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### Contextualizing Preemption

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## CONTEXTUALIZING PREEMPTION

Mark D. Rosen\*

### INTRODUCTION

Over the past two decades, commentators from across the political spectrum have documented courts' unpredictable and inconsistent application of preemption doctrine.<sup>1</sup> Some scholars have focused on the analytics of preemption<sup>2</sup>—what long has been viewed as a straightforward doctrine that did not require much in the way of theorizing—thereby generating some surprisingly helpful insights.<sup>3</sup> The renewed scholarly attention also has resulted in proposals that range from recommendations that courts tweak certain doctrinal presumptions,<sup>4</sup> completely abandon preemption doctrine,<sup>5</sup> or, only somewhat more modestly, wholly restructure preemption doctrine.<sup>6</sup> Robert Schapiro's and Thomas Merrill's Symposium proposals, to which this Article largely is directed, fall into the last category.<sup>7</sup>

It is useful to complement the intensive scrutiny to which preemption has been subject with a broader, more contextual analysis that considers preemption alongside other doctrines that seek to accomplish structurally similar ends. Such contextual analysis, it turns out, provides useful perspectives vis-à-vis both present preemption doctrine and recent scholarly proposals.

Part I shows that preemption doctrine functions almost identically to the contract doctrine of unenforceability on grounds of public policy, but

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<sup>1</sup> For a good collection of sources, see Caleb Nelson, *Preemption*, 86 VA. L. REV. 225, 233 & nn.26–30 (2000).

<sup>2</sup> See, e.g., Stephen A. Gardbaum, *The Nature of Preemption*, 79 CORNELL L. REV. 767 (1994); Thomas W. Merrill, *Preemption and Institutional Choice*, 102 NW. U. L. REV. 727 (2008).

<sup>3</sup> See Gardbaum, *supra* note 2, at 770–73.

<sup>4</sup> See, e.g., Betsy J. Grey, *Make Congress Speak Clearly: Federal Preemption of State Tort Remedies*, 77 B.U. L. REV. 559 (1997) (arguing that the courts should not presume preemption and rather should require an unmistakably clear intent to preempt before dismissing state tort claims).

<sup>5</sup> See Gardbaum, *supra* note 2, at 770 (advocating that the categories of “conflict” and “field” preemption be abandoned and replaced by ordinary statutory interpretation such that “there should be no such thing as preemption doctrine”).

<sup>6</sup> See, e.g., Nelson, *supra* note 1, at 260 (arguing that the sole test under preemption should be whether state law “contradicts a rule validly established by federal law”).

<sup>7</sup> See Robert A. Schapiro, *Monophonic Preemption*, 102 NW. U. L. REV. 811 (2008); Merrill, *supra* note 2.

that each of the two doctrines approaches its respective task in a fundamentally different way: preemption doctrine deploys a “unilateralist” approach that looks only to federal interests, whereas the public policy exception relies on a “multilateralist” approach that takes account of all stakeholder institutions. Identifying a radically different doctrinal approach to solving a similar problem suggests that contemporary preemption doctrine’s approach is neither axiomatic nor self-evident. With the understanding that there is a plausible alternative to preemption doctrine’s current approach, Part I then considers why courts have adopted unilateralism in the preemption context, concluding that there is no immediately obvious answer. Indeed, Part I’s analysis reveals that justifying today’s unilateralist preemption doctrine is even more complicated because a side-by-side analysis of preemption doctrine and the public policy exception suggests that there in fact is a third plausible approach that courts could take: judicial passivity, under which Congress (perhaps in conjunction with agencies) alone makes preemption decisions.

Part II confronts the question of how to choose between the three doctrinal approaches. Part II suggests that recent scholarly proposals, including Schapiro’s and Merrill’s, can be understood as identifying three factors that are relevant to choosing the best approach: (1) the *substantive considerations* that inform the decision whether state law should be displaced, (2) the *institutional competence* of various governmental entities to undertake the appropriate analysis, and (3) the *legitimacy* of each of these governmental entities deciding whether state law is to be preempted. Schapiro’s and Merrill’s articles make important contributions to answering these questions. Part II summarizes and, where appropriate, critiques their contributions.

In the process, Part II shows that this analysis is aided once again by examining contexts outside of preemption that confront similar issues. Preemption sorts out conflicts that can arise when more than one societal institution—state governments and Congress—appear to possess regulatory authority over a given matter. As Part II shows, multiple governmental institutions have overlapping powers in other contexts, including in horizontal federalism (i.e., interstate relations) and in the separation of powers. Part II shows that these other contexts of “concurrent” governmental powers can illuminate the costs and benefits of various approaches to sorting out conflicts among the governmental institutions with overlapping authority.

Several important conclusions emerge. Both Schapiro and Merrill suggest that Congress and the Executive should and do play important roles in determining when and what state law is to be displaced, but that courts invariably will continue to be active participants in questions of preemption. Interestingly, both scholars also agree that courts should utilize a multilateralist doctrine of the sort found in the public policy context. This Article applauds these conclusions, and furthermore suggests that the Judiciary’s adoption of the modifications that Schapiro and Merrill advocate likely will

allow Congress to assume the primary role in making preemption decisions in the future—which, the Article explains, is a highly desirable outcome. As to the interim period during which courts will continue to play an important role in preemption issues, this Article suggests that two modest statutory innovations can increase judicial functionality by ensuring that courts receive the necessary inputs of a multilateralist doctrine: states should be notified when lawsuits raise preemption issues and should have an unconditional right of intervention. Finally, building on an important insight provided by Roderick Hills,<sup>8</sup> this Article suggests that consideration should be given as to whether Congress should create some institutional alternative to courts and agencies that can more directly involve states when rendering preemption decisions.

#### I. LESSONS FROM THE PUBLIC POLICY EXCEPTION: UNILATERALISM, MULTILATERALISM, AND JUDICIAL PASSIVITY

Preemption doctrine plays an almost structurally identical role to that of contract law's doctrine of unenforceability on grounds of public policy—the “public policy exception.” Yet each doctrine uses a different methodology to discharge its respective task. The public policy exception's different approach to resolving a similar problem simultaneously highlights that the basic approach that contemporary preemption doctrine has adopted is not inevitable and points to two plausible alternatives.

It first is necessary to grasp the structural similarities shared by preemption doctrine and the public policy exception. The conclusion that federal law preempts state law means that the state law's ordering of social relations must give way to that of the federal law, generally because Congress, agencies, or courts view the state law as undermining the federal law's efficacy.<sup>9</sup> There are also modalities of ordering social relations apart from state law that potentially can interfere with the efficacy of a given law. One example is private contract.<sup>10</sup> The public policy exception polices private contracts' interference with law and provides that contracts that un-

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<sup>8</sup> Roderick M. Hills, Jr., William T. Comfort, III Professor of Law, New York University School of Law, Comments at the Northwestern University Law Review Symposium: Ordering State-Federal Relations Through Federal Preemption Doctrine (Apr. 5, 2007) [hereinafter Hills, Comments]; see also email from Roderick Hills, Jr. to Mark D. Rosen, Professor of Law, Chicago-Kent College of Law (Oct. 16, 2007, 9:32 AM CST) (on file with the Northwestern University Law Review).

<sup>9</sup> Courts typically must engage in similar purpose analysis even when applying statutes containing express preemption provisions because express preemption provisions typically utilize open-ended language. See, e.g., *Bates v. Dow Agrosciences LLC*, 544 U.S. 431, 451 (2005) (holding that the Federal Insecticide, Fungicide, and Rodenticide Act's express preemption provision did not preempt state tort failure to warn claims because, inter alia, such suits “would seem to aid, rather than hinder, the functioning of [the Act]”).

<sup>10</sup> See, e.g., Michael P. Vandenbergh, *The New Wal-Mart Effect: The Role of Private Contracting in Global Governance*, 54 UCLA L. REV. 913 (2007) (showing that private contracts can regulate individual behavior in much the same way that public statutes do).

dermine “public policy” are unenforceable.<sup>11</sup> The public policy exception hence secures the primacy of public policy in the same way that preemption doctrine secures the primacy of federal law.

Consider, for example, the many state statutes that aim to encourage marriage. A question that regularly arises is whether unmarried cohabitants can allocate property through private contract in ways that mirror the allocations provided by the state’s marriage statutes. Enforcing such private contracts could reduce citizens’ incentive to marry, thereby undermining those state laws that aim to strengthen the institution of marriage. Relying on this line of reasoning, some (though not all) state courts have concluded that cohabitation agreements are unenforceable on grounds of public policy.<sup>12</sup>

Interestingly, the public policy exception is not limited to contracts that interfere with state statutes. For example, one federal court considered the enforceability of a covenant not to sue for trademark infringement in circumstances where there was genuine concern as to public confusion.<sup>13</sup> The court recognized that enforcing the covenant, and thereby precluding the lawsuit by the party claiming trademark infringement, would interfere with federal trademark law’s paramount policy of avoiding public confusion concerning marks.<sup>14</sup> (Stay tuned for a few paragraphs to see how the federal court decided the question!)

In short, both preemption doctrine and the public policy exception are mechanisms for displacing modalities of social ordering that interfere with a favored governmental regulation. But though they are structurally parallel, each beckons courts to take account of different considerations. Preemption doctrine asks courts to focus almost exclusively on the federal law and federal interests. The doctrines of express and implied preemption, and the latter’s subdoctrines of conflict preemption, field preemption, and frustration of purpose or obstacle preemption,<sup>15</sup> ask courts to consider only the federal statute. Preemption doctrine’s exclusive focus on the federal law is moderated only slightly by the presumption against preemption in fields of law “which the States have traditionally occupied”<sup>16</sup> because, among other

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<sup>11</sup> RESTATEMENT (SECOND) CONTRACTS § 178 (1981).

<sup>12</sup> See, e.g., *Hewitt v. Hewitt*, 394 N.E.2d 1204 (Ill. 1979) (refusing to enforce a cohabitation agreement for public policy reasons). See generally Symposium, *Unmarried Partners and the Legacy of Marvin v. Marvin*, 76 NOTRE DAME L. REV. 1261 (2001). But see *Watts v. Watts*, 405 N.W.2d 303 (Wis. 1987) (holding that cohabitation contracts are not rendered unenforceable by a pro-marriage family code).

<sup>13</sup> See *T & T Mfg. Co. v. A.T. Cross Co.*, 449 F. Supp. 813, 827 (D.R.I. 1978).

<sup>14</sup> See *id.*

<sup>15</sup> For a fuller elaboration of the details of these various preemption doctrines, see Merrill, *supra* note 2, at 738–41, and Nelson, *supra* note 1, at 226–29.

<sup>16</sup> *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947).

reasons, it is only inconsistently invoked and applied.<sup>17</sup> The public policy exception, by contrast, explicitly bids courts to consider not only the law that is potentially imperiled by the private contract at issue, but the countervailing interests in enforcing the contract (such as the parties' justified expectations and the possibility of forfeiture in the event enforcement were denied).<sup>18</sup>

This chasm between these two doctrines is vast. In the helpful terminology found in the conflict-of-laws literature, preemption is a "unilateralist" doctrine that takes account of only one of the institutions whose interests are at stake: the federal government. The public policy exception, by contrast, is a "multilateralist" doctrine that asks the decisionmaker to take account of the concerns of all relevant institutions whose interests are implicated.<sup>19</sup> Accordingly, the mere fact that a private contract is in tension with the policy underlying a particular statute does not necessarily mean that the contract cannot stand. So, for instance, in the trademark case mentioned above, the federal district court enforced the covenant not to sue, despite having found that there existed a real danger of public confusion, on account of the policy of freedom of contract.<sup>20</sup>

Why is preemption doctrine unilateralist whereas the public policy exception is multilateralist? It might be thought that preemption doctrine's unilateralism can be justified on the ground that preemption is based on the Supremacy Clause, under which federal law trumps state law.<sup>21</sup> Because federal law has trumping power, then conceivably only federal law need be consulted to determine whether state law has been displaced.

But this explanation is unpersuasive. To begin, the public policy exception likewise operates over domains of private contracting where the government unquestionably has the power to regulate and thereby oust the private ordering that otherwise would be permissible. In other words, governmental regulation also is "supreme" in relation to the private ordering that is at issue in the public policy exception cases. For example, the state courts that have held that their family statutes do not render cohabitation agreements illegal concede that the state legislatures *could* have done so.<sup>22</sup> Yet, as we have seen, the public policy exception does not adopt unilateral-

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<sup>17</sup> See Merrill, *supra* note 2, at 741 ("[T]he presumption against preemption is honored as much in the breach as in observance.")

<sup>18</sup> See RESTATEMENT (SECOND) CONTRACTS § 178 (1981).

<sup>19</sup> For a helpful discussion of the difference between unilateralist and multilateralist doctrines, see William S. Dodge, *Extraterritoriality and Conflict-of-Laws Theory: An Argument for Judicial Unilateralism*, 39 HARV. J. INT'L L. 101, 107–10 (1998).

<sup>20</sup> See *T & T Mfg. Co. v. A.T. Cross Co.*, 449 F. Supp. 813, 827 (D.R.I. 1978).

<sup>21</sup> U.S. CONST. art. VI, cl. 2.

<sup>22</sup> See, e.g., *Watts v. Watts*, 405 N.W.2d 303, 310 (Wis. 1987) ("We find no indication, however, that the Wisconsin legislature intended the Family Code to restrict in any way a court's resolution of property or contract disputes between unmarried cohabitants.")

ism. The public policy exception accordingly shows that supremacy does not invariably lead to unilateralism.

Further, there is a sensible explanation as to why supremacy does not invariably lead to unilateralism in the contexts of preemption doctrine and the public policy exception. Both doctrines seek to determine whether a particular modality of social ordering has been displaced in circumstances where the institution with acknowledged trumping power has not unambiguously indicated that it sought to trump. Accordingly, the central question that preemption doctrine and the public policy exception both face is how to determine whether trumping occurs when the institution with acknowledged trumping power has not been explicit. In such circumstances, a unilateralist focus on the institution-with-trumping-power's incomplete pronouncement surely is not the only plausible method for determining whether the competing modality of social ordering is to be displaced. To the contrary, focusing exclusively on the ambiguous (or perhaps even nonexistent) pronouncement seems to be an eminently wrongheaded approach, an insightful point that has been made before by others.<sup>23</sup>

Explaining the choice behind a unilateralist or multilateralist approach is complicated by yet another factor. There are, in fact, three rather than two plausible approaches that courts can take to resolving the issues presented by preemption and the public policy exception. In addition to the options of unilateralism and multilateralism, the third logical possibility is that no displacement occurs unless and until the institution with acknowledged trumping power explicitly indicates both that there is to be trumping and what is to be trumped. Indeed, this third option has not gone unrecognized by scholars. It is the approach embraced by Martin Redish<sup>24</sup> and, to a slightly lesser degree, by Caleb Nelson.<sup>25</sup>

In sum, the public policy exception shows that there are plausible alternatives to preemption doctrine's unilateralism. There are, to be sure, many important differences between the public policy exception and preemption doctrine, but none of them accounts for the radically different approaches of each doctrine. For example, though it might be posited that the public policy exception appropriately is multilateralist because citizens' freedom to contract is such an important societal value, the federalism interests implicated in preemption also are important components of our political culture. Because there are no ready explanations for the two

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<sup>23</sup> Merrill, *supra* note 2, at 741–42; Ernest A. Young, *The Rehnquist Court's Two Federalisms*, 83 TEX. L. REV. 1, 132 (2004).

<sup>24</sup> Martin Redish advanced this view in oral comments during the Symposium. Martin H. Redish, Louis and Harriet Ancel Professor of Law and Public Policy, Northwestern University School of Law, Comments at the Northwestern University Law Review Symposium: Ordering State-Federal Relations Through Federal Preemption Doctrine (Apr. 5, 2007) [hereinafter Redish, Comments]; see also email from Martin H. Redish to Mark D. Rosen, Professor of Law, Chicago-Kent College of Law (July 20, 2007, 11:46:00 CST) (on file with the Northwestern University Law Review).

<sup>25</sup> For a discussion of Nelson's approach, see *infra* notes 36, 102.

doctrines' markedly different approaches, the question naturally arises how best to choose among the three options. And that is the subject of the next Part.

## II. CHOOSING AMONG THE THREE APPROACHES

What considerations appropriately inform the choice among these competing approaches? The recent preemption literature, including this Symposium's contributions, have identified three principal factors that are relevant to choosing among these options: (1) the *substantive considerations* that appropriately inform the decision whether state law should be displaced, and two institutional considerations, namely (2) the *institutional competence* of various governmental entities to undertake the appropriate analysis and (3) what governmental entities have constitutional or political *legitimacy* to render preemption decisions. This Part canvasses and critiques Professor Schapiro's and Professor Merrill's answers to these important questions. This Part shows that preemption doctrine is best suited to a multilateralist analysis by—in the short run, at least—courts. Further, candid judicial analysis of the relevant multilateralist considerations likely will enable Congress to take a more proactive role in preemption decisions in the future. Finally, this Part suggests that the multilateralist analysis for preemption questions can be helpfully informed by looking to other doctrines that mediate conflicts where multiple governmental institutions have overlapping authority.

### A. Substantive Considerations

This first Subpart reviews Robert Schapiro's suggestions as to what factors appropriately inform preemption, and the second Subpart examines the factors Thomas Merrill identifies. In contrast to contemporary preemption doctrine's unilateralist character, both Schapiro and Merrill call for multilateralist doctrines. Once again, this Subpart shows that analysis is aided by looking to contexts outside of preemption that confront similar issues.

*I. Schapiro: From "Polyphony" to Concurrency.*—Robert Schapiro's Symposium contribution primarily relates to the first factor (substantive considerations), though it also has some bearing on the second (institutional competence).<sup>26</sup> Schapiro helpfully seeks to create a "normative theory of preemption" that identifies considerations relevant to determining whether state law should be preempted.<sup>27</sup> Schapiro's approach to preemption is intertwined with his larger project—"polyphonic" federal-

<sup>26</sup> See Schapiro, *supra* note 7.

<sup>27</sup> *Id.* at 812. As I discuss at greater length below, Schapiro's theory is not primarily directed to the courts but instead is "directed in the first instance to nonjudicial actors," by which he means Congress and administrative agencies. *Id.*



ism.<sup>28</sup> Though I fully agree with Schapiro's diagnosis of the imperfections of the usual spatial metaphors that are relied upon for conceptualizing federal-state relations,<sup>29</sup> I have some reservations about the aural metaphor of "polyphony" that Schapiro aims to put in their place. I instead will refer to the main point behind Schapiro's proposed metaphor as the important recognition that federal and state power are largely concurrent. My primary reluctance to embrace the metaphor of polyphony is the concern that polyphony, which Schapiro appears to tie to federalism, may obscure the fact that the jurisdictional redundancy Schapiro identifies and celebrates is part of a larger phenomenon that is found in many contexts outside of federalism. In other words, it often is the case that one governmental entity's power to do *X* is *also* possessed by at least one other governmental entity.<sup>30</sup> To provide just a few examples, first consider what conventionally is

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<sup>28</sup> See Robert A. Schapiro, *Toward a Theory of Interactive Federalism*, 91 IOWA L. REV. 243 (2005) [hereinafter Schapiro, *Interactive Federalism*]; Robert A. Schapiro, *Polyphonic Federalism: State Constitutions in the Federal Courts*, 87 CAL. L. REV. 1409 (1999) [hereinafter Schapiro, *Polyphonic Federalism*].

<sup>29</sup> See Schapiro, *Interactive Federalism*, *supra* note 28. Schapiro believes that the spatial metaphors ordinarily used to capture the relation between the federal and state governments are problematic for several reasons. First, spatial metaphors naturally give rise to the conception that federal and state power cannot readily "occupy[] the same space without displacing each other or combining into a single new, unified whole." *Id.* at 253. Spatial metaphors, in other words, readily lead to the sense that regulatory power over a given matter is possessed by *either* the federal or the state government (or instead by some newfangled hybrid of the two). Second, Schapiro resists spatial metaphors because he believes that they are handmaidens to defining state power on the basis of territorial borders, which in his view is problematic because "[t]he borders between states and between nation-states have lost much of their significance." Schapiro, *supra* note 7, at 813. Third, Schapiro thinks that spatial metaphors give rise to a fixed mental image that misleadingly suggests that the relation between the federal and state governments is static. *Id.* at 838–39. Schapiro's aural metaphor is intended to avoid these three pitfalls. First, aural metaphor is intended to facilitate the understanding that federal and state powers can simultaneously coexist because two or more musical notes *can* coexist in time and sometimes even retain their distinctive "voices." Schapiro, *Interactive Federalism*, *supra* note 28, at 253–54. Second, the aural metaphor's rejection of space "seeks to move beyond this focus on territoriality." Schapiro, *supra* note 7, at 813. Third, Schapiro suggests that his musical metaphor facilitates intuition of the dynamic relationship between state and federal governments like musical performances unfold over time. *Id.* at 821.

I fully sympathize with the impetus behind Schapiro's effort to pen a new metaphor; lawyers and politicians frequently share the nonaxiomatic intuition that governmental power to do *X* rests with one, and only one, governmental institution, and spatial metaphors probably encourage this type of thinking insofar as physics teaches us that no two physical objects can occupy the same space. I also strongly agree that territorial borders are imperfect proxies for defining the limits of regulatory powers. See Mark D. Rosen, "*Hard*" or "*Soft*" Pluralism?: Positive, Normative, and Institutional Considerations of States' Extraterritorial Powers, 51 ST. LOUIS L.J. 713 (2007) [hereinafter Rosen, *Hard or Soft Pluralism*]; Mark D. Rosen, *Extraterritoriality and Political Heterogeneity in American Federalism*, 150 U. PA. L. REV. 855 (2002) [hereinafter Rosen, *Extraterritoriality*]. I concur as well with Schapiro's substantive point concerning the evolutionary nature of the federal-state relationship, though I am less certain that his musical metaphor significantly facilitates recognition of this point.

<sup>30</sup> See Mark D. Rosen, *From Exclusivity to Concurrency* (Jan. 2008) (unpublished manuscript, on file with author) (providing a comprehensive analysis of this structural characteristic of American constitutionalism).

dubbed the separation of powers. Although Article II, Section 2 of the U.S. Constitution provides that the President “shall have Power to grant Reprieves and Pardons,”<sup>31</sup> the Supreme Court long has held that Congress has the power to grant amnesties that, the Court has acknowledged, are functionally equivalent to pardons.<sup>32</sup> Similarly, while the Constitution specifies that the Senate and President are the governmental institutions responsible for creating treaties,<sup>33</sup> many of this country’s contemporary international obligations have been created outside of the treaty-making process by “sole executive agreements” (that are created solely by the President) and “congressional-executive agreements” (that are created like ordinary domestic legislation, by both houses of Congress and the President) that in most respects are the functional equivalents of treaties.<sup>34</sup> To provide yet another example from the context of horizontal federalism,<sup>35</sup> more than one state frequently has the power to apply its substantive law to a given person, transaction, or occurrence.<sup>36</sup>

The recognition that concurrently held governmental powers—“concurrency”—is not limited to the federalism context dovetails nicely with the fundamental insight that animates Schapiro’s Symposium contribution. Schapiro seeks to situate preemption within the larger context of federalism insofar as he suggests that preemption analysis should self-consciously be undertaken in view of federalism’s generic benefits of (as he calls it) “plurality, dialogue, and redundancy.”<sup>37</sup> Like Schapiro’s effort to

<sup>31</sup> U.S. CONST. art. II, § 2, cl. 1.

<sup>32</sup> See *Brown v. Walker*, 161 U.S. 591, 601 (1896) (recognizing the power of Congress to grant amnesty and noting that the difference between pardons and amnesties is “one rather of philological interest than of legal importance” (quoting *Knote v. United States*, 95 U.S. 149, 152 (1877)) (internal quotation marks omitted)).

<sup>33</sup> See U.S. CONST. art. II, § 2, cl. 2.

<sup>34</sup> See Bruce Ackerman & David Golove, *Is NAFTA Constitutional?*, 108 HARV. L. REV. 799, 801–03 (1995) (discussing the modern use of congressional-executive agreements); Bradford R. Clark, *Domesticating Sole Executive Agreements*, 93 VA. L. REV. 1573 (2007) (describing, and criticizing, the widespread modern use of sole executive agreements).

<sup>35</sup> For a discussion of horizontal federalism, see Gillian E. Metzger, *Congress, Article IV, and Interstate Relations*, 120 HARV. L. REV. 1468, 1471–72 (2007).

<sup>36</sup> See Rosen, *Extraterritoriality*, *supra* note 29, at 946–55. There are many such examples. To provide yet one more, the jury is not the sole institution with the power to engage in adjudicatory fact-finding: judges in Article I courts find facts in the very same contests where juries would have the constitutional power to find facts, see Caleb Nelson, *Adjudication in the Political Branches*, 107 COLUM. L. REV. 559, 575–76 (2007), and Article III judges arguably engage in factfinding of the sort performed by juries when they decide motions for summary judgment and motions to grant judgments notwithstanding the verdict. See Mark D. Rosen, *Revisiting Youngstown: Against the View that Jackson’s Concurrence Resolves the Relation Between Congress and the Commander-in-Chief*, 54 UCLA L. REV. 1703, 1718–19 (2007) [hereinafter Rosen, *Revisiting Youngstown*].

<sup>37</sup> Schapiro, *supra* note 7, at 819. I agree with, and cannot improve upon, the elaboration of these benefits that he provides. See *id.* at 819–22. Schapiro appears to argue that these benefits of having multiple “nodes of governmental power” rather than only one counsels strongly, though not categorically, against concluding that federal law preempts state law. See *id.* at 818, 836–37. I agree that preemption analysis should take account of these considerations, but I do not think that they necessarily

contextualize preemption within a theory of federalism, contextualizing preemption in the broader frame of concurrency may prove to be illuminating for many reasons.

To begin, canvassing concurrency in the many contexts outside of federalism where governmental institutions have overlapping powers deepens our understanding of concurrency's benefits,<sup>38</sup> and even helps identify additional generic benefits of concurrency in the federalism context that appropriately inform preemption analysis. To provide just one example, a benefit of concurrency that is prominent in another context of concurrently held powers—that of local governmental law<sup>39</sup>—is that situating concurrent power in governmental entities that are responsive to smaller constituencies broadens citizens' opportunities to actively participate in government by reducing lobbying and other participation costs and reducing the number of people whose opinions must be won over before any particular policy preference can be enacted into law. Preemption has the effect of eliminating both state and local governments as loci for political action, increasing the extent to which the large, impersonal federal government is the only avenue for political recourse.

Additionally, concurrency's omnipresence may provide additional reasons for legislatures, agencies, and courts to pause before concluding that state law has been preempted. Generally speaking, governmental power initially was presumed to fall exclusively to one institution, and only over time has been understood to be held concurrently by more than one institution.<sup>40</sup> If one trusts the common law's inductive method of reasoning and accordingly is inclined to give presumptive credit to patterns that have emerged across diverse doctrinal contexts over time, the general trajectory from exclusivity to concurrence provides additional reason to rethink preempting state law, which has the effect of relegating a given arena of human activity to regulation by only a single governmental entity.

Conversely, and just as importantly, analyzing preemption within the broader context of concurrency illuminates the costs of overlapping governmental powers. Schapiro provides a good starting point, noting that “[c]oncurrent regulation may undermine important principles of uniformity, finality, and hierarchical accountability.”<sup>41</sup> A broader study of concurrency,

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equate to so strong a presumption against preemption—one must also take account of the *costs* of polyphony, and (as described further *infra* text accompanying note 42) Schapiro's analysis curiously omits one of polyphony's most important drawbacks.

<sup>38</sup> A work-in-progress of mine undertakes this very sort of analysis. See Rosen, *supra* note 30, at 4.

<sup>39</sup> Local governmental law is yet another context of concurrent governmental powers insofar as state legislatures have the power to regulate the matters that fall within local governments' regulatory authority (though the converse is not true). Concurrency occurs in this context because local governments enjoy only those powers that have been delegated to them by state legislatures, and such delegations almost always are deemed to be nonexclusive.

<sup>40</sup> See Rosen, *supra* note 30, at 3.

<sup>41</sup> Schapiro, *supra* note 7, at 822.

though, can help identify overlooked costs. For example, a crucial cost of concurrency found in other contexts that Schapiro's Symposium contribution surprisingly neglects is that governmental entities with overlapping authority may issue edicts that outright conflict with one another or, less dramatically but also troublesome, that one entity's requirements may interfere with the efficacy of another governmental entity's regulations.<sup>42</sup>

Further, a broader study of concurrency may refine our understanding of the costs of concurrency, suggesting that either our concerns are overblown or, conversely, understated. Consider, in this regard, Thomas Merrill's insightful suggestion that preemption determinations appropriately involve analysis of whether "federal law . . . is in tension with state law . . . and whether this tension is sufficiently severe to warrant the displacement of state law."<sup>43</sup> Doctrines developed in other contexts of concurrently held powers likely will help refine this understanding in preemption doctrine. For example, assistance likely can come from the field of law known as "conflict of laws," which addresses the phenomenon of states' overlapping regulatory powers in the horizontal federalism context. Doctrines such as "false conflict" and "moderate and restrained" interpretation illuminate that differences in what two governmental laws appear at first glance to require do not necessarily mean that the laws are in fact in tension with one another.

The concepts of "false conflict" and "moderate and restrained interpretation" can be concretely illustrated by examining how such concepts would have been useful to the problem that the Supreme Court faced in *American Insurance Ass'n v. Garamendi*.<sup>44</sup> "False conflicts" in the interstate conflict-of-laws context refers to situations where careful examination of the policies underlying the two (or more) potentially applicable laws reveals that one (or more) of the laws simply is inapplicable to the situation at hand, thereby dissolving the apparent conflict insofar as only a single law actually applies.<sup>45</sup> "Moderate and restrained" interpretation refers to an interpretive approach under which, where two states' laws potentially conflict and the scope of State *A*'s law is uncertain, the court from State *A* construes its law narrowly (in a "moderate and restrained" fashion), thereby generating what conflict-of-laws scholars call a "false conflict"<sup>46</sup> (and what others likely would a situation of "no" conflict).

*Garamendi* concerned a California law that required any insurer doing business in the state to disclose information about all policies sold in

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<sup>42</sup> Admittedly, one need not have recourse to a broader study of concurrency to identify this cost. Conflict figures prominently in the preemption case law, and has received the ample attention it deserves by other preemption scholars. See, e.g., Merrill, *supra* note 2, at 743, 752.

<sup>43</sup> See *id.* at 743.

<sup>44</sup> 539 U.S. 396 (2003).

<sup>45</sup> E.g., *Babcock v. Jackson*, 191 N.E.2d 279, 284 (N.Y. 1963).

<sup>46</sup> E.g., *Bernkrant v. Fowler*, 55 Cal. 2d 588, 594–95 (1961).

Europe between 1920 and 1945.<sup>47</sup> The Supreme Court ruled that the state law was preempted by an executive agreement signed by President Clinton and German Chancellor Schroeder in which Germany agreed to enact legislation establishing a funded foundation that would compensate persons who had suffered at the hands of German companies during the Nazi era.<sup>48</sup> The executive agreement indicated that the foundation should be “the exclusive forum and remedy for the resolution of all asserted claims against German companies” arising from the Nazi era.<sup>49</sup>

The concepts of false conflict and moderate and restrained interpretation suggest that the Court may have too quickly concluded that there was a “clear conflict” between the California law and the executive agreement.<sup>50</sup> The executive agreement’s pledge that the foundation would be the “exclusive forum and remedy” need not be construed—indeed, is not most naturally interpreted—as having application to the disclosure of information concerning potential claims, something that is antecedent to pursuing a claim. To the contrary, the state law could have been said to complement the foundation’s work insofar as it helped put deserving insurance victims on notice that they had potentially valid claims that could be pursued through the foundation.

To be sure, whether a moderate and restrained approach to construing the scope of the executive agreement was sensible in *Garamendi* turns on a host of considerations not present in the context of domestic interstate conflicts.<sup>51</sup> Awareness of the concepts of moderate and restrained interpretation and false conflict, however, make it apparent that the *Garamendi* Court was faced with several choices that the majority did not appear to appreciate and that in fact merited forthright consideration. In short, although doctrines from one context cannot seamlessly be imported into another, insights likely can be taken from contexts in which sustained attention has been given to analogous concepts as those that arise in preemption questions.

## 2. *Merrill’s Proposed Substantive Considerations.*

*a. Tension.*—Although Thomas Merrill’s Symposium contribution primarily addresses institutional rather than substantive considerations, his comparative institutional analysis requires that he identify the substan-

<sup>47</sup> 539 U.S. at 401.

<sup>48</sup> *Id.* at 405–08.

<sup>49</sup> *Id.* at 406.

<sup>50</sup> *See id.* at 421.

<sup>51</sup> These include the appropriate preemptive scope of international “obligations” entered into by the President alone without the participation of the Senate in the form of treaty-making or Congress in the form of congressional-executive agreements, *see* Clark, *supra* note 34, and the appropriate scope of state regulatory authority with respect to matters that touch upon foreign relations in the absence of clear federal statute or treaty, *see, e.g.*, Jack L. Goldsmith, *Federal Courts, Foreign Affairs, and Federalism*, 83 VA. L. REV. 1617 (1997). A full examination of these issues, and their bearing on the issue in *Garamendi*, is beyond the scope of this Article.

tive criteria that properly inform the decision whether state law should be preempted.<sup>52</sup> One of the principal insights of his article, already mentioned above, is:

[Preemption], at bottom, requires a judgment about the degree of tension between federal and state law. This is not simply a mechanical exercise in discerning ‘conflict,’ either in the sense of mutual exclusivity or frustration of purpose. . . . [It also] entails an inquiry into the pragmatic consequences of either uniformity or diversity in legal standards in a given area.<sup>53</sup>

Merrill’s analysis of the widely understood costs and benefits of uniformity<sup>54</sup> tracks in no small measure the considerations that Schapiro identifies under his rubric of “polyphony” (and that I locate under the rubric of “concurrency”). I agree that the literature on uniformity versus diversity can usefully inform preemption doctrine. However, it seems preferable to situate the question that Merrill helpfully identifies—“what degree of tension between state and federal law is tolerable?”—into the larger context of whether concurrency or exclusivity is preferable, rather than to treat the issue more narrowly as a choice between uniformity or diversity. This is so for two reasons. First, a full analysis of the choice between concurrency and exclusivity necessarily includes considerations regarding uniformity and diversity insofar as concurrency creates diversity. Second, reducing the query to the tradeoffs between uniformity and diversity omits salient considerations (such as the benefits of redundancy, which are ably described by Schapiro<sup>55</sup>).

*b. Constitutional considerations.*—Merrill’s contribution also alludes to the “constitutional” consideration that any decision to preempt be “faithful to the Constitution’s division of powers between the federal government and the states.”<sup>56</sup> For Merrill, the fact that preemption includes this

<sup>52</sup> See Merrill, *supra* note 2, at 746–53.

<sup>53</sup> *Id.* at 752.

<sup>54</sup> See *id.* (discussing the benefits and costs of uniformity in terms of efficiency in national commercial markets).

<sup>55</sup> See Schapiro, *supra* note 7, at 819–22. Schapiro notes that an advantage of regulatory overlap is that

[s]tates and the federal government function in different settings and are subject to different pressures and concerns. . . . Each of these institutional actors gathers information in different ways, tends to focus on different kinds of costs and benefits, is subject to different constituent and interest group influences, exercises its authority in different manners, and exists within different structures of accountability.

*Id.* at 819–21. Whereas Schapiro characterizes these as the “diversity” benefits of polyphony, see *id.*, I think that they are better described as benefits that flow from jurisdictional redundancy. Cf. Robert M. Cover, *On the Uses of Jurisdictional Redundancy: Interest, Ideology, and Innovation*, 22 WM. & MARY L. REV. 639 (1981). However characterized, this sort of consideration could be readily overlooked by reducing the preemption inquiry to a choice between diversity or uniformity.

<sup>56</sup> Merrill, *supra* note 2, at 747. For essentially the same reasons that follow in the text above, I question the usefulness of another “constitutional” consideration to which Merrill points, that preemption should “promote[] a proper balance of authority between the central government and the states.” *Id.*

substantive consideration has institutional implications that favor courts because “courts perform best on the constitutional variables” and have the potential to perform better than either Congress or agencies on a comparative basis.<sup>57</sup>

Merrill’s analysis here strikes me as off the mark. With only a few exceptions, the Constitution does not “divide” powers between the federal government and the states, but rather grants the federal government powers that overlap with regulatory powers that the states *also* have.<sup>58</sup> For example, Congress’s power to regulate interstate commerce does not mean that states are without power to regulate interstate commerce (though various doctrines admittedly place limits on their exercise of this power<sup>59</sup>). Furthermore, where the Constitution *does* explicitly deprive states of regulatory power—states may not coin money, lay imposts or duties, make treaties, or do any of the other things enumerated in Article I, Section 10—preemption is never an issue, for if the states are without the constitutional power to act vis-à-vis these things, then it matters not whether Congress has regulated.

In short, the “division” of power that the written Constitution provides between federal and state power does not illuminate preemption analysis. Preemption issues do not arise where the Constitution allocates decision-making authority exclusively to Congress and deprives states of regulatory power. And in the circumstances where preemption *is* an issue, the Constitution’s implicit allocation of concurrent authority (implicit insofar as it explicitly grants Congress power and does not remove similar power from the states) means that the Constitution does not answer whether state law has been preempted. Rather, whether federal law that falls within Congress’s constitutional powers should displace state law is best understood as a policy question, not a justiciable constitutional question. This would seem to be the essential teaching of modern Tenth Amendment jurisprudence, which wisely eschews invitations for courts to identify a category of matters that fall within an enumerated congressional power but nonetheless are beyond Congress’s powers.<sup>60</sup>

On the other hand, one could argue that the Court’s Tenth Amendment analysis supports Merrill’s contention that questions of preemption implicate constitutional considerations after all. On this view, Congress’s decision whether state law should be preempted reflects Congress’s constitutional judgment concerning the relationship between state and federal power, but Congress’s judgment is not to be judicially reviewed. This

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Merrill himself “confess[es] to some ambivalence” about this variable because of the “difficulty of identifying the baseline against which one is to make a judgment about whether the division of power requires rebalancing.” *Id.* at 750.

<sup>57</sup> *Id.* at 757.

<sup>58</sup> See Nelson, *supra* note 1, at 225–27.

<sup>59</sup> Limiting doctrines include the dormant commerce clause, the Privileges and Immunities Clause, and the right to travel. See generally Rosen, *Hard or Soft Pluralism*, *supra* note 29.

<sup>60</sup> See, e.g., *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 546–47 (1985).

would mean that Merrill is correct to say that preemption decisions incorporate a constitutional component, but that he is mistaken as to the institutional implications: *this* constitutional decision is properly made by Congress, not courts. There is nothing novel, and certainly nothing internally inconsistent, about suggesting that a nonjudicial actor has the power to make a constitutional determination that is not subject to judicial review.<sup>61</sup> Moreover, there is (it seems to me) a real difference between saying that something is purely a policy decision to be made by Congress and saying that something is a constitutional decision to be made by Congress that is largely unreviewable by courts. One would hope that Congress would rise to the occasion when it realizes that it must make a constitutional decision—and sometimes Congress indeed has done so<sup>62</sup>—though Congress also could fail to do so, with the result that its constitutional determination would not be much if any different from a mere policy decision.<sup>63</sup>

On balance, though, the decision whether state law should be preempted is better characterized as a matter of policy judgment than as a constitutional decision. Persuasive at the end of the day is the fact that the written Constitution delegates lawmaking to Congress that largely overlaps with state lawmaking power, simultaneously granting power to Congress and withdrawing state regulatory power in only a handful of instances. It perhaps is only at the aggregate level—taking account of all the circumstances where state law has been preempted and assessing the practical residuum of state regulatory power that remains—where one properly can say that a constitutional question (likely the Tenth Amendment) is raised. And even as to these matters, it is a difficult question whether they would be essentially nonjusticiable like the rest of today's Tenth Amendment doctrine or, akin to the exceptional anticommmandeering doctrine, would be part of the narrow band of Tenth Amendment questions that falls to the courts.

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<sup>61</sup> The constitutional provisions that fall under the political question doctrine all share this characteristic. See, e.g., *Nixon v. United States*, 506 U.S. 224, 238 (1993) (holding that the Senate, not courts, determines what is required by the instruction in Article I, Section 3, Clause 6 that the Senate shall “try” all impeachments).

<sup>62</sup> The Senate's resolution of the recent filibuster controversy arguably so qualifies. For a description of the conflict and its resolution by the “Gang of 14,” see Ryan T. Becker, Comment, *The Other Nuclear Option: Adopting a Constitutional Amendment to Furnish a Lasting Solution to the Troubled Judicial Confirmation Process*, 111 PENN. ST. L. REV. 981, 988–89 (2007).

<sup>63</sup> A difficult question is what criteria and sort of reasoning Congress appropriately deploys when making a constitutional determination. There is no reason to think that a governmental institution so different from the courts necessarily would use the same criteria and reasoning as a court when it formulates a constitutional judgment, especially where (as here) the constitutional text does not directly (or even implicitly) answer the question. For a preliminary discussion of this, see Mark D. Rosen, *Why the Defense of Marriage Act is Not (Yet?) Unconstitutional: Lawrence, Full Faith and Credit, and the Many Societal Actors that Determine What the Constitution Requires*, 90 MINN. L. REV. 915, 932 & n.57 (2006); see also Neal Kumar Katyal, *Legislative Constitutional Interpretation*, 50 DUKE L.J. 1335 (2001). I shall not say anything more about this set of difficult questions in this Article.



3. *Schapiro's and Merrill's Important Common Ground.*—When all is said and done, Schapiro's and Merrill's proposed substantive criteria share one essential characteristic that sharply diverges from contemporary preemption doctrine: both scholars' approaches are firmly multilateralist. Both share the view that courts properly should take account of far more than statutory language when undertaking preemption analysis, specifically advising courts to consider the costs of displacing state law vis-à-vis the values of state sovereignty and federalism: Schapiro advises courts to take account of the costs of rejecting "polyphony" (the costs include the loss of "plurality, dialogue, and redundancy"), and Merrill advises courts that assessing the tolerable degree of tension between state and federal law entails not just analysis of the federal law but also consideration of the tradeoffs between uniformity and diversity.

In short, though I have some quibbles with Schapiro and Merrill that I have enumerated above, in the main I applaud their efforts to expand the range of considerations for courts to take into account in rendering their preemption determinations. These scholars' contributions (and, it is hoped, my refinements) provide a fuller understanding of what is at stake when state law is preempted, casting grave doubts on the advisability of current preemption doctrine's unilateralist cant.

The only possible bases for defending our current unilateralist preemption doctrine are lack of judicial institutional competence, lack of institutional legitimacy, or both. I take up each of these considerations below, ultimately concluding that neither provides a sufficiently strong reason for rejecting a multilateralist judicial doctrine of preemption.

### B. *Institutional Considerations: Competency*

Both building on and (at points) critiquing Schapiro's and Merrill's contributions, this Subpart argues that although Congress ideally is the most suitable institution for deciding when and what state law should be preempted, federal courts presently are the best positioned institution for making preemption decisions. Furthermore—and fortunately—if courts undertake a candid multilateralist analysis, which is best suited to generating intelligent preemption decisions, the resulting jurisprudence likely will enable Congress to assume greater responsibility in the near future for deciding when and what state law is to be preempted.

1. *Congress and the Ideal World.*—Schapiro's theory is not primarily directed to the courts. In his view, "preemption arguments should be directed in the first instance to nonjudicial actors,"<sup>64</sup> though he acknowledges that "[c]ourts will inevitably confront the question whether federal law preempts particular state regulations."<sup>65</sup> Although Schapiro does not explicitly

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<sup>64</sup> Schapiro, *supra* note 7, at 812.

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

defend these two propositions in the course of his Symposium contribution, I agree with both, though I allocate responsibility among the branches a bit differently, as I discuss below.

Schapiro's first point that preemption decisions are best made, all things being equal, by Congress is correct. As discussed above in defending multilateralism over unilateralism, preemption decisions are best made when they take account of a multitude of considerations. These relevant factors are incommensurable; it is not possible to translate concurrency's various costs and benefits into a common metric that permits a discretion-free, logical answer to whether state law should be preempted.<sup>66</sup> Instead, whether federal law should preempt state law is, at the end of the day, a deeply subjective, discretion-laden decision that simultaneously reflects and shapes the character of our country's federal union. For these reasons, whether state law should be preempted is best characterized as a subjective "political" decision that is most appropriately made by Congress, the most politically representative branch.<sup>67</sup>

Congress is better situated than courts to make the political decisions that underwrite preemption for several reasons. In terms of institutional competence, the most representative branch is better positioned than courts to assess public opinion (an important, if not the most important, driver behind such decisions<sup>68</sup>) and to find facts.<sup>69</sup> Moreover, Congress, unlike the courts, is *expected* to reflect public opinion. These considerations explain why Congress both is more competent and is the more legitimate institution to decide what state law is appropriately preempted.

Finally, preemption decisions are legitimately made by *federal* institutions, rather than by state institutions, on account of the Supremacy Clause, which provides that federal law—as created by federal institutions<sup>70</sup>—trumps state law. This political architecture is wise because federal entities are more institutionally competent at making preemption decisions; state interests are represented because federal representatives and senators are

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<sup>66</sup> For a discussion of incommensurability, see Mark D. Rosen, *Should "Un-American" Foreign Judgments Be Enforced?*, 88 MINN. L. REV. 783, 820–23 (2004).

<sup>67</sup> Although the President also is representative insofar as he is elected by the people (more or less), the administrative agencies, which determine what state law is to be displaced when Congress does not, are not.

<sup>68</sup> Public opinion is not the sole determinant because politicians appropriately take account of their understanding of the "public interest," a factor that may not always track contemporary public sentiment.

<sup>69</sup> Congress has ready contact with the public and the power to hold hearings. Administrative agencies do not directly assess public opinion, but also have significant factfinding powers, as Thomas Merrill notes. See Merrill, *supra* note 2, at 755.

<sup>70</sup> This is generally, but not universally true, insofar as state courts sometimes create federal common law. See Anthony J. Bellia, Jr., *State Courts and the Making of Federal Common Law*, 153 U. PA. L. REV. 825 (2005).

elected by states, and collective action problems would arise were preemption decisions left to the states.<sup>71</sup>

2. *Congress: Current Realities.*—I also agree with Schapiro’s second point that courts nonetheless are likely to continue playing an important role in determining what state law is preempted.<sup>72</sup> In a crucial passage in his contribution to this Symposium, Thomas Merrill provides a cogent argument for why it is “impossible . . . for Congress to play any kind of exclusive or even dominant role in determining whether to displace state law.”<sup>73</sup> Merrill argues:

The problem is not that Congress is institutionally incapable of spelling out whether displacement should or should not occur. The problem, rather, is that Congress cannot anticipate in advance all the situations in which questions of displacement will arise. Legislation operates *ex ante*, before particular disputes about implementation and enforcement emerge. . . . [S]ince displacement involves assessing the degree of tension between federal and state law, Congress would have to analyze and interpret the common law and statutory rules of fifty states and thousands of municipalities. This would include not only those statutes and ordinances in existence at the time it legislated, but also all those that might be enacted in the future. This is beyond impossible.<sup>74</sup>

Merrill’s points here strike me as largely correct, though overstated. Preemption doctrine’s task of deciding how conflict between federal and state law is to be sorted out invariably requires much *ex ante* analysis for the reasons Merrill identifies. On the other hand, patterns likely will arise over time in the case law. These patterns can then put “conscientious legislators”<sup>75</sup> on notice as to the sorts of decisions they should make when enacting a statute, consistent with the well-known common law pattern in which courts take the first crack at solving problems—and in the process provide experience and legal rules that can serve as the starting point for legislative solutions.

For example, past litigation teaches that federal statutes that impose licensing requirements for marketing goods that are subject to state product liability law invariably raise the question whether the federal standard pro-

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<sup>71</sup> For more on this point, see 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, at 591–602 (2008).

<sup>72</sup> See Schapiro, *supra* note 7, at 812.

<sup>73</sup> Merrill, *supra* note 2, at 754. Upon concluding that Congress can play only a limited role in rendering preemption decisions, Merrill proceeds to analyze “[t]he two most obvious candidates for undertaking such *ex post* inquiries,” namely “courts and the agencies charged with administration of federal statutes.” *Id.*

<sup>74</sup> *Id.* (footnotes omitted).

<sup>75</sup> Paul Brest, *The Conscientious Legislator’s Guide to Constitutional Interpretation*, 27 STAN. L. REV. 585 (1975) (arguing that legislators should learn how to interpret both the Constitution and opinions of courts interpreting the Constitution).

vides the floor or ceiling for product safety. And even if the federal standard is to be the ceiling, can state law nevertheless compensate for injuries via strict liability?<sup>76</sup> It would not be an “impossible” task for Congress to answer these sorts of questions. Indeed, answering these questions arguably does not require analysis of even a single state’s law, much less all fifty states’ laws. There is no good reason why Congress could not answer this readily anticipated question when it enacts statutes that provide standards of care for activities that already are the subject of state regulations.

Other recurring preemption questions that arise when Congress legislates may require consideration of the substantive state laws, but even there the task facing Congress may be less daunting than Merrill suggests. To begin, for some of the recurring issues, determining whether state law should be preempted may not turn on the particulars of a state’s law. Consistent with this, a determination by the Supreme Court that ERISA preempts Michigan tort and contract law is not understood by the Court or the larger community of lawyers to mean that *only* Michigan tort and contract law has been preempted and that, for instance, Illinois tort and contract law has not.<sup>77</sup>

Finally, even if preemption sometimes may appropriately turn on the particulars of a state’s law, this generally would not require Congress to analyze the proposed federal law’s relation to fifty different laws. Though our country has fifty states with different tort laws, we do not have fifty unique tort regimes. Instead, differences among state law tend to fall into patterns,<sup>78</sup> which is one of the reasons why law schools teach traditional state law subjects from national casebooks. Those recurring preemption questions that are sensitive to the particulars of state law accordingly may require congressional analysis of three or four types of state law rather than fifty states’ laws—a difficult task to be sure, but something that falls short of “beyond impossible.”<sup>79</sup>

In short, to the extent that Merrill’s analysis suggests that Congress is institutionally incapable of making preemption decisions, it seems to be too pessimistic an assessment. Nonetheless, it does seem likely that Congress

<sup>76</sup> For more on this issue, see Catherine Sharkey, *The Fraud Caveat to Agency Preemption*, 102 NW. U. L. REV. 841 (2008).

<sup>77</sup> See *Metro. Life Insur. Co. v. Taylor*, 481 U.S. 58, 62–64 (1987).

<sup>78</sup> See Larry Kramer, *Choice of Law in Complex Litigation*, 71 N.Y.U. L. REV. 547, 583 (1996) (“[In the nationwide class action context,] there will never be fifty different substantive rules, or even fifteen or ten. States tend to copy their laws from each other, and many use identical or virtually identical rules. In practice, the court will seldom have to deal with more than three of four formulations . . .”).

<sup>79</sup> Merrill, *supra* note 2, at 754. Finally, although Merrill is surely correct that Congress cannot be expected to consider preemption in relation to state law that might be enacted in the future, true legislative innovations are a rarity. Most federal legislation that raises potential preemption questions (much legislation does not, such as military authorizations and tax) extends or alters the baseline tort or contract rules. This increases the likelihood that Congress will be able to anticipate the sorts of preemption issues that the legislation will raise, subject to the caveats raised above in text.

is not *presently* capable of serving that role with respect to many if not most preemption issues. This likely is due to the doctrines developed by the courts to date; the unilateralist preemption doctrine's sole express focus on (frequently nonexistent) statutory intent has hidden the substantive considerations that properly (and probably do *sub rosa*) inform preemption analysis.<sup>80</sup> Such lack of doctrinal candor certainly has hindered courts' common law refinement of the considerations that thereafter could serve as Congress's starting materials.

3. *Three Alternatives to Congress.*—Present congressional incapacity does not on its own indicate which institution should make preemption decisions. There are two obvious candidates, and a third that should not escape attention either. The two most prominent contestants, to which Merrill's contribution dedicates considerable time and sheds much light, are administrative agencies and courts. The third possibility is that some altogether new institution could be created.<sup>81</sup>

a. *Agencies.*—Let us first consider the choice between agencies and courts. Merrill notes that both agencies and courts have the crucial advantage *vis-à-vis* Congress that they can “address[] displacement controversies *ex post*, after they have crystallized, in a way that Congress cannot.”<sup>82</sup> Merrill's analysis here is helpful insofar as it reminds us of Congress's present incapacities. But it is incomplete to the extent that it neglects to consider how agencies stack up against courts *vis-à-vis* this factor of *ex post* decisionmaking.

The answer turns on two factors. The first is the nature of the agency action: for example, the difference between agencies and courts is almost nonexistent with regard to adjudications in Article I courts but is considerable *vis-à-vis* agency rulemaking. Although agencies act in a less prospective manner than Congress insofar as they always have an opportunity to gather some data on how a statute operates in practice, agency actions vary in the degree to which they rely on *ex ante* decisionmaking. Further, the extent to which agency rulemaking in effect relies on *ex ante* decisionmaking turns on precisely *when* the agency promulgates rules. If it waits a considerable period of time after the statute's enactment so that it has time to amass some data—and if the statutory scheme can effectively operate in this interim period absent agency regulations—then agency rulemaking can be *ex post*. If these conditions are not present, however, the agency will

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<sup>80</sup> Merrill makes the same point. *See id.* at 741–42.

<sup>81</sup> Roderick Hills cogently made this point in his oral presentation at the Symposium. Hills, Comments, *supra* note 8.

<sup>82</sup> Merrill, *supra* note 2, at 755. Though the language quoted above appears in Merrill's discussion of administrative agencies, immediately before that Merrill writes that “[t]he two most obvious candidates for undertaking such *ex post* inquiries are courts and the agencies charged with administration of federal statutes.” *Id.* at 754.

have to hypothesize in the same manner as Congress. The second factor relevant to comparing court and agency competencies vis-à-vis ex post decisionmaking is the degree to which intelligent preemption decisions need be context-specific. To the extent they must be, the above-mentioned difference between nonadjudicatory agency action and court decisions becomes increasingly significant.<sup>83</sup>

In short, the extent of agencies' advantages vis-à-vis Congress with regard to ex post decisionmaking turns on a host of assumptions and factual contingencies. Federal courts, by contrast, virtually always engage in pure ex post decisionmaking that requires them to answer legal questions in relation to concrete facts and situations. Courts, then, would appear to have an institutional advantage over agencies with respect to ex post reasoning, even if it is true that agencies in the aggregate have the institutional edge over Congress.

Merrill also appears to be skeptical that courts should afford agency views *Skidmore* deference on the critical question of the degree of tension between federal and state law and whether this warrants displacement.<sup>84</sup> I agree. Those advocating *Skidmore* deference tend to stress that such deference is proper because agencies "draw[] upon the 'specialized experience and broader investigations and information'" vis-à-vis courts.<sup>85</sup> Though agencies admittedly have expertise regarding the impact of divergent state laws on the implementation of federal programs,<sup>86</sup> the degree of allowable tension between federal and state law turns on far more than this federal-focused inquiry. As Merrill notes, determining the allowable tension is a function of "the pragmatic consequences of either uniformity or diversity in legal standards,"<sup>87</sup> and this requires assessments of states' interests and the benefits of federalism,<sup>88</sup> matters in which agencies have no particular expertise. More than this, agencies may neglect to give adequate consideration to these state and federalism interests on account of their tunnel-vision federal focus on the statutes they are charged with implementing. Finally, there is just cause to be suspicious of agency determinations regarding such matters, even when they ostensibly take account of states' interests and federalism. After all, determining the tolerable level of tension between state and federal law in effect polices the boundaries between state and federal power, and there are good reasons to be skeptical of a bureaucracy's decision re-

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<sup>83</sup> The need for high context-specificity seems to be directly proportional to the force of Merrill's comments regarding congressional incapacity to engage in ex ante decisionmaking to render intelligent preemption decisions.

<sup>84</sup> Merrill, *supra* note 2, at 775–78.

<sup>85</sup> *Id.* at 770 (quoting *Skidmore v. Swift*, 323 U.S. 134, 139 (1944)). For a comprehensive examination of the *Skidmore* standard, see Kristin E. Hickman & Matthew D. Krueger, *In Search of the Modern Skidmore Standard*, 108 COLUM. L. REV. 1235 (2007).

<sup>86</sup> Merrill, *supra* note 2, at 755.

<sup>87</sup> *Id.* at 752.

<sup>88</sup> *See id.* at 752–53.

garding its own powers.<sup>89</sup> For these reasons, it seems unwise to give agency determinations regarding the proper level of tension between federal and state law the significant deference that *Skidmore* is generally understood to require.<sup>90</sup> This objection does not carry over, however, to agency findings regarding the ways in which state law may frustrate federal objectives, and *Skidmore* deference may well be appropriate for those agency determinations.

*b. Courts.*—Having identified present congressional incapacity and agency deficiencies with regard to preemption decisions, it does not ineluctably follow that preemption should be left to the courts. The question is whether courts are institutionally capable of rendering intelligent preemption decisions. The types of incommensurable considerations that appropriately inform preemption analysis challenge courts' institutional competence for the reasons adduced above—reasons that support Congress as the best institution to make such decisions.<sup>91</sup> On the other hand, many legal doctrines ask courts to undertake such “weighings” of incommensurables (consider balancing tests, for instance<sup>92</sup>). The real question is not whether courts are perfectly suited to deciding among incommensurables—they clearly are not—but whether decisionmaking on preemption questions is best undertaken with the participation of courts and, if so, whether judicial decisionmaking is better under a simplified unilateralist approach or a complex, incommensurable-infused multilateralist approach.<sup>93</sup> The normatively relevant considerations that are omitted under a unilateralist approach to preemption strongly suggest the latter. Further, the arguments presented above for suspecting agency judgments counsel in favor of a judicial role because federal courts are more disinterested than agencies in policing the

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<sup>89</sup> While it is true that federal courts also are part of the federal government, courts in all likelihood are less self-interested than agencies in determining the scope of the federal agency's powers. On the other hand, it is possible that federal courts are not sufficiently mindful of state interests and that it would be preferable to craft a new institution that, in accordance with Roderick Hills's suggestion at the Symposium, *see* Hills, Comments, *supra* note 8, would ensure that state interests are properly accounted for. *See infra* Part II.B.3.c.

<sup>90</sup> For an empirical examination that shows the significant deference that courts tend to grant agency decisions under *Skidmore* deference, *see* Hickman & Krueger, *supra* note 85, at 1250–91.

<sup>91</sup> *Cf.* Merrill, *supra* note 2, at 753–54 (discussing Congress's institutionally appropriate role of deciding subjective policy questions).

<sup>92</sup> More than this, constitutional law pervasively requires courts to decide among incommensurables whenever two or more constitutional principles conflict, a phenomenon that frequently occurs. *See* Rosen, *Revisiting Youngstown*, *supra* note 36, at 1737 & n.120. Richard Fallon has suggested other interesting respects in which incommensurability difficulties permeate constitutional law. Richard H. Fallon, Jr., *A Constructivist Coherence Theory of Constitutional Interpretation*, 100 HARV. L. REV. 1189, 1191–92 (1987).

<sup>93</sup> *Cf.* NEIL H. KOMESAR, IMPERFECT ALTERNATIVES: CHOOSING INSTITUTIONS IN LAW, ECONOMICS, AND PUBLIC POLICY 5 (1994) (persuasively arguing that although it frequently is the case that no institution is perfectly suited to rendering a particular decision, decisionmaking should be allocated to the institution best suited to undertaking the analysis that properly informs the decision).

borders between state law and the federal law that an agency is charged with implementing.<sup>94</sup> Also weighing in favor of a multilateralist judicial approach is that it promises to refine the various considerations, better preparing Congress to make intelligent preemption decisions some time in the future.

Once again, examples from other fields in which multiple governmental institutions have overlapping authority can be helpful. Consider the experience from the choice-of-laws doctrines that govern interstate conflicts. Determining which state is to have jurisdiction to grant and modify child custody orders in situations where one or more of the parents have exited the state where the predivorce family resided can be daunting as a matter of ex ante reasoning. Over time, however, courts heard and resolved cases that raised this question and, in the process, were able to identify a set of considerations that were generally agreed to be normatively relevant to resolving this conundrum. Courts' real-world experiences, as mediated by scholars, provided a template to legislatures, which then crafted a statutory solution that, though imperfect, has made matters far more manageable than before.<sup>95</sup>

I do not mean to overstate things. Novel federal legislation inevitably will interact with state laws in unanticipatable ways. For questions that Congress is institutionally incapable of presently legislating on an ex ante basis, delegating decisionmaking power to an institution whose ex post operation makes it more suited to the task of resolving preemption questions seems perfectly appropriate. My point, though, is that many Merrillean tensions between federal and state law are readily foreseen—or could be, if scholars devoted their attention to identifying them, as they did in the choice-of-laws context. These hard decisions ought to be made by Congress, for the reasons discussed above, after the courts have made their first cut and positioned Congress to do a reasonable job.

*c. Other institutions.*—The final question is whether preemption determinations would best be made by some new institution. Roderick Hills, for example, has suggested creating a statutory scheme that in effect establishes a framework in which federal agencies and states can directly

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<sup>94</sup> See *supra* note 89 and accompanying text.

<sup>95</sup> This is a thumbnail sketch of the history, from common law solution to the issue of child custody, to drafting and state-by-state enactment of the Uniform Child Custody Jurisdiction Act (the UCCJA), to the drafting and state-by-state enactment of the Uniform Child Custody Jurisdiction and Enforcement Act (the UCCJEA). See generally EUGENE F. SCOLES, PETER HAY, PATRICK J. BORCHERS & SYMEON C. CYMEONIDES, *CONFLICT OF LAWS* 658–65 (3d ed. 2000) (discussing common law and the first uniform act, the UCCJA); RUSSELL J. WEINTRAUB, *COMMENTARY ON THE CONFLICT OF LAWS* 356–58 (5th ed. 2006) (noting that “[t]he UCCJA has done much to end the tragedy of snatch-and-run relitigation of custody decrees that was all too common in pre-Act cases” and discussing the new UCCJEA). Scholars correctly note the deficiencies of the pre-uniform Act common law rules in relation to child custody, but they do not give fair credit to the role that the common law cases played in putting the drafters of the uniform laws on notice as to what considerations ought to count for purposes of the statutes.



bargain and thereby determine how federal and state law is to interface.<sup>96</sup> Given the limitations of Congress, agencies, and courts canvassed above, it seems sensible to keep our minds open to potential new solutions. This is not a pipe dream; the history of American public law is replete with institutional innovations (such as the twentieth century's rise of the administrative state). I cannot hope to even sketch the plans for a new institution in this short Article, but I look forward to thinking more about this issue in the future and to seeing what refinements Hills and others may offer us.

### C. *Institutional Considerations: Legitimacy*

Having considered various governmental institutions' capacities to undertake the reasoning that preemption appropriately calls for, an important remaining question is whether these institutions legitimately have the power to render preemption decisions. There is no question that congressional delegation of authority to an administrative agency to develop preemption rules would satisfy contemporary constitutional requirements.<sup>97</sup> With regard to federal courts, however, Professor Martin H. Redish argued at the Symposium that Congress alone has the authority under the Constitution to decide that state law is to be displaced.<sup>98</sup> If Congress has not clearly indicated that state law is to be displaced, Redish proposed, then state law stands.

It seems to me that federal courts unquestionably have the constitutional power to go beyond such a limited role. There are two plausible ways in which the judicial power to actively participate in preemption can be conceptualized. First, courts' role vis-à-vis preemption can be understood as an aspect of ordinary statutory interpretation. Although court rulings construing express statutory preemption provisions are readily assimilated to the statutory interpretation paradigm, court decisions finding preemption in the absence of express statutory preemption language may also fall within the realm of statutory interpretation insofar as courts regularly find "implied" provisions when undertaking purported statutory interpretation.<sup>99</sup> By and large, this is how courts speak of preemption today: as a form of ordinary statutory interpretation.

Second—and more appealing for reasons I make clear below—the judicial role in preemption matters can be understood as falling within the power of federal courts to create federal common law that helps implement

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<sup>96</sup> See Hills, Comments, *supra* note 8.

<sup>97</sup> For a discussion (and critique) of the current doctrine, see Larry Alexander & Saikrishna Prakash, *Delegation Really Running Riot*, 93 VA. L. REV. 1035, 1042–44 (2007).

<sup>98</sup> See Redish, Comments, *supra* note 24.

<sup>99</sup> Matthew G. Stephenson, *Public Regulation of Private Enforcement: The Case for Expanding the Role of Administrative Agencies*, 91 VA. L. REV. 93, 105–06 (2005) (discussing the modern "view that judicial 'implication' of private rights of action should be viewed as an exercise in statutory construction").

federal statutes. Virtually all commentators agree that this sort of federal common law survives *Erie v. Tompkins*, is constitutionally legitimate, and is institutionally appropriate.<sup>100</sup> The judicial power to make federal common law can be thought of as a delegation of lawmaking authority to courts given the inevitable gaps and interstices of federal statutory law.<sup>101</sup> Preemption doctrine is naturally assimilated to federal common law because, as argued above, Congress is institutionally incapable at this point of directly answering most preemption questions, and courts' ex post decisionmaking render them suited to the task. Judicial preemption doctrines, on this view, serve to fill in the gaps as to what state law must be displaced to effectuate federal law.<sup>102</sup> While the line between statutory interpretation and federal common law can be murky,<sup>103</sup> most scholars continue to treat them distinctly,<sup>104</sup> and for good reason. Federal common law describes a realm of judicial lawmaking that is different from mere statutory interpretation in the following crucial way: the moniker federal *common law* refers to judicial lawmaking that is less constrained, and more discretionary, than is suggested by "statutory interpretation," whose paradigmatic methodology is

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<sup>100</sup> See Curtis A. Bradley, Jack L. Goldsmith & David H. Moore, *SOSA, Customary International Law, and the Continuing Relevance of Erie*, 120 HARV. L. REV. 869, 879 (2007) (correctly noting that "[w]hile there is much scholarly debate about the proper contours of federal common law, there is widespread agreement that federal common law must be grounded in a federal law source" such as a federal statute).

<sup>101</sup> See, e.g., Thomas W. Merrill, *The Common Law Powers of Federal Courts*, 52 U. CHI. L. REV. 1, 40–46 (1985) (speaking of federal common law as being, inter alia, a form of "delegated law making" by courts).

<sup>102</sup> My account of the legitimacy of federal courts' involvement in deciding the parameters of preemption is consistent with the contemporary scholar who has advocated one of the narrowest approaches to preemption, Caleb Nelson. Nelson has propounded an exceedingly interesting originalist argument that the Supremacy Clause authorizes the simple rule that "[c]ourts are required to disregard state law if, but only if, it contradicts a rule validly established by federal law." Nelson, *supra* note 1, at 260. For example, Nelson suggests that a state law purporting to prohibit all union membership appropriately would be preempted by a valid federal law that gave workers the right to join a labor union. *Id.* at 261. Nelson does *not* argue that federal courts are consequently without constitutional power to displace any additional state law, recognizing that some federal statutes "may establish (or authorize courts to establish) a subconstitutional rule of obstacle preemption." *Id.* at 304. Though our approaches differ in important respects (I do not advocate the unilateralist doctrine of obstacle preemption but suggest that courts embrace a different, multilateralist approach), the important point for present purposes is Nelson's recognition that federal statutes can authorize courts to develop preemption doctrines even if the Constitution itself does not.

<sup>103</sup> See Peter Westen & Jeffrey S. Lehman, *Is There Life for Erie after the Death of Diversity?*, 78 MICH. L. REV. 311, 332 (1980).

<sup>104</sup> See, e.g., Bradford R. Clark, *Federal Common Law: A Structural Reinterpretation*, 144 U. PA. L. REV. 1245 (1996); Jay Tidmarsh & Brian J. Murray, *A Theory of Federal Common Law*, 100 NW. U. L. REV. 585 (2006). For one important exception, see Merrill, *supra* note 101, at 7 (advocating an approach to federal common law that absorbs much of what typically is spoken of as statutory interpretation).

text-based analysis.<sup>105</sup> On this view, it is more accurate to describe our complex body of antitrust law as a form of federal common law: the laconic federal antitrust statutes in effect gave a license to federal courts to develop antitrust law, and in doing so courts primarily appealed to considerations extrinsic to the statutory language itself, such as straightforward policy and economic analysis.<sup>106</sup>

In short, describing the judicial role on preemption questions as consisting of no more than ordinary statutory interpretation more readily gives rise to a unilateralist doctrine than does saying that the courts are charged with creating federal common law that effectuates a statute. At the end of the day, though, labels matter only so much; respected members of the legal community understand antitrust doctrine to have been created through the process of statutory interpretation notwithstanding textual exegesis's relatively small role,<sup>107</sup> and I would be satisfied if courts engaged in similarly wide-ranging analysis in working out preemption's details. The bottom line is this: Schapiro's and Merrill's articles in effect make a strong case that preemption doctrine's current unilateralism excludes too many normatively relevant criteria, leading to nontransparent, if not downright poor, decisionmaking by courts.<sup>108</sup> Courts' decisionmaking instead should be informed by a wide range of considerations, not just statutory language. And federal courts have the power to do this under the judicial power to make federal common law and interpret statutes.

#### D. Two Modest Institutional Reforms

For reasons explained above, I heartily agree with Merrill's and Schapiro's conclusions that courts are likely to continue playing a significant role in determining what state law is preempted (though I think it likely that Congress's role will increase after the courts refine the relevant criteria over time).<sup>109</sup> Merrill correctly notes that one of courts' institutional deficiencies in relation to Congress and administrative agencies is with respect

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<sup>105</sup> Cf. JED RUBENFELD, *FREEDOM AND TIME: A THEORY OF CONSTITUTIONAL SELF-GOVERNMENT* 180–82 (2001) (discussing the notion of “paradigm cases,” that is, the “central or most clearly established instances” of a rule or concept).

<sup>106</sup> For a similar suggestion, see Daniel A. Farber & Brett H. McDonnell, “*Is There a Text in This Class?*” *The Conflict Between Textualism and Antitrust*, 14 J. CONTEMP. LEGAL ISSUES 619 (2005); Tidmarsh & Murray, *supra* note 104, at 590 & n.26; Michael P. Van Alstine, *Federal Common Law in an Age of Treaties*, 89 CORNELL L. REV. 892, 934 (2004).

<sup>107</sup> See Amy Coney Barrett, *Statutory Stare Decisis in the Courts of Appeals*, 73 GEO. WASH. L. REV. 317, 320 (2005) (describing the Court's decisions that baseball is not covered by the antitrust laws as an example of statutory interpretation rather than federal common law); Lawrence M. Solan, *Statutory Inflation and Institutional Choice*, 44 WM. & MARY L. REV. 2209 (2003) (treating antitrust law as an example of statutory interpretation).

<sup>108</sup> See Merrill, *supra* note 2, at 741–44; Schapiro, *supra* note 7, at 824–29.

<sup>109</sup> See *supra* text accompanying notes 72–79.

to what he dubs the “representation” variable,<sup>110</sup> that is, “having the interests of all affected parties represented in the process that determines the vertical division of power between the federal government and the states.”<sup>111</sup> The problem is that courts may make preemption determinations based only on the argumentation of the litigating parties, thereby rendering important decisions about the scope of state regulatory authority without input from the states or other interested parties (such as consumers). Making matters worse, although “states and other affected parties can and do file amicus curiae briefs in major preemption cases. . . .[,] courts are not required to respond to these briefs or even to read them.”<sup>112</sup>

The omission of interested parties—particularly the states—from courts’ decisionmaking processes is deeply problematic under a multilateralist approach that recognizes that factors apart from federal interests appropriately inform preemption. Fortunately, relatively modest institutional innovations can go a long way toward remedying courts’ institutional deficiencies in these respects. One reason why states frequently do not file amicus briefs is that they frequently do not know that a preemption question is being litigated in court.<sup>113</sup> The first step in involving states is to make certain that they know that a preemption decision is in the offing. For example, a federal statute could mandate that notice be given to states when a preemption question is under consideration, akin to the Class Action Fairness Act’s requirement that states be notified of proposed settlement agreements in class action lawsuits.<sup>114</sup> Any such notice likely should extend beyond the state whose law is potentially being preempted in the lawsuit to include all states because a Michigan federal court decision holding that Michigan tort law is preempted by a federal statute virtually always is taken to hold that *state* tort law is preempted, not just Michigan’s tort law.<sup>115</sup> Furthermore, since preemption issues sometimes arise in state courts, it would be sensible for the federal statute to make clear that its notice requirements apply to preemption questions that arise in state courts as well. This would require some serious study that is beyond the scope of this short Article, however, because federal regulation of state procedures in this context may raise tricky constitutional questions.<sup>116</sup>

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<sup>110</sup> Merrill, *supra* note 2, at 758.

<sup>111</sup> *Id.* at 749.

<sup>112</sup> *Id.* at 758 (footnote omitted).

<sup>113</sup> Solicitor generals from several states have made this point to the author.

<sup>114</sup> See 28 U.S.C. § 1715(b) (2000).

<sup>115</sup> Although a district court’s ruling does not have precedential value beyond the judicial district, its persuasive effect probably justifies broader notice that would allow any interested state to participate.

<sup>116</sup> Congress would have constitutional authority pursuant to the Sweeping Clause to ensure that preemption decisions effectuating constitutional federal questions were appropriately made, and current Tenth Amendment jurisprudence would not appear to pose any bar to a federal statute that imposed the modest requirements discussed in the text. Nevertheless, federal regulations of state procedure potentially raise complex constitutional questions that merit sustained analysis that goes beyond the scope of

There may be entities apart from states—for example, industry and consumer groups—that also have an interest in preemption decisions. The considerations that counsel in favor of multilateralist preemption doctrine also counsel in favor of giving these nonstate actors notice when preemption decisions are being made. It would be more difficult to provide effective notice to these more diffuse entities than to states, all of which have attorneys general with publicly listed addresses. Nonetheless, one can derive helpful guidance from the class action context, where courts for years have been pressed to devise methods for giving notice to class members under Federal Rule of Civil Procedure 23(b)(3) class actions. I do not take a firm position here, however, on whether notice to nonstate entities ultimately would be worth the time and costs involved; I simply wish to put the issue on the table.

The problem identified by Merrill that federal courts need not respond to or even read states' amicus briefs can be alleviated by a statute that gives states or their agents (such as the National Conference of State Legislatures) an unconditional right to intervene for the sole purpose of litigating any preemption questions that have been raised in a case.<sup>117</sup> Although such an automatic right to intervene would increase litigation costs, any such additional costs would be justified by the very considerations that counsel in favor of multilateralist doctrine: if contemporary preemption doctrine shortchanges the interests of stakeholders apart from the federal government, it would be a mistake to shift to multilateralist analysis and yet to continue with a litigation process that does not allow participation of all the affected stakeholders or, at the very least, the most important stakeholders (that is, states).

It is arguable that there already is statutory authority mandating state notification in cases where state law may be preempted under 28 U.S.C. § 2403(b).<sup>118</sup> That provision requires notification to the attorney general in any action in federal court “wherein the constitutionality of any statute of that State affecting the public interest is drawn in question.”<sup>119</sup> However, this provision is not generally understood to require notification when preemption questions arise, and there are no reported decisions in which a pre-

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this Article. For an illuminating discussion of similar issues, see Anthony J. Bellia, Jr., *Federal Regulation of State Court Procedures*, 110 YALE L.J. 947 (2001) (analyzing federal regulations of state procedures in relation to state-created rights). Although it is well accepted that “Congress has limited authority to prescribe procedural rules that state courts must follow in enforcing federal rights of action,” *id.* at 959, preemption presents a different, more difficult question: does Congress have the power to regulate state judicial procedures for deciding the question whether a state law claim survives potential preemption by federal law? Some federal legislation has mandated certain procedures (such as prelitigation notice requirements) for purely state law claims brought in state court, *see id.* at 954 (discussing the Y2K Act), but “individual Senators and the Department of Justice questioned its constitutionality” and no courts have ruled on these provisions’ constitutionality. *Id.*

<sup>117</sup> See FED. R. CIV. P. 24(a).

<sup>118</sup> See 28 U.S.C. § 2403(b) (2006); *see also* FED. R. CIV. P. 24(c).

<sup>119</sup> 28 U.S.C. § 2403(b).

emption question has triggered § 2403(b)'s language of "constitutionality." This is not surprising; one can readily see how preemption doctrine as it is currently understood—as merely a matter of statutory interpretation—does not warrant notification under § 2403(b). Accordingly, ensuring that states have the right to intervene probably would require additional action on the part of Congress.

#### CONCLUSIONS

Presently, courts undertake preemption doctrine by means of a unilateralist approach that excludes too many normatively relevant considerations. Schapiro's and Merrill's Symposium contributions identify many of the factors that contemporary preemption doctrine should explicitly incorporate. The effort to revamp the doctrine is aided by consulting other contexts where the powers of multiple governmental entities overlap. These other contexts can help illuminate generic benefits and costs of concurrency, and may be relevant in yet other ways to preemption doctrine's reconstruction.

Although Congress is better suited institutionally to balancing the incommensurable competing considerations that a sound multilateralist doctrine recognizes, Congress is not well suited to making the large number of *ex ante* decisions that comprehensive preemption provisions must include. This may change over time, however, if courts adopt the multilateralist doctrine advocated here that requires them to candidly consider the multiplicity of relevant considerations that appropriately inform preemption decisions. Such judicial activity in all likelihood would refine our collective understanding of the various considerations, and common law patterns likely would emerge as well. All of this could then serve as crucial data points and input for Congress. In the interim period during which courts continue to play an important role in developing preemption doctrine, Congress should take steps to ensure that states have notice of lawsuits that raise preemption questions and have the opportunity to intervene. Finally, it is worth considering whether it would be wise to craft some novel institutional alternative that can render preemption decisions.

