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ADMINISTRATIVE LAW AS THE NEW FEDERALISM

Gillian E. Metzger*

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

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¹ See *infra* TAN__ and TAN __.

² As evidence of this obsession, the period 2007-2008 will witness publication of three prominent works on preemption: Richard A. Epstein & Michael S. Greve, *Federal Preemption: States Powers, National Interests* (AEI Press, 2007); Thomas O. McGarrity, *The Preemption War* (Yale, forthcoming 2008); William Buzbee ed., *Preemption Choice: The Theory, Law, and Reality of Preemption's Core Questions* (Cambridge Press, forthcoming 2008), in addition to numerous articles on the topic from a variety of perspectives (empirical, doctrinal, historical).

³ See, e.g., Department of Health & Human Servs., FDA, Requirements on Content and Format of Labeling for Human Prescription Drug and Biological Prods., 71 Fed. Reg. 3922 (Jan. 24, 2006) (FDA rule on drug labeling stating in its preamble that FDA's approval of a prescription drug label preempts not just state regulations but also state tort law and court decisions in product liability cases.); Final Rule: Standard for the Flammability (Open Flame) of Mattress Sets, 71 Fed. Reg. 13472 (Mar. 15, 2006), codified at 16 C.F.R. §§ 1633.1 et. seq. (2007) (Consumer Products Safety Administration rule on mattress safety stating in its preamble that the standard would preempt state rules and court decisions); 12 C.F.R. § 5.34(e) (2006) (Office for the Comptroller of the Currency rule stating in effect that state supervision of state-chartered subsidiaries of national banks is preempted, discussed *infra* at notes __-__ and accompanying text); Federal Motor Vehicle Safety Standards; Roof Crush Resistance, 70 Fed. Reg. 49,223 (2005) (Proposed rule for improving roof strength performance in rollover crashes, issued by the National Highway Traffic Safety Administration (NHTSA), containing a provision preempting state tort suits where the vehicle meets the government standard.); Chemical Facility Anti-Terrorism Standards, 71 Fed. Reg. 78,276 (Dec. 28, 2006) (to be codified at 6 C.F.R. 27.405(a)) (proposed Homeland Security regulation on chemical security stating that it would preempt conflicting state laws, though noting that preemption had been controversial in Congress's debates

It is therefore interesting that the relationship between federalism and administrative law remains strangely inchoate and unanalyzed. Administrative law's constitutional dimensions—in particular, doctrines of separation of powers and procedural due process—are generally recognized to have significant federalism implications.⁴ But more run-of-the-mill administrative law concerns—such as whether an agency adequately followed required procedures, engaged in reasoned decisionmaking, or deserves deference for its statutory interpretations—are rarely approached through a federalism lens. This is all the more surprising given the current focus on preemption, because despite their importance to our system of federalism, preemption determinations are understood as turning on questions of statutory interpretation rather than constitutional law.⁵ To be sure, the current preemption focus has sparked much discussion of the extent to which administrative agencies should be able to determine the preemptive scope of federal law. Yet few legal scholars have gone beyond this administrative preemption debate to consider the broader relationship between federalism and administrative law, and within this debate federalism and administrative law are often portrayed as in considerable tension.⁶

Recent Supreme Court case law suggests that the blinders to the relationship of federalism and administrative law may be lifting. In a number of decisions, the Court has demonstrated its unwillingness to impose significant constitutional limits on the substantive scope of Congress's regulatory powers. Yet it has also indicated that federalism concerns with protecting the states'

on chemical security). A number of recent articles have discussed these regulations. See, e.g., William Buzbee, *Asymmetrical Regulation: Risk, Preemption, and the Floor/Ceiling Distinction*, 82 *NYU L. Rev.* 1547, 1573-5 (2007); Catherine A. Sharkey, *Preemption by Preamble, Federal Agencies and the Federalization of Tort Law*, 56 *DePaul L. Rev.* 227 (2007). These regulations led to a recent Senate hearing on preemption. See *Regulatory Preemption: Are Federal Agencies Usurping Congressional and State Authority: Hearing Before the Senate Committee on the Judiciary*, 110th Cong. (September 12, 2007).

⁴ See, e.g., Bradford R. Clark, *Separation of Powers as a Safeguard of Federalism*, 79 *Tex. L. Rev.* 1321 (2001); *Sandin v. Connor*, 515 U.S. 472 (1995)[due process and federalism]

⁵ See Ernest A. Young, *The Rehnquist Court's Two Federalisms*, 83 *Tex. L. Rev.* 1, 133 (2004).

⁶ See, e.g., Nina A. Mendelson, *Chevron and Preemption*, 102 *Mich. L. Rev.* 737 (2004); Richard A. Nagareda, *FDA Preemption: When Tort Law Meets the Administrative State*, 1 *J. Tort L.* 1 (2006); Catherine M. Sharkey, *Preemption by Preamble: Federal Agencies and the Federalization of Tort Law*, 56 *DePaul L. Rev.* 227 (2007); Catherine M. Sharkey, *Products Liability Preemption: An Institutional Approach*, 76 *Geo. Wash. L. Rev.* (forthcoming 2008); see *infra* Part II.C; see also *Chevron U.S.A Inc. v. National Resources Defense Council, Inc.*, 467 U.S. 837, 843-44 (1984) (instructing courts to defer to a reasonable interpretation of an ambiguous statute by the agency charged with implementing it).

independent regulatory role nonetheless retain traction.⁷ The means by which the Court appears to be addressing such concerns, however, is administrative law. Acting ostensibly through the rubric of standard administrative law doctrines, such as reasoned decisionmaking requirements and the *Mead/Chevron/Skidmore* framework for review of agency statutory interpretations, the Court has ensured that the impact of challenged agency decisions on the states is considered. As a result, administrative law may be becoming the new federalism.

These moves towards transforming administrative law into a surrogate for federalism remain largely undeveloped. So far, the Court has failed to articulate a coherent account of how federalism and administrative law should be integrated; it has even failed to acknowledge that such an account may be needed or explicitly viewed its recent efforts in this light. Suggestions that administrative law may be the new federalism are present in only a handful of decisions, too few to draw any reliable inferences of a new doctrinal trend. Moreover, all of these decisions were highly contentious and may turn out to be essentially fact-dependent and result-driven. At a minimum, however, the Court appears to be increasingly aware of administrative law's importance to constitutional federalism. That increased awareness is also attested to by the Court's granting certiorari in several cases potentially implicating the role that federal administrative determinations should play in preemption challenges.⁸ Exploring the relationship between federalism and administrative law is particularly useful at this early juncture, when the Court's jurisprudence on the question is still in a formative state.

My aim in this article is twofold: first, to explore how the Court may be employing administrative law as a surrogate for constitutional federalism; and second, to assess how well administrative law performs this surrogacy role and how the Court should approach the relationship between federalism and administrative law. I conclude that administrative law has important federalism-reinforcing features, but that the Court's decisions to date have failed to fully develop administrative law's federalism potential. I also argue that the best approach—not only for the functioning of federal agencies but, critically, for the continued vibrancy of federalism in the world of the modern federal

⁷ As I use the term “federalism” or “federalism concerns” in this Article, I mean to refer to institutional interests of states in exercising the power to govern. See *infra* TAN __ (intro to III.B)).

⁸ On the Court's docket for this Term are two cases addressing the preemptive effect of federal administrative determinations this Term, *Riegel v. Medtronic, Inc.* and *Lambert v. Kent*. See *Riegel v. Medtronic, Inc.*, 451 F.3d 104 (2d Cir. 2006), cert. granted, 127 S. Ct. 3000 (June 25, 2007) (No. 06-179); *Desiano v. Warner-Lambert & Co.*, 467 F.3d 85, 91 (2d Cir. 2006) cert. granted sub nom. *Warner-Lambert Co. v. Kent*, 128 S. Ct. 31 (Sept. 25, 2007) (No. 06-1498). In addition, next Term the Court will hear another preemption case, *Wyeth v. Levine*, which raises the additional question of how much deference is due a federal agency's interpretation of its decisions' preemptive effect. See *Levine v. Wyeth*, 2006 Vt. 107 (2006), cert. granted sub nom *Wyeth v. Levine*, 76 U.S.L.W. 3391 (U.S. Jan. 18, 2008) (No. 06-1249)

administrative state—is for the Court (and Congress and the President) to advance federalism within the overall rubric of administrative law, rather than to treat federalism as a more absolute restriction on agency action absent express congressional authorization.

The article consists of four parts. Part I contains an analysis of recent Supreme Court precedent, focusing in particular on five decisions addressing the intersection of federalism and administrative law. Part II advances the claim that administrative law may be becoming the new federalism. Here I contend that the Court is unwilling to curb Congress on federalism grounds and that federalism concerns instead are being incorporated into administrative law. I then examine two ways in which federalism concerns are being addressed through an administrative law framework: application of ordinary administrative law to the benefit of the states and development of more extraordinary federalism-inspired administrative law analyses. I also discuss the current administrative preemption debate, which I contend approaches the relationship between federalism and administrative law in overly narrow terms, emphasizing the conflict between federalism and administrative law rather than their potential synergies.

Part III switches to a more normative and theoretical perspective. I begin with an analysis of whether using administrative law as a surrogate for federalism concerns is a legitimate judicial undertaking. I conclude that it is, and underscore the benefits of the administrative law approach over other subconstitutional federalism doctrines. I then examine whether, even if legitimate, using administrative law as a surrogate for federalism concerns is likely to prove effective. In addition to rejecting claims that administrative agencies are categorically ill-suited to protecting state regulatory autonomy, I emphasize the need to distinguish between agencies and administrative law. In that vein, I argue that three features of administrative law reinforce its federalism potential: its procedural mechanisms, in particular notice-and-comment rulemaking; its doctrinal and institutional capaciousness; and its very status as subconstitutional law.

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

I. A FEDERALISM AND ADMINISTRATIVE LAW QUINTET⁹

⁹ [Author note: this quintet may become a sextet when the Supreme Court issues its decision in *Riegel*.]

Federalism and administrative law are an unfamiliar couple, particularly in Supreme Court precedent. Although the Court regularly decides cases involving one or the other of these topics, and both are sometimes present in cases before it, for the most part the two remain doctrinally and analytically separate. But in five recent highly-charged decisions, issued over a several-year period, the relationship of federalism and administrative law has repeatedly risen to the fore. Most prominently this has taken the form of an injection of federalism into administrative law challenges of federal agency action. Yet the reverse has also occurred, with administrative law surfacing in more straightforward federalism challenges. This quintet of decisions is particularly worthy of study for insights into the Court’s growing awareness of the intersection between federalism and administrative law.

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

Challenges to actions by federal agencies are, of course, a regular staple of the Court’s docket. In recent years, the Court’s administrative law jurisprudence has focused overwhelmingly on determining agency statutory interpretations should receive *Chevron* deference.¹⁰ The three federal agency challenges discussed below—*Alaska Department of Environmental Conservation (ADEC) v. EPA*,¹¹ *Gonzales v. Oregon*,¹² and *Massachusetts v. EPA*,¹³—all share that focus, in that they involve challenges to agency interpretations of governing statutes.¹⁴

¹⁰ For examples of the Court’s continuing obsession with *Chevron*, see *Long Island Care at Home v. Coke*, 127 S. Ct. 2339 (2007), *Nat’l Cable & Telecomms. Ass’n v. Brand X Internet Servs.*, 545 U.S. 967 (2005); *Barnhart v. Walton*, 535 U.S. 212 (2002). Of course, the Court also issued decisions on other administrative law questions in this period, such as procedural due process, *Wilkinson v. Austin*, 545 U.S. 202 (2005); *Town of Castle Rock v. Gonzales*, 545 U.S. 748 (2005), and access to judicial review, *Wilkie v. Robbins*, 127 S. Ct. 2588 (2007), *Tenet v. Doe*, 544 U.S. 1 (2005).

¹¹ 540 U.S. 461 (2004).

¹² 546 U.S. 243 (2006).

¹³ 127 S. Ct. 1438 (2007).

¹⁴ A fourth decision that might be included in this category is *Rapanos v. United States*, 126 S. Ct. 2208 (2006). There, in rejecting the Army Corps of Engineers’s view of its jurisdiction under the Clean Water Act (CWA) as too broad, the plurality opinion by Justice Scalia emphasized that “the Corps’ interpretation stretches the outer limits of Congress’s commerce power” and intrude on “the States’ traditional and primary power over land and water use” by “authoriz[ing] the Corps to serve as a *de facto* regulator of immense stretches of intrastate land.” *Id.* at 2224 (quoting *Solid Waste Agency of Northern Cook Cty v. Army Corps of Engineers*, 531 U.S. 159, 174 (2001)). The plurality relied on these federalism concerns to justify its refusal to defer to the Corps’ statutory interpretation under *Chevron*, emphasizing that it “would expect a clearer

What differentiates them—aside from being high profile, very contentious decisions—is the degree to which members of the Court invoked federalism concerns in determining whether to uphold the challenged agency action.

I. Alaska Department of Environmental Conservation (ADEC) v. EPA.

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

The question in *ADEC* was whether EPA had authority to supervise a state’s BACT determinations. EPA read the CAA as granting it authority to block construction of a facility permitted by a state when it determined that the state’s BACT determination was unreasonable.¹⁷ In a 5-4 decision, the Court agreed, arguing that EPA’s interpretation, although “not qualify[ing] for the dispositive force described in *Chevron*” because only promulgated in internal guidance memoranda lacking the force of law, ““nevertheless warrants respect.””¹⁸ The Court further upheld EPA’s conclusion that the state environmental agency had

statement from Congress to authorize an agency theory of jurisdiction that presses the envelope of constitutional validity.” *Id.* at 2224–25; see also *id.* (emphasizing that Congress’s policy in the CWA intended to have the states play the primary role in pollution reduction and regulating use of land and water resources). Yet the extent to which the plurality opinion in *Rapanos* actually rests on federalism concerns is unclear. The opinion also contended that the Corps’ interpretation was contrary to the text of the CWA, and Justice Scalia’s invocation of federalism at the end of the opinion has an air of gilding the lily. See *id.* at 2220–23. In addition, Chief Justice Roberts argued in his concurrence that had EPA and the Corps gone forward with a proposed rulemaking on the jurisdictional question, their views of the CWA’s “broad [and] somewhat ambiguous” terms would have been entitled to deference—suggesting that federalism was not that central to his view of the case either. *Id.* at 2235–36. In any event, Justice Kennedy dismissed the plurality’s invocation of the avoidance canon on federalism grounds, see *id.* at 2246-27, 2249-50, and his vote concurring in the judgment was determinative of the result in the case.

¹⁵ 42 U.S.C. §§ 7475(a)(1), (4); § 7479(1); see generally 540 U.S. at 472.

¹⁶ 42 U.S.C. § 7410 (state responsibility in implementing the CAA); 42 U.S.C. § 7661a (procedure for delegating permitting authority to states); 42 U.S.C. § 7479(3) (giving authority to make BACT determinations to the permitting authority)

¹⁷ 540 U.S. at 469.

¹⁸ *Id.* at 487–88.

acted unreasonably in finding the facility met the CAA's BACT requirements and issuing a permit.¹⁹

From the majority's perspective, *ADEC* was simply an ordinary administrative challenge, one in which federalism figured hardly at all and instead the expertise and enforcement needs of the federal agency charged with implementation dominated. By contrast, the dissent written by Justice Kennedy viewed the case fundamentally in federalism terms. It argued vociferously that the Court's decision served remit "the federal balance . . . to a single agency official"²⁰ and "relegat[ed] States to the role of mere provinces or political corporations, instead of coequal sovereigns entitled to the same dignity and respect."²¹ The majority responded that the federal courts were available to protect the states against EPA overreaching, suggesting that it was not rejecting potential federalism concerns wholesale but instead simply did not find such concerns implicated in the specific agency action before it.²² For the most part, however, the majority and dissent in *ADEC* talked past one another, rather than attempting to resolve the tension between their federalism and administrative law rubrics.

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

2. *Gonzales v. Oregon*. In *Oregon*, the relationship between federalism and administrative law, hinted at in *ADEC*, assumed center stage. Decided in 2006, *Oregon* involved a challenge to Attorney General John Ashcroft's implementation of the Controlled Substances Act (CSA). Under the CSA, physicians can only dispense controlled substances if they are registered to do so with the Attorney General. In 2001, Attorney General John Ashcroft issued an interpretive rule stating that prescribing controlled substances to assist suicide

¹⁹ Id at 496–502.

²⁰ Id. at 517.

²¹ Id. at 518.

²² Id. at 490-91, 495. The facts of the case offer support for the majority's view. The CAA clearly assigned the EPA an oversight role regarding state permitting decisions and implementation decisions, and no one disputed that EPA had authority to prohibit a facility's construction or modification in some circumstances. EPA had long asserted the power over BACT determinations it claimed here, had raised its concerns with the state agency beforehand, and had suggested ways the state agency could justify its determination. In addition, the state agency's final BACT determination does seem unreasonable and to be motivated by reluctance to impose costs on a major employer in northwest Alaska rather than environmental concerns; notably, the state agency never explained the inconsistency between its ultimate BACT determination and its initial assessment that greater emissions control was economically feasible. Id. at 478–80, 498–500.

was grounds for suspending or revoking a doctor’s registration under the CSA because assisting suicide was not a legitimate medical purpose. As a practical matter, this rule would have nullified Oregon’s Death with Dignity Act, which legalized prescribing drugs in order to allow terminally ill patients to commit suicide, as doctors would be unwilling to issue such prescriptions if by doing so they risked losing their right to prescribe controlled substances altogether. Indeed, preventing assisted suicide under the Oregon act was clearly the motivation behind the rule’s promulgation.²³

In *Oregon*, the Court held that Ashcroft’s interpretive rule violated the CSA and was thus invalid. The majority portrayed its resolution of Oregon’s challenge as an ordinary assessment of whether an executive official exceeded her statutory authority; “an inquiry familiar to the courts” that was guided by “familiar principles” of administrative law.²⁴ In particular, the majority relied upon the Court’s 2001 decision in *United States v. Mead Corporation*, which had limited *Chevron* deference to instances when Congress had delegated authority to issue rules with the force of law to the agency.²⁵ The majority held that Congress had not delegated authority to determine what constitutes legitimate medical practice to the Attorney General, and thus that the interpretive rule did not merit deference. More generally, the majority’s opinion was animated by concerns of executive branch overreaching and self-aggrandizement. The danger it invoked was of a single executive official, lacking professional expertise and motivated by ideology, imposing his personal views of legitimate medical practice on the nation.²⁶ *Oregon* thus stands as a prime example of administrative law’s

²³ 546 U.S. 243, 254 (2006)

²⁴ *Id.* at 255

²⁵ 533 U.S. 218 (2001). The *Oregon* majority also cited precedent that precludes application of *Chevron* deference in contexts where more than one agency is given sole interpretive authority under a statute, and the CSA grants the Secretary of Health and Human Services a central role when medical judgments are involved. 546 U.S. at 266; Jacob E. Gersen, *Overlapping and Underlapping Jurisdiction in Administrative Law*, 2006 Sup. Ct. Rev. 201, 237 (emphasizing the importance of Congress’s decision to delegate to multiple agents in the CSA). Interestingly, Court did not rely on *Mead*’s suggestion that *Chevron* deference generally should apply only to agency statutory interpretations promulgated through agency procedures such as notice and comment rulemaking, *id.* at 226-27, perhaps because that aspect of *Mead* has proven more contentious for some members of the Court. See, e.g., *Barnhardt v. Walton*, 535 U.S. 212, 221 (2002).

²⁶ 546 U.S. at 272-73 (“The primary problem with the Government’s argument . . . is its assumption that the CSA implicitly authorizes an Executive officer to bar a use simply because it may be inconsistent with one reasonable understanding of medical practice.”); see also *id.* 253, 269 (emphasizing the Attorney General’s lack of any medical expertise and failure to consult before issuing the interpretive rule—either with Oregon or others in the executive branch—as well as noting Ashcroft’s prior efforts to prevent Oregon’s experiment with assisted suicide when a member of the Senate.)

longstanding concerns with politics trumping law and unchecked executive authority.²⁷

Yet the decision also plainly turns on federalism concerns. It was not simply concentrated power in the Attorney General that troubled the majority, but more specifically that “a single Executive officer [would have] the power to effect a radical shift of authority from the States to the Federal Government to define general standards of medical practice in every locality.”²⁸ Such was at odds with usual practice, under which “regulation of health and safety is ‘primarily, and historically, a matter of local concern.’”²⁹ Reading the CSA against this federalism backdrop, the majority rejected the idea that through the statute Congress intended to assert “expansive federal authority to regulate medicine.”³⁰ Instead, it portrayed the CSA as having a far more limited aim, preventing drug abuse and drug trafficking, and as relying on state regulation of medical practice.³¹

Oregon therefore represents an instance in which the Court clearly linked federalism and administrative law.³² On the surface the majority’s integration of these two appears smooth; according to the majority, the federalism implications of the interpretive rule were reason to doubt the Attorney General’s claim of delegated authority and to refuse to defer to his view of the CSA.³³ But tensions exist underneath this superficial doctrinal consistency. A core question left open by the majority opinion is whether its result would have been different had the

²⁷ See Freeman & Vermeule, *supra* note , at 30-31;. Professor Lisa Bressman has offered a slightly different take on *Gonzales*, arguing that it was the profoundly undemocratic aspect of the interpretive rule that made the Court reluctant to defer. See Bressman, *Democracy*, *supra* note, at 765, 776–80; William N. Eskridge & Kevin S. Schwartz, *Chevron and Agency Norm-Entrepreneurship*, 115 *Yale L. J.* 2623, 2630 (2006). On the relationship between law and politics in agency decisionmaking, see Peter L. Strauss, *When the Judge Is Not the Primary Official with Responsibility to Read: Agency Interpretation and the Problem of Legislative History*, 66 *Chi.-Kent L. Rev.* 321, 322, 335 (1990).

²⁸ 546 U.S. at 275. The similarity between this language and that of the *ADEC* dissent is more than just coincidence, as Justice Kennedy was the author of both.

²⁹ *Id.* at 271 (quoting *Hillsborough County v. Automated Medical Laboratories, Inc.* 471 U.S. 707, 710 (1985)).

³⁰ *Id.* at 273

³¹ *Id.* at 269-72. For a similar invocation of federalism to justify a narrower reading of a federal statute than that offered by the federal agency charged with its implementation, see *Rapanos*, 126 S. Ct. 2208, 2223-4.

³² This linkage was in the case in its presentation to the Court, and the Ninth Circuit had heavily stressed federalism in invalidating the interpretive rule. See *Oregon v. Ashcroft*, 368 F.3d 1118, 1124 (9th Cir. 2004).

³³ 546 U.S. at 270; see also *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944).

Attorney General’s rejection of assisted suicide emerged from a more consultative, formal process in which views of the Secretary of HHS were solicited and given determinative weight. Put differently, was the real problem here a violation of federalism norms or deviation from appropriate administrative process?³⁴ Answering this question was not necessary to resolve the case, but leaving it open obscures the import of *Oregon* regarding how federalism and administrative law intersect. In addition, the contrast between the decisions in *Oregon* and *ADEC* is noteworthy; in *Oregon*, the Court invoked federalism as a reason not to defer to a federal agency’s assertion of authority, whereas in *ADEC* the Court did defer notwithstanding the troubling federalism implications of doing so. Although largely fueled by factual differences between the two cases,³⁵ this unexplained discrepancy in results reinforces the sense that the Court lacked a consistent understanding of the relationship between federalism and administrative law.

3. *Massachusetts v. EPA*. Federalism and administrative law were again expressly linked in *Massachusetts*, a 5-4 decision issued a year later in 2007 in which the Court held that the state of Massachusetts had standing to challenge EPA’s refusal to regulate carbon dioxide and other greenhouse gases as air pollutants, and further that the reasons EPA gave to justify this refusal violated the CAA. In its presentation to the Court, *Massachusetts* appeared to be just an administrative law challenge—indeed, federalism was almost entirely absent from the case as it was briefed to the Court and in the decision below.³⁶ The majority opinion in *Massachusetts* imbued the case with federalism implications, however, by emphasizing Massachusetts’s status as a sovereign state in holding that Massachusetts had standing to sue. According to the majority, “[i]t is of

³⁴ The decision’s narrow view of the CSA appears to preclude the latter possibility, as does its emphasis on Congress’s role in maintaining the federal-state balance and the statute’s express restriction on preemption. 546 U.S. at 251, 269-74. But that conclusion is somewhat at odds with the opinion’s repeated emphasis on “the Secretary’s primacy in shaping medical policy under the CSA” and its assertion that “no question” exists that the federal government has constitutional authority to regulate medical practice. *Id.* at 271, 274; see also Gersen, *supra* note __. Moreover, given the majority’s recognition that “legitimate medical purpose” is ambiguous, it is unclear why such a joint, administratively proper determination by the federal officials delegated authority in this area by Congress should not be given deference. 546 U.S. at 258.

³⁵ The EPA’s actions in *ADEC* lacked many of the indicia of abuse and federal agency overreaching that characterized the Attorney General’s interpretive rule in *Oregon*. See *supra* note __.

³⁶ Federalism concerns surfaced in only one amicus brief submitted by Arizona and other states on behalf of Massachusetts. See *Br. of the States of Arizona et al., Amici Curiae in Support of Petitioners*, at 22-23, 2006 WL 2563380; Dru Stevenson, *Special Solicitude for State Standing: Massachusetts v. EPA*, 112 Penn. State L. Rev. 15, n.18, 30-31 (2007). Nor was the case an obvious vehicle for raising federalism concerns, given that it arose from a rulemaking petition filed with the EPA by private environmental groups; Massachusetts and other governments intervened in the case only after the rulemaking petition was denied. 127 S. Ct 1438, 1449-51.

considerable relevance that the party seeking review here is a Sovereign state”³⁷:

When a State enters the Union, it surrenders certain sovereign prerogatives. Massachusetts cannot invade Rhode Island to force reductions in greenhouse gas emissions, it cannot negotiate an emissions treaty with China or India, and in some circumstances the exercise of its police powers to reduce in-state motor-vehicle emissions might well be preempted.

These sovereign prerogatives are now lodged in the Federal Government, and Congress has ordered EPA to protect Massachusetts (among others) by prescribing [air pollutant] standards. . . . Congress has moreover recognized a concomitant procedural right to challenge the rejection of its rulemaking petition as arbitrary and capricious. Given that procedural right and Massachusetts’ stake in protecting its quasi-sovereign interests, the Commonwealth is entitled to special solicitude in our standing analysis.³⁸

Despite taking the initiative to invoke federalism concerns, the majority was quite imprecise with respect to how Massachusetts’s sovereignty interests were implicated.³⁹ Massachusetts was not claiming that its own regulatory efforts were unduly preempted by EPA or that the federal government was exceeding its constitutional powers—on the contrary, Massachusetts’ central allegation was that the federal government was not asserting its authority enough. The majority never explained why, having ceded regulatory authority to the federal government

³⁷ 127 S. Ct. at 1454.

³⁸ 127 S. Ct. 1438, 1454–55.

³⁹ The majority sought to draw an analogy to *parens patriae* precedent involving interstate pollution, in which the Court had emphasized the state’s “quasi-sovereign” interests “in all the earth and air within its domain” and in having “the last word as to whether its mountains shall be stripped of forests and its inhabitants shall breathe pure air.” 127 S. Ct. 1438, 1454 (quoting *Georgia v. Tennessee Copper Co.*, 206 U.S. 230, 237 (1907)). Insofar as the majority was using these cases to establish that Massachusetts had a cognizable interest in “preserv[ing] its sovereign territory” which was being lost due to rising water levels, the invocation of Massachusetts’s state status seems unnecessary, given that Massachusetts actually owned a “great deal” of coastal property in the state. 127 S. Ct. 1438, 1454; see also *infra* Part II.B.1. If, on the other hand, the majority sought to draw a connection to Massachusetts’s regulatory interest in controlling pollutant emissions within its borders, then—as Chief Justice Roberts argued in dissent—the federal-state context of the dispute before the Court rendered this interstate precedent inapplicable. By joining the union states did not cede regulatory authority over their territory to each other, but they did grant such power to the federal government. Not surprisingly, therefore, existing precedent is far less sympathetic to a state’s assertion of quasi-sovereign interests on behalf of its citizens against the federal government. *Mass v. Mellon*, 262 U.S. 447 (1923); *Alfred L. Snapp & Son v. Puerto Rico ex rel Barez*, 458 U.S. 592 (1982).

over an area, a state would continue to have a *sovereignty* interest in forcing the federal government to exercise that authority in a particular manner.

One possible explanation would focus on preemption. Section 209(a) of the CAA the CAA prohibits any state or political subdivision from adopting or enforcing “any standard relating to the control of emissions from new motor vehicles or new motor vehicle engines.”⁴⁰ This prohibition arguably give states distinct sovereign interests in ensuring that the EPA fulfills its statutory duties under the CAA. On this view, having been disabled by Congress from asserting its own regulatory authority, a state has a sovereign interest in ensuring that the federal government fulfills its regulatory responsibilities and regulatory gaps are avoided.⁴¹ Such an argument for state standing is certainly open to a variety of objections—among others, that allowing states access to federal court based solely on sovereignty interests fails to accord with the Constitution’s limitation of the federal judicial power to “cases” and “controversies” and thus to legal as opposed to political disputes. But it at least offers an explanation of why state sovereignty interests might be seen as implicated by the administrative challenge before the Court.

This alternative account is not, however, one offered by the *Massachusetts* majority.⁴² Instead, although clearly indicating that the Court perceived a

⁴⁰ 42 U.S.C. § 7543(a). Section 209(b) provides that EPA must grant a waiver for emissions controls promulgated by California (the only state with such a program in 1965), provided California determines that its “standards will be, in the aggregate, at least as protective of public health and welfare” as the federal standards and EPA does not find that this state determination is arbitrary and capricious, that California does not need the standards to meet “compelling and extraordinary conditions,” or that California’s standards are inconsistent with Section 202(a), 42 U.S.C. § 7521. The CAA further provides that other states may adopt and enforce California’s standards. *Id.* § 7521(a). California issued such emission standards, which were then adopted by eleven other states. See J.R. DeShazo & Jody Freeman, *Timing and Form of Federal Regulation: The Case of Climate Change*, 155 U. Pa. L. Rev. 1499, 1527. EPA denied California’s request for a waiver in December 2007, two years after the request was filed. Letter from Stephen Johnson, EPA Administrator, to Arnold Schwarzenegger, Governor of California (Dec. 19, 2007) available at <http://www.epa.gov/otaq/climate/20071219-slj.pdf>.

⁴¹ See Bradford C. Mank, *Should States Have Greater Standing Rights than Ordinary Citizens*, 49 Wm. & Mary L. Rev. __, __ (forthcoming 2008); Kathryn A. Watts & Amy J. Wildermuth, *Massachusetts v. EPA: Breaking New Ground on Issues Other than Global Warming*, 102 NW. U. L. Rev. __, __ (forthcoming 2008); 102 NW. U. L. Rev. Colloquy 1, 6-7 (2007). In addition, the CAA embodies a cooperative regulatory framework, under which states bear responsibility in the first instance for devising plans to ensure that air pollutant emissions within their borders meet federal air quality standards. [STAT CITE] The special role the states play in implementing the CAA could also be thought to give them added ability to challenge determinations EPA makes under the Act.

⁴² Although the majority insisted that Massachusetts was simply asserting “its rights under the [CAA],” 127 S. Ct. 1438, 1454–55 & n.17, the rights it was referring to were simply Massachusetts’ rights to petition EPA to engage in a rulemaking regarding new motor vehicle emissions of greenhouse gases and to challenge EPA’s violation of statutory requirements. The

connection between federalism and this challenge to federal agency action, the opinion—like the opinions in *ADEC*, *Raich*, and *Oregon*—leaves the nature of this connection quite opaque. Perhaps the majority’s emphasis on state status is a signal of the Court developing a deeper understanding of the role that states can play in overseeing federal program administration. Or perhaps this emphasis was simply a way of garnering Justice Kennedy’s vote and is a rule good for one case only, with the ultimate significance of *Massachusetts* being simply its forgiving application of the standard *Lujan* standing analysis to force the government to address global warming.⁴³ A third, equally plausible view is that *Massachusetts* will serve to undermine private groups’ access to the courts to challenge regulatory inaction, with the looser demands of injury, causation, and redressibility being read as only appropriate when states are plaintiffs.

B. *Administrative Law’s Appearance in Federalism Challenges*

Just as federalism has surfaced in administrative law challenges, so too has administrative law appeared in the Court’s federalism decisions, albeit to date playing a more tangential role. Here two decisions are particularly worthy of note: *Gonzales v. Raich*⁴⁴ and *Watters v. Wachovia Bank*.⁴⁵

problem is that these rights were in no way unique to Massachusetts as a state. See 42 U.S.C. § 7607(b)(1) (providing that a petition seeking review of the Administrator’s action in promulgating a standard under § 7521 or any final action taken by the Administrator must be filed in the D.C. Circuit, but not limiting who can file such a petition); see also *id.* § 7604, (“any person” may bring a suit against the Administrator to challenge the Administrator’s failure to undertake a nondiscretionary duty).

⁴³ See Jody Freeman & Adrian Vermeule, *Massachusetts v. EPA: From Politics to Expertise*, *Supreme Court Review* (forthcoming 2007) draft at 12-14.

⁴⁴ 545 U.S. 1 (2005).

⁴⁵ 127 S. Ct. 1559 (2007). In addition, in a few cases involving challenges to state actions in the context of cooperative federal-state programs, the Court emphasized the importance of the views of the federal agency involved. See, e.g., *Pharm. Research & Mfrs. of Am. v. Walsh*, 538 U.S. 644, 667-68 (2003); *S. D. Warren Co. v. Me. Bd. of Env’tl. Prot.*, 126 S. Ct. 1843, 1849 (2006); *Wash. State Dep’t of Soc. & Health Servs. v. Keffeler*, 537 U.S. 371, 391 (2003). Interestingly, however—and consistent with developments in administrative law generally—the Court generally gave little weight to federal views when those views were simply presented in amicus briefs in court, as opposed to officially adopted by the agency in the course of its implementation of the relevant statute. See, e.g., *Bates v. Dow Agrosciences*, 544 U.S. 431 (2005) (rejecting federal argument in favor of preemption raised solely by amicus briefs and not involving any concurring) (emphasizing importance of agency expertise on preemption questions); *Arkansas Dept of Health & Human Servs. v. Alhborn*, 547 U.S. 268 (2006) (rejecting US arguments in favor of state action raised primarily in amicus brief and noting that agency adjudicatory decisions cited by state were distinguishable on their facts, although also commenting that these decisions were at odds with statutory text); see also *Engine Mfrs Engine Mfrs. Ass’n v. S. Coast Air Quality Mgmt. Dist.*, 541 U.S. 246 (2004) (making no reference to US’s views in favor of preemption presented

1. *Gonzales v. Raich*. Decided a year before *Oregon*, *Raich* also involved the CSA, but its focus was on whether the CSA fell within Congress’s commerce power. In 1996 California passed a medical marijuana initiative, legalizing personal medical use and possession of marijuana.⁴⁶ The California law conflicted with the CSA, which lists marijuana as a Schedule I drug, and therefore prohibits all use of it. Two women who used marijuana under the terms of the California measure brought suit, arguing that the CSA’s ban exceeded Congress’s commerce power as applied to the cultivation, possession, and use of marijuana for personal medical purposes. By a 6-3 vote the Court rejected this claim. The *Raich* majority was unsympathetic to the plaintiffs’ as-applied framing, emphasizing that Congress has “power to regulate purely local activities that are part of an economic ‘class of activities’ that have a substantial effect on interstate commerce.”⁴⁷ Describing the activities regulated by the CSA as “quintessentially economic,”⁴⁸ the majority held that “Congress had a rational basis for believing that failure to regulate intrastate manufacture and possession of marijuana would leave a gaping hole in the CSA” and undermine that statute’s comprehensive regulatory scheme.⁴⁹ By contrast, the dissent insisted that the relevant activity was the cultivation, possession, and use of marijuana for personal medical purposes, which it deemed noneconomic and outside the scope of the commerce power.⁵⁰

Raich is overwhelming a federalism decision, and its focus is clearly on the scope of Congress’s constitutional powers. But administrative law also surfaces here, with the Court repeatedly noting that under the CSA the Attorney General has authority to change a drug’s schedule classification.⁵¹ Moreover, despite protesting that the specifics of how marijuana is regulated has “no relevance” to the question of congressional power, the majority went so far as to suggest that administrative denial of a petition to reschedule marijuana might well be overturned on appeal: “We acknowledge that evidence proffered by respondents in this case regarding the effective medical uses for marijuana, if

only in amicus briefs, notwithstanding Court agreed that California’s fleet rules preempted).

⁴⁶ Cal. Health & Safety Code Ann. §§ 11362.5(d).

⁴⁷ *Raich*, 545 U.S. at 17.

⁴⁸ *Raich*, 545 U.S. at 25–26.

⁴⁹ *Raich*, 545 U.S. 22.

⁵⁰ 545 U.S. at 48-57.

⁵¹ 545 U.S. 1, 14-15 & n.23, 28 n.25, 33 (2005).

found credible after trial, would cast serious doubt on the accuracy of the findings that require marijuana to be listed in Schedule I.”⁵²

Although administrative law plays only a marginal role in the majority opinion and is largely relegated to the footnotes, the interesting question is why it appears at all. The most plausible explanation is that it offers some solace to the specter of unlimited federal power. The majority wanted to underscore that finding an activity to fall within the scope of Congress’s constitutional authority did not mean that the resulting federal regulation was free of all legal constraints against federal overreaching.⁵³ The rescheduling option may have been “irrelevant” to the constitutional question of the scope of congressional authority, but it was quite relevant on a subconstitutional federalism level, as a means states could exploit to preserve the ability to experiment with medical care and obtained judicial scrutiny of federal determinations. Like *ADEC*, however, the *Raich* majority failed to spell out the relationship it saw between federalism and administrative law, thereby limiting its impact on future cases.

2. *Watters v. Wachovia Bank*. The *Watters* decision, the last in the quintet, was issued just two weeks after *Massachusetts*. *Watters* involved the interplay between federal and state banking authorities, and in particular the extent of supervision the latter could assert over state-chartered subsidiaries of national banks. Under the National Bank Act (NBA), national or federally-chartered banks are subject to oversight by the federal Office of the Comptroller of the Currency (OCC), with states generally being denied supervisory authority, also known as “visitorial powers.”⁵⁴ Ordinarily, state-chartered banking institutions are subject to state oversight, which in the case of Michigan’s law meant that institutions had to obtain a state license, file reports with the state, and

⁵² *Id.* at 28 n.25. This statement is particularly odd because the majority was reaching out to address a claim not before the Court. Compare *id.* at 33 (refusing to reach the respondents substantive due process and medical necessity defense claims on this ground). In addition, the statement appears to mischaracterize the procedure used to review a scheduling classification insofar as it suggests the proper schedule listing for marijuana would ever be a matter for a “trial.” Under the CSA, the means for challenging the level at which marijuana is listed is an administrative petition directed to the Attorney General which would trigger a formal rulemaking procedure and then be subject to judicial review based on the rulemaking record. See 21 U.S.C. § 811; see also *Nova Scotia United States v. Nova Scotia Food Prods. Corp.*, 568 F.2d 240 (2nd Cir. 1977) (holding that review of a regulation is based solely on the rulemaking record, not supplemented by additional evidence introduced at a subsequent enforcement trial). But the majority may simply have used the term “trial” loosely to mean challenge.

⁵³ Or political constraints. See *Raich*, 545 U.S. at 33 (“[P]erhaps even more important than these legal avenues is the democratic process, in which the voices of voters allied with these respondents may one day be heard in the halls of Congress.”).

⁵⁴ See 12 U.S.C. §§ 24, 93a, 371(a), *NationsBank v. Variable Annuity Life Ins. Co.*, 513 U.S. 251, 254 (1995). A core aspect of supervision, the ability to inspect a bank’s books and operations, is referred to as “visitorial powers” and the NBA provides that “[n]o national bank shall be subject to any visitorial powers except as authorized by Federal law.” *Id.* § 484(a).

were subject to state audits.⁵⁵ In 2000, the OCC promulgated a regulation providing that “State laws apply to national bank operating subsidiaries to the same extent that those laws apply to the parent national bank.”⁵⁶ Given that state supervisory laws do not apply to national banks under the NBA absent express statutory provision to the contrary, the import of the regulation was to preempt state supervision in regard to all national bank operating subsidiaries, even those that are state-chartered.⁵⁷

Watters appeared to be the occasion on which the Court would resolve a recurrent question in preemption challenges that directly engages the relationship between federalism and administrative law: to what extent should courts defer to administrative agencies’ interpretations of the preemptive scope of the statutes they administer?⁵⁸ On the one hand, the presumption against preemption and federalism concerns with intruding on a traditional area of state regulation counseled against granting deference to the OCC’s regulation.⁵⁹ On the other, from a purely administrative law perspective, the OCC’s views deserved deference: the NBA did not expressly address the question of state supervision of national bank subsidiaries; the OCC was the federal agency charged with implementing the NBA; and the OCC had promulgated its regulation using

⁵⁵ 127 S.Ct. 1559, 1565–66.

⁵⁶12 CFR § 7.4006.

⁵⁷ See *id.*; see also 12 U.S.C. § 24a(g)(3)(A); 12 CFR § 5.34(e) (2006). OCC also argued in favor of broad preemption of substantive state law as applied to national banks. See *infra* note — .

⁵⁸ For earlier decisions presenting but not resolving this question, see *Geier v. Am. Honda Motor Co.*, 529 U.S. 861, 883–86 (2000) (stating that DOT’s position that federal regulatory standard preempted state tort action at issue should be accorded “some weight,” but holding deference unnecessary to conclude preemption appropriate); *id.* at 911 (Stevens, J., dissenting) (arguing deference to agency views raised in legal brief inappropriate); *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 496 (1996) (stating that its determination that statute did not preempt state tort claims was “substantially informed” by federal regulations and that the agency’s views of the statute should be given “considerable weight”); *id.* at 505 (Breyer, J., concurring) (arguing that agencies should have “a degree of leeway” to determine preemptive effect of ambiguous statutes); *id.* at 512 (O’Connor, J., dissenting) (“It is not certain that an agency regulation determining the pre-emptive effect of *any* federal statute is entitled to deference.”); *Smiley v. Citibank (South Dakota) N.A.*, 517 U.S. 735, 744 (1996) (assuming *arguendo* that the question of whether a statute is preemptive “must always be decided *de novo* by the courts”).

⁵⁹ See *Medtronic Inc. v. Lohr*, 518 U.S. 470, 485 (1996) (describing the presumption against preemption set out in *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947)).

notice-and-comment rulemaking. Ordinarily, these features would suffice to trigger *Chevron* deference.⁶⁰

The Supreme Court, however, held in a 5-3 decision that the NBA itself preempted state supervision over national bank subsidiaries, concluding that therefore the degree of deference due the OCC here was “an academic question” it need not address.⁶¹ But that the majority foreswore the need to discuss *Chevron* deference should not be read as signally that the decision bypassed administrative law. On the contrary, its analysis fell well within the administrative law ambit: like *Massachusetts*, in administrative law terms the *Watters* decision represents a *Chevron* step one determination, to the effect that the NBA unambiguously preempted the state supervisory and licensing requirements at issue.

Watters represents an expansive approach to preemption. Strikingly, the majority treated the possibility of both state and federal oversight of state-chartered subsidiaries as an unjustified regulatory burden, rather than as a common feature of a federal system—and one national banks could have avoided by not utilizing state-chartered subsidiaries.⁶² Indeed, the majority denied that a subsidiary’s state-chartered status gave states any more legitimate interest in overseeing its actions than they would have in the overseeing its parent national bank. To a large extent, the majority’s unsympathetic stance to the states stemmed from the fact that the case involved the NBA, a statute the Court has fairly consistently read as creating a presumption against state regulation of national banks and in favor of exclusive federal control.⁶³ Yet application of the

⁶⁰ See, e.g., *Coke v. Long Island Care at Home v. Coke*, 127 S. Ct. 2339, __ (2007); *United States v. Mead Corp.*, 533 U.S. 218, __ (2001). All of the appellate courts that considered challenges to state efforts to exercise oversight over national bank subsidiaries had invoked *Chevron* in upholding the OCC’s regulation. See *National City Bank of Indiana v. Turnbaugh*, 463 F.3d 325, 331-33 (4th Cir. 2006); *Wachovia Bank, N.A. v. Burke*, 414 F.3d 305, 315-16 (2nd Cir. 2005); *Watters v. Wachovia Bank*; 431 F.3d 556, 560-63 (6th Cir. 2005); *Wells Fargo Bank, N.A. v. Boutris*, 419 F.3d 949, 962-67 (9th Cir. 2005).

⁶¹ 127 S. Ct. 1559, 1572-73 & n.13. Justice Thomas did not participate. Justice Stevens disagreed with the majority’s view of the NBA and also argued that *Chevron* deference was inappropriate here. See *id.* at 1578-79, 1581-85.

⁶² 127 S. Ct. at 1568, 1572-73.

⁶³ See, e.g., 127 S. Ct. at 1567 (“We have ‘interpreted grants of . . . powers to national banks as grants of authority . . . Ordinarily pre-empting contrary state law.’” (quoting *Barnett Bank*); *id.* at 1571 (“Security against significant interference by state regulators is a characteristic condition of the business of banking conducted by national banks . . .”)(internal quotations omitted). Their different understandings of the NBA and banking in general may explain the interesting line-up of Justices in the case; Justice Ginsburg, often solicitous of state regulatory authority, wrote the majority opinion, in which she was joined by Justice Kennedy, a frequent advocate of state interests. On the other hand, Justice Scalia, usually insistent on full-scale application of *Chevron*—including in *Gonzales v. Oregon*, application of *Chevron* to agency action that preempted state regulation—joined Justice Stevens’ dissent that seemed to suggest

NBA presumption here was certainly contestable, given the importance of state versus federal chartered status to the nation's dual banking system, as well as the lack of clear authorization in the NBA for either national banks' use of state-chartered operating subsidiaries or the displacement of state supervision of such subsidiaries.⁶⁴ Perhaps more importantly, the majority never addressed the states' concern that, absent some independent oversight role, they would lack the ability to enforce state laws to which the subsidiaries at issue were subject.⁶⁵ Although such state laws were enforceable by the OCC, Michigan and its amici expressed concern that the OCC was aggressively seeking to free national banks from state control and would prove unwilling to enforce state consumer protection laws in the place of state agencies.⁶⁶

Chevron was never applicable to preemptive agency action absent express statutory authorization.

⁶⁴ See *infra* TAN ___-___ (Part II.C.2) (discussing ambiguity in the NBA); see also Kenneth E. Scott, *The Dual Banking System*, 30 *Stan. L. Rev.* 1, 3-6 (1977) (describing the dual banking system and noting the importance played by chartering entity). It also merits noting that national banks that want to avoid the burdens of state oversight appear to have alternatives: conducting the activities in question through a separate division of the national bank rather than through an operating subsidiary, see 127 S. Ct. 1559, 1585 (Stevens, J., dissenting), or seeking a federal charter for their operating subsidiaries. [CHECK LATTER].

⁶⁵ Although the OCC has adopted regulations broadly preempting state banking laws as applied to national banks, that issue was not before the Court in *Watters*. Moreover, the decision was generally careful to limit its holding to state enforcement and not state power to regulate. Compare 127 S Ct 1559, 1564–65, 1573 (describing holding as being that national bank operating subsidiaries are not subject to “licensing, reporting, and visitorial regimes of the several States”); see also *id.* at 1567 (noting that national banks are subject to state laws of general applicability “to the extent such laws do not conflict with the letter or the general purposes of the NBA”) with 127 S. Ct. 1559, 1570 (referring to burdens imposed by “duplicative state examination, supervision, and regulation”(emphasis added): *id.* at 1568 n. 6 (quoting OCC regn, 69 FR 1908 (2004) (discussing burdens “of multiple, often unpredictable, different state or local restrictions and requirements”).

⁶⁶ See Brief for the Petitioner at 31-39, *Watters v. Wachovia Bank, N.A.*, 127 S.Ct. 1559 (2007) (No. 05-1342), 2006 WL 2570336; Brief of the States of New York, et al. as Amicus Curiae in Support of the Petitioner at 8, *Watters*, 127 S.Ct. 1559 (No. 05-1342), 2006 WL 2570992. See Wilmarth, *supra* note , at 275,–76, 292, 296–97 (arguing that OCC is too self-interested on the question of preemption because of its reliance on fees from banks with national charters and describing OCC's advocacy of freedom from state laws as an advantage of a national charter). Conflicts between OCC and the states were not limited to the state-chartered subsidiary context, but instead had also arisen in regard to enforcement of state consumer protection laws generally. See *Clearing House Ass'n, L.L.C. v. Cuomo*, 510 F.3d 105 (2d Cir. 2007); Nicholas Bagley, Note, *The Unwarranted Regulatory Preemption of Predatory Lending Laws*, 79 *N.Y.U. L. Rev.* 2274, 2284-86 (2004) (OCC preemption of state predatory lending laws). Adding substance to the states fears are the OCC's own statements indicating that it believes most substantive state laws are preempted as applied to national banks. See OCC, *Bank Activities and Operations*, 69 *Fed. Reg.* 1895,1912-13 (2004); Arthur E. Wilmarth, *The OCC's Preemption Rules Exceed the Agency's Authority and Present a Serious Threat to the Dual Banking System and Consumer Protection*, 23 *Ann. Rev. Banking & Fin. L.* 225, 233 (2004).

Thus, despite being decided in close succession, *Watters* and *Massachusetts* are polar opposites in their approach to state interests. In *Massachusetts*, the Court injected federalism into what had previously been thought a purely administrative law case and underscored the legitimacy of undefined state sovereignty interests. By contrast, in *Watters* it declared federalism essentially irrelevant and gave little weight to a concern seemingly central to state sovereignty: ensuring adequate enforcement of state laws. Interestingly, *Massachusetts* could be seen to offer a remedy for the enforcement gap that the states feared in *Watters*, because *Massachusetts*' logic would suggest that states should have standing to sue the OCC to enforce state laws if the OCC refuses to do so and the states cannot enforce these laws themselves. Yet notwithstanding the states' expressed concerns and the immediacy of the *Massachusetts* precedent, the *Watters* majority opinion nowhere discusses the relationship between federal and state regulatory agencies, directing its attention instead solely to the relationship between federal and state legislation.

The striking contrast between *Massachusetts* and *Watters* suggests confusion on the Court with respect to how to structure the relationship between federalism and administrative law. More clarification seems likely to come when the Court decides several cases currently on its docket that address federal agency preemption of state law.⁶⁷

II. ADMINISTRATIVE LAW AS A FEDERALISM SURROGATE

⁶⁷ The Court likely will be forced to confront the administrative preemption issue head on in *Wyeth v. Levine*, a case on its calendar for next Term addressing the extent to which approval of a prescription drug label by the Federal Drug Administration preempts state tort law actions based on that labeling. The FDA has taken the position, in a preamble to a recent rule on drug labeling, that its labeling determinations are preemptive. Department of Health & Human Servs., FDA, Requirements on Content and Format of Labeling for Human Prescription Drug and Biological Prods., 71 Fed. Reg. 3922 (2006). In *Wyeth*, the Vermont Supreme Court did not defer to the FDA's view and found a state law failure to warn claim not preempted. 2006 Vt. 107, ¶¶ 30-32.

Administrative preemption may also arise in conjunction with *Riegel v. Medtronic, Inc.*, a case on which the Court recently heard oral argument. In *Riegel*, the Second Circuit held state law claims for injuries caused by medical devices that received premarket approval from the FDA under the 1976 Medical Device Amendments (MDA) to the Federal Food, Drug and Cosmetic Act (FDCA) are preempted. 451 F.3d. 104, 106 (2006). Although FDA regulations limit preemption to instances in which the FDA has established "specific counterpart regulations or . . . other specific requirements applicable to a particular device," 21 C.F.R. § 808.1(d) (1995), in amicus briefs in recent years the FDA has taken the view that premarket approval does broadly preempt state claims. Thus, how much deference is due to the agency's view of the statute's preemptive effect could be centrally implicated in the case, and the Solicitor General had urged the Court not to grant cert in *Wyeth* before issuing its decision in *Riegel* for this reason. However, the fact that the Court granted certiorari in *Wyeth* appears a strong indication that its decision in *Riegel* will not address this question. A third case on the Court's docket for this Term, *Warner-Lambert v. Kent*, 128 S. Ct. 31 (2007), also addresses the preemptive effect of FDA actions, specifically whether state tort claims are preempted where plaintiffs allege that the drug company withheld or misrepresented information that would have changed the agency's approval decision—so called "fraud on the FDA" cases.

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

Nonetheless, these decisions share some common if inchoate themes. One is their unwillingness to curb congressional regulatory authority, whether by means of straightforward constitutional federalism restrictions or subconstitutional doctrines requiring clear authorization for federal agency action that substantially impacts the states. Another is their recurrent reliance on administrative law as a surrogate mechanism for addressing federalism concerns. The character of this surrogacy role varies and the extent to which the Court is intentionally using administrative law in this way is unclear. But at least as a practical matter, in these decisions administrative law operates to mitigate the impact of federal agency decisions on the states and protect the states against federal agency overreaching. This use of administrative law as a federalism surrogate is obscured in the current debate over administrative preemption, which tends to underscore tensions between federalism and administrative law rather than their potential symbiosis.

A. *Administrative Law as the New Federalism*

1. *The Absence of Constitutional Federalism Curbs on Congress.* An important initial point to note is the Court's unwillingness to curb congressional regulatory authority on constitutional federalism grounds. This unwillingness is most apparent in *Raich*, with its deference to Congress on the question of what constitutes the relevant class of activities against which a Commerce Clause challenge is assessed, its broad definition of economic activity, and its lack of

concern with protecting state regulatory experiments.⁶⁸ Little will fall outside of Congress' regulatory purview under *Raich's* approach to the commerce power.⁶⁹ No doubt, some measures may go too far in regulating intrastate activity,⁷⁰ and constraints such as the anti-commandeering rule will continue to apply.⁷¹ Nonetheless, *Raich's* clear import is that the expansive view of the commerce power, in place since the New Deal, will largely continue to govern.⁷²

The other five decisions echo this same theme; in none did the Court suggest that Congress had overstepped its constitutional authority by enacting the regulatory scheme in question. Indeed, even the *Watters* and *ADEC* dissents agreed that Congress had power to authorize federal agencies to preempt state action or review state administrative determinations.⁷³ Further evidence of the

⁶⁸ 545 U.S. 1, 25; see also Ernest A. Young, Just Blowing Smoke? Politics, Doctrine, and the Federalist Revival After *Gonzales v. Raich*, 2005 Sup. Ct. Rev. 1, 33-37 (critiquing *Raich's* failure to take state experimentation seriously).

⁶⁹ See 545 U.S. 1, 46 (O'Connor, J., dissenting) (arguing that *Raich's* deference to congressional class of activity determinations transformed the decisions in *United States v. Lopez*, 514 U.S. 549 (1995) and *United States v. Morrison*, 529 U.S. 598 (2000), which had upheld commerce power challenges, into "nothing more than a drafting guide" that warned Congress about the consequences of regulating too narrowly). For a similar views of *Raich*, see Jonathan Adler, Is Morrison Dead? Assessing a Supreme Drug (Law) Overdose, 9 Lewis & Clark Law Review 751, 762-66 (2005); Ilya Somin, *Gonzales v. Raich*: Federalism as a Casualty of the War on Drugs, 15 Cornell J. L. & Pub. Pol'y 507, 513-19 (2006); see also Young, Just Blowing Smoke? supra note , at 38-40 (arguing that "[o]ne can identify plausible federal statutes . . . that would exceptionally hard to justify on any of the theories offered in *Raich*," but adding that "*Raich* most likely marks the outer bound of the Court's ambition in Commerce Clause cases" and that "[a] rollback of the national regulatory state was never in the cards.").

⁷⁰ Cf. *Rapanos v. United States*, 126 S. Ct. 2208, 2224 (2006) (finding that federal jurisdiction over "ephemeral flows of water" under the CWA "stretches the outer limits of Congress's commerce power" and would require a clearer statement from Congress); *Solid Waste Agency of N. Cook Cty. v. Army Corps of Engineers*, 531 U.S. 159, 172-73 (2001) (limiting federal jurisdiction under the CWA to navigable waters to avoid Commerce Clause issue).

⁷¹ See *Printz v. United States*, 521 U.S. 898, 933 (1997); *New York v. United States*, 505 U.S. 144, 188 (1992).

⁷² Nor will the Court's recent changes in membership likely effect this conclusion, given that Justices Kennedy and Scalia voted to uphold congressional power in *Raich*.

⁷³ The *Watters* dissent is clearest on this, rejecting out-of-hand Michigan's suggestion that granting federal agencies the power of preemption violated the Tenth Amendment. See 127 S. Ct. 1559, 1585 (2007). Justice Kennedy was more oblique in *ADEC*, in particular noting constitutional limits on the commerce power such as the anti-commandeering rule, but ultimately he too appears to accept Congress's "vast legislative authority" would allow it to authorize federal agency review of state agency and state court determinations. 540 U.S. 461, 512-13 (2004). As discussed above, three justices in *Raich* did assert that application of the CSA to personal medical use and cultivation of marijuana was outside Congress's power. See supra TAN ___.

absence of constitutional federalism comes from the Court's preemption determination in *Watters*, with its willingness to find preemption absent clearly stated congressional intent and based on a pragmatic assessment of the impact of state involvement on the federal regulatory scheme. In this regard, *Watters* was typical of recent preemption jurisprudence, in which the Court has regularly upheld preemption claims absent a clear and direct conflict between federal and state law, based on its conclusion that nonetheless state law would be an obstacle to achieving the underlying purposes of federal regulation.⁷⁴ As Daniel Meltzer has noted, such "[a] freewheeling preemption jurisprudence . . . limits state autonomy."⁷⁵

As that suggests, the lack of constitutional curbs on congressional regulatory authority is hardly unique to these five decisions. The Court has signaled similar reluctance to limit other forms of congressional power that underlie many federal regulatory programs, in particular the spending power and the Necessary and Proper Clause.⁷⁶ Equally important, in its 2001 decision in *Whitman v. American Trucking Associations* the Court refused to curtail Congress's ability to delegate power broadly to administrative agencies, stating it has "almost never felt qualified to second-guess Congress regarding the permissible degree of policy judgment that can be left to those executing or

⁷⁴ See Daniel J. Meltzer, *The Supreme Court's Judicial Passivity*, 2002 Sup. Ct. Rev. 343, 362-68; see also Catherine M. Sharkey & Samuel Issacharoff, *Backdoor Federalization*, 53 U.C.L.A. L. Rev. 1353, 1372 (2006); Ernest A. Young, *The Rehnquist Court's Two Federalisms*, 83 Tex. L. Rev. 1, 30-32, 130-34 (2004). As many have noted, the Court's preemption jurisprudence, particularly relating to preemption of state tort law, is marked by inconsistencies. See e.g. Viet Dinh, *Reassessing the Law of Preemption*, 88 Geo. L. J. 2085 (2000); Jack Goldsmith, *Statutory Foreign Affairs Preemption*, 2000 Sup. Ct. Rev. 175 (2000); Roderick M. Hills, Jr., *Against Preemption: Against Preemption: How Federalism Can Improve the National Legislative Process*, 82 N.Y.U. L. Rev. 1, 17-36 (2007); Caleb Nelson, *Preemption*, 86 Va. L. Rev. 225 (2000). Thus although generally expansive in its preemption inquiry in recent years, the Court has also occasionally invoked a presumption against preemption and read the preemptive effect of federal statutes more narrowly. See, e.g., *Bates v. Dow Agrosciences*, 544 U.S. 431, 449 (2005); Young, *Blowing Smoke*, supra note , at 40-41.

⁷⁵ Meltzer, supra note , at 369.

⁷⁶ *Sabri v. United States*, 541 U.S. 600, 605 (2004) (upholding federal bribery statute that covers any employee of a entity that receives more than \$10,000 in federal funds, including a state or local government, under the spending power and Necessary and Proper Clause.); see also *United States v. American Library Assn*, 539 U.S. 194, 203 (2003) (plurality op.) (discussing federal government's ability to broadly impose conditions on federal grants). The Court has been much more willing to impose limits on Congress's Congress's authority under Section 5 of the Fourteenth Amendment, but the commerce power is far more important to the modern federal administrative state. See, e.g., *Bd. of Trs. of the Univ. of Ala. v. Garrett*, 531 U.S. 356, 374 n.9 (U.S. 2001) [noting that duties on public Ers still apply, all that is invalidated is private money damages remedy].

applying the law.”⁷⁷ To be sure, the scope of congressional delegations is still subject to scrutiny, as *Oregon* demonstrates, but critically such scrutiny takes a subconstitutional form, focusing on issues of statutory interpretation.⁷⁸ Congress’s constitutional ability to delegate broadly is accepted, and judicial inquiry centers again on determining whether Congress in fact did so.

2. *The Absence of Subconstitutional Federalism Doctrines.* Interestingly, in the five decisions the Court also eschewed overt reliance on subconstitutional or quasiconstitutional federalism doctrines, specifically federalism-inspired canons of statutory construction such as the presumption against preemption or clear statement rules.⁷⁹ *Oregon* is particularly noteworthy in this regard, as such canons had provided one of the bases on which the Ninth Circuit below had invalidated the interpretive rule.⁸⁰ By contrast, the Supreme Court viewed the challenge solely through an administrative law lens, holding that was “unnecessary even to consider” application of such federalism-inspired canons to conclude that the CSA did not delegate to the Attorney General the authority that he claimed.⁸¹

This exclusion of federalism canons sparked rebukes from dissenting justices.⁸² But only in the 2004 decision in *Nixon v. Missouri Municipal League* did a majority of the Court agree that invocation of a federalism-inspired clear statement rule was appropriate. And *Nixon* stands out from the mine run of most administrative action in that at issue was whether a federal statute preempted state’s regulation of local governments, rather than private parties—a feature that had led even the federal agency involved, the Federal Communications Commission, to conclude that clear evidence of a congressional desire to preempt was required.⁸³

⁷⁷ 531 U.S. 457, 474-75 (2001) (quoting *Mistretta v. United States*, 488 U.S. 361, 416 (1989) (Scalia, J., dissenting)).

⁷⁸ This subconstitutional posture is also true of instances when the Court has construed statutory delegations narrowly to avoid constitutional concerns. On this practice, see John F. Manning, *The Nondelegation Doctrine as a Canon of Avoidance*, 2000 Sup Ct. Rev. 223 (2000); Cass R. Sunstein, *Nondelegation Canons*, 67 U. Chi. L. Rev. 315, 315-16 (2000).

⁷⁹ See, e.g., *Gregory v. Ashcroft*, 501 U.S. 452, 460-61 (1991); William N. Eskridge Jr. & Philip P. Frickey, *Quasi-Constitutional Law: Clear Statement Rules As Constitutional Lawmaking*, 45 Vand. L. Rev. 593 (1992)

⁸⁰ See *Oregon v. Ashcroft*, 368 F.3d 1118, 1125 (9th Cir. 2004).

⁸¹ 126 S. Ct. 904, 925. But see Gersen, *supra* note , at ___ (arguing the *Oregon* majority relied on the presumption against preemption).

⁸² See *Watters*, 127 S. Ct. at 1585-86; *ADEC*, 540 U.S. at 513.

⁸³ 541 U.S. 125, 130-31, 141 (2004).

The Court's general failure to invoke such federalism doctrines in these decisions should not be surprising. Clear statement requirements fit poorly in administrative contexts. After all, in these contexts Congress has clearly spoken; it has delegated power to the federal agency to implement the regulatory scheme at issue. As *Whitman* demonstrates, the Court ordinarily does not require Congress to clearly specify the bounds of administrative authority. Insisting that Congress do so when federal administrative action substantially impacts the states, even if justifiable on federalism grounds, stands in sharp contrast to the Court's usual deference and respect for congressional regulatory choices.

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

The contrast between *Raich* and *Oregon* is singularly illustrative of this point. Although unsympathetic in *Raich* to claims that the CSA exceeded Congress's constitutional authority, the Court proceeded in *Oregon* to give voice to concerns about the impact of the CSA on the states through its administrative law analysis. This reliance on administrative law in lieu of constitutional law helps explain the striking change in position of many of the Justices between *Raich* and *Oregon*.⁸⁴ It also sparked a plaintive complaint from Justice Thomas, who remarked in *Oregon* that though he was sympathetic to the federalism argument, "that is now water over the dam. The relevance of such considerations was at its zenith in *Raich*. . . . [but] have little, if any relevance where, as here, we are merely presented with a question of statutory interpretation, and not the extent of constitutionally permissible federal power."⁸⁵

Yet given the constitutional backdrop outlined above, the Court's move to addressing federalism concerns through an administrative law framework makes sense. Administrative law offers a means by which the Court can raise such concerns while still respecting Congress's regulatory authority. Under an administrative law framework, the target of the Court's scrutiny is not Congress but federal agencies. Indeed, the courts can position themselves as agents of

⁸⁴ Justices Stevens, Kennedy, Souter, Ginsburg, and Breyer all supported the claims of federal power in *Raich* and rejected them here, whereas Justice Thomas rejected the claim of federal power in *Raich* and upheld it here. Justice Scalia was the lone member to affirm federal power in both cases, while Justice O'Connor was the only one to vote against federal power on both occasions. Chief Justice Roberts, who dissented in *Oregon*, was not on the Court when *Raich* was decided.

⁸⁵ 546 U.S. 243, 301-02.

Congress, enforcing legislative will—whether in the form of particular substantive requirements in organic statutes or the default demands of the Administrative Procedure Act (APA)—against a recalcitrant executive branch. Moreover, scrutinizing agency determinations is an activity with which the courts are quite familiar and for which they can draw on an established body of doctrine independent of federalism analysis.

The decisions are much less clear about how exactly administrative law performs this federalism surrogacy role. Two seemingly distinct models emerge. In one, the Court stays well within the contours of standard administrative law, with the connection to federalism lying simply in the fact that application of standard doctrines redounds—or might redound—to the benefit of the states. In the other, appears to be giving federalism concerns special salience in its administrative law analysis, either expressly invoking state interests or deviating from standard doctrines in ways that help protect states against federal agency overreaching. This divergence in approach makes it difficult to reach any firm conclusions about how the Court envisions administrative law’s surrogacy role—as well as about whether the Court is consciously employing administrative law as a federalism surrogate at all. Yet this divergence should not obscure the more important point, which is the dominance of administrative law paradigms instead of express federalism doctrines in these decisions. Thus, regardless of whether the Court perceives administrative law as a federalism surrogate or not, it is at least approaching these cases in a manner that allows for administrative law to play such a role.

B. *Ordinary Administrative Law and Federalism*

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

1. *Administrative Procedure: Redress and Participation.* Administrative procedure appears often in these decisions. In some cases, the procedures emphasized were administrative routes by which states could obtain seek to alter federal requirements. Thus, for example, *Raich* emphasized the option of petitioning the Attorney General to have marijuana removed from Schedule I and relisted as a Schedule II drug, while *Massachusetts* stressed that under the CAA Massachusetts had the right to petition the EPA to issue rules regulating greenhouse gas emissions.⁸⁶ Similar emphasis on the importance of agency-level

⁸⁶ *Raich*, 545 U.S. at 33; *Massachusetts*, 127 S. Ct. at 1454-55.

means of redress is evident in *ADEC*. There, the Court underscored that EPA was willing to reconsider its rejection of ADEC’s BACT determination if the state submitted additional evidence, dismissing the dissent’s fears that this amounted to a “piling of process upon process.”⁸⁷

Administrative procedure also surfaces occasionally in these decisions as a means of ensuring state participation and consultation in federal agency decisions. Again *ADEC* is illustrative; the majority described in detail EPA’s repeated communications with ADEC over the proposed permit and the BACT determination. These communications, it should be noted, were procedurally deficient and unnecessarily oblique.⁸⁸ What appeared to matter more to the majority, however, was that EPA had raised its concerns when the state agency was formulating the permit and had suggested specific ways that the state could satisfy these concerns.⁸⁹ By contrast, lack of consultation is a theme the *Oregon* majority returned to frequently, noting in particular that the Attorney General failed to consult with Oregon notwithstanding Oregon’s express request to meet “with Department of Justice officials should the Department decide to revisit the application of the CSA to assisted suicide.”⁹⁰

Procedure—its use or nonuse—thus is clearly relevant to the Court, in particular the opportunities states enjoy to express their concerns to federal agencies and potentially obtain relief. The Court is not alone in emphasizing administrative procedure as a means of ensuring that federal agencies consider state interests. On occasion Congress has required that a federal agency engage in notice-and-comment rulemaking or analogous participatory procedures before displacing state regulatory authority.⁹¹ Even more common are requirements that

⁸⁷ 540 U.S. 461, 501 n. 21.

⁸⁸ EPA submitted its first letter on the proposed permit outside the window of the public comment period, and appeared to act in response to points made by the National Park Service—which did submit its comments on time. See 540 U.S. at 508 (Kennedy, J., dissenting) And the majority itself characterized EPA’s orders against the state agency and the facility involved as “skeletal” and “surely . . . not composed with ideal clarity.” 540 U.S. 461, 477-78, 497.

⁸⁹See *id.* at 480, 493-94, 501.

⁹⁰ 546 U.S. 243, 253; see also *id.* at 269 (noting “the apparent absence of any consultation with anyone outside of the Department of Justice who might aid in a reasoned judgment” as a factor weighing against granting the Attorney General’s views any deference).

⁹¹ See, e.g., Riegle-Neal, 12 U.S.C. § 43(a); 30 U.S.C. 1254(c) (requiring that the Secretary of the Interior provide for notice and hearing in the affected state before promulgating or implementing a federal program in lieu of state control under the Surface Mining Control and Reclamation Act); 47 U.S.C. §§253(a), (d) (authorizing the FCC to preempt state law in certain contexts but requiring that the agency proceed using notice-and-comment rulemaking); see also Unfunded Mandates Reform Act of 1995, 2 U.S.C. §§ 1531–32, 1535 (requiring agencies to consider impacts on state, local, or tribal governments or the private sector for rules that might

federal agencies consult with state and local officials in formulating policy.⁹² In like vein, Executive Order 13132, which in substance dates back to President Reagan, imposes consultation and impact assessment requirements on agencies before they issue regulations with certain federalism implications, such as preempting state law.⁹³ A separate executive order requires that regulations “specif[y] in clear language, the preemptive effect, if any,” they are to be given.⁹⁴

Yet the five decisions give little guidance as to why exactly procedure matters from a federalism perspective. Only in *Massachusetts* is a connection between procedure and federalism expressly drawn, with the majority emphasizing that Massachusetts was seeking to assert its statutory procedural rights in arguing that the state was “entitled to special solicitude in our standing analysis.”⁹⁵ By contrast, the *Raich* majority insisted that the administrative rescheduling procedure had “no relevance” to its federalism analysis. Moreover, the *Raich* majority nowhere mentioned that the rescheduling route was available to the state of California (as opposed to the individual plaintiffs in the case), which would have more clearly indicated an intent to use administrative procedures to alleviate federalism tensions. In *ADEC* and *Oregon*, meanwhile, use or nonuse of procedures appears to factor primarily in the Court’s assessment of the reasonableness of the agency actions at stake, rather than to provide an independent basis for invalidation of agency action.

Further complicating efforts to understand the role procedure plays in these decisions is the lack of emphasis on notice-and-comment rulemaking.

result in an annual expenditure of \$100 million or more, and for such rules to consider alternatives and select the alternative that is “least costly, most cost-effective, or least burdensome” or explain why such an alternative was not chosen). On the UMRA’s effect, see Elizabeth Garrett, Framework Legislation and Federalism (forthcoming Notre Dame L. Rev).

⁹² See e.g., 15 U.S.C. § 717b-1(b) (siting of natural gas facilities); 5 U.S.C. 8508 (unemployment compensation regulations); 19 U.S.C. 3512, 3312 (dispute settlements under GATT and NAFTA); 21 U.S.C. 1703 (implementation of national drug control policy). See also Sharkey, Preamble, *supra* at 254.

⁹³ See Exec. Order 13132 § 6, 64 Fed. Reg. 43255, 43257–58 (1999) (requiring, “to the extent practicable and permitted by law,” that an agency submit an impact statement whenever a proposed regulation has federalism implications and imposes substantial direct compliance costs on states that are not statutorily required or preempts state law). EO 13132 also emphasizes the importance of early consultation with state and local officials and of federal agencies’ relying on state standards and regulation in policymaking generally. See *id.* § 3, 64 Fed. Reg. at 43256. The EO replaced EO 12612, issued by president Reagan.

⁹⁴ See Exec. Order 12988, § 3(b)(2), 61 Fed. Reg. 4729, 4732 (Feb. 5, 1996). See also Exec. Order 12866, 58 Fed. Reg. 51735 (Sept. 30, 1993) (requiring agencies to “respect the role of State, local, and tribal governments” by, where feasible, consulting states before imposing federal regulatory requirements and seeking to minimize those burdens).

⁹⁵ 127 Sct 1438, 1454–55.

Unlike other recent administrative law precedent in which such rulemaking is given central importance,⁹⁶ in these decisions the Court put little weight on its use (in *Watters* and *Massachusetts*) or its nonuse (in *Oregon* and *ADEC*). Yet, as discussed in greater depth below,⁹⁷ notice-and-comment rulemaking seems particularly conducive to ensuring that states can force federal agencies to respond to their concerns. The failure to give it much emphasis here is thus surprising, and calls into question perhaps the extent to which the Court intended to draw a connection between federalism and administrative law.

2. *Reasoned Decisionmaking*. More “substantive” administrative law doctrine also features prominently in these decisions.⁹⁸ Perhaps the most fundamental substantive administrative law demand is that an agency must engage in reasoned decisionmaking—in the Court’s words, an agency must “examine the relevant data and articulate a satisfactory explanation for its action including a rational connection between the facts found and the choice made.”⁹⁹ The requirement of reasoned decisionmaking appears in some form in four of the five decisions.¹⁰⁰ Even *Massachusetts*, which focused primarily on questions of statutory interpretation, repeatedly criticized EPA on this front, concluding that EPA had “offered no reasoned explanation for its refusal to decide whether greenhouse gases cause or contribute to climate change.”¹⁰¹ The *Massachusetts*

⁹⁶ See *Long Island Care at Home v. Coke*, 127 S. Ct. 2339 (2007); *Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967 (2005); *United States v. Mead Corp.*, 533 U.S. 218 (2001).

⁹⁷ See *infra* TAN (Part III.B.1).

⁹⁸ Some would classify what I am here calling substantive dimensions of administrative law—the reasoned decisionmaking demand and deference doctrines—as procedural. See, e.g., Lisa Schultz Bressman, *Procedures As Politics in Administrative Law*, 107 *Colum. L. Rev.* 1749, ___ (2007). Probably the most accurate characterization is to acknowledge that these administrative law requirements are *both* substantive and procedural: substantive, because their most direct target is the substance of an agency’s decisions; procedural, because scrutiny of substance will indirectly affect an agency’s procedural choices and because in some cases the strength of scrutiny turns on the procedures an agency used. Indeed, substance and procedure are rarely far apart in administrative law. My intent in classifying these aspects of administrative law as substantive is simply to contrast them with instances wherein the courts focus more directly on procedures, not to deny they also have procedural implications.

⁹⁹ *Motor Vehicle Manufacturers Ass’n v. State Farm Mutual Auto Ins. Co.*, 463 U.S. 29, 43 (1983) (internal quotations omitted).

¹⁰⁰ The exception is *Watters*, where the majority relied on direct statutory interpretation and thus had no need to consider the agency’s reasoning.

¹⁰¹ 127 S.Ct. 1438, 1482; see also *id.* at 1463 (arguing that factors identified by EPA do not “amount to a reasoned justification for declining to form a scientific judgment” and that “[i]f the scientific uncertainty is so profound that it precludes EPA making a reasoned judgment as to whether greenhouse gases contribute to global warming, EPA must say so”). *Oregon* is more

majority's willingness to rely on this ground is particularly striking, given that the case arose out of a rulemaking petition denial, a context in which agency policy choices usually receive great deference.¹⁰² Reasoned decisionmaking is also an important underlying theme in *ADEC*, where the majority repeatedly characterized EPA's actions in terms traditionally associated with reasoned agency determinations.¹⁰³

Here too, the decisions do not expressly link application of the reasoned decisionmaking requirement to federalism. *Raich* perhaps comes closest, with the majority's suggestion that marijuana's continued listing as a schedule I drug under the CSA might be arbitrary at the same time as it rejected a straightforward federalism challenge to the CSA.¹⁰⁴ Nonetheless, in practice application of this basic administrative law demand served to protect state interests, by guarding against federal agency overreaching at the states' expense. This is evident in *ADEC*, even though the state was not successful on its claims; there, the majority emphasized that the federal courts were available to protect states against inequitable agency conduct and then reviewed the basis for EPA's decision fairly closely before sustaining it.¹⁰⁵

The Court's failure to tie the reasoned decisionmaking requirement more overtly to protecting state interests again leaves a number of questions unanswered. Most importantly, does the fact an agency decision will substantially intrude on the states lead to a higher burden of justification or greater scrutiny of the decision's underlying basis? Or to put the point in the context of *Raich*, does the fact that a number of states have legalized medical use of marijuana mean that the Attorney General's refusal to reschedule it deserves more searching scrutiny than lower courts had so far applied? The majority's

devoted to parsing statutory text than *Massachusetts*, yet here too the Court makes note of factors traditionally associated with reasoned decisionmaking—consistency, coherence, thoroughness, expertise, openness to contrary views—in finding that the Attorney General's interpretation did not merit deference under *Skidmore*. 546 U.S. 243, 270.

¹⁰² 127 S. Ct. at 1459; see supra TAN ___.

¹⁰³ See, e.g., 540 U.S. 486, 487-91 (emphasizing cogency and consistency of EPA's interpretation as well as limited authority EPA claimed); id. at 495-502 (determining that EPA's rejection of Alaska's BACT determination was not arbitrary and capricious).

¹⁰⁴ 545 U.S. 1, 27 n.37. The earlier 2002 *FERC* decision offered an even more direct linkage between reasoned decisionmaking requirements and federalism, with the Court invoking federalism implications in support of the agency's policy choice. The Court there ruled that even if FERC could assert jurisdiction over bundled retail transmissions, the agency's discretionary choice not to do so in part because of the "implication for the States' regulation of retail sales" was justified. *New York v. FERC*, 535 U.S. 1, 27-28 (2002).

¹⁰⁵ See 540 U.S. at 495-502.

reaching out to call into question marijuana’s schedule I status suggests this, but it never said so directly.

3. *Statutory Interpretation Doctrines*. Equally evident in these decisions is reliance on general administrative law doctrines regarding when agency statutory interpretations trigger deference. *Oregon* is the most prominent example here, with the majority insisting that “familiar principles” guided its inquiry into the degree of deference due the Attorney General’s interpretive rule.¹⁰⁶ But all the decisions employed standard doctrinal frameworks to some extent in their assessments of the merits of agency statutory interpretations. Thus, in current administrative law parlance *Oregon* is a *Chevron* step zero determination, in that it focuses on determining whether the Attorney General was delegated authority to act with legal force on the question of acceptable medical practice.¹⁰⁷ *Massachusetts* and *Watters*, in turn, represent *Chevron* step one determinations.¹⁰⁸ *Skidmore* deference, the amorphous category of deference accorded agency statutory interpretations not qualifying for deference under *Chevron*, is expressly invoked in *Oregon* and *ADEC*.¹⁰⁹

Once again, however, no opinion expressly describes these standard deference doctrines as a means of addressing federalism concerns. Here, it is *Oregon* that comes closest, with its invocation of federalism concerns as one reason not to defer, under either *Chevron* or *Skidmore*, to the Attorney General’s interpretation of “legitimate medical purpose” as excluding assisted suicide.¹¹⁰

¹⁰⁶546 U.S. 243, 255.

¹⁰⁷ For characterization of *Mead* as adding a new step zero to the *Chevron* framework, see Cass Sunstein, *Chevron Step Zero*, 92 Va. L. Rev. 187, 191 (2006).; see also Thomas W. Merrill, *The Mead Doctrine: Rules and Standards, Meta-Rules and Meta-Standards*, 54 Ad. L. Rev. 807, 812-13 (2002).

¹⁰⁸ See *Massachusetts*, 127 S.Ct. 1438, 1460 (concluding CAA unambiguously includes carbon dioxide as an air pollutant and that EPA’s policy reasons for refusing to regulate carbon dioxide conflict with “the clear terms” of the CAA); *Watters*, 127 S. Ct. 1559, 1572 (holding that the NBA itself preempts state law and thus question of deference to the OCC’s view did not arise). Even *ADEC*, notwithstanding its statement that *Chevron* did not apply (and its subsequent references to the reasonableness of EPA’s view of an ambiguous provision) has a step one air, with language suggesting the majority believed EPA’s interpretation was the only plausible reading of the statute. See 540 U.S. 461, 490 (“We fail to see why Congress, having expressly endorsed an expansive surveillance role for EPA in two independent CAA provisions, would then implicitly preclude the Agency from verifying substantive compliance with the BACT provisions and, instead, limit EPA’s superintendence to the insubstantial question whether state permitting authority had uttered the key words “BACT.”)

¹⁰⁹ *Oregon*, 546 U.S. 243, 268; *ADEC*, 540 U.S. 461, 487–88, 493, 496. The *ADEC* majority itself did not expressly invoke *Skidmore*, but cites to other recent precedent that did so. See *id.* at 488 (citing *Washington State Dept of Soc & Health Servs. v. Guardianship Estate of Keffeler*, 537 U.S. 371, 385 (2003) and *United States v. Mead Corp.*, 533 U.S. at 218, 234 (2001)).

¹¹⁰ 546 U.S. 243, 268-73

More importantly, in these decisions the Court subjected agency statutory interpretations to unusually searching scrutiny, despite its invocation of standard frameworks. Whether the Court was actually creating a distinct approach to reviewing agency statutory interpretations for use when agency interpretations substantially impact the states is a question I discuss below. But that possibility does not remove the significance of the fact that the Court is invoking standard doctrines for reviewing agency statutory interpretations. At a minimum, this reinforces the point that the Court sees these decisions predominantly through an administrative law rubric, notwithstanding their federalism implications.

C. *Special Federalism-Inspired Administrative Law*

Ordinary administrative law thus surfaces regularly in these decisions and generally operates to protect state interests. Yet although the Court at points emphasizes that fact, its failure to expressly link federalism and administrative law raises the possibility that this state-protective impact is serendipitous. Moreover, as several of these decisions took the form of administrative law challenges to federal agency action, the dominance of administrative law in them is not surprising. Hence, although the connections between federalism and administrative law in these decisions are noteworthy, it remains open whether the Court is intentionally using administrative law as a federalism surrogate.

Clearer evidence that the Court may be seeking to address federalism concerns through administrative law comes from a number of instances at which the decisions give special weight to federalism concerns in their application of administrative law doctrines. Although again rarely made explicit, the contrast between the decisions and more standard application of the doctrines is striking, and it seems quite likely that federalism underlies the variation. While supporting the conclusion that the Court's is using administrative law as a federalism surrogate, it is less clear whether these examples portend development of a distinct form of administrative law for use when federal agency action raises serious federalism concerns.

1. *Massachusetts and Special Rules for State Standing.* The most obvious instance of the Court giving special weight to federalism concerns is *Massachusetts's* suggestion of distinct standing rules for states. As noted above, exactly what the majority intends by its invocation of "special solicitude" for the states in standing analysis is not obvious: such solicitude might mean a generous stance in determining whether the traditional standing trio of requirements is met, or exempting the states from the traditional analysis altogether when their sovereignty interests are implicated. What is plain, however, is the majority's willingness to treat the states differently than other plaintiffs in challenging federal administrative action, and to do so because of the states' status as sovereign entities within our federal union. In short, *Massachusetts* seems to represent a federalism-inspired deviation from standard administrative law.

Interestingly, however, the majority made no mention of federalism in addressing another administrative law issue centrally implicated in the case, the standard for reviewing denials of rulemaking petitions. Although the Court stated that review of rulemaking denials “is ‘extremely limited’ and ‘highly deferential,’” it nonetheless took a fairly aggressive interpretive stance in concluding that § 202(a)(1) of the CAA prohibited EPA from refusing to regulate carbon dioxide on general policy grounds.¹¹¹ Moreover, Court elsewhere has expressed concerns about subjecting agency nonenforcement decisions to judicial scrutiny.¹¹² A logical way that the majority could have justified undertaking more rigorous review of the rulemaking denial here with limited precedential impact was by again invoking Massachusetts’ status as a sovereign state. Having lost its sovereign power to regulate through statutory preemption, Massachusetts arguably has a special right to demand review of whether the federal government’s refusal to act accords with the governing statute. That the majority did not make this argument raises a real question about the extent to which it intended to create a distinct administrative law to govern when federal action impinges on the states. Indeed, it casts doubt on the extent to which the majority fully considered the relationship between federalism and administrative law at all.

2. *Heightened Substantive Scrutiny to Protect State Interests.* Other than *Massachusetts*, none of the five decisions expressly invoked federalism as a reason to adopt new doctrinal rules. Yet most appeared to deviate from standard administrative law, in particular involving exceptionally searching scrutiny of governing statutes and agency decisionmaking.

Massachusetts is one example. Section 202(a)(1), the provision centrally at issue there, combines reference to the Administrator’s judgment with mandatory language requiring that the administrator set standards and seeming to significantly limit the grounds on which he can refuse to do so.¹¹³ While the majority’s interpretation of § 202(a)(1) as requiring that the Administrator reach a

¹¹¹ 127 S. Ct. at 1459. For a defense of this assessment of *Massachusetts*’ statutory reasoning, see *infra* TAN __ - __.

¹¹² See *Heckler v. Chaney*, 470 U.S. 821 (1985). True, review of rulemaking denials is somewhat different than review of other inaction, in particular refusal to take enforcement action in a particular case, given the presence of an agency explanation and additional formalities—including, when the agency seeks public comment on a rulemaking petition (as EPA did in *Massachusetts*) the presence of an agency record. See 127 S. Ct. 1438, 1459; *American Horse Protection Assn., Inc. v. Lyng*, 812 F.2d 1, 3-4 (D.C. Cir. 1987); Lisa Schultz Bressman, *Judicial Review of Agency Inaction: An Arbitrariness Approach*, 79 N.Y.U. L. Rev. 1657 (2004); Eric Biber, *The Importance of Resource Allocation in Administrative Law: A Case Study of Judicial Review of Agency Inaction under the Administrative Procedure Act* (SSRN draft). Nonetheless, the practical effects of searching judicial review of rulemaking denials are quite similar: agencies potentially would need to devote substantial resources to justifying denials, and might be forced to undertake rulemakings that they deemed less pressing than others.

¹¹³ 42 U.S.C. § 7521(a)(1) (2000).

judgment on whether to set standards based on particular factors may well be the best reading, it is hard to claim that the provision is not ambiguous regarding the extent of the agency’s discretion.¹¹⁴ Yet the Court reversed the agency on *Chevron* step one grounds, concluding its interpretation was “divorced from statutory text.”¹¹⁵

The Court’s statutory analysis in *Watters* is another instance of an expansive *Chevron* step one inquiry. The authorization for operating subsidiaries in the NBA is oblique, resting on the statute’s grant of “incidental powers” and a separate act’s distinction between financial subsidiaries and other subsidiaries.¹¹⁶ More importantly, accepting that the NBA authorized banks’ use of operating subsidiaries, a point Michigan did not challenge, further inferences are required to conclude that the NBA authorizes the use of *state-chartered* operating subsidiaries or displacement of state supervision of such subsidiaries. Notably, § 484(a), the NBA provision restricting state visitorial powers, only refers expressly to national banks themselves.¹¹⁷ Perhaps, as the majority argued, the close identification of national banks and their operating subsidiaries, embodied in a statutory prescription that operating subsidiaries engage only in activities national banks can engage in and conduct such activities “subject to the same terms and conditions that govern the conduct of such activities by national banks,” justifies reading § 484(a) as extending to operating subsidiaries. But that

¹¹⁴ See Watts & Wildermuth, *supra* note, at [p.3]; [add cites].

¹¹⁵ 127 S. Ct. at 1462–63. The majority also rejected EPA’s conclusion that carbon dioxide was not a pollutant on *Chevron* step one grounds, concluding it was “foreclosed by statutory text.” *Id.* at 1460. Here the Court’s determination of statutory clarity has more basis, for as the majority noted, the statutory definition of air pollutant is extremely broad. See *id.*; 42 U.S.C. 7602(g). Yet viewing the definitional section in the context of the regulatory scheme as a whole arguably undermines this clarity somewhat, for as Justice Scalia argued, the focus of the CAA regulatory scheme in general is on limiting ambient air pollutants whose presence in the air varies geographically. See 127 S.Ct. 1438, 1471 (Scalia, J., dissenting); Adler, *supra* note __ at 40; see also Freeman & Vermeule, *supra* note , at draft p.16 (“The NAAQS system does not seem workable for greenhouse gases in part because states could never ensure compliance with federally established concentration limits; those gases are emitted from many world-wide sources not under their control.”).

¹¹⁶ 12 U.S.C. §§ 24, 24a(g)(3)(A).

¹¹⁷ *Id.* § 484(a) (“No national bank shall be subject to visitorial powers except as authorized by Federal law”). Perhaps, as the majority argued, the close identification of national banks and their operating subsidiaries, embodied in a statutory prescription that operating subsidiaries engage only in activities national banks can engage in and conduct such activities “subject to the same terms and conditions that govern the conduct of such activities by national banks,” *id.* § 24a(g)(3)(A), justifies reading § 484(a) as extending to operating subsidiaries. See 127 S. Ct. 1559, 1570–72. But that move is certainly not textually mandated. Moreover, the Court’s precedent applying the section to preempt state oversight was similarly focused on national banks. See *Barnett Bank v. Nelson*, 517 U.S. 25, 33-34 (1996).

move is certainly not textually mandated.¹¹⁸ Instead, as the appeals courts addressing the question had generally concluded, the NBA appears ambiguous on the question of whether states can exercise supervisory authority over state-chartered subsidiaries of national banks.¹¹⁹

Oregon is a third example of the Court subjecting federal agency actions to unusually searching scrutiny. Most notably, the requirement that prescriptions of controlled substances must serve a “legitimate medical purpose” was imposed by an earlier Attorney General regulation and ordinarily administrative agencies’ interpretations of their own rules receive substantial deference.¹²⁰ But the majority refused to grant deference here on the novel ground that the regulation at issue merely parroted statutory language.¹²¹ Similarly, the CSA expressly delegated authority to the Attorney General to “promulgate rules and regulations . . . relating to the registration and control of the . . . dispensing of controlled substances.”¹²² Such express delegations are usually read expansively, but the majority here was far less generous, concluding that the Attorney General’s authority was limited to changing a substance’s classification schedule and guarding against diversion.¹²³ In addition, The CSA authorizes the Attorney General to deny, suspend, or revoke a physician’s registration if the registration is “inconsistent with the public interest.”¹²⁴ Terms such as “the public interest” are frequently viewed as conveying broad policymaking authority—indeed, the more commonly voiced concern is that such a delegation leaves the responsible agency official essentially unconstrained in setting policy.¹²⁵ The majority, however,

¹¹⁸ See 127 S. Ct. 1559, 1570–72; id. § 24a(g)(3)(A).

¹¹⁹ See *Nat'l City Bank v. Turnbaugh*, 463 F.3d 325, 331(4th Cir. 2006); *Wachovia Bank, N. A. v. Burke*, 414 F.3d 305, 315-18 (2d Cir. 2005); 431 F.3d 556, 561 (6th Cir. 2005); *Wells Fargo Bank, N. A. v. Boutris*, 419 F.3d 949, 959 n. 12 (9th Cir. 2005).

¹²⁰ See *Auer v. Robbins*, 519 U.S. 452, 461–63 (1997); *Thomas Jefferson Univ. v. Shalala*, 512 U.S. 504 (1994); see generally John F. Manning, *Constitutional Structure and Judicial Deference to Agency Interpretations of Agency Rules*, 96 *Colum. L. Rev.* 612 (1996).

¹²¹ 546 U.S. 243, 258. While perhaps a good reason not to grant deference, this anti-parroting rule was not an established “familiar principle” but instead a creation of the *Oregon* majority.

¹²² 21 U.S.C. §§ 821, 871(b).

¹²³ 126 S. Ct. 904, 917.

¹²⁴ 21 U.S.C. § 824(a)(4), 822(a)(2).

¹²⁵ See, e.g., *Whitman v. American Trucking Assns, Inc.*, 531 U.S. 457 (2001); *National Broadcast. Co. v. United States*, 319 U.S. 190 (1943).

viewed this provision narrowly and rejected the Attorney General's claim that it authorized him to determine that assisted suicide was not in the public interest.¹²⁶

Even *Raich* can be grouped as an instance of unusually searching scrutiny. No petition to reschedule marijuana was before the Court. Moreover, as the majority noted, prior challenges to the federal government's refusal to reschedule marijuana had been rebuffed—not surprisingly, as the proper listing of marijuana would seem to be the type of determination requiring scientific expertise and touching on safety concerns to which the courts usually are quite deferential.¹²⁷ Yet the Court went out of its way to suggest that the evidence of marijuana's medicinal potential might require rescheduling.

Not only did the Court undertake fairly exacting scrutiny in these decisions, its doing so appears driven in large part by federalism concerns.¹²⁸ For example, the *Watters* majority's reliance on independent scrutiny of the NBA instead of deferring to the OCC's interpretation—particularly given that both approaches produced the same result—seems only explained as an effort to avoid the federalism concerns associated with administrative preemption. And the *Oregon* majority was clearly concerned that the interpretive rule undermined the federal-state balance embodied in the CSA. Similarly, it is hard to explain why the Court in *Raich* would suggest that marijuana's listing as a Schedule 1 drug was unsupported except to signal that administrative relisting represented a means of navigating the specific federalism tensions in that case.

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

¹²⁶ Although deviating from administrative law precedent in these ways, the result in *Oregon* is nonetheless defensible as a straightforward exercise in statutory interpretation. The Attorney General's broad assertion of power ill fits the CSA as a whole, which clearly intended the Secretary of HHS and the states to play a major role in regulating medical practice. Cf. Lisa Schultz Bressman, *Deference and Democracy*, 75 *Geo. Wash. L. Rev.* 761, 787 (2007) (arguing that *Oregon* could have been decided on *Chevron* step two grounds, as representing an unreasonable agency interpretation)

¹²⁷ For example, the courts repeatedly refused to overturn the FAA's Age 60 rule, despite their concerns about the agency's continued adherence to the rule. See, e.g., *Yetman v. Garvey*, 261 F.3d 664, 672 (7th Cir. 2001); *Professional Pilots Federation (PPF) v. FAA*, 118 F.3d 758 (D.C. Cir. 1997) (upholding FAA's age 60 rule). Congress recently enacted legislation raising the mandatory retirement age to 65. 49 U.S.C.A. § 44729 (2007) (P.L. 110-135; 121 Stat. 1450).

¹²⁸ *Massachusetts* may be an exception here; what seems to be driving the Court there are instead separation of powers concerns—specifically, the belief that the Bush Administration was failing to comply with a clear congressional instruction because of its differing policy views. Of course, given the importance of representation of the states in Congress to our federalism system, it is not difficult to translate the Court's insistence on the executive branch's fidelity to congressional lawmaking into federalism terms. But it is not clear from the decision, even with the reference to special state standing, that the Court itself did so.

embodying vigorous *Chevron* step one inquiries, and indeed the appropriate scope of step one has long been a source of debate.¹²⁹ Courts also vary in the strength of their scrutiny of agency reasoning, often applying more intense “hard look” review to notice-and comment rulemaking, the type of procedure involved in rescheduling decisions under the CSA and emissions-setting under the CAA.¹³⁰ Moreover, courts sometimes undertake more intensive scrutiny of agency decisionmaking when a basis exists to conclude that politics or ideology led an agency to ignore contrary facts.¹³¹ Nor, finally, does the Court require detailed evidence of an agency’s authority to regulate only in federalism contexts.¹³² In short, whatever its doctrinal formulae state, as a practical matter administrative law embraces a range of deference; the divide between ordinary and extraordinary here is far from stark.

D. *Administrative Preemption*

The current debate over administrative preemption merits special note, for it is in this context that the relationship between federalism and administrative law has surfaced most prominently. This debate accepts that substantive requirements imposed by federal agencies, for example through legislative rules, can preempt state law.¹³³ But disagreement exists over who should have primary

¹²⁹ See *Nat’l Cable & Telecomms. Ass’n v. Brand X Internet Servs.*, 545 U.S. 967 (2005), *MCI Telecomms. Corp. v. AT&T Co.*, 512 U.S. 218 (1994). See also Thomas Merrill, *Textualism and the Future of the Chevron Doctrine*, 72 *Washington U. L. Rev.* 351 (1994); Cass Sunstein, *Chevron Step Zero*, *supra* note __; Thomas Miles & Cass Sunstein, *Do Judges Make Regulatory Policy? An Empirical Investigation of Chevron*, 73 *U. Chi. L. Rev.* 823 (2006); Lisa Schultz Bressman, *How Mead Has Muddled Judicial Review of Agency Action*, 58 *Vand. L. Rev.* 1443 (2005); Kristin E. Hickman & Matthew D. Krueger, *In Search of the Modern Skidmore Standard*, 107 *Colum. L. Rev.* 1235 (2007). Sasha Volokh, *Choosing Interpretive Methods: A Positive Theory of Judges and Everyone Else*, 83 *NYU L. Rev.* __, __ (forthcoming 2008).

¹³⁰ [stat cites]; see *infra* note __ and accompanying text (IV.A.2).

¹³¹ Compare *Motor Vehicle Manufacturers Ass’n v. State Farm Mutual Auto Ins. Co.*, 463 U.S. 29, 43 (1983) with *Pension Benefit Guar. Corp. v. LTV Corp.*, 496 U.S. 633 (1990); see also Freeman & Vermeule, *supra* note __, at 26-29 (viewing Massachusetts as hearkening back to pre-*Chevron* vision of administrative law under which independence and expertise are prized over political accountability).

¹³² See *Brown & Williamson v. FDA*, 529 U.S. 120, __ (2000); see also Bressman, *Democracy*, *supra* note __, at 765–66, 799, 803 (arguing that *Brown*, *Oregon* and *Massachusetts* could all be seen as rare instances in which the Court is requiring agencies to exercise its authority in a democratically reasonable fashion).

¹³³ See Nina A. Mendelson, *A Presumption Against Agency Preemption*, 102 *Nw. U. L. Rev.* __, __ (forthcoming 2008); Thomas W. Merrill, *Preemption and Institutional Choice*, 102 *Nw. U. L. Rev.* __, __ (forthcoming 2008). One exception to this consensus is Bradford Clark, who has argued that only laws adopted pursuant to Article I, Section 7 qualify as “Laws of the United

authority to interpret the preemptive scope of agency rules or the statutes agencies are charged with implementing. Ordinarily such agency interpretations would qualify for *Chevron* deference, assuming the rule or statute at issue was ambiguous. However, the dramatic recent increase in agency interpretations of agency rules and statutes as broadly preempting state law (including state tort law) has led a number of scholars and jurists to conclude that agency preemption interpretations should receive more limited *Skidmore* deference or perhaps no deference at all.¹³⁴ Put differently, they argue for development of a special federalism-inspired deference doctrine for preemption contexts. Some go further and argue that agencies' ability to issue preemptive interpretations be limited to instances where Congress has clearly and specifically granted them that authority.¹³⁵

Whether (and in what way) courts should defer to agency preemption determinations is the question the Court evaded in *Watters*. The *Watters*' majority reliance on an expansive *Chevron* step one inquiry in lieu of deferring to the OCC might signal that these justices at least had doubts about the appropriateness of *Chevron* deference in the preemption context.¹³⁶ On the other hand, the majority's failure to acknowledge the unusual breadth of its statutory

States" for purposes of the Supremacy Clause, a test that administrative regulations of course fail. See Clark, *supra* note , at 1342–46. The Supreme Court has clearly held, however, that valid federal administrative rules preempt conflicting state law. See *Fidelity Fed. Savings & Loan Association v. de la Cuesta*, 458 U.S. 141, 154, 159–167 (1982); *United States v. Shimer*, 367 U.S. 374, 381, 383 (1961)

¹³⁴ See *Watters*, 127 S. Ct. 1559, 1584 (2007) (Stevens, J., dissenting); Mendelson, *Chevron*, *supra* note _ at _ ; Sharkey, *PLP*, *supra* note _ at _ .

¹³⁵ See Thomas W. Merrill, *supra* note _ at _ (arguing for a “super-strong clear statement rule” before “permit[ting] agencies to preempt on their own authority.”). This also is Nina Mendelson's current view. See *Presumption*, *supra* note _ at _ (arguing for a presumption against agency preemption).

¹³⁶ On several prior occasions the Court has similarly avoided taking a position on the level of deference due agency interpretations, although specific justices have voiced positions. See *Geier v. Am. Honda Motor Co.*, 529 U.S. 861, 883–86 (2000) (stating that DOT's position that federal regulatory standard preempted state tort action at issue accorded “Some weight,” but deference unnecessary to conclude preemption appropriate); *id.* at 911 (Stevens, J., dissenting) (arguing deference to agency views in legal brief inappropriate); *Medtronic, Inc. v. V. Lohr*, 518 U.S. 470, 496 (1996) (stating that concluding that its determination that statute did not preempt state tort claims was “substantially informed” by federal regulations and that the agency's views of the statute should be given ‘considerable weight’); *id.* at 505 (Breyer, J., concurring) (arguing that agencies should have “a degree of leeway” to determine preemptive effect of ambiguous statutes); *id.* at 512 (O'Connor, J., dissenting) (“It is not certain that an agency regulation determining the pre-emptive effect of *any* federal statute is entitled toe deference.”); *Smiley v. Citibank (South Dakota) N.A.*, 517 U.S. 735, 744 (1996) (assuming *arguendo* that the question of whether a statute is preemptive “must always be decided *de novo* by the courts”).

investigation may indicate some ambivalence about devising special administrative law doctrines to reflect federalism concerns.

Although punting on this deference question, *Watters* and the other decisions in the federalism-administrative law quintet carry important implications for the administrative preemption debate. In particular, the decisions reveal the theoretical limitations of the current debate, which tends to portray federalism and administrative law as inherently in conflict, thereby obscuring the possibility that administrative law could serve as a means of reinforcing federalism—and vice versa.¹³⁷ While tensions certainly exist between federalism and administrative law mindsets, the five decisions demonstrate that the relationship between these two doctrinal lines is much more complicated than one of straightforward conflict.

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

Finally, the narrow *Chevron* focus also serves to obscure the fact that administrative preemption is simply one of several instances in which administrative law and federalism intersect. It is unclear, for example, why courts should deny deference to express agency assessments of preemption or require express delegation of power to preempt, but then defer to agency substantive determinations that restrict state regulatory choices.¹³⁸ Yet not granting deference

¹³⁷ Richard Nagareda has argued that concerns about a regulatory scheme’s impact on the states could be used to reinforce the quality and efficacy of federal regulation. See Nagareda, *supra* note __, at 16–17, 40–48 (stating that “the real concern over FDA preemption is not the broad-brush one that it would shut off tort litigation but, more precisely, that it might do so for too little in return” and arguing that tort preemption concerns should be repackaged as arguments for forcing information disclosure to the FDA).

¹³⁸ In his amicus brief on behalf of Michigan in *Watters*, my colleague Tom Merrill argued that while in general agencies and courts are equally competent to interpret federal statutes, “the decision to displace state law . . . implicates a wide range of systemic variables as to which the judiciary has a superior claim.” Brief of the Center for State Enforcement of Antitrust and Consumer Protection Laws, Inc. as Amicus Curiae in Support of Petitioner at 6-8, *Watters*, 127

to agency determinations whenever they impact state regulatory interests or demanding specific delegation of preemptive authority would fundamentally undermine the modern federal administrative state. Taking a broader perspective allows for a fuller and more nuanced assessment of the costs and benefits of special federalism-inspired administrative rules.

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

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

A. *The Legitimacy of Administrative Law's Use as a Federalism Surrogate*

Injecting federalism concerns into administrative law is open to criticism as an illegitimate intrusion on congressional power. As noted, the Court is unwilling to curb Congress's regulatory authority on constitutional grounds. Even if it were, most of the administrative actions at issue in these decisions—regulation of national banking, pollution emissions, prescription of controlled

S.Ct. 1559 (No. 05-1342), 2006 WL 2570991 6-8. These variables are that displacement: presents a constitutional question, specifically the Supremacy Clause and the constitutional structure of federalism; entails application of law developed by courts; and implicates considerations of federalism and agency power best not left to agency control. None of these factors, to my mind, suffices to distinguish agency decisions expressly addressing the preemptive scope of statutes or regulations from other agency determinations. Preemption determinations are not constitutional determinations in any active sense; far more central than the Supremacy Clause are issues relating to statutory requirements and functional needs of a regulatory scheme, precisely the types of issues on which, under *Chevron*, reasonable agency determinations should govern. In any event, the Supremacy Clause seems implicated to the same extent when an agency issues substantive regulations that preclude the states from adopting a contrary regulatory approach, so if taken seriously this argument precludes *Chevron* deference in a very broad range of cases. Similarly, even if an agency invokes established preemption doctrine, its determinations regarding preemption also implicate policy concerns, such as the need for uniformity, predictability, and centralization in an area of federal regulation. Whether federal agencies can be trusted to address questions of the federal-state balance fairly is a complicated issue and is discussed in Part III.A *infra*. But at a minimum, if indeed agencies cannot be trusted to take federalism concerns seriously, again that should have implications outside the administrative preemption context.

substances—would fall fairly easily within the category of commercial activity with interstate effects. So it might be argued that if Congress acts within its constitutional powers in regulating an area and in delegating responsibility to administrative agencies to implement its regulatory scheme, then courts lack a basis for imposing additional federalism-inspired restrictions on subsequent agency determinations.¹³⁹

This complaint has little force if all that administrative law’s surrogacy role involves is the Court employing ordinary administrative law in a manner that redounds to the states’ benefit. In such a case, invocation of federalism values and concerns is not necessary to justify the results the Court reaches,¹⁴⁰ and the basis for the Court’s actions is the same as underlies its review of administrative action generally.¹⁴¹ Even express invocation of federalism concerns, if kept within the established parameters of ordinary administrative law, seems unproblematic. To conclude that any express invocation of federalism in review of agency action represents judicial usurpation of Congress’s policymaking role requires the highly dubious presumption that, unless it states otherwise, Congress prefers that agencies not take state interests into account.

But creation of special administrative law requirements to protect state interests might seem more vulnerable to the critique that courts are illegitimately intruding on congressional turf. Although its administrative law framing analytically distinguishes such an approach from straightforward federalism doctrines,¹⁴² such extraordinary federalism-inspired administrative law is similarly categorizable as a species of subconstitutionalism, as it also involves an effort to address constitutional values through means other than direct constitutional adjudication. Several critics have raised similar legitimacy concerns regarding

¹³⁹ The classic statement of this line of argument, raised in conjunction with the constitutional avoidance canon, comes in Richard A. Posner, *The Federal Courts: Challenge and Reform* 285 (1985). See also William N. Eskridge Jr. & Philip P. Frickey, *Quasi-Constitutional Law: Clear Statement Rules As Constitutional Lawmaking*, 45 *Vand. L. Rev.* 593, 633-36 (1992) (describing argument against enforcing federalism indirectly through clear statement rules).

¹⁴⁰ Cf Manning, *supra* note , at 254 (arguing that the “canon of constitutional avoidance does no work unless used to depart from the most likely or natural meaning of a statute”).

¹⁴¹ Of course, judicial review of administrative action can also be critiqued as lacking basis in constitutional or statutory text—and often is. For a classic example, see *Vermont Yankee* [cite]; see also *U.S. v. Mead*, *cite* (Scalia, J., dissenting); John Duffy, *Tex L. Rev.* [cite]. But such criticisms are not unique to review of administrative action that implicates federalism concerns, and so are (largely) outside the scope of this article.

¹⁴² See *supra* Part II.A.

the presumption against preemption,¹⁴³ clear-statement rules and other process requirements imposed on Congress in the name of federalism.¹⁴⁴

This legitimacy critique of using administrative law as a surrogate for federalism concerns is not ultimately persuasive. To begin with, subconstitutionalism is a common feature of our legal landscape. Numerous clear statement requirements and constitutionally-derived statutory presumptions exist outside the federalism area, with the perhaps most prominent example being the practice of construing statutes narrowly to avoid constitutional concerns.¹⁴⁵ Even many prudential measures used to mitigate the disruption of judicial review—presumptions of severability, abstention doctrines, and the like—qualify as instances of subconstitutionalism, as these are all instances when the courts take background constitutional concerns into account in exercising their authority without directly ruling on these concerns.¹⁴⁶ That descriptive fact alone may not be a very satisfying justification for continuing the practice, but it is important to take cognizance of what a full-scale rejection of this practice might entail.

¹⁴³ See, e.g., Viet Dinh, *Reassessing the Law of Preemption*, 88 *Geo. L. J.* 2085 (2000); Caleb Nelson, *Preemption*, 86 *Va. L. Rev.* 225 (2000); Jack Goldsmith, *Statutory Foreign Affairs Preemption*, 2000 *Sup. Ct. Rev.* 175 (2000). Of course, the presumption against preemption also has its defenders. See Gardbaum, *supra* note Stephen Gardbaum, *Rethinking Constitutional Federalism*, 74 *Texas L. Rev.* 795 (1996); Ernest A. Young, *Two Cheers for Process Federalism*, 46 *Vill. L. Rev.* 1349, 1385–89 (2001); see also Roderick M. Hills, Jr., *Against Preemption: Against Preemption: How Federalism Can Improve the National Legislative Process*, 82 *N.Y.U. L. Rev.* 1, 17-36 (2007) (defending a clear statement anti-preemption rule).

¹⁴⁴ Such requirements are faulted for misunderstanding how Congress functions, creating significant practical hurdles that Congress surmounts only with some difficulty, and they are more generally critiqued as unwarranted interference with a co-equal branch. See William N. Eskridge Jr. & Philip P. Frickey, *Quasi-Constitutional Law: Clear Statement Rules As Constitutional Lawmaking*, 45 *Vand. L. Rev.* 593, 637-39 (1992); Philip Frickey & Steven Smith, *Judicial Review, the Congressional Process, and the Federalism Cases: An Interdisciplinary Critique*, 111 *Yale L.J.* 1707, 1740-45 (2002), 1740-45; see also William W. Buzbee & Robert A. Schapiro, *Legislative Record Review*, 54 *Stan. L. Rev.* 87, 121-25 (2001); A. Christopher Bryant & Timothy J. Simeone, *Remanding to Congress: The Supreme Court's New "On the Record" Constitutional Review of Federal Statutes*, 86 *Cornell L. Rev.* 328, 370-73, 387-89 (2001); Ruth Coelker & James J. Brudney, *Dissing Congress*, 100 *Mich. L. Rev.* 80, 86-87, 116, 119-20 (2001); see also Frank B. Cross, *Realism About Federalism*, 74 *N.Y.U. L. Rev.* 1304, 1329-30 (represents a cooption of Congress's political role).

¹⁴⁵ See, e.g., *Spector v. Norwegian Cruise Line Ltd.*, 545 U.S. 119, 138-39 (2005) (invoking canon that statutes will not be read to apply extraterritorially unless Congress clearly states otherwise); *Jones v. United States*, 526 U.S. 277, 239-40 (1999) (describing the practice of construing statutes to avoid constitutional doubts "beyond debate"); Eskridge & Frickey, *supra* note , (documenting numerous examples arising in the form of clear statement rules and presumptions); see also Trevor W. Morrison, *Constitutional Avoidance in the Executive branch*, 106 *Colum. L. Rev.* 1189 (2006) (analyzing invocations of the avoidance canon within the executive branch).

¹⁴⁶ Cf. [CITES Bickel/Wechsler.]

A number of normative arguments can also be made in subconstitutionalism's defense. It minimizes head-on constitutional clashes between the Court and the elected branches and potentially offers greater room for constitutional dialogue.¹⁴⁷ True, clear statement and other process requirements can pose real obstacles for Congress, given the difficulty involved in getting new clarifying legislation enacted.¹⁴⁸ Even so, this impact is potentially less restrictive than direct judicial invalidation of a measure on constitutional grounds, since Congress at least retains the option of reenactment.¹⁴⁹ In addition, a subconstitutional approach may be better at ensuring that constitutional values are given weight in governmental decisionmaking, as courts may be more reluctant to enforce such values when doing so entails invalidating congressional or executive action.¹⁵⁰ Indeed, the strength of this last point often fuels the attack on subconstitutionalism as an abuse of judicial authority: Courts can play fast and loose with constitutional review because they do not have to resolve constitutional challenges decisively or face the full consequences of their constitutional rulings.¹⁵¹ Clearly, much turns here on whether underenforcement or overenforcement of constitutional norms is seen as the prime danger. But it is hard to insist that subconstitutionalism *necessarily* enlarges judicial power; whether it does so turns a great deal on factors such as the degree to which the constitutional concerns invoked by courts are well-established, the extent of clarity courts require from other branches, and judicial transparency and care in specifying why constitutional concerns are implicated.

What this suggests is that subconstitutionalism's legitimacy cannot really be established as a general matter; much turns on the specifics of its

¹⁴⁷ See Philip P. Frickey, Getting from Joe to Gene (McCarthy): The Avoidance Canon, Legal Process Theory, and Narrowing Statutory Interpretation in the Early Warren Court, 93 Cal. L. Rev. 399, 452-54 (2005).

¹⁴⁸ See Eskridge & Frickey, *supra* note , at 637-39; John F. Manning, The Nondelegation Doctrine as a Canon of Avoidance, 2000 Sup. Ct. Rev. 223, 254-55 (2000); Frederick Schauer, Ashwander Revisited, 1995 Sup. Ct. Rev. 71.

¹⁴⁹ But see Schauer, *supra* note , at __; Jerry L. Mashaw, Greed, Chaos, and Governance 105 (1997).

¹⁵⁰ Frickey, *supra* note 143, at 455-59; Cass R. Sunstein, Nondelegation Canons, 67 U. Chi. L. Rev. 315, 337-400 (2000) (defending nondelegation canons despite lack of direct enforcement of constitutional limits on delegation).

¹⁵¹ See Eskridge & Frickey, *supra* note , at 637; Manning, *supra* note , at 255; Schauer, *supra* note at ; Adrian Vermeule, Saving Constructions, 85 Geo. L. J. 1945, 1960-61 (1997); see also William K. Kelley, Avoiding Constitutional Questions as a Three-Branch Problem, 86 Cornell. L. Rev. 831 (2001)

application.¹⁵² The question then becomes assessing the legitimacy of the specific subconstitutional practice of devising special administrative law doctrines to enforce federalism. This, in turn, implicates two separate issues: Should federalism be judicially enforced through subconstitutional means? And if so, is adapting administrative law in this fashion to do so appropriate?

The first of these, whether federalism merits subconstitutional enforcement, has received substantial attention elsewhere. A number of scholars have defended a role for the courts in ensuring that Congress takes state interests seriously, even when Congress has constitutional authority to trump state regulation or impose burdens on the states. Often dubbed process federalism, the doctrinal impositions defended include requirements that Congress speak clearly when burdening the states and adequately consider the impact a federal measure will have on the states. Rather than being at odds with reliance on political safeguards as the central federalism protection, judicial imposition of such requirements is portrayed as necessary to ensure that Congress is aware of and adequately considers the federalism implications of its actions.¹⁵³ Ernest Young has offered perhaps the most elaborate justification for process federalism as a supplement (if not lieu of) direct constitutional enforcement of enumerated power limits. Acknowledging that the Court has little taste for curtailing the constitutional scope of congressional power, and that such curtailment ill-fits the development of a nationally integrated economy, Young argues that process federalism represent a justified attempt to recreate the federalism principle of balance and division between federal and state governments in current realities.¹⁵⁴ While no constitutional provision imposes such process requirements, that is true generally of federalism, which manifests as a background structural principle more than as a clear textual limit.¹⁵⁵

These arguments demonstrate that, in theory, subconstitutional federalism can accord well with our constitutional structure. The more serious concern is that, in practice, operation of federalism-based clarity or deliberation

¹⁵² Cf. Manning, *supra* note (critiquing the canon of constitutional avoidance specifically as it is used to address nondelegation concerns).

¹⁵³ See, e.g., Clark, *supra* note, at 1323-25, 1425-30; Philip P. Frickey, *The Fool on the Hill: Congressional Findings, Constitutional Adjudication, and United States v. Lopez*, 46 *Case W. Res. L. Rev.* 695, 720-22 (1996) (defending process elements of *Lopez*); Vicki C. Jackson, *Federalism and the Uses and Limits of Law: Printz and Principle?*, 111 *Harv. L. Rev.* 2180, 2240 (1998); Stephen Gardbaum, *Rethinking Constitutional Federalism*, [CITE *Tex L rev*]; Ernest A. Young, *Two Cheers for Process Federalism*, 46 *Vill. L. Rev.* 1349, 1358-59 (2001).

¹⁵⁴ See Young, *Making Federalism Doctrine*, *supra* note , at 1762-63, 1775-99, 1836; Young, *Blowing Smoke*, *supra* note , at ; Young, *Two Federalisms*, *supra* note at ___.

¹⁵⁵ *Making Federalism Doctrine*, at 1748, 1754. See also *Printz v. United States*, 521 U.S. 898 (1997); *Principality of Monaco v. Mississippi*, 292 U.S. 313, 322 (1934); *Printz v. United States*, 521 U.S. 898 (1997).

requirements seriously impedes Congress's exercise of its enumerated powers and leads to excessive judicial regulation of the functioning of a coequal branch. Here, an important point to emphasize is that these practical concerns are considerably abated when federalism is enforced through administrative law rather than through constraints on Congress. Unlike Congress, federal administrative agencies are already required to seek and respond to comments and explain their policy choices.¹⁵⁶ Judicial scrutiny of agency functioning is a constant and everyday aspect of administrative agency existence, and courts invalidate agency actions when agency actions exceed their authority or when agencies have failed to satisfy procedural requirements or to provide an adequate justification for their decisions.¹⁵⁷ To be sure, such invalidations can create significant obstacles for agencies to overcome, and attacks on judicial review for ossifying agency rulemaking are a well-worn component of the administrative law oeuvre.¹⁵⁸ But the burdens of notice-and-comment rulemaking are in practice considerably less onerous than bicameralism and presentment.¹⁵⁹ In any event,

¹⁵⁶ See *Motor Vehicle Manufacturers Ass'n v. State Farm Mutual Auto Ins. Co.*, 463 U.S. 29 (1983); see also *Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967 (2005) (agency can change its regulatory approach but has to explain). Indeed, the Court's decisions imposing process-based limits on Congress are often attacked on the grounds that Congress is not an administrative agency. See Bryant & Simeone, *supra* note __, at 337, 370; Buzbee & Schapiro, *supra* note __, at 90–91, 97, 119; see also Cross, *supra* note __, at 1331–32.

¹⁵⁷ See, e.g., *United States v. Nova Scotia Food Prods. Corp.*, 568 F.2d 240 (2nd Cir. 1977). Most agency actions invalidated for failing to comply with the APA's requirements for notice-and-comment rulemaking represent instances when an agency has power to act through rulemaking, but has failed to do so properly.

¹⁵⁸ See, e.g., Jerry L. Mashaw & David L. Harfst, *The Struggle for Auto Safety* (1990) Thomas O. McGarrity, *Some Thoughts on "Deossifying" the Rulemaking Process*, 41 *Duke L. J.* 1385 (1992); Cross, at 1331–32. But see William Jordan, *Ossification Revisited: Does Arbitrary and Capricious Review Significantly Interfere with Agency Ability to Achieve Regulatory Goals Through Informal Rulemaking?*, 94 *Northwestern University Law Review* 393 (2000); O'Connell, *add cite to piece on unified agenda*; Mark Seidenfeld, *Demystifying Deossification: Rethinking Recent Proposals to Modify Judicial Review of Notice and Comment Rulemaking*, 75 *Tex. L. Rev.* 483 (1997).

¹⁵⁹ See Clark, *supra* note __, at __; Young, *Two Federalisms*, *supra* note __, at 69. Indeed, the extent to which judicial review restricts agency rulemaking is a matter of debate, and may vary a great deal by agency. Compare O'Connell and Jordan with Mashaw & Harbst. [CITES NEEDED] Of course, a critical component of the burden imposed by judicial invalidation is the need to compromise on substance to get reenactment, see Eskridge & Ferejohn, *The Article I, Section 7 Game*, which is harder to measure.

federalism-inspired requirements seem unlikely to add significantly to the burdens that agencies already face in the rulemaking context.¹⁶⁰

Nor does administrative law enforcement of federalism lose the political safeguards justification that animates process federalism. True, given its focus on administrative agencies, this approach does not reinforce the political salience of federalism in Congress. Yet such administrative law enforcement still functions to reinforce political safeguards insofar as it gives additional weight to state interests in executive branch policy debates. Moreover, the administrative law approach arguably indirectly reinforces congressional political safeguards, by presuming that Congress would want agencies to take state interests into account unless it clearly indicates otherwise. What this approach does not do is to require that Congress clearly authorize administrative agencies to impose burdens on the states; nor does it read congressional delegations as presumptively displacing federalism. Those further moves are species of federalism doctrine, and in practice function to allow state interests to trump all other considerations that factor into agency decisionmaking. Instead, the administrative law approach insists on the need to take account of both national and state interests in administrative contexts. State interests are given weight, but through an administrative law framework that also allows consideration of other factors. This seems both more likely to accord with congressional intent and more in tune with our constitutional scheme than approaches that insist on either national or state interests being given trumping priority.

B. Is Administrative Law an Adequate Federalism Surrogate?

A separate objection to using administrative law as a federalism surrogate is that, even if legitimate, this approach will fail to offer adequate protection to state interests. Assessing this objection necessitates an account of what it means to be an adequate federalism surrogate. In particular, does being an adequate federalism surrogate require providing a venue for expressly asserting state interests, or is simply advancing these interests—however tacitly and indirectly—enough? Does it require bottom line success in derailing proposed administrative actions that adversely impact the states, or is it sufficient to ensure that state interests receive careful consideration by federal officials? And which types of state interests matter: Do state interests lie in having the federal government pursue the policy preferences of their residents or elected officials, or should the focus be on preserving the states' own independent power to govern and freedom from federal regulatory impositions?

Of these questions, the last is the easiest to answer. As others have argued, protecting the states' regulatory role is most central to the federalism

¹⁶⁰ Moreover, it is also possible that agencies are better able to overcome the burdens and costs imposed from procedural constraints than Congress is. See *Hillsborough County v. Automated Medical Laboratories, Inc.* 471 U.S. 707, 721 (1985).

project; what distinguishes states from other interest groups and gives their demands special normative force is their status as sovereign entities.¹⁶¹ In addition, some express invocation of state interests seems necessary to preserve the reliability of administrative law's surrogacy role. A practice of vindicating state regulatory interests only tacitly is too easily discarded and too hidden to clearly instruct agencies or lower courts. Similarly, a lack of any bottom-line success in defeating measures that adversely impact the state might call into question the ability of administrative law to offer meaningful protection to such federalism concerns. On the other hand, significant bottom-line success cannot be the measure of adequacy here. Such a measure is too much at odds with the basic presumption underlying the administrative law approach, namely that Congress has constitutional authority to regulate an activity even at the cost of preempting or otherwise burdening the states.¹⁶² Instead, the focus here, as with process federalism, necessarily must be on ensuring that federal officials adequately consider and justify decisions that harm state interests, not that they forego such decisions altogether.

How well, then, does administrative law function in ensuring consideration of state interests in playing a regulatory role and being free of federal regulatory impositions? The record from the federalism-administrative law quintet is mixed, but offers some basis for optimism. *Oregon* is clearest in cautioning agencies that they must give due heed to the regulatory role played by states in federal statutes. *Massachusetts*, in turn, grants states an important role in challenging federal policy. Although the Court ruled against the state in *ADEC* and *Watters*, those decisions also preserve important openings for state regulation. *ADEC* emphasized the broad discretion states exercises over granting permits, while *Watters* technically only precluded state enforcement and oversight efforts, leaving the states free to impose substantive requirements on national banks provided those are not seen as significant obstacles to national bank operations. On the other hand, *Watters*' willingness to read the NBA as broadly preempting, as well as its failure to force the OCC to offer greater explanation and justification for preempting state oversight, are less encouraging. Most concerning is the overall lack of express reference to how state interests should factor into agency decisionmaking and judicial review of administrative action.

A fuller picture emerges from taking a step back from these decisions and assessing administrative law's adequacy as a federalism surrogate from a more abstract perspective. Reasons certainly exist to be skeptical of the extent to which agencies will protect state regulatory prerogatives, but it is also easy to underestimate the influence that the states can wield administratively. Critically, moreover, administrative agencies and administrative law are not the same thing.

¹⁶¹ See Larry Kramer, Putting the Politics Back Into Political Safeguards, 100 Colum. L. Rev. 215, ___ (2000); Young, Two Federalisms, supra note ___, at ___.

¹⁶² See, e.g., Stephen Gardbaum, supra note _ at 826; Vicki Jackson, supra note __, at ___.

Administrative law involves deference to agency decisionmaking, to be sure, but it encompasses significantly more than that, in particular procedural limits on agencies and independent judicial scrutiny in some contexts. As a result, administrative law represents an important mechanism for improving federal agencies' responsiveness to state interests.

1. *Political versus Alternative Safeguards.* Commentators on administrative preemption have identified several reasons for skepticism about the extent to which agencies can adequately protect a regulatory role for the states. First among these is the claimed lack of political safeguards for federalism in the administrative context. Justice Stevens put it, “[u]nlike Congress, administrative agencies are clearly not designed to represent the interests of States.”¹⁶³ Moreover, although presidential oversight may render agencies politically accountable to some degree, it does not clearly tie them to state interests. On the contrary, the President is often identified as representing national interests against the more parochial views of members of Congress.¹⁶⁴ That nationalist focus may make agencies more inclined to value regulatory uniformity over state variation and more likely to heed the cries of national industrial groups bemoaning the burdens of state regulation.¹⁶⁵ At a minimum, federal agencies are likely to be subject to substantial lobbying from regulated entities favoring preemption, undermining state influence and heightening fears of agency capture.¹⁶⁶ Also playing a role here is that the hierarchical aspect of

¹⁶³ Geier v. American Honda Motor Co., 529 U.S. 861, 908 (2000); see also Jack W. Campbell, Regulatory Preemption in the *Garcia/Chevron* Era, 59 U. Pitt. L. Rev. 805, 832 (1998); Damien J. Marshall, Note, The Application of *Chevron* Deference in Regulatory Preemption Cases, 87 Geo. L. J. 263, 277-78 (1998); Cass R. Sunstein, Nondelegation Canons, 67 U. Chi. L. Rev. 315, 331 (2000). For contrary views, see Mendelson, *supra* note , at 758; Richard J. Pierce, Regulation, Deregulation, Federalism, and Administrative Law: Agency Power to Preempt State Regulations, 46 U. Pitt. L. Rev. 607, 664 (1985).

¹⁶⁴ See, e.g., Jerry Mashaw, ProDelegation: Why Administrators Should Make Political Decisions, 1 J. L. Econ. & Org. 91 (1985). For critique, Jede Nzebile, The Fable of the Nationalist President and the Parochial Congress, 53 U.C.L.A. L. Rev. 1217 (2006)

¹⁶⁵ See e.g. Louisiana PSC v. FCC Public Serv. Com v. FCC, 476 US. 355 (1986) (describing agency arguments of the need for uniformity). Cf Philip J. Weiser, Cooperative Federalism, Federal Common Law, and The Enforcement of the Telecom Act, 66 N.Y.U. L. Rev. 1692 (2001).

¹⁶⁶ Hills, Against Preemption, *supra* note _ , at ___ (describing pol economy of preemption battles). But see Matthew C. Stephenson , Public Regulation of Private Enforcement: The Case for Expanding the Role of Administrative Agencies, 91 Va. l. Rev. 93, 130-32 (2005) (arguing agency capture fears are often exaggerated).

agencies may serve to restrict states' access, particularly compared to Congress which offers affected states multiple points of entry.¹⁶⁷

Clearly, concerns about the states' loss of influence in the executive branch have some merit. But it is also easy to exaggerate the extent of this loss. Numerous factors, such as congressional oversight, federal officials' ties to state regulators, lobbying by state political organizations, and dependence on state implementation, can all serve to give state regulatory interests leverage in federal agency decisionmaking.¹⁶⁸ The influence states wield by virtue of their role in federal regulatory programs merits particular note. Studies of joint federal-state regulatory programs indicate that the extent of state power in these contexts has varied over the years, reflecting changes in political climate, regulatory approaches, and perceptions of state regulatory competence.¹⁶⁹ These studies also document a trend towards more coercive federal-state relationships since the 1960s, with states increasingly facing mandates and federal preemption.¹⁷⁰ Nonetheless, responsibility for program implementation and enforcement appears

¹⁶⁷ On the importance of such multiple power bases in Congress, see Carol F. Lee, *The Political Safeguards of Federalism? Congressional Responses to Supreme Court Decisions on State and Local Liability*, 20 *Urb. Law.* 301 (1988)

¹⁶⁸ See Kramer, *supra* note __, at __; Mendelson, *supra* note __, at 768–69.

¹⁶⁹ See DAVID B. WALKER, *THE REBIRTH OF FEDERALISM: SLOUCHING TOWARD WASHINGTON 129-70* (1995) (providing an overview of changes in federal-state relations from 1960 through early 1990s); Barry Rabe, *Environmental Policy and the Bush Era: The Collision Between the Administrative Presidency and State Experimentation*, 37 *Publius* 413, 415–18, 420–22 (2007) (detailing changed federal-state relationships in the environmental arena under the Bush I, Clinton, and Bush II administrations); Denise Scheberle, *The Evolving Matrix of Environmental Federalism and Intergovernmental Relationships*, 35 *Publius* 69, 75, 77–84 (2005) (describing changed managerial approaches in federal environmental programs during the 1990s that delegated greater managerial control to implementing states); Michael J. Scicchitano & David M. Hedge, *From Coercion to Partnership in Federal Partial Preemption: SMCRA, RCRA, and the OSH Act*, 23 *Publius* 107, 109 (1993) (noting that initial implementation of several federal environmental and health statutes was largely coercive towards the states but changed by the mid-late 1990s, with the federal and state governments coming to share responsibility over implementation).

¹⁷⁰ See John Kincaid, *From Cooperative to Coercive Federalism*, 509 *Annals of the AM. Acad. of Pol. & Soc. Sci.* 139 (1990); Paul Posner, *The Politics of Coercive Federalism in the Bush Era*, 37 *Publius* 390, 390–92, 400 (2007). But see Tim Conlan, *From Cooperative to Opportunistic Federalism: Reflections on the Half-Century Anniversary of the Commission on Intergovernmental Relations*, 66 *Pub. Admin. Rev.* 663, 666–68 (2006) (arguing that the current federal-state system is more opportunistic than coercive or cooperative because “actors . . . pursue their immediate interests with little regard for the institutional or collective consequences”); Joseph F. Zimmerman, *Congressional Preemption During the George W. Bush Administration*, 37 *Publius* 432, 446–47 (2007) (arguing that federal-state relationships demonstrate continuous metamorphosis and are more complex and nuanced than descriptions such as “coercive” or “cooperative” convey).

to enhance state influence over federal agency decisionmaking.¹⁷¹ Agency structure also appears relevant, with regional offices offering an opportunity for developing closer state-federal relationships and sensitivity to state interests.¹⁷² Such close relationships may create internal agency support for paying attention to state needs that could counterbalance the states' loss of external access to federal decisionmakers as a result of the shift of policymaking to the agency context and away from Congress.¹⁷³

2. *Administrative Law's Procedural and Substantive Requirements.* Perhaps most important, administrative law offers additional safeguards on agency functioning that could work to the states' advantage, aside from these internal administrative pressures. These are the restrictions imposed on agency action, in particular the opportunities for state notification and participation created by notice-and-comment rulemaking procedures and amplified by substantive requirements of agency explanation and reasoned decisionmaking.¹⁷⁴ From a political perspective, notice-and-comment rulemaking offers a means by which states can learn of pending agency action that might harm their interests

¹⁷¹ See Robert Agranoff, *Managing within the Matrix: Do Collaborative Intergovernmental Relations Exist?* 31 *Publius* 31, 45–54 (2001); Scheberle, *Evolving Matrix*, *supra* note , at 75–76; Scicchitano & Hedge, *supra* note _ ; Weiser, *Cooperative Federalism*, *supra* note , at 1738–41 (describing influence and role of states under the 1996 Telecom Act).

¹⁷² DENISE SCHEBERLE, *FEDERALISM AND ENVIRONMENTAL POLICY: TRUST AND THE POLITICS OF IMPLEMENTATION* 159–80, 182–83, 188 (1997).

¹⁷³ State and federal regulators' shared policy goals and professional expertise may also work to defend a state regulatory role, but the impact of these ties is more contentious. In particular, Professor Rick Hills has argued that substantive policy ties between state and federal administrators may mean that state administrators will put substantive federal policy goals with which they agree above state institutional interests in preserving a regulatory role. See Roderick M. Hills, *The Eleventh Amendment as Curb on Bureaucratic Power*, 53 *Stan. L. Rev.* 1225, 1236–37 (2001). But the same should hold true of federal administrative officials: when state regulation may offer substantive policy benefits, federal officials should seek to protect state regulatory authority. In this vein, Nina Mendelson has argued that federal agency officials may be particularly likely to appreciate the national benefits that can accrue from state regulatory autonomy, for example in the way that one state's experimentation can yield new regulatory solutions which other states and the national government can then pursue. See Mendelson, *supra* note , at 767-68. See Scheberle. In the end, it seems likely that whether substantive and personal ties between federal and state administrative officials serves to protect state regulatory authority or instead undermine it will vary according to the specific program and issue involved. This is not to deny, as a number of commentators have argued, that "close cooperation among experts at the state and federal level . . . undermines the power of elected officials at both levels," Larry Kramer, *Putting the Politics Back into the Political Safeguards of federalism*, 100 *Colum. L. Rev.* 215, 283 n. 269 (2000), but rather to question whether policy and professional ties necessarily work to the benefits of federal bureaucrats over state bureaucrats.

¹⁷⁴ See 5 U.S.C. § 553.

and inform their political allies in Congress.¹⁷⁵ Especially interesting here is Congress's inclusion in several statutes of notice-and-comment rulemaking or its equivalent as a prerequisite before an agency can displace a state regulatory role.¹⁷⁶ This suggests that, at a minimum, members of Congress—or state groups lobbying Congress—consider such procedures to offer some protection against encroachments on state regulatory authority. From a more legal and agency-functioning viewpoint, notice-and-comment rulemaking offers a means of ensuring agencies are informed of and respond to state concerns.¹⁷⁷ The relative formality and centralized aspect of notice-and-comment rulemaking also helps ensure that agency determinations are made after considerable deliberation and review.¹⁷⁸

Substantive requirements governing the quality of agency decisionmaking reinforce this last feature. Agencies must respond to significant comments not simply to fulfill the APA's procedural demands, but also to avoid their determinations being found to be arbitrary and capricious. The result is to impose potentially substantial obligations of explanation on agencies.¹⁷⁹ The states' constitutional significance might be thought alone sufficient to require that agencies consider and justify the impact a proposed regulation will have on the states' regulatory role.¹⁸⁰ But at a minimum, statutory stipulations of a regulatory role for the states—for instance, in cooperative regulatory schemes or savings clauses limiting preemption—provide a basis to require that agencies take seriously the impact a proposed regulation will have on the states.¹⁸¹ Finally, these procedural and substantive requirements may create incentives for an

¹⁷⁵ Positive political theory views administrative procedure as a means of assisting congressional oversight and protecting against bureaucratic drift. See McNollgast, *Structure and Process, Politics and Policy: Administrative Arrangements and the political Control of Agencies*, 75 Va. L. Rev. 431, 440-44 (1989); McNollgast, *Administrative Procedures as Instruments of Political Control*, 3 J. L. Econ & Org. 243, 257-60 (1987); Bressman, *Procedures as Politics*, supra note , at 15-22 (describing positive political theory and noting some criticisms of its account).

¹⁷⁶ See supra note ___.

¹⁷⁷ See Mendelson, supra note , at 777-78; Paul McGreal, *Some Rice with Your Chevron? Presumption and Deference in Regulatory Preemption*, 45 Case W. Res. L. Rev. 823, 874 (1995).

¹⁷⁸ See Nagareda, supra note , at 45–46; see also commentary supportive of *Mead* for this reason (Bressman, etc).

¹⁷⁹ See supra TAN __ (II.A.1).

¹⁸⁰ Agencies are required to assess and justify impact on the states under Executive Order 13132, but the Executive Order is not itself judicially enforceable.

¹⁸¹ Weiser, supra note _; see also Buzbee, supra note, at ___.

agency to consult with states early on, before the agency has promulgated a proposed rule and at a time when it may be most receptive to alternatives.

As Professor Nina Mendelson has argued, the ability of states to protect their regulatory interests through notice-and-comment rulemaking is largely an empirical question, as are claims about the extent of state influence on federal agency decisionmaking.¹⁸² Although public administration scholarship offers studies of many aspects of federal-state relationships, surprising little empirical evidence exists on federal-state interactions in rulemaking and other procedural contexts of particular relevance to administrative law.¹⁸³ Studies do exist documenting federal agencies' failure to take seriously the federalism assessment obligations imposed by Executive Order 13132, which suggests that notice-and-comment rulemaking may not actually yield significant federalism benefits.¹⁸⁴ On the other hand, the Executive Order expressly states that it is "not intended to create any right or benefit, substantive or procedural, enforceable at law,"¹⁸⁵ which makes it a poor basis on which to draw conclusions about the federalism impact of judicially-enforceable requirements.

3. *The Scope of Agency Expertise and the Role of Politics.* Public choice and institutional competency arguments are also raised against federal agencies' ability to serve as reliable representatives for state regulatory interests. One such argument is that federal agencies are primarily interested in expanding their own policymaking power and achieving their programmatic goals, which sets them in conflict with state regulatory autonomy. Another maintains that federal agencies' specific programmatic focus makes them ill-equipped to consider general issues

¹⁸² Mendelson, *supra* note __, at 758-59.

¹⁸³ See *id.* Moreover, useful quantifiable data may be hard to produce, given that some quantifiable measures, such as agency responses to state comments in the preambles of final rules, *id.* at 776 n.164, may be prone to agency manipulation. As a result, detailed case studies of states' influence on particular regulatory initiatives might prove the most profitable.

¹⁸⁴ [UPDATE, see NW piece] See Mendelson, *supra* note __, at 783-85 (sampling 600 proposed or final rulemakings in a three month period and finding only for which agencies prepared six federalism impact statements, with none of these acknowledging the value of preserving state regulatory prerogatives); U.S. Gen. Accounting Office, *Federalism: Implementation of Executive Order 12612 in the Rulemaking Process* (reporting that only five federalism impact statements were prepared in conjunction with issuance of 11,000 final rules between April 1996 and December 1998. See also 64 Fed. Reg. 43,255 (Aug. 4, 1999).

¹⁸⁵ § 11, 64 Fed. Reg. 43255, 43259.

of the appropriate federal-state balance.¹⁸⁶ If nothing else, some scholars contend that agencies lack expertise on such questions of general government structure.¹⁸⁷

Again, these arguments have some intuitive power. It is hard to dispute the risk that federal agencies will privilege specific programmatic goals over more general concerns relating to government structure—administrative tunnel vision is hardly an unknown phenomenon.¹⁸⁸ It is similarly plausible to conclude that at least in some contexts federal agencies view state regulators as competitors and seek to use preemption to advance their institutional interests.¹⁸⁹ The recent spate of aggressive preemption efforts by numerous different agencies during the Bush Administration—the OCC, FDA, Consumer Product Safety Administration, the National Highway Safety Administration, and the Federal Railroad Administration—raises real concerns about the potential for federal bureaucratic empire-building at the expense of the states.¹⁹⁰

Yet public choice accounts of agency motivation are unduly simplistic, to the extent they portray federal agency officials as motivated solely by desire for greater resources and power and without consideration of what represents the best regulatory policy.¹⁹¹ It also is mistaken to think that agency self-interest always lies on the side of expanding federal regulatory power at the expense of the states. Even in public choice terms that account rings false, as the potential of congressional retaliation or the desire to avoid new responsibilities may lead rational agency officials to a different account of where their parochial interests

¹⁸⁶ See Br. of the Ctr for State Enforcement, *supra* note , at 13-14; Marshall, *supra* note, at 280-81; Mendelson, *supra* note , at 794-97.

¹⁸⁷ See Br. of the Ctr for State Enforcement, *supra* note , at 11-12; Mendelson, *supra* note , at 779-91, see also *id.* at 793-94 (arguing that allowing agencies to consider general federalism concerns untethered to a particular statutory scheme raises a danger of unconstrained and thus potentially arbitrary agency decisionmaking).

¹⁸⁸ See, e.g., Mendelson, *supra* note , at ___; William A. Niskanen, Jr., *Bureaucracy and Representative Government* 36-42 (1971); Stephen G. Breyer, *Regulation and Risk Breaking the Vicious Circle: Toward Effective Risk Regulation* (1993).

¹⁸⁹ See, e.g., Wilmarth, *supra* note __, at __ (providing evidence supporting the claim that recent OCC preemption efforts were affected by the OCC's desire to expand the number of banks with national bank charters and thereby expand the fees the OCC collects); *Louisiana PSC Public Serv. Com v. FCC*, 476 US. 355 (1986).

¹⁹⁰ For description of these proposals, see *supra* note __; Sharkey, Preamble, *supra* note __, at __. For discussion of such arguments generally, see Daryl J. Levinson, *Empire-Building Government in Constitutional Law*, 118 *Harv. L. Rev.* 915, 942 (2005).

¹⁹¹ See Jerry L. Mashaw, *Greed, Chaos, and Governance* __ (1997); Steven P. Croley, *Public Interested Regulation*, 28 *Fla. St. U. L.J. Rev.* 7, __ (2000); David B. Spence & Frank Cross, *A Public Choice Case for the Administrative State*, 89 *Geo. L. J.* 97, 121-23 (2000); Stephenson, *supra* note , at __.

lie.¹⁹² Too many instances exist of federal agencies refusing to preempt or seeking to expand state regulatory autonomy to conclude that federal agencies are categorically insensitive or hostile to preserving a state regulatory role.¹⁹³ This is not to deny that federal agencies are able to aggrandize themselves at the expense of the states were they so inclined. But the fact that federal agencies frequently are not so inclined underscores that the explanation for federal agency behavior is more complicated.

One crucial variable the public choice account omits is politics. An agency's political agenda is likely to affect whether the agency will seek to accord states a regulatory role or instead centralize control in Washington. Thus, EPA's determination that the Endangered Species Act had no limiting effect on its duty to transfer permitting authority to a qualified state under the CWA, upheld last term by the Court, no doubt reflected in part the Bush Administration's hostility to the former statute.¹⁹⁴ Similarly, recent efforts to preempt state tort actions are in line with the Administration's support for tort reform and restrictions.¹⁹⁵ Put simply, politics rather than institutional position is likely the driving force behind federal administrative limitations on the

¹⁹² Levinson, *supra* note __ at 923-37. Mendelson, *supra* note _ at 796; Quincy Crawford, Comment, *Chevron* Deference to Agency Interpretations that Delimit the Scope of the Agency's Jurisdiction, 61 U. Chi. L. Rev. 957, 982 (1994). Indeed, agencies have at times fought expanded responsibilities for fear they won't perform well. (Martha Derthick, *Policymaking for Social Security* (1979).

¹⁹³ See, e.g., Gersen, *supra* note , at 32; Michael S. Greve & Jonathan Klick, Preemption in the Rehnquist Court: A Preliminary Empirical Account, 2006 Sup. Ct. Econ. Rev. 43, 73 (noting that during the Rehnquist Court, the Solicitor General only took "a pro-preemption position in 39 of 95 preemption cases, or about 40 percent"); Sharkey, PLP, *supra* note _, at 235-36; Lars Noah, 53 U. Kan. L. Rev. 149 (2004).

¹⁹⁴ See *National Assn. of Homebuilders v. Defenders of Wildlife*, 127 S. Ct. 2518 (2007); Freeman & Vermeule, *supra* note _ , (noting the Bush Administration's opposition to ESA).

¹⁹⁵ Opponents of these regulatory measures certainly see them in terms of the Administration's general support for limits on tort actions. See, e.g., Stephen Labaton, 'Silent Tort Reform' Is Overriding States' Powers, N.Y. Times, Mar. 10, 2006, at C5; William Funk et al., The Truth About Torts; Using Agency Preemption to Undercut Consumer Health and Safety, Ctr. For Prog. Reform White Paper, Sept. 2007. The White House, not surprisingly, denies the charge that these preemption proposals "reflect a concerted administrative policy." Caroline E. Mayer, Rules Would Limit Lawsuits: U.S. Agencies Seek to Preempt States, Wash. Post., Feb. 16, 2006 at D01. It is worth noting that some of the regulations involve agencies headed by independent commissions rather than simply agencies led by presidential political appointees, complicating the claim that they represent a Bush Administration initiative. On the other hand, the use of preemption appeared to grow significantly since 2006, a time by which President Bush would have been able to significantly effect the membership of most independent agencies, and independent agencies are often quite responsive to presidential policy preferences. [Peter M. Shane, *Independent Policymaking and Presidential Power*, 57 Geo. Wash. L. Rev. 596 (1989); Peter L. Strauss, *The Place of Agencies in Government*, 84 *Coum. L. Rev.* 573, 590-95 (1984).]

states—and in that regard agencies appear little different from Congress or even the courts.¹⁹⁶

This leaves the claim that agencies simply lack expertise in determining the proper balance between federal and state regulation. Here, much turns on how the question of expertise is framed. Agencies have no special claim to expertise in assessing the proper federal-state balance in the abstract, divorced from a particular regulatory scheme or statute. But federalism disputes are unlikely to surface in such a form—whether before agencies, the federal courts, or Congress. Instead, as the federalism-administrative law quintet suggests, these questions arise in particular regulatory contexts. In such contexts questions about the appropriate state-federal balance are not easily divorced from substantive policy determinations on which agencies clearly do have expertise.¹⁹⁷ *ADEC* is illustrative: The strength and legitimacy of the state dignity concerns asserted there cannot be separated from an assessment of the importance of EPA oversight of state BACT determinations to achieving the CAA’s goals, a question on which EPA has the greatest expertise.

Furthermore, framed in terms of specific contexts, agencies likely will have expertise on how best to balance federal-state regulatory roles. As Catherine Sharkey has written, “[w]ith respect to answering the central preemption question—namely, whether there in fact should be a uniform federal regulatory policy—federal agencies emerge as the institutional actor best able to answer.”¹⁹⁸ For example, the OCC would seem to have relevant expertise in assessing

¹⁹⁶ On politics dominating over federalism principles in Congress, see, e.g., Conlan, *supra* note __, at __ GET PIN Walker, *supra* note __, at __ GET PIN; Hills, *Against Preemption*, *supra* note __, at 36. On politics dominating over federalism principles in courts, see Frank B. Cross & Emerson H. Tiller, *The Three Faces of Federalism: An Empirical Assessment of Supreme Court Federalism Jurisprudence*, 73 S. Cal. L. Rev. 741, 768 (2000) (concluding that data demonstrates “a significant ideological component of federalism decisionmaking,” although noting that “honest federalism” could also be playing a strong role); Richard Fallon, *The “Conservative” Paths of the Rehnquist Court’s Federalism Decisions*, 69 U. Chi. L. Rev. 429, __ (2001).

¹⁹⁷ This seems to me equally true of preemption decisions; all that seems needed to translate a preemption question into a clear policy choice is consideration of whether state regulation is an obstacle to achieving federal regulatory goals. See also Brief for Administrative Law Professors, *supra* note _ *Watters* (preemption is a policy choice).

¹⁹⁸ Sharkey, *Products Liability Preemption (PLP)*, *supra* note __, draft at 25-26; see also *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 506 (1996) (Breyer, J. concurring) (arguing that agency responsibility for administering a statute “means informed agency involvement and, therefore, special understanding of the likely impact of both state and federal requirements, as well as an understanding of whether (or the extent to which) state requirements may interfere with federal objectives”). While this may be particularly true in regard to cooperative regulatory schemes, which by their nature entail substantial interaction between the two levels of government, it is also true even when federal and state regulation is largely independent. See *Pierce*, *supra* note __, at 664; Gersen, *supra* note __, at 32; Sharkey, *PLP*, at 25–26 (federal expertise on regulatory impact of state tort law).

whether state oversight of national bank subsidiaries will significantly impede the ability of national banks to operate and the extent to which federal preemption of such oversight will undermine the nation's dual banking system.

The problem, in short, is not lack of expertise, but federal administrative overprotectiveness of federal regulatory prerogatives—federal bias, if you will.¹⁹⁹ Administrative law cases make clear that distinguishing between bias and expertise is hard,²⁰⁰ but that challenge cannot legitimately be avoided simply by denying expertise exists.

Equally important is the comparative point alluded to above. The question is not whether federal agencies will take concerns with preserving a state regulatory role into account, but whether they will do so to a greater or lesser degree than the alternatives of Congress or the federal courts.²⁰¹ As Mendelson argues, it is not clear that Congress offers significantly more sensitivity to state regulatory prerogatives than federal agencies.²⁰² In any event, insisting that Congress itself resolve all federal-state questions is a nonstarter. Congress simply lacks the resources and foresight to resolve all the federalism issues that can arise in a given regulatory scheme. Requiring it to do so is functionally tantamount to killing a regulatory program, something the Court's delegation cases make clear it is not prepared to do.²⁰³

¹⁹⁹ Even in such contexts of rival regulation, however, federal insensitivity to state regulatory authority cannot be presumed. State regulation may in fact serve federal interests, for example by allowing federal regulators to redirect their oversight activities or save on enforcement costs. Whether federal administrators can benefit from state efforts depends, of course, on whether the regulatory policy and goals of federal and state governments are similar—but conflicting policies would seem to be fair (as in jurisdictionally-neutral) grounds for federal officials to be concerned about state actions. And even when policy conflict exists, other factors, such as congressional oversight or political ramifications more generally, may ensure that federal agencies accommodate state concerns.

²⁰⁰ See, e.g., *C&W Fish, Co., Inc. v. 931 F.2d 1556* (D.C. Cir. 1991).

²⁰¹ See generally Neil K. Komesar, *Imperfect Alternatives: Choosing Institutions in Law, Economics, and Public Policy* (1994) (emphasizing the need to assess institutional competence in comparative perspective).

²⁰² See Mendelson, *supra* note, at 759–69 (arguing that Congress's regional structure gives it “no special advantage in considering . . . more ‘national’ federalism benefits” and that “it is unclear why members of Congress would have any special incentive (beyond their incentive to respond to officials of their particular state) to respond to the . . . views” of state organizations like the National Governors' Association); see also Note, *New Evidence of the Presumption Against Preemption: An Empirical Study of Congressional Responses to Supreme Court Preemption Decisions*, 120 *Harv. L. Rev.* 1604, 1605 (2007) (noting that “Congress almost never responds to the Court's preemption decisions”).

²⁰³ See *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457 (2001), *Mistretta v. U.S.* 488 U.S. 361 (1989). The fact that in none of the federalism-administrative law quintet of decisions did the Court expressly rely on devices such as clear statement rules or the presumption against

As a result, the comparison needs to be between federal agencies and federal courts as much as between federal agencies and Congress; given that Congress will delegate broadly, one of these institutions will need to resolve the federalism disputes that will inevitably arise.²⁰⁴ A case could be made that the courts have a comparative advantage over agencies in resolving federalism questions. Unlike specialized, program-focused agencies, the federal courts are generalist institutions that have special responsibilities to enforce constitutional structures and values.²⁰⁵ Yet in practice, it is not at all clear that the federal courts have been more sensitive to state regulatory interests than agencies, and at times they have been strong enforcers of federal uniformity over state control.²⁰⁶ More recently, several commentators have noted the Rehnquist Court's willingness to curtail state regulatory authority in a variety of contexts.²⁰⁷ The difficulty in separating substantive policy and federalism also undermines the institutional competency arguments in favor of courts, for courts are comparatively ill-equipped to assess the substantive impact that preserving a state role may have on a particular regulatory regime.

4. *The Capaciousness of Administrative Law.* Here, one of the advantages of focusing on administrative law as a federalism surrogate rather than administrative agencies rises to the fore. Administrative law is institutionally capacious; it includes rules that govern internal agency actions as well as external review of agency actions by courts. (Indeed, administrative law in some ways even encompasses Congress, as it addresses Congress's constitutional ability to design agencies and control their decisionmaking and also contains elaborate doctrines of statutory interpretation.) Administrative law is also doctrinally

preemption reinforces this point, as these devices might be thought of as means to ensure that Congress itself resolve federalism disputes. See William N. Eskridge Jr. & Philip P. Frickey, *Quasi-Constitutional Law: Clear Statement Rules As Constitutional Lawmaking*, 45 *Vand. L. Rev.* 593, 619–29, 631 (1992); Mendelson, *supra* note __, at 759 (arguing that the presumption against preemption could be seen “as a method of ensuring that Congress itself makes the preemption decision”); see also *supra* Part II.B.

²⁰⁴ See Sharkey, Preamble, *supra* note at 251–52.

²⁰⁵ Mendelson, *supra* note __, at 787-88; Eskridge & Frickey, *supra* note __

²⁰⁶ Weiser, discussions of Swift, Sharkey & Issacharoff; Gersen, *supra* note __, at 32 (noting Attorney General Reno's refusal to preempt Oregon's Death with Dignity statute and concluding “there is little in [*Oregon*] to suggest a uniform bias in favor of preemption and against the preservation of state authority.”)

²⁰⁷ See Daniel J. Meltzer, *The Supreme Court's Judicial Passivity*, 2002 *Sup. Ct. Rev.* 343, 367–69, 376; Fallon, *supra* note __, at 462 (noting lack of consistent state prerogative thread in Rehnquist Court decisions and concluding driving force was instead conservatism); Ruth Coelker & Kevin M. Scott, *Dissing States?: Invalidation Of State Action During The Rehnquist Era*, 88 *Va. L. Rev.* 1301 (2002); see also Young, *Two Federalisms*, *supra* note __, at __ (Rehnquist Court emphasizes formal sovereignty over substantive power).

capacious, and in particular includes prescriptions for both deference and searching scrutiny. Courts need not step outside existing doctrinal frameworks to rein in agencies perceived to be overreaching or insufficiently sensitive to significant state interests. Express invocation of state interests is also easily included within an administrative law framework, as a presumptively relevant factor that agencies must consider in their decisionmaking.

This capaciousness allows administrative law to draw on the federalism-reinforcing aspects of both agencies and courts. For example, by independently scrutinizing the scope of power Congress has delegated to an agency, courts can guard against agency overreaching. Yet requirements that courts defer to administrative determinations within this range of delegated authority allow room for agencies to exercise some discretion on federalism matters. Administrative law also offers the possibility of seeking to advance federalism interests by enforcing procedural controls on agencies, rather than relying wholly on judicial review of agency decisionmaking by courts or Congress. Moreover, by forcing an agency to provide notice of actions it plans to take, procedural requirements also empower congressional oversight and thus reinforces such political safeguards as Congress has to offer.

Extolling administrative law's capaciousness as a federalism virtue is more than a little ironic. It is precisely this capaciousness—the fact that administrative law contains within in a number of alternative doctrinal moves from which courts can choose—that many administrative law scholars identify as its fundamental flaw. Their complaint is that this breadth translates into essentially unconstrained power in reviewing courts.²⁰⁸ That complaint is very relevant here, since it suggests that in practice administrative law is not that institutionally capacious at all; in the end, the courts call the shots across-the-board. Moreover, some might contest the claim that administrative law is capacious even if courts do succeed (at least sometimes) in combining independent scrutiny with deferential review. The problem is that on any given issue one institution—court or agency—will dominate. Options exist to try and avoid a strict demarcation between judicial and administrative decisionmaking, for example a more sliding scale, *Skidmore*-esque approach to reviewing agency

²⁰⁸ These complaints are raised, for example, in commentary on *Chevron* and ossification of rulemaking. The former tends to stress the danger that judges will as a result impose their own preferred policies in lieu of the agencies, thereby undermining political accountability and principled decisionmaking. See ADRIAN VERMEULE, *JUDGING UNDER UNCERTAINTY: AN INSTITUTIONAL THEORY OF LEGAL INTERPRETATION* __ (2006); Cross, *supra* note __, at __; see also Miles & Sunstein, *supra* note __, at __; Merrill, Mead, *supra* note __, at __ (arguing for a clearer rule-based approach to determining when *Chevron* applies). The latter tends to focus on the harmful effects potentially broad-ranging judicial review has on agency functioning, such as requiring agencies to devote substantially greater resources to rulemaking or forego it altogether, as well as how judges' lack of substantive knowledge and expertise undermines their ability to review agency action intelligently. See Pierce, *7 Ways to Deossify*, *supra* note __, at __; Cross, *supra* note __, at __; McGarrity, *Ossification*, *supra* note __, at __.

determinations on federalism issues. But adopting such an approach is likely to worsen the danger of judicial dominance.²⁰⁹

Despite these objections, administrative law's breadth still seems to offer a potential federalism payoff. Much scholarship has identified the ways that judicial review—for better or worse—indirectly influences how agencies operate,²¹⁰ and even if *Chevron* is only softly constraining, it nonetheless may lead judges to defer to agency policy choices with which they disagree.²¹¹ Even limited impacts of these sorts suffice to conclude that some potential exists to harness the potential federalism-reinforcing aspects of both courts and agencies through administrative law.

Perhaps more importantly, that judges can manipulate administrative law doctrine seems unlikely to work significantly *against* the regulatory interests of the states, even if it does not accrue to their favor. Consider in this regard the Court's recent decision in *Watters*. *Chevron*'s malleability, specifically the potential expansiveness of the step one inquiry, is clearly on display. But it is harder to imagine the Court reading the statutory mandate so expansively had the OCC ruled against preemption. Indeed, in none of the five decisions did the Court use its independent judgment to undermine state regulatory interests in the face of state-supportive agency action. Empirical studies of preemption offer further support. Notably, the federal government's opposition to preemption, in the form of a brief from the Solicitor General arguing against preemption, significantly reduces the likelihood that the Court will find preemption.²¹²

²⁰⁹ See *United States v. Mead* (Scalia, J., dissenting); Vermeule, *Judging Under Uncertainty*, at __; Merrill, *Mead*, *supra* note __, at __.

²¹⁰ For better, see, e.g., William F. Pedersen, *Formal Records and Informal Rulemaking*, 85 *Yale L. J.* 38, 59-60 (1975); Seidenfeld, *supra* note __. For worse, see Mashaw & Harbst, *supra* note __, at __; Pierce, *supra* note __, at __; see also Melnick, *supra* note __, at __ (on ossification, dominance of lawyers over substantive experts in agencies).

²¹¹ O'Connell, *supra* note __, at __ at n69, Miles & Sunstein, *supra* note __, at __ (discussing data indicating that political composition of an appeals panel can have an effect on results); Peter L. Strauss, *Overseer or Decider*, *Yale L J/Chi L Rev* forthcoming. Peter Schuck & Donald Elliot, *Studying Administrative Law: A Methodology For, and Report on, New Empirical Research*, 42 *Administrative Law Review* 519 (1990); see also Pauline Kim, *NYU L Rev* Pauline Kim, *Lower Court Discretion*, 82 *N.Y.U. L. Rev.* 383 (2007) (limits of attitudinal model to understand judicial behavior).

²¹² See Michael S. Greve & Jonathan Klick, *Preemption in the Rehnquist Court: A Preliminary Empirical Account*, 14 *Sup. Ct. Econ. Rev.* 43, 57, 73-74 (noting that the probability of "an anti-preemption outcome is highly likely when the [Solicitor General] argues against preemption," although "preemption litigation in the Supreme Court [was] by and large a fifty-fifty proposition" during the period); see also David B. Spence & Paula Murray, *The Law, Economics, and Politics of Federal Preemption Jurisprudence: A Quantitative Analysis*, 87 *Cal. L. Rev.* 1127, 1177-78 (1999) (noting that although federal agencies rarely took a position on preemption challenges before the federal appeals courts, "[w]hen they did . . . they appeared to have swayed

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

5. *The Normalizing Function of Administrative Law.* A final advantage of administrative law as a federalism surrogate is its subconstitutional and generic character. Many administrative law doctrines reflect constitutional values and concerns, such as fears of unchecked and irrational exercises of coercive power.²¹³ Nonetheless, most of these doctrines are recognized to be subconstitutional in scope—and as a result, subject to alteration by Congress.²¹⁴ Moreover, rejection of an agency decision, at least on arbitrary and capricious or procedural grounds, does not serve to take power to decide the issue at hand away from an agency. Instead, the result is remand to the agency for further consideration. As a result, courts may prove more willing to enforce federalism values through an administrative law lens, when doing so does not erect a permanent barrier to federal action.²¹⁵ The generic, or non-federalism specific, nature of ordinary administrative law may reinforce this willingness because it allows courts to bypass issues about the legitimacy of limiting federal agency action on federalism grounds. Like the *Oregon* majority, they can instead claim to be motivated by “familiar principles” that are not tied to the subject of federal-state relations.²¹⁶

This subconstitutional and generic character makes administrative law also particularly well-suited for addressing the central challenge of contemporary federalism: ensuring and protecting the relevance of states as regulatory entities in contexts marked by concurrent federal-state authority and an extensive federal administrative state. As argued above, under current constitutional doctrines little

the courts.”); Sharkey, PLP, *supra* note __draft at 14.

²¹³ See, e.g., Bressman, NYU L Rev (arbitrariness review and due process).

²¹⁴ I characterize administrative law as subconstitutional rather than nonconstitutional because the basic federal administrative procedure statutes like the APA or FOIA represent “super-statutes” whose repeal is nearly impossible. See William N. Eskridge, Jr. & John Ferejohn, Super-Statutes, 50 Duke L. J. 1215, __ (2001). But see Edward Rubin, It’s Time to Make the Administrative Procedure Act Administrative, 89 Cornell L. Rev. 95, 108 (2003) (arguing for an overhauling of the APA).

²¹⁵ See Bressman, NYU L Rev, *supra* note at __; Sunstein, *supra* note at __; Eskridge & Frickey, *supra* note __, at __.

²¹⁶ 546 U.S. 243, 255 (2006).

private activity falls outside the federal government’s regulatory power and what does is reachable through federal conditional spending. Thus if federalism is to succeed in preserving a regulatory role for the states, it has to come in to play in contexts of concurrent authority.²¹⁷ In such contexts, however, direct constitutional challenges are unlikely to do much work other than at the margins.²¹⁸ Combine all this with judicial unwillingness to impede Congress’s ability to delegate and rely on administrative agencies for policymaking, and it seems clear that federalism will play a very limited role if kept to the form of a constitutional or quasi-constitutional trump on federal action.

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

ENHANCING ADMINISTRATIVE LAW’S EFFECTIVENESS AS A FEDERALISM SURROGATE

These arguments for why administrative law could prove a useful means of advancing federalism concerns also have implications for the Court’s future jurisprudence. One central implication is that the Court should apply administrative law doctrines with an eye to reinforcing agency attentiveness to state interests. Another is that addressing federalism concerns through ordinary administrative law may often prove more effective than devising special federalism-inspired doctrines. Perhaps most importantly, the Court must discuss much more openly how federalism should factor into agency decisionmaking and judicial review if it intends administrative law to play a federalism surrogacy role.

A. *Reinforcing Agency Attentiveness to State Interests*

²¹⁷ See, e.g., Gardbaum, *supra* note __; Young, *supra* note __; Hills, *Against Preemption*, *supra* note __ at 4.

²¹⁸ The anti-commandeering rule is an example; though it prohibits the federal government from drafting state officials in the cause of implementing federal programs, see *Printz v. New York*, its practical effect is more limited given the ability of the federal government to make such state implementation a condition of funding. See Roderick M. Hills, *The Political Economy of Cooperative Federalism: Why State Autonomy Makes Sense and “Dual Sovereignty” Doesn’t*, 96 *Mich. L. Rev.* 813 (1998).

One logical implication of the foregoing analysis is that the Court should seek to reinforce agency incentives to take state interests seriously. To some extent, the federalism-administrative law quintet does this. For example, *Massachusetts*' "special solicitude for the states" in standing analysis makes it more likely that federal agencies will face federal court litigation by states who disagree with the result of administrative proceedings. As a result, agencies may well be more attentive to state interests in the course of administrative proceedings, whether in the hope of reaching compromises that would allay state suits or with an eye to judicial review and the need to demonstrate that state concerns were adequately considered. In addition, one theme that emerges from the decisions read as a whole is that the absence of careful agency consideration of state interests may make searching judicial scrutiny more likely. To contrast *ADEC* and *Oregon*, limited federal trumping of the states will receive more deference than wholesale overruling, particularly when the circumstances of agency decisionmaking signal that ideology and politics rather than expertise were at work.²¹⁹ Yet the Court's failure to make this point explicit limits the extent to which it is likely to have an impact on agency behavior. Similarly, the lack of a developed account of why and how state sovereignty matters to standing analysis in *Massachusetts* may undermine that decision's effect.

In addition to greater discussion of the relationship between federalism and administrative law, the Court's jurisprudence to date is most deficient in two key areas: developing the federalism-reinforcing potential of administrative procedure; and insisting that agencies better justify and explain decisions and policies that intrude significantly on state regulatory endeavors.

1. Federalism and Administrative Procedure. As mentioned, although procedures surface in several decisions, their role in the Court's analysis is never clearly identified. This omission is particularly unfortunate, given that administrative procedure may offer important protection for state interests—by ensuring that states have notice of proposed administrative actions that may harm their interests and can seek to forestall them, either by dissuading agency officials or perhaps by alerting Congress and obtaining legislative intervention. Greater empirical evidence that administrative procedure in fact serves this role would be desirable. But if it does, one option for strengthening administrative law's role as a federalism surrogate would be to enhance procedural protections accorded states.

A move by the courts to impose new procedural obligations on their own initiative would encounter significant doctrinal obstacles, in the form of *Vermont Yankee*'s instruction that "[a]bsent constitutional constraints or extremely compelling circumstances, 'administrative agencies should be free to craft their own rules of procedure.'"²²⁰ Yet *Vermont Yankee*'s prohibition on new judicial

²¹⁹ See Freeman & Vermeule, *supra* note , at 26–31.

²²⁰ *Vermont Yankee Nuclear Power Corp. v. NDRC*, 435 U.S. 519, 543 (1978).

procedural impositions leaves courts free to enforce the procedural requirements currently contained in statutes and agency rules, an escape hatch courts have exploited by crafting expansive interpretations of the procedural mandates contained in the Administrative Procedure Act.²²¹ Such a route seems equally available here, as courts could reinforce administrative law's surrogacy power through vigorous enforcement of the APA's requirements for notice-and-comment rulemaking and other statutory procedural requirements. For example, courts could relax their substantive scrutiny when agencies utilized procedures (whether notice and comment rulemaking or other measures) intended to ensure adequate attention to state's interests, thereby creating incentives for agencies to impose such procedural requirements on themselves.²²² In addition, courts could police the distinction between legislative and nonlegislative rules tightly, insisting on notice-and-comment procedures whenever an agency interpretive rule or policy statement had significant legal or practical effect on a state.²²³ Alternatively, courts could strictly enforce notice and explanation requirements, requiring that federal agencies carefully identify and justify the preemptive or other effects of a proposed rule on the states.²²⁴

This latter option could have considerable practical relevance today. Several agencies recently have included statements in their explanation of final rules stating that they viewed the rules as preempting state regulation and tort actions, despite having initially stated in the notice of their proposed rule that it

²²¹ See Metzger, *The Story of Vermont Yankee*, in *ADMINISTRATIVE LAW STORIES* 124 (Peter L. Strauss ed., 2006).

²²² See Matthew C. Stephenson, *The Strategic Substitution Effect: Textual Plausibility, Procedural Formality, and Judicial Review of Agency Statutory Interpretation*, 120 *Harv. L. Rev.* 528 (2007); Sharkey, *Preamble*, at 256–57 (recommending imposition of consultation and notice-and-comment requirements in administrative preemption contexts).

²²³ See EO 13132; EO 12988. Arguably, this would have offered yet another basis for invalidating the interpretive rule in *Oregon*, given the significant legal effects—loss of license or criminal punishment—the rule imposed on doctors who used controlled substances to assist suicide, and practical nullification of Oregon's Death with Dignity Act that would result. For discussion of the difficulties courts currently have in distinguishing between legislative rules that require use of notice-and-comment procedures and nonlegislative rules (interpretive rules, policy statements, or) that do not, see John Manning, *Legislative and Nonlegislative Rules*, *Geo Wash L Rev* __; Peter L. Strauss et al., eds. *Gellhorn & Byse's Administrative Law: Cases and Materials*, rev. 10th ed. __ (Supp 2007).

²²⁴ Such an approach could have led to a different result in *Watters*, had the Court relied on the OCC rule imposing preemption, given the limited and elliptical discussion the rule contained. The OCC rule stated simply that preemption would exist to the same extent as under the NBA, rather than directly stating that state oversight would actually be preempted; moreover, as the Court noted, only measures that significantly “” ... are preempted. In addition, the OCC justified the rule solely by reference to judicial preemption doctrine, rather than by explaining why exclusive federal oversight was needed to achieve the NBA's goals.

would not be preemptive.²²⁵ Arguably, such a reversal in position on preemption made the original notice inadequate, because the final rule was not a “logical outgrowth” of the proposed rule.²²⁶ Or, even if standard notice requirements were satisfied here, courts might conclude that additional clarity is required before a federal rule can have a preemptive effect, at least when state law is not plainly in conflict with the rule.²²⁷

2. *Greater Scrutiny of Agency Decisions that Burden State Interests.* A second technique for protecting state interests, this time more evident in the five decisions, is subjecting agency decisions that burdens state interests to greater substantive scrutiny than usually applied. Interestingly, the form in which this technique most clearly appears in the decisions—specifically, the Court’s use of independent scrutiny of statutory meaning—may be most problematic from an agency-incentivizing perspective. After all, why should agencies pay careful heed to federalism concerns in interpreting statutes if courts are unlike to defer to

²²⁵ See [CITE CPSC, NHTSA, FRA rulemakings]. Similarly, the OCC’s notice in *Watters* seems unduly obscure on the question of preemption, stating simply that preemption would exist to the same extent as under the NBA, rather than directly stating that state oversight would actually be preempted to a large extent, 66 Fed. Reg. 8178, 8181; reigning case law at the time provided that the NBA did not “deprive States of the power to regulate national banks, where . . . doing so does not prevent or significantly interfere with the national bank’s exercise of its powers.” *Barnett Bank v. Nelson*, 517 U.S. 25, 33 (1996). Although it cited in a footnote several types of measures that would be preempted, the OCC did not include any statement to the effect that it viewed state oversight of subsidiaries as significantly interfering with national banks’ exercise of their powers but instead emphasized the extent to which subsidiaries are equivalent to internal divisions of banks and the authority of banks to use subsidiaries under governing law. 66 Fed Reg. at 8181.

²²⁶ See *Long Island Care at Home, Ltd. v. Coke*, 127 S.Ct. 2339, 2351 (2007) (describing the “logical outgrowth” requirement as “one of fair notice”). It could be argued that states and other commentators nonetheless had “fair notice” that the agencies were considering preemption, see *id.* (finding no notice violation when agency changed position during rulemaking on substantive scope of rule), but the fact the rules in question here were addressed to substantive topics other than preemption makes that conclusion harder to justify. Indeed, the fact that preemption is addressed solely in the preambles of these rules complicates assessment of whether failure to provide adequate notice of preemption would make the final rules invalid, or simply would justify a court in failing to grant *Chevron* deference to the agency’s position on preemption; the latter would seem the correct result as an agencies’ failure to include a statement on preemption in the body of the rule suggests it does not intend such statements to have legal force and effect. See *United States v. Mead Corp.*, 533 U.S. 218 (2001); See Sharkey, Preamble/PLP, *supra* note __, at __.

²²⁷ For a discussion of different forms of preemption, see Dinh, *supra* note __, at __; Nelson, *supra* note __, at __. Preemption of state law that actually conflicts with federal regulations is not contentious; what has sparked substantial debate is instead efforts to preempt state laws not directly in conflict on the grounds that they create an obstacle to the federal regulatory scheme (as in *Watters*), or more rarely, that federal regulation indicates an intent to occupy the field. See Merrill, *NW L Rev.*

their decisions?²²⁸ That said, lack of such scrutiny—and instead willingness to apply ordinary strong *Chevron* deference to agency interpretations that significantly displace state authority—could remove a powerful check on federal agency overreaching at the states’ expense. For this reason, as noted, some scholars have argued against granting any deference to agency statutory interpretations that preempt state action or at most granting lesser *Skidmore* deference.

More beneficial, I believe, would be to approach the question from a perspective that emphasizes the quality of agency reasoning and explanation. Agencies should face a greater burden of persuasion and explanation when their decisions substantially restrict state experimentation and traditional state functions. The doctrinal rubric most amenable to such an approach is arbitrary and capriciousness review, in part because it applies to all agency decisionmaking, whether on matters of statutory interpretation or more straightforward policymaking. As a result, it avoids the odd dichotomy of denying deference to agency preemption interpretations yet reviewing agency substantive determinations quite deferentially, notwithstanding that the latter can impact as harshly on the states. Arbitrary and capriciousness review also seems particularly well-suited to curbing agency decisions that are unduly driven by executive branch politics at the expense of governing statutes.²²⁹

The downside of relying on arbitrary and capriciousness review is that the impact on agency decisionmaking is harder to cabin. Agencies make a multitude of policy and implementation decisions that burden the states, far more than the number of preemptive statutory interpretations they may issue. Imposing a greater justificatory burden when agency decisions impact negatively on state interests would be substantial counterbalance to any tendency on the part of federal agencies, by virtue of their national position or presidential policy priorities, to underweigh state interests. But arguably it does so by tilting the scales too much in favor of the states, at least applied across-the-board, undermining the important uniformity and expertise benefits that federal regulation can offer and was intended by Congress to achieve.²³⁰ This is not

²²⁸ Even adoption of *Skidmore* may have such a deterrent effect, given that *Skidmore* ties deference to the degree to which an agency has succeeded in persuading a court that the agency’s view is correct and thus in practice may not differ much from independent scrutiny. But as *Skidmore* emphasizes the quality and reliability of agency decisions in deciding whether to defer, adoption of *Skidmore* as the standard under which to review agency preemption decisions (the approach advocated by the state in *Watters*) seems better keyed to influencing agency decisionmaking than simply substituting independent judicial review.

²²⁹ It has been used in this way on significant occasions. See, e.g., *State Farm, Overton Park*, Nat’l Maritime (DC Cir).

²³⁰ See. Richard A. Epstein, *Why the FDA Must Preempt Tort Litigation: A Critique of Chevron Deference and a Response to Richard Nagareda*, 1 J. Tort Law Article 5 (2006). (Response to Nagareda); Stewart, *Regulatory Compliance* Richard B. Stewart, *Regulatory*

simply a question of national interests versus state interests, because national regulation can reinforce state authority by protecting states against harmful externalities caused by sister state regulation (or lack thereof).²³¹

As a result, a more contextual approach appears more appropriate, with greater justification perhaps required only some circumstances—for example, when the burden on states is quite significant, or when governing statutes and historical practice have tolerated a substantial role for state regulation.²³² Here another advantage of the arbitrary and capriciousness review comes to fore, which is that such review currently encompasses a broad range of scrutiny. As Peter Strauss has noted, more searching, hard look scrutiny is most common in informal rulemakings, which produce generally-applicable standards, than in less consequential informal adjudications.²³³

Interestingly, this is the approach implicitly suggested but never developed in *Raich*, and medical marijuana represents a prime context for its application. In light of strong state commitment to experimenting with medical marijuana, and the CSA's provision for rescheduling of controlled substances based on medical purpose, the federal government should face a significant justificatory burden if it refuses to relist marijuana or undertake a sustained investigation of a rescheduling petition.²³⁴

Compliance Preclusion of Tort Liability: Limiting the Dual-Track System, 88 Geo. L.J. 2167 (2000); Thomas Merrill, Preemption in Environmental Law: Formalism, Federalism Theory, and Default Rules in FEDERAL PREEMPTION, supra note _ (AEI). GET PINS

²³¹ See Merrill, AEI, supra note _, at __; Catherine M. Sharkey & Samuel Issacharoff, Backdoor Federalization, 53 U.C.L.A. L. Rev. 1353, __ (2006)

²³² See, e.g., Buzbee, Contextual Environmental Federalism, supra note _; Merrill, AEI, supra note _ (arguing that preemption has to be approached contextually); Sharkey, PLP, supra note _ at 33-35; see also Buzbee, NYU, supra note _ (arguing that federally preemptive floors and ceilings should be treated differently).

²³³ See Peter Strauss, Overseers or “The Deciders”: The Courts in Administrative Law at 5. Compare, e.g., *State Farm* (hard look review in informal rulemaking) with *PGBC* (deferential review in informal adjudication context) and *Baltimore Gas* (greater deference in light of uncertainty). Thomas Miles and Cass Sunstein’s recent empirical analysis of arbitrariness review supports this claim that arbitrary and capriciousness review encompasses a range of scrutiny, although they trace this variation to the ideology of reviewing judges and of the underlying decision. See Thomas J. Miles & Cass R. Sunstein, *The Real World of Arbitrariness Review*, U Chi. L. Rev. [update cite].

²³⁴ Cf Young, *Just Blowing Smoke*, supra note __. Another example concerns federal agency denial of state waiver requests; arguably, a federal agency should face a greater burden to justify denial of waiver requests than it does refusal to grant private regulated entities waivers. If so, this could be relevant to several current disputes in which the federal government has denied state requests for waiver authority with important federalism implications. [See, e.g., NCLB/Connecticut denial; Cal carbon dioxide emissions denial]

B. *Ordinary or Extraordinary Administrative Law?*

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

The practical import of this caution against developing extraordinary administrative law is limited. The distinction between extraordinary and ordinary administrative law is hardly bright-line. Most importantly, staying within the broad confines of ordinary administrative law does not mean foregoing express invocation of federalism concerns in administrative law decisions. Indeed, express acknowledgment of the need for agencies to take state interests seriously and of how administrative law can encourage them to do so is essential for administrative law to fulfill its surrogacy role, and important for judicial accountability more generally. Such acknowledgment puts agencies on notice of the need to take state interests seriously and allows for dialogue between agencies and courts about how state concerns should factor into agency decisionmaking. In addition, unless the Supreme Court is explicit about administrative law's role as a federalism surrogate, the traditional view of these doctrines as analytically separate may make lower courts resistant to injecting federalism concerns into an administrative law rubric.

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

Greater acknowledgment of the connection between federalism and administrative law is as important from an administrative law perspective as from

a federalism one. The quintet of decisions suggests that, faced with federalism concerns, the Court may apply more searching scrutiny and in other ways push administrative law to its extremes. From an administrative law perspective, the danger is that these more extreme approaches will spillover into contexts when federalism concerns are absent. Again, the capaciousness of ordinary administrative law means that these approaches are generally available, so such spillover does not entail that much of a doctrinal shift. And the more frequently they are invoked, the more these approaches move from the margin to the core of established administrative law analysis. This suggests that, viewed purely from an agency-centered perspective, developing special requirements limited to federalism contexts might be preferable to reliance on ordinary administrative law to address federalism concerns. At a minimum, express discussion of how federalism concerns factor into a court's application of ordinary administrative law requirements is important to limit such spillover effects.

CONCLUSION

[To be added.]