation is with administrative preemption rather than with the structural concessions that precipitate and perpetuate it. After all, administrative preemption is made possible by congressional delegation of policymaking; it is made more dangerous by the combination of executive, legislative and judicial functions within agencies;²⁴ and it is made wide-ranging by the virtual demise of federalism’s enumerated-powers principle. Insofar as we are committed to safeguarding structure, why not

21. See generally Brian Galle & Mark Seidenfeld, *Administrative Law’s Federalism: Preemption, Delegation, and Agencies at the Edge of Federal Power*, 57 DUKE L.J. 1933 (2008).

22. See David S. Rubenstein, *Delegating Supremacy?*, 65 VAND. L. REV. 1125, 1126–27 (2012).

23. Cf. Jamal Greene, *Selling Originalism*, 97 GEO L.J. 657, 663 (2009) (distinguishing “between originalism as a constitutional adjudicative practice and originalism as a method of ascertaining constitutional meaning”); Whittington, *supra* note 9, at 402 (“Originalist theory, as such, also does not definitively instruct judges on what they should do if they find themselves confronted with a legal and political status quo that already departs substantially from the original meaning of the constitutional text.”).

24. John F. Manning, *Nonlegislative Rules*, 72 GEO. WASH. L. REV. 893, 895 (2004) (“The typical agency exercises rulemaking, enforcement, and adjudication authority—functional analogues to the legislative, executive, and judicial powers that our Constitution carefully allocates among three separate branches.”).

simply direct our energy top-down? Because to do so, in short, would be futile and wrong-minded.

Administrative preemption doctrine is an appealing target of reform precisely because revising it can be less destabilizing than direct assaults on the aforementioned postulates of modern government. Reforming administrative preemption would not prevent Congress from delegating policymaking or from combining functions in agencies, and it would not restrict the subject matter over which federal law extends. Reining in administrative preemption, however, may less directly—and more modestly—recapture some of what has been lost along both the separation of powers and federalism dimensions. Moreover, the timing is ripe for this Article’s interrogation of administrative preemption, as evidenced by the recent surge of attention the subject has received from the Court,²⁵ the White House,²⁶ Congress,²⁷ and academia.²⁸

25. See, e.g., *Arizona v. United States*, 132 S. Ct. 2492, 2527 (2012) (Alito, J., concurring in part and dissenting in part) (describing as “remarkable” the federal administration’s position that “a state law may be pre-empted, not because it conflicts with a federal statute or regulation, but because it is inconsistent with a federal agency’s current enforcement priorities,” which “are not law”); *Wyeth v. Levine*, 555 U.S. 555, 576–77 (2009) (calling into question which forms of agency action may preempt state law); see also Ernest A. Young, “*The Ordinary Diet of the Law*”: *The Presumption Against Preemption in the Roberts Court*, 2011 SUP. CT. REV. 253, 281 (noting that the Court probably has not “come to rest on the complicated cluster of issues surrounding preemption by federal administrative agencies”).

26. Memorandum for the Heads of Exec. Dep’ts & Agencies on Preemption, 74 Fed. Reg. 14,693 (May 22, 2009) (advising executive agencies to understand the legitimate prerogatives of the states before preempting a state law and outlining steps that agencies should take in making preemption decisions); see also Exec. Order No. 13,132, 64 Fed. Reg. 43255, 43256 (Aug. 10, 1999) (emphasizing the importance of early consultation with state and local officials).

27. *Regulatory Preemption: Are Federal Agencies Usurping Congressional and State Authority?*: Hearing Before the S. Comm. on the Judiciary, 110th Cong. 7 (2007); see also Catherine M. Sharkey, *Inside Agency Preemption*, 110 MICH. L. REV. 521, 556 (2012) (discussing recent congressional concern and attention to administrative preemption in hearings and as reflected in the Dodd-Frank Wall Street Reform and Consumer Protection Act and the Consumer Product Safety Improvement Act).

28. Commentators have begun to appreciate the curiosities and stakes of administrative preemption, although not in the paradoxical terms advanced here. See Gillian E. Metzger, *Federalism and Federal Agency Reform*, 111 COLUM. L. REV. 1, 9–10 nn.26–28 (2011) (noting that administrative preemption has taken center stage in preemption debates and collecting sources). For a partial sampling of recent academic treatments of administrative preemption, see generally Kent Barnett, *Improving Agencies’ Preemption Expertise with Chevron Codification*, 83 FORDHAM L. REV. 587 (2014); Stuart Minor Benjamin & Ernest A. Young, *Tennis with the Net Down: Administrative Federalism Without Congress*, 57 DUKE L.J. 2111, 2154 (2008); Ashutosh Bhagwat, *Wyeth v. Levine and Agency Preemption: More Muddle or Creeping to Clarity?*, 45 TULSA L. REV. 197, 221 (2009);

I. ADMINISTRATIVE PREEMPTION DOCTRINE

This Part provides a brief survey of the Court's administrative preemption doctrine. Section A begins with the Court's statutory preemption taxonomy. Familiarity with this taxonomy will be useful because, as explained in Section B, the Court has mostly overlaid administrative preemption upon it.

This Part concludes with two related claims, which combine to frame much of the Article's remainder. The first claim is that the Court's administrative preemption is woefully undertheorized: The Court has held that agencies can preempt state law,²⁹ but we do not quite know why. Second, understanding *why* is critically important for the doctrine's legitimacy, scope, and future trajectory. Indeed, understanding why may refract new light—or doubt—on the Court's foundational theories of modern government.

A. *Taxonomy of Statutory Preemption*

Congress may statutorily preempt state law either expressly or impliedly. Congress “expressly preempts” state law when it promulgates a statute that explicitly withdraws state jurisdiction over a particular subject.³⁰ Alternatively, Congress “impliedly preempts” state law in a number of ways. First, the Court infers Congress's intent to preempt state law when Congress enacts suf-

William W. Buzbee, *Preemption Hard Look Review, Regulatory Interaction, and the Quest for Stewardship and Intergenerational Equity*, 77 GEO. WASH. L. REV. 1521 (2009); William Funk, *Judicial Deference and Regulatory Preemption by Federal Agencies*, 84 TUL. L. REV. 1233 (2010); Galle & Seidenfeld, *supra* note 21; Joshua Hawkes & Mark Seidenfeld, *A Positive Defense of Administrative Preemption*, 22 GEO. MASON L. REV. 63 (2014); Nina A. Mendelson, *A Presumption Against Agency Preemption*, 102 NW. U. L. REV. 695 (2008); Thomas W. Merrill, *Preemption and Institutional Choice*, 102 NW. U. L. REV. 727 (2008); Gillian E. Metzger, *Administrative Law as the New Federalism*, 57 DUKE L.J. 2023 (2008); Henry Paul Monaghan, *Supremacy Clause Textualism*, 110 COLUM. L. REV. 731 (2010); Michael D. Ramsey, *The Supremacy Clause, Original Meaning, and Modern Law*, 74 OHIO ST. L.J. 559 (2013); Rubenstein, *Delegating Supremacy?*, *supra* note 22, at 1126–27; Rubenstein, *Immigration Structuralism*, *supra* note 2; Miriam Seifter, *Federalism at Step Zero*, 83 FORDHAM L. REV. 633 (2014); Sharkey, *Inside Agency Preemption*, *supra* note 27, at 556; Catherine M. Sharkey, *Products Liability Preemption: An Institutional Approach*, 76 GEO. WASH. L. REV. 449 (2008); Peter L. Strauss, *The Perils of Theory*, 83 NOTRE DAME L. REV. 1567 (2008); Ernest A. Young, *Executive Preemption*, 102 NW. U. L. REV. 869 (2008). And, for important foundational work for much of this debate, see Bradford R. Clark, *Separation of Powers as a Safeguard for Federalism*, 79 TEX. L. REV. 1321 (2001).

29. See *supra* note 1.

30. See, e.g., *Chamber of Commerce v. Whiting*, 131 S. Ct. 1968, 1977 (2011).

ficiently pervasive and detailed legislation targeting a particular industry or type of conduct (“field preemption”).³¹ Second, the Court infers Congress’s intent to preempt state law that conflicts with a statute (“conflict preemption”).³² In turn, conflict preemption obtains either when a state law would frustrate or pose an obstacle to the accomplishment of a federal objective (“obstacle preemption”),³³ or when it would be impossible for a party to comply with both federal and state law (“impossibility preemption”).³⁴ In all cases of implied preemption, the Court simply infers that Congress would not want the state law to stand.³⁵

B. Taxonomy of Administrative Preemption

1. Defining the Space

Critically, what distinguishes administrative from statutory preemption is the source of the preemptive conflict. Administrative preemption involves an agency’s assertion of *its own* power and intent to preempt state law.³⁶ As a threshold matter, an agency’s power to administer a statute comes from Congress. But administrative (rather than statutory) preemption obtains when there is nothing in the relevant statutory scheme itself that expressly or impliedly displaces state law. Rather, administrative preemption requires an agency action (for ex-

31. See, e.g., *Gade v. Nat’l Solid Wastes Mgmt. Ass’n*, 505 U.S. 88, 98 (1992) (indicating that field preemption exists “where the scheme of federal regulation is ‘so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it’”).

32. *Id.*

33. See, e.g., *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941) (“Our primary function is to determine whether, under the circumstances of this particular case, Pennsylvania’s law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.”).

34. See, e.g., *Fla. Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142–43 (1963) (“A holding of federal exclusion of state law is inescapable and requires no inquiry into congressional design where compliance with both federal and state regulations is a physical impossibility for one engaged in interstate commerce . . .”).

35. *Crosby v. Nat’l Foreign Trade Council*, 530 U.S. 363, 388 (2000) (“[T]he existence of conflict cognizable under the Supremacy Clause does not depend on express congressional recognition that federal and state law may conflict . . .”); see also Bhagwat, *supra* note 28, at 200 (noting that in implied preemption cases “the Court is discerning congressional intent from the broader structure of statutes”).

36. See, e.g., Bhagwat, *supra* note 28, at 201 (drawing this distinction); Merrill, *Preemption*, *supra* note 28, at 759–60 (same).

ample, a regulation), absent which there would be no preemptive conflict between federal and state law.

For present purposes I also draw a distinction between an agency's invocation of its own power to preempt state law and an agency's interpretation of a federal statute as having preemptive effect.³⁷ As used herein, the term "administrative preemption" means the former. The practice of an agency opining on a statute's preemptive effect is not the target of my concern here. Nor is the related question of judicial deference to an agency's opinion of a statute's preemptive effect.³⁸ Rather, as used here, the term administrative preemption refers to agency action that is both necessary and sufficient to displace state law, as the examples in the following section will illustrate.

Finally, preemption by unilateral presidential action—for example, via Executive Agreements or foreign policies—is beyond this Article's scope (though it warrants noting that presidential preemption may give rise to many of the same complications and concerns addressed herein).³⁹

37. Cf. Metzger, *Federalism*, *supra* note 28, at 17 n.64 (2011) ("The question of whether courts should defer to agency views of preemptive effect contained in agency regulations that have the force of law is distinct from the question of whether substantive requirements contained in such regulations have preemptive effect.").

38. Cf. Young, *Executive Preemption*, *supra* note 28, at 895–96 ("Although an agency's interpretive power to say when a federal statute preempts state law is troubling, at least its decision to preempt in that scenario is grounded in a congressional enactment . . ."). The question of what deference, if any, to accord administrative interpretations of preemptive effects has received substantial academic commentary with most arguing in favor of *Skidmore*-type rather than *Chevron*-type deference. See *id.*; see also Nina A. Mendelson, *Chevron and Preemption*, 102 MICH. L. REV. 737, 758–98 (2004); Merrill, *Preemption*, *supra* note 28, at 769–79; Sharkey, *Products Liability Preemption*, *supra* note 28, at 491–99. *But cf.* Seifter, *supra* note 28 (arguing for *Chevron*-style deference).

39. See generally Young, *Executive Preemption*, *supra* note 28 (calling into question "executive preemption" more generally, on both constitutional and normative grounds). For treatments on executive foreign affairs preemption, see also Michael P. Van Alstine, *Executive Aggrandizement in Foreign Affairs Lawmaking*, 54 UCLA L. REV. 309 (2006); Brannon P. Denning & Michael D. Ramsey, *American Insurance Association v. Garamendi and Executive Preemption in Foreign Affairs*, 46 WM. & MARY L. REV. 825 (2004). On executive agreements, see also MICHAEL D. RAMSEY, *THE CONSTITUTION'S TEXT IN FOREIGN AFFAIRS* 283–99 (2007); Bradford R. Clark, *Domesticating Sole Executive Agreements*, 93 VA. L. REV. 1573 (2007); Michael D. Ramsey, *Executive Agreements and the (Non)Treaty Power*, 77 N.C. L. REV. 133 (1998).

2. *The Doctrine*

Under the Court's existing doctrine, certain forms of agency action qualify for preemption under the Supremacy Clause's provision for "Laws . . . made in Pursuance [of the Constitution]." ⁴⁰ And, when agency action qualifies for preemptive effect, it will trump or displace state law in the same way that federal statutes do.

For example, an agency may pass a regulation that expressly preempts state law, thereby ousting states from regulating on the same subject or in the same field. *City of New York v. FCC* is illustrative. ⁴¹ There, Congress authorized the agency to "establish technical standards relating to the facilities and equipment of cable systems which a franchising authority may require in the franchise." ⁴² Pursuant to this delegation, the agency promulgated regulations for cable-signal quality. ⁴³ The agency also promulgated a regulation expressly preempting any state law in the same field, although the Act itself did not expressly empower the agency to do so. ⁴⁴ New York and other cities challenged the agency's authority to preempt the cities' ability to "impose stricter technical standards than those imposed by the Commission." ⁴⁵ The Court rejected this challenge, explaining:

The phrase 'Laws of the United States' [in the Supremacy Clause] encompasses both federal statutes themselves and federal regulations that are properly adopted in accordance with statutory authorization. For this reason, at the same time that our decisions have established a number of ways in which Congress can be understood to have preempted state law . . . we have also recognized that 'a federal agency acting within the scope of its congressionally delegated authority may preempt state regulation . . .' ⁴⁶

Apparently for the Court, an agency's power to expressly preempt state law is impliedly transmitted alongside Congress's general delegation of policymaking authority to an agency. An express delegation of preemption power is not required. Rather,

40. U.S. CONST. art. VI, cl. 2.

41. 486 U.S. 57 (1988).

42. *Id.* at 61 (quoting 47 U.S.C. § 544(e)).

43. *Id.* at 61-62.

44. *Id.*

45. *Id.* at 62.

46. *Id.* at 63.

the conditions for administrative preemption seem to be satisfied if the agency intends to preempt state law and that action is within the scope of the agency's jurisdiction.⁴⁷

Agency action can also impliedly preempt state law in the event of a sufficient conflict between the two.⁴⁸ *Geier v. American Honda Motor Co.* was such a case.⁴⁹ There, the petitioner asserted a tort claim against Honda, alleging that the manufacturer had negligently designed a car without an airbag. Honda, however, asserted that the common law claim was preempted on at least one of two grounds. First, Honda claimed that Congress preempted the petitioner's claim in an express statutory preemption provision. Second, Honda claimed that an agency regulation "conflict" preempted the petitioner's tort claim. The Court rejected Honda's statutory preemption defense, holding that Congress itself had not directly displaced the state tort claim.⁵⁰ Honda's administrative preemption defense, however, prevailed. Specifically, the Court held that the state law claim against Honda was preempted because it posed an obstacle to the federal regulation's purpose of allowing alternatives to airbags at the time that the car in question was designed.⁵¹ In so holding, the Court stressed that the absence of a formal statement of preemptive intent by the agency was not determinative because the actual conflict between the regulation and state law was sufficient to displace state law.⁵²

These cases demonstrate that agency regulations with the "force of law" qualify for preemptive effect. But it is worth emphasizing that the procedural hurdles associated with administrative notice-and-comment rulemaking⁵³ are not prerequisites for

47. *Fid. Fed. Sav. & Loan Ass'n v. De la Cuesta*, 458 U.S. 141, 154 (1982).

48. *See, e.g., Geier v. Am. Honda Motor Co.*, 529 U.S. 861 (2000) (holding that a regulation concerning passive restraints in automobiles impliedly preempted a state tort law claim); *CSX Transp., Inc. v. Easterwood*, 507 U.S. 658, 675 (1993) (holding that a regulation governing train speed preempted a common law negligence claim); *De la Cuesta*, 458 U.S. at 170 (holding that a regulation permitting federally chartered banks to exercise the due-on-sale clause of mortgages preempts a contrary state common law rule).

49. 529 U.S. at 883.

50. *Id.* at 867-74.

51. *Id.* at 874-82.

52. *Id.* at 884.

53. For useful summaries of these procedures, see Kristin E. Hickman, *Unpacking the Force of Law*, 66 VAND. L. REV. 465 (2013), and Mark Seidenfeld, *The Role of*

preemption under the Court's existing doctrine. The Court has held, for example, that administrative *adjudicative orders* qualify for preemptive effect.⁵⁴ And, although the Court's doctrine is still developing on this point, even *nonbinding* administrative policies—which do not have the “force of law”—might qualify.⁵⁵

This last possibility was recently aired in *Arizona v. United States*,⁵⁶ but not fully (or at least not clearly) resolved. There, the federal administration sought to enjoin certain of Arizona's restrictive immigration-related statutes on the ground that the laws were preempted by congressional statutes, the executive's nonbinding enforcement policies, or both.⁵⁷ Essentially, the proffered conflict was between executive policies that focus enforcement resources on targeted subclasses of unlawfully present immigrants (such as criminals and repeat immigration offenders) and Arizona's arrest-and-report laws that targeted a generic and undifferentiated class of undocumented immigrants.⁵⁸ Justice Alito—concurring and dissenting, in part—plainly expressed the view that the immigration agency's nonbinding enforcement policies could *not* preempt since they did not carry the “force of law.”⁵⁹ More so, he thought it “remarkable” that the administration would even contend otherwise.⁶⁰

Politics in a Deliberative Model of the Administrative State, 81 GEO. WASH. L. REV. 1397, 1426–29 (2013).

54. See, e.g., *Entergy La., Inc. v. La. Pub. Serv. Comm'n*, 539 U.S. 39, 49–50 (2003) (holding that state utility order regarding the allocation of wholesale power was preempted by an order of the Federal Energy Regulatory Commission); *Nantahala Power & Light Co. v. Thornburg*, 476 U.S. 953, 966 (1986) (similar).

55. See *Altria Group, Inc. v. Good*, 555 U.S. 70, 91 (2008) (expressly leaving open the question of whether an agency's policy without the force of law can have preemptive effect).

56. 132 S. Ct. 2492 (2012).

57. See Brief for the United States at 53, *Arizona v. United States*, 132 S. Ct. 2492 (2012) No. 11-182 (arguing that Section 6 of Arizona S.B. 1070 was obstacle preempted, in part because it “empowers state and local officers to pursue and detain a person . . . without regard to federal [meaning *executive*] priorities or even specific federal [meaning *executive*] enforcement determinations”); *id.* at 50 (arguing that Section 2(B) of Arizona S.B. 1070 was preempted, in part because that law “indiscriminately” forbids state and local officers from “adhering to the enforcement judgments and discretion of the federal Executive Branch”).

58. *Id.* at 14–15.

59. *Arizona*, 132 S. Ct. at 2527 (2012) (Alito, J., concurring in part and dissenting in part).

60. *Id.* (describing, as “remarkable,” the federal administration's position that “a state law may be pre-empted, not because it conflicts with a federal statute or

Justice Scalia echoed this concern, partly because the conflicting federal policy was the administration's decision to under-enforce Congress's immigration statutes.⁶¹ But the *Arizona* majority did not directly engage these points. To the contrary, it seemed to rely on the agency's enforcement policies as a basis (or, maybe partial basis) for preemption of at least one (and maybe two) of the Arizona provisions at issue.⁶²

Questions over the scope and theory behind the Court's administrative preemption doctrine were also aired in the Court's 2009 decision in *Wyeth v. Levine*.⁶³ There, the central issue was whether the Food and Drug Act, as implemented by the Food and Drug Agency (FDA), conflict-preempted a state common law tort action for defective drug labeling.⁶⁴ The issue was not whether agency action itself could preempt state law, but rather whether the agency's view of the preemptive effect of the statutory labeling scheme was entitled to *Chevron*-style judicial deference.⁶⁵ The Court held that while an agency's view concerning the existence of a *conflict* with state law may be entitled to some (non-*Chevron*) deference, the ultimate question of whether a statute *preempts* state law must be resolved *de novo* by a court.⁶⁶

regulation, but because it is inconsistent with a federal agency's current enforcement priorities . . . [which] are not law.").

61. *Id.* at 2521 (Scalia, J., concurring and dissenting, in part) ("[T]o say, as the Court does, that Arizona *contradicts federal law* by enforcing applications of the Immigration Act that the President declines to enforce boggles the mind.").

62. *Id.* at 2506 (explaining that the state law "could be exercised without any input from the Federal Government [meaning the *Executive*] about whether an arrest is warranted in a particular case," thus "allow[ing] the State to achieve its own immigration policy"). See also Eric Posner, *The Imperial President of Arizona*, SLATE (June 26, 2012, 12:04 PM), http://www.slate.com/articles/news_and_politics/jurisprudence/2012/06/the_supreme_court_s_arizona_immigration_ruling_and_the_imperial_presidency_.html [<http://perma.cc/6QH-AZC8>] (observing that the *Arizona* majority found certain provisions of S.B. 1070 preempted, not because it conflicts with federal law, but because it "conflicts with the president's policy"). Because the Court rejected the administration's enforcement claim in respect to another provision at issue, Section 2(B), it is hard to know what to make of the Court's dichotomous treatment. Language in the Court's opinion, however, suggests that the administration's enforcement policies made an important difference for the preemption calculus, at least when the statute itself was ambiguous as to Congress's intent.

63. See *Wyeth v. Levine*, 555 U.S. 555, 576–77 (2009).

64. *Id.* at 563–64.

65. *Id.* at 576.

66. *Id.* at 580–81.

In so holding, however, the *Wyeth* majority noted that it had “no occasion . . . to consider the preemptive effect” of an agency regulation with the “force of law”—potentially calling the central holding of *Geier* into doubt.⁶⁷

Meanwhile, Justice Thomas’s *Wyeth* concurrence took aim not at administrative preemption *per se*, but rather at obstacle preemption more generally. His objection, in short, was that only statutory text—not regulatory objectives and purposes—qualifies as “Laws . . . made in Pursuance” of the Constitution under the Supremacy Clause.⁶⁸ In Justice Thomas’s view, “[t]he Supremacy Clause thus requires that pre-emptive effect be given only to those federal standards and policies that are set forth in, or necessarily follow from, the statutory text that was produced through the constitutionally required bicameral and presentment procedures.”⁶⁹ Justice Thomas repeated this objection in his concurring and dissenting opinion in *Arizona*.⁷⁰ Although the logic and thrust of his challenge to implied obstacle preemption might be extended to foreclose administrative preemption, Justice Thomas did not say so in either *Wyeth* or *Arizona*.⁷¹

As matters stand, the Court’s administrative preemption doctrine is conceptually undeveloped. We know that agencies *can* preempt state law provided that agencies act within their statutorily conferred power.⁷² But *why* administrative action can displace state law remains obscure and unstable. Perhaps it is for formalistic reasons: Agency action qualifies as “Laws . . . made in Pursuance [of the Constitution],” therefore it preempts state law.⁷³ Or perhaps it is for functional reasons: Agency action should preempt state law, therefore it should qualify as supreme Law. Or, perhaps it is for some other unstated reason. Without a

67. *Id.* at 576–77, 580.

68. *Id.* at 585 (Thomas, J., concurring).

69. *Id.* at 586.

70. *Arizona v. United States*, 132 S. Ct. 2492, 2523–24 (2012) (Thomas, J., concurring in part and dissenting in part).

71. *Cf. Wyeth*, 555 U.S. at 587–88 (“Congressional and agency musings, however, do not satisfy the Article I, § 7, requirements for enactment of federal law and, therefore, do not pre-empt state law under the Supremacy Clause.”).

72. *See supra* note 1.

73. This comes closest to the view expressed by the Court in *City of New York v. FCC*. *See* 486 U.S. 57, 63 (1988). But even there the Court did not explain *why* administrative regulations with the force of law qualify as “Laws . . . made in Pursuance [of the Constitution]” for purposes of the Supremacy Clause.

judicially approved reason, however, the scope, trajectory, and legitimacy of the Court's administrative preemption doctrine remain shrouded in doubt. Indeed, I will argue, the Court's failure to tender a legitimating theory for administrative preemption rattles the edifice of the modern administrative state.

II. THE PARADOX-HYPOTHESIS

Administrative preemption paradoxically requires agency action to simultaneously qualify as (1) "Law" for federalism (preemption) purposes and (2) not Law for separation of powers. If agency action qualifies as "Law," however, then it is arguably void under separation of powers principles (and thus ineligible to preempt state law). Meanwhile, if agency action does not qualify as "Law" (thus avoiding a separation of powers problem), then it arguably falls beyond the Supremacy Clause's purview of "Laws . . . made in Pursuance [of the Constitution]." I say arguably—rather than definitively—because like much of constitutional law, the above propositions are interpretively contestable. The analysis below thus treats the paradox more as a testable hypothesis than a foregone conclusion.

Section A provides a brief account of the Framers' structural strategies of divided government and the values those strategies were designed to serve. Section B offers textual, historical, and structural accounts that interpret the phrase "Laws . . . made in Pursuance [of the Constitution]" to mean only federal statutes. So construed, Section C hypothesizes that administrative preemption is a structural paradox that belies original conceptions of separation of powers and federalism. This Section also introduces non-originalist conceptions that might justify or deconstruct the paradox, which are revisited in later Parts.

A. *The Original Structure*

The Framers' crosscutting ambition was to empower and limit government authority.⁷⁴ To those ends, federal power was vested, enumerated, dispersed, and checked. Though the Bill of Rights was later added to further cabin government power, the

74. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 640 (1952) (Jackson, J., concurring) ("The purpose of the Constitution was not only to grant power, but to keep it from getting out of hand.").

original strategy for promoting liberty was structural and prophylactic by design.⁷⁵

Horizontally, the Constitution divides and vests federal power in three separate institutions: Article I vests the “legislative” powers in Congress;⁷⁶ Article II vests the “executive” power in the President;⁷⁷ and Article III vests the “judicial” power in the courts.⁷⁸ Layered within this separation is a system of checks and balances whereby certain federal action is made dependent on the consent of multiple institutions. The Constitution contains many expressions of this; most relevant here, Article I, Section 7 requires that both houses of Congress pass a “Law” (bicameralism), which in turn must be presented to the President for potential veto (presentment).⁷⁹

The Framers’ strategy of dispersing and intermingling federal power was designed to set ambition against ambition, faction against faction, with the related aims of promoting deliberation and accountability, while stifling self-interested government action.⁸⁰ To be sure, the resulting system of separated and balanced power was expected to result in some government inefficiency.⁸¹ But that was a price for liberty. The defeat of “a few good laws” was thought to be “amply compensated by the advantage of preventing a number of bad ones.”⁸²

Vertically, the Framers’ innovation of dividing power between the federal and state governments was similarly intended to ad-

75. Martin H. Redish & Elizabeth J. Cisar, *“If Angels Were to Govern”: The Need for Pragmatic Formalism in Separation of Powers Theory*, 41 DUKE L.J. 449, 477 (1991) (discussing the purposes of prophylactic protections).

76. U.S. CONST. art. I, § 1.

77. *Id.* art. II, § 1.

78. *Id.* art. III, § 1.

79. *Id.* art. I, § 7.

80. See THE FEDERALIST NO. 51 (James Madison); Abner S. Greene, *Checks and Balances in an Era of Presidential Lawmaking*, 61 U. CHI. L. REV. 123, 132, 184 (1994); see also *INS v. Chadha*, 462 U.S. 919, 951 (1983) (“The division of the Congress into two distinctive bodies assures that the legislative power would be exercised only after opportunity for full study and debate in separate settings.”).

81. THE FEDERALIST NO. 62, at 378 (James Madison) (Clinton Rossiter ed., 1961) (acknowledging that “check[s] on legislation may in some instances be injurious as well as beneficial”).

82. THE FEDERALIST NO. 73, at 444 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

vance the political marketplace.⁸³ Each level of government could be expected to compete for public loyalties “by conferring the freedom to choose from among various diverse regulatory regimes the one that best suits the individual’s preferences.”⁸⁴ States could garner popular loyalty not only from the substance of their laws, but also by affording the public more accessible outlets for political choice and participation in government.⁸⁵ Again, though not necessarily efficient, decentralization of power and the competition for political favor in the states was hoped to provide a critical check against an otherwise unchallenged and overweening federal government.⁸⁶

Critically, the conditions for political competition required leaving states something meaningful to offer. Toward that end, the Framers sought to limit federal power by enumerating the subject matters to which it could attach.⁸⁷ Article I vests Congress with the legislative power “herein granted,” and then specifies what those powers are.⁸⁸ The Framers’ decision to enumerate Congress’s specific powers, rather than to confer general legislative authority, presupposed that states would retain a measure of autonomy over the residue.⁸⁹

83. See Akhil Reed Amar, *Of Sovereignty and Federalism*, 96 YALE L.J. 1425, 1450 (1987) (“As with separation of powers, federalism enabled the American People to conquer government power by dividing it.”).

84. Lynn A. Baker & Ernest A. Young, *Federalism and the Double Standard of Judicial Review*, 51 DUKE L.J. 75, 139 (2001). See also Amar, *Of Sovereignty*, *supra* note 83 (“Each government agency, state and national, would have incentives to win the principal’s affections by monitoring and challenging the other’s misdeeds.”); Robert F. Nagel, *Federalism as a Fundamental Value: National League of Cities in Perspective*, 1981 SUP. CT. REV. 81, 100 (“[T]he Federalists understood and emphasized that influence through electoral politics presupposes that state governments would exist as alternative objects of loyalty to the national government.”).

85. THE FEDERALIST NO. 46, at 294 (James Madison) (Clinton Rossiter ed., 1961) (noting that “a greater number of individuals will expect to rise” into state government); Ernest A. Young, *Two Cheers for Process Federalism*, 46 VILL. L. REV. 1349, 1369, 1381–84 (2001).

86. Young, *Two Cheers for Process Federalism*, *supra* note 85, at 1358, 1369; see also *Gregory v. Ashcroft*, 501 U.S. 452, 458 (1991) (“Perhaps the principal benefit of the federalist system is a check on abuses of government power.”).

87. THE FEDERALIST NO. 45, at 292 (James Madison) (Clinton Rossiter ed., 1961) (“The powers delegated by the proposed Constitution to the federal government are few and defined.”); see also Baker & Young, *Federalism and the Double Standard*, *supra* note 84, at 139.

88. U.S. CONST. art. I, §§ 1, 8.

89. See Ernest A. Young, *Making Federalism Doctrine: Fidelity, Institutional Competence, and Compensating Adjustments*, 46 WM. & MARY L. REV. 1733, 1765–66 (2005).

B. *The Supremacy Clause's Original Meaning*

The Supremacy Clause reinforces separation of powers and federalism—simultaneously—by limiting the *types* of federal law that qualify for preemptive effect.⁹⁰ Specifically, only (1) the Constitution, (2) “Laws . . . made in Pursuance thereof” and (3) “treaties . . . shall be the supreme Law of the land.”⁹¹ If administrative action is covered, it must be by virtue of its qualification as “Laws . . . made in Pursuance [of the Constitution].” However, reading this provision in its textual, historical, and structural context rather plainly shows that it was intended to mean federal statutes—and exclusively so. Other interpretations are plausible but do not fit nearly as well with the written Constitution.⁹²

1. *Text*

First, the text. For administrative action to qualify for preemption it must be (1) “Law” (2) that is “made” (3) “in Pursuance” of the Constitution. None of these terms are constitutionally defined.

The term “Law” (or “Laws”) is used several times throughout the original Constitution. For example, “Law” is used elsewhere in the Supremacy Clause, referring to the “Laws of any state”;⁹³ in Article I, referring to congressional “Laws” promulgated pursuant to bicameralism and presentment;⁹⁴ in Article II, referring to the President’s duty to take care that the “Laws be faithfully executed”;⁹⁵ and in Article III, referring to the Court’s jurisdiction over cases and controversies arising under the “Laws of the United States.”⁹⁶

Thus, standing alone, the word “Laws” is not limited to federal statutes. When considered in context, however, that is the best textual reading. The Supremacy Clause refers not to Laws in general; rather, it refers to “Laws . . . made in Pursuance [of the

90. U.S. CONST. art. VI, cl. 2; Clark, *Separation of Powers*, *supra* note 28, at 1326.

91. U.S. CONST. art. VI, cl. 2.

92. *Cf.* Amar, *Supreme Court 1999 Term*, *supra* note 13, at 54 (“Though not wholly determinate, documentarianism . . . seeks not merely a modestly plausible reading of the Constitution, but the most plausible reading, the reading that best fits the entire document’s text, enactment history, and general structure.”).

93. U.S. CONST. art. VI, cl. 2.

94. *Id.* art. I, § 7.

95. *Id.* art. II, § 3.

96. *Id.* art. III, § 2.

Constitution].”⁹⁷ No one in the Framing generation would have used the word “made” in reference to the judicial common law: that law was found or discovered, not made.⁹⁸ Likewise, the original conception of executive power did not include the ability to make Law.⁹⁹ At most, agencies employing executive power were thought to implement or interpret Congress’s Law—but the power to *make* Law was quite clearly, and exclusively, vested in the legislature.¹⁰⁰

This reading is further buttressed by the Supremacy Clause’s caveat that preemptive Laws be made “in Pursuance” of the Constitution. The “in Pursuance” requirement has generally been understood to include a procedural component, requiring that qualifying Laws be made in the “manner prescribed by the Constitution”¹⁰¹ (as opposed to those made pursuant to the

97. *Id.* art. VI (emphasis added); see also 3 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 1831 at 694 (1833) (“It will be observed, that the supremacy of the laws is attached to those only, which are made in pursuance of the constitution[.]”).

98. Monaghan, *Supremacy Clause Textualism*, *supra* note 28, at 768, 776–78. This observation notwithstanding, Professor Monaghan rejects the notion that federal common law should be excluded from the Supremacy Clause’s purview. But, as discussed below, his position is animated by modern, not originalist, conceptions of federal law. See *infra* notes 144–46 and accompanying text. The question of whether federal common law can or should have preemptive effect has generated its own body of literature, and is beyond the scope of this Article. For treatments, see, for example, Anthony J. Bellia, Jr. & Brandford R. Clark, *The Federal Common Law of Nations*, 109 COLUM. L. REV. 1 (2009); Craig Green, *Repressing Erie’s Myth*, 96 CAL. L. REV. 595, 617–18 (2008); Monaghan, *Supremacy Clause Textualism*, *supra* note 28; Ramsey, *Original Meaning*, *supra* note 28; Strauss, *Perils of Theory*, *supra* note 28; Young, *Making Federalism Doctrine*, *supra* note 89.

99. See Ramsey, *Original Meaning*, *supra* note 28, at 573 (“In eighteenth-century language, ‘executive’ power was understood in opposition to legislative power. Executive power, whatever it might contain, did *not* encompass lawmaking power.”) (emphasis added); see also 1 WILLIAM BLACKSTONE, COMMENTARIES *142–43, *261; THE FEDERALIST NO. 47, at 303 (James Madison) (Clinton Rossiter ed., 1961) (noting that in England, “[t]he magistrate in whom the whole executive power resides cannot of himself make a law”).

100. Ramsey, *Original Meaning*, *supra* note 28, at 573.

101. See, e.g., ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS 9 (1962) (“[T]he proviso that only those federal statutes are to be supreme which are made in pursuance of the Constitution means that the statutes must carry the outer indicia of validity lent them by enactment in accordance with the constitutional forms.”); Jonathan F. Mitchell, *Stare Decisis and Constitutional Text*, 110 MICH. L. REV. 1, 5 (2011) (“This ‘in Pursuance’ caveat is most plausibly read to confer supremacy on all statutes that survive the bicameralism-and-presentment hurdles established in Article I, Section 7.”); William W. Van Alstyne, *A Critical Guide to Marbury v. Madison*, 1969 DUKE

Articles of Confederation).¹⁰² For federal statutes, this procedure requires passage according to Article I, Section 7 bicameralism and presentment. Cases from the early republic also suggest that “in Pursuance” entails a substantive component that requires federal statutes be consistent with Congress’s powers.¹⁰³ But I am aware of no originalist conception that interprets “in Pursuance” to entail a substantive requirement to the exclusion of a procedural one.¹⁰⁴ In short, “in Pursuance” might refer only to the procedural demands of Article I, Section 7, or might also include a substantive component: but, in either event, it refers to Congress’s Laws.

2. Enactment History

A textual interpretation that equates “Laws . . . made in Pursuance” of the Constitution with validly enacted federal statutes also comports with the Supremacy Clause’s drafting history.¹⁰⁵ Prior to its final form, the earlier drafts referred to the “legislative acts of the United States” and “[t]he Acts of the Legislature” as supreme Law.¹⁰⁶ There is no doubt that these

L.J. 1, 20–21 (observing that “[t]he phrase ‘in pursuance thereof’ might . . . easily mean ‘in the manner prescribed by this Constitution,’” and concluding that “the only constitutional issue to be raised in a judicial forum to determine whether an act of Congress should be given effect is whether the bill has been enacted according to the forms prescribed in the Constitution”).

102. See, e.g., DAVID P. CURRIE, *THE CONSTITUTION IN THE SUPREME COURT: THE FIRST HUNDRED YEARS 1789–1888*, at 72–73 (1985) (noting that “the reference to laws made in pursuance of ‘this Constitution’ was meant to distinguish those made under the Articles of Confederation”).

103. This interpretation draws from Chief Justice Marshall’s early accounts. See *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 180 (1803) (asserting that the “made in pursuance” language excludes from supremacy acts of Congress that the Supreme Court deems unconstitutional); see also *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 423 (1819) (construing “in pursuance thereof” to require compliance with Constitution’s substantive restrictions on federal power).

104. See *Wyeth v. Levine*, 555 U.S. 555, 586 (2009) (Thomas, J., concurring) (arguing that federal laws “made in Pursuance” of the Constitution must comply with the substantive and procedural limits on Congress’s lawmaking power). *But cf.* Strauss, *Perils of Theory*, *supra* note 28, at 1570–71 (arguing that the claim for statutory exclusivity is weakened insofar as “Pursuance” embodies a “substantive and not merely” a procedural requirement).

105. Clark, *Separation of Powers*, *supra* note 28, at 1334; see also Ramsey, *Original Meaning*, *supra* note 28, at 578 (explaining how the “drafting and ratifying history confirms the most natural reading of the text: that Article VI refers to the Constitution, treaties, and federal statutes”).

106. See *Journal of the Constitutional Convention* (July 17, 1787) in 2 *THE RECORDS OF THE FEDERAL CONVENTION OF 1787*, at 21, 22 (Max Farrand ed., 1911);

phrasings referred to congressional statutes. Nor is there any evidence in the drafting history to suggest that the Committee of Style's decision to replace "Acts of the Legislature" with "Laws" was anything other than stylistic.¹⁰⁷

Moreover, as Bradford Clark has highlighted, the historical context precipitating what became the Supremacy Clause was linked to the "Great Compromise" reached between the large and small states that enabled the Constitution's ratification.¹⁰⁸ The small states convinced the large ones "to incorporate three concrete proposals into the new Constitution—equal suffrage in the Senate, a Supremacy Clause that limited supremacy to three specific sources of law [the Constitution, 'Laws,' and treaties], and federal lawmaking procedures that required the participation of the Senate to adopt each of these sources."¹⁰⁹ As Professor Clark recounts, these bargained-for provisions were "the price that the large states had to pay to secure the small states' assent to the new Constitution."¹¹⁰

It is surely true, as Henry Monaghan argues, that the Supremacy Clause was an endorsement of federal power; after all, the Clause established the primacy of federal law.¹¹¹ Like many constitutional expressions, however, the Supremacy Clause was born of intense debate and compromise.¹¹² The compromise most relevant here was to limit the *types* of federal action that could qualify for preemptive effect. The Supremacy Clause's purpose was thus crosscutting: to give preemptive effect to the federal Constitution,

James Madison, Notes on the Constitutional Convention (Aug. 6, 1787), in 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 183 (Max Farrand ed., 1911).

107. See Rubenstein, *Delegating Supremacy?*, *supra* note 22, at 1154-55; *but cf.* Hawkes & Seidenfeld, *supra* note 28, at 72 (arguing that lack of debate on this change of language is a poor proxy for understanding the Framers' intentions).

108. See generally Bradford R. Clark, *Constitutional Compromise and the Supremacy Clause*, 83 NOTRE DAME L. REV. 1421, 1422-23 (2008). For a discussion of the Great Compromise that resulted in equal representation in the Senate, see generally MAX FARRAND, THE FRAMING OF THE CONSTITUTION OF THE UNITED STATES 91-112 (1913).

109. Clark, *Constitutional Compromise*, *supra* note 108, at 1436.

110. *Id.* See also Ramsey, *Original Meaning*, *supra* note 28, at 575-78 (linking the Supremacy Clause to the Great Compromise); *but cf.* Hawkes & Seidenfeld, *supra* note 28, at 69-71 (arguing that neither the Great Compromise, nor its timing in the Convention, supports Clark's interpretation of the Supremacy Clause).

111. Monaghan, *Supremacy Clause Textualism*, *supra* note 28, at 749.

112. See Clark, *Constitutional Compromise*, *supra* note 108 (discussing the historical context surrounding adoption of the Supremacy Clause).

statutes, and treaties; yet, at the same time, to give preemptive effect exclusively to those three sources of law.¹¹³

3. Structuralism

Although the Supremacy Clause is most commonly associated with federalism, it is as much about federal separation of powers.¹¹⁴ Reading Article I and Article VI (the Supremacy Clause) as interlocking provisions reflects a critical structural limitation imposed by the Framers.¹¹⁵ State laws would be preserved except to the extent that they conflicted with federal statutes (or the Constitution or treaties).

The cumbersome legislative process was intended to “preserve state government prerogatives by making federal law more difficult to adopt.”¹¹⁶ The notion that the Executive could bypass the Senate in making law, and that such Executive law would be supreme over state law, would have been a constitutional dealbreaker. That the timing of the Supremacy Clause’s adoption coincided precisely with the Great Compromise only reinforces this premise.¹¹⁷ As put by Professor Clark, “[i]t would make little sense for the Constitution to specify elaborate, finely-wrought lawmaking procedures and at the same time to sanction freestanding, unstructured lawmaking wholly outside these procedures.”¹¹⁸

In sum, the Constitution’s text, drafting history, and structure mutually reinforce an interpretation of the Supremacy Clause that excludes administrative preemption. Even insofar

113. See Bradford R. Clark, *Federal Lawmaking and the Role of Structure in Constitutional Interpretation*, 96 CAL. L. REV. 699, 701 (2008); Ramsey, *Original Meaning*, *supra* note 28, at 575 (“In a document born of compromise, one would expect that a nationalizing provision would come with some offer of reassurance. One way to reassure would be to describe national supremacy in limited and precise terms . . .”).

114. See Clark, *Separation of Powers*, *supra* note 28; Clark, *Federal Lawmaking*, *supra* note 113; Denning & Ramsey, *supra* note 39.

115. Cf. Akhil Reed Amar, *Intratextualism*, 112 HARV. L. REV. 747 (1999) (treating the meaning of various semantically related parts of the text as meaningfully interlinked for purposes of interpretation).

116. Clark, *Separation of Powers*, *supra* note 28, at 1326.

117. See Clark, *Constitutional Compromise*, *supra* note 108 (linking adoption of the Supremacy Clause to the Great Compromise, which gave rise to equal representation in the Senate).

118. Clark, *Federal Lawmaking*, *supra* note 113, at 711.

as the original Constitution may leave room for agencies to make *policy* in the context of implementing and interpreting Congress's Law, on the best originalist interpretation, the Constitution does not leave room for agency policies to have *preemptive* effect.

In a recent article, Joshua Hawkes and Mark Seidenfeld argue that this originalist understanding is belied by cases from the early republic.¹¹⁹ More specifically, they claim that *McCulloch v. Maryland*¹²⁰ and *Gibbons v. Ogden*¹²¹ countenanced administrative preemption insofar as agency action was involved.¹²² Because their article was published just as mine was going to print, I regrettably cannot respond to a number of important claims advanced in their work. But, it seems to me, *McCulloch* and *Gibbons* may do more to entrench—not undermine—an originalist interpretation that equates federal statutes with the Supremacy Clause's provision for "Laws . . . made in Pursuance" of the Constitution.

The question for decision in *McCulloch* was whether Maryland's tax law was "repugnant to the constitution of the United States, and the act of congress" which chartered the Bank.¹²³ And, lest there be doubt about the reach of the Court's holding, it was that "[t]he states have no power, by taxation or otherwise, to retard, impede, burden, or in any manner control the operations of the constitutional laws enacted by congress to carry into effect the powers vested in the national government."¹²⁴ The Court thus pegged preemption to Congress's laws. In no sense was the Bank directors' decision to site a branch in Baltimore understood to be Law, much less Law with preemptive effect.¹²⁵ As further developed below,¹²⁶ this distinction—

119. See Hawkes & Seidenfeld, *supra* note 28, at 83-91.

120. 17 U.S. 316 (1819).

121. 22 U.S. 1 (9 Wheat.) 1 (1824)

122. See Hawkes & Seidenfeld, *supra* note 28, at 83-85, 89-91.

123. *McCulloch*, 17 U.S. at 319.

124. *Id.* at 316, 436 (emphasis supplied); see also *id.* at 424 ("After the most deliberate consideration, it is the unanimous and decided opinion of this court, that [Congress's] act to incorporate the bank . . . is a law made in pursuance of the constitution, and is a part of the supreme law of the land.").

125. Consider, in this regard, the Attorney General's argument before the Court:

Nothing can be plainer than that, if the law of congress, establishing the bank, be a constitutional act, it must have its full and complete effects.

The right, then, to establish these branches, is a necessary part of the

between agencies' ability to make policy and the ability to preempt state law—is critical.¹²⁷

Similarly, in *Gibbons*, the Court's preemption analysis began by noting that the validity of state laws may “depend[] on their interfering with, and being contrary to, *an act of Congress passed in pursuance of the constitution.*”¹²⁸ Observe, in this phrasing, how the term “act of Congress passed” operates as a stand-in for the Supremacy Clause's provision for “Laws. . . made.” So framed, the “inquiry” before the Court was whether New York law “[came] into collision *with an act of Congress*, and deprived a citizen of a right to which *that act* entitles him.”¹²⁹ Contrary to Hawkes and Seidenfeld's suggestion, it was not the federal collector's act of granting Gibbons a license that did the preemptive work. Rather, the Court explained, it was Congress that trumped New York law.¹³⁰

means. This right is not delegated by congress to the parent bank. The act of congress for the establishment of offices of discount and deposit, leaves the time and place of their establishment to the directors, as a matter of detail. *When established, they rest, not on the authority of the parent bank, but on the authority of congress.*

Id. at 359–60 (emphasis supplied).

126. *See infra* Part IV.B.

127. *Cf.* Ramsey, *Original Meaning*, *supra* note 28, at 605 (contending that the Supremacy Clause “does not deny the possibility of non-Article VI law (so long as it is not applied to displace otherwise-constitutional state law)”). In their recent article, Hawkes and Seidenfeld mischaracterize my position to be that the “courts were wrong to allow statutes to delegate so much [policy] discretion to agencies.” *See* Hawkes & Seidenfeld, *supra* note 28, at 75. To the contrary, I have argued that the delegation of policymaking and the delegation of supremacy are conceptually severable, such that even if the former is allowed, the latter does not necessary follow. *See* Rubenstein, *Delegating Supremacy?*, *supra* note 22, at 1166–68.

128. *Gibbons*, 22 U.S. at 210; *see also id.* at 211 (referring to state law coming into “conflict with a law passed by Congress in pursuance of the constitution” and reiterating that “the act of Congress . . . is supreme”).

129. *Id.* at 210.

130. The Court addressed this point directly:

The fourth section [of the Federal Navigation Act] directs the proper officer to grant to a vessel qualified to receive it, ‘a license for carrying on the coasting trade;’ and prescribes its form. After reciting the compliance of the applicant with the previous requisites of the law, the operative words of the instrument are, ‘license is hereby granted for the said steamboat, Bellona, to be employed in carrying on the coasting trade for one year from the date hereof, and no longer.’ These are not the words of the officer; they are the words of the legislature; and convey as explicitly the authority the act intended to give, and operate as effectually, as if they had been inserted in any other part of the act, than in the license itself.

Id. at 212–13.

C. *The Originalist Paradox and the Non-Originalist Response*

If the foregoing assessment holds, then administrative preemption is a paradox: it requires agency action to simultaneously qualify as “Law” for federalism purposes and “not Law” for separation of powers. The Framers surely never intended this. Rather, as written, the Constitution allows federal action to be *or* not to be Law. If Law, then it can preempt state law; if not Law, then it cannot preempt. This result is not necessarily efficient. But, for the Framers, efficiency was not the only point.

To be sure, the operation of modern government abhors the Framers’ Law-or-not-Law choice. As discussed in Part V, it is far more convenient to permit federal action to be Law for purposes of the Supremacy Clause and, at the same time, to not be Law for purposes of Articles I and II. Indeed, this Law-*and*-not-Law option is more than just convenient; it arguably provides a better means of promoting the Union’s welfare. It is in this spirit that we can appreciate attempts of some notable scholars to constitutionally justify administrative preemption.

Professor Monaghan favors this approach.¹³¹ He concedes “that, as an historical matter, ‘Laws . . . made in Pursuance [of the Constitution]’ referred only to Acts of Congress.”¹³² Nevertheless, he argues that *changed circumstances* counsel for interpreting this phrase to include “the commands of any institution whose lawmaking authority has been recognized over time” — a category that would include federal agencies (as well as courts).¹³³ According to Professor Monaghan, a textualist or originalist approach cannot “supply a satisfying theory of our contemporary constitutional order because it is inconsistent with deeply entrenched practices and thus would destabilize far too much settled doctrine.”¹³⁴

131. Monaghan, *Supremacy Clause Textualism*, *supra* note 28, at 742 (arguing “that important aspects of the intellectual world of the Founders have wholly vanished, rendering greatly problematic any originalist understanding of the Supremacy Clause”).

132. *Id.* at 740–41.

133. *Id.* at 740–42.

134. *Id.* at 742.

Peter Strauss echoes this concern.¹³⁵ “Whatever the drafters’ theoretical expectations may have been,” Professor Strauss argues, “the passage of time has overcome them.”¹³⁶ And, though he too concedes that earlier drafts of the Supremacy Clause would seem to foreclose administrative preemption,¹³⁷ Professor Strauss finds sufficient ambiguity in the final constitutional text to permit the practice.¹³⁸ In particular, Professor Strauss first observes that the term “Laws” is employed elsewhere in the Constitution to refer to things other than federal statutes.¹³⁹ He recognizes that these other usages of the term “Law[s]” do not share the Supremacy Clause’s important qualifying language—“made in Pursuance” of the Constitution.¹⁴⁰ But, for Professor Strauss, these caveats may be deemed satisfied in the administrative context when Congress delegates lawmaking power to agencies.¹⁴¹

Professor Merrill, also for functional reasons, reaches a similar conclusion.¹⁴² He suggests that if agencies exercise congressionally delegated authority, “then it is possible to speak of the [agency’s] 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.”¹⁴³

Even Professors Clark and Ramsey—who otherwise champion originalist accounts of the Supremacy Clause—seem willing to make conceptual peace with administrative preemption. In particular, Professor Clark suggests that when Congress dele-

135. Strauss, *Perils of Theory*, *supra* note 28, at 1591 (fearing that an originalist reading of the Supremacy Clause would require abandoning the “delegation doctrine as we know it in any context impacting state law”).

136. *Id.* at 1574.

137. *Id.* at 1568.

138. *Id.* at 1568–73.

139. *Id.* at 1568–70. See also *supra* notes 93–100 and accompanying text.

140. Strauss, *Perils of Theory*, *supra* note 28, at 1570–71.

141. *Id.* (arguing that “for regulations, just as for statutes, the power of the action to command state obedience depends on its having been made in pursuance of—that is to say, under the substantive authority conferred on federal officers by—the Constitution”). See also Hawke & Seidenfeld, *supra* note 22, at 101 (concluding that “administrative action can have preemptive authority in its own right, without resort to the fiction that authorization of such action by Congress imparts the authority to preempt conflicting state law”).

142. See Merrill, *Preemption*, *supra* note 28, at 763–64.

143. *Id.*

gates policymaking power it is effectively Congress that preempts state law, thus potentially alleviating any Supremacy Clause problem.¹⁴⁴ In similar fashion, Professor Ramsey offers a modern-day justification for administrative preemption: If “Congress . . . may convey interpretation or implementation authority to a non-Article-I body, Congress’s own act—combined with the acts of interpretation/implementation of the body receiving the delegation—creates supreme law.”¹⁴⁵

These moves to unwind or justify the paradox are sensible, and I will have more to say about them later.¹⁴⁶ For present purposes I wish only to make three points. The first is that the foregoing academic conceptions are not the *Court’s*. That matters for reasons developed in Part IV. Second, these academic conceptions are mostly *non*-originalist moves. Although they make arguments from text, history, and structure, none conclude that administrative preemption fits within an originalist frame. Instead, their interpretive approaches seem mostly directed at creating a reasonable doubt about the Constitution’s original meaning.¹⁴⁷ Once this space is cleared, their sensitivity to contemporary understandings and arrangements are what do the real work of bringing agency action within the Supremacy Clause’s fold. Meanwhile, Professors Clark and Ramsey’s accommodations for administrative preemption are attempts to narrow the gap between their originalist interpretations of the Supremacy Clause and the Court’s existing doctrines.¹⁴⁸

144. Clark, *Separation of Powers*, *supra* note 28, at 1433.

145. Ramsey, *Original Meaning*, *supra* note 28, at 566–67 (“To the extent that an agency (or the President directly) acts with statutory authority, the statutory authority supplies the basis for displacing state law.”).

146. *See infra* Part IV.

147. Monaghan, *Supremacy Clause Textualism*, *supra* note 28, at 768 (“Shall we conclude that the original understanding was that ‘Laws’ in the Supremacy Clause meant *only* Acts of Congress? Reflection convinces me that the answer is yes; but it is for reasons quite different from [Professor] Clark’s political and structural account.”); Strauss, *Perils of Theory*, *supra* note 28, at 1592–93 (“In arguing that what may have been the original theory underlying the Founders’ choice of our Constitution’s text is not a persuasive basis for interpretation of that text today, I am not arguing that the [originalist] interpretation Professor Clark seeks to advance is unavailable or impermissible.”).

148. *See* Ramsey, *Original Meaning*, *supra* note 28, at 572 (“[B]ecause the aspects of modern law that raise tensions with the [Supremacy] Clause can be narrowly and categorically described, combining *stare decisis* and original meaning can provide a practical approach to resolving supremacy disputes that does not fur-

Third—and perhaps most important—the aforementioned interpretive moves to unwind the paradox transcend debates over administrative preemption. They reflect much deeper anxieties about constitutionalism and our modern theories of government, to which administrative preemption is anchored.¹⁴⁹ Administrative preemption is made possible, if at all, only on a theory of congressional delegation. As the Court itself has said, “an agency literally has no power to act, let alone pre-empt the validly enacted legislation of a sovereign State, unless and until Congress confers power upon it.”¹⁵⁰ But this formulation begs the question of whether Congress may constitutionally delegate supremacy. If Congress cannot delegate supremacy (writ small), then is it because Congress cannot delegate lawmaking (writ large)? Inversely, if Congress can delegate supremacy (writ small), does this also mean that Congress can delegate lawmaking (writ large)?

Linking questions about the delegation of *policymaking* and the delegation of *supremacy* is not logically compelled.¹⁵¹ But it is of logical concern. An originalist reading of the Supremacy Clause that would foreclose administrative preemption, Professor Strauss remarks, would necessitate abandoning the “delegation doctrine as we know it in any context impacting state law.”¹⁵² That would include most contexts, given today’s expansive federal power. Though I disagree that foreclosing administrative preemption would debunk modern government, it no doubt would affect how it operates. (Bracketing, for now, questions about what those effects might be and whether they are normatively desirable).¹⁵³

ther erode the Clause’s original meaning but also does not require substantial changes in entrenched modern law.”).

149. Cf. Monaghan, *Supremacy Clause Textualism*, *supra* note 28, at 742 (“[E]ven if the clear weight of the historical evidence supported it, Supremacy Clause textualism could not supply a satisfying theory of our contemporary constitutional order because it is inconsistent with deeply entrenched practices and thus would destabilize far too much settled doctrine.”).

150. *La. Pub. Serv. Comm’n v. FCC*, 476 U.S. 355, 374 (1986).

151. See *infra* notes 251–54 and accompanying text (explaining why); see also Rubenstein, *Delegating Supremacy?*, *supra* note 22, at 1126–27.

152. Strauss, *Perils of Theory*, *supra* note 28, at 1591.

153. See *infra* notes 288–90 and accompanying text (discussing pragmatic considerations); see also David S. Rubenstein, *Administrative Federalism as Separation of Powers*, WASH. & LEE L. REV. (forthcoming Spring 2015) (exploring what foreclosing administrative preemption might entail for the operation of modern government, along both the federalism and separation of powers dimensions).

The foregoing offered a mostly originalist account of the paradox of administrative preemption and introduced some non-originalist objections. At root, these objections spring from our evolving conceptions of separation of powers and federalism. But, more generally, these non-originalist objections spring from anxiety over what it would mean if administrative preemption is a constitutional impossibility. With these concerns in hand, the analysis below takes a deeper look at our modern conceptions of government. It also makes the case for the importance of honoring the *Court's* modern conceptions, rather than well-intentioned academic ones (which unquestionably are of great value, but of a fundamentally different kind).¹⁵⁴

III. THE “CONTINGENT CONCESSIONS” FOR MODERN GOVERNMENT

This Part provides a stylized account of how the Framers’ structural strategies of separation of powers and federalism have been repackaged to accommodate the modern administrative state. I employ the term “administrialism” to capture this transformation. My purpose is not to argue that the resulting system is unconstitutional—just that it is considerably different than what the framing generation intended or understood.¹⁵⁵

Section A briefly describes the engines of change behind administrialism. Sections B and C describe the structural “concessions” made for modern government along both the separation of powers and federalism dimensions, respectively. Critically, however, the account advanced here understands these structural concessions as being “contingent” on the legitimating theories offered by the Court. On this telling, administrialism reflects a series of “contingent concessions” made for modern government.

154. Academic commentary can influence and shape the law. But, despite our best intentions, law journals are not law. More importantly, the *Court's* reasoning is a key component of “common law constitutionalism,” to which many non-originalists subscribe.

155. Cf. Henry Paul Monaghan, *Stare Decisis and Constitutional Adjudication*, 88 COLUM. L. REV. 723, 732 (1988) (“I doubt whether any acceptable conception of original understanding can provide a satisfactory account of the New Deal.”).

A. *Restructuring*

The Framers fully appreciated that the Constitution's parchment boundaries would prove elusive and dynamic.¹⁵⁶ This indeterminacy was famously capitalized upon in the New Deal era.¹⁵⁷ The New Deal reformers perceived separated federal power as an untoward drag on the federal government's ability to address social and economic problems.¹⁵⁸ At the same time, states had proven impotent to effectively handle the troubles of the day; indeed, states were largely perceived as a major source of blame.¹⁵⁹ Competition among states was perceived to generate "race-to-the-bottom" pathologies that disadvantaged the needy and prevented the type of coordinated, centralized action believed necessary to restore the general welfare.¹⁶⁰

In the minds of the New Dealers, the limits on federal power were too great—or, what is the same to say, federal power was not strong enough. These perceptions fueled a progressive movement for institutional change along both the separation of powers and federalism dimensions.¹⁶¹ Though treated separately below, the animating force of change was mostly unitary: The

156. THE FEDERALIST NO. 37, at 228 (James Madison) (Clinton Rossiter ed., 1961) ("Experience has instructed us that no skill in the science of government has yet been able to discriminate and define, with sufficient certainty, its three great provinces—the legislative, executive, and judiciary . . . Questions daily occur in the course of practice which prove the obscurity which reigns in these subjects . . .").

157. For a sampling of New Deal treatments, see, for example, PAUL K. CONKIN, THE NEW DEAL (2d ed. 1975); KENNETH S. DAVIS, FDR: THE NEW DEAL YEARS, 1933-1937 (1986); OTIS L. GRAHAM, JR., TOWARD A PLANNED SOCIETY: FROM ROOSEVELT TO NIXON (1976); ELLIS W. HAWLEY, THE NEW DEAL AND THE PROBLEM OF MONOPOLY: A STUDY IN ECONOMIC AMBIVALENCE (1966); RICHARD HOFSTADTER, THE AGE OF REFORM (1955). To be sure, the origins of the modern administrative state predate the New Deal. But it was during the New Deal that its defining features were famously defended and cemented.

158. See Sunstein, *Constitutionalism*, *supra* note 15, at 423–24, 433. For contemporary assessments, see WILLIAM YANDELL ELLIOTT, THE NEED FOR CONSTITUTIONAL REFORM: A PROGRAM FOR NATIONAL SECURITY 31–34, 200–02 (1935) (lamenting checks and balances as unworkable and arguing for increased presidential power); WOODROW WILSON, CONSTITUTIONAL GOVERNMENT IN THE UNITED STATES 221 (1921) ("[W]e must think less of checks and balances and more of coordinated power, less of separation of functions and more of the synthesis of action.").

159. Sunstein, *Constitutionalism*, *supra* note 15, at 442 ("During the New Deal period . . . states appeared weak and ineffectual, unable to deal with serious social problems; they seemed too large to provide a forum for genuine self-determination.").

160. *Id.* at 504–05.

161. *Id.* (tracing these developments).

governmental inefficiencies formerly embraced as a cog against tyranny could not withstand the inertial tide of change.¹⁶²

B. *Separation of Powers: Contingent Concessions*

Although a number of structural concessions have been made for modern government along the horizontal dimension, this section directs attention to the one most central here: congressional delegation of policymaking power to federal agencies.¹⁶³

The Framers foresaw Congress as the most dangerous branch.¹⁶⁴ As earlier noted,¹⁶⁵ the federal lawmaking requirements of bicameralism and presentment were designed to suppress congressional overreaching by disabling Congress from changing public policy too easily or often.¹⁶⁶ But what the Framers did not anticipate was the relative ease by which Congress could bypass the legislative dam by delegating decisions to the Executive branch.¹⁶⁷ Nor, for that matter, could the

162. Monaghan, *Stare Decisis*, *supra* note 155, at 730 (noting that the imperatives of the administrative state have generally prevailed over otherwise limiting constitutional provisions).

163. Honorable mention is also had for the combination of functions in agencies. As Professor Lawson explains, consolidation of lawmaking, executive, and adjudicatory powers in agencies seems to run afoul of Articles I, II and III, simultaneously. Lawson, *The Rise and Rise*, *supra* note 15, at 1233. See also *City of Arlington v. FCC*, 133 S. Ct. 1863, 1878 (2013) (Roberts, C.J., dissenting) (describing the combination of functions in agencies as “an . . . exception to the constitutional plan;” one that was not intended by the Framers, but now a “central feature of modern American government”) (emphasis added). One might also reasonably add the *Chevron* doctrine to the list of structural concessions made for modern government. See *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 843 (1984) (holding that courts must defer to reasonable interpretations of ambiguous statutes, even if the court might independently reach a different interpretation). *Cf.* Farina, *supra* note 8 (indicting *Chevron* on separation of powers grounds). I do not include *Chevron* on my list of constitutional concessions, mostly because my arguments in this Article do not depend on it. For present purposes, it should suffice simply to note that *Chevron*—like the delegation of policymaking and combination of functions in agencies—*expands* the Executive power.

164. THE FEDERALIST No. 51, at 322 (James Madison) (Clinton Rossiter ed., 1961) (“In republican government, the legislative authority necessarily predominates.”); THE FEDERALIST NO. 48, at 309 (James Madison) (Clinton Rossiter, ed., 1961) (“The legislative department is everywhere extending the sphere of its activity and drawing all power into its impetuous vortex.”); Greene, *Checks and Balances*, *supra* note 80, at 125 (discussing the Framers’ assumption that the legislature would be the most dangerous branch).

165. See *supra* Part II.

166. See U.S. CONST. art. I, § 7; Farina, *supra* note 8, at 508.

167. Farina, *supra* note 8, at 508.

Framers anticipate that Congress would ever much want to cede power to its Executive rival.¹⁶⁸

Today, however, Congress has a long supply of reasons to delegate policy decisions to agencies—even, and sometimes especially, in regard to important matters.¹⁶⁹ For instance, Congress may delegate (1) to overcome informational costs and lack of resources;¹⁷⁰ (2) to avoid political responsibility;¹⁷¹ (3) to avoid political gridlock;¹⁷² or (4) out of recognition that, as compared to Congress, agencies may produce better decisions on account of administrative expertise, efficiency, and flexibility to respond to changing conditions.¹⁷³

Yet none of these are constitutional reasons. The conventional account thus holds that Congress may not *lawfully* delegate the legislative power.¹⁷⁴ That is generally believed to be so because Article I vests “all legislative” power in Congress, Article

168. *See id.*; *see also* FEDERALIST NO. 51, at 322–23 (James Madison) (Clinton Rossiter ed., 1961) (anticipating the propensity of the political branches to counter each other for power).

169. David B. Spence, *Administrative Law and Agency Policy-Making: Rethinking the Positive Theory of Political Control*, 14 YALE J. ON REG. 407, 427 (1997) (“The temptation to ‘pass the buck’ . . . means not only that agencies face many policy questions on which legislation is silent, but also that many of these policy questions will be important, or at least controversial.”); *see also* DAVID EPSTEIN & SHARYN O’HALLORAN, *DELEGATING POWERS: A TRANSACTION COST POLITICS APPROACH TO POLICY MAKING UNDER SEPARATE POWERS (POLITICAL ECONOMY OF INSTITUTIONS AND DECISIONS)* 129–33 (1999) (surveying delegation theories).

170. Richard J. Pierce, Jr., *Political Accountability and Delegated Power: A Response to Professor Lowi*, 36 AM. U. L. REV. 391, 404 (1987) (“Given the nature and level of government intervention that Congress now authorizes, it could not possibly make the hundreds, or perhaps thousands, of important policy decisions that agencies make annually.”).

171. JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* 131–32 (1980) (“[O]n most hard issues our representatives quite shrewdly prefer not to have to stand up and be counted but rather to let some executive-branch bureaucrat, or perhaps some independent regulatory commission, ‘take the inevitable political heat.’”).

172. Sunstein, *Constitutionalism*, *supra* note 15, at 445.

173. David Epstein & Sharyn O’Halloran, *The Nondelegation Doctrine and the Separation of Powers: A Political Science Approach*, 20 CARDOZO L. REV. 947, 966–67 (1999).

174. *Whitman v. Am. Trucking Ass’ns*, 531 U.S. 457, 472 (2001) (“Article I, § 1, of the Constitution vests ‘[a]ll legislative Powers herein granted’ in Congress and ‘permits no delegation of those powers . . .’”); THOMAS COOLEY, *A TREATISE ON THE CONSTITUTIONAL LIMITATIONS WHICH REST UPON THE LEGISLATIVE POWER OF THE STATES OF THE AMERICAN UNION* 224 (8th ed. 1927) (“One of the settled maxims in constitutional law is, that the power conferred upon the legislature to make laws cannot be delegated by that department to any other body or authority.”).

II does not vest similar power in the Executive, and there would be little point to the Constitution's bicameralism and presentment requirements if federal lawmaking could be achieved by other means.¹⁷⁵

The great puzzle of modern government, then, is how to square the proscription against Congress's delegation with the fact that it massively does so.¹⁷⁶ Some conceptual repackaging is necessary, and a number of academic theories have been advanced.¹⁷⁷ The Court's approach to this puzzle, however, has been to construe "legislative power" narrowly to mean the exercise of unconstrained discretion in making rules.¹⁷⁸ Thus, under the Court's familiar articulation, no "forbidden delegation of legislative power" occurs if Congress provides an "intelligible principle" in the statute to guide agency discretion.¹⁷⁹

Instructively, "virtually anything counts as an 'intelligible principle.'"¹⁸⁰ The post-New Deal Court has yet to overrule Congress on delegation grounds, even in the face of sweepingly broad statutory permissions for agencies to make binding rules "in the public interest."¹⁸¹ As Gary Lawson precipitously explains, "[t]he rationale for [the Court's] virtually complete abandonment of the nondelegation principle is simple: the Court believes—possibly correctly—that the modern administrative state could not function if Congress were actually required to make a significant percentage of the fundamental policy decisions."¹⁸² Faced with choosing between the original and modern

175. See John F. Manning, *The Nondelegation Doctrine as a Canon of Avoidance*, 2000 SUP. CT. REV. 223, 239–40.

176. Thomas W. Merrill, *Rethinking Article I, Section 1: From Nondelegation to Exclusive Delegation*, 104 COLUM. L. REV. 2097, 2099 (2004).

177. See, e.g., *id.* at 2100–01 (interpreting Article I's vesting of "all legislative" power to mean that "only Congress can delegate"); Eric A. Posner & Adrian Vermeule, *Interring the Nondelegation Doctrine*, 69 U. CHI. L. REV. 1721 (2002) (contending that an unlawful delegation would occur only in unheard of cases where "Congress or its individual members attempted to cede to anyone else the members' *de jure* powers as federal legislative officers, such as the power to vote on proposed statutes").

178. Merrill, *Rethinking Article I*, *supra* note 176, at 2099.

179. *J.W. Hampton, Jr., & Co. v. United States*, 276 U.S. 394, 409 (1928).

180. Manning, *Nonlegislative Rules*, *supra* note 24, at 898–901.

181. For paradigmatic examples of the Court's tolerance for broad delegations, see, for example, *Am. Power & Light Co. v. SEC*, 329 U.S. 90, 105 (1946); *Yakus v. United States*, 321 U.S. 414, 426 (1944); *Nat'l Broad. Co. v. United States*, 319 U.S. 190, 225–26 (1943).

182. Lawson, *The Rise and Rise*, *supra* note 15, at 1241.

structures of government, “the Court has had no difficulty making the choice” in favor of the latter.¹⁸³

As a result, Congress is able to pass far more law than it otherwise would or could. It is vastly easier for the collective Congress to agree on a goal—for example, clean the air or create a safe workplace—than it is to agree on the details. Yet the details are often the most critical aspects of law, or at least the most contentious, because it is there that most rights and duties are found. Congress’s ability to delegate those decisions *en masse* loosens lawmaking’s procedural grip, and, with it, the representational accountability, deliberation, inertial resistance, and factional competition those procedures were designed to advance.

None of this is to insist that congressional delegations are unconstitutional.¹⁸⁴ That judgment, again, depends mightily (if not entirely) on one’s preferred theory of constitutional interpretation.¹⁸⁵

Still, the foregoing discussion sets the stage for a designedly more modest claim: The Court’s abstention in policing the lawmaking divide is a structural concession made for modern government. Indeed, it is a concessional fountainhead. As further developed below,¹⁸⁶ congressional delegation of broad

183. *Id.*

184. For some treatments, compare DAVID SCHOENBROD, *POWER WITHOUT RESPONSIBILITY: HOW CONGRESS ABUSES THE PEOPLE THROUGH DELEGATION* 155–64 (1993) (arguing that the Constitution prohibits the delegation of legislative power); Gary Lawson, *Delegation and Original Meaning*, 88 VA. L. REV. 327, 379–80 (2002) (arguing that the Constitution forbids Congress from delegating “important” policy decisions) with Posner & Vermeule, *supra* note 177 (contending that an unlawful delegation would occur only in unheard of cases where “Congress or its individual members attempted to cede to anyone else the members’ *de jure* powers as federal legislative officers, such as the power to vote on proposed statutes”).

185. The two foremost separation of powers theories are “formalism” (most commonly associated with originalism) and “functionalism” (most commonly associated with non-originalism). Compare Peter B. McCutchen, *Mistakes, Precedent, and the Rise of the Administrative State: Toward a Constitutional Theory of the Second Best*, 80 CORNELL L. REV. 1, 8–9 (1994) (“[F]ormalism in the separation of powers context involves the application of more or less rigid rules, rather than flexible standards, to legal problems.”); Frederick Schauer, *Formalism*, 97 YALE L.J. 509, 510 (1988) (“At the heart of the word ‘formalism,’ in many of its numerous uses, lies the concept of decisionmaking according to *rule*.”) with BENJAMIN N. CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* 98–105 (1921) (commenting on evolution of functionalism); Merrill, *Preemption*, *supra* note 28, at 232–33 (describing functionalism).

186. See *infra* Part IV.B–C.

and undefined discretionary power has broad implications for federalism too.¹⁸⁷

Critically, however, the Court's nondelegation doctrine comes with strings attached. First, the Court stubbornly clings to the *theory* of nondelegation: Congress cannot delegate lawmaking,¹⁸⁸ and, relatedly, agencies cannot make Law.¹⁸⁹ These principles were recently reified in *City of Arlington v. FCC*.¹⁹⁰ Writing for the majority, Justice Scalia issued a reminder that "[a]gencies make rules . . . [that] take 'legislative' . . . forms, but they are exercises of—indeed, under our constitutional structure they *must be* exercises of—the 'executive Power.'"¹⁹¹ Occasionally, a Justice or two suggests abandoning this theory. Justice Stevens's concurring opinion in *Whitman v. American Trucking Ass'n* is an example, where he urged the Court to stop "pretend[ing]" that Congress's delegation of rulemaking authority is not "legislative power."¹⁹² But this judicial view is rarely aired and only in concurring and dissenting opinions when it is. I suspect that is because judicial candor about Congress's delegation of lawmaking might also reopen questions about the constitutionality of that practice. To date, that tradeoff is not one the Court has been willing to make. Moreover, as Kathryn Watts has recently argued, a "Candid Approach" to delegation would also mean revisiting a host of administrative law doctrines built over time around the nondelegation maxim.¹⁹³

187. Theodore J. Lowi, *Two Roads to Serfdom: Liberalism, Conservatism and Administrative Power*, 36 AM. U. L. REV. 295, 296 (1987).

188. See *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 472 (2001) (stating that Article I "permits no delegation of [legislative] power").

189. See *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 587–88 (1952) (holding that the President has no inherent constitutional authority to make domestic law). For an extended discussion the Court's "stubborn adherence to its longstanding view that rulemaking constitutes an incident of executive rather than legislative power," see Kathryn A. Watts, *Rulemaking as Legislating*, GEO. L.J. (forthcoming 2014). See also JACK M. BEERMANN, *INSIDE ADMINISTRATIVE LAW: WHAT MATTERS AND WHY* 23 (2011) (noting that the principle that authority delegated to the executive branch must be "executive in nature" and not legislative was articulated in the Court's early cases and "has not changed over time").

190. See 133 S. Ct. 1863 (2013).

191. *Id.* at 1873 n.4 (emphasis in original).

192. *Whitman*, 531 U.S. at 488 (Stevens, J., concurring).

193. See generally Watts, *Rulemaking as Legislating*, *supra* note 189 (canvassing the effects that a "Candid Approach" to delegation would have on a host of administrative law doctrines).

The second contingency surrounding delegation is that agencies will be adequately checked through political and judicial oversight.¹⁹⁴ As Cynthia Farina aptly explains, the administrative state “became constitutionally tenable because the Court’s vision of separation of powers evolved from the simple (but constraining) proposition that divided powers must not be commingled, to the more flexible (but far more complicated) proposition that power may be transferred *so long as* it will be adequately controlled.”¹⁹⁵ Though not the Framers’ version, the idea of keeping agencies in check and the government in “balance” arguably remains faithful to the spirit of separated powers.

C. Federalism: Contingent Concessions

This section now turns to the “contingent concessions” along the federalism dimension. As earlier noted, a principal feature of the Framers’ strategy was to retain states as autonomous power centers. In doing so, they hoped to provide more opportunities for citizen participation in government, to enhance political choice, and to offer a competing locus of power to check and compete with the federal government.¹⁹⁶ Though more than one way exists to promote these forms of political liberty,¹⁹⁷ the methods selected by the Framers were structural: Apart from dividing federal power to encumber federal lawmaking, the substantive scope of federal power was enumerated, and thereby limited.

Today, however, the enumerated-powers principle hardly restrains Congress’s substantive power. Over time, Congress has pervaded almost every significant aspect of our social and economic order.¹⁹⁸ And the Court, for its part, has done virtually

194. See Kristin E. Hickman, *Unpacking the Force of Law*, 66 VAND. L. REV. 465, 518–19 (2013) (“The modern administrative state reflects an implicit compromise of allowing Congress to delegate expansive lawmaking power to agencies in exchange for imposing substantial procedural requirements as agencies exercise those powers, with courts serving as the enforcer thereof.”).

195. Farina, *supra* note 8, at 487.

196. See Young, *Making Federalism Doctrine*, *supra* note 89, at 1844–45 (discussing the traditionally expressed virtues associated with state autonomy).

197. For a useful discussion of the various models of federalism, see Ernest A. Young, *The Puzzling Persistence of Dual Federalism*, in NOMOS LV: FEDERALISM AND SUBSIDIARITY (James E. Fleming & Jacob T. Levy eds., 2014).

198. Lawson, *The Rise and Rise*, *supra* note 15, at 1236; Farina, *supra* note 8, at 465.

nothing to curb this tendency.¹⁹⁹ To be sure, the Court on occasion has sanctioned Congress's use of certain regulatory tools—for example, Congress cannot commandeer state officials to administer federal programs,²⁰⁰ cannot use the spending power to “coerce” states into service,²⁰¹ and cannot use the commerce power to compel individuals into a market, as the Court's recent Affordable Care Act decision instructs.²⁰² But none of these are subject-matter limitations on the regulatory domains that Congress may stake for federal occupation.

The vertical concessions for modern government are not specific to the administrative state. However, when Congress expands into new domains, it almost invariably calls upon one or more federal agencies to administer the program. Thus, for all practical purposes, the demise of the enumerated-powers principle means that agencies often compete with state actors in regulatory domains that would otherwise be federally unoccupied.²⁰³ Often, it also means that federal and state agencies join to implement federal programs in so-called “cooperative feder-

199. Scott A. Keller, *How Courts Can Protect State Autonomy From Federal Administrative Encroachment*, 82 S. CAL. L. REV. 45, 56–57 (2008) (“The Court has not limited Congress's enumerated powers largely because the Court (1) wants to give Congress adequate powers to regulate our modern economy and (2) has not been able to create a workable Commerce Clause test.”). That is not to say that the Court never imposes limits. But the counterexample cases of *United States v. Morrison*, 529 U.S. 598, 613 (2000) (invalidating a section of the Violence Against Women Act that created a federal cause of action for victims of violent attacks motivated by gender bias), and *United States v. Lopez*, 514 U.S. 549, 551 (1995) (striking down a provision of the Gun Free School Zones Act that forbade gun possession in close proximity to schools), do very little, in practice, to forbid Congress's powers.

200. *Printz v. United States*, 521 U.S. 898, 935 (1997) (holding that Congress may not commandeer state officials to be enforcement agents of federal regulatory programs); *New York v. United States*, 505 U.S. 144, 161 (1992) (asserting that Congress may not commandeer state legislators to enact laws in service of federal regulatory programs).

201. *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566, 2602 (2012) (striking down a spending condition requiring states to participate in a significant expansion of Medicaid or risk forfeiting all federal Medicare funding).

202. *Id.*

203. Keller, *supra* note 199, at 58 (“[T]he underenforcement of federalism is exacerbated in the administrative law context because Congress can freely delegate its broad Commerce Clause powers to unelected federal agencies, which can then easily encroach on state autonomy”); see also Ernest A. Young, *Dual Federalism, Concurrent Jurisdiction, and the Foreign Affairs Exception*, 69 GEO. WASH. L. REV. 139, 146–52 (2001) (discussing the fall of dual federalism and its replacement by concurrent state and federal regulatory jurisdiction in most areas).

alism” schemes.²⁰⁴ Again, my present concerns are not with whether this federal-state interaction is constitutional or good for federalism.²⁰⁵ Rather, the point is that these arrangements were not the Framers’ original plan.

The demise of the enumerated powers doctrine, like the demise of separation of powers, has come with certain legitimating strings attached. As most relevant here, in *Garcia v. San Antonio Metropolitan Transit Authority*, the Court openly renounced any substantive role in policing the federal-state boundary when Congress seeks to directly regulate the states.²⁰⁶ According to the Court, the states’ protection from federal overreaching is *political*, not judicial.²⁰⁷ Without judicial policing of Congress’s enumerated powers, some regard *Garcia* as the “death of federalism.”²⁰⁸ Critically, however, the Court’s abstention in *Garcia* came with an important caveat: the Court would maintain a role—albeit an undefined one—in “compen-

204. While Congress may not commandeer or coerce the states to implement federal programs, see *Nat’l Fed’n of Indep. Bus.*, 132 S. Ct. 2566; *Printz*, 521 U.S. at 935; *New York*, 505 U.S. at 188, Congress may encourage states to implement federal programs in at least two ways. First, under the Spending Clause, Congress may condition federal funds on a state’s compliance with federal requirements. Second, Congress may offer states a choice of complying with federal standards or having state law preempted. Congress can also combine these methods, providing funding to cover state costs of implementing federal law. For further discussion of these points, including congressional incentives to create cooperative federalism arrangements, see Jessica Bulman-Pozen & Heather K. Gerken, *Uncooperative Federalism*, 118 YALE L.J. 1256, 1263 (2009).

205. For arguments that cooperative-federalism arrangements promote federalism values, see, for example, DANIEL J. ELAZAR, *AMERICAN FEDERALISM: A VIEW FROM THE STATES* 162 (2d ed. 1972); Bulman-Pozen & Gerken, *supra* note 204, at 1263 (developing an account of “the ways in which states playing the role of federal servant can also resist federal mandates . . . [and] can empower states to challenge federal authority” from within, rather than from outside, federal programs); Larry Kramer, *Understanding Federalism*, 47 VAND. L. REV. 1485, 1544 (1994). For arguments about the values of federal-state regulatory overlap, see ERWIN CHEMERINSKY, *ENHANCING GOVERNMENT: FEDERALISM FOR THE 21ST CENTURY* 145–247 (2008); ROBERT A. SCHAPIRO, *POLYPHONIC FEDERALISM: TOWARD THE PROTECTION OF FUNDAMENTAL RIGHTS* (2009); Robert M. Cover, *The Uses of Jurisdictional Redundancy: Interest, Ideology, and Innovation*, 22 WM. & MARY L. REV. 639, 646, 682 (1981).

206. 469 U.S. 528 (1985). See Jesse H. Choper, *Federalism and Judicial Review: An Update*, 21 HASTINGS CONST. L.Q. 577, 579 (1994) (“The reach of the [*Garcia*] Court’s doctrine . . . was specifically confined to national regulation of the ‘States as States;’ it clearly did not apply . . . to federal regulation of private persons or activities within the states.”).

207. *Garcia*, 469 U.S. at 556.

208. See William W. Van Alstyne, *The Second Death of Federalism*, 83 MICH. L. REV. 1709, 1720 (1985).

sate[ing] for possible failings in the national political process.”²⁰⁹ In *Garcia*, the Court rejected the state’s constitutional challenge only after finding that “the internal safeguards of the political process have performed as intended.”²¹⁰

Garcia’s “main thrust” was to replace a sovereignty-based analysis “with a focus on the nature of the political process responsible for making the federalism-related decisions.”²¹¹ As Professor Young usefully explains, what “distinguishes process-based from dual federalism models is simply the former’s focus on the political and procedural dynamics . . . Get those dynamics right, the process federalist contends, and one need not worry about whether particular national initiatives intrude into some protected state sphere of authority.”²¹² So reconstituted, “[f]ederalism becomes not so much a matter of drawing lines as one of calibrating incentives, enforcing procedural rules, and interpreting the output of the national political process in a way that respects the system’s structural safeguards for states.”²¹³

The Court has sought to promote the so-called political and procedural safeguards of federalism through a variety of doctrines. For instance, the Court has imposed clear-statement rules of statutory interpretation when Congress acts in certain ways that implicate state autonomy.²¹⁴ Most relevant here, the Court generally applies a “presumption against preemption,” which favors application of state law unless a federal statute reflects the “clear and manifest purpose of Congress” to displace state law.²¹⁵ Indeed, in applying the presumption against preemption in *Gregory v. Ashcroft*, the Court expressed a need to be “absolutely certain that Congress intended” to displace state law, inasmuch as the Court has left the protection of state interests “primarily to the political process.”²¹⁶ The Court explained that unless Congress actually considered and enacted into law a program that threatens state prerogatives, there is no

209. *Garcia*, 469 U.S. at 554.

210. *Id.* at 556.

211. Andrzej Rapaczynski, *From Sovereignty to Process: The Jurisprudence of Federalism After Garcia*, 1985 SUP. CT. REV. 341, 360–61.

212. Young, *Puzzling Persistence*, *supra* note 197, at 50–51.

213. Young, *Presumption Against Preemption*, *supra* note 25, at 261.

214. For an overview of these various doctrines, see Young, *Puzzling Persistence*, *supra* note 197, at 49–50.

215. *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947).

216. 501 U.S. 452, 464 (1991).

guarantee that federal lawmaking procedures served to safeguard federalism.²¹⁷

Although not without its critics,²¹⁸ process federalism may be understood as a compensating mechanism to partially offset the Court's abstention from any meaningful enforcement of the substantive limits on Congress's power.²¹⁹ Specifically, process-federalism doctrines advance the *political safeguards* of federalism by "requiring proponents of federal laws affecting the states to put the states' defenders in Congress on notice."²²⁰ At the same time, process-federalism doctrines enhance the *procedural safeguards* through "an additional drafting hurdle [*i.e.*, clarity] that legislation implicating state autonomy must surmount."²²¹ Taken together, the political and procedural safeguards help ensure that Congress is making important decisions about federalism, and, should Congress fail to do so, remit the resulting policymaking space to the states.

The foregoing discussion explained both how and why the Framers' original prophylactic strategies for securing liberty were repackaged and transformed to accommodate modern government. But, fundamentally, this story is best understood as a set of "contingent concessions." The original separation of powers

217. *Id.*

218. The main objection is that the judiciary is duty-bound to enforce *substantive* limits on Congress power, not just *procedural* ones. See, e.g., John C. Yoo, *The Judicial Safeguards of Federalism*, 70 S. CAL. L. REV. 1311, 1313 (1997) ("Although there is a great deal of historical support for the idea that the national government itself would protect state interests, there is no evidence that the Framers understood the political process to be the *exclusive* safeguard of federalism."). For criticism of the idea that process federalism adequately protects either states' interests or the values of federalism, see Michael W. McConnell, *Federalism: Evaluating the Founders' Design*, 55 U. CHI. L. REV. 1484, 1484–85 (1987) (reviewing RAOUL BERGER, *FEDERALISM: THE FOUNDERS' DESIGN* (1987)); Rapaczynski, *supra* note 211, at 346–80. Another important objection, elaborated on further below, is that "much federal law is produced through processes that avoid the 'political safeguards of federalism' altogether"—most notably, agency-created law. Young, *Making Federalism Doctrine*, *supra* note 89, at 1818; see also *infra* notes 276–77 and accompanying text. For the view that process federalism is a not-perfect but nevertheless promising approach for promoting state autonomy, see Young, *Two Cheers for Process Federalism*, *supra* note 85 (giving process federalism only two cheers—rather than a full three—given the Court's failure to place meaningful substantive limits on Congress's power so as to preserve states as a competing locus of power).

219. See Young, *Puzzling Persistence*, *supra* note 197, at 48.

220. *Id.* at 49.

221. *Id.*

model was forfeited in the administrative state on the contingencies that agencies not make “Law” and that their actions otherwise would be sufficiently held in check. Separately, federalism’s original strategy of enumerated and limited federal power has mostly been eschewed for judicial assurances that state interests would be adequately protected through the political process.

IV. PARADOX-HYPOTHESIS REVISITED: A DOCTRINAL PERSPECTIVE

This Part lays bare administrative preemption’s root anxiety: it both depends upon and is ruined by modern conceptions of federal lawmaking. On the one hand, administrative preemption depends upon a delegation of Congressional authority. On the other hand, however, administrative preemption is undermined by the Court’s outward commitments to the separation of powers maxim that agencies do not make “Law,” as well as the Court’s political and procedural safeguard theories of federalism.

Administrative preemption thus sits on shaky doctrinal foundations. Justifying the practice requires ignoring, distancing, or replacing the Court’s legitimating criteria that ushered in the constitutional concessions made for modern government. The challenge for doctrinalists, then, is to identify a premise that is broad enough to justify administrative preemption, yet narrow enough to preserve the Court’s legitimating theories for the modern administrative state. The discussion that follows highlights the difficulty of that undertaking.

Section A develops and defends a normative “contingency principle.” Its idea is rather straightforward: If we are to forgo the original strategies for securing liberty, we should insist on the Court’s legitimating theories for that forbearance. Section B explains how administrative preemption upsets the contingency principle along the separation of powers dimension. Section C does the same along the federalism dimension.

As introduced in Part II.C, the paradox-hypothesis is subject to some potentially “saving” interpretations. For instance, when agencies act within their delegated authority, we might say that it is Congress—not the agency action—that is doing the preemptive work. Or it may be that under modern conceptions of government, Law can (or should) mean one thing for purposes of the Supremacy Clause and another for purposes of separation of

powers. To be sure, these interpretive moves are consistent *in result* with the Court's administrative preemption doctrine. But, I argue here, these interpretive moves to unwind the paradox are inconsistent with the Court's doctrinal contingencies for modern government.

A. *The "Contingency Principle"*

My assessment that constitutional concessions have been made for modern government depends on a constitutional baseline. Beginning from the Constitution's text and structure is conventional and, for that reason, should not be too controversial. The pickle for constitutional theorists, however, is what to do with the conclusion: namely, that our current institutional arrangements are not what the Framers intended or what the ratifiers understood. One response is to tank the Constitution. Another is to tank the administrative state. Though surely interesting, these polar solutions attract few supporters. The generally preferred approach, therefore, is to try something in between. But there is *a lot* in between. How best, then, to give fidelity to the original Constitution in a world completely detached from the founding generation?²²²

The contingency principle, developed here, hopes to enrich that discussion. Emphatically, the principle's function is not to provide prescriptions for structuring modern government. Rather, the principle's intended function (and its value, I will argue) is to operate as a limiting principle. Specifically, if we are committed to the Constitution as law, the contingencies attaching to the Court's doctrinal concessions provide a conceptual stopping point beyond which we should not hazard—at least not without a renewed sense of alarm.

So formulated, the contingency principle may be applied to evaluate any number of institutional arrangements or doc-

222. On the subject of constitutional fidelity, see, for example, Lawrence Lessig, *Fidelity in Translation*, 71 TEX. L. REV. 1165, 1187–89 (1993) (arguing that when constitutional interpreters are faced with contexts that the Framers did not envision, the interpreter's duty is to approximate the effect of the Framers' original understanding in the changed context); Young, *Making Federalism Doctrine*, *supra* note 89, at 1812 ("[N]othing in our history since the Founding absolves courts of their obligation of fidelity to the basic notion of a federal balance."). *But cf.* Michael J. Klarman, *Antifidelity*, 70 S. CAL. L. REV. 381 (1997) (canvassing the disconnect between the Framers' and our world, along both economic and social dimensions, and challenging the precepts of fidelity).

trines. My focus in this Article, however, is with administrative preemption. And it is to that end that I will put the principle to work in Sections B and C below. To set the stage for that discussion, my objectives for this preliminary section are more basic. First, I situate the contingency principle within the academic literature on constitutional fidelity. Second, I explain why the Court's contingencies should matter, especially for non-originalists.

1. *Constitutional Fidelity*

The idea of constitutional fidelity begins with the conventional (though not universally shared) premise that the Constitution is law.²²³ Both the text and history of the Constitution unequivocally commit us to a federal structure: it entails some division and balance of authority among the federal branches and between the federal government and the states.²²⁴

However, to insist that our generation must be bound by the Framers' choices gives rise to a "dead-hand" problem.²²⁵ As David Strauss puts it, "[t]he Framers do not have any right to rule us today."²²⁶ And, even if they did, why should we accede to rules that so poorly fit the demands of modern society? Under this non-originalist view, it is public "acquiescence over time, not formal ratification ages ago, which constitutes the 'consent' necessary to legitimate" the Constitution on democratic terms.²²⁷ By interpreting the Constitution as a "living" and evolving construct, the argument goes, we are better able to secure political and sociological acceptance of the document—without which the Constitution could hardly function as law. At the same time, however, the more "living" the Con-

223. For the view that the original Constitution deserves no fidelity, see Klarman, *supra* note 222.

224. Young, *Making Federalism Doctrine*, *supra* note 89, at 1748.

225. See David A. Strauss, *Common Law Constitutional Interpretation*, 63 U. CHI. L. REV. 877, 928 (1996) ("It is difficult to understand why democracy requires us to enforce decisions made by people with whom the current population has so little in common.").

226. *Id.* at 892.

227. Greene, *Selling Originalism*, *supra* note 23, at 670; see also Terrance Sandalow, *Constitutional Interpretation*, 79 MICH. L. REV. 1033, 1050 (1981) ("In making [constitutional] decisions, . . . the past to which we turn is the sum of our history, not merely the choices made by those who drafted and ratified the Constitution.").

stitution is, the less it holds the quality of entrenched law. And therein lays the fidelitist's challenge: to adapt original conventions to new contexts, navigating between the calcifying "dead" and the freewheeling "living." What results is candidly something other than what the Framers prescribed, but which angles to preserve some of their underlying commitments.

As might be expected, the fidelity project is less of a destination than a journey with more than one path. Lawrence Lessig, for instance, offers a framework of "translation."²²⁸ He argues that when constitutional interpreters are faced with contexts that the Framers did not envision, the interpreter's duty is to approximate the effect of the Framers' original understanding in the changed context.²²⁹ Meanwhile, others have advanced the idea of maintaining our structural commitments through "compensating adjustments." Adrian Vermeule has argued, for instance, that the "best response" to an "irreversible departure" from constitutional design is "to violate the ideal along some other margin, in order to produce an offsetting condition or compensating adjustment."²³⁰

The "contingency principle" advanced here shares some of the qualities of translation and compensating adjustments, but it is neither. Foremost, the contingency principle aspires to constitutional fidelity. As already noted, the contingency principle proceeds from the rather banal premise that we have come quite far from the Framers' vision—whether measured by the scope of federal power, the balance of power, or the mechanisms for achieving it.²³¹ Moreover, the contingency principle is committed

228. Lessig, *Fidelity in Translation*, *supra* note 222, at 1189.

229. *Id.* at 1187–89.

230. Adrian Vermeule, *Hume's Second-Best Constitutionalism*, 70 U. CHI. L. REV. 421, 426 (2003). For treatments of compensating adjustments, see also McCutchen, *Mistakes*, *supra* note 185, at 17; Young, *Making Federalism Doctrine*, *supra* note 89, at 1840–44.

231. See, e.g., LOUIS HENKIN, FOREIGN AFFAIRS AND THE UNITED STATES CONSTITUTION 149 (2d ed. 1996) (describing federalism, in the sense of limits on national power, as a "wasting force in U.S. life"); John O. McGinnis, *Reviving Tocqueville's America: The Rehnquist Court's Jurisprudence of Social Discovery*, 90 CAL. L. REV. 485, 511 (2002) (observing that "constitutional federalism has been declining for the better part of a century"); Timothy Zick, *Statehood as the New Personhood: The Discovery of Fundamental "States' Rights"*, 46 WM. & MARY L. REV. 213, 215 (2004) ("Federal power and supremacy long ago eclipsed state power, no matter what barometer one consults."). The states are not dead by any stretch of the imagination, but it seems fair to say that they are plainly subordinate entities rather than "balancing" ones today.

to the ideas that that Constitution is law, should be treated as such, and entails a separation and balance of government power.²³² In these ways, the contingency principle shares many of the same premises, prescriptions, and concerns as translation and compensating adjustments.

Unlike translation, however, the contingency principle does not offer a methodological framework for deciding which original mechanisms for balance are worth preserving, or for trying to approximate how the Framers might have reworked the constitutional text to account for changed contexts.²³³ The contingency principle avoids these difficulties by borrowing the Court's own legitimating criteria for the constitutional concessions made for modern government. Moreover, unlike compensating adjustments, the contingency principle's function is not to prescribe new tools or institutions for restoring balance. Rather, by design, the contingency principle is mostly evaluative. Specifically, because it is moored to the Court's declared contingencies, it provides one way (though not the only way) to know when a compensating adjustment or translation may be necessary. The contingency principle leaves room for additional structural compensation—just not for less.

The idea of accommodating, yet limiting, the concessions made for modern government is not revolutionary. In that sense, the contingency principle is part of a much larger tradition.²³⁴ What is new, however, is the concept of leveraging the Court's own legitimating theories as limiting principles. Specifically, once we conceive of the Court's administrative doctrines as a set of "contingent concessions," the contingencies provide

232. Cf. Young, *Making Federalism*, *supra* note 89, at 1812 ("[N]othing in our history since the Founding absolves courts of their obligation of fidelity to the basic notion of a federal balance.").

233. Klarman, *supra* note 222, at 1799–1800; see also Daryl J. Levinson, *Framing Transactions in Constitutional Law*, 111 *YALE L.J.* 1311, 1367–71 (2002).

234. See McCutchen, *Mistakes*, *supra* note 185, at 3 ("Where unconstitutional institutions are allowed to stand based on a theory of precedent, the Court should allow (or even require) the creation of compensating institutions that seek to move governmental structure closer to the constitutional equilibrium."); Sunstein, *Constitutionalism*, *supra* note 15, at 492 (arguing that a strict application of the constitutional text and Framers' intent "is unhelpful in light of vast changes in the national government," and supporting "an approach that takes changed circumstances into account, but at the same time reintroduces into the regulatory process some of the safeguards of the original constitutional system").

not only a conceptual stopping point, but also one that we should cling hard to as the bargain for those concessions.

2. *Why the Court's Reasons Matter*

Some may object that the contingency principle goes too far in its commitment to the reasons that the Court has provided for its concessional doctrines. But this objection is difficult to sustain. The Court's reasons matter for at least three reasons: (1) for the institutional legitimacy of the Court; (2) for the legitimacy of the Court's doctrines; and (3) for the trajectory of those doctrines. I briefly consider each below.

a. *Institutional Legitimacy*

One way to respond to the objection that the contingency principle goes "too far" is to consider what it would mean if we did *not* hold the Court to account for its own constructs. Freeing the Court of that obligation could summon any number of familiar objections to the office of judicial review. Among other concerns, absolving the Court of its doctrinal contingencies could marginalize the value of the Court's reason-giving tradition, and, with it, one of the Court's central claims to institutional legitimacy.²³⁵

Fidelity to reason-giving should be (and tends to be) especially important to non-originalists for at least two reasons. First, as noted, one of non-originalism's animating tenets is the contemporary acceptance of the Constitution. The Court's reasons for its constitutional interpretations are an indispensable ingredient of that public assent.²³⁶ As the Court itself has emphasized, "[it] must

235. Richard H. Fallon, Jr., *Legitimacy and the Constitution*, 118 HARV. L. REV. 1787, 1828 (2005) ("The Court's institutional legitimacy resides in public beliefs that it is a generally trustworthy decisionmaker whose rulings therefore deserve respect or obedience."); see also THE FEDERALIST NO. 78, at 471 (Alexander Hamilton) (Clinton Rottier ed., 1961) ("To avoid an arbitrary discretion in the courts," the founders considered it "indispensable that they should be bound down by strict rules and precedents which serve to define and point out their duty in every particular case that comes before them[.]"); Deborah Hellman, *The Importance of Appearing Principled*, 37 ARIZ. L. REV. 1107, 1109 (1995) ("Because the Court's power depends on its ability to engender respect for its authority, guarding its image is a way of protecting its ability to be effective [I]n order for the Court to legitimately compel compliance with its directives in individual cases, it must have enough power to compel compliance over the run of cases.").

236. David A. Strauss, *Originalism, Precedent, and Candor*, 22 CONST. COMMENT. 299, 301 (2005) (favoring a common-law constitutional approach, which allows for a greater degree of judicial candor about the reasons for judicial decision, which

take care to speak and act in ways that allow people to accept its decisions on the terms the Court claims for them”²³⁷ Second, the requirement that the Court give and honor judicial reasons allows “living constitutionalism” or “common law constitutionalism” to lay claim as legitimate interpretive methodologies. Constitutional adjudication would devolve into a freewheeling exercise if the Court were absolved from the Constitution’s original meaning *and* the Court’s legitimating theories for departing from that meaning.²³⁸ Unlike Congress or the President, “the ‘judicial Power’ derives its legitimacy from the court’s elaboration of reasons[.]”²³⁹ Take away the Court’s reasons, or the need for them, and the judicial power would devolve into raw power or will.²⁴⁰

To be clear, judicial reasons can change and be overcome. Vitality, however, the Court’s judgments need reasons, and reasons to overcome them. Ignoring reasons is anathema to our legal tradition and the power of judicial review.

b. Doctrinal Legitimacy

Ultimately, the contingency principle seeks to hold the Court accountable to its own doctrinal constructs. In this way, it may be thought to operate like precedent.²⁴¹ But my claim is design-

in turn must be defended on the grounds given); see Frank H. Easterbrook, *Abstraction and Authority*, 59 U. CHI. L. REV. 349, 373 (1992) (“The need to persuade society to obey sets bounds on judicial creativity”); see also Frederick Schauer, *Giving Reasons*, 47 STAN. L. REV. 633, 633 (1995) (“The conventional picture of legal decisionmaking, with the appellate opinion as its archetype and ‘reasoned elaboration’ as its credo, is one in which giving reasons is both the norm and the ideal. Results unaccompanied by reasons are typically castigated as deficient on precisely those grounds.”).

237. *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 865 (1992).

238. See David L. Shapiro, *In Defense of Judicial Candor*, 100 HARV. L. REV. 731, 737 (1987) (“A requirement that judges give reasons for their decisions—grounds of decision that can be debated, attacked, and defended—serves a vital function in constraining the judiciary’s exercise of power.”).

239. Michael C. Dorf, *Dicta and Article III*, 142 U. PA. L. REV. 1997, 1997–98 n.4 (1994); see also *id.* at 2040 (“[J]udicial accountability and legitimacy derive from judicial rationality, which in turn will be found in the rationales offered by courts to justify their decisions.”); Schauer, *supra* note 226, at 653 (explaining that the “artificial constraint of giving reasons . . . is designed to counteract th[e] tendency” of judicial partiality).

240. Daniel A. Farber, *The Rule of Law and the Law of Precedents*, 90 MINN. L. REV. 1173, 1195 (2006); Schauer, *supra* note 236, at 653.

241. For discussions of the legal authority of precedents, see, for example, Larry Alexander, *Constrained by Precedent*, 63 S. CAL. L. REV. 1 (1989); Richard H. Fallon, Jr., *Stare Decisis and the Constitution: An Essay on Constitutional Methodology*, 76

edly different, and does not depend on facile distinctions between precedent and dictum.²⁴²

The structural *concessions* made for modern government are clearly precedential. And, if indeed there is such a thing as “super-precedent”—as some claim²⁴³—then the doctrinal lines of decision forfeiting the nondelegation and enumerated powers principles surely qualify.²⁴⁴ Less clear, however, is how to categorize the judicially expressed *contingencies* behind those concessions.

Most theories of stare decisis²⁴⁵ ascribe precedential status to the Court’s expressed reasons behind its holdings and doctrines.²⁴⁶

N.Y.U. L. REV. 570 (2001); Thomas R. Lee, *Stare Decisis in Historical Perspective: From the Founding Era to the Rehnquist Court*, 52 VAND. L. REV. 647 (1999); Monaghan, *Stare Decisis*, *supra* note 155.

242. Dorf, *Dicta and Article III*, *supra* note 239, at 2003–04 (noting the lack of consensus on how to distinguish precedent from dicta); *see generally* Michael Abramowicz & Maxwell Stearns, *Defining Dicta*, 57 STAN L. REV. 953 (2005) (offering a comprehensive framework).

243. For discussions of “super-precedents” see, for example, Bruce Ackerman, *The Living Constitution*, 120 HARV. L. REV. 1737, 1789 (2007) (discussing judicial and legislative super-precedents); Farber, *Law of Precedents*, *supra* note 240, at 1176 (arguing “for a version of stare decisis in which rulings are not overturned except for strong reasons, and only for compelling reasons in the case of . . . ‘bedrock’ precedents”); Michael J. Gerhardt, *Super Precedent*, 90 MINN. L. REV. 1204 (2006) (arguing in favor of the idea of super-precedents); Michael Sinclair, *Precedent, Super-Precedent*, 14 GEO. MASON L. REV. 363 (2007) (describing history of the term, and conceiving of super-precedent along a precedential spectrum). *But see* Randy E. Barnett, *It’s a Bird, It’s a Plane, No, It’s Super Precedent: A Response to Farber and Gerhardt*, 90 MINN. L. REV. 1232, 1238–47 (2006) (arguing that no judicial precedent should be untouchable, especially where it conflicts with the Constitution’s clear original meaning).

244. *See, e.g.*, Lawson, *The Rise and Rise*, *supra* note 15, at 1232 (“[T]he essential features of the modern administrative state have . . . been taken as unchallengeable postulates by virtually all players in the legal and political worlds . . .”); McCutchen, *Mistakes*, *supra* note 185, at 17 (“Neither the cases sanctioning open-ended delegations of legislative power nor those broadly interpreting the commerce clause will be overturned.”); *see also* Sanford Levinson, *The Limited Relevance of Originalism in the Actual Performance of Legal Roles*, 19 HARV. J.L. & PUB. POL’Y 495, 502 (1996); Monaghan, *Stare Decisis*, *supra* note 155, at 745 (“[M]any of the fundamental transformations in our governmental structure legitimated by the Supreme Court in this century are unquestionably above challenge.”).

245. *See* Abramowicz & Stearns, *Defining Dicta*, *supra* note 242, at 956 (defining stare decisis as “the doctrine through which courts use opinions not merely to resolve cases, but also to make law in the form of at least presumptively binding precedents”). Under most theories of stare decisis, the wrongness of a decision is generally not thought to be sufficient to overrule a prior precedent—there needs to be some other reason. *See* Larry Alexander, *Constrained by Precedent*, 63 S. CAL. L. REV. 1, 59 (1989) (“[I]f incorrectness were a sufficient condition for overruling, there would be no precedential constraint in statutory and constitutional cases.”); Monaghan, *Stare Decisis*, *supra* note

And, insofar as the contingencies qualify as precedent under this view, the Court should adhere to them as such. If nothing else, doing so will foreclose the need to revisit the Court's concessional doctrines for modern government.²⁴⁷

But not all theories of stare decisis treat all judicial reasons as binding precedent.²⁴⁸ Under these more narrow conceptions, the contingencies may qualify as nonbinding dicta.²⁴⁹ Even then, however, my claim is that they are dicta of a special kind that require special treatment—call it “super-dicta.” Specifically, the contingencies at issue legitimate the very postulates of modern government.²⁵⁰ To ignore and not replace them with

155, at 757 (“[P]recedent binds absent a showing of substantial countervailing considerations.”); Frederick Schauer, *Precedent*, 39 STAN. L. REV. 571, 575 (1987) (“[I]f we are truly arguing from precedent, then the fact that something was decided before gives it present value despite our current belief that the previous decision was erroneous.”). Still, as Professor Barnett explains, “[h]ow and when precedent should be rejected remains one of the great unresolved controversies of jurisprudence.” Randy E. Barnett, *Trumping Precedent with Original Meaning: Not as Radical as It Sounds*, 22 CONST. COMM. 257, 261 (2005); see also Richard H. Fallon, Jr., *Constitutional Precedent Viewed Through the Lens of Hartian Positive Jurisprudence*, 86 N.C. L. REV. 1107, 1124 (2008).

246. E.g., Dorf, *Dicta and Article III*, *supra* note 239, at 2040 (“[A] commitment to the rule of law and a proper understanding of the source of legitimate authority in our constitutional order will result in a holding/dictum distinction that turns on rationales, not just facts and outcomes.”); Farber, *Law of Precedents*, *supra* note 240, at 1183 (noting the “need to give credence to the reasoning in earlier opinions,” not just the facts and holding); Monaghan, *Stare Decisis*, *supra* note 155, at 765 (“[T]here seems to be no advantage in absolutely divorcing the precedent-setting Court’s reason for deciding from the precedent it has sought to establish, particularly when the reasoning necessarily helps frame the scope of the rule or standard.”).

247. See RICHARD A. POSNER, *HOW JUDGES THINK* 145 (2008) (precedent reduces judicial workload by “reducing the amount of fresh analysis that judges have to perform”); Farber, *Law of Precedents*, *supra* note 240, at 1191; Monaghan, *Stare Decisis*, *supra* note 155, at 750 (“[S]tare decisis operates to keep issues off the constitutional, if not the political agenda, thereby leaving open for debate only less threatening issues.”).

248. See, e.g., Judith M. Stinson, *Why Dicta Becomes Holding and Why It Matters*, 76 BROOK. L. REV. 219, 223–24 (2010) (discussing approaches that treat holdings, for purposes of stare decisis, as either (1) “limited to the facts plus the outcome” or as (2) including “the rationale or reasoning a court employs to reach a particular result.”); see also Monaghan, *Stare Decisis*, *supra* note 155, at 763 (canvassing divergent approaches to treating reasoning as holding).

249. Cf. Dorf, *Dicta and Article III*, *supra* note 239, at 2005 (“[A]ttachment of the label dicta to past statements has been used as a means of avoiding the consequences of all kinds of legal pronouncements.”).

250. See *supra* Parts III.B.2, C.2. It will not do to object that the contingencies should be treated as anything more than the idiosyncratic views of the individual Justices who penned them. Yes, we might empirically question whether in mill-run cases individual justices deliberate on and agree with the reasons (as opposed

some other legitimating theory would leave the empire of modern government with no clothes.²⁵¹

c. Doctrinal Scope and Trajectory

Judicial reasons also shape the scope and trajectory of the Court's doctrines. In contexts too innumerable to mention, the expressed reasons behind a Court's decision dictate both its contours and future path. The seminal *Chevron* doctrine illustrates the point well. There, the Court held that when statutes are ambiguous, courts must give deference to any "reasonable" interpretation by an agency charged with administering the statute.²⁵²

As noted by Professor Barron and then-Dean Elena Kagan, "[t]he *Chevron* doctrine began its life shrouded in uncertainty about its origin. *Chevron* barely bothered to justify its rule of deference, and the few brief passages on this matter pointed in disparate directions."²⁵³ Thus, from the decision's inception, legal commentators speculated about *Chevron's* theoretical justification and the doctrine's future trajectory. Years after the *Chevron* decision, the Court clarified that *Chevron*-style deference rests on a theory of congressional intent.²⁵⁴ Critically, the Court's con-

to the holdings) contained in the opinions they join. However, given the salience and importance of the reason-giving at issue, I think it fair to assume that the justices signing on to the majority opinions signed on to the contingencies as well as the concessions. In any event, and more importantly, I agree with Professor Monaghan's normative assessment that the "points of significance" in the Court's majority opinions "be understood as the result of a deliberate process which reflects the views of the members joining that opinion." Henry P. Monaghan, *Taking Supreme Court Opinions Seriously*, 39 MID. L. REV. 1, 24 (1979). A counter-norm would delegitimize not only the Court's *institutional* status, but also the *doctrines* that depend upon the Court's reasons for acceptance.

251. Cf. Dorf, *Dicta and Article III*, *supra* note 239, at 2029–30 ("When a court discards the reasoning of a prior opinion as *merely dictum*, unless it suggests an alternative basis for the outcome of the precedent case, it essentially relegates the prior decision to the position of an unjustifiable, arbitrary exercise of judicial power.").

252. *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984).

253. David J. Barron & Elena Kagan, *Chevron's Nondelegation Doctrine*, 2001 SUP. CT. REV. 201, 212–13. The *Chevron* decision, for example, stressed the institutional competency of agencies, in terms of their expertise and ability to quickly respond to changing information and conditions. At another point, however, the Court stressed that, as between agencies and the courts, agencies were more politically accountable via the President. And, at other places in the decision, the Court suggested that deference was owed because Congress delegated responsibility for administering the statute to the agency. *See generally Chevron*, 467 U.S. 837.

254. *See Nat'l Cable & Telecomm. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 980 (2005) (describing the holding in *Chevron* by stating that ambiguities in a stat-

gressional-intent theory for *Chevron* was a reason rather than a holding in the narrow sense. But it is the reason that now shapes the scope and trajectory of that doctrine.²⁵⁵

We should expect the same for administrative preemption. For instance, if the Court's reason for administrative preemption is that agency action is Law, then the Court might preclude non-binding administrative actions from having preemptive effect. Or, if the Court's expressed reason for administrative preemption is that state interests can be adequately safeguarded in the administrative process, then we might expect courts to insure that state interests were in fact considered in the administrative process before concluding that state law is preempted. And so on.

3. Preserving Constitutional Text

The foregoing treatment mostly responds to concerns that the contingency principle may go *too far* in its commitment to the Court's reason-giving. In closing, however, I should also acknowledge a potential concern that the principle may *not go far enough* in its commitment to the written Constitution. This objection, however, should quickly fall away. The principle does not rule out, negate, or seek primacy over the Constitution's text (or, for that matter, over any other fidelity device). Rather, the contingency principle simply provides an additional structural safeguard.

ute that an agency is supposed to administer are congressional delegations of authority); *United States v. Mead Corp.*, 533 U.S. 218, 229–32 (2001) (explaining that *Chevron* deference is not warranted where there is no evidence that Congress intended to delegate particular interpretive authority to an agency); *United States v. Haggard Apparel Co.*, 526 U.S. 380, 392–93 (1999) (explaining that Congress delegates authority to agencies because it cannot anticipate all circumstances to which a statute may apply); *Smiley v. Citibank*, 517 U.S. 735, 740–41 (1996) (clarifying that when Congress leaves ambiguity in a statute, it does so with the intent that the agency resolve such issues in the future).

255. See *Mead Corp.*, 533 U.S. at 226–27 (offering different ways to determine whether Congress intended to delegate authority to an agency); see also Stephen Breyer, *Our Democratic Constitution*, 77 N.Y.U. L. REV. 245, 267 (2002) (explaining that *Chevron* deference is required only where Congress would have wanted it); Elliot Greenfield, *A Lenity Exception to Chevron Deference*, 58 BAYLOR L. REV. 1, 25 (2006) (arguing that *Mead* clarifies that the “presumption [of] delegation is inferred not simply from the presence of ambiguity, but only when additional factors, such as rule-making authority, are present”); Thomas W. Merrill & Kristin E. Hickman, *Chevron's Domain*, 89 GEO. L.J. 833, 872 (2001) (“[I]f *Chevron* rests on a presumption about congressional intent, then *Chevron* should apply only where Congress would want *Chevron* to apply.”).

In sum, the contingency principle responds to the “dead hand” problem by offering a more generous constitutional baseline: one tied to the Court’s doctrinal constructs rather than the constructs of the framing generation. From both a normative and a doctrinal perspective, the theoretical contingencies attaching to the Court’s concessions for modern government are worthy of our insistence. They exist so that the Court does not have to make the choice between the Constitution on the one hand, and the administrative state on the other.²⁵⁶ For those whose fidelity runs to the written Constitution *and* our modern institutions, the contingencies would seem a rather small price to pay for having both.²⁵⁷

B. Separation of Powers Contingencies

This Section applies the contingency principle to administrative preemption with separation of powers in mind. As explained in Part II, the Court has long insisted that a constitutional line exists between permissible and impermissible congressional delegation. The mere existence of the conceptual line—even if judicially underenforced—serves an important legitimizing function.²⁵⁸ To be sure, the Court does not take its nondelegation mantra seriously when confronting *delegation* challenges. In the Court’s own words, its reasons for tolerating congressional delegation are twofold. First, the Court is not well positioned to “second-guess Congress regarding the permissible degree of policy judgment that can be left to those executing or applying the law.”²⁵⁹ Second, the Court has stipulated that

256. Farina, *supra* note 8, at 515 (remarking on our “seemingly irreversible commitment to the administrative state”).

257. Cf. Gary Lawson, *Delegation and Original Meaning*, 88 VA. L. REV. 327, 332 (2002) (suggesting that abandonment of the nondelegation principle “is a price that most people are ultimately willing to pay in return for the modern administrative state, but it is not surprising that people would look for a way to reduce that price—or at least to persuade themselves that they have not really paid it”).

258. See, e.g., Lawrence Gene Sager, *Fair Measure: The Legal Status of Underenforced Constitutional Norms*, 91 HARV. L. REV. 1212, 1213–28 (1978) (stipulating that courts underenforce constitutional norms because of institutional concerns).

259. *Whitman v. Am. Trucking Ass’ns*, 531 U.S. 457, 474–75 (2001) (quoting *Mistretta v. United States*, 488 U.S. 361, 416 (1989) (Scalia, J., dissenting)); see also RICHARD J. PIERCE, JR., 1 ADMINISTRATIVE LAW TREATISE § 2.6 (5th ed. 2010) (“The Court has become increasingly candid in recognizing its inability to enforce any

“Congress simply cannot do its job absent an ability to delegate power under broad general directives.”²⁶⁰ I will not belabor whether these are good (enough) reasons for tolerating congressional delegation of policy. My present point is that neither reason has been offered by the Court as a basis for administrative preemption. Indeed, neither reason would even seem to apply.

First, the line-drawing dilemma in the nondelegation context is eased significantly in the administrative preemption context. According to the Court, the Constitution prohibits Congress from delegating lawmaking under Article I and/or prohibits the Executive from making Law under Article II. If that’s so, then we have our answer under the Supremacy Clause: The administrative output cannot qualify as “Laws . . . made in Pursuance” of the Constitution. The indeterminacy that inheres in demarking lawful from unlawful delegations is what allows agencies to make binding policy (along the separation of powers dimension). But that indeterminacy need not have the inertial effect of infusing administrative outputs with supreme Law status (along the federalism dimension). If there is a reason for the conceptual leap from delegation to preemption, it does not come from the *nondelegation* doctrine. Indeed, if anything, preemption would seem repelled by that doctrine’s core principle—namely, that Congress cannot lawfully delegate its lawmaking power.

Second, even if we accept the prudential claim that Congress needs to delegate *policymaking* in order to do its job effectively, that hardly compels the conclusion that Congress has or needs the power to delegate *supremacy*.²⁶¹ As I have argued elsewhere, the delegation of policymaking is severable from the delegation

meaningful limitation on Congress’ power to delegate its legislative power to an appropriate institution.”).

260. *Mistretta v. United States*, 488 U.S. 361, 416 (1989). An older expression of this point is found in *Union Bridge Co. v. United States*, 204 U.S. 364, 387 (1907) (noting that to deny power to delegate “would be ‘to stop the wheels of government’ and bring about confusion, if not paralysis, in the conduct of the public business”).

261. Cf. *Keller*, *supra* note 199, at 59 (“Regardless of what one thinks about the nondelegation doctrine in general, there is a strong argument for the substantive limit that Congress cannot delegate the legislative power to alter the federal-state balance of power.”); Cass R. Sunstein, *Nondelegation Canons*, 67 U. CHI. L. REV. 315, 331 n.81 (2000) (explaining that not all types of delegations are equal, and that special treatment might be warranted for the delegation of preemption among other types of decisions).

of preemptive authority—both in theory and practice.²⁶² Agencies may make law (lower case “l”) in the sense of creating binding norms. But that is not to say that agencies need to make Law (capital “L”) in the sense used in the Supremacy Clause. The purposes and ends of policymaking and preemption are not mutually dependent.²⁶³ Agencies may make policy, yet by no logical compulsion must such policies have preemptive effect. Indeed, federal and state law operate concurrently in many if not most regulatory contexts.²⁶⁴ Depriving agencies of some or all of their power to preempt state law will surely result in more regulatory overlap and conflict. But that does not mean that *agencies*—as opposed to Congress—should decide whether state or agency policy is to be preferred with respect to a given regulatory issue.

In sum, the Court’s suggestion that agency action qualifies as “Laws . . . made in Pursuance [of the Constitution]” seems incompatible with the Court’s separation of powers maxim that agencies cannot make Law. Perhaps the treatment of what qualifies as Law does not demand equanimity in the separation of powers and federalism contexts. But, from a doctrinal perspective, we might reasonably insist that the Court acknowledge and justify disparate treatments of what Law means if that is what the Court intends.²⁶⁵

Finally—although less my focus here—academic attempts to justify administrative preemption fail to close the doctrinal loop. As noted, some have suggested that when agencies act within their delegated authority, the statute may be said to do the preemptive work.²⁶⁶ Yes, we can *say* that, but it will cost some additional constitutional capital if asked to *believe* it. When a statute actually conflicts with state law, then it is the statute that preempts. But when the conflict would not exist absent the agency action, then Congress is not really doing the

262. For a discussion of these points, see Rubenstein, *Delegating Supremacy?*, *supra* note 22, at 1167–69.

263. *Id.*

264. See Buzbee, *supra* note 28, at 1538; Robert A. Schapiro, *Toward A Theory of Interactive Federalism*, 91 IOWA L. REV. 243, 289 (2005) (noting that federal-state regulatory overlap is the norm).

265. Cf. Amar, *Intratextualism*, *supra* note 115, at 811.

266. See *supra* note 47 and accompanying text.

preemptive work.²⁶⁷ To conclude otherwise requires a new set of fictions and conceptual bargains.

C. Federalism Contingencies

Apart from violating the contingency principle along the separation of powers dimension, administrative preemption is an affront to the political and procedural safeguards in which the Court has placed federalism's primary hope.²⁶⁸

1. Political Safeguards

As Professor Young explains, "in order for the political safeguards to work, the important governmental decisions actually have to be made through channels in which the states are represented."²⁶⁹ Moreover, for the political safeguards to be effective, state representatives must be on notice that pending legislation may affect a state's interests or authority.²⁷⁰ This notice, Professor Young explains, "ensures that incursions on state autonomy will occur only as a result of the considered judgment of Congress, and it provides potential opponents of such incursions with an opportunity to mobilize their forces."²⁷¹

The political safeguards, however, have little, if any, purchase in the administrative forum.²⁷² Agencies are not beholden to states

267. Were administrative preemption foreclosed, we might expect more questions about whether a preemptive conflict exists between a statute and state law (because, in this imagined world, only the statute and not the agency action could preempt). Disentangling the statutory and administrative conflicts with state law may not always be easy. But this statutory analysis should be little different than is already practiced in statutory preemption cases. If useful, the Court might also employ a test similar to the one used to distinguish between "legislative" and "non-legislative" agency actions. Specifically, in the preemption context, the Court might ask the following: But-for the agency action at issue, is there anything in the statute itself that preempts state law? If the answer is no, then the state law at issue would stand (subject, of course, to a congressional response). And, in questionable cases, the Court's presumption against preemption can still do its work. In any event, crafting new tests for statutory preemption in a world where agencies cannot preempt is beyond the scope of this Article. I only wish to suggest that administering such a test seems quite doable for courts, and very little different from what it currently does in statutory preemption cases.

268. See *supra* note 20 and accompanying text.

269. Young, *Two Cheers for Process Federalism*, *supra* note 85, at 1358–59.

270. *Id.* at 1359.

271. *Id.*

272. Young, *Executive Preemption*, *supra* note 28, at 878–79 (explaining that the political (and procedural) safeguards of federalism "have little purchase on executive ac-

in any politically thick sense. To the contrary, agencies may have interest and incentive to subvert competing state interests.²⁷³ States, of course, enjoy certain “soft” protections in the administrative arena. Nothing, for instance, prevents states from lobbying administrative agencies. Moreover, as Larry Kramer and others have hypothesized, “cooperative federalism” schemes generate dynamics of mutual dependency that may make federal agencies receptive to state interests.²⁷⁴ Further, under existing Executive Orders, agencies are instructed to account for federalism when creating policies that may implicate state interests and to consult with appropriate state representatives.²⁷⁵

Without denying that these soft protections close some of the gap, none substitute for the states’ political safeguard in *Congress*. States can and do lobby agencies; but because agencies are not politically beholden to states, agencies can more easily turn a deaf ear.²⁷⁶ Moreover, as Catherine Sharkey points out, there will

tion”). For a contrary view, see Metzger, *Administrative Law*, *supra* note 28, at 2098 (arguing that administrative law can serve as a vehicle for “amplif[y]ing] the political safeguards available by giving weight to states in executive branch policy debates and by rendering the effects of agency decisions more transparent and more amenable to congressional oversight”). The idea that administrative law can promote federalism values, including the political safeguards, is taken up further in Part V.

273. Young, *Executive Preemption*, *supra* note 28, at 878–89; see also William N. Eskridge, Jr., *Vetogates*, *Chevron*, *Preemption*, 83 NOTRE DAME L. REV. 1441, 1484 (2008) (reporting that a survey of Supreme Court preemption cases involving federal administrative agencies between the 1984 and 2005 Terms found that “agencies pressed pro-preemption positions in two-thirds of the cases”)

274. See Kramer, *supra* note 205, at 1550; see also Bulman-Pozen & Gerken, *supra* note 204, at 1293 (highlighting that cooperative federalism schemes afford states opportunity to shape administrative policy).

275. Memorandum on Preemption, *supra* note 26 (President Obama memorandum advising executive agencies to understand the legitimate prerogatives of the states before preempting a state law and outlining steps that agencies should take in making preemption decisions); Exec. Order No. 13,132, *supra* note 26 (emphasizing the importance of early consultation with state and local officials); Exec. Order No. 12,988 § 3(b)(1)(B), 3 C.F.R. 157 (1996), *reprinted in* 28 U.S.C. § 519 (2000) (requiring that regulations “specif[y] in clear language the preemptive effect, if any,” they are to be given); see also Michele E. Gilman, *Presidents, Preemption, and the States*, 26 CONST. COMMENT. 339, 381–82 (2010) (arguing that, through Executive Orders, the President undertakes an important managerial—rather than decisional—role in administrative preemption); Richard J. Pierce, Jr., *Regulation, Deregulation, Federalism, and Administrative Law: Agency Power to Preempt State Regulation*, 46 U. PITT. L. REV. 607, 665 (1985) (arguing that agencies should approach preemption issues “with particular sensitivity to the important values of federalism”).

276. Bhagwat, *supra* note 28, at 203 (“States are obviously not represented within agencies, which are purely national, unelected institutions . . .”); Young, *Executive Preemption*, *supra* note 28, at 1359 (noting that “states have virtually no voice”

not always be a sufficiently informed or involved state representative to press state interests at the administrative level.²⁷⁷ Meanwhile, while cooperative federalism schemes may provide federal agencies some incentive to accommodate state interests, these dynamics are necessarily context-specific, and arguably apply less robustly than if federal agencies were not holding the preemption trump card.²⁷⁸ Finally, the Executive Orders instructing agencies to account for state interests lack an enforcement mechanism, and, in part because of this, studies show that agencies tend to honor these Orders mostly in the breach.²⁷⁹

In any event, the Court's jurisprudence emphasizes the states' representation in *Congress* as federalism's primary safeguard.²⁸⁰ That is because Congress, alone, is structured to take state regulatory interests into account.²⁸¹ Agencies, by contrast, are not similarly structured. They are purely national, unelected institutions. Agencies are politically accountable—at most, and generally only in theory—through the President.²⁸² But the President's

in the administrative context; certainly not of the kind enjoyed in Congress). Cf. Richard B. Stewart, *Federalism and Rights*, 19 GA. L. REV. 917, 963 (1985) (observing that “battles among factions are resolved not on the floors of Congress but in the hallways of bureaucracies This system of policymaking circumvents many of the political safeguards of federalism that are supposed to make national policies sensitive to state and local concerns”).

277. Catherine M. Sharkey, *Federalism Accountability: “Agency-Forcing” Measures*, 58 DUKE L.J. 2125, 2158–63 (2009) (explaining, for example, that few states have agencies focused on food and drug safety that could represent state interests before the FDA).

278. For more on this point, see Rubenstein, *Delegating Supremacy?*, *supra* note 22, at 1178.

279. See Mendelson, *A Presumption Against Agency Preemption*, *supra* note 28, at 723 (noting that agencies largely fail to take federalism interests into account); see also John O. McGinnis, *Presidential Review as Constitutional Restoration*, 51 DUKE L.J. 901, 902–03 (2001) (arguing that presidential federalism orders are necessary correctives, and suggesting that an agency's failure to comply with such orders should be subject to judicial review).

280. *Garcia v. San Antonio Metro. Transit Auth.*, 469 US 528, 550–51 (1985) (observing that “the composition of the Federal Government was designed in large part to protect the States from overreaching by Congress”).

281. *Id.*; see also Herbert Wechsler, *The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Government*, 54 COLUM. L. REV. 543, 559 (1954) (arguing that states' representatives “control the legislative process and, by hypothesis, have broadly acquiesced in sanctioning the challenged Act of Congress”).

282. See *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 865–66 (1984) (noting that “[w]hile agencies are not directly accountable to the people, the Chief Executive is”). *But cf.* Jack M. Beermann, *End the Failed Chevron*

constituency is of course national (not regional) in scope. Ultimately, then, the Court's approach to administrative preemption undermines its own political safeguards theory of federalism.

2. Procedural Safeguards

The Court's administrative preemption doctrine also subverts the related procedural-safeguards theory of federalism. The procedural safeguards advance state autonomy by default: Even if members of Congress have the will to encroach upon or displace state prerogatives, or both, the legislative gauntlet makes it difficult for Congress to do so. In order to become federal law, a statutory proposal must not only survive the bicameralism and presentment filters,²⁸³ but also must pass through multiple "vetogates" erected by the rules and customs of both chambers of Congress.²⁸⁴ The states directly benefit from the screening mechanism of the legislative process "because the federal government's inability to adopt 'the supreme Law of the Land' leaves states free to govern."²⁸⁵

Administrative preemption, however, bypasses the legislative dam. For a Congress seeking to expand its regulatory power at the expense of state interests, all that Congress need do is delegate. Indeed, William Eskridge explains, the legislative "vetogates encourage Congress to delegate more authority to agencies . . ."²⁸⁶ This result, William Funk observes, "is precisely the type of congressional behavior that post-*Garcia* federalism jurisprudence seeks to prevent."²⁸⁷

Finally, it is worth emphasizing that the procedural hurdles associated with notice-and-comment rulemaking are not prerequisites for preemption under the Court's existing doctrine.²⁸⁸

Experiment Now: How Chevron Has Failed and Why It Can and Should be Overruled, 42 CONN. L. REV. 779, 803 (2010) (questioning the extent to which agencies are actually held accountable).

283. See U.S. CONST. art. I, § 7.

284. For discussions on how vetogates operate, see William N. Eskridge, Jr. & John Ferejohn, *The Article I, Section 7 Game*, 80 GEO. L.J. 523, 528–33 (1992); McNollgast, *Positive Canons: The Role of Legislative Bargains in Statutory Interpretation*, 80 GEO. L.J. 705, 716–27 (1992).

285. Clark, *Federal Lawmaking*, *supra* note 113, at 1325.

286. Eskridge, *supra* note 273, at 1449 (emphasis added).

287. Jack W. Campbell IV, *Regulatory Preemption in the Garcia/Chevron Era*, 59 U. PITT. L. REV. 805, 829 (1998).

288. See *supra* notes 53–55 and accompanying text.

As discussed in Part I, the Court has held that administrative orders qualify for preemptive effect,²⁸⁹ regardless of whether state interests were even represented in the adjudication giving rise to the agency's order. And, as earlier discussed, the majority decision in *Arizona v. United States* strongly suggests that agencies might even preempt through *nonbinding* administrative policies, again without any advance notice or state input.

In sum, the Court's approach to administrative preemption seems to contradict the very premises on which the doctrine may depend. If agency action qualifies as "Law," then it should be void under separation of powers principles (and thereby ineligible to preempt state law).²⁹⁰ Meanwhile, if agency action does not qualify as "Law" (thus saving it from a nondelegation violation), then it is most difficult to comprehend why it can or should bind sovereign states. As the Court itself has recognized, the states' most meaningful protection against federal encroachment are the so-called political and procedural safeguards of federalism.²⁹¹ But neither of these safeguards attach administratively.

V. PRAGMATISM VS. PARADOX

This last Part brings pragmatism to the fore. Pragmatic considerations are almost always present, whether operating on or below the surface.²⁹² Here, I consider how two distinct lines of pragmatic argumentation bear on the paradox-hypothesis. Section A outlines the pragmatic appeal of administrative preemption. Elsewhere, I have questioned the merits of this line of argument.²⁹³ But my purpose here is different, where I both assume and accept the relevance of the pragmatic claims in favor

289. See, e.g., *Entergy La. Inc. v. La. Pub. Serv. Comm'n*, 539 U.S. 39, 49–50 (2003) (holding that state utility order regarding the allocation of wholesale power was preempted by an order of the Federal Energy Regulatory Commission); *Nantahala Power & Light Co. v. Thornburg*, 476 U.S. 953, 966 (1986) (similar).

290. See *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1 (1824) (explaining that only a *valid* federal law can preempt a state law).

291. On the political safeguards, see *infra* notes 323–36 and accompanying text. On the procedural safeguards, see *infra* notes 337–39 and accompanying text.

292. See CASS R. SUNSTEIN, *A CONSTITUTION OF MANY MINDS: WHY THE FOUNDING DOCUMENT DOESN'T MEAN WHAT IT MEANT BEFORE* 20–23 (2009) (claiming that consideration of outcomes always drive approaches to judicial review).

293. See Rubenstein, *Delegating Supremacy?*, *supra* note 22.

of administrative preemption. For some non-originalists, a favorable pragmatic prognosis may alone be sufficient to constitutionally justify administrative preemption. Section B explores an overlapping consequentialist concern: what to do about administrative preemption for those who conclude that the practice is constitutionally problematic.

A. Optimization

Before proceeding to the pragmatic claims in favor of administrative preemption, it will be useful to contextualize them within competing theories of federalism. For federalism-formalists, “efficiency is beside the point. The Constitution preserves state authority even when it is inefficient[.]”²⁹⁴ The federalism-formalist insists on dual sovereignty because the Constitution does so, regardless of whether the functional values generally ascribed to federalism (for example, the promotion of liberty, regulatory experimentation, bringing government closer to the people) are delivered in any particular case.²⁹⁵ For federalism-functionalists, however, optimization is the key. They frame federalism questions around how power *should* be allocated between the federal and state governments and ask whether centralization or decentralization is best for public outcomes.²⁹⁶ These approaches capture two competing conceptions of federalism: the first is concerned with preserving states as competing sources of power (sometimes referred to as “abstract federalism”); the second values federalism only to the

294. Bhagwat, *supra* note 28, at 225–26, 228–29.

295. Young, *Making Federalism Doctrine*, *supra* note 89, at 1762; John C. Yoo, *The Judicial Safeguards of Federalism*, 70 S. CAL. L. REV. 1311, 1320 (1996) (“[B]asing constitutional interpretation exclusively on function is inconsistent with the point of a written constitution.”).

296. See Erwin Chemerinsky, *The Values of Federalism*, 47 FLA. L. REV. 499, 539 (1995); see also *id.* at 539 (“[F]ederalism can be reconceived not as about limiting federal power or even as about limiting state or local power. Rather, it should be seen as based on the desirability of empowering multiple levels of government to deal with social problems.”); Kramer, *supra* note 205, at 1502 (“[I]mposing new limits [on federal power] just for the sake of having limits is a useless and dangerous formalism.”); Edward L. Rubin & Malcolm Feeley, *Federalism: Some Notes on a National Neurosis*, 41 UCLA L. REV. 903 (1994) (arguing that federalism *per se* serves none of the values attributed to it; rather, the asserted benefits of federalism—for instance, increased citizen participation and choice, and state competition and experimentation—are actually benefits of the “managerial concept” of “decentralization”).

extent that it may tend to advance the overall national welfare (sometimes referred to as “instrumental” federalism).²⁹⁷

Administrative preemption is generally promoted on instrumental (rather than abstract) federalism grounds.²⁹⁸ The instrumental claims, in turn, come in positive and negative varieties. Under a strong version of the positive claim, agencies are better positioned than Congress to make preemption decisions.²⁹⁹ That is not only because of Congress’s institutional limitations (lack of time, resources, foresight, and so on), but also because of agencies’ institutional advantages (expertise, deliberative qualities, flexibility, resources, etc.). A more modest version of the positive instrumental claim recognizes that Congress outperforms agencies in making preemption decisions, but that when Congress has not done so, agencies can and should.

Meanwhile, the negative instrumental claim hypothesizes a world where Congress cannot delegate supremacy, and concludes—on balance—that a system with administrative preemption outperforms an imagined system without it. In that imagined world, foreclosing administrative preemption would result in more federal-state regulatory overlap, on the assumption that Congress—either for lack of foresight or political will—often will not rise to the challenge of making a preemption decision. And, on that assumption, the federalism-functionalist speculates about whether Congress’s silence will advance federalism’s instrumental values (competition, political participation, regulatory experimentation, satisfying diverse and heterogeneous needs)³⁰⁰ or, rather, unleash federalism’s darker bents (localized bigotry, the creation of externalities, and races-to-the-bottom). Given these case-specific uncertainties and lack of congressional foresight, the instrumental claim favors giving agencies latitude to make responsive preemption decisions unless and until Congress does so.

These are powerful (though contestable) claims. As promised, resolving them is beyond the scope of this Article. Still, it

297. Galle & Seidenfeld, *supra* note 21, at 1941–42.

298. Federalism-functionalists are generally willing to concede that agencies score poorly in promoting abstract federalism because, in the end, state autonomy for its own sake is just one (rather small) input into the final calculus of whether agencies should have preemptive power.

299. *Id.* at 2006–17; *see also* Hawkes & Seidenfeld, *supra* note 28, at 78–83.

300. *See, e.g.,* Gregory v. Ashcroft, 501 U.S. 452 (1991) (discussing values of federalism).

will be useful to highlight the points of departure. The pragmatic debate over administrative preemption requires imagination (what the system would look like if . . .) and judgment (that system would be “good” or “bad”). For those who value abstract federalism, how much weight on the scale should it receive relative to instrumental considerations? Even if we remove abstract federalism from the equation, does a system with administrative preemption necessarily outperform one without it? Or, is there something in between that might be better? If so, how can we know, and what should it be?

I could go on. These and similar questions, however, reflect a more general critique of the uses of pragmatic argumentation in constitutional interpretation.³⁰¹ They require imagination and judgment, neither of which is much informed by what the Constitution says, and over which decisionmakers are apt to disagree.³⁰² Still, pragmatic claims sometimes matter—for better or worse, and sometimes more or less. Whether they have a place in debates over administrative preemption depends, again, on one’s preferred interpretive methodology.

Thus, for present purposes, my objective is simply to isolate the pragmatic claims. If pragmatism is the *only* reason to support administrative preemption, then originalists clearly will not be persuaded. On the other hand, if pragmatism is an important (but not the only) argument in favor of administrative preemption, then we should press the consequentialist claims harder. That evaluation might lead non-originalists to reject or limit the practice of administrative preemption; as noted above, the consequentialist claims do not necessarily weigh in favor of administrative preemption, much less all its uses.

301. See Benjamin & Young, *supra* note 28, at 2116 (“[C]onstitutionalism means that we are simply not free to choose whatever normative principles and institutional strategies we think best.”).

302. See ADRIAN VERMEULE, JUDGING UNDER UNCERTAINTY: AN INSTITUTIONAL THEORY OF LEGAL INTERPRETATION 153–82 (2006) (noting that judges suffer from limited information and bounded rationality, which distort their efforts to assess the consequences of their decisions); Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849, 854 (1989) (arguing that the legislature is a “more appropriate expositor of social values” than the judiciary); see also Mitchell, *Stare Decisis and Constitutional Text*, *supra* note 101, at 9 (“De facto power does not supply a justification for government action, even when combined with a sincere belief that good consequences will ensue. Something more is needed to differentiate the coercive powers of a federal court from those of a schoolyard bully.”).

At a minimum, we might expect pragmatic decisionmakers to shape administrative preemption doctrine in line with what the instrumental claims counsel for, yet no further. Take, for example, the seemingly unresolved issue of whether agency policies that do not undergo notice-and-comment rulemaking should qualify for preemptive effect.³⁰³ As to this type of agency action, instrumental claims sounding in agency deliberation and public input have little if any purchase. The pragmatic judge might thus exclude such informal agency action from “supreme Law” status, even while endorsing the preemptive effect of more formalized agency action, such as notice-and-comment rulemaking.

B. *Now (and so) What?*

Apart from whether pragmatic claims are enough to render administrative preemption constitutional, there remains the separate consideration of what the Court should *do* with the interpretive conclusion reached. To be sure, these are partly overlapping considerations: How close administrative preemption comes to the constitutional line—or how safely it falls on one side—will surely have a bearing on what if anything should be done.

Here it will be useful to take stock of the stakes, if only for some additional perspective. At stake are not only the values of *structuralism*, but also the values of *administrationalism*.³⁰⁴ If we foreclose or limit administrative preemption doctrine, we will also have to compromise some of the functional virtues associated with it. Further, as I have argued elsewhere, modifying administrative preemption doctrine can also affect—for better or worse—how the federal branches work and interact in crafting national policies.³⁰⁵

This recognition goes a long way toward explaining my bottom-up approach to administrative preemption. As I began with,

303. See *supra* notes 53–55 and accompanying text.

304. See *supra* Part III.A (discussing the engine of change behind the New Deal transformation).

305. See Rubenstein, *Administrative Federalism*, *supra* note 153; Rubenstein, *Immigration Structuralism*, *supra* note 2; see also Metzger, *Federalism*, *supra* note 28 (arguing that a more restrictive preemption doctrine can improve administrative regulation); Sharkey, *Federalism Accountability*, *supra* note 277, at 2179–80, 2186–89 (noting that *Wyeth*'s reluctance to defer to the agency's preemptive interpretation in a regulatory preamble may encourage agencies to use notice-and-comment rulemaking and create a sufficient agency record in support).

administrative preemption is made possible by congressional delegation of policymaking; it is made more dangerous by the combination of powers in agencies; and it is made wide-ranging by the virtual demise of federalism's enumerated-powers principle. Considered in this light, administrative preemption fairly may be perceived as the last stop on the structural concession train. Insofar as we are committed to safeguarding structure, why not simply derail the train at one of its earlier stops?

The short answer is that the train has already left those stations. For better or worse, all of these concessions are now entrenched postulates of modern government.³⁰⁶ By contrast, the train may still be in the administrative preemption station.³⁰⁷ Administrative preemption doctrine is an appealing vehicle for reform precisely because revising it can be less destabilizing than a direct assault on the aforementioned postulates. Specifically, reforming the doctrine would not prevent Congress from delegating policymaking; would not prevent Congress from combining functions in agencies; and would not restrict the subject matter over which federal law extends.

Reforming the Court's administrative preemption doctrine, however, may indirectly compensate for these associated concessions.³⁰⁸ Indeed, precisely because administrative preemption is situated at the structural intersection between separation of powers and federalism, reforming the doctrine may rather efficiently promote structural values along both dimensions simultaneously.³⁰⁹ What might result is surely not the Framers' design, but rather a modern translation of it: one that remains faithful to the *ideals* of political liberty, political competition, limited federal government, and representational accountabil-

306. See Lawson, *The Rise and Rise*, *supra* note 15, at 1232 ("[T]he essential features of the modern administrative state have . . . been taken as unchallengeable postulates by virtually all players in the legal and political worlds . . ."); McCutchen, *Mistakes*, *supra* note 185, at 17 ("Neither the cases sanctioning open-ended delegations of legislative power nor those broadly interpreting the commerce clause will be overturned.").

307. Cf. Benjamin & Young, *supra* note 28 (making a similar point).

308. See *supra* Part IV.

309. For an in-depth discussion of how the various academic proposals for administrative preemption can impact federalism *and* separation of powers, see Rubenstein, *Administrative Federalism*, *supra* note 153.

ity, yet without a full retreat to the Framers' original *strategies* for actualizing those ideals.³¹⁰

To say that something should be done, however, still leaves open the question of what. A smorgasbord of proposals has been advanced elsewhere, by myself and by others. These proposals may be grouped into one or more of the following general categories: (1) foreclosing administrative preemption;³¹¹ (2) requiring a clear expression of Congress's intent to delegate supremacy;³¹² (3) infusing additional procedural safeguards for state interests into the administrative decision-making process;³¹³ and (4) ramping up judicial review of administrative preemption decisions.³¹⁴ By design, this Article's layered approach to the paradox of administrative preemption does not lead to any singular solution. Yet it hopes to provide a sturdier foundation for that evaluation.³¹⁵

310. See *supra* Part II; see also Gregory v. Ashcroft, 501 U.S. 452, 458–59 (1991) (canvassing federalism values); Akhil Reed Amar, *Five Views of Federalism: "Converse 1983" in Context*, 47 VAND. L. REV. 1129 (1994); Sunstein, *Constitutionalism*, *supra* note 15, at 436–37 (discussing separation of powers values).

311. See, e.g., Rubenstein, *Delegating Supremacy?*, *supra* note 22, at 1163–90; cf. Young, *Executive Preemption*, *supra* note 28, at 896 (arguing that foreclosing administrative preemption is probably most keeping with the political and procedural safeguards, but also noting that it is "probably too late in the day to insist" on it).

312. See, e.g., Benjamin & Young, *supra* note 28; William Funk, *Preemption by Federal Agency Action*, in PREEMPTION CHOICE: THE THEORY, LAW, AND REALITY OF FEDERALISM'S CORE QUESTION 215 (William W. Buzbee, ed., 2009); Mendelson, *A Presumption Against Agency Preemption*, *supra* note 28, at 698; Merrill, *Preemption*, *supra* note 28, at 760; Young, *Executive Preemption*, *supra* note 28, at 897–98; WILLIAM BUZBEE ET AL., CENTER FOR PROGRESSIVE REFORM, THE TRUTH ABOUT TORTS: RETHINKING REGULATORY PREEMPTION AND ITS IMPACT ON PUBLIC HEALTH 15–17 (2009), available at <http://progressivereform.org/articles/RethinkingPreemption902.pdf> [<http://perma.cc/TC62-MV5J>].

313. See, e.g., Buzbee, *supra* note 28; Galle & Seidenfeld, *supra* note 21; Pierce, *supra* note 275, at 610–11; Sharkey, *Inside Agency Preemption*, *supra* note 27, at 572–94 (offering a number of recommendations to enhance compliance with existing executive orders on federalism); Young, *Executive Preemption*, *supra* note 28; see also Metzger, *Administrative Law*, *supra* note 28, at 2029 (arguing that certain features of administrative law "hold strong potential to protect state interests," including notice-and-comment rulemaking and the judicially imposed requirement that agencies engage in "reasoned decisionmaking").

314. See, e.g., Buzbee, *supra* note 28, at 1524–25; Galle & Seidenfeld, *supra* note 21, at 2001; Karen A. Jordan, *Opening the Door to "Hard-Look" Review of Agency Preemption*, 31 W. NEW ENG. L. REV. 353, 353 (2009); Mendelson, *Chevron and Preemption*, *supra* note 38; Metzger, *Administrative Law*, *supra* note 28, at 2106; Sharkey, *Inside Agency Preemption*, *supra* note 27.

315. See Rubenstein, *Administrative Federalism*, *supra* note 153 (evaluating various academic proposals for administrative preemption).

VI. CONCLUSION

The Framers' strategy for repelling tyranny was structural. Government power was dispersed horizontally among the federal branches and vertically between the federal and state units. James Madison famously professed that this structural design would remit a "double security" for liberty.³¹⁶ Although vestiges of this original strategy remain, the operation of modern government is notoriously one of constitutional dissonance: What the Constitution says is not always what it does.³¹⁷ Congress delegates vast swaths of policymaking to agencies; in turn, agencies exercise their delegated powers in ways that trump state law. Collectively, these structural concessions for modern government may portend a double *insecurity* for liberty, where federal power is first accumulated in the Executive and then exercised in ways to dislodge state autonomy. To observe that this was not intended originally is as empty as it is true; the Framers did not—and could not—envision the changes wrought by the complexities of modern society. This truism leads some to declare the administrative state unconstitutional. But it leads others to question whether the Framers' structural strategies are worth preserving today, and, if so, in what form.

This Article engages these structural issues, bottom-up, through the lens of administrative preemption. Both textually and structurally, administrative preemption seems constitutionally paradoxical. Specifically, if agency action qualifies as "supreme Law," then it violates the Constitution's separation of powers. Meanwhile, if agency action does not qualify as "Law" (thus saving it from separation of powers doom), then it falls beyond the Supremacy Clause's purview. In short, to qualify for preemption, agency action must simultaneously qualify as *Law* for federalism purposes and *not Law* for separation of powers. This structural contradiction, even if it is conceptually possible, belies the Constitution's original meaning.

316. THE FEDERALIST NO. 51, at 323 (James Madison) (Clinton Rossiter ed., 1961).

317. See Lawson, *The Rise and Rise*, *supra* note 15, at 1249 (observing that "[t]he actual structure and operation of the national government today has virtually nothing to do with the Constitution"); see also *FTC v. Ruberoid Co.*, 343 U.S. 470, 487 (1952) (Jackson, J., dissenting) ("The rise of administrative bodies . . . has de-ranked our three-branch legal theories . . .").

Doctrinal modes of argument fare no better. The Court's legitimizing theories of modern government both antagonize and are antagonized by administrative preemption. The Court forfeited the original separation of powers model on the contingency that agencies not make "Law." Separately, the Court has mostly eschewed federalism's original strategy of enumerated (and limited) federal power in favor of political and procedural state safeguards in Congress. Administrative preemption upsets these conditional principles of modern government—again, simultaneously. If administrative preemption is justified on the ground that agencies make "Law" for purposes of the Supremacy Clause, this puts enormous pressure on the Court's longstanding insistence otherwise in the separation of powers context. And, if unelected administrative officials can displace state law in Congress's stead, the Court's heralded political-safeguards theory of federalism is mostly an empty promise.

These tensions reveal the difficulty of doctrinally squaring administrative preemption with the Court's theories of modern government. We might conclude that administrative preemption is right, and the conditional principles wrong. Or, we might conclude the inverse. But it is hard to conceive of a constitutional premise that makes both views correct. Perhaps one exists, or perhaps it will require a new constitutional bargain. Either way, we still await the Court's conciliation.

In the end, pragmatic argumentation may be the best (and perhaps the only) defense of administrative preemption. The reader can decide whether the pragmatic claims are enough to justify "the paradox of administrative preemption"—constitutionally or otherwise. What seems evident, however, is that something must give. As matters stand, administrative preemption is incompatible with the written Constitution and the Court's legitimating theories of modern government. Saving administrative preemption on pragmatic grounds shades over, but does not resolve, this incoherence.