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## Administrative Federalism as Separation of Powers

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# Administrative Federalism as Separation of Powers

David S. Rubenstein\*

## *Abstract*

*Federal agencies are key players in our federalist system: they make front-line decisions about the scope of federal policy and whether such policy should preempt state law. How agencies perform these functions, and how they might fulfill them better, are questions at the heart of “administrative federalism.” Some academic proposals for administrative federalism work to enhance states’ ability to participate in federal agency decisionmaking. Other proposals work to protect state autonomy through adjustments to the Supreme Court’s administrative preemption doctrine. As jurists and scholars debate what these proposals entail for federalism, this Article doubles-down with a twist: it examines what these same proposals can do for separation of powers.*

*As uncovered here, adjustments to the administrative system—although made in federalism’s name—will derivatively affect how national law is made and checked along the separation-of-powers dimension. Moreover, as shown here, federalism-inspired proposals for the administrative system may require a tradeoff in constitutional values. Pushed to decide, we might choose federalism over separation of powers, or vice versa. This Article informs that choice by comparing and contrasting*

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*what administrative federalism's major proposals entail for federalism and separation of powers, simultaneously.*

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### I. Introduction

This Article plies the cross-dimensional channels between federalism and separation of powers.<sup>1</sup> More specifically, it provides the inaugural study of what a particularly salient brand of federalism—“administrative federalism”<sup>2</sup>—can do for a long-tortured separation of powers around the administrative state.<sup>3</sup>

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1. See *infra* Part II.D (situating this Article within an emerging scholarship on cross-dimensional structuralism).

2. See *infra* Parts II & III (discussing administrative federalism); see also Stuart Minor Benjamin & Ernest A. Young, *Tennis with the Net Down: Administrative Federalism Without Congress*, 57 DUKE L.J. 2111, 2132–37 (2008) (describing the “surprising amount of interest” devoted to administrative federalism); Gillian E. Metzger, *Federalism and Federal Agency Reform*, 111 COLUM. L. REV. 1, 9–10 nn.26–28 (2011) [hereinafter Metzger, *Agency Reform*] (noting that administrative preemption has taken center stage in preemption debates).

3. See *FTC v. Ruberoid Co.*, 343 U.S. 470, 487 (1952) (Jackson, J., dissenting) (claiming that the administrative state “has deranged our three-branch legal theories”); Lisa Schultz Bressman, *Beyond Accountability: Arbitrariness and Legitimacy in the Administrative State*, 78 N.Y.U. L. REV. 461, 462 (2003) [hereinafter Bressman, *Beyond Accountability*] (“From the birth of the administrative state, we have struggled to describe our regulatory government as the legitimate child of a constitutional democracy.”).

Administrative federalism is partly a descriptive term for the role that agencies play in shaping the federal–state balance of power today. More so, however, administrative federalism is a visionary project designed to shape federalism’s future through adjustments to the existing administrative system. Increasingly, agencies make front-line decisions about the scope of federal policy and whether such policy should preempt state law. But, at the heart of administrative federalism’s prescriptive agenda are questions about how agencies might better fulfill these functions in pursuit of one, or some other, federalist ideal.<sup>4</sup>

Some academic proposals for administrative federalism aim to enhance states’ participatory role in administrative processes; for instance, by requiring agencies to consult state officials before taking action that might implicate state prerogatives.<sup>5</sup> Other proposals work to protect state autonomy through adjustments to the Supreme Court’s preemption doctrine; for instance, by limiting it or making it more difficult for agencies to preempt competing state law.<sup>6</sup> As jurists and scholars debate what these and other proposals entail for federalism, this Article doubles-down with a twist: it examines what these same proposals entail for the federal separation of powers.

Although administrative federalism may be a surprising source of separation-of-powers innovation, the administrative system is hardly in a position to reject the bid. It is common fare that agencies distort our three-branch model of federal government.<sup>7</sup> Despite the Constitution’s vesting of “all” legislative

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4. See *infra* Part II.C (canvassing a number of different conceptions of federalism).

5. See *infra* Part III.B and IV.B (discussing and evaluating these proposals).

6. See *infra* Part IV.A (discussing and evaluating these proposals).

7. See, e.g., Cynthia R. Farina, *The Consent of the Governed: Against Simple Rules for a Complex World*, 72 CHI.-KENT L. REV. 987, 987 (1997); Jerry L. Mashaw, *Small Things Like Reasons Are Put in a Jar: Reason and Legitimacy in the Administrative State*, 70 FORDHAM L. REV. 17, 19–26 (2001); Mark Seidenfeld, *A Civic Republican Justification for the Bureaucratic State*, 105 HARV. L. REV. 1511, 1512 (1992) [hereinafter Seidenfeld, *Justification*]; Sidney Shapiro et al., *The Enlightenment of Administrative Law: Looking Inside the Agency for Legitimacy*, 47 WAKE FOREST L. REV. 463, 463 (2012).

power in Congress,<sup>8</sup> the Executive Branch (through agencies) makes the vast majority of federal law today.<sup>9</sup> Moreover, many agencies combine lawmaking, executive, and judicial functions—a combination that James Madison decried as the “very definition of tyranny”<sup>10</sup> and that arguably violates Articles I, II, and III of the Constitution simultaneously.<sup>11</sup> The result is an enormously powerful, yet constitutionally insecure, administrative machine.<sup>12</sup> Although these are familiar points in administrative law,<sup>13</sup> they remain mostly inchoate in debates over administrative federalism.

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8. U.S. CONST. art. I, § 1.

9. See *INS v. Chadha*, 462 U.S. 919, 985–86 (1983) (White, J., dissenting) (noting that “the sheer amount of law” made by agencies has “far outnumbered the lawmaking engaged in by Congress through the traditional process” for some time).

10. THE FEDERALIST NO. 47 (James Madison) (“The accumulation of all powers, legislative, executive, and judiciary, in the same hands . . . may justly be pronounced the very definition of tyranny.”).

11. See Jacob E. Gersen, *Unbundled Powers*, 96 VA. L. REV. 301, 305 (2010) (suggesting that combination in agencies of the legislative, executive, and judicial power “has long been an embarrassment for constitutional law”); Gary Lawson, *The Rise and Rise of the Administrative State*, 107 HARV. L. REV. 1231, 1232 (1994) (providing an originalist treatment of this claim).

12. On the sheer size of the administrative bureaucracy, relative to Congress, see Eric A. Posner, *Imbalance of Power*, Feb. 7, 2014, <http://ericposner.com/imbalance-of-power/> (last visited Feb. 15, 2015) (showing that over time “the ratio of federal (civilian, non-post office) employees to legislative employees (Congress and its staff)” has increased from approximately 10:1 in the early years of the New Deal to nearly 44:1 in 2010) (on file with the Washington and Lee Law Review). And the leviathan is growing. See *City of Arlington v. FCC*, 133 S. Ct. 1863, 1878 (2013) (Roberts, C.J., dissenting) (noting that “in the last 15 years, Congress has launched more than 50 new agencies. . . . And more are on the way” (internal citations omitted)).

13. See, e.g., Lawson, *supra* note 11, at 1231 (“The post-New Deal administrative state is unconstitutional, and its validation by the legal system amounts to nothing less than a bloodless constitutional revolution.”); see also *City of Arlington*, 133 S. Ct. at 1878 (Roberts, C.J., dissenting) (discussing the uneasy fit of the modern administrative state in our constitutional structure); Cynthia R. Farina, *Statutory Interpretation and the Balance of Power in the Administrative State*, 89 COLUM. L. REV. 452, 526 (1989) [hereinafter Farina, *Statutory Interpretation*] (exploring the issues raised by reallocating regulatory powers).

As developed here, however, variations in how agencies decide the reach and preemptive effect of federal policies (along the federalism dimension) can indirectly influence how national law is made and checked by the federal branches (along the separation-of-powers dimension). Take, for example, the administrative federalism proposal that would require agencies to use notice-and-comment procedures before preempting state law.<sup>14</sup> This proposal's intended federalism effects are to afford states a participatory role in agencies' preemption decisions and, relatedly, to slow the pace of those decisions. As will be shown, however, this same proposal indirectly triggers heightened political and judicial checks on agency action, which are key features of modern separation-of-powers theory.<sup>15</sup> Still, might a competing administrative federalism proposal—such as eliminating agencies' ability to preempt state law—promote separation of powers differently, or better, by requiring Congress to make (rather than delegate) more decisions of national concern?

This type of comparative analysis presents an opportunity: appreciation for how administrative federalism *affects* separation of powers opens new lines of thinking about which proposals, relative to others, can best *promote* one, or some other, version of separation of powers. That is, without denying federalism its due, we should consider ways to harness administrative federalism in service of our whole structural system.

Indeed, administrative federalism may be an especially profitable resource for promoting separation of powers. First, administrative federalism has captured the attention of the Court,<sup>16</sup> President,<sup>17</sup> Congress,<sup>18</sup> and academy.<sup>19</sup> To the extent this

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14. For further discussion of this proposal, see *infra* Part IV.A.3.

15. See *infra* Part B (discussing the evolution of separation of powers theory as relates to administrative governance).

16. See David S. Rubenstein, *The Paradox of Administrative Preemption*, 38 HARV. J. L. & PUB. POL'Y 267, 278–82 (2015) [hereinafter Rubenstein, *Paradox*] (discussing some of the Court's recent treatments of administrative preemption), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2379627](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2379627).

17. See Memorandum on Preemption, 2009 DAILY COMP. PRES. DOC. 384 (May 20, 2009) (advising executive agencies to understand the legitimate prerogatives of the states before preempting a state law, and outlining steps

movement instigates change, perhaps separation of powers can ride administrative federalism's coattails. Second, administrative federalism's impact on separation of powers will be indirect and thus relatively modest. This modesty may be a virtue, given that direct and more robust approaches to safeguarding separation of powers in and around the administrative state tend to face greater resistance. Resuscitating the nondelegation doctrine, for example, is a non-starter.<sup>20</sup> Meanwhile, separating legislative, executive, and judicial functions within agencies occurs only as a matter of grace, only rarely, and not as a matter of constitutional law.<sup>21</sup> These features of modern government are too entrenched and, most believe, too important to uproot.<sup>22</sup> Because we will not have separation-of-powers purity, second-best options in the form of checks-and-balances tend to be the only viable alternatives.<sup>23</sup>

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that agencies should take in making preemption decisions); *see also* Exec. Order No. 13,132, 64 Fed. Reg. 43255 (Aug. 4, 1999) (emphasizing the importance of early consultation with state and local officials).

18. *Regulatory Preemption: Are Federal Agencies Usurping Congressional and State Authority? Before the S. Comm. on the Judiciary*, 110th Cong. 7 (2007); *see also* Catherine M. Sharkey, *Inside Agency Preemption*, 110 MICH. L. REV. 521, 555–61 (2012) [hereinafter Sharkey, *Inside Agency Preemption*] (discussing recent congressional concern and attention to administrative preemption in hearings and as reflected in the Dodd–Frank Wall Street Reform and the Consumer Product Safety Improvement Act).

19. *See infra* Part IV (exploring recent academic scholarship on administrative federalism).

20. *See, e.g.,* Richard J. Pierce Jr., *The Role of Constitutional and Political Theory in Administrative Law*, 64 TEX. L. REV. 469, 490 (1985) (“The abstract appeal of the [nondelegation] doctrine vanishes rapidly . . . when it is tested in the crucible of reality.”).

21. *See* Lawson, *supra* note 11, at 1233–49 (describing how agencies generally “flout[] almost every important structural precept of the American constitutional order”).

22. *See, e.g., id.* at 1232 (“[T]he essential features of the modern administrative state have . . . been taken as unchallengeable postulates by virtually all players in the legal and political worlds . . .”); Peter B. McCutchen, *Mistakes, Precedent, and the Rise of the Administrative State: Toward a Constitutional Theory of the Second Best*, 80 CORNELL L. REV. 1, 17 (1994) (“Neither the cases sanctioning open-ended delegations of legislative power nor those broadly interpreting the commerce clause will be overturned.”).

23. *See infra* note 62 and accompanying text (discussing checks and



Administrative federalism is opportunity knocking, albeit at the side door.

Approaching questions of administrative federalism through a cross-dimensional lens is also prudent. As will be shown, federalism-inspired proposals may be at cross-purposes with some conceptions of separation of powers.<sup>24</sup> We should want to know when that is the case because a tradeoff in constitutional values may be required. For instance, enhancing states' participatory role in administrative federalism decisions might bring us closer to some federalist ideal but, at the same time, take us further from some separation-of-powers ideal. Of course, what's "ideal" for federalism and separation of powers are matters of taste and unrelenting debate. For that reason, this Article brackets those normative judgments as much as possible. Instead, this Article's critical move is to bring federalism and separation of powers to the same table: as we ask what administrative federalism can do for federalism, we should also be asking what it can do for separation of powers. Given that variances in administrative federalism will affect separation of powers in different ways, it seems hazardous not to think in these cross-dimensional terms. To be sure, the cross-dimensional approach advanced here will not deliver universal answers about how to shape administrative federalism going forward. But it offers better purchase on the structural stakes inhering in those decisions.

This Article proceeds as follows. Part II provides context and contour for this Article's cross-dimensional approach to administrative federalism. History proves that federalism and separation of powers are not homeostatic concepts: today, we have many theories of federalism(s) and many theories of separation(s) of powers.<sup>25</sup> This "structural pluralism," as I call it,

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balances).

24. See *infra* notes 97–103 and accompanying text (discussing the effect of administrative federalism on separation of powers).

25. See Heather Gerken, *Our Federalism(s)*, 53 WM. & MARY L. REV. 1549, 1550–52 (2012) [hereinafter Gerken, *Federalism(s)*] (tracing some of the various conceptions of federalism, and arguing that no one theory exists to "rule them all"); Jonathan Michaels, *An Evolving, Enduring Separation of Powers*, 115 COLUM. L. REV. (forthcoming 2015) (manuscript at 1–35) (tracing some of the

provides the vocabulary and grammar needed to understand the variability in how administrative federalism and separation of powers intersect. Part III describes the role of states in administrative governance, as shaped by existing judicial doctrines, legal instruments, and more informal arrangements. Part IV turns to the main event: first, it compares and contrasts what the major proposals for administrative federalism portend for our various conceptions of federalism(s); second, it mines what these same proposals entail for separation(s) of powers, and why it matters.

## *II. Structural Pluralism*

Our constitutional structure is conventionally depicted two-dimensionally: horizontally, power is dispersed among the federal branches; and vertically, power is dispersed between federal and state governments.<sup>26</sup> This two-dimensional model usefully captures the Founders' vision of separation of powers and federalism as two parts of an integrated system, working together to secure the people's liberty.<sup>27</sup> What this model fails to capture, however, is how separation of powers and federalism interact, or could interact, toward their common end. In short, what's missing is a third cross-dimension, keyed to the contemporary relationships between separation of powers and federalism. This Article is part of a nascent scholarship that seeks to understand,

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various conceptions of separation of powers), *available at* [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2444396](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2444396); *see also infra* Part II (discussing these structural transformations).

26. *See* Victoria Nourse, *The Vertical Separation of Powers*, 49 DUKE L.J. 749, 750–52 (1999) (describing our system of government as “three branches of government arranged horizontally along functional lines” and vertically separated between the three branches of federal government and the states (footnote and quotations omitted)).

27. *See* THE FEDERALIST NO. 51 (James Madison) (“In the compound republic of America, the power surrendered by the people is first divided between two distinct governments, and then the portion allotted to each subdivided among distinct and separate departments. Hence a double security arises to the rights of the people.”).

and harness, that relationship.<sup>28</sup> First, however, this Part provides the building blocks: understanding how federalism and separation of powers connect in general, and in the ways developed here, requires appreciation for the pieces being connected.

Subpart A begins with a brief account of the origins of separation of powers and federalism, and the values they were designed to serve. Subpart B describes the transformation to our modern separation(s) of powers with an emphasis on the administrative state. Subpart C describes our federalism(s), contextualizing where administrative federalism fits in. Subpart D outlines this Article's approach to administrative federalism, situating it within a broader project of cross-dimensional study.

### A. Origins

Horizontally, the Constitution vests the “legislative power” in Congress,<sup>29</sup> the “executive” power in the President,<sup>30</sup> and the “judicial” power in the Courts.<sup>31</sup> Layered within this separation is a system of checks and balances, whereby certain federal action is made dependent on the consent or participation of multiple institutions.<sup>32</sup> This tripartite division of functions was designed to secure liberty, in part, by diffusing federal power.<sup>33</sup> The inability of any branch to dominate, on its own, was hoped to promote deliberation, representational accountability, and the rule of law.<sup>34</sup> To be sure, this system of separated and balanced power

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28. See *infra* Part II.D (discussing this movement and situating where a cross-dimensional approach to administrative federalism fits in).

29. U.S. CONST. art. I, § 1.

30. U.S. CONST. art. II, § 1.

31. U.S. CONST. art. III, § 1.

32. See, e.g., U.S. CONST. art. I, § 7 (providing the President with veto power over legislation).

33. THE FEDERALIST NO. 10 (James Madison); Cass R. Sunstein, *Constitutionalism After the New Deal*, 101 HARV. L. REV. 421, 434–36, 446 (1987) [hereinafter Sunstein, *New Deal*].

34. THE FEDERALIST NO. 51 (James Madison); Abner S. Greene, *Checks and Balances in an Era of Presidential Lawmaking*, 61 U. CHI. L. REV. 123, 132, 184

was expected to result in some government inefficiency.<sup>35</sup> But the defeat of “a few good laws” was thought to be “amply compensated by the advantage of preventing a number of bad ones.”<sup>36</sup>

Vertically, the Constitution divides federal and state governments.<sup>37</sup> The Founders hoped this arrangement would advance the political marketplace as each level of government competed for the people’s loyalty.<sup>38</sup> States could garner public support by passing favorable laws and by bringing politics closer to the people.<sup>39</sup> Importantly, states would not only compete with each other but also with the central federal government.<sup>40</sup> Again, though not necessarily efficient, the decentralization of power and the competition for political favor hoped to provide a critical

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(1994); *see also* *INS v. Chadha*, 462 U.S. 919, 951 (1983) (“The division of the Congress into two distinctive bodies assures that the legislative power would be exercised only after opportunity for full study and debate in separate settings.”). These institutional rivalries, however, were not guaranteed—and history has proved the rivalries to be politically contingent. *See* Daryl J. Levinson & Richard H. Pildes, *Separation of Parties, Not Powers*, 119 *HARV. L. REV.* 2311, 2319 (2006) (“Madison’s design was eclipsed almost from the outset by the emergence of robust democratic political [party] competition.”).

35. *See* *THE FEDERALIST NO. 62* (James Madison) (acknowledging that “check[s] on legislation may in some instances be injurious as well as beneficial”).

36. *THE FEDERALIST NO. 73* (Alexander Hamilton).

37. *See* U.S. CONST. amend. X (“The powers not delegated to the United States by the Constitution . . . are reserved to the States respectively, or to the People.”).

38. *See* Akhil Reed Amar, *Of Sovereignty and Federalism*, 96 *YALE L.J.* 1425, 1450 (1987) (“As with separation of powers, federalism enabled the American People to conquer government power by dividing it.”); Robert F. Nagel, *Federalism as a Fundamental Value: National League of Cities in Perspective*, 1981 *SUP. CT. REV.* 81, 100 (“[T]he Federalists understood and emphasized that influence through electoral politics presupposes that state governments would exist as alternative objects of loyalty to the national government.”).

39. *See* *THE FEDERALIST NO. 46* (James Madison) (noting that “a greater number of individuals will expect to rise” into state government).

40. *See* Amar, *supra* note 38, at 1500–01 (“The People could confidently confer broad powers upon national agents precisely because they had also created a second set of specialized agents to monitor the first set . . .”).

check against an overweening federal government.<sup>41</sup> Critically, however, the idea that states would provide decentralized venues for politics and policy required leaving states something meaningful to do.<sup>42</sup> Toward that end, the Founders sought to limit federal power by enumerating the subject matters over which it could attach.<sup>43</sup> As Chief Justice Marshall famously pronounced in *Gibbons v. Ogden*, the enumeration of Congress's powers "presupposes something not enumerated"<sup>44</sup> over which the states would retain autonomy.<sup>45</sup>

The Founders fully appreciated that the Constitution's parchment boundaries would be elusive and dynamic.<sup>46</sup> James Madison prophesized that the Constitution would be "more or less obscure and equivocal, until [its] meaning be liquidated and ascertained."<sup>47</sup> History has proven this dictum mostly

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41. *Id.*; see also *Gregory v. Ashcroft*, 501 U.S. 452, 458 (1991) ("Perhaps the principal benefit of the federalist system is a check on abuses of government power.").

42. See Ernest A. Young, *The Rehnquist Court's Two Federalisms*, 83 TEX. L. REV. 1, 52 (2004) ("Just having state governments is not enough; those governments need to have meaningful things to do."); James A. Gardner, *The Myth of State Autonomy: Federalism, Political Parties, and the National Colonization of State Politics*, 29 J.L. & POL. 1, 1 (2013) ("American federalism contemplates that states will retain a significant degree of autonomy so that state power can serve as a meaningful counterweight to national power.").

43. See U.S. CONST. art. I, §§ 1, 8, 18 (providing examples of constitutional provisions limiting federal power); THE FEDERALIST NO. 45 (James Madison) ("The powers delegated by the proposed Constitution to the federal government are few and defined."); see also Lynn A. Baker & Ernest A. Young, *Federalism and the Double Standard of Judicial Review*, 51 DUKE L.J. 75, 139 (2001) ("[T]he recognition of limits on federal regulatory authority will increase the sphere of individual autonomy.").

44. 22 U.S. 1, 195 (1824).

45. See U.S. CONST. amend. X ("The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.").

46. See THE FEDERALIST NO. 37 (James Madison) ("[N]o skill in the science of government has yet been able to discriminate and define, with sufficient certainty, its three great provinces the legislative, executive, and judiciary. . . . Questions daily occur in the course of practice which prove the obscurity which reigns in these subjects . . .").

47. *Id.*

right.<sup>48</sup> Changed circumstances have altered the relationships between our government institutions, time and again.<sup>49</sup> Our contemporary understandings of separation(s) of powers and federalism(s) have mostly developed along separate tracks, which is how I treat them in Subparts B and C below. Later Parts will revisit the relationship between them.

### *B. Separation(s) of Powers*

The operation of modern government poses significant challenges for our system of separated federal power. Chief Justice Roberts, recently writing for a three-judge dissent, hit all the familiar tropes: how agencies combine lawmaking, executive, and judicial functions; how “the administrative state wields vast power” that “touches almost every aspect” of our “social, economic and political activities;” how the President hardly controls the vast bureaucracy; how the Court defers to agencies’ interpretations of ambiguous statutes; how the “Framers could hardly have envisioned” this state of affairs and how it “would leave them rubbing their eyes” in disbelief.<sup>50</sup>

The question, then, is how to square the administrative system with separation of powers. There is not one answer; there are answers. Here, I organize them along two spectrums: (1) formalism/functionalism and (2) internal/external checks and balances.

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48. See Bruce G. Peabody & John D. Nugent, *Toward a Unifying Theory of the Separation of Powers*, 53 AM. U. L. REV. 1, 3–4 (2003) (“Indeed, on the whole, both the scholarship and jurisprudence on separated powers is marked by its inconsistency and lack of synthesis.”). The part of Madison’s prophecy that awaits is the “liquidation” and “ascertainment” of constitutional meaning. Perhaps one day, but it is doubtful.

49. See Lawrence Lessig, *Understanding Changed Readings: Fidelity and Theory*, 47 STAN. L. REV. 395, 453–72 (1995) (proposing a theory to reconcile new readings of the Constitution with past understandings of the document).

50. See *City of Arlington v. FCC*, 133 S. Ct. 1863, 1878 (2013) (Roberts, C.J., dissenting). All told, the Chief Justice granted that “it would be a bit much”—though just a *bit*—to describe this state of affairs as the Madisonian “definition of tyranny.” *Id.* at 1879. Still, he asserted, “the danger posed by the growing power of the administrative state cannot be dismissed.” *Id.*

1. *Formalism vs. Functionalism: From Separation to Checks and Balances*

The classic divide between formalism and functionalism offers competing conceptions of separation of powers. Formalism emphasizes the separateness of the federal lawmaking, executive, and judicial functions.<sup>51</sup> To a “pure” formalist, “each of the three branches has exclusive authority to perform its assigned function, unless the Constitution itself permits an exception.”<sup>52</sup> On this view, the administrative state is almost certainly unconstitutional.<sup>53</sup> But it would be incredibly destabilizing to declare the administrative state invalid.<sup>54</sup> More “moderate” formalists, therefore, adopt a “grandfathering strategy” that accepts certain aspects of the administrative governance as given.<sup>55</sup> Most notably, Congress’s delegation of policymaking and the combination of functions in agencies are quintessential examples of grandfathered arrangements.<sup>56</sup> Meanwhile, less entrenched administrative arrangements are subject to separation-of-powers purity.<sup>57</sup>

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51. See Thomas W. Merrill, *The Constitutional Principle of Separation of Powers*, 1991 SUP. CT. REV. 225, 231–32 [hereinafter Merrill, *Principle of Separation Powers*] (describing the “exclusive functions” approach embraced by pure formalists).

52. *Id.*

53. For a seminal treatment, see Lawson, *supra* note 11, at 1249 (observing that “[t]he actual structure and operation of the national government today has virtually nothing to do with the Constitution”); see also Peter L. Strauss, *The Place of Agencies in Government: Separation of Powers and the Fourth Branch*, 84 COLUM. L. REV. 573, 581 (1984) [hereinafter Strauss, *Place of Agencies*] (noting that it is “difficult to accommodate both [our modern government] and our continuing assertion that the Constitution is law”).

54. See Merrill, *Principle of Separation Powers*, *supra* note 51, at 234 (noting that formalism has been attacked for preventing the government from effectively responding to new needs).

55. See *id.* (“[P]reserving past deviations from formalist purity (like administrative agencies) based on stare decisis or a principle of historical settlement, while subjecting new innovation to scrutiny under a rigorous exclusive functions canon.”).

56. See Lawson, *supra* note 11 (describing these features of modern government as postulates).

57. See Merrill, *Principle of Separation Powers*, *supra* note 51, at 234.

Functionalism offers an alternative. It emphasizes the needs of a “working government” and generally eschews strict divisions of federal functions.<sup>58</sup> Most functionalists retain liberty as the idealized end. But a reconstituted version of checks and balances, rather than compartmentalized divisions of power, is the favored means of securing that liberty.<sup>59</sup>

## 2. *Administrative Checks and Balances: From Without and Within*

As Cynthia Farina aptly explains, the administrative state “became constitutionally tenable because the Court’s vision of separation of powers evolved from the simple (but constraining) proposition that divided powers must not be commingled, to the more flexible (but far more complicated) proposition that power may be transferred *so long as* it will be adequately controlled.”<sup>60</sup> Still, how much control? Who should control? And what type of control? This portfolio of questions has felled as many trees as it has made professors tenured.<sup>61</sup> Here, I can only sketch the array of perspectives, which I loosely group into three schools.

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58. See Peter L. Strauss, *Formal and Functional Approaches to Separation-of-Powers Questions—A Foolish Inconsistency?*, 72 CORNELL L. REV. 488, 489 (1987) [hereinafter Strauss, *Formal and Functional*] (describing the functional approach as stressing the “core function and relationship” of the three branches of government); Merrill, *Principle of Separation Powers*, *supra* note 51, at 231 (explaining that where formalists and functionalists “disagree is over what sorts of deviations are permitted from the one function—one branch equation”).

59. See Sunstein, *supra* note 33, at 495 (explaining that, for functionalists, “[t]he text of the Constitution and the intent of its drafters are relevant, but they are not sufficiently helpful in hard cases to be determinative; it is the basic structural principles that play the critical role.”). This was the Court’s approach in opinions such as *Morrison v. Olson*, which stressed that the three branches do not “operate with absolute independence.” 487 U.S. 654, 694 (1988) (quoting *United States v. Nixon*, 418 U.S. 683, 707 (1974)). The Constitution requires only that “the proper balance between the coordinate branches” be maintained. *Id.* at 695 (quoting *Nixon v. Adm’r of Gen. Servs.*, 433 U.S. 425, 443 (1977)).

60. Farina, *Statutory Interpretation*, *supra* note 13, at 487.

61. Including this professor. See generally David S. Rubenstein, *Relative Checks: Towards Optimal Control of Administrative Power*, 51 WM. & MARY L. REV. 2169 (2010) [hereinafter Rubenstein, *Relative Checks*] (offering a



The first school emphasizes *external* oversight and control of administrative agencies by the Congress, President, and Court.<sup>62</sup> The influence and contestation among these branch heads over administrative governance is thought to provide a constitutionally legitimate separation of powers.<sup>63</sup> A second school emphasizes checks and balances *from within*

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framework of “relative-checks” that works toward optimizing each branch’s primary and checking functions, depending on the type of issue involved, and the relative institutional competencies of the branches). For some other representative views, see Bressman, *Beyond Accountability*, *supra* note 3, at 471 (advancing the view that agencies are capable of controlling themselves); Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245, 2298–99 (2001) (suggesting that the President exerts significant control over agencies); Gillian E. Metzger, *The Interdependent Relationship Between Internal and External Separation of Powers*, 59 EMORY L.J. 423, 439–40 (2009) [hereinafter Metzger, *Interdependent Relationship*] (describing the shared control of courts and agency personnel over agency actions).

62. See Rubenstein, *Relative Checks*, *supra* note 61, at 2186–213 (describing these modes of external oversight and how they interact to control administrative agencies). For its part, Congress structures agencies, establishes their regulatory goals and mandates, monitors agency action through oversight committees, controls funding, and, if necessary, overrides agency action through new legislation. See Jack M. Beeraman, *Congressional Administration*, 43 SAN DIEGO L. REV. 61, 67 (2006) (describing congressional control over agencies); Matthew D. McCubbins & Thomas Schwartz, *Congressional Oversight Overlooked: Police Patrols Versus Fire Alarms*, 28 AM. J. POL. SCI. 165, 165 (1984) (same). Meanwhile, the President monitors and shapes agency action in a variety of ways, including oversight through the Office of Information and Regulatory Affairs (OIRA), the appointment and removal of agency officials, and otherwise through informal modes of influence. See Kagan, *supra* note 61, at 2298–99 (detailing the formal and informal modes through which the President can influence agency officials); Nina A. Mendelson, *Disclosing “Political” Oversight of Agency Decision Making*, 108 MICH. L. REV. 1127, 1151 (2010) (“[O]ver 90 percent of economically significant rules underwent some change or withdrawal during the OIRA review process.”); Matthew C. Stephenson, *Mixed Signals: Reconsidering the Political Economy of Judicial Deference to Administrative Agencies*, 56 ADMIN. L. REV. 657, 667 (2004) (reporting “strong evidence of presidential influence over agency policy”); Mark B. Seidenfeld, *The Role of Politics in a Deliberative Model of the Administrative State*, 81 GEO. WASH. L. REV. 1397, 1449–50 (2013) [hereinafter Seidenfeld, *Role of Politics*] (outlining presidential control).

63. For classic expositions of this approach, see Strauss, *Formal and Functional*, *supra* note 58; Strauss, *Place of Agencies*, *supra* note 53.

administrative agencies rather than from without.<sup>64</sup> Under this school of thought, the most durable and effective checks are a collection of “hard” and “soft” administrative features. Examples of hard structural features include: (1) the disaggregation of power within administrative agencies;<sup>65</sup> (2) the civil service, which is thought to serve as a counterweight to politically-appointed agency officials;<sup>66</sup> and (3) administrative processes, such as notice-and-comment rulemaking, which offer access for public participation in administrative decisionmaking.<sup>67</sup> Softer features include an administrative culture of professionalism and expertise.<sup>68</sup> On this view, agency bureaucrats can be trusted to advance the public good. Moreover, agencies will know—aided by public input—which policies best advance the collective good.<sup>69</sup>

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64. See Dawn Johnson, *Faithfully Executing the Laws: Internal Legal Constraints on Executive Power*, 54 UCLA L. REV. 1559, 1562 (2007) (advocating intra-Executive legal constraints in light of the “inherent inadequacies of the courts and Congress as external checks on the President”); Metzger, *Interdependent Relationship*, *supra* note 61, at 439–40 (explaining that “internal mechanisms often operate continuously, rather than being limited to issues that generate congressional attention or arise in the form of a justiciable challenge”).

65. See Elizabeth Magill & Adrian C. Vermeule, *Allocating Power Within Agencies*, 120 YALE L.J. 1032, 1035 (2011) (explaining that power is allocated both horizontally and vertically within agencies); Michael Asimow, *When the Curtain Falls: Separation of Functions in Federal Administrative Agencies*, 81 COLUM. L. REV. 759, 761–77, 779–81 (1981) (examining the statutory and constitutional law controlling the separation of functions in agencies); Metzger, *Interdependent Relationship*, *supra* note 61, at 426–37 (describing examples of administrative structures that serve an internal separation-of-powers function and their constitutional implications).

66. For discussions of the how the civil service arguably keeps the Executive in check, see, for example, Shapiro, *supra* note 7 (acknowledging the discretion of agencies and suggesting methods of making agencies more accountable).

67. See, e.g., JACK L. GOLDSMITH, *POWER AND CONSTRAINT* 209–10 (2012) (arguing that the President’s behavior is constrained by such processes).

68. See, e.g., Shapiro, *supra* note 7, at 463 (describing administrative law history as a series of “attempts to legitimize unelected public administration”); see also Rachel E. Barkow, *Insulating Agencies: Avoiding Capture Through Institutional Design*, 89 TEX. L. REV. 15, 20 (2010) (“Related to the goal of expertise is a desire to insulate agency decisions from the sort of political horse-trading that is anathema to impartial decision making.”).

69. See Bressman, *Beyond Accountability*, *supra* note 3, at 471 (“[R]ather

The third school emphasizes the reciprocity between internal and external controls.<sup>70</sup> For example, administrative notice-and-comment rulemaking provides access to citizens and public-interest groups, who in turn may bring grievances externally to one or more branch-heads.<sup>71</sup> Likewise, courts engaging in external judicial review depend on agency personnel to first collect information internally and to explain the agency's decisions under review.<sup>72</sup> On this account, external checks act

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than employing external constraints . . . , the [expertise] model relie[s] on internal ones.”); Hammond H. Meazell, *Presidential Control, Expertise, and the Deference Dilemma*, 61 DUKE L.J. 1763, 1771 (2012) (describing the “important role” of expertise “as an anchor of regulatory legitimacy that has shaped the relationship between courts and agencies”); Mark B. Seidenfeld, *A Syncopated Chevron: Emphasizing Reasoned Decisionmaking in Reviewing Agency Interpretations of Statutes*, 73 TEX. L. REV. 83, 90 (1994) (explaining that the expertise model rests, in large part, on “characterizing agency decisions as technical and therefore value-neutral”).

70. See, e.g., Metzger, *Interdependent Relationship*, *supra* note 61, at 437–47 (“Bringing the interdependence of internal and external separation-of-powers mechanisms to the forefront facilitates a more realistic assessment of what internal Executive Branch constraints can accomplish.”); Seidenfeld, *Role of Politics*, *supra* note 62, at 1451 (describing the limits of political control of agencies); see also David Epstein & Sharyn O’Halloran, *The Nondelegation Doctrine and the Separation of Powers: A Political Science Approach*, 20 CARDOZO L. REV. 947, 963, 966–67 (1999) (observing that agencies are influenced “by the President, by interest groups, by the courts, and by the bureaucrats themselves”).

71. See Matthew D. McCubbins & Thomas Schwartz, *Congressional Oversight Overlooked: Police Patrols Versus Fire Alarms*, in CONGRESS: STRUCTURE AND POLICY 426, 427–30 (Matthew D. McCubbins & Terry Sullivan eds., 1987) (distinguishing between police-patrol oversight and fire-alarm oversight); Patricia M. Wald & Jonathan R. Siegel, *The D.C. Circuit and the Struggle for Control of Presidential Information*, 90 GEO. L.J. 737, 739 (2002) (explaining that the Freedom of Information Act “gave ordinary citizens, for the first time, legal rights to a large amount of formerly secret government information”). *But cf.* David B. Spence, *Managing Delegation Ex Ante: Using Law to Steer Administrative Agencies*, 28 J. LEGAL STUD. 413, 417–19 (1999) (describing the lack of empirical support for the structure and process hypothesis).

72. See Metzger, *Interdependent Relationship*, *supra* note 61, at 445 (noting that courts have invoked their dependency on agency personnel “to justify the requirement that agencies disclose underlying information and offer detailed explanations of their decisions”).

mostly to deter misguided agency action but in a relaxed form that accounts for internal checks and balances.<sup>73</sup>

In short, the oldest question of administrative law has many answers and no clear winners. These answers will become relevant again in Part IV, which explores what administrative federalism can do for separation(s) of powers in and around the administrative state. First, however, the analysis hooks back to the oldest question of constitutional law—federalism—and the plurality of viewpoints that it likewise has generated. These too will be relevant in Part IV, which unpacks how different proposals for administrative federalism favor different conceptions of federalism(s).

### *C. Federalism(s)*

Differences in federalism theory arise because there is little agreement about what federalism requires. Most agree that it requires dual sovereignty—the existence of both state and federal governments.<sup>74</sup> Yet there is little consensus beyond that. And, like for separation of powers, there is more than one way to slice the federalism pie. Here, I offer two: (1) along a state-authority spectrum; and (2) along a spectrum of institutional deciders.<sup>75</sup>

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73. See Michaels, *supra* note 25 (manuscript at 30) (“[B]ecause of a robust fallback system of administrative checks and balances, the courts are comfortable taking ‘a relaxed view’ of otherwise-suspect inter-branch maneuverings.”).

74. See John C. Yoo, *The Judicial Safeguards of Federalism*, 70 S. CAL. L. REV. 1311, 1336–37 (1997) (“The Constitution . . . established a government of dual sovereigns, in which the federal government exercised only limited, enumerated powers and in which the states, by virtue of the Tenth Amendment, retain substantial sovereign authority.”).

75. For a sampling of other efforts to identify the many conceptions of federalism, see Heather K. Gerken, *Foreword: Federalism All the Way Down*, 124 HARV. L. REV. 4 (2010) (distinguishing between the Supreme Court’s positive conception of federalism and scholars’ negative conception of federalism); Randy E. Barnett, *Three Federalisms*, 39 LOY. U. CHI. L.J. 285 (2008) (explaining that there are three versions of federalism, each with distinct origins); Erwin Chemerinsky, *The Assumptions of Federalism*, 58 STAN. L. REV. 1763, 1766–69 (2006) (arguing that the Supreme Court shifts between two different models of federalism); Deborah Jones Merritt, *Three Faces of*

Collectively, these approaches capture most—yet surely not all—of our federalism(s).<sup>76</sup> Still, the following account will satisfy my broader objectives, which are to situate where administrative federalism fits within the federalism landscape and to disaggregate the strands of federalism(s) within administrative federalism itself.

### *1. State Authority: Sovereignty, Autonomy, and Agency*

At one level, federalism theory divides along a spectrum of state authority, ranging from sovereignty, to autonomy, to agency. The “sovereignty-model” of federalism favors state insulation from federal interference (a negative right) and the ability of autonomous self-rule (a positive right).<sup>77</sup> Much of the Court’s pre-New Deal jurisprudence endorsed this view of federal–state separateness under the label “dual federalism.”<sup>78</sup>

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*Federalism: Finding a Formula for the Future*, 47 VAND. L. REV. 1563 (1994) (arguing that only one of the three models of federalism is compatible with political reality).

76. Judith Resnik’s recent work on “federalism(s)” catalogues a vast collection: “[A]dministrative federalism, cooperative federalism, competitive federalism, creative federalism, cultural federalism, dialectical federalism, dialogical federalism, dual federalism, fiscal federalism, intrastatutory federalism, noncategorical federalism, polyphonic federalism, territorial federalism, and the like.” Judith Resnik, *Federalism(s)’s Forms and Norms: Contesting Rights, De-Essentializing Jurisdictional Divides, and Temporizing Accommodations*, in NOMOS LV: FEDERALISM AND SUBSIDIARITY 371 (James E. Fleming & Jacob T. Levy eds., 2014).

77. See Gerken, *Federalism(s)*, *supra* note 25, at 1553 (“[C]hampions of sovereignty believe that federalism will succeed only if states enjoy the power to rule without interference in a policymaking domain of their own.”); Frank I. Michelman, *States’ Rights and States’ Roles: Permutations of “Sovereignty” in National League of Cities v. Usery*, 86 YALE L.J. 1165, 1192–95 (1977) (arguing that sovereignty is not merely an abstraction).

78. For an account of dual federalism’s history, see Roderick M. Hills, Jr., *The Political Economy of Cooperative Federalism: Why State Autonomy Makes Sense and “Dual Sovereignty” Doesn’t*, 96 MICH. L. REV. 813, 831–54 (1998). Though much of the Court’s pre-New Deal jurisprudence endorsed dual federalism, not all of it did. See Larry D. Kramer, *Putting the Politics Back into the Political Safeguards of Federalism*, 100 COLUM. L. REV. 215, 228–31, 268–69 (2000) [hereinafter Kramer, *Putting the Politics Back*] (offering a revisionist

Although dual federalism is now famously dead,<sup>79</sup> the sovereignty-model's commitment to state autonomy lives on.

Unlike the sovereignty model, the "autonomy model" does not resist regulatory subject matter overlap between federal and state governments.<sup>80</sup> For example, it is not a problem for autonomists that the federal government regulates in areas of traditional state concern.<sup>81</sup> The autonomy model, however, insists that Congress must leave states free to govern autonomously in the regulatory domains that Congress leaves to them.<sup>82</sup> That means limiting *how* the federal government interacts with states. State autonomy is breached, for example, "when the federal government dictates the structure of state governments, commandeers the energy of state administrators, or forces state enactment of particular laws."<sup>83</sup> Cases such as *New York v. United States*,<sup>84</sup> *Printz v. United States*,<sup>85</sup> and most recently, *National Federation of Independent Business v. Sebelius*,<sup>86</sup> reflect this conception of the autonomy model.<sup>87</sup>

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take on the Court's pre-New Deal federalism jurisprudence). For normative defenses of dual federalism, see Steven G. Calabresi, "A Government of Limited and Enumerated Powers": *In Defense of United States v. Lopez*, 94 MICH. L. REV. 752 (1995); Yoo, *supra* note 74, at 1404–05.

79. See generally Edwin S. Corwin, *The Passing of Dual Federalism*, 36 VA. L. REV. 1 (1950) (describing this transformation).

80. See Stephen Gardbaum, *Rethinking Constitutional Federalism*, 74 TEX. L. REV. 795, 799 (1996) (advocating for a federalism "based not on policing definitive and categorical jurisdictional boundaries . . . but on policing Congress's deliberative processes and its reasons for regulating").

81. See *id.* at 796–97 ("[W]here state power is not exclusive, there are no constitutional constraints in the name of federalism on Congress's exercise of its concurrent powers.").

82. See Merritt, *supra* note 75, at 1571 ("Congress can always narrow the orbit of state power, but it must leave the states free to govern autonomously in whatever areas are left to them.").

83. *Id.* at 1571.

84. 505 U.S. 144 (1992).

85. 521 U.S. 898 (1997).

86. 132 S. Ct. 2566 (2012).

87. See *id.* (holding that Congress could not compel states to expand Medicaid coverage); *Printz*, 521 U.S. at 935 (holding that Congress could not commandeer state officials to enforce federal gun-control laws); *New York*, 505

Within the autonomy camp, however, questions persist over how much autonomy states should have. A conventional view is that states must retain enough autonomy to exist as credible staging grounds for political and regulatory expression.<sup>88</sup> As Ernest Young explains, “[s]tates cannot function as checks on the power of the central government, or as laboratories of experimental regulation, if they lack the institutional ability to govern themselves in meaningful ways.”<sup>89</sup>

Moreover, theories differ on what even qualifies as state autonomy—and, in particular, where “cooperative federalism” schemes fit in.<sup>90</sup> The term cooperative federalism generally

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U.S. at 188 (holding that Congress could not commandeer state legislators to implement a federal program for low-level radioactive waste disposal).

88. See James A. Gardner, *Federalism and Subnational Political Community*, 127 HARV. L. REV. F. 153, 154–55 (2014) [hereinafter Gardner, *Subnational Political Community*] (expressing the view that autonomy is an essential feature of states as formal political communities); Merritt, *supra* note 75, at 1573–75 (asserting that there are “at least four values in the continued existence of autonomous state governments”); Ernest A. Young, *Two Cheers for Process Federalism*, 46 VILL. L. REV. 1349, 1395 (2001) [hereinafter Young, *Two Cheers*] (proposing that “judicial doctrines of federalism ought to be designed in such a way as to reinforce political and institutional checks on federal power”).

89. Young, *Two Cheers*, *supra* note 88, at 1358 n.42; accord Gardner, *Subnational Political Community*, *supra* note 88, at 154–55 (arguing that “effective execution of the constitutional plan requires states to be *political communities*,” which allows them “to make *independent* and *self-generated* judgments about the two most important considerations informing the contestatory dynamic of federalism: the welfare of their citizens and the performance of the federal government”). For further treatment of how states operate as a check on federal power, see Amar, *supra* note 38, at 1500–03; Deborah J. Merritt, *The Guarantee Clause and State Autonomy: Federalism for a Third Century*, 88 COLUM. L. REV. 1, 4–7 (1988); Andrzej Rapaczynski, *From Sovereignty to Process: The Jurisprudence of Federalism After Garcia*, 1985 SUP. CT. REV. 341, 380–95. For further treatment of how states operate as laboratories of regulatory experimentation, see, e.g., Merritt, *The Guarantee Clause*, at 9; Charles Fried, *Federalism—Why Should We Care?*, 6 HARV. J.L. & PUB. POL’Y. 1, 2–3 (1982).

90. For prominent examples of cooperative federalism, see 8 U.S.C. § 1357(g) (2012) (immigration); 33 U.S.C. §§ 1251–1387 (2006) (Clean Water Act); 42 U.S.C. § 1396a (2006) (Medicaid); 42 U.S.C. §§ 7401–7642 (2006) (Clean Air Act); 47 U.S.C. § 252(e)(5) (2006) (telecommunications); Dodd–Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111–203, § 1042(a)(2), 124 Stat. 1376, 2012–14 (2010) (codified at 12 U.S.C. § 5552 (2012)) (financial

connotes statutory arrangements in which states implement a federally prescribed program or goal.<sup>91</sup> Cooperative federalism arrangements position the federal and the state governments in a type of principal–agent relationship, with states acting as agent.<sup>92</sup> Because of that subordination, the autonomy model does not neatly capture cooperative-federalism arrangements.<sup>93</sup>

The “agency model,” however, aims to bring cooperative federalism into the fold.<sup>94</sup> As forcefully advanced by Jessica Bulman-Pozen and Heather Gerken, a significant and valuable power “reside[s] in the states when they play the role of federal servants.”<sup>95</sup> They explain how the federal government “depend[s]” on state officials to administer federal programs, which, in turn, provides states “leverage” and “discretion in choosing how to accomplish [their] tasks and which tasks to prioritize.”<sup>96</sup> Moreover, they argue, regular interactions between federal and state officials generate trust and the power to dissent as insiders rather than outsiders to the federal system.<sup>97</sup> Professors Bulman-Pozen and Gerken stress that their agency model captures

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regulation); Patient Protection and Affordable Care Act, Pub. L. No. 111–148, §§ 1101, 1311, 1321, 124 Stat. 119, 141–43, 173–79, 186 (2010) (to be codified at 42 U.S.C. §§ 18001, 18031, 18041) (healthcare).

91. See Philip J. Weiser, *Towards a Constitutional Architecture for Cooperative Federalism*, 79 N.C. L. REV. 663, 672 (2001) (describing the factors influencing “[t]he federal government’s increasing willingness to allow states to superintend the implementation of federal law”).

92. See *id.* at 691 (stating a theory that state institutions for local governance compete among each other to act as agents of Congress).

93. See Jessica Bulman-Pozen, *Unbundling Federalism: Colorado’s Legalization of Marijuana and Federalism’s Many Forms*, 85 U. COLO. L. REV. 1067, 1072 (2014) (“To understand cooperative federalism . . . we must pull out of our usual federalism bundle the insistence on an autonomous state sphere.”).

94. See *id.* at 1072–74 (noting that the principal agent relationship does not mean states are powerless in their role as agents).

95. Jessica Bulman-Pozen & Heather K. Gerken, *Uncooperative Federalism*, 118 YALE L.J. 1256, 1265 (2009).

96. *Id.* at 1266.

97. See *id.* at 1268–69 (arguing that this trust gives “lower-level decisionmakers the knowledge and relationships they need to work the system”).



something quite different than main-line conceptions of state autonomy.<sup>98</sup> Still, they insist that it qualifies as federalism.<sup>99</sup>

## 2. Institutional Deciders

The enduring question of how to maintain federalism is, in large measure, a debate over who decides the boundaries and relationships between the federal and state governments. In some measure, all of the federal branches play a part, as do the states themselves. But what role does, or should, each institution play? And how do, or should, those roles overlap and relate? We cannot understand our federalism(s)—or administrative federalism in particular—without regard to these first-order questions. The discussion below sketches how federalism’s center of gravity has institutionally shifted (1) from courts to Congress, and then (2) from Congress to agencies.

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98. See *id.* at 1268 (explaining that the agency model does not emphasize separateness and independence); see also Gerken, *Federalism(s)*, *supra* note 25, at 1561 (arguing that the autonomy enjoyed by state servants “is quite different from that typically contemplated by federalism scholars” because “[t]he servant’s power to decide is interstitial and contingent on the national government’s choice not to eliminate it”).

99. See Gerken, *Federalism(s)*, *supra* note 25, at 1561 n.48 (noting that there are many federalisms and “the typical federalism scholar does not state explicitly that we must have one theory to rule them all”); Jessica Bulman-Pozen, *From Sovereignty and Process to Administration and Politics: The Afterlife of American Federalism*, 123 YALE L. J. 1920, 1923 (2014) [hereinafter Bulman-Pozen, *From Sovereignty*] (arguing that federalism is located “in the legally and politically generative interaction among the state and federal governments and the American people”). For other accounts of how cooperative-federalism arrangements promote federalism values, see DANIEL J. ELAZAR, AMERICAN FEDERALISM: A VIEW FROM THE STATES 162 (2d ed. 1972) (proposing that the states and the federal government have a web of cooperative relationships through the federalist system); Larry D. Kramer, *Understanding Federalism*, 47 VAND. L. REV. 1485, 1544, 1554 (1994) (discussing how working alliances form between federal and state counterparts). For arguments about the values of federal–state regulatory overlap more generally, see ROBERT A. SCHAPIRO, POLYPHONIC FEDERALISM: TOWARD THE PROTECTION OF FUNDAMENTAL RIGHTS (2009); Robert M. Cover, *The Uses of Jurisdictional Redundancy: Interest, Ideology, and Innovation*, 22 WM. & MARY L. REV. 639, 646, 682 (1981).

*a. From Court to Congress*

The sovereignty model's historic downfall is most commonly attributed to the Court's relaxation of its enumerated powers and nondelegation doctrines in the New Deal era and beyond.<sup>100</sup> Initially, the Court's abstention in policing the federal–state boundary was mostly cabined to contexts involving the regulation of private conduct.<sup>101</sup> Later, in *Garcia v. San Antonio Metropolitan Transit Authority*,<sup>102</sup> the Court openly renounced substantively policing Congress's enumerated powers when Congress directly regulates the states.<sup>103</sup> According to the Court, the states' protection from federal overreaching is political and procedural, not judicial.<sup>104</sup> The judicial role, the Court explained, is merely to ensure that “the internal safeguards of the political process have performed as intended”<sup>105</sup> and to intervene only as necessary to “compensate for possible failings in the national political process.”<sup>106</sup>

*Garcia* marked the turn toward “process federalism,”<sup>107</sup> which focuses on *who* makes federal law and the *processes* for

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100. See, e.g., Corwin, *supra* note 79 (describing these developments as the death-knell of dual federalism).

101. The Court's decision in *Wickard v. Filburn* is often regarded as the high-water mark, or the low, depending on who is doing the telling. 317 U.S. 111 (1942) (holding, in very deferential terms, that Congress has the power to regulate home consumption of wheat).

102. 469 U.S. 528 (1985).

103. See *id.* at 579 (rejecting challenge to Congress's expansion of the Fair Labor Standards Act to cover certain state employers); see also Jesse H. Choper, *Federalism and Judicial Review: An Update*, 21 HASTINGS CONST. L.Q. 577, 579 (1994) (“The reach of the [*Garcia*] Court's doctrine . . . was specifically confined to national regulation of the ‘States as States’; it clearly did not apply . . . to federal regulation of private persons or activities within the states.”).

104. See *Garcia*, 469 U.S. at 556 (describing the structural protections for states in the national arena).

105. *Id.* at 554.

106. *Id.*

107. See generally Rapaczynski, *supra* note 89 (explaining that *Garcia*'s main thrust was to replace a sovereignty-based analysis with a focus on the nature of the political process responsible for making the federalism-related decisions). Even before *Garcia*, Professor Herbert Wechsler famously advanced

making it.<sup>108</sup> To that end, process federalists put faith in the so-called “political and procedural safeguards of federalism.”<sup>109</sup> The political safeguards refer to a collection of structural and political arrangements, including, most importantly, states’ equal representation in the Senate.<sup>110</sup> The procedural safeguard refers to the federal lawmaking process.<sup>111</sup> As Bradford Clark explains, federal lawmaking procedures serve an inertial function that protects state prerogatives “simply by . . . making ‘the supreme Law of the Land’ more difficult to adopt. If any of the specified veto players withhold their consent, then no new federal law is created and preexisting state and federal law remains in effect.”<sup>112</sup>

Critics of process federalism, however, maintain that the political process does not safeguard federalism very well.<sup>113</sup> One

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the “political safeguard” theory of federalism, which the Court in *Garcia* expressly relied upon. See *Garcia*, 469 U.S. at 556 (citing Herbert J. Wechsler, *The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Government*, 54 COLUM. L. REV. 543, 544–45 (1954)).

108. See Young, *Two Cheers*, *supra* note 88, at 1364 (defining process federalism as “reliance on political and institutional safeguards to preserve balance in the federal structure,” and arguing that “[p]rocess federalism’s central insight is that the federal-state balance is affected not simply by what federal law is made, but by how that law is made”).

109. *Id.* at 1368.

110. Although the political safeguards referred to by the Court in *Garcia* were mostly structural, later theorists supplemented this account. In his seminal work, for example, Larry Kramer argues that political safeguards for state interests endure today through political parties and the “political dependency” between state and federal officials. See Kramer, *Putting the Politics Back*, *supra* note 78, at 215, 282 & n.267.

111. See Young, *Two Cheers*, *supra* note 88, at 1362 (explaining how the federal lawmaking process operates as a procedural safeguard).

112. Bradford R. Clark, *Separation of Powers as a Safeguard of Federalism*, 79 TEX. L. REV. 1321, 1326 (2001) [hereinafter Clark, *Separation of Powers*]; see also Ernest A. Young, *Making Federalism Doctrine: Fidelity, Institutional Competence, and Compensating Adjustments*, 46 WM. & MARY L. REV. 1733, 1792 (2005) (“A national government that can act only with difficulty, after all, will tend to leave considerable scope for state autonomy.”).

113. See Benjamin & Young, *supra* note 2, at 2137 (collecting sources); see also Saikrishna B. Prakash & John C. Yoo, *The Puzzling Persistence of Process-*

pair of objections is that states cannot, or do not, reliably fight for their institutional interests in Congress.<sup>114</sup> Another objection is that many decisions affecting states today are not actually made by Congress; rather, federal agencies make those decisions.<sup>115</sup> These assaults strike at the heart of process federalism. If neither the Court nor Congress is reliably safeguarding federalism today, then who is? Enter administrative federalism.

*b. From Congress to Agencies*

Administrative federalism features agencies, rather than Congress, as the primary deciders of where to draw lines between federal and state authority.<sup>116</sup> That move alters not only *who* decides federalism (from Congress to agencies) but also the *process* by which these questions are decided (from the ensnaring legislative process to more pliant administrative modes).<sup>117</sup> Moreover, the shift from Congress to agencies alters the decisionmaker's political constituency.<sup>118</sup> Whereas members of

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*Based Federalism Theories*, 79 TEX. L. REV. 1459, 1460 (2001) (arguing that reliance on politics to safeguard federalism is like “reinforcing the walls of a sand castle as the tide returns”).

114. There are many proffered reasons for this. As Justice O'Connor explained in *New York v. United States*, “powerful incentives” might impel state officials “to view departures from the federal structure to be in their personal interests.” 505 U.S. 144, 182 (1992); Calabresi, *supra* note 78, at 752, 797–98 (echoing this point); Daryl J. Levinson, *Empire-Building Government in Constitutional Law*, 118 HARV. L. REV. 915, 920, 940–41 (2005) (same); Yoo, *supra* note 74, at 1399–1400 (same). Moreover, state officials have any number of incentives to subvert institutional interests: whether “to avoid responsibility” for difficult problems; “to obtain more federal funding”; or “because federal regulation would advance partisan, ideological, or constituent interests.” Miriam L. Seifter, *States as Interest Groups in the Administrative Process*, 100 VA. L. REV. 953, 983 (2014) [hereinafter Seifter, *Interest Groups*].

115. See, e.g., Seifter, *Interest Groups*, *supra* note 114, at 976 (stating that federal agencies often act without direction from Congress).

116. See Miriam L. Seifter, *States, Agencies, and Legitimacy*, 67 VAND. L. REV. 443, 445–46 (2014) [hereinafter Seifter, *States*] (describing administrative federalism and the power it gives agencies).

117. See *id.* at 446.

118. See *id.* at 502 (discussing decision makers' effects on political

Congress are more likely to represent and be held accountable to their state constituents, agencies have no political constituents.<sup>119</sup> The President may or may not be held politically accountable for agency action,<sup>120</sup> but, in any event, the President's constituency is national, not state or locally based.<sup>121</sup>

Administrative federalism is an irony, if not an oxymoron. Agencies implement their delegated power in ways that overlap and compete with state authority over the same subjects.<sup>122</sup> In addition, the Court has held that agencies may preempt state law in much the same way that Congress does: either by asserting exclusive federal control over a regulatory field or by issuing administrative policies that conflict with state law.<sup>123</sup> Agencies

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

119. Ashutosh Bhagwat, *Wyeth v. Levine and Agency Preemption: More Muddle, or Creeping to Clarity?*, 45 TULSA L. REV. 197, 203 (2009) ("States are obviously not represented within agencies, which are purely national, unelected institutions . . .").

120. Although the President is generally thought to have effective control over so-called "executive agencies," *see generally* Kagan, *supra* note 61, the point is debatable. *See* City of Arlington v. FCC, 133 S. Ct. 1863, 1877–78 (2013) (Roberts, C.J., dissenting). In any event, the general consensus is that the President has little control over so-called "independent agencies," whose heads are statutorily and constitutionally protected from presidential removal. *See* Neal E. Devins & David E. Lewis, *Not-So Independent Agencies: Party Polarization and the Limits of Institutional Design*, 88 B.U. L. REV. 459, 459 (2008) (explaining how institutional design features limit presidential control of independent agencies).

121. *See* Seifter, *States*, *supra* note 116, at 481 ("[T]he President is responsive to the majority of the American people because he caters to a national constituency . . .").

122. *See* Scott A. Keller, *How Courts Can Protect State Autonomy From Federal Administrative Encroachment*, 82 S. CAL. L. REV. 45, 58 (2008) ("[T]he underenforcement of federalism is exacerbated in the administrative law context because Congress can freely delegate its broad Commerce Clause powers to unelected federal agencies, which can then easily encroach on state autonomy.").

123. *See generally, e.g.*, Geier v. Am. Honda Motor Co., 529 U.S. 861 (2000); City of New York v. FCC, 486 U.S. 57 (1988); Fidelity Fed. Sav. & Loan Ass'n v.

thus wield an extraordinary power in our federalist system—they may displace the laws of all fifty states without the political or procedural protections that states otherwise enjoy in the legislative forum.<sup>124</sup> Moreover, agencies tend to be mission-centric institutions, not designed or expected to “ponder larger structural issues such as the relative balance of power between the federal and state governments,” or the “abstract values” of federalism more generally.<sup>125</sup> On this telling, the rise of administrative governance is arguably federalism’s greatest threat, not its savior.

But champions of administrative federalism offer a counter-narrative.<sup>126</sup> Some argue that agencies are better suited than Congress to decide questions of federalism, especially concerning whether state law should be preempted by a national standard.<sup>127</sup>

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de la Cuesta, 458 U.S. 141 (1982); *see also infra* notes 187–198 and accompanying text (discussing the Court’s administrative-preemption doctrine).

124. For a critical treatment of the Court’s administrative-preemption doctrine, see Rubenstein, *Paradox*, *supra* note 16, at 320–26 (arguing that the Court’s approach to administrative preemption is inconsistent not only with its separation-of-powers theory of nondelegation but also its “political safeguards” theory of federalism).

125. Brief of the Center for State Enforcement of Antitrust and Consumer Protection Laws, Inc. as Amicus Curias in Support of Respondent at 23, *Wyeth v. Levine*, 129 S. Ct. 1187 (2009) (No. 06-1249, 2008 WL 3851615); *accord* Robert R.M. Verchick & Nina Mendelson, *Preemption and Theories of Federalism*, in *PREEMPTION CHOICE* 13, 26–27 (William W. Buzbee ed., 2009) (noting concern that agencies are “focused on federal needs and powers,” and thus “ill-suited to weigh . . . state and local interests” when making federal policy).

126. *See* Bulman-Pozen, *From Sovereignty*, *supra* note 99, at 1922 (“The administrative state . . . [has] been reimagined as guardian[], rather than slayer[], of American federalism.”); Nourse, *supra* note 26, at 778 (“It is often complained . . . [that] if the Congress did not delegate so frequently to the Executive Branch our national government would not be as powerful as it is relative to the states.”).

127. *See* Brian Galle & Mark Seidenfeld, *Administrative Law’s Federalism: Preemption, Delegation, and Agencies at the Edge of Federal Power*, 57 *DUKE L.J.* 1933, 1939 (2008) (arguing that agencies “outperform” other branches in “allocating policymaking power” between federal and state governments); *see also* Catherine M. Sharkey, *Federalism Accountability “Agency-Forcing” Measures*, 58 *DUKE L.J.* 2125, 2127–28, 2158–63 (2009) [hereinafter Sharkey, *Accountability*] (claiming that “federal agencies . . . surprisingly emerge as the

Other administrative federalists do not necessarily favor agencies over Congress as federal lawmaker. Still, they recognize that federalism is now mostly played in the administrative arena.<sup>128</sup> With a few tweaks to the system, they argue, federalism's future will be secure.<sup>129</sup>

Limning the growing menu of administrative federalism proposals will have to wait.<sup>130</sup> The immediate point is that administrative federalism is a work in progress: the proposals

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best possible protectors of state regulatory interests” and suggesting that agencies be “reform[ed] . . . to ensure they can become a rich forum for participation by state governmental entities”); Gillian E. Metzger, *Administrative Law as the New Federalism*, 57 DUKE L.J. 2023, 2080–81 (2008) [hereinafter Metzger, *Administrative Law*] (challenging the conventional view that Congress is more sensitive “to state regulatory prerogatives than federal agencies”).

128. See, e.g., Gillian E. Metzger, *Federalism Under Obama*, 53 WM. & MARY L. REV. 567, 570, 578–79 (2011) [hereinafter Metzger, *Federalism*] (noting “the central importance of the administrative sphere to modern-day federalism,” because agencies will make “[c]ritical decisions about the actual scope of state powers and autonomy”); Sharkey, *Accountability*, *supra* note 127, at 2128 (advancing a similar claim).

129. For some representative works, see Galle & Seidenfeld, *supra* note 127, at 2020 (discussing how courts can “achieve the ends sought by federalism”); Nina A. Mendelson, *A Presumption Against Agency Preemption*, 102 NW. U. L. REV. (SPECIAL ISSUE) 695 (2008) [hereinafter Mendelson, *Presumption Against*] (suggesting that the Court extend its presumption against preemption to the administrative-preemption context); Thomas W. Merrill, *Preemption and Institutional Choice*, 102 NW. U. L. REV. (SPECIAL ISSUE) 727 (2008) [hereinafter Merrill, *Preemption and Institutional Choice*] (modeling an approach to administrative federalism based on the institutional capacities of Congress, courts and agencies); Metzger, *Administrative Law*, *supra* note 127, at 2109 (explaining why “the future of federalism lies in integrating protections for the states into agency deliberations and judicial review of agency action”); Sharkey, *Inside Agency Preemption*, *supra* note 18, at 570–95 (offering a number of proposals for institutional change); Ernest A. Young, *Executive Preemption*, 102 NW. U. L. REV. (SPECIAL ISSUE) 869 (2008) [hereinafter Young, *Executive Preemption*] (offering a number of proposals for administrative preemption). For some of my own work in the area, see generally David S. Rubenstein, *Delegating Supremacy?*, 65 VAND. L. REV. 1125 (2012) [hereinafter Rubenstein, *Delegating Supremacy?*] (arguing that many of the problems associated with administrative federalism can be alleviated by foreclosing administrative preemption).

130. See *infra* Part III (discussing the role of states administrative processes and decisionmaking).

advanced under its banner compete not only for a place in the current system but also against each other.<sup>131</sup>

#### *D. Cross-Dimensional Structuralism*

The cross-dimensional relationship between federalism and separation of powers has mostly been sporadic and unappreciated in constitutional discourse.<sup>132</sup> There are, however, some important exceptions. One strand of literature suggests that separation of powers can safeguard federalism; another strand explains how federalism can safeguard separation of powers.<sup>133</sup> When considered together, the outlines of a “cross-dimensional structuralism” emerge.

Still, however, broad headlines of “Separation of Powers as a Safeguard of Federalism”<sup>134</sup> and “Federalism as a Safeguard of Separation of Powers”<sup>135</sup> belie an important nuance: namely, we have federalism(s) and we have separation(s) of power. Thus, to say that federalism can safeguard separation of powers, or vice versa, merely begs which conceptions of federalism(s) and separation(s) of powers are being treated and which are doing the

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131. See *infra* Part IV (discussing proposals for administrative federalism).

132. Of course, there are important exceptions in the case law. See, e.g., *INS v. Chadha*, 462 U.S. 919, 950 (1983) (explaining how the separation-of-powers requirement of bicameralism reinforced “the Great Compromise, under which [the House of Representatives] was viewed as representing the people and the [Senate] the states”); *Printz v. United States*, 521 U.S. 898, 922 (1997) (noting that Congress undermines “the separation and equilibration of powers” when it demands that states, rather than the Executive Branch, administer federal programs). There are also important exceptions in academic commentary. See *infra* notes 143–158 and accompanying text (discussing some of this literature and collecting citations).

133. See *infra* notes 143–158 and accompanying text (discussing these movements).

134. See Clark, *Separation of Powers*, *supra* note 112, at 1459 (explaining how formal lawmaking procedures can advance state autonomy).

135. See Jessica Bulman-Pozen, *Federalism as a Safeguard of the Separation of Powers*, 112 COLUM. L. REV. 459, 503 (2012) [hereinafter Bulman-Pozen, *Safeguard*] (explaining how states can check federal power from within cooperative-federalism schemes).



treatment.<sup>136</sup> While other scholars have explored the relationship between certain types of federalism(s) and separation(s) of powers,<sup>137</sup> this Article is the first to probe what administrative federalism, in particular, can do for administrative separation of powers.<sup>138</sup>

As developed in Part IV, how we advance administrative federalism—more specifically, which version of it—matters for federalism and separation of powers simultaneously.<sup>139</sup> This dynamic owes, in part, to the relationship between administrative law and separation of powers: administrative law is the vessel through which constitutional norms are translated and expressed in the administrative system.<sup>140</sup> Adjustments to that system, even if garbed in federalism, can thus have indirect bearing on separation of powers. In mind is a functional, not formal, separation of powers that contemplates both external and internal administrative checks-and-balances.<sup>141</sup>

In one respect, the organizing principle of this Article is old: federalism and separation of powers were originally designed to work together to secure the people's liberty.<sup>142</sup> In more important respects, however, this is new: the federalism and separation of

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136. This is not intended as a critique of the titles Professor Clark and Professor Bulman-Pozen selected for their respective works. Rather, it is only to emphasize that neither author purports to explain how all of our conceptions of separations of powers and federalism might interact.

137. See *infra* notes 143–169 and accompanying text (discussing some of this literature).

138. See *infra* notes 146–172 and accompanying text (noting some related projects by others that have influenced some of my thinking here).

139. See *infra* Part IV.

140. See Richard A. Posner, *The Rise and Fall of Administrative Law*, 72 CHI.-KENT L. REV. 953, 953 (1997) (noting that modern conditions and expectations demanded that “the constitutional mold had to be broken and the administrative state invented”).

141. See *supra* Part II.B (discussing these conceptions).

142. See, e.g., THE FEDERALIST No. 51 (James Madison) (arguing that separation of powers and federalism would, together, provide a “double security” for the people's liberty); see also Calvin Masey, *State Standing After Massachusetts v. EPA*, 61 FLA. L. REV. 249, 273–76 (2009) (noting that “both separation of powers and federalism are structural doctrines designed to check concentration of power” and should “join” in that goal).

powers experienced today are not those of our Founding Fathers (or, for that matter, our fathers or grandfathers).

As noted above, this Article's cross-dimensional approach to administrative federalism contributes to a larger project of cross-dimensional study. Professor Clark, for example, argues that separation of powers formalism advances process federalism.<sup>143</sup> More specifically, he explains how a formalistic approach to federal lawmaking, which requires Congress to make federal "Law," best fulfills the political and procedural safeguards of federalism.<sup>144</sup> His core insight is that state interests will be best protected in the federal institution—Congress—that was designed to protect those interests.<sup>145</sup>

But inasmuch as that is true, a breakdown in lawmaking formalism, where *agencies* make law, portends a breakdown in process federalism.<sup>146</sup> Agencies, unlike Congress, are not

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143. See Clark, *Separation of Powers*, *supra* note 112, at 1326 (discussing the relationship between separation of powers and federalism).

144. See *id.* at 1324–26 (arguing procedural safeguards of federalism are best fulfilled when Congress makes law); see also *supra* notes 110, 112 and accompanying text (discussing these safeguards).

145. See *id.* (arguing the Founders' intent was for Congress to protect state interest and that intent should be respected); see also Bradford R. Clark, *Constitutional Compromise and the Supremacy Clause*, 83 NOTRE DAME L. REV. 1421, 1421–23 (2008) [hereinafter Clark, *Constitutional Compromise*] (explaining the background and context of establishing protection for states' rights during the Constitutional Convention).

146. Because of this, Professor Clark expresses some discomfort with administrative preemption of state law. Still, he seems willing to make conceptual peace with the practice. When Congress delegates policymaking power to agencies, Professor Clark suggests, it is effectively Congress that preempts state law, thus potentially alleviating any Supremacy Clause problem. See Clark, *Separation of Powers*, *supra* note 112, at 1433–34 (noting that Supremacy Clause issues are solved because Congress is preempting state law, not the agency). This functionalist conception, however, does little if anything to actually promote the type of political and procedural safeguards of federalism that Professor Clark seems to have in mind. I have speculated elsewhere that Professor Clark's accommodation for administrative preemption seems principally motivated by a desire to narrow the gap between his formalist interpretation of the Supremacy Clause, on the one hand, and the Court's functional approach to delegation, on the other. See generally Rubenstein, *Paradox*, *supra* note 16, at 295.

politically beholden to the states.<sup>147</sup> And agencies can make policy far more easily than Congress can; indeed, that is one reason why Congress delegates to agencies in the first place.<sup>148</sup> In short, lawmaking formalism might advance the political and procedural safeguards of federalism.<sup>149</sup> But the way law is actually made today—mostly by federal agencies<sup>150</sup>—leaves a gap in Professor Clark’s account that this Article helps to fill.

Working in the inverse direction, some notable scholars explain how federalism can safeguard separation of powers. Most relevant here, Jessica Bulman-Pozen, Roderick Hills, and Phillip Weiser (writing separately) argue that cooperative-federalism arrangements can advance functional separation of powers.<sup>151</sup> Their collective idea, in short, is that states can operate as a check on the Executive Branch.<sup>152</sup> According to Professors Hills

147. See Rubenstein, *Paradox*, *supra* note 16, at 323–24 (“Agencies are not beholden to states in any politically thick sense.”).

148. See *id.* at 59 (discussing how the political and procedural safeguards of federalism are compromised when agencies preempt state law).

149. See Clark, *Separation of Powers*, *supra* note 112, at 1325–26 (noting that a formalist approach to lawmaking secures federalism); *INS v. Chadha*, 462 U.S. 919, 985–86 (1983) (White, J., dissenting) (noting that “the sheer amount of law” made by agencies has “far outnumbered the lawmaking engaged in by Congress through the traditional process” for some time).

150. See Keller, *supra* note 122, at 47–48 (discussing how federal agencies make law).

151. See generally, e.g., Roderick M. Hills, *Federalism in Constitutional Context*, 22 HARV. J.L. & PUB. POL’Y 181, 185–86 (1998) [hereinafter Hills, *Constitutional Context*] (“[T]he possibility of cooperative federalism makes it easier to accomplish two goals of the ‘separation of powers’ doctrine . . . .”); Bulman-Pozen, *Safeguard*, *supra* note 135, at 504 (“[C]ooperative federalism schemes may usefully advance the formal separation of particular powers.”); Weiser, *supra* note 91, at 719 (discussing the separation-of-powers benefits of cooperative-federalism). In another important work, Brannon Denning and Michael Ramsey offer an account of how foreign affairs federalism can safeguard separation of powers. Brannon P. Denning & Michael D. Ramsey, *American Insurance Association v. Garamendi and Executive Preemption in Foreign Affairs*, 46 WM. & MARY L. REV. 825, 829–30 (2004) (explaining how a “robust foreign affairs federalism promotes a cooperative approach to foreign affairs, because the President will need the support of Congress to oust disruptive state laws; as a result, more foreign affairs decisionmaking will be done by Congress (or the Senate)”).

152. See, e.g., Weiser, *supra* note 91, at 717 (discussing some ways in which

and Weiser, cooperative federalism deprives the Executive Branch of a monopoly on administering federal programs.<sup>153</sup> On this view, “Congress can achieve fidelity to the spirit of federal laws by playing nonfederal and federal governments against each other . . . and threatening to replace one with the other if it misbehaves.”<sup>154</sup> Moreover, as Professor Hills explains, the autonomy that states receive under the Court’s anti-commandeering doctrine enables nonfederal officials to remain sufficiently “independent of Congress,” in a way that mimics—and may even surpass—the independence of the federal Executive Branch.<sup>155</sup> While Professors Hills and Weiser promote an autonomy-based approach to cooperative federalism,<sup>156</sup> Professor Bulman-Pozen espouses an agency-based approach.<sup>157</sup> More specifically, she explains how states charged with implementing federal programs may “*diverge* from federal executive policy, *curb* the federal executive’s own implementation of the law, or *goad* the federal executive to take particular actions.”<sup>158</sup>

My cross-dimensional approach to administrative federalism complements these scholars’ work but stands apart. First,

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states can check Executive power).

153. See Hills, *Constitutional Context*, *supra* note 151, at 186, 190–91 (discussing how Congress can control Executive power through regulating agencies); Weiser, *supra* note 91, at 716–18 (“For the [separation-of-powers] functionalist, the involvement of state agencies might well be [an] appealing . . . innovative structural solution to address the challenge of keeping executive authority in check.”); see also Roderick M. Hills, Jr., *Dissecting the State: The Use of Federal Law to Free State and Local Officials from State Legislatures’ Control*, 97 MICH. L. REV. 1201, 1204 (1999) (“[I]ntergovernmental competition is useful, because it allows Congress to bypass nonfederal officials who fail to implement federal policy faithfully and instead to delegate power to other nonfederal officials who demonstrate greater fidelity to federal policies.”).

154. Hills, *Constitutional Context*, *supra* note 151, at 190; accord Weiser, *supra* note 91, at 716–18 (discussing functionalist and formalist justifications and their effects on federalism).

155. See Hills, *Constitutional Context*, *supra* note 151, at 186, 190–91.

156. See *id.* at 181–82; Weiser, *supra* note 91, at 663.

157. See Bulman-Pozen, *Safeguard*, *supra* note 135, at 459 (introducing her agency-based approach to cooperative federalism).

158. *Id.* at 478 (emphasis added).

administrative federalism casts a wider net. Unlike cooperative federalism, administrative federalism extends to contexts where states are implementing state—not just federal—programs.<sup>159</sup> Second, as shown below, administrative federalism incorporates and leverages administrative law in ways that cross-dimensional treatments of cooperative federalism have not.<sup>160</sup> Finally, the institutional audience is different. The cross-dimensional treatments of cooperative federalism have mostly (though not exclusively) been directed at how *Congress* might structure cooperative programs to advance separation-of-powers values. Administrative federalism, by contrast, primarily (though not exclusively) features a set of doctrinal proposals, which makes *courts* the primary institutional audience.<sup>161</sup>

Gillian Metzger, Catherine Sharkey, and Miriam Seifter (writing separately) have also advanced ideas that relate to the project at hand. Descriptively, Professor Metzger explains that some of the Court's recent federalism decisions—particularly on questions of preemption—“seem to treat the preservation of state authority . . . as an important mechanism for guarding against

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159. See *infra* Part III (discussing the role of states in administrative federalism).

160. See *infra* Part IV (discussing how existing features of administrative law might be leveraged and tweaked to promote federalism and separation of powers, simultaneously).

161. As discussed *infra* Part V.B, the development of administrative federalism also includes a set of proposals of institutional redesign directed at Congress, the President, and agencies. See Sharkey, *Accountability*, *supra* note 127, at 2173–78 (offering some suggestions); Sharkey, *Inside Preemption*, *supra* note 18 (same). But these non-doctrinal proposals tend to be secondary, if only because they have tended to fall on deaf ears in the past, and, in any event, are not likely to make a significant difference without judicial enforcement. Cf. Sharkey, *Accountability*, *supra* note 127, at 2130, 2173. By contrast, the Court, of late, seems quite interested in questions of administrative federalism. See generally Metzger, *Agency Reform*, *supra* note 2 (discussing recent judicial developments that may reflect a concerted effort by the Court to reform agency performance through doctrine); see also Ernest A. Young, “*The Ordinary Diet of the Law*”: *The Presumption Against Preemption in the Roberts Court*, 2011 SUP. CT. REV. 253, 281 [hereinafter Young, *Ordinary Diet of the Law*] (noting that the Court probably has not “come to rest on the complicated cluster of issues surrounding preemption by federal administrative agencies”).

agency failure.”<sup>162</sup> Prescriptively, Professor Sharkey has argued that administrative preemption doctrine can be shaped to improve how agencies make decisions about whether to preempt state law.<sup>163</sup> While their emphasis is on how federalism doctrine can respond to agency failure in general, or in respect to making administrative preemption decisions more specifically,<sup>164</sup> my project takes matters one step further. Namely, it explores how federalism-inspired changes to the regulatory process may derivatively affect separation-of-powers norms.<sup>165</sup>

Meanwhile, Professor Seifter explores what enhancing “state voice” in the administrative arena portends for models of administrative legitimacy.<sup>166</sup> Among other things, she claims that state voice may enhance state autonomy at the cost of administrative “expertise” and “political accountability,”<sup>167</sup> and thus “in tension with the way we legitimize the bureaucracy.”<sup>168</sup> Some of Professor Seifter’s insights translate here, insofar as administrative legitimacy may depend upon separation of powers within and around the administrative state. After all, administrative expertise is a critical element of *internal* separation of powers; meanwhile, political accountability is a critical element of *external* separation of powers.<sup>169</sup> Thus, insofar as state voice in the administrative arena may implicate

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162. See Metzger, *Agency Reform*, *supra* note 2, at 3–5; *see also id.* at 9–34 (advancing this claim through the lens of *Altria Grp., Inc. v. Good*, 129 S. Ct. 538 (2008), *Wyeth v. Levine*, 129 S. Ct. 1187 (2009), and *Cuomo v. Clearinghouse Ass’n*, 129 S. Ct. 1187 (2009)).

163. *See* Sharkey, *Accountability*, *supra* note 127.

164. *See id.* at 2130, 2174; Metzger, *Agency Reform*, *supra* note 2, at 17.

165. *See infra* Part IV.

166. *See* Seifter, *States*, *supra* note 116, at 449–50 (“The principal project of this Article is to reveal and explain the tension between existing understandings of administrative legitimacy and special state access to the federal regulatory process.”).

167. *See id.* at 482–87, 491–96 (noting that increased state involvement endangers accountability and administrative expertise).

168. *Id.* at 447–48.

169. *See supra* notes 65–74 and accompanying text (discussing internal-and external-models of checks-and-balances).

administrative expertise and accountability, state voice will also implicate separation(s) of powers.

### *III. States in the Administrative State*

Champions of administrative federalism generally look to a collection of judicial doctrines, legal instruments, and institutional arrangements to bolster claims about the administrative system's capacity to (1) "heed state regulatory interests";<sup>170</sup> (2) "protect the ability of states to exercise meaningful regulatory power";<sup>171</sup> (3) advance and preserve national interests;<sup>172</sup> or (4) all of the above.<sup>173</sup> This Part provides a descriptive account of the existing arrangements and legal doctrines for state interests in the administrative forum. More specifically, Subpart A discusses "state voice" in administrative policymaking. Subpart B addresses "state autonomy," with an emphasis on the Court's existing approach to administrative preemption. Academic proposals to reform the existing system will be taken up in Part IV.

#### *A. State Voice*

State and agency officials generally interact in one of two ways. First, each state may separately express its regulatory preferences to the relevant agency concerning a given issue or set of issues.<sup>174</sup> Second, state officials from multiple—or all—jurisdictions join together in state-lobbying groups to express a

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170. Sharkey, *Accountability*, *supra* note 127, at 2147–48.

171. Metzger, *Administrative Law*, *supra* note 127, at 2026 n.4.

172. *See, e.g.*, Galle & Seidenfeld, *supra* note 127 (promoting a nationalist over a state-based view of administrative federalism).

173. *Cf.* Seifter, *Interest Groups*, *supra* note 114, at 957, 980–81 (noting the multiple, and sometimes competing, goals of administrative federalism advanced in the literature).

174. *See* JOHN D. NUGENT, SAFEGUARDING FEDERALISM: HOW STATES PROTECT THEIR INTERESTS IN NATIONAL POLICYMAKING 20–21 (2009) (discussing the ways state governments act to protect their interests).

collective “state” view on regulatory matters. These intergovernmental groups—such as the National Governors Association, National Conference of State Legislators, and National League of Cities<sup>175</sup>—are now key players in the administrative forum as a result of longstanding practice and legal instruments.<sup>176</sup>

Some legal instruments are subject specific. For instance, some statutes direct agencies to consult with states or intergovernmental groups on specific issues.<sup>177</sup> Meanwhile, other legal instruments are trans-substantive.<sup>178</sup> Most notably, Executive Order 13,132 was promulgated with the stated purpose of “ensur[ing] that the principles of federalism established by the Framers guide the executive departments and agencies in the formulation and implementation of policies.”<sup>179</sup> Among other things, this Order requires federal agencies to: (1) consult with states before taking action that might restrict states’ policy options; (2) take such actions only when clear constitutional

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175. See *About*, NATIONAL GOVERNORS ASSOCIATION, <http://www.nga.org/cms/about> (last visited Feb. 15, 2015) (“[G]overnors identify priority issues and deal collectively with matters of public policy and governance at the state and national levels.”) (on file with the Washington and Lee Law Review); *About Us*, NATIONAL CONFERENCE OF STATE LEGISLATORS, <http://www.ncsl.org/aboutus.aspx> (last visited Feb. 15, 2015) (“Our mission is to . . . ensure state legislatures a strong, cohesive voice in the federal system.”) (on file with the Washington and Lee Law Review); *Influence Federal Policy*, NATIONAL LEAGUE OF CITIES, <http://www.nlc.org/influence-federal-policy> (last visited Feb. 15, 2015) (describing NLC’s efforts to shape federal policy for the benefit of municipalities) (on file with the Washington and Lee Law Review).

176. For in depth treatments of the intergovernmental lobby’s role in administrative governance, see generally NUGENT, *supra* note 174; Seifter, *Interest Groups*, *supra* note 114.

177. A recent example is the Affordable Care Act, which directs the National Association of Insurance Commissioners (NAIC)—a state-interest group comprised of elected or appointed insurance commissioners from each state—to “establish” definitions and methodologies for several key provisions, subject to “certification” by HHS. See Seifter, *Interest Groups*, *supra* note 114, at 972–73 (discussing this development).

178. See, e.g., Exec. Order No. 13,132, 64 Fed. Reg. 43,255, 43,255 (Aug. 4, 1999) (applying this Executive Order to all agencies except independent agencies, which are merely “encouraged to comply”).

179. *Id.*



authority exists and the problem is of national scope; and (3) “provide all affected State and local officials notice and an opportunity for appropriate participation” in administrative rulemakings.<sup>180</sup>

These and other legal arrangements afford states privileged access to administrative policymaking. However, whether this access to administrative decisionmaking cashes out as an *effective* voice is a different matter.<sup>181</sup> Anecdotes and hypotheses suggest that states do, in fact, have significant influence in shaping administrative policy.<sup>182</sup> But this has been difficult to quantify empirically.<sup>183</sup> Meanwhile, studies show that agencies generally do not comply with the consulting and reporting requirements of Executive Order 13,132,<sup>184</sup> which by its express terms is not judicially enforceable.<sup>185</sup>

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180. *Id.* at 43, 255–56.

181. *See* Seifter, *Interest Groups*, *supra* note 114, at 953.

182. *See, e.g.*, Metzger, *Federalism*, *supra* note 128, at 567, 578–79 (discussing the states’ role in affecting the Affordable Care Act); Sharkey, *Inside Agency Preemption*, *supra* note 18, at 521, 569 (noting the effect states had on administrative policies, including those of the Department of Transportation and Environmental Protection Agency); Seifter, *States*, *supra* note 116, at 446–47 (discussing states’ effect on administrative rulemaking generally); Kramer, *Putting the Politics Back*, *supra* note 78, at 285 (“The influence of this ‘intergovernmental lobby’ is, in fact, widely acknowledged and respected in Washington.”).

183. *See* Seifter, *Interest Groups*, *supra* note 114, at 971 (“Measuring interest group influence is well-recognized to be difficult in any particular circumstance, and making generalizations about groups’ influence is even more fraught.”).

184. *See* Nina A. Mendelson, *Chevron and Preemption*, 102 MICH. L. REV. 737, 773 (2004) [hereinafter Mendelson, *Chevron and Preemption*] (laying the empirical groundwork to show that Executive Order 13,132 is mostly honored in the breach); Sharkey, *Accountability*, *supra* note 127, at 2138–39 (corroborating this view).

185. *See* Exec. Order No. 13,132, 64 Fed. Reg. 43,255, 43,257 (Aug. 4, 1999) (stating that the Executive Order “is intended only to improve the internal management of the executive branch, and is not intended to create any right or benefit, substantive or procedural, enforceable at law by a party against the United States, its agencies, its officers, or any person”).

In any event, champions of the autonomy-model of federalism may take little comfort in state voice alone.<sup>186</sup> Indeed, without advancing at least some conception of state autonomy, administrative federalism may not be federalism at all.

### *B. State Autonomy*

When it comes to state autonomy, the subject of preemption takes center stage.<sup>187</sup> For its part, the Court has recently expressed great interest in two related administrative preemption issues.<sup>188</sup> The first concerns whether, and under what circumstances, agencies (rather than Congress) may preempt state law.<sup>189</sup> The second concerns whether, and under what circumstances, the Court should defer to an agency's view that Congress intends to preempt state law.<sup>190</sup>

Under the Court's existing doctrine, agency action with the "force of law" qualifies under the Supremacy Clause's auspice of "Laws . . . made in Pursuance [of the Constitution],"<sup>191</sup> and therefore preempts state law in the same way that federal statutes do.<sup>192</sup> For example, an agency may pass a regulation that

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186. See *supra* notes 80–89 and accompanying text (discussing autonomy-model of federalism).

187. See generally, e.g., Young, *Ordinary Diet of the Law*, *supra* note 161, at 253 (addressing statutory preemption and its implications for federalism).

188. See *id.* at 280, 281 (noting that the Court probably has not "come to rest on the complicated cluster of issues surrounding preemption by federal administrative agencies").

189. See *id.* at 278 (discussing the ways in which agencies preempt, or attempt to preempt, state law).

190. Cf. Metzger, *Agency Reform*, *supra* note 2, at 17 n.64 ("The question of whether courts should defer to agency views of preemptive effect contained in agency regulations that have the force of law is distinct from the question of whether substantive requirements contained in such regulations have preemptive effect.").

191. See U.S. CONST. art. VI (laying out the Supremacy Clause); *Geier v. Am. Honda Motor Co.*, 529 U.S. 861, 886 (2000) (holding that agency regulation conflict-preempted state law).

192. See Rubenstein, *Delegating Supremacy?*, *supra* note 129, at 1147–51 (discussing the Court's administrative preemption taxonomy in detail).

expressly preempts state law, thereby ousting states from regulating on the same subject or in the same field.<sup>193</sup> An agency regulation can also preempt conflicting state law.<sup>194</sup>

Although the Court has said that agency action with the “force of law” qualifies for preemptive effect,<sup>195</sup> the import of this mantra is not entirely clear or consistent. First, the procedural hurdles associated with administrative notice-and-comment rulemaking<sup>196</sup> are not prerequisites for preemption under the Court’s existing doctrine. The Court has held, for example, that administrative adjudicative *orders* qualify for preemptive effect.<sup>197</sup> Moreover, although the Court’s doctrine is still developing on this point, even nonbinding administrative policies—which do not have the “force of law”—might qualify for preemption under the Supremacy Clause.<sup>198</sup>

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193. See, e.g., *City of New York v. FCC*, 486 U.S. 57, 69 (1988).

194. See, e.g., *Geier*, 529 U.S. at 867–68 (holding that a regulation concerning passive restraints in automobiles impliedly preempted a state tort law claim); *CSX Transp., Inc. v. Easterwood*, 507 U.S. 658, 674–75 (1993) (holding that a regulation governing train speed preempted a common law negligence claim); *Fidelity Fed. Sav. & Loan Ass’n v. de la Cuesta*, 458 U.S. 141, 170 (1982) (holding that a regulation permitting federally chartered banks to exercise the due-on-sale clause of mortgages preempts a contrary state common law rule).

195. See, e.g., *Geier*, 529 U.S. at 864–65 (allowing an agency rule to preempt state law).

196. For useful summaries of these procedures, see Kristin E. Hickman, *Unpacking the Force of Law*, 66 VAND. L. REV. 465, 473–75 (2013); Seidenfeld, *Role of Politics*, *supra* note 62, at 1426–29; see also *infra* notes 266–271 and accompanying text (discussing notice-and-comment rulemaking).

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

198. See *Altria v. Good*, 555 U.S. 70, 88–90 (2008) (leaving open the question of whether an agency’s policy without the force of law can have preemptive effect); *Arizona v. United States*, 132 S. Ct. 2492 (2012) (sending mixed signals on whether the Executive’s nonbinding enforcement priorities have preemptive effect); see also Rubenstein, *Paradox*, *supra* note 16, at 280–81 (discussing some of the mixed signals in the case).

The foregoing discussion sketched the existing arrangements and judicial doctrines concerning administrative federalism. Views differ on whether the administrative system, as is, adequately accounts for state interests.<sup>199</sup> But most see room for improvement.<sup>200</sup> The discussion below turns to the major academic proposals on the table.

#### *IV. What Administrative Federalism Can Do for Federalism(s) and Separation(s) of Powers*

This Part compares and contrasts the array of administrative federalism proposals advanced in the literature. But, unlike existing academic treatments, here I evaluate what each proposal may simultaneously entail for federalism(s) and separation(s) of powers. Before proceeding, however, a number of caveats are in order, which will also help to frame the project ahead.

First, no one suggests that administrative federalism will return us to the Founders' original design.<sup>201</sup> Rather, the discourse tends to focus on how the administrative system can hold true to some federalist ideal in ways that still account for today's political, social, and economic realities.<sup>202</sup> Mostly in mind is a reconstituted, process-based approach to federalism. In a similar vein, I do not mean to suggest that reforming administrative federalism can return us to some originalist, or

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199. Compare, e.g., Joshua Hawkes & Mark Seidenfeld, *A Positive Defense of Administrative Preemption*, 22 GEO. MASON L. REV. 63, 81 (2014) (arguing that state interests, and federalism more generally, are adequately safeguarded through administrative processes) with Rubenstein, *Paradox*, *supra* note 16, at 323–26 (arguing that administrative preemption is an affront to the political and procedural safeguards of federalism), and Young, *Executive Preemption*, *supra* note 129 (advancing a similar view).

200. See *infra* Part IV (discussing a number of proposals for administrative federalism and collecting sources).

201. See Benjamin & Young, *supra* note 2, at 2112 (“It is a truism that the founders’ world is not ours, and the problems confronting our polity, although not necessarily more difficult, are in many ways different.”).

202. See *id.* at 2112–13 (discussing previous articles that entertain arguments that modern administrative agencies foster democratic values through their treatment of federalism concerns).

formalistic, separation-of-powers ideal. Rather, in mind are more functional conceptions of separation of powers, some of which favor more separateness and inter-branch checking than others, but none of which insist on separation-of-powers purity.

Second, and relatedly, this project takes the idea of “structural pluralism” seriously.<sup>203</sup> Thus, I am not concerned with whether a particular administrative federalism proposal will deliver “more” or “less” federalism, or “more” or “less” separation of powers. Those inflections have no purchase here. Rather, the questions are whether, and how, a particular proposal might advance or undermine particular conceptions of federalism(s) and separation(s) of powers.<sup>204</sup>

Third, federalism and separation of powers are not commensurate units that can be neatly weighed against each other. Quite to the contrary, federalism and separation of powers are value-laden concepts, each with their own intractable tensions. Thus, approaching administrative federalism through a separation-of-powers lens might facilitate decisions about particular proposals for reform, or it might complicate those decisions. For example, those who favor a particular administrative federalism proposal on federalism and separation-of-powers grounds can take comfort in doubly favoring that proposal. Likewise, those who disfavor the federalism and

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203. See *supra* Part II (sketching a number of competing and somewhat overlapping conceptions of separation(s) of powers, on the one hand, and federalism(s), on the other).

204. I reserve for future consideration whether particular types of federalism(s) are *categorically* better suited to advancing certain types of separation(s) of powers. Understanding and identifying those relationships, if they exist, might profitably advance the type of cross-dimensional evaluation presented here. But they are not necessary for the discussion and uncertain enough to warrant a deeper study than I can hope to provide here. A sovereignty-model of federalism, for instance, may be wildly incompatible with a separation-of-powers model that relies on internal checks for administrative legitimacy. See *supra* notes 77–80 and accompanying text (discussing the sovereignty-model); *supra* notes 61–70 and accompanying text (discussing internal checks-and-balances). But whether, for example, process federalism will always advance a separation-of-powers model that favors external checks on agency action (over internal checks) may be a harder claim to sustain. See *supra* notes 88–117 and accompanying text (discussing process federalism); *supra* notes 67–70 and accompanying text (discussing external checks-and-balances).

separation-of-powers effects of a particular proposal can doubly disfavor it. Meanwhile, those with mixed views will face more difficult choices about how to weigh their federalism preferences against their separation-of-powers preferences. But critically, the fact that one's preferences for federalism and separation of powers cannot easily be reconciled does not eliminate the need for that reconciliation. This, in a nutshell, is the whole point of approaching administrative federalism through a cross-dimensional lens: it may make some decisions easier, or it may make what at first seemed like easy decisions much harder. In either event, however, this Article's approach is to make those decisions more informed.

Making those choices is beyond the scope of this project, with one important exception. Specifically, my analysis takes, as given, the conventional view that the Court can and should play an active role in the project of administrative federalism.<sup>205</sup> As will be discussed, many of the proposals for administrative federalism envision the Court as a supporting player—to check specific agency actions, but more so as the progenitor of doctrines designed to stimulate different dynamics within and around the administrative state.<sup>206</sup> Insofar as the Court (rather than Congress or the President) will be the federal branch giving states greater protection in and around the administrative arena, separation of powers is implicated.<sup>207</sup> Many of the doctrinal proposals considered here are designed to channel more federalism decisions to Congress, or facilitate greater political oversight of agency action. In those regards, at least, the Court's doctrinal role may support the separation of powers. But, for those who believe on separation-of-powers grounds that only Congress (and not the Court) should be making decisions bearing on federalism, this Article makes a tradeoff: administrative

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205. See *infra* Part IV.A (discussing a number of doctrinal proposals for administrative preemption).

206. *Id.*

207. See Metzger, *Agency Reform*, *supra* note 2, at 74 (noting the “separation of powers implications” when the Court, as opposed to Congress, assigns “states a special agency policing role, and observing that an approach to agency reform that “focused more centrally on Congress would at least mitigate many of the[] concerns about judicial overstepping.”).

federalism needs the Court more than separation of powers needs the Court to sit idly by. I don't foresee this tradeoff as being controversial, which is why I take some comfort in making it here. No one, to my knowledge, has argued that the Court has no role to play in shaping administrative federalism (despite deep disagreements over which doctrines the Court should adopt or maintain toward that end).<sup>208</sup>

Finally, this Article is a first pass at teasing out the separation(s) of powers in administrative federalism. I fully expect—and, indeed encourage—other views about how particular administrative federalism proposals may implicate separation of powers in ways that I may overlook or give insufficient heed to here. This recognition, however, only speaks to the importance of the project: as is, we hazard making decisions about administrative federalism without accounting for separation of powers at all.

Subpart A, below, offers a cross-dimensional evaluation of the proposals for administrative preemption. Subpart B takes a similar approach for state voice. Subpart C concludes with some additional thoughts about the values of approaching administrative federalism cross-dimensionally and the challenges ahead.

### *A. Administrative Preemption*

Scholars have suggested a mix of proposals that would modify, in one or more ways, the Court's current approach to administrative preemption. These proposals may be grouped into four categories: (1) eliminating administrative preemption;<sup>209</sup>

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208. Gillian Metzger flags this separation-of-powers issue, at least as it relates to the Court's approach to state standing as a means toward facilitating state checks on agency action. *See id.* But, elsewhere, she expresses her belief that courts should play a role in preserving and promoting federalism in the administrative state. *See, e.g., Metzger, Administrative Law, supra* note 127, at 2100 (claiming that "the Court should apply administrative law doctrines with an eye toward reinforcing agency attentiveness to state interests in regulatory autonomy"). The question, again, is how best to do so.

209. *See Rubenstein, Delegating Supremacy?, supra* note 129, at 1129–31 (arguing that many of the problems associated with administrative federalism

(2) requiring that Congress clearly delegate preemption authority as a prerequisite to administrative preemption;<sup>210</sup> (3) requiring that agencies employ certain procedures before preempting state law;<sup>211</sup> and (4) ramping up judicial review of administrative preemption decisions.<sup>212</sup>

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can be alleviated by simply foreclosing administrative preemption); *cf.* Young, *Executive Preemption*, *supra* note 129, at 896–97 (arguing that foreclosing administrative preemption is probably most in keeping with the political and procedural safeguards, but also noting that it is “probably too late in the day to insist” on it).

210. *See, e.g.*, William Funk, *Preemption by Federal Agency Action*, in *PREEMPTIVE CHOICE: THE THEORY, LAW, AND REALITY OF FEDERALISM’S CORE QUESTION* 230–31 (William W. Buzbee ed., 2008) (arguing in favor of a clear statement restriction that would require Congress to clearly manifest its intent to delegate preemption authority); Mendelson, *Presumption Against*, *supra* note 129, at 698 (same); Merrill, *Preemption and Institutional Choice*, *supra* note 129, at 760 (“Agencies can preempt state law on their own authority only insofar as Congress has expressly delegated to them the authority to do so.”); Young, *Executive Preemption*, *supra* note 129, at 897–98 (“We might insist that, in order to take action with the effect of preempting state law, the agency be exercising authority delegated by Congress with a heightened degree of clarity, . . . [or] we might instead insist that any independent preemptive authority must be clearly delegated to the agency by Congress.”).

211. *See, e.g.*, Galle & Seidenfeld, *supra* note 127, at 2002 (“[A] significant factor at play in the decision to permit agencies to expand federal power . . . [is] the need for more information. This factor is tied closely to the considerations . . . on agency procedure.”); Merrill, *Preemption and Institutional Choice*, *supra* note 129, at 776 (“Such a differentiation [between preempting action and non-preempting action] would be designed to give further encouragement to agencies to use more consultative procedures like notice and comment rulemaking in addressing preemption questions.”); Metzger, *Administrative Law*, *supra* note 127, at 2029 (arguing that certain features of administrative law “hold strong to protect state interests,” including “notice-and-comment rulemaking,” and the judicially imposed requirement that agencies engage in “reasoned decisionmaking”).

212. *See* William W. Buzbee, *Preemption Hard Look Review, Regulatory Interaction and the Quest for Stewardship and Intergenerational Equity*, 77 *GEO. WASH. L. REV.* 1521, 1525 (2009) (“[P]olicy and factual judgments underpinning preemption should be given a ‘hard look.’ Indeed, when one looks at the rationales for more rigorous modes of judicial review, virtually all are triggered by these recent agency preemption claims.”); William Funk, *Judicial Deference and Regulatory Preemption by Federal Agencies*, 84 *TUL. L. REV.* 1233, 1234 (2010) (suggesting “how courts should assess claims of preemption of state law associated with federal agency regulations”); Karen A. Jordan, *Opening the Door*



It is well understood that these proposals slant, in different ways and degrees, toward some conception of federalism.<sup>213</sup> Overlooked until now, however, is how these same proposals can indirectly affect separation(s) of powers—also in different ways and degrees.

These “horizontal derivatives,” as I call them, come in two varieties: the first relates to how the federal branches interact among each other when making decisions about *preemption*; the second relates to how federal *substantive* decisions are made. In short, administrative-preemption doctrine can affect not only how federal preemption decisions are made but also, to various extents, how run-of-the-mill federal policy is made.<sup>214</sup> As

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to “*Hard-Look*” *Review of Agency Preemption*, 31 W. NEW ENG. L. REV. 353, 355–56 (2009) (“[I]f the source of the preemption is the agency, rigorous judicial review becomes a necessary safeguard for federalism concerns.”); Mendelson, *Chevron and Preemption*, *supra* note 184, at 741 (arguing that *Chevron* deference to agency’s determination of its own preemptive effect is inappropriate); Metzger, *Administrative Law*, *supra* note 127, at 2071 (“The *Chevron* focus additionally means that the administrative preemption debate centers on judicial review.”). *But cf.* Miriam Seifter, *Federalism at Step Zero*, 83 FORDHAM L. REV. 633, 641–46 (2014) (eschewing special deference doctrines for administration preemption decisions).

213. See Rubenstein, *Delegating Supremacy?*, *supra* note 129, at 1127 (“[A]dministrative supremacy threatens the values of federalism.”); Mendelson, *Presumption Against*, *supra* note 129, at 698 (“[A]gencies lack both institutional expertise on important issues of state autonomy and federalism.”); Galle & Seidenfeld, *supra* note 127, at 1933 (“This Article critiques the practice of limiting federal agency authority in the name of federalism.”); Metzger, *Administrative Law*, *supra* note 127, at 2109 (“[T]he future of federalism lies in integrating protections for states into agency deliberations and judicial review of agency action.”).

214. Gillian Metzger, Catherine Sharkey, and Miriam Seifter (writing separately) have advanced related, but separate, ideas to the one advanced here. Metzger has argued that some of the Court’s recent federalism decisions—particularly on questions of preemption—“seem to treat the preservation of state authority . . . as an important mechanism for guarding against federal agency failure.” See Metzger, *Agency Reform*, *supra* note 2, at 5. In a similar vein, Professor Sharkey has argued that administrative preemption doctrine can be shaped to improve how agencies make decisions about whether to preempt state law. Sharkey, *Accountability*, *supra* note 127. While their emphasis is on improving the regulatory process either generally or in respect to making administrative preemption decisions, see Sharkey, *Accountability*, *supra* note 127, at 2130, 2174; Metzger, *Agency Reform*, *supra* note 2, at 17, my attention is

developed below, these horizontal derivatives may provide an additional reason to favor or disfavor a particular administrative federalism proposal relative to others.

### 1. *Eliminating Administrative Preemption*

#### a. *For Federalism*

In other writing, I have argued that Congress's ability to freely "delegate supremacy" to agencies is an affront to the political and procedural safeguard theories of federalism.<sup>215</sup> Federal legislation is purposefully difficult.<sup>216</sup> To become federal "Law," a statutory proposal must survive the constitutional rigors of bicameralism and presentment.<sup>217</sup> And, along the way, statutory proposals must also survive the subconstitutional "vetogates" erected by the rules and customs of both chambers of Congress, such as the filibuster.<sup>218</sup> Allowing agencies to preempt state law based on nothing more than a general delegation of policymaking discretion circumvents the political and procedural

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directed to how changes in the regulatory process may derivatively affect separation-of-powers norms. *See infra* Part IV. Meanwhile, Professor Seifter explores what state voice—especially as transmitted through state-interest groups—portends for models of administrative legitimacy. Seifter, *States, supra* note 116. Some of her insights pertain here, insofar as administrative legitimacy may depend upon separation of powers within and around the administrative state. *See infra* Part IV.B (discussing Seifter's work and how it relates to separation of powers).

215. *See* Rubenstein, *Delegating Supremacy?*, *supra* note 129, at 1163; Rubenstein, *Paradox, supra* note 16, at 323–26.

216. *See* Rubenstein, *Delegating Supremacy?*, *supra* note 129, at 1163; Clark, *Separation of Powers, supra* note 112, at 1338–39 (discussing how the "precise lawmaking procedures prescribed by the Constitution" safeguard federalism by making the legislative process difficult).

217. *See* U.S. CONST. art. 1, § 7 ("Every 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.").

218. For discussions on how the legislative vetogates operate, see William N. Eskridge Jr. & John A. Ferejohn, *The Article I, Section 7 Game*, 80 GEO. L.J. 523, 528–33 (1992) (describing the legislative process as a game in which agencies have altered how the game is played).

safeguards that states would otherwise enjoy in the legislative process.<sup>219</sup>

As compared to the Court's existing doctrine, eliminating the possibility of administrative preemption would siphon more preemption decisions to Congress.<sup>220</sup> In turn, states may protect themselves legislatively by blocking or shaping Congress's decision to oust state law.<sup>221</sup> Further, foreclosing administrative preemption would promote state autonomy even when Congress does not expressly engage the preemption question in a statutory provision.<sup>222</sup> Under the Court's implied-preemption doctrine, Congress (or, for that matter, agencies) need not actually make an express preemption decision for its laws (or, administrative actions) to trump: preemption occurs if a sufficient conflict exists between the federal and state policy.<sup>223</sup> Eliminating the outlet of administrative preemption, however, would ensure that only Congress's statutes (and not administrative policies) can serve as the basis for that preemptive conflict.<sup>224</sup> The likely result is less

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219. See Rubenstein, *Delegating Supremacy?*, *supra* note 129, at 1160, 1163 (listing the ability of an agency to bypass the bicameral process and circumvent the political and procedural safeguards in that process as a problem with administrative supremacy).

220. See *id.* at 1163–82 (discussing the implications of channeling preemption decisions to Congress).

221. See Benjamin & Young, *supra* note 2, at 2115 (“[C]onventional wisdom holds that the states retain some measure of protection by way of the procedural and political safeguards of federalism.”); Peter J. Smith, Pennhurst, Chevron, and the Spending Power, 110 YALE L.J. 1187, 1202 (2001) (arguing that congressional representatives are accountable to their state constituencies in federalism determinations).

222. See *Chamber of Commerce v. Whiting*, 131 S. Ct. 1968, 1981–85 (2011) (reiterating that the Court's implied-preemption analysis applies regardless of whether Congress directly addressed the question of preemption in an express preemption or savings provision).

223. See, e.g., *Gade v. Nat'l Solid Wastes Mgmt. Ass'n*, 505 U.S. 88, 98 (1992) (discussing the Court's implied-preemption doctrine).

224. See Rubenstein, *Delegating Supremacy?*, *supra* note 129, at 1165 (discussing the substantive implications of eliminating administrative preemption, such as allowing only Congress to preempt state law through “duly enacted statutes”); Clark, *Constitutional Compromise*, *supra* note 145, at 1422 (arguing that “governance prerogatives of the states” were meant to be protected by the difficulty of enacting federal law); Mendelson, *Presumption Against*,

qualifying federal conflicts and thus less displacement of state law.<sup>225</sup>

The federalism contest over this proposal is whether it pushes too far in favor of state autonomy at the expense of nationalist interests. Mark Seidenfeld and Joshua Hawkes, for example, argue that foreclosing administrative preemption would improvidently sacrifice the institutional competencies that agencies bring to the preemption calculus, such as flexibility, expertise, and accountability, among others.<sup>226</sup> I, for one, do not think so for reasons explained elsewhere.<sup>227</sup> But the point, for present purposes, is that reasonable minds will differ on whether foreclosing administrative preemption leans too heavily in favor of state autonomy, or too heavily against nationalism.

While critically important, this federalism dispute should not monopolize the conversation. We should also consult what foreclosing administrative preemption might entail for separation(s) of powers.

#### *b. For Separation of Powers*

Eliminating administrative preemption could deliver both types of horizontal derivatives outlined above concerning how (1) express preemption and (2) substantive (i.e., non-preemption) federal policies are made.

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*supra* note 129, at 717 (“[T]he presumption against preemption is to ensure that states and the federal government participate in a real dialogue over whether state law should yield to federal law.”).

225. See Rubenstein, *Delegating Supremacy?*, *supra* note 129, at 1160 (discussing how administrative preemption has increased the number of federal–state conflicts due to the sheer volume of agency rulemaking).

226. See Hawkes & Seidenfeld, *supra* note 199, at 91–102; see also Galle & Seidenfeld, *supra* note 127, at 2021–22 (arguing generally that agencies should be able to preempt state law, in part, because they are best positioned institutionally to make preemption decisions).

227. See Rubenstein, *Delegating Supremacy?*, *supra* note 129, at 1183–88 (explaining how agencies can use their expertise to nudge *Congress* to decide preemption questions; how agencies are less politically accountable than Congress; and how administrative efficiency and flexibility are reasons to worry about, not applaud, administrative preemption).

First—and most obviously—foreclosing Congress’s ability to delegate preemption authority would limit the scope of what Congress could delegate. To be clear, Congress could still delegate general policymaking, for example, to the Federal Trade Commission, the Consumer Protection Board, the Department of Homeland Security, and so on. But Congress could not delegate the decision or power to displace state law.<sup>228</sup> Thus, in the event of a conflict between an administrative policy and state law, the administrative policy would not trump.<sup>229</sup> Rather, Congress would have to make the decision to preempt by statute, either *ex ante* in anticipation of federal–state conflicts or *ex post* in response to regulatory conflicts as they arise.<sup>230</sup> In either event,

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228. See Rubenstein, *Delegating Supremacy?*, *supra* note 129, at 1129 (“Congress’s well-entrenched authority to delegate policymaking to agencies is conceptually severable from the more limited and undertheorized power to delegate supremacy.”).

229. For a discussion and normative defense of the implications of this result, see *id.* at 1170–76 (describing the costs and benefits of federal–state regulatory overlap when administrative policy does not preempt state law). For a critical response, see Hawkes & Seidenfeld, *supra* note 199, at 77–83.

230. See Rubenstein, *Delegating Supremacy?*, *supra* note 129, at 1179–80 (“Foreclosing delegated supremacy may . . . foster *ex ante* preemption decisions. . . [a]nd may also be expected to have positive effects on Congress’s *ex post* preemption decisions.”). Hawkes and Seidenfeld are wrong to suggest that foreclosing administrative preemption is the equivalent of the legislative-negative proposal that was ultimately defeated in the Constitutional Convention. Hawkes & Seidenfeld, *supra* note 199, at 78. Most importantly, Congress can, and does, preempt state law *ex ante*. Moreover, foreclosing administrative preemption might cause Congress to decide preemption questions *ex ante* more often, insofar as the outlet of administrative preemption would not be available. Further, Hawkes and Seidenfeld’s argument seems to assume that Congress categorically would want to preempt state law just because an agency might prefer to do so. Put to the choice, however, Congress may prefer federal and state regulatory overlap on a particular issue, may prefer the conflicting state law over the federal policy, may prefer to see how the conflict works itself out, or may simply not have the political grist to overcome state resistance to an administrative policy because the country is torn on what the national policy—if any—should be. See Rubenstein, *Delegating Supremacy?*, *supra* note 129, at 1169–82; see also Christina M. Rodríguez, *Negotiating Conflict Through Federalism: Institutional and Popular Perspectives*, 123 YALE L.J. 2094, 2097 (2014) (“Though pursuit of their interests . . . may often lead to conflict, . . . the value of the system common to all of its participants is the framework it creates for the ongoing negotiation of disagreements . . . .”); *id.* at

requiring *Congress* to make preemption decisions gives partial, but important, expression to the separation-of-powers maxim that Congress is federal lawmaker.<sup>231</sup>

Second, foreclosing administrative preemption may provide Congress the political will to decide (rather than delegate) more matters of substantive policy. *If* agency action cannot preempt state law, and *if* Congress anticipates or wants a uniform national standard, then *Congress* will have to decide the content of that standard. To be clear, Congress would not have to make more decisions about the scope and content of federal policy than it currently does. Congress might simply have more reason to make those decisions if it wants or expects regulatory uniformity. In short, eliminating the outlet of administrative preemption would not only require Congress to make decisions about whether to preempt state law; it might also incentivize Congress to make more substantive regulatory decisions in the first place.

Surely there is ample room to disagree about the virtues of these horizontal derivatives. Critics of the nondelegation maxim are likely to hold unfavorable views about the horizontal derivatives associated with foreclosing administrative preemption.<sup>232</sup> For example, Peter Strauss worries that

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2100 (arguing that “national’ issues—those whose salience cuts across state lines and constituencies—are not always or necessarily best served by a federal monopoly”).

231. Of course, the Court has famously underenforced the principle that Congress cannot delegate lawmaking, allowing Congress to freely delegate policymaking. *See generally* Kathryn A. Watts, *Rulemaking as Legislating*, GEO. L.J. (forthcoming 2015) (discussing the disconnect between the nondelegation maxim and a variety of the Court’s other administrative law doctrines). *But cf.* Cass R. Sunstein, *Nondelegation Canons*, 67 U. CHI. L. REV. 315, 329–37 (2000) (suggesting that the constitutional maxim that Congress cannot delegate lawmaking is now partially captured in a bundle of canons of statutory interpretation). Still, however, the Court outwardly insists that Congress cannot delegate lawmaking. *See City of Arlington v. FCC*, 133 S. Ct. 1863, 1886 n.4 (2013) (noting that “under our constitutional structure” agency rules must be exercises of the “executive” power); *Whitman v. Am. Trucking Ass’ns*, 531 U.S. 457, 472 (2001) (stating that Article I “permits no delegation of [legislative] powers”).

232. For criticism of the nondelegation maxim, see David B. Spence & Frank Cross, *A Public Choice Case for the Administrative State*, 89 GEO. L.J. 97, 131–33 (2000) (outlining and rebuking the constitutional case for nondelegation); 1

abandoning administrative preemption might also require abandoning the Court's "delegation doctrine as we know it in any context implicating state law."<sup>233</sup> Meanwhile, those of the view that Congress should be making more decisions about regulatory policy may view these horizontal derivatives more favorably.<sup>234</sup>

Again, my objective here is not to proclaim the winning position. Rather, it is to enable a more holistic evaluation of what this particular federalism proposal may entail, cross-laterally, for separation of powers.

## 2. Clear-Statement Rule

A competing proposal for administrative preemption would require, as a prerequisite, that Congress clearly delegate the power to displace state law.<sup>235</sup> Under this approach—and contrary to the Court's existing doctrine<sup>236</sup>—Congress's general

KENNETH CULP DAVIS, ADMINISTRATIVE LAW TREATISE § 2.02, at 79 (1958) (insisting that the nondelegation doctrine is a judicial invention with no true constitutional character); Jerry L. Mashaw, *Prodelegation: Why Administrators Should Make Political Decisions*, 1 J.L. ECON. & ORG. 81, 91–98 (1985) (defending delegations as desirable for promoting public preferences and public welfare); Richard J. Pierce, Jr., *The Role of Constitutional and Political Theory in Administrative Law*, 64 TEX. L. REV. 469, 490 (1985) ("The abstract appeal of the [nondelegation] doctrine vanishes rapidly . . . when it is tested in the crucible of reality.").

233. See Peter L. Strauss, *The Perils of Theory*, 83 NOTRE DAME L. REV. 1567, 1591 (2008). I do think, however, that this concern is overstated. See Rubenstein, *Delegating Supremacy?*, *supra* note 129, at 1157–69 (arguing that eliminating administrative preemption would not awaken the sleeping nondelegation doctrine).

234. See, e.g., JOHN HART ELY, DEMOCRACY AND DISTRUST 130–32 (1980) (discussing why much law is left to be made by unelected administrators and commenting that this is an undemocratic escape from accountability); MARTIN H. REDISH, THE CONSTITUTION AS POLITICAL STRUCTURE 141–43 (1995) (noting that the "broad legislative delegation to administrative agencies threatens to dilute the principle of electoral accountability" by removing policy choices from those who are most representative); DAVID SCHOENBROD, POWER WITHOUT RESPONSIBILITY (1993) (providing a scathing critique of congressional delegation).

235. See sources cited *supra* note 210.

236. See, e.g., *Fidelity Fed. Sav. & Loan Ass'n v. de la Cuesta*, 458 U.S. 141,

delegation of policymaking to an agency would not qualify as an implicit delegation of the preemption power.<sup>237</sup>

*a. For Federalism*

By design, a clear-statement approach to administrative preemption aims to promote the political and the procedural safeguards of federalism and, thus, process federalism more generally. Politically, a clear-statement requirement could put interested parties on notice during the legislative process that Congress intends to delegate preemption authority.<sup>238</sup> This notice, in turn, could provide preemption challengers an opportunity to shape or block Congress's decision to delegate that decision.<sup>239</sup> Procedurally, a clear-statement requirement could also slow the pace and scope of administrative preemption, on the assumption that Congress will often fail to meet the political or drafting hurdles needed to express clearly its intent to delegate supremacy in a given case.<sup>240</sup> When Congress does not or cannot

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153–54 (1982) (“Federal regulations have no less pre-emptive effect than federal statutes. Where Congress has directed an administrator to exercise his discretion, his judgments are subject to judicial review only to determine whether he has exceeded his statutory authority or acted arbitrarily.”).

237. See Young, *Executive Preemption*, *supra* note 129, at 886–89 (explaining how an ambiguous statute delegates policymaking decisions to an agency, but that “the further question of whether the federal statute preempts state law . . . is not a policy judgment within the agency’s expertise”).

238. See Merrill, *Preemption and Institutional Choice*, *supra* note 129, at 767 (“[A]n express delegation of authority to preempt. . . would afford enhanced opportunities for the states and other interested parties to weigh in on the issue.”); Young, *Executive Preemption*, *supra* note 129, at 877 (“The effect of this clear statement rule is to ensure notice that state interests are threatened by proposed legislation . . .”).

239. See Rubenstein, *Delegating Supremacy?*, *supra* note 129, at 1157–58 (“One intended effect of this approach is to put interested parties on notice during the legislative process that Congress intends to delegate preemption authority.”); Young, *Executive Preemption*, *supra* note 129, at 898 (describing how the clear-statement rule would oblige Congress to make the preemption decision rather than leaving it to a court).

240. See Young, *Executive Preemption*, *supra* note 129, at 899 (discussing how a nondelegation canon raises the threshold for congressional delegations of



meet those challenges, states would be left room to regulate concurrently with agencies by default.<sup>241</sup>

My own view is that a clear-statement rule would mark an improvement in the law. This proposal returns attention to Congress, at least at the threshold, by ensuring that Congress wants or expects an agency to make a preemption decision on a particular subject. Yet, as compared to eliminating administrative preemption, a clear-statement rule may concede too much.<sup>242</sup> First, it assumes that Congress is constitutionally empowered to delegate the power of preemption.<sup>243</sup> Beyond this formalistic concern, however, a clear-statement rule provides “only half-baked redress” for the political and procedural safeguards of federalism.<sup>244</sup> When Congress delegates the preemption decision, its members can simply redirect any concerned constituents to the appropriate agency. That political deflection would not be possible if, instead, the preemption buck stopped with Congress.<sup>245</sup>

Ultimately, whether a clear-statement rule bends too far in favor of state autonomy, or not far enough, largely depends on one’s normative predispositions. Those who favor a clear-statement rule generally do so as a compensating adjustment—a necessary price to pay for Congress’s ability to delegate preemption authority and the Court’s general reluctance to police the scope of Congress’s enumerated powers.<sup>246</sup> Others, however,

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authority that encroach on state autonomy).

241. *See id.* at 880.

242. *See* Rubenstein, *Delegating Supremacy?*, *supra* note 129, at 1157–58 (discussing how a clear-statement rule would require Congress to deliberate and decide for itself to displace state law, but suggesting that such a rule is not enough).

243. *See generally* Rubenstein, *Paradox*, *supra* note 16 (challenging this assumption).

244. *See* Rubenstein, *Delegating Supremacy?*, *supra* note 129, at 1158 (“Requiring Congress to deliberate and decide whether to *delegate* supremacy offers states far less protection than requiring Congress to both deliberate and decide *for itself* to displace state law.” (emphasis added)).

245. *Id.*

246. *See, e.g.*, Clark, *Separation of Powers*, *supra* note 112, at 1433 (suggesting a clear-statement rule as a prerequisite to administrative field

disfavor a clear-statement rule as an untoward judicial intrusion upon legislative decisions, administrative decisions, or both.<sup>247</sup> Gillian Metzger argues, for example, that a clear-statement rule “would create extraordinary obstacles to federal administrative governance.”<sup>248</sup> Professors Galle and Seidenfeld make a similar point, arguing that agencies have institutional advantages that make them good deciders of preemption even when Congress is silent.<sup>249</sup>

*b. For Separation of Powers*

Apart from its effect on federalism, a clear-statement rule could promote the separation-of-powers value of making Congress actually deliberate and decide to delegate supremacy.<sup>250</sup> Again, this promotes the separation-of-powers principle that Congress is lawmaker. On the other hand, however, a judicially enforced requirement that Congress clearly express its intent could also serve to undermine the Congress-as-lawmaker principle. That disruption can occur, for instance, in case-specific contexts where Congress actually intends to delegate preemption but fails to say

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preemption); Mendelson, *Presumption Against*, *supra* note 129, at 723–24 (listing the various benefits a clear-statement rule would provide for state interests); Merrill, *Preemption and Institutional Choice*, *supra* note 129, at 759 (“Whatever improvements [transferring broad authority to agencies] might bring in terms of pragmatic variables, it would disserve the cause of constitutional government.”); Young, *Executive Preemption*, *supra* note 129, at 897–99 (discussing the practical implications of a clear-statement rule).

247. See Metzger, *Agency Reform*, *supra* note 2, at 39–40 (discussing judicial opinions that describe the limits of federal court oversight of government administration). “[A]ccording to the Court, broad programmatic attack[s] inappropriately inject . . . [c]ourts into day-to-day agency management and risk judicial entanglement in abstract policy disagreements.” *Id.* (citations and quotation marks omitted).

248. Metzger, *Administrative Law*, *supra* note 127, at 2072.

249. See Galle & Seidenfeld, *supra* note 127, at 1948 (“[A]gencies are in many contexts better suited to consider federalism concerns than are Congress or the federal judiciary.”).

250. See Mendelson, *Presumption Against*, *supra* note 129, at 710 (describing how a clear-statement rule “helps assure that legislative decisions to preempt are thoughtful and deliberate”).

so in clear enough terms to satisfy a reviewing court.<sup>251</sup> In that case, the court might be substituting its judgment for Congress's.

Either way, the horizontal derivatives attaching to a clear-statement rule are, by comparison, more modest than if administrative preemption were foreclosed. While a clear-statement rule would make it more difficult for Congress to delegate supremacy, it would not prevent Congress from doing so.<sup>252</sup> That horizontal modesty, for some, may be a reason to favor this proposal.

Indeed, it may explain why Professor Clark seems to favor a clear-statement rule over an approach that would eliminate administrative preemption (although his writing has not expressly ruled out the latter possibility).<sup>253</sup> On the one hand, foreclosing administrative preemption would seem to maximize the political and procedural safeguards of federalism—a result that, considered in isolation, Professor Clark certainly seems to favor.<sup>254</sup> On the other hand, however, Professor Clark's sensitivity to the Court's existing nondelegation doctrine seems to lead him, more comfortably, in favor of a clear-statement rule.<sup>255</sup> While a

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251. See Benjamin & Young, *supra* note 2, at 2147–50 (discussing the Court's "presumption against preemption" doctrine and requirement of being certain of Congressional intent).

252. See *id.* at 2148–49; see also Young, *Executive Preemption*, *supra* note 129, at 901 (recognizing that it is difficult for Congress to predict potential conflicts and when an agency might need preemptive authority).

253. See Clark, *Separation of Powers*, *supra* note 112, at 1433 (suggesting a clear-statement rule as a prerequisite to administrative field-preemption).

254. Indeed, this is the overarching theme of his great body of work. See *id.* at 1438 ("Permitting agencies to resolve statutory ambiguities authoritatively not only negates the presumption against preemption, but effectively shifts the power to preempt state law away from Congress and the President to less accountable administrative agencies."); Clark, *Constitutional Compromise*, *supra* note 145, at 1422 ("[T]he Supremacy Clause safeguards federalism by conditioning supremacy on adherence to constitutionally prescribed lawmaking procedures."); Bradford R. Clark, *Domesticating Sole Executive Agreements*, 93 VA. L. REV. 1573, 1577 (2007) ("[T]he Supreme Court's modern view of the domestic effect of sole executive agreements appears to contradict the Supremacy Clause, constitutionally prescribed lawmaking procedures, and the political safeguards of federalism.").

255. See Clark, *Separation of Powers*, *supra* note 112, at 1375, 1433–34 (suggesting that when Congress delegates policymaking power, it is effectively

clear-statement rule might not be his ideal federalism adjustment, more aggressive reforms along the federalism dimension (say, eliminating administrative preemption) might take him too far from his ideal along the separation-of-powers dimension.

### *3. Limiting the Types of Qualifying Agency Action*

A third approach to administrative preemption would limit the types of agency action that could qualify for preemptive effect.<sup>256</sup> Due to the combination of functions in agencies (legislative, judicial, and executive), agencies make policy in any number of forms.<sup>257</sup> This, in turn, raises the issue of *which* forms should qualify for preemption under the Supremacy Clause.

#### *a. For Federalism*

As discussed in Part II, agency action with the “force of law” qualifies for preemptive effect under the Court’s existing doctrine.<sup>258</sup> Included in this category are (1) agency policies promulgated pursuant to Administrative Procedure Act (APA) notice-and-comment rulemaking and (2) binding agency adjudications—both of which are discussed in more detail below.

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Congress that preempts state law, thus potentially alleviating any Supremacy Clause problem).

256. Cf. Young, *Executive Preemption*, *supra* note 129, at 901 (“What will *not* work . . . is for the Court to continue to pretend that every federal agency action is equivalent to a congressional statute for purposes of preemption analysis.” (emphasis added)).

257. See Gersen, *supra* note 11, at 305 (“The Supreme Court has described agencies’ functional authority as a mix of executive, quasi-judicial, and quasi-legislative.”).

258. See *Wyeth v. Levine*, 555 U.S. 555, 576 (2009) (“This Court has recognized that an agency regulation with the force of law can pre-empt conflicting state requirements.”); see also *Geier v. Am. Honda Motor Co.*, 529 U.S. 861, 869 (2000) (describing ordinary preemption principles as they “instruct us to read statutes as pre-empting state laws . . . that ‘actually conflict’ with the statute or federal standards promulgated thereunder” (quoting *Fidelity Fed. Sav. & Loan Ass’n v. de la Cuesta*, 458 U.S. 141, 153 (1982))).

Less clear, however, is whether other types of agency action qualify or should qualify. For example, still undecided is whether binding administrative rules that are exempt from notice-and-comment procedures—such as rules promulgated under the APA’s “good cause” or “foreign affairs” exceptions<sup>259</sup>—can preempt state law.<sup>260</sup> Moreover, the Court’s landmark decision in *Arizona v. United States*<sup>261</sup> sent mixed signals on whether administrative enforcement policies (the product of neither rulemaking nor adjudicatory proceedings) could form the basis of a preemptive conflict.<sup>262</sup> Faced with these uncertainties, scholars have pressed for clearer lines. But, as discussed below, disagreement persists over where to draw those lines.<sup>263</sup>

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259. See 5 U.S.C. § 553(a) (2012) (exempting matters relating to the military, foreign affairs, or public property from APA rulemaking requirements); *id.* § 553(b)(B) (providing a “good cause” exemption from notice-and-comment requirements).

260. See Benjamin & Young, *supra* note 2, at 2132–33 (asserting that administrative federalism raises questions about whether rules promulgated without notice-and-comment procedures can preempt state law).

261. 132 S. Ct. 2492 (2012).

262. See Eric Posner, *The Imperial President of Arizona*, SLATE (June 26, 2012, 12:04 PM), <http://perma.cc/6QH-AZC8> (last visited January 22, 2015) [hereinafter Posner, *The Imperial President*] (observing that the *Arizona* majority found certain provisions of S.B. 1070 preempted not because it conflicts with federal law, but because it conflicts with the President’s policy) (on file with the Washington and Lee Law Review); David S. Rubenstein, *Immigration Structuralism: A Return to Form*, 8 DUKE J. CONST. L. & PUB. POL’Y 81, 86 (2013) (discussing how the Court sent mixed signals in *Arizona* on the question of whether, or to what extent, Arizona’s immigration policies were preempted by the agency’s enforcement policies or Congress’s statutes).

263. Young, *Executive Preemption*, *supra* note 129, at 899 (discussing limiting the scope of agency preemption powers in the same way deference is limited, which would not limit the ability of Congress to delegate preemptive authority, “but . . . insist that the agency actually exercise that authority” before preemption could be found).

*(1) Notice-and-Comment Rulemaking*

Some scholars suggest making notice-and-comment proceedings the exclusive means of administrative preemption.<sup>264</sup> This proposal requires appreciation—and hence, a brief detour—for what notice-and-comment rulemaking generally entails. This background will also be relevant later, where I will suggest how a notice-and-comment approach to preemption may affect separation(s) of powers.<sup>265</sup>

As applied by the Court, the APA's notice-and-comment procedure is demanding (though, to be sure, less demanding than the legislative process).<sup>266</sup> First, the agency must provide advance notice of its proposed rulemaking in the Federal Register and offer interested parties the opportunity to submit written comments in response.<sup>267</sup> Moreover, to enable meaningful public comments, courts have required the agency to make its intentions clearly

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264. See, e.g., Galle & Seidenfeld, *supra* note 127, at 1939 (“[T]here are strong indications that agency actions, especially notice-and-comment rulemaking, are more transparent than congressional actions.”); Benjamin & Young, *supra* note 2, at 2133 (stating that many questions as to whether binding administrative rules exempt from notice-and-comment procedures can preempt state law assume a focus on agency, and asserting that the more foundational question lies with Congress). Presumably, these commentators would also include agency regulations promulgated pursuant to the more procedurally demanding requirements of so-called “formal” rulemaking. See 5 U.S.C. §§ 556–557 (2012) (listing the statutory requirements for “formal” rulemaking). But these types of rulemakings are quite rare. See GARY S. LAWSON, FEDERAL ADMINISTRATIVE LAW 215 (2d ed. 2001) (“Apart from the few rulemaking statutes that contain an express ‘on the record’ requirement, formal rulemaking has virtually disappeared as a procedural category.”).

265. See *infra* notes 303–323 and accompanying text (discussing the notice-and-comment approach to preemption in more detail).

266. See *INS v. Chadha*, 462 U.S. 919, 951 (1983) (discussing the “finely wrought” and cumbersome legislative requirements of bicameralism and presentment); Eskridge & Ferejohn, *supra* note 218, at 528–33 (discussing legislative vetogates).

267. See 5 U.S.C. § 553(b)–(c) (2012) (stating the statutory notice-and-comment requirements); see also *Am. Radio Relay League, Inc. v. FCC*, 524 F.3d 227, 237 (D.C. Cir. 2008) (“It would appear to be a fairly obvious proposition that studies upon which an agency relies in promulgating a rule must be made available during the rulemaking in order to afford interested persons meaningful notice and an opportunity for comment.”).

known in the notice of rulemaking.<sup>268</sup> Further, because courts require that an agency's final rule be a "logical outgrowth" of what the notice foreshadowed, the agency may not change an important aspect of a proposed rule without first providing an additional notice and opportunity for public comment.<sup>269</sup> Finally, although the APA textually requires that a final regulation be accompanied by a "concise general statement of [the regulation's] basis and purpose,"<sup>270</sup> courts generally require the agency to respond to all significant comments received, which burdens the agency to explain its decisions rather thoroughly.<sup>271</sup>

Apart from the foregoing, notice-and-comment rulemakings potentially trigger political and judicial oversight. For example, executive orders require that executive agencies report and seek approval of its regulations from the Office of Internal Regulatory Affairs, which is under the President's supervision.<sup>272</sup> And to the

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268. See *Natural Res. Def. Council v. EPA*, 279 F.3d 1180, 1187–88 (9th Cir. 2002) (discussing the notice-and-comment requirements and that the final rule must not depart too much from the proposed rule); *Sw. Bell Tel. Co. v. FCC*, 168 F.3d 1344, 1353 (D.C. Cir. 1999) (finding that local telephone companies were not deprived of notice that the FCC might use industry-wide averages in their evaluations).

269. See *Shell Oil Co. v. EPA*, 950 F.2d 741, 751 (D.C. Cir. 1991) ("But an unexpressed intention cannot convert a final rule into a 'logical outgrowth' that the public should have anticipated."); Phillip M. Kannan, *The Logical Outgrowth Doctrine in Rulemaking*, 48 ADMIN. L. REV. 213, 214 (1996) ("Generally stated, if the final rule is found by the reviewing court to be the logical outgrowth of the proposed rule, it will find adequate notice . . .").

270. 5 U.S.C. § 553(c).

271. See, e.g., *United States v. Nova Scotia Food Prods. Corp.*, 568 F.2d 240, 252 (2d Cir. 1977) ("It is not in keeping with the rational process to leave vital questions, raised by comments which are of cogent materiality, completely unanswered."); see also Hickman, *supra* note 196, at 474 (explaining that, despite the text of § 553(c), that judicial requirements for explanation "[eschew] concision").

272. See Exec. Order No. 12,866, 3 C.F.R. 638 (1994) (providing that agencies must submit proposed agency regulation to OIRA). Every President since Ronald Reagan has had a policy of regulatory review. See Exec. Order No. 12,291, 3 C.F.R. 127 (1982) (President Reagan), *revoked by* Exec. Order No. 12,866, 3 C.F.R. 638 (1994); Exec. Order No. 12,866, 3 C.F.R. 638 (1994) (President Clinton); Exec. Order No. 13,422, 3 C.F.R. 191 (2008) (President George W. Bush), *revoked by* Exec. Order No. 13,497, 3 C.F.R. 218 (2010); Exec. Order No. 13,563, 3 C.F.R. 215 (2012) (President Obama); see also Nicholas

extent that the proposed rule may interfere with state prerogatives, Executive Order 13,132 instructs agencies to account for those federalism implications.<sup>273</sup> Moreover, pursuant to the Congressional Review Act, all agencies are required to submit proposed rules to Congress and the General Accounting Office before the rule can take effect.<sup>274</sup> Meanwhile, the procedural hurdles of notice-and-comment rulemaking yield a fairly robust paper trail, which on judicial review enables courts to take a “hard look” at a rule’s substance and the agency’s decisional basis.<sup>275</sup> Finally, and more informally, the procedures inherent in notice-and-comment rulemaking expand the class of interest groups and

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Bagley & Richard L. Revesz, *Centralized Oversight of the Regulatory State*, 106 COLUM. L. REV. 1260, 1267 (2006) (stating Office of Management and Budget review “provides a sitting President, Democrat or Republican, with a powerful tool to promote his political agenda”); Kagan, *supra* note 61, at 2285–90 (discussing President Clinton’s use of regulatory review). For a collection of the arguments over the President’s directive authority, see generally Robert V. Percival, *Who’s in Charge? Does the President Have Directive Authority over Agency Regulatory Decisions?*, 79 FORDHAM L. REV. 2487 (2011).

273. See *supra* notes 178–186 and accompanying text (providing that federal agencies must consult with the states before taking action if that action would interfere with states’ policies).

274. See 5 U.S.C. § 801 (2012) (requiring agencies to submit a report containing a copy of the rule, a general statement, and cost–benefit analysis of the rule, among other requirements). The CRA creates “an automatic process for generating legislative consideration of disapproval in every case of agency rulemaking, that brings all rules before Congress for review immediately upon their adoption.” Peter L. Strauss, Speech, *From Expertise to Politics: The Transformation of American Rulemaking*, 31 WAKE FOREST L. REV. 745, 768 (1996). Although the constitutional requirements of bicameralism and presentment for legislating are not circumvented by this procedure, the CRA eases Congress’s own rules, see 5 U.S.C. § 802, making it easier for overriding legislation to make it to the floor of each House of Congress for votes. See Beermann, *supra* note 62, at 84 (explaining that “[t]he main innovations of the CRA are procedural”).

275. See *Motor Vehicles Mfrs. Ass’n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 42–43 (1983) (discussing that hard look review requires an agency to articulate the reasoning behind its decision and the court must review the reasoning); Thomas J. Miles & Cass R. Sunstein, *The Real World of Arbitrariness Review*, 75 U. CHI. L. REV. 761, 761 (2008) (providing that hard look doctrine requires agencies “to offer detailed, even encyclopedic, explanations” for agency actions).



entities participating in the decisionmaking process.<sup>276</sup> These participants, in turn, can trigger “fire alarms” in the political branches, most notably Congress, if they are dissatisfied with the direction of anticipated agency action.<sup>277</sup> These fire alarms offer Congress a cost-efficient way to monitor agencies and to intervene, if necessary, prior to the administrative policy taking hold.<sup>278</sup>

In light of the foregoing, scholars who favor notice-and-comment procedures as a prerequisite to administrative preemption generally do so for four related reasons: first, because “[t]he additional burdens imposed on the agency” can serve to slow or quash preemptive regulations;<sup>279</sup> second, because these procedures provide states the best opportunity to have their viewpoints considered within the administrative forum;<sup>280</sup> third, because of the potential for state-triggered “fire alarms” in Congress;<sup>281</sup> and fourth, because, in the process of conducting

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276. See Mathew D. McCubbins, Roger G. Noll & Barry R. Weingast, *Administrative Procedures as Instruments of Political Control*, 3 J.L. ECON. & ORG. 243, 244, 258 (1987) (discussing that notice-and-comment procedures permit an agency to determine “who[] the relevant political interests to the decision” are).

277. See *id.* at 244, 257–58 (arguing that rulemaking procedures give Congress and the President early warning of agency action).

278. See *id.* at 244, 258 (noting that agency rulemaking procedures provide political figures notice); see also Lisa Schultz Bressman, *Procedures as Politics in Administrative Law*, 107 COLUM. L. REV. 1749, 1769 (2007) (providing that Congress “shifts to third parties the cost of gathering and processing information”). By contrast, judicial review generally requires that an agency action be final before it may be judicially challenged. See 5 U.S.C. § 704 (2012) (“A preliminary, procedural, or intermediate agency action or ruling not directly reviewable is subject to review on the review of the final agency action.”). Because of the deference that courts generally afford to the substance of agency decisions, derailing an anticipated administrative action politically is often a challenger’s best chance of redress.

279. Young, *Executive Preemption*, *supra* note 129, at 899.

280. See Metzger, *Administrative Law*, *supra* note 127, at 2058, 2084–85 (providing that the procedures provide notice to states of potentially harmful agency action, and that many statutes provide a prerequisite of notification before agency action can “displace a state regulatory role”).

281. See Mark Seidenfeld, *Who Decides Who Decides: Federal Regulatory Preemption of State Tort Law*, 65 N.Y.U. ANN. SURV. AM. L. 611, 647 (2010) [hereinafter Seidenfeld, *Who Decides*] (noting that notice and comment permits

“hard look” review, a court can ensure that the agency adequately took state interests into account during the rulemaking process.<sup>282</sup> Collectively, these reasons are a partial nod to the political and procedural safeguards of federalism. Of course, the political and procedural protection that states receive through notice and comment is fundamentally different—in kind and degree—than what states would otherwise receive in the legislative forum.<sup>283</sup> However, notice-and-comment rulemaking provides states *more* procedural (and indirect political) protection than they generally receive through less formal modes of agency action.<sup>284</sup>

(2) *Other Agency Action: Administrative Adjudication and Nonbinding Policies*

Other scholars, however, would draw the preemption line elsewhere. For example, Thomas Merrill would add binding administrative adjudications to the class of qualifying preemptive action.<sup>285</sup> The theory behind this proposal is that adjudications are binding on the parties to these proceedings.<sup>286</sup>

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interested parties to inform Congress if the rulemaking proceedings conflict with their interests); Metzger, *Administrative Law*, *supra* note 127, at 2087 (noting that “by forcing an agency to provide notice of actions it plans to take, procedural requirements empower congressional oversight and thus reinforce such political safeguards as Congress has to offer”).

282. See Seidenfeld, *Who Decides*, *supra* note 281, at 656 (“[F]ederal courts will be responsible for direct review of preemption rules.”); see also Sharkey, *Accountability*, *supra* note 127, at 2130 (arguing that hard-look review could help induce agencies to take state interests into account, as they are already required to do (but do not always do) under federalism executive orders).

283. See Young, *Executive Preemption*, *supra* note 129, at 876–78 (discussing that federal agencies “are clearly not designed to represent the interests of States” and can circumvent the political and procedural safeguards of federalism while Congress, in the legislative forum, cannot).

284. See *id.* at 899 (“Procedures such as notice and comment offer some opportunity for state governmental input into the rulemaking process, both directly and through federal representatives.”).

285. See Merrill, *Preemption and Institutional Choice*, *supra* note 129, at 763–67 (using “force of law” as a criteria for preemptive effect, in combination, however, with other limitations, including a clear-statement rule).

286. See M. Elizabeth Magill, *Agency Choice of Policymaking Form*, 71 U.

Although adjudicative orders have the force of law, the procedures generally associated with agency adjudication are a far cry from the political- and procedural-safeguards theories of federalism (if that is even the goal). To begin with, states may not even be parties to an adjudication that is later found to have preemptive force, much less be aware that a potentially preemptive adjudication occurred. Moreover, even if agency orders are binding on the agency and adjudicating parties, the decisional policies that emerge from those adjudications bind neither third parties nor the agency in the same way that notice-and-comment rulemakings do.<sup>287</sup> Indeed, an agency may choose to make policy via adjudication (rather than rulemaking) so that it can more flexibly change its position in a future adjudication should the need or desire arise.<sup>288</sup> Thus, to the extent that a decisional policy

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CHI. L. REV. 1383, 1394 (2004) (“An order produced in administrative adjudication binds only the party to that proceeding . . .”).

287. See William D. Araiza, *Agency Adjudication, the Importance of Facts, and the Limitations of Labels*, 57 WASH. & LEE L. REV. 351, 362–63 (2000) (observing that “when an agency adjudicates, it need not confine itself to existing law”); Charles H. Koch, Jr. & Richard Murphy, Annotation, *Impact of Administrative Decisions*, 2 ADMIN. L. & PRAC. § 5:67 (3d ed. 2014) (explaining that “[s]tare decisis is not the rule in administrative adjudications”); *Texas v. United States*, 866 F.2d 1546, 1556 (5th Cir. 1989) (“An agency . . . is not bound by the shackles of stare decisis to follow blindly the interpretations that it, or the courts of appeals, have adopted in the past.”); *NLRB v. Wyman-Gordon Co.*, 394 U.S. 759, 765–66 (1969) (describing administrative rules as precedential, subject only to a “qualified role of stare decisis” (emphasis added)). For a useful comparison of the similarities and differences between administrative and judicial precedent, see Ray Jay Davis, *The Doctrine of Precedent as Applied to Administrative Decisions*, 59 W. VA. L. REV. 111, 124–28 (1957). For normative defenses of the difference, see *id.* at 128–33 (arguing that a strict version of stare decisis would unduly impede administrative flexibility in making policy); Charles H. Koch, Jr., *Policymaking by the Administrative Judiciary*, 56 ALA. L. REV. 693, 705 (2005) (same).

288. See *SEC v. Cheney Corp.*, 332 U.S. 194, 202 (1947) (“Not every principle essential to the effective administration of a statute can or should be cast immediately into the mold of a general rule. . . . In performing its important functions in these respects, therefore, an administrative agency must be equipped to act either by general rule or by individual order.”). That is not to say that an agency may arbitrarily change course. Generally, courts require agencies to provide non-arbitrary explanation for an adjudicatory change in policy. See, e.g., *Comcast Corp. v. FCC*, 526 F.3d 763, 769 (D.C. Cir. 2008) (“[A]n

announced in an adjudicative order is doing the preemptive work, it is all the more difficult to capture this type of agency action under the Supremacy Clause's rubric of "Law."<sup>289</sup>

If nothing else, however, limiting preemptive effect to agency action having the "force of law" would seem to rule out a large swath of nonbinding, informal agency action, including, for example, the type of systemic prosecutorial policies at issue in *Arizona v. United States*.<sup>290</sup> In other administrative contexts—for example, the Court's *Chevron* doctrine—the Court has held that agency manuals, guidance documents, and the like do not carry the force of law.<sup>291</sup> If this conception transfers to the federalism

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agency's unexplained departure from precedent must be overturned as arbitrary and capricious."); *Borough of Columbia v. Surface Transp. Bd.*, 342 F.3d 222, 229 (3d Cir. 2003) (providing that, absent a reasoned explanation, an agency's change in precedent is arbitrary and capricious).

289. See U.S. CONST. art. VI, cl. 2 (providing that the Constitution, "Laws made . . . in Pursuance thereof," and treaties are the supreme law of the land).

290. 132 S. Ct. 2492 (2012). In *Arizona*, Justice Alito—concurring and dissenting, in part—plainly expressed the view that the immigration agency's nonbinding enforcement policies could not preempt because they did not carry the "force of law." *Id.* at 2527 (Alito, J., concurring in part and dissenting in part). More so, he thought it "remarkable" that the administration would even contend otherwise. *Id.* (describing, as "remarkable," the federal administration's position that "a state law may be pre-empted, not because it conflicts with a federal statute or regulation, but because it is inconsistent with a federal agency's current enforcement priorities. . . . [which] are not law."). But the *Arizona* majority did not directly engage these points. To the contrary, it seemed to rely on the agency's enforcement policies as a basis (or maybe partial basis) for preemption of at least one (and maybe two) of the *Arizona* provisions at issue. *Id.* at 2506 (majority opinion) (explaining that the state law "could be exercised without any input from the Federal Government (meaning the Executive) about whether an arrest is warranted in a particular case," thus "allow[ing] the State to achieve its own immigration policy"); see also Posner, *The Imperial President*, *supra* note 262 (observing that the *Arizona* majority found certain provisions of S.B. 1070 preempted, not because it conflicts with federal law, but because it "conflicts with the president's policy"). Because the Court rejected the administration's enforcement claim regarding another provision at issue, Section 2(B), *Arizona*, 132 S. Ct. at 2510, it is hard to know what to make of the Court's dichotomous treatment. Language in the Court's opinion, however, suggests that the administration's enforcement policies made an important difference for the preemption calculus, at least when the statute itself was ambiguous as to Congress's intent. See *id.* ("There is a basic uncertainty about what the law means and how it will be enforced.").

291. See *United States v. Mead Corp.*, 533 U.S. 218, 234 (2001) (finding that ruling letters have no legal force); *Christensen v. Harris Cnty.*, 529 U.S. 576,

context,<sup>292</sup> then these types of informal agency pronouncements also would lack preemptive effect under a force-of-law approach.<sup>293</sup>

*b. For Separation of Powers*

For reasons just explained, commentators differ on where the line should be drawn between preemptive and non-preemptive agency action, in part because the line's placement carries different implications for federalism(s). Still unappreciated in the debate, however, are how variations in the line's placement also have variegated effects on separation(s) of powers. Here, I consider the horizontal derivatives for two related administrative preemption proposals. The first proposal would foreclose agencies from preempting state law through nonbinding administrative action (but would still allow agencies to preempt through adjudication and notice-and-comment rulemaking). The second proposal would limit administrative preemption to notice-and-comment rulemaking (but would exclude nonbinding action, adjudication, and rules not promulgated pursuant to notice and comment from having preemptive effect).

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587 (2000) (noting interpretations, opinion letters, "policy statements, agency manuals, and enforcement guidelines" carry no legal force).

292. Cf. Sidney A. Shapiro & Richard W. Murphy, *Eight Things Americans Can't Figure Out About Controlling Administrative Power*, 61 ADMIN. L. REV. 5, 23 (2009) (describing the "force of law" as "one of the more pernicious phrases in American administrative law"). The confusion stems in part from the fact that the Court has never defined the term "force of law" and because courts employ the term in at least two other administrative law contexts: (1) deference doctrine; and (2) APA exemptions for notice-and-comment rulemaking. Hickman, *supra* note 196, at 467, 472. For a discussion of these alternative and oft-confused uses of "force of law," see Hickman, *supra* note 196, at 467, 472–90.

293. My own view is that *if* agencies are to have preemption power, then it should attach only *if* (1) Congress expressly delegates preemption authority and (2) the agency exercises that authority via notice-and-comment rulemaking. These prerequisites, taken together, afford states at least some political and procedural protection in Congress and some administrative protection. To be sure, this package falls short of the conventional political and procedural safeguards of federalism. But some administrative safeguarding of state autonomy seems better than none.

First, foreclosing the preemptive effect of nonbinding agency policies could have the effect of channeling more preemption decisions (1) to Congress, (2) to more formalized agency proceedings (such as adjudication or notice-and-comment), or (3) some combination of the above. More specifically, foreclosing nonbinding agency action from having preemptive effect would preserve state policies from being preempted by that policy. If the agency needs or wants its nonbinding policy to apply unimpeded and uniformly throughout the country, then the agency might turn to Congress for help. The separation-of-powers effects of channeling preemption decisions to Congress have already been discussed above, and will not be repeated here.<sup>294</sup>

But what if, instead of turning to Congress to create a uniform standard, the agency prefers to do so through binding agency processes, such as notice-and-comment or adjudication?

It is hornbook administrative law that agencies enjoy wide discretion in selecting their method of policymaking—whether by notice-and-comment rulemaking, administrative adjudication, or other means.<sup>295</sup> Of course, important considerations will inform an agency's choice of policymaking mode.<sup>296</sup> First, time and resources are central considerations. Notice-and-comment proceedings tend to be the most cumbersome in light of the procedures outlined above (as well as others),<sup>297</sup> which is why

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294. See *supra* Parts IV(A)(1)(b) and (2)(B).

295. Congress can limit the range of policymaking mode by statute, but it usually does not do so. See RICHARD PIERCE JR., 1 ADMINISTRATIVE LAW TREATISE § 6.9, at 374 (4th ed. 2002) (“Most agency-administered statutes confer on the agency power to issue rules and power to adjudicate cases, leaving the agency with discretion to choose any combination of rulemaking and adjudication it prefers.”). This maxim finds its roots in *SEC v. Chenery*, 332 U.S. 194, 203 (1947) (providing that agency has the discretion to decide whether the act by adjudication or rulemaking).

296. For a useful treatment of this point, see Magill, *supra* note 286, at 1396 (“An agency’s selection of a policymaking tool [implicates] . . . the procedure the agency must follow; whether and how the agency’s action binds private parties; whether and when the agency’s action can be challenged in court; and the standard that a court will apply when that suit is brought.”).

297. See *supra* notes 266–278 and accompanying text (discussing the notice-and-comment rulemaking procedures).

agencies sometimes prefer to avoid this policymaking device.<sup>298</sup> Second, the agency's procedural choice figures prominently in whether, and to what extent, the substance of the agency's policy will receive deference from a court on judicial review.<sup>299</sup> Knowing this, agencies may choose those forms of policymaking that will yield higher degrees of deference.<sup>300</sup> Third, the means chosen by the agency for developing policy dictate whether the resulting policy is binding on regulatory targets and the agency.<sup>301</sup> Agencies may or may not want their policies to be binding, and thus may select a policymaking mode based on that consideration.<sup>302</sup>

My suggestion here is that "preemptive effect" might be added to the list of considerations that inform an agency's choice of policymaking mode. If an agency wants its substantive policies to apply uniformly—that is, without state interference—then it might be more inclined to choose the policymaking mode that can accomplish that end. Stated otherwise, *if* the only way an agency could obtain preemptive effect administratively was through notice-and-comment rulemaking, and *if* an agency wants its substantive policy to preempt in the event of a conflict with state

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298. See, e.g., Hickman, *supra* note 196, at 474 ("Given the burdens of notice-and-comment rulemaking, it is perhaps not surprising that agencies might prefer to advance substantive legal interpretations through these nonlegislative formats.").

299. See Magill, *supra* note 286, at 1439 (comparing the deference each form of policy-making generally receives); see also *United States v. Mead Corp.*, 533 U.S. 218, 237 (2001) (holding that agency action with the force of law is entitled to *Chevron* deference, and that less formal means of policymaking generally is not).

300. See Magill, *supra* note 286, at 1439 (noting that agencies generally have "discretion to choose any combination of rulemaking and adjudication it prefers").

301. *United States ex rel. Accardi v. Shaughnessy*, 347 U.S. 260, 265 (1954) (finding an administrative rule binding on the agency because the rule had "the force and effect of law"); Magill, *supra* note 286, at 1386 (observing that rules promulgated to notice-and-comment procedures are akin to statutes in that "they prospectively set forth a general substantive standard of conduct for a class of private actors").

302. See Magill, *supra* note 286, at 1394–97 (comparing the binding effect of various policymaking forms).

law, then the agency will have a reason to proceed via notice-and-comment rulemaking.<sup>303</sup> Meanwhile, as the categories of preemptive administrative action expand—for example, to include adjudicative orders and nonbinding enforcement policies—an agency’s incentive to proceed via notice-and-comment rulemaking may correspondingly contract.<sup>304</sup>

Emphatically, I am not claiming that a doctrine limiting preemptive effect to notice-and-comment rulemaking will always result in agencies choosing that policymaking mode over others. Even if agencies were to weigh preemption as a factor, other considerations (such as time, resources, whether the policy is meant to be binding, and so on) might simply overshadow the preemption variable in a given case.<sup>305</sup> Nor do I claim that agencies *should* choose notice-and-comment rulemaking for their garden-variety policymaking. Rather, my point is that limiting preemptive effect to notice-and-comment rulemakings can influence agency decisions to proceed by that mode on a wide range of substantive issues.<sup>306</sup>

The foregoing hypothesis has implications for separation(s) of powers.<sup>307</sup>

First, compared to other types of agency action, notice-and-comment rulemaking offers the most access points for political

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303. This proffered dynamic springs, again, from the Court’s conflict-preemption doctrine, and is similar (but different) from what I suggested above in respect to the proposal that would completely foreclose administrative preemption. *See supra* notes 228–234 and accompanying text (discussing the proposal to eliminate administrative preemption). In that scenario, I suggested that Congress might be more inclined to make substantive policy decisions via legislation because the outlet of administrative preemption would not be available. Similarly, in an imagined world where administrative preemption was limited to notice-and-comment rulemaking, agencies may have incentive to make more substantive policy decisions via notice and comment.

304. *See* Magill, *supra* note 286, at 1402–03 (explaining that agency choice of policymaking is often driven by the desired outcome).

305. *See id.* at 1444–47 (noting considerations that may affect agencies’ policymaking choices).

306. *Cf. id.* at 1402–03 (explaining that agency choice of policymaking is often driven by the desired outcome).

307. *See supra* notes 279–284 and accompanying text (discussing a proposal to limit administrative preemption to notice and comment rulemaking).



and judicial oversight, which are central to functional separation-of-powers models trained on external checks on agency action.<sup>308</sup> For example, whereas administrative rulemakings are generally subject to presidential oversight pursuant to standing executive orders, agency adjudications and less formal guidance documents are not.<sup>309</sup> Moreover, as described above, certain notice-and-comment rulemakings—but not other types of agency action—are subject to formal congressional review under the Congressional Review Act.<sup>310</sup> Further, notice-and-comment rulemaking offers the advantage of wider public participation in the deliberative process, which, in turn, may increase the likelihood of “fire-alarms” in the political branches.<sup>311</sup> In addition, the procedural requirements inherent in notice-and-comment rulemaking provide reviewing courts the information needed to stave off arbitrary or capricious agency decisionmaking.<sup>312</sup>

Notice-and-comment proceedings also implicate separation of power(s) models that emphasize internal administrative checks.<sup>313</sup> Compared to informal adjudication and nonbinding agency action, notice-and-comment rulemaking tends to be more

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308. See Kevin M. Stack, *Agency Statutory Interpretation and Policymaking Form*, 2009 MICH. ST. L. REV. 225, 228–29 (noting that notice and comment rulemaking is subject to more political oversight than adjudications); see also *supra* notes 67–70 and accompanying text (discussing external-checks model of separation of powers).

309. See Stack, *supra* note 308, at 228–29 (noting that adjudications are subject to less political oversight); Executive Order No. 12,866, 58 Fed. Reg. 51,735 (Sept. 30, 1993) (clarifying regulatory philosophy and principles).

310. See *supra* note 274 and accompanying text (discussing the Congressional Review Act); Richard J. Pierce, Jr., *Rulemaking and the Administrative Procedure Act*, 32 TULSA L.J. 185, 200 (1996) (“[A]djudications are not appropriate candidates for congressional review.”).

311. See *supra* notes 277–278 and accompanying text (discussing “fire alarms” raised by dissatisfied participants).

312. See Sunstein, *New Deal*, *supra* note 33, at 478 (“A firm judicial hand has disciplined administrative outcomes by correcting parochial or ill-reasoned decisions and serving as a significant deterrent.”); PIERCE, *supra* note 295, at 442–47 (discussing and criticizing agency duty to respond to comments).

313. See *supra* notes 65–74 and accompanying text (discussing model of internal checks-and-balances).

transparent and deliberative,<sup>314</sup> which are important features of the internal separation-of-powers model.<sup>315</sup>

Surely, this is not our Founders' separation of powers. Nor, for that matter, is it the Founders' version of checks and balances. At most, it is a reconstituted version of functional separated and balanced power designed to accommodate the operation of modern government. Still, the question remains: are the horizontal derivatives associated with this proposal desirable?

By and large, public law scholars tend to prefer notice-and-comment rulemaking to other types of administrative policymaking.<sup>316</sup> That is in large part for the reasons outlined above: notice-and-comment rulemaking offers greater opportunities for political and judicial oversight, and tends to be the most transparent and deliberative method of administrative policymaking.<sup>317</sup> Indeed, these virtues are thought to be inexorably tied: greater oversight begets greater administrative transparency and greater administrative deliberation;<sup>318</sup>

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314. See *NLRB v. Wyman-Gordon Co.*, 394 U.S. 759, 779 (1969) (Douglas, J., dissenting) (noting that notice-and-comment rulemaking “force[s] important issues into full public display and in that sense makes for more responsible administrative action”).

315. See *supra* notes 65–74 and accompanying text (discussing model of internal checks-and-balances).

316. See, e.g., PIERCE, *supra* note 295, § 6.6 at 354; *id.*, § 6.8, at 368–74 (“Over the years, commentators, judges, and Justices have shown near unanimity in extolling the virtues of the rulemaking process over the process of making ‘rules’ through case-by-case adjudication.”). For a recent account, see Bressman, *Beyond Accountability*, *supra* note 3, at 544 (proposing a presumptive requirement that agencies “use notice-and-comment rulemaking for implementing broad statutory requirements and interpreting ambiguous statutory provisions unless they offer an explanation for their choice of adjudication or other administrative action”).

317. See *infra* notes 318–325 and accompanying text.

318. See generally Jim Rossi, *Redeeming Judicial Review: The Hard Look Doctrine and Federal Regulatory Efforts to Restructure the Electric Utility Industry*, 1994 WIS. L. REV. 763 (defending the hard look doctrine); Thomas O. Sargentich, *The Critique of Active Judicial Review of Administrative Agencies: A Reevaluation*, 49 ADMIN. L. REV. 599 (1997) (defending the necessity of judicial review); Mark B. Seidenfeld, *Demystifying Deossification: Rethinking Recent Proposals to Modify Judicial Review of Notice and Comment Rulemaking*, 75

meanwhile, greater transparency and greater deliberation allows for better oversight.<sup>319</sup> Thus, those who generally favor notice-and-comment rulemaking might be expected to favor a doctrine that has the effect of funneling policymaking toward that mode.<sup>320</sup>

However, not all jurists and scholars share the view that agency policymaking should be channeled to notice-and-comment rulemaking.<sup>321</sup> Some, for instance, stress the value of leaving the choice of policymaking mode to agencies, unencumbered by doctrinal nudges toward notice-and-comment procedures (or to any other mode).<sup>322</sup> For some in this pro-choice camp, the problem is not with notice-and-comment rulemaking per se; rather, the problem is with its attending external control mechanisms—enhanced judicial, presidential and congressional oversight—which are perceived as ossifying cogs on administrative expertise, energy, and efficiency.<sup>323</sup> Thus, for those concerned with the

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TEX. L. REV. 483 (1997) (same).

319. See, e.g., Kenneth A. Bamberger, *Regulation as Delegation: Private Firms, Decisionmaking, and Accountability in the Administrative State*, 56 DUKE L.J. 377, 406–07 (2006) (discussing transparency and deliberation as factors that increase agency accountability); Bressman, *Beyond Accountability*, *supra* note 3, at 529; Kagan, *supra* note 61, at 2382–83.

320. See, e.g., Bamberger, *supra* note 319, at 384 (arguing for increased accountability for decisions made through “delegated regulation”).

321. See, e.g., Bressman, *Beyond Accountability*, *supra* note 3, at 543–44 (providing justifications for refusing to use notice-and-comment rulemaking).

322. “Cost considerations aside, there are legitimate justifications [why an agency might choose not] to use notice-and-comment rulemaking.” *Id.* at 543. For instance, the agency might not appreciate the need for a general standard until the need presents itself in the course of adjudication or other administrative action. *Id.* 543–44. Or, for example, an agency might lack the necessary experience or expertise to decide an issue through wholesale rulemaking and instead might prefer to elaborate standards incrementally through adjudication or other means. *Id.* at 544; see also *SEC v. Chenery*, 318 U.S. 80, 92 (1943) (suggesting that these are good reasons for allowing the agency to choose whether rulemaking or adjudication is preferable with respect to a regulatory issue).

323. Scholars hypothesize that agencies, fearing judicial reversal, might devote excessive resources to meet a reviewing court’s demands, or, worse, shy away from issuing particular rules. See, e.g., STEPHEN G. BREYER, *BREAKING THE VICIOUS CIRCLE: TOWARD EFFECTIVE RISK REGULATION* 49 (1993) (noting that

heightened external controls attending notice-and-comment rulemaking, a federalism-inspired push toward this mode of policymaking may be greeted more skeptically.<sup>324</sup>

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The forgoing discussion explained how reforming administrative preemption can have unintended but important bearings on separation(s) of powers in and around the administrative state. This cross-dimensional evaluation hopes to reshape the ongoing debate about what to do, if anything, about the Court's approach to agency preemption. The discussion below makes a similar pass at the subject of "state voice" in the administrative forum,<sup>325</sup> and is directed more to questions of institutional design than to judicial doctrine.

### *B. State Voice*

The subjects of state voice and preemption partly overlap, insofar as state voice may affect an agency's decision to preempt state law.<sup>326</sup> However, the two subjects are not mutually dependent. States will want to be heard in the administrative forum in any number of contexts: for instance, in the many cases

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limited time and resources of agencies may discourage rulemaking); Thomas O. McGarity, *Some Thoughts on "Deossifying" the Rulemaking Process*, 41 DUKE L.J. 1385, 1412–13 (1992) (providing examples where the threat of judicial review has had a "debilitating effect" on agency rulemaking). It is not only judicial review that is believed to ossify notice-and-comment rulemaking; "presidential review" and "additional congressionally mandated procedures" also conspire to make rulemaking more difficult. Peter L. Strauss, *The Rulemaking Continuum*, 41 DUKE L.J. 1463, 1472 (1992); see Shapiro, *supra* note 7, at 463, 476–85 (arguing that the preoccupation with legitimizing agency action through external controls is misguided).

324. See Shapiro, *supra* note 7, at 476–85 (critiquing an "outside-in" approach to agency accountability).

325. See *infra* notes 326–344 (discussing state voice in the administrative forum).

326. See Sharkey, *Accountability*, *supra* note 127, at 2129 (arguing that increased state involvement in agency regulation could affect preemption rulemakings).

where agencies make policy that might overlap with state law or prescribe regulatory floors, but that do not expressly preempt or conflict with state law.<sup>327</sup>

### 1. *For Federalism(s)*

As discussed in Part III, whether states have or could have an effective voice in the administrative forum remains debatable.<sup>328</sup> Many of the suggestions for preemption doctrine, discussed above, speak to that concern. To complement some of those doctrinal proposals, however, Catherine Sharkey suggests a number of non-doctrinal reforms.<sup>329</sup> For example, she suggests that Executive Order 13,132 be legislatively codified, judicially enforceable (whereas currently it is not), or both.<sup>330</sup> Relatedly, she suggests a package of institutional changes designed to enhance agency consultation with states.<sup>331</sup> To this end, she recommends, among other things, that agencies “consult with state representatives early in the rulemaking process,” and that state attorney generals “automatically be notified of proposed rulemakings by agencies,” so that they, in turn, can notify the most relevant state representatives.<sup>332</sup>

Professor Sharkey is quite committed to the ideas that agencies are, and should be, key players in shaping federalism today.<sup>333</sup> But, for the same reasons, she is equally committed to

327. See Robert A. Schapiro, *Toward a Theory of Interactive Federalism*, 91 IOWA L. REV. 243, 249 (2005) (noting that some degree of federal–state regulatory overlap is the norm today).

328. See *supra* notes 181–186 and accompanying text (discussing the effectiveness of state voice in the administrative forum).

329. See Sharkey, *Inside Agency Preemption*, *supra* note 18, at 582–90.

330. See *id.* at 530–31 (discussing the enforcement provision of Executive Order 13,132).

331. See *id.* at 582–90 (suggesting reforms such as expanded state representation, the development of agency-specific liaison groups, a provision for attorney general notifications, and others).

332. *Id.* at 572–73.

333. See Sharkey, *Accountability*, *supra* note 127, at 2128 (“[N]ow that Congress has taken a back seat to federal agencies on critical questions of preemption . . . a wise strategy would be to embrace the primacy of federal

the project of reforming the administrative system so that it may better fulfill the federalism aspirations set for it.<sup>334</sup>

Whether Professor Sharkey's proposals go too far, or not far enough, will again depend on one's views about what federalism requires, and whether advancing state voice in the administrative arena does more to advance or upset that ideal. For instance, requiring agencies to solicit state views is a very different thing than requiring agencies to give special heed to state views, which, in turn, is very different than requiring agencies to accommodate state views, or to do so whenever possible. In short, state voice is not the same as state autonomy. But increasing the demands on agencies to solicit and respect state views may—for better or worse—increase state autonomy.

## 2. For Separation of Powers

Likewise, depending on one's views, enhancing state voice in the administrative arena may or may not promote separation(s) of powers. Miriam Seifter argues, for example, that state voice may enhance state autonomy at the potential expense of administrative expertise and political accountability.<sup>335</sup> Although Professor Seifter makes these claims in the context of assessing what state voice portends for models of administrative legitimacy,<sup>336</sup> some of her insights are transferrable here.<sup>337</sup>

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agencies and to focus on reforming them to ensure they can become a rich forum for participation by state governmental entities.”).

334. *See id.*; *see also* Metzger, *Agency Reform*, *supra* note 2, at 73 (“[I]t makes sense to conclude that special protections for the states must develop in the administrative realm if federalism is to have continuing relevance in the world of national administrative governance that increasingly dominates today.”).

335. *See* Seifter, *States*, *supra* note 116, at 482–87, 491–96 (noting that increased state involvement endangers accountability and administrative expertise).

336. *See* Seifter, *States*, *supra* note 116, at 449 (“The principal project of this Article is to reveal and explain the tension between existing understandings of administrative legitimacy and special state access to the federal regulatory process.”).

337. *Cf.* Seidenfeld, *Justification*, *supra* note 7, at 1512 (“[T]he powers and

Administrative “expertise” is a critical feature of the model of *internal* checks-and-balances; meanwhile, “political accountability” is a critical element of the model of *external* checks-and-balances. I turn to these considerations below.

*a. Internal Checks-and-Balances: Agency Expertise*

Among other things, Professor Seifter warns against affording states too much solicitude in administrative decisionmaking.<sup>338</sup> Her first concern is that agency outputs might unduly reflect localized political or industry preferences, both of which can undermine the ideal of administrative expertise.<sup>339</sup>

Maybe so, but there is a flip side to that coin: the localized political or industry preferences that states funnel into administrative decisionmaking may align with, reflect, and/or advance regulatory expertise.<sup>340</sup> With respect to that set of cases (however large or small), agency expertise will not be undermined.<sup>341</sup>

Perhaps Professor Seifter’s claim stems from the concern that agencies will not know when state voice impedes rather than facilitates administrative expertise.<sup>342</sup> However, why not trust agencies to identify and resist state sabotages on its expertise? If the answer is that agencies are not expert enough to know when their expertise is being undermined, or professional enough to resist it, that would seem to beg the very point in contest. States

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responsibilities of administrative agencies . . . calls into question the constitutional legitimacy of the modern federal bureaucracy.”).

338. See Seifter, *States*, *supra* note 116, at 4.

339. *Id.* at 448 (contending that “states will often push political agendas that expertise-based legitimacy eschews”).

340. See Sharkey, *Inside Agency Preemption*, *supra* note 18, at 587 (noting that representatives from states have participated in roundtables that contributed to agency expertise on the topic of seatbelt installation).

341. *Id.*

342. See Seifter, *States*, *supra* note 116, at 461–63 (noting the lack of transparency that often attends state input into administrative decisionmaking).

might help (more than hurt) the project of keeping agencies expert and professional.<sup>343</sup>

Moreover, Professor Seifter's claim that state solicitude may undermine administrative expertise arguably undervalues on-the-ground experiences that states bring to administrative policymaking.<sup>344</sup> Insofar as state voice reflects particularized, real-world experiences, those can be important data points for agencies when addressing regulatory problems.<sup>345</sup> Moreover, as Professor Seifter acknowledges, state-interest groups tend to press for the "lowest common denominator" of regulatory independence.<sup>346</sup> But, insofar as the *collective* state voice achieves end of regulatory independence, *individual* states might exercise their autonomy in experimental ways.<sup>347</sup> And that, in turn, may lead to better—more expert—administrative judgments in the future about which regulatory approaches to an issue work, which do not, and why.<sup>348</sup>

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343. See Sharkey, *Inside Agency Preemption*, *supra* note 18, at 586–87 (arguing that consultative groups, including state consultants, add to agency expertise).

344. See Seifter, *States*, *supra* note 116, at 491–92 ("In the abstract, state consultations should be a gold mine for the expertise ideal . . . . In practice, however, state consultation and expertise-based legitimacy are on a collision course.").

345. See Abbe R. Gluck, *Intrastatutory Federalism and Statutory Interpretation: State Implementation of Federal Law in Health Reform and Beyond*, 121 YALE L.J. 534, 589–94 (2011) (recognizing that states can act as laboratories and play other significant roles in implementing federal statutes); Sharkey, *Inside Agency Preemption*, *supra* note 18, at 586–87 (stating that the "EPA has gained knowledge, experience, and practice cooperating with state authorities and being sensitive to state interests").

346. See Seifter, *States*, *supra* note 116, at 460 ("[I]nstitutional concerns . . . are channeled forcefully by state interest groups, which must find common ground among their diverse members and often must settle for lowest common denominator positions."); see also NUGENT, *supra* note 174, at 46–50 (explaining that National Governors Association and National Association of State Legislatures most commonly seek to protect their administrative interests in flexibility).

347. See Gluck, *supra* note 345, at 566–68 (arguing that states can act as laboratories in the regulatory context).

348. See *id.* (commenting on the benefits of state experimentation).



In sum, enhancing state voice in administrative policymaking and processes might undermine agency expertise, for some of the reasons Professor Seifter suggests. But not necessarily. Enhancing state voice in the ways suggested by Professor Sharkey and others might actually advance administrative expertise, and thus promote a key feature of the internal checks-and-balances model of separation of powers.

*b. External Checks-and-Balances: Political Control*

The subject of state voice also appears to cut both ways in respect to external checks-and-balances. As relevant here, Professor Seifter contends that an overly robust state role may be at cross-purposes with the core premises of the presidential-control and congressional-control models of administrative oversight.<sup>349</sup>

Regarding presidential control, Professor Seifter claims that state influence can have the “opposite effect of centralizing control under a nationally sensitive President.”<sup>350</sup> That is so, she explains, “because states, unlike the President, necessarily respond to locally bounded constituencies.”<sup>351</sup>

While that is of some concern, a functionalist might be content to supplement agency accountability to the President with the increased accountability to the public that state involvement affords.<sup>352</sup> As others have shown, presidential accountability may help legitimize administrative governance in theory; but it may do little to actually keep agencies in check.<sup>353</sup>

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349. See Seifter, *States*, *supra* note 116, at 480 (“States will often act in tension with the President, not merely in concert with him . . .”).

350. *Id.* at 482.

351. *Id.*

352. See Keller, *supra* note 122, at 62 (“State power would promote accountability, whereas federal agencies are comprised of unelected officials that are almost exclusively located at the ‘distant national capital.’” (citation and internal quotation marks omitted)).

353. See, e.g., Ronald M. Levin, *Understanding Unreviewability in Administrative Law*, 74 MINN. L. REV. 689, 738 n.240 (1990) (“As regards many policy decisions . . . the likelihood that the President would suffer political reprisals if his administration made the wrong choice seems infinitesimal.”);

Perhaps states can help. States, after all, not only *voice* their preferences in the administrative forum; states also *hear* the preferences of agencies and of private interests.<sup>354</sup> Thus, states throughout the nation can alert their local constituents—and the President—of objectionable agency action, inaction or intentions. Moreover, states can dissent to agency policy by taking opposing regulatory action, or by suing agency officials, which in both cases can force national conversations that agencies might otherwise prefer to avoid.<sup>355</sup> This may not be the archetypal political accountability envisioned by the presidential-control model. But it can churn information and political awareness that can boost presidential accountability for agency action, and agency accountability to the public more generally.

Regarding congressional oversight, Professor Seifter argues that a strong version of state consultation threatens the congressional-control model because state interests “do not necessarily connect to the content of congressional commands.”<sup>356</sup> True enough, but the same is often said of federal agencies—even in matters as divisive as healthcare, immigration, the environment, education, and beyond.<sup>357</sup> Perhaps, then, it is best

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*City of Arlington v. FCC*, 133 S. Ct. 1863, 1877–78 (2013) (Roberts, C.J., dissenting) (explaining how past presidents, themselves, have disclaimed having much control over the bureaucracy). *But see* Kagan, *supra* note 61, at 2298–99 (arguing that the presidential-control model provides transparency about administrative issues and ensures responsiveness to the public).

354. See Sharkey, *Inside Agency Preemption*, *supra* note 18, at 530 (noting that procedures designed to enhance state involvement such as federalism impact statements will provide states with the nature of the agency’s concerns and its position).

355. See Bulman-Pozen & Gerken, *supra* note 95; Metzger, *Agency Reform*, *supra* note 2, at 70–71 (noting this as an important check on agency action that states provide, and arguing that the Court seems more receptive of state challenges to agency action in recent years, as reflected most prominently in *Massachusetts v. EPA*, 549 U.S. 497 (2007)); see also Richard E. Levy & Robert L. Glicksman, *Access to Courts and Preemption of State Remedies in Collective Action Perspective*, 59 CASE W. RES. L. REV. 919, 930–35 (2009) (noting that states may have incentives to overregulate depending on their relationship the activity being regulated).

356. Seifter, *States*, *supra* note 116, at 498.

357. See, e.g., MIRANDA YAVER, WHEN DO AGENCIES HAVE AGENCY: BUREAUCRATIC NONCOMPLIANCE IN THE EPA 17–25 (2014) (providing an

for agencies and states to police each other, a result made possible by a strong state participatory role.<sup>358</sup> The consultation between agency and state officials allows each to understand the other's preferences and to alert Congress (or, for that matter, courts, President, and media) if the other is diverging from congressional commands or goals.<sup>359</sup>

### C. Cross-Dimensional Tradeoffs

As shown above, the administrative federalism tent hosts an array of federalism-inspired proposals. Some ideas can work together and, indeed, are designed to. For instance, some proponents of state voice also emphasize processes for administrative preemption that incentivize, or require, agencies to consider seriously state views before making a preemption

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empirical analysis of EPA noncompliance with statutory mandates); Michael R. Crittenden & Colleen McCain Nelson, *House Votes to Authorize Boehner to Sue Obama*, WALL ST. J. (Jul. 30, 2014, 7:50 PM), <http://online.wsj.com/articles/house-votes-to-authorize-boehner-to-sue-obama-1406760762> (last visited Feb. 15, 2015) (reporting House approval to sue President Obama for taking action allegedly in violation of the Affordable Care Act) (on file with the Washington and Lee Law Review); Yuxin Jiang, *An Unexceptional Aspect of President Obama's Immigration Executive Actions*, JURIST (Jan. 15, 2015, 3:00 PM) <http://jurist.org/forum/2015/01/jill-family-executive-actions.php> (last visited Feb. 15, 2015) (noting that “[a] group of states is suing to halt the implementation of President Obama’s DAPA program”) (on file with the Washington and Lee Law Review); Joy Resmovits, *No Child Left Behind Debate Centers on Federalism*, HUFFINGTON POST (Aug. 16, 2011, 1:02 PM) [http://www.huffingtonpost.com/2011/08/16/no-child-left-behind-reauthorization-federalism\\_n\\_927718.html](http://www.huffingtonpost.com/2011/08/16/no-child-left-behind-reauthorization-federalism_n_927718.html) (last updated Mar. 9, 2012, 3:29 PM) (last visited Feb. 15, 2015) (describing the Obama administration’s “unprecedented use of executive power to work around” the No Child Left Behind Act) (on file with the Washington and Lee Law Review).

358. See Keller, *supra* note 122, at 61–62 (asserting that one of the virtues of a federalist system is increased accountability).

359. See *supra* notes 277–278 (explaining the utility of “fire alarms” raised by dissatisfied participating parties); see also Metzger, *Agency Reform*, *supra* note 2, at 70–71 (“States may have substantial access to Congress through their state representatives, allowing them to raise concerns about federal agency actions and perhaps prompt federal oversight.”).

decision.<sup>360</sup> Other proposals are not designed to work together but certainly can. For instance, a clear-statement rule may stand alone or be employed in conjunction with other requirements, such as notice-and-comment proceedings, heightened judicial scrutiny of an agency's preemption decision, or both.<sup>361</sup> Meanwhile, other proposals directly compete or otherwise talk past each other. The proposal to eliminate administrative preemption, for instance, has no need for additional downstream limitations (such as a notice-and-comment requirement for preemption or special judicial-review doctrines).

In the end, differences in opinion about what administrative federalism can do for federalism turn partly on empirics and imaginings on how the system would operate *if* some proposal, or combination of them, were adopted. Differences in opinion, however, also turn on *which* federalism(s) we hope to advance. Without a federalism theory to “rule them all,”<sup>362</sup> we lack an objective metric for deciding which proposal is best.

A separation-of-powers approach to administrative federalism fattens the constitutional goods in play. Debates over administrative federalism have trafficked almost exclusively in federalism currency. Scholars and jurists haggle over federalism ends—regulatory experimentation, resistance to federal overweening, and so on.<sup>363</sup> And they barter with means toward those ends—enhancing state voice, maintaining state autonomy, and the like.<sup>364</sup> Metaphorically, they trade green apples, red

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360. See Sharkey, *Inside Agency Preemption*, *supra* note 18, at 582–84 (arguing for increased state involvement and consultation between federal agencies and states).

361. See Rebecca Aviel, *When the State Demands Disclosure*, 33 CARDOZO L. REV. 675, 733 (2011) (“The clear statement rule might also be thought of as the judicial enforcement of minimal standards of notice for the consequences of congressional enactments.”).

362. Heather K. Gerken, *Federalism as the New Nationalism: An Overview*, 123 YALE L.J. 1889, 1914 (2014) (“We all have a different theory about what forms state power takes, but we’re in agreement that there cannot be one theory to rule them all.”).

363. See *supra* notes 216–227 and accompanying text (discussing federalism-oriented goals).

364. See *supra* notes 77–99, 326–342 and accompanying text (discussing state voice and state autonomy).

apples, Fuji apples, etcetera—but it’s an apples-to-apples market. This Article’s cross-dimensional approach adds oranges. Although this complicates matters, we have complicated tastes. We want apples and oranges. We want federalism and separation of powers. For better or worse, we have plural constitutional commitments.

To be sure, injecting separation-of-powers principles into the administrative-federalism debate will not deliver objectively correct solutions. Nor will it necessarily lead to greater consensus. However, it offers new tradeoff possibilities that, in turn, may lead to new compromises. Suppose, for example, that a decisionmaker rejects an administrative-federalism proposal because she disfavors the proffered tradeoff between one federalism good (say, state autonomy) for another (say, state voice). But suppose the federalism-inspired proposal also promotes separation of powers (say, by stimulating a congressional check on executive action). Now the decisionmaker may prefer the package. Again, I do not suggest that interposing separation of powers into the analysis will necessarily lead to consensus. Indeed, it could have the opposite effect. Still, in either event, the decisionmaker can take comfort in knowing the full terms of what is being bargained for.

### *V. Conclusion*

Administrative federalism is fashionable yet fallible. Empirically, it remains unsettled whether federalism is advanced or undercut by administrative governance. Conceptually, views splinter on whether providing states special solicitude in the administrative arena even qualifies as federalism. This Article thickens the debate by expanding the call of the question: it asks not only what administrative federalism can do for federalism but also what it can do for separation of federal powers.

Despite the complicating variables highlighted throughout this paper, the basic intuition remains the same: asking only what administrative federalism can do for federalism is potentially hazardous and at best incomplete. A federalism-inspired proposal that does violence to separation-of-powers values will necessarily require an accommodation of principles. A

decisionmaker might choose federalism over separation of powers, or vice versa. This Article's critical move, however, is to shine light on that choice before it is made. Intended or not, administrative federalism affects federalism and separation of powers. We should start treating it that way.