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SOME RICE WITH YOUR CHEVRON?:
PRESUMPTION AND DEFERENCE IN
REGULATORY PREEMPTION

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In constituting the new American nation, the Framers of the United States Constitution constructed a delicate balance between the powers of the new federal government and those of the existing state governments.1 In practice, that balance has shifted radically over time. As courts and commentators have remarked, the Framers would be stunned to behold the balance struck in the modern American administrative state.2 Yet, these same courts are otherwise silent regarding the legitimacy and efficacy of the current federal-state balance. Given the unexplained evolution from the Framers' expectations for our federal system to modern administrative practice, the principle of federalism should counsel caution when considering government action that would affect the federal-state balance.

Rarely do Congress and administrative agencies tip the federal-state balance in their favor as much as when they preempt state law. The federal government's power to preempt state law creates

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an inverse relationship between the extent of autonomous federal and state power: as autonomous federal power expands, autonomous state power shrinks. Similarly, increased preemption by federal administrative agencies translates into decreased state autonomy. Given the power wielded by administrative bodies, the Supreme Court has acted to restore a federalist balance. In *Rice v. Sante Fe Elevator Corp.*, the Court espoused as a canon of statutory interpretation the presumption that a statute does not preempt a traditional area of state law unless Congress clearly states its intent to do so.

While the Court’s use of federalism has restrained the preemption of state law, the Court has been much more accommodating of administrative agency action in general. About a decade ago, in *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, the Court determined that administrative agencies should be given wide discretion in administering their statutory schemes. Under this deferential approach, a court must ask whether the agency’s action was “permissible,” not necessarily correct, given the authorizing statute. *Chevron* acknowledged, then, that Congress often leaves a wide range of options for agency action. While the Court has occasionally suggested a partial retreat from *Chevron*, the case still stands as a symbol of the central, expansive role administrative agencies play in our modern government. This expansive role is

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4. Id. at 230.
6. Id. at 844 (recognizing that considerable weight should be accorded an agency’s construction of a statute entrusted to it for administration).
7. Id. at 843 (stating that the question for the court is “whether the agency’s answer is based on a permissible construction of the statute”); see also NLRB v. United Food & Commercial Workers Union, Local 23, 484 U.S. 112, 123 (1988) (reiterating the deferential approach set forth in *Chevron*).
8. *Chevron*, 467 U.S. at 843 (“The power of an administrative agency to administer a congressionally created . . . program necessarily requires the formulation of policy and the making of rules to fill any gap left, implicitly or explicitly, by Congress.” (quoting Morton v. Ruiz, 415 U.S. 199, 231 (1974)).
seen, depending on the writer, as necessary,\textsuperscript{11} desirable,\textsuperscript{12} troublesome,\textsuperscript{13} dangerous,\textsuperscript{14} illegitimate,\textsuperscript{15} or any combination of the above. However, all agree that the expanded role of agencies is here to stay.\textsuperscript{16}

Given the \textit{Rice} presumption against preemption, on the one hand, and the \textit{Chevron} deference to agency discretion, on the other, one would expect these judicial doctrines eventually to collide in cases of regulatory preemption.\textsuperscript{17} Indeed, collision seems inevitable

\begin{itemize}
\item \textsuperscript{11} See Scalia, \textit{supra} note 9, at 517 (noting the \textit{Chevron} discussion “permit[s] needed flexibility, and appropriate political participation, in the administrative process.”); cf. Mistretta v. United States, 488 U.S. 361, 372 (1989) (“Our jurisprudence has been driven by a practical understanding that in our increasingly complex society, replete with ever changing and more technical problems, Congress simply cannot do its job absent an ability to delegate power under broad general directives.”).
\item \textsuperscript{12} See Jerry L. Mashaw, \textit{Prodelegation: Why Administrators Should Make Political Decisions}, 2\textsuperscript{nd} ed., 1 J.L. ECON. & ORG. 81, 95-99 (1985) (discussing the benefits of delegating to administrators); Richard J. Pierce, Jr., \textit{Chevron and Its Aftermath: Judicial Review of Agency Interpretations of Statutory Provisions}, 41 VAND. L. REV. 301, 307 (1988) (recognizing that an agency is “a more appropriate institution” to make policy decisions because agencies are more accountable to the electorate than courts); Scalia, \textit{supra} note 9, at 518 (finding it desirable to allow an agency to “suit its actions to the times”); Mark Seidenfeld, \textit{A Civic Republican Justification for the Bureaucratic State}, 105 HARV. L. REV. 1511, 1516-17 (1992) (illustrating “how broad grants of administrative discretion can provide a means of fulfilling the promises of civic representation.”).
\item \textsuperscript{14} See Cynthia R. Farina, \textit{Statutory Interpretation and the Balance of Power in the Administrative State}, 89 COLUM. L. REV. 452, 456 (1989) (“Chevron is a siren’s song, seductive but treacherous.”).
\item \textsuperscript{15} See Gary Lawson, \textit{The Rise and Rise of the Administrative State}, 107 HARV. L. REV. 1231, 1231 (1994) (“The post-New Deal administrative state is unconstitutional, and its validation by the legal system amounts to nothing less than a bloodless constitutional revolution.”).
\item \textsuperscript{16} See Greene, \textit{supra} note 2, at 124 (“[W]e live with an enormous amount of [presidential] lawmaking, and few appear ready to condemn the system as invalid.”); cf. Humphrey’s Executor v. United States, 295 U.S. 602, 628-29 (1935) (accepting the premise that Congress has the authority to create quasi-legislative and quasi-judicial agencies).
\item \textsuperscript{17} This paper uses “regulatory preemption” to refer to the preemption of state law by regulations or other actions taken by federal administrative agencies, such as agency rulings or interpretations of the agency’s authorizing statute. Regulatory preemption refers solely to preemption by administrative actions themselves, as opposed to statutory preemption, which is preemption by a federal statute as independently interpreted by the judiciary. This distinction occasionally has been blurred in the commentary, see, e.g., Richard J. Pierce, Jr., \textit{Regulation, Deregulation, Federalism, and Administrative Law: Agency Power to Preempt State Regulation}, 46 U. PITT. L. REV. 607, 661-65 (1983) (discussing federal
when an administrative agency interprets an ambiguous statute to preempt state law. In such a case, the Rice presumption against preemption requires a court to reject preemption absent clear congressional intent to the contrary. Chevron, conversely, requires a court to accept the agency's interpretation in favor of preemption unless Congress expressed an intent to the contrary. The case law, however, does not evidence such a collision.

This Article examines the Court's treatment of regulatory preemption, in search of the underlying tension between presumption and deference. This search begins with a survey of the Supreme Court's regulatory preemption cases, an area of the Court's jurisprudence that has long been neglected. Since the commentary and the case law lack a common synthesis of the Court's regulatory preemption opinions, an initial goal of this Article is to cull and analyze the Court's major efforts in the area. In this pursuit, the development of regulatory preemption is compared to the Court's treatment of statutory preemption.

The journey through the case law yields two insights into regulatory preemption. First, the Court's statutory preemption doctrine is part of the Court's larger commitments to deliberative government and politically accountable lawmaking. Rice and Chevron both fit within these larger commitments. Second, the Court's regulatory preemption cases do not fit within this larger jurisprudence. This doctrinal incoherence results from the Court's unreflective treatment of regulatory preemption. While the Court has spoken on regulatory preemption, it has neither explained nor justified its position. Instead, the Court merely has applied statutory preemption rules to regulatory preemption cases. To the extent that statutory and regulatory preemption are different—under the Court's larger jurisprudence—difficulty may be expected in applying the same set of preemption rules to both areas.

A comparison of the constitutional basis of regulatory and statutory preemption reveals the difference between the two types.

agency ability to preempt state regulations that are harmful to the national interests), and has likely led to the Court's confused approach to regulatory preemption. For a discussion of preemption by administrative statutes, see Laurence H. Tribe, American Constitutional Law § 6-28, at 501-08 (2d ed. 1988) (suggesting that the existence of an administrative agency within a statutory scheme may make statutory preemption more likely). See also Schneidewind v. ANR Pipeline Co., 485 U.S. 293, 300 (1988) (stating that Congress' intent to occupy a field to the exclusion of state law may be inferred from the pervasiveness of federal regulation).
Since the beginning of the Republic, the Court has developed a doctrine governing congressional preemption of state law through enactment of a statute. The doctrine derives from a simple inquiry: Why can Congress preempt state law? The answer lies in the Supremacy Clause of the Constitution which makes duly enacted statutes the "supreme Law of the Land." In other words, Congress can preempt state law \textit{if it so desires}. The issue then quickly becomes whether Congress, in enacting a particular law, wants to preempt state law. For the Court, therefore, statutory preemption is a search for congressional intent.

Of course, statutory preemption assumes that Congress has acted within the enumerated powers set forth in Article I. For example, Congress cannot coerce states to enact a federal scheme of regulation, nor can it act outside of the constitutional proce-
dures of bicameralism and presentment. Additionally, a federal law preempting state law is reviewable under the general constitutional "rationality" standard, or a stricter standard if more "important" constitutional interests or classifications are involved. Thus, Congress can preempt state law if: (1) it intends to do so; and (2) it acts within its procedural and substantive constitutional authority.

Next consider regulatory preemption. The Supreme Court has stated that administrative actions should receive the same preemptive effect as statutes. In doing so, the Court took the preemption doctrine derived from the nature of statutory lawmaking and applied that doctrine wholesale to administrative lawmaking. Consequently, an administrative action preempts state law if: (1) the agency's intent is to preempt state law; and (2) the agency's action is procedurally and substantively valid. In structure and substance, therefore, the Court's statutory and regulatory preemption doctrines are virtually identical.

If the Court wanted to formulate a coherent regulatory preemption doctrine from scratch, it would begin, as it did with statutory preemption, with the fundamental inquiry: Why can regulatory agencies preempt state law? Answering this inquiry for regulatory


25. See TRIBE, supra note 17, §§ 16-5 to 16-6, at 1451-54.

26. See infra note 187 and accompanying text.


28. The agency action is valid if it is not "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law" and is consistent with the policy objectives embodied in the authorizing statute. 5 U.S.C. § 706(2)(A) (1988). See United States v. Morton, 467 U.S. 822, 834, 836 (1984) (finding regulations which simplify enforcement decisions for garnishment orders advance congressional objectives of speedy enforcement and minimal administrative burden).


[A] federal agency may preempt state law only when and if it is acting within the scope of its congressionally delegated authority. This is true for at least two reasons. First, an agency literally has no power to act, let alone preempt the validly enacted legislation of a sovereign State, unless and until Congress confers power upon it. Second, the best way of determining whether Congress intended the regulations of an administrative agency to displace state law is to examine the nature and scope of the authority granted by Congress to the agency.
preemption, however, is more difficult than answering the same inquiry for statutory preemption. This difficulty arises because courts and commentators have yet to become wholly comfortable with the place of administrative agencies in the constitutional framework. Agencies are repeatedly referred to as quasi-this-branch, a hybrid of that-branch, or a mix of all three branches. The basis of an agency's claim to make law entitled to the status of "supreme Law of the Land" is not clearly defined. Until that basis is clear, it is difficult, if not impossible, to construct a doctrine of regulatory preemption from the bottom up as the Court did with statutory preemption.

It is beyond the scope of this Article to discuss to what extent the doctrine of regulatory preemption requires a prior justification for administrative lawmaking. The more limited goal of this Article is to identify the Supreme Court's implicit basis for giving agency action preemptive force. This Article argues that the Court's decisions on federalism, separation of powers, federal common law, and administrative law develop a jurisprudence that supports regulatory preemption. Rice and Chevron typify two aspects of this jurisprudence. First, Rice indicates that the Court prefers deliberation upon actions that implicate federalism concerns. By presuming no preemption in the face of statutory ambiguity, the Court forces Congress to clearly make its preemption intentions known. Second, Chevron indicates that the Court prefers that close questions, in which the possibility of judicial error looms large, be decided by the most accountable decision-maker available. Ultimately, these two principles—deliberation and preference for accountable decision-making—should guide the formulation of a regulatory preemption doctrine. To the extent that the Court's current doctrine is inconsistent with these two commitments, this Article suggests how the Court can achieve coherence.

Part I briefly sketches the Court's statutory preemption doctrine. The Court has categorized types of preemption with regard to the level of congressional intent fairly ascertainable from the ac-

30. See Greene, supra note 2, at 123-24.
32. While not formulating its own legitimating theory for administrative action, this Article identifies points where such a theory would make a difference for regulatory preemption. These points act as place-holders for future discussion.
33. See infra notes 74-78 and accompanying text.
34. See infra notes 135-45 and accompanying text.
tion. According to the Court, Congress can preempt state law either expressly (by a statutory provision) or impliedly (by legislating comprehensively over an entire field or creating a conflict with state law). The degree of congressional intent to preempt state law varies significantly among these types of preemption, with express preemption being the strongest and implied field preemption the weakest. Part I also discusses the Rice presumption against preemption of state law.

Part II discusses the Chevron deference accorded to the actions of administrative agencies. Part III sets forth the larger jurisprudential framework of which Rice and Chevron are a part. The discussion concludes that the Court adheres to a preference for deliberation and accountable decision-making in its decisions on federal common law, separation of powers, federalism, preemption, and deference to administrative agencies.

Part IV sets to the central task of this Article: reconceiving regulatory preemption within the Court's structural constitutional jurisprudence. The Article contrasts the development of statutory preemption with the rather careless fashioning of regulatory preemption. This comparison examines the types of statutory preemption (express, conflict, and field) as the Court has applied them to agency actions. The discussion of each type of preemption concludes with the question at the center of this Article: How should courts resolve the tension between presumption and deference? The Article concludes that the solution lies in maintaining the Court's commitment to deliberation and accountable decision-making as exemplified in other areas.

I. INTRODUCTION TO STATUTORY PREEMPTION

Statutory preemption has deep roots, dating back to the Court's decisions in Gibbons v. Ogden and McCulloch v. Maryland. Over time, the Court has refined the concept of preemption, currently applying three types of preemption: express, conflict, and field preemption. Overlaying these three types of preemption is the Rice presumption against preemption. Section B addresses this

35. 22 U.S. (9 Wheat.) 1, 207 (1824) (invalidating a New York law granting an exclusive operating license for ship pilots because it conflicted with the federal commerce power).
36. 17 U.S. (4 Wheat.) 316, 427 (1819) (finding that the state had no power to tax the federal bank within its borders because the power of the state to tax is subordinate to laws enacted by Congress under its constitutional authority).
presumption.

A. The Preemption Rubric

According to the Supreme Court, whether a federal statute preempts state law is entirely a question of congressional intent. Congress' intent to preempt can either be expressly stated in a statutory provision, or implied from the language or structure of the statute. Express intent is the easiest case because Congress has explicitly stated that state law is preempted. The more difficult cases involve the various forms of implied intent. The remainder of this section discusses the gray areas of implied preemption.

37. Retail Clerks v. Schermerhorn, 375 U.S. 96, 103 (1963) ("The purpose of Congress is the ultimate touchstone" of preemption). See also Tribe, supra note 17, § 6-25, at 480 ("[T]he question whether federal law in fact pre-empted state action in any given case necessarily remains largely a matter of statutory construction."); Paul Wolfson, Preemption and Federalism: The Missing Link, 16 HASTINGS CONST. L.Q. 69, 70 (1988) (stating that because preemption cases concern congressional intent, Congress can overturn the Court's interpretation if the Court is mistaken).


39. Id. ("In the absence of express pre-emptive language, Congress' intent to pre-empt . . . state law . . . may be inferred . . . .").

40. This is not to suggest that interpretation of a statutory express preemption clause is always a simple matter. Ambiguities are likely to exist when interpreting the extent of preemption required by an express statutory provision. At that point, we encounter the same ambiguities inherent in the general enterprise of statutory interpretation. See generally Frank H. Easterbrook, Text, History, and Structure in Statutory Interpretation, 17 HARV. J.L. & PUB. POL'y 61, 61 (1994) (recognizing that the purpose and meaning of words change with context and over time); William N. Eskridge, Jr., Dynamic Statutory Interpretation, 135 U. PA. L. REV. 1479, 1482-83 (1987) (acknowledging that apparently clear statutory text becomes ambiguous when applied to present day problems and circumstances); William N. Eskridge, Jr., The New Textualism, 37 UCLA L. REV. 621, 621 (1990) (examining the new textualism theory of statutory interpretation which relies on the interpretation of statutory text over legislative history); William D. Popkin, An "Internal" Critique of Justice Scalia's Theory of Statutory Interpretation, 76 MINN. L. REV. 1133, 1140 (1992) (recognizing the complexities of statutory interpretation as judges consider the "ordinary meaning," the "internal context," and the more controversial "super-text meaning" of a statute); H. Jefferson Powell, The Original Understanding of Original Intent, 98 HARV. L. REV. 885, 888, 948 (1985) (stating that the constitutional interpretation theory of "original intent" does not refer to the personal intentions of the Framers but to the structural considerations of central and state-delegated power); Note, Looking It Up: Dictionaries and Statutory Interpretation, 107 Harv. L. Rev. 1437, 1445 (1994) (discussing concerns involving use of the dictionary to determine the ordinary meaning of statutory terms).
1. Conflict Preemption

As we leave express preemption, the strength of congressional intent to preempt state law lessens. The Court has identified two general categories of implied preemption: conflict and field preemption. The Court has held that federal law preempts state law to the extent that state law "actually conflicts with federal law."\(^4\) Conflict preemption, in turn, is divided into two types: direct and obstacle preemption. Direct conflict preemption occurs when "compliance with both federal and state regulations is a physical impossibility."\(^3\) For example, if state law requires something that federal law forbids, the laws would be in direct conflict.\(^4\) Direct conflict cases generally have the strongest congressional intent of the implied preemption categories.\(^4\) It is quite logical to conclude that Congress intends that its laws be obeyed.\(^4\) Consequently, one can also conclude that Congress intends to preempt any state law that effectively requires disobedience of federal law. Thus, conflict preemption historically has been an easy case.

Obstacle preemption poses a harder case. The Court has described obstacle preemption as occurring "when state law 'stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.'"\(^4\) Obstacle preemption usually arises when a state attempts to supplement the federal regulatory scheme with more stringent regulations. For example, a federal employee health law may limit employee exposure to ten units of a toxic substance, while a state's law limits exposure to only five

\(^{41}\) Hillsborough, 471 U.S. at 713 (emphasis added).
\(^ {43}\) Id. at 143 (finding no such impossibility of dual compliance where federal statute forbids marketing of any avocado with more than seven percent oil and state statute excludes any avocado with less than eight percent oil content).
\(^ {45}\) As Judge Stephen Breyer has written: "It is virtually always proper for a court to assume Congress wanted the statute to work and, at least, did not intend a set of interpretations that would preclude its effective administration." Breyer, supra note 13, at 368. An interpretation that concluded that Congress did not intend to preempt directly conflicting state law would clearly preclude "effective administration" of the statute.
To the extent that both laws have an underlying purpose of protecting employee health there seems to be no conflict. The conflict lies in the degree of regulation. Because the federal law standard may have been set after a careful balancing of the costs (to the employer) and benefits (to the employee) associated with protecting employee health, a more stringent state requirement would upset Congress’ balance. Obstacle preemption, therefore, dictates that the state law be preempted.\(^{47}\)

The obstacle preemption analysis becomes more difficult, however, if state law is intended to serve purposes not contemplated by the federal law.\(^{48}\) Under the employee health example above, state common law may hold a firm liable for damages due to employee exposure even if an employer has complied with the federal standard. While the state common law is intended to protect employee health, it also seeks to compensate victims. With such a dual purpose law, the obstacle analysis becomes more complex.\(^{49}\)

Obstacle preemption, consequently, requires a difficult and largely undefined inquiry into the policies underlying a statutory scheme, as well as the best method of implementing those policies in practice. That this inquiry requires a largely ad hoc policy analysis is evidenced by the Court’s minimally helpful guidance on obstacle preemption: “The key question is... at what point the state regulation sufficiently interferes with federal regulation that it should be deemed preempted under [federal law].”\(^{50}\)

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47. See Susan Rose-Ackerman, Rethinking the Progressive Agenda: The Reform of the American Regulatory State 128-29 (1992); Tribe, supra note 17, § 6-26, at 483-84 (citing Supreme Court decisions in which state laws were preempted when they disrupted Congress’ objectives).

48. Further difficulties arise if the federal law is intended to serve several purposes at once. These purposes may be in competition with one another or even contradictory. In such cases, the difficult task will be to determine how the statute balances these congressional purposes. See Holder v. Hall, 114 S. Ct. 2581, 2625 (1994) (Ginsburg, J., dissenting) (“However difficult this task may prove to be, it is one that courts must undertake because it is their to effectuate Congress’ multiple purposes as best they can.”).

49. See Gade v. National Solid Waste Mgmt. Ass’n, 112 S. Ct. 2374, 2388 (1992) (holding that the Occupational Safety and Health Act [OSHA] preempts state law regulating occupational safety and health even though state law also serves purpose of protecting public health); Silkwood v. Kerr-McGee Corp., 464 U.S. 238, 251-56 (1984) (finding federal regulation of nuclear energy did not preempt state common law action against nuclear energy firm because it was incomprehensible that Congress would leave employee without a remedy); see also Rose-Ackerman, supra note 47, at 129-30 (discussing the conflicts which can arise between conventional tort doctrines and the regulatory policies of federal statutes).

50. Gade, 112 S. Ct. at 2387 (emphasis added).
into sufficient interference is value-laden and policy intensive. It lies at the nebulous core of obstacle preemption. As suggested below in Part IV.C, the complex question of obstacle preemption is well-suited to agency resolution.

The preceding discussion suggests that the logic of direct conflict preemption may be helpful in identifying the proper focus of the obstacle preemption analysis. In direct conflict preemption, Congress intends that its laws be obeyed. In obstacle preemption, a small inferential step is made to the conclusion that Congress intends that its laws succeed. To the extent that state law interferes with that success, it must yield to federal law. In this way, obstacle preemption is part of the larger mission of statutory interpretation to make the law the best that it can be.

With obstacle preemption, then, the Court takes another step away from ascertainable congressional intent. In the abstract, it is logical to argue that Congress would want to preempt any law that interfered with the achievement of a statutory purpose. Yet, in application it is often difficult to pinpoint Congress' purpose and how that purpose is best achieved. The endeavor is made more difficult because Congress may have balanced several competing goals in formulating legislation. Congress alternatively may have decided to pursue a goal only so far for political reasons and may have no objections to states pursuing the goal further. In obstacle preemption congressional intent to preempt will be present, but less precise than in express and direct preemption.

51. See Breyer, supra note 13, at 383 (discussing courts' use of "hard look" doctrine to require agencies carefully to examine policy considerations prior to finalizing a decision).

52. See RONALD DWORKIN, LAW'S EMPIRE 337-38 (1986) (statutory interpretation should seek to make the statute "the best piece of statesmanship it can be"); see also Cass R. Sunstein, Law and Administration After Chevron, 90 COLUM. L. REV. 2071, 2086 (1990) (deciding whether Congress wanted to defer to an agency's interpretation of a given statute "call[s] for an assessment of which strategy is the most sensible one to attribute to Congress under the circumstances."). This position, however, leads to an important question: How does one make a law all that it can be? In the obstacle preemption context, answering that question requires a conception of the optimal allocation of authority between state and federal government given the regulatory scheme and policy objectives at issue. For a discussion of this task, see SUSAN ROSE-ACKERMAN, PRODUCTS LIABILITY AND INNOVATION: MANAGING RISK IN AN UNCERTAIN ENVIRONMENT (1994).

53. Due to the complexity and context-based nature of such an analysis, Part IV.C suggests that courts defer to agency determinations of obstacle preemption. Such deference is necessary because agencies will be more familiar with the statutory scheme, its goals, and how those goals are achieved in the real world, as well as what type of state regulation will, in practice, undercut the federal scheme. To the extent that such a determination
2. Field Preemption

The second type of implied preemption is field preemption. Under field preemption, Congress can preempt an entire area of state law. The Court will find field preemption in two cases: (1) where "the scheme of federal regulation is sufficiently comprehensive to make reasonable the inference that Congress 'left no room' for supplementary state regulation"; or (2) "where the field is one in which 'the federal interest is so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject.' As with obstacle preemption, the criteria for field preemption, "sufficiently comprehensive" and "so dominant," are not helpful. Indeed, the Court has noted that the criteria for each case of field preemption are weak guideposts for ascertaining congressional intent.

First, in New York Department of Social Services v. Dublino the Court urged caution in finding preemption due to the comprehensiveness of a statute. The Court noted that "the subjects of modern social and regulatory legislation often by their very nature require intricate and complex responses from the Congress, but without Congress necessarily intending its enactment as the exclusive means of meeting the problem." Under this view, the typical modern congressional statute is more comprehensive than its predecessor. The modern Congress legislates in greater
detail without necessarily intending that such detail mean preemption of state law.\footnote{Dublino, 413 U.S. at 415 (stating that given the complexity of the subjects of legislation, "a detailed statutory scheme was both likely and appropriate, completely apart from any questions of pre-emptive intent.").} Regardless of whether one accepts the Court's historical claim regarding the relative specificity of statutes over time, the Court states quite clearly that comprehensiveness is at best only a weak indication of congressional intent to preempt state law.

Second, the Court has not offered much guidance as to what constitutes a particularly "dominant" federal interest.\footnote{Statutory preemption has been marked by the emergence of two areas of particularly intense federal concern: labor-management relations and employee pension plans. While preemption in both areas results from express statutory provisions, and the Court generally construes such provisions narrowly, the Court has construed federal preemption most generously in these two areas.} As the Court has noted:

Undoubtedly, every subject that merits congressional legislation is, by definition, a subject of national concern. That cannot mean, however, that every federal statute ousts all related state law. Neither does the Supremacy Clause require us to rank congressional enactments in order of 'importance' and hold that, for those at the top of the scale, federal regulation must be exclusive.\footnote{Hillsborough County v. Automated Med. Lab., Inc., 471 U.S. 707, 719 (1985).}

Instead, the Court looks for some further indicia of federal importance, such as roots in the text of the Constitution, to find a "dominant" federal interest. For example, the Court has invoked federal interest preemption in the areas of foreign affairs\footnote{See, e.g., Zschering v. Miller, 389 U.S. 429, 430 (1968) (concerning the disposition of Oregon resident's estate whose sole heirs are German nationals); Hines v. Davidowitz, 312 U.S. 52, 59 (1941) (involving the validity of a Pennsylvania statute requiring aliens to register annually with the state).} and Indian law,\footnote{The Court discussed the unique preemption inquiry applicable to cases involving Indian tribes in New Mexico v. Mescalero Apache Tribe, 462 U.S. 324 (1983): \textsc{We . . . emphasize[\ldots] the special sense in which the doctrine of preemption is applied in this context. Although a State will certainly be without jurisdiction if its authority is preempted under familiar principles of preemption, we caution[\ldots] that our prior cases [do] not limit preemption of State laws affecting Indian tribes to only those circumstances. "The unique historical origins of tribal sovereignty" and the federal commitment to tribal self-sufficiency and self-determination make it "treacherous to import . . . notions of preemption that are prop-}
al interest. As with comprehensiveness, the existence of a federal
interest— itself a difficult question—is a poor indicator of congress-
sional intent. Thus, the Court has been hesitant to find either type
of field preemption absent something more specific.

In summary, the types of federal preemption fall on a contin-
uum from strong to weak congressional intent to preempt state law.
The following is a rank of statutory preemption types in order of
strongest to weakest indications of congressional intent:

1. express preemption
2. direct conflict preemption
3. obstacle preemption
4. field preemption (based on comprehensiveness or
   federal interest)

Congressional intent is the correct starting point for preemption
analysis. The easiest case is where we find Congress has expressly
exercised its power under the Supremacy Clause. As the indicia of
intent become less clear, however, as in obstacle and field preemp-
tion, we may be searching for a fictitious congressional
intent.

In other words, Congress may have never contemplated the precise
issue of preemption.

Id. at 333-34 (citations omitted) (quoting White Mountain Apache Tribe v. Bracker, 448
U.S. 136, 143 (1980)). See also Tribe, supra note 17, § 6-29, at 509-10 (discussing the
Court's treatment of the conflict between Indian tribes and state authorities as "reminiscent
of typical preemption analysis where there is a claim of actual conflict with a federal ob-
jective.").

66. U.S. Const. art. I, § 8, cl. 3 (Congress' power to "regulate Commerce with for-
eign Nations . . . and with the Indian Tribes"); id. art. I, § 8, cl. 11 (Congress' power to
"declare War"); id. art. II, § 2, cl. 2 (President's power to "make Treaties" and "appoint
Ambassadors" with approval of the Senate).

67. See Susan Bartlett Foote, Administrative Preemption: An Experiment in Regulatory
Federalism, 70 Va. L. Rev. 1429, 1436 n.31 (1984) ("Although the courts are supposed
to interpret Congress' unexpressed intent, some commentators argue that courts are doing
the intending."); Thomas R. Powell, Supreme Court Decisions on the Commerce Clause
and State Police Power, 1910-1914 (Pt. 2), 22 Colum. L. Rev. 28, 49 (1922) ("The
silence of the Constitution becomes vocal only by the judicial umpiracy of practical con-
tests under rules that leave the umpire largely free to settle each dispute as it thinks
best."); Note, Pre-emption as a Preferential Ground: A New Canon of Construction, 12
Stan. L. Rev. 208, 224 (1959) ("If the Court continues to rationalize its pre-emption
decisions in terms of spurious specific intent, or even if it speaks in terms of congressio-
nal purpose when it is actually motivated by other constitutional considerations, the Court
can only earn the disrespect of the legal profession and the public.").
Even if Congress never contemplated preemption, it is safe to assume that Congress intended that its laws succeed in both letter and spirit. To the extent that state law interferes with that success, it is vulnerable to preemption by federal law. The task, then, is to determine what a "successful" implementation of the federal scheme should look like. In direct conflict cases, we see clearly that successful federal regulation cannot tolerate directly contrary state law. This is an easy case. As we move on to obstacle and field preemption, the congressional markers become less clear. In these cases, the decision-maker is left with more discretion to formulate the ideal implementation of the federal scheme. Perhaps for this reason, the Court has had trouble deciding obstacle preemption cases and has limited field preemption to cases of extraordinary comprehensiveness or particularly intense (bordering on constitutional) federal interests. When the signal of congressional intent is hard to read, we demand a stronger signal.68

B. Presumption Against Preemption

The Court's decision in Rice v. Santa Fe Elevator Corp.69 announced an important limitation on statutory preemption.70 Under Rice, the Court presumes that Congress did not intend to preempt state law addressing traditional areas of state concern, such as public health and safety.71 Professor Laurence Tribe explains that

68. Before proceeding to the next section, one caveat is offered. Although the prior discussion was couched in terms of court doctrine, it does not suggest that all preemption questions should be decided de novo by judges. The question of the relative institutional roles in policing preemption is discussed later in Part IV. See William N. Eskridge, Jr. & Philip P. Frickey, Commentary: The Making of The Legal Process, 107 HARV. L. REV. 2031, 2033 (1994) ("The key to good government is not just figuring out the best policy, but also identifying which institutions should be making which decisions and how the different institutions can collaborate most productively." (citation omitted)).

69. 331 U.S. 218 (1947).

70. At least two commentators have argued that the Court now requires a "clear statement" of congressional intent to alter the federal-state balance of power, such as with preemption of state law. See Drummonds, supra note 44, at 528-29; Wolfson, supra note 37, at 112-13. Drummonds acknowledges that this "clear statement" requirement has not surfaced in the Court's recent preemption cases and suggests that this is a fault of preemption doctrine. Drummonds, supra note 44, at 529. This author believes, however, that a "clear statement" rule is too simplistic. Instead, as suggested in the Article, the Court's purpose is to fulfill the congressional goal of a given statute by following the most reliable indicia of that goal.

71. Rice, 331 U.S. at 230 ("[W]e start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress."). See also Maryland v. Louisiana, 451 U.S. 725, 746 (1981) ("Consideration under the Supremacy Clause starts with the basic assumption
this "reluctance" to find preemption reflects the Court's understanding of preemption.\textsuperscript{72} The Court understands that Congress, in large part, can preempt state law if it so desires.\textsuperscript{73} Where there are limits on Congress' power over the states,\textsuperscript{74} however, the Court leaves enforcement of those limits to the political process.\textsuperscript{75} This

that Congress did not intend to displace state law."); Chicago & N.W. Transp. Co. v. Kalo Brick & Tile Co. 450 U.S. 311, 317 (1981) ("Pre-emption of state law by federal statute or regulation is not favored 'in the absence of persuasive reasons--either that the nature of the regulated subject matter permits no other conclusion, or that the Congress has unmistakably so ordained.'" (quoting Florida Lime & Avocado Growers, Inc. v. Paul, 373 U.S. 132, 142 (1963))).

The Court's recent decision in Cipollone v. Liggett Group, Inc., 112 S. Ct. 2608 (1992), adds two refinements to this principle of interpretation in preemption cases. First, Cipollone states that "Congress' enactment of a provision defining the preemptive reach of a statute implies that matters beyond that reach are not pre-empted." Id. at 2618. While Justice Scalia derided the Court's analysis of this principle, see id. at 2632 (Scalia, J., concurring in the judgment in part and dissenting in part), the principle is merely an extension of the accepted canon of statutory construction: expressio unius est exclusio alterius - that which is not expressly mentioned is excluded. Id. at 2618. In other words, by expressly preempting certain areas, a court may infer that other areas are not preempted. As with all canons, the principle above should yield to a contrary congressional intent. One post-Cipollone court of appeals, however, has interpreted Cipollone to state a per se rule: "Cipollone's clear instruction [is] that when there is an express pre-emption provision we should not consider implied pre-emption." Myrick v. Freuhauf Corp., 13 F.3d 1516, 1522 (11th Cir. 1994). The Supreme Court rejected this interpretation. Freightliner Corp v. Myrick, 115 S. Ct. 1483 (1995).

Second, Cipollone requires courts to give express preemption provisions a narrow reading. Cipollone, 112 S. Ct. 2618. The Court derives this rule of construction from the Rice presumption against preemption. Id. (stating "the presumption against pre-emption of state police power regulations . . . reinforces the appropriateness of a narrow reading" of an express preemption provision). Again, Justice Scalia demurred. Id. at 2632-33. Justice Scalia believed that once the Court has identified an express preemption provision, the Rice presumption "dissolves . . . and the only remaining question is what the scope of that preemption is meant to be." Id. at 2632 (emphasis in original). At that point, Justice Scalia would apply "the ordinary principles of statutory construction." Id. Yet, is not the Rice presumption a rule of statutory construction, and a constitutionally derived one at that? Under Rice, statutory ambiguity, whether in an express preemption clause or elsewhere, is insufficient to preempt state law. Rice, 331 U.S. at 237. Justice Scalia gives no reason why construing ambiguity in the scope of a statutory preemption provision is not subject to the Rice rule of construction. For a discussion of Cipollone, see Jeffrey R. Stern, Note, Preemption Doctrine and the Failure of Textualism in Cipollone v. Liggett Group, 80 VA. L. REV. 979, 984 (1994) (supporting an approach to preemption doctrine that balances competing extra-textual factors over the text-controlled approach used in Cipollone).

72. See Tribe, supra note 17, § 6-25, at 479-80 (analyzing the appropriateness of the Court's reluctance to find preemption from the point of view of protecting state interests through the lawmaking process).

73. See supra notes 38-40 and accompanying text.

74. See supra note 22.

rationale relies, in part, on the states’ direct voice in Congress through their representatives. It is representative democracy that will serve to restrain Congress from excessive use of its preemption power. Of course, the states are protected only to the extent that Congress carefully considers the effects of legislation on the federal-state balance of power. Therefore, by erecting a presumption against preemption, the Court pushes Congress to carefully consider the federal-state balance of power when making legislation. As Professor Tribe states:

> By declining to infer preemption in the face of congressional ambiguity, the Court is not interposing a judicial barrier to Congress’s will in order to protect state sovereignty . . . but is furthering the spirit of its [federalism decisions] by requiring that decisions restricting state sovereignty be made in a deliberate manner by Congress, through the explicit exercise of its lawmaking power to that end. . . . To give the state-displacing weight of federal law to mere congressional ambiguity would evade the very procedure

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76. See Drummonds, supra note 44, at 526-27 (discussing preemption theory in terms of institutional and interpretative aspects of federalism); Wolfson, supra note 37, at 97 (examining preemption doctrine and federalism concerns under the rubric of the states’ role as laboratories for regulatory innovation). No such direct connection exists between the states and administrative agencies. It is curious that a doctrine, such as the Rice presumption, which is specifically intended to protect the states, would be transplanted from a state-accountable to a state-unaccountable context. If the states’ representatives in Congress want preemption, we can infer a measure of consent on the part of the states. See generally Louis L. Jaffe, An Essay on Delegations of Legislative Power: Part I, 47 COLUM. L. REV. 359 (1947) (discussing the role of the delegation of legislative power in government and legislative control over such delegation). If politically independent administrators really want preemption, we cannot necessarily infer any state input. We really only have an administrative preference. Id. at 370-71. And, from the point of view of state input, we would expect a difference in treatment between administrative regulations, which allow state input through the notice and comment procedures, and administrative adjudication, which generally precludes outside input. As noted above, supra note 32 and accompanying text, these are larger questions relating to the legitimacy of administrative agencies as currently conceived.
for lawmaking on which [the Court has] relied to protect states' interests.\footnote{77}

The presumption, then, merely reinforces the conclusion of the previous section: Preemption should not be found unless Congress formulated a statute containing ascertainable indicia of such a purpose. The Court's application of the presumption reflects this understanding. As discussed above, express and direct conflict preemption indicate strong congressional intent to preempt state law.\footnote{78} Consequently, we can be confident that congressional action carries an implicit deliberation on the issues of direct conflict and obstacle preemption. The Court has indicated as much by refusing to apply the presumption against preemption to express and direct conflict cases.\footnote{79}

\section*{II. \textit{Chevron} in Brief}

So much has been written on \textit{Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.}\footnote{80} that this discussion does not pretend to add anything new.\footnote{81} Rather, this discussion merely

\footnote{77. \textsc{Tribe}, supra note 17, § 6-25, at 480 (footnote omitted) (first emphasis added); \textit{see also} \textsc{Gregory v. Ashcroft}, 501 U.S. 452, 464 (1991) (quoting passage from \textsc{Tribe} above).

78. \textit{See supra} text accompanying notes 41-46.

79. \textit{See Free v. Bland}, 369 U.S. 663, 666 (1962) (applying direct conflict preemption, the Court stated, "[t]he relative importance to the State of its own law is not material when there is a conflict with a valid federal law, for the Framers of our Constitution provided that the federal law must prevail" (citing \textsc{U.S. Const.} art. VI, cl. 2)). As discussed earlier, \textit{supra} note 71, the \textsc{Rice} presumption in express preemption cases is irrelevant to whether Congress intended to preempt state law, but remains relevant in construing the scope of that preemption.


81. For helpful exegeses of the case, see \textsc{Breyer}, \textit{supra} note 13 at 381-82 (suggesting that limiting \textit{Chevron} to its factual and statutory context may be reasonable in light of the complexities and difficulties associated with particular areas of regulation); \textsc{Farina}, \textit{supra} note 14 at 452 (asserting that the judicial deference in \textit{Chevron} may be supported by the argument that because the judicial branch is the least accountable to the public, it is the least suitable branch to make policy decisions); \textsc{Kenneth W. Starr}, \textit{Judicial Review in the Post-Chevron Era}, 3 \textsc{Yale J. on Reg.} 283, 312 (1986) (concluding that \textit{Chevron} rightly supports the view that, "[p]olicy which is not the natural province of the courts, belongs properly to the administrative agencies, and, ultimately, to the executive and legislative that oversee them."); \textsc{Sunstein}, \textit{supra} note 52 at 2119 (describing \textit{Chevron} as a "counter-Marbury" for administrative law with substantial influence on public law and substantive outcomes); \textsc{Eric M. Braun}, \textit{Note, Coring the Seedless Grape: A Reinterpretation of \textit{Chevron U.S.A., Inc. v. NRDC}}, 87 \textsc{Columbia L. Rev.} 986, 1007-08 (1987) (arguing that \textit{Chevron} should be interpreted and applied as requiring a multifactor analysis rather than mere judicial deference in cases of ambiguity).}
sketches the background necessary for the present project of regulatory preemption. Chevron involved interpretation of the 1970 and 1977 amendments to the federal Clean Air Act (CAA). Specifically, the Court addressed the precise meaning of the statutory term "stationary source." The CAA required states that had yet to attain federal ambient air quality standards to maintain a permit program for polluters with "new or modified major stationary sources." The creation or modification of a "stationary source" triggered the CAA's permit requirement which, in turn, required compliance with a series of strict statutory standards. Thus, the definition of "stationary source" is of great importance to polluters.

In Chevron, the NRDC challenged the Environmental Protection Agency's (EPA) definition of stationary source. Initially, in 1980, the EPA operated with the understanding that each device that emits pollution constitutes a stationary source. At the beginning of the Reagan Administration, the EPA changed its position, adopting a definition of stationary source that triggered the CAA's permit requirement only if the creation or modification of a pollution-emitting device increased the overall pollution emissions of the polluter's plant. This plant-wide definition of stationary source relaxed the CAA's permit requirement by allowing polluters a measure of flexibility in modifying or creating new pollution emitting devices.

The central administrative law question in Chevron was whether the EPA's "plant-wide" interpretation of the CAA should receive judicial deference and, if so, how much. The Court of Appeals accorded little deference to the EPA in deciding that "stationary source" referred solely to individual polluting devices. The Supreme Court disagreed, instead employing a "principle of deference

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83. Id. § 7409.
84. Id. § 7502(b)(6).
85. Id. § 7411(a)(3).
86. Id. § 7503.
to administrative interpretations. Under *Chevron*, absent express legislative intent on an issue, "legislative regulations are given controlling weight unless they are arbitrary, capricious, or manifestly contrary to the statute." Under the accepted reading of *Chevron*, then, statutory ambiguity triggers judicial deference. While questions certainly remain, such as the meaning of "ambiguity" and "deference," the test is easily stated.

*Chevron*'s principle of deference is in tension with *Rice*'s presumption against preemption. Almost by definition, in regulatory preemption cases Congress will not have "directly spoken to the precise question at issue." If Congress had spoken clearly regarding preemption, such congressional words would constitute *statutory* preemption. Instead, regulatory preemption will generally occur in areas of statutory ambiguity. In such cases, *Chevron* requires courts to defer to the agency's decision to preempt, unless such deference yields to some other doctrine. Conversely, *Rice* requires a court to find no preemption because Congress has not spoken clearly on the issue, unless the *Rice* presumption yields to some other doctrine. As argued above, the Court has avoided deciding which doctrine—*Chevron* or *Rice*—should yield to the other. As the discussion of the Court's regulatory preemption cases in

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91. *Chevron*, 467 U.S. at 844.
92. *Id.*
93. See Starr, *supra* note 81 at 283–85 (describing the tension between the traditional role of the Court set out in *Marbury* "to say what the law is," and the role of the judiciary in reviewing administrative agency decisions).
94. For a case where the Court found a statute to be unambiguous, see MCI Telecommunications Corp. v. AT&T Co., 114 S. Ct. 2223, 2230 (1994) (reaching a conclusion regarding the meaning of the term "modify," the Court stated, "[w]e have not the slightest doubt that is the meaning the statute intended"). As is evidenced by the opinion of the three dissenters, the question of "ambiguity" is hardly an easy one. *Id.* at 4532 (Stevens, J., dissenting) (asserting that reliance on dictionary definitions may not be sufficient when construing a term within a particular statutory scheme).

Justice Scalia, while formally adhering to *Chevron*, has suggested that his approach to statutory interpretation would effectively obviate the need for the doctrine of deference. See Scalia, *supra* note 9, at 521 ("One who finds more often (as I do) that the meaning of a statute is apparent from its text and from its relationship with other laws, thereby finds less often that the triggering requirement for *Chevron* deference exists."). As one might expect, Scalia's strict approach to statutory text would also negate a presumption against preemption to the extent that preemption of state law is seen as a matter of statutory interpretation. See also Cipollone v. Liggett Group, Inc., 112 S. Ct. 2608, 2632 (1992) (Scalia, J., concurring in the judgment in part and dissenting in part) ("O]ur responsibility is to apply to the text ordinary principles of statutory construction.").
95. *Chevron*, 467 U.S. at 842.
96. See *supra* note 17 for discussion of preemption by an agency's authorizing statute.
Part IV illustrates, the Court has avoided this decision by merely applying statutory preemption principles to regulatory preemption. Part IV tries to make sense of regulatory preemption in light of the Court's conception of constitutional governmental structure. The next Part discusses that conception.

III. WHICH WAY TO COHERENCE?

The preceding two Parts of this Article set forth two doctrines in tension, presumption and deference. The Supreme Court has exacerbated this tension by applying the statutory preemption doctrine to regulatory preemption cases without addressing the differences, if any, between the two contexts. As discussed in Part I, congressional intent lies at the center of both the Court's language and its actions in statutory preemption. Part IV attempts to harmonize regulatory preemption with the larger jurisprudence sketched in this Part.

As maintained above, the Court's statutory preemption doctrine is part of a larger web of doctrines that stress deliberation and accountable decision-making. The remainder of this Part discusses the preference for accountability as found in several of the Court's doctrines. These doctrines implicitly admit that a greater judicial role is more dangerous than erroneous congressional or agency action. In other words, we should fear judicial lawmaking more than congressional or administrative lawmaking. The following discussion traces this theme through several areas of law: federal common law and preemption, federalism, separation of powers, and ultimately Chevron review. To the extent that statutory preemption is only a portion of this larger picture, a reformulation of statutory preemption would require a re-drawing of the entire picture. Conversely, it is unclear what doctrinal commitments underlie the Court's current regulatory preemption rules. For this reason, coherence should be sought by harmonizing regulatory preemption

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with the Court's larger commitments to deliberation and accountable decision-making.

A. Federal Common Law and Preemption

Since *Erie Railroad Co. v. Tompkins*, federal courts have been largely out of the business of creating federal common law. Though *Erie's* holding rested in part on an interpretation of the Federal Judiciary Act of 1789, Justice Brandeis also stated for the majority that the Constitution restrains federal courts from engaging in such lawmaking. The constitutional portion of *Erie* reflects the view that Congress generally establishes the rules of ordinary law, while courts generally play the secondary, though certainly significant, role of interpreting and applying those laws. When in doubt, the courts should defer to Congress.

The *Erie* Court's perspective on the two branches can be seen in recent cases. Consider *City of Milwaukee v. Illinois*. In Milwaukee, Illinois and Michigan brought suit in federal district court complaining of Milwaukee's discharge of untreated and under-treated sewage into Lake Michigan. The suit sought abatement of Milwaukee's discharge of sewage into interstate waters under the federal common law of public nuisance. Milwaukee responded that while a federal common law of public nuisance may exist, Congress had since preempted federal common law with regard to water pollution by enacting the Federal Water Pollution Control Act Amendments of 1972 ("Amendments").

In deciding whether Congress had preempted federal common law, the Court explained that federal common law serves solely as a stop-gap measure: "When Congress has not spoken to a particular issue... and when there exists a 'significant conflict between some federal policy or interest and the use of state law,' the Court has found it necessary, in a 'few and restricted' instances, to devel-

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98. 304 U.S. 64 (1938).
99. *Id.* at 71-73 (stating that the Judiciary Act encompassed both state statutory law, as well as state common law); 28 U.S.C. § 725 (1982).
100. *Erie*, 304 U.S. at 77-78 ("The unconstitutionality of the course pursued [in *Swift v. Tyson*] has now been made clear . . . ."); see Paul J. Mishkin, Some Further Last Words On *Erie*—The Thread, 87 HARV. L. REV. 1682, 1683-85 (1974) (arguing that *Erie* represents a constitutional limit on the federal judiciary); but see John Hart Ely, The Irrepressible Myth of *Erie*, 87 HARV. L. REV. 693, 698, 700-06 (1974) (stating that constitutional limits are implicated only when Congress has created laws governing diversity cases).
op federal common law."\(^{103}\) The Court plays a limited role because federal law "is generally made not by the federal judiciary, purposefully insulated from democratic pressures, but by the people through their elected representatives in Congress."\(^{104}\) Under this view of Congress and the federal courts, the courts presume that a congressional enactment displaces federal common law in the area.\(^{105}\) In *Milwaukee*, the presumption was dispositive; the Amendments left no room for federal common law.\(^{106}\)

*Milwaukee* drew a strict line between the comparative competencies of Congress and the federal courts. While the Court drew this line in the context of federal common law, the Court’s reasoning has lessons for preemption of state law. Specifically, *Milwaukee* suggests an additional purpose for the *Rice* presumption. In a footnote, the Court stated: “Since the States are represented in Congress but not in the federal courts, the very concerns about displacing state law which counsel against finding preemption of state law in the absence of clear intent actually suggest a willingness to find congressional displacement of federal common law.”\(^{107}\) This passage suggests that the *Rice* presumption against federal preemption extends a presumption against judicial preemption of state law.\(^{108}\) The composition and operation of the federal courts distances them from state interests, as well as leaving them the least accountable branch of government. The states, therefore, are most vulnerable when the federal judiciary preempts state law on its own.\(^{109}\)

Given the difficulty a court often faces in discerning congressional intent regarding preemption, the potential exists for *judicial* preemption if a court incorrectly concludes that Congress intended to preempt state law. In the face of statutory ambiguity, the interpreter’s discretion increases, as does the danger of an erroneous interpretation. In the preemption context, an erroneous interpretation equals judicial lawmaking. If the Court annoys Congress by incorrectly finding no preemption, Congress can avenge itself

\(^{103}\) *Milwaukee*, 451 U.S. at 313 (quoting Wallis v. Pan American Petroleum Corp., 384 U.S. 63, 68 (1966)).

\(^{104}\) Id. at 313 (emphasis added).

\(^{105}\) Id. at 316-17.

\(^{106}\) Id. at 319.

\(^{107}\) Id. at 317 n.9.

\(^{108}\) See Mishkin, supra note 100, at 1685 (arguing that *Erie* is a constitutional limitation on the judiciary).

\(^{109}\) Id.
by legislating more clearly. If the Court offends the states by incorrectly finding preemption, the states have no direct means of defense. Thus, as the footnote in Milwaukee indicates, the Rice presumption seeks to minimize the danger of judicial lawmaking.

B. Morrison and Mistretta: A Hands Off Approach to Separation of Powers

Over the last decade, the Court has vacillated over the proper approach to separation of powers. Starting in INS v. Chadha, the Court used a formalist analysis in deciding separation of powers cases. Under the formalist approach, the Court rigidly defined the precise bounds of legislative, executive, and judicial power, and sought to ensure that no branch exercised power assigned to another branch. The Court used the formalist approach to strike down the legislative veto in Chadha. Three years after Chadha, the Court again used the formalist approach in Bowsher v. Synar to eliminate a portion of the Gramm-Rudman balanced budget law. The formalist approach reserved a relatively large role for courts in deciding separation of powers cases.

Two years after Bowsher, the Court made an abrupt and unexplained about-face in its separation of powers jurisprudence. In Morrison v. Olson, the Court upheld the role of the independent counsel under the Ethics in Government Act of 1978. Ignoring the formalist reasoning of Chadha and Bowsher, the Court

112. Chadha, 462 U.S. at 951 ("The hydraulic pressure inherent within each of the separate Branches to exceed the outer limits of its power, even to accomplish desirable objectives, must be resisted.").
113. Id. at 938.
114. 478 U.S. 714, 726 (1986) (holding that the power given to the Comptroller General to execute the law violated the constitutional structure because Congress cannot grant to an officer a power it does not possess).
opted for a more functional approach to separation of powers that merely prohibited the ""encroachment or aggrandizement of one branch at the expense of the other."" The Court also applied this approach in Mistretta v. United States in upholding the Federal Sentencing Guidelines against a separation of powers challenge. This functional approach leaves great room for the political branches to design nontraditional institutional structures. In other words, courts will defer to Congress' policy judgments regarding the efficacy and desirability of, or the need for hybrid institutional forms. Again, as with preemption and federal common law, the Court is careful not to disturb the handiwork of a politically accountable decision-maker.

117. Morrison, 487 U.S. at 693 (quoting Buckley v. Valeo, 424 U.S. 1, 122 (1976)). In making this language from Buckley into the separation of powers rule, the Court made an unusual interpretive turn. Buckley's language regarding interbranch ""aggrandizement"" of power was intended as a statement of the purpose behind the doctrine of separation of powers, not as a statement of the doctrine itself. See Buckley, 424 U.S. at 120-24 (adopting a strict separation of powers view with allowance for interbranch commingling of powers to extent provided in text of Constitution). Generally speaking, the purpose or principle behind a rule will be more flexible than the rule itself. Indeed, one might see in this purpose/rule distinction a parallel to the distinction between rules and standards. See Larry Alexander & Emily Sherwin, The Deceptive Nature of Rules, 142 U. PENN. L. REV. 1191, 1193 (1994) (analyzing the differing perspectives between those who make rules and those expected to follow the rules); Louis Kaplow, Rules versus Standards: An Economic Analysis, 42 DUKE L.J. 557, 560-62 (1992); Kathleen M. Sullivan, The Supreme Court, 1991 Term—Foreward: The Justices of Rules and Standards, 106 HARV. L. REV. 22, 26 (1992) (discussing the underlying politics of choices between rules and standards). Morrison, then, transformed separation of powers analysis from a formal, rule-based doctrine into a functional, standard-based doctrine. It did so by appealing to what was meant in Buckley to be the purpose behind the rule. In Morrison, the purpose became the rule.


119. Id. at 412.

120. See Stephen L. Carter, Constitutional Improprieties: Reflections on Mistretta, Morrison, and Administrative Government, 57 U. CHI. L. REV. 357, 404 (1990) ("Probably the Justices did not intend to suggest that whatever Congress says goes, but the lesson of Morrison and Mistretta certainly seems to be that we are moving dangerously close to that."). Professor Carter argues that Morrison and Mistretta are examples of an ""evolutionary"" interpretation of the Constitution under which ""the courts permit the other branches of the federal government to work out fresh institutional arrangements, quite unlike those contemplated at the Founding, in order to meet the fresh problems of a different era."" Id. at 373. In response, Professor Carter argues for a more cautious de-evolutionary approach under which the courts first identify the intended meaning of the Founders and, second, candidly consider whether that meaning should hold sway today. Id. at 372-73.

121. See id. at 361 (reviewing Morrison and Mistretta to conclude that ""the congressional policy judgment was what mattered most.").
C. Federalism

In one of the most famous judicial flip-flops of the recent past, the Court has gone from judicial management to non-review of federalism claims.\(^{122}\) The Court's decision in *National League of Cities v. Usery*\(^{123}\) illustrates the judicial management approach. There the Court recognized that "there are attributes of sovereignty attaching to every state government which may not be impaired by Congress, not because Congress may lack an affirmative grant of legislative authority to reach the matter, but because the Constitution prohibits it from exercising the authority in that manner."\(^{124}\) The relevant attribute in this case was the ability of states to control the wages paid to state employees.\(^{125}\) The Court determined that the application of the Fair Labor Standards Act\(^{126}\) to state employees was an unconstitutional infringement upon this attribute of state sovereignty.\(^{127}\) For this reason, the Court struck down the federal law. Under *National League of Cities*, therefore, federal courts both defined and enforced general federalism limits on Congress' Commerce Clause power.

Only a decade later in *Garcia v. San Antonio Metropolitan Transit Authority*,\(^{128}\) the Court renounced any significant role in policing federalism.\(^{129}\) The Court relied instead on the states' po-

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124. *Id.* at 845.

125. *Id.*


The voting pattern in *New York v. United States*, 112 S. Ct. 2408 (1992) (6-3 decision), suggests that *Garcia’s* days may be numbered. As noted above, *see supra* note 23 and accompanying text, *New York v. United States* struck down a federal law that required states either to adopt a federal regulatory scheme or to take title to all nuclear waste within their borders. *See 42 U.S.C. § 2021c(a)(1)(A)-2021e(d)(2)(C) (1982).* The
itical participation in Congress as a check on congressional power:

Of course, we continue to recognize that the States occupy a special and specific position in our constitutional system and that the scope of Congress’ authority under the Commerce Clause must reflect that position. But the principal and basic limit on the federal commerce power is that inherent in all congressional action—the built-in restraints that our system provides through state participation in federal governmental action. The political process ensures that laws that unduly burden the States will not be promulgated.\footnote{130}

The \textit{Garcia} Court apparently decided to adopt the two step reasoning of Professor Herbert Wechsler: “To the extent that federalist values have real significance they must give rise to local sensitivity to central intervention; to the extent that such a local sensitivity exists, it cannot fail to find reflection in the Congress.”\footnote{131} However, as the \textit{Garcia} dissent emphasized, the Court offered no evidence that the second condition actually exists.\footnote{132}

three remaining Justices from the \textit{Garcia} majority (Justices Blackmun, Stevens, and White) were in dissent in \textit{New York v. United States}, while the two remaining dissenters from \textit{Garcia} (Chief Justice Rehnquist and Justice O’Connor) were in the six-person majority in \textit{New York v. United States}. The addition of Justices Kennedy, Scalia, Souter, and Thomas may have swung the pendulum back towards \textit{National League of Cities}. The Court was careful, however, to say that this “case presents no occasion . . . to revisit” \textit{Garcia}. \textit{New York v. United States}, 112 S. Ct. at 2420.

The Court may be facing another federalism challenge over the Brady Bill, which requires states to implement the background checks prior to handgun purchases that are included in the federal law. A Montana federal district court has already struck down the background check provisions as an unconstitutional infringement on state sovereignty. Printz v. United States, 854 F. Supp. 1503, 1518 (D. Mont. 1994); \textit{see also} Mack v. United States, 856 F. Supp. 1372, 1383 (D. Ariz. 1994) (also holding that portions of the Brady Bill are unconstitutional). \textit{But see} McGee v. United States, 849 F. Supp. 1147, 1149 (S.D. Miss. 1994) (denying injunction against enforcement of the Brady Bill); Prakash, \textit{supra} note 23 (concluding that federal government may commandeer the state executive and judicial branches into federal service, but not state legislatures).

As an aside, it is worth noting that Chief Justice Rehnquist’s votes in \textit{National League of Cities} and \textit{Garcia} further defy characterization of Rehnquist’s philosophy as one of deference to majoritarian branches. \textit{See supra} note 97.


\footnote{131. \textit{See} Herbert Wechsler, \textit{The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Government}, 54 COLUM. L. REV. 543, 547 (1954).}

\footnote{132. \textit{Garcia}, 469 U.S. at 564 (Powell, J., dissenting) (“Today’s opinion does not explain how the States’ role in the electoral process guarantees that particular exercises of the
Given Garcia's heavy reliance on Congress' political connection to the states, two points discussed in connection with the Milwaukee case become even clearer. First, if federalism is enforced through the states' influence in Congress, we ought to make sure that Congress engages in careful deliberation when considering actions affecting the states. This concern for congressional deliberateness surfaces in the Rice presumption against preemption. Because of the presumption, Congress is encouraged to think hard and speak clearly when displacing state law. In this way, Congress retains the final say on whether to preempt, but the Court protects the states by enforcing limits on how Congress can preempt.

Second, Garcia's endorsement of Congress' political connection with the states reflects the federal courts' isolation from the political arena. Under this view, judicial lawmaking holds the greatest threat to the states and federalism. To the extent that federalism questions are best resolved through politics, the federal courts should keep their input to a minimum. Again, we see the idea of judicial deference to accountable decision-making at work in the Court's decisions.

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Commerce Clause power will not infringe on residual state sovereignty."); see Martha A. Field, Garcia v. San Antonio Metropolitan Transit Authority: The Demise of a Misguided Doctrine, 99 HARV. L. REV. 84, 109 n.127 (1985) (noting that strict application of Garcia's hands-off approach is difficult to support); Merritt, supra note 129, at 15 (stating that the Garcia decision was deficient); Van Alstyne, supra note 129, at 1724 n.64 (calling the Garcia decision a "good-hearted joke").

133. See Mishkin, supra note 100, at 1685. Professor Mishkin offers an interesting example to illustrate this point. He notes that the proposed Federal Rules of Evidence that the Court sent to the Senate abrogated state law with regard to evidentiary privileges. Congress, on the other hand, rejected this rule and replaced it with a rule deferring to state law privileges. Professor Mishkin concludes that "this weighting of state interests in the Congress, more significantly than in the Court (or judicial appointees), was a fulfillment of the institutional structure established in the Constitution." Id.

134. Indeed, one author suggests that the Court's decision in New York v. United States was within the minimum role reserved for the federal courts within federalism. See Prakash, supra note 23. If the Court ultimately returns to the National League of Cities analysis, it will invite criticism as to the lack of coherence between its federalism and separation of powers doctrines. The question will be: Why does the Court defer to Congress' horizontal allocation of power among the branches of the federal government, but not to Congress' vertical allocation of power between the state and federal governments? New York v. United States' express reprieve for Garcia, however, leaves such a decision—and such criticism—for another day. See supra note 129.
D. Chevron

The Chevron deference rule sketched in Part II fits nicely within the scheme developed in the previous three sections. The snugness of the fit can be seen in one of the Court's justifications for deference. In a passage neglected by many commentators, the Chevron Court explained that one rationale for judicial deference lies in the comparative institutional competence between the courts and agencies:135

Judges are not experts in the field, and are not part of either political branch of the Government. Courts must, in some cases, reconcile competing political interests, but not on the basis of the judges' personal policy preferences. In contrast, an agency to which Congress has delegated policymaking responsibilities may, within the limits of that delegation, properly rely upon the incumbent administration's views of wise policy to inform its judgments. While agencies are not directly accountable to the people, the Chief Executive is, and it is entirely appropriate for this political branch of the Government to make such policy choices—resolving the competing interests which Congress itself either inadvertently did not resolve,

135. See Thomas W. Merrill, Judicial Deference to Executive Precedent, 101 YALE L.J. 969, 979 (1992) ("[T]he most apparent objective of this series of presumptions was to maximize the role of democratically accountable institutions in the process of legal interpretation and to restrict the discretion of unelected courts." (emphasis added)); see also Steven G. Calabresi & Kevin H. Rhodes, The Structural Constitution: Unitary Executive, Plural Judiciary, 105 HARV. L. REV. 1153 (1992) (arguing that Chevron contemplated a unitary executive); Geoffrey P. Miller, Independent Agencies, 1986 SUP. CT. REV. 41, 82 (noting that the Chevron holding recognized that there are inherent problems with administrative agencies); Laurence H. Silberman, Chevron—The Intersection of Law & Policy, 58 GEO. WASH. L. REV. 821, 822-24 (1990) (stating that the Chevron decision recognizes that the executive branch should make policy choices rather than the judiciary).

Professors Eskridge and Frickey have recently offered a new justification for Chevron based on their theory of government officials as strategic actors. See William N. Eskridge, Jr. & Philip P. Frickey, The Supreme Court, 1993 Term: Foreward: Law As Equilibrium, 108 HARV. L. REV. 27, 71-76 (1994). These authors suggest that officials from all three branches of government act in part to minimize the likelihood that officials from the other branches will overturn their decisions. Id. at 28-29. "To achieve its goals, each branch . . . acts strategically, calibrating its actions in anticipation of how other institutions would respond." Id. at 29. For example, in deciding a case a court will consider the likelihood that Congress and the President will combine to overturn the court's decision. Since administrative agencies "are better informed, more efficient barometers" of how the political branches may react to different statutory interpretations, courts may defer to agency decisions to avoid rebuke by another branch. Id. at 71-72.
or intentionally left to be resolved by the agency charged with the administration of the statute in light of everyday realities.\textsuperscript{136}

This passage from \textit{Chevron} holds two relevant lessons. First, statutory interpretation often requires the interpreter to define and reconcile issues of policy.\textsuperscript{137} This lesson is especially evident in the context of obstacle preemption where congressional intent is largely a fiction.\textsuperscript{138} On this view, arguments resting on a \textit{Marbury}-like aphorism that it is for the courts to "[s]ay what the law is"\textsuperscript{139} should be viewed with suspicion.\textsuperscript{140} As Cass Sunstein has written, the policy component of statutory interpretation forces "a frankly value-laden judgment about comparative competence" in deciding who should interpret a given statute.\textsuperscript{141} The above-quoted passage from \textit{Chevron} sides with agencies, identifying their link to the executive and the corresponding accountability as the deciding factors.

Second, \textit{Chevron}'s view of comparative institutional competencies establishes a hierarchy of legitimacy with respect to federal lawmaking: first Congress, then agencies, and lastly courts.\textsuperscript{142} When no agency exists, courts must interpret statutes as a matter of necessity. In doing so, courts must act within Congress' intent. When an agency exists, however, the role of the courts shrinks.

\textsuperscript{136} \textit{Chevron}, 467 U.S. at 865-66 (emphasis added). \textit{But see} Colin S. Diver, \textit{Statutory Interpretation in the Administrative State}, 133 U. Pa. L. Rev. 549, 579-80 (1985) ("The strongest argument for those who assert the superiority of courts as lawfinders is that judges are less likely than agencies to allow personal bias or self-interest to distort their reading of the enactor's intent."); William Landes & Richard Posner, \textit{The Independent Judiciary in an Interest-Group Perspective}, 18 J.L. \& Econ. 875, 879, 887-88 (1975) (calling agencies the "dependent" judiciary which makes decisions based on politics).

\textsuperscript{137} \textit{See} Sunstein, supra note 52, at 2087 (statutory interpretation "sometimes calls for an inquiry into questions of both policy and principle."); Braun, supra note 81, at 989 ("[M]ost administrative statutory interpretation involves complicated policy judgments rather than judicial extrapolations of congressional intent.").

\textsuperscript{138} \textit{See supra} notes 46-53 and accompanying text.

\textsuperscript{139} \textit{Marbury v. Madison}, 5 U.S. (1 Cranch) 137, 177 (1803).

\textsuperscript{140} \textit{See} Sunstein, supra note 52, at 2086.

\textsuperscript{141} \textit{Id.}

\textsuperscript{142} \textit{Chevron}, 467 U.S. at 842-43 ("[T]he court, as well as the agency, must give effect to the unambiguously expressed intent of Congress."). The limitation of \textit{Chevron} deference to statutes the agency administers fits this framework in two ways. First, Congress, whose intent is supreme, evidences its intent that an agency interpret a statute when Congress commits administration of the statute to the agency's discretion. Second, an agency will likely be involved in the type of policymaking that breeds informed and accountable decision-making only with respect to statutes that the agency administers.
Congress’ intent is still the preferred rule, but an ambiguous statute yields the possibility of judicial mistake and, thus, judicial lawmaking. Given this potential for error, the judgment is better made by a more accountable body: the agency. 143

The Court’s comparative competency rationale fits especially well with Morrison and Mistretta’s move to deference in the separation of powers context. As discussed above, Morrison and Mistretta give Congress a free hand in developing institutional arrangements. 144 Chevron strikes the same chord. Chevron essentially reiterates that Congress can delegate the authority to interpret federal law to an administrative agency. The novel turn in Chevron, however, was the Court’s equation of statutory ambiguity with legislative intent to delegate interpretive authority to an agency. 145

E. Conclusion

In sum, the Court consistently has preferred that accountable decision-makers make law. Chevron deference and the Rice presumption fit nicely into this framework. Part IV follows with a review of the Court’s regulatory preemption cases. This review has two goals. First, the discussion assesses the cases in light of the larger framework elaborated above. Second, when the cases deviate from the framework, the discussion suggests how regulatory preemption can be harmonized with the Court’s larger jurisprudence.

IV. REGULATORY PREEMPTION

A. United States v. Shimer: Clear Congressional Intent

The Court’s regulatory preemption jurisprudence dates to its 1961 decision in United States v. Shimer. 146 No prior case addressed the preemptive effect of administrative regulations alone,
without reference to the authorizing statute.\textsuperscript{147} Shimer, a veteran of World War II, borrowed $13,000 from Excelsior Saving Fund and Loan Association. Shimer used the proceeds of the loan to purchase residential property and gave Excelsior a mortgage on the property to secure the loan. As additional security, Shimer requested that the Veterans' Administration (VA) guarantee a portion of the loan. Under then-existing federal law, the VA, upon request of a veteran of World War II, would guarantee a portion of the veteran's indebtedness incurred for qualified purposes.\textsuperscript{148} The VA granted Shimer the maximum guarantee amount and Shimer signed papers acknowledging that the applicable VA regulations governed the guaranty.

Later that same year, Shimer defaulted on the loan. The following year, Excelsior foreclosed on its mortgage and purchased the mortgaged property for $250 at a foreclosure sale. Subsequently, Excelsior received the full guarantee amount from the VA. The VA then brought suit against Shimer seeking indemnity for the amount of the guarantee.\textsuperscript{149}

Resolution of the case depended upon whether state or federal law applied. Both parties agreed that the federal act recognized the "well-established principle of surety law" under which the VA, "as guarantor, could not recover from its principal, Shimer, any amount [the VA] was not obligated to pay the mortgagee, Excelsior, on [Shimer's] behalf."\textsuperscript{150} The central question, then, was whether the VA was obligated to pay Excelsior the guarantee amount at the time the VA made payment. The parties split over whether state or federal law governed this issue.

Shimer argued that the VA's obligation to Excelsior was a matter of Pennsylvania law. Under state law, when a mortgagee purchases the mortgaged property at a foreclosure sale, the mortgagor and guarantor are discharged unless the mortgagee seeks a judicial declaration of the value of the mortgaged property within six months after the sale.\textsuperscript{151} The judicially determined value is credited against the mortgagor's debt, thereby reducing the amount of any deficiency judgment the mortgagee obtains against the mort-

\textsuperscript{147} See supra note 17 and accompanying text.
\textsuperscript{148} Shimer, 367 U.S. at 375-76 (guaranteeing the lesser of $4,000 or 4/13 of the then-outstanding debt).
\textsuperscript{149} Id. at 376.
\textsuperscript{150} Id. at 376-77.
\textsuperscript{151} Id. at 377.
gagor or his guarantor.\textsuperscript{152} This law protects mortgagors from foreclosure sales where the purchase price does not fairly reflect the value of the mortgaged property.\textsuperscript{153} In the present case, Excelsior did not seek a judicial determination of the value of Shimer's property. Thus, under Pennsylvania law, the VA was not obligated to pay Excelsior and, consequently, Shimer was not liable to indemnify the VA.

The VA conversely argued that federal law controlled the VA's obligation to pay Excelsior. Federal regulations provided that a creditor must give the VA notice prior to instituting a foreclosure sale on property relating to a VA guarantee.\textsuperscript{154} Upon such notice, the VA could determine a minimum value for the mortgaged property known as the "upset price."\textsuperscript{155} The VA's regulations required that the upset price be credited against the secured debt unless the amount received for the property at the foreclosure sale exceeded the upset price.\textsuperscript{156} If, after the sale, the creditor felt that the VA's stated value was too high, the creditor could force the VA to purchase the property at the stated value.\textsuperscript{157} Thus, the federal regulations provided a different procedure for setting the fair value of the mortgaged property (VA estimate) than did state law (judicial proceeding).

Upon reviewing the federal statutes and regulations, the Court concluded that "this regulatory scheme, complete as it is in every detail, was intended to provide the whole and exclusive source of protection of the interests of the Veterans' Administration as guarantor and was, to this extent, meant to displace inconsistent state law."\textsuperscript{158} Given the VA's intent to displace state law, the question became whether this intent was permissible.

The Court began its discussion of the preemptive effect of the VA's regulations by stating its conclusion: "We think that the Servicemen's Readjustment Act authorized the Veterans' Administrator to displace state law by establishing these exclusive procedures."\textsuperscript{159} This statement begs the question of what specifically Congress must "authorize": (1) the preemption of state law; or (2)

\begin{itemize}
  \item \textsuperscript{152} Id.
  \item \textsuperscript{153} Id. at 379.
  \item \textsuperscript{154} Id. at 378-79.
  \item \textsuperscript{155} Id. at 379.
  \item \textsuperscript{156} Id. at 379-80.
  \item \textsuperscript{157} Id. at 380.
  \item \textsuperscript{158} Id. at 381.
  \item \textsuperscript{159} Id. (emphasis added).
\end{itemize}
the federal regulatory action which, in turn, has the intent or effect of preempting state law. The first requirement entails an analysis of the authorizing statute for congressional intent regarding preemption; the second prescribes the accepted analysis of whether a regulation is within the agency’s statutory authority. The *Shimer* Court adopted the latter approach.

In analyzing the issue of preemption, the Court began by stating the proper “scope of . . . review”:¹⁶⁰

More than a half-century ago this Court declared that “where Congress has committed to the head of a department certain duties requiring the exercise of judgment and discretion, his action thereon, whether it involve questions of law or fact, will not be reviewed by the courts, unless he has *exceeded his authority* or this court should be of [the] opinion that his action was *clearly wrong*.¹¹⁶¹

In further elaborating upon this deferential standard of review, the Court stated that when an agency’s choice among conflicting policies “represents a reasonable accommodation of conflicting policies that were committed to the agency’s care by the statute, we should not disturb it unless it appears from the statute or its legislative history that the accommodation is not one that Congress would have sanctioned.”¹¹⁶² The Court concluded that the VA’s exclusive upset price procedures were such a reasonable accommodation.¹¹⁶³

*Shimer* never explicitly addressed the question whether administrative regulations should be analyzed differently from statutory provisions on the issue of preemption of state law. Rather, the Court’s analysis proceeded in three steps. First, as just discussed, the Court decided that the VA intended to preempt state law. Second, the Court determined that the applicable statute authorized the VA to act in the general area of veteran mortgage foreclosure

¹⁶⁰. *Id.*
¹⁶¹. *Id.* at 381–82 (emphasis added) (quoting Bates & Guild Co. v. Payne, 194 U.S. 106, 108–09 (1904)).
¹⁶². *Id.* at 383.
¹⁶³. Specifically, the Court identified two policies within the Serviceman's Readjustment Act: (1) “to enable veterans to obtain loans and to obtain them with the least risk of loss upon foreclosure”; and (2) to have the VA’s guarantee “operate as the substantial equivalent of a down payment . . . in order to induce prospective mortgagee-creditors to provide 100% financing for a veteran’s home.” *Shimer*, 357 U.S. at 383. Since the upset price provision was a reasonable accommodation of these purposes, and nothing in the statute or its legislative history prohibited that accommodation, the upset price regulations were “a valid exercise of the authority granted” the VA by Congress. *Id.* at 385.
procedures. And third, the Court decided that the specific regulations were reasonable under the applicable statute. Underlying these last two steps is the assumption that administrative regulations can preempt state law if they are within the agency’s statutory authority. As noted at the outset, this approach parallels the general rule of statutory preemption that statutes can preempt state law if within Congress’ constitutional authority. This parallel signals the Court’s first application of the statutory preemption regime to a regulatory preemption case. Neither the parties nor the Court’s opinion noted, or challenged, this move.

Despite its silence on the issue, Shimer fits within the ideological framework identified in Part III and, as such, is a coherent adaptation of the Court’s statutory preemption framework to the regulatory preemption context. To understand this point, it is first necessary to identify the type of preemption at work in Shimer. From the text of the Court’s opinion, it is difficult to tell which type of preemption Shimer relied upon. The opinion contains language suggesting both conflict and field preemption:

[The VA’s regulatory] scheme of protection, while intended to remedy the same abuses at which [the Pennsylvania law] is directed, is, of course, inconsistent with the Pennsylvania procedures. . . . We have no doubt that this regulatory scheme, complete as it is in every detail, was intended to provide the whole and exclusive source of protection of the interests of the Veterans’ Administration as guarantor and was, to this extent, meant to displace inconsistent state law.164

To the extent that the Court considered federal and Pennsylvania law “inconsistent,” direct conflict preemption is suggested.165 Yet, the Court’s statement that federal law is “complete . . . in every detail” suggests the type of “comprehensive” federal scheme required for field preemption.166

The Court left substantial room for state law in the federal scheme, suggesting that its decision could have rested only on direct conflict preemption. For example, under the VA’s scheme, the price obtained at a state foreclosure sale—presumably conduct-

164. Id. at 380-81 (emphasis added).
165. See supra text accompanying notes 42-43 (defining direct conflict preemption).
166. See supra text accompanying notes 54-56 (discussing the criteria for field preemption).
ed under the procedures of state law—could be offset against the VA's guarantee obligation. Thus, Congress (and the VA) did not intend to preempt all state law relating to the "field" of veteran's debts. Rather, Congress (and the VA) merely intended to preempt the narrower sub-field of offset procedures to the extent that state law conflicted with those procedures.

Recalling the prior discussion of statutory direct conflict preemption, consider the consequence of Shimer's implicit approach: A conflict between state law and authorized administrative action results in the preemption of state law. This conclusion is consistent with the Court's commitment to deliberation and accountability. When Congress grants an agency broad discretion within which to act, Congress presumably intends that all agency actions within such discretion have the full force and effect of federal law. As with its own statutes, Congress likely intends that the authorized agency actions be obeyed, state law to the contrary notwithstanding. A congressional delegation of administrative authority, then, signals implicit deliberation on the question of preemption by

167. The VA's regulations did not prescribe a required form of foreclosure sale. Rather, the upset price provision merely supplemented the state foreclosure sale mechanism to provide a uniform measure of protection to the VA against sale at an inadequate price.

168. As this discussion suggests, field and conflict preemption may be not so much as separate, rigid categories as different points along a spectrum. See discussion supra part I.A.

169. As noted earlier, the issue whether particularly broad delegations of administrative authority are constitutionally legitimate is a separate question outside the scope of this Article. Given the recent dormancy of the nondelegation doctrine, the discussion in the text is likely not affected by that constitutional question. See Industrial Union Dep't v. American Petroleum Inst., 448 U.S. 607, 608 (1980) (upholding the authority delegated to OSHA while rejecting the agency regulation due to inadequate findings); Greene, supra note 2, at 155 (arguing that the delegation doctrine no longer provides an enforceable check against excessive delegation); Lawson, supra note 15, at 1237-41 (discussing the death of the nondelegation doctrine). Indeed, the Court has invalidated a congressional delegation as overbroad only twice. See A.L.A. Schecter Poultry Corp. v. United States, 295 U.S. 495, 541-42 (1935) (holding all code-making power of the National Industrial Recovery Act to be unconstitutional delegation); Panama Refining Co. v. Ryan, 293 U.S. 388, 430 (1935) (holding that sections of the National Industrial Recovery Act constituted an unconstitutional delegation by Congress). To the extent that the nondelegation doctrine is revitalized, Congress' ability to preempt state law through administrative agencies will decrease. See American Petroleum, 448 U.S. at 685-87 (Rehnquist, J., concurring in the judgment) (arguing that § 6(b)(5) of OSHA was an unconstitutionally broad delegation of authority). Also, to the extent that a revitalized nondelegation doctrine is based on a view of the role of administrative agencies within our constitutional government, such a view will necessarily affect our answers to the two fundamental questions underlying regulatory preemption: Why and how can administrative agencies preempt state law?

170. See supra note 45 and accompanying text.
Congress, an accountable decision-maker. *Shimer*, therefore, can be read as a coherent adaptation of the Court’s statutory direct conflict preemption analysis to a case involving administrative action.

**B. Direct Conflict Preemption: Following the Thread of Congressional Intent**

1. The Case

The Supreme Court did not revisit regulatory preemption until twenty-one years later in *Fidelity Federal Savings & Loan Ass’n v. De la Cuesta.* 171 *Fidelity* involved a conflict between state and federal law regarding the validity of so-called “due-on-sale” clauses in loans made by federal savings and loan associations. Due-on-sale clauses require a borrower to pay the outstanding balance of a debt if the property securing the debt is sold or transferred.172 The Home Owners’ Loan Act (HOLA) grants authority to the Federal Home Loan Bank Board (Board), an independent agency, to regulate federal savings and loan associations.173 HOLA authorizes the Board to promulgate regulations governing “the organization, incorporation, examination, operation, and regulation of associations to be known as Federal Savings and Loan Associations.”174 Pursuant to this authority, the Board promulgated the following regulation:

[A federal savings and loan] association continues to have the power to include, as a matter of contract between it and the borrower, a provision in its loan instrument whereby the association may, at its option, declare immediately due and payable sums secured by the association’s security instrument if all or any part of the real property securing the loan is sold or transferred by the borrower without the association’s prior written consent.175

In a statement accompanying the final rule, the Board stated that federal savings and loan associations “shall not be bound by or subject to any conflicting State law which imposes different . . .

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172. Id. at 145 & n.2.
175. Id. at 146-47 (quoting 12 C.F.R. § 545.8-3(f) (1982)).
due-on-sale requirements."\textsuperscript{176}

In the lower court litigation in \textit{Fidelity}, the California court of appeals held that the California statutory prohibition of unreasonable restraints on alienation prevented enforcement of some due-on-sale provisions between borrowers and federal savings and loan associations.\textsuperscript{177} By imposing a different due-on-sale requirement, this holding conflicted with the Board's regulation. Thus, the question became whether the Board's regulation preempted California law.

The state court of appeals squarely confronted the issue that underlay the Supreme Court's holding in \textit{Shimer}:\textsuperscript{178} When should administrative regulations receive preemptive effect and why? The court concluded that federal regulations preempt state law only if Congress intended preemption of state law, regardless of whether the agency intended preemption.\textsuperscript{179} The court reached this conclusion by attending to the federal-state balance embodied in the Federal Constitution. First, the court noted that while the Supremacy Clause\textsuperscript{180} commands preemption of state law, any preemption decision should be mindful of the limited nature of federal power, and the consequent residue of state power, indicated by the Tenth Amendment.\textsuperscript{181} This balance dictates that courts show restraint, finding preemption of state law only upon the "'clear and manifest purpose of Congress.'"\textsuperscript{182} When an administrative agency, not Congress, is alleged to have preempted state law, the touchstone of the analysis should remain \textit{congressional} intent:

\textsuperscript{176} Id. at 147 (quoting 41 Fed. Reg. 18286, 18287 (1976) (emphasis added)).
\textsuperscript{177} De la Cuesta v. Fidelity Fed. Sav. & Loan Ass'n, 175 Cal. Rptr. 467, 478-79 (Cal. Ct. App. 1981), rev'd, 458 U.S. 141 (1982). Specifically, the court of appeals concluded that "exercise of a due-on-sale clause in the absence of any threat of impairment to the security or risk of default resulting from the sale or transfer constitutes an unreasonable restraint on alienation." Id. at 478. \textit{See} \textsc{Cal. Civ. Code} \textsection 711 (West 1982) ("Conditions restraining alienation, when repugnant to the interest created, are void."); Wellenkamp v. Bank of America, 582 P.2d 970, 976-77 (Cal. 1978) (holding that a due-on-sale clause cannot be enforced unless the lender shows such is necessary to protect against risk of default).
\textsuperscript{179} \textit{De la Cuesta}, 175 Cal. Rptr. at 474 (courts should not "equate the Board's expression of intent with the requisite \textit{congressional} intent.").
\textsuperscript{180} \textsc{U.S. Const.} art. VI, cl. 2.
\textsuperscript{181} \textit{De la Cuesta}, 175 Cal. Rptr. at 470; see \textsc{U.S. Const.} amend. X ("The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.").
\textsuperscript{182} \textit{De la Cuesta}, 175 Cal. Rptr. at 471 (quoting Jones v. Rath Packing Co., 430 U.S. 519, 525 (1977)).
The decision whether to displace state law is a fundamental one going to the very fabric of federalism; thus, the decision is one to be made by the people through their elected representatives in Congress rather than by agencies or tribunals insulated from democratic pressures.\textsuperscript{183}

Applying its view of regulatory preemption, the court of appeals found no congressional intent to preempt state law restrictions on due-on-sale clauses. Thus, the court of appeals applied California law.\textsuperscript{184} The California Supreme Court refused to hear the case and the United States Supreme Court granted certiorari.\textsuperscript{185}

2. Regulatory Preemption

a. The Myth of Shimer

In \textit{Fidelity}, the Supreme Court began its preemption analysis by describing the three types of preemption.\textsuperscript{186} After this description, the Court stated the preemptive effect to be given administrative regulations: "Federal regulations have no less preemptive effect than federal statutes. Where Congress has directed an administrator

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\textsuperscript{183} \textit{Id.} at 474; see Felix Frankfurter, \textit{Some Reflections on the Reading of Statutes}, 47 \textit{COLUM. L. REV.} 527, 539-40 (1947) (noting that inherent conflict between state and federal regulation and the importance of congressional intent in determining whether a regulation preempts state action); Jaffe, \textit{supra} note 76, at 359 (arguing that large policy decisions should be grounded in consent through representation in the legislative process). In advocating a narrow judicial interpretation of federal statutes that intrude upon the "historic functions of the individual states," Frankfurter states:

The history of congressional legislation regulating not only interstate commerce as such but also activities intertwined with it, justify the generalization that, when the Federal Government takes over such local radiations in the vast network of our national economic enterprise and thereby radically readjusts the balance of state and national authority, those charged with the duty of legislating are reasonably explicit and do not entrust its attainment to that retrospective expansion of meaning which properly deserves the stigma of judicial legislation.

Frankfurter, \textit{supra}, at 539-40. The \textit{De la Cuesta} court of appeals, then, believed that the relative political independence of administrative agencies created a difficulty for the relative legitimacy of agency actions. As discussed above, the Court takes the opposite view, preferring the moderate accountability of administrative agencies to the total isolation of courts. \textit{See supra} notes 135-45 and accompanying text.

\textsuperscript{184} \textit{De la Cuesta}, 175 Cal. Rptr. at 474.


to exercise his discretion, his judgments are subject to judicial review only to determine whether he has exceeded his statutory authority or acted arbitrarily.”¹⁸⁷ The Court attributed this rule to *United States v. Shimer.*¹⁸⁸ As noted above, a similar statement may capture *Shimer*’s implicit understanding of the preemptive effect of administrative actions over conflicting state law.¹⁸⁹ *Fidelity,* however, takes this unexamined understanding as accepted dogma without explanation or analysis; the rule is stated as if *Shimer* were authority for the position.

b. The Holding

The Court next turned to analysis of the validity of the Board’s due-on-sale regulation.¹⁹⁰ The Court noted that the broad statutory grant of authority to the Board in section 5(a) of HOLA placed “no limits on the Board’s authority to regulate the lending practices of federal savings and loans.”¹⁹¹ The Court then read section

187. *Id.* at 153-54.
189. *See supra* note 169 and accompanying text. As in *Shimer,* the *Fidelity* Court reasoned that regulatory preemption depends on only two questions: “[1] whether the [agency] meant to pre-empt [state] law, and, if so, [2] whether that action is within the scope of the [agency’s] delegated authority.” *Fidelity,* 458 U.S. at 154.
190. Before reaching the validity of the regulation, the Court determined that the regulation and California law could not coexist. *Fidelity,* 458 U.S. at 154-59. This determination was relatively simple given the Board’s expressed intent to displace state law. *Id.* at 158.
191. *Id.* at 161; *see also* Glendale Fed. Sav. & Loan Ass’n v. Fox, 459 F. Supp. 903, 910 (C.D. Cal. 1978) (“It would have been difficult for Congress to give the Bank Board a broader mandate.”). Section 5(a) provides:

In order to provide local mutual thrift institutions in which people may invest their funds and in order to provide for the financing of homes, the Board is authorized, under such rules and regulations as it may prescribe, to provide for the organization, incorporation, examination, operation, and regulation of associations to be known as “Federal Savings and Loan Associations,” or “Federal mutual savings banks” . . . and to issue charters therefor [sic], giving primary consideration to the best practices of local mutual thrift and home-financing institutions in the United States.


One might think that a statute placing “no limits” on an agency’s discretion would present a paradigm nondelegation case. That the Court never hinted at the presence of a nondelegation issue gives further evidence of the doctrine’s demise.

When, as in HOLA, a statutory delegation has “no limits,” Congress has effectively created another branch of government, co-equal with Congress, that can preempt state law based on the agency’s view of the best policy under the circumstances. To reach this result, the Court must view Congress and administrative agencies as similarly situated
5(a)'s grant of power over the "operation and regulation" of federal savings and loan associations to include control over mortgages, the main business of such institutions. This power, of course, encompassed the content of mortgage agreements such as due-on-sale clauses.

After concluding that the Board was authorized to regulate the content of mortgage agreements, the Court considered whether the Board's specific decision—that due-on-sale clauses are enforceable—was reasonable. First, the Court identified a vague purpose of HOLA to ensure the financial integrity of federal savings and loan associations. The Court then noted that the Board promulgated its due-on-sale regulation to enhance the financial stability of federal savings and loan associations. Finally, while noting that

within our constitutional system with regard to the preemption of state law. Yet, Congress's enactments are given preemptive effect under the Supremacy Clause because the Constitution provides political safeguards to protect against unwarranted invasions of a state's police power. See Drummonds, supra note 44, at 526-27 ("[A]ffirmative congressional action to displace state power provides a political safeguard for federalism. . . . Members of Congress themselves are representatives of their states, and their districts within their states, in a way that appointed judges and Executive branch officials are not."); Wolfson, supra note 37, at 102 (noting the potential conflicts between federal and state laws, because the Court elevated the status of administrative regulations as a source of preemption similar to that of Congress in Fidelity). Perhaps the Court believed that equivalent safeguards were, or could be, employed in the administrative process. This view would fit with the efforts of courts and commentators to construct models of administrative law that legitimate the administrative state. See Richard B. Stewart, The Reformation of American Administrative Law, 88 HARV. L. REV. 1667, 1712 (1975) ("Faced with the seemingly intractable problem of agency discretion, courts have changed the focus of judicial review . . . ."). Indeed, commentators and courts have perennially offered theories of administrative law aimed at legitimating administrative action. If such a legitimating theory is accepted, administrative actions that preempt state law would have to be made in accord with such a theory. For example, if one believes that pluralism—the participation of interested parties in agency decision-making—legitimizes agency action, one would require states to have some voice in any decision that preempts state law. Id. at 1712 (pluralism seeks "the assurance of fair representation for all affected interests in the exercise of the legislative power delegated to agencies."). A similar analysis could be made under other legitimating theories, such as civic republicanism. See CASS R. SUNSTEIN, AFTER THE RIGHTS REVOLUTION: RECONCEIVING THE ADMINISTRATIVE STATE 12 (1990) (noting the role of deliberative democracy within the American republican system); Mark Seidenfeld, A Civic Republican Justification for the Bureaucratic State, 105 HARV. L. REV. 1512, 1512 (1992) (arguing that emphasizing participation and deliberation in decision-making is the best justification for the administrative state).

192. Fidelity, 458 U.S. at 161.
193. Id. at 167.
194. Id. at 168 ("Congress delegated power to the Board . . . to ensure that [federal savings and loans] would remain financially sound institutions able to supply financing for home construction and purchase.").
195. Id.; see 12 C.F.R. § 556.9(f)(1) (1982) (the due-on-sale clause is "a valuable and
the wisdom of the Board's policy decision is not uncontroverted," the Court concluded that the Board's decision was not arbitrary or capricious.\textsuperscript{196} Having decided that the due-on-sale regulation was a valid exercise of administrative authority, the Court's analysis was at an end, and California law was preempted.\textsuperscript{197}

3. Middle Ground: Strong Congressional Intent in Direct Conflict Preemption

\textit{Fidelity} cited \textit{Shimer} for the proposition that regulatory preemption does not require "express congressional authorization to displace state law."\textsuperscript{196} The Court's reliance on \textit{Shimer} for this proposition is problematic for two reasons. First, and perhaps most important, \textit{Shimer} never considered this proposition. Neither party raised the point in \textit{Shimer}, whereas the lower court in \textit{Fidelity} specifically addressed the point. This unexamined and unargued proposition, if implicit in the \textit{Shimer} Court's decision, should not be taken as decided.

Second, the statutes involved in \textit{Shimer} and \textit{Fidelity} were strikingly different. In \textit{Shimer}, the Servicemen's Readjustment Act addressed the specific area in which the VA promulgated regulations: payment of and offsets against the VA's guarantee obligation.\textsuperscript{199} The statute created the guarantee program and commanded the VA to develop procedures, of which the upset price was one, for its implementation.\textsuperscript{200} Thus, it was but a small step to conclude that Congress intended federal law to govern the aspects of the guarantee program Congress asked the VA to regulate.

In \textit{Fidelity}, on the other hand, the authorizing statute referenced an \textit{entire field} of regulation: federal savings and loan associations.\textsuperscript{201} With such sweeping authority, it would seem inevitable that some action of the Board would conflict with state law. The Supreme Court took this inevitability as evidence that "Congress expressly contemplated, and approved, the Board's promulgation of

\textsuperscript{196} \textit{Fidelity}, 458 U.S. at 169.
\textsuperscript{197} \textit{Id.} at 170.
\textsuperscript{198} \textit{Id.} at 154 (citing United States v. \textit{Shimer}, 367 U.S. 374, 381-83 (1961)).
\textsuperscript{199} \textit{Shimer}, 367 U.S. at 377-78.
\textsuperscript{200} \textit{Id.} at 379.
\textsuperscript{201} \textit{Fidelity Fed. Sav. \\& Loan Ass'n v. De la Cuesta}, 458 U.S. 141, 160 (1982) (Board's rules are "to provide for the organization, incorporation, examination, operation, and regulation of associations to be known as 'Federal Savings and Loan Associations'").
regulations superseding state law.\textsuperscript{202} If the Court’s discussion of the legislative history of HOLA shows anything, it is that Congress “expressly contemplated” few, if any, details. As Justice Rehnquist’s dissent amply demonstrates, it is not easy to read into HOLA congressional intent to displace state law in the sub-field of enforceability of mortgage clauses.\textsuperscript{203}

If the \textit{Fidelity} Court wanted to use \textit{Shimer} as authority, one would have expected a similar comparative discussion of the statutes involved. Such a discussion would have revealed the difficulty in reading \textit{Shimer} to reject a requirement of congressional intent to preempt, especially in light of (a) \textit{Shimer}’s silence on the issue, and (b) the abundant statutory evidence of congressional intent in support of preemption in \textit{Shimer}. \textit{Fidelity}’s view of regulatory preemption, then, was built on an image of \textit{Shimer} that does not withstand analysis.

Perhaps \textit{Fidelity} can best be justified, as was \textit{Shimer}, by using the Court’s general commitment to deliberation and accountability to explain the basis for direct regulatory preemption.\textsuperscript{204} This justification would harmonize \textit{Shimer} with the opinions of both the Supreme Court and the state court of appeals in \textit{Fidelity}. It is evident under this justification that the Supreme Court spoke too broadly in \textit{Fidelity} when it said that congressional intent is irrelevant to regulatory direct conflict preemption.\textsuperscript{205} As discussed in \textit{Shimer}, Congress’ delegation of administrative authority can easily be seen as \textit{intending} preemption of state law directly conflicting with agency regulations.\textsuperscript{206} Congressional intent to preempt directly conflicting state law, then, is part and parcel of a congressional delegation of administrative authority: congressional intent is not only relevant to, but present in regulatory preemption.\textsuperscript{207}

\textsuperscript{202} Id. at 162 (emphasis added).
\textsuperscript{203} Id. at 172-75 (Rehnquist, J., dissenting).
\textsuperscript{204} See supra notes 95-134 and accompanying text.
\textsuperscript{205} \textit{Fidelity}, 458 U.S. at 154. Indeed, the cases discussed in the next sections show the Supreme Court retreating from such a strong position.
\textsuperscript{206} \textit{Shimer}, 367 U.S. at 381.
\textsuperscript{207} That the Supreme Court spoke too broadly also can be seen by comparing statutory and regulatory preemption with ordinary statutory interpretation and review of agency action. Under the strong version of \textit{Fidelity}, the Court would apply the same standard of review to both regulatory preemption and ordinary agency action. Conversely, the Court applies different interpretive principles to statutory preemption and ordinary statutory interpretation, applying a presumption in the former case. If statutory preemption is different from ordinary statutory interpretation, why is regulatory preemption not different from ordinary review of administrative action? The short answer is that regulatory preemption is
Similarly, the state court of appeals spoke too broadly when it required Congress to expressly authorize agency preemption of state law.\textsuperscript{208} As argued above, there is a logical reason to believe that such authorization exists in the delegation of administrative authority. Thus, somewhere between the rhetoric of the Supreme Court and the court of appeals in \textit{Fidelity} lies a middle ground that \textit{Shimer} occupies: Congressional delegation of agency authority signals an implicit congressional intent to preempt state law in direct conflict with valid agency action.

The middle ground approach also remains faithful to both \textit{Rice} and \textit{Chevron}. The middle ground satisfies \textit{Rice}'s preference for deliberation on issues affecting states. Direct conflict preemption indicates a strong congressional intent to preempt contrary state laws which, in turn, implies congressional deliberation on the issue of preemption.\textsuperscript{209}

The middle ground approach also satisfies \textit{Chevron}'s preference for an accountable decision-maker. Congress authorizes regulatory direct conflict preemption through the delegation of administrative authority. Agencies largely decide whether preemption occurs because judicial review of the validity of the agency's action is limited under the Administrative Procedures Act.\textsuperscript{210} Agencies are the different. The Supreme Court, however, did not have to address the difference in \textit{Fidelity} because regulatory direct conflict preemption, as with statutory direct conflict preemption, does not implicate the presumption against preemption.


209. See supra notes 69-79 and accompanying text.

210. See 5 U.S.C. § 706(2)(A) (1988) (review of agency action under “arbitrary and capricious” standard gives agencies flexibility in exercising their delegated authority). See \textit{Starr}, supra note 81, at 285 (citing \textit{Chevron} for the proposition that that reasonable agency readings should be upheld). \textit{Fidelity}'s analysis of the validity of the Board's regulation illustrates how such review can nonetheless be contentious. Determining the validity of administrative action entails interpretation of the statute authorizing the action. The \textit{Fidelity} majority read the vague mandate of the HOLA to grant broad agency authority. \textit{Fidelity}, 458 U.S. at 170. Justice William Rehnquist's dissent illustrated that such a broad construction of HOLA was not the only reasonable interpretation. \textit{Id.} at 172-75 (Rehnquist, J., dissenting). Justice Rehnquist argued that § 5(a) merely authorized the Board to control how and when federal savings and loan associations may operate, not the underlying law governing the interaction between such associations and their customers. \textit{Id.} at 172-73. For example, if the Board determined that California law regarding due-on-sale clauses threatened the financial security of federal associations, the Board could limit the operation of the federal associations in California to avoid this threat. “[If the Board concludes that California's limitations upon the enforceability of due-on-sale clauses endangers the soundness of the system established by the HOLA and the FHLBA, then the response contemplated by Congress is for the Board to 'withhold or limit the operation' of the system in California.” \textit{Id.} at 173. The Board, however, could not bulldoze state law by promulgating
preferred decision-makers in determining regulatory preemption because of their indirect link to the people through the congressional delegation and their executive appointment. Therefore, when an agency administers the statute in question, the need for judicial intervention is reduced. Consequently, the lawmaking hierarchy described in *Chevron*—Congress, agencies, courts—is preserved.

C. Express Regulatory Preemption: Intent Attenuated

The Court's next venture into the regulatory preemption thicket was in *Capital Cities Cable, Inc. v. Crisp*. In Crisp, a cable television company challenged Oklahoma's constitutional and statutory prohibition against advertising for alcoholic beverages other than certain point of sale signs. This restriction presented a particular problem for cable television operators who re-transmit out-of-state broadcasts without alteration because such broadcasts can contain advertising for alcoholic beverages. Cable operators did not

a rule of substantive law. *Id.* at 173-74.

Justice Rehnquist also appealed to HOLA's predecessor statute in arriving at his interpretation. *Id.* at 172-73. Specifically, Justice Rehnquist referred to the Federal Home Loan Bank Act of 1932 (FHLBA). Section 8 of the FHLBA provides:

> [The Board shall examine state law] relating to the conveying or recording of land titles, or to homestead and other rights, or to the enforcement of the rights of holders of mortgages on lands securing loans, or otherwise. If any such examination shall indicate, in the opinion of the board, that under the laws of any such State . . . there would be inadequate protection to a Federal Home Loan Bank in making or collecting advances under this chapter, the Board may withhold or limit the operation of any Federal Home Loan Bank in such State until satisfactory conditions of law . . . shall be established.

12 U.S.C. § 1428 (1989 & Supp. 1994) (emphasis added). Justice Rehnquist argued that § 8 "indicates that it was Congress' understanding in 1932 that the enforceability of provisions in mortgages is a matter of state law." *Fidelity*, 458 U.S. at 174. Thus, he viewed § 8's contemporaneous statement as probative of Congress' intended meaning in passing HOLA a year later. In arriving at an independent interpretation of HOLA, Justice Rehnquist elevated the Court's position in the lawmaking hierarchy. As argued above, the Court sees its role as more limited.

211. *See*, e.g., *City of Milwaukee v. Illinois*, 451 U.S. 308 (1981) (stating a limit on judicial intervention is desirable because courts should be lawmakers only out of necessity).


213. *Id.* at 694; *see Okla. Const. art. XXVII, § 5* (repealed 1984) ("It shall be unlawful for any person, firm or corporation to advertise the sale of alcoholic beverage within the State of Oklahoma, except one sign at the retail outlet bearing the words "Retail Alcoholic Liquor Store"); *Okla Stat. Ann.* tit. 37, § 516 (West 1981) (no advertising of "any alcoholic beverages or the sale of same" except by conforming sign on store premises).
alter out-of-state programming because such alterations would be both expensive and, in some cases, in violation of Federal Communications Commission (FCC) regulations.214

As seems to happen in a system based on precedent, the non-doctrine of Shimer215 that the Court simultaneously created and restated in Fidelity216 had snowballed into a general rule in Crisp. The Court quoted extensively from Fidelity, beginning with the general rule that “[f]ederal regulations have no less preemptive effect than federal statutes.”217 The Court then outlined the same

214. The Oklahoma law conflicted with FCC regulations in two main circumstances. First, under what is called the “must carry” rule, some operators were required to retransmit the broadcast signals of television stations within 35 miles of the operator or that were “significantly viewed” in the operator’s area. Crisp, 467 U.S. at 705; see 47 C.F.R. § 76.59(a)(1), (6) (1983) (repealed 1985). The FCC also imposed a “nondeletion rule” on the “must carry” broadcasts that required a cable operator to transmit the “must carry” signals “in full, without deletion or alteration of any portion.” Crisp, 467 U.S. at 705, see 47 C.F.R. § 76.55(b) (1983) (repealed 1985). These rules, of course, required operators close to the Oklahoma border to carry broadcasts from out-of-state stations. These out-of-state broadcasts contained advertising for alcoholic beverages. Thus, some Oklahoma cable operators were squeezed between a state law that required deletion of the advertisements and a federal law that proscribed any such deletion. With regard to “must carry” signals, then, there was an irreconcilable conflict between federal and state law. As an aside, the Court recently cast doubt on the constitutionality of such a “must carry” rule. See Turner Broadcasting Sys., Inc. v. FCC, 114 S. Ct. 2445, 2469 (1994) (remanding case for district court to review “must carry” rule under “intermediate level of scrutiny applicable to content neutral restrictions that impose an incidental burden on speech.”).

Second, FCC rulings allowed cable operators to retransmit various out-of-state television broadcasts. If an operator chose to do so, however, the retransmission was subject to the “nondeletion rule” noted above. Crisp, 467 U.S. at 706; see 47 C.F.R. § 76.55(b) (1985) (repealed 1985). Under this regime, then, an operator could comply with both state and federal law by merely not broadcasting out-of-state programming. In this case, there was not a direct conflict between state and federal law. Yet, the federal statute was intended to increase access to out-of-state broadcasts. Thus, a state law that effectively decreases such broadcasts poses an obstacle to the achievement of the federal scheme.


Curiously, part of the Court’s opinion seems to address statutory preemption of the Oklahoma law. At the end of its preemption analysis, the Court discussed the effect of the Copyright Revision Act of 1976 (CRA) on the Oklahoma law. Id. at 709-10. The CRA required cable operators to pay royalties to the owners of copyrighted broadcasts that the operators transmitted to their subscribers. 17 U.S.C. § 111 (1988 & Supp. V 1993). The CRA created a system by which the cable operators could pay royalties to a central clearinghouse and consequently obtain blanket permission to retransmit copyrighted broadcasts. Id. § 111(d). In order to participate in this system, an operator must not alter or delete advertising in the copyrighted broadcasts its retransmits. Id. § 111(c)(3). The Court concluded that a purpose of the CRA was to “enhance[] the ability of cable systems to retransmit [copyrighted] programs carried on distant broadcast signals, thereby
three-part analysis that it undertook in *Fidelity*: (1) is the agency’s intent to displace state law; (2) does the agency have the authority to speak in the general area involved (in *Fidelity*, substantive mortgage provisions; in *Crisp*, cable television broadcasts); and (3) is the agency action in question a reasonable policy decision (not arbitrary or capricious)? If the Court answers “yes” to all three questions, the federal regulation preempts state law. Note again that questions two and three are asked of any federal regulation to ensure that the administrative agency has acted within its statutory authority.²¹⁸ Only the first question relates to preemption, and that issue rests on the agency’s intent.²¹⁹

The Court disposed of the second question rather quickly, relying on a previous holding that the FCC has broad authority to regulate cable television.²²⁰ The first question required more discussion. The Oklahoma advertising ban conflicted with the FCC regulations only with respect to some cable broadcasts. Under the FCC’s “must carry” rules, some cable operators must transmit certain local television broadcasts.²²¹ The FCC requires that these local broadcasts be transmitted without any deletions or alterations.²²² Certain cable operators on the Oklahoma border, then, would be caught between two irreconcilable laws: a state law pro-

allowing the public to benefit by the wider dissemination of works carried on television broadcast signals.” *Crisp*, 467 U.S. at 711. In order to comply with the CRA, Oklahoma cable operators would have to either not carry out-of-state copyrighted shows or undertake the extremely burdensome task of complying with the copyright laws outside the CRA’s system. The Court stated that Oklahoma law would result in “a loss of viewing options [that] would plainly thwart the policy identified by both Congress and the FCC of facilitating and encouraging the importation of distant broadcast signals.” *Id*. Thus, the Court viewed Oklahoma law as conflicting with the CRA in that Oklahoma law stood as a substantial obstacle to the attainment of an important goal of the CRA. This conclusion, reached briefly and largely as an afterthought, would have resolved the case without the need to enter the thicket of regulatory preemption. Instead, the Court addressed the CRA as an afterthought to its discussion of regulatory preemption. Given the Court’s sketchy treatment of regulatory preemption, it is difficult to understand why the Court wanted to reach the issue.

²¹⁸. See supra note 28 (discussing the substantive requirements of the APA).
²¹⁹. See supra note 187 and accompanying text.
²²⁰. *Crisp*, 467 U.S. at 699-700. In United States v. Southwestern Cable Co., 392 U.S. 157 (1968), the Court held that § 2(a) of the Communications Act of 1934, 47 U.S.C. § 152(a) (1988), authorized the FCC to regulate communications by cable. *Id.* at 177-78. Subsequently, the Court held that the FCC’s authority sweeps broadly to include all regulations “necessary to ensure the achievement of the Commission’s statutory responsibilities.” FCC v. Midwest Video Corp., 440 U.S. 689, 706 (1979).
²²¹. See supra note 214.
²²². See supra note 214.
hibiting broadcast of alcohol advertisements, and a federal law requiring broadcast of certain out-of-state broadcasts, including any alcohol advertisements. Thus, Oklahoma law conflicted with the FCC’s “must carry” rules.\(^\text{223}\)

Conflict preemption, however, did not displace Oklahoma law as to the cable broadcasts outside the FCC’s “must carry” rules. The Court closed this gap in preemption with its conclusion that “the FCC has unambiguously \textit{expressed its intent} to preempt any state or local regulation of this entire array of signals carried by cable television systems.”\(^\text{224}\) The Court rested this conclusion on the FCC’s repeated assertion of exclusive control over the signals carried by cable television operators.\(^\text{225}\)

\textit{Crisp}, then, was the Court’s first regulatory preemption case to address an agency’s express preemption of state law. In analyzing regulatory express preemption, the third step of the Court’s regulatory preemption analysis is central. Step three asks whether the agency’s action is within its statutory authority.\(^\text{226}\) In supporting express preemption, then, the agency must appeal to a statute authorizing such action and rely on an interpretation of that statute for its authority to preempt state law. Three possible interpretations can support an agency’s express preemption of state law. First, the agency can conclude that Congress delegated the decision whether to preempt state law to the agency’s discretion. \textit{Crisp} seemed to attribute such an interpretation to the FCC:

\begin{quote}
\textit{The Commission has determined that only federal pre-emption of state and local regulation can assure cable systems the breathing space necessary to expand vigorously and provide a diverse range of program offerings to potential cable subscribers in all parts of the country. While that judgment may not enjoy universal support, it plainly represents a reasonable accommodation of the competing policies committed to the FCC’s care, and we see no reason to}
\end{quote}

\begin{flushleft}
\footnotesize
224. \textit{Id}. at 701 (emphasis added).
225. \textit{Id}. at 702-05 & n.10 (“\textit{The FCC’s pre-emptive intent could not be more explicit or unambiguous.}”). See Duplicative and Excessive Over-Regulation-CATV, Report & Order, 54 F.C.C.2d 855, 863 (1975) (“The subject areas this agency has pre-empted include, of course, signal carriage”); Cable Television, Clarification, 46 F.C.C.2d 175, 178 (1974) (“Franchising authorities do not have any jurisdiction or authority relating to signal carriage.”); Time-Life Broadcast, Inc., Interpretive Ruling, 31 F.C.C.2d 747, 747 (1971) (“\textit{The Commission has pre-empted the field of pay television cablecasting.}”).
226. \textit{See supra} note 218 and accompanying text.
\end{flushleft}
disturb the agency’s judgment.227

Second, the agency can argue that state law will pose an obstacle to achievement of the statute’s purposes. Under this view, the agency decides that the statute yields an inference of obstacle preemption, and makes that inference explicit through agency action. Third, the agency can engage in the same analysis on the basis of field preemption.

A court’s review of an agency’s express preemption of state law will depend upon which of the above rationales the agency invokes in support of its decision. For example, compare how a court should approach review of express preemption based on obstacle preemption versus express preemption based on field preemption. First, if an agency relies on obstacle preemption, the court knows that the agency could reliably infer that Congress intended its regulatory scheme to succeed.228 As discussed above, what constitutes a “successful” implementation of a regulatory scheme is a question involving ad hoc analysis of difficult policy issues.229 Given the wide latitude for decision, and the large possibility of error, the Court’s jurisprudence would counsel deference to the accountable decision-maker—the agency. Deference harmonizes Rice and Chevron. Obstacle preemption carries a strong implicit congressional intent regarding preemption, as counseled by Rice. In the face of error and discretion, the Court defers to the accountable decision-maker, as counseled by Chevron and Milwaukee.230

If, on the other hand, the agency rests express preemption on field preemption, the analysis changes. New York Department of Social Services v. Dublino231 states that the comprehensiveness of legislation in itself constitutes weak evidence of congressional intent to preempt state law.232 This is so because modern legislation may be comprehensive for reasons other than an intent to preempt state law.233 Yet, comprehensiveness is the only criterion—other than the rarely-invoked “dominant federal interest” criterion—the Court has identified for field preemption.234 Without

227. Crisp, 467 U.S. at 708.
228. See supra notes 46-53 and accompanying text.
229. See supra notes 46-53 and accompanying text.
231. 413 U.S. 405 (1973).
232. Id. at 414-15; see supra notes 57-61 and accompanying text.
233. Dublino, 413 U.S. at 415.
234. See supra notes 54-56 and accompanying text.
further standards to judge when a statute is "comprehensive enough," a decisionmaker relying on field preemption will face a difficult task in determining whether Congress intended to preempt state law. Poor standards for identifying congressional intent, in turn, mean a greater likelihood of error in determining whether intent to preempt exists. Thus, unlike the agency relying on obstacle preemption, the agency relying on field preemption will have only weak evidence of congressional support. *Morrison*,235 *Mistretta*,236 *Chevron*,237 *Rice*,238 and *Garcia*,239 are the keys to determining how courts should treat an agency that interprets a statute to preempt an entire field. First, consider the implications of *Morrison*, *Mistretta*, and *Chevron* for this question. All three decisions give primacy to congressional action. In field preemption, however, the evidence of congressional intent will be slim. Given the increased possibility of error due to poor evidence of congressional intent, *Morrison*, *Mistretta*, and *Chevron* require that the most accountable decisionmaker available determine whether Congress intended to preempt state law.240 As between a court and an administrative agency, *Chevron* tells us that the agency is the more accountable decisionmaker.241

Second, *Rice* and *Garcia* will limit the circumstances under which an agency may properly interpret a statute to preempt an entire field.242 Since comprehensiveness is particularly weak evidence of congressional intent, a decisionmaker facing a claim of field preemption will be quite uncertain what Congress intended on preemption, or even whether Congress considered preemption, either explicitly or implicitly. Stated in terms of *Rice* and *Garcia’s* federalism concerns, regardless of whether courts or agencies are the decisionmakers, comprehensiveness alone does not necessarily resolve whether an accountable body (Congress) deliberated on the question of preemption.243 Yet, since agencies are accountable

240. *Morrison*, 487 U.S. at 693; *Mistretta*, 488 U.S. at 412; *Chevron*, 467 U.S. at 842-43. *See supra* parts ILB, ILD.
241. *Chevron*, 467 U.S. at 865-66; *supra* notes 135-36 and accompanying text.
243. *See supra* notes 69-77 and accompanying text.
bodies only one step below Congress in the lawmaking hierarchy, Rice and Garcia may be satisfied if a politically accountable agency undertakes sufficient deliberation to ensure a considered preemption decision. 244 Such deliberation could be fostered by requiring agencies to subject their express preemption decisions to notice and comment rulemaking. 245 Notice and comment rulemaking would also enhance the agency’s accountability by affording states an opportunity to air their views before the agency. Cases such as Motor Vehicle Manufacturers Ass’n v. State Farm Mutual Automobile Insurance Co. 246 which require agencies to consider available regulatory alternatives, should also help ensure that agencies consider less intrusive options than preemption of state law. Requiring greater agency deliberation would prohibit agencies from using private adjudication, a statutory interpretation advanced in litigation, 247 or other informal agency actions to expressly preempt state law based on an interpretation of field preemption.

If the agency complies with sufficient procedural constraints in advancing a field preemption rationale for its express preemption provision, the courts should review the agency’s decision in a deferential manner. If the agency has explained the basis of its decision and considered all reasonable alternatives, Chevron urges that the last word reside in the accountable decision-maker. Thus, this approach achieves both Rice deliberation and Chevron accountability.

The preceding discussion of obstacle and field preemption suggests a two-step analysis of an agency’s express preemption of state law. First, the Court must identify the basis of the agency’s action. If the agency does not reveal such a basis, the action should not preempt state law. Second, given the asserted basis of

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244. Rice, 331 U.S. at 232-34; Garcia, 469 U.S. at 556. See supra part I.B.
247. The Court has generally disfavored agency interpretations advanced for the first time in litigation. See Gregory v. Ashcroft, 501 U.S. 452, 485 n.3 (1991) (White, J., concurring in part, dissenting in part, and concurring in the judgment) (stating that the agency’s policy statement “is entitled to little if any deference” because it was merely a “litigating position”); id. at 2418 & n.4 (Blackmun, J., dissenting) (stating that agency interpretations that are first offered during litigation and are inconsistent with previous agency positions are not entitled to deference); Bowen v. Georgetown Univ. Hosp., 488 U.S. 204, 212 (1988) (“[W]e have declined to give deference to an agency counsel’s interpretation of a statute where the agency itself has articulated no position on the question . . . .”).
the agency's action, the court should engage in judicial review sufficient to promote Rice's preference for deliberation and Chevron's preference for accountability. The above discussion illustrates how such review might work for obstacle and field preemption.

_Crisp_ never confronted the challenge of harmonizing Rice and Chevron with regard to regulatory express preemption. Instead, the _Crisp_ Court simply reviewed the agency's action under a deferential standard. The question remains how _Crisp_ fits within the scheme suggested by this Article. _Crisp_ viewed the agency's express preemption provision as based upon a congressional delegation of authority to preempt state law. In a statute as vague as the Communications Act, there is little if any evidence that Congress either expressly or impliedly deliberated upon preemption.

248. 47 U.S.C. § 151 (1988 & Supp. V). The Communications Act generally authorizes the FCC to regulate the communications industry "in the public interest." This ambiguity is exacerbated by the fact that the field regulated—cable television—did not exist at the time of the passage of the Communications Act of 1932. Only in 1968 did the Supreme Court hold that the FCC's broad authority included regulation of cable television. United States v. Southwestern Cable Co., 392 U.S. 157, 177-78 (1968). Statutes certainly should encompass activities not known or existing at the time the statute was enacted. A determination whether and how the statute covers the new activity, however, should proceed from an analysis of the history, purpose, and structure of the statute. When a statute, such as the Communications Act, merely purports to regulate radio and wire communications in the public good, see 47 U.S.C. § 151 (1991), it is difficult, if not impossible, to discern how a new activity or technology fits within the statutory scheme. Is cable similar or dissimilar to other broadcast mediums? Since we do not know how Congress viewed other broadcast media (because the statute was so vague) we do not know whether cable presents the same regulatory problems and challenges and should be regulated in the same way. Indeed, just recently the Supreme Court concluded that cable television is fundamentally different from broadcast television and thus is due greater free speech protection than broadcast television. See Turner Broadcasting Sys., Inc. v. FCC, 114 S. Ct. 2445, 2457 (1994) ("The [television] broadcast cases are inapposite in the present context because cable television does not suffer from the inherent limitations that characterize the broadcast medium."). Yet, this core value choice is made by an administrative agency, not Congress, and is enforced against the states over contrary state law. Under the Court's larger jurisprudence, however, it is better that this choice be made by the somewhat accountable agency rather than the unaccountable judiciary.

249. In a statute with an ascertainable congressional intent to preempt state law, preemption is permissible because Congress has engaged in the necessary deliberation on the issue. See, e.g., City of New York v. FCC, 486 U.S. 57, 66-70 (1988) (upholding an agency's preemption of state law because the legislative history implicitly suggested congressional approval). Shortly after Crisp, Congress passed the Cable Communications Policy Act of 1984 (Cable Act), 47 U.S.C. §§ 521-559 (1988 & Supp. V), which delegated the formulation of technical standards for the cable industry to the FCC. Id. § 544(e) (amended 1992) ("The Commission may establish technical standards relating to the facilities and equipment of cable systems which a franchising authority may require in the franchise."). Pursuant to the Cable Act, the FCC promulgated rules that specified the
Rice and Chevron, however, require that an accountable body deliberate upon the issue of preemption before state law is displaced. Deliberation, then, must fall to the administrative agency. With regard to an interpretation of field preemption, the agency should follow procedures ensuring deliberation and accountability in arriving at the decision whether to preempt state law.

In Crisp, the FCC did not follow sufficient procedures to ensure deliberation and accountability. The FCC arrived at its decision to preempt state law in a private adjudication. There is no indication that the FCC either received or considered the input of interested parties, most significantly state governments. Under this Article's synthesis of Rice and Chevron, then, the Court should not have allowed the FCC to preempt state law in Crisp.

D. Field and Obstacle Preemption: Intent Evaporated

Hillsborough County v. Automated Medical Laboratories, Inc.\textsuperscript{250} was the Supreme Court's next entry in the regulatory preemption debate. For the first time, the Court faced an assertion of regulatory field preemption. In Hillsborough, several Florida medical laboratories (the Labs) challenged the constitutionality of two county ordinances that regulated the donation of blood plasma. One ordinance required the licensing and monitoring of donation centers.\textsuperscript{251} Another ordinance regulated donors, requiring them to obtain an identification card, donate at only one hospital, and be tested for hepatitis and breath alcohol before donation.\textsuperscript{252}

On the federal level, the Food and Drug Administration (FDA) regulates plasma donation pursuant to its authority under the Public Health Service Act.\textsuperscript{253} The FDA's regulations, among other things, set forth procedures for donations, establish eligibility requirements for donors,\textsuperscript{254} and require physicians to determine the technical standards for signal quality for a class of cable channels. 50 Fed. Reg. 7801, 7802 (1985) (codified at 47 C.F.R. part 76 (1986)). In adopting the regulations, the FCC stated its intent to preempt state law because uniform technical standards were required to facilitate a national cable system. 50 Fed. Reg. 52462, 52464 (1985) (codified at 47 C.F.R. pt. 2 (1986)). Since Congress spoke to the specific type of regulation involved (technical standards), a court and an agency may more easily find an articulable congressional intent to allow an agency to speak exclusively in the area.

\textsuperscript{250} 471 U.S. 707 (1985).
\textsuperscript{251} Id. at 710.
\textsuperscript{252} Id.
\textsuperscript{253} Id. at 709-10; see 42 U.S.C. § 262 (1984).
\textsuperscript{254} Hillsborough, 471 U.S. at 710; see 21 C.F.R. § 640.63(c) - (d), 640.65 (1994).
eligibility of donors, inform donors of the risks associated with donating, and be on premises during donation. The Labs argued that these regulations preempted the county ordinances because either the ordinances conflicted with the regulations or the federal scheme occupied the field of plasma donation regulation. The Labs did not argue express preemption because the FDA’s only statement on the subject, in 1973, expressly disclaimed any intent to displace state law. Since preemption is generally a matter of the lawmaker’s intent, express or implied, the Labs had to show that developments since 1973 indicated a change of heart within the FDA regarding preemption. Otherwise, even field and conflict preemption would not be available.

The Hillsborough Court began its preemption analysis, as most cases do, by restating the three types of preemption. If that much was painfully familiar, the Court’s turn to regulatory preemption brought something new: “We have held repeatedly that state laws can be preempted by federal regulations as well as by federal statutes.” The Court, of course, attributed this statement to Shimer, Fidelity, and Crisp. Yet, this passage from Hillsborough merely makes the weak claim that administrative regulations “can” preempt state law. Fidelity and Crisp, on the other hand, affirmatively stated that regulatory and statutory preemption are coextensive in scope: “Federal regulations have no less preemptive effect than federal statutes.” From the outset, then, the Hillsborough Court signaled that Fidelity and Crisp may have overstated their cases.

Initially, the Court indicated that whatever change it contemplated did not affect its prior holding in Fidelity regarding regulatory direct conflict preemption. The Court noted that to the extent that preemption depends upon an intent to preempt state law, the agency’s intent “is dispositive.” If the agency so intends, the

256. Hillsborough, 471 U.S. at 714; see 38 Fed. Reg. 19362, 19365 (1973) (“These regulations are not intended to usurp the powers of State or local authorities to regulate plasmapheresis procedures in their localities.”).
258. Id. at 713 (emphasis added).
261. Hillsborough, 471 U.S. at 714.
only remaining question is whether the agency’s action is authorized.262 Thus, Hillsborough perpetuates the fiction, born in the Supreme Court’s analysis of Fidelity, that congressional intent plays no role in determining whether a valid federal regulation preempts state law.263 As discussed above in Part I.B, a middle ground approach best harmonizes Rice, Chevron, Shimer, and Fidelity.

1. Field Preemption

The Hillsborough Court quickly disposed of the Labs’ field preemption argument. The Court noted that since the FDA’s 1973 statement disavowing preemption, the FDA’s regulatory scheme had not become significantly more comprehensive.264 Thus, the Court could not infer an intent to preempt state law from the comprehensiveness of the FDA’s regulatory scheme.265

The Court was not content to rest the field preemption issue on this simple holding. Instead, the Court continued its discussion, spinning important dicta regarding regulatory preemption. The Court began by stating that “even in the absence of the 1973 statement, the comprehensiveness of the FDA’s regulations would not justify preemption.”266 The Court supported this conclusion with its prior reasoning in the statutory preemption case of Dublino.267 The Hillsborough Court applied Dublino’s teachings to the administrative level. In doing so, the Court for the first time recognized a difference between legislative enactments and administrative actions:

We are even more reluctant to infer preemption from the comprehensiveness of regulations than from the comprehensiveness of statutes. As a result of their specialized functions, agencies normally deal with problems in far more detail than does Congress. To infer preemption whenever an agency deals with a problem comprehensively is virtually tantamount to saying that whenever a federal agency decides to step into a field, its regulation will be exclusive. Such a rule, of course, would be inconsistent with the

262. Id.
263. See supra notes 198, 205-07 and accompanying text.
265. Id.
266. Id. at 717.
267. New York Dep’t of Social Serv. v. Dublino, 413 U.S. 405 (1973); see supra notes 57-61 and accompanying text.
federal-state balance embodied in our Supremacy Clause jurisprudence.\(^{268}\)

Regulatory field preemption, then, is a doubly weak form of preemption. First, congressional intent to preempt is likely weak. Second, even if a litigant identifies such intent, comprehensive agency regulations are a poor indicator of agency intent to preempt state law. As *Hillsborough* notes, comprehensive regulations are the grist of the administrative mill. Indeed, as the Court further reasoned, "because agencies normally address problems in a detailed manner and can speak through a variety of means ... we can expect that *they will make their intentions clear* if they intend for their regulations to be exclusive."\(^{269}\) In regulatory field preemption, then, there is the danger that state law will be preempted without any government actor, other than the courts, intending that result.

Under *Rice* and *Chevron*, the Court should *not* entertain claims of regulatory field preemption. Regulatory field preemption fails to provide the protections of deliberation and accountability and, in so failing, presents an extraordinary opportunity for pure judicial preemption of state law. First, regulatory field preemption poses the probability of preemption without *Rice*'s preferred deliberation of an accountable decision-maker. *Dublino* and *Hillsborough* teach that comprehensive regulations reveal little if anything about either Congress' or the agency's views on preemption. Indeed, the likelihood is that neither body considered (or deliberated upon) the issue. Second, unlike conflict preemption, courts cannot infer an articulable congressional intent that comprehensive regulations preempt state law since *Dublino* makes such an inference dubious.

The lack of deliberation or articulable instructions from an accountable body make regulatory field preemption largely a judicial creature. Since comprehensiveness alone does not guide the courts, courts are left to decide in their own discretion whether to preempt state law. *Milwaukee*\(^{270}\) counsels that a court faced with such broad discretion should refrain from acting and await further instructions from an accountable decision-maker.\(^{271}\) *Chevron* confirms this intuition. Therefore, the courts should not entertain argu-

\(^{268}\) *Hillsborough*, 471 U.S. at 717 (emphasis added).

\(^{269}\) Id. at 718 (emphasis added).


\(^{271}\) See supra notes 101-08 and accompanying text.
ments of regulatory field preemption.

2. Obstacle Preemption

The Labs also argued that the county ordinances conflicted with the federal scheme's goal of providing an "adequate supply of plasma." The county ordinance addressing donor requirements, argued the Labs, had the effect of reducing donor participation. The Labs further argued that the added expense of complying with county licensing and procedures would reduce the numbers of plasma centers. This combined effect—reduced number of both donors and plasma centers—would defeat the purpose of the federal scheme to maintain a sufficient supply of plasma.

The Labs' argument for obstacle preemption is remarkably similar to the argument accepted by the Court in the statutory preemption context in *Jones v. Rath Packing Co.* *Jones* involved federal and state regulation of product weight as stated on package labels. The state law required that the stated weight, measured after distribution, be accurate within a narrow margin of error. The federal regulation provided for a greater margin of error that allowed for a decrease in product weight due to loss of moisture during distribution. The state argued that its more stringent regulation was a permissible supplement to the federal scheme. The manufacturers argued that the state's strict requirements conflicted with the more permissive federal regulatory scheme.

The Court discussed the state and federal schemes as they applied to the labeling of flour. The Court began its analysis by identifying the "major purpose [of the federal scheme as] facilitat[ing] value comparisons among similar products." In other words, the federal scheme seeks to ensure that a product's stated weight will closely approximate its actual weight so that consumers

273. *Id.* (arguing donor identification card requirement would deter donors who only occasionally sell their plasma).
274. *Id.* (claiming ordinances would result in a total increase in production costs of $7 per litre of plasma).
278. *Jones*, 430 U.S. at 541.
may compare the relative price per weight of different brands of the same product. Given this goal, the Court followed a string of assumptions in speculating that the state scheme would hinder the federal goal. The Court's reasoning proceeded as follows. First, the moisture content of flour affects the weight of the product. Second, manufacturers can control the moisture content of flour in the milling process. Third, since manufacturers have nothing to gain financially from overfilling their packages, each manufacturer will place the minimum amount of flour in a package needed to meet prevailing regulations. Fourth, the moisture content of flour will vary depending upon the humidity of the place it is stored. Fifth, if state law makes no allowance for loss of moisture, national manufacturers will place more flour in a package destined for an arid area to compensate for excess moisture loss. Sixth, local flour manufacturers who distribute only to more humid areas will not have to overfill their packages. Seventh, flour from both local and national manufacturers may end up on the shelves of the same store. Eighth, since national manufacturers systematically overfill to comply with state law, state law may cause systematic weight differentials between local and national brands of flour. Ninth, such systematic deviations conflict with the goal of the federal scheme to promote accurate consumer price-weight comparisons.

*Jones* found conflict preemption based on the above string of speculative assumptions. As Justice Rehnquist pointed out in dissent, the Court's analysis relied on its view of the "economics of the milling process" which was "not supported by the record." *Jones*, then, suggests that the Court (1) takes a broad view of conflict preemption; and (2) is willing to indulge a number of economic assumptions *de novo* in tracing the "actual" impact of a state regulatory scheme.

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279. *Id.*
280. *Id.*
281. *Id.* at 542.
282. *Id.* at 541.
283. *Id.* at 543.
284. *Id.* at 542-43.
285. *Id.* at 543.
286. *Id.*
287. *Id.*
288. In dissent, Justice Rehnquist derided the Court's analysis as "wholly speculative" and "unwarranted speculations." *Id.* at 548 n.5 (1977) (Rehnquist, J., dissenting).
289. *Id.* at 547 (Rehnquist, J., dissenting).
Given its loose analysis in *Jones*, it is curious that the *Hillsborough* Court rejected the Labs’ conflict argument as “too speculative to support preemption.” The Labs’ argument seemed to require a simple economic assumption: an increase in cost will generally reduce supply. While this assumption is too simple and not necessarily true, it is far less controversial than the Court’s economic musings in *Jones*. Why the change from *Jones* to *Hillsborough*? There are several possible explanations.

First, the legal realist might note that the Court was generally more receptive to speculative statements of fact in the early 1970’s. Four years before the Court decided *Jones*, it also decided a standing case entitled *United States v. Students Challenging Regulatory Agency Procedures* (SCRAP). In *SCRAP*, a student group challenged an increase in railway rates on the basis that the increase would ultimately reduce the students’ use and enjoyment of natural resources in Washington, where they lived. The Court adopted the following chain of reasoning linking the rate increase to the students’ injury:

> [A] general rate increase would . . . cause increased use of nonrecyclable commodities as compared to recyclable goods, thus resulting in the need to use more natural resources to produce such goods, some of which resources might be taken from the Washington area, and resulting in more refuse that might be discarded in national parks in the Washington area.

*SCRAP* seemed to expand the standing doctrine just as *Jones* expanded the conflict preemption doctrine. Since *SCRAP*, however, the Court has rejected such speculative claims as the injury-in-fact required for standing. *Hillsborough*, then, may be akin to the Court’s move away from reliance on speculative factual predicates.

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291. Id. at 720.
293. Id. at 688.
294. See id. at 723 (White, J., dissenting) (With *SCRAP* “we are well on our way to permitting citizens at large to litigate any decisions of the Government which fall in an area of interest to them and with which they disagree.”).
in the area of standing.

Second, the Court's rejection of excessive speculation may represent its further restriction of regulatory preemption. Just as regulatory field preemption answers to a stricter standard than statutory field preemption, regulatory obstacle preemption may now answer to a stricter standard than statutory obstacle preemption. The Court suggests this answer in its analysis:

Our analysis would be somewhat different had Congress not delegated to the FDA the administration of the federal program. Congress, unlike an agency, normally does not follow, years after the enactment of federal legislation, the effects of external factors on the goals that the federal legislation sought to promote. Moreover, it is more difficult for Congress to make its intention known—for example by amending a statute—than it is for an agency to amend its regulations or to otherwise indicate its position. So, the fact that a statute delegates authority to an agency means that the statute should be read more restrictively for preemption purposes. Also, the Court suggests that the cost of incorrectly determining the agency's intent regarding preemption is relatively slight to the extent that the agency can easily clarify that intent by subsequent regulation or other action. Such a rapid response seems likely since the Court views agencies as closely monitoring judicial interpretations of their intent. The Court, then, has identified two further differences between statutes and administrative actions: (1) the continuing monitoring by administrative agencies; and (2) the ease of response by administrative agencies.

A third possible explanation could be that Hillsborough involved an area of state police power whereas Jones merely addressed consumer protection. Yet, the Court has elsewhere stated that prevention of consumer deception is a part of the states' core police power. Thus, the presumption against preemption of state police power regulation cannot explain any difference between Jones and Hillsborough.

Finally, the Court may have implicitly acknowledged the posi-

297. Florida Lime and Avocado Growers, Inc. v. Paul, 373 U.S. 132, 146 (1963) ("[N]either logic nor precedent invites any distinction between state regulations designed to keep unhealthful or unsafe commodities off the grocer's shelves, and those designed to prevent the deception of consumers.").
Obstacle preemption is best determined by the agency administering the statute in question. Obstacle preemption entails a close and nuanced analysis of the regulatory scheme in action to determine whether state law prevents the federal scheme from "being all that it can be." This analysis is better suited to the administering agency that has day-to-day contact with the federal scheme as opposed to the part-time players in the federal judiciary. This view explains why the Court weighed the FDA's 1973 statement so heavily in its analysis. Congress intended that its statutory scheme succeed; the agency is the better decision-maker to implement that intent.

E. Agency Statutory Interpretation

Presumption and deference also come into tension when an agency interprets its authorizing statute to preempt state law. The agency will no doubt invoke Chevron for deference from a reviewing court. The opposing party will argue that the Rice presumption displaces Chevron deference when the interpretive issue is Congress' intent to preempt. What is the result? Is it enough that the agency indulged the presumption against preemption in interpreting the statute? As argued in Part IV.C above, the Court should follow a two-step process: Ask on what basis the agency interprets the statute to preempt state law, and tailor review to ensure that preemption occurs after deliberation by an accountable decision-maker. This approach reconciles Rice and Chevron.

The Court declined an opportunity to reconcile Rice and Chevron in Louisiana Public Service Commission v. FCC. Louisiana Public Service Commission involved two FCC rulings regarding

298. See supra notes 228-30 and accompanying text.
299. See generally Breyer, supra note 13, at 394-98 (discussing the desirability of having the courts independently review agency policy decisions); Starr, supra note 81, at 309-10 (arguing that agencies are better able to interpret their own statutes than generalist courts because of their extensive experience and expertise).
300. Some commentators have suggested, without detailed analysis, that this is the proper result. See Sunstein, supra note 52, at 2107, 2111-14 (stating that constitutionally inspired interpretive principles which require a clear legislative statement overcome Chevron); Peter S. Heinecke, Note, Chevron and the Canon Favoring Indians, 60 U. Chi. L. Rev. 1015, 1016-24 (1993) (arguing that the judiciary should apply canons of statutory construction which are inconsistent with Chevron's deference only if the courts can protect the values underlying the canon better than the agency).
301. See discussion supra part IV.C.
depreciation of telephone plant and equipment used in intrastate phone service.\textsuperscript{303} Upon request for “clarification,” the FCC stated that depreciation rulings preempted state law mandating contrary depreciation practices for intrastate phone equipment.\textsuperscript{304} Under \textit{Fidelity},\textsuperscript{305} the FCC’s ruling would preempt state law only if depreciation of intrastate telephone equipment fell within the FCC’s authority under the Communications Act of 1934.\textsuperscript{306} The FCC rested its preemption authority on section 220 of the Communications Act, which it interpreted to automatically preempt state regulation inconsistent with FCC depreciation practices for intrastate telephone carriers.\textsuperscript{307} Under \textit{Chevron}, the FCC’s “construction of a statutory scheme it is entrusted to administer” would be entitled to deference by courts.\textsuperscript{308} Several states’ Public Service Commissions appealed the FCC’s ruling to the Fourth Circuit, which affirmed the FCC.\textsuperscript{309}

The Supreme Court rejected the FCC’s reading of section 220. The Court began its analysis by noting that “it is, no doubt, possible to find some support in the broad language of the section” for the FCC’s interpretation.\textsuperscript{310} Indeed, the Court also noted that the meaning of section 220 was neither “unambiguous” nor “straightforward.”\textsuperscript{311} When a statute’s meaning is unclear, \textit{Chevron} forbids the Court from “simply impos[ing] its own construction of the statute,” and leaves room only for a court to determine “whether the agency’s answer is based on a permissible construction of the

\textsuperscript{303} Id. at 360; see Property Depreciation, Report & Order, 83 F.C.C.2d 267, 267 (1980) (sanctioning use of equal life and remaining life methods of depreciation); reconsideration denied, 87 F.C.C.2d 916 (1981); Uniform System of Accounts, First Report & Order, 85 F.C.C.2d 818, 837 (1981) (providing that inside wiring would not be treated as a depreciable capital investment, but would be expensed to current users).


\textsuperscript{305} \textit{Fidelity Fed. Sav. & Loan Ass'n v. De la Cuesta}, 458 U.S. 141 (1982).


\textsuperscript{307} \textit{Louisiana Pub. Serv. Comm'n}, 476 U.S. at 362.


\textsuperscript{310} \textit{Louisiana Pub. Serv. Comm'n}, 476 U.S. at 377.

\textsuperscript{311} Id.
statute." Louisiana Public Service Commission, however, made no reference to Chevron or deference to an agency's statutory interpretation in the face of an ambiguous statute. Instead, the Court interpreted section 220 for itself, concluding that the section did not preempt state law.

What conclusions can be drawn from Louisiana Public Service Commission's omission of Chevron? One possibility is that Chevron has no applicability in the regulatory preemption context. This possibility is suggested by the Court's failure to acknowledge respondents' arguments for deference. Respondents argued that if the Court found section 220 to be ambiguous, the Court should defer to the FCC's interpretation. In the only response to this argument, one of the Petitioners argued that "the law is well-settled that where the Court, using traditional tools of statutory construction, finds Congressional authority addressing the questions at issue, the agency's statutory interpretation is entitled to no deference." The Court could be seen to follow the Petitioners' argument. What, then, did the Petitioners' argument mean?

The Petitioners can be read to make one of two possible arguments. First, they may admit that Chevron applies, but argue that section 220 is "unambiguous" and thus does not trigger deference to the administrative agency's interpretation of the statute. If

314. *Id.* at 379. The Court engaged in the same act of *de novo* interpretation with regard to § 152 of the Communications Act, 42 U.S.C. § 152 (1988). *Id.* at 371-76. The state Public Service Commission argued that § 152 limited the FCC's authority to regulate depreciation by intrastate telephone carriers. *Id.* at 370. The FCC argued a narrower interpretation of § 152 that only addressed the FCC's jurisdiction to regulate telephone rate charges. *Id.* at 371-76. As with its interpretation of § 220, the Court rejected the FCC's position without reference to Chevron deference. *Id.*
315. Joint Brief of Listed Private Respondents at 14, *Louisiana Pub. Serv. Comm'n v. FCC*, 476 U.S. 355 (1986) (Nos. 84-871, 84-889, 84-1054, 84-1069); Brief for GTE Service Corp. and Affiliated Telephone Companies, Appellees-Respondents at 7, *Louisiana Pub. Serv. Comm'n* (Nos. 84-871, 84-889, 84-1054, 84-1069) ("Even if the Court, upon its own analysis of this complex regulatory statute and plan, were left with some uncertainty about precisely what Congress intended, this would be the classic kind of case in which to defer to the expert agency's careful and unanimous interpretation of the regulatory scheme that Congress has charged the FCC to administer.") (citing *Chevron, Inc. v. NRDC*, 104 S. Ct. 2778, 2782 (1984)).
the Court accepted this argument, it did so silently since its opinion never mentioned Chevron. Further, this explanation of the Court's decision ignores the Court's statements that the meaning of section 202 was not unambiguous.318

A second reading of the Petitioners' argument, and a possible basis for the Court's holding, is that Chevron deference does not apply to an agency's interpretation of Congress' preemptive intent. The Court may have concluded that the issue was a "pure question of statutory construction for the courts to decide."319 In doing so, the Court may be suggesting the position it would later flirt with explicitly, that Chevron deference does not apply to pure questions of law.320 "Pure questions of law" are to be distinguished from "the question of interpretation that arises in each case in which the agency is required to apply [a] standard[] to a particular set of facts."321 While Justice Scalia has correctly noted that this view has yet to be authoritatively adopted by the Court,322 the rationale would at least explain why Louisiana Public Service Commission never mentions Chevron.

A second explanation for the absence of Chevron may be that Louisiana Public Service Commission was merely part of the Court's inconsistent application of Chevron. One commentator has noted that the Court has applied Chevron in less than half of the available cases.323 On this reading, we should not draw too many

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318. See supra note 311 and accompanying text.
320. See NLRB v. United Food & Commercial Workers Union, Local 23, 484 U.S. 112, 123 (1987) (stating that the court must give effect to congressional intent on questions of pure statutory construction (citing Cardoza Fonseca, 480 U.S. at 446-48). The Court has subsequently abandoned discussion of this position. Indeed, some commentators have suggested that a "pure question of law" exception is in conflict with the analysis and result in Chevron. See Sunstein, supra note 52, at 2095-96 (stating that "such a distinction is in tension with Chevron since the case itself likely involved a pure question of law). See supra note 311 and accompanying text.
321. Cardoza Fonseca, 480 U.S. at 448.
322. See United Food, 484 U.S. at 133-34 (Scalia, J., concurring) (writing separately to clarify that Chevron deference applies to questions of pure statutory construction even though some courts have mistakenly concluded otherwise); Cardoza Fonseca, 480 U.S. at 453-55 (Scalia, J., concurring) (stating that under Chevron, the courts must give effect to reasonable statutory interpretation, unless it is inconsistent with a "clearly expressed Congressional intent"); Scalia, supra note 9, at 512 ("Chevron has been a source of lively debate on my own Court, centering largely on the question whether it applies with full force (as I believe it does) when the controversy involves a 'pure question of statutory construction.").
conclusions from the Court’s silence on *Chevron*.

Ultimately, one should not read too much into *Louisiana Public Service Commission*. The case merely continues the Court’s failure to formulate a coherent doctrine of regulatory preemption. Coherence requires that the twin goals of deliberation and accountability be extended to this blind spot in the Court’s jurisprudence. The two-step analysis from section C would be a measurable improvement.

**CONCLUSION**

This Article is a call to examine a neglected portion of the Court’s case law: regulatory preemption. This Article finds the topic in its infancy. Analysis of federalism and the place of administrative agencies in our constitutional system is required before the topic can creep toward its adolescence.

As an initial step, this Article canvasses the legal landscape of regulatory preemption. The survey indicates that the Court has been as unhelpful as the commentary on the issue. As a result, an unresolved tension exists between the *Rice* presumption and *Chevron* deference. Analysis of the case law indicates, however, that this tension can be resolved by locating *Rice* and *Chevron* within the larger legal landscape. On this broader view, *Rice* and *Chevron* are seen as requiring deliberation and accountability. The Court can achieve coherence in its jurisprudence by harmonizing the twin demands of deliberation and accountability. Such coherence will require attention to the context of agency action and the best route to deliberation and accountability. Any effort in this direction would improve upon the unexplained hodge-podge of cases that currently constitute the Court’s regulatory preemption jurisprudence.

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(reporting *Chevron*’s considerable effect on appellate courts); Sunstein, *supra* note 52, at 2074-75 & n.16 (stating that *Chevron* has been cited over 1000 times between its publication in 1984 and 1990 due to its importance and breadth).