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PRESIDENTS, PREEMPTION, AND THE STATES

*Michele E. Gilman**

On May 20, 2009, President Obama issued a presidential memorandum ordering federal agencies to strike preemption language from their regulations unless there is “full consideration of the legitimate prerogatives of the States and . . . a sufficient legal basis.”¹ The memo was a rebuke to the Bush Administration, which regularly inserted preemption provisions into federal regulations, affecting areas such as health, consumer safety, and the environment. As a result of federal preemption, state laws could not be more protective than the federal standard, and corporations were spared state tort lawsuits and state regulatory regimes. For instance, the EPA preempted the states from addressing climate change through limits on motor vehicle emissions,² the FDA decided that its approval of drug labels preempted state tort lawsuits,³ and the National Highway Transportation Safety Administration (“NHTSA”) issued an automotive door lock safety regulation preempting state law.⁴ In each of these instances, the evidence suggests that the White House had a hand in making these preemption decisions; they were not solely the result of like-minded political appointees coincidentally pushing preemption to further business interests.⁵

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1. Memorandum on Preemption, 2009 DAILY COMP. PRES. DOC. 384, at 1 (May 20, 2009), available at <http://www.gpoaccess.gov/presdocs/2009/DCPD-200900384.pdf>.

2. See *infra* notes 112–119 and accompanying text.

3. Requirements on Content and Format of Labeling for Human Prescription Drug and Biological Products, 71 Fed. Reg. 3922, 3933–36 (Jan. 24, 2006) (codified at 21 C.F.R. pts. 201, 314, 601).

4. Federal Motor Vehicle Safety Standards; Door Locks and Door Retention Components, Final Rule, 72 Fed. Reg. 5385, 5397 (Feb. 6, 2007) (codified at 49 C.F.R. pt. 571).

5. Regarding FDA preemption, see Alicia Mundy, *FDA Memos Undercut Stance on Pre-Emptying Drug Suits*, WALL ST. J., Oct. 30, 2008, <http://online.wsj.com/article/SB122529821388980687.html> (“[T]he administration and White House developed a strategy to use regulatory agencies to establish pre-emption.”). Regarding NHTSA, the American Association of Justice, an association of plaintiffs’ side trial

President Obama rested his memorandum on the values of federalism, announcing that “[s]tate and local governments have frequently protected health, safety, and the environment more aggressively than has the national government.”⁶ The memorandum even reaches back in time; federal agencies must review the last ten years of regulations to assess whether the rules unjustifiably preempt state authority.⁷ Not surprisingly, in response to the Obama memo, consumer advocates cheered a return to the “rule of law . . . over . . . the rule of politics,” while business groups warned that companies would have “to navigate a confusing, often contradictory patchwork quilt of 50 sets of laws and regulations.”⁸ The Obama memo followed on the heels of the Supreme Court’s decisions in *Altria Group, Inc. v. Good*,⁹ holding that federal law did not preempt state smoking and health lawsuits based on misleading labeling, and *Wyeth v. Levine*,¹⁰ holding that federal law did not preempt state tort failure-to-warn lawsuits involving prescription drug labels approved by the FDA. Shortly afterwards, the Court ruled in *Cuomo v. Clearing House Ass’n* that federal regulations issued by the Office of the Comptroller of the Currency did not preempt state investigations of national bank lending practices.¹¹ The preemption winds have shifted.

President Obama has announced a stand against unjustified preemption, and early indications suggest that the memo is impacting the output of federal agencies. For his part, President Bush also touted states’ rights, for instance, stating before his inauguration: “I realize there’s a role for the federal government, but it’s not to impose its will on the states and local communities.”¹² However, his Administration’s actions belied

lawyers, issued Freedom of Information Act requests to NHTSA that resulted in a series of emails detailing how the Office of Management and Budget, an entity within the Executive Office of the President, drafted the preemption language for NHTSA. See AMERICAN ASSOCIATION FOR JUSTICE, GET OUT OF JAIL FREE: HOW THE BUSH ADMINISTRATION HELPS CORPORATIONS ESCAPE ACCOUNTABILITY (2008), available at http://www.justice.org/resources/Preemption_Rpt.pdf. Regarding climate change, see *infra* notes 112–119 and accompanying text.

6. Memorandum on Preemption, *supra* note 1, at 1.

7. Memorandum on Preemption, *supra* note 1, at 1.

8. Philip Rucker, *Obama Curtails Bush’s Policy of ‘Preemption,’* WASH. POST, May 22, 2009, at A3 (quoting the American Association for Justice and Lisa Rickard, President of the U.S. Chamber of Commerce’s Institute for Legal Reform).

9. 129 S. Ct. 538 (2008).

10. 129 S. Ct. 1187 (2009).

11. 129 S. Ct. 2710 (2009).

12. David Jackson, *Bush Seeks GOP Governors’ Help; President-Elect Says He Will Try To Trim Federal Regulations on States*, DALLAS MORNING NEWS, Jan. 7, 2001, at 4A.

this statement.¹³ The preemption controversy is part of broader debates about the values of federalism and how best to protect them. On the one hand, the Tenth Amendment preserves state autonomy by limiting federal power to that not reserved to the states. On the other hand, the Constitution's Supremacy Clause provides that the laws and treaties of the United States "shall be the supreme law of the land . . . anything in the Constitution or Laws of any State to the contrary notwithstanding," and courts have placed few limits on Congress' lawmaking powers. Between these foundational principles lies the preemption fault line. Scholars have tracked preemption trends and disputes closely, noting that preemption is currently the "primary threat to state autonomy."¹⁴ There is a lively debate as to whether the best institutional actor to foster federalism is the courts, Congress, or agencies. These scholars ask: who is the best actor to decide whether a problem should be tackled at the federal or state level, or both? Yet despite the centrality of modern Presidents to preemption policy, the role of the President is all but ignored in preemption scholarship.¹⁵

This Article seeks to fill this gap by highlighting the role of the President in federalism issues. As this Article makes clear, the President can stifle or spur state innovation; foster or imperil federal solutions to national problems. Given that federalism values are enshrined in our constitutional system of government, this Article argues that the President is a key player in ensuring those values are fulfilled or undermined. Part I of the Article examines official executive branch policies regarding preemption and the extent to which those policies have been reflected in agency actions. This Part concludes that recent Presidents (from Reagan through Obama)¹⁶ do not demonstrate a philosophical commitment to federalism, but use federalism rhetoric when it supports their substantive policy aims. The danger is that states

13. See Tim Conlan & John Dinan, *Federalism, the Bush Administration, and the Transformation of American Conservatism*, 37 *PUBLIUS* 279, 280 (2007) (stating that Bush was "routinely dismissive of federalism concerns").

14. Ernest A. Young, *Federal Preemption and State Autonomy*, in *FEDERAL PREEMPTION: STATES' POWERS, NATIONAL INTERESTS* 249, 262 (Richard A. Epstein & Michael S. Greve eds., 2007).

15. A notable exception is John O. McGinnis, *Presidential Review as Constitutional Restoration*, 51 *DUKE L.J.* 901, 902 (2001) (arguing that presidential federalism orders are necessary correctives for declines in federalism and tricameralism wrought by the administrative state).

16. The Article focuses on these Presidents because President Reagan is credited with strengthening presidential control over the regulatory state, a trend followed and magnified by his successors.

may be misled into thinking their interests are being considered by federal actors, when, in fact, they are not. In turn, this can squelch state lobbying and limit opportunities for state participation in federal decision-making. Part II responds to the literature on institutional competence in federalism decision-making by placing the President within the debate. While most scholars focus on comparing the relative virtues and vices of agencies, courts, and Congress, this Part shows how the President's influence affects the attributes of these other actors. Part II explains why congressional decision-making about preemption is preferable to presidential preemption. However, given the reality that Congress often does not or cannot address preemption issues *ex ante*, this Part then examines how the President can impact agency decision-making about preemption. Part III explores ways in which the President can effectively ensure a vibrant role for the states in federalism regimes, while also preserving the benefits of centralized government by using his Article II powers to direct agencies in a managerial, rather than directive, role.

This Article assumes that a distribution of power between the federal and state governments is desirable: the question is who decides? A centralized approach, such as that fostered by federal preemption, ensures uniformity, lessens compliance costs, provides economies of scale, prevents a race to the bottom by states seeking to attract businesses, and contains spillover effects that arise when activity in one state crosses state lines.¹⁷ Conversely, state autonomy preserves the states as policymaking enclaves, allows the states to serve as laboratories of democracy, supports problem-solving that reflects regional differences, encourages citizen participation in an accessible level of government, diffuses power, and serves as a restraint on federal tyranny.¹⁸ Preemption can limit these state-level benefits.¹⁹

Thus, deciding where to draw the line between federal and state authority requires a balancing of the benefits and

17. See Robert R.M. Verchick & Nina Mendelson, *Preemption and Theories of Federalism*, in *PREEMPTION CHOICE: THE THEORY, LAW, AND REALITY OF FEDERALISM'S CORE QUESTION* 13, 18–19 (William W. Buzbee ed., 2009).

18. See *id.* at 16–17.

19. See Jessica Bulman-Pozen & Heather Gerken, *Uncooperative Federalism*, 118 *YALE L.J.* 1256, 1304 (2009) (“Preemption is a problem when viewed through the lens of uncooperative federalism not because it deprives states of the chance to regulate separate and apart from the federal scheme, but because it pushes states to the edges of national policymaking and reduces the number of ties that bind state and national officials.”).

detriments of each sphere. Again, the issue is who draws this line. This issue is complicated because regulatory power is not neatly carved into separate federal and state layers. Most regulatory programs are built upon a cooperative federalism framework, where the federal and state governments exercise concurrent and overlapping powers.²⁰ For instance, in environmental laws, Congress typically provides that federal standards create a minimum floor, above which states can regulate in a more protective manner.²¹ Likewise, in many public benefits programs, federal funds flow to the states within some broad parameters, but the states have considerable flexibility in program administration, standard setting, and eligibility requirements. Sometimes, the relationship between the federal and state governments is better described as uncooperative, where “states use regulatory power conferred by the federal government to tweak, challenge, and even dissent from federal law.”²² Preemption shifts all of these paradigms by creating a ceiling, or a “unitary federal choice,” above which states may not regulate.²³ As a result, the “contested questions arise when state law seeks to go *further* than federal law.”²⁴ Given the United States’ regulatory system of cooperative and competing federal and state relations, it is inevitable that presidential control over federal agencies will have federalism implications.

I. PRESIDENTS AND FEDERALISM

Typically, Congress legislates with a broad brush and gives specialized decision-making authority to executive agencies.²⁵ There are several reasons for these statutory delegations to agencies, ranging from the desire to have experts make complicated, technical decisions to an attempt to push politically

20. See Robert A. Schapiro, *From Dualism to Polyphony*, in PREEMPTION CHOICE: THE THEORY, LAW, AND REALITY OF FEDERALISM’S CORE QUESTION, *supra* note 17, at 33, 41 (“Since 1937, overlapping state and federal regulation has become the norm, for many, if not most, subjects.”).

21. See William W. Buzbee, *The Benefits of Federalism’s Institutional Diversity*, in PREEMPTION CHOICE: THE THEORY, LAW, AND REALITY OF FEDERALISM’S CORE QUESTION, *supra* note 17, at 98, 101 (“Congress has repeatedly chosen to create regulatory schemes that call on a role for federal, state, and sometimes even local governments.”).

22. Bulman-Pozen & Gerken, *supra* note 19, at 1259.

23. Buzbee, *supra* note 21, at 104.

24. Young, *supra* note 14, at 263.

25. See RICHARD J. PIERCE ET AL., ADMINISTRATIVE LAW AND PROCESS 43–44 (4th ed. 2004).

controversial decisions to the executive branch.²⁶ With increasing frequency, modern Presidents have asserted their authority to guide agency decision-making, and even to mandate a particular agency outcome. In turn, this directive authority can impact federal-state relations. This Part discusses what Presidents have said about federalism, and then compares their words to their actions. In general, recent Presidents regularly talk about the importance of power-sharing between federal and state governments. However, they will disregard state interests that conflict with their substantive policy goals. States can be effective in lobbying for their interests with federal actors, but only if they have adequate notice that their interests are at stake. As this Part describes, presidential rhetoric about federalism can mask inattention to state interests.

A. WHAT PRESIDENTS SAY ABOUT FEDERALISM

All Presidents since Ronald Reagan have maintained official executive branch policies instructing federal agencies to consider how their proposed federal actions impact the states. Nevertheless, agencies regularly disregard these presidential directives. The federalism executive orders are part of larger pattern, emerging since the New Deal, in which Presidents have steered and managed the output of federal agencies. During the New Deal, President Roosevelt seized increasing control over federal regulatory policy, an approach that President Reagan revitalized by centralizing and coordinating agency output.²⁷ President Clinton built on this foundation by directing administrative agencies to implement his desired policies in lieu of legislation.²⁸ Today, “the innovation of ‘Presidential Government’ is triumphant in America.”²⁹ President George W. Bush inherited and expanded upon these trends, using tools, such as signing statements and executive orders, to further his conception of the unitary executive,³⁰ in which the President is at the apex of the executive branch with the power to direct all

26. *See id.*

27. *See* Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245, 2277–81 (2001).

28. *Id.* at 2281–84.

29. David Gray Adler, *The Condition of the Presidency: Clinton in Context*, in *THE PRESIDENCY AND THE LAW: THE CLINTON LEGACY* 175, 176 (2002).

30. *See* Michael P. Allen, *George W. Bush and the Nature of Executive Authority: The Role of Courts in a Time of Constitutional Change*, 72 BROOK. L. REV. 871, 872–74 (2007) (describing actions taken by President Bush pursuant to broad assertions of executive power).

subordinate executive officers.³¹ Like his predecessors, President Obama is using executive branch agencies to achieve his policy objectives.

President Reagan was the first President to give regulatory review teeth, by giving the White House enforcement authority over the rulemaking process. Through executive orders,³² he required federal agencies to conduct cost-benefit analysis as part of the rulemaking process, and he centralized review of all regulations in the Office of Information and Regulatory Affairs (“OIRA”), a unit within the Office of Management and Budget (“OMB”). These executive orders were partly designed to “reduce the flow of bureaucratic power at the national level in favor of greater state-level activities.”³³ Consistent with these orders, President Reagan issued E.O. 12,612, which set forth nine fundamental principles of federalism to guide agency decision-making.³⁴ These principles highlighted the limited scope of the national government and the benefits of state sovereignty in keeping government close to the people and maintaining diverse policy preferences.³⁵ Most significantly, E.O. 12,612 forbade preemption and displacement of state interests in the absence of clear congressional intent.³⁶

While President Reagan and his successor, President George H.W. Bush, used regulatory review to pursue a deregulatory agenda, President Clinton used his control over the executive branch to achieve his policy objectives without having to confront a Republican Congress.³⁷ In E.O. 12,866, President Clinton tweaked the Reagan cost-benefit analysis executive order by requiring that agencies consider qualitative costs and benefits in addition to quantifiable ones, as well as “distributional impacts” and “equity,” and he expanded

31. See Christopher S. Yoo, Stephen G. Calabresi, & Anthony J. Colangelo, *The Unitary Executive in the Modern Era, 1945-2004*, 90 IOWA L. REV. 601, 607 (2005).

32. See, e.g., Exec. Order No. 12,291, 46 Fed. Reg. 13,193 (Feb. 17, 1981); Exec. Order No. 12,498, 50 Fed. Reg. 1036 (Jan. 4 1985).

33. LARRY N. GERSTEN, AMERICAN FEDERALISM: A CONCISE INTRODUCTION 86 (2007).

34. Exec. Order No. 12,612, 52 Fed. Reg. 41,685 (Oct. 26, 1987).

35. *Id.* Additionally, President Reagan required that OMB resolve federal and state disputes over federal grants and expenditures in consultation with state officials. Exec. Order No. 12,372, 47 Fed. Reg. 30,959 (July 14, 1982).

36. Exec. Order No. 12,612, *supra* note 34. Agencies were also required to consult with state officials about policies that could displace state authority, prepare federalism assessments of the impact of rules on federalism, and appoint officials within each agency to ensure compliance with the federalism objectives. Exec. Order No. 12,612, *supra* note 34.

37. See Kagan, *supra* note 28, at 2248.

regulatory review to the independent agencies.³⁸ E.O. 12,866 also gave a nod towards federalism; it encouraged federal agencies to pursue non-regulatory alternatives and to seek the views of state and local officials.³⁹

President Clinton took federalism a step further in 1993, when he issued E.O. 12,875, entitled “Enhancing the Intergovernmental Partnership,” which permitted states seeking to avoid federal agency regulations to submit alternative policy approaches to federal agencies, who then had to respond to state requests within 120 days.⁴⁰ However, on May 14, 1998, he revoked this order, along with President Reagan’s federalism order, and he issued a new, controversial executive order on federalism.⁴¹ E.O. 13,083 listed nine nonexclusive conditions, under which federal agencies could displace state authority.⁴² For instance, E.O. 13,083 permitted federal regulation to preempt state authority if the matter involved an interstate concern that was not contained within one state’s boundaries, if there was a need for uniform standards, or if the federal government had superior expertise.⁴³ Unlike the Reagan order, there was no presumption in favor of state sovereignty, no provisions limiting preemption, and no requirements for federalism assessments.⁴⁴ State and local governments responded with outrage, the National Governor’s Association voted in opposition to the order, Congress convened hearings, and several congressmen introduced bills that would mandate compliance with the Reagan federalism order.⁴⁵ In response, Clinton ended up suspending his order, spending over a year consulting with major organizations representing state and local governments, and replacing the order with E.O. 13,132, which remains in effect today.⁴⁶

38. Exec. Order No. 12,866, 58 Fed. Reg. 51,735 (Sept. 30, 1993).

39. *Id.*

40. Exec. Order No. 12,875, 58 Fed. Reg. 58,093 (Oct. 26, 1993).

41. Exec. Order No. 13,083, 63 Fed. Reg. 27,651 (May 19, 1998).

42. *Id.*

43. *Id.*

44. For a detailed discussion of the differences between the Reagan and Clinton orders, see David Lazer & Viktor Mayer-Schoenberger, *Blueprints for Change, Devolution and Subsidiarity in the United States and the European Union*, in *THE FEDERAL VISION* 118, 125–31 (Kalypso Nicolaidis & Robert Howse eds., 2001); Jennie Holman Blake, Note, *Presidential Power Grab or Pure State Might? A Modern Debate Over Executive Interpretations on Federalism*, 2000 *BYU L. REV.* 293, 308–18 (2000).

45. See Blake, *supra* note 44, at 300–02; see also David S. Broder, *Executive Order Urged Consulting, but Didn’t; State, Local Officials Want Federalism Say*, *WASH. POST*, July 16, 1998, at A15.

46. See Blake, *supra* note 44, at 294.

E.O. 13,132 is very similar to the Reagan order, although it does not require “clear and certain” constitutional authority to justify federal action.⁴⁷ In general, E.O. 13,132 requires an agency to identify constitutional and statutory authority before it limits the policymaking discretion of the states, and to consult with state officials whenever federal agency action has federalism implications.⁴⁸ The order permits preemption only when the statute explicitly permits it, where congressional intent is otherwise clear, or where the exercise of state authority is inconsistent with statutorily required federal action.⁴⁹ In any event, preemption must “be restricted to the minimum level necessary to achieve the objectives of the statute.”⁵⁰ Moreover, agency rules must contain a federalism summary impact statement that describes consultation efforts with state and local governments and the effect of the regulation on state authority.⁵¹ Finally, agencies must appoint an official to ensure and certify agency compliance with the order.⁵² As with most executive orders, E.O. 13,132 has no enforcement mechanism, does not create private rights of action, and is not subject to judicial review.⁵³

President George W. Bush left E.O. 13,132 intact.⁵⁴ Nevertheless, agency officials in his administration regularly and aggressively preempted state law as part of a coordinated strategy to limit state authority over tort actions.⁵⁵ This strategy was consistent with President Bush’s centralization of presidential control over the executive branch; for instance, he also issued an executive order that placed a presidential appointee within each agency who was in charge of developing and approving regulations.⁵⁶ President Obama inherited these executive orders, and the preemption memo is just one of many

47. Exec. Order No. 13,132, 64 Fed. Reg. 43,255 (Aug. 4, 1999).

48. *Id.*

49. *Id.*

50. *Id.*

51. *Id.*

52. *Id.*

53. See Kevin M. Stack, *The Statutory President*, 90 IOWA L. REV. 539, 552 (2005) (“Contemporary executive orders routinely disclaim any intention to create any right of enforcement either against the government or against private individuals.”).

54. In addition, President George W. Bush issued a memorandum on February 26, 2001, establishing an interagency working group on federalism, but there is no evidence the group ever convened, or that the memo had an impact on any decision-making. See Joseph F. Zimmerman, *Congressional Preemption During the George W. Bush Administration*, 37 PUBLIUS 432, 436 (2007).

55. See THOMAS O. MCGARITY, *THE PREEMPTION WAR* 4–5 (2008).

56. Exec. Order No. 13,422, 72 Fed. Reg. 2703 (Jan. 18, 2007).

reversals of President Bush's version of presidential administration.

Even before issuing the memorandum, Obama had expressed solicitude for state interests, telling the National Governor's Association, in December 2008, that "a single courageous state" can "serve as a laboratory experimenting with innovative solutions to our economic problems," and promising to work with the states together "in partnership."⁵⁷ Obama also invited the governors to his first state dinner in February 2009, stating that his "goal and aim is to make sure that we are making life easier, and not harder, for you."⁵⁸ In the preemption memorandum, he committed these principles to writing. Obama began by stating that, in recent years, despite E.O. 13,132, federal agencies "have sometimes announced that their regulations preempt State law. . .without explicit preemption by the Congress or an otherwise sufficient basis under applicable legal principles."⁵⁹ From now on, he announced, preemption will occur only with legal justification and consideration of state interests.⁶⁰ The memorandum reminds the executive branch that the "citizens of the several States have distinctive circumstances and values" that require respect.⁶¹ To further these values, the memorandum forbids agencies from including preemption provisions in regulatory preambles without notice and comment (a common tactic under the Bush Administration), permits preemption only in accord with E.O. 13,132, and requires agency heads to review the last ten years worth of regulations containing preemption provisions, reassess them, and amend them if necessary.⁶² In short, the memorandum is designed to reinvigorate E.O. 13,132. The following Part addresses the impact these presidential directives have had on actual policy.

B. WHAT PRESIDENTS DO ABOUT FEDERALISM

Presidents regularly speak of respect for state interests, and the executive orders exemplify that rhetoric. However, presidential actions do not necessarily adhere to these federalism

57. John Dinan & Shama Gamkhar, *The State of American Federalism 2008-2009: The Presidential Election, the Economic Downturn, and the Consequences for Federalism*, 39 *PUBLIUS* 369, 373 (2009).

58. *Id.*

59. Memorandum on Preemption, *supra* note 1, at 1.

60. Memorandum on Preemption, *supra* note 1, at 1.

61. Memorandum on Preemption, *supra* note 1, at 1.

62. Memorandum on Preemption, *supra* note 1, at 1.

statements. Rather, on issues affecting state interests, recent Presidents appear driven more by policy objectives than by any philosophical commitment to federalism.⁶³ To begin with, agencies have rarely complied with the federalism executive orders, and Presidents have not enforced those orders.⁶⁴ This is problematic because federal agencies can disregard or remain ignorant of state interests, fail to solicit state input, and alienate the very state officials who will be tasked with implementing a federal statutory scheme. At the same time, this disregard can weaken agency analysis of regulatory options and impacts. Respect for federalism does not mean that state interests should always trump federal interests; rather, it requires fair consideration of and deliberation about state interests. Those are the stated goals of E.O. 13,132; those goals have never been controversial.

During the Reagan Administration, agencies did not implement the federalism executive order and OMB was indifferent.⁶⁵ Subsequently, a 1999 GAO study found that agencies had issued 11,000 final rules in a two year period between 1996 and 1998, but prepared only five federalism impact statements.⁶⁶ Professor Nina Mendelson followed up on the GAO study and examined agency output during one quarter of 2003, finding only six federalism impact analyses in over 600 proposed and final rulemaking documents.⁶⁷ Those six analyses were of low quality, “failing to analyze state interests in providing additional protection for residents, state autonomy, or any of the other federalism values.”⁶⁸ Mendelson also examined 485 proposed and final rulemaking documents issued in May 2006.⁶⁹ Of this group, six rulemakings had a preemptive effect on

63. See Sheryll D. Cashin, *Federalism, Welfare Reform, and the Minority Poor: Accounting for the Tyranny of State Majorities*, 99 COLUM. L. REV. 552, 568–69 (1999) (“That federalism is often used as a stalking-horse for other substantive ends is at least suggested by the lack of consistency among many would-be federalists. Modern devolutionists who embrace the traditional defenses of federalism can also be found supporting nationalization of tort liability rules in ways explicitly designed to reduce the autonomous authority of the states.”).

64. See Lazer & Mayer-Schoenberger, *supra* note 44, at 131.

65. See Blake, *supra* note 44, at 318.

66. See *Federalism: Implementation of Executive Order 12,612 in the Rulemaking Process: Hearing Before the S. Comm. on Governmental Affairs*, 105th Cong. (1998) (statement of L. Nye Stevens, Director, Federal Management and Workforce Issues), available at www.gao.gov/archive/1999/gg99093t.pdf.

67. Nina A. Mendelson, *A Presumption Against Agency Preemption*, 102 NW. U. L. REV. 695, 719 (2008).

68. *Id.*

69. *Id.*

state laws, but only three concluded that a federalism impact statement was required, and only three indicated a special effort by a federal agency to contact affected state agencies for input.⁷⁰ Clearly, the executive orders have historically had little effect on agency procedures.⁷¹

At the same time, presidential policy preferences have had varying impacts on state autonomy. In general, Republican Presidents have been more interested in a deregulatory agenda, while Democrats see the executive branch as a tool for implementing an activist policy agenda.⁷² As two federalism scholars have explained, “we have frequently encountered situations in recent years in which liberals have rushed to defend the authority of states to prosecute activist policies, while conservatives in Congress and the Bush Administration promoted national preemption of activist state laws.”⁷³ Both approaches have consequences for federalism and preemption, as a comparison between Presidents Clinton and Bush reveals.

1. President Clinton

During the Clinton Administration, federal agencies generally took a narrow view of preemption and did not seek to preempt state common law claims.⁷⁴ Moreover, despite the heat he took over the botched federalism executive order, President Clinton is acknowledged to have been generally attentive to the interests of states and localities.⁷⁵ For instance, in 1993, President Clinton signed an executive order prohibiting agencies from imposing unfunded mandates on the states, and he signed codifying legislation into effect two years later.⁷⁶ In social welfare programs, his Administration granted states waivers to experiment with programs such as Medicaid and welfare.⁷⁷ Then,

70. *Id.*

71. See Lazer & Mayer-Schoenberger, *supra* note 44, at 131.

72. See Kagan, *supra* note 28, at 2315–16.

73. Conlan & Dinan, *supra* note 13, at 293.

74. See MCGARITY, *supra* note 55, at 153–54. When states objected to a proposed rule by the Federal Railway Administration that would have preempted state common law cases against railroads based on a failure to warn at railway crossings, the FRA backed down and limited the scope of the preemption. See MCGARITY, *supra* note 55, at 153–55.

75. See Brian E. Bailey, Note, *Federalism: An Antidote to Congress's Separation of Powers Anxiety and Executive Order 13,083*, 75 IND. L.J. 333, 338 (2000).

76. *See id.*

77. See John Kincaid, *The State of U.S. Federalism, 2000-2001: Continuity in Crisis*, 31 PUBLIUS 1, 21 (2001). Kincaid also notes that waivers have downsides; they can “jeopardize the integrity of the rule of law and potentially enhance executive power over

over vehement liberal objections, he pushed for and signed welfare reform legislation that devolved discretion over welfare programs to the state and local levels and encouraged state waivers and experimentation.⁷⁸

2. President George W. Bush

Like President Clinton, President Bush had policy objectives that he could not get Congress to enact, and he used his executive branch toolbox to achieve his ends. For President Bush, a prime goal was tort reform,⁷⁹ and he appointed several industry lawyers and executives as agency officials in order to implement this strategy. Soon, his Administration began to file amicus briefs in state tort litigation, arguing that federal law preempted state common law claims.⁸⁰ For instance, the Bush Administration argued in legal briefs that ERISA preempted a Texas statute (previously signed into law by Bush as governor); that EPA-approved pesticide labels preempted state common law claims, and that FDA approval of medical devices and drug labels preempted state common law claims.⁸¹ Agencies then began inserting preemption language into regulatory preambles, thereby evading notice and comment requirements on the preemption issue.⁸² This meant that states had no opportunity to comment on proposed standards, and were blindsided when those standards were announced. Examples of this “preemption by preamble” occurred in NHTSA’s SUV roof safety standards, CPSC’s mattress flammability standards, and FDA’s drug labeling approvals.⁸³

Many of these preemption policies were complete reversals of prior agency positions and were “largely hidden from public view,”⁸⁴ a practice termed “backdoor federalization.”⁸⁵ Unlike

legislative power,” and “pose issues of democratic accountability insofar as they are negotiated and implemented by executive officials outside of floodlit legislative processes.” *Id.* at 22.

78. See Cashin, *supra* note 63, at 568–574.

79. See Conlan & Dinan, *supra* note 13, at 281–82.

80. See MCGARITY, *supra* note 55, at 154.

81. See MCGARITY, *supra* note 55, at 154.

82. See Catherine M. Sharkey, *Preemption by Preamble: Federal Agencies and the Federalization of Tort Law*, 56 DEPAUL L. REV. 227, 228 (2007).

83. *Id.* at 227.

84. *Id.* at 252 n.127 (quoting Margaret H. Clune, *Stealth Tort Reform: How the Bush Administration’s Aggressive Use of the Preemption Doctrine Hurts Consumers*, CENTER FOR PROGRESSIVE REG., Oct., 2004, <http://www.progressivereform.org/articles/preemption.pdf>).

85. *Id.* at 228. These preambles were accused of “limiting the extent to which

President Clinton, who relished the regulatory limelight and claimed agency initiatives as his own, President Bush achieved his regulatory initiatives with more stealth. Nevertheless, as Jay Lefkowitz, Bush's domestic policy advisor, told *The Wall Street Journal*, "[t]he use of rulemaking to protect corporations from product liability was discussed from early in the Bush administration."⁸⁶ Even in President Bush's last weeks in office, the Administration was fast-tracking regulations that would preempt product safety lawsuits in a race before the Obama Administration took over.⁸⁷ The divide between presidential rhetoric and agency action meant that states were unable to advocate effectively for their interests; indeed, that was the goal of preemption by preamble.

Overall, President Bush was "routinely dismissive of federalism concerns and frequently an agent of centralization," in a way that marked a departure from prior Republican Presidents.⁸⁸ Further, although President Bush "never made federalism prominent on his agenda, his policies have had substantial intergovernmental impacts."⁸⁹ For instance, he used his executive powers to reform social service delivery, requiring federal agencies and states to include faith-based organizations in governmental contracting.⁹⁰ During his terms in office, states were upset at limits on their autonomy imposed by President Bush's legislative initiatives, such as: the No Child Left Behind Act, standardizing public educational goals; the REAL ID Act, mandating state driver's license requirements; and the Help America Vote Act of 2002, imposing national election requirements on states.⁹¹ States also chafed at federal budgetary reductions in health, education, and welfare programs.⁹² Finally, intergovernmental relations were strained in the aftermath of the terrorist attacks of 9/11 and Hurricane Katrina, as the federal

information about the process of decision making is available to the public." Holly Doremus, *Scientific and Political Integrity in Environmental Policy*, 66 TEX. L. REV. 1601, 1632-33 (2008).

86. Alica Mundy, *Bush Rule Changes Could Block Product-Safety Suits*, WALL ST. J., Oct. 15, 2008, at A11.

87. *Id.*

88. Conlan & Dinan, *supra* note 13, at 280.

89. John Kincaid & Richard L. Cole, *Public Opinion on Issues of Federalism in 2007: A Bush Plus?*, 38 PUBLIUS 469, 481 (2008).

90. See Michele E. Gilman, *If at First You Don't Succeed, Sign an Executive Order: President Bush and the Expansion of Charitable Choice*, 15 WM. & MARY BILL RTS. J. 1103 (2007).

91. See Conlan & Dinan, *supra* note 13, at 292.

92. See Conlan & Dinan, *supra* note 13, at 283.

and state governments struggled to respond to these crises without clear parameters for responsibility or accountability.⁹³ Thus, despite having identical formal policies regarding preemption, the Clinton and Bush Administrations impacted state autonomy quite differently.

3. President Obama

Obama's preemption memorandum is his formal statement on federalism, but of course, actions speak louder than words. Early on, consumer advocates were unhappy when the Obama Administration maintained a Bush-era preemption position before the Supreme Court in *Cuomo v. Clearing House Ass'n*.⁹⁴ In *Cuomo*, the New York Attorney General sent letters to several national banks requesting information about their lending practices, in order to see whether they violated New York's fair lending laws.⁹⁵ The Attorney General was investigating "why some national banks seemed to be making a disproportionate number of high-interest home mortgage loans to black and Hispanic borrowers."⁹⁶ The Office of the Comptroller of the Currency ("OCC") and a banking trade association brought suit to enjoin the information request, arguing that OCC regulations issued pursuant to the National Bank Act preempted state information gathering from national banks.⁹⁷ Despite the entreaties of consumer and civil rights groups, the Obama Administration adopted the Bush Administration position that the OCC's preemption decision deserved *Chevron* deference—a position that a sharply divided Supreme Court rejected.⁹⁸ Writing for the majority, Justice Scalia held that the OCC regulation was an attempt to "exempt national banks from all state banking laws," in violation of the plain language of the statute.⁹⁹

Although public interest advocates were disappointed in the Obama Administration's position, they chalked it up to a lack of time to reverse course (Obama appointee Elena Kagan was

93. See Conlan & Dinan, *supra* note 13, at 280–81.

94. 129 S. Ct. 2710 (2009).

95. *Id.* at 2714.

96. John Schwartz, *Bank Regulation Case Pits U.S. Against States*, N.Y. TIMES, Apr. 29, 2009, at B3.

97. *Cuomo*, 129 S. Ct. at 2714.

98. See Greg Stohr, *Obama Backs Banks; Seek To Block Fair Lending Probe*, BLOOMBERG NEWS, Mar. 26, 2009, <http://www.bloomberg.com/apps/news?pid=20601087&sid=aCdEKIwbiPzQ>.

99. *Cuomo*, 129 S. Ct. at 2720.

sworn in as Solicitor General a week before the oral argument) and the continued leadership of a Republican appointee at OCC.¹⁰⁰ These explanations may indeed have been accurate; the Obama Administration has since proposed regulations in-line with the goals of consumer and civil rights groups, permitting state enforcement of predatory lending laws.¹⁰¹ Moreover, the Administration has backed away from some prior litigation positions. On April 28, 2009, the Department of Justice wrote the Third Circuit to withdraw a previously submitted amicus brief that argued for preemption of state failure-to-warn claims based on drug labeling in *Colacicco v. Apotex, Inc.*¹⁰² The case is on remand from the Supreme Court for consideration in light of the Court's decision in *Wyeth v. Levine*.¹⁰³

Public interest discontent arose again at the end of 2009, when the Office of Information and Regulatory Affairs ("OIRA"), the executive office within OMB that reviews regulations, brought in a conservative economist from the FDA on a temporary civil service detail.¹⁰⁴ The economist had a history of challenging the data behind environmental and public health regulations, and while at FDA, he defended federal preemption of medical product regulation.¹⁰⁵ Professor Rena Steinzor, President of the Center for Progressive Regulation, called the personnel decision "discouraging to those hopeful that the Obama Administration will fulfill its many commitments to revitalize the agencies responsible for protecting public health, worker safety, and natural resources."¹⁰⁶ OMB defended the hire as a good fit for a civil service position in an office that was "stretched", and noted that the economist was hired to conduct analysis and had "no decision-making role."¹⁰⁷

100. See Stohr, *supra* note 98.

101. See Greg Stohr, *Banks Must Face State Enforcement, U.S. Court Says*, BLOOMBERG NEWS, June 29, 2009, <http://www.bloomberg.com/apps/news?pid=newsarchive&sid=ah4s56vtWo0A>.

102. Letter from Sharon Swingle, Appellate Staff, United States Dep't of Justice, to Marcia M. Waldron, Clerk, United States Court of Appeals for the Third Circuit (Apr. 28, 2009), available at <http://druganddevice.com/DOJ%20Letter.pdf>.

103. *Colacicco v. Apotex, Inc.*, 129 S. Ct. 1578 (2009) (mem.).

104. See OMB Watch, *New OIRA Staff Calls Attention to Office's Role*, Dec. 8, 2009, <http://www.ombwatch.org/node/10621>; Juliet Eilperin, *Official Questions Pollution Proposal; OMB Says Views of Economist on Rule are 'Irrelevant,'* WASH. POST, Dec. 4, 2009, at A15.

105. See OMB Watch, *supra* note 104.

106. Rena Steinzor, *Sunstein Watch: Randall Lutter to OIRA*, CPR BLOG, Dec. 2, 2009, <http://www.progressivereform.org/CPRBlog.cfm?idBlog=50229EA2-F753-A87A-B78036364E23EAB8>.

107. See Eilperin, *supra* note 104.

Despite these mixed signals, several agencies have issued regulations that disavowed preemption positions previously taken during the Bush Administration, demonstrating a renewed attention to federalism at the agency level. In May 2009, NHTSA issued a final rule regarding SUV roof crush resistance that deleted preemption language previously contained in the Bush-era proposed rule.¹⁰⁸ Similarly, in December 2009, NHTSA granted a petition for reconsideration of a final rule regarding safety standards for vehicle seating and agreed to remove “the portion of the regulatory text stating that State tort law requirements are preempted” in light of the fact that any federal-state conflict was unlikely.¹⁰⁹ The agency conducted a detailed analysis of preemption and savings provisions in the governing statute, as well as in court decisions, and also noted that it had “contacted organizations representing interests of State and local governments and officials about the rulemaking,” none of whom had comments on the rule.¹¹⁰ Likewise, the Mine Safety and Health Administration announced in a correction to a final rule involving safety for underground trapped miners that it had re-analyzed the rule in accordance with the presidential memorandum and was rescinding a preamble that purported to preempt private tort litigation.¹¹¹

The most significant preemption reversal, thus far under President Obama, involved EPA’s decision to grant California a long-sought waiver to regulate motor vehicle emissions. The Bush Administration continuously sowed uncertainty over the causes and consequences of climate change warming; the result was a non-regulatory approach that limited state experimentation.¹¹² To the consternation of the scientific community, the White House suppressed and edited portions of EPA reports that linked global warming to human activity.¹¹³

108. 74 Fed. Reg. 22,348, 22,349 (May 12, 2009) (codified at 49 C.F.R. pts. 571, 585) (“We do not foresee any potential State tort requirements that might conflict with today’s final rule. Without any conflict, there could not be any implied preemption.”). In its analysis of the comments to the proposed rule, NHTSA noted that it received “numerous comments,” *id.* at 22,359, on the possible preemptive effect of the rule, including one “signed by 27 State Attorneys General and the National Conference of State Legislatures,” *id.* at 22,354.

109. 74 Fed. Reg. 68,185, 68,186 (Dec. 23, 2009) (codified at 49 C.F.R. pt. 571).

110. *Id.* at 68,188–89.

111. 74 Fed. Reg. 61531 (Nov. 25, 2009) (codified at 30 C.F.R. pts. 7, 75).

112. See Cinnamon Carlarne, *Climate Change—The New “Superwhale” in the Room: International Whaling and Climate Change Politics—Too Much in Common?*, 80 S. CAL. L. REV. 753, 771 (2007).

113. See Jeremy Symons, *How Bush and Co. Obscure the Science*, WASH. POST, July 13, 2003, at B4; Andrew C. Revkin & Katharine Q. Seeyle, *Report by E.P.A. Leaves out*

The Bush Administration's position—even in the face of “unequivocal” evidence of global warming by leading international scientific bodies¹¹⁴—lead to a battle between California and the federal government over motor vehicle emissions. By its terms, the Clean Air Act (“CAA”) preempts state regulation of motor vehicle emissions, but allows California to seek a waiver from the EPA if certain statutory requirements are met.¹¹⁵ If the waiver is granted, other states can adopt California's standards, and over the forty year history of the CAA, EPA granted many such waivers to deal with local air pollution.¹¹⁶ In July 2002, the California legislature passed a statute requiring automakers to reduce vehicular emissions from all cars sold in the state, and, in 2005, California sought a waiver from EPA to implement the legislation.¹¹⁷ Sixteen states subsequently indicated their intent to adopt California's standards,¹¹⁸ but, in December 2007, EPA denied California the waiver needed to implement its laws, contending that the state law was preempted by the need for uniform federal standards.¹¹⁹

Frustrated, many states worked to reduce greenhouse gas emissions in other economic sectors. By mid-2007, seventeen states had implemented targets for reducing greenhouse gas emissions through various laws, regulations, and executive orders.¹²⁰ California Governor Schwarzenegger issued an

Data on Climate Change, N.Y. TIMES, June 19, 2003, at A1; SETH SHULMAN, UNDERMINING SCIENCE: SUPPRESSION AND DISTORTION IN THE BUSH ADMINISTRATION 22–24 (2008).

114. See Elisabeth Rosenthal & Andrew C. Revkin, *Science Panel Says Global Warming Is 'Unequivocal'*, N.Y. TIMES, Feb. 3, 2007, at A1 (noting that the report asserted with more than 90% confidence that human-caused greenhouse gases have been the major source of global warming in the past 50 years).

115. See Jonathan H. Adler, *Hothouse Flowers: The Vices and Virtues of Climate Federalism*, 17 TEMP. POL. & CIV. RTS. L. REV. 443, 456 (2008). This California-only waiver provision was included when the CAA was enacted in 1967 in light of California's severe air pollution problems and the state's leading efforts to reduce pollution. See *id.* at 456.

116. See *id.* at 456–57.

117. See *id.* at 454.

118. See Howard A. Learner, *Restraining Federal Preemption When There is an "Emerging Consensus" of State Environmental Laws and Policies*, 102 NW. U. L. REV. 649, 650 (2008).

119. See Adler, *supra* note 115, at 457–58. Adler notes that there was “ample statutory basis” for the EPA position. Adler, *supra* note 115, at 458; see also Nina A. Mendelson, *The California Greenhouse Gas Waiver Decision and Agency Interpretation: A Response To Professors Galle and Seidenfeld*, 57 DUKE L.J. 2157, 2165–66 (2008) (arguing that EPA failed to consider federalism concerns, such as “the value of state experimentation given California's history of regulating air pollution”).

120 See Kevin L. Doran, *U.S. Sub-Federal Climate Change Initiatives: An Irrational Means To a Rational End?*, 26 VA. ENVTL. L.J. 189, 209 (2008) (noting that states have acted via several methods, including executive orders, legislation, and press releases);

executive order mandating a reduction in the state's greenhouse gas emissions,¹²¹ while the California legislature passed the Global Warming Solutions Act of 2006 to reduce greenhouse gas emissions to 1990 levels by 2020 through a mix of market measures, incentive systems, and direct controls over energy producers.¹²² Twenty-eight states demanded that utilities provide a specified percentage of consumer electricity from renewable energy sources.¹²³ States also banded together in various regional coalitions committed to emission caps on stationary sources of air pollution.¹²⁴ Finally, twelve states and several cities turned to the federal judiciary and successfully sued EPA over its failure to regulate greenhouse gas emissions under the Clean Air Act.¹²⁵ The lawsuit culminated in the Supreme Court's decision in *Massachusetts v. EPA*, holding that EPA failed to make a reasoned judgment when it refused to regulate greenhouse gases, which the Court held are covered by the CAA.¹²⁶ Thus, states used both their executive and legislative powers, as well as the federal judiciary, to overcome the Bush Administration's anti-regulatory and pro-preemption climate change policies.

During his presidential campaign, Senator Obama promised that, if elected, he would reverse Bush's environmental policies and make the United States a global leader in tackling climate change. As President, most of his promised change has come through agency regulations, as Congress remains stalled on climate change legislation.¹²⁷ In April 2009, EPA issued an endangerment finding that greenhouse gases "threaten the public health and welfare of current and future generations;" the finding clears the way for substantive regulations.¹²⁸ In May 2009, President Obama held a Rose Garden ceremony surrounded by the Governors of California and Michigan, as well as auto industry executives, in which he announced that EPA and the

Learner, *supra* note 118, at 650.

121. See Alice Kaswan, *The Domestic Response To Global Climate Change: What Role for Federal, State, and Litigation Initiatives?*, 42 U.S.F.L. REV. 39, 53 (2007).

122. See *id.* at 55, 58. The states are also suing various industries under a nuisance theory. *Id.* at 91–93.

123. See Learner, *supra* note 118, at 650, 652.

124. See Kaswan, *supra* note 121, at 58.

125. *Massachusetts v. EPA*, 549 U.S. 497 (2007).

126. *Id.* at 528, 533–34.

127. Steven Mufson & David A. Fahrentold, *EPA is Preparing To Regulate Emissions in Congress' Stead*, WASH. POST, Dec. 8, 2009, at A1.

128. 74 Fed. Reg. 66,495, 66,496 (Dec. 15, 2009) (codified at 40 C.F.R. pts. 9, 63); see John M. Broder, *E.P.A. Clears Path To Regulate Heat-Trapping Gases for First Time in the U.S.*, N.Y. TIMES, Apr. 17, 2009, at A15. See generally 74 Fed. Reg. 66,495 (Dec. 15, 2009) (codified at 40 C.F.R. pts. 9, 63) (providing the final rule).

Department of Transportation (“DOT”) would commence joint rulemaking to set a national fuel economy and greenhouse gas standard that would significantly increase mileage requirements for cars and trucks.¹²⁹ The automakers signed on to the effort because they preferred a uniform federal standard to various levels of state regulation.¹³⁰ This is a situation in which both industry and environmental advocates favor federal preemption. Industry prefers a uniform standard to minimize production variations across states, while environmentalists believe that climate change is best tackled at national and global levels because greenhouse gases are not contained regionally. This example shows that preemption is not necessarily harmful to state interests; rather, respect for federalism gives states a voice in federal decision-making. In June 2009, EPA granted California’s waiver request, and California agreed to comply with a new federal standard.¹³¹ In September 2009, the EPA and DOT issued the proposed motor vehicle emissions rules, which would constitute the biggest increase in gas mileage standards in history.¹³² With these new proposals, President Obama directed executive agencies to take action to protect the climate, but left the scientific determinations to agency staff.

Of course, preemption is only part of the federalism trends under the Obama Administration. President Obama took office during a time of extreme financial distress. This may drive a shift from states as “primary innovators on many policy issues” to “renewed attention to federal policy-making,” because the federal government may be the only actor with the capacity and resources to respond to the economic crisis.¹³³ At the same time, Obama has been responsive to state fiscal interests through his support for federal stimulus funds that flowed to the states for programs, such as Medicaid, education, and infrastructure.¹³⁴ In turn, this has resulted in some state backlash. Several Governors announced that they would refuse federal stimulus money because they feared that unfunded mandates would result when

129. See Steven Mufson, *New Auto Standards vs. Old U.S. Preferences; Mileage Rules To Add To Price, Shrink Engines*, WASH. POST, May 20, 2009, at A14.

130. *Id.*

131. 74 Fed. Reg. 32,744 (July 8, 2009).

132. 74 Fed. Reg. 49,454 (Sept. 28, 2009) (codified at 49 C.F.R. pts. 531, 533, 537, 538). Later that month, EPA moved forward with proposed rules to regulate emissions from power plants and industrial facilities. See John M. Broder, *E.P.A. Proposes New Regulations On Industry*, N.Y. TIMES, Oct. 1, 2009, at A1.

133. Dinan & Gamkhar, *supra* note 57, at 369; see also Dinan & Gamkhar, *supra* note 57, at 378–79.

134. See Dinan & Gamkhar, *supra* note 57, at 374–75.

the federal funding ended.¹³⁵ Nevertheless, these Governors either ended up accepting almost all the available funds, or their state legislatures overturned their refusals.¹³⁶ Similarly, after the passage of health care reform, a priority for the President, some states banded together to challenge the law's constitutionality. These shifting state alliances demonstrate that it is impossible to talk about state interests as a monolith.¹³⁷ Indeed, it is the states' capacity for diverse viewpoints that is one of the supposed benefits of federalism. If the federal government ignores or squelches this diversity, federal policymaking can suffer as result.

II. COMPARATIVE INSTITUTIONAL COMPETENCE

An extensive body of literature on preemption focuses on which institutional actor is best positioned to divide up federal and state regulatory authority: Congress, federal agencies, or the courts. Congressional supporters stress the political safeguards of federalism inherent in the role of states in federal elections. Agency advocates argue that rulemaking processes allow states to provide input to agencies that is then weighed by the regulatory experts in a particular field. The court cohort believes only judges have the competence to take a broad view of how to uphold federalism principles. And each camp has strong critiques of its competitors: Congress's collective action hurdles undermine federalism values; agencies are too specialized to understand abstract values of federalism; and courts should respect the decisions of the political branches, which have the expertise to assess the real-world effects of regulatory programs. Regardless of the validity of these competing viewpoints, they fail to take into account how the President influences, impacts, and compares to each of these actors.

As Part I shows, Presidents impact the federalism balance, sometimes dramatically. Yet, at most, the current debate acknowledges that the President is the head of the agencies, thus giving the agencies democratic accountability. However, this probably assumes too much, as discussed below. This Part puts

135. See Dinan & Gamkhar, *supra* note 57, at 375; Shaila Dewan, *6 Governors May Reject Portions of Stimulus*, N.Y. TIMES, Feb. 20, 2009, at A12.

136. See Dinan & Gamkhar, *supra* note 57, at 375; Mike Stuckey, *When Officials Reject Stimulus Funds, Sparks Fly; Communities Split Over Attempts To Forgo Recover Act Money*, MSNBC.COM, Dec. 14, 2009, <http://www.msnbc.msn.com/id/34382454>.

137. See JOHN D. NUGENT, SAFEGUARDING FEDERALISM: HOW STATES PROTECT THEIR INTERESTS IN NATIONAL POLICYMAKING 22 (2009) (explaining that some state interests are universally shared, while others may be categorical or particularistic).

the President in center stage to assess how he compares to Congress, agencies, and the courts in protecting federalism. This Part aims to help answer the question: what role should Presidents play in preemption decisions? This Part concludes that it is preferable for Congress, rather than the President, to make preemption decisions because Congress is more transparent and deliberative than a unitary decision-maker. Thus, a presumption against preemption would promote greater opportunities for input by states. Still, because agencies make most preemption decisions, it is necessary to consider how presidential involvement impacts agency processes. The short answer is that it depends on the President.

A. CONGRESS COMPARED TO THE PRESIDENT

Most commentators promote Congress as the superior institutional actor for protecting state interests.¹³⁸ At the same time, there is widespread acknowledgment that Congress's potential is unfulfilled because it often does not expressly address whether its statutes preempt state law, or does so in a manner that is ambiguous.¹³⁹ Thus, many scholars support a presumption against preemption, enforced vigorously by courts, that would require Congress to speak clearly if it wants to preempt state law. In this view, the presumption against preemption would foster deliberation by a democratically accountable branch, result in carefully considered preemption decisions, and comport with primary constitutional principles.¹⁴⁰

138. See, e.g., Bradford R. Clark, *Process-Based Preemption*, in *PREEMPTION CHOICE: THE THEORY, LAW, AND REALITY OF FEDERALISM'S CORE QUESTION*, *supra* note 17, at 192, 193 (stating that the presumption can "play a useful role in implementing the Constitution's political and procedural safeguards of federalism"); Young, *supra* note 14, at 249, 267 ("Constitutionally based limitations should ensure that the power to preempt state law remains with Congress."); Roderick M. Hills, Jr., *Against Preemption: How Federalism Can Improve the National Legislative Process*, 82 N.Y.U. L. REV. 1, 17 (2007) ("[S]pecific action from Congress on specific legislation can mobilize public opinion, thus diminishing the tyranny of the status quo.").

139. See Hills, *supra* note 138, at 9 ("[T]he federal lawmaking process has some notorious defects, which prevent it from addressing broad policy issues such as the desirability of decentralization."); Sharkey, *supra* note 82, at 215 ("Congress punts on the key question.").

140. See Stuart Minor Benjamin & Ernest A. Young, *Tennis With the Net Down: Administrative Federalism Without Congress*, 57 DUKE L.J. 2111, 2134 (2008) ("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."). Such a presumption would also put the onus on well-financed regulated industries to lobby for and obtain preemption, rather than on more diffuse public interest groups that are less capable of organizing to obtain express savings clauses. See Hills, *supra* note 138, at 28.

Nevertheless, the reality is that most preemption decisions are made by agencies,¹⁴¹ and that the President, as head of the executive branch, is directing and/or coordinating some of these outcomes. Thus, advocates of the pro-Congress position need to articulate why a presumption against preemption would be preferable to agency decision-making, particularly with the additional layer of presidential involvement. In turn, this requires a comparison of congressional and presidential incentives to protect state autonomy. If we compare Congress and the President along the benchmarks of accountability, transparency, and deliberation—“the classic elements of representational democracy”¹⁴²—it becomes clear that Congress’s main advantages flow from the deliberative and transparent nature of its processes, and that, with regard to accountability, both of the federal political branches share similar incentives where the states are concerned. In the end, both Congress and the President fluctuate in their solicitude for state interests, usually for reasons tied to substantive policy goals.

1. Accountability

The pro-Congress position rests on the “political safeguards of federalism,” a theory set forth by Herbert Wechsler in a prominent 1954 law review article where he stated that “the role of the states in the composition and selection of the central government” preserves state autonomy.¹⁴³ Not only are members of Congress elected from specific states, but the process of lawmaking also provides opportunities for state and local governments to assert their interests.¹⁴⁴ Wechsler’s insights reflect our Founders’ understandings; they believed in the virtues of federalism and established mechanisms to ensure a voice for the states in Congress, such as the electoral college system for presidential elections and the selection of Senators from state legislatures.¹⁴⁵

141. See Catherine M. Sharkey, *Federalism Accountability: “Agency Forcing” Measures*, 58 DUKE L.J. 2125, 2128 (2009) (“[F]ederal agencies have become the real decisionmakers [sic] in preemption controversies.”).

142. Brian Galle & Mark Seidenfeld, *Administrative Law’s Federalism: Preemption, Delegation, and Agencies at the Edge of Federal Power*, 57 DUKE L.J. 1933, 1948 (2008).

143. 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, 558 (1954).

144. See *id.* at 543–44.

145. See Clark, *supra* note 138, at 194–95.

Even though most of these structural features no longer exist,¹⁴⁶ the political safeguards of federalism are arguably maintained today by the continued role of states in congressional elections, lobbying by organizations that represent state interests, the influence of state political party activists on federal lawmakers, and Congress's recognition that the states are needed to carry out cooperative federal programs.¹⁴⁷ In *Garcia v. San Antonio Metropolitan Transit Authority*, the Supreme Court explicitly endorsed Wechsler's "political safeguards of federalism" theory, stating that "the principal means chosen by the Framers to ensure the role of the States in the federal system lies in the structure of the Federal Government itself."¹⁴⁸

Under this conception of the political landscape, Congress's parochial bias stands in contrast to the President's national perspective. As Wechsler described the President, he is "the prime organ of a compensating 'national spirit'" who "speaks for and represents the full national constituency."¹⁴⁹ The model of the President as a national figurehead supports expansive interpretations of executive power, such as unitary executive theory and judicial deference to executive branch decisions.¹⁵⁰ It also suggests that the President's perch might enable him to consider federalism benefits that are felt nationally, rather than locally, because he can better "register the full intensity of the public's preferences" than Congress.¹⁵¹ Indeed, Wechsler asserted that the presidential electoral process makes the president "responsive to local values that have large support within the states."¹⁵² Thus, under the "political safeguards of federalism" theory, both political branches have incentives to

146. *Id.* at 196 (noting that pursuant to the Seventeenth Amendment, senators are no longer appointed by state legislators, states have less control over voter qualifications than they had at the Founding, and, in modern practice, presidential electors are selected through "winner-take-all popular elections," rather than by state legislatures).

147. See Verchick & Mendelson, *supra* note 17, at 20–21 (summarizing the political safeguards view and its detractors). In addition, "the need to win votes from residents of states and localities and the willingness to moderate policy positions, in order to do so make federal officials less willing to limit state authority during election years." S. Nicholson-Crotty, *National Election Cycles and the Intermittent Political Safeguards of Federalism*, 38 *PUBLIUS* 295, 296 (2008).

148. 469 U.S. 528, 550 (1985) (ruling that Congress has power under the commerce clause to extend Fair Labor Standards Act to the state and local governments).

149. Wechsler, *supra* note 143, at 552.

150. See Jide Nzelibe, *The Fable of the Nationalist President and the Parochial Congress*, 53 *UCLA L. REV.* 1217, 1219 (2006); Glen Staszewski, *Reason-Giving and Accountability*, 93 *MINN. L. REV.* 1253, 1260 (2009).

151. Nina A. Mendelson, *Chevron and Preemption*, 102 *MICH. L. REV.* 737, 772 (2004).

152. Wechsler, *supra* note 143, at 558.

consider state interests, but the President tempers Congress's more parochial impulses.¹⁵³

Yet the political safeguards of federalism are disputed, with commentators arguing that neither Congress nor the President is politically accountable to state interests. For instance, while members of Congress have incentives to cater to state and local voters, they have nothing to gain from promoting the interests of state institutions, which are their "political competitors."¹⁵⁴ Jide Nzelibe argues that similar parochial incentives motivate the President, who focuses on delivering benefits to battleground states, in order to woo enough swing votes to win the electoral college.¹⁵⁵ This form of parochialism does not further the values of federalism because only a few states get showered with attention, which is sporadic at best. These competing theories on the political safeguards of federalism suggest a stalemate. At times, both political branches have electoral incentives to pay attention to issues impacting the states, but neither seems overly concerned with preserving federalism as a principled matter.

Indeed, both the President and Congress know that implementing a states' rights platform is unlikely to garner votes. While public opinion polls show that most voters share a belief in a limited national government,¹⁵⁶ they actually end up supporting an active role for the federal government when it comes to substantive policy areas.¹⁵⁷ Moreover, voters are not interested in "abstract questions about the division of power."¹⁵⁸ Not surprisingly then, politicians like to talk about states' rights, but freely take actions inconsistent with those professed beliefs,

153. Professor John McGinnis adds that because the President's fortunes are dependent on economic growth, he has incentives to enforce economic federalism that congressional representatives lack because they "seek government action that is advantageous for their state, even at the expense of the nation." John O. McGinnis, *Presidential Review as Constitutional Restoration*, 51 DUKE L.J. 901, 903 (2001).

154. Ernest Young, *Two Cheers for Process Federalism*, 46 VILL. L. REV. 1349, 1358 (2001); see also Lynn A. Baker, *Putting the Safeguards Back Into the Political Safeguards of Federalism*, 46 VILL. L. REV. 951, 958–59 (2001); Larry D. Kramer, *Putting the Politics Back Into the Political Safeguards of Federalism*, 100 COLUM. L. REV. 215, 293 (2000).

155. Nzelibe, *supra* note 150, at 1248 ("The winner-take-all feature of the electoral college shows that it will often be in the president's interests to target benefits at a small group of voters at the expense of the rest of the population.")

156. See Kincaid & Cole, *supra* note 89, at 474–75 (stating that, in a 2007 poll, 66.1 percent of Americans said that "the federal government has too much power today," while only 4.7 percent said that state government had too much power).

157. See Conlan & Dinan, *supra* note 13, at 296.

158. Neal Devins, *The More Things Change, The More They Stay the Same*, 12 GREEN BAG 137, 137–38 (2009) (explaining why President Bush's conception of executive power played no role in the 2008 presidential election).

without fear of adverse electoral consequences. Indeed, while Congress is often silent about preemption, a bevy of federal laws contain preemption provisions, state mandates, and other policies that limit state authority, suggesting that states' rights are not a consistently overriding value for Congress in passing the laws, or for the President in signing them.¹⁵⁹ Further, due to information costs, most voters do not know the particular stances taken by their representatives in Congress, while incumbents enjoy political advantages that make their stand on the merits of specific issues often irrelevant.¹⁶⁰ Thus, voters rarely punish a congressperson solely for advancing federal interests.

Likewise, voters do not cast ballots based on how the President acts on specific policy issues, such as preemption. Rather, they elect someone who they consider like-minded, in part, so they do not have to monitor the "quotidian decisions, complex judgments, recondite bargains, and other actions" that are "beyond their understanding and attention span."¹⁶¹ Moreover, the President makes many decisions that are invisible to voters, while White House officials play a role in governmental decisions that never get publicly attributed to the President.¹⁶² Voters cannot reward or punish the President over decisions that are obscured from their view; transparency and accountability are linked. In short, both presidential and congressional elections are poor mechanisms for voters to express their views on specific policy issues, due to the number of issues at stake in an election cycle and the limited number of candidates.¹⁶³ As a result, while there are certainly instances in which Congress and/or the President are responsive to state concerns, it is difficult to conclude that one branch has greater political incentives to cater to the states than the other.

159. See Nicholson-Crotty, *supra* note 147, at 295; see also Zimmerman, *supra* note 54, at 445 ("Congress continually restructures the balance of national-state powers in a conceptual vacuum by enacting preemption statutes as *ad hoc* responses to problems."); Zimmerman, *supra* note 54, at 432 (stating that President Bush approved 64 pieces of legislation with preemption from 2001 to 2005).

160. See Galle & Seidenfeld, *supra* note 142, at 1979–80; Stanzewski, *supra* note 150, at 1267.

161. Edward Rubin, *The Myth of Accountability and the Anti-Administrative Impulse*, 103 MICH. L. REV. 2073, 2078 (2005).

162. See Stanzewski, *supra* note 150, at 1267.

163. Stanzewski, *supra* note 150, at 1270.

2. Deliberation and Transparency

From a state's perspective, deliberation and transparency appear to be Congress's main advantages over the President. To begin with, it is far more cumbersome for Congress to act because congresspersons have to form coalitions, whereas the President can act unilaterally. Congressional lawmaking faces a "maze of obstacles," as bills must work their way through multiple committees, subcommittees, floor votes in the House and Senate, and intense negotiations to reach a form agreeable in both houses—all the while fending off attacks by party leaders, rules committees, filibusters, holds, and other procedural roadblocks.¹⁶⁴

Some argue that the slow and infrequent nature of federal lawmaking furthers the political safeguards of federalism because less legislation makes for less preemption.¹⁶⁵ By contrast, William Eskridge contends that this unwieldy process does not improve federalism; rather, it leads to "statutory complexity and extensive delegation of lawmaking or law-elaborating authority to agencies and sometimes courts."¹⁶⁶ In short, the multiple "vetogates" inherent in the lawmaking process result in decisions not to decide, with Congress delegating policymaking authority to the agencies.¹⁶⁷

Once Congress delegates decision-making authority to an agency, the President can, and sometimes does, step in to influence a preemption decision.¹⁶⁸ Yet, from a state's perspective, there are more opportunities and more access points to provide input to Congress than to the President—as long as the states are aware that preemption is on the congressional agenda. To be sure, states can register their opinions with the President, but this usually happens after an unpopular preemption decision is made. For instance, in the case of climate change, many states lashed out at President Bush's refusal to regulate by issuing their own activist state-level policies, suing the federal government, and keeping the issue

164. Terry M. Moe & William G. Howell, *The Presidential Power of Unilateral Action*, 15 J.L. ECON. & ORG. 132, 146 (1999); see also William N. Eskridge, Jr., *Vetogates*, *Chevron*, *Preemption*, 83 NOTRE DAME L. REV. 1441, 1443–44 (2008).

165. See Clark, *supra* note 138, at 329–330.

166. Eskridge, *supra* note 164, at 1443.

167. Eskridge, *supra* note 164, at 1449. For this reason, Eskridge urges courts to use the presumption against preemption to overcome these vetogates. Eskridge, *supra* note 164, at 1470–71.

168. See *supra* note 5.

burning in the forefront of public consciousness.¹⁶⁹ Similarly, when President Clinton issued his preemption executive order that appeared unfavorable to the states, they actively and successfully organized to change his mind, and he responded.¹⁷⁰ However, these after-the-fact attacks can be costly to wage, undermine stability, and face an uphill battle because it is usually harder to dislodge a decision on the back end. (It is also worth noting that even the improved Clinton executive order did not impact agency decision-making.) Thus, states are more likely to influence the preemption debate if Congress is transparent in putting preemption on its agenda than if the President directs such an outcome unilaterally.

Moreover, states can only influence presidential decision-making if they know about it. While some Presidents promote transparency, others obfuscate. The Bush Administration generated distrust due to its secrecy.¹⁷¹ For instance, when Congress tried to investigate executive initiatives, the Bush Administration consistently resisted congressional efforts to subpoena documents about contacts between the White House and agencies.¹⁷² As for preemption, agencies began issuing regulatory preambles purporting to preempt conflicting state law, yet these preambles had never been subject to notice or comment, and, in fact, the notices of some proposed rulemakings misleadingly suggested that the agency was not considering preemption at all, thereby foreclosing comments.¹⁷³ Further, due to the Bush Administration's culture of secrecy, it is difficult to uncover President Bush's role in preemption decisions—the available evidence comes from leaks, statements made in congressional hearings by agency insiders, and responses to FOIA requests.

As a candidate, Obama promised a break from this pattern and pledged “to create a transparent and connected democracy.”¹⁷⁴ In his first year of office, he issued a stream of memoranda and executive orders designed to make the executive branch more open to public scrutiny, and to “usher in a new era of open Government.”¹⁷⁵ Although such broad

169. See *supra* notes 120–126 and accompanying text.

170. See *supra* notes 41–46 and accompanying text.

171. See Cary Coglianese, *The Transparency President? The Obama Administration and Open Government*, 22 *GOVERNANCE* 529, 529 (2009).

172. See *id.* at 531.

173. See Sharkey, *supra* note 82, at 254.

174. See Coglianese, *supra* note 171, at 529.

175. See Coglianese, *supra* note 171, at 533 (quoting Memorandum on the Freedom

promises may backfire as he sets standards that are nearly impossible (or undesirable) to meet,¹⁷⁶ Obama has established different expectations about transparency and greater opportunities for public participation than his predecessor. Clearly, the transparency of any given White House varies with its holder.

By contrast, congressional transparency is more consistent as an institutional matter, and less susceptible to the winds of political will. Congress is “subject to a wider range of pluralist voices and interest groups than any other political actor,” and, as a result, Congress gets better information to inform its decision-making than does the executive.¹⁷⁷ States can—and do—monitor proposed legislation that might usurp their authority, contact their representatives to express their views, and rally other interest groups in support or opposition to a bill. These are the “informal, extraconstitutional” political safeguards of federalism that operate today.¹⁷⁸ State interests are organized into an “intergovernmental lobby,” consisting of seven main organizations of state officials, including the National Governors’ Association, the National Conference of State Legislatures, the National League of Cities, the National Association of Counties, the International City-County Management Association, the U.S. Conference of Mayors, and the Council of State Governments.¹⁷⁹

Still, while congressional transparency and deliberation appear necessary to secure political safeguards of federalism, there will inevitably remain situations in which preemption decisions will fall to the agencies. Even with the best of intentions, Congress legislates *ex ante* and cannot always foresee whether or how its laws may ultimately impact state-level initiatives as circumstances change.¹⁸⁰ Moreover, even if a statute

of Information Act, 2009 DAILY COMP. PRES. DOC. 9 (Jan. 21, 2009), available at <http://www.gpo.gov/fdsys/pkg/DCPD-200900009/pdf/DCPD-200900009.pdf>.

176. Coglianesi, *supra* note 171, at 540.

177. Nzelibe, *supra* note 150, at 1222.

178. NUGENT, *supra* note 137, at 54.

179. See NUGENT, *supra* note 137, at 31, 118-120.

180. See Thomas W. Merrill, *Preemption and Institutional Choice*, 102 NW. U. L. REV. 727, 754 (2008) (“Congress cannot anticipate when it legislates all the situations in which questions of displacement will arise.”); Robert R. Gasaway & Ashley C. Parrish, *The Problem of Federal Preemption: Toward a Formal Solution*, in FEDERAL PREEMPTION: STATES’ POWERS, NATIONAL INTERESTS, *supra* note 14, at 219, 219 (“Congress cannot possibly be expected to anticipate in advance or respond in timely fashion to all conceivable ways in which states might attempt to intrude on federal policies.”); Gillian E. Metzger, *Administrative Law as the New Federalism*, 57 DUKE L.J. 2023, 2081 (2008)

addresses preemption, the language can be ambiguous or unclear, and agencies then have to decide how to proceed. As a result, it is inevitable that agencies will have to make some preemption decisions, and that Presidents will, therefore, have occasion to direct that process. Accordingly, the next Section discusses whether presidential involvement in agency decision-making enhances or detracts from federalism.

B. AGENCIES AND PRESIDENTIAL CONTROL

Although most commentators agree that Congress should decide whether or not to preempt state law, the reality is that, due to broad congressional delegations, agencies make most preemption decisions.¹⁸¹ This raises the question whether the President's position as head of the executive branch enhances the agency responsiveness to the states, as supporters of the pro-agency position assert. Furthermore, at least during the Bush Administration, it appears the White House was directing some agency outcomes, and, thus, the President's role in preemption needs to be considered. Does the President's direct participation in agency decision-making further state autonomy such that states would benefit from more or less presidential involvement?

The primary advocates for leaving federalism decisions within the hands of agencies are Brian Galle and Mark Seidenfeld, who reject the dominant scholarly preference for a court-enforced presumption against preemption that would push Congress to confront and decide federalism issues in the first instance.¹⁸² Most scholars are dubious that agencies are suited to making federalism decisions because they are staffed by unelected bureaucrats and, thus, lack political accountability. By contrast, Galle and Seidenfeld claim that this formalist position ill-fits the modern regulatory state, in which the Supreme Court has already justified deference to statutory interpretation by agencies on the grounds of congressional delegation, agency expertise, and the superior political accountability of the President.¹⁸³ They contend that agencies perform well on the

("Congress simply lacks the resources and foresight to resolve all the federalism issues that can arise in a given regulatory scheme.").

181. See Metzger, *supra* note 180, at 2081 ("[T]he critical comparison is between federal agencies and federal courts; given that Congress will delegate broadly."); Sharkey, *supra* note 141, at 2128 ("[T]he federal agencies have become the real decisionmakers in preemption controversies.").

182. See Galle & Seidenfeld, *supra* note 142, at 1939 (stating that agencies outperform the other branches).

183. See Galle & Seidenfeld, *supra* note 142, at 1938 ("[C]laims of congressional

benchmarks of deliberation, transparency, and democracy.¹⁸⁴ Yet the Bush-era “preemption war” suggests that these values can be undercut when the President steps in and directs substantive regulatory outcomes.

1. Transparency

As Galle and Seidenfeld assert, agencies are generally transparent, which is an important component to good governance. Transparency keeps citizens informed about government activity, which, in turn, fosters opportunities for input and political accountability. Under the Administrative Procedure Act, agencies must give notice and explanation of proposed rules, provide opportunities for public comment, and then publish final rules that explain the rule’s basis and purpose, as well as the agency’s responses to submitted comments.¹⁸⁵ In addition, a series of executive orders and federal statutes promote transparency by requiring agencies to assess a variety of regulatory impacts, such as cost-benefit analysis, effects on small business, paperwork burdens, alternatives to unfunded mandates, and federalism.¹⁸⁶ Agencies are also subject to sunshine laws that open agency meetings to the public,¹⁸⁷ and the Freedom of Information Act, which gives private persons access to government information.¹⁸⁸ Moreover, Galle and Seidenfeld argue that it is easier for affected parties to access agency staff members than to reach congresspersons; the latter are working on a wider range of issues and spend the bulk of their time focused on constituents.¹⁸⁹

Despite the formal mechanisms set-up to provide agency transparency, presidential interference in agency decision-making can obscure the process. If the President is pulling the levers behind the scenes, the public has no way to know who is calling the shots and cannot lobby effectively for their interests.

primacy can be defended, we argue, only on formalist grounds.”).

184. See Galle & Seidenfeld, *supra* note 142, at 1939.

185. See Galle & Seidenfeld, *supra* note 142, at 1954–57.

186. Galle & Seidenfeld, *supra* note 142, at 1957–58.

187. See Government in the Sunshine Act of 1976, 5 U.S.C.A. § 552(b) (West 2006) (stating that agency meetings headed by collegial bodies must be open to the public); Federal Advisory Committee Act of 1972, Pub. L. No. 92-463, 86 Stat. 77-76 (2006) (stating that advisory committee meetings and minutes must be open to the public); Ethics in Government Act of 1978, Pub. L. No. 95-521, 92 Stat. 1824 (2006) (providing that government personnel must disclose conflicts of interest).

188. 5 U.S.C. § 552 (2006).

189. See Galle & Seidenfeld, *supra* note 142, at 1958–59.

Moreover, agency rationales can end up as post hoc justifications, rather than legitimate reasoning. We have seen that Presidents differ in their own commitments to transparency. Whereas President Clinton publicly set agency agendas, and then proudly sought to claim agency work as his own, President Bush generally remained behind the curtains. President Obama is now swinging the pendulum back to greater transparency. Given these varied approaches to presidential administration, it is hard to conclude that presidential administration fosters transparency, as a rule.

2. Deliberation

As for deliberation, agencies must provide meaningful justifications for their rules and to evaluate alternatives.¹⁹⁰ As the Supreme Court stated in *Motor Vehicle Manufacturers Association, Inc. v. State Farm Mutual Automobile Insurance Co.*, a rule will not survive judicial review if it relies on factors outside the statute, fails to consider important aspects of the problem, offers an explanation that is contravened by the evidence before the agency, or is “so implausible that it could not be ascribed to a difference in view or the product of agency expertise.”¹⁹¹ Despite the incentives that this “hard look” review imposes on agencies to engage in reasoned decision-making, commentators disagree over whether agencies are institutionally suited to consider federalism values. Galle and Seidenfeld argue that agencies are immersed in the programs they administer, and, thus, have the expertise to consider the “day-to-day impacts that autonomous state regulators would have on a federal program,”¹⁹² and “the extent to which geographic variations warrant different regulatory approaches.”¹⁹³

Although Professor Nina Mendelson agrees that agencies are good at evaluating program impacts, she states that they lack the capacity to consider the values of “abstract federalism,”¹⁹⁴ i.e., the interest in “preserving state prerogatives for their own sake.”¹⁹⁵ As she explains, agencies are specialists in regulatory programs, not generalists accustomed to considering federalism

190. See Galle & Seidenfeld, *supra* note 142, at 1939.

191. *Motor Vehicle Mfrs. Ass’n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983).

192. Galle & Seidenfeld, *supra* note 142, at 1972.

193. Galle & Seidenfeld, *supra* note 142, at 1977.

194. Mendelson, *supra* note 151, at 782.

195. Mendelson, *supra* note 151, at 781.

issues that are abstract or political, such as the costs of regulation “upon a state’s dignity or a state’s function as a policy ‘laboratory’ or center of democratic activity.”¹⁹⁶ Further, agency staffers are hired for their technical and scientific expertise, not because they understand constitutional structure.¹⁹⁷

The President is in a good position to correct for this agency weakness. In one account of the Presidency, the national perspective of the President and the electoral process furnish incentives for him to look out for state interests, while protecting the “national commons from regional selfishness.”¹⁹⁸ Moreover, the President can lean on the legal expertise within the Office of Legal Counsel and the Solicitor General’s Office in considering abstract questions of federalism.¹⁹⁹ However, an alternative account of the Presidency maintains that the President is far more parochial than assumed because he must cater to voters in battleground states in order to win re-election and further his party’s electoral successes.²⁰⁰ As an empirical matter, the conduct of recent Presidents suggests that presidential regard for state autonomy depends on the substantive policy at stake. Moreover, even if the President is better able than agencies to weigh abstract federalism values, he does not have the capacity to monitor the entire output of the executive branch. Given the thousands of agency decisions being made at any time and the limited personnel capacity of the White House, the Administration’s attention to regulatory issues is often haphazard, sporadic, and inconsistent.²⁰¹

196. Mendelson, *supra* note 151, at 781. As two commentators have noted, “[f]ederalism criteria . . . do not have a natural home in agencies.” Lazer & Mayer-Schoenberger, *supra* note 44, at 131.

197. See Mendelson, *supra* note 151, at 782. Acknowledging that agencies have a programmatic focus, several commentators urge courts to make federalism part of hard look review; that is, to push agencies to do a better job of considering federalism. See Galle & Seidenfeld, *supra* note 142, at 1978; William W. Buzbee, *Preemption Hard Look Review, Regulatory Interaction, and the Quest for Stewardship and Intergenerational Equity*, 77 GEO. WASH. L. REV. 1521, 1525 (2009).

198. Steven G. Calabresi, *Some Normative Arguments for the Unitary Executive*, 48 ARK. L. REV. 23, 99 (1994); see also *id.* at 35 (describing the electoral process’ impact on the creation of presidential incentives).

199. See Cornelia T.L. Pillard, *The Unfulfilled Promise of the Constitution in Executive Hands*, 103 MICH. L. REV. 676, 682 (2005) (describing these offices as the “principal constitutional interpreters for the executive branch”).

200. See *supra* note 155 and accompanying text.

201. See Lisa Schultz Bressman & Michael P. Vandenbergh, *Inside the Administrative State: A Critical Look at the Practice of Presidential Control*, 105 MICH. L. REV. 47, 94–96 (2006).

The President can best impact the bureaucracy's sensitivity to federalism by working across the board, rather than sporadically and unilaterally. As the head of the executive branch, the President can require agencies to do a better job of considering state interests. This does not require interference in particular agency assessments; rather, the President can use regulatory review to ensure that agencies consult with states, take state interests into account, and consider viable alternatives. This is the model underlying the executive orders, which, if enforced, could improve the dialogue surrounding preemption.

C. COURTS AND THE PRESIDENT

In 1992, the Supreme Court ruled in *Cippollone v. Liggett Group, Inc.*, that a federal statute could preempt state common law claims; that case held that FDA-mandated cigarette label warnings preempted state tort actions for failure to warn of smoking's dangers.²⁰² *Cippollone* opened the door for regulated industries to raise preemption defenses in tort litigation, and made the courts increasingly central players in preemption decisions. Notably, the Bush Administration pushed preemption not only through agency rulemaking proceedings, but also through its litigation positions and amicus briefs in support of businesses seeking to preempt state tort law. For Presidents, the judiciary is one of many tools for advancing a federalism agenda. Moreover, the Supreme Court's preemption doctrine is a muddled one,²⁰³ with no "predictable jurisprudential or analytical pattern,"²⁰⁴ and this flux provides leeway for the President to exert influence over federal preemption. Accordingly, this Section considers how presidential politics impact existing doctrines of judicial review in the preemption context.

Given that Congress often fails to speak clearly about preemption, and that agencies step in as gap fillers, many commentators believe that the federal courts are the only realistic bulwark against federal intrusions into state interests.²⁰⁵ Scholars have articulated two major competing visions for how courts should approach preemption decisions. The majority view

202. 505 U.S. 504 (1992).

203. MCGARITY, *supra* note 55, at 107–08.

204. Viet Dinh, *Reassessing the Law of Preemption*, 88 GEO. L.J. 2085, 2085 (2000).

205. *See e.g.*, sources cited *supra* note 137. Congress can also create confusion when it enacts both a preemption clause and a savings clause, "which purports not to upend existing state common law liability." Catherine Sharkey, *What Riegel Portends for FDA Preemption of State Products Liability Claims*, 103 Nw. U.L. REV. 437, 438 (2009).

is that courts should enforce the presumption against preemption to compel Congress to wrestle with and resolve federalism issues.

The Supreme Court first articulated the presumption in *Rice v. Santa Fe Elevator Corp.*, stating that it “start[s] with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress.”²⁰⁶ In this view, Congress is the best institutional actor for making federalism decisions, but the courts need to push Congress to do its job. As noted earlier, congressional decision-making is said to foster deliberation, create opportunities for state input, comply with constitutional lawmaking requirements, and put the onus on regulated industries to lobby for and obtain favorable preemption provisions.²⁰⁷ Moreover, too much deference to agency preemption decisions is dangerous because agencies can completely subsume a regulatory field, leaving the “sole enforcement mechanism of a regulatory regime entirely concentrated within a single, overworked”²⁰⁸ agency, and substituting “public for private enforcement of the law.”²⁰⁹ Nevertheless, the Supreme Court enforces the presumption against preemption rarely and inconsistently.²¹⁰

Accordingly, another group of scholars argue that courts should (and sometimes do) use administrative law doctrine, such as hard look review, to ensure that agencies adequately consider state interests. For instance, Catherine Sharkey would have courts “look to the regulatory record to determine whether or not an agency actually considered the risks that the state law attempts to protect against,” rather than the agency’s formal

206. 331 U.S. 218, 230 (1947).

207. Detractors argue that the presumption can disrupt the “constitutional division of power between federal and state governments,” Dinh, *supra* note 204, at 2092, and permit courts to engage in “under the table constitutional lawmaking,” that tilts the field away from preemption, even when preemption is warranted, Verchick & Mendelson, *supra* note 17, at 23 (quoting William N. Eskridge & Philip P. Frickey, *Quasi-Constitutional Law: Clear Statement Rules as Constitutional Lawmaking*, 45 VAND. L. REV. 593, 635 (1992)).

208. Christopher H. Schroeder, *Supreme Court Preemption Doctrine, in PREEMPTION CHOICE: THE THEORY, LAW, AND REALITY OF FEDERALISM’S CORE QUESTION*, *supra* note 17, at 119, 141.

209. Sharkey, *supra* note 82, at 248.

210. See Sharkey, *supra* note 205, at 439; Hills, *supra* note 138, at 60 (stating that the Court has “frequently honored” the presumption by “abandoning it, finding an intent to preempt even without anything remotely like ‘clear and manifest’ evidence of such intent”).

statements about preemption.²¹¹ Gillian Metzger highlights how administrative law operates as a check on agency capture, politicization, and self-aggrandizement,²¹² while simultaneously giving states opportunities for notice and participation when their interests are at stake. These agency-first approaches would arguably minimize judicial interference with congressional prerogatives, allow regulatory experts to assess the impact of federal programs on the states, and give agencies incentives to consider state interests.

Thus, the main debate is whether the courts should push Congress or agencies to better consider federalism.²¹³ If courts vigorously enforced the presumption against preemption, agencies would not be able to preempt without express congressional permission. As a result, the President's role in preemption decisions would diminish, although he might be spurred to sponsor, influence, and veto proposed legislation in-line with his preemption goals. The presumption against preemption would limit the benefits that come from a President's national perspective, but would protect states from unilateral decision-making.²¹⁴ This is an argument in favor of the presumption against preemption that scholars have overlooked.

By contrast, if the courts used administrative law to police agency factual and policy decisions, the President could maintain a central role in preemption, which has pluses and minuses depending on the model of presidential oversight. Courts would have to decide how presidential involvement impacts *Chevron* deference (for review of agency statutory interpretation) and hard look review (for review of agency policy decisions). On the one hand, presidential involvement might suggest greater

211. Sharkey, *supra* note 205, at 442.

212. Metzger, *supra* note 180, at 2083.

213. A third approach would put courts more solidly in the driver's seat in resolving federalism problems. Thomas Merrill advocates that courts should develop "a substantive conception of those areas of regulation in which uniform rules of federal law should prevail and those areas in which diverse state standards and approaches should be allowed to flourish." Thomas W. Merrill, *Preemption in Environmental Law: Formalism, Federalism Theory, and Default Rules*, in *FEDERAL PREEMPTION: STATES' POWERS, NATIONAL INTERESTS*, *supra* note 14, at 166–167. Thus, Merrill has attempted to develop a taxonomy of default rules that apply to different categories of cases when Congress is silent or ambiguous, based on experience with how "federalism values have played out in the past in particular areas." *Id.* at 169. This has been criticized as unrealistic as a "Herculean task" for the judiciary. Hills, *supra* note 138, at 6.

214. The presumption against preemption (Congress must decide) bumps up against *Chevron* deference (defer to agency decisions), which is a tension the Supreme Court has not resolved. See Scott Keller, *How Courts Can Protect State Autonomy from Federal Administrative Encroachment*, 82 S. CAL. L. REV. 45, 76 (2008).

democratic accountability; on the other hand, it heightens the risk that an agency is acting for purely political motives. Professor Katherine Watts urges courts to openly acknowledge the politics inherent in agency decision-making, and to separate “pure partisanship or raw politics” from situations “where the political factors seek to implement policy considerations or value judgments tied in some sense to the statutory scheme being implemented.”²¹⁵ This line is blurry. However, charting it would allow courts to assess preemption without pretending that presidential politics are not part of the calculus, while simultaneously restricting overly political judgments. Even better, if the President enforced the federalism executive order through OIRA oversight, he would enhance the courts’ ability to conduct preemption hard look review because rulemaking records would contain an agency’s analysis of how federal regulations impact state law, the extent of consultation with state officials, and the benefits and costs of alternative strategies.

Bringing presidential involvement into the sunshine would also enhance political accountability due to “[t]he Presidency’s unitary power structure, its visibility, and its ‘personality’ [which] render the office peculiarly apt to exercise power in ways that the public can identify and evaluate.”²¹⁶ Presidents can also offer a broader view than agencies see from their specialized perches. Further, if presidential preemption was pushed underground, an administration dedicated to secrecy could still exercise its political muscle behind closed doors. Agencies could act as fronts for White House decisions and be awarded *Chevron* deference for their stealth. So, if presidents are going to be involved in preemption, it should be transparent. Yet transparency alone is not enough. From a state perspective, too much presidential control could limit the benefits of regulatory expertise that agencies provide, raise concerns about presidential “capture” by powerful interest groups, and limit opportunities for state input because the President is far less accessible than agency staff or congresspersons. Accordingly, the challenge for the judiciary is to harness the desirable aspects of presidential involvement in preemption decision-making, while restraining its abuses.

215. Kathryn A. Watts, *Proposing a Place for Politics in Arbitrary and Capricious Review*, 119 YALE L.J. 2, 56 (2009).

216. Kagan, *supra* note 28, at 2332.

D. WHO DECIDES?

As this Part demonstrates, each institutional actor has differing incentives and attributes when it comes to protecting federalism. Although there are many theoretical assumptions about which actor best preserves federalism, the reality is that all of them play a role in making federalism decisions. Ideally, Congress would make all preemption decisions; it is the institutional actor charged with lawmaking, and its processes are transparent and allow for public participation. However, the reality is that Congress does not, and sometimes cannot not, make *ex ante* preemption determinations. Thus, many preemption decisions get left to agencies under the President's supervision. Under the Bush Administration, the White House pushed a uniform policy of preemption and appears to have directed agencies to preempt state laws and regulations, even in situations where the outcome might otherwise have been different.²¹⁷ The President's role in preemption has not been an issue in preemption litigation. However, courts might see two sides to presidential involvement. Presidential control over preemption can bring democratic accountability and better coordination to agency decisions. At the same time, presidential meddling might undermine the reasoned explanation that hard look review demands of agencies by substituting politics for reason. In the end, the type of presidential involvement is more important than the fact of his involvement. As the next Part argues, the Obama-managerial approach appears more likely to foster federalism than the Bush-unitary approach.

III. THE PRESIDENT AND PREEMPTION

Although all three branches of federal government have a role in maintaining federalism, the President has several unique attributes that could be harnessed to promote state autonomy. As overseer of the entire federal bureaucracy, he can coordinate programs across agencies, reduce overlap and waste, centralize review and oversight, and adapt quickly to changes in the regulatory landscape. Although presidential incentives vary, the President has the power to make federalism considerations a

217. See STAFF OF H.R. COMM. ON OVERSIGHT AND GOV'T REFORM, 110TH CONG., *FDA CAREER STAFF OBJECTED TO AGENCY PREEMPTION POLICIES* ii (Comm. Print 2008) ("At least one document suggests that the White House played a significant role in the preemption provisions and pressured the agency to reject the concerns of career experts.").

priority across the executive branch, if he so wishes. The question remains, however, as to how he should exercise his power to effect federal-state relations. Should the President be a decider or a manager?²¹⁸

This question gets to the controversy over directory authority, i.e., whether the President has the power to direct agency outcomes, or whether his role involves management of the executive branch. Article II of the Constitution vests executive power in the President, but it only loosely describes the scope and extent of that power in the domestic sphere.²¹⁹ It gives the President the authority to appoint “officers” of the United States and to “require the opinion, in writing” of those officers.²²⁰ Beyond those specifications, Article II commands the President to “take care that the laws be faithfully executed.”²²¹ The history surrounding the take care clause sheds little light on this language, probably because the Framers, themselves, disagreed over the proper scope of executive power.²²² For its part, the Supreme Court has given varying and irreconcilable support to both views of the Presidency, without resolving the issue, and, thus, directory authority remains an open question.

Under President Bush, the White House directed specific outcomes in service of a pro-business agenda that advanced preemption across federal agencies. The strategy was effective and entirely consistent with the unitary executive theory that defined the Bush Presidency. By contrast, early indications are that President Obama is acting more as a manager, trying to enhance federal-state relations by making agencies do a better job of consulting and coordinating with the states. These are competing models of presidential administration with differing consequences for preemption.

218. Cary Coglianese states that is a dichotomy without a difference, because “one person’s ‘oversight’ will be another person’s ‘decision;’” moreover, the extent of presidential involvement is generally unknown to the public (or courts), and can always be covered by agency administrators. Cary Coglianese, *Presidential Control of Administrative Agencies, A Debate Over Law or Politics?*, 12 U. PA. J. CONST. L. 637, 646 (2010).

219. U.S. CONST. art. II, § 1 (“The executive power shall be vested in a President of the United States of America.”).

220. *Id.* § 2.

221. *Id.* § 3.

222. See Martin S. Flaherty, *The Most Dangerous Branch*, 105 YALE L.J. 1725, 1755 (1996) (describing the narrative of the founding as revealing “at the most general level people groping . . . toward a workable conception of government from which only broad purposes can safely be inferred.”).

Under unitary executive theory, the President is at the apex of the executive branch; agency officials serve at his pleasure; and, thus, the President can direct how agencies exercise their delegated powers.²²³ As Professors Calabresi and Yoo explain, “[a]ll subordinate nonlegislative and nonjudicial officials exercise executive power . . . only by implicit or explicit delegation from the president.”²²⁴ In this view, agencies are delegates of the President, rather than of Congress, “irrespective of Congress’s choice of delegate.”²²⁵ Unitarians point to the Framers’ intent “to construct a unitary Executive since they felt it was conducive to energy, dispatch, and responsibility.”²²⁶ In light of the growth of the modern administrative state, the unitary executive fosters accountability and efficiency because only the President is situated to oversee the vast and complex federal bureaucracy.²²⁷

In contrast, non-unitarians view agencies as the delegates of Congress, rather than instruments of the Executive. They take a different view of history, in which the Framers “believed that the President would be a managerial agent for the legislature rather than an independent source of domestic policy.”²²⁸ Further, concentration of power within the Executive runs counter to the Framers’ goal of avoiding tyranny by balancing and dispersing power among the branches.²²⁹ The Framers wanted to make “the machinery of government somewhat cumbersome, thus ensuring against the hegemony of one branch or person.”²³⁰ In the managerial view, accountability arises from multiple institutions

223. See David J. Barron, *From Takeover to Merger: Reforming Administrative Law in an Age of Agency Politicization*, 76 GEO. WASH. L. REV. 1095, 1107–08 (2008) (describing unitary executive theory and its relationship to the administrative state).

224. STEVEN G. CALABRESI & CHRISTOPHER S. YOO, *THE UNITARY EXECUTIVE: PRESIDENTIAL POWER FROM WASHINGTON TO BUSH 4* (2008).

225. Harold J. Krent, *From a Unitary to a Unilateral Presidency*, 88 B.U. L. REV. 523, 525 (2008) (criticizing unitary executive theory).

226. Steven G. Calabresi & Saikrishna B. Prakash, *The President’s Power to Execute the Laws*, 104 YALE L.J. 541, 639 (1994).

227. See Lawrence Lessig & Cass R. Sunstein, *The President and the Administration*, 94 COLUM. L. REV. 1, 105–06 (1994); Kagan, *supra* note 28, at 2252. Cynthia Farina explains the appeal of unitary executive theory: it “responds powerfully to the uncertainty and overwhelming complexity of modern life.” Cynthia Farina, *False Comfort and Impossible Promises: Uncertainty, Information Overload, and the Unitary Executive*, 12 U. PA. J. CONST. L. 357, 372 (2010).

228. Morton Rosenberg, *Beyond the Limits of Executive Power: Presidential Control of Agency Rulemaking Under Executive Order 12,291*, 80 MICH. L. REV. 193, 202–03 (1981).

229. See Flaherty, *supra* note 222, at 1741.

230. Abner Greene, *Checks and Balances in an Era of Presidential Lawmaking*, 61 U. CHI. L. REV. 123, 177 (1994).

and inputs, rather than from a unilateral actor, and the President's efficiency is best harnessed when he improves and refines regulatory processes.

President Bush conducted his Presidency consistently with the unitary executive theory, and the preemption issue is only one of many examples of fidelity to that theory. Yet it is questionable whether the unitary executive furthered the values of accountability and efficiency when it comes to preemption. Unitary executive theorists argue that presidential decision-making advances accountability because the President has a broad, national perspective, one not shared by bureaucrats who operate within the narrow zone of their expertise.²³¹ Moreover, most bureaucrats are unelected and hidden from view, while the President is directly accountable to the entire electorate.²³² Thus, the President is in the best position to consider how policy decisions will play out on a national stage. And, if citizens are unhappy with his decisions, they can punish or reward him at the ballot box.

However, it is questionable whether the President is politically accountable for agency decisions because most governmental decisions are not on the radar screen of voters.²³³ Moreover, it can be hard for voters to trace the source of administrative decision-making, particularly when the White House distances itself from bureaucrats' actions. Consider the preemption decisions of the Bush era. Due to a lack of transparency, the President was not publicly connected with the "preemption war." Even though some of his political appointees were the public faces of preemption, it is unlikely that voters would punish the President at the ballot box for the complex controversies over FDA device labeling or CPSC mattress standards. As Heidi Kitrosser has pointed out, a unitary executive "lends itself to a President who can publicly distance himself from unpopular actions of the administrative state, but who has substantial power secretly to influence the same."²³⁴ The most important factors for voters in the 2000 and 2004 presidential elections were party affiliation, foreign policy, and

231. See Lloyd N. Cutler & David R. Johnson, *Regulation and the Political Process*, 84 *YALE L.J.* 1395, 1405–06 (1975) (noting that regulation often involves political choices, rather than solely technical decisions).

232. See Heidi Kitrosser, *The Accountable Executive*, 93 *MINN. L. REV.* 1741, 1742 (2009) (summarizing unitary executive theory).

233. See Farina, *supra* note 227, at 377–84 (explaining why the President does not represent voter preferences).

234. Kitrosser, *supra* note 232, at 1765.

economic priorities.²³⁵ Even the most ardent supporters or vehement opponents of the President's preemption policies—those who single-handedly voted on a state's rights platform, alone—probably could not have impacted these elections.

In pushing preemption, President Bush did not purport to mirror public preferences, but, rather, was advancing the interests of an important group of his constituents. Tort reform was an important goal to President Bush, who was supported by business throughout his campaigns and presidency, and who had a business background, himself. He believed that tort litigation was imposing undue costs on society, and that preemption was a way to rein in state tort lawsuits. Just as agencies are subject to interest group capture, the President is, as well. Here, the President did not act as a check on that capture, but, instead, reinforced it. Moreover, to the degree that state tort lawsuits and regulatory schemes serve as an independent check on agency capture, the President's preemption policy removed that restraint, as well. Once the President made the preemption call, state opportunities for notice and comment before agencies and courts were meaningless. Indeed, in many instances, agencies preempted state law by preamble, thus stripping the public of notice and comment opportunities, altogether. The unitary executive thus can undermine accountability by "replac[ing] multiple identifiable avenues for public input and information access with a single, intrinsically opaque and relatively inaccessible formal decision maker."²³⁶

By contrast, President Obama's preemption memorandum appears to be consistent with a managerial approach to the executive branch, in which accountability arises from transparent decision-making, policy dialogue and opportunities for input, and "flexibility in the value structure of bureaucratic decision-making."²³⁷ Agency decision-making generally conforms to this vision of accountability because agencies study external scientific and technical research, conduct their own research, are subject to sunshine laws, provide public notice of their proposed decisions, accept public comment on proposed rules, hold stakeholder and regional meetings, and have regular direct

235. See D. Sunshine Hillygus & Todd G. Shields, *Moral Issues and Voter Decision-Making in the 2004 Presidential Election*, 38 PS: POL. SCI. & POL. 201, 207 (2005).

236. Kitrosser, *supra* note 232, at 1743.

237. PETER M. SHANE, *MADISON'S NIGHTMARE: HOW EXECUTIVE POWER THREATENS AMERICAN DEMOCRACY* 166 (2009).

interaction with the public.²³⁸ Agencies “gather more public input and receive more public scrutiny” than the President, and are also subject to judicial review.²³⁹ Despite these mechanisms, agencies have been insufficiently attentive to state interests and clearly need a push from an outside institutional actor. The President is ideally suited to give that push.

In this regard, the efficiency and energy that attach to the Office of the President make him an ideal player for improving preemption decision-making. As unitary executive theorists point out, the President is uniquely situated to coordinate efforts across the federal bureaucracy.²⁴⁰ In *The Federalist*, Alexander Hamilton articulated this idea: “Energy in the executive is a leading character in the definition of good government.”²⁴¹ A modern perspective links presidential control with “a number of so-called technocratic values: cost-effectiveness, consistency, and rational priority-setting.”²⁴² Thus, the notion of efficiency captures the benefits attached to a single, national leader—particularly as a way to counter the sprawl of the administrative state.

President Bush’s preemption policies were arguably “efficient” in that they were coordinated quickly across the federal bureaucracy. However, the Bush model of efficiency has its costs. The attribute of efficiency is particularly compelling in foreign affairs, where the United States needs to speak with a single voice, and in times of emergency, where executive delay can have tragic costs.²⁴³ However, these special circumstances do not arise in connection with most administrative decisions. Efficiency needs to be balanced with other constitutional values, such as democratic participation and non-arbitrariness. The managerial model accommodates these values by making agencies do a better job of carrying out statutory commands, while also giving states a voice in decisions that impact their regulatory prerogatives.

238. See Bressman & Vandenberg, *supra* note 201, at 80–83.

239. Bressman & Vandenberg, *supra* note 201, at 83.

240. See Calabresi, *supra* note 198, at 37–38.

241. THE FEDERALIST NO. 70, at 471 (Alexander Hamilton) (Jacob E. Cooke ed., 1961).

242. Kagan, *supra* note 28, at 2339.

243. See Neal Kumar Katyal, *Internal Separation of Powers: Checking Today’s Most Dangerous Branch From Within*, 115 YALE L.J. 2314, 2326 (2006) (noting the need for executive dispatch in certain circumstances, but warning that this “should not preclude ex post examination of executive conduct by agencies sharing jurisdiction”).

The managerial view animates the federalism executive orders and President Obama's federalism memorandum. These presidential directives do not mandate any particular substantive outcome regarding preemption; rather, they are aimed at making agencies more attuned to state interests. They are intended to supervise, rather than supplant.²⁴⁴ A managerial approach is ideally suited for preemption issues because it encourages transparency and deliberation at the agency level. And the more a President becomes publicly linked with a commitment to federalism values, the more stakeholders can hold him accountable if agencies fail to live up to their end of the bargain. From the states' perspective, this managerial approach gives them opportunities to provide input to federal agencies, and to haggle and negotiate with agencies as part of the federal-state regulatory dance.

Commentators have come up with ideas to strengthen federalism review even further. With the goal of promoting state level regulation to foster economic growth, John McGinnis would limit federal regulation to situations when "interstate externalities or spillovers suggest that federal regulation is necessary," narrow the clear statement requirements to "those areas in which preemption would undercut jurisdictional competition," and provide judicial review to ensure that agencies comply with the executive order.²⁴⁵

With the goal of protecting public health and safety, another group of scholars urge the President to revise the executive order to recognize that "federal and state governments play a cooperative role in setting public policy," rather than defining federalism as a limit on governmental power.²⁴⁶ They also recommend a presumption against ceiling preemption, a requirement that agencies differentiate between state common law and state positive law, and discouragement of implied preemption.²⁴⁷ To achieve these objectives, they suggest greater

244. See Krent, *supra* note 225, at 547 (describing the managerial view in previous presidential administrations).

245. McGinnis, *supra* note 153, at 944; see also McGinnis, *supra* note 153, at 944–52 (explaining how his account would limit federal regulation).

246. WILLIAM BUZBEE ET AL., CENTER FOR PROGRESSIVE REFORM, THE TRUTH ABOUT TORTS: RETHINKING REGULATORY PREEMPTION AND ITS IMPACT ON PUBLIC HEALTH 15 (2009), <http://progressivereform.org/articles/RethinkingPreemption902.pdf>.

247. *Id.* at 16–17.

scrutiny from OMB; currently, agencies simply certify their compliance with the executive order.²⁴⁸

These differing goals and suggestions reveal that even a managerial approach to executive branch administration can embody value judgments about federalism and the proper role of government, with substantive policy goals in mind. No form of executive administration can be value-neutral, and we do not expect our President to be impartial in executing the law. After all, he was elected for articulating and representing a particular agenda. Presidents are allowed to put their stamp on agency output as they “take care” to ensure that the “laws are faithfully executed.” Overseeing the executive branch, however, is different than deciding unilaterally how to apportion federal and state power. Both sets of federalism review suggestions above leave room for agency deliberation and state input, even if they are animated by differing objectives. Dialogue and debate about the proper scope of federalism are, themselves, part of the federal-state balance, and the President is an important figure in ensuring this debate continues.

CONCLUSION

During the Bush Administration, the White House orchestrated an effective tort reform strategy to protect industry by directing federal agencies to preempt state law in areas such as public health, consumer protection, and the environment. Preemption has advantages and disadvantages, usually depending on where one stands. For corporations, it lessens potential liability and provides uniform compliance standards. As a federalism matter, however, it diminishes the sovereignty of the states and limits their ability to act as policymakers. On an individual level, it can strip injured citizens of the ability to seek compensation for negligent industry practices.

A decision to preempt requires balancing a complex calculus of factors, including scrutiny of the statutory scheme at issue, the technical and/or scientific aspects of the regulatory program, the consequences for federalism, and the substantive goals of stakeholders. The Bush Administration “preemption war,” however, appeared to short-circuit this analysis. Shortly after taking office, President Obama reversed course on preemption, instructing agencies to comply with Executive

248. *Id.* at 18–20.

Order 13, 132, which requires agencies to respect the policymaking prerogatives of the states by limiting preemption, unless there is clear evidence that Congress intends to preempt state law. This does not mean that agencies will never preempt state law; rather, they must conduct a federalism analysis and seek feedback from the states in making preemption decisions.

The contrast between the Bush and Obama Administrations with regard to preemption tracks two differing models of the Presidency. The Bush approach is modeled on unitary executive theory, in which the President is empowered to direct agencies to achieve the President's substantive goals. This approach can be efficient, but because it is unilateral, it cuts the states and other stakeholders out of the decision-making process. By contrast, President Obama is taking a managerial approach to agency oversight. He is steering the agencies to do a better job in considering federalism, but he is not overtly mandating any particular outcome. The managerial model respects agency expertise, allows for state input into the regulatory process, encourages deliberation, and provides greater transparency to the work of federal agencies. For these reasons, it provides more robust protection for federalism values than a unitary executive model. Time will tell whether these benefits of the managerial approach to preemption are realized, but it is a promising start.