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Against Preemption: How Federalism
Can Improve the National Legislative
Process

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AGAINST PREEMPTION: HOW FEDERALISM CAN IMPROVE THE NATIONAL LEGISLATIVE PROCESS

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WORKING PAPER #03-007



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Against Preemption

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

*Roderick M. Hills, Jr.**

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

There are two dominant answers to this question in the scholarly literature. First, a number of scholars argue that courts ought to presume that Congress intends to preserve state powers, usually on the ground that federalism as a general matter is an important constitutional value that should not be lightly overridden.¹ Second, a smaller number of scholars argue that the existence of state regulation should make no difference to how courts construe federal statutes, either because preemptable state laws are not, as a matter of policy, healthy exercises of federalism² or because the text and history of Article VI suggests rejection of a “federalism canon” of statutory construction.³ The Court itself is divided on the issue of preemption in ways that cut across the normal fault lines: Justice O'Connor, normally regarded as a champion of federalism, tends to reject any “clear statement” rules against preemption. Justice Stevens, generally an opponent of judicially enforced federalism, has been a fairly consistent supporter of narrow interpretation of preemption. Lest one think that these divisions can easily be

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¹Candice Hoke; Cass Sunstein.

²Alan Schwartz, *Statutory Interpretation, Capture, and Tort Law: The Regulatory Capture Defense*, 2 Am. L. & Econ. Rev. 1, 20-22 (2000).

³Caleb Nelson, *Preemption*, 86 Va. L. Rev. 225 (2000).

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explained by political ideology favoring business (the “conservative” Justice O’Connor) or favoring plaintiffs (the more “liberal” Justice Stevens),⁴ Justice Breyer seems to oscillate between love of federalism (and a narrower view of preemption) and dislike of state interference with federal regulatory schemes.

I take the position in this essay not only that both of these views are mistaken, but also that they rest on a common mistaken assumption – the theory (sometimes known as “dual federalism”) that states and the federal government (should) operate in different, mutually exclusive spheres. Instead, theories of preemption need to accept the truism that the state and federal governments have largely over-lapping jurisdictions, that each level of government is acutely aware of what the other is doing, and that each level regulates with an eye to how such regulation will affect the other. The value of federalism, if any, will result from the often competitive interaction of the levels of government. In particular, as I shall argue below, the presumption against preemption makes sense not because states are necessarily good regulators of conduct within their borders but rather because state regulation makes Congress a more honest, more democratically accountable regulator of conduct throughout the nation. To reverse the usual formula, national values are well-protected by the states’ political process.

These benefits of state regulation will seem odd to advocates of dual federalism, where federalism produces benefits only when each level of government operating as much as possible in hermetically sealed spheres. But such a theory of federalism has been dead since *Wickard*. The benefits of federalism in the present and future will rest on how the federal and state governments interact, not in how they act in isolation from each other.

⁴Such an ideological explanation is offered by Richard Fallon, *The Conservative Paths of the Rehnquist Court’s Federalism Decisions*, 69 U. Chi. L. Rev. 429 (2002) and Frank B. Cross & Emerson H. Tiller, *the Three Faces of Federalism: An Empirical Assessment of Supreme Court Federalism Jurisprudence*, 73 S. Cal. L. Rev. 741 (2000).

*Against Preemption***I. THE PROBLEM OF PREEMPTION**

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

Consider, first, the idea of a federalism-promoting canon of construction that would require a clear statutory statement before a judge could construe federal law to preempt state law. Such a canon is typically justified by the general notion that federalism is an important value in the American constitutional scheme.⁵ The difficulty with such general invocations of federalism, however, is that they are too general to bake any legal bread. After all, nationalism is also a constitutional value: why not adopt a nationalism-promoting canon of construction? It is no good to argue, as does Professor Hoke, that preemption impedes the capacity of state and local governments to govern themselves.⁶ *Lack* of preemption can have the same effect of impeding self-government. Congress frequently regulates activities because state regulation or lack of regulation of those activities imposes external costs on neighboring states. The whole point of the federal scheme is to suppress state creativity, which might

⁵The following passage gives the general flavor of these sorts of arguments:

“In the system of American public law, the basis assumption is that states have authority to regulate their own citizens and territory. This assumption justifies an interpretive principle requiring a clear statement before judges will find federal preemption of state law. [FN232] Although no substitute for an inquiry into the relationship between state and federal law in the particular context, this principle will frequently aid interpretation in disputed cases.”

Cass Sunstein, *Interpreting Statutes in the Regulatory State*, 103 Harv. L. Rev. 405, 469 (1989). For an expansion of this argument, see S. Candice Hoke, *Preemption Pathologies and Civic Republican Values*, 71 B.U. L. Rev. 685 (1991).

⁶Hoke, at 687 (“[f]ederal preemption decisions impede the ability of those governmental bodies that are structured to be most responsive to citizens' public values and ideas—state and local governments—and have concomitantly undermined citizens' rights to participate directly in governing themselves”). .

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consist only in creatively gaining benefits for their own citizens at the expense of non-residents. If the state juries in, say, Creek County, Oklahoma routinely imposes enormous liability on out-of-state automobile corporations simply to enrich the local plaintiffs and local bar, then this is a burden on the self-governing capacity of states where those automobile manufacturers have their primary place of operations. In effect, Oklahoma is regulating and taxing the businesses of Michigan without considering the desires of the persons most affected – those dependent on Michigan’s tax base and sources of employment. Why is not such taxation and regulation without representation an attack on “civic republican values”?

Against the prevailing scholarly convention, Caleb Nelson offers an argument for ignoring federalism as a general matter when construing federal statutes.⁷ Nelson argues that the U.S. Constitution’s Supremacy Clause’s reference to “any Thing in the Constitution or Laws of any State to the Contrary notwithstanding” – what he calls the “*non obstante* clause – was actually a legal term of art in the late 18th century: such phrases were used to repeal the normal canon of construction that new statutes were, if possible, to be read as consistent with old statutes. Through a meticulous examination of history and text, Nelson demonstrates that the drafters of the *non obstante* clause regarded preemption of state law as analogous to repeal of existing law. The purpose of the *non obstante* clause, therefore, was to declare that “even if a particular interpretation of a federal statute would contradict (and therefore preempt) some state laws, this fact is not automatically reason to prefer a different interpretation.”⁸

Nelson’s argument has all of the trademark virtues that I have come to associate with anything

⁷Caleb Nelson, *Preemption*, 86 Va. L. Rev. 225 (2000).

⁸*Id.* at 232.

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that Nelson writes: careful, lawyerly attention to text and legal context and (most of all) originality.

He has the most original understanding of original understanding that I have read. Yet Nelson's textual argument seems to run aground on a historical fact: the legal context that gave the *non obstante* clause its logic and sense has been swept away by the New Deal Court. To take seriously his argument is to revive a constitutional idea that has been made irrelevant by contemporary legal context. Given these changes in legal context, Nelson's argument even would undermine the larger original understanding that he seeks to enforce.

The *non obstante* clause expounded by Nelson implicitly rests on two assumptions. First, it rests on the idea that federalism is adequately protected by the doctrine of enumerated powers – in Madison's words, the idea that the enumeration insures that Congress' powers are "few and defined," while the states' powers are "numerous and indefinite."⁹ Thus, there is no need for the courts to protect federalism by construing federal statutes narrowly: the limits in Article I, section 8 suffice to do the job. Second, Nelson's *non obstante* clause rests on the idea of "dual federalism" – the notion that state and national law operates in distinct and more or less mutually exclusive spheres. Thus, if the Congress has the power to enact a statute regulating some activity, then the states do not, at least not for the same purposes as Congress. At best, the states have squatters' rights to legislate in a preemptible field. At worst, the states should not be in the field at all, for they are meddling in federal matters that were none of their proper business. In this legal context, it makes perfect sense to adopt a rule of construction instructing the Court to ignore the existence of state law in interpreting federal law. Indeed, many of the drafters, ratifiers, and early interpreters of the Constitution really believed that the Congress could not constitutionally delegate federal powers to state officials. Thus, even if Congress wanted to make

⁹Publius, *Federalist #45* reprinted in 2 DEBATES ON THE CONSTITUTION 101, 105 (Library of America, Bernard Bailyn ed. 1993).

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use of state law or state officials to help implement federal aims, such a desire would be improper.¹⁰

These two assumptions – a robust doctrine of enumerated powers and dual federalism – have been utterly swept away by the pressure of practical need. Since *Wickard*, the scope of legitimate congressional powers has ballooned outward to cover most of what states do and should do. The doctrine of enumerated powers, therefore, hardly protects state legislative authority at all. Simultaneously, the doctrine that state and federal legislation should pursue different purposes has always been completely rejected. It is routine for states to enact legislation in preemptible fields for purposes that the federal government is also entitled to pursue. It is equally routine for the federal government to supplement these state laws with additional federal laws which presuppose the continued existence of the former and even attempt to cajole the states into enacting new ones. No one expects that the Congress enacts laws in blithe indifference to the existence of state laws, like a brontosaurus stomping through the brush, oblivious to the small fry that it might be trampling. To the contrary, the normal expectation is that, when Congress enacts a statute in an area where there are also state laws, Congress intends to make use of those pre-existing state laws for federal purposes – that state and federal rules are intended to dovetail into a single scheme.

In this new legal world, Nelson's view of the *non obstante* clause looks quaint and purposeless, a wheel spinning without any connection to the rest of the machine. I would go farther and argue that enforcement of Nelson's version of the *non obstante* clause in this legal environment would actually undermine the values of fidelity to the text and original understanding of the Constitution on which his argument rests. The *non obstante* clause, after all, rests on a 1789 compromise between advocates of

¹⁰For a discussion of this “dual federalism” mentality, see Roderick M. Hills, Jr., *The Political Economy of Cooperative Federalism: Why State Autonomy Makes Sense and ‘Dual Sovereignty’ Doesn’t*, 96 Mich. L. Rev. 813, 831-47 (1998).

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state and national power. The states lose their power, enjoyed under the Articles of Confederation, to influence federal law through their administration of that law, but the states are guaranteed an area of exclusive state responsibility that federal law cannot touch. The *non obstante* clause helps implement the first, nationalist part of this compromise: the existence of state law cannot influence the scope of federal law. But complete fidelity to only the nationalist part of the bargain might be unfaithful to the original understanding when there has been an entire breach of the state-protecting part of the bargain.

Partial fidelity, therefore, creates a hybrid constitution, a weird mix of old and new that is more nationalistic than anyone would have accepted in 1789 – a regime without any secure exclusive state powers but where courts construe Congress’ concurrent powers with indifference toward the states. From the point of view of a committed originalist, originalism by halves is worse than no originalism at all: it is like half of a jump across a chasm. Why not forego the whole enterprise of fine-tuned textual analysis of one clause when the text has been thrown out the window as to Article I? Why not instead focus on the spirit of the whole document – the “great outlines” and “important objects” of the Constitution, from which Marshall advised that “the minor ingredients ... be deduced”?¹¹

Both the federalism-promoting and federalism-ignoring views of preemption rest on a common assumption – that the interaction of state and federal law-making processes is not important in determining the proper scope of preemption. The federalism-promoting canon assumes that federalism should be respected because state laws are presumptively democratic or efficient regulators of their own territory. But in areas where Congress is likely to legislate – telecommunications, products liability, transportation, workplace safety, vehicular safety, food and drug safety, etc – the states are likely to be lousy regulators. The federalism-ignoring canon assumes that the late 18th century theory of separate

¹¹*McCulloch v. Maryland*, 17 (4 Wheat.) U.S. 316, 408 (1819).

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state and federal spheres ought to be respected by courts, even though it has been swept away by events.

I suggest that a more promising way to think about preemption is to take as a starting point the effects of state law-making on federal legislative processes. One should ask whether those effects are good or bad and whether encouraging or discouraging preemption will promote good or bad effects. As I argue below in Part II, federal law-making processes have some notorious defects. I suggest in Part III that an anti-preemption canon of construction might do a lot to ameliorate these defects. But whether one accepts my argument or not is less important to me than whether one focuses on the central issue that the literature has hitherto ignored – namely, the way that state legislation can change federal law-making, making the latter more or less democratically accountable.

II. THE PROBLEM OF DEMOCRATIC AGENDA-SETTING IN CONGRESS

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

Consider three different ways in which the federal government can suffer from what can be called “diseconomies of scale”¹² – that is, institutional failings that result from increasing the size of the population governed by a government and consequently the bureaucracy that performs the governing.

Borrowing from other scholars, I will call these three problems “Madison’s Nightmare,” “the Personal Vote,” and “National Overload.” The federal government is often, but not always, bedeviled by these diseconomies. The pressing institutional questions are why the national government can sometimes avoid these maladies and whether any legal reform can help with this avoidance. As I shall suggest in Part III, a “clear statement” rule against preemption can be such a legal reform.

A. *Madison’s Nightmare Revisited*

¹²I borrow the phrase “diseconomies of scale” from Elinor Ostrom [get cite],

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In Richard Stewart's memorable phrase, the federal government can become "Madison's nightmare" – the dark side of Madison's famous argument in favor of large republics. *Federalist #10* argues that the heterogeneity of the national population would prevent legislators representing a majority of votes to unite for the purpose of oppressing the rest of the population with unjust or partial legislation: differences in self-interest would cause such a majority coalition to crumble before it could do persistent damage. The nightmare version of this argument is that heterogeneity of interests prevents majority coalition from doing anything at all – even just and useful things – while simultaneously facilitating the ability of self-interested minorities to loot the federal fisc.

Familiar collective action problems might afflict citizens at any level of government to unite on behalf of a common but diffuse common interest. However, these problems are exacerbated by the problem of heterogeneous preferences in a large republic described by Madison: a Maryland environmental group that is tightly organized around the problem of pollution in the Chesapeake Bay might find it difficult to form a coalition with another group in the Midwest organized around the purchase of development rights to prevent suburban sprawl.¹³ The sheer size and complexity of the federal budget and the small stake that each citizen has in fiscal decisions also prevents taxpayers from monitoring federal spending decisions as well as homeowners can monitor service and tax levels within a single municipality.¹⁴ One might predict, therefore, that a government of a large republic would be

¹³See Richard Revesz, *Federalism and Environmental Regulation: A Public Choice Analysis*, 115 Harv. L. Rev. 553, 563 (2001). On the ways in which increasing the size of the electorate increases the collective action problems faced by latent interest groups, see Mark Schneider, Paul Teske, & Michael Mintrom, *Public Entrepreneurs: Agents for Change in American Government* 91 (1995).

¹⁴The local-federal comparison is easier to make than the state-federal comparison, because municipal taxation and expenditure affect home values, an uninsurable and extraordinarily large asset that gives homeowners an incentive for homeowners to inform about, and involve themselves in, local politics. See WILLIAM FISCHER, *THE HOMEVOTER HYPOTHESIS*.

The critical variable that this analysis omits is, of course, economies of scale in press coverage and interest group formation. National newspapers, TV news, and other media are more sophisticated at the federal level, and there is a

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especially prone to Mancur Olson's logic of collective action: the national government would be dominated by narrow interest groups with small numbers of members that can overcome collective action problems only because they seek concentrated and homogenous private benefits for their constituents at the expense of the less cohesive, more numerous general public. Such groups might form tight relationships with obscure federal agencies and their supervising congressional committees – so-called “iron triangles” – by providing campaign contributions and other political support to incumbent congresspersons in return for rents.

There is little doubt that interest groups narrowly focused on concrete benefits for their members play a large role in controlling the federal government.¹⁵ The interesting point is that the federal government is *not* pervasively controlled by such groups. Instead, public interest groups (incongruously denoted here by the acronym “PIGs”) frequently form to advance agendas that have nothing to do with the specific material interests of their members.¹⁶ These PIGs are sometimes effective in persuading Congress to consider reforms – transportation deregulation¹⁷ or environmental protection¹⁸ – that are broadly public-interested. Moreover, the agencies set up by such federal statutes do not seem to be a side of any “iron triangle”: administrative procedures and professional culture

richer array of interest groups in Washington, D.C. than, say, Lansing. Whether the greater number of groups and media inform voters sufficiently to offset the greater complexity and obscurity of federal politics is an open question.

¹⁵So, for instance, the Postal Service gains critical political support from third-class mail users – businesses who send large volumes of advertisements, solicitations, etc. (so-called “junk mail”) by hiking the rates of first-class mail users and keeping the rates of third-class mail low. Only with the clout of such a lobby can the Postal Service hope to survive intermecine congressional budget struggles with other agencies. JACK H. KNOTT & GARY J. MILLER, *REFORMING BUREAUCRACY: THE POLITICS OF INSTITUTIONAL CHOICE* 129 (1987).

¹⁶KAY LEHMAN SCHLOZMAN AND JOHN T. TIERNEY, *ORGANIZED INTERESTS AND AMERICAN DEMOCRACY* (1986).

¹⁷MARTHA DERTHICK & PAUL QUIRK, *THE POLITICS OF DEREGULATION* (Brookings 1985).

¹⁸Daniel Farber & Philip P. Frickey, *The Jurisprudence of Public Choice*, 65 *Tex. L. Rev.* 873 895-98 (1987).

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combine to give narrowly self-interested groups at bay.¹⁹

How do the PIGs do it? That Madison's Nightmare has come true in many contexts makes it, all the more mysterious why the nightmare scenario has not occurred everywhere. One might reply that Olsonian public choice theory rests on a false premise that voters are motivated primarily by material self-interest to become involved in politics. The premise of the self-interested voter *does* appear to be false,²⁰ but its falsity does not answer the question. Recall the problem (and benefit) of a large, heterogeneous republic: it is difficult for a group representing a majority of votes to unite around a single issue (whether public-spirited or self-interested) and press that issue effectively in the national legislature. Even though PIGs can draw on members who have civic or solidaristic reasons to participate in politics, how do the PIGs enable these public-spirited citizens to overcome their ideological disagreements and collective action problems to focus on a few issues and place those issues on Congress' agenda over the objections of narrowly focused groups driven by self-interest alone? Civic-minded people are no less prone to ideological bickering than others; they also get bored at public hearings and get irritated by the thought that others are free-riding off of their efforts. All of these problems will be exacerbated if the group to which the civic-minded voter belongs contains several thousand members who cannot monitor each other and disagree about programmatic goals. Yet precisely such groups are frequently effective before Congress. Why? And how can the law increase their influence?

B. The Personal Vote

¹⁹Steven P. Croley, *Theories of Deregulation: Incorporating the Administrative Process*, 98 Colum L Rev 1, 31-56 (1998).

²⁰See Jane J. Mansbridge, *The Rise and Fall of Self-Interest in the Exploration of Political Life*, in *Beyond Self-Interest* 1-22 (Jane J. Mansbridge ed., 1990); See Donald Kinder & D. Roderick Kiewiet, *Sociotropic Politics*, 11 Brit. J. Pol. Sci. 129 (1981).

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One way in which representatives solve the problem of representing ideologically heterogeneous populations is simply to avoid divisive ideological questions and concentrate on delivering the bacon to their district. The representative who tracks down VA checks and cuts ribbons for federally funded sewage treatment plants wins gratitude and makes no enemies. Better yet, this cultivation of the “personal vote” gives the incumbent legislator a built-in advantage over challengers. Especially in a system with first-past-the-post single-member districts and weak political parties, one would expect incumbents to avoid divisive policy-making (to secure majorities or pluralities of the vote in a district) and, therefore, to favor constituent services over more divisive sponsorship of legislation. One would also expect a norm of “universalism” in the Congress, where each member agrees to vote for every other member’s district-specific spending in order to give all incumbents some uncontroversially pleasant news to send to their constituents in the franked mail. The cultivation of the personal vote, however, has costs apart from the wastefulness of the cross-subsidies that it generates. As Morris Fiorina argues, individual congressperson’s cultivation of non-ideological services leads to the neglect of general policy-making. The predictable result is that each voter loves his or her congressperson but hates Congress.²¹

As with Madison’s Nightmare, the Personal Vote exists, but it is not the only form of representation in Congress. Individual congresspersons also make a name for themselves by becoming experts in some area of general policy-making and championing reforms within their area of expertise. But, as with Madison’s Nightmare, one can ask whether different institutional arrangements can make policy-minded representatives more or less likely to emerge. Some reforms such as stronger political

²¹*See generally* BRUCE CAIN, JOHN FERREJOHN & MORRIS FIORINA, *THE PERSONAL VOTE: CONSTITUENCY SERVICE AND ELECTORAL INDEPENDENCE* (1987)

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parties obviously would diminish the personal vote,²² but, aside from being controversial, they are also unlikely to be realized in the near-future through any discrete legal reform. Are there other reforms that might be less controversial and more amenable to short-term implementation?

C. Political Overload

Closely related to the problem of the personal vote is the related problem of what Samuel Beer calls “political overload” – the tendency of the national state to bite off more than it can chew and consequently grow in its cost and jurisdiction without purpose or overall supervision.²³ The problem of political overload, like Madison’s Nightmare and the Personal Vote, will tend to increase with the scale of the jurisdiction, simply because a larger jurisdiction (assuming no significant constitutional limits on the topics entrusted to its care) will have a larger number of interests and issues. There are only 537 elected policy generalists in the federal government, and they have limited time to focus on policy-making. Only a small number of issues can occupy their radar screen – their “governmental agenda,” in John Kingdon’s phrase – and policy-makers can decide an even smaller number of agenda items – what Kingdon calls their “decision agenda.”²⁴ Inevitably, national politicians delegate authority to administrative agencies to resolve not only the details but also the general policies of the federal government.

Bureaucratic government has some drawbacks. There is considerable evidence that appointed policy specialists are less likely to initiate dramatic changes in agenda or organize latent interest groups less often than elected policy generalists like members of Congress. This is not to say that appointed

²²For a famous argument for increasing political accountability by promoting “responsible party government,” see V.O. KEY, JR., *PUBLIC OPINION AND AMERICAN DEMOCRACY* 472-80 (1961).

²³Samuel H. Beer, *Political Overload and Federalism*, 10 *Polity* 5 (1977).

²⁴JOHN W. KINGDON, *AGENDAS, ALTERNATIVES, AND PUBLIC POLICIES* 16-18 (2d ed. 1995).

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policy-makers necessarily suggest only small policy reforms: major bureaucratic entrepreneurs sometimes overshadow politicians as agenda-setters.²⁵ It is only to say that, as a general matter, politicians are more likely to change the policy-making landscape than appointed policy specialists. Bureaucrats' authority rests on their expertise, specialized training, and experience dealing with particular interests defined by authorizing statutes. Therefore, bureaucrats tend to suffer from a certain tunnel vision: They do not try to form new interest groups but instead broker between those groups with which they are familiar. Bureaucrats also tend to resist or at least be indifferent to broad policy considerations or claims of abstract justice that do not fall squarely within their regulatory specialty; for instance, environmental experts will worry less about housing starts or racial integration than wetlands, simply because the latter is not part of their regulatory portfolio. Politicians' authority, by contrast, springs out of their capacity to organize and inspire voters. It is hardly surprising that they would tend to organize and represent latent interests that are not regular participants in government, using abstract rhetoric of justice and policy to mobilize constituents.²⁶

Thus, when politicians delegate regulatory authority to regulatory agencies, they could be seen as abdicating their distinctive role as policy entrepreneurs or as organizers of latent interest groups. Indeed, politicians might use federal agencies as an opportunity to duck major policy-making responsibilities (which create political risk) and instead concentrate on the personal vote.²⁷ The

²⁵See EUGENE LEWIS, *PUBLIC ENTREPRENEURSHIP: TOWARD A THEORY OF BUREAUCRATIC POWER* (1980) (describing entrepreneurial activity of Robert Moses, Hyman Rickover, and J. Edgar Hoover).

²⁶Mark Schneider, Paul Teske, & Michael Mintrom, *PUBLIC ENTREPRENEURS: AGENTS FOR CHANGE IN AMERICAN GOVERNMENT* 167 (1995) (comparing mayors and city managers); John Kingdon, *Agendas, Alternatives, and Public Policies* at 19, 30-34; JOEL ABERBACH, ROBERT PUTNAM & BERT ROCKMAN, *BUREAUCRATS AND POLITICIANS IN WESTERN DEMOCRACIES* 106-114 (1981); RENATE MAYNTZ & FRITZ SCHARPF, *POLICYMAKING IN THE GERMAN FEDERAL BUREAUCRACY* 69-76 (1975).

²⁷This is the conventional justification offered by legal scholars and political scientists for a strengthened non-delegation doctrine. See THEODORE LOWI, *THE END OF LIBERALISM: THE SECOND REPUBLIC OF THE UNITED STATES*

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predominance of bureaucratic as opposed to elected policy-makers thus corresponds in a rough way to a government that is less likely to undertake major policy reforms.

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

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

The problems described in Part II are familiar: they are essentially problems of a democratic deficit in large-scale governments. As the ratio of appointed experts to elected generalists grows larger, the former use the latter to protect their incumbency from political risk-taking. I suggest a less familiar (and obviously partial) palliative – a “clear statement” anti-preemption rule of construction that would discourage federal preemption of state tort and regulatory law. My suggestion rests on two hypotheses. First, state regulation of business for the sake of health, safety, or environmental quality gives regulated interests an incentive to put broad issues of health, safety, and environmental quality on the congressional agenda, in the form of proposals for preemptive federal legislation. Second, those regulated industries that support preemption have a greater capacity to elicit congressional debate on these issues than the interest groups that oppose preemption. Therefore, if one's goal is to elicit broad-ranging debate about public policies, then it makes sense to choose a default rule that places the burden on the regulated industries to lobby for preemptive legislation, rather than place the burden on those anti-preemption interests to lobby for a waiver of preemption.

In what follows below, I defend each of these hypotheses as at least plausible enough to justify

(1979); DAVID SCHOENBROD, *POWER WITHOUT RESPONSIBILITY: HOW CONGRESS ABUSES THE PEOPLE THROUGH DELEGATION* (1993).

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further empirical work by those scholars more skilled at it than I. I conclude with a more detailed description of a possible clear statement rule.

A. States as Agenda-Setters for the National Government

Since the important article by Elliott, Ackerman, and Millian,²⁸ it has been a familiar point that state legislation prods the regulated interests to seek federal legislation preempting the states. Elliott, Ackerman, and Millian, note that federal environmental law has largely been the product of lobbying by regulated industries, responding to the threat of “a state of affairs even worse from their perspective than federal air pollution regulation – namely, inconsistent and progressively more stringent environmental laws at the state and local level.” The insight can be generalized to other areas of federal regulation: the federal presence in areas from strip-mining to workplace safety was ushered in by state regulation that industry groups wanted to preempt. Thus, federal regulation is frequently the result of lobbying efforts by industry interests that oppose regulation. The apparent paradox of this statement dissolves when one takes into account the desire of industry for uniformity of regulation. However much they dislike the prospect of a comprehensive federal regulatory scheme, business interests dislike even more the prospect of several disuniform state regulatory schemes.

State law, therefore, are an important influence on agendas in Congress. They spur interest groups to put issues on the agenda that otherwise would never arise for congressional decision. In effect, the state governments serve as a sort of informal committee system for Congress, screening policy proposals for a minimum level of political popularity and sending some proposals to the floor of Congress simply by enacting laws that regulated interest groups find intolerable.

Is this a good thing? As John Kingdon has famously established, issues find their way on to the

²⁸E. Donald Elliott, Bruce A. Ackerman & John C. Millian, *Toward a Theory of Statutory Evolution: The Federalization of Environmental Law*, 1 J.L. Econ. & Org. 313 (1985).

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congressional decision-making docket based on the complex and largely independent interaction of problems, policies, and politics. There is no shortage of think tanks and academics peddling policies for Congress to consider, but Congress cannot possibly evaluate these policies in some rational, comprehensive, or systematic manner. Instead, a few policies will get on Congress' agenda based on whether they address problems that catch the current attention of the nation and that are consistent with the nation's current political mood. Like a surfer, the policy advocate has to wait for the right wave of problems and politics before he can move.²⁹

It follows the political change depends on an environment in which political entrepreneurs have the right opportunities and incentives to put new problems on the agenda of the nation. Kingdon recognizes that the "policy communities" (experts specializing in a particular sort of policy, both in and out of government) "tend to be inertia-bound and resistant to major changes."³⁰ As noted above, this may be especially true of bureaucratic experts. Moreover, incumbent members of Congress may also regard political entrepreneurship as too risky, given the specialized communities that it might offend and the benefits of simply cultivating the personal vote.

State and local politicians, however, are natural policy entrepreneurs who can significantly influence what sorts of conditions are publicly recognized as problems. As Kingdon notes, persuading voters that a condition is a problem is less a matter of academic expertise and more a matter of entrepreneurial imagination – "a major conceptual and political accomplishment."³¹ The entrepreneur can transform a social condition that everyone has taken for granted into a problem that must be

²⁹JOHN KINGDON, *AGENDAS, ALTERNATIVES AND PUBLIC POLICIES* 71-115 (2d ed. 1995).

³⁰*Id.* at 128.

³¹*Id.* at 115.

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addressed by re-categorizing the issue and offering different comparisons for judging whether the issue is being acceptably handled. In essence, the entrepreneur re-engineers public baselines of acceptability.³² This is not a task likely to be performed well by bureaucratic experts, and, unsurprisingly, Kingdon finds that bureaucrats are significantly less likely to be agenda-setters than elected politicians, a result that duplicates the research of others.³³

By giving non-federal lawmakers a wider scope for entrepreneurial activity, a clear statement rule against federal preemption increases their capacity to influence congressional agendas in dramatic ways. They can insure that Congress will confront controversial issues like air pollution, workplace safety, automobile safety, products liability, and even human rights and foreign policy.³⁴ To the extent that courts find that state regulatory efforts in these areas are preempted, Congress is relieved of pressure from regulated bodies to put these issues on the decision-making agenda for a debate and a vote. Preemption, thus, suppresses political entrepreneurship by suppressing the most active source of such entrepreneurship – non-federal elected officials.

Of course, if state officials were just as much affected by Madison’s nightmare, the personal

³²Thus, the acceptability of waterway fees might turn on whether the public perceives navigation on the Mississippi as *sui generis* or as just another form of transportation. If the latter, then the failure to charge barges the marginal cost of their usage might look like a “special” exemption, given that car drivers pay tolls and gas taxes to fund highways. *Id.* at 111-112. For a summary of similar ways in which public entrepreneurs re-frame issues to advance their causes, see MARK SCHNEIDER, PAUL TESKE, & MICHAEL MINTROM, PUBLIC ENTREPRENEURS: AGENTS FOR CHANGE IN AMERICAN GOVERNMENT 43, (1995).

³³Kingdon at 43-44. Schneider, Teske, and Mintrom find that city managers can act as entrepreneurs. Schneider, Teske, & Mintron at 147-67. However, unlike most federal bureaucrats, city managers have general jurisdiction over a broad portfolio of issues, including the management of the municipal budget. Thus, it should not be surprising that they have both incentives and a professional culture of engaging in broader policy-making. *See also* Colin Campbell, Super Bureaucrats (noting that budget directors and other appointed officials with general jurisdiction and political appointments engage in entrepreneurial activities). However, even Schneider, Teske, and Mintrom find that city managers tend to be more risk-averse and less innovative than mayors. *Id.* at 167.

³⁴*See* Daniel Halberstam, *The Foreign Affairs of Federal Systems: A National Perspective on the Benefits of State Participation*, 46 Villanova L. Rev. 1015, 1053-57 (2001).

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vote, and political overload, then they would add little to Congress' agenda-setting processes. However, there are at least three reasons to believe that these maladies will affect non-federal politicians less than federal ones.

First, state officials are elected by smaller and, therefore, more homogeneous interests than federal representatives. As a result, their regulatory proposals are less constrained by the need to assemble a stable coalition of interests. As Madison suggested, heterogeneity slows down the policy-making process – but this loss of velocity is not a good thing if the status quo is unsatisfactory. Gridlock and universalism in Congress is hardly the acme of justice or efficiency. Thus, the uncritical celebration of *Federalist #10* by legal academics suggests more an instinctive distrust of majoritarian democracy rather than sound policy analysis.

Second, and related to the first point, non-federal politicians can externalize the costs of their regulatory initiatives on out-of-state interests. Elliott, Ackerman, and Millian find that this tendency towards externalizing regulatory costs helps explain the avidity with which states imposed tough air standards on auto emissions: cars are not manufactured in California, so California politicians can safely urge tough standards, knowing that the costs will be borne by out-of-state employees and shareholders. Likewise, state judges and juries from rural states can impose large judgments on out-of-state businesses without fear of loss of employment.³⁵

Third, non-federal politicians are the main contenders for federal legislative office: their political ambitions drives them to attempt to establish a legislative record and name recognition so that they can effectively challenge federal incumbents. Cultivating the personal vote, therefore, is simply not an option for the state attorney general or governor who wishes to unseat a federal legislator. This

³⁵Alexander Tabbarok & Eric Helland, *Court Politics: The Political Economy of Tort Awards*, 42 J. L. & Econ. 157 (1999)

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ambition is also what makes elected politicians more likely to be entrepreneurs than appointed policy experts.³⁶

At first blush, it will hardly seem remarkable that non-federal politicians perform an entrepreneurial role in a federal regime. After all, it is a cliché hardly worth repeating that state governments are supposed to serve as laboratories of democracy in a federal regime. However, it is important to distinguish in two ways the argument offered above from the usual laboratories-of-democracy argument in favor of federalism.

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

Second, some arguments for federalism suggest that, by competing with each other, the state and federal governments provide benchmarks that assist voters in determining whether one or the other level of government is regulating efficiently.³⁷ Such an argument requires that some states be governed

³⁶Non-federal politicians' notorious ambition for federal office makes Professor Susan Rose-Ackerman's analysis of state officials' incentives unconvincing, albeit ingenious. Susan Rose-Ackerman, *Risk Taking and Reelection: Does Federalism Promote Innovation?*, 9 J. Legal Stud. 593 (1980). Rose-Ackerman argues that governmental experiments are likely to be public goods in that, once produced, copying the innovation is available to all state politicians, regardless of each state's investment. As a result, individual governors and mayors will have no incentive to invest in experiments that involve any substantive or political risk, but will prefer to wait for other states to generate them; this will, of course, produce relatively few experiments. Rose-Ackerman, however, specifically assumes that state officials do not covet higher federal office. Once one abandons this manifestly unrealistic assumption, then her argument collapses.

³⁷ALBERT BRETON, *COMPETITIVE GOVERNMENTS: AN ECONOMIC THEORY OF POLITICS AND PUBLIC FINANCE* 233-39 (1996).

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by state regulators and some by federal regulators and that the citizens of one type of state can use the performance of the other states to assess their own regulators' performance. Something like such a regime *does* exist in workplace safety under the Occupational Health & Safety Act.³⁸ However, my argument does not depend on the existence of such intergovernmental competition.

Instead, I make the much cruder argument that, however inefficient, state regulation provides the incentive to motivate business and industry groups to place issues on the federal agenda that would otherwise be buried in committee. To the extent that one wants to encourage vigorous congressional debate about such issues, one might want to choose rules of construction that promote rowdy debate in Congress. Such a rule will favor political entrepreneurs and help undermine Congress' tendencies towards issue avoidance resulting from Madison's Nightmare, the Personal Vote, and Political Overload.

B. Anti-Preemption Rules as Debate-Eliciting Rules

One might respond that *any* default rule, whether in favor of or against preemption, will create incentives for the interest groups hurt by the rule to reverse it in Congress. Why should the anti-preemption rule for tort and regulatory issues be regarded as superior to a pro-preemption rule as a device to promote vigorous debate?³⁹

My response to this objection rests on the assumption that, in most cases, the interests favoring preemption are best suited for promoting an open and vigorous debate on the floor of Congress. In particular, pro-preemption groups are more likely to succeed in getting a floor vote in Congress on

³⁸See *AFL-CIO v. Marshall*, 570 F.2d 1030, 1038 (D.C. Cir. 1980) (suggesting that federal staffing levels for OSHA inspections can serve as a benchmark for state staffing levels if the former follow a "coherent plan").

³⁹Alan Schwartz makes this point in *Statutory Interpretation, Capture, and Tort Law: the Regulatory Compliance Defense*, 2 Am J L & Econ Rev 1, 23 (2000).

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imposing federal preemption than groups opposing federal preemption, in inducing Congress to vote on removing federal preemption. To the extent that one wishes to promote such open debate about the issue of preemption, an anti-preemption default rule is more effective than a pro-preemption default rule.

My argument resembles Einer Elhauge's argument in favor of preference-eliciting default rules for statutory interpretation. Elhauge argues in favor of a "penalty default" rule, according to which, when a court is unsure of Congress' intent in enacting a statute, the court would adopt the interpretation of a statute that is most unfavorable to the interest group(s) most capable of persuading Congress to reverse this interpretation.⁴⁰ By analogy, I argue that, where a statute is ambiguous, the court ought to interpret the preemptive force of federal statutes to burden interest groups favoring preemption, on the assumption that these pro-preemption groups – overwhelmingly, business and industry groups⁴¹ – are more capable of promoting a vigorous debate in Congress than their opponents. In effect, the anti-preemption rule is a rule in favor of a political Donnybrook – a visible and direct confrontation on a hotly contested policy issue. Such a fight is useful if one believes that any rule of construction should induce Congress to confront politically troublesome issues that Congress would prefer to avoid.

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

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

First, the interest groups favoring preemption have stronger incentives to bring legislation to the attention of Congress, because they have an interest in regulatory uniformity for its own sake. Pro-

⁴⁰Einer Elhauge, *Preference-Eliciting Statutory Default Rules*, 102 Colum. L. Rev. 2162 (2002).

⁴¹*See, e.g.*, W. John Moore, *Stopping the States*, National Journal, July 21, 1990, volume 22, No. 29, at 1758-1762.

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preemption forces tend to be business and industry groups (*e.g.*, the National Association of Manufacturers, the U.S. Chamber of Commerce, the Business Roundtable), and uniformity of regulation is good for business. Indeed, one of the most common arguments in favor of preemptive federal standards made by industry groups is not that state standards are too stringent but that they are non-uniform and, therefore, costly for large-scale manufacturers, employers, and distributors to monitor and obey.⁴²

This interest in uniformity gives pro-preemption groups an incentive to bring preemptive legislation to the attention of Congress, even when such legislation will not reduce the stringency of the regulations to which business is subject. Federalization of the regulation of some activity hardly means that the activity will be regulated leniently: There is always a risk that, once a regulatory issue is federalized, members of Congress will have political incentives to look like they are tough on the environment, consumer safety, etc., and insure that federal standards are as stringent as the toughest state standards.⁴³ Nonetheless, industry groups have consistently favored preemption of state standards despite this risk. This independent interest in regulatory uniformity gives pro-preemption groups an interest in making pacts with anti-preemption groups – unions, environmentalists, consumer advocates – to bring preemptive legislation to the floor even when the proposed federal standard is tough.

By contrast, anti-preemption groups have less of a consistent interest in eliminating preemption for the sake of state diversity. It is possible to imagine business and industry groups favoring preemptive legislation for the sake of uniformity, even if that preemption did not result in any

⁴²See, *e.g.*, Jonathan Walters, “Save Us From the States,” *Governing Magazine*, June 2001, at 20; Solveig Singleton, *Rethinking Federalism: The Case for Preemption in the Information Age*, Working Paper, Competitive Enterprise Institute.

⁴³See, *e.g.*, the Clean Air Act’s incorporation of California’s emissions standards, codified at 42 U.S.C.A. § 7543(b)(1). Elliot, Ackerman, and Millian attribute the toughness of the federal standard to a contest between Nixon and Muskie to outbid each other on their dedication to environmentalism.

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

Professor Alan Schwartz urges a view directly opposite the view offered above. His argument is complex and subtle but, I believe, incorrect. At the risk of over-simplification, it rests on the fundamental assumption that Congress has some collective intention concerning preemption even before a bill specifically addressing the issue of preemption focuses the attention of congresspersons on the problem. Starting from this assumption, Professor Schwartz argues that, *if* Congress had some specific intention concerning preemption, then they would find it easier to reverse judicial decisions that enforce preemption than to reverse judicial decisions that reject preemption.⁴⁴

I find this argument unconvincing. One can concede, for the sake of argument, that members of Congress who oppose federal preemption also tend to assume that the federal regulatory “floor” would somehow induce states to adopt a regulatory standard that was higher than the federal standard. One can also concede that members of Congress with anti-preemption views might tend to favor the stiffer state standards and would be quick to install a higher federal regulatory standard in response to

⁴⁴Schwartz, *Statutory Interpretation, Regulatory Capture, and Tort Law*, 2 Am J L & Econ at 29-37.

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judicial decisions finding that federal standards were a preemptive ceiling.⁴⁵ Although I find both of these assumptions implausible,⁴⁶ one need not reject these premises in order to reject Schwartz's argument, for there is a deeper objection.

Schwartz seems to assume that members of Congress have some clear intention concerning preemption absent a floor debate on the issue that focuses their attention and the attention of interest groups on the preemption question. His only argument for this position is that Condorcet cycles need not prevent such a stable majority position from emerging in Congress.⁴⁷ His analysis of the theoretical problem of cycling, however, is beside the point. Members of Congress have many reasons not to take any position on the issue of preemption quite apart from the problem of cycles. The more empirically well-established (albeit intellectually more mundane) problem is that members of Congress are risk-averse and time-constrained. As Kingdon has shown, they do not have the time to adopt views on issues not squarely placed on their decision-making agenda by the confluence of problems and politics. Moreover, they have political incentives to avoid premature adoption of positions on an issue until the issue becomes a salient problem that captures the attention of the relevant interest groups. Schwartz's

⁴⁵This seems to be Schwartz's critical assumption justifying his argument that an "anti-preemption" Congress would find it easier to reverse "pro-preemption" judicial decisions than a "pro-preemption" Congress would find it to reverse "anti-preemption" judicial decisions. See *id.* at 36 ("this result obtains because a Congress that wants to enact a minimum expects to induce firms to produce more safety than the minimum").

⁴⁶Such assumptions ignore the possibility that members of Congress might simultaneously oppose federal preemption and also disapprove of state regulatory standards higher than the federal standards on grounds of principled federalism. Such congresspersons would not endorse a more stringent federal standard, even if they did predict that their federal "floor" would also increase the stringency of state law, because they value autonomous state policy-making authority for its own sake, even if such state policy-making resulted in laws that the member opposed. Senator Voinovich of Ohio is notorious for adopting such a view. Likewise, Ron Wyden of Oregon both publicly opposed Oregon's death with Dignity Act and also opposed federal legislation preempting this state law. More cynically, it might be that risk-averse members of Congress simply wish to duck any responsibility for taking a position on the right regulatory standard and invoke the principle of federalism to avoid any clear position on the substantive tort issue. See Jonathan Macey, *Federal Deference Toward Local Regulators and the Economic Theory of Regulation: Toward a Public Choice Explanation of Federalism*, 76 Va. L. Rev. 265 (1990).

⁴⁷Schwartz, at 11-16.

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analysis, in other words, simply ignores the institutional dynamics – of Madison’s Nightmare, the Personal Vote, and Political Overload – that keep members of Congress from addressing issues until they float to the surface of the public agenda as a problem requiring decision. Given these familiar reasons for members of Congress simply to refuse to take any position on the question of preemption, it seems fantastic to ascribe specific intentions on such an issue to members of Congress in absence of congressional debate and interest group lobbying on the question.

The more realistic assumption is that, when Congress expresses no clear intention concerning preemption, then they have no such intention. The task of the courts ought to be to create a default rule that will force Congress to squarely confront the question, even when members of Congress might be anxious to evade such a confrontation. A default rule against preemption places the onus on the interest groups most capable of promoting this debate – the pro-preemption groups. For this reason, the anti-preemption default rule makes sense to those who fear that, afflicted by the maladies described in Part II, Congress will evade its law-making responsibility.

2. *Promoting “public” over “special” interest groups*

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

PIGs and SIGs are morally loaded terms (although the acronyms pleasingly cut against the

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connotation of the terms themselves). Following a convention in the political science literature,⁴⁸ however, I intend to use them in a morally neutral way. PIGs are public-interested only in that the material benefits flowing to group members from their membership rarely explains their decision to join the group.⁴⁹ This distinction does not imply that PIGs' lobbying is more beneficial to the public than SIGs' lobbying. For instance, the American Nazi Party could be regarded as a PIG, in that few of this Party's members join because they derive some material benefit from their membership. The distinction between PIGs and SIGs maps on to the older distinction drawn by political theory between principle and interest as motives for partisan or political acts.⁵⁰ GreenPeace may be destroying our economy, and the ACLU may be helping criminals to roam our streets with impunity, but both qualify as PIGs, because the members of both derive only ideological and solidaristic benefits from their organizations' perverse political efforts. By contrast, when the Automakers Institute lobbies for a reduction in the steel tariff, their lobbying (if successful) may redound to the benefit of consumers throughout the nation, but the material benefits that the automakers derive from tariff reduction suffice to explain their support for the group's activities.

To what extent do pro-preemption interests tend to be SIGs and anti-preemption interests, PIGs? The organizations that tend to support the use of federal regulatory standards to preempt state tort and regulatory law are business interests like the National Association of Manufacturers, the Business

⁴⁸For literature distinguishing public interest groups (or "citizen groups") from special interest groups, see Hugh Heclo, *Issue Networks and the Executive Establishment* in *The New American Political System* 87-124 (Anthony King ed. 1978);

⁴⁹The definitional problems with the contrast between "public interest groups" and "special interest groups" are carefully explored at Steven P. Croley, *Theories of Regulation: Incorporating the Administrative Process*, 98 *Colum L Rev* 1, 93-94 n.272 (1998).

⁵⁰For a brief description of this older tradition, see Roderick M. Hills, Jr., *Are Judges Really More Principled than Voters?* 37 *NYU L Rev* 37, 40-42 (2002).

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Roundtable, and the U.S. Chamber of Commerce. These groups self-consciously view their mission as advancing the material self-interest of their members by pressing for legislation that will provide direct and immediate economic benefits to business enterprises. Their support for preemption is an illustration of this mission: preemption reduces regulatory costs confronted by their membership. The groups opposing preemption tend to be advocates of environmental and consumer protection whose members are motivated by ideological desire to secure diffuse benefits like cleaner air and safer products on the general public: they are classic PIGs. In general, therefore, SIGs tend to advance the case in favor of making federal standards preemptive, while PIGs argue against making federal regulatory standards a preemptive “ceiling” on state regulation.⁵¹

Thus, the battle between groups that seek or oppose preemption of state law with federal regulatory standards is largely a struggle between pro-preemption SIGs and anti-preemption PIGs. Is there any reason to prefer a rule of construction that favors the latter over the former? I suggest that the PIGs’ style of advocacy improves the Congress’ legislative process, because, when compared to SIGs, the PIGs favor a style of advocacy that counteracts Congress’ tendency towards gridlock and avoidance

⁵¹This is not to say that PIGs never press for preemption of state law. Preemption of state law is a part of many PIGs’ agenda. Thus, the NAACP has argued that the Fair Housing Act preempts low-density zoning regulations that have the effect of excluding racial minorities and low-income households from the suburbs. Likewise, conservative PIGs like the National Rifle Association or the Family Research Council have pressed for federal statutes that would preempt state laws interfering with what they regard as fundamental rights of gun ownership or parental control of children. These examples of preemption, however, differ from the sort of preemption urged by business interests in an important respect: rather than substituting federal rules for state rules, the preemption urged by PIGs seek to eliminate a type of state regulation altogether, without replacing the state law with any analogous federal rule. The ideological motivation for the sort of preemption urged by PIGs is essentially libertarian: the preempted state laws offend some fundamental liberty of individuals (to purchase housing free from racial or class discrimination, to possess firearms, to raise children, etc). Business interests seeking to preempt state regulations with substantially similar, albeit more lenient, federal standards cannot plausibly make such a clear libertarian argument. The preemptive federal standards are simply too similar to – and sometimes just as stringent as – the state regulations that they preempt. Thus, business interests seeking to substitute federal for state regulations are reduced to making the less resonant argument that federal standards are more uniform or reflect greater expertise than state standards. But uniformity and expertise are hardly inspiring slogans for a PIG. It should be small wonder, therefore, that business interests can rarely find a PIG as an ally in the struggle for preemption.

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of controversial policy debates. In general, PIGs disproportionately use a “strategy of persuasion,” mobilizing support by trying to change the values of their opponents or inspire their supporters to act on the basis of their values.⁵² Such a strategy requires the PIGs to seek publicity for their positions, using the press, TV, and congressional hearings to enlist public support.⁵³ The best evidence suggests that the PIGs use these tools more frequently and more effectively than business groups.⁵⁴ One should not overstate the power of PIGs to mobilize the public: SIGs occasionally sponsor mass mailings designed to mobilize large segments of the public. But mass mobilization of the public through a strategy of persuasion is not the SIGs’ strong suit: the material self-interest of the SIGs’ membership erodes their credibility as leaders of public opinion, and their efforts at mass mobilization are frequently discounted as “astro-turf” – meaning an artificial or shallow grass-roots movement – by their opponents.⁵⁵ As a result, business interests might be expected to rely more on a “procedural strategy” whereby they stall anti-preemption bills with informal arm-twisting with members of Congress behind the scenes and obstruction through gridlock-promoting congressional procedures.⁵⁶

One might reasonably conclude that, if one wants to promote a highly visible, vigorous debate on preemption in a way that will mobilize as many voters as possible, it makes sense to favor an anti-

⁵²Douglas Arnold, *The Logic of Congressional Action* 92-99.

⁵³See Jeffrey Berry, *The Rise of Citizen Groups* in *CIVIC ENGAGEMENT IN AMERICAN DEMOCRACY* 327 (Theda Skocpol & Morris Fiorina ed. 1999).

⁵⁴*Id.*

⁵⁵Sharon Beder, *'Public Relations' Role in Manufacturing Artificial Grass Roots Coalitions'*, *Public Relations Quarterly* 43(2), Summer 98, pp. 21-3. As one public relations expert advised, “[a]ny institution with a vested commercial interest in the outcome of an issue has a natural credibility barrier to overcome with the public, and often with the media.” *Id.* This judgment seems to be confirmed by more systematic data. See Jeffrey Berry, at 384-85 (indicating pervasive distrust of business groups’ public relations in press and public).

⁵⁶Douglas Arnold, *Logic of Congressional Action* at 99-108.

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preemption rule of construction for federal statutes. Given the SIGs' interest in uniformity, they will have sufficient incentive to press for *some* sort of preemptive federal legislation. Non-federal elected officials and PIGs will oppose such efforts, using the tools of mass mobilization in their opposition. Thus, an anti-preemption rule of construction advances democratic values in the same way that competitive elections do – by increasing the public's awareness and political knowledge through the promotion of lively conflict.⁵⁷ Such mobilization is at least a partial antidote to the maladies of Madison's nightmare, the personal vote, and political overload. The resulting debate might not be sophisticated, but it is less likely to suffer from a democratic deficit than the sort of process used by SIGs. For this reason, one might support an anti-preemption "clear statement" rule for process-related reasons even if one disliked the PIGs' substantive agenda.

IV. PRESERVING STATE COMMON LAW: A "CLEAR STATEMENT" RULES FOR DEMOCRATS

So far, I have argued generally in favor of a "clear statement" rule of construction against preemption. But I have yet to explain how such a rule would operate as a practical matter in a specific context. To provide such a context, consider the following perennial preemption issue. Suppose that it is undisputed that federal regulations provide a "ceiling" on any further regulations by the states, such that more stringent state regulations are preempted by federal standards. Should it follow that those federal regulations also preempt state tort liability for damages where the liability-incurring conduct is permitted under the federal regulations?

The Court has not consistently followed any requirement that Congress clearly state whether it is preempting compensatory remedies. On one hand, decisions like *Silkwood v. Kerr-McGee*

⁵⁷On the tendency of competitive elections to increase political knowledge, see X. DELLI CARPINI & SCOTT KEETER, *WHAT AMERICANS KNOW ABOUT POLITICS AND WHY IT MATTERS* 210-11 (1996).

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*Corporation*⁵⁸ and *Medtronic v. Lohr*⁵⁹ come closest to adopting the view (outlined in more detail below) that the purposes of compensation and regulation are so distinct that preemption of the latter says little about preemption of the former.⁶⁰ On the other hand, the Court adopted the view in *Geier v. American Honda Motor Co.*⁶¹ that tort standards are just as much a form of regulation as state agencies' rules: if the federal agency's rules are intended to place a ceiling on state rule-making, then they should also bar state tort liability. Justice Breyer's opinion in *Geier* echoes his concurrence in *Medtronic* that state regulations and state tort judgments are indistinguishable because "[t]he effects of the state agency regulation and the state tort suit are identical." It would be "anomalous," according to Justice Breyer, for a state jury to be permitted hold a manufacturer liable for failing to comply with a state standard of care if a state agency would be barred from issuing a rule requiring the manufacturer to comply with that same standard of care. Such a distinction between juries and state agencies "would

⁵⁸464 U.S. 238 (1984).

⁵⁹518 U.S. 470 (1996).

⁶⁰In both *Medtronic* and *Silkwood*, the Court presumed that Congress wanted to preserve compensatory remedies, regardless of whether Congress wanted to preempt state regulations. Thus, Justice White's opinion for a majority in *Silkwood* Justice White justified such a presumption in part on the ground that the issue of compensation is distinct from the issue of regulation: in White's view, Congress' "silence takes on added significance in light of Congress' failure to provide any federal remedy for persons injured by such conduct," because "it is difficult to believe that Congress would, without comment, remove all means of judicial recourse for those injured by illegal conduct." *Silkwood* at 251. Even Justice Powell, in dissent seemed to accept the majority's essential premise that payment of compensation for the sake of corrective justice was distinct from the issue of how best to regulate nuclear power plants; he also agreed that preemption of state laws concerning the latter issue (concerning how nuclear plants ought to be managed) implied nothing about preemption of state laws concerning the former issue (concerning how to compensate persons injured by even properly regulated nuclear power plants). Powell simply disagreed that punitive damages were concerned with compensation as opposed to regulation. *Silkwood* at 283-47.

Likewise, in *Medtronic*, Justice Stevens' plurality opinion relied on the idea that the Court should not lightly presume that Congress would preempt compensatory remedies simply because Congress intended to prohibit state regulations, noting that "[i]t is, to say the least, 'difficult to believe that Congress would, without comment, remove all means of judicial recourse for those injured by illegal conduct.'" *Medtronic* at 487.

⁶¹529 U.S. 861 (2000).

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grant greater power (to set state standards ‘different from, or in addition to,’ federal standards) to a single state jury than to state officials acting through state administrative or legislative lawmaking processes.”

I suggest that, using the ‘clear statement’ rule defended above, Justice Breyer’s view of preemption of compensatory remedies is mistaken. Absent an express statement to the contrary in federal law, preemption of state regulations should never be regarded as grounds for preempting state common-law liability for damages, even when the standard of care required to avoid damages is higher than the preemptive federal standard of care. The reasons for this view are that (1) there is usually an ambiguity about whether the purposes and method of common-law litigation conflicts with federal regulations and (2) resolving that ambiguity against preemption is the best way to focus Congress’ attention on the central question of corrective justice that would otherwise be ignored or slighted – namely, how the government ought to allocate the costs of accidents.

First, consider the degree of statutory ambiguity that Justice Breyer’s argument ignores. Justice Breyer’s argument rests on the premise that, if state regulations are preempted, then common-law remedies with similar effects must also be preempted. But this premise overlooks how preemption might depend as much on the state law’s purpose as its effects.

To illustrate how the effects of a state law cannot indicate preemption in the sense suggested by Justice Breyer, suppose that a state creates a subsidy program that paid auto manufacturers 90% of the cost of installing drivers’ side air bags in all vehicles. Assume that the Federal Department of Transportation deliberately enacted a regulation giving manufacturers the option of using safety devices aside from drivers’ side air bags. Suppose also that this federal regulation expressly bars state regulatory agencies from requiring auto manufacturers to install drivers’ side air bags. The state subsidy program would have the effect of discouraging manufacturers from taking advantage of an

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option that the federal agency wanted to preserve, because the state subsidy would effectively raise the price of unsubsidized safety devices: manufacturers relying on those devices would not get the state subsidy. Despite these effects, it would be extremely odd to argue that the federal regulation preempted the state subsidy program: Congress and the federal agency might have good reasons to distinguish subsidies from regulations, even when both have effects that federal authorities might want to preempt, because subsidies might have benefits that regulations lack. For instance, the state residents would bear the cost of the subsidy, reducing the chance that the subsidizing state was imposing costs on neighboring states. The federal agency might also want to encourage subsidies that promoted any sort of safety research. In short, the state's means matters just as much as the state program's effects in determining whether the state program is preempted by state law.

Preemption of state law turns not only on the precise means chosen by the state but also the state's purpose. Suppose that a state exempts a certain synthetic fabric from all state taxation in order to encourage re-location of the fabric-producing industry to the state. Suppose also that this fabric is used to manufacture air bags. The practical effect of the tax exemption is that drivers' side air bags suddenly become cheaper to produce: fewer auto manufacturers take advantage of the option provided by federal law to use technologies besides air bags. It hardly follows that a federal safety regulation preempting state rules requiring air bags would, therefore, preempt the state tax exemption: the aim of federal preemption is too remote from the state's purpose of encouraging economic development to justify preemption of the latter by the former.

Even when state law is directed towards the same general end as the federal regulation law, the latter should not preempt the former if the state law does not contain any judgment that is inconsistent with the federal agency's judgment. To illustrate this principle, consider, for instance, a state rule requiring employers to pay a higher disability insurance premium to the state-controlled disability

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insurance fund if they have higher rates of work-related disease among their employees. Suppose that the federal government requires manufacturers to reduce the incidence of byssinosis (“brown lung” disease) among textile workers by prevent any concentration of ambient cotton dust higher than 1,000 micrograms per cubic meter of air. The federal standard expressly prohibits any more stringent state regulatory standard. Suppose, however, that a textile mill wants to reduce employee lung disease in order to reduce its state-mandated insurance rates. If a textile mill determines that, by reducing the concentration of cotton dust even further than required by the federal regulation, they can reduce their rates of employee lung disease and, thus, reduce their disability insurance rates, then one could accurately say that the state rules concerning disability insurance have the same effects as a preempted state agency rule requiring a lower concentration of cotton dust. It would, however, be “anomalous” – indeed, bizarre – to suggest that the states’ disability insurance rules linking injury rates to premiums are, therefore, preempted by the federal regulations. The reason is that the state’s rule on disability insurance does not rely on any policy judgment that is inconsistent with the federal regulatory standard. The state simply provides businesses with an incentive to reduce accident rates and is agnostic about whether reducing cotton dust below federal levels will actually reduce accident rates or whether the social value of such reduction justifies the economic cost. Instead, the state law leaves the decision about the tradeoff between injuries and precautions to the employer.

Thus, one must look to the mechanism, the purpose, and the policy judgments underlying a state law, not just to the law’s effects, before deciding that the state law is preempted by federal regulations.

Preemption of state law would not be justified if (1) the state’s chosen mechanism intrudes *less* on a federal interest than some expressly preempted state regulation, (2) the state and federal government are pursuing wholly distinct purposes, or (3) there is no contradiction in the policy judgments of the state and federal agencies.

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With this framework in mind, the case for federal regulatory preemption of state tort liability for damages is far weaker than Justice Breyer suggests. First, consider the mechanism of common-law litigation: contrary to Justice Breyer's assertion, juries and the common law are arguably more democratic than state agencies. Each jury consists of laypersons chosen from a cross-section of the local community, giving jury proceedings a populist resonance that is lacking in state agency proceedings by appointed experts. Moreover, the common law itself is a product of elected state judges and the elected state legislature, both of which enact rules that generally reflect popular intuitions of justice reflected in the notions of "reasonability." Given the venerable status of the right to jury trial in the American tradition, one could imagine that a Congress with populist inclinations might be more willing to preempt the power of state agencies than state juries.

Second, consider the purpose and policy judgments underlying common-law liability for compensatory damages. If one regards such liability as a form of "liability rule" in Calabresi's and Melamed's sense of the term, then the purpose of compensatory damages is not to prohibit some private activity sanctioned by a federal agency but simply to insure that the actor internalizes any costs resulting from the activity. If one views compensatory damages as serving such a cost-internalization purpose, then there is no *a priori* reason to believe that such damages contradict a federal regulation that preempts state agencies from regulating some activity more stringently than the federal agency. The federal regulation is presumably rooted in the view that any further regulation of the activity would generate more costs (in terms of higher prices or fewer product amenities) than benefits (in terms of safety). But compensatory damages do not imply any rejection of this view. Rather, compensatory damages can be explained by the state's judgment of corrective justice that, whatever the social benefits of some activity, the actor ought to restore persons injured by the activity to the position that they would have occupied but for their injuries.

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Lest one regard this view of damages liability as fanciful, one should consider that section 826 of the Second Restatement of Torts takes such a view of damages. Under § 826(b), even if the judge finds that the benefits of a nuisance outweigh the costs, the judge is permitted to award damages to compensate the plaintiff for any “serious” harm imposed by the defendant’s activity, where the financial burden of damages would not prevent the activity altogether.⁶² Thus, the Second Restatement’s denial of injunctive relief against a tortfeasor does not imply rejection of damages. By analogy, a federal agency’s preemption of state agencies’ regulations – that is, injunctions – does not imply any rejection of state tort damages. The federal agency may intend only to bar states from enjoining activities that the federal agency regards as socially beneficial, on the theory that the state is not well-suited to evaluate the social benefits of activities where most of those benefits (higher employment, lower insurance premiums, lower cost goods, etc) occur outside the borders of the regulating state.⁶³ This purpose does not imply that the federal agency also seeks to bar states from using damages to force these actors to internalize the costs of their actions. Liability for damages might be more acceptable to the federal agency precisely because it is likely to be more efficient than the injunctive remedy provided by state agencies.⁶⁴ In sum, given the gulf that separates property and liability rules, I suggest that one cannot

⁶²§ 826(b) provides that “[a]n intentional invasion of another’s interest in the use and enjoyment of land is unreasonable if (a) the gravity of the harm outweighs the utility of the actor’s conduct, or (b) the harm caused by the conduct is serious and the financial burden of compensating for this and similar harm to others would not make the continuation of the conduct not feasible.”

⁶³Such a purpose is suggested by the common statutory language authorizing federal agencies to allow supplementary state regulations of some activity where such regulations will not unduly burden interstate commerce. *See, e.g.*, Consumer Product Safety Act, 15 U.S.C. § 2075(a); Magnuson-Moss Warranty Federal Trade Commission Improvement Act, 15 U.S.C. § 2311 (1994) (providing that state laws concerning labeling or disclosure with respect to written warranties within the scope of the Act must be identical to federal requirements, unless the state applies to the Federal Trade Commission for approval of a state standard that does not unduly burden interstate commerce).

⁶⁴Louis Kaplow & Stephen Shavell, *Property Rules Versus Liability Rules: An Economic Analysis*, 109 Harv. L. Rev. 713 (1996).

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safely infer an intent to preempt the latter from preemption of the former.

Quite apart from the ambiguous relationship between damages and injunctions, however, there is a second reason to avoid an inference that federal regulations preempt tort liability for damages. As argued above in Part III, the best way to focus Congress' attention on the question of victim compensation is to force interest groups favoring preemption of tort claims to bear the burden of urging preemption of those claims before Congress. Such a rule gives state politicians the best opportunity to act as political entrepreneurs by placing the issue of compensation on Congress' agenda. The "clear statement" rule also places the burden of seeking preemptive legislation on the interests that have the strongest incentives to lobby effectively for preemption. Finally, the anti-preemption rule insures that the PIGs, which are most likely to use a highly visible lobbying campaign, will be guaranteed an opportunity to promote such a campaign, because, at the urging of SIGs, a bill will likely be placed on the calendar for a floor debate.