3-2013

Preemption and Choice-of-Law Coordination

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The doctrine treating federal preemption of state law has been plagued by uncertainty and confusion. Part of the problem is that courts purport to interpret congressional intent when often Congress has never considered the particular preemption question at issue. This Article suggests that courts deciding preemption cases should take seriously a commonly articulated rationale for the federalization of law: the need to coordinate applicable legal standards in order to facilitate a national market or to otherwise provide clear guidance to parties regarding the laws that apply to their conduct. In situations where federal law can serve a coordinating function but congressional intent regarding preemption is unclear, we propose that courts consider whether the states have effectively allocated sovereign authority among themselves through choice-of-law rules. Where states have achieved such "horizontal coordination," Congress often has little need to usurp the states' role as laboratories for experimenting with potentially diverse substantive laws. Our approach would help to promote a "healthy federalism" by encouraging courts to preserve the benefits of local and state sovereignty while simultaneously enabling federal statutes to coordinate U.S. law where necessary. To show how our approach might improve preemption decisions, we apply it to several areas in which the courts have struggled. Although our approach provides a conceptually obvious, and therefore elegant, solution to many preemption problems, to date it has been entirely unexplored.

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INTRODUCTION

Preemption doctrine is plagued by both indeterminacy and incoherence.[1] These problems likely reflect the inevitable tension in a federal system between the appeal of having one clearly applicable federal policy and a commitment to preserving state and local sovereign authority. Unfortunately, the Supreme Court has not yet found a sensible way to balance these competing values. The Court's preemption decisions sometimes stress the benefits of state sovereignty and diversity while, at other times, the Court

1. *See, e.g.*, Viet D. Dinh, *Reassessing the Law of Preemption*, 88 GEO. L.J. 2085 (2000); Jack Goldsmith, *Statutory Foreign Affairs Preemption*, 2000 SUP. CT. REV. 175, 178; S. Candice Hoke, *Preemption Pathologies and Civic Republican Values*, 71 B.U. L. REV. 685, 733–37 (1991); Marin R. Scordato, *Federal Preemption of State Tort Claims*, 35 U.C. DAVIS L. REV. 1, 32 (2001); Catherine M. Sharkey, *Products Liability Preemption: An Institutional Approach*, 76 GEO. WASH. L. REV. 449, 459 (2008); Robert N. Weiner, *The Height of Presumption: Preemption and the Role of Courts*, 32 HAMLINE L. REV. 727 (2009).

asserts a need to protect federal policy from the vagaries of different state policies.[2] The justices' rhetoric seems to vacillate between these two pillars of federalism depending on the individual circumstances of the case.[3] Rather than utilizing a nuanced view of the circumstances under which federal policy displaces state law, the Court's preemption cases seem preoccupied with presumptions and rules that emphasize gross dichotomies.[4]

Courts ostensibly attempt to glean congressional intent regarding the degree to which a federal law preempts state law.[5] Although the Supremacy Clause of the U.S. Constitution[6] enables Congress to displace state law in order to advance federal policy goals,[7] Congress cannot foresee all possible preemption scenarios or perfectly articulate the effect of its laws in all situations.[8] Moreover, silence regarding a preemption question can be the unfortunate product of political compromise[9] with strong political forces often preventing Congress from explicitly addressing the question of state sovereignty. When Congress fails to clarify the extent to which overlapping state laws are displaced, the courts attempt to discern both Congress's policy goals and the extent to which Congress would tolerate state laws that have the potential to conflict with federal policy. The former determination is notoriously difficult for courts to make, given that congressional bills are often multifaceted and the votes of more than 500 members of Congress can reflect a variety of very different policy goals.[10] Congress's willingness to accommodate overlapping state law requires an even more nuanced analysis and is therefore even harder to determine with confidence.[11]

On the surface, the Supreme Court has resisted efforts to fill voids in legislative intent with the justices' own views on the relative normative desirability of federal and state substantive policies. In this sense, the Court seems wary of usurping congressional prerogatives. Instead, the Court has

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2. *See* William W. Bratton, Jr., Note, *The Preemption Doctrine: Shifting Perspectives on Federalism and the Burger Court*, 75 COLUM. L. REV. 623, 624–39 (1975) (describing the Court's historic oscillation between favoring federal interests and preferring state autonomy).

3. *See infra* text accompanying notes 29–56.

4. *See infra* text accompanying notes 29–56.

5. *See, e.g.*, cases cited *infra* note 42.

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

7. *See* Thomas W. Merrill, *Preemption and Institutional Choice*, 102 NW. U. L. REV. 727, 729 (2008); *see also* Stephen A. Gardbaum, *The Nature of Preemption*, 79 CORNELL L. REV. 767 (1994).

8. Kenneth L. Hirsch, *Toward a New View of Federal Preemption*, 1972 U. ILL. L. F. 515, 540.

9. *See* Lisa Schultz Bressman, Chevron*'s Mistake*, 58 DUKE L.J. 549, 614–15 (2009) (discussing this possibility).

10. *See generally* Frank H. Easterbrook, *Text, History, and Structure in Statutory Interpretation*, 17 HARV. J.L. & PUB. POL'Y 61 (1994); Kenneth A. Shepsle, *Congress Is a "They," Not an "It": Legislative Intent as Oxymoron*, 12 INT'L REV. L. & ECON. 239 (1992).

11. For example, the majority and dissent disagreed over how to assess congressional willingness to tolerate overlapping state law in *Geier v. American Honda Motor Co.*, 529 U.S. 861 (2000), a case discussed *infra* in note 52 and accompanying text.

turned to a set of generally applicable doctrines that enable courts (if they so choose) to avoid a detailed analysis of the merits of the substantive legal rules at issue.

Specifically, the Court has developed a set of presumptions to resolve cases where congressional intent is unclear.[12] For example, the Court often presumes that Congress has not displaced state laws when it legislates in an area traditionally regulated by the states. Conversely, the court tends to presume that Congress intended to preempt state laws when Congress acts in an area that it has pervasively regulated or when state laws could conflict with congressional objectives. These presumptions frequently conflict, however, and the justices often offer splintered opinions, with a majority emphasizing the applicability of one presumption and dissenting justices emphasizing another.[13] In the end, it is difficult to avoid the suspicion that the decisions are based on unarticulated policy judgments that are operating offstage.[14] Preemption decisions thus lack transparency, may turn on poor policy reasoning that is deprived of robust discussion and debate, and fail to provide useful guidance for future cases.

Legal scholars often advocate that the Court promote clarity by consistently applying a single presumption when congressional intent is unclear.[15] Some argue that the courts should consistently presume preemptive intent in order to promote legal uniformity or the development of a national market, or to force Congress to deal with preemption issues.[16] Others argue, to the contrary, that the courts should presume against preemptive intent in order to preserve state sovereignty or force Congress to act explicitly when it intends to displace state laws.[17] Regardless of the approaches they propose, virtually all preemption scholars seem focused on the proper allocation between state and federal power, a concern that we label "vertical coordination." While this is clearly the central issue embedded in the Supremacy Clause, in many cases a vertical coordination approach, standing

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12. These presumptions are articulated more fully *infra* in Part I. Actually, the doctrines discussed in Part I include both presumptions and articulated rules. But because both types of doctrine lead courts to draw dichotomous conclusions based on categorizations in the case of congressional silence regarding preemption, we refer to both as "presumptions."

13. For examples of splintered opinions, see *infra* Part IV.

14. *See, e.g.*, Merrill, *supra* note 7, at 741–42 ("In a word, the Court's preemption doctrine is substantively empty. This emptiness helps mask the fact that courts are actually making substantive decisions in the name of preemption."); Note, *Pre-emption as a Preferential Ground: A New Canon of Construction*, 12 STAN. L. REV. 208, 208 (1959) (noting criticism that the Supreme Court's preemption decisions represent "extreme examples of the unwarranted substitution of judicial wisdom for that of Congress").

15. *See infra* Section III.B (discussing various theories of preemption).

16. *See infra* note 140 and accompanying text.

17. *See infra* notes 138–139 and accompanying text. For other arguments in favor of a presumption against preemption, see Betsy J. Grey, *Make Congress Speak Clearly: Federal Preemption of State Tort Remedies*, 77 B.U. L. REV. 559, 565, 613–18 (1997), and S. Candice Hoke, *Preemption Pathologies and Civic Republican Values*, 71 B.U. L. REV. 685, 710–14, 764–66 (1991).

alone, provides inadequate guidance for drawing the line between federal and state regulatory authority.

This Article proposes a horizontal coordination approach to preemption. Unlike other approaches that uniformly promote either more federal law or more state law, our approach is designed to help produce a healthy balance between enhancing the goals of federal law while preserving the authority of states to resolve legal problems in diverse ways. In many preemption cases, our approach would provide helpful guidance to courts.

One important function of federalizing laws is to coordinate the governing law for parties.[18] However, clarity regarding governing laws sometimes can be produced by means short of eliminating state law and its benefits. We argue that in preemption cases courts should take into account "horizontal coordination," or the degree to which the states have effectively allocated sovereign authority among themselves.[19] Specifically, court preemption decisions should consider whether the states have voluntarily adopted a choice-of-law rule for the substantive legal question at issue clarifying which state has sovereign authority to regulate the matter. If so, a court should further consider whether that allocation serves functionally to contain the effects of each state's laws. If the states have coalesced around such a choice-of-law rule for a given subject matter, this coordination indicates that each state is willing to have other states experiment with the content of laws and that the effects of such laws are not spilling over in harmful ways to people and activities located in other states.[20] In these circumstances, Congress may have little need to usurp the states' role as laboratories for experimenting with potentially diverse substantive laws.

States' coalescence around a single choice-of-law approach is a necessary but not sufficient condition for concluding that the states have effectively coordinated sovereign authority. Sometimes, choice of law is

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18. One consequence of the *Erie* doctrine is that federal courts cannot coordinate the governing law for parties on matters of substance governed by state law. *See* Klaxon Co. v. Stentor Elec. Mfg. Co., 313 U.S. 487, 496 (1941) (holding that choice of law is substantive for *Erie* purposes and that therefore federal courts sitting in diversity must apply the choice-of-law principles of the state in which the district court is located). We, and others, have advocated elsewhere that Congress enact uniform choice-of-law principles for interstate activities, but Congress has been generally disinterested in legislating on choice-of-law issues. *See* ERIN A. O'HARA & LARRY E. RIBSTEIN, THE LAW MARKET 47–49 (2009) (discussing general congressional reluctance to legislate regarding choice of state laws). Without a federal vehicle for coordinating state choice-of-law policies, the remaining alternative for coordinating the governing law is to federalize the substantive legal principles themselves.

19. Allan Erbsen recently identified the interrelationship between somewhat analogous concepts that he called horizontal federalism and vertical federalism. However, his analysis differs from ours in that his analysis focuses on horizontal federalism without regard to its possible implications for vertical federalism. *See* Allan Erbsen, *Horizontal Federalism*, 93 MINN. L. REV. 493 (2008).

20. Others have discussed the possible spillover effects of state law. *See* Samuel Issacharoff & Catherine M. Sharkey, *Backdoor Federalization*, 53 UCLA L. REV. 1353, 1368 (2006); Gary T. Schwartz, *Considering the Proper Federal Role in American Tort Law*, 38 ARIZ. L. REV. 917, 922 (1996). Our contribution in this Article is to tie the problem of spillover effects to state choice-of-law policies.

coordinated as a formal matter but one state's exercise of authority ends up *functionally* displacing the authority of the other states. Often this happens when a choice-of-law rule that sensibly allocates state sovereign authority with regard to some matters proves inadequate to coordinate sovereign authority in other situations to which the rule applies. This can happen when legal rules applicable in one state influence activities in other states. Consider, for example, state laws that attempt to regulate employee training and safety equipment aboard oil tankers. Even if each state coordinated around a choice-of-law rule that limited state sovereign authority to oil tankers operating in that state's waters, functional noncoordination would result when that rule is applied to tankers that operate in the waters of—and therefore that must comply with the regulations of—many states and nations.[21] Tankers might cope with this situation by complying with the most stringent laws, but then the jurisdiction with the most stringent laws would end up dominating the jurisdictions with less onerous rules. And if state regulations require that the tankers take differing measures, the cumulative effect of state laws might prove cripplingly burdensome to tankers. In general, taking into account functional as well as formal coordination recognizes that, while state choice-of-law rules can be powerful coordination mechanisms, they are not necessarily coextensive with a healthy federalism.

We suggest a more refined analysis for deciding preemption cases than the blunt and obfuscating presumptions the courts currently apply. Under our approach, implicit considerations about the substantive desirability of state and federal law can be replaced with a transparent and more apt focus on promoting a healthy federalism. Our horizontal coordination approach is not based on any particular theory of congressional intent. Rather, where appropriate, it asks courts to fill a gap in legislative intent by looking to the values embedded in the federal system in which Congress, the courts, and the states operate. It also provides a general guideline that cuts across the substantive areas in which Congress legislates.

We argue that a horizontal coordination approach promotes a "healthy federalism," a term that we introduce and seek to explain here. In our view, when the federal system operates properly, states should be permitted to preserve sovereign powers to experiment with potentially diverse substantive laws when that experimentation is likely to produce better laws in the long run. As we have argued elsewhere, good laws are more likely to evolve when state powers are constrained by effective jurisdictional competition.[22] For jurisdictional competition to be effective, two forces must be present. First, when states experiment with their laws in particularly undesirable ways, people and firms begin to relocate their activities and their assets to other states.[23] Conversely, states can attract citizens and businesses by experimenting with desirable laws. Jurisdictional competition need not result

21. *See, e.g.*, United States v. Locke, 529 U.S. 89 (2000) (discussing need for uniform federal law in this context).

22. *See generally* O'HARA & RIBSTEIN, *supra* note 18.

23. *Id.* at 28.

in a single legal rule being adopted in all jurisdictions, however. Indeed, another benefit to state law is that when parties can choose among diverse laws, they can more effectively satisfy their inevitably diverse preferences, needs, and constraints. When the boundaries between state laws are not clearly and coherently drawn, however, parties might not be able to forecast the legal standards that apply to their conduct, and thus they might be forced to comply with the laws of all potentially relevant states. Moreover, if parties can neither avoid jurisdictions with undesirable laws nor contract for favorable laws, states with undesirable laws will not be pressured into enacting better ones. When state laws promote a race to the bottom or carry the potential for multiple laws to apply to a single action, the resulting federalism is not healthy. Such unhealthy federalism hinders U.S. markets by increasing the cost of conducting interstate and international commerce,[24] and it can impoverish our citizens. In contrast, presuming that federal law displaces state law when the states have coherently allocated sovereign authority on their own can work to destroy the potential benefits of state laws.

Preemption under the Supremacy Clause enables Congress and the courts to act as a team in appropriately allocating state and federal regulatory authority.[25] When Congress has spoken on a particular issue, courts use the preemption doctrine primarily to fill statutory gaps that leave unclear the extent to which state and federal laws should coexist. But achieving an optimal balance through preemption policy can be tricky. Interpreting federal statutes' preemptive effect too narrowly impedes effective policymaking, including coordination, by Congress. On the other hand, preempting too readily might undermine efficient jurisdictional competition among the states. Implementing our horizontal regulatory coordination approach in preemption cases would help ensure that the courts give federal and state legislation their respective, appropriate scopes.

In sum, state self-discipline through effective choice-of-law rules should be an important consideration in preemption cases. In the absence of clear congressional intent to the contrary, courts should hesitate to preempt where states are applying choice-of-law rules that clearly and sensibly allocate state sovereign authority. Conversely, the states' failure to adopt choice-of-law rules that sensibly allocate sovereign authority supports preemption in favor of a single federal law. Although our approach cannot alone solve all preemption cases, it clearly supports less preemption in some areas and greater preemption in others as compared to likely results under current preemption doctrine.

This Article proceeds as follows. Part I briefly describes current preemption law, demonstrating the inadequacy of the presumptions that courts have applied to resolve preemption issues. Part II explores the respective yet

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24. *See* Erin O'Hara O'Connor & Larry E. Ribstein, *Exit and the American Illness*, *in* THE AMERICAN ILLNESS (F.H. Buckley ed., forthcoming Mar. 2013), *available at* http://ssrn.com/abstract=1745141.

25. Of course, other constitutional provisions also help allocate state and federal lawmaking authority, a discussion we defer to *infra* in Section III.A.

sometimes overlapping roles of horizontal and vertical coordination in our federal system, and it discusses the varying institutional mechanisms that can be used by the federal government to encourage the states to achieve effective horizontal coordination. Part III articulates our regulatory coordination approach to preemption and places it in the context of existing preemption doctrine and theory. Part IV applies the coordination approach to resolve specific coordination problems that arise in Supreme Court cases.

I. PROBLEMS WITH PREEMPTION DOCTRINE

The Supremacy Clause provides as follows:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any state to the Contrary notwithstanding.[26]

The mandate that a state "shall be bound" by federal law "notwithstanding" a state constitutional provision or statute at least requires that state law give way to federal law if the former is directly "contrary" to the latter.[27] But the clause doesn't directly resolve the bulk of preemption cases that come to the Supreme Court, cases involving state and federal laws that do not conflict on their face but that address the same or similar problems.

Preemption is clearest when an actor cannot comply with both laws because a federal law mandates what the state law forbids or vice versa.[28] Conflict also can arise where parties can comply with both laws but state law is either more or less restrictive than the federal law, or where the two laws regulate the same activity but in different ways. In the absence of a congressional statement about Congress's intended displacement of state law, courts must determine whether the state and federal regimes may coexist. Preemption issues often arise in this gray area.

The Supreme Court has formulated a set of presumptions or rules to help guide preemption analysis. We briefly describe four here, acknowledging that our discussion is somewhat simplistic but adequate for present purposes. First, if Congress regulates an area traditionally left to the states, the Court may presume 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."[29] For example, in *Gregory v. Ashcroft*,[30] the Court

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

27. The two are directly contrary when it is impossible for a party to comply with both laws. Howard P. Walthall, Jr., Comment, Chevron *v. Federalism: A Reassessment of Deference to Administrative Preemption*, 28 CUMB. L. REV. 715, 721 (1998).

28. *See* Florida Lime & Avocado Growers, Inc. v. Paul, 373 U.S. 132, 142–43 (1963) (state law preempted where compliance with both state and federal law found to be a "physical impossibility").

29. Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947).

30. 501 U.S. 452 (1991).

held that the Age Discrimination in Employment Act did not preempt a Missouri constitutional requirement that state judges retire at age seventy. The Court reasoned that, because states traditionally determine their judges' qualifications, the federal statute should not apply to state judges absent a clear congressional statement of intent.[31] More generally, in such state-dominated areas as torts, property, contracts, corporate law, family law, insurance law, trusts and estates, and agency law, the presumption should work in favor of federal law operating alongside state law.[32]

In contrast, when Congress has established a pervasive scheme of federal regulation, the Court applies a "field preemption" presumption that Congress intended to displace all state law in the field.[33] Examples of areas deemed subject to field preemption include air traffic noise and immigration.[34]

The Court has also determined that federal law preempts state law when the state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress."[35] For example, in *Felder v. Casey*, the Court held that federal law preempted a Wisconsin statute requiring plaintiffs to file notices of claim prior to suing government officials because the statute was an obstacle to the congressional purpose of ensuring compensation for violations of federal civil rights laws.[36]

Finally, federal laws override state and local policies that can affect foreign affairs in order to enable the federal government to speak with a clear voice. For example, *Crosby v. National Foreign Trade Council* involved a federal law that enabled the president to impose sanctions on Burma to the extent that such sanctions would protect U.S. security interests, democracy, and human rights.[37] The federal law was deemed to preempt a Massachusetts law that prohibited state entities from procuring goods or services from companies engaged in commerce with Burma.[38] The Court reasoned that the state law could interfere with the finely tuned calibration of economic pressure necessary for effective presidential diplomacy.[39]

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31. *Gregory*, 501 U.S. 460–61.

32. *See, e.g.*, Egelhoff v. Egelhoff, 532 U.S. 141, 151 (2001) (family law); Wyeth v. Levine, 555 U.S. 555 (2009) (tort duty to warn); Hayfield N. R.R. Co. v. Chi. & Nw. Transp. Co., 467 U.S. 622 (1984) (eminent domain power).

33. *See, e.g.*, Merrill Lynch, Pierce, Fenner & Smith Inc. v. Dabit, 547 U.S. 71 (2006) (federal securities law).

34. R. Seth Davis, Note, *Conditional Preemption, Commandeering, and the Values of Cooperative Federalism: An Analysis of Section 216 of EPAct*, 108 COLUM. L. REV. 404, 430 n.178 (2008).

35. Hines v. Davidowitz, 312 U.S. 52, 67 (1941). For evidence that the Court's use of obstacle preemption may be on the decline, see Gregory M. Dickinson, *An Empirical Study of Obstacle Preemption in the Supreme Court*, 89 NEB. L. REV. 682 (2011).

36. 487 U.S. 131, 137–38 (1988).

37. 530 U.S. 363, 369–70 (2000).

38. *Crosby*, 530 U.S. at 378–80.

39. *Id.* at 380–81.

These preemption principles create confusion rather than clarification for multiple reasons. First, the preemption rules often conflict with one another.[40] Because both state and federal regulation can be pervasive, the Court can often categorize the law as reaching into areas of traditional state regulation and federal government occupation, especially where Congress has recently but comprehensively legislated into an area previously left to the states. Even when the area is clearly one traditionally governed by state rather than federal law, the state law often can be characterized as an obstacle to the objectives of federal legislation.

More fundamentally, courts' applications of the preemption principles can mask judicial policymaking under the guise of legislative intent. Courts usually treat preemption as an issue of statutory interpretation,[41] recognizing that "[t]he purpose of Congress is the ultimate touchstone."[42] This makes sense since federal "laws" and "treaties" are the basis of preemption under the Supremacy Clause. The problem with this approach is that Congress frequently fails to specify whether the state law should coexist with federal law, and even if it does, it generally leaves some ambiguity about exactly which state laws are displaced. The court then has no choice but to make some policy judgment as to the allocation of power between states and the federal government.[43] Yet the courts are reluctant to admit that they are filling congressional gaps with their own judgments.[44] This "disconnect" between judicial rhetoric and action[45] results in a lack of transparency and in decisions that appear inconsistent, ad hoc, and formalistically reasoned.

The confusion created by preemption jurisprudence can be illustrated with a few examples. *Florida Lime & Avocado Growers, Inc. v. Paul*[46] held that a California law regulating immature avocados based on oil content (thus favoring California's oilier avocados over Florida's avocados) was not preempted by a federal regulation that placed standards on the sale of avocados based on considerations other than oil content. The majority reasoned that the supervision of food marketing was traditionally a state matter,[47] justifying a presumption against preemption. However, four dissenting justices thought that the matter was governed by obstacle preemption and the need

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40. *See infra* Part IV.

41. *See* JOHN E. NOWAK & RONALD D. ROTUNDA, CONSTITUTIONAL LAW § 9.1, 393 (8th ed. 2010).

42. Retail Clerks Int'l Ass'n, Local 1625 v. Schermerhorn, 375 U.S. 96, 103 (1963); *see also* Wyeth v. Levine, 555 U.S. 555, 565 (2009); Medtronic, Inc. v. Lohr, 518 U.S. 470, 485 (1996); Hawaiian Airlines, Inc. v. Norris, 512 U.S. 246, 252 (1994).

43. Merrill, *supra* note 7, at 729.

44. *See id.* at 742 (concluding that "courts are actually making substantive [policy] decisions in the name of preemption").

45. *See* Jamelle C. Sharpe, *Toward (A) Faithful Agency in the Supreme Court's Preemption Jurisprudence*, 18 GEO. MASON L. REV. 367 (2011) (discussing the "disconnect" between courts' rhetoric of construing legislative intent and their practice of making policy judgments).

46. 373 U.S. 132 (1963).

47. *Florida Lime*, 373 U.S. at 144. The Court remanded the case for further consideration of whether the California law might violate the Commerce Clause. *Id.* at 158–59.

for uniform standards to facilitate the orderly marketing of avocados.[48] In contrast, in *Jones v. Rath Packing Co.*,[49] a majority of justices concluded that federal flour packaging standards preempted California law, where the federal standards would have permitted flour packages to vary somewhat from their stated weight but state law required that commodity quantities be no less than the net weight stated on the package. The majority reasoned that the California regulation created obstacles to the federal standard, which would protect sellers from weight variations due to loss of moisture.[50] If the state law survived, then out-of-state sellers packaging for California would put more flour into each container than those not also selling in California, and the weight disparities would create consumer confusion that could undermine the federal packaging laws. The dissenters found the majority's concern to be based on "supposition" and "inference" and therefore insufficient to overcome the general presumption against preemption.[51]

Consider also *Geier v. American Honda Motor Co.*[52] in which the Court held that a common law tort claim for negligent automobile design based on the lack of airbags was an obstacle to a federal motor vehicle safety law requiring some vehicles to have airbags. The dissenters reasoned that that this federal objective was not strong enough to overcome the traditional presumption against preemption.[53] Yet in *Williamson v. Mazda Motor of America, Inc.*,[54] the Court held that the same motor vehicle safety law, which also let manufacturers choose between lap and lap-and-shoulder belts for rear seats, did not preempt a California tort suit. The *Williamson* Court reasoned that obstacle preemption was inapplicable because manufacturer choice was not a significant federal regulatory objective.[55] These cases are not readily reconcilable by the Court's reasoning, perhaps because the presumptions rationalize results based on unexpressed policy considerations.[56]

Preemption cases are inherently difficult for courts, especially because many potential policy concerns can influence case decisions. In the next Part, we propose that courts take into consideration one policy concern that has never been explored in the academic literature but that can prove very helpful in many preemption cases. Our approach is rooted in federalism

48. *Id.* at 132 (White, J., dissenting).

49. 430 U.S. 519 (1977).

50. *Jones*, 430 U.S. at 543.

51. *Id.* at 546 (Rehnquist, J., concurring in part and dissenting in part).

52. 529 U.S. 861 (2000).

53. *Geier*, 529 U.S. at 894–99 (Stevens, J., dissenting).

54. 131 S. Ct. 1131 (2011).

55. *Williamson*, 131 S. Ct. at 1137–38.

56. For a terrific discussion of the National Highway Traffic Safety Administration's preemption position in *Williamson* and its influence on the outcome of the case, see Catherine M. Sharkey, *Inside Agency Preemption*, 110 MICH. L. REV. 521, 544–45 (2012). Sharkey's analysis suggests that agency positions can strongly influence the Court's determination regarding obstacle preemption. *Id.* We consider the potentially useful role of agencies in preemption analysis *infra* in Sections II.E.2 and IV.D.

principles rather than in legislative intent, and it can guide courts in a straightforward and legitimate manner.

II. COORDINATION IN A FEDERAL SYSTEM

Preemption cases should take account of the fact that a healthy federalism can be promoted by both (1) "horizontal" coordination among the states through choice-of-law rules or otherwise, and (2) "vertical" coordination between the states and the federal government. Moreover, a healthy federalism is best promoted by remaining mindful of the fact that effective horizontal coordination can and sometimes should substitute for federally imposed uniformity.[57] As always, governing considerations must enable courts to sensibly draw the line between state and federal authority. This Part begins constructing our framework by more fully articulating our coordination principle, which entails a focus on the extent to which states have voluntarily allocated their sovereign authority through uniform choice-of-law principles. Part III then describes how the coordination principle should guide preemption decisions.

A federal system must reconcile the potentially contradictory values of respecting the sovereignty of the states and facilitating national policy, including the creation of a national market. Federal law's primacy often is premised on the need for coordinated policy within the United States, but sometimes that coordination can be achieved while still retaining state sovereign authority. Section II.A discusses the benefits of preserving, where possible, the potential welfare-increasing effects of state sovereignty. These effects include fostering experimentation, enabling parties to avoid welfare-reducing laws, and providing choices among diverse laws to suit diverse needs. Our analysis highlights an important factor overlooked in virtually all preemption analyses to date: the states' ability to achieve horizontal coordination among themselves through choice-of-law rules. States' ability to coordinate in this way often reduces or eliminates the need for federally imposed uniformity, which in turn suggests that the preemptive reach of federal law should be narrowly construed. Where, however, the states have not effectively coordinated, courts should give federal statutes broader preemptive effect.

Section II.B discusses the costs of state sovereignty where horizontal coordination is inadequate. For example, state lawmakers may have incentives to impose regulatory costs on outsiders for the benefit of in-state interest groups or to underregulate activities whose full costs are inflicted in other states. Poorly designed state choice-of-law rules can exacerbate these problems. Section II.C describes various ways in which states can minimize the costs of state sovereignty, including by coordinating sovereign authority

57. *See, e.g.*, Henry N. Butler & Larry E. Ribstein, *Legal Process and the Discovery of Better Policies for Fostering Innovation and Growth*, *in* RULES FOR GROWTH: PROMOTING INNOVATION AND GROWTH THROUGH LEGAL REFORM 463 (2011); John F. Coyle, *Rethinking the Commercial Law Treaty*, 45 GA. L. REV. 343 (2011); Erin O'Hara O'Connor, *The Limits of Contract Law Harmonization*, 33 EUR. J.L. & ECON. 505 (2012).

through choice-of-law rules. As we will see, whether states are employing this coordination mechanism, either tacitly or explicitly, is a factor that helps inform the need for federal preemption. Section II.D explores the federal government's role in helping achieve horizontal regulatory coordination through preemption, federally imposed choice-of-law rules, and enforcement of choice-of-law and choice-of-court agreements. Section II.E describes structural mechanisms for resolving preemption issues: congressional preemption and savings clauses, administrative agency delegation, and court determination.

A. *Benefits of Multiple Laws*

There are significant benefits to having multiple lawmaking authorities generate rules and regulations.[58] First, as Justice Louis Brandeis famously observed, multiple lawmakers enable laboratories of experimentation.[59] A legislature cannot design perfectly efficient laws given limits on knowledge and information. Endowing states with sovereign power facilitates meaningful legal experimentation that ultimately promotes the enactment of better laws.[60]

Second, even an omniscient legislature likely cannot design laws that perfectly suit its constituents' diverse needs and differing economic, social, and other environments. If parties can choose from multiple state laws, they might be able to obtain a better fit between their activities and the governing rules.[61]

Third, multiple governing laws can constrain powerful interest groups' ability to lobby for laws that favor their members at others' expense.[62] The costs of special-interest legislation can be minimized by exit, whereby individuals either move their activities to another jurisdiction[63] or otherwise choose a different governing legal regime. Parties often can exit a nation's laws by avoiding that nation altogether because the jurisdictional reach of the nation's authority is necessarily limited.[64] A federal system enhances

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58. We have described these advantages in more detail elsewhere. *See* O'HARA & RIBSTEIN, *supra* note 18, ch. 2.

59. New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting).

60. *See* DANIEL A. FARBER, ECO-PRAGMATISM 179–82 (1999) (making this argument in context of environmental laws).

61. A single state may be able to generate a menu of rules from which parties can choose. *See* Ronald J. Gilson et al., *Regulatory Dualism as a Development Strategy: Corporate Reform in Brazil, the United States, and the European Union*, 63 STAN. L. REV. 475 (2011). But these examples are rare and almost never extend beyond the generation of a second regulatory option.

62. For the classic treatment of interest groups' relative abilities to influence legislative decisions, see generally MANCUR OLSON, THE LOGIC OF COLLECTIVE ACTION (rev. ed. 1971).

63. *See* Charles M. Tiebout, *A Pure Theory of Local Expenditures*, 64 J. POL. ECON. 416, 424 (1956) (finding that the problem of special-interest legislation is minimized if individuals are fully mobile).

64. For apparent examples of businesses exiting states with undesirable laws, see Richard A. Epstein, *Exit Rights and Insurance Regulation: From Federalism to Takings*, 7 GEO.

exit options because moving across state rather than national boundaries is less costly. Federalism allows the mover to retain the basic legal rights and governance rules contained in federal laws and principles.

B. *The Problems of State Sovereignty*

Although having multiple sovereign states within a federal system can provide clear benefits, multiple laws can also prove costly. If one state's laws can apply to people and events in other states, then the regulatory costs of that state's laws can spill over into other states, causing problems for other sovereigns. Spillovers can occur when interest groups in one state benefit from laws that hurt outsiders who may be poorly represented in that state's legislature. Spillovers result when a state extends its regulatory authority beyond its borders, but they can also result when a state generates a law desired by out-of-state parties who attempt to choose that law by contract or other activities.

Spillover problems from extraterritorial regulation can take several forms, but our approach primarily addresses one form of the problem: the costs imposed on national parties when jurisdictional authority over a given activity is either uncertain or entrusted to multiple states.[65] In either case, the interstate actor is forced to plan for the possibility that multiple states' laws must be investigated and complied with.[66] The interaction of multiple governing laws can burden the party in ways not desired by any single jurisdiction. Moreover, compliance with the most burdensome law (a common strategy for national firms)[67] can effectively thwart the policies of states attempting to experiment with more liberal laws.

A separate potential spillover problem involves the "race for the bottom"[68] that can occur when a choice-of-law rule enables firms and individuals to choose the state law that applies to them. States may attract national actors with their lax laws, and those actors can use their regulatory freedom in ways that cause harm in other states. Our focus on regulatory coordination is not intended to address this problem. Put differently, we recognize the prevention of a race to the bottom as a basis for federal

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MASON L. REV. 293 (1999) (describing how state insurance regulations cause insurance firms to attempt to exit the state), and Jonathan Klick et al., *The Effect of Contract Regulation: The Case of Franchising* (George Mason Law & Econ. Research Paper No. 07-03, 2006), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=951464 (finding that franchise industry employment as proportion of total employment falls in states imposing franchise regulations).

65. Issacharoff and Sharkey focus on spillovers as a rationalization for federalization. *See* Issacharoff & Sharkey, *supra* note 20. Although they emphasize the need for federal law to prevent states from imposing spillovers onto one another and to provide a coordinated policy, they miss the potential for horizontal coordination on choice of law as emphasized here.

66. *See* Schwartz, *supra* note 20, at 924–25 (discussing problem in context of state products liability laws in national markets).

67. Issacharoff & Sharkey, *supra* note 20, at 1386.

68. This phrase was coined by William Cary. *See* William L. Cary, *Federalism and Corporate Law: Reflections upon Delaware*, 83 YALE L.J. 663, 666 (1974).

preemption even in some situations where the states have coordinated around a choice-of-law rule.

Of course, the effects of state laws very often are felt in other states, and often these laws are respected by other sovereigns notwithstanding such spillover. Precisely because spillovers need not be deemed costly, state choice-of-law policies become important factors in evaluating state exercises of sovereign authority. When states voluntarily coalesce around a single approach to choice-of-law issues or develop a consensus in favor of enforcing choice-of-law clauses, the coordination likely reflects the states' collective judgment that the choice-of-law approach sensibly allocates sovereign authority and therefore minimizes costly spillovers. Conversely, states that prefer to preserve their own sovereignty may be unwilling to coalesce around a choice-of-law rule that effectively balances these competing interests. These latter situations may be appropriate for federal action, as discussed in Section II.D.

C. *State Horizontal Coordination*

A healthy federalism attempts to delimit state regulatory authority so as to enhance the benefits provided by multiple sovereigns while reducing costly regulatory spillovers. This Section explores the states' ability to coordinate, either through agreement or independent action, to achieve such objectives. As discussed above, in some cases the states' lack of coordination will call for broad application of federal laws. Indeed, U.S. choice of law is generally understood to be a mess,[69] with the states applying varied and unpredictable choice-of-law standards.[70] Our impression is that federalization of laws in the United States gained strong momentum as the states abandoned uniform choice-of-law rules in favor of these unpredictable standards.[71] However, despite this general trend toward choice-of-law chaos, the states have managed to coordinate on choice of law in several important areas. This potential for self-coordination is important to our analysis

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69. Michael H. Gottesman, *Draining the Dismal Swamp: The Case for Federal Choice of Law Statutes*, 80 GEO. L.J. 1 (1991); Hillel Y. Levin, *What Do We Really Know About the American Choice-of-Law Revolution?*, 60 STAN. L. REV. 247, 248 (2007) (book review); Kermit Roosevelt III, *The Myth of Choice of Law: Rethinking Conflicts*, 97 MICH. L. REV. 2448, 2449 (1999).

70. *See generally* LEA BRILMAYER ET AL., CONFLICT OF LAWS chs. 2–3 (6th ed. 2011).

71. New York began to experiment with a new approach to choice of law in the 1950s. Commentators, starting with Brainerd Currie, and other states began proposing and adopting varied new approaches to choice of law beginning in 1960. *See generally id.* at ch. 3. Strong federalization of laws occurred during the 1960s and 1970s. *See* Craig M. Bradley, *Racketeering and the Federalization of Crime*, 22 AM. CRIM. L. REV. 213, 242–54 (1984) (describing an "era of activism" in federal criminal law starting around 1960); E. Donald Elliott et al., *Toward a Theory of Statutory Evolution: The Federalization of Environmental Law*, 1 J.L. ECON. & ORG. 313, 313 (1985) (pegging strong federalization of environmental law to the post-1960 time period); Damien Geradin, *The Development of European Regulatory Agencies: What the EU Should Learn from American Experience*, 11 COLUM. J. EUR. L. 1, 6 (2004) (asserting that the federalization of a range of policies occurred in the 1960s and 1970s).

because, where present, it dampens the need for federal preemption of state regulatory authority.

States can coordinate in various ways. First, states can refrain from enacting laws with effects that spill over into other states. To be sure, the increasing geographic scope of business and the mobility of people and firms makes it inevitable that state regulation will affect the national economy. However, there remain situations in which the choice-of-law rule reasonably tracks states' appropriate interests in applying their laws. In such cases, spillovers are sometimes mutually tolerated, as discussed below.

Second, states can adopt uniform state substantive laws. States' enactment of uniform laws can reduce the variation and experimentation that are key benefits of state sovereignty. However, uniform state law proposals can be superior to an imposed federal law because the adoption of uniform laws can reflect a broader consensus and because voluntary adoption leaves states the opportunity to fine-tune the extent of uniformity and experiment with alternative laws as warranted by economic, social, or other circumstances. In some cases, states have in fact adopted uniform laws that have provided effective coordination.[72]

Third, and most importantly for purposes of our analysis, states can commit to a common set of choice-of-law rules that clearly delineate the boundaries of each state's lawmaking authority. Clear choice-of-law rules enable firms and individuals to plan their activities knowing the governing legal standards, and they help parties avoid having to comply with multiple and potentially conflicting legal rules.[73] Consistent with this pro-predictability policy, states have given parties fairly wide latitude to contract for their governing laws and courts, particularly in large commercial contracts[74] and through the rule applying the law of the place of incorporation to the internal affairs of a company.[75] Some rules, such as the situs rule for real property,[76] provide an obviously sensible basis for clearly allocating sovereign authority. Cooperative allocation of authority can produce overall benefits for the states because deference to others' sovereign authority can

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72. *See* Bruce H. Kobayashi & Larry E. Ribstein, *Evolution and Spontaneous Uniformity: Evidence from the Evolution of the Limited Liability Company*, 34 ECON. INQUIRY 464 (1996); Larry E. Ribstein & Bruce H. Kobayashi, *An Economic Analysis of Uniform State Laws*, 25 J. LEGAL STUD. 131 (1996) [hereinafter Ribstein & Kobayashi, *Uniform State Laws*]. *But see* Bruce H. Kobayashi & Larry E. Ribstein, *The Non-Uniformity of Uniform Laws*, 35 J. CORP. L. 327 (2009) (showing that uniform lawmaking bodies can generate rules that reflect special-interest biases).

73. *Cf.* O'HARA & RIBSTEIN, *supra* note 18, at 16 (arguing that contractual choice-of-law clauses serve this function).

74. *See id.* at ch. 4 (exploring state legal treatment of choice-of-law clauses).

75. *Id.* at ch. 6 (exploring state adherence to the internal affairs doctrine).

76. *See* EUGENE F. SCOLES ET AL., CONFLICT OF LAWS 1054 (4th ed. 2004) ("[O]ur society, historically rooted in an agrarian economy reinforced by concepts of territorial sovereignty, has always placed a high emotional and protective value on land, identifying it with the security of the person, family, and home. It is thus not surprising that the law of the situs of land was early viewed as having the overwhelming if not exclusive claim to govern issues related to land.").

enable a state to garner reciprocal respect in future cases.[77] Finally, states can compete for residents, businesses, and other valuable assets not only with desirable substantive rules but also by respecting reasonable choice-of-law rules.[78]

State choice-of-law coordination requires not only that states uniformly adopt clear choice-of-law rules but also that these rules allocate lawmaking authority in a way that provides parties with notice regarding what law governs their conduct. Without such notice, parties must contend with the possibility of multiple and conflicting laws. Thus, a choice-of-law rule that clearly designates the applicable law based on facts that occur after a party chooses a course of action may provide guidance for the court in litigation but it does not adequately allocate regulatory authority.

In our examples of horizontal coordination,[79] the states independently chose to follow the governing choice-of-law rule. Our approach does not depend on states explicitly agreeing with one another to follow a particular rule that allocates state sovereign authority. Sometimes a state merely recognizes that another state has more compelling interests in regulating the conduct. In addition, we have elsewhere explored the willingness of states to apply other states' laws in order to attract and retain residents and thereby serve the interests of politically powerful, "exit-affected" local groups.[80] Thus, state coordination is not random but the combined product of recognized forces and pragmatic limits on states' jurisdictional reach. As a result, coordination around a state choice-of-law rule indicates (though it doesn't prove) a sensible allocation of sovereign authority.

Importantly, a preemption approach that takes into account horizontal coordination might spur the states to further coordinate their choice-of-law policies. If courts factored horizontal coordination into their approach to preemption, they would bolster a process already inherent in federalism.

So far our discussion has focused on state *formal* coordination around a single choice-of-law rule. Our approach also demands that any formal choice-of-law system operate *functionally* to achieve horizontal coordination in a manner that contains costly spillovers. Functional noncoordination may result where a choice-of-law rule achieves horizontal coordination in most but not all cases to which the rule applies. In the residual cases, federal vertical coordination may be necessary despite state coalescence around a sensible choice-of-law rule. Consider, for example, the situs-based choice-of-law rule as applied to nuisance actions. This rule was one of the traditional choice-of-law rules put in place over a century ago,[81] and despite

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77. *See, e.g.*, King v. Sarria, 69 N.Y. 24 (1877) (discussing importance of reciprocity to smooth international relations); *cf.* Fales v. Comm'n on Licensure to Practice the Healing Art, 275 A.2d 238 (D.C. 1971) (noting that recognition of out-of-state professional licenses promotes interstate reciprocity).

78. For an elaboration of this point, see O'HARA & RIBSTEIN, *supra* note 18, ch. 4.

79. *See supra* notes 74–77 and accompanying text.

80. *See* O'HARA & RIBSTEIN, *supra* note 18, at 73–81.

81. *See* SCOLES ET AL., *supra* note 76, at 1056–57 & n.2.

a movement to other choice-of-law approaches by the overwhelming majority of states, the situs rule continues for real property.[82] The situs rule makes intuitive sense: it is clear where real property is situated, and the situs state presumably has a predominant interest in the ownership and use of the property.[83] Indeed, the Supreme Court once held that only the situs state has subject matter jurisdiction to make determinations regarding title to property.[84]

A situs rule for nuisance achieves formal coordination because the location of the property effectively guarantees the application of one state's law. In most cases, formal coordination also achieves functional coordination in that it makes sense for the situs state to balance the competing interests regarding the maintenance and use of the land. However, the situs rule fails to appropriately deal with harms that float across state borders. In those cases, regulatory spillovers may justify a pro-preemption approach.

D. *Federal Vertical Coordination*

Of course, states' abilities to self-coordinate are limited. The federal government can provide substitute coordination in at least three ways. First, Congress can exercise its Commerce Clause or other constitutional authority to supplant state substantive laws with uniform federal law.[85] Although actual displacement eliminates the benefits of state law, the threat of congressional action can induce the states to coordinate on their own. Second, Congress can impose a choice-of-law rule on the states. This solution promotes state coordination without fully supplanting state regulatory authority. Third, Congress can mandate the enforcement of choice-of-law and choice-of-court clauses. These clauses enable parties to choose among various procedural and substantive rules. Even where the states have failed to coordinate their substantive laws or choice-of-law policies, party choice can help clarify the governing legal rules for individual contracts. This Section elaborates on the latter two coordinating mechanisms.

1. Federal Choice-of-Law Rules

Instead of replacing state substantive laws, Congress could preserve state regulatory authority but coordinate it through federally created choice-of-law rules. The Full Faith and Credit Clause of the U.S. Constitution requires each state to give "Full Faith and Credit" to the "public Acts, Records, and judicial Proceedings" of other states and empowers Congress to determine the effect each state must give to the laws of the other states.[86]

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82. *Id.* at 1056–57.

83. *Id.* at 1055.

84. Ellenwood v. Marietta Chair Co., 158 U.S. 105, 108 (1895).

85. The Supreme Court can do the same under the Dormant Commerce Clause. *See infra* Section III.A.

86. U.S. CONST. art. IV, § 1.

Congress could use this provision to induce horizontal coordination by imposing a nationwide approach to choosing governing laws.

Congress has ignored scholarly pleas to use its full faith and credit power to coordinate choice-of-law policies.[87] This inaction can be explained on political and policy grounds. Political groups tend to be interested in specific substantive law issues rather than in choice of law. Thus, when addressing a particular issue, Congress is more likely to federalize a substantive rule than to impose a choice-of-law rule on the states. Moreover, an important rationale for federalism is to further democracy by bolstering the power of local institutions (including interest groups) to address local concerns.[88] Congress is not as well positioned as the states to promote these local policies. Thus, in the limited situations in which Congress has employed a choice-of-law approach, it has done so to promote national policy rather than to coordinate state policymaking. For example, Congress enacted a choice-of-law rule for usury legislation as applied to loans generated by national banks.[89] Also, in enacting the Defense of Marriage Act ("DOMA"), Congress responded to the national debate on same-sex marriage by providing that states need not recognize same-sex marriages performed in other states.[90] Congress thus promoted its view of national policy rather than trying to achieve effective horizontal coordination of conflicting state policies. We are unaware of any congressional bill seeking to comprehensively legislate on choice-of-law rules.[91]

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87. *See, e.g.*, Gottesman, *supra* note 69; Linda S. Mullenix, *Federalizing Choice of Law for Mass-Tort Litigation*, 70 TEX. L. REV. 1623, 1636–37 (1992).

88. *See, e.g.*, Dan T. Coenen, *Untangling the Market-Participant Exemption to the Dormant Commerce Clause*, 88 MICH. L. REV. 395, 427, 441 (1989) (arguing that federalism values further responsiveness to distinctive local concerns).

89. *See infra* Section IV.D.

90. 28 U.S.C. § 1738C (2006) (providing that "[n]o State . . . shall be required to give effect to any public act, record, or judicial proceeding of any other State . . . respecting a relationship between persons of the same sex that is treated as a marriage under the laws of such other State . . . .").

91. In contrast, recently enacted European Union ("EU") laws contain a number of choice-of-law rules to be uniformly applied by the member nations. *See, e.g.*, Regulation (EC) No 593/2008 of the European Parliament and of the Council of June 17, 2008 on the Law applicable to contractual obligations [hereinafter Rome I], O. J. EU L 177/6 of July 4, 2008; Regulation (EC) 864/2007, on the Law Applicable to Non-Contractual Obligations [hereinafter Rome II], 2007 O.J. (L 199) 40; Council Regulation (EU) 1259/2010, Implementing Enhanced Cooperation in the Area of the Law Applicable to Divorce and Legal Separation [hereinafter Rome III], 2010 O.J. (L 343) 10. Unlike Rome I and II, Rome III does not bind all EU member nations, and so far only fourteen member nations have expressed a willingness to cooperate on choice of law in this area. For a report and relevant documentation, see Giorgio Buono, *Rome III Reg.: Council Adopts Decision Authorising Enhanced Cooperation on the Law Applicable to Divorce*, CONFLICT OF LAWS.NET (July 16, 2010), http://conflictoflaws.net/2010/rome-iii-reg-council-adopts-decision-authorising-enhanced-cooperation-on-the-law-applicable-to-divorce/.

2. Federal Enforcement of Choice-of-Law and Choice-of-Court Clauses

If federal choice-of-law rules are infeasible, Congress might instead focus on coordinating sovereign authority in cases where the parties contracted for a particular governing law or court to resolve disputes. Allowing parties to contract for their own governing law promotes clarity and eliminates the problem of multiple applicable laws. However, a federal statute enforcing choice-of-law clauses would require Congress to grapple with a number of difficult policy questions, including the extent to which these clauses should be enforced in contracts of adhesion, the circumstances under which enforcement harms third parties, and whether the clauses should be enforced where the chosen law invalidates all or part of the contract.[92] Even if Congress could be induced to undertake this project, the results would not necessarily be better than current state approaches to enforcing choice-of-law clauses.

We have elsewhere proposed a federal statute that would enable Congress to promote choice while deferring to state law on these difficult policy questions. Specifically, our proposal would require states to enforce choice-of-law clauses except where enforcement is inconsistent with a state statute that protects a contracting party who resides in the state.[93] Our proposed federal statute would help states coordinate their regulatory authority over commercial relations without restricting their ability to experiment with substantive regulations. Moreover, a general choice-of-law statute like the one we have proposed is less likely to be infected by the political considerations that can influence statutes addressing a particular issue, such as same-sex marriage, and is therefore more likely to sensibly allocate state power. On the other hand, the relative absence of interest-group engagement makes it less likely that Congress will be moved to enact such a statute.

Choice-of-court clauses also can help parties avoid uncertainty regarding the legal rules that govern their conduct. When suit can be brought in multiple states' courts and those courts apply nonuniform choice-of-law rules and nonuniform procedural rules, the likely outcome of a claim will depend on the forum in which it is ultimately resolved. Consider, for example, disputes involving noncompete clauses in employment contracts. When an employee in state *A* leaves her firm to work for a competitor in state *B*, each party might be tempted to file suit in a different state court. The employee and new employer might sue for declaratory judgment in their local state *B* court, especially if state *B* restricts enforcement of noncompete clauses. In

92. *See generally* BRILMAYER ET AL., *supra* note 70, ch. 8 (materials demonstrating that these issues are important considerations relevant to enforcement of choice-of-law clauses). We are confident that Congress will continue to avoid answering these questions because Congress has so far abstained from addressing comparable issues as they arise in the context of enforcement of arbitration clauses under the Federal Arbitration Act ("FAA").

93. *See* O'HARA & RIBSTEIN, *supra* note 18, at 206–15; *see also* Henry N. Butler & Larry E. Ribstein, *A Single-License Approach to Regulating Insurance* 14–20 (Univ. of Ill. Law & Econ. Research Paper No. LE08-015, 2008), *available at* http://ssrn.com/abstract=1134792 (proposing a similar statute for insurance law).

contrast, the former employer might sue for breach of contract in its local state *A* court, especially if state *A* tends to enforce noncompete clauses. In this case, with multiple forums chosen, the parties' legal rights and obligations would depend on who wins a race to judgment.[94]

A federal statute requiring state courts to enforce contractual choice-of-court clauses could minimize litigation gamesmanship. However, as with choice-of-law clauses, Congress would be forced to grapple with a number of policy issues regarding the extent to which these clauses could harm a contracting or third party.[95] Also, Congress's constitutional authority to regulate choice-of-court clauses is at least slightly more limited than its explicit Full Faith and Credit Clause authority to regulate state choice-of-law policies. Presumably, Congress would have to enforce forum choice under its Commerce Clause authority, and the substantive scope of the Commerce Clause is narrower than that of the Full Faith and Credit Clause.[96]

The federal government has found other ways to encourage enforcement of choice-of-court clauses, however. The Supreme Court has strongly endorsed choice-of-court clauses in its federal admiralty law cases, which, although not binding on the states, probably have encouraged greater enforcement by state courts of choice-of-court clauses in other contexts. For example, in *The Bremen v. Zapata Off-Shore Co.*, the Court mandated enforcement of a choice-of-court clause based on a strong federal policy to strengthen the United States' international competitive position:

> The expansion of American business and industry will hardly be encouraged if, notwithstanding solemn contracts, we insist on a parochial concept that all disputes must be resolved under our laws and in our courts . . . . We cannot have trade and commerce in world markets and international waters exclusively on our terms, governed by our laws, and resolved in our courts.[97]

Carnival Cruise Lines, Inc. v. Shute extended this reasoning to a consumer contract contained within a passenger cruise line ticket.[98] Both admiralty cases involved businesses whose ships touched many jurisdictions, speaking to a need for coherent regulatory coordination.

Federal courts have also facilitated the enforcement of choice-of-court agreements by creatively exercising their removal power in federal diversity cases. The Supreme Court held in *Stewart Organization, Inc. v. Ricoh Corp.* that federal law applies in a motion to transfer a diversity case to a

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94. A similar situation arose in *Application Group, Inc. v. Hunter Group, Inc.*, 72 Cal. Rptr. 2d 73 (Ct. App. 1998).

95. *See* SCOLES ET AL., *supra* note 76, ch. 8. The fact that Congress continues to refuse to address such issues as they arise under the FAA provides evidence that Congress would likely remain inactive here too.

96. Congress can address any topic under the Full Faith and Credit Clause, but its authority under the Commerce Clause is limited to issues affecting interstate commerce.

97. 407 U.S. 1, 9 (1972).

98. 499 U.S. 585, 593–94 (1991).

different federal court.[99] This case may signal a more tolerant approach by federal courts to choice-of-court clauses.[100] The Federal Arbitration Act ("FAA"),[101] discussed in more detail below in Part IV, also authorizes contracting parties to choose an arbitral forum in which to resolve their disputes. It is likely that this indirectly affects enforcement of choice-of-court clauses because once parties can opt out of courts altogether, it seems more reasonable to permit them to choose the courts of another state.[102]

International law soon may require member states to enforce choice-of-court agreements. Article 5(1) of the Hague Convention on Choice of Court Agreements provides that "[t]he court or courts of a Contracting State designated in an exclusive choice of court agreement shall have jurisdiction to decide a dispute to which the agreement applies, unless the agreement is null and void under the law of that State."[103] If the United States ratifies the agreement,[104] Congress would then need to enact federal law analogous to the Federal Arbitration Act mandating enforcement of choice-of-court clauses. Note that the same international commercial pressures that influenced the Court in *The Bremen* are at play in the Hague Convention negotiations.

E. *Resolving Preemption Questions*

So far we have illustrated the role that horizontal choice-of-law coordination can play in maximizing the benefits of state law and in alleviating the necessity that state law be replaced with federal law. Horizontal coordination therefore can be an important determinant in preemption analysis. Preemption questions can be resolved by some combination of action by Congress, administrative agencies, and courts. Although the rest of this Article focuses principally on judicial resolution of preemption issues, our

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99. 487 U.S. 22 (1988).

100. The *Stewart* Court did not go so far as to state that the strong presumption of enforceability announced in *Bremen* and *Shute* applies in the context of transfer motions. Instead, transfer motions are subject to their own standard. *Stewart*, 487 U.S. at 29–32. In a concurring opinion, two justices stated a preference that the strong presumption carry over to consideration of transfer motions. *Id.* at 33 (Kennedy, J., concurring). For an excellent discussion of the issue, see Ryan T. Holt, Note, *A Uniform System for the Enforceability of Forum Selection Clauses in Federal Courts*, 62 VAND. L. REV. 1913 (2009).

101. 9 U.S.C. §§ 1–16 (2006).

102. *See* O'HARA & RIBSTEIN, *supra* note 18, at 106.

103. Hague Convention on Choice of Court Agreements art. 5(1), June 30, 2005, 44 I.L.M. 1294, *available at* http://www.hcch.net/index_en.php?act=conventions.text&cid=98.

104. The Hague Convention takes force if two member nations ratify it. *Id.* at art. 31. To date, only Mexico has ratified the Convention, but both the United States and the European Union have signed it. *See Status Table: Convention of 30 June 2005 on Choice of Court Agreements*, HAGUE CONF. ON PRIVATE INT'L L., http://www.hcch.net/index_en.php?act=conventions.status&cid=98 (last updated Nov. 11, 2010). Ratification by the United States would give the Convention force and thus obligate the United States to generate domestic laws that comply with it.

analysis touches on both congressional carve-outs and agency preemption determinations. Each is briefly described in this Section.

1. Carve-Out and Savings Clauses

When Congress clearly intends to displace particular types of state laws, it can express that intent with a preemption clause. For example, in addressing motor vehicle emissions, section 209 of the Federal Clean Air Act provides as follows:

> No State or any political subdivision thereof shall adopt or attempt to enforce any standard relating to the control of emissions from new motor vehicles or new motor vehicle engines subject to this part. No State shall require certification, inspection, or any other approval relating to the control of emissions from any new motor vehicle or new motor vehicle engine as condition precedent to the initial retail sale, titling (if any), or registration of such motor vehicle, motor vehicle engine, or equipment.[105]

When Congress intends to create federal law that will coexist with state laws, it can place a savings clause into the legislation. For example, section 24(a) of the Federal Insecticide, Fungicide, and Rodenticide Act makes clear that Congress did not intend its regulation to displace state pesticide regulation that is more restrictive than the federal regulation:

> A State may regulate the sale or use of any federally registered pesticide or device in the State, but only if and to the extent the regulation does not permit any sale or use prohibited by this subchapter.[106]

One type of savings clause is a carve-out that federalizes the portion of a legal area that most needs coordination while leaving the rest of the field for state regulation. An important example of this limited approach to federal coordination is in the Securities Litigation Uniform Standards Act ("SLUSA"). An earlier federal law, the Private Securities Litigation Reform Act ("PSLRA"), had restricted federal securities class actions by imposing pleading and other requirements on cases brought under the federal securities laws.[107] Plaintiffs circumvented these restrictions by bringing state court suits under state securities laws.[108] Congress then enacted SLUSA to eliminate state securities law class actions based on untrue statements, omissions of material fact, or the use of manipulative or deceptive devices or contrivances.[109] At the same time, however, SLUSA also included the so-called "Delaware carve-out," which preserved state securities claims where those claims were based on the law of the state of the issuer's incorporation and

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105. 42 U.S.C. § 7543(a) (2006).

106. 7 U.S.C. § 136v(a) (2006).

107. Private Securities Litigation Reform Act of 1995, Pub. L. No. 104-67, 109 Stat. 737 (codified in part at 15 U.S.C. §§ 77z-1, 78u-4 (2006)).

108. H.R. Rep. No. 105-640, at 10 (1998) (Conf. Rep.).

109. 15 U.S.C. §§ 77p(b), 78bb(f)(1) (2006).

generally touched on corporate internal governance.[110] The Delaware carve-out preserved state laws in an area where the states have effectively achieved horizontal coordination on their own. By choosing the place of incorporation, incorporating shareholders are able to choose the rules that will determine their rights, and future shareholders can price the company's securities based on those rights. In contrast, pre-SLUSA state securities laws often protected resident shareholders of foreign corporations and so potentially subjected corporate actors to multiple states' securities laws. SLUSA provided for coordination by preserving only those state securities class actions based on the law of the state of incorporation. In Section IV.A, we apply this analysis to the preemptive scope of SLUSA provisions.

Although carve-outs may be effective in some circumstances, Congress has rarely employed this nuanced approach. It has done so only when the carve-out has strong national interest-group backing, such as the corporate managers and lawyers supporting nonpreemption of Delaware corporation law. Accordingly, it is necessary to look outside of Congress for detailed approaches to preemption issues.

2. Administrative Agencies

It is extremely difficult to perfectly balance nationwide coordination of regulatory authority with the preservation of state sovereignty. The balance requires consideration of a complex set of factors, and reasonable minds can disagree about whether more coordination or more state sovereignty is preferable at the margins. In addition, state lawmaking is a dynamic process and states can achieve greater or lesser horizontal coordination over time. Congress might displace state laws when horizontal coordination is lacking only to find later that state coordination over similar nondisplaced issues has improved due to legal or economic changes. Conversely, Congress might refrain from displacing state law when horizontal coordination is present or promising, only to later find that such coordination has dissipated.[111]

Administrative agencies might be best suited to consider the dynamic nature of horizontal coordination. For example, Congress could enact a statute that is clear as to a federal objective yet unclear as to its preemptive scope and then delegate authority to an administrative agency to make preemption determinations in light of the degree of horizontal coordination over time. Although agencies sometimes perform this role even without specific congressional delegation,[112] there is scholarly disagreement over the degree to which it makes sense to house preemption determinations within agencies. Some argue that agencies are structured to provide expertise in

110. 15 U.S.C. §§ 77p(d)(1), 78bb(f)(3)(a).

111. This may have happened in a number of areas with the "choice-of-law" revolution during the 1960s and 1970s, when the states moved from troubled but somewhat uniform choice-of-law rules to a number of mostly standard-based approaches to choice of law. *See generally* BRILMAYER ET AL., *supra* note 70, ch. 2 (exploring various modern approaches to choice of law that developed during this timeframe).

112. *See* Bressman, *supra* note 9, at 614–16; *see also* Sharkey, *supra* note 56, at 544–45.

specific subject areas and are therefore poorly suited to evaluate larger structural issues like promoting a healthy federalism.[113] Others argue that agencies are relatively well equipped to represent state interests,[114] deliberate effectively in an environment of accountability,[115] and bring substantive expertise to bear on the preemption question.[116]

Our approach offers a new argument for why preemption decisions are sometimes best left to agencies: agencies have an institutional comparative advantage in their ability to monitor changes in state horizontal coordination and to make reversible determinations[117] on whether preemption of state law seems appropriate. By leaving flexible the extent to which federal law will ultimately displace state law, Congress's use of federal administrative monitoring can motivate the states to continue to coordinate in order to avoid federal preemption.

To be sure, self-interested executive agencies may be too inclined toward preemption because preemption aggrandizes agency authority.[118] However, executive, congressional, and judicial oversight can help temper these effects.[119] In any event, although our theory provides a basis for action by administrative agencies, it does not preclude other considerations that might suggest otherwise.

In short, although Congress and administrative agencies can provide some help in resolving preemption issues, they have rarely done so. The judiciary is the only branch of the federal government that regularly addresses the scope of preemption. The next Part considers how the judiciary may play a more effective role by explicitly recognizing regulatory coordination as a basis for resolving preemption issues.

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113. *See* Nina A. Mendelson, Chevron *and Preemption*, 102 MICH. L. REV. 737, 741–42 (2004); Brief of the Center for State Enforcement of Antitrust and Consumer Protection Laws, Inc. as Amicus Curiae in Support of Respondent at 23, Wyeth v. Levine, 555 U.S. 555 (2009) (No. 06-1249), 2008 WL 3851615.

114. Catherine M. Sharkey, *Federalism Accountability: "Agency-Forcing" Measures*, 58 DUKE L.J. 2125, 2127–28 (2009).

115. Brian Galle & Mark Seidenfeld, *Administrative Law's Federalism: Preemption, Delegation, and Agencies at the Edge of Federal Power*, 57 DUKE L.J. 1933, 2008–10 (2008).

116. Gillian E. Metzger, *Administrative Law as the New Federalism*, 57 DUKE L.J. 2023, 2082–83 (2008).

117. *See* Galle & Seidenfeld, *supra* note 115, at 1990 ("[T]here is little mechanism in the legislative branch for ongoing reevaluation of a policy, and the very high costs of legislative change decrease the likelihood that Congress will respond definitively to new events.").

118. *Cf.* WILLIAM A. NISKANEN, JR., BUREAUCRACY AND REPRESENTATIVE GOVERNMENT 36–42 (1971) (discussing agency aggrandizement).

119. *See* Bressman, *supra* note 9, at 569–71 (discussing congressional oversight strategies); Jody Freeman & Jim Rossi, *Agency Coordination in Shared Regulatory Space*, 125 HARV. L. REV. 1131, 1155–1203 (2012) (discussing ways in which all three branches can monitor agencies).

III. A CHOICE-OF-LAW COORDINATION APPROACH TO PREEMPTION

This Part links the first two Parts of this Article by showing how and when horizontal regulatory coordination can provide an appropriate policy basis for determining the preemptive effect of federal laws. Specifically, we argue that preemption decisions should lean toward invalidation of overlapping state legislation where the states have failed to achieve horizontal coordination as described in Section II.B. Conversely, preemption decisions should lean toward respecting state sovereignty where the states have coordinated or shown substantial promise or progress toward coordination through choice-of-law policies or otherwise. Other factors can swamp the importance of horizontal regulatory coordination, but its presence or absence can provide needed guidance for the preemption determination.

Our contribution is to identify an important yet previously unaddressed structural factor that should play a role in preemption decisions. The Supremacy Clause promotes federal authority, including Congress's Commerce Clause power to create and maintain a national market. Because this market may be jeopardized by the states' failure to horizontally coordinate, courts should take into account the degree to which the states can or have coordinated the allocation of their sovereign authority over the legal issue involved. We believe that our inquiry would promote a healthy federalism, an important consideration underlying the Supremacy Clause. Moreover, encouraging courts to ground preemption decisions on factors that promote a healthy federalism enables them to avoid making opaque policy decisions masquerading as determinations of congressional intent.

A key aspect of our approach is that it factors choice of law into preemption analysis. The degree of state horizontal coordination most often turns on the nature of the choice-of-law rules applied by the states. State sovereignty should be preserved where the state choice-of-law rules relating to the question at hand provide formal and functional horizontal coordination. On the other hand, displacement of state laws makes more sense in the presence of costly regulatory spillovers. Although it is often impossible to objectively determine the appropriate degree of regulation, states' willingness to sensibly allocate their sovereign authority over such questions indicates their acceptance of the diversity of state laws. In identifying the choice-of-law coordination factor, we hope to improve the analysis in some types of preemption cases, which now rest on conflicting, overly broad, and not fully apt presumptions.

Before detailing our approach, two caveats are in order. First, we do not propose an exclusive approach to preemption. We simply argue that the degree of state choice-of-law coordination can in many cases be a relevant, important, or dispositive factor in making a preemption determination. Our approach can work side by side with other theories of preemption, and is more important in some types of cases than in others. Factors other than horizontal coordination should at times also be considered, and they may eclipse the importance of coordination to the preemption decision.

Second, we do not purport to place our proposal in the context of constitutional theories. Rather, we build on the federalist structure of government and the role that the Supremacy Clause can play in promoting a strong balance between state and federal government. We hope we can persuade general constitutional theorists to reconcile our approach with their theories, but we leave that exercise for another day.

Section III.A places the preemption inquiry alongside constitutional provisions that, with the Supremacy Clause, help to coordinate sovereign authority both vertically and horizontally. Section III.B contrasts our regulatory coordination approach with other proposed theories of preemption. Section III.C compares our approach to the preemption presumptions discussed in Part I.

A. *Preemption's Coordinating Role*

Regulatory coordination is a general principle for allocating power among the states and between the state and federal governments, and therefore it appropriately informs the constitutional provisions that support our federal system. Preemption decisions are made under the Supremacy Clause, but those decisions work in conjunction with other constitutional provisions designed to help coordinate regulatory authority in our federal system. These include the federal government's "umpire" role under the Full Faith and Credit Clause, Congress's affirmative power to act under the Commerce Clause, and the courts' power to declare state laws unconstitutional under the Dormant Commerce Clause.

The Constitution's most specific statement that the federal government should play a role in coordinating the reach of state laws is contained in the Full Faith and Credit Clause, which promotes horizontal coordination in two ways. First, under the Clause, each state must give effect to sister-state "public Acts, Records, and judicial Proceedings."[120] On its face, the Clause seems to require each state to fully enforce other states' laws. According to Justice Robert Jackson, the Clause can guard against "the disintegrating influence of provincialism in jurisprudence, but without aggrandizement of federal power at the expense of the states."[121] In practice, however, the Supreme Court has done little under the Full Faith and Credit Clause to insist that state choice-of-law rules promote horizontal regulatory coordination.[122]

Second, the Clause explicitly empowers Congress to enact general laws that "prescribe . . . the Effect" of states' acts, records, and proceedings.[123] Based on this language, Congress could (but rarely does) enact laws regulating choice of law. The main contemporary example is the Defense of

120. U.S. CONST. art. IV, § 1.

121. Robert H. Jackson, *Full Faith and Credit—The Lawyer's Clause of the Constitution*, 45 COLUM. L. REV. 1, 17 (1945).

122. Daniel J. Dorward, *The Forum Non Conveniens Doctrine and the Judicial Protection of Multinational Corporations from Forum Shopping Plaintiffs*, 19 U. PA. J. INT'L ECON. L. 141, 167 (1998).

123. U.S. CONST. art. IV, § 1.

Marriage Act.[124] Perhaps Congress's reluctance to more effectively allocate state sovereign authority is not surprising. Congressional representatives may be unwilling to incur the political costs of invading the turf of locally entrenched interest groups even if federal law could help contain spillovers.[125] More importantly, if interest groups are sufficiently strong to mobilize Congress to act, the resulting legislation is more likely to federalize substantive law than to impose rules designed to encourage more effective state regulatory authority.

The Commerce Clause empowers Congress "[t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes."[126] This power enables Congress to deal with horizontal coordination problems that might hinder the creation of an efficient national market. In fact, courts tend to focus directly on horizontal coordination under the Dormant Commerce Clause, which invalidates state regulation of interstate commerce in some situations.[127] The Court has struck down state regulation that effectively governs out-of-state business activities. Examples include state regulation of the length of interstate trains[128] and trucks[129] and the shape of truck mudguards.[130] Such regulations effectively forced interstate transportation companies either to make costly changes when crossing state lines or to comply with the most onerous state regulations for all interstate activities. In these cases, state laws inappropriately spilled over into other states.

Although horizontal coordination can and does play a legitimate role in the Supreme Court's Dormant Commerce Clause jurisprudence, horizontal coordination concerns are important enough in our scheme of federalism that there is a role for coordination analysis elsewhere in our constitutional structure. Surely, horizontal coordination is not relevant only before Congress has acted. Preemption and Dormant Commerce Clause cases represent two situations where the courts can facilitate horizontal coordination in the face of congressional silence on state authority to regulate.

To illustrate the point, consider the case of *H.P. Hood & Sons, Inc. v. Du Mond*.[131] In *Hood*, the Court struck down the New York Commissioner of Agriculture and Markets's decision to deny a dairy company a license to establish and operate a fourth milk plant in New York for the purpose of

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124. *See supra* text accompanying note 90.

125. *See* Jonathan R. Macey, *Federal Deference to Local Regulators and the Economic Theory of Regulation: Toward a Public-Choice Explanation of Federalism*, 76 VA. L. REV. 265, 270–90 (1990) (discussing Congress's political calculus in deciding whether to enact statutes that invade areas in which states have exercised lawmaking authority).

126. U.S. CONST. art. I, § 8.

127. *See, e.g.*, Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1, 189, 195, 204–06, 209–11 (1824).

128. *See* S. Pac. Co. v. Arizona, 325 U.S. 761, 771 (1945).

129. *See* Kassel v. Consol. Freightways Corp., 450 U.S. 662, 674–79 (1981); Raymond Motor Transp., Inc. v. Rice, 434 U.S. 429, 446–48 (1978).

130. *See* Bibb v. Navajo Freight Lines, Inc., 359 U.S. 520, 529–30 (1959).

131. 336 U.S. 525 (1949).

exporting milk to Massachusetts.[132] New York justified its denial on the ground that granting the application could lead to ruinous competition given the state's milk supply shortage.[133] The Court concluded that New York's actions impermissibly interfered with interstate commerce because the state had hindered the interstate transfer of milk in favor of protecting the interests of local buyers.[134] In response to this finding, New York argued that the Agricultural Marketing Agreement Act ("AMAA"), a federal law, specifically authorized the state's actions.[135] New York argued that its licensing scheme, as applied, was constitutionally permissible because it "coincides with, supplements and is part of the federal regulatory scheme,"[136] but the Court ultimately concluded that the AMAA did not authorize the state's actions.[137]

Suppose, however, that the case had come to the Court as a preemption case. The dairy company would have argued that the state scheme was inconsistent with the AMAA and was therefore preempted. Despite some potential tension between the two schemes, the AMAA did not actually conflict with the state law at issue, and, under the Supreme Court's presumption regarding traditional areas of state regulation, the state scheme might have been held valid.

Note that if the case can be decided on the basis of preemption, then the Court would have needed to tether its decision to an actual congressional statute. Congress's enactment of a law represents an implicit political judgment that the benefit to national interest groups outweighs the cost of some potential intrusion on state sovereignty, even if the statute fails to specify exactly how much intrusion is contemplated. By using the Dormant Commerce Clause instead of preemption doctrine, the Court is able to invalidate state laws without any statement of congressional policy that could be construed as favoring vertical regulatory coordination, and the legitimacy of its decisions therefore is less clear. In our view, state laws disciplined by horizontal coordination should survive constitutional scrutiny under both the Dormant Commerce Clause and the Supremacy Clause, unless displacing state law is necessary in order to promote some other federal policy.

B. *Regulatory Coordination and Preemption Theories*

We are not the first to propose preemption analyses that might help courts fill gaps in legislative intent. This Section briefly compares our approach to other recently proposed preemption analyses. Some commentators have proposed political theories of preemption designed to ensure that exercises of federal preemptive power ultimately reflect the public will. These

132. *Hood*, 336 U.S. at 528–29, 545.

133. *Id.* at 528–29.

134. *Id.* at 537–39.

135. *Id.* at 540–41.

136. *Id.* at 540.

137. *Id.* at 544–45.

theories do not attempt to distinguish situations according to the need for federal action. Others have argued that preemption doctrine should be used to create uniform substantive law, either for its own sake or to promote a national market. These theories recognize the potential problems caused by state spillovers. However, they do not allow for the value of diverse state laws and the potential for choice-of-law rules to constrain the excesses of state law and promote a healthy federalism.

1. Political Theories of Preemption

Some scholars have incorporated theories of politics into their theories of preemption. For example, David Dana has proposed focusing on "democratic preferences expressed through representative state institutions,"[138] particularly where congressional intent is uncertain.[139] In deciding whether to preempt, Dana would take into account "the weight of democratic support for the kind of state law or laws at issue."[140] Thus, a California law outweighs one in Rhode Island, and a type of law adopted "by states that account for half of the nation's population has more democratic weight than a measure adopted by states that account for one tenth of the nation's population."[141] In particular, Dana argues for nonpreemption by the Clean Air Act of California's stricter fuel economy standards, which are now applied in several other states, consistent with a National Highway and Traffic Safety Administration ("NHTSA") ruling.[142]

Dana's approach fails to take into account the benefits of state sovereignty in contributing to a healthy federalism. What matters for Dana is not state diversity but the extent to which the states have endorsed a single legal approach.[143] Federalism, however, is not just a matter of counting votes. Federalism can protect democratic values not only by enabling parties to express political voice but also by enabling parties with diverse interests and needs to gravitate toward laws that better suit their activities.

The following example demonstrates the primary difference between Dana's theory and ours. Suppose that only a few small states such as Delaware apply specific business association rules but that all states have adopted a uniform choice-of-law rule such as the internal affairs doctrine.[144] Next assume that a federal law overlaps with the small states' business asso-

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138. David A. Dana, *Democratizing the Law of Federal Preemption*, 102 NW. U. L. REV. 507, 527 (2008).

139. *Id.* at 512.

140. *Id.*

141. *Id.*

142. *Id.* at 532–35.

143. *Id.* at 527–32.

144. An example of a specific business association rule would be an antitakeover statute. *See* Larry E. Ribstein, *Preemption as Micromanagement*, 65 BUS. LAW. 789 (2010) (discussing whether the Delaware antitakeover statute should be preempted by federal antitakeover law).

ciation rules.[145] Dana presumably would support preemption in this circumstance because, as represented by the population in each state promulgating business association rules, only a tiny fraction of the nation's population politically supports the alternative laws. By contrast, we would oppose preemption as unnecessary because the states have achieved horizontal coordination of their differing substantive rules through uniformly applied choice-of-law rules.

In addition to helping preserve a healthy federalism, our approach might promote democratic values as well as or better than Dana's approach. Each state's willingness to enforce other states' laws within its own borders should provide the general democratic approval Dana is seeking. And our approach can enable those constituents whose voices are not well represented in a given state's legislature to choose rules from states where their interests are better represented.

In contrast, other commentators have proposed preemption theories that emphasize the role of interest groups. For example, Roderick Hills opposes preemption where congressional intent is unclear as the best way to provoke Congress to more clearly state the circumstances under which it prefers preemption.[146] Hills reasons that strong business groups usually favor a strong presumption in favor of preemption and can effectively lobby for it in Congress.[147] He responds to commentators such as Alan Schwartz[148] who favor preemption as a mechanism for overcoming Congress's political inertia in responding to coordination problems.

Interest group–based theories of preemption do not take account of the value of state diversity and states' ability to coordinate sufficiently to overcome spillover problems. Nor do they recognize that Congress may fail to address preemption for both good and bad reasons. For example, the states' ability to coordinate around a choice-of-law rule suggests the existence of a political equilibrium that may be particularly difficult to defeat in Congress, because clear choice-of-law rules often enable some states to specialize in the production of laws in that area.[149] Schwartz's approach therefore could lead to preemption where congressional inertia reflects the fact that the states have horizontally coordinated. And Hills' approach would produce too little preemption when powerful interests are pitted against one another, a circumstance that might indicate that effective horizontal choice-of-law coordination is not feasible.

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145. Preemption of the Delaware antitakeover law is discussed *infra* in note 184 and accompanying text.

146. Roderick M. Hills, Jr., *Against Preemption: How Federalism Can Improve the National Legislative Process*, 82 N.Y.U. L. REV. 1, 17 (2007).

147. *Id.* at 29–32.

148. *See* Alan Schwartz, *Statutory Interpretation, Capture, and Tort Law: The Regulatory Compliance Defense*, 2 AM. L. & ECON. REV. 1 (2000).

149. *See* Macey, *supra* note 125, at 276–81 (discussing corporate law as an example of such an equilibrium).

In any event, one benefit to not offering an all-encompassing solution to preemption is that our approach could operate alongside interest-group theories. For example, the political benefits of Hill's approach could be combined with the policy considerations underlying our approach by demanding a clear preemption statement only in situations where the states have achieved choice-of-law coordination. Our approach also can accommodate Schwartz's concern about inadequate preemption as a result of congressional inertia because it would place a lower burden on congressional action where uncoordinated states create a compelling need for preemption. Conversely, our approach encourages the states to coordinate when feasible in order to avoid or minimize the extent of federal preemption.[150]

2. Preemption to Promote Uniformity

Some commentators explicitly take account of the coordination benefits of preemption by arguing that preemption should reflect the federal interest under the Commerce Clause in providing uniform substantive laws. For example, according to Viet Dinh, Dormant Commerce Clause analysis supports "a uniquely federal interest in maintaining national unity and uniformity in interstate economic regulation," and that interest is also relevant to preemption when federal legislation has "a general purpose to further the constitutional values of national cohesion and economic uniformity."[151] Similarly, Thomas Merrill recognizes that preemption may involve a judgment about whether federal law needs to operate exclusively in order to protect the interest in "maintaining a single national market."[152] Both authors assume that uniform substantive legal rules are necessary to promote national markets.[153]

Our horizontal coordination approach also promotes national markets and coherent legal rules, but we emphasize other possible ways to achieve these goals. If uniformity were an end in itself, then federal law would almost always be the most effective lawmaking vehicle. It would follow that courts should generally, if not always, presume in favor of preempting state law where legislative intent is unclear. However, uniformity is only a means to an end. Where clarity in the rules that apply to particular conduct is the objective, there are means other than uniformity and federalization that might be effective. Importantly, these less drastic means enable the preservation of the benefits of state sovereignty, including the provision of

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150. This is similar to the effect of the Supreme Court's acceptance of federal common law in *Swift v. Tyson*, 41 U.S. (16 Pet.) 1 (1842), which spurred the states to embrace uniform state laws. This history is traced in Ribstein & Kobayashi, *Uniform State Laws*, *supra* note 72.

151. Dinh, *supra* note 1, at 2110–11.

152. Merrill, *supra* note 7, at 743.

153. Issacharoff and Sharkey, *supra* note 20, also focus on national market exigencies, but their analysis is more nuanced and less categorical than those of Dinh and Merrill. However, as mentioned earlier, *see supra* note 65 and accompanying text, they too overlook the importance of considering horizontal coordination on choice of law.

laboratories of experimentation, the possibility of jurisdictional competition, and the ability of parties to better fulfill their diverse needs. When states have effectively coordinated themselves, preemption is justified only to achieve a particular national policy.

Like us, Robert Schapiro explicitly recognizes the potential of preemption doctrine to help discipline state spillovers.[154] However, to the extent that he recognizes a spillover problem, Schapiro proposes solutions designed to achieve *substantive uniformity across the states*.[155] In its extreme form, Schapiro's theory would destroy state legal diversity in the process of containing state spillovers. His mistake, like those of Dinh and Merrill, is to assume that only substantive uniformity can achieve coordination. Again, other coordination mechanisms, particularly choice-of-law rules, can address spillovers while preserving the state market for laws.

In short, we advocate that courts unpack claims about the desirability of "uniform" substantive rules to distiguish situations in which uniformity is serving the value of providing clarity regarding the governing legal standard. In these situations, we suggest that courts consider whether this clarity is, or realistically can be, achieved through choice-of-law coordination while preserving the benefits of state sovereignty.

C. *Reexamining Preemption Presumptions*

This Section compares our choice-of-law coordination approach to the currently employed preemption presumptions discussed above.[156] We have shown how courts apply these presumptions inconsistently and in a way that likely obfuscates behind-the-scenes policy judgments. We offer an alternative horizontal coordination approach that can operate as a relevant factor rather than an across-the-board presumption. This approach is more transparent and conceptually consistent than the presumption approach because it is clearly tethered to a structural commitment to a "healthy federalism."

A basic problem with preemption analysis is that it tends to allocate an area of law either to the state or federal domain. There is nothing inherently "state-like" or "federal-like" about most areas of law. Federal and state laws both occupy many substantive legal areas and the balance between the two shifts over time, with a general tendency toward increasing federalization. Robust federalism demands that the courts protect against shifts that disrupt the appropriate allocation of power between federal and state government rather than adopting policies that fuel such trends irrespective of the wishes of Congress. Also, coherently filling gaps in legislative intent demands doctrines that do not require a binary categorization of each legal subject area as

154. *See* Robert A. Schapiro, *Monophonic Preemption*, 102 NW. U. L. REV. 811, 824–29 (2008).

155. *See id.* at 829.

156. *See supra* Section III.B.

either exclusively federal or as left to the states.[157] Regulatory coordination provides a basis for such doctrine.

Consider, for example, the presumption against preemption when Congress acts in an area that is traditionally left to the states. This presumption reaches correct results under our theory where the states have not only traditionally regulated in an area but also have effectively coordinated through choice-of-law rules to mitigate spillovers. Examples include the corporate internal affairs doctrine and the real property situs rule. In both of those situations, federal law is unnecessary to provide clarity regarding the governing rules, and that fact provides a reason to interpret narrowly the preemptive reach of federal law.

In contrast, consider tort law, which is also typically left to the states. Here the states have done a poor job of coordinating. Some states tend to choose the law of the place of injury, some choose the law of the parties' residence, and some choose the law of the forum.[158] A defendant therefore could be subject to the tort laws of multiple states for a single action and have little notice at the time of engaging in conduct as to which law will apply in future proceedings.[159] This results in the types of regulatory spillovers that federal law can appropriately address. Congress has left much of tort law to the states not because federal law is somehow inherently inappropriate but for other reasons—perhaps because of inertia resulting from the clash of powerful interest groups. Where Congress does act, regulatory coordination considerations might justify using preemption to more broadly interpret the displacement of state law. Accordingly, our approach suggests different results depending on the legal area.

Field preemption, or the presumption in favor of preemption where federal regulation has pervasively regulated a field, is similarly overbroad. When Congress attempts to occupy a field, a court should not assume it is therefore appropriate to interpret such federal statutes as eliminating state regulatory authority to the greatest extent possible. Instead, courts should ask whether preemption in a given case would promote a congressional desire to impose a particular rule or instead a need to coordinate governing rules. If the latter arguably motivates Congress, then state horizontal coordination, if feasible, would be superior to vertical coordination. A particular danger of an overly broad field preemption doctrine is that when states expect courts to apply field preemption to a particular problem, they might

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157. *See* Schapiro, *supra* note 154, at 815–17 ("Dual federalism, the idea that the states and the national government enjoy exclusive and non-overlapping regulatory domains, no longer holds sway on the United States Supreme Court.").

158. For a discussion of the varying approaches used by the states to resolve choice-of-law issues in tort suits, see generally EUGENE F. SCOLES ET AL., CONFLICT OF LAWS 688–755 (3d ed. 2000).

159. Of course, it is possible that the states could coordinate on a choice-of-law rule that does not provide ex ante notice as, for example, when the states coordinated around a place-of-injury rule under the First Restatement. *See* RESTATEMENT (FIRST) OF CONFLICT OF LAWS § 377 (1934). In either case, horizontal coordination fails to provide a basis for leaving the substantive law to the states.

refrain from efficient lawmaking, including efforts to solve coordination problems.[160]

The extensive corporate governance provisions in the Dodd–Frank Wall Street Reform and Consumer Protection Act[161] illustrate these field preemption difficulties. The Act might suggest to courts that Congress intends to occupy the field of corporate governance. Since corporate governance is traditionally a state matter, the field preemption presumption would conflict with the state law nonpreemption presumption. Aside from this problem of conflicting presumptions,[162] the potential role of field preemption ignores the states' horizontal coordination through the internal affairs doctrine, which counsels against preemption. Applying field preemption perversely encourages a creep toward federalization rather than respect for the states' ability to self-coordinate consistent with a healthy federalism. In this situation, our approach to preemption would demand evidence of clear congressional intent to preempt.

It is important to clarify the relationship between our approach and congressional intent. We do not seek to override congressional intent. Whether or not regulatory coordination justifies preemption, a court should find that federal law preempts state law whenever preemption would further congressional intent. Moreover, although our approach is designed to apply when congressional intent is unclear, it is not based on a theory of legislative intent. Instead, our approach advocates a judicially imposed gap-filling policy justified by preemption's role in helping to promote a healthy federalism. Consequently, even if Congress indicated no intent to preempt state law or achieve horizontal coordination, preemption nevertheless might be appropriate to achieve this coordination. Our approach promotes transparency by asking courts to consider our policy basis for their determinations instead of falsely claiming to glean legislative intent.

Regulatory coordination can also help to clarify existing doctrine, as illustrated by reexamining the *Florida Lime* and *Jones* cases discussed earlier.[163] Both cases involved California food products regulations that were more stringent than applicable federal regulations; one required avocados sold in the state to have a minimum oil content,[164] and the other required that flour sold in the state weigh at least as much as the amount stated on the package.[165] Both state regulations applied to intrastate sales that are traditionally within the province of state law and therefore arguably justify a presumption against preemption under current doctrine. Yet *Florida Lime*

160. *See, e.g.*, David A. Skeel, Jr., *Rethinking the Line Between Corporate Law and Corporate Bankruptcy*, 72 TEX. L. REV. 471, 489–90 (1994) (discussing how federal law has caused systemic neglect of state insolvency law).

161. *See infra* note 202 and accompanying text.

162. *See supra* Part I.

163. *See supra* Part I.

164. Florida Lime & Avocado Growers, Inc. v. Paul, 373 U.S. 132, 133 (1963).

165. Jones v. Rath Packing Co., 430 U.S. 519, 526 (1977).

upheld the state regulation[166] while *Jones* struck it down,[167] in both cases over dissenting opinions.

Our approach helps rationalize these results. *Florida Lime* was consistent with choice-of-law coordination because whatever one thinks of California's rule, it applied only to sales within California. Avocado sellers easily could avoid the California rule simply by not selling in California. California therefore could experiment with its regulatory approach while not imposing costs on a national market. Importantly, *Florida Lime* was decided in 1963, before the predominance of national distribution chains for produce.[168] In that environment, each state could enact regulations that applied only to sales within the state, and the benefits of state law could be preserved without hindering parties' ability to determine what law applied to their conduct or to comply with applicable law.

By contrast, the California regulation in *Jones*, decided a few years after *Florida Lime*, effectively hindered the then-existing national market for flour. Because many companies could not cheaply tailor the products or labels on products offered for sale in individual states,[169] California's regulations would have forced companies to change their product labeling or the amount of flour provided in each lot across the United States.[170] Moreover, California's regulations would have forced interstate sellers to overpack in order to take into account interstate variations in humidity.[171] Spillover effects justified giving a broader scope to the federal regulation in *Jones* than the one in *Florida Lime*.

Jones and *Florida Lime* are harder cases to evaluate under our approach than are cases involving the internal affairs or situs rules. As with those rules, states achieve horizontal coordination regarding sales regulations because each state applies its law only to those goods sold in-state. However, this formal choice-of-law coordination fails to produce functional coordination in a market where nationwide sales distribution patterns force some product manufacturers to comply with all laws for all of its sales (a factor that concerned the *Jones* Court). Put differently, clear choice-of-law rules fail to eliminate the application of multiple laws and the subsequent spillover effects.

Although our approach can help to rationalize the results of *Jones* and *Florida Lime*, we do not purport to explain why the justices actually reached

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166. *Florida Lime*, 373 U.S. at 151–52.

167. *Jones*, 430 U.S. at 543.

168. Indeed, the majority's discussion in *Florida Lime* indicated that it believed Congress was focused on local rather than national harvesting and marketing conditions. *Florida Lime*, 373 U.S. at 147–50.

169. The majority in *Jones* seemed concerned about the possible inability of producers to know whether their packages might ultimately land in California. *See Jones*, 430 U.S. at 543 ("[A] miller with a national marketing area would not know the destination of its flour when it was packaged and would therefore have to assume that the flour would lose weight during distribution. The national manufacturer, therefore, would have to overpack.").

170. *Id.* at 542–43.

171. *Id.*

their conclusions. Importantly, preemption analysis may turn on a variety of applicable policies as well as the statutory language and other evidence of congressional intent. Moreover, other policy factors can trump our analysis in appropriate cases, and clear legislative intent always trumps our analysis. But when the preemptive effect of a statute is unclear, choice-of-law coordination by the states is, and should be, a relevant and sometimes dispositive factor.

D. *Implementing the Approach*

This Section discusses how courts might implement our approach. In general, we aim to enlist courts in preemption cases as active participants in facilitating a federal system that takes account of the benefits both of diverse state laws and of coordinating state law to accommodate markets that cross state borders. Where the terms of a federal statute and other evidence of congressional intent fail to provide guidance about whether state law is preempted, the court should take account of the extent to which the states have voluntarily allocated their sovereign authorities. Where states have effectively coordinated sovereign authority through choice-of-law rules or uniform lawmaking, the court should uphold the state law unless another policy cuts in the opposite direction.[172] This approach preserves state sovereignty when federalization of the law is unnecessary to facilitate clarity or otherwise to promote a national market. On the other hand, when the states have not horizontally coordinated and the federal statute applies to the given situation, our approach supports giving the statute preemptive effect.[173]

Our approach would require courts to develop standards of coordination. This raises a host of questions. Just how many states need to agree to a single choice-of-law approach? What if states agree on a general approach but not on the circumstances where exceptions apply? What if some but not all states permit parties to choose their governing law in a particular context? If states agree on a formal choice-of-law approach, at what point is a national scheme's interference with the allocation of state authority sufficient to trigger a presumption in favor of preempting state law?

We do not purport to resolve those issues here. However, in answering these questions, it is important to keep in mind a few general considerations. First, complete coordination is likely an unreasonable standard. Even the relatively rigid corporate internal affairs doctrine is deviated from in some states under some circumstances.[174] Presumably it is sufficient if states have

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172. This, of course, would not preclude holding the state law unconstitutional on grounds other than the Supremacy Clause, including under the Dormant Commerce Clause or the Full Faith and Credit Clause. *See supra* Section III.A (discussing preemption in the context of other constitutional doctrines).

173. Our approach does not, however, preclude the possibility that some other set of policy concerns might support preserving state law even where this is inconsistent with a healthy federalism.

174. California, for example, asserts authority to regulate some aspects of the internal affairs of firms incorporated outside of California when the firm is not listed on a national

adopted (or have shown promise in adopting) choice-of-law rules that tend to guard against regulatory spillovers by enabling the parties to choose or know the law at the time of the relevant conduct. Second, timing of coordination is also relevant to this determination because the states need time to work toward horizontal coordination. Thus, courts should not require full coordination at the time of their decision unless it is reasonable to expect the states to have already achieved such coordination. Third, the necessary degree and timing of effective coordination might turn on the context in which the laws operate. Because a healthy federalism balances the benefits of state experimentation and diversity against the benefits of creating a national market, the necessary degree of horizontal coordination likely will turn on the relative perceived benefits of state and federal law. More benefits from diversity suggest a greater tolerance for imperfect but promising coordination and vice versa.

Although these judgments entail some uncertainty in decisionmaking, such standards can be worked out over time.[175] Working through these uncertainties is justified by the coherent guidance that our approach can give to courts and administrative agencies and our approach's firm grounding in principles of federalism. A clearer approach, such as across-the-board presumptions in favor of or against preemption,[176] could reduce decisionmaking costs but poses the risk of upsetting the important balance between federal and state power. Moreover, our approach has the added benefit of encouraging states to coordinate through choice-of-law rules, which would create further potential benefits to decentralized lawmaking.

IV. SPECIFIC APPLICATIONS

We have so far shown how a horizontal coordination approach to preemption can enable courts to fill gaps in congressional intent based on structural constitutional values intended to promote a healthy federalism. This Part uses several Supreme Court cases to further illustrate how our approach can inform preemption jurisprudence.[177] These cases involve subjects that illustrate one of five recurring situations relevant to our analysis: (1) states have coordinated their choice-of-law rules so as to have achieved effective formal horizontal coordination; (2) states have clearly failed to achieve such coordination; (3) states have formally coordinated choice-of-

securities exchange and most of its property and shareholders are in California. *See* CAL. CORP. CODE § 2115 (West 2006).

175. The courts might, for example, enlist the aid of the states themselves, through state attorney general amicus briefs, in highlighting the degree of state coordination. For general analyses of the use of state attorney general amicus briefs in the Supreme Court, see Christopher R. Drahozal, *Preserving the American Common Market: State and Local Governments in the United States Supreme Court*, 7 SUP. CT. ECON. REV. 233 (1999); Michael E. Solimine, *State Amici, Collective Action, and the Development of Federalism Doctrine*, 46 GA. L. REV. 355 (2012).

176. *See supra* Part III.B.

177. The Supreme Court hears preemption cases every term, and we are therefore unable to speculate on whether or how our approach would apply to all possible preemption cases.

law rules but functionally the substantive laws of one or more states end up thwarting the practical effect of the substantive rules in other states; (4) the preemption analysis is better delegated to an administrative agency rather than a court because of factually unclear or temporally shifting horizontal coordination; and (5) horizontal coordination should not control the analysis because other policy considerations dominate.

A. *Formal Coordination*

In the cases discussed in this Section, states have achieved horizontal coordination. Under our analysis, when congressional intent is unclear, courts should refuse to preempt in the absence of an overriding policy concern.

1. Corporate and Securities Law

As discussed above, states have achieved a high level of choice-of-law coordination regarding corporate and other business association governance by adopting the internal affairs doctrine. Under that choice-of-law rule, the law of the firm's state of organization (i.e., "place of incorporation") applies to the firm's governance and its members' liability for the firm's debts. This rule fosters experimentation in state law with relatively little spillover cost. It follows under our analysis that courts should decline to preempt where congressional intent is unclear on the scope of preemption.

Our analysis supports the result in *CTS Corp. v. Dynamics Corp. of America*,[178] where the Supreme Court upheld an Indiana law regulating tender offers for control of an Indiana corporation. The Court reasoned that the Williams Act, a federal law that mandates disclosure in connection with tender offers, did not preempt the Indiana law. Despite possible delays that could have resulted from applying the Indiana law, the Court reasoned that nothing in its earlier cases "suggested that *any* delay imposed by state regulation, however short, would create a conflict with the Williams Act."[179] Rather, after reviewing the many state law provisions that would have similar effects, the Court reasoned that states' traditional regulation of corporate governance supported a presumption against preemption.[180] However, under current preemption presumptions, the Court alternatively might have reasoned either that Congress had occupied the field by adopting the Williams Act or that the state law interfered with the objectives or purposes of the federal law, and that therefore federal law preempted state law. Our regulatory coordination approach provides a way to avoid conflicting and overbroad presumptions. Our analysis suggests that the Court instead should have rejected preemption because the states have achieved horizontal coordination around the internal affairs choice-of-law rule.

178. 481 U.S. 69, 78–87 (1987).

179. *CTS*, 481 U.S. at 85.

180. *Id.* at 86.

The Court did in fact employ a regulatory coordination analysis in *CTS*, but it did so when analyzing whether to invalidate the Indiana statute under the Dormant Commerce Clause. The Court distinguished cases "invalidat[ing] statutes that may adversely affect interstate commerce by subjecting activities to inconsistent regulations":[181]

> The Indiana Act poses no such problem. So long as each State regulates voting rights only in the corporations it has created, each corporation will be subject to the law of only one State. No principle of corporation law and practice is more firmly established than a State's authority to regulate domestic corporations, including the authority to define the voting rights of shareholders. Accordingly, we conclude that the Indiana Act does not create an impermissible risk of inconsistent regulation by different States.[182]

As we argued earlier, regulatory coordination is relevant to both constitutional doctrines, but the necessary degree of horizontal coordination may differ. For example, given that preemption analysis only occurs when Congress has passed a statute that provides clear evidence of a federal policy, more horizontal coordination may be necessary to insulate state law under preemption than under Dormant Commerce Clause analysis. But the potentially differing standards for horizontal coordination further justify consideration of coordination in both contexts.

CTS also rejected the argument that the Indiana law should be invalidated based on the need to protect the national market for interstate tender offers. Instead, the Court focused on the state "interest in promoting stable relationships among parties involved in the corporations it charters, as well as in ensuring that investors in such corporations have an effective voice in corporate affairs."[183] The Court also responded to economic arguments citing the value of the market for corporate control by observing that "[t]he Constitution does not require the States to subscribe to any particular economic theory."[184] In sum, *CTS* stands for the basic principle underlying our approach: diversity trumps uniformity in the presence of horizontal coordi-

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181. *Id.* at 88.

182. *Id.* at 89 (citation omitted).

183. *Id.* at 91.

184. *Id.* The value of coordination in resolving ambiguity concerning federal preemption of state corporate law is apparent in light of an argument by Guhan Subramanian and his coauthors that the Williams Act preempts Delaware's antitakeover statute. *See* Guhan Subramanian et al., *Is Delaware's Antitakeover Statute Unconstitutional? Evidence from 1988–2008*, 65 BUS. LAW. 685, 736 (2010). The authors evaluate Delaware's statute (and distinguish others) based on the precise extent to which it conflicts with the state–federal balance decreed in the Williams Act, *id.* at 686, and they suggest that their analysis has implications for the takeover laws of several other states, *id.* at 734–35. This reasoning could support invalidation of a wide swath of state corporate law. *See* Ribstein, *supra* note 144. Moreover, it is not clear that one can fairly imply a complex preemption scheme from the Williams Act's very general indications of legislative intent. Indeed, the authors acknowledge that Congress very likely gave no consideration to the preemption of state takeover laws when passing the Act. Subramanian et al., *supra*, at 690. Our coordination principle would resolve these questions by presuming against preemption because the states have horizontally coordinated over corporate law.

nation and the absence of an overriding substantive federal law policy. Although a determination of what counts as an overriding substantive federal law policy is a normative one left to the courts, the horizontal coordination principle remains a relatively objective determination that can be used to effectively guide the analysis.

The coordination principle's role in resolving preemption issues in corporate law cases is also relevant in the more complex context of state securities regulation. Consider *Merrill Lynch, Pierce, Fenner & Smith Inc. v. Dabit*,[185] a case involving SLUSA. As previously described in Part II, SLUSA was enacted to cut off an attempted end run around the PSLRA.[186] Plaintiffs' lawyers were avoiding the PSLRA by suing under state securities laws.[187] SLUSA preempted certain state law private securities class actions that alleged fraud "in connection with the purchase or sale of a covered security."[188] Plaintiffs' lawyers then sued under state law on behalf of plaintiffs who *held* rather than traded securities. They argued that these actions were not "in connection with the *purchase or sale* of a . . . security" and therefore were outside the SLUSA preemption provision.[189] This argument was bolstered by a prior Supreme Court case, *Blue Chip Stamps v. Manor Drug Stores*, that had denied a holder a private right of recovery under similar language in the securities laws.[190]

Dabit rejected the plaintiffs' arguments and extended SLUSA preemption to holder actions, distinguishing *Blue Chip Stamps*.[191] The Court reasoned that state holder actions would be inconsistent with Congress's clear intent to control abusive state litigation. The result is not obvious under traditional approaches to preemption.[192] Congress's intent to preempt state holder actions is at least ambiguous in light of the prior Supreme Court case on holders' rights to sue. Congress may have intended SLUSA to limit only end-run litigation around the PSLRA rather than to generally control abusive state securities litigation. Holder actions were not clearly PSLRA end runs since the purchaser–seller requirement excluded them from federal court irrespective of the PSLRA. Nor does the Court get much help from the preemption presumptions. The Court said that the presumption against preemption of state law did not apply because "federal law, not state law, has long been the principal vehicle for asserting class-action securities fraud

185. 547 U.S. 71 (2006).

186. Pub. L. No. 104-67, 109 Stat. 737 (codified in part at 15 U.S.C. §§ 77z-1, 78u-4 (2006)); *see also supra* Part II.E.1.

187. Michael A. Perino, *Fraud and Federalism: Preempting Private State Securities Fraud Causes of Action*, 50 STAN. L. REV. 273, 292–93 (1998).

188. 15 U.S.C. §§ 77p(b), 78bb(f)(1) (2006).

189. *Id.* (emphasis added).

190. Blue Chip Stamps v. Manor Drug Stores, 421 U.S. 723, 733, 754–55 (1975).

191. Merrill Lynch, Pierce, Fenner & Smith Inc. v. Dabit, 547 U.S. 71, 88–89 (2006).

192. *See* Larry E. Ribstein, Dabit, *Preemption, and Choice of Law*, 2006 CATO SUP. CT. REV. 141, 146–47.

claims."[193] Yet the states allowed securities fraud remedies even before the adoption of the federal securities laws, and in those statutes, Congress explicitly preserved the state remedies.[194] Moreover, it is questionable whether the existence of federal *cases* authorizing securities class actions should provide the basis for presuming preemption based on *Congress's* supposed intent to occupy the field.

The *Dabit* result makes more sense under our coordination principle. The states had failed to effectively coordinate their sovereign authority over securities laws, at least functionally. Although states had generally agreed that corporations could be sued under the laws of each state in which their securities were purchased, this clear and uniform choice-of-law rule had the effect of subjecting a single corporation's conduct to multiple governing state securities laws and therefore did not effectively coordinate states' lawmaking authority. Given national and international securities markets and firms' need to standardize their securities offerings, large states with onerous securities standards like California could effectively impose their securities laws on corporations everywhere, resulting in significant spillover effects. Accordingly, despite the existence of a uniform choice-of-law rule, the states had not achieved effective horizontal coordination. These circumstances supported resolving the issue in favor of preemption.

The appropriateness of applying the coordination principle is reinforced in this case by Congress's incorporation of the coordination principle into SLUSA. That statute provided for a so-called "Delaware carve-out," discussed earlier,[195] which exempted certain types of suits from preemption "based upon the statutory or common law of the State in which the issuer is incorporated."[196] There is evidence that Congress was concerned about invading the important state corporate governance realm (particularly Delaware's), and it crafted the exception to track the types of cases to which Delaware itself had applied its law.[197]

The *Dabit* Court noted the relevance of the Delaware carve-out to its preemption analysis by referring to "tailored exceptions to SLUSA's pre-emptive command,"[198] which the Court said indicated that Congress was not acting "cavalierly" in preempting state law.[199] *Dabit*'s reference to this

193. *Dabit*, 547 U.S. at 88.

194. *See* 15 U.S.C. §§ 77p(a), 78bb(a).

195. *See supra* Section II.E.1.

196. 15 U.S.C. §§ 77p(d)(1), 78bb(f)(3)(A).

197. *See* Jennifer O'Hare, *Director Communications and the Uneasy Relationship Between the Fiduciary Duty of Disclosure and the Anti-Fraud Provisions of the Federal Securities Laws*, 70 U. CIN. L. REV. 475, 501–04 (2002).

198. *Dabit*, 547 U.S. at 87.

199. *Id.* This was a reference to *Bates v. Dow AgroSciences LLC*, 544 U.S. 431 (2005), in which the Court reasoned that "because the States are independent sovereigns in our federal system, we have long presumed that Congress does not cavalierly pre-empt state-law causes of action." *Id.* at 449 (quoting Medtronic, Inc. v. Lohr, 518 U.S. 470, 485 (1996)). *Bates* and *Lohr* both applied a general presumption against preemption of traditional areas of state law, a presumption that we have already critiqued, *see supra* Section III.C.

language suggests that Congress's consideration of horizontal coordination in a particular statute can support the Court's application of our approach in deciding whether to apply that statute to preempt state law. We suggest that courts apply the coordination approach as a policy matter even where Congress did not specifically indicate its intent to apply it in a particular case. Legislative intent may, however, provide an additional basis for emphasizing regulatory coordination.

Continued developments may bear on state horizontal coordination and therefore on the scope of federal preemption of state corporate and securities laws. There is evidence that cases governed by Delaware corporate law are currently being filed outside of Delaware,[200] and that cases challenging mergers under state securities law are being filed in multiple jurisdictions.[201] Delaware law does not and likely cannot compel cases to be brought in its courts, and SLUSA's "Delaware carve-out" preemption exemption does not depend on whether the cases are heard in Delaware despite legislative history indicating that Congress's respect for Delaware courts was a justification for the carve-out.

Congress, of course, has the last word on these issues. For example, Congress can, among other things, explicitly preempt state corporate governance rules despite state coordination on these matters, as it did to some extent in the Williams Act and in Dodd–Frank.[202] Although the states might all agree to abide by the internal affairs doctrine, Congress might disapprove of the laws that result from enabling the choice.[203] Under our approach, courts nevertheless should continue to presume against preemption in these cases, thereby effectively requiring Congress to make its preemption explicit when it legislates on state corporate law.[204]

Finally, the scope of preemption in these situations depends on the current level of state horizontal coordination and the costs and benefits of federal law, and so could implicate questions of institutional competence,

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200. *See* John Armour et al., *Is Delaware Losing Its Cases?* (Northwestern Law & Econ. Research Paper No. 10-03, 2010), *available at* http://ssrn.com/abstract=1578404.

201. Jennifer J. Johnson, *Securities Class Actions in State Court*, 80 U. CIN. L. REV. 349, 374 (2012).

202. *See* Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, § 951, 124 Stat. 1376, 1899 (2010) (requiring shareholder votes on executive compensation); *id.* § 952 (requiring independent compensation committees); *id.* § 953 (requiring executive compensation disclosures); *id.* § 954 (expanding "clawbacks" of executive compensation); *id.* § 971 (clarifying Securities and Exchange Commission authority to promulgate "proxy access" rule); *id.* § 972 (requiring disclosure of whether the same person holds both chief executive officer and chairman of the board positions). For a brief summary of these Dodd–Frank provisions, see Stephen M. Bainbridge, *The Corporate Governance Provisions of Dodd–Frank* (UCLA School of Law, Law-Econ Research Paper No. 10-14, 2010), *available at* http://ssrn.com/abstract=1698898.

203. *See* Mark J. Roe, *Delaware's Competition*, 117 HARV. L. REV. 588, 591–93 (2003).

204. Conversely, Congress could refuse to preempt state securities regulation despite the absence of state coordination in that area, as it did with the federal securities laws; or it could repeal or limit the Delaware carve-out because the carve-out is failing to funnel cases into Delaware courts.

discussed below. Put differently, the situation arguably supports empowering administrative agencies to determine the scope of preemption in light of these ongoing developments.[205]

2. Real Property

Courts routinely decide cases regarding the ownership and use of real property by reference to the law of the situs of the property[206] and, as mentioned earlier, the situs rule has historically carried great weight.[207] The situs-based subject matter jurisdiction limitation has been watered down to some extent,[208] and, as a matter of choice of law, the situs rule is sometimes relaxed in cases of divorce,[209] estate administration,[210] and secured loan contracts.[211] Nevertheless, the situs rule's near-universal appeal supports a narrow reading of federal statutes that could overlap with state property law.

To see how horizontal coordination around the situs rule can be relevant to preemption analysis, consider *Hayfield Northern Railroad Co. v. Chicago & North Western Transportation Co.*[212] *Hayfield* involved the Staggers Rail Act, which governs the procedures for obtaining a certificate of abandonment from the Interstate Commerce Commission ("ICC")—a prerequisite to abandoning a railroad.[213] Pursuant to the Act, the ICC sets prices at which shippers can buy or subsidize the railroad to prevent the abandonment.[214] In *Hayfield*, shippers brought post-abandonment proceedings in Minnesota state court seeking state condemnation of a portion of the abandoned rail line within Minnesota.[215] The railroad argued that the Staggers Act preempted the state condemnation proceedings, but the Supreme Court disagreed.[216] The Court's discussion focused on whether field preemption was present and, if not, whether the state condemnation proceeding would frustrate congressional objectives.[217]

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205. *See infra* Section IV.D.

206. SCOLES ET AL., *supra* note 76, at 1054–57.

207. *See supra* note 76.

208. For example, the nonsitus state now can indirectly but not directly affect title to property. Fall v. Eastin, 215 U.S. 1, 11–12 (1909).

209. For example, marital rights to property can be determined according to the law of the marital domicile at the time that the property was acquired. SCOLES ET AL., *supra* note 76, at 603–05.

210. For example, some state statutes direct the situs state to defer to a determination by the state of the decedent's domicile regarding the validity and construction of a will that passes land. *Id.* at 1168–69.

211. *See id.* at 1060.

212. 467 U.S. 622 (1984).

213. *Hayfield*, 467 U.S. 622.

214. *Id.* at 629–30.

215. *Id.* at 625–26.

216. *Id.*

217. *Id.*

Under our approach, the Court, after determining that there was no evidence of congressional intent regarding state condemnation proceedings, would have considered the degree of horizontal coordination regarding condemnation. Because it was clear where the track was located and states would defer to the situs state for condemnation determinations, the Court should have upheld the coexistence of state law. While the Staggers Act provides a useful mechanism for determining the fate of an interstate line, states should still be permitted to adjudicate condemnation of a local piece of the line. Should Minnesota put in place rules for condemnation that interfere with optimal business decisions, then it will suffer lower investment within the state.

Consider also *Louisiana Public Service Commission v. FCC*,[218] in which a five-justice majority determined that under the Communications Act of 1934, the states could regulate depreciation rates and methods of classes of property used by the telephone company only for intrastate telephone service—even if that meant having to identify the percentages of a company's interstate and intrastate service.[219] Here too horizontal coordination is effective if each state sets rates for intrastate property used to provide telephone services within the state. The majority concluded that it did not matter that state depreciation rates could affect the amount that customers paid and the quality of interstate services because the Act specifically preserved state authority over intrastate telephone service.[220] If the Act had not included that language, under our approach the Court would have asked whether, in fact, state rates had caused spillover effects that interfered with the interstate provision of telephone services. If there had been spillover effects, then vertical coordination would have called for the application of federal law to resolve the problem. Otherwise, the states would have been deemed to achieve horizontal coordination and would not have been denied jurisdiction over the intrastate portion of a company's business.

3. Contractual Choice-of-Law

Choice-of-law rules for contracts are nonuniform.[221] Some courts focus on the place of contracting,[222] some on the place of performance,[223] and some on the location of one of the parties.[224] Nevertheless, in many contract contexts, the states have achieved significant horizontal coordination by letting contracting parties contract for the applicable law. For example, the

218. 476 U.S. 355 (1986).

219. *La. Pub. Serv. Comm'n*, 476 U.S. 355.

220. *Id.* at 358–59.

221. For a general discussion of choice of law for contracts, see SCOLES ET AL., *supra* note 76, §§ 18.13–18.41.

222. *Id.* § 18.14.

223. *Id.*

224. *See, e.g.*, HIMC Inv. Co. v. Siciliano, 246 A.2d 502, 506 (N.J. Super. Ct. Law Div. 1968) (applying law of location of the borrower); Lilienthal v. Kaufman, 395 P.2d 543, 549 (Or. 1964) (applying law of the place of residence of the spendthrift defendant).

Uniform Commercial Code enforces the parties' choice of the law of any state that bears a reasonable relationship to the transaction.[225] For other contracts, virtually all states follow the Second Restatement, which allows parties to choose any law to govern matters that the parties could have resolved with specific contractual provisions (i.e., default rules).[226] The Second Restatement also lets parties choose their governing law even if a connected state views its legal rule to apply notwithstanding a contrary contractual provision (i.e., a mandatory rule). The choice-of-law clause is enforced for mandatory rules if (1) the chosen state has a "substantial relationship to the parties or the transaction" or there is another "reasonable basis for the parties' choice"; and (2) application of the law chosen would not contravene "a fundamental policy of a state [with] a materially greater interest than the chosen state in the determination of the particular issue."[227]

The Second Restatement places a heavy thumb on the scale in favor of enforcing choice-of-law clauses. For many types of contracts today, courts routinely and nearly uniformly enforce choice-of-law clauses.[228] In these types of cases, enforcement of choice-of-law clauses provides the formal coordination necessary to weigh against preemption.

States do not uniformly enforce choice-of-law clauses in some contract settings, however, including contracts containing noncompete clauses, franchise contracts, and consumer contracts.[229] States may invoke their "fundamental policy" concerns in favor of protecting local franchisees, consumers, or employees. In order to bolster enforcement of choice-of-law clauses, contract drafters may use choice-of-court clauses to direct disputes to courts that are inclined to enforce contractual choice. States' enforcement of choice-of-court clauses can restore any horizontal coordination that is compromised by their nonenforcement of choice-of-law clauses. However, enforcement of choice-of-court clauses is not fully effective for this purpose to the extent that courts scrutinize them for public policy concerns.[230]

Enforcement of arbitration clauses, like that of choice-of-court clauses, can bolster horizontal coordination. Arbitration association rules routinely

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225. U.C.C. § 1-301 (2008).

226. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 187(1) (1971) ("The law of the state chosen by the parties to govern their contractual rights and duties will be applied if the particular issue is one which the parties could have resolved by an explicit provision in their agreement directed to that issue.").

227. *Id.* § 187(2). The state with the materially greater interest is also the state whose law would be chosen by the court in the absence of the choice-of-law provision. *Id.*

228. For empirical evidence of enforcement of choice-of-law clauses, see O'HARA & RIBSTEIN, *supra* note 18, at 83–84 (examining cases decided before mid-2006), and Larry E. Ribstein, *From Efficiency to Politics in Contractual Choice of Law*, 37 GA. L. REV. 363 (2003) (examining 700 cases decided prior to 2003).

229. For a general discussion of court enforcement of choice-of-law clauses, see Erin Ann O'Hara, *Opting Out of Regulation: A Public Choice Analysis of Contractual Choice of Law*, 53 VAND. L. REV. 1551, 1558–69 (2000).

230. For a general discussion of enforcement of choice-of-court clauses, see SCOLES ET AL., *supra* note 76, at 857–939.

require arbitrators to apply the law chosen by the parties to resolve their disputes.[231] However, states have traditionally been hostile to arbitration because it removes matters from courts altogether. As discussed below, the FAA preempted hostile state law rules.[232] For contractual issues then, questions arise concerning the appropriate scope of federal preemption in the face of substantial but incomplete horizontal coordination. We return to the preemptive effect of the FAA below.

B. *Formal Noncoordination*

This Section discusses cases in which the states have clearly not achieved horizontal coordination. These situations suggest that in the absence of contrary congressional intent or some good reason to retain chaotic state laws, preemption is appropriate. In particular, we consider the two very different contexts of products liability law and arbitration law.

1. Products Liability

Horizontal coordination is severely lacking in state products liability law. Until the early twentieth century, products liability was treated as a branch of sales law[233] so that state sovereign authority was allocated according to a traditional place-of-contract choice-of-law rule.[234] As tort doctrines for products-related injuries developed, however, products liability choice-of-law rules began focusing on the place of injury.[235] Under modern approaches to choice of law for tort, courts focus on a number of factors, including the place of the sale of the product, the place of injury, the domicile of the plaintiff, and the location or place of design or manufacture by the defendant.[236] Thus, each of these states' laws potentially can determine the existence of a cause of action, available defenses, and damages, including the possibility and amount of punitive damages. Given national distribution chains and diverse choice-of-law approaches, these rules can leave manufacturers unable to avoid application of strict liability rules to their products. To make matters worse from a horizontal coordination standpoint, the advent of the modern class action has enabled plaintiffs to sue in

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231. *E.g.*, International Centre for Dispute Resolution Arbitration Rules art. 28(1), *available at* http://www.adr.org (follow "Rules & Procedures" hyperlink; then follow "Rules" hyperlink; then follow "International Dispute Resolution Procedures (Including Mediation and Arbitration Rules) - English" hyperlink) (last visited Jan. 3, 2013); JAMS Employment Arbitration Rules and Procedures, Rule 24(c), *available at* http://jamsadr.com/rules-employment-arbitration.

232. *See supra* note 101.

233. *See generally* TIM KAYE, PRODUCTS LIABILITY LAW: CASES, COMMENTARY AND CONUNDRA ch. 2 (2012).

234. *See* RESTATEMENT (FIRST) OF CONFLICT OF LAWS § 332 (1934).

235. *See id.* § 378.

236. *See* SCOLES ET AL., *supra* note 76, §§ 17.64–17.76 (discussing approaches to choice of law for products liability).

states likely to apply plaintiff-favoring or certification-favoring laws to all of the claims in their case. Thus, even long after the sale of a product, a court can pick a state's products liability law to determine the manufacturer's liability. Manufacturers must therefore comply with the most onerous standards to minimize their risk of liability.

Despite this lack of horizontal coordination, the executive branch of the federal government has been reluctant to assert preemptive authority over state tort law. This federal reluctance is indicated by President Obama's memorandum stating a general administrative policy against preemption of state law except after "full consideration of the legitimate prerogatives of the States and with a sufficient legal basis for preemption."[237] President Obama explained that preemption should be avoided, where possible, in order for the states to serve the "distinctive circumstances and values" of their citizens.[238] Quoting Justice Brandeis, the memorandum stated that "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."[239]

Note that President Obama's memorandum cautions against executive branch preemptive actions but nevertheless indicates that preemption would be appropriate where the states are not exercising their "legitimate prerogatives" and where there is a sufficient legal basis for preemption.[240] Our analysis provides such a basis: despite the potential value of Brandeis's "laboratory," jurisdictional competition is not always wealth increasing, and when state laws create significant regulatory spillovers, vertical coordination may be necessary to constrain the excesses of cumulative state sovereignty. Given the states' failure to achieve effective choice-of-law coordination, federal laws should trump overlapping state products liability laws, a result that the Supreme Court does not always reach.

To illustrate the point, consider three recent Supreme Court opinions involving federal laws that could preempt state products liability laws. In *Bruesewitz v. Wyeth LLC*, plaintiffs attempted to sue a vaccine manufacturer under Pennsylvania law when their daughter suffered a seizure disability after being vaccinated.[241] The Court held that the claim was preempted by the National Childhood Vaccine Injury Act of 1986.[242] This Act created a default compensation program to guarantee compensation to injured children while protecting the vaccine market, which had nearly collapsed because of an increase in vaccine-related tort suits.[243] The Court rejected

237. Memorandum for the Heads of Executive Departments and Agencies, 74 Fed. Reg. 24,693, 24,693 (May 22, 2009), *available at* http://www.gpo.gov/fdsys/pkg/FR-2009-05-22/pdf/E9-12250.pdf.

238. *Id.*

239. *Id.*

240. *Id.*

241. 131 S. Ct. 1068, 1074–75 (2011).

242. *Bruesewitz*, 131 S. Ct. at 1082.

243. *Id.* at 1073.

plaintiffs' argument that the Act preempted only claims for defects that were an unavoidable aspect of the specific vaccine.[244] Congress had determined that without national protection from state tort liability, drug companies would not manufacture critical vaccines.[245] The U.S. government argued in favor of preemption because "[t]he federal government has a unique policy governing childhood vaccines, and that policy differs from those governing most pharmaceuticals and medical devices."[246] Our regulatory coordination approach would support preemption in this situation even absent a showing of the federal government's "unique policy." The regulatory coordination problems inherent in state tort liability for vaccine-related illness support reading the Act broadly to prevent tort claims generally and not just those inherent in a particular vaccine.

In addition, compare the Court's opinion in *Geier*, discussed above,[247] with *Williamson v. Mazda Motor of America, Inc.*[248] Both cases considered whether federal products regulations preempt state tort claims and in both cases, the majority and dissent disagreed over how the case should be decided. In *Geier*, the majority concluded that federal airbag regulations preempt state tort actions for negligent and defective automobile design.[249] In *Williamson*, the Court concluded that the same motor vehicle safety standard involved in *Geier*, which also gave the manufacturer a choice between installing either a lap belt or a lap-and-shoulders belt on inner-rear seats, did not preempt a California tort suit.[250] The Court distinguished *Geier* on the ground that the manufacturer-choice portion of the standard was not a significant regulatory objective of the federal government.[251]

Our approach would support preemption in both cases and would produce a different result in *Williamson*. Even if all states adhered to the traditional place-of-injury choice-of-law rule, the inherent mobility of automobiles increases the number of potential state laws that could apply to manufacturers when consumers are injured, thus enhancing the value of federal regulatory coordination. Making matters worse, modern approaches to choice of law for torts often emphasize other connecting factors, thereby undermining formal as well as functional coordination. Deferring to state law could force automobile manufacturers to protect themselves from state tort liability by placing the most protective device in all of their vehicles. This could thwart the federal policy determination favoring gradual implementation and state experimentation by giving stricter state standards effect beyond those states' borders. Thus, in *Williamson*, even without evidence

244. *Id.* at 1075–78.

245. *Id.* at 1084–85.

246. Brief for the United States as Amicus Curiae Supporting Respondents at 19, *Bruesewitz*, 131 S. Ct. 1068 (No. 09-152), 2010 WL 3017753.

247. *See supra* note 52 and accompanying text.

248. 131 S. Ct. 1131 (2011).

249. Geier v. Am. Honda Motor Co., 529 U.S. 861, 881–82 (2000).

250. *Williamson*, 131 S. Ct. at 1139–40.

251. *Id.* at 1137.

that Congress intended to preempt state regulation, the regulatory coordination analysis would fill the gap in legislative intent by supporting preemption.

2. Arbitration

Arbitration is another area, like products liability, in which a strong state policy supporting application of local law should yield to federal law because of the need for regulatory coordination. As discussed earlier, predispute arbitration clauses, like choice-of-court clauses, enable parties to override some states' opposition to contractual choice of law.[252] In a world where commercial transactions often cross state and national borders, arbitration is an important means by which parties restore some certainty regarding the rules that apply to their conduct and to their disputes.

The key point about arbitration for present purposes is that the states have been unable on their own to achieve horizontal coordination. Federal arbitration law and policy resulted from significant international trade pressures. Responding to competitive pressure from England's adoption of arbitration laws in 1886, New York became the first U.S. state to enforce arbitration clauses in 1920,[253] followed by New Jersey in 1923.[254] However, other states, presumably with a different local interest-group mix, refused to enforce arbitration clauses and awards.[255] Isolated state endorsements of arbitration could not protect parties from suits in courts hostile to arbitration.[256]

Congress enacted the Federal Arbitration Act in 1925 in response to lobbying by members of the New York Bar Association and the U.S. Chamber of Commerce.[257] More recently, the United States signed the New York Convention, which obligates member countries to enforce arbitration clauses and arbitrator awards except in certain circumstances.[258] Coupled with choice-of-law clauses, federal enforcement of arbitration clauses now has created vertical coordination for a wide range of interstate and international activities. The Supreme Court has applied the FAA's pro-arbitration policy to virtually all contractual disputes, including those that involve public law

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252. *See supra* note 231 and accompanying text. For a discussion of other advantages of arbitration, see O'HARA & RIBSTEIN, *supra* note 18, ch. 6.

253. New York Arbitration Act, ch. 275, 2 N.Y. Laws 803 (1920).

254. *See* IAN R. MACNEIL, AMERICAN ARBITRATION LAW 42–43 (1992); *see also* Bruce L. Benson, *An Exploration of the Impact of Modern Arbitration Statutes on the Development of Arbitration in the United States*, 11 J.L. ECON. & ORG. 479, 481 (1995) (referring to New York and New Jersey arbitration clause enforcement).

255. For a discussion of predominant court hostility to arbitration prior to the FAA, see THOMAS E. CARBONNEAU, THE LAW AND PRACTICE OF ARBITRATION 123–25 (4th ed. 2012).

256. *Id.*

257. Benson, *supra* note 254, at 495.

258. New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, *done* June 10, 1958, 21 U.S.T. 2517 (entered into force with respect to the United States Dec. 29, 1970).

claims.[259] Even arbitration agreements in employment and consumer contracts are enforceable,[260] despite strong countervailing state and federal policies and weaker international trade pressures in that context. Indeed, much of the rest of the developed world does not compel arbitration of employment and consumer contract disputes.[261] Although the Court arguably could interpret the FAA to permit states to regulate arbitration of employment and consumer disputes, it has so far held to the contrary.[262]

The preemption debate regarding arbitration centers on states' ability to police unfair arbitration clauses. Section 2 of the FAA contains a savings clause that permits states to scrutinize arbitration clauses on such "grounds as exist at law or in equity for the revocation of any contract."[263] Thus, although states may not enact general anti-arbitration policies, they may apply general contract doctrines such as fraud, duress, and unconscionability to scrutinize individual agreements.[264] Some state and federal courts have used these doctrines to strike arbitration clauses that had the effect of preventing a claim

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259. *See, e.g.*, Shearson/Am. Express Inc. v. McMahon, 482 U.S. 220, 242 (1987) (claims under the Racketeer Influenced and Corrupt Organizations Act arbitrable); Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 629, 631 (1985) (antitrust claims arbitrable); Scherk v. Alberto-Culver Co., 417 U.S. 506, 519–20 (1974) (securities claims arbitrable).

260. *See, e.g.*, AT&T Mobility LLC v. Concepcion, 131 S. Ct. 1740, 1753 (2011) (striking down a California class-waiver rule, designed to aid consumers, as applied to arbitration on grounds that it conflicted with the policy underlying the FAA); Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 27 (1991) (claims under the Age Discrimination in Employment Act arbitrable).

261. 1 GARY B. BORN, INTERNATIONAL COMMERCIAL ARBITRATION 817–29 (2009).

262. Section 1 of the FAA contains language that could be interpreted as prohibiting application of the Act to employment contracts. CARBONNEAU, *supra* note 255, at 55–61. In addition, § 1 defines "commerce" in a way that could be read as permitting courts to exclude consumer contracts. *See* Jean R. Sternlight, *Panacea or Corporate Tool?: Debunking the Supreme Court's Preference for Binding Arbitration*, 74 WASH. U. L.Q. 637, 647–49 (1996) (arguing that the FAA should be interpreted to apply to merchants but not consumers).

One notable exception to the universal enforcement of arbitration clauses is insurance contracts because some courts have interpreted federal law delegating insurance regulation to the states as taking precedence over the FAA. *See* CARBONNEAU, *supra* note 255, at 339–43 (discussing cases). Federal circuit courts, however, are split on this question, *id.* at 340, and some courts have ruled that the FAA provisions that implement U.S. obligations under the New York Convention are not preempted by the federal insurance law, which reverse-preempts only an "Act of Congress" that interferes with state law. *See, e.g.*, Safety Nat'l Cas. Corp. v. Certain Underwriters at Lloyd's, London, 587 F.3d 714, 723–24 (5th Cir. 2009) (en banc).

263. 9 U.S.C. § 2 (2006).

264. After *Concepcion*, 131 S. Ct. 1740, some believed that the unconscionability doctrine was no longer a permissible means for state courts to scrutinize arbitration clauses. *See, e.g.*, Thomas J. Stipanowich, *The Third Arbitration Trilogy:* Stolt-Nielsen, Rent-A-Center, Concepcion *and the Future of American Arbitration*, 22 AM. REV. INT'L ARB. 323, 380 (2011). However, in *Marmet Health Care Center, Inc. v. Brown*, 132 S. Ct. 1201 (2012), the Court in a per curiam opinion suggested that states could use the unconscionability doctrine so long as it was not employed as a blanket public policy prohibition on the use of arbitration clauses for given contracts.

altogether,[265] or where the terms of the clause have appeared fundamentally unfair to a party lacking bargaining power.[266] These decisions prompted the largest U.S. arbitration associations to adopt due process protocols and other procedural rules designed to make it easier for consumers and employees to bring their claims to arbitration.[267]

Arbitration has been particularly contentious in the context of class arbitration. Class proceedings enable individuals to aggregate their small-value claims in order to attract high-quality legal representation. California courts thought it essential that consumers have access to class proceedings and, in cases involving adhesion contracts, have effectively made it per se unconscionable for a company to prohibit class proceedings for small-value claims in court or in arbitration.[268] Although unconscionability is a contract doctrine that seems to fall under section 2 of the FAA, California's use of the unconscionability doctrine had broad implications for companies because it forced them to either accept class arbitration, a particularly undesirable result, or entirely eliminate resort to arbitration for customer disputes. Thus, class-action waivers raise an issue where the FAA's preemptive intent is unclear, and therefore where our regulatory coordination approach applies.

The issue of preemption of class-action waivers in arbitration came to a head in *AT&T Mobility LLC v. Concepcion*, in which the Supreme Court ruled that the FAA preempted California's per se unconsionability rule "as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress."[269] The case involved a consumer class action alleging that AT&T had impermissibly charged its customers sales tax on the

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265. *See* O'HARA & RIBSTEIN, *supra* note 18, at 141–43 & nn.20–27 (discussing judicial willingness to strike arbitration clauses as unconscionable if the contract works to make arbitral relief prohibitively expensive for the nondrafting party).

266. *See, e.g.*, Hooters of Am., Inc. v. Phillips, 173 F.3d 933, 938–40 (4th Cir. 1999) (striking arbitration clause under state contract law principles where employer controlled list of acceptable arbitrators and employee, but not employer, was required to share vital information about her claims and witnesses); Armendariz v. Found. Health Psychcare Servs., Inc., 6 P.3d 669, 690–92 (Cal. 2000) (striking arbitration clause that required employee, but not employer, to arbitrate her claims).

267. *See, e.g.*, AMERICAN ARBITRATION ASSOCIATION, *Consumer Due Process Protocol*, *available at* http://www.adr.org (follow "Rules & Procedure" hyperlink; then follow "Codes & Protocols" hyperlink; then follow "Consumer Due Process Protocol" hyperlink) (last visited Jan. 3, 2013); *JAMS Policy on Consumer Arbitrations Pursuant to Pre-Dispute Clauses Minimum Standards of Procedural Fairness*, JAMS (July 15, 2009), http://www.jamsadr.com/rules-consumer-minimum-standards/.

268. Discover Bank v. Super. Ct., 113 P.3d 1100, 1110 (Cal. 2005), *abrogated by Concepcion*, 131 S. Ct. 1740. Technically, the applicability of the *Discover Bank* rule also requires that the plaintiffs allege a deliberate scheme to defraud consumers. *Id.* However, given that nothing stops plaintiffs from preserving their right to class proceedings with such allegations, that requirement seems nonrestrictive, as indicated by the majority opinion in *Concepcion*, 131 S. Ct. at 1750.

269. *Concepcion*, 131 S. Ct. at 1753 (internal quotation marks omitted). Actually, Justice Thomas, one of the justices to join the five-justice majority, wrote a separate concurring opinion reaffirming his prior disagreement with the Court's use of obstacle preemption. *Id.* at 1754 (Thomas, J., concurring). But he nevertheless joined the majority opinion. *Id.*

value of phones that the company provided to the customers without charge.[270] The Concepcions' claim was worth $30.22.[271] The customer service agreement required the parties to arbitrate all of their disputes.[272] The agreement required AT&T to (1) pay all arbitration costs for nonfrivolous claims; (2) arbitrate in the county where the customer is billed; (3) permit the customer to choose how the arbitration would proceed; (4) enable the customer to instead sue in small-claims court; and (5) provide a prevailing plaintiff with minimum relief and double attorneys' fees.[273] In short, the contract arguably made individual arbitration for even small claims economically feasible.[274]

A bare majority reasoned that the California rule was preempted because the FAA reflects a strong congressional policy in favor of enforcing arbitration clauses according to the parties' preferences and treating arbitration clauses on par with other contract terms. Four dissenters saw no conflict between congressional objectives and the California rule and concluded that the California rule was not directed at arbitration because it struck down bans on both class arbitration and class litigation using the same standard.[275] However, the majority concluded that the California rule's facial application to nonarbitration proceedings did not place it within the savings clause because it had the effect of significantly interfering with two of the primary benefits of arbitration: streamlined[276] and informal[277] proceedings. Although parties are free to contract for class proceedings if they so choose, the majority thought that most parties would not prefer class arbitration.[278] In particular, "class arbitration greatly increases risks to defendants" because "[t]he absence of multilayered review makes it more likely that errors will go uncorrected."[279] While both the majority and dissenting opinions focused on congressional intent,[280] their disagreement on this score helps to bolster

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270. *Id.* at 1744 (majority opinion).

271. *Id.*

272. *Id.*

273. *Id.*

274. *See* Suzanna Sherry, *Hogs Get Slaughtered at the Supreme Court*, 2011 S. CT. REV. 1, 13–14.

275. *Concepcion*, 131 S. Ct. at 1757 (Breyer, J., dissenting).

276. *Id.* at 1748 (majority opinion).

277. *Id.* at 1751.

278. *Id.* at 1752.

279. *Id.*

280. *Id.* at 1744–53; *id.* at 1756–62 (Thomas, J., concurring). Justice Thomas reasoned that California's rule was expressly preempted, and he relied on a textual argument that "the FAA requires that an agreement to arbitrate be enforced unless a party successfully challenges the formation of the arbitration agreement, such as by proving fraud or duress." *Id.* at 1753. Section 4 of the FAA compels a court to enforce an arbitration agreement "upon being satisfied that the making of the agreement for arbitration or the failure to comply therewith is not in issue." *Id.* at 1754. Section 2 defines the grounds preserved for nonenforcement relating to "the making of the agreement." *Id.* at 1755. According to Justice Thomas, the California rule was preempted because it "does not relate to defects in the making of an agreement." *Id.* at 1753. Justice Thomas joined the majority opinion because he noted that no party had briefed

the conclusion that in fact Congress had formed no intent regarding whether its savings clause would cover such state use of the unconscionability doctrine. Given (1) the lack of evidence of legislative intent; (2) the fact that the justices split their votes along ideological lines; and (3) the language quoted above, it is hard to escape the conclusion that *Concepcion* was ultimately decided on the basis of the justices' views on freedom of contract. Our regulatory coordination approach would focus instead on the extent to which a state's blanket prohibition on class waivers would create regulatory spillovers.

The *Concepcion* dissenters supported their conclusion with an appeal to federalism, but it was the wrong argument:

> By using the words "save upon such grounds as exist at law or in equity for the revocation of any contract," . . . Congress reiterated a basic federal idea that has long informed the nature of this Nation's laws . . . . Here, recognition of that federalist ideal, embodied in specific language in this particular statute, should lead us to uphold California's law, not to strike it down. We do not honor federalist principles in their breach.[281]

In our view, the "basic federal idea" and "federalist principles" that should guide preemption must include a balancing of the desirability of state experimentation with rules that sensibly allocate state sovereign authority. Federalist principles that enable one state to change the governing legal rules across the entire country will not promote a healthy federalism. As noted in a Tennessee court case, California was likely the only state to ban enforcement of all class waivers in arbitration clauses in consumer contracts.[282] Plaintiffs' attorneys seeking to avoid the class waiver could end-run the law of the other forty-nine states by filing a nationwide class action in

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the issue. *Id.* at 1754. However, this argument was made briefly in an amicus brief joined by one of us. See Brief Amici Curiae of Distinguished Law Professors in Support of Petitioner at 31 n.7, *Concepcion*, 131 S. Ct. 1740 (No. 09-893).

281. *Concepcion*, 131 S. Ct. at 1762 (Breyer, J., dissenting).

282. 224 S.W.3d 698, 714 (Tenn. Ct. App. 2006) ("[W]ith the exception of courts sitting in California, the vast majority of state and federal courts that have considered the question have rejected the argument that class action and class arbitration waiver clauses are unconscionable per se."). The class waiver rule, established in *Discover Bank*, provided as follows:

> [W]hen the waiver is found in a consumer contract of adhesion in a setting in which disputes between the contracting parties predictably involve small amounts of damages, and when it is alleged that the party with the superior bargaining power has carried out a scheme to deliberately cheat large numbers of consumers out of individually small sums of money, then . . . the waiver becomes in practice the exemption of the party "from responsibility for [its] own fraud, or willful injury to the person or property of another." Under these circumstances, such waivers are unconscionable under California law and should not be enforced.

Concepcion, 131 S. Ct. at 1746 (alteration in original) (quoting Discover Bank v. Super. Ct., 113 P.3d 1100, 1110 (Cal. 2005)). The *Concepcion* majority concluded that despite its limiting language, the rule worked functionally to ban class waivers in all consumer contracts. *Id.* at 1749–50.

California state or federal courts.[283] Because California's rule could apply to contracts entered into in all fifty states by plaintiffs located in all fifty states, California frustrated other states' legal experiments. This is regulatory hegemony rather than coordination.

Our theory does not take a normative position on either the desirability of such plaintiff strategies or the validity of California's concern with companies using arbitration clauses to insulate themselves from class proceedings. Strong arguments favoring the California approach can be made. Healthy federalism enables testing of alternative rules, including those favoring enforcement of arbitration clauses, across the states. California's mandatory class arbitration is inconsistent with such experimentation because it applies too broadly. If forcing consumers to proceed as individuals in fact undermines the vital deterrent function of class actions, and individual state law experimentation cannot work due to the nature of class litigation, then the issue is most appropriately resolved with a federal rule. Put differently, in the context of class litigation, the balance between federal government coordination and state law experimentation weighs in favor of federal government action.

Congress is certainly capable of stepping in to resolve this difficult question. For example, Congress has been considering an "Arbitration Fairness Act" which would prohibit enforcement of predispute arbitration clauses in employment and consumer contracts, as well as contracts that implicate a civil rights statute.[284] Even without this statute, a court might hold that authorizing arbitration in some situations conflicts with overriding national policies reflected in other statutes.[285] Our point here is not to defend any particular approach to resolving the substantive policy issue in *Concepcion*, but rather to illustrate the strengths of our regulatory coordination analysis relative to an exclusive focus on legislative intent.

C. *Functional Noncoordination*

Even in situations where choice-of-law rules allocate state sovereign authority reasonably as a *formal* matter, there might be no *functional* coordination because of how the formal rules work in certain types of cases. Typically, the functional coordination problem occurs where a formal choice-of-law rule works to sensibly allocate sovereign authority in some but not all cases; the rule as applied to a subset of matters creates a situation that causes costly spillovers. This Section provides two examples of formal rules that work for general types of cases but fail to appropriately handle

283. The trial court decision in *Concepcion* was issued by a federal district court in California that applied the state law rule on the ground that it was exercising diversity jurisdiction over the class action. *Concepcion* 131 S. Ct. at 1746.

284. Arbitration Fairness Act of 2011, S. 987, 112th Cong. (2011); Arbitration Fairness Act of 2011, H.R. 1873, 112th Cong. (2011).

285. Unfortunately, the Court appears to have narrowed this possibility recently in *Compucredit Corp. v. Greenwood*, 132 S. Ct. 665 (2012), in which it suggested that the FAA mandates are only inapplicable where Congress explicitly makes that determination.

some specific problems: state environmental laws and state products regulations.

1. Environmental Law

Because environmental hazards and harms often run with property, the situs rule can provide formal coordination of state sovereign authority over such problems. Formal coordination does not, however, obviate the need for federal coordination in some contexts. Some environmental harms resemble torts, where state choice-of-law rules have failed to achieve regulatory coordination. Also, even where formal coordination exists through the situs rule, environmental harms that extend beyond the situs can create spillover problems. In order to demonstrate the role of functional coordination, this Section begins by discussing the application of formal horizontal coordination to environmental law.

After more than forty years of federal environmental regulation by Congress and executive agencies, environmental law might appropriately fall into the field preemption category. However, a horizontal coordination approach counsels a different result. Many environmental effects such as solid waste, smog, and most water pollution lie within state lines and may be subject to state regulation. Moreover, much state regulation of environmental harms is through property or nuisance law, areas where the law of the "situs" state governs.[286] Applying state laws in these situations can provide geographic variation and experimentation[287] while effectively containing each state's sovereign authority. Moreover, where land use is subject to voluntary arrangement and does not inflict harm on third parties, a contractual choice-of-law approach may provide sufficient horizontal choice-of-law coordination to promote a healthy federalism.[288] Preemption, therefore, may not be appropriate under our approach.

Consider, for example, *Engine Manufacturers Association v. South Coast Air Quality Management District*.[289] Section 209 of the Federal Clean Air Act prohibits the adoption or attempted enforcement of any state or local "standard relating to the control of emissions from new motor vehicles or new motor vehicle engines."[290] Congress may have federalized emissions standards out of concern that more restrictive regulations in one or a few states could end up governing the production and sale of motor vehicles across the country. Congress may also have been concerned that, because automobiles are inherently mobile, less restrictive regulations in one or a

286. *See supra* text accompanying note 76.

287. Jonathan H. Adler, *Jurisdictional Mismatch in Environmental Federalism*, 14 N.Y.U. ENVTL. L.J. 130, 137 (2005).

288. *See* Larry E. Ribstein, *The Market for Conservation Law* 14–20 (Univ. Ill. Law & Econ. Research Paper No. LE10-009, 2010), *available at* http://ssrn.com/abstract=1609793 (proposing to let property owners enter into conservation easements under the laws of states other than where their property is located).

289. 541 U.S. 246 (2004).

290. 42 U.S.C. § 7543(a) (2006).

few states could end up causing unwanted pollution in states with higher emissions standards.

In *Engine Manufacturers*, the Los Angeles–area air quality management district promulgated air quality rules under which local fleet operators—including operators of street sweepers, trucks, waste collection vehicles, taxicabs, and so forth—could buy or lease only vehicles that met stringent emissions standards.[291] The Court struck down the rules as directly violating § 209 and remanded the case for consideration of several issues, including whether the internal purchasing decisions by state and local governments could withstand preemption.[292] The remand arguably reflected a judgment that § 209 would not impose significant spillovers on other states because government vehicle purchases are unlikely to affect the national market and therefore do not require federal regulation.

Some environmental hazards, however, do cross state lines and therefore might not be adequately handled by choice-of-law rules that achieve formal coordination for other areas of environmental law. These hazards include water pollution affecting interstate watersheds and interstate industrial and other air pollution. Thus, some states' lax pollution laws can reduce the ability of other states to address their pollution problems. Conversely, overly strict pollution rules can sometimes impose nationwide costs on firms, as mentioned above in the context of automobile manufacturers attempting to comply with state-by-state emissions standards. In contexts where environmental hazards cross state lines, our approach supports federal preemption of state laws as a remedy for state failures to horizontally coordinate.

International Paper Co. v. Ouellette[293] nicely illustrates this reasoning. The Clean Water Act prohibits the discharge of effluents into the navigable waters of the United States without a federal government permit. Although the Environmental Protection Agency has authority to effectively regulate water pollution through the permit scheme,[294] a savings clause in the Act provides that "[n]othing in this section shall restrict any right which any person . . . may have under any statute or common law to seek enforcement of any effluent standard or limitation or to seek any other relief."[295] Other Clean Water Act provisions and federal regulations empower states in which pollution sources are located to participate in permitting decisions[296] and to impose pollution standards more stringent than those of the federal government.[297] In *Ouellette,* Vermont landowners brought a Vermont common law nuisance action in Vermont state court against a pulp and paper mill located on a lake in New York.[298] Pollutants discharged by the mill had apparently

291. *Engine Mfrs.*, 541 U.S. at 249–51.

292. *See id.* at 255, 258–59.

293. 479 U.S. 481 (1987).

294. 33 U.S.C. §§ 1252, 1342 (2006).

295. 33 U.S.C. § 1365(e).

296. *Ouellette*, 479 U.S. at 490.

297. *Id.* at 489–90.

298. *Id.* at 484.

damaged Vermont land situated along the same lake.[299] Despite the relatively broad language of the savings clause, the Supreme Court interpreted the Clean Water Act to permit relief only according to the laws of the state in which the pollution source was located.[300] Plaintiffs thus could sue under New York but not Vermont nuisance law.

Importantly for our purposes, and unique for preemption cases, the majority actually used choice-of-law reasoning to justify its conclusion:

> Application of an affected State's law to an out-of-state source also would undermine the important goals of efficiency and predictability in the permit system. The history of the 1972 amendments shows that Congress intended to establish "clear and identifiable" discharge standards .... [U]nder the reading of the saving clause proposed by respondents, a source would be subject to a variety of common-law rules established by the different States along the interstate waterways. These nuisance standards often are "vague" and "indeterminate." The application of numerous States' laws would only exacerbate the vagueness and resulting uncertainty....
>
> For a number of different states to have independent and plenary regulatory authority over a single discharge would lead to chaotic confrontation between sovereign states. Dischargers would be forced to meet not only the statutory limitations of all states potentially affected by their discharges but also the common law standards developed through case law of those states. It would be virtually impossible to predict the standard for a lawful discharge into an interstate body of water. Any permit issued under the Act would be rendered meaningless.[301]

Justice Brennan dissented and, in an opinion signed by three justices, also invoked state choice-of-law reasoning:

> The Act provides no support for deviation from well-settled conflict-of-law principles. Under conflict-of-law rules, the affected State's nuisance law may be applied when the purpose of the tort law is to ensure compensation of tort victims. "It is beyond dispute" that affected States have "a significant interest in redressing injuries that actually occur within the State."[302]

Justice Brennan's reasoning is problematic in two respects. First, as noted earlier,[303] the traditional place-of-injury rule for torts has been displaced in most states with multifactored standards that create significant differences as well as significant uncertainty regarding the governing laws. Second, even if states had continued to adhere to a place-of-injury rule, formal allocation of sovereign authority regarding many traditional torts and nuisances has failed to achieve functional coordination in the regulation of interstate

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299. *Id.*

300. *Id.* at 493–94.

301. *Id.* at 496–97 (internal quotation marks and citations omitted).

302. *Id.* at 502 (Brennan, J., dissenting) (footnote omitted) (quoting Keeton v. Hustler Magazine, Inc., 465 U.S. 770, 776 (1984)).

303. *See supra* Section III.C.

pollution—a context in which multiple legal standards could apply to the same conduct. A source-state rule could lead to underregulation of pollution in a world where pollution is regulated exclusively by the states. Some states might be tempted to relax their pollution standards in order to attract firms, jobs, and tax bases, especially if the environmental harms could largely be exported into other states.[304]

The Clean Water Act does permit some state variation, however. The Act preserves the rights of states to experiment with tort laws and otherwise to provide greater protection of the environment while limiting the number of state laws to which a source can be exposed. If injured states seek greater protection from pollution sources located in other states, they can appeal to Congress. This structure, as interpreted by the Supreme Court, arguably accommodates federal environmental goals while promoting a healthy federalism.

2. Products Regulation

Our earlier discussion of the possible distinction between California's avocado and flour weight regulations suggests the potential difficulty of determining whether state products regulations should be subject to preemption by federal law that also regulates product sales.[305] Products regulation differs from products liability in that state choice-of-law rules for products regulations often allocate sovereign authority much more cleanly than do state choice-of-law rules for products liability. With products regulation, the state most often applies its regulations to sales that occur within the state. These choice-of-law rules provide sensible formal allocation of sovereign authority, but they might not ensure functional coordination where sellers cannot tailor their products to fit the regulation of particular states. This may justify federal preemption despite the presence of formal coordination.

Whether sellers can effectively tailor their products to comply with varying state regulations may involve complicated factual inquiries requiring expertise in the particular product market. For example, in our earlier analysis we suggested that interstate distribution of avocados might have differed significantly from the distribution of flour. That analysis may not, however, be factually correct. Also, as product markets and their distribution chains develop over time, the extent to which sellers can tailor their products to conform to differing state laws can change. This is particularly true for fast-moving markets like electronic commerce.[306] Because functional

304. *See* Richard B. Stewart, *Pyramids of Sacrifice? Problems of Federalism in Mandating State Implementation of National Environmental Policy*, 86 YALE L.J. 1196, 1211–12, 1215–16 (1977). Others question the plausibility of such claims. *See* Richard L. Revesz, *Rehabilitating Interstate Competition: Rethinking the "Race-to-the-Bottom" Rationale for Federal Environmental Regulation*, 67 N.Y.U. L. REV. 1210 (1992).

305. *See supra* notes 46–51 and accompanying text.

306. *See* Larry E. Ribstein & Bruce H. Kobayashi, *State Regulation of Electronic Commerce*, 51 EMORY L.J. 1, 52–55 (2002) (discussing relevance of geographic identifiers to analyzing need for federal regulation of electronic commerce).

coordination for a particular product market requires both fact-specific and dynamic determinations, these preemption determinations might appropriately be delegated to administrative agencies.[307] We turn now to the question of institutional competence for preemption.

D. *Agency Preemption*

Our approach works well in the hands of judges in cases where the degree of state horizontal coordination, both formally and functionally, is static over time and the factual determinations relevant to preemption are relatively straightforward. Where state coordination is evolving or otherwise likely to change over time, or where courts find it difficult to determine whether the relevant markets are prone to regulatory spillovers, preemption determinations become more difficult for courts and might be better made by administrative agencies. Although this difficulty surely exists in other circumstances, here we focus on the example of consumer credit, where both the Supreme Court and Congress have weighed in on the extent to which preemption determinations made by the Office of the Comptroller of the Currency ("OCC") deserve respect.

Prior to the Supreme Court's involvement in 1978, consumer credit and loans were primarily regulated by state laws. Even national banks could charge no more than the interest rate allowed by the state in which the bank was "located"[308] or any rate above the maximum allowed for state regulated banks.[309] State usury statutes varied, with some states setting fixed rates and others setting maximum rates that fluctuated with inflation.[310] State choice-of-law rules also varied. Although most applied usury laws based on the borrower's residence,[311] there is evidence that some applied the law of the place of contract or of the bank's home state, while others applied local law.[312]

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307. *Cf.* Michael Asimow, *The Scope of Judicial Review of Decisions of California Administrative Agencies*, 42 UCLA L. REV. 1157, 1195–96 (1995) (noting that agencies have comparative advantage in utilizing specialized, technical, and contextual knowledge); David S. Rubenstein, *"Relative Checks": Towards Optimal Control of Administrative Power*, 51 WM. & MARY L. REV. 2169, 2184 (2010) (noting that agencies are relatively more flexible in responding to changing conditions).

308. 12 U.S.C. § 85 (2006).

309. *See* Tiffany v. Nat'l Bank of Mo., 85 U.S. (18 Wall.) 409 (1873) (interpreting the National Bank Act to provide that a general rate ceiling, not a lower one for state banks, controls).

310. For a discussion of state usury legislation during the 1970s and 1980s, see Steven W. Bender, *Rate Regulation at the Crossroads of Usury and Unconscionability: The Case for Regulating Abusive Commercial and Consumer Interest Rates Under the Unconscionability Standard*, 31 HOUS. L. REV. 721, 732–33 (1994).

311. Mark Furletti, Comment, *The Debate over the National Bank Act and the Preemption of State Efforts to Regulate Credit Cards*, 77 TEMP. L. REV. 425, 430 (2004).

312. *See* SCOLES ET AL., *supra* note 158, at 905–06 (discussing default principles for choice of law for loan agreements and citing cases from the 1970s).

Whether or not states were evolving toward an agreed allocation of their sovereign authority is somewhat unclear, however, because starting in 1978, the Supreme Court interpreted the National Bank Act to impose a federal choice-of-law rule for permissible consumer credit interest rates charged by national banks.[313] Under this rule, national banks could charge any interest rate permitted by the state in which the bank was chartered, regardless of the location of the borrower, subject matter of the loan, or other potential connections.[314] The same rule has been extended to fees associated with credit cards.[315] The Supreme Court has also held that bank subsidiaries can charge any interest rates and fees permitted in the state in which the parent is chartered.[316]

The federally imposed choice-of-law rules eliminate any problems associated with formal choice-of-law coordination. The clear charter-state rules help banks identify the laws to which their loans will be subject without worrying about whether courts will scrutinize their agreements ex post according to the law of another state. Moreover, the federal choice-of-law rules enable credit card companies and other lenders to effectively choose the law that will govern their agreements, thus enabling firms to choose the laws that best fit their needs as well as providing forces for beneficial jurisdictional competition.

Unlike some of the other areas where we have identified clear choice-of-law rules, however, the consumer credit choice-of-law rules are not the result of states voluntarily coalescing toward a single approach to allocating sovereign authority. While federally imposed choice-of-law rules can provide some of the same benefits, horizontal coordination's structural benefits may not exist unless the states agree to the rules. In response to this federally imposed choice-of-law rule, states like Delaware and South Dakota repealed their usury laws and do not regulate the fees charged in consumer credit contracts.[317] Naturally, credit card companies relocated to these states. Other states have been forced to relax their consumer credit regulations in order to prevent further exodus by lenders.[318]

In short, while formal choice-of-law coordination exists for consumer credit law, the fact that it has been federally imposed rather than state-led has enhanced the likelihood of the rule generating functional coordination problems for the states. Delaware and South Dakota may have triggered a race to the bottom that has the effect of imposing regulatory spillovers in

313. Marquette Nat'l Bank of Minneapolis v. First of Omaha Serv. Corp., 439 U.S. 299, 308 (1978).

314. *Id.* at 313.

315. Smiley v. Citibank (S.D.), N.A., 517 U.S. 735, 737, 744–45 (1996).

316. *See* Watters v. Wachovia Bank, N.A., 550 U.S. 1, 17 (2007).

317. John P. Seidenberg, et al., *States Create Friendly Climate for Card Issuers by Repealing Usury Laws (South Dakota, Nevada, Delaware, and Arizona)*, CARD NEWS, June 3, 1991, *available at* http://business.highbeam.com/4008/article-1G1-10980957/states-create-friendly-climate-card-issuers-repealing.

318. O'HARA & RIBSTEIN, *supra* note 18, at 48.

other states. If states could decide whether to apply these other states' rules, then a more healthy experimentation with consumer credit protections might have been possible. Of course, it is also possible that the federally imposed rules have facilitated a vibrant national market in consumer credit that would not have been feasible had growth of this market depended on the slow evolution of state choice-of-law policies. But given the way in which the federal choice-of-law rule was imposed on the states, we cannot tell which course better promotes a healthy federalism.

The Supreme Court has construed the federally imposed rule broadly. In *Marquette National Bank of Minneapolis v. First of Omaha Service Corp.*, the Court reasoned that Congress, in enacting the National Bank Act, was aware of the potentially interstate nature of the banking business and "intended to facilitate" this national business.[319] The Court therefore rejected petitioners' argument that the " 'exportation' of interest rates" would "significantly impair the ability of States to enact effective usury laws." In any event, "the protection of state usury laws is an issue of legislative policy, and any plea to alter § 85 to further that end is better addressed to the wisdom of Congress than to the judgment of this Court."[320]

The above analysis assumes that the only available choices were between tolerating a slowly evolving state equilibrium and imposing a rigid federal rule. However, an alternative approach is to allocate the determination of the appropriate scope of preemption of state consumer credit laws to an administrative agency. The Supreme Court has exhibited a willingness to defer to agency preemption determinations in this area. In 2007, the Court in *Watters v. Wachovia Bank, N.A.*[321] upheld a determination by the OCC that national banks' operating subsidiaries are subject to the same rules as their parent companies, including rules regulating interest rates and fees.[322] This deference was mitigated by Dodd–Frank, under which Congress partially reduced the OCC's preemption authority.[323] Dodd–Frank seems to express an ideological or political viewpoint rather than a structural one: it appears that Congress simply disliked the preemption decisions that the OCC was rendering.

Despite the rejection of this approach in Dodd–Frank, there is much to be said for leaving cases of indeterminate horizontal coordination to administrative agency discretion. For example, suppose the federal law leaves

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319. 439 U.S. 299, 314–15 (1978).

320. *Marquette*, 439 U.S. at 319.

321. 550 U.S. 1 (2007). For a discussion of the agency's preemption determination, see Bressman, *supra* note 9, at 614–16.

322. The OCC's decision seems to have been related more to the perceived need for a national credit market than for regulatory coordination. *See* Bressman, *supra* note 9, at 615–16. Our point is slightly different, but the Court's deference to any agency determination lends support to the notion that such deference does occur where deemed appropriate.

323. *See* Dodd–Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, § 1044(a), 124 Stat. 1376, 2015–16 (2010) (reducing the level of deference courts must give OCC preemption determinations and requiring the OCC to have "substantial evidence" for such determinations).

preemption decisions to an administrative agency. Then suppose the states change the choice-of-law rule for consumer credit transactions from a contract-based to a tort-based rule, perhaps responding to Elizabeth Warren's argument analogizing financial products to dangerous nonfinancial products.[324] Conversely, states might move toward greater coordination, for example by adopting a lender place-of-incorporation rule for credit transactions not covered by existing federal law. Vesting power in an agency has the benefit of enabling preemption to more easily respond to changes in the conditions relating to the need for federal law.

Preemption determinations could also vary with changes in the market, such as innovations in consumer finance. Consider, for example, the advent of payday loans, which are sometimes structured so that the loans are made by banks.[325] Payday loans involve very high interest rates and fees compared to credit cards, but they enable consumers to obtain quick access to cash to carry them over until the next payday.[326] Many states have begun to regulate these loans.[327] At least some of these loans may be governed by the National Bank Act, and the Act might be interpreted to preempt the state regulations. The OCC, however, has so far taken the position that the National Bank Act does not preempt the state regulations.[328] This gives states the chance to experiment with differing regulations while also giving them an opportunity to coalesce toward a coherent allocation of sovereign authority. If the states fail over time to effectively coordinate their choice-of-law policies regarding payday loan regulations, the OCC could reverse course toward preemption.[329]

E. *The Limits of Horizontal Coordination*

Although we offer an approach to preemption that can help inform many cases, it would be a mistake to conclude that the approach informs all

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324. Elizabeth Warren, *Unsafe at Any Rate*, DEMOCRACY, Summer 2007, at 8, 8–9.

325. Sometimes the payday lenders partner with banks, but more recently banks seem to be offering short-term lending services that resemble payday loans. *See Payday Lending—Research & Analysis*, CTR. FOR RESPONSIBLE LENDING, http://responsiblelending.org/payday-lending/research-analysis/ (last visited Jan. 3, 2013).

326. Nathalie Martin, *1,000% Interest—Good While Supplies Last: A Study of Payday Loan Practices and Solutions*, 52 ARIZ. L. REV. 563, 606, 610 (2010).

327. *See* Leah A. Plunkett & Ana Lucia Hurtado, *Small-Dollar Loans, Big Problems: How States Protect Consumers from Abuses and How the Federal Government Can Help*, 44 SUFFOLK U. L. REV. 31, 37–48 (2011).

328. Angela Littwin, *Testing the Substitution Hypothesis: Would Credit Card Regulations Force Low-Income Borrowers into Less Desirable Lending Alternatives?*, 2009 U. ILL. L. REV. 403, 418.

329. To help ensure the quality of the agency's determinations, Congress could provide guidance regarding how and when to make preemption determinations. To guard against the most problematic agency decisions, agency action should be subject to the procedural safeguards that attach to other agency decisionmaking—including notice-and-comment requirements—and it should be subject to court review to ensure that the decisions are consistent with congressional command.

preemption cases. If in enacting federal law Congress is at least partly motivated by the desire to ensure that individuals and firms need only comply with one law, then it makes sense to ask whether the related state laws have been horizontally coordinated as a formal and functional matter. On the other hand, when Congress has in mind a federal policy that it hopes to further without regard to state coordination, national policy might trump horizontal coordination. In this situation, our approach might not prove particularly helpful in resolving preemption questions.

Chamber of Commerce of the United States v. Whiting,[330] a recent Supreme Court case that involved the intersection of state business license law with federal immigration policies, illustrates this limit on horizontal coordination. The federal Immigration Reform and Control Act ("IRCA") makes it unlawful to employ a known unauthorized alien,[331] requires employers to verify each employee's eligibility for employment, provides an e-verify system as one mechanism for verifying eligibility,[332] and preempts state sanctions for employing illegal aliens "other than through licensing and similar laws."[333] The Legal Arizona Workers Act of 2007 ("LAWA") requires all entities conducting business within Arizona to similarly verify employee eligibility, but unlike the IRCA, LAWA requires employers to use the e-verify system. LAWA also provides for suspension or revocation of Arizona business licenses of employers who knowingly or intentionally employ unauthorized aliens.[334] LAWA defines "license" to include documents such as articles of incorporation, certificates of partnership, and grants of authority to foreign companies to transact business in the state.[335]

The *Whiting* Court held that the IRCA did not expressly or impliedly preempt the Arizona statute. Specifically, the majority concluded that the Act's preservation of state "licensing and similar laws" is broad enough to encompass Arizona's conditions on articles of incorporation, certificates of partnership, and grants of authority to foreign firms.[336] The dissenters reasoned that LAWA conflicts with Congress's intent to impose a uniform system of immigration enforcement on the states, although the two dissenting opinions emphasized different sources of conflict.[337]

As with the other cases discussed in this Part, evidence of congressional intent is inconclusive, so one might think it appropriate for a court to consider, as a factor in its analysis, the degree of horizontal choice-of-law coordination present in state licensing of employers. Indeed, in the employment context, states mostly internalize the costs and benefits of their laws.

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330. 131 S. Ct. 1968 (2011).

331. 8 U.S.C. § 1324a(a)(1)(A) (2006).

332. *Id.* § 1324a(b).

333. *Id.* § 1324a(h)(2).

334. ARIZ. REV. STAT. ANN. § 23-212.01(F) (2010).

335. *Id.* § 23–211(9).

336. Chamber of Commerce of the U.S. v. Whiting, 131 S. Ct. 1968, 1978 (2011).

337. *See id.* at 1987–97 (Breyer, J., dissenting); *id.* at 1998–2007 (Sotomayor, J., dissenting).

Arizona's licensing rules regulate the employer in relation to its employment of individuals within the state,[338] and the employer can easily control the state in which an employee works. Given that Arizona is a small state, interstate businesses that find the law unduly onerous can presumably exit without substantial loss. Thus, Arizona will be forced to internalize the costs of the LAWA if its burden is unreasonable. And given that both the definition of an illegal worker and the substantive standards for what constitutes verification remain federal rules, any state experimentation in withholding permission to conduct business in the state is unlikely to interfere with national immigration policy.

The Arizona law is a good illustration of the potential benefits of state diversity. One writer noted that the Arizona law

> reduced Arizona's population of working-age illegal immigrants by about 17 percent, or roughly 92,000 people, in just a single year .... And the swift attrition was mainly achieved through voluntary compliance: the number of employers prosecuted under the law can be counted on one hand. These results suggest that maybe—just maybe—America's immigration rate isn't determined by forces beyond any lawmaker's control. Maybe public policy can make a difference after all. Maybe we could have an immigration system that looked as if it were designed on purpose, not embraced in a fit of absence of mind.[339]

State experimentation thus could provide data about the effects of specific approaches and thereby inform future policymaking.

At root, however, the federal law regarding immigration reflects national goals. Choice-of-law coordination across the states cannot take care of the concern behind congressional legislation in this area because the federal government seeks a single government policy for immigration. In our view, this is not an area where Congress acts under the Commerce Clause to coordinate commerce among the states but rather acts to effectuate a distinctly national policy. In general, federal immigration laws cannot coexist with state policies, even when it is clear which state's laws might apply. Disagreement between the majority and dissent in *Whiting* reflects a disagreement over whether the state law supports or hinders federal policy. In this sense, they disagree about the federal policy at issue. The majority focuses on the fact that the state policy helps further the federal goal of preventing the employment of illegal aliens. The dissent seems focused instead on the hostile symbolism of Arizona's law and the fact that added licensing sanctions could force employers to somehow discriminate against legal immigrants. However one views these issues, state coordination over the applicability of business license laws does not seem to aid the analysis.

A similar conclusion holds for the Court's most recent preemption decision involving additional laws promulgated by Arizona in an attempt to combat illegal immigration. In *Arizona v. United States*, a five-justice

338. ARIZ. REV. STAT. ANN. § 23-212A.

339. Ross Douthat, *Trust but E-Verify*, N.Y. TIMES, May 30, 2011, at A19, http://www.nytimes.com/2011/05/30/opinion/30douthat.html.

majority struck down provisions of a state statute that criminalized a failure to comply with federal registration requirements as well as knowingly attempting to seek unauthorized employment in Arizona.[340] In addition, the statute expanded both the powers and the responsibilities of state law enforcement authorities over the investigation and arrest of suspected illegal aliens.[341] All but the first of these provisions clearly delineate the territorial reach of the statute to employee and law enforcement activities occurring within state borders, so from a horizontal coordination perspective these provisions do not appear to be troublesome.[342] Notwithstanding the fact that these laws are consistent with the goals of horizontal coordination, the majority concluded that three out of the four provisions (all but the police investigative provision) interfere with the federal immigration scheme. The concurring and dissenting opinions found that the preempted provisions were in fact consistent with federal policy,[343] and Justice Scalia insisted that it was the administration's failure to carry out congressional intent that compelled Arizona to act.[344] Despite the disagreement among the justices regarding the substance of federal policy, it is clear that here, too, the federal interest in creating substantive immigration policy eliminates the utility of our approach.

CONCLUSION

We suggest an approach to resolving preemption cases that asks courts to take into account the extent to which the states have formally and functionally coordinated their sovereign authority over the legal question at issue. A common justification for replacing state with federal law is the need for a unified standard in order to attract international trade or to provide guidance to private parties. However, a federal substantive law is but one means to achieve that goal. Sometimes clarity can be obtained through state laws subject to coordinated choice-of-law approaches. This latter

340. 132 S. Ct. 2492, 2510 (2012).

341. *Arizona*, 132 S. Ct. at 2506.

342. The provision making it an offense to fail to comply with the federal scheme could create difficulties regarding the scope of its applicability. By its terms it appears to apply universally. *See* ARIZ. REV. STAT. ANN. § 13-1509 (2010), *preempted by Arizona*, 132 S. Ct. at 2501–02.

343. *Arizona*, 132 S. Ct. at 2522 (Scalia, J., concurring in part and dissenting in part) ("Arizona has moved to protect its sovereignty—not in contradiction of federal law, but in complete compliance with it. The laws under challenge here do not extend or revise federal immigration restrictions, but merely enforce those restrictions more effectively."); *id.* at 2524 (Thomas, J., concurring in part and dissenting in part) (noting "the lack of any conflict between the ordinary meaning of the Arizona law and that of the federal laws at issue here"); *id.* at 2525 (Alito, J., concurring in part and dissenting in part) (arguing that congressional intent to preempt Arizona law provisions was unclear).

344. *See id.* at 2517 (Scalia, J., concurring in part and dissenting in part) (citing the administration's "deliberate inattention to the presence of removable aliens in Arizona"); *id.* at 2520 (Scalia, J., concurring in part and dissenting in part) (noting that federal enforcement efforts had given "short shrift" to the illegal aliens present in Arizona).

possibility promotes a healthy federalism because the benefits of state law—experimentation, jurisdictional competition, and diverse options—can be retained. In such circumstances, courts should be reluctant to conclude that state laws are preempted. Where, however, sovereign authority over state laws is uncoordinated, either as a functional or a formal matter, then courts should place a thumb on the scale in favor of preemption of state law. In cases of uncertain or dynamic coordination of state sovereign authority, Congress should consider delegating preemption determinations to federal agencies.