

2014

## Federalism at Step Zero

Miriam Seifter

*University of Wisconsin Law School*

---

### Recommended Citation

Miriam Seifter, *Federalism at Step Zero*, 83 Fordham L. Rev. 633 (2014).

Available at: <http://ir.lawnet.fordham.edu/flr/vol83/iss2/9>

This Symposium is brought to you for free and open access by FLASH: The Fordham Law Archive of Scholarship and History. It has been accepted for inclusion in Fordham Law Review by an authorized editor of FLASH: The Fordham Law Archive of Scholarship and History. For more information, please contact [tmelnick@law.fordham.edu](mailto:tmelnick@law.fordham.edu).

# FEDERALISM AT STEP ZERO

Miriam Seifter\*

## INTRODUCTION

Given the extensive interconnections between state and federal actors and laws in the administrative sphere, it should be no surprise that administrative law cases—cases often involving the application of *Chevron*—frequently raise federalism questions.<sup>1</sup> States are deeply intertwined in the development and implementation of federal regulation.<sup>2</sup> Federal rules and policies affect states in myriad ways, including by preempting state law, by burdening state coffers, and by limiting state administrators’ discretion and flexibility through the imposition of federal standards.<sup>3</sup>

What should courts do when the worlds of *Chevron* and federalism collide? This is among the “second-generation”<sup>4</sup> *Chevron* questions that merit attention as we look back at *Chevron*’s first thirty years and ahead to its future.<sup>5</sup> The U.S. Supreme Court has at times indicated—repeatedly, but not consistently—that *Chevron* does not apply in certain federalism cases,

---

\* Assistant Professor of Law, University of Wisconsin Law School; Visiting Researcher, Georgetown University Law Center, 2012–2014. I am grateful to my fellow participants in the *Fordham Law Review*’s *Chevron at 30: Looking Back and Looking Forward* Symposium for helpful comments and conversations.

1. See, e.g., *City of Arlington v. FCC*, 133 S. Ct. 1863 (2013); *Cuomo v. Clearing House Ass’n, L.L.C.*, 557 U.S. 519 (2009); *Wyeth v. Levine*, 555 U.S. 555 (2009); *Riegel v. Medtronic, Inc.*, 552 U.S. 312, 329–30 (2008); *Watters v. Wachovia Bank, N.A.*, 550 U.S. 1 (2007); *Gonzales v. Oregon*, 546 U.S. 243 (2006); *Smiley v. Citibank (S.D.), N.A.*, 517 U.S. 735 (1996); see also Gillian E. Metzger, *Administrative Law As the New Federalism*, 57 DUKE L.J. 2023 (2008) (identifying cases); cf. Jacob E. Gersen, *Overlapping and Underlapping Jurisdiction in Administrative Law*, 2006 SUP. CT. REV. 201, 202–03 (“[I]ncreasingly, *Chevron* is being applied confusingly to interpretations of statutes that allocate interpretive authority . . . to a mix of federal and state institutions.”).

2. See Miriam Seifter, *States, Agencies, and Legitimacy*, 67 VAND. L. REV. 443, 446–47 (2014).

3. For discussions of the many ways in which states interact with and are affected by the federal regulatory process, see, for example, DANIEL ELAZAR, *AMERICAN FEDERALISM: A VIEW FROM THE STATES* (2d ed. 1972); JOHN D. NUGENT, *SAFEGUARDING FEDERALISM* (2009); Larry Kramer, *Understanding Federalism*, 47 VAND. L. REV. 1485 (1994).

4. Gersen, *supra* note 1, at 247 (referring to the allocation of authority between state and federal governments as a “second-generation question[]” that “require[s] more nuanced analysis of politics and policy” than first-generation *Chevron* problems of “courts versus agencies”).

5. 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).

or does not apply in its usual way.<sup>6</sup> Several scholars have embraced these indications and have argued that *Chevron* should yield to federalism norms, at least in certain contexts.<sup>7</sup> Because these proposals all require analysis before the *Chevron* framework is deployed, I refer to them collectively as a “Federalism Step Zero.”<sup>8</sup> This Essay identifies Federalism Step Zero as a distinct concept, analyzes its underpinnings and mechanics, and ultimately, argues against its adoption.

To date, Federalism Step Zero proposals have lacked much unified treatment. A few scholars have considered explicitly whether the Supreme Court should—or already does—apply a special Step Zero test in cases that implicate federalism.<sup>9</sup> Professor Rick Hills, for example, has urged that an agency should never be eligible for *Chevron* deference when interpreting a statute that also allocates authority to subnational actors.<sup>10</sup> But most attention has focused on distinct slices of the Federalism Step Zero question or has considered the question only obliquely. The most extensive dialogue has considered the sub-issue of whether or how *Chevron* should apply in preemption cases.<sup>11</sup> Though not usually phrased in Step Zero language, this debate contemplates an antecedent step that would remove preemption cases from *Chevron* analysis, substituting *Skidmore*<sup>12</sup> or de novo review.

---

6. See *infra* Part II.

7. See *infra* Part II.

8. For an overview of Step Zero, see *infra* Part I.

9. See Gersen, *supra* note 1 (describing the use of federalism at Step Zero in *Gonzales v. Oregon*); Scott A. Keller, *How Courts Can Protect State Autonomy from Federal Administrative Encroachment*, 82 S. CAL. L. REV. 45, 50 (2008) (observing that the *Gonzales* Court “infused federalism concerns into *Chevron* Step Zero” but arguing that Step Zero provides insufficient protection for federalism values).

10. See Rick Hills, *How Did Scalia’s Anti-Federalism Bluster in City of Arlington v. FCC Go Unnoticed by Six Justices?*, PRAWFSBLAWG (May 24, 2013, 11:35 AM), <http://prawfsblawg.blogspot.com/2013/05/scalias-odd-view-of-federalism-in-city-of-arlington-v-fcc.html> (“[A]t the very least, the Court should not put its finger on the scale in favor of the agency when the relevant statutory language clearly anticipates a division of authority between two potentially rival governmental actors.”).

11. See, e.g., William N. Eskridge, Jr., *Vetogates, Chevron, Preemption*, 83 NOTRE DAME L. REV. 1441, 1471 (2008) (arguing that courts should require a clear, targeted statement from Congress to empower an agency to preempt state law); Nina A. Mendelson, *Chevron and Preemption*, 102 MICH. L. REV. 737, 742 (2004) (arguing that *Chevron* should not apply to agency interpretations of a statute’s preemptive effect); Thomas W. Merrill, *Preemption and Institutional Choice*, 102 NW. U. L. REV. 727, 730 (2008) (arguing that “courts should develop a preemption-specific doctrine for considering agency views about preemption that focuses on the pragmatic dimensions of preemption controversies and seeks to encourage agencies to permit public participation in proceedings that implicate preemption”); Cass R. Sunstein, *Nondelegation Canons*, 67 U. CHI. L. REV. 315, 331 (2000) (stating that congressional rather than agency resolution of preemption questions is “important” given the safeguards in Congress against “cavalier disregard of state interests”); Damien J. Marshall, Note, *The Application of Chevron Deference in Regulatory Preemption Cases*, 87 GEO. L.J. 263, 278 (1998) (arguing that *Chevron* should not apply in regulatory preemption cases because, inter alia, agencies lack sufficient expertise and accountability); cf. *The Supreme Court, 2008 Term—Leading Cases, Preemption of State Common Law Claims*, 123 HARV. L. REV. 262, 271 (2009) [hereinafter *Preemption of State Common Law Claims*] (arguing that preemption cases should be decided within the *Chevron* framework, in part because Step Zero will filter out cases undeserving of deference).

12. *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944).

Scholars writing at the intersection of administrative law and federalism have questioned whether *Chevron* analysis and other deference doctrines could be altered in federalism cases to better protect state interests, implicating but not focusing on Step Zero questions.<sup>13</sup> And as noted, a number of judicial decisions have intimated favor for a Federalism Step Zero, albeit without consistency or doctrinal clarity.<sup>14</sup> All of these dispersed contributions share a common aim of altering *Chevron*'s application in the federalism context.

A unified treatment of Federalism Step Zero is timely. Recent, heightened lamentations about the excess of the federal bureaucracy and the need to restrain federal agencies from trampling on states call the *Chevron*-federalism intersection squarely into question.<sup>15</sup> Neither the outsized role of federal regulatory policy nor the intertwining of federal regulation and state functions is likely to retreat. This is the era of administrative federalism,<sup>16</sup> and evaluation of federalism's intersection with *Chevron* is therefore vital.

This Essay offers a fresh approach to the *Chevron*-federalism quandary, focusing on the mismatch between the nature of Step Zero and the nature of federalism analysis in the administrative context. Step Zero is best served by a rule rather than a standard, a lesson evident in the aftermath of *United States v. Mead Corp.*<sup>17</sup> and apparently part of the doctrine after *City of Arlington v. FCC*.<sup>18</sup> But the heterogeneity of questions and goals at stake in administrative federalism cases makes bright lines a poor fit. No rule can identify accurately when agencies should answer federalism questions—and because agencies are well-positioned to resolve many such questions, there is no reason to believe that categorically denying deference would better serve federalism goals. Moreover, courts can already police bad agency

---

13. See Catherine M. Sharkey, *Preemption by Preamble: Federal Agencies and the Federalization of Tort Law*, 56 DEPAUL L. REV. 227, 256–57 (2007) (suggesting that an agency's compliance with the Federalism Executive Order could be treated as a prerequisite for judicial deference to agency decisions in federalism cases); Ernest A. Young, *Executive Preemption*, 102 NW. U. L. REV. 869, 883, 891 (2008) (proposing that compliance with the Federalism Executive Order could be a variable in determining whether to defer to agencies under *Skidmore* in preemption cases); see also Metzger, *supra* note 1, at 2105 (suggesting that agencies should face a higher burden of persuasion when substantially infringing on state prerogatives).

14. See *infra* Part II.

15. See, e.g., *City of Arlington v. FCC*, 133 S. Ct. 1863, 1877–78 (2013) (Roberts, C.J., dissenting); see also *Util. Air Regulatory Grp. v. EPA*, 134 S. Ct. 2427, 2444 (2014) (describing the EPA's interpretation of the statute, in part, as “laying claim to extravagant statutory power over the national economy”).

16. See, e.g., Metzger, *supra* note 1, at 2027 (suggesting that “administrative law may be becoming the home of a new federalism”).

17. 533 U.S. 218 (2001).

18. 133 S. Ct. 1863 (2013); see *infra* Part I. A number of other contributions to this symposium consider *Chevron* Step Zero and the effect of *City of Arlington*. See Jack M. Beermann, *Chevron at the Roberts Court: Still Failing After All These Years*, 83 FORDHAM L. REV. 731, 741–43 (2014); Kristin E. Hickman, *The Three Phases of Mead*, 83 FORDHAM L. REV. 527, 528–30 (2014); Thomas W. Merrill, *Step Zero After City of Arlington*, 83 FORDHAM L. REV. 753, 556–58 (2014); Peter L. Strauss, *In Search of Skidmore*, 83 FORDHAM L. REV. 789, 792–93 (2014).

interpretations through *Chevron* analysis and arbitrary and capricious review. A Federalism Step Zero would thus needlessly harm the coherence and predictability of the *Chevron* framework.

First, a Federalism Step Zero is unlikely to serve federalism goals better than ordinary *Chevron* analysis and arbitrary and capricious review. The idea behind existing Federalism Step Zero proposals tends to be that federalism is too important to leave in the hands of administrative agencies, which might lack the expertise or incentives to protect the federal balance of power.<sup>19</sup> But this oversimplifies, as others have recognized. Nearly all federalism cases in the administrative context involve factual or policy analysis at which courts and scholars generally presume agencies are superior,<sup>20</sup> and these components are impossible to separate neatly from purely legal questions.<sup>21</sup> Moreover, federalism is a shorthand for multiple, often conflicting goals: scholars and courts seek not only to protect state power but also to channel state expertise in national decision making and to honor the democratic will of state polities.<sup>22</sup> Agencies often are equipped and disposed to contribute to these goals. Accordingly, neither the existence of federalism implications nor an agency's competence to evaluate them can be readily parsed by a Step Zero rule. Unlike, say, the question whether an agency is exercising delegated power to make rules or adjudicate,<sup>23</sup> a Federalism Step Zero would demand detailed, holistic analysis. Attempts to abstract a federalism "test" for *Chevron* eligibility would produce inaccuracies, rendering agencies ineligible for deference when they are in fact well-positioned to respond to diverse inquiries and goals bound up with federalism. The upshot is necessarily inexact,<sup>24</sup> but there is no reason to believe a Federalism Step Zero would produce a net benefit for federalism goals.

Nor is switching the default deference presumption to *Skidmore* or de novo review through a Federalism Step Zero a low-cost modification. One of *Chevron*'s salient features is the simplicity of an overarching presumption that agencies interpret statutory ambiguities, subject to limits of reasonableness.<sup>25</sup> Expansions of Step Zero, federalism or otherwise,

---

19. See, e.g., Gersen, *supra* note 1, at 232–35 (canvassing "standard" arguments against giving *Chevron* deference to agency interpretations regarding preemption).

20. See, e.g., Catherine M. Sharkey, State Farm "with Teeth": *Heightened Judicial Review in the Absence of Executive Oversight*, 90 N.Y.U. L. REV. 101, 107 (forthcoming 2014) (stating that "a (if not *the*) significant factor governing an agency's determination that state law interferes with the federal regulatory scheme is the burden or cost (net of the corresponding benefit) of such state regulation on the federal scheme," and that in preemption cases, "agency action is (or, I argue, *should* be) premised on an empirical or factual substrate of information").

21. See Merrill, *supra* note 11, at 773.

22. See, e.g., Miriam Seifter, *States As Interest Groups in the Administrative Process*, 100 VA. L. REV. 953 (2014).

23. See *infra* notes 49–51 and accompanying text (discussing *City of Arlington*).

24. After all, there is no plausible quantification of what share of federalism questions would be better decided by agencies or how much better agencies would be at deciding such questions.

25. See, e.g., Adrian Vermeule, *Introduction: Mead in the Trenches*, 71 GEO. WASH. L. REV. 347, 348 (2003).

chip away at that presumption, making the deference regime less coherent and predictable.<sup>26</sup> The more exceptions that are added to Step Zero, the more the *Chevron* doctrine seems to crumble.

These costs are unnecessary. Federalism values can be considered effectively, and with fewer negative consequences, in the more encompassing reasonableness analysis that courts perform in the ordinary two steps of the *Chevron* framework, and in arbitrary and capricious review.<sup>27</sup> Those phases of review allow courts to assess federalism questions in their applied context and consider multiple federalism-related values that may be at issue. *Chevron*'s interior steps and arbitrary and capricious review also empower courts to reject unreasonable agency decisions, including those that misconceive or disregard federalism implications. To the extent that federalism is implicated in *Chevron* cases, these established phases of review are where any consideration of federalism values should occur.<sup>28</sup>

Part I of the Essay offers a brief overview of Step Zero, sketching its genesis, highlighting the need to keep the inquiry simple and clear, and identifying *City of Arlington*'s progress toward a clear rule. Part II shows that a variety of existing proposals belong under the rubric of a Federalism Step Zero and teases out their normative and practical facets. Although the Essay ultimately concludes that a Federalism Step Zero is both unnecessary and unwise, the project of recognizing a Federalism Step Zero as a distinct concept, analyzing its normative and logical underpinnings, and exploring its potential mechanics should be valuable even to those who disagree with the bottom line.

Part III argues that federalism analysis at Step Zero is bad for the *Chevron* framework and unlikely to achieve its proponents' goals. To develop this argument, I identify three possible forms a Federalism Step Zero inquiry might take—inquiries based on the category of legal question presented (e.g., preemption), the agency's procedures, or the subject area at issue—and explain why none is workable. I then explain why federalism goals could be more effectively addressed, with fewer costs, within the flexible confines of the *Chevron* two-step and in arbitrary and capricious review.

Although the focus here is on the symposium's honoree, the *Chevron* doctrine itself, this Essay also suggests a deeper, generalizable point about

---

26. A Federalism Step Zero shares common ground with other proposed exceptions to *Chevron*'s application, though analysis of those proposals is beyond the scope of this Essay. See *infra* notes 119–21 and accompanying text.

27. As discussed in Part III, this Essay does not take a position on current debates regarding whether Steps One and Two of *Chevron* are redundant, either with each other or with arbitrary and capricious review. It suffices here that, both within *Chevron* and in arbitrary and capricious review, courts have authority to review the reasonableness of agency decisions, taking many factors into account.

28. My criticism does not preclude the application of the “federalism canons” of statutory interpretation at Step One (or Step Two), though as I explain in Part III, some of the flaws of a Federalism Step Zero also counsel against heavy reliance on federalism canons.

administrative federalism. Federalism inquiries and values tend to be multifaceted and nuanced in ways that make them poor fits for the more formalistic, rule-bound features of administrative law. Attention to federalism requires the use of standards, in *Chevron* analysis and beyond it.

#### I. THE NEED FOR—AND ARRIVAL OF—A SIMPLE STEP ZERO

To understand why federalism should not be a factor at Step Zero, it is first necessary to see the importance of a clear, rule-based Step Zero inquiry. This requires a bit of background about Step Zero's evolution.

The "Step Zero" moniker was coined in an influential 2001 article by two participants in this symposium, Professors Thomas Merrill and Kristin Hickman.<sup>29</sup> The term describes the antecedent question a court must ask before proceeding with *Chevron*'s two steps: Does *Chevron* apply at all to the particular statute or agency interpretation at issue?<sup>30</sup> In several decisions beginning in 2000, the Supreme Court began developing a Step Zero doctrine to answer that question. (Indeed, some Justices have now even adopted the Step Zero terminology.<sup>31</sup>) But an early trilogy of Step Zero decisions left the required inquiry unclear.

The trilogy's key case, *Mead*, provided a confounding explanation of the appropriate analysis. The Court appeared to establish a rule that agency interpretations were *Chevron*-eligible only if they were made pursuant to delegated authority to act with "the force of law."<sup>32</sup> But the Court left unclear the meaning of "the force of law," whether it was a distinct test or part of a more encompassing evaluation of the agency's action, and how it related to the agency's use of formal or informal procedures.<sup>33</sup> In particular, the Court indicated that an agency's use of formal procedures was a "very good indicator" of congressional delegation to act with the force of law, but the Court did not explain when informal procedures might suffice.<sup>34</sup> *Mead*'s ambiguity was compounded by mixed signals in two Step Zero cases decided in the prior and subsequent years, *Christensen v. Harris County*,<sup>35</sup> which emphasized the importance of formal procedures,<sup>36</sup>

---

29. Thomas W. Merrill & Kristin E. Hickman, *Chevron's Domain*, 89 GEO. L.J. 833 (2001). Professor Merrill's contribution to this symposium traces the doctrine's historical development. See Merrill, *supra* note 18.

30. See Merrill & Hickman, *supra* note 29, at 835; see also Gersen, *supra* note 1, at 217.

31. See, e.g., Transcript of Oral Argument at 6, 8, 25, 27–28, *City of Arlington v. FCC*, 133 S. Ct. 1863 (2013) (No. 11-1545).

32. *United States v. Mead Corp.*, 533 U.S. 218, 221 (2001).

33. See Hickman, *supra* note 18, at 529 ("After initially articulating a relatively rule-like two-part test for determining the scope of *Chevron*'s applicability, the *Mead* Court waffled over which agency actions would or would not satisfy that test . . .").

34. Justice Breyer has added another wrinkle, suggesting that an agency may not always act with the force of law even when it does use formal procedures. See *Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 1004 (2005) (Breyer, J., concurring).

35. 529 U.S. 576 (2000).

36. *Id.* at 587.

and *Barnhart v. Walton*,<sup>37</sup> which seemed to embrace a multifactor analysis of the statutory background and the agency's conduct.<sup>38</sup>

This trilogy of cases left lower courts and commentators confused about the status and content of Step Zero, and prompted an abundance of critical commentary.<sup>39</sup> Step Zero became so confounding that it could scarcely be applied. Befuddled lower courts adopted a practice of “*Chevron* avoidance.”<sup>40</sup> The doctrine's vagueness also allowed Step Zero to be malleable, serving “as a placeholder for a range of judicial concerns,”<sup>41</sup> and allowed interpretive authority to be shifted from agencies to courts.<sup>42</sup> Thus, some commentators lamented, the broad, vague Step Zero unnecessarily undermined salutary application of the *Chevron* framework.<sup>43</sup> A lesson emerged in *Mead*'s wake: Step Zero is a doctrinal step better served by a clear rule.<sup>44</sup>

Prioritizing clarity at Step Zero is arguably in some tension with *Mead*'s delegation-based justification for *Chevron*. As Professor Abbe Gluck's contribution to this symposium observes, *Mead* seeks to be realistic about, and in tune with, how Congress actually delegates.<sup>45</sup> But there is no requirement that the test for congressional intent be as complex as congressional intent itself, or that it take the form of a standard rather than a rule.<sup>46</sup> Plunging down the rabbit hole of congressional intent produces numerous costs and consequences. That may be why *Mead* itself, despite

37. 535 U.S. 212 (2002).

38. *Id.* at 222 (“[T]he interstitial nature of the legal question, the related expertise of the Agency, the importance of the question to administration of the statute, the complexity of that administration, and the careful consideration the Agency has given the question over a long period of time all indicate that *Chevron* provides the appropriate legal lens through which to view the legality of the Agency interpretation here at issue.”).

39. See Vermeule, *supra* note 25, at 349 (“*Mead*'s ambitious recasting of deference law has gone badly awry.”); see also Lisa Schulz Bressman, *How Mead Has Muddled Judicial Review of Agency Action*, 58 VAND. L. REV. 1443, 1475 (2005); Cass R. Sunstein, *Chevron Step Zero*, 92 VA. L. REV. 187, 248 (2006). Many other commentators have remarked on the deluge of criticism leveled at *Mead*. See, e.g., 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, 993–94 (2013) (characterizing *Mead* as “the doctrine among the administrative law canons subject to the most vociferous criticism” and noting that the decision has “struggled for any ground to justify the layer of doctrinal complexity that it imposes”).

40. Bressman, *supra* note 39, at 1446.

41. Aziz Z. Huq, *The Institution Matching Canon*, 106 NW. U. L. REV. 417, 440 (2012).

42. See Gersen, *supra* note 1, at 239 (describing a directional shift in the “global presumption in favor of judicial deference to agencies”).

43. See Sunstein, *supra* note 39, at 194.

44. For commentary embracing a clear or rule-based Step Zero, see, for example, *id.*; Thomas W. Merrill, *The Mead Doctrine: Rules and Standards, Meta-Rules and Meta-Standards*, 54 ADMIN. L. REV. 807, 819 (2002).

45. See Abbe R. Gluck, *What 30 Years of Chevron Teach Us About the Rest of Statutory Interpretation*, 83 FORDHAM L. REV. 607, 623–25 (2014).

46. See Vermeule, *supra* note 25, at 356.

professing a desire to “tailor deference to variety,”<sup>47</sup> attempted to create rule-based proxies for inferring delegation.<sup>48</sup>

The Supreme Court appears to have clarified and simplified the Step Zero analysis in *City of Arlington*—at least for now—thus sanctioning the more limited delegation inquiry. Justice Scalia’s opinion for the majority not only rejects an exception to *Chevron* for “jurisdictional” questions<sup>49</sup> but helpfully restates the Step Zero test. The Court embraces the basic requirements of *Mead* in a way that sounds clearer and more rule-like than *Mead* itself. The *City of Arlington* test asks simply whether Congress gave the agency *general* authority to administer the statute (through a grant of power for rulemaking or adjudication) and whether the agency took the action in question in exercise of that authority.<sup>50</sup> This two-part test takes the key prongs of the *Mead* test and strips away their complexity. Under this apparent test, an agency exercising delegated rulemaking or adjudicative authority satisfies Step Zero.<sup>51</sup> The Court did not mention the ambiguous “force of law” requirement or profess a commitment to the variety of ways in which Congress actually intends to delegate. Nor did the Court say that rulemaking or adjudication must be formal to satisfy Step Zero (indeed, the declaratory ruling at issue in *City of Arlington* was a species of informal adjudication, albeit one with many trappings of more formal procedures). As I explain further in Part III, if this is the correct interpretation of Step Zero’s current status, it is a welcome development.

## II. IDENTIFYING A FEDERALISM STEP ZERO

This part collects the scattered suggestions in cases and commentary that explicitly or implicitly propose a Federalism Step Zero and teases out their key facets. It describes the goals that proponents seek to achieve and identifies three apparent approaches to a Federalism Step Zero solution. The Essay’s next part finds these options wanting.

Scholarly proposals for a Federalism Step Zero are rooted in several related normative grounds. The general idea is that federalism questions are

---

47. *United States v. Mead Corp.*, 533 U.S. 218, 236 (2001).

48. *Cf. Vermeule, supra* note 25, at 356 & n.34 (noting that *Mead*, while adopting an “all-things-considered inquiry” and “sneer[ing]” at a rule-like alternative, nonetheless “filters the congressional intent inquiry through rule-like procedural categories designed to make the inquiry more tractable”).

49. *City of Arlington v. FCC*, 133 S. Ct. 1863, 1868 (2013).

50. *See id.* at 1874 (“It suffices to decide this case that the preconditions to deference under *Chevron* are satisfied because Congress has unambiguously vested the FCC with general authority to administer the Communications Act through rulemaking and adjudication, and the agency interpretation at issue was promulgated in the exercise of that authority.”).

51. *See id.* Professor Merrill’s contribution to this symposium interprets Justice Scalia’s opinion in the same way, but doubts its staying power, finding Chief Justice Roberts’s approach more compelling. *See Merrill, supra* note 18, at 774–75. Even that approach, which would look more thoroughly at the agency’s organic statute to ensure that it applied to the agency action in question (rather than allowing a general grant of rulemaking or adjudicatory authority to suffice), seems an improvement from *Mead*.

important, and agencies are not the best institutions to resolve them.<sup>52</sup> Some scholars advancing these proposals believe that agencies are inferior because they are insensitive to state interests or lack opportunities to consider state input.<sup>53</sup> Other scholars posit that agencies are likely as sensitive to state interests as Congress is, but lack the expertise to analyze the purely legal or constitutional questions that federalism cases may present.<sup>54</sup> Still others fear that agencies have incentives to aggrandize their own power at states' expenses.<sup>55</sup> All of these proposals presume that courts, which are expert in constitutional analysis, are better suited to analyze federalism questions. Given these premises, the proposals seek to turn off *Chevron* where federalism is implicated, or at least to create a rebuttable presumption that Congress has not authorized the agency to interpret the ambiguity at issue.

The scholarly proposals differ in their focus and mechanics. I group them into three types: (1) a categorical approach, triggered by agency preemption or some other transsubstantive subset of types of federalism cases; (2) a procedural approach, hinging *Chevron*'s application on whether the agency complied with federalism-friendly procedures; and (3) a substantive approach, in which the application of *Chevron* depends on what statute or subject area is at issue.

#### A. The Categorical Approach

First, a number of scholars have argued that *Chevron* should not apply, or should not apply in its usual way, when agencies interpret statutes to preempt state law.<sup>56</sup> In effect, these proposals carve out one paradigmatic and easy to identify category of federalism cases for consideration at Step Zero.<sup>57</sup> A leading proposal comes from Professor Nina Mendelson. In her view, agencies lack the requisite expertise to evaluate the purely legal question of the appropriate balance of power between levels of government, may lack authority from Congress to consider federalism when interpreting a statute, and may sometimes have incentives to increase their own authority at the expense of state interests.<sup>58</sup> She proposes that agency preemption determinations receive only the deference due under *Skidmore*.<sup>59</sup> Other scholars, including Professor Catherine Sharkey, agree that *Skidmore* is the appropriate standard where agencies interpret statutes to preempt state law.<sup>60</sup> Professor Merrill agrees that *Skidmore* is preferable

---

52. See *supra* note 19 and accompanying text.

53. See, e.g., Sunstein, *supra* note 11, at 331; Marshall, *supra* note 11, at 277–81.

54. See Mendelson, *supra* note 11, at 779.

55. See *id.* at 794–96 (discussing this possibility).

56. See *supra* notes 11, 13.

57. See Young, *supra* note 13, at 869 (“Preemption of state regulatory authority by national law is the central federalism issue of our time.”).

58. See Mendelson, *supra* note 11, at 779–97.

59. *Id.* at 797–98.

60. See Sharkey, *supra* note 20, at 141; Catherine M. Sharkey, *Products Liability Preemption: An Institutional Approach*, 76 GEO. WASH. L. REV. 449, 491 (2008); see also

to *Chevron* in agency preemption cases, but argues that a still better solution is a preemption-specific deference doctrine that would give weight to some subsidiary agency conclusions but reserve other aspects of the preemption determination for de novo review.<sup>61</sup> Professor Ernest Young has stated his unwillingness to “jump on the *Skidmore* bandwagon” because “stronger medicine” is necessary, but he is open to a “preemption-specific version of *Skidmore*” that would hold agency preemption interpretations to a stricter standard.<sup>62</sup>

The categorical approach finds some support in case law, although the Supreme Court has been inconsistent on this point.<sup>63</sup> While in years past, the Court has seemed deferential to preemptive agency determinations,<sup>64</sup> in recent years, the Court has considered preemption cases outside the usual *Chevron* framework.<sup>65</sup> The Court’s decision in *Wyeth v. Levine*<sup>66</sup> illustrates the latter approach, which amounts to a Federalism Step Zero. The case addressed whether the FDA’s approval of the labeling for a nausea medication preempted a state failure-to-warn tort claim against the manufacturer. The Court indicated that it would not simply defer to an agency’s legal conclusion that a federal statutory scheme preempts state law. Instead, agency conclusions regarding a conflict between state law and federal regulations would be evaluated based on the “agency’s explanation of how state law affects the regulatory scheme.”<sup>67</sup> The Court explained that agencies have “a unique understanding of the statutes they administer and an attendant ability to make informed determinations about how state requirements may pose an” obstacle to Congress’s purposes, but they “have no special authority to pronounce on pre-emption absent delegation by Congress.”<sup>68</sup> After *Wyeth*, scholars have understood preemption, as a

---

Eskridge, *supra* note 11, at 1443 (arguing that, unless Congress has explicitly authorized the agency to preempt state law, courts should apply an “expanded *Skidmore*” approach).

61. See Merrill, *supra* note 11, at 775–76.

62. Young, *supra* note 13, at 890–92.

63. See, e.g., Gregory M. Dickinson, *Calibrating Chevron for Preemption*, 63 ADMIN. L. REV. 667, 669 (2011) (noting that in preemption cases, “the Court continues to apply deference haphazardly from case to case with no clearly articulated reason for its variation”).

64. Professor Sharkey notes that before *Wyeth*, “[t]he Court had previously given a nod (if not outright deference) to agency proclamations of preemption” made in both regulations and other statements. Catherine M. Sharkey, *Federalism Accountability: “Agency-Forcing” Measures*, 58 DUKE L.J. 2125, 2180 (2009).

65. See *Preemption of State Common Law Claims*, *supra* note 11, at 268 (describing the Court’s “practice of withholding preemption determinations from the general *Chevron* regime”); see also *PLIVA, Inc. v. Mensing*, 131 S. Ct. 2567, 2575 n.3 (2011) (“Although we defer to the agency’s interpretation of its regulations, we do not defer to an agency’s ultimate conclusion about whether state law should be pre-empted.” (citing *Wyeth v. Levine*, 555 U.S. 555, 576 (2009))); cf. *Riegel v. Medtronic, Inc.*, 552 U.S. 312, 329–30 (2008) (stating the Court was “neither accepting nor rejecting the proposition that this regulation can properly be consulted to determine the statute’s meaning”).

66. 555 U.S. 555 (2009).

67. *Id.* at 576.

68. *Id.* at 577.

category, to be relevant to whether *Chevron* will apply—that is, relevant to Step Zero—even if the doctrinal rule is still murky.<sup>69</sup>

One can imagine categories other than preemption questions that encompass slightly different swaths of federalism-implicating cases. For example, the category might be adjusted to include all cases in which a state sues an agency regarding interpretation of a statute, or cases in which an agency interprets a statute that allocates authority to both levels of government.<sup>70</sup> Or the test might be narrowed to apply only when an agency concludes that state law *is* preempted.<sup>71</sup>

### B. Procedure-Based Approaches

Other scholarly proposals focus on agency procedures. The idea here is that certain parts of an agency's decision-making process can be federalism-protecting, and that agencies should be induced to engage fully in those procedures. One way to encourage agency compliance with federalism-friendly procedures is to make such compliance a prerequisite for *Chevron* (or other deference doctrines). For example, Professor Catherine Sharkey has suggested that courts could “condition[] any deference to an agency's preemption position on that agency's compliance with the strictures of Executive Order 13,132,” the “Federalism Executive Order,” which requires consultation with states.<sup>72</sup> She has also suggested that applying *Skidmore* rather than *Chevron* deference may be a way to “encourag[e] agencies to engage in formal notice-and-comment rulemaking processes that, arguably, vet the agency decisionmaking process and make the agency respond to substantive concerns raised by all affected parties.”<sup>73</sup> Professor Young has made a similar suggestion, proposing that an improved *Skidmore* analysis would consider whether the agency complied with the Federalism Executive Order. Professor Gillian Metzger has observed that there are various ways for courts to encourage agencies to adhere to procedures geared toward care for state interests. Among other options, “courts could relax their substantive scrutiny when agencies utilized procedures (whether notice-and-comment rulemaking or other measures) intended to ensure adequate attention to state interests.”<sup>74</sup>

Here, too, *Wyeth* lends some support by reflecting concern with agency procedure. The FDA's notice of proposed rulemaking had explicitly stated that the rule would *not* have federalism implications or preempt state law; the agency later finalized the rule and, without giving states additional notice or allowing them to comment, “articulated a sweeping position on

---

69. See, e.g., Dickinson, *supra* note 63, at 680–89; Merrill, *supra* note 18, at 773; Sharkey, *supra* note 64, at 2180.

70. See *supra* note 10.

71. See Mendelson, *supra* note 11, at 741 n.14 (citing Howard P. Walthall, Jr., Comment, *Chevron v. Federalism: A Reassessment of Deference to Administrative Preemption*, 28 CUMB. L. REV. 715, 754–58 (1997–98)).

72. Sharkey, *supra* note 64, at 2185; Sharkey, *supra* note 13, at 256–57.

73. Sharkey, *supra* note 64, at 2185; Sharkey, *supra* note 60, at 498.

74. Metzger, *supra* note 1, at 2102–03.

the [statute's] pre-emptive effect in the regulatory preamble."<sup>75</sup> The Court's dissatisfaction with the FDA's bait and switch was palpable: "The agency's views on state law," the Court stated, "are inherently suspect in light of this procedural failure."<sup>76</sup> The Court's dissatisfaction in one case certainly does not establish a doctrinal rule. Still, it lends some support to the proposals that agencies should get less deference when they fail to undertake federalism-friendly procedures.

### C. Substance-Based Approaches

A third approach to Federalism Step Zero would tailor *Chevron's* application based on the particular subject area or statute at issue. This is a cousin of the famously fraught efforts to identify separate spheres of state and federal authority as part of a model of "dual federalism."<sup>77</sup> And yet the substance-based proposals recur. The reason may be that, although it is likely impossible to identify entire subject areas of exclusive state or federal authority, it is still the case that the federal balance does not look the same in every field, and that some specific issues or tasks, if not categories, have usually been handled by one level of government or the other.<sup>78</sup>

The Supreme Court's Step Zero analysis in *Gonzales v. Oregon*<sup>79</sup> intimates a subject-based approach—in particular, one that asks whether the area is one of "traditional" state authority. The case involved an Interpretive Rule issued by the Attorney General under the Controlled Substances Act prohibiting doctors from prescribing drugs for use in physician-assisted suicide, a practice permitted in the state of Oregon.<sup>80</sup> The Court found the *Chevron* framework inapplicable at Step Zero because the Attorney General lacked authority to issue the interpretation in question—in the language of *Mead*, he had not acted with the force of law.<sup>81</sup> One of the Court's grounds for this conclusion was concern for "the background principles of our federal system."<sup>82</sup> The Court concluded that the statute, consistent with tradition, presumes that states are the lead regulators of medical practice,<sup>83</sup> and the Court refused to believe that Congress would have used "an obscure grant of authority to regulate areas

---

75. *Wyeth v. Levine*, 555 U.S. 555, 577 (2009).

76. *Id.*

77. On the demise of dual federalism, see generally Edward S. Corwin, *The Passing of Dual Federalism*, 36 VA. L. REV. 1 (1950); Ernest A. Young, *Dual Federalism, Concurrent Jurisdiction, and the Foreign Affairs Exception*, 69 GEO. WASH. L. REV. 139, 188 (2001).

78. Cf. Eskridge, *supra* note 11, at 1485 ("[T]he larger project of preemption jurisprudence is to develop area-specific precepts for calibrating the state-federal balance. Professor Thomas Merrill is working on such an area-specific project for environmental law. Professors Langbein and Macey are moving in that direction for pension and banking law, respectively. Professor Catherine Sharkey is thinking along similar lines for federal preemption of state product liability law. Other academics should join this parade.")

79. 546 U.S. 243 (2006).

80. *See id.* at 249.

81. *See id.* at 268. The Court commented that the statute would have been ambiguous for purposes of *Chevron* Step One. *See id.* at 258.

82. *Id.* at 274.

83. *See id.* at 270–71.

traditionally supervised by the States' police power."<sup>84</sup> The Court characterized this as a "commonsense conclusion," expressly disavowing reliance on the presumption against preemption or clear statement rules.<sup>85</sup>

While leaving many questions unanswered, the relevant portion of the Court's analysis opens the door to a very broad Federalism Step Zero. In effect, the Court pronounced a Step Zero presumption that Congress has not given an agency the law-interpreting authority necessary to trigger *Chevron* deference where the delegation intrudes on state prerogatives in traditional areas of state police power.<sup>86</sup> This doctrine has the potential to reach beyond square administrative preemption cases. After all, although *Gonzales* involved conflict between state and federal law in the colloquial sense, it was not a true conflict preemption case in the doctrinal sense,<sup>87</sup> and the Court did not invoke the presumption against preemption.<sup>88</sup> *Gonzales* thus may well stand for a broader approach in which the trigger for shutting off *Chevron* is the incursion of federal agency action into subject areas thought to be traditionally state controlled.<sup>89</sup>

---

84. *Id.* at 274.

85. *Id.*

86. See Gersen, *supra* note 1, at 244 ("Read properly as Step Zero analysis, [the key passage in *Gonzales*] indicates that *Chevron* deference will not generally be given to agency interpretations of statutes generating conflicts with state law, at least in fields traditionally of state or local concern like the regulation of the medical profession."). Professor Gersen interprets *Gonzales* as creating a "modified Step Zero presumption against preemption" under which "Congress will not be taken to delegate law-interpreting authority when a federal agency asserts authority in a way that butts up against traditional state concerns." See *id.* at 245; see also Keller, *supra* note 9, at 70 & n.129.

87. See *Gonzales*, 546 U.S. at 290 (Scalia, J., dissenting) (stating that the Interpretive Rule "does not purport to pre-empt state law in any way, not even by conflict pre-emption—unless the Court is under the misimpression that some States *require* assisted suicide[.]" but "merely interprets the CSA to prohibit, like countless other federal criminal provisions, conduct that happens not to be forbidden under state law").

88. See *supra* note 85 and accompanying text; see also Gersen, *supra* note 1, at 247 (noting that *Gonzales*'s "modified preemption presumption of Step Zero is a close cousin to the *Rice* presumption against preemption, but the Court apparently conceives of them as different tools").

89. Cf. Hills, *supra* note 10 (referring to the "*Mead-Gonzales* doctrine" as one that requires de novo review when statutes allocate authority to decision makers at multiple levels of government). The litigants in *City of Arlington* also raised the possibility of a subject area-based test for a Federalism Step Zero, noting that the FCC was asserting interpretive authority in the area of land use, an area of "traditional state and local concern." *City of Arlington v. FCC*, 133 S. Ct. 1863, 1873 (2013) (internal quotation marks omitted). This approach garnered the interest of Chief Justice Roberts and Justice Kennedy at oral argument. Justice Scalia's majority opinion rejected the proposal, concluding that the case did not raise federalism questions at all, because there was no question that federal law would control; the only question was whether federal courts or federal agencies would decide its meaning. See *id.* For disagreement, see Hills, *supra* note 10 (noting that it is "entirely plausible" to believe that "federal judges are likely to be more likely than mission-bound agency bureaucrats to understand and care about general aspects of our legal culture like federalism").

## III. CRITIQUING A FEDERALISM STEP ZERO

A Federalism Step Zero imposes costs without adequate benefits. This part first explains why a Federalism Step Zero, operationalized through any of the approaches noted above, would be unlikely to serve the federalism goals of its proponents. It then describes the harms that such a test would cause related to the *Chevron* framework itself—by reducing the coherence, simplicity, and predictability of the deference regime.

A. *The Impossibility of a Federalism “Test”*

A first reason to reject a Federalism Step Zero is that it is unlikely to aid the federalism cause. The heterogeneity of federalism questions reveals why: the modes and goals of federalism analysis are too varied for any test to accurately predict which cases, if any, will be so unsuitable for deference that they should not even be eligible for it.<sup>90</sup>

Federalism questions tend to involve diverse subsidiary inquiries, including factual and policy inquiries on which agencies likely have expertise.<sup>91</sup> In addition, the goals of federalism are varied. When scholars talk about federalism values, especially in the administrative context, they actually invoke a number of distinct values that will sometimes conflict.<sup>92</sup> As I have written elsewhere, three key goals emerge from the administrative federalism literature’s desire to protect federalism in the administrative process. The most prominent goal is the protection of state autonomy or state power.<sup>93</sup> But courts and commentators also emphasize at least two other goals: learning from, and making good decisions based on, states’ knowledge and information, and following the will of state citizens.<sup>94</sup> There is no single federalism rule or norm that can be coherently abstracted from these multiple values and imported into the Step Zero framework, much less a test that could predict when and on which goals agencies (or

---

90. There is, of course, no agreed upon baseline for the desired extent of protection of federalism values. The assertion here is thus comparative: federalism values, as defined here, will likely be no better off if federal questions are intercepted by courts at Step Zero than if they are evaluated in the ordinary *Chevron* framework.

91. See, e.g., *Wyeth v. Levine*, 555 U.S. 555, 576–77 (2009); Merrill, *supra* note 11, at 779; Sharkey, *supra* note 20, at 107. One way to incorporate the expertise of both agencies and courts is to apply lesser *Skidmore* deference to federalism questions, a proposal favored by several of the scholars mentioned in this Essay. But as discussed below, the very project of identifying which cases ought to be carved out for analysis under *Skidmore* rather than *Chevron* is likely to be ineffective and burdensome, and carving out broad exceptions from *Chevron*-eligibility would harm the doctrine’s coherence and predictability. Because *Chevron* itself leverages the competence of both courts and agencies, the carve-out is hard to justify.

92. See Seifter, *supra* note 22, at 957. Relatedly, scholars have recognized that there are a number of different overarching definitions and accounts of federalism. See, e.g., Akhil Reed Amar, *Five Views of Federalism: “Converse-1983” in Context*, 47 VAND. L. REV. 1229 (1994); Jessica Bulman-Pozen, *Unbundling Federalism: Colorado’s Legalization of Marijuana and Federalism’s Many Forms*, 85 U. COLO. L. REV. 1067, 1070 (2014).

93. See Seifter, *supra* note 22, at 980–81.

94. See *id.* at 957.

courts) will underperform.<sup>95</sup> Federalism's moving parts need to be evaluated holistically and weighed in context.

In turn, each of the three approaches to a Federalism Step Zero described in Part II is doomed to fail. Each test will produce inaccuracies, stripping cases of deference-eligibility even where federalism values are not threatened or where agencies are well-equipped to perform the analysis.

### 1. The Categorical Approach

Recall that the first and most popular option has been a category-based approach, which would deny *Chevron* analysis in preemption cases or another easily identifiable subset of cases with federalism implications.<sup>96</sup> This approach would impose some neatness; it would be relatively easy to determine whether the case falls within the category. But it is an inaccurate gauge for detecting when an agency might mishandle a federalism question.

As alluded to already, preemption questions, like other federalism questions, are often rooted in factual and policy questions on which agencies have substantial expertise.<sup>97</sup> Categorically carving these cases out of the *Chevron* framework thus risks denying deference in cases where its traditional justifications are strongest.

Perhaps less obviously, selecting only preemption cases for exclusion from the *Chevron* framework is also somewhat arbitrary. First, as Professor Gillian Metzger has pointed out, withholding deference for statutory interpretations that would preempt state law misses the fact that agencies can also (or effectively) preempt through legislative rules that do not directly address the statute's preemptive scope.<sup>98</sup> Furthermore, preemption is but a slice of the many ways in which federal agencies can substantially limit states' autonomy and discretion. Funding decisions, and conditions on funding, can also invade state prerogatives in powerful ways. So can the huge category of rules that eliminate some swath of state discretion without directly preempting state law. Indeed, some of these alternative constraints on state power may be more pernicious from a federalism perspective than ordinary preemption.<sup>99</sup> Focusing exclusively on cases that fall within preemption doctrines misses some of the most potent and pervasive

---

95. Cf. John F. Manning, *Federalism and the Generality Problem in Constitutional Interpretation*, 122 HARV. L. REV. 2003, 2040 (2009) (identifying difficulties with an abstract federalism norm as a constitutional matter).

96. See *supra* Part II.B.

97. See, e.g., Merrill, *supra* note 11, at 779; Sharkey, *supra* note 20, at 107.

98. Metzger, *supra* note 1, at 2071. Professor Merrill has proposed mitigating this inconsistency by applying a *sui generis* standard of review in preemption cases that would apply not only to agencies' legal conclusions regarding preemption, but also to other agency interpretations that effectively preempt state law. See Merrill, *supra* note 11, at 773–76. This would limit some potential manipulation, but it would not address the broader problem of non-preemption cases that infringe federalism norms.

99. After all, federalism is sometimes served by the imposition of a uniform national solution. Cf. Robert D. Cooter & Neil S. Siegel, *Collective Action Federalism: A General Theory of Article I, Section 8*, 63 STAN. L. REV. 115 (2010). It is harder to make the case that federalism is served by underfunding federal programs or constraining state officials' discretion in ways that make it difficult for them to do their jobs.

infringements on state prerogatives while also denying deference where it is justified.

## 2. Procedure-Based Approaches

The second possible approach to a Federalism Step Zero, hinging eligibility for deference on an agency's use of federalism-friendly procedures, is also flawed. There is no agency procedure that reliably defends, or even tracks, the suite of federalism goals sought by most federalism proponents.<sup>100</sup>

The most prominent federalism-friendly agency procedure is consultation with states. In prior work, I revealed that these consultations most often occur with state interest groups, organizations of state officials that lobby on behalf of state interests.<sup>101</sup> Indeed, both formal legal instruments and longstanding administrative practice bless the involvement of state interest groups in agency decision making. Yet state interest groups, my prior work concluded, tend to serve one federalism goal while undermining others—state interest group consultations usually yield pleas for state autonomy, but they tend to disserve the goals of enhancing agency expertise with states' substantive experiences and protecting the interests of state citizens.

This imbalance occurs because of the mission and structure of state interest groups. The purpose of the groups is to focus states on their common ground. To be effective as lobbyists, the groups focus their advocacy on single positions. This means (seemingly ironically for federalism) that the groups downplay states' differences and diversity, and do not serve as conduits for states' substantive information and experiences. Moreover, because of the way that the groups are governed—for example, not all states are usually members, unanimity is not required, and many state members do not engage in most votes—a “group” position often does not reflect the views of all state official members, let alone state citizens.<sup>102</sup>

Nor does consulting with states individually rather than with state interest groups necessarily serve all federalism goals. Individual consultations produce the opposite tradeoff: state officials readily convey their substantive experiences and the preferences of their citizens, but they have many reasons not to value state autonomy.<sup>103</sup> As I and others have noted elsewhere, state officials have numerous reasons—ideology, political needs, fiscal concerns, personal gain, and more—to depart from the federal structure.<sup>104</sup> They may well lobby for a new federal rule or the expansion

---

100. As the discussion suggests, I take as given that the majority of federalism proponents have nuanced goals related to state autonomy, expertise, and democratic accountability, rather than a singular focus on any one facet of federalism.

101. For more on state interest groups and their role in the federal regulatory process, see generally Seifter, *supra* note 22, at 961–79.

102. *See id.* at 1001–02.

103. *See id.* at 982–83.

104. *See* *New York v. United States*, 505 U.S. 144, 182 (1992) (noting that “powerful incentives might lead both federal and state officials to view departures from the federal structure to be in their personal interests”); Seifter, *supra* note 22, at 982–83 & n.128 (collecting sources).

of federal programs even where the optimal outcome for the federal structure is the protection of state autonomy.

Because there is no ideal procedure for defending the goals of federalism proponents, denying deference where agencies fail to follow particular procedures for state input may be unhelpful or even counterproductive for federalism purposes.<sup>105</sup>

### 3. Substance-Based Approaches

The third approach to a Federalism Step Zero would hinge *Chevron*-eligibility on the subject matter or statute at issue, with the idea that some areas are traditionally reserved for state governance. This approach is well-known for its futility.<sup>106</sup> As federalism scholars have recognized (through metaphors of “marble cake” and others), state and federal governance are so intertwined that it is impossible to identify any areas of exclusive state or federal control.<sup>107</sup> Even “traditionally” state areas like policing or “traditionally” federal areas like foreign affairs have substantial state and federal involvement.<sup>108</sup> It may be possible to say in a given case that the specific question at issue has been historically controlled by the states or the federal government, but that helps only if the courts take a case-by-case approach—the very approach that won’t work at Step Zero.

One potential response to this Essay’s critique of the available approaches to a Federalism Step Zero is that its logic has no stopping point. If federalism cannot be distilled to a simple inquiry, must we also abolish the longstanding federalism canons?<sup>109</sup> Such a response might posit that some inaccuracy is acceptable, even inevitable, in statutory interpretation, such that both the federalism canons and a potential Federalism Step Zero are saved. This response has some merit, but should not prevail. One reply is that federalism canons can be and are applied selectively, when judges find that the circumstances warrant their use.<sup>110</sup> This inconsistency is not

---

105. I have argued elsewhere that agencies should be required to consult with individual states *in addition to* state interest groups to satisfy the Federalism Executive Order. See Seifter, *supra* note 22, at 1021–22. If that requirement were adopted, a procedure-based test for federalism compliance would work better. Still, this is a second-best solution compared to the avenues for more encompassing reasonableness analysis in *Chevron*’s interior steps and arbitrary and capricious review.

106. See, e.g., David A. Dana, *Democratizing the Law of Federal Preemption*, 102 NW. U. L. REV. 507, 515 (2008) (“[T]he category of traditional arenas of state regulation is so subject to manipulation that almost any state law or regulation could be characterized as falling or not falling within a traditional arena.”).

107. E.g., Morton Grodzins, *The Federal System*, in AMERICAN INTERGOVERNMENTAL RELATIONS 54, 54 (Laurence J. O’Toole, Jr. ed., 4th ed. 2007) (explaining that federalism is more of a “marble cake” than a “layer cake”).

108. See, e.g., *id.* at 54–57.

109. See generally, e.g., William N. Eskridge, Jr., *The New Textualism*, 37 UCLA L. REV. 621, 665 (1990) (“Federalism canons are rules of construction based upon the nation’s federal system of government, with its division of responsibilities among national, state, and local governments.”).

110. See generally Karl N. Llewellyn, *Remarks on the Theory of Appellate Decision and the Rules or Canons About How Statutes Are to Be Construed*, 3 VAND. L. REV. 395, 401–06 (1950).

suitable for Step Zero, where waffling could destabilize or even unravel *Chevron*. Nor is it something to strive for; federalism canons, particularly the presumption against preemption, are oft-criticized for their inconsistent and even opportunistic application.<sup>111</sup> More importantly, canons are applied *contextually*. They are weighed against other canons and the facts and circumstances of the case to reach an answer. This is the sort of analysis that is possible in the reasonableness inquiries of *Chevron* and arbitrary and capricious review. A Federalism Step Zero, in contrast, would be an on-off switch, shutting off the necessary contextual analysis regarding the federalism values at stake and the propriety of agency deference.

### B. *Chevron-Related Harms*

Another set of costs arising from a Federalism Step Zero relates to the *Chevron* framework itself. First, adding a federalism inquiry to the pre-*Chevron* analysis would make the analysis more complex and less coherent.<sup>112</sup> A key feature of *Chevron* is its creation of a simple, broad presumption in favor of agency interpretations of statutory ambiguities.<sup>113</sup> Particular agency decisions may be unreasonable and undeserving of deference, but that is a problem that can be handled within *Chevron*'s interior steps.<sup>114</sup> Creating exceptions to *Chevron*'s application—and if the Court did so for federalism, it would make little sense not to do so for other issues as well—undermines the coherence and predictability of the deference regime.

As noted, prioritizing the importance of coherence and clarity in *Chevron* analysis entails some limit on efforts to tailor *Chevron*'s application to the variety of congressional intent, a development *City of Arlington* appears to support.<sup>115</sup> The federalism context reflects the sensibility of this limitation, for it would be a particularly thorny area in which to develop new doctrines to match Congress's unstated intentions. The recent, pathbreaking empirical study by Professors Lisa Bressman and Abbe Gluck illuminated that legislative drafters had a range of intentions regarding delegation to

---

111. See, e.g., Daniel Abebe & Aziz Z. Huq, *Foreign Affairs Federalism: A Revisionist Approach*, 66 VAND. L. REV. 723, 754 (2013) ("In the most charitable light, it might be said that the Court's preemption jurisprudence responds to individual policy considerations and circumstantial detail. More skeptically, it might be posited that the latter jurisprudence is to date wanting in guiding principles."); Sharkey, *supra* note 60, at 458 ("I join a veritable chorus of scholars pointing out the Court's haphazard application of the presumption.").

112. Cf. Transcript of Oral Argument at 39, *City of Arlington v. FCC*, 133 S. Ct. 1863 (2013) (No. 11-1545) (Solicitor General Verrilli arguing that adding jurisdictional questions into the Step Zero inquiry would give it "the complexity of the Internal Revenue Code").

113. See Sunstein, *supra* note 39, at 191–92; Vermeule, *supra* note 25, at 348 ("[T]he key innovation of *Chevron* is to create a global interpretive presumption: ambiguities are, without more, taken to signify implicit delegations of interpretive authority to the administering agency.").

114. See Sunstein, *supra* note 39, at 194.

115. For a summary of competing views regarding the legal fiction of congressional intent on which *Chevron* rests, see generally Lisa Schultz Bressman, *Reclaiming the Legal Fiction of Congressional Delegation*, 97 VA. L. REV. 2009 (2011).

agencies for different types of questions that implicated federalism.<sup>116</sup> Approximately 70 percent of the surveyed drafters indicated that they intended agencies to fill gaps regarding the division of labor between states and federal agencies, while approximately 36 percent said that they intended agencies to fill gaps regarding preemption.<sup>117</sup> Attempting to track Congress's fine-grained, unspoken, and likely shifting preferences could produce doctrinal chaos. *City of Arlington's* bright-line rule, in contrast, provides a default against which Congress can legislate. This sort of congressional engagement does not seem far-fetched given recent evidence that Congress is aware of *Chevron*. Professor Kent Barnett has highlighted a recent instance—the Dodd-Frank Act—in which Congress answered the Step Zero question expressly, suggesting that Congress may use *Chevron* as a default principle when drafting legislation and knows how to select a different rule when it so desires.<sup>118</sup>

There is also the risk that judicial administration of the Federalism Step Zero itself would be a muddle. I have argued that a Federalism Step Zero would have to be a bright-line test, but as the foregoing discussion points out, even the best options for such a test would not always be bright. A test based on subject area, in particular, would be hopelessly difficult to apply. If the new Step Zero itself is unclear, the result would be a repeat of *Mead*: unpredictability for courts and litigants, and inconsistent results.

The stakes of this debate extend beyond the federalism topics discussed in this Essay. Scholars have debated other potential exceptions to *Chevron's* application, all of which are properly understood as Step Zero debates. One debate has considered whether certain substantive canons of construction “trump” *Chevron*.<sup>119</sup> Another possible exception would carve certain “major” questions out of *Chevron's* domain, on the assumption that Congress would not have intended to allow agencies to decide matters of such importance.<sup>120</sup> Yet another debate—resolved in *City of Arlington*—had surrounded whether agencies' interpretations of their own “jurisdiction” (or statutory authority) were eligible for deference under *Chevron*.<sup>121</sup> In

---

116. See Gluck & Bressman, *supra* note 39, at 994–95.

117. See *id.* at 1004–05 & fig.11.

118. See Kent Barnett, *Improving Agencies' Preemption Expertise with Chevmore Codification*, 83 *FORDHAM L. REV.* 587 (2014); Kent Barnett, *Codifying Chevmore*, 89 *N.Y.U. L. REV.* (forthcoming 2014), available at <http://ssrn.com/abstract=2405016>. Professor Barnett ultimately concludes that *Mead*, rather than *City of Arlington*, provides the better default rule. See *id.*

119. While some courts and commentators have suggested that the canons trump *Chevron*, see, for example, *Edward J. DeBartolo Corp. v. Florida Gulf Coast Building & Constuction Trades Council*, 485 U.S. 568, 575 (1988); Sunstein, *supra* note 11, at 330, others have suggested that *Chevron* should trump the canons, see ADRIAN VERMEULE, *JUDGING UNDER UNCERTAINTY: AN INSTITUTIONAL THEORY OF LEGAL INTERPRETATION* 210–11 (2006); Christopher J. Walker, *Avoiding Normative Canons in the Review of Administrative Interpretations of Law: A Brand X Doctrine of Constitutional Avoidance*, 64 *ADMIN. L. REV.* 139, 190 (2012). Kenneth Bamberger has proposed that agencies consider these canons at Step Two. See Kenneth A. Bamberger, *Normative Canons in the Review of Administrative Policymaking*, 118 *YALE L.J.* 64, 111 (2008).

120. See Sunstein, *supra* note 39, at 231–47.

121. See *supra* note 49 and accompanying text.

each of these areas, expanding Step Zero threatens harm to the *Chevron* framework, and the question must be whether the benefits justify that harm.

C. *A Better Way: Reasonableness and State Interests*

I have argued so far that a Federalism Step Zero is ill-advised because the test would likely mark no improvement for achieving federalism goals and would impose significant costs on the *Chevron* framework. None of this is to say that federalism is irrelevant to the question whether courts should defer to particular agency decisions, or that there ought to be no means of reining in poor agency judgments. Quite the contrary: in some cases, issues of state-federal balance, or agencies' engagement or failure to engage with interested state participants, can usefully inform whether agency interpretations should be controlling. And agency decisions can be policed through a flexible inquiry into reasonableness—an inquiry possible within the *Chevron* analysis, and in arbitrary and capricious review—rather than at the simple, light-touch inquiry of Step Zero. Considering federalism at these phases of the analysis would more sensibly achieve the goals of federalism proponents, at much less cost to *Chevron*.

Both *Chevron*'s interior steps and arbitrary and capricious review afford the flexibility and holistic evaluation necessary to consider, in context, whether and how an agency decision affects federalism values.<sup>122</sup> Arbitrary and capricious review, sometimes nicknamed “hard look” review, allows courts to ask whether an agency's decision was adequately explained, taking into account all relevant factors.<sup>123</sup> *Chevron*'s interior steps, particularly *Chevron*'s Step Two, address the reasonableness or permissibility of an agency's decision with reference to what Congress has commanded.<sup>124</sup> These are appropriate points at which to consider whether the agency's action or interpretation is sufficiently consistent with the federal structure. In undertaking that analysis, a court can consider the subject matter, the agency's procedures, and the category of action at issue, as well as other relevant factors, without being boxed in by an artificial rule.

---

122. See *Judulang v. Holder*, 132 S. Ct. 476, 483 n.7 (2011) (stating that the Court performs the same analysis at *Chevron*'s Step Two and in arbitrary and capricious review, asking “whether an agency interpretation is ‘arbitrary or capricious in substance’” (quoting *Mayo Found. for Med. Educ. & Research v. United States*, 131 S. Ct. 704, 711 (2011))).

123. See *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 48–49 (1983); Merrick B. Garland, *Deregulation and Judicial Review*, 98 HARV. L. REV. 505, 586 (1985); Kathryn A. Watts, *Proposing a Place for Politics in Arbitrary and Capricious Review*, 119 YALE L.J. 2, 5 (2009).

124. Although a lively debate surrounds the precise content of each of *Chevron*'s two core steps and their possible redundancy (either with each other or with arbitrary and capricious review), that debate need not be resolved to find a home for federalism analysis. While many subtle differences have been advanced, it is undisputed that both the *Chevron* inquiry and arbitrary and capricious review cover the reasonableness or permissibility of the agency's interpretation, which is where federalism analysis best fits. For the debate and commentary, see Matthew C. Stephenson & Adrian Vermeule, *Chevron Has Only One Step*, 95 VA. L. REV. 597 (2009); Kenneth A. Bamberger & Peter L. Strauss, *Chevron's Two Steps*, 95 VA. L. REV. 611, 612 (2009). See also Richard Re, *Should Chevron Have Two Steps?*, 89 IND. L.J. 605 (2014).

Take the example of *Gonzales*.<sup>125</sup> The federalism portion of that case's analysis could well have been applied at Step Two, or in arbitrary and capricious review, rather than Step Zero. Under this alternative approach, the court still could have rejected the Attorney General's interpretive rule, but it could have done so in a way that preserved the existing *Chevron* framework rather than creating a confusing new test that would sweep in cases where there is no federalism threat.<sup>126</sup> The Court could have deemed the Attorney General's interpretation unreasonable in light of the specific circumstances: this particular decision looked like an overreach, in part because of the subject matter at issue, in part because of the agency's inconsiderate procedures (Attorney General Ashcroft denied the Oregon Attorney General's request for a meeting and indicated that the Department of Justice was not planning to revisit its then-existing interpretation regarding physician-assisted suicide), and in part because of the "category" of case at issue (while it was not a doctrinal preemption case, the interpretive rule would have displaced a state law). The Court would have reached this conclusion without creating a puzzling new "*Gonzales* doctrine" that would carve out subsequent subject-area cases from *Chevron* analysis. A Step Two analysis would have left open the possibility that some agency decisions, even in similar areas, warranted deference as authorized and reasonable statutory interpretations.

This resolution is in harmony with other proposals for contextual evaluation of an agency's treatment of federalism issues. Professor Gillian Metzger has suggested that courts should hold agencies to "a greater burden of persuasion and explanation" under arbitrary and capricious review when agency actions "substantially restrict state experimentation and traditional state functions."<sup>127</sup> She suggests that this be applied as a "contextual approach," such that greater justification is not a rigid requirement, but is demanded where the circumstances warrant it.<sup>128</sup> Professors Brian Galle and Mark Seidenfeld have proposed "an amalgam of *Skidmore* and hard look review" for agency decisions displacing state power, which would consider a variety of federalism-related factors.<sup>129</sup> This Essay's proposal to consider federalism values at Step Two and in arbitrary and capricious review also resonates with Professor Kenneth Bamberger's suggestion to

---

125. See *supra* notes 79–89 and accompanying text.

126. For purposes of this illustration, I bracket the non-federalism reasons the Court relied upon at Step Zero.

127. Metzger, *supra* note 1, at 2105. To be sure, this is a difficult question to answer at any phase of analysis, even analysis for arbitrariness. But it is far easier to answer accurately by considering context and a multiplicity of factors than through application of bright lines.

128. As examples of appropriate circumstances for greater justification, she mentions cases in which "the burden on states is quite significant, or when governing statutes and historical practice have long tolerated a substantial role for state regulation." *Id.* at 2106.

129. Brian Galle & Mark Seidenfeld, *Administrative Law's Federalism: Preemption, Delegation, and Agencies at the Edge of Federal Power*, 57 DUKE L.J. 1933, 1997 (2008) ("[T]he main factors at play should be the strength of the underlying interest in state autonomy, the agency's decision process, the court's need for information from the agency, the evidence of congressional authorization, the need for exclusive judicial control over fundamental constitutional issues, and the possibility of political externalities.").

consider “normative canons” of statutory interpretation, including federalism canons, at Chevron’s Step Two.<sup>130</sup>

Unlike the expansion of Step Zero, there is little cost to considering federalism among the factors that affect the reasonableness of an agency’s decision. There is no reason to believe that the levers within the *Chevron* framework and arbitrary and capricious review will be unable to weed out those instances in which agency interpretations misconceive federalism values or reveal insufficient expertise, inadequate procedures, or the like. Nor do the flexibility of arbitrary and capricious review and the Step Two inquiry, which are already central to administrative law, substantially harm judicial administration or *Chevron*’s stability.

#### CONCLUSION

Numerous proposals at the intersection of administrative law and federalism belong under the rubric of a Federalism Step Zero. These proposals generally seek to carve federalism questions out of *Chevron*’s domain in order to better protect the values associated with the federal structure. But Step Zero must be (and apparently now is) a simple inquiry based on bright-line rules, while federalism analysis is not susceptible to any bright-line tests. In *Chevron* and beyond, federalism is best analyzed with standards rather than rules. The multiple goals and issues that federalism questions entail prevent any neat interception of questions unsuitable for agency deference, and suggest that agencies have as much to offer in many federalism cases as they do in other *Chevron*-eligible realms. Agencies will not be perfect at such tasks, but the restraints within the *Chevron* framework leave plenty of room to rein in bad agency decision making. When it comes to protecting federalism values, two steps of *Chevron* are enough.

---

130. See generally Bamberger, *supra* note 119.