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## Administrative Balance

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# Administrative Balance

David Russell\*

## ABSTRACT

Two of the most discussed administrative-law theories in contemporary discussion are executive preemption and big waiver. Executive preemption is the idea that agency regulations preempt state law by extension of the federal statutes the agencies are charged with enforcing. Big waiver is the idea that Congress delegates, to administrative agencies, the power to waive statutory provisions.

The constitutional questions raised by executive preemption and big waiver can be put in the following terms. Executive preemption raises constitutional issues as regulatory agencies go farther and farther away from the “clear statement” of a given statute. Thus, one wonders whether agencies are turning themselves into an unconstitutional lawmaking body. Big waiver also raises constitutional issues. To some, it inverts the traditional approach to delegation and allows regulatory agencies to, in part, cancel laws that Congress passed.

Executive preemption and big waiver currently constitute two separate theories of administrative law. This paper instead argues that these theories should be thought of in tandem. Executive preemption takes rights away from the states and big waiver gives rights back. As such, these tools allow agencies to balance federalism concerns in our present era of legislative gridlock.

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## INTRODUCTION

*The agency giveth and the agency taketh away.*

The prognosis as to why Congress is engaged in an unprecedented position of legislative gridlock is a subject of discussion in and of itself. However, more relevant to this paper are the inevitable responses agencies adopt in response to changing conditions. Naturally, our understanding of what these agencies are doing must also change. The two theories put forth in this paper are two of the most often-discussed, namely executive preemption and big waiver. Executive preemption is the idea that agency regulations preempt state law by extension of the federal statutes that the agencies are charged with enforcing.<sup>1</sup> Big waiver is the idea that Congress delegates the power to waive statutory provisions to administrative agencies either explicitly or implicitly.<sup>2</sup>

The constitutional questions raised by executive preemption and big waiver can be put in the following terms. Executive preemption raises constitutional issues as regulatory agencies go farther and farther away from the “clear statement” of a given statute.<sup>3</sup> Thus, one wonders whether agencies are turning themselves into an unconstitutional lawmaking body.<sup>4</sup> Big waiver also raises constitutional issues. To some, it inverts the traditional approach to delegation and allows regulatory agencies to, in part, cancel laws that Congress passed.<sup>5</sup>

Executive preemption and big waiver currently constitute two separate theories of administrative law.<sup>6</sup> This paper argues that doing so is inefficient and ineffective. This paper instead argues that these theories should be thought of in tandem. Executive preemption takes rights away from the states and big

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1. See Ernest A. Young, *Executive Preemption*, 102 NW. U. L. REV. 869, 869-71 (2008).

2. See David J. Barron & Todd D. Rakoff, *In Defense of Big Waiver*, 113 COLUM. L. REV. 265, 272-73 (2013).

3. See Young, *supra* note 1, at 870-71; see also *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230-31 (1947) (holding that agencies receive preemptive effect only from a “clear statement” of the statute).

4. See Barron & Rakoff, *supra* note 2, at 277-79.

5. See Barron & Rakoff, *supra* note 2, at 278.

6. See Barron & Rakoff, *supra* note 2, at 272-73; Young, *supra* note 1, at 869-71.

waiver gives rights back. As such, these theories counterbalance each other in a manner that benefits federalism, namely by allotting rights and powers in a way most efficient for the administration of government.

This paper will proceed in four parts. Part I discusses the concepts of executive preemption and big waiver. Part II discusses the current constitutional debate surrounding these theories. Part III argues that both theories should be thought of in tandem as mutually reinforcing each other, thus creating administrative balance. Part IV argues that adopting administrative balance promotes federalism as it exists within the current environment of legislative gridlock.

## I. A THEORETICAL BACKGROUND

### A. EXECUTIVE PREEMPTION

The Supremacy Clause states that “the [l]aws of the United States . . . shall be the supreme [l]aw of the [l]and.”<sup>7</sup> Under the Supremacy Clause, federal laws preempt state laws in cases where a conflict arises between the two.<sup>8</sup> This is the clear meaning of the Supremacy Clause, which renders the preemptive power of federal statutes, in theory, unquestionably constitutional.<sup>9</sup> In many ways, the preemptive power of federal statutes could be termed “classic preemption.” However, Congress simply passes statutes, it doesn’t enforce them. What preemptive power, then, do regulatory agencies have in promulgating regulations in furtherance of enforcing a federal statute?

Executive preemption is the idea that regulatory agencies’ regulations preempt state law by the power of the federal statutes that they are directed to enforce.<sup>10</sup> Under the fiction of executive preemption, administrative agencies carry out the statutes passed by Congress, which by their own effect have preemptive power.<sup>11</sup> Thus, in carrying out federal statutes administrative agencies obtain preemptive power by extension.<sup>12</sup> Such an idea has existed

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

8. *See id.*

9. *See id.*

10. *See Young, supra note 1, at 869-71.*

11. *See Young, supra note 1, at 869-71.*

12. *See Young, supra note 1, at 869-71.*

at least since the 1940s as a body of jurisprudence within administrative law.<sup>13</sup>

That being said, the power of administrative agencies to preempt state law is not clear-cut. In fact, the Supreme Court has taken a somewhat winding road in refining its jurisprudence on executive preemption. One can see this with three of the most seminal administrative law cases of the 20th Century, namely *Skidmore v. Swift & Co.*, *Rice v. Santa Fe Elevator Corp.*, and *Chevron U.S.A., Inc. v. National Resources Defense*.<sup>14</sup>

In *Skidmore*, petitioner employee argued that the respondent owed the petitioner wages for requiring the petitioner to be on-call and on premises four nights a week after the petitioner had finished work.<sup>15</sup> According to the petitioner this “waiting time” requirement violated the Fair Labor Standards Act according to interpretive documents and informal ruling of the U.S. Department of Labor.<sup>16</sup> Respondent argued that the Fair Labor Standards Act was silent on counting “waiting time” as working hours, which allowed the respondent to require “waiting time” without paying for it.<sup>17</sup> *Skidmore* helped to define a concept of judicial interpretation known as *Skidmore* deference.<sup>18</sup> *Skidmore* holds that “[t]he weight of [an agency’s] judgment in a particular case will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control.”<sup>19</sup> This *Skidmore* deference gives weight to agency determinations in judicial proceedings, yet declines to give such determinations the weight of law.<sup>20</sup> In so many words, under *Skidmore* administrative agencies have no preemptive power *per se*, but in some cases preemptive power may be found depending on the weight of the agency determinations.<sup>21</sup> This somewhat seesawing

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13. See *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230-31 (1947).

14. See *Rice*, 331 U.S. at 230-31; *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944); *Chevron U.S.A., Inc. v. Nat’l Res. Def. Council, Inc.*, 467 U.S. 837 (1984).

15. See *Skidmore*, 323 U.S. at 135-36.

16. See *id.*

17. See *id.*

18. See Young, *supra* note 1, at 890.

19. *Skidmore*, 323 U.S. at 140.

20. See Young, *supra* note 1, at 890.

21. See *id.*

opinion was followed just three years later by a more bright line ruling—*Rice*.<sup>22</sup>

In *Rice*, petitioner argued that respondents, Illinois warehousemen engaged in operating public warehouses for storage of grain, violated the Illinois Public Utilities Act and the Illinois Grain Warehouse Act.<sup>23</sup> Respondents in *Rice* argued that the United States Warehouse Act preempted the Illinois law.<sup>24</sup> The holding in *Rice* helped form what exactly administrative agencies need in order to justify the argument that a federal statute preempts state law.<sup>25</sup> *Rice* held that “the historic police powers of the States are not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress.”<sup>26</sup> This is colloquially known as the “clear statement rule,” which requires that an administrative agency claiming preemptive power must find the power in a clear statement of a federal statute.<sup>27</sup> In many ways, *Rice* did the opposite of what *Skidmore* did. *Rice* created a bright line rule in favor of anti-preemption except in cases where it was clear that Congress intended to preempt state law.<sup>28</sup> The clear statement rule was axiomatic until *Chevron*, which creates a conflict as to how courts interpret *Rice*’s “presumption against preemption.”<sup>29</sup>

In *Chevron*, petitioner argued that an EPA regulation, which allowed states to treat pollution-emitting devices within the same industrial grouping as a single group was a reasonable interpretation of a “stationary source.”<sup>30</sup> Respondent argued that the EPA regulation was a contradictory interpretation of the term “stationary source,” and thus the regulation was invalid.<sup>31</sup> The holding in *Chevron* ultimately formed what is now known as the *Chevron* doctrine.<sup>32</sup> Under *Chevron*, when a statute is silent or ambiguous a court will defer to the agency’s interpretation if that

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22. See *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230-31 (1947).

23. See *id.* at 220–22.

24. See *id.* at 220–23.

25. See *id.* at 230.

26. *Id.* at 230.

27. See Young, *supra* note 1, at 877.

28. See Young, *supra* note 1, at 877.

29. See *Rice*, 331 U.S. at 230; Young, *supra* note 1, at 883-85.

30. See *Chevron U.S.A., Inc. v. Nat’l Res. Def. Council, Inc.*, 467 U.S. 837, 840 (1984).

31. See *id.* at 842.

32. See Young, *supra* note 1, at 883-85, 899.

interpretation is reasonable.<sup>33</sup> In many ways this counters *Rice*'s bright line rule insofar as *Chevron* treats a statute's silence as an implied delegation of authority to the agency charged with its enforcement.<sup>34</sup> As this paper will later discuss, *Rice* and *Chevron* are often in conflict with each other in regard to executive preemption, with *Skidmore* doing little to alleviate such tension.

## B. BIG WAIVER

The concept of waiver is a long-standing administrative power.<sup>35</sup> Most traditionally, waiver gives administrative agencies the power to waive regulations that they themselves promulgated.<sup>36</sup> This waiver power could be termed "classic waiver." The reason for classic waiver pertains to the delegated authority to enforce statutes, which requires the creation of regulations. In order to properly and effectively enforce statutes administrative agencies find it necessary, from time to time, to waive their own regulations.<sup>37</sup> Waiving regulations keeps agencies' regulatory framework current.

Big waiver is the concept that Congress delegates the power to waive statutory provisions to administrative agencies either explicitly or implicitly.<sup>38</sup> This is in contrast to the concept of classic waiver, which deals only with regulations of an agency's own making.<sup>39</sup> According to David J. Barron and Todd D. Rakoff, big waiver is a new, inverse, form of delegation. One can see this new form of delegation arise in two recent and well-known statutes, the No Child Left Behind Act ("NCLB") and the Affordable Care Act ("ACA").<sup>40</sup>

NCLB's main provision outlines certain conditions that states must satisfy in order to receive federal grants.<sup>41</sup> To receive

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33. See Young, *supra* note 1, at 885.

34. See Young, *supra* note 1, at 885.

35. See Barron & Rakoff, *supra* note 2, at 276.

36. See Barron & Rakoff, *supra* note 2, at 276.

37. See Barron & Rakoff, *supra* note 2, at 276.

38. See Barron & Rakoff, *supra* note 2, at 278.

39. See Barron & Rakoff, *supra* note 2, at 276.

40. No Child Left Behind Act, Pub. L. No. 107-110, 115 Stat. 1425 (2002) (codified in scattered sections of 20 U.S.C.); Affordable Care Act, Pub. L. No. 111-48, 124 Stat. 119 (2010) (codified as amended in scattered sections of the Internal Revenue Code and 42 U.S.C.); Barron & Rakoff, *supra* note 2, at 279, 81.

41. See Barron & Rakoff, *supra* note 2, at 279.

federal grants, a state must submit a plan demonstrating the adoption of challenging academic standards.<sup>42</sup> Schools must also adopt testing on those same standards.<sup>43</sup> A state must then show “adequate yearly progress” of its students so that by 2013–14, all students “will meet or exceed the State’s proficient level of academic achievement.”<sup>44</sup> Along with this requirement, NCLB allows the Secretary of Education to “waive any statutory or regulatory requirement of this chapter for . . . [an] educational agency that—(1) receives funds . . . and (2) requests a waiver . . . .”<sup>45</sup> According to Barron and Rakoff:

in terms of what the statute allows, and . . . what the Secretary proposes to do, this waiver is clearly “big.” It is, by design, a significant revision of what was spelled out in the statute . . . . For those states that qualify for the waiver, it creates a new regime.<sup>46</sup>

The ACA uses waiver in a slightly different but no less “big” manner. Much of the ACA relies on delegations to the Secretary of Health and Human Services to create a regulatory framework in which the carry out the ACA.<sup>47</sup> Within this delegation is an explicit provision that allows the Secretary to adopt an alternative health care scheme for states.<sup>48</sup> This alternative scheme would waive key provisions of the ACA, including those relating to health care exchanges and the individual mandate.<sup>49</sup> Though the ACA’s waiver is not nearly as big as the waiver power in the NCLB, it is still clearly “big.” According to Barron and Rakoff, the ACA’s waiver power “make[s] an all-things-considered judgment about whether there is some other framework . . . that states may adopt as an alternative to what Congress expressly prescribed.”<sup>50</sup>

Though Barron and Rakoff define big waiver as requiring an explicit statutory waiver provision,<sup>51</sup> perhaps big waiver is

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42. See Barron & Rakoff, *supra* note 2, at 279–80.

43. See Barron & Rakoff, *supra* note 2, at 279–80.

44. See Barron & Rakoff, *supra* note 2, at 279.

45. See Barron & Rakoff, *supra* note 2, at 280 (quoting 20 U.S.C. § 7861(a) (2006)).

46. Barron & Rakoff, *supra* note 2, at 280.

47. See Barron & Rakoff, *supra* note 2, at 281–82.

48. See Barron & Rakoff, *supra* note 2, at 281–82.

49. See Barron & Rakoff, *supra* note 2, at 281–82.

50. See Barron & Rakoff, *supra* note 2, at 282.

51. See Barron & Rakoff, *supra* note 2, at 335.

something broader. As *United States v. Texas* highlighted, big waiver may allow for temporary waiver of statutory provisions absent an explicit waiver provision.<sup>52</sup> The quagmire of the Immigration and Nationality Act (“INA”)<sup>53</sup> demonstrates why some courts have been willing to expand big waiver absent an explicit statutory provision.

It is well-accepted that the INA is unworkable.<sup>54</sup> Arguably, an easy remedy for this would be to have Congress overhaul the INA to make immigration framework workable. Theoretically, this new system could operate with the given amount of funding Congress would allot it. Unfortunately, Congress does not seem able to get anywhere close to correcting the INA for present application.<sup>55</sup> So how should agencies act when required to enforce a statute that they neither have the resources nor the manpower to enforce?

As to the INA, one thing agencies did was to utilize what one could view as a temporary form of big waiver. Two examples of this would be the programs Deferred Action for Childhood Arrivals (“DACA”)<sup>56</sup> and Deferred Action for Parents of Americans (“DAPA”).<sup>57</sup> DACA and DAPA are, essentially, deferred action grants for a period of three years.<sup>58</sup> These deferred action programs grant qualifying aliens a form of temporary legal status.<sup>59</sup> The practical justification for these programs is to allow agencies to focus on priority illegal immigrants, namely illegal immigrants with criminal records.<sup>60</sup>

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52. See *United States v. Texas*, 136 S. Ct. 2271 (2016); *Texas v. United States*, 805 F.3d 653 (5th Cir. 2015). As to *United States v. Texas*, though affirming the Fifth Circuit’s decision via an equally divided court, it remains key to a discussion of big waiver insofar as the Fifth Circuit’s discussion of the extent to which a federal agency can waive statutory directives.

53. See Immigration and Nationality Act, 8 U.S.C. §§ 1101-1537 (2016).

54. See Alex Nowrasteh, *Repeal and Replace the Immigration and Nationality Act*, CATO INSTITUTE (Dec. 3, 2014), <http://www.cato.org/publications/commentary/repeal-replace-immigration-nationality-act> [<https://perma.cc/MUW2-YGTY>].

55. *Id.*

56. See Consideration of Deferred Action for Childhood Arrivals (DACA), U.S. CITIZENSHIP & IMMIGR. SERVS., <https://www.uscis.gov/archive/consideration-deferred-action-childhood-arrivals-daca> [<https://perma.cc/4M74-34HB>] (last visited Oct. 18, 2018).

57. See *Texas v. United States*, 805 F.3d at 660.

58. See *id.* at 664.

59. See *id.* at 660.

60. See 8 U.S.C. § 1103 (2016); Exec. Order No. 13768, 82 Fed. Reg. 18 (Jan. 25, 2017).

DACA and DAPA qualify as big waiver because the INA requires that all illegal immigrants be deported absent a specific exception.<sup>61</sup> This deportation mandate clearly applies to those under DACA and DAPA.<sup>62</sup> But, the argument for DACA and DAPA is that the INA prioritizes deporting aliens with criminal records.<sup>63</sup> This impliedly requires that noncriminal illegal immigrants receive temporary waivers of their illegal status in order to sift through the sheer amount of illegal immigrants.

Though Texas succeeded in invalidating DAPA's application in its eponymous case, the resolution of *United States v. Texas* has little bearing on the general constitutionality of temporary big waiver.<sup>64</sup> This is because the split decision in the case simply invalidated DAPA as to the Fifth Circuit.<sup>65</sup> Thus, in the ten other circuits, DAPA stands as a valid extension of big waiver when promulgated on a temporary basis.<sup>66</sup>

### C. PRACTICAL JUSTIFICATIONS FOR THE THEORIES

The practical justifications for these theories have to do mainly with the significant growth of the administrative state along with the current legislative gridlock in Congress. As to the first issue, it is clear that the administrative state has grown into a quasi-lawmaking body. As Justice White said in *INS v. Chadha*, “[f]or some time, the sheer amount of law . . . made by the agencies has far outnumbered the lawmaking engaged in by Congress through the traditional process.”<sup>67</sup> But, even if agencies act as quasi-lawmaking bodies, the general assumption still holds that agencies defer to Congress as the *primary* lawmaking body.<sup>68</sup>

Unfortunately, Congress is gridlocked. One can look at the number of laws Congress has recently passed and easily infer that

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61. See 8 U.S.C. § 1104.

62. See *id.*

63. See *id.* § 1103; Exec. Order No. 13768, 82 Fed. Reg. 18.

64. See Alex Twinem, *The Curious Case of United States v. Texas*, THE STANFORD DAILY (Apr. 21, 2016), <http://www.stanforddaily.com/2016/04/20/the-curious-case-of-united-states-vs-texas> [https://perma.cc/FP9G-HFFF].

65. See *id.*

66. See *id.*

67. *INS v. Chadha*, 462 U.S. 919, 985–86 (1983) (White, J., dissenting).

68. See *id.*

Congress isn't really "lawmaking" anymore.<sup>69</sup> In some ways, one could argue that agencies, as more flexible bodies, have become quasi-primary lawmakers. In this new role agencies have created tools allowing them to take on a responsibility that administrative agencies arguably were not meant to take on. Executive preemption and big waiver are two tools that administrative agencies use. In many ways, both tools are indispensable in order for administrative agencies to go forth as lawmakers.

## II. THE HEADY DEBATE: ARE THESE THEORIES CONSTITUTIONAL?

### A. FOR EXECUTIVE PREEMPTION

Those that argue for executive preemption do so because they also think executive preemption is ultimately good. For instance, Brian Galle and Mark Seidenfeld argue that, contrary to popular belief, executive preemption is actually *more* transparent than congressional action.<sup>70</sup> Thus, executive preemption creates greater accountability than classic preemption, which in turn hews closer to the tenets of federalism.<sup>71</sup> Galle and Seidenfeld point out that many arguments against executive preemption stress that agencies are less deliberative than Congress.<sup>72</sup> These critics view deliberation as a procedural safeguard against over-preemption and federal encroachment.<sup>73</sup> But, Galle and Seidenfeld argue that evidence suggests that agencies, in fact, act *more* deliberatively than Congress as opposed to less deliberately and transparently.<sup>74</sup>

Galle and Seidenfeld argue that legislators trade votes in order to get votes for other statutes.<sup>75</sup> This infers that voting records are less than ideal for understanding where members of

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69. See Jonathan Weisman, *In Congress, Gridlock and Harsh Consequences*, N.Y. TIMES (Jul. 7, 2013), [http://www.nytimes.com/2013/07/08/us/politics/in-congress-gridlock-and-harsh-consequences.html?\\_r=0](http://www.nytimes.com/2013/07/08/us/politics/in-congress-gridlock-and-harsh-consequences.html?_r=0) [<https://perma.cc/JQG9-XGHF>].

70. See Brian Galle & Mark Seidenfeld, *Administrative Law's Federalism: Preemption, Delegation, and Agencies at the Edge of Federal Power*, 57 DUKE L. J. 1933, 1939 (2008).

71. See *id.*

72. See *id.* at 1936.

73. See *id.* at 1946.

74. See *id.* at 1939.

75. See Galle & Seidenfeld, *supra* note 70, at 1950.

Congress stand on a given issue.<sup>76</sup> Furthermore, they argue that the mechanisms by which Congress passes laws are hidden from the public.<sup>77</sup> This can be seen from the fact that laws first go through committees, which may engage in significant horse-trading. Committees thus disallow the public from understanding exactly how the law was passed.<sup>78</sup>

In contrast, Galle and Seidenfeld argue that administrative agencies are more transparent on both points.<sup>79</sup> They argue that agencies have a better combination of rules and procedures that encourage deliberation and transparency.<sup>80</sup> At the base of this argument is the fact that agencies are controlled by procedures that open up its rulemaking process.<sup>81</sup> The two most important controls, in their view, are the Executive Order passed by President Clinton and the Notice of Proposed Rulemaking (“NOPR”).<sup>82</sup> The Executive Order requires that “every agency to include in the Unified Regulatory Agenda . . . [to provide] both a brief summary and contact information for ‘all regulations under development or review.’”<sup>83</sup> And “[i]n the NOPR, the agency must reveal information on which it relied in formulating the proposed rule to ensure that the public has a meaningful opportunity to comment on the rule.”<sup>84</sup> These rules and procedures lead Galle and Seidenfeld to conclude that agencies are significantly better forums for resolving issues of federalism than Congress.<sup>85</sup>

## B. AGAINST EXECUTIVE PREEMPTION

Just as proponents of executive preemption argue backwards from the conclusion that executive preemption is good, opponents argue backwards from the conclusion that executive preemption is bad. For instance, Ernest Young argues that executive preemption, in its current state, creates a constitutional problem

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76. See Galle & Seidenfeld, *supra* note 70, at 1950-51.

77. See Galle & Seidenfeld, *supra* note 70, at 1950-51.

78. See Galle & Seidenfeld, *supra* note 70, at 1951-52.

79. See Galle & Seidenfeld, *supra* note 70, at 1955-56.

80. See Galle & Seidenfeld, *supra* note 70, at 1955-56.

81. See Galle & Seidenfeld, *supra* note 70, at 1955-56.

82. See Galle & Seidenfeld, *supra* note 70, at 1955-56.

83. See Galle & Seidenfeld, *supra* note 70, at 1955.

84. See Galle & Seidenfeld, *supra* note 70, at 1956.

85. See Galle & Seidenfeld, *supra* note 70, at 1939.

in that it flies in the face of *Rice*.<sup>86</sup> *Rice* holds that there is a presumption against preemption and that preemption must be found in a clear statement.<sup>87</sup> Specifically, he argues that the Supremacy Clause gives Congress the power to preempt state laws because Congress is bound by procedural safeguards to adequately check Congress from abusing its preemptive power.<sup>88</sup> In Young's opinion, agencies have nowhere near the same amount of procedural checks on them as Congress has.<sup>89</sup> This thus implies that agencies receive a lesser degree of preemptive power than Congress, namely the preemptive power afforded to agencies by *Rice*.

Young's position appears to be almost the opposite of Galle and Seidenfeld's, which perhaps implies that he does not buy their argument that agencies are more deliberative than Congress.<sup>90</sup> One can see Young's opinion of agency deference as to preemptive power in the way that he treats *Chevron*. Young advocates that when a direct conflict arises between *Rice* and *Chevron*, *Rice*'s presumption against preemption should prevail.<sup>91</sup> He argues that the solution to over-preemption by agencies is the adoption of a modified test drawn from *Skidmore*.<sup>92</sup> According to Young:

A preemption-specific version of *Skidmore* might prescribe deference to the agency's interpretation of federal law if:

- the agency itself considered the *Rice* presumption in the first instance, as required by Executive Order 13,132;
- the agency's analysis includes a "federalism impact statement," also required by the Federalism Order, that is nonperfunctory;
- the preemption determination turns on the existence of policy conflicts, which the agency

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86. See Young, *supra* note 1, at 881-83.

87. See *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230-31 (1947); Young, *supra* note 1, at 876-78.

88. See Young, *supra* note 1, at 876-79.

89. See Young, *supra* note 1, at 878.

90. See Galle & Seidenfeld, *supra* note 70, at 1955-56.

91. See Young, *supra* note 1, at 891-92.

92. See Young, *supra* note 1, at 891-92.

may have special expertise in identifying, rather than on pure statutory construction;

- state officials had prior notice that the agency was considering a preemption finding, by notice and comment or otherwise;
- the agency's preemption finding includes a limiting principle preserving meaningful areas of state regulatory authority; and/or
- the agency in question has a moderate history—that is, it sometimes finds *against* preemption rather than always expanding its own authority at the expense of the states.<sup>93</sup>

Roderick M. Hills, Jr. argues that adopting an anti-preemption rule of statutory construction actually benefits the national lawmaking process.<sup>94</sup> Hills's argument uses the following hypothetical to illustrate why an anti-executive position encourages a more open democratic process.<sup>95</sup> Let us assume that the federal government avoids legislating on politically sensitive issues. In fact, evidence shows that states are more apt to legislate on politically sensitive issues because their demographics are much less heterogeneous.<sup>96</sup> Going forward from this, let us assume that states produce more divisive laws, which are unlikely to be preempted by the tamer body of federal law.<sup>97</sup> Furthermore, let us say that a state passes a law that is detrimental to certain businesses. What should the businesses do? Certainly, if a pro-preemption rule held, the businesses would lobby agencies to pass

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93. See Young, *supra* note 1, at 891–92. Unfortunately, Young's position is slightly undone by the fact that the current Supreme Court has seemingly no desire to make a complete return to a strict definition of *Rice*. In fact, many of the Court's rulings almost appear to reinforce *Chevron* deference by limiting it. Two great examples of this would be *Christensen v. Harrison County* and *United States v. Mead Corp.*, in which the Court together defined the principle that *Chevron* deference applies only when Congress delegates authority with the force of law. See *Christensen v. Harris Cty.*, 529 U.S. 576, 577 (2000); *U.S. v. Mead Corp.*, 533 U.S. 218, 218 (2001). In limiting *Chevron*, the current Court impliedly favors it. This is a reasonable and correct choice because the state of Congress today is not the same as the state of Congress in the 1940s when *Rice* and *Skidmore* were decided. See Jessica Bulman-Pozen, *Executive Federalism Comes to America*, 102 VA L. REV. 953, 959–60 (2016).

94. See Roderick M. Hills, Jr., *Against Preemption: How Federalism Can Improve the National Legislative Process*, 82 N.Y.U. L. REV. 1, 1–4 (2007).

95. See *id.* at 29–31.

96. See *id.* at 29.

97. See *id.* at 29–31.

a regulation that preempts the disfavored state law. In doing so, the businesses would have preempted a state law without having to go through any body responsible to the voters of the state in which the original law was passed.

The above example demonstrates why Hills argues for a strict anti-preemption view of statutory construction. In his view, anti-executive preemption means that the lawmaking process benefits from maintaining an open and deliberative process for creating federal preemptive power.<sup>98</sup>

### C. FOR BIG WAIVER

Proponents of big waiver tend to favor it because it seems to be a practical necessity in the age of legislative gridlock. For instance, Michael S. Greve and Ashley C. Parrish highlight that waiver, in many ways, must occur in two types of situations.<sup>99</sup> The first situation is where gridlock disallows Congress from repealing old statutes that inhibit agencies from creating a functioning regulatory framework.<sup>100</sup> The second situation is where Congress has hyper-legislated, thus “exceed[ing] the bandwidth of administrative agencies.”<sup>101</sup>

Greve and Parrish’s example of an old statute is the Clean Air Act viewed through *Utility Air Regulatory Group v. EPA* (“*UARG*”).<sup>102</sup> In *UARG*, the EPA essentially rewrote part of the Clean Air Act to cover a large range of greenhouse gas emitters, including individual automobiles.<sup>103</sup> The conflict in *UARG* was whether the EPA had rewritten part of a statutory provision that was unambiguous, thus violating *Chevron*.<sup>104</sup> The Court held that

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98. *See id.* at 30-32. That being said, a strong anti-preemption rule may conflict with Supreme Court’s current jurisprudence. This is something that even Hills admits in his article when he discusses *Geier v. American Honda Motor Co.* *See generally* *Geier v. Am. Honda Motor Co.*, 529 U.S. 861 (2000). According to Hills, after *Geier*, “the Court’s decisions have frequently honored *Rice*’s ‘initial assumption’ by abandoning it, finding an intent to preempt even without anything remotely like ‘clear and manifest’ evidence of such intent.” Hills, *supra* note 94, at 61-62.

99. *See* Michael S. Greve & Ashley C. Parrish, *Administrative Law Without Congress*, 22 *GEO. MASON L. REV.* 501, 504 (2015).

100. *See id.* at 504.

101. *Id.* at 505.

102. *Id.* at 504 (citing *Util. Air Regulatory Grp. v. E.P.A.*, 134 S. Ct. 2427 (2014)).

103. *See id.* at 2436-37.

104. *See* Greve & Parrish, *supra* note 99, at 511.

the EPA violated *Chevron*.<sup>105</sup> But, it adopted a very narrow definition of the term “unambiguous.”<sup>106</sup> According to Gary Lawson, the term “unambiguous” within the *Chevron* context can mean one of two things.<sup>107</sup> The phrase can mean “unambiguous” in that “no sensible reader [could] understand *this* term (or phrase or sentence) to mean anything other than what it says.”<sup>108</sup> Alternatively, “unambiguous” can mean something closer to a certainty in that “we are confident of its meaning after we have deployed all ordinary canons of construction.”<sup>109</sup> By invalidating the EPA regulation on the grounds that the statute could not be read in a way that validated the regulation the *UARG* Court missed an opportunity to restrain agency rewrites.<sup>110</sup> As Greve and Parrish argue, this creates an opening for big waiver.<sup>111</sup>

Greve and Parrish’s hyper-legislation example, on the other hand, is the Dodd-Frank Act.<sup>112</sup> The Dodd-Frank Act was a major piece of legislation that brought about sweeping changes to the finance industry and the regulatory framework surrounding it.<sup>113</sup> According to Greve and Parrish, the Act was so broad that its requirements exceeded the bandwidth of the agencies charged with enforcing it.<sup>114</sup> For instance, the Act required close to 400 rulemakings to be completed within a tight timeframe.<sup>115</sup> This requirement was never met because meeting it was impossible given agency budget restraints.<sup>116</sup> What agencies ended up doing with many of the deadlines imposed by Dodd-Frank was to simply let them pass.<sup>117</sup> In the alternative, the agencies prioritized proceedings according to the needs of constituencies.<sup>118</sup>

In many ways what hyper-legislation does is force agencies to prioritize their resources into the parts of a statute with the most

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105. See Greve & Parrish, *supra* note 99, at 511–12.

106. See GARY LAWSON, *FEDERAL ADMINISTRATIVE LAW* 640 (6th ed. 2013).

107. *Id.*

108. See Greve & Parrish, *supra* note 99, at 511.

109. See Greve & Parrish, *supra* note 99, at 511.

110. See Greve & Parrish, *supra* note 99, at 511–12.

111. See Greve & Parrish, *supra* note 99, at 512.

112. See Greve & Parrish, *supra* note 99, at 516–18.

113. See Greve & Parrish, *supra* note 99, at 516–18.

114. See Greve & Parrish, *supra* note 99, at 516–18.

115. See Greve & Parrish, *supra* note 99, at 505.

116. See Greve & Parrish, *supra* note 99, at 504–05.

117. See Greve & Parrish, *supra* note 99, at 523.

118. See Greve & Parrish, *supra* note 99, at 523.

teeth.<sup>119</sup> This forces agencies to look at the intent of the statute rather than seemingly clear mandates.<sup>120</sup> As a backstop, agencies know that if they stray too far from the path, a court will invalidate their waivers or regulations as exceeding their delegated powers.<sup>121</sup>

Barron and Rakoff support the hyper-legislation argument by stating that Congress, at present, legislates via highly detailed statutes coupled with waiver provisions.<sup>122</sup> In doing so, Congress creates a first draft when it passes a statute.<sup>123</sup> This first draft has everything Congress wants in the statute.<sup>124</sup> But at the same time, Congress knows it cannot get everything that it wants.<sup>125</sup> This is why Congress includes waiver provisions.<sup>126</sup> Armed with a waiver provision, agencies choose which parts of the statute are workable and waive the rest.<sup>127</sup> In many ways, this concept supports Greve and Parrish's argument that courts favor big waiver over big delegation.<sup>128</sup> Today's Congress must legislate in a jungle of pre-existing law, lobbying, and extreme partisanship. As a result, Barron and Rakoff argue that the "power to unmake Congress's law is approaching in significance the delegation of the power to make law on Congress's behalf."<sup>129</sup>

#### D. AGAINST BIG WAIVER

Even if Barron and Rakoff are correct in saying that big waiver is the new normal for agencies in an era of hyper-legislation,<sup>130</sup> constitutional issues still arise. For instance, *UARG* is an example of an institutional problem with big waiver. As Greve and Parrish argue, "broad waiver authority may enable an agency to tailor its regulations so as to obviate *congressional* review and interventions. Barring judicial review, the agency may

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119. See Greve & Parrish, *supra* note 99, at 545.

120. See Greve & Parrish, *supra* note 99, at 516.

121. See Greve & Parrish, *supra* note 99, at 503-04.

122. See Greve & Parrish, *supra* note 99, at 534.

123. See Barron & Rakoff, *supra* note 2, at 269.

124. See Barron & Rakoff, *supra* note 2, at 269-70.

125. See Barron & Rakoff, *supra* note 2, at 269.

126. See Barron & Rakoff, *supra* note 2, at 269.

127. See Barron & Rakoff, *supra* note 2, at 269.

128. See Greve & Parrish, *supra* note 99, at 511-12.

129. See Barron & Rakoff, *supra* note 2, at 269.

130. See Barron & Rakoff, *supra* note 2, at 267-71.

be entirely on its own.”<sup>131</sup> As Greve and Parrish argue, *UARG* involved a shell game in which the EPA attempted to justify its rewrite by rewriting other parts of the statute to make the main rewrite appear more constitutional.<sup>132</sup> While the Court in *UARG* discovered the EPA’s shell game,<sup>133</sup> one can foresee this not always being the case. One could foresee an agency engaging in an ambiguous rewrite that contravenes, in part, the statute’s original intent. This situation would be harder to invalidate because *Chevron* creates a space in which agencies may operate with significant deference.<sup>134</sup>

This creates a problem in that the Supreme Court puts the burden on those affected by agency rewrites to challenge them.<sup>135</sup> While this may not seem particularly onerous, it is burdensome in that it forces those affected by rewrites to discover the rewrite in the first place.<sup>136</sup> If one assumes that agencies have a knowledge advantage over non-agency parties as to their own regulatory framework, then what is to stop agencies from burying the rewrite in way that makes it non-discoverable? Furthermore, wouldn’t such an act be more likely if, like in *UARG*, the agencies’ rewrite raises *Chevron* issues? While in many ways, creating a more liberal interpretation of *Chevron* and big waiver advances what Barron and Rakoff call the new normal,<sup>137</sup> it also creates significant federalism issues. As seen with *UARG*, we do not want to give agencies the power to rewrite or undo statutes in a way that Congress does not intend. Doing so takes these agency actions wholly outside of the democratic process.<sup>138</sup>

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131. See Greve & Parrish, *supra* note 99, at 539.

132. See Greve & Parrish, *supra* note 99, at 525-27.

133. See Greve & Parrish, *supra* note 99, at 504-05.

134. See *Chevron U.S.A., Inc. v. Nat’l Res. Def. Council, Inc.*, 467 U.S. 837, 838-44 (1984).

135. See Greve & Parrish, *supra* note 99, at 539-43.

136. See Greve & Parrish, *supra* note 99, at 539.

137. See Barron & Rakoff, *supra* note 2, at 269.

138. Even if *UARG* justifies big waiver absent a statutory waiver provision in *Chevron*-type situations, how can one justify temporary big waiver of the type in *United States v. Texas*? Under the INA, if one is found to be an illegal alien that person is placed in deportation proceedings. See 8 U.S.C. § 1227 (2012 & Supp. I 2018). Thus, how are DACA and DAPA justified, as they appear to do the opposite of what the INA requires by giving those covered under the programs temporary legal status? In many ways temporary big waiver raises the exact type of concerns put forth by Richard Epstein in opposition to big waiver. Richard A. Epstein, *Gov’t by Waiver*, 37 NAT’L AFFAIRS 39 (Spring 2011), <http://www.nationalaffairs.com/publications/detail/government-by-waiver>

Another problem with big waiver is that it essentially allows legislators to lie to their constituents. According to Greve and Parrish, hyper-legislation is meant to accommodate “an entrenched lobbying culture, and deep partisan division.”<sup>139</sup> Along with these accommodations, legislators can include waiver provisions to undo many of the accommodations so that the agency can actually enforce the statute.<sup>140</sup> Thus, hyper-legislation allows legislators to plausibly satisfy the forces of lobbying culture and partisan division while at the same time satisfying agencies by supplying them with a workable statute. But, this scenario raises some serious issues if we are to maintain a democratic system. If this is the situation that hyper-legislation creates, perhaps we should ask ourselves if it is a good thing to let legislators say one thing and do another. More succinctly, should we let legislators get around legislative gridlock by creating administrative workarounds (such as waiver provisions) instead of addressing the elements of our political process that got us to gridlock in the first place?

This is not a question that this paper in any way seeks to answer. But the previous paragraph raises serious questions about whether the concept of hyper-legislation, paired with big waiver, is in line with our democratic process. How transparent do we want our democratic process to be? More to the point, does hyper-legislation, paired with big waiver, completely obliterate the argument that Congress is more deliberative than agencies? In many ways, part of the deliberate-ness argument is premised on

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[<https://perma.cc/S2CY-B5EU>]. According to Epstein, one of the main problems with big waiver is that it’s highly prone to capricious application. *See id.* at 40-41. Epstein highlights the ACA’s “mini-med” plan, which deals with employers offering part-time workers a form of basic coverage so that these workers are not left uninsured. *See id.* at 51-52. One issue with the “mini-med” plans was that large employers, with high turnover rates for part-time workers, could potentially be overly burdened by such a requirement. *See id.* In response to this issue, the Department of Health and Human Services allowed employers to apply for a waiver to the “mini-med” requirement, eventually granting over 1,000 waivers. *See id.* But, as Epstein points out, “what about employers who do not have the resources to navigate the waiver process? What about those lacking the political connections to make their concerns heard in Washington?” *See id.* at 52. In this regard, big waiver becomes a further wedge between the haves and the have nots. *See id.* Although Epstein’s argument against big waiver extends to the concept of waiver in general, his point on big waiver resonates strongly. *See id.* If the “mini-med” situation creates a wedge between the haves and the have-nots, is this a desirable outcome in a democracy meant to represent persons equally?

139. Greve & Parrish, *supra* note 99, at 535.

140. Greve & Parrish, *supra* note 99, at 535.

the idea that Congress makes hard choices about what to include in statutes. If Congress simply throws everything into the kitchen pot and leaves it to agencies to fix Congress' first draft, Congress is not acting deliberately. Instead, Congress is appeasing in a blanket manner. This raises a lot of questions as to whether our democratic system should allow legislators to prioritize reelection over legislating. If the answer is no, then big waiver should be significantly paired back in order to disincentivize Congress from engaging in hyper-legislation.

### III. THE CONVERGENCE OF THE TWAIN: ADMINISTRATIVE BALANCE

In many ways, Part II outlines reasons to be both excited and wary of executive preemption and big waiver. One possible solution could be to address the issues with these theories on their own, thus addressing these theories one by one. But, what if the downsides to these theories could be addressed without novel argument? What if, instead, the downsides to each theory could be redefined as merely *de minimis* and thus not warranting address? This paper positions itself as an answer to the latter question. By looking at executive preemption and big waiver in tandem, as two sides of the same coin, each theory reinforces each other and allays their respective concerns.

#### A. AN OVERVIEW OF ADMINISTRATIVE BALANCE

Think of each theory broadly. Executive preemption can be thought of as restricting the rights of states to create their own laws by expanding the preemptive effect of federal statutes. Big waiver can be thought of as expanding the rights of states to create their own laws by shrinking the preemptive effect of federal statutes. Theoretically, each theory could thus be seen as mutually enforcing. They create a situation in which states sometimes win (by getting more rights via big waiver) and sometimes lose (by getting less rights via executive preemption). This paper defines this principle as "administrative balance." Looking further into administrative balance, one could even see it take place within the same statute. Take, for instance, Dodd-Frank and the INA through the lens of DACA and DAPA.

As previously mentioned in this paper, Dodd-Frank requires its agencies to create over 400 new rulemakings.<sup>141</sup> These rulemakings all possess explicit preemptive effect, even by *Rice*'s definition.<sup>142</sup> Dodd-Frank, then, exemplifies hyper-legislation's ability to create broad executive preemption.

That being said, Dodd-Frank's rulemaking requirements were generally accompanied by tight implementation deadlines, resulting in holdups to the rulemaking process because the sheer mass of the requirement exceeded the bandwidth of the agencies, given the deadlines.<sup>143</sup> In response to this problem, the applicable agencies waived certain rulemaking requirements by letting the deadlines pass, declining to preempt state law to the full extent allowed by the statute.<sup>144</sup> These waivers thus exemplify the idea that agencies generally decline to exercise the degree to which hyper-legislation empowers them to preempt.<sup>145</sup> In this regard, hyper-legislation can be said to require administrative balance, as agencies take the "first draft" of a statute and shape it into a workable framework.

A further and subtler example of administrative balance existing within one statute can be seen in the INA through the lens of DAPA and DACA. As this paper has previously argued, DAPA and DACA constitute a form of temporary waiver, effected absent a statutory provision.<sup>146</sup> That being said, these programs contain implicit authorization to engage in executive preemption insofar as they require Texas to afford qualifying aliens a form of temporary legal status under Texas's laws.<sup>147</sup> This status affects both Texas' previous standards for issuing driver's licenses to illegal aliens as well as its ability to control these immigrants' entry into the labor market.<sup>148</sup> In this regard, DAPA and DACA

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141. Greve & Parrish, *supra* note 99, at 505.

142. *See Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230-31 (1947); Greve & Parrish, *supra* note 99, at 504-05.

143. Greve & Parrish, *supra* note 99, at 504-05.

144. Greve & Parrish, *supra* note 99, at 523.

145. Greve & Parrish, *supra* note 99, at 523.

146. *See, e.g., Texas v. United States*, 805 F.3d 653, 660 (5th Cir. 2015) (discussing DAPA, which this paper argues is a form of temporary big waiver).

147. *See Texas v. United States*, 86 F. Supp. 3d 591, 616-17 (S.D. Tex. 2015).

148. *See id.*

take the INA, a quintessentially national law, and extend it into a state's legal corpus further than the INA allows on its face.<sup>149</sup>

DAPA and DACA take the form of a more modern executive preemption than the kind found in Dodd-Frank because modern executive preemption assumes an absence of a clear statement.<sup>150</sup> Thus, even though Dodd-Frank clearly pertains to executive preemption, DAPA and DACA extends our understanding of this concept.<sup>151</sup>

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149. See *id.* at 627; see also 8 U.S.C. § 1104 (2012) (discussing the base requirements for enforcement of the INA).

150. See *Chevron U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 842-43 (1984).

151. Interestingly, DAPA could be a great example of modern executive preemption benefitting federalism. To understand this point, take a look at how Texas asserted standing (i.e. how it alleged harm) and how its assertion misunderstands the preemptive effect of these theories. In the original district court case, Texas filed suit to enforce the INA under a *parens patriae* theory. See *Texas*, 86 F. Supp. 3d at 625. The *parens patriae* doctrine holds that a state may file a lawsuit on behalf of one of its citizens, often to enforce a right granted to that citizen by a federal statute. See *Parens Patriae*, BLACK'S LAW DICTIONARY (10th ed. 2014); *Texas*, 86 F. Supp. 3d at 626. For instance, a private citizen may be barred from filing a suit on standing grounds, but a state may be free to file suit under a *parens patriae* theory. See *Parens Patriae*, BLACK'S LAW DICTIONARY, *supra*; *Texas*, 86 F. Supp. 3d at 626. While the *parens patriae* doctrine still requires a state to prove some sovereign interest to have standing to sue, Texas alleged in this suit that DAPA and DACA infringed on their economic and property interests. See *Texas*, 86 F. Supp. 3d at 626-27. Specifically, Texas argued that it retained a valid quasi-sovereign interest in "the health and well-being—both physical and economic—of its residents," which allowed a valid *parens patriae* claim. *Id.* at 627 (quoting *Alfred L. Snapp & Son v. P.R.*, 458 U.S. 592, 607 (1982)). Specifically, Texas "allege[d] that the DHS Directive will create a discriminatory employment environment that will encourage employers to hire DAPA beneficiaries instead of those with lawful permanent status in the United States." *Id.* at 627. According to Texas, DAPA creates this harm by requiring Texas to give those under DAPA driver's licenses, which would allow them to seek forms of lawful employment they were previously foreclosed from obtaining. See *id.* at 616, 618-19 (stating that Texas had not allowed illegal aliens to obtain driver's licenses without proving, at least, some valid employment permit). In some ways, DAPA and DACA's preemptive effect creates a harm in that it inhibits Texas' lawmaking power in this arena. It also puts thousands of previously unemployable persons into Texas' job market, which increases the unemployment rate and the competitiveness of the Texas job market. Additionally, it forces Texas to bear any additional costs of issuing driver's licenses to aliens covered under these programs over the \$24 aliens must pay to obtain a driver's license. See *Texas*, 86 F. Supp. 3d at 617. But, at the same time, one could foresee some serious benefits to Texas that could counteract any possible harms it might incur. For instance, Texas could see initial revenue from additional taxes brought on by these programs. According to a 2013 study by the Heritage Foundation, "[m]ost analysts assume that roughly half of unlawful immigrants work 'off the books' and therefore do not pay income or FICA taxes. During the interim phase, these 'off the books' workers would have a strong incentive to move to 'on the books' employment." ROBERT RECTOR & JASON RICHWINE, HERITAGE FOUNDATION, THE FISCAL COST OF UNLAWFUL IMMIGRANTS AND AMNESTY TO THE U.S. TAXPAYER, at

Concurrently, DAPA and DACA may also constitute a form of waiver by allowing Texas law enforcement to engage in an omission by not having to report illegal aliens to DHS.<sup>152</sup> Under the INA previous to DAPA and DACA any alien found to be illegal was to be brought to the attention of the DHS.<sup>153</sup> This puts a strain, if only a small one, on local law enforcement to act in tandem with DHS's police in order to round up illegal aliens. But, DAPA and DACA alleviate this strain by allowing local enforcement in Texas to omit reporting illegal aliens covered under DAPA and DACA.<sup>154</sup> This freedom to engage in an omission allows local law enforcement to divert whatever resources would have been committed to reporting illegal aliens into other endeavors. As such, this omission ability constitutes a waiver in that it gives states the ability to reallocate money in a way previously disallowed under the INA.<sup>155</sup>

In regard to both Dodd-Frank and the INA, what can be seen is that both modern legislation and modern agency enforcement already show instances of administrative balance. In many ways, the hyper-legislation theorized by Greve and Parrish<sup>156</sup> requires

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vi (May 6, 2013), <http://www.heritage.org/research/reports/2013/05/the-fiscal-cost-of-unlawful-immigrants-and-amnesty-to-the-us-taxpayer> [<https://perma.cc/CDU7-VWQL>]. This is huge considering that, in 2010, the average household of illegal aliens received \$24,721 in government benefits while only paying \$10,344 in taxes. *See id.* at 13, 16. If anything, the monetary deficit of having illegal aliens with no form of legal status could be erased in the short term. *See id.* at vi-vii, 13. This is particularly important considering the fact that Texas alleged that DAPA and DACA would harm their citizens' competitiveness in the job market. *Texas*, 86 F. Supp. 3d at 627. Realistically, this is a short-term problem in and of itself because added human capacity necessarily equates, long-term, to higher unemployment. *See* RECTOR & RICHWINE, *supra*, at 24-25. Thus, the short-term solution forecast by the Heritage Foundation study could create balance by introducing a short-term solution to a short-term problem. *See* RECTOR & RICHWINE, *supra*, vi-vii. That being said, the same study found that amnesty for illegal immigrants would likely create a net deficit in the long-term. But, the same study tempered its conclusion by noting that many citizens produce a net deficit to the economy over the same period of time. *See* RECTOR & RICHWINE, *supra*, at 10-13.

152. *See* 8 U.S.C. § 1103 (Supp. IV 2017).

153. *See* 8 U.S.C. § 1103 (2012).

154. *See* 8 U.S.C. § 1103 (Supp. IV 2017); Jeh Charles Johnson, Sec'y, U.S. Dep't Homeland Sec., Exercising Prosecutorial Discretion with Respect to Individuals Who Came to the United States as Children and with Respect to Certain Individuals Whose Parents are U.S. Citizens or Permanent Residents (Nov. 20, 2014), [https://www.dhs.gov/sites/default/files/publications/14\\_1120\\_memo\\_deferred\\_action\\_1.pdf](https://www.dhs.gov/sites/default/files/publications/14_1120_memo_deferred_action_1.pdf) [<https://perma.cc/2CGC-H4XE>].

155. *See id.*

156. *See* Greve & Parrish, *supra* note 99, at 502.

administrative balance. Without administrative balance a piece of hyper-legislation would be almost unworkable from an enforcement perspective. Moreover, Greve and Parrish's old statute scenario<sup>157</sup> may also be unworkable without administrative balance. This is because keeping old statutes current and aligned with their original intent involves both ratcheting up and ratcheting down certain elements of the statute. Agencies do this by promulgating new regulations or by temporarily waiving statutory requirements.

The hyper-legislation and old statute theories put forth by Greve and Parrish both showcase the underlying existence of administrative balance. For these theories to be true, administrative balance must also be true. Without the assumption of administrative balance's existence, both theories cannot reconcile themselves with how these statutes play out in practice.

## B. RECONCILING THE SCHOLARSHIP

A key to adopting administrative balance is that it reconciles, to an extent, the problems scholars find with executive preemption and big waiver. While the arguments against these theories raise legitimate concerns about these theories' continued use, they ultimately fail to understand two things. First, these arguments misunderstand the current state of administrative law given the gridlocked state of Congress. Secondly, the way in which these arguments predict the effects of executive preemption and big waiver is fundamentally wrong because these arguments think of these theories as separate ideas.

### 1. THE MISPLACED ARGUMENT AGAINST EXECUTIVE PREEMPTION

Addressing *Young*, Young argues that executive preemption, in its current state, creates a constitutional issue in that it seems to fly in the face of *Rice*.<sup>158</sup> But, the way to reconcile this problem is to look at where the Court is, currently, in its preemption jurisprudence and the way that the Court looks at preemption today. The Court has truly deviated from *Rice* in its

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157. See Greve & Parrish, *supra* note 99, at 502.

158. See Young, *supra* note 1, at 881-83; *supra* Part II(B).

jurisprudence.<sup>159</sup> Instead, it appears that the Court oftentimes starts from *Chevron* and then, if at all, looks to *Rice* after its *Chevron* analysis is completed.<sup>160</sup> Young argues that the Court's mode of analysis is flawed (or at least incorrect).<sup>161</sup> Instead, Young advocates for a return to *Rice* and a strict view of agency preemption.<sup>162</sup> Young advances his argument by putting forth a modified *Skidmore* test, which he thinks honors *Rice* and the concept of federalism as a whole.<sup>163</sup>

But Young's own view is flawed. The fact is that the state of administrative law, at the time that *Rice* and *Skidmore* were decided, was very different from the state of administrative law today.<sup>164</sup> Thus, one could argue that reverting to *Rice* would actually be *more* detrimental to the administrative state and federalism generally. *Rice* does not account for the things that agencies do in the face of incredible legislative gridlock.<sup>165</sup> On the other hand, administrative balance does. Administrative balance is premised on the fact that executive preemption and big waiver create a situation in which states sometimes get more power and sometimes get less power. This win/lose principle is not legal fiction—it is a practical reality.

## 2. THE MISPLACED ARGUMENT AGAINST BIG WAIVER

Greve and Parrish hold up the EPA in *UARG* as an example of an agency abusing its discretion.<sup>166</sup> In their opinion, *UARG*'s EPA is the classic “bad actor” that uses its knowledge of its own regulatory framework to obscure its intentions and push its agenda.<sup>167</sup> Furthermore, *Texas v. United States* highlights another risk within big waiver, namely that of burden shifting.<sup>168</sup> Although it is natural for those harmed by big waiver to bear the burden of proving the harm, most likely these plaintiffs are at an

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159. See Hills, *supra* note 94, at 61.

160. See Young, *supra* note 1, at 884.

161. See Young, *supra* note 1, at 891.

162. See Young, *supra* note 1, at 891.

163. See Young, *supra* note 1, at 891-92.

164. See Greve & Parrish, *supra* note 99, at 530.

165. See Young, *supra* note 1, at 882.

166. See Greve & Parrish, *supra* note 99, at 526-27.

167. See Greve & Parrish, *supra* note 99, at 526.

168. See *Texas v. United States*, 787 F.3d 733, 750 (5th Cir. 2015).

information disadvantage.<sup>169</sup> As stated before in this paper, what is to stop agencies from using their informational advantage to bury evidence of its improper rewrites? Interestingly, the answer to these issues could be that the questions these issues raise are the wrong questions to be asking. Put another way, perhaps these questions are misdirected. Perhaps *UARG*'s EPA was not a bad actor at all, but instead a hapless warrior trying to do the best it could in a terrible situation. As to *UARG* and *Texas v. United States*, these broad rewrite situations can almost distract one from the events leading up to the agency policies in the first place. The reason that the EPA and the DOJ acted in the way that they did was because of extreme problems in the statutes that they were charged with enforcing.<sup>170</sup>

*UARG* dealt with the Clean Air Act.<sup>171</sup> As Greve and Parrish wrote, "*UARG* has its history in a long record of futile efforts, dating back two decades, to enact comprehensive climate change legislation. Congress often considered legislation; however, it never took affirmative action to regulation greenhouse gas emissions."<sup>172</sup> Ultimately, advocacy groups petitioned the EPA to regulate greenhouse gases, which it resisted doing, arguing that it lacked authority.<sup>173</sup> However, in *Massachusetts v. EPA*, the Court held that greenhouses gases were unambiguously included in the Clean Air Act.<sup>174</sup> Though the Court did not require the EPA to regulate greenhouses gases de jure, many read the ruling to require the regulation de facto.<sup>175</sup> Unfortunately, the Clean Air Act's architecture did not give the EPA any real ability to regulate greenhouse gases.<sup>176</sup> This created a situation in which the EPA had no choice but to rewrite parts of the Clean Air Act.<sup>177</sup> Thus, one could look at *UARG* not as a story of an agency run amuck, but instead as one trying to do the best it can in the worst of circumstances.

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169. *See id.*

170. *See* Greve & Parrish, *supra* note 99, at 506-08.

171. *Util. Air Regulatory Grp. v. EPA*, 134 S. Ct. at 2424.

172. *See* Greve & Parrish, *supra* note 99, at 506.

173. *See* Greve & Parrish, *supra* note 99, at 506.

174. *See Massachusetts v. EPA*, 549 U.S. 497, 532 (2007); Greve & Parrish, *supra* note 99, at 506.

175. Greve & Parrish, *supra* note 99, at 506.

176. Greve & Parrish, *supra* note 99, at 506.

177. Greve & Parrish, *supra* note 99, at 506.

With DAPA and DACA, the DOJ was in relatively the same situation with the INA as the EPA was with the Clean Air Act. Congress had, for years, tried to address the fact that there are millions of illegal immigrants in this country that the DHS has no resources to deport and no legal avenue to grant status.<sup>178</sup> Furthermore, the INA directs the DHS to prioritize prosecuting illegal immigrants with criminal records.<sup>179</sup> But, more and more illegal immigrants enter this country by the day, packing the immigration courts' dockets to the brim and draining the resources of the DOJ and DHS.<sup>180</sup> This makes it exceedingly hard to process illegal immigrants with criminal records.<sup>181</sup> In response to this ever-growing problem, the DOJ created DAPA and DACA partially in order to free up its immigration courts and the resources it tied to those courts.<sup>182</sup> Interestingly, these additional resources can be diverted to *more* closely adhering to the INA by devoting further resources to prosecuting illegal aliens with criminal records.<sup>183</sup> Thus, one can look at the temporary waiver in *Texas v. United States* not as an unconstitutional act, but as a desperate attempt to stop the bleeding.

### 3. ADMINISTRATIVE BALANCE AND THE *DE MINIMIS* RENDERING

Parts III(B)(1–2) of this paper argue that opponents of executive preemption and big waiver misunderstand the current state of administrative law relative a gridlocked Congress in the context of these theories.<sup>184</sup> But, what if these opponents *did*

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178. See Nowrasteh, *supra* note 54.

179. See Exec. Order No. 13,768 82 C.F.R. § 18 (Jan. 30, 2017).

180. See Muzaffar Chishti & Michelle Mittelstadt, UNAUTHORIZED IMMIGRANTS WITH CRIMINAL CONVICTIONS: WHO MIGHT BE A PRIORITY FOR REMOVAL?, MIGRATION POL'Y INST. (Nov. 2016), <https://www.migrationpolicy.org/news/unauthorized-immigrants-criminal-convictions-who-might-be-priority-removal> [<https://perma.cc/4ENX-QKDS>].

181. See Jeh Charles Johnson, U.S. Dep't Homeland Sec., Policies for the Apprehension, Detention, and Removal of Undocumented Immigrants (Nov. 20, 2014), [https://www.dhs.gov/sites/default/files/publications/14\\_1120\\_memo\\_prosecutorial\\_discretion.pdf](https://www.dhs.gov/sites/default/files/publications/14_1120_memo_prosecutorial_discretion.pdf) [<https://perma.cc/B3RB-64FM>].

182. See *Statement by Secretary Jeh Johnson Concerning the District Court's Ruling Concerning DAPA and DACA*, DHS.GOV (Feb. 17, 2015), <https://www.dhs.gov/news/2015/02/17/statement-secretary-jeh-c-johnson-concerning-district-courts-ruling-concerning-dapa> [<https://perma.cc/TE3P-YZUD>].

183. See *id.*

184. See *supra* Parts III(B)(1–2).

understand the current state of administrative law? Would their arguments against these theories stand of firmer footing? The answer is likely no. These opponents argue against these theories by, in part, forecasting the effect of these theories in practical application.<sup>185</sup> But, to argue these theories separately fundamentally misunderstands how these theories effect administrative law as a whole.

As seen in Dodd-Frank and the INA, executive preemption and big waiver can exist in tandem with each other.<sup>186</sup> Without viewing these theories through the lens of administrative balance one cannot get an accurate picture as to how these theories are playing out in reality. What if one only looked at Dodd-Frank from an executive preemption perspective? By doing so, one might predict agency overreach as they execute their broad authority to write regulations for 400 components of the statute.<sup>187</sup> But, when viewing Dodd-Frank through administrative balance one gets a very different picture. Instead of an overreaching agency one sees a pragmatic agency. One sees an agency overloaded by the enormous requirements of Dodd-Frank's rulemakings.

Furthermore, one sees an agency distilling the requirements to the most important of the bunch, separating the wheat from the chafe. Additionally, what if one only looked at DAPA and DACA from a big waiver perspective? By doing so, one might predict an agency shirking its duties as to hundreds of thousands of illegal aliens. But, when viewing the INA through administrative balance the picture changes. Instead of a capricious agency one sees a desperate agency. One sees an agency requiring states to recognize aliens as legal residents. One might see this preemption as enacted in order to carry out the stronger requirements of the INA, namely the deportation of illegal aliens with criminal records.

It is not that opponents to executive preemption and big waiver are wrong to argue that, in some cases, these theories negatively impact the concept of federalism.<sup>188</sup> This paper argues instead that these arguments are fundamentally misguided

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185. *See supra* Parts III(B)(1-2).

186. *See supra* Part III(A).

187. *See supra* Part II(B); Young, *supra* note 1, at 869-80.

188. *See supra* Part II; Young, *supra* note 1, at 869-80.

because they fail to view these theories through administrative balance. As such, they fail to recognize that administrative balance may, at times, render the harm caused by one theory on its own *de minimis* when viewed through administrative balance.

#### IV. THE NEW FRONTIER: ADMINISTRATIVE BALANCE AND MODERN FEDERALISM

*For the world is changing. The old era is ending. The old ways will not do.*

– John F. Kennedy<sup>189</sup>

##### A. A TOOL FOR ADAPTATION

Even if it is true that administrative balance already occurs, this would not matter if administrative balance were a bad thing. Clearly it matters less that administrative balance is provable than that administrative balance is good. Fortunately, administrative balance is good. It is good because administrative balance is, at its heart, a tool for adaptation.

Administrative balance allows agencies, and the federal statutes they enforce, to adapt to the times in a way that they could not without administrative balance. It allows federal agencies to revise old statutes in light of new statutes. This allows those old statutes to maintain their purpose and effectiveness in light of changing times. Administrative balance also allows agencies to tailor new statutes for the future. The waiver provisions in hyper-legislated statutes like the ACA allow agencies to tailor these statutes into a workable framework. This tailoring ensures the effectiveness of the statutes like the ACA and cements their purpose for the times that lie ahead.

Consider how administrative balance benefits federalism in regard to old statutes. Modern immigration law is based on the Immigration and Naturalization Act passed in 1965.<sup>190</sup> Throughout the years, the INA adapted passing Congress passing

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189. “The New Frontier,” acceptance speech of Senator John F. Kennedy, Democratic National Convention, JOHN F. KENNEDY PRESIDENTIAL LIBRARY AND MUSEUM (July 15, 1960), <https://www.jfklibrary.org/Asset-Viewer/Archives/JFKSEN-0910-015.aspx> [https://perma.cc/B2KX-2F4F].

190. See *U.S. Immigration Since 1965*, History.com (Mar. 5, 2010), <http://www.history.com/topics/us-immigration-since-1965> [https://perma.cc/H74B-6YXH].

small revisions.<sup>191</sup> Accordingly, the DOJ has promulgated differing regulations over the years in order to enforce the INA. These regulations have preemptive effect by way of *Chevron*.<sup>192</sup> But, Congress's revisions assumedly rendered some of the DOJ's initial regulations ineffective.<sup>193</sup> Additionally, the DOJ may have added new regulations to adapt to the changing state of immigration in our country.<sup>194</sup> As such, over the years the DOJ has utilized administrative balance in order to maintain a workable immigration system in light of changing societal attitudes and congressional action. Even though most waivers amounted simply to waiving regulations,<sup>195</sup> the DOJ's recent actions display the full breadth of waiver in DAPA and DACA. Thus, congressional gridlock has expanded the possibilities of administrative balance.

But, the goal is the same. The DOJ utilizes administrative gridlock to create a workable system.<sup>196</sup> Remember, the INA is a quintessentially national statute. Its requirements, both statutory and regulatory, preempt state law as far as the DOJ deems necessary within the bounds of the law.<sup>197</sup> Thus, the DOJ's commitment to maintaining a workable immigration system via administrative balance does two things, both benefitting federalism. The DOJ's use of administrative balance ensures that it has the tools to implement the INA to the most efficient extent possible. Concurrently, administrative balance upholds the DOJ's implied commitment to the states to provide them with a workable immigration system to be carried out by federal officials.

Consider how administrative balance benefits federalism in regard to new statutes in the form of hyper-legislation. Hyper-legislation assumes subsequent agency waiver to convert the "first draft" that Congress passes into a workable statute for enforcement purposes.<sup>198</sup> These statutes do so by inserting waiver

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191. *See id.*

192. *See Chevron U.S.A., Inc. v. Nat'l Res. Def. Council, Inc.*, 467 U.S. 837, 840-45 (1984).

193. *See Federal Policy on DACA and DAPA, 2017-2020*, BALLOTPEdia, [https://ballotpedia.org/Federal\\_policy\\_on\\_DACA\\_and\\_DAPA,\\_2017-2020](https://ballotpedia.org/Federal_policy_on_DACA_and_DAPA,_2017-2020) [<https://perma.cc/MY23-DLNU>] (last visited Oct. 11, 2018).

194. *See supra* Part I(B).

195. *See supra* Part I(B).

196. *See* DHS.GOV, *supra* note 182.

197. *See* DHS.GOV, *supra* note 182.

198. *See* Barron & Rakoff, *supra* note 2, at 269.

provisions into the statutes for later agency use.<sup>199</sup> As outlined in Part III(A), hyper-legislation creates a preemptive ceiling in a given statute's full preemptive extent (along with any further *Chevron*-type regulations).<sup>200</sup> Concurrently, hyper-legislation permanently inserts waiver provisions, allowing agencies to tailor the statute for future application.<sup>201</sup>

Looking at the ACA, one can see administrative balance aiding agencies to accomplish the ACA's ultimate goal—universal health care.<sup>202</sup> Agencies can waive provisions as to exchanges and individual mandates in order to help citizens of different states obtain a base line of coverage.<sup>203</sup> But, agencies can also reassert their full preemptive powers, along with install further *Chevron*-style regulations, if these agencies find states uncooperative in the future.<sup>204</sup> Thus, the agencies' use of administrative balance in the ACA benefits federalism two ways. It recognizes that different states have different baselines of healthcare infrastructure.<sup>205</sup> Waivers facilitate state involvement in setting up health care exchanges and promote state independence by giving them a voice in deciding how to effect the ACA in their state.<sup>206</sup> Furthermore, administrative balance benefits federalism by allowing agencies to flex their preemptive muscles if states attempt to impede the ACA's implementation.

## B. A TOOL OF MINIMAL CONCERN

A further benefit of administrative balance is that it is a tool of minimal concern. While concerns arise about validating the type of plus and minus system that administrative balance outlines, these concerns are likely overplayed.

For example, some may worry that viewing executive preemption and big waiver through administrative balance may empower agencies to over-preempt or over-waive.<sup>207</sup> This paper argues that such a concern is misguided. Regarding over-

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199. See Barron & Rakoff, *supra* note 2, at 266-69.

200. See *supra* Part III(A).

201. See Barron & Rakoff, *supra* note 2, at 266-69.

202. See Barron & Rakoff, *supra* note 2, at 281-83.

203. See Barron & Rakoff, *supra* note 2, at 281-83.

204. See Barron & Rakoff, *supra* note 2, at 279-81.

205. See Barron & Rakoff, *supra* note 2, at 281-83.

206. See Barron & Rakoff, *supra* note 2, at 281-83.

207. See Epstein, *supra* note 138, at 39-41; Young, *supra* note 1, at 869-80.

preemption, such a concern assumes that agencies have the monetary power to actually carry out such expansive preemptive action. In reality, many agencies are underfunded.<sup>208</sup> Agencies simply do not have the money to over-preempt because they would not be able to enforce their preemptive action.

Agencies are also unlikely to over-waive. Courts are much stricter on agency waiver than on agency preemption.<sup>209</sup> Though the ACA and NCLB have resulted in much agency waiver, those waiver provisions were explicitly included in the statute.<sup>210</sup> On the other hand, a court would likely invalidate any waiver or rewrite that in any way resembled *UARG*.<sup>211</sup> Big waiver is not like executive preemption. Courts have never given agencies even close to as long a leash on big waiver as they've given agencies on executive preemption.<sup>212</sup>

Additional concerns arise not from the idea of over-preemption or over-waiver but from administrative balance itself. For instance, Richard Epstein argues that something akin to administrative balance raises significant risks for arbitrary and capricious application.<sup>213</sup> According to Epstein, administrative balance risks a situation where “[i]n some cases, special benefits or permissions releasing companies from government regulations will simply be granted. In others, the releases will be provided only if the regulated parties agree to waive some legal protection to which they would otherwise be entitled.”<sup>214</sup> In this regard,

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208. See Charlie Osborne, Lack of Funding Exposes US Federal Agencies to High Data Breach Risks, ZDNet (Feb. 22, 2018, 3:15 PM), <https://www.zdnet.com/article/us-suffers-highest-data-breaches-of-government-agencies-worldwide> [<https://perma.cc/FNZ8-6GCG>] (discussing lack of funding for cybersecurity efforts).

209. See *Texas v. United States*, 86 F. Supp. 3d 591, 626 (S.D. Tex. 2015).

210. See Barron & Rakoff, *supra* note 2, at 281-82, 279.

211. See Greve & Parrish, *supra* note 99, at 511.

212. See Greve & Parrish, *supra* note 99, at 511.

213. Epstein doesn't mention the term administrative balance in his scholarship, but what he discusses as to this issue amounts to administrative scholarship. Essentially, Epstein discusses the risks arising in hyper-legislation-type statutes where agencies receive carte blanche in the form of broad preemptive and waiver powers. See Epstein, *supra* note 138, at 39-40. As such, this paper will treat Epstein's scholarship as a challenge to administrative balance.

214. See Epstein, *supra* note 138, at 40. Epstein cites Dodd-Frank as a clear example of how hyper-legislation of the kind Greve and Parrish discuss afford agencies incredible discretion. See Epstein, *supra* note 138, 52-53. Consider Epstein's example of how, in his view, Dodd-Frank gives carte blanche to administrative agencies:

Epstein views something like administrative balance as agency *carte blanche* to act as primary lawmakers.<sup>215</sup> But, perhaps Epstein's concerns are overblown. Epstein worries that administrative balance creates further wedges between the haves and the have nots by giving special releases to large companies while leaving small companies by the wayside.<sup>216</sup> But, Epstein does not relate how this action goes any further than what Congress already does. Epstein asserts no evidence that agencies are more amendable to lobbying than Congress.<sup>217</sup> As such, his concern over agency discretion seems overblown as to how this discretion would produce more deleterious effects on our democracy than congressional lobbying. In regard to federalism, Epstein's concern is even more overblown. The chance that one state will more effectively lobby an agency compared to another state has almost no evidence in Epstein's work.<sup>218</sup> Thus, the idea that administrative balance raises federalism concerns as to disparate application is almost a non-concern.

Epstein also worries that administrative balance creates situations in which agencies will preempt state law in order to exact concessions in return for waivers.<sup>219</sup> The basis for this concern is that judicial review is often slow and deferential to agency enforcement decisions.<sup>220</sup> According to Epstein, "most

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Consider, for example, the process the law uses to establish whether a given financial institution creates a systemic financial risk — a risk that in turn justifies some form of government takeover. In the language of the statute, the Federal Deposit Insurance Corporation is empowered to "determine that such action is necessary for purposes of the financial stability of the United States" — a stunningly broad determination, the terms of which are nowhere clearly defined. If the FDIC does make such a determination about a firm, it can inject into the company funds drawn from a new "orderly liquidation fund" created from fees assessed from all regulated financial firms. The amounts of these assessments are not fixed by the law, or applied universally across all financial institutions: Rather, they are to be determined based on the regulator's judgment of such factors as "economic conditions generally affecting financial companies," "the risks presented by the financial company to the financial system," and, of course, "other risk-related factors as the [regulator] may determine to be appropriate."

*Id.*

215. See Epstein, *supra* note 138, at 50.

216. See Epstein, *supra* note 138, at 51-52.

217. See Epstein, *supra* note 138, at 51-52.

218. See, e.g., Epstein, *supra* note 138.

219. See Epstein, *supra* note 138, at 48-49.

220. See Epstein, *supra* note 138, at 53.

private parties are not foolhardy enough to challenge a government regulator—they fear, understandably, that the government will retaliate elsewhere.”<sup>221</sup> In regard to federalism, this concern seems overblown. To analogize this concern to states would be to assume that states act like corporations in regard to challenging agency actions.<sup>222</sup> Furthermore, this concern assumes that agencies would preference an acrimonious relationship with states over a harmonizing one. According to Jessica Bulman-Pozen and Heather Gerken, agencies depend on states to administer their programs.<sup>223</sup> In summing up a study by Daniel Elazar, they state that “because federal authorities rely on the states to achieve their policy goals, they listen to the concerns of the state officials and ‘are prepared to make concessions to their state counterparts.’”<sup>224</sup> Or, as Larry Kramer analogized it, “[w]hatever a boss’s formal power may be, there are always significant limits on his or her practical authority. Only a very bad manager fails to consider the needs and interests of subordinates or to consult them before making significant policy changes.”<sup>225</sup> In this regard, Epstein’s second concern that administrative balance may encourage agency bullying<sup>226</sup> is not a particular concern for states given how agencies and states engage with each other.

### C. A TOOL FOR DEALS

When looking at how administrative balance benefits federalism it is important to step back and ask what federalism truly is. The traditional definition of federalism is the distribution of power between the federal and state governments.<sup>227</sup> But how does that distribution of power get effected? Obviously, part of

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221. See Epstein, *supra* note 138, at 53.

222. In fact, Epstein himself appears to argue against this view by stating that nonprofits are much more likely to challenge agency action than for-profit corporations. See *id.* States would appear to go even farther than nonprofits in their concern for business interests. If anything, states would be more apt to challenge agency abuse in order to protect their rights.

223. See Jessica Bulman-Pozen & Heather K. Gerken, *Uncooperative Federalism*, 118 YALE L.J. 1256, 1266-67 (2009).

224. *Id.* at 1266.

225. *Id.* at 1267 (quoting Larry Kramer, *Understanding Federalism*, 47 VAND. L. REV. 1485, 1544 (1994)).

226. See Epstein, *supra* note 138, at 48-49.

227. See *Federalism*, BLACK’S LAW DICTIONARY (10th ed. 2014).

the distribution occurs through clear legal mandates, the Supremacy Clause being an example of such.<sup>228</sup> But at the same time, this distribution also occurs via compromise and negotiation.<sup>229</sup> In this regard, the federal and state governments sit at a metaphorical negotiating table. At this table, they negotiate over the distribution of power between them in order to implement their respective agendas.

If the negotiating table metaphor is true, then what is the effect of legislative gridlock on those negotiations? If Congress, in light of gridlock, cannot legislate, one could infer that Congress cannot negotiate as well. Thus, to adopt a traditional definition of federalism is to adopt the view that the parties sitting at the negotiating table are not negotiating. But, what if federalism was not bound by the traditional definition of it being between Congress and the states? If modern federalism is something different than its traditional definition, then perhaps administrative balance becomes an important aspect of this modern definition. This paper argues that modern federalism is not defined by the traditional relationship of it being between Congress and the states. As such, administrative balance promotes modern federalism because it recognizes that modern federalism is not defined by its traditional relationship.<sup>230</sup> Instead, modern federalism is a relationship between agencies and the states.<sup>231</sup>

If modern federalism is defined by the agency-state relationship, should not states prefer to sit at the negotiating table with agencies as opposed to Congress? The negotiating table

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228. See U.S. CONST. art. VI, § 2.

229. See Bulman-Pozen & Gerken, *supra* note 223, at 1266-67.

230. “Traditional relationship” being the relationship between Congress and the states.

231. According to Bulman-Pozen, modern federalism is already defined as such, taking the form of what she calls “executive federalism.” See Bulman-Pozen, *supra* note 93, at 953-55. Bulman-Pozen describes executive federalism closely to what this paper refers to as the negotiating table metaphor, in which agencies and states negotiate compromises with each other over major pieces of legislation. See *id.* at 954-55. Holding out the ACA as an example, Bulman-Pozen writes that the ACA’s waiver provision has allowed agencies and states to negotiate implementation after the Supreme Court invalidated required Medicaid expansion. See *id.* at 976-78; see also Nat’l Fed’n of Indep. Bus. v. Sebelius, 132 S. Ct. 2566 (2012). According to Bulman-Pozen, “[t]he states have not always gotten what they want; the federal executive has rejected proposals for partial Medicaid expansion, among others. But notwithstanding the hierarchy baked into the statute, political considerations and federal reliance on state implementation have yielded a range of compromises.” Bulman-Pozen, *supra* note 93, at 977.

metaphor assumes that the distribution of power between the federal and state governments occurs via a certain degree of horse trading. As such, it benefits states to horse trade with an amendable body (i.e. a body that can *actually* horse trade). In this regard, administrative balance provides agencies the necessary tools to sit at the negotiating table and actually negotiate. As previously mentioned in this paper, statutes like the ACA and Dodd-Frank involved a negotiating process between agencies and the states in order to effect the statutes.<sup>232</sup> This negotiating process was accomplished through administrative balance. By formally viewing the negotiating process of modern federalism through the lens of administrative balance both agencies and the states benefit because they can understand exactly how they're negotiating.

Furthermore, administrative balance promotes the idea that the negotiating process between agencies and states is not inherently acrimonious. Instead, modern federalism is a relationship of mutual dependency.<sup>233</sup> According to Bulman-Pozen and Gerken, the fact that agencies rely on states to help administer their programs creates a situation in which agencies are dependent on states.<sup>234</sup> At the same time, states know that agencies have leverage over the states in that the federal government can always administer its programs itself.<sup>235</sup> As such, states are dependent on agencies in regard to state independence and control over how federal programs affect their citizens.<sup>236</sup> If modern federalism is truly a relationship of mutual dependency, then administrative balance becomes even more beneficial to this relationship. This is because administrative balance gives agencies an understanding of its full range of negotiating tools in order to reach a deal that both parties want to come to.

## CONCLUSION

The paper has put forth administrative balance as an alternate and beneficial framework in which to view executive

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232. See Bulman-Pozen, *supra* note 223, at 1266-67; see also *supra* note 210 and accompanying text; *supra* note 214 and accompanying text.

233. See Bulman-Pozen, *supra* note 223, at 1266-67.

234. See Bulman-Pozen, *supra* note 223, at 1266.

235. See Bulman-Pozen, *supra* note 223, at 1267.

236. See Bulman-Pozen, *supra* note 223, at 1267.

preemption and big waiver. We are in a new era of federalism. In this new era, administrative balance clarifies this still uncertain relationship between agencies and states. It reassures states that executive preemption and big waiver are good things. At best, Congress's laws become more effective and intelligible, affording states more certainty to know what will and will not get preempted. At the same time, administrative balance bolsters federalism by allowing agencies to sit at the metaphorical negotiating table and reach compromises that benefit both agencies and the states.

Change is uncertain, even scary. But change can also be exciting. We should be excited about administrative balance and its dual benefits—clarifying an already existing relationship and pushing that relationship towards a more harmonious definition of modern federalism.