

## BACKDOOR FEDERALIZATION

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Two primary arguments are advanced for the contemporary functional importance of federalist constraints on centralized political power. The first is captured in Justice Brandeis's famous invocation of the states as the laboratories of democracy in which "a single courageous State" may blaze new paths by trying "novel social and economic experiments." The second ties the smaller, decentralized scale of subnational units to a more robust democratic accountability, by which "government is brought closer to the people, and democratic ideals are more fully realized." This Article is largely about circumstances in which these two arguments for federalism fail. The question that concerns us is what happens when one state's experimentation poses "risks to the rest of the country," in the form of spillover effects that adversely affect citizens of other states. In such circumstances, not only may the benefits of heterogeneity fail, but also the citizens of other states are deprived of the political means of compelling democratic accountability on economic actors shielded by other states' claims of sovereignty.

In this Article, we address the emergence of partial federalization of areas historically governed by state law. Our approach is to think of the battles over federalism as running across two dimensions. The more familiar is the question of which law controls, state or federal. But a second dimension is the battle over which forum should control, state or federal, and which is to be the catalyst for new legal norms. Focusing on the rise of federal preemption of state law, on the expansion of the federal forum through federal question subject matter jurisdiction or the newly minted Class Action Fairness Act, and on the constitutional override of matters formally assigned to state law, such as punitive damages, we hope to highlight and explain a quiet federalization of vital areas of law—one far less noticed than the heavily (and perhaps overly) publicized limitations on federal regulation of internal matters of state governance. Our main argument is that the U.S. Supreme Court

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*has, in preemption and forum allocation cases, attempted to capture the considerable benefits that flow from national uniformity and to protect an increasingly unified national (and international) commercial market from the imposition of externalities by unfriendly state legislation. We hope to give a broader rendition of the legal response to market pressures toward predictability and uniformity than would emerge from a narrow focus on formal constitutional doctrine. We also aim to underscore aspects of “horizontal federalism”—namely, policing relations between the states—that have tended to be obscured by the looming shadow of “vertical federalism”—namely, the balance of power and division of labor between federal and state sources of authority.*

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## INTRODUCTION

Two primary arguments are advanced for the contemporary functional importance of federalist constraints on centralized political power. The first is captured in Justice Brandeis’s famous invocation of the states as the laboratories of democracy in which “a single courageous State” may blaze new paths by

trying "novel social and economic experiments."<sup>1</sup> The second ties the smaller, decentralized scale of subnational units to a more robust democratic accountability by which "government is brought closer to the people, and democratic ideals are more fully realized."<sup>2</sup> Each of these arguments fits well with concerns over the centralization of power inherited from the history of the twentieth century. Federalism, understood in its contemporary role as a vindication of state authority relative to the federal government, stands, as claimed by Judge Easterbrook, as an antidote to the "central planner," the figure of mythic economic inefficiencies and staunch antidemocratic propensities to totalitarianism.<sup>3</sup> While perhaps these claims saddle the dual sovereignty of federalism with more historic weight than it might bear, the focus on economic heterogeneity and democratic accountability is certainly critical.

This Article is largely about circumstances in which these two arguments for federalism fail. While Justice Brandeis's aphorism about the states as laboratories of democracy is oft repeated, the tail end of his claim tends to get lost. Brandeis sought to leave open the prospect that "a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments *without risk to the rest of the country*."<sup>4</sup> The question that concerns us is what happens when claims of state sovereignty do pose risks to the rest of the country, when the experiments of democracy within one state's borders have spillover effects that adversely affect citizens of other states.<sup>5</sup> In such circumstances, not only may the benefits of heterogeneity and interstate competition fail, but also the citizens of other states are deprived of the political means of compelling democratic accountability on economic actors shielded by other states' claims of sovereignty.

The novelty of our approach is to think of the battles over federalism as running across two dimensions. The more familiar is the question of which law controls, state or federal. But a second dimension is the battle over which forum should control, state or federal, and which is to be the catalyst for new legal

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1. *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting).

2. DAVID L. SHAPIRO, *FEDERALISM: A DIALOGUE* 91-92 (1995).

3. *In re Bridgestone/Firestone, Inc.*, 288 F.3d 1012, 1020 (7th Cir. 2002) (Easterbrook, J.) ("Efficiency is a vital goal of any legal system—but the vision of 'efficiency' underlying this class certification is the model of the central planner.").

4. *New State Ice Co.*, 285 U.S. at 311 (Brandeis, J., dissenting) (emphasis added).

5. We use the terms "spillover effects" and "externalities" interchangeably, though we recognize the different nuances associated with each term. See David G. Post & David R. Johnson, "Chaos Prevailing on Every Continent": *Towards a New Theory of Decentralized Decision-Making in Complex Systems*, 73 CHI.-KENT L. REV. 1055, 1060 n.12 (1998) ("The notion of a spillover effect is similar to the familiar concept of an 'externality.' In its most common usage, an 'externality' describes a spillover effect that has the additional characteristic that it is not the subject of a market transaction.").

norms. With a two-by-two matrix corresponding to these substantive and procedural dimensions, we aim to underscore aspects of “horizontal federalism”—namely, policing relations between the states<sup>6</sup>—that have tended to be obscured by the looming shadow of “vertical federalism”—namely, the balance of power and division of labor between federal and state sources of authority. By approaching the topic indirectly, focusing primarily on what Richard Fallon terms the “subconstitutional” domain of preemption and forum selection,<sup>7</sup> we hope to give a broader rendition of the legal response to market pressures toward predictability and uniformity than would emerge from a narrow focus on formal constitutional doctrine.

Our main argument is that the U.S. Supreme Court has, in preemption and forum-allocation cases, attempted to capture the considerable benefits that flow from national regulatory uniformity and to protect an increasingly unified national (and international) commercial market from the imposition of externalities by unfriendly state legislation.<sup>8</sup> We highlight the role that such

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6. We use the term “horizontal federalism,” as it has evolved in the literature, to address federalist concerns raised by allocation of authority and relations among the states. Our concern with state predation on other states is, in some ways, the converse of that raised by Lynn Baker and Ernest Young. See, e.g., Lynn A. Baker & Ernest A. Young, *Federalism and the Double Standard of Judicial Review*, 51 DUKE L.J. 75, 111 (2001) (arguing that political safeguards undoubtedly protect the states from some vertical threats, but do nothing to address the horizontal problem of federal “homogenization” of diverse state policy preferences, which imposes burdens on some states to the benefit of other states); Lynn A. Baker, *Should Liberals Fear Federalism?*, 70 U. CIN. L. REV. 433, 434–35 (2002) (arguing that federalism provides “outlier” or “minority” states protection from federal homogenization or “horizontal aggrandizement”). Others have pursued a broader structural understanding of horizontal federalism. See, e.g., Scott Fruehwald, *The Rehnquist Court and Horizontal Federalism: An Evaluation and a Proposal for Moderate Constitutional Constraints on Horizontal Federalism*, 81 DENV. U. L. REV. 289, 292 (2003) (arguing that “greater constraints on horizontal federalism should be created in a principled manner based on a neutral reading of the Constitution’s structural provisions”—namely, the Due Process, Full Faith and Credit, and Dormant Commerce Clauses); Gillian Metzger, *Congress, Interstate Relations, and Article IV*, at 3 (Nov. 2, 2005) (unpublished manuscript), available at <http://www.law.virginia.edu/home2002/pdf/workshops/0506/metzger.pdf> (“[A]lthough writing on vertical federalism abounds, the challenges and dilemmas of horizontal federalism are underappreciated in American constitutional scholarship.”).

7. Alternatively, we might characterize the domain of preemption and forum selection as “second order constitutionalism,” highlighting the role of the U.S. Supreme Court in furthering a certain vision of federal structures through its interpretive decisions that allocate power among institutional actors in these highly technical, fact-specific arenas. On this view, then, preemption and forum-allocation decisions are “constitutional,” though in a less-obvious manner than, for example, the Eleventh Amendment sovereign immunity cases, which are more-narrowly focused on formal proclamations on the “first order” interpretations of the Constitution.

8. While our account focuses on the commercial market in the United States, significant implications can be drawn from the increasing globalization of commercial relations. First, the issues that concern us are at the heart of contemporary debates regarding the formation of new constitutional regimes, as in South Africa, and the development of the European Union. See, e.g., S. AFR. CONST. 1996 § 44(2) (“Parliament may intervene, by passing legislation . . . with regard to a matter falling within [the following] functional area[s] . . . when it is necessary—(a) to maintain national security; (b) to maintain economic

functional principles can play in illuminating the contemporary Court's interpretive method across substantive and procedural areas of the law relating to commercial matters.<sup>9</sup> Rather than standing as an ally of state autonomy against the encroachments of the federal behemoth—the exaggerated but commonplace reading of the Court's highly publicized federalism rulings on the scope of the Eleventh Amendment<sup>10</sup>—the Court appears to be a willing partner of Congress in providing federal oversight to state interference with the national market.<sup>11</sup>

We can project the Court's work in preemption cases across a spectrum of congressional efforts to exert a federal interest. At one pole are statutes such as the Employee Retirement Income Security Act of 1974 (ERISA)<sup>12</sup> or the Copyright Act,<sup>13</sup> in which field preemption of the substantive law is accompanied by exclusive federal-court jurisdiction. In such cases, the only issue is the boundaries of the field. At the other extreme are Dormant Commerce Clause cases in which the Court has to define the federal interest in the absence of congressional action. In between are the difficult cases in which the Court assesses Congress's interest in protecting the rational operation of the national

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unity; (c) to maintain essential national standards; (d) to establish minimum standards required for the rendering of services; or (e) to prevent unreasonable action taken by a province which is *prejudicial to the interests of another province* or to the country as a whole.”) (emphasis added); Matthias Kumm, *Constitutionalizing Subsidiarity in Integrated Markets: The Case of Tobacco Regulation in the European Union*, 12 EUR. L.J. 503 (2006). Second, it may well be that, as a functional matter, cross-national competition will replace that of local experimentation and interstate competition—thus significantly reframing, and adding an international dimension to, the regulatory competition and federalism debates in the United States.

9. We deliberately limit our federalism inquiry to functional accounts of the control of substantive law and the appropriate judicial forum for its enforcement. (Our sample set of cases is described *infra* note 60.) While a conventional approach in political science or economics, functionalism takes a back seat to legal, doctrinal analysis in federal courts. We leave to one side the debates about the original and textual commitments to different levels of state regulatory independence. Likewise, we make no attempt to intervene in the separation of powers debate surrounding the interplay of domestic political structures—including the Court, Congress, and administrative agencies. Finally, by focusing on federal courts' interpretive methodology, we put to one side political economy stories based upon interest-group politics. By pursuing—somewhat unidimensionally—our functionalist account, we hope to shed new light on this highly ploughed terrain.

10. A number of critical commentators have argued that the Court's wholehearted embrace of state autonomy in its Eleventh Amendment jurisprudence has had little practical impact on protecting the states from litigation. See, e.g., John C. Jeffries, Jr., *In Praise of the Eleventh Amendment and Section 1983*, 84 VA. L. REV. 47, 49 (1998) (“[F]or all its virtues, Eleventh Amendment scholarship neglects a crucial fact: The Eleventh Amendment almost never matters. More precisely, it matters in ways more indirect and attenuated than is usually acknowledged.”). See generally Henry Paul Monaghan, *The Supreme Court, 1995 Term—Comment: The Sovereign Immunity “Exception,”* 110 HARV. L. REV. 102 (1996).

11. In addition to courts and Congress, federal regulatory agencies have also been active in the preemption of state law. See Catherine M. Sharkey, *Preemption by Preamble: Federal Agencies and the Federalization of Tort Reform*, 56 DE PAUL L. REV. (forthcoming 2007).

12. Employee Retirement Income Security Act of 1974 (ERISA), Pub. L. No. 93-406, 88 Stat. 829 (codified in scattered sections of 26 U.S.C. and 29 U.S.C.).

13. Copyright Act, Pub. L. No. 94-553, 90 Stat. 2541 (1976) (codified as amended at 17 U.S.C.).

market by coordinating state regulation. Products liability cases occupy this middle ground in the federalization process because of the characteristically incomplete manner in which Congress legislates in this area. Typically, Congress acts, in limited product realms, to define standards of liability but leaves to state law the need to provide remedies—an incomplete regulatory regime fraught with the capacity for federal-state conflict.

Within this framework, we address the emergence of partial federalization of commercial areas historically governed by state law. Focusing on the rise of federal preemption of state law, on the expansion of the federal forum through federal question subject matter jurisdiction or the newly minted Class Action Fairness Act of 2005,<sup>14</sup> and on the constitutional override of matters formally assigned to state law, such as punitive damages, we hope to highlight and explain a quiet federalization of vital areas of law—one far less noticed than the heavily (and perhaps overly) publicized limitations on federal regulation of internal matters of state governance.

Our hope is that by examining contemporary areas of federalization of either the substantive law or the forum we can provide a logic to the less examined, though perhaps more significant, areas in which law has been substantially remolded to meet the demands of the expanded scope of the market. Our account of what we term backdoor federalization, however, is part of a rich historical evolutionary tale. We use the term “federalization” in the connotation that would ring familiar to the debates of the founding generation, as shorthand for a common national law governing national market activity. We focus on the incompletely realized and undertheorized attempts of federal courts (particularly the Supreme Court) to mediate the tensions between the claimed commitment to the states as sovereign overseers of the quotidian affairs of their citizens and the reality that the lives of citizens are increasingly accountable to broader market commands. Moreover, we identify pressure points where the federal courts may play an especially important role in facilitating transitions to more stable equilibria where the substantive law and forum are aligned.

Our goal in part is to provide another dimension to the federalism debates that embroil constitutional law. When examined as part of the tension between expanding market demands and the original grant of power to the states, the process of federalization, as we term it, extends beyond the narrow reach of state immunity from federal law and reaches more deeply into the domain of preemption, forum allocation, and other manifestations of legal oversight of commerce.

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14. Class Action Fairness Act of 2005 (CAFA) (to be codified in scattered sections of 28 U.S.C.).

# I. MATRIX: "SUBSTANTIVE LAW" BY "PROCEDURAL FORUM"

We begin with a stylized two-by-two matrix, designed to accentuate our framework of thinking about federalization across two dimensions: substantive law (federal or state) and procedural forum (federal or state). Quadrant IV is the domain of the bulk of private common law—torts and contracts—traditionally within the province of the states; both the substantive state law and the forum align to provide command of citizens' primary conduct. This equilibrium is shaken, however, as market conduct expands beyond local command. Specifically, state-imposed rules, such as tort obligations and remedies for their breach, may be orthogonal to the need to coordinate an increasingly national market for goods and services and to police outlier states.

A strong undercurrent of our analysis is that the push toward federal standards and the federal forum flows from the need to coordinate an increasingly national (let alone international) market for goods and services with the inherited presumption of state-level legal oversight. These exigencies galvanize a drive toward federal standards and the federal forum, which can be depicted in our matrix as momentum away from Quadrant IV, toward Quadrant I.

		Substantive Law	
		<i>Federal</i>	<i>State</i>
Procedural Forum	<i>Federal</i>	I	II
	<i>State</i>	III	IV

The drive toward Quadrant I—the domain of federal law and forum—is evident in the formal recognition by the Supreme Court of both the broad sweep of federal law (the subject of Part II) and the expansive use of federal jurisdiction to control adjudication of claims (the subject of Part III). National law, presiding over a national market, replaces state law as commander of citizens' primary conduct. And coherence is maintained in the move from Quadrant IV to Quadrant I, where the source of law (federal) is once again aligned with the forum for resolution of the legal dispute (federal).

In many ways, this argument is a familiar one across American constitutional history, reflected in the historic battle between the federalist and antifederalist wings of American political thought. The premise of dual federalism has run up against the demands of a national market time and again.

Whether in the initial efforts to secure credit across the fledgling nation,<sup>15</sup> or under the Taft Court's vision of a compelling economic integration,<sup>16</sup> or under the demands of an internet-driven erasure of state and, increasingly, national lines, efforts to preserve autonomous domains of state regulatory sovereignty repeatedly confront the inexorable logic of the market. Even the contemporary Court, toying with state autonomy at the margins of the Eleventh Amendment, nonetheless retreats to the sweeping nationalism of the New Deal era when California seeks to secede from the federal regulation of marijuana.<sup>17</sup>

#### A. Historical Evolution: National Law for a National Market

Quadrant I is inhabited by national legislation, enacted pursuant to Congress's broad Commerce Clause powers, particularly federal regulation with broad preemptive force. Over the last century, the powers of Congress have been greatly expanded, in large part because of a recognition that we live in a world with an increasingly interconnected national commercial market. As markets become more national, the tension arising out of competing sovereign commands threatens private ordering, and the cry for uniformity of regulation becomes more pronounced. Commerce Clause jurisprudence has been animated by a self-conscious desire on the part of the Supreme Court to preserve and protect "the single, national market still emergent in our own era."<sup>18</sup> Congress may regulate and protect both the channels of interstate

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15. See *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819).

16. See, e.g., *Lambert v. Yellowley*, 272 U.S. 581, 591–97 (1926) (upholding broad use of commerce power during Prohibition in regulation of physicians prescribing alcohol); see also Robert Post, *Federalism in the Taft Court Era: Can It Be "Revived"?*, 51 DUKE L.J. 1513, 1523–26 (2002) (describing the effect of World War I's revolutionary expansion of federal power on the Court's approach to federalism).

17. *Gonzales v. Raich*, 125 S. Ct. 2195, 2198, 2215 (2005).

18. *United States v. Lopez*, 514 U.S. 549, 568 (1995) (Kennedy, J., concurring) ("The history of the judicial struggle to interpret the Commerce Clause during the transition from the economic system the Founders knew to the single, national market still emergent in our own era counsels great restraint before the Court determines that the Clause is insufficient to support an exercise of national power."). Richard Fallon offers an alternative—though not inconsistent—explanation based on path dependence. See Richard H. Fallon, Jr., *The "Conservative" Paths of the Rehnquist Court's Federalism Decisions*, 69 U. CHI. L. REV. 429, 436 (2002) ("[C]onsiderations of path dependence must loom large in any plausible explanation of why the Court has acted with such relative caution in reshaping constitutional doctrines involving Congress's general regulatory powers and its related authority to impose obligations on state and local governments under the Commerce and Spending Clauses.").

As numerous commentators have recognized, the same nationalist impulse is equally (if not more) true of the Supreme Court's jurisprudence under the Dormant Commerce Clause, where the Court seeks to protect national markets from discriminatory laws passed by states to impose burdens upon out-of-state goods and shift externalities to neighboring states. See, e.g., SHAPIRO, *supra* note 2, at 74 n.67 (acknowledging that the Dormant Commerce Clause furthers federalism's



commerce and the instrumentalities, persons, or things in interstate commerce.<sup>19</sup> More controversially, Congress has the power to regulate activities that substantially affect interstate commerce.<sup>20</sup> The main thrust of Commerce Clause jurisprudence—both historically,<sup>21</sup> and as embodied in contemporary doctrine—reflects a judicial judgment that Congress should be given broad deference in defining which important matters, like drugs and agriculture, require a uniform nationalist agenda.

We need not be long detained to establish the sweep of the recognized federal interest in national market conduct under current doctrine. The most broad-gauged exposition comes in *Wickard v. Filburn*,<sup>22</sup> a case from the era of the Court's confrontation with the expansive regulatory reach of the New Deal. As we subsequently develop, *Wickard*'s broad reading of federal power emerged from the same era as *Erie Railroad Co. v. Tompkins*,<sup>23</sup> the quintessential guarantor of state common law prerogatives. The question posed in *Wickard* was whether the federal Commerce Clause interest in regulating wheat

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values by "protecting state interests against unfair treatment by other states"); Jenna Bednar & William N. Eskridge, Jr., *Steadying the Court's "Unsteady Path": A Theory of Judicial Enforcement of Federalism*, 68 S. CAL. L. REV. 1447 (1995); Viet D. Dinh, *Reassessing the Law of Preemption*, 88 GEO. L.J. 2005, 2110 (2000) (characterizing Dormant Commerce Clause jurisprudence as resting upon the "uniquely federal interest in maintaining national unity and uniformity in interstate economic regulation"); Henry P. Monaghan, *Foreword: Constitutional Common Law*, 89 HARV. L. REV. 1, 17 (1975) (asserting that the failure to appreciate the nationalist impulse of the Dormant Commerce Clause cases "is largely because the sanction of nullity for violation of the free-trade policy is the same as under a *Marbury*-like invalidation and does not 'look like' the affirmative creation of federal regulatory rules").

In recent years, "the Court has done more to tighten than to loosen the restrictions that the so-called dormant Commerce Clause imposes on state and local governments." Fallon, *supra*, at 432. Recently, the Supreme Court reiterated that "[o]ur Constitution 'was framed upon the theory that the peoples of the several states must sink or swim together.'" *Am. Trucking Ass'n v. Mich. Pub. Serv. Comm'n*, 125 S. Ct. 2419, 2422 (2005) (quoting *Baldwin v. G.A.F. Seelig, Inc.*, 294 U.S. 511, 523 (1935)). A negative command arising from the Commerce Clause prevents states from "jeopardizing the welfare of the Nation as a whole," by "plac[ing] burdens on the flow of commerce across its borders that commerce wholly within those borders would not bear." *Id.* at 2423 (quoting *Okla. Tax Comm'n v. Jefferson Lines, Inc.*, 514 U.S. 175, 180 (1995)).

19. *Perez v. United States*, 402 U.S. 146, 150 (1971).

20. *Lopez*, 514 U.S. at 558–59.

21. There is little dispute that the Constitution fundamentally sought to overcome the barriers to economic integration under the Articles of Confederation. Both economic liberty and innovation under the Articles were thwarted as states often imposed taxes and duties on goods from other states, serving to fragment the economic union of the states and their citizens. The Constitutional Convention was called by the framers to end interstate rivalries under the "conviction that in order to succeed, the new Union would have to avoid the tendencies toward economic Balkanization that had plagued relations among the Colonies and later among the States under the Articles of Confederation." *Granholm v. Heald*, 544 U.S. 460, 472 (2005) (quoting *Hughes v. Oklahoma*, 441 U.S. 322, 325–26 (1979)).

22. 317 U.S. 111 (1942).

23. 304 U.S. 64 (1938).

production could reach a farmer's crops grown for private consumption, with no intent to sell that wheat on any market. In upholding the regulation, the Court found that the power to regulate interstate commerce could extend to the protection of the integrity of commercial markets, even from commodities that were not themselves subject to commercial transactions.<sup>24</sup> While *Wickard* could perhaps be characterized as the in extremis version of the Court's retreat from its early attempts to derail the New Deal, the Court has now reaffirmed the broad sweep of *Wickard*, and then some.

In *Gonzales v. Raich*,<sup>25</sup> a 2005 medical marijuana case, the issue presented was whether the federal Controlled Substances Act (CSA)<sup>26</sup> could constitutionally be used to prohibit the cultivation and use of marijuana in compliance with California state law.<sup>27</sup> The challenge to the CSA was quite narrow: It asked whether the home cultivation of marijuana that was not intended to be sold and could not be sold, and which was authorized by California's Compassionate Use Act,<sup>28</sup> could nonetheless be subjected to congressional oversight.

Despite its billing as the protector of states' rights, the Court gave almost as expansive an account of federal power under the Commerce Clause as could be imagined. In order to sustain the claimed federal interest, the Court had to find that, as applied, the CSA was a valid exercise of the federal legislative power, notwithstanding the lack of engagement of the home-grown marijuana with any economic markets, intrastate or interstate.<sup>29</sup> A key

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24. The Court upheld the application of the Agricultural Adjustment Act to Filburn, who had exceeded his acreage allotment by roughly twelve acres, even though his wheat was not intended to be sold in the interstate market, never left his farm, and was simply fed to his livestock. *Wickard*, 317 U.S. at 114. The Court found that, while Filburn's conduct alone might not influence the supply or demand for wheat, the aggregation of all similarly situated people could have an enormous impact. *Id.* at 127–29.

25. 125 S. Ct. 2195 (2005).

26. Controlled Substances Act (CSA), 21 U.S.C. §§ 801–904 (2000). The main objectives of the CSA were “to conquer drug abuse and to control legitimate and illegitimate traffic in controlled substances.” *Raich*, 125 S. Ct. at 2203. To effectuate these objectives, the statute provided for a system that allowed drugs to be categorized into five different schedules: Marijuana was categorized by Congress as a Schedule I drug, “categorized as such because of [its] high potential for abuse, lack of any accepted medical use, and absence of any accepted safety for use in medically supervised treatment.” *Id.* at 2204 (citing 21 U.S.C. § 812 (b)(1)).

27. *Id.* at 2199.

28. The California Compassionate Use Act of 1996 was designed to ensure that seriously ill residents would be able to obtain marijuana for medical purposes when such treatment was deemed appropriate and recommended by a physician. CAL. HEALTH & SAFETY CODE § 11362.5(b)(1)(A) (West 2005).

29. Justice Stevens wrote for a five-justice majority. Justice Scalia concurred in the judgment on different grounds (the Necessary and Proper Clause), so six justices voted to reverse the Ninth Circuit Court of Appeals. *Raich*, 125 S. Ct. at 2198, 2215–16.

assumption of the majority's reasoning is that, at least in the case of fungible commodities such as wheat and marijuana, there exists a single, unified economic market. Based on this view of the national market, it was then within the power of Congress to assume authority over all practices that pose a threat to the national market or policies. Thus, the federal power could reach and regulate the entire class of activities—such as production and use of wheat or drugs. Relying heavily upon the “aggregation principle” of *Wickard*, the Court reasoned:

In *Wickard*, we had no difficulty concluding that Congress had a rational basis for believing that, when viewed in the aggregate, leaving home-consumed wheat outside the regulatory scheme would have a substantial influence on price and market conditions. Here too, Congress had a rational basis for concluding that leaving home-consumed marijuana outside federal control would similarly affect price and market conditions.<sup>30</sup>

For the majority, once aggregation is accepted, it almost logically follows that Congress must have some power to counteract the individual instances of localized market conduct which, when grouped together, might thwart Congress's overall interstate regulatory purposes.

The *Raich* dissenters inveighed against Congress's clear abrogation of state sovereignty in an area of traditional state concern. Invoking “[o]ne of federalism's chief virtues,” as explicated by Justice Brandeis's dissent in *New State Ice Co. v. Liebmann*,<sup>31</sup> Justice O'Connor extolled “the role of States as laboratories,” buttressed by “[t]he States' core police powers [that] have always included the authority to define criminal law and to protect the health, safety, and welfare of their citizens.”<sup>32</sup> The majority's reasoning, the dissent argued, would lead inevitably to a theory of general federal police power—a theory rejected by the framers, as well as by the handful of recent cases limiting the reach of federal power.<sup>33</sup>

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30. *Id.* at 2207. Justice Scalia's separate concurrence in *Raich* provides an even broader basis for congressional regulation. Congress's power derives, according to Justice Scalia, not from the Commerce Clause, but instead from the Necessary and Proper Clause:

[T]he authority to enact laws necessary and proper for the regulation of interstate commerce is not limited to laws governing intrastate activities that substantially affect interstate commerce. Where necessary to make a regulation of interstate commerce effective, Congress may regulate even those intrastate activities that do not themselves substantially affect interstate commerce.

*Id.* at 2216 (Scalia, J., concurring).

31. 285 U.S. 262 (1932).

32. *Raich*, 125 S. Ct. at 2220–21 (O'Connor, J., dissenting).

33. See, e.g., *id.* at 2236 (Thomas, J., dissenting) (“[T]he Framers understood what the majority does not appear to fully appreciate: There is a danger to concentrating too much, as well as too little, power in the Federal Government.”). The dissent relied unsuccessfully on *United States v. Lopez*, 514 U.S. 549 (1995), for some boundaries on the Commerce Clause powers, together with *United States v. Morrison*, 529 U.S. 598 (2000), for the authority of the states over matters of traditional state regulation. *Raich*, 125 S. Ct. at 2220–21 (O'Connor, J., dissenting).

What of course unites both the majority and dissent—and what is key for our purposes—is the shared belief in the existence of a unified national economic market for goods and services.<sup>34</sup> Because the existence of a national market was not in dispute, the dissent feared that including intrastate activity not geared to any sales at all would give Congress the power to reach virtually any intrastate conduct it deemed harmful or an obstacle to its regulation. Whatever the strain in *Wickard* in placing domestic wheat production within the scope of interstate commerce, at least there was an interstate wheat market that Congress sought to nurture through its regulation. In *Raich*, by contrast, the question was whether Congress's authority over interstate commerce could override California's experiment with legalizing medically prescribed marijuana that was grown and consumed outside any chain of sale. The Court concluded that Congress's ample powers over commerce could reach any "fungible commodity for which there is an established, albeit illegal, interstate market."<sup>35</sup> If anything, *Raich* makes *Wickard* appear tame in restricting its sights to conventional markets whose vitality Congress actually sought to promote.

With *Raich*, the Supreme Court reaffirmed its commitment to broad federal power and a nationalist agenda.<sup>36</sup> *Raich* is the contemporary embodiment of a broad and sweeping nationalism: In areas affecting commerce in which Congress itself deems it important enough to legislate, the power of the states is displaced notwithstanding how legitimate their own needs and policies may be.<sup>37</sup>

34. Justice Thomas is explicit on this point:

The majority's rewriting of the Commerce Clause seems to be rooted in the belief that, unless the Commerce Clause covers the entire web of human activity, Congress will be left powerless to regulate the national economy effectively. The interconnectedness of economic activity is not a modern phenomenon unfamiliar to the Framers.

*Id.* at 2236 (Thomas, J., dissenting) (internal citations omitted).

35. *Id.* at 2206.

36. Indeed, for a long unbroken stretch until 1995, "the Court ha[d] not overruled a single case upholding congressional power to regulate commercial activities." Fallon, *supra* note 18, at 432; see also Bednar & Eskridge, *supra* note 18, at 1451 ("For sixty years (1936 to 1995), the Court deferred to Congress in every Commerce Clause case it decided."). In *United States v. Lopez*, 514 U.S. 549 (Gun Free Schools Act), and *United States v. Morrison*, 529 U.S. 598 (Violence Against Women Act), the Court struck down federal statutes arguably aimed at intrastate, noneconomic activity. We do not engage here the controversial definition of "economic" for constitutional purposes. For an insightful criticism of the "categorization" of federalism as distinctly economic or noneconomic, see Judith Resnik, *Categorical Federalism: Jurisdiction, Gender, and the Globe*, 111 YALE L.J. 619 (2001).

37. Consider in this regard Justice Stevens's ringing endorsement of federal power:

The Supremacy Clause unambiguously provides that if there is any conflict between federal and state law, federal law shall prevail. It is beyond peradventure that federal power over commerce is "superior to that of the States to provide for the welfare or necessities of their inhabitants," however legitimate or dire those necessities may be.

*Raich*, 125 S. Ct. at 2212 (quoting *Maryland v. Wirtz*, 392 U.S. 183, 196 (1968)). Even more telling, perhaps, is Justice Thomas's dissent last Term in *Gonzales v. Oregon*, in which he lamented

## B. Disequilibrium: Federal Courts' Role in Facilitating Transition

The evolutionary drive toward federalization of law and forum will not, however, always be complete. The trends we analyze in Parts II and III are nonetheless consistent with the general thrust toward an expansive realm of federal law and federal forum. Our stylized two-by-two matrix, then, organizes the subconstitutional doctrines that are our main focus (preemption and forum allocation). In addition to illustrating the main thrust of movement away from Quadrant IV in the direction of Quadrant I, the matrix usefully identifies the fault lines, or pressure points, of this process of federalization. Within Quadrants II and III our focus will be on the ways in which federal courts play a significant role in facilitating transition toward alignment of substantive law and procedural forum—whether fueling the momentum toward Quadrant I, or the return back toward Quadrant IV.

## II. PREEMPTION AND FEDERALISM

Over the last half century, the powers of the federal government have expanded through an increasingly muscular reading of the Commerce Clause. With the broadened scope of federal power, the Supreme Court has engaged in the delicate balancing act inherent in a dual-sovereign world, increasingly determining whether state law has been preempted by federal laws, policies, and regulations.<sup>38</sup> Underlying the balance between federal and state power is the critical recognition that “[t]he extent to which a federal statute displaces (or preempts) state law affects both the substantive legal rules under which we live and the distribution of authority between the states and the federal government.”<sup>39</sup>

Curiously, however, the preemption cases have not played a dominant role in the perennial federalism debates, as if the question of the source of substantive law governing everyday conduct were not the core of the constitutional assignment of authority between the states and the federal government. Instead,

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that any attempt to limit congressional power “in a manner consistent with the principles of federalism and our constitutional structure” was “water over the dam.” *Gonzales v. Oregon*, 126 S. Ct. 904, 941 (2006) (Thomas, J., dissenting).

38. At least since *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819), and *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1 (1824), the Supreme Court has recognized the ability of federal law to trump inconsistent or conflicting state law.

39. Caleb Nelson, *Preemption*, 86 VA. L. REV. 225, 225–26 (2000). That said, “[t]he powers of the federal government and the powers of the state overlap enormously. Although the Constitution makes a few of the federal government’s powers exclusive, the states retain concurrent authority over most of the areas in which the federal government can act.” *Id.* at 225.

these cases have, in large part, ducked under the federalism radar that has commanded such constitutional and scholarly attention over the past quarter century. Perhaps because preemption issues turn largely on the corresponding claims of regulatory oversight, the preemption battles have been largely confined to the realm of statutory interpretation.<sup>40</sup> This view has prompted Michael Greve (and others) to pronounce that preemption cases are not about federalism at all.<sup>41</sup> In a similar vein, Richard Fallon has challenged commentators to “link[] the Supreme Court’s preemption cases to its federalism agenda.”<sup>42</sup>

40. To be sure, the cornerstone of preemption analysis is congressional intent: Did Congress intend to displace state law and, if so, to what extent? See, e.g., *Retail Clerks Int’l Ass’n Local 1625 v. Schermerhorn*, 375 U.S. 96, 103 (1963). Generally speaking, the U.S. Supreme Court has recognized that congressional preemption may be either express or implied. A given statute may include a specific provision in which the preemptive effect of the statute is delineated, giving rise to express preemption. Implied preemption is broken down further into two categories: “field” preemption and “conflict” or “obstacle” preemption. Field preemption exists when the congressional statute is written in such a way that it provides no room for the operation of state law on the subject. See, e.g., *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947). Conflict preemption is a narrower doctrine, recognizing state law to be preempted when it directly conflicts with existing federal law, or when state regulations interfere with or frustrate the implementation of congressional objectives. See, e.g., *Fla. Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142–43 (1963).

41. Michael S. Greve, *Federalism’s Frontier*, 7 TEX. REV. L. & POL. 93, 116–17 (2002). Justice Scalia has expressed “incredulity” about invocations of federalism in preemption cases. See, e.g., *AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366, 379 n.6 (1999) (terming the invocation of “States’ rights” by Justices Breyer and Thomas, in dissent, “peculiar” given that, even under their view, federal courts may bring to heel state commissions that are not regulating according to federal policy).

42. Fallon, *supra* note 18, at 462; see also Thomas W. Merrill, *The Making of the Second Rehnquist Court: A Preliminary Analysis*, 47 ST. LOUIS U. L.J. 569, 571 (2003) (noting that many sympathetic federalist readings of the Rehnquist Court decisions “cannot account for the continued willingness of the Court to find state laws preempted by federal regulation”). The puzzle is that the “Federalism Five” (former Chief Justice Rehnquist, former Justice O’Connor, and Justices Scalia, Kennedy, and Thomas) have been consistently pro-preemption, which is seemingly at odds with their respective disposition toward states rights, at least in the Eleventh Amendment and Commerce Clause areas. See Fallon, *supra* note 18, at 471–72 (noting that the “pro-federalism justices” found federal preemption in every one of the Court’s seven preemption cases during the 1999 and 2000 Terms); Daniel J. Meltzer, *The Supreme Court’s Judicial Passivity*, 2002 SUP. CT. REV. 343, 369–70 (“[O]f eight non-unanimous preemption decisions in the 1999, 2000, and 2001 Terms, Justice Scalia voted to preempt in all eight, the [former] Chief Justice and Justices O’Connor and Kennedy in seven each, and Justice Thomas in six. . . . Justices Souter, Ginsburg, and Breyer each voted to preempt only twice and Justice Stevens never voted to preempt.”).

By contrast, in the most comprehensive empirical study of voting lineups in preemption cases—analyzing 105 cases decided by the Rehnquist Court—Michael Greve and Jonathan Klick conclude that “[i]n contrast to federalism law, we find no clear decisional trend in preemption law. Moreover, we find no firm voting blocs and no swing vote.” Michael S. Greve & Jonathan Klick, *Preemption in the Rehnquist Court: A Preliminary Empirical Assessment*, 14 SUP. CT. ECON. REV. 43, 47 (2006).

We may nonetheless make some general observations about the voting patterns of individual Justices. Justice Stevens is the standard-bearer for voting against preemption (consistent with Fallon and Meltzer’s more limited samples). Justice Souter has likewise been adamant in the use of a presumption against preemption as a means of protecting the states’ traditional regulatory domain. See, e.g., *Engine Mfrs. Ass’n v. S. Coast Air Quality Mgmt. Dist.*, 541 U.S. 246, 259 (2004) (Souter, J.,

Scholars who attempt to view preemption doctrine as somehow providing an important account of the difficulties of the dual-sovereign premises of American constitutionalism tend to be dismissed either with cynicism or derision. The legal realist (or cynic) sees an ideological crusade, waged most recently in the name of substantive conservatism.<sup>43</sup> The traditional defender of federalism (or

dissenting). At the other extreme, Justice Scalia will more readily find for preemption, perhaps because of his "plain meaning" approach to interpretation and concomitant dislike of "artificial" presumptions. See, e.g., *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 548 (1992) (Scalia, J., concurring in part and dissenting in part) (finding all claims preempted and arguing against applying a "niggardly rule of construction" in what Justice Scalia considered a standard case of statutory construction). Justice Scalia, moreover, has a more nationalist—or perhaps federalist, as opposed to antifederalist—orientation than Justice Thomas, who has in significant cases sided with Justices Stevens or Souter. See, e.g., *Geier v. Am. Honda Motor Corp.* 529 U.S. 861, 886 (2000) (Stevens, J., dissenting, joined by Souter, Thomas, and Ginsburg, JJ.); *CSX Transp., Inc. v. Easterwood*, 507 U.S. 658, 679 (1993) (Thomas, J., concurring in part and dissenting in part, joined by Souter, J.) (arguing that none of respondent's claims was preempted and noting that "[r]espect for the presumptive sanctity of state law should be no less when federal pre-emption occurs by administrative fiat rather than by congressional edict"); see also Antonin Scalia, *The Two Faces of Federalism*, 6 HARV. J.L. & PUB. POL'Y 19 (1982). Justice Kennedy has likewise departed company from the "Federalism Five" in several cases, most notably joining Justice Blackmun's dissent in *Cipollone*, 505 U.S. at 531 (Blackmun J., concurring in part, concurring in the judgment in part, and dissenting in part, joined by Kennedy and Souter, JJ.) (finding none of the claims preempted). Finally, Justice Breyer, consistent with his pragmatic or functionalist approach, often finds that federal statutes preempt state tort law. In addition to his majority decision in *Geier*—which stands as a testament to the broad scope of conflict preemption—Justice Breyer penned separate concurrences in *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 503 (1996) (Breyer, J., concurring), and *Bates v. Dow Agrosciences, LLC*, 544 U.S. 431, 454 (2005) (Breyer, J., concurring), in which he expressed a willingness to give administrative agencies wide latitude to determine for themselves the preemptive scope of statutes within their purview.

43. See, e.g., Fallon, *supra* note 18, at 474 ("[T]here are a number of doctrinal areas in which the Court is more substantively conservative than it is pro-federalism."); *id.* at 471 ("Because federal preemption eliminates state regulatory burdens, preemption rulings have a tendency—welcome to substantive conservatives—to minimize the regulatory requirements to which businesses are subject."); see also Ruth Colker & Kevin M. Scott, *Dissing States?: Invalidation of State Action During the Rehnquist Era*, 88 VA. L. REV. 1301, 1343–45 (2002) (suggesting division falls along whether underlying state action is "liberal" or "conservative"); Frank B. Cross & Emerson H. Tiller, *The Three Faces of Federalism: An Empirical Assessment of Supreme Court Federalism Jurisprudence*, 73 S. CAL. L. REV. 741, 756, 767–68 (2000) (concluding, on the basis of a broad empirical study of Supreme Court voting patterns in federalism cases, that the political ideologies of justices play a significant role in explaining outcomes); Jonathan R. Macey, *Federal Deference to Local Regulators and the Economic Theory of Regulation: Toward a Public-Choice Explanation of Federalism*, 76 VA. L. REV. 265, 265 (1990) ("Conservatives and liberals alike extol the virtues of state autonomy whenever deference to the states happens to serve their political needs at a particular moment."); Edward L. Rubin & Malcolm Feeley, *Federalism: Some Notes on a National Neurosis*, 41 UCLA L. REV. 903, 948 (1994) ("[C]laims of federalism are often nothing more than strategies to advance substantive positions . . ."); David B. Spence & Paula Murray, *The Law, Economics, and Politics of Federal Preemption Jurisprudence: A Quantitative Analysis*, 87 CAL. L. REV. 1125, 1194 (1999) (demonstrating a strong trend toward preemption in a statistical analysis of lower federal-court opinions, which "highlights the irony of the status quo, in which modern preemption jurisprudence, administered by a largely Republican federal judiciary and motivated in part by conservative policy goals and a conservative (Coasean) philosophy of regulation, has facilitated a triumph of interest group politics").

naysayer) augurs the death of federalism as we know it: "The whole point of preemption is generally to force national uniformity on a particular issue, stifling state-by-state diversity and experimentation."<sup>44</sup>

Here, we seek to return to a centuries-old concern about the tension between state-based regulation and the commands of a national market. Contrary to the dismissive assertion that the preemption cases are simply a political battleground in the struggle between an overweening federal power and a beleaguered state authority, we advance instead a functionalist account, focusing on interests in promoting national uniformity and protecting against spillover effects.<sup>45</sup> Our aim is not to convince that functional concerns should displace statutory interpretation as a matter of doctrinal development.<sup>46</sup> Instead we seek to provide a positive, analytic framework for understanding the Rehnquist Court's decisions as consistent with a momentum toward

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44. Ernest A. Young, *The Rehnquist Court's Two Federalisms*, 83 TEX. L. REV. 1, 130 (2004); see also *id.* at 131 ("Doctrines limiting federal preemption of state law thus go straight to the heart of the reasons why we care about federalism in the first place."); Calvin Massey, *Federalism and the Rehnquist Court*, 53 HASTINGS L.J. 431, 508 (2002) ("[T]he failure of the Court to apply preemption doctrine sparingly, and with real attention both to Congress's intent and the values of federalism, will in the long run prove disastrous to . . . the very real values . . . inherent in federalism.").

In an interesting variant of this argument, Roderick Hills would apply a presumption against preemption not only as a useful means of protecting state autonomy, but, more importantly, as a means of encouraging robust debate in the federal legislative process. Roderick M. Hills, Jr., *Against Preemption: How Federalism Can Improve the National Legislative Process* 2, 15–30 (U. Mich. Law, Pub. Law & Legal Theory Research Paper No. 27, 2003), available at <http://ssrn.com/abstract=412000>. Hills's argument is discussed further *infra* note 51.

45. We do not claim originality in unearthing these criteria. See, e.g., Gary Schwartz, *Considering the Proper Federal Role in American Tort Law*, 38 ARIZ. L. REV. 917, 922 (1996) [hereinafter Schwartz, *American Tort Law*] ("The most obvious justifications for federal law that supersedes state law is that state law produces effects that are felt beyond the territorial limits of the states themselves or that there is some significant need for national uniformity in the content of legal rules."). At the same time, we attempt to link up these considerations—more accentuated in the torts and regulation literature—to the broader federalism debate. Our approach is, in this sense, the mirror image of that adopted by Alan Schwartz. Alan Schwartz, *Statutory Interpretation, Capture, and Tort Law: The Regulatory Compliance Defense*, 2 AM. L. & ECON. REV. 1, 2 (2000) [hereinafter Schwartz, *Statutory Interpretation*] ("[T]he appropriate preemptive reach of national safety laws implicates important issues of statutory interpretation and federalism. Prior studies of what is called the 'regulatory compliance defense' slight these broader issues because they take a tort perspective.").

46. That said, the functionalist approach is not entirely anathema to the way that the Court has self-consciously approached preemption cases. See, e.g., *Medtronic*, 518 U.S. at 486 ("Congress' intent . . . primarily is discerned from the language of the pre-emption statute and the 'statutory framework' surrounding it. Also relevant, however, is the 'structure and purpose of the statute as a whole,' as revealed not only in the text, but through the reviewing court's reasoned understanding of the way in which Congress intended the statute and its surrounding regulatory scheme to affect business, consumers, and the law.") (internal citations omitted). But see *Bates*, 544 U.S. at 459 (Thomas, J., concurring) (agreeing with the majority that preemption analysis should not amount to a "freewheeling judicial inquiry" into the tensions between state and federal objectives, but instead should attempt to discern the original meaning of the preemption provision enacted by Congress).



federalization over the long term.<sup>47</sup> More specifically, we seek to explain the drive toward federalization in numerous areas of the law with reference to two animating principles: (1) National market exigencies demand uniformity of treatment across the United States in interpreting federal regulations; and (2) states can neither export costs onto their neighbors nor compromise the ability of other states to have a reasonable set of regulations.<sup>48</sup> The first principle situates federalization within an account of coordination problems in which there is no individual strategy by which a sole actor can achieve socially optimal results. The second principle is a market application of the pollution problem in which individual actors face incentives to engage in harmful behavior because the benefits are localized to them (as with economic gains from coal-burning power plants) while the burdens are externalized to downstream communities.<sup>49</sup>

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47. Our interest, in other words, centers on federalism as a standard of policy more than as a formal constitutional doctrine.

48. These two principles—uniformity of regulation and protection from spillover effects—are intertwined concepts in the sense that one of the primary means of preventing states from externalizing costs of regulation is via implementation of a national regime. See generally Richard Briffault, *Taking Home Rule Seriously: The Case of Campaign Finance Reform*, 37 PROC. ACAD. POL. SCI. 35, 45 (1989) (arguing in the context of state campaign-finance reform that “[t]he law of preemption should be viewed as an attempt to reconcile the deep-seated tension between the local diversity that home rule creates and the need, in certain areas, for statewide uniformity. The argument for uniformity . . . is strongest when a local law will have considerable effects outside the local boundaries”).

49. The general theoretical framework for the imposition of costs on third parties is found in A.C. PIGOU, *THE ECONOMICS OF WELFARE* 134 (Transaction Publishers 2002) (1952), and Charles M. Tiebout, *A Pure Theory of Local Expenditures*, 64 J. POL. ECON. 416 (1956). For applications, see Richard L. Revesz, *Rehabilitating Interstate Competition: Rethinking the “Race-to-the-Bottom” Rationale for Federal Environmental Regulation*, 67 N.Y.U. L. REV. 1210, 1222 (1992) (“The presence of interstate externalities is a powerful reason for intervention at the federal level: because some of the benefits of a state’s pollution control policies accrue to downwind states, states have an incentive to underregulate.”); Bruce L. Hay, *Conflicts of Law and State Competition in the Product Liability System*, 80 GEO. L.J. 617, 617 (1992) (“When states can pass laws whose costs are borne by outsiders, self-interested behavior by each makes all worse off.”); Vicki Been, *“Exit” as a Constraint on Land Use Exactions: Rethinking the Unconstitutional Conditions Doctrine*, 91 COLUM. L. REV. 473, 509 (1991) (positing the need for coordinated federal regulation “to avoid underregulation”).

“Preemption,” in other words, “is a way of arresting [states’] perennial quest for a free lunch.” Michael S. Greve, *Subprime, but not Half-Bad*, AEI FEDERALIST OUTLOOK, Sept.–Oct. 2003, available at [http://www.aei.org/publications/pubID.19271/pub\\_detail.asp](http://www.aei.org/publications/pubID.19271/pub_detail.asp). Greve explicates the “free lunch” metaphor as follows:

So long as the costs of regulation accrue principally within each regulating state, states should generally be free to do as they please. Overregulated citizens and businesses tend to leave, and that threat will at some point discipline the politicians setting the rules. In contrast, when states impose the costs of their regulatory experiments on citizens in *other* states, the folks who foot the bill can neither run away nor vote the bums out of office. For that reason, state politicians are extremely creative in exporting the costs of their schemes.

*Id.*

We distinguish two types of preemption, “vertical” and “horizontal.” Vertical preemption appears as the more intrusive assertion of a federal interest that, in the extreme, clears the field from all state participation, an analog to the negative Commerce Clause powers that remove all state actors from an area entrusted to federal stewardship.<sup>50</sup> These cases do appear as restrictions on the powers of the states—and rightly so. Perhaps the strongest case for national uniformity is found along the vertical dimension of federalism, mediating the role between the national and state governments in dealing with foreign relations. When what is at stake is a national, integrated scheme for employee benefits, labor law, carrier liability, or arbitration, for example, the vertical dimension to the federalism interest points to the central role of national power in solving the autarchic impulses that doomed the Articles of Confederation and prompted the creation of the modern federal state.

But the preemption cases that interest us the most are the horizontal preemption cases in which the assertion of a federal interest emerges as a necessary default to prevent states from imposing externalities on each other or to overcome the inability to rationalize coordinated national standards for goods and services. Congress frequently regulates activities because state regulation, or lack of regulation, of those activities imposes external costs on neighboring states. Building on this insight, Roderick Hills has noted, “The whole point of the federal scheme is to suppress state creativity, which might consist only in creatively gaining benefits for their own citizens at the expense of non-residents.”<sup>51</sup> As Justice Brandeis understood, experimentation—a chief virtue of federalism—may, nonetheless, have nefarious spillover effects upon “the rest of the country.”<sup>52</sup> The same concession is made by even the most

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50. See *supra* note 18.

51. Hills, *supra* note 44, at 3–4. Hills takes this insight in a different direction from ours. His main focus is the way in which state legislation can set the federal lawmaking agenda. He argues for a “clear statement” rule presumption against preemption on the ground that this will enhance the democratic accountability of Congress. In short, Hills contends that nonfederal politicians have an incentive to externalize the costs of regulatory initiatives on out-of-state interests. This will lead business groups, who have a strong combined interest in uniformity, to lobby Congress for preemptive legislation. Public interest groups will then oppose such legislation, leading to a full debate in the general population. See generally *id.*

Hills challenges Alan Schwartz’s contention that courts should adopt, as a default construction of federal regulatory statutes, the view that Congress intended to exculpate from liability firms that comply with regulatory standards, on the ground that it would be easier for Congress to correct such a construction if it is not what was intended. See Schwartz, *Statutory Interpretation*, *supra* note 45.

52. *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting). While state experimentation is, in theory, an excellent idea—because it facilitates gradualism, promotes institutional learning, and addresses localized needs and constituencies—in practice [s]uch experimentation carries political risks, which are principally from the fact that the governmental experimenters, and the interest groups that hang around them, have huge stakes

ardent defendants of the corresponding federalist virtue of interstate regulatory competition in contemporary debates, for example, in corporate and environmental law.<sup>53</sup> By spillover effects, we simply mean state law that, by its operation, shifts costs and favors its own citizens while disproportionately affecting out-of-state interests, or, as the economists would have it, imposes externalities on others. As David Shapiro has noted, state action can create both positive and negative externalities. A negative externality “arises when action in one state causes disproportionate harm in other states. A positive externality arises when significant benefits from costly action in one state accrue in other states.”<sup>54</sup>

Interstate externality problems associated with diverse state regulations may be solved through interstate compacts or more informal arrangements, or, alternatively, through the promulgation and enactment of codes of uniform laws.<sup>55</sup> Among uniformity’s signature advantages:

[U]niform minimum standards may raise the overall standard of . . . protection and foreclose the possibility of a race to the bottom while uniform maximum standards may allow the private sector to operate within a predictable and stable environment.<sup>56</sup>

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in exploiting the test population of citizens. Legislative experimentation must therefore be constrained. . . . The point of [our] constitutional arrangement is to limit what government may do to citizens in the way of experimentation; . . . to guard against the risk of factious, “partial” legislation, or what we now call rent seeking.

Michael S. Greve, *Laboratories of Democracy: Anatomy of a Metaphor*, AEI FEDERALIST OUTLOOK, May 2001, available at [http://www.aei.org/publications/pubid.12743/pub\\_detail.asp](http://www.aei.org/publications/pubid.12743/pub_detail.asp). Here, we invoke David Shapiro’s argument for a strong national authority, based in part on Madisonian political theory: “[T]he existence of [an extended republic] is bound to reduce the power of factions seeking government action in order to advance their own interest rather than the broader public good.” SHAPIRO, *supra* note 2, at 45. While interest groups may be able to capture authorities at the state level where the externalities from state action will be felt beyond the state’s boundaries, the range and scope of parties and interests at the federal level will counteract such factious ambition. *Id.*; see also THE FEDERALIST NO. 10 (James Madison).

53. See, e.g., Roberta Romano, *Is Regulatory Competition a Problem or Irrelevant for Corporate Governance?*, 21 OXFORD REV. OF ECON. POL’Y 212, 226 (2005) (“[N]o participants in that debate [on the theory of charter competition in corporate law] would contend that the federal government has no role in preventing negative externalities from jurisdictional spillovers.”); Richard L. Revesz, *Federalism and Interstate Environmental Externalities*, 144 U. PA. L. REV. 2341, 2414–15 (1996) (concluding that federal regulation may be necessary to overcome externalities, especially for large-scale and complex environmental problems in which Coasean bargaining is unlikely because uncertainty about pollution’s geographic impact bars transactions and because, depending on the source of pollution, the range of affected states will vary).

54. SHAPIRO, *supra* note 2, at 44 n.109.

55. See *id.* at 132 (recognizing that national uniformity may not always be the preferred solution when regional cooperation is possible); see also Nim Razook, *Uniform Private Laws, National Private Laws, National Conference of Commissioners for State Laws Signaling, and Federal Preemption*, 38 AM. BUS. L.J. 41, 53–56 (2000).

56. Paul S. Weiland, *Federal and State Preemption of Environmental Law: A Critical Analysis*, 24 HARV. ENVTL. L. REV. 237, 276 (2000).

In the absence of “cooperative” solutions, a solution to solving externality problems is congressional—or judicial—preemption of state laws in favor of a single federal regime.

In the next parts, we assay to give a flavor of how a hidden functional logic may emerge from what Caleb Nelson has called the preemption jurisprudence “muddle.”<sup>57</sup> By focusing on preemption cases, we inevitably elevate the importance of the layers of subconstitutional decisions, echoing Justice Breyer’s dissent in *Egelhoff v. Egelhoff*:<sup>58</sup>

[T]he true test of federalist principle may lie, not in the occasional effort to trim Congress’ commerce power at the edges . . . or to protect a state treasury from a private damage action . . . but rather in those many statutory cases where courts interpret the mass of technical detail that is the *ordinary diet of the law*.<sup>59</sup>

We examine a range of preemption cases decided during the Rehnquist Court to show how the Court has read the claims of congressional authority broadly and has correspondingly narrowed the scope for state conduct.<sup>60</sup> While our sample is necessarily partial and cannot account for every data point in which state and federal interests collide, the overall trend is sufficiently compelling to mute the overblown claims of antipathy to regulation. At the outset, moreover, it is important to dampen the rush to political explanations, which may all too readily flow from an overly cabined examination of preemption solely from the vantage point of decided case law.

#### A. The Systemic Effects of Preemption

When preemption is granted, the effect is to deny a state-law claim either because of its definition of liability or the expansiveness of its remedy. From that, one can draw the conclusion that preemption is simply a tool to disable regulation and give potential tortfeasors a wider berth in which to act.

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57. Nelson, *supra* note 39, at 232 (“Most commentators who write about preemption agree on at least one thing: Modern preemption jurisprudence is a muddle.”).

58. 532 U.S. 141, 153 (2001) (Breyer, J., dissenting).

59. *Id.* at 160–61 (Breyer, J., dissenting) (emphasis added) (citations omitted).

60. We derived our sample set of thirty-six cases (listed in the Appendix) from the universe of cases analyzed by Michael Greve and Jonathan Klick. See Greve & Klick, *supra* note 42. Our sample consists of the thirty-two cases Greve and Klick coded as cases involving the preemption of state tort suits by federal laws and regulations. To these we added *Bates v. Dow Agrosciences, LLC*, 544 U.S. 431 (2005) (which post-dates the Greve and Klick analysis), *United States v. Locke*, 529 U.S. 89 (2000) (which deals with design standards for oil tankers in the foreign-affairs context), and two cases dealing with a variety of state-law regulations likely to give rise to state-law tort suits (but nonetheless not coded as tort by Greve and Klick): *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525 (2001), and *Gade v. National Solid Wastes Management Ass’n*, 505 U.S. 88 (1992).

However, it is important to note the cases that do not come into the system. An expansive reading of the federal interest in regulating the national market preempts not only the regulations of states that would impose higher regulatory burdens on interstate actors, but also those that would impose lower burdens as well. In the latter case, however, there will be no trail of litigation because a plaintiff would sue directly on the federal standard and not on the more lax state requirements.<sup>61</sup> The effect would be just as preemptive of state prerogatives, only it would not yield an opinion on preemption. At most there could be a challenge that the federal regulation was not within the scope of Congress's authority under the Commerce Clause, likely a losing proposition after *Raich*.

The systemic bias would result if the effect of preemption was to stifle all state regulation in favor of federal standards that were invariably below that of all the states. In other words, if Occupational Safety and Health Act of 1970 (OSHA)<sup>62</sup> standards were systematically less protective than all nonfederal state safety and health workplace rules, then preemption would have a clear systemic bias.<sup>63</sup> But if the states align across a spectrum of more and less exacting regulations, and if the federal regulations fall somewhere within that spectrum, then the effect of the assertion of a dormant federal interest will be to raise the baseline in some states and lower it in others.<sup>64</sup> However, only cases in which the federal standard is below the most exacting state

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61. Because most of the relevant federal statutes do not include an express or implied private right of action, the typical fact pattern involves a plaintiff who relies upon a breach of a federal regulation or statute to make out a *prima facie* state cause of action. See RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY § 4 (1997) (“[A] product’s noncompliance with an applicable product safety statute . . . renders the product defective . . .”); RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL HARM § 14 reporter’s note cmt. a (Proposed Final Draft 2005) (“The violation of federal statutes and regulations is commonly given negligence per se effect in state tort proceedings.”). Courts differ, however, on the question whether, absent a federal right of action, state tort law may provide an enforcement mechanism for the violation of federal standards. See Sharkey, *supra* note 11. The Court, moreover, has recently shied away from inferring federal implied rights of action. See *id.*

62. Occupational Safety and Health Act of 1970 (OSHA), 29 U.S.C. §§ 651–678 (2000).

63. Cf. Spence & Murray, *supra* note 43, at 1160–61 (noting, in statistical analysis of lower federal-court preemption decisions, a systematic bias toward preemption, but explaining it in terms of the propensity for public-sector actors to pursue “losing” preemption cases for symbolic or political value).

64. See, e.g., Alison D. Morantz, *Has Regulatory Devolution Injured American Workers? A Comparison of State and Federal Enforcement of Construction Safety Regulations* 4 (Stanford Law Sch. John M. Olin Program in Law & Econ., Working Paper No. 308, June 2005), available at <http://ssrn.com/abstract=755026> (“explor[ing] the effects of regulatory devolution [in the occupational-safety arena] by exploiting a unique historical anomaly whereby some state governments have assumed independent responsibility for protective labor regulations otherwise enforced by the Occupational Safety and Health Administration”).

standard will appear as a preemption challenge in court, leading to the misimpression that federal regulation is invariably a shield and never a sword.<sup>65</sup>

## B. Federal Regulatory Regimes

### 1. Vertical Preemption

The quintessential case for vertical uniformity arises in the international context, where the power of the federal government largely occupies the entirety of the field at the expense of any claimed state autonomy. The cases defining field preemption offer the most direct, and readily comprehensible, account of the conflict between federal and state power over the regulation of an entire area of law. Typically these cases turn on an interpretation of the extent of congressional action to determine how completely Congress sought to clear the terrain of impeding state intervention.

Consider, for example, the Ports and Waterways Safety Act (PWSA),<sup>66</sup> which establishes standards for the design and maintenance of ships, the reporting of accidents, and the condition of ships that vessels must meet before entering a U.S. port. Washington state enacted its own set of regulations, providing a number of standards that vessels were required to meet in

65. Our argument here assumes a heterogeneity of state regulatory responses. Oddly, most of the academic literature assumes races to the bottom in fields like environmental regulation and posits that only federal regulation can rescue the states from their own ineptitude. We join with Richard Revesz's sharp criticisms of that literature. Richard L. Revesz, *Federalism and Environmental Regulation: A Public Choice Analysis*, 115 HARV. L. REV. 553, 555–57 (2001) (arguing that the common conception that “public choice pathologies cause environmental interests to be systematically underrepresented at the state level relative to business interests . . . [and] that states would ‘race to the bottom’ by offering industrial sources excessively lax standards” is both fundamentally flawed and empirically unsubstantiated); see also Richard L. Revesz, *The Race to the Bottom and Federal Environmental Regulation: A Response to Critics*, 82 MINN. L. REV. 535 (1997) [hereinafter Revesz, *The Race to the Bottom*]; Revesz, *supra* note 49, at 1233–44.

On the other hand, much of the academic literature on preemption starts from a diametrically counterposed assumption. In this literature, the commentary assumes a world in which states are no longer engaged in a race to the bottom to attract business investment, but are instead engaged in an equally headlong race to the top of regulatory zeal. Under this view, states are eagerly trying to protect consumer welfare, and preemption emerges as a threat to responsible regulation, scaling back to invariably lower federal standards. See, e.g., Fallon, *supra* note 18, at 471 (“Because federal preemption eliminates state regulatory burdens, preemption rulings have a tendency—welcome to substantive conservatives—to minimize the regulatory requirements to which businesses are subject.”); S. Candace Hoke, *Preemption Pathologies and Civic Republican Values*, 71 B.U. L. REV. 685, 691–92 (1991) (“[A]n ever-larger number of suits are filed with the express objective of invalidating state or local law on a given subject. Business and industry groups have spurred this trend when they have found state regulatory schemes more burdensome, or their enforcement more aggressive, than pertinent federal legislation.”). In our view, neither the “race-to-the-bottom” nor the “race-to-the-top” account comports with the actual complex world of regulation.

66. Ports and Waterways Safety Act (PWSA), 33 U.S.C. §§ 1221–1232a (2000).

order to enter the state's waters.<sup>67</sup> In *United States v. Locke*,<sup>68</sup> the Court unanimously determined that these state-imposed requirements were preempted by the PWSA.<sup>69</sup> Highlighting the importance of the national interest at stake with respect to regulation of ports and waterways, the Court explained that Washington had enacted "legislation in an area where the federal interest has been manifest since the beginning of the Republic and is now well established."<sup>70</sup> Also, the Court explained:

The state laws now in question bear upon national and international maritime commerce, and in this area there is no beginning assumption that concurrent regulation by the State is a valid exercise of its police power. Rather, we must ask whether the local laws in question are consistent with the federal statutory structure, which has as one of its objectives a uniformity of regulation for maritime commerce.<sup>71</sup>

In passing the federal law, Congress had made clear a desire to allow those tankers that conformed to the PWSA to enter all U.S. ports, instead of having to meet the vagaries of many different state regulations:

[T]he Supremacy Clause dictates that the federal judgment that a vessel is safe to navigate United States waters prevail over the contrary state judgment. Enforcement of the state requirements would at least frustrate what seems to us to be the evident congressional intention to establish a uniform federal regime controlling the design of oil tankers.<sup>72</sup>

In other words, the federal government had set maximum standards; the states could not supplement them because it would impede the certainty and uniformity that the federal government obviously believed necessary to promote free commercial trade in an area in which federal authority is necessarily exclusive.<sup>73</sup>

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67. These requirements included English language proficiency for all crew members, imposition of certain training standards, and accident and navigation watch reporting.

68. 529 U.S. 89 (2000).

69. More precisely, the Court held that at least four of the requirements were preempted, and remanded to determine whether any other requirements were also preempted. *Id.* at 112–16.

70. *Id.* at 99.

71. *Id.* at 108.

72. *Id.* at 111 (internal quotation and citation omitted). In short, the scheme envisioned by Washington state represented the very type of state-imposed barriers that the Constitution and the Commerce Clause were designed to prevent. Moreover, the Court made clear that only state rules that impose inconsequential externalities upon ships, operating in a national and international free-trade market, would be allowed to stand under the uniform regime established by the federal government. See *id.* at 112 ("Local rules not pre-empted under . . . the PWSA . . . do not affect vessel operations outside the jurisdiction, do not require adjustment of systemic aspects of the vessel, and do not impose a substantial burden on the vessel's operation within the local jurisdiction itself.").

73. As *Locke* suggests, the Court has forcefully protected the field of international relations from burdensome state legislation. See also *Am. Ins. Ass'n v. Garamendi*, 539 U.S. 396 (2003)

Uniformity and subordination of the ability of the states to act is likewise a governing principle in regulating airline-carrier liability. The Warsaw Convention,<sup>74</sup> which limits airline-passenger claims for personal injury damages, is premised upon the recognition (by the nations that ratified the Convention) of the advantage of regulating carrier liability in a uniform manner.<sup>75</sup> In *El Al Israel Airlines, Ltd. v. Tsui Yuan Tseng*,<sup>76</sup> the Court emphasized that allowing state-law claims to be asserted against an airline would undermine this interest in uniformity that the Convention was designed to foster:

Carriers might be exposed to unlimited liability under diverse legal regimes, but would be prevented, under the treaty, from contracting out of such liability. Passengers injured physically in an emergency landing might be subject to the liability caps of the Convention, while those merely traumatized in the same mishap would be free to sue outside of the Convention for potentially unlimited damages.<sup>77</sup>

A substantial percentage of the Court's regulatory preemption cases involve ERISA, a "comprehensive statute [passed by Congress in 1974] for the regulation of employee benefit plans" with "an integrated system of

(finding that California's Holocaust Victims Insurance Reporting Act would interfere with the president's ability to speak with one voice for the nation and was thus preempted by certain executive agreements with Germany and Austria); *Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363, 379–80 (2000) (finding that a Massachusetts law imposing restrictions upon trade with Burma was preempted, on the ground that it interfered with the congressional scheme to have the president control foreign trade policy with Burma, and also because the state law imposed sanctions above and beyond those mandated by Congress).

For criticism of the Supreme Court's use of a broad conception of dormant foreign-affairs preemption power in cases like *Garamendi* and *Crosby*, see Jack L. Goldsmith, *Federal Courts, Foreign Affairs, and Federalism*, 83 VA. L. REV. 1617 (1997) (arguing that foreign affairs does not constitute an exclusive federal enclave in which federal common law should operate); Jack Goldsmith, *Statutory Foreign Affairs Preemption*, 2000 SUP. CT. REV. 175; Ernest A. Young, *Dual Federalism, Concurrent Jurisdiction, and the Foreign Affairs Exceptionalism*, 69 GEO. WASH. L. REV. 139 (2001).

74. Convention for the Unification of Certain Rules Relating to International Transportation by Air, Oct. 12, 1929, 137 L.N.T.S. 11 [hereinafter Warsaw Convention].

75. To provide the desired uniformity, Chapter III sets out an array of liability rules applicable to all international air transportation of persons, baggage, and goods. *Id.*

76. 525 U.S. 155 (1999).

77. *Id.* at 171. Justice Stevens, in dissent, disagreed with the majority's judgment regarding the potential disruption of the uniformity interest:

[I]t is clear to me that the central purposes of the Convention will not be affected . . . .

. . . .

. . . The interest in uniformity would not be significantly impaired if the number of cases not preempted, like those involving willful misconduct, was slightly enlarged to encompass those relatively rare cases in which the injury resulted from neither an accident nor a willful wrong.

*Id.* at 179–80 (Stevens, J., dissenting).



procedures for enforcement.”<sup>78</sup> ERISA’s broad preemption, including exclusive jurisdiction in federal courts,<sup>79</sup> is directly linked to the statutory interest in uniformity:

Section 514(a) [the preemption provision] was intended to ensure that plans and plan sponsors would be subject to a uniform body of benefit law; the goal was to minimize the administrative and financial burden of complying with conflicting directives among States or between States and the Federal Government.<sup>80</sup>

There are inevitably difficult questions of statutory interpretation under ERISA.<sup>81</sup> The statute grants three separate potential sources of federal preemptive authority, not all of which are intended to be field clearing in terms of state regulation. Despite the attending difficulties in applying the statute, the Rehnquist Court remained highly protective of the declared federal interest in a common regulatory regime for benefits law.<sup>82</sup> In case after case dealing with the inevitable tension between ERISA and state common law tort and contract obligations, the Court consistently preempted state tort suits that threatened the uniform character of benefit-plan regulation. In *Ingersoll-Rand Co. v. McClendon*,<sup>83</sup> most notably, the Court foreclosed common law wrongful termination claims as inconsistent with ERISA’s comprehensive civil enforcement regime:

Particularly disruptive is the potential for conflict in substantive law. It is foreseeable that state courts, exercising their common law powers, might develop different substantive standards applicable to the same employer conduct, requiring the tailoring of plans and employer conduct to the peculiarities of the law of each jurisdiction. Such an outcome is fundamentally at odds with the goal of uniformity that Congress sought to implement.<sup>84</sup>

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78. *Aetna Health, Inc. v. Davila*, 542 U.S. 200, 208 (2004). According to Greve and Klick’s classification project (see *supra* note 60), of the 105 preemption cases (focusing only on preemption of state statutes) decided by the Rehnquist Court (from 1986 to 2003), labor and employment cases (in which ERISA predominated) comprised 32, or roughly one-third of the total.

79. 29 U.S.C. § 1144(a) (2000) (ERISA provisions “shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan”); *id.* § 1132(e)(1) (“[T]he district courts of the United States shall have exclusive jurisdiction of civil actions under this title brought by the Secretary or by a participant, beneficiary, fiduciary . . .”).

80. *Ingersoll-Rand Co. v. McClendon*, 498 U.S. 133, 142 (1990); see also *FMC Corp. v. Holliday*, 498 U.S. 52, 60 (1990) (“To require plan providers to design their programs in an environment of differing state regulations would complicate the administration of nationwide plans . . .”).

81. As the Court has noted, the complicated preemption and savings clauses “perhaps are not a model of legislative drafting.” *Metro. Life Ins. Co. v. Massachusetts*, 471 U.S. 724, 739 (1985).

82. See *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41, 44 (1987).

83. 498 U.S. 133.

84. *Id.* at 142. Similarly, in *Egelhoff v. Egelhoff*, 532 U.S. 141 (2001), the Court found a Washington state statute preempted not only by the express language of ERISA, but also on implied

Accordingly, any "state-law cause of action that duplicates, supplements, or supplants the ERISA civil enforcement remedy conflicts with the clear congressional intent to make the ERISA remedy exclusive and is therefore pre-empted."<sup>85</sup>

In similar fashion, the Labor-Management Relations Act (LMRA)<sup>86</sup> confers jurisdiction upon federal courts to hear suits charging violations of collective-bargaining agreements and "to fashion a body of federal common law to be used to address disputes arising out of labor contracts."<sup>87</sup> Given the claimed authority to impose federal common law uniformity on labor regulations, it is not surprising that the Court has consistently held that any state-law claim that might compromise uniformity is preempted.<sup>88</sup> The Court has elaborated upon this nationalist interest in uniformity in the interpretation of labor contract terms:

The possibility that individual contract terms might have different meanings under state and federal law would inevitably exert a disruptive influence upon both the negotiation and administration of collective agreements. . . . Once the collective bargain was made, the possibility of conflicting substantive interpretation under competing legal systems would tend to stimulate and prolong disputes as to its interpretation.<sup>89</sup>

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conflict or obstacle preemption grounds because the statute "interfere[d] with nationally uniform plan administration." *Id.* at 148. The uniformity goal, the Court explained, would be thwarted "if plans are subject to different legal obligations in different States." *Id.*

85. *Aetna Health, Inc. v. Davila*, 542 U.S. 200, 209 (2004). In *Pilot Life Insurance Co. and Metropolitan Life Insurance Co. v. Taylor*, 481 U.S. 58 (1987), the Court held that tort and breach of contract cases filed by employees or beneficiaries were preempted by the "exclusive" remedy of ERISA because the claims "relate[d] to" benefits received under the plans. *Id.* at 61, 63.

*Pegram v. Herdrich*, 530 U.S. 211 (2000), might, however, be read as a narrower application of preemptive scope. The Court held unanimously that Congress did not intend an HMO to be treated as a fiduciary to the extent that it made mixed eligibility decisions acting through its physicians. The Court seemed concerned that a preemption finding would fundamentally alter the business of HMO groups because it would have meant near-automatic liability for any balancing decision made by a physician. In short, while *Pegram* was unique in finding nonpreemption, it presented such an extreme choice for the Court that the decision should be read carefully and not taken to mean a retreat from the broad preemptive force of ERISA. Moreover, most recently in *Aetna Health*, the Court essentially limited the holding of *Pegram* to a very specific class of cases: those "where the underlying negligence also plausibly constitutes medical maltreatment by a party who can be deemed to be a treating physician or such a physician's employer." 542 U.S. at 221 (citing *Cicio v. Does*, 321 F.3d 83, 109 (2d Cir. 2003) (Calabresi, J., dissenting in part)).

86. Labor-Management Relations Act, 1947 (LMRA), ch. 120, 61 Stat. 136 (codified in scattered sections of 29 U.S.C.).

87. *Allis-Chalmers Corp. v. Lueck*, 471 U.S. 202, 209 (1985).

88. *But see Hawaiian Airlines, Inc. v. Norris*, 512 U.S. 246 (1994) (holding that the Railway Labor Act did not preempt a claim for wrongful discharge on grounds of retaliation). For an argument that strong preemption has thwarted the development of a more robust labor law as the economy trends from manufacturing to service, see Cynthia L. Estlund, *The Ossification of American Labor Law*, 102 COLUM. L. REV. 1527 (2002).

89. *Int'l Brotherhood of Elec. Workers v. Hechler*, 481 U.S. 851, 856 (1987) (internal quotation omitted). In *Electrical Workers*, the Court held that a union member was precluded from

Conversely, the Supreme Court has not found preemption where allowing a cause of action would not upend or unduly interfere with the objectives of federal policy. Thus, in *California v. ARC America Corp.*,<sup>90</sup> the Court held that the judicially created rule<sup>91</sup> limiting recoveries under the Sherman Act<sup>92</sup> to direct purchasers did not preempt express state statutory provisions that gave indirect purchasers a damages cause of action.<sup>93</sup> The Court reasoned that state indirect-purchaser statutes did not undermine the aims of the federal rule to provide some party with an incentive to police anticompetitive behavior, nor would they reduce the likelihood of direct purchasers bringing private federal antitrust actions.

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evading the preemptive force of section 301 of the LMRA by casting her claim as a state-law tort action, namely that the union breached its duty of care to provide a safe workplace. *Id.* at 862; see also *Allis-Chalmers*, 471 U.S. 202; *United Steelworkers of Am. v. Rawson*, 495 U.S. 362 (1990) (preemption by section 301 cannot be avoided by characterizing union's negligence as state-law tort). But see *Lingle v. Norge Div. of Magic Chef, Inc.*, 486 U.S. 399 (1988) (holding that an employee covered by a collective-bargaining agreement that provided her with a contractual remedy for discharge without just cause could enforce her state-law remedy for retaliatory discharge, because that state-law cause of action was independent of the collective-bargaining agreement); *Caterpillar Inc. v. Williams*, 482 U.S. 386 (1987) (respondents' state-law complaint for breach of individual employment contracts not preempted by section 301, which says nothing about the content or validity of individual employment contracts).

There are numerous examples of other federal statutes whose preemptive force is directly tied to the degree of the national interest in uniformity. A prime example is found in the National Banking Act and the Court's decision in *Beneficial National Bank v. Anderson*, 539 U.S. 1, 10–11 (2003) (recognizing complete preemption doctrine of state-law usury claims and stating that “[u]niform rules limiting the liability of national banks and prescribing exclusive remedies for their overcharges are an integral part of a banking system that needed protection from possible unfriendly State legislation”) (internal quotation omitted). In addition, in enacting the Federal Arbitration Act (FAA), “Congress declared a national policy favoring arbitration and withdrew the power of the states to require a judicial forum for the resolution of claims which the contracting parties agreed to resolve by arbitration.” *Perry v. Thomas*, 482 U.S. 483, 484 (1987) (finding that section 2 of the FAA, which mandates enforcement of arbitration agreements, preempts section 229 of the California Labor Code, which provides that actions for the collection of wages may be maintained “without regard to the existence of any private agreement to arbitrate”); see also *Green Tree Fin. Corp. v. Bazzle*, 539 U.S. 444 (2003) (whether a contract allows class arbitration is a question of contract interpretation that is to be determined by an arbitrator); *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 109 (2001) (FAA's section 1 exemption of “contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce” applies only to contracts of transportation workers, and not any worker engaged in interstate commerce); *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52 (1995) (FAA ensures that contracting parties' agreement to include punitive damages in the scope of their arbitration agreement will be enforced according to its terms even if a rule of state law would otherwise exclude such claims from arbitration). The FAA therefore is read to further the view that “Congress intended to foreclose state legislative attempts to undercut the enforceability of arbitration agreements.” *Perry*, 482 U.S. at 489 (internal quotation omitted).

90. 490 U.S. 93 (1989).

91. *Ill. Brick Co. v. Illinois*, 431 U.S. 720 (1977).

92. Sherman Act, 15 U.S.C. §§ 1–7 (2000).

93. See *ARC Am. Corp.*, 490 U.S. at 105.

Similar logic prevailed in *English v. General Electric Co.*,<sup>94</sup> where the Court held that federal statutes relating to nuclear power safety should only preempt to the extent that state laws tried to impose their own standards on radiological safety levels.<sup>95</sup> The interpretive key was to fashion uniform emissions rules to provide incubation for a national nuclear power industry meeting predictable safety standards. In this instance, an attempt to preempt customary tort claims concerning employment did not fall within the scope of the federal interest in uniformity of nuclear safety standards. While recognizing that a whistleblower's claim for intentional infliction of emotional distress might have some tangential effect on the operation of nuclear power plants, the Court concluded that "this effect is neither direct nor substantial enough to place petitioner's claim in the pre-empted field."<sup>96</sup> We are left, then, with a strong sense that the Court simply believed that the connection between the state tort suit and the uniform standards established by the law were simply too far removed: The one, in other words, was unlikely to alter in any meaningful way the obligations imposed by the other.

## 2. Horizontal Preemption

Whereas vertical preemption aims to achieve federal-state uniformity, the agenda of horizontal preemption is the development of coordinated solutions to matters that cross state lines. Environmental pollution may present the clearest case for a horizontal national solution impelled by significant interstate externalities.<sup>97</sup> The Clean Water Act (CWA),<sup>98</sup> for example, prohibits

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94. 496 U.S. 72 (1990).

95. The key issue, according to the Court, was whether the tort claim related to the "radiological safety aspects involved in the . . . operation of a nuclear [facility]." *Id.* at 82 (internal quotation omitted).

96. *Id.* at 85. The Court stated:

We recognize that the claim for intentional infliction of emotional distress at issue here may have some effect on these decisions, because liability for claims like petitioner's will attach additional consequences to retaliatory conduct by employers. As employers find retaliation more costly, they will be forced to deal with complaints by whistle-blowers by other means, including altering radiological safety policies. Nevertheless, we believe that this effect is neither direct nor substantial enough to place petitioner's claim in the pre-empted field.

*Id.*

97. See, e.g., Weiland, *supra* note 56, at 276 (noting that, absent preemption, interjurisdictional externalities may cause lower levels of government to engage in inefficient behavior); see also Kirsten Engel, *State Environmental Standard-Setting: Is There a "Race" and Is It "To the Bottom"?* 48 HASTINGS L.J. 271, 285 (1997) ("The interstate spillover rationale is the classic economic efficiency argument that federal intervention is necessary to prevent the environmental, social, and economic losses that accrue when air and water pollution originating in one state are carried by natural forces into other states."). But see *supra* note 65 (questioning overly simplistic race-to-the-bottom theory).

98. Clean Water Act (CWA), 33 U.S.C. §§ 1251-1387 (2000).

the discharge of effluents into navigable waters unless the point source has obtained a permit from the Environmental Protection Agency. The Act also allows a state in which the point source is located to impose more stringent discharge limitations than the federal ones, and even to administer its own permit program if certain requirements are met. By contrast, "affected" states that are subject to pollution originating in source states have only the right to notice and comment before the issuance of a federal or state source permit.<sup>99</sup>

While the CWA establishes federal regulatory authority, the question still remains whether federal regulation preempts potential common law claims arising out of the same events. In *International Paper Co. v. Ouellette*,<sup>100</sup> the Supreme Court held that the CWA preempted a property owner's common law nuisance claim (brought in Vermont state court) for discharges from a New York-based paper company into Lake Champlain, which his property abutted on the Vermont side.<sup>101</sup> Unchecked, the common law could as easily alter the regulatory framework as formal participation in the administrative regulatory scheme. The Court was therefore "convinced that if affected States were allowed to impose separate discharge standards on a single point source, the inevitable result would be a serious interference with the achievement of the full purposes and objectives of Congress."<sup>102</sup> The assertion of state common law claims would invariably compromise the federal purpose: "The inevitable result of such suits," the Court concluded, "would be that Vermont and other States could do indirectly what they could not do directly—regulate the conduct of out-of-state sources."<sup>103</sup> Moreover, and most critically, "a source would be subject to a variety of common-law rules established by the different States along the interstate waterways."<sup>104</sup>

Worker safety is yet another area that implicates coordination concerns, as evidenced by OSHA. Again, we are not addressing the question whether

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99. *Int'l Paper Co. v. Ouellette*, 479 U.S. 481, 490 (1987).

100. 479 U.S. 481.

101. In the course of its business, *International Paper Co.* had discharged effluents into the lake through a diffusion pipe that ended shortly before the New York-Vermont border. *Id.* at 484.

102. *Id.* at 493–94 (internal quotation omitted). Nor—to the dissent's chagrin—was the majority deterred by the broad language of the CWA's explicit savings clause: "Nothing in this section shall restrict any right which any person (or class of persons) may have under any statute or common law to seek enforcement of any effluent standard or limitation or to seek any other relief. . . ." 33 U.S.C. § 1365(e); see also *Ouellette*, 479 U.S. at 504 (Brennan, J., dissenting) ("[T]he Act's plain language clearly indicates that Congress wanted to leave intact the traditional right of the affected State to apply its own tort law when its residents are injured by an out-of-state polluter.").

103. *Ouellette*, 479 U.S. at 495.

104. *Id.* at 496. The Court continued: "These nuisance standards often are 'vague' and 'indeterminate.' The application of numerous States' laws would only exacerbate the vagueness and resulting uncertainty." *Id.*

Congress has the authority to act in the area of occupational safety and health, a rather unchallenging application of the Commerce Clause, but rather the interpretive gloss that the Court places on the sweep of congressional action. Here again we find a strong impulse toward using broad preemption to impose the coordination of national standards. Thus, in *Gade v. National Solid Wastes Management Ass'n*,<sup>105</sup> for example, the Court held that OSHA preempted state regulations dealing with worker safety that had not been submitted and approved according to the Act. The Court explained:

To allow a State selectively to “supplement” certain federal regulations with ostensibly nonconflicting standards would be inconsistent with this federal scheme of establishing uniform federal standards, on the one hand, and encouraging States to assume full responsibility for development and enforcement of their own OSH programs, on the other.<sup>106</sup>

In the Court’s view, OSHA called for cooperation between the state and federal authorities: The federal standard provided a benchmark, which the states would then have power to implement or enforce on their own, complementing federal enforcement but not dislodging federal coordination of standards. The Act’s objective—namely cooperative federalism—was, however, frustrated by state regulations that imposed substantive obligations that were not authorized under federal law. State requirements that might attempt to tighten or loosen the federal benchmark standard threatened the uniformity with which multistate employers regulate their workplaces.<sup>107</sup>

### C. Products Liability

The concept of horizontal preemption is best elucidated in areas where the direct federal interest is weakest, such as in the standards governing tort liability for the manufacture of products placed on the national market. Unlike the modern regulatory state, which developed in tandem with the expansion of federal power, “[t]ort law in America is built on the bedrock of

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105. 505 U.S. 88 (1992).

106. *Id.* at 103.

107. Notwithstanding the fact that employee health and safety were areas of traditional state regulation, the Court in *Gade* did not apply any presumption against preemption. Instead, the Court self-consciously adopted a functional approach to the preemption question: “In assessing the impact of a state law on the federal scheme, we have refused to rely solely on the legislature’s professed purpose and have looked as well to the effects of the law.” *Id.* at 105 (emphasis added). The Court’s approach prompted a retort from Justice Kennedy (who concurred in the judgment only), chastising the plurality not only for abandoning the presumption against preemption, but also for engaging in a “freewheeling judicial inquiry into whether [the] state statute is in tension with federal objectives.” *Id.* at 111 (Kennedy, J., concurring).

state common law.”<sup>108</sup> Contrary to the federal regulatory arena (explored in the previous part), here we often find a reluctance of federal courts to interfere by way of preemption in an area of traditional state authority:

Because of the role of States as separate sovereigns in our federal system, we have long presumed that state laws—particularly those, such as the provision of tort remedies to compensate for personal injuries, that are within the scope of the States’ historic police powers—are not to be preempted by a federal statute unless it is the clear and manifest purpose of Congress to do so.<sup>109</sup>

Oddly, and perhaps as a residual hangover of *Erie* (to which we shall return in the next part), the Court seems less willing to displace state common law than positive enactments.<sup>110</sup> But when the Court does act in the name of creating a common national baseline, it is left to the dissenters to inveigh against “giv[ing] unelected federal judges *carte blanche* to use federal law as a means of imposing their own ideas of tort reform on the States.”<sup>111</sup> It is here, for example, where Justice Stevens, generally a vote for national authority in the Eleventh

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108. Robert L. Rabin, *Federalism and the Tort System*, 50 RUTGERS L. REV. 1, 2 (1997).

109. *Geier v. Am. Honda Motor Co.*, 529 U.S. 861, 894 (2000) (Stevens, J., dissenting). The Court has seemed to adhere to a “presumption against preemption,” especially prevalent in situations in which the federal government regulates in areas traditionally within the domain of the states. See, e.g., *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1946) (“[W]e start with the assumption that the historic police powers of the State were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress.”). The current viability of the presumption is, however, subject to debate. See, e.g., Mary J. Davis, *Unmasking the Presumption in Favor of Preemption*, 53 S.C. L. REV. 967 (2002) (claiming that the Court has abandoned the presumption against preemption altogether); Susan Raeker-Jordan, *The Pre-emption Presumption that Never Was: Preemption Doctrine Swallows the Rule*, 40 ARIZ. L. REV. 1379 (1998). And, in a recent case, *Engine Manufacturers Ass’n v. South Coast Air Quality Management District*, 541 U.S. 246 (2004), Justice Scalia garnered majority support for refusing to apply the presumption—prompting a vehement dissent from Justice Souter.

110. The Court here has been persuaded that state-law remedies (i.e., damages) are distinct from pure regulatory law. Thus, for example, in *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238 (1984)—the definitive early case in which the Court tackled the issue of the preemptive effect of federal law upon state tort law—the Court held that *Silkwood*’s claim for punitive damages arising out of radiation injuries from exposure to plutonium was not preempted by the Atomic Energy Act (AEA). *Id.* at 257–58. This, despite the fact that the previous Term, the Court had held that the AEA preempted state safety regulation of nuclear power plants. See *Pac. Gas & Elec. Co. v. State Energy Res. Conservation & Dev. Comm’n*, 461 U.S. 190 (1983). The majority in *Silkwood* conceived punitive damages as distinct from pure regulatory law. Moreover, because the AEA did not provide for a private right of action, preemption in the case would have left victims wholly without legal remedy. The dissent ridiculed the majority’s reasoning here, arguing that a punitive damages award would, in effect, allow a state to enforce a legal standard that was “more exacting than the federal standard.” *Silkwood*, 464 U.S. at 265 (Blackmun, J., dissenting).

111. *Geier*, 529 U.S. at 894 (Stevens, J., dissenting).

Amendment and Commerce Clause contexts,<sup>112</sup> can be found to dissent on the ground that, “[t]his is a case about federalism,” that is, about respect for “the constitutional role of the States as sovereign entities.”<sup>113</sup>

Not only is tort liability an area traditionally controlled by state law, but the ready sources of potential tort cases—such as the law governing automobiles, landowners, or medical malpractice—generally concern matters that are quite localized in their impact.<sup>114</sup> Seen through the lens of extraterritorial effects, however, the products liability strain of tort law stands as a striking counterexample.<sup>115</sup> It may be possible to hold off property claims as subject to local authority,<sup>116</sup> and to preserve state autonomy in the limited context of state

112. See, e.g., *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62, 92 (2000) (Stevens, J., concurring); *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 76 (1996) (Stevens, J., dissenting) (“This case is about power—the power of the Congress of the United States to create a private federal cause of action against a State, or its Governor, for the violation of a federal right.”); *EEOC v. Wyoming*, 460 U.S. 226, 244 (1983) (Stevens, J., concurring).

113. *Geier*, 529 U.S. at 887 (Stevens, J., dissenting) (quoting, inter alia, *Alden v. Maine*, 527 U.S. 706, 713 (1999)). Justice Stevens is clearly the justice most concerned with preempting state common law remedies through broad federal preemption. His opinions in *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504 (1992), *Medtronic, Inc. v. Lohr*, 518 U.S. 470 (1996), and *Geier v. American Honda Motor Corp.*, 529 U.S. 861, 886 (2000) (Stevens, J., dissenting), are the clearest statements of the role of federalism in preemption decisions, and he is the most consistent and outspoken justice in favor of the presumption against preemption. See *supra* note 42.

114. See Schwartz, *American Tort Law*, *supra* note 45, at 922. A historical exception is tort liability of interstate railroads, and of course the Federal Employer's Liability Act stands in opposition to the longstanding tradition of state common law tort. See generally Gary T. Schwartz, *Tort Law and the Economy in Nineteenth Century America: A Reinterpretation*, 90 YALE L.J. 1717, 1739 (1981); JOHN FABIAN WITT, *THE ACCIDENTAL REPUBLIC* (2004).

115. See Sherman Joyce, *Federal Product Liability Litigation Reform: Recent Developments and Statistics*, 19 SEATTLE U. L. REV. 421, 427–28 (1996) (advocating federal products liability legislation in light of the fact that the U.S. economy is both national and global, and, according to a U.S. Bureau of the Census report, over 70 percent of the goods manufactured in one state are shipped and sold out of that state) (citing BUREAU OF THE CENSUS, *COMMODITY TRANSPORTATION SURVEY 1–7* (1981)).

Moreover, “[p]roducts liability differs from most other fields of tort law in the frequency of diversity cases—and hence the awkward obligation it imposes on federal court judges to marshal their resources not in declaring law in a reasonably authoritative manner, but rather in merely making educated guesses about what results state courts would themselves support.” Schwartz, *American Tort Law*, *supra* note 45, at 950. Plaintiffs, moreover, may have an additional incentive to engage in forum shopping, especially in mass tort cases, where defendants can be sued in different states. See, e.g., Alvin B. Rubin, *Mass Torts and Litigation Disasters*, 20 GA. L. REV. 429, 443 (1986); Comment, In Re Joint Eastern and Southern District Asbestos Litigation: *Bankrupt and Backlogged—A Proposal for the Use of Federal Common Law in Mass Tort Class Actions*, 58 BROOK. L. REV. 553, 606–07 (1992).

116. See, e.g., *Kelo v. City of New London*, 125 S. Ct. 2655 (2005); see also William A. Fletcher, *Property/Takings Talk at Santa Clara Symposium 12* (Feb. 3, 2006) (unpublished manuscript, on file with author) (“Taken together, these decisions [*Kelo*, 125 S. Ct. 2655; *Lingle v. Chevron U.S.A., Inc.*, 125 S. Ct. 2074 (2005); *San Remo Hotel v. City of San Francisco*, 125 S. Ct. 2491 (2005)] represent a substantial change—entirely in the direction of deferring to the political and legal judgments of the states.”); *id.* at 13–14 (“With the exception of the Supreme Court’s certiorari jurisdiction, the state courts are now the exclusive protectors of private property owners against takings effected by state and local authorities.”).



governmental conduct of its own affairs.<sup>117</sup> But in the rich regulatory environment of commercial exchange and the production of goods, a potential federal interest is never too far at bay. Counterarguments pressed in support of “state sovereignty” and Brandeisian experimentation have been, correspondingly, diminished in the realm of products liability.<sup>118</sup>

### 1. The Need for National Regulation

Because most products are mass produced and mass distributed, without any clear sense of where in the national market they might end up, the need for federal uniformity would seem especially pressing.<sup>119</sup> Mass production

117. See, e.g., *Bd. of Trs. of the Univ. of Ala. v. Garrett*, 531 U.S. 356, 363 (2001); *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62, 72–73 (2000); *Fla. Prepaid Postsecondary Educ. Expense Bd. v. Coll. Sav. Bank*, 527 U.S. 627, 634–35 (1999); *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 47 (1996).

118. For standard arguments in favor of state experimentation in the products realm, see, for example, Betsy J. Grey, *The New Federalism Jurisprudence and National Tort Reform*, 59 WASH. & LEE L. REV. 475, 517–18 (2002) (arguing that state legislation and common law reflect local interests, and voters play an important role in judicial lawmaking because they can overturn a common law rule by voting to pass a law); Linda S. Mullenix, *Mass Tort Litigation and the Dilemma of Federalization*, 44 DEPAUL L. REV. 755, 768 (1995) (characterizing argument for state sovereignty in defense of differing products standards in fifty states as manifestation of local values and community culture); Rabin, *supra* note 108, at 29 (grounding argument in respect for tradition and sensitivity to local issues); Frances E. Zollors et al., *Looking Backward, Looking Forward: Reflections on Twenty Years of Product Liability Reform*, 50 SYRACUSE L. REV. 1019, 1040–41 (2000) (extolling role of states as laboratories of democracy in considering products liability reforms); see also Mark C. Weber, *Complex Litigation and the State Courts: Constitutional and Practical Advantages of the State Forum Over the Federal Forum in Mass Tort Cases*, 21 HASTINGS CONST. L.Q. 215, 238–39 (1994) (arguing that geographic variations influence the kinds of hazards that may arise in the tort or products liability context).

119. Alan Schwartz makes the case:

An effective pursuit of optimal product safety often will require national regulation. Uniformity reduces costs because there commonly are economies of scale to production. As a consequence, when firms are required to produce different versions of a product to comply with different state safety standards, each item will be more expensive than it would otherwise have been, and some items may not be produced at all. A single standard thus will often make the best tradeoff between safety and the other benefits that consumers could derive from a product. In addition, increasing the safety of a particular product attribute could make the product less safe as a whole unless other attributes also are modified. This argues for a coordinated form of regulation that the different states could not supply.

Schwartz, *Statutory Interpretation*, *supra* note 45, at 17; see also Richard B. Stewart, *Regulatory Compliance Preclusion of Tort Liability: Limiting the Dual-Track System*, 88 GEO. L.J. 2167, 2169 (2000) (“[T]he tort system cannot ensure desirable consistency and coordination in legal requirements, which is especially important for nationally marketed products.”).

Richard Revesz would distinguish product standards, “which regulat[e] the environmental consequences of the product itself,” from process standards, which regulate “the environmental consequences of the industrial process through which the product is produced.” Richard L. Revesz, *Federalism and Environmental Regulation: Some Lessons for the European Union and the International Community*, 83 VA. L. REV. 1331, 1332 (1997). Revesz argues that the case for uniformity is much

means that goods and services are produced for potential distribution and sale anywhere demand might arise, without a particular purchaser in mind. In the case of the prototypical widget manufactured for a national market, not only is the ultimate buyer unknown, but so is the particular state in which the ultimate sale may occur—except in some actuarial sense by which California may historically have been the market for 30 percent of national widget sales, for example. This mass production and distribution of products casts a huge cloud of doubt upon the wisdom of individual state courts as the source of liability rules.<sup>120</sup> Given vexing choice of law issues, it is virtually impossible for manufacturers to adjust the price of products they sell in various states to take account of different liability standards.<sup>121</sup> The upshot is that most manufacturers design and market uniform products rather than different products for each state and, correspondingly, design their products to the specifications of the largest states or to the jurisdiction with the most stringent liability standards, regardless of whether they represent either an efficient solution or the national consensus.<sup>122</sup>

Products liability law raises the specter of spillover effects, whereby a state uses its liability regime to benefit in-state residents with larger compensation payments, or exports the costs of its regulation to out-of-state manufacturers and product consumers in the rest of the nation.<sup>123</sup> Alan Schwartz

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stronger for product standards, especially ones that act as both a “floor” and a “ceiling,” because “disparate regulation would break up the national market for the product and be costly in terms of foregone economies of scale.” Revesz, *The Race to the Bottom*, *supra* note 65, at 544. As he further notes:

The benefits of uniformity . . . are less compelling in the case of process standards, which govern the environmental consequences of the manner in which goods are produced rather than the consequences of the products themselves. Indeed, unlike the case of dissimilar product standards, there can be a well functioning common market regardless of the process standards governing the manufacture of the products traded in the market.

*Id.*

120. There is disagreement as to the extent of variation in products liability law among the states. Compare, e.g., Schwartz, *American Tort Law*, *supra* note 45, at 929 (“Within products liability . . . the inter-state variations in common law doctrine are both more frequent and more significant than they are in other sectors of the common law of torts.”), with, e.g., Stephen D. Sugarman, *Should Congress Engage in Tort Reform?*, 1 MICH. L. & POL’Y REV. 121, 127 (1996) (“[S]tate tort laws today are broadly the same in product injury cases,” although there are differences “around the edges.”).

121. For a discussion of choice of law problems, which increase the complexity, expense, and duration of litigation, and which provide little clear guidance, see generally Samuel Issacharoff, *Getting Beyond Kansas*, 74 UMKC L. REV. (forthcoming 2006).

122. See, e.g., Schwartz, *American Tort Law*, *supra* note 45, at 927 (“Manufacturers . . . must distribute a uniform product on a nationwide basis and cannot modify the price they charge for each product to account for state-law variations in that product’s liability exposure.”).

123. Gary Schwartz termed this the “structural bias problem.” *Id.* at 932; see also Michael W. McConnell, *A Choice-of-Law Approach to Products-Liability Reform*, in NEW DIRECTIONS IN LIABILITY LAW 90, 97 (Walter Olson ed., 1988) (“[S]tates pursue a persistent and one-directional

has termed this the “cost externalization constraint” on federalism.<sup>124</sup> Competitive forces, in other words, may induce states to adopt policies that run contrary to national objectives.<sup>125</sup> Elected state officials could well respond to the political preferences of the voters of any particular state yielding “intrajurisdictional efficiency” at the expense of the “interjurisdictional efficiency” concerns of the polity writ large.<sup>126</sup> The end result could be underregulation<sup>127</sup> or overregulation. The basic overregulation argument (traditionally pressed by groups such as the Chamber of Commerce and the National Association of Manufacturers) is that states with little industry of a certain kind impose high liability on out-of-state industry—whether due to

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race toward ever-higher plaintiff recoveries, a race whose outcome does not necessarily represent the considered judgment of decision makers in the several states.”); Robert M. Ackerman, *Tort Law and Federalism: Whatever Happened to Devolution?*, YALE L. & POL’Y REV. 429, 451 (Symposium Issue, 1996); John S. Baker, Jr., *Respecting a State’s Tort Law, While Confining its Reach to that State*, 1 SETON HALL L. REV. 698, 704 (2001) (“Congress should respond when the laws of one state, whether it is good or bad, imposes itself on the citizens of other states who have no connection with and who have not invoked the law of that state.”); Harvey S. Perlman, *Products Liability Reform in Congress: An Issue of Federalism*, 48 OHIO ST. L.J. 503, 508 (1987) (arguing that federal legislation should be narrowly directed toward reducing spillover effects—namely where citizens of one state must bear the cost of the policy decisions in another state).

124. Schwartz, *Statutory Interpretation*, *supra* note 45, at 21 & n.26 (specifying as a constraint on the pursuit of local values that “local regulation will not externalize costs to other states”). Schwartz elaborates further:

[S]tates that require products to be made safer than the federal standard may impose costs on the citizens of other states. . . . [I]f a large state prefers higher safety standards than smaller states and it is impractical for a national manufacturer to make different versions of the product, then the citizens of smaller states may have to consume more safety than they would like. Similarly, if enough small states prefer more safety than some larger states do, then big state citizens may be bound by the preferences of small state citizens.

*Id.* at 21.

125. See, e.g., Michael I. Krauss, *Product Liability and Game Theory: One More Trip to the Choice-of-Law Well*, 2002 BYU L. REV. 759, 782–84 (arguing, using prisoners’ dilemma approach, that states are better off adopting discriminatory rules to other states no matter what rules other states adopt); William Powers, Jr., *Some Pitfalls of Federal Tort Reform Legislation*, 38 ARIZ. L. REV. 909, 910 (1996) (“[I]n a classic example of the tragedy of the commons, each state may have a bias in favor of products liability rules that increase recovery.”).

126. The terminology is from Robert P. Inman & Daniel L. Rubinfeld, *Making Sense of the Antitrust State-Action Doctrine: Balancing Political Participation and Economic Efficiency in Regulatory Federalism*, 75 TEX. L. REV. 1203, 1234 (1997).

127. The underregulation argument is that states have an incentive to underregulate in order to pacify an industry that might otherwise leave; hence states do not have incentives to protect their own citizen consumers. The argument for federal standards here is typically an argument for a federal “floor,” given states’ natural inclination to underregulate. Roderick Hills traces the historical origins of the idea of a broad federal power to regulate national markets and elaborates the New Deal argument that market pressure induces states to underregulate. Roderick M. Hills, Jr., *Two Concepts of “The Economic” in Constitutional Law: The Underlying Unity of Due Process and Federalism Jurisprudence* 1, 12 (Sept. 8, 2004) (unpublished manuscript), available at [http://www.law.columbia.edu/faculty/fac\\_resources/faculty\\_lunch/fall\\_2004?exclusive=filemgr.download&file\\_id=9596&rtcontentdisposition=filename=Hills.pdf](http://www.law.columbia.edu/faculty/fac_resources/faculty_lunch/fall_2004?exclusive=filemgr.download&file_id=9596&rtcontentdisposition=filename=Hills.pdf).

pandering to the local trial bar, state courts seeking fees, or local plaintiffs seeking damages.<sup>128</sup> The upshot is that states will tend to overregulate national goods moving in the stream of commerce—and this tendency is exacerbated by lax or uncertain choice of law rules and rules of personal jurisdiction that allow each state to impose its own law and courts on large-scale, out-of-state defendants.

*Blankenship v. General Motors Corp.*,<sup>129</sup> an opinion authored by former West Virginia Supreme Court Justice Richard Neely (a sort of poster child for damaging spillover effects),<sup>130</sup> offers an unusually candid portrayal:

West Virginia is a small rural state with .66 percent of the population of the United States. Although some members of this Court have reservations about the wisdom of many aspects of tort law, as a court we are utterly powerless to make the *overall* tort system for cases arising in interstate commerce more rational: Nothing that we do will have any impact whatsoever on the set of economic tradeoffs that occur in the *national* economy. And, ironically, trying unilaterally to make the American tort system more rational through being uniquely responsible in West Virginia will only punish our residents severely without, in any regard, improving the system for anyone else. . . .<sup>131</sup>

Per Justice Neely, no state has an incentive to disable the recoveries of its citizens so long as there is not a corresponding diminution by other states

128. See, e.g., RICHARD NEELY, *THE PRODUCT LIABILITY MESS* (1988) (demonstrating that state judges and legislators shape tort law to favor the interests of resident plaintiffs over nonresident manufacturers); Richard Willard, Comment, 31 SETON HALL L. REV. 750, 751 (2001) ("Some states . . . might use their tort systems to expropriate wealth from, and regulate the conduct of, out-of-state entities. This is a problem the states cannot be expected to resolve individually and thus implicates federalism concerns."). As general counsel of a manufacturing company, Willard points out the difficulty for manufacturers because they sell in a national market and cannot limit their products to a particular state. *Id.*

This bias against out-of-state defendants has some empirical validity. See Eric Helland & Alexander Tabarrok, *The Effect of Electoral Institutions on Tort Awards*, 4 AM. L. & ECON. REV. 341, 359 (2002) ("[M]oving an otherwise average case with an out-of-state defendant from a nonpartisan to a partisan state raises the expected [tort] award by \$362,988."); Alexander Tabarrok & Eric Helland, *Court Politics: The Political Economy of Tort Awards*, 42 J.L. & ECON. 157 (1999). But see Thomas A. Eaton & Susette M. Talarico, *Testing Two Assumptions About Federalism and Tort Reform*, YALE L. & POL'Y REV. 371, 377–85 (Symposium Issue, 1996) (finding little evidence, in a study of statutes and court decisions, of a systemic bias against nonresident manufacturers).

129. 406 S.E.2d 781 (W. Va. 1991).

130. Gary Schwartz cautioned against relying too heavily on the *Blankenship* opinion: [I]f one is looking for convincing confirmation of the Neely diagnosis, *Blankenship* does not suffice. For the *Blankenship* opinion is coy and self-conscious: plainly Judge Neely was deliberately trying to draw attention to what he saw as an inherent defect in the products liability lawmaking process.

Schwartz, *American Tort Law*, *supra* note 45, at 934.

131. *Blankenship*, 406 S.E.2d at 783.

(the coordination problem) and, besides, the costs are borne elsewhere (the spillover or pollution effect). It is therefore not surprising to see several pivotal preemption cases articulate a need for the coordinated power of the federal government to oust state courts of their traditional jurisdiction over common law tort actions. It is also not surprising to see industry groups push for national standards as a way to rationalize potential legal liabilities from their broad market conduct.<sup>132</sup>

## 2. Horizontal Preemption

Products liability preemption cases occupy a difficult middle ground along a spectrum. At one pole are the areas of law in which Congress has sought to occupy the field, such as ERISA or LMRA.<sup>133</sup> In these areas, the statutes typically announce the exclusive sway of federal law and often provide for exclusive jurisdiction in the federal courts as well. At the other pole stand the Dormant Commerce Clause cases, typified by a judicial determination that Congress's silence as to both substantive law and federal jurisdiction should nonetheless be seen as an exercise in federal power to keep states from regulating in any fashion.<sup>134</sup>

The products liability cases are unlike the vertical preemption cases, in which the Court responds to an assertion of a direct federal interest that claims to occupy the entire field. But they are also unlike the Dormant Commerce Clause cases, in which the Court proclaims the federal interest paramount despite the absence of affirmative action by Congress. The products liability cases lie somewhere between the two poles, typically presenting themselves as part of an incomplete federal regime. Most often the cases deal with the attempt to establish national regulatory objectives that come to govern liability, but with poorly defined remedial schemes.<sup>135</sup> Thus, federal preemption must be

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132. See E. Donald Elliott et al., *Toward a Theory of Statutory Evolution: The Federalization of Environmental Law*, 1 J.L. ECON. & ORG. 313, 330, 333–36 (1985).

133. See *supra* Part II.B.1.

134. In Dormant Commerce Clause cases, the Supreme Court has attempted to protect national markets from discriminatory laws passed by states to impose burdens upon out-of-state goods and to shift externalities to neighboring states. See *supra* note 18. In a sense, we seek to extend Bednar & Eskridge's Dormant Commerce Clause analysis. See Bednar & Eskridge, *supra* note 18. We pick up where Bednar and Eskridge left off: "Should the Supremacy Clause . . . be the primary basis for monitoring all sorts of cheating—from shirking . . . to externalities and protectionism, which are now regulated primarily under the dormant commerce clause?" *Id.* at 1488.

135. For an express recognition that common law damages are an integral part of the Court's understanding of legal requirements or prohibitions, see *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 522 (1992) (relying in turn on WILLIAM L. PROSSER, *HANDBOOK OF THE LAW OF TORTS* 4 (4th ed. 1971)).

implied against a poorly elaborated regulatory patchwork and force courts in the first instance to resolve difficult questions of statutory interpretation.

We hope to demonstrate that the Supreme Court, in the interpretive space that is created by this patchwork of federal products liability legislation, acts to protect the national market from externalities and spillover effects—albeit in a more tentative, less-comprehensive fashion. While spillover effects would compel a broader swath of preemption in the products liability arena, the Court is no doubt constrained by the absence of comprehensive national legislation and by the absence of a remedial scheme that matches the potential field-clearing sweep of the federal regulatory interest.<sup>136</sup> We are cognizant of the uphill battle we face; any attempt to provide a uniform set of guiding principles to articulate a clear logic and vision in the area of products liability preemption would seem doomed to failure.<sup>137</sup> At the same time, absent such functional criteria, the Court's highly fact-dependent, case-by-case inquiry into congressional purpose and the language employed to effectuate that purpose cannot adequately account for the case outcomes, let alone provide a coherent account of this area of the law.<sup>138</sup>

Consider, for example, *Geier v. American Honda Motor Co.*<sup>139</sup> The Court was asked to decide whether the National Traffic and Motor Vehicle Safety

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136. Congress might be looked to as the actor of institutional choice in responding to spillover effects. But, unlike in the contexts we explored *supra* Part II.B (regarding CWA, ERISA, LMRA, OSHA, FAA), Congress has not passed comprehensive federal legislation governing products. Here, the United States stands at odds with the European Community. In 1985, the EC Council of Ministers promulgated a Directive on Products Liability, which governs most of the content of member states' products liability systems. See Schwartz, *American Tort Law*, *supra* note 45, at 924. In 1996, the Common Sense Product Liability Legal Reform Act (PLLRA) was proposed as a national solution to respond to the reality that "rules of law governing product liability actions, damage awards and allocations of liability have evolved inconsistently within and among the states." See Cynthia C. LeBow, *Federalism and Federal Product Liability Reform: A Warning Not Heeded*, 64 TENN. L. REV. 665, 672 (1997) (quoting 142 CONG. REC. S2587 (daily ed. Mar. 21, 1996); H.R. 956, 104th Cong. § 2(a)(8), (10) (1996)). On May 3, 1996, President William Clinton vetoed the bill, charging that it would "inappropriately intrude[] on state authority." Neil A. Lewis, *President Vetoes Limits on Liability*, N.Y. TIMES, May 3, 1996, at A1, A8, *quoted in* Schwartz, *American Tort Law*, *supra* note 45, at 917 (discussing progression of PLLRA through approval in both Houses in Congress).

137. See, e.g., Meltzer, *supra* note 42, at 362–78; Robert L. Rabin, *Reassessing Regulatory Compliance*, 88 GEO. L.J. 2049, 2058 (2000) ("[P]reemption analysis by the Court will remain a source of disappointment for those in search of broad constitutional principles regarding the allocation of decisionmaking authority between federal regulatory schemes and state tort law."). The products liability area, moreover, tends to produce fractured opinions from the Court. See, e.g., *Medtronic, Inc. v. Lohr*, 518 U.S. 470 (1996) (plurality opinion); *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504 (1992) (plurality opinion).

138. As has been emphasized in the relevant literature, "For a variety of reasons, Congress often does not make its intention known so clearly that one can say with confidence whether it had in mind to statutorily preempt state tort law." Rabin, *supra* note 137, at 2054.

139. 529 U.S. 861 (2000).

Act of 1966<sup>140</sup> preempted a state common law tort action against a defendant auto manufacturer, which equipped its auto with passive restraints, as required by a regulation promulgated under the Act, but not air bags, which were not required.<sup>141</sup> The Act articulated directly counterposed signals on the extent of the federal interest.<sup>142</sup> Its preemptive clause decreed that “no State . . . shall have any authority . . . to establish . . . any safety standard . . . which is not identical to the federal standard.”<sup>143</sup> Yet the accompanying savings clause removed any seeming clarity by directing that “[c]ompliance with any Federal motor vehicle safety standard . . . does not exempt any person from any liability under common law.”<sup>144</sup>

In holding that the regulation (promulgated pursuant to the Act) preempted state common law tort actions premised on the failure to provide state-of-the-art passenger protection, the Court reasoned that, absent preemption, “state law could impose legal duties that would conflict directly with federal regulatory mandates.”<sup>145</sup> The policy consideration here went beyond a

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140. National Traffic and Motor Vehicle Safety Act of 1966, Pub. L. No. 89-563, 80 Stat. 718 (codified in scattered sections of 15 U.S.C.).

141. *Geier*, 529 U.S. at 875–76 (discussing the history behind the standard promulgated by the secretary).

142. As aptly noted by Robert Rabin, “Once again, Congress demonstrates its capacity for creating ambiguity in the preemption area—in this instance, not by remaining silent about the continuing vitality of state tort law, but by issuing seemingly contradictory commands.” Rabin, *supra* note 137, at 2058–59.

143. 15 U.S.C. § 1392(d) (1988).

144. *Id.* § 1397(k). Peter Strauss offers an intriguing potential reconciliation: namely that the savings clause might be read narrowly (and weakly) “as a declaration by Congress that no rights existing when it acted (that is, *under the common law as it then was*) should be found prejudiced by its action.” Peter L. Strauss, *Courts or Tribunals? Federal Courts and the Common Law*, 53 ALA. L. REV. 891, 919 (2002). Strauss reminds us that “[l]iability for ‘design defects’ was not very well developed when the savings clause was enacted [in 1966], but liability for manufacturing defects was,” and argues that “[a] member of Congress thinking about the common law liability problem through that lens would not see frequent occasions for actual disabling conflict between common law principles of liability and the federal standards to be developed.” *Id.* at 920. While an admirable attempt to reconcile the seemingly contradictory impulses of Congress, in the end (as Strauss himself recognizes) no traces of its logic can be found in the Court’s 2000 opinion—nor, it might be added, in the 1994 amendments to the Act (recodified in scattered sections of 49 U.S.C.). In the end, and as Strauss acknowledges, the *Geier* majority might best be viewed as performing a type of “preemptive lawmaking” function as described by Thomas Merrill. Thomas W. Merrill, *The Common Law Powers of Federal Courts*, 52 U. CHI. L. REV. 1, 36 (1985) (“Preemptive lawmaking may be invoked when a court, although it can discern no specific intention on the part of the enacting body with respect to the question before it, finds that the adoption of state law as the rule of decision would unduly frustrate or undermine a federal policy as to which there is a specific intention on the part of the enacting body.”).

145. *Geier*, 529 U.S. at 871. The majority’s decision prompted criticisms that the Court was imposing tort reform in disguise, *id.* at 894 (Stevens, J., dissenting), and had managed, through sleight of hand, to eradicate entirely the presumption against preemption, *see, e.g.*, Calvin Massey, *Joltin’ Joe Has Left and Gone Away: The Vanishing Presumption Against Preemption*, 66 ALB. L. REV. 759, 762 (2003).

mere ephemeral concern that imposition of tort liability would increase the cost of making cars. The Court was instead concerned that state tort suits themselves would have the perverse effect of limiting the choices available to automobile manufacturers. The regulatory standard itself explicitly invited federal nonuniformity, but a single state's imposition of tort liability would impose a significant spillover effect because of the interstate mobility of cars. Even were manufacturers to limit the distribution of cars to conform sales to the requirements of a particular state, they would remain exposed to suit should an accident ensue after the car had been driven to another state where a different restraint system was required. Because automobile manufacturers cannot restrict the freedom of movement of end purchasers of their cars, the only way to avoid massive tort liability would be to adopt an airbag-only policy. But, as the Court explained, "The standard deliberately provided the manufacturer with a range of choices among different passive restraint devices. Those choices would bring about a mix of different devices introduced over time; and . . . would thereby lower costs, overcome technical safety problems, encourage technological development, and win widespread consumer acceptance."<sup>146</sup> In this instance, state law "would have presented an obstacle to the variety and mix of devices that the federal regulation sought."<sup>147</sup> And

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146. *Geier*, 529 U.S. at 875.

147. *Id.* at 881. Peter Strauss has commented that "as neither Congress nor the Secretary had made this judgment, the majority was, necessarily, asserting a law-making authority in the federal courts—corresponding roughly to the law-making authority the courts have exercised in 'dormant Commerce Clause' cases excluding various state regulatory measures for conflict with interstate commerce." Strauss, *supra* note 144, at 906. The solicitor general, nonetheless, argued in *Geier* that the promulgation of Federal Motor Vehicle Safety Standard 208 embodied an affirmative "policy judgment that safety would best be promoted if manufacturers installed *alternative* protection systems in their fleets rather than one particular system in every car." *Geier*, 529 U.S. at 881 (quoting Brief for the United States as Amicus Curiae Supporting Affirmance at 25, *Geier v. Am. Honda Motor Co.*, 529 U.S. 861 (2000) (No. 98-1811)).

By contrast, the Court rebuffed the preemption argument in *Freightliner Corp. v. Myrick*, 514 U.S. 280 (1995). Like *Geier*, the preemptive effect of a National Highway Traffic Safety Administration regulation was at issue; but, unlike the situation in *Geier*, the agency, while it held hearings, had never formally adopted and reinstated the amended standard at issue (which provided stopping distances and vehicle stability requirements for trucks). The Court held that the Act's preemption clause applied only "[w]hen[ ] a Federal motor vehicle safety standard . . . is in effect"; moreover, the absence of a standard could not itself be considered to constitute regulation, especially where the lack of regulation was due not to an affirmative decision of the agency, but by the ruling of a federal court. *Id.* at 286 (quoting 15 U.S.C. § 1392(d) (1994)).

In analogous fashion, in *Spietsma v. Mercury Marine*, 537 U.S. 51 (2002), the Court held (unanimously) that a state common law tort action seeking damages from the manufacturer of an outboard motor was not preempted either by the enactment of the Federal Boat Safety Act of 1971 or by the decision of the Coast Guard in 1990 not to promulgate a regulation requiring propeller guards on motorboats. Here, too, the interest in securing "uniformity of boating laws and regulations as among the several States and the Federal Government" would seem paramount. *Id.* at 57. However, again, unlike in *Geier* and similar to *Freightliner*, here there was no definitive agency regulation—instead,



it was thus manufacturer choice itself that the Court was protecting from potentially burdensome state liability rules.<sup>148</sup>

The point is confirmed by *Cipollone v. Liggett Group, Inc.*,<sup>149</sup> a watershed decision in which a divided Court signaled a broader approach to preemption and a willingness to set aside state common law in the name of federal objectives. A plurality of the Court held that the Public Health Cigarette Smoking Act of 1969<sup>150</sup> preempted a number of state tort claims that were based on the failure to provide information about the health consequences of cigarette smoking.<sup>151</sup> The issue that divided the Court was whether common law causes of action were

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the Court was asked to consider whether the Coast Guard's decision not to regulate propeller guards impliedly preempted any state-law common law liability. *Id.* at 65 ("[H]istory teaches us that a Coast Guard decision not to regulate a particular aspect of boating safety is fully consistent with an intent to preserve state regulatory authority pending the adoption of specific federal standards.").

The Court, moreover, was likely heavily swayed by the fact that the solicitor general, joined by counsel for the Coast Guard, took the position that the agency did not view the 1990 refusal to regulate or any subsequent regulatory actions by the Coast Guard as having any preemptive effect. The influence of the position of the solicitor general in cases before the Supreme Court is widely acknowledged. See, e.g., Michael S. Greve, *The Supreme Court Term That Was and the One That Will Be*, AEI FEDERALIST OUTLOOK, July–Aug. 2002, [http://www.aei.org/publications/pubID.15849/pub\\_detail.asp](http://www.aei.org/publications/pubID.15849/pub_detail.asp) ("The solicitor general participates in every preemption case, and since those cases turn on the interpretation of federal statutes, his views are accorded special weight."); see also Cross & Tiller, *supra* note 43, at 747 ("When the Solicitor General requests that a case be taken on certiorari, the Court frequently complies. When the Federal government appears as a party before the Court, it has an unusually high rate of success.") (footnote omitted).

148. Roderick Hills has argued that *Geier* is wrongly decided because state tort law liability might serve different purposes (e.g. corrective justice) from state regulation, even if it has the same effect. For this reason, in his view, federal law that preempts state regulations should not be read to preempt tort liability. The Supreme Court has wrestled fairly extensively with this purported distinction between state common law and regulatory or statutory regimes. See *supra* note 110. The Court appears uncomfortable with rules that constrict remedies as opposed to liability-determinative rules, a further distinction that is problematic, but at least it does not confuse the source of ultimate regulatory activity for national market conduct. *Bates v. Dow Agrosciences, LLC*, 544 U.S. 431 (2005) (discussed *infra* text accompanying note 159) highlights this problem.

149. 505 U.S. 504 (1992).

150. Public Health Cigarette Smoking Act of 1969, 15 U.S.C. § 1340 (2000).

151. Rose Cipollone, who began smoking in 1942 and died of lung cancer in 1984, brought claims for breach of express warranties, failure to warn, design defects, fraudulent misrepresentation, and conspiracy to defraud. *Cipollone*, 505 U.S. at 508–09. A plurality of the Court (per Justice Stevens) held that petitioner's claims based upon express warranty and conspiracy were not preempted by the 1969 Act. *Id.* at 525–30. Justice Blackmun (writing for himself, and Justices Kennedy and Souter) concluded that the 1969 Act did not clearly and manifestly exhibit a congressional intent to preempt common law damages actions, and therefore concurred in part that certain of the claims were not preempted. *Id.* at 533–34 (Blackmun, J., dissenting). Justices Scalia and Thomas concurred in part and dissented in part, arguing that all of the claims were preempted by the 1969 Act under ordinary principles of statutory construction. *Id.* at 548–54 (Scalia, J., concurring in the judgment in part and dissenting in part, joined by Thomas, J.).

A majority (again, per Justice Stevens) also held that the previously enacted 1965 Federal Cigarette Labeling and Advertising Act (FCLAA) did not preempt state-law damages actions, but preempted only positive enactments by state and federal rulemaking bodies in the areas of advertising and labeling cigarettes. *Id.* at 518–20.

"requirements" (akin to state statutory and administrative regulations) within the meaning of the 1969 statute's express preemption provision.<sup>152</sup> Although this division could be placed within a traditional statutory interpretation framework,<sup>153</sup> the resulting opinions are far from an homage to textualism.<sup>154</sup> Absent some overriding theory of the relation between federal integration and the risk of conflict among state commands, it is difficult to lend any coherence to the Court's approach to implied preemption.

Not surprisingly, we find room for a more functionalist account, much in line with that of the late Gary Schwartz. Schwartz provided a favorable account of the result in *Cipollone* by emphasizing the undesirability of allowing nonuniform rulings from state to state to control the extent of cigarette companies' warning obligations:

The federal interest in a coherent warning program would be unduly impaired if a jury in Massachusetts could find that the warning should mention addiction while an Oregon jury rules that the warning should include a skull-and-crossbones and a Florida jury concludes that the warning should set forth actual data on the probability of disease.<sup>155</sup>

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152. That provision (section 5(b)) was broader than the 1965 Act because: "First, the later Act bars not simply 'statement[s]' but rather 'requirement[s] or prohibition[s]' . . . imposed under State law.' Second, the later Act reaches beyond statements 'in the advertising' to obligations 'with respect to the advertising or promotion' of cigarettes." *Id.* at 520.

153. The plurality decision makes clear that "[w]hen Congress has considered the issue of pre-emption and has included in the enacted legislation a provision explicitly addressing that issue, and when that provision provides a 'reliable indicium of congressional intent with respect to state authority,' there is no need to infer congressional intent to pre-empt state laws from the substantive provisions' of the legislation." *Id.* at 517 (quoting *Malone v. White Motor Corp.*, 435 U.S. 497, 505 (1978) and *Cal. Fed. Sav. & Loan Ass'n v. Guelta*, 479 U.S. 272, 282 (1987)). In other words, the Court would employ a variation on *expressio unius est exclusio alterius* to focus explicitly and exclusively on the express provision included by Congress and would not address implied preemption arguments. For an argument that courts should employ default rules that are ungenerous to Congress in such statutory cases so as to force Congress to confront more fully the impact of its decisionmaking, see Einer Elhauge, *Preference-Eliciting Statutory Default Rules*, 102 COLUM. L. REV. 2162 (2002).

154. Justice Scalia vigorously dissented in part, arguing that the Court, with its various presumptions against preemption, had done significant damage to the literal wording of the statute. In Justice Scalia's view, both the 1965 and 1969 Acts expressly preempted all of *Cipollone*'s claims. Justice Scalia inveighed against the Court's traditional preemption framework:

Must express pre-emption provisions really be given their narrowest reasonable construction (as the Court says in Part III), or need they not (as the plurality does in Part V)? Are courts to ignore all doctrines of implied pre-emption whenever the statute at issue contains an express pre-emption provision, as the Court says today, or are they to continue to apply them, as we have in the past? For pre-emption purposes, does 'state law' include legal duties imposed on voluntary acts (as we held last Term in *Norfolk & Western R. Co.*), or does it not (as the plurality says today)? These and other questions raised by today's decision will fill the lawbooks for years to come. A disposition that raises more questions than it answers does not serve the country well.

*Cipollone*, 505 U.S. at 555–56 (Scalia, J., dissenting).

155. See Gary T. Schwartz, *Tobacco Liability in the Courts*, in *SMOKING POLICY: LAW, POLITICS, AND CULTURE* 131, 151 (Robert L. Rabin & Stephen D. Sugarman eds., 1993).

Thus, the Court found that a state tort claim that was premised upon the notion that the manufacturer “should have included additional, or more clearly stated, warnings” could not survive.<sup>156</sup> By contrast, the Court let stand a state-law claim for fraudulent misrepresentation on the ground that fraud did little to upend national uniformity: “Unlike state-law obligations concerning the warning necessary to render a product ‘reasonably safe,’ state-law proscriptions on intentional fraud rely only on a single, *uniform* standard: falsity.”<sup>157</sup> In the wake of *Cipollone*, lower courts have read the fraud exception narrowly and have followed a trend to infer broad preemption of state law.<sup>158</sup>

Nonetheless, the federalization process moves by fits and starts. Most notably, in the 2005 case *Bates v. Dow Agrosciences, LLC*,<sup>159</sup> the Court returned to the preemptive effects of federal labeling requirements, this time under the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA).<sup>160</sup> This time, and arguably in tension with *Cipollone*, the Court relied on a “parallel requirements” reading of federal law to hold that FIFRA could coexist with common law claims. The Court concluded that because the common law did not expressly alter the labeling requirements under federal law, but simply added another level of remedial penalties, it did not necessarily do violence to congressional regulation.<sup>161</sup> In other words, states may provide the legal vehicle for remedying violations of federal standards, standards from which they are unable to add or subtract. While this does alter the market incentives that attach to business decisions, under the Court’s view there is no conflict in the commands that companies are compelled to follow. Here, the Court makes clear that FIFRA retains preemptive force: “In the main, it pre-empts

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156. *Cipollone*, 505 U.S. at 524.

157. *Id.* at 529 (emphasis added).

158. See, e.g., Robert J. Katerberg, *Patching the “Crazy Quilt” of Cipollone: A Divided Court Rethinks Federal Preemption of Products Liability in Medtronic, Inc. v. Lohr*, 75 N.C. L. REV. 1440, 1478 n.260 (1997) (listing post-*Cipollone* cases broadly inferring preemption).

In a more recent preemption case addressing the federal regulation of cigarette marketing, the Court held that cigarette-advertising regulations imposed by Massachusetts were preempted by the FCLAA, which prescribed mandatory health warnings for cigarette packaging and advertising. *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 550 (2001). The clear import of the FCLAA, according to the Court, was to prohibit state cigarette-advertising regulations motivated by concerns about smoking and health. *Id.* at 548. The Court thus held that, because it was clear that Massachusetts had attempted to address the incidence of underage cigarette smoking by regulating advertising, the regulations were preempted. *Id.* at 548–50.

159. 544 U.S. 431 (2005).

160. Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA), 7 U.S.C. §§ 136–136y (2000).

161. *Bates*, 544 U.S. at 446–49. Here, too, the Court seemed to breathe new life into the presumption against preemption. See *id.* at 449 (“[B]ecause the States are independent sovereigns in our federal system, we have long presumed that Congress does not cavalierly pre-empt state causes of action.”) (quoting *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996) (alteration in original)).

competing state labeling standards—imagine 50 different labeling regimes prescribing the color, font size, and wording of warnings—that would create significant inefficiencies for manufacturers.”<sup>162</sup>

The distinction between liability and remedies in *Bates* is conceptually unsatisfying but reflects the tension in areas where the Court wants to promote uniformity in the absence of a complete regulatory framework.<sup>163</sup> The same pressure toward horizontal integration is present in federal oversight over the design of medical devices, an area where the case law likewise does not entirely hold together. Here we are forced to contrast an impulse toward preserving the integrity of the common law in *Medtronic, Inc. v. Lohr*<sup>164</sup> with the more expansive account of the federal interest in *Buckman Co. v. Plaintiffs’ Legal Committee*.<sup>165</sup> *Medtronic* held, again by a sharply divided Court, that common law claims concerning the design of medical implements were not preempted by the Medical Device Amendments of 1976 (MDA).<sup>166</sup> The plurality rejected as unpersuasive and implausible *Medtronic’s* argument that any common law claim altered incentives and imposed additional duties.<sup>167</sup>

162. *Id.* at 452.

163. The Court, moreover, was clearly concerned by the fact that most farmers would be left without a remedy if state tort suits for misbranding were entirely preempted. *Id.* at 449 (“The long history of tort litigation against manufacturers of poisonous substances adds force to the basic presumption against pre-emption. If Congress had intended to deprive injured parties of a long available form of compensation, it surely would have expressed that intent more clearly.”). Given the contemporary Court’s reluctance to infer private rights of action from statutes like FIFRA, the consequence of a preemption decision may be to leave injured plaintiffs entirely bereft of remedies. For an elaboration of the inverse relationship between the comprehensiveness of a federal regulatory scheme and the necessity for private rights of action, see Sharkey, *supra* note 11.

164. 518 U.S. 470 (1996).

165. 531 U.S. 341 (2001).

166. Medical Device Amendments of 1976 (MDA), 21 U.S.C §§ 360c–379a (2000). The case involved negligence and strict liability claims by a plaintiff injured by a pacemaker, which had been approved by the Food and Drug Administration (FDA), as directed by the MDA. *Medtronic*, 518 U.S. at 470. Section 360k(a) provided:

[N]o State . . . may establish or continue in effect with respect to a device intended for human use any requirement (1) which is different from, or in addition to, any requirement applicable under this chapter to the device, and (2) which relates to the safety or effectiveness of the device or to any other matter included in a requirement applicable to the device under this chapter.

21 U.S.C. § 360k(a). As is typical, neither the statutory language (nor the legislative history) of the MDA is explicit about barring tort claims. See, e.g., Robert S. Adler & Richard A. Mann, *Preemption and Medical Devices: The Courts Run Amok*, 59 MO. L. REV. 895, 923–24 (1994) (“[W]e note that there is no absolutely dispositive language in the MDA regarding preemption and the common law. That is, nowhere in the amendments or in the legislative history of the amendments does Congress indicate that state common law tort claims are preempted or are not preempted.”) (footnote omitted).

167. Moreover, Justice Stevens, writing for the plurality, was concerned that, to accept *Medtronic’s* argument would lead to the perverse result that Congress granted complete immunity to an entire industry from suits by users. *Medtronic*, 518 U.S. at 487. As in *Silkwood*, the plurality was unwilling to infer such an intent on the part of Congress when the language was ambiguous. *Id.*

The case shows the Court's hesitation over the ultimate logic of the national marketplace: the complete displacement of state tort law.<sup>168</sup> The plurality tries to limit the sweep of *Cipollone* by relying on a "sliding scale" analysis that factors in the breadth of the unwinding of the tort law system: Preemption is more likely when the field preempted is narrow and when there is some potential alternative legal remedy available to individuals.<sup>169</sup> By contrast, where a statute covers an entire field, like the design of medical devices, a broad reading will invariably lead to the complete supplanting of the traditional ability of states to provide remedies for their injured citizens. The dissent understood the same tension in federal-state relations, but would have preempted any claim that might potentially alter incentives or impose additional requirements upon entities covered by the statute.<sup>170</sup>

*Buckman* pushes in the other direction, with the Court showing far greater concern for the potential balkanization of federal regulatory authority. There, a state common law claim was premised upon allegedly false representations made to the Food and Drug Administration (FDA) in the course of obtaining approval for orthopedic bone screws. The suit claimed that the misrepresentations were the "but for" cause of the ensuing injuries that plaintiffs sustained from the implantation of these devices.<sup>171</sup> The Court, per

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168. The plurality frames its argument with its federalism-inspired presumption against preemption: "[B]ecause the States are independent sovereigns in our federal system, we have long presumed that Congress does not cavalierly pre-empt state-law causes of action." *Id.* at 485.

169. Justice Stevens created a new sort of balancing test:

The pre-emptive statute in *Cipollone* was targeted at a limited set of state requirements—those "based on smoking and health"—and then only at a limited subset of the possible applications of those requirements—those involving the "advertising or promotion of any cigarettes the packages of which are labeled in conformity with the provisions of" the federal statute. In that context, giving the term "requirement" its widest reasonable meaning did not have nearly the pre-emptive scope nor the effect on potential remedies that Medtronic's broad reading of the term would have in this suit.

*Id.* at 488 (citation omitted).

170. Justice O'Connor (writing for herself, then-Chief Justice Rehnquist, and Justices Thomas and Scalia) wrote:

I conclude that § 360k(a)'s term "requirement" encompasses state common-law claims. Because the statutory language does not indicate that a "requirement" must be "specific," either to pre-empt or be pre-empted, I conclude that a state common-law claim is pre-empted if it would impose "any requirement" "which is different from, or in addition to," any requirement applicable to the device under the [Federal Food, Drug, and Cosmetic Act of 1938].

*Id.* at 514 (O'Connor, J., concurring in part and dissenting in part, joined by Rehnquist, C.J., and Scalia and Thomas, JJ.).

171. The screws were approved by the FDA as a predicate device, but upon representations that these screws were to be marketed for legs and arms, as opposed to spines. Claiming that the FDA would not have approved the screws had petitioner not made the fraudulent representation, plaintiffs sought damages under state tort law. *Buckman Co. v. Plaintiffs' Legal Comm.*, 531 U.S. 341, 346–47 (2001) (discussing the history of the approval process and the filing of some 2300 civil actions).

then-Chief Justice Rehnquist, did not hesitate to preempt based on the functional consequences of allowing such a claim to proceed:

As a practical matter, complying with the FDA's detailed regulatory regime in the shadow of 50 States' tort regimes will dramatically increase the burdens facing potential applicants . . . . Would-be applicants may be discouraged from seeking . . . approval of devices with potentially beneficial off-label uses for fear that such use might expose the manufacturer or its associates . . . to unpredictable civil liability.<sup>172</sup>

Even within the core of traditional state-law duties, *Buckman* reaffirms the need for horizontal integration to coordinate the liability standards of goods manufactured for the national market.

### III. FORUM SELECTION AND FEDERALISM

Federal authority is not simply a matter of control over the formal substantive law, but also over the forum in which the law is elucidated. It is worth recalling that the first great effort to harmonize commercial law in the service of the national market took as its centerpiece the use of federal authority over diversity cases.<sup>173</sup> The target of such reforms was the autarchic division of the markets that stood as a deep inhibition of interstate commerce. As one contemporary rather colorfully expressed the issue:

Inter-commercial in this united way, our law is essentially defective . . . where in the North, professing the principles of the English common law, a merchant shall have a contract interpreted in one way in Pennsylvania, another way in New York, and a third way in Boston: and when he goes South with it next week, shall find it open to new constructions;—in Florida, by the Partidas of Spain; in Louisiana, by the Code Civil of France, and in Texas and California, by something which is neither and both; half code, half custom . . . where in fact, law is a science of geography, almost as much as of justice.<sup>174</sup>

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172. *Id.* at 350. To be sure, the Court was swayed by additional factors:

Policing fraud against federal agencies is hardly "a field which the States have traditionally occupied," such as to warrant a presumption against finding federal preemption of a state law cause of action. To the contrary, the relationship between a federal agency and the entity it regulates is inherently federal in character because the relationship originates from, is governed by, and terminates according to federal law.

*Id.* at 347 (internal citation omitted). Also, the federal statutory scheme empowers the FDA to punish and deter fraud against the Agency. *Id.* at 349–50.

173. See generally Henry J. Friendly, *The Historic Basis of Diversity Jurisdiction*, 41 HARV. L. REV. 483 (1928).

174. JOHN WILLIAM WALLACE, *THE WANT OF UNIFORMITY IN THE COMMERCIAL LAW BETWEEN THE DIFFERENT STATES OF OUR UNION* 28 (Phila., L.R. Bailey 1851).

The impediments to commerce gave force to the proponents of using a common commercial law as an integral part of the consolidation and expansion of the fledgling American state, what Chief Justice Shaw of the Massachusetts Supreme Court would describe aspirationally as the creation of “one extended commercial community.”<sup>175</sup> The goal, claimed a bit prematurely as close to an accomplished fact by William Kent in 1838, was to see to it that “the law of commerce is not confined and local, but, the production of many countries and ages, [and] is in most respects common to them all, and uniform.”<sup>176</sup> As eloquently summarized by Daniel Webster, who would subsequently appear as counsel for Swift in *Swift v. Tyson*:<sup>177</sup> “Whatever we may think of it now, the Constitution has its immediate origin in the conviction of the necessity for this uniformity, or identity, in commercial regulations. . . . Unity and identity of commerce among all the States was its seminal principle.”<sup>178</sup> To this day, the Supreme Court has identified the Commerce Clause as emerging from “the Framers’ response to the central problem giving rise to the Constitution itself: the absence of any federal commerce power under the Articles of Confederation.”<sup>179</sup> We turn now to the role of federal courts as the vehicle of commercial harmonization, most notably in the hands of Justice Story. On this account, federal courts used their powers over diversity cases to provide a more coherent and distinctively American law and to protect against the centripetal pressures of state authority under the sway of localism.

#### A. From *Swift* to *Erie*: Federal Power and the Common Law

The role of jurisdiction based on diversity of citizenship in this account is subject to underestimation. From the modern vantage point, it is too easy to invest diversity with a rights gloss, protecting individuals against the passions

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175. *Staples v. Franklin Bank*, 42 Mass. (1 Met.) 43, 47 (1840).

176. William P. LaPiana, *Swift v. Tyson and the Brooding Omnipresence in the Sky: An Investigation of the Idea of Law in Antebellum America*, 20 SUFFOLK U. L. REV. 771, 780–81 (1986) (quoting William Kent, *The Rise and Progress of Commercial Law in English Jurisprudence*, in INAUGURAL ADDRESS, DELIVERED BY THE PROFESSORS OF LAW IN THE UNIVERSITY OF THE CITY OF NEW YORK 45–49 (1838)).

177. 41 U.S. (16 Pet.) 1 (1842).

178. Daniel Webster, as quoted in Alfred B. Teton, *The Story of Swift v. Tyson*, 35 ILL. L. REV. 519, 538 n.107 (1940). For historical analysis portraying the constitutional founding as a struggle between creditors and debtors, see generally MERRILL JENSEN, *THE ARTICLES OF CONFEDERATION* (1970). In a separate argument before the Court, Webster addressed the link between commerce and diversity jurisdiction: “It was from a distrust of state tribunals that the provision [diversity jurisdiction] of the Constitution of the United States was introduced.” *Groves v. Slaughter*, 40 U.S. (15 Pet.) 449, 490 (1841).

179. *Gonzales v. Raich*, 125 S. Ct. 2195, 2205 (2005).

of local herd-like antipathy.<sup>180</sup> But the concern of the framers was otherwise. It was not the random hostility to a citizen of another jurisdiction that concerned them as much as it was the predictable pattern of hostility to a discrete class of potential parties in state-court litigation: creditors. With the immediate background of Shays' Rebellion and broader concerns that overarching democratic impulses could compromise the integrity of financial markets, not to mention any system of currency,<sup>181</sup> the framers viewed the risk of popular repudiation of commercial obligations as a threat to the economic expansion of the new Republic and a potential source of interstate popular retaliation.<sup>182</sup> Diversity jurisdiction served not so much to protect the unfortunate individual litigant who found himself in unwelcoming environs, but to provide a jurisdictional refuge for the commercial class that, even at the time of the founding, was already spreading its affairs across the new nation.<sup>183</sup> Indeed, the debate over the Judiciary Act of 1801<sup>184</sup> highlighted "Federalist arguments that expanded federal court jurisdiction was needed to protect commercial interests."<sup>185</sup> As historian Jackson Turner Main has written: "The prospect that creditors could sue in the federal courts and recover claims in real was particularly pleasing at a time when the collection of debts was exceptionally difficult and the number of suits in state courts extraordinarily high."<sup>186</sup>

According to Madison's notes of the Constitutional Convention, the concept of diversity jurisdiction was not much debated in the convention itself;

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180. See, e.g., *Burford v. Sun Oil Co.*, 319 U.S. 315, 337 (1943) (Frankfurter, J., dissenting) (using broad rights-oriented language to describe diversity jurisdiction as existing "to avoid possible unfairness by state courts, state judges and juries, against outsiders"). For academic commentary making the same point, see, for example, Graham C. Lilly, *Making Sense of Nonsense: Reforming Supplemental Jurisdiction*, 74 IND. L.J. 181, 190 (1998) ("[T]he principal argument for diversity jurisdiction is the protection of out-of-state litigants from local prejudice.").

181. See RON CHERNOW, *ALEXANDER HAMILTON* 225 (2004) (highlighting the influence on the framers of Shays' Rebellion and the extremist movement in Rhode Island that advocated the abolition of debt and the equal division of wealth).

182. See CALVIN H. JOHNSON, *RIGHTEOUS ANGER AT THE WICKED STATES* 57 (2005) ("To the extent that creditors were citizens of other states, anti-creditor measures were also considered by the nationalists to be aggressions by one state against its neighboring states.").

183. See generally JACKSON TURNER MAIN, *THE ANTIFEDERALISTS: CRITICS OF THE CONSTITUTION 1781-1788* (1961) (explaining the divide over the Constitution "in terms of a debtor-creditor alignment"); CHARLES A. BEARD, *AN ECONOMIC INTERPRETATION OF THE CONSTITUTION OF THE UNITED STATES* (1961) (describing the Constitution as springing out of essentially economic interests). In a contemporary discussion of the Constitution in general, Jeremiah Libbey wrote "it will make them [the States] honest & put it out of their power to cheat every body by tender laws & paper money." *Id.* at 341 n.88.

184. Judiciary Act of 1801, ch. 4, 2 Stat. 89.

185. LaPiana, *supra* note 176, at 795 n.100.

186. MAIN, *supra* note 183, at 164-65.



while the wording was left to the Committee of Detail,<sup>187</sup> some version of the clause was an established part of assumed terms of the eventual constitutional compromise.<sup>188</sup> Even the Virginia Plan would have given federal courts jurisdiction over “cases in which foreigners or citizens of other States applying to such jurisdictions may be interested, or which respect the collection of the National revenue.”<sup>189</sup> In carrying the spirit of the founding to the subsequent debates on ratification, Luther Martin argued the centrality of the forum in protecting commerce:

The injury to commerce, and the oppression to individuals, which may thence arise, need not be enlarged upon. Should a citizen of Virginia, Pennsylvania, or any other of the United States, be indebted to, or have debts due from a citizen of this State, or any other claim be subsisting on one side or the other, in consequence of commercial or other transactions, it is only in the courts of Congress that either can apply for redress.<sup>190</sup>

John Marshall similarly understood that the ability to draw cases into federal court on diversity grounds “may be necessary with respect to the laws and regulations of commerce, which Congress may make.”<sup>191</sup> As summarized subsequently by Henry Friendly, “the desire to protect creditors against legislation favorable to debtors was a principal reason for the grant of diversity

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187. See generally 1–3 THE RECORDS OF THE FEDERAL CONVENTION OF 1787 (Max Farrand ed., 1937); see also Akhil R. Amar, *A Neo-Federalist View of Article III: Separating the Two Tiers of Federal Jurisdiction*, 65 B.U. L. REV. 205, 242–45 (1985) (tracing the language of diversity jurisdiction through the drafts of the Committee of Detail).

188. For a careful account of the historical record on the adoption of diversity jurisdiction and its tie to the protection of national commercial interests, see Debra Lyn Bassett, *The Hidden Bias in Diversity Jurisdiction*, 81 WASH. U. L.Q. 119, 131–36 (2003).

189. 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 187, at 22.

190. 3 *id.* at 220–21. On the other side of the aisle, George Mason asked delegates to ponder: “What effect will this power have between British creditors and the citizens of this State?” George Mason Fears the Power of the Federal Courts: What Will be Left to the States? (June 19, 1788), in 2 THE DEBATE ON THE CONSTITUTION 720, 725 (Bernard Bailyn ed., 1993). It is also relevant that the Anti-Federalist concerns about a state itself being called in front of the federal courts were focused on financial or commercial issues. Hamilton responds to these in *The Federalist* No. 81, replying that it was without foundation that “an assignment of the public securities of one State to the citizens of another would enable them to prosecute that State in the federal courts for the amount of those securities.” THE FEDERALIST NO. 81, at 487 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

191. John Marshall on the Fairness and Jurisdiction of the Federal Courts (June 20, 1788), in 2 THE DEBATE ON THE CONSTITUTION, *supra* note 190, at 735. Marshall offered as examples the types of cases that could be expected to arise under this clause, such as suits by creditors, issues over trade and product disputes, and disagreements over interest rates. *Id.*

jurisdiction.”<sup>192</sup> Nor, as Bruce Mann shows in the context of bankruptcy, was this an isolated concern of the framers:

Credit, like commerce, could not be contained within state boundaries. Full faith and credit helped somewhat, but it could harm out-of-state creditors by imposing on them state bankruptcy discharges that stripped them of their claims without their participation in the process. . . . Federal “uniform Laws on the subject of Bankruptcies,” which subjected debtors and creditors to the same rules and procedures regardless of where they lived, would be more in keeping with the interstate nature of commerce and the credit relations on which commerce rested.<sup>193</sup>

The significance of diversity jurisdiction in achieving economic integration came into its own in the first decades of the Republic.<sup>194</sup> For Justice Story, as expressed in the too easily discounted case of *Swift v. Tyson*,<sup>195</sup> access to federal courts resulting from expanding interstate contacts, and hence diversity of citizenship, could counteract the retrograde efforts against economic expansion in two ways. First, the fact of diversity jurisdiction allowed federal courts to stand between commercial creditors and local interests, even if compromised by the right to jury trial. Second, control of the substantive law to be applied in federal court could overcome tendencies toward protectionism and other barriers to the advancement of a national market. *Swift* was entirely consistent with Justice Story’s deep attachment to the role of law as cementing the expanding nation and argued that courts must be able to fashion legal principles addressing the distinct needs of the ascendant republic. But *Swift* also resonated with the central intuition behind the establishment of federal courts<sup>196</sup>—which, it must be recalled, were created with only diversity jurisdiction and no independent authority to hear federal claims until after the Civil War.

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192. Friendly, *supra* note 173, at 496–97. For other contemporary commentators focusing on the need to protect national creditors from the pro-debtor bias of state interests, see RICHARD A. POSNER, *THE FEDERAL COURTS: CRISIS AND REFORM* 141–42 (1985) (arguing that federal-court oversight is essential to protection of commercial interests); Larry Kramer, *Diversity Jurisdiction*, 1990 BYU L. REV. 97, 119 (arguing that “the desire to protect commercial interests from pro-debtor state courts” was key to “the creation of diversity jurisdiction”).

193. BRUCE H. MANN, *REPUBLIC OF DEBTORS* 185–86 (2002).

194. For a rich account of the intellectual history of the move toward a national common law, and particularly the role of Daniel Webster, James Kent and Joseph Story in the creation of that intellectual tradition, see DANIEL J. HULSEBOSCH, *CONSTITUTING EMPIRE* 274 (2005).

195. 41 U.S. (16 Pet.) 1 (1842).

196. Patrick Borchers identifies diversity jurisdiction as rooted in the “national peace and harmony” clause in the amended Virginia Plan. He argues that the framers recognized that federal courts needed independent substantive rules in order to advance this goal. Patrick J. Borchers, *The Origins of Diversity Jurisdiction, the Rise of Legal Positivism, and a Brave New World for Erie and Klaxon*, 72 TEX. L. REV. 79, 90–94 (1993).

Perhaps confirming the maxim that “if you build it, they will come,” federal courts quickly became the forum of choice of creditors, particularly after the creation of the circuit courts.<sup>197</sup> *Swift* was itself a fairly unexceptional case for that era in the federal courts. At issue was the enforceability of a type of secured credit in pre-Civil War America, what was known as an “accommodation loan,” recognized in most states, but not in New York, the site of the litigation. The spread of interstate commerce necessitated some form of uniform rules concerning the enforceability of commercial paper, regardless of the state in which the holder in due course might seek to enforce judgment. In seeking to unburden the new American state from its British and colonial inheritances, Justice Story held that, while federal judges sitting in diversity were obligated to honor state law, “state law” would be defined to mean only state statutes, but not state common law.<sup>198</sup> Thus, in the absence of express state statutes, federal judges were charged with articulating a “general common law” to be developed through the federal courts.

For Justice Story, *Swift* reinforced a position he had long expounded, based on an understanding of the common law as “a system of elementary principles and of general juridical truths, which are continually expanding with the progress of society, and adapting themselves to the gradual changes of trade, and commerce, and the mechanic arts, and the exigencies and usages of the country.”<sup>199</sup> Well prior to *Swift*,<sup>200</sup> in *Van Reimsdyk v. Kane*,<sup>201</sup> he wrote of the inherent limits on the power of state law:

In controversies between citizens of a state, as to rights derived under that statute, and in controversies respecting territorial interests, in which, by the laws of nations, the *lex rei sitae* governs, there can be little doubt, that the regulations of the statute must apply. But in controversies affecting citizens of other states, and in no degree arising from local regulations, as for instance, foreign contracts of a commercial nature, I think that it can hardly be maintained, that the laws of a state, to which they have no reference, however narrow,

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197. See Wythe Holt, “The Federal Courts Have Enemies in All Who Fear Their Influence on State Objects”: *The Failure to Abolish Supreme Court Circuit-Riding in the Judiciary Acts of 1792 and 1793*, 36 BUFF. L. REV. 301, 323–24 (1987) (“Out-of-state creditors also began to meet with success in the new federal courts. . . . [T]hese trends had begun to become evident by the spring and fall circuits of 1791, and became increasingly prominent through the 1790s.”) (citation omitted).

198. *Swift v. Tyson*, 41 U.S. (16 Pet.) 1, 4–5 (1842).

199. LaPiana, *supra* note 176, at 774 (quoting J. Story, *Codification of the Common Law*, in THE MISCELLANEOUS WRITINGS OF JOSEPH STORY 702 (W. Story ed., 1852)).

200. See also *Thomas v. Hatch*, 23 F. Cas. 946, 949–51 (C.C.D. Me. 1838) (No. 13,899); *Robinson v. Commonwealth Ins. Co.*, 20 F. Cas. 1002, 1004 (C.C.D. Mass. 1838) (No. 11,949).

201. 28 F. Cas. 1062 (C.C.D. R.I. 1812) (No. 16,871).

injudicious and inconvenient they may be, are to be the exclusive guides for judicial decision. Such a construction would defeat nearly all the objects for which the constitution has provided a national court.<sup>202</sup>

*Swift*, almost unexceptionally,<sup>203</sup> advanced the view that “questions of commercial law are generally considered, as not justly included in that branch of local law, which the courts of the United States are bound to administer, as the State Courts hold it to be.”<sup>204</sup> As Justice Story would later add in *Williams v. Suffolk Insurance Co.*:<sup>205</sup>

[U]pon commercial questions of a general nature, the courts of the United States possess the same general authority, which belongs to the state tribunals, and are not bound by the local decisions. They are at liberty to consult their own opinions, guided, indeed, by the greatest deference for the acknowledged learning and ability of the state tribunals, but still exercising their own judgment, as to the reasons, on which those decisions are founded.<sup>206</sup>

The contemporary reaction to *Swift* was unremarkable—especially in light of the overwhelming response the case would later occasion.<sup>207</sup> State courts in Ohio and New York “seemed persuaded that it would lead to a desirable uniformity in commercial matters.”<sup>208</sup> In fact, “[d]uring *Swift*’s first fifty years there were occasional dissents, but no Justice openly challenged Story’s original justification.”<sup>209</sup> Above all, the decision seemed a clarification of the role of the “general common law” as it applied to commercial

202. *Id.* at 1065. On appeal to the Supreme Court, John Marshall did not echo Justice Story’s assessment, choosing to remand the case to determine the contours of the local law in Batavia, where the contract at issue was written. *Clark’s Ex’rs v. Van Reimsdyk*, 13 U.S. (9 Cranch) 164 (1815).

203. *Swift* was hardly controversial at the time: It was a unanimous decision garnering support from a Court with a majority of Jacksonian judges. See TONY FREYER, *HARMONY & DISSONANCE: THE SWIFT & ERIE CASES IN AMERICAN FEDERALISM* 2–3 (1981) (noting that even “Democratic stalwarts . . . Chief Justice Roger B. Taney and Justice Peter V. Daniel” agreed with the decision “written by the nationalist Joseph Story”). Justice Story’s son did not include *Swift* in his biography of the justice, though he was detailed in his accounts of Justice Story’s other “great” cases. See William A. Fletcher, *The General Common Law and Section 34 of the Judiciary Act of 1789: The Example of Marine Insurance*, 97 HARV. L. REV. 1513, 1514 (1984) (noting that William Story “does not so much as mention *Swift*” in the biography).

204. *Donnell v. Columbian Ins. Co.*, 7 F. Cas. 889, 893 (C.C.D. Mass. 1836) (No. 3987).

205. 29 F. Cas. 1402 (C.C.D. Mass. 1838) (No. 17,738).

206. *Id.* at 1405.

207. See, e.g., GRANT GILMORE, *THE AGES OF AMERICAN LAW* 61 (1977) (“[T]he federalizing—or nationalizing—principle of *Swift v. Tyson* became a headless monster, marked down for destruction by all right-thinking men.”).

208. See Teton, *supra* note 178, at 524 n.36; see also *Staker v. McDonald*, 6 Hill. 93 (N.Y. 1843); *Treon v. Brown & Fuller*, 14 Ohio 172 (1846); *Carlisle v. Wishart*, 11 Ohio 173 (1842).

209. William R. Casto, *The Erie Doctrine and the Structure of Constitutional Revolutions*, 62 TUL. L. REV. 907, 915 (1988).

transactions unaffected by the particularized concerns of "local law."<sup>210</sup> Nor did the decision raise issues about its impact on federal structures.<sup>211</sup>

As *Swift* played itself out, however, and as it began to intersect the decidedly more interventionist jurisprudence of the Supreme Court after the Civil War, it emerged as a symbol of the critical fault line in a system premised on dual sovereignty. The resulting critique of *Swift*, almost as universally accepted as it is likely overly simplistic, follows two tracks. First, Justice Story's efforts at using the common law in aid of nation building ran into the problem of a dual-court system and the risk of divergent bodies of law seeming to control the same daily activities. Federal courts became more enamored of their new common law powers, with Justice Swayne, for example, subsequently proclaiming for the Supreme Court, "We shall never immolate truth, justice, and the law, because a State tribunal has erected the altar and decreed the sacrifice."<sup>212</sup> Although wonderfully colorful and more than a touch presumptuous, there was still the problem that state courts remained faithful to the "altar" of state decisional law and that the needs of "truth" and "justice" were a tad difficult to predict ahead of time. As a result, the same case could well be decided differently depending upon the accident of citizenship of the parties. Rather than serve as a unifying agent for the nation, *Swift* threatened arbitrariness, subjecting parties to two different standards of law in their everyday affairs.

The *Black & White Taxicab* case epitomized this problem.<sup>213</sup> Brown & Yellow Taxicab, a Kentucky corporation, had secured an exclusive-dealing contract to provide taxi services at a Kentucky railroad station, thereby preventing its competitor, Black & White Taxicab, another Kentucky corporation, from competing in that market. However, Kentucky courts had refused to enforce exclusive-dealing contracts as contrary to public policy. Federal courts, operating under *Swift*, were not obligated to honor Kentucky state decisional law, and had in fact found exclusive-dealing arrangements lawful and enforceable. Brown & Yellow therefore reincorporated in Tennessee,

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210. This point is carefully worked out by Judge William Fletcher in a review of the application of general common law principles to the necessarily interstate market for marine insurance. See Fletcher, *supra* note 203, at 1517. Fletcher points in particular to Blackstone as upholding commercial transactions governed by "a great universal law" that was "regularly and constantly adhered to." *Id.* at 1518 (quoting WILLIAM BLACKSTONE, 4 COMMENTARIES \*67).

211. See LaPiana, *supra* note 176, at 814 (noting that Justice Story himself did not see "the nature of federalism as an important issue"). Indeed, the case passed without mention in law reviews, except for one brief comment that failed even to examine its implications for the federal system. See Note, *Swift v. Tyson Exhumed*, 79 YALE L.J. 284, 293 n.45 (1969).

212. *Gelpcke v. City of Dubuque*, 68 U.S. (1 Wall.) 175, 206-07 (1863).

213. *Black & White Taxicab & Transfer Co. v. Brown & Yellow Taxicab & Transfer Co.*, 276 U.S. 518 (1928).

and then, armed with diversity of citizenship, successfully brought an action against Black & White in federal court. By manipulating its citizenship and taking advantage of federal as opposed to state courts, Brown & Yellow was able to enjoin its rival from interfering with its exclusivity contract, a legal maneuver that was ultimately upheld by the Supreme Court. This sort of manipulation of citizenship to control the legal rules governing the same exact contractual relationship at a Kentucky train station exposed the ultimate vulnerability of *Swift*.

Unpredictability was not the only source of disenchantment with *Swift*. The second ground for *Swift*'s demise was that the general common law powers of federal courts had been one of the linchpins of federal intervention to stop regulations of the progressive era, with the most notorious being the use of the labor injunction. In addition, the expansive use of constitutional oversight throughout the *Lochner* era had made federal courts a particular enemy of progressive reformers throughout the early part of the twentieth century.<sup>214</sup> The hostility to expansive federal-court power only intensified when the Court struck down the National Industrial Recovery Act<sup>215</sup> and other early pieces of the New Deal. By 1938, however, the Court's resistance to social legislation was beginning to buckle, President Roosevelt's appointees were taking hold, and the Court was prepared to rein in the far reaches of the federal common law, with *Erie* the ultimate result.

The demise of *Swift* and the emergence of *Erie* highlight that forum-allocation questions play a major role in the emergence of legal standards, particularly where the dual sovereignty of American federalism runs up against the need for order and predictability in settling the legal expectations of the citizenry as they go about their day-to-day lives. The facts of *Erie* underscored the systemic inefficiencies of rival state and federal claims upon legal actors. At issue was the level of care owed by a railroad to persons who without permission regularly used an obvious footpath along the rail bed. Under the law of Pennsylvania, the situs of the injury at issue, such pedestrians would be considered trespassers to whom only a limited duty of care attached. But when the case was brought in a New York federal court under diversity jurisdiction, the court decreed that the general common law would treat such persons as invitees to whom a heightened duty was owed. Under the Pennsylvania rule, the railroad would be liable only for known hazards; under the federal approach, the railroad would have to police against

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214. See Post, *supra* note 16, at 1598 n.295 (tying the Court's attachment to the substantive due process doctrines to its handling of the *Black & White Taxicab* case).

215. National Industrial Recovery Act, ch. 90, 48 Stat. 195 (1993).

potential sources of injury. Regardless of how the policy argument concerning the proper duty is resolved, there is clearly a systemic interest in having a clear standard against which the railroad can measure its anticipated liabilities and invest in the optimal level of care.

The early history of the *Erie* doctrine, as exemplified by Justice Frankfurter's opinion in *York v. Guarantee Trust*,<sup>216</sup> concerned itself primarily with disabling the law-generating capacity of federal courts.<sup>217</sup> *Erie* tried to restore the primacy of state courts in developing common law rules by limiting federal courts to the role of explicating procedural rules, as permitted under the Rules of Decision Act.<sup>218</sup> Justice Frankfurter took this one step further by defining the domain of "procedure," as distinct from "substantive" law, to turn on the impact that the forum would have on the conduct of the litigation. Under Justice Frankfurter's "outcome determinative" standard, federal courts were forbidden to alter how a course would have played out in state court but for the fact of diversity jurisdiction, even down to what were generally thought of as procedural requirements, such as rules for class certification<sup>219</sup> or forms of service.<sup>220</sup>

Sheer animus to the federal courts could not sustain *Erie* through the Warren Court era. By the time of *Hanna v. Plumer*,<sup>221</sup> the inquiry had become more sophisticated and focused on the ambiguity of regulatory control over the day-to-day lives of the citizenry, the problem that emerged directly from the dual-court problem faced after *Swift*. In the commanding concurrence in *Hanna*, Justice Harlan identified the key to the *Erie* problem as the difficulty of ordinary citizens controlling their lives in the face of legal uncertainty.<sup>222</sup> Going back to the *Black & White Taxicab* case, for example, both cab companies had an overriding interest in clear legal rules governing exclusive-dealing contracts so as to be able to make such critical business decisions as whether to invest in new cabs, just as the railroad in *Erie* sought legal standards in order to calculate the proper level of investment in precaution. Consistent with the intellectual ascendance of legal-process approaches at

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216. 326 U.S. 99 (1945).

217. Merrill, *supra* note 144, at 13–19.

218. Judiciary Act of 1789, ch. 20, § 34 1 Stat. 73, 92.

219. See *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541 (1949) (requiring plaintiffs in derivative action to post bond pursuant to New Jersey state law, even though suit was filed in federal court).

220. See *Ragan v. Merchants Transfer & Warehouse Co.*, 337 U.S. 530 (1949) (barring as untimely an action filed in federal court prior to statute of limitations under FED. R. CIV. P. 3, but inconsistent with Kansas state practice requiring service of process prior to the expiration of the statute of limitations).

221. 380 U.S. 460 (1965).

222. *Id.* at 474–75 (Harlan, J., concurring).

the time,<sup>223</sup> Justice Harlan viewed the primary role of law as an aid to private ordering, a role that privileged settled rules of conduct articulated by the proper rule generators.

Justice Harlan's key insight was that procedural rules, even if outcome determinative after the fact, would not create uncertainty in how citizens conducted their lives. If actual service, not mere filing, were required within the limitations period, or if service had to be made by hand, parties would adjust accordingly in using the legal system to resolve disputes. But such variations in procedural rules for litigation would not inhibit the ability of parties privately to order their affairs the way that the primary conduct at issue in *Black & White Taxicab* or *Erie* required the ability to identify the clear expositor of legal obligations. Justice Harlan's elegant *ex ante* approach sought to restore to the state legal systems, including common law courts, the ability to set the terms and conditions of the lives of their citizens in such critical areas as tort, contract, and property.

In limiting the law-generative power of federal courts to the realm of the procedural, however, Justice Harlan may have alleviated the *Erie* common law skirmishes while failing to grasp the impact of the ceaseless assaults upon state autonomy posed by the national market—the core problem that Justice Story and the Federalists had well understood more than a century earlier. Even on its own terms, the resolution of the role of federal courts in generating new legal obligations could not possibly have the significance hoped for in *Erie*, in the dogmatic approaches of *York*, or even in *Hanna*. As is often noted,<sup>224</sup> *Erie* coexisted uncomfortably with the Court's endorsement of the sweeping expansion of the federal regulatory state in the New Deal period. The same impetus toward market rationalization of federal law that we identified in the preceding discussion of preemption reasserts itself in the domain of forum selection, despite the best efforts of Justice Harlan to cabin hermetically the significance of the choice of forum. Justice Harlan assumed that limiting the source of federal common law innovation in the realms of traditional areas of state law would make clear the source of sovereign authority of those primary areas of life. The expansion of the national market and the corresponding centrality of federal regulatory oversight over traditional areas of state common law powers compromised Justice Harlan's elegant *Hanna* divide between state and federal authority.

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223. See generally HENRY M. HART, JR. & ALBERT M. SACKS, *THE LEGAL PROCESS* (1994).

224. See, e.g., Merrill, *supra* note 144, at 13–19.



## B. The Expanding Federal Interest

Justice Harlan's opinion in *Hanna* provided the best, and perhaps the final, approach at a clean division between the spheres of dual sovereignty, a frequently invoked term in contemporary commentary on the cases exploring the limitation on congressional authority, primarily under the Eleventh Amendment.<sup>225</sup> Whether invoked at the turn of the twentieth century when dealing with the Taft Court or at the turn of the twenty-first century with regard to the Rehnquist Court, "[d]ual sovereignty held that the nation and the states were each authorized to control autonomous and distinct domains of social life."<sup>226</sup> The effectiveness of dual sovereignty depends critically on the ability to maintain the rival sources of authority as truly autonomous and distinct.

As the preemption cases show, however, the assumption of autonomous zones of federal and state authority readily breaks down as soon as we confront an increasingly rapacious national market for goods and services. Going back to *National League of Cities v. Usery*,<sup>227</sup> the emerging Rehnquist Court drew a strong distinction between the ability of Congress to regulate the activities of private actors within the states, and the ability of Congress to regulate the states themselves.<sup>228</sup> That distinction well survives the sovereign immunity cases that have prompted so much commentary,<sup>229</sup> as well as the efforts in *United States v. Lopez*<sup>230</sup> to rein in the use of the Commerce Clause for regulations bearing nonobvious relations to national markets. As Ernest Young aptly notes, the "attributes of sovereignty" that the recent federalism cases seek to protect "conspicuously did not include the right to regulate within the states' own jurisdiction free of federal interference. Rather, sovereignty was

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225. See, e.g., *Brzonkala v. Va. Polytechnic Inst. & State Univ.*, 169 F.3d 820, 893 (4th Cir. 1999) (en banc) (Wilkinson, C.J., concurring), *aff'd sub nom.*, *United States v. Morrison*, 529 U.S. 598 (2000). For a historical account of the concept of dual sovereignty in debates about American federalism, see H. Jefferson Powell, *The Oldest Question of Constitutional Law*, 79 VA. L. REV. 633, 655-57 (1993).

226. Post, *supra* note 16, at 1518.

227. 426 U.S. 833 (1976).

228. See Young, *supra* note 44, at 25. Although we take issue with Ernest Young's effort to develop a sweeping autonomy model for state regulatory endeavors, he provides a crisp analytic divide for assessing the seemingly contradictory impulses between the more prominent federalism cases involving Eleventh Amendment immunities and the preemption cases, for example. See also Fallon, *supra* note 18, at 482 (similarly arguing that the Rehnquist Court federalism decisions have been most sweeping in the sovereign immunity context).

229. See, e.g., Larry D. Kramer, *Foreword: We the Court*, 115 HARV. L. REV. 5, 146-50 (2001) (analyzing *Bd. of Trs. of Univ. of Ala. v. Garrett*, 531 U.S. 356 (2001), and *Kimmel v. Fla. Bd. of Regents*, 528 U.S. 62 (2000), as opinions designed to divest congressional power); Linda Greenhouse, *Focus on Federal Power*, N.Y. TIMES, May 24, 1995, at A1.

230. 514 U.S. 549 (1995).

limited to the states' right to be free from federal regulation of state institutions themselves."<sup>231</sup> As we previously noted, following the expansive reading of the Commerce Clause in *Raich*, there is little doubt that Congress has ample powers to reach any traditional area of commercial exchange.

Our concern in this part, however, is not so much with the ample substantive scope of federal power over commerce, but with the jurisdictional effects of the expansive federal regulatory reach. Because the Constitution and 28 U.S.C. § 1331 grant federal courts the power to hear any case "arising under" federal law, the expansion of federal regulatory reach gives federal courts the same power to assume primacy over shaping substantive law as was provided by diversity jurisdiction in the days of Justice Story. To a large extent, *Erie* and Justice Frankfurter's subsequent robust reading of the "outcome determinative test" had much the quality of generals fighting the last war. The history of post-World War II federal jurisdiction is of an ever-increasing amount in controversy for the invocation of § 1332,<sup>232</sup> as federal courts look increasingly askance at routine state-law claims coming into the federal system. Rather, the source of increasing federal-court immersion into matters once left to state law and state courts comes directly through the expanding domain of federal law itself, and not through the power to hear diversity cases.

### C. The Federal Ingredient in State Law

As the scale of federal regulation grew, there was a corresponding expansion of the role of federal-court jurisdiction under § 1331. The expansion of federal subject matter jurisdiction is most direct in "[t]he 'vast majority' of cases . . . covered by Justice Holmes's statement that a 'suit arises under the law that creates the cause of action.'"<sup>233</sup> Under what is known as the "Holmes test," federal question subject matter jurisdiction exists where federal law specifically creates the cause of action. Thus, a plaintiff suing under a federal civil rights statute, or in antitrust or securities law, is claiming recovery directly under the statute that controls the case and the jurisdictional reach is

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231. See Young, *supra* note 44, at 25.

232. The most recent increase came in 1996 when section 205 of the Federal Courts Improvement Act of 1996, increased the amount in controversy threshold for diversity cases from \$50,000 to \$75,000. Pub. L. No. 104-317, § 205, 110 Stat. 3847, 3850 (codified as amended at 28 U.S.C. § 1332 (2000)). For a history of the increases in diversity jurisdiction requirements, see Jaren Casazza, Note, *Valuation of Diversity Jurisdiction Claims in the Federal Courts*, 104 COLUM. L. REV. 1280, 1283 (2004).

233. *Merrell Dow Pharms., Inc. v. Thompson*, 478 U.S. 804, 808 (1986) (quoting *Franchise Tax Bd. v. Constr. Laborers Vacation Trust*, 463 U.S. 1, 8-9 (1983) (quoting *Am. Well Works Co. v. Layne & Bowler Co.*, 241 U.S. 257, 260 (1916) (Holmes, J.))).

the direct corollary of the expansion of federal regulatory power. Whatever tension there may be in the scope of potential federalization of traditional state prerogatives will likely be played out at the level of the substantive law and not in a dispute over forum allocation.

Once we move beyond the direct creation of federal law commanding the field, however, the inquiry becomes more difficult, as with cases recognizing an implied right of action when Congress has failed to empower federal courts to hear claims that should follow from enabling statutes.<sup>234</sup> Here courts have to be wary of cavalierly expanding federal jurisdiction in such a way that would thwart the operation of state courts. As a result, one key element of the “settled framework” for the recognition of an implied federal cause of action is whether the subject of the statute is an area traditionally within the province of state courts and state law.<sup>235</sup>

Beyond the question whether a cause of action should be implied where Congress has acted only partially, the true battleground over jurisdictional authority is a third approach distinct from both express and implied federal causes of action: what is termed the “federal ingredient” test for cases arising under federal law. A federal ingredient may emerge in a state-court case pleaded under state law where the state-law claim ultimately turns so indispensably on an interpretation of federal law as to render it, for all intents and purposes, a federal claim.<sup>236</sup> Even in a post-*Erie* world in which state courts are seen primarily as a forum for resolving state-law issues and

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234. For example, Title VII of the Civil Rights Act of 1964 covering employment discrimination claims creates an express private right of action. 42 U.S.C. § 2000e-5(f) (2000). A corresponding section of the same Act, Title VI, which covers federally funded programs as opposed to employment discrimination, does not. *Id.* § 2000d. However, the statutes are designed in similar fashion to achieve similar aims, and without a private right of action, Title VI would fail in its purposes. See *Barnes v. Gorman*, 536 U.S. 181, 185 (2002) (“Although Title VI does not mention a private right of action, our prior decisions have found an implied right of action, e.g., *Cannon v. University of Chicago*, 441 U.S. 677, 703 (1979), and Congress has acknowledged this right in amendments to the statute, leaving it ‘beyond dispute that private individuals may sue to enforce’ Title VI, *Alexander v. Sandoval*, 532 U.S. 275, 280 (2001).”).

235. *Merrell Dow*, 478 U.S. at 810.

236. Some courts apparently treat the presence of an important international, or foreign relations, element to a state-law claim as a sufficient “federal ingredient.” See, e.g., *Torres v. S. Peru Copper Corp.*, 113 F.3d 540, 543 (5th Cir. 1997) (asserting jurisdiction over a state tort action brought by hundreds of Peruvian citizens against an American company because of injuries they had allegedly suffered from exposure to toxic gases during copper smelting and refining operations in Peru because “[the] plaintiffs’ complaint raises substantial questions of federal common law by implicating important foreign policy concerns”); *Republic of Philippines v. Marcos*, 806 F.2d 344, 354 (2d Cir. 1986) (suggesting that federal jurisdiction was appropriate “because of the necessary implications of such an action for United States foreign relations”).

federal courts for resolving questions of federal law,<sup>237</sup> the absence of a clear boundary between the two sources of law spills over into the jurisdictional domain. So long as the articulation of state law remains the domain of state courts, and corresponding development of federal law rests with federal courts, the gods of the two-by-two matrix smile approvingly. As set forth in our introductory table, we are securely within the first and fourth quadrants in which there is a convergence of the forum and the source of law.

The presence of a federal ingredient introduces a hybrid cause of action in which a claim sounding in state law compels review of federal law as well. Invariably such federal ingredient claims force courts into the uncertain terrain of the second or third quadrants, where federal courts must assume the oversight of state law, or state courts begin to divide up responsibility for the application of federal law. As with all areas of law, the borders are hard to police. The question under the federal ingredient test is whether an interpretation of federal law is so integral to the resolution of a dispute that the state court would be required to interpret federal law in some dispositive fashion.<sup>238</sup> Ultimately the definition of the federal ingredient forces courts to define the relative authority of state and federal courts in regard to the importance of the competing state and federal interests. Too broad a definition of the federal ingredient would risk federalizing tort law, as so much of daily market transactions with goods and services that might give rise to a contract or tort claim are in turn covered by some aspect of federal regulatory law. On the other hand, too narrow a definition risks balkanizing federal regulations by leaving their interpretation to uncoordinated state courts.

In the leading case of *Merrell Dow Pharmaceuticals Inc. v. Thompson*,<sup>239</sup> the Supreme Court confronted directly the expansive potential of federal ingredient jurisdiction. At issue in the sweeping Bendectin litigation was whether the mention of a federal statute on the face of a complaint was a sufficient basis for federal jurisdiction. Although plaintiffs sought to recover for alleged birth defects under Ohio tort law, a critical element of the alleged negligence was premised on the claim that the drug's manufacturer failed to label it adequately under a federal statute, the Federal Food, Drug, and Cosmetic Act (FDCA).<sup>240</sup> According to

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237. For a fuller exposition of this point, see Barry Friedman, *Under the Law of Federal Jurisdiction: Allocating Cases Between Federal and State Courts*, 104 COLUM. L. REV. 1211 (2004).

238. Our discussion of the federal ingredient test, up to and including *Merrell Dow*, in the subsequent three paragraphs, draws from SAMUEL ISSACHAROFF, CIVIL PROCEDURE 124–25 (2005).

239. 478 U.S. 804 (1986).

240. *Id.* at 805–06.

the complaint, the misbranding of Bendectin in violation of the Act was a proximate cause of the harms suffered that should establish “negligence *per se*.”<sup>241</sup>

The Court in *Merrell Dow* split five to four on the definition of the federal ingredient. The narrow majority held that the incorporation of the FDCA as evidence of negligence did not present a sufficient federal ingredient to justify federal question jurisdiction, even if a state court would have to rule on the application of the FDCA to the labeling of Bendectin. By effectively limiting federal jurisdiction to express and implied federal causes of action, the Court created a barrier to the potential federalization of all tort law through the introduction of regulatory violations as an element of the state-law cause of action. For causes of action arising under state law, the Court ultimately reasoned, the primacy of the state interest should direct litigants to state courts.

While the majority could claim to be protecting the integrity of state control of the tort system, the dissent could equally claim to be protecting the integrity of the federal statute from ad hoc interpretation in local state courts around the country. After all, much of the justification for subjecting important areas of our economic and social life to federal oversight is the need for uniform regulation of matters such as copyright or bankruptcy or the vast areas that fall under the Commerce Clause. It would be anomalous to enable federal oversight on this basis and then leave the interpretation and implementation to state courts acting more or less autonomously. Bringing federal-law questions to federal court allows oversight by the circuit courts of appeals and allows much greater coordination through the developing law of each circuit that controls subsequent cases. The alternative would be to proceed in more spasmodic fashion through the state courts with the only centralizing and unifying force being the remote possibility of U.S. Supreme Court review of state-court final decisions.

*Merrell Dow* proved not to be the last word on the federal ingredient test. Recently, in *Grable & Sons Metal Products, Inc. v. Darue Engineering & Manufacturing*,<sup>242</sup> the Court confronted a lurking federal issue in an action to quiet title—about as prototypical a state-court action as one could envision. The difficulty in the case lay in the argument that title had been improperly taken from Grable because an earlier tax forfeiture had not provided him with notice as required by the relevant tax statute. Darue sought to remove the action on the ground that the ruling would invariably turn on the correct application of federal tax law, something that required both expertise and

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241. *Id.* at 823 (Brennan, J., dissenting); see also *supra* note 61.

242. 125 S. Ct. 2363 (2005).

predictability of treatment that could only be achieved in federal court. In upholding the removal, the Court was careful to consider the sweeping implications for forum alterations that would result were any federal ingredient to suffice for federal subject matter jurisdiction: "A general rule of exercising federal jurisdiction over state claims resting on federal mislabeling and other statutory violations would thus have heralded a potentially enormous shift of traditionally state cases into federal courts."<sup>243</sup>

Even so, the Court could not avoid reinvigorating the federal ingredient line of arising under jurisdiction because of the need for forum specialization in the expanding domain of federal law:

The doctrine [of federal arising under jurisdiction] captures the commonsense notion that a federal court ought to be able to hear claims recognized under state law that nonetheless turn on substantial questions of federal law, and thus justify resort to the experience, solicitude, and hope of uniformity that a federal forum offers on federal issues . . . .<sup>244</sup>

Despite the potential sweep of this jurisdictional assertion, the opinion prompted nary a dissent. *Grable* has reinvigorated federal question jurisdiction.<sup>245</sup> Whatever the federalism concerns may have been, they appear secondary to the need to provide an effective forum for claims under national law.

#### IV. UNSTABLE HYBRIDS: PARTIAL FEDERALIZATION

This Article is primarily an analysis of the subconstitutional decisions of the past two decades to show that the Rehnquist Court, despite its federalist billing, has largely been an active promoter of the federalization of large bodies of substantive law and the law governing forum selection. Thus far our project has been an attempt to categorize the impetus to federalization as turning on an effort to align the source of substantive law with the forum.

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243. *Id.* at 2370–71 (distinguishing *Merrell Dow*).

244. *Id.* at 2367.

245. Lower courts have begun to adopt a similarly expansive view of *Grable*. See, e.g., *Nicodemus v. Union Pac. Corp.*, 440 F.3d 1227 (10th Cir. 2006) (reversing course from prior decision governed by *Merrell Dow* and holding in an unjust enrichment case—requiring interpretation of a federal land grant—that federal jurisdiction was proper under *Grable*); see also *Broder v. Cablevision Sys. Corp.*, 418 F.3d 187 (2d Cir. 2005); *McMahon v. Presidential Airways*, 410 F. Supp. 2d 1189 (M.D. Fla. 2006). Most recently, however, in a five-to-four decision, the U.S. Supreme Court has attempted to cabin *Grable* within a “special and small category” of cases involving “a nearly ‘pure issue of law,’ one ‘that could be settled once and for all and therefore would govern numerous tax sale cases.’” *Empire HealthChoice Assurance, Inc. v. McVeigh*, No. 05-200, slip op. at 19, 20 (U.S. June 15, 2006) (quoting RICHARD H. FALLON, JR., DANIEL J. MELTZER & DANIEL L. SHAPIRO, *HART AND WECHSLER’S THE FEDERAL COURTS AND THE FEDERAL SYSTEM* 65 (Supp. 2005)).

On our account, there is a conceptual integrity to the first and fourth quadrants in which federal and state laws are presented in turn to federal and state judicial fora. However, our model turns not on the notion of an evolved, stable equilibrium, but instead on identifying pressure points (in the second and third quadrants), wherein federal courts can help facilitate transitions toward more stable resting ground, without engaging in wholesale federalization through federal common law. We have identified the continued pressure that the nationalized market places to move the source of regulatory authority from the fourth quadrant (state-law claims in state court) to the first quadrant (federal-law claims in federal court). Federalization responds to the need to coordinate national market standards, a concern that we can trace back to the framers, and from the need to police against the pollution-like conduct at the state level—actions that externalize costs but concentrate benefits for a particular state at the expense of others. But federal courts may, conversely, intervene in ways that, over time, lead cases to settle back into the comfort of the fourth quadrant.<sup>246</sup>

We now turn away from the quadrants that offer conceptual integrity to those that are most problematic, the second and third quadrants dealing with a mismatch between the source of law and the forum. In this part, we present two examples where our approach yields insights about partial federalization attempts and, more generally, the role of federal courts as facilitators during periods of transition.

#### A. The Class Action Fairness Act

The first problem is created by a decision to centralize in federal court cases affecting the national market, but without providing a source of federal law to govern these actions—what serves as Quadrant II in our introductory

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246. A contemporary example is provided in the takings context. See *supra* note 116. A historical example (suggested to us by Thomas Merrill) is the Supreme Court's nineteenth-century invocation of the Contract Clause to discipline states that were repudiating their bond obligations. Over time, after repeated federal-court intervention, such cases settled back into stability in Quadrant IV. Although beyond the scope of this Article, it is also possible that the expansion of the national commercial market during the period of *Swift's* ascendancy may have allowed the benefits of homogenized market treatment of transactions to be realized and may have, in turn, laid the foundation for the rapid adoption of the Uniform Commercial Code across the country. This is also suggested to us by Thomas Merrill as an example in which federal-court intervention can further a state interest in coordinated treatment of common problems. The upshot is that the uncertainty of our Quadrants II and III need not lead inevitably to the full federalization of Quadrant I if other means of coordinating state conduct can be found.

schematic. The primary effect of the Class Action Fairness Act (CAFA)<sup>247</sup> is to expand the scope of federal diversity jurisdiction over class actions bearing on national market conduct, consistent with the tenor of expansive judicial readings of federal question jurisdiction<sup>248</sup> and supplemental jurisdiction<sup>249</sup> to extend similarly the reach of federal courts. By its own terms, Congress in CAFA sought to “restore the intent of the framers of the United States Constitution by providing for Federal court consideration of interstate cases of national importance under diversity jurisdiction”<sup>250</sup> and to stem “[a]buses”<sup>251</sup> that were “keeping cases of national importance out of Federal court.”<sup>252</sup>

In expanding the scope of diversity jurisdiction, Congress directly tied federal-court review to the national market scope of the alleged improper conduct. CAFA’s definition of jurisdiction turns on the multistate scope of the harm and an amount in controversy greater than \$5 million. As reflected in the senate report, the animating concern was that principles of horizontal federalism needed to be invoked to constrain the ability of one state to impose its desired legal standards on national market conduct: “The effect of class action abuses in state courts is being exacerbated by the trend toward ‘nationwide’ class actions, which invite one state court to dictate to 49 others what their laws should be on a particular issue, thereby undermining basic federalism principles.”<sup>253</sup> The congressional response was to open up the federal forum as a bulwark against improper or opportunistic state-court oversight of the national market.

Our inquiry is not directed at the scope of the perceived abuses of class action practice in some notorious captive jurisdictions.<sup>254</sup> Rather, we turn to the broader concern about the need for federal oversight of legal claims that affect the entire national market. National market claims pose the risk that any one state’s ability to enforce the judgments of its courts threatens to disable any second state’s ability to have corresponding authority over claims

247. Class Action Fairness Act of 2005, Pub. L. No. 109-2, 119 Stat. 4 (codified in scattered sections of 28 U.S.C.).

248. See *Grable*, 125 S. Ct. at 2367 (noting expansion of federal question jurisdiction beyond federal causes of action to cases that “implicate significant federal issues”); see also *supra* Part III.

249. See *Exxon Mobil Corp. v. Allapattah Servs., Inc.*, 125 S. Ct. 2611, 2620–21 (2005) (finding jurisdiction for a single claim “even if the civil action over which it has jurisdiction comprises fewer claims than were included in the complaint”).

250. Class Action Fairness Act of 2005 § 2(b)(2), 119 Stat. at 5.

251. *Id.* § 2(a)(4), 119 Stat. at 5.

252. *Id.* § 2(a)(4)(A), 119 Stat. at 5.

253. S. REP. NO. 109-14, at 24 (2005), as reprinted in 2005 U.S.C.C.A.N. 3, 24.

254. See, e.g., *NLJ Roundtable: Class Action Fairness Act*, NAT’L L.J., May 16, 2005, at 18 (statement of John Beisner, Partner, O’Melveny & Myers LLP) (suggesting that CAFA was aimed at preventing class action abuses in “magnet” state courts).



affecting the second state's citizens. CAFA responds to this problem by expanding the scope of diversity and removal jurisdiction in federal court.<sup>255</sup> But the Act conspicuously eschews any substantive legal oversight at the national level, as with a federal products liability or consumer-protection regime, and instead provides only an alternative forum that is left to struggle with conflicting substantive laws over what is likely to be identical market conduct.

The decision not to reach issues of substantive law was far from inadvertent. The current wedge issue for the viability of many class actions—particularly those like consumer class actions that are not financially viable as individual cases—is oftentimes the manageability for trial of claims that cover multiple jurisdictions.<sup>256</sup> Congress rejected several amendments that would have addressed the manner by which multistate class actions brought into federal court under CAFA should be handled.<sup>257</sup> In the short run, it is difficult to avoid the conclusion that CAFA was designed to offer absolution to potential defendants in what are termed “negative value” class actions, such as consumer cases, in which the only capacity to bring suit is premised on the ability of an entrepreneurial attorney to organize a class action of suitable dimensions.<sup>258</sup> At least in the short run, removal to federal court is likely to prompt endless arguments on the reconcilability of the different legal regimes that might apply had low-value consumer claims been prosecuted individually—an exchange as unrealistic as it is contrary to the animating premise of CAFA: the existence of economic activity of nationwide scope.<sup>259</sup>

The debates over the form that class actions can take under CAFA, and over the burdens that the new federal forum will impose on cases that had

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255. CAFA allows for easier removal of nationwide class actions to federal court by expanding federal jurisdiction for minimal diversity and substituting a class-wide jurisdictional amount of \$5 million. See Class Action Fairness Act of 2005 § 4(a)(2), 119 Stat. at 9 (adding new 28 U.S.C. § 1332(d)(2)).

256. See, e.g., *In re Bridgestone/Firestone, Inc.*, 288 F.3d 1012 (7th Cir. 2002); *In re Rhone-Poulenc Rorer Inc.*, 51 F.3d 1293 (7th Cir. 1995); see also Richard A. Nagareda, *Bootstrapping in Choice of Law After the Class Action Fairness Act*, 74 UMKC L. REV. (forthcoming 2006) (describing centrality of disputes over choice of law issues in certifying nationwide classes).

257. One rejected amendment, introduced by Senator Dianne Feinstein, would have directed federal courts not to “deny class certification” simply because “the law of more than 1 State will be applied.” 151 CONG. REC. S1215 (daily ed. Feb. 9, 2005) (proposed amendment SA4 by Sen. Feinstein). Issacharoff was a primary draftsman for another of the rejected amendments.

258. See *Amchem Products, Inc. v. Windsor*, 521 U.S. 591, 617 (1997) (“The policy at the very core of the class action mechanism is to overcome the problem that small recoveries do not provide the incentive for any individual to bring a solo action prosecuting his or her rights.”) (quoting *Mace v. Van Ru Credit Corp.*, 109 F.3d 338, 344 (7th Cir. 1997)).

259. Also likely, at least in the short run, will be attempts to circumvent CAFA’s jurisdictional requirements by some selective filing of single-state class cases. We will leave to the side these sorts of transitional issues that emerge as the plaintiff and defense bars work out their respective strategies for using CAFA.

previously been the exclusive preserve of state courts, are not our central concern. CAFA changes the conditions for the viability of a large number of class action cases and there invariably will be short-term strategic posturing of the parties as they acclimate to a new legal environment.<sup>260</sup>

Rather, our concern is with the implications of CAFA for federalization. Intriguingly, CAFA takes us back to Justice Story and the attempt to forge national law for the emerging national market nearly two centuries ago. Justice Story understood the centrality of a predictable and uniform body of law to govern interstate commerce, but his efforts foundered on the dual-court problem. So long as both state and federal courts could hear the same claims, depending on the fortuity of the domicile of the parties or of strategic pleading of the diversity requirements (or obstacles thereto), uniformity could not be achieved, as famously demonstrated in the *Black & White Taxicab* case.<sup>261</sup>

CAFA provides a fitting lens through which to view the entire thrust of this Article. Judged in retrospect, we can see the root causes of why Justice Story's efforts at rational centralization of law failed. Uniformity required one of two strategies: either preemption of rivalrous state law, regardless of its source in decisional or statutory law, or concentration of an entire body of cases in federal court. The burden of our argument has been to show that there is an underexplored link between the emergence of predominant federal substantive law overcoming the problems of horizontal coordination among the states, and the correspondingly expanding role of the federal forum in creating a nurturing incubator for that law.

The question then becomes what are federal courts to do with an intermediate legal regime that gives them forum control of "cases of national importance"<sup>262</sup> without any corresponding invitation to forge the substantive law that governs those cases. Here again, we wish to distinguish the short-term strategies from the longer-term implications of centralizing a body of law in federal courts.

In the initial jockeying under CAFA, the lines of argumentation will presumably follow the inherited minuet from past cases. Opponents of class certification will claim that the overwhelming differences in the substantive laws and the preeminence of choice of law principles, no matter how indeterminate these might be, make aggregation impossible in light of the

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260. For a fuller discussion of the impact of CAFA on multistate class actions and the immediate difficulties posed by choice of law questions, see Samuel Issacharoff, *Settled Expectations in a World of Unsettled Law*, 106 COLUM. L. REV. (forthcoming 2006).

261. *Black & White Taxicab & Transfer Co. v. Brown & Yellow Taxicab & Transfer Co.*, 276 U.S. 518 (1928); see *supra* notes 213–224 and accompanying text.

262. Class Action Fairness Act of 2005, Pub. L. No. 109-2, § 2(a)(4)(A), 119 Stat. 4, 5.

“manageability” requirement of Federal Rule of Civil Procedure 23(b)(3).<sup>263</sup> Meanwhile, proponents of class certification will claim either that the differences in substantive law among the states are nonexistent or that they can be handled through patterned jury charges.<sup>264</sup> As summarized by a current draft on the issue of claim aggregation by the American Law Institute,

advocates of class certification have an incentive to frame legal and factual issues at high levels of generality so as to argue for their commonality, whereas opponents of class certification have an incentive to catalogue in microscopic detail each legal or factual variation suggesting the existence of individual questions.<sup>265</sup>

We leave for other commentators and for another time the particulars of how to join cases arising from multiple state laws.

Although CAFA declared its intent to leave *Erie* untouched,<sup>266</sup> once national-market cases are jurisdictionally isolated in federal courts, the need to develop incremental decisional law to address the particular concerns of these cases will be inescapable.<sup>267</sup> And if federal courts are the only courts hearing these cases, then the most relevant source of authority for how to handle similar problems will be the common experience of federal courts in other CAFA cases.<sup>268</sup> The likely effect of CAFA will then be to allow a body of national law to develop that corresponds to the demands of an undifferentiated market in which products are manufactured and sent to consumers

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263. See *supra* note 256. For an argument that under *Klaxon Co. v. Stentor Electric Manufacturing Co.*, 313 U.S. 487 (1941), there can be no settled expectation in any stable choice of law regime, see Issacharoff, *supra* note 260. Nonetheless, there is evidence in the legislative history of CAFA that this is exactly what was hoped for: “[O]ver the past ten years, the federal court system has not produced any final decisions—not even one—applying the law of a single state to all claims in a nationwide or multi-state class action.” See S. REP. NO. 109-14, at 64 (2005), as reprinted in 2005 U.S.C.C.A.N. 3, 59.

264. This use of patterned jury instructions to isolate all the necessary elements under various state-law regimes is the approach first suggested by the Third Circuit Court of Appeals in *In re School Asbestos Litigation*, 789 F.2d 996, 1010–11 (3d Cir. 1986), approvingly cited by the MANUAL FOR COMPLEX LITIGATION (FOURTH) § 22.317, at 361 n.1078 (2004).

265. For further discussion, see AM. LAW INST., PRINCIPLES OF THE LAW OF AGGREGATE LITIGATION § 2.03, cmt. b (Prelim. Draft No. 3, Aug. 25, 2005). Issacharoff serves as the Reporter for this ALL project.

266. The Senate Report states that “the Act does not change the application of the *Erie* Doctrine.” S. REP. NO. 109-14, at 49 (2005), as reprinted in 2005 U.S.C.C.A.N. 3, 46.

267. Cf. JoEllen Lind, “Procedural Swift”: Complex Litigation Reform, State Tort Law, and Democratic Values, 37 AKRON L. REV. 717, 719 (2004) (suggesting, pre-CAFA, that procedural changes could lead to “substantially different results than state proceedings”).

268. This is likely to be the case with novel claims for which there is no governing state law. Imagine, for example, an interstate class action involving an internet-based electronic intrusion—an area of indeterminate state law, in a state of flux. Of course, conversely, federal courts might use this as an occasion to deny certification on manageability grounds, see *supra* note 256.

across a distributional chain of ever-expanding geographic reach. Despite the entreaties of *Erie*, there is only one term for a body of self-referential decisional law emerging from the federal courts: federalized common law.<sup>269</sup>

There is, of course, no certainty as to how the law will develop. CAFA could well augur the death knell for all national market class actions if federal courts were to decide that redress in these cases is not to be had.<sup>270</sup> But by creating a centralized forum for all national market class actions, CAFA could very well provide an impetus for the development of a coordinated body of substantive law to address the particular concerns of these cases. Centralized forum law without centralized substantive law is simply not a stable resolution of the concerns giving rise to CAFA.

## B. Punitive Damages

We turn now from Quadrant II, where CAFA resides, to Quadrant III, our second example of partial federalization: the Supreme Court's punitive damages jurisprudence. Over the past decade, the Supreme Court has been building an increasingly elaborate constitutional edifice around state-law awards of punitive damages.<sup>271</sup> In a series of decisions announcing a due process limit on the amount of punitive damages that the Constitution may be read to tolerate, the Court has largely federalized an area long thought to be a matter solely within the realm of state prerogatives.<sup>272</sup> Undeniably, with its placement of constitutional limitations on punitive damages, the Court

269. Post-*Erie*, commentators have described "enclaves" of federal common law—most prominently in admiralty, see U.S. CONST. art. III, § 2, and the government contractor defense, see *Boyle v. United Tech. Corp.*, 487 U.S. 500, 504–06 (1988). But, of course, the reach of general common law is not quite so limited. See, e.g., Caleb Nelson, *The Persistence of General Law*, 106 COLUM. L. REV. 503, 505 (2006) ("[O]ur federal system all but requires continuing recourse to rules of general law."); see also Martha A. Field, *Sources of Law: The Scope of Federal Common Law*, 99 HARV. L. REV. 881, 888 (1986) ("Federal common law is not limited to particular enclaves. Instead, the central issue in all cases is the degree of federal need for a federal rule, and the degree to which that rule would impinge upon state interests.").

270. See, e.g., John C. Coffee, Jr., *New World of Class Actions: CAFA, Exxon, and Open Issues*, N.Y.L.J., July 21, 2005, at 5 (challenging the "conventional wisdom about class actions . . . that [CAFA] will reduce their number, end the certification of nationwide class actions in notorious 'magnet' state courts, and largely preclude mass tort class actions").

271. See *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408 (2003); *Cooper Indus., Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. 424 (2001); *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559 (1996); *TXO Prod. Corp. v. Alliance Res. Corp.*, 509 U.S. 443 (1993); *Pac. Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1 (1991); *Browning-Ferris Indus. of Vermont, Inc. v. Kelco Disposal, Inc.*, 492 U.S. 257 (1989).

272. See Catherine M. Sharkey, *Punitive Damages as Societal Damages*, 113 YALE L.J. 347, 429–32 (2003) (discussing "federalism-based territorial limitations on punitive damages" imposed by the Supreme Court in *Gore* and *Campbell*).

“ventures into territory traditionally within the States’ domain.”<sup>273</sup> Not surprisingly, then, the Court’s jurisprudence here has been criticized as usurping state power.<sup>274</sup> Even within the Court, there is strong dissension on federalism grounds; for example, in one scathing retort, Justice Scalia was adamant that “[t]he Constitution provides no warrant for federalizing yet another aspect of our Nation’s legal culture.”<sup>275</sup>

But, as we saw in the preemption cases, federalism objections in the name of state autonomy neglect the horizontal federalism dimension that has been our main concern. Just as in prior areas where there is a substantial federal interest in overcoming the coordination problem among states, here too the Court appears sensitive to the impact of local decisions on the national economy and on other states’ ability to regulate their affairs. And, here again, an insistence upon reserving the traditional function of tort damages to the states would in fact undermine the broader ability of states to regulate locally. The extraterritorial effect of punitive damages awards—not often at the fore of the vociferous debate in this area<sup>276</sup>—is at the heart of our account of the Supreme Court’s federalization of the law of punitive damages.<sup>277</sup>

273. *Gore*, 517 U.S. at 607 (Ginsburg, J., dissenting).

274. See, e.g., Martin H. Redish & Andrew L. Mathews, *Why Punitive Damages are Unconstitutional*, 53 EMORY L.J. 1, 10 (2004) (“A federalized democratic system should not tolerate so blatant a usurpation of state legislative and judicial prerogatives by an unaccountable federal judicial body.”).

275. *Gore*, 517 U.S. at 599 (Scalia, J., dissenting). The dissents of Justices Scalia and Ginsburg, joined, respectively, by Justice Thomas and then-Chief Justice Rehnquist were grounded in federalism concerns. *Id.* at 598 (Scalia, J., dissenting) (finding the Court’s holdings in this area “an unjustified incursion into the province of state governments”); *id.* at 607 (Ginsburg, J., dissenting) (“The Court . . . unnecessarily and unwisely ventures into territory traditionally within the States’ domain . . .”).

276. See Michael P. Allen, *The Supreme Court, Punitive Damages and State Sovereignty*, 13 GEO. MASON L. REV. 1, 3 (2004) (arguing that the state sovereignty limitation on punitive damages awards is a “largely ignored aspect of the Supreme Court’s developing constitutional jurisprudence relating to punitive damage awards”). But see Paul H. Rubin et al., *BMW v. Gore: Mitigating the Punitive Economics of Punitive Damages*, 5 SUP. CT. ECON. REV. 179, 216 (1997) (“The most interesting issue raised by *Gore* is the federalism issue: is it appropriate for federal courts to interfere with state court decisions on damages?”); Sharkey, *supra* note 272, at 429–32 (discussing “vexing issue of extraterritoriality” in Supreme Court punitive damages jurisprudence); *id.* at 350 (“A . . . contextualized and nuanced reading of [Campbell] suggests that the Court was primarily concerned with limiting the extraterritorial or out-of-state reach of punitive damages.”). A different approach is suggested by David Shapiro, who identifies the “hazards of punitive damage exposure in multiple jurisdictions” as potentially a burden on interstate commerce resulting from “threatened . . . overexposure to liability.” SHAPIRO, *supra* note 2, at 120.

277. For a contrary account, see Benjamin C. Zipursky, *A Theory of Punitive Damages*, 84 TEX. L. REV. 105, 119 (2005) (“[T]he Justices were surely aware that [comity and federalism concerns] were only ‘hooks’ for the proponents of constitutional scrutiny of punitive damages; the larger issue, by far, was whether the Court would strike down the award as excessive, and would hold that—even apart from comity and state sovereignty issues—there are guidelines for constitutional excessiveness that in principle apply to any punitive damages award under any American jurisdiction’s tort law.”).

*BMW of North America, Inc. v. Gore*<sup>278</sup> and *State Farm Mutual Automobile Insurance Co. v. Campbell*<sup>279</sup>—the two cases in which the Supreme Court has reversed state punitive damages judgments—each involved attempts by one state to regulate conduct occurring in another state.<sup>280</sup> In *Gore*, where the Court overturned a \$2 million punitive damages award in a consumer fraud case involving an undisclosed paint touchup on a BMW (one of roughly 983 such undisclosed reported incidences nationwide), the Court declared that “one State’s power to impose burdens on the interstate market for automobiles is not only subordinate to the federal power over interstate commerce, but is also constrained by *the need to respect the interests of other States*.”<sup>281</sup> By imposing large punitive damages awards, Alabama appropriates funds from BMW, which BMW recoups not solely from the citizens of Alabama, but from the country as a whole.<sup>282</sup> In this way, Alabama, as a putative Brandeisian laboratory of democracy, imposes harm on the rest of the country.<sup>283</sup> These spillover

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278. 517 U.S. 559 (1996).

279. 538 U.S. 408 (2003).

280. Rubin et al. provide a persuasive account of the federalism interest at stake. They argue persuasively, relying on Tiebout’s “exit” model (*see supra* note 49), that the pre-BMW cases where the Supreme Court refused to interfere can be viewed as presenting situations where the firms would have more easily been able to exit the awarding jurisdiction. Rubin et al., *supra* note 276, at 212–13. According to the authors, the exit theory holds true for “goods or services sold within the boundaries of one state, such as trash removal services, medical insurance, and land, all of which were involved in recent cases in which the Court upheld large punitive damages awards.” *Id.* at 216 (discussing *TXO Prod. Corp. v. Alliance Resources Corp.*, 509 U.S. 443 (1993) (land); *Pac. Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1 (1991) (health insurance); *Browning-Ferris Indus. of Vt., Inc. v. Kelco Disposal, Inc.*, 492 U.S. 257 (1989) (disposal services)).

281. *Gore*, 517 U.S. at 571 (emphasis added) (citation omitted). As a general matter, the Court reasoned that “principles of state sovereignty and comity” required that the imposition of punitive damages “must be supported by the State’s interest in protecting its *own* consumers and its *own* economy.” *Id.* at 572 (emphases added).

282. *Id.* at 572–74. Rubin et al. have proposed that federal regulation of punitive damages is appropriate when two conditions hold: “1. the transaction that yielded the award is part of interstate commerce; and 2. it is impossible for the defendant to charge the citizens of the state with the total value of expected bad judgments.” Rubin et al., *supra* note 276, at 203–04. These two conditions likewise rule out situations where it would be possible to internalize the costs of a state’s tort system to affect only its citizens. If the transaction is not part of interstate commerce (i.e., it is a completely local operation), then an increase in prices to offset the punitive damages award will affect only the citizens of the regulating state. This will often be an empirical question. Compare Helland & Tabarrok, *supra* note 128, at 359–61 (discussing effects on out-of-state defendants), with Thomas J. Campbell et al., *The Causes and Effects of Liability Reform: Some Empirical Evidence* 15 (Nat’l Bureau of Econ. Research, Working Paper No. 4989, 1995), available at <http://papers.nber.org/papers/w4989.v5.pdf> (arguing that the costs of inefficient jury verdicts have primarily local effects).

283. But see Allen, *supra* note 276, at 38–39 (rejecting the premise that punitive damages based in part on out-of-state conduct amount to extraterritorial regulation, and suggesting instead that “the approach the Court has taken in the criminal context provide[s] the most analogous paradigm for approaching the use of extraterritorial conduct in the punitive damages context”).

effects from Alabama's actions, moreover, impede the very autonomy value the dissenters seek to protect with their invocations of federalism.<sup>284</sup>

A similar theme is picked up by the Court in *Campbell*—a case involving a bad faith action against an insurance company that had engaged in various forms of alleged nationwide misconduct: “A basic principle of federalism is that each State may make its own reasoned judgment about what conduct is permitted or proscribed within its borders, and each State alone can determine what measure of punishment, if any, to impose on a defendant who acts within its jurisdiction.”<sup>285</sup> According to the Court, states lack “a legitimate concern in imposing punitive damages to punish a defendant for unlawful [let alone lawful] acts committed outside of the State’s jurisdiction.”<sup>286</sup> For these reasons, the Court chastised the Utah Supreme Court for using the case “as a platform to expose, and punish, the perceived deficiencies of State Farm’s operations *throughout the country*.”<sup>287</sup>

Consistent with the thrust of our main argument, federalization takes hold of this area of the law at least in part to restrain nefarious spillover effects. But the cost of policing against any given state’s encroachment on the autonomy of another has been the increasing removal of authority over punitive damages from the states altogether. The result has been a progressively constricted constitutional collar on state authority in the realm of punitive damages. In this vein, Justice Ginsburg has plaintively criticized the

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The analogy to extraterritoriality in criminal sentencing, however, comes up short with respect to spillover effects. It is difficult to imagine a situation where an aggravating factor used in a criminal sentence in one state would harm the citizens of another.

284. The effect of the punitive damages award (overturned in *Gore*) would be to privilege Alabama’s regulatory decision above the “patchwork of rules representing the diverse policy judgments of lawmakers in 50 states.” *Gore*, 517 U.S. at 570; see also *id.* at 572 (“[B]y attempting to alter BMW’s nationwide policy, Alabama would be infringing on the policy choices of other States.”).

285. *State Farm Mut. Auto. Co. v. Campbell*, 538 U.S. 408, 422 (2003) (citing *Gore*, 517 U.S. at 569). The Ninth Circuit previously elaborated on this same point:

“... While each State has ample power to protect its own consumers, none may use the punitive damages deterrent as a means of imposing its regulatory policies on the entire Nation.” ... Nevada is free, in the absence of federal legislation to the contrary, to choose a policy that may sacrifice some innovation in favor of safety, and Alaska is free to choose a policy that may sacrifice some safety in favor of innovation. ... Neither state is entitled, in our federal republic, to impose its policy on the other.

*White v. Ford Motor Co.*, 312 F.3d 998, 1018 (9th Cir. 2002) (quoting *Gore*, 517 U.S. at 585). But see *Boyd v. Goffoli*, 608 S.E.2d 169, 178–79 (W. Va. 2004) (noting *Campbell*’s approval of *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797 (1985), and holding that “a State has a legitimate interest in imposing damages to punish a defendant for unlawful acts committed outside of the State’s jurisdiction where the State has a significant contact or significant aggregation of contacts to the plaintiffs’ claims which arise from the unlawful out-of-state conduct”).

286. *Campbell*, 538 U.S. at 421.

287. *Id.* at 420 (emphasis added).

Court for providing “marching orders” on punitive damages to the states.<sup>288</sup> State courts and legislatures have, to a considerable extent, taken these orders to heart. As a preliminary matter, some state courts have, in line with the Court’s direction in *Cooper Industries, Inc. v. Leatherman Tool Group, Inc.*,<sup>289</sup> replaced their traditional deferential standard of review with de novo review of defendants’ state constitution-based or statutory-based claims that a punitive damages award is excessive.<sup>290</sup> Then, in conducting de novo appellate review, notwithstanding the Court’s cautious refusal to establish a “bright-line” test for the ratio between punitive and compensatory damages,<sup>291</sup> many state courts now seem to apply a de facto constitutional cap.<sup>292</sup>

Beyond following suit in terms of conducting appellate review, states arguably have gone further in terms of incorporating the Court’s guideposts for appellate review into their substantive standards for punitive damages.<sup>293</sup>

288. *Id.* at 438–39 (Ginsburg, J., dissenting).

289. 532 U.S. 424 (2001).

290. In *Cooper Industries, Inc. v. Leatherman Tool Group, Inc.*, the Court held that “courts of appeals should apply a *de novo* standard of review when passing on district courts’ determinations of the constitutionality of punitive damages awards.” *Id.* at 436. Because *Cooper Industries* dealt with an excessiveness claim raised under the federal Due Process Clause, it did not address whether the de novo standard of review would apply to the appellate court’s review of state-based claims. Numerous state supreme courts have decided, nevertheless, that the *Cooper Industries* de novo standard applies to state common law claims as well. *See, e.g.*, *Diversified Holdings, L.C. v. Turner*, 63 P.3d 686, 692 (Utah 2002). *But see, e.g.*, *Time Warner Entm’t Co. v. Six Flags Over Georgia, LLC*, 563 S.E.2d 178, 181 (Ga. Ct. App. 2002) (holding that state courts may apply the abuse of discretion common law standard for review of factual questions).

291. *Campbell*, 538 U.S. at 425.

292. *See, e.g.*, *Hudson v. Cook*, 105 S.W.3d 821, 832 (Ark. Ct. App. 2003) (upholding approximate seven-to-one ratio as within “the acceptable range . . . most recently set forth by . . . *Campbell*”); *Campbell v. State Farm Mut. Auto. Ins. Co.*, 98 P.3d 409, 418 (Utah 2004) (setting punitive damages at maximum single-digit ratio of nine to one on remand). *But see* *Simon v. San Paolo U.S. Holding Co.*, 113 P.3d 63, 77 (Cal. 2005) (noting that *Campbell*’s discussion of *Gore*’s single-digit ratio merely establishes a “type of presumption” that may be exceeded in cases of “extreme reprehensibility or unusually small, hard-to-detect or hard-to-measure compensatory damages”); *Williams v. Philip Morris Inc.*, 127 P.3d 1165, 1181 (Or. 2006) (upholding \$79.5 million punitive damage award—where jury awarded \$800,000 in compensatory damages—reasoning that “[s]ingle-digit ratios may mark the boundary in ordinary cases, but the absence of bright-line rules necessarily suggests that the other two guideposts—reprehensibility and comparable sanctions—can provide a basis for overriding the concern that may arise from a double-digit ratio”). The Court granted certiorari in *Williams* and, in the upcoming Term, will take up the issue (raised also in *Simon*) whether highly reprehensible conduct on the part of the defendant “can ‘override’ the constitutional requirement that punitive damages be reasonably related to the plaintiff’s harm.” *Philip Morris USA v. Williams*, 126 S. Ct. 2329 (2006).

293. So, for example, the Court’s “reprehensibility” prong has been incorporated directly into substantive law, with express reliance upon *Gore* and *Campbell*. *See, e.g.*, CIVIL COMM. ON CAL. JURY INSTRUCTIONS, CALIFORNIA CIVIL JURY INSTRUCTIONS § 14.71.2 (2005); COMM. ON PATTERN JURY INSTRUCTIONS ASS’N OF SUPREME COURT JUSTICES, NEW YORK PATTERN JURY INSTRUCTIONS—CIVIL § 2:278 (2006) [hereinafter NEW YORK JURY INSTR.]. Similarly, the “ratio” prong has been incorporated, at least with respect to requiring a “reasonable and proportionate”



Recent legislative (or committee) modifications of state rules of evidence and pattern jury instructions relating to evidence of out-of-state conduct likewise bear the hallmark of *Gore* and *Campbell*.<sup>294</sup>

To the extent that states have felt *obligated* to fall in step with the Supreme Court's marching orders,<sup>295</sup> it is not a stretch to suggest that the Court's jurisprudence is in the process of creating a generalized federal common law of punitive damages, with far-reaching potential implications. But, to return to our matrix analysis, it is an unstable equilibrium arrived at in Quadrant III, characterized by an overlay of federal law in cases decided for the most part in state courts. The instability of the partial federalization of punitive damages law manifests itself at present in a power struggle of sorts between federal and state articulation of the purposes of punitive damages and in the seemingly intractable "multiple punitive damages" problem, which we explore in turn.

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ratio between punitive and compensatory damages. See, e.g., IOWA CIVIL JURY INSTRUCTIONS § 210.1 (2005); MD. INST. FOR CONTINUING PROF'L EDUC. OF LAWYERS, INC., MARYLAND CIVIL PATTERN JURY INSTRUCTIONS § 10:12 (4th ed. 2002); NEW YORK JURY INSTR., *supra*, § 3:50; WASH. SUPREME COURT COMM. ON JURY INSTRUCTIONS PRAC., WASHINGTON PATTERN JURY INSTRUCTIONS—CIVIL § 348.02 (5th ed.). The defense bar, not surprisingly, generally applauds (and advocates further) this kind of incorporation of federal procedural standards into state substantive law. See, e.g., Andrew L. Frey, *No More Blind Man's Bluff on Punitive Damages: A Plea to the Drafters of Pattern Jury Instructions*, 29 LITIGATION 24 (Summer 2003).

Lest one conclude that it follows naturally that states should incorporate the Supreme Court's appellate review guideposts into substantive punitive damages law, see PENNSYLVANIA SUGGESTED STANDARD CIVIL JURY INSTRUCTIONS § 14.02 (2d ed. 2003) ("The amount you assess as punitive damages need not bear any relationship to the amount you choose to award as compensatory damages . . .") (emphasis added).

294. For example, Colorado lawmakers, citing *Campbell*, provide that evidence of dissimilar acts that are independent from acts upon which liability was premised is inadmissible. See JOHN W. GRUND ET AL., PERSONAL INJURY PRACTICE—TORTS AND INSURANCE § 37.30 (West's Colo. Practice Series, 2005); see also ARK. SUPREME COURT COMM. ON JURY INSTRUCTIONS, ARKANSAS MODEL JURY INSTRUCTIONS—CIVIL § 2218 (2006) (same); IOWA CIVIL JURY INSTRUCTIONS ON PUNITIVE DAMAGES, CIVIL JURY INSTR. § 210.1 (same); NEW YORK JURY INSTR., *supra* note 293, at § 2:278 Special Verdict Form I (directing courts to *Campbell* for "a discussion of evidence that may be considered by the jury"). By contrast, in California, the Advisory Committee to the Judicial Council of California's Civil Jury Instructions (CACI) recently decided to refrain from making substantive changes in the CACI punitive damages instructions because California tort law was undergoing rapid developments. JUDICIAL COUNCIL OF CALIFORNIA CIVIL JURY INSTRUCTIONS § 3942 (2006).

State-court judges have likewise felt bound (even absent legislative direction) to incorporate state evidentiary standards from the Supreme Court. See, e.g., *Sand Hill Energy, Inc. v. Smith*, 142 S.W.3d 153, 157 (Ky. 2004) (vacating a punitive damages award on the ground that the trial court's jury instructions failed to limit evidence of out-of-state conduct); *Jackson v. State Farm Mut. Auto. Ins. Co.*, 600 S.E.2d 346, 36 (W. Va. 2004) (Davis, J., concurring) ("[T]he ruling in *Campbell* on the use of a defendant's lawful out-of-state [conduct] is binding on the courts of West Virginia.").

295. It seems reasonable to assume this is the case. For some of the developments detailed in the foregoing footnotes, we can do better than assume. See, e.g., ARKANSAS MODEL JURY INSTRUCTIONS, *supra* note 294 (noting that the new instruction on evidence of out-of-state conduct was "necessitated by the Court's explicit mandate in *State Farm*") (emphasis added).

With respect to the purposes of punitive damages, a paradox emerges: The Supreme Court has simultaneously proclaimed that (1) the federal due process inquiry into the excessiveness of a punitive damages award “appropriately begins with an identification of the *state interests* that a punitive award is designed to serve”;<sup>296</sup> and (2) the twofold purposes of punitive damages are to punish and to deter.<sup>297</sup> Most states appear to be in line here with the Supreme Court; the vast majority of states include punishment and deterrence as the goals of punitive damages, a few even incorporating wholesale the precise language from *Campbell* in their pattern jury instructions.<sup>298</sup> If the state definition of the purposes of punitive damages coincides with that of the Court, then there is no great conflict between state interests and the constitutional overlay. But what if a state has a different conception of punitive damages?<sup>299</sup> The paradox stems from the fact that *Gore* and *Campbell* have effectuated a substantive rather than merely procedural revision of punitive damages law and have allowed state interests to be realized so long as they are in line with the constitutionally acceptable ends of punishment and deterrence.

A partially federalized punitive damages regime raises a second, deep-seated source of instability that stems from what numerous courts and

296. *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 568 (1996) (emphasis added).

297. *Id.*; see Sharkey, *supra* note 272, at 350, 429; see also Allen, *supra* note 276, at 8 n.24 (noting the “potentially quite powerful argument that the Court is acting beyond its constitutional role . . . by itself articulating the ‘proper’ role for punitive damages”).

298. See, e.g., NEW YORK JURY INSTR., *supra* note 293, § 2:278 (quoting *Campbell* in articulating purposes of punitive damages).

299. See Catherine M. Sharkey, *Revisiting the Noninsurable Costs of Accidents*, 64 MD. L. REV. 409, 444 (2005) (“[I]n addition to punishment and deterrence rationales, several states embrace compensatory goals . . .”); *id.* at 447 nn.185–87 (citing cases). What, for example, of the “bounty” rationale for punitive damages?, see, e.g., *In re Simon II Litig.*, 407 F.3d 125, 136 (2d Cir. 2005) (“In addition to serving the goals of punishment and deterrence, punitive damages have been ‘justified’ as a ‘bounty’ that encourages private lawsuits seeking to assert legal rights.”) (quoting *Smith v. Wade*, 461 U.S. 30, 58 (1982) (Rehnquist, J., dissenting)), or the precise relevance of the wealth of the defendant?, see, e.g., *Simon v. San Paolo U.S. Holding Co.* 113 P.3d 63, 79 (Cal. 2005) (declaring that, post-*Campbell*, defendant’s financial condition “remains a legitimate consideration in setting punitive damages” because punitive damages should vindicate the state’s legitimate interests in deterring conduct harmful to state residents). See also NEW YORK JURY INSTR., *supra* note 293, § 2:278 (instructing jurors to consider defendant’s “financial condition and the impact your punitive damages award will have on the defendant”).

There is considerable ambiguity, moreover, with respect to what the Court means by deterrence. See, e.g., Sharkey, *supra*, at 443 (“The general consensus surrounding the standard, articulated purposes of punitive damages—to punish and to deter—in fact masks deep and significant disagreement both in terms of relative emphasis of one goal over the other, as well as the exclusivity of these punitive goals.”); see also Mark Geistfeld, *Constitutional Tort Reform*, 38 LOY. L.A. L. REV. 1093, 1115 (2005) (arguing that *Campbell* “effectively limit[s] the purpose of punitive damages to individual or specific deterrence,” relying on a “conception of tort liability that is not widely shared”).

commentators have termed the “multiple punishments” conundrum.<sup>300</sup> Repeated awards of punitive damages arising from a defendant’s single course of conduct threaten the due process rights of a defendant who faces potentially ruinous sanctions. Such awards likewise contribute to a “race to the courthouse” mentality that may jeopardize future plaintiffs, especially if a defendant is driven into bankruptcy early in the litigation process.<sup>301</sup> In *Campbell*, the Court identified the multiple-punishment issue as a threat to state sovereignty interests.<sup>302</sup> But the threat of extraterritorial application of punitive damages is only one source of potential excess. There is no way to measure whether the purposes of punishment and deterrence have been realized on a state-by-state basis when the underlying conduct at issue spans the nation, as with a defective pharmaceutical drug sent into the stream of commerce. Moreover, most states do not even provide for consideration of prior punitive damages awards across related cases *within* the same state, let alone punishment exacted in other jurisdictions.<sup>303</sup> The Court, despite its concern for unconstitutional excess, has never directly addressed whether there is any constitutional limit on the aggregate amount of all punitive damages awards against one defendant for a single course of conduct.<sup>304</sup> While courts and legislatures have proposed various stop-gap measures, it seems clear that,

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300. See Sharkey, *supra* note 272, at 432 (“The multiple punishments problem has confounded jurists and scholars for the better part of the past three decades.”).

301. See, e.g., *In re Exxon Valdez*, 229 F.3d 790, 795–96 (9th Cir. 2000) (“Mandatory class actions avoid the unfairness that results when a few plaintiffs—those who win the race to the courthouse—bankrupt a defendant early in the litigation process . . . [and] also avoid the possible unfairness of punishing a defendant over and over again for the same tortious conduct.”).

302. *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 423 (2003) (“Punishment on these bases creates the possibility of multiple punitive damages awards for the same conduct; for in the usual case nonparties are not bound by the judgment some other plaintiff obtains.”); see also *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 593 (1996) (Breyer, J., concurring) (“Larger damages might also ‘double count’ by including in the punitive damages award some of the compensatory, or punitive, damages that subsequent plaintiffs would also recover.”).

303. For a listing of statutory provisions in a few outlier states that do attempt to limit subsequent punitive damages awards for “the same act or single course of conduct,” see Sharkey, *supra* note 272, at 407 & n.216; see also Thomas B. Colby, *Beyond the Multiple Punishment Problem: Punitive Damages as Punishment for Individual, Private Wrongs*, 87 MINN. L. REV. 583, 628 (2003).

304. *In re Simon II Litig.*, 407 F.3d 125, 136 (2005) (“Despite the long-recognized possibility that defendants may be subjected to large aggregate sums of punitive damages if large numbers of victims succeed in their individual punitive damages claims . . . the United States Supreme Court has not addressed whether successive individual or class action punitive awards, each passing constitutional muster under the relevant precedents, could reach a level beyond which punitive damages may no longer be awarded.”) (citing *Roginsky v. Richardson-Merrell, Inc.*, 378 F.2d 832, 839 (2d Cir. 1967) (Friendly, J.) (“We have the gravest difficulty in perceiving how claims for punitive damages in such a multiplicity of actions throughout the nation can be so administered as to avoid overkill.”)). Issacharoff served as counsel in this litigation.

absent a federalized, coordinated solution, the problem will persist. In other words, the partially federalized, Quadrant III solution is inherently incomplete.

### C. Further Implications

Our focus on the instability of Quadrants II and III suggests that hybrids between the source of substantive law and the designated forum may be subject to transitional pressures toward integration of substantive law and forum law.<sup>305</sup> We conclude with an example of a possible evolutionary direction that would make for a more stable legal regime, one that takes as its starting point the concerns underlying both CAFA and the expanded constitutional realm of punitive damages law. To begin, CAFA represents a dramatic expansion of federal jurisdiction, driven in large part by Congress's recognition of the demands of an integrated national market economy. Instability is introduced, however, by the absence of federal substantive law. By contrast, the Supreme Court has forged a quasi-federal substantive law of punitive damages—leading to the converse instability, namely an absence of federal jurisdictional authority.

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305. An illuminating example (outside the scope of our Article) may be found in Congress's passage of the Private Securities Litigation Reform Act of 1995 (PSLRA), Pub. L. No. 104-67, 109 Stat. 737 (codified in scattered sections of 15 U.S.C.), followed in quick succession by passage of the Securities Litigation Uniform Standards Act of 1998 (SLUSA), Pub. L. No. 105-353, 112 Stat. 3227 (1998) (codified in scattered sections of 15 U.S.C.). In 1995, Congress passed the PSLRA in order to combat perceived abuses in the use of federal securities law by unscrupulous lawyers. One of the main responses to the enactment of the PSLRA was to push much of the litigation of alleged securities violation into state courts, based on state-law claims. See Joseph A. Grundfest & Michael A. Perino, *Securities Litigation Reform: The First Year's Experience*, at 11 (Stanford Law Sch., Release 97.1, 1997), [http://securities.stanford.edu/research/studies/19970227firstyr\\_firstyr.html](http://securities.stanford.edu/research/studies/19970227firstyr_firstyr.html), reprinted in SECURITIES LITIGATION 1997, at 955, 958 (PLI Corporate Law & Practice Course Handbook Series No. B4-7199, 1997), available at WL 1015 PLI/Corp 955 (finding that approximately 26 percent of securities class action litigation moved from federal to state court during the year after the passage of the PSLRA); H.R. REP. NO. 105-803, at 14 (1998) (Conf. Rep.) (recognizing a "substitution effect" whereby plaintiffs resort to state court to avoid the new, more stringent requirements of federal cases"). Congress reacted relatively quickly to this unexpected phenomenon in 1998 by passing the SLUSA, which preempts state-law class action claims alleging "a misrepresentation or omission of a material fact in connection with the purchase or sale of a covered security." 15 U.S.C. § 78bb(f)(1)(A) (2000). In *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Dabit*, 126 S. Ct. 1503 (2006), the Supreme Court adopted a broad reading of SLUSA's preemptive effect. In so doing, the Court (per Justice Stevens) emphasized the "magnitude of the federal interest in protecting the integrity and efficient operation of the market for nationally traded securities." *Id.* at 1509; see also *id.* at 1514 (noting that the prospect of parallel class actions proceeding in state and federal court "squarely conflicts with the congressional preference for national standards for securities class action lawsuits involving nationally traded securities") (internal quotation omitted).

Moreover, this instability is likely to persist—even with the Supreme Court’s expansion of its partial federalization of punitive damages<sup>306</sup>—given the Court’s limited ability to police state-court decisionmaking in this realm. As Justice Ginsburg has pointed out, “unlike federal habeas corpus review of state-court convictions under 28 U.S.C. § 2254, the Court ‘work[s] at this business of [checking state courts] alone,’ unaided by the participation of federal district courts and courts of appeals.”<sup>307</sup> It is indeed rare for the federal constitution to constrain state actors, while leaving implementation solely in the hands of state actors.<sup>308</sup> The dissenters in *Merrell Dow* echoed a parallel sense of doubt that “this Court’s appellate jurisdiction over state-court judgments in cases arising under federal law can be depended upon to correct erroneous state-court decisions and to insure that federal law is interpreted and applied uniformly.”<sup>309</sup>

Even if the core problem of the inability to coordinate the imposition of unified punitive damages were to persist for some time, it is possible to imagine intermediate steps that might tighten the fit between the expanding role of federal substantive law and access to the federal forum.<sup>310</sup> For example, the presence of a claim for punitive damages in the world following *Gore* and *Campbell* necessarily implicates federal issues in terms of the permissible limitations on and objectives of punitive damages. To recognize a federal

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306. See *Williams v. Philip Morris Inc.*, 127 P.3d 1165, 1181 (Or. 2006), *cert. granted*, 126 S. Ct. 2329 (2006). An alternative trajectory (pushing in the direction of Quadrant IV) would be for the Court to continue to police state boundaries for punitive damages, but otherwise refrain from expanding federalization of the substantive law. Moreover, “lower federal courts may increasingly push the Court toward reconciling its principles of extraterritoriality in the punitive damages and class action spheres. The end result would be a regime in which class actions and punitive damages are equally circumscribed by state lines.” Sharkey, *supra* note 272, at 431–32. As noted above, see *supra* note 259, the disaggregation of class action claims at the state level is still a possibility—though perhaps less likely—in the post-CAFA world.

307. *Campbell*, 538 U.S. at 431 (Ginsburg, J., dissenting) (quoting *Gore*, 517 U.S. at 613) (alteration in original).

308. As Justice Ginsburg references, in the realm of criminal procedure, there is federal habeas review. In other areas, there is a § 1983 mechanism for collateral attack. Here, takings challenges are unique, in that they require exhaustion of state procedures before one can bring a § 1983 action. See *supra* note 116. There are only a handful of additional examples of constitutional claims that can only be asserted on direct appeal through the state-courts system, such as First Amendment limitations on defamation awards.

309. *Merrell Dow Pharms. Inc. v. Thompson*, 478 U.S. 804, 827 n.6 (1986) (Brennan, J., dissenting) (“[A]s any experienced observer of this Court can attest, ‘Supreme Court review of state courts, limited by docket pressures, narrow review of the facts, the debilitating possibilities of delay, and the necessity of deferring to adequate state grounds of decision, cannot do the whole job.’”) (quoting D. CURRIE, *FEDERAL COURTS* 160 (3d ed. 1982)).

310. Our proposal here focuses on the Supreme Court’s ability to interpret the federal interest sufficient to trigger federal jurisdiction. An alternative approach would be for Congress to provide for habeas-type collateral review of state-court punitive damages judgments. This type of legislatively enacted collateral review would likewise effectuate a move from Quadrant III to Quadrant I.

question sufficient for federal jurisdiction whenever punitive damages are sought would risk a sweeping relocation of much of tort law into the federal courts. But it is also possible to imagine a more limited federal interest that would be created where a colorable demand for punitive damages is combined with a state cause of action based upon a federal regulation. A greater alignment of the federal forum and federal law would be achieved by allowing the combination to suffice for federal question jurisdiction.<sup>311</sup>

This approach would not be a radical expansion of federal law because many state common law cases already begin from a foundation of federal law, most notably when the violation of federal regulatory requirements is asserted as the presumptive basis for common law liability.<sup>312</sup> Such a scheme, in essence, would reconcile *Merrell Dow* and *Grable* with the extraterritoriality insight from *Gore* and *Campbell*. We pick up, then, where we left off in our discussion of *Merrell Dow* and *Grable*. Recall that we asserted that invariably federal ingredient claims—where state-law claims turn indispensably on interpretations of federal law—force courts into the uncertain terrain of Quadrants II or III. But the Court, in *Merrell Dow*, was understandably apprehensive about federalizing the bulk of tort law. In *Grable*, by contrast, the Court did allow for original jurisdiction under § 1331 for a claim under state law that incorporated a federal-law standard, because of the centrality of federal tax law in the underlying claim.

We understand the Court's concern that an overly expansive view of the federal interest risks bringing the entirety of the common law into federal court. However, our proposal focuses on two distinct aspects, each of which represents a heightened federal interest and which, taken together, trigger the "strength of the federal interest" while being attentive to the "implications of opening the federal forum."<sup>313</sup> As similarly was the case in our evaluation of preemption, a key consideration is the "sound division of labor between state

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311. In other words, defendants could remove such cases under 28 U.S.C. § 1441(b) (2005).

312. We are concerned specifically with cases in which a claimed violation of a federal regulation or statute is used to make out a prima facie state cause of action. See, e.g., *Lowe v. Gen. Motors Corp.*, 624 F.2d 1373, 1379 (5th Cir. 1980) ("This Court has often held that violation of a Federal law or regulation can be evidence of negligence, and even evidence of negligence per se."). For a fuller discussion, see *supra* note 61 and accompanying text.

313. *Grable & Sons Metal Prods., Inc. v. Darue Eng'g & Mfg.*, 125 S. Ct. 2363, 2369 (2005). The Court in *Grable* took comfort in the fact that "it is the rare state quiet title action that involves contested issues of federal law," such that allowance of federal jurisdiction "would not materially affect, or threaten to affect, the normal currents of litigation." *Id.* at 2371. Moreover, the Court subsequently reiterated that "*Grable* emphasized that it takes more than a federal element 'to open the 'arising under' door.'" *Empire HealthChoice Assurance, Inc. v. McVeigh*, No. 05-200, slip. op. at 21 (U.S. June 15, 2006).

and federal courts.”<sup>314</sup> This functional view of the federal interest, represented when both the underlying standard of tort liability is predicated on federal law and the potential for punitive damages threatens to spill across a state’s borders, is consistent with the flexible standard employed by the Court in “exploring the outer reaches of § 1331.”<sup>315</sup> It is consistent, moreover, with the thrust of CAFA, which, after all, has granted a federal forum to a significant subsample of cases involving colorable preemption defenses—namely interstate class actions.<sup>316</sup>

All of which leads us back to our functional lens. Whereas the violation of the federal statute in *Merrell Dow* did not, in the Court’s mind, “fundamentally change the state tort nature of the action,”<sup>317</sup> the addition of a claim for punitive damages—with the inherent risk of extraterritorial effects upon other states—may.

### CONCLUSION: THE RISK OF PREDATION

At its core, our Article is concerned with how federal substantive law and federal forum law, in tandem, serve to stave off the inherent risk of predation—when one state encroaches upon the decisional autonomy of another. Despite its billing as staunch protector of states’ rights, the Rehnquist Court continued down the same path as its forebears, at least within the subconstitutional domains of preemption and forum selection. We are struck by the similarity of the rationales put forward for the preemptive role of federal law to promote horizontal equity among the states and for the need to provide a federal forum for diversity and federal question cases implicating the needs of national market integration. This same theme reemerges in CAFA, with the concentration in federal court of class action cases arising from national market conduct, and in the Supreme Court’s punitive damages

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314. *Grable*, 125 S. Ct. at 2367.

315. *Merrell Dow Pharms. Inc. v. Thompson*, 478 U.S. 804, 810 (1986) (“[I]n exploring the outer reaches of § 1331, determinations about federal jurisdiction require sensitive judgments about congressional intent, judicial power, and the federal system.”). Or, to quote Justice Brennan, “a test based upon an ad hoc evaluation of the importance of the federal issue is infinitely malleable: at what point does a federal interest become strong enough to create jurisdiction?” *Id.* at 822 n.1 (Brennan, J., dissenting).

316. Under the well-pleaded complaint rule, federal question jurisdiction does not exist to support removal on the basis of a preemption defense. See, e.g., *Pinney v. Nokia, Inc.*, 402 F.3d 430, 448–49 (4th Cir. 2005) (holding preemption defense is not a basis for removal of interstate class action against manufacturers and distributors of wireless telephones, rejecting defendants’ argument that state-law claims have a “sufficient connection” to a federal regulatory scheme to provide a basis for federal jurisdiction). Post-CAFA, cases such as *Pinney*, however, would be removable to federal court under CAFA given their interstate nature.

317. *Merrell Dow*, 478 U.S. at 814 n.12.

jurisprudence, attuned to the extraterritorial impact of local decisions on the national economy and on other states' ability to regulate their affairs. Adopting a functional lens, our approach here has been to merge the analysis of substantive law with that of forum law in order to illuminate the discernible trend toward federalization, albeit often indirect and partial, in the direction of national law for a national market.



## APPENDIX

## Preemption Cases in Sample (chronological listing)

1. International Paper Co. v. Ouellette, 479 U.S. 481 (1987).
2. Pilot Life Insurance Co. v. Dedeaux, 481 U.S. 41 (1987).
3. Metropolitan Life Insurance Co. v. Taylor, 481 U.S. 58 (1987).
4. International Brotherhood of Electrical Workers, AFL-CIO v. Hechler, 481 U.S. 851 (1987).
5. Caterpillar Inc. v. Williams, 482 U.S. 386 (1987).
6. Perry v. Thomas, 482 U.S. 483 (1987).
7. Lingle v. Norge Division of Magic Chef, Inc., 486 U.S. 399 (1988).
8. California v. ARC America Corp., 490 U.S. 93 (1989).
9. Adams Fruit Co. v. Barrett, 494 U.S. 638 (1990).
10. United Steelworkers of America, AFL-CIO-CLC v. Rawson, 495 U.S. 362 (1990).
11. English v. General Electric Co., 496 U.S. 72 (1990).
12. Ingersoll-Rand Co. v. McClendon, 498 U.S. 133 (1990).
13. Gade v. National Solid Wastes Management Ass'n, 505 U.S. 88 (1992).\*
14. Cipollone v. Liggett Group, Inc., 505 U.S. 504 (1992).
15. CSX Transportation, Inc. v. Easterwood, 507 U.S. 658 (1993).
16. Hawaiian Airlines, Inc. v. Norris, 512 U.S. 246 (1994).
17. American Airlines, Inc. v. Wolens, 513 U.S. 219 (1995).
18. Mastrobuono v. Shearson Lehman Hutton, 514 U.S. 52 (1995).
19. Freightliner Corp. v. Myrick, 514 U.S. 280 (1995).
20. Medtronic, Inc. v. Lohr, 518 U.S. 470 (1996).
21. AT&T Co. v. Central Office Telephone, Inc., 524 U.S. 214 (1998).
22. El Al Israel Airlines, Ltd. v. Tsui Yuan Tseng, 525 U.S. 155 (1999).
23. Humana Inc. v. Forsyth, 525 U.S. 299 (1999).
24. United States v. Locke, 529 U.S. 89 (2000).\*
25. Norfolk Southern Railway Co. v. Shanklin, 529 U.S. 344 (2000).
26. Geier v. American Honda Motor Co., 529 U.S. 861 (2000).
27. Pegram v. Herdrich, 530 U.S. 211 (2000).
28. Buckman Co. v. Plaintiffs' Legal Committee, 531 U.S. 341 (2001).
29. Circuit City Stores, Inc. v. Adams, 532 U.S. 105 (2001).
30. Lorillard Tobacco Co. v. Reilly, 533 U.S. 525 (2001).\*
31. Sprietsma v. Mercury Marine, 537 U.S. 51 (2002).
32. Beneficial National Bank v. Anderson, 539 U.S. 1 (2003).
33. American Insurance Ass'n v. Caramendi, 539 U.S. 396 (2003).
34. Green Tree Financial Corp. v. Bazzle, 539 U.S. 444 (2003).
35. Aetna Health Inc. v. Davila, 542 U.S. 200 (2004).
36. Bates v. Dow Agrosciences, LLC, 544 U.S. 431 (2005).\*

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\* Denotes a case that was added to the original sample of thirty-two "tort preemption" cases derived from Greve & Klick, *supra* note 42.

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