

# NATIONAL SECURITY PREEMPTION: THE CASE OF CHEMICAL SAFETY REGULATION

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*In 2006, the Department of Homeland Security (DHS) asserted federal preemption of state law governing the security of chemical facilities. The continuing controversy over chemical security preemption reveals one way in which executive power asserts itself in the national security context: the reclassification of seemingly domestic regulatory concerns as matters of national security and the consequent constriction of state regulatory authority. This Note analyzes the DHS's chemical security regulations as a case study for the problem of national security preemption. It argues that the presumption of federal supremacy in foreign affairs can ratify conclusory and unsupported preemption claims because the national security interest mixes both foreign and domestic affairs, while the only doctrinal guidance for defining that interest comes from contested foreign affairs preemption doctrines. The Note proposes that, if strengthened, deference doctrines drawn from administrative law provide the best means of scrutinizing and limiting such claims of executive authority. Agency claims of preemption on the basis of national security should be subject to heightened scrutiny. Such scrutiny is more useful than the stalemated positions of the law and security debate for policing the state-federal divide in national security.*

The terrorist attacks of September 11, 2001, forced Americans to confront a host of existing vulnerabilities that they had largely ignored. Of these, few pose as terrifying a threat as the specter of toxic chemical disasters. Such disasters, intentional or negligent, can cause catastrophic harm, such as in the 1995 Aum Shinrikyo gas attack on the Tokyo subway system that killed twelve and injured over a thousand people,<sup>1</sup> and the 1984 toxic gas leak at a Union Carbide facility in Bhopal, India, that killed at least 3500 people and injured perhaps 150,000 more.<sup>2</sup> Yet, the federal government took over five years after the September 11th attacks to promulgate new regulations covering chemical security—and those regulations were temporary.

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<sup>1</sup> See, e.g., DAVID E. KAPLAN, *Aum Shinrikyo*, in *TOXIC TERROR: ASSESSING TERRORIST USE OF CHEMICAL AND BIOLOGICAL WEAPONS* 207, 218 (Jonathan B. Tucker ed., 2000) (providing background on Aum cult's March 1995 sarin gas attack).

<sup>2</sup> See, e.g., Armin Rosenzanz et al., *Legal and Political Repercussions in India*, in *LEARNING FROM DISASTER: RISK MANAGEMENT AFTER BHOPAL* 44, 44 (Sheila Jasanoff ed., 1994) (providing background on Bhopal disaster).

Behind this delay lie both a familiar battle between repeat players in the politics of federal regulation and a neglected yet significant intersection of federalism, national security, and administrative law. Trade associations and industry groups such as the American Chemistry Council have sparred with labor unions, environmental organizations, and other usual suspects over the strength of federal chemical security regulation. In asserting its regulatory power, however, the federal government has articulated a new theory of preemption, one whose ramifications extend to broader problems of national security law.

The current legal debate over national security pits the war powers of the executive against constitutional guarantees of civil liberties and is frequently presented as a contest between liberty and security.<sup>3</sup> But in this age of a seemingly perpetual War on Terror,<sup>4</sup> the asserted scope of executive authority over national security has spread beyond the confines of war-making and emergency powers. The chemical security controversy reveals one way in which creeping executive power asserts itself: the reclassification of seemingly domestic regulatory concerns as matters of national security and the consequent constriction of state regulatory authority through a new theory of federal national security preemption. This expansion of federal authority

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<sup>3</sup> Important contributions to this debate include BRUCE ACKERMAN, *BEFORE THE NEXT ATTACK: PRESERVING CIVIL LIBERTIES IN AN AGE OF TERRORISM* 4 (2006) (proposing “emergency constitution” to be enacted by statute that “imposes strict limits on unilateral presidential power”); JACK GOLDSMITH, *THE TERROR PRESIDENCY: LAW AND JUDGMENT INSIDE THE BUSH ADMINISTRATION* 205–13 (2007) (maintaining that wartime executive cooperation with Congress is more effective than “Bush administration’s go-it-alone approach”); ERIC A. POSNER & ADRIAN VERMUELE, *TERROR IN THE BALANCE: SECURITY, LIBERTY, AND THE COURTS* 5 (2007) (“[T]he executive branch, not Congress of the judicial branch, should make the tradeoff between security and liberty.”); RICHARD A. POSNER, *NOT A SUICIDE PACT: THE CONSTITUTION IN A TIME OF NATIONAL EMERGENCY* 9 (2006) (criticizing “court-centric approach” of civil libertarians and proposing balancing between civil liberties and public safety); JOHN YOO, *THE POWERS OF WAR AND PEACE: THE CONSTITUTION AND FOREIGN AFFAIRS AFTER 9/11*, at 10 (2006) (responding to those criticizing executive exercise of war powers without congressional authorization by contending that “constitutional text and structure provide far more flexibility to the president and Congress”); Samuel Issacharoff & Richard H. Pildes, *Between Civil Libertarianism and Executive Unilateralism: An Institutional Process Approach to Rights During Wartime*, 5 *THEORETICAL INQUIRIES L.* 1, 5 (2004) (“[C]ourts have developed a process-based, institutionally-oriented (as opposed to rights-oriented) framework for examining the legality of governmental action in extreme security contexts.”); and Mark Tushnet, *Emergencies and the Idea of Constitutionalism*, in *THE CONSTITUTION IN WARTIME: BEYOND ALARMISM AND COMPLACENCY* 39, 40 (Mark Tushnet ed., 2005) (arguing that legality should be suspended in wartime emergencies “to avoid providing law-based justifications” for actions that “undermine the values expressed in the rule-of-law tradition”).

<sup>4</sup> President George W. Bush, Address to a Joint Session of Congress and the American People (Sept. 20, 2001), <http://georgewbush-whitehouse.archives.gov/news/releases/2001/09/20010920-8.html>.

arises, in part, because the national security interest includes both foreign and domestic affairs, while the only doctrinal guidance for defining that interest comes from contested foreign affairs preemption doctrines. The issue here is not security versus liberty but security versus federalism and the ability of administrative law to provide an optimal framework for delineating the scope of executive power.

Constitutional and administrative law scholars have lavished much attention on federal preemption of state law, particularly agency assertions of preemption and judicial deference to such assertions.<sup>5</sup> The policy context of national security raises the stakes of these issues even higher. An expansive definition of the federal national security interest could enable federal preemption in policy matters that have little to do with foreign affairs or terrorist threats. On the other hand, dividing national security oversight between the federal government and the states could result in poor coordination with potentially calamitous consequences.<sup>6</sup>

This Note will examine the security regulations for chemical facilities proposed by the Department of Homeland Security (DHS) in 2006–2007 and use them as a case study for the problem of national security preemption.<sup>7</sup> These regulations were among several proposed

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<sup>5</sup> Discussions of agency assertions of preemption include FEDERAL PREEMPTION: STATES' POWERS, NATIONAL INTERESTS (Richard A. Epstein & Michael S. Greve eds., 2007), Brian Galle & Mark Seidenfeld, *Administrative Law's Federalism: Preemption, Delegation, and Agencies at the Edge of Federal Power*, 57 DUKE L.J. 1933 (2008), Nina A. Mendelson, *A Presumption Against Agency Preemption*, 102 NW. U. L. REV. 695 (2008), Gillian E. Metzger, *Administrative Law as the New Federalism*, 57 DUKE L.J. 2023 (2008), Catherine M. Sharkey, *Federalism Accountability: "Agency-Forcing" Measures*, 58 DUKE L.J. 2125 (2009) [hereinafter Sharkey, *Federalism Accountability*], Catherine M. Sharkey, *Preemption by Preamble: Federal Agencies and the Federalization of Tort Law*, 56 DEPAUL L. REV. 227 (2007), and Ernest A. Young, *Executive Preemption*, 102 NW. U. L. REV. 869 (2008).

<sup>6</sup> See, e.g., E.L. Gaston, *Taking the Gloves Off of Homeland Security: Rethinking the Federalism Framework for Responding to Domestic Emergencies*, 1 HARV. L. & POL'Y REV. 519, 519 (2007) ("Federalism preferences must take a backseat to the country's immediate need for a functional preparedness and response system.").

<sup>7</sup> The one article-length legal study of national security preemption devotes little attention to the Department of Homeland Security's (DHS's) Advance Notice of Rulemaking issued in December 2006, see Chemical Facility Anti-Terrorism Standards, 71 Fed. Reg. 78,276 (proposed Dec. 28, 2006) (to be codified at 6 C.F.R. pt. 27), and does not discuss its determinations on preemption or alternative technologies, or its consequences for national security preemption doctrine. Leticia M. Diaz, *Chemical Homeland Security, Fact or Fiction: Is the U.S. Ready for an Attack on Our Chemical Facilities? An Examination of State and Federal Laws Aimed at Immediate Remediation*, 56 CATH. U.L. REV. 1171, 1198 n.235 (2007) (providing short discussion of rulemaking by DHS and ensuing controversy). The other scholars who discuss chemical security preemption mention it in passing. See William W. Buzbee, *Asymmetrical Regulation: Risk, Preemption, and the Floor/Ceiling Distinction*, 82 N.Y.U. L. REV. 1547, 1573–75 & n.90 (2007) (briefly discussing controversy over Chemical Facility Anti-Terrorism Standards (CFATS)); Galle & Seidenfeld, *supra*

during the administration of President George W. Bush that asserted federal preemption for largely domestic affairs on the basis of an asserted national security interest.<sup>8</sup> The chemical security regulations exemplified the problem posed by national security preemption: The presumption of federal supremacy in foreign affairs can ratify conclusory and unsupported preemption claims. This Note argues that deference doctrines drawn from administrative law can and should be used to scrutinize and limit such claims of executive authority. Reviewing the factual and legal sufficiency of the regulatory record forces agencies to apply their own particular competence in fact-finding to their federalism determinations, instead of making conclusory claims of federal interest that lack evidentiary support and doctrinal cogency. Agency claims of preemption on the basis of national security should be subject to heightened scrutiny; such scrutiny is more useful than the stalemated positions of those currently engaged in the law and security debate for policing the state-federal divide.

Part I introduces the doctrinal issues at play in national security preemption and presents the history of DHS's chemical security rulemaking. Part II explains how chemical security preemption reframes the debate over law and security and argues that the agency reference model is the appropriate means of scrutinizing agency assertions of national security preemption. Part III evaluates DHS's preemption claim for chemical security using the agency reference model. It begins by appraising the factual sufficiency of the regulatory record supporting the claim and then discusses whether state regulation would frustrate the two federal purposes asserted by DHS.

## I

### PREEMPTION DOCTRINE AND CHEMICAL SECURITY

This Part will first explore the preemption and administrative law doctrines involved in DHS's Chemical Facility Anti-Terrorism Standards (CFATS), specifically the special case of agency preemption and

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note 5, at 2013–17 (briefly analyzing merits of preemption claim in CFATS and concluding that “most of the signs seem to point against preemption”); Mendelson, *supra* note 5, at 695–97, 701–02, 717, 720–21, 723 (criticizing DHS for not paying “any particular attention to state interests” in proposing CFATS).

<sup>8</sup> Others include the various safety and security regulations promulgated by the Federal Railroad Administration in the Department of Transportation. See Hazardous Materials: Enhancing Rail Transportation Safety and Security for Hazardous Materials Shipments, 71 Fed. Reg. 76,834 (Dec. 21, 2006) (to be codified at 49 C.F.R. pts. 172, 174) (regulating transport of hazardous materials by rail); Rail Transportation Security, 71 Fed. Reg. 76,852 (Dec. 21, 2006) (to be codified at 49 C.F.R. pts. 1520, 1580) (mandating security requirements for freight, passenger, and municipal transit rail systems).

the forms of foreign affairs preemption, and will consider the ability of administrative law's deference doctrines to subject national security preemption to appropriate scrutiny. It will then discuss both the legislative history and the rulemakings behind CFATS, as well as its broader institutional context.

*A. Preemption, Administrative Agencies, and the National Security Interest*

Federal preemption of state law renders the state law at issue invalid because it conflicts with a particular federal law and thus runs afoul of the Supremacy Clause.<sup>9</sup> While courts and commentators sometimes differ, current preemption doctrine recognizes three general categories of preemption: express preemption (where a federal statute contains express language invalidating state law) and two forms of implied preemption. The forms of implied preemption include field preemption (where courts find that Congress "completely occupies a given field"<sup>10</sup> of regulation, excluding state law) and obstacle preemption (where state law obstructs the accomplishment of federal goals<sup>11</sup>).

Another distinction concerns the type of federal law for which preemptive authority is claimed. Many preemption cases concern the preemptive intent or effect of a federal statute or the regulatory scheme created by such a statute. These often boil down to disputes over statutory interpretation. But others involve the preemptive effect of regulations enacted by an administrative agency, sometimes without any explicit instruction from Congress as to whether it intended to endow the agencies with such power.

Agency preemption took center stage after the Rehnquist Court abandoned the presumption against preemption<sup>12</sup> and agencies in the administration of George W. Bush increasingly asserted federal pre-

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<sup>9</sup> U.S. CONST. art. VI, § 2.

<sup>10</sup> *Pac. Gas & Elec. Co. v. State Energy Res. Conservation & Dev. Comm'n*, 461 U.S. 190, 213 (1983).

<sup>11</sup> *See, e.g., Hines v. Davidowitz*, 312 U.S. 52, 67 (1941) (invalidating Pennsylvania law because it "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress").

<sup>12</sup> *See, e.g., Erwin Chemerinsky, Empowering States: The Need To Limit Federal Preemption*, 33 PEPP. L. REV. 69, 72 (2005) ("In case after case, the Rehnquist Court has gone out of its way to broadly construe preemption to strike down state laws."); Richard H. Fallon, Jr., *The "Conservative" Paths of the Rehnquist Court's Federalism Decisions*, 69 U. CHI. L. REV. 429, 462 (2002) ("Over the decade since Clarence Thomas joined the Court and produced the current pro-federalism five-member majority, the Court has decided thirty-five preemption cases and found state statutes or causes of action to be preempted, either in whole or in part, in twenty-two.").

emption.<sup>13</sup> The first wave of recent preemption scholarship argued for controlling agency preemption by disfavoring assertions of preemption made by agencies rather than Congress and for reviving the presumption against preemption—requiring a clear statement of congressional intent to preempt state law.<sup>14</sup> Attention has now turned to the deference courts should afford agency statutory interpretations and the relative institutional competencies of courts, agencies, and Congress in striking the balance between federal and state power.<sup>15</sup>

Those criticizing agency preemption, such as Professor Nina Mendelson, argue that agencies pay little heed to state autonomy because they proceed without adequate guidance from Congress, rely on a notice-and-comment process that is less transparent than legislation, and have a poor record of taking the interests of states into account, despite executive orders mandating a review of federalism concerns.<sup>16</sup> Other scholars, such as Professors Brian Galle and Mark Seidenfeld, contend that agencies are actually the best equipped of all federal actors to strike a balance between states and the federal government.<sup>17</sup> While Congress may suffer from the dysfunction identified by public choice theory,<sup>18</sup> and courts may rely on the partial informa-

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<sup>13</sup> For a list of agency preemption claims during the administration of President George W. Bush, see AM. ASS'N FOR JUSTICE, GET OUT OF JAIL FREE: HOW THE BUSH ADMINISTRATION HELPS CORPORATIONS ESCAPE ACCOUNTABILITY app. B, [http://www.justice.org/cps/rde/xbcr/justice/Preemption\\_Rpt.pdf](http://www.justice.org/cps/rde/xbcr/justice/Preemption_Rpt.pdf) (last visited Oct. 27, 2010).

<sup>14</sup> See, e.g., Thomas W. Merrill, *Rescuing Federalism After Raich: The Case for Clear Statement Rules*, 9 LEWIS & CLARK L. REV. 823, 851 (2005) (arguing for “regime of clear statement rules” that seeks to “limit further federal growth to problem areas that all three branches agree require such a solution”); Ernest A. Young, *Making Federalism Doctrine: Fidelity, Institutional Competence, and Compensating Adjustments*, 46 WM. & MARY L. REV. 1733, 1849 (2005) (“[C]ourts should be able to impose an anti-preemption canon as a compensating adjustment for failure of the doctrine of enumerated powers to protect state autonomy.”).

<sup>15</sup> See, e.g., Mendelson, *supra* note 5, at 699 (“[C]ourts should apply not only a presumption against preemption, but also an additional presumption against agency preemption.”); Nina A. Mendelson, *Chevron and Preemption*, 102 MICH. L. REV. 737, 742 (2004) [hereinafter Mendelson, *Chevron and Preemption*] (“*Chevron* deference to agency interpretations of the preemptive effect of statutes is . . . inappropriate.”); Young, *supra* note 5, at 885 (noting that “deference becomes problematic” when an agency addresses preemption by “construing a preemption clause in the federal statute or considering whether a given state statute conflicts with a federal statute’s underlying purpose”).

<sup>16</sup> Mendelson, *supra* note 5, at 699, 717–19 (“[A]gencies lack an institutional focus on the value of retaining an independent state role and preserving state sovereignty . . .”).

<sup>17</sup> Galle & Seidenfeld, *supra* note 5, at 1936 (“[F]ederal agencies should often be the preferred institutions in which to vest the authority to allocate power between states and the federal government.”).

<sup>18</sup> *Id.* at 1950–52 (“[O]pacity [of the legislature] gives focused interest groups greater influence than they are entitled to under a theory of representative democracy that counts the interests of each citizen equally.”).

tion produced by case-by-case adjudication,<sup>19</sup> agencies have superior information through their inherent expertise and the processes of notice-and-comment rulemaking. Furthermore, agencies are uniquely subject to oversight from the judicial and legislative branches, which curbs overreach and enforces mandates of transparency and accountability.<sup>20</sup>

Either way, as Professor Catherine Sharkey points out, “[F]ederal agencies have become the real decisionmakers in preemption controversies . . . .”<sup>21</sup> The question then arises: What level of deference should courts afford to agency assertions of federal preemption? Mendelson argues that agency preemption claims deserve only the limited deference<sup>22</sup> afforded by *Skidmore v. Swift*<sup>23</sup> and *United States v. Mead*<sup>24</sup> conditioned on the persuasiveness of the agency’s reasoning, not the mandatory deference framework with limited judicial scrutiny offered by *Chevron v. Natural Resources Defense Council*.<sup>25</sup> She argues that merely entertaining the question of how much deference to give to agency preemption inappropriately assumes that agencies have some inherent power to preempt state law.<sup>26</sup> William Eskridge maintains that *Chevron* “super-deference” should be given to agency claims of preemption “only . . . when there has been a formal congressional delegation of lawmaking authority to agen-

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<sup>19</sup> *Id.* at 1968–70 (asserting that “the courts’ viewpoint is limited” to parties in disputes before them and that these parties “are unlikely to represent all the various backgrounds and perspectives that may be relevant to a determination”).

<sup>20</sup> *Id.* at 1974–77 (“[A]gencies are well suited for evaluating the benefits of both localism and the need for experimenting within the programs they regulate.”).

<sup>21</sup> Sharkey, *Federalism Accountability*, *supra* note 5, at 2128.

<sup>22</sup> Mendelson, *Chevron and Preemption*, *supra* note 15, 797 (proposing that court “could continue to follow [an] agency interpretation on a case-by-case basis to the extent the court finds the agency interpretation persuasive under the doctrine of *Skidmore v. Swift*”).

<sup>23</sup> *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944) (holding that weight given to agency’s judgment “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>24</sup> *United States v. Mead Corp.*, 533 U.S. 218, at 221 (2001) (holding that agency rulings are not entitled to judicial deference under *Chevron* if there is “no indication that Congress intended such a ruling to carry the force of law”).

<sup>25</sup> 467 U.S. 837, 844 (1984) (holding that agency regulations filling gaps left by legislature “are given controlling weight unless they are arbitrary, capricious, or manifestly contrary to the statute” and that in cases in which “the legislative delegation to an agency on a particular question is implicit rather than explicit[,]” a court “may not substitute its own construction of a statutory provision for a reasonable interpretation made by the administrator of an agency”).

<sup>26</sup> Mendelson, *supra* note 5, at 705–06 (arguing that posing question of whether agency preemption determinations “merit application of the *Chevron* doctrine” can “too readily make[] the assumption that an agency has some intrinsic power to preempt state law”).

cies.”<sup>27</sup> On the other hand, Richard Epstein contends that even *Chevron* deference does not afford federal agencies enough power and argues for a default rule of field preemption.<sup>28</sup>

A similar debate over the levels of appropriate deference to the executive is occurring in the area of foreign relations law. Some scholars who propound a doctrine of increased executive power in foreign relations and national security have invoked the frameworks of administrative law, arguing that executive interpretations of law that implicate international relations doctrines should be accorded *Chevron* deference. In support of this argument, they cite rationales of executive expertise and accountability.<sup>29</sup> The counterargument insists that currently existing deference doctrines—the political question doctrine, areas of exclusive executive lawmaking authority, or the customary respect paid to executive determinations of foreign affairs interests—grant the executive enough latitude.<sup>30</sup> Any more leeway would concentrate excessive power in the executive branch.<sup>31</sup>

These general policy concerns find specific expression in the context of foreign affairs preemption. This form of preemption has two variants: statutory foreign affairs preemption, which applies the familiar categories of express and implied preemption to federal and state laws governing foreign relations; and dormant foreign affairs preemption, in which courts find preemption of state law affecting foreign relations based upon prevailing federal interests in the abstract in the absence of any enacted federal law.<sup>32</sup> While statutory foreign affairs preemption might be a familiar matter of statutory interpreta-

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<sup>27</sup> William N. Eskridge, Jr., *Vetogates, Chevron, Preemption*, 83 NOTRE DAME L. REV. 1441, 1443 (2008).

<sup>28</sup> Richard A. Epstein, *Why the FDA Must Preempt Tort Litigation: A Critique of Chevron Deference and a Response to Richard Nagareda*, J. TORT L., Dec. 2006, at art. 5, 3 (arguing that once FDA enacts comprehensive regulatory review, private rights of action should be preempted “even if the agency issues some declaration to the contrary,” and that only Congress should be able to displace “the doctrine of implied preemption”).

<sup>29</sup> Eric A. Posner & Cass R. Sunstein, *Chevronizing Foreign Relations Law*, 116 YALE L.J. 1170, 1207 (2007) (“[T]he expertise rationale for deference to the executive is stronger in the foreign relations setting than in the traditional *Chevron* setting, while the accountability rationale for deference is at least equally strong.”).

<sup>30</sup> Derek Jinks & Neal Kumar Katyal, *Disregarding Foreign Relations Law*, 116 YALE L.J. 1230, 1236–38 (2007) (discussing how existing doctrines foreclose many foreign affairs issues from judicial resolution, rendering additional judicial deference to executive unnecessary and unwarranted).

<sup>31</sup> *Id.* at 1262.

<sup>32</sup> For discussion of this distinction, see Jack Goldsmith, *Statutory Foreign Affairs Preemption*, 2000 SUP. CT. REV. 175, 203–08. For dormant foreign affairs preemption, see Curtis A. Bradley, *Chevron Deference and Foreign Affairs*, 86 VA. L. REV. 649, 721–25 (2000); Joseph B. Crace, Jr., Note, *Gara-mending the Doctrine of Foreign Affairs Preemption*, 90 CORNELL L. REV. 203 (2004).



tion, the applicability of the presumption against preemption in such cases is complicated by a competing canon: the presumption of federal supremacy in foreign affairs. These presumptions apply before the usual categories of preemption analysis (express, conflict, obstacle, field) and, some argue, skew the preemption inquiry with considerations unrelated to statutory text or purpose.<sup>33</sup> As a result, these presumptions enlist the judiciary to aid the executive in reshaping both federalism and the separation of powers.

These difficulties become even more pronounced when courts apply dormant foreign affairs preemption. The existence of this sort of super-preemption, not requiring even an implied conflict with an enacted federal law or regulation, has been enabled by the argument that the Constitution entrusted all control of foreign relations to the federal government. In the seminal case establishing dormant foreign affairs preemption, *Zschernig v. Miller*,<sup>34</sup> the Supreme Court preempted an Oregon statute restricting the ability of non-resident aliens to inherit property because the statute had “a direct impact upon foreign relations and may well adversely affect the power of the central government to deal with those problems.”<sup>35</sup> Since then, the Court has avoided elaborating on the dormant foreign affairs preemption doctrine, arguably sticking to statutory foreign affairs preemption to decide the most recent major cases, *Crosby v. National Foreign Trade Council*<sup>36</sup> and *American Insurance Association v. Garamendi*.<sup>37</sup> But the doctrine persists, illustrating the power of federal supremacy in foreign affairs to sweep aside federalism challenges without reference to any congressional allocation of lawmaking authority to the executive. In this respect, dormant foreign affairs preemption functions

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<sup>33</sup> Goldsmith, *supra* note 32, at 201 (“[T]he presumptive canons [against preemption and for federal supremacy in foreign affairs] have no discernible basis in statutory text or purpose.”). Michael Ramsey, criticizing foreign affairs “exceptionalism,” has argued that the preemption analysis of federal foreign affairs statutes should proceed on the same terms as for any other federal statute. Michael D. Ramsey, *Review Essay: Textbook Revisionism*, 43 VA. J. INT’L L. 1111, 1116–19 (2003) (reviewing CURTIS A. BRADLEY & JACK L. GOLDSMITH, *FOREIGN RELATIONS LAW: CASES AND MATERIALS* (2002)).

<sup>34</sup> 389 U.S. 429 (1968).

<sup>35</sup> *Id.* at 441.

<sup>36</sup> *Crosby v. Nat’l Foreign Trade Council*, 530 U.S. 363, 366, 373–74, 388 (2000) (finding that federal law imposing sanctions on Myanmar (Burma) preempted Massachusetts law barring state entities from buying goods or services from companies doing business with same).

<sup>37</sup> *Am. Ins. Ass’n v. Garamendi*, 539 U.S. 396, 397, 425 (2003) (finding that federal executive agreements with Germany, Austria, and France governing claims by Holocaust survivors preempted California law requiring insurers doing business in state to disclose information about all policies sold in Europe between 1920 and 1945).

much like field preemption in the domestic regulatory context,<sup>38</sup> involving similar issues of whether congressional authorization, executive action, or the mere existence of prevailing federal interests without federal government action is sufficient to preempt state law.<sup>39</sup>

As I will discuss in Part III.B, DHS's argument for CFATS draws upon this body of law, asserting a prevailing federal interest in national security by referring to *Crosby* and arguments for dormant foreign affairs preemption.<sup>40</sup> The problem is that the federal interest in foreign affairs has ill-defined boundaries. As Jack Goldsmith has pointed out, "the line between domestic and foreign affairs has blurred," and "the category of 'foreign relations' has lost distinctive meaning . . . ."<sup>41</sup> Moreover, foreign relations and national security are not synonymous interests, despite DHS's attempt to fuse them in its argument for CFATS.<sup>42</sup> National security has an even broader and equally ill-defined sweep because it is not confined solely to foreign governments or foreign threats. Agencies could take advantage of this doctrinal ambiguity to assert federal national security preemption in regulatory areas where the foreign-domestic distinction is blurred by using the presumption of federal foreign affairs supremacy to choke off meaningful judicial review of these claims. All together, this package could grant agencies the power to recalibrate the federal-state balance and invalidate wide swathes of essentially domestic state police-power regulation in the name of national security.

CFATS provides an excellent case study for testing these possibilities within the context of a specific agency assertion of national

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<sup>38</sup> In his majority opinion in *Garamendi*, Justice Souter described dormant foreign affairs preemption as field preemption, where the federal government had "no serious claim to be addressing a traditional state responsibility." See 539 U.S. at 419 n.11.

<sup>39</sup> The debate over *Garamendi* involves this issue, asking whether executive assertions of preemption should be treated as matters of statutory foreign affairs preemption or rejected as unlawful attempts by the executive to legislate. Justice Souter, writing for the majority, distinguished *Zschernig* from *Garamendi* by arguing that the former found preemption "even absent any affirmative federal activity in the subject area of the state law, and hence without any showing of conflict," while *Garamendi* involved "a sufficiently clear conflict to require finding preemption." *Id.* at 418, 420. Under this reading, *Garamendi* is a conflict preemption case like *Crosby*. But others argue that *Garamendi* departed from *Crosby* because it involved an executive agreement with a foreign state, with no statutory grounding. See, e.g., MICHAEL D. RAMSEY, *THE CONSTITUTION'S TEXT IN FOREIGN AFFAIRS* 288–90 (2007) (criticizing *Garamendi* for "granting executive lawmaking power" and inappropriately endowing it with power to preempt state law). The question, not addressed in this Note, is whether executive assertions of foreign affairs preemption without statutory grounding truly constitute dormant foreign affairs preemption, a doctrine that strictly extends only to cases where the federal government—including the executive—has not acted.

<sup>40</sup> See *infra* Part III.B.

<sup>41</sup> Goldsmith, *supra* note 32, at 221–22.

<sup>42</sup> These arguments are discussed *infra* Part III.B.

security preemption. Existing and proposed administrative law doctrines could police the federal-state boundary in foreign relations, as opposed to Congress performing the task. By scrutinizing arguments based upon the presumption of federal supremacy in foreign affairs, deference doctrines derived from *Chevron*, *Skidmore*, and similar cases could strike the right balance between foreign affairs and domestic state regulatory power.

### B. *The Emergence of Chemical Security Preemption*

Chemical facility security exemplifies the mixed nature of the national security interest: It presents a potentially catastrophic domestic vulnerability to international terrorism, but it also involves localized safety hazards, occupational safety, and environmental protection. Many of the possible threats and disasters involve unsafe design, accidents, negligence, inadequate regulatory oversight, and human error, rather than terrorism. Examples include the 1984 Bhopal disaster<sup>43</sup> and the train crash and chlorine gas leak in Graniteville, South Carolina that killed eight people and sent more than 200 to the hospital with respiratory problems on January 6, 2005.<sup>44</sup>

The creation of the Department of Homeland Security in November 2002 brought together an assortment of existing federal agencies under the umbrella of national security. Some of these agencies—such as the Animal and Plant Health Inspection Service, the Secret Service, and the Federal Emergency Management Agency—perform functions that are only tangentially related to foreign affairs, the traditional focus of national security. Yet all of them now fall under the purview of an agency defined by a national security agenda. This structural reorganization of the administrative state has profound doctrinal implications. By bundling agencies in charge of anti-terrorism, immigration, economic globalization, and disaster relief into a novel agency's jurisdiction, the creation of DHS transformed the category of national security into a capacious and powerful hybrid with uncertain limits.

Before the creation of DHS, the Environmental Protection Agency (EPA) regulated risks at chemical facilities.<sup>45</sup> After the

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<sup>43</sup> See *supra* note 2 and accompanying text.

<sup>44</sup> Ariel Hart, *8 Are Killed in Train Crash and Gas Leak*, N.Y. TIMES, Jan. 7, 2005, at A17.

<sup>45</sup> EPA regulatory authority over chemical securities was codified in the Emergency Response Planning and Community Right-to-Know Act of 1986, 42 U.S.C. §§ 11001–11050 (2006), passed two years after the Bhopal disaster, and section 301(r)(7)(B)(ii) of the Clean Air Act Amendments of 1990, 42 U.S.C. § 7412(r)(7)(B)(ii) (2006). These statutes

September 11th terrorist attacks, lawmakers such as then-Senator Jon Corzine of New Jersey pushed for continued EPA regulation of chemical security.<sup>46</sup> Industry groups like the American Chemistry Council opposed the measure,<sup>47</sup> and in 2003, the Bush administration finally transferred regulation of chemical facility safety from EPA to DHS.<sup>48</sup>

New Jersey, with its many chemical plants,<sup>49</sup> ran far ahead of the federal government in regulating the security and safety of such facilities.<sup>50</sup> When Congress turned its attention to the issue, members of the New Jersey delegation attempted to protect these regulations with proposed anti-preemption language.<sup>51</sup> Both these measures and

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required chemical facilities to submit risk management plans for approval by EPA and to report quantities of hazardous chemicals and any releases of such substances to local governments and first responders.

<sup>46</sup> The first chemical security bill, introduced by Senator Corzine in October 2001, would have kept chemical plants under EPA oversight. Chemical Security Act of 2001, S. 1602, 107th Cong. (2001).

<sup>47</sup> *EPA Drops Chemical Security Effort; Agency Lacks Power To Impose Anti-Terror Standards, Lawyers Decide*, WASH. POST, Oct. 3, 2002, at A17.

<sup>48</sup> Homeland Security Presidential Directive/HSPD-7-Critical Infrastructure Identification, Prioritization, and Protection, 2 PUB. PAPERS 1739, 1741 (Dec. 17, 2003).

<sup>49</sup> Comments of Sen. Frank R. Lautenberg, Rep. Frank Pallone & Sen. Robert Menendez, on Chemical Facility Anti-Terrorism Standards, 71 Fed. Reg. 78,276, 78,302 (proposed Dec. 28, 2006) (to be codified at 6 C.F.R. pt. 27) [hereinafter Comments] (“New Jersey is one of the states most vulnerable to a terrorist attack: It is home to what counterterrorism experts at the [FBI] have called ‘the most dangerous two miles in America,’ the stretch between Newark Airport and Port Elizabeth, in great part due to the presence of chemical facilities.”), available at <http://menendez.senate.gov/pdf/CommentsreDHSChemSecurityrulesFeb72007.pdf>.

<sup>50</sup> In November 2005, the New Jersey Department of Environmental Protection, pursuant to an order from Acting Governor Richard Codey, issued regulations under the state’s longstanding Toxic Catastrophe Prevention Act. N.J. Stat. Ann. § 13:1K-19 to -35 (2003). These required certain chemical facilities to conduct security reviews, evaluate the feasibility of certain security and safety technologies, and develop emergency response plans. See Press Release, N.J. Acting Governor’s Office, New Jersey Becomes First State To Require Chemical Plant Security Measures To Protect Against Terrorist Attack (Nov. 29, 2005), available at [http://www.state.nj.us/cgi-bin/governor/njnewsline/view\\_article.pl?id=2815](http://www.state.nj.us/cgi-bin/governor/njnewsline/view_article.pl?id=2815) (describing facility review mandated by new requirements). The Acting Governor had approved standards formulated by the Domestic Security Preparedness Task Force. N.J. DOMESTIC SEC. PREPAREDNESS TASK FORCE, BEST PRACTICES STANDARDS AT TCPA/DPCC CHEMICAL SECTOR FACILITIES (2005), available at <http://www.state.nj.us/dep/trpp/brp/security/secdown.htm> [hereinafter BEST PRACTICES STANDARDS]. More recently, the state has imposed stronger regulatory standards. See, e.g., Toxic Catastrophe Prevention Act Program, Inherently Safer Technology Review, Proposed Amendments, 39 N.J. Reg. 1351 (proposed Apr. 16, 2007) (requiring certain classes of facilities to conduct reviews of production processes to identify alternatives that would reduce or eliminate risks posed by hazardous substances and making these requirements applicable to existing as well as newly constructed processes). These amendments were adopted in 2008. Toxic Catastrophe Prevention Act Program, Inherently Safer Technology Review, Rule Adoptions, 40 N.J. Reg. 2254 (Apr. 10, 2008) (to be codified at N.J. ADMIN. CODE §§ 4, 7, 11).

<sup>51</sup> New Jersey Senator Frank Lautenberg and New Jersey Representative Frank Pallone introduced various measures in the 109th Congress explicitly protecting state

opposing provisions granting DHS preemption, were defeated in committee.<sup>52</sup>

On October 3, 2006, Congress passed the Department of Homeland Security Appropriations Act, 2007.<sup>53</sup> Section 550 of the Act required DHS to promulgate security regulations for chemical facilities<sup>54</sup> but was entirely silent on preemption.<sup>55</sup> Pursuant to section 550, DHS issued an advance notice of rulemaking for CFATS on December 28, 2006, that included a preemption provision. DHS articulated both field and conflict theories of preemption to support its proposed rule.<sup>56</sup> During the ensuing notice-and-comment period, congressmen, state government representatives, and various interest groups vigorously protested the preemption provision,<sup>57</sup> while some

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chemical security regulations. *See* Chemical Security and Safety Act of 2006, S. 2486, 109th Cong. § 16 (2006) (“Nothing in this Act affects any duty or other requirement imposed under any other Federal, State, or local law or any collective bargaining agreement.”); Chemical Security Act of 2005, H.R. 2237, 109th Cong. § 10 (2005) (“Nothing in this Act affects any duty or other requirement imposed under any other Federal or State law.”).

<sup>52</sup> Regarding the latter, Senator George Voinovich of Ohio proposed an amendment establishing federal preemption to the Chemical Facility Anti-Terrorism Act of 2006. It was defeated by a committee vote of 7 to 9 on June 14, 2006. S. REP. NO. 109-332, at 30–31 (2006).

<sup>53</sup> H.R. 5441, 109th Cong. (2006).

<sup>54</sup> Department of Homeland Security Appropriations Act, 2007, Pub. L. No. 109-295, § 550, 120 Stat. 1355, 1388 (2006). Under the resulting regulatory scheme, DHS would first determine whether a facility with threshold quantities of chemicals deemed hazardous by the Assistant Secretary was a “high level of security risk” facility falling under the statute and classify the facility in one of four risk tiers. Chemical Facility Anti-Terrorism Standards, 6 C.F.R. § 27.205 (2010). The facility would then submit a Security Vulnerability Assessment for agency review of its classification. 6 C.F.R. § 27.220. If the facility remained subject to regulation, it would then develop a Site Security Plan outlining measures that it would take to meet the “risk-based performance standards” for its risk tier; these general standards include restricting the facility perimeter, deterring attacks, and preventing theft and sabotage. 6 C.F.R. §§ 27.225, 27.230. DHS would next review the plan; if approved, it would then conduct a physical site inspection to assess compliance. 6 C.F.R. §§ 27.245, 27.250. DHS has the authority to issue orders ceasing operations and to issue civil fines of up to \$25,000 per day. 6 C.F.R. § 27.300.

<sup>55</sup> Department of Homeland Security Appropriations Act, 2007, Pub. L. No. 109-295, § 550, 120 Stat. 1355, 1388 (2006); *see also* Chemical Facility Anti-Terrorism Standards, 71 Fed. Reg. 78,276, 78,302 (proposed Dec. 28, 2006) (to be codified at 6 C.F.R. pt. 27) (“Ultimately, Section 550 was silent on preemption.”). Since this authorization was attached to an appropriations bill, any regulations issued by DHS were only interim final rules that were set to expire on October 4, 2009. § 550(b), 120 Stat. at 1388 (“[T]he authority provided by this section shall terminate three years after the date of enactment of this Act.”).

<sup>56</sup> Chemical Facility Anti-Terrorism Standards, 71 Fed. Reg. at 78,292–93.

<sup>57</sup> *See, e.g.*, Comments, *supra* note 49, at 8 (“We are deeply disturbed that . . . there is now an effort by the [a]dministration to prevent states and local communities from taking the necessary steps to protect their communities.”); Letter from Carl Tubbesing, Deputy Executive Director, National Conference of State Legislatures, to Dennis Deziel, Dep’t of Homeland Sec. (Feb. 7, 2007), *available at* <http://www.regulations.gov/search/Regs/home.html#documentDetail?R=09000064801fcb5a> (“The exclusion of states from the decision-making process undermines state efforts to secure chemical facilities located within their

members of Congress charged that DHS had distorted legislative intent to meet the demands of the chemical industry.<sup>58</sup>

DHS responded by issuing a slightly modified interim final rule on April 9, 2007.<sup>59</sup> It disclaimed its argument for field preemption and admitted that its rationale was “potentially too broad.”<sup>60</sup> However, it insisted that conflict preemption would still apply, and it did not change the actual preemption language of the rule.<sup>61</sup> Because the congressional authorization for CFATS was part of an appropriations bill, it is currently up for reauthorization, and in negotiations, members of Congress—led by the New Jersey delegation—continue to clash over new preemption language.<sup>62</sup>

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borders and undermines our federal system of government.”); Press Release, U.S. Senate Comm. on Homeland Sec. and Governmental Affairs, Lieberman Expresses Concerns About Proposed Chemical Security Regulations (Feb. 9, 2007), *available at* <http://hsgac.senate.gov/public/index.cfm?FuseAction=Press.Home> (choose “February” and “2007” from drop down menu; follow “GO” hyperlink) (quoting comment by Senator Joseph Lieberman that CFATS “seems calculated to imperil State and local laws” and that DHS “should remain silent on preemption, as Congress did and as it intended the Department to do”).

<sup>58</sup> Senator Lautenberg claimed that the Bush administration was “willing to put the health and safety of millions of people at risk” to meet the demands of the chemical industry and noted that DHS had stealthily published the regulation shortly before the December holidays. Press Release, Senator Lautenberg, Bush Administration Announces Regulation That Would Nullify New Jersey’s Chemical Plant Security Law; Lautenberg Blasts Bush Move; Vows To Stop Bush Action (Dec. 22, 2006) [hereinafter Lautenberg Press Release], *available at* <http://lautenberg.senate.gov/newsroom/record.cfm?id=267101>. Senator Susan Collins of Maine argued that the original bill’s silence on preemption reflected “a careful compromise on a difficult issue,” and that DHS had granted itself “a responsibility Congress never authorized, on an issue more properly presented to the courts.” Chris Strohm, *Senators Fight Pre-emption of Chemical Security Laws*, NAT’L J. TECH. DAILY, Jan. 11, 2007, <http://www.govexec.com/dailyfed/0107/011107tdpm2.htm>.

<sup>59</sup> Chemical Facility Anti-Terrorism Standards, 72 Fed. Reg. 17,688 (Apr. 9, 2007) (to be codified at 6 C.F.R. pt. 27).

<sup>60</sup> *Id.* at 17,727.

<sup>61</sup> *Id.*

<sup>62</sup> Senator Lautenberg on December 17, 2007 inserted a provision in the 2008 Homeland Security Appropriations Bill that blocked DHS from preempting stronger state regulations. *See* 153 CONG. REC. S15,879 (Dec. 18, 2007) (statement of Sen. Frank Lautenberg). Again, this was only a temporary measure, since it amended the temporary Department of Homeland Security Appropriations Act, 2007. Consolidated Appropriations Act, 2008, Pub. L. No. 110-161, § 534, 121 Stat. 1844, 2075 (2007) (“This section shall not preclude or deny any right of any State or political subdivision thereof to adopt or enforce any regulation . . . with respect to chemical facility security that is more stringent than a regulation . . . issued under this section . . . unless there is an actual conflict between this section and the law of that State.”). Three months later, Representative Bennie Thompson of Mississippi, Chairman of the House Committee on Homeland Security, introduced the Chemical Facility Anti-Terrorism Act of 2008, amending the original Homeland Security Act of 2002 and expressly forbidding federal preemption of stronger state regulations. Chemical Facility Anti-Terrorism Act of 2008, H.R. 5577, 110th Cong. § 4 (2008) (“Nothing in this title shall preclude or deny any right of any State . . . to adopt or enforce any regulation . . . that is more stringent than a regulation . . . pursuant to this title . . . unless a direct conflict

The uneasy sparring between DHS and members of Congress in 2007 revealed a concern that chemical security preemption did not serve an authentic national security interest and reflected regulatory capture by chemical manufacturers. For instance, New Jersey Senator Frank Lautenberg accused DHS and the Bush administration of working to “please their cronies in the chemical industry.”<sup>63</sup> Some scholars have discerned structural tendencies that support this reading of DHS policy. Professors Dara Kay Cohen, Mariano-Florentino Cuéllar, and Barry R. Weingast argue that the administration organized DHS in part “to further domestic policy priorities independent of homeland security” by “strategically mixing security and nonsecurity functions within the same bureaucracy.”<sup>64</sup> Those priorities included rolling back regulations that business and industry found objectionable.<sup>65</sup> Whatever the policy motivations of DHS and the Bush administration, their initial case for federal preemption in chemical security entered uncharted territory by invoking an expansive yet vaguely defined national security interest as a justification for federal supremacy.

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exists between this title and the regulation . . . issued by a State . . .”). This bill died in committee. Library of Congress THOMAS, Bill Summary and Status, H.R. 5577, 110th Cong., <http://www.thomas.gov/cgi-bin/bdquery/z?d110:HR05577:@@X> (last visited Oct. 27, 2010).

The CFATS reauthorization currently passed by the House limits DHS’s preemption powers. In June 2009, Representative Thompson introduced this bill, the Chemical and Water Security Act of 2009, with strong anti-preemption language. Chemical Facility Anti-Terrorism Act of 2009, H.R. 2868, 111th Cong. § 3 (2009) (“This title does not preclude or deny any right of any State . . . to adopt or enforce any regulation . . . that is more stringent than a regulation . . . issued under this title, or otherwise impair any right or jurisdiction of any State . . . with respect to covered chemical facilities within that State . . .”). The House passed that bill in November 2009. *Id.*

However, the Senate re-authorization bill currently in committee does not contain anti-preemption language. *See* Continuing Chemical Facilities Antiterrorism Security Act of 2010, S. 2996, 111th Cong. (2010) (introduced by Sen. Susan Collins of Maine). While Senator Collins has criticized chemical security preemption, one of this bill’s co-sponsors, Senator George Voinovich of Ohio, has supported it. *See supra* note 52.

<sup>63</sup> Lautenberg Press Release, *supra* note 58.

<sup>64</sup> Dara Kay Cohen et al., *Crisis Bureaucracy: Homeland Security and the Political Design of Legal Mandates*, 59 STAN. L. REV. 673, 678 (2006).

<sup>65</sup> *See id.* at 725–27 (describing how transfer of agencies such as Coast Guard, Federal Emergency Management Agency, and Immigration and Naturalization Service into DHS enabled Bush administration to divert resources to national security at expense of domestic regulatory agendas unpopular with business constituencies).

## II NATIONAL SECURITY PREEMPTION AND DEFERENCE DOCTRINES

The breadth of DHS's regulatory ambit and the indefinite boundaries of the national security interest implicate the primary concerns of the contemporary law and security debate. This Part examines the way in which the struggle to define the limits of executive power in national emergencies has led to an impasse, with arguments unable to settle the issue of how much deference is due to the executive. It then explores how administrative deference doctrines could provide a procedural path out of this impasse in the form of notice-and-comment rulemaking on national security issues.

### A. *Preemption and the Debate over Law and Security*

The battle over chemical security not only illustrates the problems posed by national security preemption in domestic policy contexts but also casts a new light on the debate over law and security. Judicial review is central to this debate, as well as to the law of preemption. As Justice Robert H. Jackson put it, the American people expect the courts to “both preserve liberty and protect security, finding ways to reconcile the two needs so that we do not lose our heritage in defending it.”<sup>66</sup>

Those opposing an expansive view of executive national security powers generally advocate rigorous judicial review to ensure that their exercise remains within constitutional limits.<sup>67</sup> Many of these commentators take their cue from Justice Jackson's concurrence in *Youngstown Sheet & Tube Company v. Sawyer*,<sup>68</sup> which stated that the President's authority is at its maximum when he acts pursuant to congressional authorization, at its minimum when he acts without such

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<sup>66</sup> Robert H. Jackson, *Wartime Security and Liberty Under Law*, 1 *BUFF. L. REV.* 103, 115 (1951).

<sup>67</sup> See, e.g., JOHN HART ELY, *WAR AND RESPONSIBILITY: CONSTITUTIONAL LESSONS OF VIETNAM AND ITS AFTERMATH* 67 (1993) (“The judiciary shouldn't decide what wars we fight, but it can insure that Congress play its constitutionally mandated role in such decisions.”); THOMAS M. FRANCK, *POLITICAL QUESTIONS/JUDICIAL ANSWERS: DOES THE RULE OF LAW APPLY TO FOREIGN AFFAIRS?* 7 (1992) (proposing that “there are no valid reasons . . . for treating foreign-relations cases differently from any others” with regard to judicial review, and that “U.S. federal courts stop abdicating in foreign-affairs cases”); LOUIS HENKIN, *FOREIGN AFFAIRS AND THE UNITED STATES CONSTITUTION* 148 (2d ed. 1996) (“[T]hough the courts have only a supporting part, it is indispensable and inevitable . . . .”); HAROLD HONGJU KOH, *THE NATIONAL SECURITY CONSTITUTION: SHARING POWER AFTER THE IRAN-CONTRA AFFAIR* 224 (1990) (“[T]he Framers designed our constitutional system with foreign affairs—and judicial review of foreign affairs—firmly in mind.”).

<sup>68</sup> 343 U.S. 579 (1952).



authorization, and in a “zone of twilight” when Congress has not spoken on the issue.<sup>69</sup> Courts have a vital role to play in policing this three-part framework, ensuring that both Congress and the President share authority over national security.

The countervailing argument, as proposed by Eric Posner and Adrian Vermuele, holds that “judicial review of governmental action, in the name of the Constitution, should be relaxed or suspended during an emergency.”<sup>70</sup> This argument relies on three major premises. First, an unavoidable tradeoff exists between security and liberty, since “[n]either good can simply be maximized without regard to the other.”<sup>71</sup> Second, the government is “not more likely” to engage in opportunism or oppress minorities “during emergencies than during normal times.”<sup>72</sup> Third, “courts are less able to police such behavior during emergencies than during normal times.”<sup>73</sup> The judiciary lacks the institutional competence to define the limits of executive power in national emergencies because judges are “generalists” and their “political insulation . . . deprives them of information,” especially relating to “novel security threats.”<sup>74</sup> Most importantly, Posner and Vermuele argue, “the expected costs of judicial review rise sharply in times of emergency” because judicial error “can produce large harms.”<sup>75</sup> Meanwhile, the executive has the advantages of “relative decisiveness, secrecy, [and] centralization”; as a result, “shackling the executive has real security costs.”<sup>76</sup>

The law and security debate has produced no consensus on the relative institutional competence of the three branches. Its focus on emergency powers—including the denial of habeas corpus, domestic surveillance, the treatment of enemy combatants, and military tribunals<sup>77</sup>—is accompanied by bitter political polarization to the point of stalemate.<sup>78</sup> While emergency powers will and should remain central to the debate, dwelling on them has obscured the extent to which the War on Terror is reshaping nonemergency executive power and the

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<sup>69</sup> *Id.* at 635–38 (Jackson, J., concurring).

<sup>70</sup> POSNER & VERMUELE, *supra* note 3, at 15, 17.

<sup>71</sup> *Id.* at 22.

<sup>72</sup> *Id.* at 31.

<sup>73</sup> *Id.*

<sup>74</sup> *Id.*

<sup>75</sup> *Id.* at 45.

<sup>76</sup> *Id.* at 55.

<sup>77</sup> Most commentators in the debate focus on these measures. *See, e.g.*, POSNER, *supra* note 3, at 10 (listing “the post-9/11 counterterrorist measures, actual and contemplated, that have engendered the most controversy”).

<sup>78</sup> *See, e.g.*, Issacharoff & Pildes, *supra* note 3, at 4 (describing “polarized assertions of two factions,” “executive unilateralists” and “civil libertarian idealists,” as “cloud[ing]” necessity of legal changes required by new security threats).

domestic regulatory ambit of the administrative state through mixed foreign and domestic security policy areas like CFATS.

Moreover, when we apply the institutional competence analysis often used in the law and security debate to actual exercises of national security law, the result is often a wash. Each branch or level of government brings its own strengths and weaknesses to the table. While abstract comparisons of these strengths may yield arguments for particular policy choices, these results fall away when national security law is examined at the correct level of specificity: existing programs and policies. The virtue of administrative law and the agency reference model is that they require highly specific fact-finding instead of largely hypothetical institutional competence arguments.

### B. *Skidmore and the Agency Reference Model Strike the Proper Balance*

If we employ administrative law doctrines to police both agency preemption and foreign affairs preemption, which doctrines are most suitable? At the very least, properly calibrated deference doctrines can force agencies to provide a minimum level of evidentiary support for their claims of a federal national security interest—support that shifting congressional majorities might not demand. But they can serve this function only if the standard of judicial review has been reinvigorated by a more searching scrutiny of agency preemption claims.

As discussed earlier, many commentators argue that agency findings and actions should inform the scope of preemption; we should not let agency expertise go to waste.<sup>79</sup> Yet this approach does nothing to ameliorate agencies' amply documented disregard for federalism concerns.<sup>80</sup> To address this tension, Catherine Sharkey has proposed an "agency reference model,"<sup>81</sup> whereby courts would decide questions of implied conflict preemption based upon "a particularized

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<sup>79</sup> See, e.g., Metzger, *supra* note 5, at 2083 ("[F]ramed in terms of particular contexts, agencies likely will have greatest expertise on the specific question of how best to balance federal-state regulatory roles."); *supra* notes 17–20 and accompanying text.

<sup>80</sup> Sharkey, *Federalism Accountability*, *supra* note 5, at 2131–42 (providing examples of agencies disregarding federalism concerns of states).

<sup>81</sup> Catherine M. Sharkey, *Products Liability Preemption: An Institutional Approach*, 76 GEO. WASH. L. REV. 449, 452–53, 477–502 (2008). The model has its critics: Richard Epstein has argued that the burden of courts "wading through" an agency record, coupled with attendant litigation, would end up "barring preemption across the board." Richard A. Epstein, *The Case for Field Preemption of State Laws in Drug Cases*, 103 NW. U. L. REV. 463, 473 (2009). Moreover, the weakness of *Skidmore* deference to agency preemption findings would subject agencies to the vagaries of interest-group pressure, yielding "helter-skelter" regulatory results. *Id.*

understanding of the regulatory review and action taken by the regulatory agency.”<sup>82</sup> The model adopts a form of *Skidmore* deference to take advantage of the superior fact-finding capacities of administrative agencies, while holding them accountable for generating a regulatory record and formulating policy based upon it.<sup>83</sup>

The model would allow courts to use “input from the relevant agency”<sup>84</sup> in making preemption decisions, but only if the court had engaged in “judicial scrutiny of the agency record.”<sup>85</sup> It conditions judicial deference to agency findings of preemption upon “direct, hard evidence from the agency’s regulatory record of how state . . . law conflicts with the federal regulatory scheme . . . .”<sup>86</sup> While agencies should certainly avoid “procedural irregularities” in soliciting and analyzing public comment, and heed “congressional and executive commands” of federalism impact statements, such procedural safeguards do not satisfy this inquiry.<sup>87</sup> Nor does generalized “legal interpretation.”<sup>88</sup> In analyzing the example of the Food and Drug Administration’s (FDA’s) preemptive authority to regulate medical devices, Sharkey argues that the Agency should have included “hard evidence” on the “precise risks” it considered and “some record evidence” to substantiate its chief claim for preemption: “overwarning,” mandated by stricter state regulations, would undercut the overall effectiveness of all medical warnings.<sup>89</sup>

In *Wyeth v. Levine*,<sup>90</sup> the Supreme Court appears to have endorsed elements of this model.<sup>91</sup> Even though the Court invalidated an agency preemption claim asserted by the FDA, it pointed to agencies’ “unique understanding of the statutes they administer and an attendant ability to make informed determinations” regarding federalism concerns.<sup>92</sup> It applied *Skidmore* deference, not *Chevron* deference, to agency preemption determinations.<sup>93</sup>

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<sup>82</sup> Catherine M. Sharkey, *What Riegel Portends for FDA Preemption of State Law Products Liability Claims*, 103 Nw. U. L. REV. 437, 461 (2009).

<sup>83</sup> *Id.* at 447 (citing *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944)).

<sup>84</sup> *Id.* at 456.

<sup>85</sup> *Id.* at 460.

<sup>86</sup> *Id.* at 449.

<sup>87</sup> *Id.* at 457.

<sup>88</sup> *Id.*

<sup>89</sup> *Id.*

<sup>90</sup> 129 S. Ct. 1187 (2009).

<sup>91</sup> See Sharkey, *Federalism Accountability*, *supra* note 5, at 2186 (“*Wyeth v. Levine* implicitly endorses the ‘agency reference model’ with the corresponding heightened judicial scrutiny that I have propounded.”).

<sup>92</sup> 129 S. Ct. at 1201.

<sup>93</sup> See Sharkey, *Federalism Accountability*, *supra* note 5, at 2180 (discussing *Wyeth*’s application of *Skidmore* deference).

This Note argues that judicial review of agency national security preemption should proceed according to *Skidmore* deference and the agency reference model. Coupling *Chevron* mandatory deference with the presumption of federal foreign affairs supremacy would allow agencies to recite a purported national security interest and thus evade meaningful review of regulations promulgated on this basis. These standards of deference and review would assure, at a minimum, that national security preemption claims would not be pretextual and would prevent agencies from exploiting the supremacy presumption to escape accountability.

Advocates of enhanced executive power in national security and foreign affairs might object that this approach circumvents the supremacy presumption by forcing agencies to justify a principle that has already been enshrined in the Constitution itself. In typical foreign affairs preemption cases like *Zschernig*, *Crosby*, and *Garamendi*, this argument might hold water. But as Part III will show, CFATS is fundamentally different for two reasons: It involves an agency assertion of preemption, and it asserts preemption in a mixed policy area that intermingles foreign and domestic regulatory concerns. The issue is not whether the federal foreign affairs interest should be subverted, but rather whether an agency should be able to assert it without facing meaningful scrutiny in a case that stretches the definition of foreign affairs. In the case of CFATS, where it is unclear to what extent the presumption of federal supremacy applies, should an agency be permitted to answer this question on its own, without being called upon to meet basic evidentiary standards in its answer?

### III

#### EVALUATING CHEMICAL SECURITY PREEMPTION

In creating CFATS, DHS proposed regulations invalidating any state “law, regulation, or administrative action” that “conflicts with, hinders, poses an obstacle to or frustrates the purposes of these regulations or of any approval, disapproval or order issued thereunder.”<sup>94</sup> In Section A, this Part will employ the agency reference model to show that DHS’s regulatory record was factually insufficient. Section B will show that the regulatory record improperly asserted field preemption based on a federal national security interest, and Section C will explore the problematic argument DHS made for conflict preemption. Under the agency reference model, DHS would have been required to present specific evidence supporting its claim for either

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<sup>94</sup> Chemical Facility Anti-Terrorism Standards, 71 Fed. Reg. 78,276, 78,302 (proposed Dec. 28, 2006) (to be codified at 6 C.F.R. pt. 27).

field or conflict preemption to overcome the federalism concerns articulated in the presumption against preemption. This analysis, summarized in Section D, shows that DHS failed to meet this standard. Section D also demonstrates that the model effectively identifies the evidentiary and doctrinal shortcomings of CFATS and can help police the federal-state boundary in national security policy.

#### A. *The Factual Insufficiency of DHS's Regulatory Record*

The agency reference model initially scrutinizes the sufficiency of the factual evidence on the regulatory record. DHS's record for CFATS fails to pass this test of factual sufficiency. First, in issuing its Advance Notice of Rulemaking, DHS cited criticisms of *other* chemical security legislative proposals as “allowing a patchwork of inconsistent or contradictory state or local security regulations that would compromise a uniform effective [f]ederal program.”<sup>95</sup> But with regard to CFATS itself, it provided no specific explanation of how this patchwork would actually impede implementation but instead alluded to “ambiguity that would delay or compromise implementation of security measures at a facility.”<sup>96</sup>

Second, in issuing the interim final rule, DHS drew a distinction between risk-based performance standards (which allow facilities to use various security measures, such as securing perimeters, to meet security benchmarks) and specification standards (which require chemical facilities to adopt particular measures). DHS noted that members of the chemical industry were concerned that “national risk-based, performance standards could be undercut by specification standards imposed by the States.”<sup>97</sup> They worried that, without preemption, “companies with multi-state operations could be subject to a confusing array of State programs” that might “provide varying levels of protection,” arguably flouting congressional intent.<sup>98</sup> But again, DHS made no attempt to quantify, much less evaluate, the economic impact of these concerns. It cited no statistical evidence and no outside research or reports to that effect. Instead, it relied upon a generalized legal argument that conflict preemption was a well-accepted doctrine with evident controls and safeguards.<sup>99</sup>

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<sup>95</sup> *Id.* at 78,292.

<sup>96</sup> *Id.* at 78,293.

<sup>97</sup> Chemical Facility Anti-Terrorism Standards, 72 Fed. Reg. 17,688, 17,717 (Apr. 9, 2007) (to be codified at 6 C.F.R. pt. 27).

<sup>98</sup> *Id.*

<sup>99</sup> *Id.* at 17,727 (“Conflict preemption is established in the Constitution and has been developed in case law . . . and the well-known standards of conflict preemption—which are captured in the regulatory text at § 27.405—apply to Section 550 and this regulation.”).

This regulatory record left a number of essential factual questions unanswered. DHS did not indicate how many high-risk facilities were run by companies with multistate operations. It did not demonstrate that state regulations would vary so extensively so as to pose real confusion or considerable additional compliance costs. It did not demonstrate that states would be inclined to enact specification-based rather than performance-based standards. Nor did it show that state regulations might undercut federal standards.<sup>100</sup> It made no effort to distinguish between state regulations that were less or more stringent than federal ones. Of course, DHS conducted cost-benefit analyses of its proposed regulatory scheme pursuant to Executive Order 12,866,<sup>101</sup> but these analyses focused on DHS's own regulatory scheme, not the impact of state alternatives.<sup>102</sup> All the concerns DHS raised were merely theoretical; that is, the Department made little effort to contrast its proposed regulations with existing state regulations. DHS did note that it did not foresee a conflict with those regulations, but it admitted that it had not conducted a close review of them.<sup>103</sup> On the regulatory record as a whole, DHS provided no hard evidence of the precise risks involved; it relied on generalized legal interpretation of potential conflicts, rather than analyzing the actual economic and regulatory effects of those conflicts. Moreover, it did not explicitly show how conflicts between state and federal law—aside from their putative economic impact—would impair the asserted federal interest of national security beyond a general claim of “compromise” and “ambiguity” that might lead to “delay.”<sup>104</sup>

Such a fact-deficient record, relying almost entirely on legal doctrine and generalized claims of adverse economic impact, would not satisfy the agency reference model's requirement of hard evidence to justify *Skidmore* deference. Substantively and normatively, DHS's conclusions may very well be correct, but the model requires that the agency provide concrete evidence for these conclusions.

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<sup>100</sup> See generally Chemical Facility Anti-Terrorism Standards, 72 Fed. Reg. at 17,717.

<sup>101</sup> Exec. Order No. 12,866, 3 C.F.R. 638 (1993), *reprinted in* 5 U.S.C. § 601 (2006).

<sup>102</sup> DEP'T OF HOMELAND SEC., DHS-2006-0073, REGULATORY ASSESSMENT: CHEMICAL FACILITY ANTI-TERRORISM STANDARDS 9 (2007) [hereinafter DHS, REGULATORY ASSESSMENT], available at <http://www.regulations.gov/fdmspublic/component/main?main=DocumentDetail&o=0900006480222d8c> (estimating cost of CFATS at \$3.6 billion between 2006 and 2009, assuming population of 5000 high risk chemical facilities, but not offering comparisons with different hypothetical regulatory regimes).

<sup>103</sup> Chemical Facility Anti-Terrorism Standards, 72 Fed. Reg. at 17,727 (“While we have not canvassed all existing state laws and regulations, currently we have no reason to conclude that any such non-Federal measure is being applied in a way that would impede the performance standards or other provisions of Section 550 and this Interim Final Rule.”).

<sup>104</sup> Chemical Facility Anti-Terrorism Standards, 71 Fed. Reg. 78,276, 78,293 (proposed Dec. 28, 2006) (to be codified at 6 C.F.R. pt. 27).

*B. DHS's Argument for Field Preemption: Misconstruing Chemical Security as Foreign Affairs*

As substantive arguments for chemical security preemption, DHS has asserted that two federal purposes would potentially be obstructed by state law: (1) federal supremacy in all matters affecting national security and (2) the ability to promulgate a particular regulatory balance. This Section will consider the first of these claims.

DHS asserted that “[t]he security of the Nation’s chemical facilities is a matter of national and homeland security,” citing remarks by then-Secretary Michael Chertoff.<sup>105</sup> Specifically, it argued that DHS was charged not only with “the prevention of terrorist attacks” and “the reduction of the vulnerability of the United States to terrorism,” but also with “ensur[ing] that the overall economic security of the United States is not diminished by efforts . . . aimed at securing the homeland.”<sup>106</sup> Therefore, DHS concluded, “[S]tate laws must give way to Federal statutes and regulatory programs to ensure a unified and coherent national approach in areas where the Federal interests prevail—such as national security.”<sup>107</sup> As authority for this proposition, the DHS cited *Crosby v. National Foreign Trade Council*, in which the Supreme Court struck down a Massachusetts law forbidding state governmental agencies from buying goods and services from companies conducting business in Myanmar (Burma).<sup>108</sup>

These arguments amounted to a claim of field preemption, though DHS did not refer to it by name. Construing national security as a single, “unified and coherent” policy field where “[f]ederal interests prevail,” the agency implied that the assertion of a federal national security interest would be enough to void state regulation that affected the interest.<sup>109</sup> This argument read the *Crosby* opinion too broadly by confusing foreign affairs with national security. *Crosby* involved a state’s attempt to regulate trade with a foreign government; the Court, citing Justice Robert Jackson’s concurrence in *Youngstown*, noted the “plentitude of Executive authority” that “controls the issue of preemption” in the arena of foreign relations.<sup>110</sup> CFATS, on the other hand, does not involve a foreign government—neither did *Youngstown*—and is concerned with national security, not foreign relations. DHS ignored this distinction, attempting to graft

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<sup>105</sup> *Id.* at 78,292 (citing remarks of then-Secretary Chertoff from March 21, 2006, and September 28, 2006).

<sup>106</sup> *Id.* (citing 6 U.S.C. § 111 (2006)).

<sup>107</sup> *Id.* (citing *Crosby v. Nat’l Foreign Trade Council*, 530 U.S. 363, 375–76 (2000)).

<sup>108</sup> *Crosby*, 530 U.S. at 375–76.

<sup>109</sup> Chemical Facility Anti-Terrorism Standards, 71 Fed. Reg. at 78,292.

<sup>110</sup> *Crosby*, 530 U.S. at 376.

federal supremacy in foreign relations onto the mixed domestic and foreign regulatory area of national security. Success in this attempt would turn the latter into a field of federal regulation and secure DHS's preemption claim.

Moreover, DHS's assertion of federal supremacy in national security circumvented Congress's silence on chemical security preemption. If *Crosby* found that federal interests in foreign affairs automatically prevailed over state interests, the agency would not need statutory authority to preempt state law. In other words, DHS assumed that the Court had endorsed the theory of dormant foreign affairs preemption. Once again, DHS read too much into *Crosby*. In that case, Congress had passed a statute authorizing the President to impose trade restrictions or other sanctions on Burma.<sup>111</sup> In finding federal preemption of the Massachusetts law, the Court indicated that it ruled only on statutory grounds, and it refused to make "any general consideration of limits of state action affecting foreign affairs."<sup>112</sup>

As noted earlier, DHS ultimately disclaimed its field preemption argument. This clarification, however, has not resolved the fundamental issue at the heart of the chemical security controversy. Even if all state law impacting national security is not automatically preempted, it is still unclear what state regulations would actually impede the federal interest of national security. A robust doctrine of conflict preemption for national security could be almost as powerful as field preemption.

### C. *DHS's Argument for Conflict Preemption: Misconstruing Weaker Regulation as Regulatory Flexibility*

DHS articulated a second federal purpose obstructed by state regulation: the ability to strike a flexible regulatory balance without interference. DHS interpreted section 550 as establishing "a carefully balanced regulatory relationship between the [f]ederal government and chemical facilities."<sup>113</sup> On the one hand, the statute grants the

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<sup>111</sup> *Id.* at 368–70 (outlining statute and executive orders issued pursuant to its provisions).

<sup>112</sup> *Id.* at 381; see also Daniel Halberstam, *The Foreign Affairs of Federal Systems: A National Perspective on the Benefits of State Participation*, 46 VILL. L. REV. 1015, 1021 (2001) (arguing that Court in *Crosby* "strenuously declined to discuss the constitutional role that States generally should play in the foreign affairs arena"). DHS would have been better off citing *Garamendi*, which involved executive agreements that lacked statutory authorization from Congress. See *Am. Ins. Ass'n v. Garamendi*, 539 U.S. 396 (2003). But DHS nonetheless would have run into a similar problem to the problem it experienced with *Crosby*: Unlike CFATS, these cases both involved relations with particular foreign governments.

<sup>113</sup> Chemical Facility Anti-Terrorism Standards, 71 Fed. Reg. at 78,293.



Secretary of DHS authority to disapprove any site security plan that fails to meet federal standards, but it also “compels the [DHS] to preserve chemical facilities’ flexibility to choose security measures to reach the appropriate security outcome.”<sup>114</sup> The Department claimed that these requirements unavoidably imply that any “state measure frustrating this balance will be preempted.”<sup>115</sup>

### 1. *Geier, Wyeth, and DHS’s Argument for Regulatory Flexibility*

DHS’s argument relied heavily on the Supreme Court’s decision in *Geier v. American Honda* by drawing an analogy between section 550’s contemplation of flexible means to meet security standards for chemical facilities and the Court’s desire to preserve a flexible standard for passenger restraints in cars.<sup>116</sup> DHS claimed that it was “particularly concerned that a conflict or potential conflict between an approved [Federal] Site Security Plan and state regulatory efforts could create ambiguity that would delay or compromise implementation of security measures at a facility.”<sup>117</sup> In other words, state regulations would inevitably conflict with a flexible federal approach because they imposed additional mandates that would frustrate the latter’s regulatory mix of alternatives available to regulated actors. Preemption would remedy this ambiguity. To facilitate federal supremacy of chemical security regulations, DHS proposed a process by which state or local governments could seek opinions on preemption from the DHS.<sup>118</sup>

DHS’s invocation of *Geier* suggested that state and federal regulatory schemes for chemical security employ incompatible regulatory methods. In fact, both use a substantially similar regulatory model. CFATS relies upon a balance between federal regulatory authority and a covered facility’s discretion to design its own security measures; the availability of a flexible regulatory mix is crucial to the program.<sup>119</sup> However, existing state security regulations, such as New Jersey’s, embody a similar performance-based approach and similar flexibility. The New Jersey law requires certain high-risk chemical facilities to

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<sup>114</sup> *Id.* (citing Pub. L. No. 109-295, § 550).

<sup>115</sup> *Id.*

<sup>116</sup> *See id.*

<sup>117</sup> *Id.*

<sup>118</sup> Chemical Facility Anti-Terrorism Standards, 71 Fed. Reg. at 78,293, 78,302 (“To meet this need, the proposed regulations, at § 27.405, would permit State or local governments, and/or covered facilities, to seek opinions on preemption from the [DHS].”).

<sup>119</sup> *Id.* at 78,284–85; *see also* Chemical Facility Anti-Terrorism Standards, 72 Fed. Reg. 17,688, 17,705 (Apr. 9, 2007) (to be codified at 6 C.F.R. pt. 27) (noting in response to comments received pursuant to its Advance Notice of Rulemaking that Congress intended facilities to have flexibility in selecting security measures).

conduct security reviews, formulate security plans, and submit both to the New Jersey Department of Environmental Protection.<sup>120</sup> This process substantially conforms to the flexible method of regulation proposed by DHS.<sup>121</sup>

In contrast to these similar regulatory methods, *Geier* involved a state tort suit with a proposed remedy that would have completely nullified the flexibility of federal regulations.<sup>122</sup> The state and federal regulations in that case differed in method, resulting in an irresolvable conflict between the specific remedies imposed by state courts and federal flexibility based on safety performance. DHS is correct that state tort suits and state chemical security regulations that impose specific requirements would conflict with CFATS and its congressional mandate. However, it does not follow that all state regulations would pose such a conflict, especially when those states follow the federal government's flexible model. DHS's argument, to the contrary, would create an unsound rule that whenever the federal government asserts an interest in creating a flexible regulatory scheme, any state regulations in the field would be automatically preempted. Flexibility does not require exclusivity.

In *Wyeth v. Levine*, the Court spelled out the extent to which courts should rely on an agency's views on preemption. *Wyeth* concedes that "an agency regulation with the force of law can pre-empt conflicting state requirements," indicating that statutory authorization and compliance with rulemaking procedures will endow preemption regulations with such authority.<sup>123</sup> But where Congress "has not authorized" the agency "to pre-empt state law directly,"<sup>124</sup> the Court "ha[s] not deferred to an agency's *conclusion* that state law is preempted. Rather, [it has] attended to an agency's explanation of how state law affects the regulatory scheme."<sup>125</sup> As discussed above, *Wyeth* holds that the inquiry proceeds according to the "thoroughness, con-

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<sup>120</sup> See *supra* note 50.

<sup>121</sup> See, e.g., BEST PRACTICES STANDARDS, *supra* note 50, ¶ 5, at 6–7 (providing that covered facilities "shall conduct a review of the practicability and the potential for adopting inherently safer technology (IST)" as part of assessments required by state law and that "[s]uch review shall include analysis of whether adoption of IST alternatives is practicable and the basis for any determination that implementation of IST is impractical").

<sup>122</sup> *Geier*, 529 U.S. at 874–78, 881, 886 (holding that state tort suit claiming passenger automobiles without airbags were negligently and defectively designed conflicted with federal regulations allowing automobile manufacturers to meet safety standards with mix of passive and active restraint devices).

<sup>123</sup> 129 S. Ct. 1187, 1200 (2009) (citing *Geier v. Am. Honda Motor Co.*, 529 U.S. 861 (2000)).

<sup>124</sup> *Id.* at 1201.

<sup>125</sup> *Id.*

sistency, and persuasiveness” of the agency’s federalism position—the inquiry in *Skidmore* and the agency reference model.<sup>126</sup>

*Geier* can be distinguished from *Wyeth* on the grounds that, in the former case, the agency asserted preemption through notice-and-comment rulemaking pursuant to a statutory grant of preemptive authority (however ambiguous).<sup>127</sup> In the latter case, the agency asserted preemption through a rulemaking preamble that was never subject to notice-and-comment rulemaking and lacked any explicit statutory authority to preempt.<sup>128</sup> But the rulemaking process that produced CFATS is closer to the defective rulemaking in *Wyeth*, not the rulemaking in *Geier*. Even though DHS promulgated CFATS through the normal processes of notice-and-comment rulemaking, Congress was silent on the preemption issue. Therefore, the preemption provision does not have the force of law and is not automatically entitled to deference. To receive any deference, the preemption provision must meet the evidentiary standards of *Skidmore* and, by extension, the agency reference model. DHS’s mere invocation of *Geier* was not enough to make the case for conflict preemption based on the frustration of regulatory flexibility; DHS was required to provide factual support for its claim that state regulations would defeat such flexibility. As the next Section will show, DHS failed to meet this burden.

## 2. *Inherently Safer Technologies and the Substance of Regulatory Conflict*

Despite DHS’s invocation of *Geier*, the substantive conflict between federal and state chemical security law does not lie in regulatory method. Instead, it lies in the strength of the performance standards imposed by different regulatory regimes. The difference between the chemical security laws of the federal government and New Jersey is that the latter has actively embraced a more stringent industry security protocol entitled Inherently Safer Technologies (IST).<sup>129</sup> This protocol involves modifying production processes instead of the traditional safety method of inserting layers of security protection between the hazard and the public, usually on the exterior of a facility. While the traditional method involves perimeter security

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<sup>126</sup> *Id.*

<sup>127</sup> See *Geier*, 529 U.S. at 885.

<sup>128</sup> *Wyeth*, 129 S. Ct. at 1199–201 (discussing both statutory authority and assertion of preemption through rulemaking preamble).

<sup>129</sup> By adopting the Domestic Security Preparedness Task Force’s *Best Practices Standards*, Acting Governor Richard Codey of New Jersey adopted IST standards for high-risk chemical facilities in the state; the New Jersey Department of Environmental Protection continues to administer these standards. Cf. Press Release, N.J. Acting Governor’s Office, *supra* note 50.

measures such as fencing, monitoring through video cameras and motion detectors, or using security staff, IST involves replacing toxic chemicals used in manufacture with safer alternatives, reducing inventories, and changing production processes.<sup>130</sup>

DHS responded to comments calling for the adoption of IST by claiming that section 550 prohibited the disapproval of a site security plan based on particular measures.<sup>131</sup> However, this response wrongly construes IST as a specification-based measure, when it is actually just a security standard that can be implemented either as a performance-based or a specification-based protocol. IST does not necessarily mandate any specific measures. It simply looks inside the factory walls, whereas traditional methods generally do not, and outlines a choice between flexible strategies of minimization, substitution, moderation, and simplification.<sup>132</sup> Despite DHS's claims to the contrary, IST is not incompatible with a regulatory performance standard; as Senator Susan Collins has noted, "IST is one of the recognized means of meeting a performance standard."<sup>133</sup>

Certain interest groups, including labor unions and environmental groups, have argued that IST standards should become mandatory for all chemical facilities.<sup>134</sup> DHS is correct in its assertion that doing so would violate the statutory mandate for CFATS. However, requiring specific perimeter-based security measures—such as a certain kind of fencing, or a certain type of video monitoring—would also violate that mandate. When implementing performance-based security standards, the issue is not whether IST is involved, but rather how those standards—whether they involve IST or traditional perimeter-based measures—are implemented.

The practical difference is that including IST measures as options for evaluating site security plans may require higher initial capital outlays from chemical facilities to comply with security regulations. In other words, the clash between state and federal governments over

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<sup>130</sup> James L. Beebe, *Inherently Safer Technology: The Cure for Chemical Plants Which Are Dangerous by Design*, 28 HOUS. J. INT'L. L. 239, 258 (2005) (distinguishing IST from traditional approaches to chemical process safety). See generally CTR. FOR CHEM. PROCESS SAFETY, AM. INST. OF CHEM. ENG'RS, *INHERENTLY SAFER CHEMICAL PROCESSES: A LIFE CYCLE APPROACH* 9–10 (2d ed. 2009) ("[I]nherent safety seeks to *remove* the hazard at the source, as opposed to accepting the hazard and attempting to mitigate the effects.").

<sup>131</sup> Chemical Facility Anti-Terrorism Standards, 72 Fed. Reg. 17,688, 17,718 (Apr. 9, 2007) (to be codified at 6 C.F.R. pt. 27).

<sup>132</sup> Beebe, *supra* note 130, at 257–63.

<sup>133</sup> 151 CONG. REC. S14067 (daily ed. Dec. 19, 2005) (statement of Sen. Collins).

<sup>134</sup> See, e.g., *Chemical Facility Anti-Terrorism Act of 2008: Hearing Before the H. Comm. on Homeland Sec.*, 110th Cong. 27 (2008) (statement of Rick Hind, Legislative Director, Greenpeace Toxics Campaign) ("IST is the best tool available to completely mitigate facility vulnerabilities and safeguard communities.").

chemical security boils down to the familiar debate of whether federal regulations should act as a floor or as a ceiling on state regulations.<sup>135</sup> Members of Congress opposed to preemption have proposed statutory language specifically defining federal regulation as a floor and not a ceiling.<sup>136</sup>

DHS, for its part, only hinted at its argument against IST's heightened standards. On the record, it focused on its claim that only a performance-based standard is flexible enough to identify the most cost-effective security mechanisms for chemical facilities with very different locations and possible threats, ignoring the fact that IST is itself amenable to performance-based standards.<sup>137</sup> Elsewhere, then-Secretary Michael Chertoff commented at an industry conference that IST represented "interference with business," and that preemption was necessary because inconsistent rules across states would lead to "ruinous liability" for the chemical industry and "a regulatory regime that is doomed to failure."<sup>138</sup>

Chertoff may have been correct. However, DHS's rulemaking failed to support these determinations with factual evidence sufficient under the agency reference model. DHS did not prove that a state's adoption of IST would impose costs that would threaten the viability of federal regulation; for example, DHS did not cite any cost estimates for IST generated by the chemical industry.<sup>139</sup> Moreover, measures suggested by the IST protocol may in some cases be the most cost-

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<sup>135</sup> See William W. Buzbee, *Asymmetrical Regulation: Risk, Preemption, and the Floor/Ceiling Distinction*, 82 N.Y.U. L. REV. 1547, 1568–74 (2007) (describing DHS's controversial preemption claims in 2006 as example of "unitary federal choice ceiling preemption" that "leaves no gap that states or other state institutions such as courts can fill").

<sup>136</sup> Chemical Facility Anti-Terrorism Act of 2008, H.R. 5577, 110th Cong. § 2107(a) (2008) ("Nothing in this title shall preclude or deny any right of any State or political subdivision thereof to adopt or enforce any regulation . . . with respect to chemical facility security . . . that is more stringent than a regulation . . . issued pursuant to this title . . . unless a direct conflict exists between this title and the regulation . . . issued by a State . . .").

<sup>137</sup> As required by Executive Order 12,866, the DHS conducted a regulatory assessment of the costs of CFATS. Beyond a general discussion of the desirability of performance-based rather than specification-based standards, the Department did not show why IST would impose costs that would obstruct the federal purpose at work in CFATS. See generally DHS, REGULATORY ASSESSMENT, *supra* note 102, at 8–9.

<sup>138</sup> Spencer S. Hsu, *Chertoff Seeks To Improve Chemical Plants' Security*, WASH. POST, Mar. 22, 2006, at A7 (quoting former Secretary Chertoff).

<sup>139</sup> In responding to various comments on its capital cost estimates for CFATS, DHS never mentioned IST as a competing model. See Chemical Facility Anti-Terrorism Standards, 72 Fed. Reg. 17,688, 17,721–22 (Apr. 9, 2007) (to be codified at 6 C.F.R. pt. 27) (discussing various comments regarding costs of CFATS to industry).

effective means of complying with state and federal security regulations, especially in the long run.<sup>140</sup>

While Chertoff argued that IST would impose unacceptable liability on the chemical industry, New Jersey regulators have argued that such technologies could contribute to “a more stable business plan” by lowering “the facility’s potential liabilities.”<sup>141</sup> Moreover, the initial capital costs of IST could be offset by “lower operating costs in areas such as maintenance, operations, and emergency response requirements.”<sup>142</sup> The Department conceded that “covered chemical facilities are certainly free to consider IST options, and their use may reduce risk and regulatory burdens.”<sup>143</sup> At the very least, the cost-effectiveness of IST remains open to debate, deserving more scrutiny than DHS’s conclusory dismissal on the record.

Putting aside the normative merits of IST, the Department did not show why current state implementation of the protocol obstructs the federal regulatory scheme. New Jersey’s regulations do not require the adoption of IST; they merely mandate an IST feasibility review.<sup>144</sup> DHS provided no reason why a mere IST review—without specific implementation requirements—would be so costly to the industry that a single state implementing it would thwart CFATS. It certainly did not provide any hard evidence required by the agency reference model.

In an apparent response to sustained state opposition, DHS declared in issuing its interim final rule that it had no reason to believe that any existing state statutes or regulations would impede CFATS.<sup>145</sup> This ultimate compromise on IST—dismissing it, yet professing to respect states that implement it—might have a sound policy justification. The Department might have been simply guarding against a worst-case scenario, where a complete lack of federal preemptive power opens CFATS to arbitrary state-imposed specification standards. Perhaps states might impose punitive standards to force chem-

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<sup>140</sup> Beebe, *supra* note 130, at 263–64 (arguing that IST “usually leads to cheaper costs”); see also T.A. Kletz, *Inherently Safer Design—Its Scope and Future*, 81 SAFETY PROCESS & ENVTL. PROT. 401 (2003) (“Inherently safer designs are usually cheaper than those they replace as less added-on safety equipment is needed. Intensification will usually give a further reduction in cost as smaller equipment is usually cheaper.”).

<sup>141</sup> Toxic Catastrophe Prevention Act Program, *Inherently Safer Technology Review*, Proposed Amendments, 39 N.J. Reg. 1351 (proposed Apr. 16, 2007).

<sup>142</sup> *Id.*

<sup>143</sup> Chemical Facility Anti-Terrorism Standards, 72 Fed. Reg. at 17,718.

<sup>144</sup> BEST PRACTICES STANDARDS, *supra* note 50; see also Comments, *supra* note 49, at 6–7 (“The inherently safer technology requirement under the [New Jersey] Standards represents a practicability test; it is not mandatory that a covered facility implement IST, only that they evaluate.”).

<sup>145</sup> Chemical Facility Anti-Terrorism Standards, 72 Fed. Reg. at 17,727.

ical industries out of their borders. These might raise compliance costs to an unacceptable level, thereby damaging the economic viability of the chemical industry overall and co-opting CFATS for a purpose it was never intended to fulfill.

However, the congressional opponents of broad conflict preemption in CFATS recognized this danger and accounted for it by granting DHS regulations preemptive authority in cases of “direct conflict.”<sup>146</sup> The Department’s opposition to this language suggests that it wished to reserve to itself a more sweeping preemption power than that granted by Congress. Not surprisingly, states and their representatives in Congress have been skeptical about the Department’s promises to respect existing state regulations.<sup>147</sup> They continue to push for statutory language foreclosing DHS’s assertion of broad powers of preemption.

#### *D. Scrutinizing Agency Assertions of National Security Preemption*

Despite DHS’s claimed national security interest, the debate over chemical facility security is, at root, an all-too-familiar domestic argument over the ability of federal regulators to impose uniformity in the name of business profitability and a unified national market. National security concerns do not appear to underlie the factual basis DHS provided for its rule. DHS’s invocation of national security<sup>148</sup> and its attempt to superimpose it on domestic issues threatened to cut off the debate over the merits of preemption by making a seemingly unassailable claim of federal authority.

In promulgating CFATS, DHS asserted that its authority to preempt state law on national security extended to regulating the economics of impacted industries. To justify this highly questionable

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<sup>146</sup> Chemical Facility Anti-Terrorism Act of 2008, H.R. 5577, 110th Cong. § 2107(a) (2008).

<sup>147</sup> For a description of comments received from state government representatives in response to DHS’s Advance Notice of Rulemaking, see Chemical Facility Anti-Terrorism Standards, 72 Fed. Reg. at 17,717. The new bill proposed by preemption opponents in Congress would forestall these specific threats to state authority. See Chemical Facility Anti-Terrorism Act of 2008, H.R. 5577, 110th Cong. § 2107(a)–(b) (2008) (proscribing federal preemption of any state or local law that imposes regulations more stringent than those of federal government, and any state or local environmental regulations). State governments and legislators opposed to preemption may have good reason to suspect DHS’s promise to respect existing state law; some journalists have charged that conservative lawyer and lobbyist Philip Perry—a son-in-law of Vice President Dick Cheney and General Counsel of DHS in 2006—drafted the preemption language in CFATS at the behest of the chemical industry specifically to invalidate New Jersey’s regulatory scheme. For this interpretation of the purposes behind CFATS, see Art Levine, *Dick Cheney’s Dangerous Son-In-Law: Philip Perry and the Politics of Chemical Security*, WASH. MONTHLY, July 3, 2007, at 38.

<sup>148</sup> See *supra* text accompanying notes 105–08.

claim, DHS would have to produce evidence of how the economic impact of state regulation impairs the fiscal security of particular facilities, businesses, or industries and how this outcome impairs defense from terrorist threats. DHS failed to do so and instead merely referred to “the overall economic security of the United States.”<sup>149</sup> This confusion of national security and fiscal stability amounts to little more than a play on words.

In determining which branch of government should evaluate such assertions of national security preemption, the example of CFATS and its legislative response might prompt observers to revisit Herbert Wechsler’s theory of the political safeguards of federalism.<sup>150</sup> Since New Jersey’s congressional delegation spearheaded the fight against chemical security preemption, perhaps its limited success vindicates the idea that the states’ elected representatives can handle the task of protecting state autonomy against executive overreaching. On the other hand, Congress’s hostile response to DHS’s preemption claim may have been the product of political fortuity.

The original measure authorizing DHS to promulgate regulations—passed by a Republican House and a Democratic Senate—was silent on preemption.<sup>151</sup> DHS issued its proposed rule less than two months after the 2006 elections in which the Democrats—skeptical of the Bush administration’s approach to preemption—gained control of the House of Representatives. CFATS also happened to have a sunset provision that expired in 2009, since it was an interim rule attached to an appropriations bill. Before it came up for reauthorization, the Obama administration disavowed its predecessor’s approach to preemption.<sup>152</sup> More to the point, the clash between the current House and Senate bills re-authorizing CFATS shows that the issue is not resolved.

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<sup>149</sup> Chemical Facility Anti-Terrorism Standards, 71 Fed. Reg. 78,276, 78,292 (proposed Dec. 28, 2006) (to be codified at 6 C.F.R. pt. 27); *see also supra* note 106 and accompanying text.

<sup>150</sup> *See* Herbert Wechsler, *The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Government*, 54 COLUM. L. REV. 543, 560 (1954) (“[I]t is Congress rather than the Court that on the whole is vested with the ultimate authority for managing our federalism . . .”).

<sup>151</sup> *See supra* notes 54–55 and accompanying text.

<sup>152</sup> Memorandum from President Barack Obama to the Heads of Executive Departments and Agencies (May 20, 2009), *available at* [http://www.whitehouse.gov/the\\_press\\_office/presidential-memorandum-regarding-preemption](http://www.whitehouse.gov/the_press_office/presidential-memorandum-regarding-preemption) (maintaining that “[i]n recent years” some agencies made preemption declarations without “sufficient basis under applicable legal principles,” and “the general policy of [his] [a]dministration that preemption of State law by executive departments and agencies should be undertaken only with full consideration of the legitimate prerogatives of the States and with a sufficient legal basis for preemption”).



In other words, the legislative resistance to DHS's chemical security preemption claim may have been a matter of timing and partisan politics, rather than a deeply considered evaluation of the federalism issues at play. CFATS may have been the exception that proves the rule: Congress is not the branch best equipped to judge the merits of preemption claims. At the very least, the various contingencies that produced this outcome do not silence the public choice critiques of congressional authority over preemption.<sup>153</sup> Agencies, supervised by judicial review, would do a better job at striking the right balance in federalism determinations.

In the national security context, *Skidmore* and the agency reference model rightly balance deference to agencies with scrutiny of rulemaking. These doctrines defer to agencies' superior expertise and experience in fact-finding, and only insist that agencies engage in that fact-finding. *Chevron* deference applied to national security might not scrutinize effectively the sorts of pretextual arguments DHS employed in CFATS. *Skidmore* deference and the agency reference model would force agencies to do what they do best: gather evidence and build a regulatory record.

In so doing, these doctrines call out mistaken legal interpretations, such as DHS's misreading of the Supreme Court's foreign affairs preemption decisions,<sup>154</sup> so that such interpretations cannot underwrite doctrinally suspect claims of agency authority. The deference doctrines prevent agencies like DHS from merely asserting the predominance of national security interests in an area of commingled state and federal, foreign and domestic security regulation. Applying *Skidmore* and the agency reference model to national security preemption claims has revealed the need to pry apart national security from foreign affairs and develop a thorough doctrinal understanding of the former federal interest—not importing legal principles from a different area of law.

## CONCLUSION

“In a world in which the category ‘foreign relations’ has an indefinite scope,” Jack Goldsmith has argued, “doctrines tied to the category make no sense.”<sup>155</sup> Whether or not this assessment applies to the breadth of foreign relations and national security law, it certainly applies to the doctrinal issues posed by CFATS: agency assertion of national security preemption, and the mixed foreign and domestic

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<sup>153</sup> See *supra* note 18 and accompanying text.

<sup>154</sup> See *supra* notes 105–10 and accompanying text.

<sup>155</sup> Goldsmith, *supra* note 32, at 222.

nature of national security policy. With national security law focused upon emergency powers and civil liberties, the doctrinal confusion of borderline cases—such as CFATS’s reclassification of domestic business regulation as national security—needs clarification.

Rather than propose new principles based on the sorts of arguments that mark the law and security debate, this Note asserts that the deference doctrines of administrative law, properly tailored to require agency fact-finding, can effectively evaluate agency claims of national security preemption. In so doing, they do not deny the executive its authority in the realm of national security; they simply require that executive agencies back up their assertions that their authority is applicable.

While talk of a “national security state” generally denotes the familiar institutional organs of the security bureaucracy—the Central Intelligence Agency, the Department of Defense, and so on—it can also refer to a particular nation-state that has chosen to prioritize national security over all other government functions and core values.<sup>156</sup> In concrete terms, the national security state entrenches itself as the executive amasses power at the expense of the other branches, the states, civil liberties, or the Constitution. The example of CFATS demonstrates that the frontiers of the national security state lie not just in emergency powers but also in areas far removed from the foreign affairs or domestic surveillance contexts. Likewise, a solution to the problem lies within the same doctrines of administrative law that are being crafted to bring agency expertise and accountability to American federalism.

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<sup>156</sup> NORRIN M. RIPSAN & T.V. PAUL, *GLOBALIZATION AND THE NATIONAL SECURITY STATE* 10–11 (2010) (referring to three meanings of “national security state,” which include “a state that accords primacy to the protection of national borders, physical assets, and core values largely through military means,” “states that have institutionalized the provision of security and prioritized it over all functions of state,” and “the political institutions responsible for the conduct of foreign security policy”).