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Preemption Conflation: Dividing the Local from the State in Congressional Decision Making

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INTRODUCTION

Under the Federal Constitution’s Supremacy Clause,¹ Congress has the power to preempt state and local laws, rendering them “null, void, invalid and inoperative.”² Congress often exercises this power by adopting statutory provi-

1. U.S. CONST. art. VI, § 2 (“This Constitution, and the Laws of the United States which shall be made in Pursuance thereof . . . , 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.”).

2. *Cal. Fed. Sav. & Loan Ass’n v. Guerra*, 479 U.S. 272, 279 (1987) (internal quotation marks and citation omitted); *see also, e.g.*, Richard A. Epstein & Michael S. Greve,

sions that expressly preempt certain forms of state or local regulation.³ The traditional answer to whether federal preemption treats state law and local (city or county) law the same has been an unequivocal yes.

This Article lifts the lid on that assumption of equal treatment to see whether Congress actually differentiates between state and local laws in the federal preemption context—and to ask whether it should do so. Perhaps the City of New Orleans should be allowed to escape federal preemption more easily than the State of Louisiana in order to encourage local experimentation, or because a single local law will have less impact on federal uniformity interests than a state law will. Or perhaps Louisiana should have more leeway than New Orleans because states are considered sovereigns in our federalist system⁴ and local governments are not,⁵ or because we have only fifty states but thousands of local governments (about 3000 counties or county equivalents,⁶ 16,500 towns,⁷ and

Introduction to FEDERAL PREEMPTION: STATES' POWERS, NATIONAL INTERESTS 3 (Richard A. Epstein & Michael S. Greve eds., 2007) (“The vast judicial office of federal preemption is perched atop a single constitutional provision . . .”). Debate exists over the relevance of other provisions to the preemption power. *See, e.g.,* Stephen Gardbaum, *Congress’s Power To Preempt the States*, 33 PEPP. L. REV. 39, 49 (2005).

3. *See, e.g.,* Michele E. Gilman, *Presidents, Preemption, and the States*, 26 CONST. COMMENT. 339, 364 (2010) (“[A] bevy of federal laws contain preemption provisions, state mandates, and other policies that limit state authority . . .”); *cf.* William W. Buzbee, *Introduction to PREEMPTION CHOICE: THE THEORY, LAW, AND REALITY OF FEDERALISM’S CORE QUESTION 10* (William W. Buzbee ed., 2009) [hereinafter Buzbee, *Introduction*] (noting that “nonpreemptive regimes,” however, “remain the dominant political choice”); William W. Buzbee, *Federal Floors, Ceilings, and the Benefits of Federalism’s Institutional Diversity*, in *PREEMPTION CHOICE*, *supra*, at 98, 100 & n.4 [hereinafter Buzbee, *Federal Floors*] (noting that, despite its ability to preempt state and local regulation, Congress usually chooses nonpreemption and prefers “multiple levels of regulators”).
4. *See, e.g.,* *Gregory v. Ashcroft*, 501 U.S. 452, 457 (1991) (“As every schoolchild learns, our Constitution establishes a system of dual sovereignty between the States and the Federal Government.”); *Tafflin v. Levitt*, 493 U.S. 455, 458 (1990) (referring to federalism as a “system of dual sovereignty”).
5. *See, e.g.,* *Bd. of Supervisors v. Local Agency Formation Comm’n*, 838 P.2d 1198, 1205 (Cal. 1992) (“In our federal system the states are sovereign but cities and counties are not; in California as elsewhere they are mere creatures of the state and exist only at the state’s sufferance.”); David J. Barron, *A Localist Critique of the New Federalism*, 51 DUKE L.J. 377, 390 (2001) (“As a formal legal matter, the federal Constitution does not treat local governments as anything approximating coequal sovereigns.”).
6. *Domestic Names: Frequently Asked Questions*, U.S. GEOLOGICAL SURVEY, <http://geonames.usgs.gov/domestic/faqs.htm> (last visited Nov. 21, 2011).
7. RICHARD BRIFFAULT & LAURIE REYNOLDS, *STATE AND LOCAL GOVERNMENT LAW* 12 (7th ed. 2009) (citing 2002 census data).

20,000 cities),⁸ meaning that local laws could have a greater cumulative effect on federal interests than state laws would.

I conclude that Congress distinguishes the state from the local more often than is commonly understood. Further, Congress is justified in doing so on both constitutional and policy grounds. Indeed, Congress should think even more systematically and regularly about state-local differences than it currently does when drafting preemption provisions.

The newness of this line of inquiry is surprising. State and local governments differ dramatically in ways relevant to preemption doctrine. Moreover, federal preemption statutes and federal preemption cases are pervasive. Federal statutes have been crisscrossed with preemption provisions, with no sign of abatement. By 2004, Congress had enacted 522 preemption statutes⁹—statutes that declare certain forms of subfederal law prohibited. That number rose to 681 by 2011.¹⁰

And federal preemption is “almost certainly the most frequently used doctrine of constitutional law in practice.”¹¹ Federal preemption challenges over the last decade have addressed issues ranging from health care, labor, employment, and banking to telecommunications, pharmaceuticals, medical devices, securities, transportation, foreign affairs, and occupational health and safety—and even to habeas corpus¹² and meat inspection.¹³ High-profile cases include the

8. U.S. CENSUS BUREAU, *Government Organization*, [1] 2002 CENSUS GOVERNMENTS (2002), available at <http://www.census.gov/prod/2003pubs/gco21x1.pdf>.

9. JOSEPH F. ZIMMERMAN, CONGRESSIONAL PREEMPTION: REGULATORY FEDERALISM 1 (2005) (providing data back to 1790); see also, e.g., *id.* at 5 (“[O]nly twenty-nine such statutes [were] enacted by 1900”); *id.* at 7 (describing the “federalism revolution” after 1965).

10. E-mail from Joseph Zimmerman, Professor, State Univ. of N.Y. at Albany, to author (Jan. 12, 2012, 3:23 PM EST) (on file with author).

11. Stephen A. Gardbaum, *The Nature of Preemption*, 79 CORNELL L. REV. 767, 768 (1994); see also Buzbee, *Introduction*, *supra* note 3, at 1 (noting that “[d]ebates over the federal government’s preemption power rage” in Congress, agencies, and courts); Thomas W. Merrill, *Preemption and Institutional Choice*, 102 NW. U. L. REV. 727, 730 (2008) (“Preemption is one of the most widely applied doctrines in public law, yet it remains surprisingly underanalyzed.”); Jamelle C. Sharpe, *Toward (a) Faithful Agency in the Supreme Court’s Preemption Jurisprudence*, 18 GEO. MASON L. REV. 367, 367 (2011) (“Preemption has become one of the most frequently recurring and perplexing public law issues facing the federal courts today.”). *But see* Benjamin I. Sachs, *Despite Preemption: Making Labor Law in Cities and States*, 124 HARV. L. REV. 1153 (2011) (discussing the vigorous labor activity at state and local levels through private arrangements, despite the looming threat of preemption).

12. See *United States v. Pleau*, Nos. 11-1775, 11-1782, 2011 WL 6400651 (1st Cir. Dec. 21, 2011) (en banc) (agreeing to rehear a decision finding preemption under the Interstate Agreement on Detainers Act).

13. See *Nat’l Meat Ass’n v. Harris*, 132 S. Ct. 965 (2012).

challenges to state¹⁴ and local¹⁵ efforts to regulate the presence of undocumented immigrants, with Arizona's laws currently the most prominent. The Second Circuit recently held that federal law preempted New York City's latest effort to encourage the development of hybrid taxis.¹⁶ And the Ninth Circuit recently struck down as preempted the Port of Los Angeles' regulations converting drivers from independent contractors to employees.¹⁷

Many scholars just ignore the local entirely when discussing federal preemption. Even when others acknowledge that federal law preempts local as well as state regulation, they generally do not pry the local apart from the state.¹⁸ Instead, they use the phrase "state and local" reflexively or talk about the local without applying a comparative lens.¹⁹ The three major recent volumes on federal preemption almost entirely gloss over the local.²⁰ This conflation tracks the tendency in federalism theory—the umbrella under which preemption theory

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14. See, e.g., *Chamber of Commerce v. Whiting*, 131 S. Ct. 1668 (2011) (upholding part of the Legal Arizona Workers Act); *United States v. Arizona*, 641 F.3d 339 (9th Cir. 2011) (striking down sections of Arizona's immigration law, S.B. 1070), *cert. granted*, 132 S. Ct. 845 (2011).
 15. See, e.g., *Lozano v. City of Hazleton*, 620 F.3d 170 (3d Cir. 2010); Michael A. Olivas, *Immigration-Related State and Local Ordinances: Preemption, Prejudice, and the Proper Role for Enforcement*, 2007 U. CHI. LEGAL F. 27; Mark S. Grube, Note, *Preemption of Local Regulations Beyond Lozano v. City of Hazleton: Reconciling Local Enforcement with Federal Immigration Policy*, 95 CORNELL L. REV. 391 (2010); see also Hiroshi Motomura, *Immigration Outside the Law*, 108 COLUM. L. REV. 2037, 2081-83 (2008) (identifying the different experiences of immigration regulation at the state versus local level, particularly in the context of the integration of immigrants).
 16. *Metro. Taxicab Bd. of Trade v. City of New York*, 615 F.3d 152 (2d Cir. 2010) (applying the federal Energy Policy and Conservation Act), *cert. denied*, 131 S. Ct. 1569 (2011); see also, e.g., Jonathan Skinner, *Who Killed the Hybrid Car? State and Local Green Incentive Programs after Metropolitan Taxicab Board of Trade v. City of New York in the Second Circuit*, 30 STAN. ENVTL. L.J. 311 (2011).
 17. *Am. Trucking Ass'ns v. City of Los Angeles*, 660 F.3d 384, 407-08 (9th Cir. 2011) (finding preemption under the Federal Aviation Administration Authorization Act).
 18. See, e.g., Paul S. Weiland, *Preemption of Local Efforts To Protect the Environment: Implications for Local Government Officials*, 18 VA. ENVTL. L.J. 467 (1999).
 19. See, e.g., THOMAS O. MCGARITY, *THE PREEMPTION WAR: WHEN FEDERAL BUREAUCRACIES TRUMP LOCAL JURIES* 242-43 (2008) (making no distinctions between state and local laws when lauding the virtues of nonfederal regulation); Garrick B. Pursley, *Preemption in Congress*, 71 OHIO ST. L.J. 511, 572 (2010) (not discussing the difference).
 20. See FEDERAL PREEMPTION, *supra* note 2; MCGARITY, *supra* note 19; PREEMPTION CHOICE, *supra* note 3.

falls²¹—to focus on federal-state regulations.²² Mark Gordon provides a major exception. He argues as part of a broader agenda that Congress should “consider more explicitly the role played by local governments as distinct from states in the federal relationship.”²³

Part I sets the stage by identifying the foundations of state-local conflation for preemption purposes and tracing its trajectory in judicial and congressional practice. I first show how the Constitution’s silence on local governance gave rise to an understanding of local governments as subordinates to the states. That understanding in turn spawned the assumption that local governments are indistinguishable from the states for purposes of federal preemption. Turning to the judiciary, I identify two major doctrinal rules that merge the local into the state for purposes of federal preemption: what I call the “conflation axiom,” and a default rule of merger when Congress has saved state law from preemption but is silent on local outcomes. Yet the courts at times will treat state and local laws differently for purposes of federal preemption in ways unacknowledged by those doctrines or the literature on local government or federalism. I then move beyond the literature and the doctrine, inspecting the preemption provisions in thirteen leading federal environmental and health and safety statutes to determine what Congress is actually doing.²⁴ I find that Congress already—albeit unsystematically—takes state-local differences into account more than is assumed.

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21. Ernest Young, *Federal Preemption and State Autonomy*, in *FEDERAL PREEMPTION*, *supra* note 2, at 249, 269 (stating that “the true test of federalist principle’ comes in preemption cases” (quoting *Egelhoff v. Egelhoff ex rel. Breiner*, 532 U.S. 141, 160 (2001) (Breyer, J., dissenting))); *see also, e.g.*, *McCulloch v. Maryland*, 17 U.S. 316, 405 (1817) (“[T]he conflicting powers of the general and state governments must be brought into view . . .”); Jonathan D. Varat, *Federalism and Preemption in October Term 1999*, 28 *PEPP. L. REV.* 757, 758 (2001) (noting that preemption is, “in a sense, a microcosm of federalism and separation of powers debates”).
 22. *See, e.g.*, Robert R.M. Verchick & Nina Mendelson, *Preemption and Theories of Federalism*, in *PREEMPTION CHOICE*, *supra* note 3, at 13, 13 (discussing “the distribution of power between the federal government and state governments”); *cf.* David J. Barron, *Foreword: Blue State Federalism at the Crossroads*, 3 *HARV. L. & POL’Y REV.* 1, 2 (2009) (“Federalism . . . refers only to a particular form of decentralization. It favors states, not cities.”).
 23. *See* Mark C. Gordon, *Differing Paradigms, Similar Flaws: Constructing a New Approach to Federalism in Congress and the Court*, 14 *YALE L. & POL’Y REV.* 187, 190 (1996). While Congress might “stress[] the importance of local decision-making” in some legislative debates, “specific proposals have overwhelmingly sought to transfer power to the states.” *Id.* at 209. The background history of urban problems that have been viewed as appropriate for direct federal attention is a fascinating one, beginning with efforts in the 1960s and 1970s, when the federal government established direct connection with cities, and into the 1990s, when the states emerged triumphant.
 24. *See* apps. A-B.

Part II tackles a vexing threshold question: whether Congress even has the power to enact preemption provisions that differentiate between the state and the local. This question is particularly vexing when Congress seeks to constrain state power but to liberate local authority. Going to the heart of the relative federal and state power over local governments, the question becomes: Can Congress as well as the states decide how much power local governments can wield? If so, when can Congress interfere? I argue that Congress has the power to interfere with state-local relations if it clearly states its intentions to do so.

Parts I and II establish that Congress has the necessary tools and powers to distinguish the local from the state in preemption provisions, despite the prevailing assumption of equivalency. Part III then argues that Congress should seize the opportunity to think more systematically about state-local differences when drafting preemption provisions. This Part sets out a framework to govern that process. In particular, I argue that Congress should consider the relative value of state versus local law according to seven variables, which range from maintaining federal uniformity and encouraging innovation to reducing the exportation of burdens to other jurisdictions. Even mere deliberation about these questions, I argue, will produce a range of benefits for federal law and intergovernmental relations.

Part IV identifies mechanisms that can assist Congress in the project of differentiating the local from the state for purposes of federal preemption. I propose steps that Congress can take to mitigate the impacts of its decisions on state authority. In turn, courts can participate in the project by applying a plain-statement rule when interpreting federal preemption clauses—those clauses that prohibit (as opposed to save) subfederal regulation. The rule would be that if Congress only expressly prohibits state regulation (not local), then courts should not read the term “local” into the statute. This rule would require Congress to be more specific about both state and local outcomes and would abide by the so-called “presumption against preemption,” which requires a plain statement of congressional intent before courts find a subfederal law preempted. Yet I also explain why courts can continue to apply the current default rule of state-local merger discussed in Part I when they interpret savings clauses. Finally, I chart out ways in which federal agencies can serve as partners in the differentiation project.

These questions matter not only because preemption challenges are so prevalent. They challenge our fundamental assumptions about the relationships among the federal, state, and local governments. They also help draw attention to the independent significance of local governance, strengthening ongoing scholarly efforts to disentangle the local from the state in federalism theory. And they enrich ongoing debates about the relative institutional competencies of Congress, courts, and agencies to wield the federal preemption power—debates that become particularly heated when that power threatens to nullify state or local control.

I. THE STATE-LOCAL CONFLATION AND SIGNS OF DIFFERENTIATION

While the state-local preemption merger has a strong foothold in congressional practice and in judicial doctrine, cracks appear in the façade. This Part describes the tension between judicial and congressional practices that ignore state-local differences for purposes of federal preemption and the counterexamples where they take differences into account.

A. *The Constitutional Source of the State-Local Merger*

I start with the Federal Constitution's partial responsibility for the reigning assumption that federal preemption folds the local into the state. The Constitution frequently mentions the states but it never discusses towns, cities, or counties.²⁵ For example, Article IV, Section 3 protects state boundaries and integrity,²⁶ while, in contrast, states can create or abolish localities and modify their boundaries, and local governments often map over each other's territory.²⁷ Article IV, Section 4 protects the "Republican Form of Government" for states but not local governments,²⁸ and Section 2 gives to individuals various protections against the states while ignoring local threats.²⁹ Article I, Section 3 provides only the states with equal suffrage in the Senate,³⁰ and Article V protects them from losing that suffrage through constitutional amendments without their consent.³¹

25. See *supra* note 5.

26. U.S. CONST. art. IV, § 3.

27. See, e.g., *Avery v. Midland Cnty.*, 390 U.S. 474, 483 (1968) ("[W]hile special-purpose organizations abound and in many States the allocation of functions among units results in instances of overlap and vacuum, virtually every American lives within what he and his neighbors regard as a unit of local government In many cases citizens reside within and are subject to two such governments, a city and a county."); Richard Briffault, "What About the 'Isms'?: Normative and Formal Concerns in Contemporary Federalism," 47 VAND. L. REV. 1303, 1338 (1994); Aaron J. Saiger, *Local Government Without Tiebout*, 41 URB. LAW. 93, 97 (2009) ("Cities, counties and school districts overlap, and divide their responsibilities for services and powers to tax in complex, sometimes byzantine ways.").

28. U.S. CONST. art. IV, § 4; see also, e.g., *Johnson v. Genesee Cnty.*, 232 F. Supp. 567, 570 (D. Mich. 1964) ("This guarantee does not extend to systems of local government for municipalities, counties, or parishes."); Victoria Verbyla Sutton, *Divergent but Co-Existent: Local Governments and Tribal Governments Under the Same Constitution*, 31 URB. LAW. 47, 48 (1999) ("In local government law, citizens are not entitled to a 'republican form of government.'").

29. U.S. CONST. art. IV, § 2, cl. 1.

30. U.S. CONST. art. I, § 3; see also U.S. CONST. amend. XVII (providing for direct election of two senators from each state to the Senate).

31. U.S. CONST. art. V.

Therefore, the story goes, localities have no de jure constitutional presence.³² This silence on local governments shapes federalism theory generally as well as the subset that focuses on federal preemption.

Yet local governments have more of a constitutional presence than that story suggests. They were significant at the time of the Framing and have a constitutional role to play today. One such account looks to the Tenth Amendment's reservation of powers to "the people." As that provision declares, "[P]owers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."³³ The "to the people" clause was not mere surplusage.³⁴ In combination with the "history of colonial localism" and the "structure of the Constitution" itself, the Tenth Amendment can be read to preserve the right of local self-determination, seeing local governments as the best vehicle for the expression of the people's will.³⁵ Similarly looking beyond the Constitution's textual silence, others have argued that local governments have a form of sovereignty apart from the states.³⁶

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32. See, e.g., Yishai Blank, *Federalism, Subsidiarity, and the Role of Local Governments in an Age of Global Multilevel Governance*, 37 *FORD. URB. L.J.* 509, 525 (2010) (asserting that, under our federalism, sub-state bodies are "inferior and hence unrecognized theoretically and constitutionally"); Jake Sullivan, Comment, *The Tenth Amendment and Local Government*, 112 *YALE L.J.* 1935, 1935 (2003) ("Given this omission" of local governments, "Supreme Court doctrine and modern scholarship on local government articulate—or at least accept—the following principle: Localities possess no constitutional personality.").
33. U.S. CONST. amend. X; see also U.S. CONST. amend. IX ("The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.").
34. Sullivan, *supra* note 32, at 1937; *id.* at 1936 n.11 ("[T]hroughout the late nineteenth century, a significant number of scholars and judges subscribed to the view that towns and cities retained a right to self-government under the Constitution.") (citing Amasa M. Eaton, *The Right to Local Self-Government*, 13 *HARV. L. REV.* 441, 447 (1900)); cf. Nestor M. Davidson, *Cooperative Localism: Federal-Local Collaboration in an Era of State Sovereignty*, 93 *VA. L. REV.* 959, 1021 (2007) (describing the notion of inherent sovereignty, which sees federal and state powers as "subsets of the residual sovereignty of the people"); Jonathan Zasloff, *The Tyranny of Madison*, 44 *UCLA L. REV.* 795, 856 (1997) (noting that "even local government authority was sparse" as Justice Marshall's jurisprudence was developing).
35. See, e.g., Sullivan, *supra* note 32, at 1940 ("Localities were viewed as 'little republics,' repositories of popular sovereignty through which citizens decided the most fundamental political questions."); cf. Michael W. McConnell, *Federalism: Evaluating the Founders' Design*, 54 *U. CHI. L. REV.* 1484, 1511 (1987) (reviewing RAOUL BERGER, *FEDERALISM: THE FOUNDERS' DESIGN* (1987)) (finding that the "argument for substantial state and local autonomy was powerful at the time of the founding, and remains so").
36. See, e.g., Joseph C. Cove, *The Relationship Between the Federal Government and Local Government*, in 1 *MASSACHUSETTS MUNICIPAL LAW* §§ 5.1-5.2 (2008) (arguing that federalism principles "appl[y] equally to local municipal government as

Constitutional text provides one reason why state-local differences have remained understudied, but we need not read the Constitution's failure to mention local governments as requiring local merger into the state. More specifically, such silence does not mean that courts or Congress must treat state and local governments as equivalents when enacting preemption provisions.

B. Judicial Merger and Recognition of Difference

The next question is whether the judiciary treats state and local laws as equivalents, either in theory or in practice. This question matters for both litigants and Congress. I find that courts sometimes affirm the conflation story and at other times find state-local differences relevant to federal preemption outcomes.

I begin with ways in which the courts have adopted the view of state-local conflation, eliding the state and the local. The conflation goes well beyond the common practice of using the terms "state" and "local" interchangeably.³⁷ The Supreme Court has developed two rules: (1) what I term the "conflation axiom," a general rule requiring that state and local laws be analyzed in the same way in federal preemption cases, and (2) a default rule that when Congress only protects "states" from preemption in savings clauses, but does not mention local governments, we can assume that local governments are also protected.

Both of these doctrines likely arise from a vision of local subordination to the state, as opposed to a vision of state-local equivalency.³⁸ Most famously, in

to state government" and that localities "enjoy the prerogatives of sovereignty"); Abner S. Greene, Kiryas Joel *and Two Mistakes About Equality*, 96 COLUM. L. REV. 1, 4 (1996) (identifying a form of "permeable sovereignty" that allows homogeneous communities to exercise public as well as private power"); cf. Richard C. Schragger, *Cities as Constitutional Actors: The Case of Same-Sex Marriage*, 21 J.L. & POL. 147, 148 (2005) (reading *Romer v. Evans*, 517 U.S. 620 (1996), to mean "that under some circumstances, localities should be permitted to regulate in areas that states cannot"); Ernest A. Young, *The Rehnquist Court's Two Federalisms*, 83 TEX. L. REV. 1, 64 (2004) (exploring whether an autonomy-centered regulatory model would address the problem "that . . . local governments . . . have no independent status under the federal Constitution").

37. See, e.g., *United States v. Locke*, 529 U.S. 89, 108 (2000) (considering a preemption challenge to a state law but characterizing the question as "whether the local laws in question are consistent with the federal statutory structure"); *Hillsborough Cnty. v. Automated Med. Lab., Inc.*, 471 U.S. 707, 719 (1985) (describing the presumption against preemption as being about respecting "local concern[s]"); *Farmer v. United Bhd. of Carpenters & Joiners, Local 25*, 430 U.S. 290, 296-97 (1977) (stressing the importance of not preempting those "interests so deeply rooted in local feeling and responsibility" in a case involving a state law (quoting *San Diego Bldg. Trades Council, Millmen's Local 2020 v. Garmon*, 359 U.S. 236, 244 (1959))).
38. See, e.g., *City of Columbus v. Ours Garage & Wrecker Serv., Inc.*, 536 U.S. 424, 445 (2002) (Scalia, J., dissenting) (using the conflation axiom after asserting that "the

Hunter v. City of Pittsburgh, the Supreme Court declared that local governments are “convenient agencies for exercising such of the governmental powers of the State as may be entrusted to them.”³⁹ Therefore, the “number, nature, and duration of [local governments’] powers” and “territor[ies]” rest in “the absolute discretion of the State.”⁴⁰ *Hunter* serves as a poster child for the most extreme view of severely diminished local power and inflated state power,⁴¹ “haunt[ing] modern local government law.”⁴² The so-called judicial “Dillon’s Rule” complements *Hunter*, arising from a late-nineteenth-century treatise.⁴³ According to this rule, local power arises solely from state delegation, and courts must construe any such delegations to local governments narrowly.⁴⁴ Many state courts still apply this rule when considering challenges to the exercise of local authority.⁴⁵

This vision is “a quasi-constitutional, instrumental view of the nature of the state-local relationship.”⁴⁶ However, the vision of local powerlessness is limited;⁴⁷ “no city is as thoroughly under the thumb of the state as a matter of state

lawmaking power of a political subdivision of a State is a subset of the lawmaking power of the State”).

39. 207 U.S. 161, 178 (1907) (rejecting efforts by City of Allegheny residents to resist consolidation with the City of Pittsburgh, which occurred pursuant to a state statute).
40. *Id.*
41. Though *Hunter* often is cited for the vision of local subordination to state power, it was not the first case to demonstrate this vision. See, e.g., *City of Worcester v. Worcester Consol. St. Ry. Co.*, 196 U.S. 539, 549-51 (1905) (citing nineteenth-century cases).
42. Lynn A. Baker & Daniel B. Rodriguez, *Constitutional Home Rule and Judicial Scrutiny*, 86 DENV. U. L. REV. 1337, 1337 (2009).
43. See 1 JOHN F. DILLON, COMMENTARIES ON THE LAW OF MUNICIPAL CORPORATIONS § 237 (5th ed. 1911).
44. See, e.g., David J. Barron, *Reclaiming Home Rule*, 116 HARV. L. REV. 2255, 2285 (2003) (describing the rule); Gary T. Schwartz, *Reviewing and Revising Dillon’s Rule*, 67 CHI.-KENT L. REV. 1025, 1025 (1991) (same).
45. See, e.g., Richard Briffault, *Our Localism: Part I—The Structure of Local Government Law*, 90 COLUM. L. REV. 1, 8 n.14 (1990) (citing scholars making this observation).
46. Davidson, *supra* note 34, at 1010.
47. Cf. Roderick M. Hills, Jr., *Dissecting the State: The Use of Federal Law To Free State and Local Officials from State Legislatures’ Control*, 97 MICH. L. REV. 1201, 1208 (1999) (arguing that confidence in Dillon’s Rule is “hardly obvious”—i.e., that local governments are not necessarily powerless in the absence of state authorization).

law⁴⁸ as this vision would suggest. The Court later counseled against broad adherence to *Hunter*'s "seemingly unconfined dicta;" "a correct reading" of *Hunter* and related cases "is not that the State has plenary power to manipulate in every conceivable way, for every conceivable purpose, the affairs of its municipal corporations."⁴⁹ Indeed, the Court declared that it "has never acknowledged that the States have power to do as they will with municipal corporations regardless of consequences."⁵⁰ Additionally, the home-rule movement that took shape at the end of the nineteenth century partly sought to counter Dillon's Rule and similar constrictions on local authority.⁵¹ Home-rule provisions in state constitutions and statutes therefore removed many assumed limitations on local power, even occasionally offering immunity against state interference in certain arenas.⁵² Home-rule provisions therefore have been called "mini-Tenth Amendments designed to cordon off local matters from state intervention."⁵³

1. The Conflation Axiom

In its 1985 *Hillsborough County* opinion, the Supreme Court declared that, "for purposes of the Supremacy Clause, the constitutionality of local ordinances

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48. David J. Barron, *Why (and When) Cities Have a Stake in Enforcing the Constitution*, 115 YALE L.J. 2218, 2243 (2006); *see also* Davidson, *supra* note 34, at 1022 ("[The] view of local powerlessness and the unitary state is simply one path taken, and by no means an entirely solid one."); Gerald E. Frug, *The City as a Legal Concept*, 93 HARV. L. REV. 1059, 1061-62 (1980) (challenging the view of cities as pure receptacles for state delegation under state control and criticizing limitations on local power).
49. *Gomillion v. Lightfoot*, 364 U.S. 339, 344 (1960); *id.* at 346-47 (discussing Fifteenth Amendment constraints); *see also, e.g.*, Barron, *supra* note 22, at 3 ("The state supremacist rhetoric in *Hunter* is excessive, and subsequent precedent suggests that the Court no longer subscribes to all of it.").
50. *Gomillion*, 364 U.S. at 344; *see also* Sullivan, *supra* note 32, at 1937-39; *cf.* *Fort Gratiot Sanitary Landfill, Inc. v. Mich. Dep't of Natural Res.*, 504 U.S. 353, 361 (1992) ("[A] State . . . may not avoid the strictures of the Commerce Clause by curtailing the movement of articles of commerce through subdivisions of the State . . .").
51. *See, e.g.*, Keith Aoki et al., *(In)visible Cities: Three Local Government Models and Immigration Regulation*, 10 OR. REV. INT'L L. 453, 466 (2008).
52. *See, e.g.*, Baker & Rodriguez, *supra* note 42, at 1341; David J. Barron & Gerald E. Frug, *Defensive Localism: A View of the Field from the Field*, 21 J.L. & POL. 261, 263 (2005); Briffault, *supra* note 45, at 17-18.
53. Barron, *supra* note 5, at 392; *cf.* Baker & Rodriguez, *supra* note 42, at 1337 ("How constitutional home rule can be reconciled with the *Hunter* principle is an enduring puzzle in American local government law."). I return to the significance of home rule below. *See infra* notes 250-256 and accompanying text.

is analyzed in the same way as that of statewide laws.⁵⁴ In other words, the Court established a blanket rule that courts should not take state-local differences into account in federal preemption cases.⁵⁵

I call this rule the conflation axiom. Though no one has identified, let alone analyzed, this rule, the axiom is becoming firmly established, with dozens of opinions⁵⁶ as well as legal scholarship⁵⁷ and treatises⁵⁸ citing it. The rule seems to extend to the “presumption against preemption” as well, requiring that a presumption of lawfulness apply to both state and local law in the absence of clear congressional intent to the contrary.⁵⁹ This black-letter presumption states that courts should not find state and local law preempted unless Congress has demonstrated a “clear and manifest purpose” to preempt it.⁶⁰

The conflation axiom guides judicial decision making; it does not mandate that Congress treat state and local laws as equivalents. But the rule likely con-

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54. *Hillsborough Cnty. v. Automated Med. Lab., Inc.*, 471 U.S. 707, 713 (1985) (unanimous opinion).
55. The *Hillsborough County* briefs had not recommended that the Court adopt the axiom or make such a rule explicit, and Justice Marshall’s papers are silent on the issue. See E-mail from Patrick Kerwin, Manuscript Reference Librarian, Library of Congress, to Beth Gordon, Reference Librarian, Cardozo Law Sch. (Aug. 10, 2010, 12:56 PM EST) (on file with author). The Court had ruled on federal preemption challenges to local laws earlier, *see, e.g.*, *R.R. Transfer Serv., Inc. v. City of Chicago*, 386 U.S. 351 (1967), but did not formulate the axiom as a rule. The first such formulation I found was in a 1982 dissent. *See Cmty. Commc’ns Co. v. City of Boulder*, 455 U.S. 40, 69 (1982) (Rehnquist, C.J., dissenting) (“This Court has made no . . . distinction between States and their subdivisions with regard to the pre-emptive effects of federal law.”).
56. *See, e.g.*, *Bldg. & Constr. Trades Council v. Associated Builders & Contractors*, 507 U.S. 218, 224 (1993); *Wis. Pub. Intervenor v. Mortier*, 501 U.S. 597, 605 (1991); *Golden State Transit Corp. v. City of Los Angeles*, 475 U.S. 608, 614 n.5 (1986); *Liberty Cablevision of P.R., Inc. v. Municipality of Caguas*, 417 F.3d 216, 220-21 (1st Cir. 2005); *Miller v. Miller*, 788 A.2d 717, 721 n.4 (Md. Ct. Spec. App. 2002).
57. *See, e.g.*, Young, *supra* note 36, at 65; Paul S. Weiland, Comment, *Federal and State Preemption of Environmental Law: A Critical Analysis*, 24 HARV. ENVTL. L. REV. 237, 253 (2000).
58. *See, e.g.*, 16 AM. JUR. 2D *Constitutional Law* § 56 & n.9; 62 C.J.S. MUNICIPAL CORPORATIONS § 194 & nn.14-15 (2010).
59. *See, e.g.*, *Engine Mfrs. Ass’n v. S. Coast Air Quality Mgt. Dist.*, 541 U.S. 246, 269 (2004) (Souter, J., dissenting) (drawing attention to the fact that the presumption against preemption applies equally to localities as to states).
60. *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947) (citations omitted); *see also, e.g.*, *Wyeth v. Levine*, 555 U.S. 555, 565 (2009) (same); *cf.* Erwin Chemerinsky, *Empowering States When It Matters: A Different Approach to Preemption*, 69 BROOK. L. REV. 1313, 1324-28 (2004) (showing flaws in the Court’s application of the presumption and the harms to valuable state laws); Young, *supra* note 21, at 262 (discussing the weaknesses of the presumption against preemption).

tributes to the general inattention to state-local differences in the federal preemption universe.

2. The Default Rule that “State” Means “State and Local” in Savings Clauses

The Court has developed another formal default rule for preemption cases: Courts should presume that the term “state” in savings clauses includes “local” regulation, or at least the state’s ability to delegate authority to the local level. Preemption provisions generally take two forms: preemption clauses and, the focus here, savings clauses. Preemption clauses do the work of staking out exclusive federal territory. They state Congress’s intent to displace state or local regulation and may or may not actually use the term “preempt.” Conversely, savings clauses carve out safe harbors for specified kinds of state or local regulation. Though often drafted in boilerplate language,⁶¹ savings clauses fulfill a range of anti-preemption goals.⁶²

The Supreme Court established this rule relatively recently (in 1991) when interpreting a savings clause in the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA). FIFRA declares that “[a] State may regulate the sale or use of any federally registered pesticide . . . in the State” as long as it does not “permit any sale or use prohibited by this subchapter.”⁶³ A Wisconsin town called Casey, with a population of about 500, had enacted an ordinance requiring pesticide users to obtain permits from the town board for certain pesticide applications. The plaintiffs challenged Casey’s ordinance as preempted by FIFRA (as well as by state law), arguing that the term “state” in the savings clause did not preserve local regulation. The town countered that Congress wanted to protect local regulation as well: “[O]nly the localities where the pesticide will be used can be aware of the local conditions and the hazards that pesticide use can cause in a particular locality.”⁶⁴ Contributing to a lower court split on the question, the

61. See Thomas W. Merrill, *Preemption in Environmental Law: Formalism, Federalism Theory, and Default Rules*, in FEDERAL PREEMPTION, *supra* note 2, at 166, 176 (arguing that savings clauses cannot “capture the enormous and pervasive work of federal law in environmental regulation”); *cf.* *Bates v. Dow Agrosciences LLC*, 544 U.S. 431, 446 n.21 (2005) (noting that “[n]ot even the most dedicated hair-splitter could distinguish” some preemption clauses from each other (quoting *Shaw v. Dow Brands, Inc.*, 994 F.2d 364, 371 (7th Cir. 1993)) (internal quotation marks omitted)); Sandi Zellmer, *When Congress Goes Unheard: Savings Clauses’ Rocky Judicial Reception*, in PREEMPTION CHOICE, *supra* note 3, at 144, 165 (proposing model savings clause language for Congress).

62. Zellmer, *supra* note 61, at 146, 164.

63. 7 U.S.C. § 136v(a) (2006).

64. *Mortier v. Town of Casey*, 452 N.W.2d 555, 561 (Wis. 1990).

Wisconsin Supreme Court held that local governments such as Casey could not rely on the savings provision.⁶⁵

The U.S. Supreme Court reversed in *Wisconsin Public Intervenor v. Mortier*.⁶⁶ The Court first set forth the conflation axiom;⁶⁷ then it created a default rule, concluding that FIFRA's savings clause preserved local regulation as well as state regulation:

Properly read, the statutory language tilts in favor of local regulation. The principle is well settled that local governmental units are created as convenient agencies for exercising such of the governmental powers of the State as may be entrusted to them in [its] absolute discretion. The exclusion of political subdivisions cannot be inferred from the express authorization to the "State[s]" because political subdivisions are components of the very entity the statute empowers.⁶⁸

A decade later, in 2002, the Court addressed a similar statutory interpretation question in *City of Columbus v. Ours Garage & Wrecker Service*⁶⁹: whether the savings clause in the Interstate Commerce Act that mentioned only state regulation nevertheless included local law. Resolving a circuit split,⁷⁰ the Court focused on the question of state delegation of authority to local governments. The Court declared that, as a default rule, a "reference to the 'regulatory authority of a State' should be read to preserve, not preempt, the traditional prerogative of the States to delegate their authority to their constituent parts."⁷¹

65. Compare, e.g., *id.* (holding that the term "state" does not include local governments, meaning that local regulation was preempted), with *People ex rel. Deukmejian v. Cnty. of Mendocino*, 36 Cal. 3d 476 (1984) (finding no preemption of local regulation).

66. 501 U.S. 597 (1991).

67. *Id.* at 605 ("It is, finally, axiomatic that 'for the purposes of the Supremacy Clause, the constitutionality of local ordinances is analyzed in the same way as that of statewide laws.'" (quoting *Hillsborough Cnty. v. Automated Med. Labs., Inc.*, 471 U.S. 707, 713 (1985))); see also discussion *supra* Section I.B.

68. *Mortier*, 501 U.S. at 607-08 (citations and internal quotation marks omitted); see also *id.* at 610-12.

69. 536 U.S. 424 (2002).

70. See *id.* at 431-32 (2002) ("The Courts of Appeals have divided on the question whether § 14501(c)(2)(A)'s safety regulation exception to preemption encompasses municipal regulations."); see also *Auto. Club of N.Y., Inc. v. Dykstra*, 520 F.3d 210, 217 (2d Cir. 2008) (finding that a New York City regulation was not preserved by the savings clause, but not because it was a local regulation).

71. *Ours Garage*, 536 U.S. at 429. But see *id.* at 448 (Scalia, J., dissenting) (noting that the state's power is not "sacrosanct"); *id.* at 443 (arguing that "a reference to 'State' power or authority can be meant to include" local powers or just state power); see also, e.g., *Am. Trucking Ass'ns v. City of Los Angeles*, 596 F.3d 602, 606 (9th Cir. 2010) (finding that regulations by the Port of Los Angeles fell within

Again, the rule is only a default: In both *Mortier* and *Ours Garage*, the Court considered legislative history and employed various canons of construction to conclude that the term “state” in the relevant statutory provisions included the local or at least the power of the state to delegate to the local. Accordingly, while courts have applied the rule to savings clauses in other statutes to read “local” into the term “state,”⁷² others have refused to do so, noting that it is not a hard rule.⁷³

The Supreme Court has not yet considered whether to apply this default rule to a preemption clause—i.e., a clause prohibiting state regulation—as opposed to a savings clause. The Second Circuit did find that the term “state” includes the local in what it believed to be the Occupational Safety and Health Act’s (OSH Act) preemption clause.⁷⁴ A circuit split developed because other courts, such as the Sixth Circuit, disagreed.⁷⁵ In Part IV, I argue that courts should limit the *Mortier-Ours Garage* statutory interpretation default rule of merger to savings clauses and not extend it to preemption clauses.

the safety exception); *Tillison v. City of San Diego*, 406 F.3d 1126, 1129 (9th Cir. 2005) (applying the safety exception and discussing *Ours Garage*).

72. See *Fireman’s Fund Ins. Co. v. City of Lodi*, 302 F.3d 928, 941-43 (9th Cir. 2002) (interpreting savings clauses that only mentioned the “state,” 42 U.S.C. §§ 9614(a), 9652(d)).
73. See, e.g., *United States v. City & Cnty. of Denver*, 100 F.3d 1509, 1513 (10th Cir. 1996) (refusing to extend *Mortier*’s reasoning to the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), 42 U.S.C. § 9621(d)(2)(A)(ii): “If Congress had wished to include local zoning ordinances within the definition of ‘state law’ it would surely have so stated.”); *cf. id.* (citing the Resource Conservation and Recovery Act (RCRA)’s reference to “State or political subdivision” as an example of Congress including local zoning ordinances within the definition of “state law”).
74. See *Envtl. Encapsulating Corp. v. City of New York*, 855 F.2d 48, 54 (2d Cir. 1988).
75. Compare *id.* (merging the local into the state), with *Ohio Mfrs. Ass’n v. City of Akron*, 801 F.2d 824, 829 (6th Cir. 1986) (“[T]he trial court concluded that Congress did not simply overlook including political subdivisions or that it implicitly included them in the word ‘state.’ We concur in the trial court’s conclusion.”); *cf. R. Mayer of Atlanta, Inc. v. City of Atlanta*, 158 F.3d 538, 547 (11th Cir. 1998) (“*Mortier* . . . falls short of establishing a rule that the word ‘state’ must be interpreted to include political subdivisions in all circumstances.”); *Profl Lawn Care Ass’n v. Village of Milford*, 909 F.2d 929, 941 (6th Cir. 1990) (Nelson, J., concurring) (noting, in a Federal Insecticide, Fungicide and Rodenticide Act (FIFRA) opinion vacated post-*Mortier*, the “radically different usages” of the term “State,” even in the Constitution). However, the Supreme Court made the split less relevant when it subsequently held in *Gade v. National Solid Wastes Management Ass’n* that the Occupational Safety and Health Act (OSH Act) does not have an express preemption clause—in other words, what seemed to be a preemption clause was not actually one. 505 U.S. 88, 98-99 (1992).

3. Signs of Judicial Differentiation

The Court's adoption of the conflation axiom and of the default rule that state means state and local (at least in savings clauses) does not mean that courts never differentiate between the two in federal preemption cases.

First, courts treat state and local regulations differently when adjudicating certain otherwise identical constitutional challenges. Formal judicial doctrines bar local governments from benefitting from state immunity under the Eleventh Amendment⁷⁶ when they face preemption challenges under federal anti-trust laws⁷⁷ as well as under § 1983 challenges.⁷⁸ And, less formally, a study of federal preemption decisions found that a set of Democratic judges preempted local laws more often than they preempted state laws when considering preemption by federal environmental and health and safety statutes.⁷⁹ Legal scholars also have found that courts do or should treat state and local laws differently in other constitutional contexts, such as freedom of religion and freedom of speech cases.⁸⁰

76. See U.S. CONST. amend. XI; see also, e.g., *Bd. of Trs. of Univ. of Ala. v. Garrett*, 531 U.S. 356, 369 (2001) (“[T]he Eleventh Amendment does not extend its immunity to units of local government.”).

77. See *Cnty. Commc’ns Co. v. City of Boulder*, 455 U.S. 40, 49-50 (1982) (not including cities in exemptions from antitrust laws that were granted to states); *City of Lafayette v. La. Power & Light Co.*, 435 U.S. 389, 412 (1978) (plurality opinion) (same).

78. See, e.g., *Monell v. Dep’t of Soc. Servs.*, 436 U.S. 658, 690 (1978) (holding that—unlike states—municipalities are not immune from § 1983 liability).

79. See David B. Spence & Paula Murray, *The Law, Economics, and Politics of Federal Preemption Jurisprudence: A Quantitative Analysis*, 87 CAL. L. REV. 1125, 1178-79 & tbl.9, 1186-87 (1999). It is no surprise that political party affects preemption case outcomes. A slew of recent descriptive and empirical studies has shown that judges’ ideological predispositions and other factors extraneous to the merits affect preemption outcomes. See, e.g., Tonja Jacobi & Matthew Sag, *Taking the Measure of Ideology: Empirically Measuring Supreme Court Cases*, 98 GEO. L.J. 1, 20 & n.87 (2009) (citing studies); Richard H. Pildes, *Democracy and Disorder*, 68 U. CHI. L. REV. 695, 705 (2001) (discussing the influence of “[t]he cultural attitudes judges bring” to democracy cases); Catherine M. Sharkey, *Against Freewheeling, Extratextual Obstacle Preemption: Is Justice Thomas the Lone Principled Federalist?*, 5 N.Y.U. J.L. & LIBERTY 63, 64-65 (2010) (surveying studies).

80. See, e.g., Davidson, *supra* note 34, at 975 n.56, 982 & n.78, 983 & n.82, 990; Mark D. Rosen, *Institutional Context in Constitutional Law: A Critical Examination of Term Limits, Judicial Campaign Codes, and Anti-Pornography Ordinances*, 21 J.L. & POL. 223 (2005); Mark D. Rosen, *The Surprisingly Strong Case for Tailoring Constitutional Principles*, 153 U. PA. L. REV. 1513 (2005); Richard C. Schragger, *The Role of the Local in the Doctrine and Discourse of Religious Liberty*, 117 HARV. L. REV. 1810 (2004); Adam Winkler, *Fatal in Theory and Strict in Fact: An Empirical Analysis of Strict Scrutiny in the Federal Courts*, 59 VAND. L. REV. 793, 822 (2006) [hereinafter Winkler, *Fatal in Theory*] (“Strict scrutiny is much more fatal to local laws (17%

Finally, as described below,⁸¹ the Court in 2004 treated state law differently from local law when adjudicating a local challenge to state law based on a federal preemption provision. While the Court has not outright banned federal preemption challenges by local governments against their parent states, the imposition of a superclear-statement rule for Congress in such cases indicates that the conflation axiom—the rule of equal treatment of state and local laws—is, at the very least, incomplete.

C. Current Congressional Practice

Against that constitutional and judicial background, this Section turns to actual congressional practice. To see how Congress treats the state and the local, I studied the preemption provisions in thirteen leading environmental, health, and safety statutes.⁸² I selected these statutes in part because of the study finding that (Democratic) judges preempted local laws more often than state laws in cases involving these statutes.⁸³ I began by asking whether statutory text helps explain their finding and emerged with broader observations about congressional practice.

These statutes constitute a fraction of the nearly seven hundred preemptive statutes in effect.⁸⁴ Therefore, future research might find that preemption provisions in other statutory realms, such as education, exhibit different patterns. Future research also might discover, for example, that Congress's preempt-

survival rate) than it is to state laws (29% survival rate)”); Adam Winkler, *Free Speech Federalism*, 108 MICH. L. REV. 153, 155 (2009) [hereinafter Winkler, *Free Speech Federalism*] (“[T]he level of government is a very good predictor of whether a speech restriction is likely to be upheld by the federal courts”). *But see* David A. King, Note, *Formalizing Local Constitutional Standards of Review and the Implications for Federalism*, 97 VA. L. REV. 1685, 1711 & nn.135-36 (2011) (describing reasons for greater deference to local laws in certain constitutional contexts).

81. See Section II.A.

82. See apps. A-B. Because each of the thirteen statutes that I examine is highly complex, this analysis does not capture the considerations involved in the drafting of each statute's preemption provisions. Also, because of the length and complexity of the statutes, it is possible that not all provisions with preemptive effect are analyzed here.

83. See Spence & Murray, *supra* note 79.

84. See *supra* notes 9-10 and accompanying text; cf. Cristina M. Rodríguez, *The Significance of the Local in Immigration Regulation*, 106 MICH. L. REV. 567, 573 (2008) (noting that, in matters of federalism, one must be “responsive to facts on the ground, or to the arrangements that the various levels of government have devised to manage the challenges that cross their jurisdictions”). See generally Sandra Zellmer, *Preemption by Stealth*, 45 Hous. L. REV. 1659, 1674-84, 1699-1702 (2009) (providing background on the specific goals of several preemptive federal statutes).

tion-provision drafting habits have changed over time or that the house in which a preemption provision originates matters.⁸⁵ Caution in not extrapolating too much from these findings also is advisable given the flaws in the enactment process: In addition to standard drafting problems (infelicitously tangled phrases, for example), preemption provisions can reflect congressional oversights or deadlock on what kind of preemption to cover, producing intentionally vague terms.⁸⁶

I focus on state-local differentiation in express statutory preemption provisions for two reasons. First, Congress can do the work of state-local differentiation most efficiently through these provisions. Second, these provisions provide the best indication of congressional intent, and intent is the “touchstone” of the preemption analysis.⁸⁷ In the absence of such express preemption provisions, courts will search for implied congressional intent, employing the so-called field and conflict preemption doctrines.⁸⁸

1. Mapping Preemption Provisions

I found that Congress sometimes mentions both state and local regulatory authority and sometimes only state authority in its preemption and savings clauses. Congress also sometimes crafts hybrid preemption or savings clauses that link the preservation or rejection of state authority to truly local conditions. At the very least, these variations start to chip away at the assumption of state-local merger.

I begin with preemption clauses—the provisions crafted to trump subfederal regulation to achieve federal predominance over some regulatory matter.

85. Perhaps, for example, preemption provisions that explicitly address local authority tend to originate in the House of Representatives, with the hypothesis being that the House is more accessible, majoritarian, and sensitized to local concerns. See, e.g., David A. Dana, *Democratizing the Law of Federal Preemption*, 102 Nw. U. L. REV. 507, 519 (2008) (discussing the majoritarian nature of the House as compared with the Senate).

86. See, e.g., Verchick & Mendelson, *supra* note 22, at 21 (describing some of these situations).

87. *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996) (“[O]ur analysis of the scope of the statute’s pre-emption is guided by our oft-repeated comment . . . that ‘[t]he purpose of Congress is the ultimate touchstone in every pre-emption case.’” (quoting *Retail Clerks v. Schermerhorn*, 375 U.S. 96, 103 (1963))). This intent maxim has been called a “bromide endlessly repeated or paraphrased” in subsequent decisions. Merrill, *supra* note 11, at 740; see also, e.g., Max Radin, *Statutory Interpretation*, 43 HARV. L. REV. 863, 875 (1930) (pointing out the many limitations on such a search for intent).

88. See *Altria Grp., Inc. v. Good*, 555 U.S. 70, 76 (2008). The categories sometimes overlap in practice. See, e.g., *Gade v. Nat’l Solid Wastes Mgmt. Ass’n*, 505 U.S. 88, 104 n.2 (1992).

Congress addresses *both* state and local regulation in the majority of the preemption clauses that I examined: nineteen of the twenty-five provisions.⁸⁹ For example, a Clean Water Act clause states that if a qualifying federal standard is in effect, a “*State or political subdivision* or interstate agency may not adopt or enforce any effluent limitation . . . [or other related standard] which is less stringent” than the federal one.⁹⁰ In contrast, six preemption clauses expressly preempt only state regulation; they are silent on the question of local law.⁹¹ For example, a Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) preemption clause precludes recovery of “removal costs or damages or claims pursuant to any other *State* or Federal law” if the same recovery was available under the statute.⁹² Finally, three statutes lacked express preemption clauses.⁹³

The patterns shift when we turn to savings clauses. Eighteen out of the forty-two savings clauses in the thirteen statutes examined here—less than half—mention both state and local regulation.⁹⁴ For example, the Toxic Substances Control Act’s general savings provision declares that “nothing in this chapter shall affect the authority of any *State or political subdivision of a State* to establish or continue in effect regulation of any chemical substance, mixture, or article containing a chemical substance or mixture.”⁹⁵ Twenty-four savings clauses—more than half—only mention state regulation, meaning that Congress is silent on what outcome it desires for local regulation.⁹⁶ For example, the OSH

89. See app. A.

90. 33 U.S.C. § 1370(1)(B) (2006) (emphasis added).

91. See app. A.

92. 42 U.S.C. § 9614(b) (emphasis added).

93. See app. A; see also, e.g., *Gade*, 505 U.S. at 104 n.2 (1992) (concluding that the arrangement under the OSH Act did not rise to the level of express preemption); *Niagara Mohawk Power Corp. v. Hudson River-Black River Regulating Dist.*, 673 F.3d 84, 94 (2d Cir. 2012) (“The [Federal Power Act] does not contain an express preemption clause.”); *Northern States Power Co. v. Minnesota*, 447 F.2d 1143, 1147 (8th Cir. 1971) (“[N]o provision of the Atomic Energy Act expressly declares that the federal government shall have the sole and exclusive authority to regulate radiation emissions from nuclear power plants.”). But see *Gade*, 505 U.S. at 109-14 (Kennedy, J., concurring) (arguing that the provision does constitute express preemption).

94. See app. B.

95. 15 U.S.C. § 2617(a)(1) (emphasis added). For another example, see *SED, Inc. v. City of Dayton*, 519 F. Supp. 979 (S.D. Ohio 1981) (relying on another Toxic Substances Control Act savings provision that mentions both state and local regulation to find a local regulation saved).

96. See app. B; cf. *Ophir v. City of Boston*, 647 F. Supp. 2d 86, 92 n.15 (D. Mass. 2009) (discussing Clean Air Act (CAA) savings clauses that only mention the “state” (such as 42 U.S.C. § 7429(h)(2)) but seeming to apply them to local law without comment).

Act declares Congress’s intent not to “prevent any State agency or court from asserting jurisdiction under State law over any occupational safety or health issue with respect to which no standard is in effect.”⁹⁷ The remaining four savings clauses do not mention either state or local regulation explicitly.⁹⁸

2. What the Mapping Reveals

Despite the assumption of state-local equivalence, Congress employs several strategies to differentiate between the two. First, Congress mandates equal outcomes for state and local laws in most cases. In about three-fourths of the preemption clauses and in almost half of the savings clauses, Congress specifies that a preemption choice applies to both state and local law. From one perspective, lumping state and local law together for equal treatment can be seen as a form of conflation. But from another perspective, mentioning both state and local law constitutes a form of differentiation. That is, mentioning both acknowledges that both state and local regulatory authority exist. Pure conflation, in contrast, occurs when Congress uses the term “state” and assumes that local governments fall into that category as well.

In contrast, many preemption provisions mention outcomes only for state regulation, remaining silent on local regulation. In six preemption clauses and twenty-four savings clauses, Congress only specifies outcomes for the “state.” It seems fair to conclude that Congress sometimes engages in conflation when it only mentions the “state” because it assumes that the term “state” includes the local, while it sometimes engages in differentiation when it only mentions the “state” because it truly means *only* state, not “state and local.”

Congress likely is engaging in differentiation, rather than conflation, in a few situations. First, Congress likely means “state” and not “state and local” when only states can or do regulate the subject matter that Congress is targeting. For example, Congress provided that, for personal injury or property damages actions arising from hazardous substances, CERCLA preempts the state statute of limitations if certain conditions are met.⁹⁹ If no local law provides a relevant statute of limitations, the failure to mention local law is understandable and even deliberate. Similarly, Congress preempts state authority over car registration matters in the Clean Air Act (CAA) but does not mention local law,¹⁰⁰

97. 29 U.S.C. § 667.

98. See app. B.

99. See 42 U.S.C. § 9658(a)(1); *Evans v. Walter Indus., Inc.*, 579 F. Supp. 2d 1349 (N.D. Ala. 2008) (addressing preemption of an Alabama statute of limitations provision).

100. See 42 U.S.C. § 7543(a) (“No State shall require [approval] . . . as condition precedent to the initial retail sale, titling (if any), or registration of such motor vehicle, motor vehicle engine, or equipment.”). *But see id.* § 7543(d) (mentioning both the state and the local in a savings provision, but covering more types of regulation than just registration).

likely because states, not localities, typically regulate car registration matters. And the Resource Conservation and Recovery Act (RCRA) preserves only the state's authority to request a manifest for hazardous waste generated in or coming into that state, which again seems to be a state, not local, function.¹⁰¹ We also might assume that Congress means only "state" when it enacts savings clauses that preserve state tort and common law nuisance claims¹⁰² because there are no local equivalents. Finally, though less certainly, we can apply standard canons of construction to assume that Congress intends "state" to mean only "state" when, in a single provision, it first specifies outcomes for *both* state and local law and then specifies outcomes only for state law, as it did in one CAA provision¹⁰³ and one RCRA provision.¹⁰⁴ While such silence on local outcomes can be rational (if not advisable), it can fail to give notice to local governments about their expected roles. As Section I.B showed, litigation can result over whether the term "state" includes "local."

A separate phenomenon is visible in some of these state-only clauses: The state outcome depends on local conditions or local contributions. I call these the "local-twist" provisions. For example, a Hazardous Materials Transportation Act (HMTA) provision constrains state authority in part by requiring states to ensure that localities follow the Secretary of Transportation's standards and requiring states to resolve conflicts among political subdivisions.¹⁰⁵ Another HMTA provision requires states and tribes to consult with local authorities when making certain highway routing decisions.¹⁰⁶ Linking state outcomes to

101. See 42 U.S.C. § 6929.

102. Buzbee, *Federal Floors*, *supra* note 3, at 101-02 (noting that industry prefers ceilings); Verchick & Mendelson, *supra* note 22, at 30.

103. See 42 U.S.C. § 7543(a); see also, e.g., *Engine Mfrs. Ass'n v. S. Coast Air Quality Mgt. Dist.*, 541 U.S. 246 (2004) (applying the first sentence of § 7543(a) to indicate state-level preemption).

104. See 42 U.S.C. § 6929 (2006 & Supp. 2010); *cf.*, e.g., *ENSCO, Inc. v. Dumas*, 807 F.2d 743, 745 (8th Cir. 1986) (noting that "concurrent regulation is not totally precluded"); *N. Haven Planning & Zoning Comm'n v. Upjohn Co.*, 753 F. Supp. 423, 429 (D. Conn. 1990) (describing RCRA's savings clause as a way "to promulgate . . . cooperation"), *aff'd*, 921 F.2d 27 (2d Cir. 1990); *Ogden Envtl. Servs. v. City of San Diego*, 687 F. Supp. 1436, 1444 (S.D. Cal. 1988) ("Congress, by way of the 'savings' clause, clearly did envision the extra layer of regulatory requirements that might be imposed by local governments.").

105. See 49 U.S.C. § 5112(b)(1)(H) (2006) (stating that the Secretary's standards for states and tribes must contain "a requirement that a State be responsible (i) for ensuring that political subdivisions of the State comply with standards prescribed under this subsection . . . ; and (ii) for resolving a dispute between political subdivisions").

106. *Id.* § 5112(b)(1)(C) (stating that the Secretary's standards for states and tribes must contain "a requirement that, in establishing a highway routing designation, limitation, or requirement, a State or Indian tribe consult with appropriate State, local, and tribal officials"). However, the provision requires this consultation only

local consultation reflects a vision of localities as specially qualified and knowledgeable. Similarly, a Federal Power Act provision preserves the “laws of the respective States” regarding water when that water is being used for “municipal purposes,” among other uses.¹⁰⁷ And the Federal Railroad Safety Act (FRSA) savings clause permits states to go above a federal floor if, among other requirements, doing so is necessary “to eliminate or reduce an essentially local safety or security hazard.”¹⁰⁸ Courts have interpreted FRSA’s “essentially local hazard” clause to mean that the problem addressed *cannot* be statewide.¹⁰⁹ However, agencies and courts have concluded that two other local-twist clauses do not actually require that local (versus statewide) conditions determine the outcome.¹¹⁰

for localities outside their jurisdiction, weakening the requirement for our purposes. *Cf.* 33 U.S.C. § 1251(g) (protecting, as part of the CWA, state rights to allocate water quantities, and gesturing at *federal* cooperation with “local agencies”); *City of Albuquerque v. Browner*, 97 F.3d 415, 423 n.9 (10th Cir. 1996) (applying the provision to tribes); *Riverside Irrigation Dist. v. Andrews*, 758 F.2d 508, 513 (10th Cir. 1985) (discussing a Clean Water Act clause in relation to local irrigation districts without comment on the decision to extend it beyond a state body); *Alameda Water & Sanitation Dist. v. Reilly*, 930 F. Supp. 486, 493 (D. Colo. 1996) (same).

107. *See* 16 U.S.C. § 821; *see also* *Mega Renewables v. Cnty. of Shasta*, 644 F. Supp. 491, 497 (E.D. Cal. 1986) (rejecting the preemption challenge to a state law and discussing state law in a particularly favorable light).

108. *See* 49 U.S.C. § 20106(a)(2)(A) (2006 & Supp. 2010).

109. *See, e.g.,* *CSX Transp., Inc. v. Easterwood*, 507 U.S. 658, 675 (1993) (citing the local hazard rule); *Jacob Z. Jacobson v. BNSF Ry. Co.*, No. 1:11-CV-01003, 2011 WL 6099389, at *6 (D.S.D. Dec. 7, 2011) (citing, *inter alia*, H.R. REP. NO. 91-1194, at 12 (1970), *reprinted in* 1970 U.S.C.C.A.N. 4104, 4117).

110. One clause appears in FIFRA. *See* 7 U.S.C. § 136v(c)(1) (2006) (letting states register pesticides for uses beyond those registered by the federal government “to meet special local needs”); 40 C.F.R. § 162.151 (2012) (defining “special local need”); 3 WILLIAM H. RODGERS, JR., *RODGERS’ ENVIRONMENTAL LAW* § 5:15 (2011) (noting that this savings clause applies to statewide, not just local, situations); *cf.* Mary Jane Angelo, *The Killing Fields: Reducing the Casualties in the Battle Between U.S. Species Protection Law and U.S. Pesticide Law*, 32 HARV. ENVTL. L. REV. 95, 145 n.281 (2008) (interpreting “special local needs,” apparently to mean truly “local”).

The other provision appears in the OSH Act. *See* 29 U.S.C. § 667(c)(2) (specifying that a state occupational health and safety plan can be approved to replace a federal standard if, among other requirements, the standards “are required by compelling local conditions”); *Shell Oil Co. v. U.S. Dep’t of Labor*, 106 F. Supp. 2d 15, 20 (D.D.C. 2000) (interpreting this provision “to allow increased state regulation whenever the state regulators identify compelling conditions within their own borders”); Supplement to California State Plan; Approval, 62 Fed. Reg. 31,159 (June 6, 1997) (stating that state standards affecting interstate commerce “must be required by compelling local conditions”). However, there is not much case law interpreting this provision. *Cf.* *Nat’l Solid Wastes Mgmt. Ass’n v. Killian*, 918 F.2d

These local-twist clauses are important here first because they show Congress linking a favorable preemption judgment to the local. State-level law escapes federal preemption by riding on the back of the local, reversing the standard story of states empowering local governments.¹¹¹ Second, these clauses show Congress taking into account state-local differences, finding such differences meaningful for purposes of preemption.

Congress, therefore, acknowledges state and local differences far more often than the conflation story recognizes. However, while Congress has a set of tools for differentiation, I see little evidence in statutory text or legislative history that Congress has any real system for thinking about state-local differences. Part III proposes such a framework to encourage statutory drafting that takes the fullest advantage of state and local capacities.

We emerge from Part I's investigations having identified and then having started to untangle the strong assumption of state-local equivalency that prevails in federal preemption scholarship and doctrine. Instead of an undifferentiated mass, state and local laws at times appear as separate threads in the bundle of subfederal regulations potentially subject to federal preemption. I now turn to more normative and prescriptive considerations.

II. DOES CONGRESS HAVE THE POWER TO DIFFERENTIATE BETWEEN STATE AND LOCAL REGULATION?

This Part addresses a threshold challenge: Can Congress specify divergent outcomes for state and local regulation in preemption clauses, particularly if Congress is seeking to constrain state authority while upholding local authority? For example, what if Congress preempts state authority but preserves local law because it concluded that a given regulatory matter is best handled at the local level, whether for efficiency or other reasons?¹¹² Or what if Congress seeks to preserve local regulation over a given matter and therefore explicitly preempts

671, 678 (7th Cir. 1990) (leaving out this provision from a discussion of OSH Act preemption).

111. Courts seem to engage in a similar move when they cite specifically local conditions while addressing federal preemption challenges to state authority. *See* Gordon, *supra* note 23, at 208-09 & nn.99-101 (citing *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 578 (1985) (Powell, J., dissenting); *Nat'l League of Cities v. Usery*, 426 U.S. 833, 851 (1976); Briffault, *supra* note 27, at 1328-35).

112. *See* *Se. Oakland Cnty. Res. Recovery Auth. v. City of Madison Heights*, 5 F.3d 166, 169 (6th Cir. 1993) ("If the state has preempted [the local ordinance], its validity cannot be saved by a grant of authority from Congress." (quoting *R.I. Cogeneration Assocs. v. City of E. Providence*, 728 F. Supp. 828, 833 n.11 (D.R.I. 1990) (alteration in original))).

any attempt by the states to preclude localities from acting?¹¹³ I argue that Congress has the power to do both.

A. *The Gregory Plain Statement Rule for Congressional Interference with State Authority*

Congress cannot recklessly interfere with states' internal structures. Yet such intervention is permissible if Congress follows the rules.

Most important here, Congress can interfere with state authority if it makes its intention to do so crystal clear. As the Court declared in *Gregory v. Ashcroft*, “[I]f Congress intends to alter the usual constitutional balance between the States and the Federal Government, it must make its intention to do so unmistakably clear in the language of the statute.”¹¹⁴ The Court called this a “plain-statement rule” that recognizes “that the States retain substantial sovereign powers under our constitutional scheme, powers with which Congress does not readily interfere.”¹¹⁵ While often cited as a constraint on federal power, the plain-statement rule also recognizes the liberating power of the Supremacy Clause, which provides that, notwithstanding “any Thing in the Constitution or Laws of any State to the Contrary,” federal law prevails over conflicting state law.¹¹⁶ As the Court therefore conceded in *Gregory*, state sovereignty is “subject . . . to limitations imposed by the Supremacy Clause.”¹¹⁷

In its 2004 *Nixon v. Missouri Municipal League* decision, the Court relied on Congress's failure to use crystal-clear language, as required by the plain-statement rule, as an alternative ground for holding that a local govern-

113. See also *Hills*, *supra* note 47, at 1211 (“At most, such federal laws simply require the state to remove certain restrictions on the power of subordinate officials so that those officials can voluntarily assume federal duties.”).

114. 501 U.S. 452, 460 (1991) (alteration in original) (citation and internal quotation marks omitted).

115. *Id.* at 461.

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

117. *Gregory*, 501 U.S. at 457 (citations and internal quotation marks omitted); cf. Bradford R. Clark, *Process-Based Preemption*, in Buzbee, PREEMPTION CHOICE, *supra* note 3, at 208, 210 (finding the *Gregory* rule to be too strong). These powers might be particularly strong when Congress is acting pursuant to its Commerce Clause authority. See U.S. CONST. art. I, § 8, cl. 3 (granting Congress the power “to regulate commerce with foreign nations and among the several states”); see also, e.g., Benjamin H. Barton, *An Article I Theory of the Inherent Powers of the Federal Courts*, 61 CATH. U. L. REV. 1, 10 (2011) (“As long as congressional action passes the low ‘necessary and proper’ bar, Congress has plenary Article I authority to pass the laws it pleases.”). They might be weaker when Congress is acting pursuant to its bankruptcy power. See, e.g., *Ashton v. Cameron Cnty. Water Improvement Dist. No. 1*, 298 U.S. 513 (1936) (holding that Congress cannot employ its bankruptcy power to force local governments into involuntary bankruptcy without their respective states' permission).

ment could not rely on federal preemption doctrine to preempt a state law that prohibited local authority over telecommunications.¹¹⁸ The Court first concluded that Congress could not have intended to permit local regulation against the will of the states in this case, offering “a few hypotheticals” from state and local government law to “bring the point home.”¹¹⁹ But the Court then turned to “a complementary principle”—namely, the *Gregory* plain-statement rule.¹²⁰ The Court concluded that *Gregory* “would bring us to the same conclusion even on the assumption that preemption could operate straightforwardly to provide local choice, as in some instances it might.”¹²¹ Thus the Court acknowledges that, in some circumstances, federal preemption might operate to trump state law and to “provide local choice”—but Congress failed to clearly state its intent in the Federal Telecommunications Act to permit such an outcome.

“To take the Court’s anxiety [in *Missouri Municipal League*] head on, then,” as Nestor Davidson observes, “the question becomes whether it is possible to defend the delegation of federal authority to local governments even in the face of direct state resistance.”¹²² The answer, I believe, is yes. Different facts in future cases could mean that, when the Court spins out its hypotheticals, it will not find the same kind of chaos that results from permitting a local government to wield federal preemption against its parent state. And, most relevant here, Congress can make clearer its intention to permit the preemption of state law in order to protect local choice.¹²³ Congress has the power to intervene in

118. 541 U.S. 125 (2004) (considering a preemption claim relying on the Federal Telecommunications Act). In *Missouri Municipal League*, a Missouri statute prohibited the state’s political subdivisions from offering certain telephone services. *Id.* The Federal Telecommunications Act stated that no one could “prohibit . . . any entity” from entering the telecommunications market, a phrase interpreted alongside another express preemption provision. 47 U.S.C. § 253(a), (d) (1996) (emphasis added). The statutory interpretation question therefore was whether the phrase “any entity” included localities such that federal law preempted Missouri’s statute constraining local action.

119. *Missouri Municipal League*, 541 U.S. at 134. While the Court’s willingness to engage in such hypotheticals is suspect, that point is not directly relevant to the discussion here.

120. *Id.* at 140.

121. *Id.*; see also *id.* (stating that the “liberating preemption” the localities sought “would come only by interposing federal authority between a State and its municipal subdivisions, which our precedents teach, ‘are created as convenient agencies’” of the state (quoting *Wis. Pub. Intervenor v. Mortier*, 501 U.S. 597, 607-08 (1991))).

122. Davidson, *supra* note 34, at 1018.

123. See also Garrick B. Pursley & Hannah J. Wiseman, *Local Energy*, 60 EMORY L.J. 877, 953 (2011) (reading *Missouri Municipal League* in the same way). Others have argued that the FCC has this power in the context of local provision of broadband. See, e.g., Matthew Dunne, Note, *Let My People Go (Online): The Power of the FCC To Preempt State Laws that Prohibit Municipal Broadband*, 107 COLUM. L. REV.

state-local relations, including by differentiating between the state and local in the text of preemption provisions.

B. Other Support for Congressional Authority To Differentiate

Additional justifications derived from both case law and political theory support the conclusion that Congress has the power to differentiate between state and local governments in preemption provisions.

Although it struck down the attempt in *Missouri Municipal League*, the Court in other cases has permitted local governments to bring federal preemption claims against state governments.¹²⁴ In *Lawrence County v. Lead-Deadwood School District No. 40-1*, the Court permitted a county to rely on a federal statute in order to preempt a state law that purported to limit how the county could use federal funds.¹²⁵ The Court rejected the “concerns of federalism” that the state raised.¹²⁶ And in *PUD No. 1 of Jefferson County v. Washington Department of Ecology*, the Court addressed an attempt by a city and a local utility district to use the Federal Power Act to trump a state environmental agency’s decision.¹²⁷ The Court proceeded to the merits of the preemption claim without rejecting the claim as a threshold matter—that is, without holding that local entities lacked the power to wield federal law in this manner. The Court ultimately rejected the claim on the merits.

Turning to political theory, one also can argue that Congress is the most institutionally competent actor to make decisions about distributing power

1126 (2007) (making a sweeping argument for federal power to preempt adverse state laws in the broadband context).

124. Hills, *supra* note 47, at 1207-08 (discussing the Washington Supreme Court’s conclusion that Congress could *not* “endow a state-created municipality with powers greater than those given it by its creator, the state legislature” (quoting *City of Tacoma v. Taxpayers of Tacoma*, 307 P.2d 567, 577 (Wash. 1957))); *see also* Gillian E. Metzger, *Federalism Under Obama*, 53 WM. & MARY L. REV. 567, 593 (2011) (citing *Missouri Municipal League* for the proposition that “[a]lthough the Court has recently signaled that such federal authorization of local violations of state law may raise federalism concerns,” it previously has “sustained federal power to preempt state-law limits on actions by localities”); Rodríguez, *supra* note 84, at 637 (speculating that federal intervention in state-local relations “might be appropriate in some circumstances”).

125. 469 U.S. 256, 270 (1985). *Lead-Deadwood* was issued in the same year as *Hillsborough County v. Automated Medical Laboratories, Inc.*, 471 U.S. 707, 713 (1985), which was the first explicit recognition of the conflation axiom. In both cases, the level of government was deemed irrelevant to resolving the federal preemption challenge.

126. *Lead-Deadwood*, 469 U.S. at 269.

127. 511 U.S. 700, 721-22 (1994).

among the three levels of government.¹²⁸ Federal legislation gains a unique form of legitimacy through the processes of deliberation, representation, and dialogue with the public that judicial decisions cannot replicate.¹²⁹ As a practical matter, courts cannot engage in the kind of extensive fact-gathering and policy fine-tuning that is Congress's specialty.¹³⁰ Congressional staff, agencies, and state and local lobbying organizations assist in the process.¹³¹ These institutional strengths complement a process-based view of preemption grounded in constitutional text and structure.¹³²

Of course, congressional decision making has its flaws.¹³³ Congress rarely acts with a single unified voice. Members frequently vote on legislation despite being unfamiliar with the details. And factors extraneous to the merits of the legislation shape the resulting statutes—including “raw political power,”¹³⁴ tactical reasons to combine provisions (i.e., “logrolling”¹³⁵), and other

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128. See Davidson, *supra* note 34, at 961 (stating that such intergovernmental conflicts as federal-local alliances against the states are “best left to the political process”).
129. See, e.g., Lillian R. Bevier, *Religion in Congress and the Courts: Issues of Institutional Competence*, 22 HARV. J.L. & PUB. POL'Y 59, 63 (1998) (calling the judiciary “hobbled” by its many flaws, such as “its lack of accountability”).
130. See, e.g., Merrill, *supra* note 11, at 758.
131. See, e.g., JAMES T. O'REILLY, *FEDERAL PREEMPTION OF STATE AND LOCAL LAW: LEGISLATION, REGULATION AND LITIGATION* 209 (2007) (“The clarity with which Congress addresses residual state and local authority when the Congress addresses a societal problem or regulatory need is the responsibility of Congress, especially the staff members of the subcommittees . . .”).
132. See JESSE CHOPER, *JUDICIAL REVIEW AND THE NATIONAL PROCESS* (1980) (developing the theory that led to the creation of the “process federalism” strand of political safeguards). Compare *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 550-54 (1985) (discussing the theory with approval), Marci A. Hamilton, *The Elusive Safeguards of Federalism*, 574 ANNALS AM. ACAD. POL. & SOC. SCI. 93 (2000) (same), Larry D. Kramer, *Putting the Politics Back into the Political Safeguards of Federalism*, 100 COLUM. L. REV. 215 (2000) (same), and Herbert Wechsler, *The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Government*, 54 COLUM. L. REV. 543 (1954) (same), with Saikrishna B. Prakash & John C. Yoo, *The Puzzling Persistence of Process-Based Federalism Theories*, 79 TEX. L. REV. 1459 (2001) (providing a critique of the process-based theory of federalism), and Andrzej Rapaczynski, *From Sovereignty to Process: The Jurisprudence of Federalism After Garcia*, 1985 SUP. CT. REV. 341, 351 (same).
133. Bevier, *supra* note 129, at 62-63 (“A perfect, reliable institutional actor does not exist.”). Others have challenged congressional hegemony persuasively. See, e.g., Merrill, *supra* note 11, at 727-28.
134. Dana, *supra* note 85, at 549.
135. See, e.g., *Stroh Brewery Co. v. State*, 954 S.W.2d 323, 325 (Mo. 1997) (defining “logrolling” as the process whereby “several matters that would not individually command a majority vote are rounded up into a single bill to ensure passage”).

“[s]ignificant pathologies of the democratic process,” such as a lack of deliberation, interest group influence, and lack of focus on specific issues.¹³⁶

C. *The Irrelevance of Congressional Power if States Can Evade It?*

Even if Congress acts within its powers to constrain state authority, that action could be meaningless if states can evade federal statutory mandates. To highlight one possibility, states could respond by enacting a law preempting the local authority that Congress has sought to preserve. However, Congress could respond by preempting the restrictive state law, making its intentions clear in the text of the statute.

A state also could try to get around any undesired federal authorization of local action by employing “carrots” or “sticks” that convince local governments to do its bidding, not the federal government’s. In terms of sticks, states could, for example, threaten to revoke local governments’ home-rule status or to withhold funding. However, states would be unlikely to yank power away from local governments in this manner because states gain a great deal from expansive local powers. For example, local government management and financing of education,¹³⁷ health care, and other services for the indigent relieve burdens on state agencies and state budgets; this role is particularly important in times of escalating state debt,¹³⁸ even as states cut down on local funding.¹³⁹ Therefore, in order for states to be motivated to withdraw local power, the exercise of local authority would have to constitute a very significant threat to state interests.

136. Bernard W. Bell, *Using Statutory Interpretation To Improve the Legislative Process: Can It Be Done in the Post-Chevron Era?*, 13 J.L. & POL. 105, 106 (1997).

137. See, e.g., Kamina Aliya Pinder, *Federal Demand and Local Choice: Safeguarding the Notion of Federalism in Education Law and Policy*, 39 J.L. & EDUC. 1, 11-14 (2010); Saiger, *supra* note 27, at 103-04 & nn.47-48 (acknowledging the importance of local control over financing while compiling literature critical of existing local school financing on grounds of “racism and injustice”).

138. See, e.g., NICHOLAS JOHNSON, PHIL OLIFF & ERICA WILLIAMS, CTR. ON BUDGET AND POLICY PRIORITIES, AN UPDATE ON STATE BUDGET CUTS (2011), available at <http://www.cbpp.org/3-13-08sfp.pdf> (examining how the recession has affected state budgets); Michael Cooper & Mary Williams Walsh, *Mounting State Debts Stoke Fear of a Looming Crisis*, N.Y. TIMES, Dec. 5, 2010, at A1; cf. Richard C. Schragger, *Democracy and Debt*, 121 YALE L.J. 860, 862 (2012) (noting that state and local fiscal crises are not a new phenomenon but instead part of normal business cycles); David A. Super, *Rethinking Fiscal Federalism*, 118 HARV. L. REV. 2544 (2005) (providing suggestions, inter alia, for states to update their fiscal constitutional provisions to avoid endemic problems).

139. See, e.g., NAT’L GOVERNORS ASS’N & NAT’L ASS’N OF STATE BUDGET OFFICERS, THE FISCAL SURVEY OF STATES 8 (2010) (“To eliminate fiscal 2011 budget gaps, 35 states are using specific, targeted cuts [to state budgets] Another method being used by 19 states is to reduce aid to localities . . .”).

Moreover, some states give local governments home-rule powers through their state constitutions as opposed to through statutes. Constitutional home-rule provisions provide greater protections to general-purpose local governments in that the state *legislature* cannot repeal or amend them.¹⁴⁰ Therefore, if a local government's home-rule powers are derived from a state constitutional source, they can only be withdrawn if the people decide to amend the state constitution.¹⁴¹

III. A FRAMEWORK FOR CONGRESSIONAL DIFFERENTIATION BETWEEN THE LOCAL AND THE STATE

Having concluded that Congress has the power to differentiate between state and local preemption outcomes, this Part argues that Congress should strive to do so or at least to deliberate over state-local differences and make clear its intentions for both levels of government in federal preemption provisions. This Part proposes a framework of variables that Congress could weigh and systematically consider when drafting preemption provisions.¹⁴² The discussion remains somewhat abstract in that Congress's final preemption choices must depend on the specific subject matter at hand.¹⁴³

As Table 1 summarizes, Congress might seek to protect state law when its top goals are federal uniformity with a minor degree of subfederal variation or encouraging subfederal regulation that effectively replaces federal regulation. In contrast, Congress might be more willing to protect local laws when its top goals are allowing for rapid, site-specific responses and regulation; encouraging innovation and intergovernmental learning over time; and enlisting local governments as partners in federal activities. Finally, Congress might have no pref-

140. See, e.g., Janice C. Griffith, *Regional Governance Reconsidered*, 21 J.L. & POL. 505, 521 (2005); see also, e.g., Cove, *supra* note 36, § 5.2 (noting that, even without home rule, general-law local governments can exercise the standard police powers and “adopt local ordinances, zoning rules, bylaws, voting procedures, and legislative forums and procedures”).

141. See, e.g., Cynthia Cumfer, *Original Intent v. Modern Judicial Philosophy: Oregon's Home Rule Case Frames the Dilemma for State Constitutionalism*, 76 OR. L. REV. 909, 913 (1997).

142. Others have proposed default rules to guide not only Congress but also judges and agencies in handling preemption questions. Their goals are similar—increased consistency and legitimacy—but they do not engage with the question of state-local differentiation, and therefore they identify different though overlapping variables as relevant. See, e.g., MCGARITY, *supra* note 19, at 214; Buzbee, *Introduction*, *supra* note 3, at 9; William W. Buzbee, *Conclusion: The Menu of Preemption Choice Variables*, in PREEMPTION CHOICE, *supra* note 3, at 301, 302-03 [hereinafter Buzbee, *Conclusion*]; Thomas Hazlett, *Federal Preemption in Cellular Phone Regulation*, in FEDERAL PREEMPTION, *supra* note 2, 113, 116; Merrill, *supra* note 11, at 747.

143. See *supra* notes 84-85 and accompanying text.

erence between state and local law when it has imposed an optimal federal standard or is seeking to decrease subfederal externalities and burden-exportation.

Table 1

Federalism-Related Goal	Favors Preemption or Preservation of Subfederal Law?	Prefers the Preservation of Which Level of Subfederal Law (Relatively)?
Minimizing subfederal variation	Preemption	State over Local
Encouraging subfederal regulation that effectively replaces federal regulation	Preservation	State over Local
Allowing site-specific regulation	Preservation	Local over State
Promoting innovation and intergovernmental learning	Preservation	Local over State
Enlisting local partners in federal programs	Preservation	Local over State
Implementing an optimal federal standard	Preemption	No Preference
Decreasing externalities and burden-exportation	Preemption	No Preference

A. *Situations in Which State Law Has Advantages over Local Law*

State laws have certain advantages over local laws in the context of federal preemption. This Section examines the situations in which Congress might want to harness those advantages.

1. When Congress Seeks To Minimize Subfederal Variation

The primary reason that Congress might protect state but not local law when drafting preemption provisions is to maintain a high¹⁴⁴—but not abso-

144. Congress seeks to preserve uniform federal laws in some cases to protect national economic interests. *See, e.g.,* *Boggs v. Boggs*, 520 U.S. 833, 835-36 (1997) (“Given the pervasive significance of pension plans in the national economy, . . . the [Em-

lute¹⁴⁵—degree of federal uniformity. Both state and local regulation present some threats to federal uniformity.¹⁴⁶ However, Congress might find state regulation to be the lesser threat.

First, both state and local regulation present courts with a challenge: Judges fear that if they permit this subfederal law to escape preemption, similar laws will proliferate in other jurisdictions,¹⁴⁷ placing a greater burden on federal law. However, local laws present a greater threat of proliferation as a matter of sheer numbers. There are fifty states but thousands of local bodies available to mimic each other.¹⁴⁸

Moreover, local laws present a greater threat to federal uniformity because they might deviate more, both from federal law and from each other. States have a more robust uniform law movement than localities do, aided by organi-

ployee Retirement Income Security Act preemption] question is of undoubted importance.”).

145. Cf. Catherine L. Fisk & Michael M. Oswald, *Preemption and Civic Democracy in the Battle over Wal-Mart*, 92 MINN. L. REV. 1502, 1537 (2008) (arguing that uniformity interests should give way to other community-based interests); Roderick M. Hills, Jr., *Against Preemption: How Federalism Can Improve the National Legislative Process*, 82 N.Y.U. L. REV. 1, 66 (2007) (challenging the uniformity justification for preemption on the ground that it is preferable to focus on the statutory purpose of the challenged law).
146. Thus, when enacting the Hazardous Materials Transportation Act (HMTA), Congress asserted the goal of “preclud[ing] a multiplicity of State and local regulations and the potential for varying as well as conflicting regulations in the area of hazardous materials transportation.” *Consol. Rail Corp. v. City of Bayonne*, 724 F. Supp. 320, 327 (D.N.J. 1989) (quoting S. REP. NO. 93-1192, at 37 (1974)) (internal quotation marks omitted); see also S. REP. NO. 101-449 (1990), *reprinted in* 1990 U.S.C.C.A.N. 4595, 4596 (using similar language). Congress expressed similar uniformity goals when enacting the Federal Hazardous Substances Act. See *Pa. Gen. Ins. Co. v. Landis*, 96 F. Supp. 2d 408, 414 (D.N.J. 2000) (citing to various documents in the legislative history), *aff’d*, 248 F.3d 1131 (3d Cir. 2000).
147. See, e.g., Dana, *supra* note 85, at 548 (discussing the fact that states copy each other’s legislation, though they often fiddle with it); Motomura, *supra* note 15, at 2055 (describing the growth of state and local immigration initiatives and citing the National Conference of State Legislatures’ data for state laws); Kirk Johnson, *State Goes Its Own Way To Regulate Forest Roads*, N.Y. TIMES, Feb. 5, 2012, at A12 (describing Colorado’s exceptions to a federal forest “roadless” rule, and the fear that other states will follow, creating “[a] patchwork system of rules and special interests that can speak loudly in state capitals”).
148. As the phenomenon of local megafederalism would predict, see *infra* pp. 136-137 the same argument is made for why federal uniformity is better than state regulation. See, e.g., Jonathan Adler, *When Is Two a Crowd? The Impact of Federal Action on State Environmental Regulation*, 31 HARV. ENVTL. L. REV. 67, 67 (2007); Ilya Shapiro, *Tis Better To Be Regulated by One Gorilla than by Fifty Monkeys*, CATO@LIBERTY (Dec. 15, 2008, 2:32 PM), <http://www.cato-at-liberty.org/tis-better-to-be-regulated-by-one-gorilla-than-by-fifty-monkeys/>.

zations such as the Uniform Law Commission of the National Conference of Commissioners on Uniform State Laws.¹⁴⁹ Therefore, if states were to step off the federal path, they might do so in a more coordinated manner than localities would, lessening the overall impact on uniformity. For example, if five states were to adopt an identical law instead of adopting five distinct laws, compliance costs and other costs of the deviation from federal uniformity would decrease for interstate operators.¹⁵⁰ Not only are “[l]ower levels of government . . . more likely to depart from established consensus simply because they are smaller and more numerous,” but also “a smaller unit of government is more likely to have a population with preferences that depart from the majority’s.”¹⁵¹ The fact that state laws are more difficult to enact than local laws also could lessen Congress’s fear that a state law will spark a chain reaction in other states. These number and deviation threats provide a counterpoint to the argument that a single local law “cannot wreak as much havoc with federal regulatory regimes as a state law can.”¹⁵²

2. When Congress Seeks To Encourage Subfederal Regulation that Effectively Replaces Federal Regulation

From the federal perspective, one of the most useful functions of state and local governments is that they can assume responsibility over matters that the federal government otherwise would handle.¹⁵³ Congress might see states, more than local governments, as capable of functioning as near equivalents when it

149. See Unif. Law Comm’n, *About the ULC*, NAT’L CONF. COMMISSIONERS ON UNIFORM ST. LAWS, <http://www.nccusl.org/> (last visited Mar. 20, 2012) (“The Uniform Law Commission [provides] . . . legislation that brings clarity and stability to critical areas of state statutory law.”); see also, e.g., Kim Quaile Hill & Patricia A. Hurley, *Uniform State Law Adoptions in the American States: An Explanatory Analysis*, 18 PUBLIUS 117 (1988).

150. Cf. Dana, *supra* note 85, at 529 (noting that multiple alternatives to a federal standard can be more burdensome than a single deviation).

151. McConnell, *supra* note 35, at 1498.

152. Chang Derek Liu, Note, *The Blank Page Before You: Should the Preemption Doctrine Apply to Unwritten Practices?*, 109 COLUM. L. REV. 350, 366 (2009).

153. Indicating some sense of their mutual contributions, a Senate Report on the 1990 amendments to the CAA’s preemption section regarding hazardous emissions evenhandedly discussed state and local remedial regulation. See S. REP. NO. 101-228 (1989), reprinted in 1990 U.S.C.C.A.N. 3385, 3581 (“This regulatory regime provides a significant role for *State and local* governments . . .”) (emphasis added); see also *id.* at 3633 (discussing the intent to protect both state and local regulation in a CAA savings clause, 42 U.S.C. § 7416).

comes to implementing federal objectives. Health care is only the most recent area in which Congress has recognized states as near equals.¹⁵⁴

The confidence in state regulation comes from various sources. State legislation is perceived to have greater democratic legitimacy and quality than local regulation. State laws tend to undergo a longer enactment process and to have more resources committed to their development, leading to greater technical sophistication.¹⁵⁵ More people, and a wider swath of them, typically participate in the making of state laws, if only by voting on their state representatives.¹⁵⁶ In contrast, the more localized the decision making, the more self-interested the voting might be.¹⁵⁷ Varied competing interests are also more likely to exist at the state level, while well-resourced interests might have more of a monopoly at the local level.

Spence and Murray speculate that the Democratic judges in their study collectively preempted local laws more often than state laws because they “simply believe that the law of the larger jurisdiction is entitled to more weight.”¹⁵⁸ Fo-

154. See Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 (2010) (to be codified). While the fate of this law is uncertain at the moment, the outcome of litigation challenging this Act will not affect this point.

155. See, e.g., Petition for Writ of Certiorari at app. E, Injunctive Order from Professional Lawn Care Ass’n v. Village of Milford at 11, Wis. Pub. Intervenor v. Mortier, No. 89-1905, 501 U.S. 597 (1991) (stating that, unlike states, “local units of government generally, particularly small cities like Milford or any of the other small cities around the country, just don’t have the facilities to do the kinds of work and research that is necessary”). But see Wis. Pub. Intervenor v. Mortier, 501 U.S. 597, 616 (1991) (rejecting the argument that “local ordinances necessarily rest on insufficient expertise”); see also, e.g., Michael Burger, *Empowering Local Autonomy and Encouraging Experimentation in Climate Change Governance: The Case for a Layered Regime*, 39 ENVTL. L. REP. NEWS & ANALYSIS 11,161, 11,167 (2009); Benjamin K. Sovacool, *The Best of Both Worlds: Environmental Federalism and the Need for Federal Action on Renewable Energy and Climate Change*, 27 STAN. ENVTL. L.J. 397, 430 (2008) (discussing size issues).

156. Cf. Winkler, *Fatal in Theory*, *supra* note 80, at 822 (“In a larger polity . . . , ‘a greater variety of parties and interests . . . make it less probable that a majority of the whole will have a common motive to invade the rights of other citizens.’” (quoting THE FEDERALIST NO. 10, at 83 (James Madison) (Clinton Rossiter ed., 1961))).

157. See generally Sheryll D. Cashin, *Federalism, Welfare Reform, and the Minority Poor: Accounting for the Tyranny of State Majorities*, 99 COLUM. L. REV. 552 (1999) (focusing on harms to welfare recipients); see also generally CLAYTON P. GILLETTE, LOCAL REDISTRIBUTION AND LOCAL DEMOCRACY: INTEREST GROUPS AND THE COURTS (2011) (investigating, among other matters, the influence of local interest groups on redistributive programs and evaluating when, if ever, courts should intervene to counter what he calls a more “malign” version of redistribution).

158. Spence & Murray, *supra* note 79, at 1178; see also *id.* (suggesting that “judges may see local regulations as the expressions of impassioned [not-in-my-backyard] groups whose members are numerous enough to persuade local governments but not state governments” to enact laws “not represent[ing] broadly held, or even

cusing on the relevance of size to democratic preferences, David Dana has argued that Congress should consider enacting more provisions permitting variation by large states along the lines of the CAA exception for California's air quality standards. He does so despite the assumption, "from a pure federalism perspective," that size and number of jurisdictions should not matter.¹⁵⁹

B. Situations in Which Local Law Has Advantages over State Law

While Congress might preserve state law but not local law to protect a limited degree of federal uniformity or to hand over certain kinds of responsibilities, Congress might find local regulation more worthy of preservation from federal preemption on other grounds. These grounds include localities' ability to tailor laws to local conditions, to innovate, and to serve as useful partners in specific ventures.

But to be clear, Congress only infrequently would decide to preserve local authority while preempting state authority over the same regulatory matter.¹⁶⁰ And nearly as infrequently would Congress decide to preserve local authority and prohibit states from using state law to interfere with the local authority that Congress had preserved. The potential outcry from states could be substantial. And, as a substantive matter, the pro-state principles outlined in Section III.A generally militate in favor of preempting local laws while saving state laws. But the relative advantages of local regulation outlined in this Section do not necessarily favor preempting state regulation. They primarily support Congress ensuring that local regulation is protected. In other words, this Section generally adopts the more modest position that Congress should, at a minimum, clarify that local law as well as state law will survive preemption in situations in which the local values identified are particularly strong.

Such a position is consonant with theories of cooperative federalism¹⁶¹—not seeking to carve out exclusive domains of regulation but rather seeking to

majority, views"); *id.* n.236 (speculating additionally that local governments are more susceptible to political pressure and thereby enact weak laws that are more likely to be preempted).

159. See Dana, *supra* note 85, at 511-12 (although not comparing state with local laws, seeming to support the conclusion that a state law would hold more weight in that balance than a local law); see also *id.* at 527 ("It seems straightforward that there is more democratic support in the case of a nonfederal standard that has been legislatively adopted by five large (populous) states than by one small state.").

160. See discussion *supra* Part II.

161. See, e.g., Zellmer, *supra* note 61, at 146 (describing cooperative federalism). Cooperative federalism goes by many names. See, e.g., David E. Adelman & Kirsten H. Engel, *Adaptive Environmental Federalism*, in PREEMPTION CHOICE, *supra* note 3, at 277, 277; Kirsten H. Engel, *Harnessing the Benefits of Dynamic Federalism in Environmental Law*, 56 EMORY L.J. 159, 176 (2006) (identifying "dynamic federalism" and other terms); Robert A. Schapiro, *From Dualism to Polyphony*, in PREEMPTION CHOICE, *supra* note 3, at 33, 34 ("polyphonic federalism").

preserve flexibility and intergovernmental sharing of responsibility, including between state and local governments. Cooperative federalism is visible in action in various fields, from minimum wage regimes and environmental waste regulation to workplace discrimination and the tax code.¹⁶² Indeed, Congress has appeared to be less enamored by regulatory exclusivity—allocating responsibility only to one level or another—than the courts or scholars.¹⁶³ The waning theory of dual federalism,¹⁶⁴ for example, envisions a regulatory stage on which two actors¹⁶⁵—the federal sovereign and the co-sovereign state—compete to establish exclusive authority over particular regulatory matters.¹⁶⁶ However, while the theory of cooperative federalism is more sympathetic to local authority than dual federalism, theories of cooperative federalism still tend to focus on the federal-state dyad.

Buttressing the pro-local arguments made in this Section is a federalism theory that I here call “local megafederalism.”¹⁶⁷ The idea is that the well-known

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162. See, e.g., *Wis. Pub. Intervenor v. Mortier*, 501 U.S. 597, 601 (1991) (stating that “FIFRA specifies several roles for state and local authorities,” including some through “cooperative agreements” with the federal government); Michael Burger, “It’s Not Easy Being Green”: *Local Initiatives, Preemption Problems, and the Market Participant Exception*, 78 U. CIN. L. REV. 835, 853 n.104 (2010) (environment); Henry H. Drummonds, *Beyond the Employee Free Choice Act: Unleashing the States in Labor-Management Relations Policy*, 19 CORNELL J.L. & PUB. POL’Y 83, 83 (2009) (labor). But see ZIMMERMAN, *supra* note 9, at 21-23, 187-90 (proposing what he sees as a more dynamic model than “dual federalism” or “cooperative federalism”); Johanna Kalb, *The Persistence of Dualism in Human Rights Treaty Implementation*, 30 YALE L. & POL’Y REV. 71 (2011) (arguing the same in the context of human rights treaty implementation).
163. See, e.g., Briffault, *supra* note 27, at 1328 (noting that “[t]he Court has been more attentive to the formal differences between states and local government than the scholarly advocates of federalism”).
164. See, e.g., Lynn A. Baker & Ernest A. Young, *Federalism and the Double Standard of Judicial Review*, 51 DUKE L.J. 75, 88 & n.61 (2001) (describing a “graveyard of failed distinctions”); Edward S. Corwin, *The Passing of Dual Federalism*, 36 VA. L. REV. 1 (1950); Ernest A. Young, *Dual Federalism, Concurrent Jurisdiction, and the Foreign Affairs Exception*, 69 GEO. WASH. L. REV. 139, 153-67 (2001) (observing that the Rehnquist Court abandoned dual federalism in its jurisprudence). Some see signs of dualism reappearing at the Court, if not in Congress. See, e.g., Schapiro, *supra* note 161, at 46-48.
165. See, e.g., Davidson, *supra* note 34, at 964-65 (describing dual federalism as permitting “no independent role for local governments”).
166. See, e.g., Richard A. Epstein & Michael S. Greve, *Conclusion: Preemption Doctrine and Its Limits*, in *FEDERAL PREEMPTION*, *supra* note 2, at 309, 311 (“[E]ither federal or state government, but not both, should handle any given matter.”); Schapiro, *supra* note 161, at 34 (describing “[t]he key postulates of dual federalism”).
167. The modifier “mega” signifies that certain federalism traits are amplified when local governments, as opposed to states, exercise their authority.

arguments in favor of state regulation over federal regulation¹⁶⁸—including the values of “participation, diversity, intergovernmental competition, political responsiveness, and innovation”¹⁶⁹—are only enhanced when comparing local regulation to federal (or state) regulation.¹⁷⁰ In other words, pro-state arguments have even stronger force when applied to the local level. The remaining sections of this Article draw both expressly and impliedly on the theory of local megafederalism.

1. When Congress Wants To Allow Site-Specific Local Responses

Congress might want to preserve the special ability of local governments to respond in a tailored manner to certain types of harms.¹⁷¹ “The first, and most

168. See, e.g., *Gregory v. Ashcroft*, 501 U.S. 452, 458 (1991) (O’Connor, J.) (noting that the “federalist structure of joint sovereigns preserves to the people numerous advantages,” and proceeding to list them); Davidson, *supra* note 34, at 1006 (citing the “now-familiar core of arguments for limiting federal power and promoting state authority”); Heather K. Gerken, *Foreword: Federalism All the Way Down*, 124 HARV. L. REV. 4, 6 (2010) (“[W]e are intimately familiar with [federalism’s] benefits: federalism promotes choice, competition, participation, experimentation, and the diffusion of power. The Court reels these arguments off as easily as do scholars.”); Trevor W. Morrison, *The State Attorney General and Preemption*, in PREEMPTION CHOICE, *supra* note 3, at 81, 82-84 (rehearsing the goals of federalism); Rodríguez, *supra* note 84, at 609-10 (making similar observations in the context of “migration management”); Verchick & Mendelson, *supra* note 22, at 16-17 (compiling reasons for “preserving a state’s authority and autonomy to regulate”).

169. Briffault, *supra* note 27, at 1315.

170. See, e.g., Paul Diller, *Intrastate Preemption*, 87 B.U. L. REV. 1113, 1114 (2007) (“In the sheer number of laboratories [of democracy] offered, local governments dwarf the mere 50 states”); Gordon, *supra* note 23, at 218 (noting that certain “federalist values . . . occur far better on the municipal than on the state level”); Schragger, *supra* note 36, at 178 (same). *But see* D. Bruce La Pierre, *Political Accountability in the National Political Process—The Alternative to Judicial Review of Federalism Issues*, 80 NW. U. L. REV. 577, 630-31 (1985) (“[T]here is no proof that either participation or accountability is greater in the states and local governments.”).

171. See, e.g., *Avery v. Midland Cnty.*, 390 U.S. 474, 481 (1967) (stating that the “responsible and responsive operation [of local governments] is today of increasing importance to the quality of life of more and more of our citizens”); Dana, *supra* note 85, at 536 (acknowledging that state-level regulation can be easier to enact than federal-level regulation, an argument that I transplant here to compare local versus state law); Heather K. Gerken, *Dissenting by Deciding*, 57 STAN. L. REV. 1745, 1784 (2005) (“Disaggregated institutions are often a solution to the problem of mass governance.”); Richard C. Schragger, *The Progressive City*, in WHY THE LOCAL MATTERS: FEDERALISM, LOCALISM, AND PUBLIC INTEREST ADVOCACY 39, 48-49 (Columbia Law Sch. Nat’l State Att’y’s Gen. Program & Yale Law Sch. Liman Pub. Interest Program eds., 2009), available at <http://www.law.yale.edu/intellectuallife/whythelocalmatters.htm>.

axiomatic, advantage of decentralized government is that local laws can be adapted to local conditions and local tastes, while a national government must take a uniform—and hence less desirable—approach.¹⁷² According to this metric, and consistent with local megafederalism, “[s]tates are preferable governing units to the federal government, and local government to states.”¹⁷³

The perception of special local responsiveness reflects the idea that local governments engage citizens in the political process better than state governments do,¹⁷⁴ just as states respond more quickly than the federal government, providing opportunities for political participation.¹⁷⁵ Local governments provide venues for debating critical public issues.¹⁷⁶ In turn, local politicians learn quickly about local concerns so that they can tailor legislation to resolve those problems.

Congress might be particularly careful to preserve local regulations that address site-specific harms.¹⁷⁷ Federal and even state regulation can be ill-suited to resolve local problems. Legislative histories often sound the theme of needing to preserve local flexibility in order to permit local governments to solve inherently local problems.¹⁷⁸

172. McConnell, *supra* note 35, at 1493.

173. *Id.* at 1494.

174. See, e.g., Verchick & Mendelson, *supra* note 22, at 17 (noting that “[a]lthough it has been a benefit claimed for federalism,” the “goal of stimulating greater citizen engagement may logically lead to calls for concentrating power in localities”); Gerken, *supra* note 168, at 30 (“If you care about participation, look down.”). See generally Frug, *supra* note 48 (providing a classic argument for the value of local political participation).

175. See, e.g., *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 575 n.18 (Powell, J., dissenting) (“The Framers recognized that the most effective democracy occurs at local levels of government, where people with firsthand knowledge of local problems have more ready access to public officials”); Richard T. Ford, *Law’s Territory (A History of Jurisdiction)*, 97 MICH. L. REV. 843, 844 (1999); Sullivan, *supra* note 32, at 1935 (“It is no historical accident that the ‘town meeting’ is the dominant political metaphor of our American republic.”); cf. Richard Briffault, *Our Localism: Part II—Localism and Legal Theory*, 90 COLUM. L. REV. 346, 393-99 (1990).

176. David J. Barron, *The Promise of Cooley’s City: Traces of Local Constitutionalism*, 147 U. PA. L. REV. 487, 491 (1999).

177. See Gerken, *supra* note 168, at 45 (“[A] centralized decisionmaker might think it’s quite a good idea to encourage . . . tailoring at the local level.”); Ken Starr, *Preface to FEDERAL PREEMPTION*, *supra* note 2, at xiii (describing how Americans “intuitively recoil from the idea of ‘one size fits all,’ the proposition that our hopes for happiness and fulfillment somehow lie in beneficent national measures reaching into our smallest communities and neighborhoods”).

178. See, e.g., H.R. REP. NO. 99-253(V) (1985), *reprinted in* 1986 U.S.C.C.A.N. 3124, 3220 (amending CERCLA); 136 CONG. REC. 16,877, 16,883 (1990) (statement of Sen. Symms); 136 CONG. REC. 12,911, 12,913 (1990) (statement of Rep. Dannemeyer); 136

The concept of “subsidiarity” provides additional ammunition for these arguments. An influential concept in Europe but also prevalent in the United States,¹⁷⁹ subsidiarity theory posits that power and responsibility should be devolved to the lowest level of government capable of exercising it well.¹⁸⁰ The higher level of government must justify its retention of authority over a given matter.¹⁸¹ Therefore, to the extent that Congress concludes accurately that local governments are better suited than states to perform a certain task, a federal law assigning that task to the local government is superior to one that assigns that task to the states (or the federal government).

Local governments also have a comparative functional advantage when regulating those matters traditionally considered part of the local realm.¹⁸² Local

CONG. REC. 3712 (1990) (statement of Rep. Dingell) (quoting a letter from the President’s Council on Economic Advisers declaring, *inter alia*, that “failure to provide local areas with the necessary authority and flexibility to solve local problems adds needless costs”). Emerging literature on local land-use models supports this perspective. *See, e.g.,* Alejandro E. Camacho, *Mustering the Missing Voices: A Collaborative Model for Fostering Equality, Community Involvement and Adaptive Planning in Land Use Decisions*, 24 STAN. ENVTL. L.J. 269, 277 (2005) (arguing, *inter alia*, for the integration of local land-use collaborative processes instead of “[r]etrospectively limiting the discretion of those best placed to resolve disputes”); Ashira Pelman Ostrow, *Process Preemption in Federal Siting Regimes*, 48 HARV. J. ON LEGIS. 289 (2011) (proposing an approach to facilities siting called “process preemption” that leaves most authority in local hands but incorporates federal limits).

179. *See, e.g.,* Robert K. Vischer, *Subsidiarity as a Principle of Governance: Beyond Devolution*, 35 IND. L. REV. 103, 123 (2001) (“[M]uch of this country’s political and legal landscape comports fully with subsidiarity’s ideal.”); Jared Bayer, Comment, *Re-Balancing State and Federal Power: Toward a Political Principle of Subsidiarity in the United States*, 53 AM. U. L. REV. 1421, 1472 (2004).
180. *See* Blank, *supra* note 32, at 540 (“[W]ho can disagree with the idea that every decision or governmental function should be given to the ‘smallest’ and ‘closest-to-the-citizen’ jurisdiction, under the condition that such jurisdiction can perform it efficiently?”); Alex Mills, *Federalism in the European Union and the United States: Subsidiarity, Private Law, and the Conflict of Laws*, 32 U. PA. J. INT’L L. 369, 376 (2010) (noting that subsidiarity is “increasingly invoked . . . in support of arguments for devolution toward greater local government”).
181. Mills, *supra* note 180, at 377; *see also* George A. Bermann, *Taking Subsidiarity Seriously: Federalism in the European Community and the United States*, 94 COLUM. L. REV. 331, 405 (1994) (discussing the democratic participation justifications for subsidiarity).
182. *See* Utah v. Hutchinson, 624 P.2d 1116, 1126 (Utah 1980) (noting that “[i]n granting cities and counties the power to enact ordinances to further the general welfare, the Legislature no doubt took such political realities into consideration”); Davidson, *supra* note 34, at 961; Richard H. Fallon, Jr., *The “Conservative” Paths of the Rehnquist Court’s Federalism Decisions*, 69 U. CHI. L. REV. 429, 441 (2002) (“[I]n functional analysis of the values that federalism serves, the significance of

governments bring tremendous resources to bear on matters of immediate, palpable concern to residents. Consider street maintenance, law enforcement, emergency medical services, traffic control, drinking water, sewage, and waste management.¹⁸³ While the state might set priorities and provide some funding to the locality to deal with these issues, local governments manage them. The increasing scholarly focus on the role of local special-purpose districts, as opposed to local general-purpose governments, has trained our attention on the local bodies providing those and other services.¹⁸⁴ Among other benefits, these tailored bodies match the scope of government to the scope of the problem.¹⁸⁵

Although Congress should consider which level of government traditionally has handled the regulatory matter at issue when deciding whether to preempt or not, such lines have proven difficult, if not impossible, to draw in the federal versus subfederal context.¹⁸⁶ Drawing lines between state and local regulation is similarly difficult: Both can exercise the state's police power, they often share regulatory authority, and their competencies can change over time.¹⁸⁷ Attempts

local governments is enormous.”); Gerken, *supra* note 168, at 23; *cf.* Briffault, *supra* note 175, at 393 (finding no “compelling normative basis” for localism in the local-autonomy-protecting theme of “efficiency in the provision of public sector goods and services”).

183. *See, e.g.,* City of Columbus v. Ours Garage & Wrecker Serv., Inc., 536 U.S. 424, 439 (2002) (highlighting the particular competencies of localities to regulate street and highway safety, an area in which “States have traditionally allowed localities to address local concerns”).
184. *See, e.g.,* Gerken, *supra* note 168, at 30 (discussing the place of special-purpose institutions in federalism); Camille Pannu, Comment, *Drinking Water and Exclusion: A Case Study from California’s Central Valley*, 100 CALIF. L. REV. 223 (2012) (“The phrase ‘special-purpose district’ is a local government law term of art; it refers to any local government formed with a fairly narrow or specific purpose in mind.”); *cf.* Young, *supra* note 36, at 65 (suggesting that limiting federal preemption through doctrines that protect autonomy would “benefit all governmental entities further down the food chain”).
185. BRIFFAULT & REYNOLDS, *supra* note 7, at 13-15 (noting that special-purpose governments are the “most common form of local government in the United States today”).
186. *See, e.g.,* Baker & Young, *supra* note 164, at 87-88 (describing a “graveyard of failed distinctions”); Judith Resnik, *Categorical Federalism: Jurisdiction, Gender, and the Globe*, 111 YALE L.J. 619, 621-22 (2001) (offering empirical reasons that line-drawing is difficult). The trend is reflected in Commerce Clause jurisprudence. *See, e.g.,* United States v. Lopez, 514 U.S. 548, 564-65 (1995). Nevertheless, matters such as crime, poverty, and family matters clearly tend to be dedicated to the states, and foreign relations and immigration to the federal government. *Cf.* Rodríguez, *supra* note 84, at 572 (seeing “functional, structural reasons” for the Court’s dedication of immigration matters to the federal government).
187. *See, e.g.,* Baker & Rodríguez, *supra* note 42, at 1354-55 (“The prevailing conception of local governments and their functions has shifted considerably over time.”).

to distinguish them often end in frustration.¹⁸⁸ Nevertheless, legislatures and courts distinguish the two regularly, such as when courts hear state challenges to local regulations on state-law-preemption grounds.¹⁸⁹ And state constitutions detail nonexclusive categories of what kinds of activities constitute so-called municipal affairs.¹⁹⁰ Scholars also attempt to categorize the relative institutional competencies of state versus local governments.¹⁹¹

Moreover, as a practical matter, state and local governments do not devote equal time and resources to all matters. For example, while both state and local governments have land-use responsibilities,¹⁹² land-use regulation ends up being primarily a local responsibility—even a pillar of local law¹⁹³—as environmental law seems increasingly to be becoming.¹⁹⁴ Formal powers also differ between state and local governments. States have the power to enact

188. See, e.g., Terrance Sandalow, *The Limits of Municipal Power Under Home Rule: A Role for the Courts*, 48 MINN. L. REV. 643, 661 (1964).

189. Baker & Rodriguez, *supra* note 42, at 1344-45, 1349-50; see also, e.g., Johnson v. Bradley, 4 Cal. 4th 389, 398 (1992) (establishing a “dialectical” approach to categorizing matters as “municipal affairs”).

190. See, e.g., Barron, *supra* note 44, at 2326-28; Briffault, *supra* note 27, at 1343.

191. Baker & Rodriguez, *supra* note 42, at 1354.

192. See, e.g., Solid Waste Agency of N. Cook Cnty. v. U.S. Army Corps of Eng’rs, 531 U.S. 159, 174 (2001) (citing “the States’ traditional and primary power over land and water use”).

193. See, e.g., N. Haven Planning & Zoning Comm’n v. Upjohn Co., 753 F. Supp. 423, 427 (D. Conn. 1990) (“Local land use decisions have repeatedly been held to be issues of local concern.”); Ostrow, *supra* note 178, at 296 (“That local governments were primarily empowered to regulate land is not a historical accident. Rather, local primacy in this area of law stems from a practical recognition that local governments are institutionally better suited to this task than are higher levels of government.”); cf. Sheryll D. Cashin, *Localism, Self-Interest, and the Tyranny of the Favored Quarter: Addressing the Barriers to New Regionalism*, 88 GEO. L.J. 1985, 1993 (2000) (discussing the ways in which delegation of local land-use control has led to “highly exclusionary zoning and developmental policies,” and the fact that “homogeneous localities can give effect to their worst biases”).

194. See, e.g., City of Chesapeake v. Sutton Enters., Inc., 138 F.R.D. 468, 475 (E.D. Va. 1990); cf. Ogden Env’tl. Servs. v. City of San Diego, 687 F. Supp. 1436, 1446 (S.D. Cal. 1988) (“[T]raditional land use and zoning decisions at the local level are necessarily intertwined with concerns about human health and the environment, over which the EPA has also been given regulatory authority in this instance.”).

civil-relationship laws and to punish serious crimes,¹⁹⁵ a power that localities lack. And trespass¹⁹⁶ and other torts are matters of state law.

The local-twist preemption provisions identified in Part I indicate that Congress is attuned to such distinct subject-matter competencies. These provisions in part rely on local concerns to determine state outcomes.

2. When Congress Wants To Promote Innovation and Intergovernmental Learning

Congress sometimes chooses not to preempt subfederal regulation so that it can encourage learning over time. The goal is to allow regulators to gain information from each other and improve federal laws incrementally.¹⁹⁷

I focus here on experimentation as the mechanism for such intergovernmental learning. Perhaps no feature of subfederal governance is lauded more frequently than its association with innovation.¹⁹⁸ Local regulation often is considered more innovative than state regulation (a megafederalist phenomenon), whether because the sheer number of local governments increases the chances of a good idea emerging or because it is relatively easier to get a local law enacted and tested out in practice. As a result, Congress might be particularly motivated to protect local regulation when it recognizes the need for innovation.¹⁹⁹

Localities have experimented, for example, with environmental and health-care regulation, from New York City's climate change regulations²⁰⁰ to

195. See Briffault, *supra* note 27, at 1343; see also *Egelhoff v. Egelhoff ex rel. Breiner*, 532 U.S. 141, 155 (2001) (state family and probate law); *Boggs v. Boggs*, 520 U.S. 833, 840 (1997) (community property).

196. See *Sears, Roebuck & Co. v. San Diego Cnty. Dist. Council of Carpenters*, 436 U.S. 180 (1978) (trespass).

197. Michael C. Dorf & Charles F. Sabel, *A Constitution of Democratic Experimentalism*, 98 COLUM. L. REV. 267 (1998) (stressing mutual learning).

198. See, e.g., David J. Barron, *Fighting Federalism with Federalism: If It's Not Just a Battle Between Federalists and Nationalists, What Is It?*, 74 FORDHAM L. REV. 2081, 2091 (2006) (stating that experimentalism has been called the "essence to constitutional federalism"). Local multiplicity is important not only because local experimentation leads to better laws but also because such flourishing is good in and of itself.

199. Cf. Exec. Order 12,612, 52 Fed. Reg. 41,685 (Oct. 26, 1987) (emphasizing, *inter alia*, the need to recognize and encourage local regulation).

200. See, e.g., Ann E. Carlson, *Iterative Federalism and Climate Change*, 103 NW. U. L. REV. 1097, 1106, 1153 (2009); Katherine A. Trisolini, *All Hands on Deck: Local Governments and the Potential for Bidirectional Climate Change Regulation*, 62 STAN. L. REV. 669, 677, 731-32 (2010); see also *Allway Taxi, Inc. v. City of New York*, 340 F. Supp. 1120, 1124 (S.D.N.Y. 1972) ("[B]oth the history and text of the [CAA] show that the . . . preemption section was [not made] to hamstring localities in their fight against air pollution . . ."), *aff'd*, 468 F.2d 624 (2d Cir. 1972); cf. *Metro. Taxi-*

San Francisco's employer health care pay-or-play law.²⁰¹ Localities also have been active in labor and employment initiatives, such as living-wage and wage-theft laws.²⁰² The same is true for anti-immigrant state and local laws,²⁰³ as well as state and local laws seeking to integrate immigrants into communities.²⁰⁴ So-called "affirmative litigation units" emerging in city and county attorney offices have supported such initiatives.²⁰⁵ When seeking innovative solutions to ongoing problems and the kind of intergovernmental communication that co-

cab Bd. of Trade v. City of New York, 615 F.3d 152 (2d Cir. 2010) (preempting the city's attempt to encourage the use of hybrid taxis).

201. See Catherine L. Fisk, *The Last Article About the Language of ERISA Preemption? A Case Study of the Failure of Regulation*, 33 HARV. J. ON LEGIS. 35 (1996). Compare *Golden Gate Rest. Ass'n v. City & Cnty. of San Francisco*, 558 F.3d 1000 (9th Cir. 2009) (denying petition for rehearing en banc), with *Retail Indus. Leaders Ass'n v. Fielder*, 475 F.3d 180, 193 (4th Cir. 2007); see also, e.g., *N.Y. State Rest. Ass'n v. N.Y.C. Bd. of Health*, 556 F.3d 114 (2d Cir. 2009) (calorie-count law); Charles R. Shipan & Craig Volden, *Bottom-Up Federalism: The Diffusion of Antismoking Policies from U.S. Cities to States*, 50 AM. J. POL. SCI. 825, 828, 840 (2006); Stephanie Rosenbloom, *Calorie Data To Be Posted at Most Chains*, N.Y. TIMES, Mar. 24, 2010, at B1; Sara Bonisteel, *Toys Banned in Some California Fast Food Restaurants*, CNN (Apr. 28, 2010), <http://www.cnn.com/2010/LIVING/04/28/fast.food.toys.california/index.html>.
202. See, e.g., Scott L. Cummings, *Litigation at Work: Defending Day Labor in Los Angeles*, 58 UCLA L. REV. 1617 (2011); Catherine L. Fisk, *The Anti-Subordination Principle of Labor and Employment Law Preemption*, 5 HARV. L. & POL'Y REV. 17 (2011); Noah D. Zatz, *The Minimum Wage as a Civil Rights Protection: An Alternative to Antipoverty Arguments?*, 1 U. CHI. LEGAL F. 1, 4 (2009) (noting the "vibrant role" of minimum wage laws "in state and local economic justice campaigns").
203. See, e.g., Maria Marulanda, *Preemption, Patchwork Immigration Laws, and the Potential for Brown Sundown Towns*, 79 FORDHAM L. REV. 321, 368 (2010); Lindsay Nash, *Expression by Ordinance: Preemption and Proxy in Local Legislation*, 25 GEO. IMMIGR. L.J. 243 (2011); Daniel Eduardo Guzmán, Note, *"There Be No Shelter Here": Anti-Immigrant Housing Ordinances and Comprehensive Reform*, 20 CORNELL J.L. & PUB. POL'Y 399 (2010).
204. See, e.g., Bd. of Supervisors, Cnty. of Santa Clara, Calif., Policy Resolution 2011-504: *Resolution of the Board of Supervisors of the County of Santa Clara Adding Board Policy 3.54 Relating to Civil Immigration Detainer Requests* (Oct. 18, 2011), available at <http://acjusticeproject.files.wordpress.com/2011/10/detainerpolicy.pdf>; Christopher Carlberg, Note, *Cooperative Noncooperation: A Proposal for an Effective Uniform Noncooperation Immigration Policy for Local Governments*, 77 GEO. WASH. L. REV. 740, 759 (2009); Gail Robinson, *Bill Curtails City Role in Deportations*, GOTHAM GAZETTE (N.Y.C.) (Nov. 4, 2011), <http://www.gothamgazette.com/article/searchlight/2011104/203/3630>; cf. Rodríguez, *supra* note 84, at 631 (arguing that "Congress should adopt a presumption against preemption" when communities regulate immigration matters to encourage integration).
205. See Kathleen Morris, *San Francisco and the Rising Culture of Engagement in Local Public Law Offices*, in WHY THE LOCAL MATTERS, *supra* note 171, at 51.

operative federalism prizes, Congress therefore might be particularly careful to protect local laws.

Before moving on to the next variable, I pause to play out Congress's options if it seeks to establish a federal floor. The phrase "floor preemption" refers to Congress's choice to preempt "state regulations weaker than those in the federal statutes," while "ceiling preemption" describes Congress's choice in a federal statute to set a "maximum standard but allow[] weaker state regulations."²⁰⁶ In some situations, Congress might want to preempt both state and local laws that fall *below* a floor that it has set but allow local law to go farther *above* the federal floor than state law. Innovation might be particularly necessary on a given matter, but uniformity might remain somewhat important.²⁰⁷ There would not be too much risk, and potentially would be some gains, if Congress were to let local governments go farther above that floor than states.

Congress could even specify that only a certain number of local governments is free to innovate (or that only certain kinds of them may do so, as discussed in Part IV). Spurring innovation might be important enough in the context of a particular substantive statutory program that Congress will permit discrete divergence from the federal rule through a contained number of local deviations. Congress thereby could gain some of the benefits of permitting experimentation while not permitting an objectionable level of impact on federal uniformity. In contrast, permitting two large states (or many local governments) to experiment could have too large of an impact. While in Section III.A I argue that state laws might have less of an impact on federal uniformity than local laws, here I contemplate only a certain number of local governments experimenting.

3. When Congress Wants To Enlist Local Partners in Federal Programs

Finally, Congress might want to retain local authority when it seeks to cultivate local partnerships to effectuate a federal regulatory program. In other words, Congress sometimes perceives local institutions to be the most desirable partners.

A major strand in recent literature disentangling the local from the state has demonstrated the importance of federal-local collaborations. These collabora-

206. Patricia L. Bellia, *Federalization in Information Privacy Law*, 118 YALE L.J. 868, 896 n.101 (2009); see also, e.g., 136 CONG. REC. 17,232 (1990) (statement of Sen. Jeffords) (saying that he was "especially pleased that the conferees were able to include provisions [he] had supported," including "phasing out CFC's without preempting State and local authority to enact stricter regulations").

207. As discussed in Subsection III.A.1, if uniformity is a more significant yet not overriding concern, Congress might preserve state law but not local law.

tions sometimes deliberately bypass the states.²⁰⁸ For example, a prolonged history of direct federal grants to localities (particularly to large urban governments)²⁰⁹ has displaced states in certain instances.²¹⁰ Nestor Davidson developed the theory of “cooperative localism” to describe such “direct relations between the federal government and local governments.”²¹¹

Federal partnering with local governments need not lead to a conflict with the states. However, if the states resist, or if state law conflicts with the role envisioned for local governments, Congress can preempt the state law that interferes with the ability of the locality to further the federal scheme.²¹² For example, such a conflict between federal and state objectives is likely looming in the world of broadband. The American Recovery and Reinvestment Act of 2009²¹³ carved out \$7.2 billion for the development of broadband infrastructure and services. Congress in part sought to enhance the role of local governments in broadband services—both as owners and providers of broadband services, and as regulators of broadband activity.²¹⁴ Partly in response to lobbying by private providers seeking to squelch local competition, at least nineteen states had preempted the local provision of broadband as of December 2011.²¹⁵

208. Davidson, *supra* note 34, at 1021 (“Congress, at times with the Court’s blessing, interferes directly with the internal structuring of state governments in a variety of contexts.”).

209. See, e.g., Barron, *supra* note 22, at 4 (citing the President’s proposal for a Federal Office of Urban Policy as a sign that “states and their cities might not be best viewed as one and the same”).

210. See Barron, *supra* note 5, at 378-90 (discussing the ways in which exercises of federal power can empower local governments); *id.* at 380 (noting that Congress, “altering the background framework within which local power is exercised,” can “creat[e] new opportunities for exercising local power”); Roderick M. Hills, Jr., *Is Federalism Good for Localism? The Localist Case for Federal Regimes*, 21 J.L. & POL. 187, 197 n.25 (2005).

211. See Davidson, *supra* note 34, at 960.

212. See *supra* Part II.

213. Pub. L. No. 111-5, 123 Stat. 115.

214. See, e.g., Metzger, *supra* note 124, at 592-93 (noting that recent federal programs have “targeted localities, at times requiring that certain funds be granted to local governments”). See generally Olivier Sylvain, *Broadband Localism*, 74 OHIO ST. L.J. (forthcoming 2013) (draft on file with author) (developing support for federal-local collaborations that encourages the municipal provision of broadband in part because of the very local nature of broadband).

215. See Sylvain, *supra* note 214, at 20 n.76 (discussing lobbying, as well as delay tactics such as litigation, employed to slow down local initiatives); Anthony E. Varona, *Toward a Broadband Public Interest Standard*, 61 ADMIN. L. REV. 1, 98-100 (2009) (criticizing these protectionist efforts); see also, e.g., Dunne, *supra* note 123, at 1128 (“[W]here federal preemption may actually further the ultimate goals of federalism by allowing local governments to respond to issues of particular local

C. *Situations in Which State-Local Differences Do Not Matter*

Generally speaking, state-local differences seem relatively insignificant in at least two situations: when Congress feels that it has identified an optimal solution, and when it preempts subfederal regulation to prevent burden exportation.

1. When Congress Seeks To Implement an Optimal Federal Solution

Congress sometimes develops regulatory solutions that it believes to be so optimal that it wants to exclude any deviation.²¹⁶ Enforcing such optimal standards thus can result in economies of scale. An optimal standard is different, therefore, from setting a regulatory floor or setting a regulatory ceiling.²¹⁷ Congress's decision that it has found an optimal solution is particularly appropriate when Congress builds in flexibility for adaptation or a sunset provision.²¹⁸ In other words, Congress can mitigate risks by requiring preemption clauses to sunset unless renewed.

Both state and local regulation come out relatively evenly under this variable. Optimal means optimal. If Congress (or a federal agency) truly believes that the federal government has identified the right solution to a puzzle, any different solution potentially threatens that choice.

concern," as in the broadband context, "*Gregory v. Ashcroft's* presumption against preemption may be counterproductive."); Christopher Mitchell, *Georgia Legislature To Revoke Local Authority To Build Networks*, COMMUNITY BROADBAND NETWORKS (Jan. 24, 2012), <http://www.muninetworks.org/content/georgia-legislature-revoke-local-authority-build-networks>.

216. See William W. Buzbee, *Asymmetrical Regulation: Risk, Preemption, and the Floor/Ceiling Distinction*, 82 N.Y.U. L. REV. 1547, 1549-55 (2007) (identifying "unitary federal choice" preemption as a third category in addition to floor and ceiling preemption); see also *Steel Inst. of N.Y. v. City of New York*, No. 09-civ-6539(CM), 2011 WL 6778502, at *20 (S.D.N.Y. Dec. 21, 2011) ("There are . . . circumstances where it is evident that Congress (or an agency) intended its regulation to serve as both a 'floor' and a 'ceiling,' putting any contrary State regulation at all into conflict with the Federal purpose." (citing *Geier v. Am. Honda*, 529 U.S. 861 (2000))); Robert R. Gasaway, *The Problem of Federal Preemption: Reformulating the Black Letter Rules*, 33 PEPP. L. REV. 25, 35-36 (2005) ("Findings of federal preemption are often rooted in the need to protect federal resolutions of problems requiring the balancing of competing objectives—cases where Congress or a federal agency has arrived at what is assertedly an optimal level of regulation.").

217. See *supra* Subsection II.B.2 (discussing floors and ceilings).

218. See Buzbee, *Conclusion, supra* note 142, at 302.

2. When Congress Wants To Decrease Externalities and Burden-Exportation

Another common reason why Congress seeks to preempt state and local laws is to prevent these actors from exporting burdens and externalities to other jurisdictions while retaining benefits for themselves.²¹⁹ This behavior can take the form of economic balkanization and excessive competition.²²⁰ Such behavior, the theory goes, can harm markets, reduce feedback to regulators, and lead to discrimination.²²¹ Courts have found, for example, that a preemption provision in the Interstate Commerce Act “is entirely consistent with the Congressional transportation policies to deregulate certain areas of commerce” and “may promote ‘competitive and efficient services’ by allowing national carriers like Greyhound to compete with entrenched local carriers.”²²²

The exclusionary and parochial quality of local laws, including “not-in-my-backyard” tendencies, is a favorite target of criticism.²²³ They are also feared for their potential to discriminate against outsiders or against minorities.²²⁴ These accusations are enhanced versions of those leveled against the states by federal

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219. Epstein & Greve, *supra* note 2, at 312 (describing cost externalization); *see also* 136 CONG. REC. 35,016 (1990) (statement of Rep. Rinaldo) (observing that, “[f]or those of us in New Jersey, it is equally important that this bill addresses the air pollution that comes into our State from other areas” so as not to “suffer because . . . [our] neighbors have looser standards”). Some commentators temper the force of this consideration by observing that spillover effects can be positive. *See, e.g.*, Rodríguez, *supra* note 84, at 638.
220. *Cf.* Dep’t of Revenue v. Davis, 553 U.S. 328, 338 (2008) (noting the tension between “the Framers’ distrust of economic Balkanization” and the notion of federalism, which “favor[s] a degree of local autonomy”).
221. Hazlett, *supra* note 142; *see also* Merrill, *supra* note 61, at 183 (citing examples); *id.* at 174-79 (deriving a balkanization default rule from three preemption clauses).
222. Greyhound Lines, Inc. v. City of New Orleans *ex rel.* Dep’t of Pub. Utils., 29 F. Supp. 2d 339, 345 (E.D. La. 1998) (quoting 42 U.S.C. § 13101(a)(2)).
223. *See, e.g.*, City of Columbia v. Omni Outdoor Adver., Inc., 499 U.S. 365, 389-90 (1991) (Stevens, J., dissenting) (“[U]nlike States, municipalities are more apt to promote their narrow parochial interests ‘without regard to extraterritorial impact and regional efficiency.’” (quoting Lafayette v. La. Power & Light Co., 453 U.S. 389, 404 (1978))); Rollins Env’tl. Servs. (FS), Inc. v. St. James Parish, 775 F.2d 627, 635 (5th Cir. 1985) (describing local laws as “sham[s]”); Roderick M. Hills, Jr., *Romancing the Town: Why We (Still) Need a Democratic Defense of City Power*, 113 HARV. L. REV. 2009, 2011-12 (2000) (noting that the flip side of local power is “the social inequality and parochialism that local governments also seem to promote”).
224. *See, e.g.*, Briffault, *supra* note 175, at 453 (noting that “local boundaries mark racial and class inequalities as well as the divisions between jurisdictions”); Davidson, *supra* note 34, at 1014, 1024-26; Ford, *supra* note 175, at 926 (“Local autonomy may protect gay rights ordinances in Aspen and Denver, but it would also allow antigay laws in more conservative jurisdictions such as Cincinnati.”).

power advocates, supported by history: The federal government added the Fourteenth Amendment to the U.S. Constitution and enacted civil-rights laws to address state bigotry, for example.

However, state laws resulting in negative externalities for surrounding states could have a heavier impact on other jurisdictions than do local laws. Senator Chris Dodd expressed this concern about state-level impacts (although he did not compare them to local impacts) during the CAA debates. He lauded the creation of a regional commission with the power to force individual states to cut their pollution, stating that, without it, “my home State of Connecticut probably never would be able to meet Federal standards, because so many pollutants are blown in from neighboring States.”²²⁵ And when explaining the OSH Act’s uniformity provisions, the Court of Appeals for the Third Circuit noted that Congress favored uniformity for similar anti-exportation purposes—“so that those states providing vigorous protection would not be disadvantaged by those that did not.”²²⁶

State and local regulation appear to come out relatively evenly under this variable. The potential for greater deviation at the local level might matter when thinking about impacts on federal uniformity, as discussed above. But it is not relevant to the question of negative externalities.

3. The Value of Deliberation

Increased deliberation under the framework laid out above could lead to a variety of benefits. Perhaps most important, if Congress deliberates over state-local differences pursuant to this framework, it might craft better statutes. It could better match up regulatory capability with regulatory authority.²²⁷ Congress might also produce more innovative preemption arrangements.²²⁸

Furthermore, the benefits of deliberation can transcend whatever policy choices Congress ultimately makes.²²⁹ Even if Congress ultimately decides to

225. 136 CONG. REC. 17,749, 17,750 (1990) (statement of Sen. Dodd); *see also* 136 CONG. REC. 12,848, 12,874 (1990) (statement of Rep. Rinaldo).

226. *United Steelworkers v. Aucther*, 763 F.2d 728, 734 (3d Cir. 1985) (citing the legislative history of the OSH Act).

227. *See* Cass R. Sunstein, *Interpreting Statutes in the Regulatory State*, 103 HARV. L. REV. 405, 457 (1989) (identifying one goal of interpretive principles as “improving lawmaking”).

228. *See, e.g.*, ZIMMERMAN, *supra* note 9, at 192 (recommending, for example, that federal laws offer incentives to states to enact legislation compatible with federal regimes, and that federal laws provide opt-out provisions); *see also* O’REILLY, *supra* note 131, at 207 (summarizing additional pre-enactment and post-enactment proposals in JOSEPH ZIMMERMAN, *FEDERAL PREEMPTION* (1991)).

229. *Cf.* Cass R. Sunstein, *Beyond the Republican Revival*, 97 YALE L.J. 1539, 1549-56 (1988) (arguing that deliberation about a common good can constitute a “transformative” process).

treat state and local regulation as equivalents in a given text—or to be deliberately vague—so long as it does so pursuant to considered deliberation, we might have gained something. Indeed, in some situations Congress might want to leave preemption and savings clauses ambiguous to give courts flexibility. While perhaps increasing the chance of judicial error, such a tactic could serve as a hedge against congressional error, if Congress, for example, lacks the facts it needs to make a better allocation of authority.²³⁰ Looking earlier in the process, increased deliberation can improve notice of potentially preemptive legislation to local and state governments. Such notice can enhance political safeguards, allowing subfederal governments to protect their interests²³¹ and answering Ernest Young’s call for “doctrines that focus on correcting defects in the political process’ own protection of federalism.”²³² Even if political safeguards have weakened over time, they still function as “veto gates.”²³³ Although the literature on political safeguards, like other federalism theories, generally focuses on the state-federal dyad,²³⁴ it appears that both state and local governments are prepared to respond to federal legislation that has preemptive effects.²³⁵ Giving state and local governments advance notice also is more efficient than letting state and local governments try to correct perceived problems through amicus

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230. Congress acknowledged as much when explaining why it chose not to include a preemption clause in the Atomic Energy Act: Congress not only believed that the regulation had a broad preemptive sweep such that a preemption clause was unnecessary, but also wanted to let courts determine “matters on the fringe of the preempted areas,” such as “certain types of zoning requirements.” *United States v. City of New York*, 463 F. Supp. 604, 611 (S.D.N.Y. 1978) (quoting congressional hearings).
231. Courts could institute a mandatory notification system letting state governments know about relevant litigation to address such concerns post-enactment. See Mark D. Rosen, *Contextualizing Preemption*, 102 Nw. U. L. REV. 781, 807 (2008).
232. Young, *supra* note 36, at 4.
233. Clark, *supra* note 117, at 196 (citation omitted).
234. See, e.g., JOHN D. NUGENT, *SAFEGUARDING FEDERALISM: HOW STATES PROTECT THEIR INTERESTS IN NATIONAL POLICYMAKING* 4 (2009); cf. Gerken, *supra* note 168, at 34-35 (highlighting the flaws of process federalism, including that it is grounded in sovereignty and therefore less protective of local governance).
235. See William N. Eskridge, Jr., *Overriding Supreme Court Statutory Interpretation Decisions*, 101 YALE L.J. 331, 362 (1991); Nina A. Mendelson, *Chevron and Preemption*, 102 MICH. L. REV. 737, 762 (2004); Pursley, *supra* note 19, at 572 (describing the “more than sixty organizations representing state and local governments and government officials”); Catherine M. Sharkey, *Federalism Accountability: “Agency-Forcing” Measures*, 58 DUKE L.J. 2125, 2162 (2009) (describing the so-called “Big Seven” associations of state, county, and city government officials); PREEMPTION MONITOR (NCSL Law & Criminal Justice Comm., Denver, Colo.) (Apr. 7, 2010), <http://www.ncsl.org/default.aspx?tabid=20109>; see also, e.g., Links, *PREEMPTION & MOVEMENT BUILDING IN PUB. HEALTH*, <http://www.preemptionwatch.org/links/> (last visited Jan. 5, 2012).

briefs in subsequent litigation²³⁶ or by seeking post-enactment amendments or repeals.

Moreover, under the status quo, states likely are more frequent and forceful lobbyists than are local governments, and they thereby get more congressional attention.²³⁷ Rigorous deliberation about both local and state capacities could increase Congress's attention to local regulation.²³⁸ Increased attention, however, could translate into increased preemption of local law in situations in which, with less thought, Congress might have preserved local authority. Other values of increased deliberation on state-local differences could include more attention to the broader federalism impacts of preemption—perhaps leading to more careful legislation overall²³⁹—and richer legislative history, aiding future courts.²⁴⁰

Every proposal has its drawbacks. Increased deliberation could make preemption provisions even more of a bargaining chip than they currently are. Indeed, “most preemption clauses have been ‘a last minute compromise in a massive piece of new legislation.’”²⁴¹ But perhaps greater deliberation would ameliorate the last-minute and bargaining-chip nature of preemption decisions.

236. We do not know much about state versus local influences and resources during litigation. See Pursley, *supra* note 19, at 574 & n.266 (noting the need for further research on the priorities and success of state and local organizations).

237. The degree of power that state and local interests wield over Congress is debated. See, e.g., Pursley, *supra* note 19, at 573-75; Ernest Young, *Two Cheers for Process Federalism*, 46 VILL. L. REV. 1349, 1358 (2001); cf. Ron Nixon, *In Post-Earmark Era, Small Cities Step Up Lobbying To Fight for Federal Grants*, N.Y. TIMES, Feb. 3, 2012, at A17.

238. See, e.g., Sharpe, *supra* note 11, at 434 (“[M]ost federalism issues can be cured by permitting states, localities, and state and local interest groups an opportunity to meaningfully participate in the deliberative process before agencies promulgate preemption regulations.”).

239. See *Tenth Amendment Enforcement Act of 1996: Hearing on S. 1629 Before the S. Comm. on Governmental Affairs*, 104th Cong. 52 (1996) (statement of Rep. Patrick Sweeney, Minority Leader, Ohio House of Representatives, on behalf of Nat’l Conf. of State Legislatures) (“We only occasionally hear a meaningful debate on the federalism implications of preemptive bills.”); ZIMMERMAN, *supra* note 9, at 192 (“Congress should examine the broader federalism implications of the bill to ensure it achieves national goals without unnecessarily removing powers from states and their political subdivisions.”).

240. Cf. James J. Brudney, *Confirmatory Legislative History*, 76 BROOK. L. REV. 901 (2011) (arguing that, even when statutory text is relatively clear, courts will turn to legislative history for confirmation or corroboration of their interpretation).

241. O’REILLY, *supra* note 131, at 54 (quoting Fisk, *supra* note 201, at 35, 102); *id.* at 54-57 (describing the other matters that drown out close consideration of preemption during enactment and the fact that members barter over preemption provisions); *id.* at 57 (“[R]eal experience . . . breeds a profound skepticism of the role that congressional intent should play in preemption analysis.”). Justice Scalia has dis-

IV. IMPLEMENTING CONGRESSIONAL DIFFERENTIATION

This Part outlines additional mechanisms available to Congress, courts, and agencies to help implement the project of state-local differentiation.

A. *Congressional Tools for Softening the Effects of Interference with State Authority*

One remaining question is how Congress can soften the effects of interference with state authority while implementing the framework proposed in Part III. Some suggestions follow.

1. Accommodating Existing State Structures

Congress might decide to specify divergent outcomes for local and state regulation in preemption provisions. If so, to lessen the impact on state authority, Congress could build on existing state structures and otherwise accommodate existing differences between local governments. Precedent exists: Congress regularly seeks to build on existing state and local programs when enacting federal legislation.²⁴²

Congress, for example, might wish to vary its preemption provisions based on size and type of local government. Even putting aside state authority concerns, the term “local” covers up meaningful variations among local governments for which Congress might want to account.²⁴³ The United States has an estimated 90,000 local governments,²⁴⁴ some general-purpose and others special-purpose. Some local governments are large enough to resemble or even surpass states. Los Angeles County adopted a 2011 budget of \$23 billion and has almost 10 million residents;²⁴⁵ New York City adopted a Fiscal Year 2012 budget

cussed the vicissitudes of the political process that likely led to the enactment of FIFRA’s preemption provisions. *See Wis. Pub. Intervenor v. Mortier*, 501 U.S. 597, 620-21 (1991) (Scalia, J., concurring).

242. *See, e.g.*, 42 U.S.C. § 7412(d)(7) (2006) (protecting state authority to establish a “more stringent emission limitation or other applicable requirement” under the CAA); 136 CONG. REC. 3673 (1990) (statement of Rep. Michael Bilirakis) (stating that the EPA should “incorporate State permit programs” as much as possible and not “disrupt[]” them).

243. I do not address regional governance here; for an exploration of that topic, see, for example, Cashin, *supra* note 193, at 1997 (discussing the importance of regional solutions); Davidson, *supra* note 34, at 962 (turning to regionalism to “temper[] the scope of federal power and local autonomy”); and *id.* at 1023.

244. BRIFFAULT & REYNOLDS, *supra* note 7.

245. Garrett Therolf, *L.A. County Supervisors OK \$23-Billion Budget*, L.A. TIMES, June 7, 2010 (Extra), at AA1.

of \$66 billion and has more than 8 million residents.²⁴⁶ In contrast, Wyoming projected a Fiscal Year 2011-2012 (24-month) budget of approximately \$3 billion and has about 500,000 residents.²⁴⁷ Indeed, Congress could account for variations in the size of state governments, as well for the various kinds of state regulatory authority within a single state.²⁴⁸

Moreover, Congress could divvy up responsibilities according to the ways in which states have allocated local home-rule powers and the ways in which states have classified local governments. State structures thus would provide the baseline for how Congress thinks about local authority. Laurie Reynolds recently has argued that Congress's failure to accommodate existing state decisions regarding state-local allocation of powers—through an excessive focus on state sovereignty—actually insults the states.²⁴⁹ Similarly, I argue that paying attention to existing state structures might respect state sovereignty in a useful manner.

To begin with, Congress could incorporate existing state schemes for home-rule jurisdictions. Almost all states—forty-eight according to a recent count²⁵⁰—have granted some form of home rule to at least some of their local governments through constitutional and statutory provisions “that explicitly identif[y] towns and cities as legally independent entities.”²⁵¹ Because states have developed a wide variety of models for devolving powers through home rule, Congress could assume that the local governments to which states have given home-rule powers are also the ones that states would be most willing to see exercising authority in partnership with a federal scheme²⁵²—that is, states consider those local governments to be the most capable of exercising independent

246. See, e.g., Henry Goldman, *New York City Council Approves \$66 Billion 2012 Budget Restoring Teachers*, BLOOMBERG (June 29, 2011), <http://www.bloomberg.com/news/2011-06-29/new-york-city-council-approves-66-billion-2012-budget-restoring-some-cuts.html>.

247. WYOMING STATE BUDGET: 2011-2012 BIENNIUM 3 (2010), available at <http://ai.state.wy.us/budget/pdf/2011/2011-12StateBudget.pdf>.

248. Cf. Paul Frymer & Albert Yoon, *Political Parties, Representation, and Federal Safeguards*, 96 Nw. U. L. REV. 977 (2002) (“States today (and arguably always) are fragmented and diverse entities.”); Hills, *supra* note 47, at 1201 (unpacking the “black box” of the “state” in the context of federal delegations of powers to state and local entities, despite the opposition of state legislators).

249. See Laurie Reynolds, *A Role for Local Government Law in Federal-State-Local Disputes*, 43 URB. LAW. 977, 980-81 (2011).

250. Matthew J. Parlow, *Progressive Policy-Making on the Local Level: Rethinking Traditional Notions of Federalism*, 17 TEMP. POL. & CIV. RTS. L. REV. 371, 383 (2008).

251. Barron, *supra* note 44, at 2278.

252. Cf. Dunne, *supra* note 123, at 1148 (noting that in *Missouri Municipal League*, the “Court admits in a footnote that the hypothetical cases being discussed indeed are ‘general law’—i.e., Dillon’s Rule—states rather than home rule states” (quoting *Nixon v. Mo. Mun. League*, 541 U.S. 125, 135 n.3 (2004))).

action. For example, if a state has granted home rule to cities with populations over 10,000 residents, Congress could provide that those are the cities that would benefit from savings provisions. Or Congress could decide that non-home-rule cities would benefit most, depending on the type of activity that Congress wants to encourage. Congress also could consider differentiating between local governments that operate under the so-called “imperio” form of home rule (meaning that they have great autonomy over “local” or “municipal” matters within their own imperial realm)²⁵³ and those that operate under “legislative” home rule (which gives local governments the power to act independently so long as the state has not preempted such action). However, such a division could create great confusion; for example, some home-rule configurations exhibit a mix of imperio and legislative elements.

Moreover, many states establish different “classes” among their local jurisdictions. Such classes determine whether they can exercise home-rule powers or more specific powers (such as taxation).²⁵⁴ Other states do not so differentiate.²⁵⁵ For example, the Michigan Constitution provides home-rule powers to all cities and villages that choose to embrace such powers.²⁵⁶

When engaging in such differentiation, Congress or regulatory agencies should think about the consequences. For example, they can clarify whether their specifications should prevent local governments from partnering with each other or from collaborating at a regional level where appropriate.

253. See, e.g., CAL. CONST. art. 11, § 5(a) (“City charters adopted pursuant to this Constitution . . . with respect to municipal affairs shall supersede all laws inconsistent therewith.”); cf. 45 CAL. JUR. 3D *Municipalities* § 187 (2011) (noting that what constitutes a municipal affair is left to the courts for case-by-case adjudication).

254. See, e.g., WASH. CONST. art. XI, § 10 (“Any city containing a population of ten thousand inhabitants, or more, shall be permitted to frame a charter for its own government, consistent with and subject to the Constitution and laws of this state”); *Heinsma v. City of Vancouver*, 29 P.3d 709, 711 (Wash. 2001) (“Thus, a first class city [in Washington] may, without sanction from the legislature, legislate regarding any local subject matter.”); Barron, *supra* note 44, at 2260 n.7 (“Some states limit home rule powers to local governments of a certain size, for example; in addition, only thirty-seven states recognize some kind of home rule for counties.”).

255. See, e.g., Kevin J. Worthen, *Two Sides of the Same Coin: The Potential Normative Power of American Cities and Indian Tribes*, 44 VAND. L. REV. 1273, 1292 n.87 (1991) (noting that “the minimum population requirement is generally small (between 2000 and 10,000)” and that, “[i]n many jurisdictions, home-rule authority is available for towns and villages, and for any city regardless of size”).

256. See MICH. CONST. art. VII, § 22.

2. Allowing for a Limited Number of Deviations

If Congress permits local action but precludes state action on a given matter, it could place limits on the local action. For example, spurring innovation might be important enough in the context of a particular substantive statutory program that Congress is willing to permit local deviation—but it may choose to permit only a certain number of local governments to experiment. By doing so, Congress could gain some of the benefits of innovation while minimizing the impacts on federal uniformity and on state sovereignty.²⁵⁷

3. Specifying Time Limits on State-Local Divergences

Congress also could place a limited time period on any divergence it creates between state and local authority. Such a limit, for example, could permit local experimentation for five years. Doing so would eventually level the playing field for state and local governments. Congress could reap the benefits of local experimentation while avoiding the otherwise bizarre result of forbidding states from taking advantage of useful local discoveries.

B. *Judicial Presumptions for When “State” Means “State” or “State and Local”*

What can courts do to supplement the project of differentiation at the heart of this Article? Courts certainly play an important role in the federal preemption universe.²⁵⁸ Here, I focus on the rules that courts should apply when Con-

257. Cf. ZIMMERMAN, *supra* note 9, at 106 (describing examples of “limited congressional preemption” in which the statutory provision “removes the authority of subnational governments to engage in regulatory actions affecting a specified portion of a regulatory field”); Christen Linke Young, Note, *Pay or Play Programs and ERISA Section 514: Proposals for Amending the Statutory Scheme*, 10 YALE J. HEALTH POL’Y L. & ETHICS 197, 233 (2010) (“[T]here are models in the modern administrative system that begin by preempting state law but nonetheless allow states and localities to advance their own regulatory interests on a federally-controlled playground.”).

258. See, e.g., Merrill, *supra* note 11, at 737; Sharpe, *supra* note 11, at 369 (“Institutional, cultural, and litigant demands for clarity and consistency all but force the Court to step into the preemption-policymaking void often left by Congress.”); Ryan D. Newman, Note, *From Bivens to Malesko and Beyond: Implied Constitutional Remedies and the Separation of Powers*, 85 TEX. L. REV. 471, 511-12 (2006). Congress cannot anticipate every situation in which federal law should or should not preempt state or local law. See, e.g., Gasaway, *supra* note 216, at 29-30; Merrill, *supra* note 11, at 754 (noting that Congress preemptively would have to “analyze and interpret the common law and statutory rules of fifty states and thousands of municipalities”—an undertaking that is “beyond impossible”). And Congress has been shown to be unresponsive to the Court’s preemption decisions, so courts will continue to play a role even when applying plain-statement rules. See Note,

gress does not specify the desired outcomes for both state and local regulation in express preemption provisions. The best option, and the one toward which the Court already might lean, is to apply two separate presumptions—one for preemption clauses and one for savings clauses.

1. “State” Means “Only State” in Preemption Clauses

Courts could develop a “state-means-only-state” plain-statement rule for preemption clauses—the clauses that trump subfederal authority. Such a rule would require Congress to make its desired outcomes for local regulation as clear as it makes its desired outcomes for state regulation. When Congress does *not* so specify, courts could adhere to the plain meaning of the statutory text.²⁵⁹ Therefore, if Congress declares that it seeks to preempt, say, state regulation of power-plant siting, but does not mention local regulation of power-plant siting, the courts would presume that local governments could continue to regulate. By adopting the “state-means-state” rule for preemption clauses, courts can be seen as “prodding” (or “pleading” with) Congress as “a corollary to the more traditionally emphasized function of checks and balances.”²⁶⁰

Requiring Congress to be clear before preempting subfederal legislation would adhere to the black-letter presumption against preemption that requires a plain statement of congressional intent before preempting state or local law. If, instead, courts applied the *Mortier-Ours Garage* “state-means-state-and-local” rule to preemption clauses,²⁶¹ local laws would be preempted in the face of congressional silence on local outcomes, undermining the presumption.

Additional benefits of applying a plain-statement rule to the presumption against preemption clauses follow. If, as a result, Congress deliberates more extensively about local authority or drafts more specific provisions, notice to state and local governments would increase. Section III.D outlined the various bene-

New Evidence on the Presumption Against Preemption: An Empirical Study of Congressional Responses to Supreme Court Preemption Decisions, 120 HARV. L. REV. 1604, 1626 (2007) (finding that Congress rarely reacts to the Court’s preemption decisions). Courts also help safeguard state sovereignty and local power through protections such as the presumption against preemption. See Verchick & Mendelson, *supra* note 22, at 18-19, 21.

259. This rule would draw on a canon of statutory construction: *inclusio unius est exclusio alterius* (the inclusion of one thing suggests the exclusion of others). Such canons “can be defended if they generate greater objectivity and predictability in statutory interpretation.” William N. Eskridge, Jr., *Norms, Empiricism, and Canons in Statutory Interpretation*, 66 U. CHI. L. REV. 671, 678-79 (1999).

260. See Benjamin Ewing & Douglas A. Kysar, *Prods and Pleas: Limited Government in an Era of Unlimited Harm*, 121 YALE L.J. 350, 354 (2011) (developing these concepts in the climate-change context).

261. See *City of Columbus v. Ours Garage & Wrecker Serv., Inc.*, 536 U.S. 424, 432 (2002) (quoting *Wis. Pub. Intervenor v. Mortier*, 501 U.S. 597, 607 (1991)); *supra* Section I.B.

fits of increased notice, such as enhanced political safeguards and more efficient engagement of states and localities. If Congress becomes more specific, the risk of judicial interpretive error would decrease,²⁶² and debate on difficult questions would become more prevalent.²⁶³ Congress could produce more finely tuned, thoughtful regulation that accommodates state and local differences *ex ante*.²⁶⁴ Finally, such a rule would provide a symbolic recognition of the importance and place of local regulation.

I should note that it may be worth calling the default rule a “presumption” to soften its effect and make it more appropriately flexible. Moreover, a rigid rule might not be required given that the standard rules of statutory interpretation already limit (if not obviate) the risk of courts badly misinterpreting congressional intent.

2. “State” Means “State and Local” in Savings Clauses

On the other hand, the current *Mortier-Ours Garage* default rule discussed in Part I might continue to be the most appropriate rule for savings-clause provisions.²⁶⁵ When Congress is unclear in preemption provisions about whether the term “state” includes the local, courts will presume that it does, or at least that the state retains its power to delegate its authority to local governments.²⁶⁶

This rule also accords with the presumption against preemption. Again, as the Court declared in *Mortier* and repeated in *Ours Garage*, “[M]ere silence . . .

262. The Wisconsin Supreme Court had found that it was “abundantly clear” that Congress intended to “preempt local, but not state, regulation” when it ruled on the meaning of FIFRA’s preemption clause—and then the U.S. Supreme Court unanimously reversed. *Mortier v. Town of Casey*, 452 N.W.2d 555, 558 (Wis. 1990), *rev’d*, 501 U.S. 597 (1991); *see also* Jack Goldsmith, *Statutory Foreign Affairs Preemption*, 2000 SUP. CT. REV. 175, 186 (noting that both pro- and anti-preemption errors are possible).

263. *See, e.g.*, Bell, *supra* note 136, at 108 (“[S]cholars, jurists, and others have increasingly focused on the effect that interpretive methodology can have on the legislative process—both in terms of encouraging or discouraging ideal legislative behavior and in terms of the ease with which citizens and those to whom citizens turn for counsel (‘the relevant audience’) can ascertain the law.”).

264. *Id.*

265. I do not propose any changes to the conflation axiom, the rule considered in Part I that mandates equal treatment of the state and the local in federal preemption cases. But more work could be done to evaluate whether courts are impermissibly violating this rule.

266. Indeed, some have argued for a plain-statement requirement for all preemption cases, doing away entirely with implied preemption or at least with some of its strands. *See, e.g.*, *Gade v. Nat’l Solid Wastes Mgmt. Ass’n*, 505 U.S. 88, 110-11 (1992) (Kennedy, J., concurring in part and concurring in the judgment); Young, *supra* note 21, at 265-66. Others seek to strengthen the presumption against preemption in the absence of clear congressional intent. *See* Hills, *supra* note 145.

cannot suffice to establish a clear and manifest purpose to pre-empt local authority.”²⁶⁷ Therefore, silence in a savings clause on local regulation should weigh in favor of including the local in the state (nonpreemption), while silence regarding local regulation in a preemption clause should weigh in the opposite direction.

C. *The Participation of Regulatory Agencies*

Finally, what can federal regulatory agencies offer? Congress might not always be best positioned to take detailed information into account about variations among local governments or between local and state governments.²⁶⁸ Agencies can partner with Congress and perform some of the legwork of state-local differentiation.²⁶⁹ A comparative agency strength includes its fact-finding capabilities and some degree of representativeness.²⁷⁰ Moreover, letting agencies do the differentiation could provide political cover for Congress. This suggestion enters new territory. Scholarship on federal regulatory agencies and preemption, as with the literature on preemption in Congress, the judiciary, and federalism more generally, does not focus on agency interaction with local governments, especially not from a comparative (state versus local) perspective.

For example, if Congress were to specify that cities could perform some types of regulation that states could not, Congress might have one kind of city

267. *City of Columbus v. Ours Garage & Wrecker Serv., Inc.*, 536 U.S. 424, 432 (2002) (quoting *Wis. Pub. Intervenor v. Mortier*, 501 U.S. 597, 607 (1991)).

268. *Cf.* Joan MacLeod Heminway, *Rock, Paper, Scissors: Choosing the Right Vehicle for Federal Corporate Governance Initiatives*, 10 *FORDHAM J. CORP. & FIN. L.* 225, 274 (2005) (discussing Congress’s failure to gain “expertise on highly specialized matters of substantive law and regulation”).

269. This is not to say that agencies are flawless partners. There is the ever-present threat of capture. Agencies also can have trouble monitoring the effects of their decisions. *See, e.g.*, Alejandro E. Camacho, *Can Regulation Evolve? Lessons from a Study in Maladaptive Management*, 55 *UCLA L. REV.* 293 (2007) (discussing the literature on agency action and noting, for example, that agencies do not always adjust future behavior based on data from past decisions); Alejandro E. Camacho, *Transforming the Means and Ends of Natural Resources Management*, 89 *N.C. L. REV.* 1405, 1414-17 (2011) (same). Data collection could be even more difficult at the local level, given the number of local governments and the challenges of data collection.

270. *See* Merrill, *supra* note 11, at 755 (arguing that agencies are better fact-finders and better than Congress at evaluating the impact on uniformity and diversity); *see also* Brian Galle & Mark Seidenfeld, *Administrative Law’s Federalism: Preemption, Delegation, and Agencies at the Edge of Federal Power*, 57 *DUKE L.J.* 1933, 1949-61 (2008) (evaluating Congress, the courts, and agencies according to the transparency of their actions); *cf.* Paula A. Sinozich et al., *Project: The Role of Preemption in Administrative Law*, 45 *ADMIN. L. REV.* 107, 113 n.18, 116 (1993).

and one kind of state in mind—say, Cheyenne and Wyoming, not Chicago and Illinois or Los Angeles and California. The result could be crude and potentially error-ridden legislation.²⁷¹ Regulatory agencies, on the other hand, might be able to take such variations into account. They could do so in the rules they promulgate, when engaging in regulatory preemption, or when providing feedback to Congress.²⁷²

Regulatory agencies have experience with differentiation.²⁷³ For example, certain Federal Railroad Administration regulations preempt local but not state speed limits.²⁷⁴ The FCC has preempted local but not state regulation.²⁷⁵ And a court held that while FRSA's savings clause (which mentioned only the "state") did not protect local involvement, HMTA regulations "recognize[] the possibility of local involvement."²⁷⁶ Indeed, when rejecting a preemption challenge to New York City's routing regulations for tank trucks carrying hazardous wastes,

271. See Spence & Murray, *supra* note 79, at 1190-91 (discussing examples of unintended consequences).

272. See, e.g., William N. Eskridge, Jr., *Vetogates, Chevron, Preemption*, 83 NOTRE DAME L. REV. 1441, 1468 n.117 (2008) (noting that about twenty percent of the cases examined involved agency preemption); Merrill, *supra* note 11, at 727 (recommending the consideration of agencies to supplement the judiciary's norm articulation). The literature in the debate as to what degree of preemptive power regulatory agencies should have is enormous, so I provide merely a few examples. Compare Young, *supra* note 21, at 268, with William Funk, *Preemption by Federal Agency Action*, in PREEMPTION CHOICE, *supra* note 3, at 214, 215-17. See also, e.g., Colo. Pub. Utils. Comm'n v. Harmon, 951 F.2d 1571 (10th Cir. 1991) (comparing agency with judicial competence); Merrill, *supra* note 11, at 728-29 (summarizing the controversy); David C. Vladeck, *Preemption and Regulatory Failure Risks*, in PREEMPTION CHOICE, *supra* note 3, at 54, 54.

273. Cf. Young, *supra* note 21, at 233-35 (proposing an active role for agencies in deciding whether state and local health-care initiatives are preempted by the Employee Retirement Income Security Act).

274. See *Hotchkiss v. Nat'l R.R. Passenger Corp.*, No. 88-1884, 1990 WL 70700, at *3 (6th Cir. May 29, 1990) ("Federal courts that have considered the issue have concluded that these speed regulations establish a maximum speed limit and preempt local, but not state, speed limits . . .").

275. See, e.g., Nicholas P. Miller & Joseph Van Eaton, *Local Communities and Communications Networks: Key Issues 2008*, CABLE TELEVISION LAW 2008: COMPETITION IN VIDEO, INTERNET, & TELEPHONY, at 93-94 (PLI Patents, Copyrights, Trademarks, and Literary Prop., Course Handbook Ser. No. 14,173, 2008) (expressing skepticism of the FCC's authority to do so).

276. *Consol. Rail Corp. v. City of Bayonne*, 724 F. Supp. 320, 326, 327-28 (D.N.J. 1989) (noting that the Federal Railroad Safety Act's (FRSA) savings provision "only allows for 'state' regulation of and participation in railroad safety," and that, while "[n]o provision is made for political subdivisions," the HMTA "recognizes the possibility of local involvement" and provides procedures for obtaining agency rulings on preemption).

the Second Circuit concluded that “[t]he Secretary has not issued, and cannot practicably issue, specific routing requirements for localities, whose own agencies are very likely far better equipped to do so,” despite Congress’s “goal of national uniformity when it enacted the HMTA.”²⁷⁷

Moreover, federal regulatory programs already are tasked with evaluating the effects of federal decisions on both state and local authority. A 1999 executive order required agencies to consider the impacts of preemption decisions on state and local governments.²⁷⁸ A recent federal executive memorandum indicated this same desire to have regulatory agencies evaluate impacts. It directed agencies to preempt state law only after conducting a “full consideration of the legitimate prerogatives of the States[,] . . . with a sufficient legal basis for preemption,” and when “justified under legal principles governing preemption.”²⁷⁹ Recognizing both state and local contributions, an executive memorandum issued in early 2011 “instruct[ed] agencies to work closely with state, local, and tribal governments to achieve greater administrative flexibility and lower administrative burdens from federal requirements.”²⁸⁰ Finally, the Unfunded Mandates Reform Act requires that “[e]ach agency shall . . . assess the effects of Federal regulations on States, local governments, [and] tribal governments” and “identify and consider a reasonable number of regulatory alternatives,” selecting the “least costly.”²⁸¹

Federal agencies also evaluate and approve subfederal proposals to participate in federal programs.²⁸² Adopting such interactive approaches could help alleviate a potential concern levied against the proposals here: that Congress could permit action by local governments that lack the resources and technical sophistication to carry out their plans. For example, regulations promulgated pursuant to the EPA’s authority under RCRA and the related Hazardous and Solid Waste Amendments of 1984 describe the process by which states can implement their own programs to regulate hazardous waste.²⁸³ To receive approv-

277. *Nat’l Tank Truck Carriers, Inc. v. City of New York*, 677 F.2d 270, 275 (2d Cir. 1982).

278. Exec. Order No. 13,132, 64 Fed. Reg. 43,255, 43,256 (Aug. 4, 1999).

279. See Memorandum for the Heads of Executive Departments and Agencies, 74 Fed. Reg. 24,693, 24,693 (May 20, 2009); Metzger, *supra* note 124, at 594 (quoting the directive); see also Catherine M. Sharkey, *Inside Agency Preemption*, 110 MICH. L. REV. 521, 528-29 (2012) (discussing the effects of the memorandum).

280. Metzger, *supra* note 124, at 594 (citing President Obama, Government Reform for Competitiveness and Innovation, 76 Fed. Reg. 14,273, 14,273 (Mar. 11, 2011)).

281. Unfunded Mandates Reform Act of 1995, 2 U.S.C. §§ 1531-1532, 1535 (2006).

282. *Cf.* Sharpe, *supra* note 11, at 370-71 (discussing an agency delegation model that “consciously embraces and encourages dialogue among Congress, the Court, federal administrative agencies, states, and interest groups, while also minimizing the need for preemption policymaking by the judiciary”).

283. See Requirements for Authorization of State Hazardous Waste Programs, 40 C.F.R. § 271 (2011); EPA, INTRODUCTION TO STATE AUTHORIZATION TRAINING

al, a state program must be, *inter alia*, “equivalent to and at least as stringent as the Federal rules” and must “[c]ontain[] adequate enforcement authority.”²⁸⁴

Still other examples abound. Under the CAA, if a state or local government wants to implement certain parts of the statute, the EPA will look at the proposed policy and the ability of the entity to fund, enforce, and otherwise carry out the program. For example, Philadelphia’s Air Management Services Agency²⁸⁵ was “delegated the authority to implement and enforce the provisions of [a federal regulation] on behalf of EPA.”²⁸⁶ The local authority operates in tandem with state approval, in part relying on state distinctions among “classes” of local governments.²⁸⁷

CONCLUSION

This Article takes the prevailing assumption that state-local differences are irrelevant to federal preemption and shows that, at the very least, this story is incomplete. Congress differentiates between the state and the local in the text of statutory preemption provisions, as do the courts in default rules and in deciding cases. But neither explains why. That failure impedes the development of the best federal law possible, creates confusion over whether both local and state governments can regulate given matters, increases the chance of judicial error, and reduces the stature of local law.

I suggest a framework that Congress can employ to consider state-local differences systematically, weighing state and local strengths against a set of relevant considerations. I also identify mechanisms for the courts and federal agencies to support these efforts in a systematic, dynamic, and iterative manner. While local governments, as a constitutional matter, are no more important today than at the Framing, their contributions to our polity are coming into sharper focus. The percentage of the population that lives in major cities has grown, the complexity of local government structures has increased, and local regulatory innovation continues to spread into new areas. At the same time, preemption is an increasingly robust and high-profile yet undertheorized area of law. Congress is enacting preemption provisions at a fast clip, and courts are

MANUAL, at I-3, available at http://www.epa.gov/osw/laws-regs/state/revision/training/final_manual.pdf.

284. *Id.* at I-8.

285. See *Air Management Services*, CITY PHILA., <http://www.phila.gov/health/airmanagement/> (last visited Mar. 20, 2012).

286. See Approval and Promulgation of Air Quality Implementation Plans, 48 Fed. Reg. 31,638 (July 11, 1983) (codified at 40 C.F.R. pt. 52 (2011)).

287. See, e.g., Agreement for Implementation of the Philadelphia County Air Pollution Control Program, at 1, available at http://www.dep.state.pa.us/dep/deputate/airwaste/aq/permits/docs/philadelphia_plan_approval.pdf (describing the state-local agreement and noting accommodations for counties of the “first class”).

PREEMPTION CONFLATION

addressing preemption challenges at a correspondingly high rate. Understanding the place of the local within federal preemption is that much more significant. This Article provides the first roadmap for navigating this evolving legal terrain.

Appendix A: Preemption Clauses

Statute	Provisions that Preempt Both State and Local Regulation	Provisions that Preempt Only State Regulation
Atomic Energy Act of 1954 42 U.S.C. §§ 2011 to 2297g-4 (2006 & Supp. 2011)	--	--
Clean Air Act 42 U.S.C. §§ 7401-7671q (2006 & Supp. 2010)	§ 7543(a) (2006) § 7543(c) § 7543(e)(1) § 7545(c)(4) § 7573 § 7671m(a)	§ 7543(a) (2006)
Clean Water Act 33 U.S.C. §§ 1251-1376 (2006 & Supp. 2011)	§ 1370(1)(B) (2006)	--
Comprehensive Environmental Response, Compensation, and Liability Act of 1980 42 U.S.C. §§ 9601-9675 (2006 & Supp. 2011)	§ 9621(e)(1) (2006)	§ 9614(b) (2006) § 9658(a)(1)
Federal Hazardous Substances Act 15 U.S.C. §§ 1261-1278 (2006)	Pub. L. No. 89-756, sec. 4, 80 Stat. 1303, 1305 (1966)	--
Federal Insecticide, Fungicide, and Rodenticide Act 7 U.S.C. §§ 136-136y (2006 & Supp. 2011)	--	§ 136v(b) (2006)
Federal Railroad Safety Act of 1970 49 U.S.C. §§ 20101-21311 (2006 & 2010)	--	§ 20106 (2006)
Federal Power Act 16 U.S.C. §§ 791-825r (2006)	--	--
Hazardous Materials Transportation Act 49 U.S.C. §§ 5101-5128 (2006 & Supp. 2010)	§ 5125(a) (2006 & Supp. 2010) § 5125(b)	§ 5112(b)(1) (2006 & Supp. 2010)
Interstate Commerce Commission Termination Act 49 U.S.C. §§ 10101-11908 (2006)	§ 14501(a)(1) (2006) § 14501(b)(1) § 14501(c)(1) § 14501(d)	--
Occupational Safety and Health Act 29 U.S.C. §§ 651-678 (2006)	--	--
Resource Conservation and Recovery Act of 1978 42 U.S.C. §§ 6901-6987 (2006 & Supp. 2011)	§ 6929 (2006 & Supp. 2011)	--
Toxic Substances Control Act 15 U.S.C. §§ 2601-2692 (2006 & Supp. 2011)	§§ 2617(a)(2)(A)-(B) (2006)	--

Appendix B: Savings Clauses

Statute	Provisions Mentioning Both State and Local Regulation	Provisions Protecting Only State Regulation
Atomic Energy Act of 1954 42 U.S.C. §§ 2011 to 2297g-4	§ 2018 (2006) § 2021(k)	§ 5851(h) (2006)
Clean Air Act 42 U.S.C. §§ 7401-7671q	§ 7412(r)(11) (2006) § 7416 § 7429(h)(1) § 7543(d) § 7604(e)	§ 7412(d)(7) (2006) § 7429(h)(2) § 7507 § 7543(b) § 7543(e)(2) § 7545(c)(4)(B) § 7545(c)(4)(C)(i)
Clean Water Act 33 U.S.C. §§ 1251-1376	§ 1370(1) (2006)	§ 1251(g) (2006) § 1370(2)
Comprehensive Environmental Response, Compensation, and Liability Act of 1980 42 U.S.C. §§ 9601-9675	--	§ 9614(a) (2006) § 9652(d) § 9659(h)
Federal Hazardous Substances Act 15 U.S.C. §§ 1261-1278	Pub. L. No. 89-756, sec. 4, 80 Stat. 1303, 1305 (1966)	--
Federal Insecticide, Fungicide, and Rodenticide Act 7 U.S.C. §§ 136-136y	--	§ 136v(a) (2006) § 136v(c)(1)
Federal Railroad Safety Act of 1970 49 U.S.C. §§ 20101-21311	--	§ 20106(a)(2) (2006) § 20106(b)
Federal Power Act 16 U.S.C. §§ 791-825r	--	§ 821 (2006)
Hazardous Materials Transportation Act 49 U.S.C. §§ 5101-5128	§ 5125(e) (2006 & Supp. 2010)	§ 5125(c) (2006 & Supp. 2010)
Interstate Commerce Commission Termination Act of 1995 scattered sections of 49 U.S.C.	§ 14501(c)(2)(C) (2006) § 14501(c)(3)	§ 14501(a)(2) (2006) § 14501(b)(2) § 14501(c)(2)(A)
Occupational Safety and Health Act 29 U.S.C. §§ 651-678	--	§ 667(a) (2006)
Resource Conservation and Recovery Act of 1978 42 U.S.C. §§ 6901-6987	§ 6929 (2006 & Supp. 2010)	§ 6929 (2006 & Supp. 2010)
Toxic Substances Control Act 15 U.S.C. §§ 2601-2692	§ 2617(a)(1) (2006) § 2617(a)(2)(B)(i)-(iii) § 2617(b)	--