THE PARADOX OF ADMINISTRATIVE PREEMPTION

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ABSTRACT

Administrative preemption is a convenience and contrivance for modern government. But, as uncovered here, it is also a constitutional paradox. Specifically, in the federalism context the Court treats agency action as preemptive under the Supremacy Clause, which provides that certain federal “Laws” shall be supreme over state law. However, if agency action qualifies as “Law,” then it should be void under separation-of-powers principles (and thus ineligible to preempt state law). Meanwhile, if agency action does not qualify as “Law” (thus avoiding a separation-of-powers problem), then it should fall beyond the Supremacy Clause’s purview. Paradoxically, administrative preemption requires that agency action simultaneously qualify as (1) “Law” for federalism purposes and (2) “not Law” for separation of powers.

The Founders surely never intended this. Although much has changed since then, resort to the Court’s interpretive glosses for modern government fair no better. For instance, if the Court’s premise behind administrative preemption is that agencies make “Law,” then how should we understand the Court’s longstanding insistence otherwise in the separation-of-powers context? And, if unelected administrative officials can displace state law in Congress’s stead, what are we to make of the Court’s heralded political-safeguards theory of federalism? These inquests underscore the difficulty of settling on a constitutional premise that is both broad enough to justify administrative preemption, yet narrow enough to preserve the Court’s legitimating theories of modern government. Perhaps administrative preemption is right, and the Court’s legitimating glosses for modern government are wrong. Or perhaps the inverse is true. This Article’s insight is that these cannot all be right—at least not without a new constitutional bargain.

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INTRODUCTION

The Framers’ strategy for repelling tyranny was structural. Government power was dispersed horizontally among the federal branches (i.e., separation of powers) and vertically between the federal and state units (i.e., federalism). James Madison famously professed that this structural design would remit a “double security” for liberty.\(^1\) Although vestiges of this original strategy remain, the operation of modern government is notoriously one of constitutional dissonance: what the Constitution says is not always what it does.\(^2\) Federal agencies are imbued with the constitutionally distinct (and supposedly separate) lawmaking, executive and adjudicative functions.\(^3\) Further, despite the Constitution’s vesting of “all legislative” power in Congress,\(^4\) the Supreme Court has effectively (though not formally) condoned vast delegations of lawmaking to agencies.\(^5\)

These structural concessions for modern government have prompted generations of scholars to question the legitimacy of the administrative state.\(^6\) Though less studied, these separation-of-powers concessions also have cascading effects for federalism.\(^7\) Specifically, federal agencies implement their accumulated power in regulatory domains shared by state law. This, in turn, leads to federal-state regulatory overlap that otherwise might not exist, including in traditional state fields such as

\(^{1}\) The Federalist No. 51 (James Madison) (Clinton Rossiter ed., 1961).
\(^{3}\) John F. Manning, Nonlegislative Rules, 72 Geo. Wash. L. Rev. 893, 895 (2004) (“The typical agency exercises rulemaking, enforcement, and adjudication authority—functional analogues to the legislative, executive, and judicial powers that our Constitution carefully allocates among three separate branches.”). For further discussion on the combination of functions in administrative agencies, see infra notes ___-__ and accompanying text.
\(^{4}\) U.S. Const. art. I § 1.
\(^{5}\) For a discussion of the Court’s underenforced nondelegation doctrine, see infra notes ___-__ and accompanying text.
\(^{6}\) See Cass Sunstein, Constitutionalism After the New Deal, 101 Harv. L. Rev. 421, 446 (1987) (“At least since the 1940’s, many observers have invoked the traditional concerns underlying the distribution of national powers to challenge the role and performance of administrative agencies.”). The obsession with legitimizing the administrative state has delivered an enormous literature. See Cynthia R. Farina, Statutory Interpretation and the Balance of Power in the Administrative State, 89 Colum. L. Rev. 452, 465 (1989) (collecting sources); Thomas O. Sargentich, The Reform of the American Administrative Process: The Contemporary Debate, 1984 Wis. L. Rev. 385 (synthesizing much of the literature).
healthcare, banking, labor, education, consumer protection, and more.\(^8\)

Meanwhile, despite telling indicators in the Supremacy Clause to the contrary, the Court’s administrative preemption doctrine holds that federal agencies may trump state law in much the same way as Congress.\(^9\) Under this doctrine, agencies wield an extraordinary power in our federalist system: they may displace the laws of all 50 states without the political or procedural safeguards baked into the legislative process.

Collectively, these structural concessions for modern government portend a double insecurity for liberty, where federal power is first accumulated in the Executive and then exercised in ways to dislodge state autonomy. To observe that this was not originally intended is as empty as it is true; the Framers did not—and could not—envision the changes wrought by the complexities of modern society. This truism leads some to declare the administrative state unconstitutional.\(^10\) But it leads others to question whether the Framers’ structural strategies are worth preserving today, and, if so, in what form.

This Article engages these structural issues, bottom-up, through the lens of administrative preemption. As pertinent here, the Supremacy Clause provides that “Laws of the United States . . . made in Pursuance [of the Constitution] . . . shall be the supreme Law of the Land.”\(^11\) The Clause raises two questions. The first concerns the types of conflicts between federal and state law that can suffice to preempt state law.\(^12\) The second question—more central to my project—is what types of federal law may even qualify for preemptive effect. It is undisputed that validly enacted federal statute\(^s\) qualify.\(^13\) My inquest here, however, is whether agency action (e.g., a regulation, adjudicative order, policy guideline, etc.) may also qualify as supreme Law. The Court has said ‘yes’ but has not explained why. To be sure, some forms of administrative action are now conventionally understood to be federal law (lower case “l”). Yet whether agency action can or should qualify under the Supremacy Clause’s purview of “Laws” (capital “L”) “made in Pursuance” of the Constitution is a different matter. Or, so I argue.

The very notion that Congress can “delegate supremacy”\(^13\) to agencies is arguably paradoxical. Specifically, in the federalism context, the Court

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\(^8\) Keller, How Courts Can Protect, supra note ___, at 58 (“The underenforcement of federalism is exacerbated in the administrative law context because Congress can freely delegate its broad Commerce Clause powers to unelected federal agencies, which can then easily encroach on state autonomy.”).


\(^10\) For a seminal treatment, see, e.g., Lawson, supra note ___.

\(^11\) U.S. CONST. art. VI.

\(^12\) See Stephen A. Gardbaum, The Nature of Preemption, 79 CORNELL L. REV. 767, 770-73 (1994) (stating that state law is only trumped when conflicting state and federal laws would apply); Nelson, supra note ___, at 234 (arguing that the Supremacy clause “requires courts to 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”); Wyeth v. Levine, 555 U.S. 555, 583-94 (2009) (Thomas, J., concurring in the judgment) (calling the Court’s obstacle-preemption doctrine into doubt); Arizona v. United States, 132 S. Ct. 2492, 2522-24 (2012) (Thomas, J., concurring and dissenting, in part) (same).

\(^13\) See David S. Rubenstein, Delegating Supremacy?, 65 VAND. L. REV. 1125 (2012) (challenging the Court’s administrative preemption doctrine on constitutional and normative grounds).
deems agency action preemptive under the Supremacy Clause’s provision for “Laws . . . made in Pursuance [of the Constitution].”14 Meanwhile, however, the Court has maintained in the separation-of-powers context that only Congress (and not the Executive) can make “Law.”15 So, how is it that agency action is Law for federalism purposes, yet simultaneously is not Law for separation-of-powers purposes? Of more concern, why is this structural contradiction possible? The Court has never engaged these questions, much less acknowledged them. Commentators have recently begun to appreciate the curiosities of administrative preemption,16 although not in the paradoxical terms advanced here.

The paradox-hypothesis offers a new set of challenges for the Court’s administrative preemption doctrine. But it also summons doubt over the Court’s legitimating theories of modern government. For instance, if the Court’s major premise behind administrative preemption is that agencies make “Law,” then how should we understand the Court’s longstanding insistence otherwise in the separation-of-powers context? And, if unelected administrative officials can displace state law in Congress’s stead, what are we to make of the Court’s heralded political-safeguards theory of federalism? These inquests underscore the difficulty of settling on a constitutional premise that is both broad enough to justify administrative preemption, yet narrow enough to preserve the Court’s legitimating theories of modern government. Perhaps administrative preemption is right, and the Court’s legitimating glosses for modern government are wrong. Or perhaps the inverse is true. This Article’s

14 U.S. Const. art. VI, cl. 2; see also infra notes ___–___ and accompanying text (discussing the Court’s administrative preemption doctrine).
15 See Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 588 (1952) (holding that the President has no inherent constitutional authority to make domestic law); Marshall Field & Co. v. Clark, 143 U.S. 649, 692 (1892) (“That Congress cannot delegate legislative power to the president is a principle universally recognized as vital to the integrity and maintenance of the system of government ordained by the constitution.”); see also Whitman v. American Trucking Ass’ns, 531 U.S. 457, 472 (2001) (stating that Article I “permits no delegation of [legislative] power”). See also infra notes ___–___ and accompanying text.
insight is that these cannot all be right—at least not without a new constitutional bargain.

Part I canvasses the Court’s administrative preemption doctrine. Part II conceives of administrative preemption as a paradox using textual, historical and structural modes of constitutional interpretation. The discussion starts with these interpretive modes simply because they are conventionally thought to be a good place to start (even if not a good place to stop). Part III then lays the groundwork for a doctrinal assessment of administrative preemption. It provides an account of how the Framers’ structural strategies have been repackaged to accommodate the administrative state. I employ the term *adminstructuralism* to capture this transformation. Critically, this narrative highlights the “contingent” nature of the structural “concessions” made for modern government. Most notably, the Framers’ separation-of-powers model was forfeited on the theoretic contingencies that agencies cannot make “Law,” and that agency action would be sufficiently controlled by political and judicial oversight. 17 Separately, federalism’s original strategy of enumerated (and limited) federal power has mostly been eschewed on the theoretic contingency that state interests would be adequately protected through the legislative process.18

From this narrative, Part IV develops a normative “contingency principle” for use in evaluating the Court’s administrative preemption doctrine. The idea behind the principle is rather straightforward: the contingencies announced in the Court’s concessional doctrines are the legitimating strings that attach. Thus, for example, inasmuch as the Court seeks to legitimate Congress’s delegation of policymaking on the ground that the administrative output cannot be Article I, Section 7 “Law,” we can and should hold the Court to that conception when evaluating the legitimacy of administrative preemption. And, inasmuch as the Court has sought to legitimate its failure to police the federal-state boundary on the theory that state interests are adequately protected in the legislative process, we can and should insist on the Court’s assurance to “compensate for possible failings” in that process. 19

As applied to administrative preemption, the contingency principle suggests that the Court’s current doctrine is not nearly as protective of state interests as it arguably should be. This is the work of the paradox in

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17 See Gerald E. Frug, *The Ideology of Bureaucracy in American Law*, 97 HARV. L. REV. 1276, 1284 (1984) (observing that various models of administrative agencies are aimed at characterizing bureaucracies as being “under control”); Kristin E. Hickman, *Unpacking the Force of Law*, 66 VAND. L. REV. 465, 518-19 (2013) (“The modern administrative state reflects an implicit compromise of allowing Congress to delegate expansive lawmaking power to agencies in exchange for imposing substantial procedural requirements as agencies exercise those powers, with courts serving as the enforcer thereof.”); see also infra notes ___ and accompanying text.

18 See infra notes ___ and accompanying text.

19 See Garcia v. San Antonio Metropolitan Transit Authority, 469 U.S. 528, 545 (1985); see also supra notes ___ and accompanying text.
doctrinal terms. Specifically, if agency action qualifies as “Law,” then it is conceptually void under the nondelegation doctrine (and should thereby be ineligible to preempt state law). 20 Meanwhile, if agency action does not qualify as “Law” (thus avoiding a nondelegation violation), then it is most difficult to comprehend why that action can or should bind sovereign states. As the Court itself has recognized, the states’ most meaningful protection against federal encroachment is the so-called political and procedural safeguards of federalism. 21 But neither of these safeguards attach administratively.

Part V brings pragmatic claims to the fore. For instance, agencies may be in a better position than Congress to make decisions about preemption. 22 And that is not only because of Congress’s institutional limitations (lack of time, resources, foresight, and so on), but also because agencies may be preferred for their institutional capacities (expertise, flexibility, resources, etc.). 23 Furthermore, a system with administrative preemption may be better than a system without it (putting aside, for now, what “better” means here). 24 Rather than challenge the merits of these pragmatic claims, my aim is to isolate them. 25 If pragmatic appeals are the only ones that support administrative preemption, then those decisionmakers of an originalist bent might be expected to foreclose the practice. Short of that, if pragmatism is an important (but not the only) argument in favor of administrative preemption, then we might expect non-originalist decisionmakers to shape the doctrine in line with what the pragmatic arguments commend themselves to, yet no further.

To be clear, I do not mean to impugn appeals to pragmatism. Indeed, they give expression to the puzzle this Article concludes with: if administrative preemption is a paradox, what now? 26 The question itself appreciates that more is at stake here than the Framers’ original strategies for securing liberty. Also at stake are the values that birthed the modern administrative state. And, on this recognition, the analysis returns full circle. It explains my preference for a bottom-up approach to the question of administrative preemption; and more generally, why my

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20 See Gibbons v. Ogden, 22 U.S. 1 (1824) (explaining that only a valid federal law can preempt a state law).
21 On the political safeguards, see infra notes __ and accompanying text. On the procedural safeguards, see infra notes __ and accompanying text.
22 Galle & Seidenfeld, supra note __.
23 See id., 1939, 1954-59, 2008 (arguing that agencies outperform the other branches on questions of preemption).
24 Cf. Benjamin & Young, supra note __, at 2116 (“[C]onstitutionalism means that we are simply not free to choose whatever normative principles and institutional strategies we think best.”).
25 In prior work I offer a critique of these pragmatic claims. See Rubenstein, Delegating Supremacy, supra note __.
26 See Selling Originalism, supra note __, at 663 (distinguishing “between originalism as a constitutional adjudicative practice and originalism as a method of ascertaining constitutional meaning”); Keith E. Whittington, Critical Introduction to Originalism at 34 (forthcoming 2013?) (“Originalist theory as such also does not definitively instruct judges on what they should do if they find themselves confronted with a legal and political status quo that already departs substantially from the original meaning of the constitutional text”).
preoccupation is with administrative preemption rather than the structural concessions that precipitate and perpetuate it. After all, administrative preemption is made possible by congressional delegation of policymaking; it is made more dangerous by the combination of powers in agencies; and it is made wide ranging by the virtual demise of federalism’s enumerated-powers principle. Insofar as we are committed to safeguarding structure, why not simply direct our energy top-down?

Because to do so, in short, would be futile if not also wrong minded. Administrative preemption doctrine is an appealing target of reform precisely because revising it can be less destabilizing than direct assaults on the aforementioned postulates. Reforming the doctrine would not prevent Congress from delegating policymaking, would not prevent Congress from combining functions in agencies, and would not restrict the subject matter over which federal law extends. Reining in administrative preemption, however, may less directly—and more modestly—recapture some of what has been lost along both the separation of powers and federalism dimensions. Moreover, the timing seems especially ripe, evidenced by the recent surge of attention administrative preemption has received from the Court, academy, White House and Congress.

I. ADMINISTRATIVE PREEMPTION DOCTRINE

Section A summarizes the Court’s statutory preemption taxonomy. Familiarity with this taxonomy will be useful because the Court has overlaid administrative preemption upon it. Section B canvasses the Court’s administrative preemption doctrine. It concludes with two related claims, which combine to frame much of the Article’s remainder. The first claim is that the Court’s administrative preemption is woefully undertheorized. The Court has held that agencies can preempt state law, but we do not quite know why. Second, understanding why is important because the doctrine’s legitimacy, scope and future trajectory all depend

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27 See, e.g., Arizona v. United States, 132 S. Ct. 2492, 2527 (2012) (Alito, J., concurring in part and dissenting in part) (describing, as “remarkable,” the federal administration’s position that “a state law may be pre-empted, not because it conflicts with a federal statute or regulation, but because it is inconsistent with a federal agency’s current enforcement priorities,” which “are not law”); Wyeth v. Levine, 129 S. Ct. 1187 (2009) (calling into question which forms of agency action may preempt state law); see also Ernest A. Young, “The Ordinary Diet of the Law”: The Presumption Against Preemption in the Roberts Court, 2011 SUP. CT. REV. 253, 280, 282 (noting that the Court probably has not “come to rest on the complicated cluster of issues surrounding preemption by federal administrative agencies.”).

28 See supra note ___ (collecting sources). See also infra notes ___-___ and accompanying text.

29 Memorandum on Preemption, 2009 DAILY COMP. PRES. DOC. 384 (May 20, 2009) (President Obama memoranda advising executive agencies to understand the legitimate prerogatives of the states before preempting a state law, and outlining steps that agencies should take in making preemption decisions); see also Exec. Order No. 13,132, 64 Fed. Reg. 43255 (Aug. 4, 1999) (emphasizing the importance of early consultation with state and local officials).

30 Regulatory Preemption: Are Federal Agencies Usurping Congressional and State Authority? Hearing Before S. Comm. on the Judiciary, 110th Cong. 7 (2007); see also Sharkey, Inside Agency Preemption, supra note ___ (discussing recent congressional concern and attention to administrative preemption in hearings and as reflected in the Dodd-Frank Wall Street Reform and Consumer Protection Act and the Consumer Product Safety Improvement Act).
on it. Indeed, understanding why may shed new light on the Court’s foundational theories of modern government.

A. Taxonomy of Statutory Preemption

Congress may statutorily preempt state law either expressly or impliedly. Congress “expressly preempts” state law when it promulgates a statute that explicitly withdraws state jurisdiction over a particular subject.\textsuperscript{31} Alternatively, Congress “impliedly preempts” state law in a number of ways. First, the Court infers Congress’s intent to preempt state law when Congress enacts sufficiently pervasive and detailed legislation targeting a particular industry or type of conduct (“field preemption”).\textsuperscript{32} Second, the Court infers Congress’s intent to preempt state law that conflicts with a statute (“conflict preemption”).\textsuperscript{33} In turn, conflict preemption obtains either when a state law would frustrate or pose an obstacle to the accomplishment of a federal objective (“obstacle preemption”),\textsuperscript{34} or when it would be impossible for a party to comply with both federal and state law (“impossibility” preemption).\textsuperscript{35} In all cases of implied preemption, the Court simply infers that Congress would not want the state law to stand.\textsuperscript{36}

In sum, with all its subparts, the Court’s taxonomy recognizes four forms of statutory preemption: (1) express; (2) implied field; (3) implied obstacle; and (4) implied impossibility.

B. Taxonomy of Administrative Preemption

1. Defining the Space

Critically, what distinguishes administrative from statutory preemption is the source of the preemptive conflict. Administrative preemption involves an agency’s assertion of its own power and intent to preempt state law.\textsuperscript{37} Of course, the source of the agency’s power to

\textsuperscript{32} See, e.g., Gade, 505 U.S. at 98 (indicating that field preemption exists “where the scheme of federal regulation is so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it”).
\textsuperscript{33} See, e.g., id.
\textsuperscript{34} See, e.g., Hines v. Davidowitz, 312 U.S. 52, 67 (1941) (“Our primary function is to determine whether, under the circumstances of this particular case, Pennsylvania’s law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.”).
\textsuperscript{35} See, e.g., Fla. Lime & Avocado Growers, Inc. v. Paul, 373 U.S. 132, 142–43 (1963) (“A holding of federal exclusion of state law is inescapable and requires no inquiry into congressional design where compliance with both federal and state regulations is a physical impossibility for one engaged in interstate commerce.”).
\textsuperscript{36} Crosby v. Nat’l Foreign Trade Council, 530 U.S. 363, 388 (2000) (“[T]he existence of conflict cognizable under the Supremacy Clause does not depend on express congressional recognition that federal and state law may conflict.”); see also Bhagwat, supra note ___, at 200 (noting that in implied preemption cases “the Court is discerning congressional intent from the broader structure of statutes”).
\textsuperscript{37} See, e.g., Bhagwat, supra note ___, at 201 (drawing this distinction); Merrill, Preemption, supra note ___, at 759–60 (same).
administer a statute comes from Congress. But administrative (rather than statutory) preemption obtains when there is nothing in the relevant statutory scheme itself that expressly or impliedly displaces state law. Rather, administrative preemption requires an agency action (e.g., a regulation), absent which there would be no preemptive conflict between federal and state law.

For present purposes, I also draw a distinction between (1) an agency’s invocation of its own power to preempt state law and (2) an agency’s interpretation of a federal statute as having preemptive effect. As used herein, the term administrative preemption means the former. The practice of an agency opining on a statute’s preemptive effect is not the target of my concern here. Nor is the related question of judicial deference to an agency’s opinion of a statute’s preemptive effect. Rather, as used here, the term administrative preemption refers to agency action that is both necessary and sufficient to displace state law, as the examples in the following section will illustrate.

Finally, preemption by unilateral presidential action—e.g., via Executive Agreements or foreign policies—is beyond this Article’s scope (though it warrants noting that presidential preemption may give rise to many of the same complications and concerns addressed herein).

2. The Doctrine

Under the Court’s existing doctrine, certain forms of agency action qualify for preemption under the Supremacy Clause’s provision for “Laws . . . made in Pursuance [of the Constitution].” And, when agency action qualifies for preemptive effect, it will trump or displace state law in the same way that federal statutes do.

38 Cf. Metzger, Federalism and Federal Agency Reform, supra note __, at 17 (2011) (“The question of whether courts should defer to agency views of preemptive effect contained in agency regulations that have the force of law is distinct from the question of whether substantive requirements contained in such regulations have preemptive effect.”).

39 Cf. Young, Executive Preemption, supra note __, at 895–96 (“Although an agency’s interpretive power to say when a federal statute preempts state law is troubling, at least its decision to preempt in that scenario is grounded in a congressional enactment . . . .”). The question of what deference, if any, to accord administrative interpretations of preemptive effects has received substantial academic commentary, with most arguing in favor of Skidmore-type, rather than Chevron-type, deference. See id.; See also Nina A. Mendelson, Chevron and Preemption, 102 Mich. L. Rev. 737, 758–98 (2004); Merrill, Institutional Choice, supra note 27, at 769–79; Sharkey, Products Liability Preemption, supra note 26, at 491–99.


41 U.S. CONST. art. VI.
For example, an agency may pass a regulation that expressly preempts state law, thereby ousting states from regulating on the same subject or in the same field.\textsuperscript{42} \textit{City of New York v. FCC} is illustrative.\textsuperscript{43} There, Congress authorized the agency to “establish technical standards relating to the facilities and equipment of cable systems which a franchising authority may require in the franchise.”\textsuperscript{44} Pursuant to this delegation, the agency promulgated regulations for cable-signal quality.\textsuperscript{45} The agency also promulgated a regulation expressly preempts any state law in the same field, although the Act itself did not expressly empower the agency to do so.\textsuperscript{46} New York and other cities challenged the agency’s authority to preempt the cities’ ability to “impose stricter technical standards than those imposed by the Commission.”\textsuperscript{47} The Court rejected this challenge, explaining:

The phrase ‘Laws of the United States’ [in the Supremacy Clause] encompasses both federal statutes themselves and federal regulations that are properly adopted in accordance with statutory authorization. For this reason, at the same time that our decisions have established a number of ways in which Congress can be understood to have preempted state law, we have also recognized that ‘a federal agency acting within the scope of its congressionally delegated authority may preempt state regulation.”\textsuperscript{48}

Apparently, for the Court, an agency’s power to expressly preempt state law is impliedly transmitted alongside Congress’s general delegation of policymaking authority to an agency. An express delegation of preemption power is not required. Rather, the conditions for administrative preemption seem to be satisfied if (1) the agency intends to preempt state law and (2) that action is within the scope of the agency’s jurisdiction.\textsuperscript{49}

Agency action can also impliedly preempt state law in the event of a sufficient conflict between the two.\textsuperscript{50} \textit{Geier v. American Honda Motor Company} was such a case.\textsuperscript{51} There, the petitioner asserted a tort claim against Honda, alleging that the manufacturer had negligently designed a

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\item[43] Id.
\item[44] Id. at 61 (quoting 47 U.S.C. § 544(e)).
\item[45] Id. at 61-62.
\item[46] De la Questa, 458 U.S. at 154.
\item[47] Id. at 62.
\item[48] Id. at 63.
\item[49] Id. at 63.
\item[50] See, e.g., \textit{Geier}, 529 U.S. at 867-68 (holding that a regulation concerning passive restraints in automobiles impliedly preempted a state tort law claim); \textit{CSX Transp., Inc. v. Easterwood}, 507 U.S. 658, 674-75 (1993) (holding that a regulation governing train speed preempted a common law negligence claim); \textit{de la Cuesta}, 458 U.S. at 170 (holding that a regulation permitting federally chartered banks to exercise the due-on-sale clause of mortgages preempts a contrary state common law rule).
\item[51] \textit{Geier}, 529 U.S. at 883.
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car without an airbag. Honda, however, asserted that the common law claim was preempted on at least one of two grounds. First, Honda claimed that Congress preempted petitioner’s claim in an express statutory preemption provision. Second, Honda claimed that an agency regulation “conflict” preempted the petitioner’s tort claim. The Court rejected Honda’s statutory preemption defense, holding that Congress itself had not directly displaced the state tort claim. Honda’s administrative preemption defense, however, prevailed. Specifically, the Court held that the state law claim against Honda was preempted because it posed an obstacle to the federal regulation’s purpose of allowing alternatives to airbags at the time the car in question was designed. In so holding, the Court stressed that the absence of a formal statement of preemptive intent by the agency was not necessary because the actual conflict between the regulation and state law was sufficient to displace state law.

These cases demonstrate that agency regulations with the “force of law” qualify for preemptive effect. But it is worth emphasizing that the procedural hurdles associated with administrative notice-and-comment rulemaking are not prerequisites for preemption under the Court’s existing doctrine. The Court has held, for example, that administrative adjudicative orders qualify for preemptive effect. And, although the Court’s doctrine is still developing on this point, even nonbinding administrative policies—which do not have the “force of law”—might qualify.

This last possibility was recently litigated in Arizona v. United States, but not fully (or at least not clearly) resolved. There, the federal administration sought to enjoin certain of Arizona’s restrictive immigration-related statutes on the ground that the laws were preempted by congressional statutes and/or the executive’s nonbinding enforcement policies. Essentially, the proffered conflict was between (1) executive policies that focus enforcement resources on targeted subclasses of unlawfully present immigrants (such as criminals and repeat immigration offenders) and (2) Arizona’s arrest-and-report laws that target a generic

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52 Id. at 867-74.
53 Id. at 874-82.
54 Id. at 884.
55 For useful summaries of these procedures, see Hickman, Unpacking the Force of Law, 66 VAND. L. REV. 465 (2013), Mark Seidenfeld, The Role of Politics in a Deliberative Model of the Administrative State, 81 GEO. WASH. L. REV. 1397, 1426-29 (2013).
57 See Altria (expressly leaving open the question of whether an agency’s policy without the force of law can have preemptive effect); see also Arizona v. United States (discussed in the text above).
58 See Brief for the United States, at 53, Arizona v. United States, No.11-182 (2012) (arguing that Section 6 of Arizona S.B. 1070 was obstacle preempted, in part because it “empowers state and local officers to pursue and detain a person . . . without regard to federal [i.e., executive] priorities or even specific federal [i.e. executive] enforcement determinations”); id. at 50 (arguing that Section 2(B) of Arizona S.B. 1070 was preempted, in part because that law “indiscriminately” forbids state and local officers from “adhering to the enforcement judgments and discretion of the federal Executive Branch”).
and undifferentiated class of undocumented immigrants. Justice Alito—concurring and dissenting, in part—plainly expressed the view that the immigration agency’s nonbinding enforcement policies could not preempt since they did not carry the “force of law.” More so, he thought it “remarkable” that the administration would even contend otherwise. Justice Scalia echoed this concern, partly because the conflicting federal policy was the administration’s decision to underenforce Congress’s immigration statutes. But the Arizona majority did not directly engage these points. To the contrary, it seemed to rely on the agency’s enforcement policies as a basis (or, maybe partial basis) for preemption of at least one (and maybe two) of the Arizona provisions at issue.

Questions over the scope and theory behind the Court’s administrative preemption doctrine were also aired but left unresolved in the Court’s 2009 decisions in Wyeth v. Levine. There, the central issue was whether the Food and Drug Act, as implemented by the agency, conflict-preempted a state common-law tort action for defective drug labeling. The issue was not whether agency action itself could preempt state law, but rather whether the agency’s view of the preemptive effect of the statutory labeling scheme was entitled to Chevron-style judicial deference. The Court held that while an agency’s view concerning the existence of a conflict with state law may be entitled to some (non-Chevron) deference, the ultimate question of whether a statute preempts state law must be resolved de novo by a court.

In so holding, however, the Wyeth majority opinion left open (or, perhaps reopened) certain other questions. Specifically, the Wyeth majority noted that it had “no occasion . . . to consider the preemptive effect” of an agency regulation with the “force of law”—thus calling the central holding of Geier into doubt. Although the majority seemed to want to leave this question open, Justice Breyer sought to close it in his

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59 See supra note 33.
61 Id. (describing, as “remarkable,” the federal administration’s position that “a state law may be preempted, not because it conflicts with a federal statute or regulation, but because it is inconsistent with a federal agency’s current enforcement priorities, which “are not law”).
62 Id. at 2521 (Scalia, J., concurring and dissenting, in part) (“[T]o say, as the Court does, that Arizona contradicts federal law by enforcing applications of the Immigration Act that the President declines to enforce boggles the mind.”).
63 Id. at 2506 (explaining that the state law “could be exercised without any input from the Federal Government [i.e., the Executive] about whether an arrest is warranted in a particular case,” thus “allow[ing] the State to achieve its own immigration policy”). See also Eric Posner, The Imperial President of Arizona, SLATE (June 26, 2012, 12:04 PM) (observing that the Arizona majority found certain provisions of S.B. 1070 preempted, not because it conflicts with federal law, but because it “conflicts with the President’s policy”). Because the Court rejected the administration’s enforcement claim in respect to another provision at issue, Section 2(B), it is hard to know what to make of the dichotomy. Language in the Court’s opinion, however, suggests that the administration’s policies made an important difference, at least when the statute itself was ambiguous as to Congress’s intent.
65 Id. at 1201.
66 Id. at 1203-04.
67 Id. at 1200–01, 1203.
In his view, agencies could issue specific regulations with legal force that have preemptive effect.\(^8\) This view was shared by the three dissenting Justices in \textit{Wyeth}. They, like Justice Breyer, defended the result in \textit{Geier}, but also thought that the agency’s determination that the drug at issue was “safe” had legal force, and thus had preemptive effect.\(^9\)

Meanwhile, Justice Thomas’s \textit{Wyeth} concurrence took aim not at administrative preemption \textit{per se}, but rather at obstacle-preemption more generally. His objection, in short, was that only statutory text—not regulatory objectives and purposes—qualifies as “Laws . . . made in Pursuance” of the Constitution under the Supremacy Clause.\(^7\) In Justice Thomas’ view, “[t]he Supremacy Clause requires that preemptive effect be given only to those federal standards and policies that are set forth in, or necessarily follow from, the statutory text that was produced through the constitutionally required bicameral and presentment procedures.”\(^7\) Justice Thomas repeated this objection in his concurring and dissenting opinion in \textit{Arizona}.\(^7\) Although the logic and thrust of his challenge to implied-obstacle preemption might be extended to foreclose administrative preemption, Justice Thomas did not say so in either \textit{Wyeth} or \textit{Arizona}.

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As it stands, the Court’s administrative preemption doctrine is conceptually undeveloped. We know that agencies can preempt state law provided that they act within their statutorily conferred power. But the reason why is obscure and unstable. It will be useful, here, to conceive of administrative preemption as a two-step act: first, there is a \textit{delegation} of power from Congress; second, there is the \textit{displacement} of state law by some agency action. The Court’s jurisprudence presumes the correctness of the second step without explanation. Perhaps it is for formalistic reasons: agency action qualifies as “Laws . . . made in Pursuance [of the Constitution],” therefore it preempts state law. Or perhaps it is for functional reasons: agency action should preempt state law, therefore it should qualify as supreme Law. Or, perhaps it is for some other reason.

The point is that administrative preemption is in search of a major premise. And, without one, the scope, trajectory and legitimacy of the doctrine is shrouded in doubt. Indeed, I will argue, the Court’s failure to

\(^8\) \textit{Id.} at 1204 (Breyer, J., concurring).
\(^9\) \textit{Id.} at 1227–29 (Alito, J., dissenting).
\(^7\) \textit{Id.} at __ (Thomas, J., dissenting).
\(^7\) \textit{Id.}
\(^7\) \textit{Arizona}, 132 S. Ct. at 2523-24.
\(^7\) \textit{Cf. id.} at 587-88 (“Congressional and agency musings, however, do not satisfy the Art. I, § 7 requirements for enactment of federal law and, therefore, do not pre-empt state law under the Supremacy Clause.”).
tender a legitimating theory for administrative preemption rattles the edifice of the modern administrative state.

II. THE PARADOX-HYPOTHESIS

Administrative preemption is a convenience and contrivance for modern government. But, as hypothesized here, it may be constitutionally impossible. As explained above, the Court treats agency action under the Supremacy Clause’s purview of “Laws . . . made in Pursuance [of the Constitution].” If agency action qualifies as “Law,” however, then it is arguably void under separation-of-powers principles (and thus ineligible to preempt state law). Meanwhile, if agency action does not qualify as “Law” (thus avoiding a separation-of-powers problem), then it should fall beyond the Supremacy Clause’s purview.

This Part conceives of the paradox using textual, historical and structural modes of constitutional interpretation.\(^\text{74}\) These modes tend to be associated with originalism, but to be clear, my purpose is not to defend or promote originalism as an interpretive methodology.\(^\text{75}\) Rather, I start with text, history and structure simply because these interpretive inputs are generally acceptable to most non-originalists as well.\(^\text{76}\) Rather, what loosely distinguishes most forms of originalism\(^\text{77}\) from most forms of


\(^{76}\) Farber, [cite] (“Almost no one believes that the original understanding is wholly irrelevant to modern-day constitutional interpretation.”); David A. Strauss, Common Law Constitutional Interpretation, 63 U. Chi. L. Rev. 877, 881 (1996) (observing that “[v]irtually everyone agrees” that constitutional text and original meaning matter in constitutional interpretation); see also Originalism is Bank, at 25 (“Even those scholars most closely identified with non-originalism: Paul Brest, David Strauss, Laurence Tribe, for example [explicitly assign original meaning or intentions a significant role in the interpretive enterprise.”); Sanford Levinson, The Limited Relevance of Originalism in the Actual Performance of Legal Roles, 19 Harv. J.L. & Pub. Pol’y 495, 495 (1996) (“[A]lmost everyone is an originalist in at least some limited sense.”)

\(^{77}\) As Christopher Eisgruber put it, “[o]riginalism comes in a bewildering variety of colors and flavors.” CHRISTOPHER L. EISGRUBER, CONSTITUTIONAL SELF-GOVERNMENT 26 (2001); see also, e.g., Mitchell N. Berman, Originalism Is Bank, 84 N.Y.U. L. Rev. 1, 9-16 (2009) (arguing that “literally thousands of discrete theses can plausibly claim to be originalist”). So, even to define the term “originalism” is a challenge, perhaps even an intractable one. But, here, I employ the term in its most generic sense. As Keith Whittington describes it, “[t]he two crucial components of originalism are the claims that
non-originalism\textsuperscript{78} is the exclusivity or lexical priority afforded to text, drafting history and structure in constitutional interpretation. For most originalists, these inputs (and perhaps only the text) will be exclusive and dispositive.\textsuperscript{79} Meanwhile, for most non-originalists, these inputs will be relevant but not dispositive.\textsuperscript{80} Later parts of this Article will account for doctrinal\textsuperscript{81} and pragmatic\textsuperscript{82} considerations, which some non-originalists may find equally or more appealing.\textsuperscript{83}

Section A provides a brief account of the Framers’ structural strategies of divided government and the values those strategies were designed to serve. Section B offers textual, historical and structural accounts that interpret the phrase “Laws . . . made in Pursuance of [the Constitution]” to mean only federal statutes. So construed, Section C hypothesizes that

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constititutional meaning was fixed at the time of the textual adoption and that the discoverable historical meaning of the constitutional text has legal significance and is authoritative in most circumstances. Whittington, \textit{Critical Introduction}, supra note \underline{____}, at 3. \textit{See also} Lawrence Solum, District of Columbia v. Heller and Originalism, 103 NW. U.L. REV. 923, 954 (2009) (positing that originalism consists of a “fixation” and “contribution” thesis; the former reflecting the idea that the meaning of the Constitution was fixed when adopted, and the latter reflecting the idea that the “linguistic meaning of the Constitution constrains the content of constitutional doctrine”).

\textsuperscript{78} Like originalism, the non-originalism tent hosts a splintering array of interpretive approaches. As the term is used here, it includes but is not limited to “living originalism” and “common law constitutionalism.” In general, however, I employ the term non-originalism here in its simplest form—to wit, something other than originalism.

\textsuperscript{79} Paul Brest [cite] 204 (describing originalism as theory that “accords binding authority to the text of the Constitution or the intentions of its adopters”); James A. Gardner, The Positiveist Foundations of Originalism: An Account and Critique, 71 B.U. L. REV. 1, 7 (1991) (noting diversity of originalist views, but identifying as its core premise that “the role of judges in constitutional cases is simply and exclusively to discover and give effect to the meaning of the Constitution as embodied in the constitutional text and the original intentions of the founders”); O’NEILL, supra note \underline{____} at 1-2 (2005) (noting originalism’s “insist[ence] that interpreters be bound by the meaning the document had for those who gave it legal authority.”).

\textsuperscript{80} \textit{Originalism is Bunk}, supra note \underline{____} at 82 (explaining that the debate over originalism “is between following the original understanding always and following it sometimes (perhaps very often, perhaps not)”; \textit{Multi-Valenced}, supra note \underline{____} at 634-35 (noting that the “priority for the text is not incompatible with an evolutionary, common law method of interpretation”); \textit{Critical Introduction}, supra note \underline{____}, at 41 (“For many non-originalists, the original meaning is simply one piece of information to consider in determining how law should develop”).

\textsuperscript{81} On doctrinal argumentation, see Amar, \textit{Supreme Court Forward}, supra note \underline{____} 26-27 ("doctrinalists […] rarely try to wring every drop of possible meaning from constitutional text, history, and structure. Instead, they typically strive to synthesize what the Supreme Court has said and done, sometimes rather loosely, in the name of the Constitution.").

\textsuperscript{82} Pragmatic or prudential argument seek “to balance the necessity of taking an action against its costs.” \textit{Unenumerated Rights} [cite] at 533. Under the pragmatic approach, “judges should simply decide cases in whatever way will produce the best future results.” Fallon, \textit{How to Choose}, supra note \underline{____}, at 564. For more on pragmatism, see Michael C. Dorf, The \textit{Supreme Court 1997 Term, Foreword: The Limits of Socratic Deliberation}, 112 HARV. L. REV. 4, 80-81 (1998); BOBBIT, \textit{Fate}, supra note \underline{____}, at 61 (prudential argument “is actuated by the political and economical circumstances” surrounding the decision); POSNER, supra note \underline{____}, at 238-30. \textit{See also infra notes} \underline{____} \underline{____} and accompanying text.

\textsuperscript{83} For arguments that doctrinalism promotes a system of constitutional governance, see for example Charles Fried, \textit{Constitutional Doctrine}, 107 HARV. L. REV. 1140, 1152-53 (1994) and Fallon, supra note \underline{____} at 106-39; Strauss, \textit{Common Law}, supra note \underline{____} at 883-84. For arguments in favor of pragmatism, see e.g., STEPHEN BREYER, \textit{Active Liberty: Interpreting Our Democratic Constitution} 6, 18, 116 (2005) (explaining the importance of considering practical consequences). \textit{But cf.} Amar, \textit{The Supreme Court 1999 Term, Forward}, supra note \underline{____}, at 34-48 (2000) (arguing that the Constitution and its amendments should take priority over judicial doctrine); ADRIAN VERMUILE, \textit{Judging Under Uncertainty} 153-82 (2006) (arguing that judges’ limited information distort their efforts to assess the consequences of their decisions); Scalia, \textit{Originalism: The Lesser Evil}, supra note \underline{____} at 854 (1989) (arguing that the legislature is a “more appropriate expositor of social values” than the judiciary). For a more general treatment of what divides originalist from non-originalist methodology, see Whittington, \textit{Critical Introduction}, supra note \underline{____}.

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administrative preemption is a structural paradox that belies original conceptions of separation of powers and federalism. This section also introduces non-originalist conceptions that might justify or deconstruct the paradox, which are explored in later parts.

A. The Original Structure

Our Constitution was born of lessons learned. The failed experiment of the Articles of Confederation proved that national government could be too weak; the imperialism experienced under British rule proved that government could be too strong. Against this backdrop, “We the People” set out to “form a more perfect Union.” Success depended on creating a powerful enough, yet not too powerful, central government. The Framers’ cross-cutting ambition was thus to empower, and at the same time, to limit. To those ends, federal power was vested, enumerated, dispersed, and checked. Though the Bill of Rights was later added to further cabin government power, the original strategy for promoting liberty was structural and prophylactic by design.

1. Separated and Balanced Federal Power

The Constitution divides and vests federal power in three separate institutions: Article I vests the “legislative power” in Congress; Article II vests the “executive” power in the President; and Article III vests the “judicial” power in the courts. Layered within this separation is a system of checks and balances, whereby certain federal action is made dependent on the consent of multiple institutions. The Constitution contains many expressions of this; for example, the requirement that both houses of

84 See Amar, Of Sovereignty, at 1448–49 (“The Philadelphia delegates . . . had the benefit of two previous efforts to achieve a theoretically acceptable and practically workable federalism.”).
86 See, e.g., JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW 26-31 (1980) (identifying colonial British rule as the impetus for the American revolutionaries’ emphasis on constitutional limits on government power); Rebecca L. Brown, Separated Powers and Ordered Liberty, 139 U. PA. L. REV. 1513, 1513–16 (1991) (raising James Madison’s warning that the accumulation of all governmental powers in one body is the very definition of tyranny); Lawrence Lessig & Cass R. Sunstein, The President and the Administration, 94 COLUM. L. REV. 1, 13 (1994) (“It is an important truism that the framers were quite skeptical of broad executive authority, a notion that they associated with the tyrannical power of the King.”).
87 See U.S. CONST. pmb. As Mark Killenbeck has observed, the Framers were “pragmatists who viewed their assignment [as] creating not the ‘ultimate’ Union, but simply ‘a more perfect’ one…” Mark R. Killenbeck, Pursuing the Great Experiment: Reserved Powers in a Post-Ratification, Compound Republic, 1999 SUP. CT. REV. 81, 86.
88 Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 640 (1952) (Jackson, J., concurring) (“The purpose of the Constitution was not only to grant power, but to keep it from getting out of hand.”).
90 U.S. CONST. art. I, § 1.
91 Id. art. II, § 1.
92 Id. art. III, § 1.
Congress pass a “Law” (bicameralism), the presidential veto, and Congress’s authority to override a veto.\(^93\) Unlike a ‘pure’ theory of separation of powers that parcels out government functions to different actors, our system of checks confers a degree of joint accountability for the performance of certain key functions.\(^94\)

This tri-partite division of federal power was designed to secure liberty, in part, by diffusing the ability of government officials to advance either their own interests, or factional ones, over the public welfare.\(^95\) Both dispersing and intermingling power was designed to set ambition against ambition, faction against faction, with the related aims of promoting deliberation and stifling self-interested government action.\(^96\) To be sure, the resulting system of separated and balanced power was expected to result in some government inefficiency.\(^97\) But that was a price for liberty. The defeat of “a few good laws” was thought to be “amply compensated by the advantage of preventing a number of bad ones.”\(^98\)

2. Federalism

Dividing power vertically between the federal and state governments was similarly intended to advance the political marketplace.\(^99\) Each level of government could be expected to compete for public loyalties “by conferring the freedom to choose from among various diverse regulatory regimes the one that best suits the individual’s preferences.”\(^100\) States could garner popular loyalty not only from the substance of their laws, but also by affording the public more accessible outlets for political choice and participation in government.\(^101\) As Akil Amar explains, federalism’s effect of bringing government closer to the people was linked to the states’

\(^93\) Id. art. I, § 7.
\(^94\) Farina, supra note ___, at 491; Martin H. Redish & Elizabeth J. Cisar, “If Angels Were to Govern”: The Need for Pragmatic Formalism in Separation of Powers Theory, 41 DUKE L.J. 449, 458 (1991) (”Mixed government was designed to prevent absolutism—the arbitrary use of power—by avoiding the concentration of all state power in one body.”); Thomas W. Merrill, The Constitutional Principle of Separation of Powers, 1991 SUP. CT. REV. 225, 229, 246 (noting that “diffusion of power among the branches is an important and traditional purpose of separation of powers).\(^100\)
\(^95\) THE FEDERALIST No. 10 (James Madison) (Clinton Rossiter ed., 1961); Sunstein, supra note ___, at 434–36.
\(^96\) THE FEDERALIST No. 51 (James Madison), supra note ___; Abner S. Greene, Checks and Balances in an Era of Presidential Lawmaking, 61 U. CHI. L. REV. 123, 132, 184 (1994); see also INS v. Chadha, 462 U.S. 919, 951 (1983) (”The division of the Congress into two distinctive bodies assures that the legislative power would be exercised only after opportunity for full study and debate in separate settings.”).
\(^97\) THE FEDERALIST No. 62 (James Madison), supra note ___ (acknowledging that “check[s] on legislation may in some instances be injurious as well as beneficial”).\(^100\)
\(^98\) THE FEDERALIST No. 73 (Alexander Hamilton), supra note ___.
\(^99\) Amar, Of Sovereignty, supra note ____ at 1450 (“As with separation of powers, federalism enabled the American People to conquer government power by dividing it.”).
\(^100\) Lynn A. Baker & Ernest A. Young, Federalism and the Double Standard of Judicial Review, 51 DUKE L.J. 75, 139 (2001); Robert F. Nagel, Federalism as a Fundamental Value: National League of Cities in Perspective, 1981 SUP. CT. REV. 81, 100 (“[T]he Federalists understood and emphasized that influence through electoral politics presupposes that state governments would exist as alternative objects of loyalty to the national government.”); Amar, Of Sovereignty, supra note ____ at 1450 (“Each government agency, state and national, would have incentives to win the principal’s affections by monitoring and challenging the other’s misdeeds.”).
\(^101\) THE FEDERALIST No. 46 (James Madison), supra note ___95 (noting that “a greater number of individuals will expect to rise” into state government); Ernest A. Young, Two Cheers for Process Federalism, 46 VILL. L. REV. 1349, 1369, 1381–84 (2001).
ability to check the national government and compete for the Peoples’ favor.\(^{102}\) Again, though not necessarily efficient, decentralization of power and the competition for political favor in the states was hoped to provide a critical check against an otherwise unchallenged and overweening federal government.\(^{103}\)

Critically, the quest for political competition required leaving states something meaningful to offer. Toward that end, the Framers sought to limit federal power by enumerating the subject matters over which it could attach.\(^{104}\) Article I vests Congress with the legislative power “herein granted,” and then specifies what those powers are.\(^{105}\) As Chief Justice Marshall famously proclaimed in *Gibbons v. Ogden*, the enumeration of Congress’s powers “presupposes something not enumerated.”\(^{106}\) The Framers’ decision to enumerate Congress’s specific powers, rather than to confer general legislative authority, presupposed that states would retain a measure of autonomy over the residue.\(^{107}\)

**B. The Supremacy Clause’s Original Meaning**

As bears repeating, the Supremacy Clause’s text facially discriminates as to the *types* of federal law that can preempt state law.\(^{108}\) Specifically, the (1) Constitution, (2) “Laws . . . made in Pursuance thereof” and (3) “treaties . . . shall be the supreme Law of the land.”\(^{109}\) If administrative action is covered, it must be by virtue of its qualification as “Laws . . . made in Pursuance [of the Constitution].” However, reading this provision in its textual, historical and structural context rather plainly shows that it was intended to mean federal statutes—and exclusively so. Other interpretations are plausible, but do not fit nearly as well with the written Constitution.\(^{110}\)

1. **Text**

First, the text. For administrative action to qualify for preemption it must be (1) “Law” (2) that is “made” (3) “in Pursuance” of the Constitution. None of these terms are constitutionally defined.

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\(^{102}\) Akhil Reed Amar, *Of Sovereignty and Federalism*, 96 YALE L.J. 1425, 1448–51 (1987) (“The People could confidently confer broad powers upon national agents precisely because they had also created a second set of specialized agents to monitor the first set . . . .”).

\(^{103}\) *Id.* at 1448–51; Young, *supra* note ___, at 1369, 1358; see also Gregory v. Ashcroft, 501 U.S. 452, 458 (1991) (“Perhaps the principal benefit of the federalist system is a check on abuses of government power.”).

\(^{104}\) The Federalist No. 45 (James Madison), *supra* note ___ (“The powers delegated by the proposed Constitution to the federal government are few and defined.”); see also Baker & Young, *supra* note ___, at 139.

\(^{105}\) U.S. CONST. art. I, § 1, 8, 18.

\(^{106}\) *Gibbons v. Ogden*, 22 U.S. 1, 195 (1824).


\(^{108}\) Clark, *supra* note ___, at 1326; U.S. CONST. art. VI, cl. 2.

\(^{109}\) U.S. CONST. art. VI, cl. 2.

\(^{110}\) Cf. Amar, *Supreme Court Forward, supra* note ___, at 54 (“Though not wholly determinate, documentarianism . . . seeks not merely a modestly plausible reading of the Constitution, but the most plausible reading, the reading that best fits the entire document’s text, enactment history, and general structure.”).
The term “Law” or “Laws,” however, is used several times throughout the original Constitution. For example, the term “Law” is used (1) elsewhere in the Supremacy Clause, referring to the “Law of the States”;111 (2) in Article I, referring to congressional “Laws” promulgated pursuant to bicameralism and presentment;112 (3) in Article II, referring to the President’s duty to take care that the “Laws be faithfully executed”;113 and (4) in Article III, referring to the Court’s jurisdiction over cases and controversies arising under the “Laws of the United States.”114

Thus, standing alone, the term “Laws” clearly includes but is not necessarily limited to federal statutes. However, that work is accomplished by the surrounding text. The Supremacy Clause refers not to Laws in general, but specifically to those “made in Pursuance [of the Constitution].”115 As Henry Monighan observes, no one in the Framing generation would have used the word “made” in reference to the judicial common law: that law was found or discovered, not made.116 Similarly, as Michael Ramsey explains, the original conception of the executive power simply did not include the ability to make Law.117 Critically, agencies employing executive power at most would have been thought to implement or interpret Congress’s Law—but the power to make Law was quite clearly, and exclusively, vested in the legislature.118

This reading is further buttressed by the Supremacy Clause’s caveat that Law be made “in Pursuance” of the Constitution. The “in Pursuance” requirement has generally been understood to include a procedural component, requiring that qualifying Laws be made in the “manner prescribed by the Constitution”119 (as opposed to those made pursuant to

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111 U.S. CONST. art. VI, cl. 2.
112 Id. art. I, sec. 7.
113 Id. art. II, sec. __.
114 Id. art III, sec. 2.
115 U.S. CONST. art. VI; see also 3 J. Story, Commentaries on the Constitution of the United States § 1831, p. 694 (1833) (“It will be observed, that the supremacy of the laws is attached to those only, which are made in pursuance of the constitution”).
116 Monaghan, Supremacy Clause Textualism, supra note __, at 768, 776-78. This observation notwithstanding, Professor Monaghan rejects the notion that federal common law should be excluded from the Supremacy Clause’s purview. But, as discussed below, his position is animated by modern, not originalist, conceptions of federal law. See infra notes __ and accompanying text. The question of whether federal common law can and/or should have preemptive effect has generated its own body of literature, and is beyond the scope of this Article. For treatments, see, e.g., id; Clark, Federal Common Law, supra note 1; Young [cite]; Original Meaning, supra note __; Strauss, Perils of Theory, supra note __. See Craig Green, Repressing Erie’s Myth, 96 CAL. L. REV. 595, 617-18 (2008).
117 See Ramsey, Original Meaning, supra note ____, at 17 (“In eighteenth-century language, “executive” power was understood in opposition to legislative power. Executive power, whatever it might contain, did not compass lawmaking power.”); see also 1 William Blackstone, Commentaries on the Laws of England 142-43, 261 (1765-69), as did The Federalist. See The Federalist, No. 47, at 303 (James Madison) (in England, “[t]he magistrate in whom the whole executive power resides cannot of himself make a law.”).
118 Ramsey, Original Meaning, supra note __, at 17.
119 See, e.g., id. (“This ‘in Pursuance’ caveat is most plausibly read to confer supremacy on all statutes that survive the bicameralism-and-presentment hurdles established in Article I, Section 7’); Alexander M. Bickel, The Least Dangerous Branch: The Supreme Court At The Bar Of Politics 9 (1962) (“[T]he proviso that only those federal statutes are to be supreme which are made in pursuance of the Constitution means that the statutes must carry the outer indicia of validity lent them by enactment in
In reference to federal statutes, that means passage according to Article I, Section 7 bicameral and presentment. Cases from the early republic also suggest that “in Pursuance” entails a substantive component that requires federal statutes be consistent with Congress’s powers. But I am aware of no originalist conception that interprets “in Pursuance” to entail a substantive requirement to the exclusion of a procedural one. Thus, “in Pursuance” might refer only to the procedural demands of Article I, Section 7, or might also include a substantive component: but, in either event, it refers to the Laws of Congress.

2. Drafting History

A textual interpretation that equates “Laws . . . made in Pursuance” of the Constitution with validly enacted federal statutes is also fully consistent with the Supremacy Clause’s drafting history. Prior to its final form, the Clause referred to the “legislative acts of the United States and “[t]he Acts of the Legislature” as supreme Law. There is no doubt that these phrasings referred to congressional statutes. Nor is there any evidence in the drafting history to suggest that the Committee of Detail’s decision to replace “Acts of the Legislature” with “Laws” was anything other than stylistic.

Moreover, as Bradford Clark has highlighted, the historical context precipitating what became the Supremacy Clause was linked to the “Great Compromise” reached between the large and small states that enabled the Constitution’s ratification. The small states convinced the

120 See, e.g., David P. Currie, The Constitution of the Supreme Court: The First Hundred Years 1789-1889, at 71-73 (1985) (noting that the reference to laws made in pursuance of ‘this Constitution’ was meant to distinguish those made under the Articles of Confederation).

121 This interpretation draws from Chief Justice Marshall’s early accounts. See Marbury v. Madison 5 U.S. (1 Cranch) 137, 180 (1803) (asserting that the "made in Pursuance" language excludes from supremacy acts of Congress that the Supreme Court deems unconstitutional); see also McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 423 (1819) (construing "in pursuance thereof" to require compliance with Constitution's substantive restrictions on federal power).

122 See Wyeth v. Levine, 555 U.S. 555, 586 (2009) (Thomas, J., concurring) (arguing that federal laws “made in Pursuance” of the Constitution must comply with the substantive and procedural limits on Congress’s lawmaking power). But cf. Perils of Theory, supra note __, at 1570-71 (arguing that the claim for statutory exclusivity is weakened inssofar as “Pursuance” embodies a “substantive and not merely” a procedural requirement).

123 Clark, supra note __, at 1334; Original Meaning, supra note __, at 18-22 (explaining how the “drafting and ratifying history confirms the most natural reading of the text: that Article VI refers to the Constitution, treaties, and federal statutes.


125 See generally Clark, Constitutional Compromise, supra note __ at 1422-23. For a discussion of the Great Compromise that resulted in equal representation in the Senate, see generally Max Farrand, The Framing of the Constitution of the United States 91–112 (1913). The delegates spent almost three weeks debating the mode of representation in Congress without a solution, “and the convention was on the point of breaking up.” Id. at 94. After the Convention resolved that representation in the lower branch of
large ones “to incorporate three concrete proposals into the new Constitution—equal suffrage in the Senate, a Supremacy Clause that limited supremacy to three specific sources of law [i.e., the Constitution, “Laws,” and treaties], and federal lawmaking procedures that required the participation of the Senate to adopt each of these sources.”\(^{126}\) As Professor Clark recounts, these bargained-for provisions were “the price that the large states had to pay to secure the small states’ assent to the new Constitution.”\(^{127}\)

It is surely true, as Henry Monaghan argues, that the Supremacy Clause was an endorsement of federal power; after all, the Clause established the primacy of federal law.\(^{128}\) Like many constitutional expressions, however, the Supremacy Clause was born of intense debate and compromise.\(^{129}\) The compromise, most relevant here, was to limit the types of federal action that could qualify for preemptive effect. The Supremacy Clause’s purpose was thus cross-cutting: to give preemptive effect to the Constitution, statutes, and treaties; yet, at the same time, to give preemptive effect exclusively to those three sources of law.\(^{130}\)

3. \textit{Structuralism}

Although the Supremacy Clause is most commonly associated with federalism, it is as much about federal separation of powers.\(^{131}\) Reading Article I and Article VI (Supremacy Clause) as interlocking provisions reflects a critical structural limitation imposed by the Framers.\(^{132}\) State laws would be preserved except to the extent that they conflicted with federal statutes (or the Constitution or treaties).

The finely wrought legislative process was intended to “preserve[] the governance prerogatives of the states by making federal law relatively difficult to adopt.”\(^{133}\) The notion that the Executive could bypass the Senate in making law, and that such Executive law would be supreme

\(^{126}\) Clark, \textit{Constitutional Compromise}, supra note \_, at 1436.

\(^{127}\) \textit{Id}. at 1436. \textit{See also Original Meaning}, supra note \_, at 42-43 (linking the Supremacy Clause to the Great Compromise).

\(^{128}\) Monaghan, \textit{Supremacy Clause Textualism}, supra note \_, at 749.

\(^{129}\) See Clark, \textit{Constitutional Compromise}, supra note \_ (discussing the historical context surrounding adoption of the Supremacy Clause).

\(^{130}\) Clark, \textit{supra} note \_ at 701; \textit{Original Meaning}, supra note \_, at 18 (“In a document born of compromise, one would expect that a nationalizing provision would come with some offer of reassurance. One way to reassure would be to describe national supremacy in limited and precise terms . . . .”).


\(^{133}\) Clark, \textit{supra} note \_ at 711.
over state law, would have been a constitutional deal breaker. That the timing of the Supremacy Clause’s adoption coincided precisely with the Great Compromise only reinforces this premise.\textsuperscript{134} As put by Professor Clark, “[i]t would make little sense for the Constitution to specify elaborate, finely-wrought lawmaking procedures and at the same time to sanction freestanding, unstructured lawmaking wholly outside these procedures.”\textsuperscript{135}

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In sum, the Constitution’s text, drafting history and structure mutually reinforce an interpretation of the Supremacy Clause that excludes administrative preemption. Even insofar as the original Constitution may leave room for agencies to make policy in the context of implementing and interpreting Congress’s Law, on the best originalist interpretation, the Constitution does not leave room for agency policies to have preemptive effect. As further developed below, this distinction between agencies’ ability (1) to make policy and (2) to make policy having preemptive effect is critical—both in theory and practice. As Professor Ramsey explains, the Supremacy Clause “does not deny the possibility of non-Article VI law (so long as it is not applied to displace otherwise-constitutional state law).”\textsuperscript{136}

\textbf{C. The Originalist Paradox (and the Non-Originalist Response)}

If the foregoing originalist assessment holds, then administrative preemption is a paradox: it requires agency action to simultaneously qualify as “Law” for federalism purposes and “not Law” for separation of powers. But if agency action qualifies as “Law,” then it should be void under separation-of-powers principles (and thus ineligible to preempt state law). Meanwhile, if agency action does not qualify as “Law” (thus avoiding a separation-of-powers problem), then it would seem to fall beyond the Supremacy Clause’s purview. In short, for purposes of preemption, the Constitution offers federal action a choice: to be or not to be Law. If Law, then it can preempt state law; if not Law, then it cannot preempt. The result is not necessarily efficient. But, for the Framers, efficiency was not the only point.

To be sure, the operation of modern government abhors the Framers’ Law-or-not-Law choice. As discussed in Part V, it is far more convenient to permit federal action to be Law for purposes of the Supremacy Clause and, at the same time, to not be Law for purposes of Articles I and II. Indeed, this Law-and-not-Law option is more than just convenient; it

\textsuperscript{134} See Clark, \textit{Constitutional Compromise}, supra note ___ (linking adoption of the Supremacy Clause to the Great Compromise, which gave rise to equal representation in the Senate); \textit{see also} supra notes ___ and accompanying text.

\textsuperscript{135} Clark, \textit{supra} note __, at 711.

\textsuperscript{136} \textit{Original Meaning}, supra note __, at 50.
arguably provides a more—"more perfect"—means toward promoting the Union's welfare.\textsuperscript{137} It is in this spirit that we can appreciate attempts of some notable scholars to deconstruct the paradox—not to subvert administration preemption, but rather to constitutionally justify it.

Professor Monaghan favors this approach.\textsuperscript{138} He concedes "that, as an historical matter, 'Laws . . . made in Pursuance [of the Constitution] referred only to Acts of Congress."\textsuperscript{139} Still, however, he argues that \textit{changed circumstances} counsel for interpreting this phrase to include "the commands of any institution whose lawmaking authority has been recognized over time"—a category that would include federal agencies (as well as courts).\textsuperscript{140} According to Professor Monaghan, a textualist/originalist approach cannot "supply a satisfying theory of our contemporary constitutional order because it is inconsistent with deeply entrenched practices and thus would destabilize far too much settled doctrine."\textsuperscript{141}

Peter Strauss echoes this concern.\textsuperscript{142} "Whatever the drafters' theoretical expectations may have been," Professor Strauss argues, "the passage of time has overcome them."\textsuperscript{143} And, though he too concedes that earlier drafts of the Supremacy Clause would seem to foreclose administrative preemption,\textsuperscript{144} Professor Strauss finds sufficient ambiguity in the final constitutional text to permit the practice.\textsuperscript{145} In particular, Professor Strauss first observes that the term "Laws" is employed elsewhere in the Constitution to refer to things other than federal statutes.\textsuperscript{146} He recognizes that these other usages of the term "Law[s]" do not share the Supremacy Clause's important qualifying language—"made in Pursuance" of the Constitution.\textsuperscript{147} But, for Professor Strauss, these caveats may be deemed satisfied in the administrative context when Congress delegates lawmaking power to agencies.\textsuperscript{148}

\begin{itemize}
  \item \textsuperscript{137} Cf. U.S. CONST. pmbl.
  \item \textsuperscript{138} Monaghan, \textit{Supremacy Clause Textualism, supra note __}, at 742 (arguing "that important aspects of the intellectual world of the Founders have wholly vanished, rendering greatly problematic any originalist understanding of the Supremacy Clause.").
  \item \textsuperscript{139} Id. at 741.
  \item \textsuperscript{140} Id. at 740–42.
  \item \textsuperscript{141} Id. at 742.
  \item \textsuperscript{142} Strauss, \textit{Perils of Theory, supra note __}, at 1591 (fearing that an originalist reading of the Supremacy Clause would require abandoning the "delegation doctrine as we know it in any context implicating state law").
  \item \textsuperscript{143} Id. at 1574; \textit{see also id.} at 1591 ("Professor Clark's treatment of this issue reflects the difficulty anyone would face in attempting to reconcile the historical ideal of the Supremacy Clause as he propounds it with contemporary realities.").
  \item \textsuperscript{144} Id. at 1574.
  \item \textsuperscript{145} Id. at 1568–74.
  \item \textsuperscript{146} Id. at __. \textit{See also supra} notes __-__ and accompanying text.
  \item \textsuperscript{147} Id. at 1570–71.
  \item \textsuperscript{148} Id. (arguing that "for regulations, just as for statutes, the power of the action to command state obedience depends on its having been made in pursuance of—that is to say, under the substantive authority conferred on federal officers by—the Constitution").
\end{itemize}
Professor Merrill, also for functional reasons, reaches a similar conclusion.\textsuperscript{149} He suggests that if agencies exercise congressionally delegated authority, “then it is possible to speak of the [agency’s] edict as being one that has been made ‘in Pursuance’ of the Constitution, to wit, in pursuance of a legislative delegation of lawmaking authority permitted by the Necessary and Proper Clause.”\textsuperscript{150}

Even Professors Clark and Ramsey—who otherwise champion the originalist view—seem willing to make conceptual peace with administrative preemption. In particular, Professor Clark suggests that, when Congress delegates policymaking power, it is effectively Congress that preempts state law, thus potentially alleviating any Supremacy Clause problem.\textsuperscript{151} In similar fashion, Professor Ramsey offers a modern-day justification for administrative preemption: If “Congress . . . may convey interpretation or implementation authority to a non-Article-I body, Congress’ own act—combined with the acts of interpretation/implementation of the body receiving the delegation—creates supreme law.”\textsuperscript{152}

These moves to unwind or justify the paradox are sensible. And, I will have more to say about them later. For present purposes, I wish only to make three points. The first is that the foregoing academic conceptions are not the Court’s. That matters for reasons developed in Part IV. Second, these academic conceptions are mostly non-originalist moves. Although Professors Monaghan, Strauss and Merrill make arguments from text, history and structure, none of them conclude that administrative preemption fits within an originalist frame. Rather, the conclusions they reach seem mostly directed at creating a reasonable doubt about the Constitution’s original meaning.\textsuperscript{153} Once this space is cleared, their sensitivity to contemporary understandings and arrangements are what do the work of bringing agency action within the Supremacy Clause’s fold. Meanwhile, Professors Clark’s and Ramsey’s accommodations for administrative preemption seem principally motivated by a desire to narrow the gap between their interpretations of the Supremacy Clause and the Court’s existing doctrines. In that sense, stare decisis operates as an exception to—not a part of—their otherwise

\textsuperscript{149} Merrill, supra note __, at 763–64.
\textsuperscript{150} Id.
\textsuperscript{151} Clark, Separation of Powers, supra note __, at 1433-34.
\textsuperscript{152} Original Meaning, supra note __, at 10 (“To the extent that an agency (or the President directly) acts with statutory authority, the statutory authority supplies the basis for displacing state law”).
\textsuperscript{153} Perils of Theory, supra note __, at 1568-69 (“In arguing that what may have been the original theory underlying the Founders’ choice of our Constitution’s text is not a persuasive basis for interpretation of that text today, I am not arguing that the [originalist] interpretation Professor Clark seeks to advance is unavailable or impermissible”); Supremacy Clause Textualism, supra note __, at 768 (“Shall we conclude that the original understanding was that “Laws” in the Supremacy Clause meant only Acts of Congress? Reflection convinces me that the answer is yes; but it is for reasons quite different from [Professor] Clark’s political and structural account.”).
originalist interpretations.\textsuperscript{154}

Third, the non-judicial/non-originalist moves to unwind the paradox transcend debates over administrative preemption. They reflect much deeper anxieties about constitutionalism and our modern theories of government, to which administrative preemption is anchored.\textsuperscript{155} Administrative preemption is made possible, if at all, only on a theory of congressional delegation. As the Court itself has said, “an agency literally has no power to act, let alone preempt the validly enacted legislation of a sovereign State, unless and until Congress confers power upon it.”\textsuperscript{156} But this formulation begs whether Congress may constitutionally delegate supremacy. If Congress cannot delegate supremacy (writ small), then is it because Congress cannot delegate lawmaking (writ large)? Inversely, if Congress can delegate supremacy (writ small), does this also mean that Congress can delegate lawmaking (writ large)?

Linking questions about the delegation of policymaking and the delegation of supremacy is not logically compelled.\textsuperscript{157} But it is of logical concern. An originalist reading of the Supremacy Clause that would foreclose administrative preemption, Professor Strauss remarks, would necessitate abandoning the “delegation doctrine as we know it in any context impacting state law.”\textsuperscript{158} That would include most contexts, given today’s expansive federal power. Though I disagree that foreclosing administrative preemption would debunk modern government, it no doubt would affect how it operates. (Bracketing, for now, questions about what those affects might be and whether they are normatively desirable).\textsuperscript{159}

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The foregoing offered an originalist paradox-hypothesis, and introduced some non-originalist objections. At root, these objections spring from our evolving conceptions of separation of powers and federalism. But, more generally, they spring from anxiety over what it would mean if administrative preemption is a constitutional impossibility. With these concerns in hand, the analysis below takes a deeper look at our modern conceptions of government. It also makes the case for the importance of honoring the Court’s modern conceptions, rather than well-intentioned academic ones (which unquestionably are of great value, but of a

\textsuperscript{154} See \textit{Original Meaning}, supra note __, at 6 (“because the aspects of modern law that raise tensions with the clause can be narrowly and categorically described, combining stare decisis and original meaning can provide a practical approach to resolving supremacy disputes that does not further erode the clause’s original meaning but also does not require substantial changes in entrenched modern law.”).

\textsuperscript{155} Cf. Monaghan, \textit{Supremacy Clause Textualism}, supra note __, at 742 (“even if the clear weight of the historical evidence supported it, Supremacy Clause textualism could not supply a satisfying theory of our contemporary constitutional order because it is inconsistent with deeply entrenched practices and thus would destabilize far too much settled doctrine”)


\textsuperscript{157} See \textit{infra} notes __-__ and accompanying text (explaining why); see also Rubenstein, \textit{Delegating Supremacy}, supra note __, at __.

\textsuperscript{158} Strauss, \textit{supra} note __, at 1591.

\textsuperscript{159} See \textit{infra} notes __-__ and accompanying text (discussing pragmatic considerations).
fundamentally different kind).\textsuperscript{160}

III. THE “CONTINGENT CONCESSIONS” FOR MODERN GOVERNMENT

This Part provides a stylized account of how the Framers’ structural strategies of separation of powers and federalism have been repackaged to accommodate the modern administrative state. As noted, I employ the term “administructuralism” to capture this transformation. My purpose is not to argue that the resulting system is unconstitutional—just that it is surely different than what the framing generation intended or understood.\textsuperscript{161} Federal power is limited, but not in the way or to the extent originally planned. I also resist committing to whether the resulting system meets the framing generation’s “more perfect” ideal,\textsuperscript{162} is more-more perfect, less perfect, or something else. My objectives for this Article purposefully try not to depend on those judgments.

Section A briefly describes the engines of change behind “administructuralism.” Sections B and C describe the structural “concessions” made for modern government along both the separation-of-powers and federalism dimensions, respectively. Critically, however, this narrative understands the concessions made for modern government as being “contingent” on the legitimating theories offered by the Court. On this account, administructuralism reflects a series of “contingent concessions” made for modern government.

A. Restructuring

The Framers fully appreciated that the Constitution’s parchment boundaries would prove elusive and dynamic.\textsuperscript{163} This indeterminacy was famously capitalized upon in the New Deal era.\textsuperscript{164} The New Deal reformers perceived separated federal power as an untoward drag on the federal government’s ability to address the social and economic problems that precipitated the Great Depression.\textsuperscript{165} At the same time, the Framing

\textsuperscript{160} Academic commentary can influence and shape the law. But law journals are not law (not even lower-case law).

\textsuperscript{161} Cf. Monahan, \textit{Stare Decisis}, supra note __, at 732 ("I doubt whether any acceptable conception of original understanding can provide a satisfactory account of the New Deal.").

\textsuperscript{162} See U.S. Const. pmbl.

\textsuperscript{163} \textit{The Federalist No. 37} (James Madison), \textit{supra} note __ ("Experience has instructed us that no skill in the science of government has yet been able to discriminate and define, with sufficient certainty, its three great provinces—the legislative, executive, and judiciary. . . . Questions daily occur in the course of practice which prove the obscurity which reigns in these subjects.").

\textsuperscript{164} For a sampling of New Deal treatments, see, for example, P. Conkin, \textit{The New Deal} (2d Ed. 1975); K. Davis, \textit{FDR: The New Deal Years}, 1933-1937 (1986); O. Graham, Jr., \textit{Toward A Planned Society} (1976); E. Hawley, \textit{The New Deal and the Problem of Monopoly} (1966); R. Hofstadter, \textit{The Age of Reform} (1955); B. Karl, \textit{The Uneasy State} (1983); J. Patterson, \textit{Congressional Conservatism and The New Deal} (1967); J. Patterson, \textit{The New Deal and the States: Federalism in Transition} (1969).

To be sure, the origins of the modern administrative state predate the New Deal. But it was during the New Deal that its defining features were famously defended and cemented.

\textsuperscript{165} Sunstein, \textit{supra} note __, at 423-24, 433. For contemporary assessments, see W. Elliot, \textit{The Need For Constitutional Reform: A Program For National Security} 31-34, 200-02 (1935) (lamenting checks and balances as unworkable and arguing for increased presidential power); W. Wilson, \textit{Constitutional Government in the United States} 221 (1921) ("[W]e must think less of checks and balances and more of coordinated power, less of separation of functions and more of the synthesis of action.").
vision of states as bulwarks of liberty seemed feckless. States had proven impotent to effectively handle the troubles of the day; indeed, states were largely perceived as the source of blame.\textsuperscript{166} Competition among states was perceived to generate “race-to-the-bottom” pathologies that disadvantaged the needy and prevented the type of coordinated, centralized action believed necessary to restore the general welfare.\textsuperscript{167}

In the minds of the New Dealers, the limits on federal power were too great—or, what is the same to say, federal power was not strong enough. These perceptions fueled a progressive movement for institutional change along both the separation of powers and federalism dimensions.\textsuperscript{168} Though treated separately below, the animating force of change was mostly unitary: the government inefficiencies formerly embraced as a cog against tyranny could not withstand the inertial tide of pragmatism.\textsuperscript{169}

\textbf{B. Separation of Powers}

\textit{1. The Horizontal Concessions}

Although a number of structural concessions arguably have been made for modern government along the horizontal dimension, this section focuses on the one most directly relevant: congressional delegation of lawmaking to federal agencies. Honorable mention is also had for the combination of government functions in agencies.\textsuperscript{170} Together, these structural concessions for modern government vastly accumulate power in the Executive branch, “both in absolute terms and relative to Congress.”\textsuperscript{171}

\textbf{a. Delegation of Lawmaking}

The Framers foresaw Congress as the most dangerous branch.\textsuperscript{172} As earlier noted, the federal lawmaking requirements of bicameralism and

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\item \textsuperscript{166} Sunstein, supra note ___, at 424, 504-05 (“During the New Deal period . . . states appeared weak and ineffectual, unable to deal with serious social problems; they seemed too large to provide a forum for genuine self-determination.”).
\item \textsuperscript{167} Sunstein, supra note ___, at 424, 504-05.
\item \textsuperscript{168} Id. (tracing these developments).
\item \textsuperscript{169} Monahan, \textit{Stare Decisis}, supra note ___, at 730 (noting that the imperatives of the administrative state have generally prevailed over otherwise limiting constitutional provisions).
\item \textsuperscript{170} One might reasonably add the \textit{Chevron} doctrine to this list. See \textit{Chevron}, U.S.A., Inc. v. NRDC, Inc., 467 U.S. 837, 843 (1984) (holding that courts must defer to reasonable interpretations of ambiguous statutes, even if the court might independently reach a different interpretation). \textit{Cf.} Farina, supra note ___ (indicating \textit{Chevron} on separation-of-powers grounds). I do not include \textit{Chevron} on my list of constitutional concessions, mostly because my arguments in this Article do not depend on it. For present purposes, it should suffice simply to note that \textit{Chevron}—like the delegation and combination postulates featured in the text—\textit{expands} the Executive power.
\item \textsuperscript{171} Greene, supra note ___, at 134; \textit{see also} WILLIAM N. ESKRIDGE, JR. \& JOHN FEREJOHN, A REPUBLIC OF STATUTES: THE NEW AMERICAN CONSTITUTION 533 (2010) (noting that the “shift to agency lawmaking has been accompanied by an overall shift of lawmaking authority from Congress to the President”).
\item \textsuperscript{172} \textit{The Federalist} No. 51, at 322 (James Madison) (“In republican government, the legislative authority necessarily predominates.”); \textit{The Federalist} No. 48 (James Madison), supra note ___ (“The legislative department is everywhere extending the sphere of its activity and drawing all power into its impetuous vortex.”); Greene, supra note ___, at 125 (discussing the Framers’ assumption that the legislature would be the most dangerous branch).
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presentment were designed to suppress congressional overreaching by disabling Congress from changing public policy too easily or often. But what the Framers did not anticipate was the relative ease by which Congress could bypass the legislative dam by delegating decisions to the Executive branch. Nor, for that matter, could the Framers anticipate that Congress would ever much want to cede power to its Executive rival.

Today, however, Congress has a long supply of reasons to delegate policy decisions to agencies—even, and sometimes especially, in regards to important matters. For instance, Congress may delegate (1) to overcome informational costs and lack of resources; (2) to avoid political responsibility; (3) to avoid political gridlock; and/or (4) out of recognition that, as compared to Congress, agencies may produce better decisions on account of administrative expertise, efficiency, and flexibility to respond to changing conditions.

Yet none of these are constitutional reasons. The conventional account thus holds that Congress may not lawfully delegate the legislative power. That is generally believed to be so because Article I vests “all legislative” power in Congress, Article II does not vest similar power in the Executive, and there would be little point to the Constitution’s bicameralism and presentment requirements if federal lawmaking could be achieved by other means.

The great puzzle of modern government, then, is how to square the proscription against Congress’s delegation with the fact that it massively

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174 Farina, supra note ___.
175 See id.; see also FEDERALIST No. 51 (James Madison), supra note ___ (anticipating the propensity of the political branches to counter each other for power).
176 David B. Spence, Administrative Law and Agency Policy-Making: Rethinking the Positive Theory of Political Control, 14 YALE J. ON REG. 407, 427 (1997) (“The temptation to ‘pass the buck’ . . . means not only that agencies face many policy questions on which legislation is silent, but also that many of these policy questions will be important, or at least controversial.”); see also DAVID EPSTEIN & SHARYN O’HALLORAN, DELEGATING POWERS: A TRANSACTION COST POLITICS APPROACH TO POLICY MAKING UNDER SEPARATE POWERS (POLITICAL ECONOMY OF INSTITUTIONS AND DECISIONS) 129-33 (1999) (surveying delegation theories).
177 See Richard J. Pierce, Jr., Political Accountability and Delegated Power: A Response to Professor Loui, 36 AM. U.L. REV. 391, 404 (1987) (“Given the nature and level of government intervention that Congress now authorizes, it could not possibly make the hundreds, or perhaps thousands, of important policy decisions that agencies make annually.”).
178 Elly, supra note ___, at 131-32 (“on most hard issues our representatives quite shrewdly prefer not to have to stand up and be counted but rather let some executive-branch bureaucrat, or perhaps some independent regulatory commission, ‘take the inevitable political heat.’”).
179 Sunstein, supra note ___, at 445.
181 Whitman, 531 U.S. at 472 (“Article I, § 1, of the Constitution vests ‘all legislative Powers herein granted’ in Congress and ‘permits no delegation of those powers’”; THOMAS COOLEY, CONSTITUTIONAL LIMITATIONS 224 (8th ed. 1927) (“One of the settled maxims in constitutional law is, that the power conferred upon the legislature to make laws cannot be delegated by that department to any other body or authority.”).
does so. Some conceptual repackaging is necessary, and a number of legitimizing theories have been advanced. For example, Thomas Merrill interprets Article I’s vesting of “all legislative” power to mean that “only Congress can delegate.” Under his exclusive-delegation conception, the Constitution confers—rather than denies—Congress’s authority to delegate lawmaking. Eric Posner and Adrian Vermuele likewise argue that the Constitution does not forbid the delegations that define our modern government. For them, an unlawful delegation would occur only in unheard of cases where “Congress or its individual members attempted to cede to anyone else the members’ de jure powers as federal legislative officers, such as the power to vote on proposed statutes.”

The Court’s legitimizing theory is different, but tellingly lands in the same place. Specifically, the Court narrowly defines “legislative power” to mean the exercise of unconstrained discretion in making rules. Thus, under the Court’s familiar articulation, no “forbidden delegation of legislation” occurs if Congress provides an “intelligible principle” in the statute to guide agency discretion. This approach to nondelegation acknowledges that “a certain degree of discretion, and thus of policymaking, inheres in most executive action.” And, it subtly shifts the inquiry from a qualitative one to a quantitative one, testing whether Congress has given the executive too much discretion. Thus, under Justice Scalia’s formulation:

What Congress does is to assign responsibilities to the Executive; and when the Executive undertakes those assigned responsibilities it acts, not as the “delegate” of Congress, but as the agent of the People. At some point the responsibilities assigned can become so extensive and so unconstrained that Congress has in effect delegated its legislative power; but until that point of excess is reached there exists, not a “lawful” delegation, but no delegation at all.

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184 Id. at 2100-01.
185 Id. at 2130–38. For a similar treatment, see Henry P. Monaghan, Marbury and the Administrative State, 83 COLUM. L. REV. 1, 25–28 (1983).
187 Id. at 1726.
188 Merrill, supra note ___, at 2099.
189 J.W. Hampton, Jr., & Co. v. United States, 276 U.S. 394, 409 (1928).
190 See Whitman, 531 U.S. at 475 (quoting Mistretta v. United States, 488 U.S. 361, 417 (1989) (Scalia, J., dissenting)); see also Lawson, supra note ___ (“A government function is not legislative . . . merely because it involves some element of policymaking discretion: it has long been understood that some such exercises of discretion can fall within the definition of the executive power.”).
192 Loving, 517 U.S. at 776-77 (Scalia, J., concurring in part and in the judgment). To the extent it was not already, this conception of the non-delegation took hold in the Court’s majority opinion in Whitman, with Justice Scalia writing for the majority.
Instructively, “virtually anything counts as an intelligible principle.”  The post-New Deal Court has yet to overrule Congress on delegation grounds, even in the face of sweepingly broad statutory permissions for agencies to make binding rules “in the public interest.”

The Court’s reasons for tolerating congressional delegation are twofold. First, the Court inwardly recognizes its institutional limitation to police the lawmaking divide. This point was expressed in *Whitman v. American Trucking Associations*, where the Court explained that it has “almost never felt qualified to second-guess Congress regarding the permissible degree of policy judgment that can be left to those executing or applying the law.” The Court’s second reason looks outward to the pragmatic demands of modern society. For example, in *Loving v. United States*, the Court observed that “[t]o burden Congress with all federal rulemaking would divert that branch from more pressing issues, and defeat the Framers’ design of a workable National Government.” Along similar lines, the Court in *Mistretta v. United States* recognized that “in our increasingly complex society . . . Congress simply cannot do its job absent an ability to delegate power under broad general directives.”

As Gary Lawson precipitously explains, “[t]he rationale for [the Court’s] virtually complete abandonment of the nondelegation principle is simple: the Court believes—possibly correctly—that the modern administrative state could not function if Congress were actually required to make a significant percentage of the fundamental policy decisions.” Faced with choosing between the original and modern structures of government, “the Court has had no difficulty making the choice” in favor of the latter.

As a result, Congress is able to pass far more law than it otherwise would, or could. It is vastly easier for the collective Congress to agree on a goal—e.g., clean the air, create a safe work place, etc.—than it is to agree on the details. Yet the details are often the most critical aspects of law, or at least the most contentious, because it is there that most rights and duties are found. Congress’s ability to delegate those decisions *en masse* loosens lawmaking’s procedural grip, and, with it, the representational accountability, deliberation, inertial resistance, and factional competition those procedures were designed to advance.

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193 Manning, supra note ___, at 898-901.
197 *Mistretta v. United States*, 488 U.S. 361 (1989). For an older expression of this point, see *Union Bridge Co. v. United States*, 204 U.S. 364, 387 (1907) (noting that to deny power to delegate “would be ‘to stop the wheels of government’ and bring about confusion, if not paralysis, in the conduct of the public business”).
199 *Id.*
None of this is to insist that congressional delegations are unconstitutional. That judgment, again, depends mightily (if not entirely) on one’s preferred constitutional theory. Still, the foregoing discussion sets the stage for a designedly more modest claim: the Court’s abstention in policing the lawmaking divide is a structural concession made for modern government. Indeed, it is a concessional fountainhead. As further developed below, congressional delegation of broad and undefined discretionary power “deranges virtually all constitutional relationships.”

b. Combination of Federal Functions

James Madison described the combination of lawmaking, executive, and judicial powers in the same institution as “the very definition of tyranny.” The New Deal, however, ushered in a new model. One of its enduring legacies is the “prevalence of agencies that combine all three government functions.” Indeed, these functions are often consolidated in the same people within those agencies.

Of course, irrespective of how an agency exercises its consolidated power, the very existence of this consolidation concedes away the prophylactic security against its misuse. As Professor Lawson explains, consolidation of lawmaking, executive, and adjudicatory powers in agencies seems to run afoul of Articles I, II, and III, simultaneously. The post-New Deal Court, however, has “never seriously questioned the constitutionality of this combination of functions in agencies.”

At times, the Court has sought to justify agencies’ combative powers by reference to “quasi-legislative” and “quasi-judicial” powers. But, as Justice Jackson once remarked, “the mere retreat to the qualifying ‘quasi’ is implicit with confession that all recognized classifications have broken down.” Indeed, just last term, Chief Justice Roberts described the combination of powers in agencies as “an exception to the constitutional plan;” one that was not intended by the Framers, but now a “central feature of modern American government.”

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201 THE FEDERALIST NO. 47 (James Madison), supra note ___.
202 Lawson, supra note ___, at 1233. Included on the long list of such agencies are the Environmental Protection Agency (EPA), the Federal Communications Commission (FCC), the Food and Drug Administration (FDA), the Federal Trade Commission (FTC), the National Labor Relations Board (NLRB), and the Securities and Exchange Commission (SEC).
203 Lawson, supra note ___, at 1248-49.
204 Id. at 1233 (impugning as unconstitutional the combination of executive, legislative, and judicial powers in administrative agencies); McCutchen, supra note ___, at 2 (same).
205 Lawson, supra note ___, at 1249.
206 See, e.g., Humphrey’s Ex’r v. United States 295 U.S. 602, 629 (1935) (holding Congress had authority to limit president’s removal authority over quasi-judicial and quasi-legislative officers).
2. The Horizontal Contingencies

The Executive branch has far more power—in kind and degree—as a result of congressional delegation and the combination of functions in agencies. But, as noted, whether this transformation is unconstitutional depends on one’s preferred constitutional theory. The two foremost separation-of-powers theories are “formalism” (most commonly associated with originalism) and “functionalism” (most commonly associated with non-originalism). This Article does not choose sides in that classic debate. But, for two reasons, it will be useful to appreciate why we have it: first, because the debate itself has shaped the Court’s separation-of-powers jurisprudence in ways that bear upon administrative preemption; second, because my evaluation of administrative preemption hopes to accommodate, as much as possible, the animating features of both interpretive philosophies.

A “pure formalist” ascribes to the view that “each of the three branches has exclusive authority to perform its assigned function, unless the Constitution itself permits an exception.” Under this conception, however, the administrative state is unconstitutional. And, therein lay formalism’s kryptonite. To declare the administrative state invalid—or, to seriously do anything about it—would be incredibly destabilizing. Plus, if we believe that the administrative state is necessary—or, at least better than a system without it—some alternative to formalism’s

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209 E.g., Farina, supra note ____, at 523 (“T]he dominance of the executive that has followed the delegation of regulatory power cannot be squared with the original commitment to separation of powers . . . .”); William P. Marshall, Eleven Reasons Why Presidential Power Inevitably Expands and Why it Matters, 88 B.U.L. REV. 505, 506 (2008) (“[T]he expansion in presidential power has created a constitutional imbalance between the executive and legislative branches, calling into doubt the continued efficacy of the structure of separation of powers set forth by the Framers.”).

210 Compare McCutchen, supra note ____, at 8-9 (“Formalism in the separation of powers context involves the application of more or less rigid rules, rather than flexible standards, to legal problems.”); Frederick Schauer, Formalism, 97 YALE L.J. 509, 510 (1988) (“At the heart of the word ‘formalism,’ in many of its numerous uses, lies the concept of decision making according to rule.”) with BENJAMIN N. CARDozo, The Nature of the Judicial Process 98-105 (1921) (commenting on evolution of functionalism); Merrill, supra note ____, at 232-33 (describing functionalism).

211 For one treatment, see Symposium, Formalism Revisited, 66 U. CHI. L. REV. 527 (1999).


214 See, e.g., Farina, supra note ____, at 526; Lawson, supra note ____, at 1233; Henry Paul Monaghan, Stare Decisis and Constitutional Adjudication, 88 Colum. L. Rev. 723, 729-35 (1988); see also Peter L. Strauss, The Place of Agencies in Government: Separation of Powers and the Fourth Branch, 84 Colum. L. Rev. 573, 580-81 (1984) (noting that it is “difficult to accommodate both [our modern government] and our continuing assertion that the Constitution is law”).

215 See, e.g., McCutchen, supra note ____, at 11 (observing this “overriding problem with formalism”); see also Harold H. Bruff, Presidential Power and Administrative Rulemaking, 88 Yale L.J. 451, 498-99 (1979) (same); Strauss, supra note ____, at 596 (same).
that straightjacketing effect seems warranted.\textsuperscript{216} That is what functionalism offers.

Methodologically, a pure functionalist takes certain aspects of modern government as unassailable postulates, and then reasons backwards to accommodate them.\textsuperscript{217} Substantively, functionalists reject the notion that government action can be neatly separated.\textsuperscript{218} Instead, functionalists argue, courts should generally defer to Congress’s allocation of government power, and should intervene only when necessary to prevent congressional tampering with the “core” functions of each branch.\textsuperscript{219}

Neither formalism nor functionalism is beyond reproach. As already noted, the conceptual difficulty for pure formalists is the resulting constitutional indictment of the administrative state. At the same time, however, the functionalist approach is condemnable on methodological grounds for its backward-working logic, and on substantive grounds for its general disregard of structural principles.\textsuperscript{220} If formalism’s major flaw is rigidity, functionalism’s major flaw is “that it is not rigid enough.”\textsuperscript{221}

Most formalists and functionalists have thus made accommodations for the other. Formalists generally adopt a “grandfather strategy” that accepts certain aspects of the administrative state as water under the bridge, while subjecting less entrenched government innovations to rigorous (and generally originalist) separation-of-powers purity.\textsuperscript{222} The delegation and combinative postulates described above are the quintessential examples of grandfathered institutions.\textsuperscript{223} Indeed, this recognition probably serves to explain why separation-of-powers champions, like Justice Scalia, may tolerate delegation of lawmaking even though they may call it something else.\textsuperscript{224}

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\item[216] Brown, supra note ___, at 1526 (stating that formalism tends to “straightjacket the government’s ability to respond to new needs in creative ways”).
\item[217] See Eskridge, supra note ___, at 21 (explaining functionalism’s inductive approach; Gary Lawson, Prolegomenon to Any Future Administrative Law Course: Separation of Powers and the Transcendental Deduction, 49 St. Louis U.L.J. 885, 889 (2005) (“The constitutionality of the basic institutions of modern governance is the starting point of functionalist constitutional argument rather than a testable, and possibly false, conclusion.”); Strauss, supra note ___, at 1574 (advocating a “dynamic approach to constitutional interpretation that . . . finds [constitutional] meaning best suited both to continuity with established understandings and to the exigencies of the present”).
\item[218] Merrill, supra note ___, at 231 (explaining that formalists and functionalists “disagree is over what sorts of deviations are permitted from the one function-one branch equation”); see also Sunstein, supra note ___, (“In the most extreme version of functionalism, the idea of a specified allocation of functions would disappear altogether, leaving only the notion of a general diffusion or balancing of power among the branches.”)
\item[219] See, e.g., Merrill, supra note ___, at 232-33 (describing functionalism)
\item[220] McCutchen, supra note ___, at 3 (“Functionalism should be rejected because it amounts to no judicial review at all”).
\item[221] Merrill, supra note ___, at 234.
\item[222] See Merrill, supra note ___, at 234.
\item[223] See Lawson, supra note ___, (describing these features of modern government as postulates); Sunstein, supra note ___, at ____ (explaining why a “general revival of the nondelegation doctrine would . . . be a mistake”).
\item[224] See supra note ____ and accompanying text. Lawson, Prolegomenon, supra note ___, at 892 (observing that Justice Scalia’s “general interpretative orientation is originalist,” but that Justice Scalia “does not regard the constitutionality of basic institutions of modern administrative governance as open to inquiry,” including the nondelegation doctrine).
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At the same time, functionalists seek to accommodate separation-of-powers norms, though short of its purest conception. Most functionalists retain liberty as the idealized end. But a reconstituted version of checks and balances, rather than a strict division of power, is the favored means of securing that liberty. This was the Court’s approach in opinions such as Morrison v. Olson, which stressed that the three branches do not “operate with absolute independence;” the Constitution requires only that “the proper balance between the coordinate branches” be maintained.

As Cynthia Farina aptly explains, the administrative state “became constitutionally tenable because the Court’s vision of separation of powers evolved from the simple (but constraining) proposition that divided powers must not be commingled, to the more flexible (but far more complicated) proposition that power may be transferred so long as it will be adequately controlled.” Though not the Framers’ version, the idea of keeping agencies in check and the government in “balance” arguably remains faithful to the spirit of separated powers.

* * *

The discussion above sketched two concessions made for modern government along the horizontal separation-of-powers dimension. But these concessions come with strings attached. First, the Court rejects in theory that Congress can lawfully delegate lawmaking, and, relatedly, asserts that agencies cannot make Law. Indeed, the Court reified these principles just last term. Writing for the majority in FCC v. Arlington, Justice Scalia reminded that “[a]gencies make rules . . . . [that] take “legislative” . . . forms, but they are exercises of—indeed, under our constitutional structure they must be exercises of—the “executive Power.” Second, to the extent delegation of policymaking and the combination of functions in agencies are tolerated, these arrangements come at the price of sufficiently holding agencies in check through political and judicial oversight.

C. The Vertical Transformation

This section now turns to the “contingent concessions” along the vertical federalism dimension. As earlier noted, a principle feature of the Framers’ strategy was to retain states as autonomous power centers. Doing so hoped to provide more opportunities for citizen participation in

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225 See Merrill, supra note ___, at 230.
226 Sunstein, supra note ___, at 495 (explaining that, for functionalists, “[t]he text of the Constitution and the intent of its drafters are relevant, but they are not sufficiently helpful in hard cases to be determinative; it is the basic structural principles that play the critical role.”).
228 Farina, supra note ___, at 487.
government, enhance political choice, and offer a competing locus of power to check and compete with the federal government.\textsuperscript{231} Though more than one way exists to promote these forms of political liberty,\textsuperscript{232} the methods selected by the Framers were structural: apart from dividing federal power to encumber lawmaking, the substantive scope of federal power was enumerated, and thereby limited.\textsuperscript{233}

### 1. Expanding Federal Power

Today, however, the enumerated-powers principle hardly restrains Congress’s substantive power. Over time, Congress has pervaded almost every significant aspect of our social and economic order.\textsuperscript{234} And the Court, for its part, has done virtually nothing to curb this tendency.\textsuperscript{235} To be sure, the Court on occasion has sanctioned Congress’s use of certain regulatory tools—for example, Congress cannot commandeer state officials to administer federal programs,\textsuperscript{236} cannot use the spending power to “coerce” states into service,\textsuperscript{237} and cannot use the commerce power to compel individuals into a market, as the Court’s recent Affordable Care Act decision instructs.\textsuperscript{238} But none of these are subject-matter limitations on the regulatory domains that Congress may stake for federal occupation.

The vertical concessions for modern government are not specific to the administrative state. However, when Congress expands into new domains, it almost invariably calls upon one or more federal agencies to administer the program. Thus, for all practical purpose, the demise of the enumerated-powers principle means that agencies often compete with state actors in regulatory domains that would otherwise be federally unoccupied.\textsuperscript{239} Often, it also means that federal and state agencies join to

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\item \textsuperscript{231} See Young, supra note ___, at 1844-45 (discussing the traditionally expressed virtues associated with state autonomy).
\item \textsuperscript{232} For a useful discussion of the various models of federalism, see Ernest A. Young, The Puzzling Persistence of Dual Federalism, in NOMOS LIV: Liberty (2012).
\item \textsuperscript{233} See supra note ___ and accompanying text.
\item \textsuperscript{234} Lawson, supra note ___, at 1236; Farina, supra note ___, at 465.
\item \textsuperscript{235} Keller, supra note ___, at 56-57 (“The Court has not limited Congress’s enumerated powers largely because the Court (1) wants to give Congress adequate powers to regulate our modern economy and (2) has not been able to create a workable Commerce Clause test.”). That is not to say that the Court never imposes limits. But the counterexample cases of United States v. Morrison 529 U.S. 598, 613 (2000) (invalidating a section of the Violence Against Women Act that created a federal cause of action for victims of violent attacks motivated by gender bias); United States v. Lopez, 514 U.S. 549, 551 (1995) (striking down a provision of the Gun Free School Zones Act that forbade gun possession in close proximity to schools) do very little, in practice, to forbid Congress’s powers.
\item \textsuperscript{236} Printz v. United States, 521 U.S. 898, 935 (1997) (holding that Congress may not commandeer state officials to be enforcement agents of federal regulatory programs); New York v. United States, 505 U.S. 144, 161 (1992) (asserting that Congress may not commandeer state legislators to enact laws in service of federal regulatory programs).
\item \textsuperscript{237} Nat’l Fed’n of Indep. Bus. v. Sebelius, 132 S. Ct. 2566, 2602 (2012) (striking down a spending condition requiring states to participate in a significant expansion of Medicaid or risk forfeiting all federal Medicare funding).
\item \textsuperscript{238} Id.
\item \textsuperscript{239} Keller, supra note ___, at 58 (“The underenforcement of federalism is exacerbated in the administrative law context because Congress can freely delegate its broad Commerce Clause powers to unelected federal agencies.”).
\end{itemize}
implement federal programs, in so-called “cooperative federalism” schemes.\textsuperscript{240} Again, my present concerns are not whether this federal-state interaction is constitutional or good for federalism.\textsuperscript{241} Rather, the point is that these arrangements were not the original plan.

\textbf{2. The Vertical Contingencies}

The demise of the enumerated powers doctrine, like the demise of separation of powers, has come with certain legitimating strings attached. As most relevant here, in \textit{Garcia v. San Antonio Metropolitan Transit Authority} the Court openly renounced any substantive role in policing the federal-state boundary when Congress seeks to directly regulate the states.\textsuperscript{242} According to the Court, the states’ protection from federal overreaching is political, not judicial.\textsuperscript{243} Without judicial policing of Congress’s enumerated powers, some regard Garcia as the “death of federalism.”\textsuperscript{244} Critically, however, the Court’s abstention in Garcia came with an important caveat: the Court would maintain a role—albeit an undefined one—in “compensate[ing] for possible failings in the national political process.”\textsuperscript{245} In Garcia, the Court rejected the state’s constitutional challenge only after finding that “the internal safeguards of the political process have performed as intended.”\textsuperscript{246}

As Andrezej Rapaczynski put it, Garcia’s “main thrust” was to replace a sovereignty-based analysis “with a focus on the nature of the political

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\textsuperscript{240} While Congress may not commandeer or coerce the states to implement federal programs, see Printz v. United States, 521 U.S. 898, 935 (1997); New York v. United States, 505 U.S. 144, 188 (1992); Nat’l Fed’n of Indep. Bus. v. Sebelius, 132 S. Ct. 2566 (2012), Congress may encourage states to implement federal programs in at least two ways. First, under the Spending Clause, Congress may condition federal funds on a state’s compliance with federal requirements. Second, Congress may offer states a choice of complying with federal standards or having state law preempted. Congress can also combine these methods, providing funding to cover state costs of implementing federal law. For further discussion of these points, including congressional incentives to create cooperative federalism arrangements, see Bulman-Pozen, supra note \textit{___}, at 473-76.


\textsuperscript{242} Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528 (1985). See Jesse H. Choper, \textit{Federalism and Judicial Review: An Update}, 21 HASTINGS CONST. L.Q. 577, 579 (1994) (“The reach of the [Garcia] Court’s doctrine ... was specifically confined to national regulation of the ‘States as States’; it clearly did not apply ... to federal regulation of private persons or activities within the states.”).

\textsuperscript{243} Garcia, 469 U.S. at 556.


\textsuperscript{245} Garcia, 469 U.S. at 554.

\textsuperscript{246} \textit{Id.}
process responsible for making the federalism-related decisions.”

Professor Young explains that “what distinguishes process-based from dual federalism models is simply the former’s focus on the political and procedural dynamics . . . Get those dynamics right, the process federalist contends, and one need not worry about whether particular national initiatives intrude into some protected state sphere of authority.” So reconstituted, “federalism becomes not so much a matter of drawing lines as one of calibrating incentives, enforcing procedural rules, and interpreting the output of the national political process in a way that respects the system’s structural safeguards for states.”

The Court has sought to promote the so-called political and procedural safeguards of federalism through a variety of doctrines. For instance, the Court has imposed clear-statement rules of statutory interpretation when Congress acts in certain ways that implicate state autonomy. Most relevant here, the Court generally applies a “presumption against preemption,” which favors application of state law unless a federal statute reflects the “clear and manifest purpose of Congress” to displace state law. Indeed, in applying the presumption against preemption in Gregory v. Ashcroft, the Court expressed a need to be “absolutely certain that Congress intended” to displace state law, inasmuch as the Court has left the protection of state interests “primarily to the political process.” The Court explained that unless Congress actually considered and enacted into law a program that threatens state prerogatives, there is no guarantee that federal lawmaking procedures served to safeguard federalism.

Although not without its critics, process federalism may be understood as a compensating mechanism to partially offset the Court’s abstention from any meaningful enforcement of the substantive limits on

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247 Rapaczynski, supra note ___, at 360-61.
248 Young, supra note ___.
249 Young, supra note ___, at 261.
250 For an overview of these various doctrines, see Young, supra note ___, at 21.
253 Id.
254 The principal objection is that the judiciary is duty-bound to enforce substantive limits on Congress power, not just procedural ones. See, e.g., John C. Yoo, The Judicial Safeguards of Federalism, 70 S. CAL. L. REV. 1311, 1313 (1997) (“Although there is a great deal of historical support for the idea that the national government itself would protect state interests, there is no evidence that the Framers understood the political process to be the exclusive safeguard of federalism.”). For criticism of the idea that process federalism adequately protects either states’ interests or the values of federalism, see McConnell, supra note ___, at 1484, 1485 (reviewing Raoul Berger, Federalism: The Founders’ Design (1987)); Rapaczynski, supra note ___, at 346-80. Another important objection, elaborated on further below, is that “much federal law is produced through processes that avoid ‘the political safeguards of federalism’ altogether”—most notably, agency created law. Young, supra note ___, at 1818; see also infra notes ___ and accompanying text. For the view that process federalism is a not-perfect but nevertheless promising approach for promoting state autonomy, see Young, supra note ___ (giving process federalism only two cheers—rather than a full three—for the Court’s failure to place meaningful substantive limits on Congress’s power so as to preserve states as a competing locus of power).
Congress's power. Specifically, process-federalism doctrines advance the political safeguards of federalism by “requiring proponents of federal laws affecting the states to put the states’ defenders in Congress on notice.”

At the same time, process-federalism doctrines “enhance the procedural safeguards by adding an additional drafting hurdle [i.e., clarity] that legislation implicating state autonomy must surmount.” Taken together, the political and procedural safeguards help ensure that Congress is making important decisions about federalism, and, should Congress fail to do so, remit the resulting policymaking space to the states.

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The forgoing discussion explained both how and why the Framers’ original prophylactic strategies for securing liberty were repackaged and transformed to accommodate modern government. Critically, however, the story of administructuralism is one of “contingent concessions.” The original separation-of-powers model was forfeited in the administrative state on the contingencies that agencies not make “Law,” and that their actions otherwise would be sufficiently held in check. Separately, federalism’s original strategy of enumerated and limited federal power has mostly been eschewed for judicial assurances that state interests would be adequately protected through the political process.

IV. PARADOX-HYPOTHESIS REVISITED: A DOCTRINAL PERSPECTIVE

This Part lays bare administrative preemption’s root anxiety: it both depends upon and is ruined by modern conceptions of federal lawmaking. More specifically, administrative preemption is undermined by the Court’s outward commitments to (1) the separation-of-powers maxim that agencies do not make “Law” and (2) the political- and procedural-safeguard theories of federalism. Administrative preemption thus sits on shaky doctrinal foundations. Justifying the practice requires ignoring, distancing, or replacing the Court’s legitimating criteria for the constitutional concessions made for modern government. The challenge for doctrinalists—both on and off the Court—is to identify a premise that is broad enough to justify administrative preemption, yet narrow enough to preserve the Court’s legitimating theories of government.

255 See Young, supra note ___.
256 Young, supra note ___, at 21-22.
257 Id.
258 Hickman, supra note ___, at 518-19 (“The modern administrative state reflects an implicit compromise of allowing Congress to delegate expansive lawmaker power to agencies in exchange for imposing substantial procedural requirements as agencies exercise those powers, with courts serving as the enforcer thereof.”); Louis L. Jaffe, The Right to Judicial Review I, 71 HARV. L. REV. 401, 405 (1958) (“The availability of judicial review is the necessary condition, psychologically if not logically, of a system of administrative power which purports to be legitimate, or legally valid.”).
The discussion that follows, however, highlights the difficulty of that undertaking.

Section A develops and defends a normative “contingency principle.” Its idea is rather straightforward: if we are to forgo the original strategies for securing liberty, we should insist on the Court’s legitimating theories for that forbearance. Section B explains how administrative preemption upsets the contingency principle along the separation-of-powers dimension. Section C does the same along the federalism dimension.

As introduced in Part II.C, the paradox-hypothesis is subject to some potentially “saving” interpretations. For instance, when agencies act within their delegated authority, we might say that it is Congress—not the agency action—that is doing the preemptive work. Or, it may be that under modern conceptions of government, Law can (or should) mean one thing for purposes of the Supremacy Clause and yet another for purposes of separation of powers. To be sure, these interpretive moves are consistent in result with the Court’s administrative preemption doctrine. That is one of the happy incidents of arguing backwards from doctrine that we already have. But, I argue here, interpretive moves to unwind the paradox upset the contingency principle. Put otherwise, interpretive moves to justify administrative preemption may be consistent with the Court’s administrative preemption doctrine, but inconsistent with the Court’s doctrinal contingencies for modern government.

A. The “Contingency Principle”

My assessment that constitutional concessions have been made for modern government depends on a constitutional baseline. Beginning from the Constitution’s text and structure is conventional and, for that reason, should not be too controversial. The pickle for constitutional theorists, however, is what to do with the conclusion: namely, that our current institutional arrangements are not what the Framers intended or the ratifiers understood. One response is to tank the Constitution. Another is to tank the administrative state. Though surely interesting, these polar solutions attract few supporters. The generally preferred approach, therefore, is to try something in between. But there is a lot in between. How best, then, to give fidelity to the original Constitution in a world completely detached from the founding generation?259

259 On the subject of constitutional fidelity, see, e.g., Lessig, supra note ___, 1187-89 (arguing that when constitutional interpreters are faced with contexts that the Framers did not envision, the interpreter’s duty is to approximate the effect of the Framers’ original understanding in the changed context); Young, supra note ___ (“[N]othing in our history since the Founding absolves courts of their obligation of fidelity to the basic notion of a federal balance.”). But cf. Klarman, supra note ___ ( canvassing the disconnect between the Framers’ and our world, along both economic and social dimensions, and challenging the precepts of fidelity).
The contingency principle, developed here, hopes to enrich that discussion. Emphatically, the principle’s function is not to provide prescriptions for structuring modern government. Rather, the principle’s intended function (and its value, I will argue) is to operate as a limiting principle. Specifically, if we are committed to the Constitution as law, the contingencies attaching to the Court’s doctrinal concessions provide a conceptual stopping point beyond which we should not hazard—at least not without a renewed sense of alarm.

So formulated, the contingency principle may be applied to evaluate any number of institutional arrangements or doctrines. My focus in this Article, however, is with administrative preemption. And, it is to that end that I will put the principle to work in Sections B and C below. To set the stage for that discussion, my objectives for this preliminary section are more basic. First, I situate the contingency principle within the academic literature on constitutional fidelity. Second, I explain why the Court’s contingencies should matter, especially for non-originalists. Lastly, I respond to a potential originalist critique that the contingency principle may not go far enough in its commitment to the Constitution’s text.

1. Constitutional Fidelity

The idea of constitutional fidelity begins with the conventional (though not universally shared) premise that the Constitution is law.\textsuperscript{260} Both the text and history of the Constitution unequivocally commit us to a federal structure: it entails some division and balance of authority (1) among the federal branches and (2) between the federal government and the states.\textsuperscript{261}

However, to insist that our generation must be bound by the Framers’ choices gives rise to a “dead-hand” problem.\textsuperscript{262} As David Strauss puts it, “[t]he Framers do not have any right to rule us today.”\textsuperscript{263} And, even if they did, why should we accede to rules ill-fitting the demands of modern society? Under this non-originalist view, it is “public acquiescence over time, not formal ratification ages ago, which constitutes the ‘consent’ necessary to legitimate” the Constitution on democratic terms.\textsuperscript{264} By interpreting the Constitution as a “living” and evolving construct, the argument goes, we are better able to secure political and sociological acceptance of the document—without which the Constitution could hardly function as law. At the same time, however, the more “living” the

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\item \textsuperscript{260} For the view that the Constitution deserves no fidelity, see Michael J. Klarman, Antifidelity, 70 S. CAL. L. REV. 381 (1997).
\item \textsuperscript{261} Making Federalism, supra note __, at 1748.
\item \textsuperscript{262} Fallon, Constitutional Interpretation, supra note __, at 928 (“It is difficult to understand why democracy requires us to enforce decisions made by people with whom the current population has so little in common.”)
\item \textsuperscript{263} David A. Strauss, Common Law Constitutional Interpretation, 63 U. CHI. L. REV. 877, 892 (1996).
\item \textsuperscript{264} Selling Originalism, supra note __, at 670; see also Sandalow, supra note 46, at 1050 (“In making [constitutional] decisions, . . . the past to which we turn is the sum of our history, not merely the choices made by those who drafted and ratified the Constitution.”)
\end{itemize}
Constitution is, the less it holds the quality of entrenched law. And therein lays the fidelitist’s challenge: to adapt original conventions to new contexts, navigating between the calcifying “dead” and the freewheeling “living.” What results is candidly something other than what the Framers’ prescribed, but which angles to preserve some of their underlying commitments.

As might be expected, the fidelity project is less of a destination than a journey with more than one path. Lawrence Lessig, for instance, offers a framework of “translation.” He argues that when constitutional interpreters are faced with contexts that the Framers did not envision, the interpreter’s duty is to approximate the effect of the Framers’ original understanding in the changed context. According to Professor Lessig, however, the interpreter should do so with “the smallest possible change necessary to preserve as much from the original context as is possible.”

Meanwhile, others have advanced the idea of maintaining our structural commitments through “compensating adjustments.” Adrian Vermeule has argued, for instance, that the “best response” to an “irreversible departure” from constitutional design is “to violate the ideal along some other margin, in order to produce an offsetting condition or compensating adjustment.”

The “contingency principle” advanced here shares some of the qualities of translation and compensating adjustments, but it is neither. Foremost, the contingency principle aspires to constitutional fidelity. As already noted, the contingency principle proceeds from the rather banal premise that we have come quite far from the Framers’ vision—whether measured by the scope of federal power, the balance of power, or the mechanisms for achieving it. Moreover, the contingency principle is committed to the ideas that that Constitution is law, should be treated as such, and entails a separation and balance of government power. In these ways, the contingency principle shares many of the same premises, prescriptions and concerns as translation and compensating adjustments.

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265 [cites]
266 [cites]
267 Lessig, Translating Federalism, supra note 74, at 127, 145
269 See, e.g., LOUIS HENKIN, FOREIGN AFFAIRS AND THE UNITED STATES CONSTITUTION 149 (2d ed. 1996) (describing federalism, in the sense of limits on national power, as a “wasting force in U.S. life”); John O. McGinnis, Reviving Tocqueville’s America: The Rehnquist Court’s Jurisprudence of Social Discovery, 90 CAL. L. REV. 485, 511 (2002) (observing that “constitutional federalism has been declining for the better part of a century”); Timothy Zick, Statehood as the New Personhood: The Discovery of Fundamental “States’ Rights”, 46 WM. & MARY L. REV. 213, 215 (2004) (“Federal power and supremacy long ago eclipsed state power, no matter what barometer one consults.”). The states are not dead by any stretch of the imagination, but it seems fair to say that they are plainly subordinate entities rather than “balancing” ones today.
270 Cf. Making Federalism, supra note _____, at _____ (“nothing in our history since the Founding absolves courts of their obligation of fidelity to the basic notion of a federal balance.”).
Unlike translation, however, the contingency principle does not offer a methodological framework for deciding which original mechanisms for balance are worth preserving, or for trying to approximate how the Framers’ might have reworked the constitutional text to account for changed contexts. For Michael Klarman, these aspects of translation make that entire enterprise rather hopeless. As explained further below, however, the contingency principle avoids these difficulties by borrowing the Court’s own legitimating criteria for the constitutional concessions made for modern government. Moreover, unlike compensating adjustments, the contingency principle’s function is not to prescribe new tools or institutions for restoring balance. Rather, by design, the contingency principle is mostly evaluative. Specifically, because it is moored to the Court’s declared contingencies, it provides one way (though not the only way) to know when a compensating adjustment or translation may be necessary. The contingency principle leaves room for additional structural compensation—just not for less.

The idea of accommodating-yet-limiting the concessions made for modern government is not revolutionary. In that sense, the contingency principle is part of a much larger tradition. What is new, however, is the concept of leveraging the Court’s own legitimating theories as limiting principles. Specifically, once we conceive of the Court’s adminstructuralism doctrines as a set of “contingent concessions,” the contingencies provide not only a conceptual stopping point, but also one that we should cling hard to as the bargain for those concessions.

2. Why the Court’s Reasons Matter

Some may object that the contingency principle goes too far in its commitment to the reasons that the Court has provided for its concessional doctrines. But this objection is difficult to sustain. The Court’s reasons matter for at least three reasons: (1) for the institutional legitimacy of the Court; (2) for the legitimacy of the Court’s doctrines; and (3) for the trajectory of those doctrines. I briefly consider each below.

a. Institutional Legitimacy

One way to respond to the objection that the contingency principle goes “too far” is to consider what it would mean if we did not hold the


272 See Sunstein, supra note ___, at 492 (arguing that a strict application of the constitutional text and Framers’ intent “is unhelpful in light of vast changes in the national government,” and supporting “an approach that takes changed circumstances into account, but at the same time reintroduces into the regulatory process some of the safeguards of the original constitutional system”); McCutchen, supra note ___, at 3 (“Where unconstitutional institutions are allowed to stand based on a theory of precedent, the Court should allow (or even require) the creation of compensating institutions that seek to move back toward the constitutional equilibrium.”).
Court to account for its own constructs. Freeing the Court of that obligation could summon any number of familiar objections to the office of judicial review. Among other concerns, absolving the Court of its contingencies could marginalize the value of the Court’s reason-giving tradition, and, with it, one of the Court’s central claims to institutional legitimacy.273

Unlike Congress or the President, “the judicial power derives its legitimacy from the court’s elaboration of reasons.”274 Take away the Court’s reasons, or the need for them, and the judicial power would devolve into raw power or will.275 Fidelity to reason-giving should be (and tends to be) especially important to non-originalists for at least two reasons.276 First, as noted, one of non-originalism’s animating tenets is the contemporary acceptance of the Constitution. The Court’s reasons for its constitutional interpretations are an indispensable ingredient of that public accent.277 As the Court itself has emphasized, “[it] must take care to speak and act in ways that allow people to accept its decisions on the terms the Court claims for them.”278 Second, the requirement that the Court give and honor judicial reasons allows “living constitutionalism” and/or “common law constitutionalism” to lay claim as legitimate interpretive methodologies. Constitutional adjudication would devolve into a freewheeling exercise if the Court were absolved from the Constitution’s text and the Court’s legitimating theories of departure.279

273 Fallon, Legitimacy, supra note __ (“The Court’s institutional legitimacy resides in public beliefs that it is a generally trustworthy decisionmaker whose rulings therefore deserve respect or obedience”); see also Deborah Hellman, The Importance of Appearing Principled, 37 Ariz. L. Rev. 1107, 1109 (1995) (“Because the Court’s power depends on its ability to engender respect for its authority, guarding its image is a way of protecting its ability to be effective . . . . [I]n order for the Court to legitimately compel compliance with its directives in individual cases, it must have enough power to compel compliance over the run of cases.”); “To avoid an arbitrary discretion in the courts,” the founders considered it “indispensable that they should be bound down by strict rules and precedents which serve to define and point out their duty in every particular case that comes before them.” See THE FEDERALIST NO. 78 (Alexander Hamilton), supra note __

274 Dicta & Article III, supra note __, at 1997 n.4; see also id. at 2040 (“Judicial accountability and legitimacy derive from judicial rationality, which in turn will be found in the rationales offered by courts to justify their decisions.”); Giving Reasons, supra note __, at 653 (explaining that the “artificial constraint of giving reasons . . . is designed to counteract th[e] tendency” of judicial partiality).

275 Id.; Law of Precedents, supra note __, at 1195.

276 Originalism, Precedent, supra note __, at 301 (favoring a common-law constitutional approach, which allows for a greater degree of judicial candor about the reasons for judicial decision, which in turn must be defended on the grounds given).

277 Originalism, Precedent, supra note __, at 301 (favoring a common-law constitutional approach, which allows for a greater degree of judicial candor about the reasons for judicial decision, which in turn must be defended on the grounds given); See Frank H. Easterbrook, Abstraction and Authority, 59 U. Chi. L. Rev. 349, 373 (1992) (“The need to persuade society to obey sets bounds on judicial creativity.”); See also Giving Reasons, supra note __, at 633 (“The conventional picture of legal decisionmaking, with the appellate opinion as its archetype and “reasoned elaboration” as its credo, is one in which giving reasons is both the norm and the ideal. Results unaccompanied by reasons are typically castigated as deficient on precisely those grounds.”).


279 [cite originalist critiques]; see also David L. Shapiro, In Defense of Judicial Candor, 100 Harv. L. Rev. 731, 737 (1987) (“A requirement that judges give reasons for their decisions—grounds of decision that can be debated, attacked, and defended—serves a vital function in constraining the judiciary’s exercise of power.”).
To be clear, judicial reasons can change and be overcome. The point is that the Court’s judgments need reasons, and reasons to overcome them. Ignoring reasons is anathema to our legal tradition and the power of judicial review.

b. Doctrinal Legitimacy

Ultimately, the contingency principle seeks to hold the Court accountable to its own doctrinal constructs. In this way, it may be thought to operate like precedent. But my claim is designedly different, and does not depend on facile distinctions between precedent and dicta.

The structural concessions made for modern government are clearly precedential. And, if indeed there is such a thing as “superprecedent”—as some claim—then the doctrinal lines of decision that forfeit the nondelegation and enumerated powers principles surely qualify. Less clear, however, is how to categorize the judicially expressed contingencies behind those concessions.

Most theories of stare decisis ascribe precedential status to the Court’s expressed reasons behind its holdings and doctrines. And,
insofar as the contingencies qualify as precedent, the Court should adhere to them as such. Adherence to precedent promotes the rule of law, stability, reliance interests, and judicial restraint. Moreover, adherence to precedent reduces the decisional costs of having to reopen every question of constitutional intrigue.

But not all theories of stare decisis treat (all) judicial reasons as binding precedent. Under these more narrow conceptions, the contingencies may qualify as nonbinding dicta. Even then, however, they are dicta of a very special kind. Specifically, they are what purport to legitimate the very postulates of modern government. These postulates are virtually immune from being overruled, not on the strength of their correctness, but rather despite their deep seeded constitutional insecurity. If the legitimating contingencies are dicta, then I submit they are entitled to special status—call it “superdicta.” To ignore and not replace them with some other legitimating theory would leave the empire of modern government with no clothes.

precedent should be rejected remains one of the great unresolved controversies of jurisprudence. Randy E. Barnett, Trumping Precedent with Original Meaning: Not as Radical as It Sounds, 22 Const. Comm. 257, 261 (2005). See also Fallon, Constitutional Precedent, supra note 278, at 1124. Law of Precedents, supra note __, at 1183 (noting the “need to give credence to the reasoning in earlier opinions,” not just the facts and holding); Dicta and Article III, supra note __, at 2040 (“a commitment to the rule of law and a proper understanding of the source of legitimate authority in our constitutional order will result in a holding/dictum distinction that turns on rationales, not just facts and outcomes.”); Monaghan, Stare Decisis, supra note __, at 764-65 (“there seems to be no advantage in absolutely divorcing the precedent-setting Court’s reason for deciding from the precedent it has sought to establish, particularly when the reasoning necessarily helps frame the scope of the rule or standard”).

See, e.g., Monaghan, Stare Decisis, supra note __, at 155-59 (rule of law grounds); Thomas W. Merrill, Originalism, Stare Decisis, and the Promotion of Judicial Restraint, 22 Const. Comment. 271, 273 (2005) (judicial restraint).

See RICHARD A. POSNER, HOW JUDGES THINK 145 (2008); Law of Precedents, supra note __, at 1191; Monaghan, Stare Decisis, supra note __, at 750 (“stare decisis operates to keep issues off the constitutional, if not the political agenda, thereby leaving open for debate only less threatening issues”). Why Dicta Becomes Holding, supra note __, at 223-24 (discussing approaches that treat holdings, for purposes of stare decisis, as either (1) “limited to the facts plus the outcome” or as (2) including “the rationale or reasoning a court employs to reach a particular result.”). See also Monahan, Stare Decisis, supra note __, at 763 (canvassing divergent approaches to treating reasoning as holding).

Cf. Dicta and Article III, supra note __, at 2005 (“attachment of the label dicta to past statements has been used as a means of avoiding the consequences of all kinds of legal pronouncements.”).

See supra notes __ and accompanying text. It will not do to object that the contingencies should be treated as anything more than the idiosyncratic views of the individual Justices who penned them. Yes, we might empirically question whether in mill-run cases individual justices deliberate on and agree with the reasons (as opposed to the holdings) contained in the opinions they join. However, given the salience and importance of the reason-giving at issue, I think it fair to assume that the justices signing on to the majority opinions signed on to the contingencies as well as the concessions. In any event, and more importantly, I agree with Professor Monaghan’s normative assessment that the “points of significance” in the Court’s majority opinions “be understood as the result of a deliberate process which reflects the views of the members joining that opinion.” A counter-norm would delegitimize not only the Court’s institutional status, but also the doctrines that depend upon the Court’s reasons for acceptance.

Farber, Law of Precedents, supra note __, at 1180-81 (“Legitimate or not, these modern constitutional doctrines are here to stay as a realistic matter.”); Selling Originalism, supra note __, 668-69 (noting that the doctrines that gave rise to the modern administrative state are unconstitutional from an originalist perspective, yet are now so entrenched as to be “beyond any reasonable constitutional objection”).

Cf. Dorf, Dicta and Article III, supra note __, at 2029-30 (“When a court discards the reasoning of a prior opinion as merely dictum, unless it suggests an alternative basis for the outcome of the precedent case, it essentially relegates the prior decision to the position of an unjustifiable, arbitrary exercise of judicial power.”).
c. Doctrinal Scope and Trajectory

Judicial reasons are also critical for shaping the scope and trajectory of the Court’s doctrines. The seminal *Chevron* doctrine well illustrates the point. There, the Court held that when statutes are ambiguous, courts must give deference to any “reasonable” interpretation by an agency charged with administering the statute. My intention here is not to debate the merits of *Chevron*, but rather to turn attention to (1) the Court’s rationale for *Chevron*, and (2) how, in turn, that rationale shapes the scope and trajectory of the doctrine.

As noted by Professor Barron and then-Dean Elena Kagan, “[t]he *Chevron* doctrine began its life shrouded in uncertainty about its origin. *Chevron* barely bothered to justify its rule of deference, and the few brief passages on this matter pointed in disparate directions.” Thus, from the decision’s inception, legal commentators speculated about *Chevron*’s theoretical justification and the doctrine’s future trajectory. Years after the *Chevron* decision, the Court clarified that *Chevron*-style deference rests on a theory of congressional intent. More specifically, *Chevron* rests on a “presumption that Congress, when it left ambiguity in a statute meant for implementation by an agency, understood that the ambiguity would be resolved, first and foremost, by the agency, and desired the agency (rather than the courts) to possess whatever degree of discretion the ambiguity allows.” Critically, the Court’s congressional-intent theory for *Chevron* was a reason, not a holding in the narrow sense. But it is the reason that now shapes the scope and trajectory of that doctrine.

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294 David J. Barron & Elena Kagan, *Chevron’s Nondelegation Doctrine*, 2001 SUP. CT. REV. 201, 212-13. The *Chevron* decision, for example, stressed the institutional competency of agencies, in terms of their expertise and ability to quickly respond to changing information and conditions. At another point, however, the Court stressed that, as between agencies and the courts, agencies were more politically accountable via the President. And, at other places in the decision, the Court suggested that deference was owed because Congress delegated responsibility for administering the statute to the agency. [cite]

295 See *Nat’l Cable & Telecomm. Ass’n v. Brand X Internet Servs.*, 545 U.S. 967, 980 (2005) (describing the holding in *Chevron* by stating that ambiguities in a statute that an agency is supposed to administer are congressional delegations of authority); *United States v. Mead Corp.*, 533 U.S. 218, 229-32 (2001) (explaining that *Chevron* deference is not warranted where there is no evidence that Congress intended to delegate particular interpretive authority to an agency); *United States v. Haggar Apparel Co.*, 526 U.S. 380, 392-93 (1999) (explaining that Congress delegates authority to agencies because it cannot anticipate all circumstances to which a statute may apply); *Smiley v. Citibank*, 517 U.S. 735, 740-41 (1996) (clarifying that when Congress leaves ambiguity in a statute, it does so with the intent that the agency resolve such issues in the future).

296 *Smiley*, 517 U.S. at 740-41.

297 *See Mead Corp.*, 533 U.S. at 226-27 (offering different ways to determine whether Congress intended to delegate authority to an agency); *see also Chevron’s Domain*, supra note 83, at 872 (“[I]f *Chevron* rests on a presumption about congressional intent, then *Chevron* should apply only where Congress would want *Chevron* to apply.”); Greenfield, supra note 57, at 25 (arguing that Mead clarifies that the “presumption [of] delegation is inferred not simply from the presence of ambiguity, but only when additional factors, such as rule-making authority, are present”); *see also Stephen Breyer, Our Democratic Constitution, 77 N.Y.U. L. REV. 245, 267 (2002) (explaining that *Chevron* deference is required only where Congress would have wanted it).
Specifically, once the Court settled on its congressional-intent theory, the Court began to insist on some evidence of that intent before deferring. The effect of this limitation has been to limit the types of administrative action that can qualify for *Chevron* deference. Of equal import, the Court’s congressional-intent theory rules out, by negative implication, other potential legitimating theories of *Chevron* deference. And this too affects the doctrine’s contours. If *Chevron* rested on a theory of institutional competence, for example, then it would not matter whether Congress intended to delegate interpretive authority. Along similar lines, if *Chevron* rested on a theory of political accountability, then deference could have depended (but does not) on whether the agency interpretation under review was made by an “executive agency” as opposed to an “independent agency,” over which the President has far less (if any) political influence.

In short, this *Chevron* example provides another reason why the Court’s reasons matter: they shape the scope and trajectory of its doctrines. And, as such, they also shape the future of government action.

3. *Preserving Constitutional Text*

The foregoing treatment mostly responds to concerns about whether the contingency principle goes too far in its commitment to the Court’s reason-giving. In closing, however, I should also acknowledge an opposing concern that the principle may not go far enough in its commitment to the written Constitution. However, this objection too should fall away once we understand the nature of the contingency principle. As explained, the contingency principle is a limiting one tied to the Court’s own constructs. But it does not rule out, negate, or seek primacy over the Constitution’s text (or, for that matter, any other fidelity device). The contingency principle simply provides an additional safeguard; it does not obstruct others. Insofar as the contingency principle leads to the same conclusion as the Constitution’s text, drafting history, and structure—namely, that administrative preemption is a dubious construct—the call for reform should simply ring louder.

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As argued in Part II, administrative preemption would seem foreclosed under an originalist (and textualist) interpretation. Yet, not all are comfortable with the originalist (or textualist) frame, owing mostly to the “dead-hand” problem. The contingency principle responds by offering a more generous constitutional baseline; one tied to the Court’s doctrinal

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298 *Mead Corp.*, 533 U.S. at 226 (explaining that “administrative implementation of a particular statutory provision qualifies for *Chevron* deference when it appears that Congress delegated authority to the agency generally to make rules carrying the force of law, and that the agency interpretation claiming deference was promulgated in the exercise of that authority”).

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constructs rather than the constructs of the framing generation. Ultimately, the contingency principle strives to accommodate both the structural concessions made for modern government and the doctrinal contingencies that ushered those concessions in the first place. Absolving the Court of its reason-giving would not only undermine a critical feature of the Court’s institutional legitimacy, but would also recall into question the legitimacy of the doctrines on which modern government depends.

Moreover, the Court’s reasons can and should influence the trajectory of its doctrine. For instance, if the Court’s theory behind administrative preemption is that Congress has the power to delegate supremacy, then maybe the Court will insist on some clear evidence of that congressional delegation in individual cases. Or, perhaps the analytic exercise will lead the Court to conclude that no theory of administrative preemption is both broad enough to defend the practice, yet narrow enough to comport with the Court’s existing theories of separation of powers and federalism. In that case, the Court might opt to jettison administrative preemption, if for no other reason than to keep old inquests about the legitimacy of modern government off the agenda.

From both a normative and doctrinal perspective, the theoretical contingencies attaching to the Court’s concessions for modern government are worthy of our insistence. They exist so that the Court does not have to make the choice between the Constitution, on the one hand, and the administrative state, on the other. For those whose fidelity runs to the written Constitution and our modern institutions, the contingencies would seem a rather small price to pay for the fiction of having both.

B. Separation-of-Powers Contingencies

This Section applies the contingency principle to administrative preemption along the separation-of-powers dimension. As explained in Part II, the Court has long insisted that a constitutional line exists between permissible and impermissible congressional delegation. The mere existence of the conceptual line—even if judicially underenforced—
serves an important legitimizing function.\textsuperscript{306} To be sure, the Court does not take its nondelegation mantra seriously when confronting delegation challenges. As earlier discussed, the Court’s reasons for tolerating congressional delegation are twofold. First, the Court is not well positioned to “second-guess Congress regarding the permissible degree of policy judgment that can be left to those executing or applying the law.”\textsuperscript{307} Second, the Court has stipulated that “Congress simply cannot do its job absent an ability to delegate power under broad general directives.”\textsuperscript{308}

Again, I will not belabor whether these are good (enough) reasons. My present point is that neither reason has been offered by the Court as a basis for administrative preemption. Indeed, neither reason even seems to apply. First, if the Constitution prohibits Congress from delegating lawmaking under Article I and/or prohibits the Executive from making Law under Article II, as the Court insists, then we have our answer under the Supremacy Clause: the administrative output cannot qualify as “Laws . . . made in Pursuance” of the Constitution. There is no impenetrable question of degree; there is no line-drawing dilemma.\textsuperscript{309} Critically, the indeterminacy that inheres in demarking lawful from unlawful delegations is what allows agencies to make binding policy (along the separation-of-powers dimension). But that indeterminacy need not have the inertial effect of infusing administrative outputs with supreme Law status (along the federalism dimension). If there is a reason for the conceptual leap from delegation to preemption, it does not come from the nondelegation doctrine. Indeed, if anything, preemption would seem repelled by that doctrine’s core principle—namely, that Congress cannot delegate lawmaking.


\textsuperscript{307} \textit{Am. Trucking Ass’ns}, 531 U.S. at 474-75 (quoting Mistretta v. United States, 488 U.S. 361, 416 (1989)); see also Richard J. Pierce, Jr., \textit{1 Administrative Law Treatise} § 2.6 (5th ed. 2010) (“The Court has become increasingly candid in recognizing its inability to enforce any meaningful limitation on Congress’ power to delegate its legislative power to an appropriate institution.”).

\textsuperscript{308} \textit{Am. Trucking Ass’ns}, 531 U.S. at 474-75 (quoting Mistretta v. United States, 488 U.S. 361, 416 (1989)). An older expression of this point is found in \textit{Union Bridge Co. v. United States}, 204 U.S. 364, 387 (1907) (noting that to deny power to delegate “would be ‘to stop the wheels of government’ and bring about confusion, if not paralysis, in the conduct of the public business”).

\textsuperscript{309} Were administrative preemption foreclosed, we might expect more questions about whether a preemptive conflict exists between a statute and state law (since, in this imagined world, only the statute and not the agency action could preempt). Disentangling the statutory and administrative conflicts with state law may not always be easy. But this statutory analysis should be little different than is already practiced in statutory preemption cases. If useful, the Court might also employ a test similar to the one used to distinguish between “legislative” and “non-legislative” agency actions. Specifically, in the preemption context, the Court might ask the following: but-for the agency action at issue, is there anything in the statute itself that preempts state law? If the answer is ‘no,’ then the state law at issue would stand (subject, of course, to a congressional response). And, in questionable cases, the Court’s presumption against preemption can still do its work. In any event, crafting new tests for statutory preemption in a world where agencies cannot is beyond the scope of this Article. I only wish to suggest that administering such a test seems quite doable for courts, and very little different than what it currently does in statutory preemption cases.
Second, even if we accept the prudential claim that Congress needs to delegate *policymaking* in order to do its job effectively, that hardly compels the conclusion that Congress has or needs the power to delegate *supremacy*. As I have argued elsewhere, the delegation of policymaking is severable from the delegation of preemptive authority—both in theory and practice. Agencies may make law (lower case “l”) in the sense of creating binding norms. But that is not to say that agencies need to make Law (capital “L”) in the sense used in the Supremacy Clause. The purposes and ends of policymaking and preemption are not mutually dependent. Agencies may make policy, yet no logical compulsion demands that such policies have preemptive effect. Indeed, federal and state law operate concurrently in many if not most regulatory contexts.

In sum, the Court’s suggestion that agency action qualifies as Laws... made in Pursuance [of the Constitution]” seems incompatible with the Court’s separation-of-powers maxim that agencies cannot make Law. Perhaps the treatment of what qualifies as Law does not demand equanimity in the separation-of-powers and federalism contexts. But, from a doctrinal perspective, we might reasonably insist that the Court acknowledge and justify disparate treatments of what Law means if that is what the Court intends.

Finally—although less my focus here—academic attempts to justify administrative preemption fail to close the doctrinal loop. As noted, some have suggested that when agencies act within their delegated authority, the statute may be said to do the preemptive work. Yes, we can say that, but it will cost some additional constitutional capital if asked to believe it. When a statute actually conflicts with state law, then it is the statute that preempts. But when the conflict would not exist absent the agency action, then it is only through new fictions and conceptual bargains that we may conclude that Congress is doing the preemptive work.

**C. Federalism Contingencies**

Apart from violating the contingency principle along the separation-of-powers dimension, administrative preemption is an affront to the political

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310 *Cf.* Keller, * supra* note ___, at 58 (“Regardless of what one thinks about the nondelegation doctrine in general, there is a strong argument for the substantive limit that Congress cannot delegate the legislative power to alter the federal-state balance of power.”); Sunstein, * supra* note ___, at 315, 331 n.81 (explaining that not all types of delegations are equal, and that special treatment might be warranted for the delegation of preemption among other types of decisions).

311 For a discussion of these points, see Rubenstein, * supra* note ___, at 1167-69.

312 *Id.*


314 *Cf.*, *Intratextualism*, * supra* note ___, at 811.

315 *See supra* notes ___ and accompanying text.
and procedural safeguards, in which the Court has placed federalism’s primary hope.316

1. Political Safeguards

As Professor Young explains, “in order for the political safeguards to work, the important government decisions actually have to be made through channels in which the states are represented.”317 Moreover, for the political safeguards to be effective, state representatives must be on notice that pending legislation may affect a state’s interests or authority.318 This notice, Professor Young explains, “ensures that incursions on state autonomy will occur only as a result of the considered judgment of Congress, and it provides potential opponents of such incursions with the opportunity to mobilize their forces.”319

The political safeguards, however, have little if any purchase in the administrative forum.320 Agencies are not beholden to states in any politically thick sense. To the contrary, agencies may have interest and incentive to subvert competing state interests.321 States, of course, enjoy certain “soft” protections in the administrative arena. Nothing, for instance, prevents states from lobbying administrative agencies. Moreover, as Larry Kramer and others have hypothesized, “cooperative federalism” schemes generate dynamics of mutual dependency that may make federal agencies receptive to state interests.322 Further, under existing presidential Executive Orders, agencies are instructed to account for federalism when creating policies that may implicate state interests, and to consult with appropriate state representatives.323

316 See supra notes ____ and accompanying text.
317 Young, supra note ___, at 1358.
318 Id.
319 Id.
320 Young, supra note ___, at 869 (explaining that the political (and procedural) safeguards of federalism “have little purchase on executive action”). For a contrary view, see Metzger, Administrative Law as the New Federalism, supra note ___, at 2098 (arguing that administrative law can serve as a vehicle for “amplifying the political safeguards available by giving weight to states in executive branch policy debates and by rendering the effects of agency decisions more transparent and more amenable to congressional oversight.”). The idea that administrative law can promote federalism values, including the political safeguards, is taken up further in Part IV.
321 Young, supra note ___, at 878-89; see also Eskridge, supra note ____ (reporting that a survey of Supreme Court preemption cases involving federal administrative agencies between the 1984 and 2005 Terms found that “agencies pressed preemption positions in two-thirds of the cases.”)
322 See, e.g., Kramer, supra note ___, Bulman-Pozen & Gerken, supra note ___, at 1293 (highlighting that cooperative federalism schemes afford states opportunity to shape administrative policy). For a discussion of cooperative federalism, see supra note ____
323 Memorandum on Preemption, 2009 Daily Comp. Pres. Doc. 384 (May 20, 2009) (President Obama memoranda advising executive agencies to understand the legitimate prerogatives of the states before preempting a state law, and outlining steps that agencies should take in making preemption decisions); Executive Order No. 13,132 (emphasizing the importance of early consultation with state and local officials); Exec. Order No. 12,988 § 3(b)(2), 3 C.F.R. 157 (1996), reprinted in 28 U.S.C. § 519 (2000) (requiring that regulations “specify in clear language, the preemptive effect, if any,” they are to be given); see also Michele E. Gilman, Presidents, Preemption, and the States, 26 CONST. COMMENT. 339, 381-82 (2010) (arguing that, through Executive Orders, the President undertakes an important managerial—rather than decisional—role in administrative preemption); Richard J. Pierce, Jr., Regulation, Deregulation, Federalism, and Administrative Law: Agency Power to Preempt State Regulation, 46 U. Pitt.
Without denying that these soft protections close some of the gap, none substitute for the states’ political safeguard in Congress. States can and do lobby agencies; but because agencies are not politically beholden to states, agencies can more easily turn a deaf ear. Moreover, as Catherine Sharkey points out, there will not always be a sufficiently informed or involved state representative to press state interests at the administrative level. Meanwhile, while cooperative federalism schemes may provide federal agencies some incentive to accommodate state interests, these dynamics are necessarily context specific, and arguably apply less robustly than if federal agencies were not holding the preemption trump card. Finally, the Executive Orders instructing agencies to account for state interests lack an enforcement mechanism; and, in part because of this, studies show that agencies tend to honor these Orders mostly in the breach.

In any event, the Court’s jurisprudence emphasizes the states’ representation in Congress as federalism’s primary safeguard. That is because Congress, alone, is structured to take state regulatory interests into account. Agencies, by contrast, are not similarly structured. They are purely national, unelected institutions. Agencies are politically accountable—at most, and generally only in theory—through the President. But the President’s constituency is of course national (not regional) in scope.

Ultimately, then, the Court’s approach to administrative preemption undermines its own political safeguards theory of federalism.

L. Rev. 607, 665 (1985) (arguing that agencies should approach preemption issues “with particular sensitivity to the important values of federalism”).

Young, supra note ___, at 1358 (noting that “states have virtually no voice” in the administrative context; certainly not of the kind enjoyed in Congress); Bhagwat, supra note ___, at 204 (“States are obviously not represented within agencies, which are purely national, unelected institutions.”); cf. Richard B. Stewart, Federalism and Rights, 19 Ga. L. Rev. 917, 963 (1985) (observing that “battles among factions are resolved not on the floors of Congress but in the hallways of bureaucracies....This system of policymaking circumvents many of the political safeguards of federalism that are supposed to make national policies sensitive to state and local concerns.”).

Catherine M. Sharkey, Federalism Accountability: “Agency-Forcing” Measures, 58 Duke L.J. 2125, 2158-63 (2009) (explaining, for example, that few states have agencies focused on food and drug safety that could represent state interests before the FDA).

For more on this point, see Rubenstein, supra note ___, at 1178.

Mendelson, supra note ___, at 723 (noting that agencies largely fail to take federalism interests into account); see also John O. McGinnis, Presidential Review as Constitutional Restoration, 51 Duke L.J. 901, 902 (2001) (arguing that presidential federalism orders are necessary correctives, and suggesting that an agency’s failure to comply with such orders should be subject to judicial review).

Garcia v San Antonio Metro. Transit Auth., 469 U.S. 528, 550-51 (1985) (observing that “the composition of the Federal Government was designed in large part to protect the States from overreaching by Congress”).

Id.; see also Herbert Wechsler, The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Government, 54 Colum L. Rev. 543, 559 (1954) (arguing that states’ representatives “control the legislative process and, by hypothesis, have broadly acquiesced in sanctioning the challenged Act of Congress”).

2. Procedural Safeguards

The Court's administrative preemption doctrine also subverts the related procedural-safeguards theory of federalism. The procedural safeguards advance state autonomy by default: even if Congress has the will to encroach upon and/or displace state prerogatives, the legislative gauntlet makes it difficult for Congress to do so. In order to become federal law, a statutory proposal must not only survive the bicameralism and presentment filters,331 but also must pass through multiple “vetogates” erected by the rules and customs of both chambers of Congress.332 The states directly benefit from the screening mechanism of the legislative process “because the federal government’s inability to adopt ‘the supreme Law of the Land’ leaves states free to govern by default.”333

Administrative preemption, however, bypasses the legislative dam. For a Congress seeking to expand its regulatory power at the expense of state interests, all that Congress need do is delegate. Indeed, William Eskridge explains, the legislative “vetogates encourage Congress to delegate more authority to agencies.”334 This result, William Funk observes, “is precisely the type of congressional behavior that post-Garcia federalism jurisprudence seeks to prevent.”335

Again, none of this is to deny that states may get some procedural protection in the administrative context. If the preempting agency action is a regulation, for example, states may have a number of procedural opportunities to shape or block the regulation.336 But the sum of these opportunities comes nowhere close to those enjoyed by the states in the legislative forum. Administrative procedures simply do not filter in the same way or degree as the legislative process. Indeed, that is one reason why Congress delegates to agencies in the first place.337 Moreover, whatever procedural protection states may receive in the administrative process is somewhat offset by the lack of agencies’ political accountability to the states. While states may have formal procedural opportunities to speak in the administrative arena, their interests will be heard without the tenor of a political bullhorn.

Finally, it is worth emphasizing that the procedural hurdles associated with notice-and-comment rulemaking are not prerequisites for preemption under the Court’s existing doctrine.338 As discussed in Part I,

333 Clark, supra note ___, at 1325.
334 Eskridge, supra note ___, at 1449.
335 Campbell, supra note ___, at 829.
336 See supra note ___ and accompanying text.
337 See supra note ___ and accompanying text.
338 See supra notes ___ and accompanying text.
the Court has held that administrative orders qualify for preemptive effect, regardless of whether state interests were even represented in the adjudication giving rise to the agency’s order. And, as earlier discussed, the majority decision in Arizona v. United States strongly suggests that agencies might even preempt through nonbinding administrative policies, again without any advance notice or state input.

The Arizona decision is telling and troubling for three reasons pertinent here. First, as already mentioned, Arizona underscores that administrative preemption is a judicially undertheorized concept. The Court did not engage Justice Alito’s or Justice Scalia’s objections that agency action without the “force of law” could nevertheless preempt state law. Second, Arizona exposes the possibility that states may get zero procedural protection in the administrative arena. The federal administration was under no obligation and did not seek state input in developing its immigration enforcement priorities. Third—and perhaps most disconcerting—the administration has defended its immigration enforcement policies against separation-of-powers challenges on the ground that the policies are nonbinding exercises of prosecutorial discretion, and therefore do not cross into impermissible lawmaking or otherwise violate the Executive’s constitutional duty to “take care that [Congress’s] Laws be faithfully executed.” The administration’s position that its immigration enforcement policies are not Law for separation-of-powers purposes, yet are Law for preemption purposes, may or may not be politically duplicitous. But it is seemingly paradoxical.

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In sum, the Court’s approach to administrative preemption seems to contradict the very premises on which the doctrine may rest. If agency action qualifies as “Law,” then it should be void under separation-of-powers purposes.

340 Others have provided theories to close the loop. See Kerry Abrams, Plenary Power Preemption, 99 VA. L. REV. 601, 606 (2013); David A. Martin, Reading Arizona, 98 Va. L. REV. 41 (2012); Adam B. Cox, Enforcement Redundancy and the Future of Immigration Law, 2012 SUP. CT. REV. 31, 52. While attempting to explain the inconsistency, none of these theories claim that the Court’s treatment was correct. In any event, we need the Court’s reasons. See supra notes ___ and accompanying text.
342 David S. Rubenstein, Immigration Structuralism: A Return to Form, 8 DUKE J. CONST. LAW & PUB. POLY (forthcoming 2013) (making the case for why nonbinding immigration enforcement policies cannot preempt under the Constitution, and should not preempt as a matter of policy).
powers principles (and thereby ineligible to preempt state law). Meanwhile, if agency action does not qualify as “Law” (thus saving it from a nondelegation violation), then it is most difficult to comprehend why it can or should bind sovereign states. As the Court itself has recognized, the states’ most meaningful protection against federal encroachment is the so-called political and procedural safeguards of federalism. But neither of these safeguards attach administratively.

Before proceeding further, I wish to acknowledge the indeterminacy that inheres in foregoing doctrinal exercise. The contingencies are hardly models of fixed precision. For example, we might insist that the Court honor the political and procedural safeguards of federalism, but how must it be honored? We might, for instance, insist that administrative preemption be completely foreclosed. But more moderate approaches might satisfy enough (even if not all) of the political and procedural demand. For example, some commentators suggest requiring that Congress clearly delegate supremacy as a prerequisite to administrative preemption. This approach would at least put states on notice during the legislative process that Congress intends for the agency to make preemption decisions. In addition (or, alternatively), some commentators suggest that only agency action traversing notice-and-comment procedures should qualify for preemptive effect. This approach could replicate some of the deliberative and inertial qualities associated with the political and procedural safeguards, albeit not in the legislative forum. The Court’s current approach, however, does none of these things.

Ultimately, my point is that trying to give expression to the contingencies is better than simply ignoring them. To completely ignore the contingencies would seem to break the last remaining ties between what our Constitution says and what our Constitution does. That poses a problem for originalists and non-originalists alike, although perhaps not an intractable one for the reasons I turn to next.

343 See Gibbons v. Ogden, 22 U.S. 1 (1824) (explaining that only a valid federal law can preempt a state law).
344 On the political safeguards, see infra notes ___-___ and accompanying text. On the procedural safeguards, see infra notes ___ and accompanying text.
345 For a normative defense of this view, see Rubenstein, supra note __. See also Young, Executive Preemption (offering an iterated approach, and positing, as a first possibility, that administrative preemption be foreclosed).
347 See, e.g., Buzbee, supra note Galle & Seidenfeld, supra note ___; Young, supra note ___; Pierce, supra note __, at 610-611; see generally Metzger, Administrative Law as the New Federalism, supra note ___ (arguing that certain features of administrative law “hold strong potential to protect state interests,” including notice-and-comment rulemaking and the judicially imposed requirement that agencies engage in “reasoned decisionmaking”).
V. PRAGMATISM VS. PARADOX

Pragmatic considerations are almost always present, whether operating on or below the surface. This last Part brings pragmatism to the fore. I consider how two distinct lines of pragmatic argumentation bear on the paradox-hypothesis. Section A outlines the pragmatic appeal of administrative preemption. Elsewhere, I have questioned the merits of this line of argument. But my purpose here is different, where I both assume and accept the relevance of the pragmatic claims in favor of administrative preemption. For some non-originalists, a favorable pragmatic prognosis may alone be sufficient to constitutionally justify administrative preemption. Section B explores an overlapping consequentialist concern: what to do about administrative preemption for those who conclude that the practice is constitutionally problematic. It is not obvious that anything should be done, given what doing so may entail for the operation of modern government. At the same time, it is not obvious that nothing should be done, precisely for the same reason.

A. Optimization

Before proceeding to the pragmatic claims in favor of administrative preemption, it will be useful to contextualize them within competing theories of federalism. For federalism-formalists, “efficiency is beside the point. The Constitution preserves state authority even when it is inefficient.” The federalism-formalist insists on dual sovereignty because the Constitution does, regardless of whether the functional values generally ascribed to federalism (e.g., the promotion of liberty, regulatory experimentation, bringing government closer to the people) are delivered in any particular case. For federalism-functionalists, however, optimization is the key. They frame federalism questions around “how power should be allocated between the federal and state governments,” and ask whether centralization or decentralization is best for public outcomes. These approaches capture two competing conceptions of federalism: the first is concerned with preserving states as competing sources of power (sometimes referred to as “abstract federalism”); the

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348 See Cass R. Sunstein, A Constitution Of Many Minds 20-23 (2011) (claiming that consideration of outcomes always drive approaches to judicial review); See also supra notes ___-___ (describing pragmatism).
349 Bhagwat, Agency Preemption, supra note ___, at 225–26, 228–29.
350 Young, Making Federalism, supra note ___, at 1762; John C. Yoo, The Judicial Safeguards of Federalism, 70 S. Cal. L. Rev. 1311, 1320 (1997) (“Basing constitutional interpretation exclusively on function is inconsistent with the point of a written constitution.”).
351 See generally Erwin Chemerinsky, The Values of Federalism, 47 Fla. L. Rev. 499, 534 (1995); see also id. at 539 (“Federalism can be reconceived not as about limiting federal power or even as about limiting state or local power. Rather, it should be seen as based on the desirability of empowering multiple levels of government to deal with social problems.”); see also Kramer, Understanding Federalism, supra note ___ (“[I]mposing new limits [on federal power] just for the sake of having limits is a useless and dangerous formalism”); Edward L. Rubin & Malcolm Feeley, Federalism: Some Notes on a National Neurosis, 41 UCLA L. Rev. 903 (1994) (arguing that federalism per se serves none of the values attributed to it; rather, the asserted benefits of federalism—for instance, increased citizen participation and choice, and state competition and experimentation—are actually benefits of the “managerial concept” of “decentralization”).
second values federalism only to the extent that it may tend to advance
the overall national welfare (sometimes referred to as “instrumental”

Abstract federalism tends to be of more concern to Congress and the
Court than it is to agencies. Perhaps that is because of states’ greater
representation in Congress, perhaps because of agency mission-bias in
favor of regulatory uniformity, or perhaps both. In any event, federalism-
functionalists are willing to concede that agencies score poorly in
promoting abstract federalism because, in the end, state autonomy for its
own sake is just one (rather small) input into the final calculus of whether
agencies should have preemptive power.

Rather, administrative preemption is generally promoted on the
strength of instrumental federalism claims, which come in positive and
negative varieties. Under a strong version of the positive claim, agencies
are better positioned than Congress to make preemption decisions.\footnote{See generally Galle & Seidenfeld, supra note __, at __.} That
is not only because of Congress’s institutional limitations (lack of time,
resources, foresight, and so on), but also because of agencies’ institutional
advantages (expertise, deliberative qualities, flexibility, resources, etc.). A
more modest version of the positive instrumental claim recognizes that
Congress outperforms agencies in making preemption decisions, but that
when Congress has not done so, agencies can and should.

Meanwhile, the negative instrumental claim hypothesizes a world
where Congress cannot delegate supremacy, and concludes—on balance—
that a system with administrative preemption outperforms an imagined
system without it. In that imagined world, foreclosing administrative
preemption would result in more federal-state regulatory overlap, on the
assumption that Congress—either for lack of foresight or political will—
often will not rise to the challenge of making a preemption decision. And,
on that assumption, the federalism-functionalist speculates about
whether Congress’s silence will advance federalism’s instrumental values
(e.g., competition, political participation, regulatory experimentation,
satisfying diverse and heterogeneous needs)\footnote{See, e.g., Gregory v. Ashcroft, 501 U.S. 452 (1991) (discussing values of federalism).} or, rather, unleash
federalism’s darker bents (e.g., localized bigotry, the creation of
externalities, and races-to-the-bottom). Given these case-specific
uncertainties, and lack of congressional foresight, the instrumental claim
favors giving agencies latitude to make responsive preemption decisions
unless and until Congress does so.

These are powerful (though contestable) claims. As promised, resolving
them is beyond the scope of this Article. Still, it will be useful to highlight
the points of departure. The pragmatic debate over administrative preemption requires imagination (what the system would look like if . . . ) and judgment (that system would be “good” or “bad”). For those who value abstract federalism, how much weight on the scale should it receive relative to instrumental considerations? Even if we remove abstract federalism from the equation, does a system with administrative preemption necessarily outperform one without it? Or, is there something in between that might be better? If so, how can we know, and what should it be?

I could go on. These and like questions, however, reflect a more general critique of the uses of pragmatic argumentation in constitutional interpretation. They require imagination and judgment, neither of which is much informed by what the Constitution says, and over which decisionmakers are apt to disagree. Still, pragmatic claims sometimes matter—for better or worse, and sometimes more or less. Whether they have a place in debates over administrative preemption depends, again, on one’s preferred interpretive methodology.

Thus, for present purposes, my objective is simply to isolate the pragmatic claims. If pragmatism is the Court’s unstated reason for administrative preemption, then it should so say. If pragmatic appeals are the only ones that support administrative preemption, then those decisionmakers of an originalist bent might be expected to jettison the practice. Short of that, if pragmatism is an important (but not the only) argument in favor of administrative preemption, then we should press the consequentialist claims harder. That evaluation might lead to the same result as originalism—namely, that administrative preemption is dubious—albeit for different reasons.

Meanwhile, if the pragmatic claims have merit, we might at least expect pragmatic decisionmakers to shape administrative preemption doctrine in line with what those arguments counsel for, yet no further. Take, for example, the seemingly unresolved issue of whether agency policies that do not undergo notice-and-comment rulemaking qualify for preemptive effect. As to this type of agency action, pragmatic claims sounding in agency deliberation and public input do not apply with much if any force. The pragmatic judge might thus exclude such informal

355 See Stuart Minor Benjamin & Ernest A. Young, Tennis with the Net Down: Administrative Federalism Without Congress, 57 DUKL J. 2111, 2116 (2008) (“[C]onstitutionalism means that we are simply not free to choose whatever normative principles and institutional strategies we think best.”).

356 ADRIAN VERMEULE, JUDGING UNDER UNCERTAINTY 153-82 (2006) (noting that judges suffer from limited information and bounded rationality, which distort their efforts to assess the consequences of their decisions); Antonin Scalia, Originalism: The Lesser Evil, 57 U. CIN. L. REV. 849, 854 (1989) (arguing that the legislature is a “more appropriate expositor of social values” than the judiciary); See also [cite] (“De facto power does not supply a justification for government action, even when combined with a sincere belief that good consequences will ensue. Something more is needed to differentiate the coercive powers of a federal court from those of a schoolyard bully.”).

357 See supra notes ___-___ and accompanying text.
agency action from “supreme Law” status, even while endorsing the preemptive effect of more formalized agency action, such as notice-and-comment rulemaking.

B. Now (and so) What?

Apart from whether pragmatic claims are enough to render administrative preemption constitutional, there remains the separate consideration of what the Court should do with the interpretive conclusion reached. To be sure, these are partly overlapping considerations: how close administrative preemption comes to the constitutional line—or how safely it falls on one side—will surely have a bearing on what if anything should be done. But here I consider some possible reactions for those who conclude that administrative preemption comes uncomfortably close to the unconstitutional line or crosses it. Even some “faint-hearted” originalists, who conclude that administrative preemption is unconstitutional as a matter of interpretation, might nevertheless make pragmatic allowance for it.

Here it will be useful to take stock of the stakes, if only for some additional perspective. First, clear away what is not at stake. The sky is not falling. The government may not be working well, or as originally intended, but it is working (the 2013 shutdown notwithstanding). On the strength of whatever comfort this affords, we might appreciate the paradox as an interesting hypothesis and do nothing about it. Or, if pushed to decide, we might candidly choose our working system over what

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358 “Faint-hearted originalism” is an approach to stare decisis that allows originalist interpretations to accommodate precedent some of the time. It is a term most commonly associated with Justice Scalia, with which he self-identifies. Scalia, supra note 106, at 140 (“stare decisis is not part of my originalist philosophy; it is a pragmatic exception to it”). See also Nelson Lund, Stare Decisis and Originalism: Judicial Disengagement from the Supreme Court’s Errors, 19 GEO. MASON L. REV. 1029, 1041 (2012) (arguing that “[a]lmost all originalists have decided, on pragmatic grounds, that the Supreme Court’s constitutional infidelities must sometimes be allowed to mature into de facto constitutional amendments”). For general discussions of the dilemma that originalists face when original meaning clashes with entrenched precedents, see for example, Michael J. Gerhardt, The Role of Precedent in Constitutional Decisionmaking and Theory, 60 GEO. WASH. L. REV. 68, 133-34 (1991) (“[F]aithful adherents to original understanding face an inescapable dilemma. They either can strive to overrule the better part of constitutional doctrine and thereby thrust the world of constitutional law into turmoil, or they must abandon original understanding in numerous substantive areas in order to stabilize constitutional law.”); Popular Sovereignty, pg. 1473-74 (“Originalists thus appear to be faced with an unpleasant choice: either take a principled stance with such dire implications for the rule of law that it endangers originalism as a viable theory of interpretation, or apply an inconsistent and unprincipled stare decisis.”). For originalist critiques of faint-hearted originalism, see Randy E. Barnett, Scalia’s Infidelity: A Critique of “Faint-Hearted” Originalism, 75 U. Chi. L. REV. 7, 13 (2006); Michael Stokes Paulsen [cite] (“stare decisis... is completely irreconcilable with originalism”); Gary Lawson, The Constitutional Case Against Precedent, 17 HARV. J.L. & PUB. POL’Y 23 (1994) (arguing that the Constitution forbids elevating erroneous precedents over the Constitution’s original meaning). For non-originalist critiques of faint-hearted originalism, see STRAUSS, supra note 20, at 17 (arguing that rigorous originalism produces results that are “inconsistent with principles that are at the core of American constitutional law,” and that “fainthearted” originalism that accommodates stare decisis removes constraints on judicial discretion and allows judges to become “sometime-living-constitutionalists”); CASS R. SUNSTEIN, RADICALS IN ROBES: WHY EXTREME RIGHT-WING COURTS ARE WRONG FOR AMERICA 53-78 (2005) (arguing that “faint-hearted” textualists who accommodate stare decisis “cannot easily show that their approach promotes their goal of binding judges through clear rules”); MARK TUSHNET, TAKING THE CONSTITUTION AWAY FROM THE COURTS 156-57 (1999).
the written Constitution and the Court’s doctrinal contingencies seem to prescribe.

I cannot foreswear these reactions as beyond reproach (though mine is surely different). Indeed, courts and commentators have embraced some version of these passive reactions on matters of greater expanse: namely, for congressional delegation, Congress’s virtually illimitable substantive power, and the combination of functions in administrative agencies. That the Court has already condoned administrative preemption makes it all the more fair to ask—why should we care about this? I suspect that, for many readers, answering that question will depend on any number of convictions about what the Constitution prescribes in terms of balance, and whether that balance, or the one we actually have, needs adjustment. It is well beyond my ambition here to catalog all available viewpoints, much less to convince the reader of the best among them. So, rather than hazard an answer to why we should care, I return to the more propitious line of inquiry—what is at stake?

It is far too late to insist that our original structural design is at stake. The great bulk of that structure has already been gutted and will not be restored. To insist on legal arrangements completely blind to the government that we actually have would be futile, if not also wrong minded. Our modern government could hardly operate—at least not effectively—without some of the structural concessions made for the administrative state. Indeed, that is why the concessions were made. On the table, however, is the opportunity to retain (or recapture) some of the values that our structural constitution was intended to serve: among them, political liberty, limited federal government, accountability, and competition. We need not be committed to the founding generation to be committed to these ideals.

At the same time, it would be wrong to suggest that our structural values are the only thing at stake. If we foreclose or limit administrative preemption doctrine, we will also have to compromise some of the functional virtues associated with it. Further, as I have argued elsewhere, modifying administrative preemption doctrine can also affect—for better or worse—how the federal branches work and interact in crafting national

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See supra Part II. See also Bhagwat, supra note __, at 225–26 (noting that “since the New Deal we have to some extent accepted [the threat to structural federalism] by permitting national, administrative authority to expand enormously,” but suggesting that administrative preemption “may be one step too far”).

See supra notes __ and accompanying text.

McCutchen, supra note __, at 41–42 (“At least politically, the abolition of administrative agencies and a return to the formalist system of constitutional governance has become unthinkable.”).

See supra notes __ and accompanying text.

Thus, at stake are not only the values of structuralism, but also the values of administructuralism.\textsuperscript{365}

This recognition goes a long way toward explaining my bottom-up approach to administrative preemption. As I began with, administrative preemption is made possible by congressional delegation of policymaking; it is made more dangerous by the combination of powers in agencies; and it is made wide ranging by the virtual demise of federalism’s enumerated-powers principle. Considered in this light, administrative preemption fairly may be perceived as the last stop on the structural concession train. Insofar as we are committed to safeguarding structure, why not simply derail the train at one of its earlier stops?

The short answer is that the train has already left those stations. For better or worse, all of these concessions are now entrenched postulates of modern government.\textsuperscript{367} By contrast, the train may still be in the administrative preemption station.\textsuperscript{368} Administrative preemption doctrine is an appealing vehicle for reform precisely because revising it can be less destabilizing than a direct assault on the aforementioned postulates. Specifically, reforming the doctrine would not prevent Congress from delegating policymaking; would not prevent Congress from combining functions in agencies; and would not restrict the subject matter over which federal law extends.

Reforming the Court’s administrative preemption doctrine, however, may indirectly compensate for these associated concessions.\textsuperscript{369} Indeed, precisely because administrative preemption is situated at the structural intersection between separation of powers and federalism, reforming the doctrine may rather efficiently promote structural values along both dimensions.\textsuperscript{370} What might result is surely not the Framers’ design, but rather a modern translation of it: one that remains faithful to the ideals of political liberty, political competition, limited federal government, and representational accountability, yet without a full retreat to the Framers’ original strategies for actualizing those ideals.\textsuperscript{371}

\textsuperscript{365} Rubenstein, Immigration Structuralism: A Return to Form. See also, Sharkey, Federalism Accountability, supra note ___ at 2179–80, 2186–89 (noting that Wyeth’s reluctance to defer to the agency’s preemptive interpretation in a regulatory preamble may encourage agencies to use notice-and-comment rulemaking and create a sufficient agency record in support); Metzger, Federal Agency Reform, ___ (arguing that a more restrictive preemption doctrine can improve administrative regulation).

\textsuperscript{366} See supra Part III.A (discussing the engine of change behind the New Deal transformation).

\textsuperscript{367} See Lawson, supra note ___, at 1232 (“[T]he essential features of the modern administrative state have . . . been taken as unchallengable postulates by virtually all players in the legal and political worlds...”); Peter B. McCutchen, Mistakes, Precedent, and the Rise of the Administrative State: Toward a Constitutional Theory of the Second Best, 80 CORNELL L. REV. 1, 17 (1994). (“Neither the cases sanctioning open-ended delegations of legislative power nor those broadly interpreting the commerce clause will be overturned.”).

\textsuperscript{368} Cf. Benjamin & Young, supra note ___, at ____ (making a similar point).

\textsuperscript{369} See infra Part IV.

\textsuperscript{370} See Rubenstein, Immigration Structuralism: A Return to Form (arguing that separation-of-powers norms and the lawmaking process may be enhanced by foreclosing the preemptive effect of nonbinding administrative policies).

To say that something should be done, however, leaves open the question of what. A smorgasbord of proposals have been advanced elsewhere, by myself and others. These proposals may be grouped into one or more of the following general categories: (1) foreclosing administrative preemption;372 (2) requiring a clear expression of Congress’s intent to delegate supremacy,373 (3) infusing additional procedural safeguards for state interests into the administrative decision-making process;374 and (4) ramping up judicial review of administrative preemption decisions.375 By design, this Article’s layered approach to the paradox of administrative preemption does not lead to any singular solution. But it does provide a sturdier foundation for that evaluation.

CONCLUSION

Whether administrative preemption is a paradox, and, if so, what to do about it, depends greatly on one’s interpretive preferences and normative commitments. Rather than resist these analytic variables, this Article employs textual, historical, structural, doctrinal, and pragmatic modes of constitutional argument to interrogate the Court’s administrative preemption doctrine.

Both textually and structurally, administrative preemption seems constitutionally paradoxical. Specifically, if agency action qualifies as “supreme Law,” then it violates the Constitution’s separation of powers. Meanwhile, if agency action does not qualify as “Law” (thus saving it from separation-of-powers doom), then it falls beyond the Supremacy Clause’s purview. In short, to qualify for preemption, agency action must qualify as Law for federalism purposes, and not Law for separation-of-powers—simultaneously. This structural contradiction, even if it is conceptually possible, belies the Constitution’s original meaning.

(1994) (same); Sunstein, Constitutionalism After, supra note __, at 436-37 (discussing separation-of-powers values).
372 See Rubenstein, supra note __ of Young, supra note at 897 (arguing that foreclosing administrative preemption is probably most keeping with the political and procedural safeguards, but also noting that it is “probably too late in the day to insist” on it).
374 See, e.g., Buzbee, supra note Galle & Seidenfeld, supra note __; Young, supra note __; Pierce, supra note __, at 610-611; Sharkey, Inside Agency Preemption, supra note __, 572-94 (offering a number of recommendations to enhance compliance with existing executive orders on federalism); see generally Metzger, Administrative Law as the New Federalism, supra note __ (arguing that certain features of administrative law “hold strong potential to protect state interests,” including notice-and-comment rulemaking” and the judicially imposed requirement that agencies engage in “reasoned decisionmaking”).
375 See, e.g., Buzbee, supra note __, at 1524-25; Galle & Seidenfeld, supra note __, at 2001; Karen A. Jordan, Opening the Door to “Hard-Look” Review of Agency Preemption, 31 W. NEW ENG. L. REV. 353, 353 (2009); Nina A. Mendelson, Chevron and Preemption, 102 MICH. L. REV. 737 (2004); Metzger, Administrative Law as the New Federalism, supra note __, at 2106; Catherine Sharkey, supra note __.
Doctrinal modes of argument fare no better. The Court’s legitimizing theories of modern government both antagonize and are antagonized by administrative preemption. As explained, the Court forfeited the original separation-of-powers model on the contingency that agencies not make “Law.” Separately, the Court has mostly eschewed federalism’s original strategy of enumerated (and limited) federal power in favor of political and procedural state safeguards in Congress. Administrative preemption upsets these conditional principles of modern government—again, simultaneously. If administrative preemption is justified on the ground that agencies make “Law” for purposes of the Supremacy Clause, then how are we to understand the Court’s longstanding insistence otherwise in the separation-of-powers context? And, if unelected administrative officials can displace state law in Congress’s stead, what are we to make of the Court’s heralded political-safeguards theory of federalism? These tensions reveal the difficulty of doctrinally squaring administrative preemption with the Court’s theories of modern government. We might conclude that administrative preemption is right, and the conditional principles wrong. Or, we might conclude the inverse. But, it is hard to conceive of a constitutional premise that makes all of them correct. Perhaps one exists, but we still await the Court’s.

In the end, pragmatic argumentation may be the best (and perhaps the only) defense of administrative preemption. First, administrative preemption may on balance produce better system results. Second, foreclosing administrative preemption may be too destabilizing for the operation of modern government. The merits of these pragmatic claims are questionable, and also beyond this Article’s scope. Rather, my aim has been to isolate them. The reader can decide whether the pragmatic claims are enough to justify “the paradox of administrative preemption”—constitutionally or otherwise. What seems evident, however, is that something must give. As matters stand, administrative preemption is incompatible with the written Constitution and the Court’s legitimating theories of modern government. Saving administrative preemption on pragmatic grounds shades over, but does not resolve, this incoherence.