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Improving Agencies' Preemption Expertise with *Chevmore* Codification

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IMPROVING AGENCIES' PREEMPTION EXPERTISE WITH *CHEVMORE* CODIFICATION

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INTRODUCTION

After nearly thirty years, the judicially crafted *Chevron*[1] and *Skidmore*[2] judicial-review doctrines have found new life as exotic, yet familiar, legislative tools. When *Chevron* deference applies, courts employ two steps: they consider whether the statutory provision at issue is ambiguous, and, if so, they defer to an administering agency's reasonable interpretation.[3] *Skidmore* deference, in contrast, is a less deferential regime in which courts assume interpretative primacy over statutory ambiguities but defer to agency action based on four factors—the agency's thoroughness, reasoning, consistency, and overall persuasiveness.[4] In the Dodd-Frank Wall Street Reform and Consumer Protection Act,[5] Congress directed courts to review the Office of the Comptroller of the Currency's (OCC) decisions to preempt state law under *Skidmore*'s four criteria.[6] It also provided a savings clause that permitted *Chevron* deference for other OCC determinations.[7] This was the first time that Congress codified either *Skidmore* or *Chevron*. By doing so, Congress itself used the judicially choreographed *Chevron* two-step and *Skidmore* quadrille—to which I refer collectively as *Chevmore*[8]—to inform ongoing debates in administrative law.[9]

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* Assistant Professor, University of Georgia School of Law. I appreciate helpful comments from Mehrsa Baradaran, Bo Rutledge, Catherine Sharkey, Chris Walker, Art Wilmarth, and the participants at the University of Georgia School of Law's junior faculty workshop. I also very much appreciate suggestions from the symposium participants in Chevron *at 30: Looking Back and Looking Forward* at Fordham University School of Law on March 7, 2014.

1. Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837 (1984).
2. Skidmore v. Swift & Co., 323 U.S. 134 (1944).
3. *See Chevron*, 467 U.S. at 844.
4. *See Skidmore*, 323 U.S. at 140.
5. Pub. L. No. 11-203, 124 Stat. 1376 (2010) (codified as amended in scattered sections of 7, 12, 15, 18, 22, 31, 42 U.S.C.).
6. *See infra* Part II.B.1.
7. 12 U.S.C. § 25b(b)(5)(B) (2012).
8. I use the portmanteau *Chevmore* to distinguish these two judicially crafted judicial-review doctrines from other judicial-review standards, such as those in the Administrative Procedure Act (APA), 5 U.S.C. § 706 (2012).
9. In a forthcoming article, *Codifying* Chevmore, 89 N.Y.U. L. REV. (forthcoming 2015), I consider the broader implications of, and other uses for, *Chevmore* codification.

In this Essay for the *Fordham Law Review* symposium Chevron *at 30: Looking Back and Looking Forward*, I focus on one way in which *Chevmore* codification can improve administrative law: encouraging agencies to improve their expertise in preempting state law (or "agency preemption").[10] To do so, I present a case study of Congress's response to the OCC's controversial preemption of state consumer-protection law. I begin in Part I by focusing on administrative expertise's role in *Chevmore* deference generally[11] and in agency preemption specifically.[12] With expertise's doctrinal and normative place in mind, I explain in Part II.A that, because of the OCC's conflicts of interest and purported status as a "captured" agency, the agency's broad preemption rulings were most likely not the product of agency expertise. I continue in Part II.B to argue that, with Dodd-Frank's substantive and procedural preemption provisions (including its codified *Skidmore* provision), Congress did more than establish its disapproval of the OCC's broad preemption rulings. Instead, it confronted the conflict and capture concerns by encouraging the OCC to develop and use its preemption expertise. It did so by codifying the appropriate preemption standard, establishing various procedural requirements for the OCC to support its decisions with data, and limiting judicial deference (through *Skidmore* codification) to the OCC's preemption decisions.

Despite Congress's largely successful attempt to encourage agency expertise, I briefly conclude in Part II.C by considering how Congress can further improve agencies' expertise as to preemption specifically and other matters generally. Congress can lead agencies to consider how their technical and administrative expertise interacts with federalism values by requiring the agencies to consider those values and consult with affected parties. Congress can also use *Chevmore* codification to improve agencies' use of technical and administrative expertise both in and outside of the preemption context by allowing agencies to exchange *Skidmore* deference for *Chevron* deference when they develop and apply their expertise to certain matters.

I. ADMINISTRATIVE EXPERTISE IN JUDICIAL REVIEW

Before discussing the OCC's preemption history and *Skidmore*'s codification, this Essay considers how expertise does and should inform judicial review generally and agency preemption specifically.

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10. For an overview of the symposium, see Peter M. Shane & Christopher J. Walker, *Foreword:* Chevron *at 30: Looking Back and Looking Forward*, 83 FORDHAM L. REV. 475 (2014).

11. *See, e.g.*, Stephen Breyer, *Judicial Review of Questions of Law and Policy*, 38 ADMIN. L. REV. 363, 368 (1986); Evan J. Criddle, Chevron*'s Consensus*, 88 B.U. L. REV. 1271, 1310–11 (2008); Ronald J. Krotoszynski, Jr., *Why Deference?: Implied Delegations, Agency Expertise, and the Misplaced Legacy of* Skidmore, 54 ADMIN. L. REV. 735, 737 (2002).

12. *See, e.g.*, Nina A. Mendelson, Chevron *and Preemption*, 102 MICH. L. REV. 737 (2004).

A. Expertise and Chevmore

Expertise is and should be a necessary criterion for all judicial deference to agency action, including for *Chevron* deference. From a descriptive standpoint, expertise matters under current doctrine. The U.S. Supreme Court, although often focusing on several values in determining whether to defer to agency action,[13] consistently invokes agency expertise as a guiding value. *Skidmore* deference, for instance, is grounded primarily on expertise, while *Chevron* deference relies upon expertise to inform whether Congress intended an agency to receive interpretive primacy. And from a normative perspective, expertise should inform judicial review because it justifies the administrative state.

Skidmore deference (or the lack thereof) focuses on administrative expertise. In *Skidmore*, the Court reviewed whether certain employees were entitled to overtime pay and related damages under the Fair Labor Standards Act[14] (FLSA).[15] The Labor Department had provided its interpretation of the statute that required a "flexible" analysis to determine when overtime was due.[16] The Court held that an agency's interpretation is entitled to deference, even if not controlling on the courts, if it represents a "body of experience and informed judgment."[17] Deference depends upon the agency's use of expertise, as evidenced by "the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade."[18] Indeed, the Court in *United States v. Mead*[19] held that the music for a *Skidmore* quadrille begins when "the regulatory scheme is highly detailed . . . [and the agency] can bring the benefit of specialized experience to bear."[20] In short, as leading scholars have noted, the existence and use of agency expertise are central to *Skidmore* deference.[21]

Expertise is likewise germane to *Chevron* deference, even if it only informs whether Congress wants an agency to assume interpretive primacy over ambiguous statutory provisions that the agency administers. The Court in *Chevron* relied primarily upon a delegation theory—namely, that

13. *See generally* Criddle, *supra* note 11.
14. 29 U.S.C. §§ 201–219 (2012).
15. Skidmore v. Swift & Co., 323 U.S. 134, 135–36 (1944).
16. *Id.* at 138.
17. *Id.* at 140.
18. *Id.*
19. 533 U.S. 218 (2001).
20. *Id.* at 235.
21. *See* A.T. Massey Coal Co. v. Holland, 472 F.3d 148, 169 (4th Cir. 2006) (denying an agency *Skidmore* deference because the agency had "developed virtually no experience that might be considered a 'body of experience and informed judgment'" (quoting *Skidmore*, 323 U.S. at 140)); Kristin E. Hickman & Matthew D. Krueger, *In Search of the Modern* Skidmore *Standard*, 107 COLUM. L. REV. 1235, 1293 (2007) (noting "comparative agency expertise and the potential for arbitrariness in the exercise of that expertise" are central to *Skidmore*); Thomas W. Merrill & Kristin E. Hickman, Chevron*'s Domain*, 89 GEO. L.J. 833, 855 (2001) ("Under *Skidmore*, however, it does not matter whether Congress has delegated authority to an agency to administer the statute as long as the agency has relevant expertise.").

Congress delegated power to the Environmental Protection Agency (EPA) to create binding interpretations of ambiguous statutory terms—in deferring to the EPA's interpretation of an ambiguous term within the Clean Air Act.[22] Determining whether Congress delegated authority to the agency requires courts to consider congressional intent.[23] The *Chevron* Court concluded that Congress could reasonably think that agencies with their "great expertise" are in a better position to fill statutory gaps than courts.[24] Expertise, accordingly, informed whether Congress intended to delegate interpretive primacy to an agency.[25]

Almost two decades later, the Court in *United States v. Mead* suggested that expertise was not germane to *Chevron* deference.[26] There, the Court determined that *Chevron* should not apply to certain Customs Service ruling letters because Congress had not intended to delegate interpretive primacy to the agency when it exercised its authority through informal means that lacked the force of law.[27] In focusing on the formality of the agency action, the Court stated that "generally . . . Congress contemplates administrative action with the effect of law when it provides for a relatively formal administrative procedure," and pointed to notice-and-comment rulemaking and formal adjudication as generally sufficient.[28] The Court relegated its discussion of expertise to its consideration of *Skidmore* deference.[29]

Notwithstanding *Mead*'s suggestion that expertise was irrelevant to *Chevron* deference,[30] Professor Evan Criddle contends that the Court has continued to consider expertise after *Mead*.[31] For instance, the Court relied upon the Attorney General's lack of expertise in medical ethics when refusing to grant him *Chevron* deference for an interpretive rule concerning euthanasia.[32] The official's lack of relevant expertise undermined the argument that Congress had delegated lawmaking power to him.[33]

22. Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 843–45 (1984); *see* 42 U.S.C. §§ 7401–7671 (2012).

23. *See* Elizabeth Garrett, *Legislating* Chevron, 101 MICH. L. REV. 2637, 2646 (2003).

24. *Chevron*, 467 U.S. at 865.

25. *Id.* at 865–66; John F. Duffy, *Administrative Common Law in Judicial Review*, 77 TEX. L. REV. 113, 191 (1998) ("[T]he Court ultimately supported its deference principle [in *Chevron*] with two intertwined policy reasons—agency expertise and democratic accountability . . . .").

26. United States v. Mead, 533 U.S. 218 (2001).

27. *See id.* at 231–33; *see also* Criddle, *supra* note 11, at 1274 ("[T]he Supreme Court . . . expressly ground[ed] *Chevron* in the congressional delegation theory.").

28. *Mead*, 533 U.S. at 230–31.

29. *Id.* at 234–35.

30. *See* Criddle, *supra* note 11, at 1301–02 (discussing *Mead*'s impact on "consensus view"); Garrett, *supra* note 23, at 2637 (referring to delegation theory as "consensus view" of *Chevron*).

31. *See generally* Criddle, *supra* note 11. *But see* Einer Elhauge, *Preference-Estimating Statutory Default Rules*, 102 COLUM. L. REV. 2027, 2137 (2002) ("*Chevron* deference does not depend on any showing of agency expertise . . . .").

32. Gonzales v. Oregon, 546 U.S. 243, 266–67 (2006).

33. Moreover, the *Gonzales* Court refused to defer to the Attorney General's interpretation of a regulation per *Auer v. Robbins*, 519 U.S. 452 (1997). *See Gonzales*, 546 U.S. at 256–57. The regulation merely parroted the statutory language, "instead of using [the official or agency's] expertise and experience to formulate a regulation." *Id.* at 257. The

Conversely, in awarding *Chevron* deference to the Labor Department in *Long Island Care at Home, Ltd. v. Coke*,[34] the Court relied upon the agency's expertise in deciding that Congress had delegated lawmaking authority to the Department to interpret the FLSA's overtime and minimum-wage provisions.[35] Indeed, after their comprehensive empirical study of the Supreme Court's use of deference doctrines since *Chevron*, William Eskridge and Lauren Baer concluded that the application of specialized agency expertise may be the "most significant variable" in influencing whether the Supreme Court defers to agency action.[36]

Considering expertise for both *Skidmore* and *Chevron* makes sense. Agencies' *raison d'être* is to provide a font of expertise to advise Congress and to administer a complex and often technical statutory scheme in an ever-growing federal bureaucracy.[37] Agency expertise can take different (yet overlapping) forms. Agencies may develop "administrative expertise" by having repeated experience with regulated and benefited parties in administering a statutory scheme and regularly confronting (and learning from) new issues that arise.[38] They can also have "technical expertise" concerning the jargon and nature of the particular regulated industry, including the scientific or economic considerations that inform and impact how a regulated industry operates.[39] Agencies, too, may acquire

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Court's reliance on expertise is meaningful for both *Auer* and *Chevron* deference—despite the former doctrine's concern with deference to agency interpretations of ambiguous regulations, as opposed to statutes—because "[i]n practice, *Auer* deference is *Chevron* deference applied to regulations rather than statutes." Decker v. Nw. Envtl. Def. Ctr., 133 S. Ct. 1326, 1339 (2013) (Scalia, J., concurring and dissenting in part).

34. 551 U.S. 158, 165, 167–68 (2007).

35. *Id.* at 165; *see also* Lisa Schultz Bressman, *Reclaiming the Legal Fiction of Congressional Delegation*, 97 VA. L. REV. 2009, 2015–18 (2011) (noting that the Court in Martin v. OSHRC, 499 U.S. 144 (1991), considered the comparative expertise of two agencies in deciding to which agency Congress delegated interpretive authority for agency regulations); Garrett, *supra* note 23, at 2649 (arguing expertise should be germane to delegation).

36. William N. Eskridge & Lauren E. Baer, *The Continuum of Deference: Supreme Court Treatment of Agency Statutory Interpretations from* Chevron *to* Hamdan, 96 GEO. L.J. 1083, 1180 (2008); *see also* Ronald M. Levin, *Scope-of-Review Doctrine Restated: An Administrative Law Section Report*, 38 ADMIN. L. REV. 239, 270 (1986) (noting that expertise is a "significant variable" in determining judicial deference).

37. *See* John F. Manning, *Constitutional Structure and Judicial Deference to Agency Interpretations of Agency Rules*, 96 COLUM. L. REV. 612, 681 (1996) ("Congress's decision to commit lawmaking power to agencies vests substantial regulatory authority in specialized bodies with knowledge, expertise, and experience that generalist courts lack. Agencies may therefore have insights into regulatory history, context, or purpose that may not be readily apparent to even the most seasoned federal judge."); Jonathan R. Siegel, *The REINS Act and the Struggle to Control Agency Rulemaking*, 16 N.Y.U. J. LEGIS. & PUB. POL'Y 131, 174 (2013) ("[O]ne need only recall the reasons why Congress creates administrative agencies . . . in the first place: Congress lacks the time and expertise to make every decision itself . . . .").

38. *See* Breyer, *supra* note 11, at 368 ("At a minimum, the agency staff understands the sorts of interpretations needed to 'make the statute work.'"); Criddle, *supra* note 11, at 1286–87.

39. *See* Emily Hammond Meazell, *Super Deference, the Science Obsession, and Judicial Review As Transaction of Agency Science*, 109 MICH. L. REV. 733, 756 (2011); Edward L. Rubin, *Uniformity, Regulation, and the Federalization of State Law: Some Lessons from the*

"legislative expertise"—i.e., insight into legislative history and congressional intent—because they often have a hand in advising Congress in drafting and revising legislation.[40] Expertise, as central to agencies' very existence, rightly influences judicial deference and the nature or extent of congressional delegation.[41]

To be sure, expertise should not assume talismanic dimension, where its invocation provides agencies carte blanche. Even when technical in nature, expertise is not always an objective matter.[42] Agency decisions, masquerading as expertise,[43] can arise from political considerations,[44] faulty assumptions, or improper biases.[45] These failings will likely never be cured because of human nature, changing agency incentives, and the varied matters that agencies must decide.

That said, expertise's perceived failings may be exaggerated by turning expertise into something that it is not. In any of its forms, expertise may not always be scientific, quantitative, or objective.[46] Instead, like lawyerly expertise, agency expertise includes the acquisition of considered (and often subjective) judgment, i.e., the ability to predict likely outcomes, recognize relevant issues and uncertainties, and reach sensible conclusions based often

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Payment System, 49 OHIO ST. L.J. 1251, 1267 (1989) (noting that merely speaking the language of industry is a key form of administrative expertise).

40. Breyer, *supra* note 11, at 368; *accord* Howe v. Smith, 452 U.S. 473, 485 (1981) ("[T]he Bureau [of Prisons]'s interpretation of the statute merits greater than normal weight because it was the Bureau that drafted the legislation and steered it through Congress with little debate."); Eskridge & Baer, *supra* note 36, at 1173.

41. These forms of agency expertise have long informed another judicial-review standard: whether agency action is "arbitrary or capricious" under the APA, 5 U.S.C. § 706(2)(A) (2012). *See* Bressman, *supra* note 35, at 2042–43 (noting that political scientists have argued that agency expertise influences congressional delegation); Krotoszynski, *supra* note 11, at 755.

42. *See, e.g.*, Cynthia R. Farina, *Statutory Interpretation and the Balance of Power in the Administrative State*, 89 COLUM. L. REV. 452, 524 (1989) ("We have gradually become disillusioned with the idea that regulatory policy dilemmas have an objectively 'correct' answer, discernible through the aggregation of enough information and the application of enough expertise.").

43. *See* Emily Hammond Meazell, *Presidential Control, Expertise, and the Deference Dilemma*, 61 DUKE L.J. 1763, 1809 (2012) ("[S]cholars have demonstrated that agencies sometimes cloak policy judgments in a shroud of science to avoid accountability and achieve more deferential judicial review.").

44. *See* Kathryn A. Watts, *Proposing a Place for Politics in Arbitrary and Capricious Review*, 119 YALE L.J. 2, 18–19 (2009) (referring to political considerations in agency decision making).

45. *See* Kent Barnett, *Resolving the ALJ Quandary*, 66 VAND. L. REV. 797, 816–27 (2013) (discussing due process and bias concerns surrounding federal administrative law judges); Eskridge & Baer, *supra* note 36, at 1173 (noting perception of agency bias affects agency's institutional advantage). Indeed, one study concerning the FTC's antitrust decisions suggests that agencies may not have more expertise than generalist federal courts. *See generally* Joshua D. Wright & Angela M. Diveley, *Do Expert Agencies Outperform Generalist Judges? Some Preliminary Evidence from the Federal Trade Commission*, 1 J. ANTITRUST ENFORCEMENT 82 (2013).

46. *See* Greater Bos. Tel. Corp. v. FCC, 444 F.2d 841, 850 (D.C. Cir. 1970) ("[A]gency matters typically involve a kind of expertise—sometimes technical in a scientific sense, sometimes more a matter of specialization in kinds of regulatory programs.").

on repeated confrontations with particular scenarios.[47] This judgment—developed, among other ways, through repeated litigation, solicitation of public comment, pilot studies, modification of prior rules,[48] and at times an "administration's views of wise policy"[49]—can and often should inform agency action.

Moreover, limiting the proper scope of agency expertise can largely mitigate expertise's shortcomings. Congress or courts can define substantive considerations to cabin the agency's discretion and harness the agency's judgment that arises from experience and knowledge, especially when an equation or experiment fails to provide a definitive answer. Congress can also provide procedural requirements—such as *Mead*'s reliance upon formalized administrative action—to improve agencies' exercise of their judgment. When these required procedures allow public participation (and, in turn, administrative responsiveness to interested parties' concerns), they help inform agencies and assist courts and agencies in ferreting out decision making that relies on something other than permissible considerations and agency expertise.[50] By doing so, substantive and procedural limitations provide Congress, as principal, ways of controlling its agency costs without sacrificing the benefits of administrative expertise.[51]

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47. *See* Sanford N. Caust-Ellenbogen, *Blank Checks: Restoring the Balance of Powers in the Post-*Chevron *Era*, 32 B.C. L. REV. 757, 774–75 (1991) ("[E]xpertise is reflected primarily in the assessment of the likely outcomes of policy alternatives."); Eskridge & Baer, *supra* note 36, at 1174 (recognizing that applying a statute to new circumstances creates uncertainties that agencies are usually "much better equipped to handle" than courts); Sidney Shapiro et al., *The Enlightenment of Administrative Law: Looking Inside the Agency for Legitimacy*, 47 WAKE FOREST L. REV. 463, 470 (2012) (recognizing the deliberative-constructive paradigm of administrative law holds that "experts are not limited to persons trained in scientific methodologies but include other professionals, particularly lawyers and public administrators, who rely on qualitative analysis to identify and justify regulatory solutions").

48. *See* Eskridge & Baer, *supra* note 36, at 1174.

49. *See* Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 865 (1984); *see also* Lisa Schultz Bressman, *Procedures As Politics in Administrative Law*, 107 COLUM. L. REV. 1749, 1765 (2007) ("[*Chevron*] recognized that politics is a permissible basis for agency policymaking."); Watts, *supra* note 44, at 8.

50. *See* Krotoszynski, *supra* note 11, at 752–53 (noting how public-participation requirements encourage the use of agency expertise and better ensure that decisions are not arbitrary); Thomas O. McGarity, *Some Thoughts on "Deossifying" the Rulemaking Process*, 41 DUKE L.J. 1385, 1444 (1992) ("[A] reasoned explanation ensures that the range of agency action is . . . supportable by facts in the record, reasonable assumptions, and sound policy considerations . . . .").

51. *See* Jody Freeman & Jim Rossi, *Agency Coordination in Shared Regulatory Space*, 125 HARV. L. REV. 1131, 1187 (2012) ("[W]henever Congress delegates authority to an agency, the delegation . . . creates a risk of drift away from the preferences of the [delegating] lawmakers . . . ."). Because political accountability and public-participation values can improve agency decision making, values aside from expertise should also be relevant to *Chevron* deference. *See* Criddle, *supra* note 11, at 1284–91; *see also* Peter L. Strauss, *One Hundred Fifty Cases per Year: Some Implications of the Supreme Court's Limited Resources for Judicial Review of Agency Action*, 87 COLUM. L. REV. 1093, 1112 (1987) (considering the values of national uniformity that *Chevron* furthers).

B. Expertise in Agency Preemption

Agency expertise should also inform the narrower issue of judicial deference to agency preemption. Without significant discussion, courts have applied both *Chevron* and *Skidmore* when reviewing agency-preemption decisions.[52] Prior to Dodd-Frank, Professor Nina Mendelson persuasively contended that *Skidmore* should apply[53] to agency preemption because agencies lack expertise in federalism matters.[54] Agencies, with their technical and administrative expertise, can usually determine how state laws affect statutory schemes that they administer.[55] And they may often use their delegated rulemaking power that has the force of law. But, aside from lacking clear guidance from Congress as to when they should preempt,[56] agencies often fail to consider political and abstract federalism values, such as those that seek to protect a state's dignity interest or its ability to serve as a policy "laboratory."[57] Agencies' failure to do so may not be surprising because they are unlikely to confront these values routinely. Yet, even when they could have considered federalism values, they often have ignored all or some of the nine federalism values that Federalism Executive Order 13,132 required or advised them to consider.[58] Applying *Skidmore* deference to agency preemption recognizes agencies' technical and administrative expertise while accounting for their lack of experience in weighing federalism values in their preemption analysis.[59]

Agencies can, however, improve their preemption expertise. Professor Catherine Sharkey has proposed an "agency-reference model" that calls for agencies (and courts during judicial review) to focus on what agencies do best: use their expertise in collecting and analyzing information, particularly as it relates to cost-benefit analysis, concerning preemption.[60] In later work, she surveyed federal agencies (including the OCC) to recommend improvements that agencies can make in their agency-

52. *Compare* Wachovia Bank v. Watters, 431 F.3d 556 (6th Cir. 2005) (applying the *Chevron* framework to the OCC's preemption decision (citing Wells Fargo Bank N.A. v. Boutris, 419 F.3d 949, 958 (9th Cir. 2005), and Wachovia Bank, N.A. v. Burke, 414 F.3d 305, 315 (2d Cir. 2005))), *with* Wyeth v. Levine, 555 U.S. 555, 576–77 (2009) (applying *Skidmore* deference to agency's preemption decision). *See also* Cuomo v. Clearing House Ass'n, L.L.C., 557 U.S. 519, 525 (2009) (applying the *Chevron* framework to the OCC's preemption of state visitorial powers, but not deferring).

53. *See generally* Nina A. Mendelson, *A Presumption Against Agency Preemption*, 102 NW. U. L. REV. 695 (2008); Mendelson, *supra* note 12.

54. Mendelson, *supra* note 12, at 779.

55. *See id.* at 779–80.

56. *See* Mendelson, *supra* note 53, at 721–22.

57. *See* Mendelson, *supra* note 12, at 781–82.

58. *See id.* at 784–86; *see also* Exec. Order No. 13,132, 3 C.F.R. 206 (1999). Those values include using preemption only for issues of truly national scope, considering the states' and the people's rights to determine the "moral, political, and legal character of their lives," treating the states as policy laboratories, and acting with "the greatest caution" when federal action affects states' or localities' policymaking discretion. *See id.* § 2(a)–(i).

59. *See* Mendelson, *supra* note 12, at 797.

60. *See* Catherine M. Sharkey, *Federalism Accountability: "Agency-Forcing" Measures*, 58 DUKE L.J. 2125, 2153 (2009).

preemption determinations.[61] For instance, she suggests that agencies develop internal guidelines to determine when rulemakings implicate federalism concerns and to use empirical evidence to show that state law impedes federal objectives.[62] To permit a more robust federalism debate, she also recommends better agency consultation with state representatives by having agencies contact more interested groups and notify state attorneys general about agency-preemption actions.[63] By encouraging reliance on empirical evidence and engagement with state governments, her recommendations encourage agencies to use and develop their administrative and technical expertise when deciding preemption matters by collecting and considering additional data.

Together, Mendelson's and Sharkey's scholarship details how agencies have failed to develop and use their expertise in agency-preemption matters, suggests that *Skidmore* deference is appropriate in light of an agency's lack of preemption expertise, and indicates that an agency's inexpert status need not be static. Although Sharkey focuses on how agencies can improve their preemption decision making, we can rely on her insights to consider how Congress has improved (and can further improve) administrative expertise in preemption.

To be sure, as Miriam Seifter's valuable contribution to this symposium argues, applying *Skidmore* to preemption or federalism questions will render *Chevron*'s "Step Zero"—the step at which courts determine whether *Chevron*'s two-step regime applies—more complex and less certain by excluding a certain kind of agency interpretation from *Chevron* deference.[64] But because *Chevron* is premised primarily on notions of congressional intent and delegation,[65] one must subjugate concerns over complexity and certainty to those of congressional intent. Congressional intent as to delegation is often far from simple and consistent as a general matter.[66] But, in the preemption context, there is good reason to think that Congress does not intend to delegate interpretive primacy to agencies over preemption matters, and therefore the certainty issues in the preemption context are not as worrisome as may exist elsewhere. Abbe Gluck and Lisa Bressman's pathbreaking survey of congressional drafters concerning various administrative law doctrines found that most of the surveyed drafters asserted that agency preemption of state law is a major policy question that Congress does not delegate to agencies.[67] Likewise, as Chris

61. *See* Catherine M. Sharkey, *Inside Agency Preemption*, 110 MICH. L. REV. 521 (2012).

62. *See id.* at 572, 578–79.

63. *See id.* at 582–90.

64. *See* Miriam Seifter, *Federalism at Step Zero*, 83 FORDHAM L. REV. 633, 636–37 (2014).

65. *See supra* Part I.A.

66. *See* David J. Barron & Elena Kagan, Chevron*'s Nondelegation Doctrine*, 2001 SUP. CT. REV. 201, 223 (2001) ("Congress's view on deference (were Congress to consider the matter) likely would hinge on numerous case-specific and agency-specific variables . . . .").

67. Abbe R. Gluck & Lisa Schultz Bressman, *Statutory Interpretation from the Inside—An Empirical Study of Congressional Drafting, Delegation, and the Canons: Part I*, 65 STAN. L. REV. 901, 1004 (2013) ("But of note, 55% of our respondents equated preemption

Walker's contribution to this symposium indicates, surveyed agency rule drafters mostly thought that Congress does not signal delegation of preemption questions to agencies through statutory ambiguity (and thus intend *Chevron* deference to apply).[68] These findings concerning intent suggest that applying *Skidmore* to preemption questions is consistent with congressional intent and thus existing deference doctrines.

II. CONGRESSIONAL RESPONSE TO OCC PREEMPTION

The OCC's preemption of state consumer-protection laws provides perhaps the most striking example of inexpertness, preemption, and a congressional response. The OCC's critics charged that the OCC's preemption decisions were driven not by expertise but by the OCC's attempt to aggrandize its own power. Through Dodd-Frank, Congress sought to improve the OCC's agency-preemption expertise in several ways, including by limiting judicial deference to the OCC with *Chevmore* codification. That codification, among other things, can further improve agency expertise in future legislation.

A. OCC Preemption Before Dodd-Frank

The OCC, an independent agency within the U.S. Treasury Department,[69] administers the National Bank Act[70] (NBA) and provides federal banking charters.[71] The Supreme Court held in *Barnett Bank of Marion County, N.A. v. Nelson*[72] that the NBA preempts state laws that "stan[d] as an obstacle" to federal objectives, such as empowering federal banks and ensuring their safety and soundness.[73] In later decisions, the Supreme Court added that the NBA preempts state laws that "significantly burden,"[74] "interfere with,"[75] or "impair[] or impede[]"[76] it.[77]

In response to *Barnett Bank*, the OCC engaged in numerous preemption activities. Before 2004, it issued numerous preemption legal opinions and

questions with major policy questions, in the sense that they viewed those as not for agencies to resolve.").

68. *See* Christopher J. Walker, Chevron *Inside the Regulatory State: An Empirical Assessment*, 83 FORDHAM L. REV. 703, 721 (2014) ("Finally, regarding preemption of state law, fewer than half (46 percent) agreed that Congress intends to delegate preemption questions by ambiguity.").

69. 12 U.S.C. § 1 (2012); 44 U.S.C. § 3502(5) (2012) (listing the OCC as an "independent regulatory agency"). Although independent agencies are typically defined as those whose heads the President cannot remove at will, Kirti Datla & Richard L. Revesz, *Deconstructing Independent Agencies (and Executive Agencies)*, 98 CORNELL L. REV. 769, 772 (2013), the President can remove the Comptroller at will, see 12 U.S.C. § 2.

70. 12 U.S.C. § 38.

71. *See* 12 C.F.R. § 4.2 (2011).

72. 517 U.S. 25 (1996).

73. *Id.* at 31 (quoting Hines v. Davidowitz, 312 U.S. 52, 67 (1941)).

74. Watters v. Wachovia Bank, N.A., 550 U.S. 1, 13 (2007).

75. *Id.* at 12.

76. *Id.* at 21.

77. The NBA does not permit field preemption. *See* Aguayo v. U.S. Bank, 653 F.3d 912, 921 (9th Cir. 2011).

interpretive letters concerning national banks.[78] But its actions did not receive widespread attention until 2003 when the OCC preempted many provisions of the Georgia Fair Lending Act,[79] which sought to prevent common predatory mortgage-lending practices.[80] The OCC contended that it had little evidence that national banks were engaged in predatory practices and, at any rate, many of the same prohibitions existed under federal regulations.[81] Consumer advocates responded that the OCC had prevented the states—twenty-eight of which had adopted predatory-lending prohibitions[82]—from protecting their citizens, and they saw the OCC's sole concern as banks' safety and soundness as opposed to consumer protection.[83] At about the same time, the OCC promulgated an expansive rule that preempted state laws that "obstruct, impair, or condition a national bank's ability to fully exercise its Federally authorized powers" in lending, taking deposits, and other "operations."[84] In response, Congress conducted hearings to determine whether the OCC had acted contrary to congressional intent[85] and whether the regulation's preemption—especially with the "condition" concept—was broader than the *Barnett Bank* standard.[86] Ultimately, the Supreme Court expressed its lack of confidence in the OCC when it rejected the OCC's preemption of state visitorial powers over national banks.[87]

Three considerations suggest that the OCC's preemption decisions were not products of agency expertise. First, the OCC has a conflict of interest in

78. *See* Raymond Natter & Katie Wechsler, *Dodd-Frank Act and National Bank Preemption: Much Ado About Nothing*, 7 VA. L. & BUS. REV. 301, 318–20 (2012) (identifying preemption concerning banking branches, offices, ATM locations, loan products, and fees).

79. GA. CODE ANN. § 7-6A-1 (2012).

80. *See* Natter & Wechsler, *supra* note 78, at 320.

81. *See id.*; Christopher L. Peterson, *Preemption, Agency Cost Theory, and Predatory Lending by Banking Agents: Are Federal Regulators Biting Off More Than They Can Chew?*, 56 AM. U. L. REV. 515, 526–27 (2007).

82. *See* Natter & Wechsler, *supra* note 78, at 324.

83. *See, e.g.*, Brief of AARP et al. As Amici Curiae Supporting Petitioner at 11–12, Watters v. Wachovia Bank, N.A., 127 S. Ct. 1559 (No. 05–1342), 2006 WL 2570989, at *11; Amanda Quester & Kathleen Keest, *Looking Ahead After* Watters v. Wachovia Bank*: Challenges for Lower Courts, Congress, and the Comptroller of the Currency*, 27 REV. BANKING & FIN. L. 187, 195 (2007); Nicholas Bagley, Note, *The Unwarranted Regulatory Preemption of Predatory Lending Laws*, 79 N.Y.U. L. REV. 2274, 2304 (2004). For its part, the OCC denies that it has ignored consumer protection. *See* Mark E. Budnitz, *The Federalization and Privatization of Public Consumer Protection Law in the United States: Their Effect on Litigation and Enforcement*, 24 GA. ST. U. L. REV. 663, 673 n.50 (2008).

84. *See* Sharkey, *supra* note 61, at 553–54 (quoting Arthur E. Wilmarth, Jr., Cuomo v. Clearing House*: The Supreme Court Responds to the Subprime Financial Crisis and Delivers a Major Victory for the Dual Banking System and Consumer Protection*, *in* THE PANIC OF 2008: CAUSES, CONSEQUENCES AND IMPLICATIONS FOR REFORM 305 (Lawrence E. Mitchell & Arthur E. Wilmarth, Jr. eds., 2010)).

85. *See id.*

86. *See* Natter & Wechsler, *supra* note 78, at 322; *see also* Arthur E. Wilmarth, Jr., *The Dodd-Frank Act's Expansion of State Authority to Protect Consumers of Financial Services*, 36 J. CORP. L. 893, 936 (2011).

87. *See* Cuomo v. Clearing House Ass'n, LLC, 557 U.S. 519, 535–36 (2009). *See generally* Wilmarth, *supra* note 84.

preempting state law.[88] Former Comptroller John Hawke, Jr., acknowledged that the OCC used agency preemption to attract chartering entities (from competitors such as the Office of Thrift Supervision (OTS) and state agencies).[89] Attracting and retaining banking entities is important to the OCC because it receives almost all of its funding from chartered entities, not taxpayers.[90] Second, regulated parties reputedly have captured the OCC and have used it to limit their liability under various state laws.[91] Regulatory capture undermines expert decision making because the agency becomes persistently biased in favor of the captor (usually the regulated industry).[92] Indeed, the conflicted and captured OCC appeared to focus on preemption as a "tool for conducting nationwide business,"[93] ignoring data and other values that are germane to preemption, such as corrective justice,[94] regulatory efficiency,[95] and states' authority, dignity, and policy experimentation.[96] For example, the OCC's revision to its 2004 Visitorial Powers Rule and notice of proposed rulemaking contained "no factual findings . . . explaining why preemption was necessary in the specific case or what conflicts between state authorities and federal banks justified preemption."[97] Likewise, the OCC's lengthy explanation in preempting Georgia's Fair Lending Act failed to engage in any significant discussion of federalism values.[98] Third, the OCC's process for preemption rulemaking may not provide adequate assurances that agency expertise influences federalism questions. OCC preemption rulings are generally no different than other rulemakings, have internal guidelines that are "a bit out of date," and rely upon mere "informal[]" agency supervision.[99] The Government Accountability Office found that the OCC inadequately consulted with

88. *See* Mendelson, *supra* note 53, at 722 (noting that agency self-interest can impede agency's consideration of states' interest); *accord* Mendelson, *supra* note 12, at 794–95.

89. S. REP. NO. 111-176, at 16 (2010); *accord* Arthur E. Wilmarth, Jr., *The OCC's Preemption Rules Exceed the Agency's Authority and Present a Serious Threat to the Dual Banking System and Consumer Protection*, 23 ANN. REV. BANKING & FIN. L. 225, 232 (2004); *see also* Mendelson, *supra* note 53, at 715 (noting that strong obstacle preemption prevents state competition). Indeed, U.S. Bancorp CEO Richard Davis stated that the OCC's preemption power was the banking industry's "number one concern" with Dodd-Frank. *See* Chris Serres, *Bill Has Banks Fearing Power of the States*, STAR TRIBUNE (Mar. 16, 2010, 11:35 PM), http://www.startribune.com/business/87956447.html.

90. *See* Wilmarth, *supra* note 89, at 232.

91. *See, e.g.*, Gillian E. Metzger, *Federalism and Federal Agency Reform*, 111 COLUM. L. REV. 1, 27 (2011) (referring to amici briefs in *Cuomo*, 557 U.S. 519).

92. Rachel E. Barkow, *Insulating Agencies: Avoiding Capture Through Institutional Design*, 89 TEX. L. REV. 15, 21–22 (2010).

93. *See* Sharkey, *supra* note 61, at 555 (quoting OCC officials).

94. *See* Jamelle C. Sharpe, *Legislating Preemption*, 53 WM. & MARY L. REV. 163, 227–28 (2011).

95. *See id.*

96. Mendelson, *supra* note 12, at 781–82.

97. Sharkey, *supra* note 61, at 581. The OCC had engaged in some factual discussion concerning whether depository institutions engaged in predatory lending when preempting Georgia's Fair Lending Act. *See* OCC, Preemption Determination & Order, 68 Fed. Reg. 46,264, 46,271–72 (Aug. 5, 2003).

98. *See generally* OCC, Preemption Determination & Order, 68 Fed. Reg. 46,264 (Aug. 5, 2003).

99. Sharkey, *supra* note 61, at 576–77 (quoting OCC officials).

affected groups (such as states and consumer advocates), failed to document these consultations,[100] and failed to provide sufficiently detailed internal guidance for preemption rulemaking.[101]

B. Encouraging Agency-Preemption Expertise

In response to the OCC's flawed preemption rulings,[102] Dodd-Frank sought to address state-law preemption standards that govern national banks and their subsidiaries in 12 U.S.C. § 25b. Despite the Obama Administration's call to abolish the OCC's preemption authority,[103] Congress took a more modest, yet pathbreaking, approach to encourage better agency preemption. Dodd-Frank provides a preemption standard, judicial review standards, and various procedures for the OCC to follow when seeking to preempt certain state consumer-protection laws.

1. Dodd-Frank and *Chevmore* Codification

The relevant preemption provisions apply primarily to "state consumer financial laws."[104] Those laws directly regulate consumer financial transactions and do not discriminate against national banks.[105] Dodd-Frank preempts them only if, among other reasons, they "prevent[] or significantly interfere[] with the exercise by the national bank of its powers" in accord "with the legal standard for preemption in . . . *Barnett Bank*."[106]

The Act contains several procedural requirements for agency preemption. The preemption determination may be made by a court or "by regulation or order of the [Comptroller[107]] on a case-by-case basis."[108] "Case-by-case basis" refers to the OCC's "determination . . . concerning the impact of a particular State consumer financial law on any national bank . . . or the law of any other State with substantively equivalent terms."[109] The Comptroller must consult with and consider the views of the Consumer Financial Protection Bureau (CFPB).[110] "Substantial evidence, made on the record of

100. *Id.* at 582–83.

101. *See id.* at 576.

102. *See, e.g.*, James A. Huizinga et al., *OCC Moves to Implement Dodd-Frank Act Preemption Provisions*, 128 BANKING L.J. 755, 758 (2011) (referring to letters to the OCC from Rep. Barney Frank, Sen. Mark Warner, and Sen. Tom Carper expressing concerns about the OCC's preemption rulings).

103. *See* Natter & Wechsler, *supra* note 78, at 341 n.231 (referring to U.S. DEP'T OF THE TREASURY, FINANCIAL REGULATORY REFORM: A NEW FOUNDATION 61 (2009) and H.R. 3126, 111th Cong. § 143 (2009)).

104. *See* 12 U.S.C. § 25b(b) (2012).

105. *See id.* § 25b(a)(2).

106. *Id.* § 25b(b)(1)(B).

107. Section 25b(b)(6) provides that "[a]ny regulation, order, or determination made by the Comptroller . . . under paragraph (1)(B) shall be made by the Comptroller, and shall not be delegable . . . ."

108. *Id.* § 25b(b)(1)(B). The rule or order must be made "in accordance with applicable law," presumably including the APA. *See id.*

109. *Id.* § 25b(b)(3)(A).

110. *See id.* § 25b(b)(3)(B).

the proceeding," must support the regulation or order.[111] Every five years thereafter, the OCC must reconsider—through notice-and-comment proceedings—whether preemption is still necessary and report to Congress.[112] The OCC must also publish at least quarterly a list of preemption determinations and identify affected activities and practices.[113]

When reviewing the OCC's preemption determinations, Congress commanded courts to apply the four *Skidmore* factors.[114] A savings clause clarifies that the codified *Skidmore* standard for preemption rulings, however, does not apply to other OCC interpretations of the NBA.[115] The codification of the *Chevmore* doctrines appears intentional because the House, before sending its bill to the Senate, revised the original bill from providing no deference for preemption determinations[116] to providing *Skidmore* deference[117] and rejected an amendment that would have likely allowed *Chevron* to apply.[118] The relevant Senate Committee Report described concerns regarding the OCC's conflict of interest in using preemption as a tool for fee generation[119] and noted that *Chevron* deference would no longer apply to the OCC's preemption decisions.[120]

2. How Congress Focused on Expertise

Congress's handiwork in § 25b may be best understood as attempting to develop and encourage the OCC's use of technical and administrative expertise in agency preemption. I consider below five key ways in which Congress did so, including by codifying *Skidmore*.

First, Congress requires the OCC to support its preemption rulings with data. The OCC must develop a factual record because it must have "substantial evidence, made on the record of the proceeding." The use of

111. *See id.* § 25b(c).
112. *See id.* § 25b(d)(1)–(2).
113. *See id.* § 25b(g).
114. More specifically, *Skidmore* deference extends to "any determinations made by the Comptroller regarding preemption of a *State law* by title 62 of the Revised Statutes or [12 U.S.C. § 371]," not merely state consumer financial laws. *Id.* § 25b(b)(5)(A) (emphasis added).
115. *See id.* § 25b(5)(B).
116. *See* H.R. 4173, 111th Cong. § 5136C(b)(4) (as reported by H. Comm. on Financial Services, 1st Sess., 2009), *available at* http://www.gpo.gov/fdsys/pkg/BILLS-111hr4173ih/pdf/BILLS-111hr4173ih.pdf.
117. *See* H.R. 4173, 111th Cong. § 5136C(b)(5)(A) (as passed by House, 1st Sess., 2009), *available at* http://www.gpo.gov/fdsys/pkg/BILLS-111hr4173ih/pdf/BILLS-111hr4173ih.pdf.
118. *See* 155 CONG. REC. E3029 (daily ed. Dec. 16, 2009) (statement of Rep. Melissa Bean) ("[W]hen a court is reviewing an OCC determination concerning the proper interpretation of the [NBA] or other Federal law that the OCC is charged with administering, the court is to apply the traditional deference accorded to an agency, often referred to as 'Chevron' deference."). Representative Bean's manager's amendment had no specific provision for deference to agency preemption. *See* Amend. No. 141 to H.R. 4173 (Dec. 9, 2009) (Offered by Rep. Bean of Ill.).
119. *See* S. REP. NO. 111-176, at 16 (2010).
120. *See id.* at 176.

the Administrative Procedure Act's[121] (APA) "substantial evidence" standard (as opposed to its arbitrary and capricious standard, which would normally apply to informal proceedings) is telling because "substantial evidence" primarily focuses on factual findings and their implications, as opposed to discretionary policy judgments,[122] and constitutes "a considerably more generous judicial review" standard.[123] Indeed, OCC officials after Dodd-Frank are "aware that proffering evidence in support of preemption enhances the likelihood that a court will adopt its preemption conclusions."[124]

Relatedly, Congress requires that parties have the ability to participate in perhaps extremely formalized proceedings. The OCC must place its substantial evidence "on the record" after some kind of administrative proceeding, indicating that the OCC must provide interested parties an opportunity to respond to the Agency's position and provide supporting or contrary comments and evidence that expand the administrative record. Because these opportunities generally arise in (but are not limited to) formal adjudication and formal and informal substantive rulemakings,[125] the OCC's ability to promulgate guidance documents, opinion letters, or other forms of informal or interagency decision making appears significantly constrained, if not prohibited, for preemption rulings. Indeed, Congress's use of the "on the record" language (which triggers formal proceedings under the APA), along with its reference to the "substantial evidence" standard that only applies to formal proceedings under the APA, strongly suggests that the OCC must preempt through formal adjudication or formal rulemaking under the APA.[126]

Second, to promote robust debate and data collection and to counter regulatory capture concerns, Congress has encouraged the CFPB's participation.[127] The Comptroller's obligation to consult the CFPB and

121. 5 U.S.C. § 706 (2012).

122. *See* Levin, *supra* note 36, at 253–55, 273–76 (contrasting review of policy judgments under arbitrary and capricious standard with review of factual findings under substantial evidence standard).

123. *See* Abbott Labs., Inc. v. Gardner, 387 U.S. 136, 143 (1967); Stephanie R. Hoffer & Christopher J. Walker, *The Death of Tax Court Exceptionalism*, 99 MINN. L. REV. (forthcoming 2014) (manuscript at 20 n.138) (citing Am. Paper Inst. v. Am. Elec. Power Serv. Corp., 461 U.S. 402, 412 n.7 (1983)), *available at* http://papers.ssrn.com/sol3/Delivery.cfm/SSRN_ID2458248_code649541.pdf?abstractid=2393412&mirid=1 (describing arbitrary and capricious review as "more lenient" to the agency than substantial evidence review).

124. Sharkey, *supra* note 61, at 582.

125. *See* 5 U.S.C. §§ 553, 554, 556, 557 (2012); Wilmarth, *supra* note 86, at 931 ("[T]he OCC may not make any preemption determination by issuing an opinion letter, court brief or informal guidance.").

126. Sections 553 and 554 of the APA require formal proceedings when Congress calls for agency action "on the record after opportunity for an agency hearing." The directive in Dodd-Frank calls for findings "on the record of the proceeding." Because the Court has strictly interpreted the APA triggering language, it is not certain that Congress has required the OCC to proceed through formal proceedings. But if so, it is likely one of the first instances in which Congress has required formal rulemaking in decades.

127. *See* 12 U.S.C. § 25b(b)(3)(B) (2012).

consider its views renders it more likely that the OCC has the input of an agency focused on consumer protection, as opposed to national banks' safety.[128] The CFPB may be able to provide (or alert consumer-protection advocates to provide) the OCC with additional germane data to influence the OCC's preemption decision.[129] More cynically, the CFPB's presence (and ability to alert Congress) may also help focus the Agency on the administrative record (and thus render it more likely that the OCC will use its expertise) by helping temper the significant bias and interest-group capture concerns that undermine expert decision making.[130]

Third, Congress requires the OCC to revisit its earlier preemption decisions at least every five years (and consider their implications quarterly).[131] These reevaluations require the Agency, after notice and comment, to determine whether new data or experience undermines the original preemption determination. Likewise, the OCC's duty to report its periodic evaluations to Congress ensures that Congress—and courts with *Skidmore* deference in hand—can oversee whether current data informs the OCC's determination.[132]

Fourth, Congress has sought to focus and limit the Comptroller's preemption inquiry. The Comptroller herself[133] must apply the codified preemption standard via rule or order on a case-by-case basis to ensure that she considers the implications of a particular law.[134] By narrowing the Comptroller's inquiry and providing procedural requirements for that inquiry, Congress has rendered it more likely that instead of implementing broad preemption policies, the Comptroller can develop and identify data to inform whether the specific state law significantly interferes with national banks' powers.

Finally, and perhaps most importantly, Congress's *Skidmore* codification incentivizes agencies to develop and rely upon their technical and administrative expertise when engaging in agency preemption. Courts, as discussed in Part I, defer under *Skidmore* only to the extent that the agency

128. *See id.*

129. *See* Barkow, *supra* note 92, at 52 ("Consultation may bring more experts into the process and improve decision making by presenting competing viewpoints.").

130. *See id.* at 21–22 (discussing how capture impedes expert decision making); *id.* at 62 (noting that interagency lobbying can neutralize interest-group influence).

131. *See* § 25b(d)(1)–(2).

132. These review-and-report provisions also increase the burden of agency preemption, incentivizing the OCC to limit preemption rulings.

133. The Comptroller's inability to delegate ensures that he or she retains full political accountability for preemption decisions.

134. The substantive preemption standard presents interpretive difficulties. *Compare* Natter & Wechsler, *supra* note 78, at 337–48 (arguing that Dodd-Frank did not materially alter *Barnett Bank* or prior OCC standard), *with* Wilmarth, *supra* note 86, at 925 (arguing that "Dodd-Frank establishes new preemption standards under the NBA"), *and* Jared Elosta, *Dynamic Federalism and Consumer Financial Protection: How the Dodd-Frank Act Changes the Preemption Debate*, 89 N.C. L. REV. 1273, 1299 (2011) ("[Dodd–Frank's] language is notably different from the OCC's 2004 [preemption] rule . . . ."). However, Congress has at least provided some substantive guidance to the OCC and aligned that guidance with matters within the agency's ken. *See* Mendelson, *supra* note 53, at 721–22 (noting that Congress rarely provides agencies clear guidance on preemption).

employs expertise because they look for determinations that "constitute a body of experience and informed judgment."[135] In short, without developing and relying upon expertise supported by an administrative record, the agency is entitled to no deference at all.

3. Why the OCC Was Not Ready for *Chevron* Deference

Awarding the OCC *Chevron* deference would likely have been premature for two reasons. First, conflict-of-interest and capture concerns continue to surround the OCC, giving the OCC incentive to mask improper purposes as "expertise." To be sure, Congress ensured some balance to OCC preemption decision making by requiring the OCC to consult the CFPB. And Congress likely reduced the OCC's conflict of interest by abolishing another charter-granting federal agency (the OTS).[136] But the OCC still may view preemption as a fee-generating device because the OCC continues to collect fees from chartered institutions,[137] which can otherwise obtain cheaper state charters.[138] Moreover, regulated parties appear to have significant sway over the OCC after Dodd-Frank because immediately before the effective date of certain Dodd-Frank provisions, the OCC largely reaffirmed its preemption determinations without satisfying the procedural requirements in § 25b.[139] The OCC concluded (with almost no explanation) that by acting before that effective date, it did not need to comply with § 25b at all.[140] Scholars and courts challenged its action as "flouting" those requirements.[141] These lingering structural concerns and recent actions suggest that Congress and courts should be skeptical of OCC preemption decisions that purport to be products of agency expertise and thereby support Congress's choice to remove the OCC's preemption decisions from *Chevron*'s warm embrace.

Second, Dodd-Frank does not require the OCC to consider federalism values, limiting its ability to develop experience in considering how these values should influence the Agency's reliance on technical and

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135. Skidmore v. Swift & Co., 323 U.S. 134, 140 (1944).

136. *See* Wilmarth, *supra* note 86, at 896.

137. *See* OCC, http://www.occ.gov/about/what-we-do/mission/index-about.html (last visited on Oct. 19, 2014) ("[T]he OCC's operations are funded primarily by assessments on national banks and federal savings associations.").

138. Heidi Mandanis Schooner, *Recent Challenges to the Persistent Dual Banking System*, 41 ST. LOUIS U. L.J. 263, 273 (1996); *accord* Christine E. Blair & Rose M. Kushmeider, *Challenges to the Dual Banking System: The Funding of Bank Supervision*, FDIC BANKING REV., Mar. 2006, at 6 ("[T]he assessments for supervision paid by state-chartered banks are significantly less than those paid by comparably sized OCC-supervised banks."); *see also* Mendelson, *supra* note 53, at 715 (noting that strong obstacle preemption prevents state competition).

139. *See* Arthur Wilmarth, *OCC Gets It Wrong on Preemption, Again*, AM. BANKER (Jul. 28, 2011, 4:34 PM), http://www.americanbanker.com/bankthink/OCC-preemption-Dodd–Frank-1040692-1.html.

140. *See* Office of Thrift Supervision Integration; Dodd-Frank Act Implementation, 76 Fed. Reg. 43,549, 43,557 (July 21, 2011).

141. *See* Wilmarth, *supra* note 139 (stating the OCC's 2004 preemption rules "fl[y] in the face of Dodd-Frank"). A federal district court has agreed. *See* Sacco v. Bank of Am., No. 5:12-cv-00006-RLV-DCK, 2012 WL 6566681, at *8 n.7 (W.D.N.C. Dec. 17, 2012).

administrative expertise in preemption matters. Because Dodd-Frank turned the OCC into an independent agency,[142] the OCC no longer must comply with the Federalism Executive Order's directive to consider federalism values or consult with states.[143] This omission limits the extent of the OCC's inquiry and possibly the input from significantly interested parties. In short, aside from its historical lack of expertise-driven determinations, the OCC's continuing conflict of interest, its apparent regulatory capture, and its myopic preemption inquiry all suggest that *Chevron* deference was not—at least yet—suitable.

C. Improving Expertise in Agency Preemption

Going forward, Congress can improve an agency's use of expertise as to preemption specifically and other matters generally. Congress can lead agencies to consider how their technical and administrative expertise interacts with federalism values by requiring agencies to consider those values and consult with affected parties. Congress can also improve agencies' use of administrative and technical expertise both inside and outside of the preemption context by using *Chevron* deference as a "carrot" for agencies to develop and apply their expertise.

In the agency-preemption context, Congress should expand the kind of expertise that agencies have in preemption matters. Congress can do so by requiring agencies to consider how federalism values interact with the agencies' understanding of state laws' impact on industry and the federal statutory scheme.[144] These federalism values, found in the well-received Federalism Executive Order,[145] include using preemption only for issues of truly national scope, considering the states' and the people's rights to determine the "moral, political, and legal character of their lives," treating the states as policy laboratories, and acting with "the greatest caution" when federal action affects the states' or localities' policymaking discretion.[146] Codifying these considerations (which are unlikely to be part of agencies' daily missions) ensures that they are part of the preemption calculus and encourages agencies to gain experience in applying their day-to-day expertise to broader inter-sovereign structural values.

Codifying federalism values will give agencies statutory impetus for collecting quantitative and qualitative information from states concerning these values. The federalism values, after all, generally fall on the "costs" side of a preemption cost-benefit ledger, even if they may often be qualitative in nature, because federal preemption limits the benefits that

142. *See* Sharkey, *supra* note 61, at 555–56. The OCC is listed as an "independent regulatory agency," 44 U.S.C. § 3502(5) (2012), but the Comptroller of the Currency is still subject to the President's at-will removal, 12 U.S.C. § 2 (2012).

143. *See* Exec. Order No. 13,132, § 9, 3 C.F.R. 206 (1999); Sharkey, *supra* note 61, at 555–56.

144. *See* Mendelson, *supra* note 12, at 789–90.

145. *See* Sharkey, *supra* note 61, at 526–27 ("There appears to be consensus that the requirements of the preemption provisions of E.O. 13132—including consultation with the states and 'federalism impact statements'—are sound.").

146. Exec. Order No. 13,132, § 2(a)–(i), 3 C.F.R. 206 (1999).

federalism is thought to provide. Agencies can seek information from states on, for instance, how a proposed preemptive regulation would likely affect autonomy interests, whether the states have invested money in state-level regulatory regimes that would evidence states' interest in the field, and whether states are engaged in innovative or uniform policymaking. After receiving evidence, the agency can rely upon its administrative and technical expertise—whether from the agency's administration of a regulatory program or from its staffers' work in the private sector—to evaluate the information and better understand a preempting regulation's effect on state interests. By prompting agencies to receive data on federalism values and consider them as part of the decision-making process, agencies can improve their preemption expertise while Congress and courts acknowledge that "questions about the appropriate federal-state balance are not easily separated from substantive policy determinations on which agencies do have expertise" concerning specific regulatory schemes.[147]

Likewise, Congress should also require consultation with states or state-government groups as mandated under the Federalism Executive Order.[148] Indeed, Congress has done so in other contexts.[149] Additional stakeholders' participation in preemption decision making not only encourages inter-sovereign dialogue (to validate the states' dignity interests) but also provides a way for the agency to obtain (or confront) additional information and empirical data that even consumer advocates may not have. Such consultation can improve all facets of agency expertise by broadening the discussion to include federalism values with affected sovereigns and obtaining the states' regulatory data.

More broadly, both inside and outside the preemption context, Congress can use *Chevmore* codification to encourage agencies to engage in public participation that can lead to a robust exchange of ideas and data. Aside from requiring an agency to use particular regulatory procedures, Congress could provide that the use of certain procedures entitles the agency to *Chevron* deference. By doing so, Congress could indicate its preference for procedures that encourage public participation, full administrative records, the collection and use of data, and expert determinations. As yet another option, to help give agencies time to develop and demonstrate their ability to rely upon their expertise, Congress could clarify that *Skidmore* deference applies until a certain contingency occurs, at which time *Chevron* deference would apply. The contingency could be the promulgation of a certain number of preemption orders or rules, the promulgation of a certain number of rulings that have received the courts' approval under *Skidmore*, or a certain time period (say, after five years of preemption rulings). By using

147. Gillian E. Metzger, *Administrative Law As the New Federalism*, 57 DUKE L.J. 2023, 2080–82 (2008) (discussing the interrelationship between importance of state dignity interests and policy considerations).

148. *See* Sharkey, *supra* note 61, at 584–86 (recommending that agencies prepare guidance documents for outreach to affected groups and state representatives).

149. *See, e.g.*, 49 U.S.C. § 5125(b)(2) (2012) (regarding preemption decisions concerning hazardous materials by the Secretary of Homeland Security).

Skidmore as a stick and *Chevron* as a carrot, Congress can encourage agencies to develop and use their expertise, especially for regulatory matters in which additional values outside of the regulatory scheme are important.

This is true even if agencies generally think that *Skidmore* deference applies to preemption decisions. Chris Walker asserts that *Chevmore* codification may have limited effect on agencies because, according to the agency personnel that he surveyed, they think that *Skidmore* and a presumption against preemption apply to their preemption decisions.[150] But these assumptions only show the value of using *Chevron* as a carrot. Having a trigger for *Chevron* deference that depends on increased agency expertise not only clarifies Congress's intent to delegate (and perhaps to abrogate the presumption against preemption under certain statutory schemes), but it also provides the agency incentive to improve its preemption expertise to obtain more judicial deference. To be sure, the codification of *Skidmore* deference for an agency that already thinks that *Skidmore* applies would have minimal effect. But my proposal goes further and suggests that both *Skidmore* and *Chevron* can be used together to influence agency behavior.

CONCLUSION

Chevmore serves as more than a doctrine for courts to invoke when overseeing the federal administrative state. It has become, instead, a congressional tool to help resolve concerns over agency preemption and judicial review thereof. And more broadly, Congress can use *Chevmore* codification to reveal its intent as to which values, such as expertise, should inform appropriate judicial deference to agency action going forward—especially in the context of agency preemption. In other words, *Chevmore*, during the next thirty years, has an innovative new role to play.

150. *See* Walker, *supra* note 68, at 721.