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Legislating Preemption

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ABSTRACT

Federal preemption is perhaps the most important public law issue of the day. The stakes in preemption cases are enormous, as preemption determines whether the federal government or the states control regulatory policy in a host of politically controversial contexts. Congress clearly has primary constitutional authority in setting federal preemption policy, but, for numerous political and practical reasons, cannot be solely responsible for its implementation. Determining which organ of the federal government is best at implementing preemption policy has therefore become the central preoccupation of the academic literature. While this comparative institutional analysis is certainly important in allocating preemption policy-making business, it has elided a very important issue: Congress has an interest not only in what substantive preemption policy should be, but also in who should be primarily responsible for implementing it. In other words, there is a strategic delegation choice to be made by Congress for which current institutional choice approaches to preemption do not fully account.

This Article addresses the delegation issue by providing a framework for how Congress should be "legislating preemption." It identifies two previously overlooked challenges posed by delegating preemption implementation responsibility to the federal courts instead of to federal agencies. First, Congress has only weak policing

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tools when it delegates to federal courts, and therefore has little opportunity to correct the judiciary when it strays from Congress's preemption policy preferences. Second, in its preemption jurisprudence, the Supreme Court has adopted what this Article terms a Centralization Default, which leads it to generally disfavor anti-preemption arguments when Congress does not provide clear instructions to the contrary. The Article then proposes that Congress respond to these challenges by drafting broad standards and creating favorable legislative history when preemption policy coincides with the Centralization Default. By contrast, Congress should draft clear rules when it wants to overcome the Centralization Default. After developing the "legislating preemption" framework, the Article uses the Dodd-Frank Act's national bank preemption provisions to illustrate what happens when Congress does not apply the framework. As the Article shows, Congress's failure to account for its weak post-delegation policing tools or the Centralization Default will likely lead to more federal preemption than Congress intended.

TABLE OF CONTENTS

INTRODUCTION

Once an arcane backwater of constitutional jurisprudence loved almost exclusively by law professors, preemption has become the focus of the country's most contentious political issues. From immigration to gay marriage, from tort reform to financial reform, the propriety of displacing state law with federal law is quite possibly the most important public law question of the day. When framed in more practical terms, the enormity of the stakes in preemption cases becomes unmistakably clear: preemption determines which level of government—federal or state—gets to control regulatory policy in a complex federal system.[1] It should therefore come as no surprise that the Supreme Court has significantly increased its involvement in preemption issues over the past twenty years. Indeed, the Court docketed five preemption cases for the 2010-2011 Term alone.[2]

Despite this new interest in preemption, little attention has been given to a persistent and fundamental puzzle that it presents: how horizontal allocations of governmental power—as between Congress, the Supreme Court, and the administrative state—affect vertical distributions of governmental power—as between the federal government and the governments of the several states. In other words, how does assigning preemption decision making to one federal body or another make it more or less likely that federal law will trump state law? In other areas dealing with allocations of federal and state power, such as those implicating the dormant

1. *See* Richard A. Epstein & Michael S. Greve, *Federal Preemption: Principles and Politics*, FEDERALIST OUTLOOK, June 2007, at 1, 1-2, 6, http://www.aei.org/docLib/20080228_EpsteinGreve.pdf.

2. The Court consolidated three generic drug labeling cases. Demahy v. Actavis, Inc., 593 F.3d 428 (5th Cir. 2010), *cert. granted*, 131 S. Ct. 817 (2010); Mensing v. Wyeth, Inc., 588 F.3d 603 (8th Cir. 2009), *cert. granted sub nom*. Actavis Elizabeth, LLC v. Mensing, 131 S. Ct. 817 (2010); Mensing v. Wyeth, Inc., 588 F.3d 603 (8th Cir. 2009), *cert. granted sub nom*. PLIVA, Inc. v. Mensing, 131 S. Ct. 817 (2010). Four additional preemption cases were on the Court's docket for the 2010-2011 Term. Laster v. AT&T Mobility LLC, 584 F.3d 849 (9th Cir. 2009), *cert. granted sub nom*. AT&T Mobility LLC v. Concepcion, 130 S. Ct. 3322 (2010); Bruesewitz v. Wyeth Inc., 561 F.3d 233 (3d Cir. 2009), *cert. granted*, 130 S. Ct. 1734 (2010); Chicanos Por La Causa, Inc. v. Napolitano, 558 F.3d 856 (9th Cir. 2009), *cert. granted sub nom*. Chamber of Commerce v. Candelaria, 130 S. Ct. 3498 (2010); Williamson v. Mazda Motor of Am., Inc., 84 Cal. Rptr. 3d 545 (Cal. Ct. App. 2008), *cert. granted*, 130 S. Ct. 3348 (2010).

Commerce Clause and abstention, courts and commentators assume with little discussion that the federal judiciary is ultimately responsible for making difficult federalism choices. As this Article demonstrates, however, preemption is different. While it is routinely acknowledged that the Constitution invests Congress with the authority to set preemption policy, the oddity and implications of Congress's power over such an important aspect of "Our Federalism"[3] is routinely overlooked.

Until recently, such an oversight was perhaps understandable. Historically, Congress has done little to second guess the Court's preemption decisions.[4] Whether because of apathy, mistake, or the inability to build majority coalitions, Congress has left the final decision-making authority for preemption issues largely in the hands of the federal courts.[5] The Court has, in turn, proven increasingly sympathetic to claims of preemption in recent years,[6] thereby allowing defendants otherwise subject to suit under state law to escape liability. This has shaken Congress out of its typical disengagement with preemption matters. In response to several of the Court's recent preemption decisions, Congress has entered the preemption fray with uncharacteristic vigor.[7] Most notably, President Obama recently signed into law the Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank Act).[8]

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3. Younger v. Harris, 401 U.S. 37, 44 (1971).

4. According to one recent study, Congress explicitly and fully overrode only 2 out of 127 preemption decisions issued by the Court between the Court's 1983 and 2003 Terms. *See* Note, *New Evidence on the Presumption Against Preemption: An Empirical Study of Congressional Responses to Supreme Court Preemption Decisions*, 120 HARV. L. REV. 1604, 1612-13 (2007). *But cf.* Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1376 (codified as amended in scattered sections of 12 U.S.C.) (implicitly overruling the Supreme Court's holding in *Watters v. Wachovia Bank, N.A.*, 550 U.S. 1 (2006), that state mortgage lending laws do not apply to state-chartered affiliates and subsidiaries of national banks).

5. *See generally* Jamelle C. Sharpe, *Toward (A) Faithful Agency in the Supreme Court's Preemption Jurisprudence*, 18 GEO. MASON L. REV. 367 (2011) (scrutinizing the Supreme Court's control over the formulation of preemption policy).

6. *See infra* Part II.C.

7. For example, in 2009, eighteen members of the United States Senate sponsored the Medical Device Safety Act of 2009. S. 549, 111th Cong. (2009). The purpose of the bill was to "correct the Supreme Court's decision in *Riegel v. Medtronic*, which misconstrued the intent of Congress and cut off access to our Nation's courts for citizens injured or killed by defective medical devices." 155 CONG. REC. S1861 (daily ed. Feb. 6, 2009) (statement of Sen. Leahy).

8. Pub. L. No. 111-203, 124 Stat. 1376 (2010).

Among other things, this sweeping legislation attempts to reverse the twenty-year expansion of federal preemption in the area of national banking and federal thrift regulation.[9]

The question that this Article addresses, and one that has thus far received no significant attention in the literature, is how Congress can best achieve its federal preemption policy-making goals. If Congress has any interest in what its substantive preemption policies should be, it must also be interested in who is primarily responsible for implementing those policies. Given that preemption involves a host of detailed, context-specific, and often unanticipated policy judgments, Congress has no choice but to delegate some responsibility for its development and management to other governmental departments.[10] More specifically, Congress must make a strategic choice to select the Court,[11] administrative agencies, or some combination of the two to fill out the details of its preemption preferences. Determining how to make this choice is not straightforward. Recent institutional choice approaches to preemption have analyzed and compared the institutional competencies of Congress, the Court, and administrative agencies. Such analyses have suggested, for example, that the Court is better suited to make some preemption policy because it is better equipped to answer constitutional federalism questions.[12] They have also suggested that agencies may be preferable because of their greater familiarity with the statutes they enforce, their superior understanding of the industries

9. *See infra* Part III.A.

10. *See* Thomas W. Merrill, *Preemption and Institutional Choice*, 102 NW. U. L. REV. 727, 754 (2008); Sharpe, *supra* note 5, at 369.

11. *See infra* Part I.C.1. This Article assumes that congressional delegation of preemption policy to courts falls primarily to federal courts and, within the federal judiciary, the Supreme Court controls that delegation. It should be noted, however, that state courts must also answer preemption questions within their jurisdiction. Moreover, there is reason to believe that approaches to preemption taken by state courts may differ from those taken by their federal counterparts. *See* Keith N. Hylton, *Preemption and Products Liability: A Positive Theory*, 16 SUP. CT. ECON. REV. 205, 244, 247 (2008) (conducting empirical study on a data set of 300 state court products liability preemption decisions and concluding that "federal courts are considerably more likely to find preemption than are state courts"); Catherine M. Sharkey, *Federalism in Action: FDA Regulatory Preemption in Pharmaceutical Cases in State Versus Federal Court*, 15 J.L. & POL'Y 1013, 1021-46 (2007) (asserting that state courts are more likely than federal courts to reject expansive preemption arguments, whereas federal courts are more likely than state courts to defer to agency preemption arguments).

12. *See* Merrill, *supra* note 10, at 757; Sharpe, *supra* note 5, at 434.

they regulate, or their greater analytical sophistication.[13] What these approaches hold in common is their assumption that Congress has "punted" the preemption issue to courts or to agencies, and hence the analysis of preemption should begin with the capacities of courts and agencies to resolve preemption problems.

While comparative institutional advantage is certainly an important factor in allocating preemption policy-making business, it cannot be the only factor. But it is here that the typical institutional choice approach elides something very important: Congress has an interest not only in what substantive preemption policy should be, but also in who should be primarily responsible for implementing that policy. In other words, there is a delegation choice to be made by Congress for which the literature does not fully account, and this choice is informed by distinctly congressional interests.

In making the delegation choice, Congress depends a great deal on its ability to monitor and influence judicial and agency implementations of its preemption policies. Such monitoring helps Congress to maximize policy conformance and to minimize policy drift. Generally speaking, Congress has access to an array of formal and informal mechanisms to police delegations of policy-making authority to administrative agencies. Through committee hearings, promised budget appropriations and threatened cuts, letters, and phone calls, members of Congress have numerous means by which to guide agency decision making after enacting legislation.[14]

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13. *See* Merrill, *supra* note 10, at 755; Catherine M. Sharkey, *Products Liability Preemption: An Institutional Approach*, 76 GEO. WASH. L. REV. 449, 485-86 (2008); Sharpe, *supra* note 5, at 428-29.

14. *See* LEWIS FISHER, THE POLITICS OF SHARED POWER: CONGRESS AND THE EXECUTIVE (4th ed. 1998). To be clear, it is not the goal of this Article to explore the effectiveness of Congress's agency monitoring tools *relative* to the President or to the nongovernmental constituencies that agencies are often thought to serve. Accordingly, this Article does not debate the effectiveness of congressional monitoring in the face of contradictory interest group pressures placed on agencies. In any event, capture by regulated industries is certainly a concern when delegating policy implementation authority to administrative agencies, though the actual extent of this problem is debatable. *Compare* Thomas W. Merrill, *Capture Theory and the Courts: 1967-1983*, 72 CHI.-KENT L. REV. 1039, 1050-52 (1997) (observing that agency capture and its centrality is the "pathology of agency government"), *with* David B. Spence, *The Shadow of the Rational Polluter: Rethinking the Role of Rational Actor Models in Environmental Law*, 89 CALIF. L. REV. 917, 961 (2001) ("The most important defect of capture theory is that it is unsupported by the evidence."), *and* Matthew C. Stephenson, *Public Regulation of Private Enforcement: The Case for Expanding the Role of Administrative*

However, the policing mechanisms Congress uses to rein in agency policymaking are mostly inapplicable to the federal judiciary.[15] In fact, when dealing with courts, Congress is generally limited to two such mechanisms—the creation of legislative history and the threat of legislative override—neither of which is effective in most situations.[16] As a result, Congress can assert little post-enactment control when it delegates policy-making power to federal courts. Nevertheless, the federal courts are frequently left to implement Congress's preemption policies. Whether Congress specifies those policies in statutory text or leaves such details for future delineation,[17] it stands to reason that it will want to at least consider whether it can monitor and influence how the Supreme Court interprets and implements congressional policies. Judicial interpretation and implementation could otherwise result in outcomes that

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Agencies, 91 VA. L. REV. 93, 130-32 (2005) (arguing that fears of agency capture are often exaggerated). Nor does this Article attempt to compare Congress's influence over agencies, independent or dependent, to that of the President. *Cf.* Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245 (2001) (analyzing congressional and presidential control over administrative policy making).

Rather, my assertion is that Congress has more effective means of correcting agency policy drift than judicial policy drift. Accordingly, I am sympathetic to arguments made by advocates of "congressional dominance theory" asserting that Congress can effectively control delegations to administrative agencies through ex post controls. *See* Barry R. Weingast & Mark J. Moran, *Bureaucratic Discretion or Congressional Control? Regulatory Policymaking by the Federal Trade Commission*, 91 J. POL. ECON. 765, 780 (1983). For an excellent summary of the congressional dominance theory literature, see J.R. DeShazo & Jody Freeman, *The Congressional Competition to Control Delegated Power*, 81 TEX. L. REV. 1443, 1457-59 (2003).

15. Congress may nevertheless have reasons for choosing courts over agencies. For example, Congress may feel pressured to punish "rogue agencies" that stray from the policies preferred by Congress or the public. One way to mete out punishment is to subject agencies to greater judicial scrutiny. *Cf.* Sidney A. Shapiro & Ronald F. Wright, *The Future of the Administrative Presidency: Turning Administrative Law Inside-Out*, 65 U. MIAMI L. REV. 577, 584-85 (2011). Congress may also delegate to courts when looking to insulate their policy choices from interference by future Presidents. The operating assumption would be that agencies, unless independent, are more susceptible to presidential influence than are federal courts.

16. *See infra* Part I.C.2.

17. *See* Ehud Guttel & Alon Harel, *Uncertainty Revisited: Legal Prediction and Legal Postdiction*, 107 MICH. L. REV. 467, 480 (2008) ("Rules and standards may both generate uncertainty. Standards are legal norms whose interpretation is provided only ex post by the courts. Standards, therefore, produce future uncertainty resulting from the indeterminacy of the interpretation given to them ex post by the courts. Rules are concrete norms that leave no (or little) discretion to decision makers.").

Congress never intended, or actively sought to avoid, leaving Congress with few options for correcting the judiciary's "mistakes."[18]

To maintain maximum possible control over how the Court interprets and implements its statutes, Congress must be responsive to two factors when drafting potentially preemptive legislation. The first is the Court's preferred method of statutory interpretation, which indicates the sources of evidence on which the Court will rely when interpreting congressional legislation.[19] Under a purposivist interpretive approach, the justices may rely on legislative history as evidence of Congress's legislative purposes. Congress exercises tremendous control over legislative history, so judicial reliance on it shifts control of statutory interpretation away from the Court and toward Congress.[20] Assuming that it is easier for members of Congress to express their policy preferences in legislative history than it is for them to reach agreement on specific statutory language, they can adopt broad, vague, or ambiguous language in the hope that the Court will refer to a statute's legislative history for clarification and guidance. Under a textualist interpretive approach, by contrast, the Justices look to the plain meaning of the legislative

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18. William N. Eskridge, Jr., *Overriding Supreme Court Statutory Interpretation Decisions*, 101 YALE L.J. 331, 338 (1991) (concluding after empirical study that Congress overrides the Supreme Court's statutory decisions an average of ten times per year); Charles R. Shipan, *Interest Groups, Judicial Review, and the Origins of Broadcast Regulation*, 49 ADMIN. L. REV. 549, 555 (1997) ("[I]t can be difficult to overturn court decisions. Even if majorities in both houses want to overturn a court decision, they may be blocked by institutional features of Congress. Deference to the courts and congressional inattentiveness also decrease the likelihood that Congress will overturn a court decision.").

19. *See infra* Part II.A.

20. *See infra* notes 157-81 and accompanying text. Contrary to the views sometimes expressed by proponents of textualist methods of statutory interpretation, I assume here that judicial reliance on legislative history is constitutional. *Compare* Stephen J. Breyer, *On the Uses of Legislative History in Interpreting Statutes*, 65 S. CAL. L. REV. 845, 862-64 (1992) (arguing that judicial use of legislative history does not violate the constitutional requirements of bicameralism and presentment in Article I, Section 7, or Article I, Section 1's "vesting" of legislative power in Congress), *with* John Manning, *Textualism as Nondelegation Doctrine*, 97 COLUM. L. REV. 673, 673-76, 684-719, 738-39 (1997) (arguing that judicial reliance on legislative history violates the constitutional requirements of bicameralism and presentment by allowing members of Congress to resolve statutory ambiguities after enactment). I also assume that legislative history is produced by representative subgroups of Congress that can, with varying degrees of legitimacy, speak on behalf of the body as a whole. *See* William N. Eskridge, Jr., *Legislative History Values*, 66 CHI.-KENT L. REV. 365, 382-83 (1990) (describing theory of legislative intent under which Congress implicitly and legitimately delegates clarification of ambiguous statutes to committees and sponsors).

text and disregard legislative history. Settling on precise statutory text may become much more important in this context, because textualism allows Congress fewer opportunities to use legislative history to influence statutory interpretation after legislation is enacted.[21] In either case, where the Court looks for evidence of statutory meaning should play an important role in how Congress drafts its legislative text.

The second factor Congress must consider is the Supreme Court's predisposition toward or against preemption. The Court has adopted what this Article terms a "Centralization Default" in its preemption cases,[22] which leads the Court to find that state law is preempted in the absence of clear and contrary instructions from Congress.[23] Recognition of the Default is critical because Congress must know whether it is working with or against judicial preemption policy preferences when drafting legislation. Coupled with the first factor relating to interpretive methods, the Centralization Default reveals how Congress can reduce preemption policy drift. Assuming, for instance, that Congress wants to reduce federal preemption in a given regulatory arena, it would be unwise to pass legislation in the form of a broad standard. Doing so would give the Court wide latitude in interpreting Congress's intent, because Congress would have declined to provide specific statutory instructions in the legislative text. Although it is possible that the Court would refer to legislative history to flesh out the details of the legislation, there is no guarantee that it would do so.[24] Given the Centralization Default, there is a substantial likelihood that the Court would interpret the legislation in a way that promotes preemption. Thus, the ultimate preemption policy outcome would be the opposite of what Congress intended. To reduce the likelihood that the Court will stray from congressional preemption policy preferences, Congress must there-

21. *See infra* Part II.A.

22. Here, this Article uses the term "default" in a manner similar to Professor Merrill's use of the term "default rule": "[A] legal presumption ... about the preemptive effect of a federal statute in the absence of a discernable intention of Congress directing a different result." Thomas W. Merrill, *Preemption in Environmental Law: Formalism, Federalism Theory, and Default Rules*, *in* FEDERAL PREEMPTION: STATES' POWERS, NATIONAL INTERESTS 166, 168 (Richard A. Epstein & Michael S. Greve eds., 2007).

23. *See infra* Part II.C.

24. *See infra* Part II.A.

fore account for both the Court's interpretive methods and its Centralization Default when determining the specificity and content of its preemption statutes.[25]

In essence, members of Congress must make a choice between adopting statutory language that invites a purposivist interpretive approach and relies on legislative history, or adopting statutory language that is amenable to a textualist interpretive approach. It is more difficult to agree on detailed bright-line preemption provisions than it is to agree on broader preemption standards, and so bright-line provisions are likely to be less comprehensive than a combination of broad standards and legislative history. Accordingly, this choice necessarily involves a strategic tradeoff: members of Congress must decide whether settling for "less" in specific bright-line text, or hoping for "more" in legislative history, will ultimately provide them with greater control over post-enactment statutory meaning. This Article's analysis of the Centralization Default and the Court's approaches to statutory interpretation informs that choice. Because of the particular challenges that are posed by monitoring and influencing judicial implementation of congressional preemption policy, this Article reaches an institutional choice conclusion different from that of several other commentators.[26] It concludes that Congress should be hesitant to delegate preemption policymaking authority to federal courts unless it has identified and can account for the Centralization Default. All things being equal, delegating preemption policy-making responsibility to administrative agencies may be preferable because of the numerous opportunities Congress has to police agency decision making.[27]

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25. This is not to say that the Centralization Default or the Court's preferred methods of statutory interpretation are static, immobile targets. To the contrary, it is perfectly reasonable to assume that both may change over time. However, this assumption makes congressional identification of the Court's interpretive and federalism assumptions only slightly more challenging. As indicated below, the Court's current views on statutory interpretation and federalism have evolved quite slowly. *See infra* Part II.B. By contrast, Congress is more likely to be focused on short-term policy considerations, further reducing the likelihood that it will be caught off-guard by an abrupt change in the Court's approaches to interpretive methods or federalism.

26. *See, e.g.*, Merrill, *supra* note 10, at 759 ("The best solution would seem to be to rely on courts as the primary institution for resolving preemption controversies.").

27. *See infra* Part I.C.2.

In reaching this conclusion, the Article makes three distinct contributions. First, it frames the preemption delegation choice faced by Congress as a strategic one made by its members. In doing so, the Article demonstrates the importance of congressional delegation and monitoring, thereby adding a critical step to the customary institutional choice approach to preemption that focuses primarily on comparative institutional advantages.

Second, it demonstrates how the Centralization Default poses particular challenges to Congress's control of preemption policymaking. More specifically, the Article asserts that the Centralization Default increases the difficulty with which federal legislators reach agreement on antipreemption legislation. The Default does this either by forcing greater textual specificity in antipreemption legislation,[28] or by incentivizing copious and persuasive legislative history indicating Congress's preemptive intentions.

Finally, the Article puts "legislating preemption" in context by undertaking one of the first comprehensive analyses of the Dodd-Frank Act's controversial national bank preemption provisions. Broadly speaking, these provisions shift preemption policy implementation away from the Office of the Comptroller of the Currency (OCC) and the Office of Thrift Supervision (OTS) and toward the federal judiciary. This shift may ultimately thwart the Act's antipreemption thrust, because Congress implemented it in a manner that fails to take account of post-enactment monitoring options and Centralization Default considerations.

The Article proceeds as follows: Part I describes the doctrinal and political components of preemption policymaking, and how they should factor into Congress's decision to delegate preemption policymaking authority to the Court or to administrative agencies. Part II analyzes the constraints on Congress's ability to influence or control judicial interpretations of statutory language, and the centrality of congressional monitoring to managing preemption policy. It then describes the Centralization Default adopted by the Court and its effects on Congress's post-enactment monitoring

28. *See* John F. Manning, *Second-Generation Textualism*, 98 S. CAL. L. REV. 1287, 1293 n.36 (2010) ("[T]he conventional wisdom holds that legislators must expend more political capital to reach agreement on statutory text.").

options. Part III applies the foregoing analysis to the institutional choices in the Dodd-Frank Act. A brief conclusion follows.

I. CONGRESSIONAL MANAGEMENT OF PREEMPTION

Simply stated, preemption addresses whether, when, and to what extent Congress displaces state laws and actions with federal law.[29] To be sure, there is substantial debate in the scholarly literature as to which provisions of the Constitution provide the power to preempt state laws, and which organs of the federal government are constitutionally invested with that power.[30] It is by now black letter law, however, that the Constitution commits such decisions to Congress under the Supremacy Clause.[31] Accordingly, when preemption issues are framed for judicial resolution, the Supreme Court has steadfastly maintained that the inquiry is driven by whether Congress manifested some intent to displace state law with federal legislation.[32] As described in the following subsections, the fact that congressional intent drives the preemption inquiry has implications for the shape of preemption doctrine, the likelihood that Congress will meaningfully and consistently engage preemption problems, and the challenges it faces when it does decide to engage them.

A. Doctrinal Considerations

Broadly speaking, Congress can engage preemption problems in one of two ways that the Court will recognize. First, it can expressly

29. *Cf.* Merrill, *supra* note 10, at 731.

30. *Compare id.* at 733-37 (arguing that the Supremacy Clause provides, but does not limit, the power to preempt state law to Congress), *with* Stephen A. Gardbaum, *The Nature of Preemption*, 79 CORNELL L. REV. 767, 785 (1994) (arguing that the Necessary and Proper Clause is the basis for preemption power, and that it is exclusively wielded by Congress).

31. Altria Group, Inc. v. Good, 555 U.S. 70, 76-77 (2008). More broadly, Professor Clark has argued that congressional control of federalism issues is constitutionally mandated. *See* Bradford R. Clark, *Separation of Powers as a Safeguard of Federalism*, 79 TEX. L. REV. 1321, 1330-31 (2001) (asserting that the legislative procedures set forth in the Constitution protect state prerogatives by limiting Congress's power).

32. *Good*, 555 U.S. at 76 ("[I]nquir[ies] into the scope of a statute's pre-emptive effect [are] guided by the rule that '[t]he purpose of Congress is the ultimate touchstone in every pre-emption case.'" (quoting Medtronic, Inc. v. Lohr, 518 U.S. 470, 485 (1996)) (internal quotation marks omitted)); *see also* Wyeth v. Levine, 129 S. Ct. 1187, 1194-95 (2009).

state its preemptive intent in the language of federal statutes that may overlap or conflict with state laws or actions (express preemption).[33] For example, the Federal Hazardous Substances Act (FHSA) specifically forbids states from creating or enforcing cautionary labeling requirements for hazardous substances that differ in any way from those established under federal law.[34] Thus, a plaintiff who was burned by ignited vapors emanating from a metal primer was barred from suing the primer's manufacturer under state law.[35] Permitting state tort claims for failure to warn against the manufacturer based on theories of strict product liability, negligence, and breach of warranty would have impermissibly imposed primer labeling requirements different from those already established under the FHSA.[36]

Second, Congress can imply its intent to preempt state laws or actions in a variety of ways. It can, for example, enact such pervasive and detailed legislation targeting a particular industry or form of conduct that the Court will infer Congress's intent to occupy the entire field of regulation, to the clear exclusion of the states (field preemption).[37] Congress can also enact legislation geared toward serving interests of such particular federal importance that its effectuation would only be impeded by state regulatory involvement (obstacle preemption).[38] Finally, Congress may enact legislation that forbids conduct required under state law, or that requires conduct forbidden under state law, making compliance with both federal and state law impossible (conflict preemption).[39] While the evidence of

33. *E.g.*, Catherine M. Sharkey, *Against Freewheeling, Extratextual Obstacle Preemption: Is Justice Clarence Thomas the Lone Principled Federalist?*, 5 N.Y.U. J.L. & LIBERTY 63, 71 (2010).

34. Milarese v. Rust-Oleum Corp., 244 F.3d 104, 109 (2d Cir. 2001) ("[I]f a hazardous substance or its packaging is subject to a cautionary labeling requirement under [the FHSA] designed to protect against a risk of illness or injury associated with the substance, no State ... may establish or continue in effect a cautionary labeling requirement applicable to such substance or packaging and designed to protect against the same risk of illness or injury unless such cautionary labeling requirement is identical to the labeling requirement under [the FHSA]." (quoting Pub. L. No. 89-756, § 4(a), 80 Stat. 1303, 1305 (codified as amended at 15 U.S.C. § 1261 note (b)(1)(A) (2006) (Effect upon Federal and State Law))).

35. *Id.* at 108-09.

36. *Id.* at 109.

37. Gade v. Nat'l Solid Wastes Mgmt. Ass'n, 505 U.S. 88, 98 (1992).

38. Crosby v. Nat'l Foreign Trade Council, 530 U.S. 363, 372-73 (2000).

39. Fla. Lime & Avocado Growers, Inc. v. Paul, 373 U.S. 132, 142-43 (1963).

Congress's intent may vary under each of these approaches, none involve an explicit statutory instruction by Congress regarding the primacy of federal or state law.[40]

Whether Congress's intent to preempt state law is expressed in a statute or implied by it, the Court describes its role as being limited to determining that intent through tools of statutory interpretation.[41] Presumably, when administrative agencies are tasked with promulgating preemption rules, they are also bound by, and therefore must locate, Congress's intent. Despite the Court's insistence to the contrary, however, preemption is not a routine exercise in statutory interpretation.[42] Unlike other instances in which courts or agencies are asked to determine congressional intent from statutory text or other sources, preemption necessarily involves three simultaneous policy considerations. First and foremost are questions of federalism, which bring to bear the constitutional sensitivities inherent in the federal-state relationship.[43] Second, corrective justice considerations examine whether the state remedial laws under which individuals, entities, or interest groups seek redress for private wrongs will be eliminated to serve some overriding federal purpose.[44] Third, regulatory efficiency considerations compare federally centralized administration with state-

40. *See, e.g.*, Sharkey, *supra* note 33, at 71.

41. *See* Merrill, *supra* note 10, at 742.

42. *See id.* ("The interpretation of a federal statute does not ordinarily entail a judgment nullifying state law, yet that far-reaching result is precisely what happens when courts apply preemption doctrine.").

43. *See* Sharpe, *supra* note 5, at 373. In this vein, there are at least two forms in which preemption federalism can take shape. The first is a procedural federalism, which emphasizes the participation of the states in discussions over whether their laws should be superseded. *See, e.g.*, Catherine M. Sharkey, *Inside Agency Preemption*,110 MICH. L. REV. (forthcoming 2011) (describing the role that state governments and state-based interest groups play in federal administrative preemption rulemaking). The second is a formalistic federalism, in which areas of regulation are denominated as federal, local, or common a priori. *Cf.* Robert A. Schapiro, *From Dualism to Polyphony*, *in* PREEMPTION CHOICE: THE THEORY, LAW, AND REALITY OF FEDERALISM'S CORE QUESTION 33, 46-47, 51-52 (William W. Buzbee ed., 2009) (describing the flaws in a conception of federalism that attempts to demarcate immutable and exclusive spheres of federal and state regulatory authority). *See generally* EDWARD A. PURCELL, JR., ORIGINALISM, FEDERALISM, AND THE AMERICAN CONSTITUTIONAL ENTERPRISE 7-10 (2007) (arguing that no definitive conclusions regarding the balance between state and federal power can reasonably be drawn from the Constitution's history or text).

44. *See* Sharpe, *supra* note 5, at 375-76.

based decentralized administration to determine the appropriate means by which to effectuate federal regulatory policy.[45]

Congress has rarely made clear the extent to which any of these factors have influenced its preemption policy decisions.[46] Moreover, the proper balance with regard to each consideration—whether to defer to state as opposed to federal enforcement or to provide greater or lesser state involvement in federal policymaking, whether to eliminate causes of action for one set of potential plaintiffs but not for another, or whether to centralize or decentralize particular regulatory activities—is not susceptible to immutable rules that clearly differentiate between correct or incorrect resolutions.[47] The three policy considerations are, in this sense, arbitrary; they cannot be definitively and objectively derived from binding rules of logic or law.[48] When the Court or administrative agencies face preemption questions, they are therefore left to piece together Congress's intent from available evidence or, as is more often the case, fill in the gaps with their own views on federalism, corrective justice, and regulatory efficiency.[49]

A recent example drawn from the Court's products liability preemption jurisprudence illustrates the point. In *Riegel v. Medtronic, Inc.*, the Court was asked to decide whether Congress intended to include the standards underlying state common law tort claims in its definition of "requirements" under the Medical Device Amendments of 1976 (MDA).[50] Under the MDA's express preemption clause, states are prohibited from imposing medical device design

45. *Id.* at 376-77.

46. Catherine L. Fisk, *The Last Article About the Language of ERISA Preemption?: A Case Study of the Failure of Textualism*, 33 HARV. J. ON LEGIS. 35, 43 (1996) ("Congress often does not attempt to expressly articulate its intent regarding preemption."); Sharkey, *supra* note 13, at 450-51 (observing that Congress frequently shifts policy questions relating to products liability preemption to courts or administrative agencies). It is conventional wisdom in the academy that Congress focuses on the core purposes of the legislation it enacts and not on ancillary consequences such as preemption. *See* Fisk, *supra*, at 102-03 (observing that a preemption clause enacted by Congress can be the product of "last-minute compromise in a massive piece of new legislation").

47. *See* Sharpe, *supra* note 5, at 374.

48. *See* Hoctor v. U.S. Dep't of Agric., 82 F.3d 165, 170 (7th Cir. 1996) (describing as "arbitrary" rules promulgated in the absence of clear and rational justifications derived from the statutes on which they are based).

49. *See* Sharpe, *supra* note 5, at 362.

50. 552 U.S. 312, 323 (2008).

requirements that are "different from, or in addition to" the safety and effectiveness standards set by the Food and Drug Administration (FDA).[51] Although the MDA's preemptive scope turns in this instance on which state laws, regulations, or decisions constitute "requirements," Congress did not define the term anywhere in the Act.[52] Moreover, the Court did not accept as definitive the FDA's construal of the term, in effect concluding that Congress had not delegated that responsibility to the FDA.[53] Rather, the Court proceeded as though Congress implicitly delegated to it the task of determining when state products liability laws are displaced by the FDA-promulgated medical device requirements.[54] As is typical of its preemption clauses, Congress provided no express guidance on how to undertake this delegated task.

A majority of the Justices resorted to the sources of intent evidence prescribed by textualist interpretive methods, such as dictionary definitions, a legal treatise, and the MDA's language.[55] In doing so, the Court concluded that "requirements" did include state common law and that Congress did in fact intend to preempt the plaintiff's claim.[56] What is clear from the opinion is that the Court did more than simply fill in the definition of "requirement"; it chose that definition based in large part on its assumptions that Congress wanted to prioritize regulatory efficiency concerns over corrective justice concerns and that centralized decision making by the FDA was the appropriate means of addressing those concerns.[57]

In a revealing observation, Justice Scalia, writing for the majority, stated that "excluding common-law duties from the scope of pre-emption would make little sense" because "[a state] jury ... sees only the cost of a more dangerous design, and is not concerned with its benefits; the patients who reaped those benefits are not repre-

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51. *Id.* at 316 (quoting 21 U.S.C. § 360k(a)(1) (2006)).

52. *See id.* at 324-25.

53. *See id.* at 322 (observing that its interpretation of the MDA's preemption provision is only "substantially informed" by the FDA's regulations).

54. *See* Margaret H. Lemos, *The Consequences of Congress's Choice of Delegate: Judicial and Agency Interpretations of Title VII*, 63 VAND. L. REV. 363, 372 (2010) (noting that an ambiguous term is tantamount to delegation of authority to courts).

55. *Riegel*, 552 U.S. at 326, 328-30.

56. *Id.* at 324-25.

57. *Id.*

sented in court."[58] A federal agency like the FDA, by contrast, "could at least be expected to apply cost-benefit analysis."[59] As demonstrated by Justice Stevens in his concurrence and by Justice Ginsburg in her dissent, the Court could have easily found that the MDA did not preempt the plaintiff's claim by relying on the MDA's legislative history, which the plaintiff argued would have shown that Congress prioritized corrective justice over regulatory efficiency.[60] In either case, the Court felt compelled to make this policy choice itself because Congress provided no definitive guidance on which preemption factors were most important in reaching the agreement that led to the MDA's enactment.

B. Practical and Political Considerations

For several reasons, Congress either does not or cannot make all of the decisions needed to seamlessly implement its preemption policy. From a mechanical rule-making perspective, the foresight needed to anticipate all of the situations in which preemption questions might arise, and to determine how to deal with them, is simply beyond the capabilities of any legislative body; attempts at creating any such all-encompassing codes are futile.[61] Even if Congress could understand how its legislation will affect the laws of all fifty states, those states are well within their rights to change their laws at any time.[62] Further, Congress's administrative resources are limited; it cannot identify and respond to all of the

58. *Id.* at 325.

59. *Id.*

60. *See id.* at 331 (Stevens, J., concurring); *id.* at 335-37 (Ginsburg, J., dissenting). Even though Justice Stevens concluded in *Riegel* that common law tort claims constitute "requirements" under the MDA, he seemed to do so despite his previously expressed view of the matter. *Id.* at 331-33 (Stevens, J., concurring). In *Medtronic, Inc. v. Lohr*, the predecessor case to *Riegel*, Justice Stevens characterized the notion that the MDA proscribed all state tort claims against medical device manufacturers as both "unpersuasive" and "implausible." 518 U.S. 470, 487 (1996) (plurality opinion). However, only four justices signed on to that part of the opinion. *Id.* at 487-91.

61. *See* Fisk, *supra* note 46, at 102 ("Congress simply cannot anticipate all preemption problems when it enacts a far-reaching law that displaces a substantial amount of state law.").

62. *See id.* at 100 (discussing how Hawaii amended its Health Care Act despite having received an express preemption exemption from Congress).

changes that may occur in the areas it has chosen to regulate.[63] Other plausible pitfalls include time pressures, legitimate drafting challenges, mistakes, and incompetence.[64] Procedurally, the distribution of agenda-setting authority among various committees and party leaders within and outside of Congress can effectively thwart attempts to override judicial decisions, even when a majority of members would favor such actions.[65]

From a purely political perspective, legislators are apt to delegate to courts or agencies those policy decisions that garner them the least in electoral gains.[66] Ambiguity or silence in legislative language may therefore be purposeful, as legislative coalitions, unable to agree on all aspects of a particular proposal, may choose instead to omit or to muddle disputed features, and thereby leave their settlement to another day.[67] Similarly, ambiguous statutory language may be the shrewd legislator's response to competing interest group pressures; leaving a disputed policy choice unresolved may enable the legislator to shift the political costs of decision to the courts or to an administrative agency that will ultimately be charged with resolving it.[68] Moreover, it is possible that legislators will delegate the implementation of policies they fully expect to fail. Doing so grants them two electoral benefits. They gain the first by enacting legislation that is seemingly responsive to the concerns of the constituencies they are trying to please.[69] They gain the second

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63. *See generally* RANDALL B. RIPLEY & GRACE A. FRANKLIN, CONGRESS, THE BUREAUCRACY, AND PUBLIC POLICY 12 (Wadsworth, Inc., 5th ed. 1991) (observing that the size and complexity of federal regulation prevents Congress from implementing it on its own).

64. *See* Daniel B. Rodriguez, *Statutory Interpretation and Political Advantage*, 12 INT'L REV. L. & ECON. 217, 220 (1992).

65. *See* Amy Coney Barrett, *Substantive Canons and Faithful Agency*, 90 B.U. L. REV. 109, 112 n.5 (2010) ("A bill must compete for space and priority on the congressional agenda. It must navigate numerous 'vetogates,' including committee votes, the threat of Senate filibuster, and the threat of presidential veto. Passage through each of these points requires both strategic choice and compromise."); Brian A. Marks, *A Model of Judicial Influence of Congressional Policymaking:* Grove City College v. Bell 5-7 (Hoover Inst., Working Paper No. P-88-7, 1988), *available at* http://www.law.northwestern.edu/searlecenter/papers/Marks_A_Model_of_Judicial_88.pdf.

66. *See* RIPLEY & FRANKLIN, *supra* note 63, at 13.

67. *See* Rodriguez, *supra* note 64, at 218.

68. *See* RIPLEY & FRANKLIN, *supra* note 63, at 13. It is even possible that administrative agencies would invite such an outcome. Rodriguez, *supra* note 64, at 220.

69. *See* Rodriguez, *supra* note 64, at 218.

when they intervene—through public criticism, constituent service, or new legislation—to correct the implementation failures of their delegates.[70]

The fact that preemption shifts the balance of regulatory power away from states and toward the federal government can make it highly unpopular with the voters and elected officials in a congressperson's or a senator's home district or state.[71] In addition, federal preemption frequently results in the weakening or the elimination of state and federal judicial remedies, which rallies powerful interests that range from consumer advocacy groups to the plaintiffs' bar.[72] At the same time, the business community and those that advocate on their behalf are frequently consumers of federal preemption, which they claim reduces the costs of regulatory compliance by eliminating the redundancy of simultaneous state and federal regulation.[73] Given the difficulties endemic to pleasing both pro- and antipreemption interest groups, and presuming that members of Congress perceive as credible at least some of the threats of reprisal levied at them by both groups, one would expect federal legislators to generally avoid expending political capital to adopt clear and comprehensive preemption legislation.[74] Even assuming that some federal legislators are sufficiently public-minded to subordinate personal electoral gains to principles such as corrective justice or constitutional federalism, a minority of self-interested lawmakers would be sufficient to make enacting those principles in clear and comprehensive preemption legislation politically infeasible.[75] The difficulty of appeasing both pro- and

70. *See* MORRIS P. FIORINA, CONGRESS: KEYSTONE OF THE WASHINGTON ESTABLISHMENT 48 (1977).

71. *Id.* To be sure, state-based interest groups can effectively lobby against preemption. *Cf.* JAMES I. O'REILLY, FEDERAL PREMPTION OF STATE AND LOCAL LAW 48-49 (2006) (describing how state and local governments rally federal representatives against the adoption of administrative agency regulations that would have preemptive effect).

72. *See* Mark E. Gudnitz, *The Federalization and Privatization of Public Consumer Protection Law in the United States: Their Effect on Litigation and Enforcement*, 24 GA. ST. U. L. REV. 663, 690 (2008); Sharpe, *supra* note 5, at 375-76 (discussing how the predispositions of Supreme Court Justices in preemption cases can result in the preservation or elimination of private rights of action).

73. Roderick M. Hills, Jr., *Against Preemption: How Federalism Can Improve the National Legislative Process*, 82 N.Y.U. L. REV. 1, 19-20 (2007).

74. *Id.* at 28.

75. *About the Senate Committee System*, U.S. SENATE, http://www.senate.gov/general/

antipreemption constituencies will thus increase the likelihood that Congress will purposely ignore the issue, make vague pronouncements that do not offend competing interest groups, and/or delegate decision-making responsibility to another branch of government.[76]

C. Delegation and Monitoring Considerations

1. Limitations on Congress's Choice of Delegate

Congressional hesitancy in the preemption context can result not only in vague or ambiguous preemption directives but also in vague or ambiguous delegations of preemption authority. The problem of vague delegations in the preemption context has manifested itself in scholarly debates regarding the scope of Congress's delegation authority and in the Supreme Court's indecision over the level of deference courts should afford an agency's preemption determinations. Scholars have questioned whether Congress possesses the constitutional authority to delegate preemption decisions to administrative agencies,[77] and hence whether the only appropriate delegate for such questions is the judiciary. Others have asserted that, constitutional issues aside, agencies simply lack the institutional competence to determine the appropriate balance between state and

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common/generic/about_committees.htm (last visited Sept. 23, 2011) ("Several thousand bills and resolutions are referred to committees during each 2-year Congress. Committees select a small percentage for consideration, and those not addressed often receive no further action."); *see also How Our Laws are Made*, LIBRARY OF CONGRESS, http://thomas.loc.gov/home/lawsmade.bysec/considbycomm.html (last visited Sept. 23, 2011) ("A committee may table a bill or fail to take action on it, thereby preventing its report to the House.").

76. *See* Hills, *supra* note 73, at 28 (noting that preemption can create a vigorous and public debate, which Congress "would prefer to avoid").

77. *See, e.g.*, Cass R. Sunstein, *Nondelegation Canons*, 67 U. CHI. L. REV. 315, 331 n.81 (2000) ("It is not entirely clear whether an agency might be able to decide the [preemption] question if Congress expressly said that the agency is permitted to do so."). That being said, the fecklessness of the Court's nondelegation doctrine is not likely to pose a threat to Congress's preemption delegations. *See* Margaret H. Lemos, *The Other Delegate: Judicially Administered Statutes and the Nondelegation Doctrine*, 81 S. CAL. L. REV. 405, 435-36 (2008) ("Only if Congress empowers an agency to make law without supplying an 'intelligible principle' has Congress crossed the constitutional line by giving away the nondelegable core of legislative power.").

federal power, again making the courts Congress's only viable option.[78]

We see this issue play out in the Court's struggles with the level of deference courts should afford agencies when those agencies interpret statutory language in a way that displaces state law. From an institutional choice perspective, the deference issue is critical. If the Court decides that an agency's preemption decisions are worthy of only *Skidmore* deference,[79] it has effectively concluded that the courts are primarily responsible for implementing Congress's preemption policies. Although courts must consider an agency's views under *Skidmore*, they are free to reject those views to the extent they are unpersuasive. By contrast, if the Court accords an agency's views *Chevron* deference,[80] then it has inferred that Congress wanted to make the agency primarily responsible for determining Congress's preemptive intent.[81]

Although the issue is certainly not free from doubt, it appears from the Supreme Court's engagement with the deference issue that it is not yet poised to prevent Congress from delegating preemption decisions to federal agencies. However, the Court may have already imposed requirements for how Congress indicates its delegation choice. In *Riegel v. Medtronic, Inc.* and *Medtronic, Inc. v. Lohr*, the

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78. *See, e.g.*, Nina A. Mendelson, *A Presumption Against Agency Preemption*, 102 NW. U. L. REV. 695, 706-07, 717-18, 722-25 (2008) (arguing that agencies lack the institutional competence and statutory guidance required to make informed choices on questions of state autonomy).

79. Under *Skidmore* deference, "[t]he weight of [an agency's views] in a particular case will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control." Skidmore v. Swift & Co., 323 U.S. 134, 140 (1944). While there is disagreement about the precise contours of the *Skidmore* analysis, it is clear that "*Skidmore* allows a reviewing court to be the final arbiter of whether the agency's interpretation is persuasive but specifies some factors and allows for the existence of others that a court should consider in evaluating the agency's case." Kristin E. Hickman, *The Need for* Mead*: Rejecting Tax Exceptionalism in Judicial Deference*, 90 MINN. L. REV. 1537, 1552 (2006).

80. WILLIAM F. FUNK & RICHARD H. SEAMON, ADMINISTRATIVE LAW 285 (3d ed. 2009) ("The *Chevron* doctrine has come to be associated with the idea that courts defer to an agency's interpretation of law and that this deference is strong deference, allowing agencies substantial leeway in their interpretations.").

81. *See* Lemos, *supra* note 77, at 429 ("Under *Chevron*, courts treat ambiguity in an agency-administered statute as implicit evidence of Congress's intention to delegate lawmaking authority to the agency.").

Court suggested that an agency's preemption determinations should be accorded *Skidmore* deference (or at least something less than *Chevron* deference).[82] In *Watters v. Wachovia Bank, N.A.*, it expressly refused to address the deference question.[83] In *Wyeth v. Levine*,[84] Justice Stevens, writing for the five-Justice majority,[85] noted that the Court has in prior decisions "given 'some weight' to an agency's views about the impact of tort law on federal objectives when 'the subject matter is technical and the relevant history and background are complex and extensive.'"[86] From this observation, it appears that the Court will default to *Skidmore* deference to an agency's preemption determinations, at least where state common law is involved, and at least where the agency's technical core competencies are implicated. The weight the Court accords "the agency's explanation of state law's impact on the federal scheme [will accordingly] depend[] on its thoroughness, consistency, and persuasiveness."[87] In keeping with this *Skidmore* default, Justice Stevens also preserved the possibility that Congress could expressly delegate preemption decision-making authority to an administrative agency. He observed that "agencies have no special authority to pronounce on pre-emption *absent delegation by Congress*."[88]

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82. 552 U.S. 312, 326-27 (2008); 518 U.S. 470, 495 (1996). The Court's opinion in *Lohr* is particularly curious in this regard. The Court specifically acknowledged conditions that would seemingly make *Chevron* deference appropriate: that § 360k of the MDA was ambiguous, that "Congress ha[d] given the FDA a unique role in determining the scope of § 360k's pre-emptive effect," and that "the [FDA was] uniquely qualified to determine whether a particular form of state law [stood] as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress ... and therefore whether it should be preempted." 518 U.S. at 496 (internal quotations omitted). The Court even cited *Chevron* in its analysis. *See id.* Nevertheless, it did not state that it must defer to the FDA's conclusions regarding § 360k's preemptive scope. Rather, it stated that its conclusions are only "substantially informed" by the FDA's interpretation of the statute. *Id.*

83. 550 U.S. 1, 20-21 (2006).

84. 129 S. Ct. 1187 (2009).

85. Though he concurred in the Court's decision, Justice Thomas did not agree with the Court's reasoning. *See id.* at 1205 (Thomas, J., concurring) ("I write separately, however, because I cannot join the majority's implicit endorsement of far-reaching implied pre-emption doctrines.").

86. *Id.* at 1201 (alteration omitted) (quoting Geier v. Am. Honda Motor Co., 529 U.S. 861, 883 (2000)).

87. *Id.* (citing United States v. Mead Corp., 533 U.S. 218, 234-35 (2001); Skidmore v. Swift & Co., 323 U.S. 134, 140 (1944)).

88. *Wyeth*, 129 S. Ct. at 1201 (emphasis added).

It therefore appears that the Court will assume Congress has delegated preemption decisions to the judiciary and that an agency's views on the matter will be informative but not dispositive. As Professor Metzger has recently observed, it seems that "*Wyeth* insist[s] that conclusions of preemptive effect are ultimately for the courts to make in their independent judgment, at least absent an express delegation to an agency of preemptive authority."[89] While Justice Stevens did not explicitly address whether such a delegation could ever be *implied* from an express preemption clause, the Court's decision almost four months later in *Cuomo v. Clearing House Ass'n* left open that possibility.[90] There, the Court flirted with applying the *Chevron* framework to the OCC's interpretation of the term "visitorial powers" without fully committing to it, fully rejecting it, or explicitly engaging in a "*Chevron* Step Zero" analysis.[91] Although the Court in *Cuomo* had to construe the National Bank Act's (NBA) express preemption provision, it declined to indicate whether Congress had delegated preemption authority to the OCC through that provision. It may be that the difference between the Court's flirtation with *Chevron* deference in *Cuomo* and its seeming rejection of it in *Wyeth* can be explained by Congress's inclusion of an express preemption clause in the NBA and its exclusion of such a clause in the Food, Drug, and Cosmetic Act.[92] If that is the case, however, it is puzzling that the Court referred to the *Chevron* framework in neither *Lohr* nor *Riegel*, both of which involved the

89. Gillian E. Metzger, *Federalism and Federal Agency Reform*, 111 COLUM. L. REV. 1, 15 (2011).

90. 129 S. Ct. 2710 (2009).

91. *Id.* at 2715; *see* Metzger, *supra* note 89, at 16 ("[T]the majority opinion [in *Cuomo*] deviates from ordinary *Chevron* review by refusing to defer to the OCC's regulation interpreting 'visitorial powers' in the NBA, despite acknowledging that this term was ambiguous and the regulation had been promulgated using full notice-and-comment procedures."). The Court ultimately rejected the OCC's interpretation as unreasonable. *See Cuomo*, 129 S. Ct. at 2724 (Thomas, J., concurring). One could argue that the Court did not consider *Chevron* deference a viable option, given the fuzziness of its analysis and its implicit refusal to dismiss *Chevron* analysis as the appropriate framework for answering the deference question. *See* Sharkey, *supra* note 33, at 106 & n.230 (asserting that the Court did not move beyond *Chevron* Step One, and hence did not grant the OCC *Chevron* deference, because it resolved the "visitorial powers" question on the plain terms of the NBA).

92. *See Wyeth*, 129 S. Ct. at 1196 (observing that Congress "declined to enact" an express preemption provision applicable to prescription drug regulation).

application of the MDA's express preemption clause.[93] Nevertheless, it would seem that the Court will certainly recognize express congressional delegations of preemption authority—and hence apply *Chevron* analysis—when a statute specifically invests a federal agency with that authority. Otherwise, the Court will likely assume that Congress intended the judiciary to be its primary preemption delegate.

2. The Importance of Congressional Monitoring

Assuming that congressional delegation of some preemption policymaking is all but inevitable, and assuming that there are few, if any, constitutional constraints on Congress's choice of delegate, the question becomes how Congress should choose its delegate. Scholars most often answer this question by analyzing the strengths and weaknesses of the two primary institutional candidates: the federal courts, usually the Supreme Court, and federal agencies. For example, Professor Merrill has proffered what is essentially a two-step analysis for the closely related issue of whether Congress, the Court, or an agency is best suited to manage preemption issues. He first identifies preemption's core considerations from an institutional choice perspective, which in his view include "constitutional, interpretational, and pragmatic variables."[94] He then assesses the comparative advantages and disadvantages of Congress, the courts, and agencies in dealing with each variable.[95] Similarly, Professor Sharkey has argued that questions of institutional choice in the products liability preemption context should be answered by courts, plied with empirical data from expert federal agencies like the FDA.[96] Other commentators have employed similar analyses that focus on whether different branches of the federal government are institutionally competent to make substantive preemption policy choices,[97] though their conclusions vary.

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93. Riegel v. Medtronic, Inc., 552 U.S. 312, 316 (2008); Medtronic, Inc. v. Lohr, 518 U.S. 470, 482 (1996).

94. Merrill, *supra* note 10, at 730.

95. *Id.* at 744-59.

96. Sharkey, *supra* note 13, at 485-91.

97. *See, e.g.*, Brian Galle & Mark Seidenfeld, *Administrative Law's Federalism: Preemption, Delegation, and Agencies at the Edge of Federal Power*, 57 DUKE L.J. 1933, 1948

To be sure, these thoughtful analyses highlight a critical component of preemption policy management: an unreasonable expectation of an institution's decisional capacities could thwart the effective implementation of any policy, preemption policy included.[98] Along these lines, I have described elsewhere how "institutional singularity" has dominated the Supreme Court's preemption jurisprudence. Although the Court's decisions rhetorically assume that Congress is solely responsible for controlling the shape of federal preemption policy, in practice the Court itself attempts to exercise such control.[99] In either case, the Court's operative assumption is that a single branch of the federal government can effectively manage the confluence of policy issues that preemption routinely presents.[100] Such institutional singularity not only disregards Congress's critical role as federal preemption policy coordinator,[101] but it also disregards important strategic factors that members of Congress likely consider when delegating preemption policy implementation to the executive and judicial branches.[102] A critical addition to this account is the centrality of Congress's role in coordinating and delegating preemption policy formation and implementation.

Even if members of Congress choose to delegate preemption policy implementation based primarily on how well courts and agencies address federalism, corrective justice, and regulatory efficiency issues, it stands to reason that those members would still wish to retain some means of correction and adjustment. Stated differently, the need to delegate some preemption policymaking and implementation responsibility does not also connote, let alone necessitate, congressional abdication of preemption policymaking to courts or agencies. Given an increasing scholarly and popular interest in

(2008) (analyzing the comparative institutional competence of courts and agencies to manage federalism concerns).

98. *See* Merrill, *supra* note 10, at 753-59 (describing the comparative strengths and weaknesses of Congress, the courts, and administrative agencies in formulating and implementing federal preemption policy); *cf.* Sharkey, *supra* note 13, at 485-502 (describing the institutional advantages of agencies in making preemption determinations, and the role that courts can play in limiting agency preemptive power).

99. *See* Sharpe, *supra* note 5, at 406-07.

100. *See id.* at 369.

101. *See id.* at 426-28.

102. *See id.* at 426-34.

preemption issues,[103] it is perhaps unrealistic to expect members of Congress to leave its management wholly to the other branches of the federal government. An approach to analyzing the institutional choice of preemption that does not account for congressional delegation is, therefore, incomplete.

If one assumes that Congress prefers that the results produced by its legislation trend in a particular policy direction, it would stand to reason that Congress should have some idea when drafting it as to how courts or agencies would construe that legislation. Stated differently, Congress would be expected to provide delegates with discretion if it is generally confident that the delegate will, in the end, effect congressionally selected policy goals. By contrast, Congress would be expected to provide its delegates with little discretion if those delegates are not likely to give effect to congressional policy choices.[104] It would be sensible therefore for Congress to try to retain some powers of correction and influence after the legislative language has been settled upon and the delegation has been made.[105]

As a general matter, Congress can use ex ante or ex post control mechanisms to monitor how the governmental agents to which it delegates the implementation of its legislative mandates conform to congressional goals.[106] The primary ex ante control mechanism is legislative text which, broadly speaking, can take two forms. First, Congress can clearly and comprehensively enumerate the considerations that go into implementing its legislation. If effectively executed, this method reduces the interpretive latitude of the implementing agent and, presumably, produces results more in

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103. *See* Robert A. Schapiro, *Monophonic Preemption*, 102 NW. U. L. REV. 811, 811 (2008) ("Much scholarly and public attention has now turned to another aspect of the Court's federalism jurisprudence, the preemption of state law.").

104. *See* THEODORE J. LOWI, THE END OF LIBERALISM 92-94 (2d ed. 1979) (noting that delegation of authority needs to be checked, guided, and safeguarded).

105. At a minimum, members of Congress, who are presumably heavily influenced by changes in public opinion, would want to secure for themselves the option of changing their views regarding the policies underlying enacted legislation and to have those changes reflected in the ways enacted legislation is interpreted and implemented. *See* Rodriguez, *supra* note 64, at 218.

106. *See* DAVID EPSTEIN & SHARYN O'HALLORAN, DELEGATING POWER: A TRANSACTION COST POLITICS APPROACH TO POLICY MAKING UNDER SEPARATE POWERS 25 (1999).

keeping with legislative intent.[107] One such attempt at detailed instruction is section 301 of the Copyright Act of 1976, which specifically enumerates the circumstances under which, and the extent to which, federal law displaces state law.[108] Another is section 514 of the Employee Retirement Income Security Act (ERISA), which has produced less than stellar results.[109]

Alternatively, Congress can enact broad implementing language that, on its face, welcomes some measure of interpretive latitude. For example, section 1044(b)(1)(B) of the Dodd-Frank Act instructs courts and the OCC to apply implied conflict and obstacle preemption doctrines when determining the applicability of state laws to national bank and federal thrift activities.[110] In drafting this section, Congress essentially left the details of preemption policy to future determination.[111] Scholars have uniformly concluded that these implied preemption doctrines, with one possible exception,[112] invite and often require a substantial measure of judicial policymaking.[113] In other words, the instruction to apply these implied preemption doctrines is tantamount to an implicit delegation of authority to the courts and stands in stark contrast to the ex ante legislative control created by specifically detailed legislative language. Instead of

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107. *See id.* at 26 (arguing that Congress can control bureaucratic drift, the tendency of agencies to ignore congressional policy preferences in favor of their own, by "passing specific, detail-filled legislation"). Of course, the increased complexity of such a statute could increase the rate of erroneous application, thus creating bureaucratic drift of a different kind.

108. 17 U.S.C. § 301 (1998).

109. 29 U.S.C. § 1144 (2006). Criticisms of ERISA's preemption provisions are legion. *See, e.g.*, Fisk, *supra* note 46, at 35.

110. Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, § 1044(b)(1)(B), 124 Stat. 1376, 2015 (2010) (to be codified in scattered sections of 12 U.S.C.).

111. Moreover, one of the most intriguing aspects of the Dodd-Frank Act's national bank preemption provisions is its dramatic increase in judicial preemption discretion at the expense of agency discretion. *See infra* Part III.

112. *See* Caleb Nelson, *Preemption*, 86 VA. L. REV. 225, 234, 261 (2000) (proposing a "logical-contradiction" test for preemption, under which courts "ignore state law if (but only if) state law contradicts a valid rule established by federal law, so that applying the state law would entail disregarding the valid federal rule"); *see also* Wyeth v. Levine, 129 S. Ct. 1187, 1209 (2009) (Thomas, J., concurring) (advocating for the abandonment of the Court's implied preemption jurisprudence in favor of preemption test similar to that proposed by Professor Nelson). The Supreme Court has yet to embrace the logical-contradiction test.

113. *See, e.g.*, Merrill, *supra* note 10, at 742 ("[C]ourts are actually making substantive [policy] decisions in the name of preemption."); Sharpe, *supra* note 5, at 568 ("[T]here is a puzzling and fundamental disconnect between what the Supreme Court says in its preemption cases, and what it does in its preemption cases.").

attempting to enumerate the specific instances in which state law is displaced by federal law, section 1044(b)(1)(B) gives courts wide latitude to identify those instances themselves.

Ex post control mechanisms, by contrast, comprise the monitoring methods available to Congress after it makes a delegation.[114] In theory, such mechanisms are numerous, and their use depends in some measure on propriety and the most cost-effective means of discovering and addressing delegation problems.[115] Members of Congress can, for example, resort to the relatively inexpensive methods of sending letters or placing calls to delegates, threatening to hold potentially embarrassing hearings or to cut funding, or adopting resolutions staking out particular policy positions.[116] Members can also hold hearings in which they publicly scrutinize the decisions of agency officials. With substantially greater time and effort, members can enact legislation to create private rights of action and individual standing or to overturn an implementation decision with which they disagree.[117]

When considerations of institutional choice are added, however, delegating implementation to courts as opposed to administrative agencies has immediate and significant consequences for the availability of these ex post control mechanisms. Courts are largely insulated from congressional attempts at ex post influence or control.[118] As a matter of governmental culture, it is inappropriate for members of Congress to send letters to judges expressing their views on the potential outcomes of individual cases. While members of Congress may file amicus briefs expressing such views, courts are

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114. *See* EPSTEIN & O'HALLORAN, *supra* note 106, at 25.

115. The classic distinction here is between "police-patrol" and "fire-alarm" monitoring systems. Each involves costly monitoring of delegate activities, but they distribute the direct costs of that monitoring differently. Whereas police patrols require Congress to incur monitoring costs by proactively scrutinizing delegate behavior itself, fire alarms empower private individuals and interest groups to examine delegate decisions. *See* Mathew D. McCubbins & Thomas Schwartz, *Congressional Oversight Overlooked: Police Patrols Versus Fire Alarms*, 28 AM. J. POL. SCI. 165, 166 (1984).

116. *See* FISHER, *supra* note 14, at 78.

117. *Cf.* EPSTEIN & O'HALLORAN, *supra* note 106, at 24 (noting that interest groups are well informed about relevant delegate actions).

118. Mathew D. McCubbins et al., *Structure and Process, Politics and Policy: Administrative Arrangements and the Political Control of Agencies*, 75 VA. L. REV. 431, 445 (1989) (observing that many of the procedural mechanisms used by Congress to control agency behavior are not available to control courts).

under no obligation to read them, let alone follow them.[119] Although Congress could attempt to shape judicial opinions through the appropriations process,[120] doing so would be both unwise and ineffective. In all likelihood, the public would view a congressional threat of cutting or increasing judicial funding to influence case results as an unseemly infringement on the independence that Article III affords the federal courts. Even if this were not the case, an increase or a reduction in judicial appropriations is unlikely to be sufficiently targeted to control the decisions of the 1776 judges and magistrates currently authorized by the federal court system.[121] Similar hurdles would impede congressional efforts to influence state judges, with the additional impediment that Congress can only conditionally promise to direct or threaten to withhold funds to state court systems; such entreaties would first have to go to state legislators who would then, in turn, have to lobby their courts on Congress's behalf.[122]

Administrative agencies, by contrast, are much more susceptible to ex post congressional influence than are federal courts.[123] Even in the case of independent agencies or commissions, the cultural proscriptions against congressional ex parte contacts with their directors, commissioners, or board members are far less robust than they are with federal judges.[124] Congressional committees can target

119. Amanda L. Tyler, *Continuity, Coherence, and the Canons*, 99 NW. U. L. REV. 1389, 1451 n.311 (2005).

120. Todd D. Peterson, *Controlling the Federal Courts Through the Appropriations Process*, 1998 WIS. L. REV. 993, 1033 (1998).

121. *See* JAMES C. DUFF, ADMIN. OFFICE OF THE U.S. COURTS, JUDICIAL BUSINESS OF THE UNITED STATES COURTS: 2009 ANNUAL REPORT OF THE DIRECTOR 34-37 (2009).

122. The possible exception here would be with popularly elected state judges, where the effects of the party system might be brought to bear. *Cf.* Steven P. Croley, *The Majoritarian Difficulty: Elective Judiciaries and the Rule of Law*, 62 U. CHI. L. REV. 689, 777 (1995) (commenting on effects when those charged with protecting the minority are chosen by the majority).

123. *See* FISHER, *supra* note 14, at 71, 73, 75-78; J.R. DeShazo & Jody Freeman, *Public Agencies as Lobbyists*, 105 COLUM. L. REV. 2217, 2235-36 (2005) ("Potential sanctions for an agency's failure to fulfill statutory mandates include political embarrassment at congressional hearings, vulnerability to auditing and investigation, the threat of losing appropriations, and even elimination of the agency.").

124. *See* Marshall J. Berger & Gary J. Edles, *Established by Practice: The Theory and Operation of Independent Federal Agencies*, 52 ADMIN. L. REV. 1111, 1194-95 (2000); *cf.* Bill Mears, *Scalia Won't Recuse Himself from Cheney Case*, CNN.COM (Mar. 18, 2004), http://articles.cnn.com/2004-03-18/justice/scalia.recusal_1_cheney-case-recuse-scalia-and-

specific agency activities through the appropriations process,[125] and have some measure of control over the political appointments made to those agencies by the President.[126] Additionally, Congress can empower courts to monitor agency actions to ensure compliance with its goals.[127] Agencies, on the other hand, are not in a position to monitor the activities of the federal courts. The availability of these ex post controls may be crucial to correcting the interpretation and implementation mistakes that agencies are bound to make.[128] Thus, even if Congress is unable to build the coalition needed to alter the language of a legislative mandate, to overturn agency decisions or actions, or to revise agency procedures,[129] there are numerous informal mechanisms to which it can resort.[130]

Given that courts are less susceptible to ex post congressional influence than are administrative agencies, the Dodd-Frank Act stands out as somewhat unusual. The Act clearly chooses the judiciary to implement its pro-state, antipreemption policies. For example, the Act instructs the courts to review OCC preemption determinations with *Skidmore* as opposed to *Chevron* deference,[131] which allows courts to shape preemption policy to a far greater

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125. David S. Rubenstein, *"Relative Checks": Towards Optimal Control of Administrative Power*, 51 WM. & MARY L. REV. 2169, 2207 (2010).

126. Jack M. Beermann, *Congressional Administration*, 43 SAN DIEGO L. REV. 61, 136 (2006).

127. Martin Kellner, *Congressional Grants of Standing in Administrative Law and Judicial Review: Proposing a New Standing Doctrine from a Delegation Perspective*, 30 HAMLINE L. REV. 315, 337 (2007).

128. *Cf.* FIORINA, *supra* note 70, at 48.

129. *See* Daniel B. Rodriguez & Barry R. Weingast, *The Positive Political Theory of Legislative History: New Perspectives on the 1964 Civil Rights Act and Its Interpretation*, 151 U. PA. L. REV. 1417, 1450-51 (2003).

130. This is not to say that members of Congress have free reign over agency conduct. There are meaningful legal checks on the level of influence they may exert on agency officials. *See* FISHER, *supra* note 14, at 80-82. Nor is it the position of this Article that agencies are perfectly "faithful agents," in that they immediately or necessarily follow Congress's post-enactment influence. Moreover, agencies may not in all instances be more useful congressional delegates than courts, as there are circumstances in which congressional purposes may be better served by the courts than by agencies. The point here is simply that, as a general matter, agencies are more easily influenced by Congress than is the judiciary and, as a consequence, Congress may generally find delegating to agencies more desirable than delegating to courts.

131. Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, § 1044(b)(5)(n), 124 Stat. 1376, 2015 (2010) (to be codified in 12 U.S.C. § 25b).

extent than otherwise possible under the Court's decision in *Cuomo*.[132] The Act also adopts the implied conflict and obstacle preemption standards described by the Court in *Barnett Bank v. Nelson*.[133] As already described, these implied preemption tests invite courts to engage in substantial policymaking,[134] and are considered by the courts to be implicit judicial delegations. Finally, the Act burdens the OCC's preemption decision-making procedures without similarly burdening the procedures employed by the courts.[135]

Taken together, these features invite the inference that Congress regarded the judiciary, and the Supreme Court particularly, as the implementing institution least likely to constrict state regulatory authority in contravention of the legislative bargains memorialized by the Act.[136] Unlike the typical instance in which Congress is silent on the delegation issue and the delegation devolves on the courts by default,[137] Congress specifically chose the courts over the OCC in the Dodd-Frank Act. This may be the case for either of two reasons. First, it may be that Congress can exert more effective postenactment control over the meaning and application of the Act if the courts rather than the OCC are chiefly charged with its implementation. This explanation is somewhat implausible, however, considering that courts are not as susceptible to ex post congressional controls as are administrative agencies.[138]

Second, and more plausibly, it may be that the potential for postenactment judicial policy drifts is less concerning, and hence the available methods of postenactment monitoring available to Congress would be adequate to correct them. There are certainly potential benefits to delegating preemption authority to courts as opposed to agencies. Perhaps chief among them is the potential to

132. *See* Cuomo v. Clearing House Ass'n, 129 S. Ct. 2710, 2715 (2009).

133. 517 U.S. 25, 31 (1996).

134. *See supra* Part I.C.

135. § 1044(c), 124 Stat. at 2016.

136. *See infra* Part III. Congress also made the OCC an independent agency. See § 315, 124 Stat. at 1524, which indicates Congress's intent to increase its influence over the agency while limiting the influence of the President. This change indicates some awareness on Congress's part of the need to retain some measure of control over the policy decisions made by its delegates. *See id.*

137. *See supra* Part I.C.1.

138. *See supra* note 118 and accompanying text.

protect Congress's preemption policy choices from the contrary views of future Presidents, particularly if the Presidency is controlled by an opposing political party. Whereas a President can have substantial influence over how an administrative agency resolves preemption issues,[139] a President is unlikely to have similar influence over how courts resolve those issues. Committing these decisions to courts can therefore have a greater potential to lock in desired results by insulating them from the Executive's competing policy preferences. The lingering concern would then be judicial policy drift. One would expect Congress to protect its preemption policy choices from the President by delegating authority to courts where Congress is confident that it can rein in judicial policy drift, or where such policy drift is unlikely to occur.

Given that the members of Congress and their staffers who were responsible for the Dodd-Frank Act's national bank preemption provisions could not have reasonably expected to exercise more robust ex post legislative controls over the courts than over the OCC, it would follow that they instead assumed, or would have assumed had they specifically considered the matter, that the Court would by and large interpret and apply the Act's preemption provisions in a manner that tended to favor more state regulation. At a minimum, they could have assumed that the Court would do so more frequently than would the OCC. Either of these assumptions could be based on an expectation that the Court will recognize and respect the overall pro-state leanings of the Act's national banking preemption provisions, or on the expectation that the Court will construe the Act's terms by relying on its legislative history, over which members of Congress have substantial control.[140]

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139. Unless, of course, the agency is independent and thus more insulated from the President's influence. *See* Rachel E. Barkow, *Insulating Agencies: Avoiding Capture Through Institutional Design*, 89 TEX. L. REV. 15, 25-26 (2010) (describing how agency independence shifts control from the President to Congress); *see also* Sharkey, *supra* note 43 (noting that the Dodd-Frank Act makes the OCC an independent agency, and hence insulates it from Executive Order 13,132, which imposes specific federalism procedures on agencies).

140. *See supra* text accompanying notes 20-21.

II. PREEMPTION AND LEGISLATIVE CONTROL OVER JUDICIAL INTERPRETATION

As already described, Congress has numerous monitoring strategies and procedural devices at its disposal to ensure that its chosen policy delegates conform to legislatively created mandates.[141] Because the range of ex post control options available to Congress is quite limited when its chosen delegate is the judiciary, by far the most important of these options is the language of its statutory enactments.[142] However, courts will inevitably stray from the intended effects of even the most carefully crafted statutes.[143] As a consequence, Congress must either attempt to influence the methods by which courts will interpret its legislation in future cases, or it must be confident that the courts will settle on interpretations that adhere to its conception of statutory purpose. Both options require some understanding of the judiciary's preemption policy presumptions. This Part first describes the monitoring mechanisms available to Congress when its chosen delegate is the judiciary and discusses how those methods can be used most effectively given different preemption policy goals. It then uses two areas of the Court's "new federalism" jurisprudence—implied statutory remedies and the clear statement rule—to illustrate the effect that judicial default rules have on federal legislation in contexts closely related to preemption. This Part then identifies the preemption default adopted by the Court, contrasts it with the Court's "new federalism" jurisprudence, and discusses its implications for Congress's preemption policy goals.

A. Influence over Judicial Interpretation

At the outset, it is important to recognize that many of Congress's monitoring difficulties could theoretically be reduced simply by

141. *See* McNollgast, *Positive and Normative Models of Procedural Rights: An Integrative Approach to Administrative Procedures*, 6 J.L. ECON. & ORG. 307, 312-13 (1990).

142. *See* Maureen B. Cavanaugh, *Order in Multiplicity: Aristotle on Text, Context, and the Rule of Law*, 79 N.C. L. REV. 577, 600 n.72 (2001).

143. *See* Michael P. Healy, Communis Opinio *and the Methods of Statutory Interpretation: Interpreting Law or Changing Law*, 43 WM. & MARY L. REV. 539, 561 & n.91 (2001).

enacting clear statutory mandates regarding its intent to preempt state law. Though it is an open question as to what the Supremacy Clause requires, Congress could, for example, dictate the legal consequence of a court's finding of irreconcilable conflict between state and federal law by specifically directing the court to choose state law,[144] or by explicitly stating its intent to occupy an entire field of regulation. The Dodd-Frank Act, in one notable instance, does exactly that.[145] Alternatively, Congress could create a federal statutory remedy in those instances where the Court's preemption decisions eliminate state remedial opportunities.[146]

As already explained, there are numerous reasons why Congress rarely does so.[147] Even where Congress has managed to draft a clear preemption or saving clause, there is a temporal aspect to statutory interpretation that can raise a barrier to the courts acting as faithful agents: deciding to which Congress courts owe their allegiance. Courts must choose whether to follow the directives of the Congress that enacted the potentially preemptive statutory language or the directives of the sitting Congress that has the power to overrule its interpretation.[148] It is safe to assume that the preferences of these two bodies will not align, given that the differences in their personnel reflect intervening changes in voter

144. The test case would be one involving so-called "impossibility" preemption, where federal and state requirements conflict to such a degree that simultaneous compliance with both is impossible. If the Supremacy Clause operates as a constraint on Congress's legislative power, then Congress could not "opt out" of having its laws trump those of the states. If, on the other hand, the Supremacy Clause operates as a default rule that privileges federal law, then Congress could expressly permit compliance with state law when it conflicts with federal law. *Cf.* Richard H. Fallon, Jr., *The "Conservative" Paths of the Rehnquist Court's Federalism Decisions*, 69 U. CHI. L. REV. 429, 462 (2002) ("In cases of actual conflict between state and federal commands, federal law indisputably prevails under the Supremacy Clause of Article VI. The recurring question is whether Congress, although possessed of power to displace state rules, has manifested its intent to do so.").

145. *See* Pub. L. No. 111-203, § 1004(b)(4), 124 Stat. 1376, 2015 (2010) (stating that the Act's preemption standards relating to state consumer financial protection laws "[do] not occupy the field in any area of State law").

146. A proposed but ultimately rejected provision in the House version of the Dodd-Frank Act would have had a similar effect. *See* Wall Street Reform and Consumer Protection Act of 2009, H.R. 4173, 111th Cong. § 4404(d) (2009) (requiring the OCC or a court to find that a substantive federal consumer protection standard is in place before preempting a state law).

147. *See supra* Part I.B.

148. *See* John Ferejohn, *Law, Legislation, and Positive Political Theory*, *in* MODERN POLITICAL ECONOMY 191, 204 (Jeffrey S. Banks & Eric A. Hanushek eds., 1995).

preferences.[149] Courts that view their role as protecting the legislative bargain reached by the enacting Congress will likely be mindful of how the sitting Congress will respond to their decisions—so as to further minimize the possibility of legislative override[150]—but will ultimately decide cases that do not give full effect to the preferences of the sitting Congress.[151] This type of "strategic jurisprudence" further complicates Congress's attempts to control judicial interpretation of its enactments.[152] Courts may therefore be either unwilling or unable to follow Congress's instructions due to factors wholly exogenous to the clarity of the baseline statutory text.

Whether one accepts or rejects the premise that judges do not always strive to fully enforce Congress's policy choices, it follows that Congress would not just want to control the statutory language that gives formal expression to its policy choices, but it would also want to control, or at least to heavily influence, the methods of statutory interpretation employed by the judiciary when applying statutory language to the facts of specific cases.[153] In this regard, and contrary to what others who study preemption have suggested,[154] statutory language need not be used solely as an ex ante control mechanism. It can also be used as an indirect ex post control mechanism.

By altering the form of its preemption provisions, Congress can influence the availability of the interpretive methods employed by the courts, which are primarily textualism and purposivism.[155] The available method of interpretation, in turn, affects the amount of ex post control Congress exercises over judicial interpretation of its statutes. For example, choosing to adopt a clear preemption rule, as opposed to a preemption standard, makes it easier for courts to

149. *See id.*

150. *See supra* Part I.A.

151. Ferejohn, *supra* note 148, at 204.

152. *See id.*

153. *See* Linda D. Jellum, *"Which Is To Be Master," the Judiciary or the Legislature? When Statutory Directives Violate Separation of Powers*, 56 UCLA L. REV. 837, 892-93 (2009).

154. *See, e.g.*, Merrill, *supra* note 10, at 754 (asserting that Congress is not well suited to manage preemption issues because, in part, "[l]egislation operates ex ante, before particular disputes about implementation and enforcement emerge").

155. Of course, there are alternative interpretation methods that have been proposed by scholars. I nevertheless limit my discussion here to textualism and purposivism because those are the methods of interpretation primarily used in the federal courts.

employ textualist methods of statutory interpretation. A clear rule in this context would provide an all but unmistakable indication of Congress's preemptive intent.[156] Courts would be left to determine the text's "plain meaning" without having to resort to the primary extratextual source of Congress's intent: legislative history.[157] By foregoing reliance on legislative history, over which Congress exercises complete control, courts are able to lessen Congress's opportunities to influence policymaking after enacting statutes.[158] Stated differently, facilitating judicial adoption of textualism "limits the options of legislators who would seek political advantage through opportunistic use of legislative history."[159] This reduction in congressional influence produces a concomitant increase in judicial interpretive independence.[160]

Clear statutory language may clearly resolve some preemption issues. As already explained, however, Congress cannot draft preemptive legislation so detailed as to anticipate all of the state-federal conflicts that courts and agencies will invariably face.[161] The

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156. Courts have deemed a handful of express preemption clauses as self-executing in this respect. *See, e.g.*, Motor Vehicle Mfrs. Ass'n v. N.Y. Dep't of Envtl. Conservation, 17 F.3d 521, 533 (2d Cir. 1994) (discussing self-executing provision of Clean Air Act).

157. Joel E. Tasca, Comment, *Judicial Interpretation of the Effect of the Supplemental Jurisdiction Statute on the Complete Amount in Controversy Rule: A Case for Plain Meaning Statutory Construction*, 46 EMORY L.J. 435, 462 (1997). This is not to say that textualists do not rely on extra-textual sources of meaning when interpreting statutory language. For instance, they routinely rely on dictionaries to assist them in construing a text's meaning. *See* Phillip A. Rubin, Note, *War of the Words: How Courts Can Use Dictionaries in Accordance with Textualist Principles*, 60 DUKE L.J. 167, 175 (2010) ("[D]ictionaries are external sources of interpretation.").

158. *See* Nicholas S. Zeppos, *Legislative History and the Interpretation of Statutes: Toward a Fact-Finding Model of Statutory Interpretation*, 76 VA. L. REV. 1295, 1331-32 (1990).

159. Rodriguez, *supra* note 64, at 223 (explaining how limiting judicial use of legislative history "disempowers legislators by debilitating one of the more useful ways of influencing future interpretation").

160. Zeppos, *supra* note 158, at 1332 ("Congress has historically exercised its power and influence in ways other than the passage of legislation under Article I. By demanding that Congress now spell out its prerogatives in the text itself, textualism inevitably lessens the power of the legislative branch.").

161. *See supra* notes 61-64 and accompanying text. A prominent example is the express preemption clause in the MDA. Despite specifically preempting any medical device standards different from those promulgated by the FDA, courts have failed to agree on its proper scope of application. *See* Sharpe, *supra* note 5, at 397-99 (describing the Supreme Court's difficulties in determining whether the MDA preemption clause preempts state law tort design defect claims).

core problem with legislative drafting in general is that some gap-filling by Congress's chosen delegate—whether court or agency—is inevitable.[162] Preemption is no different in this respect,[163] though what informs that gap-filling is specific to the preemption context.[164] This is why, at least in part, Congress frequently chooses to adopt preemption standards as opposed to clear preemption rules or, even more frequently, why Congress is simply silent as to its specific preemptive intent.[165] This is also why the Court has developed the implied preemption doctrines to fill in gaps—or, as the case may be, to establish federal common law. Because incomplete, vague, or ambiguous statutory prescriptions necessarily leave policy details to the implementation stage,[166] courts are hard pressed to find sufficient textual guidance regarding their intended effects. Courts must then turn to extratextual sources of information to fill in the gaps,[167] and one of those sources will likely be the legislative history that is controlled by Congress.[168] That legislative history—in the

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162. *See* Peter L. Strauss, *On Resegregating the Worlds of Statute and Common Law*, 1994 SUP. CT. REV. 429, 442 (1994).

163. *See* Sharpe, *supra* note 5, at 401-02.

164. *See* discussion *supra* notes 42-45 and accompanying text.

165. *See* Sharpe, *supra* note 5, at 395-96 (discussing judicial assessment of preemption and savings clauses that are vague and lack clarity); *cf.* Barnett Bank v. Nelson, 517 U.S. 25, 31 (1996) ("Sometimes courts, when facing the pre-emption question, find language in the federal statute that reveals an explicit congressional intent to pre-empt state law. More often, explicit pre-emption language does not appear, or does not directly answer the question." (citation omitted)).

166. *See* John F. Manning, *Federalism and the Generality Problem in Constitutional Interpretation*, 122 HARV. L. REV. 2003, 2018 & n.69 (2009) (noting that indeterminate legislative language sometimes "reflect[s] an implicit or explicit legislative choice to delegate to interpreters authority over policy details").

167. *Cf.* Zeppos, *supra* note 158, at 1330 ("Broadly phrased statutes like section 1988 or the Sherman Act in effect operate as delegations of authority to the courts to develop a federal common law on the subject, be it attorneys' fees or antitrust. With such common law statutes, it seems inevitable that guidance must be sought from nontextual sources.").

168. *See* Rodriguez, *supra* note 64, at 222. Furthermore, several empirical studies of judicial statutory interpretation found significant reliance on legislative history. *See* Frank B. Cross, *The Significance of Statutory Interpretive Methodologies*, 82 NOTRE DAME L. REV. 1971, 1983 (2007) (reporting that "legislative intent remains a significant source for statutory interpretation," and that "the purported 'death' of legislative history is exaggerated"); Jane S. Schacter, *The Confounding Common Law Originalism in Recent Supreme Court Statutory Interpretation: Implications for the Legislative History Debate and Beyond*, 51 STAN. L. REV. 1, 15 (1998) (determining that legislative history was cited in 49 percent of the majority opinions during the Supreme Court's 1996 Term); Nicholas S. Zeppos, *The Use of Authority in Statutory Interpretation: An Empirical Analysis*, 70 TEX. L. REV. 1073, 1088, 1093 (1992)

form of conference reports, committee reports, hearings, and floor statements—is often designed by legislators to influence judicial interpretation.[169] By encouraging courts to rely on legislative history, Congress shifts the balance of interpretive power, and hence policy control, toward itself and away from the courts.[170]

For at least two reasons, this "interpretive nudging" approach to ex post congressional influence over judicial interpretation may not, on its own, serve Congress equally well in all circumstances. First, courts are not certain to rely on legislative history when construing indeterminate statutory text.[171] Were courts encouraged or even forced to consider extratextual evidence of Congress's preemptive intent, it is likely that they would resort to legislative history.[172] There are no guarantees, however. Despite Congress's best efforts to constrain courts' options of extratextual interpretive materials, courts are still free to ignore legislative history. The *Cuomo* decision

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(determining that, in a random sample of 413 Supreme Court cases decided between 1890 and 1990, 32 percent cited congressional reports, 16.9 percent cited floor debates, and 12.6 percent cited hearing materials). Even Justice Scalia, the staunchest textualist on the Court, has joined opinions that relied in part on legislative history. *See* Cross, *supra* at 1987 (reporting that Justice Scalia joined three opinions between 1994 and 2002 that relied on legislative history, though he authored none himself).

169. Patricia M. Wald, *The Sizzling Sleeper: The Use of Legislative History in Construing Statutes in the 1988-89 Term of the United States Supreme Court*, 39 AM. U. L. REV. 277, 306 (1990) (asserting the benefits and importance of judicial use of legislative history); *see also* Zeppos, *supra* note 158, at 1331 ("Through judicial resort to legislative history, Congress and its members have been able to exert continuing influence over policymaking decisions that arise after the enactment of the statute.").

170. *See* Rodriguez, *supra* note 64, at 221-23. Congress could also attempt to pass legislation requiring courts to rely on legislative history or forbidding them to use certain interpretive methods. Such attempts, though tried by Congress in the past, have routinely failed. *See id.* at 224-25 (describing attempt to include a rule of construction provision in the Civil Rights Act of 1991). In any event, it is unclear whether Congress is constitutionally empowered to enact such statutes. *Compare* Gary Lawson, *Controlling Precedent: Congressional Regulation of Judicial Decision-Making*, 18 CONST. COMMENT. 191, 211 (2001) (arguing that Congress lacks the power to control how the judiciary interprets its statutes), *and* Larry Alexander & Saikrishna Prakash, *Mother May I? Imposing Mandatory Prospective Rules of Statutory Interpretation*, 20 CONST. COMMENT. 97, 98-99 (2003), *with* Nicholas Quinn Rosenkranz, *Federal Rules of Statutory Interpretation*, 115 HARV. L. REV. 2085, 2088 (2002) (arguing that Congress has the authority to codify some methods of statutory interpretation).

171. *See* Rodriguez, *supra* note 64, at 223.

172. *See* Cross, *supra* note 168, at 1988 (noting that even though most believe textualism and the use of legislative history are at odds, Justices sometimes use both when trying to make their arguments).

provides an example.[173] The issue there was whether the OCC properly determined the scope of its "visitorial powers" under the NBA. According to the OCC, "visitorial powers" included its exclusive authority both to inspect and to bring law enforcement actions against national banks.[174] As a consequence of this interpretation, the OCC claimed that the New York State Attorney General was preempted from initiating inspection or law enforcement actions against national banks located in the state.[175] Although the Court concluded that the term "visitorial powers" was ambiguous,[176] it made no mention of the NBA's legislative history in concluding that the OCC's interpretation was unreasonably broad under *Chevron*.[177] Justice Thomas, writing separately, also concluded that the term "visitorial powers" was ambiguous.[178] Though he rejected the Court's conclusion that the OCC's interpretation was unreasonably broad, he too declined to rely on any legislative history to support his arguments.[179] When the Court ignores legislative history, Congress is left with legislative override as its only ex post monitoring mechanism.

Second, Congress cannot be sure that the courts will rely on legislative history in the way that Congress intended or of which Congress approves, even if courts do turn to it.[180] In other words, there is no necessarily causal relationship between the methods of interpretation employed by the courts and the preemption results they reach in particular cases. This point can be illustrated with a simplified example, made under the following three limiting as-

173. Cuomo v. Clearing House Ass'n, 129 S. Ct. 2710 (2009).

174. *Id.* at 2715.

175. *Id.* at 2714.

176. *Id.* at 2715.

177. Notably, this decision not to rely on legislative history does not appear to be a byproduct of ideological differences. While Justice Scalia, a staunch textualist, wrote the majority opinion, it was joined by Justices Stevens, Souter, Ginsburg, and Breyer, all of whom are inclined to rely on legislative history when faced with indeterminate legislation. *See* Anita S. Krishnakumar, *Statutory Interpretation in the Roberts Court's First Era: An Empirical and Doctrinal Analysis*, 62 HASTINGS L.J. 221, 251-52 (2010) ("Justices Souter, Ginsburg, Breyer, and Stevens exhibited the highest rates of reliance on interpretive tools that promote statute-specific coherence—that is, legislative history, purpose, intent, and practical consequences focused on policy constancy concerns.").

178. 129 S. Ct. at 2722 (Thomas J., concurring).

179. *Id.* at 2722-23.

180. *See* Rodriguez, *supra* note 64, at 223.

sumptions. First, there are two factors that dominate the outcomes in preemption cases: methods of statutory interpretation and background assumptions regarding the federal-state balance. Second, each of these factors has two forms. With respect to the methods of statutory interpretation, the first restricts the evidence of congressional intent to the plain language of the statute, textualism, while the second allows consideration of the statute's legislative history, purposivism. With respect to assumptions regarding preemption, the first favors federal regulatory control, while the second favors state regulatory control. Third, there are two institutions that compete for control over these factors: Congress and the Court. One institution's expansion of power over a particular factor necessarily results in a contraction of the other institution's power over that factor.

Given these assumptions, Table 1 below provides a simplified representation of the legislative choices available to Congress when attempting to guide judicial preemption policy implementation. The methods of statutory interpretation employed by the Court could have one of two effects on the balance of interpretive power between Congress and the courts: they could be Congress-aggrandizing (CA) or they could be Judiciary-aggrandizing (JA). Table 1 also assumes that preemption cases will have one of two possible results: state regulatory power could be aggrandized (SA), or federal regulatory power could be aggrandized (FA).

Table 1

Outcome #1	CA/SA
Outcome #2	CA/FA
Outcome #3	JA/SA
Outcome #4	JA/FA

Based on these assumptions, Table 1 indicates the potential difficulties of cabining the courts' interpretive and preemption choices. Assuming that Congress could successfully manipulate the courts into adopting CA methods of interpretation, there are still two preemption results that could result from it. Without some

additional connecting factor, the courts could still choose either SA or FA. Conversely, if Congress were to cede control of statutory meaning to the courts (JA), there is still no guarantee that the courts will then choose SA over FA, or vice versa. In sum, any legislative effort to influence the outcome of preemption cases through statutory interpretation requires some additional understanding of how the available interpretive options relate to how the judiciary balances federal and state regulatory power. Table 1 therefore indicates that generalized increases or decreases of interpretive control will not necessarily serve Congress's preemption policy goals. Rather, its choice of CA or JA must be responsive to the judiciary's predispositions toward SA and FA.

This insight affects the basic strategic options Congress should consider ex ante when its members bargain for the final wording of preemptive legislation. For example, it affects whether that legislation is crafted in the form of a rule or a standard, and the specific subjects to which the rule or standard is addressed. It also affects how Congress should prioritize its interests. That prioritization is reflected by the numerical values in Table 2, which assumes for illustrative purposes that Congress would prefer to increase its own interpretive power, but that its primary goal is to increase the regulatory power of the states—or, put another way, to reduce the frequency of federal preemption.

Table 2.

	SA	FA
JA	2	4
CA	1	3

From Congress's perspective, the best result is the CA/SA pairing, gained directly through clear legislative text or indirectly through a combination of text and interpretive nudging. The second-best result would be the direct selection of the JA/SA pairing. Assuming that preemption reduction is prioritized over ex post statutory control, Congress should be willing to cede control of statutory meaning to the judiciary if doing so would still result in preemption reduction. By contrast, Congress should avoid the CA/FA pairing.

While it would preserve Congress's power of ex post statutory control, it would fail to accomplish its primary preemption-reduction goal. Finally, the JA/FA pairing represents complete legislative failure; not only would Congress fail to achieve its preemption-reduction goal, it would also cede interpretive control to the courts.

If the courts are predisposed to FA, then the costs associated with adopting a SA legislative scheme will increase. To overcome the judiciary's FA predisposition, members of Congress would have to settle on specific statutory text, create favorable legislative history and hope that the courts will rely on it, or adopt some combination of both approaches. In other words, members of Congress who wish to reduce preemption would need to create sufficiently persuasive evidence to convince courts that Congress did not intend to preempt state law. They would therefore be led to adopt CA as opposed to JA to reach their ultimate preemption policy goal. Without knowledge of the judiciary's FA predisposition, those members could unwittingly adopt a JA approach that would thwart their antipreemption policy goals. Additionally, those members would have to reconsider whether their initial antipreemption policy goal is worth the effort if one assumes that adopting CA is more difficult than adopting JA, which would simply involve the adoption of vague, ambiguous, or incomplete statutory text.[181]

Whether Congress chooses to delegate preemption implementation primarily to courts or to agencies, it can use the specificity of legislative text as an ex ante control mechanism. If Congress chooses to delegate preemption policy implementation to the courts and not to administrative agencies, interpretive nudging is the primary ex post control mechanism it has apart from legislative override. The right combination of textual specificity and interpretive nudging to reach congressional policy goals depends on the courts' predisposition toward preemption. If Congress ignores this fact, it may achieve the preemption policy outcomes it wants in some cases, but is likely to fail in many others.

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181. The difficulties associated with adopting CA are not limited to the technical challenges of drafting sufficiently specific language or sufficiently clear and persuasive legislative history. Greater textual specificity also affords fewer opportunities to use ambiguity to gloss over disagreements amongst disagreeing coalitions, to deflect interest group pressures, or to shift the political costs of decision making to other branches of government. *See* Rodriguez, *supra* note 64, at 218.

B. Implied Remedies and Clear Statement Default Rules

The ultimate effectiveness of either the ex ante drafting or ex post interpretive nudging depends in large part on the background preemption presumptions against which the courts construe legislative text. Courts will often fall back on their assumptions about federalism, regulatory efficiency, or corrective justice when faced with a federal statute that does not directly address a salient policy question. The Court's recent jurisprudence in two areas of federal statutory interpretation—implied statutory remedies and clear statement requirements—are particularly instructive in this regard. In both areas the Court has shifted its presumed balance of federal-state regulatory power and increased the difficulty that Congress would have in overcoming that presumption.

1. Implied Statutory Remedies

Until relatively recently, the Supreme Court relied on traditional purposivist methods of interpretation to determine whether Congress intended courts to imply private causes of action in the absence of express language doing so.[182] This interpretive methodology led the Court to rely heavily on extratextual evidence to reconstruct Congress's intent, which frequently resulted in the creation of a federal right to file suit. The Court's decision in *J.I. Case Co. v. Borak* is a notable example,[183] one that was decided during the Warren Court's general expansion of federal rights and judicial jurisdiction.[184] The case involved a determination of whether Congress intended the antifraud provision in section 14 of the Securities Exchange Act to be enforced through private causes of action. Under the language of the Act, enforcement rested solely

182. *See infra* Part II.B.1.

183. 377 U.S. 426 (1964).

184. *See* Erwin Chemerinsky, *Ending the Parity Debate*, 71 B.U. L. REV. 593, 597 (1991) ("The Warren Court generally expanded the scope of constitutional rights."); Rebecca E. Zietlow, *The Judicial Restraint of the Warren Court (and Why It Matters)*, 69 OHIO ST. L.J. 255, 257 (2008) ("The many 'activist' rulings of the Warren Court expanding individual rights and the jurisdiction of federal courts are the paradigmatic examples of courts protecting the rights of minorities.").

with the Securities and Exchange Commission (SEC).[185] A unanimous Court nevertheless concluded that "[p]rivate enforcement of the proxy rules provides a necessary supplement to Commission action."[186] The Court based this conclusion not only on its reading of the language of the Act,[187] but also on several extratextual evidentiary sources it believed would illuminate the Act's purpose: House and Senate committee reports describing the goals of the Act and the underlying problems it was intended to address;[188] the Court's independent views regarding the optimal enforcement regime for effectively enforcing the Act;[189] and the presumption that "it is the duty of the courts to be alert to provide such remedies as are necessary to make effective the congressional purpose."[190]

The federalism default rule underlying the Court's decision unmistakably leaned toward federal as opposed to state regulatory authority. The effect of the Court's decision was to expand federal jurisdiction into an area already addressed by state tort law. The Court made this clear by specifically rejecting the argument that the relief afforded by any implied federal cause of action under the Act should be limited to prospective relief because the states already provided adequate remedies at law.[191] The Court underscored the point when it observed that, without a federal cause of action, "victims of deceptive proxy statements would be obliged to go into state courts for remedial relief,"[192] and that states may not adequately address the harms Congress intended the Act to cure.[193] Although the *Borak* Court did not look to displace state tort law, it did presume that Congress wanted potential shareholder plaintiffs to have a federal alternative to the judicial procedures and remedial schemes already provided by the several states. As the extratextual intent evidence on which the Court relied did nothing to disturb this

185. *Borak*, 377 U.S. at 427 n.1.
186. *Id.* at 432.
187. *Id.* at 431-32.
188. *Id.* at 431 (citing H.R. REP. NO. 73-1383, at 13 (1934); S. REP. NO. 73-792, at 12 (1934)).
189. *Id.* at 432-33.
190. *Id.* at 433.
191. *Id.* at 434-35.
192. *Id.* at 434.
193. *Id.* at 434-35.

presumption—to the contrary, it supported it—the presumption drove the outcome.

The Court's implied remedy opinions migrated slowly away from *Borak*'s heavy reliance on legislative history and federal judicial responsibility, and toward a singular focus on legislative text and the presumption that states are well equipped to remedy private wrongs. In *Cort v. Ash*, the Court recast the implied remedies issue in a way that challenged *Borak*'s presumption that the federal judiciary plays a special role in the vindication of federal rights.[194] While the implied remedies test formulated by the *Ash* Court still allowed courts to rely heavily on legislative history,[195] legislative history would have to be used to overcome the very different presumption that state remedies were adequate.[196]

The full extent of the Court's migration away from reliance on legislative history and federalization was portended by Justice Rehnquist's influential concurrence in *Cannon v. University of Chicago*, which addressed whether the Court should imply a private right of action for sex discrimination under Title IX of the Education Amendments of 1972.[197] Criticizing the purpose-driven approach to interpretation used in *Borak* and *Ash*, Justice Rehnquist advised his colleagues to leave remedy creation to Congress.[198] Justice Rehnquist's entreaty to his colleagues is important in two respects. First, it assumes that state remedies are adequate to address private injuries, and thus rejects *Borak*. Second, it limits the intent evidence the Court should consider to legislative text,[199] and thus significantly narrows the opportunities that members of Congress have to influence post-enactment judicial interpretation. In sum,

194. 422 U.S. 66 (1975). The *Ash* Court observed that it would be guided by the following three inquiries when deciding whether to imply a private cause of action from a federal statute that did not expressly provide one: (1) whether the plaintiff was part of the class of persons whom Congress intended to benefit from the statute; (2) whether there were any implicit or explicit indications that Congress intended to provide or to deny a private remedy; and (3) whether it would be inappropriate to create a private remedy because the activity in question was one of state concern and arose in an area of regulation that traditionally was controlled by the states. *Id.* at 78.

195. The Court in *Ash* itself, as it did in *Borak*, relied not only on the text of the statute being construed, but also on its legislative history to infer its purposes. *See id.* at 81-82.

196. *Id.* at 78.

197. 441 U.S. 677, 677 (1979).

198. *Id.* at 717-18 (Rehnquist, J., concurring).

199. *Id.*

Justice Rehnquist felt that states should be presumed to provide adequate remedies absent highly specific—that is, textual—evidence of Congress's intent to do otherwise.

The migration suggested by Justice Rehnquist in *Cannon* was essentially completed in *Alexander v. Sandoval*.[200] Section 602 of Title VI of the Civil Rights Act of 1964 authorizes federal agencies to enforce the Act's antidiscrimination provisions[201] "by issuing rules, regulations, or orders of general applicability."[202] Pursuant to this section, the DOJ promulgated a rule forbidding states that received federal grants from "utiliz[ing] criteria or methods of administration which have the effect of subjecting individuals to discrimination because of ... race, color, or national origin."[203] The plaintiffs asked the Court to infer a private right of action to enforce this regulation against the State of Alabama's Department of Public Safety, asserting that the Department's English-only driver's license exam policy had a discriminatorily disparate impact on non-English speakers because of their national origins.[204]

Finding that it could both begin and end "[its] search for Congress's intent with the text and structure of Title VI,"[205] the five-Justice majority rejected the plaintiffs' request to infer a disparate impact cause of action from section 602.[206] Writing for the Court, Justice Scalia relied on the common law canon of *expressio unius est exclusio alterius* in concluding that Congress had no intention of allowing private rights of action under section 602.[207] He first noted that Congress set out elaborate procedures to enforce regulations

200. 532 U.S. 275 (2001).

201. *Id.* at 278. These provisions are covered in section 601, which states that "no person shall, 'on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity' covered by Title VI." *Id.* at 278 (quoting 42 U.S.C. § 2000d (2006)).

202. *Id.* (quoting 42 U.S.C. § 2000d-1 (2006)).

203. *Id.* (quoting 28 C.F.R. § 42.104(b)(2) (2000)).

204. *Id.* at 278-79. Although the Court concluded that section 601 already provided a private cause of action, those actions were limited to claims of intentional discrimination. According to the Court, the only strategy available to the plaintiffs was to bring their disparate impact claim under the broader language of section 602, because that section allows federal agencies to promulgate rules prohibiting both intentional and disparate impact discrimination. *Id.* at 280-81.

205. *Id.* at 288.

206. *Id.*

207. *Id.* at 289 (noting that section 602 focuses on the regulating agencies, not individuals).

promulgated under that section.[208] He then emphasized that the section barred agencies from initiating enforcement actions without first notifying the target state that it was in violation of the section, or without concluding that the state's compliance with the section could not be secured by voluntary means.[209] Moreover, a federal agency that attempted to pull funding had to provide both the House and Senate with reports explaining the reasons for such action, and the agency's decision only became effective thirty days after the report was filed.[210] All of this, Justice Scalia concluded, "tend[ed] to contradict a congressional intent to create privately enforceable rights through § 602."[211]

On their own, neither these provisions nor their characterization by Justice Scalia as "elaborate"[212] necessarily show that Congress intended to forbid implied private rights of action. As Justice Stevens pointed out in his dissent, resort to the "nature of the rights at issue," "the relevant legislative history," and "the text and structure of the statute" would have led to the conclusion that the plaintiffs were entitled to an implied remedy.[213] Put another way, Justice Stevens argued that it was not self-evident what legal conclusions should be drawn from the fact that section 602's enforcement provisions are intricate. Some principle or rule must invest them with legal significance.

Whereas Justice Stevens would have bridged this gap between the enforcement provisions and conclusions regarding Congress's intent with a presumption in favor of creating federal remedies, Justice Scalia bridged it with a presumption against doing so. The federalism assumptions underlying the Court's use of the *expressio unius* canon appeared to reject the federally skewed balance that it assumed in its prior implied remedies cases. In *Borak*, the Court was adamant that its identification of a federal right presumed the necessity of its creation of a federal judicial remedy.[214] Moreover, the

208. *See id.*
209. *Id.*
210. *Id.* at 290.
211. *Id.*
212. *Id.*
213. *Id.* at 312 & n.21 (Stevens, J., dissenting) (quoting Cannon v. Univ. of Chi., 441 U.S. 667, 691, 694, 696-98, 703 (1979)).
214. J.I. Case Co. v. Borak, 377 U.S. 426, 433 (1964) ("It is for the federal courts to adjust

Borak Court pressed the need for a federal damages remedy despite the acknowledged preponderance of state corporation law issues.[215] In *Sandoval*, by contrast, the Court implicitly rejected the proposition that federal courts are presumed to be available to individuals whose federally created rights have been violated. Rather, the availability of such remedies is controlled by the laws enacted by Congress;[216] the federal courts have no extra-statutory responsibility that presses them to extend federal judicial jurisdiction to the limits of federal legislative jurisdiction. The Court's observation that "'affirmative' evidence of congressional intent must be provided *for* an implied remedy, not against it,"[217] leaves the default federalism rule oriented toward state power.

Moreover, Justice Scalia drastically narrowed the body of evidence that could be mustered to overcome his presumption by relying on the textualist assumptions embedded in the *expressio unius* canon. "The express provision of one method of enforcing a substantive rule suggests that Congress intended to preclude others."[218] Justice Scalia effectively replaced purposivist evidence of legislative behavior—primarily legislative history controlled by Congress—with a textualist presumption about congressional legislative behavior, the content of which was controlled by the Court.

2. The Clear Statement Rule

This confluence of textualism and federalism seen in the Court's implied statutory remedies cases found its clearest expression in *Gregory v. Ashcroft*.[219] In surprisingly categorical terms, the *Gregory* Court decreed that "if Congress intends to alter the usual constitutional balance between the States and the Federal Government, it must make its intention to do so unmistakably clear in the language of the statute."[220] Like *Sandoval*, *Gregory* indicated that the

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their remedies so as to grant the necessary relief where federally secured rights are invaded." (internal quotation marks omitted)).

215. *Id.* at 434-35.

216. *See supra* notes 200-13.

217. *Sandoval*, 532 U.S. at 293 n.8.

218. *Id.* at 290.

219. 501 U.S. 452 (1991).

220. *Id.* at 460 (quoting Atascadero State Hosp. v. Scanlon, 473 U.S. 234, 242 (1985))

judiciary should now reject legislative history when construing federal statutes implicating the balance between federal and state power.[221]

As an initial matter, we must have some understanding of what the Court believes the "usual constitutional balance between the States and the Federal Government" to be. According to *Gregory*, striking this balance involves what is commonly referred to as "dual federalism."[222] Although largely abandoned after the New Deal, dualism of this sort has become a centerpiece in much of the Court's recent federalism jurisprudence.[223] As Professor Schapiro has described it, dualism requires that "the states and the federal government exercise exclusive control over nonoverlapping regions of authority, that these realms of exclusive control are defined by subject matter, and that the federal courts play an important and distinctive role in guarding the boundaries of state and federal terrain."[224] The general subject matter in *Gregory* was the establishment of employment requirements of state constitutional officers, judges specifically. Concluding that this was an area traditionally regulated by the states which also involved an irreducible element of state sovereignty,[225] the Court held that Congress would have to clearly and specifically invoke its powers under the Commerce Clause to interfere with it.[226]

This idea of a "usual balance" also assumes some default proportionality between federal and state power. Prior to the New Deal, the Court assumed that this default balance favored federal regulation in those areas where Congress chose to legislate.[227] According to one commentator, all preemption under the Commerce Clause, for instance, was what we would now regard as field

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(internal quotation marks omitted).

221. It is possible that, to the extent that it seeks to impose a particular means of statutory interpretation on the courts through the force of stare decisis, *Gregory* was wrongly decided. *See supra* note 170.

222. 501 U.S. at 460.

223. *See* Schapiro, *supra* note 43, at 46-52.

224. *Id.* at 34.

225. *See* 501 U.S. at 460.

226. *Id.* at 470.

227. David S. Schwartz, *Correcting Federalism Mistakes in Statutory Interpretation: The Supreme Court and the Federal Arbitration Act*, 67 LAW & CONTEMP. PROBS. 5, 23 (2004).

preemption.[228] "If Congress enacted a commerce regulation ... unless it expressly saved state law, it was deemed to have occupied the field, and no state regulation on the subject would be permitted."[229] Since then, the areas of local concern to which the commerce power extends have expanded, but the federalism default has changed. Instead of assuming that Congress intends to supplant state regulation when legislating under the Commerce Clause, the Court will now assume that Congress *did not* intend to do so.[230] The clear statement requirement thus has a practical effect that is similar to that of *Sandoval* and the Court's implied statutory remedies jurisprudence. It makes congressional legislation reducing state regulatory power more difficult to draft and to adopt, and it does so by presuming a default balance in favor of state power while simultaneously narrowing the evidence of congressional intent that can be invoked to counterbalance it.

C. The Centralization Default

There are clear parallels between the Court's approach to preemption cases and its approach to the "new federalism" cases described above. Both immerse the Court in questions of federalism, statutory interpretation, and the relationship between them. That being said, there is a critical difference in how the Court resolves these questions in the two contexts: the default rule underlying many of the Court's preemption cases is different from the default rule underlying its new federalism cases.[231] This observation may seem patently wrong at first blush: after all, the Court has insisted in some cases that it will not presume that Congress intended to preempt state law in areas where the states have traditionally controlled regulation.[232] It is all the more surprising given that this

228. *Id.*

229. *Id.*

230. *See* Gardbaum, *supra* note 30, at 806.

231. *See* Fallon, *supra* note 144, at 471 (observing that the Court has "bypassed opportunities to promote federalism through doctrines involving ... federal preemption"); Samuel Issacharoff & Catherine M. Sharkey, *Backdoor Federalization*, 53 UCLA L. REV. 1353 (2006) (arguing that the Court has employed preemption to protect emerging national commercial markets from the negative externalities imposed by hostile state regulation).

232. *See infra* note 321.

presumption is consistent with the largely state-favoring work of the Court's new federalism cases. These cases indicate that the default rule of "Our Federalism" is that states hold regulatory sway absent overt and specific indications by Congress to the contrary.[233]

From a practical standpoint, however, and as several scholars have pointed out, the presumption against preemption does not play an important role in the Court's preemption jurisprudence.[234] To the contrary, the Court has repeatedly hinted at a Centralization Default, which makes it more difficult for Congress to choose an antipreemption policy scheme.[235]

As Professors Greve and Klick have noted, there is a perceived discontinuity "between the Rehnquist Court's federalism cases and its preemption decisions."[236] They have further observed that "[i]n preemption law ... the justices often seem to 'switch sides': liberals almost always vote 'against the states' in federalism cases—and often against preemption, and thus 'for the states,' in preemption cases. Conservative justices often flip-flop in the opposite direction."[237] In describing the preemption decisions of the Supreme Court's 1999 term, Professor Fallon observed that "[f]our of the

233. *See supra* Part II.B.

234. *See* Erwin Chemerinsky, *Empowering States When It Matters: A Different Approach to Preemption*, 69 BROOK. L. REV. 1313, 1318-24 (2004) (arguing that the Court has abandoned the presumption against preemption, which embodies the federalism considerations at the heart of preemption policymaking); Sharkey, *supra* note 13, at 458.

235. Several Justices have hinted at two other default rules that have yet to gain majority support. The first is a remedial default rule implied by Justice Ginsburg's dissenting opinion in *Riegel*. There she observed that "[i]t is 'difficult to believe that Congress would, without comment, remove all means of judicial recourse' for large numbers of consumers injured by defective medical devices." Riegel v. Medtronic, Inc., 552 U.S. 312, 337 (Ginsburg, J. dissenting) (quoting Silkwood v. Kerr-McGee Corp., 464 U.S. 238, 251 (1984)); *cf.* Schapiro, *supra* note 43, at 51 (asserting that a presumption of concurrent state and federal regulatory involvement "would decrease implied preemption of state laws"). A similar sentiment was expressed by the dissenters (Stevens, Kennedy, Souter, and Ginsburg) in Medtronic, Inc. v. Lohr, 518 U.S. 470, 487. This remedial default would force Congress to clearly express its intent to eliminate state tort remedies without providing a federal alternative. The second is a state autonomy default rule championed solely by Justice Thomas. The effect of such a default is to drastically reduce the frequency of federal preemption. It would eliminate most of the implied preemption doctrines, and would presume the primacy of state regulatory regimes absent an actual conflict between state and federal law or an express statutory directive from Congress. *See* Sharkey, *supra* note 33, at 65-70.

236. Michael S. Greve & Jonathan Klick, *Preemption in the Rehnquist Court: A Preliminary Empirical Assessment*, 14 SUP. CT. ECON. REV. 43, 47 (2006).

237. *Id.*

Court's five most conservative, generally pro-federalism justices ... found federal preemption in each instance, and Justice Thomas agreed in every case but one."[238] More recent statistical studies of the Court's preemption jurisprudence have also shown that the Court has generally been more sympathetic to claims of preemption.[239] Speaking specifically of the Roberts Court, Dean Chemerinsky has observed that the Court, far from adopting a presumption against preemption, has actually adopted a presumption in favor of it.[240] The reason for this trend may be policy-driven. The Justices may generally be more inclined to favor regulatory efficiency as opposed to corrective justice or state-regarding federalism. Doing so would lean the Court toward preemption instead of away from it. As already discussed, Justice Scalia's statement in *Riegel v. Medtronic, Inc.*, regarding the comparative decisional competence of state legislatures and state juries, supports such an inference.[241] Others have suggested that this trend is driven by political party interests.[242]

The reason may also be doctrinal, in the sense that the Court's implied preemption tests overwhelm the limitations that would otherwise be set by its express preemption tests. In *Cipollone v. Liggett Group*, the Court stated that Congress's inclusion of a preemption clause in a statutory scheme should serve as the sole evidence of its preemptive intent.[243] The implicit corollary was that federal courts should not resort to extratextual methods of statutory interpretation to infer the existence or extent of Congress's preemp-

238. *See* Fallon, *supra* note 144, at 472.

239. *See* Greve & Klick, *supra* note 236, at 52, 57 tbl.5 (finding that 52 percent of 105 preemption decisions from the Rehnquist Court era were decided in favor of preemption; finding 62.5 percent preemption rate in 32 products liability cases involving preemption of state common-law tort claims from 1986 to 2004; and finding that the rate increases to 67.6 percent when cases are restricted to the "Second Rehnquist Court," beginning in 1994).

240. Chemerinsky, *supra* note 234, at 1318-24; *see also* Erwin Chemerinsky, *The Roberts Court at Age Three*, 54 WAYNE L. REV. 947, 968-72 (2008) (noting, as of the writing of the article, that "[e]very preemption case decided so far by the Roberts Court ha[d] been decided in favor of finding preemption"); Metzger, *supra* note 89, at 10 (observing that the Court has tended to favor preemption over the last decade).

241. *See supra* Part I.A.

242. *See generally* Linda S. Mullenix, *Strange Bedfellows: The Politics of Preemption*, 59 CASE W. RES. L. REV. 837, 839-43 (2009) (discussing the alliance on preemption issues of otherwise opposed business and political interest groups).

243. 505 U.S. 504, 517 (1992).

tive intent.[244] Such methods are more appropriately reserved for when Congress's intent cannot be inferred from the text due to its vagueness, ambiguities, or omissions.

The Court has reversed course since *Cipollone*, emphasizing instead that "the existence of conflict cognizable under the Supremacy Clause does not depend on express congressional recognition that federal and state law may conflict."[245] Although an express preemption or saving clause can be *clear* evidence of Congress's preemptive intent, it may not be *definitive* evidence. The Court can still displace or eliminate state regulatory activity, and it will do so without regard to whether Congress has included an express preemption or saving clause in the statutory language.

Geier v. American Honda Motor Co. serves as an example.[246] There the Court addressed whether federal automobile safety regulations promulgated under the National Traffic and Motor Vehicle Safety Act (NTMVSA) preempted a state tort action alleging that the defendant automaker negligently failed to equip the plaintiff's car with driver's side airbags.[247] The NTMVSA included express preemption and saving clauses, the latter providing that "'compliance with' a federal safety standard 'does not exempt any person from any liability under common law.'"[248] The Court first concluded that the NTMVSA did not expressly preempt state common law actions.[249] The Court then determined that "the saving clause (like the express pre-emption provision) does *not* bar the ordinary working of conflict pre-emption principles."[250] Finally, the Court held that the plaintiff's state tort suit was preempted because it "stood as an obstacle" to the attainment of federal objectives.[251] Other of the Court's preemption cases also point out that the

244. *Cf. id.*

245. Crosby v. Nat'l Foreign Trade Council, 530 U.S. 363, 388 (2000) (citing Hines v. Davidowitz, 312 U.S. 52, 67 (1941)).

246. 529 U.S. 861 (2000).

247. *Id.* at 865.

248. *Id.* at 868 (alteration omitted) (quoting 15 U.S.C. § 1397(k) (1998)).

249. *Id.* ("We have found no convincing indication that Congress wanted to pre-empt, not only state statutes and regulations, but also common-law tort actions.").

250. *Id.* at 869.

251. *Id.* at 881.

presence of explicit, statutory expression of Congress's preemptive intent may not definitively resolve the preemption question.[252]

Given *Geier* and similar cases, one could reasonably ask what Congress could have possibly done differently; it enacted a saving clause that explicitly preserved state tort claims even when the manufacturer complied with federal regulations. Assuming, as seems reasonable, that Congress did not actually intend regulations promulgated under the NTMVSA to preempt state tort claims, *Geier* illustrates the importance of understanding the Court's preemption leanings and addressing them. Justice Breyer's majority opinion assumed that Congress would want the Court to apply "ordinary pre-emption principles"[253] when the Court discovered a conflict or an obstacle. This seems to also assume that Congress did not itself identify such conflicts or obstacles but would have resolved them in favor of preemption if it had. The operative presumption, then, is that where a state law conflicts or interferes with federal regulation, Congress always intends the state law to yield unless there is a sufficiently specific and contrary indication.[254] This does not seem to be an unreasonable presumption, but it may nevertheless be wrong in some instances. The general lesson from *Geier* is as follows: where Congress recognizes the possibility of a conflict or state-based obstacle but nevertheless wants to yield to state authority, the Centralization Default requires it to clearly state as much.[255]

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252. *See* Sprietsma v. Mercury Marine, 537 U.S. 51, 64-65 (2002) ("Congress's inclusion of an express pre-emption clause 'does not bar the ordinary working of conflict pre-emption principles.'" (quoting *Geier*, 529 U.S. at 869)); Freightliner Corp. v. Myrick, 514 U.S. 280, 287-88 (1995) (describing as "without merit" the assertion that "implied pre-emption cannot exist when Congress has chosen to include an express pre-emption clause in a statute").

253. *Geier*, 529 U.S. at 871.

254. Justice Breyer made a similar observation in *Barnett Bank v. Nelson*. 517 U.S. 25, 30 (1996) ("[The preemption] question is basically one of congressional intent. Did Congress, in enacting the Federal Statute, intend to exercise its constitutionally delegated authority to set aside the laws of a State? If so, the Supremacy Clause requires courts to follow federal, not state, law.").

255. 529 U.S. at 868, 871-72 (concluding that while Congress has the power to select the state law in a state/federal conflict, "there is no reason to believe Congress has done so here").

III. LEGISLATING PREEMPTION IN CONTEXT: THE DODD-FRANK ACT

Congress has two core decisions to make when crafting preemption legislation. First, it must decide whether to delegate primary implementation authority to courts or to administrative agencies. Administrative agencies are more susceptible to congressional monitoring[256] and hence more susceptible to correction when they drift away from Congress's preemption policy choices.[257] Despite this fact, Congress either fails to make an explicit delegation decision, leaving the task to the courts by default, or specifically chooses courts over agencies. Second, assuming that preemption delegation has primarily fallen to the courts, Congress must craft its legislation to be responsive to the Supreme Court's Centralization Default. Whether Congress resorts to clear rules, broad standards, robust legislative histories, or some combination thereof, will largely depend on whether it must overcome the Centralization Default or whether it can take advantage of it.

The ambitious national bank preemption scheme set out in the Dodd-Frank Act provides a timely and interesting case to which to apply the foregoing analytical framework. As described below,[258] Congress attempted to provide states with a greater role in the provision of consumer protections, and it did so by reducing the preemptive power held by the OCC and the OTS and by increasing the preemptive authority of the federal courts. Given Congress's monitoring challenges with respect to the Court, and given the Centralization Default, there is reason to be skeptical about the Act's institutional choices. This Part begins with a brief history of national banking regulation, which provides the political and regulatory backdrop against which Congress drafted the Dodd-Frank Act's national bank preemption provisions. It then describes those provisions, focusing on their delegation of preemption authority to the courts and the preemption standard that the Act adopts. The Part concludes with an assessment of the likely effectiveness of the Act's national bank preemption scheme, given

256. Beermann, *supra* note 126, at 122-23.

257. *See supra* notes 123-30 and accompanying text.

258. *See infra* notes 263-66 and accompanying text.

the monitoring and Centralization Default considerations discussed in previous sections of the Article.

A. Congressional Responses to Expanded National Bank Preemption

The years preceding the passage of the Dodd-Frank Act saw a significant expansion of federal banking regulation. Beginning in the 1990s, the OCC and OTS relied on preemption arguments to assert greater regulatory authority over the state-chartered affiliates and subsidiaries of national banks and federal thrifts.[259] For federal thrifts, courts gave the Home Owners' Loan Act (HOLA),[260] and regulations promulgated pursuant to it by the OTS field preemptive effect.[261] Over the same period, Congress, the courts, and the OCC greatly expanded the scope of federal preemption of state laws applicable to national bank activities. For example, in 1994, Congress enacted the Riegle-Neal Interstate Banking and Branching Efficiency Act of 1994,[262] which permitted national banks to open branches in multiple states.[263] In an opinion letter issued shortly thereafter, the OCC granted national banks the power to export interest rates from both the state in which the bank was headquartered and the state in which one of its branches was located.[264] This decision allowed national banks to select the highest available interest rate regardless of state laws that would have otherwise prohibited them.[265]

Two years later, the Supreme Court decided *Barnett Bank v. Nelson*, which invalidated a state insurance law prohibiting national

259. Arthur E. Wilmarth, Jr., *The OCC's Preemption Rules Exceed the Agency's Authority and Present a Serious Threat to the Dual Banking System and Consumer Protection*, 23 ANN. REV. BANKING & FIN. L. 225, 283-84 (2004).

260. 12 U.S.C. § 1461 (2006).

261. *See* Flagg v. Yonkers Sav. & Loan Ass'n, 396 F.3d 178, 183-84 (2d Cir. 2005); Bank of Am. v. City of S.F., 309 F.3d 551, 558 (9th Cir. 2002) ("This court has recognized that regulation of federal savings associations by the OTS has been so 'pervasive as to leave no room for state regulatory control.'" (quoting Conference of Fed. Sav. & Loan Ass'ns v. Stein, 604 F.2d 1256, 1260 (9th Cir. 1979), *aff'd*, 445 U.S. 921 (1980))).

262. 12 U.S.C. § 1811 (2006).

263. *Id.* § 1842(d); *see also* Matthew Dyckman et al., *Financial Regulatory Reform—The Dodd-Frank Act Rolls Back Federal Preemption*, 64 CONSUMER FIN. L. Q. REP. 129, 158 (2010).

264. *See* Dyckman et al., *supra* note 263, at 274.

265. *See id.*

banks from selling insurance in towns of 5,000 or fewer residents.[266] The Court in essence applied conflict and obstacle preemption standards to national banks, deeming preempted state laws that "prevent or significantly interfere" with a national bank's exercise of its federally granted powers.[267] In 2004, and largely in response to the *Barnett Bank* decision, the OCC issued two rules that further expanded the scope of federal preemption. The first provided that national banks and their operating subsidiaries were immune from state laws that "obstruct, impair or condition" a national bank's exercise of its powers to make loans or to take deposits.[268] The intended effect was to preempt almost all state consumer protection laws regulating the lending activities of national banks. The second rule restricted the authority of states to exercise so-called "visitorial" powers on national banks and their nonbank operating affiliates, making their examination the exclusive province of the OCC.[269] These regulations were consistently upheld by the lower federal courts, which *Chevron* deferred to the OCC's interpretation of the preemptive scope of the National Bank Act.[270] Moreover, the Court in *Watters v. Wachovia Bank, N.A.* upheld the OCC's assertion of exclusive visitorial authority.[271] Although the Court's subsequent decision in *Cuomo* refused to extend the OCC's preemptive powers to state enforcement of state fair lending laws against national banks,[272] it also declined to rule out the possibility that *Chevron* deference applied to the OCC's interpretation of the NBA's preemptive scope.[273]

Due to this sustained expansion of federal banking preemption and the upheaval caused by the recent economic crisis, many antipreemption advocates viewed the OCC, the OTS, Congress, and

266. 517 U.S. 25, 29, 37 (1996).

267. *Id.* at 33.

268. 12 C.F.R. §§ 7.4009, 34.4 (2010).

269. *Id.* § 7.4000.

270. *See* Nat'l City Bank of Ind. v. Turnbaugh, 463 F.3d 325, 331-33 (4th Cir. 2006) (citing Wells Fargo Bank N.A. v. Boutris, 419 F.3d 949, 958 (9th Cir. 2005); Wachovia Bank, N.A. v. Burke, 414 F.3d 305, 315 (2d Cir. 2005); Wachovia Bank, N.A. v. Watters, 431 F.3d 556, 560 (6th Cir. 2005)).

271. 550 U.S. 1, 6-7 (2007).

272. *See* Cuomo v. Clearing House Ass'n, 129 S. Ct. 2710, 2720-21 (2009).

273. *See id.* at 2715 (invoking "the familiar *Chevron* framework," but not explicitly applying that framework to the OCC's interpretation of "visitorial powers" as used in the NBA).

the federal courts as being hostile to robust consumer protection laws,[274] most of which were adopted and enforced at the state level. Suspicion of the OCC in particular has been profound over the past two decades, with many outside observers concluding that the agency has been too solicitous of the national banks it is charged with regulating, or so single-mindedly focused on its mandate to ensure the soundness of national banks that it has consistently neglected competing consumer protection concerns.[275]

Although the Dodd-Frank Act clearly attempts to respond by scaling back the dominant role played by federal administrative agencies in consumer financial protection, it does so in a way that shows Congress's preference for delegating rather than resolving difficult and potentially contentious preemption issues.[276] A primary example is the Act's codification of the preemption standard used in *Barnett Bank*.[277]

As the process that led to the Act's codification of *Barnett Bank* demonstrates, the substantive preemption standard to be applied to the NBA and the HOLA was a matter of significant disagreement. The Treasury Department had initially proposed the adoption of a bright-line, mandatory rule eliminating federal preemption of generally applicable state consumer protection laws.[278] This proposal gained little traction in Congress, and the House Financial Services Committee chose instead to propose a standard-based approach that limits preemption to situations in which state law "prevents, significantly interferes [with], or materially impairs" the capacity of a national bank to conduct its banking business. In other words, the Committee chose selected portions of the *Barnett Bank*

274. *See* Mark Furletti, Comment, *The Debate over the National Bank Act and the Preemption of State Efforts to Regulate Credit Cards*, 77 TEMP. L. REV. 425, 447 (2004) (describing vociferous state and interest group criticism of the OCC's preemption policies).

275. *See* Metzger, *supra* note 89, at 27 & nn.122-23; Wilmarth, *supra* note 259, at 352-53.

276. Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, § 1044(b)(1), 124 Stat. 1376, 2015-16 (2010) (to be codified at 12 U.S.C. § 75b). The one possible exception to the Act's general thrust of preemption delegation is its overruling of the Court's decision in *Watters*, which ruled that federal preemption extends to the activities of a national bank's subsidiaries and affiliates as well as to the activities of the bank itself. *See id.* § 1044(b)(2), 124 Stat. at 2015.

277. *Id.* § 1044(b)(1)(B), 124 Stat. at 2015.

278. U.S. DEP'T OF THE TREASURY, FINANCIAL REGULATORY REFORM, A NEW FOUNDATION: REBUILDING FINANCIAL SUPERVISION AND REGULATION 62 (2009) [hereinafter Treasury White Paper].

decision as its preemption standard. Believing that the Committee's selection too narrowly construed the breadth of preemption permitted by *Barnett Bank*, Representative Melissa Bean of Illinois proposed additional, pro-preemption language.[279] The Senate Banking Committee went even further, including a citation to *Barnett Bank* itself in the Act's final language.[280] While the House initially rejected this change, it eventually agreed to it.[281]

This procedural history of *Barnett Bank*'s codification shows that it was not intended to completely unfetter the states' authority to apply their consumer protection laws to national banks and federal thrifts. There was insufficient political will, and hence an insufficient number of House and Senate votes, to eliminate federal preemption altogether as suggested by the Treasury Department. Rather, *Barnett Bank*'s inclusion was intended to provide states with significantly greater regulatory authority than they were previously afforded by the OTS and the OCC,[282] while also preserving federal power to provide the exclusive rules of decisions in particular circumstances.

Despite this continuous back-and-forth regarding the *Barnett Bank* preemption standard, and despite the high level of suspicion with which the OCC was regarded, there was never any serious attempt to enumerate the specific categories of state consumer financial protection laws or specific bank activities that would be subject to federal preemption. With the House's rejection of the Treasury Department's blanket ban on federal preemption, the crux of the ensuing argument was not whether the courts and the OCC would be delegated the authority to determine which state laws the preemption standard displaces. All of the House and Senate bills distributed preemption policymaking authority relating to national

279. *See* Timothy R. McTaggart & Travis P. Nelson, *House Passes Major Financial Services Reform Package,* FIN. SVCS. ALERT (Pepper Hamilton LLP, Washington, D.C.), Dec. 29, 2009, at 1-2, *available at* http://www.pepperlaw.com/pdfs/FSAlert122909.pdf.

280. S. REP. NO. 111-176, at 175 (2010).

281. H.R. REP. NO. 111-517, at 652 (2010) (Conf. Rep.).

282. Whereas the OCC preemption regulation applies to deposit and lending laws that "obstruct, impair, or condition" the capacity of national banks to exercise their federally created powers, *Barnett Bank* does not preempt state laws that merely place conditions on the exercise of those powers. Additionally, the now-defunct OTS preemption regulation provided for field preemption of all state deposit and lending laws. Under *Barnett Bank*, some such state laws are now applicable to federal thrifts.

banks and federal thrifts among the proposed Bureau of Consumer Financial Protection (CFPB), the OCC, and the courts.[283] Rather, the crux of the argument was how best to guide the preemption discretion that was certainly going to be granted to the courts and to the OCC. As neither the Dodd-Frank Act nor the *Barnett Bank* decision define any of the key terms that constitute the Act's substantive preemption standard, the courts and the OCC are necessarily left to exercise substantial discretion in construing and applying them.[284] In the end, both the House and the Senate left the preemption delegation system that preceded the Act intact, while merely changing the parameters of its delegations.[285]

B. The Dodd-Frank Act's Institutional Choices

As important as the preemption standard adopted by the Act is its shift of primary preemption policymaking and implementation authority from the OCC and the OTS to the courts. The Act places substantial procedural limitations on OCC preemption decision making without placing similar limitations on the courts. The Act also subjects OCC preemption decisions to far more robust judicial review than previously deemed appropriate by the Supreme Court.

With respect to the procedural limitations placed on the OCC, section 1044(b)(1)(B) restricts it to "case-by-case" determinations of whether state consumer financial laws are preempted by the NBA; the effect of an OCC preemption determination is limited to the particular state law it is asked to consider.[286] In the event that the

283. *See* Dodd-Frank Act, Pub. L. No. 111-203, §§ 1041-1048, 124 Stat. 1376, 2011-18 (2010) (to be codified in scattered sections of 12 U.S.C.). The Act also eliminated the OTS and distributed its regulatory responsibility among the Federal Reserve, the FDIC, and the OCC. *See id*. §§ 312-313, 124 Stat. at 1521-23.

284. *See* Lemos, *supra* note 54, at 372.

285. That the preemption provisions, like other aspects of the Act, were subject to substantial disagreement is further evidenced by the closeness of the ultimate votes that led to its passage. The conference report resolving the differences between the House and Senate versions passed the House by a vote of 237 to 192, and barely bypassed the filibuster in the Senate by a vote of 60 to 39. *H.R. 4173: Dodd-Frank Wall Street Reform and Consumer Protection Act*, GOVTRACK, http://www.govtrack.us/congress/bill.xpd?bill=h111-4173 (last visited Sept. 23, 2011).

286. *See* § 1044(b)(1)(B), 124 Stat. at 2015 ("[A]ny preemption determination under this subparagraph may be made by a court, or by regulation or order of the Comptroller of the Currency on a case-by-case basis, in accordance with applicable law."); *see also id*. §

OCC deems it prudent to preempt the laws of other states that are substantially similar to the one it has specifically been asked to consider, it must consult with the CFPB and take the CFPB's position into account before proceeding.[287] The Act imposes no such requirement on judicial preemption determinations.[288]

Beyond simply placing procedural burdens on the OCC that the courts do not share, section 1044(b)(5)(A) and section 1044(c) directly subordinate the OCC to the courts in the preemption policymaking hierarchy.[289] Section 1044(b)(5)(A) substantially reduces the level of deference afforded OCC preemption determinations when those determinations are the subject of judicial review.[290] In *Cuomo*, the Court applied *Chevron* deference to the OCC's interpretation of the NBA and, as a direct consequence, to the OCC's preemption determination.[291] Section 1044(b)(5)(B) reverses that aspect of the case, instead directing courts reviewing any preemption determinations made by the OCC "[to] assess the validity of such determinations, depending upon the thoroughness evident in

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1044(b)(3)(A), 124 Stat. at 2015 (defining "case-by-case basis" as "a determination pursuant to this section made by the Comptroller concerning the impact of a particular State consumer financial law on any national bank that is subject to that law, or the law of any other State with substantively equivalent terms").

287. *See id*. § 1044(b)(3)(B), 124 Stat. at 2015.

288. Given that § 1044(b)(1)(B) separates its reference to courts and its reference to the OCC by a comma, the fairest reading of the subsection is that courts may make preemption determinations in accordance with applicable law, whereas the OCC must make its preemption determinations on a case-by-case basis in accordance with applicable law. *See supra* note 287. This reading is buttressed by the fact that the Senate rejected the House version of this language, which grouped courts and the OCC together in the same clause, and then stated that their determinations would be subject to the case-by-case limitation. *See* Wall Street Reform and Consumer Protection Act of 2009, H.R. 4173, 111th Cong. § 4404(b)(1)(B) (2009) ("Any preemption determination under this subparagraph may be made by a court or by regulation or order of the Comptroller of the Currency in accordance with applicable law, on a case-by-case basis.").

289. § 1044(b)(5)(A), (c), 124 Stat. at 2015-16.

290. *Id*. § 1044(b)(5)(A), 124 Stat. at 2015-16.

291. *See* Cuomo v. Clearing House Ass'n, 129 S. Ct. 2710, 2715, 2721 (2009). In *Watters*, the Court conspicuously side-stepped whether *Chevron* deference applied to the OCC's preemption determinations. *See* Evan J. Criddle, Chevron*'s Consensus*, 88 B.U. L. REV. 1271, 1307 & n.187 (2008) (noting that *Watters* was one of several cases in which the Supreme Court reviewed agency interpretations of ambiguous statutory language and either neglected to mention *Chevron*, or mentioned it without supporting analysis); Ann Graham, *Searching for* Chevron *in Muddy* Watters*: The Roberts Court and Judicial Review of Agency Regulations*, 60 ADMIN. L. REV. 229, 232 (2008) (noting that *Chevron* analysis was "missing in action" in *Watters*).

the consideration of the agency, the validity of the reasoning of the agency, the consistency with other valid determinations made by the agency, and other factors which the court finds persuasive and relevant to its decision."[292] Stated differently, the Act downgrades the level of deference that courts must afford OCC preemption determinations from *Chevron* to *Skidmore*. Even if the OCC's interpretations of ambiguous and potentially preemptive provisions are reasonable—and would thus have required acceptance by the courts under *Chevron*—the courts are no longer obliged to accept them. Instead, the courts may determine the preemptive scope of the Act and the NBA largely independent of the OCC; they need only give consideration to the OCC's opinion. In the event of a disagreement, the tie now goes to the courts.

Congress did not stop at reducing the level of judicial deference accorded to OCC preemption determinations. Section 1044(c) further subordinates the OCC to the courts by imposing a "substantial evidence" requirement for any of its preemption determinations.[293] Two aspects of this provision are somewhat puzzling. First, it instructs courts to apply the "substantial evidence" test in accordance with the Court's decision in *Barnett Bank*, which did not apply or even mention the substantial evidence test.[294] Second, the substantial evidence test, as it is commonly applied to judicial review of administrative agency determinations,[295] is relevant to questions of fact and policy, but not to questions of law. Preemption may conceivably, or perhaps even properly, turn on questions of fact,[296] but that is not how courts currently understand it. Rather,

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292. § 1044(b)(5)(A), 124 Stat. at 2015-16.

293. *Id.* § 1044(c), 124 Stat. at 2016.

294. *See supra* text accompanying notes 266-69.

295. *See, e.g.*, NLRB v. Columbian Enameling & Stamping Co., 306 U.S. 292, 300 (1939) (describing "substantial evidence" as "enough to justify, if the trial were to a jury, a refusal to direct a verdict when the conclusion sought to be drawn from it is one of fact for the jury").

296. For instance, it may be that empirical evidence relating to the practical impact that diverse state regulatory regimes have had on regulated industries could usefully inform preemption analysis. *Cf.* Merrill, *supra* note 10, at 776 (asserting that *Skidmore* deference to agency preemption determinations does not "channel attention to those aspects of the preemption decision where the agency can provide the most help to the court, namely in assessing the practical impact of diverse state rules on the objective of maintaining a single integrated commercial market"); Sharkey, *supra* note 13, at 477-502 (describing an "agency reference model" in which courts would adopt a modified *Skidmore* deference standard to take advantage of the fact-finding capacities of agencies).

courts currently understand it as purely a question of law.[297] Section 1044(c)'s implications are, accordingly, an open question.[298] On the one hand, section 1044(c) may require courts to determine whether the OCC has based its preemption determinations on demonstrable evidence, or sufficiently compelling forecasting,[299] tending to show that state law conflicts with or poses an obstacle to federal law. If this is the case, the section provides courts with no guidance as to evidentiary sufficiency.[300] On the other hand, it is possible, though

297. *See, e.g.*, Pac. Gas & Elec. Co. v. State Energy Res. Conservation & Dev. Comm'n, 461 U.S. 190, 201 (1983) (holding the challenge to a California law ripe because "[t]he question of pre-emption is predominantly legal, and although it would be useful to have the benefit of California's interpretation of what constitutes a demonstrated technology or means for the disposal of high-level nuclear waste, resolution of the pre-emption issue need not await that development"); Elassaad v. Independence Air, Inc., 613 F.3d 119, 124 (3d Cir. 2010) (observing that preemption is a question of law); Boomer v. AT&T Corp., 309 F.3d 404, 422 n.10 (7th Cir. 2002) ("[T]he issue of preemption involves a pure question of law."); Dow Chem. Co. v. Exxon Corp., 139 F.3d 1470, 1473-79 (Fed. Cir. 1998) (observing that preemption is a question of law reviewed de novo); United States v. R.I. Insurers' Insolvency Fund, 80 F.3d 616, 619 (1st Cir. 1996) ("[A] federal preemption ruling presents a pure question of law subject to plenary review."); Baker v. Farmers Elec. Coop., Inc., 34 F.3d 274, 278 (5th Cir. 1994) ("Preemption is a question of law reviewed *de novo*.").

298. In a somewhat different context, Judge McGowan expressed frustration about a similar problem relating to Congress's requirement that the courts review for substantial evidence rules "promulgated by the Secretary of Labor under the Occupational Safety and Health Act of 1970":

> This direct review proceeding presents a classic case of what Judge Friendly has aptly termed "a new form of uneasy partnership" between agency and court that results whenever Congress delegates decision making of a legislative character to the one, subject to review by the other. The angularity of this relationship is only sharpened when, as here, Congress—with no apparent awareness of anomaly—has explicitly combined an informal agency procedure with a standard of review traditionally conceived of as suited to formal adjudication or rulemaking. The federal courts, hard pressed as they are by the flood of new tasks imposed upon them by Congress, surely have some claim to be spared additional burdens deriving from the illogic of legislative compromise. At the least, it would have been helpful if there had been some recognition by Congress that the quick answer it gave to a legislative stalemate posed serious problems for a reviewing court, and that there would inevitably have to be some latitude accorded it to surmount those problems consistently with the legislative purposes. The duty remains, in any event, to decide the case before us in accordance with our statutory mandate, however dimly the rationale, if any, underlying it can be perceived.

Indus. Union Dep't, AFL-CIO v. Hodgson, 499 F.2d 467, 469-70 (D.C. Cir. 1974) (citation omitted).

299. *But see id.* at 472-76 (enumerating the problems associated with judicial review of policy and predictive factual findings).

300. Again, it is unlikely that *Barnett Bank* can be of any assistance here, as it does not

substantially less likely, that section 1044(c) requires courts to determine whether the OCC has considered sufficient evidence of Congress's preemptive intent. If that is the case, then the implications for statutory interpretation are staggering, given the adoption of textualist interpretive methods by several of the Justices on the Supreme Court. It would be all but impossible under such a construction for courts to ignore extratextual evidence of general congressional intent and specific legislative history.

Regardless of whether section 1044(c) requires the OCC to point to some factual evidence that state law conflicts or interferes with federal law, to detailed forecasting that suggests the likelihood of such conflicts or interference, or to some factual evidence of what Congress actually intended by its statutory language, the implications of mandating judicial review under the substantial evidence test are clear. Requiring the OCC to produce a record of the evidence on which it relied when it made a preemption determination would also require the onerous, costly, and time-consuming formal rule-making or adjudication procedures[301] required by sections 556 and 557 of the Administrative Procedure Act.[302] This further, or perhaps completely, undermines the ability of the OCC to promulgate rules regarding preemption. By contrast, courts are accustomed to conducting such proceedings, and can presumably do so much more effectively than the OCC.

Moreover, it is possible that requiring substantial evidence review would force the OCC to explicitly consider each of the corrective justice, federalism, and regulatory efficiency considerations that

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mention or otherwise rely on the substantial evidence test. *See supra* text accompanying notes 266-71.

301. *See* Andrew P. Morriss et al., *Choosing How To Regulate*, 29 HARV. ENVTL. L. REV. 179, 179 n.2 (2005) ("[F]ormal rulemaking's high costs made it an unattractive alternative for both Congress and regulators, making its use rare.").

302. Administrative Procedure Act, 5 U.S.C. §§ 556-57 (2010). Requiring courts to review agency decisions via substantial evidence affects the procedures that agencies employ when making those decisions. *See* Aerial Banners, Inc. v. FAA, 547 F.3d 1257, 1261 n.3 (11th Cir. 2008) ("Substantial evidence challenges may ... be raised to formal rulemakings pursuant to 5 U.S.C. § 556-57, or to 'agency hearings provided by statute.'") (quoting 5 U.S.C. § 706(2)(E) (2006)); *Indus. Union Dep't*, 449 F.2d at 472-76 (noting that the Secretary of Labor, though normally accustomed to promulgating rules under notice-and-comment rulemaking, nevertheless employed a formal rule-making procedure because of substantial evidence review).

underlie every preemption decision,[303] to make plain the evidentiary proxies it uses to gauge the magnitude of each consideration, and to indicate the relative importance of each to its ultimate conclusions. Courts currently do not analyze preemption issues with such exactitude or thoroughness.[304] Nor does it appear on the face of the Act that they would be required to do so now, though it is possible that the burdens placed on the OCC could have some effect on how the courts undertake the preemption inquiry in this context. In any event, as with Congress's elimination of the OTS,[305] its reduction of agency deference from *Chevron* to *Skidmore*, and its imposition of the case-by-case requirement on the OCC, Congress clearly has decided that the courts are more apt to give effect to its legislative intentions than is the OCC and has attempted to empower the courts accordingly.

C. Monitoring and the Centralization Default

As already described, the preemption provisions in the Dodd-Frank Act were Congress's attempt to rein in what was widely perceived as overly aggressive preemption of state consumer financial protection laws by the OCC and the OTS.[306] In trying to expand state autonomy in the provision of consumer financial protections, Congress faced a choice of antipreemption strategies. It could have, for example, specified bright-line antipreemption rules that, because of their specificity, might not have been as comprehensive as their sponsors wanted.[307] Alternatively, Congress could have opted for a purposivist-oriented strategy in which it enacted comparatively broad standards, trusting that any ambiguities would be resolved

303. *See* Sharpe, *supra* note 5, at 371 (arguing that the balancing of federalism, corrective justice, and regulatory efficiency considerations in the preemption context is a quintessential policy decision, and is not governed by universally accepted rules of law or logic).

304. Courts frequently, and without explanation, rely heavily on one or two of these considerations while completely ignoring the others. This is particularly true of federalism considerations. *See supra* Part II.C.

305. Title III of the Dodd-Frank Act eliminates the OTS, and transfers its powers to the OCC and the Federal Reserve. Heidi Mandanis Schooner, *Private Enforcement of Systemic Risk Regulation*, 43 CREIGHTON L. REV. 993, 1005 n.48 (2010).

306. *See supra* Part III.A.

307. *See supra* Part III.A.

by reference to the Act's antipreemption legislative history.[308] Congress ultimately chose the latter strategy, but did so without due regard to either the Centralization Default or the Court's prevailing views on statutory interpretation.

As a general matter, the Dodd-Frank Act contains numerous provisions intended to shift the balance of federal-state regulatory responsibility by expanding the role of state regulators in providing protections to consumers of financial products and services. For example, the Act grants significant powers to state attorneys general and state regulators to enforce provisions of the Act, regulations promulgated under the Act, and other laws that provide remedies to aggrieved consumers.[309] The Act also requires the CFPB to propose new consumer protection rules or modifications to existing rules at the behest of a majority of the states,[310] to explain its decision not to issue a rule to each state that proposed it,[311] and to promulgate rules concerning coordination of enforcement actions with state attorneys general.[312] As described, the federal-state balance to be struck through federal preemption was, in particular, a matter of substantial disagreement among the Obama Administration, the House of Representatives, and the Senate.[313] What does not appear to have been a matter of substantial disagreement, however, was the empowerment of the courts as the primary guardian of the Act's preemption goals.

It would have behooved those members of Congress seeking to ensure a reduction in federal consumer financial protection preemption to account for ex post monitoring considerations and the Centralization Default. The decision in *Barnett Bank*, like all of the Court's preemption decisions that employ implied preemption

308. See *supra* Part II.B.1.

309. *See, e.g.*, Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, § 1042, 124 Stat. 1376, 2012 (2010) (to be codified at 12 U.S.C. § 5552); *id.* § 1042(a)(1), 124 Stat. at 2012 (permitting state attorneys general to enforce any provision of the Act or regulations promulgated under it in any federal or state court with jurisdiction over the defendant); *id.* § 1042(d)(1)-(3), 124 Stat. at 2014 (preserving state authority to adopt rules, initiate enforcement, or take action based on state claims, state securities regulations, or state insurance regulations).

310. *Id.* § 1041(c)(1), 124 Stat. at 2011.

311. *Id.* § 1041(c)(3)(B), 124 Stat. at 2012.

312. *Id.* § 1042(c), 124 Stat. at 2014.

313. *See supra* Part III.A.

analysis, is driven in large part by the preemption default rules adopted by the Court. It seems that Congress's best alternative for substantially reducing federal preemption would have been to enact clear, targeted preemption rules. Given their well-documented propensity for preempting state law enforced against national banks and federal thrifts,[314] shifting the lion's share of preemption policy-making responsibility away from the OCC and the OTS appeared to be a logical first step in reducing the overall rate of consumer financial protection preemption. In doing so, it also appears that Congress failed to take account of the complex interplay between statutory interpretation and federalism default rules that largely drives the Supreme Court's preemption decisions.

By all indications, the members of Congress who voted in favor of the Dodd-Frank Act, or at least those who drafted the pertinent preemption language, expected section 1044(b)(1)(B)'s citation to *Barnett Bank* and the empowerment of the judiciary over the OCC and the OTS to reduce the frequency with which state consumer financial protection laws are preempted by federal law, thereby increasing the role that states play in providing consumer financial protections.[315] In codifying *Barnett Bank*, Congress chose, by accident or by design, a purposivist-oriented standard that relies on a combination of statutory text and interpretive nudging for ex post preemption policy management.[316] It then left the interpretation and implementation tasks primarily to the courts. Congress's choice provides courts with substantial latitude in identifying the evidence that demonstrates a conflict with or impediment to federal prerogatives, and substantial latitude in weighing that evidence when reaching their preemption conclusions. Concomitantly, it provides Congress with increased opportunities to influence judicial interpretation through manipulation of legislative history. The *Barnett Bank* decision itself, authored by Justice Breyer, relied on at least six evidentiary sources, including legislative history, to determine the intended preemptive effect of a 1916 federal statute permitting national banks to sell insurance in small towns.[317]

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314. *See supra* Part III.A.

315. *See supra* Part III.B.

316. *See supra* Part II.A.

317. Aside from the text of the statute, 517 U.S. 25, 32 (1995), and its legislative history,

Unlike the general rule of construction that was ultimately deleted from the Civil Rights Act of 1991,[318] or the guidance provided by the Uniform Statute and Rule Construction Act of 1995,[319] section 1044(b)(1)(B) does not specify the interpretive methods the courts should employ. Rather, the section indirectly encourages courts to rely on legislative history by declining to provide clear instructions on how Congress wanted to resolve particular preemption issues.

Unfortunately, section 1044(b)(1)(B) does not assert any control over the courts' preemption preferences, nor does it exhibit any awareness of the Centralization Default. Unlike an amendment to the MDA's express preemption clause introduced in the Senate,[320] or the presumption against preemption,[321] section 1044(b)(1)(B) does not instruct the courts to systematically favor the preservation of state laws and regulations. It may be that this omission was caused by the practical and political controversy surrounding the Act's preemption provisions and the inescapable difficulty of foreseeing the specific preemption problems that the Act's provisions would

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id. at 35, Justice Breyer also relied on: (1) the Court's prior precedents interpreting similar statutes, *id*.; (2) assumptions about what Congress would normally have intended in similar situations, *id*. at 40-41; (3) ordinary English/common sense meanings of operative statutory terms, *id*. at 38; and (4) Black's Law Dictionary, *id*. Justice Breyer did not explicitly list these sources, made no attempt to specify the weight he accorded to each of these sources, and did not indicate whether this list of sources was exhaustive.

318. *See* Rodriguez, *supra* note 64, at 224-25.

319. UNIF. STATUTE & RULE CONSTR. ACT § 20(c)(4) (1995).

320. In 2009, two Senators introduced a bill to "correct the Supreme Court's decision in *Riegel v. Medtronic*, which misconstrued the intent of Congress and cut off access to our Nation's courts for citizens injured or killed by defective medical devices." 155 CONG. REC. S1861 (daily ed. Feb. 6, 2007) (2009) (statement of Sen. Leahy). The saving clause that the bill would add to the MDA provides that "[n]othing in [§ 360k of the MDA] shall be construed to modify or otherwise affect any action for damages or the liability of any person under the law of any State." Medical Device Safety Act of 2009, S. 540, 111th Cong. § 2(a) (2009). An identical bill has also been introduced in the House of Representatives. *See* Medical Device Safety Act of 2009, H.R. 1346, 111th Cong. § 2(a) (2009). Neither bill has moved out of its respective committee.

321. *See supra* Part II.C. Unlike some other of the Court's preemption decisions, *Barnett Bank* does not mention the presumption against preemption in those areas traditionally governed by state law. *See, e.g.*, Hillsborough Cnty. v. Automated Med. Labs. Inc., 471 U.S. 707, 715 (1985) ("Where ... the field that Congress is said to have pre-empted has been traditionally occupied by the States we start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress." (internal quotation marks omitted)). Accordingly, it does not necessarily follow that courts would apply it when construing the Dodd-Frank Act's preemption provisions.

produce. Congress chose instead to leave the resolution of these fretted preemption questions to the courts and, to a diminished extent, to the OCC. However, given the Centralization Default and the weak ex post monitoring mechanisms at Congress's disposal, the Act leaves in place a likelihood of substantial policy drift. Accordingly, the institutional choices made in the Dodd-Frank Act may not be those best suited to achieving Congress's preemption policy goals. In sum, the success of Congress's strategy will ultimately depend on whether nudging the courts toward a purposivist interpretative approach that permits greater ex post congressional control over statutory meaning will also have the effect of inducing the courts to more frequently disfavor preemption, or it will depend on whether statutory interpretation has no meaningful impact on judicial federalism determinations in the preemption context. If neither supposition is correct, then Congress's decision not to negotiate clearer, though potentially far narrower, textualism-oriented bright-line preemption rules, or not to reform the OCC's and OTS's preemption policies while leaving their pre-enactment preemption implementation role unchanged, will undermine its efforts to curb preemption.

CONCLUSION

Congress cannot always choose its ideal legislative option. The legislation it enacts is necessarily bounded by the politics of the possible. Nevertheless, in order to reach the best possible compromise, it must recognize all the critical factors that impact the policies it seeks to elevate to the status of law. In the preemption context, this requires Congress to have a sound understanding of how to choose its policy implementation delegates, and how to guide the decision making of those delegates. As this Article demonstrates, Congress's ability to monitor judicial and agency preemption policy implementation is a critical though frequently overlooked factor in making the delegation choice. Additionally, understanding that the Court has adopted a pro-preemption presumption when addressing preemption issues is fundamental to intelligently employing the ex post monitoring mechanisms at Congress's disposal. As evidenced by various provisions of the Dodd-Frank Act

concerning national bank preemption, however, Congress has yet to fully appreciate the complex interplay among legislative form, statutory interpretation, and the Court's Centralization Default in preemption cases. Had it done so, it would have provided more specific preemption instructions to the courts instead of adopting an implied preemption standard that leaves the courts with substantial preemption policymaking discretion.