REMARKS OF GILLIAN METZGER†

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I thought that I would begin by putting my priors on the table. On that front, I am actually surprised but pleased to find out that I might be agreeing more with Rick [Hills] than I was expecting to on this panel. On the institutional design question I share some concerns with Susan [Frederick] and Dan [Schweitzer]. However, in the preemption context my inclination is that federal agencies can, and have the capacity to, do a better balancing of the federalism and national interests than either Congress or the courts. And I also think that there are instances in which agencies can legitimately preempt on obstacle grounds, although I find the recent expansion in obstacle preemption very concerning.

The point I want to start with, however, relates back to Congress. I think it is hard to challenge the legitimacy gains of greater congressional involvement in this area. In particular, Congress needs to be involved in order to address the social insurance aspect of preemption cases. This is because agencies do not have the ability to say, without congressional approval, that even if we make the right systemic regulatory decision, somebody is going to get hurt and maybe compensation should be available. A decision to provide compensation has to be made at the congressional level. I agree, though, with Rick [Hills] that Congress has shown too much predilection for addressing preemption without the kind of clarity and specificity that is needed. In addition, if we are talking about issues that are going to end up having an administrative edge, the reality is that Congress generally delegates very broadly to agencies. I find it difficult to imagine Congress as willing or able to change that practice and delegate more clearly when it comes to administrative preemption. The typical reasons given for why Congress delegates broadly—the political difficulties of reaching agreement on regulatory specifics; the lack of time and expertise needed to ad-

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dress specific issues; the need to have regulatory schemes that are flexible and can respond to new challenges as they emerge—all apply in the context of administrative preemption.

What I am even more convinced of is that a greater role for agencies in the preemption context is simply inevitable. The reasons are not only the economic and national political reasons that Rick [Hills] mentioned, but additionally, I do not think that courts are going to enforce rules requiring Congress to play a central role. It is just too much at odds with the norms of the national administrative state that we have developed over the last century—and are only developing further—to think that is going to happen. So I truly believe that we need to face the fact that agencies will inevitably play a bigger role here. I happen to think that that is not a bad outcome. Although agencies have many of the pathologies that have been identified already today, they also have some important strengths in terms of their ability to apply area-specific expertise and weigh state and national interests in particular regulatory contexts. I believe that too often the national-state debate is presented as being necessarily the kind of stark conflict that it was under the Bush Administration, without much sympathy to state interests at the national level. I am not so sure that national and state regulatory interests are always as opposed to one another as is sometimes conveyed. Another point to note about agencies, which is important for what I want to get to, is that agencies are more amenable to being checked by a variety of different actors than either Congress or the courts. That matters because I think the issue on which we should be focusing—the real institutional design question—is: Accepting that agencies are inevitably going to be playing a role here, how do we structure their involvement to make sure that they make the best decisions about preemption? In particular for federalism interests, how do we structure their involvement to ensure that state and local interests are adequately heard, responded to, and taken seriously? That was what Rick [Hills] was getting at in terms of the Vice President,[1] and I have somewhat similar suggestions to make.

First, let me talk about a couple of other approaches. As Rick [Hills] mentioned, one of the things I, [Catherine Sharkey], and a number of others have advocated for is the traditional administrative law response of enhanced judicial review. And I do think that subjecting preemption determinations to a more searching scrutiny could have some traction. If you look at some of the preemption

1. *See* Roderick M. Hills, Remarks at the *New York University Annual Survey of American Law* Symposium: Tort Law in the Shadow of Agency Preemption (Feb. 27, 209) (transcript available at New York University Annual Survey of American Law).

regulations that came out under the Bush Administration, there are some fairly obvious APA [Administrative Procedure Act][2] issues that can be raised. For example, there are issues involving inadequate notice. Such APA procedural reversal might only serve to slow down adoption of the agency's preemptive position. But with an agency that is even nominally responsive, the possibility exists that such reversals might have some substantive effect down the road. You can again put this down to my priors; I tend to believe that agencies are not so committed to a pre-chosen path that they are not interested in hearing other voices or open to responding to states' concerns. Agencies are under-resourced to be sure, and can have programmatic tunnel vision. Sometimes agencies can be overly politicized. But I believe it is a mistake to assume that agencies will be unresponsive. The critical issue is designing agencies and their relationships with their political and judicial overseers so as to encourage agencies to take other interests and perspectives seriously. As a result, I see some potential for the option of enhanced judicial scrutiny to improve preemption determinations.

Another option at the national level is enhanced congressional oversight. [Catherine Sharkey] has spoken a little bit about that in terms of Executive Order 13132[3] and we heard some discussion today about FDA [Food and Drug Administration] oversight. There are some obvious avenues on this front that matter. The angle I would emphasize more, however—and Rick [Hills] made this point too[4]—involves intra-agency checks. I could not agree more with Rick [Hills] about trying to learn lessons from the example of cooperative federalism. If we accept the inevitability of federal agencies being involved in this area, a key question is how to structure the federal regulatory process to fully bring in state and local interests.

Another mechanism might be to try to require the establishment of advisory committees within each agency, embodying state and local interests, as a means to create ongoing contact between the different levels of regulators. Issues will of course exist about whom to put on such advisory committees to represent state and local interests. But what is needed is a formal intra-agency institutional structure to represent state and local interests [a] that has an existence beyond a particular issue, [b] that is not dependent on the agency triggering a request for comments in a particular case, and [c] that, over time and through ongoing interactions, can build confidence, relationships, and receptivity among federal, state, and

2. Administrative Procedure Act, 5 U.S.C. §§ 701–6 (2006).

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

4. *See* Hills, *supra* note 1.

local regulators. While I think the Vice President can also serve a role in terms of appeals from agencies, we really should consider building into the agencies greater sensitivity to state and local interests. This should include even those agencies that do not take a cooperative form, that implement more dual regulatory regimes, or that represent centralized federal regulatory power without a state analog. Some kind of advisory committee structure is one option for building such a formal institutional representation of federalism concerns.

There is also the option of trying to do more with the executive order and OMB [Office of Management and Budget]. That only works, of course, if you have an OMB that is sympathetic. But as Susan [Frederick] was saying, some potential exists here for a more centralized emphasis on taking state and local interests seriously. When that has happened—when agencies start taking the 13132 process of federalism generally more seriously—agency institutional culture can be significantly affected.

The last point I want to make gets outside of the executive branch and focuses instead on what states and local governments can do, and do collectively, independently of federal agencies. One of the things I find very interesting, when you look at preemption clauses, is the extent to which they reserve what I would call "complementary state measures." The language is often along the lines of, "state regulations that are identical and not in addition to federal regulation are preserved." This may create an opening for states to do more policing of the federal administrative process than has so far occurred. And it certainly is an opening I would like to see state and local governments explore. For example, regulated entities that are filing reports with the FDA of certain complications could also be required to file with states and, perhaps, local bodies. These governments would then be in a better position to police whether or not the FDA is adequately responsive to such filings and to petition the FDA or use their contacts at the federal government to increase national regulatory responsiveness. This approach is obviously much easier when there is a cooperative regulatory scheme. But one of the things that states may need to do is develop analogous regulatory competency in areas where they may have ceded too much to the federal regime, so they can play such a policing role. Developing such competency might also lead to more regulatory experimentation. For example, state-level agencies may be able to develop mechanisms that enhance regulators' access to information, so that tort suits need not be so important as information-gathering tools.

I am actually quite open to arguments that none of these ideas will work. The one point that I am certain of is that the issue that needs to be addressed is how agencies confront the federalism issue. I am skeptical that trying to bump up preemption determinations to Congress is going to work in the long run. And, as was said at the earlier panel, I am concerned that we are not going to end up with a very sensible regulatory regime if we try and leave preemption determinations in the first instance to the courts.