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Deciding Who Decides: Searching for a Deference Standard When Agencies Preempt State Law

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Deciding Who Decides: Searching for a Deference Standard When Agencies Preempt State Law

By John R. Ablan *

Abstract

When a federal agency determines that the statute that it administers or regulations it has promulgated preempt state law, how much deference must a federal court give to that determination? In *Wyeth v. Levine*, the Supreme Court expressly declined to decide what standard of deference courts should apply when an agency makes a preemption determination pursuant to a specific congressional delegation to do so. Under this circumstance, this Article counsels against applying any single deference standard to an agency’s entire determination. Instead, it observes that preemption determinations are a complex inquiry involving questions of federal law, state law, and congressional intent. As such, this Article proposes that the level of deference a court grants to an agency’s resolution of each of these sub-questions ought to vary with the sub-question under review.

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I. INTRODUCTION

Imagine you are a federal district judge and the following case comes before you. A woman named Alexis Geier is injured in a car accident, and she is suing the car manufacturer for compensation under state tort law. Geier alleges that the manufacturer was negligent when it failed to equip her car with an airbag and that this negligence is the proximate cause of her injuries. The manufacturer files a motion to dismiss arguing that the National Traffic and Motor Safety Act and regulations duly promulgated by the Department of Transportation (DOT) preempt the state law claim. The manufacturer’s brief cites the following: (1) a federal statute delegating to the DOT the authority to preempt state tort law; and (2) a statement of basis and purpose—published in the Federal Register contemporaneously with the regulations in question—stating that the DOT has determined that the regulation preempts state tort law. As the judge, you must decide what amount of deference you are required to accord the DOT’s preemption determination. This point of law—expressly left open by the Supreme Court—is the subject of this Article.2

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2 This circumstance and the facts that follow are based on a real case. See Geier v. Honda Motor Co., Inc., 529 U.S. 861 (1999). I have altered the facts in order for them to give rise to the novel question of law addressed by this Article. In this regard, I have included a specific Congressional delegation of authority to the agency to pronounce on preemption determinations. It is the addition of this delegation to the fact pattern that gives rise to a question the Supreme Court considers to be an open one. See Wyeth v. Levine, 555 U.S. 555, 576–77 (2009) (“While agencies have no special authority to pronounce on pre-emption absent delegation by Congress, they do have a unique understanding of the statutes they administer and an attendant ability to make informed determinations about how state requirements may pose an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.” (internal quotation marks omitted)); see also id. at 580 (“By contrast, we have no occasion in this case to consider the pre-emptive effect of a specific agency regulation bearing the force of law.”). Review for better quote

3 This question is not a purely academic one. Since Congress has enacted such delegations, this question will inevitably make its way to the Supreme Court. An example appears to be the following provision, which delegates power to the Federal Communications Commission as part of the Telecommunications Act of 1996:

If, after notice and an opportunity for public comment, the Commission determines that a State or local government has permitted or imposed any statute, regulation, or legal requirement that violates subsection (a) or (b) of this section, the Commission shall preempt the enforcement of such statute, regulation, or legal requirement to the extent necessary to correct such violation or inconsistency.
You have a few options. Under the most deferential approach, you could apply the rules developed for agencies’ interpretations of federal law; the starting point there is the seminal

Chevron, U.S.A., Inc. v. National Resources Defense Council, Inc.\(^4\) Since 1984, Chevron’s test instructs courts to determine whether a statute is ambiguous and whether the agency has interpreted it reasonably. If so, then the court must defer to the agency’s interpretation even if the court would arrive at a different interpretation under a de novo standard.\(^5\) Your next option is the standard announced in Skidmore v. Swift Co.,\(^6\) which applies when an agency’s interpretation is not entitled to Chevron deference.\(^7\) Under that standard, courts give heavy persuasive weight to an agency’s interpretations, but the court ultimately has the final word on the statute’s meaning.\(^8\) The Supreme Court’s most recent statement on deference to agencies’ preemption determinations held that if—unlike your fact pattern—there is no specific congressional delegation of authority to preempt state law, then Skidmore is the proper standard.\(^9\) Finally, you could apply the standard for preemption claims generally: de novo with a presumption against preemption, and, thus, give no weight to the DOT’s statements.\(^10\) Figure 1 illustrates the relationship between these standards.

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\(^4\) 467 U.S. 837 (1984). Of course, not all agency interpretations of federal law are entitled to Chevron deference. See United States v. Mead, Corp., 533 U.S. 218 (2001) (holding that in order for the agency interpretation at issue to be eligible for Chevron deference, it must be the product of the agency’s exercise of a congressional delegation to bind with the force of law).

\(^5\) Nat’l Cable & Telecomms. Ass’n v. Brand X Internet Servs., 545 U.S. 967, 980 (2005) (“If a statute is ambiguous, and if the implementing agency’s construction of the statute is reasonable, Chevron requires a federal court to accept the agency’s construction of the statute, even if the agency’s reading differs from what the court believes is the best statutory interpretation.”).

\(^6\) 323 U.S. 134 (1944).

\(^7\) Mead, 533 U.S. at 234–35.


\(^9\) Id. at 565 (stating that all preemption cases begin with the assumption that “the historic police powers of the States were not to be superseded by Federal Act unless that was the clear and manifest purpose of Congress”).

\(^10\) Id. at 565.
This is a difficult choice. There is a fundamental divide between the *Chevron* deference standard, on one hand, and the *Skidmore* and de novo standards on the other. *Chevron* deference often results in an agency making the final decision on the meaning of federal law while the latter standards keep that authority in the courts. Put simply, *Chevron* privileges agencies’ interpretations of federal law over courts’ while *Skidmore* and de novo privilege courts’ interpretations over agencies’. Additionally, each of these standards has a well-developed, compelling rationale attached to it. *Chevron* deference is based on the notion that filling in statutory gaps inevitably involves policy decisions that agencies are better equipped to make than courts. Agencies are better equipped because of their expertise in a given policy area, and *Chevron* is ultimately a recognition that our increasingly complex society calls for a correspondingly sophisticated level of expertise for effective government.\(^{11}\) Congress simply cannot make every policy decision by itself.\(^{12}\) Additionally, it is more appropriate for agencies to make policy decisions because they are politically accountable bodies—at least more accountable than a court presided over by a federal judge appointed for life.\(^{13}\)

On the other hand, having a court make the final interpretive decision has virtues as well. The Tenth Amendment enshrines the historic and residual regulatory powers of the several states, and federal courts have historic and special role as umpire for conflicts between the nation

\(^{11}\) *See* *Chevron*, U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 863 (1984) (“Our review of the EPA's varying interpretations of the word “source”—both before and after the 1977 Amendments—convinces us that the agency primarily responsible for administering this important legislation has consistently interpreted it flexibly—not in a sterile textual vacuum, but in the context of implementing policy decisions in a technical and complex arena.”).

\(^{12}\) *Chevron*.

\(^{13}\) U.S. CONST. art. III, § 1.
and state. Thus, federalism concerns cut in favor of the more scrutinizing de novo standard—or at least Skidmore deference—as appropriate for the fact pattern. Since your fact pattern involves an agency interpreting the statute that it administers in the midst of a preemption determination, the question seems to be: which of these standards trumps the other? Indeed many scholars have made compelling cases for each of these options.  

This Article charts a different course. It counsels against an outright application of any one of these options to agencies’ preemption determinations, and instead proposes that the Supreme Court adopt a more narrowly tailored standard of review. This Article argues that—depending on the type of preemption claimed—there are a myriad of separate sub-questions that a court reviewing a preemption claim must answer, and that it is not the case that any single institution ought to be privileged to answer all of them. Accordingly, this Article proposes that a court apply a different standard of review depending on what sub-question the court is analyzing.

Doubtless the standard previewed here is more complicated than either a normal Chevron or preemption analysis. However, it is critical to realize that determining whether a state law ought to be preempted in order to further a policymaking goal and whether it actually is preempted as a legal matter are two separate lines of inquiry. The first determination is a policy conclusion, and the second is a legal conclusion. Accordingly, courts ought to adopt a model of judicial review that expressly addresses this duality. Courts should rely on and defer to an agency’s determinations about the proper policy course to take as expressed in its interpretations of federal law. However, those determinations should only begin the inquiry. Finally, lurking in

14 See, e.g., Nina A. Mendelson, Chevron and Preemption, 102 Mich. L. Rev. 737, 800 (2004) (arguing that Chevron deference should not apply and that instead the Court should “apply the Rice presumption against preemption, as well as to exercise its discretion to take an agency interpretation into account when the court deems it appropriate”); Thomas W. Merrill, Preemption and Institutional Choice, 102 NW. U.L. Rev. 727, 771 (2008) (arguing that Chevron deference ought to apply when there is a specific congressional delegation to preempt); Catherine M. Sharkey, Products Liability Preemption: An Institutional Approach, 76 Geo. Wash. L. Rev. 449, 491–99 (2008) (arguing for Skidmore deference for agency preemption determinations in the products liability area).
the background is the fact that preemption claims involve interpretive questions of state law, and thus, allowing a federal agency to have final authority to determine these questions raises grave constitutional concerns.

To explore these issues, Part II provides a background on preemption claims in order to demonstrate the existence of separate sub-questions that a court already must address. Part III examines each of the three options in more detail and demonstrates why adopting any single one to the entire preemption inquiry would produce contradictions with settled doctrinal or constitutional commitments. Part IV lays out this Article’s proposed standard of review, articulates why it is a viable option, and responds to objections.

II. Preemption’s Sub-Questions

Articulating precisely why it is not possible to apply any of the three options outright to an agency’s preemption determinations requires a more nuanced understanding of preemption doctrine generally—or at least an understanding that the Supreme Court has never articulated. In a nutshell, this Article argues that all preemption claims require answering a set of sub-questions that provide a necessary basis with which to resolve any preemption claim. I mention them here in passing—in conjunction with a promissory note for further explanation\(^{15}\)—in order to provide an orientation to guide the reader through the analysis of preemption that follows. These questions are: What does federal law require? What does state law require? Is it possible to comply with both requirements? What are the purposes of Congress? Has Congress regulated pervasively enough to infer that it has occupied the field? One preliminary point to note is that not every sub-question will be relevant to every type of preemption, though there are some that will.

\(^{15}\) See infra Part II.B.
I now provide a brief tour of the Court’s preemption jurisprudence in an effort both to highlight preemption’s general considerations, themes, and rationales and to demonstrate the confusion and uncertainty with the doctrine. These themes create the basis for the sub-questions, and preemption’s confusion and uncertainty demonstrate their utility. By analyzing preemption using these sub-questions, instead of the tests the Court has articulated, I am able to provide a blueprint for analyzing agencies’ preemption determinations and, at the same time, avoid an intolerable situation of having my analysis preempted (no pun intended) by a small change in how the Court articulates a particular species of preemption analysis.

Before I begin describing the different species of preemption, a brief word on generally applicable preemption principles. Typically, the Court begins preemption analysis by reciting two generally applicable principles. First, the purpose of Congress is the ultimate touchstone in every preemption case. Second, in all preemption cases, courts are to start with the assumption that the “historic police powers of the States [are] not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress.” This second principle is also called the “presumption against preemption.”

I concur with other scholars who have pointed out that making congressional purpose the touchstone of an agency preemption analysis is a difficult proposition to wrap your mind around. This is because Congress often grants agencies broad delegations of power

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17 Id. (internal quotation marks omitted).
18
19 See Merrill, supra note 14, at 740. Other scholars have pointed out that congressional purpose also has a limited role in some species of preemption even where there is no agency involved. Ashutosh Bhagwat, Wyeth v. Levine and Agency Preemption: More Muddle, or Creeping to Clarity?, 45 TULSA L. REV. 197, 200 (2009) (noting that if compliance with both a state and federal law is physically impossible, Congress’s intent has “absolutely nothing to do” with a state law giving way).
accompanied with little guidance on how they ought to exercise that power.\textsuperscript{20} In addition, the \textit{Chevron} doctrine expressly contemplates the possibility that Congress either had no opinion on a specific issue or, even more shockingly, that Congress was not able to garner a majority to enact a provision to govern an issue.\textsuperscript{21} In the latter case it is especially difficult to imagine that there even exists a congressional purpose to use as a touchstone.

In addition, many other scholars have questioned the Court’s application of the presumption against preemption by levying charges of inconsistency to the point of downright irrelevance.\textsuperscript{22} I highlight this inconsistency here only to note that it creates the possibility for a more refined treatment of agency preemption. I address this point further in Part IV.

\textbf{A. The Many Species of Preemption}

Untangling the Supreme Court’s preemption jurisprudence is not a straightforward task. Even at the highest levels of abstraction, there is confusion and debate concerning the proper rules to apply and the Court’s consistency when it applies those rules.\textsuperscript{23} Every first semester Constitutional Law professor teaches that there are two broad categories of preemption: express and implied.\textsuperscript{24} And that within the implied category, there is an additional distinction between

\begin{itemize}
\item \textsuperscript{20} For example, the Internal Revenue Service is empowered to make “needful” regulations “in relation to internal revenue.” 26 U.S.C. § 7805(a) (2006). Likewise, the Securities and Exchange Commission is empowered to “exempt any person security or transaction . . . from any provision” of the Securities Act of 1933 so long as “such exemption is necessary or appropriate to the public interest . . . .” 15 U.S.C. § 77z-3.
\item \textsuperscript{21} \textit{Chevron}, U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 865 (1984); \textit{see also infra} text accompanying note 90.
\item \textsuperscript{22} \textit{See, e.g.}, Bhagwat, \textit{supra} note 19, at 199 (“[T]here is some dispute regarding the exact scope of this presumption, and there are serious doubts about whether the Court in fact follows such a presumption with any consistency.”); Merrill, \textit{supra} note 16, at 741; Sharkey, \textit{supra} note 14, at 458 (“I join the veritable chorus of scholars pointing out the Court’s haphazard application of the presumption.”); \textit{see also Gillian E. Metzger, Federalism and Federal Agency Reform}, 111 COLUM. L. REV. 1, 8 (2011) (describing critical commentary and claiming that recent preemption decisions “provide more fodder for those debates”).
\item \textsuperscript{23} \textit{See, e.g.}, Merrill, \textit{supra} note 14, at 740–41 (calling preemption jurisprudence “anomalous” and “controversial”).
\item \textsuperscript{24} \textit{See, e.g.}, Cipollone v. Liggett Group, Inc., 505 U.S. 504, 517 (1992) (“In our opinion, the pre-emptive scope of the 1965 Act and the 1969 Act is governed entirely by the express language in \textsection 5 of each Act. When Congress has considered the issue of pre-emption and has included in the enacted legislation a provision explicitly addressing that issue, and when the that provision provides a reliable indicium of congressional intent with respect to state authority, there is no need to infer congressional intent to-pre-empt state laws from the substantive provisions of the
conflict and field preemption. This Article does not deal with the express preemption case because, by definition, that case would not require a court to decide how much deference to accord an agency’s preemption determination; the answer would be none. To see this, imagine that the Court adopted the most deferential standard in our list of options, *Chevron* deference, to govern all agency preemption cases. Even in that case, a court would *never* defer to an agency’s preemption determination because the matter would be resolved at *Chevron* step one: if Congress has spoken directly on the point at issue, the court applies the expressed will of Congress. It is only when the statute is ambiguous that an agency’s interpretations are eligible for *Chevron* deference.

This brings us back to implied preemption, and as mentioned, law students will confidently assert that there are two types of implied preemption: conflict and field. However, both the Court and scholars have enumerated—what appear to be—several distinct species of implied preemption beyond simply conflict and field. For starters, the Court describes conflict preemption as occurring when “compliance with both the federal and state regulations is a physical impossibility.” However, the Court has also stated that conflict preemption occurs when the state law “stands as an obstacle to the accomplishment and execution of the full legislation.” (internal quotation marks omitted) (citations omitted)); Fidelity Fed. Sav. and Loan Ass’n v. de la Cuesta, 458 U.S. 141, 152–53 (1982) (“Pre-emption may be express or implied . . . .”).

26 *Chevron*, 467 U.S. at 842–43.
27 *Id.*
28 *Compare* Cipollone, 505 U.S. at 516 (describing implied preemption as having two categories: conflict and field preemption), *with* Louisiana Pub. Serv. Comm’n v. FCC, 476 U.S. 355, 368–69 (1988) (dividing implied preemption into five separate categories), *with de la Cuesta*, 458 U.S. at 153 (dividing conflict preemption into a situation where state law “actually conflicts” with federal law and where state law would stand “as an obstacle to the accomplishment . . . of the full purposes and objectives of Congress”).
29 Bhagwat, *supra* note 19, at 199 (“[T]he Court has identified two quite distinct forms of conflict preemption, thereby increasing the forms of preemption to four.”); Merrill, *supra* note 14, at 739 (“We thus have multiple categories of implied preemption, the exact number depending on who is doing the counting.”).
30 As will become clear in Part II.B., whether the traditional categories of preemption can be divided into species is ultimately an irrelevant point. What is relevant is that there is enough vagueness and confusion in preemption jurisprudence to make distilling sub-questions a worthwhile exercise.
purposes and objectives of Congress.”32 One scholar has termed this second species of conflict preemption as “obstacle preemption.”33 This distinction is an appropriate one to make because logically, impossibility preemption is a narrower category than obstacle preemption, and to include them in a “conflict” category without differentiation would be an analytical oversight.

Field preemption is less susceptible to species differentiation. Under this species, state law is preempted when a scheme of regulation is “so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it” or “the Act of Congress may touch a field in which the federal interest is so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject.”34 These two formulations, while admittedly not identical, are substantially similar enough to defensibly group them together. I struggle to imagine a situation where a federal interest dominates enough to preclude concurrent state law enforcement and, at the same time, the scheme of federal regulation does not rise to a level of pervasiveness necessary to infer congressional occupation of the field. In other words, a federal interest will dominate if and only if the scheme is pervasive. No doubt, clever lawyers will be able to make convincing arguments to convince judges that, in fact, two separate species of preemption constitute field preemption. To the extent that there are two species here, it only strengthens the need and utility of distilling preemption’s sub-questions.

All this leads to a quandary: how are courts supposed to map a doctrine of deference to agencies’ preemption determinations onto a preemption jurisprudence that is inconsistent, vague, and confusing? Adding a layer of complexity is that fact that the differences in these species are meaningful variables when deciding which institution should be privileged in resolving interpretive ambiguities. Impossibility preemption seems to require looking at (and thus

33 Bhagwat, supra note 19, at 199.
interpreting) only a specific federal law, while field preemption requires courts to interpret large amounts of federal law in order to see whether it is reasonable to infer that Congress intended to occupy the field. Relatedly, impossibility preemption seems to require a court to say nothing about congressional purposes or objectives while other species have courts dealing with them explicitly.\textsuperscript{35} At this stage in the analysis, distilling preemption claims’ common questions demonstrates its utility.

B. \textit{Distilling Sub-Questions}

As promised, this sub-Part explains preemption’s sub-questions in full detail. The analytical move that underlies my sub-question taxonomy might be usefully termed: “the Kit-Kat Bar effect.” The overall point is that each species of preemption has a court asking what appears to be a single question, but in reality that question must be broken down into constitutive sub-questions that must be answered before the court can answer the larger single question. For example, the sub-species of conflict preemption sometimes termed “impossibility preemption” has courts asking whether “it is physically impossible for someone to comply with both federal and state law.”\textsuperscript{36} If yes, then the state law is preempted. However, in order to answer this larger question, a court must first know the answers to three separate sub-questions. They are:

1) What does federal law require?
2) What does state law require?
3) Is it physically possible to comply with both requirements?

Note that it is not logically possible to answer sub-question three without first answering \textit{both} sub-questions one and two. How can you know what’s possible before you know what’s

\textsuperscript{35} See, e.g., Crosby v. Nat’l Foreign Trade Council, 530 U.S. 363, 373 (2000) (describing the test for obstacle preemption as: “What is a sufficient obstacle is a matter of judgment, to be informed by examining the federal statute as a whole and identifying its purpose and intended effects”).

\textsuperscript{36} See supra note 31 and accompanying text.
required? Also note that—like eating a Kit-Kat bar in pieces instead of as a whole—impossibility preemption analysis is cleaner when done in this way. Finally, and this is the subject of Part III, note that it is immediately clear that applying a single standard of deference (e.g., *Chevron*, *Skidmore*, or de novo with a presumption against preemption) to all three sub-questions would be inappropriate because each deals with a meaningfully different part of American law. Table 2 lays out the remainder of the sub-questions I have identified.

<table>
<thead>
<tr>
<th>Preemption Species</th>
<th>Primary Question</th>
<th>Sub-Questions</th>
</tr>
</thead>
<tbody>
<tr>
<td>Conflict: Im possibility</td>
<td>Is it physically impossible to comply with both the federal and state law?</td>
<td>1) What does federal law require?</td>
</tr>
<tr>
<td></td>
<td></td>
<td>2) What does state law require?</td>
</tr>
<tr>
<td></td>
<td></td>
<td>3) Is it physically possible to comply with these requirements?</td>
</tr>
<tr>
<td>Conflict: Obstacle</td>
<td>Does state law stand as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress?</td>
<td>1) What are the purposes and objectives of Congress?</td>
</tr>
<tr>
<td></td>
<td></td>
<td>2) What does state law require?</td>
</tr>
<tr>
<td></td>
<td></td>
<td>3) Does the state law requirement frustrate those purposes and objectives?</td>
</tr>
<tr>
<td>Field</td>
<td>Is the federal scheme so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it?</td>
<td>1) What does federal law require?</td>
</tr>
<tr>
<td></td>
<td></td>
<td>2) Are the federal law requirements pervasive enough to infer that Congress has occupied the field?</td>
</tr>
<tr>
<td></td>
<td></td>
<td>3) What does the state law require?</td>
</tr>
<tr>
<td></td>
<td></td>
<td>4) Does the state law requirement touch on the relevant field?</td>
</tr>
</tbody>
</table>
The Supreme Court implicitly recognized some of these sub-questions just last term in *Arizona v. United States*.\(^{37}\) There, the United States sued Arizona claiming that federal immigration law preempted provisions of the Arizona Support Our Law Enforcement and Safe Neighborhoods Act.\(^{38}\) One provision the U.S. claimed was preempted was Section 2(B) which required state police officers to “make a reasonable attempt to determine the immigration status” of any person they seize if “reasonable suspicion exists that the person is an alien and is unlawfully present in the United States.”\(^{39}\) The Court declined to find the statute preempted, however it did so not because it thought the statute was consistent with federal law. Instead, it held that an injunction to restrict the statute’s enforcement would be inappropriate because Arizona courts had not had a chance to interpret it first.\(^{40}\) The Court elaborated:

The nature and timing of this case counsel caution in evaluating the validity of § 2(B). The Federal Government has brought suit against a sovereign State to challenge the provision even before the law has gone into effect. There is a basic uncertainty about what the law means and how it will be enforced. *At this stage, without the benefit of a definitive interpretation from the state courts, it would be inappropriate to assume § 2(B) will be construed in a way that creates a conflict with federal law.* This opinion does not foreclose other preemption and constitutional challenges to the law as interpreted and applied after it goes into effect.\(^{41}\)

The Court implicitly realized that because it was unable to answer the state law sub-question, it could not resolve the entire preemption claim. Notice, that it was not able to make a preemption conclusion *either way*. In very much the flavor of its various abstention doctrines, the Court declined to give any holding the state statute’s consistency with federal law, practically inviting a later challenge.


\(^{38}\) Id. at 2497.

\(^{39}\) Id. at 2507 (quoting Ariz. Rev. Stat. Ann § 11–1051(B) (West 2012)).

\(^{40}\) Id. at 2510.

\(^{41}\) Id. (citations omitted) (emphasis added).
Arizona v. U.S. demonstrates that preemption claims involve interpreting state law, that state courts are the proper interpreters of that law, and that preemption claims cannot be resolved without answering each sub-question. With this analytical framework for preemption claims in place, I now move on to demonstrating the impossibility of adopting a single option to the entire agency preemption question.

III. ELIMINATING THE USUAL SUSPECTS: THE IMPOSSIBILITY OF A SINGLE STANDARD OF DEFERENCE

With this taxonomy in place, it is now possible to more fully appreciate the problem that agency preemption determinations pose. These sub-questions demonstrate that preemption involves both legal and policy questions. They also demonstrate that the meaning of both state and federal law can potentially be at issue.

This Part defends the following premise: the mixture of these questions within a single preemption claim precludes applying any single standard of deference to an entire preemption inquiry. I will now go through each option to demonstrate in full detail the impossibility of adopting it outright. Recall that the options are, in descending order by level of deference: Chevron deference, Skidmore deference, and de novo with a presumption against preemption.42

A. Option 1: Chevron Deference

As an option, deference under Chevron has a lot going for it. For about thirty years, the Supreme Court has held steadfast to the notion that agencies are in a privileged position to interpret the federal statutes they administer because those interpretations inevitably involve resolving policy issues.43 Agencies are better suited to this task because they take account of more wide-ranging facts, make rules prospectively, and have a general expertise in their area of

42 See supra fig.1.
43 The Court decided Chevron in 1984 and there are no signs that its holding is anything but here to stay.
responsibility. Under *Chevron* and subsequent cases, federal courts are required to defer to an agency’s interpretations of ambiguous statutes when the agency’s interpretations are reasonable, so long as Congress has delegated to the agency the authority to bind with force of law and the agency has exercised that authority. Subsequent cases have filled in many aspects of the doctrine, and it has a robust rationale. It now appears the Court assumes that Congress legislates with the *Chevron* in mind.

Unfortunately, courts cannot apply *Chevron* deference to the entire preemption inquiry because doing so would violate the non-delegation doctrine. You read that right: I said the non-delegation doctrine. I appreciate that it might seem like a bold move to lead with the non-delegation doctrine as an argument for denying outright *Chevron* deference to preemption determinations. It is bold because the Court has stated that the non-delegation doctrine is not violated as long as Congress provides an “intelligible principle” that directs the body being empowered on how to exercise that power. The Supreme Court has applied this requirement liberally and upheld “Congress’ ability to delegate power under broad standards.” Though never formally overruled, the doctrine is all but meaningless. The rationale for this liberal application is the “practical understanding that in our increasingly complex society, . . . Congress

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46 Id. at 230 (“It is fair to assume generally that Congress contemplates administrative action with the effect of law when it provides for a relatively formal administrative procedure tending to foster the fairness and deliberation that should underlie a pronouncement of such force.”).
48 Id.
49 See, e.g., Am. Power & Light Co. v. SEC, 329 U.S. 90, 105 (1946) (Congress may delegate to the Securities and Exchange Commission the authority to prevent unfair or inequitable distribution of voting power among security holders); Yakus v. United States, 321 U.S. 414, 426 (1944) (Congress may delegate to a Price Administrator the authority to fix commodity prices that would be fair and equitable); Nat’l Broad. Co. v. United States, 319 U.S. 190, 225–26 (1943) (Congress may delegate to the Federal Communications Commission the authority to regulate broadcast licensing “as public interest, convenience or necessity” require).
simply cannot do its job absent an ability to delegate power under broad general directives.”

With this liberal standard in mind, it is tempting to conclude that the Court is correct to imply that an express congressional delegation of authority to pronounce on preemption determinations would be grounds for granting *Chevron* deference because Congress need only provide a thin intelligible principle to guide an agency as it applies the preemption determination authority.51

This reasoning is too quick. For any legal delegation, it must be true as a necessary but not sufficient condition that Congress *have the power* it is seeking to delegate.52 And once a preemption claim is broken down into its constitutive sub-questions, it is clear that Congress lacks authority to delegate in at least one of them: authoritative interpretation of state law. To see this, imagine that Congress attempted to grant jurisdiction to the federal courts to authoritatively interpret state law. Such a grant would fly in the face of bedrock principles that are part of our constitutional structure.

As early as *Erie Rail Road Co. v. Tompkins*, the Court interpreted the Constitution as requiring that state courts be the final interpreters of state law. There, the issue before the Court was whether the Federal Judiciary Act of 1789 required federal courts sitting in diversity to apply state common law decisions handed down by state courts.53 The statutory provision at issue reads as follows:

> The laws of the several states, except where the Constitution or treaties of the United States or Acts of Congress otherwise require or provide, shall be regarded as rules of decision in civil actions in the courts of the United States, in cases where they apply.54

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50 *Mistretta*, 488 U.S. at 372.
51 Indeed at least one scholar has. See Merrill, *supra* note 14, at 771.
52 Though I am not aware of any case in which the Court has announced this specific principle, it must be true because otherwise Congress would be able to create federal authority where there was not any to begin with. The very notion of a government of limited powers would be frustrated were this principle not true.
53 *Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 80 (1938).
54 28 U.S.C. § 1652 (2006). At the time, the provision read: “The laws of the several States, except where the Constitution, treaties, or statutes of the United States otherwise require or provide, shall be regarded as rules of decision in *trials at common law*, in the courts of the United States, in cases where they apply.” *Erie*, 304 U.S. at 71
At the time, it was settled law that “laws of the several states” only included state statutes and state judges’ constructions of those statutes, but that federal courts were free to “exercise an independent judgment” concerning state common law. The Erie Court overruled this precedent and held that the Constitution requires that states have the final word on the interpretation of their own law, and that this principle requires federal courts to apply judge-made common law in diversity cases. This is because “Congress has no power to declare substantive rules of common law applicable in a state . . . . And no clause in the Constitution purports to confer such a power upon the federal courts.”

Speaking of the previous doctrine, the Court elaborated:

[N]otwithstanding the frequency with which the doctrine has been reiterated, there stands, as a perpetual protest against its repetition, the constitution of the United States, which recognizes and preserves the autonomy and independence of the states— independence in their legislative and independence in their judicial departments.

Thus, the Constitution does not grant Congress the power to authoritatively interpret state law and forbids it from granting federal courts the power to authoritatively interpret state law. If it is true that Congress lacks this power and the federal courts cannot be so empowered, then it must be true that Congress likewise cannot vest this authority in a federal agency.

(emphasis added). The only difference between the provision as written today and the provision interpreted by the Court in 1938 is the replacement of “trials at common law” with “civil actions”. This change reflects the decision made in the Federal Rules of Civil Procedure to ignore the distinction between suits at law and suits in equity. See FED. R. CIV. P. 3 (“There is one form of action—the civil action.”); id. cmt. 2 (“Reference to actions at law or suits in equity in all statutes should now be treated as referring to the civil action prescribed in these rules.”).

55 Erie, 304 U.S. at 71.
56 Id. at 78–80. The Court was careful to note that states have the authority to decide what institution within its government is privileged to interpret its own law. Id.
57 Id.
58 Id. at 78–79.
59 I put aside what I will term the ‘Tidewater objection.’ An objector might point out that Congress has been permitted to vest an Article III court with jurisdiction that falls outside the bounds of those categories listed in Article III. In National Mutual Insurance Co. v. Tidewater Transfer Co., Inc., the Supreme Court upheld Congress vesting federal district courts with original jurisdiction over claims brought “between citizens of different States, or citizens of the District of Columbia” as part of amendments to the Judiciary Act. 337 U.S. 582 (1949). This holding is remarkable because, relevant to this question, Article III lists among the enumerated categories of federal court
But that is exactly what applying *Chevron* deference outright would do, at least to some degree. As argued in Part II.B., in order to make preemption determinations, an institution must know what state law requires; that is, it must interpret state law. Thus, granting *Chevron* deference to agencies’ preemption determinations outright would necessarily include granting deference to their interpretations of state law. This result would violate the non-delegation doctrine and, thus, it is unconstitutional for a federal court to apply *Chevron* deference to an agency’s preemption determination outright.

At this point, it is important to address an important objection: that delegating special authority to pronounce on preemption (and thus make such a pronouncement entitled to *Chevron* deference) would not give a federal agency final authority to interpret state law. After all, in any case where a federal court gives an agency’s interpretation *Chevron* deference, it is ultimately a court that decides whether to grant deference. Isn’t it the case then that this procedural reality demonstrates federal courts will always have the final say over agencies’ interpretations?

Again this reasoning is too quick. The reality is that when a federal court conscientiously applies *Chevron*’s test as written, there are circumstances in which it will be required to adopt, apply, and enforce rules of law that it does not believe are the best interpretation. Nothing demonstrates the truth of this proposition more than *National Cable & Telecommunications Ass’n v. Brand X Internet Services*. There, the Court had to determine whether the Federal Communications Commission had permissibly construed the Communications Act when it determined that internet service was not a “telecommunications service” within the meaning of

jurisdiction: “between Citizens of different States” only. U.S. CONST. art. III, § 2. An objector might argue that this case demonstrates that Congress may delegate powers to courts that are outside the relevant constitutional scheme, so why not agencies as well? For a myriad of reasons, I do not think this an objection is worth more than a passing reference. Suffice it to say that *Tidewater* is a unique case, it does not deal with federalism values, and the justices were not able to agree on a rationale for their decision.

60 *See supra* Part II.B.
61 545 U.S. 967 (2005).
that act.\textsuperscript{62} The twist to normal \textit{Chevron} analysis came when the Court of Appeals for the Ninth Circuit declined to give \textit{Chevron} deference because that court had adopted a contrary interpretation in a previous case.\textsuperscript{63} The Ninth Circuit reasoned that its interpretation’s “stare decisis” effect trumped the agency’s claim to deference under \textit{Chevron} because the court had interpreted the relevant federal statute before the agency did.\textsuperscript{64} The Supreme Court reversed and rejected this rule because to do so would “allow a court’s interpretation to override an agency’s. \textit{Chevron}’s premise is that it is for agencies, not courts to fill statutory gaps.”\textsuperscript{65} Justice Thomas, writing for the Court, went on by stating, “\textit{Chevron} teaches that a court’s opinion as to the best reading of an ambiguous statute an agency is charged with administering is not \textit{authoritative} . . . .”\textsuperscript{66} The Court’s penultimate sentence reads:

If a statute is ambiguous, and if the implementing agency’s construction of the statute is reasonable, \textit{Chevron} requires a federal court to accept the agency’s construction of the statute, even if the agency’s reading differs from what the court believes is the best statutory interpretation.\textsuperscript{67}

Put another way, when an agency acts within its sphere of delegation, its interpretation of federal law will trump a court’s unless it is unreasonable.

Thus, if the Supreme Court were to apply \textit{Chevron} deference to agencies’ preemption determinations outright, agencies would be receiving deference for their interpretations of state law, a practice they must go through when making any preemption determination.\textsuperscript{68} Applying the holding of \textit{Brand X} to the question of authoritative state law interpretation reveals that a congressional delegation to pronounce on preemption outright is an unconstitutional delegation

\textsuperscript{62} \textit{Id.} at 973–74.
\textsuperscript{63} \textit{Id.} at 982 (citing AT&T Corp. v. City of Portland, 216 F.3d 871 (9th Cir. 2000)).
\textsuperscript{64} \textit{Id.} 979–80.
\textsuperscript{65} \textit{Id.} at 982.
\textsuperscript{66} \textit{Id.} at 983 (emphasis added).
\textsuperscript{67} \textit{Id.} at 980 (emphasis added).
\textsuperscript{68} \textit{See supra} Part II.B.
because it represents a delegation of authoritative interpretive authority over state law—an authority that Congress does not have the power to delegate.

Another important objection concerns the difference between federal courts and federal agencies on this point. An objector might concede that preemption determinations involve knowing what state law requires but argue that it is no different when federal courts make the determination. Like when a federal court conducts an “Erie guess” analysis, federal agencies will not be interpreting state law, instead they will only be applying it as interpreted by the state’s supreme court. Thus, *Chevron* deference will not be given to an agency’s interpretations of state law and there is not, therefore, any non-delegation problem.

Admittedly, this objection is difficult to overcome for the simple reason that, in the abstract, it is accurate. It is possible for an agency to avoid interpreting state law using the same techniques developed by federal courts, namely, the “Erie guess” doctrine, the abstention doctrine, or the certification rules. However, for a few reasons, I argue that the Constitution commits this task to the federal courts. Federal courts must be the institution to discern what state law requires because of their historic role of mediator between conflicts of the nation and state and also because of the constitutional rules that promote political safeguards of federalism.

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69 *See* Haley N. Schaffer & David F. Herr, *Why Guess? Erie Guesses and the Eighth Circuit*, 36 WM. MITCHELL L. REV. 1625, 1626 (2010) (“However, when there is no case directly on point, a federal court . . . must make what is informally referred to as an ‘Erie guess.’ An ‘Erie guess’ is an attempt to predict what a state's highest court would decide if it were to address the issue itself.”).

70 *See supra* note 69.

71 There are many abstention doctrines in which a federal court will decline to exercise jurisdiction over a case because of a countervailing consideration. One such doctrine that is potentially relevant here is the *Pullman* abstention doctrine in which a federal court will abstain “when difficult and unsettled questions of state law must be resolved before a substantial federal constitutional question can be decided.” *Hawaii Housing Auth. v. Midkiff*, 467 U.S. 229, 236 (1984).

The first reason is a positive argument favoring federal courts, and the second is a negative argument disfavoring agencies.

Federal courts ought to determine the substance of state law—as interpreted by state supreme courts—because allowing federal agencies to do so would exacerbate a democratic market failure. Historically, the Supreme Court has looked primarily to political safeguards to police the boundary between nation and state and hence applies deferential standards of review when those safeguards are working properly. In contrast, the Court applies heightened scrutiny when there is a democratic market failure.

As an example of this distinction, compare the standards of review the Court has adopted when it interprets the positive versus dormant commerce clause.\textsuperscript{73} For the reach of Congress’s regulatory power under the Commerce Clause, \textit{Wikard v. Filburn},\textsuperscript{74} \textit{Gonzales v. Raich},\textsuperscript{75} and \textit{Garcia v. San Antonio Metropolitan Transit Authority},\textsuperscript{76} together adopt a deferential rational basis standard of review that leaves the policing to the political process. Indeed, this rationale was expressly stated in \textit{Garcia}:

\begin{quote}
Of course, we continue to recognize that the States occupy a special and specific position in our constitutional system and that the scope of Congress’ authority under the Commerce Clause must reflect that position. But the principal and basic limit on the federal commerce power is that inherent in all congressional action—the built-in restraints that our system provides through state participation in federal governmental action. The political process ensures that laws that unduly burden the states will not be promulgated.\textsuperscript{77}
\end{quote}

\textsuperscript{73} U.S. CONST. art. I, § 8, cl. 3.
\textsuperscript{74} 317 U.S. 111 (1942).
\textsuperscript{75} 545 U.S. 1 (2005).
\textsuperscript{76} 469 U.S. 528 (1985).
\textsuperscript{77} \textit{Id.} at 556.
The Court also stated that its role was not to create a “limit on federal power” but to enforce procedural safeguards “inherent in the structure of the federal system.” Thus, in Commerce Clause cases in which there is no perceived democratic market failure, the Court relaxes its judicial review muscles.

Compare this standard of review with the virtual per se rule of invalidity the Court has adopted when a litigant claims that a state law is facially invalid under the Dormant Commerce Clause. Suppose a state enacts a law that prohibits retailers from purchasing apples from an orchard located outside the state. The Court would place a heavy—almost irrebuttable— presumption of invalidity in a Dormant Commerce Clause challenge. The enacting state may overcome this presumption only by showing that it has a legitimate purpose that cannot be achieved by any other means. This heightened scrutiny is appropriate because a facially discriminatory law effectively allows the majority of citizens in one state to deal itself benefits at the expense of the citizens in another state, and, importantly, the out-of-state citizens have no political recourse. In other words, there is a democratic market failure and the Court must ensure that there is an exceptionally good reason for the restriction the state legislature enacted. The Court captured this rationale when it stated: “[T]o the extent that the burden of state regulation falls on interests outside the state, it is unlikely to be alleviated by the operation of those political restraints normally exerted when interests within the state are affected.” In addition, that Congress may consent to statutes that normally would run afoul of the Court’s Dormant Commerce Clause challenges.

78 Id. at 551.
79 See Welton v. Missouri, 1 Otto (91 U.S.) 275 (1876).
Commerce Clause jurisprudence also fits with a democratic market failure theory. If Congress passes such a law, there is no political process market failure, and the Court need not adopt a searching standard of review.

The Court’s adoption of the democratic market failure model of judicial review when it comes to regulating the boundaries of national and state regulatory authority should guide the Court’s analysis when it decides whether federal courts or agencies must discern state law’s meaning. Preemption implicates federalism values, and the Court has demonstrated a willingness to apply a democratic market theory of judicial review to questions of federalism. A proper application of that theory requires that the Court adopt a more searching review of a preemption claim than *Chevron* deference would allow because *Chevron* deference in this context exacerbates a democratic market failure.

*Chevron* exacerbates a democratic market failure because agencies are insulated from the democratic process by a significant degree. None of an agency’s positions, even at the very top, are elected. Agencies may enact regulations that apply to individuals across the country with limited procedural requirements. Some have the ability to create, enforce, and interpret binding law all as a single entity. When an agency enacts a regulation, it often has the ability to choose

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82 See KATHLEEN M. SULLIVAN & GERALD GUNTHER, CONSTITUTIONAL LAW 182 (16th ed. 2007) (“Congress is now viewed as having authority to consent to state regulations of Commerce that would otherwise be barred by the Dormant Commerce Clause.”).

83 This argument is influenced by Herbert Wechsler’s classic article that argues against a robust judicial review to enforce federalism-based limits on Congress’s power because of the political safeguards of federalism. 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).

84 In order to promulgate a rule of general applicability, an agency may typically use the procedures outlined in the Administrative Procedure Act (APA). The APA requires that agencies (1) issue a general notice of proposed rule making in the Federal Register, (2) solicit comments from interested parties, and (3) publish the rule at least 30 days before its effective date. 5 U.S.C. § 553 (2006). These requirements are significantly easier to satisfy than enacting a federal statute. Ernest A. Young, *Executive Preemption*, 102 NW. U. L. REV. 869, 876 n.44 (2008).

85 An example is the Federal Energy Regulatory Commission (FERC). FERC conducts executive functions including investigation and prosecution; legislative functions by promulgating regulations, and judicial functions by resolving disputes that concern hundreds of millions of dollars annually. 1 RICHARD J. PIERCE, ADMINISTRATIVE LAW TREATISE 48 (5th ed. 2010).
between various methods of lawmaking. An agency’s action may not be overruled by single-chamber-legislative veto, but must instead be undone via normal statute. Additionally, only federal employees or appointees constitute agencies, states are not represented.

With their ability to create binding law, agencies are in a fine position to enact policy that would be too unpopular to accomplish through the legislative process required by the Constitution’s Article I, section 7. As discussed above, Congress often enacts broad delegations with thin principles to guide an agency’s subsequent rulemaking and the Court has acquiesced to these delegations. Indeed, the Court acknowledged this reality and used it as a rationale for deference in the first place. After the Chevron Court determined that the Clean Air Act was ambiguous on the question of law at issue, the Court stated:

Perhaps [Congress] consciously desired the Administrator to strike the balance at this level, thinking that those with great expertise and charged with responsibility for administering the provision would be in a better position to do so; perhaps it simply did not consider the question at this level; and perhaps Congress was unable to forge a coalition on either side of the question, and those on each side decided to take their chances with the scheme devised by the agency. For judicial purposes, it matters not which of these things occurred.

The Court proceeded to find the Environmental Protection Agency’s interpretation of the statute reasonable and instructed lower courts to defer to it.

Constitutional law scholar John Hart Ely recognized this democratic market failure in his famous Democracy and Distrust and condemned it. He recognized that legislators prefer to

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86 SEC v. Chenery, 332 U.S. 194, 203 (1947) (holding that an agency may make prospective rules of general applicability in the context of an adjudication or rulemaking).
87 Immigration & Naturalization Serv. v. Chadha, 462 U.S. 919 (1983) (holding that a provision of the Immigration and Nationality Act which permitted either the House of Representatives or the Senate to veto an action taken by the Attorney General is unconstitutional).
88 This process is the familiar bicameral and presentment rules described in a normal civics course.
89 See supra notes 20 and 49 and accompanying text.
91 Id. at 866.
avoid “hard decisions” by “passing the buck to the agencies with vaguely worded statutes.”

This reality is inappropriate because it allows legislators to escape the accountability necessary to the “intelligible functioning of a democratic republic.” Ely elaborates:

How much more comfortable it must be simply to vote in favor of a bill calling for safe cars, clean air, or nondiscrimination, and to leave to others the chore of fleshing out what such a mandate might mean. How much safer, too—and here we get to the nub. For the fact seems to be that on most hard issues our representatives quite shrewdly prefer not to have to stand up and be counted but rather to let some . . . bureaucrat, or . . . some independent regulatory commission, take the inevitable political heat.

This system places obstacles in the channels of political change or, in other words, creates a democratic market failure.

This argument might seem to prove too much. I am arguing only that federal courts must be the ones to discern state law’s meaning (as determined by the state’s supreme court) in the midst of a preemption inquiry. However, from this argument it seems equally reasonable to conclude that agencies’ regulations should not be permitted to preempt state law at all, that Chevron deference should not be given to any agency interpretations of federal law, or even that agencies should not be permitted to create any binding law. What is more, the Court has answered these questions already and held the opposite. As such, stare decisis counsels against overturning these foundational rules of administrative law.

This criticism is accurate at this stage in the argument, and, as such, I need to provide a limiting principle that demonstrates why federal courts ought to discern what state law means according to the state’s supreme court. I now argue that there are such reasons. The first is that

93 Id. at 132.
94 Id.
95 Id. 131–32 (internal quotation marks omitted).
the Court still considers whether *Chevron* deference ought to be applied to preemption as an open question.\(^9^6\) Thus, stare decisis concerns do not apply. The second is that the market failure that is always present when an agency creates a rule is exacerbated in the preemption context because by definition, only a single state’s law is affected. In the typical scenario,\(^9^7\) an agency is declaring that *a particular* state’s law or common law cause of action is preempted, and thus, the agency’s action has an effect on only one state that does not necessarily apply to others. When an agency creates a rule that applies to the entire country, there is a stronger argument for thinking that the democratic market, supplemented with other procedural requirements created by the statute or the Court, can still function well enough to justify a deferential standard of review from the Court. After all, both the President and the Congress represent the entire United States. However, when a single state is being affected, the national political process likely will be much less responsive.

The Court acknowledged this reasoning when it adopted the virtual per se rule of invalidity for state laws that facially discriminate against other states.\(^9^8\) In the Dormant Commerce Clause context, the Court could have relied on Congress to remedy the situation in response to political pressures. The Court did not do so because there are too many obstacles in the democratic process. Each individual discriminatory state law might be lost in the political shuffle because each creates benefits that are concentrated in a single state but burdens that are diffuse across the others. The Court’s heightened scrutiny in the Dormant Commerce Clause context shows that even when the people within a state have *some* political recourse, it may not

\(^9^6\) See *supra* note 2.

\(^9^7\) By “typical scenario” I mean a situation where an agency, in the midst of litigation to which it may or may not be a party, declares that a particular state law or cause of action is preempted. Not a situation where an agency declares that a particular category of state laws are preempted. For an illustration see my discussion of *Geier*. *See supra* text accompanying note 1.

\(^9^8\) See *supra* text accompanying notes 79–81.
be enough to justify a deferential standard of review. There must be sufficient proximity between the ballot box and the policy enacted.

In the situation where a federal agency is taking an action against a single state, the democratic process will not be sufficient protection against federal encroachment. The combination of (1) an agency creating and using a binding rule of conduct—an action already once removed from the political process—that (2) affects a single state while (3) the federal courts defer to that decision, exacerbates a significant democratic market failure. Reviewing the decision with more scrutiny than *Chevron* deference would provide states with some protection from federal encroachment and ensure that state law is only preempted when a neutral decision maker has deemed it appropriate. Implicit in this view is a distrust of an agency’s neutrality when it makes a determination on preemption.99 Because the agency’s powers are implicated and it is politically insulated, it has a strong incentive to interpret its own regulatory reach broadly.100

99 The importance of neutrality on this score was recognized as early as the founding. THE FEDERALIST NO. 39, at 258 (James Madison) (Issac Kramnick ed., 1987) (“It is true that in controversies relating to the boundary between the [federal and state governments], the tribunal which is ultimately to decide is to be established by under the general government. But this does not change the principle of the case. The decision is to be impartially made, according to the rules of the Constitution; and all the usual and most effectual precautions are taken to secure this impartiality. Some such tribunal is clearly essential to prevent an appeal to the sword and a dissolution of the compact . . . .”).

100 See Stuart Minor Benjamin & Ernest A. Young, *Tennis with the Net Down: Administrative Federalism Without Congress*, 57 DUKE L.J. 2111, 2154 (2008) (suggesting that cases demonstrate that in practice administrative agencies pay little attention to federalism concerns); Merrill, *supra* note 14, at 755 (“[Agencies] are unlikely to have much knowledge—or even care—about larger questions concerning the division of authority between the federal government and the states.”). In 2004, Professor Mendelson summarized her small study on the frequency and depth of federalism impact statements done by federal agencies with the following:

Even with the federalism executive order requirements, agencies tend to identify possible federalism implications only rarely. Even when federalism implications are identified, agencies tend not to focus upon federalism values, such as the need to preserve “core regulatory functions” of state governments. The rate of federalism impact assessments, for example, appears quite low. In 1999, the General Accounting Office reported that only five federalism impact assessments had been prepared for the over 11,000 final rules agencies issued between April 1996 and December 1998. A sampling of 600 proposed and final rules during one quarter in 2003 revealed six federalism impact analyses prepared by agencies. Five were included in the Federal Register notice of the rule or proposed rule that each accompanied, and the sixth was reported as on file with the agency.
In addition, the limited political influence that some politicians have over particular agencies may bias an agency into taking policy positions that would not be achievable through the Article 1, Section 7 legislative process.\textsuperscript{101} Courts, on the other hand, are disinterested and not as easily influenced by political pressure.\textsuperscript{102}

With this last objection (determining which federal institution may determine the scope of state law as interpreted by its supreme court) dealt with, I end this sub-Part by stating its conclusion. Courts may not apply \textit{Chevron} deference to preemption determinations outright because doing so would result in a federal agency having a limited authoritative interpretive power over issues of state law. Since the Constitution requires that state courts be the final interpreters of state law and Congress has no ability to alter this fact, this consequence is something that the non-delegation doctrine forbids. Even if it is true that federal agencies might avoid interpreting state law using techniques developed by federal courts, the Constitution requires that federal courts be the institution to complete this task because of their historic role and the preservation of a robust political process.

\textbf{B. Options 2 & 3: Skidmore Deference \& De Novo with a Presumption Against Preemption}

The unworkability of options 2 & 3 is much more straightforward. The reason is that each of these options puts the final interpretive authority over preemption claims in federal courts. This point is tautological for de novo, but it is also true of \textit{Skidmore}. \textit{Skidmore} deference is as follows:

\textsuperscript{101} Relatedly Professor Merrill has pointed out that agencies are less stable because they are able to implement policy changes more quickly than Congress or the courts. Merrill, \textit{supra} note 14, at 756.
\textsuperscript{102} Accord Bhagwat, \textit{supra} note 19, at 227 (“[A]gencies often have incentives to expand their own sphere of authority by supplanting state law, incentives which are much less relevant to the work of courts.”).
Interpretations and opinions of [an agency construing the statute it administers], while not controlling upon the courts by reason of their authority, do constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance. The weight of such a judgment in a particular case will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control.\textsuperscript{103}

Thus, while federal courts may give substantial persuasive weight to an agency’s interpretations, when this standard applies, federal courts have the final word on the meaning of a federal statute. Thus, applying either \textit{Skidmore} deference or de novo with a presumption against preemption to agencies’ preemption determinations outright would place all final interpretive authority over federal law in federal courts.

This result is unworkable because it would lead to federal law meaning different things at different times. Recall the holding of \textit{Brand X}: even when a federal court disagrees with an agency’s interpretation of federal law and the federal court interpreted the law before the agency did, the federal court is bound by the agency’s interpretation so long as the agency has interpreted an ambiguous statute reasonably.\textsuperscript{104} With that rule in mind consider the following hypothetical: In litigation #1, a federal court is called upon to determine what a federal statute means. Reviewing de novo the federal court would conclude it means XYZ, but conscientiously applying \textit{Chevron} and \textit{Brand X}, the court defers to the relevant federal agency’s interpretation: ABC. Subsequently, in a separate litigation #2, the same federal court is called upon to determine whether the same federal statute preempts a particular state law. If de novo or \textit{Skidmore} applied to that entire inquiry (\textit{because it was a preemption determination}), then the federal court would conclude that the federal statute means XYZ and proceed to determine the rest of the relevant

\textsuperscript{103} Skidmore v. Swift & Co., 323 U.S. 134, 140 (1944) (emphasis added).
\textsuperscript{104} Nat’l Cable & Telecomms. Ass’n v. Brand X Internet Servs., 545 U.S. 967, 980 (2005).
preemption theory’s sub-questions. Whether the court finds the state law preempted is immaterial to this hypothetical. The point is that there will inevitably be differences in which state laws would be preempted under the varying meanings of federal law put forth by the court and the agency. And it is therefore the case that federal law would mean different things depending on the type of claim for which its interpretation was needed. Such a result is contrary to the holding of Brand X, and more fundamentally, to basic notions in our legal system that a law, though perhaps ambiguous, has a single meaning across all situations.

For this reason, courts may not apply Skidmore and de novo with a presumption against preemption to agency preemption determinations outright either.

IV. SECRET OPTION 4: ALL OF THE ABOVE

We now come to the crux of the argument: because a preemption claim involves sub-questions that call for conflicting standards of review, it is necessary to treat each question separately in order to remain consistent with other constitutional and doctrinal commitments. This standard of review has been referred to as the “splitting the atom” view.\(^\text{105}\) It has also been criticized.\(^\text{106}\) In this Part, I shall articulate my version of the splitting the atom view, argue why it is viable solution, and respond to objections.

A. The View

The best way to explain how the splitting the atom view works is by example. For impossibility preemption, recall that there are three sub-questions:

1) What does federal law require?

2) What does state law require?

\(^{105}\) Merrill, supra note 14, at 773; see also Smiley v. Citibank (South Dakota), N.A., 517 U.S. 735, 744 (1995) (cautioning that it is easy to confuse “the question of substantive (as opposed to pre-emptive) meaning of a state with the question of whether a statute is pre-emptive”).

\(^{106}\) See, e.g., Merrill, supra note 14, at 773 (“Although I was initially drawn to such an atom-splitting resolution, I know think it would be a mistake.”).
3) Is it physically impossible to comply with both requirements?

If courts viewed the impossibility preemption inquiry this way and accepted the notion that different standards of review can apply to different sub-questions, then it becomes a relatively easy exercise to decide which standard should apply to which question. Courts should review Question 1 under *Chevron* because agencies are privileged to interpret federal law when *Chevron*’s steps are satisfied. Courts should review Question 2 de novo because state courts are the final interpreters of state law. By de novo I do not mean to suggest that federal courts are to interpret state law. Instead, I mean that no deference be given to the agency’s view on what state law requires. Finally, courts should review Question 3 under *Skidmore*. This latter assignment is a bit more complicated to describe. *Skidmore*—as compared to *Chevron*—is appropriate for question 3 because the question involves comparing federal and state law, a task traditionally done by federal courts as mediators between the nation and state. However, *Skidmore*—as compared to de novo—is appropriate because there may be policy related disputes to resolve when determining whether something is a physical impossibility, and the preferred policy maker is of course the agency. Admittedly, there may be few policy issues to resolve on a question of “physical impossibility” but *Skidmore* accommodates this fact by giving weight only when an agency puts forward well-reasoned arguments. If an agency attempts to disguise a flimsy impossibility argument as a policy choice, the court is free to ignore it. Table 3 displays the other sub-questions and standards of review associated with them.

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<th>Sub-Question</th>
<th>Standard of Review</th>
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<tbody>
<tr>
<td>What does federal law require?</td>
<td><em>Chevron</em></td>
</tr>
<tr>
<td>What does state law require?</td>
<td>De novo*</td>
</tr>
<tr>
<td>Is it physically possible to comply with both requirements?</td>
<td><em>Skidmore</em> – light deference</td>
</tr>
<tr>
<td>What are the purposes and objectives of</td>
<td>De novo, with presumption against</td>
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</tbody>
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Congress?

| Does the state law requirement frustrate those objectives? | preemption |
| Are federal law requirements pervasive enough to infer that Congress has occupied the field? | De novo, with presumption against preemption |
| Does the state law requirement touch on that field? | Skidmore – light deference |

Two final points explain the rest of the deference assignments. First, in any situation where a sub-question involves comparing federal law/purposes/fields and state law requirements, courts should apply Skidmore deference for the same reasons it that Skidmore is appropriate in the “physical impossibility” sub-question. The “light deference” or “strong deference” attached to each assignment is simply an armchair prediction on how much a particular sub-question requires resolution on policy issues. Second, I have assigned de novo with a presumption against preemption to any sub-question that asks for congressional intent or purpose because the very heart of the presumption against preemption is the notion that the historic regulatory power of state law ought to be preempted only when Congress has made its intent clear. To do otherwise would be to ignore a very old principle in precisely the area in which it is supposed to apply.

B. Virtues and Vices

The chief virtue of the atom-splitting view is its accommodation of multiple inconsistent standards of review. In it, an agency is permitted to play the role the Court (arguably with congressional acquiescence) has set for it since 1984 with the Chevron decision; namely the agency is presumed to be in a superior position to fill in statutory gaps left by Congress. State courts maintain their superior interpretive authority over state law. Federal courts continue to play their historic role of refereeing disputes between the nation and state concerning regulatory

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107 See supra note 17 and accompanying text.
authority. The standard thus has constitutional viability because it avoids the non-delegation doctrine trap two which an outright adoption of the *Chevron* standard would fall prey. The standard also has doctrinal viability because it avoids the multiple meanings problem demonstrated by the *Brand X* hypotheticals discussed in Part III.B.

A second virtue is the placement of the *Skidmore* standard. As mentioned at the Article’s outset, preemption decisions involve both legal and policy questions. By preserving the federal courts’ role as referees of legal disputes between the nation and state but explicitly commanding them to give weight to thoroughly considered, well-reasoned views of an agency applying its expertise, the atom-splitting view expressly acknowledges the duality of preemption decisions. Overlooking the fact that our society is a complex one and that this complexity demands a correspondingly sophisticated government would not only ignore the Court’s administrative law jurisprudence but it would be an exercise of the highest kind of denial. Relatedly, this standard’s partial inclusion of *Chevron* deference in the preemption context does not require the Court to overrule settled administrative law. In short, this solution is a doctrinally and practically viable one.

A third virtue of this approach is its transparency. By breaking preemption determinations into sub-questions and assigning different institutions superior interpretive authority, each institution will be able to more reliably predict how the Court will rule on preemption determinations. This is true because the questions assigned to federal courts are highly dependent on answers to questions assigned to agencies and state courts.

One objection with the atom-splitting view is its increase in complexity; an increase that may rise to the level of unworkability.\(^\text{108}\) The argument goes something like this. Both *Chevron* deference and preemption analyses are already complex inquiries. Splitting the preemption

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\(^{108}\) *Merrill, supra* note 14, at 733.
determination into sub-questions and assigning them different standards of review will “magnify” the costs of litigation with “little discernible benefit.”

My response is two-fold. First, as a threshold matter, it seems odd that costs to litigants would be an important factor in the decision to of what type of deference to accord an agency’s preemption determinations at all. This question of law is primarily concerned with the structure of our national government and the relationship of that structure to the states. Doubtless it is true that without the existence of litigants with a concrete case or controversy, the federal courts could not adjudicate these questions. However, this truth seems to be—in this context—an ancillary externality to the Supreme Court’s role of playing referee to disputes of the political branches and of “saying what the law is.” Thus, even if this objection were factually accurate, I do not think it is sufficient to warrant abandonment of the solution. At most, the objection raises an unfortunate but necessary cost to the adoption of the atom-splitting view.

My second response is to simply attack the objection’s factual premises. It is not clear that the atom-splitting model—though clearly an increase in stated complexity—is any worse than that inconsistent nature of preemption determination jurisprudence currently in existence. Ironically, by breaking down the inquiry into discrete sub-questions, each of which a court will be required to state and answer (whether by its own conclusion or that of another institution), preemption jurisprudence might actually be comparatively clearer in the agency context than otherwise.

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109 Id.
111 I do not mean to suggest that costs to litigants are never an important factor when deciding a question of law. Indeed, nearly the exact opposite is true.
112 Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803).
113 See Bhagwat, supra note 19, at 197 (“The law of preemption generally, and the law of agency preemption in particular, is infamous for its vagueness and unpredictability.”); see also supra Part II.
A second objection is that the standard gives agencies an opportunity to stack the deck. Granting agencies *Chevron* deference on the interpretation of federal law will allow them to interpret federal statutes in a way guaranteed to result in preemption even when other sub-questions are given higher scrutiny. I believe this objection is not so much about *Chevron* deference in the preemption context, but a concern about *Chevron*’s implications generally. I believe this because *Chevron* deference applies to questions concerning the substance of federal law already. Recall the hypothetical litigations described in Part III.B. This atom-splitting standard does not have to be the law for it to be true that sometimes federal courts are called on to interpret the substance of federal law and defer to agencies, and then subsequently that provision is claimed to preempt state law. If an objector is concerned about too much interpretive power being vested in agencies, I think the problem is with *Chevron* generally, not this Article’s proposed standard.

V. CONCLUSION

At the end of the day, this problem is about allocation of authoritative interpretive power over law. As our society’s complexity has increased, so has the sophistication of its governmental institutions. That sophistication warrants deference to interpretive decisions. At the same time, the American system of government has attempted to maintain a division of power between the nation and state from its inception. The federal courts’ role as neutral referees when disputes arise between these two entities should not be eschewed.

*Chevron* deference and federal preemption jurisprudence with its presumption against preemption are doctrines that represent our system’s current accommodation of these principles. Choosing one over the other would require choosing between two well-developed rationales for the scope of judicial review. Thus, it seems natural to synthesize the two doctrines to get the best
of both worlds. Admittedly, the atom-splitting standard of review is more complex than a statutory preemption claim. However, the Court’s current jurisprudence for agency preemption is already complex and plagued with uncertainty. The atom-splitting model at least remedies the uncertainty problem, and may actually simplify the inquiries a federal court will have to review de novo. The model’s primary virtue is its accommodation of conflicting constitutional and doctrinal commitments and its acknowledgement of the important role administrative agencies have come to play in American government.