2011

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

Annie Decker

Follow this and additional works at: https://digitalcommons.law.yale.edu/ylpr

Part of the Law Commons

Recommended Citation
Available at: https://digitalcommons.law.yale.edu/ylpr/vol30/iss2/3

This Article is brought to you for free and open access by Yale Law School Legal Scholarship Repository. It has been accepted for inclusion in Yale Law & Policy Review by an authorized editor of Yale Law School Legal Scholarship Repository. For more information, please contact julian.aiken@yale.edu.
Preemption Conflation:
Dividing the Local from the State in Congressional Decision Making

Annie Decker*

Introduction ........................................................................................................ 322

I. The State-Local Conflation and Signs of Differentiation ........ 328
   A. The Constitutional Source of the State-Local Merger .......... 328
   B. Judicial Merger and Recognition of Difference .............. 330
      1. The Conflation Axiom .............................................. 332
      2. The Default Rule that “State” Means “State and Local” in
         Savings Clauses ...................................................... 334
      3. Signs of Judicial Differentiation ................................. 337
   C. Current Congressional Practice .................................... 338
      2. What the Mapping Reveals ....................................... 341

II. Does Congress Have the Power To Differentiate Between State and Local Regulation? .... 344
   A. The Gregory Plain Statement Rule for Congressional Interference
      with State Authority .................................................. 345
   B. Other Support for Congressional Authority To Differentiate .... 347
   C. The Irrelevance of Congressional Power if States Can Evade It? .... 349

III. A Framework for Congressional Differentiation Between the Local and the State ......... 350

* Visiting Professor, Fordham University School of Law. I am grateful for the insightful critiques and suggestions provided by the participants in the Junior Faculty Workshop at Cardozo; students in my state and local government law classes at Cardozo and Stanford law schools; Vicki Been and colleagues at the New York University Furman Center for Real Estate and Urban Policy; and Nestor Davidson, Sylvia and Tom Decker, Kate Desormeau, Heather Gerken, Clayton Gillette, Margaret Lemos, Timothy Malloy, Rachel Moran, Hiroshi Motomura, Gabriel Ravel, Richard Schragger, Stewart Sterk, David Super, Jane Yakowitz, and Joseph Zimmerman. Jonathan Chao and Elana Jacob provided terrific research assistance. I also am grateful to Isia Jasiewicz and other Yale Law & Policy Review staff members for excellent editorial guidance.
**A. Situations in Which State Law Has Advantages over Local Law**

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

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

1. When Congress Wants To Allow Site-Specific Local Responses
2. When Congress Wants To Promote Innovation and Intergovernmental Learning
3. When Congress Wants To Enlist Local Partners in Federal Programs

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

1. When Congress Seeks To Implement an Optimal Federal Solution
2. When Congress Wants To Decrease Externalities and Burden-Exportation
3. The Value of Deliberation

**IV. Implementing Congressional Differentiation**

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

1. Accommodating Existing State Structures
2. Allowing for a Limited Number of Deviations
3. Specifying Time Limits on State-Local Divergences

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

1. “State” Means “Only State” in Preemption Clauses
2. “State” Means “State and Local” in Savings Clauses

**C. The Participation of Regulatory Agencies**

**Conclusion**

**Appendix A: Preemption Clauses**

**Appendix B: Savings Clauses**

**Introduction**

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

1. U.S. Const. art. VI, § 2 (“This Constitution, and the Laws of the United States which shall be made in Pursuance thereof, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.”).

2. Cal. Fed. Sav. & Loan Ass'n v. Guerra, 479 U.S. 272, 279 (1987) (internal quotation marks and citation omitted); see also, e.g., Richard A. Epstein & Michael S. Greve,
sions that expressly preempt certain forms of state or local regulation. The traditional answer to whether federal preemption treats state law and local (city or county) law the same has been an unequivocal yes.

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


5. See, e.g., Bd. of Supervisors v. Local Agency Formation Comm’n, 838 P.2d 1198, 1205 (Cal. 1992) (“In our federal system the states are sovereign but cities and counties are not; in California as elsewhere they are mere creatures of the state and exist only at the state’s sufferance.”); David J. Barron, A Localist Critique of the New Federalism, 51 Duke L.J. 377, 390 (2001) (“As a formal legal matter, the federal Constitution does not treat local governments as anything approximating coequal sovereigns.”).


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

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

The newness of this line of inquiry is surprising. State and local governments differ dramatically in ways relevant to preemption doctrine. Moreover, federal preemption statutes and federal preemption cases are pervasive. Federal statutes have been crisscrossed with preemption provisions, with no sign of abatement. By 2004, Congress had enacted 522 preemption statutes—statutes that declare certain forms of subfederal law prohibited. That number rose to 681 by 2011. And federal preemption is “almost certainly the most frequently used doctrine of constitutional law in practice.” Federal preemption challenges over the last decade have addressed issues ranging from health care, labor, employment, and banking to telecommunications, pharmaceuticals, medical devices, securities, transportation, foreign affairs, and occupational health and safety—and even to habeas corpus and meat inspection. High-profile cases include the


9. Joseph F. Zimmerman, Congressional Preemption: Regulatory Federalism 1 (2005) (providing data back to 1790); see also, e.g., id. at 5 ("[O]nly twenty-nine such statutes [were] enacted by 1900 . . ."); id. at 7 (describing the “federalism revolution” after 1965).

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


challenges to state\(^4\) and local\(^5\) efforts to regulate the presence of undocumented immigrants, with Arizona’s laws currently the most prominent. The Second Circuit recently held that federal law preempted New York City’s latest effort to encourage the development of hybrid taxis.\(^6\) And the Ninth Circuit recently struck down as preempted the Port of Los Angeles’ regulations converting drivers from independent contractors to employees.\(^7\)

Many scholars just ignore the local entirely when discussing federal preemption. Even when others acknowledge that federal law preempts local as well as state regulation, they generally do not pry the local apart from the state.\(^8\) Instead, they use the phrase “state and local” reflexively or talk about the local without applying a comparative lens.\(^9\) The three major recent volumes on federal preemption almost entirely gloss over the local.\(^10\) This conflation tracks the tendency in federalism theory—the umbrella under which preemption theory...
falls—to focus on federal-state regulations. Mark Gordon provides a major exception. He argues as part of a broader agenda that Congress should "consider more explicitly the role played by local governments as distinct from states in the federal relationship."

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


23. See Mark C. Gordon, Differing Paradigms, Similar Flaws: Constructing a New Approach to Federalism in Congress and the Court, 14 YALE L. & POL'Y REV. 187, 190 (1996). While Congress might "stress[] the importance of local decision-making" in some legislative debates, "specific proposals have overwhelmingly sought to transfer power to the states." Id. at 209. The background history of urban problems that have been viewed as appropriate for direct federal attention is a fascinating one, beginning with efforts in the 1960s and 1970s, when the federal government established direct connection with cities, and into the 1990s, when the states emerged triumphant.

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

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

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

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

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

A. The Constitutional Source of the State-Local Merger

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

25. See supra note 5.
26. U.S. Const. art. IV, § 3.
27. See, e.g., Avery v. Midland Cnty., 390 U.S. 474, 483 (1968) (“[W]hile special-purpose organizations abound and in many States the allocation of functions among units results in instances of overlap and vacuum, virtually every American lives within what he and his neighbors regard as a unit of local government . . . . In many cases citizens reside within and are subject to two such governments, a city and a county.”); Richard Briffault, “What About the ‘Ism’?”. Normative and Formal Concerns in Contemporary Federalism, 47 Vand. L. Rev. 1303, 1338 (1994); Aaron J. Saiger, Local Government Without Tiebout, 41 Urb. Law. 93, 97 (2009) (“Cities, counties and school districts overlap, and divide their responsibilities for services and powers to tax in complex, sometimes byzantine ways.”).
29. U.S. Const. art. IV, § 2, cl. 1.
30. U.S. Const. art. I, § 3; see also U.S. Const. amend. XVII (providing for direct election of two senators from each state to the Senate).
31. U.S. Const. art. V.
PREEMPTION CONFLATION

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

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


³³. U.S. CONST. amend. X; see also U.S. CONST. amend. IX (“The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.”).


³⁵. See, e.g., Sullivan, supra note 32, at 1940 (“Localities were viewed as ‘little republics,’ repositories of popular sovereignty through which citizens decided the most fundamental political questions.”); cf. Michael W. McConnell, Federalism: Evaluating the Founders’ Design, 54 U. CHI. L. REV. 1484, 1511 (1987) (reviewing RAOUl BERGER, FEDERALISM: THE FOUNDERS’ DESIGN (1987)) (finding that the “argument for substantial state and local autonomy was powerful at the time of the founding, and remains so”).


329
Constitutional text provides one reason why state-local differences have remained understudied, but we need not read the Constitution's failure to mention local governments as requiring local merger into the state. More specifically, such silence does not mean that courts or Congress must treat state and local governments as equivalents when enacting preemption provisions.

B. Judicial Merger and Recognition of Difference

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

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

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

This vision is “a quasi-constitutional, instrumental view of the nature of the state-local relationship.” However, the vision of local powerlessness is limited; “no city is as thoroughly under the thumb of the state as a matter of state lawmaking power of a political subdivision of a State is a subset of the lawmaking power of the State”).

39. 207 U.S. 161, 178 (1907) (rejecting efforts by City of Allegheny residents to resist consolidation with the City of Pittsburgh, which occurred pursuant to a state statute).

40. Id.

41. Though Hunter often is cited for the vision of local subordination to state power, it was not the first case to demonstrate this vision. See, e.g., City of Worcester v. Worcester Consol. St. Ry. Co., 196 U.S. 539, 549-51 (1905) (citing nineteenth-century cases).


43. See 1 JOHN F. DILLON, COMMENTARIES ON THE LAW OF MUNICIPAL CORPORATIONS § 237 (5th ed. 1911).


46. Davidson, supra note 34, at 1010.

47. Cf. Roderick M. Hills, Jr., Dissecting the State: The Use of Federal Law To Free State and Local Officials from State Legislatures’ Control, 97 MICH. L. REV. 1201, 1208 (1999) (arguing that confidence in Dillon’s Rule is “hardly obvious”—i.e., that local governments are not necessarily powerless in the absence of state authorization).
law” as this vision would suggest. The Court later counseled against broad adherence to Hunter’s “seemingly unconfined dicta;” “a correct reading” of Hunter and related cases “is not that the State has plenary power to manipulate in every conceivable way, for every conceivable purpose, the affairs of its municipal corporations.” Indeed, the Court declared that it “has never acknowledged that the States have power to do as they will with municipal corporations regardless of consequences.” Additionally, the home-rule movement that took shape at the end of the nineteenth century partly sought to counter Dillon’s Rule and similar constrictions on local authority. Home-rule provisions in state constitutions and statutes therefore removed many assumed limitations on local power, even occasionally offering immunity against state interference in certain arenas. Home-rule provisions therefore have been called “mini-Tenth Amendments designed to cordon off local matters from state intervention.”

1. The Conflation Axiom

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

48. David J. Barron, Why (and When) Cities Have a Stake in Enforcing the Constitution, 115 Yale L.J. 2218, 2243 (2006); see also Davidson, supra note 34, at 1022 ("[The] view of local powerlessness and the unitary state is simply one path taken, and by no means an entirely solid one."); Gerald E. Frug, The City as a Legal Concept, 93 Harv. L. Rev. 1059, 1061-62 (1980) (challenging the view of cities as pure receptacles for state delegation under state control and criticizing limitations on local power).

49. Gomillion v. Lightfoot, 364 U.S. 339, 344 (1960); id. at 346-47 (discussing Fifteenth Amendment constraints); see also, e.g., Barron, supra note 22, at 3 (“The state supremacist rhetoric in Hunter is excessive, and subsequent precedent suggests that the Court no longer subscribes to all of it.”).


53. Barron, supra note 5, at 392; cf. Baker & Rodriguez, supra note 42, at 1337 (“How constitutional home rule can be reconciled with the Hunter principle is an enduring puzzle in American local government law.”). I return to the significance of home rule below. See infra notes 250-256 and accompanying text.
is analyzed in the same way as that of statewide laws." In other words, the Court established a blanket rule that courts should not take state-local differences into account in federal preemption cases.

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

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


55. The Hillsborough County briefs had not recommended that the Court adopt the axiom or make such a rule explicit, and Justice Marshall's papers are silent on the issue. See E-mail from Patrick Kerwin, Manuscript Reference Librarian, Library of Congress, to Beth Gordon, Reference Librarian, Cardozo Law Sch. (Aug. 10, 2010, 12:56 PM EST) (on file with author). The Court had ruled on federal preemption challenges to local laws earlier, see, e.g., R.R. Transfer Serv., Inc. v. City of Chicago, 386 U.S. 351 (1967), but did not formulate the axiom as a rule. The first such formulation I found was in a 1982 dissent. See Cnty. Commc'ns Co. v. City of Boulder, 455 U.S. 40, 69 (1982) (Rehnquist, C.J., dissenting) ("This Court has made no . . . distinction between States and their subdivisions with regard to the pre-emptive effects of federal law.").


59. See, e.g., Engine Mfrs. Ass'n v. S. Coast Air Quality Mgt. Dist., 541 U.S. 246, 269 (2004) (Souter, J., dissenting) (drawing attention to the fact that the presumption against preemption applies equally to localities as to states).

60. Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947) (citations omitted); see also, e.g., Wyeth v. Levine, 555 U.S. 555, 565 (2009) (same); cf. Erwin Chemerinsky, Empowering States When It Matters: A Different Approach to Preemption, 69 Brook. L. Rev. 1313, 1324-28 (2004) (showing flaws in the Court's application of the presumption and the harms to valuable state laws); Young, supra note 21, at 262 (discussing the weaknesses of the presumption against preemption).
tributes to the general inattention to state-local differences in the federal preemption universe.

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

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

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


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


64. Mortier v. Town of Casey, 452 N.W.2d 555, 561 (Wis. 1990).
Wisconsin Supreme Court held that local governments such as Casey could not rely on the savings provision.\textsuperscript{65} The U.S. Supreme Court reversed in \textit{Wisconsin Public Intervenor v. Mortier}.\textsuperscript{66} The Court first set forth the conflation axiom;\textsuperscript{67} then it created a default rule, concluding that FIFRA’s savings clause preserved local regulation as well as state regulation:

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

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

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


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

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

\textsuperscript{69} 536 U.S. 424 (2002).

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

\textsuperscript{71} \textit{Ours Garage}, 536 U.S. at 429. But see \textit{id.} at 448 (Scalia, J., dissenting) (noting that the state’s power is not “sacrosanct”); \textit{id.} at 443 (arguing that “a reference to ‘State’ power or authority can be meant to include” local powers or just state power); see also, e.g., Am. Trucking Ass’ns v. City of Los Angeles, 596 F.3d 602, 606 (9th Cir. 2010) (finding that regulations by the Port of Los Angeles fell within
Again, the rule is only a default: In both Mortier and Ours Garage, the Court considered legislative history and employed various canons of construction to conclude that the term “state” in the relevant statutory provisions included the local or at least the power of the state to delegate to the local. Accordingly, while courts have applied the rule to savings clauses in other statutes to read “local” into the term “state,” others have refused to do so, noting that it is not a hard rule. 73

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

72. See Fireman’s Fund Ins. Co. v. City of Lodi, 302 F.3d 928, 941-43 (9th Cir. 2002) (interpreting savings clauses that only mentioned the “state,” 42 U.S.C. §§ 9614(a), 9652(d)).

73. See, e.g., United States v. City & Cnty. of Denver, 100 F.3d 1509, 1513 (10th Cir. 1996) (refusing to extend Mortier’s reasoning to the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), 42 U.S.C. § 9621(d)(2)(A)(ii): “If Congress had wished to include local zoning ordinances within the definition of ‘state law’ it would surely have so stated.”); cf. id. (citing the Resource Conservation and Recovery Act (RCRA)’s reference to “State or political subdivision” as an example of Congress including local zoning ordinances within the definition of “state law”).

74. See Envtl. Encapsulating Corp. v. City of New York, 855 F.2d 48, 54 (2d Cir. 1988).

75. Compare id. (merging the local into the state), with Ohio Mfrs. Ass’n v. City of Akron, 801 F.2d 824, 829 (6th Cir. 1986) (“[T]he trial court concluded that Congress did not simply overlook including political subdivisions or that it implicitly included them in the word ‘state.’ We concur in the trial court’s conclusion.”); cf. R. Mayer of Atlanta, Inc. v. City of Atlanta, 158 F.3d 538, 547 (11th Cir. 1998) (“Mortier . . . falls short of establishing a rule that the word ‘state’ must be interpreted to include political subdivisions in all circumstances.”); Prof’l Lawn Care Ass’n v. Village of Milford, 909 F.2d 929, 941 (6th Cir. 1990) (Nelson, J., concurring) (noting, in a Federal Insecticide, Fungicide and Rodenticide Act (FIFRA) opinion vacated post-Mortier, the “radically different usages” of the term “State,” even in the Constitution). However, the Supreme Court made the split less relevant when it subsequently held in Gade v. National Solid Wastes Management Ass’n that the Occupational Safety and Health Act (OSH Act) does not have an express preemption clause—in other words, what seemed to be a preemption clause was not actually one. 505 U.S. 88, 98-99 (1992).
3. Signs of Judicial Differentiation

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

First, courts treat state and local regulations differently when adjudicating certain otherwise identical constitutional challenges. Formal judicial doctrines bar local governments from benefitting from state immunity under the Eleventh Amendment\(^76\) when they face preemption challenges under federal antitrust laws\(^77\) as well as under § 1983 challenges. And, less formally, a study of federal preemption decisions found that a set of Democratic judges preempted local laws more often than they preempted state laws when considering preemption by federal environmental and health and safety statutes.\(^79\) Legal scholars also have found that courts do or should treat state and local laws differently in other constitutional contexts, such as freedom of religion and freedom of speech cases.\(^80\)

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


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

C. Current Congressional Practice

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

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

---

81. See Section II.A.

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

83. See Spence & Murray, supra note 79.

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

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

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


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

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

---

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

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

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

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

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

89. See app. A.
91. See app. A.
92. 42 U.S.C. § 9614(b) (emphasis added).
93. See app. A; see also, e.g., Gade, 505 U.S. at 104 n.2 (1992) (concluding that the arrangement under the OSH Act did not rise to the level of express preemption); Niagara Mohawk Power Corp. v. Hudson River-Black River Regulating Dist., 673 F.3d 84, 94 (2d Cir. 2012) (“The [Federal Power Act] does not contain an express preemption clause.”); Northern States Power Co. v. Minnesota, 447 F.2d 1143, 1147 (8th Cir. 1971) (“[N]o provision of the Atomic Energy Act expressly declares that the federal government shall have the sole and exclusive authority to regulate radiation emissions from nuclear power plants.”). But see Gade, 505 U.S. at 109-14 (Kennedy, J., concurring) (arguing that the provision does constitute express preemption).
94. See app. B.
96. See app. B; cf. Ophir v. City of Boston, 647 F. Supp. 2d 86, 92 n.15 (D. Mass. 2009) (discussing Clean Air Act (CAA) savings clauses that only mention the “state” (such as 42 U.S.C. § 7429(h)(2)) but seeming to apply them to local law without comment).
PREEMPTION CONFLATION

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

2. What the Mapping Reveals

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

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

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

\textsuperscript{97.} 29 U.S.C. § 667.

\textsuperscript{98.} See app. B.


\textsuperscript{100.} See 42 U.S.C. § 7543(a) ("No State shall require [approval] . . . as condition precedent to the initial retail sale, titling (if any), or registration of such motor vehicle, motor vehicle engine, or equipment."). But see id. § 7543(d) (mentioning both the state and the local in a savings provision, but covering more types of regulation than just registration).
likely because states, not localities, typically regulate car registration matters. And the Resource Conservation and Recovery Act (RCRA) preserves only the state’s authority to request a manifest for hazardous waste generated in or coming into that state, which again seems to be a state, not local, function.\textsuperscript{101} We also might assume that Congress means only “state” when it enacts savings clauses that preserve state tort and common law nuisance claims\textsuperscript{102} because there are no local equivalents. Finally, though less certainly, we can apply standard canons of construction to assume that Congress intends “state” to mean only “state” when, in a single provision, it first specifies outcomes for both state and local law and then specifies outcomes only for state law, as it did in one CAA provision\textsuperscript{103} and one RCRA provision.\textsuperscript{104} While such silence on local outcomes can be rational (if not advisable), it can fail to give notice to local governments about their expected roles. As Section I.B showed, litigation can result over whether the term “state” includes “local.”

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

\textsuperscript{101} See 42 U.S.C. § 6929.

\textsuperscript{102} Buzbee, Federal Floors, supra note 3, at 101-02 (noting that industry prefers ceilings); Verchick & Mendelson, supra note 2, at 30.

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

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

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

\textsuperscript{106} Id. § 5112(b)(1)(C) (stating that the Secretary’s standards for states and tribes must contain “a requirement that, in establishing a highway routing designation, limitation, or requirement, a State or Indian tribe consult with appropriate State, local, and tribal officials”). However, the provision requires this consultation only
local consultation reflects a vision of localities as specially qualified and knowledgeable. Similarly, a Federal Power Act provision preserves the “laws of the respective States” regarding water when that water is being used for “municipal purposes,” among other uses.\textsuperscript{107} And the Federal Railroad Safety Act (FRSA) savings clause permits states to go above a federal floor if, among other requirements, doing so is necessary “to eliminate or reduce an essentially local safety or security hazard.”\textsuperscript{108} Courts have interpreted FRSA’s “essentially local hazard” clause to mean that the problem addressed cannot be statewide.\textsuperscript{109} However, agencies and courts have concluded that two other local-twist clauses do not actually require that local (versus statewide) conditions determine the outcome.\textsuperscript{110}

---

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


The other provision appears in the OSH Act. See 29 U.S.C. § 667(c)(2) (specifying that a state occupational health and safety plan can be approved to replace a federal standard if, among other requirements, the standards “are required by compelling local conditions”); Shell Oil Co. v. U.S. Dep’t of Labor, 106 F. Supp. 2d 15, 20 (D.D.C. 2000) (interpreting this provision “to allow increased state regulation whenever the state regulators identify compelling conditions within their own borders”); Supplement to California State Plan; Approval, 62 Fed. Reg. 31,159 (June 6, 1997) (stating that state standards affecting interstate commerce “must be required by compelling local conditions”). However, there is not much case law interpreting this provision. Cf. Nat’l Solid Wastes Mgmt. Ass’n v. Killian, 918 F.2d
These local-twist clauses are important here first because they show Congress linking a favorable preemption judgment to the local. State-level law escapes federal preemption by riding on the back of the local, reversing the standard story of states empowering local governments. Second, these clauses show Congress taking into account state-local differences, finding such differences meaningful for purposes of preemption.

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

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

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

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

---

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


112. See Se. Oakland Cnty. Res. Recovery Auth. v. City of Madison Heights, 5 F.3d 166, 169 (6th Cir. 1993) (“If the state has preempted [the local ordinance], its validity cannot be saved by a grant of authority from Congress.” (quoting R.I. Cogeneration Assocs. v. City of E. Providence, 728 F. Supp. 828, 833 n.11 (D.R.I. 1990) (alteration in original))).
any attempt by the states to preclude localities from acting? I argue that Congress has the power to do both.

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

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

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

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

113. See also Hills, supra note 47, at 1211 ("At most, such federal laws simply require the state to remove certain restrictions on the power of subordinate officials so that those officials can voluntarily assume federal duties.").
114. 501 U.S. 452, 460 (1991) (alteration in original) (citation and internal quotation marks omitted).
115. Id. at 461.
116. U.S. Const. art. VI, cl. 2.
117. Gregory, 501 U.S. at 457 (citations and internal quotation marks omitted); cf. Bradford R. Clark, Process-Based Preemption, in Buzbee, Preemption Choice, supra note 3, at 208, 210 (finding the Gregory rule to be too strong). These powers might be particularly strong when Congress is acting pursuant to its Commerce Clause authority. See U.S. Const. art. I, § 8, cl. 3 (granting Congress the power "to regulate commerce with foreign nations and among the several states"); see also, e.g., Benjamin H. Barton, An Article I Theory of the Inherent Powers of the Federal Courts, 61 Cath. U. L. Rev. 1, 10 (2011) ("As long as congressional action passes the low 'necessary and proper' bar, Congress has plenary Article I authority to pass the laws it pleases."). They might be weaker when Congress is acting pursuant to its bankruptcy power. See, e.g., Ashton v. Cameron Cnty. Water Improvement Dist. No. 1, 298 U.S. 513 (1936) (holding that Congress cannot employ its bankruptcy power to force local governments into involuntary bankruptcy without their respective states' permission).
ment could not rely on federal preemption doctrine to preempt a state law that prohibited local authority over telecommunications. The Court first concluded that Congress could not have intended to permit local regulation against the will of the states in this case, offering "a few hypotheticals" from state and local government law to "bring the point home." But the Court then turned to "a complementary principle"—namely, the Gregory plain-statement rule. The Court concluded that Gregory "would bring us to the same conclusion even on the assumption that preemption could operate straightforwardly to provide local choice, as in some instances it might." Thus the Court acknowledges that, in some circumstances, federal preemption might operate to trump state law and to "provide local choice"—but Congress failed to clearly state its intent in the Federal Telecommunications Act to permit such an outcome.

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

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

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

120. Id. at 140.

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

122. Davidson, supra note 34, at 1018.

123. See also Garrick B. Pursley & Hannah J. Wiseman, Local Energy, 60 Emory L.J. 877, 953 (2011) (reading Missouri Municipal League in the same way). Others have argued that the FCC has this power in the context of local provision of broadband. See, e.g., Matthew Dunne, Note, Let My People Go (Online): The Power of the FCC To Preempt State Laws that Prohibit Municipal Broadband, 107 Colum. L. Rev.
state-local relations, including by differentiating between the state and local in the text of preemption provisions.

B. Other Support for Congressional Authority To Differentiate

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

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

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

---

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

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

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

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

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

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

128. See Davidson, supra note 34, at 961 (stating that such intergovernmental conflicts as federal-local alliances against the states are “best left to the political process”).
129. See, e.g., Lillian R. Bevier, Religion in Congress and the Courts: Issues of Institutional Competence, 22 HARV. J.L. & PUB. POL’Y 59, 63 (1998) (calling the judiciary “hobbled” by its many flaws, such as “its lack of accountability”).
130. See, e.g., Merrill, supra note 11, at 758.
131. See, e.g., JAMES T. O’REILLY, FEDERAL PREEMPTION OF STATE AND LOCAL LAW: LEGISLATION, REGULATION AND LITIGATION 209 (2007) (“The clarity with which Congress addresses residual state and local authority when the Congress addresses a societal problem or regulatory need is the responsibility of Congress, especially the staff members of the subcommittees . . . .”).
134. Dana, supra note 85, at 549.
135. See, e.g., Stroh Brewery Co. v. State, 954 S.W.2d 323, 325 (Mo. 1997) (defining “logrolling” as the process whereby “several matters that would not individually command a majority vote are rounded up into a single bill to ensure passage”).
"[s]ignificant pathologies of the democratic process," such as a lack of deliberation, interest group influence, and lack of focus on specific issues.\footnote{136}{Bernard W. Bell, Using Statutory Interpretation To Improve the Legislative Process: Can It Be Done in the Post-Chevron Era?, 13 J.L. & Pol. 105, 106 (1997).}

\textbf{C. The Irrelevance of Congressional Power if States Can Evade It?}

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

A state also could try to get around any undesired federal authorization of local action by employing "carrots" or "sticks" that convince local governments to do its bidding, not the federal government's. In terms of sticks, states could, for example, threaten to revoke local governments' home-rule status or to withhold funding. However, states would be unlikely to yank power away from local governments in this manner because states gain a great deal from expansive local powers. For example, local government management and financing of education,\footnote{137}{See, e.g., Kamina Aliya Pinder, Federal Demand and Local Choice: Safeguarding the Notion of Federalism in Education Law and Policy, 39 J.L. & Educ. 1, 11-14 (2010); Saiger, supra note 27, at 103-04 & nn.47-48 (acknowledging the importance of local control over financing while compiling literature critical of existing local school financing on grounds of "racism and injustice").} health care, and other services for the indigent relieve burdens on state agencies and state budgets; this role is particularly important in times of escalating state debt,\footnote{138}{See, e.g., Nicholas Johnson, Phil Oliff & Erica Williams, Ctr. on Budget and Policy Priorities, An Update on State Budget Cuts (2011), available at http://www.cbpp.org/3-13-08spb.pdf (examining how the recession has affected state budgets); Michael Cooper & Mary Williams Walsh, Mounting State Debts Stoke Fear of a Looming Crisis, N.Y. Times, Dec. 5, 2010, at A1; cf. Richard C. Schragger, Democracy and Debt, 121 Yale L.J. 860, 862 (2012) (noting that state and local fiscal crises are not a new phenomenon but instead part of normal business cycles); David A. Super, Rethinking Fiscal Federalism, 118 Harv. L. Rev. 2544 (2005) (providing suggestions, inter alia, for states to update their fiscal constitutional provisions to avoid endemic problems).} even as states cut down on local funding.\footnote{139}{See, e.g., Nat'l Governors Ass'n & Nat'l Ass'n of State Budget Officers, The Fiscal Survey of States 8 (2010) ("To eliminate fiscal 2011 budget gaps, 35 states are using specific, targeted cuts [to state budgets] .... Another method being used by 19 states is to reduce aid to localities ....").} Therefore, in order for states to be motivated to withdraw local power, the exercise of local authority would have to constitute a very significant threat to state interests.
Moreover, some states give local governments home-rule powers through their state constitutions as opposed to through statutes. Constitutional home-rule provisions provide greater protections to general-purpose local governments in that the state legislature cannot repeal or amend them. Therefore, if a local government's home-rule powers are derived from a state constitutional source, they can only be withdrawn if the people decide to amend the state constitution.

III. A Framework for Congressional Differentiation Between the Local and the State

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

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

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


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

143. See supra notes 84-85 and accompanying text.
ference between state and local law when it has imposed an optimal federal standard or is seeking to decrease subfederal externalities and burden-exportation.

Table 1

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

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

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

1. When Congress Seeks To Minimize Subfederal Variation

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

---

144. Congress seeks to preserve uniform federal laws in some cases to protect national economic interests. See, e.g., Boggs v. Boggs, 520 U.S. 833, 835-36 (1997) ("Given the pervasive significance of pension plans in the national economy, . . . the [Em-
lute—degree of federal uniformity. Both state and local regulation present some threats to federal uniformity. However, Congress might find state regulation to be the lesser threat.

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

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


147. See, e.g., Dana, supra note 85, at 548 (discussing the fact that states copy each other’s legislation, though they often fiddle with it); Motomura, supra note 15, at 2055 (describing the growth of state and local immigration initiatives and citing the National Conference of State Legislatures’ data for state laws); Kirk Johnson, State Goes Its Own Way To Regulate Forest Roads, N.Y. TIMES, Feb. 5, 2012, at A12 (describing Colorado’s exceptions to a federal forest “roadless” rule, and the fear that other states will follow, creating “[a] patchwork system of rules and special interests that can speak loudly in state capitals”).

148. As the phenomenon of local megafederalism would predict, see infra pp. 136-137 the same argument is made for why federal uniformity is better than state regulation. See, e.g., Jonathan Adler, When Is Two a Crowd? The Impact of Federal Action on State Environmental Regulation, 31 HARV. ENVT'L. L. REV. 67, 67 (2007); Ilya Shapiro, Tis Better To Be Regulated by One Gorilla than by Fifty Monkeys, CATO@LIBERTY (Dec. 15, 2008, 2:32 PM), http://www.cato-at-liberty.org/tis-better-to-be-regulated-by-one-gorilla-than-by-fifty-monkeys/.
PREEMPTION CONFLATION

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

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

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


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

151. McConnell, supra note 35, at 1498.


153. Indicating some sense of their mutual contributions, a Senate Report on the 1990 amendments to the CAA's preemption section regarding hazardous emissions ev- enhandedly discussed state and local remedial regulation. See S. Rep. No. 101-228 (1989), reprinted in 1990 U.S.C.C.A.N. 3385, 3581 ("This regulatory regime provides a significant role for State and local governments . . . "); see also id. at 3633 (discussing the intent to protect both state and local regulation in a CAA savings clause, 42 U.S.C. § 7416).
YALE LAW & POLICY REVIEW 30:321 2012

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

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

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

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


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

157. See generally Sheryll D. Cashin, Federalism, Welfare Reform, and the Minority Poor: Accounting for the Tyranny of State Majorities, 99 Colum. L. Rev. 552 (1999) (focusing on harms to welfare recipients); see also generally Clayton P. Gillette, Local Redistribution and Local Democracy: Interest Groups and the Courts (2011) (investigating, among other matters, the influence of local interest groups on redistributive programs and evaluating when, if ever, courts should intervene to counter what he calls a more “malign” version of redistribution).

158. Spence & Murray, supra note 79, at 1178; see also id. (suggesting that “judges may see local regulations as the expressions of impassioned [not-in-my-backyard] groups whose members are numerous enough to persuade local governments but not state governments” to enact laws “not represent[ing] broadly held, or even
cusing on the relevance of size to democratic preferences, David Dana has argued that Congress should consider enacting more provisions permitting variation by large states along the lines of the CAA exception for California's air quality standards. He does so despite the assumption, "from a pure federalism perspective," that size and number of jurisdictions should not matter.\textsuperscript{159}

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

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

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

Such a position is consonant with theories of cooperative federalism\textsuperscript{161}—not seeking to carve out exclusive domains of regulation but rather seeking to

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

\textsuperscript{160} See discussion \textit{supra} Part II.

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

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

---


163. See, e.g., Briffault, supra note 27, at 1328 (noting that “[t]he Court has been more attentive to the formal differences between states and local government than the scholarly advocates of federalism”).


165. See, e.g., Davidson, supra note 34, at 964-65 (describing dual federalism as permitting “no independent role for local governments”).

166. See, e.g., Richard A. Epstein & Michael S. Greve, Conclusion: Preemption Doctrine and Its Limits, in FEDERAL PREEMPTION, supra note 2, at 309, 311 (“[E]ither federal or state government, but not both, should handle any given matter.”); Schapiro, supra note 161, at 34 (describing “[t]he key postulates of dual federalism”).

167. The modifier “mega” signifies that certain federalism traits are amplified when local governments, as opposed to states, exercise their authority.
arguments in favor of state regulation over federal regulation—including the values of “participation, diversity, intergovernmental competition, political responsiveness, and innovation”—are only enhanced when comparing local regulation to federal (or state) regulation. In other words, pro-state arguments have even stronger force when applied to the local level. The remaining sections of this Article draw both expressly and impliedly on the theory of local megafederalism.

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

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

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

169. Briffault, supra note 27, at 1315.

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

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

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

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

173. Id. at 1494.
174. See, e.g., Verchick & Mendelson, supra note 22, at 17 (noting that "[a]lthough it has been a benefit claimed for federalism," the "goal of stimulating greater citizen engagement may logically lead to calls for concentrating power in localities"); Gerken, supra note 168, at 30 ("If you care about participation, look down."). See generally Frug, supra note 48 (providing a classic argument for the value of local political participation).
175. See, e.g., Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528, 575 n.18 (Powell, J., dissenting) ("The Framers recognized that the most effective democracy occurs at local levels of government, where people with firsthand knowledge of local problems have more ready access to public officials . . . ."); Richard T. Ford, Law's Territory (A History of Jurisdiction), 97 MICH. L. REV. 843, 844 (1999); Sullivan, supra note 32, at 1935 ("It is no historical accident that the 'town meeting' is the dominant political metaphor of our American republic."); cf. Richard Briffault, Our Localism: Part II—Localism and Legal Theory, 90 COLUM. L. REV. 346, 393-99 (1990).
177. See Gerken, supra note 168, at 45 ("[A] centralized decisionmaker might think it's quite a good idea to encourage . . . tailoring at the local level."); Ken Starr, Preface to Federal Preemption, supra note 2, at xiii (describing how Americans "intuitively recoil from the idea of 'one size fits all,' the proposition that our hopes for happiness and fulfillment somehow lie in beneficent national measures reaching into our smallest communities and neighborhoods").
The concept of "subsidiarity" provides additional ammunition for these arguments. An influential concept in Europe but also prevalent in the United States, 179 subsidiarity theory posits that power and responsibility should be devolved to the lowest level of government capable of exercising it well. 180 The higher level of government must justify its retention of authority over a given matter. 181 Therefore, to the extent that Congress concludes accurately that local governments are better suited than states to perform a certain task, a federal law assigning that task to the local government is superior to one that assigns that task to the states (or the federal government).

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

---


180. See Blank, supra note 32, at 540 ("[W]ho can disagree with the idea that every decision or governmental function should be given to the 'smallest' and 'closest-to-the-citizen' jurisdiction, under the condition that such jurisdiction can perform it efficiently?"); Alex Mills, Federalism in the European Union and the United States: Subsidiarity, Private Law, and the Conflict of Laws, 32 U. Pa. J. Int'l L. 369, 376 (2010) (noting that subsidiarity is "increasingly invoked... in support of arguments for devolution toward greater local government").


182. See Utah v. Hutchinson, 624 P.2d 1116, 1126 (Utah 1980) (noting that "[i]n granting cities and counties the power to enact ordinances to further the general welfare, the Legislature no doubt took such political realities into consideration"); Davidson, supra note 34, at 961; Richard H. Fallon, Jr., The "Conservative" Paths of the Rehnquist Court's Federalism Decisions, 69 U. Chi. L. Rev. 429, 441 (2002) ("[I]n functional analysis of the values that federalism serves, the significance of
Local governments bring tremendous resources to bear on matters of immediate, palpable concern to residents. Consider street maintenance, law enforcement, emergency medical services, traffic control, drinking water, sewage, and waste management. While the state might set priorities and provide some funding to the locality to deal with these issues, local governments manage them. The increasing scholarly focus on the role of local special-purpose districts, as opposed to local general-purpose governments, has trained our attention on the local bodies providing those and other services. Among other benefits, these tailored bodies match the scope of government to the scope of the problem.

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

---

183. See, e.g., City of Columbus v. Ours Garage & Wrecker Serv., Inc., 536 U.S. 424, 439 (2002) (highlighting the particular competencies of localities to regulate street and highway safety, an area in which “States have traditionally allowed localities to address local concerns”).

184. See, e.g., Gerken, supra note 168, at 30 (discussing the place of special-purpose institutions in federalism); Camille Pannu, Comment, Drinking Water and Exclusion: A Case Study from California’s Central Valley, 100 Calif. L. Rev. 223 (2012) (“The phrase ‘special-purpose district’ is a local government law term of art; it refers to any local government formed with a fairly narrow or specific purpose in mind.”); cf. Young, supra note 36, at 65 (suggesting that limiting federal preemption through doctrines that protect autonomy would “benefit all governmental entities further down the food chain”).

185. Briffault & Reynolds, supra note 7, at 13-15 (noting that special-purpose governments are the “most common form of local government in the United States today”).


187. See, e.g., Baker & Rodriguez, supra note 42, at 1354-55 (“The prevailing conception of local governments and their functions has shifted considerably over time.”).
to distinguish them often end in frustration. Nevertheless, legislatures and courts distinguish the two regularly, such as when courts hear state challenges to local regulations on state-law-preemption grounds. And state constitutions detail nonexclusive categories of what kinds of activities constitute so-called municipal affairs. Scholars also attempt to categorize the relative institutional competencies of state versus local governments.

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

---


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

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


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

194. See, e.g., City of Chesapeake v. Sutton Enters., Inc., 138 F.R.D. 468, 475 (E.D. Va. 1990); cf. Ogden Envtl. Servs. v. City of San Diego, 687 F. Supp. 1436, 1446 (S.D. Cal. 1988) ("[T]raditional land use and zoning decisions at the local level are necessarily intertwined with concerns about human health and the environment, over which the EPA has also been given regulatory authority in this instance.").
civil-relationship laws and to punish serious crimes, a power that localities lack. And trespass and other torts are matters of state law.

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

2. When Congress Wants To Promote Innovation and Intergovernmental Learning

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

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

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

---


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


200. See, e.g., Ann E. Carlson, Iterative Federalism and Climate Change, 103 NW. U. L. REV. 1097, 1106, 1153 (2009); Katherine A. Trisolini, All Hands on Deck: Local Governments and the Potential for Bidirectional Climate Change Regulation, 62 STAN. L. REV. 669, 677, 731-32 (2010); see also Allway Taxi, Inc. v. City of New York, 340 F. Supp. 1120, 1124 (S.D.N.Y. 1972) ("[B]oth the history and text of the [CAA] show that the . . . preemption section was [not made] to hamstring localities in their fight against air pollution . . . ."), aff'd, 468 F.2d 624 (2d Cir. 1972); cf. Metro. Taxi-
San Francisco’s employer health care pay-or-play law. The same is true for anti-immigrant state and local laws, as well as state and local laws seeking to integrate immigrants into communities. So-called “affirmative litigation units” emerging in city and county attorney offices have supported such initiatives.


5. See Kathleen Morris, San Francisco and the Rising Culture of Engagement in Local Public Law Offices, in Why the Local Matters, supra note 171, at 51.
operative federalism prizes, Congress therefore might be particularly careful to protect local laws.

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

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

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

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

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

---

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

207. As discussed in Subsection III.A.1, if uniformity is a more significant yet not overriding concern, Congress might preserve state law but not local law.
tions sometimes deliberately bypass the states. For example, a prolonged history of direct federal grants to localities (particularly to large urban governments) has displaced states in certain instances. Nestor Davidson developed the theory of "cooperative localism" to describe such "direct relations between the federal government and local governments."

Federal partnering with local governments need not lead to a conflict with the states. However, if the states resist, or if state law conflicts with the role envisioned for local governments, Congress can preempt the state law that interferes with the ability of the locality to further the federal scheme. For example, such a conflict between federal and state objectives is likely looming in the world of broadband. The American Recovery and Reinvestment Act of 2009 carved out $7.2 billion for the development of broadband infrastructure and services. Congress in part sought to enhance the role of local governments in broadband services—both as owners and providers of broadband services, and as regulators of broadband activity. Partly in response to lobbying by private providers seeking to squelch local competition, at least nineteen states had preempted the local provision of broadband as of December 2011.

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

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

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

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

212. See supra Part II.


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

215. See Sylvain, supra note 214, at 20 n.76 (discussing lobbying, as well as delay tactics such as litigation, employed to slow down local initiatives); Anthony E. Varona, Toward a Broadband Public Interest Standard, 61 Admin. L. Rev. 1, 98-100 (2009) (criticizing these protectionist efforts); see also, e.g., Dunne, supra note 123, at 1128 ("[W]here federal preemption may actually further the ultimate goals of federalism by allowing local governments to respond to issues of particular local
C. Situations in Which State-Local Differences Do Not Matter

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

1. When Congress Seeks To Implement an Optimal Federal Solution

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

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

See William W. Buzbee, Asymmetrical Regulation: Risk, Preemption, and the Floor/Ceiling Distinction, 82 N.Y.U. L. Rev. 1547, 1549-55 (2007) (identifying “unitary federal choice” preemption as a third category in addition to floor and ceiling preemption); see also Steel Inst. of N.Y. v. City of New York, No. 09-civ-6539(CM), 2011 WL 6778502, at *20 (S.D.N.Y. Dec. 21, 2011) (“There are . . . circumstances where it is evident that Congress (or an agency) intended its regulation to serve as both a ‘floor’ and a ‘ceiling,’ putting any contrary State regulation at all into conflict with the Federal purpose.” (citing Geier v. Am. Honda, 539 U.S. 861 (2000))); Robert R. Gasaway, The Problem of Federal Preemption: Reformulating the Black Letter Rules, 33 PEPP. L. Rev. 25, 35-36 (2005) (“Findings of federal preemption are often rooted in the need to protect federal resolutions of problems requiring the balancing of competing objectives—cases where Congress or a federal agency has arrived at what is assertedly an optimal level of regulation.”).

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

See Buzbee, Conclusion, supra note 142, at 302.
2. When Congress Wants To Decrease Externalities and Burden-Exportation

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

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

219. Epstein & Greve, supra note 2, at 312 (describing cost externalization); see also 136 Cong. Rec. 35,016 (1990) (statement of Rep. Rinaldo) (observing that, “[f]or those of us in New Jersey, it is equally important that this bill addresses the air pollution that comes into our State from other areas” so as not to “suffer because . . . [our] neighbors have looser standards”). Some commentators temper the force of this consideration by observing that spillover effects can be positive. See, e.g., Rodriguez, supra note 84, at 638.

220. Cf Dep’t of Revenue v. Davis, 553 U.S. 328, 338 (2008) (noting the tension between “the Framers’ distrust of economic Balkanization” and the notion of federalism, which “favor[s] a degree of local autonomy”).

221. Hazlett, supra note 142; see also Merrill, supra note 61, at 183 (citing examples); id. at 174-79 (deriving a balkanization default rule from three preemption clauses).


224. See, e.g., Briffault, supra note 175, at 453 (noting that “local boundaries mark racial and class inequalities as well as the divisions between jurisdictions”); Davidson, supra note 34, at 1014, 1024-26; Ford, supra note 175, at 926 (“Local autonomy may protect gay rights ordinances in Aspen and Denver, but it would also allow antigay laws in more conservative jurisdictions such as Cincinnati.”).
power advocates, supported by history: The federal government added the Fourteenth Amendment to the U.S. Constitution and enacted civil-rights laws to address state bigotry, for example.

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

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

3. The Value of Deliberation

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

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


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

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

230. Congress acknowledged as much when explaining why it chose not to include a preemption clause in the Atomic Energy Act: Congress not only believed that the regulation had a broad preemptive sweep such that a preemption clause was unnecessary, but also wanted to let courts determine “matters on the fringe of the preempted areas,” such as “certain types of zoning requirements.” United States v. City of New York, 463 F. Supp. 604, 611 (S.D.N.Y. 1978) (quoting congressional hearings).

231. Courts could institute a mandatory notification system letting state governments know about relevant litigation to address such concerns post-enactment. See Mark D. Rosen, Contextualizing Preemption, 102 Nw. U. L. Rev. 781, 807 (2008).

232. Young, supra note 36, at 4.

233. Clark, supra note 117, at 196 (citation omitted).

234. See, e.g., JOHN D. Nugent, Safeguarding Federalism: How States Protect Their Interests in National Policymaking 4 (2009); cf. Gerken, supra note 168, at 34-35 (highlighting the flaws of process federalism, including that it is grounded in sovereignty and therefore less protective of local governance).

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

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

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

---

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


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

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

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

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

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

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

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

1. Accommodating Existing State Structures

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

Congress, for example, might wish to vary its preemption provisions based on size and type of local government. Even putting aside state authority concerns, the term “local” covers up meaningful variations among local governments for which Congress might want to account.\(^{240}\) The United States has an estimated 90,000 local governments,\(^{244}\) some general-purpose and others special-purpose. Some local governments are large enough to resemble or even surpass states. Los Angeles County adopted a 2011 budget of $23 billion and has almost 10 million residents;\(^{245}\) New York City adopted a Fiscal Year 2012 budget...
of $66 billion and has more than 8 million residents.\textsuperscript{246} In contrast, Wyoming projected a Fiscal Year 2011-2012 (24-month) budget of approximately $3 billion and has about 500,000 residents.\textsuperscript{247} Indeed, Congress could account for variations in the size of state governments, as well for the various kinds of state regulatory authority within a single state.\textsuperscript{248}

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

To begin with, Congress could incorporate existing state schemes for home-rule jurisdictions. Almost all states—forty-eight according to a recent count\textsuperscript{250}—have granted some form of home rule to at least some of their local governments through constitutional and statutory provisions “that explicitly identif[y] towns and cities as legally independent entities.”\textsuperscript{251} Because states have developed a wide variety of models for devolving powers through home rule, Congress could assume that the local governments to which states have given home-rule powers are also the ones that states would be most willing to see exercising authority in partnership with a federal scheme\textsuperscript{252}—that is, states consider those local governments to be the most capable of exercising independent


\textsuperscript{251} Barron, supra note 44, at 2278.

\textsuperscript{252} Cf. Dunne, supra note 123, at 1148 (noting that in Missouri Municipal League, the “Court admits in a footnote that the hypothetical cases being discussed indeed are ‘general law’—i.e., Dillon’s Rule—states rather than home rule states” (quoting Nixon v. Mo. Mun. League, 541 U.S. 125, 135 n.3 (2004))).
action. For example, if a state has granted home rule to cities with populations over 10,000 residents, Congress could provide that those are the cities that would benefit from savings provisions. Or Congress could decide that non-home-rule cities would benefit most, depending on the type of activity that Congress wants to encourage. Congress also could consider differentiating between local governments that operate under the so-called “imperio” form of home rule (meaning that they have great autonomy over “local” or “municipal” matters within their own imperial realm) and those that operate under “legislative” home rule (which gives local governments the power to act independently so long as the state has not preempted such action). However, such a division could create great confusion; for example, some home-rule configurations exhibit a mix of imperio and legislative elements.

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

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

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

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

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

256. See MICH. CONST. art. VII, § 22.
2. Allowing for a Limited Number of Deviations

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

3. Specifying Time Limits on State-Local Divergences

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

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

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

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

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

1. "State" Means "Only State" in Preemption Clauses

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

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

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

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

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


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

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

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

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

This rule also accords with the presumption against preemption. Again, as the Court declared in Mortier and repeated in Ours Garage, “[M]ere silence . . .
cannot suffice to establish a clear and manifest purpose to pre-empt local authority." Therefore, silence in a savings clause on local regulation should weigh in favor of including the local in the state (nonpreemption), while silence regarding local regulation in a preemption clause should weigh in the opposite direction.

C. The Participation of Regulatory Agencies

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

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

---


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

270. See Merrill, supra note 11, at 755 (arguing that agencies are better fact-finders and better than Congress at evaluating the impact on uniformity and diversity); see also Brian Galle & Mark Seidenfeld, Administrative Law's Federalism: Preemption, Delegation, and Agencies at the Edge of Federal Power, 57 Duke L.J. 1933, 1949-61 (2008) (evaluating Congress, the courts, and agencies according to the transparency of their actions); cf. Paula A. Sinozich et al., Project: The Role of Preemption in Administrative Law, 45 Admin. L. Rev. 107, 113 n.18, 116 (1993).
and one kind of state in mind—say, Cheyenne and Wyoming, not Chicago and Illinois or Los Angeles and California. The result could be crude and potentially error-ridden legislation. Regulatory agencies, on the other hand, might be able to take such variations into account. They could do so in the rules they promulgate, when engaging in regulatory preemption, or when providing feedback to Congress.

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

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

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

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

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


276. Consol. Rail Corp. v. City of Bayonne, 724 F. Supp. 320, 326, 327-28 (D.N.J. 1989) (noting that the Federal Railroad Safety Act’s (FRSA) savings provision “only allows for ‘state’ regulation of and participation in railroad safety,” and that, while “[n]o provision is made for political subdivisions,” the HMTA “recognizes the possibility of local involvement” and provides procedures for obtaining agency rulings on preemption).
the Second Circuit concluded that “[t]he Secretary has not issued, and cannot practically issue, specific routing requirements for localities, whose own agencies are very likely far better equipped to do so,” despite Congress’s “goal of national uniformity when it enacted the HMTA.”

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

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

282. Cf. Sharpe, supra note 11, at 370-71 (discussing an agency delegation model that “consciously embraces and encourages dialogue among Congress, the Court, federal administrative agencies, states, and interest groups, while also minimizing the need for preemption policymaking by the judiciary”).
283. See Requirements for Authorization of State Hazardous Waste Programs, 40 C.F.R. § 271 (2011); EPA, INTRODUCTION TO STATE AUTHORIZATION TRAINING
al, a state program must be, inter alia, “equivalent to and at least as stringent as the Federal rules” and must “[c]ontain[] adequate enforcement authority.”

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

Conclusion

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

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

---


284. Id. at I-8.


287. See, e.g., Agreement for Implementation of the Philadelphia County Air Pollution Control Program, at 1, available at http://www.dep.state.pa.us/dep/deputate/airwaste/aq/permits/docs/philadelphia_plan_approval.pdf (describing the state-local agreement and noting accommodations for counties of the “first class”).
addressing preemption challenges at a correspondingly high rate. Understanding the place of the local within federal preemption is that much more significant. This Article provides the first roadmap for navigating this evolving legal terrain.
Appendix A: Preemption Clauses

<table>
<thead>
<tr>
<th>Statute</th>
<th>Provisions that Preempt Both State and Local Regulation</th>
<th>Provisions that Preempt Only State Regulation</th>
</tr>
</thead>
<tbody>
<tr>
<td>Atomic Energy Act of 1954</td>
<td>--</td>
<td>--</td>
</tr>
<tr>
<td>Clean Air Act</td>
<td>§ 7543(c)</td>
<td>§ 7543(c) (2006)</td>
</tr>
<tr>
<td>Clean Water Act</td>
<td>§ 7543(c)</td>
<td>§ 7543(c)(4)(2006)</td>
</tr>
<tr>
<td>§ 9614(b) (2006)</td>
<td>§ 9658(a)(1)</td>
<td></td>
</tr>
<tr>
<td>Federal Power Act</td>
<td>--</td>
<td></td>
</tr>
<tr>
<td>Occupational Safety and Health Act</td>
<td>§ 14501(c)(1)</td>
<td></td>
</tr>
</tbody>
</table>
# Appendix B: Savings Clauses

<table>
<thead>
<tr>
<th>Statute</th>
<th>Provisions Mentioning Both State and Local Regulation</th>
<th>Provisions Protecting Only State Regulation</th>
</tr>
</thead>
<tbody>
<tr>
<td>42 U.S.C. §§ 2011 to 2297g-4</td>
<td>§ 2021(k)</td>
<td></td>
</tr>
<tr>
<td>42 U.S.C. §§ 7401-7671q</td>
<td>§ 7416</td>
<td>§ 7429(h)(2)</td>
</tr>
<tr>
<td></td>
<td>§ 7429(h)(1)</td>
<td>§ 7507</td>
</tr>
<tr>
<td></td>
<td>§ 7543(d)</td>
<td>§ 7543(b)</td>
</tr>
<tr>
<td></td>
<td>§ 7604(e)</td>
<td>§ 7545(c)(4)(B)</td>
</tr>
<tr>
<td></td>
<td></td>
<td>§ 7545(c)(4)(C)(i)</td>
</tr>
<tr>
<td>33 U.S.C. §§ 1251-1376</td>
<td></td>
<td>§ 1370(2)</td>
</tr>
<tr>
<td>42 U.S.C. §§ 9601-9675</td>
<td></td>
<td>§ 9652(d)</td>
</tr>
<tr>
<td></td>
<td></td>
<td>§ 9659(h)</td>
</tr>
<tr>
<td>7 U.S.C. §§ 136-136y</td>
<td></td>
<td>§ 136v(c)(1)</td>
</tr>
<tr>
<td>49 U.S.C. §§ 20101-21311</td>
<td></td>
<td>§ 20106(b)</td>
</tr>
<tr>
<td>16 U.S.C. §§ 791-825r</td>
<td></td>
<td></td>
</tr>
<tr>
<td>49 U.S.C. §§ 5101-5128</td>
<td></td>
<td></td>
</tr>
<tr>
<td>scattered sections of 49 U.S.C.</td>
<td>§ 14501(c)(3)</td>
<td>§ 14501(b)(2)</td>
</tr>
<tr>
<td></td>
<td></td>
<td>§ 14501(c)(2)(A)</td>
</tr>
<tr>
<td>Occupational Safety and Health Act</td>
<td>--</td>
<td>§ 667(a) (2006)</td>
</tr>
<tr>
<td>29 U.S.C. §§ 651-678</td>
<td></td>
<td></td>
</tr>
<tr>
<td>42 U.S.C. §§ 6901-6987</td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td>§ 2617(b)</td>
<td></td>
</tr>
</tbody>
</table>