

Essays

TENNIS WITH THE NET DOWN: ADMINISTRATIVE FEDERALISM WITHOUT CONGRESS

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Constitutional law is a funny subject for academics. As scholars, we aspire to push forward the frontiers of knowledge—to make new discoveries and to think about things in ways that no one has ever thought of before. The metaphor of scientific discovery has always been somewhat awkward in the social sciences—and perhaps even more awkward in law—but surely we all hope to add something *new* to the sum of human knowledge. We are not, to borrow a phrase from Oliver North’s lawyer Brendan Sullivan, “just potted plants.”¹

Constitutional law, on the other hand, is all about *old*. A central function of the Constitution in American law is to entrench certain structures and rights against change, and every argument—even those for progressive reform of our institutions—must be grounded in or at least tenuously connected to a text drafted generations ago. “Original” in other fields of inquiry means innovative or surprising; in

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1. Sullivan spoke up during his client North’s testimony and was told to be silent. Sullivan responded, “I’m not a potted plant. I’m here as a lawyer. That’s my job.” Joint Hearings Before S. Select Comm. on Secret Military Assistance to Iran and the Nicaraguan Opposition and H. Select Comm. to Investigate Covert Arms Transactions with Iran, 100th Cong. 100-7 Pt. I, 263 (1987) (testimony of Oliver L. North); see also *Washington Talk: Briefing: Potted Plants Galore*, N.Y. TIMES, Mar. 17, 1988, at B6.

constitutional law “originalism” stands for a hidebound appeal to history. The most creative arguments must somehow be couched in terms designed to make them seem less daring and more consonant with what has gone before.

Hence the temptation to just cut the cord. It is a truism that the founders’ world is not ours, and the problems confronting our polity, although not necessarily more difficult, are in many ways different. Moreover, no matter how much brilliance and foresight we are willing to ascribe to our constitutional founders, it would be surprising if all the effort devoted to the study of political institutions over the past two centuries had not yielded *some* progress. And to the extent that we think we have identified a new problem or simply come up with a better way, it is natural to want to reshape our institutions in response—Constitution or no Constitution. It is hard not to start tugging at the knots that bind us to the mast.

American politicians, lawyers, and judges have only partially resisted this temptation. We have constructed a national security constitution, for instance, that to a significant degree reflects the responsibilities and vulnerabilities of a superpower in an age of supersonic transport and weapons of mass destruction. On the domestic side, we have a centralized administrative welfare state exercising authority and undertaking responsibility in ways that would have shocked the Framers. And this yields a second central dilemma for constitutional scholars, powerfully put by Gary Lawson:

The actual structure and operation of the national government today has virtually nothing to do with the Constitution. There is no reasonable prospect that this circumstance will significantly improve in the foreseeable future. If one is not prepared (as I am) to hold fast to the Constitution though the heavens may fall, what is one supposed to do with that knowledge?²

The thoughtful articles by Brian Galle and Mark Seidenfeld³ and by Gillian Metzger,⁴ to which this brief Essay responds, offer one possible answer to Professor Lawson’s question. Professors Galle and Seidenfeld are eminently unwilling to sit with Lawson and watch the

2. Gary Lawson, *The Rise and Rise of the Administrative State*, 107 HARV. L. REV. 1231, 1249 (1994).

3. Brian Galle & Mark Seidenfeld, *Administrative Law’s Federalism: Preemption, Delegation, and Agencies at the Edge of Federal Power*, 57 DUKE L.J. 1933 (2008).

4. Gillian E. Metzger, *Administrative Law as the New Federalism*, 57 DUKE L.J. 2023 (2008).

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heavens fall; they are, moreover, steeped in the latest learning on the comparative competence of political, judicial, and bureaucratic institutions. Consequently, they are willing to entertain arguments that modern administrative agencies are, in fact, better vessels of democratic values than Congress, and to acknowledge the claims of federalism only if and to the extent that decentralizing authority furthers some sort of public policy value.⁵ Similarly, Professor Metzger accepts the value of federalism but argues that it should be protected through the operation of ordinary principles of administrative law.⁶ What both articles have in common—other than their high quality—is that they shift the focus of federalism doctrine from the structures established by the Constitution to the structures established by the administrative state. To paraphrase their thesis in Lawson’s terms, Galle, Seidenfeld, and Metzger have chosen to “acknowledge openly and honestly, as did some of the architects of the New Deal, that one cannot have allegiance both to the administrative state and to the Constitution.”⁷

For our own part, we are unwilling to adopt this “in for a penny, in for a pound” approach to the modern administrative state. The two of us often disagree profoundly about the degree of social, political, and institutional change that is desirable in a polity,⁸ but that is a dispute about the extent to which institutional structure *ought* to be constitutionally entrenched. Neither of us has any doubt, however, that the Constitution we actually have—which neither of us chose, but with which both of us are stuck—does entrench certain structures, like separation of powers and federalism. Both of these structural principles are contestable and open-ended, and we might disagree (albeit probably to a less fisticuffs-inducing extent) about their best reading in many contexts. But we both think that contemporary American lawyers have to maintain continuity with—to make *some sense* of—the constitutional vision of separation of powers and federalism notwithstanding the many profound changes to that structure that have occurred since 1789. We worry, with Professor Lawson, that “[i]f . . . one . . . follows the New Deal architects in

5. Galle & Seidenfeld, *supra* note 3, at 1936–40.

6. Metzger, *supra* note 4, at 2028.

7. See Lawson, *supra* note 2, at 1253.

8. This disagreement has raged since the day we met, as coclerks in August 1995. Professor Benjamin would characterize Professor Young as the most egregiously hidebound variety of Burkean conservative; Professor Young thinks Professor Benjamin is a Jacobin.

choosing the administrative state over the Constitution, one must also acknowledge that all constitutional discourse is thereby rendered problematic.”⁹

The constitutional discourse that Professors Galle, Seidenfeld, and Metzger propose in their contributions to this symposium reminds us of a favorite observation from that noted administrative law sage, Robert Frost. In a 1966 interview, Frost commented, “I’d as soon write free verse as play tennis with the net down.”¹⁰ To our minds, the brand of functionalism embraced by our interlocutors here amounts to a similar disregard for the constraints that give meaning to constitutionalism. Against this anti-Frostian perspective, we insist that constitutional text, structure, history, and tradition impose meaningful boundaries on the institutional structures available to pursue federal policy goals. You can hit a wicked serve with the net down,¹¹ but you’re not playing tennis anymore.

Our response to these papers proceeds in three parts. Part I considers Professors Galle and Seidenfeld’s invocation of “constitutional realism,” by which they seem to mean that constitutional principle must give way to contemporary functional realities.¹² We think we can discern a similar notion implicit in Professor Metzger’s idea of administrative law as a “federalism surrogate”—that is, that the established constitutional structures can be simply placed to one side and replaced with something else if those established structures prove outmoded or ineffective as vehicles for protecting more general constitutional values.¹³ Our discussion compares this version with Karl Llewellyn’s quite different version of constitutional realism,¹⁴ which emphasizes the extent to which extratextual institutions and practices supplement the constitutional “work” of the 1789 document but does *not* claim that the basic principles of the canonical document could be simply shoved aside for policy reasons. We like to think we are constitutional realists too, but

9. Lawson, *supra* note 2, at 1253.

10. THE OXFORD DICTIONARY OF QUOTATIONS 295 (Angela Partington ed., 4th ed. 1996).

11. In some variants of beer pong, for example, the net is removed from the ping pong table in order to facilitate a very low and fast serve. See *Dartmouth Beer Pong*, WIKIPEDIA.COM (available at http://en.wikipedia.org/wiki/Dartmouth_pong) (last visited May 31, 2008).

12. Galle & Seidenfeld, *supra* note 3, at 1938–39.

13. See Metzger, *supra* note 4, at 2059.

14. K.N. Llewellyn, *The Constitution as an Institution*, 34 COLUM. L. REV. 1 (1934).

we prefer Professor Llewellyn's version to the ones on offer elsewhere in this symposium.

Part II focuses more specifically on questions of administrative law and in particular administrative federalism. We discuss Professors Galle, Seidenfeld, and Metzger's focus on agencies and why we think it is inadequate. Expansive notions of the Commerce Clause have largely cast aside the protections for states that dual federalism and other mechanisms once offered, but conventional wisdom holds that the states retain some measure of protection by way of the procedural and political safeguards of federalism.¹⁵ On the separation of powers side, the death of the nondelegation doctrine threatened to eviscerate the central assumption that *Congress* makes the laws. As with federalism, though, this problem has been thought to be mitigated by Congress's continued supremacy over agencies and the availability of judicial review to enforce the statutory limits of agency authority.¹⁶ We are largely willing to accept these rationales; we think, however, that by elevating the administrative agency itself to the primary role, Galle, Seidenfeld, and Metzger shatter the fragile constitutional compromises that allow present institutional arrangements to maintain continuity with traditional constitutional structures.

In Part III we discuss how our approach differs from that of Professors Galle, Seidenfeld, and Metzger. In our view, the touchstone of any analysis must be what Congress intended, not what agencies can do to improve on Congress. This is not only old-fashioned but also may prove cumbersome for an agency that wants to act quickly and (let us suppose) has states' best interests at heart. We thus concede that our approach might not be as conducive to optimal policymaking as the alternative focus proposed by Galle, Seidenfeld, and Metzger. (We do not think, however, that our insistence on traditional structures would preclude adopting many of the federalism-protective administrative mechanisms that our colleagues champion here.) But the more traditional approach does

15. See *infra* Part III.A. See generally 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 (1954).

16. See, e.g., CASS R. SUNSTEIN, AFTER THE RIGHTS REVOLUTION: RECONCEIVING THE REGULATORY STATE 143 (1990) ("Broad delegations of power to regulatory agencies, questionable in light of the grant of legislative power to Congress in Article I of the Constitution, have been allowed largely on the assumption that courts would be available to ensure agency fidelity to whatever statutory directives have been issued.").

have the virtue of allowing us to call ourselves constitutional lawyers and still look ourselves in the mirror each morning.

The central thrust of Professors Galle, Seidenfeld, and Metzger's argument is to propose a different form of federalism to be enforced through a different set of institutional mechanisms. This might be an entirely sensible prescription for a new constitution in a newly-established federal system. But for us, constitutionalism means that we are simply not free to choose whatever normative principles and institutional strategies we think best. We must, to borrow a phrase from our days in Texas, "dance with the girls that brung us."

I. TWO KINDS OF CONSTITUTIONAL REALISM

The anti-Frostian articles in this symposium represent a more general trend in administrative law that focuses on federal agencies themselves as the situs for protecting constitutional values such as separation of powers, federalism, and democratic accountability. Our friend Lisa Bressman's work, for example, has questioned conventional views of agencies as implementing a discernible intent of Congress¹⁷ or as democratically accountable through an elected president¹⁸ and has instead emphasized the importance of procedural mechanisms at the agencies as a means of promoting political control and preventing arbitrariness.¹⁹ A parallel trend in constitutional law more generally emphasizes other nontextual institutional structures, such as political parties, as vehicles for protecting constitutional values.²⁰ In each instance, the impulse is to look beyond the hardwired features of the Constitution—such as Congress's representational features and lawmaking processes set forth in Article I—for alternate institutional mechanisms.

17. Lisa Schultz Bressman, *Interpreting Regulatory Statutes in Light of Legislative Realities*, 58 DUKE L.J. (forthcoming 2009) (manuscript at 8–10, on file with the *Duke Law Journal*) [hereinafter Bressman, *Interpreting Regulatory Statutes*].

18. See Lisa Schultz Bressman, *Beyond Accountability: Arbitrariness and Legitimacy in the Administrative State*, 78 N.Y.U. L. REV. 461, 493–503 (2003).

19. See Lisa Schultz Bressman, *Procedures as Politics in Administrative Law*, 107 COLUM. L. REV. 1749, 1796–1804 (2007).

20. See, e.g., Larry D. Kramer, *Putting the Politics Back into the Political Safeguards of Federalism*, 100 COLUM. L. REV. 215, 234–52, 278–87 (2000) (arguing that federalism is best protected by political party dynamics rather than judicial enforcement of textual limits on Congress's powers); Daryl J. Levinson & Richard H. Pildes, *Separation of Parties, Not Powers*, 119 HARV. L. REV. 2311, 2385 (2006) (suggesting that "the separation of powers as the Framers understood it . . . ha[s] ceased to exist" and that "[t]he enduring institutional form of democratic political competition has turned out to be not branches but political parties").

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This school of thought finds its *ne plus ultra* in the work of Edward Rubin, who insists that

many of the basic concepts that we use to describe our current government are the products of social nostalgia. The three branches of government, power and discretion, democracy, legitimacy, law, legal rights, human rights, and property are all ideas that originated in pre-administrative times and that derive much of their continuing appeal from their outdated origins. . . . [T]hese concepts are simply not the most useful or meaningful ones that we could find to describe contemporary government.²¹

Dean Rubin would thus replace much of the traditional discourse in constitutional and administrative law with technocratic notions of “administration,” institutional “microanalysis,” and a unified governmental “network.”²² This analytical shift goes considerably further than anything proposed by Professors Galle, Seidenfeld, and Metzger, but it shares their impulse to set aside “outmoded” constitutional structures and ways of thinking and replace them with more “realistic” modes of analysis.

We find much to admire in this vein of scholarship, and we would be the first to concede that extraconstitutional mechanisms play an important role in the vindication of constitutional values. What troubles us is the notion that the hardwired constitutional mechanisms can be left behind or, failing that, pushed to the sidelines in favor of more promising institutional strategies. The constitutional structure builds in a vast amount of play in the joints, but we do think attention to certain hardwired institutions and processes is nonoptional. Prominent among them is the centrality of Congress’s legislative decisions in our constitutional scheme. With respect to changes in state authority, an agency’s role is whatever Congress gives it, and no more. Congress’s choices are the touchstone.

21. EDWARD L. RUBIN, *BEYOND CAMELOT: RETHINKING POLITICS AND LAW FOR THE MODERN STATE* 2 (2005). Although Dean Rubin does not mention federalism in this particular passage, he has made his contempt for people who care about federalism clear in other work. See Edward L. Rubin & Malcolm Feeley, *Federalism: Some Notes on a National Neurosis*, 41 *UCLA L. REV.* 903, 908 (1994) (“When federalism is raised as an argument against some national policy, we generally reject it by whatever means are necessary, including, in one case, killing its proponents [the Civil War]. This Article . . . asserts that, on grounds of political morality, it has been exactly the right thing to do.”).

22. See RUBIN, *supra* note 21, at 22–36 (administration); *id.* at 18 (microanalysis); *id.* at 48–53 (networks).

In making this point, we do not propose to quarrel in detail (much) with Professors Galle and Seidenfeld's comparative institutional analysis or with Professor Metzger's account of the Supreme Court's administrative law decisions. (We are not entirely convinced on either score, but point-by-point refutation is not our interest here.) Nor do we propose to offer a detailed affirmative account of how we would address problems of federalism in the administrative state, such as the preemptive powers of federal agencies. One of us has addressed the administrative preemption question in detail elsewhere,²³ but we despair of ever agreeing on particular doctrinal prescriptions. What we think we *can* agree on²⁴ is a more general approach to these questions as a matter of constitutional theory. We begin, therefore, with a crucial distinction that is explicit in the Galle and Seidenfeld article and seems to be implicit in the Metzger article—the distinction between constitutional realism and formalism.

A. *The Anti-Frostian Take on the Structural Constitution*

Although Professors Galle and Seidenfeld invoke “constitutional legal realism,”²⁵ they do not spend much time fleshing out what they mean. What we take them to mean is that legal structures must reflect the functional realities of effective governance—as opposed to the “formal” requirements grounded in constitutional text and history. The proper allocation of authority between administrative agencies, courts, and Congress thus turns on a sophisticated and nuanced evaluation of comparative institutional competence, and that competence is directed toward protecting federalism *only* to the extent that federalism “improve[s] the regulatory process”—there is no independent normative significance to “the preservation of state regulatory prerogatives per se.”²⁶ We think it is thus fair to say that the Galle and Seidenfeld view has two components: (1) contemporary institutional structures should take whatever form best promotes the relevant public values, and (2) those values are defined in consequentialist terms (“improving the regulatory process”) rather than in terms of fidelity to some value handed down from the constitutional Framers.

23. See Ernest A. Young, *Executive Preemption*, 102 NW. U. L. REV. 869 (2008).

24. And frankly, this is something of a pleasant surprise.

25. Galle & Seidenfeld, *supra* note 3, at 1994.

26. *Id.* at 1949.

This formulation may sound a bit more radical than anything Professors Galle and Seidenfeld have come right out and said in their article, but we think it is a fair generalization from their particular claims and, more fundamentally, the method by which they support those claims. The entire point of the Galle and Seidenfeld article is to attack doctrines requiring federal intrusions on state regulatory authority to come from Congress, rather from federal administrative agencies,²⁷ the most prominent of which is the presumption against preemption.²⁸ These doctrines, Galle and Seidenfeld argue, are misguided because agencies are in fact more transparent, deliberative, and accountable than Congress and because agencies are better at determining the allocation of regulatory authority that will promote good policy outcomes.²⁹ They give zero attention to claims that the Constitution may simply *require* Congress to make these calls, not because Galle and Seidenfeld are unaware of such arguments but because such arguments do not count in their jurisprudential world. As they frankly acknowledge, “[t]he story we have given so far depends on a willingness to acknowledge that the legal realism that animates administrative law also should inform constitutional doctrine.”³⁰ The alternative, in their view, is a kind of “formalism” that is blind to institutional realities.³¹

Although Professor Metzger does not explicitly invoke legal realism, it seems reasonable to attribute to her much the same view, at least with respect to the fungibility of institutional structures. Her very title—*Administrative Law as the New Federalism*—suggests the

27. Professors Galle and Seidenfeld explain the crux of their argument:

That problem, of course, raises a question of its own: who best to decide how best to divide [power between states and the federal government]? With some modest exceptions, most courts and commentators have looked to Congress. Federal courts have done little to limit federal power directly. Instead, they have insisted on rules that give primacy to Congress, but also impose some burden on Congress to make good decisions. We argue in this Article that this allocation is a mistake, and that instead federal agencies should often be the preferred institutions in which to vest the authority to allocate power between states and the federal government.

See id. at 1936 (footnote omitted).

28. *See Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947). On the tension between the *Rice* presumption and doctrines of deference to agencies, see, for example, Damien J. Marshall, Note, *The Application of Chevron Deference in Regulatory Preemption Cases*, 87 GEO. L.J. 263, 264, 268–74 (1998).

29. Galle & Seidenfeld, *supra* note 3, at 1992.

30. *Id.* at 1994.

31. *See id.* We doubt that “formalism” is the right word for the view that Professors Galle and Seidenfeld oppose. *See infra* text accompanying notes 71–78.

replacement of outmoded institutional structures (which may just happen to be in the Constitution) with new governance arrangements.³² And Metzger's central thesis is to suggest that administrative law may function as a "surrogate" for constitutional federalism, protecting values of state autonomy via the workings of the administrative state in lieu of either judicially-enforced substantive limitations on national power or adherence to political or process limits.³³ Unlike Professors Galle and Seidenfeld, Professor Metzger does not appear to dismiss these more traditional limitations as obsolescent formalism; she does, however, think that constitutional constraints are largely beside the point in administrative federalism cases because the Supreme Court has construed the relevant constitutional limitations so broadly.³⁴ And she insists that "for federalism to have continued vibrancy as a governing principle, it needs to be 'normalized' and consciously incorporated into the day-to-day functioning of the federal administrative state."³⁵ The original Constitution may have envisioned a particular set of political and procedural safeguards for state autonomy, but—in Metzger's view—contemporary interpreters remain free to substitute another set of surrogate safeguards if those alternative structures would better promote public values.³⁶

The second component of the view we have ascribed to our interlocutors—that the public values to be enforced by institutional structures should be defined in consequentialist terms—is easier to establish. Professors Galle and Seidenfeld begin by pointing out that "there is really not one federalism but two"³⁷:

One form, which some commentators have termed "abstract federalism," can be thought of as political or rights oriented. In this

32. Cf. Wikipedia, *The New Black*, http://en.wikipedia.org/wiki/The_new_black (last visited May 31, 2008) ("'_____ is the new black' is a catch phrase and snowclone used to indicate the sudden popularity or versatility of an idea at the expense of the popularity of a second idea. It is also the origin of a snowclone of the form 'X is the new Y.'"). For those not hip enough to know what a "snowclone" is, see Glen Whitman, *Phrases for Lazy Writers in Kit Form Are the New Clichés*, AGORAPHILIA, http://agoraphilia.blogspot.com/2004_01_11_agoraphilia_archive.html#107412842921919301 (Jan. 14, 2004, 17:00).

33. Metzger, *supra* note 4, at 2070.

34. *See id.* at 2045–48. For an example, see *Gonzales v. Raich*, 125 S. Ct. 2195, 2198, 2201 (2005) (construing Congress's power under the Commerce Clause to reach in-state, noncommercial production of medical marijuana).

35. Metzger, *supra* note 4, at 2087.

36. *Id.* at 2093.

37. Galle & Seidenfeld, *supra* note 3, at 1941.

conception, federalism preserves the states as a source of power that rivals the federal government, so that competition between the two for the loyalty of the public constrains any tendency towards tyranny or other bad behavior. The second, economic conception, values federalism because—and only to the extent that—it may tend to increase overall national welfare or utility.³⁸

As the language we have already quoted suggests,³⁹ Galle and Seidenfeld have little use for abstract federalism. When they analyze the comparative competence of institutions to protect federalism, “the issue is not which institution best enables state influence over regulation, but rather which institution fosters state influence that will enhance public welfare, and not simply state officials’ opportunities for rent seeking.”⁴⁰ This approach is diametrically opposed to that of someone like Justice O’Connor, who insisted that “[o]ur task would be the same even if one could prove that federalism secured no advantages to anyone. It consists not of devising our preferred system of government, but of understanding and applying the framework set forth in the Constitution.”⁴¹ For Galle and Seidenfeld, federalism is purely instrumental, and its claims extend only insofar as it “may tend to increase national welfare or utility.”⁴² The value of constitutional fidelity espoused by Justice O’Connor has no independent weight in this analysis.⁴³

Pinning this consequentialist label on Professor Metzger’s article is harder, but we have our suspicions.⁴⁴ Metzger seems to accept an

38. *Id.* at 1941–42 (footnotes omitted).

39. *See supra* note 26 and accompanying text.

40. Galle & Seidenfeld, *supra* note 3, at 1949.

41. *New York v. United States*, 505 U.S. 144, 157 (1992).

42. Galle & Seidenfeld, *supra* note 3, at 1942; *see also id.* at 2021 (“We have argued that the realist view of federalism recognizes that the principle of limited federal power is an instrumental one.”).

43. *See id.* at 1949 (stating that their analysis “credits the availability of dual sovereignty only as a functional matter—that is, only when that availability is related to regulatory outcomes and not simply out of some posited formalistic preference for protection of dual sovereignty”).

44. Consequentialism may be endemic to administrative law experts (although Justice Scalia seems to have avoided the bug thus far). *See, e.g.*, STEPHEN BREYER, *ACTIVE LIBERTY: INTERPRETING OUR DEMOCRATIC CONSTITUTION* 18 (2005) (“Since law is connected to life, judges, in applying a text in light of its purpose, should look to *consequences*, including ‘contemporary conditions, social, industrial, and political, of the community to be affected.’” (quoting *LEARNED HAND, THE SPIRIT OF LIBERTY* 109 (3d ed. 1960))); Ken I. Kersch, *Justice Breyer’s Mandarin Liberty*, 73 U. CHI. L. REV. 759, 766 (2006) (characterizing Justice Breyer’s jurisprudence as driven by attention to the purposes of legislation and the consequences of resolving disputes about those purposes in particular ways).

obligation to protect federalism as part of the constitutional enterprise; her proposal is simply that one set of institutions (ordinary administrative processes) are better suited to promote that value than another (judicial insistence that *Congress* make the decision to supplant state law). In this sense, then, we may read Metzger as adopting the first part of Professors Galle and Seidenfeld's position but not the second. On the other hand, Metzger strikes us as particularly fainthearted about promoting federalism in any way that might limit federal authorities' ability to achieve their policy goals.⁴⁵ This suggests an implicit consequentialism similar to that of Galle and Seidenfeld: federalism is a value only to the extent that it does not pose a cost in terms of social utility.⁴⁶

As we have already suggested, the setting aside of constitutional constraints that Professors Galle, Seidenfeld, and Metzger propose brings to mind Robert Frost's criticism of free verse.⁴⁷ Although we would be the first to concede that constitutional text, history, and tradition leave a great deal of play in the joints—indeed, a great deal of room for Galle and Seidenfeld-style analysis of comparative institutional competence⁴⁸—the constraints of text, history, and tradition nonetheless form the net across which constitutional tennis must be played. Like Frost, we find the game unrecognizable (and not much fun) in the absence of these constraints. Nor do we accept that one must adopt the anti-Frostian view represented by Galle, Seidenfeld, and Metzger as part of any “realistic” approach to jurisprudence. We develop our own view of “constitutional realism” in the next Section.

45. Metzger, *supra* note 4, at 2073.

46. Put more precisely, federalism itself has no inherent value to weigh against any decrease in utility that might result from interference with federal policy goals.

47. See *supra* note 10 and accompanying text.

48. See, e.g., Stuart Minor Benjamin & Arti K. Rai, *Who's Afraid of the APA? What the Patent System Can Learn from Administrative Law*, 95 GEO. L.J. 269, 308–17 (2007) (applying comparative institutional analysis to patent law); Ernest A. Young, *Making Federalism Doctrine: Fidelity, Institutional Competence, and Compensating Adjustments*, 46 WM. & MARY L. REV. 1733, 1740–58 (2005) [hereinafter Young, *Making Federalism Doctrine*] (arguing that the Constitution's provision for federalism allows sufficient room for courts to make “compensating adjustments” over time); Ernest A. Young, *The Rehnquist Court's Two Federalisms*, 83 TEX. L. REV. 1, 65–122 (2004) [hereinafter Young, *Two Federalisms*] (applying comparative institutional analysis to federalism doctrine).

B. Llewellyn's Realism and the Constitution Outside the Constitution

Although we often think of legal realism as primarily a private law phenomenon, the realists also had important things to say about public law. A leading example—and one that echoes some of the concerns of this symposium's articles—is Karl Llewellyn's essay on *The Constitution as an Institution*.⁴⁹ This essay draws on the basic realist distinction between the “law in the books” and the “law in action”⁵⁰ to understand the “Constitution” as encompassing not simply the canonical text but also the large set of statutes, regulations, practices, and norms that have grown up around the text to give shape and life to the institutions of actual governance. Hence, Professor Llewellyn derides as “extraordinary” the “notion that the primary source of information as to what our Constitution comes to, is the language of a certain Document of 1789, together with a severely select coterie of additional paragraphs called Amendments.”⁵¹ Llewellyn instead seeks to identify the elements of a “working constitution,” and he insists that “[a]s a criterion of what our working Constitution is, the language fails in both directions. It affords neither a positive nor a negative test.”⁵² This working constitution includes, for example, subconstitutional rules like the voting rules in the Senate and even informal norms such as the pre-Twenty-Second Amendment understanding that presidents would generally serve no more than two terms.⁵³

It is worth pausing for a moment to ask what is really “realist” about Professor Llewellyn's working constitution. Lawyers commonly think of legal realism as focused on indeterminacy in the law. According to Brian Leiter, the realists meant two things by indeterminacy:

first, that the law was *rationally* indeterminate, in the sense that the available class of legal reasons did not *justify* a unique decision (at least in those cases that reached the stage of appellate review); but second, that the law was also *causally* or *explanatorily*

49. Llewellyn, *supra* note 14.

50. Brian Leiter, *American Legal Realism*, in THE BLACKWELL GUIDE TO PHILOSOPHY OF LAW AND LEGAL THEORY 50, 61 (Martin P. Golding & William A. Edmundson eds., 2003) (noting “a disjunction between the ‘law in the books’ and the ‘law in action’” as characteristic of legal realism).

51. Llewellyn, *supra* note 14, at 3.

52. *Id.* at 15.

53. *See id.* at 15–17.

indeterminate, in the sense that legal reasons did not suffice to explain why judges decided as they did.⁵⁴

One might, we suppose, understand Llewellyn's notion of a working constitution as a claim that the canonical document is "causally or explanatorily indeterminate"—that is, that the canonical document does not suffice to explain the governing institutions that we actually have. There is something to this, as Llewellyn plainly set out to debunk traditional legal culture's focus on the canonical text. But Llewellyn's claim—at least in this work—is not that the canonical constitution was indeterminate (in either sense) with respect to the matters it addresses, but rather that it is incomplete—that it fails to address any number of important issues of governance, and that other rules and practices have grown up around the canonical document to fill these gaps. This position has little to do with what Professor Leiter calls the "core claim" of legal realism: "in deciding cases, judges respond primarily to the stimulus of the facts of the case, rather than to legal rules and reasons."⁵⁵ In fact, Llewellyn's claim about the Constitution has little to do with deciding cases at all. Rather, it is a general claim about the relative unimportance of the divide between "constitutional" and "ordinary" law in structuring the way our institutions operate outside the courts.

What is "realist" about Professor Llewellyn's idea of a working constitution is its empiricism and its disregard of formal categories of law in favor of how law actually operates in practice.⁵⁶ For Llewellyn, "[a] realist is one who, no matter what his ideological or philosophical views, believes that it is important regularly to focus attention on the law in action at any given time and to try to describe as honestly and clearly as possible what is to be seen."⁵⁷ Part of this is a claim about the importance of norms not formally enshrined in binding law: much

54. Leiter, *supra* note 50, at 51.

55. *Id.* at 52; *see also* NEIL DUXBURY, PATTERNS OF AMERICAN JURISPRUDENCE 123 (1995) ("[T]he realist assumption . . . was that judges—stimulated, primarily, by the facts before them rather than by the rules to which those facts might be fitted—work backwards 'from a desirable conclusion to one or another of a stock of logical premises.'" (footnotes omitted) (quoting Max Radin, *The Theory of Judicial Decision: Or How Judges Think*, 11 A.B.A. J. 357, 359 (1925))).

56. *See* DUXBURY, *supra* note 55, at 71 ("'Realism' describes accurately what was possibly the single unifying ambition of so-called realists: namely, the commitment to candour, to telling it—whatever 'it' happened to be—as it is.").

57. WILLIAM TWINING, KARL LLEWELLYN AND THE REALIST MOVEMENT 74 (rev. ed. 1985).

as Llewellyn thinks that judges enforce the norms of commercial culture in commercial cases,⁵⁸ he also thinks that informal norms play an important role in constituting the government.⁵⁹ But many aspects of the working constitution are “hard” law—that is, statutes, legislative rules, and the like. And these provisions of law may operate in a highly determinate sense. The realist point is simply that, in order to appreciate the full scope of our constitutive institutional arrangements, one has to set aside the formal category of “constitutional law” and look at the roles that various sorts of legal measures actually play in the system.⁶⁰

One of us recently sought to develop Professor Llewellyn’s conception by drawing an analogy to the British constitutional tradition, which lacks a single document codifying the polity’s constitutive institutional arrangements and entrenching those arrangements against change.⁶¹ In the British tradition, “constitutional law” is defined by function rather than form; a law is part of the Constitution if it performs a constitutive function—e.g., establishing an institution or conferring rights on individuals. Accordingly “the Constitution” consists simply of all the laws and practices that perform these functions.⁶² As Professor Llewellyn suggests, our own American Constitution can be thought of in much the same way: our “working constitution” consists not only of the original document and its formal amendments, but also laws like the 1789 Judiciary Act (and its subsequent amendments) that established the federal courts, the various civil rights statutes conferring important rights on individuals

58. See Leiter, *supra* note 50, at 58. Norms play a significant role in many areas of law (and legal scholarship). See, e.g., Arti Kaur Rai, *Regulating Scientific Research: Intellectual Property Rights and the Norms of Science*, 94 NW. U. L. REV. 77, 88–115 (1999) (discussing the role of norms in science).

59. The obvious analogy is to the use of “conventions” in the British system. See ADAM TOMKINS, PUBLIC LAW 10–12 (2003).

60. See DUXBURY, *supra* note 55, at 96–97 (stressing the empiricism of the realists).

61. See, e.g., Ernest A. Young, *The Constitution Outside the Constitution*, 117 YALE L.J. 408 (2007) [hereinafter Young, *Outside the Constitution*]. On the British Constitution, see TOMKINS, *supra* note 59, at 1–30. For a similar analogy between Llewellyn’s realism and New Zealand’s unwritten constitution, see Matthew S.R. Palmer, *Using Constitutional Realism to Identify the Complete Constitution: Lessons from an Unwritten Constitution*, 54 AM. J. COMP. L. 587 (2006). We note that our other coclerk, Heather Gerken, has been kind enough to describe Professor Young’s article as a “signal[] that the end of the world is nigh.” Heather K. Gerken, *The Hydraulics of Constitutional Reform: A Skeptical Response to Our Undemocratic Constitution*, 55 DRAKE L. REV. 925, 932 (2007).

62. See, e.g., A.V. DICEY, INTRODUCTION TO THE STUDY OF THE LAW OF THE CONSTITUTION 22–23 (8th ed. 1915).

(including rights against government action) that go beyond the rights articulated in the Bill of Rights, and practices such as the internal House and Senate rules that establish the committee structure and rules for voting on legislation.

An important difference between our system and Britain's, of course, is that elements of our constitutive arrangements—those that are a part of the canonical document—are entrenched against change through “ordinary” legislation.⁶³ But we think that difference is less critical, in most circumstances, than people sometimes think. For one thing, formal entrenchment of the Article V variety is not the *only* thing that makes a legal norm hard to change; it seems much more likely, for instance, that we will see in our lifetime a constitutional amendment to allow the prohibition of flag burning than a repeal of the Social Security program.⁶⁴ But more important is the fact that the canonical Constitution simply does not speak to a very great number of constitutive issues in any significant degree of detail. It leaves those issues for ordinary legislation to work out. We are convinced, moreover, that this is a feature, not a bug, in our system: it leaves the great bulk of our institutional arrangements open to change and adaptation over time.⁶⁵ Bruce Ackerman is thus right to say that the “constitution” has been amended over the course of our history outside the Article V process,⁶⁶ but we think those amendments have occurred much more frequently and incrementally than they do in his

63. For an argument that British law is beginning to reflect a distinction between ‘higher’ and ‘ordinary’ law, see MARTIN LOUGHLIN, *SWORD & SCALES: AN EXAMINATION OF THE RELATIONSHIP BETWEEN LAW AND POLITICS* 4 (2000).

64. See Young, *Outside the Constitution*, *supra* note 61, at 426–28.

65. Our great friend Sanford Levinson has argued that this perspective understates the extent to which, on certain critical issues like the malapportionment of the Senate or the distortions that the Electoral College produces, the canonical text does amount to an “iron cage” that prevents necessary reforms. See Sanford Levinson, *Reconsidering the Syllabus in “Constitutional Law,”* 118 *YALE L.J. POCKET PART* 7, 9–10 (2008), <http://thepocketpart.org/2008/05/16/levinson.html>. We are not nearly as worked up about those problems as Professor Levinson, but in any event we suspect that extracanonical reforms can in fact fix or at least mitigate many of them. See Ernest A. Young, *Curricula and Complacency: A Response to Professor Levinson*, 118 *YALE L.J. POCKET PART* 12, 15 & n.15 (2008), <http://thepocketpart.org/2008/05/16/young.html> (pointing out, for example, that a proposed interstate compact could render the popular vote decisive in presidential elections with the concurrence of as few as eleven states).

66. See generally BRUCE ACKERMAN, *WE THE PEOPLE: FOUNDATIONS* (1991).

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account. In particular, they have occurred through “ordinary” legislation rather than “higher lawmaking.”⁶⁷

The administrative state is surely part of this “constitution outside the Constitution.” The great organic statutes that establish and empower the various agencies—the Communications Act of 1934, the Food, Drug, and Cosmetic Act, the Clean Air and Water Acts, and other key environmental laws—are all quintessentially constitutive statutes. These laws establish enduring institutions of governance; their preemption and savings clauses sketch the boundary of state and federal power; they confer both substantive and procedural rights upon individuals. The Administrative Procedure Act and executive orders allocating power between the agencies and the White House play similar constitutive roles that cut across multiple areas of regulatory action. We suspect that a constitution that tried to entrench the level of institutional detail represented in these statutes would prove insufficiently flexible to endure over time. We differ from Karl Llewellyn, then, to the extent that he suggested that the working constitution should be “not subject to abrogation or material alteration.”⁶⁸ Much of the utility of our extracanonical constitution derives from the fact that it can be changed through ordinary legislative processes or even more informal means in response to the shifting needs of society.

Having embraced the institutional flexibility of the administrative state, then, why do we reject the vision of administrative federalism advanced by Professors Galle, Seidenfeld, and Metzger? Although we would follow Professor Llewellyn in acknowledging how much of our “constitution” consists of ordinary law, subject to alteration and adaptation in response to contemporary circumstances, we think our interlocutors improperly disregard the role of the canonical, entrenched Constitution. To return to our Frostian analogy, we admit that most of what is interesting about tennis consists in angles, spin, power, and position—it has little to do with the net.⁶⁹ So it is with the structural constitution: the canonical

67. See Young, *Outside the Constitution*, *supra* note 61, at 448–59; see also Ernest A. Young, *The Constitutive and Entrenchment Functions of Constitutions: A Research Agenda*, 10 U. PA. J. CONST. L. 399 (2008).

68. Llewellyn, *supra* note 14, at 29.

69. Or so we infer from watching people who are actually *good* at tennis. On the rare occasions when *we* play, the net plays an extremely significant role. Most of our shots end up there.

text does not determine most of the interesting institutional design questions, and contemporary political actors enjoy significant discretion to order things to their liking.⁷⁰ But certain key entrenched requirements remain, and our concern is that our anti-Frostian friends have impermissibly set them aside. Tennis with the net down isn't really tennis at all.

C. *Formalism, Functionalism, and Constitutionalism*

Professors Galle and Seidenfeld reject this view—that the Constitution simply *requires* a focus on Congress, regardless of the possibility that administrative agencies may have superior institutional competence—as a kind of “formalism.” As Lawrence Solum has noted, however, “[t]he terms ‘formalism’ and ‘formalist’ are thrown around quite a bit, but they turn out to be surprisingly difficult to define.”⁷¹ It is worth pausing for a moment to assess the senses in which our position is and is not formalist, as that inquiry may help illumine the extent and limits of our disagreement with our interlocutors.

Leading definitions of “formalism” involve excluding various sorts of considerations from legal decisions. Frederick Schauer’s influential account, for example, equates formalism with rule-based decisionmaking:

At the heart of the word “formalism,” in many of its numerous uses, lies the concept of decisionmaking according to *rule*. Formalism is the way in which rules achieve their “ruleness” precisely by doing what is supposed to be the failing of formalism: screening off from a

70. See, e.g., *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635–37 (1952) (Jackson, J., concurring) (suggesting that presidential authority is almost always a function of the consistency of executive action with congressional legislation); Ernest A. Young, *Toward a Framework Statute for Supranational Adjudication*, 57 EMORY L.J. 93, 95–100 (2007) (suggesting that structural questions concerning the relationship between domestic and supranational courts are largely undetermined by the canonical Constitution and should be resolved through framework legislation).

71. Lawrence Solum, *Legal Theory Lexicon 043: Formalism and Instrumentalism*, LEGAL THEORY LEXICON, <http://legaltheorylexicon.blogspot.com/2005/05/legal-theory-lexicon-043-formalism-and.html> (May 22, 2005, 14:10); see also Frederick Schauer, *Formalism*, 97 YALE L.J. 509, 509–10 (1988) (“Even a cursory look at the literature reveals scant agreement on what it is for decisions in law, or perspectives on law, to be formalistic, except that whatever formalism is, it is not good.”).

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decisionmaker factors that a sensitive decisionmaker would otherwise take into account.⁷²

On this account, the opposite of formalism is standard-based decisionmaking, under which a decisionmaker applying a legal directive may have direct recourse to that directive's underlying reasons.⁷³ We take Professors Galle and Seidenfeld to mean something similar by "functionalism"—that is, they contend that the allocation of authority between Congress and administrative agencies should be settled not by the constitutional principle that the Constitution vests legislative authority in Congress,⁷⁴ but rather by assessing more directly whether Congress or agencies better promote the Constitution's underlying values.⁷⁵ They assert, for example, that an assertion of "exclusive judicial or congressional power to decide the appropriate scope of national authority" would be illegitimate because such an assertion "cannot be squared with the basic rationales of federalism,"⁷⁶ not because such an assertion would be an incorrect interpretation of the Constitution's provisions.

Our contrasting view legitimately may be characterized as "formalist" in the following sense: we think that if the Constitution is fairly read to vest decisionmaking responsibility in Congress, then it is not open to us to inquire whether underlying constitutional values might be better served by vesting that responsibility elsewhere. But this kind of formalism is inherent in the very notion of constitutionalism itself. It is exactly the same idea that keeps us from

72. Schauer, *supra* note 71, at 510; *see also* Solum, *supra* note 71 ("The core idea of formalism is that the law (constitutions, statutes, regulations, and precedent) provide[s] rules and that these rules can, do, and should provide a public standard for what is lawful (or not)."). Adrian Vermeule has identified "two senses of formalism," both of which involve limiting the considerations available to a decisionmaker: first, an "attempt to deduce legal rules from intelligible essences, such as 'the nature of contracts' or 'the rule of law,' while excluding considerations of morality and policy," and second, a "rule-bound decision-making strategy," under which "judges . . . should restrict the range of information they attempt to collect and reduce the complexity of their behavioral repertoire." ADRIAN VERMEULE, *JUDGING UNDER UNCERTAINTY: AN INSTITUTIONAL THEORY OF LEGAL INTERPRETATION* 5 (2006).

73. *See, e.g.*, Kathleen M. Sullivan, *The Supreme Court, 1987 Term—Foreword: The Justices of Rules and Standards*, 106 HARV. L. REV. 22, 58 (1992) ("A legal directive is 'standard'-like when it tends to collapse decisionmaking back into the direct application of the background principle or policy to a fact situation.").

74. *See* U.S. CONST. art. I, § 1.

75. *Cf.* Schauer, *supra* note 71, at 537 ("Understanding the way in which rules truncate the range of reasons available to a decisionmaker helps us to appreciate the distinction between formalism and functionalism, or instrumentalism.").

76. Galle & Seidenfeld, *supra* note 3, at 1939.

asking in every Fifth Amendment case whether the Constitution's underlying norms are really well served by a principle foreclosing self-incrimination (much less whether those underlying norms are the right norms to have). That refusal to require that constitutional directives be justified anew in every case is part of what it means to say that the Constitution is entrenched.

To say, however, that that we must do whatever the Constitution requires, without examining its underlying justifications, is not to say that we should interpret the *meaning* of those constitutional requirements in a formalist way. For example, one could vindicate the principle that all agency authority must ultimately be traced back to Congress by requiring a formal "clear statement" of delegation in the text of the statute, but one could also argue, as Lisa Bressman does, that finding broad delegations to agencies whenever certain functional considerations are present best implements Congress's intentions.⁷⁷ If the constitutional principle is simply that Congress's intent must be followed, one might adopt either formalist or functionalist approaches to ascertaining that intent.⁷⁸

Our disagreement with Professors Galle and Seidenfeld—not to mention Professors Metzger and Bressman—may well extend to questions of constitutional meaning, such as the proper interpretation of the Constitution's lawmaking provisions. The important point for present purposes, however, is that *that* disagreement would not be a disagreement about realism or about formalism. We are entirely open to the need to assess constitutional structure in realist terms, and in many respects we are willing to interpret that structure in a functionalist way. Where we jump off the train is at the proposition that the Constitution's hardwired provisions, however construed, may somehow be subordinated to its underlying values or, even worse, to consequentialist notions of good policy.

II. THE LEGITIMATING ROLE OF CONGRESS IN THE ADMINISTRATIVE STATE

So far we have sketched a contrast between two different realist views of how the structural constitution changes in response to

77. See Bressman, *Interpreting Regulatory Statutes*, *supra* note 17 (manuscript at 46).

78. See, e.g., VERMEULE, *supra* note 72, at 33 ("[T]he best reading of the Constitution is that interpretive formalism and interpretive anti-formalism are constitutionally optional for judges.").

changing conditions over time. Our own Frostian view is that the Constitution leaves many institutional questions open to be resolved by a more mutable “constitution outside the Constitution,” but that the features that the canonical Constitution *does* speak to must be respected. The anti-Frostian view that Professors Galle, Seidenfeld, and Metzger espouse, on the other hand, holds that contemporary actors are free to adopt whatever structures seem likely to best realize public values and that (at least for Galle and Seidenfeld) those values are essentially consequentialist in character. This is a general disagreement about constitutional theory, but it arises in a very specific context concerning the means by which federalism may be protected in the modern administrative state. In this Part, we apply the somewhat abstract points developed above to this specific dispute about administrative federalism.

A. Foundational Considerations in Administrative Federalism

It may be a stretch to say that the issue of administrative federalism will ever be “hot,” but for a complicated issue of intergovernmental relations involving intricate matters of statutory construction and administrative law, the topic has attracted a surprising amount of interest lately.⁷⁹ One reason is that although the Rehnquist Court’s “federalist revival” generated a great deal of academic interest in federalism,⁸⁰ an emerging consensus recognizes

79. In addition to this symposium, many of the articles in the *Northwestern Law Review*’s 2008 symposium on preemption engaged that question in an administrative context. See, e.g., Nina A. Mendelson, *A Presumption Against Agency Preemption*, 102 NW. U. L. REV. 695 (2008); Thomas W. Merrill, *Preemption and Institutional Choice*, 102 NW. U. L. REV. 727 (2008); Catherine M. Sharkey, *The Fraud Caveat to Agency Preemption*, 102 NW. U. L. REV. 841 (2008); Young, *Executive Preemption*, *supra* note 23; see also Nina A. Mendelson, *Chevron and Preemption*, 102 MICH. L. REV. 737 (2004) [hereinafter Mendelson, *Chevron and Preemption*]; Paul E. McGreal, *Some Rice With Your Chevron?: Presumption and Deference in Regulatory Preemption*, 45 CASE W. RES. L. REV. 823 (1995); Catherine M. Sharkey, *Preemption by Preamble: Federal Agencies and the Federalization of Tort Law*, 56 DEPAUL L. REV. 227 (2007) [hereinafter Sharkey, *Preemption by Preamble*]. On preemption more generally, see the essays in FEDERAL PREEMPTION: STATES’ POWERS, NATIONAL INTERESTS (Richard A. Epstein & Michael S. Greve eds., 2007).

80. See, e.g., Vicki C. Jackson, *Federalism and the Uses and Limits of Law: Printz and Principle?* 111 HARV. L. REV. 2180, 2213 (1998) (coining the term “federalist revival”). The leading cases on the (canonical) constitutional side are *Printz v. United States*, 521 U.S. 898 (1997) (holding that Congress may not commandeer state executive officers by requiring them to enforce federal law), *Seminole Tribe v. Florida*, 517 U.S. 44 (1996) (holding that Congress may not, when using its Article I powers, abrogate the states’ sovereign immunity from private suits for money damages), and *United States v. Lopez*, 514 U.S. 549 (1995) (holding that the

that the Court's holdings under the Commerce Clause, anticommandeering doctrine, and Eleventh Amendment are likely to make considerably less difference than how the Court approaches questions of statutory and administrative preemption.⁸¹ Another source of the current interest lies in the Bush administration's aggressive assertions of executive power, and in particular its use of administrative agency action to achieve policy goals that it could not achieve through the legislative process.⁸² Finally, the Supreme Court has decided a string of cases all involving—but none definitively *resolving*—basic questions concerning the role of federal administrative agencies in the federal system, with another pair of potentially defining decisions teed up for next term.⁸³

One set of questions in administrative federalism focuses on the quality and processes of decisionmaking at the agency. For example:

federal Gun Free School Zones Act exceeded Congress's Commerce Clause authority). For a general account of this line of cases, see Young, *Two Federalisms*, *supra* note 48, at 23–32.

81. See, e.g., Egelhoff v. Egelhoff, 532 U.S. 141, 160–61 (2001) (Breyer, J., dissenting) (observing that preemption cases present “the true test of federalist principle”); Calvin Massey, *Federalism and the Rehnquist Court*, 53 HASTINGS L.J. 431, 508 (2002) (underscoring preemption's significant implications for federalism); Young, *Two Federalisms*, *supra* note 48, at 130–34 (attempting to place preemption at “the center of our federalism debates”).

82. See, e.g., Sharkey, *Preemption by Preamble*, *supra* note 79, at 227–28 (describing an administrative process of “silent tort reform”); Joel Brinkley, *Out of Spotlight, Bush Overhauls U.S. Regulations*, N.Y. TIMES, Aug. 14, 2004, <http://www.nytimes.com/2004/08/14/politics/14bush.html?ex=1250136000&en=1bf32d7574b25b2b&ei=5090> (discussing the Bush administration's expansive use of agency authority). For additional citations, see Metzger, *supra* note 4, at 2025 n.3.

83. See, e.g., Watters v. Wachovia Bank, N.A., 127 S. Ct. 1559, 1572 (2007) (avoiding deciding how much deference to accord agency preemption determinations by basing the Court's holding that state law was preempted on the Court's independent interpretation of the underlying statute); Gonzales v. Oregon, 126 S. Ct. 904, 914–21 (2006) (refusing to defer to the attorney general's interpretation of the Controlled Substance Act as authorizing regulations preempting Oregon's physician-assisted suicide law); Geier v. Am. Honda Motor Co., 529 U.S. 861, 883 (2000) (placing “some weight” on the agency's conclusion that state law posed an obstacle to executing federal policy); Medtronic, Inc. v. Lohr, 518 U.S. 470, 495–97 (1996) (giving “substantial weight” to the Food and Drug Administration's construction of the Medical Devices Amendments *not* to preempt the Lohrs' claims); Smiley v. Citibank (S.D.), N.A., 517 U.S. 735, 744 (1996) (deferring to an agency's construction of a statute in a preemption case, but distinguishing “the question of the substantive (as opposed to pre-emptive) *meaning* of a statute [from] the question of *whether* a statute is pre-emptive” and “assum[ing] (without deciding) that the latter question must always be decided *de novo* by the courts”). The new cases are *Altria Group, Inc. v. Good*, 501 F.3d 29 (1st Cir. 2007), *cert. granted*, 128 S. Ct. 1119 (2008) (raising questions concerning, *inter alia*, the scope of agency authority to preempt state law by informal action), and *Levine v. Wyeth*, 944 A.2d 179, 192–94 (Vt. 2006), *cert. granted*, 128 S. Ct. 1118 (2008) (raising the question of how much deference is due a federal agency's interpretation of its decisions' preemptive effect).

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If an agency can preempt state law in the exercise of a general delegated authority, should preemptive effect be limited to agency actions of a particular kind—e.g., notice-and-comment rulemaking?⁸⁴ What should be the effect of agencies' failure to comply with executive orders mandating that they consider the federalism impacts of proposed actions before reaching a final decision?⁸⁵

Those questions assume a focus on agencies. More foundational are questions involving the relationship between the agency and Congress. Some of these concern the authority of federal administrative agencies to preempt state law. For instance, when a federal administrative agency interprets an ambiguous federal statute as preempting state law, is the agency's interpretation entitled to judicial deference?⁸⁶ If so, what *degree* of deference? Relatedly, to what extent can Congress delegate the authority to preempt state law on the agency's own initiative? How clearly must such delegations be stated? Professors Galle, Seidenfeld, and Metzger largely focus on this second set of questions.

In our view, answering the second set of questions must start with Congress. To be sure, the Court has acknowledged Congress's ability to delegate significant powers to administrative agencies. As Justice White pointed out in dissent in *INS v. Chadha*:⁸⁷

[T]he sheer amount of law—the substantive rules that regulate private conduct and direct the operation of government—made by the agencies has far outnumbered the lawmaking engaged in by Congress through the traditional process. There is no question but that agency rulemaking is lawmaking in any functional or realistic sense of the term.⁸⁸

But without denying the truth of Justice White's statement, the Court has always insisted that administrative agency action be grounded in and defended in terms of the action of Congress itself. Hence, in *Chadha*, the majority responded that

84. See Young, *Executive Preemption*, *supra* note 23, 891–92, 899 (suggesting that it should).

85. See Mendelson, *Chevron and Preemption*, *supra* note 79, at 782–85 (discussing agencies' generally miserable record of compliance with such orders).

86. See *id.* at 739–43 (parsing this question and recommending that *Skidmore*, not *Chevron*, deference applies); Merrill, *supra* note 79, at 728–30 (recommending that courts adopt a preemption-specific deference analysis).

87. *INS v. Chadha*, 462 U.S. 919 (1983)

88. *Id.* at 985–86 (White, J., dissenting).

[e]xecutive action under legislatively delegated authority that might resemble “legislative” action in some respects . . . is always subject to check by the terms of the legislation that authorized it; and if that authority is exceeded it is open to judicial review as well as the power of Congress to modify or revoke the authority entirely.⁸⁹

Chadha was not a preemption case, but its rigorous insistence on the primacy of the Article I lawmaking process has important implications for administrative preemption issues. We contend that the Constitution *requires* that the central decision to preempt state law be meaningfully traceable to Congress—not simply to the will of the agency itself. This flows from the structure of the Constitution. Indeed, it is hardwired into the Supremacy Clause. That provision confers the status of supreme federal law only on three sorts of enactments: the Constitution; “the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States.”⁹⁰ Administrative regulations, adjudicatory rulings, and the like are not “Laws of the United States” within this language because they are not made “in Pursuance” of the legislative process laid out in Article I; rather, their effect as supreme federal law is necessarily parasitic upon the supremacy of the underlying statutes that authorize administrative action. Further, Article I, section One vests “[a]ll legislative Powers herein granted . . . in a Congress of the United States,”⁹¹ and the Supreme Court has repeatedly held that the particular lawmaking procedures specified in that Article are not subject to modification through ordinary legislation.⁹² All supreme legislative authority, then, stems from Congress acting through specified procedures.⁹³

This point does not mean that administrative actions cannot be “law” under the Supremacy Clause. Rather, we simply insist that agency actions have the status of supreme law because they are made pursuant to delegations from Congress; the force of agency actions is

89. *Id.* at 953–54 n.16 (majority opinion).

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

91. U.S. CONST. art. I, § 1.

92. *See* *Clinton v. City of New York*, 524 U.S. 417, 447 (1998) (striking down the line-item veto); *Chadha*, 462 U.S. at 959 (striking down the legislative veto).

93. As we discuss in Part III, the Court has implemented this principle through developing a variety of “clear statement” requirements that insulate the states from federal interference absent explicit congressional decisions to the contrary. *See infra* notes 135–38 and accompanying text.

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derivative, not primary.⁹⁴ We think the Court put it reasonably well in *Louisiana Public Service Commission v. FCC*.⁹⁵

[A] federal agency may pre-empt state law only when and if it is acting within the scope of its congressionally delegated authority. This is true for at least two reasons. First, an agency literally has no power to act, let alone pre-empt the validly enacted legislation of a sovereign State, unless and until Congress confers power upon it. Second, the best way of determining whether Congress intended the regulations of an administrative agency to displace state law is to examine the nature and scope of the authority granted by Congress to the agency.⁹⁶

This will strike many as an obvious point, but even obvious points can do some work. Congress is the touchstone, and that suggests a quite different focus from that suggested by Professors Galle, Seidenfeld, and Metzger.

That does not mean that the first set of questions are not important, or even that those are not also *constitutional* questions—in the sense that the answers to those questions are not also constitutive of the functional relationship between the nation and the states. We do insist that the answers to the second set of questions must flow from the guideposts created by the entrenched, canonical constitution. An analysis of the constitutional guideposts is thus not optional in the sense that the first set of questions might be. And that is the nub of our disagreement with Professors Galle, Seidenfeld, and Metzger.

94. It may be helpful to compare the status of federal agency action with that of federal common law, which may also preempt state law in the event of a conflict. We doubt anyone would say, however, that judge-made rules that fill gaps in federal statutes, for example, are the same as the federal statutes themselves. As one of us has demonstrated elsewhere, the preemptive force of federal common law derives from the supremacy of the underlying federal legislative enactments. See Ernest A. Young, *Preemption and Federal Common Law*, 83 NOTRE DAME L. REV. (forthcoming 2008) (manuscript at 125).

95. *La. Pub. Serv. Comm'n v. FCC*, 476 U.S. 355 (1986).

96. *Id.* at 374. The Supreme Court came closest to equating administrative regulations and federal statutes in *Fidelity Federal Savings & Loan Ass'n v. de la Cuesta*, 458 U.S. 141 (1982), stating that “[f]ederal regulations have no less pre-emptive effect than federal statutes,” *id.* at 153. But the Court immediately turned its focus back to Congress by noting that “Congress has directed [the] administrator to exercise his discretion” and that the administrator’s actions were “subject to judicial review . . . to determine whether he has exceeded his statutory authority.” *Id.* at 153–54; see also *id.* at 152 (“The pre-emption doctrine, which has its roots in the Supremacy Clause, requires us to examine congressional intent.” (citation omitted)). Nothing in *de la Cuesta* suggests that agency actions have preemptive force apart from underlying congressional action.

B. Shifting the Focus to Agencies

Professors Galle, Seidenfeld, and Metzger reason that agencies are no worse, and probably better, decisionmakers than Congress in determining whether state laws should be preempted. Galle and Seidenfeld, in particular, emphasize several dimensions of comparative institutional competence that, in their view, favor federal agencies over Congress and the courts as the venue for contemporary federalism debates. Agencies, they say, are more deliberative, transparent, and accountable than Congress.⁹⁷ Metzger likewise contends that “[n]umerous factors, such as congressional oversight, federal officials’ ties to state regulators, lobbying by state political organizations, and dependence on state implementation, can all serve to give state regulatory interests leverage in federal agency decisionmaking,” and she emphasizes that “administrative law [may] offer[] adequate protection against agency failure to take federalism concerns seriously.”⁹⁸

The specific doctrinal conclusions that both articles seem to draw from these insights strike us as relatively modest. Professors Galle and Seidenfeld would reject the “trend of modern doctrine toward requiring in all cases clear congressional authorization for preemption or other expansions of federal power.”⁹⁹ Professor Metzger focuses less on critique than on developing the notion that ordinary administrative law may protect federalism interests, but she likewise seems to reject requirements “that Congress . . . clearly authorize burdens that administrative agencies impose on the states.”¹⁰⁰ Our focus in this reply is not on the specific rejection of clear statement rules, but rather on the sort of analysis that forms the basis for that conclusion.

In particular, we reject the notion that administrative federalism should focus on the agencies rather than Congress. That notion emerges most clearly at the beginning of the Galle and Seidenfeld article:

Federal courts . . . have insisted upon rules that give primacy to, but also impose some burden upon, Congress to make good decisions. Our goal in this article is to show that this allocation is a mistake,

97. Galle & Seidenfeld, *supra* note 3, at 1939.

98. Metzger, *supra* note 4, at 2072, 2080.

99. Galle & Seidenfeld, *supra* note 3, at 1940.

100. Metzger, *supra* note 4, at 2095.

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and that instead federal agencies should often be the preferred institution in which we should vest authority to allocate power between states and the federal government.¹⁰¹

Similarly, Metzger would shift the focus of administrative federalism from the constitutionally-prescribed role of Congress to agency decisionmaking and administrative law:

One central implication is that the Court should apply administrative law doctrines with an eye to reinforcing agency attentiveness to state interests. Another is that addressing federalism concerns through ordinary administrative law may often prove more effective than devising special federalism-inspired doctrines.¹⁰²

Significantly, Metzger concludes that “federalism . . . needs to be ‘normalized’ and incorporated into the day-to-day functioning of the federal administrative state.”¹⁰³

As we have already suggested, our interlocutors’ approach addresses the *ends* of constitutional structure—the protection of federalism or of other democratic values—while sidelining particular institutional *mechanisms* that the constitutional text prescribes for meeting those ends. Professors Galle, Seidenfeld, and Metzger suggest that if agencies can do a reasonable job of protecting states’ interests, then everyone should be happy: the goals of federalism will be met. We need not insist upon congressional authorization for agency action, because everyone knows that Congress does not do a very good job of protecting states’ interests.¹⁰⁴ This view presupposes that it is the Constitution’s underlying values that really matter—not the particular mechanisms that we have traditionally relied upon to vindicate those values. There is no reason to insist on Congress’s role

101. Galle & Seidenfeld, *supra* note 3, at 1936.

102. Metzger, *supra* note 4, at 2099.

103. *Id.* at 2091.

104. See, e.g., Kramer, *supra* note 20, at 223–27 (demolishing many of the traditional arguments that the states’ representation in Congress protects the institutional interests of the states); Saikrishna B. Prakash & John C. Yoo, *The Puzzling Persistence of Process-Based Federalism Theories*, 79 TEX. L. REV. 1459, 1460 (2001) (likening reliance on politics to safeguard federalism to “reinforcing the walls of a sand castle as the tide returns”); William Marshall, *American Political Culture and the Failures of Process Federalism*, 22 HARV. J.L. & PUB. POL’Y 139, 147–52 (1998) (suggesting that changing political realities have undermined what few political safeguards existed).

as a protection for the states if the agencies are even better suited to perform that role.

The Supreme Court rejected a very similar argument in *Whitman v. American Trucking Associations, Inc.*¹⁰⁵ In that case, the U.S. Court of Appeals for the District of Columbia Circuit had proposed that the solution to the problem of broad delegations of power to agencies was to require the agencies themselves to issue regulations constraining their own exercise of the delegated authority.¹⁰⁶ On appeal, the Supreme Court emphatically rejected that suggestion:

We have never suggested that an agency can cure an unlawful delegation of legislative power by adopting in its discretion a limiting construction of the statute. . . . The idea that an agency can cure an unconstitutionally standardless delegation of power by declining to exercise some of that power seems to us internally contradictory. The very choice of which portion of the power to exercise—that is to say, the prescription of the standard that Congress had omitted—would *itself* be an exercise of the forbidden legislative authority. Whether the statute delegates legislative power is a question for the courts, and an agency's voluntary self-denial has no bearing upon the answer.¹⁰⁷

105. *Whitman v. Am. Trucking Ass'ns, Inc.* 531 U.S. 457 (2001).

106. *See Am. Trucking Ass'ns, Inc. v. U.S. EPA*, 175 F.3d 1027, 1038 (D.C. Cir. 1999), *rev'd in part on other grounds*, 531 U.S. 457 (2001).

Where (as here) statutory language and an existing agency interpretation involve an unconstitutional delegation of power, but an interpretation without the constitutional weakness is or may be available, our response is not to strike down the statute but to give the agency an opportunity to extract a determinate standard on its own. Doing so serves at least two of three basic rationales for the nondelegation doctrine. If the agency develops determinate, binding standards for itself, it is less likely to exercise the delegated authority arbitrarily. And such standards enhance the likelihood that meaningful judicial review will prove feasible.

Id. (citations omitted); *see also Am. Trucking Ass'ns, Inc. v. EPA*, 195 F.3d 4, 6–8 (D.C. Cir. 1999), *rev'd in part on other grounds*, 531 U.S. 457 (2001) (elaborating, on petition for rehearing, upon the court's prior delegation holding). The circuit court acknowledged that

[a] remand of this sort of course does not serve the third key function of nondelegation doctrine, to “ensure[] to the extent consistent with orderly governmental administration that important choices of social policy are made by Congress, the branch of our Government most responsive to the popular will.” The agency will make the fundamental policy choices.

Am. Trucking Ass'ns, Inc. 175 F.3d at 1038 (alteration in original) (quoting *Indus. Union Dep't, AFL-CIO v. Am. Petroleum Inst.*, 448 U.S. 607, 685 (1980) (Rehnquist, J., concurring)). Nonetheless, the court found that sacrifice worth making because “the remand [would] ensure that the courts not hold unconstitutional a statute that an agency, with the application of its special expertise, could salvage.” *Id.*

107. *Whitman*, 531 U.S. at 472–73.

It is possible, of course, that the Court was wrong to dismiss so quickly the D.C. Circuit's innovative solution to the delegation conundrum. But we do think *American Trucking* highlights the extent to which our interlocutors' proposal—that administrative mechanisms can be substituted for legislative ones so long as underlying constitutional values are served—is a departure from more familiar forms of constitutional doctrine.

In defense of the constitutional legitimacy of their position, we imagine that Professors Galle, Seidenfeld, and Metzger might make two different arguments.¹⁰⁸ First, they might say that the step they are taking is fairly small and that we have exaggerated the extent of their departure from more traditional assumptions about constitutional structure. Second, they might simply insist that it is too late in the day to challenge the constitutionality of the administrative state. We address the first of these arguments in the remainder of this Section and the second in the next.

Professor Metzger suggests that we have exaggerated the conceptual distance between her view and ours when she notes that “Congress is far from absent under the administrative law approach, notwithstanding this approach’s primary focus on agencies.”¹⁰⁹ She is surely right to observe that, when we insist that “the central decision to preempt state law [must] be meaningfully traceable to Congress,”¹¹⁰ “[m]uch depends on the degree of clarity that ‘meaningful traceability’ requires.”¹¹¹ All the participants in this debate seem to accept the proposition that the initial delegation of authority must come from Congress, and none have questioned the nondelegation doctrine’s vestigial requirement that such delegations be accompanied by an “intelligible principle” that guides the exercise of agency discretion. Metzger thus notes that:

administrative law enforcement of federalism does not lose the political safeguards justification that animates process federalism but instead amplifies the political safeguards available by giving weight to state interests in executive branch policy debates as well

108. Both arguments, in fact, were advanced in our colloquy at the symposium. See Symposium, *38th Annual Duke Law Journal Administrative Law Symposium: Administrative Law, Preemption, and Federalism*, <http://realserver.law.duke.edu/ramgen/spring08/students/04152008.rm> (Apr. 15, 2008).

109. Metzger, *supra* note 4, at 2094.

110. See *supra* text accompanying note 90.

111. Metzger, *supra* note 4, at 2094.

as by rendering the effects of agency decisions on the states more transparent and thus more subject to congressional oversight.¹¹²

We acknowledge that, in some respects, the administrative agency mechanisms that Professors Galle, Seidenfeld, and Metzger celebrate may add an additional layer of protection for federalism within the executive branch, and we consider in Part III whether that is a good thing.¹¹³ The important question for present purposes, however, is whether our interlocutors' proposals undermine the role of *Congress* in protecting the states from federal preemption. That is a hard question to evaluate as a matter of positive law simply because the existing doctrine is so unsettled. But we think that what makes these articles so original and interesting is precisely their suggestion that current law's focus (such as it is) on Congress is misplaced and that constitutional values would be better served by *shifting* the inquiry away from Congress and onto the structure and processes of the agencies themselves. If administrative law really *is* "the new federalism," that suggests at least some degree of willingness to part ways with the old legislative mechanisms.¹¹⁴

Consider, for example, the current controversy over agency regulations promulgated with preambles stating a broad view of the federal law's preemptive effect. Such preambles have been issued in a variety of areas, including federal drug regulation, motor vehicle regulation, and product safety.¹¹⁵ According to Professor Sharkey, "[t]he regulatory preemption debate centers on the extent to which the preambles go beyond simply reciting the preemptive effect of the

112. *Id.*

113. Professor Young thinks it is; Professor Benjamin thinks it isn't. *See infra* p. 2113. Part III also identifies ways in which these administrative mechanisms may provide considerably *less* protection, as a practical matter, than an approach that insists upon congressional action. *See infra* text accompanying notes 155–63.

114. *Cf. Sharkey, Preemption by Preamble, supra* note 79, at 242 ("Congressional intent is at the heart of conventional preemption analysis.").

115. *See, e.g.,* Requirements on Content and Format of Labeling for Human Prescription Drug and Biological Products, 71 Fed. Reg. 3,922, 3,934 (Jan. 24, 2006) (to be codified at 21 C.F.R. pts. 201, 314, 601) ("FDA approval of labeling under the act . . . preempts conflicting or contrary State law."); Tresa Baldas, *FDA's Pre-emption Rule Splits the Courts*, NAT'L L.J., Apr. 30, 2007, at 1, available at <http://www.law.com/jsp/article.jsp?id=1178183076770>; Sharkey, *Preemption by Preamble, supra* note 79, at 230–42 (surveying actions by the Food and Drug Administration, the National Highway Traffic Safety Administration, and the Consumer Product Safety Commission). Professor Sharkey suggests that "these preemption preambles may be only the tip of the iceberg—a harbinger of a future where federal agency regulations come armed with directives that displace competing or conflicting state regulations or common law as a matter of course." *Id.* at 227–28.

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governing statute or regulation promulgated within the agency's delegated authority, and instead attempt to discern the proper scope of preemption with little or no direction from Congress."¹¹⁶ On our view of the law, such preambles would add relatively little to a preemption inquiry; the preemptive effect of federal law would have to be grounded in actions by Congress, not the agency's judgment. But it seems likely that Professors Galle, Seidenfeld, and Metzger would approach the question quite differently by focusing on the processes and reasoning of the agency itself. Unless we have profoundly misread them, our interlocutors would care far less than we would about the extremely attenuated role that Congress plays in such cases.

In any event, our purpose here is not so much to prove our symposium guests wrong as to insist on the continued primacy of Congress in preemption decisions. To the extent that Professors Galle, Seidenfeld, and Metzger accept that primacy, we are certainly happy to embrace them. But we suspect that the shift we detect in these articles is, in fact, a meaningful one, and to that extent we hope to provide a reminder that legislative authority must *always* be grounded in action by the states' representatives in Congress.

C. *"That Ship Has Sailed"*

The second possible answer to our critique raises the interesting and difficult question of how one approaches the question of constitutional limits on the administrative state. At one extreme, one could conclude that the administrative state is hopelessly unconstitutional and thus that no more further discussion need occur.¹¹⁷ At the other extreme, one could decide that the basic questions of separation of powers have been resolved in favor of administrative agencies, so that contemporary constitutional debate must take their legitimacy as given. Arguments like ours, which continue to treat agencies as constitutionally suspect in at least some important ways, are thus outside the scope of relevant constitutional debate. We take this to be the position of Professors Galle, Seidenfeld, and Metzger. It is not so much that the arguments against broad delegation of authority to agencies are implausible, but rather

116. Sharkey, *Preemption by Preamble*, *supra* note 79, at 243.

117. *See, e.g.*, Lawson, *supra* note 2, at 1249 (stating that he is willing "to hold fast to the Constitution though the heavens may fall").

that it is simply too late to make those arguments. That ship has sailed.

This is, without a doubt, a plausible position. Neither of us—not even Professor Benjamin, on his most Jacobin days—is eager to uproot the administrative state, even if we were handed power to do so. And although it is fun to play the curmudgeon and grumble about the constitutional liberties taken during the New Deal and Great Society, we also confess that we prefer our constitutional arguments to be at least *somewhat* relevant to the world we actually live in. Nonetheless, we think at least two answers are available to the “too late” argument.

The first is that the constitutional legitimacy of the administrative state rests on a set of awkward but durable intellectual compromises, and we want to insist that those compromises remain deserving of respect. Probably the most common line of argument in matters of administrative law and federalism has gone as follows: don’t worry about whatever change we are proposing, because there are still unshakeable bulwarks that will always be there to protect the states. When, for instance, the Supreme Court read the Commerce Clause so broadly that “interstate commerce” encompassed anything that looked like commerce,¹¹⁸ the reassuring response was that the political safeguards of federalism still existed—that members of the House and Senate are elected by states and units of states and those members make the laws that govern commerce.¹¹⁹ Similarly, when Congress started creating agencies that would have broad rulemaking, adjudicatory, and enforcement authority, and thus seemed to both delegate legislative power to entities outside Congress and to combine legislative, judicial, and executive authority in ways that seemed in tension with the separation of powers, the reassuring response was that these agencies would not supplant Congress or act on their own and judicial review would keep the agencies within their statutory bounds.¹²⁰ Congress would still make

118. *See, e.g., Wickard v. Filburn*, 317 U.S. 111 (1942).

119. *See, e.g., Wechsler, supra* note 15, at 546–52 (discussing the “crucial role [of the states] in the selection and the composition of the national authority”); *Kramer, supra* note 20, at 234–52 (updating Wechsler’s argument).

120. *See, e.g., SUNSTEIN, supra* note 16, at 143 (“Broad delegations of power to regulatory agencies . . . have been allowed largely on the assumption that courts would be available to ensure agency fidelity to [Congress’s] statutory directives . . .”).

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the decision of how much authority to give to agencies, so the buck would stop there.

Scholars and judges thus reconciled the administrative state with constitutional principles of both federalism and separation of powers by emphasizing the key role of Congress. There is thus something special about keeping the focus on Congress; that focus, in fact, is the irreducible minimum that allows us to swallow the institutional innovations of the last century. Given this intellectual history, one cannot infer from the present acceptance of administrative agencies that such agencies are substitutes for Congress or anything close to it. They are subservient at best and unconstitutional at worst—that is, whenever they lose their vital connection to the People’s elected representatives.

To be sure, intermediate positions are often somewhat jerry-rigged affairs, risking the appearance of ad hocery. We have said that preemption decisions must be “meaningfully traceable” to Congress itself—a formula that would hardly be self-applying in practical contexts.¹²¹ But even if we could identify a more specific limit on shifting preemptive power to agencies, why draw the line there and not somewhere else? The anti-Frostians might say that once we have allowed agencies to exist, we have given up on our principles and thus our ability to take a principled stand—in for a penny, in for a pound.

Again, this is an intellectually plausible position. But it does not reflect the dominant current of American constitutional thought over the past three quarters of a century. The administrative state has *always* rested on awkward compromises, and our insistence on Congress’s primacy is firmly grounded in that settlement. The positions advanced by Professors Galle, Seidenfeld, and Metzger here may offer an advance in terms of intellectual purity, but they risk untethering the administrative state from its established intellectual moorings. If the understanding we outlined in the previous paragraph is not operative, then one must return to the status quo ante and discuss the legitimacy of the basic institutional arrangements upon which one’s ideas are premised. One cannot, in our view, shove Congress aside without justifying the constitutional vision that renders that action legitimate.

121. One of us has tried to flesh out this principle elsewhere, *see* Young, *Executive Preemption*, *supra* note 23, at 886–88, but Professor Benjamin would no doubt flesh it out quite differently—thereby underscoring the difficulty of the enterprise.

Our second rejoinder emphasizes continuing ferment rather than settled understandings. Although the basic legitimacy of the administrative state is no longer in doubt, practically speaking, not all questions are so settled. This is particularly true in the area of administrative federalism, in which the Supreme Court is just beginning to explore the relationship between its administrative law jurisprudence and its doctrines protecting state autonomy. The Court has not, for example, definitively settled the level of deference owing to an agency when it reads its organic statute to preempt state law,¹²² and it has yet to consider the effect of broadly preemptive “preambles” issued by an agency with relatively tenuous grounding in the underlying statute. These are questions that can still go either way. Indeed, it seems fair to say that the proagency positions on these issues—which would, for instance, largely supplant the current widespread use of state tort law as a supplementary mechanism for promoting consumer safety—pose the greater danger to settled expectations.

The two of us may disagree over the extent to which consolidating regulatory authority over product safety or similar issues would be a good thing. We are content to agree, however, that it would be a *new* thing. It may be fair to say that “that ship has sailed” when speaking of basic delegations of authority to federal agencies. But on the finer points of administrative federalism, we still have time to bomb those ships in the harbor.

III. PROTECTING FEDERALISM IN THE ADMINISTRATIVE STATE

Thus far we have argued that the focus of administrative federalism doctrine should remain on Congress, because that is where the *Constitution* focuses. In this last Part, we broaden our own focus from the issue of fidelity to hardwired constitutional mechanisms to an assessment of how an “administrative law”-based approach might affect underlying constitutional values of federalism. We suggest, first, that downplaying Congress’s role would undermine state autonomy to a greater degree than our interlocutors seem to think. Second, we consider the potential benefits to state autonomy of administrative law protections, if those protections are added as a

122. See *Watters v. Wachovia Bank, N.A.*, 127 S. Ct. 1559, 1572 (2007) (avoiding the question as “academic”).

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supplement to, rather than a substitute for, an insistence on Congress's primary role.

Our discussion in this Part is complicated by a normative disagreement about the desirability of protecting state autonomy per se. One of us believes that constitutional fidelity means adherence not only to particular institutional mechanisms in the text (e.g., Congress's lead role in lawmaking) but also to the Constitution's underlying commitment to balance between national and state power.¹²³ The other denies the pull of such broader structural principles and is skeptical that state autonomy warrants protection as a normative matter. This disagreement has implications for how we view both the current doctrine that our interlocutors would undermine and the administrative law-based safeguards for federalism that they would develop. Throughout this Part, we try to make explicit where we differ and how those differences cash out.

A. *Congress and the Procedural Safeguards of Federalism*

The Constitution vests the legislative power in Congress and creates difficult hurdles for legislative action. These textual provisions are critical elements of the Constitution's protection of federalism. As Bradford Clark has explained, these procedures safeguard federalism in two distinct respects. The first is representational or political in nature:

Federal lawmaking procedures safeguarded federalism . . . by assigning power to adopt "the supreme Law of the Land" solely to entities subject to "the political safeguards of federalism"—that is, the states' "strategic role to the selection of Congress and the President." These procedures enhanced the influence of the states by giving federal institutions designed to represent state interests—such as the Senate—a veto over all forms of federal lawmaking¹²⁴

This is the familiar "political safeguards of federalism" argument that Herbert Wechsler popularized¹²⁵ and the Supreme Court endorsed in *Garcia v. San Antonio Metropolitan Transit Authority*.¹²⁶ But as

123. See generally Young, *Making Federalism Doctrine*, *supra* note 48, at 1762–75.

124. Bradford R. Clark, *Separation of Powers as a Safeguard of Federalism*, 79 TEX. L. REV. 1321, 1330–31 (2001) (quoting Wechsler, *supra* note 15, at 544).

125. See Wechsler, *supra* note 15, *passim*.

126. *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 550–54 (1985).

Professor Clark points out, federal lawmaking procedures also serve a distinct function: “[t]hese procedures safeguard federalism on one level simply by requiring agreement among multiple actors, thus making the ‘Constitution,’ ‘Laws,’ and ‘Treaties’ of the United States relatively difficult to adopt.”¹²⁷

It is true, as Carlos Vázquez recently pointed out,¹²⁸ that the difficulty of navigating the national lawmaking process simply entrenches the status quo at the federal level by making changes to federal law difficult. If the federal government is already regulating in a given area, these inertia-based limits may thus entrench federal power by thwarting devolutionary impulses that might return authority to the states. Relying on federal inertia to protect state autonomy thus entails a predictive judgment about the relative frequency of federal initiatives that expand or contract national power. We are fairly comfortable, however, in predicting that the former will exceed the latter in both frequency and importance.

We refer to the two principles we have identified as the “political” and “procedural” safeguards of federalism, respectively. These lawmaking procedures were never intended to be the *only* constitutional means of protecting state autonomy, of course. The Framers also relied upon the doctrine of enumerated powers, underscored by the Tenth Amendment’s command that “[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.”¹²⁹ But contemporaneous commentary underscores the central place of the Constitution’s lawmaking procedures in the Framers’ strategy for protecting federalism.¹³⁰

127. Clark, *supra* note 124, at 1330; see also MARTHA DERTHICK, KEEPING THE COMPOUND REPUBLIC: ESSAYS ON AMERICAN FEDERALISM 28 (2001) (observing that inertia-based limits on federal action protect state autonomy because “[t]he states are the ‘default setting’ of the American federal system”); Matthew C. Stephenson, *The Price of Public Action: Constitutional Doctrine and the Judicial Manipulation of Legislative Enactment Costs*, 118 YALE L.J. (forthcoming 2008) (manuscript at 32–33) (discussing federalism implications of the “enactment costs” of federal legislation).

128. See Carlos Manuel Vázquez, *The Separation of Powers as a Safeguard of Nationalism*, 83 NOTRE DAME L. REV. (forthcoming 2008) (manuscript at 4–5).

129. U.S. CONST. amend. X; see also *United States v. Lopez*, 514 U.S. 549, 600–01 (1995) (invalidating the federal Gun Free School Zones Act as outside the limits of Congress’s Commerce Power); *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 195 (1824) (stating that “[t]he enumeration presupposes something not enumerated”).

130. See, e.g., THE FEDERALIST Nos. 45 & 46, at 311, 317–18 (James Madison) (emphasizing the importance of the states’ representation in the federal lawmaking process); Letter from

Neither the political nor the procedural safeguards inherent in the lawmaking process work very well if law is, in fact, made in other ways.¹³¹ Hence, the Court's delegation decisions continue to insist that "when Congress confers decisionmaking authority upon agencies Congress must 'lay down by legislative act an intelligible principle to which the person or body authorized to [act] is directed to conform.'"¹³² Likewise, the modern Court has kept its focus firmly on Congress when considering the scope and validity of federal intrusions on state autonomy.¹³³ And although the Court has held that Congress may regulate "the states as states," even when they are performing traditional state government functions,¹³⁴ the Court has also required a clear statement of Congress's intent to accomplish such regulation:

[I]nasmuch as this Court in *Garcia* has left primarily to the political process the protection of the States against intrusive exercises of Congress' Commerce Clause powers, we must be absolutely certain that Congress intended such an exercise. "To give the state-displacing weight of federal law to mere congressional *ambiguity* would evade the very procedure for lawmaking on which *Garcia* relied to protect states' interests."¹³⁵

James Madison to Edward Everett (Aug. 28, 1830), in 9 THE WRITINGS OF JAMES MADISON 383, 395–96 (1910) ("As a security of the rights & powers of the States in their individual capacities, ag[ainst] an undue preponderance of the powers granted to the Government over them in their united capacity, the Constitution has relied on . . . [t]he responsibility of the Senators and Representatives in the Legislature of the U. S. to the Legislatures & people of the States."); see also THE FEDERALIST No. 51, at 348–51 (James Madison) (emphasizing that checks and balances, including checks built into the lawmaking process, would preserve balance among competing institutions); Clark, *supra* note 124, at 1346–67 (surveying the founding debates over the Supremacy Clause and the Constitution's lawmaking procedures).

131. Clark, *supra* note 124, at 1331 (explaining that these institutional dynamics "suggest that the Founders understood constitutionally prescribed lawmaking procedures to establish the exclusive means of adopting 'the supreme Law of the Land'").

132. *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 472 (2001) (alteration in original) (quoting *J.W. Hampton, Jr., & Co. v. United States*, 276 U.S. 394, 409 (1928)); see also *Loving v. United States*, 517 U.S. 748, 771 (1996) ("It does not suffice to say that Congress announced its will to delegate certain authority. . . . The intelligible-principle rule seeks to enforce the understanding that Congress may not delegate the power to make laws and so may delegate no more than the authority to make policies and rules that implement its statutes.").

133. See, e.g., *Watters v. Wachovia Bank, N.A.*, 127 S. Ct. 1559, 1572 (2007) (holding a state banking law preempted but focusing on the statutory text, not the agency's judgment).

134. *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 554 (1985).

135. *Gregory v. Ashcroft*, 501 U.S. 452, 464 (1991) (quoting LAURENCE TRIBE, AMERICAN CONSTITUTIONAL LAW § 6-25, at 480 (2d ed. 1988)); see also *Will v. Mich. Dep't of State Police*, 491 U.S. 58, 65 (1989) ("[I]f Congress intends to alter the 'usual constitutional balance between

In preemption cases, the Court continues to invoke—and, somewhat more sporadically, to follow—a “presumption against preemption,” which holds that “[i]n areas of traditional state regulation, we assume that a federal statute has not supplanted state law unless Congress has made such an intention ‘clear and manifest.’”¹³⁶ Likewise, the Court has been unwilling to defer to administrative agency interpretations of federal statutes when those readings supplant state authority in fields of traditional state regulation,¹³⁷ and it has held that preemptive federal regulation at the outer limits of Congress’s commerce power must come from the legislative body itself, not an administrative agency.¹³⁸

Note that nothing we have said so far dictates *how* we should determine Congress’s intent, and we think reasonable minds can differ. One might decide, for example, simply to use ordinary methods of statutory construction to determine whether Congress intended to preempt or to give an agency the power of preemption. Indeed, the two of us disagree as to the desirability of the various clear statement rules just invoked. One of us is a big fan, who has defended clear statement requirements as “resistance norms” that can compensate for the underenforcement of federalism and other structural values;¹³⁹ for him, clear statement rules form the cornerstone of a viable approach to judicial enforcement of

the States and the Federal Government,’ it must make its intention to do so ‘unmistakably clear in the language of the statute.’” (quoting *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 242 (1985))).

136. *Bates v. Dow Agrosciences LLC*, 544 U.S. 431, 449 (2005) (quoting *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947)).

137. *See Gonzales v. Oregon*, 126 S. Ct. 904, 914–22, 925 (2006) (rejecting the attorney general’s interpretation of the Controlled Substances Act to ban physician assisted suicide, in part, because “such an obscure grant of authority to regulate areas traditionally supervised by the States’ police power” was unlikely).

138. *See Solid Waste Agency of N. Cook County v. U.S. Army Corps of Eng’rs*, 531 U.S. 159, 172 (2001) (“Where an administrative interpretation of a statute invokes the outer limits of Congress’ power, we expect a clear indication that Congress intended that result.”). Similar clear statement rules apply when Congress supplants neutral state procedural rules in association with federal claims brought in state court, *see Howlett v. Rose*, 496 U.S. 356, 372 (1990), when Congress, in the exercise of its power to enforce the Reconstruction Amendments, abrogates state sovereign immunity from private suits for money damages, *see Atascadero*, 473 U.S. at 242, and when Congress affixes conditions to grants of federal funds, *see Arlington Cent. Sch. Dist. v. Murphy*, 548 U.S. 291, 296 (2006).

139. *See Ernest A. Young, Constitutional Avoidance, Resistance Norms, and the Preservation of Judicial Review*, 78 TEX. L. REV. 1549, 1552 (2000).

federalism.¹⁴⁰ The other of us remains skeptical of canons of construction and would prefer to ascertain the intent of Congress through more traditional modes of statutory construction.¹⁴¹ But we do agree that the Court's employment of clear statement rules in a variety of contexts reflects the traditional—and in our view plainly correct—notion that *Congress* must make the critical decisions concerning the federal/state balance.¹⁴² Our disagreement is about how Congress's intent should be ascertained, not where the focus of inquiry should lie.

We also agree that, by minimizing Congress's role, Professors Galle, Seidenfeld, and Metzger would substantially undermine the states' position. The constitutionally-mandated lawmaking process protects state autonomy in two distinct respects—politically and procedurally—and the arguments of our interlocutors only go to one of them.¹⁴³ If the states really do have significant opportunities to press their interests and exercise political leverage within the federal administrative process, that might ameliorate concerns about circumventing the political safeguards in Congress. But Professors Galle, Seidenfeld, and Metzger all concede that it is *far* easier to enact federal law through administrative processes than through legislation.¹⁴⁴ Agency action, quite simply, leaves the inertia-driven *procedural* safeguards of federalism in the dust.

The two of us are not completely on the same page concerning the desirability, as a policy matter, of these inertia-based safeguards. But we do agree that they play a major role in the constitutional scheme for protecting federalism. The difficulty of enacting federal law is what fuels the basic presupposition of our system that

[f]ederal law is generally interstitial in its nature. It rarely occupies a legal field completely, totally excluding all participation by the legal

140. See Young, *Two Federalisms*, *supra* note 48, at 123–27. For a particular application of this approach to administrative federalism, see generally Young, *Executive Preemption*, *supra* note 23.

141. For an example of this approach to administrative law, see generally Benjamin & Rai, *supra* note 48.

142. See *United States v. Bass*, 404 U.S. 336, 349 (1971) (“In traditionally sensitive areas, such as legislation affecting the federal balance, the requirement of clear statement assures that the *legislature* has in fact faced, and intended to bring into issue, the critical matters involved in the judicial decision.” (emphasis added)).

143. See *supra* Part III.A.

144. Galle & Seidenfeld, *supra* note 3, at 1971; Mendelson, *Chevron and Preemption*, *supra* note 79, at 738.

systems of the states. . . Congress acts, in short, against the background of the total *corpus juris* of the states in much the way that a state legislature acts against the background of the common law, assumed to govern unless changed by legislation.¹⁴⁵

To the extent that this “interstitial” view of federal law has become dated,¹⁴⁶ that development is largely owing to the advent of nonlegislative lawmaking processes, including not only administrative agency action but also federal common lawmaking, which evade the burdens of overcoming inertia inherent in the Article I legislative process. It is important to recognize, in assessing the administrative process’s adequacy as a federalism surrogate, that that process provides little substitute for the procedural safeguards of federalism.

B. The Administrative Safeguards of Federalism?

We have argued that, in administrative federalism cases, the focus should be on exactly what Congress authorized the agencies to do. That is what we believe the Constitution commands. Functional considerations at the agency level are interesting, and they are important in lots of situations. But we believe that the first question in any analysis must be what Congress intended.

By eliding this question, Professors Galle, Seidenfeld, and Metzger leave us in a strange place. If the Constitution does not constrain (as opposed to merely suggest ideas to) Congress and agencies, what meaningful limit exists? A doctrine from administrative law is illustrative here. The Administrative Procedure Act says that its constraints do not apply if “agency action is committed to agency discretion by law.”¹⁴⁷ The Court has found that this exception arises “in those rare instances where ‘statutes are drawn in such broad terms that in a given case there is no law to apply.’”¹⁴⁸ In such situations, the Court has held that it cannot impose any limits on the agency’s exercise of its discretion because it has no

145. RICHARD H. FALLON, JR., DANIEL J. MELTZER, & DAVID L. SHAPIRO, HART AND WECHSLER’S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 494–95 (5th ed. 2003) (quoting the first edition); see also Henry M. Hart, Jr., *The Relations Between State and Federal Law*, 54 COLUM. L. REV. 489, 495–98 (1954).

146. See, e.g., FALLON ET AL., *supra* note 145, at 495 (“In the fifty years since the First Edition was published, the expansion of federal legislation and administrative regulation . . . has accelerated . . .”).

147. 5 U.S.C. § 701(a)(2) (2006).

148. *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 410 (1971) (citing S. REP. NO. 79-752, at 26 (1945)).

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legal basis for doing so.¹⁴⁹ It seems to us that Galle, Seidenfeld, and Metzger have similarly left courts (and everyone else) without any law to apply in considering the adequacy of agencies' efforts to accommodate federalism concerns. They have suggested the federalism principles can give some guidance to agencies, but they have not indicated how we would ever determine that agencies have acted unlawfully. This is not necessarily a fatal flaw. In some situations there really is no law to apply. But here there *is* law to apply—the Constitution—and it provides some constraints. We are being asked to abandon those constraints and replace them with . . . well, nothing.

Our view still leaves a role for functionalism. In some situations we might conclude that the best reading of a statute is that Congress delegated broad authority to an agency that it could choose to exercise in a variety of ways (preempting and otherwise), so there would be no constitutional question of the sort we are describing. Congress would have spoken with whatever is the requisite amount of clarity to the agency, and the policy question would then be whether we, as citizens, should want the agency to make a certain decision, or whether we should prefer that it be made by courts or Congress. That is, once the constitutional question is removed, we can discuss the policy question of what our preferences should be. But our point is that the constitutional question comes first, and only if it is answered in the affirmative can we then move to the normative question.

This goes to the question of the usefulness of the sort of functional analysis that Professors Galle, Seidenfeld, and Metzger engage in. The point of their analysis (and in particular Galle and Seidenfeld's), is that agencies may protect state interests better than Congress would, so we should feel fine about agencies making preemption decisions on their own. In our view, this sort of analysis is not sufficient, and it may not even be necessary. It is not sufficient because, as we have noted already, no matter how solicitous agencies may be of states' interests, we believe that the best understanding of the Constitution is that Congress must make the central judgments. Even if agencies were, as a factual matter, clearly superior to Congress in protecting states' interests, it would not change the fact

149. *See Webster v. Doe*, 486 U.S. 592, 601 (1988) (holding, in the case of a Central Intelligence Agency employee who was fired because of his sexual orientation, that there was no law to apply under the Administrative Procedure Act but the plaintiff's constitutional claims *were* reviewable).

that the Constitution requires the basic decisions to be made by Congress.

One of us (Professor Benjamin) would go further to say that all this functional analysis is not necessary because, once we have gotten past the initial question—that is, once we have concluded that Congress authorized the agency to preempt, or authorized the agency to decide to preempt—we do not need to consider the degree to which agencies protect states' interests. The policy analysis certainly can include such considerations, but they are not, in any sense, required. This view holds that considering state interests in the mix of policy concerns can be a valuable element of agencies' overall decisionmaking process, but it need not be a central or separable element. Congress should make the relevant decisions regarding states' interests, and once it has done so the degree of protection of states provided by agencies simply is not terribly important.

The other of us (Professor Young) thinks that the constitutional obligation to protect federalism is considerably more demanding.¹⁵⁰ That obligation includes two distinct components: first, to observe the entrenched structural mechanisms that the Constitution builds in, such as the representation of the states in Congress and the arduousness of the Article I legislative process; and second, to respect the Constitution's more general commitment to balance the meaningful sovereign roles of both national and state governments. This latter commitment is frequently observed by institutional innovation outside the canonical Constitution—for example, when the federal courts formulate judge-made abstention doctrines that protect the role of the state courts.¹⁵¹ Although this view has been developed primarily in the context of the courts' obligation to formulate federalism-protective doctrine, the political branches take the same oath to preserve the Constitution and, in fact, have frequently observed that obligation by promulgating statutes, regulations, and practices that protect federalism in ways not directly mandated by the canonical document.¹⁵² The functional analysis that

150. See Young, *Making Federalism Doctrine*, *supra* note 48, at 1762–99.

151. See, e.g., *Younger v. Harris*, 401 U.S. 37, 43–54 (1971) (developing a doctrine of equitable abstention to protect the autonomy of state judicial proceedings from federal interference); Young, *Making Federalism Doctrine*, *supra* note 48, at 1775–83 (discussing the need for and historical extent of extraconstitutional innovation to protect the federal balance).

152. See Young, *Outside the Constitution*, *supra* note 61, at 429–36 (discussing the roles of statutes and regulations in defining the federal balance).

Professors Galle and Seidenfeld offer, and the doctrinal suggestions that Professor Metzger puts forward, are tremendously helpful in terms of vindicating these commitments.¹⁵³

We hasten to add, however, that the administrative safeguards of federalism will be helpful to state autonomy only if they act as a supplement to, not a substitute for, existing rules of Congressional primacy. We have already suggested that it is far from clear that agencies are “just as good” as Congress at protecting interests of state autonomy. There is a robust debate about exactly what agency officials maximize, and thus what sort of behavior we should expect from them.¹⁵⁴ This debate has been largely theoretical, as it is difficult to construct rigorous empirical benchmarks for testing various theories of officials’ motivations. But the lack of empirical clarity about officials’ goals should not obscure the historical reality of the increase in agencies’ power, often at the expense of states. Simply stated, notwithstanding Professors Seidenfeld and Galle’s abstract points of comparative institutional analysis, the vast expansion of the federal administrative state over the last century—much of it driven by decisions taken at the agency level—is *res ipsa loquitur*. Moreover, this expansion has occurred despite the existence of *both* the judicial focus on grounding administrative activity in congressional action *and* the federalism-protective features of the agency process itself that Galle and Seidenfeld invoke. Galle and Seidenfeld give us no reason to conclude that, despite the spotty record of both sets of safeguards in limiting national aggrandizement, removing one of those safeguards will enhance state autonomy.

Likewise, although Professor Metzger offers a creative and extremely interesting glimpse of administrative law’s potential to protect federalism, we expect she would acknowledge that the

153. See Young, *Making Federalism Doctrine*, *supra* note 48, at 1771–75 (suggesting that courts may well have a constitutional *obligation* to formulate federalism-protective doctrines to compensate for the enumerated powers doctrine’s failure to constrain national authority).

154. Compare WILLIAM A. NISKANEN JR., BUREAUCRACY AND REPRESENTATIVE GOVERNMENT 114 (1971) (arguing that agency officials will expand their budgets and power because “the coterminous relation of a bureaucrat’s rewards and his position implies that a bureaucrat will maximize the total budget of his bureau”), with Daryl J. Levinson, *Empire-Building in Constitutional Law*, 118 HARV. L. REV. 915, 932 (2005) (disagreeing with the agency “empire-building hypothesis,” and stating that “[e]ven if most bureaucrats were primarily interested in lining their own pockets, the relationship between a larger agency budget and higher salaries or cushier working conditions is empirically tenuous”); see also Stuart Minor Benjamin & Arti K. Rai, *Fixing Innovation Policy: A Structural Perspective*, 77 GEO. WASH. L. REV. (forthcoming Nov. 2008) (manuscript at 41–44) (discussing this debate).

evidence that administrative law actually plays this role at present is pretty thin. The cases she discusses are not all that encouraging. The federalism-protective aspect of *Alaska Department of Environmental Conservation v. EPA*¹⁵⁵ was offered in dissent.¹⁵⁶ *Gonzales v. Oregon*¹⁵⁷ involved a particularly blatant power grab by executive officials seeking to do what Congress had explicitly refused to do and involved a particularly sensitive area of state policy experimentation,¹⁵⁸ if anything, the Court's opinions distressingly suggest the case was closer than it should have been.¹⁵⁹ *Massachusetts v. EPA*¹⁶⁰ was a case about standing, not regulatory authority, and the special role of the states played a relatively minor role in the decision.¹⁶¹ And both *Gonzales v. Raich*¹⁶² and *Watters v. Wachovia Bank, N.A.*¹⁶³ were big defeats for state regulatory autonomy. We always respect the ability to make lemonade out of the lemons life gives you, but these are the cases from which we are supposed to conclude that administrative law will protect federalism?

CONCLUSION

There is perhaps an irony in our critique of Professors Galle, Seidenfeld, and Metzger: one of us (the hidebound Burkean) would require a clear statement from Congress before interpreting a statute as giving an agency the authority to preempt or the authority to decide to preempt. The other one (the Jacobin) would not require any sort of clear statement and would instead resort to ordinary tools of statutory construction. So, in reality, our interpretive techniques would yield different answers in many (perhaps most) cases. But we

155. *Alaska Dep't of Env'tl. Conservation v. EPA*, 540 U.S. 461 (2004).

156. *See id.* at 517–18 (Kennedy, J., dissenting).

157. *Gonzales v. Oregon*, 126 S. Ct. 904 (2006).

158. *See id.* at 911 (acknowledging the “earnest and profound debate about the morality, legality, and practicality of physician-assisted suicide” (quoting *Washington v. Glucksberg*, 521 U.S. 702, 735 (1997))).

159. Three Justices dissented, after all. *See id.* at 926 (Scalia, J., joined by Roberts, C.J., & Thomas, J., dissenting).

160. *Massachusetts v. EPA*, 127 S. Ct. 1438 (2007).

161. *See id.* at 1454–55 (discussing Massachusetts's “special position” as a litigant rather than a regulator for standing purposes).

162. *See Gonzales v. Raich*, 125 S. Ct. 2195 (2005) (interpreting the Commerce Clause broadly to permit federal regulation of homegrown marijuana use, thereby nullifying California's medical marijuana).

163. *See Watters v. Wachovia Bank, N.A.*, 127 S. Ct. 1559, 1573 (2007) (holding that the National Banking Act leaves little room for state regulation of the “business of banking”).

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agree on the foundational interpretive point that the constitutional decisions to employ certain mechanisms are just as mandatory as the underlying values that those decisions seek to protect. Expanding this institutional array is often permissible and may even be essential, but this element of realism does not legitimate marginalizing the institutions that the Constitution does specify. To the extent that Galle, Seidenfeld, and Metzger shift the focus away from Congress's role in the lawmaking process to that of administrative agencies, they exceed the limits of constitutional flexibility. We want to keep the focus where the Constitution does.