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ASYMMETRICAL REGULATION: RISK, PREEMPTION, AND THE FLOOR/CEILING DISTINCTION

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If the federal government has constitutional power to address a social ill, and hence has power under the Supremacy Clause to preempt state, local, and common law regimes, is there a principled rationale for distinguishing federal standards that set a federal floor or ceiling? At first blush, the two appear to be mere flip sides of the same federal power: The choice of a floor reflects a goal of minimizing risk, while ceilings reflect concern with excessively stringent regulation.

This Article argues, however, that these two regulatory choices are fundamentally different in their institutional implications. Floors embrace additional and more stringent state and common law action, while ceilings are better labeled a "unitary federal choice" due to how they preclude any other regulatory choice by state regulators and also eliminate the possibility of the different actors, incentives, and modalities of information elicitation and proof that common law settings provide. Advocates of free markets respond that this is precisely the idea—regulatory certainty is enhanced with a unitary federal choice, allowing manufacturers to plan with confident knowledge of the regulatory terrain, unbuffeted by an array of uncoordinated actors.

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Debate over floors versus ceilings was, until recently, largely hypothetical, due to the rarity of federal imposition of ceilings. During the past year, however, in settings ranging from product approvals to regulation of risks posed by chemical plants to possible climate change legislation regarding greenhouse gases, legislators and regulators have embraced the broad, preemptive impact of unitary federal choice preemption. The federal action regarding such risks would be the final regulatory choice. But under what theory of regulation and legislation can one be confident that placing all decisionmaking power in one institution at one time will lead to appropriate standard setting? In fact, advocates of risk regulation, "experimentalist regulation" scholars, and skeptics about the likelihood of public-regarding regulation all call for attention to pervasive risks of regulatory failure. Agency and legislative inertia, information uncertainties and asymmetries, outdated information and actions, regulatory capture, and a host of other common regulatory risks create a substantial chance of poor or outdated regulatory choice.

Considering these pervasive risks of regulatory failure, the principled distinctions between floor and ceiling preemption become apparent. Vesting all decisionmaking power in one institution can freeze regulatory developments. Unitary federal choice preemption is an institutional arrangement that threatens to produce poorly tailored regulation and public choice distortions of the political process, whether it is before the legislature or a federal agency. Floor preemption, in contrast, constitutes a partial displacement of state choice in setting a minimum level of protection, but leaves room for other actors and additional regulatory action. Floors anticipate and benefit from the institutional diversity they permit. This Article closes by showing how the institutional diversity engendered by retaining multiple layers of law and regulatory actors creates conditions conducive to reassessment and adjustment of rigid or outdated regulation.

INTRODUCTION

Despite Congress's embrace of regulatory schemes utilizing multiple levels of regulators, judicial doctrine and much scholarly commentary continue to express a normative preference for a cleaner delineation of federal and state powers.[1] The "dual federalism" phase in judicial federalism doctrine constituted an extreme form of this preference for neatly divided authority.[2] The dualist approach imposed, as a matter of constitutional doctrine, a clean line between what was federal and what was state. The occupation by one of an area meant the exclusion of the other. That phase in constitutional doctrine is long gone,[3] but its vestiges live on in judicial doctrine.[4] For example, in three of the Supreme Court's most recent federalism decisions, Justices clashed over the legitimate reach of federal authority,

[1] *See, e.g.*, United States v. Morrison, 529 U.S. 598, 617–18 (2000) ("The Constitution requires a distinction between what is truly national and what is truly local." (citing United States v. Lopez, 514 U.S. 549, 568 (1995))); Printz v. United States, 521 U.S. 898, 918–19 (1997) ("It is incontestable that the Constitution established a system of 'dual sovereignty.'" (citing Gregory v. Ashcroft, 501 U.S. 452, 457 (1991))); William W. Buzbee & Robert A. Schapiro, *Legislative Record Review*, 54 STAN. L. REV. 87 (2001) (analyzing Supreme Court's aggressive parsing of "legislative record" in federalism cases and Court's allusions to need for distinct state and federal regulatory domains); Robert A. Schapiro & William W. Buzbee, *Unidimensional Federalism: Power and Perspective in Commerce Clause Adjudication*, 88 CORNELL L. REV. 1199, 1257 (2003) (analyzing Commerce Clause jurisprudence using "unidimensional" perspectives on underlying regulatory challenges to strike down federal power and keep distinct federal and state roles).

[2] *See generally* Edward S. Corwin, *The Passing of Dual Federalism*, 36 VA. L. REV. 1 (1950) (providing historical overview of dual federalism); Paul Wolfson, *Preemption and Federalism: The Missing Link*, 16 HASTINGS CONST. L.Q. 69, 91–92 (1988) (discussing Supreme Court's preemption jurisprudence and providing historical analysis of preemption).

[3] *See generally* Corwin, *supra* note 2, at 17 (discussing collapse of dual federalism during New Deal).

[4] *See generally* Robert A. Schapiro, *Justice Stevens's Theory of Interactive Federalism*, 74 FORDHAM L. REV. 2133 (2006) (explaining that dual federalism persists in courts and academia although it is not reflected in operation of government). For an example of the vestiges of dual federalism, see *Solid Waste Agency of North Cook County v. U.S. Army Corps of Engineers*, 531 U.S. 159, 172–73 (2001), in which the Court interpreted the Clean Water Act narrowly, in part because of reluctance to permit "federal encroachment upon a traditional state power." *Id.*

arguing whether the subject of regulation involved primarily federal or state turf.[5]

In the modern political realm and the contemporary administrative state, however, dual federalism approaches are a rarity. Instead, Congress has repeatedly chosen to create regulatory schemes that involve federal, state, and sometimes even local governments.[6] These multilayered regulatory schemes, often labeled cooperative federalism structures or delegated program federalism, typically involve a federal statute that regulates a risk or addresses a social ill or need.[7] Such laws do not depend solely on federal actors for their implementation and enforcement. Through an array of statutorily created incentives or choices, state and local actors often assume critically important regulatory duties. The extent to which federal, state, or local actors retain regulatory roles varies under different statutory arrangements, but seldom does any actor completely surrender its involvement. The result is federal law that calls on and retains a role for all three layers of government.

Other federal regulatory schemes rely on, or at least countenance, the ongoing existence of state and local law and regulation pertaining to the same subject covered by federal law. Such state and local roles exist pursuant to state law, independent of federal regulation. These retained roles may involve legislative action, administrative agency implementation, and enforcement in areas overlapping with federal law. They may also involve ongoing development of state common law. State tort and nuisance law is the most typical and significant retained area of independent authority in which state common law overlaps with federal law. Through "savings clauses," Congress often expressly states its intent to preserve such state roles.[8]

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[5] Rapanos v. United States, 126 S. Ct. 2208, 2224 (2006) (plurality opinion) ("[T]he Corps' interpretation stretches the outer limits of Congress's commerce power . . . ."); *id.* at 2236, 2246–47 (Kennedy, J., concurring in the judgment) (rejecting plurality's application of avoidance concerns); Gonzales v. Oregon, 546 U.S. 243, 269–70 (2006) (6–3 opinion) (reading Controlled Substances Act narrowly in part because of federalism concerns); Gonzales v. Raich, 545 U.S. 1, 38–39 (2005) (5–1–3 opinion) (upholding Congress's commerce power to regulate marijuana under Controlled Substances Act).

[6] *See* William W. Buzbee, *Contextual Environmental Federalism*, 14 N.Y.U. ENVTL. L.J. 108, 122 (2005) (explaining how environmental laws rely on "tiered implementation and enforcement roles involving all levels of government, as well as citizens"); Robert A. Schapiro, *Toward a Theory of Interactive Federalism*, 91 IOWA L. REV. 243, 248, 288 (2005) (emphasizing benefits of interaction among courts and other regulatory actors).

[7] Such cooperative federalism schemes are especially prevalent in the environmental law field. *See infra* Part II.C (discussing risk, environmental, and social welfare regulation); *infra* note 56 and accompanying text (illustrating cooperative federalism in Clean Air Acts's National Polluttion Discharge Elimination System).

[8] *See, e.g.*, Federal Insecticide, Fungicide and Rodenticide Act § 2, 7 U.S.C. § 136v(a) (2000) (permitting state regulation of federally registered pesticides provided that such

It is in the ongoing tension between the oft-voiced judicial and scholarly preference for distinctly delineated federal and state roles and the reality of overlapping federal and state roles that one finds federalism's central debates.[9]

For approximately the past decade, much of this debate centered on the legitimacy and wisdom of federal standard setting. Typically, the debate focused on federal standard setting via regulatory "floors," where federal law allows states to increase the stringency of regulation but prohibits more lenient state regulation. Much of this debate concerned the race-to-the-bottom rationale for federal regulation—the

regulation does not conflict with federal law); Toxic Substances Control Act § 18(a)(1), 15 U.S.C. § 2617(a)(1) (2000) (preserving state authority to regulate chemical substances subject to certain limitations); Clean Water Act § 510, 33 U.S.C. § 1370 (2000) (preserving state authority to adopt and enforce pollution regulations that are more stringent than federal law); Resource Conservation and Recovery Act of 1976 § 2, 42 U.S.C. § 6929 (2000) (preserving state authority to impose solid waste disposal requirements more stringent than those created by Act).

[9] *See generally* Robert B. Ahdieh, *Dialectical Regulation*, 38 CONN. L. REV. 863 (2006) (offering theory of intersystemic regulation); William W. Buzbee, *Recognizing the Regulatory Commons: A Theory of Regulatory Gaps*, 89 IOWA L. REV. 1, 48–53 (2003) [hereinafter Buzbee, *Recognizing the Regulatory Commons*] (discussing "regulatory commons" problem that can lead to regulatory gaps in complex regulatory settings involving numerous regulatory actors, and possible solutions for that problem); William W. Buzbee, *The Regulatory Fragmentation Continuum, Westway and the Challenges of Regional Growth*, 21 J.L. & POL. 323 (2005) [hereinafter Buzbee, *Regulatory Fragmentation*] (discussing regulatory fragmentation and its implications); Erwin Chemerinsky, *Empowering States When It Matters*, 69 BROOK. L. REV. 1313 (2004) (discussing actual application of Rehnquist Court's stated presumption against preemption); Kirsten H. Engel, *Harnessing the Benefits of Dynamic Federalism in Environmental Law*, 56 EMORY L.J. 159 (2006) (arguing for broad overlap in federal and local spheres of environmental regulatory power); Daniel C. Esty, *Revitalizing Environmental Federalism*, 95 MICH. L. REV. 570 (1996) (arguing that multitiered regulatory structures, rather than decentralized approaches often favored by academics and politicians, best address environmental problems); Robert L. Glicksman, *From Cooperative to Inoperative Federalism: The Perverse Mutation of Environmental Law and Policy*, 41 WAKE FOREST L. REV. 719 (2006) (tracing decline of cooperative environmental federalism and various obstacles to federal, state, and local policies); Roderick M. Hills, Jr., *Is Federalism Good for Localism? The Localist Case for Federal Regimes*, 21 J.L. & POL. 187 (2005) (arguing that subnational legislatures do not undermine "democratically accountable local autonomy"); Caleb Nelson, *Preemption*, 86 VA. L. REV. 225 (2000) (using historical analysis of Supremacy Clause to challenge both current preemption jurisprudence and "presumption against preemption"); Richard L. Revesz, *Federalism and Environmental Regulation: A Public Choice Analysis*, 115 HARV. L. REV. 553 (2001) (challenging traditional perspective on "merits of centralized environmental regulation"); Edward L. Rubin & Malcolm Feeley, *Federalism: Some Notes on a National Neurosis*, 41 UCLA L. REV. 903 (1994) (distinguishing federalism from administrative decentralization and arguing that decentralization is sufficient to achieve many benefits usually ascribed to federalism); Robert A. Schapiro, *Polyphonic Federalism: State Constitutions in the Federal Courts*, 87 CAL. L. REV. 1409 (1999) (defending intersystemic adjudication of state constitutional rights); Schapiro, *supra* note 6, at 246–249 (arguing that dualist theories of federalism have failed and advancing theory that focuses on "dynamic interaction among states and the national government").

argument that without federal regulation, states would enact suboptimally lax environmental standards in an effort to attract and retain industry.[10] The focus on federal floors that serve as "one-way ratchets" is unsurprising—laws and regulations that cut the other way, that prohibit more protective state regulation of risks, have been rare. This is not to claim that *preemption* is rare.[11] Outright preemption remains a choice embraced in an array of areas, especially where laws or regulations mandate specific product features or engineering.[12] So-called "complete preemption" is also found in a few areas where Congress has defined its role as exclusive, often in connection with special solicitude for a particular industry such as nuclear power, or a broad social goal such as childhood vaccination. In these areas Congress often provides a substitute compensatory remedy regime.[13] In most areas focused on regulation of risks, however, such as discrimination and efforts to enhance public welfare through regulation of environmental, occupational, and product risks, the protective one-way ratchet of floor preemption, rather than complete preemption, has been the legislative and regulatory norm.[14]

Several recent legislative and regulatory actions, however, attempt to impose a federal "ceiling"—federal action would preclude any more protective legal requirements or incentives created by other actors, be they state political actors or even common law regimes. Of perhaps greatest significance on the legislative front, climate change politics regarding regulation of greenhouse gas emissions recently changed from outright industry opposition to conditional support for federal law, provided any such federal law would preempt relevant

10 *See generally* Richard L. Revesz, *The Race to the Bottom and Federal Environmental Regulation: A Response to Critics*, 82 MINN. L. REV. 535 (1997) (responding to arguments concerning Revesz's challenge to race-to-bottom rationale).

11 Note, *New Evidence on the Presumption Against Preemption: An Empirical Study of Congressional Responses to Supreme Court Preemption Decisions*, 120 HARV. L. REV. 1604, 1611 (2007) ("[T]he broad trend in Congress since 1960 has been toward massive federal preemption of state law.").

12 *See infra* Part II.B (discussing product-design regulation).

13 *See infra* note 36 and accompanying text (describing exclusive preemption with substitution of federal remedy in 9/11 and nuclear accident contexts).

14 *See infra* Part II.C (reviewing floor preemption structures). Nevertheless, courts applying the "obstacle" preemption criteria have at times preempted state action despite the existence of savings clauses. *See, e.g.*, Buckman Co. v. Plaintiffs' Legal Comm., 531 U.S. 341, 347–48 (2001) (distinguishing Medtronic Inc. v. Lohr, 518 U.S. 470, 485 (1996), which allowed common law claims under same statute, with assumption "that Congress does not cavalierly pre-empt state-law causes of action"); Geier v. Am. Honda Motor Co., 529 U.S. 861, 867–68 (2000) (finding conflict preemption in statute containing both express preemption provision and savings clause); California v. Fed. Energy Regulatory Comm'n, 495 U.S. 490, 506–07 (1990) (holding that FERC minimum stream-flow standards preempt California state stream-flow minimums despite savings clause).

state or local regulation.[15] In the Energy Policy Act of 2005, the Liquid Natural Gas (LNG) refinery siting decision process was utterly transformed.[16] Previously, siting decisions for dangerous or large industrial facilities had first and foremost been ruled by state and local governments. The Energy Act turned the hierarchy upside down, replacing state and local LNG siting choice with a commenting role in a siting decision now made by the Federal Energy Regulatory Commission (FERC).[17]

During 2006, several federal agencies, in preambles to proposed regulations concerning issues like drug, car, or consumer product safety, stated the view that federal regulatory action precluded additional legal action, including state common law product injuries claims.[18] More recently, the Department of Homeland Security (DHS), acting under a statute lacking any provision preempting state authority, asserted in a proposed regulation a broad preemptive intent

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[15] *See infra* Part II.D (discussing unitary federal choice).

[16] Energy Policy Act of 2005, Pub. L. No. 109-58, § 311(c), 119 Stat. 594, 685–87 (to be codified at 15 U.S.C. § 717b) (amending Natural Gas Act § 3, 15 U.S.C. § 717b).

[17] Energy Policy Act of 2005, Pub. L. No. 109-58 § 311(c)(2), 119 Stat. 594, 686–87 (to be codified at 15 U.S.C. § 717b(e)(1)) (amending Natural Gas Act § 3, 15 U.S.C. § 717b) (granting FERC "exclusive authority to approve or deny an application for the siting construction, expansion, or operation of an LNG terminal"). One previous federal law arguably had a similar effect, but it concerned the thornier issue of hazardous material transportation where a multiplicity of local strictures threatened to create an impossible situation for transporters. *See* Hazardous Materials Transportation Uniform Safety Act of 1990, Pub. L. No. 101-615, 104 Stat. 3244.

[18] *E.g.*, Final Rule: Standard for the Flammability (Open Flame) of Mattress Sets, 71 Fed. Reg. 13,472, 13,496–97 (Mar. 15, 2006) (to be codified at 16 C.F.R. pt. 1633) (attempt by Consumer Product Safety Commission to preempt "non-identical" state mattress flammability requirements); Requirements on Content and Format of Labelling for Human Prescription Drug and Biological Products, 71 Fed. Reg. 3922, 3933–36 (Jan. 24, 2006) (to be codified at 21 C.F.R. pts. 201, 314, and 601) (attempt by Food and Drug Administration to preempt state law); Federal Motor Vehicle Safety Standards; Roof Crush Resistance, 70 Fed. Reg. 49,223, 49,245 (Aug. 23, 2005) (to be codified at 49 C.F.R. pt. 571) (attempt by National Highway Traffic Safety Administration to preempt state law); *see also* Howard L. Dorfman, Vivian M. Quinn & Elizabeth A. Brophy, *Presumption of Innocence: FDA's Authority to Regulate the Specifics of Prescription Drug Labeling and the Preemption Debate*, 61 FOOD & DRUG L.J. 585, 601–04 (2006) (explaining that federal agencies rely on *Geier*, 529 U.S. 861, for principle that federal regulations may preempt state tort claims); Samuel Issacharoff & Catherine M. Sharkey, *Backdoor Federalization*, 53 UCLA L. REV. 1353, 1389–98 (2006) (discussing preemption jurisprudence in area of products liability law); Catherine M. Sharkey, *Preemption by Preamble: Federal Agencies and the Federalization of Tort Law*, 56 DEPAUL L. REV. 227 (2007) (discussing federal agency attempts to displace allegedly conflicting state regulation or common law actions and remedies). For a recent, thorough survey of numerous areas where industries have recently sought federal regulation, often in an attempt to fend off lawsuits, foreign competitors, and state regulation, see Eric Lipton & Gardiner Harris, *In Turnaround, Industries Seek U.S. Regulations*, N.Y. TIMES, Sept. 16, 2007, at A1.

for regulations regarding chemical plant safety.[19] Similarly, in several Supreme Court briefs, the U.S. Department of Justice has weighed in with amicus briefs supporting a broad preemptive reading of federal agency actions, even with laws containing savings clauses.[20]

This sort of "ceiling" preemption, or what this Article will generally call "unitary federal choice" preemption, involves federal standard setting or regulation that is, in institutional effect, a far different form of action than more common federal floors. Federal floors preclude less stringent state and local regulation, but allow for additional and more stringent regulation and typically are accompanied by savings clauses and cooperative regulatory structures. The unusual recent ceiling preemptions, in contrast, preclude more protective state regulations or common law protections. Diversity of regulatory approaches becomes impossible, as only one standard matters—the federal one.

Debates over federalism in the risk regulation arena thus include arguments for distinct and separate federal and state roles, critiques of the protective one-way federal ratchet of floor preemption, and now legal developments reflecting a policy preference that flips the federal role. This Article asks a central question of federalism, but one only recently prompted by actual policy consequences: Is there a principled rationale for distinguishing federal floors and ceilings? Specifically, if one rejects a constitutionally driven view about the legitimate roles of the federal government or the states, can one derive a principled justification for what this Article terms asymmetrical regulation? By "asymmetrical regulation," this Article refers both to the asymmetrical impacts of regulatory floors and ceilings, as well as a contrasting normative critique of the two choices. As discussed below, regulatory arrangements utilizing protective federal regulatory floors generally constitute an institutionally sound choice, especially viewed in light of the benefits of federalist structures, while unitary federal

[19] *See infra* note 87 and accompanying text.

[20] *See, e.g.*, Brief for the United States as Amicus Curiae Supporting Respondent at 10–13, 17–18, Bates v. Dow Agrosciences L.L.C., 544 U.S. 431 (2005) (No. 03-388), 2004 WL 2681684 (arguing that Federal Insecticide and Rodenticide Act preempts state tort claims in absence of savings clause expressly preserving such claims); Brief for the United States as Amicus Curiae Supporting Reversal at 12, Engine Mfrs. Ass'n v. South Coast Air Quality Mgmt. Dist., 541 U.S. 246 (2004) (No. 02-1343), 2003 WL 22068761 (arguing that section of Clean Air Act related to motor vehicle control expressly preempts California South Coast Air Quality management rules); Brief for the United States as Amicus Curiae Supporting Petitioner at 16–22, Buckman v. Plaintiffs' Legal Comm., 531 U.S. 341 (2001) (No. 98-1768), 2000 WL 1364441 (arguing that conflict preemption precludes respondents' "fraud-on-the-FDA" claims); Brief for the United States as Amicus Curiae Supporting Affirmance at 15–16, Geier v. Am. Honda Motor Co., 529 U.S. 861 (2000) (No. 98-1811), 1999 WL 1045.

choice preemption constitutes a problematic choice. An alternative view is that all federal laws that constrain the state and local regulatory menu are analytically the same, differing only in whether federal law or state law determines the ultimate stringency of regulatory protections. If such choices are essentially equivalent manifestations of federal power, but just reflect different enacted preferences regarding acceptable levels of risk, then a principled argument for one approach over the other would be difficult to make. This Article rejects this alternative view.

Principled rationales exist to distinguish and embrace a protective federal one-way ratchet of floor preemption, or at least to see floor preemption as less institutionally problematic than the new breed of ceiling preemption that this Article refers to as "unitary federal choice preemption." Unitary federal choice preemption, by definition, precludes additional state and local protections and eliminates institutional diversity that is preserved (though limited) by floor preemption. Unitary federal choice preemption is, upon closer examination, a regulatory choice that in operation runs counter to many of the most valuable elements of federalist schemes.[21] In contrast, federal floors retain the benefits of multiple regulatory voices, protections, and diverse regulatory modalities.[22] These factors serve as important antidotes to common forms of regulatory dysfunction.

This Article is not, however, arguing against preemption in all instances. Policymakers may have good reasons for broadly preemptive federal action. In addition, where application of both federal and state laws creates an outright conflict, conflict preemption logically follows from the Supremacy Clause. There may be good reasons to reject the partially preemptive effect of federal floors, but scholars and policymakers to date pay little attention to the benefits lost with unitary federal choice preemption.

To further explore the benefits of multilayered governance retained by floor preemption and the relative costs of unitary federal choice preemption, this Article links its analysis to literature on regu-

[21] This Article's argument does not rest on some distinctive benefit of the federal nature of the regulatory action, although such arguments have been made and might have merit. *See, e.g.*, William W. Buzbee, *Remembering Repose: Voluntary Contamination Cleanup Approvals, Incentives, and the Costs of Interminable Liability*, 80 MINN. L. REV. 35, 110–16 (1995) (explaining why federal involvement may be necessary to encourage voluntary environmental clean-up initiatives); Esty, *supra* note 9, at 613–51 (discussing shortcomings of current presumption in favor of decentralized environmental regulation); Peter P. Swire, *The Race to Laxity and the Race to Undesirability: Explaining Failures in Competition Among Jurisdictions in Environmental Law*, 14 YALE L. & POL'Y REV. 67, 99–105 (1996) (detailing public choice reasons why states will underprotect environment).

[22] *See infra* Part III.B.1.

latory failure risks and experimentalist modes of regulation. When one considers the political and economic realities of the regulatory process, and common regulatory flaws, the risks of unitary federal choice preemption become especially apparent. Unitary federal choice preemption should be disfavored by policymakers, or at a minimum adopted with due awareness of the loss of institutional benefits discussed here. Any preemption at first appears contrary to experimentalist regulation's goal of ongoing monitoring and revision. Floor federalism's preservation of state roles, however, actually creates a more realistic interactive tension than one finds in the sometimes idealized descriptions of experimentalist regulation. Most critically, because floor preemption retains multiple institutions and the different modalities and incentives of common law litigation, one need not rely on hyper-involved citizens and selfless bureaucrats to prompt regulatory reexamination and adjustment. The common law system's independence and private incentives to challenge the status quo are particularly valuable antidotes to complacency and ineffective regulation.

Although judicial doctrine and presumptions regarding preemption are not the focus of this Article, the arguments presented here weigh in favor of the usual doctrinal presumptions against preemption, but with a special additional emphasis on the valence of the preemption and the retention of multiple regulatory actors.[23] Federal floors retain important state and local roles as well as common law schemes. The unusual new unitary federal choice preemption, in contrast, threatens to displace completely state and local legal developments and the benefits of intersystemic interaction inherent in federalist schemes.

Part I addresses preliminary definitional issues, including a brief explanation for why the term "ceiling preemption" is problematic. Part II introduces the four most significant forms of preemption, with special attention to examples of floor and unitary federal choice preemption. Part III, the heart of this Article, explores the rationale for distinguishing floor and ceiling preemption based on their different effects on institutional diversity. This diversity includes not only the

[23] Professor Young, in a recent conference paper, similarly criticizes preemption choices by courts, legislatures, and agencies that effectively turn federal statutes into "an inflexible equilibrium . . . [with] the effect of preempting *any* departure by state law." Ernest A. Young, *Federal Preemption and State Autonomy*, *in* FEDERAL PREEMPTION: STATES' POWERS, NATIONAL INTERESTS 249, 265–66 (Richard A. Epstein & Michael S. Greve eds., 2007). Professor Young, however, does not address the floor/ceiling distinction. He concedes that the legislature may at times choose complete preemption, but he advocates a presumption against preemption in the absence of a clear statement. *Id.* at 250.

usual vertical federal-state relationships, but also the different regulatory modalities and room for innovation and change retained by floor preemption. This Part closes by linking floor preemption to the insights of scholarship on regulatory failure and experimentalist regulation, exploring how floor preemption's multilayered features can help overcome common forms of regulatory failure, without relying on unrealistically selfless citizens and regulators. Part IV broadens the Article's focus on the floor/ceiling distinction, analyzing other variables, especially the innovation/certainty tradeoff, that also influence the political preemption choice decision. This Part looks at preemption choice from an institutional and regulatory design perspective. Part V returns to the recent unusual unitary federal choice preemption actions, analyzing their rationales and wisdom in light of the Article's earlier analysis.

I
PRELIMINARY DEFINITIONAL ISSUES

The usual preemption discussion of floors and ceilings can be a somewhat misleading way of framing the preemption question, especially when viewed from a federalism angle. Similarly, talk of levels of stringency is problematic once one considers that police power regulation, especially regulation of risk and the environment, tends to be two-sided in its impact: One person's regulatory cost is another's clean air or water.[24] Furthermore, although most areas of regulation involve entities appropriately identified as targets or beneficiaries, laws typically aim to do more than just protect groups of individuals from risk.[25] Instead, regulatory approvals and requirements may reflect legislative or regulatory compromises, usually intended to provide protection, but also intended to create reasonable burdens and certainty for the creators of risk.[26] Still, as discussed below and in the following Parts, numerous laws do make quite explicit that additional stringency is allowed, while others preclude additional regulation or common law relief. This Part briefly sketches out a few of these con-

[24] This is consistent with Ronald Coase's insights about the two-sided nature of nuisance disputes. R. H. Coase, *The Problem of Social Cost*, 3 J.L. & ECON. 1, 11 (1960) (noting "reciprocal nature" of "harmful effect" problem).

[25] *See generally* George J. Stigler, *The Theory of Economic Regulation*, BELL J. ECON. & MGMT. SCI., Spring 1971, at 3 (arguing that regulation actually tends to benefit those ostensibly regulated).

[26] *See* Frank H. Easterbrook, *Statutes' Domains*, 50 U. CHI. L. REV. 533, 539–44 (1983) (arguing that statutes result from legislative compromises to strike balance between different interests).

ceptual and definitional issues as a foundation for the sections that follow.

The concept of a regulatory "floor," in the sense of a minimal required level of stringency or protection, does not pose a major definitional problem. This term refers to the requirement that after a federal standard has been set, no one is permitted to adopt a less protective or more lenient approach. Floors preclude greater regulatory laxity. The floor concept is also helpful because it implies what has long been a reality in most laws: State and local regulators, and common law regimes as well, can impose requirements or create incentives for greater protection from risk.[27] With a floor, for example, federal law prohibits certain levels of exposure to, or emissions of, workplace or environmental toxins. State and local governments, or common law regimes, however, can create an even safer workplace or environment. This Article will therefore generally use the term "floors" with no further definition.

In contrast, the typical characterization of the alternative choice as a federal "ceiling" is misleading. What this Article will call a "true ceiling" is analytically possible but appears to be virtually nonexistent in the law. A true ceiling, if the converse of a floor, would be a federal statement of the maximum level of regulation or protection that any entity could issue, yet the federal government itself would not issue any regulation mandating compliance with that maximum. Such a regulation would constitute a true ceiling because the absence of a federal standard would leave all jurisdictions free not to regulate the risk, or to regulate up to the mandated ceiling.[28]

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[27] Of course, how one describes these more stringent protections poses its own linguistic challenge. They cannot be "higher," in the sense of allowing a higher level of risk, but alternatively one could describe floors as prohibiting "lower" state or local standards.

[28] If the federal government did itself set a standard requiring compliance, it would either be a floor allowing additional state and local regulation, or both a floor and a ceiling, which is what this Article calls a unitary federal choice. Although examples of politically created true ceilings are rare, courts striking down state or local regulation under Dormant Commerce Clause doctrine are effectively enforcing a judicially implied ceiling; some level of state or local regulation is allowed in the absence of federal politically created requirements, but if state or local requirements are too burdensome on commerce or suffer other infirmities, courts will strike them down. In practice, state and local governments can regulate up to the point at which a court will find a violation of the Dormant Commerce Clause. *See, e.g.*, United Haulers Ass'n v. Oneida-Herkimer Solid Waste Mgmt. Auth., 127 S. Ct. 1786, 1796 (2007) (applying Dormant Commerce Clause doctrine and distinguishing other cases in upholding challenged local requirements). For a recent case undertaking preemption analysis of a statute with a preemption clause, but also analyzing the burdens imposed by state law and state law's nondiscriminatory nature in ways analogous to Dormant Commerce Clause jurisprudence, see *New York Susquehanna & Western Railway Corp. v. Jackson*, No. 07-1675, 2007 WL 2472332 (3d Cir. filed Sept. 4, 2007). In that case,

In its actual manifestations, however, so-called ceiling preemption gives nonfederal regulators no room to be more lax, since the federal standard coincides with or undercuts all other standards. Such ceiling preemption leaves no opportunity for modifications by others. The federal regulation constitutes a choice that is final. State and local regulators are precluded from any further regulation in the area.[29] They cannot impose additional protections, nor can they offer less protection than provided by the federal action. As mentioned above, a true ceiling, due to the logic of federal supremacy, could only exist if federal law did not itself set a standard or impose a requirement on a regulatory target, but dictated only the maximum level of protections that could be provided by state or local law. For this reason, this Article will often use the phrases "unitary federal choice" and "unitary federal choice ceiling" rather than just "ceiling," but both are intended to be synonymous despite the problematic connotations of "ceiling."

Although much of the preemption and federalism debate discussed in this Article is rooted in arguments over federal "standards," often the regulatory action may be of a different sort, such as approving a product, granting a siting permit, deciding on degrees of product safety, or setting a more ordinary "standard," such as one that dictates levels of car pollution. Since the federal action always involves a regulatory choice that cannot be supplemented or adjusted by others, this Article refers to it as a unitary federal choice ceiling. As the examples in Part II illustrate, preemption intended to prevent design-mandate conflicts could be characterized as a subset of unitary federal choice ceilings, but recent political assertions of preemptive effect are unitary federal choice ceilings in areas not justified by the impossibility of compliance with clashing mandates.

II
FEDERALISM AND INTERJURISDICTIONAL CHOICE

Where Congress has constitutional power to regulate in an area, the interjurisdictional allocation of regulatory responsibilities will most often assume one of four preemption forms.[30] Only by recog-

the court reversed the the trial court's preemption finding and remanded for analysis under the court's articulated approach. *Id.* at 39–40, 47.

[29] It remains possible that federal law would set the standard but that other actors could have implementation and enforcement roles. *See infra* Part II (discussing forms of preemption).

[30] Although political scientist Joseph Zimmerman documents eleven preemption permutations, JOSEPH F. ZIMMERMAN, CONGRESSIONAL PREEMPTION: REGULATORY FEDERALISM 108–15 (2005), this Article focuses on the most prevalent forms of preemption

nizing these distinctive regulatory allocations can one analyze the relative benefits and costs of federal regulatory floors or ceilings that, by their nature, act as a unitary federal choice. This Part illustrates these four forms of interjurisdictional allocation with brief reference to recent legislative, regulatory, and case developments. In actual regulatory fields, these choices may be blurred or share some overlapping characteristics, but to set the stage for the succeeding Parts' discussion of the rationales for and implications of asymmetrical regulation, they are broken out cleanly here. Each choice is briefly illustrated with actual examples, with a special focus on the recent, unusual assertions of unitary federal choice ceiling preemption.

A. No Federal Regulation

The most obvious and simplest regulatory choice by federal policymakers is not to enter a regulatory field at all. In that instance, state and local legislatures, agencies, and courts have plenary power under their relevant constitutions, statutes, and common law to address a risk or other social need. It is difficult to identify areas of law left completely or overwhelmingly to state and local control, but land use decisionmaking—especially planning and zoning—remains an example. Even there, however, federal environmental regulation can impinge on local and state land use regulatory choices by denying actions that might otherwise be allowed, or by imposing additional conditions on approvals.[31] Federal law also at times uses monetary incentives to change local land use practices, as in the Coastal Zone Management Act.[32]

In our post–New Deal era, most areas of law traditionally dominated by state and local choice include at least limited federal involvement. For example, state and local governments regulate most

choice, especially emphasizing the floor/ceiling choice and its implications in risk regulation settings.

[31] Judicial concerns with federal assertions of power impinging on such state and local domains are often evident, especially in the setting of federal environmental regulation. *See, e.g.*, Rapanos v. United States, 126 S. Ct. 2208, 2224 (2006) (plurality opinion) (stating that state and local governments traditionally regulate land use); Solid Waste Agency of N. Cook County v. U.S. Army Corps of Eng'rs, 531 U.S. 159, 173–74 (2001) (expressing concern that expanding federal jurisdiction over ponds and mudflats under Migratory Bird Rule would impinge significantly on traditional state power over land and water use); Babbitt v. Sweet Home Chapter of Comtys. for a Great Or., 515 U.S. 687, 728–29 (1995) (Scalia, J., dissenting) (expressing concern with pervasive federal regulation of private land under Endangered Species Act's "takings" provision).

[32] 16 U.S.C. §§ 1451–64 (2000); *see also* William W. Buzbee, *Urban Sprawl, Federalism, and the Problem of Institutional Complexity*, 68 FORDHAM L. REV. 57, 110–17 (1999) (discussing Coastal Zone Management Act and other federal laws that impinge on state and local land use decisionmaking through conditional federal spending incentives).

professional licenses, yet federal law can influence that power, especially where a profession like medicine involves the use of substances that are subject to federal regulation.[33] Relatedly, state departments support and regulate many agricultural activities; yet federal subsidies, incentives, environmental regulations, and trade policy all play a huge role in influencing agricultural activity by limiting what lands can be used, rewarding conservation, and penalizing pollution.[34] In areas untouched by federal law, state constitutions and laws provide the only constraint on state and local choice. In that setting, state diversity is retained, although competition for business and tax revenues can reduce or eliminate that diversity, even in the absence of federal regulation under the race-to-the-bottom dynamic.[35]

B. Express Federal Preemption of Design and Engineering Requirements

At the other end of the spectrum is complete federal displacement of state regulation. In principle, this can involve complete preemption of any state, local, or common law that imposes overlapping requirements or creates incompatible incentives, but such complete preemption is rare.[36] More common and more defensible are preemp-

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[33] Gonzales v. Oregon, 546 U.S. 243, 270–71 (2006) ("Even though regulation of health and safety is 'primarily, and historically, a matter of local concern,' there is no question that the Federal Government can set uniform national standards [of medical practice]." (citation omitted) (quoting Hillsborough County v. Automated Medical Laboratories, Inc., 471 U.S. 707, 719 (1985))).

[34] *E.g.*, Food Security Act of 1985 (FSA), Pub. L. No. 99-198, 99 Stat. 1354 (codified in scattered sections of 7, 15, 16, and 21 U.S.C.), *amended by* Food, Agriculture, Conservation, and Trade Act of 1990 (FACTA), Pub. L. No. 101-624, 104 Stat. 3359, *and limited through exceptions by* Federal Agriculture Improvement Act of 1996 (FAIA), 16 U.S.C. §§ 3822(b)(1)(G)(i)–(iii) (2000) (penalizing farmers who convert wetlands to agricultural purpose under FSA or destroy wetland with purpose of converting it under FACTA, with exceptions added by FAIA); *see also* David E. Adelman & John J. Barton, *Environmental Regulation for Agriculture: Towards a Framework to Promote Sustainable Intensive Agriculture*, 21 STAN. ENVTL. L.J. 3, 27–28 (2002) (reviewing agricultural regulation and incentives to consider environmental harms). *See generally* Daryn McBeth, *Wetlands Conservation and Federal Regulation: Analysis of the Provisions of the Food Security Act's* Swampbuster *Provisions as Amended by the Federal Agriculture Improvement and Reform Act of 1996*, 21 HARV. ENVTL. L. REV. 201 (1997) (focusing on "swampbuster" provisions in FSA).

[35] *See infra* note 57 and accompanying text (citing scholarship analyzing state laws prohibiting state standards exceeding federal standards in their stringency).

[36] An example of such complete preemption is the Price-Anderson Act, 42 U.S.C. § 2210(n)(2) (2000), which federalized personal injury and property damage claims arising from significant accidents at nuclear power plants. The Price-Anderson Act, in its special support and protection of the nuclear power industry, contains broad preemptive language not only limiting additional state or local regulation, but also preempting common law regimes and displacing state fora in favor of federal courts. *Id.* §§ 2011–2281; *see also* El Paso Natural Gas Co. v. Neztsosie, 526 U.S. 473, 482–86 & 484 n.6 (1999) (describing law's

tive federal requirements concerning product design or engineering. By their nature, such preemption choices typically involve detailed federal mandates issued by Congress or an administrative agency regarding the physical shape, features or operations of a product. These may include a design mandate, but more frequently set a performance standard that is tightly pegged to a particular technology or engineering practice. While courts sometimes conflate design mandates and performance standards, this Article views the two as distinct.[37]

For example, the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA) mandates that "[a] State shall not impose or continue in effect any requirements for labeling or packaging in addition to or different from those required under this subchapter."[38] It also specifically "saves" the states' power to "regulate the sale or use of any federally registered pesticide or device in the state, but only if and to the extent the regulation does not permit any sale or use prohibited by this subchapter."[39] FIFRA distinguishes between product labeling and packaging requirements, which are exclusively federal, and use

resemblance to "complete preemption doctrine"); Kerr-McGee Corp. v. Farley, 115 F.3d 1498, 1503–05 (10th Cir. 1997) (discussing history of Price-Anderson Act and how it limits state role in nuclear energy regulation).

The Price-Anderson Act is not, however, the only example of complete preemption. *See, e.g.*, National Childhood Vaccine Injury Act of 1986 §§ 2111(a), 2112(a), 42 U.S.C. §§ 300aa-11(a), 300aa-12(a) (federalizing all vaccine injury claims); Air Transportation Safety and System Stabilization Act §§ 403, 405(3), 49 U.S.C. § 40101 (Supp. IV 2005) (substituting federal remedy for tort claims that 9/11 victims and their families might have asserted against airlines).

Some statutes are less explicit in their displacement of state regulation, but have been extensively litigated and expansively interpreted by the Supreme Court. *E.g.*, Employee Retirement Income Security Act of 1974 (ERISA) § 514, 29 U.S.C. § 1144 (2000) (federalizing disputes over certain employment related benefits). ERISA has also spawned prolific litigation. *See* Catherine L. Fisk, *The Last Article About the Language of ERISA Preemption?: A Case Study of the Failure of Textualism*, HARV. J. ON LEGIS., Winter 1996, at 35, 59 & n.106 (noting that ERISA has generated thousands of preemption cases); *see also* Jeffrey A. Brauch, *ERISA at 25—and Its Most Persistent Problem*, 48 U. KAN. L. REV. 285 (2000) (discussing federal courts' struggle with ERISA); Howard Shapiro, René E. Thorne & Edward F. Harold, *ERISA Preemption: To Infinity and Beyond and Back Again? (A Historical Review of Supreme Court Jurisprudence)*, 58 LA. L. REV. 997 (1998) (discussing Supreme Court's analysis of ERISA preemption).

For a discussion contrasting explicitly preemptive statutes and other laws with less preemptive language, see David Vladeck, *Preemption and Regulatory Failure*, 33 PEPP. L. REV. 95, 97–98 (2005).

[37] *See infra* Part III (discussing preemption choices).

[38] 7 U.S.C. § 136v(b) (2000).

[39] 7 U.S.C. § 136v(a) (2000). The Supreme Court in 2005 reconciled these provisions by concluding that an array of state statutory and common law claims remained viable despite federal approval of an herbicide's sale and label; fraud and failure-to-warn claims only might be preempted, but that determination required a remand to the lower courts. Bates v. Dow Agrosciences L.L.C., 544 U.S. 431, 449–53 (2005).

and sale regulation, which is preserved for state regulation provided it does not clash with federal requirements.[40] Professor Merrill sees in such preemption an "anti-balkanization rule," preempting state law where it would "present[ ] a serious danger of interfering with the ability of . . . enterprises to exploit economies of scale and scope."[41]

In federal environmental law, design preemption is most prominent in automobile pollution control requirements. Under existing law and regulations, which have been in place since the early 1970s, federal law sets an array of pollution control requirements[42] that, in turn, require substantial investment in engineering changes.[43] To reduce the possibility of a multiplicity of different state requirements with attendant balkanization of the market and losses in production economies of scale, federal law preempts any state regulation of automobile emissions, with one notable exception. That exception gives California, with Los Angeles's pollution woes, the option to require an even lower polluting vehicle.[44] Other jurisdictions can elect to adopt the California standard, but the federal regulation expressly prohibits a "third vehicle."[45] Hence, federal standard setting here offers what in effect are two preemptive choices.[46]

The Toxic Substances Control Act strikes a similar balance, prohibiting states and other political subdivisions from imposing product attribute "requirement[s]" contrary to federal regulation, but preserving state and subdivision power to ban local sales or uses

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[40] Thomas W. Merrill, *Preemption in Environmental Law: Formalism, Federalism Theory, and Default Rules*, *in* FEDERAL PREEMPTION: STATES' POWERS, NATIONAL INTERESTS, *supra* note 23, at 177.

[41] *Id.* at 25.

[42] *E.g.*, Clean Air Act Subchapter II, Emissions Standards for Moving Vehicles, 42 U.S.C. §§ 7521–7590 (2000).

[43] *See, e.g.*, Natural Res. Def. Council, Inc. v. Thomas, 805 F.2d 410 (D.C. Cir. 1986) (holding that 42 U.S.C. § 7521 enables Environmental Protection Agency to implement technology-forcing standards).

[44] *See* 42 U.S.C. § 7543(b)(1), (e)(2)(A) (2000). For discussion of these provisions and the regulatory dynamics they create, see Anne E. Carlson, *Federalism, Preemption, and Greenhouse Gas Emissions*, 37 U.C. DAVIS L. REV. 281 (2003).

[45] 42 U.S.C. §§ 7507, 7543(e)(2)(A) (2000).

[46] In *Engine Manufacturers Ass'n v. South Coast Management District*, 541 U.S. 246 (2004), the Supreme Court gave an expansive reading to these preemptive provisions, interpreting the Clean Air Act's prohibition on state or local setting of automobile "standards" as prohibiting a state air quality management district's imposition of "Fleet Rules" limiting the sorts of vehicles that could be leased or purchased. *Id.* at 252, 255 (declining to read purchase/sale distinction into text of Clean Air Act). Motor vehicle safety standards are also imposed under a preemptive regime that is explained by concerns about conflicting engineering requirements and economies of scale. *See* Geier v. Am. Honda Motor Co., 529 U.S. 861, 868–72 (2001) (discussing National Traffic and Motor Vehicle Safety Act's requirements and preemptive effect).

"except in manufacturing."[47] Hence, manufacturing is not subject to state requirements, but the areas of sales and uses can be subjected to state requirements.

All this illustrates that even engineering- or design-based preemption can be balanced with savings provisions that preserve the states' ability to regulate sale and use, or impose liabilities for other effects of the regulated product. Manufacturers might prefer more complete immunization of their products from bans or use limitations, but these forms of regulation do not typically run afoul of the design-based preemption choice of Congress.[48] To say that design mandates may justify a preemptive impact does not, however, mean that such a preemptive design mandate is a wise or necessary choice; the regulatory decision to impose a design mandate may be federally embraced over alternative regulatory strategies due to how it can justify a broader preemptive effect. In other words, an industry desiring a legislative determination of regulatory obligations may embrace a design mandate precisely because design mandates are typically given broad preemptive effect. The finality offered by a preemptive federal standard may be the goal, not a preference for a particular design requirement.

C. Federal Regulatory Floors

In the areas of risk, environmental, and social welfare regulation, the federal government has for decades been quite active. Rarely, however, do federal laws completely supplant state and local actors. Option three, which this Article will refer to as "federal regulatory floors," limits state and local choice, but retains several key roles for nonfederal actors. The most debated area of federal regulatory dominance, especially in relation to this Article's topic, is federal environmental regulation.

As discussed in depth in Professor Stewart's *Pyramids of Sacrifice*, and as most environmental laws passed during the 1970s and 1980s show, federal risk regulation generally requires a multilayered regulatory apparatus.[49] These modern statutes allocate roles to federal regulators, but also seek to entice state and local regulators to

[47] *See* 15 U.S.C. § 2617 (2000) (setting forth Act's preemptive effect and allowing states to further prohibit uses of toxic substances except in manufacturing).

[48] As previously discussed, in a few limited areas the federal government has asserted what has been called "complete preemption." Those areas reflect a special solicitude for a particular industry or effort to encourage particular socially beneficial activities by limiting associated liabilities. *See supra* note 36 and accompanying text.

[49] Richard B. Stewart, *Pyramids of Sacrifice? Problems of Federalism in Mandating State Implementation of National Environmental Policy*, 86 YALE L.J. 1196 (1977).

join in the pursuit of federally identified ends. They also often preserve concurrent state power over the area of regulation, subject, as usual, to particular instances of "conflict preemption" where a particular federal and state regulatory choice might directly clash.[50]

After *New York v. United States*,[51] simple mandates to states to take regulatory actions or face a sanction present a constitutional dilemma.[52] Enticements to state and local actors, however, may include the choice of succumbing to federal regulation (implemented and enforced by federal actors) or opting to assume a critical implementation and enforcement role. Monetary enticements in the form of conditional federal spending can also lead to cooperative state and local behavior.

Where states, and often local governments, decide to participate in a federal regulatory scheme under the environmental laws, they typically confront a cooperative federalism scheme of the sort often labeled "delegated program" federalism.[53] Through legislative edict, regulatory standard setting, or both, federal actors set a goal or standard that must be accepted by all. States, local governments, affected industries, and other stakeholders start with this federal goal, often a minimum required level of stringency or protection. State actors, sometimes assisted by local governments, can in turn assume key implementation and enforcement roles. They must comply not only with federally determined levels of protection, but also devise state laws and regulations creating institutions and procedures consistent with federal requirements. The paradigmatic examples of such delegated programs are the interrelated National Ambient Air Quality Standards (NAAQS) and State Implementation Plan (SIP) provisions of the Clean Air Act,[54] and the Clean Water Act's National Pollution

[50] *See, e.g.*, Crosby v. Nat'l Foreign Trade Council, 530 U.S. 363, 366 (2000) (holding that federal law preempted state foreign trade policy regulation toward Burma because local law undermined federal regulatory scheme); Gade v. Nat'l Solid Waste Mgmt. Ass'n, 505 U.S. 88, 96–108 (1992) (broadly finding preemptive impact of Occupational Safety and Health Act in opinion garnering both majority and plurality support).

[51] 505 U.S. 144 (1992).

[52] *See id.* at 188 ("The Federal Government may not compel the States to enact or administer a federal regulatory program.").

[53] *See, e.g.*, Clean Air Act § 102(a), 42 U.S.C. § 7402(a) (2000) ("The administrator shall encourage cooperative activities by the States and local governments . . . ."); Clean Water Act, 33 U.S.C. § 1251(b) (2000) (same); Endangered Species Act of 1973 § 2(c)(2), 16 U.S.C. § 1531(c)(2) (2000) (same); *see also* Jonathan H. Adler, *Judicial Federalism and the Future of Environmental Regulation*, 90 IOWA L. REV. 377, 384–87 & n.35 (2005) (discussing cooperative federalism schemes); Buzbee, *supra* note 6 (discussing how federal and state interaction influences regulatory innovations and environmental law's content); Glicksman, *supra* note 9 (same, in article focused on legal developments undercutting cooperative federalism schemes).

[54] 42 U.S.C. §§ 7409–10 (2000).

Discharge Elimination System (or NPDES program).[55] Under the NPDES program, most states take over the permitting of industry and municipal polluters, requiring polluters to discharge in conformity with federal regulations and dictating acceptable levels of pollution by categories of sources.[56] State laws and regulations tailor that federal program to dovetail with other state law structures and requirements.

For the purpose of this Article, the most important aspect of these schemes is how they utilize a federal floor that acts as a one-way ratchet. Federal requirements must be followed by state and local regulators and targets, but most such laws specifically allow states to be even more protective with their regulation. In addition, many laws seek to entice states to play key roles in tailoring federal goals to local circumstances. Additional state institutions retain a protective role.[57] Hence, more stringent standards are permitted and multiple institutions retain standard-setting roles. For example, federal regulations may require that a category of polluter emit air pollutants at level *X*, but allow states to require the more stringent requirement of *X* minus 2 if they prefer a cleaner environment. A monitored or approved product or activity may create harms not addressed by federal law, spurring states and even tort lawyers to push for safer products.[58] Alternatively, state and local governments may effectively regulate such risks further by regulating conduct or land use or by providing additional remedies for related harms. Federal laws and regulations only rarely require anything other than compliance with a specified minimal level of pollution control. Despite the confusing "command and control" moniker, mandates for polluters to use a particular technology are rare.[59] In most cases, therefore, regulators and polluters retain choice in how best to achieve or surpass federal minimal standards. States and local governments thus have the ability to respond

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[55] 33 U.S.C. § 1342 (2000 & Supp. 2004).

[56] § 1342(b) (setting requirements and structure of delegated state permit program).

[57] Numerous states, however, have enacted laws that prohibit state regulation from being more stringent than federal standards. Jerome M. Organ, *Limitation on State Agency Authority To Adopt Environmental Standards More Stringent than Federal Standards: Policy Considerations and Interpretive Problems*, 54 MD. L. REV. 1373, 1376–86 (1995).

[58] *See, e.g.*, Marla Cone, *U.S. Rules Allow the Sale of Products Others Ban: Chemical-Laden Goods Outlawed in Europe and Japan Are Permitted in the American Market*, L.A. TIMES, Oct. 8, 2006, at A1 (discussing California's intent to regulate formaldehyde levels in plywood in absence of comprehensive federal regulation).

[59] David M. Driesen, *Is Emissions Trading an Economic Incentive Program?: Replacing the Command and Control/Economic Incentive Dichotomy*, 55 WASH. & LEE L. REV. 289, 297–98 (1998); Jody Freeman & Daniel A. Farber, *Modular Environmental Regulation*, 54 DUKE L.J. 795, 819 (2005); *see also* Jonathan Remy Nash, *Framing Effects and Regulatory Choice*, 82 NOTRE DAME L. REV. 313, 320 (2006) (stating that most command-and-control regulation imposes performance standard rather than requiring use of specific technology).

to popular support for an especially clean environment. They can crack down on high aggregate levels of pollution that federal pollution laws allow. After all, source-specific standards and permits are sometimes insensitive to their ambient effects. Without state and local latitude to act, vulnerable populations may be inadequately protected or environmental injustice may result.[60]

The Clean Water Act contains paradigmatic examples of such regulatory floors.[61] The law's savings clause makes clear that federal anti-pollution standards are a floor, setting the minimum level of stringency or protection that must be provided by states and political subdivisions. States can pass additional "standard[s] or limitation[s]," or "any requirement respecting control or abatement of pollution," as long as they are not "less stringent" than federal requirements.[62] Other statutes contain similar savings clauses in provisions concerning

[60] *See* Victor B. Flatt, *This Land Is Your Land (Our Right to the Environment)*, 107 W. VA. L. REV. 1, 38 (2004) (stating that considering aggregate environmental data ignores harm to certain populations); Richard J. Lazarus, *Pursuing "Environmental Justice": The Distributional Effects of Environmental Protection*, 87 NW. U. L. REV. 787, 796 (1993) (finding past studies strongly suggestive of unequal distribution of benefits of environmental regulations).

[61] The Clean Water Act contains numerous savings clauses. The statute's opening "declaration of goals and policy" states that it is "the policy of Congress to recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution, to plan the development and use . . . of land and water resources, and to consult with" the EPA's administrator. 33 U.S.C. § 1251(b) (2000). At times the Supreme Court has looked at broad declarations regarding intent to preserve state power as a ground to limit federal power, even in massive new federal anti-pollution legislation like the Clean Water Act. *See, e.g.*, Rapanos v. United States, 126 S. Ct. 2208, 2224 (2006) (plurality opinion) (arguing for limiting Clean Water Act's application based on section 1251(b)'s declaration that states' rights should be preserved); Solid Waste Agency of N. Cook County v. U.S. Army Corps of Eng'rs, 531 U.S. 159, 172–74 (2001) (restricting federal agency's power under Clean Water Act in part to protect states' rights). The intent not to displace state riparian rights law is made with unusual clarity: The Act states that it is the "policy of Congress that the authority of each State to allocate quantities of water shall not be superseded, abrogated or otherwise impaired . . . ." § 1251(g). Section 1365(e) explicitly preserves "any right which any person . . . may have under any statute or common law to seek enforcement of any effluent standard or to seek any other relief." This provision was critical to the Supreme Court's affirmation in *International Paper Co. v. Ouellette*, 479 U.S. 481 (1987), that state common law actions for water pollution harms were not completely preempted by the Clean Water Act. *Id.* at 496–500. The *Ouellette* line of cases has confused economists and law professors alike. *See* Andrew McFee Thompson, *Free Market Environmentalism and the Common Law: Confusion, Nostalgia, and Inconsistency*, 45 EMORY L.J. 1329, 1344–47 (1996) (critiquing and explaining misreadings of *Ouellette* in work by law and economics scholars); *see also* Alexandra B. Klass, *Common Law and Federalism in the Age of the Regulatory State*, 92 IOWA L. REV. 545, 560–65 (2007) (discussing *Ouellette* as preserving state common law claims rooted in source state's law).

[62] 33 U.S.C. § 1370 (2000).

states' retained regulatory power[63] and provisions expressly preserving states' rights to protect the environment with more stringent protections.[64] These federal provisions usually create a stringency floor, not a ceiling.[65]

Furthermore, savings clauses do not displace state and local siting choices; a facility's ability to meet a presumptive federal standard does not guarantee the ability to operate a polluting facility.[66] State and local land use and related siting laws remain in force. Only if a state or local government decides to permit the operation of a polluting facility do federal standards apply. Relatedly, SIP planning leaves air planning regions latitude to select among pollution sources to impose more stringent regulatory protections.[67] That choice is not subject to federal second guessing, as the Supreme Court affirmed in *Union Electric v. EPA*.[68] States can even impose regulation on certain sources so stringent that they are forced to close down.[69] Most federal anti-pollution laws add up to "right to pollute" laws, but they preserve for state and local governments the choice to prohibit any pollution or impose further constraints on polluters' activities.

An additional source of flexibility here is the common law. Because federal regulatory floors preserve state common law claims, damages remedies can provide relief for those suffering pollution harms under federal "right to pollute" laws such as the Clean Air and Water Acts, while creating further incentives for polluters to reduce their emissions.

D. Unitary Federal Choice Ceilings

The fourth form of interjurisdictional choice, preemptive ceilings that function as a unitary federal choice, was until recently a rarity. Here, as with floor preemption, the federal government sets a standard of performance or regulatory requirement reflecting a choice

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[63] *See* Clean Air Act § 1(a)(3), 42 U.S.C. § 7401(a)(3) (2000); Resource Conservation and Recovery Act (RCRA) § 1002(a)(4), 42 U.S.C. § 6901(a)(4) (2000).

[64] *Compare* 42 U.S.C. § 6929 (2000) (allowing "more stringent" regulation under RCRA), *with* 42 U.S.C. § 7416 (2000) (allowing additional state regulation of air pollution, other than regarding "moving sources," as long as it is not "less stringent" than federal requirements).

[65] Glicksman, *supra* note 9, at 737–43; Robert V. Percival, *Environmental Federalism: Historical Roots and Contemporary Models*, 54 MD. L. REV. 1141, 1175 (1995).

[66] MICHAEL B. GERRARD, WHOSE BACKYARD, WHOSE RISK: FEAR AND FAIRNESS IN TOXIC AND NUCLEAR WASTE SITING 51–52 (1994) (describing latitude under federal and state laws for communities to reject disliked facilities and assessing means to overcome rejection of needed sites).

[67] 42 U.S.C. § 7410 (2000).

[68] 427 U.S. 246, 256–57 (1976).

[69] *Id.*

about the degree of required protection, but prohibits any additional or more stringent regulation by states. This somewhat overlaps with the second form discussed above in Part II.B, but it is not rooted in concerns about possible clashing physical requirements regarding product design or engineering, nor is it necessarily linked to solicitude for a particular industry or public initiative.[70] Instead, federal law creates a standard that effectively prohibits additional or more stringent regulation by state institutions. Such prohibitions can target state legislative or regulatory standard setting, or they can target any activity by state or local actors, even in the common law realm. The unitary federal choice preemption referred to here is not typically a particular number, but rather a displacement of state or local *actors* who might otherwise have latitude to protect their citizens in different ways or to a greater extent than required by a presumptive federal standard. Unitary federal choice preemption leaves no gap that states or other state institutions such as courts can fill. Whatever the federal choice, it is exclusive. Unitary federal choice ceiling preemption thereby causes complete institutional displacement, providing industry with the regulatory certainty it surely desires, or at least eliminating the need to deal with state regulators or state courts acting under state positive or common law.

Three examples are notable: industry support for federal legislation broadly preempting state and local regulation of greenhouse gases; the 2005 Energy Act's LNG siting process; and assertions of preemptive power by direct regulatory action or in regulatory preambles by an array of federal agencies during 2006. All such actions or proposals have the effect of displacing actors playing a critical role deciding about levels of risk, but for reasons unrelated to concerns about clashing design requirements.

Of perhaps the greatest national and international importance, proposed legislation to regulate greenhouse gases that contribute to global climate change received a boost when several industry leaders indicated they might welcome such a federal law. Until now, federal law has provided only limited regulation of greenhouse gases like carbon dioxide, and agencies have been reluctant to use existing statutory powers to promulgate regulatory constraints.[71] An array of states and cities have started to regulate greenhouse gases, and common law

[70] *See supra* note 36 (identifying areas of "complete preemption" and their rationales).

[71] This reluctance led to *Massachusetts v. EPA*, 127 S.Ct. 1438 (2007), which held that the EPA had statutory authority to regulate greenhouse gases, *id.* at 1459–60, and rejected as inadequately rooted in statutory criteria and science the agency's proffered justifications for not doing so, *id.* at 1462–63.

suits have been filed as well.[72] The apparent industry change of heart reflects a desire to "avert the multiplicity of regulations being drafted by various state governments."[73] According to the President of Shell Oil, "We cannot deal with 50 different policies . . . . We need a national approach to greenhouse gases."[74] Relatedly, recent legislative debates have explored whether regulation of motor vehicle greenhouse gas emissions should fall under the states' authority or exclusively within the federal domain.[75]

Although the 2005 Energy Act's unusual preempting provisions did not directly involve risk standards, they too constitute a form of unitary federal choice preemption, albeit one limited to siting decisions. The most fundamental choice about the operation of a noxious facility emitting pollutants or posing other operational risks is whether to site the facility in a particular location at all. Consistent with state and local governments' dominance in land use decisionmaking, siting decisions about large-scale, noxious facilities have long been ruled by state and local laws and actors. Typically, state and local governments

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[72] *See* Kirsten H. Engel & Scott R. Saleska, *Subglobal Regulation of the Global Commons: The Case of Climate Change*, 32 ECOL. L.Q. 183 (2005) (acknowledging difficulty of regulating global challenges like climate change, and using game theoretic model to explain why state and local regulation is nevertheless occurring); *see also* Engel, *supra* note 9 (exploring same developments, but linking them to larger benefits of retaining latitude for dynamic interaction of different levels of government).

[73] Steven Mufson & Juliet Eilpern, *Energy Firms Come to Terms with Climate Change*, WASH. POST, Nov. 25, 2006, at A1.

[74] *Id.*

[75] *See, e.g.*, Avery Palmer, *Panel Votes To Compel EPA Ruling on California Plan*, 65 CQ WEEKLY 3585, 3585 (2007), *available at* http://library.cqpress.com/cqweekly/weeklyreport110-000002567017 (reporting that Senate committee passed legislation to compel decision from EPA as to whether California's stricter regulation was allowed); Michael Burnham, *Climate: Business Roundtable Calls for GHG Emissions Cuts*, E&E NEWS PM, July 17, 2007, http://eenews.net/eenewspm/print/2007/07/17/2 (discussing positions of industry and President regarding greenhouse gases emissions debate); Alex Kaplun, *Climate: Rep. Dingell Defends Plan To Limit State GHG Authority*, E&E NEWS PM, June 7, 2007, http://www.eenews.net/eenewspm/print/2007/06/07/1 (reporting on debate as to whether federal law should preempt any state power to regulate motor vehicle greenhouse gas emissions, such as whether California and states following California should be allowed to choose different strategies, and reporting on auto industry concern with "50 different standards").

A similar emergence of industry support for a preemptive federal response when confronted with diverse state regulation occurred earlier in the modern environmental law era. Industry sought preemptive federal regulation of air and water pollution sources but, as noted, ultimately obtained little relief other than car pollution regulation. *See* RICHARD N.L. ANDREWS, MANAGING THE ENVIRONMENT, MANAGING OURSELVES: A HISTORY OF AMERICAN ENVIRONMENTAL POLICY 208–09 (2d ed. 2006) (discussing growing industry support for federal environmental law in light of states' enactment of environmental laws); *supra* text accompanying notes 42–46 (discussing nearly complete federal preemption of state regulation in area of automobile emissions and tendency for industry to favor such centralization).

fight to attract new employers, even when the employers' operations might also cause discomforts. The desire for jobs and tax revenues usually prevails over softer environmental or quality of life concerns.[76] Despite this usual incentive for local governments to seek employers and foster economic growth, local and state actors also may make the same calculation that a facility's discomforts outweigh its local benefits. Consistent with the NIMBY ("not in my backyard") phenomenon, it may be impossible to find a jurisdiction willing to site certain noxious facilities.[77]

Perhaps driven by this concern, as well as possible free-rider and coordination problems,[78] the LNG provisions of the Energy Act

[76] The well publicized battle in Louisiana over the permitting of a Shintech facility is a good example of state interest in jobs and tax revenues. *See, e.g.*, EPA, *In re* Shintech, Inc., Permit Nos. 2466-VO, 2467-VO, 2468-VO, Order Partially Granting and Partially Denying Petitions for Objection to Permits (Sept. 10, 1997), *available at* http://www.epa.gov/Region7/programs/artd/air/title5/t5memos/shin1997.pdf (identifying various technical deficiencies in meeting environmental standards overlooked by Louisiana when granting permits for polluting facilities); EPA, *In re* La. Dept. of Envtl. Quality/Permit for Proposed Shintech Facility, Draft Revised Demographic Information for Title VI Administrative Complaint File No. 4R-97-R6 (Apr. 1998), *available at* http://www.epa.gov/ocrpage1/docs/shintech/apr98/cover48.pdf (report regarding Title VI administrative complaint filed by Tulane Environmental Law Clinic exposing probability that proposed Shintech facility's pollution would disparately impact African Americans). For a general background of the Shintech matter, see Robert R. Kuehn, *Denying Access to Legal Representation: The Attack on the Tulane Environmental Law Clinic*, 4 WASH. U. J.L. & POL'Y 33, 38–51 (2000). *See also* Vicki Been, *"Exit" as a Constraint on Land Use Exactions: Rethinking the Unconstitutional Conditions Doctrine*, 91 COLUM. L. REV. 473, 512–14 (1991) (discussing interjurisdictional competition for businesses); Michael B. Gerrard, *Fear and Loathing in the Siting of Hazardous and Radioactive Waste Facilities: A Comprehensive Approach to a Misperceived Crisis*, 68 TUL. L. REV. 1047, 1149–55 (1994) (discussing examples of cities near hazardous waste facilities where facilities dominate local economy and noting that siting efforts are most successful when perceived risks of facilities are low).

[77] *See* Orlando E. Delogu, *"NIMBY" Is a National Environmental Problem*, 35 S.D. L. REV. 198, 207–08 & 208 n.30 (1990) ("If any state or local government has the unilateral power to prevent the construction of federally approved disposal facilities, then every other state or local government in the nation would possess the same ability. The likely proliferation of bans . . . would aggravate the hazards Congress sought to alleviate . . . ." (quoting William L. Andreen, *Defusing the "Not in My Back Yard" Syndrome: An Approach to Federal Preemption of State and Local Impediments to the Siting of PCB Disposal Facilities*, 63 N.C. L. REV. 811, 847 (1985)); Kirsten Engel, *Reconsidering the National Market in Solid Waste: Trade-offs in Equity, Efficiency, Environmental Protection, and State Autonomy*, 73 N.C. L. REV. 1481, 1491 & n.48 (1995) (noting that failure to site new facilities is generally attributed to NIMBY problem); Michael B. Gerrard, *The Victims of NIMBY*, 21 FORDHAM URB. L.J. 495, 496, 511 (1994) (identifying waste facilities as target of NIMBY phenomenon and asserting that local opposition holds down number of waste disposal facilities).

[78] For a general discussion of free-rider and coordination problems, see MANCUR OLSON, THE LOGIC OF COLLECTIVE ACTION: PUBLIC GOODS AND THE THEORY OF GROUPS 9–22 (1971); Richard L. Revesz, *Federalism and Environmental Regulation: A Public Choice Analysis*, 115 HARV. L. REV. 553, 563–68 (2001); and Cass R. Sunstein, *Social Norms and Social Roles*, 96 COLUM. L. REV. 903, 944–52 (1996).

reversed the long-established primacy of state and local law and institutions in making siting choices.[79] Local governments' veto power was replaced with a notice-and-comment participatory process; final decisionmaking authority was placed solely in FERC's hands.[80] The new LNG siting process is unprecedented except for one somewhat analogous federal law pertaining to the shipment of hazardous waste.[81] While this law does not concern a design standard, its logic is similar. Without federal primacy, different jurisdictions could fail to coordinate their actions, leading to costly or impossible burdens on hazardous material transporters. State law precedents also exist for displacing multiple actors' roles in siting choices in favor of creating one comprehensive permitting venue.[82]

Perhaps the most unusual change in preemption policy occurred in early 2006. An array of products, due to their risks, are subject to federal regulatory approvals, which sometimes include reviews of product designs or characteristics before marketing. Such federal laws pertain to medicines, pesticides, automobile safety, workplace safety,

[79] Section 311(c)(2) of the Energy Policy Act of 2005 grants FERC the "exclusive authority to approve or deny an application for the siting, construction, expansion, or operation of a [LNG] terminal." Pub. L. No. 109–58, § 311(c)(2), 119 Stat. 594, 686 (codified at 15 U.S.C. § 717b(e)(1) (Supp. 2005)). Section 313(a)(3) of the Act designates FERC as the "lead agency for the purposes of coordinating all applicable Federal authorizations [necessary to site Liquified Natural Gas terminals] and for the purposes of complying with the National Environmental Policy Act of 1969." § 717n(b)(1). FERC's choice, in turn, must be preceded by opportunities for comment by state and local governments and others, but the ultimate decision whether to site a LNG facility is now federal. Section 311(d) of the Act requires that FERC "consult with [the appointed] state agency regarding state and local safety considerations prior to issuing an order" to approve the siting of a LNG terminal. § 717b-1. Furthermore, the state agency is given the option to submit an "advisory report" regarding state and local safety concerns to FERC, and FERC must "review and respond specifically to the issues raised" before approving the LNG terminal. § 717b-1. For close analysis of these provisions, see Angela J. Durbin, Comment, *Striking a Delicate Balance: Developing a New Rationale for Preemption While Protecting the Public's Role in Siting Liquified Natural Gas Terminals*, 56 EMORY L.J. 507, 520–22 (2006).

[80] *See supra* note 79; *see also* Jacob Dweck, David Wochner & Michael Brooks, *Liquefied Natural Gas (LNG) Litigation After the Energy Policy Act of 2005: State Powers in LNG Terminal Siting*, 27 ENERGY L.J. 473, 481 (2006) (noting that Act granted FERC exclusive authority over siting of LNG terminals and displaced traditional state roles); James B. Lebeck, *Liquefied Natural Gas Terminals, Community Decisionmaking, and the 2005 Energy Policy Act*, 85 TEX. L. REV. 243, 245, 250–53 (2006) (outlining FERC's decisionmaking authority and process, including state's role during notice-and-comment phase).

[81] In the Hazardous Materials Transportation Uniform Safety Act of 1990, federal law precluded state and local governments from imposing their own strictures on the movement of hazardous wastes through their jurisdictions. Pub. L. No. 101-615, 104 Stat. 3244 (1990) (codified at 49 U.S.C. App. §§ 1801–1813).

[82] *See* GERRARD, *supra* note 66, at 52 & n.46 (noting that some states' laws create special siting boards to act on facility proposals and allow for preemption of local authority).

consumer products, and other areas. These regulatory schemes typically include the second form of preemption discussed above, explicitly prohibiting state legislatures or agencies from creating their own clashing design requirements.[83] Several of these statutory regimes, however, include both savings clauses and provisions explicitly stating the intent to preempt directly conflicting standards.[84]

Almost simultaneously, an array of federal agencies charged with managing such risks asserted in Federal Register preambles that their promulgated regulatory choices not only preempted directly conflicting standards, but also supplanted potential common law tort liabilities for harms resulting from the regulated items.[85] Perhaps due to the strength of environmental law cases reconciling savings clauses paired with fairly limited preemptive clauses as preserving room for state regulation and common law liability, typically in nuisance, no similar change in preemption policy was articulated by the Environmental Protection Agency.[86]

Similarly, in late 2006, the Department of Homeland Security (DHS) proposed that its regulation of risks of chemical facilities should have broad preemptive effect, displacing state and local regulation that might upset the balance struck by federal law and implementing regulations.[87] The underlying statute lacks any preemption

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[83] *See supra* Part II.B.

[84] *See* Merrill, *supra* note 40 (discussing such provisions); Vladeck, *supra* note 36, at 98 & n.16 (same).

[85] Sharkey, *supra* note 18, at 227–28. As the Consumer Products Safety Commission recently explained with respect to its mattress flammability regulation, "[s]tate requirements . . . have the potential to undercut the Commission's uniform national flammability standard, create impediments for manufacturers . . ., establish requirements that make dual state and federal compliance physically impossible, and cause confusion among consumers . . . ." Final Rule: Standard for the Flammability (Open Flame) of Mattress Sets, 71 Fed. Reg. 13,472, 13,496–97 (Mar. 15, 2006) (to be codified at 16 C.F.R. pt. 1633). The Commission made clear its intent to preempt *all* state activity, including common law claims. The FDA asserted similar preemptive impact in its new rule about drug labeling. *See* Allison M. Zieve & Brian Wolfman, *The FDA's Argument for Eradicating State Tort Law: Why It Is Wrong and Warrants No Deference*, 34 Prod. Liab. & Safety Rep. (BNA) No. 12, at 308 (Mar. 27, 2006) (questioning legality and wisdom of FDA's declaration). The National Highway Traffic Safety Administration (NHTSA) recently asserted similar preemptive power in connection with its proposed roof strength regulations. *See* Rob Ammons & David George, *Tort Reform by Regulation: The National Highway Traffic Safety Administration Attempts To Preempt State-Tort Lawsuits with Its Proposed Roof-Strength Regulation*, 58 ADMIN. L. REV. 709, 714–15 (2006) (discussing NHTSA's contention that its safety standard, if adopted, will preempt state tort lawsuits).

[86] *See supra* Part II.C (discussing delegated programs and savings provisions in federal environmental laws).

[87] Relying on Public Law 109-295, an appropriations bill regarding chemical facility risks that empowered DHS to issue regulations, DHS proposed "Chemical Facility Anti-Terrorism Standards." Advance Notice of Rulemaking Regarding Chemical Facility Anti-Terrorism Standards, 71 Fed. Reg. 78,276, 78,276 (proposed Dec. 28, 2005) (to be codified

provision. The *New York Times*, in an editorial, asserted that these regulations sought to use a law lacking a preemption provision to protect "absurdly weak" federal regulations with a regulatory agenda "to block serious safety measures at every level of government."[88] After heated debate over this preemption claim, DHS backed down and stated to the press, and subsequently in somewhat ambiguous language in an interim final rule, that it would no longer assert such preemptive authority.[89] Legislative proposals and counterproposals that

at 6 C.F.R. pt. 27) (proclaiming agency's authority to regulate as derived from Department of Homeland Security Appropriations Act of 2007, Pub. L. No. 109-295, § 550, 120 Stat. 1355, 1388–89 (to be codified at 6 U.S.C. § 121)). These proposed regulations sought to preempt "conflicting" state and local law, which DHS defined to include common law regimes. After citing relevant cases and approaches, DHS explained that preemption choices here must include attention to the "balance" struck in the law, strongly implying that even additional risk-reduction efforts by state and local governments or by common law litigation would be preempted. *Id.* at 78,292–93.

> Section 550 preempts State laws and laws of their political subdivisions that conflict with the regulations promulgated thereunder. . . .
>
> In Section 550, Congress created a carefully balanced regulatory relationship between the Federal government and chemical facilities. . . . But Section 550 also compels the Department to preserve chemical facilities' flexibility to choose security measures to reach the appropriate security outcome.

Id. at 78,293 (citations omitted). ("[R]egulations [issued under this statute] shall permit each such facility, in developing and implementing site security plans, to select layered security measures that, in combination, appropriately address the vulnerability assessment and the risk-based performance standards for security for the facility."). A state measure frustrating this balance will be preempted. *Id.*

[88] Editorial, *Chemical Insecurity*, N.Y. TIMES, Jan. 23, 2007, at A18.

[89] *See* Interim Final Rule Announcing Chemical Facility Anti-Terrorism Standards, 72 Fed. Reg. 17,688, 17,725–27 (to be codified at 6 C.F.R. pt. 27); Editorial, *supra* note 88 *(*discussing proposal's language). In its Federal Register discussion, DHS concedes that its proposal's discussion of the need to retain the "balance" struck by the proposed regulation was "potentially too broad." Interim Final Rule, 72 Fed. Reg. at 17,727. Instead, the final regulation's explanation is that only conflict preemption, not field preemption, is meant to be asserted. *Id.* The regulation "is only meant to indicate that the regulation is not to be conflicted by, interfered with, hindered by or frustrated by State measures, under long-standing legal principles." *Id.* at 17,726. The agency retains its view that it can appropriately make such determinations in actual application, subject to judicial review. Such applied conflict preemption determinations would ordinarily follow opportunity for input from the affected state and, time permitting, public notice and comment as well. *Id.* at 17,727. The final regulatory discussion does not allude to regulatory versus common law conflict or set forth what sorts of state or local regulation might raise such conflicts, although the agency does state that it "does not intend to preempt existing health, safety and environmental regulations." *Id.* Regulations to "prevent terrorist attacks" or "regulate security at chemical facilities" are characterized as more distinctly federal, *id.* at 17,726, and DHS indicates that new state or local risk, health, or environmental regulations with such a focus would more likely be held preempted. *Id.* at 17,727. Of potential significance is language in the actual regulation declaring that potentially preempted state actions include—in addition to conflicting statutes, regulations, or administrative actions—"any . . . common law standard of a State or any of its political subdivisions" that the agency views as raising such a conflict. *Id.* at 17,739. In addition, despite the Federal Register discussion disavowing anything other than an intent to preserve the possibility of conflict

would protect or eliminate state and local authority became a source of heated legislative debate during the summer of 2007, leaving uncertain the issue of DHS's preemptive authority.[90]

The Supreme Court has vacillated on how to reconcile preemptive and savings clauses. With the exception of *Bates* and *Medtronic*, which preserved a substantial role for state regulation and common law, several recent cases have found a broad preemptive impact.[91] In these cases, the Court majority has paid little attention to the costs of eliminating other institutions' roles.

As further developed below, broad preemption claims in regulatory materials, the LNG process change, legislative proposals, and cases finding a broad preemptive impact all have the effect of eliminating the role of other institutions that might deliberate over different regulatory choices, try different means to achieve similar regulatory ends, or directly or indirectly take actions that could lead to a less risky product or environment. Tort and nuisance law regimes, for example, would do so not through design mandates, but by imposing liability for the harms a product caused. Supplanting this traditional state role, the new breed of federal regulation becomes the

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preemption, the actual regulation still contains references to state or local laws, regulations, or actions that not only "conflict" with federal requirements but also "hinder, pose an obstacle to or frustrate the purposes of this Part." *Id.*

[90] As of the drafting of this Article, the fate of these competing provisions was unresolved. *Compare* Stephen Labaton, *Congress Passes Increase in the Minimum Wage*, N.Y. TIMES, May 25, 2007, at A12 ("The National Association of Manufacturers succeeded in having a provision stricken that would have blocked federal officials from lowering tougher state safety standards for chemical plants."), *with* Linda Roeder, *House-passed Homeland Security Bill Includes Chemical Security State Preemption*, 31 Chem. Reg. Rep. (BNA) No. 26, at 609 (June 25, 2007) ("State and local governments would be able to set chemical security standards that are more stringent than federal requirements under a provision in the fiscal year 2008 Department of Homeland Security appropriations bill passed by the House of Representatives."), *and* Jeffrey H. Birnbaum, *Chemical Makers and Trial Lawyers Square Off over Iraq Spending Bill*, WASH. POST, Apr. 10, 2007, at A15 (discussing these provisions and reporting that President Bush has indicated that he opposes spending bill language providing states latitude to "impos[e] extra security requirements on the nation's chemical plants").

[91] *Compare* Bates v. Dow Agrosciences, L.L.C., 544 U.S. 431, 444 (2005) (finding no or limited preemptive impact), *and* Medtronic, Inc. v. Lohr, 518 U.S. 470, 488–89 (1996) (same), *with* Engine Mfrs. Ass'n v. S. Coast Air Quality Mgmt. Dist., 541 U.S. 246, 255, 258 (2004) (finding broad preemptive impact of provisions regarding motor vehicle emissions to preclude local fleet purchasing mandates), Buckman Co. v. Plaintiffs' Legal Comm., 531 U.S. 341, 347–48 (2001) (finding state tort claims impliedly preempted in case of regulation not historically handled by state), Geier v. Am. Honda Motor Co., 529 U.S. 861, 866–69 (2000) (plurality opinion) (indicating that savings clause does not foreclose possibility of implied conflict preemption), *and* Gade v. Nat'l Solid Wastes Mgmt. Ass'n, 505 U.S. 88, 98–99 (1992) (finding broad implied preemptive impact due to conflicts with purpose of federal statute). *See generally* Issacharoff & Sharkey, *supra* note 18, at 1390–98 (discussing partial federalization of areas historically governed by state law); Vladeck, *supra* note 36, at 98–100 (discussing conflicting jurisprudence of preemption of state damage actions).

final arbiter of the degree of risk allowed. In quite final form, it constitutes a unitary federal choice leaving no role for state institutions.[92]

III
Preemption Choices and Institutional Diversity

This Part argues that a critical but largely overlooked implication of broad federal preemption, especially unitary federal choice preemption, is the way it displaces multilayered institutional arrangements offering different actors, venues, and modalities for addressing a social problem. Viewed through this federalism lens and recognizing the associated benefits of institutional diversity, one can make a principled argument that not all federal preemption choices are the same. In particular, this Part suggests that floor preemption displaces fewer institutions and in fact harnesses benefits of federalism's layered institutional diversity. In contrast, due to how they function as a unitary federal choice, recent ceiling preemption assertions create heightened risks of dysfunction and stasis. This is especially the case when state common law tort or nuisance regimes are displaced. In short, the mode of federal preemption choices makes a difference, totally independent from any underlying views about the desirability of more or less risk regulation or constitutionally driven views about state and federal roles and the appropriateness of federal standard setting.

To develop this hypothesis, this Part starts by briefly reviewing the literature on the implications of federal standard setting that, in effect, can act to preempt state and local choice. This Article largely puts to the side scholarship parsing the Supreme Court's preemption case law, which has accurately been characterized as a "muddle."[93] Instead, the Article focuses on scholarship relevant to policymakers

[92] While not evident in major provisions of federal law, yet another interjurisdictional choice is a federal default standard. Such a standard would presumptively set requirements for state governments, but states could, at least to a limited extent, deviate from the default rule. To the author's knowledge, a risk-level default standard does not exist, but federal procedural requirements for states seeking to take over delegated programs have a similar characteristic. Federal statutory provisions under the Clean Air and Water Acts and their implementing regulations set an array of requirements for states. States need not, however, adopt identical provisions; they are allowed some voice in the overall way they design their own delegated program. State SIP planning under the Clean Air Act has a similar quality. Federal statutory and regulatory provisions set forth basic requirements for SIPs, which include an increasingly stringent set of mandatory SIP elements in specified "nonattainment" areas not meeting federal ambient air quality standards. From this basic federal menu, states can choose strategies and their preferred degree of stringency for their selected pollution sources. Relatedly, laws allowing states to take over federal powers to grant exemptions act as a form of ceiling, but with some de facto room for state laxity. *See* Glicksman, *supra* note 9, at 798–800 (discussing how federal transportation law and National Environmental Policy Act create authority for state grants of exemptions).

[93] Nelson, *supra* note 9, at 232.

seeking to decide whether to assert a preemptive effect in a statute or regulation. Next, the Article turns to an analysis of how floor and unitary choice preemption differ in their effect on institutional diversity, arguing that floor and unitary federal choice preemption are distinct, even though both involve federal regulatory choices foreclosing areas of state discretion.

This Part closes by looking at how multilayered federalism and the retention of state common law regimes serve as a valuable, if somewhat neglected, variant of the experimentalist regulatory forms advocated by Professors Sabel, Dorf, and others.[94] Here, it is not so much the "rolling" nature of rules as the forced interaction among institutions and stakeholders—including common law regimes—that

[94] *See generally* Michael C. Dorf & Charles F. Sabel, *A Constitution of Democratic Experimentalism*, 98 COLUM. L. REV. 267, 349–55 (1998) (arguing for continuous generation of new information, adjustment, and improvement in response to changing conditions, systematic feedback loops, and rolling standards of best practice in constitutional interpretation); Jody Freeman, *Collaborative Governance in the Administrative State*, 45 UCLA L. REV. 1 (1997) (outlining limits of then-existing collaborative governance projects and proposing new challenges to traditional models of agency discretion and experiment); Bradley C. Karkkainen, *Environmental Lawyering in the Age of Collaboration*, 2002 WIS. L. REV. 555, 567–71 (2002) (detailing new form of innovation called "collaborative ecosystem management" that steers away from rule enforcement model and toward locally and regionally tailored solutions with broad coordination and public accountability); Bradley C. Karkkainen, *"New Governance" in Legal Thought and in the World: Some Splitting as Antidote to Overzealous Lumping*, 89 MINN. L. REV. 471 (2004) (discussing same legal innovations under umbrella of "new governance" and critiquing Professor Lobel's lumping together of these models under one general approach, and referring to them as loosely related family of alternative approaches to governance with often competing schools of thought regarding reflexivity and softness in law); James S. Liebman & Charles F. Sabel, *A Public Laboratory Dewey Barely Imagined: The Emerging Model of School Governance and Legal Reform*, 28 N.Y.U. REV. L. & SOC. CHANGE 183, 189–90, 189 n.23 (2003) (arguing for routine revision and reevaluation of institutional processes in public school systems); Orly Lobel, *The Renew Deal: The Fall of Regulation and the Rise of Governance in Contemporary Legal Thought*, 89 MINN. L. REV. 342, 396, 461 (2004) (discussing myriad of legal innovations and methods of governance that allow for uncertainty and diversity, including experimentalist literature, characterizing them together as "the renew deal"); Eric W. Orts, *Reflexive Environmental Law*, 89 NW. U. L. REV. 1227, 1252–68 (1995) (introducing "reflexive," as opposed to conventional, model of environmental regulation); Charles Sabel et al., *Beyond Backyard Environmentalism*, *in* BEYOND BACKYARD ENVIRONMENTALISM 3, 6–7, 13–15 (Joshua Cohen & Joel Rogers eds., 2000) (describing rolling rule regimes); Charles F. Sabel & William H. Simon, *Destabilization Rights: How Public Law Litigation Succeeds*, 177 HARV. L. REV. 1015, 1082–94 (2004) (describing public law cases as examples of destabilization rights to disentrench failing institutions and arguing that these cases demonstrate move toward ongoing stakeholder negotiations, rolling rule regimes, and transparency); Susan Sturm, *Second Generation Employment Discrimination: A Structural Approach*, 101 COLUM. L. REV. 458, 479–89 (2001) (outlining interactive structural approach for trial courts to address problems of compliance in employment discrimination). For an earlier work exploring similar issues, see IAN AYRES & JOHN BRAITHWAITE, RESPONSIVE REGULATION: TRANSCENDING THE DEREGULATION DEBATE (Donald R. Harris et al. eds., 1992).

creates a potentially valuable antidote to stasis, error, and regulatory failure.[95] With floor preemption and its usual savings clauses, interaction will increase among local, state, and federal regulators, as will diversity of choices among the states.

Retaining common law regimes, with their unique array of actors and incentives, is particularly likely to create incentives for reexamining regulatory choices. Indeed, the different incentives and institutional structures of common law regimes create a possible means of overcoming a major weakness in experimentalist regimes: the ordinary lack of incentives for regulators to engage in reflection, reexamination of past actions, admission of error, and unsettling of the status quo.

A. Past Debates over Preemptive and Preclusive Federal Regulatory Action

Any federal standard-setting or regulatory action has at least a potential preemptive impact. If a law expressly states the intent to preempt other state choices, that is the end of the matter; federal law is supreme, and any existing or contemplated different choices in state or local law are preempted. Even without such express intent, federal actions can in application clash with state or local requirements, giving rise to conflict preemption. Pervasive federal regulation of an area can lead agencies or courts to find field preemption. Or, under a somewhat more amorphous prong of preemption doctrine, state or local laws may stand as an obstacle to federal law.[96]

In recent decades, two particular forms of potentially preclusive or preemptive federal actions have provoked substantial debate. The debates illuminate how unitary federal choice preemption is different from floor preemption and arguably detrimental to many of the greatest strengths of federalist structures. These debates also concern the closely related question of whether federal regulatory actions should preclude additional or different state and local choices. The debates focus on the race-to-the-bottom rationale for federal regulation and the tort literature exploring the regulatory compliance defense in products liability cases.[97] Somewhat oddly, these two

[95] *See* Sabel et al., *supra* note 94 (discussing rolling rule regimes); Dorf & Sabel, *supra* note 94 (same).

[96] For summaries of the various preemption tests, see, for example, *Crosby v. National Foreign Trade Council*, 580 U.S. 363, 372–73 (2000); *Gade*, 505 U.S. at 98; Mary J. Davis, *Unmasking the Presumption in Favor of Preemption*, 53 S.C. L. REV. 967, 970 (2002); Viet D. Dinh, *Reassessing the Law of Preemption*, 88 GEO. L.J. 2085, 2097–2107 (2000); and Nelson, *supra* note 9, at 226–29.

[97] One scholar has embraced the preclusive impact of federal regulatory compliance while, in recent works, criticizing federal floor preemption because it displaces state and

bodies of scholarship end up pointing in different directions notwithstanding their substantial overlap.

The inconsistency in these bodies of scholarship is perhaps attributable in part to the divergent views of protective risk regulation they reflect. Scholars criticizing the race-to-the-bottom rationale for federal standards that serve as preemptive floors often applaud how state competition for industry is encouraged, leading to less regulation.[98] Similarly, advocates of the regulatory compliance defense seek to reduce allegedly excessive and potentially inconsistent regulatory burdens and to harness the benefits of expert agencies rather than misguided juries. As Professor Young observes, "preemption is generally deregulatory in its impact."[99] Without necessarily endorsing this trend, Professors Issacharoff and Sharkey explain recent Supreme Court decisions preempting state regulation and common law as driven by the Court's desire to "capture the considerable benefits that flow from national uniformity and to protect an increasingly unified national (and international) commercial market from the imposition of externalities by unfriendly state legislation."[100] If business boosterism is the goal, these literatures can be reconciled.[101] Both the regulatory compliance defense and national regulatory certainty are attractive to industry. If, however, the goal is to harness the relative institutional advantages of federal, state, and local governments and the benefits resulting from their interaction, the business effects should be largely irrelevant. Regulatory preemption and regulatory compliance defenses may be good for business, but they run counter to the goal of diversity of political and economic market choices.

The race-to-the-bottom debate is critical to this Article's exposition of asymmetrical regulation and the floor/ceiling distinction. The enactment of numerous federal environmental laws was justified by

citizen choice offered by diverse state regulatory regimes. *Compare* Richard B. Stewart, *Regulatory Compliance Preclusion of Tort Liability: Limiting the Dual-Track System*, 88 GEO. L.J. 2167, 2176–86 (2000) [hereinafter Stewart, *Preclusion of Tort Liability*] (arguing in favor of regulatory compliance defense), *with* Richard B. Stewart, *Environmental Quality as a National Good in a Federal State*, 1997 U. CHI. LEGAL F. 199, 207–08 (concluding that adherents to race-to-the-bottom rationale for federal environmental regulation have failed to carry their "burden of proof").

98 *Cf.* Michael S. Greve, *Business, the States, and Federalism's Political Economy*, 25 HARV. J.L. & PUB. POL'Y 895, 903 & n.25 (2002) (arguing that "business will view state regulation as tolerable and even advantageous" when absence of federal preemptive regulatory floors allows states to compete by reducing regulation).

99 Young, *supra* note 23, at 263. He continues by observing that "it should not be surprising that conservatives favor it and liberals oppose it." *Id.*

100 Issacharoff & Sharkey, *supra* note 18, at 1354.

101 This, however, is virtually never explored as a rationale in statements of agencies and courts. Scholars linked to the American Enterprise Institute address it more forthrightly. *See, e.g.*, Greve, *supra* note 98 (advocating against proliferation of regulations).

the concern that without a uniform federal standard, states competing for business and tax revenues would sacrifice their citizens' preferred level of environmental quality. With states reacting to each other's efforts to gain a market advantage, all competing states would drop their standards, resulting in a suboptimally degraded environment.[102]

Questioning this rationale, Dean Revesz reignited interest in the race-to-the-bottom theory.[103] He focused on laws that contained both floor preemption clauses and strong savings clauses,[104] such as the provisions of the Clean Air Act that function as regulatory floors. Dean Revesz correctly observed that by setting a federal floor, state tailoring of regulatory obligations to each state's particular aspirations and endowments would be constrained.[105] Dean Revesz, however, ended up arguing for decentralized regulation because of the possibility that taking one choice off of the regulatory menu would lead some states to experience a suboptimal result given the reality of interjurisdictional competition for business and tax revenues. Only complete federalization of all regulatory standards could eliminate regulatory sacrifices to win such interjurisdictional competition.[106]

Dean Revesz, like Professor Stewart, focused on how federal floor preemption leads some states to experience a social welfare loss. Both argued for the benefits of decentralized regulatory choice and

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102 Stewart, *supra* note 49, at 1211–12, 1212 n.66.

103 *See* Richard L. Revesz, *Rehabilitating Interstate Competition: Rethinking the "Race-to-the-Bottom" Rationale for Federal Environmental Regulation*, 67 N.Y.U. L. REV. 1210 (1992).

104 *Id.*

105 *Id.* at 1244–47. When critics interpreted him to be claiming that levels of environmental protection might not drop, Dean Revesz clarified that he does not necessarily dispute that environmental standards may drop in response to competition, but is arguing that federal standard setting might induce a reduction in social welfare:

> I argue that even if states systematically enacted suboptimally lax environmental standards, federal environmental regulation would not necessarily improve the situation. If states cannot compete over environmental regulation because it has been federalized, they will compete along other regulatory dimensions, leading to suboptimally lax standards in other areas, or along the fiscal dimension, leading to the underprovision of public goods. Thus, the reduction in social welfare implicit in race-to-the-bottom arguments would not be eliminated merely by federalizing environmental regulation: the federalization of all regulatory and fiscal decisions would be necessary to solve the problem.

Id. at 540; *see also id.* at 539 (acknowledging that, absent federal intervention, interaction between states could lead to underregulation).

106 Professor Kirsten H. Engel, *State Environmental Standard-Setting: Is There a Race and Is It "To the Bottom"?*, 48 HASTINGS L.J. 271 (1997), convincingly showed, using both theoretical and empirical analysis drawing on survey data, that state regulators will drop environmental standards in trying to attract business and will look closely at other states' standards and match them unless federal standards preclude competitive standard setting.

for avoiding "diseconomies of scale," in which a national standard fails to fit localized needs.[107]

But not all states experience such losses. After all, floor preemption coupled with delegated program federalism allows all states to engage in further protective actions, in turn tailoring federal standards to local conditions and allowing ongoing application of state common law.[108] Furthermore, while some states might prefer environmental laxity, others undoubtedly are happy with the federal standard, and still others prefer more environmental protection. Floor preemption is thus, in reality, only a partial displacement of state choice and state institutions. The states most likely to lose under a floor preemption regulatory scheme are those preferring environmental laxity to other areas of regulatory competition, and even they retain some ability to dovetail regulation to local conditions.[109]

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[107] As Professor Stewart argues:

> This presumption [in favor of decentralization] serves utilitarian values because decisionmaking by state and local governments can better reflect geographical variations in preferences for collective goods like environmental quality and similar variations in the costs of providing such goods. Noncentralized decisions also facilitate experimentation with differing governmental policies, and enhance individuals' capacities to satisfy their different tastes in conditions of work and residence by fostering environmental diversity.
>
> Important nonutilitarian values are also served by noncentralized decisionmaking. It encourages self-determination by fragmenting governmental power into local units of a scale conducive to active participation in or vicarious identification with the processes of public choice. This stimulus to individual and collective education and self-development is enriched by the wide range of social, cultural and physical environments which noncentralized decisionmaking encourages.

Stewart, *supra* note 49, at 1210–11.

[108] Statutory language leaves the impression that industry-wide, technology-based standards leave little room for such tailoring, but in juggling sometimes clashing requirements, regulators that issue permits often engage in some facility-specific tailoring. Environmental quality-based standards such as the Clean Air Act SIP program leave broad tailoring discretion. *See supra* Part II.C.

[109] Many states, however, have enacted statutes that prohibit state regulators from promulgating any standards more stringent than the federal floor. *See* Organ, *supra* note 57, at 1376. In those states, the initial federal floor becomes the unitary federal choice due to the combination of federal and state action.

Somewhat counterintuitively, it is possible that some states with a preference for protective regulation could be harmed by a federal embrace of similar protections. Typically, risk regulation will create some social benefits but will also come with costs causing states to embrace federal regulation that would reduce the risk of losing business to more lax jurisdictions. This is the risk motivating states discussed in Organ, *supra* note 57, at 1388–89. It remains possible, however, that some states would see benefits in creating a distinctively protective or low-risk environment. They might want to be seen as especially "green" or high quality of life jurisdictions, or they might be able to create low-risk environments at lower cost than other jurisdictions. For such states, a uniform, federally imposed standard might reduce those states' comparative advantage.

The regulatory compliance defense literature and caselaw is also closely related to the floor/ceiling distinction and this Article's analysis of asymmetrical regulation. The scholarship typically does not speak in terms of preemption, though some scholars see the linkage.[110] Rather, advocates of the defense argue that compliance with federal standards and approvals should immunize a tortfeasor from liability.[111] The defense would eliminate or at least undercut the possibility of tort liability if a producer causes injury despite compliance with federal regulations or federal product approval.

The defense is not the norm. Most states and court decisions under federal and state law conclude that while noncompliance with federal requirements can create presumptive liability, compliance is, at most, just a factor to be weighed in tort suits.[112] Federal standards or requirements are thus typically construed as merely setting a minimum requirement or floor. They leave room for nonconflicting state action and tort suit conclusions that the standard of care is greater than the one approved by federal actors.

Advocates of a regulatory compliance defense are concerned about the burdens on producers of risk if they face potentially disparate state standards of care. They argue either that products will not move across borders, or that producers will strive to meet the standards of the most protective state, even if they are excessively stringent.[113] This will raise costs for all consumers, leading to inefficiencies.[114] In addition, advocates of the defense assert that

110 Robert L. Rabin, *Reassessing Regulatory Compliance*, 88 GEO. L.J. 2049, 2059 (2000) (noting that, for formal and policy reasons, courts that reject preemption will not examine regulatory compliance defense); Alan Schwartz, *Statutory Interpretation, Capture, and Tort Law: The Regulatory Compliance Defense*, 2 AM. L. & ECON. REV. 1, 2–3 (2000) (explaining current state of preemption doctrine prior to advocating expansion of regulatory compliance defense).

111 *See, e.g.*, Schwartz, *supra* note 110, at 47 (concluding that federal statutes should contain presumption of full substantive preemption, permitting complete regulatory compliance defense). I acknowledge my debt here to Professor Bernard Bell for sharing, in an email exchange, thoughts about the regulatory compliance defense.

112 *See, e.g.*, Rabin, *supra* note 110, at 2050 (discussing RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY § 4(b) (1997), which considers compliance but does not deem it conclusive); Schwartz, *supra* note 110, at 3 (detailing majority view that compliance with federal regulation is not exculpatory as matter of law, but simply "relevant evidence for a jury to consider").

113 *Cf.* Schwartz, *supra* note 110, at 17 (contending that lack of national safety standard causes firms to forego production of useful products); Stewart, *Preclusion of Tort Liability*, *supra* note 97, at 2177–78 (arguing that not allowing regulatory compliance defense burdens firms by imposing a duplicative system of review of agencies' decisions by unreliable and inconsistent jurors across country).

114 Professor Huber posits that regulatory uncertainties and the risks of large tort liabilities will fail to provide the optimal incentives to manufacturers. Peter Huber, *Safety and the Second Best: The Hazards of Public Risk Management in the Courts*, 85 COLUM. L.

handing determinations about product safety to lay juries empowers nonexperts who are vulnerable to cognitive errors, oversimplification, and votes based on sympathy.[115] They argue that questions of product safety are better left to expert agencies that generally operate via closely scrutinized rulemaking.[116]

Critics of the regulatory compliance defense reject these assertions. They defend the status quo by pointing out that many agency approvals are merely approvals of a product as meeting some minimum requirement, and that agencies can be captured by those they ostensibly regulate, or can simply overlook risks.[117] That can lead to inappropriately lax regulation, although some approvals do concededly look more like searches for optimal products.[118] Professor Rabin further argues that despite the flaws in tort liability regimes, they serve a valuable role in eliciting information about product risks that might otherwise be overlooked.[119] In addition, civil tort discovery can reveal other industry irregularities that perhaps would not otherwise be known to regulators. Tort litigation can, in fact, serve as a "feedback loop," eliciting information that leads to reexamination of past federal regulatory actions.[120]

REV. 277, 316–17 (1985). This argument has engendered debate. *See, e.g.*, Clayton P. Gillette & James E. Krier, *Risk, Courts, and Agencies*, 138 U. PA. L. REV. 1027, 1057 (1990) (positing that court-driven liability helps treat risk producers evenhandedly); Joseph A. Page, *Deforming Tort Reform*, 78 GEO. L.J. 649 (1990) (criticizing PETER W. HUBER, LIABILITY: THE LEGAL REVOLUTION AND ITS CONSEQUENCES (1988)); Robert A. Prentice & Mark E. Roszkowski, *"Tort Reform" and the Liability "Revolution": Defending Strict Liability in Tort for Defective Products*, 27 GONZ. L. REV. 251, 276 n.137 (1991/92) (discussing empirical research).

115 *See* Stewart, *Preclusion of Tort Liability*, *supra* note 97, at 2171–73 (claiming that evidence suggests that jury trial system results in overdeterrence).

116 Lars Noah, *Rewarding Regulatory Compliance: The Pursuit of Symmetry in Products Liability*, 88 GEO. L.J. 2147, 2153 (2000) ("As the decisionmakers empowered by the citizenry to set safety standards, legislatures and regulatory agencies select the levels of product risk that they deem appropriate based on scientific, economic, and—yes—political considerations."); Stewart, *Preclusion of Tort Liability*, *supra* note 97, at 2173 (supporting regulatory preclusion partially because of agencies' abilities to evaluate costs and benefits).

117 Rabin, *supra* note 110, at 2068–70 (showing how, even without capture dynamics, regulators can miss risks that tort system identifies).

118 Professor Noah argues that federal agencies sometimes seek to identify a product's optimal, not minimal, features when promulgating a standard. Noah, *supra* note 116, at 2152.

119 *See* Rabin, *supra* note 110, at 2068–70 (noting that breast implant manufacturing and tobacco litigations revealed important information to public).

120 *See* Thomas O. McGarity, *The Regulation–Common Law Feedback Loop in Non-Preemptive Regimes*, *in* PREEMPTION CHOICE: THE THEORY, LAW, AND REALITY OF FEDERALISM'S CORE QUESTION (William W. Buzbee ed., forthcoming 2008) (manuscript at 6–7, 14–16, on file with the *New York University Law Review*) (noting that litigation is valuable source of information because discovery process opens company files and settlement agreements sometimes require litigants to perform new scientific tests). For a work advocating latitude for tort claims for harms caused by pesticides, see Alexandra B. Klass,

In sum, opponents of floor preemption advocate decentralized standard setting, at least in preference to federalization rooted in a race-to-the-bottom argument.[121] Proponents of a regulatory compliance defense argue for federal displacement of state tort regimes. Despite their different conclusions regarding the federal role, with one rejecting a preemptive federal role and the other advocating a preclusive impact for federal regulatory actions, both result in outcomes that are generally favorable for business. Facilitating state competition for business will likely result in reduced regulatory burdens, while recognition of a regulatory compliance defense could eliminate many areas of potential tort liability.

Critics of the regulatory compliance defense, defenders of the race-to-the-bottom rationale for federal regulation, as well as this Article, all share the view that one must pay attention to political dysfunctions and failures in assessing the appropriate role for federal regulation. Indeed, if one starts with perhaps the most basic philosophical and instrumental underpinnings of federalist structures—that one needs to be skeptical about the capacity and will of government—then preemption choices start to look quite different.[122]

Pesticides, Children's Health Policy, and Common Law Tort Claims, 7 MINN. J. L. SCI. & TECH. 89 (2005). Additional works discuss feedback interactions with an emphasis on tort claims and industry learning. *See, e.g.*, David A. Hyman & Charles Silver, *The Poor State of Health Care Quality in the U.S.: Is Malpractice Liability Part of the Problem or Part of the Solution?*, 90 CORNELL L. REV. 893, 919–20 (2005) (describing wave of malpractice lawsuits and negative publicity surrounding surgical anesthesia that prompted changes to American Society of Anesthesiologists' monitoring guidelines and standards); Mary L. Lyndon, *Tort Law and Technology*, 12 YALE J. ON REG. 137, 163–65 (1995) (denoting distinct benefits of having both tort law and agency law); Joseph Frueh, Comment, *Pesticides, Preemption, and the Return of Tort Protection*, 23 YALE J. ON REG. 299, 308 (2006) (discussing how tort litigation provides feedback to manufacturers of pesticides).

121 Interstate externalities and public choice pathologies are distinct rationales for federal regulation. *See* Revesz, *supra* note 103, at 1222–24.

122 Two Federalist Papers attributed to James Madison capture well the need to rely on government, yet anticipate and create structures (such as federalist structures) to counter human and institutional flaws. As stated in *Federalist 51*:

> If men were angels, no government would be necessary. If angels were to govern men, neither external nor internal controuls on government would be necessary. In framing a government which is to be administered by men over men, the great difficulty lies in this: You must first enable the government to controul the governed; and in the next place, oblige it to control itself.

THE FEDERALIST NO. 51, at 252 (James Madison) (Terence Ball ed., 2003). In *Federalist 55*, Madison states:

> As there is a degree of depravity in mankind which requires a certain degree of circumspection and distrust: So there are other qualities in human nature, which justify a certain portion of esteem and confidence. Republican government presupposes the existence of these qualities in a higher degree than any other form.

THE FEDERALIST NO. 55, at 273 (James Madison) (Terence Ball ed., 2003).

Unitary federal choice preemption can exacerbate risks of agency failure and precludes the benefits of multiple layers of regulators and preserved common law regimes. As argued below, one can logically take an asymmetrical regulatory approach that embraces floor preemption yet finds unitary federal choice preemption to be a problematic institutional choice that runs contrary to the very rationales for federalism. Floor preemption retains many of the benefits of federalist forms of government, whereas federal ceilings provide little more than regulatory certainty, with considerable attendant costs. The succeeding sections build on the questions sharpened in the race-to-the-bottom and regulatory compliance defense debates, emphasizing the implications of the different institutional arrangements inherent in federal preemptive floors and ceilings.

B. Ceiling Preemption and Federalism's Core Benefits

One can derive a principled argument to embrace federal floor preemption, yet find unitary federal choice preemption to be a distinguishable and problematic choice. This argument is not rooted in the assumption that more stringent regulation is always better, nor is it rooted in constitutional language, structure, or presumptions. The Constitution seldom provides much guidance for when preemption is appropriate or when floors or ceilings make sense, although courts seem forever tempted to find in the Constitution's text and historical analysis answers to which roles should be handled by which level of government.[123] Instead, this Article's exposition of the floor/ceiling distinction and asymmetrical regulation is fundamentally rooted in skepticism about government, as well as recognition of the benefits of the institutional diversity offered by multilayered federalist structures retaining state regulatory power and common law regimes. In fact, the different actors and modalities of state common law litigation make it a critical, although only partial, antidote to predictable sorts of government failures. Other countervailing factors will at times make unitary federal choice preemption, or other types of preemption, appropriate choices. This Part illuminates the previously neglected distinction between floors and ceilings by focusing on their different institutional implications. These distinctions and their implications will not invariably trump other preemption choice variables, but they need to be acknowledged.

[123] *See supra* notes 3–5 and accompanying text (discussing and citing cases where Justices' presumptions about federal and state roles influence their disparate views of appropriate federalism case outcomes).

1. Interactive Benefits Retained with Floor Preemption

Although both floor and ceiling preemption involve a federal choice that prohibits states from regulating with, respectively, greater laxity or rigor, they are not flip sides of the same coin. Floor preemption does partially eliminate the option of decentralized regulatory choice, prohibiting some states from adopting their preferred tradeoff among regulatory regimes. However, it also preserves substantial state roles, displaces only some states' choices, and permits the mutual learning that further regulatory interaction can foster.

First, floor preemption only forecloses some states from making choices they would prefer. It is theoretically possible that federal legislators or regulators would impose a stringent standard that all states would reject, but this is highly unlikely. Political safeguards may not guarantee that state views will be incorporated into federal decisionmaking,[124] but states are active and often effective in both federal legislative and agency venues.[125] If uniform state objections were heard, only rarely, if ever, would a proposal nevertheless become law. Race-to-the-bottom literature acknowledges that federal standard setting will benefit those states with a taste for less risk or a cleaner environment; those states will not have to drop standards to meet the competition.[126] States that have an even greater taste for low-risk or clean environments are also winners with floor preemption; they are explicitly guaranteed the right to promulgate more stringent standards.[127] In so doing, they will generate new information about what is possible. Only those jurisdictions genuinely preferring laxity lose in the short

[124] 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 (1954) (arguing that role of states in national political process provides sufficient protection against encroachment of national legislation, thereby making judicial protection unnecessary). *But see* DANIEL J. ELAZAR, AMERICAN FEDERALISM: A VIEW FROM THE STATES 185 (3d ed. 1984) (describing how state legislatures are constrained in efforts to influence state/federal cooperative programs); Larry Kramer, *Understanding Federalism*, 47 VAND. L. REV. 1485, 1503–14 (1994) (criticizing Wechsler's theory); H. Geoffrey Moulton, Jr., *The Quixotic Search for a Judicially Enforceable Federalism*, 83 MINN. L. REV. 849, 911–12 (1999) (criticizing political safeguards theory).

[125] Ernest A. Young, *The Rehnquist Court's Two Federalisms*, 83 TEX. L. REV. 1, 73, 79 (2004) (discussing criticisms of Wechsler but also noting some state and local governments' effective efforts in Washington and commenting that they "have also, at least to some extent, learned to function in Washington much like other interest groups").

[126] *See supra* notes 107–09 and accompanying text.

[127] As noted *supra* note 109, it is also possible that a state preferring a low-risk environment, and able to achieve it at low cost, might lose some interjurisdictional advantage if all states were forced by a federal standard to meet that protective state's preferred level of risk. More often, however, states preferring lower risk or cleaner environments prefer a federal standard that will protect them against race-to-the-bottom dynamics and attendant economic losses. *See generally* Revesz, *supra* note 103; Engel & Saleska, *supra* note 72.

term. Even those states, however, may benefit from observing what can be achieved; apparently unpalatable tradeoffs may actually be acceptable, as can be established by other jurisdictions' regulatory choices.

Second, once a federal floor of minimal required stringency is set, states and affected industry often retain discretion to devise means to attain the federal goal, subject to varying degrees of oversight. Despite common errors in assuming that so-called command-and-control regulation mandates particular technological choices,[128] federal standard setting tends to set only goals, in some instances prohibiting specification of technological means unless a numerical standard is impracticable.[129] Industry may prefer technological mandates or product specifications to other regulatory strategies because of the certainty such requirements can create, but such rigid regulation is not the norm.[130] Because means are typically not specified, especially in environmental regulation, creativity in state and industry implementation is retained.[131]

Furthermore, the multiple actors who remain empowered by regulatory floors can prompt more rigorous regulatory analysis. Standards set through comparisons to some variant of what can be achieved with "best available technology," or other standards benchmarked against some general safety or reasonable risk requirement, often require federal and state regulators and other stakeholders to examine in an ongoing way the most protective plan or risk-reduction achieved in practice. This can occur in high-stakes set-

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[128] *See, e.g.*, Driesen, *supra* note 59, at 300–01 ("Use of the term 'command and control' to describe . . . technology-based regulation [is misleading]."); Sabel & Simon, *supra* note 94, at 1019 (characterizing command-and-control regulation as "prescrib[ing] the inputs and operating procedures of the institutions they regulate," and calling for general standards that "express the *goals* the parties are expected to achieve"); Rena I. Steinzor, *Reinventing Environmental Regulation: The Dangerous Journey from Command to Self-Control*, 22 HARV. ENVTL. L. REV. 103, 114–16 (1998) (differentiating between health-based and technology-based standards in context of command-and-control regulation).

[129] *E.g.*, Clean Air Act § 111, 42 U.S.C. § 7411(b)(5), (h) (2000) (stating that Act does not authorize or require particular technological design standards for new and modified stationary sources of pollution but authorizing "design, equipment," or other more rigid regulatory forms if "it is not feasible to prescribe or enforce a standard of performance"); *see also* 42 U.S.C. § 7412(h) (2000) (requiring emissions regulations for hazardous air pollutants to be performance standards unless they are "not feasible," in which case "design, equipment, work practice, or operational standard[s]" can be used).

[130] *See* Nathaniel O. Keohane, Richard L. Revesz & Robert N. Stavins, *The Choice of Regulatory Instruments in Environmental Policy*, 22 HARV. ENVTL. L. REV. 313, 346–50 (1998) ("[Economic theory] explains why private firms . . . may have a strong preference for command-and-control standards.").

[131] Industry will still be tempted to use the means federal regulators identified as best, but that choice is rooted in risk aversion, not a mandate.

tings of promulgation of regulations or product approvals, but often also occurs in more specific, applied settings such as issuing permits or approvals for particular regulatory targets.[132]

Thus, federal "floors" allow both for more stringent state actions and for diversity and creativity in implementing federal standards. Especially in environmental regulation, with its developed delegated program structures, the process of determining levels of stringency or granting permits involves interaction among federal and state regulators, as well as other stakeholders. At every stage after a legislative setting of regulatory criteria, broad participation and litigation rights are guaranteed. The possibility of federal "overfiling" or rejection of permit choices, and citizen suits or Administrative Procedure Act (APA) challenges if a permit violates the law, means that authority is pervasively monitored and checked.[133] Even in regulatory settings that merely preserve state regulatory powers, a multiplicity of actors remain active. Disputes may be common, but that is not necessarily a sign of regulatory flaws. Instead, it may just reflect how regulation by hierarchical fiat is subject to challenge. The multilayered law found with floor preemption regimes provides many venues in which policy choices are explored.

Floor preemption's typical retention of possible common law liability in nuisance or tort further serves a valuable role. Most obviously, if a creator of risk faces potential liability for harms that it causes, it forever has an incentive to avoid harms and reduce risks, long after a federal standard may have been set.[134] Without the fear of tort liability, and absent new regulation, risk creators would have little incentive to improve their operations and reduce risk, absent a profit motive that coincided with improvement.[135] As the Supreme

[132] *See, e.g.*, Clean Air Act §§ 165, 169, 42 U.S.C. §§ 7475, 7479 (2000) (setting forth preconstruction permit requirement that new and modified sources achieve emission levels commensurate with best available technology, as determined on "case-by-case" basis); Clean Air Act §§ 171, 173, 42 U.S.C. §§ 7501, 7503 (2000) (setting forth nonattainment permitting provisions requiring achievement of emission levels equal to "lowest achievable emissions rate" at specified comparators).

[133] *See, e.g.*, Ala. Dep't of Envtl. Conservation v. EPA, 540 U.S. 461, 485 (2004) (affirming EPA's power to object with administrative orders to lax state permits issued in violation of "Best Available Control Technology" requirement).

[134] Of course, with a preemptive unitary federal choice made by the legislature or an agency, that same institution could always revise its choice at a similar or greater level of procedural formality.

[135] Steven Shavell, *Liability for Harm Versus Regulation of Safety*, 13 J. LEGAL STUD. 357, 371 (1984) (exploring why compliance with regulatory requirements does not logically justify eliminating additional common law liability); *see also* Catherine M. Sharkey, Products Liability Preemption: An Institutional Approach 8–9 (Spring 2007) (unpublished manuscript, on file with the *New York University Law Review*) (discussing Shavell's analysis).

Court majority concluded in the recent *Bates* case, such common law incentives can reinforce and supplement the protections provided in regulatory regimes.[136] As discussed below in connection with the discussion of experimentalist regulation,[137] common law liability regimes add a crucial set of institutional actors. Plaintiffs and their lawyers have incentives to challenge the status quo, ferret out error or misdeeds, and prompt change despite uninterested regulators, possibly ignorant public interest groups, and resistant industry. The ultimate decisionmakers—courts and juries—are also not invested in defending earlier regulatory actions.

In short, floor preemption limits choices for a subset of states, but embraces multilayered institutional arrangements and sets in motion virtually constant federal, state, and private stakeholder interactions. This institutional diversity, especially with saved common law regimes, allows for a substantial degree of decentralized decisionmaking and creates room for challenging the status quo.[138] Like biodiversity, which can reduce an ecosystem's vulnerability to wipe-out risks faced by monocultures,[139] floor preemption's institutional diversity and related interactions leave a salutary play in the joints and room for ongoing adjustment.

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136 Bates v. Dow Agrosciences L.L.C., 544 U.S. 431, 450 (2005) (rejecting industry preemption argument and stating that tort litigation "history emphasizes the importance of providing an incentive to manufacturers to use the utmost care in the business of distributing inherently dangerous items").

137 *See infra* Part III.C.

138 This interaction has led agencies in a number of recent high visibility settings to reexamine past actions and modify their course. *See, e.g.*, DAVID KESSLER, A QUESTION OF INTENT 250–60 (2001) (reviewing history of FDA's decision to attempt to regulate tobacco products, including contributions of private individuals); Rabin, *supra* note 110, at 2069 ("[I]f we are substantially dependent on the tort system to provide the educational function of revealing massive cover-ups of health information by industries like asbestos . . . then it is undeniably the case that tort law is serving a positive function of some consequence."); *see also* McGarity, *supra* note 120 (manuscript at 9–16) (reviewing feedback loop between tort litigation and risk regulation).

139 Biodiversity insulates ecosystems from massive losses, especially in comparison to ecosystems with diminished biodiversity. *See, e.g.*, Shahid Naeem & Andrew C. Baker, *Paradise Sustained*, NATURE, Jan. 27, 2005, at 370 (describing role of biodiversity in stabilizing ecosystems); Kevin Shear McCann, *The Diversity-Stability Debate*, NATURE, May 11, 2000, at 228 (in survey of related literature, proposing that decrease in biodiversity, particularly through extinction, will result in decrease in ecosystem stability); David Tilman, Clarence L. Lehman & Charles E. Bristow, *Diversity-Stability Relationships: Statistical Inevitability or Ecological Consequence?*, 151 AM. NATURALIST 277, 277 (1998) (describing hypothesis that ecological stability depends on biological diversity).

2. *Unitary Federal Choice Preemption's Contrasting Lack of Institutional Diversity*

Unitary federal choice preemption does not leave room for deviation and tailoring. By definition, if a statute or regulatory action precludes different state choices and also eliminates the risk of common law liabilities, it constitutes a unitary federal choice. The very singularity and finality of this choice leaves little or no opportunity for further regulatory interaction, as the agency preemption claims, LNG siting provisions, and debate concerning greenhouse gas and chemical facility regulation illustrate.[140]

That is not to say that there is never a reason to prefer a unitary federal choice. A unitary federal choice will undoubtedly benefit the targeted industry, and perhaps for a time even those protected by a regulatory act. The final choice creates complete regulatory stability, eliminating the risk of other institutions modifying that choice or common law liability prompting reexamination. It reduces costs associated with battling over regulation in numerous venues. As surely intended, it reduces costs faced by risk producers and may ultimately result in more goods in the marketplace, possibly at lower prices. It may also, as in the LNG setting, overcome free-rider temptations, where all jurisdictions hope others will provide an industry or product that many jurisdictions desire or need.[141] A single federal decisionmaker, given its broader constituency, may overcome such parochialism.

A unitary federal choice also will likely create benefits for federal actors. If Congress or an agency becomes the only game in town, it will attract greater attention from affected industry as well as other supporting or opposed stakeholders.[142] Legislators may benefit from electoral or monetary support.[143] Agencies may be able to secure expanded budgets or even engage in outright favoritism to affected industry in exchange for the usual rewards of regulatory capture—

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[140] *See supra* Part II.D.

[141] These and other rationales for complete preemption are further discussed *infra* in Part IV, where this Article places the floor/ceiling differences and implications into a broader consideration of other preemption variables.

[142] *Cf*. Nina A. Mendelson, Chevron *and Preemption*, 102 MICH. L. REV. 737, 794–95 (2004) (noting that asserting preemption would enable federal agencies to ask for larger budgets and greater numbers of employees).

[143] With respect to the motivations of legislators, some scholars offer a rather skeptical perspective, *see, e.g.*, FRED S. MCCHESNEY, MONEY FOR NOTHING 45–66 (1997) (collecting tales of legislators benefiting from threatening legislation unfavorable to interest groups), while others offer a more generous view, *see, e.g.*, MARTHA DERTHICK & PAUL J. QUIRK, THE POLITICS OF DEREGULATION 239–42 (1985) (discussing leadership of legislators in deregulating airline, trucking, and telecommunications industries).

electoral support for the administration in power, revolving doors from agencies to industry, and a reduced risk of embarrassment that might result from more adversarial modes of regulatory exchange.[144] A stringent unitary federal choice could also engender political support from sympathetic public interest groups. These political benefits for regulators and legislators, however, may not be in the public's interest.

In assessing the efficacy of unitary federal choice preemption and its institutional implications, one must consider that few statutes explicitly preempt state common law actions.[145] Most statutes say nothing precluding common law liabilities. Given the centrality of this issue and ongoing tort reform debates, a serious question about fealty to legislative supremacy can be raised in objection to agency or Department of Justice claims that an agency's action should have final preclusive or preemptive effect.[146] For this reason, recent scholarship soundly suggests that before broad federal preemption power is found or claimed, it should be subjected to a strong "clear statement" requirement.[147] Regulated industries eager for preemptive regulation would need to overcome this default rule by pushing for open legislative debate and a victory in the legislature rather than engaging in the more familiar and effective industry blocking tactics.[148] The federal legislative forum is one where more dispersed and less wealthy public interest groups also may find more advantages due to how they can consolidate their resources and attention.[149] Furthermore, in the fed-

144 *Cf.* WILLIAM A. NISKANEN, JR., BUREAUCRACY AND REPRESENTATIVE GOVERNMENT 36–42 (1971) (positing that most regulators seek to expand their budgets for variety of reasons). Others call for greater nuance in assessing the motivations of regulators. *See, e.g.*, Buzbee, *Recognizing the Regulatory Commons*, *supra* note 9, at 45–46 (discussing criticisms of Niskanen and other theories regarding regulator motivation).

145 *See supra* note 36 and accompanying text (discussing and citing rare instances of "complete preemption").

146 *See* Zieve & Wolfman, *supra* note 85.

147 *See, e.g.*, Bradford R. Clark, *Separation of Powers as a Safeguard of Federalism*, 79 TEX. L. REV. 1321, 1425–26 (2001) (interpreting clear statement antipreemption requirement as means to "ensure compliance with federal lawmaking procedures"); Roderick M. Hills, Jr., *Against Preemption: How Federalism Can Improve the National Legislative Process*, 82 N.Y.U. L. REV. 1, 28 (2007) (asserting that clear statement burden will lead affected industry to make arguments in most visible of fora, eliciting "an open and vigorous debate on the floor of Congress"); Young, *supra* note 23, at 164–69 (advocating revival of presumption against preemption and "clear statement" rules for limiting agencies' preemption powers).

148 Hills, *supra* note 147, at 15. Hills acknowledges this proposal's similarity to the "penalty default" rule advocated in Einer Elhauge, *Preference-Eliciting Statutory Default Rules*, 102 COLUM. L. REV. 2162, 2165–66 (2002).

149 Stewart, *supra* note 49, at 1213–15; *cf.* Buzbee, *supra* note 6, at 112 (noting that one factor favoring federal-level environmental regulation is that environmental interest groups have been most effective on that level during past thirty years); Esty, *supra* note 9,

eral political sphere, issues are often more salient than in decentralized fora where they receive less public scrutiny.[150] As Professor Hills argues, federal legislators are most likely to seek to "organize and inspire voters" and to use "abstract rhetoric of justice and policy to mobilize constituents."[151]

Although some private and public actors benefit from unitary federal choice preemption, this form of preemption comes with significant costs. Unitary federal choice preemption completely eliminates any of the interaction retained by floor preemption. It could, theoretically, be accompanied by delegated program tailoring by states, but recent ceiling preemption assertions have not utilized such structures. Moreover, only those states desiring the exact decision reached by the federal actor imposing a unitary federal choice ceiling will be happy with such a choice. When one considers common regulatory failures and dysfunctions, many of which explain embrace of federalist schemes of government, additional costs of such broad preemption become apparent. The next section turns to such an examination, illuminating the discussion with scholars analyzing experimentalist, benchmarking, or "rolling rule" regulatory regimes.

C. Regulatory Failure Risks, Preemption Choices, and Experimentalist Aspirations

Multilayered federalist schemes and federal floor preemption may seem far from idealized experimentalist regulation, where regulators reexamine their choices, measure results, and improve regulatory choices in an ongoing way.[152] In reality, however, floor preemption's institutional diversity may create a better chance of success than the somewhat heroic roles assigned to regulators in experimentalist regulatory settings and related scholarship. More particularly, in contrast to federal unitary choice preemption and sometimes unrealistic experimentalist aspirations, floor preemption can work by promoting reexamination and virtually precluding stasis despite human and institutional flaws such as inertia, selfishness, short-sightedness, and lack of willpower.[153] Again, there remains a place for the more com-

at 598, 610–11 (discussing arguments by public choice theorists that environmental interest groups are underrepresented at local levels but overrepresented at federal level).

150 William W. Buzbee, *Brownfields, Environmental Federalism, and Institutional Determinism*, 21 WM. & MARY ENVTL. L. & POL'Y REV. 1, 44–45 & nn. 170–78 (1997) (citing and discussing political science literature on issue salience).

151 Hills, *supra* note 147, at 15–16.

152 *See supra* note 94 (citing prominent examples of experimentalist regulatory scholarship).

153 *See, e.g.*, Matthew D. McCubbins et al., *Structure and Process, Politics and Policy: Administrative Arrangements and the Political Control of Agencies*, 75 VA. L. REV. 431, 440

plete preemptive regulation found in unitary federal choice preemption or preemptive approaches linked to design mandates; such preemption choices, however, are prone to exacerbate common forms of regulatory dysfunction, especially the rigidity bemoaned by experimentalist scholars.

The litany of forms and causes of agency failure is amply documented. The experimentalist literature devotes substantial attention to these flaws, as have other authors,[154] regardless of their political background or general attitude towards risk and regulation. As further explored below,[155] agencies fall short for many reasons beyond their control, including excessively aspirational or symbolic statutory goals, a surfeit of delegated tasks, insufficient funding for those tasks, and unduly rigorous judicial review.[156] Legislation seldom requires or rewards agency reexamination and assessment of past action.[157] Agencies also can fall prey to common bureaucratic temptations such as focusing on the most immediate crisis or avoiding hot-button issues

(1989) (arguing that to steer agencies to desired outcomes, legislatures can either write "into the law precisely what the agency is to achieve and how it is to do so" or they can "constrain an agency's policies . . . by enfranchising the constituents of each political actor"); Matthew D. McCubbins & Thomas Schwartz, *Congressional Oversight Overlooked: Police Patrols Versus Fire Alarms*, 28 AM. J. POL. SCI. 165, 166 (1984) (developing theory that participation and litigation rights serve as "fire alarms" that alert legislators if laws are not being implemented).

154 *See, e.g.*, William W. Buzbee, *Regulatory Underkill in an Era of Anti-Environmental Majorities*, *in* STRATEGIES FOR ENVIRONMENTAL SUCCESS IN AN UNCERTAIN JUDICIAL CLIMATE 141 (Michael Allan Wolf ed. 2005) (arguing that environmental regulation can be derailed by various indirect actions of agencies resulting in "regulatory underkill," even without any direct legislative action weakening relevant laws); Daniel A. Farber, *Taking Slippage Seriously: Noncompliance and Creative Compliance in Environmental Law*, 23 HARV. ENVTL. L. REV. 297 (1999) (discussing how "slippage" from statutory language and aspirations renders law less rigid and burdensome than indicated by statutory and regulatory edicts).

155 *See infra* Part IV (elucidating other preemption variables and risks of any rigid regulatory choice).

156 *See, e.g.*, JERRY L. MASHAW & DAVID L. HARFST, THE STRUGGLE FOR AUTO SAFETY 189–94 (1990) (highlighting reasons for regulatory failure by looking at U.S. National Highway Traffic Safety Administration and arguing that it stopped revisiting its regulations after 1976); Cary Coglianese, *Empirical Analysis and Administrative Law*, 2002 U. ILL. L. REV. 1111, 1126 ("In some cases, agencies have allegedly retreated altogether from efforts to establish new regulations."); Thomas O. McGarity, *Some Thoughts on "Deossifying" the Rulemaking Process*, 41 DUKE L.J. 1385, 1436 (1992) ("Given all of the barriers to writing a rule in the first place, few agencies are anxious to revisit the process in light of changed conditions or new information.").

157 *Cf*. Leslie Kux, *Looking Back at Existing Rules: Agency Perspectives on Analysis Requirements*, 48 ADMIN. L. REV. 375, 378 (1996) (analyzing administration's objection to certain bills proposing lookback provisions); McGarity, *supra* note 156, at 1401 ("A trip back to the drawing board . . . can consign [the project] to oblivion as the agency's limited staff resources are committed to other projects, institutional memory fades, and more immediate priorities press old rulemaking initiatives to the bottom of the agenda.").

likely to engender criticism or rejection.[158] When they do act, agency information limitations can lead to error, inordinate reliance on information provided by those regulated, and unduly lax regulation.[159] As a result, agencies frequently miss statutory deadlines and neglect altogether tasks that are not subject to statutory mandates.[160]

Agencies are particularly unlikely to revisit past regulatory actions absent some outside force prompting such reexamination.[161] Regulatory reexamination can reveal error and cause political embarrassment. Legislators tend to focus on and be rewarded for new actions, not for reexamining past decisions or encouraging regulators to do so.[162] The risk of agency capture can further lead regulators to

158 *See* Richard J. Lazarus, *The Tragedy of Distrust in the Implementation of Federal Environmental Law*, LAW & CONTEMP. PROBS., Autumn 1991, at 311, 359 ("Intense agency oversight, repeated regulatory failure, and frequent controversy likewise discourage agency initiative."); McGarity, *supra* note 156, at 1390–92 (finding that once "legal and political dust has settled, an agency is inclined to let sleeping dogs lie," and that this ossification has "reduce[d] agency incentives to experiment with flexible or temporary rules").

159 These are key elements in the experimentalist critique of traditional regulatory methods. For scholarship in the experimentalist vein, see the sources cited *supra* note 94.

160 *See* Alden F. Abbott, *The Case Against Federal Statutory and Judicial Deadlines: A Cost-Benefit Appraisal*, 39 ADMIN. L. REV. 171, 177 (1987) (finding that individuals institute "[c]omplaints alleging unreasonable delay brought against federal agencies . . . rely[ing] upon specific statutory guarantees, the APA, or both" when agencies neglect tasks); Bradley C. Karkkainen, *Information-Forcing Environmental Regulation*, 33 FLA. ST. U. L. REV. 861, 897 (2006) (stating that when regulatory agencies fail to perform, citizens can institute deadline suits to "secure strict enforcement of conventional regulatory rules and standards, often in circumstances where the government enforcement agency has overlooked the violation, whether inadvertently or as a matter of policy or enforcement priorities"); *see also* Sidney A. Shapiro & Robert L. Glicksman, *Congress, the Supreme Court, and the Quiet Revolution in Administrative Law*, 1988 DUKE L.J. 819, 839 (stating that Congress has implemented statutory "hammers" and specific substantive criteria to counter environmental agencies' lack of action); Sarah B. Van de Wetering & Robert W. Adler, *New Directions in Western Water Law: Conflict or Collaboration?*, 20 J. LAND RESOURCES & ENVTL. L. 15, 37 (2000) (finding that Colorado Fish Recovery Programs will not work unless "regulatory hammers are retained, and the resulting agreements are enforceable in some meaningful way").

161 *See supra* note 160.

162 Enactment of a lookback provision requiring agencies to assess existing regulations was a key element in the 104th Congress's failed efforts to pass regulatory reform legislation. Statements by supporters of the proposed legislation reflected dissatisfaction with agencies' failure to reexamine past regulatory choices. *E.g.*, H.R. REP. NO. 104-284, at 10 (1995) (noting that presidential mandates have failed to regulate agency actions and thus that lookback provision is necessary to reduce "the number of duplicative or unnecessary regulations now on the books" and to "discourag[e] unnecessary rules in the future"); 141 CONG. REC. 2748 (1995) (statement of Sen. Roth) ("[T]he regulatory process itself has become too cumbersome, unresponsive, and inefficient."); 141 CONG. REC. 18,348 (1995) (statement of Sen. Thompson) ("When the whim suits them, Federal agencies comply with the Executive order. When it does not, they do not. In most cases, agencies are not making careful assessments of the positive and negative impacts of their regulations."). *See generally* Kux, *supra* note 157, at 375 (highlighting 104th Congress's attempts to establish lookback provisions for regulatory agencies). For other discussions of problems of

be unduly sympathetic to dominant interest groups and hence be wary of change.[163]

Even without capture pathologies, all stakeholders and agencies will invest in the regulatory status quo, leading to a resistance to change that is totally apart from what might be ideal. Such path dependence makes all rules somewhat sticky.[164] The net effect of these factors is that regulations tend to accrete,[165] and the first significant regulatory action on an issue may sit unrevised for years, long after the state of the art has changed.[166]

Enforcement and implementation laxity is a related risk.[167] Any regulatory policy needs to be assessed against these pervasive and common forms of regulatory failure. Especially in the risk regulation setting—where zero-sum decisions and post-action litigation are the norm—missed deadlines, obsolete standards, and underenforcement are common.[168]

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legal accretion, see generally GUIDO CALABRESI, A COMMON LAW FOR THE AGE OF STATUTES (1982); J.B. Ruhl & James Salzman, *Mozart and the Red Queen: The Problem of Regulatory Accretion in the Administrative State*, 91 GEO. L.J. 757 (2003).

163 *See* McGarity, *supra* note 156 (discussing roots of regulatory ossification problem).

164 *See* Clayton P. Gillette, *Lock-in Effects in Law and Norms*, 78 B.U. L. REV. 813, 817 (1998) (finding that administrative law is subject to "lock-in" and "path dependence" because "regulations provide signals of acceptable behavior and promise rewards to those who conform" and thus threaten "evolutionary processes that might return still greater rewards"); Ruhl & Salzman, *supra* note 162, at 818 ("Over time, the accretion of rules will present more regulatory decision nodes, which will add to the path dependence of present regulatory positions, and will therefore limit the options for new rules."). *See generally* Donald T. Hornstein, *Complexity Theory, Adaptation, and Administrative Law*, 54 DUKE L.J. 913, 926–28 (2005) (explaining how scholarly attention to "the insights of sensitivity to initial conditions and path dependence" has helped explain "features of the administrative state such as the overaccumulation of rules and 'lock-in' effects (citations omitted)); Jeffrey J. Rachlinski, *A Positive Psychological Theory of Judging in Hindsight*, 65 U. CHI. L. REV. 571 (1998) (discussing industry investment and link to status quo bias).

165 *See* Ruhl & Salzman, *supra* note 162, at 762 (analyzing reasons "massive, detailed, and encompassing" regulatory law will develop over time, and discussing associated problems created).

166 *See* McGarity, *supra* note 156, at 1390–93, 1436 (illustrating how agencies are often "inclined to let sleeping dogs lie" rather than go through cumbersome rulemaking process, even when new scientific or technical knowledge would warrant change).

167 *See, e.g.*, Buzbee, *supra* note 154, at 151 ("[M]ere promulgation of regulations is many steps removed from actual implementation and enforcement of the law and the new regulations."); Farber, *supra* note 154, at 299–300 (defining lack of enforcement as "negative" slippage and creative interpretation and renegotiation of standards to make compliance easier as "affirmative" slippage).

168 Risk regulation involves interests and dynamics that distinguish it from other forms of government action, such as the provision of services or the management of federal lands and property. Risk regulation, broadly defined to include not just risks to health or the environment, but risks of monetary loss and market threats as well, tends to require government action in settings involving clashing interests. For example, environmentalists and industry seek divergent outcomes. Securities firms and consumer groups will often disagree about the degree of oversight and regulatory constraints. Health advocates and phar-

The traditional answer to these common forms of regulatory dysfunction, which are especially prevalent in the area of risk regulation, has been to create public participation rights, mandate regulatory transparency, enact detailed statutory requirements, add statutory deadlines that require regulatory reexamination of past actions, and grant causes of action to challenge government action or inaction.[169] Still, pervasive litigation threats and the delay associated with litigation can make these responses of limited efficacy. Antidotes to stasis and regulatory imprudence have been, at best, partially effective.

Experimentalist forms of regulation advocated by Professor Sabel and others are offered as an antidote to these common forms of regulatory stasis and failure. They call for regulators to act in ways modeled on Toyota's innovative and decentralized production line practices that have now been widely adopted.[170] Regulators should reexamine past actions, monitor the effects of their choices, benchmark best practices, and improve their regulatory choices.[171] This is, indeed, an aspiration all can embrace. Where there is a ready mea-

maceutical companies dispute how to deal with risks associated with new drugs. In all of these settings, the government's role is to make choices where one side or the other will feel a loss; zero-sum outcomes, not win-win regulatory choices, are the rule.

In addition, while interest groups are arrayed on both sides, resources and monetary incentives are not equally distributed. Industry, confronted with the high costs of any regulatory action, will have incentives and monetary resources adequate to participate throughout the legislative or regulatory process. In contrast, citizens and nonprofits may care deeply, but tend to be outmatched. Their ability to challenge unfounded regulatory actions by agencies, especially in court, gives them enough leverage so they cannot be ignored. These disparate interests and genuinely divergent preferences mean that post-action litigation is a common threat.

The line between risk regulation and economic regulation is often fuzzy. *See* STEPHEN BREYER, REGULATION AND ITS REFORM 7 (1982) (stating that to distinguish economic and noneconomic regulation is "difficult and the subject of controversy"). A recent proposal to create state and federal regulations that would protect citizens from unduly dangerous financial products and services provides an example of how risk regulation can bleed into economic regulation. *See* Gretchen Morgenson, *Beware of Exploding Mortgages*, N.Y. TIMES, June 10, 2007, at B1 (discussing risks of adjustable rate "exploding mortgages" and proposed regulations to control that risk).

169 *See, e.g.*, Richard B. Stewart, *The Reformation of American Administrative Law*, 88 HARV. L. REV. 1669, 1713–55 (1975) (explaining interest-representation model of monitoring agency performance); *supra* note 160 (discussing deadlines, regulatory hammers, and citizen suits); *cf.* Michael Herz, *Judicial Textualism Meets Congressional Micromanagement: A Potential Collision in Clean Air Act Interpretation*, 16 HARV. ENVTL. L. REV. 175, 179 (1992) (explaining how increased specificity of statutes governing regulatory agencies seems driven, in part, by congressional intent to reduce judicial deference to agency decisions under *Chevron* analysis).

170 Dorf & Sabel, *supra* note 94, at 292–310 & nn. 87–88 & 111. Specifically, Professors Dorf and Sabel argue that "learning-by-monitoring solutions," such as those used by Japanese automakers, "are well fitted to the characteristic problems of modern polities as these appear in the travails of post-New Deal institutions." *Id.* at 314.

171 *Id.* at 299–300.

sure for success and improvement, as the profit motive provides in private manufacturing, then the many human flaws that could derail such virtuous and energetic self-criticism can be overcome.

In the field of regulation, similar self-interested reasons for reexamination and change may be lacking. To overcome this conundrum, experimentalist regulatory regimes and proposals tend to rely, at some point, on a regulatory actor whose job is to collect information about best practices, disseminate that information, and possibly wield coercive (yet not rigid) power to prompt others to adopt those best practices.[172] The literature does not explain, however, why self-interested regulators would do so. In practice, a diversity of actors, and latitude to experiment, are essential for such regulatory strategies to succeed.[173] Somewhat paradoxically, experimentalist forms of regulation are rooted in a criticism of regulators yet simultaneously place great faith that with interaction and better information, regulatory failures will abate.[174]

A major question is thus whether experimentalist regulation is subject to incentives or rewards sufficient to overcome flaws inherent in all human beings and governments. If one accepts that all human beings and collective organizations are subject to incentives that can clash with public-regarding goals, then it is no answer to rely on technocratic faith in zealous experts. Some motive or incentive for improvement must exist.

In short, to embrace unitary federal choice preemption or, for that matter, the promise of experimentalist regulation, one must have great faith that regulatory actors will have uncommon virtue and knowledge. With unitary federal choice preemption, all power resides in one regulator (or the legislature). Sound regulatory results depend on that regulator's overcoming interest group distortions of the regulatory process, agency self-interest, information limitations, and inertia to make a choice that is optimal in its first attempt at regulation. One must also trust the regulator or actor to revisit that choice and ensure it is up to date. Only deferential judicial review creates the modest possibility that an agency's selection of unitary federal choice preemption will not become the law. Post-regulatory interactions with other institutions will be minimal.

Assessed in light of these common regulatory failures and scholarly aspirations for improving the regulatory process, unitary federal choice preemption looks likely to be a disaster. A single final choice

172 *Id.* at 354.

173 *Id.* at 298–300, 314.

174 *See id.* at 336–38, 354–55, 374–75 (discussing role of government information pooling and need for "peer inspectorate").

by the legislature or a regulator could preclude reexamination or related actions by others. Instead of a diversity of actors, one actor makes a binding choice. Little or nothing in the resulting structure creates conditions conducive to reexamination and innovation.

Floor preemption, although criticized by advocates of more flexible and dynamic experimentalist regulation, begins to look like a second-best solution to these pervasive forms of regulatory failure.[175] It is far from the ongoing "rolling rules" regime to which experimentalists aspire.[176] Nevertheless, floor preemption may overcome the excessively optimistic expectations about regulators and citizens that seem to characterize experimentalist scholarship, while also creating incentives to overcome common forms of regulatory failure. As discussed earlier,[177] floor preemption or related federal regulatory approvals that retain the possibility of state and local regulatory action and common law regimes undoubtedly serve to supplant the preferred choices of some states. Other states, however, will embrace the regulatory choice.

Furthermore, in the implementation and enforcement process in areas like environmental law, states that retain discretion will necessarily interact in an ongoing way with federal regulators and private stakeholders. Between states choosing to do more than is federally required and private or government changes prompted by common law liabilities, substantial latitude is left for experimentation by private and government actors. Indeed, the mere existence of this policy option means that citizens or groups seeking more protective regulation or safer products have ongoing incentives to gather relevant information and to seek such a regulatory choice; industry and government actors will need to prepare responses, rather than just rest in reliance on a rigid status quo. This will facilitate experimentation with different policy choices in the real world.

Retention of the possibility of common law liability is a particularly valuable counter to the litany of agency failures.[178] Common law liability can provide an especially strong real-world impetus for reexamination that is often lacking in experimentalist regulation, and certainly lacking in settings of unitary federal choice preemption. The

175 *See, e.g.*, *id.* at 315, 354–55 (broadly criticizing regulatory standard setting and dysfunctions associated with traditional regulatory process). Later, Dorf and Sabel offer more nuanced praise of the Clean Air Act's use of "joint federal/state responsibility that functions largely according to principles of democratic experimentalism." *Id.* at 434.

176 *Id.* at 350–54.

177 *See supra* text accompanying notes 107–08.

178 *See* sources cited *supra* note 138 (discussing regulatory benefits flowing from agency involvement in common law litigation).

incentives of those injured and their lawyers, along with the independence of judges and juries, are critical. In many of the instances cited above, the goal of a monetary recovery by plaintiffs and their lawyers has led to civil discovery and the revelation of information not considered during earlier regulatory actions.[179] This information might have been overlooked, withheld, or perhaps not yet in existence during government review and action occuring years earlier. Product use and production externalities will reveal harms that may have been unknown.[180] Common law litigation can reveal such information. Common law liabilities can lead to private-sector adjustment and improvement and prompt agency reexamination.[181] In the absence of common law liability, similar incentives created by whistleblower protections, and "destabilization rights" granted by statute or regulation,[182] it is hard to see why producers or agencies would revisit their past work. It might eventually happen, but litigants motivated by a desire for compensation and who are unbeholden to industry or the government will pursue their investigations with zeal.

Viewed in light of these common forms of regulatory failure and the insights of experimentalist regulatory scholars, unitary federal choice preemption and floor preemption create substantially different risks and benefits. As experimentalist regulatory scholars advocate, effective regulation requires reexamination and adjustment. Regulatory mechanisms that operate via floor preemption can surely be subject to regulatory failure, but their institutional diversity reduces that risk. Unitary federal choice preemption, by contrast, is particularly vulnerable to regulatory failure.

IV
PREEMPTION CHOICE AND THE INNOVATION/CERTAINTY TRADEOFF

The dominant preemption choices of regulatory floors and unitary federal choice ceilings differ significantly in the room left for additional and different regulatory actions. The institutional diversity permitted by floor preemption creates benefits by allowing for change

179 *See supra* note 138; *see also* MARTHA DERTHICK, UP IN SMOKE: FROM LEGISLATION TO LITIGATION IN TOBACCO POLITICS (2d ed. 2005) (recounting battles over tobacco risks and interactions between legislative, regulatory, and common law actions).

180 *See supra* note 138.

181 *See* McGarity, *supra* note 120 (manuscript at 6–9) (explaining "feedback loop" of litigation, whereby litigation-related investigations produce "information that is typically unavailable to agencies").

182 Sabel & Simon, *supra* note 94, at 1020 (defining destabilization rights in examination of how impact litigation can lead to unsettling of status quo).

and innovation, while also serving as an antidote to regulatory inertia and error. Nevertheless, there are two obvious, strong counterarguments to that proposition.

The first is that a great benefit, and indeed frequent purpose, of preemption is to create a more certain regulatory terrain around which businesses can plan. What this Article calls and praises as "diversity" is, from the perspective of industry and other business interests, a harmful lack of regulatory certainty.[183] In essence, the room left for change and multilayered regulatory structures is arguably in tension with rule-of-law values that stress clear mandates, legal stability, and distinct lines of accountability.[184] The counterargument also relates to the incompleteness of the floor/ceiling distinctions analyzed in Part III; institutional diversity and interaction may be regulatory goods, but other preemption variables must be factored into the analytical equation.

This Part therefore explores how preemption choice seemingly turns primarily on this innovation/certainty tradeoff, but in fact involves a wide array of other significant variables that should influence the preemption choice decision. This Part thus places the floor/ceiling distinction and the arguments for asymmetrical regulation into a broader institutional analysis of preemption choice. Perhaps surprisingly, preemption scholarship to date has focused mainly on court doctrine and logic,[185] preemption's implications for legislative dynamics,[186] and arguments that federal preemptive power is justified as an antidote to states' effectively exporting their burdens to other states.[187] This previous scholarship casts significant light on judicial preemption doctrine, but devotes little attention to the antecedent

183 A variant on this argument is Professor Schwartz's discussion of the inefficacies associated with disparate state standards, in which he questions the presumption that Congress would want additional state regulation and common law. *See* Schwartz, *supra* note 110, at 6–10.

184 *E.g.*, FREDERICK SCHAUER, PLAYING BY THE RULES: A PHILOSOPHICAL EXAMINATION OF RULE-BASED DECISION-MAKING IN LAW AND IN LIFE §§ 7.3, 7.5 (1991) (arguing for rule-based decisionmaking from standpoint of efficiency and stability); Antonin Scalia, *The Rule of Law as the Law of Rules*, 56 U. CHI. L. REV. 1175 (1989) (extolling advantages of clear, predictable, general rules).

185 *See, e.g.*, Merrill, *supra* note 40, at 166–68 (arguing that current preemption doctrine is both "too abstract and too particular," and proposing default rules that judges could use in resolving particular cases and controversies); Nelson, *supra* note 9, at 231–32 (criticizing Supreme Court's jurisprudence in light of preemption doctrine's grounding in Supremacy Clause).

186 *See* Hills, *supra* note 147, at 22 (arguing that preemption suppresses political entrepreneurship).

187 *See* Michael S. Greve, *Federalism's Frontier*, 7 TEX. REV. L. & POL. 93, 101 (2002) (exploring risk of "interstate exploitation" where lawsuits in one state victimize producers from other jurisdictions); Issacharoff & Sharkey, *supra* note 18, at 1356–57 (arguing that in

political-legal preemption choice. That choice turns largely on the nature of the institutional settings and attendant institutional implications of how a standard is set.[188]

This Part seeks to develop a more institutionally sensitive framework for conceptualizing preemption, illuminating the floor/ceiling distinction and the innovation/certainty tradeoff with special attention to institutional actors and the nature of the underlying regulatory actions. Only with sensitivity to this broader institutional matrix can one begin to see the inadequacy of broad-brush claims about preemption's rationales. Like the previous Part's illumination of the implications of regulatory floors and unitary federal choice ceilings, this Part's analysis reveals the limited settings in which unitary federal choice ceiling preemption is justified.

Preemption choice necessarily involves underlying political judgments about institutional capacities. A choice to preempt, and the nature of that preemption choice, reflect a judgment that the federal actor and its regulatory actions will achieve better outcomes than would result from retaining latitude for different actions by state actors and institutions. It also involves a correlative judgment about the desirability of encouraging regulatory innovation versus providing certainty with a single regulatory answer binding on all. These judgments, implicit in preemption choices, turn largely on questions of institutional trust.

The federal/state choice and the linked innovation/certainty tradeoff cannot be resolved with attention to the actors only or to some generally stated preference for certainty. As demonstrated by Professor Komesar, Dean Rubin, and others, attention to relative institutional competence is critical, but competence is context sensitive.[189] No single actor or arrangement will work well in responding

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preemption cases Supreme Court has attempted to protect national market from externalities of state legislation).

[188] For two articles that predate the recent wave of ceiling preemption actions and focus more on political preemption choice than the rationales and case law of judicial preemption, see John P. Dwyer, *The Role of State Law in an Era of Federal Preemption: Lessons from Environmental Regulation*, LAW & CONTEMP. PROBS., Summer 1997, at 203; and Paul S. Weiland, *Federal and State Preemption of Environmental Law: A Critical Analysis*, 24 HARV. ENVTL. L. REV. 237 (2000).

[189] *See, e.g.*, NEIL K. KOMESAR, IMPERFECT ALTERNATIVES: CHOOSING INSTITUTIONS IN LAW, ECONOMICS, AND PUBLIC POLICY 5 (1999) (proposing that comparative institutional analysis is necessary to determine relative ability of each institution in achieving desired goal given circumstances); Buzbee, *supra* note 150, at 1–2 (showing how differences in historical circumstances for same institution on same issue can affect outcome); William W. Buzbee, *Sprawl's Dynamics: A Comparative Institutional Analysis Critique*, 35 WAKE FOREST L. REV. 509, 516–18 (2000) [hereinafter Buzbee, *Sprawl's Dynamics*] (noting that sensitivity to context, specifically historical context, is necessary to determine possible policy implications of choosing particular institution); James E. Krier, *The Tragedy*

to diverse challenges.[190] Preemption choice therefore must turn largely on the nature of the regulatory task involved. Many of the preemption-choice variables discussed here have analogs in literature on rules versus standards,[191] policymaking by rulemaking versus adjudication,[192] statutory versus common law responses to social ills,[193] and the optimal precision of rules.[194]

These dichotomies, however, cannot capture a number of distinctive facets of preemption choice. As developed here, preemption choice requires attention to several elements: (1) the regulatory target—is it a process, a level of risk, a product, or a behavioral man-

of the Commons, Part Two, 15 HARV. J.L. & PUB. POL'Y 325, 340 (1992) (stating that objective of comparative institutional analysis "is to determine what mixes of market and government, rights and regulation, work best under various circumstances"); Edward L. Rubin, *The New Legal Process, the Synthesis of Discourse, and the Microanalysis of Institutions*, 109 HARV. L. REV. 1393, 1406–07 (1996) (analyzing argument advanced in KOMESAR, *supra*, and concluding that it requires choosing among institutional alternatives on basis of issue-by-issue "comparative institutional analysis").

190 *See, e.g.*, NEIL GUNNINGHAM ET AL., SMART REGULATION: DESIGNING ENVIRONMENTAL POLICY 15 (1998) (arguing for combination of policy instruments); KOMESAR, *supra* note 189, at 271 (stating that one institution alone cannot produce optimal result); Daniel C. Esty, *Environmental Protection in the Information Age*, 79 N.Y.U. L. REV. 115, 146–48 (2004) (arguing that "mix of institutions," rather than single institutional strategy, is necessary to effectively address challenge of reducing toxic emissions); Esty, *supra* note 9, at 614 (stating that optimal strategy to regulate "the diversity of environmental harms" is combination of governmental and private "structures").

191 *See, e.g.*, Louis Kaplow, *Rules Versus Standards: An Economic Analysis*, 42 DUKE L.J. 557, 568, 571–77 (1993) (describing factors that influence formulation of rules and standards, and circumstances that lead to preference for one over another); Pierre J. Schlag, *Rules and Standards*, 33 UCLA L. REV. 379 (1985) (refining rules/standards debate).

192 *See, e.g.*, John F. Manning, *Constitutional Structure and Judicial Deference to Agency Interpretations of Agency Rules*, 96 COLUM. L. REV. 612, 665 (1996) ("Although *Chenery* does give agencies a presumptive legal right to implement their delegations through adjudication, practical or legal concerns may induce them to use rulemaking in particular contexts."); David L. Shapiro, *The Choice of Rulemaking or Adjudication in the Development of Administrative Policy*, 78 HARV. L. REV. 921, 926–42 (1965) (describing benefits of both rulemaking and adjudication).

193 *Compare* Roger Meiners & Bruce Yandle, *Common Law and the Conceit of Modern Environmental Policy*, 7 GEO. MASON L. REV. 923, 948–56 (1999) (extolling virtues of common law environmental protection while pinpointing shortcomings of statutory environmental protection), *and* Roger E. Meiners & Bruce Yandle, *Common Law Environmentalism*, 94 PUB. CHOICE 49, 50 (1998) (same), *with* Frank B. Cross, *Common Law Conceits: A Comment on Meiners & Yandle*, 7 GEO. MASON L. REV. 965, 965, 971–77 (1999) (arguing that free market environmentalists, such as Meiners and Yandle, present flawed and naïve exposition of virtues of common law protection). For a general analysis of common law and public law from a law and economics perspective, see GUIDO CALABRESI, A COMMON LAW FOR THE AGE OF STATUTES 163–66 (1982).

194 *See* Colin S. Diver, *The Optimal Precision of Administrative Rules*, 93 YALE L.J. 65, 67–76 (1983) (setting forth three dimensions to rules—transparency, accessibility, and congruence—and arguing that mix of these will produce optimal rule in different circumstances).

date?; (2) issues of scale, as in the dimensions of the regulatory challenge; (3) the informational demands relevant to the action; and (4) risks associated with the action or a failure to act. Such an analysis reveals reasons to disfavor unitary federal choice preemption in areas where contextual and informational complexities prevent a single, final, national judgment from being well tailored and durable. It also reveals areas where preemption is justified and areas where preemption choice presents a close question. Perhaps unsurprisingly, those close calls track areas where the courts' preemption jurisprudence has been most muddled.[195]

A. The Regulatory Target

Regulatory and legislative actions that require a preemption choice can involve an array of targets, but they can usefully be distilled into several major categories. Regulation may dictate *product design*, leaving little or no latitude for deviation. The more rigid the product mandate, especially for products with a large market, the greater the justification for a single rule that provides certainty, economies of scale, and avoidance of market balkanization.[196] Closely related are the rare, but much maligned *technology mandates*, where regulation dictates exactly which technology should be used to address a risk. This is a quintessential form of frequently criticized "command and control regulation" but is actually quite rare in the law, despite industry's frequent support for the ease of compliance it affords.[197] Other regulation may target *process* by setting parameters for how, for example, a workplace should operate, waste should be handled, or a municipality should address certain risks. Here, a single rule may draw upon the special expertise of the rule giver, but may involve far more context-sensitive judgments given the inherent variety of business and industry processes.

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[195] *E.g.*, Noah, *supra* note 116, at 2157–59 (attempting to parse muddled jurisprudence regarding preemption of state tort actions by FDA regulation of pharmaceutical products); *see also* Riegel v. Medtronic, Inc., 451 F.3d 104, 118–20 (2d Cir. 2006) (closely parsing FDA approval and review procedures to determine preemptive impacts of FDA actions), *cert. granted*, 127 S. Ct. 3000 (U.S. June 25, 2007) (No. 06-179).

[196] Merrill, *supra* note 40 (seeing concern with market balkanization in judicial preemption doctrine).

[197] *See, e.g.*, Dorf & Sabel, *supra* note 94, at 349–50 (arguing that until recently technology standards were based on industry compromises); Keohane et al., *supra* note 130, at 357–67 (discussing "supply" incentives for particular regulatory instrument choices); Wendy E. Wagner, *The Triumph of Technology-Based Standards*, 2000 U. ILL. L. REV. 83, 88–90 (describing technology-based standards and their resulting emission or effluent limitations).

Regulation also can set *performance standards*, dictating a level of some source of risk, such as permissible concentrations or levels of pollutants or impurities in food. The wisdom of such standards will depend in part on the localized benefits of such regulation as well as on the expertise and resources of the rule giver. For example, setting standards for emissions of pollutants by particular industries based on an assessment of what can be accomplished with "best available technology" requires huge investments of time, money, and technological knowledge.[198] Well-funded industries and motivated nonprofits will stand ready to litigate after lengthy rulemaking.[199] The complexity of the regulatory task coupled with these attendant litigation costs will discourage regulation by individual states.

Also found in regulation are *behavioral mandates*, pursuant to which certain actions are required or prohibited. Behavioral mandates can overlap with regulation of process, but may have a greater focus on individual behavior, such as prohibitions against racism in employment settings or midnight dumping of hazardous wastes.[200] Although behavioral mandates can be another form of command-and-control regulation, they are also found in laws regulating behavior (such as race discrimination) that is perceived as virtually always worthy of condemnation.[201]

B. Issues of Scale

Issues of scale are always relevant to the preemption choice. Here, scholarship on federalism sometimes focuses on only one facet of federalism, such as the location of pollution,[202] or on one activity in

198 *See* Wagner, *supra* note 197, at 94–96 (noting considerable demands of standard setting but arguing that it is comparatively less demanding than other seemingly more ideal forms of regulation).

199 *See* Bruce A. Ackerman & Richard B. Stewart, *Reforming Environmental Law*, 37 STAN. L. REV. 1333, 1333–34, 1341–64 (1985) (describing how agency determinations of "complex scientific, engineering, and economic issues regarding the feasibility of controls on hundreds of thousands of pollution sources . . . . provide a fertile ground for complex litigation"); Howard Latin, *Ideal Versus Real Regulatory Efficiency: Implementation of Uniform Standards and "Fine Tuning" Regulatory Reform*, 37 STAN. L. REV. 1267, 1270 & n.17 (1985) (describing how powerful interests are at stake in agency regulation and create incentives for litigation).

200 *See, e.g.*, Solid Waste Disposal Act § 3008, 42 U.S.C. §§ 6928(d), (g) (2000) (creating criminal and civil penalties for so-called midnight dumping).

201 *See* Civil Rights Act of 1964 § 701, 42 U.S.C. § 2000e-2 (2000) (creating causes of action and liability for prohibited forms of employment discrimination).

202 Jonathan H. Adler, *Jurisdictional Mismatch in Environmental Federalism*, 14 N.Y.U. ENVTL. L.J. 130, 133, 158–60 (2005); Henry N. Butler & Jonathan R. Macey, *Externalities and the Matching Principle: The Case for Reallocating Environmental Regulatory Authority*, 14 YALE L. & POL'Y REV. 23, 25 (1996); *see also* Buzbee, *Recognizing the Regu-*

determining federal power under the Commerce Clause.[203] Effective regulation and preemption choice, however, require a far more subtle attention to the many dimensions of risk creation and the conditions necessary for an effective regulatory response.[204]

Regulators must be sensitive to the cause of a harm. This includes both the direct source of a risk or harm and dynamics that provide incentives for activities creating the risk, such as interstate business competition or movement of goods. The scales of such causes will influence both the jurisdictions capable of an effective regulatory response, as well as choices about regulatory strategy.

Another relevant scale is the locus of the risk or harm that results from the activity.[205] Regulatory capacity and competence are also relevant, requiring attention to how jurisdictional lines do or do not match with risk-creating activities, relevant business dynamics, or the sites of harm. Benefits and harms of regulation may be borne both inside and outside the jurisdiction; perfectly tailored regulatory responses are seldom possible.[206]

Finally, because of these several scales at which regulation must operate, there are frequently several government actors with partial potential jurisdiction over the ill and the regulatory response. This can create a *regulatory commons problem*. No one regulator has regulatory primacy; thus, those demanding regulation will be uncertain where to turn, and no regulator will see regulatory action as inuring sufficiently to its benefit to justify a response.[207] At the other end of

latory Commons, *supra* note 9, at 4–7 (criticizing focus on exclusive locus of contamination and discussing other dimensions relevant to regulatory choice).

203 Buzbee & Schapiro, *supra* note 1, at 1206–09 (arguing that regulation can be conceptualized as akin to "regulatory prism"); *id.* at 1209–34 (analyzing Supreme Court doctrine from New Deal to present and discussing Court's increasingly "unidimensional" approaches after several decades during which diverse "activities" were found to justify use of federal power).

204 I have developed many of this Subsection's points at greater length elsewhere. *See* Buzbee, *Recognizing the Regulatory Commons*, *supra* note 9, at 7–36 (discussing scholarly inattention to "regulatory commons" problem, various factors relevant to regulatory action, and reasons why regulatory gaps may result where regulatory opportunity is shared among potential regulators, such as in settings of social ills like urban sprawl, climate change, or overfishing). For recent application of the "regulatory commons" concept in an in-depth examination of overfishing ills, see Hope M. Babcock, *Grotius, Ocean Fish Ranching, and the Public Trust Doctrine: Ride 'Em Charlie Tuna*, 26 STAN. ENVTL. L.J. 3, 4–6, 68–71 (2007). *See also* Hari M. Osofsky, *The Geography of Climate Change Litigation: Implications for Transnational Regulatory Governance*, 83 WASH. U. L.Q. 1789, 1791–95 (2005) (working with regulatory commons concept and identifying array of scalar mismatches confounding efforts to regulate climate change causes).

205 This is the focus of Butler & Macey, *supra* note 202.

206 Professors Issacharoff and Sharkey, *supra* note 18, at 1355, focus on the risks of a jurisdiction favoring its own and exporting regulatory costs to others.

207 Buzbee, *Recognizing the Regulatory Commons*, *supra* note 9, at 22–27.

the spectrum, many regulators may choose to act, thus creating fragmentation, overlapping obligations, and possibly confusing regulatory terrains.[208]

C. Information Variables

Preemption choice also needs to take into account the information demands of the regulatory judgment. Some forms of risk may pose similar hazards regardless of their source or location, and hence the relevant information depends mainly on the nature of the risk source, as is the case with asbestos, lead, and flammable products. Here the *risk source character* is key. The complexity or information demands associated with assessing the risk will influence which regulator should handle the problem, as well as the wisdom of entrusting such decisions to a single regulator. Of course, risk pathways vary, so study of the risk source character will never be the final regulatory judgment.[209] Where substantial technological or scientific research is needed, a national role is appropriate if states share roughly similar interests in the underlying source of risk. If all jurisdictions share an interest in that risk source, then all would otherwise be tempted to free ride on the actions of others.

In addition, leaving such research to one regulatory actor can lead to a benefit from economies of scale while further avoiding the need for scattered and possibly redundant investigation.[210] Especially where a central regulator can build expertise applied to an array of similar risks, as do the Centers for Disease Control and Prevention and the National Institute of Occupational Safety and Health, an already expert institution will involve far fewer startup costs when encountering a new challenge.[211] The information demands to assess the risk would not hinge on more localized knowledge if the risk source character was constant. In addition, a central actor can pool information and make it available for others. Unlike states, which might seek advantage from information, a national agency or Congress will typically see only benefit in assisting states and private

[208] Buzbee, *Regulatory Fragmentation*, *supra* note 9; Ruhl & Salzman, *supra* note 162.

[209] *See* Ohio v. EPA, 997 F.2d 1520, 1534–36 (D.C. Cir. 1993) (discussing exposure pathways and means to assess risk in challenge to amendments to CERCLA's National Oil & Hazardous Substances Pollution Contingency Plan).

[210] Professor Carlson observes that giving one large state, like California, the ability to adopt its own different standards for cars can similarly generate economies of scale and may have the added benefit of a concentration of similarly focused innovators who will benefit from geographical proximity and associated "agglomeration economies." *See* Carlson, *supra* note 44, at 314.

[211] Dorf & Sabel, *supra* note 94, at 354–56 (discussing advent of novel forms of organization through pooling of information by experimentalist administration).

actors with such information. Of course, initial allocations of such tasks to one entity do not resolve the issue of the desirability of allowing other actors to retain concurrent powers. By providing latitude for other actors to build on or refine such information, or to make different regulatory choices, benefits of economies of scale and avoidance of free-rider dynamics remain, but other motivated actors can interact and explore other informational wrinkles or fill informational gaps.

At the other end of the spectrum are choices that hinge on *context-rich judgments*. If a risk is heavily dependent on local settings such as physical configurations of a city or an industrial park, or different workplace attributes, then a uniformly imposed regulatory judgment is likely to be problematic. Relatedly, if a regulatory choice implicates localized economic tradeoffs, then a national rule risks matching poorly with optimal local choice, a peril captured by the concept of diseconomies of scale.[212] Another form of context-rich judgment arises where the regulatory target is a changeable risk, such as financial scams, or risks arising from products in an emergent industry or with a new class of drugs or medical products.[213]

Effects monitoring may also require close attention to varied contexts. Effects monitoring assesses the effects of regulated behavior and of a regulatory action. The nature of those effects will influence which actor or actors should serve in such monitoring roles. An additional informational variable is the creation or retention of checking and monitoring institutions that will have incentives or obligations to assess effects in an ongoing way. Such analysis needs to take into account not just regulatory standards, but also the reality of how laws and regulations are implemented and enforced.

D. Regulatory Risks

Any preemption choice must take into account pervasive sources of regulatory risk.[214] One cannot assume that a policy goal, once defined, will translate into successful action.[215] Confronted with an

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[212] *See* Stewart, *supra* note 49, at 1219–20 (discussing risk of overly large regulator imposing costs due to such diseconomies).

[213] Dorf & Sabel, *supra* note 94, at 315–16, emphasize the importance of embracing interactive experimentalist regimes utilizing a diversity of actors in settings characterized by "volatility" and "diversity."

[214] Part III discussed how retaining institutional diversity can serve as an antidote to regulatory dysfunctions. This section expands on Part III's analysis, offering a broader array of regulatory risks associated with preemption choice.

[215] *See* Buzbee, *supra* note 32, at 59–61 (discussing need for policy analysts not just to envision goals, but also to understand institutional roots and related incentives that cause social ills and hence must be factored into responses); *see also* Buzbee, *Sprawl's Dynamics*,

underlying societal concern or risk, political or regulatory actors may fail to act. This lack of protective regulatory action may cause harm. Conversely, such regulatory actors may commit a regulatory error by choosing imprudently, leading either to overly zealous or inefficient action or an action that itself causes unnecessary harms. Another risk is emphasized in a recent work by Professors Issacharoff and Sharkey: States may externalize regulatory harms by cracking down on sources of risk if the benefits of regulation are within the jurisdiction and the regulatory burdens fall elsewhere.[216]

Another risk is that changing conditions will render an earlier regulatory choice obsolete. With preemption choices, there is a risk of changes being missed either by a regulator that is too large or by one that is too small due to lack of resources. Changing information about a risk, or information about a changing risk, require either regulators that are nimble or regulators that are sensitive to actions and harms at different scales.

With limited resources and time, regulators may be tempted to leave initial judgments alone given the limited opportunities for credit-claiming that may arise when reexamining old work.[217] This links to the *status quo bias*. People's attachment to the status quo is a well-documented psychological phenomenon, meaning that individuals will generally oppose change.[218] In the setting of regulatory

supra note 189, at 510–11 *(*distinguishing between "goal choice" and need for comparative institutional analysis in assessing multifaceted challenges such as urban sprawl and its associated harms and benefits).

216 Issacharoff & Sharkey, *supra* note 18, at 1385–89; *see also* Greve, *supra* note 187, at 101 (exploring risk of "interstate exploitation"). This idea of exportation of regulatory or common law costs to other jurisdictions has intuitive appeal but rests on somewhat shaky foundations. Regulators or jurors in a poor state lacking producers subject to regulation or sanction may be more willing to punish or regulate risk creators than would a state with such producers. But with dispersed ownership of most corporations, institutional managers of diverse retirement accounts, and substantial production occurring abroad, it is unclear that there is a great risk that another state will fall victim to what these authors view as potentially overzealous jurors or regulators. In addition, as seen in the ceiling preemption assertions critiqued in this Article, little can be done about these risks short of the preclusion of any state, local, or common law actions. Such preemption creates its own risks. The stronger regulatory externality argument, articulated in Schwartz, *supra* note 110, is that a large state will set a protective standard, thereby increasing the cost of compliant products, and that manufacturers eager for economies of scale will market those more costly products in all states. This would effectively result in the protective state imposing higher prices on others through intermediate private-sector decisions. *Id.* at 21. Still, it is the very nature of regulation that producers will frequently need to decide whether to produce goods with diverse features or to meet the largest markets' demands. Unless all regulation of goods and production is to be nationalized, such regulatory externalities will arise with great frequency.

217 Ruhl & Salzman, *supra* note 162.

218 *See* Rachlinski, *supra* note 164, at 576 (discussing phenomenon that people become attached to status quo and avoid changes to status quo even when they will benefit from

edicts, reliance interests further create dynamics locking in any initial choice; industry, regulators, and often nonprofits may invest in an initial regulatory choice.[219] Even if another choice might be better when assessed ex ante, any change will often be resisted unless that different choice generates benefits overcoming the costs of change. Due to industry's especially large investment in any regulatory edict, industry will often be most opposed to regulatory change and is sure to participate in opposition efforts.[220] Relatedly, any regulatory change can lead to unexpected results, which explains why risk-averse actors may oppose change.[221]

Several sorts of risk relate to potential political dysfunctions often emphasized in public choice scholarship and in critiques by public interest advocates.[222] Ostensible targets of regulation may capture the regulator, thereby ensuring that any standard setting benefits the target.[223] Such capture risks exist both at the state and federal level,

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that change); William Samuelson & Richard Zeckhauser, *Status Quo Bias in Decision Making*, 1 J. RISK & UNCERTAINTY 7, 12–14 (1988) (summarizing experimental research studies revealing status quo bias).

219 *See* Jeffrey J. Rachlinski, *The Psychology of Global Climate Change*, U. ILL. L. REV. 299, 307–08 (2000) (discussing status quo bias and stating that investments made in reliance on past regulatory and business norms often lead industries and legislators to maintain status quo).

220 *See, e.g.*, Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 29, 36–40 (1983) (describing challenge to new regulation requiring seatbelts or airbags in new automobiles and reviewing industry opposition to imposition of additional safety features); Dorf & Sabel, *supra* note 94, at 357–64 (reviewing history of *State Farm* as evidence of need for less oppositional forms of regulatory process); *see also* KEITH BRADSHER, HIGH AND MIGHTY: SUVS—THE WORLD'S MOST DANGEROUS VEHICLES AND HOW THEY GOT THAT WAY 31 (2002) (reviewing American Motors' resistance to addressing stability and rollovers in Jeeps).

221 Agencies also face a modestly increased burden when changing approaches. They must confront the old approach, admit that a change is proposed, and explain the change so it is not adjudged to be arbitrary and capricious. *Cf.* Kevin M. Stack, *The Constitutional Foundations of* Chenery, 116 YALE L.J. 952, 972–73 (forthcoming 2007), *available at* http://ssrn.com/abstract=975758 (discussing strong burden of justification that agencies face when taking regulatory action).

222 *See generally* JERRY L. MASHAW, GREED, CHAOS, AND GOVERNANCE: USING PUBLIC CHOICE TO IMPROVE PUBLIC LAW (1997) (noting criticisms and arguing for more pragmatic application of public choice theory); Vladeck, *supra* note 36 (arguing against federal preemption of state tort claims in light of regulatory failures).

223 George Stigler claimed that regulation is typically for the benefit of the ostensibly regulated target. *See* Stigler, *supra* note 25, at 3. More usual "capture" theory arises out of concerns with the revolving door between industry and regulators, or regulators who over time become too cozy with the industry they are supposed to monitor. Much of so-called capture behavior can arise out of agencies' dependence on information that industry provides. *See* Richard B. Stewart, *supra* note 169, at 1684–87 (suggesting that agency capture results from benign repeat interactions with targets of regulation, limited agency resources, and inability of diffuse groups to pool resources in order to provide information to regulators).

but if there is one regulator, then all sides will seek to persuade or capture that regulator.[224] Relatedly, as discussed in greater depth above,[225] state regulators concerned with attracting and retaining business to secure jobs and tax revenues for their state may drop regulatory standards to stay competitive, creating a race to the bottom. Such a race will lead to levels of protection more lax than citizens would pick if not confronted with such competition. Under this theory, a nationally set standard will eliminate this downward race, at least along the regulatory gradient directly subject to a federal standard.[226]

With splintered and overlapping regulatory regimes, seemingly contradictory risks exist. With many states regulating, and possibly nonpreemptive federal regulation existing as well, *redundant and overlapping regulation* can lead to confusion, high compliance costs, and a drag on otherwise beneficial activities. Such uncoordinated regulation can accrete and create cumulative burdens, even if each regulation or law made sense when created.[227] A multiplicity of regulators that do not match well with an underlying social ill can also lead to underregulation and regulatory gaps due to the *regulatory commons problem*.[228] Regulatory commons problems arise where those desiring regulation do not know where to turn for regulatory action, thereby leading them either not to act or to fragment their demands for regulation.[229] Potential regulators, as a result, will not realize the full extent of citizen or industry concerns due to the fragmentation of entreaties for regulation. The result can be a failure to regulate even where a social ill is widely recognized. In a somewhat related phenomenon, a widely perceived need may be subjected to the NIMBY phenomenon, where many or all jurisdictions decline to site a needed facility due to their free riding; all will fail to act based on the hope that others will accept a needed but noxious facility.[230]

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224 *Cf.* MCCHESNEY, *supra* note 143, at 26–32 (reviewing ways legislators can propose legislation merely to secure political or monetary benefits, even where such law is not expected to be enacted).

225 *See supra* Part III.A.

226 The problem here, as Dean Revesz observes, is that if federal regulatory schemes prevent jurisdictions from competing for industry by lowering environmental standards, states will seek to draw industry by lowering regulatory standards in other areas. Only complete nationalization of regulatory decisions will eliminate such competition. Revesz, *supra* note 10, at 540.

227 Ruhl & Salzman, *supra* note 162, at 763.

228 Buzbee, *Recognizing the Regulatory Commons*, *supra* note 9, at 22–36.

229 *Id.*

230 This is perhaps the most justifiable rationale for the shift of LNG siting authority to FERC. *See* Durbin, *supra* note 79, at 540–41 (arguing that Congress's decision to transfer LNG siting authority to FERC was justified to prevent anticommons problem that could

A different sort of risk relates to implementation and enforcement zeal. Legislators and regulators can take initial regulatory action but then do little to implement the law or regulation. A preemptive standard can act to displace other regulatory actors, including citizens, who otherwise might have picked up the slack by directly enforcing the law or nudging reluctant regulators to act. The mere possibility that another regulatory actor, such as a state attorney general, may act and uncover wrongdoing can serve to counter the inertial tendencies of other government actors.[231] Similarly, as explored in Part III, common law actions can elicit information that prompts agencies or the legislature to revisit previous actions. Sound regulatory choices must include institutional structures and authority allocations that will prompt periodic regulatory reassessment of earlier choices.

E. Linking the Preemption-Choice Variables

These assorted preemption-choice variables do not all point in the same direction. Much may depend on an institution's culture, such as an agency's tendency to act and never reexamine its choices, or the frequency of major statutory amendments to a particular law. Nevertheless, these variables do lead to a few clear conclusions.

A preemptive federal rule is particularly appropriate when a particular product's design needs to be regulated, compliance is expensive and time-consuming, and the product is likely to be nationally distributed in large quantities. Even in such a setting, the risk of inertia and failure to reexamine past actions is substantial. Less appropriate for preemption, however, is mere approval of a product for marketing.

At the other end of the spectrum, if possible federal regulation involves a subject where localized, context-rich judgments and tradeoffs are rife, then a federal preemptive mandate is unlikely to be justified. Where the subject of regulation is likely to change frequently, or information about its attributes evolves rapidly, then any rigid form of regulation may be ineffective.

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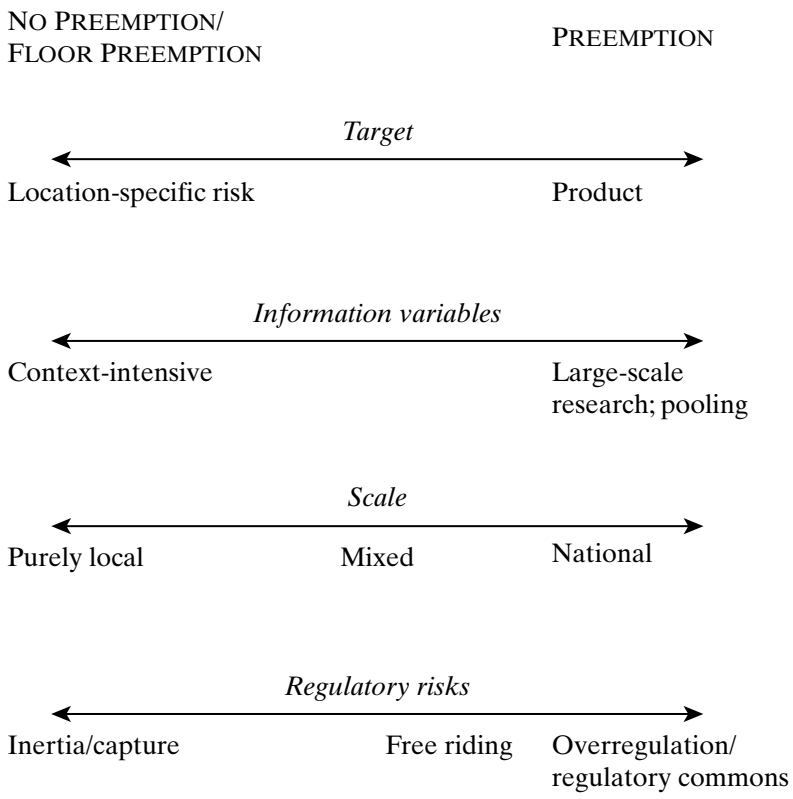
have led to undersupply of LNG sites and, therefore, gas shortage); Richard J. Pierce, Jr., *Environmental Regulation, Energy, and Market Entry*, 15 DUKE ENVTL. L. & POL'Y F. 167, 175–76 (2005) (discussed in Durbin, *supra* note 79, at 541 & nn.252–58) (pointing out robust and widespread "NIMBY-based local opposition" as potential anticommons barrier to construction of FERC- and Coast Guard–approved LNG terminals); *see also infra* Part V.

231 *See* Ahdieh, *supra* note 9, at 872–75 (discussing role of state attorneys general in prompting federal regulatory action); Trevor Morrison, *The State Attorney General Role and Preemption Claims*, *in* PREEMPTION CHOICE, *supra* note 120 (manuscript at 4–6) (arguing that state attorneys general can "root out unlawful conduct that might otherwise go undetected").

A preemptive standard, especially ceiling preemption establishing a unitary federal choice, creates an especially great risk of precluding varied approaches that may, in time, generate a better regulatory system. As pragmatists such as John Dewey illustrated, innovation and adjustment are often critical to effective regulation, especially in settings of change and evolving information.[232] Nevertheless, if regulation is likely, business will generally prefer the certainty afforded by a firmly preemptive choice.[233] The various variables and categories can be captured roughly by the stacked array of preemption/no preemption continua presented in Figure 1.

FIGURE 1: PREEMPTION CHOICE VARIABLES



[232] *See, e.g.*, JOHN DEWEY, RECONSTRUCTION IN PHILOSOPHY 183–84 (1948) (using education to describe pragmatist account of relationship between means and ends, whereby means constantly reconceptualize ends), *cited in* Dorf & Sabel, *supra* note 94, at 284–85 & 285 n.54.

[233] *See, e.g.*, Keohane et al., *supra* note 130, at 346–53 (discussing why targets of regulation may embrace command-and-control regulation and disfavor strategies preferred by economists).

Seldom will any regulatory challenge fall invariably on one side of this continuum. The preemption challenge is to think through these variables and assess the benefits and costs of such a decision.

V
REVISITING RECENT PREEMPTION ACTIONS

This exploration of the floor/ceiling distinction and the broader variables relevant to the political-legal preemption choice reveals the sound roots of the oft-stated, but oft-neglected, judicial presumption against finding preemption. It also sheds light on the wisdom of recent assertions of ceiling preemption power. This Part reexamines recent unitary federal choice preemption assertions, applying the variables and insights from Parts III and IV.

The Supreme Court has repeatedly stated that there is an interpretive presumption against finding federal law and action to be preemptive.[234] Critics correctly observe that this presumption has often been ignored or overcome in Supreme Court cases from the last decade.[235] Nevertheless, the presumption is well justified. First, as a matter of statutory interpretation, Congress undoubtedly knows how to effect a strongly or completely preemptive regime, much as it knows how to retain significant state, local, and common law roles in many laws.[236] With all of the debates over federalism and tort reform, and with the Court itself actively revising federalism doctrine, it is unlikely that Congress would overlook the preemption question or draft without awareness of the implications of language choice.[237]

This Article also shows how instrumental rationales for federalism's usual retention of state power, with the resultant multiple layers of governance, also weigh in favor of a presumption against

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234 *E.g.*, Bates v. Dow Agrosciences L.L.C., 544 U.S. 431, 449 (2005) ("In areas of traditional state regulation, we assume that a federal statute has not supplanted state law unless Congress has made such an intention clear and manifest." (citations omitted)).

235 *See, e.g.*, Mary J. Davis, *Unmasking the Presumption in Favor of Preemption*, 53 S.C. L. REV. 967, 1002–13 (2002) (noting that recent cases show presumption analysis operating to exclude state law with even minimal effect on federal objectives); Sharkey, *supra* note 135, at 6–12 (noting inconsistent adherence to this presumption but also observing that Supreme Court's major preemption outcomes tend to track litigation position taken by relevant federal regulatory agencies); Note, *supra* note 11, at 1604 (noting inconsistent application of presumption against preemption).

236 *See, e.g.*, Hills, *supra* note 147, at 58 n.200 (listing congressional language calling for preemption of state laws); Vladeck, *supra* note 36, at 98 n.16 (citing statutes with explicit broadly preemptive language); *supra* Part II (discussing cooperative federalism structures).

237 *See, e.g.*, Chemical Facility Anti-Terrorism Standard, 71 Fed. Reg. 78,276, 78,292–93 (proposed Dec. 28, 2006) (to be codified at 6 C.F.R. pt. 27) (discussing how legislators explicitly discussed and considered different preemption language choices before ultimately deleting any such language); *see also* discussion *supra* Part II.D.

preemption. Unitary federal choice preemption is particularly contrary to the theory behind federalist structures due to how it displaces other actors and fosters inertia and other political-economic dysfunctions.[238]

For these reasons, an array of commentators from across the political spectrum suggests that courts should re-embrace the presumption against preemption. Only with a legislative "clear statement" indicating Congress's intent to preempt should courts or agencies interpret statutes to authorize preemption of state, local, or common law regulation.[239] In a close case, courts and agencies should be especially wary of unitary federal choice preemption due to its comprehensive preemptive impact.

Reexamining the recent assertions of unitary federal choice preemption discussed in Part II, one or two constitute close calls, while most of the others are poorly suited to unitary federal choice preemption. The LNG siting change is perhaps in a category unto itself. One might argue against supplanting the state and local role in deciding whether to site an LNG facility, but the risk of all jurisdictions opposing such facilities in their own jurisdiction while conceding their need provides a rationale for FERC's new decisive role. Congress made its choice with clarity, and at least retained a commenting role for state and local entities. Still, given the context-rich judgments and tradeoffs inherent in siting any large commercial facility—especially a facility creating risks for neighbors—reducing the state and local role so significantly is quite unusual.

As a matter of statutory interpretation, none of the recent assertions by agencies of preemptive effect are well founded. The statutory language is sometimes inconclusive given the presence of both preemption and savings clauses, although none of the underlying laws contain express language preempting common law claims.[240] The subjects of these agency assertions of unitary federal choice preemption are somewhat closer calls in approving consumer product safety features or drugs for marketing. The mattress flammability requirements come fairly close to the sort of design mandate often made preemptive, as the challenge of conflicting mandates is real.[241] Yet the Consumer Products Safety Commission rule does not dictate all aspects of mattress design, thus leaving a realm of uncertainty about whether

238 *See supra* Part III.B (discussing federalism's core benefits).

239 Clark, *supra* note 147, at 1425–26; Hills, *supra* note 147, at 17; Vladeck, *supra* note 36, at 110; Young, *supra* note 23, at 264–69.

240 Vladeck, *supra* note 36, at 110, 115; *see also* Sharkey, *supra* note 18, at 227, 234, 238 (reviewing language of relevant enabling acts).

241 *See supra* Part II.D.

conflicts would actually arise were tort claims still viable. The possibility of an underprotective regulation, especially after the regulation is in place for several years, remains a distinct risk.

Regulation of car safety, specifically roof anticrush standards, is an area where additional state regulation or tort verdicts might burden manufacturers with additional efforts to make cars even safer, thereby reducing economies of scale.[242] Additional state protections would not, however, create a situation of impossibility, as with a specific design mandate. Here too, there is a risk that a design minimum over time will become obsolete and underprotective; indeed, car safety is one area where companies compete and states and juries might reasonably determine that an out-of-date standard is far from the state of the art. A sort of "Volvo effect" remains possible, where one industry leader may keep changing what can reasonably be included in a car's design.[243] Setting a single standard—and eliminating any room for additional state regulation or common law recoveries—creates a risk of obsolescence and eliminates the benefits of institutional diversity. This is especially the case where car manufacturers will, in the initial rulemaking process, strongly resist regulation that will increase car prices. Risk-regulation histories are rife with industry claims of impossibility or exorbitant cost that are subsequently disproved.[244]

The FDA's and the Supreme Court's vacillating views on the preemptive impact of FDA drug-labeling approvals have, most recently, come to rest with the FDA's broad assertion of preemptive impact of any state law that is "conflicting or contrary" or does not "parallel FDA requirements."[245] The FDA further emphasizes its intent to preempt "additional requirements," questioning whether such requirements would actually be "more protective of patients" and voicing concern with "the careful and truthful representation of benefits and

242 *See* Sharkey, *supra* note 18 (discussing roof regulation).

243 The "Volvo effect" alludes to the Volvo car company's consistent efforts to provide an unusually safe car and to market it emphasizing safety features. *See* Note, *Harnessing Madison Avenue: Advertising and Products Liability Theory*, 107 HARV. L. REV. 895, 896 (1994) (describing Volvo effect).

244 *See* Frank Ackerman, *The Unbearable Lightness of Regulatory Costs*, 33 FORDHAM URB. L.J. 1071, 1071–73 (2006) (noting that many regulations can be achieved at zero or negative cost); Lisa Heinzerling, *Political Science*, 62 U. CHI. L. REV. 449, 463 (1995) (reviewing STEPHEN BREYER, BREAKING THE VICIOUS CIRCLE: TOWARD EFFECTIVE RISK REGULATION (1993) ("[Justice Breyer] almost certainly exaggerates the costs of controlling these chemicals by uncritically accepting the notoriously inflated cost estimates of industry and the Reagan-Bush OMB.")).

245 Labeling Requirements, 71 Fed. Reg. 3922, 3934, 3936 (Jan. 24, 2006) (to be codified at 21 C.F.R. pts. 201, 314, 601).

risks."[246] Close parsing of the underlying statutory language, and the Supreme Court's announcements, make the FDA's power here unclear.[247] That said, it is clear that clashing label requirements imposed by states would be preempted even without a broad FDA statement of such intent. In addition, where FDA approvals are tantamount to a design mandate—a subject of some debate—then a stronger justification for preemption exists.[248]

Under the variables discussed in this Article, making an FDA approval the final, dispositive word on a product, thereby insulating a manufacturer from any claims and precluding states from action other than those "paralleling" the FDA, poses distinct risks. Requirements and incentives to update information, especially with post-approval experiences of patients and doctors, vary depending on the nature of the FDA approval.[249] The relative efficacy of a drug product may, over time, become clearer, yet if no actor other than the FDA plays a role, incentives for other institutions and actors to investigate and monitor efficacy will be substantially diminished.[250] Little "learning by monitoring" will go on with no diversity of institutional actors and no reward for such action.[251]

Most problematic are DHS's recent assertion of broad preemptive impact in its proposed chemical facility regulations and its recently floated industry support for federal greenhouse gas (GHG) legislation that would preempt state and local authority.[252] Power politics or political compromise embracing the viable might explain such actions, but they lack a sound policy rationale when tested against the variables elucidated here. Neither is likely to involve anything close to a federal design mandate that would clash with state or

246 *Id.* at 3922, 3935.

247 *See* JAMES T. O'REILLY, FOOD AND DRUG ADMINISTRATION §§ 26:58–:80 (3d ed. 2007) (reviewing FDA cases involving preemption or non-preemption of tort claims).

248 *See* Noah, *supra* note 116, at 2159–60 (describing potential regulatory conflicts that can arise when juries find breach of duty in tort by defendant who complied with federal regulations).

249 *See* Riegel v. Medtronic, Inc., 451 F.3d 104, 108–13 (2d Cir. 2006) (distinguishing uncommon Premarket Approval (PMA) medical devices, which require lengthy pre-marketing process and post-marketing reporting, with more common Section 510(k) devices that are subject to far fewer advance or post-sale requirements), *cert. granted*, 127 S. Ct. 3000 (U.S. June 25, 2007) (No. 06-179).

250 The FDA's own changing and sometimes mushy assertions about the preemptive impacts of its actions render the finality of these most recent statements somewhat uncertain. Sharkey, *supra* note 18, at 242 (noting inconsistency of FDA position); Vladeck, *supra* note 36, at 124–26 (same).

251 Dorf & Sabel, *supra* note 94, at 287. Professors Dorf and Sabel define "learning by monitoring" as a collaborative process whereby independent actors "monitor one another's activities closely enough to detect performance failures and deception." *Id.*

252 *See supra* notes 87–90 and accompanying text.

local positive law, nor would recoveries under common law regimes be likely to create a clashing requirement.

State and local regulation of chemical facilities is virtually impossible to avoid given the roles state and local actors play as emergency responders. In addition, effectively regulating risks from such facilities will invariably involve context-rich judgments that no regulation can effectively capture. Physical layouts will differ, and surrounding populations and land usage will ineluctably make each facility's risks and appropriate safety measures subject to necessary individual tailoring. Furthermore, as facility operations and designs change, or as terrorist threats vary, adjustment of safety efforts will be necessary. Some federal minima would make sense, but eliminating the additional layer of state and local regulation and common law incentives creates a high risk of dysfunctional regulation.[253]

The proposed broadly preemptive federal GHG legislation would be perhaps the most inappropriate of these recent actions. Virtually nothing in the GHG and climate change challenge lends itself to a broadly preemptive approach. A unitary federal choice would be especially problematic. The setting of floors, especially those regulating large-scale emitters of such gases, would be an important start of any regulatory effort. Technology-based performance standards, as already prevalent in the Clean Air Act, would provide an important starting template and might also serve as an important adjunct to "cap and trade" programs.[254] However, supplanting others' actions or precluding common law litigation would be inappropriate. The GHG challenge involves a multiplicity of sources, varied risks and harms in different locations, changing science and engineering, and an array of scale challenges. No one regulator can effectively regulate at all levels.[255] In addition, the actual federal track record has been one of

253 As observed in Edward L. Rubin & Malcolm Feeley, *Federalism: Some Notes on a National Neurosis*, 41 UCLA L. REV. 903 (1994), a decentralized managerial structure under the national government can secure many of the benefits associated with federalism—e.g., public participation, giving citizens choices, achieving economic efficiency through competition among jurisdictions, and encouraging experimentation. *Id.* at 914–26. However, the critical latitude that a federalist structure provides to state and local governments is the ability not just to tailor national goals to local settings but also to make different policy choices and to be responsive to a different electorate and the different tradeoffs beneficial to that constituency. *See id.* at 929.

254 *See generally* David Driesen, *The Economic Dynamics of Environmental Law: Cost-Benefit Analysis, Emissions Trading, and Priority-Setting*, 31 B.C. ENVTL. AFF. L. REV. 501 (2004) (discussing how emissions-trading programs give industry inadequate incentives to establish pollution-reduction initiatives).

255 Any regulation of GHGs is therefore somewhat unexpected. *See* Engel, *supra* note 9, at 168 & n.41 (noting that benefits of pollution control are not internalized by individual regulators); Engel & Saleska, *supra* note 72, at 190 (describing climate change as classic

backpedaling and half measures, while some states and local governments have taken a leading role.[256] Their diverse efforts serve in a role long embraced in federalism jurisprudence, that of "laboratories" of democracy.[257]

More recently, industry and legislators have debated whether the regulation of GHGs from motor vehicles should be purely federal, allow for both federal and California regulation that other states can follow, or allow all fifty states to choose their own diverse motor vehicle strategies.[258] This ongoing debate tracks the variables identified here. The automobile industry seeks certainty and production economies of scale given the large number of cars and near impossibility of tailoring different models to fifty different approaches. The industry hence prefers a uniform national standard if GHGs are to be regulated at all. Legislators and states concerned with greenhouse gases and climate change fear a lax and preemptive federal standard. Fifty different approaches would indeed be excessive for a large-scale manufacturing sector that markets internationally, such as the automobile industry. However, precluding the limited diversity of two approaches—federal and California standards—would constitute the rejection of an approach long allowed by the Clean Air Act for other pollutants.[259] Here, as in most areas, embracing a single, preemptive federal approach (whether a unitary federal choice ceiling or design mandate) raises far more risks than retaining at least the limited institutional diversity of a federal and California approach.

In short, the GHG and climate-change problem is one particularly well suited to federal floors and not to unitary federal choice ceilings that would preempt other entities' potential regulatory or common law roles.[260] Any federal law should set floors suitable for

commons problem wherein individual nations have little incentive to forego economic benefit by regulating industry).

256 Engel, *supra* note 9, at 160; Engel & Saleska, *supra* note 72, at 213.

257 *New State Ice Co. v. Liebmann*, 285 U.S. 262 (1932), contains the leading statement of the principle: "It is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country." *Id.* at 311 (Brandeis, J., dissenting); *see also* Carlson, *supra* note 44, at 284 (discussing "laboratories" theory).

258 *See* Editorial, *The Democrats Lag on Warming*, N.Y. TIMES, June 10, 2007, at C13 (describing "regressive bill" by Representative John Dingell that would "override" Supreme Court's finding of EPA power to regulate motor vehicle GHGs and "block efforts by California and 11 other states to regulate and reduce greenhouse gases from vehicles").

259 *See supra* notes 42–45 and accompanying text (discussing California's exemption from federal preemption on pollution law); *supra* note 75 and accompanying text.

260 For a work identifying risks of state regulation of GHG emissions and arguing for national and international regulation, but not addressing the floor/ceiling distinction and possible benefits of both layers of regulation, see Jonathan B. Wiener, *Think Globally, Act Globally: The Limits of Local Climate Policies*, 155 U. PENN. L. REV. 1961 (2007).

large emitters and provide a federal clearinghouse with information about means to reduce emissions while also retaining broad latitude for regulation at multiple scales with room for adjustment. For high-volume, widely marketed products like cars, allowing at least the limited diversity of two approaches could serve as an incentive for innovation and an antidote to inertia and outdated or lax regulation. In settings of volatility and diversity of conditions, especially where knowledge is incomplete and evolving rapidly, room for pragmatic adjustment and experimentation is critical.[261]

CONCLUSION

Floor and ceiling preemption choices should not be assessed with mere reference to their level of stringency or laxity. They are not simply contrasting federal choices that scholars must accept if they see constitutionally driven federalism presumptions as inconclusive. Instead, if one starts with perhaps the central tenet that underpins federalist schemes of governance—the need for skepticism about government and the need to retain roles for different levels of government—then floor preemption is distinguishable. Despite floor preemption's partial displacement of state choice, it retains substantial state latitude for experimentation and provides ongoing motivation for an array of governmental and private actors to debate regulatory choices. The retention of common law regimes further maintains a forum in which earlier governmental and private actions can be reexamined. The unavoidable clashes and reexamination that are inherent in multi-layered federalism schemes, like floor preemption strategies, also can provide the impetus for the reexamination aspired to, but sometimes missing, in experimentalist scholarship. This Article thus embraces the presumption against preemption, especially where the preemptive power claimed involves ceiling preemption that constitutes a final, unitary federal choice. Policymakers and courts assessing such ceiling preemption should be sensitive to inevitable associated losses of institutional diversity and heightened risks of regulatory failure. Not all federal standard setting is the same.

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[261] *See* JOHN DEWEY, THE PUBLIC AND ITS PROBLEMS 202–03 (1927) (urging an experimental approach to social policy whereby existing and proposed policies are "treated as working hypotheses, not as programs to be rigidly adhered to and executed").