

State Greenhouse Gas Regulation, Federal Climate Change Legislation, and the Preemption Sword

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The proliferation of state and local measures to address climate change has spawned a lively debate. Much of this debate seeks to identify why sub-national levels of government would, seemingly illogically, grapple with an international challenge of global magnitude.¹ This is especially a puzzle since others’ inaction or opportunistic actions can defeat benefits of state and local activism.² Some question the efficacy of such state and local efforts.³ A broad consensus notes, however, that in this and other areas of environmental regulation, state and local regulatory interventions have catalyzed support for federal legislation, with once vocal industry opponents coming to prefer federal legislation over often-diverse state and local measures.⁴ Scholars and

1. See, e.g., Kirsten Engel, *State and Local Climate Change Initiatives: What Is Motivating States and Local Governments to Address a Global Problem and What Does This Say About Federalism and Environmental Law?*, 38 URB. LAW. 1015, 1021-25 (2006); Jonathan B. Wiener, *Think Globally, Act Globally: The Limits of Local Climate Change*, 155 U. PA. L. REV. 1961, 1962-63 (2007); Richard B. Stewart, *States and Cities as Actors in Global Climate Regulation: Unitary Vs. Plural Architectures*, 50 ARIZ. L. REV. 681, 683-88 (2008).

2. See Engel, *supra* note 1, at 1023 (“[F]rom the perspective of benefiting from reductions in climate change, it makes little economic sense for a state or local government to reduce its emissions of greenhouse gases.”); Stewart, *supra* note 1, at 689-93.

3. See, e.g., Wiener, *supra* note 1, at 1962 (“[S]ubnational state-level action is not the best way to combat global climate change.”); but see David E. Adelman & Kirsten H. Engel, *Reorienting State Climate Change Policies to Induce Technological Change*, 50 ARIZ. L. REV. 835, 837 (2008) (“[I]nducing technological change provides an independent ground for state action on climate change—one can think globally and still act locally.”).

4. See RICHARD N. L. ANDREWS, *MANAGING THE ENVIRONMENT, MANAGING OURSELVES: A HISTORY OF AMERICAN ENVIRONMENTAL POLICY* 209 (Yale Univ. Press 1999); J.R. DeShazo & Jody Freeman, *Timing and Form of Federal Regulation: The Case of Climate Change*, 155 U. PA. L. REV. 1499, 1504-1508 (2007); E. Donald Elliott et al., *Toward a Theory of Statutory Evolution: The Federalization of Environmental Law*, 1 J.L. ECON. & ORG. 313, 326 (1985); Kirsten H. Engel & Scott R. Saleska, *Subglobal Regulation of the Global Commons: The Case of Climate Change*, 32

policymakers broadly agree that larger-level responses are also necessary, ideally via international legal instruments and national legislation and implementing regulation.⁵

This conference essay turns to a less addressed question that is becoming a central one in legislative venues. If the United States enacts national climate change legislation, what role, if any, remains for state and local greenhouse gas (GHG) regulation? This is, in part, a question for state and local governments that might be considering the utility of their own additional measures once federal law is enacted. It is also, however, a question that federal legislators, regulators, and, ultimately, courts will need to resolve. Should federal climate change legislation preempt state and local climate-related efforts? If so, to what extent and through what sort of language and institutional structures? Is a clean and predictable preemptive regime even possible? If the presumption is to retain most or all of state and local governments' plenary powers to address climate change and other sources of risk and concern, how should legitimate claims of conflict between federal and state or local law be resolved? Finally, are there attributes of climate change policy that make it particularly suited to preemptive or non-preemptive federal legislation?

This Article starts in Part I by reviewing the basic anticipated design elements of federal climate legislation, then it reviews the substantial regulatory failure risks inherent in such climate-change legislation. It then turns in Part II to analysis of preemption choices. The Article follows in Part III by examining preemption jurisprudence, especially the growing risk of broad preemptive reads of federal law, and demonstrating how statutory uncertainties regarding preemption could result in subsequent interpretations substantially expanding the law's preemptive impact. The expanding and indeterminate body of "obstacle preemption" law poses especially significant risks for state and local climate change efforts. After all, it is virtually unavoidable that residual state and local regulation will overlap with any federal climate law while also adopting somewhat different priorities and means to regulatory ends. Obstacle

ECOLOGY L.Q. 183, 223-26 (2005) (labeling this phenomenon as a "domino effect" in which state regulation triggers industry to prefer federal regulation).

5. See, e.g., William L. Andreen, *Federal Climate Change Legislation and Preemption*, 3 ENVTL. & ENERGY L. & POL'Y J. 261, 266-69 (2008); Jonathan B. Wiener, *Property and Prices to Protect the Planet*, 19 DUKE J. COMP. & INT'L L. 515, 522-23 (stressing the importance of global participation).

preemption jurisprudence threatens to justify judicial preemptive conclusions if state or local laws merely strike a different balance than federal law. Furthermore, as discussed in Part IV, overlap and interaction of concurrent federal, state, and local climate change laws creates an array of benefits. This Article, therefore, concludes that federal climate legislation should adopt an anti-preemptive norm, with specific language preserving state and local legal turf.

The Article closes in Part V by suggesting that still inevitable conflicts will arise, but that such preemption disputes over climate-related regulation, whether raised by governments or private actors, should be analyzed in accordance with strongly anti-preemption statutory criteria. Even better would be direction of preemption claims not straight to the courts but to a newly created Preemption Review Committee. The Preemption Review Committee, like the Endangered Species Review Committee that can authorize otherwise illegal harms to endangered species in extraordinary circumstances, would be constituted of high level federal officials from several agencies and departments as well as state representatives. This new committee would take evidence on claims of unduly burdensome legal conflicts and issue a record-based ruling. Only then would judicial review enter the picture. This procedural hurdle and requirement of record evidence of undue conflicts would preclude litigants and courts from making conclusory arguments about conflicts. Such a committee-structured regulatory crucible would serve to check preemption arguments and try to ensure that preemption decisions are based on both statutory criteria and on actual evidence about the effects of overlapping state, local, and federal law.

I. CLIMATE CHANGE LEGISLATION AND THE INEVITABILITY OF PARTIAL REGULATORY FAILURE

Pending federal climate legislation has a number of basic elements. Despite some ongoing debate over whether a carbon tax or a federal “cap-and-trade” scheme would be more effective to address climate change, current momentum favors a cap-and-trade scheme.⁶ This Part

6. See Robert N. Stavins, *A Meaningful U.S. Cap-and-Trade System to Address Climate Change*, 32 HARV. ENVTL. L. REV. 293, 348-53 (2008) (comparing and preferring a cap-and-trade scheme to a carbon tax approach); Jonathan B. Wiener, *Radiative Forcing: Climate Policy to Break the Logjam in Environmental Law*, 17 N.Y.U. ENVTL. L.J. 210, 238-42 (2008) (advocating a cap-and-trade scheme for GHG emissions). For more works discussing the mechanics of a cap-and-trade system, see Lesley K. McAllister, *The Overallocation Problem in Cap-and-Trade*, 34 COLUM. J. ENVTL. L. 395, 398-410 (2009) and Richard B. Stewart & Jonathan B. Wiener, *The Comprehensive Approach to Global Climate Policy: Issues of Design and Practicality*, 9 ARIZ. J. INT'L & COMP. L. 83, 103-106 (1992) (discussing cap-and-trade in the international context).

discusses the basic anticipated architecture of federal climate legislation and ways it is likely to result in at least partial regulatory failure.

At its most basic, federal law would set a national GHG-cap measured by annual aggregate emissions of carbon dioxide equivalents of various GHGs, with that cap dropping over time. Via some sort of distribution of carbon dioxide (CO₂) allowances to polluters, all emitters of GHGs would have to emit no more than their purchased or received allowances. Some of these allowances would likely also be generated by “offsets,” usually natural states, technologies, or actions that actually serve to reduce anticipated atmospheric GHG levels, thereby generating offset-based credits, which in turn would function like allowances. To minimize costs associated with reductions in GHG emissions, entities holding or needing allowances would participate in a GHG market, trading CO₂ allowances and offset credits. This would allow a market to function, with low-cost measures to reduce GHGs or produce offsets rewarding best performers by reducing their need to purchase allowances and allowing them to profit by selling allowances to emitters less able to reduce their emissions. A cap-and-trade market would thus reward lowest-cost-emissions reducers and also allow emitters lacking easy ways to reduce pollution to buy or hold onto allowances for their own use. Liberal provisions allowing banking of allowances and credits would also provide emitters flexibility and reward innovators able to reduce emissions. Since a GHG emitted anywhere has the same effect everywhere (if taken by itself, with no associated more local effects),⁷ trading should greatly reduce costs associated with legally mandated GHG reductions.

Federal legislation is also likely to contain other measures mandating or incentivizing efficiency improvements for consumer products and cars. Federal law will likely also help with adaptations for climate-change harms and disruptions likely to result from a law mandating GHG reductions. Federal law might also set performance standards for certain categories of large emitters, in effect requiring them to do their best to reduce GHG emissions, totally separate from cap-and-trade dynamics.

7. This will seldom be the case, since GHGs are often separately regulated for other effects, often are accompanied by co-pollutants, and have other harms and distributional effects associated with their production. These realities are discussed *infra* in Part I(C).

This sounds clean, efficient, and likely to benefit from the miracle-of-market economics. In reality, however, climate change legislation is unusually vulnerable to a large number of regulatory failure risks.

A. A Cap That is Too High

Federal law that sets the cap too high is perhaps the greatest failure risk. Despite abundant science establishing the substantial role of anthropogenic contributions to climate change and a growing consensus about atmospheric levels needed to avoid potentially catastrophic effects,⁸ congressional politics are never solely science-based. Due to huge industrial and regional tradeoffs, as well as costs and possible benefits associated with climate change and any climate-change law, legislative horse-trading to gain necessary votes is inevitable.⁹ A likely result of hardball legislative politics is a federal law that sets the target cap too high or ratchets down its caps at too slow a rate to effect needed atmospheric reductions. This is especially risky during a time of economic recession, as is the case during mid-2009, while this Article is being drafted. A federal law that imposes economic hardship on an already-struggling United States economy would be politically difficult for legislators to support. A highly likely result is a weakened federal law that reduces costs and burdens by raising its cap to gain political viability. Critics of the bill that emerged from the House of Representatives at the end of June 2009 criticized it on just these grounds, claiming the cap is both too high and too slow to require actual, substantial reductions.¹⁰

Other developments confirm the risk that any ultimately enacted law will be unduly lax and not prompt needed swift innovations and pollution reductions. The shift during the spring of 2009 to a federal bill that would not distribute allowances by auction, as preferred by most policy analysts, to a law that freely hands out allowances to powerful

8. See generally M.L. PARRY ET AL., IPCC 2007: SUMMARY FOR POLICYMAKERS, IN CLIMATE CHANGE 2007: IMPACTS, ADAPTION AND VULNERABILITY 7, 11-18 (2007), <http://www.ipcc.ch/pdf/assessment-report/ar4/wg2/ar4-wg2-spm.pdf>.

9. DeShazo & Freeman, *supra* note 4, at 1539-45 (analyzing the interaction of various interest groups and the potential legislative result); Frank H. Easterbrook, *Statutes' Domains*, 50 U. CHI. L. REV. 533, 540-44 (1983) (discussing how “[a]lmost all statutes are compromises”); Robert A. Schapiro & William W. Buzbee, *Unidimensional Federalism: Power and Perspective in Commerce Clause Adjudication*, 88 CORNELL L. REV. 1199, 1238-40 (discussing legislative compromise).

10. John M. Broder, *House Passes Bill to Address Threat of Climate Change*, N.Y. TIMES, June 26, 2009, at A1 (reporting passage of bill by House but also opposition of some environmental groups on grounds that bill is too lax).

interests¹¹ is evidence of the importance of political compromise and appeasement of legislative and industry opponents.¹² This shift may have been necessary to assemble an adequate supportive legislative coalition, but auctioning such allowances would be a more effective means to accomplish both environmental and market goals. Auctioning all or most allowances would create immediate incentives for everyone to ratchet back their pollution because every unit of emissions would require purchase of an allowance or possibly an offset credit.¹³ In addition, incentives for innovations, conserving energy, and reducing pollution would be enhanced with more entities bidding for allowances, if new market entrants were not monetarily disadvantaged compared to grandfathered pollution sources receiving free allowances, and if old polluters were not rewarded with allowances.¹⁴ In addition, money generated could be used to finance other government projects. With free allocations, in contrast, wealth associated with allowances flows into private hands, and the incentive to reduce emissions is reduced immediately because allowances are allocated free-of-charge.¹⁵ This would likely reduce their market price and certainly reduce pressure on

11. See, e.g., *Key Provisions of the Climate Bill*, WASHINGTON POST, June 27, 2009, <http://www.washingtonpost.com/wp-dyn/content/article/2009/06/26/AR2009062602746.html>

12. However, as Lesley McAllister observes, despite policy analysts' preferences for distribution via auction, preceding analogous cap-and-trade regimes have also ultimately allocated pollution allowances for free, mostly to existing polluters. McAllister, *supra* note 6, at 411.

13. As Professor Merrill observes, whether pollution is subject to a tax or a purchase obligation, the effect is akin to a Pigouvian tax. By associating pollution with a monetary charge, all polluters will face at least modest incentives to reduce emissions. See Thomas W. Merrill, *Explaining Market Mechanisms*, 2000 U. ILL. L. REV. 275, 276 (2000). For more detailed discussion of incentives and the choice of free distribution of pollution allowances versus auctioning such rights, see discussion *infra* notes 14-17 and accompanying text.

14. See generally Chulho Jung et al., *Incentives for Advanced Pollution Abatement Technology at the Industry Level: An Evaluation of Policy Alternatives*, 30 J. ENVTL. ECON. & MGMT. 95 (1996) (ranking regulatory instruments and incentives created for innovation, and finding freely distributed permits inferior to auctioned permits and other incentive-based instruments); Scott R. Milliman & Raymond Prince, *Firm Incentives to Promote Technological Change in Pollution Control*, 17 J. ENVTL. ECON. & MGMT. 247 (1989) (assessing pollution-reducing instruments, and finding auctioned permits to provide the best incentives for innovation); Thomas H. Tietenberg, *Tradable Permits in Principle and Practice*, 14 PENN. ST. ENVTL. L. REV. 251, 271 (2006) (discussing innovation incentives undercut if new market entrants face higher costs than grandfathered polluters or others given free pollution rights).

15. See Stavins, *supra* note 6, at 317-21 (discussing the disadvantages of free allocations).

polluters receiving free allowances to innovate and reduce emissions.¹⁶ Yet, if the focus is on the cap, if free allowance allocation is the political price to have the law enacted, and if trading will follow the free allocations, then the environmental results over the long term should not dramatically differ.¹⁷ Nevertheless, a shift to free allocations does reduce short-term incentives for pollution reduction and also weakens innovation incentives. It is a near certainty that more similar compromises will weaken the law's environmental benefits.

Furthermore, despite the strong scientific consensus about the roots of climate change and its potential dramatic effects, climate change's causes, effects, and regulatory responses all confront a handful of cognitive and political economic shortcomings that are likely to create either pressures for a lax cap or delayed reductions in that cap.¹⁸ For citizens to demand climate change legislation and legislators to supply it will require both to give great weight to a largely invisible threat of uncertain effect that will become most evident at least decades in the future. A common cognitive shortcoming identified in behavioral law and economics scholarship is poor human ability to sort out different magnitudes of risk, especially those that are unfamiliar and will arise in the future.¹⁹

Furthermore, climate change is likely to require virtually everyone in some ways to change how they usually behave. Change tends to be opposed due to the "status quo" bias under which people value what they have more than they would pay to obtain the same status in the first place.²⁰

For legislators, the status quo bias is compounded by political economic dynamics. Businesses, regulators, and interest groups invest

16. See McAllister, *supra* note 6, at 422 (noting the relationship between market price and the incentive to innovate).

17. See Victor B. Flatt, *Taking the Legislative Temperature: Which Federal Climate Change Legislative Proposal Is "Best"?*, 102 NW. L. REV. 123, 139 (2007) ("Whether allocations are auctioned or given away will have little effect on the ultimate economic efficiency of the policy, since trade will efficiently allocate the allotments.").

18. See generally Richard J. Lazarus, *Super Wicked Problems and Climate Change: Restraining the Present to Liberate the Future*, 94 CORNELL L. REV. 1153 (2009); Jeffrey J. Rachlinski, *The Psychology of Global Climate Change*, 2000 U. ILL. L. REV. 299, 304-11 (2000).

19. See Joni Hersh & W. Kip Viscusi, *Allocating Responsibility for the Failure of Global Warming Policies*, 155 U. PA. L. REV. 1657, 1684- 92 (2007) (discussing the problems of uncertainty and discounting).

20. For works discussing the status quo basis, see William W. Buzbee, *Recognizing the Regulatory Commons: A Theory of Regulatory Gaps*, 89 IOWA L. REV. 1, 33-36 (2003); Colin Camerer et al., *Regulation for Conservatives: Behavioral Economics and the Case for "Asymmetric Paternalism"*, 151 U. PA. L. REV. 1211, 1224- 26 (2003); and William Samuelson & Richard Zeckhauser, *Status Quo Bias in Decision Making*, 1 J. RISK & UNCERTAINTY 7, 7 (1988).

in any particular regulatory arrangement and will frequently see any change as undercutting past investments and requiring new investments.²¹ A climate law would lead to pervasive changes and hence would be met with resistance.

Major storm events like Hurricane Katrina may create a pro-climate-change legislation availability heuristic, under which people weigh recent and significant experiences more heavily than other concerns.²² The availability heuristic could also, however, lead citizens, stakeholders, and legislators to focus on more immediate and pressing challenges like the recession, medical costs, or wars abroad. Furthermore, legislators are sure to hear from industry stakeholders due to lobbyists and substantial monetary stakes in any climate legislation; legislators may come to weigh those oft-heard views more heavily than the interests of citizens or the environment that may have few, if any, spokespeople. When one adds in the influence of funded lobbyists and political contributions, the influence of dollars will cut against a rigorous climate-change law.

In combination, these cognitive tendencies and often-linked political economic dynamics explain the low priority given by most citizens to climate change.²³ It similarly is consistent with the seeming indifference

21. An unsettling change in the law will predictably require new investments by those affected to adjust as necessary. Those responsive investments can possibly lead to resistance to subsequent change, even efforts to return to the original status quo. See generally William W. Buzbee, *The One-Congress Fiction in Statutory Interpretation*, 149 U. PENN. L. REV. 171, 206-210 (2000) (in criticizing judicial tendency to engage in “one-Congress fiction” in drawing interpretive inferences from language usage in different statutes, discussing political economic dynamics surrounding unsettling judicial interpretations of disputed language); Matthew D. McCubbins et al., *Structure and Process, Politics and Policy: Administrative Arrangements and the Political Control of Agencies*, 75 VA. L. REV. 431, 435-40 (1989) (exploring how original enacting political coalitions are unlikely to join together again to correct an unexpected change in the law due to how those changes will also change the law’s distributional impacts and resulting incentives).

22. See Amos Tversky & Daniel Kahneman, *Judgment Under Uncertainty: Heuristics and Biases*, 185 SCI. 1124, 1127-28 (1974); see also Cass R. Sunstein, *On the Divergent American Reactions to Terrorism and Climate Change*, 107 COLUM. L. REV. 503, 534-40 (2007) (discussing the availability heuristic in the context of terrorism and climate change).

23. A 2009 poll and study revealed that despite an avalanche of news items about climate change science, passage of a climate bill by the House of Representatives and debate over such a bill in the Senate, most citizens had little or no understanding of the goals or content of a “cap-and-trade” bill. See Christa Marshall, *Most Americans still foggy on cap and trade*, CLIMATEWIRE, Oct. 16, 2009, <http://www.eenews.net/climatewire/2009/10/16/3> (discussing Pew Research Center for the People and the Press report following a poll).

of many legislators. Correspondingly, the lack of any single institution or actor with chief responsibility for climate ills or legislation, and the likely dispersion of regulatory roles among numerous committees and regulators, means that both enactment of climate legislation and subsequent implementation drift are a risk due to “regulatory commons” dynamics.²⁴ Under such dynamics, a risk or social ill that is effectively a regulatory opportunity shared in common with many, and that creates a setting where blame and credit flow in uncertain ways, can lead both those potentially demanding and supplying regulation to ignore a social ill, leaving it a regulatory gap. This has long been the status of climate change. Climate-change legislation still has a chance of enactment during 2009 or 2010, but the same political economic and regulatory commons dynamics that have long frustrated climate change political efforts remain barriers and, even if a law is enacted, threaten to derail subsequent implementation.

B. The Cap Proves Too High or Slow

Even if Congress and the President miraculously get the cap right at the moment federal legislation is enacted, there is no guarantee it will remain appropriate. Scientific data on climate change causes and effects continue to develop rapidly. Many supposedly worst-case scenarios discussed in the most recent International Panel on Climate Change report have proven to be unduly optimistic.²⁵ In addition, economic and political dynamics remain unpredictable, as does the development of new industries and products. The net implication of this area of rapid change and uncertainty is that subsequent scientific, political, and economic development is highly likely to reveal that the cap is too high or too slow in planned reductions. But once a federal law is enacted, strong resistance to any amendment is a certainty. An ineffective law that is locked in place would be a major regulatory failure.

C. Changing Science and Predictions About Climate and Markets

Predicting and modeling climate change’s causes, effects, and future implications is a massive, complex undertaking at the bounds of human and computer capacity. For example, until the last few years, few people

24. See Buzbee, *supra* note 20; Engel & Saleska, *supra* note 4, at 190-91.

25. See, e.g., Roger Pielke, Jr. et al., *Dangerous Assumptions*, 452 NATURE 531, 531 (2008).

focused on the massive contribution of cattle and cow emissions²⁶ or on black carbon emitted from widespread use of inefficient stoves and other dirty forms of combustion.²⁷ Even the best-intentioned federal law could prove to be aimed wrong, either missing major causes or risks or possibly over-regulating risks that prove minor.

In addition, the effectiveness of a cap-and-trade strategy is based on complex assumptions about market behavior and production methods. A huge question is whether a cap will create enough scarcity to reward entities reducing emissions or creating offsets. A cap that is too high would undercut a new carbon market. In addition, a new cap-and-trade scheme can be destroyed if claims about baseline emissions or future emissions are inaccurate, if policing of market trades and actual emissions proves inadequate, or if cheating pervades the market. Markets need scarcity, reliable monitoring, and enforcement. Where a regulatory regime is creating and relying on a new massive market, regulatory failure will flow ineluctably from market failures. Cruder, more tested forms of regulation, such as technology-based performance standards, or perhaps a carbon tax, might be necessary if cap-and-trade proves a disappointment.

D. Cap-Lowering Delays

The timing of cap reductions is critical both to achieving reductions in greenhouse gas emissions and in creating market scarcity that will reward pollution reductions and prompt innovations.²⁸ Even if the ultimate endpoint cap is sound, the interim steps to get there can be too slow and lax, thereby also undercutting the market. Although society has an interest in rapid reductions in GHGs, those most directly affected will surely lobby to put off the day when production and behavioral changes, and attendant expenses, will have to be confronted. And if interim caps are too lax, especially in combination with initial distribution of free carbon allowances, incentives for innovation will be minimal and incentives for innovations undercut.

26. See, e.g., Allison N. Hatchett, Note, *Bovines and Global Warming: How the Cows are Heating Things Up and What Can Be Done to Cool Them Down*, 29 WM. & MARY ENVTL. L. & POL'Y REV. 767 (2005).

27. See, e.g., V. Ramanathan & G. Carmichael, *Global and Regional Climate Changes Due to Black Carbon*, 1 NATURE GEOSCI. 205, 226 (2008).

28. See McAllister, *supra* note 6, at 419-423 (discussing the problems of delays in emissions reductions).

E. Innovation Errors

Opponents of climate legislation mainly focus upon economic hardship and putting the United States at a disadvantage in a highly competitive world.²⁹ They predict high costs of adjustment, dislocation of industry and workers, and market and technological innovations that will trail legislative mandates. This could, of course, be true. However, if precedent is our guide, major industries over recent decades have repeatedly claimed that regulations mandating reductions in pollution and risks would have massive resulting costs. Actual studies after the fact, however, have repeatedly shown that those predictions were far higher than reality.³⁰ Part of those disparities likely results from strategic exaggerations of anticipated costs in an effort to either shift regulatory burdens elsewhere or defeat regulation outright.

New regulatory burdens also may cost less than predicted due to the manner in which new regulatory schemes themselves prompt and reward innovation. Any new regulatory regime creates market opportunities. Both those burdened by new regulation and those who can profit from sale of cost-saving innovations have incentives to produce or find low-cost innovations to reduce the targeted risk. Incentives for low cost innovations are especially strong under a market-based environmental law regime that rewards any risk reduction by allowing a polluter to sell unused pollution rights or reduce the need to acquire them. Predictions about climate change legislation's effects could similarly err in predicting possible rates of progress and costs of meeting regulatory mandates. Especially with market dynamics under a cap-and-trade scheme, large and small cost-saving innovations could substantially differ from anticipated outcomes. However, due to possibly inordinate fear of compliance costs, the level of capped GHG reductions might be too high and rate of decline too slow, not adequately anticipating and reflecting the benefits of responsive innovations.

II. THE PREEMPTION CHOICE MENU

Climate change legislation is critical, but it faces numerous regulatory failure risks. From the viewpoint of many prominent industry stakeholders and their allies, a major impetus for federal law is a

29. See, e.g., Christa Marshall, *Can Farm Groups Kill the Climate Bill*, N.Y. TIMES, June 30, 2009, available at <http://www.nytimes.com/cwire/2009/06/30/30climatewire-can-farm-groups-kill-the-climate-bill-71264.html?scp=2&sq=climate%20legislation%20opposition&st=cse>.

30. See, e.g., Winston Harrington et al., *On the Accuracy of Regulatory Cost Estimates* 19 J. POL'Y ANALYSIS & MGMT. 297, 300 (2000).

different sort of regulatory risk. Polluters tend to dislike the existence of overlapping regulatory regimes due to resulting legal complexities, additional legal obligations, and the possibility that obligations imposed by state or local law will be more stringent than federal law.³¹ Polluters, therefore, see federal law as a means to undercut or preempt outright state and local law as well as common law litigation directed at climate change and its many contributing sources.³² As Professor Andrews and others have long noted, proliferating state and local laws can turn industry opponents of regulation into advocates for a single federal law.³³ But a new federal law could, in fact, utilize several different types of preemption, partial preemption, or non-preemptive choices.³⁴ The leading federal climate bill appears likely to utilize a partially preemptive strategy. This Part explains the preemption choices in very basic terms and then sketches briefly the likely partially preemptive strategy in federal climate legislation.

A. Preemption Strategy Choices

A totally preemptive federal regime is possible but has been a rarity in addressing pollution, environmental harms, and other risks. A totally preemptive federal law would make federal law the sole regulator of a field of concern. Contributors to such a risk would look exclusively to federal law to ascertain their obligations. Complete preemption is an industry dream, especially if the preemptive law is also lax, but in reality it is extraordinarily rare. First, as discussed below, the broader the regulatory goal, the harder it is even to devise a preemptive regime due to unavoidable areas of regulatory overlap. With a ubiquitous source of risk such as GHGs, almost any activity relates to climate change. Displacing hundreds of areas of state and local regulation due to one risk associated with that activity is unworkable. Second, where a genuine, thorny social ill is the challenge, legislators will often want federal, state,

31. See, e.g., J.B. Ruhl & James Salzman, *Mozart and the Red Queen: The Problem of Regulatory Accretion in the Administrative State*, 91 GEO. L.J. 757 (2003) (discussing problems of regulatory accretion).

32. For discussion of industry's efforts to use preemption to gain regulatory relief, see THOMAS O. MCGARITY, *THE PREEMPTION WAR* (Yale Univ. Press 2008).

33. See ANDREWS, *supra* note 4, at 209; Elliott et al., *supra* note 4, at 326.

34. For a summary of preemption doctrine, see Christopher H. Schroeder, *Supreme Court Preemption Doctrine*, in *PREEMPTION CHOICE: THE THEORY, LAW, AND REALITY OF FEDERALISM'S CORE QUESTION* 119 (William W. Buzbee ed., 2009).

and local actors to work together to address the ill.³⁵ If the preemption question concerns the ongoing viability of common law regimes, federal legislation seldom will assert broad preemptive impact due to both the lack of compensatory remedies in most areas of risk and environmental regulation and the benefits of common law regimes in ferreting out neglected areas of undue risk.³⁶

Complete or near complete preemption is thus rare. It is at its most justifiable where a particular product design is at issue and that product both benefits from production economies of scale and is widely distributed. Thus, for example, the Clean Air Act generally embraces a non-preemptive strategy, but car emissions are subject to a single federal standard unless California is granted a waiver to require its own less-polluting cars.³⁷ At that point, other states can choose between the federal and California car. Similarly, federal appliances are subject to a federal efficiency regime, with California able to petition to require even more efficient appliances.³⁸

A completely preemptive federal law would create a unitary federal standard, in effect setting a regulatory floor and ceiling.³⁹ A regulatory ceiling would prohibit even similarly directed state or local laws from doing more to address a risk or harm. Despite the rarity of such complete preemption in the law, federal agencies and some industry advocated for it with success from around 2005 to 2008, late in the administration of George W. Bush.⁴⁰ That broad preemption is a rarity outside quite specific regulation of product features is unsurprising.

35. See Robert A. Schapiro, *From Dualism to Polyphony*, in PREEMPTION CHOICE, *supra* note 34, at 33, 42-44 (William W. Buzbee ed., 2009) (discussing the benefits of state and federal regulatory overlap); Stewart, *supra* note 1, at 699-704 (weighing the cost and benefits of continued state regulation in the presence of federal regulation).

36. See David C. Vladeck, *Preemption and Regulatory Risks*, in PREEMPTION CHOICE, *supra* note 34, at 54, 56-58 (William W. Buzbee ed., 2009) (arguing that “tort law is an important backstop to regulation”); see also *Wyeth v. Levine*, 129 S. Ct. 1187, 1202-04 (2009) (contrasting FDA’s new 2006 pro-preemption views with the FDA’s longstanding opposite view that FDA regulation and common law regimes served complementary functions, furthered statutory goals given an often underfunded and understaffed FDA, and created appropriate incentives for manufacturers).

37. See 42 U.S.C. § 7543(b)(1), (e)(2)(A) (2000); See also Anne E. Carlson, *Federalism, Preemption, and Greenhouse Gas Emissions*, 37 U.C. DAVIS L. REV. 281 (2003) (discussing these provisions) [hereinafter *Greenhouse Gas Emissions*].

38. See generally Ann E. Carlson, *Energy Efficiency and Federalism*, 1 SAN DIEGO J. CLIMATE & ENERGY L. 11 (2009).

39. See William W. Buzbee, *Asymmetrical Regulation: Risk, Preemption, and the Floor/Ceiling Distinction*, 82 N.Y.U. L. REV. 1547, 1567-76 (2007); see also Robert L. Glicksman & Richard E. Levy, *A Collective Action Perspective on Ceiling Preemption by Federal Environmental Regulation: The Case of Global Climate Change*, 102 NW. U. L. REV. 579, 602-610 (2008) (analyzing the limited justifications for ceiling preemption).

40. See MCGARITY, *supra* note 32; Catherine M. Sharkey, *Preemption by Preamble: Federal Agencies and the Federalization of Tort Law*, 56 DEPAUL L. REV. 227 (2007).

After all, when regulation concerns behavior, production processes, and harms associated with behavior or production, uniform regulatory burdens will be rare; production variations and context-based distinctions, often worked out through permitting procedures, will lead to diverse, tailored legal obligations. In such settings, a uniform law is unnecessary.

The far more prevalent federal preemption choice is to enact a law that is only partially preemptive, typically with provisions that explicitly preserve or “save” state and local law. Such prevalent laws often contain other provisions that seek to enlist state and local involvement through cooperative federalism structures. This norm utilizes federal law as a floor.⁴¹ Federal law sets a certain minimum allowable level of risk and prohibits any jurisdiction from dropping its standards to be more lax. This is the explicit legislative choice in most environmental laws. Similarly, food and drug regulation, while not always explicitly preserving state and local regulatory turf, has been long- construed by most federal regulators and courts to assume the ongoing existence of common law regimes and non-conflicting state and local regulatory protections.

Federal law that purports to be completely non-preemptive is possible, but due to the workings of the Constitution’s Supremacy Clause, it is difficult to envision a law that does not at least potentially act to preempt conflicts or create a federal regulatory floor. Still, a federal law that regulates a source of risk could rationally declare itself completely non-preemptive and allow a proliferation of state and local laws directed at similar ends. But if, in application, a federal and a state or local law were to come into direct conflict by, for example, mandating two mutually inconsistent designs, then federal law would preempt the clashing law.⁴²

B. The Likely Federal Climate Change Legislation Preemption Choices

Preemption choices, like most regulatory choices, are heavily influenced by the particular attributes of the regulatory challenge. Such attributes include the underlying physical, scientific, and economic realities, preceding related regulatory regimes, the stakeholders, and risks and rewards for both those demanding regulation and those

41. See Buzbee, *supra* note 39, at 1564-68.

42. See Schroeder, *supra* note 34, at 131-35 (discussing conflict preemption).

who can supply it. In addition, the regulatory strategies and tools used to address an ill—such as performance-based standards, design mandates, information revelation, or utilization of market-creating or mimicking strategies—will shape the viability and efficacy of the chosen legislative architecture and related preemption choices. As discussed in succeeding Parts, a portion of the answer to the preemption choice question is driven by the ubiquitous nature of activities contributing to rising GHG levels and the unavoidably huge number of regulatory fields relating to GHG emissions.

Federal climate legislation is virtually certain to contain efficiency standards for cars, appliances, and perhaps even homes and buildings. Such standards, to have any effect, need to set a regulatory floor at a minimum. A federal efficiency floor would be much like those in place for cars and appliances. The question is whether to allow more stringent state and local regulation. Even that choice, however, actually splits into three dominant likely choices: an exclusive federal standard that becomes the unitary standard, operating as a ceiling and a floor; a presumptive exclusive unitary federal standard subject to a limited opt out or waiver for California, perhaps with other states able to piggyback on California's different and more stringent choice; or, lastly, a federal standard that operates as a floor but gives state and local governments discretion to enact more stringent standards without any preceding approval.⁴³ Any of these options could be implemented just by federal actors or potentially through cooperative federalism structures, especially delegated federal programs that hand implementation and enforcement authority over to states.⁴⁴

It is hard, however, to implement a workable delegated program federalism structure with anything more preemptive than a federal law setting a regulatory floor. When a state assumes delegated program duties, states will necessarily tailor their implementation of federal law to their own laws, contexts, and political priorities. A fully preemptive federal floor and ceiling would be unlikely to offer states the latitude they need and would likely engender preemption litigation by targets of state regulation. Perhaps for this reason, all federal environmental laws with delegated program provisions are accompanied by savings clauses

43. Of course, a limited opt out for a particular state need not choose California, but the tradition of special treatment for California and its history of innovation and leadership make it the most likely choice for any such partial opt out from an otherwise federalized regulatory regime. See generally Ann Carlson, *Iterative Federalism*, 103 NW. U. L. REV. 1097 (2009).

44. See Alice Kaswan, *A Cooperative Federalism Proposal for Climate Change Legislation: The Value of State Autonomy in a Federal System*, 85 DENV. U. L. REV. 791, 814-23 (2008) (discussing cooperative federalism models).

making clear that states can make their own laws more stringent than federal law.⁴⁵

The most important and distinctive principal element of a federal climate bill would create a federal cap-and-trade regime. As summarized earlier and discussed in accompanying conference papers, especially that of Professor Kaswan, the federal government would set a series of declining GHG caps.⁴⁶ The cap would be enforced by only allowing GHG emissions pursuant to a federal allowance acquired from the government either via an outright grant, via purchase at an auction held by the federal or perhaps state governments, or via acquisition from other allowance holders who find it more profitable to sell than use them. Allowances (or credits usable in ways akin to allowances) could also be created by offset activities.

A cap-and-trade regime could itself utilize diverse preemptive and non-preemptive options. Key questions are whether there should exist only a single federal GHG trading market or whether states or regions should retain the ability to continue with their own slightly older, but still young, cap-and-trade regimes.⁴⁷ It appears that there is broad agreement that an initial shift to a single national market, which eventually would tie into an international market, is preferable to having parallel, but possibly slightly different, GHG trading regimes.⁴⁸ However, the agreement that a single federal, national GHG trading regime constitutes the best scheme is separate from the question of whether state or local governments should retain the power now or in the future to restart (or start anew) a state or local GHG trading market.

For a cap-and-trade market to work, it is critical that the sellable commodity—the CO₂ allowance—be a uniform currency.⁴⁹ The same

45. Even those few more fully preemptive provisions—for example, car emission and appliance efficiency standards—provide a safety valve allowing petitions for more stringent regulation by California and piggybacking states. See Carlson, *supra* note 37; Glicksman & Levy, *supra* note 39, at 640-42.

46. See generally Alice Kaswan, *Decentralizing Cap-and-Trade? The Question of State Stringency*, 1 SAN DIEGO J. CLIMATE & ENERGY L. 103 (2009).

47. See Andreen, *supra* note 5 at 275-82 (discussing state and local climate change initiatives, including in-state and regional cap-and-trade regimes).

48. See Stavins, *supra* note 6, at 324-27 (discussing the relationship between a federal cap-and-trade scheme and existing state and international programs).

49. See Jillian Button, Note, *Carbon: Commodity or Currency? The Case for an International Carbon Market Based on the Currency Model*, 32 HARV. ENVTL. L. REV. 571 (2008); see also James Salzman & J. B. Ruhl, *Currencies and the Commodification of Environmental Law*, 53 STAN. L. REV. 607 (2000).

holds true of offsets that would generate allowances. Thus, the criteria for CO₂ allowances and offsets likely need to be nationally uniform if the national market is to work. To create a uniform currency requires that the relative climate change effects of different gasses compared to CO₂ be agreed upon, ensuring that allowances, wherever generated, have the same value. In effect, an allowance needs to be like a dollar or some other monetary metric with an understood value. Much as Afghanistan needed a uniform currency rather than diverse tribal currencies,⁵⁰ the United States needed a single federal currency rather than distinctive state currencies,⁵¹ and even the European Union needed to shift to a single currency to start functioning as a union,⁵² a liquid and efficient GHG allowance market requires a consistent currency. In order for free trade across state and, possibly, international lines to succeed, allowances need to have an understood unit of value so that polluters can assess their emissions and allowance needs or surplus.

The leading federal climate bills resolve these questions by mandating a single, federal cap-and-trade market that preempts all other such markets for six years. Existing markets are given means to shift to the federal scheme, but for six years, the cap and related trading would be under an exclusively federal market. The leading bills' provisions regarding state power are quite clear that this time-limited preemption is only of state regulatory strategies utilizing cap-and-trade elements; state authority to regulate GHG emitters through other strategies is preserved. The next part turns to strategies to ensure that additional state regulation is effective to reduce emissions.

C. The Thorny Excess Allowance Issue

A climate law should generally preserve broad state and local climate authority outside of (a) a preemptive federal cap-and-trade market, including a consistent national allowance currency and (b) preemptive federal floors regarding various sorts of efficiency standards, ensuring that no jurisdictions adopt more lax standards.⁵³ The law might also (c)

50. John F. Burns, *Threats and Responses: Kabul; For Afghan Central Bank, It's Out With the Old Money and In With the New*, N.Y. TIMES, Oct. 7, 2002, at A10.

51. See generally ARTHUR NUSSBAUM, *A HISTORY OF THE DOLLAR* (Colum. Univ. Press 1957).

52. For a brief history on the development of the Euro, see Kathy Jones & Alan N. Rechtschaffen, *The Euro—Ready or Not: Trading Implications of the New Common Currency*, 22 FORDHAM INT'L L.J. 786, 790 (1999).

53. As discussed below, this Article advocates that states retain power to charge more in allowances for particular emitting conduct than federally required. Hence, this Article sees defining allowances as requiring uniformity but with states retaining latitude to require more allowances per unit of GHG emission. As discussed in the text above, this

create a preemptive unitary federal efficiency standard for certain categories of goods but, like the current Clean Air Act automobile standards, allow California and other piggybacking states the option to do even better.

One other difficult and important preemption-drafting choice will likely require explicit and clear resolution. This concerns the ability of states to act more aggressively in reducing GHG emissions under a partially preemptive federal law and the problem of resulting unused or unsought carbon allowances.⁵⁴ This problem is most likely to arise in connection with regulation of major stationary sources, such as power plants and factories, but it could also concern the regulation of sources like commercial and municipal transportation fleets or other significant categories of GHG emissions. Major stationary sources of pollution are already subject to numerous regulatory obligations under the Clean Air Act. State and local governments also have long had broad discretion to determine issues of local operation and transportation impacts, hours of operation, siting, and even the mandating of more stringently reduced levels of pollution than those initially set as a federal floor.⁵⁵ Federal delegated program schemes have similarly made clear that federal clean air legislation is merely a floor, allowing for additional and more protective state and local actions. Federal law has never supplanted these traditional state and local roles.

But should state and local authorities be able to pursue more aggressive climate change goals by requiring a stationary source (or other GHG emitters) to reduce its greenhouse gas emissions to what is technologically possible in ways akin to best available technology performance standards under the Clean Air Act?⁵⁶ Due to the co-pollutant problem and many other legitimate state and local land use and environmental concerns, state and local governments almost certainly have to retain this authority, even if a polluter has or could secure federal

option is necessary if state regulation is to retain any efficacy in reducing GHG emissions in a world where emissions (or emissions allowances) might move to other jurisdictions.

54. See Stewart, *supra* note 1, at 703 (noting this problem).

55. See Buzbee, *supra* note 39, at 1564-68.

56. For discussion of technology-based standards, especially their benefits despite their apparent crudity compared to incentive-based instruments, see Sidney A. Shapiro & Thomas O. McGarity, *Not So Paradoxical: The Rationale for Technology-Based Regulation*, 1991 DUKE L.J. 729 (1991) and Wendy Wagner, *The Triumph of Technology-Based Standards*, 2000 U. ILL. L. REV. 83, 86 (2000).

carbon allowances above those allowed by state or local law. This relates to the “inextricability” problem addressed in the following Part.

The conundrum is at the next step: should state and local governments be able to prohibit not only that higher rate of pollution, but also the sale of unused allowances, preclude a pollution source from profiting from foregone GHG emissions, or, through other means, take such allowances out of circulation? The difficult question concerns what the facility can do with those excess emission allowances or never-emitted emissions. Similarly, should state and local governments retain power to pursue more aggressive GHG-reduction goals by requiring facilities within the jurisdiction to utilize a higher number or rate of allowances for a particular activity than that which is the federal norm? This, too, is a strategy to force reductions in GHGs and preclude the movement (or leakage) of that quantity of GHGs to other, more lax jurisdictions.⁵⁷

This question is difficult because such state and local actions regulating GHG emissions more stringently than federal law and prohibiting trading benefits would not literally be under another cap-and-trade program, but they would affect the federal cap-and-trade market.⁵⁸ Depending on how allowances are initially distributed, stringent state regulation (via direct regulation or a higher required allowance rate) combined with a prohibition on sale of excess allowances, could influence the market price for allowances by increasing or decreasing their value.

In addition, the reward to an emission source for avoiding emissions would be lessened by such a state law. Thus, to allow this sort of state and local action would affect the federal market and modify the incentives and rewards for pollution-reducing innovations. Reducing the number of allowances on the market would increase their price, creating incentives for greater efficiency and related innovations. However, more costly allowances would undercut short-term, cost-effectiveness goals. Due to these price effects, state power of this sort must be explicitly addressed if it is to be allowed. Without an express grant, preemption challenges by polluters are likely.⁵⁹

If such additional state climate change efforts were preempted, however, the effect would be to hobble state and local efforts to foster more rapid GHG reductions. If any state or local action to require better performance than federally required always resulted in either sellable allowances or reduced demand for allowances that others could then buy

57. See Wiener, *supra* note 1, at 1971-73 (discussing the problems of leakage).

58. See Stewart, *supra* note 1, at 702-703 (discussing how state initiatives could interfere with the incentives of a federal cap-and-trade scheme); Glicksman & Levy, *supra* note 39, at 642-43.

59. See *infra* Part III(B) (discussing risks of preemption litigation and broadly preemptive results if federal climate does not contain strong savings clause provisions).

for less, then state and local government efforts to make additional climate progress would be for naught.

Solutions are therefore to:

1. allow state and local governments to impose an additional allowance charge or tax on emissions of GHGs, which would permit state and local governments to, in effect, charge more in federal allowances per ton of GHGs than assumed in the creation and trading of federal allowances;
2. allow state and local governments by regulation to require pollution sources to meet required emissions levels, regardless of GHG effects and the number of allowances held by a source;
3. allow state and local governments to compel the retirement of excess allowances held as a result of stringent regulatory action, thereby taking those unused allowances out of circulation; or
4. make states the distributor of auctioned GHG allowances with authority to retire some. If carbon allowances are auctioned, then some leakage is likely and perhaps unavoidable, unless states are handed a central role in distributing allowances, including authority to withhold allowances under some statewide allowance budget. A state that chooses to require its own citizens and sources to emit less, but with no other constraining regulatory action, would merely result in fewer purchased allowances, leaving those allowances available for other states and sources at a lower cost. Such an outcome would frustrate state efforts to make greater GHG progress than under the federal cap-and-trade allocations. Only if states could obtain their share of allowances based on some baseline calculation and then retire a percentage of them could the migration of allowances to a less regulated jurisdiction leakage problem be avoided under an auctioned allowance scenario.

Unless state powers were specifically preserved under one or all of these powers, the retained state and local power to address climate change would likely prove illusory. Any levels of pollution below that which is federally assumed or allowed would merely result in the shifting of carbon allowances to other polluters outside the jurisdiction. Once again, all GHG reductions and related climate progress would depend on the effectiveness of federal law. If state and local governments

are to be agents of progress, it is critical to protect state and local government authority to impose more stringent GHG obligations and preclude polluter profit-making from those additional reductions required by state law. Since state or local actions would be impinging on otherwise available allowance trading, they could be seen as interfering with the six-year period of an exclusively federal cap-and-trade regime. For this reason, such authority would need to be granted with near explicit language.⁶⁰

D. Climate Preemption and the Inextricability Problem

Any efforts to construct a partially preemptive federal climate change law confront a challenge that I refer to as the “inextricability” problem. The same ubiquity of GHG sources that makes a climate cap-and-trade scheme a good idea makes attempted preemption difficult. After all, actions causing or having an effect on GHGs and climate change are pervasive. Thus, statutory language leaving pro-preemption advocates room to argue for preemptive outcomes could pose major risks to broad swaths of state and local regulatory authority due to the inextricability problem. Simply stated, virtually all combustion of fossil fuels results in GHG emissions, as do uses of many solvents and chemicals. The layout of cities, transportation options, and rate regulation of power plants also influence GHG-emission levels. The stringency (or laxity) of building codes as well as conservation and efficiency mandates are hugely important. Any permitting of a new or expanded stationary source of pollution will influence resulting GHG emissions. Green space preservation also has direct GHG linkages in both reducing emissions associated with deforestation and likely also absorbing carbon dioxide and thereby acting as a carbon sink. Furthermore, many basic environmental risks, such as particulate matter, hazardous air pollutants, and other criteria pollutants under section 108 of the Clean Air Act, are also GHGs or pollutants emitted along with GHGs. Such accompanying pollutants are often referred to as “co-pollutants.” Renewable portfolio standards, a policy adopted by many states, have many goals, and one of them is often the reduction of GHGs. Tax burdens will influence incentives where people choose to live, work, or invest, as do subsidies and positive, monetary incentives. All of these sorts of actions and regulatory choices influence the resulting carbon footprint. To summarize,

60. See Glicksman & Levy, *supra* note 39, at 609-10 (advocating a “strong judicial presumption against ceiling preemption under federal environmental statutes in the absence of an express provision”). For discussion of obstacle preemption, see *infra* Part III(C).

state and local policies that directly and indirectly relate to GHG emissions and that could affect GHG allowance markets are innumerable.

Since thousands of actions by state and local governments can have goals other than climate change, or have a climate change focus among numerous other goals, the question is what a preemptive federal law would entail. These many-identified state and local actions as well as many, many others would directly or indirectly influence resulting levels of GHGs. They might also influence a polluter's ability to make changes that could benefit them through carbon-allowance trading. They would unquestionably "relate to" GHGs or climate change and would also likely affect the overall market for CO₂ allowances.

To work, a partially, or purportedly completely, preemptive federal climate law would somehow need to weed out traditional, permitted areas of state and local power. Especially under obstacle preemption logic detailed below, any preemption language that is not closely tailored with explicit, focused language could result in preemption claims against thousands of government actions inextricably linked to climate change. Once again, the price of ambiguity and policy uncertainties could be unpredictable, expansive claims about the preemptive reach of federal law.

The next Part analyzes preemption jurisprudence, demonstrating how statutory ambiguity on the preemption question could result in a vastly expanded preemptive impact.

III. WHEN CLIMATE LEGISLATION MEETS THE PREEMPTION JURISPRUDENCE SWORD

Compromise is often the glue that cements legislative majorities. By leaving disputes unresolved and accepting a degree of linguistic ambiguity for later resolution before agencies and courts, partisans may support a bill.⁶¹ Clear language, in contrast, may make the winners and losers too clear to assemble a workable supportive legislative coalition. Preemption choices are no different, especially where a bill involves a challenge as massive as combating climate change. But the efficacy of

61. See *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 865 (1984) (setting forth the "two-step" framework for judicial review of agency statutory interpretations and discussing reasons Congress may leave or create statutory gaps or ambiguities); see also Kirsten Engel, *Harnessing the Benefits of Dynamic Federalism in Environmental Law*, 56 EMORY L.J. 159, 184 (2006) ("Federal preemption can be considered an unpleasant by-product of interest group lawmaking.").

legislative language depends on underlying interpreting frameworks and the voyage on which a statute will embark.⁶² The degree of acceptable ambiguity and policy choice uncertainty, and the effects of such ambiguity and uncertainty, will vary greatly depending on the underlying body of interpretive norms and law.

Preemption jurisprudence presents a particularly challenging problem. The oft-stated prevailing interpretive presumption is the “presumption against preemption,” seemingly disfavoring preemptive outcomes and putting the onus on pro-preemption forces to secure explicit pro-preemption language.⁶³ The applied reality, however, is actually unpredictable and often friendly to pro-preemption results. A growing strain in Supreme Court and Court of Appeals precedents reveals sympathy for preemptive outcomes. The courts’ stated reasons closely track “rule of law” virtues, especially the desire for certainty, but these increasingly preemptive results are perhaps also explained by anti-regulatory and pro-business preferences.⁶⁴ As Professor Young and others have observed, outside of floor preemption structures, preemption tends to be anti-regulatory in impact and is sought for that reason.⁶⁵ Despite abundant scholarly commentary explaining the virtues of non-preemptive regimes, judicial preemption precedents in recent years tend to embrace preemption.⁶⁶

62. Cf. T. Alexander Aleinikoff, *Updating Statutory Interpretation*, 87 MICH. L. REV. 20 (1988) (developing the nautical metaphor to describe how the process of interpretation will over time change the meaning ascribed to a statute).

63. *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947) (“[W]e start with the assumption that the historic police powers of the States were not to be superseded . . . unless that was the clear and manifest purpose of Congress.”). For works discussing the “presumption against preemption,” see Nina A. Mendelson, *A Presumption Against Agency Preemption*, 102 NW. U. L. REV. 695, 709-710 (2008); Thomas W. Merrill, *Preemption and Institutional Choice*, 102 NW. U. L. REV. 727, 741-42 (2008); Schroeder, *supra* note 34, at 122-23; and Catherine M. Sharkey, *Products Liability Preemption: An Institutional Approach*, 76 GEO. WASH. L. REV. 449, 455-59 (2008).

64. See, e.g., *Riegel v. Medtronic, Inc.*, 128 S. Ct. 999, 1020 (2008) (holding that a federal statute preempted state tort action against a medical device manufacturer); *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 532 (2001) (holding that a federal statute preempted state regulation of tobacco advertising); *Geier v. Am. Honda Motor Co.*, 529 U.S. 861, 865 (2000) (holding that a federal regulation preempted state common-law defective design action); *United States v. Locke*, 529 U.S. 89, 94 (2000) (holding that a federal regulation preempted state regulation of oil tankers).

65. See Ernest A. Young, *Federal Preemption and State Autonomy*, in *FEDERAL PREEMPTION: STATES’ POWERS, NATIONAL INTERESTS* 249, 263 (Richard A. Epstein & Michael S. Greve eds., 2007); Ernest A. Young, *Executive Preemption*, 102 NW. U. L. REV. 869 (2008).

66. See Buzbee, *supra* note 39; McGarity, *supra* note 32; Young, *supra* note 66; see also sources cited, *supra* note 32, 39, 63 & 65 (discussing the merits of changing preemption policy trends in the executive branch and courts).

This problematic pro-preemption case law contains several key elements. Courts, especially the Supreme Court, often selectively ignore the “presumption against preemption;” savings clauses are given little or no weight; and preempted conflicts are readily found, even in laws lacking express preemptive language.⁶⁷ Few preemption precedents develop a normative strain recognizing the benefits of retaining state and local authority in addition to related federal law.⁶⁸

Perhaps most significantly, as explored below, the Supreme Court and following lower courts have begun to develop a growing “obstacle preemption” jurisprudence where a direct conflict need not be shown for preemptive outcomes; rather, challenges must merely demonstrate that a state or local law strikes a different balance than federal law. Because any state involvement in a field that is also subject to federal regulation is likely to reflect different priorities than federal law, a different balance is a near inevitability. Such a different balance could lead federal actors or affected industry to use preemption case law as a sword to displace state or local law. Finally, agencies may play a critical interpretive role in construing statutes to preempt or authorize preemption; those agency actions may receive judicial deference, meaning that a pro-preemption president or agency might strategically use ambiguous language to expand the realm of preempted law.⁶⁹

Collectively, these preemption precedents create a setting whereby any intended anti-preemptive results in climate legislation will require statutory drafting of uncommon clarity. Without it, claims of conflict preemption, especially obstacle preemption, will arise with great frequency. This Part is not claiming that pro-preemption results are a certainty but,

67. See *infra* Parts III(A)-(C).

68. Two notable and important exceptions are *Bates v. Dow Agrosiences*, 544 U.S. 431 (2005) and *Wyeth v. Levine*, 129 S. Ct. 1187 (2009). Both cases discuss why there are benefits of retaining federal regulatory oversight and state common law regimes. As I have explored elsewhere, *Wyeth* and several other cases together create doctrinal support for courts to subject the factual and policy claims underlying agency claims of preemptive power and effect to “hard look review.” See William W. Buzbee, *Preemption Hard Look Review, Regulatory Interaction, and Quest for Stewardship and Intergenerational Equity*, 77 GEO. WASH. L. REV. 1521 (2009).

69. See Mendelson, *supra* note 63 (discussing this possibility in her article focusing on whether agencies should receive deference for statutory interpretations underlying preemption claims); Catherine M. Sharkey, *Federalism Accountability: “Agency-Forcing” Measures*, 58 DUKE L.J. 2125 (2009) (discussing agency assertions of preemptive impact and suggesting doctrinal grounds and other rationales for making agencies more accountable for such assertions).

instead, that the underlying law is in disarray. The growing strain of pro-preemption logic means that statutory ambiguities could over time result in agency interpretations and cases leaving little room for independent state and local climate policies. As shown below, retaining state and local roles is both difficult to avoid and desirable in order to further the goal of combating climate change.

A. *The Erratic Voyage of the “Presumption Against Preemption”*

The dominant-stated interpretive norm about preemption is the “presumption against preemption.” As explained in numerous cases, this norm is meant to favor the preservation of state law despite federal law’s constitutional supremacy.⁷⁰ This anti-preemption norm is rooted in the Constitution’s federalist structures and the value of preserving legal domains for state law. This heightened attention to preserving state law links to the many cases emphasizing the importance of state sovereignty.

Despite the durability and frequent reiteration of this norm, the Supreme Court, in reality, states and applies it only sporadically.⁷¹ In *Riegel v. Medtronic*⁷² and *Geier v. American Honda Motor Co.*,⁷³ the Court did not even mention this anti-preemption presumption and ended up embracing preemptive outcomes. In addition, the Court has neglected this presumption in interpreting statutes that lack express preemption provisions.⁷⁴

Many laws do contain preemptive language, making judicial neglect of the anti-preemption norm less surprising, but even there, the question is how broadly to construe preemptive language. In particular, should express preemption of conflicting “requirements” include preemption of the possibility of common law liabilities if the law does not mention common law? On that issue, the Supreme Court has in recent years seesawed, with the Court’s vacillation tracking the Court’s stated application or rejection of the “presumption against preemption.” For example, the most recent major preemption decision, *Wyeth v. Levine*,⁷⁵

70. *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996); *Jones v. Rath Packing Co.*, 430 U.S. 519, 525 (1977); *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947).

71. See Sharkey, *supra* note 63, at 458-59; see also Calvin Massey, “Joltin’ Joe Has Left and Gone Away”: *The Vanishing Presumption Against Preemption*, 66 ALB. L. REV. 759, 764 (2003) (“[T]he Court . . . continues to simultaneously repeat and ignore the presumption against preemption.”); Caleb Nelson, *Preemption*, 86 VA. L. REV. 225, 298 (2000) (“The Court itself has applied the presumption only half-heartedly.”).

72. *Riegel v. Medtronic*, 128 S. Ct. 999, 1006 (2008).

73. *Geier v. Am. Honda Motor Co.*, 529 U.S. 861, 881 (2000).

74. See *Sprietsma v. Mercury Marine*, 537 U.S. 51 (2002); *Geier*, 529 U.S. at 906.

75. *Wyeth v. Levine*, 129 S. Ct. 1187 (2009).

both defended application of this anti-preemption presumption and reached an anti-preemption result. This outcome in *Wyeth*, however, surely does not resolve this question. *Wyeth* reflects what is the latest of a series of close 5-4 preemption decisions applying inconsistent frameworks and reaching different results based on claimed differences in underlying facts, statutory language, and bodies of regulation. The slightly earlier *Riegel v. Medtronic* went decisively the other way, and the 2005 *Bates*⁷⁶ decision was more consistent with *Wyeth*.⁷⁷

The bottom line is that the “presumption against preemption” no longer is applied predictably or consistently. Federal climate legislation cannot rely on this presumption to tip the interpretive scale against preemption.

B. The Much-Neglected Savings Clauses

Many statutes contain provisions that “save” state law. With varying degrees of specificity, they make clear that a federal law or perhaps a portion of a federal law is not to be implemented or construed to preempt existing state law. As Professor Zellmer makes clear in her chapter in *Preemption Choice*, savings clauses have frequently been given little to no weight or attention in major Supreme Court preemption decisions.⁷⁸ The Court has explicitly said that findings of conflict preemption are not precluded by the presence of a savings clause.⁷⁹ In addition, since some laws contain both preemptive provisions and savings clauses, the mere presence of a savings clause does not necessarily shift interpretative modes into a strongly anti-preemptive stance. This body of law makes clear that if a savings clause is to have an anti-preemptive effect, it needs to be strongly and specifically worded. Because the presence of a savings clause does not preclude a finding of a preempted conflict and because the growing body of obstacle preemption has expanded what counts as a conflict, additional

76. *Bates v. Dow Agrosiences LLC*, 544 U.S. 431, 449 (2005).

77. These cases and related precedents are analyzed closely in suggesting agency preemption claims should be subjected to hard look review in Buzbee, *supra* note 68, at 1557-76.

78. Sandi Zellmer, *When Congress Goes Unheard: Saving Clauses’ Rocky Judicial Reception*, in *PREEMPTION CHOICE*, *supra* note 34, at 144, 164-166 (William W. Buzbee ed., 2009).

79. *Geier*, 529 U.S. at 870.

statutory findings or policy provisions expressly explaining why state law should be preserved are also likely necessary.

*C. The Rise of “Obstacle” Preemption and the
Problem of Multiple Goal Statutes*

Although much of preemption jurisprudence concerns interpretation of statutory language bearing on the preemption question, conflicts can and will arise between federal and state law, regardless of the subject of regulation. Little dispute concerns conflicts involving impossibly clashing requirements, especially clashing design mandates. Such “physical impossibility conflict” requires a resolution, and the Constitution’s Supremacy Clause makes clear that federal law trumps state law.

Less obvious and more problematic for climate legislation is the growing body of “obstacle preemption” law. If a state law’s functioning stands as an obstacle to purposes evident in a federal law, or perhaps strikes a different balance regarding competing federal purposes, courts may find it preempted under obstacle preemption doctrine. Hence, in *Geier v. American Honda Motor Co.*,⁸⁰ the Court found that the possibility of tort liability for a car’s lack of an airbag was preempted under obstacle preemption theory because of federal regulation chose a phase-in period for air bags. Tort liability “would have stood as an obstacle to the gradual, passive restraint phase-in that the federal regulation deliberately imposed.”⁸¹ In one of its earliest applications, in *Hines v. Davidovitz*,⁸² the Court invalidated a state regulation imposing more requirements on aliens than federal law because such state laws “stand as an obstacle to the full purpose and objectives of Congress.”⁸³ The growing body of obstacle preemption cases vary in whether a preemptive result is reached, but the question remains the same: are the different or additional state or local regulatory burdens an obstacle to the balance struck by federal law?

If judges or justices frame the preemption question as whether state law or actions are contrary to “the balance struck” in federal law, they are near certain to favor or reach pro-preemption outcomes.⁸⁴ If that is

80. *Id.* at 881.

81. *Id.* For a concise but thorough discussion of *Geier* and obstacle preemption doctrine, see Schroeder, *supra* note 34, at 132-35.

82. 312 U.S. 52 (1941).

83. *Id.* at 66-74.

84. *Wyeth v. Levine*, 129 S. Ct. 1187, 1221 (2009) (Alito, J., dissenting) (arguing that federal drug labels should preclude state common law from striking a different balance than federal actions); *Edgar v. MITE Corp.*, 457 U.S. 624 (1982) (finding Illinois takeover law preempted by the federal Williams Act due to how state law differed from the “balance struck” in federal law); *Florida Lime & Avocado Growers, Inc., v. Paul*,

the question, the frame for analysis is weighted heavily towards preemption since any different state and local choices, by definition, will strike a different balance. If a law “interferes with the methods by which the federal statute was designed to reach [the federal] goal,” then it can be preempted under obstacle preemption logic even where the state or local law seeks to achieve the same primary goal as federal law.⁸⁵ As Justice Thomas wrote in his *Wyeth* concurrence, where he issued a direct, withering attack on the whole doctrinal concept of obstacle preemption, obstacle preemption is unpredictable and empowers judges to exercise broad policy discretion.⁸⁶

The 2003 Second Circuit decision in *Clean Air Markets Group v. Pataki* (CAMG) is especially illuminating in assessing climate-change obstacle-preemption risks.⁸⁷ CAMG involved the sulfur dioxide acid rain cap-and-trade program under the Clean Air Act. When New York tried to restrict trading of SO₂ allowances to polluters in upwind states, an association representing those polluters claimed that New York State was preempted from taking actions that burdened trading under the Clean Air Act. The Second Circuit agreed. Noting how burdening of SO₂ trades would undercut the cost-effectiveness goals of the cap-and-trade regime, the court expressed, “[T]here can be no doubt that the [state law] interferes with the method selected by Congress for regulating SO₂ emissions.”⁸⁸ By parsing the statute’s language and the history of related implementing regulations, the court concluded that New York restrictions on trades were contrary to federal law and a preempted obstacle “even if . . . it [did] not ‘actually conflict with federal law because it [was] expressly permitted by’ the Clean Air Act’s floor preemption savings clauses.”⁸⁹ The court concluded that the state law “impedes the execution of ‘the full purposes and objectives’ of Title IV[’s acid rain cap-and-trade system].”⁹⁰

373 U.S. 132, 171 (1963) (White, J., dissenting) (using “the balance struck” terminology in arguing the Court majority should have found that federal marketing orders preempted state law differently regulating avocado sales).

85. *Int’l Paper Co. v. Ouellette*, 479 U.S. 481, 494-97 (1987). In *Ouellette*, the Court’s application of obstacle preemption ultimately led it to a choice of law decision, applying state common law of the pollution source’s state, not the law of the victim’s state.

86. *Wyeth*, 129 S. Ct. at 1214-28 (Thomas, J., concurring).

87. *Clean Air Markets Group v. Pataki*, 338 F.3d 82, 86-89 (2d Cir. 2003).

88. *Id.* at 87.

89. *Id.* at 89.

90. *Id.* (quoting *Hines v. Davidovitz*, 471 U.S. at 713).

Obstacle preemption is thus a particular problem for climate-change legislation and the preservation of state roles. A federal cap-and-trade law will almost inevitably result from compromises about the pace of progress and a desire to balance environmental goals and costs, or it will, at least, minimize costs to achieve a designated climate goal. Any state law directly or indirectly relating to climate change and GHG emissions will necessarily strike a different balance reflecting that jurisdiction's more environmentally aggressive priorities. Obstacle preemption doctrine could result in preemption of state efforts, unless federal law in savings clauses and policy as well as findings provisions expressly allows additional or more rapid state and local efforts to reduce GHG emissions. Also helpful would be provisions that identify other benefits of preserving state and local regulatory power in order to address climate change. Such a law would also have to avoid broad or indeterminate preempting language such as "related to" due to the broad way such a provision would be interpreted.⁹¹

D. Agency Interpretation in the Climate Change Preemption Crucible

As evident in *Geier*, *Wyeth*, and numerous agency declarations and actions late in the recent Bush Administration, agencies can use their implementation and interpretive discretion to assert their view that some state or local action, law or regulation, or even common law is preempted. The Supreme Court has clearly stated that agency actions can be the federal law that preempts⁹² but has yet to resolve a longstanding debate regarding whether federal agency declarations about preemptive impact are subject to deferential judicial reviewing frameworks. The recent *Wyeth* case is dismissive of claims of preemptive impact asserted in a regulatory preamble without advance notice and opportunity for public input, thus perhaps impliedly indicating that more process would justify greater deference.⁹³ Several recent decisions expressly do not resolve this question.

If ambiguities left in federal law empower federal agencies to assert preemptive impact and receive judicial deference, then poorly resolved preemption choices in climate legislation could lead a pro-preemption administration to broaden the preemptive reach of a federal climate law and limit state authority. Once again, the price of ambiguity and

91. In *Altria Group, Inc. v. Good*, 129 S. Ct. 538 (2008), the Supreme Court made clear that preemptive language including the phrase "relating to" "indicates Congress' [sic] intent to pre-empt a large area of state law to further its purpose." *Id.* at 548-49.

92. *Fid. Fed. Sav. & Loan Ass'n v. De la Cuesta*, 458 U.S. 141, 153 (1982).

93. *Wyeth v. Levine*, 129 S. Ct. 1187, 1200-02 (2009).

uncertainties resulting from compromise might be a climate-change law that, in ultimate application and interpretation, becomes broadly preemptive.

IV. WHY STATE AND LOCAL CLIMATE ROLES ARE DESIRABLE

The major arguments for preserving state and local climate-change authority logically flow from the preceding sections. Several others also deserve attention.

Preserving state and local authority despite a federal climate-change law can serve as a partial antidote to several likely forms of regulatory failure discussed in Part I. If federal law proves to be too lax either in the level of its cap or in the rate of progress, state and local governments could choose to take supplemental, more stringent actions. These, concededly, would burden those regulated more than under federal law alone. This ability of state and local governments to take more stringent actions could, nevertheless, prove critical and beneficial in several respects. First, widespread state and local actions could reduce the nation's aggregate emissions, thereby leading to environmental progress despite what might be an unduly lax federal law. Second, a groundswell of additional and possibly different state and local climate-change efforts could, once again, play a critical role in catalyzing support for additional or amended federal legislation.⁹⁴ Industry hoping to avoid too many diverse state and local initiatives might support federal legal change. If state and local actors were legally precluded from action, then progress could falter and the states-as-catalyst dynamic would be lost.⁹⁵

In addition, federal law could fail if a lack of monitoring and enforcement destroyed the integrity of the new carbon-allowance market. Empowering state and local governments to play their own supplementary roles in enforcing the law could be the equivalent of additional cops on the beat.⁹⁶ With higher rates of monitoring, detection of violations, and punishment, rates of compliance would likely increase. Correspondingly, retaining overlapping and cooperative state and local climate regulation roles would result in state and local governments continuing to gain GHG regulation expertise. With that experience

94. See sources cited, *supra* note 4.

95. See generally Kaswan, *supra* note 46.

96. See Andreen, *supra* note 5 (discussing diverse state climate initiatives); Engel, *supra* note 61, at 178-81 (discussing regulatory safety nets); Schapiro, *supra* note 35, at 44 (articulating the benefits of regulatory redundancy).

might come ideas for ways to improve federal law.⁹⁷ If at the end of the period of preemptive federal cap-and-trade exclusivity states desired to initiate their own additional GHG regulation and trading regime, the start-up hurdles would be less formidable.

Preserving state and local climate roles would also leave room to engage in policy innovation and experimentation.⁹⁸ A federal cap-and-trade regime might prove highly effective, but additional measures are sure to be needed. Apart from the broadly shared goal of creating a liquid and thriving carbon-trading market—a goal assisted by a single federal trading market—many other strategies could also prove effective in reducing GHG emissions. Pollution trading is a promising way to find cost-effective means to meet a pollution goal but, by definition, does not prod polluters to extend beyond the cap's required aggregate reductions. Numerous other regulatory strategies can also help reduce GHG emissions, as they have long helped address other environmental ills. The optimal mix of mandates, technology forcing, incentive-based tools such as taxes and subsidies, site-specific imposition of rigorous performance goals, among many other strategies, is not yet known. Giving state and local governments latitude to experiment serves to diversify the risks posed by a single, federal regulatory monopoly. Even a trading regime could benefit from different state or regional experiences in setting up their own markets. The several state and regional carbon-trading regimes in place at this time utilize somewhat different strategies.⁹⁹ Provided that the tradable GHG allowances and credits are sufficiently uniform to facilitate trades across jurisdictional borders, the content and institutional arrangements under cap-and-trade regimes would likely also benefit from allowing diverse strategies; the federal regime, other states, and possibly other nations, all could learn by comparing the efficacy, in actual implementation, of diverse approaches to GHG regulation and even cap-and-trade regulatory strategies.

State and local governments also provide additional venues in which citizens and stakeholders can participate and nudge governments and polluters to improve. Federal regulatory venues can be invaluable, but different sorts of participation and input, often at lower cost, may be facilitated by preservation of state and local government roles. Similarly, federal actors may be uninterested in smaller-scale subjects of

97. See Stewart, *supra* note 1, at 700 (discussing how state initiatives could lead to more stringent federal regulation).

98. See William W. Buzbee, *Interaction's Promise: Preemption Policy Shifts, Risk Regulation, and Experimentalism Lessons*, 57 EMORY L.J. 145, 152-55 (2007); Engel, *supra* note 61, at 182-83; Schapiro, *supra* note 35, at 43.

99. For an analysis of current state initiatives, see Adelman & Engel, *supra* note 3, at 862-875.

regulation that could easily be reached at more local levels. Hence, state and local regulatory roles could serve to enhance participation while also filling in regulatory gaps left in federal law.

Even without federal error, reliance on a single regulator poses high risks of stasis. The regulatory temptation to take an action and not revisit it has long been noted, leading to calls for regulatory look-back, creation of regulatory “hammers” incentivizing regulatory reexamination, and imposition of statutory deadlines.¹⁰⁰ Any regulatory reexamination poses risks of revealing imprudence, error, and ineffective regulation. Furthermore, recent precedents greatly strengthen government defenses to lawsuits intended to address agency inaction. Unless either an enabling act grants a particular cause of action to address inaction or a law mandates “required” and “discrete” actions, courts cannot prompt an agency to act.¹⁰¹

Despite these barriers to prompting federal action, if state and local governments retain latitude for their own additional and different climate strategies, then stakeholders have another venue in which to pursue their ideas. Diverse state and local strategies may reveal effective measures that then can be copied by other states and, possibly, federal regulators. One need not wishfully rely on selfless federal actors eager to both engage in self-criticism and subject themselves to more work in order to reveal and test new ideas; state and local actions can establish new possibilities. Retaining a diversity of actors and latitude for diverse regulatory arrangements can, thus, serve to foster “democratic experimentalism” and “learning by monitoring,” with others able to learn from benchmarked best practices.¹⁰² This is true for GHG mitigation strategies and, as shown in a forthcoming article by Professor Camacho,¹⁰³ adaptation strategies. The price of misguided strategies also is far lower if state and local governments can give new strategies a test run. As Professor Carlson observes, California has often used its

100. See, e.g., CURTIS COPELAND, U.S. CONGRESSIONAL RESEARCH SERVICE, REEXAMINING RULES: SECTION 610 OF THE REGULATORY FLEXIBILITY ACT (2005), https://www.policyarchive.org/bitstream/handle/10207/2360/RL32801_20050311.pdf?sequence=1.

101. Norton v. S. Utah Wilderness Alliance, 542 U.S. 55, 65 (2004).

102. See Michael C. Dorf & Charles F. Sabel, *A Constitution of Democratic Experimentalism*, 98 COLUM. L. REV. 267, 287-88 (1998).

103. See generally Alejandro E. Camacho, *Adapting Governance to Climate Change: Learning to Manage Uncertainty*, 59 EMORY L.J. (forthcoming 2009), available at http://papers.ssrn.com/sol3/pap_ers.cfm?abstract_id=1352693.

special Clean Air Act powers to innovate in helpful ways, but it has also helped avoid larger-scale national mistakes due to experience gained from failed state strategies.¹⁰⁴

V. PREEMPTION CRITERIA AND THE VALUE OF A PREEMPTION REVIEW COMMITTEE

Despite this Article's arguments against preempting state and local government climate change roles, it remains virtually unavoidable that conflicts will arise between federal and state and local law. It is also likely that, in order to assemble an adequate coalition that will support federal climate legislation, at least limited preemption language will be necessary. This Part suggests how to design limited preemptive provisions that reduce the risk of stasis and error while retaining the potential benefits of state and local action. This Part also suggests that federal law should create a Preemption Review Committee as the initial venue in which to hear preemption claims by federal officials or private actors.

A. *Minimal Preemptive Language*

The most justifiable preemptive language would create a single, federally designed carbon dioxide allowance. Because there are numerous GHGs with different climate effects, and because offsets will also arise out of different activities, a federal law would need to attribute values to these climate-related emissions and offsets. Legislatively dictating these equivalencies and ratios would hasten implementation of the law but would pose substantial risks of error and stasis. Ideally, federal climate legislation would set, to the extent feasible based on the best-available data, ratios and equivalencies; it would also address the stasis risk by creating an agency obligation to reexamine these assumptions every few years and also provide for a petition process whereby anyone could prompt a revisiting of these carbon allowance and offset values.¹⁰⁵ Preserving broad participation rights and requiring agency responses to such petitions would also reduce the risk of agency stasis.

Second, creating a single national cap-and-trade regime would serve to focus all on one market, reducing transaction costs and helping to create a single clearinghouse for information and trades. A single

104. Carlson, *supra* note 43.

105. Oddly, the Waxman-Markey climate bill draft of June 5, 2009 was careful to create a petition process for allowance equivalencies and designation of GHGs but did not do so for offsets. The two provisions should have symmetrical periodic review and petition procedures.

domestic carbon market would also ease integration into international trading regimes. Further, it would simplify efforts to monitor the market and certify trades, claimed underlying emissions levels, and offset activities. The risk, as stated above, is that the cap would be too high or slow to decrease and also that something about the market's structure would prove dysfunctional. Correspondingly, lack of monitoring and enforcement could undercut the market's integrity and destroy the value of carbon allowances. If the single national market would permanently preempt other levels of government, only federal legislative or agency willingness to fix the market could rectify problems.

The best resolution to risks of a single national cap-and-trade market is what appears likely in the leading climate change bill. Creating a single, preemptive federal cap-and-trade market while limiting the duration of its preemptive effect would give the federal regime a chance to get rolling. A period of federal exclusivity would also prompt all parties to work out the kinks in the federal regime rather than abandon it for some other legal regime or market. By giving the federal market preemptive exclusivity for several years, even opponents of climate legislation would have incentives to make the federal law work so that states and regions would not revive or create their own cap-and-trade markets at the end of the preemptive period. In addition, much as allowance-creation should be subject to agency reexamination and stakeholder petition rights for modification via notice and comment processes, a federal cap-and-trade market should have its own similar mechanisms to address flaws and institute improvements. Thus, although a limited preemptive phase would be part of the law, administrative reexamination and amendment procedures could address risks of error, even if the protections of federalism are temporarily lost.¹⁰⁶

Apart from focusing all on a single, federal GHG currency and a single, federal market for a limited time, state and local roles should be broadly preserved via savings clauses and findings as well as policy provisions that document reasons to allow additional state and local actions that could not only directly or indirectly relate to GHG emissions, but also possibly affect the federal cap-and-trade market. Due to the ubiquity of activities linked to climate change, broad preservation of state and local roles is necessary to avoid a landslide of

106. See Gillian E. Metzger, *Administrative Law as the New Federalism*, 57 DUKE L.J. 2023, 2109 (2008).

preemption litigation, where a federal climate law would be used as a sword to weaken state and local laws.

B. For a Preemption Review Committee and Structured Review of Preemption Claims

Even with only limited preemptive language and well-crafted savings clauses, conflicts will arise and prompt claims that state or local actions or laws are preempted. As discussed above in Part III, preemption jurisprudence has become unpredictable. Among its problems lies uncertainty among judges regarding how to determine whether a conflict that would require preemption actually exists. Some courts will take evidence on this question, as was the case at the trial level in the recent *Wyeth v. Levine* decision, which the Supreme Court majority reviewed in depth when it declined to preempt state tort law. In other cases, however, courts often focus just on the statutory interpretation question and give little attention the realities of the claimed conflict.¹⁰⁷ In those cases, judicial views about the value of regulation and, especially, regulatory overlap and interaction seem more important than actual evidence about a conflict. In addition, as mentioned above, courts often barely give attention to the presence of savings provisions. As generalists, it is doubtful that courts often know about the benefits of regulatory interaction and overlap, especially in particular regulatory settings. Instead, courts are likely mainly to hear the complaints of industry that is unhappy with additional obligations or liabilities imposed by state or local law.¹⁰⁸

107. See generally Buzbee, *supra* note 68, at 1553-80 (discussing frequent judicial and scholarly focus on the question of agency statutory authority to preempt, and deriving doctrinal and policy arguments for more closely scrutinizing the factual and policy rationales for preemption under a “hard look review” framework); Sharkey, *supra* note 69, at 2178-91 (discussing ways courts could encourage agencies to make preemption judgments in a more transparent and accountable manner).

108. A recent congressional report on Food and Drug Administration pro-preemption declarations reveals that career officials disputed the empirical basis for political appointees’ pro-preemption claims about conflicts between regulatory obligations and tort law. MAJORITY STAFF OF H.R. COMM. ON OVERSIGHT & GOV’T REFORM, FDA CAREER STAFF OBJECTED TO AGENCY PREEMPTION POLICIES 4 (2008), <http://oversight.house.gov/documents/20081029102934.pdf>. In two related cases before the Supreme Court, *Riegel v. Medtronic*, 128 S. Ct. 999, 1010-11 (2008) and *Wyeth v. Levine*, 129 S. Ct. 1877, 1219-20 (2009) (Alito, J., dissenting), five and then three justices, respectively, largely adopted the anti-tort, pro-preemption views embraced by political leadership at the FDA and favored by industry, but which in reality had been rejected as empirically unsound by career staff experts. The justices took this perspective with little or no empirical support. The majority in *Wyeth* rejected this approach. In the climate arena, the Preemption Review Committee idea proposed here is meant to reduce the risk that judges, justices, and agency officials will resolve preemption claims based on intuition and political preferences.

Three simple means can be taken to address this judicial tendency to make conclusory preemption findings without adequate consideration of underlying evidence. The first is for the Supreme Court to call for “hard look” review of evidence underlying government or private sector claims that alleged conflicts with federal law require preemption.¹⁰⁹ A second option is for Congress to make clear in judicial review provisions that agency or private claims of preemptive effect require submission of evidence as well as either a hearing or a notice and comment process prior to agency or judicial resolution of a preemption claim.

The third means involves creating a Preemption Review Committee composed of top federal officials and, perhaps, also including a few state-appointed representatives. It would be modeled after the Endangered Species Committee (ESC), also known as the “God Squad.” The ESC is authorized to utilize an on-the-record (but mostly paper) process to consider petitions seeking permission to take actions that threaten endangered species or their habitats, despite otherwise applicable Endangered Species Act (ESA) prohibitions.¹¹⁰ The ESC’s determinations must be based on this on-the-record introduced evidence and, for a petition grant, make specific findings under ESA criteria, including evidence about the overall benefits and costs of a proposed action. The ESC’s actions are reviewable in the courts based on this underlying record and its ruling. The effect of the ESC is to create a safety valve for the ESA’s generally strong prohibitions, but it also tests petitioners by requiring proof both of the merits of a project and that means to avoid endangered species harms truly do not exist.

A Climate Change Preemption Review Committee would similarly test federal or private actors who claim that state and local action must be preempted. Since several federal agencies would likely be involved in implementing and enforcing a federal climate law, the Committee would not be composed of officials from only one agency. And because state perspectives on state law would be important, so would be giving states a Committee voice. Even if not actually on the Committee, states

109. See Buzbee, *supra* note 68.

110. See generally *Portland Audubon Soc’y v. Endangered Species Comm.*, 984 F.2d 1534 (9th Cir. 1993) (reviewing the key language and requirements applicable to the Committee in challenge to actions of the Endangered Species Committee, especially *ex parte* communication.); Oliver S. Houck, *The Endangered Species Act and Its Implementation by the U.S. Departments of Interior and Commerce*, 64 U. COLO. L. REV. 278, 330-33 (1993).

would need to have an opportunity to participate since a preemption claim would threaten to nullify state law. Partisans and the Committee would not only have to construe federal and state or local laws to show that federal law is meant to preempt state or local law (at least, if they conflict), but they also would have to show how, in actual application, federal and state or local laws or actions create conflicts worthy of preemption under the federal law's criteria. Those criteria would need to include language allowing preemption both in settings of physical impossibility and upon proof that a state or local law actually imposes a conflict that leads to increased GHG emissions or otherwise exacerbates climate change. Other preemption claims based on allegations of undue conflict and unreasonable burdens would need to balance overall benefits of retaining state and local regulatory power with particular individualized burdens that might arise, with greatest weight given to climate change goals. Again, proof of both the benefits of state and local law and resulting harms would be needed. Only if, overall, state and local law created a conflict that in some way undercut federal climate change goals could it be held preempted. The Committee's statutory criteria would also call for declarations of preemptive impact to be narrowly tailored, preserving state and local authority to address climate change as much as possible.

By utilizing a Preemption Review Committee, preemption claims would not be resolved on an ad hoc basis heavily influenced by general views about the value of regulation or gut responses to claims of conflict. Statutory criteria would focus the Committee on general benefits of both state and local climate efforts while also examining the particular burdens claimed. The Committee's tailored discretion would, in turn, constrain courts from overreaching. The availability of judicial review, however, would remain important in order to ensure that the Committee's own work did not become politicized or inattentive to statutory criteria and presumptions.

At this time, leading federal climate bills do not contain any structure like this, but creation of a Preemption Review Committee would create a safety valve to address settings where preemption really is needed while also constraining and guiding such preemption review by dictating that the Committee and any reviewing courts assess actual underlying facts in light of statutory criteria. A subsequent judicial hard look at the Committee's determinations would further support the integrity of the process. Moreover, such a specialized tribunal would, over time, increase expertise on climate change preemption conflicts.

VI. CONCLUSION

Federal climate legislation confronts numerous distinctive risks of regulatory failure. Protecting state and local power to take additional and more stringent steps to address climate change preserves incentives for stakeholders to address flaws in federal climate legislation while also retaining state and local room for policy innovations. In addition, due to the ubiquity of GHG emissions, it is difficult to extricate regulatory actions that focus on GHGs from regulation directed at other sorts of pollution and risk. Express preservation of state and local regulatory power that impinges on carbon regulation and markets is important to preclude industry use of federal climate legislation as a preemption sword. Ambiguous language regarding the preemptive effect of federal legislation would be a recipe for decades of preemption litigation. Despite the often-stated presumption against preemption, actual recent preemption cases reveal preemption jurisprudence that is increasingly sympathetic to preemptive outcomes, especially under obstacle preemption logic. To avoid unpredictable preemption litigation and preserve state and local roles, statutory preemption criteria and anti-preemption presumptions would help, as would the creation of a Preemption Review Committee to hear and resolve preemption claims. The Article also demonstrates how state and local climate roles can only be preserved and effective if state and local governments have the authority either to retire carbon allowances or to charge more in carbon allowances per ton of GHG emissions. Ideally, state and local governments would also play in role in distributing allowances. Without these sorts of authority, state and local stringency would just result in leakage of those emissions to other jurisdictions, possibly at lowered costs. If that were the case, then all climate change hopes would depend on the adequacy of federal legislation or binding international treaty commitments. Preservation of state and local authority is a more prudent alternative.