

LESSONS FROM A NONDELEGATION CANON

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I. INTRODUCTION: NONDELEGATION CANONS

In recent years, the idea of “nondelegation canons” has gained currency in public law¹—and for good reason. Coined by Cass Sunstein,² the phrase nicely captures the aspiration that courts can deploy interpretive canons—various well-known federalism canons,³ norms against retroactivity,⁴ presumptions against extraterritoriality,⁵ and the

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1 See Cass R. Sunstein, *Nondelegation Canons*, 67 U. CHI. L. REV. 315, 331–32 (2000). The idea of nondelegation canons recurs frequently in contemporary public law scholarship. See, e.g., Adam B. Cox, *Deference, Delegation, and Immigration Law*, 74 U. CHI. L. REV. 1671, 1674–79 (2007) (using the nondelegation canons idea as a frame of reference for considering judicial approaches to immigration cases); William K. Kelley, *Avoiding Constitutional Questions as a Three-Branch Problem*, 86 CORNELL L. REV. 831, 840 (2001) (identifying Professor Sunstein’s theory of nondelegation canons as a prominent modern justification for the canon requiring courts to interpret statutes to avoid serious constitutional questions); Trevor W. Morrison, *Constitutional Avoidance in the Executive Branch*, 106 COLUM. L. REV. 1189, 1214–15 (2006) (same).

2 See Sunstein, *supra* note 1, at 316.

3 See, e.g., *Gregory v. Ashcroft*, 501 U.S. 452, 460 (1991) (requiring a clear statement of legislative intent before interpreting a statute “to alter the ‘usual constitutional balance between the states and the Federal Government’” (quoting *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 242 (1985))); *Atascadero*, 473 U.S. at 242–43 (requiring a clear statement of congressional intent before inferring a waiver of sovereign immunity).

4 See, e.g., *Landgraf v. USI Film Prods.*, 511 U.S. 244, 263–80 (1994) (requiring a clear statement for retroactive liability); *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 208–09 (1988) (same).

like—to implement constitutional (and other) values.⁶ Proponents of this approach cite three related virtues. The first is that such canons permit effective enforcement of otherwise underenforced constitutional values. Nondelegation canons thus assume that even if official action does not squarely offend an express constitutional guarantee, it might nonetheless intrude upon widely shared background constitutional values⁷—such as the decentralization of power in a federal system, the rule of law values implicit in statutory prospectivity, or the separation-of-powers values served by confining the presumptive territorial sweep of federal lawmaking.

The second—and closely related—advantage is that the values canons do their work not by displacing congressional decisions, but rather by using interpretive rules of thumb to promote congressional responsibility. Congress can displace traditional state authority, impose retroactive liability, or project its power overseas as long as *it* decides to do so explicitly. What it cannot do is duck responsibility for such choices by delegating to agencies or courts vague or ambiguous authority that apparently permits but does not expressly prescribe such results. By implementing constitutional values in this way, nondelegation canons purport to avoid the brute force of *Marbury*

5 See, e.g., *EEOC v. Arabian Am. Oil Co.*, 499 U.S. 244, 248 (1991) (noting that the extraterritoriality canon “serves to protect against unintended clashes between our laws and those of other nations which could result in international discord”).

6 Among his compilation of nondelegation canons, Professor Sunstein also lists canons that promote conceptions of sovereignty (such as the canon requiring liberal construction of statutes and treaties in favor of Native American tribes) and those that promote generally held public policy commitments (such as the canon requiring narrow construction of tax exemptions). See Sunstein, *supra* note 1, at 322–35. As discussed below, this Essay will not focus on the derivation of the subjects protected by these nondelegation canons, but rather on their administrability. See *infra* note 17 and accompanying text. Although not central to the analysis, I believe that the canons affecting sovereignty are properly understood within the framework of constitutionally inspired canons; questions of sovereignty go to the relative allocation of authority in our system of government.

7 Professor Ernest Young, who favors such canons, sees no reason to believe that “[t]he force of a constitutional value . . . is exhausted by the set of cases in which that value would require invalidation of a conflicting statute.” Ernest A. Young, *Constitutional Avoidance, Resistance Norms, and the Preservation of Judicial Review*, 78 TEX. L. REV. 1549, 1593–94 (2000). As Professor Young notes, if one views the canon of avoidance as a resistance norm, it makes sense that “[t]he constitutional value would be protected even in cases in which the ‘right answer’ to the constitutional question would require that the statute be upheld.” *Id.* at 1589.

style judicial review, with all of the countermajoritarian anxiety that it produces.⁸

The third asserted virtue (which will be this Essay's focus) is this: within their spheres of operation, nondelegation canons have the collateral benefit of promoting congressional responsibility for lawmaking without the judicial manageability problems that have dissuaded the Court from enforcing the nondelegation doctrine directly by invalidating statutes that confer excessive discretion upon executors.⁹ In particular, the Court has made it abundantly clear that the constitutional structure forbids the delegation of legislative power to courts or agencies.¹⁰ Yet it has almost never implemented that conviction

8 Hence, even if the underlying constitutional norm is not sharply delineated, the canons should not trigger standard countermajoritarian-dilemma concerns: "[t]he relevant canons operate as nondelegation principles, and they are designed to ensure that Congress decides certain contested questions on its own. If this idea is a core structural commitment of the Constitution, there can be no problem with its judicial enforcement." Sunstein, *supra* note 1, at 338.

9 See John F. Manning, *The Nondelegation Doctrine as a Canon of Avoidance*, 2000 SUP. CT. REV. 223, 238–42.

10 See, e.g., *Loving v. United States*, 517 U.S. 748, 758 (1996) ("The fundamental precept of the delegation doctrine is that the lawmaking function belongs to Congress and may not be conveyed to another branch or entity." (citation omitted)); *Touby v. United States*, 500 U.S. 160, 164–65 (1991) ("The Constitution provides that '[a]ll legislative Powers herein granted shall be vested in a Congress of the United States.' From this language the Court has derived the nondelegation doctrine: that Congress may not constitutionally delegate its legislative power to another branch of Government." (alteration in original) (citation omitted) (quoting U.S. CONST. art. I, § 1)). The Court has explained, moreover, that the Constitution vests lawmaking authority in Congress because of that body's unique qualities. See *Loving*, 517 U.S. at 757–58 ("Article I's precise rules of representation, member qualifications, bicameralism, and voting procedure make Congress the branch most capable of responsive and deliberative lawmaking.").

Recently, an informative debate has developed around the basic question of whether the nondelegation doctrine has a constitutional foundation. Compare Larry Alexander & Saikrishna Prakash, *Reports of the Nondelegation Doctrine's Death Are Greatly Exaggerated*, 70 U. CHI. L. REV. 1297, 1304–28 (2003) (defending the traditional conception of the nondelegation doctrine), with Eric A. Posner & Adrian Vermeule, *Inter-vening the Nondelegation Doctrine*, 69 U. CHI. L. REV. 1721, 1725–41 (2002) (invoking various textual, structural, and historical arguments to conclude that the implementation of an organic statute constitutes permissible "execution" of the law), and Eric A. Posner & Adrian Vermeule, *Nondelegation: A Post-Mortem*, 70 U. CHI. L. REV. 1331 (2003) (responding to Alexander and Prakash). Questions about the originalist pedigree of the nondelegation doctrine lie beyond the scope of this Essay. Rather, I seek here merely to examine the concerns that emanate from the Court's perception that there *is* a nondelegation doctrine, but that it does lend itself to manageable judicial review.

through judicial review,¹¹ even though Congress has sometimes passed organic acts with vaporous standards that grant agencies breathtaking discretion to set the operative details of federal law.¹² The Court has candidly attributed this reticence to anxiety about its own competence to judge when a statute is so vague or open-ended that it effectively transfers legislative power to an agency or court.¹³ Because all statutory language is more or less open textured, the Court acknowledges that some discretion inheres in the implementation of any statute.¹⁴ In the absence of any judicially manageable standard for identifying how much is too much, the Court has “‘almost never felt qualified to second-guess Congress regarding the permissible degree of policy judgment that can be left to those executing or applying the law.’”¹⁵ Proponents of nondelegation canons argue that by insisting upon a clear or explicit legislative expression where a proffered agency interpretation would intrude upon a relevant constitutional value, such canons achieve nondelegation goals—insisting

11 The Court has only twice invalidated statutes on nondelegation grounds. *See* A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495, 541–42 (1935); Pan. Refining Co. v. Ryan, 293 U.S. 388, 430 (1935). As Cass Sunstein thus observed, it is fair to say that “the conventional doctrine has had one good year” in our entire history. *See* Sunstein, *supra* note 1, at 322.

12 *See, e.g.*, *Lichter v. United States*, 334 U.S. 742, 785–87 (1948) (upholding a statute authorizing an agency to recoup “excessive profits” from war contractors); *Am. Power & Light Co. v. SEC*, 329 U.S. 90, 104–06 (1946) (upholding a statute assigning the Securities and Exchange Commission power to reject corporate reorganizations that “‘unduly or unnecessarily complicate the structure’ or ‘unfairly or inequitably distribute voting power among security holders’” (quoting 15 U.S.C. § 79k(b)(2) (2000) (repealed 2005))); *NBC v. United States*, 319 U.S. 190, 225–26 (1943) (upholding a statute delegating authority to the Federal Communications Commission to allocate broadcast licenses in conformity with the “‘public interest, convenience, [and] necessity’” (quoting 47 U.S.C. §§ 307(a), 309(a), 310(d) (2000))); *see also, e.g.*, *Ariz. Grocery Co. v. Atchison, Topeka & Santa Fe Ry. Co.*, 284 U.S. 370, 386 (1932) (emphasizing that an agency exercising delegated lawmaking authority “speaks as the legislature, and its pronouncement has the force of a statute”).

13 *See* *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 474–75 (2001).

14 *See id.* at 475.

15 *Id.* at 474–75 (quoting *Mistretta v. United States*, 488 U.S. 361, 416 (1989) (Scalia, J., dissenting)); *see also* Manning, *supra* note 9, at 241–42 (discussing the judicial competence concern); Sunstein, *supra* note 1, at 326–28 (same). Indeed, Chief Justice Marshall recognized that same concern in the early days of the Republic:

The difference between the departments undoubtedly is, that the legislature makes, the executive executes, and the judiciary construes the law; but the maker of the law may commit something to the discretion of the other departments, and the precise boundary of this power is a subject of delicate and difficult inquiry, into which a Court will not enter unnecessarily.

Wayman v. Southard, 23 U.S. (10 Wheat.) 1, 46 (1825).

upon a *congressional* choice—without requiring judges to decide, in the abstract, whether the underlying statute has assigned the agency too much discretion.¹⁶

Although scholars have repeatedly raised concerns about the pedigree and derivation of some of the constitutional (and other) “values” that trigger what we now call nondelegation canons,¹⁷ less has been said about whether such canons can, in fact, achieve the accountability-forcing goals of the traditional nondelegation doctrine without producing the corresponding judicial administrability problems. The subject of this Symposium—Professor Clark’s Supremacy Clause exclusivity thesis—sharply poses the latter question by providing an explicit constitutional source for one of the most important nondelegation canons: the presumption against preemption.¹⁸ In *Separation of Powers as a Safeguard of Federalism*, Professor Clark argues that the text, structure, and history of the Supremacy

16 Professor Sunstein thus explains:

Courts do not ask the hard-to-manage question whether the legislature has exceeded the permissible level of discretion, but pose instead the far more manageable question whether the agency has been given the discretion to decide something that (under the appropriate canon) only legislatures may decide. In other words, courts ask a question about subject matter, not a question about degree.

Sunstein, *supra* note 1, at 338.

17 For example, some believe that the current Court picks and chooses constitutional values in a way that is not neutral in distributional consequences; they argue that present canons tend to favor economic liberties and state autonomy over individual rights. See William N. Eskridge, Jr., *Textualism, the Unknown Ideal?*, 96 MICH. L. REV. 1509, 1545–46 (1998) (book review) (arguing that the textualists on the Supreme Court selectively apply clear statement rules); Bradford C. Mank, *Textualism’s Selective Canons of Statutory Construction: Reinvigorating Individual Liberties, Legislative Authority, and Deference to Executive Agencies*, 86 KY. L.J. 527, 527 (1998) (“[T]extualist judges selectively prefer clear-statement rules that favor states’ rights and private economic interests, and usually narrow a statute’s meaning.”). Others have argued that what we now call nondelegation canons lead to the creation of “judge-made constitutional ‘penumbra[s],’” unwisely extending the document’s reach. See Richard A. Posner, *Statutory Interpretation—In the Classroom and in the Courtroom*, 50 U. CHI. L. REV. 800, 816 (1983).

18 See *infra* note 49 and accompanying text. The classic articulation of the presumption against preemption states:

In all pre-emption cases, and particularly in those [where] Congress has “legislated . . . in a field which the States have traditionally occupied,” we “start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress.”

Medtronic, Inc. v. Lohr, 518 U.S. 470, 485 (1996) (first alteration added) (citation omitted) (quoting *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1987)).

Clause indicate that only three specific forms of law—“the ‘Constitution,’ ‘Laws,’ and ‘Treaties’”—can displace contrary state law.¹⁹ This careful enumeration, he argues, cross-references the familiar lawmaking procedures that the document explicitly supplies for each of the three categories—procedures that share the common feature of building in rather obvious safeguards for the states.²⁰ If, as a result, the bicameralism and presentment requirements prescribed by Article I,

19 See Bradford R. Clark, *Separation of Powers as a Safeguard of Federalism*, 79 TEX. L. REV. 1321, 1427–29 (2001) (quoting U.S. CONST. art. VI, cl. 2). The Supremacy Clause provides:

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

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

20 The first set of safeguards are found in the intricate provisions for adopting and amending “the Constitution” under Articles V and VII. See Clark, *supra* note 19, at 1331. Article VII of course provides that the ratification of “this Constitution” by nine states sufficed for its establishment as the Constitution of the United States. See U.S. CONST. art. VII. Article V of course supplies the manner of amendment. In the commonly used method, two thirds of both Houses “shall propose Amendments to this Constitution,” and those amendments become “Part of this Constitution” when ratified by three quarters of the states. U.S. CONST. art. V. Citing the Supremacy Clause’s reference to “Laws . . . made in Pursuance of [this Constitution],” Professor Clark notes that the terminology of Article I, Section 7 similarly refers to the enactment of “a Law.” See Clark, *supra* note 19, at 1332. Article I, Section 7 provides that “[e]very Bill which shall have passed the House of Representatives and the Senate, shall, before it become a Law, be presented to the President of the United States.” U.S. CONST. art. I, § 7, cl. 2 (emphasis added). If the President signs the bill, it becomes a law. See *id.* But “if not he shall return it, with his Objections to that House in which it shall have originated.” *Id.* In that case, if two-thirds of each House votes to override his or her veto, it can also “become a Law.” *Id.* (emphasis added). “Treaties” make up the final category. See Clark, *supra* note 19, at 1332. The Treaty Clause provides that the President “shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur.” U.S. CONST. art. II, § 2, cl. 2.

Each such procedure thus conditions the adoption of its specified legal text on the assent of a majority or supermajority of the Senate, a supermajority of the states, or both. See Clark, *supra* note 19, at 1344–46. The Supremacy Clause’s adoption coincided exactly with the Great Compromise providing for equal state representation in the Senate—further reinforcing the premise that the forms of law specified in the Supremacy Clause were meant to tap into processes in which the interests of the small states received explicit and disproportionate protection. See *id.* at 1352–55; see also Bradford R. Clark, *Constitutional Compromise and the Supremacy Clause*, 83 NOTRE DAME L. REV. 1421 (2008) (elaborating on the apparent connection between the compromises that gave rise to equal representation in the Senate and the adoption of the Supremacy Clause).

Section 7 reflect the exclusive means for adopting preemptive “Laws,” then any congressional attempt to delegate power to preempt would circumvent the procedural safeguards of federalism prescribed by the Supremacy Clause. Since the Court has made clear, however, that there is no judicially manageable standard for enforcing any resulting nondelegation doctrine directly,²¹ a nondelegation canon requiring a “clear and manifest” statutory purpose to preempt nicely and manageably serves the same end.²²

Because preemption doctrine has attracted a great deal of attention in recent years,²³ and because Professor Clark’s Supremacy

21 See Clark, *supra* note 19, at 1373–78 (discussing the Court’s difficulties in articulating a judicially manageable standard for the nondelegation doctrine and favorably discussing Sunstein’s nondelegation canons thesis).

22 See *Rice*, 331 U.S. at 230; Clark, *supra* note 19, at 1429 (“By recognizing only the ‘Constitution,’ ‘Laws,’ and ‘Treaties’ of the United States as ‘the supreme Law of the Land,’ the Supremacy Clause requires adherence to constitutionally prescribed lawmaking procedures in order to displace state law. The presumption against preemption instructs courts to apply state law unless a federal statute reflects ‘the clear and manifest purpose of Congress’ to displace such law. By requiring the statute to be clear in this respect, the presumption ensures that Congress and the President—rather than politically unaccountable judges—make the crucial decision to preempt state law through constitutionally prescribed lawmaking procedures designed to safeguard federalism.” (footnotes omitted) (quoting U.S. CONST. art. VI, cl. 2; *Rice*, 331 U.S. at 230)).

23 Preemption has become the subject of a considerable flurry of scholarship. See, e.g., William N. Eskridge, Jr., *Vetogates, Chevron, Preemption*, 83 NOTRE DAME L. REV. 1441, 1460–84 (2008) (arguing that the pervasiveness of vetogates in the federal legislative process counsels against strong judicial deference to agency interpretations on questions involving preemption of state law); Roderick M. Hills, Jr., *Against Preemption: How Federalism Can Improve the National Legislative Process*, 82 N.Y.U. L. REV. 1, 16–36 (2007) (arguing that given the constellation of interest groups at the national level, a presumption against preemption is more likely to inspire Congress to address the question of preemption expressly); Nina A. Mendelson, *Chevron and Preemption*, 102 MICH. L. REV. 737, 759–79 (2004) (arguing that the administrative process does not demonstrably protect state interests less effectively than does the legislative process); Thomas W. Merrill, *Preemption and Institutional Choice*, 102 Nw. U. L. REV. (forthcoming 2008) (manuscript at 26–44, on file with author) (arguing that courts should more self-consciously consider comparative institutional competence in determining questions of preemption); Gillian E. Metzger, *Administrative Law as the New Federalism*, 57 DUKE L.J. (forthcoming 2008) (manuscript at 19–39), available at <http://ssrn.com/abstract=1095327> (contending that the Court has increasingly come to use run-of-the-mill administrative law doctrines to protect state regulatory autonomy); Caleb Nelson, *Preemption*, 86 VA. L. REV. 225, 232 (2000) (arguing that the Founders would have understood the Supremacy Clause as adopting a non obstante clause that negates any presumption against implied repeal and therefore does not support a presumption against preemption); Catherine M. Sharkey, *Products Liability Preemption: An Institutional Approach*, 76 GEO. WASH. L. REV. (forthcoming 2008) (manuscript at 44–55), available at <http://ssrn.com/abstract=1084919> (arguing that courts should

Clause thesis gives the presumption against preemption a firm (though not unassailable) constitutional grounding,²⁴ that nondelegation canon seems to offer a particularly suitable context for posing some questions about the judicial manageability or administrability of such canons more generally.²⁵ In that vein, this Essay will argue that nondelegation canons present the same line-drawing problems as the traditional nondelegation doctrine because they require courts to identify when an interpretive decision is properly attributed to “a Law” passed by Congress or to policymaking discretion exercised by an

give some, but ultimately rather limited, deference to agency determinations that state law should be preempted).

24 In his thoughtful contribution to this Symposium, Peter Strauss raises several objections to Clark’s thesis. See Peter L. Strauss, *The Perils of Theory*, 83 NOTRE DAME L. REV. 1567 (2008). To name one: the Supremacy Clause makes the enumerated categories of federal law supreme, “any Thing in the Constitution or *Laws* of any State to the Contrary notwithstanding.” U.S. CONST. art. VI, cl. 2 (emphasis added). Professor Strauss argues that unless federal law cannot preempt state common law, the term “Laws” as used in the foregoing clause must refer to state common law. See Strauss, *supra*, at 1567–73. On this account, Professor Clark’s reading requires the term “Laws” to have one meaning in the first part of the Supremacy Clause (“Laws of the United States which shall be made in Pursuance” of this Constitution) and a different one in the final clause describing what is preempted. See *id.* at 1568–69. Professor Clark responds that “Constitution or Laws of any State” need not refer to common law because the states received the common law by adopting reception statutes or constitutional provisions. See Bradford R. Clark, *The Procedural Safeguards of Federalism*, 83 NOTRE DAME L. REV. 1681, 1685 (2008). Clark also notes that, even if “Laws of any State” were read to encompass common law, the Clause’s initial reference to “Laws of the United States which shall be made in Pursuance” of the Constitution could not be read to refer to common law because (unlike statutes) such law was not understood to be “made.” See *id.* at 1686–87. Any attempt to resolve this or the many other interesting points of difference between the two lies well beyond this Essay’s scope. For purposes of triggering the present inquiry into the presumption against preemption as a nondelegation canon, it suffices to note that Professor Clark’s thesis represents a substantial account of important structural, functional, and political elements of a compromise that yielded both the Supremacy Clause and a number of lawmaking procedures that fit coherently with its text and apparent design. Indeed, although not grounding the conclusion in the Supremacy Clause, others have defended the presumption against preemption as a nondelegation canon. See, e.g., Sunstein, *supra* note 1, at 331 (describing the nondelegation effect of the presumption as “an important requirement in light of the various safeguards against cavalier disregard of state interests created by the system of state representation in Congress”).

25 The question of “judicial manageability” of course pervades constitutional adjudication and carries rich and complex connotations. See generally Richard H. Fallon, Jr., *Judicially Manageable Standards and Constitutional Meaning*, 119 HARV. L. REV. 1274 (2006). Here, I use judicial “manageability” or “administrability” to refer to the Court’s own account of its deep reluctance to enforce the nondelegation doctrine because of a felt incapacity to determine how much delegated discretion is too much. See *Whitman v. Am. Trucking Ass’ns*, 531 U.S. 457, 474–75 (2001).

agency or court. Since all federal statutes confer some degree of discretion upon the courts or agencies that implement them, applying a nondelegation canon will still ultimately come down to hard-to-define judgments about whether a statute has conferred *too much* policymaking discretion upon the entity charged with implementing it. Perhaps as a result of this problem, the Supreme Court is prone to articulate a canon like the presumption against preemption as a “clear statement rule,” which more manageably assigns the full burden of ambiguity to those who would preempt—but, in so doing, goes well beyond any plausible traditional understanding of nondelegation. In addition, I suggest that even when a nondelegation canon is framed as a clear statement rule, it may be hard for judges to maintain a posture in which they must sometimes conclude that the best answer to a statutory question is, say, preemption, but the result is simply not clear enough to warrant enforcement. Hence, judges may end up doing something that looks a lot like everyday, boring statutory interpretation, even when putatively enforcing a nondelegation canon.

This Essay will use the presumption against preemption to raise more general questions about the judicial administrability of nondelegation canons. After laying some groundwork in statutory interpretation theory, Part II elaborates on why nondelegation canons generally present judicial administrability concerns analogous to those associated with the nondelegation doctrine. It then discusses ways in which these administrability problems might affect the judiciary’s implementation of the presumption against preemption. Part III examines whether nondelegation canons can provide a judicially administrable solution to at least part of the puzzle of how to structure judicial review of agency action when an agency wishes to preempt state law.

II. NONDELEGATION CANONS AND JUDICIAL ADMINISTRABILITY

This Part asks whether a nondelegation canon presents problems of judicial administrability similar to those that have doomed the traditional nondelegation doctrine. My thesis is simple: a nondelegation canon, by definition, seeks to ascertain whether an interpretive decision is properly attributed to congressional choice or to what, for convenience, I will call “executory discretion”—the policymaking discretion exercised by the entity primarily responsible for implementing the statute. For familiar reasons, however, this will be difficult (if not impossible) to define in a principled way. All laws leave some element of discretion to those who put them into effect. So, at least at the margins, almost all interpretive decisions will involve some combination of congressional choice and executory discretion. The necessary

line drawing by courts applying a nondelegation canon may therefore end up feeling quite similar to the line drawing needed to give meaningful effect to the traditional nondelegation doctrine.

In this Part, I first address the conceptual difficulty in identifying a meaningful line between congressional choice and impermissible delegation. I speculate about the coincidence of that line drawing difficulty with certain widely understood features of the presumption against preemption—including the Court’s tendency to articulate that canon as a clear statement rule and its difficulty implementing it in a consistent manner.

Before turning to the specifics, however, I should note that although Professor Sunstein takes care to limit his endorsement of nondelegation canons to contexts involving judicial review of agency action,²⁶ my analysis in this Part will adopt the simplifying assumption of a single interpreter, such as a court that must make a preemption determination under a statute that grants a private right of action. Putting to one side my own sense that the concept of nondelegation canons applies no less to judicially administered statutes,²⁷ I adopt this assumption because one can more easily isolate the underlying line drawing problem without the added complication of the scope of judicial review. In Part III, however, I do draw on the resulting analysis to examine nondelegation canons in the judicial-review-of-agency-action context in which Professor Sunstein developed his themes.

26 See Sunstein, *supra* note 1, at 340.

27 Under Professor Sunstein’s premises, nondelegation canons instruct reviewing courts to use tools of construction to ensure that decisions in sensitive areas properly reflect congressional choice rather than agency discretion. See *id.* at 338. Even the most formalist of judges would acknowledge that when judges interpret ambiguous or open-ended statutes, they properly exercise policymaking discretion as well. Cf. Antonin Scalia, *Judicial Deference to Administrative Interpretations of Law*, 1989 DUKE L.J. 511, 515 (arguing that the traditional tools of construction used by courts frequently involve “judicial consideration and evaluation of competing policies”). Hence, the goals of the nondelegation canon framework would seem to apply no less when the issue is whether a sensitive decision is more properly attributed to congressional choice or *judicial* discretion. Along these lines, I note that the Court does not confine the presumption against preemption to agency-administered statutes; that canon also plainly applies to cases in which a judge makes the primary decision whether and to what extent a statute preempts. See, e.g., *Dep’t of Revenue v. ACF Indus.*, 510 U.S. 332, 345 (1994) (using the presumption to analyze whether the Railroad Revitalization and Regulatory Reform Act of 1976 preempts a state property tax as applied to railroads); *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 516 (1992) (invoking the presumption to decide whether the Federal Cigarette Labeling Act preempts a state tort action); *Rice*, 331 U.S. at 230 (applying the presumption in connection with a determination of whether the Federal Warehouse Act preempts various state law regulatory requirements for the storage of grain).

A. *Interpretation, Ambiguity, and Matters of Degree*

In thinking about the judicial manageability of nondelegation canons, it is helpful to compare modern assumptions about the traditional nondelegation doctrine with those about statutory interpretation. Recall first the institutional concerns that the Court has invoked when justifying its reluctance (or, more accurately, refusal) to enforce the traditional nondelegation doctrine through *Marbury*-style judicial review. Because “no statute can be entirely precise,” it is now well-accepted “that some judgments, even some judgments involving policy considerations, must be left to the officers executing the law and to the judges applying it.”²⁸ Accordingly, “[a] certain degree of discretion, and thus of lawmaking, inheres in most executive or judicial action.”²⁹ For this reason, the Court has “‘almost never felt qualified to second-guess Congress regarding the permissible degree of policy judgment that can be left to those executing or applying the law.’”³⁰ The question in the standard, garden-variety nondelegation case—how much discretion is too much—simply does not lend itself to principled line drawing.

The same difficulty troubles the alternative of enforcing nondelegation principles through interpretive canons. Nondelegation canons aim to make Congress take responsibility for a choice that cuts against some constitutional or quasi-constitutional value—including the choice to preempt state law, to impose retroactive liability, or to project federal legislative authority overseas. But how does one tell whether Congress has, in fact, expressed such a decision? Few (if any) now believe that the task of interpretation entails recovering intrinsic “plain meaning[s]” from within “the four corners” of a statute.³¹ Modern language theory tells us instead that words have meaning because a relevant linguistic community applies an array of shared

28 *Mistretta v. United States*, 488 U.S. 361, 415 (1989) (Scalia, J., dissenting). The idea that all enacted texts will have some degree of indeterminacy has deep roots in our history. See, e.g., WILLIAM BLACKSTONE, 1 COMMENTARIES *62 (noting that “in laws all cases cannot be foreseen or expressed”); THE FEDERALIST NO. 37, at 229 (James Madison) (Clinton Rossiter ed., 1961) (“All new laws, though penned with the greatest technical skill and passed on the fullest and most mature deliberation, are considered as more or less obscure and equivocal, until their meaning be liquidated and ascertained by a series of particular discussions and adjudications.”); see also H.L.A. HART, THE CONCEPT OF LAW 123 (1961) (explaining why texts will inevitably have some indeterminacy on the margins).

29 *Whitman*, 531 U.S. at 4775 (quoting *Mistretta*, 488 U.S. at 417 (Scalia, J., dissenting)) (emphasis omitted).

30 *Id.* at 474–75 (quoting *Mistretta*, 488 U.S. at 416 (Scalia, J., dissenting)).

31 *White v. United States*, 191 U.S. 545, 551–52 (1903) (exemplifying the old formalist position).

conventions for understanding words in context.³² Nor can the judge identify legislative choice by excavating unexpressed but reliably genuine legislative intent on a contested question about which the text is ambiguous.³³ While intentionalism of course still has prominent defenders,³⁴ the insights of public choice theory suggest that the legislative process is too complex, opaque, and path-dependent to permit judges to reconstruct how an uncertain issue would have been resolved if Congress had confronted it more explicitly.³⁵

If one accepts the resultant skepticism about intrinsic plain meaning and actual legislative intent, the most plausible view of legislative

32 Even the strictest textualists embrace that view. See, e.g., *Deal v. United States*, 508 U.S. 129, 132 (1993) (Scalia, J.) (arguing that it is a “fundamental principle of statutory interpretation (and, indeed, of language itself) that the meaning of a word cannot be determined in isolation, but must be drawn from the context in which it is used”); Frank H. Easterbrook, *Text, History, and Structure in Statutory Interpretation*, 17 HARV. J.L. & PUB. POL’Y 61, 64 (1993) (“Because interpretation is a social enterprise, because words have no natural meanings, and because their effect lies in context, we must consult these contexts.”). The modern conception derives from LUDWIG WITTGENSTEIN, *PHILOSOPHICAL INVESTIGATIONS* §§ 134–142, at 44–48 (G.E.M. Anscombe trans., 3d ed. 2001), which emphasizes the use of words in linguistic interactions within a relevant community.

33 Elsewhere, I have extensively summarized evidence for and against this view. See John F. Manning, *The Absurdity Doctrine*, 116 HARV. L. REV. 2387, 2395–408 (2003) (discussing the argument for strong intentionalism); *id.* at 2408–19 (describing the argument for intent skepticism).

34 See, e.g., Larry Alexander & Saikrishna Prakash, “*Is That English You’re Speaking?*” *Why Intention Free Interpretation Is an Impossibility*, 41 SAN DIEGO L. REV. 967, 974–78 (2004) (explaining the centrality of the speaker’s intention to the derivation of meaning); Paul Campos, *That Obscure Object of Desire: Hermeneutics and the Autonomous Legal Text*, 77 MINN. L. REV. 1065, 1089 (1993) (same); Stanley Fish, *Intention Is All There Is: A Critical Analysis of Aharon Barak’s Purposive Interpretation in Law*, 29 CARDOZO L. REV. 1109 (2008) (same).

35 See, e.g., Frank H. Easterbrook, *Statutes’ Domains*, 50 U. CHI. L. REV. 533, 547 (1983) (“[I]t turns out to be difficult, sometimes impossible, to aggregate [legislators’ preferences] into a coherent collective choice. Every system of voting has flaws. The one used by legislatures is particularly dependent on the order in which decisions are made.”); *id.* at 548 (“[W]hen logrolling is at work the legislative process is submerged and courts lose the information they need to divine the body’s design.”); Kenneth A. Shepsle, *Congress Is a “They,” Not an “It”: Legislative Intent as Oxymoron*, 12 INT’L REV. L. & ECON. 239, 244 (1992) (noting that the success of a piece of legislation often depends on “idiosyncratic, structural, procedural, and strategic factors, which are at best tenuously related to normative principles embraced by democratic theorists and philosophers”). For a particularly thoughtful rebuttal to public choice skepticism about the recovery of legislative intent, see McNollgast, *Legislative Intent: The Use of Positive Political Theory in Statutory Interpretation*, LAW & CONTEMP. PROBS., Winter 1994, at 3, 24–25, which argues that floor managers and committee chairs act on behalf of the enacting coalition when they use legislative history to express the details of legislative policy.

supremacy suggests that interpretation amounts to the derivation of some form of “constructive intent.”³⁶ Simply put, an interpreter’s job is to decode legislative instructions according to shared social and linguistic conventions. As Jeremy Waldron puts it:

A legislator who votes for (or against) a provision like “No vehicle shall be permitted to enter any state or municipal park” does so on the assumption that—to put it crudely—what the words mean to him is identical to what they will mean to those to whom they are addressed (in the event that the provision is passed). . . . That such assumptions pervade the legislative process shows how much law depends on language, on the shared conventions that constitute a language, and on the reciprocity of intentions that conventions comprise.³⁷

On that theory, even in the absence of plain meaning or actual intent, it remains possible to attribute an interpreter’s decision to legislative choice if one assumes that legislators intend “to say what one would be normally understood as saying, given the circumstances in which one said it.”³⁸ By ascribing conventional meaning to legislators, this assumption provides an intelligible way to hold them accountable for

36 Even if one starts from a baseline of skepticism about plain meaning or actual legislative intent, some minimal conception of legislative intent is necessary to make sense of a system founded on legislative supremacy. As Joseph Raz has insightfully noted, “It makes no sense to give any person or body law-making power unless it is assumed that the law they make is the law they intended to make.” Joseph Raz, *Intention in Interpretation*, in *THE AUTONOMY OF LAW* 249, 258 (Robert P. George ed., 1996). As he explains:

[T]o assume that the law made by legislation is not the one intended by the legislator, we must assume that he cannot predict what law he is making when the legislature passes any piece of legislation. But if so, why does it matter who the members of the legislature are, whether they are democratically elected or not, whether they represent different regions of the country, or classes in the population, whether they are adults or children, sane or insane? Since the law they will end by making does not represent their intentions, the fact that their intentions are foolish or wise, partial or impartial, self-serving or public spirited, makes no difference.

Id. at 258–59. Professor Raz explains that one can have meaningful legislative supremacy if legislators intend to enact a law that will be decoded according to prevailing interpretive conventions. *See id.* at 268; *infra* text accompanying notes 38–39.

37 Jeremy Waldron, *Legislators’ Intentions and Unintentional Legislation*, in *LAW AND INTERPRETATION* 329, 339 (Andrei Marmor ed., 1995); *see also* Gerald C. Mac Callum, Jr., *Legislative Intent*, 75 *YALE L.J.* 754, 758 (1966) (“The words [a legislator] uses are the instruments by means of which he expects or hopes to effect . . . changes [in society]. What gives him this expectation or this hope is his belief that he can anticipate how others (*e.g.*, judges and administrators) will understand these words.”).

38 Raz, *supra* note 36, at 268.

whatever bill they have passed, whether or not they have actually formed an intention about its detailed application.³⁹

In other words, interpretive theory now rests on the premise that interpreters filter available materials through applicable conventions to make an approximation of how a reasonable person (viz. reasonable legislator) would have understood the question in issue.⁴⁰ Interpreters will have an array of diverse, often conflicting evidence at their disposal: the conventional meanings of statutory language in context, evidence of the special connotations of technical terms of art, inferences from statutory structure, relevant canons of construction (both substantive and semantic), the mischiefs that inspired a statute, the overall tenor of the statute, and the like.⁴¹ Although practitioners of the main interpretive approaches that now compete for the Supreme Court's allegiance (textualism and purposivism) would filter the evidence in different ways, the important point is that most modern interpreters try to make a best approximation of what a "reasonable person" applying relevant social and linguistic conventions would infer from evidence of meaning that may cut in more than one direction.⁴²

39 See *id.* at 267 ("Th[at] minimal intention is sufficient to preserve the essential idea that legislators have control over the law. Legislators who have the minimal intention know that they are, if they carry the majority, making law, and they know how to find out what law they are making.").

40 The following discussion is based on John F. Manning, *What Divides Textualists from Purposivists?*, 106 COLUM. L. REV. 70 (2006).

41 See *id.* at 79–91 (discussing tools of construction commonly used by the Supreme Court).

42 Methodological differences among the leading approaches are not trivial in practice, but do not affect the analysis of the difficulty of using nondelegation canons. The main dividing line on the present Supreme Court is between textualists, who emphasize the conventional semantic meaning of the enacted texts, and purposivists, who emphasize the goals that Congress sought to pursue in enacting the text. See *id.* at 91–108 (outlining the distinctions between the two mainstream approaches). Both camps, however, use some version of the "reasonable person" construct to describe the relevant interpretive task. Textualists thus look for the way "a skilled, objectively reasonable user of words" would have understood the statutory language. Frank H. Easterbrook, *The Role of Original Intent in Statutory Construction*, 11 HARV. J.L. & PUB. POL'Y 59, 65 (1988); see also *Chisom v. Roemer*, 501 U.S. 380, 405 (1991) (Scalia, J., dissenting) ("We are to read the words of that text as any ordinary Member of Congress would have read them, and apply the meaning so determined." (citation omitted)); Antonin Scalia, *Common-Law Courts in a Civil-Law System: The Role of United States Federal Courts in Interpreting the Constitution and Laws*, in A MATTER OF INTERPRETATION 3, 17 (Amy Gutmann ed., 1997) (arguing that an interpreter should search for "the intent that a reasonable person would gather from the text of the law, placed alongside the remainder of the *corpus juris*"). The most influential version of modern purposivism—the legal process school developed by Professors Hart and Sacks—

If that account is correct, then the interpretive process will typically lead not to a “yes” or “no” decision about whether members of the enacting coalition *actually* preferred alternative *x* to alternative *y*, but rather to a probabilistic judgment about how strongly the arrayed evidence cuts in a particular direction under accepted conventions (“I think it sixty percent likely that the statute means *x* rather than *y*.”).⁴³ Sometimes the relevant evidence will point so clearly in one direction that the interpretive calculation might almost feel automatic; in that case, the statute is surely clear in context.⁴⁴ Sometimes the relevant evidence will make it seem that Congress left no meaningful clue about its interpretive choice; in that case, the resultant decision would seem to hinge very much on the interpreter’s executory discretion.⁴⁵

But the hard—and, for purposes of line drawing, the most relevant—cases will lie at the margins. With respect to those cases, the important question is this: if we presume that in an ordinary case (i.e., one not governed by a nondelegation canon), it suffices for an interpreter to conclude the evidence more likely than not points to *x*, then how much more certainty do we need in a case governed by a nondelegation canon? If the answer is “none,” the nondelegation canon does no work; it is ordinary interpretation. If the answer is “some” (as it sensibly must be),⁴⁶ then how much additional confi-

instructs interpreters to filter the same evidence through the assumption “that the legislature was made up of reasonable persons pursuing reasonable purposes reasonably.” HENRY M. HART, JR. & ALBERT M. SACKS, *THE LEGAL PROCESS* 1378 (William N. Eskridge, Jr. & Philip P. Frickey eds., 1994).

43 See Felix Frankfurter, *Some Reflections on the Reading of Statutes*, 47 *COLUM. L. REV.* 527, 527–28 (1947) (“When we talk of statutory construction we have in mind cases in which there is a fair contest between two readings, neither of which comes without respectable title deeds. A problem in statutory construction can seriously bother courts only when there is a contest between probabilities of meaning.”); Jacob E. Gersen & Adrian Vermeule, *Chevron as a Voting Rule*, 116 *YALE L.J.* 677, 694 (2007) (discussing interpretive decisions in terms of probabilities).

44 For a good working definition of statutory clarity, see *infra* note 52.

45 Professor Richard Pierce provides an instructive account of the types of “meaningless” regulatory standards sometimes adopted by Congress—including the “traditional empty standards,” “lists of unranked decisional goals,” and mutually “contradictory standards.” See Richard J. Pierce, Jr., *The Role of Constitutional and Political Theory in Administrative Law*, 64 *TEX. L. REV.* 469, 474–78 (1985). One might also find cases, though perhaps rare, in which the relevant evidence of meaning is essentially in equipoise. See Scalia, *supra* note 27, at 520–21 (arguing that competing interpretations are almost never in equipoise).

46 In other words, courts applying a nondelegation canon must sometimes reject what they regard as the more likely interpretation because it does not meet the higher threshold set by the nondelegation canon. The logical necessity for such an approach has been nicely articulated in the context of a much-studied nondelegation canon—the canon requiring avoidance of serious constitutional questions, where possible.

dence is enough? I do not know how to begin to answer that question. My uncertainty, moreover, does not depend upon any belief that interpreters will be unable to make meaningful judgments about the relative strength of competing interpretations—that is, about the probabilities of each alternative, given the available evidence.⁴⁷ Rather, the problem is the *conceptual* one of knowing how to describe the degree of certainty needed to cross some imaginary line between congressional choice and executory discretion: if most proffered interpretations of statutes leave some residue of ambiguity or doubt in the interpreter's mind, how much is too much?⁴⁸ As with the questions of degree that have dissuaded the judiciary from enforcing the traditional nondelegation doctrine, there is no satisfying answer to that question of degree.

B. *Line Drawing, Clear Statements, and Ordinary Interpretation*

If the concept of a nondelegation canon does present this sort of judicial manageability problem, it might relate to two phenomena that characterize the presumption-against-preemption case law. First, it may give the Court cause to articulate the presumption as a clear statement rule, pushing the inquiry away from the margins by requir-

See, e.g., Feltner v. Columbia Pictures Television, Inc., 523 U.S. 340, 358 (1998) (Scalia, J., concurring) (noting that “[t]he doctrine of constitutional doubt does not require that the problem-avoiding construction be the *preferable* one,” for that “would deprive the doctrine of all function” (quoting *Almendarez-Torres v. United States*, 523 U.S. 224, 270 (1998) (Scalia, J., dissenting))); Frederick Schauer, *Ashwander Revisited*, 1995 SUP. CT. REV. 71, 89 (“[A]voidance is only important in those cases in which the result is different from what the result would have been by application of a judge’s or court’s preconstitutional views about how a statute should be interpreted.”).

47 Along these lines, Gary Lawson has argued that interpreters can make such determinations and, in fact, do so in many contexts. *See* Gary Lawson, *Proving the Law*, 86 NW. U. L. REV. 859, 890–94 (1992).

48 In the context of another famous nondelegation canon—the rule of lenity—then-Judge Scalia suggested a similar problem. *See* *United States v. Hansen*, 772 F.2d 940, 948 (D.C. Cir. 1985) (noting that the rule of lenity “provides little more than atmospherics, since it leaves open the crucial question—almost invariably present—of how much ambiguousness constitutes an ambiguity”); *see also* Antonin Scalia, *Assorted Canards of Contemporary Legal Analysis*, 40 CASE W. RES. L. REV. 581, 582 (1990) (“I should think that the effort, with respect to *any* statute, should be neither liberally to expand nor strictly to constrict its meaning, but rather to get the meaning precisely right. Now that may often be difficult, but I see no reason, *a priori*, to compound the difficulty, and render it even more unlikely that the precise meaning will be discerned, by laying a judicial thumb on one or the other side of the scales. And that is particularly so when the thumb is of indeterminate weight. How ‘liberal’ is liberal, and how ‘strict’ is strict?”).

ing clear evidence of preemptive purpose. Second, the posited manageability concern corresponds with (but may or may not explain) a widely accepted observation that the presumption-against-preemption cases are all over the map. Although detailed examination of the presumption and its implementation lies beyond this Essay's scope, I will begin to explore some possible links between judicial manageability concerns and those features of the case law.

First, the Court has formally articulated the presumption against preemption as a clear statement rule:

In all pre-emption cases, and particularly in those [where] Congress has “legislated . . . in a field which the States have traditionally occupied,” we “start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was *the clear and manifest purpose* of Congress.”⁴⁹

By moving the relevant interpretive inquiry from the margins to the tail of the distribution, such an inquiry might provide a relatively workable criterion for implementing the nondelegation doctrine.⁵⁰ It is true, of course, that judges can disagree about the question whether a statute is clear.⁵¹ But one can at least articulate a plausible standard

49 *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996) (citation omitted) (first alteration and emphasis added) (quoting *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947)); *see also, e.g.*, *Fla. Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142 (1963) (“The principle to be derived from our decisions is that federal regulation of a field of commerce should not be deemed preemptive of state regulatory power in the absence of persuasive reasons—either that the nature of the regulated subject matter permits no other conclusion, or that the Congress has unmistakably so ordained.”); *Napier v. Atl. Coast Line R.R. Co.*, 272 U.S. 605, 611 (1926) (“The intention of Congress to exclude States from exerting their police power must be clearly manifested.”); *Reid v. Colorado*, 187 U.S. 137, 148 (1902) (“It should never be held that Congress intends to supersede or by its legislation suspend the exercise of the police powers of the States, even when it may do so, unless its purpose to effect that result is clearly manifested.”).

50 Along these lines, Professor Sunstein has equated nondelegation canons with a requirement of statutory clarity. *See Sunstein, supra* note 1, at 330 (“These canons impose important constraints on administrative authority, for agencies are not permitted to understand ambiguous provisions to give them authority to venture in certain directions; a clear congressional statement is necessary.”); *see also, e.g., id.* at 316 (noting that such canons provide that “federal administrative agencies may not engage in certain activities unless and until Congress has expressly authorized them to do so”); *id.* (noting that under the canon of avoidance, “Congress must clearly assert its desire to venture into the disputed terrain”); *id.* at 332 (noting that a civil statute will be applied retroactively only if Congress has made “that choice explicitly”); *id.* (noting that the rule of lenity requires the imposition of criminal sanctions to reflect “a clear judgment on Congress’s part”).

51 *See, e.g., Zuni Pub. Sch. Dist. No. 89 v. Dep’t of Educ.*, 127 S. Ct. 1534, 1543–46 (2007) (Breyer, J.) (finding the term “percentile” ambiguous because the statute did

against which to argue about clarity: if all or almost all of those conversant with applicable social and linguistic conventions would agree upon a statute's meaning, the outcome can be said to be clear in context.⁵² In such a case, where almost all interpreters (sharing a common methodology) would agree that the evidence points decisively in one direction, only the most dedicated rule skeptics would hesitate to attribute the resultant interpretation to Congress.⁵³ In short, if the very idea of a nondelegation canon requires a standard higher than ordinary interpretation, then a clear statement may be the only meaningful stopping point.

Assuming that one can successfully implement such a clear statement rule for preemption, the resulting regime would effectively assign the whole burden of statutory uncertainty to those who would preempt. That is, even if one could plausibly ascribe preemption to congressional choice with a lower probability interpretation, line-drawing problems at that level might require the Court to overcorrect, demanding a clarity of expression or purpose about which reasonable people would not disagree. Whatever its merits, such a standard goes well beyond the premises one might ascribe to a *nondelegation* canon. No version of the traditional nondelegation doctrine has ever presupposed that an impermissible delegation of lawmaking power occurs

not specify the distribution against which the percentile was to be measured); *id.* at 1552–55 (Scalia, J., dissenting) (finding the statute to be clear); *Gen. Dynamics Land Sys., Inc. v. Cline*, 540 U.S. 581, 596–97 (2004) (Souter, J.) (holding that discrimination “because of . . . age” is ambiguous and may mean either disfavored because of a difference in age or disfavored because of more advanced age); *id.* at 603–04 (Thomas, J., dissenting) (arguing that the phrase is clear in context and takes on the “primary meaning” of difference in age).

52 See Richard A. Posner, *Legal Formalism, Legal Realism, and the Interpretation of Statutes and the Constitution*, 37 CASE W. RES. L. REV. 179, 187 (1986) (arguing that a statute is clear when “all or most persons, having the linguistic and cultural competence assumed by the authors of the text, would agree on its meaning”).

53 For some prominent versions of rule skepticism, see, for example, James Boyle, *The Politics of Reason: Critical Legal Theory and Local Social Thought*, 133 U. PA. L. REV. 685, 708–11, 728 (1985) (contending that the linguistic formulations of legal rules are indeterminate and that “content enters law . . . not through the pure linguistic connections envisaged by formalist theory but through the limitations imposed by a deeply political set of assumptions about the social world”); Joseph William Singer, *The Player and the Cards: Nihilism and Legal Theory*, 94 YALE L.J. 1, 19, 21 (1984) (explaining that rules “generally do not determine the scope of their own application” and discussing various external factors that influence legal doctrine); Mark V. Tushnet, *Following the Rules Laid Down: A Critique of Interpretivism and Neutral Principles*, 96 HARV. L. REV. 781, 822–23 (1983) (arguing that a direction “to follow the rules tells us nothing of substance” and that the socialization of judges is more important in determining judicial outcomes).

unless the statute addresses a point so clearly that reasonable people would not disagree about its meaning.⁵⁴ Indeed, if such clarity were required for constitutionally legitimate legislation, the resultant standard would prove impossibly difficult to meet, given the starting premise that some degree of ambiguity, and thus policymaking discretion, is inevitable in any statute. So understood, a clear statement rule would operate not as a (situation-specific) stand-in for the traditional nondelegation doctrine, but rather as a fairly prohibitive tax upon the legislative process—one that would take the form of incremental bargaining and drafting costs necessarily expended to move from the level of determinacy necessary for (valid) ordinary legislation to the unusual clarity demanded for legislation governed by a clear statement rule.⁵⁵ However attractive the nondelegation canon rhetoric may be, the justification for a clear statement rule must reflect the additional burden upon the legislative process that the requirement of a clear statement imposes.

A second phenomenon deserves mention: even a clear statement regime may ultimately slide from requiring a genuinely clear statement to something much more like boring, everyday interpretation. Here is why: a clear statement rule asks judges to do something they may find difficult. If all statutes have a latent ambiguity until interpreted, the judge applying the clear statement rule must apply all of the traditional tools of construction to see if the statute adopts the relevant disfavored result (such as preemption) in a clear and manifest way. If, having interpreted the statute, the judge concludes that the best reading favors preemption, it may be psychologically difficult not to conflate the *best* reading with a *clear* reading.⁵⁶

54 Of the traditional nondelegation doctrine, Professor Sunstein writes that “it is extremely difficult to defend the idea that courts should understand Article I, section 1 of the Constitution to require Congress to legislate with particularity.” Sunstein, *supra* note 1, at 317. In the particular areas in which the Court applies nondelegation canons, however, the effect of a clear statement rule, successfully applied, would seem to require particularity—an explicit statement that Congress meant to disturb the particular value protected by the canon.

55 Framing any legal rule incurs the cost of obtaining and analyzing information about the rule’s probable impact, and the cost of securing agreement among the participants in the . . . process. These costs usually rise with increases in a rule’s transparency since objective regulatory line-drawing increases the risk of misspecification and sharpens the focus of value conflicts.

Colin S. Diver, *The Optimal Precision of Administrative Rules*, 93 YALE L.J. 65, 73 (1983).

56 See Gersen & Vermeule, *supra* note 43, at 697–98 (arguing that this sort of “second-order interpretation” may be “psychologically demanding for judges”). In a famous article, then-Judge Breyer predicted that the *Chevron* doctrine would be unsta-

Although this point obviously requires conjecture,⁵⁷ this potential difficulty does fit with a phenomenon that many commentators have observed about the presumption against preemption (and about some other clear statement rules). In particular, it has become accepted wisdom that courts apply the presumption against preemption only spottily and that they often find preemption even in the absence of a clear statement.⁵⁸ Indeed, others have convincingly shown that preemption decisions frequently mimic the boring, garden-variety approaches to statutory interpretation that would govern in the absence of a clear statement rule.⁵⁹ One could certainly imagine a

ble because of its similar analytical structure. See Stephen Breyer, *Judicial Review of Questions of Law and Policy*, 38 ADMIN. L. REV. 363, 373–81 (1986). At step one, a court reviewing an agency interpretation of an organic act was to use the traditional tools of construction to determine if “Congress ha[d] directly spoken to the precise question in issue.” *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842 (1984). If not, the court was to accept the agency’s “reasonable” interpretation even if the court would not have arrived at the same conclusion itself. *Id.* at 843 n.11, 845. As then-Judge Breyer explained:

[S]uch a formula asks judges to develop a cast of mind that often is psychologically difficult to maintain. It is difficult, after having examined a legal question in depth with the object of deciding it correctly, to believe both that the agency’s interpretation is legally wrong, *and* that its interpretation is reasonable. More often one concludes that there is a “better” view of the statute for example, and that the “better” view is “correct,” and the alternative view is “erroneous.”

Breyer, *supra*, at 379. For a more detailed discussion of *Chevron* and its implications, see *infra* Part III.

57 As noted, Professor Lawson believes that judges successfully apply differential burdens of persuasion to statutory interpretation questions in many diverse contexts. See Lawson, *supra* note 47, at 869–70, 891–96.

58 See, e.g., S. Candice Hoke, *Preemption Pathologies and Civic Republican Values*, 71 B.U. L. REV. 685, 733 (1991) (describing the Court’s devotion to this presumption as “fickle”); Calvin Massey, “*Joltin’ Joe Has Left and Gone Away*”: *The Vanishing Presumption Against Preemption*, 66 ALB. L. REV. 759, 764 (2003) (“[T]he Court . . . continues to simultaneously repeat and ignore the presumption against preemption.”); Merrill, *supra* note 23 (manuscript at 21) (noting that “the presumption against preemption is honored as much in the breach as in the observance”); Nelson, *supra* note 23, at 298 (“The Court itself has applied the presumption only half-heartedly.”); Sharkey, *supra* note 23 (manuscript at 110) (“I join a veritable chorus of scholars pointing out the Court’s haphazard application of the presumption. In the realm of products liability preemption, the presumption does yeoman’s work in some cases, while going AWOL altogether in others.” (footnotes omitted)).

59 Along these lines, Professor Merrill has identified a number of cases in which the Court found preemption without invoking the presumption against preemption, even though the dissent argued that the presumption should resolve the case the other way. See Merrill, *supra* note 23 (manuscript at 21) (citing *Engine Mfrs. Ass’n v. S. Coast Air Quality Mgmt. Dist.*, 541 U.S. 246 (2004); *Lorillard Tobacco Co. v. Reilly*,

variety of potential explanations for this phenomenon—including the possibility that the Supreme Court generally has trouble sticking to a single interpretive approach⁶⁰ or, indeed, that multimember courts cannot be expected to act more consistently than any other multimember decisionmaker.⁶¹ But it is not far-fetched to imagine that when asked to apply a dice-loading canon, judges can at least sometimes convince themselves that the most likely outcome is also a clear outcome. If so, then perhaps even a clear statement rule may function in practice more like everyday statutory interpretation.⁶²

533 U.S. 525 (2001); *Buckman Co. v. Plaintiffs' Legal Comm.*, 531 U.S. 341 (2001)). My colleague Daniel Meltzer, moreover, has suggested that the Supreme Court employs creative, purpose-oriented methods of interpretation more frequently in preemption cases than in run-of-the-mill cases not governed by such a presumption. See Daniel J. Meltzer, *The Supreme Court's Judicial Passivity*, 2002 SUP. CT. REV. 343, 362–68 (analyzing the interpretive method used in a series of Supreme Court preemption cases).

60 See, e.g., Michael C. Dorf, *Foreword: The Limits of Socratic Deliberation*, 112 HARV. L. REV. 4, 4 (1998) (“When the Justices divide over interpretive methodology, they usually do so along a fault line between textualists and purposivists.”); cf. *W. Va. Univ. Hosps., Inc. v. Casey*, 499 U.S. 83, 112 (1991) (Stevens, J., dissenting) (“In recent years the Court has vacillated between a purely literal approach to the task of statutory interpretation and an approach that seeks guidance from historical context, legislative history, and prior cases identifying the purpose that motivated the legislation.”).

61 See, e.g., Frank H. Easterbrook, *Ways of Criticizing the Court*, 95 HARV. L. REV. 802, 823–31 (1982) (using social choice theory to examine aggregation problems on multimember courts); Lewis A. Kornhauser & Lawrence G. Sager, *Unpacking the Court*, 96 YALE L.J. 82, 102–16 (1986) (same); Adrian Vermeule, *The Judiciary Is a They, Not an It: Interpretive Theory and the Fallacy of Division*, 14 J. CONTEMP. LEGAL ISSUES 549, 554–64 (2005) (suggesting considerations that would cast doubt on the judiciary’s capacity to achieve sustained coordination on interpretive issues).

62 Although a full examination of the Court’s dice-loading canons lies beyond this Essay’s scope, it is worth noting that others have identified the same judicial drift toward inconsistent application and ordinary statutory interpretation in the context of two other famous clear-statement approaches—the rule of lenity and the *Chevron* doctrine. The rule of lenity, which stretches to the earliest days of the Republic, of course provides that “penal laws are to be construed strictly.” *United States v. Wiltberger*, 18 U.S. (5 Wheat.) 76, 95 (1820); see also, e.g., *Staples v. United States*, 511 U.S. 600, 619 n.17 (1994) (noting that the rule of lenity requires that “ambiguous criminal statute[s] . . . be construed in favor of the accused”); *Rewis v. United States*, 401 U.S. 808, 812 (1971) (emphasizing that “ambiguity concerning the ambit of criminal statutes should be resolved in favor of lenity”). From early on, this maxim has had a nondelegation component. See, e.g., *Wiltberger*, 18 U.S. (5 Wheat.) at 95 (grounding the maxim, in part, “on the plain principle that the power of punishment is vested in the legislative, not in the judicial department”); see also *United States v. Bass*, 404 U.S. 336, 348 (1971) (emphasizing that “legislatures and not courts should define criminal activity”). As with the presumption against preemption, however, it is well accepted that the courts apply the rule of lenity inconsistently. See, e.g., Dan M. Kahan, *Lenity and Federal Common Law Crimes*, 1994 SUP. CT. REV. 345, 346 (“Judicial

III. CONCLUSION: THE *CHEVRON* TWIST?

When one focuses on a single interpreter applying a nondelegation canon, it is surpassingly difficult to say how much ambiguity is too much to justify treating the decision as Congress' rather than the interpreter's. This difficulty may push the Court toward articulating nondelegation canons as clear statement rules. Even though such rules go beyond the minimum requirement for any plausible nondelegation principle, they should work, at least in theory, because they

enforcement of lenity is notoriously sporadic"); Lawrence M. Solan, *Law, Language, and Lenity*, 40 WM. & MARY L. REV. 57, 58 (1998) ("Although widely accepted, the rule [of lenity] is by no means adhered to universally."). Some believe that the maxim does no work in practice. See John Calvin Jeffries, Jr., *Legality, Vagueness, and the Construction of Penal Statutes*, 71 VA. L. REV. 189, 199–200 (1985) ("[T]he construction of penal statutes no longer seems guided by any distinct policy of interpretation; it is essentially ad hoc.").

Similarly, the *Chevron* doctrine functions like a prodelegation canon but calls for the same line drawing. See *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842–45 (1984). As discussed below, *Chevron* hinges on the judicial ability to draw a line between decisions expressly made by Congress and decisions resting on agency discretion derived from an ambiguous organic act. See *infra* text accompanying notes 66–72. Although full consideration of the practical success or failure of that framework is beyond this Essay's scope, it is worth noting that some commentators have found that the Court has effectively gutted *Chevron* by applying the tools of statutory interpretation aggressively to find congressional clarity even when the relevant evidence does not point clearly in one direction. See Richard J. Pierce, Jr., *The Supreme Court's New Hypertextualism: An Invitation to Cacophony and Incoherence in the Administrative State*, 95 COLUM. L. REV. 749, 754–62 (1995) (arguing that the Court is too quick to find that Congress has clearly addressed an issue that should, in fact, be viewed as sufficiently ambiguous to trigger *Chevron* deference); Peter L. Strauss, *On Resegregating the Worlds of Statute and Common Law*, 1994 SUP. CT. REV. 429, 444–47 (same). Empirical studies have fallen on both sides of the question whether *Chevron* has affected judicial behavior. Compare, e.g., Peter H. Schuck & E. Donald Elliott, *To the Chevron Station: An Empirical Study of Federal Administrative Law*, 1990 DUKE L.J. 984, 1059 (arguing that in its early years, *Chevron* had a significant effect on the behavior of the courts of appeals), with Linda R. Cohen & Matthew L. Spitzer, *Judicial Deference to Agency Action: A Rational Choice Theory and an Empirical Test*, 69 S. CAL. L. REV. 431, 474–75 (1996) ("Our tests show that the Court does not uniformly endorse judicial deference, but rather does so discriminately in the years where the doctrine yields policy outcomes more to the Court's liking."), and Thomas W. Merrill, *Textualism and the Future of the Chevron Doctrine*, 72 WASH. U. L.Q. 351, 359 (1994) ("The most general finding of the survey [of Supreme Court cases preceding and postdating *Chevron*] was that *Chevron* had not made a dramatic difference in the frequency with which the Supreme Court deferred to agency interpretations of statutes."), and Thomas J. Miles & Cass R. Sunstein, *Do Judges Make Regulatory Policy?: An Empirical Investigation of Chevron*, 73 U. CHI. L. REV. 823, 826 (2006) (finding it "unclear" whether *Chevron* affects whatever the Justices' baseline tendency is to vote along the lines of their policy predispositions in statutory cases).

assign the full burden of uncertainty to those who would intrude upon the value protected by a particular canon. Judges, however, may tend to bridle at such a requirement; whether consciously or not, they may find it easy to confuse what they think is the *most likely* reading of a statute with a *clear* reading of a statute. If so, then clear statement rules—and the nondelegation principles they (over)enforce—may end up deteriorating into something that looks more like ordinary interpretation. If so, perhaps nondelegation canons are more trouble than they are worth.⁶³

Even if one accepts these concerns, however, Professor Sunstein's insight about nondelegation canons—which he carefully confines to the context of agency-administered statutes⁶⁴—still offers an elegant answer to a question that has become pressing in administrative law: whether *Chevron* deference should be available in a case in which the

63 Of course, instead of calibrating degrees of ambiguity, one might try to implement nondelegation canons by eliminating particular elements of interpretation that facilitate interpreter discretion. At least sometimes, for example, the Supreme Court seems to rule out the use of legislative history to identify a clear statement. See William N. Eskridge, Jr. & Philip P. Frickey, *Quasi-Constitutional Law: Clear Statement Rules as Constitutional Lawmaking*, 45 VAND. L. REV. 593, 597 (1992); see also, e.g., *Dellmuth v. Muth*, 491 U.S. 223, 230 (1989) (“Legislative history generally will be irrelevant to a judicial inquiry into whether Congress intended to abrogate the Eleventh Amendment.”); *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 242 (1985) (“Congress may abrogate the States’ constitutionally secured immunity from suit in federal court only by making its intention unmistakably clear in the language of the statute.”). One might ask whether such cases offer the potential for an alterative, and more judicially manageable, form of nondelegation canon.

To be sure, some believe that a tool such as legislative history enhances an interpreter's discretion by permitting judges “to look out over the heads of the crowd and pick out [their] friends.” Scalia, *supra* note 42, at 36 (attributing the quip to Judge Harold Leventhal). Others believe that legislative history confers no more discretion than other interpretive techniques—and may confer less. See, e.g., Eskridge, *supra* note 17, at 1547 (arguing that sources of textual meaning may give interpreters no less discretion than legislative history); Jerry L. Mashaw, *Textualism, Constitutionalism, and the Interpretation of Federal Statutes*, 32 WM. & MARY L. REV. 827, 836 (1991) (arguing that reliance on legislative history may actually confine the open texture of statutory language). I have elsewhere suggested that some uses of legislative history do present nondelegation problems. See John F. Manning, *Textualism as a Nondelegation Doctrine*, 97 COLUM. L. REV. 673, 697 (1997) (making such an argument about the use of legislative history as authoritative evidence of legislative intent). If, however, one takes seriously the nondelegation argument for excluding such tools of construction, the rationale does not seem easy to confine to the sphere of discrete nondelegation canons. Exploring that complex question is not necessary to address the simpler claim I advance here: holding one's method of interpretation constant, it entails arbitrary line drawing to identify the level of background ambiguity at which statutory outcomes cross the line from congressional choice to executory discretion.

64 See Sunstein, *supra* note 1, at 340.

agency interprets its organic act to preempt state law.⁶⁵ If one takes the guiding rationale of Sunstein's nondelegation canons seriously, the Court should find it straightforward to forgo the *Chevron* framework in the sensitive contexts governed by such canons. If so, nondelegation canons would, at the very least, serve an important sorting function under present administrative law doctrine—a function, moreover, that is judicially administrable (up to a point).

Here is why: *Chevron* is a prodelegation canon.⁶⁶ Within its specified domain,⁶⁷ *Chevron* presupposes that when Congress has spoken unambiguously, a reviewing court—and the agency itself—must respect Congress' clearly expressed instructions.⁶⁸ If, however, the organic act is “silent or ambiguous with respect to the specific issue,” the reviewing court must accept the agency's interpretation as long as it is “permissible” or “reasonable.”⁶⁹ This two-step analysis is the flip-side of a nondelegation canon. If an ambiguous organic act leaves open a question of policymaking discretion,⁷⁰ it is preferable in our representative system to assume that Congress intended to delegate that discretion to more accountable agencies rather than to less accountable courts.⁷¹

65 See, e.g., Mendelson, *supra* note 23, at 755–58 (arguing that if agencies pay sufficient attention to the interest of states, federalism interests may not require courts to forebear from giving *Chevron* deference to agency interpretations of statutes that result in preemption); Merrill, *supra* note 23 (manuscript at 65) (contending that *Chevron* deference should apply only “where Congress has expressly delegated authority to the agency to preempt and the agency has exercised this delegated authority”); Sharkey, *supra* note 23 (manuscript at 166–73) (relying on comparative institutional competence to argue that reviewing courts should accept persuasive agency determinations that national uniformity is warranted on a particular regulatory issue).

66 See Sunstein, *supra* note 1, at 329 (describing *Chevron* as “the quintessential prodelegation canon”).

67 The Court has confined *Chevron* to an agency's implementation of delegated authority to act with legally binding effect. See *United States v. Mead Corp.*, 533 U.S. 218, 229–31 (2001).

68 See *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842–43 (1984) (“If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress.”).

69 *Id.* at 843–44.

70 See, e.g., Richard J. Pierce, Jr., *Chevron and Its Aftermath: Judicial Review of Agency Interpretations of Statutory Provisions*, 41 VAND. L. REV. 301, 307–08 (1988) (noting that ambiguity in an organic act creates space for the agency's exercise of policymaking discretion); Laurence H. Silberman, *Chevron—The Intersection of Law & Policy*, 58 GEO. WASH. L. REV. 821, 822 (1990) (same).

71 See Thomas W. Merrill, *Judicial Deference to Executive Precedent*, 101 YALE L.J. 969, 978 (1992) (“In order to make deference a general default rule, the Court had to come up with some *universal* reason why administrative interpretations should be pre-

The resultant prodelegation canon seems vulnerable to judicial administrability concerns no different from those of nondelegation canons; although looking at the problem from opposite sides of the line, each inquiry requires courts to identify a line between congressional choice and executory discretion.⁷² When juxtaposed against each other, however, these two types of canons may offer meaningful (though ultimately incomplete)⁷³ boundary-drawing potential. Accordingly, if an agency wishes to defend a preemptive interpretation on the ground that it is entitled to *Chevron* deference, that agency is (by definition) asking the reviewing court to defer to the agency's exercise of delegated policymaking discretion. That being the case, if the presumption against preemption is indeed properly understood as a nondelegation canon, any agency request for *Chevron* deference would itself suffice to trigger the canon, thereby precluding the agency from effecting its preemptive goals.⁷⁴ On that assumption, the

ferred to the judgments of Article III courts. Democratic theory supplied the justification"); Richard J. Pierce, Jr., *The Role of the Judiciary in Implementing an Agency Theory of Government*, 64 N.Y.U. L. REV. 1239, 1256 (1989) (describing *Chevron* as "an effort to reconcile the administrative state with the principles of democracy"). The *Chevron* Court thus explained:

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

Chevron, 467 U.S. at 865–66; see also *Smiley v. Citibank (S.D.), N.A.*, 517 U.S. 735, 740–41 (1996) (ascribing *Chevron* deference to the "presumption that Congress . . . understood that the ambiguity would be resolved, first and foremost, by the agency, and desired the agency (rather than the courts) to possess whatever degree of discretion the ambiguity allows").

⁷² See *supra* note 62.

⁷³ See *infra* text accompanying notes 76–77.

⁷⁴ Although not precisely analogous, the courts have relied on an agency's own request for deference as a way to establish the presence of legally decisive ambiguity in at least one other area. A central assumption of due process is that persons must be "free to steer between lawful and unlawful conduct." *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972). Accordingly, legal rules must give persons of "ordinary intelligence a reasonable opportunity to know what is prohibited, so that [they] may act accordingly." *Id.* Where an agency attempts to impose a penalty or deny a benefit

agency would always have to defend preemption decisions on the merits without the benefit of judicial deference. As Professor Sunstein argues, in matters governed by a nondelegation canon like the presumption against preemption, *Chevron* deference should therefore be a nonstarter.⁷⁵

Even though this conclusion about *Chevron* represents one judicially administrable implication of nondelegation canons, however, it ultimately falls short of a complete solution. The Court's refusal to apply *Chevron* would require an agency to defend a preemption decision on the merits of the underlying statutory analysis.⁷⁶ Looking at the question from the perspective of de novo review, a reviewing court applying the presumption against preemption would still have to determine whether the statute resolved the preemption question clearly enough to satisfy the nondelegation impulse implicit in the presumption. That inquiry, in turn, would require court to answer these questions: Does the interpretation at issue reflect too much ambiguity to attribute it to congressional choice rather than executory discretion? And just how much is too much? As we have seen, from a standpoint of judicial administrability, those questions may have no good answer.⁷⁷

based on an interpretation of a regulation that it deems to be sufficiently ambiguous to warrant deference, the agency must be able to show that it has given the disadvantaged party specific advance notice of that interpretation. *See, e.g.,* Ga. Pac. Corp. v. Occupational Safety & Health Review Comm'n, 25 F.3d 999, 1005–06 (11th Cir. 1994); Kropp Forge Co. v. Sec'y of Labor, 657 F.2d 119, 123–24 (7th Cir. 1981); Dravo Corp. v. Occupational Safety & Health Review Comm'n, 613 F.2d 1227, 1232 (3d Cir. 1980); Diamond Roofing Co. v. Occupational Safety & Health Review Comm'n, 528 F.2d 645, 649–50 (5th Cir. 1976). In effect, the agency's assertion of entitlement to deference is taken to be an acknowledgment of sufficient ambiguity to raise concerns about adequate notice.

⁷⁵ *See* Sunstein, *supra* note 1, at 330 (arguing that, where applicable, nondelegation canons negate *Chevron* deference).

⁷⁶ At least one commentator has argued that a reviewing court should review an agency's preemption decision under the intermediate deference framework of *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944), which directs judges to give an agency interpretation the "weight" warranted by "the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control." *Id.* at 140; *see* Sharkey, *supra* note 23 (manuscript at 143–51). As discussed above, my sense is that if one were to take the idea of nondelegation canons seriously, the minimum requirement would be that reviewing courts decline to defer to agency decisions to preempt state law. *See supra* text accompanying notes 64–75.

⁷⁷ *See supra* Part II.A.