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Access to Courts and Preemption of State Remedies in Collective Action Perspective

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ACCESS TO COURTS AND PREEMPTION OF STATE REMEDIES IN COLLECTIVE ACTION PERSPECTIVE

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The extent to which federal law may preempt state common law tort remedies, thereby limiting litigants' access to court, is an increasingly important issue.[1] Businesses that produce and sell products increasingly assert preemption defenses against product liability and related lawsuits by injured consumers based on

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[1] The issue gained added urgency with the Supreme Court's decision in *Geier v. American Honda Motor Co.*, 529 U.S. 861 (2000), which held that a savings clause in the National Traffic and Motor Vehicle Safety Act of 1966 explicitly exempting common law tort remedies from the effect of the Act's express preemption provision did not prevent application of the implied preemption doctrine. Most recently, the Supreme Court addressed this issue in *Wyeth v. Levine*, 129 S. Ct. 1187 (2009). *See infra* notes 89–99 (discussing the implications of *Wyeth* for our analysis). Other recent examples of cases addressing these issues are legion. *See, e.g.*, Altria Group, Inc. v. Good, 129 S. Ct. 538 (2008) (holding that the Federal Cigarette Labeling and Advertising Act neither explicitly nor implicitly preempted claim of alleged violation of state unfair trade practices act in connection with marketing of light cigarettes); Riegel v. Medtronic, Inc., 552 U.S. 312 (2008) (holding that patient's common-law claims of negligence, strict liability, and implied warranty against manufacturer of catheter were preempted by FDA premarket approval process); Sprietsma v. Mercury Marine, 537 U.S. 51 (2002) (holding that plaintiff's claim based on failure to install propeller guards on boat engine was not preempted by the Federal Boat Safety Act or the Coast Guard's decision not to adopt regulation requiring propeller guards); Lindsey v. Caterpillar, Inc., 480 F.3d 202 (3d Cir. 2007) (holding that worker's products liability claim was not preempted by OSHA requirements for rollover protective structures for material-handling equipment); Witty v. Delta Air Lines, Inc., 366 F.3d 380 (5th Cir. 2004) (holding that federal aviation regulations preempted claim based on failure to warn of the risk of forming blood clots from remaining seated in a pressurized cabin for a long duration); Richardson v. R.J. Reynolds Tobacco Co., 578 F. Supp. 2d 1073 (E.D. Wis. 2008) (holding that Federal Cigarette Labeling and Advertising Act did not impliedly preempt state law).

regulations establishing health and/or safety standards that apply to their products.[2] At the same time, political and legal developments have made it more difficult to adopt strong health and safety regulations.[3] Thus, preemption of state tort remedies may lock in weak federal regulations, prevent states from protecting citizens, and leave consumers without adequate recourse against dangerous or unhealthy products. Nonetheless, there may be good reasons for federal law to be designed or construed so as to preempt state remedies.

"Remedial preemption" raises fundamental questions about the proper allocation of authority between the federal and state governments and about the role of courts in interpreting statutes and providing remedies for those who suffer injuries.[4] At bottom, remedial preemption cases present the same basic questions, even if the answers to those questions will inevitably vary depending on the specific federal statutes and state remedies at issue. Developing a workable framework for analyzing remedial preemption issues can therefore help to ensure an appropriate accommodation of the federal and state interests at stake and promote consistent application of preemption doctrine to state judicial remedies.

In a previous article, we developed a "collective action" framework for preemption analysis and applied it to the issue of state environmental regulations addressing the problem of global climate change.[5] In this contribution to the symposium, we apply that approach to the issue of remedial preemption. Our analysis suggests that while remedial preemption may be justified in some cases, courts should not lightly infer remedial preemption unless: (1) a primary purpose of the federal law is to ensure uniform standards to promote

[2] *See* Michael S. Greve & Jonathan Klick, *Preemption in the Rehnquist Court: A Preliminary Empirical Assessment*, 14 SUP. CT. ECON. REV. 43, 44–45 (2006) (discussing emergence of federal preemption as a prominent field of study and attributing heightened interest in the field to, among other things, "the increased resort of [business] defendants to federal preemption defenses"). Industry reliance on federal regulation as a defense to state remedies reflects a certain degree of irony insofar as these same defendants often opposed the adoption of statutes or promulgation of regulations on which they now rely. A prominent example of this phenomenon concerns tobacco warnings.

[3] *See* Robert L. Glicksman & Richard E. Levy, *A Collective Action Perspective on Ceiling Preemption by Federal Environmental Regulation: The Case of Global Climate Change*, 102 NW. U. L. REV. 579, 580–84 (2008) (discussing political and legal developments that have led to an era of "regulatory skepticism").

[4] We use the term, "remedial preemption," for purposes of convenience to refer to federal preemption of state judicial remedies for injured plaintiffs. Our primary concern here is with monetary remedies available in state tort law causes of action (particularly products liability actions), but remedies also may be available for causes of action based on state contract (such as breach of warranty) or property law.

[5] *See* Glicksman & Levy, *supra* note 3.

free movement of goods, prevent the export of regulatory burdens by "downstream" states, or solve a not-in-my-backyard (NIMBY) problem; and (2) there is strong evidence that state judicial remedies (as opposed to direct state regulation through legislation or the actions of administrative agencies) would interfere with the achievement of those goals. In addition, we conclude that preemption of one common law cause of action does not necessarily warrant preemption of different causes of action for remediation of the same injury. Finally, we argue that courts should be especially reluctant to read the preemptive effect of federal law so as to leave injured persons without any remedy whatsoever.

Our argument proceeds in three parts. Part I of the Article describes the basic collective action framework for analyzing remedial preemption issues. This discussion identifies important differences among various kinds of preemption, develops the essential premises of our framework, and considers the kinds of federal purposes that might justify preemption of more stringent state health and safety regulation. Part II of the Article applies this framework to the problem of remedial preemption, with particular attention to the ways in which state judicial remedies differ from state regulation by means of statutes or administrative rules, including the differences between legislatures and courts, between legislative rules and judicial decisions, and among possible preemptive effects on judicial remedies. Part III analyzes how the Supreme Court's 2009 decision[6] holding that state tort remedies based on failure-to-warn claims were not preempted by federal regulation of the content of warning labels for drugs comports with our analysis. A final section summarizes our conclusions and their implications.

I. COLLECTIVE ACTION AND PREEMPTION

In this part of the Article, we articulate the basic elements of our collective action framework for preemption and its application to remedial preemption issues. We begin by drawing some basic distinctions among certain kinds of preemption that prove useful in focusing the issues. We then identify the basic premises of our approach, including a strong presumption against preemption, the central role of federal statutory purposes in preemption analysis, and the relevance of collective action principles in understanding the significance of federal statutory purposes for preemption analysis. Finally, we consider the kinds of federal purposes that might support

[6] Wyeth v. Levine, 129 S. Ct. 1187 (2009).

preemption of state judicial remedies that effectively impose more stringent health and safety standards on defendants.

A. Types of Preemption

As an initial matter, it is important to clarify some basic distinctions that we will use throughout the discussion. The first distinction is between preemption as a result of a "direct conflict" between state and federal law, on the one hand, and preemption that occurs because federal law "displaces" state authority in a given area, on the other. The second is a distinction between what may be called "floor" preemption and "ceiling" preemption.

1. Direct Conflicts vs. Displacement of State Authority

Traditional preemption doctrine distinguishes between express and implied preemption, and between two kinds of implied preemption, federal occupation of the field and conflict preemption.[7] Under this traditional analysis, implied occupation of the field arises when federal regulation is so pervasive and federal interests are so dominant that state law is completely preempted in the entire field. Conflict preemption arises either when it is impossible to comply with both federal and state law, or when the state law stands as an obstacle to the accomplishment of the object and purpose of the federal law.

The distinction between direct conflict preemption and displacement preemption is similar to, but different from, the traditional distinction between "conflict" preemption and "occupation of the field" preemption. Direct conflict preemption applies not only when it is impossible to comply with both federal and state law, but also when the state law, on its face, creates a direct and clear conflict with federal law.[8] Thus, direct conflict preemption is broader than the "impossibility of compliance" strand of conflict preemption, but narrower than the "obstacle to the accomplishment of federal objectives" strand.[9] For example, if a state permit allowed the

[7] *See, e.g.*, Mary J. Davis, *The Battle Over Implied Preemption: Products Liability and the FDA*, 48 B.C. L. REV. 1089, 1114 (2007) (referring to "the now-standard categories of occupation of the field preemption and conflict preemption" (footnotes omitted)); Mary J. Davis, *On Preemption, Congressional Intent, and Conflict of Laws*, 66 U. PITT. L. REV. 181, 199–200 (2004); Susan Raeker-Jordan, *The Pre-Emption Presumption That Never Was: Pre-Emption Doctrine Swallows the Rule*, 40 ARIZ. L. REV. 1379, 1383–84 (1998).

[8] *See generally* Caleb Nelson, *Preemption*, 86 VA. L. REV. 225, 260–61 (2000) (advocating a "logical-contradiction test").

[9] In *Wyeth v. Levine*, 129 S. Ct. 1187 (2009), the majority rejected an impossibility of compliance argument, stressing that "[i]mpossibility pre-emption is a demanding defense." *Id.* at 1199.

dumping of toxic waste in violation of federal law, there would be a direct conflict and federal law would preempt the permit, which could not serve as a defense to an enforcement action based on the federal violation (absent an express savings provision).[10]

Displacement of state authority operates more broadly to prevent the state from exercising its authority in a particular regulatory area or manner, and includes not only traditional field preemption, but also the broad application of the strand of conflict preemption based on an obstacle to the accomplishment of federal purposes or objectives. Thus, for example, if federal law strikes a careful balance between regulatory burdens and health benefits, state laws imposing more stringent regulations might stand as an obstacle to the purpose of striking this balance, even if the requirements for federal occupation of the field are not met. In such a case, state regulatory authority is displaced broadly.

When there is a direct conflict between federal and state law, the superiority of federal law follows directly from the Supremacy Clause (whether or not it is possible to comply with both).[11] To illustrate the difference between direct conflicts and displacement, suppose that a federal agency adopts health and safety regulations governing the operation of power plants. Even if the federal regulations include standards for siting power plants, preemption of state and local zoning authority would require a strong showing of congressional intent to

[10] Although the conflict between state and federal law is clear and direct, this conflict would not fall within the impossibility of compliance strand of conflict preemption because the regulated party could comply with both federal and state law by electing not to exercise the permit. In his concurring opinion in *Wyeth*, Justice Thomas argued in favor of an approach similar to ours, noting that the Court "has not explained why a narrow 'physical impossibility' standard is the best proxy for determining when state and federal laws 'directly conflict' for purposes of the Supremacy Clause." *Id.* at 1209 (Thomas, J., concurring). He went on to observe that "if federal law gives an individual the right to engage in certain behavior that state law prohibits, the laws would give contradictory commands notwithstanding the fact that an individual could comply with both by electing to refrain from the covered behavior." *Id.* Justice Thomas rejected other forms of implied conflict preemption altogether as an improper judicial extension of statutes. *See id.* at 1205 ("I write separately, however, because I cannot join the majority's implicit endorsement of far-reaching implied pre-emption doctrines. In particular, I have become increasingly skeptical of this Court's 'purposes and objectives' pre-emption jurisprudence."). We are sympathetic to Justice Thomas's position, although we are not prepared at this point to advocate the complete rejection of displacement of state authority based on the "obstacle" strand of federal preemption. *See* Glicksman & Levy, *supra* note 3, at 591 n.56. At a minimum, there should be very strong evidence of congressional intent to oust state law to support implied displacement of state authority.

[11] Thus, for example, in *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 427 (1819), the Court held that taxation of a national bank was preempted by federal law even though it was possible for the national bank to comply with the state law by paying the tax. *See* Glicksman & Levy, *supra* note 3, at 588 n.44. *See generally* Stephen A. Gardbaum, *The Nature of Preemption*, 79 CORNELL L. REV. 767 (1994) (distinguishing between "supremacy" and "preemption" and arguing that preemption is not justified by the Supremacy Clause, but rather by the Necessary and Proper Clause).

displace that authority, given the traditional control that states and localities have had over land use decisions. But if the federal agency issued a permit approving the location of a particular proposed power plant, that permit would preempt application of even a pre-existing zoning law (such as one that permits only residential use at the location of the proposed plant) to block construction of the plant. The zoning law would be in direct conflict with the federal permit, even though it would be possible to comply with both sets of laws by not building the plant.[12]

By way of contrast, field preemption, or a broad conclusion that certain general categories of state regulation stand as an obstacle to the accomplishment of the object and purpose of federal law, effectively displaces state authority to act in a given area.[13] It is the displacement of state authority to provide judicial remedies that concerns us here. This sort of displacement, which rests on the conclusion that the retention of state regulatory authority is inconsistent with the purposes of federal law, represents a significant interference with the interests of states.

2. Floor and Ceiling Preemption

A second distinction that informs our approach is the distinction between "floor" and "ceiling" preemption, which we borrow from William Buzbee.[14] As the terms suggest, floor preemption occurs when federal law sets a minimum standard of regulation or protection, establishing a floor that state laws cannot lower, but leaving states the option of providing more stringent protections. In the context of state and federal remedies, floor preemption would prevent compliance with a less stringent state law from operating as a defense to a federal remedy for violation of federal law. Floor preemption would not impose any restrictions, however, on state remedies that offer greater

[12] To borrow the terminology of Thomas Merrill, this sort of preemption means that federal law "trumps" state law, but does not displace state authority to enact laws in the area. *See* Thomas W. Merrill, *Preemption and Institutional Choice*, 102 NW. U. L. REV. 727, 730–31 (2008) (explaining that displacement "occurs when state law in a particular area is nullified or wiped out, leaving federal law as the sole source of legal obligation," while trumping "occurs when the wiping out or displacement of federal law by state law is prohibited").

[13] *See, e.g.*, Geier v. Am. Honda Motor Co., 529 U.S. 861, 886 (2000) (holding action alleging defective design of automobile because of the absence of a driver's side airbag was preempted because it conflicted with the objectives of a safety standard issued by the Department of Transportation under the National Traffic and Motor Vehicle Safety Act of 1966, even though the suit was not covered by the statute's express preemption clause).

[14] *See* William W. Buzbee, *Asymmetrical Regulation: Risk, Preemption, and the Floor/Ceiling Distinction*, 82 N.Y.U. L. REV. 1547 (2007). Both the Supreme Court and the FDA used this terminology in *Wyeth v. Levine*, 129 S. Ct. 1187, 1193, 1199–1200 (2009). *See infra* note 93 and accompanying text (quoting examples).

protection than those provided by federal law. Floor preemption is the norm with federal health and safety standards, and would seem to follow inherently from the federal action imposing a minimum standard.[15]

Ceiling preemption, on the other hand, precludes states from adopting more stringent or protective regulations. Remedial preemption presents issues of ceiling, rather than floor preemption. The essential argument for remedial preemption is that state remedies are a form of regulation that effectively impose higher regulatory standards than those imposed by federal law. Note that remedial preemption thus raises two distinct questions: whether federal law should be interpreted as having ceiling preemptive effect on more stringent regulatory standards; and, if so, whether state judicial remedies should be understood as imposing such standards.

B. Basic Premises

Our framework for preemption analysis rests on three basic premises. First, we believe that there should be a strong presumption against remedial preemption. Second, we argue that, in the absence of explicit statutory language, the presumption against remedial preemption is overcome only when it is clear that state remedies would interfere with the primary purposes of the federal law. Finally, we believe that the relevant federal purposes in the context of preemption analysis are the purposes that, as understood in collective action terms, justify regulation at the federal, rather than state level.

1. The Presumption Against Preemption

The Supreme Court has often stated that there is a presumption against preemption, although it has also indicated that the presumption may not apply in some areas of dominant federal concern, and it has not consistently accorded the presumption the same weight.[16] Whatever the general scope and force of the

[15] Indeed, this sort of floor preemption would seem to follow even without displacement of state authority, because the assertion of compliance with a lower state standard as a defense would directly conflict with the operation of federal law and thus be trumped by it. Displacement of state authority to establish lower standards would not be necessary, however, to achieve minimum levels of protection, since the parallel enforcement of state remedies, even those imposing less protective standards, would not interfere with the federal minimum unless it prevented a later prosecution. *See* Glicksman & Levy, *supra* note 3, at 583 n.19. In effect, the party who violated both the federal standard and the state's less protective standard would be subject to a greater chance of prosecution and higher penalties as a result of violating both standards.

[16] The majority and dissent disagreed about the application of the presumption against preemption in *Wyeth v. Levine*, 129 S. Ct. 1187 (2009). *See infra* notes 90–92 and

presumption, it should have special weight as applied to remedial preemption of state judicial remedies because the federalism and institutional concerns that justify the presumption are particularly powerful in this context.

The primary justification for the presumption against preemption is respect for the sovereign authority of states. This respect is especially justified in the area of tort remedies, which have traditionally been a matter of state law. Indeed, many state constitutions, including the constitution of our home state, Kansas, specifically recognize the right of injured citizens to a "remedy by due course of law."[17] Given the importance attached by the states to providing such remedies, Congress should be especially cautious about displacing state authority to provide them, and courts should be especially cautious about inferring the intent to do so in the absence of explicit statutory language.

The presumption against preemption of state judicial remedies can be understood both as a principle of legislative draftsmanship and as a quasi-constitutional clear statement principle. As a principle of legislative draftsmanship, the presumption reasons that insofar as Congress may expressly provide for preemption of state remedies, the failure to do so raises an inference that remedial preemption was not intended.[18] As a quasi-constitutional clear statement principle, the presumption against preemption implements federalism principles by prompting courts to read ambiguous statutes to avoid unnecessary intrusions on state authority to provide common law remedies.[19]

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accompanying text.

[17] KAN. CONST., BILL OF RIGHTS, § 18 ("All persons, for injuries suffered in person, reputation or property, shall have remedy by due course of law, and justice administered without delay.").

[18] This rationale also applies to express preemption provisions applicable to state law "standards," "requirements," "prohibitions," or similar terms. Congress's failure to use language that addresses remedies is significant, since the primary function of state judicial remedies is to provide compensation for injured individuals, rather than to establish regulatory standards, requirements, or prohibitions—even if the award of compensation has incidental regulatory effects. *See* THOMAS O. MCGARITY, THE PREEMPTION WAR: WHEN FEDERAL BUREAUCRACIES TRUMP LOCAL JURIES 232 (2008) ("The primary function of the common law is to dispense corrective justice by forcing those who have unlawfully damaged others to compensate their victims."); *id.* at 252 ("[C]orrective justice is the primary function of the common law of torts . . . ."). Courts should not interpret such express preemption provisions to cover state judicial remedies absent a showing that those remedies interfere with the purposes of the federal legislation, and the burden of proving such interference (through empirical evidence, for example) should be on the party arguing in favor of preemption. For further discussion of the purposes and effects of state judicial remedies, see *infra* Part II.B.

[19] This approach recognizes the constitutional role of states as a counterweight to the assertion of federal power, while acknowledging the supremacy of federal law. It assumes that Congress respects that role and does not lightly infer congressional intent to displace state

Taken together, these principles also suggest a political process rationale for the presumption—by requiring Congress to address the preemptive effect of statutes explicitly, the presumption reinforces the political safeguards of federalism.[20]

A comparison to the problem of implied private rights of action is particularly instructive. In *Cort v. Ash*,[21] the Supreme Court curtailed the recognition of implied federal causes of action, stressing a negative inference from Congress's failure to provide an express cause of action. In the wake of *Cort*, it is difficult, if not impossible, to establish an implied right of action under federal statutes.[22] The

authority, particularly in areas of constitutional importance to states.

[20] *See* Bradford R. Clark, *Separation of Powers as a Safeguard of Federalism*, 79 TEX. L. REV. 1321, 1328–29 (2001) (discussing how federal lawmaking procedures safeguard federalism). Unlike federal agencies or federal courts, senators and representatives in Congress are politically accountable to geographic constituencies. Even if these political safeguards operate imperfectly, they are the constitutionally designed mechanism for protecting state interests in the legislative process. Note that this analysis suggests critical differences between preemption as a result of federal statutes and preemption as a result of administrative regulations, insofar as agencies are not subject to the political safeguards of federalism. The Supreme Court has held that an agency's authority to promulgate regulatory standards did not include the authority to decide the preemptive scope of the statute because the statute did not clearly delegate the latter authority. *See* Adams Fruit Co. v. Barrett, 494 U.S. 638, 649–50 (1990); *see also* Gonzales v. Oregon, 546 U.S. 243, 263 (2006) (rejecting an interpretive rule adopted by the attorney general because "[t]he statutory terms . . . do not call on the Attorney General, or any other executive official, to make an independent assessment of the meaning of federal law"). Likewise, in *Wyeth v. Levine*, 129 S. Ct. 1187 (2009), the Court declined to defer to the FDA's conclusions regarding the preemptive effect of federal drug labeling requirements. *See infra* note 96. This is an important and fascinating issue whose implications we will not explore in this Article. *See generally* Nina A. Mendelson, *A Presumption Against Agency Preemption*, 102 NW. U. L. REV. 695 (2008); Catherine M. Sharkey, *Products Liability Preemption: An Institutional Approach*, 76 GEO. WASH. L. REV. 449 (2008); Catherine M. Sharkey, *Preemption by Preamble: Federal Agencies and the Federalization of Tort Law*, 56 DEPAUL L. REV. 227 (2007); Karen Jordan, *Opening the Door to Hard-Look Review of Agency Preemption*, 31 W. NEW ENG. L. REV. 353 (2009).

[21] 422 U.S. 66 (1975).

[22] *See, e.g.*, Thomas W. Merrill, *Capture Theory and the Courts: 1967–1983*, 72 CHI.-KENT L. REV. 1039, 1083 (1997) ("The creation of wholly new implied rights of action has largely passed from the scene."); Andrew M. Siegel, *The Court Against the Courts: Hostility to Litigation as an Organizing Theme in the Rehnquist Court's Jurisprudence*, 84 TEX. L. REV. 1097, 1127 n.113 (2006) ("The *Cort* and *Cannon* decisions are, in retrospect, largely doctrinal rest stops on the path from a rule conceptualizing the adoption of appropriate remedies as a proper equitable function for the courts to one in which the courts are powerless to extrapolate remedies beyond those that Congress expressly established or clearly intended but simply forgot to memorialize."); Matthew C. Stephenson, *Public Regulation of Private Enforcement: The Case for Expanding the Role of Administrative Agencies*, 91 VA. L. REV. 93, 102–05 (2005) (describing how "[t]he standards used by courts to determine whether to imply a private right of action have changed substantially in the last thirty years"); *see also* H. Miles Foy, III, *Some Reflections on Legislation, Adjudication, and Implied Private Actions in the State and Federal Courts*, 71 CORNELL L. REV. 501, 521–22 (1986) (asserting that various arguments for how to infer congressional intent in the face of textual silence "are not about actual legislative intentions; they are designed for cases in which there is no hard evidence of legislative intentions. These legal arguments masquerade as arguments about legislative facts.

Court has not always applied the presumption against implied preemption with equal vigor, however. As a result, the failure to include an express preemption clause in the statute does not necessarily preclude a finding of implied preemption. The juxtaposition of these two tendencies has particular significance if a federal regulatory statute is silent with respect to both remedial preemption and a federal cause of action. Because the Court appears to be more willing to infer remedial preemption than to infer an implied right of action, the result could well be the preemption of state remedies without the provision of any substitute federal remedy—even though Congress was silent on both issues.[23]

2. The Purposes of Federal Law

In general terms, the extent to which state authority is displaced by federal law depends on the purposes of the federal law. This is true whether courts are interpreting the scope of an ambiguous express preemption provision, determining the existence or scope of federal occupation of the field, or assessing the displacement of state authority to prevent the exercise of that authority from impeding the accomplishment of the object and purpose of federal law.[24] Given the concerns articulated above, the presumption against remedial preemption should not be lightly overcome and requires careful attention to the extent to which state remedial authority would interfere with the attainment of the purposes of federal law.

Of particular relevance here is the extent to which most federal laws have multiple purposes of varying degrees of centrality. We believe it is important to distinguish between the primary or principal purposes of a statute—those justifications that were central to a statute's adoption—and secondary purposes that might have been articulated during the legislative process. In the absence of an express remedial preemption provision, courts should be especially reluctant

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At bottom, they are legal arguments about the adjudicatory consequences that *should* be assigned to legislative silence by operation of law.").

[23] *Cf.* Mertens v. Hewitt Assocs., 508 U.S. 248 (1993) (denying the availability of a right of action under ERISA against non-fiduciaries, even though express preemption provision barred state remedies, thus leaving the intended statutory beneficiaries of ERISA without any remedy). Justice Thomas's position in *Wyeth v. Levine*, 129 S. Ct. 1187 (2009), however, appears to treat implied preemption, in the sense of displacement of state authority, similarly to implied rights of action. *See supra* note 10.

[24] *See generally* Glicksman & Levy, *supra* note 3, at 585–89 (discussing the relevance of purposes to various types of preemption). In contrast, when there is a direct conflict it is unnecessary to determine federal statutory purposes because the conflict itself requires preemption under the Supremacy Clause.

to infer remedial preemption based solely on secondary statutory purposes. For example, when the principal purposes of federal law relate to ensuring minimum health and safety standards (establishing a floor), a court should be reluctant to infer displacement of state remedial authority based on a secondary purpose of promoting uniformity or balancing economic and health or safety considerations.

Of course, the characterization of such purposes as primary or secondary may be disputed and unclear, especially because statutory provisions that reflect the "secondary" purposes may have been essential to the adoption of the statute. We draw this distinction not because there is any magic to the characterization of primary and secondary purposes, but rather to underscore the basic point that the sovereign interests of the states are entitled to respect, and one way in which that respect is manifested is in the consistent application of a strong presumption against preemption. Accordingly, the courts should require the party arguing that the federal statute in question has preemptive effect to provide a strong showing that the availability of state judicial remedies would frustrate statutory purposes (whether they are labeled "primary" or "secondary") to such an extent that Congress would not have wanted to allow those remedies to remain available.

Assuming a strong presumption against remedial preemption that is only overcome by strong evidence that state remedies would interfere with the primary objectives or purposes of federal law, the question becomes what kinds of primary objectives and purposes state remedies would likely obstruct. That is where the collective action perspective comes in.

3. Collective Action and Federal Regulation

The collective action perspective on federal preemption begins with the recognition that federalism is a structural response to collective action problems among states. Collective action problems arise when individual states have incentives to act in a manner that is contrary to the interests of states as a collective, and transaction and enforcement costs would prevent an effective agreement among the states to act collectively. Typical examples include negative externalities, resource pooling, the race to the bottom, uniformity and rationalization of standards, and the "NIMBY" phenomenon. In the broadest sense, the benefits of collective action in these situations produce a public or collective good for all the states.[25]

[25] In essence, when collective action produces collective benefits, those benefits are a species of public good; thus, individual states have incentives to act as free riders and a

The exercise of federal authority is most justified in response to collective action problems that provide incentives for states to act in a manner that is inconsistent with the interest of the nation as a whole. Most federal regulatory legislation responds to one or more collective action problems, as reflected in the statutory purposes. In other words, federal action is necessary or justified when state regulation is unlikely to produce the optimal result, viewed from the perspective of the United States as a whole, because the incentives of individual states and the interests of the states as a collective run in different directions.

Our approach to preemption issues takes this principle one step further, arguing that displacement of state authority is most justified when individual states' regulations are the product of the very incentives to act in a manner contrary to the collective interest that justified federal action. Of particular significance for remedial preemption as a species of ceiling preemption is that displacement of state authority is justified primarily when collective action principles would suggest that state courts have incentives to "overregulate" in ways that interfere with the interests of the nation as a whole.

C. Federal Purposes, State Incentives, and Ceiling Preemption

Not all of the collective action problems identified above create incentives to overregulate. In this section, we consider which of these problems are likely to lead to overregulation by states in a manner that might justify ceiling preemption. The focus here is on ceiling preemption generally, and not the more specific question of remedial preemption. We address the distinctive issues raised by remedial preemption in Part II of the Article.

1. Resource Pooling and the Race to the Bottom

We will address resource pooling and the race-to-the-bottom rationales for federal regulation first, because these two rationales do not generally support ceiling preemption. To the extent that these purposes do not support ceiling preemption, it follows without further inquiry that they would not generally support remedial preemption.

Resource pooling rests on the idea that collective action by states creates economies of scale or other synergies. Common examples might include collective bargaining, national defense, or scientific

"prisoners' dilemma" results. For discussion of that dilemma, see Glicksman & Levy, *supra* note 3, at 597–98.

research. Federal action is justified because the states individually lack the resources or incentives to act effectively in these areas. To the extent that federal health and safety regulation rests on resource pooling rationales, the concern that necessitates federal action is that states will underregulate. Ceiling preemption would not be justified because regulation that goes beyond federal action does not derive from or create the problem that resource pooling is designed to address—insufficient state regulation.[26]

Similarly, federal regulation in response to a so-called race to the bottom also would not generally support ceiling preemption. The concern reflected in a race-to-the-bottom scenario is that states would underregulate because of competition with other states for business.[27] There is considerable academic debate over whether a race to the bottom should be viewed as a problem, rather than a form of beneficial interjurisdictional competition, and the extent to which it actually occurs and presents an obstacle to proper state regulation.[28] Regardless of the merits of this debate, to the extent that the race to the bottom presents incentives for states to underregulate, federal

[26] One possible exception to this point might be in the area of international negotiations, in which unilateral state action might undermine the bargaining position of the United States. *See* Crosby v. Nat'l Foreign Trade Council, 530 U.S. 363 (2000) (holding that Massachusetts law designed to pressure Burma/Myanmar to improve human rights practices was preempted by federal law delegating authority in this area to the President). The auto industry raised this argument, for example, as an objection to state regulations designed to reduce greenhouse gas emissions that contribute to climate change, on the theory that it would weaken the ability of the United States to negotiate concessions on greenhouse gas emission reductions from other countries. *See, e.g.*, Cent. Valley Chrysler-Jeep, Inc. v. Goldstene, 529 F. Supp. 2d 1151 (E.D. Cal. 2007) (rejecting argument and granting summary judgment to the state); Green Mountain Chrysler Plymouth Dodge Jeep v. Crombie, 508 F. Supp. 2d 295, 392 (D. Vt. 2007) (rejecting argument). *See generally* Glicksman & Levy, *supra* note 3, at 618–24 (discussing issue). This potential argument in favor of ceiling preemption is generally not at issue in the context of remedial preemption and will not be discussed further in this Article.

[27] *See, e.g.*, Helvering v. Davis, 301 U.S. 619, 644 (1937) (reasoning that federal old age insurance was justified because "states and local governments are at times reluctant to increase so heavily the burden of taxation to be borne by their residents for fear of placing themselves in a position of economic disadvantage as compared with neighbors or competitors"); Steward Mach. Co. v. Davis, 301 U.S. 548, 588 (1937) (reasoning that federal unemployment compensation was necessary because "[m]any [states] held back through alarm lest, in laying such a toll upon their industries, they would place themselves in a position of economic disadvantage as compared with neighbors or competitors").

[28] *See, e.g.*, Kirsten H. Engel, *State Environmental Standard-Setting: Is There a "Race" and Is It "To the Bottom"?*, 48 HASTINGS L.J. 271 (1997); Daniel C. Esty, *Revitalizing Environmental Federalism*, 95 MICH. L. REV. 570 (1996); Richard L. Revesz, *Federalism and Environmental Regulation: A Public Choice Analysis*, 115 HARV. L. REV. 553 (2001); Richard L. Revesz, *Federalism and Interstate Environmental Externalities*, 144 U. PA. L. REV. 2341 (1996); Richard L. Revesz, *Rehabilitating Interstate Competition: Rethinking the "Race-to-the-Bottom" Rationale for Federal Environmental Regulation*, 67 N.Y.U. L. REV. 1210 (1992); Scott R. Saleska & Kirsten H. Engel, *"Facts are Stubborn Things": An Empirical Reality Check in the Theoretical Debate over the Race-to-the-Bottom in State Environmental Standard-Setting*, 8 CORNELL J.L. & PUB. POL'Y 55 (1998).

regulation to combat a race to the bottom would not support ceiling preemption to invalidate state regulation that is more protective than federal regulation.[29]

2. Uniformity and Rationalization of Standards

A common justification for federal regulation is the need for uniformity, particularly as a means of removing obstructions to interstate commerce. In economic terms we might conceive of this federal purpose as the rationalization of regulatory standards so as to reduce transaction costs associated with a national market. The benefits of reducing transaction costs and establishing a national market may be understood as public goods that individual states may tend to undervalue because many of the benefits are experienced outside the state. Especially when powerful interests within a state benefit from a standard that deviates from that of other states or when the transition to new standards imposes significant costs, state policy makers may lack incentives to achieve uniformity.[30] Even in the absence of such difficulties, the achievement by states of uniform standards requires that they overcome the transaction costs of reaching agreement on those standards.[31]

Because state regulation that exceeds national standards is incompatible with uniformity and states' incentives may run counter to the national interest in achieving it, a federal purpose of achieving uniformity would tend to support ceiling preemption. Nonetheless, it is important to emphasize that not all legislative expressions of a desire for uniformity reflect a significant purpose of rationalizing standards so as to minimize transaction costs. For example, proponents of federal legislation to combat a race-to-the-bottom problem might extol the value of a uniform federal standard, but the focus in such a case may well be the establishment of a uniform floor

[29] One might conceive of the converse problem (a "race to the top"), in which states compete to attract desirable residents and businesses through overregulation. This problem is better conceived of as a manifestation of the NIMBY problem, discussed below. *See infra* notes 37–38 and accompanying text.

[30] In *Bibb v. Navajo Freight Lines, Inc.*, 359 U.S. 520 (1959), for example, the Court invalidated a state law requiring use of contoured mud flaps on trucks as an obstruction of interstate commerce because other states required straight mud flaps. It was reported to one of the authors by a student that the manufacturer of contoured mud flaps was located in the state. Although we were unable to verify this claim, the scenario is plausible and serves to illustrate the point that state policy makers may have incentives to benefit local interests at the expense of the national interest in reducing the transaction costs of interstate commerce.

[31] In many instances, however, all states may benefit, and there are examples of states voluntarily achieving rationalization of legal standards, most prominently in the case of the Uniform Commercial Code.

to provide a minimum level of protection.[32] In such a case, uniformity would not support ceiling preemption because the focus is not on reducing transaction costs by rationalizing standards.[33]

In addition, the strength of these concerns may differ sharply based on the differences between regulation of goods and services that are mobile and regulation of fixed sources.[34] Consumer products, for example, move frequently across state lines, especially if those products are used for purposes of transportation. This movement makes rationalization of standards relatively more important with respect to such goods and services than with respect to goods or services that are stationary and fixed, such as a large power plant. This is not to say that the need for uniformity would never justify ceiling preemption for stationary or fixed goods and services, but rather that the case for ceiling preemption is not as intrinsically powerful.

More broadly, uniformity is to some extent inherent in federal regulation, and achieving uniformity is likely to appear at least as a secondary consideration or justification for virtually any federal regulatory law. To avoid the intrusion on state autonomy that would result from preemption of a broad swath of state regulation, the purpose of promoting uniformity to rationalize standards and thereby reduce transaction costs for regulated entities should be a clear, primary purpose of the federal law before it justifies preemption of state law.

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[32] *See, e.g.*, 30 U.S.C. § 1202(a) (2006) (enunciating goal in the Surface Mining Control and Reclamation Act to "establish a nationwide program to protect society and the environment from the adverse effects of surface coal mining operations"); Pa. Fed'n of Sportsmen's Clubs, Inc. v. Hess, 297 F.3d 310, 327 (3d Cir. 2002) (describing the goal of that statute as being "to establish a 'nationwide' program of minimum standards for protecting health, safety, and the environment"); Envtl. Encapsulating Corp. v. City of New York, 855 F.2d 48, 59 (2d Cir. 1988) (rejecting argument that the Occupational Safety and Health Act, 29 U.S.C. §§ 651–678, preempted local regulations requiring training and certification of asbestos removal worker because "[t]he statute's purpose was to assure minimum—but not necessarily uniform—occupational health and safety standards"). As Tom McGarity has explained, regulatory standards are usually designed to provide minimum, across-the-board standards applicable to all regulated entities, rather than representing the expert agency's judgment that its standard represents the optimal protective action that should apply in all situations. MCGARITY, *supra* note 18, at 260–61.

[33] *Cf.* MCGARITY, *supra* note 18, at 266 (arguing that federal health and safety standards based on what is feasible or what is necessary to provide a certain minimum level of protection do not conflict with remedies for state common law causes of action that require defendants "to rise above the minimum when a reasonable person in the defendant's position would do so").

[34] *See* Glicksman & Levy, *supra* note 3, at 627–36 (discussing distinction between pollution from mobile and stationary pollution sources in terms of the need for uniformity).

3. Externalities

One important justification for regulation at the federal level is that activity within one state produces externalities that affect other states. This sort of externality may be negative, in the sense that the state exports burdens to other states (through unregulated activity or through regulation itself), or positive, in the sense that the state exports benefits (in the form of reduced negative externalities as a result of the state's self-regulation or in the form of economic benefits resulting from the failure to regulate activities that produce harms within the state). The externalization of burdens or benefits means that an individual state's incentives will not align with the interest of the states as a whole.

If there is a negative externality and the burdens of an activity are exported, then we might expect the state of origin to tolerate or promote too much of that activity (viewed from the vantage point of the collective). If the concern is private activity that causes harm in other states, such as pollution or the production of dangerous products, then the state in which the activity occurs has an incentive to underregulate. When dealing with products sold nationwide, for example, states in which the products are produced may have incentives to underregulate because the undesirable health and safety impacts of those products are borne primarily by those in other states, while the economic benefits of the activity are concentrated internally. This sort of concern would justify federal regulation to establish minimum standards (i.e., floor preemption), but would not ordinarily justify preemption of higher state standards.

In some circumstances, however, the negative externality may be a regulatory burden.[35] When the regulatory burden of state law is exported to other states or to actors in other states, then the state exporting the burden has an incentive to overregulate. States in which products are sold, but not manufactured, may have incentives to require such products to meet stringent health and safety standards, insofar as the regulatory burdens will be felt primarily in other, manufacturing states. Thus, federal action might be justified to prevent overregulation, and this action might support ceiling

[35] This issue frequently arises under the so-called dormant Commerce Clause, in which the Court has expressed concerns about the export of regulatory burdens. *See, e.g.*, S. Pac. Co. v. Arizona, 325 U.S. 761, 767 n.2 (1945) ("[T]he Court has often recognized that to the extent that the burden of state regulation falls on interests outside the state, it is unlikely to be alleviated by the operation of those political restraints normally exerted when interests within the state are affected.").

preemption of state laws that impose higher health and safety standards than those reflected in federal law.[36]

If the activity in question produces benefits that are exported to other states, then we might expect too little of the activity. In some respects, this is simply the flip side of a negative externality. For example, regulation of pollution-causing activities in a state that exports environmental harms produces a positive externality in other states. Thus, the state's incentives might lead to underregulation. Federal regulation to combat underregulation resulting from positive externalities would not generally support ceiling preemption.

If, however, an activity within a state produces economic benefits that are exported to other states, but causes health and safety burdens within the state, then the state may have an incentive to overregulate. This is, in essence, the NIMBY problem. Consider, for example, the problem of waste disposal and the export of waste disposal services.[37] The environmental, health, and safety costs of waste disposal are concentrated locally, while the benefits of having facilities to dispose of waste, especially radioactive and hazardous waste, are felt nationally. For this reason, a state may have incentives to overregulate so as to block the siting of a facility in the state.[38]

This discussion suggests two basic conclusions about the implications of federal regulation to address externalities. First, ceiling preemption is not ordinarily justified if the purpose of federal regulation is to prevent the export of health and safety risks to other states, because that kind of externality would tend to cause underregulation. Second, ceiling preemption may be justified in one of two circumstances: (1) when states have incentives to export regulatory burdens, or (2) when states have incentives to overregulate an activity that exports benefits to other states.

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[36] As we discuss more fully below, state remedies may be different from state regulation in several respects that may be relevant to the preemption analysis. *See infra* Part II.

[37] *See, e.g.*, City of Philadelphia v. New Jersey, 437 U.S. 617 (1978) (holding that ban on import of wastes violated the dormant Commerce Clause). Although the Court in *City of Philadelphia* treated the law in question as a ban on imports, a more accurate characterization would be that the law banned the export of waste disposal space. Viewed from that perspective, it is clear that the law was the product of a NIMBY problem because the benefits of waste disposal within New Jersey were felt in other states, but the burden of adverse environmental consequences (i.e., increased risks of leakage and contamination or a decline in the amount of available open space) was felt in New Jersey.

[38] This appears to be the rationale behind the Low-Level Radioactive Waste Policy Act of 1980, 42 U.S.C. §§ 2021b–2021d (2000). The 1980 Act was amended in 1986. Low-Level Radioactive Waste Policy Amendments Act of 1985, Pub. L. No. 99-240, 99 Stat. 1842 (1986). *See generally* New York v. United States, 505 U.S. 144, 149–51 (1992) (discussing the operation of low-level radioactive waste facilities and legislation pertaining to them).

4. General Framework

The analysis to this point suggests a general framework for analyzing the kinds of federal regulatory purposes that might support ceiling preemption of state health and safety regulations. These purposes are relevant to all three kinds of preemption under standard preemption doctrine. They are relevant to the congressional decision whether to expressly preempt (or save) state authority to regulate and in interpreting the scope of any express preemption provision (or savings clause). They are relevant to the determination of whether federal law has occupied the field, which is determined under current doctrine by assessing whether the purpose of the federal law requires occupation of the field and whether there is a dominant federal interest. They are also relevant to the scope of an occupied field. Finally, they are relevant in determining whether conflict preemption has occurred, which depends on whether enforcement of the state law would obstruct the object and purpose of the federal law.

Our approach focuses on the collective action problems among states that justify regulation at the federal level to analyze whether the purposes of federal regulation support preemption of state judicial remedies. From this perspective, it appears that resource pooling and combating a race to the bottom do not generally support ceiling preemption, while the rationalization of regulatory standards (uniformity), overcoming the externalization of regulatory burdens, and responding to a NIMBY problem might.

We say "might" because the presence of one or more of these purposes is not sufficient, in and of itself, to support preemption. The states are sovereign entities with the authority and responsibility to exercise the police power to protect the health, safety, and welfare of their citizens. In light of the constitutional weight afforded this authority,[39] the presumption against preemption requires that ceiling preemption be explicit, or that statutory purposes that justify implied ceiling preemption be sufficiently clear and important to warrant the displacement of state authority. The analysis of these questions will necessarily depend on the specifics of the federal statute involved.

Even if ceiling preemption of state *regulation* is justified, moreover, it does not inevitably follow that state *judicial remedies*

[39] This weight is perhaps reflected in the practice of the Supreme Court of referring to "Our Federalism" using capital letters, beginning in *Younger v. Harris*, 401 U.S. 37, 44 (1971). Although the Court had used the term at least as far back as 1939, *see* Texas v. Florida, 306 U.S. 398, 428 (1939), it apparently did not merit capitalization until *Younger*. Recent decisions use both the upper case and lower case versions of the term. *See, e.g.*, Alden v. Maine, 527 U.S. 706, 748 (1999) (lower case); Ruhrgas AG v. Marathon Oil Co., 526 U.S. 574, 587 (1999) (upper case).

should be preempted. In the next part of the Article, we consider the differences between state remedies and other forms of state law and what those differences imply for application of ceiling preemption to state judicial remedies.

II. CEILING PREEMPTION AND STATE REMEDIES

Assuming that a sufficiently clear and important federal purpose supports ceiling preemption, the question remains whether the displaced state regulatory authority encompasses state judicial remedies. We believe that there are important differences between state judicial remedies and other forms of state regulation that warrant special consideration when analyzing remedial preemption issues. These include the differences between legislatures and courts as policymaking bodies, the differences between legislative rules[40] and judicial remedies as instruments of policy, and the possibility of accommodating federal regulation within the remedial structure of state law. All of these differences generally support affording federal law less preemptive effect on judicial remedies than on legislative rules.

A. Courts vs. Legislatures

The prior discussion of the incentives of states did not consider the nature of the institutional processes through which those incentives affect the expression of policy preferences as law.[41] Yet the process through which positive state regulation is adopted differs in important respects from the process through which courts provide remedies, and these differences affect the extent to which we might expect the law to reflect the narrow self-interests of the state. In particular, the enactment of laws by a politically accountable legislature (and implementation by politically accountable agencies) is substantially more likely to be affected by problematic incentives than are judicial decisions regarding remedies.

[40] We use this term to include both statutes enacted by state legislatures and binding regulations issued by state agencies.

[41] Incentives issues are particularly salient for burden export and NIMBY problems, which are essentially problems of state incentives. The ways in which state incentives may undervalue rationalization of standards so that transaction costs are reduced are less obvious. In any event, inquiry into those incentives may be less important when there is a primary federal purpose of rationalizing standards, insofar as any state standards that deviate from the federal norm interfere with the purpose of achieving uniformity, even if they are the product of historical accident or other factors.

1. Political Accountability and Legislative Incentives

Notwithstanding public choice and related criticisms of the political process, the essential feature of legislatures is their political accountability. The law assumes, because of this accountability, that legislators will enact laws that reflect the interests of the state; i.e., enact laws that are pleasing to (and oppose laws that are not pleasing to) their political constituencies.[42] Thus, the political process tends to align legislation with the interests of constituents, which for state legislators means interests within the state. While state administrative agencies are less directly politically accountable, some state administrators may be elected and most others are appointed and removed by the governor, also a political actor.

Consider, for example, the problem of exporting a regulatory burden. This phenomenon is problematic because the out-of-state parties that bear the burden lack political input and are not part of the constituency to whom the legislators answer.[43] The citizens of the state, on the other hand, gain the benefits of improved health and safety or environmental quality that result. From the perspective of a legislator, such regulations would be desirable because there is a chance to gain political favor with in-state constituencies without any loss of political support from other in-state constituencies. The assumption that state legislatures are likely to favor in-state interests is widespread and lies at the foundations of various constitutional provisions and doctrines or statutory schemes.[44]

2. Judicial Independence and Incentives

In contrast to legislators, courts, as an institution, are generally more insulated from and independent of the political process. While the independence of federal judges is protected by the appointment process, life tenure, and salary protections,[45] state judges typically

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[42] There is disagreement, of course, about the elements of their constituency to which legislators respond—average voters, members of their party, major contributors, or some other subset.

[43] Under some views of the legislative process, however, legislators might respond to out-of-state interests that make substantial political contributions.

[44] *See supra* note 35 (citing example of this reasoning under the dormant Commerce Clause).

[45] Even with these protections, empirical evidence suggests that political affiliations of federal judges affect their decisionmaking. *See, e.g.*, Thomas J. Miles & Cass R. Sunstein, *Do Judges Make Regulatory Policy? An Empirical Investigation of* Chevron, 73 U. CHI. L. REV. 823 (2006); Richard L. Revesz, *Environmental Regulation, Ideology, and the D.C. Circuit*, 83 VA. L. REV. 1717 (1997); Cass R. Sunstein, David Schkade & Lisa Michelle Ellman, *Ideological Voting on Federal Courts of Appeals: A Preliminary Investigation*, 90 VA. L. REV. 301 (2004); *cf.* Joanna M. Shepherd, *Money, Politics, and Impartial Justice*, 58 DUKE L.J. 623

have fewer safeguards of independence. For example, many state judges face potentially contested elections (either partisan or nonpartisan), and a majority stand periodically for retention.[46] Notwithstanding relatively greater political accountability of state judges as compared to federal judges, a variety of factors suggest that political considerations are much less significant for judicial decisions than for legislative votes.[47]

For those judges that do stand for election, the role of political pressure on policy issues tends to be more muted than in legislative elections. Retention elections, for example, are uncontested, and judges seldom are expelled on the basis of their decisions, although it does happen from time to time for particularly high-profile and unpopular decisions.[48] Contested elections are often nonpartisan, and even partisan elections are less likely to be hotly contested than their legislative counterparts or to attract active public interest, even if there is a trend toward increasing politicization of judicial elections.[49]

(2009) (discussing impact of judicial elections in locations dominated by one political party on judicial decisions).

[46] For a comprehensive compilation of state judicial selection methods, see AM. JUDICATURE SOC'Y, JUDICIAL SELECTION IN THE STATES: APPELLATE AND GENERAL JURISDICTION COURTS (2007), *available at* http://www.ajs.org/selection/docs/Judicial%20Selection%20Charts.pdf [hereinafter JUDICIAL SELECTION]; *see also* Stephen J. Ware, *Selection to the Kansas Supreme Court*, 17 KAN. J.L. & PUB. POL'Y 386, 387–94 (2008) (providing an overview of state methods for selecting state supreme court justices with a focus on the role of the bar). According to JUDICIAL SELECTION, nine states select trial judges of general jurisdiction by partisan election, six select intermediate appellate judges by partisan election, and eight select judges of the court of last resort by partisan election. JUDICIAL SELECTION, *supra*, at 4–6. A much larger number use merit selection: seventeen states use merit selection for trial courts, eighteen for courts of appeal, and twenty-five (half) for the court of last resort. *Id.* Even in states with merit selection, nonpartisan retention elections are common. *Id.*

[47] Our colleague Steve Ware has argued, however, that current judicial selection methods in some states make them overly accountable to the bar as a special interest. *See* Ware, *supra* note 46, at 394–409 (advocating changes to the selection process in Kansas to reduce the influence of the bar). The implications of this argument for preemption analysis are unclear, because the influence of the bar may tend to favor either plaintiffs or defendants, although it might be argued that both the plaintiff and defendant bars have incentives to increase the amount of litigation, which would tend to favor more judicial remedies.

[48] *See, e.g.*, Brett Christopher Gerry, *Parity Revisited: An Empirical Comparison of State and Lower Federal Court Interpretations of* Nollan v. California Coastal Commission, 23 HARV. J.L. & PUB. POL'Y 233, 248 (1999) (referring to "the rare but high profile incidents of judges being rejected by an electorate"); Robert S. Thompson, *Judicial Retention Elections and Judicial Method: A Retrospective on the California Retention Election of 1986*, 61 S. CAL. L. REV. 2007 (1988) (discussing the 1986 California election in which Chief Justice Rose Byrd of the California Supreme Court was ousted in a retention election).

[49] *See* Charles Gardner Geyh, *The Endless Judicial Selection Debate and Why It Matters for Judicial Independence*, 21 GEO. J. LEGAL ETHICS 1259, 1263–69 (2008) (discussing various developments that contribute to increased politicization of judicial elections).

While critics may argue with some force that judicial elections compromise judicial independence,[50] other factors tend to diminish the extent to which even elected judges are likely to decide cases in accordance with the perceived interests of their constituents. The nature of the judicial office limits the extent to which judges campaign on the basis of their decisions. While *Republican Party of Minnesota v. White*[51] held that the First Amendment protects judges' ability to conduct election campaigns, the extent to which judges can and do campaign on the basis of how they would decide cases remains limited by both tradition and ethical canons.[52] Conversely, research suggests that the public is less attentive to judicial elections.[53] If so, then judges would tend to be less concerned that they will be punished politically for their decisions—except that the public may of course react to controversial, high-profile decisions.

More fundamentally, judges remain accountable to the law in other ways, particularly through precedent and the potential for appeal. While a legislator is free to vote in accordance with his or her views of public policy or the interests of constituents, judges are not. By training and inclination, they use the legal method, which places emphasis on precedent, even if there are means of avoiding or overruling it. For lower courts, the possibility of being reversed on appeal is a significant check on the judge's ability to decide a case in accordance with his or her views of the preferences of constituents, and even state supreme court justices may have to be concerned about the possibility of reversal by the United States Supreme Court.[54] It is also worth noting that, to the extent litigation of state remedies satisfies the requirements of diversity of citizenship, the case can be removed to federal court.[55]

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[50] For an extreme example, see Caperton v. A.T. Massey Coal Co., Inc., 129 S. Ct. 2252 (2009) (holding that due process requires recusal of elected judge from case involving litigant who spent millions of dollars in support of his election).

[51] 536 U.S. 765 (2002).

[52] For example, canons prohibiting judges from committing to decide a case in a particular way have been upheld. *E.g.*, Pa. Family Inst., Inc. v. Celluci, 521 F. Supp. 2d 351 (E.D. Pa. 2007); Fla. Family Policy Council v. Freeman, No. 4:06cv00395 (N.D. Fla. Sept. 11, 2007) (order of dismissal).

[53] *See* Geyh, *supra* note 49, at 1270–72 (discussing data suggesting substantial "roll off" from voters who vote in executive and legislative races but not judicial elections and whether increasingly hotly contested elections will change that tendency).

[54] *Cf.* Christopher R. Drahozal, *Judicial Incentives and the Appeals Process*, 51 SMU L. REV. 469 (1998) (concluding that the possibility of being reversed on appeal affects the incentives of trial judges).

[55] Of course, under the *Erie* doctrine the federal court would apply the forum state's law, which means that diversity jurisdiction responds only to the potential that forum state interests would affect the particular case, and not the potential problem that the forum state's law itself reflects improper state incentives.

All this is not to say that state judges are immune from consideration of their state's interests when deciding cases.[56] Indeed, as Justice Story famously proclaimed, "[t]he constitution has presumed (whether rightly or wrongly we do not inquire) that state attachments, state prejudices, state jealousies, and state interests, might sometimes obstruct, or control, or be supposed to obstruct or control, the regular administration of justice."[57] Diversity jurisdiction, after all, is based on the fear that state courts and juries will treat out-of-state parties unfairly.[58] The difference in the nature of political accountability of legislatures and judges nevertheless suggests that courts should not assume that congressional concern about improper state regulatory incentives necessarily extends to judicial decisions. The same difference also suggests that the evidence to justify remedial preemption should reflect specific concern for judicial incentives, not merely general concern for state incentives.[59]

These issues are illustrated by *International Paper Co. v. Ouellette*,[60] which held that, while the federal Clean Water Act preempted a claim under the nuisance law of the state in which the pollution damage occurred, it did not preempt a suit based on the common law of the source state.[61] In terms of our framework, the displacement of the downstream state's nuisance remedies would only make sense if the Clean Water Act reflected significant federal

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[56] For example, Richard E. Neely, a former West Virginia Supreme Court Justice, wrote:

> As long as I am allowed to redistribute wealth from out-of-state companies to injured in-state plaintiffs, I shall continue to do so. Not only is my sleep enhanced when I give someone else's money away, but so is my job security, because the in-state plaintiffs, their families, and their friends will reelect me.

RICHARD NEELY, THE PRODUCT LIABILITY MESS: HOW BUSINESS CAN BE RESCUED FROM THE POLITICS OF STATE COURTS 4 (1988). Neely advocates an expanded role for federal common law as a solution to the problem of unreasonable products liability judgments. *See id.* at 28–29.

[57] Martin v. Hunter's Lessee, 14 U.S. (1 Wheat.) 304, 347 (1816).

[58] *See, e.g.*, Jonathan Remy Nash, *The Uneasy Case for Transjurisdictional Adjudication*, 94 VA. L. REV. 1869, 1872 (2008) ("[T]he constitutional inclusion and the continued congressional authorization of federal diversity jurisdiction suggest . . . that state courts' susceptibility to bias against out-of-state parties renders them less able than federal courts to resolve state law questions 'correctly.'").

[59] This analysis would not apply to remedies created by state statute, however, because statutory remedies are enacted by politically accountable legislators rather than adopted by judicial decision.

[60] 479 U.S. 481 (1987).

[61] The Court in *Ouellette* reasoned that "the application of Vermont law against [International Paper] would allow [the plaintiffs] to circumvent the [Act's] permit system, thereby upsetting the balance of public and private interests so carefully addressed by the Act." *Id.* at 494. It also found that allowing tort actions to be brought under the common law of the affected state would allow "Vermont and other States [to] do indirectly what they could not do directly—regulate the conduct of out-of-state sources." *Id.* at 495. Finally, the Court determined that "[a]pplication of an affected State's law to an out-of-state source also would undermine the important goals of efficiency and predictability in the permit system." *Id.* at 496.

concerns that judges in downstream states would have incentives to export regulatory burdens to upstream states.[62] At the same time, however, the Court rejected the defendant paper company's argument that any parties injured by water pollution should be required to sue in the courts of the source state, as well as rely on source state common law.[63] Thus, the paper company apparently believed that the courts of its home state would treat it more favorably both in terms of the applicable nuisance law (which the Supreme Court accepted) and in terms of the application of that law (which the Supreme Court rejected).

B. Legislative Rules vs. Judicial Decisions

Another important difference between ordinary ceiling preemption and remedial preemption is the difference between the purpose and effect of legislative rules and of judicial remedies. The purposes of legislative rules and judicial remedies differ in that most legislative rules focus primarily on controlling the conduct of the regulated entity, while judicial remedies also are designed to compensate or otherwise provide relief for a party who has suffered harm.[64] In terms

[62] Insofar as the Court interpreted the statute as permitting only source states to impose stricter regulation of discharges into their waters, *see id.* at 499 ("Because the Act specifically allows source States to impose stricter standards, the imposition of source-state law does not disrupt the regulatory partnership established by the permit system."), the statute would appear to reflect concern about the export of regulatory burdens by downstream states. While this interpretation of the Clean Water Act is debatable, *see* Richard E. Levy & Robert L. Glicksman, *Judicial Activism and Restraint in the Supreme Court's Environmental Law Decisions*, 42 VAND. L. REV. 343, 403 (1989), if accurate it would justify ceiling preemption of regulation by downstream states. It does not follow from this conclusion, however, that downstream state nuisance remedies should also be preempted, unless the statute also reflected equal concern that judges would have similar incentives to export burdens to upstream states. Insofar as the statute contains an express savings clause for judicial remedies that is broadly worded and does not distinguish between upstream and downstream states, see 33 U.S.C. § 1365(e) (2006), the case for preempting state judicial remedies is weaker.

[63] The Court concluded that "application of the source State's law does not disturb the balance among federal, source-state, and affected-state interests," *Ouellette*, 479 U.S. at 498–99, and added that "the restriction of suits to those brought under source-state nuisance law prevents a source from being subject to an indeterminate number of potential regulations." *Id.* at 499.

[64] Alexandra Klass distinguishes between those tort laws intended to serve as a branch of public regulatory law by deterring undesirable conduct, compensating victims of wrongdoing, and spreading undesirable losses, and those tort laws designed to provide citizens with the right to redress private wrongs, thereby setting standards for individual rights and responsibilities and assuring citizens that the government will provide them with a judicial means of redress based on individual circumstances. She contends that the public law component of tort law should be protected from federal interference under federalism principles, including the presumption against preemption. The private law aspects of tort law should be protected not only by federalism principles, but also by principles of due process. Alexandra B. Klass, *Tort Experiments in the Laboratories of Democracy*, 50 WM. & MARY L. REV. 1501 (2009). For discussion of potential takings issues arising from preemption of state judicial remedies, see *infra* note 72 and accompanying text. *Cf.* MCGARITY, *supra* note 18, at 31–34 (describing the

of effects, legislative rules have a more direct and significant impact on a class of regulated entities than do judicial decisions, which directly bind only the parties and may be distinguished in later decisions.

Both the purposes and effects of state law are relevant to analysis of the preemptive effect of federal law, but they are relevant to different aspects of that analysis. The purposes of state law are relevant because they reflect the weight of the state's interest in the preservation of its laws. As we indicate below, states have a strong interest in the preservation of state judicial remedies that provide compensation for those injured by the activities of others, particularly if the federal regulatory program creates no substitute for the preempted state compensatory remedies. In this "corrective justice" context, the strength of the state's interest would support the application of a very strong presumption against preemption.[65] The effects of state laws are relevant to whether those laws conflict with the purposes of federal law in such a way as to warrant preemption. A legitimate set of state purposes should not save from preemption a law that impermissibly interferes with the accomplishment of federal goals. Conversely, a state law prompted by concerns that Congress would not have regarded as legitimate should not support preemption if the operation of that law does not impair federal goals.

1. The Purposes of Judicial Remedies

As noted above, while the primary purpose of legislative rules is typically to affect the conduct of regulated parties, judicial remedies, particularly tort remedies, have an important compensatory function.[66] It may be true, as proponents of law and economics argue,

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shift in emphasis over time between the corrective justice and protective justice functions of tort law).

[65] *See* MCGARITY, *supra* note 18, at 31 (defining corrective justice as "the correction of unjust changes in wealth that result from interactions among the members of a polity" and describing its function as "'redress[ing] unjust gains and losses by means of a financial adjustment'" (quoting Catharine Pierce Wells, *Tort Law as Corrective Justice: A Pragmatic Justification for Jury Adjudication*, 88 MICH. L. REV. 2348, 2355 (1990))); WILLIAM FUNK ET AL., CTR. FOR PROGRESSIVE REFORM, THE TRUTH ABOUT TORTS: REGULATORY PREEMPTION AT THE NATIONAL HIGHWAY TRAFFIC SAFETY ADMINISTRATION 10 (2008), *available at* http://www.progressivereform.org/articles/NHTSA_Preemption_804.pdf ("When people are injured despite manufacturer compliance with existing safety standards, the corrective justice function of state tort law ensures that those injured are properly compensated in light of the evolving state of technology and new information available to the manufacturer."). *See generally* Wells, *supra* (comparing distributive and corrective justice and exploring the justifications for the corrective justice function of tort law).

[66] Of course, state statutes may create remedies as well. Thus, these arguments would also apply to the preemption of statutory remedies.

that common law tort rules have a deterrent effect and are consistent with a policy designed to promote efficient behavior,[67] but that should not cause courts to lose sight of the fact that the primary goal of tort law is compensation.[68] State constitutions do not enshrine the right to a "remedy by due course of law" because of a desire to efficiently regulate conduct,[69] but rather because widespread conceptions of justice require compensation when a person suffers injury from the wrongful conduct of another.

Unlike the preemption of state legislative rules, the preemption of state judicial remedies displaces not only their regulatory (or police power) component, but also their compensatory role. This point is particularly significant when the federal law in question does not provide a remedy.[70] When such a federal law displaces a state legislative rule, the regulatory component of the state law is replaced by the regulatory component of the federal law. In contrast, unless the federal law also creates a remedy for injured persons, remedial preemption would not replace the compensatory component of the displaced state remedies. In light of the importance attached to judicial remedies by states and their citizens, we believe that courts should be especially reluctant to find remedial preemption when the federal law in question does not provide a substitute remedy of some kind.[71] Indeed, the elimination of all state compensatory remedies

[67] *See generally* WILLIAM M. LANDES & RICHARD A. POSNER, THE ECONOMIC STRUCTURE OF TORT LAW (1987) (discussing the application of economic efficiency theory to the common law). Many different kinds of state actions have incidental regulatory effects, including state tax laws. Unless courts construe federal statutory provisions preempting state "requirements" or "standards" to be confined to state laws whose primary function is to regulate private conduct, such provisions might invalidate state tax laws, even though they may be designed primarily to enhance state revenues.

[68] Thus, for example, in *Wyeth v. Levine*, 129 S. Ct. 1187 (2009), the Court reasoned that Congress declined to provide a remedy for consumers injured by misbranded drugs because it relied on state remedies to perform that compensatory function. *Id.* at 1199. The Court then observed that Congress "may also have recognized that state-law remedies further consumer protection by motivating manufacturers to produce safe and effective drugs and to give adequate warnings." *Id.* at 1199–1200.

[69] *See supra* note 17 and accompanying text.

[70] *See Wyeth*, 129 S. Ct. at 1199 ("Congress did not provide a federal remedy for consumers harmed by unsafe or ineffective drugs in the 1938 statute or in any subsequent amendment.").

[71] This analysis underscores the point we made earlier concerning the Supreme Court's apparently greater willingness to find implied preemption than to find an implied right of action. *See supra* notes 21–23 and accompanying text; *see also* MCGARITY, *supra* note 18, at 33 ("[I]nsofar as the federal government's regulatory standards preempt state common law remedies without providing an alternative compensation regime, preemption completely eliminates the corrective justice role that common law courts have played in this country since its founding."). Professor McGarity adds that, in interpreting the scope of express preemption clauses or determining the scope of implied preemption, "[t]he loss of corrective justice will probably play strongly . . . , along with the general virtues of federalism and the back-stop function of the common law." *Id.* at 245.

without the creation of a federal substitute may raise due process or takings concerns.[72]

2. The Regulatory Effects of Judicial Remedies

Of course, state law is preempted, regardless of its purposes, if the effect of the state law is to impede the operation of the federal law. Thus, the purposes of state judicial remedies cannot save them from preemption if their effects place them within the scope of an express preemption provision or interfere with federal purposes that support preemption. While judicial remedies do have regulatory effects, however, those effects are less direct and immediate than those resulting from other forms of state regulation. As a result, those remedies are less likely to interfere with the federal regulatory objectives. Put differently, a federal purpose (and statutory language) that supports ceiling preemption of state ***regulation*** does not necessarily support preemption of state ***remedies***.[73]

Regulation in the form of legislative rules creates directly binding obligations that apply across-the-board to all regulated entities. These rules are typically enforced by means of executive or administrative action and are subject to criminal or civil sanctions. Thus, while regulatory violations can and do occur, including intentional violations, it is normal and expected that regulated entities will take immediate action to comply with legislative rules. To the extent that the state's regulation through legislative rules is inconsistent with the purposes of federal regulation, the impairment of the federal purpose from the regulation is likely great.

By way of contrast, judicial remedies are individual decisions whose regulatory effects result from their precedential value. A judicial decision is therefore less likely to have a direct, across-the-board regulatory impact on affected entities.[74] To be sure, companies

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[72] *See, e.g.*, Robert L. Glicksman, *Federal Preemption and Private Legal Remedies for Pollution*, 134 U. PA. L. REV. 121, 179–85 (1985); *cf.* Ingraham v. Wright, 430 U.S. 651, 673 (1976) (stating that among the "historic liberties" preserved from deprivation without due process is a right "to obtain judicial relief for, unjustified intrusions on personal security" (citing Meyer v. Nebraska, 262 U.S. 390, 399 (1923))); Richards v. Wash. Terminal Co., 233 U.S. 546, 553 (1914) ("[W]hile the legislature may legalize what otherwise would be a public nuisance, it may not confer immunity from action for a private nuisance of such a character as to amount . . . to a taking of private property for public use."); Bormann v. Bd. of Supervisors, 584 N.W.2d 309 (Iowa 1998) (holding that state law barring nuisance actions against farmers who burn their crops amounted to the taking of an easement over neighboring properties). *But cf.* Johnson v. Am. Leather Specialties Corp., 578 F. Supp. 2d 1154, 1172–76 (N.D. Iowa 2008) (holding that state statute creating immunity from tort liability did not amount to a compensable taking).

[73] *See supra* note 18 (arguing that the use of terms such as "standards" or "requirements" in express preemption provisions does not necessarily include state judicial remedies).

[74] *Cf. Wyeth*, 129 S. Ct. at 1194 (quoting with approval the Vermont Supreme Court's

pay attention to litigation and the results, especially when they or others like them are held liable (or forced to defend multiple suits) or when damages are very large, but they do not necessarily alter their conduct on the basis of a few successful lawsuits, since other suits may be unsuccessful. An important factor in this regard is the availability of insurance, which reduces the impact of successful lawsuits, but cannot be used to soften the blow of enforcement of legislative rules.[75]

To illustrate the differences between legislative rules and judicial remedies for purposes of preemption analysis, consider the purpose of rationalizing standards to reduce the transactions costs of interstate distribution of goods and services. The collective action problem to which federal preemption responds is that states may undervalue the benefits of reducing transaction costs for businesses marketing their products or services nationally, or that transaction costs may prevent voluntary alignment of laws.[76] If states have conflicting and inconsistent legislative rules governing the design or marketing of a product, then companies have little choice but to adapt the design and sales of that product to the requirements of each state or forego marketing and selling the product in some states.[77]

The question in deciding whether to preempt state judicial remedies, or to construe ambiguous federal legislation to have that effect, is whether retention of state judicial remedies creates the same threat of increased transaction costs and obstacles to national product marketing that a lack of uniformity in positive regulation does. In light of the strong presumption against preemption of state judicial remedies and the limited regulatory effects of judicial remedies, we argue that a federal purpose of achieving regulatory uniformity will not always justify preemption of state judicial remedies.[78] The

observation that the jury verdict in the case did not "mandate a particular replacement warning").

[75] Ironically, the "moral hazard" problem that is often seen as a negative effect of insurance coverage may be a positive reason to avoid remedial preemption.

[76] *See supra* Part I.C.2.

[77] Alternatively, if state standards are performance standards rather than design standards, companies may choose to comply with the most stringent state's standards and market uniform products nationally. This result would allow the state with the highest performance standards to dictate the national standard, increasing the costs for companies and potentially exporting regulatory burdens to other states. Another option for regulated entities is to violate legislative rules and treat any resulting monetary penalties as a cost of doing business. Criminal fines may be excluded from insurance coverage, however. *See* Andrew L. Kolesar & Jacqueline M. Kovilaritch, *Buying and Selling Brownfield Properties: A Practical Guide for Successful Transactions*, 27 N. KY. L. REV. 467, 474 (2000).

[78] The analysis here does not extend to legislation that reflects Congress's decision to strike a particular balance between protecting public health and safety and limiting the burdens

existence of potential tort liability in different states, unlike the applicability of multiple state regulatory standards, is likely to be viewed as a cost of doing business.[79] That cost may be addressed by responses other than changing the design or marketing of the product, including insurance coverage, price increases, or contractual responses. The interference with the goal of reducing transaction costs is less severe than the one resulting from standards imposed by legislative rules.

C. Extent of Remedial Preemption

Even assuming that the language and purposes of federal law provide sufficiently clear evidence to overcome the presumption against remedial preemption, the complete displacement of state remedial authority will seldom be necessary to accommodate the federal interest, and would be especially inappropriate when the federal law provides no substitute remedy. Instead, there are likely to be ways for state remedial law to avoid incompatibility with the federal law.

1. Using the Federal Standard

One way to reconcile state remedies and federal law is to conform the state remedial law to federal requirements or standards. There are two obvious ways to do this. The first is to treat compliance with federal law as a defense to a state tort action, to the extent that the

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that regulation imposes on product manufacturers and service providers. If Congress decides that a particular balance is optimal, and that any deviation from that balance would interfere with the federal purposes reflected in settling on that optimal balance, then it might make sense to preempt state tort judgments against a business in full compliance with federal standards. Preemption in this context, however, is based on an effort to prevent states from exporting regulatory burdens, rather than a desire to reduce transaction costs. In other words, preemption is justified as a mechanism to prevent the export of externalities resulting from overregulation by states of businesses located elsewhere, rather than from a desire to achieve uniform levels of regulation to reduce transaction costs. Note, however, that Congress may seek to strike a balance in adopting federal regulatory standards without also having a purpose to prevent states from striking a different balance. Displacement of state authority is only justified when the legislative purpose is to strike a single nationwide balance and to prevent disruption of that balance from overregulation.

[79] Imagine, for example, a fast food chain being held liable in tort for injuries resulting from a spill of scalding-hot coffee. *See* Greene v. Boddie-Noell Enters., Inc., 966 F. Supp. 416, 418 n.1 (W.D. Va. 1997) (noting a state court jury in Albuquerque, New Mexico that awarded a woman compensatory damages and punitive damages after she was burned by coffee purchased from a drive-through window at a McDonalds restaurant, but dismissing case involving similar incident). The fast food chain will not relish the prospect of defending such suits, but the possibility that it will have to do so is not likely to disrupt its efforts to market its coffee throughout the nation, given readily available options such as lowering the temperature of the coffee or purchasing insurance to protect it against damage awards.

lawsuit alleges conduct that falls within the scope of the federal regulatory regime. The second is to treat the federal law as establishing the standard by which the liability of the defendant is to be judged, essentially allowing the state to provide compensation for persons injured as a result of a violation of federal law.[80] The essential difference between these two approaches is the burden of proof. If treated as a defense, the burden would be on the defendant to establish compliance with federal law, while treating federal law as the applicable standard would require the plaintiff to establish a violation.

Absent unusual circumstances, it is hard to see how either approach would compromise federal interests, since the federal standard is retained. Providing compensation to plaintiffs able to prove that the defendant violated federal law might have a general deterrent effect on regulated entities in the state providing compensation. Such a deterrent, however, would not interfere with the rationalization of standards, since the remedial standard would be the same as the uniform federal standard (just as it would be under the approach that allows compliance to serve as a defense to a state common law tort action). Likewise, since the state remedies incorporate federal standards, those standards are not distorted under either approach by burden exports or NIMBY problems. In some cases, there could be concerns that the application of the federal standard might be affected by distorted incentives (even to the point of jury nullification).[81] Similarly, state courts might interpret and apply federal standards differently so as to undermine uniformity and increase transaction costs. These problems, however, are surely less severe and commonplace than the comparable problems caused by differing state judge-made liability standards (which are in turn less severe than those caused by state legislative rules).

Conversely, incorporation of the federal standard would allow the states, at least to some degree, to further the compensatory purposes of judicial remedies. It would still prevent states from protecting their citizens by providing a judicial forum for compensating them for injuries caused by conduct that complies with federal standards that the state might consider to be insufficiently protective. This concern cautions against too readily concluding that federal laws preempt state remedies in the sense of establishing a defense or the standard of

[80] *See* State *ex rel.* Stenehjem v. FreeEats.com, Inc., 712 N.W.2d 828 (N.D. 2006) (involving a state remedy for alleged violations of Federal Telecommunications Act).

[81] A jury might find for a local plaintiff and against an out-of-state company notwithstanding compliance with the federal standard. Such a result could be difficult to detect if there is a general verdict.

liability. But if remedial preemption is called for, either approach preserves some access to court for injured individuals, and allows the states to protect their citizens, at least to some extent.

2. Alternative Theories

A related point is that even if preemption of some state remedies is called for, other theories of liability may be consistent with federal law. In other words, careful attention should be paid to whether the theory of a given case would establish de facto regulatory standards that would undermine the purposes of the federal statute or regulation in question. Given the important state interests in compensating injured citizens through judicial remedies, the scope of remedial preemption should be no greater than necessary to protect the federal purposes.

To illustrate this point, consider the Supreme Court's decision in *Geier v. American Honda Motor Co.*,[82] which in many ways launched the current debate over remedial preemption. The Supreme Court held that a federal regulation giving automobile manufacturers the choice of providing passive seatbelts or airbags preempted a products liability lawsuit alleging that providing seatbelts but not airbags constituted a design defect.[83] This result makes some sense in terms of our framework, because there are powerful reasons for rationalizing standards for the design of automobiles to reduce transaction costs.[84] Further, courts in states that do not manufacture automobiles may have an incentive to overregulate because the burden is exported to other states in which the manufacture took place.

Even if products liability cases based on this theory are preempted, however, other theories would not necessarily conflict with federal purposes to the same extent, and might be allowed to go forward. The courts should analyze each theory of liability to determine whether providing relief under that particular theory creates a conflict with federal law. Thus, for example, in *Carrasquilla v. Mazda Motor Corp.*,[85] a federal district court held that some claims related to seatbelts were preempted by federal law under *Geier*. But it allowed claims based on alleged defects in the design of the seat back, seat

[82] 529 U.S. 861 (2000).

[83] *Id.* at 864

[84] An even narrower reading of *Geier* would be that the recognition of liability based on the choice to provide passive seatbelts is in direct conflict with the federal regulation permitting that choice.

[85] 166 F. Supp. 2d 169 (M.D. Pa. 2001).

track, and knee bolster to go forward.[86] Claims based on the manufacturer's choice of seatbelts may be inconsistent with a regulatory standard providing auto manufacturers with that choice. But the federal standard did not address seat back, seat track, or knee bolster design, so allowing design defect claims relating to those components of the car to proceed did not interfere with operation of any federal standard.[87]

This kind of analysis has been applied in other areas as well, particularly with respect to claims against cigarette manufacturers. Thus, for example, courts have determined that failure to warn claims are preempted by federal law, but not claims based on theories such as misrepresentation or fraud.[88] Careful attention to the basis of the state law claim helps to ensure that preemption only applies when the regulatory effects of the claim are within the scope of any federal purposes that support ceiling preemption. Conversely, that attention helps to preserve the states' fundamental interest in providing remedies for their citizens when recognition of such remedies does not have regulatory effects that are inconsistent with federal purposes.

III. *WYETH V. LEVINE*

In this section, we briefly discuss the Supreme Court's recent decision in *Wyeth v. Levine*,[89] which is consistent with our analysis and serves as a useful illustration of several key points we advance here. First, the Court (over the objections of dissenters) began with a presumption against preemption, emphasizing the traditional role of states' police powers to protect the health and safety of their citizens.[90] The majority rejected the argument advanced by the dissent—correctly in our view—"that the presumption against pre-emption should not apply to claims of implied conflict pre-emption at all . . . ."[91] Later in the opinion, the Court also drew a negative inference against legislative intent to preempt state judicial

[86] *Id.* at 178-80.

[87] *See id*.

[88] *See, e.g.*, Altria Group, Inc. v. Good, 129 S. Ct. 538 (2008).

[89] 129 S. Ct. 1187 (2009).

[90] *Id.* at 1194–95 ("'In all pre-emption cases, and particularly in those in which Congress has "legislated . . . in a field which the States have traditionally occupied," . . . we "start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress."'" (quoting Medtronic, Inc. v. Lohr, 518 U.S. 470, 485 (1996) (quoting Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947))) (alterations in original)); *see also id.* at 1195 n.3 ("We rely on the presumption because respect for the States as 'independent sovereigns in our federal system' leads us to assume that 'Congress does not cavalierly pre-empt state-law causes of action.'" (quoting *Medtronic*, 518 U.S. at 485)).

[91] *Id.* at 1195 n.3.

remedies from Congress's failure to include an express preemption provision.[92]

Second, the Court distinguished between floor and ceiling preemption, and looked for evidence of congressional intent to displace state authority to impose more stringent standards than required by Congress:

> Wyeth contends that the FDCA establishes both a floor and a ceiling for drug regulation: Once the FDA has approved a drug's label, a state-law verdict may not deem the label inadequate, regardless of whether there is any evidence that the FDA has considered the stronger warning at issue. The most glaring problem with this argument is that all evidence of Congress' purposes is to the contrary. Building on its 1906 Act, Congress enacted the FDCA to bolster consumer protection against harmful products.[93]

In this regard, the key issue appeared to be whether state remedies would upset the balance between the benefits and burdens of regulation struck by an expert federal agency, the FDA.[94]

While there was some support for this argument based on the FDA's statements in a regulatory preamble and in the statutory scheme,[95] the majority concluded that the language and history of the statutory scheme reflected a primary purpose of protecting consumers by establishing a floor, and did not support the conclusion that the balance struck by the FDA foreclosed states from striking a different

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[92] *Id.* at 1200 ("If Congress thought state-law suits posed an obstacle to its objectives, it surely would have enacted an express pre-emption provision at some point during the FDCA's 70-year history. . . . Its silence on the issue, coupled with its certain awareness of the prevalence of state tort litigation, is powerful evidence that Congress did not intend FDA oversight to be the exclusive means of ensuring drug safety and effectiveness.").

[93] *Id.* at 1199; *see also id.* at 1193 (quoting Vermont Supreme Court's conclusion that federal warning requirements "'create a floor, not a ceiling, for state regulation'"); *id.* at 1200 (quoting preamble to FDA rule stating that federal requirements establish "both a 'floor' and a 'ceiling,'"); *id.* at 1202 (describing prior FDA statements that "cast federal labeling standards as a floor upon which States could build"); *id.* at 1204 (Breyer, J., concurring) (suggesting that FDA may describe "when labeling requirements serve as a ceiling as well as a floor" through specific regulations).

[94] Neither the majority nor the dissent suggested a congressional purpose to rationalize standards so as to reduce transaction costs and promote interstate commerce. Although such a purpose might support the adoption of uniform federal standards, this purpose was apparently not a significant factor underlying the particular federal regulatory regime at issue in *Wyeth*. There would also appear to be no NIMBY problem in this context.

[95] *See Wyeth*, 129 S. Ct. at 1219 (Alito, J., dissenting) (discussing regulatory scheme). Because Justice Alito, as well as Justice Scalia (who, together with Chief Justice Roberts, joined the dissent) reject reliance on legislative history as a tool of statutory construction, the dissent did not discuss any legislative history that might have supported its analysis.

balance.[96] This analysis is consistent with our view that only the primary legislative purposes should be relevant to implied preemption analysis. We would add that this conclusion makes sense in terms of our collective action analysis because there was no suggestion by either the drug manufacturer or the dissent of congressional concern for the export of regulatory burdens by "downstream states" as a result of distorted state incentives.

Third, the majority recognized the difference between state judicial remedies and direct regulation, observing that the "the jury verdict established only that [the] warning was insufficient. It did not mandate a particular replacement warning, nor did it require contraindicating" the method of drug administration approved by the FDA.[97] In addition, the Court recognized that "Congress did not provide a federal remedy for consumers harmed by unsafe or ineffective drugs in the 1938 statute or in any subsequent amendment. Evidently, it determined that widely available state rights of action provided appropriate relief for injured consumers."[98] It would be particularly perverse if the effect of adoption of a federal statute whose primary purpose is to protect consumers were to leave them without a remedy for injuries suffered as a result of the use of products regulated under the statute.[99]

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[96] Much of the discussion focused on the FDA's argument for preemption set forth in a regulatory preamble, and on whether it warranted deference. The majority concluded that "[t]he weight we accord the agency's explanation of state law's impact on the federal scheme depends on its thoroughness, consistency, and persuasiveness." *Id.* at 1201 (majority opinion) (citing United States v. Mead Corp., 533 U.S. 218, 234–35 (2001); Skidmore v. Swift & Co., 323 U.S. 134, 140 (1944)). Under this standard, according to the majority, the "preamble does not merit deference" because it represented an abrupt shift in the rule as proposed without notice or opportunity for comment and because it "is at odds with what evidence we have of Congress' purposes, and it reverses the FDA's own longstanding position without providing a reasoned explanation, including any discussion of how state law has interfered with the FDA's regulation of drug labeling during decades of coexistence." *Id.* at 1201.

[97] *Id.* at 1194.

[98] *Id.* at 1199. The Court referenced legislative history indicating that, as originally proposed, the statute did provide a federal remedy, which was removed because "witnesses testified that such a right of action was unnecessary because common-law claims were already available under state law." *Id.* at 1199 n.7 (citing *Hearings on S. 1944 Before a Subcomm. of the S. Comm. on Commerce*, 73d Cong., 400, 403 (1933) (statements of W.A. Hines and J.A. Ladds)).

[99] Even the dissenters in *Wyeth*, however, apparently would have allowed state tort suits to proceed, provided that they did not find liability for warnings that complied with federal requirements. *See id.* at 1231 (Alito, J., dissenting) ("To be sure, state tort suits can peacefully coexist with the FDA's labeling regime, and they have done so for decades. But this case is far from peaceful coexistence. The FDA told Wyeth that Phenergan's label renders its use 'safe.' But the State of Vermont, through its tort law, said: 'Not so.'" (citation omitted)).

CONCLUSION

We believe that federalism is, in many respects, a pragmatic response to collective action problems among states. From this perspective, collective action principles provide a powerful tool for analyzing federalism issues, including preemption. In this Article we have applied those principles to consider the issues raised by remedial preemption, an increasingly important and frequently litigated issue. Remedial preemption cases raise fundamental questions of how to balance the national interests that support federal regulation against the legitimate and powerful state interests in preserving access to courts and judicial remedies for injured parties.

Our analysis suggests two essential points. First, preemption of state remedies is a form of "ceiling preemption" that is supported only when the primary purposes of federal regulation reflect concern that states have an incentive to overregulate. Such primary purposes include achieving uniform standards to reduce transactions costs, responding to the export of regulatory burdens to other states, and combating the NIMBY problem. Second, because state judicial remedies differ in important respects from state legislative rules, statutory language and purposes that support ceiling preemption of legislative rules do not necessarily support remedial preemption. In particular, the institutional structure of courts differs from that of legislatures. These differences insulate judges from the political pressures that create problematic incentives for legislatures. In addition, the states have an important interest in providing remedies and that interest is entitled to respect under preemption doctrine. Finally, the regulatory effect of common law tort remedies is less than that of legislative rules. As a result, it is often possible to accommodate the federal purpose within the remedial jurisprudence of the state courts without displacing that remedial authority entirely.

Ultimately, we do not claim that our approach will provide easy answers to difficult preemption problems that will likely depend on the particulars of the federal statute and the state remedies at issue. We do believe, however, that our approach focuses on the right questions.