

## VETOGATES, *CHEVRON*, PREEMPTION

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### INTRODUCTION

Article I, Section 7 of the Constitution creates a structure that makes it difficult to enact federal statutes: in order to become a “Law,” statutory proposals must be accepted in the same form and language by both the House and the Senate *and* must be presented to the President.<sup>1</sup> Fifteen years ago, scholars from a variety of perspectives seized upon this structure to think about its implications for American public law.<sup>2</sup> Professor Bradford Clark argues that the lawmaking process entailed in Article I, Section 7 is one constitutional structure that helps “safeguard federalism . . . simply by requiring the participation and assent of multiple actors” before there can be a national “Law” that can preempt state law under the Supremacy Clause.<sup>3</sup> He also argues that the Article I, Section 7 structure provides a reason for the Supreme Court to rethink at least one feature of its *Chevron* doctrine, namely, the deference the Court sometimes gives to dynamic agency interpretations that have the effect of preempting state law.<sup>4</sup> For

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1 U.S. CONST. art. I, § 7, cls. 2–3.

2 See William N. Eskridge, Jr. & John Ferejohn, *The Article I, Section 7 Game*, 80 GEO. L.J. 523, 528–33 (1992); John F. Manning, *Textualism as a Nondelegation Doctrine*, 97 COLUM. L. REV. 673, 706–10 (1997); McNollgast, *Positive Canons: The Role of Legislative Bargains in Statutory Interpretation*, 80 GEO. L.J. 705, 716–27 (1992).

3 Bradford R. Clark, *Separation of Powers as a Safeguard of Federalism*, 79 TEX. L. REV. 1321, 1339 (2001).

4 See *id.* at 1430–38; see also *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 866 (1984) (upholding the EPA’s construction of a statutory term).

agency lawmaking that is *Chevron*-eligible, the Court asks whether Congress has “directly addressed” the issue; if not, the Court accepts the agency view so long as it is “reasonable.”<sup>5</sup> Some judges and commentators have argued that *Chevron* deference ought to apply very broadly, to any case where an agency has authoritatively interpreted a federal statute.<sup>6</sup> The Court and most commentators have limited *Chevron* to instances where the agency is acting under the auspices of a congressional delegation of lawmaking authority.<sup>7</sup>

Let me start by saying that Professor Clark has identified an extremely important phenomenon: federal statutes preempt a potentially large swath of state law, and Supreme Court litigation over the matter *usually* involves agency rules, orders, and interpretations. As the Appendix to this Article documents, the Court decided 131 cases between *Chevron* and the end of the 2005 Term in which preemption of state law was at issue and a federal agency rule, order, or interpretation was relevant to the Court’s decision.

Importantly, the Court followed the federal agency 71.8% of the time, an impressive agreement rate even by the high standards set by the Solicitor General, who supports or advances agency interpretations in Supreme Court cases.<sup>8</sup> Moreover, the 131 cases involving agency inputs into the Court’s preemption decisions powerfully affect particular areas of law, especially the law governing pensions (17 cases), civil rights (23 cases), Indian law (20 cases), transportation policy (16 cases), public health and safety law (16 cases), taxation (14 cases), and energy policy (10 cases).<sup>9</sup> In short, there are few topics relating to the Supreme Court’s statutory jurisprudence that are as important as agency inputs into preemption decisions, and none that are more important.

I agree with Professor Clark’s argument that *Chevron* should be applied conservatively in preemption cases, and this Article will explore that critique more deeply. The process of federal lawmaking is even more complicated than that required by Article I, Section 7. To become a federal law, a proposal must pass through multiple “vetogates”—not just adoption by floor majorities in both the House and

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5 *Chevron*, 467 U.S. at 842–43.

6 See Antonin Scalia, U.S. Supreme Court Justice, Judicial Deference to Administrative Interpretations of Law, Administrative Law Lecture at Duke University School of Law (Jan. 24, 1989), *in* 1989 DUKE L.J. 511, 512.

7 See, e.g., *United States v. Mead Corp.*, 533 U.S. 218, 226–27 (2001); Thomas W. Merrill & Kristin E. Hickman, *Chevron’s Domain*, 89 GEO. L.J. 833, 854–56 (2001).

8 See *infra* Appendix (listing 94 cases where agency views prevailed, out of 131 cases total).

9 See *infra* Table 3.

the Senate and presentment to the President as required by Article I, Section 7, but also those internal vetogates Congress has created pursuant to Article I, Section 5: substantive committees in both chambers, calendar expedition through the Rules Committee (House) or unanimous consent agreements (Senate), and supermajorities if there is a Senate filibuster.<sup>10</sup> Part I of this Article will lay out a vetogates model for national lawmaking, and Part II will explore its consequences for American public law. Under modern circumstances, the most important effect of vetogates is not to reduce national intrusion into state responsibilities; indeed, that is not necessarily the net effect of the vetogates model. Instead, in today's world, the most important effects are statutory complexity and extensive delegation of lawmaking or law-elaborating authority to agencies and sometimes courts.

The normative doctrinal implications of this constitutional structure might be debated. Part III will lay out my reasons for agreeing with Professor Clark's suggestion that, particularly in preemption cases, a broad reading of *Chevron* is in tension with the vetogates model drawn from Article I. I shall develop limitations for deference jurisprudence that would bring it into greater consistency with the implications of Article I, Sections 5 and 7. The super-deference entailed in *Chevron* ought only be triggered when there has been a formal congressional delegation of lawmaking authority to agencies. In the same spirit, an agency rule or order can preempt state law *only* when there has been a clear congressional delegation of preemptive authority to the agency. The Court should also, as it routinely does, carefully consider and solicit agency inputs even when the issue is whether the statute itself, rather than an agency action, preempts state law. But the Court should *not* apply *Chevron* to such agency interpretations unless Congress has explicitly delegated to the agency authority to preempt state law; instead, the Court should evaluate the agency interpretations under an "expanded *Skidmore*" approach, which considers agency inputs for their persuasive value.<sup>11</sup> Drawing from an empirical analysis of the Supreme Court's practice (1984–2006), Part III will close with three meta-canons: the Court ought to be particularly open to agency inputs when (1) the agency provides reasons *not* to preempt, (2) the subject matter is technical rather than normative,

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10 McNollgast, *supra* note 2, at 720 (deploying this felicitous term to describe the multiple kill points for national legislation).

11 See *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944) (stating that a court exercising its independent judgment when interpreting a federal statute ought to consider "the thoroughness evident in [the agency's] consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control").

or (3) the agency view has been longstanding and has generated reliance interests.

I shall illustrate these doctrinal points by reference to a recent Supreme Court decision involving agency preemption of state law. The Article will close with some general concerns, also suggested by Article I, Sections 5 and 7, that state law is too readily being preempted in some areas without sufficient statutory justification.

## I. VETOGATES

The bicameralism and presentment requirements of Article I, Section 7 do not provide a comprehensive constitutional account of statutory enactment. Its requirements are supplemented by Article I, Section 5, Clause 2, which provides that “[e]ach House may determine the Rules of its Proceedings.”<sup>12</sup> Both the House and the Senate have adopted rules of their proceedings that create multiple opportunities in *each chamber* for opponents to kill proposed legislation. Combining Sections 5 and 7 of Article I yields a process that looks very complex indeed, with at least nine different points where bills can die. Consider this common scenario, where a bill originates in the House.

*Vetogate 1: House Committee.* When a bill is introduced in the House, the Speaker must refer it to the appropriate committee.<sup>13</sup> The committee chair decides whether to schedule hearings, markup sessions, and even votes.<sup>14</sup> Although a majority of the committee’s membership can compel the chair to schedule a bill,<sup>15</sup> this rarely occurs.<sup>16</sup> Hence, if the chair opposes the bill, believes more study is needed on the matter, or is pessimistic (perhaps unduly so) that the bill has sufficient political support down the road, the bill will die in committee. This is the fate of ninety percent of the bills introduced in each session of Congress.<sup>17</sup>

*Vetogate 2: House Rules Committee.* A bill reported by a House committee will not be considered by the chamber unless the Rules Com-

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12 U.S. CONST. art. I, § 5, cl. 2.

13 See RULES OF THE HOUSE OF REPRESENTATIVES, H.R. DOC. NO. 109-157, R. XII(2), at 600–06 (2006); DAVID C. KING, TURF WARS 100–01 (1997).

14 See H.R. DOC. NO. 109-157, R. XI(2)(c), at 546–47.

15 See *id.*

16 Cf. KING, *supra* note 13, at 20–21 (explaining that committee members’ “entrepreneurial motivations” cause them to “try to grab territory that will benefit them”).

17 See U.S. Senate, Résumé of Congressional Activity, [http://www.senate.gov/pagelayout/reference/two\\_column\\_table/Resumes.htm](http://www.senate.gov/pagelayout/reference/two_column_table/Resumes.htm) (last visited Apr. 4, 2008) (providing data on the number of bills introduced, reported from committee, and voted upon from the 80th Congress to the present).

mittee expedites its consideration through a special rule (voted upon by the full chamber).<sup>18</sup> This traffic cop authority vests the Rules Committee with veto power similar to that of the substantive committee. In practice, the Rules Committee does the bidding of the Speaker of the House, and so is typically an instrument by which the majority party dictates the House agenda.

*Vetogate 3: House Floor Consideration.* On the floor of the House, a proposed bill faces new challenges. The most common challenge is that opponents will propose amendments that either weaken the bill or strengthen it so much that the bill will lose its majority support (“killer amendments”).<sup>19</sup> Hence, even a measure that enjoys the support of a majority of the House may be either weakened or even defeated through the strategic deployment of amendments.

*Vetogate 4: Senate Committee.* The Senate Rules do not require the Majority Leader to refer bills to committee, but the Senate practice is to do so.<sup>20</sup> As in the House, the chair of the relevant Senate committee (or subcommittee) can usually kill the bill, subject to petition by a majority of the committee’s members.<sup>21</sup> So add this as another vetogate, where even measures with majority support can be delayed or even killed.

*Vetogate 5: Unanimous Consent Agreement.* Unlike the House, the Senate has no rules committee that recommends expedited scheduling. Instead, the Senate expedites bills and organizes their debate according to unanimous consent agreements negotiated by the Majority Leader.<sup>22</sup> If one senator objects, of course, the agreement is not unanimous. Theoretically, one senator can kill or delay even major legislation, and a determined minority can usually do so.

*Vetogate 6: Filibusters and Holds.* Senators can often talk a bill to death through the notorious filibuster; filibusters may occur on motion to proceed with a bill, but the famous ones are those seeking to block final votes on bills.<sup>23</sup> Under the Senate’s standing rules, sixty votes can cut off debate; conversely, a minority of forty-one senators can block legislation.<sup>24</sup>

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18 See STANLEY BACH & STEVEN S. SMITH, *MANAGING UNCERTAINTY IN THE HOUSE OF REPRESENTATIVES* 6–11 (1988).

19 See WILLIAM N. ESKRIDGE, JR. ET AL., *CASES AND MATERIALS ON LEGISLATION* 33–35 (4th ed. 2007).

20 See *STANDING RULES OF THE SENATE*, S. DOC. NO. 110-9, R. XVII, at 12 (2007).

21 See *id.* R. XXVI(3), at 30.

22 See *id.* R. XII(4), at 8.

23 See SARAH A. BINDER & STEVEN S. SMITH, *POLITICS OR PRINCIPLE?* 6–29 (1997).

24 See S. DOC. NO. 110-9, R. XXII(2), at 15–17.

*Vetogate 7: Conference Committee.* Article I, Section 7 requires that legislation be adopted in the same form by both chambers. Hence, any inconsistencies adopted by the second chamber must either be accepted by the first or must be resolved through a conference committee.<sup>25</sup> Not only do conference committees edit out provisions that enjoyed majority support in one of the chambers, but in recent years scholars have shown that such committees are deleting provisions adopted in both chambers.<sup>26</sup>

*Vetogate 8: Conference Bill Consideration by House and Senate.* Even when conferees from the House and Senate reach agreement as to the final product, both chambers must vote for that product. Although few bills die at this stage, some do, either because time runs out in the congressional session or there are too many problems with the final product for a majority in one chamber to accept it.

*Vetogate 9: Presentment to the President.* Under Article I, Section 7 of the Federal Constitution, once an enrolled bill is presented to the President, the chief executive has ten days (not including Sundays) to sign it or veto it.<sup>27</sup> If the President vetoes the bill, it is returned to Congress, where the veto can be overridden by two-thirds of those voting in each chamber.<sup>28</sup> If the veto is overridden, the bill then becomes law without the President's signature.<sup>29</sup> In most cases, if no action is taken within the constitutional ten-day period, the bill also becomes law without the President's signature.<sup>30</sup> The exception to this last rule is that if Congress adjourns before the end of the ten-day period and the President fails to sign the bill, it is killed by a *pocket veto*.<sup>31</sup>

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25 See ESKRIDGE ET AL., *supra* note 19, at 35–37.

26 See Seth Grossman, *Tricameral Legislating: Statutory Interpretation in an Era of Conference Committee Ascendancy*, 9 N.Y.U. J. LEGIS. & PUB. POL'Y 251, 266–70 (2005).

27 See U.S. CONST. art. I, § 7, cls. 2–3.

28 See *id.*

29 See *id.*

30 See *id.* art. I, § 7, cl. 2.

31 See *id.*

FIGURE 1. VETO GATES

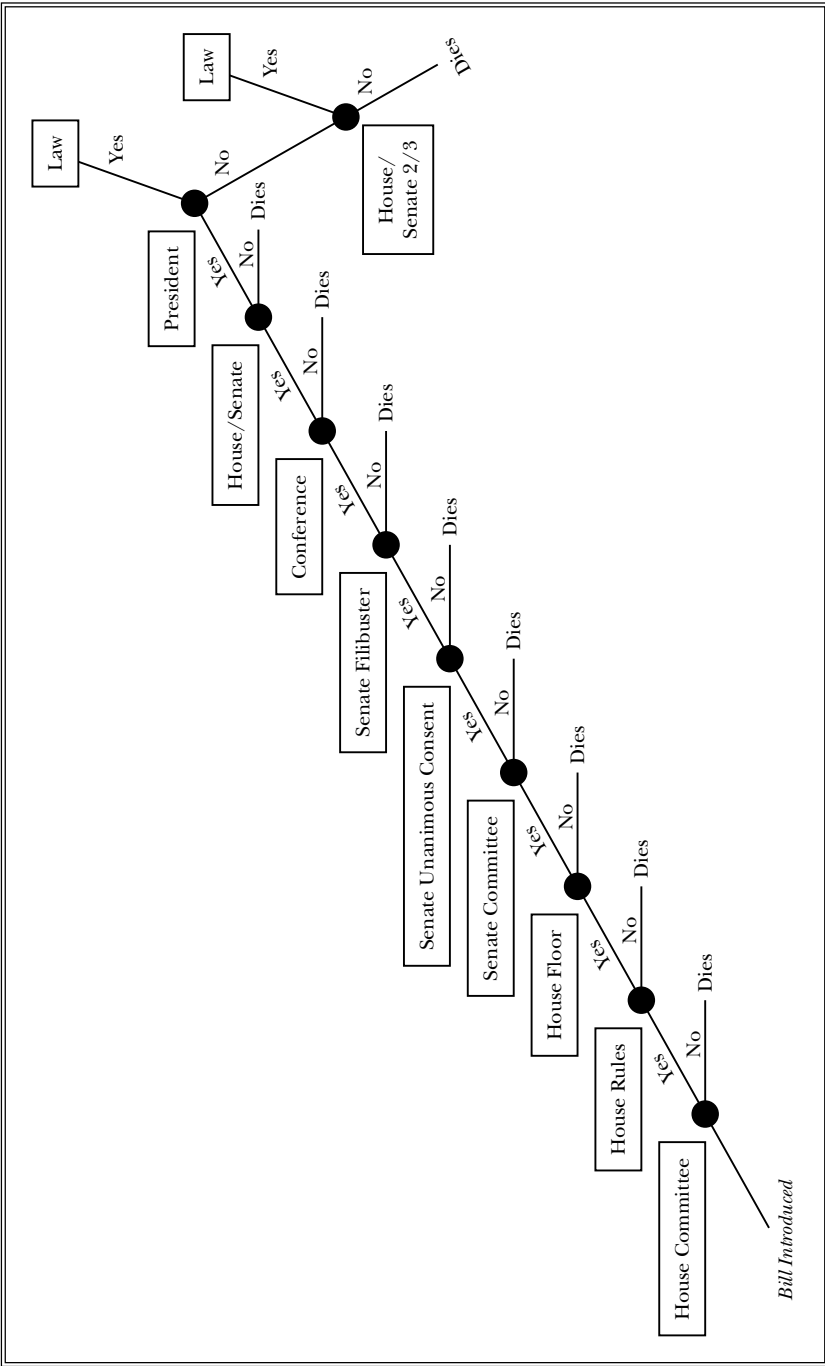


Figure 1 maps the Article I, Sections 5 and 7 vetogates through which a bill usually must pass before it becomes a law. For a bill to become a law, it must normally pass through all these vetogates; if but one is closed to it, the bill dies. Theoretically, then, federal legislation can be blocked not only by majorities in either the House or the Senate, but also by individual committee chairs in either chamber, by the Rules Committee in the House, by filibustering minorities in the Senate, by House-Senate conference committees, by negative votes of either chamber for the conference substitute, and of course by the President. This is an awesome obstacle course for major legislation having large stakes or generating intense opposition (or both).

In practice, the vetogate hurdles for major legislation are reduced through informal cooperation among legislators who agree not to block most measures they oppose and through deals worked out by congressional, executive, and/or party officials through legislator-executive “summits,”<sup>32</sup> as well as legislative caucuses or conference committees.<sup>33</sup> What political scientist Barbara Sinclair calls “unorthodox lawmaking” allows many pieces of important legislation (especially budgetary and tax legislation) to bypass one or more vetogates—but not most of them.<sup>34</sup> For example, the Article I, Section 7 process, together with the Senate filibuster, cannot be evaded through summistry when important legislation stirs intense opposition. So even under accounts that present a less lengthy gauntlet, the vetogates model is an imposing obstacle to the adoption of national legislation.<sup>35</sup>

## II. PUBLIC LAW CONSEQUENCES OF THE VETOGATES MODEL

The obvious consequence of the vetogates structure is that federal statutes are hard to enact. This does *not* mean, however, that there will *necessarily* be less federal statutory lawmaking or less national

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32 See JOHN B. GILMOUR, STRATEGIC DISAGREEMENT 132–64 (1995).

33 See GROSSMAN, *supra* note 26, at 272–81.

34 See BARBARA SINCLAIR, UNORTHODOX LAWMAKING (3d ed. 2007); see also GLEN S. KRUTZ, HITCHING A RIDE 61–87, 102–34 (2001) (offering a pioneering account of how some legislative vetogates can be avoided through “omnibus legislation”).

35 Moreover, it would be easy to *expand* the model to include vetogates omitted in Figure 1. Most major legislation is referred to subcommittees in both the House and the Senate, which theoretically represent additional kill points. The Senate filibuster might be broken up into “motion to consider” filibusters and “debate on the merits” filibusters, both of which were activated during the Senate’s lengthy debate over the Civil Rights Act of 1964. See ESKRIDGE ET AL., *supra* note 19, at 15–22. Moreover, Senate Rule XXII(2) allows but regulates post-cloture amendments that can seriously stall legislation. See STANDING RULES OF THE SENATE, S. DOC. NO. 110-9, R. XXII(2), at 15–17 (2007).

usurpation of traditional state responsibilities, for the reasons explained below.<sup>36</sup> This point will be illustrated by the Comprehensive Drug Abuse Prevention and Control Act of 1970,<sup>37</sup> a broad federal regime regulating drug use that not only inserted a frequently overpowering federal presence into drug enforcement, but has also effectively preempted substantial swaths of state law. In 1969, every state prohibited the sale or use of marijuana and other mind-altering drugs.<sup>38</sup> Fueled by widespread, albeit low-intensity, concern with the use and abuse of drugs during the 1960s, a drug abuse law was proposed by President Nixon in 1969 and worked its way through the vetogates in just over a year—swift progress for such major legislation.<sup>39</sup> While one might speculate that the vetogates model would assure that such a drug abuse law would be less intrusive than it otherwise would have been, the model just as easily suggests greater and more preemptive federal regulation of drugs. The discussion below will demonstrate how the vetogates model contributes to more, rather than less, expansive federal regulation superseding, supplementing, or supplanting state law, both as a matter of theory and as a matter of historical record. Hence, I am skeptical of broad claims that the Article I, Section 7 structure or the vetogates model *necessarily* protects the federal arrangement simply by making national statutes hard to enact. Nonetheless, there are, as a matter of theory, other systemic effects that the vetogates structure generates in our federal system. The primary effect, for purposes of this Article, is that the vetogates encourage Congress to delegate more authority to agencies to make ongoing statutory policy choices. Those theoretical effects can be illustrated by the enactment and evolution of the drug abuse law and other statutes.

A. *Statutes Will Involve Compromises, Logrolls, and Bundles*

An important consequence of the vetogates model is that statutory enactment will *ordinarily* involve a lot more legislative compromises, logrolls, and bundles than we would have under a parliamentary system, where a bill becomes a law upon the majority vote in but one legislative chamber. Even under a parliamentary sys-

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36 So here I disagree with Clark, *supra* note 3, at 1341.

37 Pub. L. No. 91-513, 84 Stat. 1236 (codified as amended in scattered sections of 18, 19, 21, 26, 31, 40, 42, 46, 49 U.S.C.).

38 See *Gonzales v. Raich*, 545 U.S. 1, 11 n.14 (2005).

39 See DAVID F. MUSTO & PAMELA KORSMEYER, *THE QUEST FOR DRUG CONTROL* 56–71 (2002).

tem, of course, legislation will involve *compromises*. Figure 2a illustrates this phenomenon.

FIGURE 2A. PREFERENCES FOR CHANGING THE STATUS QUO,  
PARLIAMENTARY SYSTEM (COMPROMISE: STATUTORY POLICY AT  $x - 2$ )

$x$	$x - 2$	$x - 4$	$SQ$
25	51	75	

In Figure 2a, the status quo ( $SQ$ ) is problematic and needs fixing. The sponsors, the legislators who favor the most highly regulatory fix (leftward on the political spectrum), have only twenty-five votes for their preferred approach, however; hence, they cannot enact it in a chamber of one hundred legislators. By compromising, ameliorating their regulatory fix by two units ( $x - 2$ ), the sponsors can achieve a majority (fifty-one legislators favor  $x - 2$  over the status quo). Under simple majority voting, legislation will often be less regulatory than the sponsors would like; this is an elementary lesson of democracy.

In a bicameral legislature such as that created in Article I, there is a good chance that the sponsors will have to compromise even further, setting policy at  $x - 4$ , either because the second chamber is more conservative, because a relevant committee chair is strongly opposed to  $x - 2$ , or because a filibuster-proof number of senators oppose  $x - 2$  but would settle for  $x - 4$ . Figure 2b maps a simple example of this phenomenon.

FIGURE 2B. PREFERENCES FOR CHANGING THE STATUS QUO,  
BICAMERAL CONGRESS (COMPROMISE: STATUTORY POLICY AT  $x - 4$ )

$x$	$x - 2$	$x - 4$	$x - 6$	$SQ$
	House	C	Senate	

Even if both chambers and all the relevant committees in Congress were willing to compromise along the lines of  $x - 4$ , however, the compromise might be pushed further toward the status quo if the President were opposed to any legislation. If the President's threatened veto could garner more than one-third of the representatives in either chamber, then statutory policy might have to be compromised at something closer to  $x - 8$ .

FIGURE 2C. PREFERENCES FOR CHANGING THE STATUS QUO, BICAMERAL CONGRESS + PRESIDENT (COMPROMISE: STATUTORY POLICY CLOSER TO  $x - 8$ )

$x$	$x - 2$	$x - 4$	$x - 6$	$x - 8$	<u>SQ</u>
	House		Senate		President

Under the assumptions of Figures 2b–c, the vetogates model will kill proposals ( $x - 2$ ) that would enjoy “majority” support in a simple parliamentary model (Figure 2a), but less significant changes from the status quo ( $x - 4$  or  $x - 8$ ) might be enacted instead. As Professor John Ferejohn and I have argued, this incentive to compromise and moderate changes to the status quo inspired the Framers’ support for Article I, Section 7;<sup>40</sup> it likewise inspires Professor Clark’s reliance on Article I, Section 7.<sup>41</sup> But there is more to be said about the implications of vetogates for statutory policy.

The sponsors have other options that might enable their preferred, highly regulatory, proposal to be enacted by a majority vote. Especially when powerful politicians, such as the chief executive or the legislative leadership, favor a strong measure, moderate legislators who sincerely favor a less regulatory statute might still vote for it in return for a *logroll* unrelated to the proposal.<sup>42</sup> Figure 3a illustrates this phenomenon within the confines of one chamber.

FIGURE 3A. PREFERENCES FOR CHANGING THE STATUS QUO, ONE CHAMBER (LOGROLL: STATUTORY POLICY AT  $x + y$ )

$x + y$	$x - 2$	$x - 4$	<u>SQ</u>
House (Logroll)	House (Non-Logroll)	C (Non-Logroll)	

Under Figure 3a, the sponsors are engaged in logrolling on a modest scale, that is, earning the moderates’ support for their highly regulatory proposal in return for the sponsors’ support for another proposal or set of proposals. Payoffs can be pork barrel projects, political or

40 See William N. Eskridge, Jr. & John Ferejohn, *Making the Deal Stick: Enforcing the Original Constitutional Structure of Lawmaking in the Modern Regulatory State*, 8 J.L. ECON. & ORG. 165, 168 (1992).

41 See Clark, *supra* note 3, at 1328.

42 To distinguish a *logroll* from a *compromise*, I am using the former term to entail the sponsors’ support for an *unrelated* proposal (logroll), rather than their willingness to trim back their own proposal (a compromise).

personal favors, or of course substantive measures (reflected in Figure 3a).

Expand the model to include the other vetogates. As the number of vetogates expands, so expands the number of points where a determined minority can kill the bill. But what also expands is the number of points where logs can (or must) be rolled by the sponsors in order to achieve the legislative policy they believe is best ( $x$ ). There are, concededly, not a lot of sponsoring coalitions that can carry through multiple logrolls, but if the sponsoring coalition includes the leadership of the majority party and/or the President, it can roll a lot of logs to have its way. Indeed, it is increasingly common for executive and legislative leaders to *bundle* a variety of different proposals into one giant piece of legislation.<sup>43</sup> The legislators who are strongly in favor of liberal policy  $x$  might be willing to make a deal with legislative moderates who want policy  $y$  to include that in their bill, as well as policy  $z$  (which picks up some legislators who are not enthusiastic about regulation  $x$  but do favor other regulatory measures or simply want pork for their districts). *Omnibus legislation* allows bundling of disparate policies in the same bill, which ties the fate of all three policies together. Bundling can create supermajorities for a variety of proposals which, individually, would not even have majority support in the legislature. Hence, Figure 3a can be adjusted for a complicated bargaining situation: rather than bundling just two higher-spending proposals having different constituencies ( $x + y$ ), the super-regulatory coalition might bundle dozens of proposals ( $x + y + z + \text{etc.}$ ) that have a variety of constituencies and reflect a variety of political preferences.

Theoretically, an important effect of the vetogates model is to significantly increase the incidence of compromise, logrolls, and bundles—a conclusion that is consistent with, albeit hardly proved by, the proliferation of increasingly complex omnibus statutes since World War II.<sup>44</sup> Unfortunately, this effect complicates any simple belief that vetogates assure there will not be much national legislation, thereby protecting state and local primacy in most areas of law. Note, further, that different coalitional strategies have different effects on govern-

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43 See, e.g., SINCLAIR, *supra* note 34, at 91–93, 127–28 (describing the increased use of variegated omnibus legislation to gain support from legislative and executive actors with differing agendas); *id.* at 143–59 (2d ed. 2000) (illustrating the operation of the unorthodox lawmaking model by reference to the Omnibus Drug Initiative Act of 1988); see also KRUTZ, *supra* note 34, at 102–23 (examining in detail bills bundled into omnibus legislation).

44 See, e.g., Glen S. Krutz, *Tactical Maneuvering on Omnibus Bills in Congress*, 45 AM. J. POL. SCI. 210, 213–15 (2001) (describing the rise in omnibus legislation in the years following World War II).

ance: a compromise strategy typically follows the Framers' (and Professor Clark's) expectation that vetogates will moderate the direction of legislative changes, while a logrolling strategy will often confound that expectation and contribute to more legislation and sometimes less moderation.

Criminal laws such as the drug abuse law, as enacted and amended over the years, illustrate how widening the range of political actors having veto power can be perfectly consistent with national regulatory expansion. Criminal codes generally, and the nation's drug laws in particular, have become regulatory Christmas trees, with each vetogate exercising power to add or expand its favorite crime, cheered on by federal prosecutors and law enforcement agents. The Comprehensive Drug Abuse Prevention and Control Act itself was something of a statutory Christmas tree. Social liberals and social conservatives alike were concerned with the proliferation of addictive and psychotropic drugs, but they had different attitudes toward their regulation. Following the bundling strategy, the Act adopted *both* a liberal therapeutic approach, funding narcotic prevention and treatment programs,<sup>45</sup> *and* a conservative punitive approach, outlawing and providing stiff penalties for the use or distribution of controlled substances.<sup>46</sup> (Notice how *both* social liberals *and* social conservatives favored greater government regulation.) Bundling therapeutic and punitive approaches to the problem in the same legislation facilitated its way through the vetogates described above—but with the obvious effect that vetogates encouraged Congress to double the amount of regulatory state effort and expenditure rather than to moderate its departure from the status quo.<sup>47</sup>

*B. Statutes Have Got to Last a Long Time, Which Entails Delegation of Significant Gap-Filling Authority to Judges and, Especially, Agencies*

If vetogates make statutes hard to enact, they make them doubly hard to repeal. To repeal a statute, supporters must not only press their proposal through various vetogates, but they must contend with

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45 See Comprehensive Drug Abuse Prevention and Control Act of 1970, Pub. L. No. 91-513, §§ 1-4, 84 Stat. 1236, 1238-41 (codified as amended in scattered sections of 42 U.S.C.).

46 See *id.* §§ 401-410, 84 Stat. at 1260-69 (codified as amended at 21 U.S.C.A. §§ 841-850 (West 1999 & Supp. 2007)) (creating criminal liability for the manufacture, distribution, dispensation, or possession of controlled substances).

47 The 1970 Act also included a number of compromises, of course. See, e.g., MUSTO & KORSMEYER, *supra* note 39, at 67-71 (following the last-stage bargaining which yielded numerous compromises).

a regulatory endowment effect: most statutes create constituencies and reliance interests for their regulatory regime, and these engender extra opposition to changing or abandoning the statutory policy.<sup>48</sup> Vetogates and regulatory endowment effects work together. Because these constituencies and reliance interests usually have political influence at critical veto points, such as House or Senate committees or subcommittees, they are often able to block changes even when legislative majorities would desire such changes.<sup>49</sup> As legislators well know, this means that statutes they enact have got to last a long time—often indefinitely—even as they are periodically amended.

The indefinite lifetime of statutes means that they will be applied to situations and under circumstances never considered by the legislature. Hence, the statute must usually have a mechanism for its directives to be elaborated and specified to new circumstances over years, maybe decades. The traditional eighteenth- and nineteenth-century assumption was that common law judges would be the agents for the reasoned elaboration of the statute over time to new circumstances.<sup>50</sup> This was the model followed by Congress in statutes such as the Sherman Antitrust Act,<sup>51</sup> which the Supreme Court has dubbed a “common law statute.”<sup>52</sup> The knowledge that the statute’s broad terminology (“conspiracies in restraint of trade”<sup>53</sup>) would take on concrete meaning only over time, as applied by federal judges, was probably one of the reasons Congress was able to negotiate the vetogates when it adopted the Sherman Act. The vague language enabled sup-

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48 On the “status quo basis” of endowment effects, see Richard Thaler, *Toward a Positive Theory of Consumer Choice*, 1 J. ECON. BEHAV. & ORG. 39, 43–44 (1980), which originated the term “endowment effect,” and Donald C. Langevoort, *Behavioral Theories of Judgment and Decision Making in Legal Scholarship: A Literature Review*, 51 VAND. L. REV. 1499, 1503–04 (1998).

49 Even statutes such as the Voting Rights Act and the USA PATRIOT Act, which sunset after a period of years, seem to enjoy a regulatory endowment effect when they come up for legislative renewal. See Voting Rights Act of 1965, Pub. L. No. 89-110, § 5, 79 Stat. 437, 439 (codified as amended at 42 U.S.C.A. § 1973c (West 1999 & Supp. 2007)); Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act (USA PATRIOT Act) of 2001, Pub. L. No. 107-56, 115 Stat. 272 (codified in scattered sections of 8, 12, 15, 18, 22, 28, 31, 42, 49, 50 U.S.C.).

50 See Anthony J. Bellia Jr., *State Courts and the Interpretation of Federal Statutes*, 59 VAND. L. REV. 1501, 1507 (2006); Caleb Nelson, *Preemption*, 86 VA. L. REV. 225, 302 n.235 (2000).

51 Ch. 647, 26 Stat. 209, 209–10 (1890) (codified as amended at 15 U.S.C. §§ 1–7 (2000 & Supp. V 2005)).

52 *Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 127 S. Ct. 2705, 2720 (2007).

53 15 U.S.C. § 1.

porters to win over moderates and some skeptics with assurances that sensible judges would apply the statute in moderate and productive ways.

In the twentieth century Congress handled statutory longevity very differently. Administrative agencies, rather than or in addition to judges, were delegated authority to elaborate broadly phrased statutory commands and to adapt even well-defined commands to new circumstances.<sup>54</sup> (Indeed, political scientists maintain that Congress has created “deliberate ambiguities” so that agencies, not legislators, would make controversial decisions.<sup>55</sup>) Return to the assumptions of the logrolling scenario mapped in Figure 3a. In addition to adopting a highly regulatory policy ( $x$ ), let’s say that Congress also delegates implementing authority to an agency. Unless the statute is highly specified, there is no doubt that the agency will interpret the statute dynamically. There is also a good chance that the agency will press the statute toward more, rather than less, government regulation.<sup>56</sup> The result is further regulatory expansion. Figure 3b illustrates this scenario.

FIGURE 3B. STATUTORY POLICY DELEGATED TO A TURF-GRABBING AGENCY (POLICY SHIFTS FROM  $x - 4$  TO  $x + 2$ )

$x + 2$	$x - 4$	(Old <i>SQ</i> )
Agency	Congress’ Compromise	

Federal drug statutes have revealed this tendency toward greater delegation and its potential for fueling national regulatory expansion.

54 See GUIDO CALABRESI, A COMMON LAW FOR THE AGE OF STATUTES 45 (1982). The shift from courts to agencies was primarily driven by the expertise agencies brought to particular statutory schemes, but also by the distrust some legislative and executive department officials harbored toward judges and by the (related) belief that agencies would be more responsive to evolving congressional or presidential preferences than judges. See *id.* at 44–45.

55 See Joseph A. Grundfest & A.C. Pritchard, *Statutes with Multiple Personality Disorders: The Value of Ambiguity in Statutory Design and Interpretation*, 54 STAN. L. REV. 627 (2002) (describing and providing examples of Congress’ use of ambiguous language); Lisa Schultz Bressman, *Chevron’s Mistake 14–17* (2008) (unpublished manuscript, on file with author) (describing “deliberate ambiguities” as congressional delegations to agencies).

56 The dominant reason for greater regulation would be agency turf-building. Concededly, this might be offset by countervailing congressional pressure through the appropriations process. Another possible reason would be presidential pressure, which of course can cut against regulation as well as for it.

Early federal drug laws imposed heavy administrative burdens and taxes on disapproved drugs such as marijuana and vested enforcement authority with the Treasury Department.<sup>57</sup> The Controlled Substances Act (CSA)—the core of the 1970 drug control law—replaced these registration and tax burdens with direct criminalization of the manufacture, distribution, or possession of “controlled substances,” except under the circumstances allowed by the Act.<sup>58</sup> Congress realized that judgments about dangerous substances that were sensible in 1970 might not be sensible a generation later. Hence, the CSA provides for the periodic updating of drug schedules and authorizes the Attorney General, after consultation with the Secretary of Health and Human Services (whose conclusions can bind the Attorney General), to add, remove, or transfer substances from the various schedules.<sup>59</sup> This administrative process has expanded, but never contracted, the regulatory scope of the CSA.<sup>60</sup>

The CSA prohibits medical and other personnel from dispensing or prescribing controlled substances unless they are registered to do so under the Act and follow the statute’s protections against abuse.<sup>61</sup> The Attorney General is in charge of this registration system, and the CSA authorizes him or her to promulgate rules “relating to the registration and control of the manufacture, distribution, and dispensing of controlled substances.”<sup>62</sup> Congress in 1984 authorized the Attorney General to deny or suspend registration when “inconsistent with the public interest.”<sup>63</sup> The registration and prosecutorial functions have vested the Department of Justice (DOJ) with substantial authority over the practice of medicine, sometimes overriding state laws to the con-

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57 See Marihuana Tax Act of 1937, ch. 553, 50 Stat. 551 (repealed 1970); Harrison Act of 1914, ch. 1, 38 Stat. 785 (repealed 1970).

58 See Controlled Substances Act, 21 U.S.C. § 841(a) (2000).

59 See *id.* § 811 (2000 & Supp. V 2005).

60 For examples of agency updating, anabolic steroids have been listed as a Schedule III substance and GHB (liquid ecstasy) has been listed as a Schedule I substance. For current Schedules, see 21 C.F.R. § 1308 (2007). Marijuana has been a source of frequent and extended administrative deliberation but remains a Schedule I substance, even when required for legitimate medical reasons. See *Gonzales v. Raich*, 545 U.S. 1, 15 n.23 (2005) (discussing the unsuccessful campaign to reclassify marijuana).

61 See 21 U.S.C.A. §§ 822–823 (West 1999 & Supp. 2007).

62 21 U.S.C. § 821 (2000 & Supp. V 2005).

63 *Id.* § 823(f) (2000) (listing denial of registration as one of the Attorney General’s powers); *id.* § 824(a)(4) (listing suspension of a title to manufacture, distribute, or dispense a controlled substance as one of the Attorney General’s powers).

trary.<sup>64</sup> A recent illustration of this process was former Attorney General Ashcroft's directive advising doctors in Oregon that they would be subject to deregistration and criminal prosecution if they used controlled substances to carry out that state's death-with-dignity law.<sup>65</sup>

The agency-driven evolution of the CSA has taken a statute that was already an unprecedented federal assumption of state responsibilities for narcotics crimes and has expansively applied it to assume some responsibilities for regulating the practice of medicine which have traditionally been even more of a state preserve. And note that this exercise of delegated power is usually *not* subject to the vetogates described above.<sup>66</sup> Although agencies do typically take account of federalism interests when they engage in adjudications, rulemaking, and advice giving, on the whole their motivations are to implement the national statutory scheme and to expand their own federal authority, often at the expense of state authority.<sup>67</sup> And, as we shall now see, the vetogates model demonstrates why even a Congress more concerned with state authority will rarely override agencies' jurisdiction-grabbing dynamic interpretations.

### C. *Dynamic Interpretations of Statutes by Agencies and Judges Are Hard to Override*

Congress presumably understands that delegating law-elaborating authority to judges, agencies, or both will yield dynamic interpretations of those statutes. The Supreme Court has made this point clear enough. For example, the Court has characterized its Sherman Act jurisprudence as "dynamic" in the common law sense<sup>68</sup>—not only loosely tethered (at best) to the statutory text and apparently oblivious of the statute's original meaning,<sup>69</sup> but also surprisingly little con-

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64 See, e.g., *Raich*, 545 U.S. at 31–34 (interpreting the CSA to preempt California's medical marijuana law); *United States v. Moore*, 423 U.S. 122, 142–43 (1975) (interpreting the CSA to criminalize medical misuse of controlled substances).

65 See *Dispensing of Controlled Substances to Assist Suicide*, 66 Fed. Reg. 56,607, 56,608 (Nov. 9, 2001) (stating the Attorney General's Interpretive Rule). Compare *Gonzales v. Oregon* (*Oregon Aid-in-Dying Case*), 546 U.S. 243, 269–75 (2006) (rejecting the Attorney General's assertion of his CSA authority to preempt Oregon's aid-in-dying law), with *id.* at 299–302 (Thomas, J., dissenting) (observing ironically that the Court has sanctioned broad DOJ control over medical practice, traditionally reserved to the states).

66 See *supra* Part I.

67 The best discussion of these points is Nina A. Mendelson, *Chevron and Preemption*, 102 MICH. L. REV. 737, 791–94 (2004).

68 *Bus. Elecs. Corp. v. Sharp Elecs. Corp.*, 485 U.S. 717, 732 (1988).

69 Following Judge Bork, the Supreme Court's current interpretation of the Sherman Act assumes that its goal is enhancement of overall social utility and economic

strained by the Court's own statutory precedents.<sup>70</sup> Some of the Court's recent decisions have been controversial, none more so than its ruling that no vertical price restrictions are per se antitrust violations.<sup>71</sup> Although Congress had in the 1970s and 1980s headed off challenges to the old doctrine and had relied on it in legislative contributions to antitrust law,<sup>72</sup> it was unable to respond to the new Court ruling because of the vetogates problem. Even if the Democrat-controlled House were to pass a bill overriding the Court, there is some reason to doubt that the evenly divided Senate would go along, and no chance of that if there were a filibuster or veto threat. By shifting the burden of inertia, the Court's Sherman Act interpretation has cemented into law a regulatory policy that would have gone down to defeat in 1890 had it been proposed as an amendment to the proposed Sherman Act and that would not have been enacted by any Congress between 1890 and 2006.

The same phenomenon applies to dynamic agency interpretations of other regulatory statutes, such as the drug abuse statute. After Oregon adopted, by popular initiative, its Death with Dignity Act (DWDA),<sup>73</sup> Senator Ashcroft proposed a CSA amendment to preempt the Oregon law.<sup>74</sup> The Ashcroft bill was dead on arrival, because it would probably not have been reported by committees in either the House or the Senate, because one or both of the Oregon senators would likely have filibustered an effort to "interfere" with their state's medical policy, or because then-President Clinton would have vetoed the bill. Knowing that the effort was doomed, Senator Ashcroft apparently did not push the proposal very hard—until he was appointed Attorney General in 2001 (after losing his reelection bid in 2000). A

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efficiency, a goal that is inconsistent with Congress' original goals, as revealed in the extensive legislative history of the statute. See I PHILLIP E. AREEDA & HERBERT HOVENKAMP, *ANTITRUST LAW* §§ 101, 103 (3d ed. 2006).

70 See *Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 127 S. Ct. 2705, 2721–26 (2007) (expressing an almost cavalier disregard for one of the Court's oldest Sherman Act precedents); *State Oil Co. v. Khan*, 522 U.S. 3, 20–22 (1997).

71 *Leegin*, 127 S. Ct. at 2721–26 (overruling *Dr. Miles Med. Co. v. John D. Park & Sons Co.*, 220 U.S. 373 (1911)).

72 See Brief of *Amicus Curiae* Consumer Federation of America in Support of Respondent at 22–25, *Leegin*, 127 S. Ct. 2705 (No. 06-480), 2007 WL 621853 (showing how Congress reaffirmed *Dr. Miles* in a 1975 statute and subsequent appropriations laws).

73 OR. REV. STAT. §§ 127.800–.897 (2007).

74 See *Oregon v. Ashcroft*, 368 F.3d 1118, 1122–23 & n.4 (9th Cir. 2004), *aff'd sub nom. Gonzales v. Oregon (Oregon Aid-in-Dying Case)*, 546 U.S. 243 (2006); see also Lethal Drug Abuse Prevention Act of 1998, H.R. 4006, S. 2151, 105th Cong. (1998) (similar bills proposed by Rep. Hyde and Sen. Nickles).

highly dynamic interpretation of the CSA, the Ashcroft Directive promised to be the death knell for Oregon's DWDA. Even though Ashcroft's policy would in 2001 still not have been passed by the Senate (which was controlled by the Democrats starting in May), it was the law of the land because opponents of the Ashcroft Directive would have faced even more daunting vetogate obstacles—opposition by the House Judiciary Committee, which might have scheduled hearings but would not have reported any such override; by the GOP House leadership, which would not have allowed the House Rules Committee to expedite such a bill; and by President George W. Bush, who would likely have vetoed such a bill.

There is a formal way of expressing the point made by these examples. Any complicated legislation will include bundles of different policy directives, some or all of which will be limited by carefully negotiated compromises and logrolls needed to procure legislator support for policies in that or other legislation.<sup>75</sup> Even if an agency or court were immediately to apply a particular provision much more aggressively than was contemplated by the legislative meta-deal that got the statute through all the vetogates, Congress could rarely override the interpretation, because there was never a sufficient majority to push that particular provision through all the vetogates in the first place. A dynamic interpretation that radically changed the entire statute would garner legislative attention and might generate an override, but cherry-picking interpretations would not. This phenomenon is more powerful over time, after the enacting coalition has passed. There would be no override so long as one of the Article I, Section 7 vetogates (the House, Senate, or the President) or one of the Article I, Section 5 vetogates (committee chairs, Rules Committee, filibuster) would balk. An important qualification, from the analysis suggested above, is that an override could come as a provision thrown into an omnibus bill in order to attract support from defenders of the original legislative deal. My earlier empirical study of congressional overrides of Supreme Court statutory interpretations provided several examples of this phenomenon, but it is not the norm: relatively few congressional overrides of disapproved judicial interpretations came in omnibus legislation, and the large majority were not in large-scale statutory revision laws either.<sup>76</sup>

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75 See *supra* Figures 2a–c, 3a.

76 See William N. Eskridge, Jr., *Overriding Supreme Court Statutory Interpretation Decisions*, 101 YALE L.J. 331, 387–89 (1991).

### III. DOCTRINAL LESSONS: RESTRICTING AGENCY AUTHORITY TO PREEMPT STATE LAW BUT ENCOURAGING FACT-BASED AGENCY INPUTS

The analysis in Part II leaves the country with a dilemma: the delegation of extensive law-elaborating or lawmaking authority to judges or agencies, a phenomenon the vetogates mechanism encourages, creates a structure whereby dynamic interpretations alter and usually expand the statute in ways that Congress cannot easily correct because of those same vetogates.<sup>77</sup> Consistent with Professor Clark's analysis, this dilemma has special resonance for the federal structure and the predominant role of state law as to many areas of governance. The Supremacy Clause of Article VI requires preemption of state law only by federal "Laws" (as well as by the Constitution and "Treaties").<sup>78</sup> Article I, Sections 5 and 7 provide the primary mechanism by which a federal "Law" can be created.<sup>79</sup> The vetogate-driven difficulty of that mechanism might suggest, upon first blush, that preemption ought to be exceptional under our constitutional system. According to the previous analysis, however, this conclusion is too hasty: federal statutes often contain ambitious regulatory initiatives (such as the CSA, *bundled* with other measures in the 1970 Act) together with massive delegation of responsibilities to agencies (such as the scheduling, registration, and rulemaking authorities *delegated* to the Attorney General by the CSA).

This Part addresses the particular concern that dynamic agency interpretation of the preemptive force of federal law, especially if entitled to *Chevron* deference, would be an unnecessary and troubling disruption of the constitutional balance anticipated by the interaction of the Supremacy Clause and Article I, Sections 5 and 7. I am assuming for purposes of this Article that the federal arrangement is not only instinct in the Constitution, which is clearly the case, but also remains useful under the circumstances of the modern regulatory state, which is hotly debated.<sup>80</sup>

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77 See Eskridge & Ferejohn, *supra* note 2, at 528–33.

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

79 See *id.* art. I, §§ 5, 7. Professor Strauss cogently argues that agency rules and judicial common law might have preemptive effect under the Supremacy Clause. See Peter L. Strauss, *The Perils of Theory*, 83 NOTRE DAME L. REV. 1567, 1590–92 (2008). The Supreme Court's rulings to that effect might be reconciled with the constitutional text on the ground that preemptive agency rules and judicial decisions are issued pursuant to federal statutory authorization (implicit in the case of judicial common law).

80 Compare Edward L. Rubin & Malcolm Feeley, *Federalism: Some Notes on a National Neurosis*, 41 UCLA L. REV. 903, 908, 950–51 (1994) (criticizing public law's

The original constitutional solution to the problem of dynamic agency interpretations was the nondelegation doctrine, which prohibited Congress from delegating law-elaborating authority to agencies without clear guidelines that would allow judicial review to rein in excessively aggressive agency applications.<sup>81</sup> The Supreme Court of the New Deal era allowed broad lawmaking delegations with guidance at only the most general level;<sup>82</sup> today, some scholars cogently argue that the Constitution should be interpreted to confer, rather than deny, Congress' plenary authority to delegate lawmaking powers.<sup>83</sup> Indeed, the Administrative Procedure Act (APA)<sup>84</sup> authorizes congressional delegation of rulemaking and adjudication (both can be "lawmaking") authority to agencies, but assures judicial review as to issues of law and, to a lesser extent, issues of fact.<sup>85</sup> The theory of the APA is that judges can monitor agencies and rebuke them if their interpretations stray from statutory directives. Many congressional delegations are so open-ended, however, that one might wonder whether judicial review is often nothing more than substituting judicial preferences for agency ones.

The *Chevron* doctrine speaks to this concern. The Supreme Court in *Chevron* ruled that federal judges must defer to "reasonable" agency interpretations of a statute it is charged with implementing, unless Congress has "directly addressed" the issue and resolved it contrary to the agency's view.<sup>86</sup> In addition to the traditional justification for deference, namely agency expertise, the Court reasoned that statutory lawmaking by agencies is more legitimate than lawmaking by courts, in part because Congress has formally delegated lawmaking

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celebration of federalism as a "national neurosis"), *with Gregory v. Ashcroft*, 501 U.S. 452, 458–59 (1991) (celebrating the various virtues of federalism).

81 See, e.g., *Field v. Clark*, 143 U.S. 649, 692 (1892) ("That Congress cannot delegate legislative power . . . is a principle universally recognized as vital to the integrity and maintenance of the system of government ordained by the Constitution.").

82 Cf. *Pan. Ref. Co. v. Ryan*, 293 U.S. 388, 429–30 (1935) (admitting that Congress may delegate legislative authority if it has established an "intelligible principle to which the person or body authorized to [act] is directed to conform," but finding that the delegation at hand was impermissible because "Congress ha[d] declared no policy, ha[d] established no standard, ha[d] laid down no rule" (quoting *J.W. Hampton, Jr., & Co. v. United States*, 276 U.S. 394, 409 (1928))).

83 See Thomas W. Merrill, *Rethinking Article I, Section 1: From Nondelegation to Exclusive Delegation*, 104 COLUM. L. REV. 2097, 2130–38 (2004); Henry P. Monaghan, *Marbury and the Administrative State*, 83 COLUM. L. REV. 1, 25–28 (1983).

84 Pub. L. No. 79-404, 60 Stat. 237 (1946) (codified as amended in scattered sections of 5 U.S.C.).

85 See 5 U.S.C. §§ 553–554, 701–706 (2000).

86 See *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 865–66 (1984).

authority to those agencies and in part because agencies are functionally accountable to the President, our only nationally elected official.<sup>87</sup> There has been much *sturm und drang* among academics as to whether the *Chevron* doctrine represents a “revolution” in court-agency interaction,<sup>88</sup> whether any such revolution (if it has occurred) is consistent with settled legal and constitutional understandings,<sup>89</sup> and whether the doctrine or the revolution has been good for balanced governance.<sup>90</sup>

Lauren Baer and I address the first issue in an empirical study demonstrating that *Chevron* has been evolutionary rather than revolutionary at the Supreme Court level<sup>91</sup>: the Court fails to apply the *Chevron* framework to most of the cases where it would seem to apply;<sup>92</sup> the Court’s dominant approach is still *Skidmore*, where deference turns on agency expertise and consistency rather than formal delegation;<sup>93</sup> and the Justices’ willingness actually to go along with agency legal positions is driven more by substantive and even constitutional views than by any legal test.<sup>94</sup> Consistent with this analysis, when the *Oregon Aid-in-Dying Case*<sup>95</sup> came before the Justices, the Court majority, after lengthy debate, applied *Skidmore* rather than *Chevron* deference, even though the dissenting Justices demonstrated that Attorney General Ashcroft was acting within the letter of several explicit CSA delegations.<sup>96</sup> The Ashcroft Directive was more consistent with the statutory delegation than with the constitutional understandings of the majority

87 *See id.*

88 *See, e.g.,* Thomas W. Merrill, *Judicial Deference to Executive Precedent*, 101 YALE L.J. 969, 980–84 (1992) (arguing that *Chevron* was not revolutionary at the Supreme Court level).

89 *See, e.g.,* Stephen Breyer, *Judicial Review of Questions of Law and Policy*, 38 ADMIN. L. REV. 363, 372–82, 397–98 (1986) (arguing that *Chevron* is at odds with the Court’s *Marbury* role).

90 *See, e.g.,* Cynthia R. Farina, *Statutory Interpretation and the Balance of Power in the Administrative State*, 89 COLUM. L. REV. 452, 499–526 (1989) (criticizing a strong version of *Chevron* as contrary to original constitutional concerns about excessive delegation and alienation of policymaking from “We the People’s” elected representatives).

91 *See* William N. Eskridge, Jr. & Lauren E. Baer, *The Continuum of Deference: Supreme Court Treatment of Agency Statutory Interpretations from Chevron to Hamdan*, 96 GEO. L.J. 1083 (2008).

92 *See id.* at 1120–36.

93 *See id.* at 1109–11.

94 *See id.* at 1145–48.

95 *Gonzales v. Oregon (Oregon Aid-in-Dying Case)*, 546 U.S. 243 (2006).

96 *Compare id.* at 256–75 (applying *Skidmore* after finding that the Attorney General’s interpretive rule was not promulgated pursuant to a congressional delegation of lawmaking), *with id.* at 276–99 (Scalia, J., dissenting) (analyzing various regulations and arguing for *Chevron* deference).

Justices. Five Justices, all in the *Oregon Aid-in-Dying Case* majority, had opined in *Washington v. Glucksberg*<sup>97</sup> that they were open to recognizing an individual's "constitutionally cognizable interest in controlling the circumstances of his or her imminent death," in at least some instances.<sup>98</sup> The same majority rejected the Directive's policy judgment and interpreted the statute in a manner consistent with their constitutional understandings.<sup>99</sup> The dissenting Justices seemed inspired by precisely the same kind of constitutional motivations. According to the rhetoric of their written opinion, the three dissenters considered aid-in-dying one step short of murder, a view consistent with their willingness to uphold the Directive and with their likely view that there is no constitutional protection for people's desire for medical assistance to speed their deaths under circumstances of great suffering.<sup>100</sup>

Complementing the earlier empirical study, this Article examines *Chevron* through the lens of the Article I, Sections 5 and 7 (the veto-gates) structure of lawmaking. I offer three normative propositions here, all inspired by the constitutional values suggested by the Article I, Sections 5 and 7 structure. First, to the extent that *Chevron* demands special judicial deference to certain agency interpretations of law, the justification must be congressional delegation of lawmaking power (a formal justification offered in *Chevron*) and not the comparative legitimacy agency decisions assertedly get from their accountability to the President (a functional justification offered in *Chevron*). The delegation-based justification for *Chevron* deference requires the Court to assure itself that an agency is acting pursuant to delegated lawmaking authority, understood both formally and functionally.<sup>101</sup> Second, and as a corollary to the first point, the Court should require a clear statement by Congress before *Chevron*-deferring to agency rulemaking that preempts state law.<sup>102</sup>

Third, the Court should consider and even solicit agency inputs when determining whether federal statutes preempt state law, as a matter of statutory interpretation. Rather than being accorded *Chevron* deference, however, those inputs should usually be evaluated in a

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97 521 U.S. 702 (1997).

98 See *id.* at 736–38 (O'Connor, J., concurring); *id.* at 744–45 (Stevens, J., concurring); *id.* at 773–89 (Souter, J., concurring); *id.* at 789 (Ginsburg, J., concurring); *id.* at 789–92 (Breyer, J., concurring).

99 See *Oregon Aid-in-Dying Case*, 546 U.S. at 256–75.

100 See *id.* at 285–86 (Scalia, J., dissenting) (citing *Glucksberg*, 521 U.S. at 731).

101 See *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842–45 (1984).

102 See *id.* at 866.

practical way. When we read the thousand-plus post-*Chevron* cases in our empirical survey, Lauren Baer and I suggested a new “consultative” category for understanding Supreme Court deference to agency interpretations. Consultative deference demands neither the super-deference of *Chevron* nor the antideference theoretically required by the Court’s episodically applied presumption against preemption in areas of law traditionally regulated by the states.<sup>103</sup> Similar to *Skidmore* deference, consultative deference is a functional inquiry, focusing on questions such as these: Is the agency interpretation a longstanding benchmark creating reliance interests? Does it reflect applications of expertise to resolve policy questions? Is the issue one that judges can competently evaluate using legal criteria?

The approach I advocate here accepts two of the fundamental norms inherent in the Constitution’s structure (federalism and the procedural hurdles for enactment of legislation) and tries to translate those norms into the Court’s complicated deference jurisprudence. One might calibrate the balance differently if one values federalism or legislative process differently than the Framers did. In any event, consider this: what I propose as a theoretical matter is substantively the approach the Supreme Court took in the 131 preemption cases it decided between *Chevron* and the end of the 2005 Term in which an agency interpretation was presented to the Justices. This empirical finding also reinforces the message of the vetogates analysis: the Court in the *Oregon Aid-in-Dying Case* reached the correct result.

#### A. *Delegation Required for Chevron Deference*

Consistent with the APA and the traditional role of judges when interpreting statutes, *Skidmore* suggests that judges should take into consideration agency inputs, especially when they reflect the agency’s expert judgment and longstanding practice.<sup>104</sup> *Chevron* emphasizes two other justifications for an even broader deference. One justification rests upon Congress’ authority to delegate *lawmaking* power to agencies.<sup>105</sup> When Congress has exercised that authority to delegate lawmaking responsibilities to an agency, courts ought to be particu-

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103 See Eskridge & Baer, *supra* note 91, at 1111–15 (discussing “consultative deference” cases decided by the Supreme Court); see also Viet D. Dinh, *Reassessing the Law of Preemption*, 88 GEO. L.J. 2085, 2111–12 (2000) (urging the Court to abandon the inconsistently invoked presumption against preemption in legal arenas traditionally regulated by the states).

104 See *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944).

105 See Merrill, *supra* note 83, at 2130–38.

larly deferential to agency rules and orders.<sup>106</sup> The vetogates model is consistent with, and indeed provides powerful constitutional reinforcement to, this formalist justification. If a statute contains an open-textured substantive directive *and* a provision delegating substantive authority to an agency, it should be presumed that both provisions were part of a compromise or a bundled deal. Hence, something more than *Skidmore* deference would be appropriate, because the congressional deal (one Congress is empowered to make) entailed a commitment to specified substantive regulation, but with updating delegated to an agency.

*Chevron* also justified special deference on the ground that agencies are more democratically legitimate policy gap-fillers; although neither agencies nor judges are elected officials, the former are more accountable to the President, who is an elected official.<sup>107</sup> This rationale could support *Chevron* deference even when there has been no formal delegation, and might render *Skidmore* (substantially) obsolete. The rationale based upon superior agency accountability has drawn academic criticism as inconsistent with the APA and the traditional law-declaring role of courts,<sup>108</sup> as well as a romantic view of the presidency and its relationship to agency policy.<sup>109</sup> The logic of the vetogates model suggests a constitutional critique of this *Chevron* rationale: it draws legislative authority away from Congress and toward the President, thereby upsetting the balance reflected in Article I, Section 7. Figure 3c represents this shift most dramatically.

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106 See *Chevron*, 467 U.S. at 842–43. *Chevron* in this regard was following earlier Supreme Court formulations supporting special deference. See, e.g., *Batterton v. Francis*, 432 U.S. 416, 425 (1977).

107 See *Chevron*, 467 U.S. at 842–43.

108 See, e.g., Breyer, *supra* note 89, at 372–82, 397–98; Farina, *supra* note 90, at 499–526; see also John F. Duffy, *Administrative Common Law in Judicial Review*, 77 TEX. L. REV. 113, 193–99 (1998) (providing the most comprehensive demonstration that a broad understanding of *Chevron* is inconsistent with the original expectations as well as the plain meaning and structure of the APA).

109 See, e.g., Lisa Schultz Bressman, *Beyond Accountability: Arbitrariness and Legitimacy in the Administrative State*, 78 N.Y.U. L. REV. 461, 506–11 (2003); Cynthia R. Farina, *Faith, Hope, and Rationality or Public Choice and the Perils of Occam's Razor*, 28 FLA. ST. U. L. REV. 109, 128–29 (2000); Jide Nzelibe, *The Fable of the Nationalist President and the Parochial Congress*, 53 UCLA L. REV. 1217, 1231–42 (2006).

FIGURE 3C. STATUTORY POLICY DELEGATED TO AN AGENCY RESPONSIVE TO THE PRESIDENT (POLICY SHIFTS FROM  $x - 4$  TO  $x + 4$ )

$x + 4$	$x - 4$	$SQ$
President Agency	Congress' Compromise	

Under the circumstances of Figure 3c, Congress will enact a moderate statute ( $x - 4$ ), even though the President would like something much more regulatory; because everyone knows the President will not veto any policy to the left of the status quo ( $SQ$ ), presidential preferences will not figure into the compromise. Knowing the President's tendency to overregulate, Congress will tend not to delegate lawmaking responsibilities to the President or an agency the President can control. But Congress will vest the agency with routine authority to administer the statute; under the Court's pre-*Chevron* practice, such authority would only generate *Skidmore* deference, and Congress would expect judges to prevent the President or the agency from pulling policy far away from the original deal. Under a presidential-accountability reading of *Chevron*, however, the agency might be able to move statutory policy sharply to the left (toward greater regulation)—much more than the legislative process reasonably contemplated in the pre-*Chevron* world.

Federal criminal law, for example, is an area where Congress sometimes writes open-ended statutes but usually does not delegate rulemaking authority to agencies. This is supportable on a number of grounds, one of which is a concern that prosecutors would push some criminal laws beyond the considered judgment of the nation's legislators. For example, Congress in 1970 was concerned about the proliferation of substance abuse but took a less punitive approach than the Nixon administration's Justice Department did. Although Congress did delegate some administrative authority to the Attorney General, it did not delegate authority to create new substantive liability, except under circumstances where the Department of Health, Education, and Welfare (HEW)—now Health and Human Services (HHS)—would be involved.<sup>110</sup> The Ashcroft Directive reflects the fact that the Bush administration has been even more highly drug-regulatory than the Nixon administration was. A strong reading of *Chevron* could support special deference to the Ashcroft Directive, because the

110 21 U.S.C. §§ 811–812 (2000 & Supp. V 2005) (allowing the Attorney General, in consultation with HHS, to add new drugs to one of the controlled drug schedules and to shift drugs around within the schedules).

Attorney General was acting consistent with the administration's general philosophy and its understanding of the popular mandate. Vetogates theory resists the strong reading and would insist upon a moderate reading of *Chevron* which would require actual delegation of lawmaking authority to the Attorney General.

The Supreme Court's announced doctrine has been consistent with vetogates theory in this respect. The Court in *United States v. Mead Corp.*<sup>111</sup> held that *Chevron* did not govern unless there was a delegation of lawmaking authority to the agency from Congress.<sup>112</sup> *Mead* accurately restated the Court's practice since *Chevron*. Almost ninety percent of the Supreme Court cases applying the *Chevron* framework between 1984 and 2006 did so when the agency was acting pursuant to explicit congressional delegations of lawmaking authority.<sup>113</sup> Lauren Baer and I found not a single case where a Court majority applied *Chevron* to an agency interpretation because of presidential inputs but without a congressional delegation.<sup>114</sup> Also consistent with this approach was the Court's opinion in the *Oregon Aid-in-Dying Case*. Even though the Ashcroft Directive was almost a textbook example of the presidential-accountability rationale in *Chevron*, Justice Kennedy declined to apply *Chevron* deference because he did not believe there was a congressional delegation of lawmaking authority as to the aid-in-dying issue.<sup>115</sup>

B. *Preemption-Specific Delegation Required for an Agency Rule or Order to Preempt State Law (and the Relationship to the Court's Antipreemption Presumption)*

In dictum, *Mead* suggested that the Court would *Chevron*-defer if there were an *implicit* delegation of lawmaking authority to the agency.<sup>116</sup> Vetogates theory suggests reasons to read this dictum carefully and narrowly. According to the normative element of vetogates theory, nondelegation is the baseline: an agency seeking special deference has got to demonstrate that Congress intended to delegate law-

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111 533 U.S. 218 (2001).

112 *See id.* at 226–27.

113 *See* Eskridge & Baer, *supra* note 91, at 1125 tbl.4 (showing that seventy-six of eighty-five *Chevron*-applying cases from 1984–2006 were ones where the agency was acting pursuant to an explicit delegation of lawmaking authority); *cf. id.* (indicating that, ironically, there were 267 cases where *Chevron* might have been applied for this reason, but only seventy-six of those 267 cases explicitly followed *Chevron*).

114 *See id.*

115 *See* *Gonzales v. Oregon (Oregon Aid-in-Dying Case)*, 546 U.S. 243, 258–69 (2006).

116 *See Mead*, 533 U.S. at 229.

making authority to it. Because a key premise of our constitutional system is federalism, such an intention must be super-clear when an agency is claiming authority to preempt state law. According to the descriptive element of vetogates theory, a statute *with* an explicit delegation reflects a significantly different legislative deal than a statute *without* such a delegation. Hence, a broad or ambiguous statutory terminology *without* a clear delegation presumptively reflects an Article I, Section 7 deal that denies agencies any special authority.

The Court's preemption practice reflects these ideas. About twenty percent of the Court's preemption cases involved claims that federal agency action itself (orders, standards, and rules) preempted state law.<sup>117</sup> In almost all of these cases, there was a clear congressional directive authorizing or requiring the agency to preempt law on its own authority. For example, about half of these cases involved DOJ's refusal to preclear state voting changes pursuant to its express authority under the Voting Rights Act.<sup>118</sup> Other cases involved orders and rules explicitly authorized by Congress, with either explicit authorization to preempt state law or implicit but clear expectation to the same effect.<sup>119</sup> Interestingly, in only three of these cases did the Supreme Court apply *Chevron* or a related deference test.<sup>120</sup>

The Court did not *Chevron*-defer in the other preemption-by-the-agency's-own-action cases.<sup>121</sup> The Court's reluctance is justified for

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117 See *infra* Appendix (listing 131 cases in my study, including at least 24 cases where an agency was asserting that state law was preempted by an agency order, rule, standard, or inaction).

118 A jurisdiction (in the South) covered by section 5 of the Voting Rights Act, 42 U.S.C.A. § 1973c(a) (West 1999 & Supp. 2007), cannot make voting and districting changes without "preclearance," either through DOJ or the United States District Court for the District of Columbia, *id.* Hence, section 5 cases involve preemption in that sense: if DOJ does not preclear, the state statutory change is blocked; if DOJ does preclear, the state statutory change goes into effect unless the courts override the Department. See *id.*

119 See, e.g., *CSX Transp., Inc. v. Easterwood*, 507 U.S. 658, 676 (1993) (holding that Department of Transportation regulations preempted state speed limit rules but did not preempt state negligence causes of action); *Transcon. Gas Pipe Line Corp. v. State Oil & Gas Bd.*, 474 U.S. 409, 425 (1986) (holding that a Federal Emergency Regulatory Commission order preempted state law).

120 In *Hillsborough County v. Automated Medical Laboratories, Inc.*, 471 U.S. 707, 715–16 (1985), the Court correctly applied *Chevron*, but in *Presley v. Etowah County Commission*, 502 U.S. 491, 508–09 (1992), the Court invoked *Chevron* in a Voting Rights section 5 case, even though the Court generally does not apply *Chevron* in those circumstances. In *Geier v. American Honda Motor Co.*, 529 U.S. 861, 884–86 (2000), the Court applied *Seminole Rock* deference (generally similar to and perhaps more deferential than *Chevron*) to the agency's interpretation of its own standard.

121 See *infra* Appendix.

most and perhaps all of those instances, including the *Oregon Aid-in-Dying Case*, which illustrates the categories of (1) explicit, (2) implicit, and (3) preemption-specific delegations. Sections 823 and 824 of the CSA require the Attorney General to administer a registration system to regulate doctors and others who can lawfully dispense certain controlled substances; the statute directs the Attorney General to make registration (and deregistration) decisions with regard to the “public interest,” as elaborated by various statutory factors.<sup>122</sup> Section 821 authorizes the Attorney General to make “rules and regulations and to charge reasonable fees relating to the registration and control” of drug manufacture, distribution, and dispensation.<sup>123</sup> As the dissenting Justices correctly observed, the Ashcroft Directive also fell within the broad terms of this delegation: warning Oregon doctors that they would be prosecuted if they dispensed regulated drugs in connection with the state’s DWDA, the Directive “relate[d] to” both the “registration” requirements for doctors (the Attorney General would deregister doctors who followed the Oregon law) and the “control” of drug “prescription” and dispensation.<sup>124</sup> Yet the Court majority did not accept this textually sensible argument. Justice Scalia’s dissenting opinion suggests that the majority was being either pigheaded or result oriented,<sup>125</sup> but I think there is a more principled explanation, resting upon the structures flowing from Article I, Sections 5 and 7.

Broadly drafted delegations can technically support *Chevron* deference, as the *Oregon Aid-in-Dying Case* dissenters maintained: § 821 is an explicit delegation of lawmaking authority, and §§ 823–824 constitute implicit delegations.<sup>126</sup> But such delegations need not be liberally construed, the point the majority was trying to make.<sup>127</sup> Thus, it was reasonable for the dissenters to say that the delegation authorized the Attorney General to make any and all kinds of rules relating to registration and control of drug dispensation,<sup>128</sup> but it was also reasonable for the majority to say that the delegation of authority to issue “rules and regulations” and to charge “reasonable fees” was a delegation limited to matters that did not go to the ethics of medical prac-

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122 21 U.S.C.A. §§ 823–824 (West 1999 & Supp. 2007).

123 21 U.S.C. § 821 (2000 & Supp. V 2005); *see also id.* § 871(b) (2000) (delegating authority to make rules deemed “necessary and appropriate” for the Attorney General’s administration of the CSA).

124 *Gonzales v. Oregon (Oregon Aid-in-Dying Case)*, 546 U.S. 243, 281–85 (2006) (Scalia, J., dissenting).

125 *See id.* at 275–99 (criticizing the majority’s reasoning).

126 *See id.* at 292–98.

127 *See id.* at 258–61, 267–68 (majority opinion).

128 *See id.* at 281–85 (Scalia, J., dissenting).

tice.<sup>129</sup> Under the dissenters' reading, the Attorney General could expand substantive liability under the CSA not only in the *Oregon Aid-in-Dying Case*, but also in any other case where he or she disagreed with state medical practice.<sup>130</sup> Not only is this a matter for concern, but it is a concern reinforced by the CSA's careful limit on rescheduling substances: the Attorney General cannot reschedule a substance without the approval of the Department of Health and Human Services, where the medical experts are concentrated.<sup>131</sup> As the descriptive thrust of vetogates theory suggests, this was apparently bargained for in Congress: in all probability, the representatives wanting administrative updating of substance abuse crimes to reflect new drugs and dangers had to compromise with liberals concerned with excessive zealotry and lack of medical expertise within DOJ.<sup>132</sup> By reading Congress' delegation of authority to the Attorney General narrowly (to focus on housekeeping details rather than substantive liability),<sup>133</sup> the majority was probably faithful to the original deal, as reflected in the statutory structure.

Vetogates theory would press the foregoing argument somewhat further. Not only is the Court right to interpret broad delegations cautiously when they are deployed by agencies expansively to preempt state law, but the Court should require a targeted (preemption-specific) statement from Congress when it is delegating preemptive authority to an agency. The Supreme Court has held that "Laws of the United States"<sup>134</sup> in the Supremacy Clause includes both "federal statutes themselves and federal *regulations* that are properly adopted in accordance with statutory authorization."<sup>135</sup> The normative edge of vetogates theory, namely, its insight into the structural principles

129 *See id.* at 275 (majority opinion).

130 *See id.* at 261–63.

131 *See id.* at 265 (invoking 21 U.S.C. § 811(b) (2000)).

132 On the political give and take between politicians supporting a punitive approach and broad DOJ supervision of drug programs, versus those supporting a treatment/medical approach and greater involvement by HEW (the predecessor agency to HHS), see MUSTO & KORSMEYER, *supra* note 39, at 58–62, 67–71.

133 *See Oregon Aid-in-Dying Case*, 546 U.S. at 259 ("Congress did not delegate to the Attorney General authority to carry out or effect all provisions of the CSA. Rather, he can promulgate rules relating only to 'registration' and 'control' . . .").

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

135 *City of N.Y. v. FCC*, 486 U.S. 57, 63 (1988) (emphasis added). The logic might be that it is the Article I, Section 7 "Law" that preempts state law, and the agency directive or regulation is preemptive as an "interpretation" of that "Law." Thomas W. Merrill argues that Congress has authority under the Necessary and Proper Clause to authorize the delegation of lawmaking authority to agencies. *See Merrill, supra* note 83, at 2120–39.

undergirding the Constitution, would augur caution before giving wide berth to this precept. Consistent with this structure, the Court should apply a clear congressional intent (or, if you are a textualist, a clear statement) rule here, as it has done to give interpretational teeth to other underenforced constitutional norms.<sup>136</sup>

Apply this precept to the CSA. Section 821 is an explicit grant of rulemaking authority, and §§ 823–824 implicitly authorize the Attorney General to provide doctors with guidelines instructing them as to his understanding of the registration requirements (and what will risk deregistration). But none of these provisions authorizes the Attorney General to displace state law on his own authority. Contrast §§ 811–812, which authorize the Attorney General and the Secretary of HHS to add new controlled substances to the statutory prohibitions. If the two departments followed the rulemaking process entailed in §§ 811–812, they could reschedule certain drugs from Schedule II (available through a one-time prescription from a registered doctor<sup>137</sup>) to Schedule I (not available through a prescription<sup>138</sup>). Thus amended, the CSA would then trump Oregon’s law if it allowed the now–Schedule I substance to be used for death-with-dignity purposes. Sections 811–812 suggest how preemption can be authorized through analysis of the structure of the statute. That is *not* the case for §§ 821 and 823–824, where the structure cuts the other way: the notion of “registration” suggests housekeeping and ministerial rather than deeply substantive authority, as does the fact that the Attorney General can issue rules without public participation or consultation with HHS experts (in contrast to §§ 811–812).

Note that the preemption-specific clear statement approach that I am suggesting is a better-grounded rule than the Court’s longstanding (but only episodically invoked) presumption against federal preemption of state law carrying out traditional state functions.<sup>139</sup> The anti-preemption presumption is inspired by the same constitutional federalism principle that inspires my preemption-specific clear statement rule, and both canons create a higher burden of proof in cases where one party argues that a federal agency rule, order, etc. preempts state law. But these different canons operate at different

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136 See ESKRIDGE ET AL., *supra* note 19, at 1138.

137 See 21 U.S.C. § 829(a) (2000).

138 See *id.* § 829.

139 Compare *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996) (applying the anti-preemption presumption), with *Riegel v. Medtronic, Inc.*, 128 S. Ct. 999, 1006–11 (2008) (ignoring the anti-preemption presumption, in a case raising very similar issues). See generally *Dinh*, *supra* note 103 (noting the Court’s capricious invocation of the anti-preemption presumption and urging the Court to abandon it).

points in the statutory analysis. The preemption-specific clear statement requirement, as I propose it, creates a higher burden for the agency to meet when it claims *Chevron* deference, while the anti-preemption presumption applies (in ways that vary from case to case) when the Court exercises its judgment (perhaps informed by agency inputs, but not *Chevron*-deferring) as to the proper interpretation of the statute.

In my view, the *Oregon Aid-in-Dying Case* should be read to express something like a preemption-specific clear statement rule when an agency is claiming authority to preempt state law. This theory explains the concluding observation in the majority opinion: “[T]he background principles of our federal system also belie the notion that Congress would use such an obscure grant of authority to regulate areas traditionally supervised by the States’ police power.”<sup>140</sup> Having rejected *Chevron* deference and applying *Skidmore*, the Court started with the observation that the CSA’s regulation of medical practice trains on the role doctors might play in drug trafficking, feeding the habits of addicts, and abusing their authority to obtain drugs for the use of their friends and themselves.<sup>141</sup> But that is as far as the statute goes, the majority reasoned from “the structure and limitations of federalism, which allow the States ‘great latitude under their police powers to legislate as to the protection of the lives, limbs, health, comfort, and quiet of all persons.’”<sup>142</sup> Because the Attorney General’s superficially reasoned directive provided nothing to refute the federalism presumption, the *Skidmore*-deferring Court interpreted the CSA not to preempt the Oregon Death with Dignity Act.<sup>143</sup>

### C. *Expanded Skidmore (Consultative Deference) for Agency Inputs into Judicial Decisions Whether Statutes Preempt State Law*

Unlike the *Oregon Aid-in-Dying Case*, more than eighty percent of the Supreme Court preemption cases in my sample were cases where the agency was offering its interpretation of the federal statute and its view whether the statute itself (and not an agency order or rule) preempted state law.<sup>144</sup> Whatever the format of the agency opinion—a

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140 *Gonzales v. Oregon (Oregon Aid-in-Dying Case)*, 546 U.S. 243, 274 (2006). Somewhat confusingly, this passage came at the end of the Court’s discussion of the proper interpretation of the CSA, but the target of the passage was the Attorney General’s argument that the CSA’s prescription requirement, 21 U.S.C. § 829 (2000), authorized the Ashcroft Directive’s preemption of state law.

141 *Oregon Aid-in-Dying Case*, 546 U.S. at 269–70.

142 *Id.* at 270 (quoting *Medtronic*, 518 U.S. at 475).

143 *See id.* at 275.

144 *See infra* Appendix.

notice-and-comment rule, a guidance, an opinion letter, or an amicus brief—these inputs from the agency ought not be evaluated under *Chevron*, unless Congress has clearly authorized the agency to create rules with preemptive authority. Yet these agency inputs and opinions are typically useful for a judge's determination whether state law is preempted on one of the traditional statutory grounds: an explicit preemption clause applies to the state law, the state law frustrates the purpose or conflicts with the operation of federal law, or federal law occupies the field.<sup>145</sup> In making this determination, federal judges should follow something like *Skidmore*, but modified in light of the evidence that Lauren Baer and I uncovered from examining twenty-two years of the Court's deference jurisprudence.

Traditional *Skidmore* deference considers the longevity and consistency with which the agency has adhered to an interpretation, the reasons given by the agency, and the thoroughness of the agency's consideration.<sup>146</sup> Professor Thomas Merrill suggests that the traditional *Skidmore* factors do not perfectly inform what should interest the Supreme Court in preemption cases.<sup>147</sup> Merrill suggests that there be a special deference rule for preemption cases, namely, a focus on the agency's views and information about the actual effect of state law on the statutory scheme and, perhaps, also on the openness of the process by which the agency reached its conclusion.<sup>148</sup> Congenial to the impulse that inspires Merrill's suggestion, I have another one that draws from the Supreme Court's actual practice.

Baer and I found that the Supreme Court continued to apply *Skidmore* deference after *Chevron* (including many cases before *Mead*). What we also found, to our great surprise, was that between 1984 and 2006 the Court followed a more informal approach than either *Skidmore* or *Chevron*—and it did so in more cases than the combined total

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145 On the different grounds for preemption, see S. Candice Hoke, *Transcending Conventional Supremacy: A Reconstruction of the Supremacy Clause*, 24 CONN. L. REV. 829, 851 n.103 (1992).

146 See *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944); see also *United States v. Mead Corp.*, 533 U.S. 218, 228 (2001) (providing a somewhat different list of *Skidmore* factors: "the degree of the agency's care, its consistency, formality, and relative expertise, and . . . the persuasiveness of the agency's position" (footnotes omitted)).

147 Thomas W. Merrill, *Preemption and Institutional Choice*, 102 NW. U. L. REV. (forthcoming 2008) (manuscript at 39), available at <http://www.law.northwestern.edu/colloquium/constitutionallaw/Merrill.pdf>.

148 See *id.* (manuscript at 37); see also Catherine M. Sharkey, *Products Liability Preemption: An Institutional Approach*, 76 GEO. WASH. L. REV. 449, 502–20 (2008) (suggesting an "agency reference" approach that abjures a formal deference regime in favor of a fact-based functional approach open to expertise-reflecting agency inputs).

of those applying either *Skidmore* or *Chevron*.<sup>149</sup> We call this approach “consultative deference”: without citing to a specific deference regime, the Court explicitly relied on information, projections, experience, and distinctive legal arguments presented to the Court only by the agency (usually through an amicus brief). Consultative deference is mostly functional, for it focuses on agency-generated information about whether the agency or Congress has relied on a particular understanding of the statute, how particular interpretations fit with the statutory purposes, and what effects one interpretation might have in practice. There may also be a formal feature to consultative deference: the information and judgments may have special cogency because they come from an agency that is presumed to be public-regarding and in practice has to live with whatever interpretation the Court hands down. In the spirit of the earlier study, I would suggest here that *Skidmore* deference be understood to include the kinds of reliance that Baer and I found in the consultative deference cases. They might even be dubbed (as we do) “*Skidmore-Lite*.”<sup>150</sup>

An illustration of the Court’s deference, even when it does not formally announce a regime, is *Wimberly v. Labor & Industrial Relations Commission*.<sup>151</sup> The Unemployment Tax Act provides that states participating in this federal unemployment compensation plan may not deny compensation “solely on the basis of pregnancy or termination based on pregnancy.”<sup>152</sup> Missouri did not provide compensation for employees who left work because of pregnancy and were not reinstated by their employers.<sup>153</sup> In an amicus brief, the Department of Labor argued that its longstanding interpretation to that effect be given *Chevron* deference<sup>154</sup>—a request the Court ignored.<sup>155</sup> Yet the Court relied heavily on the historical and factual information in the Department’s brief in its decision to allow the Missouri approach.<sup>156</sup>

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149 See Eskridge & Baer, *supra* note 91, at 1099 tbl.1 (reporting *Chevron* deference in 8.3% of the Court’s agency interpretation cases from 1984–2006; *Skidmore* deference in 6.7% of the cases; and “consultative deference” in a whopping 17.8% of the cases).

150 See *id.* at 1111–15, 1144.

151 479 U.S. 511 (1987).

152 26 U.S.C.A. § 3304(a)(12) (West 2000 & Supp. 2007).

153 See *Wimberly*, 479 U.S. at 512–14.

154 See Brief for the United States as Amicus Curiae Supporting the Respondents at 29–30, *Wimberly*, 479 U.S. 511 (No. 85-129), 1986 WL 728133.

155 See *Wimberly*, 479 U.S. at 514–23.

156 See *id.* at 515 (relying on the government’s brief for a factual description of state unemployment compensation practices); *id.* at 519–20 (relying on the government’s history of the statute to show that the Congress enacting the statute had before it a Department of Labor letter indicating that nineteen states treated pregnancy-

The Court could have cited *Skidmore*, but it did not, and in my view that should not make a difference as to how we understand *Wimberly*: rather than accepting the agency's view that state law was not preempted by the statutory language (*Chevron*), the Court considered the agency's useful historical information to reach a result that probably reflected Congress' expectations when the statute was enacted in 1976.

Contrast the *Oregon Aid-in-Dying Case*, where the Court considered and rejected the Attorney General's arguments and information explicitly under a *Skidmore* standard.<sup>157</sup> The difference in results has nothing to do with the different standards, but rather the different utilities of the agency's input. In the *Oregon Aid-in-Dying Case*, the agency provided no useful factual information about Congress' assumptions or purposes when it enacted and amended the CSA, or about the consequences of the Oregon law for the operation of the statutory scheme. The Ashcroft Directive was long on moralizing and short on pertinent legal analysis. The moralizing underscored rule of lenity concerns with allowing the Attorney General to criminalize conduct accepted by a state's medical standards, for the main underpinning of the rule of lenity is the nondelegation policy that Congress and not the courts or prosecutors make the moral judgments associated with the criminal sanction.<sup>158</sup>

My reading of the 131 preemption cases involving agency inputs suggests a structured inquiry for figuring out when the Court is most willing to defer, informally, to agency guidance in those cases where there is no question of congressional delegation of lawmaking or preemption authority. The precept I draw from the constitutional structure, and from Professor Clark's persuasive exegesis, is the following: displacement of state law by federal law is an act of great import that the federal government should not undertake unless it is clear that state law is inconsistent with the statute Congress has passed.<sup>159</sup> As a matter of institutional pragmatics, I assume that agency inputs will

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based dismissals as not compensable under their unemployment schemes); *id.* at 521–22 (relying on the government's brief to show that contemporaneous understandings of the statute allowed noncoverage of pregnancy-based terminations so long as they were not singled out from other terminations "for cause").

157 See *Gonzales v. Oregon* (*Oregon Aid-in-Dying Case*), 546 U.S. 243, 269–75 (2006).

158 See, e.g., *United States v. Bass*, 404 U.S. 336, 348–49 (1971); cf. *Oregon Aid-in-Dying Case*, 546 U.S. at 262–63 (invoking rule of lenity concerns as an additional reason not to credit the Attorney General's directive).

159 For an excellent argument that most preemption cases involve "displacement" of state law and thereby deeply implicate the state-federal balance, see the sources cited *infra* note 162.

have a bigger impact when they provide the Justices with novel factual material, fresh legal history, or statutory insights that the Justices themselves are not competent to make.

These precepts give rise to several hypotheses, which I have tested against the Supreme Court's practice in the period since *Chevron*. My initial hypothesis was that agency input will be less significant in cases of *express* preemption than in cases of *conflict*, *obstacle*, or *field* preemption. Following the logic of *Chevron* itself, the Court might be particularly deferential to agencies when they are providing expert advice on how the statutory policy or the field is affected by state law, and less deferential when agencies are providing guidance as to the interpretation of statutory preemption clauses or provisions. If the latter, the Court is more likely to decide the matter using traditional tools of statutory interpretation, and the agency inputs are less likely to have a decisive impact; given the apparent textualist slant of the Supreme Court in this period, agencies would seem to have less to add to the Justices' inquiry in express preemption cases.<sup>160</sup> Field or conflict preemption, in contrast, requires a policy judgment whether federal law occupies the field or is significantly undermined by state law. Such a judgment is less purely legal and typically involves consideration of the congressional purpose, the practical operation of the statutory scheme, and the ways state law might interfere with it. Agencies have more to contribute to such judgments; stated another way, these judgments are ones as to which judges are often less competent to make than agencies are.<sup>161</sup>

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160 *E.g.*, *Riegel v. Medtronic, Inc.*, 128 S. Ct. 999, 1007–09 (2008) (agreeing with an agency's interpretation of a medical device law's preemption clause but pointedly declining to rely on the agency position); *Cal. Fed. Savs. & Loan Ass'n v. Guerra*, 479 U.S. 272, 278–79, 282–92 (1987) (rejecting an agency's interpretation of the Pregnancy Discrimination Act's explicit preemption provision).

161 *E.g.*, *Sanchez-Llamas v. Oregon*, 126 S. Ct. 2669, 2677–88 (2006) (following an agency's brief and specific argumentation in holding a state criminal process not conflict-preempted by international convention); *Am. Ins. Ass'n v. Garamendi*, 539 U.S. 396, 413–27 (2003) (following an agency's lead and specific argumentation in holding a state Holocaust disclosure law field-preempted).

TABLE 1. SUPREME COURT PREEMPTION CASES INVOLVING FEDERAL AGENCY INPUTS, 1984–2006: KINDS OF PREEMPTION INQUIRIES

	<i>Supreme Court Follows Agency Position</i>	<i>Supreme Court Rejects Agency Position</i>	<i>Supreme Court Accepts Agency Position in Part</i>
<i>Express Preemption</i>	70 Cases	25 Cases	2 Cases
<i>Conflict or Obstacle Preemption</i>	21 Cases	8 Cases	0 Cases
<i>Field Preemption</i>	10 Cases	5 Cases	2 Cases

\* Source: Appendix to this Article and data assembled by William N. Eskridge, Jr. and Lauren E. Baer. The numbers add up to more than 131 because some cases involved both express and conflict preemption claims.

As Table 1 reveals, however, the population data for the Supreme Court's preemption cases do not support this hypothesis. A large majority of the cases were express preemption ones, and the agency win rate in those cases, 72.2% (70/97 cases), was very similar to its win rate in conflict and obstacle preemption cases, 72.4% (21/29 cases), and was much higher than the win rate in field preemption cases, 58.8% (10/17 cases). My best explanation for these results is that the Justices themselves understand express preemption cases as involving something more than parsing statutory texts and as involving important judgments about policy displacement in a federal system. As Professor Gardbaum has argued, every preemption case, including the express preemption cases, requires the Court to make a judgment about whether federal uniformity is required as to a particular issue, or whether state variety is permitted.<sup>162</sup> The language and expectations of Congress are, of course, the primary considerations, but Congress usually did not focus on the precise preemption issues that get litigated all the way to the Supreme Court. Hence, informed judgment is required as to all cases, whether they are technically billed as "express," "conflict/obstacle," or "field."

So my initial hypothesis does not wash, but three others do find support (two of them strong support) in the data Lauren Baer and I gathered for the period 1984–2006.

162 See Stephen A. Gardbaum, *The Nature of Preemption*, 79 CORNELL L. REV. 767, 783–85 (1994) (distinguishing between federal law's "trumping" state law and "displac[ing]" it); Merrill, *supra* note 147 (manuscript at 4–12, 31–34) (applying Gardbaum's distinction to argue for a focus on policy balancing in judicial preemption analysis).

## 1. Greater Agency Credibility When the Agency Favors a Continuing Role for the States

In light of the foundational precepts, a comparison of the *Oregon Aid-in-Dying Case* and *Wimberly* suggests another hypothesis. In the former case, the agency was grabbing more regulatory turf at the expense of the states, while in the latter the agency was arguing for state variety; the Court declined to follow the grabby agency but did defer to the federalism-respecting one. Consistent with the federalism-protective constitutional structure, there is concern among scholars that federal agencies harbor a turf-grabbing or turf-protecting bias that would over-preempt state law if the Court followed their lead routinely, and there is a constituency within the Court for this concern.<sup>163</sup> In 2003, Justice Thomas argued that the Court should strongly presume *against* conflict preemption when the agency maintains that state law does not undermine the statutory scheme as the agency is administering it.<sup>164</sup> Justice Thomas (a dissenter in the *Oregon Aid-in-Dying Case*<sup>165</sup>) did not suggest a similar precept in express preemption cases, but, for the Gardbaumian reasons suggested above, the Court itself seems to view those cases in a similar light.

The population data lend support to this hypothesis. As Table 2 reports, 66.4% of the cases in the 1984–2006 population (87/131) involved agency interpretations, rules, or orders that preempted or favored preemption of state law; in 3.8% (5/131) of the cases the agency argued for preemption as to one issue and no preemption as to another; and in 29.8% (39/131) of the cases the agency opposed preemption. In the 39 cases where the agency argued against any preemption, such as *Wimberly*, the Court agreed a whopping 84.6% of the time (33/39 cases); in the 87 cases where the agency argued for preemption, such as the *Oregon Aid-in-Dying Case*, the Court agreed 64.4% (56/87) of the time, a significantly lower win rate for the agency.

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163 *E.g.*, Timothy K. Armstrong, *Chevron Deference and Agency Self-Interest*, 13 CORNELL J.L. & PUB. POL'Y 203, 209–11 (2004); Mendelson, *supra* note 67, at 794–97.

164 *See Pharm. Research & Mfrs. of Am. v. Walsh*, 538 U.S. 644, 676–82 (2003) (Thomas, J., concurring in the judgment).

165 *See Gonzales v. Oregon (Oregon Aid-in-Dying Case)*, 546 U.S. 243, 299 (2006).

TABLE 2. SUPREME COURT PREEMPTION CASES INVOLVING FEDERAL AGENCY INPUTS, 1984–2006: AGENCY POSITION ON PREEMPTION

	<i>Supreme Court Follows Agency Position</i>	<i>Supreme Court Rejects Agency Position</i>	<i>Supreme Court Accepts Agency Position in Part</i>
<i>Agency Favors Preemption</i>	56 Cases	28 Cases	3 Cases
<i>Agency Opposes Preemption</i>	33 Cases	5 Cases	1 Case
<i>Agency Mixed on Preemption</i>	5 Cases	0 Cases	0 Cases

\* Source: Appendix to this Article and data assembled by William N. Eskridge, Jr. and Lauren E. Baer.

The foregoing discussion did not count the five cases where the agency gave a split judgment. In all those cases, the Supreme Court agreed with the agency's precise balance. This is itself a striking finding, as it weakly suggests that the Justices were crediting the agency with doing a judicious federal-state balancing judgment and were for that reason inclined to go along. In one of the five cases, for example, dissatisfied frequent fliers sued American Airlines for state fraud and breach of contract.<sup>166</sup> American responded that the Airline Deregulation Act of 1978 expressly preempted state laws "relating to" carrier rates, routes, or services,<sup>167</sup> and that the Act's preemption displaced both statutory fraud law and the common law of contracts.<sup>168</sup> On appeal to the Supreme Court, an amicus brief filed by the United States and the Department of Transportation distinguished between the plaintiff's fraud claims, which it thought preempted, and the ordinary breach of contract claims, which were not.<sup>169</sup> The regulatory precept was that contractual obligations were self-imposed by the airline, while antifraud obligations were regulatory ones imposed by the state. Justice Ginsburg credited and followed the Department's precept in *American Airlines, Inc. v. Wolens*.<sup>170</sup> This splitting-the-baby result was particularly striking in light of broad dicta in an earlier case, which suggested to dissenting Justices that the Court (with Congress going along) was committed to a broader reading of the broad preemption language in that statute.<sup>171</sup> I think the dissenters' rule of law concerns

166 See *Am. Airlines, Inc. v. Wolens*, 513 U.S. 219, 224–25 (1995).

167 Pub. L. No. 94-504, § 105(a)(1), 92 Stat. 1705, 1708.

168 See *Wolens*, 513 U.S. at 225–32.

169 See *id.* at 228–33.

170 See *id.* (specifically citing and following the suggested resolution in the United States' amicus brief).

171 See *id.* at 238–50 (O'Connor, J., concurring in the judgment in part and dissenting in part).

were apt, but the majority was better attuned to the serious federalism concerns associated with an excessively broad reading of the preemption language—and the agency input was critical in helping the Court see that.

## 2. Greater Deference to Agency Expert Judgment When the Subject Matter Is Technical

Based upon my earlier study with Lauren Baer, I also thought that the Court would be much more likely to rely on agency judgments about the federal-state balance when the statutory scheme involved issues that were technical rather than normative. The Justices realize they have little competence to evaluate policy arguments in technical fields such as transportation and energy, and the underlying policies (usually efficiency) do not generate heated disagreement among them. Areas that involve goals that are normatively contested, such as civil rights and Indian law, are those where the Justices themselves often have strong views and are less likely to defer to agency suggestions.

TABLE 3. SUPREME COURT PREEMPTION CASES INVOLVING FEDERAL AGENCY INPUTS, 1984–2006: PRIMARY SUBJECT MATTER

	<i>Supreme Court Follows Agency Position</i>	<i>Supreme Court Rejects Agency Position</i>	<i>Agency Win Rate in This Subject Area</i>
<i>Civil Rights, including Voting</i>	13 Cases	10 Cases	56.5%
<i>Indian Law</i>	13 Cases	7 Cases	65.0%
<i>Transportation</i>	13 Cases	3 Cases	81.3%
<i>Pensions (ERISA)</i>	14 Cases	3 Cases	82.3%
<i>Health and Safety</i>	12 Cases	4 Cases	75.0%
<i>Tax</i>	7 Cases	7 Cases	50.0%
<i>Energy</i>	10 Cases	0 Cases	100.0%
<i>Workplace</i>	8 Cases	5 Cases	61.5%
<i>Communications</i>	4 Cases	1 Case	80.0%

\* Source: Appendix to this Article and data assembled by William N. Eskridge, Jr. and Lauren E. Baer. Mixed cases are treated as rejections for purposes of this table.

There is probably no single way to test this hypothesis, for there is reasonable disagreement as to what is “technical” and what is “normative.” Table 3 reveals the breakdown for the nine subject-matter areas with the most cases in the 1984–2006 Supreme Court population. Although the numbers are modest for each area, one is struck by the huge variance from one subject matter to another. It is also illuminating, I think, to aggregate some of the subject areas. For example,

transportation, energy, and communications law strike me as technical areas where the efficiency goal is not deeply controversial among Justices. For these three areas, the agency win rate is a whopping 87.1% (27/31 cases). Contrast civil rights, taxation, and Indian law, whose main legal complications come from the Court's own precedents and which involve goals that are normatively contested and as to which the Justices have strong views. The agency win rate for these areas is 57.9% (33/57), impressive but not nearly as strong as the technical areas. In the middle are pension, workplace, and health/safety law, where the goals are pretty straightforward and little-contested, but there are obvious allocational effects and a great deal of Supreme Court precedent. The agency win rate for this bundle of areas is 73.9% (34/46).

The foregoing thought experiment provides provisional evidence for the hypothesis and can be buttressed by examples. The *Oregon Aid-in-Dying Case* is a classic one. The Justices were faced with an aggressive agency interpretation of a criminal statute (not one of the main subject areas in the Eskridge-Baer preemption sample), and the issue was triply normative, for it involved (1) criminal liability and the moral condemnation implicated by that; (2) issues of medical ethics, such as whether the "do no harm" norm is compatible with doctors' role in death with dignity; and (3) the asserted privacy right to have some say in the timing of one's death, especially when the endgame involves terrible pain and suffering. In such cases, I'd expect the agency win rate to be a bit higher than 50–50, as one cannot expect the Justices to defer at all to the agency—but they might themselves agree with the agency, and the Solicitor General would do a good job of screening out some appeals that were obvious losers. The *Oregon Aid-in-Dying Case* scenario recurs in the civil rights area, where the agency win rate is only 56.5% (13/23 cases).

### 3. Greater Deference to Agency for Longstanding Judgments That Have Generated Reliance Interests

My third corollary is that the Court is more likely to defer to agency judgments about preemption that have been consistent over several administrations. Consistent-over-time judgments have several virtues: they are less likely to reflect partisan points of view or be arbitrary; they are more likely to have generated reliance interests, especially when the agency has supported state experimentation; and they are more likely to have enjoyed input from the states themselves, especially when the agency has demanded uniformity, and the states have had opportunities to object.

The Supreme Court in *Wimberly* strongly relied on the fact that the Department of Labor had taken a no-preemption stance during the statutory enactment process and had specifically told the states of its position, giving its nonpreemptive interpretation an even greater boost.<sup>172</sup> The Court also found the agency viewpoint useful because it provided reliable information about the statutory enacting coalition and had been relied on by states devising and revising their unemployment plans.<sup>173</sup> The *Wimberly* point is generalizable: in our general study of Supreme Court deference to agency interpretations, Lauren Baer and I found a significant bounce for “longstanding” agency interpretations, and this bounce is illustrated by numerous recent cases involving preemption judgments.<sup>174</sup>

In contrast, DOJ’s volte-face on the preemption issue in the *Oregon Aid-in-Dying Case* may have sealed the fate of the Ashcroft Directive among the Justices. Unlike the agency position in *Wimberly*, the position in *Oregon* came out of right field long after the statute had been enacted and revised and had obviously not been the object of reliance among the states. Indeed, Oregon had relied on the CSA’s *silence* and apparent tolerance for state medical rules regarding aid-in-dying. The *Oregon Aid-in-Dying Case* reflected judicial skepticism about politically motivated agency volte-faces on matters of fundamental state-federal balance as are implicated in preemption cases.

On the other hand, the Court recently went along with the Food and Drug Administration’s (FDA) new stance as regards preemption of state tort claims by the Medical Device Amendments of 1976.<sup>175</sup> The 1976 Amendments added a broad express preemption provision to that part of the Food, Drug, and Cosmetics Act that regulates medical devices.<sup>176</sup> The issue in *Riegel v. Medtronic, Inc.*<sup>177</sup> was whether the

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172 See *Wimberly v. Labor & Indus. Relations Comm’n*, 479 U.S. 511, 521–22 (1987).

173 I do have a normative qualm about *Wimberly*, explained below.

174 E.g., *Watters v. Wachovia Bank, N.A.*, 127 S. Ct. 1559, 1569–73 (2007) (following a long-held Comptroller of the Currency view regarding the preemptive authority of the National Bank Act, although not invoking any deference regime); *Sanchez-Llamas v. Oregon*, 126 S. Ct. 2669, 2677–88 (2006) (following a long-held executive department views about the preemption of state law by consular treaties, although not invoking any deference regime); *Engine Mfrs. Ass’n v. S. Coast Air Quality Mgmt. Dist.*, 541 U.S. 246, 252–58 (2004) (following a long-held Environmental Protection Agency interpretation of the Clean Air Act preemption provision, although not invoking any deference regime).

175 Pub. L. No. 94-295, 90 Stat. 539 (codified as amended at 21 U.S.C. §§ 360c–360k, 379–379a (2000)).

176 21 U.S.C. § 360k(a).

177 128 S. Ct. 999 (2008).

provision preempted state tort suits claiming that medical device manufacturers failed state duties of care in labeling their products to warn of unsafe uses.<sup>178</sup> Without conceding that it was “deferring” to the FDA, the Court closely followed the reasoning and adopted factual and legal analyses presented in an amicus brief filed for the United States and the FDA.<sup>179</sup> Justice Ginsburg, in dissent, objected that the agency’s cogency was undermined by the fact that the George W. Bush administration’s FDA took a broader view of preemption than the agency had during the William J. Clinton and George H.W. Bush administrations.<sup>180</sup> Justice Scalia’s opinion for the Court pointed out that the FDA’s primary stance had been consistent and that, in any event, its interpretation of the statute was required by Supreme Court precedent and statutory plain meaning.<sup>181</sup>

Although *Riegel* pretty much fits my hypothesis, the Ginsburg dissenting opinion suggests that the value of agency consistency on preemption issues may be in play among the current Justices. This is a fair point, but the federalist structure does suggest caution of the following sort. Consistent with the *Oregon Aid-in-Dying Case*, an agency volte-face should be closely scrutinized when the new stance displaces state law—and viewed very skeptically when it displaces a core area of state regulation, such as family law, contract and property law, and so forth. If an agency is displacing state law for ill-explained political or moral reasons, as in the *Oregon Aid-in-Dying Case*, the Court should overturn the agency. On the other hand, if the new agency position reflects new circumstances and is a reasoned effort to adapt Congress’ statutory policy to those new circumstances, then the Court should give greater leeway. (Such liberality might be buttressed by the agency following a deliberative process such as rulemaking.) Indeed, there was a sounder reason for the Court to have accepted a dynamic agency interpretation in *Wimberly* than in the *Oregon Aid-in-Dying Case*. A few years after the agency interpretation was adopted, Congress enacted the Pregnancy Discrimination Act (PDA) of 1978,<sup>182</sup> which added pregnancy (to the definition of “sex”) as a forbidden ground for discrimination by employers.<sup>183</sup> Although the PDA did not formally amend the unemployment compensation law construed in *Wim-*

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178 See *id.* 1002–07.

179 See *id.* 1007–09.

180 See *id.* at 1016 n.8 (Ginsburg, J., dissenting).

181 See *id.* at 1006–11 (majority opinion); *id.* at 1011–12 (Stevens, J., concurring in part and in the judgment).

182 Pub. L. No. 95-555, 92 Stat. 2076 (codified as amended at 42 U.S.C. § 2000e(k) (2000)).

183 See *id.*

berly, it might (and in my view ought to) have been the occasion for the agency and the states to revisit their earlier determination. If the agency had grounded its new interpretation in Congress' normative judgment rather than its own, the Court should not have deducted points for inconsistency.

#### CONCLUSION

On balance, my survey suggests that the Supreme Court's treatment of agency preemption interpretations, rules, and orders is properly appreciative of the federal structure and the cautions suggested by vetogates theory. One final data point reinforces this conclusion somewhat. Even though agencies pressed pro-preemption positions in two-thirds of the cases, the Court followed a more balanced approach on the whole. In the 1984–2006 population, the Court rejected preemption claims in 47.3% (62/131 cases) of the cases and accepted preemption claims in 45.8% (60/131 cases), with 6.9% (9/131 cases) mixed.<sup>184</sup>

Unfortunately, these numbers do not establish that the Court always gets the federalism calculus "right." As *Riegel* illustrates, the post-millennium preemption cases brought to the Supreme Court reflect a concerted campaign by business groups to eradicate state-level regulations through the courts.<sup>185</sup> That a lobbying group favors preemption, of course, does not suggest that it is not in the national interest—but it does raise red flags when the business lobby and the agency combine to argue for displacement of state law. My colleague Jon Macey argues that the Court was egregiously wrong in *Watters v. Wachovia Bank, N.A.*,<sup>186</sup> when it not only ratified but read into a statute a Comptroller of the Currency policy preempting state regulation of state-chartered subsidiaries of national banks.<sup>187</sup> As Justice Stevens, joined by Chief Justice Roberts and Justice Scalia, argued in dissent, these subsidiaries escape federal regulation by their incorporation as state banks, and now *Watters* allows them to escape state regulation as well.<sup>188</sup> *Watters* looks even weaker in light of the irresponsible lending

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184 See *infra* Appendix; cf. Michael S. Greve & Jonathan Klick, *Preemption in the Rehnquist Court: A Preliminary Empirical Assessment*, 14 SUP. CT. ECON. REV. 43, 57 tbl.5 (2006) (finding that 52% of the Rehnquist Court's preemption cases resulted in displacement of state law by federal law).

185 See Samuel Issacharoff & Catherine M. Sharkey, *Backdoor Federalization*, 53 UCLA L. REV. 1353, 1374–98 (2006) (showing that business groups are achieving deregulation at the state level through preemption litigation).

186 127 S. Ct. 1559 (2007).

187 See *id.* at 1569–73.

188 See *id.* at 1573–86 (Stevens, J., dissenting).

practices that ill-monitored banks engaged in during the last twenty years, practices that were the precise subject of the Michigan regulation that was found preempted.<sup>189</sup>

*Watters* is just one case, but there is also an entire jurisprudence that is probably misguided and harmful: the application of ERISA's provision preempting state laws that "relate to" employee benefit plans regulated by ERISA. Cheered on by amicus briefs filed by the Solicitor General as well as pro-business groups, the Supreme Court has applied the "relate to" language broadly to preempt a broad array of state laws pertaining to the workplace. After decades studying American pension law and attending to the Court's expansive case-by-case elaboration, my colleague John Langbein is persuaded that the ERISA preemption jurisprudence is not only internally incoherent and historically ill-grounded, but positively detrimental to a regulatory regime that ensures American workers well-protected pensions for their retirement years.<sup>190</sup>

Although beyond the scope of this Article, the larger project of preemption jurisprudence is to develop area-specific precepts for calibrating the state-federal balance.<sup>191</sup> Professor Thomas Merrill is working on such an area-specific project for environmental law.<sup>192</sup> Professors Langbein and Macey are moving in that direction for pension and banking law, respectively.<sup>193</sup> Professor Catherine Sharkey is thinking along similar lines for federal preemption of state product liability law.<sup>194</sup> Other academics should join this parade. One point of this Article is that their audience needs to be agencies and the Solicitor General's Office as well as judges and the Supreme Court. Indeed, agencies might be better able to operationalize the subject matter-specific precepts generated by the academy. In turn, the

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189 See Jonathan Macey, *Connecting Procedure to Substance: Treatment by Appellate Courts of Decisions by Three Legally Authorized Institutions—Corporate Boards of Directors, Administrative Agencies and Congress* 21–30, 33–35 (Feb. 4, 2008) (unpublished manuscript, on file with author).

190 See JOHN H. LANGBEIN ET AL., *PENSION AND EMPLOYEE BENEFIT LAW* 758–841 (4th ed. 2006).

191 For earlier academic calls to focus on subject-area-specific rather than just general theories of statutory interpretation, see Jonathan R. Siegel, *Textualism and Contextualism in Administrative Law*, 78 B.U. L. REV. 1023 (1998).

192 See Thomas W. Merrill, *Preemption in Environmental Law: Formalism, Federalism Theory, and Default Rules*, in *FEDERAL PREEMPTION* 166, 166–88 (Richard A. Epstein & Michael S. Greve eds., 2007).

193 See LANGBEIN ET AL., *supra* note 190, at 758–841; Macey, *supra* note 189.

194 See Sharkey, *supra* note 148, at 480–502 (examining specific substantive and institutional factors that ought to be relevant to the preemption of products liability law).

Supreme Court ought to demand that agencies seeking preemption of state law provide not only technical legal arguments, but also reasons and analysis about why displacement of state law and altering the state-federal balance is *justified* by congressionally enacted policies and, even better, by systemic federalism-type reasons for displacing state law, such as concerns with balkanization or cost exporting by some states.<sup>195</sup>

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195 See Merrill, *supra* note 192, at 180–87 (suggesting partiality, cost-exporting, and antibalkanization principles to guide courts and perhaps agencies in environmental preemption cases).

APPENDIX. SUPREME COURT PREEMPTION CASES INVOLVING AGENCY  
INPUTS, 1984–2005 TERMS

	<i>Supreme Court Case</i>	<i>Subject Matter</i>	<i>Preemption Category</i>	<i>Agency Position</i>	<i>Agency Position Wins? (Deference Regime)</i>
1	Lawrence County v. Lead-Deadwood Sch. Dist. 40-1, 469 U.S. 256 (1985)	Indian Law	Conflict and Obstacle	Favors Preemption	Yes
2	United States v. Maine, 469 U.S. 504 (1985)	Federal Land & Environment	Express	Favors Preemption	Mixed
3	NAACP v. Hampton County Election Comm'n, 470 U.S. 166 (1985)	Voting Rights	Express, by Agency Action	Favors Preemption	Yes ( <i>Sheffield</i> Deference)
4	County of Oneida v. Oneida Indian Nation, 470 U.S. 226 (1985)	Indian Law	Express	Favors Preemption	Yes ( <i>Skidmore-Lite</i> Deference)
5	First Nat'l Bank of Atlanta v. Bartow County Bd. of Tax Assessors, 470 U.S. 583 (1985)	Taxation	Express	Favors Preemption	No
6	S. Motor Carriers Rate Conference, Inc. v. United States, 471 U.S. 48 (1985)	Business Regulation	Conflict	Favors Preemption	No
7	Hillsborough County v. Automated Med. Labs., Inc., 471 U.S. 707 (1985)	Health & Safety	Field, by Agency Order	Opposes Preemption	Yes ( <i>Chevron</i> Deference)
8	Montana v. Blackfeet Tribe of Indians, 471 U.S. 759 (1985)	Indian Law, Federal Land & Environment	Express	Favors Preemption	Yes ( <i>Skidmore-Lite</i> Deference)
9	Atascadero State Hosp. v. Scanlon, 473 U.S. 234 (1985)	Civil Rights, Health & Safety	Express	Opposes Preemption	Yes ( <i>Skidmore-Lite</i> Deference)
10	Transcon. Gas Pipe Line Corp. v. State Oil & Gas Bd., 474 U.S. 409 (1986)	Energy (Gas)	Conflict, by Agency Order	Favors Preemption	Yes
11	Wis. Dep't of Industry, Labor & Human Relations v. Gould Inc., 475 U.S. 282 (1986)	Workplace (NLRA)	Conflict	Favors Preemption	Yes ( <i>Skidmore-Lite</i> Deference)
12	Exxon Corp. v. Hunt, 475 U.S. 355 (1986)	Federal Land & Environment	Express	Favors Preemption	Yes
13	Golden State Transit Corp. v. City of L.A., 475 U.S. 608 (1986)	Workplace (NLRA)	Conflict	Favors Preemption	Yes ( <i>Skidmore-Lite</i> Deference)

	<i>Supreme Court Case</i>	<i>Subject Matter</i>	<i>Preemption Category</i>	<i>Agency Position</i>	<i>Agency Position Wins? (Deference Regime)</i>
14	<i>La. Pub. Serv. Comm'n v. FCC</i> , 476 U.S. 355 (1986)	Communications	Express and Conflict, by Agency Order	Favors Preemption	No
15	<i>Nantahala Power &amp; Light Co. v. Thornburg</i> , 476 U.S. 953 (1986)	Energy	Conflict, by Agency Order	Favors Preemption	Yes
16	<i>Thornburg v. Gingles</i> , 478 U.S. 30 (1986)	Voting Rights	Express, by Agency Action	Favors Preemption	Yes
17	<i>Cal. Fed. Sav. &amp; Loan Ass'n v. Guerra</i> , 479 U.S. 272 (1987)	Civil Rights, Workplace	Express or Conflict	Favors Preemption	No
18	<i>ICC v. Texas</i> , 479 U.S. 450 (1987)	Transportation	Express, by Agency Order	Favors Preemption	Yes (pre- <i>Chevron</i> Deference for ICC orders)
19	<i>Int'l Paper Co. v. Ouellette</i> , 479 U.S. 481 (1987)	Environment	Field	Opposes Preemption	Mixed
20	<i>Wimberly v. Labor &amp; Indus. Relations Comm'n</i> , 479 U.S. 511 (1987)	Taxation, Workplace	Express	Opposes Preemption	Yes ( <i>Skidmore</i> -Lite Deference)
21	<i>W. Air Lines, Inc. v. Bd. of Equalization</i> , 480 U.S. 123 (1987)	Transportation, Taxation	Field	Favors Preemption	No
22	<i>California v. Cabazon Band of Mission Indians</i> , 480 U.S. 202 (1987)	Indian Law	Field	Favors Preemption	Yes ( <i>Skidmore</i> -Lite Deference)
23	<i>FCC v. Fla. Power Corp.</i> , 480 U.S. 245 (1987)	Communications	Express	Opposes Preemption	Yes ( <i>Skidmore</i> -Lite Deference)
24	<i>Cal. Coastal Comm'n v. Granite Rock Co.</i> , 480 U.S. 572 (1987)	Federal Land & Environment	Express and Conflict, by Agency Rule	Favors Preemption	No
25	<i>Metro. Life Ins. Co. v. Taylor</i> , 481 U.S. 58 (1987)	ERISA	Express	Favors Preemption	Yes
26	<i>Pilot Life Ins. Co. v. Dedeaux</i> , 481 U.S. 41 (1987)	ERISA	Express	Favors Preemption	Yes
27	<i>CTS Corp. v. Dynamics Corp. of Am.</i> , 481 U.S. 69 (1987)	Business Regulation	Obstacle/Conflict	Favors Preemption	No
28	<i>Burlington N. R.R. Co. v. Okla. Tax Comm'n</i> , 481 U.S. 454 (1987)	Transportation	Express	Opposes Preemption	Yes
29	<i>Rose v. Rose</i> , 481 U.S. 619 (1987)	Veterans	Express and Conflict	Favors Preemption	No
30	<i>Fort Halifax Packing Co. v. Coyne</i> , 482 U.S. 1 (1987)	ERISA	Express	Favors Preemption	No
31	<i>P.R. Dep't of Consumer Affairs v. Isla Petroleum Corp.</i> , 485 U.S. 495 (1988)	Energy	Express, by Agency Rule	Opposes Preemption	Yes ( <i>Skidmore</i> -Lite Deference)

	<i>Supreme Court Case</i>	<i>Subject Matter</i>	<i>Preemption Category</i>	<i>Agency Position</i>	<i>Agency Position Wins? (Deference Regime)</i>
32	Regents of the Univ. of Cal. v. Pub. Employment Relations Bd., 485 U.S. 589 (1988)	Workplace	Express	Favors Preemption	Yes ( <i>Skidmore</i> -Lite Deference)
33	Goodyear Atomic Corp. v. Miller, 486 U.S. 174 (1988)	Workplace	Conflict/Obstacle	Favors Preemption	No
34	Mackey v. Lanier Collection Agency & Serv., Inc., 486 U.S. 825 (1988)	ERISA	Express	Favors Preemption	No
35	Miss. Power & Light Co. v. Mississippi <i>ex rel.</i> Moore, 487 U.S. 354 (1988)	Energy	Express, by Agency Order	Favors Preemption	Yes ( <i>Skidmore</i> -Lite Deference)
36	Shell Oil Co. v. Iowa Dep't of Revenue, 488 U.S. 19 (1988)	Taxation	Express	Opposes Preemption	Yes
37	Nw. Cent. Pipeline Corp. v. State Corp. Comm'n, 489 U.S. 493 (1989)	Energy	Express and Conflict	Opposes Preemption	Yes
38	Davis v. Mich. Dep't of Treasury, 489 U.S. 803 (1989)	Taxation	Express	Favors Preemption	Yes
39	Miss. Band of Choctaw Indians v. Holyfield, 490 U.S. 30 (1989)	Indian Law	Express	Favors Preemption	Yes ( <i>Skidmore</i> -Lite Deference)
40	California v. ARC Am. Corp., 490 U.S. 93 (1989)	Business Regulation	Conflict or Obstacle	Opposes Preemption	Yes
41	Mansell v. Mansell, 490 U.S. 581 (1989)	Veterans	Express	Favors Preemption	Yes
42	North Dakota v. United States, 495 U.S. 423 (1990)	Procurement	Express, by Agency Rule	Favors Preemption	No
43	California v. FERC, 495 U.S. 490 (1990)	Energy	Express	Favors Preemption	Yes
44	Duro v. Reina, 495 U.S. 676 (1990)	Indian Law	Express	Favors Preemption	No
45	English v. Gen. Elec. Co., 496 U.S. 72 (1990)	Energy	Field	Opposes Preemption	Yes
46	FMC Corp. v. Holliday, 498 U.S. 52 (1990)	ERISA	Express	Opposes Preemption	No
47	Ingersoll-Rand Co. v. McClendon, 498 U.S. 133 (1990)	ERISA	Express	Favors Preemption	Yes
48	Okla. Tax Comm'n v. Citizen Band Potawatomi Indian Tribe, 498 U.S. 505 (1991)	Indian Law	Express/Field	Opposes/ Favors Preemption	Yes ( <i>Skidmore</i> -Lite Deference; Court follows precise SG parsing of precedents)
49	Clark v. Roemer, 500 U.S. 646 (1991)	Voting Rights	Express	Favors Preemption	Yes

	<i>Supreme Court Case</i>	<i>Subject Matter</i>	<i>Preemption Category</i>	<i>Agency Position</i>	<i>Agency Position Wins? (Deference Regime)</i>
50	Chisom v. Roemer, 501 U.S. 380 (1991)	Voting Rights	Express, by Agency Inaction	Favors Preemption	Yes
51	Houston Lawyers' Ass'n v. Attorney Gen., 501 U.S. 419 (1991)	Voting Rights	Express	Favors Preemption	Yes
52	County of Yakima v. Confederated Tribes & Bands of the Yakima Indian Nation, 502 U.S. 251 (1992)	Indian Law, Taxation	Field	Favors Preemption	Mixed
53	Presley v. Etowah County Comm'n, 502 U.S. 491 (1992)	Voting Rights	Express	Favors Preemption	No
54	Morales v. Trans World Airlines, Inc., 504 U.S. 374 (1992)	Transportation	Express	Favors Preemption	Yes
55	Gade v. Nat'l Solid Wastes Mgmt. Ass'n, 505 U.S. 88 (1992)	Health & Safety, Workplace	Conflict or Obstacle, by Agency Standard	Favors Preemption	Yes
56	Dist. of Columbia v. Greater Wash. Bd. of Trade, 506 U.S. 125 (1992)	ERISA	Express	Favors Preemption	Yes
57	Itel Containers Int'l Corp. v. Huddleston, 507 U.S. 60 (1993)	Taxation	Express	Opposes Preemption	Yes
58	Negonsott v. Samuels, 507 U.S. 99 (1993)	Indian Law	Express	Opposes Preemption	Yes
59	Voinovich v. Quilter, 507 U.S. 146 (1993)	Voting Rights	Express	Opposes Preemption	Yes
60	Bldg. & Constr. Trades Council v. Associated Builders & Contractors of Mass./R.I., Inc., 507 U.S. 218 (1993)	Labor	Field or Conflict	Opposes Preemption	Yes
61	CSX Transp., Inc. v. Easterwood, 507 U.S. 658 (1993)	Transportation, Health & Safety	Express, by Agency Rule	Mixed	Yes ( <i>Skidmore</i> -Lite Deference; Court closely follows DOT compromise)
62	Okla. Tax Comm'n v. Sac & Fox Nation, 508 U.S. 114 (1993)	Indian Law, Taxation	Express	Favors Preemption	Yes
63	Dep't of Revenue v. ACF Indus., 510 U.S. 332 (1994)	Transportation, Taxation	Express	Opposes Preemption	Yes
64	Am. Dredging Co. v. Miller, 510 U.S. 443 (1994)	Transportation, Workplace	Conflict or Obstacle	Mixed on Preemption	Yes

	<i>Supreme Court Case</i>	<i>Subject Matter</i>	<i>Preemption Category</i>	<i>Agency Position</i>	<i>Agency Position Wins? (Deference Regime)</i>
65	Dep't of Taxation & Fin. v. Milhelm Attea & Bros., Inc., 512 U.S. 61 (1994)	Taxation	Express	Favors Preemption	No
66	Haw. Airlines, Inc. v. Norris, 512 U.S. 246 (1994)	Workplace, Transportation	Conflict	Opposes Preemption	Yes
67	Holder v. Hall, 512 U.S. 874 (1994)	Voting Rights	Express, by Agency Inaction	Favors Preemption	No
68	Johnson v. De Grandy, 512 U.S. 997 (1994)	Voting Rights	Express, by Agency Inaction	Largely Favors Preemption	Mixed
69	Am. Airlines, Inc. v. Wolens, 513 U.S. 219 (1995)	Transportation	Express	Mixed	Yes ( <i>Skidmore</i> -Lite Deference; Court follows DOT compromise)
70	Mastrobuono v. Shearson Lehman Hutton, Inc., 514 U.S. 52 (1995)	Business Regulation	Conflict	Opposes Preemption	Yes
71	Anderson v. Edwards, 514 U.S. 143 (1995)	Social Security	Express	Opposes Preemption	Yes
72	Freightliner Corp. v. Myrick, 514 U.S. 280 (1995)	Transportation	Express and Conflict	Opposes Preemption	Yes ( <i>Skidmore</i> -Lite Deference)
73	N.Y. State Conference of Blue Cross & Blue Shield Plans v. Travelers Ins. Co., 514 U.S. 645 (1995)	ERISA	Express	Opposes Preemption	Yes
74	City of Edmonds v. Oxford House, Inc., 514 U.S. 725 (1995)	Housing	Express	Opposes Preemption	Yes
75	Miller v. Johnson, 515 U.S. 900 (1995)	Voting Rights	Express, by Agency Inaction	Favors Preemption	No
76	Barnett Bank of Marion County v. Nelson, 517 U.S. 25 (1996)	Business Regulation	Express	Favors Preemption	Yes
77	Seminole Tribe v. Florida, 517 U.S. 44 (1996)	Indian Law	Express	Favors Preemption	Yes (Court then strikes down preemption as unconstitutional)
78	Morse v. Republican Party of Va., 517 U.S. 186 (1996)	Voting Rights	Express	Favors Preemption	Yes
79	Medtronic, Inc. v. Lohr, 518 U.S. 470 (1996)	Health & Safety	Express	Opposes Preemption	Yes
80	Lopez v. Monterey County, 519 U.S. 9 (1996)	Voting Rights	Express	Favors Preemption	Yes
81	Cal. Div. of Labor Standards Enforcement v. Dillingham Constr., Inc., 519 U.S. 316 (1997)	ERISA	Express	Opposes Preemption	Yes

	<i>Supreme Court Case</i>	<i>Subject Matter</i>	<i>Preemption Category</i>	<i>Agency Position</i>	<i>Agency Position Wins? (Deference Regime)</i>
82	<i>Young v. Fordice</i> , 520 U.S. 273 (1997)	Voting Rights	Express	Favors Preemption	Yes
83	<i>Reno v. Bossier Parish Sch. Bd.</i> , 520 U.S. 471 (1997)	Voting Rights	Express, by Agency Inaction	Favors Preemption	No
84	<i>De Buono v. NYSA-ILA Med. &amp; Clinical Servs. Fund</i> , 520 U.S. 806 (1997)	ERISA	Express	Opposes Preemption	Yes
85	<i>Boggs v. Boggs</i> , 520 U.S. 833 (1997)	ERISA	Express	Favors Preemption	Yes
86	<i>Abrams v. Johnson</i> , 521 U.S. 74 (1997)	Voting Rights	Express	Favors Preemption	No
87	<i>Foreman v. Dallas County</i> , 521 U.S. 979 (1997)	Voting Rights	Express, by Agency Inaction	Favors Preemption	Yes
88	<i>South Dakota v. Yankton Sioux Tribe</i> , 522 U.S. 329 (1998)	Indian Law	Field	Favors Preemption	No
89	<i>Montana v. Crow Tribe of Indians</i> , 523 U.S. 696 (1998)	Indian Law, Taxation	Field	Favors Preemption	No
90	<i>Kiowa Tribe of Okla. v. Mfg. Techs. Inc.</i> , 523 U.S. 751 (1998)	Indian Law	Field	Favors Preemption	Yes
91	<i>Cass County v. Leech Lake Band of Chippewa Indians</i> , 524 U.S. 103 (1998)	Indian Law Taxation	Field	Favors Preemption	No
92	<i>El Al Isr. Airlines Ltd. v. Tsui Yuan Tseng</i> , 525 U.S. 155 (1999)	Transportation	Field	Favors Preemption	Yes
93	<i>Lopez v. Monterey County</i> , 525 U.S. 266 (1999)	Voting Rights	Express	Favors Preemption	Yes
94	<i>AT&amp;T Corp. v. Iowa Utils. Bd.</i> , 525 U.S. 366 (1999)	Communications	Express	Favors Preemption	Yes
95	<i>Minnesota v. Mille Lacs Band of Chippewa Indians</i> , 526 U.S. 172 (1999)	Indian Law	Field	Favors Preemption	Yes
96	<i>UNUM Life Ins. Co. v. Ward</i> , 526 U.S. 358 (1999)	ERISA	Express	Mixed	Yes ( <i>Skidmore</i> -Lite Deference; Court closely follows SG compromise)
97	<i>El Paso Natural Gas Co. v. Neztosie</i> , 526 U.S. 473 (1999)	Energy, Indian Law	Express	Opposes Preemption	Yes
98	<i>Reno v. Bossier Parish Sch. Bd.</i> , 528 U.S. 320 (1999)	Voting Rights	Express, by Agency Inaction	Favors Preemption	No

	<i>Supreme Court Case</i>	<i>Subject Matter</i>	<i>Preemption Category</i>	<i>Agency Position</i>	<i>Agency Position Wins? (Deference Regime)</i>
99	United States v. Locke, 529 U.S. 89 (2000)	Health & Safety, Transportation	Express and Conflict	Favors Preemption	Yes
100	Norfolk S. Ry. Co. v. Shanklin, 529 U.S. 344 (1999)	Transportation, Health & Safety	Express, by Agency Rule	Opposes Preemption	No
101	Geier v. Am. Honda Motor Co., 529 U.S. 861 (2000)	Transportation, Health & Safety	Express, by Agency Standard	Favors Preemption	Yes ( <i>Auer</i> Deference to Agency interpretation of own standard)
102	Crosby v. Nat'l Foreign Trade Council, 530 U.S. 363 (2000)	Foreign Affairs, Business Regulation	Express and Field	Favors Preemption	Yes
103	Dir. of Revenue v. Cobank ACB, 531 U.S. 316 (2001)	Taxation	Conflict	Opposes Preemption	Yes
104	Buckman Co. v. Plaintiffs' Legal Comm., 531 U.S. 341 (2001)	Health & Safety	Conflict	Favors Preemption	Yes
105	Circuit City Stores v. Adams, 532 U.S. 105 (2001)	Workplace, Civil Rights	Express	Opposes Preemption	No
106	Idaho v. United States, 533 U.S. 262 (2001)	Indian Law	Express	Favors Preemption	Yes
107	Nevada v. Hicks, 533 U.S. 353 (2001)	Indian Law	Express and Conflict	Favors Preemption	No
108	Lorillard Tobacco Co. v. Reilly, 533 U.S. 525 (2001)	Health & Safety	Express	Opposes Preemption	No
109	Raygor v. Regents of the Univ. of Minn., 534 U.S. 533 (2002)	Procedure	Conflict	Opposes Preemption	Yes
110	New York v. FERC, 535 U.S. 1 (2002)	Energy	Express, by Agency Regs	Favors Preemption	Yes
111	Verizon Commc'ns Inc. v. FCC, 535 U.S. 467 (2002)	Communications	Express	Favors Preemption	Yes
112	Rush Prudential HMO, Inc. v. Moran, 536 U.S. 355 (2002)	ERISA	Express	Opposes Preemption	Yes
113	City of Columbus v. Ours Garage & Wrecker Serv., Inc., 536 U.S. 424 (2002)	Transportation, Health & Safety	Express	Opposes Preemption	Yes ( <i>Skidmore</i> -Lite Deference)
114	Sprietsma v. Mercury Marine, 537 U.S. 51 (2002)	Transportation, Health & Safety	Express and Conflict	Opposes Preemption	Yes ( <i>Skidmore</i> -Lite Deference)
115	Pierce County v. Guillen, 537 U.S. 129 (2003)	Freedom of Information	Express	Favors Preemption	Yes
116	Branch v. Smith, 538 U.S. 254 (2003)	Voting Rights	Express	Favors Preemption	Yes

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117	Ky. Ass'n of Health Plans, Inc. v. Miller, 538 U.S. 329 (2003)	ERISA	Express	Opposes Preemption	Yes
118	Pharm. Research & Mfrs. of Am. v. Walsh, 538 U.S. 644 (2003)	Health & Safety	Conflict	Opposes Preemption	Yes
119	Entergy La., Inc. v. La. Pub. Serv. Comm'n, 539 U.S. 39 (2003)	Energy	Conflict	Favors Preemption	Yes
120	Beneficial Nat'l Bank v. Anderson, 539 U.S. 1 (2003)	Business Regulation	Express	Favors Preemption	Yes
121	Am. Ins. Ass'n v. Garamendi, 539 U.S. 396 (2003)	Foreign Affairs	Field	Favors Preemption	Yes ( <i>Skidmore</i> -Lite Deference)
122	Nixon v. Mo. Mun. League, 541 U.S. 125 (2004)	Communications	Express	Opposes Preemption	Yes
123	Engine Mfrs. Ass'n v. S. Coast Air Quality Mgmt. Dist., 541 U.S. 246 (2004)	Federal Land & Environment	Express	Favors Preemption	Yes
124	Aetna Health Inc. v. Davila, 542 U.S. 200 (2004)	ERISA	Express	Favors Preemption	Yes
125	Bates v. Dow Agrosciences LLC, 544 U.S. 431 (2005)	Federal Land & Environment, Health & Safety	Express	Favors Preemption	No
126	Wagon v. Prairie Band Potawatomi Nation, 546 U.S. 95 (2005)	Indian Law Taxation	Field	Favors Preemption	No
127	Gonzales v. Oregon, 546 U.S. 243 (2006)	Health & Safety, Federal Crimes	Express, by Agency Directive	Favors Preemption	No (Anti-Deference; avoidance canon in background)
128	Merrill Lynch, Pierce, Fenner & Smith Inc. v. Dabit, 547 U.S. 71 (2006)	Business Regulation	Express	Favors Preemption	Yes ( <i>Skidmore</i> -Lite Deference)
129	Empire Healthchoice Assurance, Inc. v. McVeigh, 547 U.S. 677 (2006)	Workplace, Health & Safety	Express	Favors Preemption	No
130	League of United Latin Am. Citizens v. Perry, 126 S. Ct. 2594 (2006)	Voting Rights	Express	Opposes Preemption	No
131	Sanchez-Llamas v. Oregon, 126 S. Ct. 2669 (2006)	Foreign Affairs	Conflict	Opposes Preemption	Yes ( <i>Skidmore</i> -Lite Deference)