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## ARTICLES

### AGAINST PREEMPTION: HOW FEDERALISM CAN IMPROVE THE NATIONAL LEGISLATIVE PROCESS

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*How easily should courts infer that federal statutes preempt state law? An ongoing debate exists on the question in Congress and among scholars and judges. One side calls for judges to protect federalism by adopting a rule of statutory construction that would bar preemption absent a clear statement of preemptive intent. Opponents argue against such a “clear statement” rule by arguing that state control over preemptable topics is often presumptively inefficient, because common law juries lack expertise and because states are prone to imposing external costs on their neighbors.*

*This Article sidesteps these debates over preemption and instead argues that, quite apart from whether state law is itself efficient, an anti-preemption rule of statutory construction has benefits for the national lawmaking process. Because of the size and heterogeneity of the population that it governs, Congress has institutional tendencies to avoid politically sensitive issues, deferring them to bureaucratic resolution and instead concentrating on constituency service. Nonfederal politicians can disrupt this tendency to ignore or suppress political controversy by enacting state laws that regulate business interests, thus provoking those interests to seek federal legislation that will preempt the state legislation. In effect, state politicians place issues on Congress’s agenda by enacting state legislation. Because business groups tend to have more consistent incentives to seek preemption than anti-preemption interests have to oppose preemption, controversial regulatory issues are more likely to end up on Congress’s agenda if business groups bear the burden of seeking preemption. Moreover, the interests opposing preemption tend to use publicity rather than internal congressional procedures to promote their ends. Therefore, by*

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adopting an anti-preemption rule of construction, the courts would tend to promote a more highly visible, vigorous style of public debate in Congress.

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INTRODUCTION

When Congress enacts a law to protect the health and safety of consumers, employees, or citizens generally, it acts against the background of pervasive state common law regulation. What difference should this regulatory background make to the courts’ interpretation of those federal statutes? Should the courts presume that Congress wanted to preserve state tort law, or should any such presumption be considered judicial overreaching?

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There are two dominant answers to this question in the scholarly literature. First, a number of scholars argue that courts ought to presume that Congress intends to preserve state powers, usually on the ground that federalism as a general matter is an important constitutional value that should not be easily overridden.<sup>1</sup> Second, a smaller number of scholars argue that the existence of state regulation should not affect how courts construe federal statutes, either because preemptable state laws are not, as a matter of policy, healthy exercises of federalism,<sup>2</sup> or because the text and history of Article VI suggests rejection of a “federalism canon” of statutory construction.<sup>3</sup> The U.S. Supreme Court itself is divided on the issue of preemption in ways that cut across the normal ideological fault lines: In her time on the Court, Justice O’Connor, regarded by many as a champion of federalism, tended to reject any “clear statement” rules against preemption.<sup>4</sup> Justice Stevens, generally an opponent of judicially enforced federalism, has been a fairly consistent supporter of a narrow interpretation of preemption.<sup>5</sup> The Court’s decisions cannot be explained entirely in terms of an ideological predisposition to favor businesses (Justice O’Connor) over plaintiffs (Justice Stevens),<sup>6</sup> as Justice Breyer

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<sup>1</sup> See, e.g., Betsy J. Grey, *Make Congress Speak Clearly: Federal Preemption of State Tort Remedies*, 77 B.U. L. REV. 559, 565, 613–18 (1997) (arguing that presumption against preemption protects states’ traditional control over tort law); S. Candice Hoke, *Preemption Pathologies and Civic Republican Values*, 71 B.U. L. REV. 685, 710–14, 764–66 (1991) (arguing that canon of construction disfavoring preemption promotes public participation in states’ political processes).

<sup>2</sup> See, e.g., Alan Schwartz, *Statutory Interpretation, Capture, and Tort Law: The Regulatory Compliance Defense*, 2 AM. L. & ECON. REV. 1, 20–22 (2000) (arguing that inefficiencies result from nonuniform state-level safety standards).

<sup>3</sup> See generally Caleb Nelson, *Preemption*, 86 VA. L. REV. 225 (2000) (arguing that language of Article VI was originally understood to preclude any presumption against preemption of state law).

<sup>4</sup> For an example of Justice O’Connor’s text-based approach to preemption, see *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 509–14 (1996) (O’Connor, J., dissenting), in which she concluded that a “fair reading” of certain statutory provisions indicated that state common law claims were preempted and that state statutory law claims were not.

<sup>5</sup> See *Bates v. Dow Agrosciences LLC*, 544 U.S. 431, 452 (2005) (holding that Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA), 7 U.S.C. § 136 (2000), did not preempt common law damages claim for defective design and manufacture of pesticide); *Medtronic*, 518 U.S. at 484–91 (1996) (holding that Federal Medical Devices Act did not preempt state negligent design claim and noting importance of preserving “historic police powers of the States”).

<sup>6</sup> Such an ideological explanation is offered by Frank B. Cross & Emerson H. Tiller, *The Three Faces of Federalism: An Empirical Assessment of Supreme Court Federalism Jurisprudence*, 73 S. CAL. L. REV. 741, 753–54, 757 n.81, 761–62 (2000), who show that liberal Justices are likely to use federalism principles to defeat conservative plaintiffs and support liberal plaintiffs, and Richard H. Fallon, Jr., *The “Conservative” Paths of the Rehnquist Court’s Federalism Decisions*, 69 U. CHI. L. REV. 429, 471–72 (2002), who argue that in some cases in which state and federal regulations conflict, Supreme Court justices are motivated more by substantive conservative ideology than by federalism principles.

seems to oscillate between a love of federalism (and a narrower view of preemption) and a dislike of state interference with federal regulatory schemes.<sup>7</sup>

I take the position in this Article that both the anti-preemption views represented by Candice Hoke and Betsy Gray, on the one hand, and the pro-preemption theory of Alan Schwartz, on the other, rest on an outdated and mistaken assumption—the theory, sometimes known as “dual federalism,” that states and the federal government (should) operate in different, mutually exclusive spheres.<sup>8</sup> Instead, theories of preemption need to accept the truisms that the federal and state governments have largely overlapping jurisdictions, that each level of government is acutely aware of what the other is doing, and that each level regulates with an eye to how such regulation will affect the other.<sup>9</sup> Federalism’s value, if there is any, lies in the often competitive interaction between the levels of government. In particular, a presumption against federal preemption of state law makes sense not because states are necessarily good regulators of conduct within their borders, but rather because state regulation makes Congress a more honest and democratically accountable regulator of conduct throughout the nation. To reverse the usual formula, national values are well protected by the states’ political process. Thus, the benefits of federalism in the present and in the future will rest on how the federal and state governments interact, not in how they act in isolation from each other.

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<sup>7</sup> For a more detailed appraisal of different Justices’ views on preemption in different contexts, see generally Michael S. Greve & Jonathan Klick, *Preemption in the Rehnquist Court: A Preliminary Empirical Assessment*, 14 SUP. CT. ECON. REV. 43 (2006). Greve and Klick demonstrate that the standard attitudinal models used to show a conservative bias in the Court’s preemption decisions are too crude to capture the various ideological factors that more accurately map onto the Justices’ votes. *Id.* at 75–77, 79–85.

<sup>8</sup> For an account of the history of dual federalism, see Roderick M. Hills, Jr., *The Political Economy of Cooperative Federalism: Why State Autonomy Makes Sense and “Dual Sovereignty” Doesn’t*, 96 MICH. L. REV. 813, 831–54 (1998). Although it is a truism that state and federal governments have overlapping jurisdictions, this is a state of affairs that some Justices have deplored. Under the “political accountability” theory of federalism deployed by Justices O’Connor and Kennedy, for instance, it threatens political accountability if federal laws trespass into state territory because, in such a case, “the boundaries between the spheres of federal and state authority would blur and political responsibility would become illusory.” *United States v. Lopez*, 514 U.S. 549, 576–77 (1995) (Kennedy, J., concurring). As I have noted elsewhere, this theory also implies the exclusion of state meddling in federal areas—an implication that might explain Justice O’Connor’s indifference to protecting states from federal preemption in areas of undoubted federal authority. See Hills, *supra*, at 824–30.

<sup>9</sup> For a broader defense of the view that federal courts should assume and promote a high level of interaction between state and federal governments, see generally Robert A. Schapiro, *Polyphonic Federalism: State Constitutions in Federal Courts*, 87 CAL. L. REV. 1409 (1999).

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## I

## THE PROBLEM OF PREEMPTION

Two views dominate the legal scholarship on preemption. One theory calls for federalism-promoting canons of statutory construction. The other theory argues that federalism should have no bearing on the scope of federal preemption. Both views, however, are unsatisfactory for the same reason: They both lack an account of joint state-federal policymaking.

A. *The Conventional Case for Federalism-Promoting Canons of Statutory Construction*

Consider, first, the idea of a federalism-promoting canon of construction that would require a clear statutory statement before a judge could construe federal law to preempt state law. Such a canon is typically justified by the general notion that federalism is an important value in the American constitutional scheme.<sup>10</sup> The difficulty with such a broad invocation of federalism, however, is that it is too general. After all, nationalism is also a constitutional value: Why not adopt a nationalism-promoting canon of construction? It is no good to argue, as does Hoke, that preemption impedes the capacity of state and local governments to govern themselves.<sup>11</sup> Lack of preemption can have the same effect of impeding self-government. Congress frequently regulates activities because state regulation, or lack of regulation, of those activities imposes external costs on neighboring states. The whole point of the federal scheme is to suppress states' creativity, which might consist only of creatively achieving benefits for their own citizens at the expense of nonresidents. If the state juries in, say, Creek County, Oklahoma, routinely impose enormous liability on out-of-state automobile corporations simply to enrich local plaintiffs and the local bar, then this is a burden on the self-governing capacity

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<sup>10</sup> The following passage typifies this type of argument:

In the system of American public law, the basic assumption is that states have authority to regulate their own citizens and territory. This assumption justifies an interpretive principle requiring a clear statement before judges will find federal preemption of state law. Although no substitute for an inquiry into the relationship between state and federal law in the particular context, this principle will frequently aid interpretation in disputed cases.

Cass R. Sunstein, *Interpreting Statutes in the Regulatory State*, 103 HARV. L. REV. 405, 469 (1989). For an expansion of this argument—that the presumption against preemption promotes the states' republican forms of government—see Hoke, *supra* note 1, at 703–14, 760–63.

<sup>11</sup> See Hoke, *supra* note 1, at 687 (“Federal preemption decisions impede the ability of those governmental bodies that are structured to be most responsive to citizens’ public values and ideas—state and local governments—and have concomitantly undermined citizens’ rights to participate directly in governing themselves.”).

of states where those automobile manufacturers have their primary places of operations. In effect, Oklahoma is regulating and taxing the businesses of Michigan without considering the desires of the persons most affected—those dependent on Michigan’s tax base and sources of employment. Why is not such taxation and regulation without representation an attack on “civic republican values”?

*B. The Efficiency-Based Case Against Federalism-Promoting Canons of Statutory Construction*

Against the prevailing scholarly convention, a smaller number of scholars urge that the Court should follow a default rule favoring preemption whenever state regulation will inefficiently tend to externalize costs or interfere with a national market for goods and services.<sup>12</sup> In contrast with abstract canons favoring federalism, these theories favoring preemption have the considerable advantage of being focused on the right question about institutional competence: Which level of government is best suited to regulate which issue? The difficulty with such theories, however, is that they choose the wrong institution, in terms of *interpretive* institutional competence, to answer this substantive question. They assume that judges are well equipped to determine whether or not state legislation will tend to be more inefficient than a single uniform federal standard. This assumption assigns a Herculean task to the judiciary. Rather than a system that forces judges to answer questions about the design of federal systems, this Article will suggest one in which judges force Congress to assess the comparative merits of state and federal policymaking.

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<sup>12</sup> Efficiency-based arguments are not the only reason to reject a default rule against preemption. Caleb Nelson presents an ingenious originalist and text-based argument for such a position. See Nelson, *supra* note 3, at 245–60, 292–98. Nelson argues that the Supremacy Clause’s reference to “any Thing in the Constitution or Laws of any State to the Contrary notwithstanding,” U.S. CONST. art. VI—what he calls the “non obstante clause”—was actually a legal term of art in the late eighteenth century. Such phrases were used to repeal the normal canon of construction that new statutes were, if possible, to be read as consistent with old statutes. Nelson, *supra* note 3, at 241–42. Through a meticulous examination of history and text, Nelson demonstrates that the drafters of the non obstante clause regarded preemption of state law as analogous to repeal of existing law. *Id.* at 245–60. The purpose of the non obstante clause, therefore, was to declare that “even if a particular interpretation of a federal statute would contradict (and therefore preempt) some state laws, this fact is not automatically reason to prefer a different interpretation.” *Id.* at 232. The difficulty with this fine-grained analysis of Article VI is not that it is mistaken but that it is inconsistent with the rest of the Court’s federalism jurisprudence. There is something odd about broadly construing Congress’s Article VI preemption power in the name of text and original understanding while adhering to the narrow construction of the states’ reserved powers under Article I and the Tenth Amendment as set forth in *Wickard v. Filburn*, 317 U.S. 111 (1942).

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Thomas Merrill's analysis of preemption and environmental law provides a good example of the strengths and weaknesses of efficiency-based default rules.<sup>13</sup> Merrill argues that courts ought to rely on topic-specific default rules for resolving statutory ambiguities. If the topic of regulation is likely to require a nationally uniform rule or an impartial federal decisionmaker, then Merrill urges the courts to presume that ambiguous federal statutes preempt state law. For instance, Merrill argues in favor of what he calls a "partiality rule" favoring preemption whenever the application of state law to an interstate dispute "would present serious danger of partiality towards one State or another, and hence would pose a threat to the stability of the federal system."<sup>14</sup> As an example of this partiality rule in action, Merrill points to litigation between states over transboundary pollution as an example of a context in which his partiality default rule would justify a presumption of preemption by federal common law.<sup>15</sup> Because neither party to the interstate dispute could be trusted to craft a common law rule that would be impartial to their rival state, the federal courts should step in to provide an impartial rule of law.<sup>16</sup>

The great merit of Merrill's theory is that it captures the proper normative issue raised by preemption: Ideally, federal law ought to preempt state law when state governments are untrustworthy because of their partiality, disruptive effects on national markets, and incentives for cost exporting. But the difficulty with Merrill's default rules is that, outside of a very narrow range of paradigm cases, the rules quickly become judicially unmanageable and even democratically illegitimate. For example, Merrill's examples suggest that the partiality rule has the strongest justification only in cases involving litigation between two states—a tiny set of cases covered by the U.S. Supreme Court's original jurisdiction.<sup>17</sup> Merrill argues that the rule should be extended to cases in which the "costs of pollution are primarily borne in one or more states other than the source state, or when the benefits of the pollution-generating activity are primarily captured by the state that is the source of the pollution to the exclusion of . . . states that incur the costs of the pollution."<sup>18</sup>

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<sup>13</sup> See Thomas W. Merrill, *Preemption in Environmental Law: Formalism, Federalism Theory, and Default Rules*, in *PREEMPTION IN CONTEXT: LAW, ECONOMICS, AND POLITICS* [provisional title] (Richard Epstein ed., forthcoming 2007).

<sup>14</sup> *Id.* at 12.

<sup>15</sup> *Id.* at 9–13, 22–27.

<sup>16</sup> *Id.* at 11–12.

<sup>17</sup> See *id.* at 8, 11–12. Merrill relies on *City of Milwaukee v. Illinois*, 451 U.S. 304 (1981), as the paradigm of interstate litigation that called for the partiality rule. Merrill, *supra* note 13, at 8 n.9.

<sup>18</sup> Merrill, *supra* note 13, at 12–13.

The vagueness of the term “primarily” suggests that this formulation will lead to excessive litigation rather than an efficient outcome. Virtually every polluting activity falls within the second clause of Merrill’s formulation; it is not easy to imagine many forms of pollution that generate any benefits for “downstream” jurisdictions. Because Merrill does not wish to press such an all-encompassing presumption, he leaves federal courts to make fine judgments about how much of a spillover effect justifies federal preemption.

Merrill’s test would force courts to determine which is more dangerous—an overcentralized and unresponsive federal Leviathan or an anarchy of parochial cost-exporting states. Any set of default rules that requires judges to determine such an imponderable might create more problems of administrability than it solves. This is not to say that Merrill’s proposal lacks merit in every context. There are certainly areas—navigation, interstate transportation, immigration, and foreign affairs, for instance—in which the risk of external costs are so high that preemption of state law ought to be presumed (and is, as a matter of judicial practice).<sup>19</sup> Moreover, Merrill certainly does not propose that courts determine whether a state law exports costs or partially interferes with other states through sheer abstract reasoning. He recommends a common law method, in which courts infer the default rules from patterns in the case law. Nonetheless, I maintain that courts will reach little consensus about the dangers of state parochialism; the ideological battle between those who fear the excessive centralization of Leviathan and those who fear the parochialism of the states is not amenable to objective answers.

Beyond the problem of judicial manageability, however, there is the related but greater problem of legitimacy. The struggle over preemption is, in large part, a struggle between proponents of markets and proponents of regulation. Asking judges to assess the efficiency of state regulation comes perilously close to enlisting them on one side or another of this ideological conflict between libertarians and statist.

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<sup>19</sup> See *United States v. Locke*, 529 U.S. 89, 108 (2000) (striking down state regulation of oil spills from tankers and asserting that “an ‘assumption’ of nonpreemption is not triggered when the State regulates in an area where there has been a history of significant federal presence”). For an instance of preemption in which the Court deferred to the judgment of the Executive Branch that a state law impinged on its congressionally granted powers over national foreign policy, see *Crosby v. National Foreign Trade Council*, 530 U.S. 363, 383–86 (2000), in which the Court struck down a Massachusetts law restricting the ability of Massachusetts and its agencies to purchase goods or services from companies that did business with Burma. Federal preemption of state laws affecting immigration policy is commonplace. See, e.g., *Hines v. Davidowitz*, 312 U.S. 52, 62–69, 72–74 (1941) (giving reasons to presume field preemption where Congress has passed legislation on subject within “general field of foreign affairs” and holding that federal Alien Registration Act preempts Pennsylvania statute for registering immigrants).



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Predictably, judges favoring markets will find large external spillovers, while judges favoring regulation will find a need for local control. Why is the taking of sides in such a politicized debate a properly judicial task? The concern for overextending the legitimacy of federal courts has tempered the Court's willingness to displace swathes of state law with judicially crafted federal common law absent some sort of specific congressional guidance.<sup>20</sup> Because the "function of weighing and appraising" considerations of fairness and efficiency in the determination of substantive standards is "more appropriate" for the political branches,<sup>21</sup> Merrill's default rules might seem like a usurpation of power.

Merrill's call for a federal common law is far superior to the sort of textualism that the Court has used in some preemption contexts. For instance, the interpretive practice dominant in preemption with respect to the Employment Retirement Income Security Act<sup>22</sup> (ERISA) is a faux textualism in which the Court invokes the alleged plain meaning of two wholly ambiguous words in ERISA's preemption clause to work a vast and ill-considered deregulation of employee benefits.<sup>23</sup> Others have called for more creative judicially crafted federal common law to fill the gap left by such wooden preemption on the theory that Congress cannot possibly fill all of the gaps in federal statutes.<sup>24</sup> If judicial legislation were the only mechanism available to fill such gaps, then Merrill's default rules are surely the most intelligent yet to be proposed to guide this task. But this Article suggests that there is another possibility. The Court could create incentives for Congress itself to answer the most burning questions about the relative values of uniformity and localism.

I argue below in Part II that the federal lawmaking process has some notorious defects, which prevent it from addressing broad policy issues such as the desirability of decentralization. I suggest in Part III that an anti-preemption default rule might do a lot to ameliorate these defects by forcing Congress to be attentive to the issue of federalism. State lawmaking can give Congress the right incentives to focus on the

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<sup>20</sup> See, e.g., *O'Melveny & Myers v. FDIC*, 512 U.S. 79, 88 (1994) (rejecting federal common law rule for attorney malpractice absent "an identifiable federal policy or interest").

<sup>21</sup> *Id.* at 89.

<sup>22</sup> 29 U.S.C. §§ 1001–1461 (2000).

<sup>23</sup> See *infra* Part III.E.

<sup>24</sup> See, e.g., Daniel J. Meltzer, *The Supreme Court's Judicial Passivity*, 2002 SUP. CT. REV. 343, 376–90 (asserting that Supreme Court Justices assume more common-law-like role in preemption cases where they recognize importance of federal objective and thus harmonize complex state and federal laws, and arguing that Court ought to assume such role in other circumstances as well).

most important ambiguities of federal law. This proposal focuses on a central issue that the literature has hitherto ignored—namely, the way that state legislation can change federal lawmaking, rendering the latter more or less democratically accountable.

## II

### THE PROBLEM OF DEMOCRATIC AGENDA SETTING IN CONGRESS

Before one can prescribe a cure, one must define the disease. What is so wrong with the national legislative process that a presumption against preemption might help?

Consider three different ways in which the federal government can suffer from what can be called “diseconomies of scale,”<sup>25</sup> or the institutional failings that result from increasing the size of the population governed and the bureaucracy that performs the governing. Borrowing from other scholars, I will call these three problems “Madison’s Nightmare,” “the Personal Vote,” and “Political Overload.” The federal government is often, but not always, bedeviled by these diseconomies. The pressing institutional questions are: When can the national government avoid these maladies and can any legal reform help? As I suggest in Part III, a clear statement rule against preemption could be such a legal reform.

#### A. *Madison’s Nightmare Revisited*

In Richard Stewart’s memorable phrase, the federal government can become “Madison’s Nightmare”—the dark side of Madison’s famous argument in favor of large republics.<sup>26</sup> *Federalist No. 10* argues that the heterogeneity of the national population would prevent legislators representing a majority of votes from uniting for the purpose of oppressing the rest of the population with unjust or partial legislation. Differences in self interest would cause such a majority coalition to crumble before it could do persistent damage.<sup>27</sup> The nightmare version of this argument is that heterogeneity of interests could prevent the majority coalition from doing anything at all—even just and useful things—while simultaneously facilitating the ability of self-interested minorities to loot the federal fisc.

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<sup>25</sup> I borrow the phrase “diseconomies of scale” from VINCENT OSTROM, ROBERT BISH & ELINOR OSTROM, *LOCAL GOVERNMENT IN THE UNITED STATES* 97–98 (1988), which describes the increasing average costs of production as certain government outputs increase.

<sup>26</sup> Richard B. Stewart, *Madison’s Nightmare*, 57 U. CHI. L. REV. 335, 342 (1990).

<sup>27</sup> FEDERALIST No. 10 (James Madison).

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Familiar collective action problems might prevent citizens at any level of government from coalescing on behalf of a common but diffuse interest. However, these difficulties are exacerbated by the fact of heterogeneous preferences in a large republic.<sup>28</sup> For example, a Maryland environmental group that is tightly organized around the issue of pollution in the Chesapeake Bay might find it difficult to form a coalition with another group in the Midwest organized around the purchase of development rights to prevent suburban sprawl. The sheer size and complexity of the federal budget and the small stake that each citizen has in fiscal decisions both prevent taxpayers from monitoring federal spending decisions in the way homeowners can monitor service and tax levels within a single municipality.<sup>29</sup> One might predict, therefore, that the government of a large republic would be especially prone to Mancur Olson's logic of collective action:<sup>30</sup> The national government would be dominated by narrow interest groups that seek concentrated and homogenous private benefits for their constituents at the expense of the less cohesive, more numerous general public.<sup>31</sup> The best empirical evidence, however, indicates that such an Olsonian story has been, at best, incomplete,

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<sup>28</sup> See Richard L. Revesz, *Federalism and Environmental Regulation: A Public Choice Analysis*, 115 HARV. L. REV. 553, 563 (2001) (“[T]he national aggregation of environmental interests results in the loss of homogeneity of interests, thereby complicating organizational problems.”).

<sup>29</sup> The local-federal comparison is easier to make than the state-federal comparison, because municipal taxation and expenditure affect home values, an uninsurable and extraordinarily large asset that gives homeowners an incentive to learn about, and involve themselves in, local politics. See generally WILLIAM A. FISCHER, *THE HOMEVOTER HYPOTHESIS: HOW HOME VALUES INFLUENCE LOCAL GOVERNMENT TAXATION, SCHOOL FINANCE, AND LAND-USE POLICIES* (2001).

The critical variable that this analysis omits is, of course, economies of scale in press coverage and interest group formation. National newspapers, TV news, and other media are more sophisticated at the federal level, and there is a richer array of interest groups in Washington, D.C., than, say, Lansing, Michigan. Whether the greater number of groups and media inform voters sufficiently to offset the greater complexity and obscurity of federal politics is an open question.

<sup>30</sup> MANCUR OLSON, *THE LOGIC OF COLLECTIVE ACTION: PUBLIC GOODS AND THE THEORY OF GROUPS* 3 (1971).

<sup>31</sup> There is a myriad of examples of the “iron triangles” of regulated industries, members of Congress, and agency bureaucrats who cooperate with each other for regulatory benefits, campaign contributions, and budget items. As an illustrative example, consider how the U.S. Postal Service gains critical political support from third-class mail users—businesses who send large volumes of advertisements, solicitations, etc. (“junk mail”)—by hiking the rates of first-class mail users and keeping the rates of third-class mail low. Only with the clout of such a lobby can the Postal Service hope to survive internecine congressional budget struggles with other agencies. JACK H. KNOTT & GARY J. MILLER, *REFORMING BUREAUCRACY: THE POLITICS OF INSTITUTIONAL CHOICE* 129–30 (1987).

especially since the rise of “citizen groups” in the 1970s.<sup>32</sup> In terms of media attention, presence at congressional hearings, and lobbying effectiveness, citizen groups advancing diffuse ideological goals such as environmental quality, consumer safety, child welfare, or corruption-free government seem to dominate groups that focus on the immediate economic interests of their members.<sup>33</sup> Moreover, Olson’s theory contains gaps that make the existence of these groups unsurprising.<sup>34</sup>

Madison’s Nightmare, in other words, is not Olson’s nightmare. Rather, it is a different sort of bad dream—the nightmare of gridlock. The problem is not that interest groups do not represent diffuse ideological interests. Rather, the problem is that nothing unifies these interests into coalitions capable of making policy. In part because simplicity of message helps them communicate better with their passive memberships of mass-mail recipients, citizen groups tend to be advocates for narrow issues—the prohibition or protection of abortion, firearms, vouchers for private religious schools, etc.<sup>35</sup> It is difficult for this myriad of groups to coalesce into a single policymaking majority absent strong political parties that would broker the long-term vote-trading needed for cooperation. But national political parties in the United States tend to be weak, particularly when compared with the disciplined parties of Parliamentary regimes.<sup>36</sup> This does not mean that the groups are powerless; because enacting federal laws requires supermajorities to overcome presidential vetoes or senatorial

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<sup>32</sup> See generally KAY LEHMAN SCHLOZMAN & JOHN T. TIERNEY, *ORGANIZED INTERESTS AND AMERICAN DEMOCRACY* (1986) (providing survey data on different types of lobbying organizations and their activities).

<sup>33</sup> See JEFFREY M. BERRY, *THE NEW LIBERALISM: THE RISING POWER OF CITIZEN GROUPS* 14, 19–25, 61–69, 119–24 (1999).

<sup>34</sup> For a crisp overview of these theoretical gaps, see Steven P. Croley, *Theories of Regulation: Incorporating the Administrative Process*, 98 COLUM. L. REV. 1, 31–56 (1998).

<sup>35</sup> See Theda Skocpol, *Advocates Without Members: The Recent Transformation of American Civic Life*, in *CIVIC ENGAGEMENT IN AMERICAN DEMOCRACY* 461, 499–504 (Theda Skocpol & Morris P. Fiorina eds., 1999) (comparing staff-led, centralized advocacy groups to federated groups composed of associations of local chapters).

<sup>36</sup> It is a familiar point that American political parties tend to lack detailed programs or mechanisms to discipline legislators who depart from those programs. See, e.g., JOHN H. ALDRICH, *WHY PARTIES? THE ORIGINS AND TRANSFORMATIONS OF POLITICAL PARTIES IN AMERICA* 195–201 (1995) (analyzing partisan voting in Congress over time); Theodore J. Lowi, *Party, Policy, and Constitution in America*, in *THE AMERICAN PARTY SYSTEMS: STAGES OF POLITICAL DEVELOPMENT* 238, 259 (William Nisbet Chambers & Walter Dean Burnham eds., 2d ed. 1975) (“American parties are not ‘responsible parties.’”). Morris Fiorina (among others) has attributed representatives’ reliance on the personal vote in part to this tendency. Morris P. Fiorina, *The Decline of Collective Responsibility in American Politics*, *DÆDALUS*, Summer 1980, at 25, 27 (noting that United States has neither “the institutions nor the traditions to support a British brand of responsible party government”).

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filibusters, a group of interests far smaller than a majority can block legislation.<sup>37</sup> As a result, it is much easier to prevent policymaking in Washington, D.C., than to successfully enact new policies. The result is a tyranny of the status quo in which new proposals die in subcommittee even when they have substantial support from a majority of Congress.

And yet Congress occasionally breaks through the gridlock to enact comprehensive reforms, even at the expense of many well-mobilized interests: Tax shelters are closed,<sup>38</sup> transportation is deregulated,<sup>39</sup> polluters are regulated,<sup>40</sup> and the banking industry is opened to competition.<sup>41</sup> Some of these initiatives depend on policy entrepreneurs at federal administrative agencies who exercise power in the vacuum created by a gridlocked Congress.<sup>42</sup> In some cases, however, Congress itself enacts new laws without the prompting of bureaucratic entrepreneurs. Why? And how can legal reform increase this tendency?

### B. *The Personal Vote*

One way in which representatives solve the problem of representing ideologically heterogeneous populations is simply by avoiding divisive ideological questions and concentrating on delivering the bacon to their districts. The representative who tracks down Veterans Affairs checks and cuts ribbons for federally funded sewage treatment plants wins gratitude and makes no enemies. Better yet, this cultivation of “the personal vote” gives the incumbent legislator a built-in advantage over challengers. Especially in a system with first-past-the-

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<sup>37</sup> See KEITH KREHBIEL, *PIVOTAL POLITICS: A THEORY OF U.S. LAWMAKING* 20–48 (1998) (setting out theory based on filibuster and veto pivots to explain observed gridlock).

<sup>38</sup> See generally ALAN S. MURRAY & JEFFREY H. BIRNBAUM, *SHOWDOWN AT GUCCI GULCH: LAWMAKERS, LOBBYISTS, AND THE UNLIKELY TRIUMPH OF TAX REFORM* (1987) (describing process by which 1986 tax reform measures were enacted despite heavy opposition from affected interests).

<sup>39</sup> See MARTHA DERTHICK & PAUL J. QUIRK, *THE POLITICS OF DEREGULATION* 147–74 (1985) (describing deregulation of airlines and trucking industries in late 1970s in face of industries’ own objections).

<sup>40</sup> See Daniel A. Farber & Philip P. Frickey, *The Jurisprudence of Public Choice*, 65 *TEX. L. REV.* 873, 895–96 (1987) (arguing that evidence is unpersuasive that environmental regulation is really product of special interests).

<sup>41</sup> See Steven P. Croley, *Public Interested Regulation*, 28 *FLA. ST. U. L. REV.* 7, 75–84 (2000) (describing deregulation of banking industry as example of public interest regulation).

<sup>42</sup> On the general notion of the “policy entrepreneur,” see MARK SCHNEIDER, PAUL TESKE & MICHAEL MINTROM, *PUBLIC ENTREPRENEURS: AGENTS FOR CHANGE IN AMERICAN GOVERNMENT* 1–2 (1995). Steve Croley, for instance, details the entrepreneurial role that EPA Administrator Carol Browner played in defending the regulation of ozone and particulate matter. See Croley, *supra* note 41, at 55–66.

post single-member districts and weak political parties, one would expect incumbents to favor constituent services over more divisive sponsorship of legislation, in order to secure majorities or pluralities of the vote in their districts. One would also expect a norm of “universalism” in Congress, where each member agrees to vote for every other member’s district-specific spending in order to give all incumbents some uncontroversially pleasant news to deliver to their constituents.<sup>43</sup> The cultivation of the personal vote, however, may have costs apart from the wastefulness of the cross-subsidies that it generates. As Morris Fiorina suggests, each individual congressperson’s cultivation of nonideological services can lead to the neglect of general policymaking.<sup>44</sup> The predictable result is that each voter loves his or her congressperson but hates Congress.<sup>45</sup>

As with Madison’s Nightmare, the Personal Vote exists, but it is not the only mechanism at work in Congress. Individual congresspersons also make a name for themselves by becoming experts in some area of general policymaking and then championing reforms within that area of expertise. But, as with Madison’s Nightmare, one can ask whether different institutional arrangements can make policy-minded representatives more or less likely to emerge. Some reforms such as stronger political parties obviously would diminish the Personal Vote,<sup>46</sup> but, aside from being controversial, they are also unlikely to be realized in the near future through any discrete legal reform. Are there other reforms that might be less controversial and more amenable to short-term implementation?

### C. Political Overload

Closely related to the problem of the Personal Vote is the related problem of what Samuel Beer calls “political overload”—the tendency of the national state to bite off more than it can chew and consequently expand its costs and jurisdiction without purpose or overall

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<sup>43</sup> For a definition and illustration of universalism in federal fiscal politics, see Robert P. Inman & Michael A. Fitts, *Political Institutions and Fiscal Policy: Evidence from the U.S. Historical Record*, 6 J.L. ECON. & ORG. (SPECIAL ISSUE) 79, 83–84, 106–25 (1990).

<sup>44</sup> See MORRIS P. FIORINA, *CONGRESS: KEYSTONE OF THE WASHINGTON ESTABLISHMENT* 37–47, 85–97 (2d ed. 1989) (describing individual congresspersons’ efforts to secure reelection through noncontroversial and district-specific casework, potentially at expense of general legislation).

<sup>45</sup> See generally BRUCE CAIN, JOHN FERREJOHN & MORRIS FIORINA, *THE PERSONAL VOTE: CONSTITUENCY SERVICE AND ELECTORAL INDEPENDENCE* (1987) (examining why citizens evaluate their legislators and their legislature differently).

<sup>46</sup> For an argument that the looseness of the party system in American politics leads to “noncongruent majorities” on the issues, see V.O. KEY, JR., *PUBLIC OPINION AND AMERICAN DEMOCRACY* 476–78 (1964).

supervision.<sup>47</sup> The problem of Political Overload, like Madison's Nightmare and the Personal Vote, will tend to increase with the scale of the jurisdiction, simply because a larger jurisdiction (assuming no significant constitutional limits on the topics entrusted to its care) will have a larger number of interests and issues. There are only 537 elected policy generalists in the federal government, and they have limited time to focus on policymaking. Only a small number of issues can occupy their radar screen—their “governmental agenda,” in John Kingdon's phrase—and policymakers can decide an even smaller number of agenda items, what Kingdon calls their “decision agenda.”<sup>48</sup> Inevitably, national politicians delegate authority to administrative agencies to resolve not only the details but also the general policies of the federal government.

Bureaucratic government has some drawbacks. There is considerable evidence that appointed policy specialists are less likely to initiate dramatic changes in agenda or to organize latent interest groups than elected policy generalists such as members of Congress.<sup>49</sup> This is not to say that appointed policymakers necessarily suggest only small policy reforms: Major bureaucratic entrepreneurs sometimes overshadow politicians as agenda setters.<sup>50</sup> However, as a general matter, politicians are more likely to change the policymaking landscape than appointed policy specialists. Bureaucrats' authority rests on their expertise, specialized training, and experience dealing with particular interests defined by authorizing statutes. Therefore, bureaucrats rarely try to form new interest groups but instead broker between those groups with which they are familiar. Bureaucrats also tend to resist or at least be indifferent to broad policy considerations or claims of abstract justice that do not fall squarely within their regulatory specialty; for instance, environmental experts will worry less about housing starts or racial integration than wetlands, simply because the former are not part of their regulatory portfolio.<sup>51</sup> Politicians' authority, by contrast, springs out of their capacity to organize and inspire voters. It is hardly surprising that they will tend to organize

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<sup>47</sup> See generally Samuel H. Beer, *Political Overload & Federalism*, 10 *POLITY* 5 (1977).

<sup>48</sup> JOHN W. KINGDON, *AGENDAS, ALTERNATIVES, AND PUBLIC POLICIES* 16, 20 (2d ed. 1995).

<sup>49</sup> See JOEL D. ABERBACH, ROBERT D. PUTNAM & BERT A. ROCKMAN, *BUREAUCRATS AND POLITICIANS IN WESTERN DEMOCRACIES* 106–14 (1981) (contrasting bureaucrats' criteria for evaluating policy with that of politicians).

<sup>50</sup> See generally EUGENE LEWIS, *PUBLIC ENTREPRENEURSHIP: TOWARD A THEORY OF BUREAUCRATIC POWER* (1980) (describing entrepreneurial activity of Robert Moses, Hyman Rickover, and J. Edgar Hoover).

<sup>51</sup> See, e.g., STEPHEN BREYER, *BREAKING THE VICIOUS CIRCLE: TOWARD EFFECTIVE RISK REGULATION* 11 (1993) (describing tunnel vision of specialist agencies).

and represent latent interests that are not regular participants in government, using the abstract rhetoric of justice and policy to mobilize constituents.<sup>52</sup>

Thus, when politicians delegate regulatory authority to regulatory agencies, they could be seen as abdicating their distinctive role as policy entrepreneurs or as organizers of latent interest groups. Indeed, politicians might use federal agencies as an opportunity to duck major policymaking responsibilities (which create political risk) and instead concentrate on the Personal Vote.<sup>53</sup> The predominance of bureaucratic as opposed to elected policymakers thus corresponds in a rough way to a government that is less likely to undertake major policy reforms.

As with Madison's Nightmare and the Personal Vote, the federal government overcomes Political Overload often enough. The question naturally arises: How? And how can this track record be improved? In particular, are there any relatively simple legal reforms that might mitigate the problem?

### III

#### HOW AN ANTI-PREEMPTION RULE CAN FORCE CONGRESS TO CONFRONT TOUGH ISSUES

The problems described in Part II are familiar: They are essentially the problems of a democratic deficit in large-scale governments. As the number of interest groups increases and as political parties weaken, the capacity to muster a majority becomes more difficult. As the ratio of appointed experts to elected generalists grows larger, the latter use the former to protect their incumbency from political risk taking. Both of these conditions afflict the federal government more than state governments to the extent that the conditions are a function of population size and interest group heterogeneity.

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<sup>52</sup> See, e.g., KINGDON, *supra* note 48, at 19, 30–34 (discussing how bureaucrats have limited effect on agenda setting as compared to political appointees); RENATE MAYNTZ & FRITZ W. SCHARPF, *POLICYMAKING IN THE GERMAN FEDERAL BUREAUCRACY* 69–76 (1975) (describing how bureaucratic specialization decreases number of policy proposals on large issues requiring cooperation among divisions or issues facing entrenched interests); SCHNEIDER, TESKE & MINTROM, *supra* note 42, at 148 (finding that city managers are secondary source of policy innovation, after politicians).

<sup>53</sup> This is the conventional justification offered by legal scholars and political scientists for a strengthened nondelegation doctrine. See, e.g., DAVID SCHOENBROD, *POWER WITHOUT RESPONSIBILITY: HOW CONGRESS ABUSES THE PEOPLE THROUGH DELEGATION* 99–106 (1993) (describing inability of voters to monitor government when Congress delegates broadly to federal agencies); Theodore J. Lowi, *Two Roads to Serfdom: Liberalism, Conservatism and Administrative Power*, 36 AM. U. L. REV. 295, 296–97 (1987) (arguing that broad delegation “deranges virtually all constitutional relationships”).



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What has any of this to do with preemption? I suggest an unfamiliar (and obviously partial) palliative to the tyranny of the status quo—a “clear statement” anti-preemption rule of construction that would discourage federal judicial preemption of state tort and regulatory law, a rule that I will outline in more doctrinal detail at the end of this Article. My suggestion rests on three hypotheses. First, specific action from Congress on specific legislation can mobilize public opinion, thus diminishing the tyranny of the status quo. Second, state regulation of business for the sake of health, safety, or environmental quality gives regulated interests an incentive to put broad issues of health, safety, and environmental quality on the congressional agenda, in the form of legislation that would preempt state regulation. Third, those regulated industries that support preemption have a greater capacity to elicit a specific congressional response to a bill—either a floor vote or committee hearings—than the interest groups that oppose preemption. Therefore, if the goal is to mobilize the public to focus its attention on Congress, then it makes sense to choose a default rule that places the burden on the regulated industries to lobby for preemptive legislation, rather than one that places the burden on those anti-preemption interests to lobby for a waiver of preemption.

In what follows, I defend each of these hypotheses as at least plausible enough to justify further empirical work by other scholars.<sup>54</sup>

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<sup>54</sup> The most thorough study of Congress’s willingness to override judicial decisions is contained in William N. Eskridge, Jr., *Overriding Supreme Court Statutory Interpretation Decisions*, 101 *YALE L.J.* 331 (1991). Eskridge finds that state and local officials do relatively well in persuading Congress to overrule judicial decisions that they oppose. *See id.* at 352. Eskridge’s empirical breakdown does not examine preemption decisions as a separate category of decisions. Many of the victories chalked up to state and local governments were cases in which Congress overrode judicial decisions vindicating the rights of criminal defendants against state law enforcement. *See id.* at 362. These decisions say very little about whether nonfederal officials will be successful when they are opposed by less stigmatized groups.

As this Article was going to press, I had the pleasure of reading a student note by Noah Purcell, which surveys preemption decisions of the U.S. Supreme Court between 1983 and 2003 to see if Congress was more or less likely to overrule decisions holding that a federal statute preempted state law. *See Note, New Evidence on the Presumption Against Preemption: An Empirical Study of Congressional Responses to Supreme Court Preemption Decisions*, 120 *HARV. L. REV.* (forthcoming April 2007). Purcell finds that Congress generally does not overrule the Court’s preemption decisions, regardless of whether those decisions find for or against preemption. Purcell’s survey is a very helpful addition to the literature. However, it does not examine whether Congress is more likely to give committee hearings or floor consideration to bills seeking to override judicial decisions preempting state law. Given that I am more interested in the quality of the congressional debate rather than the outcome of congressional votes, this survey does not directly resolve the issues raised in this Article. There remains a need for a comparison of pro- and anti-preemption bills’ chances of escaping committee, after hearings, to reach a floor vote.

I conclude in Part IV with a more detailed description of a possible clear statement rule.

*A. Congressional Action as a Source of Public Mobilization*

There is nothing inherently evil about gridlock. Sometimes the best legislative result is inaction. Congressional instability resulting from constantly cycling majorities can generate the same kinds of inefficiencies as congressional gridlock. Gridlock leads to “tyranny” only when Congress maintains the status quo despite the existence of latent interest groups that would, if mobilized, induce Congress to change the status quo for an outcome closer to that preferred by the public. By creating a divergence between the status quo and public preferences, lack of public mobilization, not inaction per se, transforms mere gridlock into the tyranny of the status quo. The solution to such tyranny, therefore, is not to induce Congress to act, but rather to mobilize the public to focus on Congress such that congressional decisions, whether action or inaction, will more accurately reflect public opinion.

Congress can mobilize public opinion by taking specific action on a bill, such as holding a hearing or a floor vote. Consider reasons why hearings and floor votes could be mobilizing. Such focal points induce interest groups to adopt what Ken Kollman calls an “outside strategy” to influence legislation: They publicize legislation by contacting their members and urging them to write or call their representatives, by holding press conferences, by issuing press releases, by writing op-eds, by appearing on talk shows, etc.<sup>55</sup> Interest groups, however, are more likely to adopt an outside strategy if there is some salient event in Congress on which to focus the public’s attention. As Kollman notes, the stage at which legislation is proposed is critical for inducing interest groups with broad popular support to adopt an outside strategy as a way of signaling the popularity of the policy to politicians.<sup>56</sup>

Additionally, challengers to congressional incumbents use their voting records to mobilize opposition. The public is generally uninformed about its representative’s vote at the time that it occurs. How-

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Only then can one determine whether Congress is likely to give more serious consideration to pro- or anti-preemption bills.

<sup>55</sup> KEN KOLLMAN, *OUTSIDE LOBBYING: PUBLIC OPINION AND INTEREST GROUP STRATEGIES* 34–49 (1998) (describing type and frequency of interest groups’ outside strategies); see also KENNETH M. GOLDSTEIN, *INTEREST GROUPS, LOBBYING, AND PARTICIPATION IN AMERICA* 22–28 (1999) (describing interest groups’ stimulation of grass roots campaigns to influence Congress).

<sup>56</sup> KOLLMAN, *supra* note 55, at 115–18.

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ever, challengers comb through the records for controversial votes that could be used against the incumbent in an election campaign.<sup>57</sup> It is precisely because incumbents fear such use of their voting records that they have an incentive to cultivate the Personal Vote and avoid voting on potentially controversial legislation.<sup>58</sup> Floor votes, in short, can ultimately mobilize the public even if, at the time of the vote, no member of the public pays any attention to the legislation on which Congress is voting.

Ensuring that bills get hearings and floor votes is not, of course, the only, or even the best, way to mobilize the public. But, unlike some other mechanisms for mobilizing the public, hearings and floor votes can be promoted by actions that governmental officials actually have political incentives to perform.<sup>59</sup> In particular, as explained below, nonfederal officials' ordinary pursuit of their own electoral ambitions can play an important role in encouraging public-mobilizing federal legislation.

### *B. States as Agenda Setters for the National Government*

It has become a familiar point that state regulatory legislation prods regulated interests to seek federal legislation preempting the states. Elliott, Ackerman, and Millian note that federal environmental law has largely been the product of lobbying by regulated industries responding to the threat of "a state of affairs even worse from their perspective than federal air pollution regulation—namely, inconsistent and progressively more stringent environmental laws at the state and local level."<sup>60</sup> The insight can be generalized to other areas of federal regulation: The federal presence in numerous unrelated areas—pension regulation, securities regulation, prohibitions on electronic identity theft, prohibitions on predatory lending—was ushered in by state regulation that industry groups wanted to preempt.<sup>61</sup> Thus, federal regulation frequently results from lobbying

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<sup>57</sup> For a description of congresspersons' fear of future electoral adversaries alerting citizens to their votes, see JOHN W. KINGDON, *CONGRESSMEN'S VOTING DECISIONS* 60–61 (3d ed. 1989).

<sup>58</sup> The theoretical account of Congress's fear of even an inattentive public is set forth in R. DOUGLAS ARNOLD, *THE LOGIC OF CONGRESSIONAL ACTION* 64–71 (1990).

<sup>59</sup> By contrast, reforms such as making electoral districts more competitive obviously face the entrenched opposition of legislative incumbents.

<sup>60</sup> E. Donald Elliott, Bruce A. Ackerman & John C. Millian, *Toward a Theory of Statutory Evolution: The Federalization of Environmental Law*, 1 *J.L. ECON. & ORG.* 313, 326 (1985).

<sup>61</sup> For the role that California's regulation of insurance played in inducing employers to embrace the Employment Retirement Income Security Act (ERISA) in the early 1970s, see JAMES A. WOOTEN, *THE EMPLOYMENT RETIREMENT INCOME SECURITY ACT OF 1974*, at 264–65 (2004). For the role that New York State Attorney General Eliot Spitzer's inves-

efforts by industry interests that oppose regulation. The apparent paradox of this statement dissolves when one takes into account industry's desire for uniformity of regulation. However much they dislike the prospect of a comprehensive federal regulatory scheme, business interests have even stronger reasons to dislike the prospect of several nonuniform state regulatory schemes, and those reasons can often lead them to acquiesce to federal laws that preempt the latter.

State laws, therefore, are an important influence on Congress's agenda. They spur interest groups to raise issues that might otherwise never receive congressional attention. In effect, the state governments serve as a sort of informal committee system for Congress, screening policy proposals for a minimum level of political popularity and sending some proposals to the floor of Congress by enacting laws that regulated interest groups find intolerable.

Is this a good thing? As John Kingdon has famously established, issues find their way on to the congressional decisionmaking docket based on the complex and largely independent interaction of "problems, policies, and politics."<sup>62</sup> There is no shortage of think tanks and academics peddling policies for Congress to consider, but Congress cannot possibly evaluate these policies in some rational, comprehensive, or systematic manner.<sup>63</sup> Instead, a few policies will get on Congress's agenda based on whether they address problems that catch the attention of the nation and that are consistent with the nation's political mood. Like a surfer, the policy advocate has to wait for the right wave of problems and politics before he can move.<sup>64</sup>

It follows that political change depends upon an environment in which political entrepreneurs have the right opportunities and incentives to put new problems on the agenda of the nation. Kingdon recognizes that "policy communities" (experts specializing in a particular

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tigation of securities fraud played in inducing issuers to seek (unsuccessfully) preemption by the Sarbanes-Oxley Act of 2002, see Renee M. Jones, *Does Federalism Matter? Its Perplexing Role in the Corporate Governance Debate*, 41 WAKE FOREST L. REV. 879, 889-94 (2006). For the role that state regulation of identity theft has played in inducing the credit industry to accept similar federal regulations in exchange for the preemption of state law, see Michael Epshteyn, *The Fair and Accurate Credit Transactions Act of 2003: Will Preemption of State Credit Reporting Laws Harm Consumers?*, 93 GEO. L.J. 1143, 1158 (2005). For the role that state predatory lending laws have played in forcing the Office of the Comptroller of Currency (OCC) to promulgate its own regulations on predatory lending, see Jason Howard, *Development in Banking & Financial Law, 2003: Predatory Lending*, 23 ANN. REV. BANKING & FIN. L. 83, 83-93 (2004), which describes state laws, subsequent federal bills in Congress, and the OCC's proposed changes to banking rules to control predatory lending.

<sup>62</sup> KINGDON, *supra* note 48, at 19.

<sup>63</sup> *Id.*

<sup>64</sup> See *id.* (arguing that political action only occurs at certain "critical junctures" when separate "streams of problems, policies, and politics" come together).

sort of policy, both in and out of government) “tend to be inertia-bound and resistant to major changes.”<sup>65</sup> As noted above, this may be especially true of bureaucratic experts. Moreover, incumbent members of Congress may also regard political entrepreneurship as too risky, given the specialized communities that it might offend and the benefits of simply cultivating the personal vote.

State and local politicians, however, are natural policy entrepreneurs who can significantly influence what sorts of conditions are publicly recognized as problems. As Kingdon notes, persuading voters that a condition is a problem is less a matter of academic expertise and more a matter of entrepreneurial imagination—“a major conceptual and political accomplishment.”<sup>66</sup> The entrepreneur can transform a social condition that everyone has taken for granted into a problem that must be addressed by recategorizing the issue and offering different comparisons for judging whether the issue is being acceptably handled. In essence, the entrepreneur reengineers public baselines of acceptability.<sup>67</sup> This is not a task likely to be performed well by bureaucratic experts, and, unsurprisingly, Kingdon finds that bureaucrats are significantly less likely to be agenda setters than elected politicians, a result that duplicates the research of others.<sup>68</sup>

Nonfederal officials have not only an incentive to be agenda setters but they also have a critical weapon with which to force federal policymakers to pay attention—the power to redefine the regulatory status quo. Recall that Madison’s Nightmare is a problem of the tyranny of the status quo: Even though a majority of the nation’s repre-

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<sup>65</sup> *Id.* at 128.

<sup>66</sup> See *id.* at 115 (discussing difficulty of getting public “to see old problems in one way rather than another”).

<sup>67</sup> Thus, the acceptability of waterway fees might turn on whether the public perceives navigation on the Mississippi River as *sui generis* or as merely another form of transportation. If the latter, then the failure to charge barges the marginal cost of their usage might look like a “special” exemption, given that car drivers pay tolls and gas taxes to fund highways. See *id.* at 111–12. For a summary of similar ways in which public entrepreneurs reframe issues to advance their causes, see SCHNEIDER, TESKE & MINTROM, *supra* note 42, at 42–44.

<sup>68</sup> KINGDON, *supra* note 48, at 43–44. Schneider, Teske, and Mintrom find that city managers can act as entrepreneurs. SCHNEIDER, TESKE & MINTROM, *supra* note 42, at 147–67. However, unlike most federal bureaucrats, city managers have general jurisdiction over a broad portfolio of issues, including the management of the municipal budget. Thus, it should not be surprising that they have both incentives for and a professional culture of engaging in broader policymaking. See COLIN CAMPBELL & GEORGE J. SZABLOWSKI, *THE SUPERBUREAUCRATS: STRUCTURE & BEHAVIOR IN CENTRAL AGENCIES* 11–14 (1979) (noting that bureaucrats in centralized agencies with broader jurisdictions include more political considerations and view themselves as more directly politically accountable than traditional bureaucrats in specialized agencies). However, even Schneider, Teske, and Mintrom find that city managers tend to be more risk averse and less innovative than mayors. SCHNEIDER, TESKE & MINTROM, *supra* note 42, at 167.

sentatives do not favor the status quo, Congress cannot enact plausible alternatives. However, if one reframes the status quo to present a policy sufficiently disfavored by members of Congress, then one can muster sufficient votes to overcome the veto-filibuster obstacles that otherwise induce gridlock.<sup>69</sup> Because interest groups invest resources to mobilize their members to contact congresspersons when some major event justifies the investment, the prospect of a floor vote is itself a mobilizing event.<sup>70</sup> Thus, reframing of the status quo can force Congress, interest groups, and the public to attend to policies that otherwise would never escape committee.

By giving nonfederal lawmakers a wider scope for entrepreneurial activity, a clear statement rule against federal preemption increases their capacity to influence congressional agendas in dramatic ways. State lawmakers will confront controversial issues like air pollution, workplace safety, automobile safety, products liability, and even human rights and foreign policy.<sup>71</sup> However, to the extent that courts find that state regulatory efforts in these areas are preempted, Congress is relieved of pressure from regulated bodies to put these issues on the decisionmaking agenda for a debate and a vote. Preemption thus suppresses political entrepreneurship by suppressing the most active source of such entrepreneurship—nonfederal elected officials.

It is natural to assume that nonfederal officials can perform this agenda-setting role only if they are free from the problems of capture that affect Congress. But one need not assume that state politicians are somehow more public spirited or less subject to interest-group pressure than members of Congress in order to believe that they have incentives to change the status quo in ways that will provoke congressional action. Instead, one must accept three modest assumptions about state politicians: (1) They are subject to a different set of interest-group pressures than members of Congress; (2) they have incentives to respond to these pressures because they can frequently externalize the costs of policymaking on to nonresidents; and (3) they are sufficiently ambitious for higher office that they will undertake the

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<sup>69</sup> KREHBIEL, *supra* note 37, at 47–48.

<sup>70</sup> On legislation as a catalyst for popular mobilization, see STEVEN J. ROSENSTONE & JOHN MARK HANSEN, *MOBILIZATION, PARTICIPATION, AND DEMOCRACY IN AMERICA* 107–17 (1993).

<sup>71</sup> See Daniel Halberstam, *The Foreign Affairs of Federal Systems: A National Perspective on the Benefits of State Participation*, 46 *VILL. L. REV.* 1015, 1053–57 (2001) (arguing for cooperative federalism model, where states may take action affecting foreign policy in order to spur inert federal government to act on previously dormant issues).

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risks of enacting new policies rather than wait for some other politician to take the initiative.

The anecdotal support for all three of these propositions—interest-group heterogeneity, cost exporting, and ambition—is strong. There is little doubt that the demographics of the United States are sufficiently heterogeneous that the several states contain a wider array of interests than those considered on Capitol Hill. For example, in states without auto manufacturers but with a strong environmental lobby, state politicians will have greater incentives than Congress to load costs on to car makers.<sup>72</sup> The point is not that state politicians are somehow immune to “capture” by regulated interests. The point is that they are captured by a different set of interests than those dominant in Washington, D.C., because state constituencies contain a different mix of interests than the nation as a whole.<sup>73</sup> That such state politicians would, therefore, enact policies that are mired in gridlock at the national level should be no surprise, especially because they can frequently export the costs of their regulatory initiatives on to nonresidents.<sup>74</sup> Finally, given that nonfederal politicians constitute the major source of competition to congressional incumbents,<sup>75</sup> it is natural that

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<sup>72</sup> See KINGDON, *supra* note 57, at 35–38 (noting congresspersons’ interest in protecting district industry because, in one member’s words, “Damn it, home comes first”).

<sup>73</sup> The partisan environment is also different in some states than in Washington, D.C., because state political parties sometimes have powerful control over state legislative partisan blocs and such parties can overcome the centrifugal pressures of interest groups. See, e.g., Wayne L. Francis, *Leadership, Party Caucuses, and Committees in United States State Legislatures*, 10 LEGIS. STUD. Q. 243, 246–53 (1985) (discussing differing roles of political parties in state legislatures); Charles W. Wiggins, Keith E. Hamm & Charles G. Bell, *Interest Group and Party Influence Agents in the Legislative Process: A Comparative State Analysis*, 54 J. POL. 82, 97 (1992) (finding that party-oriented leadership can sometimes offset interest-group pressure). In states like New York, where the state legislature is effectively controlled by the Speaker of the House and the Majority Leader of the State Senate, there is little danger of gridlock from excessive decentralization.

<sup>74</sup> Elliott, Ackerman, and Millian find that this tendency toward externalizing regulatory costs helps explain the avidity with which states imposed tough air standards on auto emissions. Cars are not manufactured in California, so California’s politicians can safely urge tough standards, knowing that the costs will be borne by out-of-state businesses, their employees, and their shareholders. Elliott, Ackerman & Millian, *supra* note 60, at 329. Likewise, state judges and juries in rural states can impose large judgments on out-of-state businesses without negative local consequences. See Alexander Tabbarok & Eric Helland, *Court Politics: The Political Economy of Tort Awards*, 42 J.L. & ECON. 157, 157–59 (1999) (describing why local plaintiffs are more politically powerful than out-of-state defendants, particularly in states with elected judges).

<sup>75</sup> Roughly half of all members of the U.S. House of Representatives were state legislators before being elected to Congress. Michael B. Berkman, *State Legislators in Congress: Strategic Politicians, Professional Legislatures, and the Party Nexus*, 38 AM. J. POL. SCI. 1025, 1025 (1994). The percentage of state legislators in the House did not fall below thirty percent between 1940 and 1992. *Id.* at 1027 fig.1. Governorships, historically, were also a “major channel” to the U.S. Senate: Between 1914 and 1960 roughly twenty-two percent

nonfederal politicians want to make a name for themselves by taking the risk of advocating new policies.<sup>76</sup> It is not smart politics to play it safe against an incumbent who, almost by definition, will have greater name recognition and nonideological goodwill from his or her gerrymandered district.<sup>77</sup>

At first blush, it will hardly seem remarkable that nonfederal politicians perform an entrepreneurial role in a federal regime. After all, it is a cliché hardly worth repeating that state governments are sup-

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of senators were formerly governors. See DAVID R. MATTHEWS, *U.S. SENATORS AND THEIR WORLD* 55 tbl.27 (1960).

<sup>76</sup> Nonfederal politicians' notorious ambition for federal office makes Susan Rose-Ackerman's analysis of state officials' incentives unconvincing, albeit ingenious. Susan Rose-Ackerman, *Risk Taking and Reelection: Does Federalism Promote Innovation?*, 9 J. LEGAL STUD. 593 (1980). Rose-Ackerman argues that governmental experiments are likely to be public goods in that, once produced, they are reproducible by all state politicians, regardless of each state's investment. *Id.* at 604–05. As a result, individual governors and mayors will have no incentive to invest in experiments that involve any substantive or political risk, but will prefer to wait for other states to generate them; this will, of course, produce relatively few experiments. *Id.* Rose-Ackerman, however, assumes that state officials's desire for higher office has, at best, a weak effect on their incentives to innovate. *Id.* at 594, 615. She offers no defense of this assumption, which she introduces on the penultimate page of her article and does not incorporate into the preceding formal proof. Once one abandons this assumption, Rose-Ackerman's argument collapses.

Since Joseph Schlesinger's landmark study of ambition among legislators, there have been numerous studies attempting to measure political ambition for higher office among politicians. Schlesinger set the terms of research by defining three categories of ambition—discrete, static, and progressive—that could affect legislators' desire to run for higher office, with “progressive” ambition being defined as the desire to use one's existing office to “progress” to a higher office. JOSEPH A. SCHLESINGER, *AMBITION AND POLITICS: POLITICAL CAREERS IN THE UNITED STATES* 10 (1966). Taking into account the difficulties of measuring psychological traits such as the propensity to take risk, the studies seem uniformly to suggest what should be intuitively obvious to anyone who reads a newspaper—that many incumbent politicians are “progressively ambitious” for higher office, are prepared to take political risks to win such office, and change their voting behavior in preparation for elections to higher office. See, e.g., Paul R. Abramson, John H. Aldrich & David W. Rohde, *Progressive Ambition Among United States Senators: 1972–1988*, 49 J. POL. 3, 11–14 (1987) (arguing that propensity to take risks to win higher office is common among U.S. senators); Gary W. Copeland, *Choosing to Run: Why House Members Seek Election to the Senate*, 14 LEGIS. STUD. Q. 549, 553 (1989) (stating that House members preparing to run for Senate act strategically); David W. Rohde, *Risk-Bearing and Progressive Ambition: The Case of Members of the United States House of Representatives*, 23 AM. J. POL. SCI. 1, 14–15 (1979) (identifying “risk takers” in House of Representatives and demonstrating relationship between being risk taker and seeking senatorial office).

<sup>77</sup> See ALAN EHRENHALT, *THE UNITED STATES OF AMBITION: POLITICIANS, POWER AND THE PURSUIT OF OFFICE* 226–27 (1991) (describing difficulty of dislodging incumbents). For an anecdotal account of the degree to which state attorneys general, in particular, engage in highly visible activism, see Brooke A. Masters, *States Flex Prosecutorial Muscle; Attorneys General Move into What Was Once Federal Territory*, WASH. POST, Jan. 12, 2005, at A1.



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posed to serve as laboratories of democracy in a federal regime.<sup>78</sup> However, it is important to distinguish in two ways the argument offered above from the usual laboratories-of-democracy argument in favor of federalism.

First, the conventional argument for federalism assumes that state governments' laws and regulations are likely to be efficient regulations of their own citizens to the extent that those citizens internalize the costs of the regulation.<sup>79</sup> By contrast, I assume that much innovative state regulation is inefficient because the voters of the regulating states do not actually internalize those costs. As Elliott, Ackerman, and Millian point out, it is precisely because there is no such internalization of costs that nonfederal politicians can be trusted to be aggressive regulators.<sup>80</sup>

Second, some arguments for federalism suggest that, by competing with each other, the state and federal governments provide benchmarks that assist voters in determining whether one or the other level of government is regulating efficiently.<sup>81</sup> Such an argument requires a model in which some states are governed by state regulators and some by federal regulators, and citizens of one type of state can use the performance of the other states to assess their own regulators' performance. Something like such a regime does exist in workplace safety under the Occupational Safety and Health Act.<sup>82</sup> However, my argument does not depend on the existence of such intergovernmental competition. Instead, I argue in favor of state power for those who distrust states: However inefficient, state regulation provides the incentive to motivate business and industry groups to place issues on the federal agenda that would otherwise be buried in committee. The argument assumes nothing about the intrinsic benefits of state law.

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<sup>78</sup> *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting) (“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.”).

<sup>79</sup> See generally WALLACE E. OATES, *FISCAL FEDERALISM* (1972) (setting forth theory of fiscal federalism under which state laws efficiently accommodate regional variations in preferences for public goods).

<sup>80</sup> See Elliott, Ackerman & Millian, *supra* note 60, at 329–30 (describing how cost externalization gives state politicians incentives to regulate auto industry).

<sup>81</sup> See, e.g., ALBERT BRETON, *COMPETITIVE GOVERNMENTS: AN ECONOMIC THEORY OF POLITICS AND PUBLIC FINANCE* 233–39 (1996) (describing theory of competition between states based on performance of different states' regulatory programs).

<sup>82</sup> Occupational Safety and Health Act of 1970, 29 U.S.C. §§ 651–78 (2000). See *AFL-CIO v. Marshall*, 570 F.2d 1030, 1038 (D.C. Cir. 1980) (suggesting that federal staffing levels for Occupational Safety and Health Administration inspections that follow “coherent program” can serve as benchmark for state staffing levels).

One might object that it is not sensible to provoke debate by encouraging state politicians to enact inefficient, cost-exporting laws. After all, such state laws might not be repealed, even if Congress is mobilized to address them. But before one balks at the cost of enduring a patchwork of inefficient state policies, recall that the gridlock at the federal level also potentially imposes an even greater inefficiency. The failure to enact policies favored by the majority exacts a welfare loss just as surely as does the enactment of too many cost-exporting state policies. Indeed, the structure of federal and state inefficiency is remarkably similar: In both cases, excessive decentralization of power allows elected representatives to export costs to the nation as a whole. In the case of Congress, this cost exporting is more difficult to see because Congress is superficially a single centralized legislative body. In reality, however, the decentralization of power among members of Congress allows them to block legislation unless they are appeased by benefits for their favored interests. In effect, they can thereby extort subsidies or regulatory benefits for their districts at the expense of the nation as a whole—precisely the sort of externality that nonfederal politicians are said to produce.

The application of such externalizing tendencies in Congress is easy to see in fiscal policy. In a legislature without strong party leaders, each legislator has an incentive to vote for the spending proposals of her fellow legislators in order to win their support for her own proposals, with the result that every electoral district fails to pay the full marginal costs of the public goods that it consumes, externalizing those costs on to the budget of the nation as a whole.<sup>83</sup> And, in fact, a similar sort of cost externalization emerges in regulatory legislation. If small minorities of representatives can block reforms that harm their districts, the gridlock imposed effectively creates a regula-

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<sup>83</sup> The intuition is that universalistic voting provides an insurance policy against being left out of a majority coalition. Although each legislator thereby has less money to spend on her own district, each also is given insurance that she will not be left out of the governing coalition with *no* share of the budget whatsoever. Although Barry Weingast famously outlined the theoretical possibility of universalism in 1979, see Barry R. Weingast, *A Rational Choice Perspective on Congressional Norms*, 23 AM. POL. SCI. REV. 245, 252 (1979), there is ongoing debate about the degree to which universalistic norms actually govern Congress. See, e.g., Robert M. Stein & Kenneth N. Bickers, *Universalism and the Electoral Connection: A Test and Some Doubts*, 47 POL. RES. Q. 295, 295–99 (1995) (describing some limits on universalism in Congress). But there is little doubt that a bipartisan universalistic strategy is sometimes used by members of Congress to spread pork and punish those who refuse to join the universal coalition by voting against their colleagues' spending proposals. See Inman & Fitts, *supra* note 43, at 94–95, 111–13 (arguing that strong majority party can use government spending to affect member voting).

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tory externality—undesirably high<sup>84</sup> or low levels of regulation—for other districts. If political parties were strong enough, then they might be able to work out a deal in which individual congresspersons (or groups of congresspersons) traded their vetoes in exchange for regulatory packages that they each preferred more than gridlock. But political parties are not always so powerful; the result is that no such deal is brokered. The result is a tragedy of the commons just as costly, in theory, as the cost-exporting regulations of parochial states' governors, legislatures, and attorneys general.

As Samuel Issacharoff and Catherine Sharkey have argued, the Court's preemption doctrines are best explained as a judicial effort to protect the rest of the country from cost-exporting state laws.<sup>85</sup> However, such judicial arguments are incomplete absent some recognition of the analogous ways in which members of a decentralized Congress externalize identical costs on to the nation; courts should not attempt to correct state parochialism until they make some comparison of the inefficiencies of state cost exporting with the inefficiencies of federal gridlock. Both sorts of inefficiency are the result of cost exporting in a decentralized political environment.

Absent evidence to the contrary, there is no intuitively plausible reason to believe that the costs of federal gridlock are somehow less than the costs of nonfederal hyperactivity. Indeed, these sorts of costs are notoriously difficult to calculate and compare.<sup>86</sup> Instead of assuming away the costs of the excessive federalization of the law, one might look for some mechanism to force Congress itself to focus its attention on making the necessary comparison. State legislation may serve such a function.

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<sup>84</sup> The dangers of cost exporting are not simply the result of gridlock: They can also be the result of excessively stringent regulations that are designed to protect congresspersons' districts from other districts' economic competition. See, e.g., B. Peter Pashigian, *Environmental Regulation: Whose Self-Interests are Being Protected?*, in CHICAGO STUDIES IN POLITICAL ECONOMY 498, 515 (George Stigler ed., 1988) (suggesting that certain state delegations supported more stringent federal auto emissions policy in order to maintain competitive advantage). The classic study of such strategic overregulation is BRUCE A. ACKERMAN & WILLIAM T. HASSLER, *CLEAN COAL/DIRTY AIR* (1981).

<sup>85</sup> Samuel Issacharoff & Catherine M. Sharkey, *Backdoor Federalization*, 53 UCLA L. REV. 1353, 1368–71 (2006) (explaining preemption as response to “spillover effects” of local regulation).

<sup>86</sup> For an elaboration of this argument, see Roderick M. Hills, Jr., *Compared to What? Tiebout and the Comparative Merits of Congress and the States in Constitutional Federalism*, in THE TIEBOUT MODEL AT FIFTY: ESSAYS IN PUBLIC ECONOMICS IN HONOR OF WALLACE OATES 239 (William A. Fischel ed., 2006).

### C. *Anti-Preemption Rules as Debate-Eliciting Rules*

Any default rule, whether in favor of or against preemption, might create incentives for the interest groups hurt by the rule to reverse it in Congress.<sup>87</sup> Why should the anti-preemption rule for tort and regulatory issues be regarded as superior to a pro-preemption rule as a device to promote vigorous debate?

My response to this objection rests on the intuition that, in most cases,<sup>88</sup> the interests favoring preemption are best suited for promoting an open and vigorous debate on the floor of Congress. In particular, pro-preemption groups are more likely to succeed in getting a floor vote in Congress on imposing federal preemption than groups opposing federal preemption. To the extent that one wishes to promote such open debate about the issue of preemption, an anti-preemption default rule will therefore be more effective than a pro-preemption default rule.

My argument resembles Einer Elhauge's argument in favor of preference-eliciting default rules for statutory interpretation. Elhauge argues in favor of a "penalty default" rule, according to which, when a court is unsure of Congress's intent in enacting a statute, it would adopt the interpretation that is most unfavorable to the interest group(s) most capable of persuading Congress to reverse this interpretation.<sup>89</sup> By analogy, I argue that, where a statute is ambiguous, a court ought to interpret the preemptive force of federal statutes to burden interest groups favoring preemption, on the assumption that these pro-preemption groups are more capable of promoting a vigorous debate in Congress than their opponents. In effect, the anti-preemption rule is a rule in favor of a political donnybrook—a visible and direct confrontation on a hotly contested policy issue. Such a fight is useful if one believes that any rule of construction should induce Congress to confront politically troublesome issues that it would prefer to avoid.

Why adopt the premise that business groups are most capable of promoting such a debate? Consider two reasons, described in more detail below, for believing that industry and business groups are most capable of bearing the burden of changing the law.

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<sup>87</sup> See Schwartz, *supra* note 2, at 23 (2000) (arguing that if court does not know what legislature wanted, any construction has "forcing effect").

<sup>88</sup> I will discuss qualifications in Part III.D, *infra*.

<sup>89</sup> Einer Elhauge, *Preference-Eliciting Statutory Default Rules*, 102 COLUM. L. REV. 2162, 2165–66 (2002).

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### 1. *Incentives of Pro-Preemption Interests to Seek Regulatory Uniformity*

The interest groups favoring preemption have stronger incentives to bring legislation to the attention of Congress because they have an interest in regulatory uniformity for its own sake. Pro-preemption forces tend to be business and industry groups (e.g., the National Association of Manufacturers, the U.S. Chamber of Commerce, the Business Roundtable), as the uniformity of regulation that preemption brings is good for business.<sup>90</sup> The threat of nonuniform state regulation to large-scale business enterprises is not merely the administrative cost of complying with different states' rules but also the power of small states to impose large regulatory costs on a nonresident business. The U.S. Supreme Court has not enforced strong constitutional limits on states' legislative and adjudicative jurisdiction.<sup>91</sup>

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<sup>90</sup> See, e.g., W. John Moore, *Stopping the States*, 22 NAT'L J. 1758, 1758–59 (1990) (describing business groups' support for wide-ranging preemption of state regulations of products and services); Jonathan Walters, *Save Us from the States*, GOVERNING MAGAZINE, June 2001, at 20 (same); Solveig Singleton, *Rethinking Federalism: The Case for Preemption in the Information Age* 1–4 (Competitive Enter. Inst., Working Paper, undated) (stating that business support for preemption in national markets “reflects a long-term need of markets for reasonably certain, uniform law”). The U.S. Chamber of Commerce was largely responsible for killing bills in the House and Senate in 1999 that would have prohibited federal preemption of state law absent a clear statement authorizing preemption in federal statutes and regulations. See *Federalism Bill Stalls in House, Moves to Senate Floor*, OMB WATCH, Aug. 6, 1999, <http://www.ombwatch.org/article/articleview/570/1/4> (describing Chamber of Commerce's opposition to Federalism Act of 1999, H.R. 2245, 106th Cong. (1999)); Press Release, U.S. Chamber of Commerce, U.S. Chamber Asks Senate to Block Federalism Bill (Aug. 3, 1999), available at <http://www.uschamber.com/press/releases/1999/august/99-139.htm> (describing Chamber of Commerce's opposition to proposed Federalism Accountability Act of 1999, S. 1214, 106th Cong. (1999)).

<sup>91</sup> The constitutional limits on states' legislative jurisdiction are primarily derived from the Full Faith and Credit Clause, the Due Process Clause of the Fourteenth Amendment, and the Commerce Clause. To generalize crudely but efficiently, a state may apply its laws to a nonresident firm if (1) that state had some interest in the case at the time that the underlying events giving rise to the litigation occurred, *Alaska Packers Ass'n v. Indus. Accident Comm'n*, 294 U.S. 532, 549–50 (1935) (forum state may apply its own workers' compensation statute to employment-related injuries of worker hired in state), and (2) if the parties to the dispute could have had some reasonable notice that such law could be applicable to the case at the time that the underlying events giving rise to the litigation occurred. See *Home Ins. Co. v. Dick*, 281 U.S. 397, 410 (1930) (finding Texas court may not enforce limitations period provided by Texas law, thereby contradicting insurance policy's one-year limitations period, because Texas lacks power to affect “the rights of parties beyond its borders having no relation to anything done or to be done within them”). Both the interest and the notice can be shown by involvement of the state's domiciliaries or territory in the prelitigation events or even, perhaps, the plaintiff's postlitigation move to the regulating state, if that move were not motivated by the litigation. See *Allstate Ins. Co. v. Hague*, 449 U.S. 302, 318–19 (1981) (plurality opinion); *Phillips Petroleum v. Shutts*, 472 U.S. 797, 820 (1985) (noting that, in *Hague*, “the plaintiff's move to the forum was only relevant because it was unrelated and prior to the litigation”).

Therefore, even if a firm could insure that it would be subject to lenient regulation in most states, that firm could not easily escape stringent regulations in other states if those states' territories and domiciliaries are affected by the firm's extraterritorial activity.

None of these considerations, of course, suggests that industry will always support uniform federal laws over nonuniform state laws. If most states had an extremely lenient regulatory standard and the industry's members were confident that they could not be unwillingly subjected to the outlying states' more stringent regulatory standards, then one might reasonably expect that the industry would forego uniform regulation in favor of nonuniform state control. The critical point, however, is that regulated industries' interests in regulatory uniformity are *asymmetric*: That is, industry occasionally has interests in regulatory uniformity irrespective of the stringency of regulation, while it does not generally have any such content-neutral interests in regulatory diversity.

This asymmetric interest in uniformity gives pro-preemption groups an incentive to bring preemptive legislation to the attention of Congress, even when such legislation will not reduce the stringency of the regulations to which business is subject. Federalization of the regulation of some activity does not guarantee that the activity will always be regulated leniently. There is always a risk that, once a regulatory issue is federalized, members of Congress will have political incentives to look like they are tough on polluters, consumer safety, etc., and therefore ensure that federal standards are as stringent as the toughest state standards.<sup>92</sup> Nonetheless, industry groups have frequently favored preemption of state standards despite this risk.<sup>93</sup> This independent interest in regulatory uniformity gives pro-preemption groups an interest in making pacts with anti-preemption groups—unions, environmentalists, consumer advocates—to bring preemptive legislation to the floor even when the proposed federal standard is tough.<sup>94</sup>

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<sup>92</sup> See, for example, the Clean Air Act's waiver provision, codified at 42 U.S.C. § 7543(b)(1) (2000), which exempts any state that has adopted emissions standards that are at least as protective as the federal standards. Elliott, Ackerman, and Millian attribute the toughness of the federal standard to a contest between Nixon and Muskie to outbid each other on their dedication to environmentalism. Elliott, Ackerman & Millian, *supra* note 60, at 327–28.

<sup>93</sup> See *supra* note 61 (describing industry groups' support for preemptive federal regulation).

<sup>94</sup> The principal exception to this tendency exists when the dominant choice-of-law rule among the states ensures that industries can secure uniform and favorable treatment without congressional intervention. See *infra* Part III.D (offering "caveats").

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By contrast, anti-preemption groups have less of a consistent interest in eliminating preemption for the sake of state diversity. It is inconceivable that environmentalists, for instance, would sponsor legislation eliminating federal preemption of state environmental standards if they believed that the practical result would be more lenient state environmental standards overall. Anti-preemption groups simply lack the unifying interest in regulatory diversity for its own sake. For this reason, one might expect that Congress would be more likely to consider a federal bill resolving the issue of preemption if that bill were urged by pro-preemption groups seeking preemptive federal standards than anti-preemption groups trying to repeal federal preemption.

Alan Schwartz defends a position directly opposed to my conclusion: He argues that Congress would find it easier to reverse judicial decisions that enforce a preemptive ceiling on state regulation than to reverse judicial decisions that reject preemption and treat federal standards as minimum “floors” above which states can regulate.<sup>95</sup> Schwartz’s argument is subtle, technical, and insightful, but I believe it is unpersuasive. His argument rests on a paradoxical assumption—the assumption that “a Congress that wants to enact a minimum expects to induce firms to produce more safety than the minimum.”<sup>96</sup> Foreseeing that firms will respond to a minimum non-preempting standard in this manner, Congress enacts such standards with the intention of inducing every firm to increase its safety level even if the result is that many firms exceed the minimum defined by federal law.<sup>97</sup>

According to Schwartz, if a court mistakenly construes the federal “floor” of regulation to preclude such extra effort, a sufficient coalition will likely exist to reverse the decision by enacting a higher national standard, because Congress, after all, enacted the minimum standard with the intention of causing firms to move to a level of precaution higher than the actual minimum standard.<sup>98</sup> The same cannot be said for judicial decisions that mistakenly construe a federal preemptive “ceiling” for a minimum standard.

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<sup>95</sup> Schwartz, *supra* note 2, at 29–37.

<sup>96</sup> *Id.* at 36. Schwartz rests this premise on the idea that, by “select[ing] a product for national regulation,” the federal law “will induce a court or jury to suppose that the product is more dangerous than would be thought had there been no regulation.” *Id.* at 32. At the risk of inaccurate paraphrasing, Schwartz seems to be suggesting that the sheer existence of the federal statutory standard, regardless of what it might be, induces regulators—judges, juries, etc.—to be suspicious of the regulated product, inducing risk-averse firms to take extra precautions.

<sup>97</sup> *Id.* at 32.

<sup>98</sup> *Id.* at 34–35.

Although Schwartz's argument is ingenious, it rests on the implausible assumption that Congress implicitly views its minimum standards as an effort to induce firms to adopt standards of care in excess of those minimum standards. One might think instead that firms would tend to show compliance with non-preemptive federal standards as evidence of their exercise of sufficient care, even if this evidence did not support a conclusive regulatory compliance defense. In any case, even if the decision not to preempt state law has such arcane effects on firms, it does not follow that Congress intends such effects.<sup>99</sup>

For the reasons suggested above, the more realistic assumption is that a default rule against preemption places the onus on the interest groups most capable of promoting this debate—the pro-preemption groups. For this reason, the anti-preemption default rule makes sense to those who fear that Congress will evade its lawmaking responsibility.

## 2. Promoting “Public” over “Special” Interest Groups

An anti-preemption clear statement rule is also desirable because such a rule tends to place the burden of persuasion on “special interest groups” (SIGs) rather than “public interest groups” (PIGs). Admittedly, such an approach might seem too crassly political for judicial taste. However, one can make a respectable argument that principles of procedural democracy might justify such favoritism, even if one opposed the specific political goals of PIGs. They might help reduce the malaise of Madison's Nightmare, the Personal Vote, and Political Overload to which the federal government might be prone.

PIGs and SIGs are morally loaded terms; following a convention in the political science literature,<sup>100</sup> however, I intend to use them in a morally neutral way. PIGs are public-interested only in that the material benefits flowing to group members from their membership rarely

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<sup>99</sup> Members of Congress might simultaneously oppose federal preemption and also disapprove of levels of precaution higher than the federal standards on grounds of principled federalism. Such congresspersons would not endorse a more stringent federal standard, even if they did predict that their federal “floor” would also increase the precautions of firms. It simply might be that risk-averse members of Congress wish to duck any responsibility for taking a position on the correct regulatory standard and thus may invoke the principle of federalism to avoid any clear position on the substantive tort issue. See Jonathan R. Macey, *Federal Deference Toward Local Regulators and the Economic Theory of Regulation: Toward a Public-Choice Explanation of Federalism*, 76 VA. L. REV. 265, 284–86 (1990) (using public choice theory to argue that federal legislators may defer to state regulation to avoid responsibility and risk of political fallout).

<sup>100</sup> On the distinction between public interest groups (or “citizen groups”) from special interest groups, see Hugh Hecl, *Issue Networks and the Executive Establishment*, in *THE NEW AMERICAN POLITICAL SYSTEM* 87, 94–105 (Anthony King ed., 1978).



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explain their decision to join the group.<sup>101</sup> This distinction does not imply that PIGs' lobbying is more beneficial to the public than SIGs' lobbying. For instance, the American Nazi Party could be regarded as a PIG, in that few of this Party's members join because they derive some material benefit from their membership. The distinction between PIGs and SIGs maps on to the older distinction drawn by political theory between principle and interest as motives for partisan or political acts.<sup>102</sup> Greenpeace may be destroying our economy and the ACLU may be helping criminals to roam our streets with impunity, but both qualify as PIGs, because members of both derive only ideological and solidaristic benefits from their organizations' perverse political efforts. By contrast, when the Automakers Institute lobbies for a reduction in the steel tariff, the material benefits that the automakers derive from tariff reduction suffice to explain their support for the group's activities, although their lobbying may rebound to the benefit of consumers throughout the nation.

To what extent do pro-preemption interests tend to be SIGs and anti-preemption interests PIGs? The organizations that tend to support the use of federal regulatory standards to preempt state tort and regulatory law are business interests like the National Association of Manufacturers, the Business Roundtable, and the U.S. Chamber of Commerce.<sup>103</sup> These groups self-consciously view their mission as advancing the material self-interest of their members by pressing for legislation that will provide direct and immediate economic benefits to business enterprises. Their support for preemption is an illustration of this mission; preemption reduces the regulatory costs confronted by their members. The groups opposing preemption tend to be advocates of environmental and consumer protection whose members are motivated by the ideological desire to secure diffuse benefits like cleaner air and safer products for the general public—in other words, they are classic PIGs. In general, therefore, SIGs tend to advance the case in favor of making federal standards preemptive, while PIGs argue against making federal regulatory standards a preemptive ceiling on state regulation.<sup>104</sup>

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<sup>101</sup> The definitional problems with the contrast between public interest groups and special interest groups are explored by Croley, *supra* note 34, at 93–94 n.272.

<sup>102</sup> For a brief description of this older tradition, see Roderick M. Hills, Jr., *Are Judges Really More Principled than Voters?*, 37 U.S.F. L. REV. 37, 40–42 (2002).

<sup>103</sup> See *supra* note 90 and accompanying text.

<sup>104</sup> This is not to say that PIGs never press for preemption of state law. Preemption of state law is a part of many PIGs' agendas. Thus, the NAACP has argued that the Fair Housing Act preempts low-density zoning regulations that have the effect of excluding racial minorities and low-income households from the suburbs. See *Huntington Branch, NAACP v. Town of Huntington*, 844 F.2d 926, 928 (2d Cir. 1988) (describing NAACP's

Thus, the battle between groups that seek or oppose preemption of state law with federal regulatory standards is largely a struggle between pro-preemption SIGs and anti-preemption PIGs. Is there any reason to prefer a rule of construction that favors the latter over the former? I suggest that the PIGs' style of advocacy improves Congress's legislative process, because, when compared to SIGs, PIGs favor a style of advocacy that counteracts Congress's tendency toward gridlock and avoidance of controversial policy debates. In general, PIGs disproportionately use a "strategy of persuasion,"<sup>105</sup> mobilizing support by trying to change the values of their opponents or inspire their supporters to act on the basis of their values. Such a strategy requires PIGs to seek publicity for their positions, using the press, TV,

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legal challenge under Fair Housing Act to ordinance restricting building of multiunit housing outside of urban majority-minority neighborhood), *aff'd*, 488 U.S. 15 (1988) (per curiam). Likewise, conservative PIGs like the National Rifle Association (NRA) or the Family Research Council (FRC) have pressed for federal statutes that would preempt state laws interfering with what they regard as fundamental rights of gun ownership or parental control of children. Recently, the NRA successfully backed federal preemptive legislation barring litigants from filing civil claims against gun manufacturers, distributors, and retailers for injuries not caused by product defect. *See* Protection of Lawful Commerce in Arms Act, Pub. L. No. 109-92, § 2(b)(1), 119 Stat. 2095, 2096 (2005) (to be codified at 15 U.S.C. § 7901(b)(1)) (describing one purpose of statute as "prohibit[ing] causes of action against manufacturers . . . when the [firearm] product functioned as designed and intended"); Press Release, Nat'l Rifle Ass'n Inst. for Legislative Action, Reckless Lawsuit Preemption Bills Introduced in U.S. House and Senate (Feb. 19, 2005), *available at* <http://www.nraila.org/CurrentLegislation/Read.aspx?ITNDrop=1387-L> (announcing introduction of bill). The FRC has also backed federal preemptive legislation. *See* S. COMM. ON GOVERNMENTAL AFFAIRS, FAMILY PRIVACY PROTECTION ACT OF 1995, S. REP. NO. 104-351, at 7 (1996) (describing bill's requirement that administrators of federally funded surveys of children must receive written approval from their parents beforehand if "sensitive questions" will be asked); *id.* at 4, 5 (describing testimony of Robert Knight, FRC's Director of Cultural Studies, in support of bill). These examples of preemption, however, differ from the sort of preemption urged by business interests in an important respect: Rather than substituting federal rules for state rules, the preemption urged by PIGs seeks to eliminate a type of state regulation altogether, without replacing the state law with any analogous federal rule. The ideological motivation for the sort of preemption urged by PIGs is essentially libertarian—the preempted state laws offend some fundamental liberty of individuals (to purchase housing free from racial or class discrimination, to possess firearms, to raise children, etc.). Business interests seeking to preempt state regulations with substantially similar, albeit more lenient, federal standards cannot plausibly make such a clear libertarian argument. The preemptive federal standards are simply too similar to—and sometimes just as stringent as—the state regulations that they preempt. Thus, business interests seeking to substitute federal for state regulations are reduced to making the less resonant argument that federal standards are more uniform or reflect greater expertise than state standards. But uniformity and expertise are hardly inspiring slogans for a PIG. It should be no small wonder, therefore, that business interests can rarely find a PIG as an ally in the struggle for preemption.

<sup>105</sup> *See* ARNOLD, *supra* note 58, at 92–99 (defining strategies of persuasion as those that "create, activate, or change the policy preferences of legislators, attentive publics, and inattentive publics").

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and congressional hearings to enlist public support.<sup>106</sup> The best evidence suggests that PIGs use these tools more frequently and more effectively than business groups.<sup>107</sup> One should not overstate the power of PIGs to mobilize the public; SIGs also occasionally mobilize large segments of the public.<sup>108</sup> But mass mobilization of the public through a strategy of persuasion is not the SIGs' strong suit. The material self-interest of the SIGs' membership erodes their credibility as leaders of public opinion, and their efforts at mass mobilization are frequently discounted as "astroturf"—meaning an artificial or shallow grassroots movement—by their opponents.<sup>109</sup> As a result, business interests might be expected to rely more on a procedural strategy, whereby they stall anti-preemption bills in Congress by informal arm-twisting behind the scenes, and on obstruction, through gridlock-promoting congressional procedures.<sup>110</sup>

Therefore, one way to promote a highly visible, vigorous debate on preemption in a way that will mobilize as many voters as possible is to give SIGs some incentive to use an outside strategy rather than a procedural strategy. SIGs have the greater need for such an incentive because, unlike PIGs, they are normally inclined to lie low. Forcing SIGs to bring bills out of committee to a floor vote requires them to resist these inclinations, as bills and votes on them are, under normal circumstances, in greater need of public justification than congressional inaction. Thus, an anti-preemption rule of construction advances democratic values in the same way that competitive elections do, by increasing the public's awareness and political knowledge

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<sup>106</sup> See Jeffrey M. Berry, *The Rise of Citizen Groups*, in *CIVIC ENGAGEMENT IN AMERICAN DEMOCRACY*, *supra* note 35, at 367, 379–85 (discussing effectiveness of interest group strategies in gaining attention of policymakers and public).

<sup>107</sup> *Id.*

<sup>108</sup> A now-legendary example of such SIG mobilization was the National Federation of Independent Business's campaign against President Clinton's health plan in 1993, including their famous "Harry and Louise" television ads. For a detailed description, see GOLDSTEIN, *supra* note 55, at 72–105.

<sup>109</sup> See Sharon Beder, *Public Relations' Role in Manufacturing Artificial Grass Roots Coalitions*, *PUB. REL. Q.*, Summer 1998, at 20, 21. As one public relations expert advised, "[a]ny institution with a vested commercial interest in the outcome of an issue has a natural credibility barrier to overcome with the public, and often[] with the media." *Id.* at 20 (quoting Merrill Rose, *Activism in the 90s: Changing Roles for Public Relations*, *PUB. REL. Q.*, Fall 1991, at 28, 31). This judgment seems to be confirmed by more systematic data. See Berry, *supra* note 106, at 384–85 (indicating pervasive distrust of business groups' public relations in press).

<sup>110</sup> See ARNOLD, *supra* note 58, at 92, 99–108 (defining procedural strategies as those that "attempt to influence legislators' political calculations by adroit use of legislative rules and procedures").

through the promotion of lively conflict.<sup>111</sup> Such mobilization is at least a partial antidote to the maladies of Madison's Nightmare, the Personal Vote, and Political Overload. The resulting debate might not be sophisticated, but it would be more visible than congressional inaction unaccompanied by the mobilization induced by a fight over a proposed preempting bill. For this reason, one might support an anti-preemption "clear statement" rule for process-related reasons even if one disliked the PIGs' substantive agenda.

#### D. Caveats

The theory of legislation outlined above provides a qualified case for disfavoring federal preemption of state law as a way of provoking Congress to address issues that might otherwise die in committee. The nature of the argument, however, requires discussion of some obvious and not-so-obvious caveats to this argument against preemption.

First and most obviously, the implicit premise of the argument is that preemption is possible and ought to be enforced when unambiguously preemptive legislation is enacted by Congress. After all, the theory specifies that a cause of political mobilization is SIGs' interest in preempting state laws. If preemption were impossible, then state legislation would not mobilize any SIG to press for federal action. Therefore, the mobilization theory offered above is not an argument for abolishing preemption through a no-preemption rule, but rather for constraining it with a plain-statement canon of construction as a way to maximize the possibilities for popular mobilization that the fight for preemption seems to encourage.

Second, the argument rests on a simple assumption about the asymmetry of interest groups' incentives—namely, that interests seeking preemption favor uniformity for its own sake, while interests disfavoring preemption do *not* favor diversity for its own sake. In short, the fundamental (and plausible<sup>112</sup>) premise of this argument is that rhetoric in favor of federalism as such is insincere: Few with influence in the political process care about promoting state power as an end in itself. To the extent that this assumption is untrue, the mobilization theory outlined above would fail. Encouraging the courts to construe statutes to preempt state law would be a better way

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<sup>111</sup> On the tendency of competitive elections to increase political knowledge, see MICHAEL X. DELLI CARPINI & SCOTT KEETER, *WHAT AMERICANS KNOW ABOUT POLITICS AND WHY IT MATTERS* 209–11 (1996).

<sup>112</sup> See, e.g., Michael Grunwald, *Devolution: Congress Does Not "Walk the Walk"*, *ST. LEGISLATURES*, Jan. 1, 2000, at 32 (arguing that Congress only supports state power in theory).

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to mobilize such principled federalists, as they would, regardless of the content of the state law, seek to overturn the courts' interpretation of ambiguous federal statutes.

Third and most important, the degree to which an anti-preemption canon of construction will be more mobilizing than a pro-preemption canon depends on empirical assumptions that are entirely contingent on further research to be fully persuasive. At most, I suggest that the empirical premises of this Article are the most intuitively plausible accounts of Congress, states, and interest groups now available. However, there are circumstances under which these generalizations will not be valid.

Take, for instance, the extreme form of preemption known as the dormant commerce power: Such a doctrine can create such a politically intolerable regulatory vacuum that it mobilizes business interests rapidly to support national legislation. The Supreme Court's Dormant Commerce Clause decisions preempting state regulation of interstate railroad rates<sup>113</sup> and the interstate transportation of alcoholic beverages<sup>114</sup> were the impetus for major federal legislation—the Interstate Commerce Act of 1886<sup>115</sup> and the Wilson Act,<sup>116</sup> respectively. By effectively deregulating railroad rates and alcoholic beverages, the Court guaranteed that some sort of national legislation would be enacted to end a level of libertarianism intolerable to powerful political interests. However, such judicially inferred preemption from Congress's dormant commerce power differs strongly from the ordinary variety of statutory preemption, because the latter rarely leads to radical deregulation of a field. Absent such a dramatic elimination of regulation, this Article suggests that judicial decisions refusing to find preemption of state law by an existing federal regulatory scheme will tend to be more mobilizing than judicial decisions that infer such preemption.

Consider another example of SIG support for state law—corporate managers' tolerance of state law governing corporations' internal

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<sup>113</sup> *Wabash, St. Louis & Pac. R.R. v. Illinois*, 118 U.S. 557, 577 (1886) (holding that Illinois could not regulate prices of railroad freight if goods were shipped to or from locations outside of state). *Wabash* is credited by some historians with breaking the deadlock in Congress over whether to enact the Interstate Commerce Act by creating a regulatory vacuum that Congress had to correct. *E.g.*, James W. Ely, Jr., "The Railroad System Has Burst Through State Limits": *Railroads and Interstate Commerce, 1830–1920*, 55 *ARK. L. REV.* 933, 945 (2003).

<sup>114</sup> *Bowman v. Chi. & Nw. Ry.*, 125 U.S. 465, 500 (1888) (holding that Iowa could not prohibit its own residents from importing liquor from other states, as such shipments were interstate commerce requiring uniform national regulation).

<sup>115</sup> Interstate Commerce Act, ch. 104, 24 Stat. 379 (1887).

<sup>116</sup> Wilson Act, ch. 728, 26 Stat. 313 (1890).

affairs.<sup>117</sup> One can explain this support by noting that each corporation can select a single, uniform corporate law for itself without federal intervention, as long as states adhere to the doctrine that a corporation's "internal affairs" should be governed by the law of the place in which it is incorporated.<sup>118</sup> Thus, corporate management lacks any incentive to support federal preemption of the state law of corporations, especially given that management controls the process of incorporation and can choose the single law most favorable to its own interests.<sup>119</sup> The implicit threat of federal preemption of these state laws operates as a political constraint on states' departure from choice of law rules favoring mutually beneficial deals between the politically active SIGs: managers, shareholders, and the plaintiffs' bar.<sup>120</sup>

Likewise, there may be exceptional cases in which an interest group favors nonuniform state regulation for its own sake, regardless of the content of those regulations, because they protect markets from interstate competition. If, for instance, professional groups such as bar associations used state licensing regulations as barriers against competition from out of state competitors, then such groups would be well served by nonuniform licensing standards to maximize the barriers to entry. The persistence of the judicially created *Parker* exception to federal antitrust laws for professional groups might be explained by professional groups' special protectionist incentives to maintain nonuniform law.<sup>121</sup>

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<sup>117</sup> See, e.g., Jonathan R. Macey, *Securities and Exchange Nanny*, WALL ST. J., Dec. 30, 2003, at A10 (arguing against SEC's intervention into state governance of corporations' internal affairs). For a public choice hypothesis of why managers may prefer Delaware law to federal regulation of corporations' internal affairs, see Mark J. Roe, *Delaware's Competition*, 117 HARV. L. REV. 588, 640-41 (2003).

<sup>118</sup> See RESTATEMENT (SECOND) OF CONFLICT OF LAW §§ 303-306 (1971) (providing that "local law of the state of incorporation" applies to relations between shareholders, directors, and officers, "except in the unusual case" in which some other state has more significant relation with issue). As numerous commentators have noted, in contract and tort, in particular, the presumptions provided by the Second Restatement can be extremely pliable. See, e.g., Larry Kramer, *Choice of Law in the American Courts in the 1990s: Trends and Developments*, 39 AM. J. COMP. L. 465, 466, 486-89 (1991).

<sup>119</sup> The effect of management's practical capacity to select any state's law as governing corporate law is the topic of a voluminous literature. For a survey of this literature and an assessment that such managerial capacity is economically efficient, see generally ROBERTA ROMANO, *THE ADVANTAGE OF COMPETITIVE FEDERALISM FOR SECURITIES REGULATION* 63-75 (2002).

<sup>120</sup> See generally Mark J. Roe, *Delaware's Politics*, 118 HARV. L. REV. 2493 (2005) (analyzing role of federal trump in constraining redistributive innovation in corporate law).

<sup>121</sup> See *Parker v. Brown*, 317 U.S. 341, 352 (1943) (inferring statutory immunity from Sherman Antitrust Act for actions by state officials to maintain raisin monopoly pursuant to state agricultural statute). For professional boards to take shelter under *Parker*, however, the state must actively supervise the restrictions imposed by such boards. Cal. Retail

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These exceptional cases, however, underscore the power of regulated industries to preempt state law when it suits their interests. Federalism lacks staying power: It is the fragile hostage of regulated interests' power to eliminate it whenever the costs of state nonuniformity rise beyond a minimum threshold. By contrast, federal preemption has enormous staying power: Except in the unusual case of total judicial field preemption—like *Cooley's* version of the Dormant Commerce Clause in the mid-nineteenth century<sup>122</sup>—federal preemption of state law does not mobilize interest groups to the same extent as state interference with federal uniformity. Therefore, if one wants Congress to engage in an active debate and issue a definite decision about the scope of state powers, then the courts ought to resolve doubtful questions of statutory interpretation in favor of those powers.

### E. ERISA as a Case Study

ERISA provides an excellent illustration of the “mobilization theory” outlined above. I term it an illustration rather than a confirmation, because no complex theory of mobilization could be confirmed by the experience with a single statute. However, the Supreme Court's decisions giving a broad construction to ERISA's preemption clauses provide a highly suggestive example of how judicial findings of preemption can suppress a lively democratic debate.

The enactment of ERISA in 1974 demonstrates the power of state legislation to provoke federal preemption.<sup>123</sup> Neither employers nor unions were united in favor of federal legislation.<sup>124</sup> Even the

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Liquor Dealers Ass'n v. Midcal Aluminum, Inc., 445 U.S. 97, 105 (1980) (striking down resale price restrictions on wine prices as insufficiently supervised by California).

<sup>122</sup> *Cooley v. Bd. of Wardens*, 53 U.S. 299, 320 (1851) (“Whatever subjects of [the Dormant Commerce Clause power] are in their nature national, or admit only of one uniform system, or plan of regulation, may justly be said to be of such a nature as to require exclusive legislation by Congress.”).

<sup>123</sup> The following account of ERISA's enactment is drawn from WOOTEN, *supra* note 61.

<sup>124</sup> Large-scale employers worried that they would be required to subsidize the underfunded pension plans of smaller employers. *See id.* at 71–72 (describing how under certain insurance schemes proposed in 1962–1963, risk pooling would require higher premiums paid by strong firms, in effect subsidizing weak firms). Craft unions worried that federal law would impose vesting and funding standards on union-administered multiemployer pension plans. *See id.* at 37–39 (describing why pension plans in certain industries in 1950s were multiemployer in nature and managed by unions rather than employers, resulting in preference among those unions for minimal federal regulation). Industrial unions tended to support federal standards for pension plans, because their members typically derived their pensions from plans administered by a single large-scale employer. *See id.* at 36–38 (describing development of pension plans in industries in 1950s managed by large-scale employers and not unions, creating desire among such unions for federal regulation of pensions plans). The AFL-CIO, therefore, was divided on ERISA. *See id.* at

American Bar Association (ABA) opposed it because of its provisions regarding legal services plans.<sup>125</sup> Given such powerful opponents, one might justly wonder how ERISA ever was enacted. Wooten suggests that ERISA is proof that considerations of public interest can trump SIGs in legislation.<sup>126</sup> However, consistent with the thesis of this Article, there is a more dispiriting explanation. As much as they disliked federal law, the relevant SIGs disliked state law even more. Insurance companies sought relief from the advantages conferred by state legislatures on self-insured employee benefit plans, which were generally exempt from state insurance regulation.<sup>127</sup> Employers and unions administering multiemployer benefit plans sought to preempt aggressive state laws that would mandate special insurance benefits such as cost of living increases in pension benefits.<sup>128</sup> To preempt these state laws regulating the funding and vesting of employee benefit plans, union and employer plan administrators, perhaps uncharacteristically, agreed to accept federal regulation.<sup>129</sup>

Once ERISA was enacted, however, the scope of its preemption clauses posed a conundrum for courts. ERISA's clauses addressing preemption represented a compromise between regulated interests (which wanted relief from state law) and state insurance commissions (which wanted to preserve their traditional role under the McCarran-Ferguson Act<sup>130</sup>). The major preemption clause of ERISA specified that "the provisions of [ERISA] shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan [covered by ERISA]."<sup>131</sup> ERISA also contained a savings clause, however, preserving from preemption "any law of any State which regulates insurance, banking, or securities,"<sup>132</sup> but then qualified this preservation of state law with a deemer clause specifying that "employee benefit plan[s]" shall not "be deemed to be an insurance

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226–27 (describing AFL-CIO's position seeking differing standards for single-employer and multiemployer pension plans, and describing internal tensions among specific member unions).

<sup>125</sup> *Id.* at 235–36.

<sup>126</sup> Wooten argues that ERISA was an example of public-interested regulators and legislators pressing for federal legislation in the teeth of SIG opposition. *Id.* at 7–11.

<sup>127</sup> *See id.* at 234–35 (describing interests of regulated insurance companies in causing self-insured employer plans to be regulated, either under state or federal scheme).

<sup>128</sup> *See, e.g., id.* at 264–65 (describing reactions by unions and employers to California bill that sought cost of living adjustments and subsequent successful efforts to lobby Congress to broaden preemption provision to preempt California's and similar bills).

<sup>129</sup> *See id.* at 258–59 (describing opposition of large employers and labor unions to state regulation of self-insured welfare plans).

<sup>130</sup> 15 U.S.C. §§ 1011–1015 (2000) (declaring that insurance regulation is state matter).

<sup>131</sup> 29 U.S.C. § 1144(a) (2000).

<sup>132</sup> *Id.* § 1144(b)(2)(A).



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company or other insurer, bank, trust company, or investment company . . . for purposes of [state laws purporting to regulate banking, insurance, or securities].”<sup>133</sup> The gist of the whole preemption scheme, in short, hinged on a two-word phrase—“relate to”—that the Act otherwise left entirely undefined.

The fate of state laws regulating employees’ health care would depend on whether the courts gave the phrase a broad or narrow interpretation. Congress had given no consideration to managed care in 1974. The controversial issues surrounding ERISA’s enactment were vesting and funding requirements for pensions, not the regulation of managed care organizations (MCOs). Indeed, MCOs barely existed in the 1970s, when most benefit plans reimbursed fees charged for medical services without any use of managed care.<sup>134</sup> With the rise of managed care as a method for controlling employers’ health care costs, the question soon arose: Would ERISA preempt regulation of third parties, such as MCOs, that were hired by plan administrators to provide plan benefits?

The answer would seem to be “no.” ERISA was intended to protect plan administrators (chiefly employers and unions) and employees.<sup>135</sup> Nothing about ERISA’s history suggested the slightest hint that it was intended to protect doctors, hospitals, MCOs, or other third parties who administered plan benefits on behalf of employers. With ERISA’s focus on employers and unions in mind, Russell Korobkin argues that ERISA does not preempt state regulations of the managed care industry, on the theory that employers’ contracts with MCOs are not “employee welfare benefit plans” covered by ERISA, because this statutory term encompasses only contracts between employers, unions, or other plan administrators and employees.<sup>136</sup> In addition, ERISA preemption might be defended on the ground that such state regulations would certainly raise the costs

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<sup>133</sup> *Id.* § 1144(b)(2)(B).

<sup>134</sup> See generally HARRY A. SULTZ & KRISTINA M. YOUNG, *HEALTH CARE USA: UNDERSTANDING ITS ORGANIZATION AND DELIVERY* 20, 43, 299–301 (5th ed. 2006) (describing boom of MCOs following Congress’s passage of Health Maintenance Organization Act in 1973).

<sup>135</sup> See Employee Retirement Income Security Act of 1974, Pub. L. No. 93-406, § 2, 88 Stat. 829, 832–33 (1974) (codified at 29 U.S.C. §§ 1001–1001b (2000)) (establishing findings and declaration of policy with focus limited to employees and plan administrators). Currently, ERISA’s stated policy has not been expanded directly to confront MCOs. See 29 U.S.C. §§ 1001a–1001b (2000) (stating additional findings and policy that refer specifically to multi- and single-employer plans, respectively, but making no mention of MCOs).

<sup>136</sup> See Russell Korobkin, *The Failed Jurisprudence of Managed Care, and How to Fix It: Reinterpreting ERISA Preemption*, 51 *UCLA L. REV.* 457, 470–74 (2003) (arguing that because ERISA provides right of action for employees against employers, but not against third-party benefits providers, latter claims should not be preempted).

of managed care. But no credence has been given to the suggestion that any state law—say, state taxes or state-law malpractice liability—“relates to” employment relations under ERISA merely because such laws will affect the price of MCOs’ services. By the same token, one could argue that state regulation of the employers’ contracts with MCOs do not “relate to” employers’ benefit plans merely because such laws will affect the cost of those benefit plans.

The Supreme Court, however, has adopted an entirely different and much broader view of ERISA preemption. Putting aside the question of whether text and legislative history better justify the Court’s or Korobkin’s interpretation of ERISA, I wish to ask how the Court’s rejection of Korobkin’s theory might have affected congressional deliberation about health care.

The history of ERISA preemption suggests that the Court’s rejection of the Korobkin theory has dramatically reduced the ability of Congress to clarify the scope of ERISA and, more generally, the proper regulation of managed care. By bestowing the protection of ERISA preemption on the managed care industry, the Court eliminated that industry’s incentive to lobby Congress for any clarification of ERISA’s scope. The result arguably has been gridlock in Congress over the status of managed care for decades.

In suggesting a causal link between broad preemption and a stymied Congress, I do not mean to assert that the link can be proven to the satisfaction of a political scientist. Instead, I suggest merely that the circumstantial evidence is suggestive of such a connection. This evidence takes the form of two periods of legislative activity. Between 1992 and 1994, five bills were introduced in Congress to partially repeal ERISA preemption of state health care initiatives.<sup>137</sup> None of these bills made it out of committee, and hearings were held on only one, despite the fact that health care reform was at the top of

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<sup>137</sup> See Devon P. Groves, *ERISA Waivers and State Health Care Reform*, 28 COLUM. J.L. & SOC. PROBS. 609, 635–46 (1995) (describing proposals of Sen. Patty Murray, Rep. Jim McDermott, Sen. Patrick Leahy, Rep. Romano L. Mazzoli, Sen. David Durenberger, and Sen. Bob Graham, respectively). Groves suggests that the lack of enthusiasm for these bills was due to the discussion at the time of the Clinton health care initiative, which addressed reform of the managed care industry. *Id.* at 648. However, the Democrats in Congress were never firmly united behind President Clinton’s bill, and, indeed, rival bills were floated by (among others) Representatives Jim Cooper, Jim McDermott, and Pete Stark, and Senators George Mitchell, Paul Wellstone, and Ted Kennedy. THEDA SKOCPOL, *BOOMERANG: CLINTON’S HEALTH SECURITY EFFORT AND THE TURN AGAINST GOVERNMENT IN U.S. POLITICS* 99–106 (1996). The notion that President Clinton’s health plan crowded out all rivals, therefore, is flatly inconsistent with the well-known history of health care reform in the early 1990s.

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Congress's agenda.<sup>138</sup> Between 1997 and 2001, by contrast, there was a blizzard of bills reported out of committee that cut back on ERISA preemption. Some versions of these bills inevitably passed a floor vote in either the House or the Senate and were only defeated in conference committee or by stalling action in one house of Congress after massive public relations efforts from the MCOs.

What explains the difference in the congressional treatment of MCO liability between 1992 and 1994 and 1997 and 2001? Why did one set of proposals die an ignominious and obscure death in committee, while the other set provoked a full-fledged and highly visible legislative battle? Without a comprehensive study of the political circumstances surrounding the bills, one cannot provide any definitive explanation. But consider the following possibility: The lower federal courts and the Supreme Court briefly reversed the presumption in favor of ERISA preemption between 1995 and 2004. During this window, several major bills either confirming or constraining ERISA preemption suddenly became central topics of debate. I suggest that the congressional debate was, in part, the result of the judicial retreat on preemption.

In 1995, following the cue from the Supreme Court in *New York State Conference of Blue Cross & Blue Shield Plans v. Travelers Insurance Co.*,<sup>139</sup> lower federal courts began cutting back on the preemptive scope of ERISA. In particular, the Third Circuit held in *Dukes v. U.S. Healthcare, Inc.*,<sup>140</sup> that employees could sue an MCO for the negligent treatment decisions of its physicians. The *Dukes* court reasoned that such a malpractice lawsuit was not preempted because it did not seek to recover benefits under the contract between the MCO and the employer; instead, the lawsuit conceded that the contractually required medical services had been provided but that the provider's employee was guilty of professional incompetence.<sup>141</sup> The Supreme Court's 1997 decisions in *De Buono v. NYSA-ILA Medical and Clinical Services Fund*<sup>142</sup> and *California Division of Labor*

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<sup>138</sup> Only Senator Leahy's bill received a hearing. See *State Health Care Plans: Hearing on S. 3180 Before the S. Comm. on Finance*, 102d Cong. 2, 8–11 (1992) (providing background information about Sen. Leahy's bill and including Sen. Leahy's description of it).

<sup>139</sup> 514 U.S. 645 (1995). The Court held that New York could apply a surcharge to MCOs and other insurers. *Id.* at 664.

<sup>140</sup> 57 F.3d 350 (3d Cir. 1995).

<sup>141</sup> *Id.* at 356–57 (“Instead of claiming that the welfare plans in any way withheld some quantum of plan benefits due, the plaintiffs in both cases complain about the low quality of the medical treatment that they actually received and argue that [the defendant] should be held liable under agency and negligence principles.”).

<sup>142</sup> 520 U.S. 806 (1997).

*Standards Enforcement v. Dillingham Construction*<sup>143</sup> suggested an even broader theory. *Dillingham* upheld California's prohibition on apprentice-scale wages because the state's wage law applied to both ERISA apprenticeship programs and other non-ERISA apprenticeship programs; the law "function[ed] irrespective of . . . the existence of an ERISA plan," and it did not "make reference" to such plans.<sup>144</sup> *De Buono* upheld New York's tax on the gross receipts paid to health care facilities for patient services on the ground that the tax was generally applicable and did not single out ERISA plans for any special burden.<sup>145</sup> Citing *Dillingham* and *Travelers*, *De Buono* declared that, when a state law did not single out ERISA plans for distinctive treatment, the state law's impact on the costs of plan benefits, by itself, would ordinarily not suffice to justify preemption of the law.<sup>146</sup> The natural implications of *De Buono* were that generally applicable tort law also might not be preempted by ERISA, even if such law imposed liability on MCOs for negligent denial or processing of benefits claims.

*Dukes*, *Travelers*, *Dillingham*, and *De Buono* seemed to open up a space for MCO liability that state legislatures quickly exploited. Following *Dukes*, Texas enacted the Texas Health Care Liability Act (THCLA) in 1997, a statute that provided that MCOs could be held liable for negligently denying or processing insurance coverage claims.<sup>147</sup> Texas's lead was followed by thirteen other states between 1997 and 2001, all of which imposed some form of liability on MCOs for negligent or bad-faith failure to authorize a request for a medically

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<sup>143</sup> 519 U.S. 316 (1997).

<sup>144</sup> *Id.* at 328 (quoting *Ingersoll-Rand Co. v. McClendon*, 498 U.S. 133, 139 (1990) (internal quotation marks omitted)).

<sup>145</sup> *De Buono* held that New York could tax the gross receipts of health care facilities owned by a trust fund that administered an ERISA benefit plan. 520 U.S. at 815–16. Justice Stevens's opinion stressed that the state tax was simply "a tax on hospitals," most of which were "not owned or operated by ERISA funds," and therefore the law was just "one of a myriad of state laws of general applicability" the burdens of which did not "relate to" the ERISA plan. *Id.*

<sup>146</sup> *Id.* at 816 ("Any state tax, or other law, that increases the cost of providing benefits to covered employees will have some effect on the administration of ERISA plans, but that simply cannot mean that every state law with such an effect is pre-empted by the federal statute.").

<sup>147</sup> Texas Health Care Liability Act, ch. 163, § 1, 1997 Tex. Gen. Laws 317, 317–20 (codified as amended at TEX. CIV. PRAC. & REM. CODE ANN. §§ 88.001–.003 (Vernon 2005 & Supp. 2006)). The statute requires that "health insurance carrier[s], health maintenance organization[s] [and] other managed care entit[ies]" and their employees, agents, and representatives "exercise ordinary care when making health care treatment decisions," and renders them "liable for damages for harm to an insured or enrollee proximately caused by its failure to exercise such ordinary care." *Id.* § 88.002(a)–(b). *But see* Act of June 17, 2005, ch. 306, 2005 Tex. Gen. Laws 931 (codified at TEX. CIV. PRAC. & REM. CODE ANN. § 88.0015 (Vernon Supp. 2006)) ("This chapter does not apply to an employee benefit plan regulated under the Employee Retirement Income Security Act of 1974.").

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necessary covered service.<sup>148</sup> Given *Dukes*'s apparent distinction between contract and tort,<sup>149</sup> it was not obvious that these laws would be preempted by ERISA. *De Buono*'s hint that "laws of general applicability" were not "relate[d] to" ERISA plans<sup>150</sup> suggested that it might not even matter if state law imposed liability based on the terms of an MCO's agreement with an employer (an "eligibility" decision that would arguably be preempted under *Dukes*) rather than for negligent care (a malpractice claim that *Dukes* preserved).

How did Congress respond to this reduction in ERISA preemption? The more that the courts cut back on preemption, the more clearly Congress addressed the issue of preemption by introducing bills to replace judicially defined preemption with new legislative limits on state law. In particular, between 1997 and 2001, urged on by the managed care industry, the Republican leadership of the House and Senate repeatedly introduced various "patients' bills of rights" providing new remedies for patients aggrieved by MCOs but also limiting the scope of MCO liability. Unlike earlier bills that addressed preemption but never made it out of committee, these bills not only were reported to the full House or Senate but received extensive press coverage and floor votes. In the end, the Republicans could not enact their protections for MCOs against the threat of a Democratic filibuster. However, the entire debate forced the Republicans to take a specific stand on MCO liability in a way that mobilized a wide array of interest groups.

Taking any specific position in favor of diminishing or increasing ERISA preemption would have placed Newt Gingrich, Republican Speaker of the House, in a dilemma: Gingrich was courting the American Medical Association (AMA) with the possibility of investigations of managed care abuse<sup>151</sup> but he also did not wish to alienate

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<sup>148</sup> For a summary of the thirteen statutes passed between 1998 and 2004, as well as a summary of all state managed care liability laws, see Nat'l Conference of State Legislatures, Health Care Program: Managed Care Insurance Liability, <http://www.ncsl.org/programs/health/liable.htm> (last visited Jan. 6, 2007).

<sup>149</sup> See *Dukes v. U.S. Healthcare Inc.*, 57 F.3d 350, 358 (3d Cir. 1995) ("The plaintiffs are not attempting to define new 'rights under the terms of the plan'; instead, they are attempting to assert their already-existing rights under the generally-applicable state law of agency and tort.").

<sup>150</sup> 520 U.S. at 815 (internal quotation marks omitted).

<sup>151</sup> Edwin Chen, *Gingrich Calls for Investigation of Managed Care Health: House Speaker Makes Unexpected Proposal for Congressional Hearings into Booming Industry*, L.A. TIMES, Mar. 29, 1995, at 1 (noting that Gingrich called "for an unprecedented congressional investigation of the managed-care industry, the fastest-growing and perhaps most controversial sector of the nation's health care system," and that this "unexpected" proposal was "cheered" by physicians but "stunned" insurance industry); Christopher Connell, *House Speaker Asks AMA to Support GOP Contract's Proposals for Health Case*, ST. PAUL PIONEER PRESS, Mar. 29, 1995, at 4A (noting ovation given to Gingrich at 1995

the insurance industry. The best practical solution, therefore, was to press neither solution: A bill introduced on September 27, 1995, to strip MCOs of some of their ERISA immunity from state lawsuits<sup>152</sup> never made it out of committee. Republicans similarly smothered efforts to extend ERISA preemption that were popular with business groups.<sup>153</sup>

Republicans were afflicted by Madison's Nightmare—the political immobility induced by a fear of offending conflicting and influential interest groups—for which fence sitting was the best remedy. This silence on the precise scope of preemption was politically advantageous only so long as the federal courts continued to protect the MCOs by preempting state laws offensive to the managed care industry, thereby relieving Republicans of the necessity of doing so.

*Dukes* and *Travelers* suggested that the federal courts might not play this role forever. Between 1997 and 2001, the Court's apparent retreat on ERISA preemption repeatedly forced Republicans to take the politically risky position of expressly protecting MCOs from suit. In 1997, for instance, the Court handed down *Dillingham* (on February 18) and *De Buono* (on June 2), threatening ERISA preemption and creating Texas's opportunity to impose liability on MCOs for negligent processing of claims. In the face of various proposals to regulate MCOs,<sup>154</sup> the Health Benefits Coalition (HBC), a group of

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AMA meeting for attacking medical malpractice lawsuits); Stuart Schear, *The Ultimate Self-Referral: Medicare Reform, AMA-Style*, AMERICAN PROSPECT, Mar.–Apr. 1996, at 68, available at <http://www.prospect.org/print/V7/25/schear-s.html> (noting doctors' hostility toward managed care expressed at AMA meeting on March 28, 1995).

<sup>152</sup> Family Health Care Fairness Act of 1995, H.R. 2400, 104th Cong. § 302(d) (1995).

<sup>153</sup> For instance, the House Committee on Economic and Educational Opportunities reported H.R. 995, the ERISA Targeted Health Insurance Reform Act of 1996 (ETHIRA), to the House of Representatives. H.R. 995, 104th Cong. (1995). ETHIRA broadened ERISA's preemption of state law in the name of promoting market competition in health care. See H.R. REP. NO. 104-498, pt. 1, at 26–27 (1996) (“The story—and success—of ERISA in expanding coverage proves beyond any doubt that the cornerstone of preemption has been critical to the growth and expansion of employer-provided health insurance . . . [and] that the preemption cornerstone needs to be extended to a larger class of employers . . .”). As the sponsor of ETHIRA, Representative Harris Fawell stated, “Let the market roar: Increased health plan competition means more affordable choice of coverage,” “[s]tate benefit mandates are limited,” “[s]tate anti-managed-care laws are restructured and, instead, uniform standards are encouraged,” and “[r]estrictive state laws relating to Provider Health Networks, Employer Health Coalitions, insured plans, and self-insured plans are preempted.” 141 CONG. REC. 4, 5526 (1995). Unsurprisingly, the Democratic members of the committee dissented, attacking the proposed preemption as likely to be “extremely controversial with the Nation's governors, State insurance commissioners, and State legislators.” H.R. REP. NO. 104-498, pt. 1, at 101. ETHIRA had the support of major business associations. *Id.* at 31–32 (noting support of National Federation of Independent Business and National Association of Manufacturers).

<sup>154</sup> Representative Charles Norwood reintroduced his proposal to repeal some of the protection from state law that MCOs enjoyed under ERISA. Patient Access to Respon-

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insurers and business associations, launched a massive publicity campaign denouncing litigation as a solution to MCO misconduct.<sup>155</sup> Republicans were pressed to come up with their own measure that would neither offend the managed care industry (major donors to the Republican Party<sup>156</sup>) by failing to preempt the right to sue, nor alienate the public by failing to provide meaningful remedies against MCOs.<sup>157</sup>

These political considerations help explain why Gingrich sponsored, and the House Republicans passed, a patient protection bill<sup>158</sup> that placed limits on “any health care liability action” on noneconomic compensatory damages, punitive damages, joint and several liability, and the period for bringing suit.<sup>159</sup> Despite being widely regarded as a “poison pill” that would kill the bill in the Senate,<sup>160</sup> such broad protections for all medical providers had the

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sible Care Act, H.R. 1415, 105th Cong. (1997). The President’s Advisory Commission on Consumer Protection and Quality in the Health Care Industry did not propose repeal of ERISA preemption but instead suggested federal administrative remedies. PRESIDENT’S ADVISORY COMM’N ON CONSUMER PROT. & QUALITY IN THE HEALTH CARE INDUS., QUALITY FIRST: BETTER HEALTH FOR ALL AMERICANS (1998), <http://www.hcqualitycommission.gov/final>. Senator Kennedy, however, proposed removing the federal preemption provision in a Patients’ Bill of Rights he co-sponsored, S. 1890, 105th Cong. § 713 (1998). See 144 CONG. REC. 10, 14,636–38.

<sup>155</sup> See ERIKA FALK, ANNENBERG PUB. POLICY CTR. OF THE UNIV. OF PA., LEGISLATIVE ISSUE ADVERTISING IN THE 107TH CONGRESS 32 (July 2003), available at [http://www.annenbergpublicpolicycenter.org/issueads/APPC\\_IssueAds107th.pdf](http://www.annenbergpublicpolicycenter.org/issueads/APPC_IssueAds107th.pdf) (reporting \$1.3 million of spending on ads about patients’ bills of rights, with opponents spending \$840,000—about 66% of total—and supporters spending \$440,000 during 107th Congress, with largest support coming from American Medical Association, which spent about \$250,000).

<sup>156</sup> See Jennifer Schecter, *The Return of Harry and Louise*, MULTINATIONAL MONITOR, Jan.–Feb. 1998, at 35, available at <http://multinationalmonitor.org/mm1998/mm9801.11.html> (reporting that “[h]ealth insurance companies and health maintenance organizations have distributed more than \$685,000 in political contributions to federal candidates and parties so far in the 1997–98 election cycle, 68 percent to Republicans”).

<sup>157</sup> See William M. Welch, *The New Untouchables: Why You Can’t Sue Your HMO; 1974 Pensions Law Sparks Political Fire*, USA TODAY, June 19, 1998, at A1 (noting popular upsurge of support for regulation of MCOs).

<sup>158</sup> Patient Protection Act of 1998, H.R. 4250, 105th Cong. (1998).

<sup>159</sup> *Id.* §§ 4001, 4012.

<sup>160</sup> See, e.g., Donald W. Parsons, M.D., *Where Will the Health Reform Debate Lead?*, PERMANENTE J., Fall 1998, at 96, 96, available at <http://xnet.kp.org/permanentejournal/fall98pj/debate.html> (noting that “medical malpractice reform provisions included in H.R. 4250” were likely “poison pill” because they were “anathema to President Clinton and Congressional Democrats who are supported heavily by contributions from trial attorneys”).

The Senate Republicans had introduced a bill that was silent on the question of preempting tort remedies. The Patients’ Bill of Rights Act, S. 2330, 105th Cong. §§ 121, 231 (1998), relied on a system of administrative remedies such as external reviews and civil penalties but was silent on the issue of ERISA preemption. But Senator Don Nickles, the bill’s sponsor, emphasized the costs of litigation in his floor statement. 144 CONG. REC. 11, 16,082–84 (1998) (“Our bill is the ‘Patients’ Bill of Rights.’ Theirs is the ‘Lawyers’ Right to

advantages of being popular with the AMA and of not singling out politically unpopular MCOs for special immunities. Moreover, a bill that was silent about preemption of liability would provide no protection to MCOs if the Court cut back on ERISA protection. The House Republicans scarcely needed to be reminded that the Court's preemption doctrine was no longer a reliable protection for MCOs. But House Democrats reminded them anyway, noting that the Court had cut back on preemption in *De Buono* and *Dillingham* and questioning the Republicans on whether their bill would preempt Texas's MCO liability law.<sup>161</sup>

The Court's retreat on preemption, therefore, forced the House Republicans in the 105th Congress to grasp a nettle that the Court had been painfully gripping since 1974—the issue of defining state power to regulate third parties hired by employers or unions to provide benefits to employees. The Republicans found the experience politically painful: After barely passing in the House, H.R. 4250 was tabled in the Senate, weighed down by its controversial medical malpractice provisions.<sup>162</sup>

The debates over various “patients’ bills of rights” in the 106th and 107th Congresses illustrated even more specifically how changes in the Court's preemption doctrine can deprive Congress of political

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Bill.’”). Some supporters of the bill would mention that S. 2330 “deals with those health plans that are not regulated by the States,” 144 CONG. REC. 11, 16,168 (remarks of Sen. Thomas), or ones “that states cannot touch,” 144 CONG. REC. 11, 16,106 (remarks of Sen. Frist). But the bill's supporters did not explain that federal law was the source of the limit on state power.

<sup>161</sup> Representative Pete Sessions remarked on July 30, 1998:

I explained . . . that the United States Supreme Court, in the last three years in cases like *Travelers*, *Dillingham*, and *De Buono*, have narrowed the previously broadly interpreted scope of the ERISA preemption and clarified that ERISA does not preempt traditional state law areas of regulation such as “quality standards in health care.” Federal Circuit courts of appeal have likewise been holding more recently that ERISA does not and should not preempt patient quality of care cases against HMOs like the 3rd Circuit held in the *Dukes* case. Five different Federal judges in the Dallas-Fort Worth area, all Republican, have also held that quality of care cases are not preempted by ERISA . . . . Mr. Speaker, Republicans in Texas last year passed state patient protection legislation that is more comprehensive than the Patient Protection Act. Such protections include the right to sue HMOs for affecting the quality of health care treatment decisions. Aetna has gone to court in Houston to assert that Texas legislation is preempted by ERISA.

144 CONG. REC. 12, 18,311 (1998). Likewise, Representative Granger questioned Representative Fawell, the chair of the House Education and Economic Opportunities Committee, about whether the provisions for external review of MCO decisions contained in H.R. 4250 would preempt Texas's MCO liability act. 144 CONG. REC. 12, 17,236 (1998).

<sup>162</sup> 144 CONG. REC. 17, 25,070 (1998).



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cover. After a confusing flurry of bills during the 106th Congress,<sup>163</sup> the House and Senate each settled on two rival measures in the fall of 1999. The two measures differed from each other primarily over whether to give consumers the right to sue MCOs: The Senate measure was silent on ERISA preemption, whereas the House measure provided that ERISA would not preempt any claim “under state law to recover damages resulting from personal injury or for wrongful death against any person . . . in connection with the provision of insurance, administrative services, or medical services by such person to or for a group health plan . . . .”<sup>164</sup>

Consistent with the predictions of this Article, the Senate Republicans in the 106th Congress offered no definition or defense of the particular scope of ERISA preemption. Instead, the committee report accompanying S. 326 referred briefly to the doctrine defining ERISA preemption and, after noting that there were ambiguities in the doctrine, declared that “there is no ambiguity that States cannot directly regulate self-funded ERISA plans.”<sup>165</sup> Likewise, no Republican senator defended the existing ERISA doctrine’s preemption of MCO liability during the floor debate.<sup>166</sup> Instead, they generally attacked medical malpractice lawsuits and they urged rejection of the rival bills that Senators Kennedy and Daschle introduced, which expanded the scope of such tort liability by repeal-

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<sup>163</sup> For a summary of the major bills in the 106th Congress, see Jill A. Marstettler & Randall R. Bovbjerg, *Federalism and Patient Protection: Changing Roles for State and Federal Government* 8, 10, 12–13 (Urban Inst., Occasional Paper No. 28, 1999), available at <http://www.urban.org/uploadedpdf/occa28.pdf> (summarizing provisions of frontrunner bills in Congress).

<sup>164</sup> Bipartisan Consensus Managed Care Improvement Act of 1999, H.R. 2723, 107th Cong. § 302 (1999). The Senate enacted the text of S. 326 on July 15, 1999, as an amendment to S. 1344. 145 CONG. REC. 11, 16,132 (1999) (enacting text of S. 326 as amendments 1254 and 1232 by vote of fifty-three to forty-seven). S. 326 provided no limit on ERISA preemption but added administrative remedies such as external review for wrongful denial of coverage. Patients’ Bill of Rights Act, S. 326, 106th Cong. § 121 (1999). The House bill, H.R. 2723, provided a limited repeal of ERISA’s preemption of state claims against MCOs, allowing such claims but limiting punitive damages. 106th Cong. § 302 (1999). The bill barred punitive damages whenever the liability arose out of a decision subject to external appeal and the defendant complied with the decision of the external reviewer. H.R. 2723, 107th Cong. § 302 (1999).

<sup>165</sup> Patients’ Bill of Rights Act of 1999, S. REP. NO. 106-82, at 7–8 (1999).

<sup>166</sup> Senator Rick Santorum noted that, under *Dukes*, ERISA did not totally preclude MCOs’ liability for malpractice in the quality of treatment decisions. 145 CONG. REC. 11, 16,055 (1999). However, Santorum offered no explanation as to why MCOs’ negligent decisions concerning eligibility ought to be immunized from liability and, indeed, stated “I do not have any problem with your being able to sue your HMO.” *Id.*

ing ERISA's preemption of personal injury lawsuits against MCOs.<sup>167</sup>

The behavior of the Senate Republicans in the 106th Congress is consistent with the thesis of this Article: Because the courts had already delivered the benefits of preemption to them, these senators had no need to set forth any more specific—and, therefore, politically risky—preemption proposal. Seeking only to preserve the Court-created status quo, Senate Republicans were willfully vague about its merits. In light of the rulings in *Travelers*, *De Buono*, and *Dillingham* there was, of course, the risk that the Court might eliminate such preemption. However, as the fate of Gingrich's Patient Protection Act of 1998 illustrated, the risks of defending a specific position on malpractice reform were even greater. It was far better, then, to issue bland generalities about tort reform while preserving a preemption status quo that one would not defend or even define.

This ability to evade a defense of blanket preemption of negligent eligibility decisions, however, was fatally undermined by the Supreme Court's apparent retreat on preemption in *Pegram v. Herdrich*.<sup>168</sup> Strictly speaking, *Pegram* held only that an MCO's decision about a patient's eligibility for a particular type of treatment was not a fiduciary decision regulated by ERISA.<sup>169</sup> In reaching its holding, however, the Court seemed to assume that ERISA did not preempt what amounted to ordinary state malpractice liability arising out of an MCO's negligent exercise of medical judgment in denying plan coverage for medically necessary treatment.<sup>170</sup>

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<sup>167</sup> S. 6, 106th Cong. (1999); S. 240, 106th Cong. (1999). Both bills contained repeals of ERISA preemption similar to that contained in H.R. 2723, except that the Senate bills lacked the House bill's limit on punitive damages. S. 6, § 302; S. 240, § 302.

The Senate debate took place between July 12 and July 15, 1999, occupying 268 pages of the Congressional Record. 145 CONG. REC. 11, 15,450–93, 15,569–85, 15,592–625, 15,789–872, 16,041–134 (1999). For a typical example of Republican attacks on medical malpractice liability, see 145 CONG. REC. 11, 16,041–42 (1999), in which Senator Gregg urged a "Sense of the Senate" resolution attacking "the tort system of the United States . . . as inefficient, expensive and of little benefit to the injured."

<sup>168</sup> 530 U.S. 211, 214 (2000).

<sup>169</sup> *Id.* at 231 ("Mixed eligibility decisions by an HMO acting through its physicians have, however, only a limited resemblance to the usual business of traditional trustees.")

<sup>170</sup> The Court stated that:

[E]very claim of fiduciary breach by an HMO physician making a mixed decision would boil down to a malpractice claim, and the fiduciary standard would be nothing but the malpractice standard traditionally applied in actions against physicians. What would be the value to the plan participant of having this kind of ERISA fiduciary action? It would simply apply the law *already available in state courts and federal diversity actions today*, and the formulaic addition of an allegation of financial incentive would do nothing but bring the same claim into a federal court under federal-question jurisdiction.

*Id.* at 235 (emphasis added).

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*Pegram* was handed down during the summer of 2000, when House and Senate conferees faced an intractable impasse over their different versions of patients' rights.<sup>171</sup> The decision, however, immediately transformed the political incentives of the managed care industry and Congress. On its broadest reading, *Pegram* seemed to smash a massive hole in the wall of ERISA preemption that had previously protected the managed care industry.<sup>172</sup> To plug the hole, the industry would have to ask for specific preemptive protection from state lawsuits alleging MCOs' negligent evaluation of medical necessity. But asking for the indefensible is a difficult thing to do, and blanket immunity for one's own negligence comes close to being indefensible.<sup>173</sup> *Pegram*, therefore, seemed to force the House and Senate Republicans to propose their own legislation allowing suits against MCOs, hedged with defensibly specific limits on liability.

This is precisely what transpired in the 107th Congress. Undermined by *Pegram*, the Republican opposition to any MCO liability simply collapsed, despite the election of a Republican President. Members who supported a right to sue MCOs repeatedly brought *Pegram* to the attention of their colleagues.<sup>174</sup> Perhaps as a conse-

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<sup>171</sup> For a brief description of the impasse between the House and the Senate over the Patients' Bill of Rights from the fall of 2000 to the fall of 2001, see John B. Judis, *No Holds Barred*, AM. PROSPECT, Nov. 6, 2000, at 13, 14, available at <http://www.prospect.org/web/page.www?section=root&name=ViewPrint&articleId=5511>.

<sup>172</sup> Eventually, the Court would clarify that *Pegram* applied only to determinations of medical necessity made by a physician or medical caregiver who had an independent legal duty to exercise professional care, apart from any contractual obligation under the benefit plan. *Aetna Health Inc. v. Davila*, 542 U.S. 200, 220–21 (2004) (holding that "it was essential to *Pegram*'s conclusion that the decisions challenged there were truly 'mixed eligibility and treatment decisions' . . . made by the plaintiff's physician *qua* treating physician and *qua* benefits administrator" (internal citations omitted)).

<sup>173</sup> See Jennifer Arlen & W. Bentley MacLeod, *Malpractice Liability for Physicians and Managed Care Organizations*, 78 N.Y.U. L. REV. 1929, 2005 (2003) (arguing that MCOs do not take optimal care absent sanctions for affiliated physicians' negligence).

<sup>174</sup> Representative Greg Ganske, a renegade Iowa Republican who allied himself with Democratic lawmakers in sponsoring bills repealing ERISA preemption, repeatedly reminded his colleagues that *Pegram* authorized claims against MCOs and that "liability issues do not belong in Federal courts and [the Court] strongly indicated its view that in its current form ERISA does not preclude State law actions." 146 CONG. REC. 10, 13,826–27 (2000). Ganske spoke again to this effect on May 23, 2001:

The Supreme Court in *Pegram v. Herdrich* said decisions involving benefits stay in ERISA, but decisions involving medical judgment should go to the States where they have traditionally resided, where we have 200 years of case law. That is what they should be doing. That is what is in the Ganske-Dingell bill, the McCain-Edwards bill that should come before the House and before the Senate.

147 CONG. REC. 7, 9,325 (2001); see also 147 CONG. REC. 3, 3444 (2001) (remarks of Rep. Ganske) ("Our bill outlines . . . a new compromise on liability that provides for meaningful accountability for injured patients. We took the lead from the Supreme Court in its case *Pegram v. Herdrich*, and addressed the desire of multistate employer plans for uniformity

quence, every major “patients’ bill of rights” introduced in the summer of 2001 contained some sort of right to sue MCOs.<sup>175</sup>

The Republicans were thus forced by the Court’s progressively increasing tolerance for state regulation of MCOs to offer specific measures defining the plausible scope of MCO liability. Strategic silence and reliance on congressional gridlock was no longer a viable strategy for defeating state laws, because the Court seemed no longer willing to carry the burden of preempting state law. By 2001, the pressure from state legislation forced every Republican-backed bill to address preemption of state measures either by expressly capping state law damages or by creating an exclusive federal cause of action containing such caps. Such bills inevitably were reported out of committee, in part because HBC, the primary opponent of MCO liability, needed federal legislation to head off liability in the states. The issue of ERISA preemption went from being buried in committee without hearings between 1992 and 1994 to being the central issue of congressional debate and the focus of bills from both sides of the aisle.

In 2004, *Aetna Health Inc. v. Davila*<sup>176</sup> relied on the allegedly “clear congressional intent” of ERISA’s preemption clause to hold that ERISA preempted liability of MCOs administering ERISA-covered benefits plans.<sup>177</sup> In thus preempting the Texas Health Care Liability Act, the Court delivered to the HBC the benefit that it could not secure through legislation. Since *Davila*, debate on the topic of medical providers’ liability has been stunningly absent from Congress’s agenda. Compare, for example, post-*Davila* silence with pre-*Davila* debate over medical malpractice. Between 2001 and 2003, Republicans proposed ever broader forms of preemption of state tort law, including caps on health providers’ liability for pain and suffering and punitive damages for medical malpractice. The ensuing debate was front page news for months,<sup>178</sup> with the Democrats emphasizing

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of benefit decisions.”); 146 CONG. REC. 11, 15,970–73 (2000) (remarks of Sen. Dorgan referencing *Pegram*).

<sup>175</sup> The Senate passed Senator McCain’s Bipartisan Patient Protection Act, S. 1052, 107th Cong. (2001), on June 29, 2001. See 147 CONG. REC. 9, 12,683–707 (2001). Title IV, section 402 of McCain’s bill provided for federal civil remedies allowing liability for personal injury or death if a plan or issuer fails to exercise ordinary care in making a decision with respect to the denial of a claim for benefits. S. 1052, § 402. Representative Ganske’s bill, the Bipartisan Patient Protection Act, H.R. 2563, 107th Cong. (2001), was substantially similar and passed in the House on August 2, 2001. 147 CONG. REC. 11, 15,726–58 (2001). Representative Fletcher’s bill, H.R. 2315, 107th Cong. (2001), provided a more limited right to recover damages from negligent MCOs.

<sup>176</sup> 542 U.S. 200 (2004).

<sup>177</sup> *Id.* at 209, 213–14.

<sup>178</sup> See, e.g., Jonathan D. Glater, *Pressure Increases for Tighter Limits on Injury Lawsuits*, N.Y. TIMES, May 28, 2003, at A1; James Harding, *President Seeks to Rein in Medical*

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that preemption of medical malpractice liability would preempt state law tort liability of MCOs as well as individual doctors.<sup>179</sup> In the end, the Republican effort failed because of a Democratic filibuster in the Senate.<sup>180</sup> Since *Davila*, however, debate over tort liability of medical providers has disappeared from Congress's agenda.

Although there are, no doubt, many reasons for the change in the congressional agenda, the Supreme Court's ERISA preemption jurisprudence should be on the list: *Davila* already delivered preemption to the HBC sufficient to curb its appetite for further debate on the question. Had the Court upheld state laws imposing liability on the managed care industry, then the MCOs would have been encouraged to put some sort of preemptive federal legislation on Congress's agenda, if only to curb states like Texas that threatened to impose liability. Having eliminated the possibility of such laws, the Court also eliminated any incentive of the managed care industry to let any bill out of committee that addresses the issue of preemption.

The result of the Court's action is a status quo that would certainly not win a majority vote in Congress—absolute immunity of the managed care industry from liability for consequential damages caused by wrongful denial of benefits. Ironically, at least two members of the *Davila* majority recognize that *Davila*'s view of ERISA is likely not Congress's view. Justices Ginsburg and Breyer, concurring in *Davila*, stated that *Davila*'s broad view of ERISA's preemptive force created a “regulatory vacuum” in which “[v]irtually all state law remedies are preempted but very few federal substitutes are provided.”<sup>181</sup> Following the lead of several commentators, they urged that the Court fashion a more careful equitable remedy using principles of trust law implicitly incorporated by ERISA.<sup>182</sup>

But this trust-based remedy assumes that abstract principles of equity should somehow resolve the divisive political questions of lia-

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*Lawsuits*, FIN. TIMES, Jan. 17, 2003, at 8; Vicki Kemper, *Senate Medical Malpractice Bill Fails*, L.A. TIMES, July 10, 2003, at A17; Francine Kiefer, *Patients' Rights Rise in Senate: The Democrat-Controlled Chamber Will Debate a Patients' Bill of Rights Tomorrow*, CHRISTIAN SCI. MONITOR, June 18, 2001, at 1; Jube Shiver, Jr., *Compromise Urged on Patients' Rights Bill*, L.A. TIMES, June 11, 2001, at A9.

<sup>179</sup> See H. COMM. ON THE JUDICIARY, 108TH CONG., HELP EFFICIENT, ACCESSIBLE, LOW-COST, TIMELY HEALTHCARE (HEALTH) ACT OF 2003, H.R. REP. NO. 108-32, pt. 1, at 252–53 (2003) (expressing concern that proposed bill would “completely preempt[] states' patients' bills of rights that [allow] HMOs to be sued for wrongful actions”).

<sup>180</sup> Sheryl Gay Stolberg, *Senate Refuses to Consider Cap on Medical Malpractice Awards*, N.Y. TIMES, July 10, 2003, at A20.

<sup>181</sup> 542 U.S. at 222 (Ginsburg, J., concurring) (internal quotation marks omitted).

<sup>182</sup> See *id.* at 224 (“Congress . . . intended ERISA to replicate the core principles of trust remedy law, including the make-whole standard of relief. I anticipate that Congress, or this Court, will one day so confirm.” (internal citations and quotation marks omitted)).

bility, risk, and incentives that are raised by the debates over MCO liability. This view, that legal craftsmanship can be a substitute for a genuinely democratic resolution of a political impasse, is unrealistic. The problems that bedevil ERISA are not matters that can be settled through a more accurate use of the doctrine of trusts. They are, instead, the result of a clash of powerful interests—patients, trial lawyers, insurers, the managed care industry, doctors, and the general public. The best forum for resolving this conflict is a political forum, not a juridical one. Sadly, if the argument of this Article is correct, the Court's preemption jurisprudence has only helped to ensure that such a public and political resolution does not take place.

#### IV

##### MOBILIZING THE PUBLIC WITH *CHEVRON*-STYLE DEFERENCE FOR STATE LAW

Thus far, I have argued generally in favor of a clear statement rule of construction against preemption. But I have yet to explain how such a rule would operate as a practical matter. Scholars have been understandably skeptical about the value of general transsubstantive canons of construction, given the substance- and text-specific nature of federal statutes.<sup>183</sup> I would suggest, however, that it is nevertheless possible to craft a useful default rule disfavoring preemption across otherwise widely varying statutes. In fact, there is doctrinal precedent for doing so: the doctrine of deference to administrative agencies announced in *Chevron v. NRDC*.<sup>184</sup> *Chevron*, of course, establishes a default rule of judicial deference to federal agencies' interpretations of ambiguous provisions in federal statutes.<sup>185</sup> Here, I propose an analogous default rule of deference to another nonjudicial actor—nonfederal governments acting in the shadow of ambiguous federal law. As I shall explain below, my proposal serves two of the same purposes as *Chevron*: It economizes on judicial resources, and it defers to the nonjudicial actors most capable of bringing statutory ambiguities to the attention of Congress.

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<sup>183</sup> See Jonathan R. Siegel, *Textualism and Contextualism in Administrative Law*, 78 B.U. L. REV. 1023, 1024–25 (1998) (arguing that neglect of “background principles”—resulting from misguided adherence to scholarly trends against transsubstantive rules—leads to poor judicial decisionmaking).

<sup>184</sup> 467 U.S. 837 (1984).

<sup>185</sup> *Id.* at 843–44 (“[I]f the statute is silent or ambiguous . . . the question for the court is whether the agency’s answer is based on a permissible construction of the statute. . . . [A] court may not substitute its own construction . . . for a reasonable interpretation made by the administrator of an agency.”).

### A. *Chevron as a Model for an Anti-Preemption Default Rule*

What reasoning would justify the application of *Chevron*-style deference to state laws threatened with preemption by ambiguous federal statutes? Recall the black-letter formulation of *Chevron*: Over some disputed range of cases,<sup>186</sup> federal courts are instructed to defer to a federal agency's interpretation of a federal statute when (1) the statutory language is ambiguous and (2) the agency's interpretation of the statute is "permissible" or "reasonable."<sup>187</sup> The justifications for such deference are disputed in the voluminous scholarly literature and judicial opinions analyzing *Chevron*.<sup>188</sup> On one account, *Chevron* is not about deference at all but rather about delegation; Congress is implicitly understood to have delegated the task of filling the gaps in federal statutes to federal agencies.<sup>189</sup> On another account, however, it is a bald legal fiction to hypothesize any specific congressional intention to delegate the gap-filling function to agencies: Congress, in all likelihood, "didn't think about the matter at all."<sup>190</sup> A third account posits that deference to agencies' interpretations is justified, instead, by the advantage of economizing on judicial resources and placing

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<sup>186</sup> For an overview of the question of whether *Chevron* applies to agency actions such as litigating positions, interpretive rules, preambles of regulations, and other contexts outside of rulemaking and adjudication, see Cass R. Sunstein, *Chevron Step Zero*, 92 VA. L. REV. 187 (2006).

<sup>187</sup> *Chevron*, 467 U.S. at 842–45.

<sup>188</sup> For a sampling of literature, see David J. Barron & Elena Kagan, *Chevron's Nondelegation Doctrine*, 2001 SUP. CT. REV. 201, 234–57 (arguing that *Chevron* deference should depend on political prominence of official taking responsibility for agency interpretation); Elizabeth Garrett, *Legislating Chevron*, 101 MICH. L. REV. 2637, 2639–40 (2003) (analyzing methods by which Congress could signal its intentions regarding deference to agency interpretation of law); Ronald J. Krotoszynski, Jr., *Why Deference?: Implied Delegations, Agency Expertise, and the Misplaced Legacy of Skidmore*, 54 ADMIN. L. REV. 735, 750–53 (2002) (arguing for *Chevron* deference only where agency has exercised specialized expertise in interpreting statute); Thomas W. Merrill & Kristin E. Hickman, *Chevron's Domain*, 89 GEO. L.J. 833, 882–88 (2001) (describing limits on scope of judicial obligation to defer under *Chevron*); Jonathan T. Molot, *Reexamining Marbury in the Administrative State: A Structural and Institutional Defense of Judicial Power over Statutory Interpretation*, 96 NW. U. L. REV. 1239, 1243–47 (2002) (arguing that judicial power to interpret whether statutes are ambiguous and reasonable is substantial and justified); Cass R. Sunstein, *Law and Administration After Chevron*, 90 COLUM. L. REV. 2071, 2093–2104 (1990) (arguing for limit on *Chevron* deference based on reconstruction of congressional instructions in light of relevant agency's institutional capacities and describing several contexts in which deference is inappropriate).

<sup>189</sup> See John F. Duffy, *Administrative Common Law in Judicial Review*, 77 TEX. L. REV. 113, 199–203 (1998) ("A reviewing court does decide all questions of law . . . but it may find that the statute confers on the agency a lawmaking power. The *Chevron* principle is then just a corollary of the delegated lawmaking theory . . .").

<sup>190</sup> Antonin Scalia, *Judicial Deference to Administrative Interpretations of Law*, 1989 DUKE L.J. 511, 517.

statutory interpretation in the hands of officials who are more democratically accountable than federal judges.<sup>191</sup>

It is not difficult to construct an analogy between this third account of *Chevron* and a default rule disfavoring preemption of state law. If one accepts the “public mobilization” theory set forth above,<sup>192</sup> then it is easy to see why interpretations of federal law by states that favor their own jurisdictions are more democratically legitimate than efforts by federal courts to craft a federal common law to fill statutory gaps. Unpreempted state law, by my hypothesis, is simply easier for Congress to overrule than federal courts’ broad preemption doctrines. Moreover, a rule of deference to states economizes on judicial resources much in the same way that *Chevron* does, by giving courts a simple default rule to apply in cases of statutory ambiguity: When in doubt, do not preempt. To the extent that *Chevron* is justified by such considerations,<sup>193</sup> those considerations likewise justify an anti-preemption default rule.

A *Chevron*-style rule disfavoring preemption enlists state governments to serve as the agents of Congress and empowers them to bring statutory ambiguities to the attention of Congress by enacting state legislation to fill those statutory gaps. If it seems odd to speak of states as the agents of Congress, it might simply be the result of an implicit adherence to the myth of dual federalism: that states and Congress operate in distinct and mutually exclusive spheres. Whatever the merits of this view of federalism before the New Deal, it has since been entirely supplanted by a different paradigm in which Congress routinely legislates against a background of state laws that it does not intend to disturb. Congress implicitly enlists state law to serve federal ends, by operating on the tacit understanding that state and federal rules dovetail into a single scheme.<sup>194</sup> As federal and state

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<sup>191</sup> See, e.g., Cynthia R. Farina, *Statutory Interpretation and the Balance of Power in the Administrative State*, 89 COLUM. L. REV. 452, 456 (1989) (“Courts must defer . . . in order to respect the legislature’s decision to entrust regulatory responsibility to agencies, and to ensure that the policy choices . . . are made by persons answerable to the political branches rather than by unelected judges.”); Sunstein, *supra* note 188, at 2079 (attributing rise of administrative state to fact that “courts lacked the flexibility, powers of coordination, initiative, democratic accountability, and expertise necessary to deal with complex social problems”); *id.* at 2084 (noting that where, as in *Chevron*, “[t]he agency’s fact-finding and policymaking competence, and its electoral accountability, [are] highly relevant . . . deference is particularly appropriate”).

<sup>192</sup> See *supra* Part III.A.

<sup>193</sup> Adrian Vermuele provides such an argument, justifying *Chevron* as a measure to simplify the judicial task and minimize the costs of litigation. ADRIAN VERMUELE, *JUDGING UNDER UNCERTAINTY: AN INSTITUTIONAL THEORY OF LEGAL INTERPRETATION* 205–29 (2006).

<sup>194</sup> This assumption is usually expressed as a canon disfavoring the displacement of state law in contexts where such law has traditionally been dominant. See, e.g., *BFP v.*



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laws become more intertwined, it becomes less plausible to say that federal law is preserving state law's independent scope and more plausible to say that federal law is effectively deputizing the states to fill gaps in federal statutes.<sup>195</sup>

With this analogy to *Chevron* in mind, it is easy to formulate a two-part statement of an anti-preemption default rule: Courts should infer that federal law does not preempt state law if (1) the federal statute does not directly address the precise issue covered by state law and (2) the state regulation is a reasonable construction of the space left by the federal statute.

To illustrate this two-part test, consider the following typical preemption issue—whether a state law regulating the packaging of chlorine tablets is preempted by the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA).<sup>196</sup> Under the first step of the test, one would ask whether FIFRA's packaging standards, as promulgated by either Congress or the EPA, directly addressed the precise issue covered by state law.<sup>197</sup> Suppose that the state law in question required that chlorine tablets be sealed in watertight plastic to ensure that the chlorine did not become wet and thereby generate dangerous fumes. If the EPA had never considered, and did not discuss, the issue of leaky packaging in its regulations pursuant to FIFRA, then the state law would pass the first prong of the test, even if, as a strictly textual matter, the “plain language” of FIFRA's preemption clause might suggest preemption.<sup>198</sup> The second prong would then ask whether the state law reasonably interprets the space left open by the authoritative federal policymaker—whether the agency<sup>199</sup> or Congress—for nonfederal lawmaking.

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Resolution Trust Corp., 511 U.S. 531, 544–45 (1994) (adopting California's foreclosure rules to define term in federal bankruptcy statute).

<sup>195</sup> Consider the formulation that, unless the “federal statutory purpose [is] ‘clear and manifest’ . . . the Bankruptcy Code will be construed to adopt, rather than to displace, pre-existing state law.” *Id.* (quoting *English v. Gen. Elec. Co.*, 496 U.S. 72, 79 (1990)). The critical point is that the federal statute is not merely preserving state law to govern some autonomous realm of local concerns but rather is *incorporating* state law to define the federal statutory standard.

<sup>196</sup> 7 U.S.C. §§ 136–136y (West 1999 & Supp. 2005).

<sup>197</sup> *See, e.g.*, *Hawkins v. Leslie's Pool Mart*, 184 F.3d 244, 253–55 (3d Cir. 1999) (refusing to find preemption of New Jersey common law tort for defective packaging under FIFRA).

<sup>198</sup> The text of FIFRA's preemption clause quite arguably preempts additional state regulation: “Such 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.” 7 U.S.C. § 136v(b). In *Hawkins*, 184 F.3d at 253–55, given that the EPA had promulgated a standard for insuring that packaging was child-resistant, the literal terms of § 136v(b) would seem to prohibit any additional state standards.

<sup>199</sup> There remains, of course, the important issue of the weight that should be given to agencies' declarations of the preemptive force of their own regulations. Judicial pro-

How does such a “reasonability” inquiry apply to the central issue with statutory preemption—the construction of the preemption clause itself? Such an inquiry will inevitably focus on the clause’s prepositional phrase defining the relationship between state law and exclusively federal topics. Such phrases typically provide that state regulations are preempted if they are “for,” “related to,” “with respect to,” or “applicable to” certain topics.<sup>200</sup> Although the Court sometimes proceeds under the assumption that these phrases have an obvious “common-sense meaning,”<sup>201</sup> the imputation of clarity to a two- or three-word prepositional phrase is implausible. The central task for a *Chevron*-style default rule, therefore, is determining how to construe these ambiguous prepositions.

This Article proposes that such preemption clauses be construed to define the preempted state laws in terms of their reasonably inferred purpose or object. Thus, a state law would have the forbidden relationship to some exclusively federal topic only if the objective purpose of that state law were to address that topic. In the example from FIFRA, the state law requiring watertight packaging of chlorine tablets would not be a regulation “for” the topic covered by

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nouncements on the issue have been unclear, and rival canons of construction suggest that courts should defer both to agencies and to states. The Supreme Court recently granted certiorari to address precisely this question. *See Wachovia Bank, N.A. v. Watters*, 431 F.3d 556 (6th Cir. 2005), *cert. granted*, 74 U.S.L.W. 3697, 3702 (U.S. June 19, 2006) (No. 05-1342). There is a growing literature on whether federalism norms ought to trump *Chevron* deference to agencies. *See, e.g.,* Nina A. Mendelson, *Chevron and Preemption*, 102 MICH. L. REV. 737, 758–79 (2004) (arguing against *Chevron* deference on ground that political safeguards for federalism are absent in agencies’ regulatory processes). However, this Article will suspend judgment about the degree to which agencies are adequate substitutes for Congress as federal decisionmakers.

<sup>200</sup> *See, e.g.,* 7 U.S.C. § 136v(b) (“Such 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.”) (emphasis added); ERISA, 29 U.S.C. § 1144(a) (2000) (“[T]he provisions of [ERISA] shall supersede any and all State laws insofar as they may now or hereafter *relate to* any employee benefit plan [covered by ERISA].”) (emphasis added); 49 U.S.C. § 14501(a) (2000) (“No State or political subdivision thereof . . . shall enact or enforce any law . . . *relating to* scheduling of interstate or intrastate transportation . . . .”) (emphasis added); The National Highway Traffic & Safety Act, 49 U.S.C. § 30103 (2000) (“When a motor vehicle safety standard is in effect under this chapter, a State . . . may prescribe or continue in effect a standard *applicable to* the same aspect of performance . . . only if the standard is identical to the standard prescribed under this chapter.”) (emphasis added).

<sup>201</sup> This is true most notably in the context of ERISA preemption. *See, e.g.,* *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41, 47 (1987) (“In both cases ‘[t]he phrase “relate to” was given its broad common-sense meaning . . . .’” (quoting *Metro. Life Ins. Co. v. Massachusetts*, 471 U.S. 724, 739 (1985))); *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 96–98 (1983) (stating that phrase “relate to” should be interpreted in broad sense, such that state law “‘relates to’ an employee benefit plan, in the normal sense of the phrase, if it has a connection with or reference to such a plan”).

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the EPA's regulation unless the purpose of the state law were the same as the purpose of the EPA's regulation. If the EPA required the packaging to be childproof, for instance, then the state law's requirement that the packaging be waterproof would not be preempted, because the two laws would have different targets: One protects children from packaging that they might unwrap, whereas the other protects everyone from packaging that water can penetrate. The object of the state law, in short, would determine whether it fell within the scope of the preemption clause.

Such a purpose-based formula tends to disfavor preemption to the extent that the federal statute is read to have a narrow purpose and the state law is construed charitably as pursuing some end other than one exclusively reserved for the federal government. That the state law might have effects on the subject matter governed exclusively by federal law is immaterial. The doctrine, therefore, allows for considerable overlap between the regulations imposed by the state and federal governments, as the FIFRA illustration above suggests.<sup>202</sup> The Court's decisions in *Silkwood v. Kerr-McGee Corp.*<sup>203</sup> and *Medtronic, Inc. v. Lohr*<sup>204</sup> provide additional illustrations of the capacity for such a doctrine to accommodate state tort laws, even when such laws have obvious effects on federal regulatory goals. In these cases, a majority and a plurality of the Court, respectively, held that states' compensatory tort remedies were not preempted by federal laws barring state safety regulations, reasoning that the federal laws did not preempt state laws with a compensatory "nature."<sup>205</sup> By

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<sup>202</sup> Chief Justice John Marshall famously noted this tendency of purpose-based preemption in his account of Dormant Commerce Clause doctrine: "If congress had passed any act which bore upon the case . . . in execution of the power to regulate commerce . . . we should feel not much difficulty in saying that a state law coming in conflict with such act would be void." *Willson v. Black Bird Creek Marsh Co.*, 27 U.S. (2 Pet.) 245, 252 (1829).

<sup>203</sup> 464 U.S. 238, 257–58 (1984) (holding that federal government's exclusive power to define radiological safety standards at nuclear power plants did not preempt state tort claims seeking both compensatory and punitive damages from plant operators).

<sup>204</sup> 518 U.S. 470, 500–02 (1996) (plurality opinion) (holding that general federal requirements for manufacturing and labeling did not preempt state laws applying specifically to medical devices).

<sup>205</sup> Although much of *Silkwood* was devoted to parsing legislative history, the Court also concluded that the state tort remedy was not preempted because the federal statute lacked a remedial purpose: "This silence takes on added significance in light of Congress' failure to provide any federal remedy for persons injured by such conduct. It is difficult to believe that Congress would, without comment, remove all means of judicial recourse for those injured by illegal conduct." 464 U.S. at 251. Even Justice Powell, in dissent, shared the assumption that the existence of a conflict between state and federal laws should turn on whether the state tort claim had a *regulatory* or *compensatory* nature. *Id.* at 274–75 (Powell, J., dissenting) ("Punitive damages, unrelated to compensation for any injury or damage sustained by a plaintiff, are 'regulatory' in nature rather than compensatory."). See also *Medtronic*, 518 U.S. at 487 (quoting *Silkwood*, 464 U.S. at 251).

contrast, as Justice Breyer's *Medtronic* concurrence noted, an effects-based theory of preemption would treat state tort law as a potentially preempted state safety regulation, because tort damages obviously have significant regulatory effects.<sup>206</sup>

The purpose-based nature of the anti-preemption rule follows naturally from the analogy to *Chevron*. Although there is uncertainty about the proper focus of *Chevron*'s "Step 2" analysis, one prominent view is that such analysis simply reviews agency decisions to ensure that the agency explains its view of the statute in a reasoned manner and does not act arbitrarily.<sup>207</sup> Likewise, the anti-preemption default rule defended here merely asks that a state present a plausible view of how its law pursues goals permitted by the federal statute. In either case, the court presumes that the state or federal agency is effectively acting as a faithful agent of Congress.

State officials, of course, do not work for Congress. Why, then, should courts trust them to adopt "reasonable" views of federal preemption? The theory of public mobilization set forth in Part III provides one answer. If states burden regulated interests with excessive tort liability, then it is more likely that the burden will be brought to Congress's attention. The point of an anti-preemption default rule is to shield Congress from a deluge of petty statutory details. As Daniel Meltzer has cogently observed, Congress cannot be expected to address every unforeseen issue raised by the text of a statute.<sup>208</sup> One would not want Congress to busy itself with such minutiae—which, Meltzer argues, are more properly the province of legal technocrats sitting on federal courts.<sup>209</sup> The issues raised by preemptible state laws, however, are rarely technical details.<sup>210</sup> Rather, they tend to be the political efforts of major elected officials—state attorneys general, state supreme court justices, governors, state legislators, etc.—engaging in political entrepreneurship in order to win public approval. These sorts of issues can only be resolved politically: They ought to be brought to Congress's attention forcefully, and nonfederal elected officials—as I argued in Part III—are the officials best suited to act as messengers.

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<sup>206</sup> *Medtronic*, 518 U.S. at 504–05 (Breyer, J., concurring).

<sup>207</sup> See, e.g., *Verizon Commc'ns Inc. v. FCC*, 535 U.S. 467, 539 (2002) (upholding FCC regulations on ground that they were within zone of reasonable interpretation given FCC's reasoned explanation of its approach).

<sup>208</sup> Meltzer, *supra* note 24, at 376–77.

<sup>209</sup> *Id.* at 376, 379–89 (urging that federal judges do and should assume "more common-law-like role" when there exists discernable federal objective and Congress could not feasibly have addressed all possible contingencies).

<sup>210</sup> *But see* *Boggs v. Boggs*, 520 U.S. 833 (1997) (preempting Louisiana community property law addressing survivorship and annuities).

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State tort remedies for injuries resulting from defective products are a case in point. When Congress or a federal agency regulates, it often does not account for cost internalization, compensation, or insurance policy. Many regulatory agencies have no mechanism for, or expertise in, spreading the costs of accidents through damages, insurance, or other sorts of liability rules. To hold that the federal standard of care preempts state tort remedies, therefore, is to eliminate the protection of liability rules even though the relevant decisionmakers have given no consideration to the issues (cost internalization, compensation, insurance) raised by such preemption. An effects-based theory of preemption, of course, need not result in the automatic preemption of liability rules. However, as explained below, the judicial assessment of the regulatory effect of tort remedies is not a promising way to ensure that the relevant policy is aired.

*B. Is an Anti-Preemption Doctrine Consistent with Precedent?*

Regardless of the other merits of the anti-preemption default rule, one might nonetheless object that it is inconsistent with the Court's preemption doctrine. The Court has vacillated about whether to adopt a clear statement rule against preemption. It continues to recite the conventional bromide from *Rice v. Santa Fe Elevator Corp.*, that, when Congress legislates "in a field which the States have traditionally occupied . . . the Court start[s] with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress."<sup>211</sup> But numerous commentators have observed that, especially since *Geier v. American Honda Motor Co.*,<sup>212</sup> the Court's decisions have frequently honored *Rice*'s "initial assumption" by abandoning it, finding an intent to preempt even without anything remotely like "clear and manifest" evidence of such intent.<sup>213</sup>

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<sup>211</sup> 331 U.S. 218, 230 (1947). For cases citing *Rice*, see, for example, *Rush Prudential HMO, Inc. v. Moran*, 536 U.S. 355, 365 (2002), *Medtronic*, 518 U.S. at 485, and *New York State Conference of Blue Cross & Blue Shield Plans v. Travelers Insurance Co.*, 514 U.S. 645, 655 (1995).

<sup>212</sup> 529 U.S. 861 (2000).

<sup>213</sup> The Court's recent unwillingness to find preemption of state law has been described in various ways. See, e.g., Mary J. Davis, *Unmasking the Presumption in Favor of Preemption*, 53 S.C. L. REV. 967, 968 (2002) ("There is no [anti-preemption] presumption any longer, if, indeed, there ever really was one."); Calvin Massey, "Joltin' Joe Has Left and Gone Away": *The Vanishing Presumption Against Preemption*, 66 ALB. L. REV. 759, 759 (2003) (deeming anti-preemption doctrine "devoid of force and no longer even hortatory"); Susan Raeker-Jordan, *A Study in Judicial Sleight of Hand: Did Geier v. American Honda Motor Co. Eradicate the Presumption Against Preemption?*, 17 BYU J. PUB. L. 1, 3 (2002) ("The *Geier* Court . . . [made] it much easier for judicial preemption to trump even clear congressional enactments that explicitly save state law from federal law override.").

The rumors of the death of the *Rice* presumption against preemption may be exaggerated. Against *Geier*, one can set three more recent decisions that refused to preempt state law,<sup>214</sup> one of which recited *Rice*'s clear statement rule as a justification for its holding.<sup>215</sup> If the Court were so inclined, there is little doubt that the ambiguity in its preemption precedents would leave it ample room to convert *Rice* into a more powerful default rule disfavoring preemption by ambiguous federal laws.

The purpose-based theory of preemption proposed by this Article, however, would seem much more definitively foreclosed by precedents. The Court has emphatically and repeatedly declared that the purpose of a state law cannot be decisive for determining whether it conflicts with a federal statute.<sup>216</sup> These sorts of declarations have led at least one commentator to declare that a purpose-based test is simply foreclosed by the case law.<sup>217</sup>

Such a conclusion might be premature for two reasons. First, when viewed in context, such judicial declarations about the irrelevance of state legislative purpose are best given an evidentiary rather than substantive reading—the Court seems more concerned with excluding certain types of subjective and highly manipulable evidence of state legislative intent than with excluding an inquiry into a state law's purpose established through more objective considerations. Second, the alternatives to a purpose-based test—either some form of

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<sup>214</sup> See *Gonzales v. Oregon*, 126 S. Ct. 904, 923–25 (2006) (holding that federal Controlled Substances Act does not preempt Oregon's authorization of physician-assisted suicide); *Bates v. Dow Agrosciences LLC*, 544 U.S. 431, 444–45 (2005) (holding that FIFRA does not preempt tort suit alleging defective design, defective manufacture, negligent testing, or breach of express warranty); *Sprietsma v. Mercury Marine*, 537 U.S. 51, 63–64 (2002) (holding that Federal Boat Safety Act does not preempt tort suit alleging defective design of boat propeller).

<sup>215</sup> See *Bates*, 544 U.S. at 449 (“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.’” (quoting *Rice*, 331 U.S. at 230)).

<sup>216</sup> See, e.g., *Fla. Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142 (1963) (“The test of whether both federal and state regulations may operate, or the state regulation must give way, is whether both regulations can be enforced without impairing the federal superintendence of the field, not whether they are aimed at similar or different objectives.”).

<sup>217</sup> See José L. Fernandez, *Dynamic Statutory Interpretation: Occupational Safety and Health Act Preemption and State Environmental Regulation*, 22 FLA. ST. U. L. REV. 75, 91–94 (1994) (arguing that *Gade v. National Solid Wastes Management Ass'n*, 505 U.S. 88 (1992), “clos[ed] the door” on using purpose-based tests to detect preempted state laws). Fernandez had earlier defended a purpose-based view of the preemption clause in the Occupational Safety and Health Act (OSHA). See Jose L. Fernandez, *The Purpose Test: Shielding State Environmental Statutes from the Sword of Preemption*, 41 SYRACUSE L. REV. 1201, 1239–41 (1990) (arguing that purpose-based test gives states greater latitude to protect workers and environment, since state laws are not preempted provided that purposes underlying those laws are different than purposes of OSHA).

textualism or some sort of “effects” test—seem wholly unmanageable and unpredictable.

Consider, first, those precedents that seem to reject purpose-based preemption. Comparison with other constitutional doctrines suggests that such declarations ought to be viewed skeptically. The Court emphatically stated in *United States v. O'Brien* that the First Amendment’s application to laws limiting expression does not depend on the purpose of such laws.<sup>218</sup> Yet, some have persuasively argued that the Court’s decisions seem to rely on the purpose of legislation to determine whether such laws constitute impermissible burdens on the First Amendment.<sup>219</sup> Indeed, any doctrine requiring that rules be neutral as to some forbidden criterion (e.g., content, race, residency) seems explicable only as a theory of excluded reasons—that is, as a purpose-based test.<sup>220</sup> Thus, the Court’s statements in *Palmer v. Thompson*<sup>221</sup> that liability in equal protection cases did not turn on legislative purpose turned out to be confused and mistaken,<sup>222</sup> as did the Court’s declarations that liability under the Dormant Commerce Clause doctrine would turn on a “balancing” test.<sup>223</sup>

Patterns strikingly similar to these constitutional decisions emerge in preemption decisions. Indeed, in one of the Court’s efforts to explain why “inquiry into legislative motive is often an unsatisfactory venture,” the Court cited *O'Brien*’s argument that legislative purpose is not relevant to a law’s constitutionality.<sup>224</sup> In *Gade v. National Solid Wastes Management Association*,<sup>225</sup> the Court confronted an Illinois law requiring workers who handled hazardous waste to meet

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<sup>218</sup> 391 U.S. 367, 383 (1968).

<sup>219</sup> See, e.g., LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* § 12-7, at 831 (2d ed. 1988) (emphasizing legislation’s target rather than its purpose as basis for subjecting it to strict scrutiny); Elena Kagan, *Private Speech, Public Purpose: The Role of Governmental Motive in First Amendment Doctrine*, 63 U. CHI. L. REV. 413, 414–16 (1996) (arguing that Court’s First Amendment doctrine functions as search for law’s motive).

<sup>220</sup> See Roderick M. Hills, Jr., *The Constitutional Rights of Private Government*, 78 N.Y.U. L. REV. 144, 191–96 (2003) (arguing that rights trump governmental decision-making only to extent that latter pursues purposes delegated to former); Richard H. Pildes, *Why Rights Are Not Trumps: Social Meanings, Expressive Harms, and Constitutionalism*, 27 J. LEGAL STUD. 725, 750–54 (1998) (noting that First Amendment free speech cases, Establishment Clause cases, and Dormant Commerce Clause cases turn on ensuring that government justifies its actions).

<sup>221</sup> 403 U.S. 217 (1971).

<sup>222</sup> On *Palmer*, see generally Paul Brest, *Palmer v. Thompson: An Approach to the Problem of Unconstitutional Legislative Motive*, 1971 SUP. CT. REV. 95.

<sup>223</sup> On the irrelevance of balancing to Dormant Commerce Clause liability, see generally Donald Regan, *The Supreme Court and State Protectionism: Making Sense of the Dormant Commerce Clause*, 84 MICH. L. REV. 1091 (1986).

<sup>224</sup> See *Pac. Gas & Elec. Co. v. State Energy Res. Conservation & Dev. Comm’n*, 461 U.S. 190, 216 (1983) (citing *United States v. O'Brien*, 391 U.S. 367, 383 (1968)).

<sup>225</sup> 505 U.S. 88 (1992).

licensing requirements more stringent than the federal standards.<sup>226</sup> Illinois argued that this law was not preempted by the federal Occupational Safety and Health Act (OSHA), because the purpose of the federal law was to protect workers' safety while the purpose of the Illinois law was to protect the safety of the general public by ensuring that crane operators working with hazardous waste had sufficient experience.<sup>227</sup>

In rejecting this argument, the *Gade* Court stated that “[i]n assessing the impact of a state law on the federal scheme, we have refused to rely solely on the legislature’s professed purpose and have looked as well to the effects of the law.”<sup>228</sup> The *Gade* Court quoted its earlier decision in *Perez v. Campbell*<sup>229</sup> at length, stating that

We can no longer adhere to the aberrational doctrine . . . that state law may frustrate the operation of federal law as long as the state legislature in passing its law had some purpose in mind other than one of frustration. Apart from the fact that it is at odds with the approach taken in nearly all our Supremacy Clause cases, such a doctrine would enable state legislatures to nullify nearly all unwanted federal legislation by simply publishing a legislative committee report articulating some state interest or policy—other than frustration of the federal objective—that would be tangentially furthered by the proposed state law. . . . [A]ny state legislation which frustrates the full effectiveness of federal law is rendered invalid by the Supremacy Clause.<sup>230</sup>

The Court concluded that “a dual impact state regulation cannot avoid OSH Act pre-emption simply because the regulation serves several objectives rather than one.”<sup>231</sup> Illinois’s law was preempted because it “directly, substantially, and specifically regulates occupational safety and health.”<sup>232</sup> The Court subsequently stated, “That such a law may also have a nonoccupational impact does not render it any less of an occupational standard for purposes of pre-emption analysis.”<sup>233</sup>

Like the Court’s First Amendment doctrine, this ringing rejection of purpose-based tests seems to have defined the scope of preempted regulation largely in terms of whether the state law singled out the federal interest for special regulation. Illinois’s law was preempted

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<sup>226</sup> *Id.* at 93–94.

<sup>227</sup> *Id.* at 94, 105.

<sup>228</sup> *Id.* at 105.

<sup>229</sup> 402 U.S. 637 (1971).

<sup>230</sup> *Gade*, 505 U.S. at 105–06 (quoting *Perez*, 402 U.S. at 651–52).

<sup>231</sup> *Gade*, 505 U.S. at 106.

<sup>232</sup> *Id.* at 107.

<sup>233</sup> *Id.*



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not because it had an effect on worker safety but rather because it was not a “state law[ ] of general applicability” such as “laws regarding traffic safety or fire safety.”<sup>234</sup> If Illinois had “regulate[d] the conduct of workers and nonworkers alike,” then its law “would generally not be pre-empted,” even though it might have a “direct and substantial effect” on the treatment of hazardous waste.<sup>235</sup> This singling out of a federal interest, rather than the empirical effects of the state law on the federal interest in limiting the waste management industry’s regulatory obligations, was what led to the law’s preemption.

It is difficult to regard such a “no discrimination against federal interests” doctrine as anything but a purpose-based test for preemption. In this respect, *Gade*’s invocation of the notion of “laws of general applicability” mimics the First Amendment doctrine protecting content-neutral laws from the scope of the First Amendment’s prohibition. Despite the Court’s protests,<sup>236</sup> the Court’s distinction seems only to make sense in distinguishing among state laws based on the judgments that underlie those laws. There is no reason to believe that a more narrowly targeted state law, after all, will somehow have a larger effect on the federal interest than a more broadly worded state law. Relying on the discriminatory nature of the law, therefore, is tantamount to abandoning an effects test for preemption. The Supreme Court, as well as the lower federal courts, routinely relies on such analysis of legislative purpose to determine whether a state law “relates to” some exclusively federal end.<sup>237</sup>

Why, then, does the Court denounce reliance on state regulatory purpose? The most likely explanation is that the Court does not want to be burdened with the duty of considering unreliable and manipulable evidence of legislative intent. Thus, *Perez* argues that a state legislature must not be able to defend its laws from preemption “by simply publishing a legislative committee report articulating some state interest or policy—other than frustration of the federal objective—that would be tangentially furthered by the proposed state

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<sup>234</sup> *Id.*

<sup>235</sup> *Id.* (internal quotation marks omitted).

<sup>236</sup> *See, e.g.,* *English v. Gen. Elec. Co.*, 496 U.S. 72, 80–86 (1990) (refusing to find preemption of employee’s state tort claim against employer for alleged retaliatory firing because she complained about inadequate cleanup at employer’s nuclear production facility, despite federal law preempting state regulation of nuclear safety; but also rejecting view that absence of preemption followed from purpose of state tort law, which was not to regulate plant safety).

<sup>237</sup> *See, e.g.,* *Ward v. New York*, 291 F. Supp. 2d 188, 209–11 (W.D.N.Y. 2003) (holding that state ban on cigarettes was not preempted by federal regulation of interstate carriers, because state law was “designed to combat . . . cigarette smoking” rather than regulate interstate transportation of goods).

law.”<sup>238</sup> *Pacific Gas & Electric* expressed a similar concern,<sup>239</sup> even as it used a purpose-based test to determine whether California’s regulation of utilities interfered with a federal statute’s exclusive control of nuclear reactor safety.<sup>240</sup> In effect, *Gade* and *Perez* adopt a parol evidence rule for inferring state legislative intent, refusing to consider any extrinsic evidence of motives that contradicts the purpose of the law on its face. This evidentiary concern, however, does not change the Court’s focus on legislative purpose; it just means that such purpose will be inferred from the state law’s language (in statutory text or common law precedent) and natural effects, not its legislative history.

The emphasis on statutory purpose in preemption analysis is not merely consistent with precedent. It is also superior to the two primary alternative theories—effects-based analysis and textualism—because it yields meaningful results without sacrificing judicial manageability.

Effects-based tests for preemption are simply unmanageable. Asking whether a state law affects a federal policy “too much” invites amorphous policy inquiries that courts cannot make. To grasp the difficulty of applying such a test, consider the following hypothetical: Suppose that a state law requires employers to pay a higher disability insurance premium to the state-controlled disability insurance fund if the employers have higher rates of work-related disease among their employees, and that the federal government requires manufacturers to reduce the incidence of byssinosis (“brown lung” disease) among textile workers by preventing any concentration of ambient cotton dust higher than one thousand micrograms per cubic meter of air. The federal standard expressly prohibits any more stringent state regulatory standard. Suppose, however, that a textile mill wants to reduce employee lung disease in order to reduce its state-mandated insurance rates. If a textile mill determines that, by reducing the concentration of cotton dust even further than required by the federal regulation, it can reduce its rates of employee lung disease and, thus,

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<sup>238</sup> *Perez v. Campbell*, 402 U.S. 637, 652 (1971).

<sup>239</sup> See *Pac. Gas & Elec. Co. v. State Energy Res. Conservation & Dev. Comm’n*, 461 U.S. 190, 216 (1983) (stating that “we should not become embroiled in attempting to ascertain California’s true motive” for enacting regulation of nuclear power plant because “[w]hat motivates one legislator to vote for a statute is not necessarily what motivates scores of others to enact it,” so “inquiry into legislative motive is often an unsatisfactory venture” (internal quotation marks omitted)).

<sup>240</sup> *Id.* at 212–13 (“When the Federal Government completely occupies a given field or an identifiable portion of it, as it has done here, the test of pre-emption is whether ‘the matter on which the state asserts the right to act is in any way regulated by the Federal Act.’”) (quoting *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 236 (1947)). The Court concludes that, because California’s regulation was in pursuit of economic rather than safety objectives, it was not preempted by federal law. *Id.* at 216.

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reduce its disability insurance rates, then one could accurately say that the state rules concerning disability insurance have the same effects as a preempted state agency rule requiring a lower concentration of cotton dust.

It would be odd, however, to suggest that the states' disability insurance rules linking injury rates to premiums are, therefore, preempted by the federal regulations. The reason is that the state's rule on disability insurance does not rely on any policy judgment that is inconsistent with the federal regulatory standard. The state simply provides businesses with an incentive to reduce accident rates and is agnostic about whether reducing cotton dust below federal levels will actually reduce accident rates or whether the social value of such reduction justifies the economic cost. In short, it is the object of the state law, not its effects, that saves it from preemption.

The Court, of course, is not unaware that effects-based theories of preemption, if taken literally, cut too wide a swath through state laws. It is a staple of judicial preemption rhetoric that the Court rejects the broadest implications of such effects-based theories, even in the context of ERISA preemption.<sup>241</sup> Yet such disclaimers leave the doctrine hopelessly murky, defined only by the Court's conclusory assertion that state regulation can ordinarily affect national purposes unless some unspecified "special features" make such effects excessive.<sup>242</sup>

An alternative to effects-based theories are text-based theories that rely on the plain meaning of preemption clauses in federal statutes. But such theories assume that the typical preemption clause has a plain meaning—a dubious assumption, given the wooden nature of these clauses. The typical preemption clause simply states that some form of state law—"regulation," "requirement," etc.—is preempted if it is connected to some topic of federal regulation. The relevant connection is generally specified by a two- or three-word prepositional phrase such as "related to" or "with respect to." Such cryptic prepositions simply have no "plain meaning," despite the Court's occasional assertions to the contrary. When the Court claims that it is simply

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<sup>241</sup> The three ERISA cases described in Part III.E note that ERISA cannot preempt every state law that merely affects ERISA benefit plans. *De Buono v. NYSA-ILA*, 520 U.S. 806, 816 (1997); *Cal. Div. of Labor Standards Enforcement v. Dillingham Constr.*, 519 U.S. 316, 328 (1997); *N.Y. State Conference of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.*, 514 U.S. 645, 659, 662 (1995).

<sup>242</sup> *See, e.g., Hillsborough County v. Automated Med. Labs., Inc.*, 471 U.S. 707, 719 (1985) ("Undoubtedly, every subject that merits congressional legislation is, by definition, a subject of national concern. That cannot mean, however, that every federal statute ousts all related state law. . . . Instead, we must look for special features warranting preemption.").

carrying out the plain sense of such ambiguous phrases, it is being disingenuous, abdicating responsibility for decisions that need more justification than textualist window dressing.<sup>243</sup>

In sum, neither austere textualism nor amorphous effects-based theories are promising bases for preemption doctrine. Perhaps the best theory left standing is the theory that the Court, despite its protests to the contrary, seems to employ preemption of state laws if and only if they aim at an object forbidden by federal statute. The forbidden state purpose can be inferred objectively from a law's use of classifications that fit federal topics with suspicious neatness. But it is the purpose or object of the law, however inferred, that should be the gist of the inquiry.

Whether the Court would accept such a purpose-based theory of preemption depends in great measure on the degree to which it believes that the states can be adequately policed by Congress and federal regulatory agencies. If the states refrain in good faith from second-guessing federal judgments, then the only risk posed by state lawmakers is that they will be insufficiently careful about the collateral effects that their laws may have on federal goals. No doubt this risk is real. If the mobilization theory of this Article is correct, however, interest groups who are burdened by such effects will have ample incentives to bring them to Congress's attention. By contrast, the risk may be greater that excessively centralizing federal laws might be locked in by sheer congressional inertia. The question is, of course, an empirical one. It should, however, be at the heart of the preemption debate.

#### CONCLUSION

One does not need to love federalism in order to hate preemption. Even if one distrusts state politicians, there is reason to believe that they can break congressional gridlock that can be just as costly as state incompetence. Courts can help states perform this function by refusing to find preemption absent clear evidence that state law announces policies that contradict policy judgments contained in federal statutes. Lacking such evidence, the courts would be well advised to leave state law unpreempted, secure in the knowledge that congresspersons will have strong incentives to strengthen the statutes' preemptive force if this is the wish of their constituents.

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<sup>243</sup> The extraordinary breadth of ERISA preemption is occasionally justified by the Court as an expression of the plain meaning of ERISA's preemption clause. *See, e.g.,* *District of Columbia v. Greater Wash. Bd. of Trade*, 506 U.S. 125, 129 (1992) (noting that interpretation of ERISA preemption clause "is true to the ordinary meaning of 'relate to' . . . and thus gives effect to the deliberately expansive language chosen by Congress" (internal citations omitted)).