2010

# Null Preemption

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# NULL PREEMPTION

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*How free should the federal government be, not only to preempt state regulatory law, but also to choose itself to adopt no law on point? Such instances of "null preemption" have been historically rare, but now are occurring with greater frequency. Consider that the Environmental Protection Agency (EPA) refused to allow states to impose standards governing motor vehicle tailpipe greenhouse-gas emissions, and also argued that it could not, or alternatively would not, issue any federal regulations. Further, though the Supreme Court rejected the EPA's arguments, two years have since passed with no EPA action.*

*The regulatory voids resulting from such instances of "null preemption" are rarely normatively justified. Even if states lack a normative justification for regulating, still the structure of the federal system means that null preemption offends states' sovereign prerogative to protect their citizens. Moreover, it is far more likely, not that the states lack any normative justification, but that there is a normative dispute between federal and state government over the propriety of regulation. Only rarely—such as when the federal government seeks to avoid interstate externalities and the cost of national regulation outweighs its benefit—will null preemption be justified.*

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For helpful discussions and suggestions, I am grateful to Adeno Addis, William Buzbee, Clifford Carrubba, Adam Cox, Claire Dickerson, Onnig Dombalagian, Richard Epstein, Allan Erbsen, Brian Galle, Jacob Gersen, Jennifer Johnson, Martin Lederman, Glynn Lunney, Dan Markel, Jonathan Masur, John McGinnis, Cherie Metcalf, Lori Greendorfer Nash, Richard Revesz, Gregory Riggs, Catherine Sharkey, Frederick Tung, Johan van der Vyver, Liza Vertinsky, Keith Werhan, and Kathryn Zeiler. I also benefited greatly from presentations at the annual meeting of the Canadian Law and Economics Association, at law and economics workshops at Georgetown University Law Center and the Law Faculty of Queen's University, and at faculty workshops at Emory University School of Law and Tulane Law School.

*Null preemption should accordingly be limited. Congress can statutorily limit federal regulators' freedom to engage in null preemption. Courts should react skeptically to assertions of null preemption, especially where regulators make such assertions without indication of supporting congressional intent.*



## INTRODUCTION

How free should the federal government be, not only to preempt state regulatory law, but also to choose itself to adopt no law on point? Federal preemption of state law has drawn a great deal of academic attention in recent years.[1] Commentators have drawn distinctions between "floor" preemption and "ceiling" preemption,[2] and have questioned the validity of preemptions effected not by Congress, but

1 *See, e.g.*, Symposium, *Ordering State-Federal Relations Through Federal Preemption Doctrine*, 102 NW. U. L. REV. 503 (2008).

2 *See* William W. Buzbee, *Interaction's Promise: Preemption Policy Shifts, Risk Regulation, and Experimentalism Lessons*, 57 EMORY L.J. 145, 147–48 (2007).

by federal agencies.[3] Throughout this literature—and the cases—runs the assumption that preemption involves (1) the preemption of state law (2) by some federal standard.[4]

Both floor and ceiling preemption contemplate that the federal government has established some level of federal regulation. Commentators have not paid much attention to the possibility that the federal government might preempt state law without providing any federal regulation, thus leaving a vacuum. It is this type of setting, which I term one of "null preemption," on which I focus in this Article.

While null preemption has been historically uncommon, recent years have seen more occurrences. Recent litigation involving the regulation of greenhouse-gas emissions from motor vehicles' tailpipes provides an important example. In response to litigation by states to compel the Federal Environmental Protection Agency (EPA) to regulate such emissions, the federal government argued (unsuccessfully in the end) that it lacked authority so to regulate.[5] In the meantime, in litigation involving states' ability to impose limits on such emissions, courts have held that such state laws are preempted unless a waiver is obtained from the federal government.[6] In *Massachusetts v. EPA*,[7] the Supreme Court ultimately ruled that the EPA had authority to regulate motor vehicle tailpipe emissions;[8] after that, the EPA denied states a waiver to regulate themselves.[9] Taken as a whole, then, the position of EPA (albeit rejected in part by the Supreme Court) was that it lacked authority to regulate motor vehicle tailpipe greenhouse-gas emissions and that, absent a waiver (which it denied), neither did the states. In other words, the position of the federal government was that there was null preemption of motor vehicle tailpipe greenhouse-gas emissions. Moreover, even in the wake of the *Massachusetts* case, the EPA declined to take regulatory action.[10] Only under the new leadership of the Obama administration—and two years after the

3 *See infra* note 118 and accompanying text.

4 *See, e.g.*, William W. Buzbee, *Asymmetrical Regulation: Risk, Preemption, and the Floor/Ceiling Distinction*, 82 N.Y.U. L. Rev. 1547, 1549–50 (2007) (framing questions about the role of federal preemption with this underlying assumption).

5 *See* Massachusetts v. EPA, 549 U.S. 497, 511–14 (2007) (summarizing the EPA's argument that it lacked authority to regulate the emissions).

6 *See infra* notes 63–65 and accompanying text.

7 549 U.S. 497 (2007).

8 *Id.* at 528–32.

9 *See infra* note 66.

10 *See infra* note 57 and accompanying text.

Court handed down its decision in *Massachusetts*—is the EPA preparing to regulate greenhouse-gas emissions.[11]

By depriving states of their ability to regulate and leaving a federal regulatory void as well, null preemption infringes upon states' sovereignty. It also impedes the ability of states to ensure the health and safety of their constituents.

I argue here that suggestions of null preemption should be subject to considerable scrutiny. Still, it is important to understand the scope of my claim in this regard: The fact that null preemption should be viewed skeptically does not mean that regulation should necessarily be favored over the absence of regulation. There may be situations where an absolute absence of regulation—in favor of simple market forces, for example—is normatively desirable. The answer to that question is distinct, however, from the question of which institution or institutions should be vested with authority to decide it. Under our federal system of government, the federal government and state governments have the power to regulate (or to decline to regulate). Null preemption raises the question of when one government—the federal government—should not only decide that it ought not to regulate, but also that it should deprive state governments of the prerogative to make a similar call.[12]

The propriety of null preemption thus boils down to a question of how confident the federal government is that a setting of no regulation is absolutely appropriate. This understanding refines the claim about the rare normative desirability of null preemption. There may be settings where the federal government is convinced that a state government normatively errs by promulgating regulation. Even if the state government lacks a valid normative justification for its regula-

11 *See* Endangerment and Cause or Contribute Findings for Greenhouse Gases Under Section 202(a) of the Clean Air Act, 74 Fed. Reg. 66,496 (Dec. 15. 2009); John M. Broder, *E.P.A. Expected to Regulate Carbon Dioxide and Other Heat-Trapping Gases*, N.Y. TIMES, Feb. 19, 2009, at A15.

12 *See* Ernest A. Young, *Federal Preemption and State Autonomy*, *in* FEDERAL PREEMPTION 249, 255 (Richard A. Epstein & Michael S. Greve eds., 2007) ("The Constitution . . . does not enact *laissez faire* economics; it *does* enact a basic balance of authority between state and federal governments.").

Note that, despite the usual sense in which government regulation is seen to impinge upon individual rights, regulation may sometimes be deployed to enhance people's rights by, for example, recognizing enforceable property rights. Thus, in *Goldstein v. California*, 412 U.S. 546 (1973), the Court held that states could enforce laws criminalizing the piracy of sound recordings, even though Congress had affirmatively declined to afford copyright protection to sound recordings. *Id.* at 571. In rejecting an argument for effective null preemption, the Court upheld states' ability to afford greater rights to their citizens than were created under federal law. *Id.*

tion, the fact remains that our federal system assumes that benefits arise from generally leaving state governments free to regulate where the federal government declines to do so. Those benefits dissipate when the federal government acts to displace state government regulatory freedom.

But the state may have a normative basis for wishing to regulate. The federal government may be wrong about the state's lack of normative justification. More likely, there may be a dispute between the federal and state governments as to the proper normative measure or approach. Perhaps the state government does not believe that cost-benefit analysis should justify regulation, while the federal government does; or the state and federal governments agree on the validity of cost-benefit analysis, yet they disagree as to the assumptions underlying that analysis; or the state government takes a more precautionary approach than does the federal government. In such settings, is the federal government justified in unilaterally opting for no regulation?

To be sure, there may be settings where the federal government is justified in giving rise to null preemption. For example, the federal government might have determined that federal regulation is unjustified and also that state regulation would impose substantial externalities on other states. As a general matter, however, null preemption will rarely be normatively justified.

The propriety of null preemption also should turn on the particular federal actors that, it is claimed, have generated the null preemption. Null preemption requires two steps: (1) the choice of no federal regulation, and (2) the preemption of state law by the federal government.[13] Null preemption is more acceptable when the legislature effects both these steps. In contrast, assertions of null preemption should be received more skeptically to the extent that the executive branch has effected these steps. Indeed, considerations of political economy suggest that societal actors may more and more be turning to executive branch actors to attain null preemption when it was previously thought to be unattainable.

I make four broad contributions in this Article. First, I explore the contours of null preemption. I also develop a typology of settings in which null preemption may arise. Professor Robert Glicksman has identified one intentional setting of null preemption, to which I refer as "regulatory inaction null preemption."[14] My comprehensive taxon-

13 *See infra* Part II.B.

14 *See infra* text accompanying notes 161–64; *see generally* Robert L. Glicksman, *Nothing Is Real: Protecting the Regulatory Void Through Federal Preemption by Inaction*, 26

omy includes null preemption settings that are either intentional or unintentional and accidental, and that are either clear or ambiguous.

Second, I consider the normative desirability of null preemption. I argue that the class of cases in which it is desirable is a small one. Even if the federal and state governments disagree over what is normatively desirable, there will rarely be justification for the federal government to impose its normative values onto state governments and thus to deprive the state governments of their sovereign prerogative. I also apply the normative framework to the various taxonomical settings of null preemption.

Third, I describe the political economy of null preemption. I explain that null preemption has heretofore been rare. But I also argue that occurrences of null preemption are on the rise, thanks primarily to executive branch action (or inaction, as the case may be).

Fourth, given the narrow normative case for null preemption, I suggest ways in which Congress might legislatively constrain the freedom of the executive branch to give rise to null preemption where Congress does not intend to allow for that possibility. I suggest that Congress might either promulgate "background" rules that apply in the absence of regulatory action, or preclude preemption of state law unless and until regulators generate affirmative federal regulations in an area.

I also offer recommendations for courts that are called upon to examine situations in which null preemption is claimed. I first suggest that states, as sovereigns, be given special latitude in terms of standing in federal court to pursue allegations of null preemption. Second, I suggest that evidence of null preemption should make it more likely for courts to grant relief to a state alleging that the federal government has improperly failed to regulate, or has improperly preempted state law. And, third, I suggest that perhaps a special cause of action be created to allow states to challenge null preemption.

This Article proceeds as follows. In Part I, I introduce the concept of null preemption. I discuss in greater detail the case of regulation of motor vehicle tailpipe greenhouse-gas emissions as a case study of null preemption. In Part II, I explore the contours of null preemption, and then describe, and distinguish among, several paradigmatic settings in which null preemption may arise.

In Part III, I consider the normative case for null preemption. I conclude that the case is narrow. I also consider concerns of institutional choice and argue that even those who generally defend agency

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VA. ENVTL. L.J. 5 (2008) (considering "when inaction by either Congress or a federal regulatory agency should be deemed to preempt state law").

preemption of state law should be wary of "back door" assertions of null preemption by agencies, and should therefore support some congressional constraints on regulatory freedom.

In Part IV, I consider how concerns of political economy may explain why null preemption has historically been uncommon, but may become more common in the future. Finally, in Part V, I offer suggestions as to how Congress might constrain regulators from invoking null preemption, and also for courts called upon to review claimed occurrences of null preemption.

## I. Examples of Null Preemption

In essence, null preemption arises where two things happen: (1) the federal government establishes a "zero level" of federal regulation, and (2) the federal government preempts the states from filling the regulatory void.[15] In this Part, I offer some examples of null preemption. I focus on the regulation of motor vehicle tailpipe greenhouse-gas emissions as a case study, after which I discuss some additional examples.

### *A. A Case Study in Null Preemption: The Regulation of Motor Vehicle Greenhouse-Gas Emissions*

The scientific community first began to acknowledge and analyze the problem of global warming nearly fifty years ago.[16] Despite that, Congress has declined to enact legislation directed specifically against the problem.[17] The growing consensus in recent decades among scientists about the reality, and seriousness, of global warming[18] led to an increase in legislative proposals to address global warming, but in the end did not result in any enacted laws.[19] On the international treaty front,[20] the United States entered into the preliminary Framework Convention on Climate Change[21] in 1992, but it was with near unanimous senatorial opposition that President Clinton declined to

15 *See infra* Part II.B.

16 For an overview of the science and public policy issues related to global warming, see Jonathan Remy Nash, *Standing and the Precautionary Principle*, 108 Colum. L. Rev. 494, 507–08 (2008).

17 *See* Massachusetts v. EPA, 549 U.S. 497, 511–12 (2007).

18 *See* Nash, *supra* note 16, at 507.

19 *See infra* note 58 and accompanying text.

20 For additional discussion, see generally Jonathan Remy Nash, *Beyond Kyoto: The Treatment of Outliers*, 15 U.C. Davis J. Int'l L. & Pol. 31 (2008) (explaining the history and questionable future of the treaty regime addressing climate change).

21 United Nations Framework Convention on Climate Change, May 29, 1992, 1771 U.N.T.S. 107.

submit the Kyoto Protocol[22]—which, by its terms, imposed limits on national greenhouse-gas emissions[23]—for ratification.[24]

As a general matter, Congress has not passed laws directed against specific air pollutants. Instead, Congress has delegated broad authority under the Clean Air Act[25] (CAA) to address air pollution. While Congress devolved authority on the EPA and the states to identify and achieve safe and acceptable ambient levels of air pollution,[26] motor vehicle regulation receives special treatment under the Act. Section 202(a) of the CAA directs the EPA Administrator to prescribe, by regulation, "standards applicable to the emission of any air pollutant from any class or classes of new motor vehicles or new motor vehicle engines, which in his judgment cause, or contribute to, air pollution which may reasonably be anticipated to endanger public health or welfare."[27] Section 209(a) of the CAA provides that "[n]o State or any political subdivision thereof shall adopt or attempt to enforce any standard relating to the control of emissions from new motor vehicles or new motor vehicle engines subject to this part."[28] Section 209(b) empowers a state to generate motor vehicle emissions standards more stringent than the federal standard, provided that a

22 Kyoto Protocol to the United Nations Framework Convention on Climate Change, Dec. 11, 1997, 2303 U.N.T.S. 162.

23 *See id.* art. 3, 2303 U.N.T.S. at 216–18.

24 *See* Nash, *supra* note 16, at 507 n.62.

25 42 U.S.C. §§ 7401–7671 (2006 & Supp. II 2008).

26 The CAA directs the EPA Administrator to identify "air pollutant[s] . . . emissions of which, in his judgment, cause or contribute to air pollution which may reasonably be anticipated to endanger public health or welfare." CAA § 110(a)(1), 42 U.S.C. § 7408(a)(1)(A). For each such pollutant, the EPA is to generate primary and secondary "national ambient air quality standards"—or "NAAQS"—that represent the maximum ambient levels of the pollutant appropriate to protect the public health and welfare, respectively. *See id.* § 109(b), 42 U.S.C. § 7409(b). The states are then directed to generate "implementation plans" that explain how they will comply with the NAAQS. *See id.* § 110, 42 U.S.C. § 7410.

There are currently only six pollutants for which NAAQS have been issued. Since the enactment of the CAA in 1970, the EPA has identified only one additional criterion air pollutant—lead—and that was after the EPA had been compelled by court order to do so. The EPA has never identified a criterion air pollutant based on its status as a greenhouse gas. Greenhouse gases thus remain essentially unregulated under the heart of the CAA.

27 *Id.* § 201(a)(1), 42 U.S.C. § 7521(a)(1).

28 *Id.* § 209(a), 42 U.S.C. § 7543(a). The provision adds: "No State shall require certification, inspection, or any other approval relating to the control of emissions from any new motor vehicle or new motor vehicle engine as condition precedent to the initial retail sale, titling (if any), or registration of such motor vehicle, motor vehicle engine, or equipment." *Id.*

waiver from the federal government is obtained.[29] The statute provides that the federal government "shall" grant such a waiver unless either (1) the state's determination of its standard is "arbitrary or capricious";[30] (2) the state does not need a state standard to "meet compelling and extraordinary circumstances";[31] or (3) the state's standard and accompanying enforcement procedures "are not consistent" with federal standards.[32] If such a waiver is provided, then section 177 authorizes other states to choose between the standards of the federal government and California.[33]

Section 209(a) is a broad preemption provision.[34] By its own terms, it preempts any state standard "relating to the control of emissions."[35] And the Supreme Court has interpreted its reach broadly.[36]

In sum, then, with respect to motor vehicle emissions, Congress's vision seems to have been that the EPA would identify, and develop regulations for, any air pollutant, the emission of which by motor vehicles, "in [the EPA Administrator's] judgment, cause[s] or contribute[s] to air pollution which may reasonably be anticipated to endanger public health or welfare."[37] In order to protect automobile manufacturers from a patchwork of regulations, Congress broadly preempted state law, allowing states the freedom only to choose between federal emissions standards and stricter standards promulgated by California.[38]

But that vision is not the only way to understand the statutory framework. And, indeed, recent litigation positions taken by the federal government, combined with the states' understanding that they need a waiver from the EPA to regulate tailpipe greenhouse-gas emissions and the EPA's decision to deny such waiver requests,[39] combine to suggest that the federal government's understanding of the statutory framework did not work toward that vision, but rather frustrated it. It seems that the executive branch understood Congress to have

29 *See id.* § 209(b), 42 U.S.C. § 7543(b).

30 *Id.* § 209(b)(1)(A), 42 U.S.C. § 7543(b)(1)(A).

31 *Id.* § 209(b)(1)(B), 42 U.S.C. § 7543(b)(1)(B).

32 *Id.* § 209(b)(1)(C), 42 U.S.C. § 7543(b)(1)(C).

33 *See id.* § 177, 42 U.S.C. § 7507.

34 *See id.* § 209(a), 42 U.S.C. § 7543(a).

35 *Id.*

36 *See* Engine Mfrs. Ass'n v. S. Coast Air Quality Mgmt. Dist., 541 U.S. 246, 252–55 (2004) (precluding state imposition of rules applicable to public and private operators of fleets of vehicles that would have required the operators to purchase vehicles that complied with state pollution reduction rules).

37 CAA § 108(a)(1)(A), 42 U.S.C. § 7408(a)(1)(A).

38 *See id.* § 177, 42 U.S.C. § 7507.

39 *See infra* notes 63–66 and accompanying text.

implemented—or at least to have approved of—a regime of null preemption.[40]

Let us consider first federal regulation of motor vehicle tailpipe greenhouse-gas emissions. In *Massachusetts v. EPA*, several states joined some environmental organizations in a challenge to the EPA's failure to regulate greenhouse-gas emissions from motor vehicles.[41] The EPA resisted the challenge on three primary grounds: (1) that the challengers lacked standing to bring their action to court,[42] (2) that the EPA lacked statutory authority to regulate greenhouse gases,[43] and (3) that, even if it had authority, the EPA was within its rights to decline to exercise that authority.[44]

The Supreme Court heard the case and rejected each of these arguments. First, relying upon what some contend to be a relaxing of traditional standing requirements,[45] combined with recognition of special solicitude for states as plaintiffs,[46] the Court dispatched the EPA's challenge to standing.[47] The Court emphasized the fact that, on the record before it, the EPA had failed to controvert Massachusetts's factual assertions about the dangers posed by global warming,[48] and the extent to which reductions in greenhouse-gas emissions—and in particular greenhouse-gas emissions from U.S. motor vehicles—would help ameliorate the problem.[49] The Court also rejected the

40 *See infra* notes 71–74, 125 and accompanying text.

41 The environmental organizations were the original plaintiffs, with the states intervening. *See* Massachusetts v. EPA, 549 U.S. 497, 511, 514 (2007).

42 *Id.* at 517.

43 *Id.* at 528.

44 *Id.* at 532–33.

45 This was certainly the view of the Chief Justice in dissent. *See id.* at 540–46 (Roberts, C.J., dissenting).

46 *See id.* at 518–20 (majority opinion).

47 Specifically, the Court found that Massachusetts had sufficiently established harm, causation, and redressability. *See id.* at 521–26. For a critique of the Court's approach, see Nash, *supra* note 16, at 524–25.

48 *See Massachusetts*, 549 U.S. at 521 ("EPA regards as an 'objective and independent assessment of the relevant science'" a report by the National Research Council that "identifies a number of environmental changes that have already inflicted significant harms." (citations omitted) (quoting Control of Emissions from New Highway Vehicles and Engines, 68 Fed. Reg. 52,922, 52,930 (Envtl. Prot. Agency Sept. 8, 2003))).

49 The Court explained: "We . . . attach considerable significance to EPA's 'agree[ment] with the President that we must address the issue of global climate change,' and to EPA's ardent support for various voluntary emission-reduction programs." *Id.* at 526 (quoting Control of Emissions from New Highway Vehicles and Engines, 68 Fed. Reg. at 52,929) (internal quotation marks omitted). It further acknowledged that, "[a]s Judge Tatel observed in dissent below, 'EPA would presumably not bother with such efforts if it thought emissions reductions would have no

argument that Massachusetts's harm was too generalized to support standing, reasoning that the potential loss of coastline was sufficient.[50]

The Court next concluded that the EPA had statutory authority to regulate greenhouse-gas emissions. The Court held that the CAA's "sweeping definition of 'air pollutant'" was "unambiguous" in its inclusion of greenhouse gases.[51] It also rejected the argument that Congress's failure to enact specific legislation aimed at greenhouse-gas emissions indicated intent to deprive EPA of the power to regulate greenhouse-gas emissions under the CAA.[52]

Finally, the Court considered the EPA's proffered justifications for declining to exercise its power to regulate motor vehicle greenhouse-gas emissions: that a voluntary greenhouse-gas reduction program was sufficient to address the problem; that the decision to regulate U.S. motor vehicle greenhouse-gas emissions would undermine the President's ability to negotiate an effective international treaty to deal with the problem of global warming by removing a bargaining stick; and that a piecemeal response to global warming that dealt with motor vehicle emissions separately from other sources was undesirable.[53] The Court explained:

> Under the clear terms of the Clean Air Act, EPA can avoid taking further action only if it determines that greenhouse gases do not contribute to climate change or if it provides some reasonable explanation as to why it cannot or will not exercise its discretion to determine whether they do.[54]

The Court found none of the proffered responses to meet this criterion.[55] It remanded the case to afford the EPA the opportunity to deliver a valid justification for failing to regulate.[56] Even in *Massachu-*

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discernable impact on future global warming.'" *Id.* (quoting Massachusetts v. EPA, 415 F.3d 50, 60 (D.C. Cir. 2005), *rev'd*, 549 U.S. 497 (2007)).

50 *Id.* at 521–23.

51 *Id.* at 528–29.

52 *See id.* at 529–31. As the Court explained:

> Even if . . . postenactment legislative history could shed light on the meaning of an otherwise-unambiguous statute, EPA never identifies any action remotely suggesting that Congress meant to curtail its power to treat greenhouse gases as air pollutants. That subsequent Congresses have eschewed enacting binding emissions limitations to combat global warming tells us nothing about what Congress meant when it amended § 202(a)(1) in 1970 and 1977.

*Id.* at 529–30.

53 *See id.* at 533.

54 *Id.*

55 *See id.* at 533–35.

56 *Id.* at 535.

*setts*'s wake, however, the EPA declined so to regulate.[57] Only now is the EPA, under the new leadership of the Obama administration—and two years after the Court handed down its decision in *Massachusetts*—preparing to regulate greenhouse-gas emissions.[58]

In short, then, the executive branch argued in the *Massachusetts* case that it lacked power to, and in any event could decide not to, regulate motor vehicle tailpipe greenhouse-gas emissions.[59] Even though it lost the case, moreover, it continued—for a period of years—to decline to regulate those emissions.

Let us consider now federal government preemption of state authority to regulate motor vehicle tailpipe greenhouse-gas emissions. While challenging the EPA's failure to regulate motor vehicle greenhouse-gas emissions, California also sought a waiver from the EPA to impose greenhouse-gas emission level limits—in excess of the (nonexistent) federal limits—on California motor vehicles.[60] Motor vehicle manufacturers and distributors challenged California's proposal—and other states' proposals to follow suit.[61] Federal district courts in Vermont and California rejected the automobile industry's initial challenges to the state initiatives.[62]

Of importance here is the courts' treatment of the question of whether the states required a waiver from the EPA before they could act: Both courts agreed that a waiver was required. The California district court specifically held that California's ability to enforce its

57 *See* Glicksman, *supra* note 14, at 14 & n.38; Jason Scott Johnston, *Climate Change Confusion and the Supreme Court: The Misguided Regulation of Greenhouse Gas Emissions Under the Clean Air Act*, 84 NOTRE DAME L. REV. 1, 63 (2008).

58 *See supra* note 11 and accompanying text. Congress has recently considered proposals to regulate greenhouse-gas emissions. *See, e.g.*, American Clean Energy and Security Act of 2009, H.R. 2454, 111th Cong. (as passed by House of Representatives, June 26, 2009); America's Climate Security Act of 2007, S. 2191, 110th Cong. (2007).

59 *Massachusetts*, 549 U.S. at 528.

60 *See* Felicity Barringer, *California Sues E.P.A. over Denial of Waiver*, N.Y. TIMES, Jan. 3, 2008, at A14.

61 *See* Cent. Valley Chrysler-Jeep v. Witherspoon (*Cent. Valley Chrysler-Jeep I*), 456 F. Supp. 2d 1160, 1163 (E.D. Cal. 2006).

62 *See* Green Mountain Chrysler Plymouth Dodge Jeep v. Crombie, 508 F. Supp. 2d 295, 350 (D. Vt. 2007) (holding that Vermont regulations were not preempted); Cent. Valley Chrysler-Jeep v. Goldstene (*Cent. Valley Chrysler-Jeep II*), 529 F. Supp. 2d 1151, 1190 (E.D. Cal. 2007) (rejecting on summary judgment claims that California standards were preempted by the Energy Policy and Conservation Act and were unenforceable on foreign policy preemption grounds); *Cent. Valley Chrysler-Jeep I*, 456 F. Supp. 2d at 1174, 1183–87 (dismissing on pleadings claims that California standards violated the dormant Commerce Clause and were preempted by the Sherman Act, and holding that the EPA waiver was needed to avoid Clean Air Act preemption).

standard hinged on whether the EPA granted a waiver,[63] while the Vermont district court noted, "[T]he parties have proceeded with this case on the assumption that EPA will grant California's waiver application. If it does not, of course, Vermont's regulation is preempted by the CAA's section 209(a)."[64] The Vermont court also observed that "[t]he parties agree that enforcement of Vermont's [greenhouse gas] standards is preempted by Section 209(a) of the Clean Air Act . . . unless and until the EPA Administrator grants California a waiver under Section 209(b) . . . for its identical [greenhouse gas] regulations."[65]

After considerable administrative delay, the EPA in 2008 decided to deny California's request for a waiver under Section 209.[66] It reasoned that California does not need its greenhouse-gas standards for new motor vehicles to meet compelling and extraordinary conditions, as required by statute.[67] California filed suit to challenge the waiver denial,[68] while Congress undertook an investigation of the denial's propriety.[69] Only recently has the new Obama administration directed the EPA to reconsider the waiver denial.[70]

Let us now consider the null preemption of motor vehicle tailpipe greenhouse-gas emissions, in light of the foregoing discussion of federal regulation, and federal preemption of state regulation in

63 *Cent. Valley Chrysler-Jeep I*, 456 F. Supp. 2d at 1174–75. In a subsequent opinion, the district court noted that the state defendants had "acknowledge[d] and . . . conceded in open court" the legal conclusion that "the new regulations could not be enforced absent a waiver from EPA." Cent. Valley Chrysler-Jeep Inc. v. Witherspoon, No. CV F 04-6663, 2007 WL 135688, at *5 (E.D. Cal. Jan. 16, 2007). The district court's final holding furthers the point, stating that enforcement by California (and other states) of the California motor vehicle greenhouse-gas standards was not barred by foreign policy preemption where "California's . . . [r]egulations [are] granted [a] waiver of preemption by EPA pursuant to section 209 of the Clean Air Act." *Cent. Valley Chrysler-Jeep II*, 529 F. Supp. 2d at 1190.

64 *Green Mountain Chrysler*, 508 F. Supp. 2d at 302.

65 *Id.* at 343 n.50 (citations omitted).

66 *See* Kevin M. Davis, *The Road to Clean Air Is Paved with Many Obstacles: The U.S. Environmental Protection Agency Should Grant a Waiver for California to Regulate Automobile Greenhouse Gas Emissions via Assembly Bill 1493*, 19 FORDHAM ENVTL. L. REV. 39, 93–95 (2009).

67 *See* California State Motor Vehicle Pollution Control Standards; Notice of Decision Denying a Waiver of Clean Air Act Preemption for California's 2009 and Subsequent Model Year Greenhouse Gas Emission Standards for New Motor Vehicles, 73 Fed. Reg. 12,156–57 (Envtl. Prot. Agency Mar. 6, 2008).

68 *See* Barringer, *supra* note 60.

69 *See* Steven D. Cook, *Waxman Opens Investigation into EPA Denial of California's Greenhouse Gas Limit Waiver*, 39 ENV'T REP. (BNA) 12, 12 (2008).

70 *See* John M. Broder & Peter Baker, *Obama's Order Likely to Tighten Auto Standards*, N.Y. TIMES, Jan. 26, 2009, at A1.

the area. At the end of the day, motor vehicle greenhouse-gas emissions are not a setting of null preemption, insofar as the EPA now (albeit two years after the decision in *Massachusetts* was handed down) has moved to regulate those emissions.[71] However, under very plausible assumptions, it does seem to be the case that the *federal government's* position was that there was null preemption. Specifically, assume (as seems rational) that the government's view that California (and other states) required a federal waiver to impose state-based restrictions on motor vehicle greenhouse-gas emissions—and the government's decision to deny such a waiver—did not change by virtue of the Court's decision in *Massachusetts*.[72] Under those assumptions, state regulation of motor vehicle greenhouse-gas emissions would be entirely preempted. Now combine that conclusion with the government's three primary arguments in *Massachusetts*.[73] If the states are preempted from regulating and the EPA lacks authority to regulate motor vehicle greenhouse-gas emissions, then there would be null preemption. There would also be null preemption if the states are preempted from regulating and the EPA, though it had authority to regulate, simply declined to do so. And, finally, there would be effective null preemption if the states were preempted from regulating and the states lack standing to challenge either the EPA's assertion that it lacks authority to regulate, or equally the EPA's decision not to regulate.

It thus is appropriate to understand the government's position (at least based upon its arguments in, and its position in the wake of, the *Massachusetts* litigation and upon its decision to deny California's waiver request) as amounting to an assertion of null preemption. Indeed, on this reasoning, had the *Massachusetts* case come out differently, one can readily envision a scenario under which null preemption would have obtained even more permanence.

Importantly, moreover, the *Massachusetts* Court's decision against the EPA's position notwithstanding, the EPA continued to decline to

71 *See supra* note 11 and accompanying text.

72 While it is theoretically possible that the EPA might have acted differently with respect to the need for California's waiver application, there is every reason to believe that the EPA would have adhered to the view that California could not enforce its motor vehicle greenhouse-gas emissions standards absent an EPA waiver. Indeed, such was—even before the Court's holding in *Massachusetts v. EPA*—the holding of the California district court, and thereafter a premise accepted by courts and parties (including state governments) alike. And, similarly, while a contrary ruling in *Massachusetts* may have led the EPA to grant California's waiver request, it is far from inconceivable that the EPA still would have denied that request.

73 *See supra* notes 42–44 and accompanying text.

regulate motor vehicle tailpipe greenhouse-gas emissions in the two years since that decision was handed down.[74] Practically speaking, then, the EPA has effected null preemption in the area for years.

### *B. Other Examples of Null Preemption*

Regulation of motor vehicle tailpipe greenhouse-gas emissions is not the only example of null preemption. The laws governing national banking institutions provide another example. Under the National Bank Act,[75] Congress has authorized federally chartered banking institutions to engage in various enumerated banking activities and "all . . . incidental powers as shall be necessary to carry on the business of banking."[76] Congress has subjected these institutions to federal regulation and, "[t]o prevent inconsistent or intrusive state regulation from impairing the national system," exempted them from state regulation.[77] The Supreme Court has interpreted the National Bank Act to preclude the application of state laws regulating bank advertising to federally chartered banks.[78] It recently also held that the broad preemption of state law extended to state chartered subsidiaries of national banks on the ground that national banks' incidental powers include the option of operating through subsidiaries, even if federal law did not entirely fill the resulting gap.[79]

Federal labor law provides another setting of null preemption. Though the National Labor Relations Act[80] (NLRA) includes no express preemption provision,[81] the Supreme Court has interpreted the NLRA to effect so-called "*Machinists* pre-emption"—that is, to preempt state regulation where Congress has evinced an intent for an area to "be unregulated because left to be controlled by the free play of economic forces."[82]

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74 *See* Broder, *supra* note 11.

75 12 U.S.C. §§ 21–216d (2006).

76 *Id.* § 24 (Seventh).

77 Watters v. Wachovia Bank, N.A., 550 U.S. 1, 11 (2007); *see also* 12 U.S.C § 484(a) ("No national bank shall be subject to any visitorial powers except as authorized by Federal law . . . .").

78 *See* Franklin Nat'l Bank v. New York, 347 U.S. 373, 377–79 (1954).

79 *Watters*, 550 U.S. at 41.

80 29 U.S.C. §§ 151–169 (2006).

81 *See* Chamber of Commerce v. Brown, 128 S. Ct. 2408, 2412 (2008).

82 *Id.* (quoting Machinists v. Wis. Employment Relations Comm'n, 427 U.S. 132, 140 (1976)) (internal quotation marks omitted); *see also id.* at 2417 ("We have characterized *Machinists* pre-emption as 'creat[ing] a zone free from all regulations, whether state or federal.'" (quoting Bldg. & Constr. Trades Council v. Associated Builders & Contractors of Mass./R.I., Inc., 507 U.S. 218, 227 (1993))).

The federal securities laws offer yet another setting of null preemption. Prior to 1996, states had, under their blue sky laws and consistent with the federal securities laws, imposed so-called qualification requirements—that is, minimal substantive requirements—on securities.[83] In enacting the federal securities laws, in contrast, Congress eschewed a qualification-based approach,[84] opting instead for information regulation and disclosure.[85] With the National Securities Markets Improvement Act of 1996[86] (NSMIA), Congress expressly precluded states from imposing qualification requirements on so-called "covered securities"—that is, in effect, securities that are either traded, or could be traded, on a national stock exchange.[87] Congress's goal seems to have been the desire for greater uniformity and to eliminate what it perceived as duplicative regulation.[88]

The NSMIA may be seen to have effected null preemption in two ways. First, the securities laws have long exempted from their reach

83 *See* Rutheford B. Campbell, Jr., *The Insidious Remnants of State Rules Respecting Capital Formation*, 78 WASH. U. L.Q. 407, 410 (2000). These blue sky laws were seen to be consistent with the federal securities laws (which postdated the blue sky laws) because the federal laws took the different tack of requiring disclosure and imposing procedural requirements, rather than substantive requirements, on issuers. *See id.*

84 President Franklin Roosevelt's initial request that Congress enact securities regulation legislation specifically disclaimed the notion that the federal government should "take any action which might be construed as approving or guaranteeing that newly issued securities are sound in the sense that their value will be maintained or that the properties which they represent will earn profit." H.R. REP. NO. 73–85, at 2 (1933). Nonetheless, early draft bills did call for federal qualification requirements. *See* James M. Landis, *The Legislative History of the Securities Act of 1933*, 28 GEO. WASH. L. REV. 29, 31–32 (1959). However, the draft bill that ultimately became the Securities Act of 1933 "remained true to the conception . . . that its requirements should be limited to full and fair disclosure of the nature of the security being offered and that there should be no authority to pass upon the investment quality of the security." *Id.* at 34.

85 *See* Charles M. Yablon & Jennifer Hill, *Timing Corporate Disclosures to Maximize Performance-Based Remuneration: A Case of Misaligned Incentives?*, 35 WAKE FOREST L. REV. 83, 92 & n.36 (2000).

86 Pub. L. No. 104-290, 110 Stat. 3416 (codified as amended in scattered sections of 15 and 29 U.S.C.).

87 Since NSMIA, federal law precludes states from imposing qualification requirements on any "covered security." Securities Act of 1933 § 18(a)(1)(A), 15 U.S.C. § 77r(a)(1)(A) (2006). "Covered security" is defined to include any securities listed, or to be listed, on a national stock exchange or the NASDAQ National Market and all securities sold under Securities Act Rule 506, the SEC's private placement safe harbor. *See id.* §§ 18(b)(1)–(4), 15 U.S.C. § 77r(b)(1)–(4); Renee M. Jones, *Does Federalism Matter? Its Perplexing Role in the Corporate Governance Debate*, 41 WAKE FOREST L. REV. 879, 890 n.68 (2006).

88 *See* Campbell, *supra* note 83, at 411–12.

"transactions by an issuer not involving any public offering,"[89] which the Securities and Exchange Commission (SEC) has implemented by exempting private placements to sophisticated investors under Rule 506.[90] The combination of NSMIA's preemption of state regulation and Rule 506 leaves investors purchasing under Rule 506 without traditional federal securities regulatory protection.[91] Indeed, on this basis, some have argued that the regulatory void be undone.[92]

The NSMIA may also be seen to have created a null preemption that goes beyond the bounds of the statutory and regulatory exemption for transactions not involving private offerings. To the extent that the SEC is not authorized to impose qualification requirements[93] and that the NSMIA precludes the states from doing so with respect to covered securities,[94] then qualification requirements have been entirely preempted with respect to all covered securities. Does that amount to null preemption? The answer, it seems, turns on one's perspective. If one subscribes to the view that congressional preemption was warranted by virtue of the fact that qualitative requirements were duplicative of the federal securities laws,[95] then there does not seem to be null preemption; the federal securities laws continue to regulate. On this understanding, the federal laws' disclosure requirements and

89 Securities Act of 1933 § 18(2), 15 U.S.C. § 77d(2).

90 *See* 17 C.F.R. § 230.506 (2009).

91 *See* Jennifer J. Johnson, *Private Placements: A Regulatory Black Hole*, 35 DEL. J. CORP. L. (forthcoming 2010) (manuscript at 34–36).

92 *See, e.g.*, *id.* (manuscript at 49–61); G. Philip Rutledge, *NSMIA . . . One Year Later: The States' Response*, 53 BUS. LAW. 563, 565–66 (1998) (arguing that the regulatory void might allow persons with disciplinary records to purvey stocks under Rule 506). The North American Securities Administrators Association (NASAA) has listed the "[Reinstatement of] State Regulatory Authority of Regulation D 506 Offerings" as part of its 2008 Agenda. *See* N. Am. Sec. Adm'rs Ass'n, 2008 Pro-Investor Legislative Agenda para. 8 (2008), http://www.nasaa.org/content/Files/NASAA_Legislative_Agenda_2008.pdf. *But see* Michael A. Perino, *Fraud and Federalism: Preempting Private State Securities Fraud Causes of Action*, 50 STAN. L. REV. 273, 332 (1998) (arguing that because "large private placements to institutional or other sophisticated investors are typically sold in interstate commerce," and "sophisticated investors [are] capable of protecting themselves, additional state causes of action are likely unnecessary").

93 If instead it were empowered, but nonetheless declined, to do so, then null preemption would still apply, but it would be of the type discussed below—where Congress preempts state law and executive branch inaction generates a level of "zero regulation."

94 *See* Securities Act of 1933 § 18(a)(1)(A), 15 U.S.C. § 77r-1(a)(1)(A); John C. Coffee, Jr., & Hillary A. Sale, *Redesigning the SEC: Does the Treasury Have a Better Idea?*, 95 VA. L. REV. 707, 763 (2009).

95 *See, e.g.*, Roberta S. Karmel, *Blue-Sky Merit Regulation: Benefit to Investors or Burden on Commerce?*, 53 BROOK. L. REV. 105, 116–24 (1987); Perino, *supra* note 92, at 318–29.

qualification requirements are different means to the same end; as long as a path to an end remains regulated, there is no null preemption. Put another way, a choice by the federal government among possible regulatory tools should not be seen as null preemption. On the other hand, if one disagrees and sees a role for qualification requirements separate and apart from disclosure requirements—as some do[96]—then the NSMIA's preemption of state and federal qualification requirements is an example of null preemption.

As another example of null preemption, consider the fate of New York State's airline passenger "bill of rights,"[97] enacted in response to a series of episodes in which airline passengers sat for hours on aircraft, often without provision of food or water.[98] In *Air Transport Ass'n v. Cuomo*,[99] the U.S. Court of Appeals for the Second Circuit found the New York State provision to be preempted[100] by the preemption provision of the Federal Airline Deregulation Act of 1978.[101] The court recognized that, while New York State was trying to fill a regulatory void,[102] this was not because the federal government lacked the power to regulate or because the federal government had affirmatively decided not to generate any such regulation. To the contrary, the court noted that the Federal Department of Transportation was

96 *See, e.g.*, Manning Gilbert Warren III, *Reflections on Dual Regulation of Securities: A Case Against Preemption*, 25 B.C. L. REV. 495, 527–37 (1984).

97 N.Y. GEN. BUS. LAW § 251-g (McKinney 2004 & Supp. 2009).

98 *See* Jeff Bailey, *Long Delays Hurt Image of JetBlue*, N.Y. TIMES, Feb. 17, 2007, at C1 (describing episode in which, in wake of ice storm, nine JetBlue Airlines aircraft sat on the tarmac at John F. Kennedy International Airport for anywhere between six and ten hours); John Doyle et al., *Air 'Refugees' in New JFKaos: Hordes Camp Overnight Before JetBlue Says: Tough Luck, No Flights*, N.Y. POST, Feb. 16, 2007, at 10 (same); Joe Sharkey, *After 8 Hours on the Taxiway, You Might Want a Bill of Rights*, N.Y. TIMES, Jan. 30, 2007, at C8 (describing a similar episode on an American Airlines aircraft at Dallas–Fort Worth International Airport).

99 520 F.3d 218 (2d Cir. 2008).

100 *Id.* at 220.

101 Pub. L. No. 95–504, 92 Stat. 1705 (codified as amended in scattered sections of 18, 26, and 49 U.S.C.). The Act's preemption provision states that

> a State, political subdivision of a State, or political authority of at least 2 States may not enact or enforce a law, regulation, or other provision having the force and effect of law related to a price, route, or service of an air carrier that may provide air transportation under this subpart.

49 U.S.C. § 41,713(b)(1) (2006).

102 Other states had proposed similar legislation. *See Air Transp. Ass'n*, 520 F.3d at 224 n.1; *see also* David K. Randall, *Legislator Calls for an Airline Passenger 'Bill of Rights'*, N.Y. TIMES, Sept. 2, 2007, at NJ2 (noting New Jersey legislator's call to emulate New York's passenger bill of rights).

considering "several similar passenger protection measures that could provide uniform standards to deal with lengthy ground delays."[103]

Finally, consider the holding of the United States Court of Appeals for the Second Circuit in *National Basketball Ass'n v. Motorola, Inc.*[104] There, the manufacturer and promoter of handheld electronic devices defended against the claim of the National Basketball Association (NBA) that it had misappropriated NBA intellectual property—the statistics of live NBA games that were transmitted to the electronic devices—in violation of New York law on the ground that New York law was preempted by the Federal Copyright Act.[105] The court upheld this argument, explicitly holding that, though the games and statistics themselves (as opposed to television and radio broadcasts of the games) were not subject to federal copyright protection, Congress intended the Copyright Act's preemption provision to extend even to materials not subject to the copyright act: "Copyrightable material often contains uncopyrightable elements within it, but [the Act's preemption provision] bars state law misappropriation claims with respect to uncopyrightable as well as copyrightable elements."[106] The court reasoned that Congress had intended the scope of preemption to be broader than the scope of federal copyright:

> Adoption of a partial preemption doctrine—preemption of claims based on misappropriation of broadcasts but no preemption of claims based on misappropriation of underlying facts—would expand significantly the reach of state law claims and render the preemption intended by Congress unworkable. . . . Congress, in extending copyright protection only to the broadcasts and not to the underlying events, intended that the latter be in the public domain. Partial preemption turns that intent on its head by allowing state law to vest exclusive rights in material that Congress intended to be in the public domain and to make unlawful conduct that Congress intended to allow.[107]

## II. The Contours of Null Preemption

In this Part, I consider the contours of null preemption. I first explicate null preemption to consist of two "steps": the preemption of

103 *Air Transp. Ass'n*, 520 F.3d at 224 n.1. Only late last year did the Department of Transportation in fact formally promulgate such measures. *See* Enhancing Airline Passenger Protections, 74 Fed. Reg. 68,983 (Dec. 30, 2009).

104 105 F.3d 841 (2d Cir. 1997).

105 *Id.* at 843, 848–53; *see also* 17 U.S.C. § 301 (2006) (providing for federal preemption of state copyright law).

106 *Nat'l Basketball Ass'n*, 105 F.3d at 849.

107 *Id.*

state law and the choice of a "zero level" of federal regulation. I then consider which federal government actors—the legislature or an executive branch actor—might effect each of these steps. Next, I focus on the "preemption step" and ask what types of preemption—express preemption, implied conflict preemption, or field preemption—might appropriately be used to attain null preemption.

### *A. What Null Preemption Is Not*

Null preemption is a setting in which there is a regulatory void; the private market controls. It is helpful to situate null preemption among other settings in which there is no regulation. While similar to null preemption in this sense, these other settings differ from null preemption in important ways.

Consider first settings in which there is simply neither federal nor state (nor local) regulation, but also no preemption. Here, unlike a setting of null preemption, the regulatory void that inheres can be displaced by government at any level enacting regulation. Null preemption's regulatory void can be dissipated only when either the federal government dissolves its affirmative preemption of state law[108] and the state government regulates, or the federal government itself chooses to regulate.

Consider next areas in which the Constitution preempts regulation. For example, the First Amendment precludes Congress from enacting laws "abridging the freedom of speech."[109] Insofar as the Fourteenth Amendment has been interpreted to incorporate this prohibition also against the states,[110] the net result is that speech is an area largely void of regulation. The extent to which this regulatory void is ensconced is confirmed by the oft-repeated description of the First Amendment as allowing speech to flourish or fail in a "market-

108 When I speak of the federal government "affirmatively" preempting state law, I mean only that the federal government takes some affirmative step to preempt state law. I thus do not mean to exclude implied conflict preemption or implied field preemption. As I shall discuss below, however, neither of these types of preemption is likely to underlie null preemption; rather, express preemption is. *See infra* Part II.B.2.b.

109 U.S. CONST. amend. I.

110 In its original form, the First Amendment divested Congress of the power to "abridg[e] the freedom of speech." U.S. CONST. amend. I. Analogous preemption of state law arises from the Supreme Court's decisions that incorporate the First Amendment into the Fourteenth Amendment's Due Process Clause that limits the powers of the states. *See, e.g.*, First Nat'l Bank of Boston v. Bellotti, 435 U.S. 765, 779–80 (1978) (finding freedom of speech to be a "fundamental component of the liberty safeguarded by the Due Process Clause"); Gitlow v. New York, 268 U.S. 652, 666 (1925) (same).

place of ideas."[111] All laws that courts deem to abridge the freedom of speech are preempted, and the preemption is absolute (absent constitutional amendment). In contrast, for null preemption to arise, the federal government must both (1) affirmatively preempt state law, and (2) choose not to enact regulations itself.

A close constitutional analog of null preemption is found in dormant Commerce Clause jurisprudence. The Commerce Clause conveys a positive grant of authority to the federal government to regulate interstate commerce.[112] However, the Court has long interpreted the Clause also to include a negative component that precludes certain state regulation, even in the absence of federal regulation[113] (except to the extent that Congress may expressly authorize the states to regulate).[114] Like null preemption, the dormant Commerce Clause involves preemption of state law and often (in the absence of any federal law) no federal regulation.[115] In contrast to null preemption, which requires some affirmative federal preemption of state law, however, the dormant Commerce Clause *presumes* an absence of regulation.[116] As a corollary, null preemption (as I have defined it) will never arise where the dormant Commerce Clause already preempts state law.

Table 1 summarizes the features and distinctions of these various settings where a regulatory void may arise.

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111 *See* Pac. Gas & Elec. Co. v. Pub. Utils. Comm'n of Cal., 475 U.S. 1, 8 (1986) ("By protecting those who wish to enter the marketplace of ideas from government attack, the First Amendment protects the public's interest in receiving information.").

112 U.S. CONST. art. I, § 8, cl. 3 (empowering Congress "[t]o regulate Commerce with foreign Nations, and among the several States.").

113 *See, e.g.*, City of Phila. v. New Jersey, 437 U.S. 617, 624 (1978) ("[W]here simple economic protectionism is effected by state legislation, a virtually *per se* rule of invalidity has been erected."). Another possible source of preemption arguably grounded in the Constitution is foreign affairs preemption. For a discussion and critique of foreign affairs preemption, see generally Judith Resnik, *Foreign as Domestic Affairs: Rethinking Horizontal Federalism and Foreign Affairs Preemption in Light of Translocal Internationalism*, 57 EMORY L.J. 31, 74–78 (2007).

114 For discussion, see Gillian E. Metzger, *Congress, Article IV, and Interstate Relations*, 120 HARV. L. REV. 1468, 1480–85 (2007).

115 *See, e.g.*, Boston Stock Exch. v. State Tax Comm'n, 429 U.S. 318, 328 (1977) (noting that the Commerce Clause, "'by its own force created an area of trade free from interference by the States'" (quoting Freeman v. Hewitt, 329 U.S. 249, 252 (1946))).

116 *See City of Phila.*, 437 U.S. at 620–21 & n.4.

TABLE 1. COMPARISON OF SETTINGS IN WHICH A REGULATORY VOID MAY ARISE

| Setting | Nature of Preemption | Reason for Absence of Federal Regulation |
|---|---|---|
| Simple Absence of Regulation | None | Decision by federal government |
| Freedom of Speech Guarantee | Constitutional; self-executing | Preempted by Constitution |
| Dormant Commerce Clause | Constitutional; self-executing | Decision by federal government |
| Null Preemption | Non-constitutional; requires affirmative preemption | Decision by federal government |

### *B. The Two Steps of Null Preemption: Preemption and a "Zero Level" of Federal Regulation*

Typical preemption may be seen to consist of two "steps" or "moving parts," so to speak: first, the preemption of state law and, second, the implementation of some federal standard. Null preemption also involves two steps. First, the federal government must preempt state law (the "preemption step"). Second, the federal government must establish a "zero level" of federal regulation (the "zero federal regulation step"). In this section, I first consider which actors might effect each step, and I then explore these two steps in the context of null preemption.

#### 1. The Actors that Effect the Two Steps

In theory, the legislature, or an executive branch actor, could effect each of the two steps necessary for null preemption.[117] There are thus, in theory, four possible combinations: Congress could effect both steps ("Type I null preemption"), Congress could preempt state law and an executive branch actor could choose a zero level of federal regulation ("Type II null preemption"), an executive branch actor could preempt state law and Congress could choose a zero level of federal regulation ("Type III null preemption"), or an executive branch actor could effect both steps ("Type IV null preemption"). Table 2 organizes these possibilities.

117 The judiciary may also have a role in recognizing (or rejecting) assertions of either step of null preemption. *See supra* note 82 and accompanying text (discussing *Machinists* preemption).

TABLE 2. ACTORS EFFECTING THE TWO STEPS OF NULL PREEMPTION

| | | Which Actor Chooses a Zero Level of Federal Regulation? | |
|---|---|---|---|
| | | Congress | Executive Branch Actor |
| Which Actor Preempts State Law? | Congress | Type I | Type II |
| | Executive Branch Actor | Type III | Type IV |

As an initial matter, the practice of an executive branch department or agency preempting state law, even in favor of an affirmative form of federal regulation, is relatively novel and fairly controversial.[118] The notion that the executive branch would preempt state law

118 For a description of the practice, see, for example, William Funk, *Preemption by Federal Agency Action*, *in* PREEMPTION CHOICE 214, 215–24 (William W. Buzbee ed., 2009); Catherine M. Sharkey, *Preemption by Preamble: Federal Agencies and the Federalization of Tort Law*, 56 DEPAUL L. REV. 227, 229–42 (2007) [hereinafter Sharkey, *Preemption by Preamble*].

The Supreme Court has yet to resolve agency power to preempt. *See, e.g.*, Robert R.M. Verchick & Nina Mendelson, *Preemption and Theories of Federalism*, *in* PREEMPTION CHOICE, *supra* at 13, 27 (noting that the Court skirted the issue in *Watters v. Wachovia Bank N.A.*, 559 U.S. 1 (2007)). Commentators are divided over the question. *Compare* Nina A. Mendelson, *A Presumption Against Agency Preemption*, 102 NW. U. L. REV. 695, 708–25 (2008) (arguing that institutional competence and separation of powers weigh in favor of Congress making preemption choices, and so the standard presumption against preemption should apply with even greater force against agency preemption), Thomas W. Merrill, *Preemption and Institutional Choice*, 102 NW. U. L. REV. 727, 766–69 (2008) (contending that courts should uphold agency preemption only where Congress has delegated such authority), Mark D. Rosen, *Contextualizing Preemption*, 102 NW. U. L. REV. 781, 796–800 (2008) (emphasizing, despite its shortcomings, Congress's institutional advantages in making preemption decisions), Verchick & Mendelson, *supra*, at 27 (taking a skeptical view of agency preemption), *and* Ernest A. Young, *Executive Preemption*, 102 NW. U. L. REV. 869 (2008) (advocating restricting the freedom of agencies to preempt unilaterally), *with* Brian Galle & Mark Seidenfeld, *Administrative Law's Federalism: Preemption, Delegation, and Agencies at the Edge of Federal Power*, 57 DUKE L.J. 1933, 1990 (2008) (arguing that agencies may be better positioned than Congress to decide whether preemption of state law is appropriate), Gillian E. Metzger, *Administrative Law as the New Federalism*, 57 DUKE L.J. 2023, 2069–72 (2008) (arguing that existing administrative law requirements may facilitate the inclusion of states' interests in administrative decisions), Catherine M. Sharkey, *Products Liability Preemption: An Institutional Approach*, 76 GEO. WASH. L. REV. 449, 477–502 (2008) [hereinafter Sharkey, *Products Liability Preemption*] (arguing in favor of agency reference of preemption decisions, with judicial review to ensure proper administrative process), *and* Catherine M. Sharkey, *What* Riegel *Portends for FDA Preemption of State Law Products Liability Claims*, 103 NW. U. L. REV. 437, 441–46 (2009) [hereinafter Sharkey, *What* Riegel *Portends*] (same). *See generally* William W. Buzbee, *State Greenhouse Gas Regulation, Federal Climate Change Legislation, and the Preemption Sword*, 1 SAN DIEGO J. CLIMATE

and also announce a decision to impose no federal regulation goes considerably farther and exceeds, at least at present, the behavior of executive branch departments and agencies. Accordingly, Type IV null preemption should, one would expect, be exceedingly rare. Type III null preemption may also be relatively uncommon.

Much more common will be hybrids where Congress and an executive branch actor together give rise to the steps of null preemption, or where arguments are made in the alternative that either Congress or an executive branch actor has given rise to one or both steps.[119] Consider the purported null preemption of motor vehicle greenhouse-gas emissions.[120] The preemption seems to have been accomplished jointly by the legislative and executive branches. As I described above, the states understood themselves to be obliged by congressional statute to seek a waiver from the federal government to regulate tailpipe greenhouse-gas emissions beyond the (nonexistent) level of federal regulation.[121] But it was an agency—the EPA—that ultimately denied the requests for those waivers.[122]

Consider now that the zero federal-regulation step was argued to be, alternatively, the result of congressional or executive branch action. Part of the EPA's argument in *Massachusetts v. EPA* was that the EPA lacked the statutory authority—i.e., that Congress had failed to confer authority on the EPA—to regulate tailpipe greenhouse-gas emissions.[123] And the EPA sought further to buttress the resilience of its interpretation of the congressional grant by arguing that the plaintiffs lacked standing to challenge the EPA's inaction.[124] Taking the federal government's position on the two points together, then, the government understood Congress to have preempted state law regulating greenhouse-gas emissions from motor vehicles (absent a waiver) and also not to have authorized the EPA to regulate those emissions.[125]

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& ENERGY L. 23 (2009) (arguing in favor of independent "Preemption Review Committee" that would render preemption decisions in problematic settings based on statutory criteria and record evidence).

119 One also might envision some forms of null preemption, such as *Machinists* preemption, as a hybrid resulting from a combination of congressional and judicial action.

120 *See supra* Part I.A.

121 *See supra* notes 63–65 and accompanying text.

122 *See supra* notes 66–69 and accompanying text.

123 *See supra* note 43 and accompanying text.

124 *See supra* note 42 and accompanying text.

125 Other examples of congressional null preemption can be found in federal preemption of banking laws, securities laws, and labor law. *See supra* Part I.B.

Another understanding (again, ultimately rejected by the Court in *Massachusetts*) of the regulation of tailpipe greenhouse-gas emissions sees the executive branch as effecting a zero level of federal regulation. One of the arguments advanced by the federal government in *Massachusetts* was that, even if the EPA had authority to regulate tailpipe greenhouse-gas emissions, it justifiably declined to exercise that authority.[126] That position, combined with the federal government's understanding that states could not regulate such emissions absent a waiver from the federal government,[127] leads to a condition of null preemption. And, as above, the EPA's additional argument on standing serves further to insulate the null preemption condition.[128]

### 2. The Two Steps of Null Preemption

#### a. The Zero Federal Regulation Step

Under the zero federal regulation step, the federal government adopts a zero level of regulation. This raises an important question: How special a case is null preemption? One might at first blush think that null preemption is simply a case (albeit an extreme one) of ordinary preemption, where the federal government preempts state law and establishes a very low level of federal regulation. If that is true, then null preemption deserves no treatment different from ordinary preemption settings. Indeed, were this the case and were null preemption to receive a more hostile reception in court, then the federal government, frustrated in its attempts to implement null preemption, presumably would simply preempt state law and put in place minimal federal regulation.

The argument that null preemption is simply the limiting case of state law preemption combined with very low level federal regulation overlooks the important effects of having regulation "on the books" even if the level of regulation is exceedingly low. The mere existence of regulation—even if now at a low level and indeed even if it merely requires registration of certain actors—often anticipates additional regulation in the future.[129] It puts the issue on the legislature's and

126 *See supra* note 44 and accompanying text.

127 *See supra* notes 63–70 and accompanying text.

128 *See supra* note 42 and accompanying text.

The preemption of New York State's airline passenger "bill of rights" is another example of executive branch null preemption. *See supra* text accompanying notes 97–103.

129 *See* Natural Resources Def. Council, Inc. v. Costle, 568 F.2d 1369, 1380–82 (D.C. Cir. 1977) (emphasizing distinction between minimal permitting program and full-fledged exemption advanced by the EPA).

regulators' radar screens. And, even merely ministerial requirements can be expensive and time consuming.[130] Note that none of this is to say that either null preemption or minimal regulation is preferable one to the other; it is only to see that they are quite different. If one strongly favors a laissez-faire approach in a particular setting, then one should strongly prefer null preemption; if, on the other hand, one believes that some regulation is appropriate, then null preemption will be undesirable.

b. The Preemption Step

Preemption of state law by federal law is justified by the Supremacy Clause.[131] Commentators often categorize preemption based upon the scope of the preemption. They have identified "floor preemption" where the federal government sets a regulatory floor below which states may not pass but above which states are free to aspire.[132] In contrast, "ceiling preemption" or "unitary federal choice preemption" occurs where the federal government chooses a regulatory level and preempts all state law above, below, or generally inconsistent with,[133] that choice. In some sense, null preemption is a

130 *See* Grayson P. Hanes & J. Randall Minchew, *On Vested Rights to Land Use and Development*, 46 WASH. & LEE L. REV. 373, 381 (1989) (noting that compliance with "certain specific and published ordinances and regulations" to obtain "ministerial approvals . . . is often expensive and time consuming").

131 *See* U.S. CONST. art. VI, § 2. As I discuss below, the dormant Commerce Clause is an avenue through which state law is preempted even without congressional or regulatory action. *See infra* text accompanying notes 152–153. For explication, and criticism, of existing preemption doctrine, see generally Caleb Nelson, *Preemption*, 86 VA. L. REV. 225, 290–303 (2000).

132 *See* Buzbee, *supra* note 2, at 147–48.

133 It is possible for the federal government to leave intact state law requirements that are consistent with, and may enhance, existing federal standards. *See* Medtronic, Inc. v. Lohr, 518 U.S. 470, 494–97 (1996) (holding that certain state common law actions were not preempted since they simply "provide[d] another reason for manufacturers to comply with identical existing 'requirements' under federal law" where federal statute only preempted state law that created requirements "'different from, or in addition to,'" federal requirements (quoting 21 U.S.C. § 360k(a) (2006))); *see also* Bates v. Dow AgroSciences LLC, 544 U.S. 431, 447–48 (2005) (quoting *Medtronic* and holding to the same effect). On the importance of interaction between regulatory regimes and the common law where both coexist, see generally Thomas O. McGarity, *The Regulation-Common Law Feedback Loop in Nonpreemptive Regimes*, *in* PREEMPTION CHOICE, *supra* note 118, at 235.

While null preemption is a type of unitary federal choice, a similar possibility of preserving consistent state regulatory law does not exist—no affirmative state regulation could be consistent with a federal choice not to regulate.

variant of unitary federal choice preemption—with the federal choice being a regulatory vacuum.

Let us now focus on the type of preemption that the preemption step of null preemption effects. Under currently dominant preemption doctrine, preemption may occur either by explicit direction of Congress (or, of more recent vintage, a federal department or agency), or implicitly by virtue of the structure of federal statutory and regulatory law. Express preemption arises where Congress (or a federal department or agency) announces that state law is preempted to a defined extent.[134]

Courts and commentators have identified two types of implicit preemption, that is, settings in which courts will find state law preempted even though there is no explicit statement of preemption: conflict preemption and field preemption.[135] Under conflict preemption, preemption occurs "when it is impossible to comply with both state and federal law, or where the state law stands as an obstacle to the accomplishment of the full purposes and objectives of Congress."[136] No direct conflict is required for a conclusion of field preemption; rather, the logic is that the federal government has, through extensive regulation, seen fit so completely to "occupy a given field" that any and all state regulation is deemed preempted.[137]

Is it possible to have null preemption where the preemption is implied? A moment's reflection reveals that it is essentially, if not entirely, impossible to have field preemption as a component of null

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134 *See* Henry H. Drummonds, *The Sister Sovereign States: Preemption and the Second Twentieth Century Revolution in the Law of the American Workplace*, 62 FORDHAM L. REV. 469, 529–30 (1993).

135 *Id.*

136 Silkwood v. Kerr-McGee Corp., 464 U.S. 238, 248 (1984) (citations omitted).

137 *Id.* Some commentators assert that courts have interpreted some statutes to effect preemption even though the statutes do not include express preemption provisions and where the requirements of implied preemption would not be met. *See, e.g.*, Drummonds, *supra* note 134, at 555–95 (describing how preemption under the Federal Arbitration Act and federal labor law as interpreted by the courts does not conform to the standard preemption jurisprudential model). In contrast, Professor Archibald Cox advanced the argument that state law preemption under the NLRA rests at least in part on congressional intent:

> An appreciation of the true character of the national labor policy expressed in the NLRA and LMRA indicates that in providing a legal framework for union organization, collective bargaining, and the conduct of labor disputes, Congress struck a balance of protection, prohibition, and laissez faire in respect to union organization, collective bargaining, and labor disputes that would be upset if a state could also enforce statutes or rules of decision resting upon its views concerning accommodation of the same interests.

Archibald Cox, *Labor Law Preemption Revisited*, 85 HARV. L. REV. 1337, 1352 (1972).

preemption. On one hand, field preemption seems to provide an example of null preemption achieved through implicit preemption: It knocks out state laws within the entire field, even those that are not directly covered by the governing federal regulation. In effect, such state laws are preempted without being directly replaced by a similar federal regulation. This resemblance to null preemption is limited, however: The very existence of field preemption turns on there being *substantial* federal regulation of the field. Viewed more globally, therefore, the preemption is accomplished via the imposition of massive federal regulation, which can hardly be described as the absence of a federal standard.[138]

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138 Viewed another way, one might say that field preemption provides local examples of what we might call "quasi-null preemption" within the global context of non-null preemption: while what Congress and the courts view as "occupying the field" cannot technically be null preemption, it still resembles null preemption with respect to the narrow point of which a state wishes to regulate but cannot.

These different possible ways to conceive of how preemption arises highlight the importance of "framing" for identifying and distinguishing settings of null preemption. (I am grateful to Glynn Lunney for emphasizing to me the potential import of framing in this context.) As Professor Daryl Levinson has explained, legal analysis greatly turns upon how the relevant transaction is framed. *See* Daryl J. Levinson, *Framing Transactions in Constitutional Law*, 111 YALE L.J. 1311, 1332–75 (2002) (discussing the importance of how transactions are framed for constitutional analysis). While private law transactions tend to be readily ascertainable and relatively free from dispute, the same cannot be said of transactions in the public law setting. Professor Levinson has argued that the relevant frame for constitutional purposes should derive from the purpose of the constitutional provision at issue. *See id.* at 1375–90.

A similar approach is appropriately used to identify settings of null preemption. First, an instrumental approach is true to the concern of null preemption of regulatory voids. Second, such an approach accords with the Supreme Court's analysis in cases that raise issues tantamount to null preemption. In *Sprietsma v. Mercury Marine*, 537 U.S. 51 (2002), the Court considered preemption of state law under the Federal Boat Safety Act, 46 U.S.C. §§ 4301–4311 (2006). There, Congress authorized the Coast Guard to issue boat safety regulations and also directed that, to the extent that the Coast Guard had in fact issued regulations, state law "that is not identical to a regulation" be preempted. *Id.* § 4306. (The Act otherwise directed, under a saving clause, that any state law be preserved. *See id.* § 4311(g).) The issue in *Sprietsma* was whether state law governing propeller guards was preempted. *Sprietsma*, 537 U.S. at 54. The Coast Guard had considered promulgating regulations on the subject, but ultimately decided not to. *Id.* at 60–62. The respondents asked the Court to hold that the totality of Coast Guard safety regulations, combined with the Guard's decision not to regulate propeller guards, should preempt state law on the subject. *Id.* at 64. Rejecting this argument, the Court reasoned that state law was not preempted by the Coast Guard's decision not to regulate propeller guards. *See id.* at 64–68. The Court also reasoned that the Coast Guard's decision to promulgate numerous other regulations related to boat safety did not preempt state law on propeller guards since

the Coast Guard had left unregulated the separate risk posed by unprotected propellers. *See id.* at 68–70.

The instrumental approach is also consistent with the Court's decision in *Goldstein v. California*, 412 U.S. 546 (1973), that states could enforce laws criminalizing the piracy of sound recordings, even though Congress had affirmatively declined to afford copyright protection to sound recordings. *Id.* at 571. The Court rejected the argument that the then-extant copyright statute "occupied the field" of all writings of which Congress wished to allow protection, and accordingly that any state laws purporting to confer such protection should be preempted. *See id.* at 563–70. (I am grateful to Glynn Lunney for this reference.)

The proper frame helps greatly to clarify where null preemption arises and where it does not. For example, the government might be said to have occupied the field of air pollutant regulation under the extant CAA. If that is so, then, to the extent that states were preempted from regulating tailpipe greenhouse-gas emissions, it would be due to field preemption, not null preemption. Put another way, do greenhouse-gas emissions constitute their own field (that Congress has to date not chosen to regulate), or is the appropriate frame the field of all air pollutants, which Congress has occupied through the extant CAA?

Because null preemption is properly concerned with regulatory voids mandated by the federal government, the appropriate frame must be whether there is a regulatory risk that remains unaddressed. On this understanding, greenhouse gases pose a risk independent from the risk posed by other air pollutants. Accordingly, the extant CAA should not be seen to occupy the field of air pollution regulation. (An exception might arise to the extent that regulation of pollutants might be said to have, as a byproduct, an effect as well on greenhouse-gas emissions, such that regulation of greenhouse gases might be said to be duplicative. *Cf.* Jonathan Remy Nash, *Too Much Market? Conflict Between Tradable Pollution Allowances and the "Polluter Pays" Principle*, 24 HARV. ENVTL. L. REV. 465, 511–15 (2000) (describing phenomenon of "indirect regulation," where regulation of one pollutant has a regulatory effect on emissions of another pollutant).) This conclusion is entirely consistent with the arguments and decision in *Massachusetts*. Though the case did not directly raise a question of state law preemption, the government did not argue that the CAA should be construed to be the congressional final word on air pollution regulation, and, because the Act does not directly regulate greenhouse gases, the EPA lacked power to regulate greenhouse gases. Rather, it argued that greenhouse-gas regulation was *inimical* to the CAA. This view was shared by Justice Scalia in dissent. *See* Massachusetts v. EPA, 549 U.S. 497, 551–52 (2007) (Scalia, J., dissenting). Indeed, the government pointed to Congress's limited foray into greenhouse-gas regulation in other statutes, and its consideration and ultimately rejection of larger statutory treatments of the problem. *See id.* at 507–08, 529–30 (majority opinion).

Consider next whether null preemption arises where the federal government offers a law or regulation, while preempting state law that it believes are duplicative of federal law. Viewed instrumentally, the answer depends on the eye of the beholder. To the extent that the federal government honestly believes state law to be duplicative, the regulatory risk at issue is addressed and there is no regulatory void. On the other hand, to the extent that the state takes issue with that assessment—or, indeed, the federal government has disingenuously used a claim of duplication to make preemption more palatable—then there is null preemption. In the next section, I dis-

The distinction between typical field preemption and null preemption is exemplified by a recent application of *Machinists* preemption.[139] In its recent decision in *Chamber of Commerce v. Brown*,[140] the Supreme Court concluded that federal labor law preempted a California law that prohibited private employers receiving state program funds from using those funds to assist, promote, or deter union organizing. The Court emphasized that the state statute was inconsistent with Congress's intent to construct "'a zone free from all regulations, whether state or federal.'"[141] The Court then explained:

> Had Congress enacted a federal version of [the state statute at issue] that applied analogous spending restrictions to *all* federal grants or expenditures, the pre-emption question would be closer. But none of the cited statutes is Government-wide in scope, none contains comparable remedial provisions, and none contains express pro-union exemptions.[142]

Put another way, then, while under field preemption it is the decision of Congress to promulgate so many laws that results in a conclusion that state law is displaced, in *Brown*, in contrast, it was the *absence* of federal law that led the Court to conclude that state law was displaced.

Consider now whether null preemption can have as a component implied conflict preemption, where courts find state law preempted because its application conflicts with a federal statute or federal regulation. Under null preemption, the unitary federal choice is not to regulate at all. To the extent that this unitary federal choice manifests

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cuss "duplicative-regulation null preemption" as part of the taxonomy of settings of null preemption. *See infra* text accompanying notes 170–75.

A final question is whether null preemption necessarily arises where federal law protects against a particular regulatory risk but fails to do so by recognizing a private right of action. The instrumental approach directs that this question be answered in the negative. To the extent that existing federal law addresses the regulatory risk, then there is no regulatory void. By the same token, however, there may be settings where private rights of action—such as state law tort claims—*do* address separate regulatory risks. *See Sprietsma*, 537 U.S. at 65 ("[A] Coast Guard decision not to regulate a particular aspect of boating safety is fully consistent with an intent to preserve state regulatory authority . . . ."); Barry Meier, *Life, Death and Liability*, N.Y. TIMES, Feb. 20, 2009, at B1 (discussing congressional momentum to overturn *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996), and restore individuals' common law rights to sue defective medical-device makers). In such settings, the preemption of such causes of action without any offsetting federal regulation (whether in the form of a federal private right of action or otherwise) might constitute null preemption.

139 *See supra* text accompanying notes 81–82.

140 128 S. Ct. 2408 (2008).

141 *Id.* at 2417 (quoting Bldg. & Constr. Trades Council v. Associated Builders & Contractors of Mass./R. I., Inc., 507 U.S. 218, 226 (1993)).

142 *Id.* at 2418 (citation omitted).

itself simply as a failure to regulate (which, as discussed above, will be a common setting), then, there will be no express law or regulation with which state law will conflict.

Though unlikely, it is possible that, in the absence of federal law, there will be a federal policy goal that state law might impede. *Machinists* preemption, where the Court understood Congress to have preempted state law even though an express assertion of preemption was absent,[143] may be one such circumstance, although some have argued that it is difficult to square the Court's reasoning in *Machinists* with traditional preemption jurisprudence.[144]

It is also possible for regulatory inaction to beget implied conflict null preemption. The Supreme Court in *Bethlehem Steel Co. v. New York State Labor Relations Board*[145] explained that the failure of an administrative agency to promulgate a regulation should be interpreted to preempt state law "where failure of the federal officials affirmatively to exercise their full authority takes on the character of a ruling that no such regulation is appropriate or approved pursuant to the policy of the statute."[146] The *Bethlehem Steel* Court proceeded to conclude that the National Labor Relation Board's decision (in effect at the time) not to allow foremen to unionize indeed preempted New York State's own labor board from allowing such relief.[147] In other settings, however, the Court has concluded that an administrative decision not to regulate does *not* preempt state law that regulates the area that the federal government declined to regulate. For example, in *Sprietsma v. Mercury Marine*,[148] the Supreme Court rejected the argument that the Coast Guard's decision not to issue federal regulations governing boat propeller guards did not preempt state law on the subject.[149] The Court rested its conclusion on the ground that, in so ruling, the Coast Guard did not decide that, "as a matter of policy, the States and their political subdivisions should not impose some version of propeller guard regulation,"[150] but only concluded that, at the time, there was no universally acceptable propeller guard for all modes of boat operation that it believed it appropriate to mandate.[151]

143 *See supra* text accompanying notes 81–82.

144 *See supra* note 137.

145 330 U.S. 767 (1947).

146 *Id.* at 774.

147 *See id.* at 774–77.

148 537 U.S. 51 (2002).

149 *Id.* at 64.

150 *Id.* at 67.

151 *See id*; *see also* Ark. Elec. Coop. Corp. v. Ark. Pub. Serv. Comm'n, 461 U.S. 375, 384 (1983) (finding that, although "a federal decision to forgo regulation in a given

A comparison between null preemption and its constitutional analog, dormant Commerce Clause jurisprudence, further confirms that null preemption will rarely be achieved without explicit preemption. Dormant Commerce Clause preemption requires no explicit congressional or agency invocation.[152] However, while the dormant Commerce Clause is self-executing, other forms of preemption are not. Indeed, to the contrary, the Supreme Court has long recognized—and continues to recognize—a presumption *against* preemption.[153]

Thus understood, null preemption stands ordinary preemption on end. Under ordinary conceptions of preemption, there is an express federal standard while the preemption itself may be express or implied. With null preemption, by contrast, the preemption will always be express[154] while the federal standard will often, if not almost always, be unstated. Table 3 summarizes the similarities and differences among different types of preemption, and highlights these points.

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area may imply an authoritative federal determination that the area is best left *un*regulated, and in that event would have as much pre-emptive force as a decision *to* regulate[,] . . . nothing in the language, history, or policy of the [federal statute at issue] suggest[ed] such a conclusion" (citations omitted)).

152 *See supra* text accompanying notes 113–15.

153 For recent statements, see Wyeth v. Levine, 129 S. Ct. 1187, 1194–95 (2009); Altria Group, Inc. v. Good, 129 S. Ct. 538, 543 (2008); Bates v. Dow AgroSciences LLC, 544 U.S. 431, 449 (2005); Medtronic, Inc. v. Lohr, 518 U.S. 470, 485 (1996). Legal scholars have been less convinced of the continuing vitality of the presumption. *See, e.g.*, Mary J. Davis, *The 'New' Presumption Against Preemption*, 61 HASTINGS L.J. (forthcoming 2010) (arguing that in practice, the Supreme Court applies presumption against preemption with varying rigidity, depending upon the setting); Roderick M. Hills, Jr., *Against Preemption: How Federalism Can Improve the National Legislative Process*, 82 N.Y.U. L. REV. 1, 61 (2007) ("The Court has vacillated about whether to adopt a clear statement rule against preemption."). For additional examples, see Alexandra B. Klass, *State Innovation and Preemption: Lessons from State Climate Change Efforts*, 41 LOY. L.A. L. REV. 1653, 1658–72 (2008). For a critique of the "empty formalism" of current preemption doctrine, including the presumption against preemption, see Thomas W. Merrill, *Preemption in Environmental Law: Formalism, Federalism Theory, and Default Rules*, *in* FEDERAL PREEMPTION, *supra* note 12, at 166, 166–172. For a normative argument that the presumption be applied only in particular circumstances, see Stephen F. Williams, *Preemption: First Principles*, 103 NW. U. L. REV. 323, 327–31 (2009).

154 Here, I refer to "express preemption" expansively to include state law preemption as interpreted by the Court under a preemption standard that is different from the traditional standard. *See supra* note 137. Along similar lines, Professor Glicksman argues that courts ought to be reticent to find preemption by inaction absent express congressional preemption of state law. *See* Robert L. Glicksman, *Federal Preemption by Inaction*, *in* PREEMPTION CHOICE, *supra* note 118, at 167, 178–83.

TABLE 3. COMPARISON OF DIFFERENT FORMS OF PREEMPTION

| Type of Preemption | Is the preemption constitutional? | Is the preemption express or implied? | Federal standard? |
|---|---|---|---|
| Typical Express Preemption | No | Express | Yes |
| Implied Conflict Preemption | No | Implied | Yes |
| Implied Field Preemption | No | Implied | Massive, but not directly on point |
| Null Preemption | No | Express, in most cases | No |
| Dormant Commerce Clause | Yes | Implied | No |

### *C. Typology of Null Preemption*

In this section, I elucidate several paradigmatic settings in which null preemption may arise: intentional null preemption, regulatory-delay null preemption, regulatory-preemptive-mismatch null preemption, and duplicative regulation null preemption. I also offer some preliminary thoughts on the extent to which the applicable setting may shed light on the normative desirability of null preemption. I return to the normative question in greater detail in the succeeding Part.

#### 1. Intentional Null Preemption

Intentional null preemption arises when the federal government affirmatively decides both to preempt state law and to establish a zero level of federal regulation. In other words, it arises when the federal government decides to ensconce a regulatory void.

Intentional null preemption may arise in two ways. First, Congress may affirmatively decide both to preempt state law and to bar federal regulation in an area. It is also possible for Congress to preempt state law and to have the executive branch actor to which Congress delegated the decision whether to promulgate federal regulation choose not to regulate. Given the Supreme Court's statement that it vindicates congressional intent to create a zone free of federal and state regulation, *Machinists* preemption is an example of intentional null preemption.[155]

155 *See supra* notes 81–82 and accompanying text. Another possible example of intentional null preemption is found in the Commodity Futures Modernization Act of 2000 (CFMA), Pub. L. No. 106-554, 114 Stat. 2763 app. E (codified as amended in

The forms of null preemption to which we now turn differ from intentional null preemption in that they are settings where the null preemption arises accidentally or incidentally. As we shall see, however, these forms of null preemption may elide into intentional null preemption, depending upon the attendant circumstances or upon one's point of view.

### 2. Regulatory-Delay Null Preemption

Regulatory-delay null preemption may arise where Congress leaves it to an executive branch actor to promulgate federal regulation as it sees fit, and the absence of federal regulation may simply be the result of delay in promulgating regulation.[156] A federal department or agency may decide to issue a finding that no regulation in an area is appropriate, perhaps in response to an administrative petition for rulemaking. Often, however, the federal department or agency will simply decide not to regulate without formalizing that position.[157] In short, then, the decision not to regulate will often manifest itself simply as an absence of federal law or regulation. The fate of New York

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scattered sections of 7, 8, 11, 12, and 15 U.S.C.). There, Congress precluded the Commodities Futures Trading Commission and the SEC from regulating individually negotiated swap agreements, and also prohibited states from regulated certain "covered swap agreements" under gaming and bucket shop laws. *See id.* § 105, 8 U.S.C. § 1188 (2006). Uncertainty remains, however, as to whether other state regulatory regimes might remain applicable and available. *See* William K. Sjostrom, Jr., *The AIG Bailout*, 66 WASH. & LEE L. REV. 943, 983–89 (2009) (noting that there was an open question as to whether states could use insurance law to regulate credit default swaps, though no state elected to do so). (I am grateful to Onnig Dombalagian and Jennifer Johnson for directing me to this example.)

156 It is possible, of course, for Congress to preempt state law in an area and then to consider subsequent regulatory legislation at various points in the future that might reduce the scope of the null preemption. Indeed, Congress has considered over the years, though never enacted, federal legislation that would have created a federal airline passenger bill of rights. *See, e.g.*, Bailey, *supra* note 98 (noting, in the wake of the JetBlue incident in New York in 2008, that Senator Boxer was "planning" to sponsor federal legislation); Sharkey, *supra* note 98 (describing how an American Airlines episode in Dallas-Fort Worth had motivated a passenger to push for a federal air passenger bill of rights, and also noting episodes from earlier years that had prompted other, ultimately doomed efforts to enact legislation).

Still, the notion of Congress enacting legislation with perhaps some legislators having a vague intent to revisit the area in the future differs from an executive branch actor setting priorities and developing a regulatory agenda. It is for this reason that I conclude that regulatory-delay null preemption is properly considered a subset of executive branch null preemption.

157 *See supra* text accompanying notes 99–103.

State's airline passenger "bill of rights"[158] provides an example of regulatory-delay null preemption.[159] More generally, agencies may (often quite predictably) take a slower approach to regulation than will states, and sometimes may never promulgate regulations.[160]

If regulatory delay is truly the source of the null preemption, one can expect the federal government to regulate—and therefore the null preemption to dissipate—within some reasonable period of time.[161] One such example would be the efforts by states, and by the federal government, to promulgate an airline passengers' "bill of rights."[162] On the other hand, it is possible that regulatory delay may extend far beyond congressional intent. Even beyond that, it may be that the executive branch actor uses regulatory-delay as an excuse when in fact the actor never intends to regulate. These situations of "regulatory inaction null preemption" are more intentional, and more problematic. Consider, for example, the EPA's argument that it justifiably could decline to exercise any existing authority it had to regulate tailpipe greenhouse-gas emissions; the EPA's standing argument was intended further to shield the EPA's affirmative decision not to act.[163] Even more egregious on this account is the EPA's continued failure to regulate motor vehicle tailpipe greenhouse-gas emissions even in the wake of the Court's *Massachusetts v. EPA* decision.[164]

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158 *See supra* text accompanying notes 97–103.

159 *See supra* note 103 (noting that Department of Transportation has only very recently taken steps to regulate in the area).

160 Professor Christopher Schroeder explains:

> The ossification of federal rule making makes federal agencies very slow-moving beasts. They are reluctant to revise standards or programs in light of new knowledge and changed circumstances due to the cumbersome, labor-intensive nature of the enterprise, fraught as it is with the hazards of hard-look judicial review. None of the federal agencies that have issued statements of preemption in regulatory preambles, for instance, has been an active rule maker in recent years, preferring instead to engage in negotiations with the regulated community to persuade "voluntary" recalls or modifications of products or drug labels. In comparison, states and localities are relatively more nimble.

Christopher H. Schroeder, *Supreme Court Preemption Doctrine*, *in* PREEMPTION CHOICE, *supra* note 118, at 119, 142.

161 *Cf. supra* text accompanying notes 129–30 (noting the difference between minimal regulation and exemption from regulation).

162 *See supra* text accompanying notes 97–103.

163 *See supra* notes 5, 52–59 and accompanying text.

164 *See supra* notes 57–58 and accompanying text.

### 3. Regulatory-Preemptive-Mismatch Null Preemption

Regulatory-preemptive-mismatch null preemption occurs where the breadth of preemption of state law as set by Congress unintentionally does not match the scope of federal regulation as established either by Congress or an executive branch actor, with the mismatch resulting in null preemption. Though null preemption results, it is not intentional. Thus, for example, the null preemption of data from live basketball games that the Second Circuit effectively found in the *Motorola* case was intentional,[165] and therefore not a case of regulatory-preemptive-mismatch null preemption.

It is possible to envision settings of intentional null preemption that may be difficult to distinguish from true, unintentional regulatory-preemptive-mismatch null preemption. It is possible that Congress intentionally sets the scope of preemption more broadly than its regulation (or than a delegation of regulatory authority). It is also possible that Congress unintentionally set the scope of preemption and a regulatory grant non-coextensively, yet an executive branch actor argues (and seeks judicial deference on the point) that Congress did so intentionally.

For example, Congress's decision to exempt sophisticated investors from some protections of the securities laws and then also to preempt state law qualification requirements[166] can be seen as intentional null preemption. On the other hand, one could argue that Congress did not realize that null preemption was the combined effect of these exemptions; in that case, the setting can be seen as an example of regulatory-preemptive-mismatch null preemption.

Also hard to categorize is the federal government's apparent conception of the null preemption of power to regulate motor vehicle greenhouse-gas emissions. The EPA seems to have believed that Congress intentionally both preempted state law regulation of motor vehicle greenhouse-gas emissions (subject to obtaining a waiver) and also disallowed the EPA from regulating in the area (or, equally, chose to allow the EPA to decide whether so to regulate and EPA declined that invitation).[167] On the other hand, opponents of the EPA's position would argue (indeed, did argue, at least in part) that the null preemption was the inadvertent result of a regulatory-preemptive-mismatch.[168] (In the end, the Supreme Court concluded that Congress

165 *See supra* notes 104–07 and accompanying text.

166 *See supra* notes 89–92 and accompanying text.

167 *See supra* notes 123–25 and accompanying text.

168 *See supra* note 41 and accompanying text.

did empower the EPA to act, and also that the EPA was constrained in deciding not to act.[169])

### 4. Duplicative Regulation Null Preemption

Duplicative regulation null preemption occurs when the federal government decides to preempt state law on the ground that the state law to be preempted is duplicative of federal law (whether existing federal law or federal law being enacted at the same time as the preemption). Here, in its pure form, the federal government does not understand itself to be effecting null preemption—there is federal law on point, after all. The states (and presumably others in society) do understand there to be null preemption to the extent that they do not see the state law to be duplicative of federal law.

Congress's broader decision to preempt state qualification requirements on the ground that they were duplicative of existing federal securities law regulation[170] is an example of duplicative regulation null preemption. So, too, is the preemption of state laws under the national banking laws.[171] (In the latter case, federal regulators remain free to impose federal regulation.)

Much as unintentional regulatory-delay null preemption can morph into (or really be) regulatory inaction null preemption, so too is there a sinister side to duplicative regulation null preemption. The claim that federal regulation duplicates state regulation such that state regulation is unnecessary and can be preempted may be a cover to create an intentional regulatory void.

Some commentators have argued that the effect of leaving purchasers under Rule 506 without the protections of either state or federal law was unintended, and that the preemption of state law should be repealed.[172] With respect to the question of whether NSMIA creates a far broader form of null preemption by precluding all qualification requirements, those who believe that qualification requirements do work separate from that done by disclosure requirements under federal law likely understand NSMIA to effect null preemption, and find it normatively undesirable.[173] Those, in contrast, who derided state blue-sky merit regulation as duplicative of federal securities regulation,[174] and accordingly laud the NSMIA preemption,[175] may not

169 *See supra* notes 51–56 and accompanying text.
170 *See supra* notes 83–96 and accompanying text.
171 *See supra* notes 75–79 and accompanying text.
172 *See supra* note 92 and accompanying text.
173 *See supra* notes 93–96 and accompanying text.
174 *See, e.g.*, Karmel, *supra* note 95, at 107–16; Perino, *supra* note 92, at 318–29.

see the NSMIA as effecting null preemption in the first instance, and in any event consider the preemption normatively desirable.

## III. The Narrow Normative Case for Null Preemption

The previous Part set out the contours of null preemption. In this Part, I address the question of when null preemption might be normatively desirable. I first argue that the normative case for null preemption is generally a narrow one. Second, I consider questions of institutional choice. While those commentators who find it normatively preferable to have Congress make these preemption decisions in general clearly will prefer Congress also to make decisions on null preemption,[176] I argue that even those who have an institutional preference for an executive branch actor to make preemption decisions will want those actors to announce the reasons for invoking null preemption. On this basis, all commentators should find normatively undesirable situations where an executive branch actor seeks to instantiate null preemption covertly through a "back door."

### *A. Evaluating the Normative Value of Null Preemption*

Let us begin by looking at one necessary component of null preemption—that the federal government believes that regulation is not desirable. Under a basic formulation of the standard cost-benefit view of regulation,[177] one should regulate if the benefits of regulation, $B_R$, exceed the costs of regulation, $C_R$, i.e., if $B_R - C_R > 0$.[178] One should not regulate if that is not the case.

175 *See, e.g.*, Perino, *supra* note 92, at 331 ("The allocations of governmental authority made in the NSMIA translate well to allocating authority and control over the creation and administration of private causes of action. . . . [I]t makes little sense to preserve state antifraud causes of action for issuers whose securities trade on national markets.").

176 *See, e.g.*, Buzbee, *supra* note 4, at 1599–1613 (setting out criteria guiding normatively desirable federal preemption).

177 There may be other normative bases upon which to decide whether to regulate. I do not address them in this Article.

178 One might take the view that error costs (i.e., the possibility that one might misestimate the benefits, the costs, or both) militate in favor of requiring, before regulation, that the benefits exceed the costs by some significant amount (i.e., only if $B_R - C_R - \varepsilon > 0$), or, perhaps, regulating even where the costs slightly outweigh the benefits (i.e., where $C_R - B_R < \varepsilon$). These variants all turn on the sign and magnitude of the term $B_R - C_R$ that is required to justify regulation. For ease of exposition, I remain in the text with the basic formulation that calls for $B_R - C_R > 0$.

Cost-benefit analysis also calls for choosing among regulatory options the one that provides the greatest surplus of benefits over costs. I assume, again for ease of

But is this condition sufficient? It is not, because it speaks only to whether the federal government itself should regulate, not whether it should also preempt state law. There are two broad reasons why the mere fact that the federal government is justified in not regulating does not also mean that the federal government is justified in preempting state law. First, and of great importance, there are federalism costs associated with preempting state law, even where the state in question lacks an objectively valid normative basis for the law that is to be preempted. Second, beyond this, in some cases, the state government may have a valid normative justification for its law. In such cases, the state and federal governments may simply disagree as to what is normatively justified and desirable, in which case the normative hurdle for the federal government to meet in order to preempt the state law becomes even higher. I address each point in turn.

Let us begin, then, with a setting where state government has not promulgated a law or regulation for an objectively normatively desirable reason.[179] For one thing, as courts long have lamented, it is difficult to ascertain when—and perhaps rare to find that—a state is acting pursuant to purely undesirable motives.[180] For example, even if one can make a convincing case that regulatory interest groups have captured state government, it is very unlikely that there are no legitimate goals that state regulation seeks to pursue.

Moreover, even if a state acts pursuant to normatively undesirable motivations, there are costs to federal preemption. Consider first separation of powers[181] and legitimacy costs to state governments. The

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exposition, that any regulatory program under consideration already meets this criterion.

179 It is hardly beyond the pale to include environmental groups within the broad universe of interest groups who may seek to sway government action under public choice and political economy theories. Still, one would not expect this particular circumstance to be commonplace. *See* Todd J. Zywicki, *Environmental Externalities and Political Externalities: The Political Economy of Environmental Regulation and Reform*, 73 TUL. L. REV. 845, 874–88 (1999).

180 *Compare* C & A Carbone, Inc. v. Town of Clarkstown, 511 U.S. 383, 402 (1994) (O'Connor, J., concurring) (noting the legal distinction between on the one hand "[a] facially nondiscriminatory regulation supported by a legitimate state interest which incidentally burdens interstate commerce," which "is constitutional unless the burden on interstate trade is clearly excessive in relation to the local benefits," and on the other hand "a regulation [that] affirmatively or clearly discriminates against interstate commerce on its face or in practical effect," which "violates the Constitution unless the discrimination is demonstrably justified by a valid factor unrelated to protectionism" (citations omitted) (internal quotation marks omitted)), *with id.* ("Of course, there is no clear line separating these categories.").

181 For discussion in the preemption context, see Verchick & Mendelson, *supra* note 118, at 16.

federal system created by the U.S. Constitution presupposes the legitimacy of states to regulate on a whole host of matters.[182] States, it seems, may enact poor laws and promulgate undesirable regulations with not inconsiderable frequency.[183] To be sure, the Framers envisioned the Constitution and the federal government to act as a check on some categories of undesirable state laws.[184] But were the federal government to preempt state law every time it deemed the state law to be—and even when, objectively, state law is—undesirable, then there would be little left to federalism.[185]

182 *See, e.g.*, U.S. CONST. amend. X; Herbert Wechsler, *The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Government*, 54 COLUM. L. REV. 543, 544 (1954) ("National action has . . . always been regarded as exceptional in our polity, an intrusion to be justified by some necessity, the special rather than the ordinary case."). Some may doubt the value of having a federal system (at least for purposes of governing in certain areas), and on this basis may discount the benefits of federalism. For purposes of the calculus here, I accept as exogenous the choice to maintain a federal system, and therefore take federalism benefits as a given. *Cf.* Jonathan Remy Nash, *The Uneasy Case for Transjurisdictional Adjudication*, 94 VA. L. REV. 1869, 1916–19 (2008) (noting that the federal structure of the Constitution suggests that the federalism benefits of having state courts resolve some cases and issues be taken as a given); Ann Woolhandler & Michael G. Collins, *Judicial Federalism and the Administrative States*, 87 CAL. L. REV. 613, 655 (1999) ("Even though some critics have expressed doubts about the continued need for certain categories of federal jurisdiction—particularly diversity jurisdiction—they remain a given whose provision and presumed purposes the judicial branch is obliged to honor." (footnote omitted)).

183 *See* Neil Gorsuch & Michael Guzman, *Will the Gentlemen Please Yield? A Defense of the Constitutionality of State-Imposed Term Limitations*, 20 HOFSTRA L. REV. 341, 351 (1991) ("[T]he Framers adopted a compromise, placing primary authority with states, but empowering the Congress to override undesirable regulations.").

184 Consider, for example, the Commerce Clause, and especially, as interpreted by the courts, the dormant Commerce Clause. *See supra* notes 112–16 and accompanying text.

185 Some, perhaps most notably Herbert Wechsler, have argued that the constitutional structure itself protects the interests of states by distributing legislative power and the power to select the President at least in part on the basis of state boundaries. *See* Wechsler, *supra* note 182, at 546–58; *see also* Bradford R. Clark, *Constitutional Compromise and the Supremacy Clause*, 83 NOTRE DAME L. REV. 1421, 1431–35 (2008) (making a similar argument based on the debates at the Constitutional Convention). On this account, one can be more sanguine that preemption decisions made by the political branches are appropriate since the interests of the states will have been taken into account. *See* Wechsler, *supra* note 182, at 558–60.

Whatever the merit of this argument, it is weaker in the context of null preemption, as opposed to preemption of state law in favor of a national standard. The interests of states and national government are at least somewhat aligned—aligned, that is, at least in terms of whether regulation *in some form* is appropriate—where national action is being weighed against individual state action (at least to the extent that many states are undertaking, or would like to undertake, such action). In contrast, null

The legitimacy costs of null preemption to state governments are substantial. Federal preemption of state law is inconsistent with the dignity of states as sovereigns in any circumstance.[186] The offense is of lesser magnitude where, under the constitutional scheme for allocation of power, the preemption lies in an area in which the federal government is seen to regulate more effectively or appropriately. In contrast, the offense to state dignity is surely heightened where the preemption is null preemption, and the federal government preempts state power to regulate without offering to do so on its own.[187] Null preemption entirely deprives states of their ability to fulfill their sovereign obligation to protect their citizens. In forming (and subsequently joining) the United States, the sovereign states have surrendered certain powers to the national government.[188] States have surrendered at least concurrent regulatory jurisdiction over some areas and have also conferred to the federal government the

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preemption disempowers states and the federal government from regulating where at least many states believe some regulatory action is appropriate. Indeed, though it is doubtful that he contemplated the possibility of null preemption, Professor Wechsler discussed the primacy of state governance as against "[n]ational action," *id.* at 544, not as against the absence of any action at all.

186 *See, e.g.*, Daniel J. Meltzer, *State Sovereign Immunity: Five Authors in Search of a Theory*, 75 NOTRE DAME L. REV. 1011, 1040–41 (2000) ("[B]road notions of state dignity are difficult to square with . . . the power of [the federal] sovereign to strip states of their regulatory authority via federal preemption."). For critical discussion of the relationship between state dignity and state sovereign immunity jurisprudence, see Peter J. Smith, *States as Nations: Dignity in Cross-Doctrinal Perspective*, 89 VA. L. REV. 1, 51–76 (2003).

187 *Cf.* Cuomo v. Clearing House Ass'n, 129 S. Ct. 2710, 2720 (2009) (noting that "the incursion that the [federal] regulation makes upon traditional state powers [should not] be minimized").

188 *See* Massachusetts v. EPA, 549 U.S. 497, 519 (2007) (noting that, "[w]hen a State enters the Union, it surrenders certain prerogatives"). Other powers are retained by the states, while yet other powers are potentially exercisable by either the federal government or the states.

A competing account sees power as emanating directly from the people, with the Constitution allocating that power among the federal government, state governments, and the people. *See* McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 403–04 (1819); THE FEDERALIST No. 51 (James Madison). Even on this understanding, one might think that, to the extent that the federal government alters the initial constitutional allocation by preempting state law, the states might expect the federal government to regulate in their stead. *Cf. McCulloch*, 17 U.S. (4 Wheat.) at 404–05 ("The government of the Union . . . is, emphatically and truly, a government of the people. . . . Its powers are granted by them, and are to be exercised directly on them, and for their benefit."). People then have a right to expect that, to the extent that the federal government precludes the state government from exercising a power that they (the people) granted to the state government, the federal government will affirmatively exercise that power in an appropriate fashion.

right to preempt them from regulating over those areas.[189] The states might reasonably expect that, in return for the loss of sovereign prerogative (where the federal government chooses to divest the states of power to regulate by preemption), the federal government will regulate in their stead.[190] And the regulatory void will (at least in the view of the states that can neither regulate nor point to federal law that fills the void) disadvantage their citizens.[191]

Second, consider the costs resulting from not having multiple regimes free to regulate in an area. These costs arise generally when the federal government preempts state law and installs its own system of regulation;[192] the fact that the federal government in addition chooses not to regulate itself only exacerbates these costs. First, null preemption foregoes the benefits of having states functions as federal "laborator[ies]" of experimentation.[193] It will also tend to short-cir-

189 *See Massachusetts*, 549 U.S. at 519.

190 *See id.* ("When a State enters the Union, it surrenders certain sovereign prerogatives. . . . These sovereign prerogatives are now lodged in the Federal Government . . . ."); *cf.* Anita Bernstein, *Implied Reverse Preemption*, 74 BROOK. L. REV. 669, 670–71 (2009) (suggesting that judicial holdings of implied preemption be subject to reversal based upon subsequent congressional deregulation of an area).

Not all political structures that feature hierarchical layers of governments make similar assumptions about the allocation of powers. Only for those that do will the analysis here apply. *See infra* text accompanying notes 275–78.

191 *Cf.* Williams, *supra* note 153, at 333 (admitting that application of the presumption against preemption only in some circumstances would alter the balance of federal and state power, but arguing that it would do so in order to ameliorate "the risk that state action may impose costs on the welfare of *citizens* of other states"). Here, the argument is that null preemption impairs the citizens of states that are unable to regulate. It bears emphasis that greater regulation need not be the result: State regulation may function to enhance, rather than restrict, people's rights. *See supra* note 12.

192 *See* Robert A. Schapiro, *From Dualism to Polyphony*, *in* PREEMPTION CHOICE, *supra* note 118, at 33, 43–44 (discussing the values of a new conception of the relationship of the states and the federal government).

193 New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting); *see* Schapiro, *supra* note 192, at 43. It is on this basis that commentators faced with a related but distinct question—whether, where federal preemption of state law is justified, it should take the form of setting a federal regulatory floor or a unitary federal choice—argue that the presumption should be the setting of a federal floor, because that option preserves greater state regulatory authority. *See, e.g.*, Buzbee, *supra* note 4, at 1574, 1603–13. Professor Buzbee has set out several criteria that should guide us in determining whether federal preemption is normatively desirable (and, if so, whether that preemption should take the form of floor or ceiling preemption). Put succinctly, he argues that preemption is more likely to be justified where (1) the regulatory object is a product, as opposed to a location-specific risk; (2) there is the need for large-scale research and thus benefits to be gained from research pooling, as opposed to the need for context-intensive research; (3) the scale of the prob-

cuit the evolution and spread of regulatory ideas.[194] Even if a particular area is normatively better left unregulated, still there may be lost the benefit of having states engage in new forms of regulation.[195] Second, an absence of regulation forecloses a dialogue among jurisdictions—and ultimately among their constituents—as to the desirability and appropriate form of regulation.[196] It also interferes with the notion that law allows for citizens to express certain values.[197] Null preemption cuts interjurisdictional dialogue off completely, and also stifles the expressive value of law. Third, preemption of state law in favor of a federal standard reduces the benefits that flow from "redundancy" of having multiple regulatory systems; another regulatory system reduces the possibility that certain undesirable behavior slips through the cracks.[198] Null preemption ensures that there will be no regulation, thus exacerbating the problem even more.

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lem is national, as opposed to local; and (4) the problem raises the potential for overregulation by virtue of multiple responses, as opposed to the potential for governments to be overly burdened by inertia and/or capture in responding to the problem (all of which argues in favor of multiple regulatory pathways). *See id.* at 1612 fig.1.

Reflection confirms that these considerations do not (standing alone, at least) help us to resolve the normative question of null preemption. Professor Buzbee's criteria were developed, and seem most applicable, where the question of whether to regulate has already been answered affirmatively, and the only question remaining is which level of government is better suited to undertake the regulatory role. In settings in which null preemption is on the table, by contrast, the federal government is proposing not only to preempt all state law, but also to provide no regulation itself.

194 There are different methods of policy diffusion, some of which are preferable to others. *See* Charles R. Shipan & Craig Volden, *The Mechanisms of Policy Diffusion*, 52 AM. J. POL. SCI. 840, 841–44 (2008) (distinguishing among learning, competition, imitation, and coercion as different methods of policy diffusion of varying valence). In particular settings, it may be that undesirable forms of policy diffusion—such as competition—may dominate, in which case the losses from preemption may be lower. Further, some policy diffusion instruments require longer time horizons; for them, an extended period of experimentation free of preemption may be required.

195 These costs may be substantial, but also hard to predict, given the often path-dependent nature of the evolution of law.

196 *See* Schapiro, *supra* note 192, at 43–44 (discussing how different regulators can learn from each other). Professors Galle and Seidenfeld, Metzger, and Sharkey argue that administrative law requirements may preserve this interjurisdictional dialogue, albeit in the context of federal rulemaking. *See infra* notes 224–26 and accompanying text.

197 *See, e.g.*, Jason Mazzone, *When Courts Speak: Social Capital and Law's Expressive Function*, 49 SYRACUSE L. REV. 1039, 1039–41 (1999) (asserting that "[b]y performing an expressive function, courts often serve as a unique site for public discourse").

198 *See* Schapiro, *supra* note 192, at 44 (discussing how an alternative set of regulators can provide an alternative avenue for relief).

Putting the foregoing in the nomenclatures of benefits and costs, even if the federal government is confident that $B_R < C_R$, the federalism benefits that having the federal government preempt state law would sacrifice, $B_F$, may be large enough to change the calculus. The state regulation will nonetheless be justified in surviving if $B_R + B_F > C_R$.

We have just seen that federal preemption of state law may not be justified even where the state government lacks a normatively desirable justification for promulgating the law in question. There is even less justification for federal preemption where, as is often the case, the state has arguable normative justifications.

Consider first that the federal and state governments may measure the relevant benefits and costs differently, and thus reach different conclusions about the normative desirability of regulation. In addition to being normatively justified in choosing not to regulate itself, the federal government must be normatively justified in preempting state law.

One setting in which the federal and state governments may measure benefits and costs differently is where global and local benefits and costs differ. A state government may believe itself justified in regulating if the local benefits of regulation, $B_{RL}$, exceed the local costs thereof, $C_{RL}$, i.e., if $B_{RL} > C_{RL}$. Here the federal government may be justified in preempting state law if the state regulation would impose externalized costs on those in other states. Since the state is not taking into account those externalized "federalism costs," $C_F$, it may well be that $B_{RL} < C_{RL} + C_F$, in which case federal preemption might be justified.[199]

It is difficult to identify other settings where differences in the way that federal and state governments measure benefits and costs are sufficient to justify null preemption. Consider first a setting where there is disagreement as to whether to consider psychic benefits of regulation, $B_{RP}$. Some commentators have argued that risk regulation should largely be left to experts who can assess objectively the threats posed by various risks.[200] In contrast, others have argued that govern-

199 *See, e.g.*, Jonathan Remy Nash, *Environmental Superliens and the Problem of Mortgage-Backed Securitization*, 59 WASH. & LEE L. REV. 127, 178–79 (2002) (discussing an example of such an externality); Jonathan Remy Nash, *The Illusion of Devolution in Environmental Law*, 38 URB. LAW. 1003, 1005–06 (2006) [hereinafter Nash, *The Illusion of Devolution*].

200 *See generally* STEPHEN BREYER, BREAKING THE VICIOUS CIRCLE 59–61 (1993) (calling for creation of health and environmental administrative overseer that would deal with risk regulation uniformly and rationally); James T. Hamilton & W. Kip Viscusi, *The Magnitude and Policy Implications of Health Risks from Hazardous Waste Sites*, *in* ANALYZING SUPERFUND 55, 76–80 (Richard L. Revesz & Richard B. Stewart eds., 1995) (crit-

ment responsibly should respond to things that the public *perceives* to pose risks, even if in reality they do not (or if they pose less of a risk than they are generally perceived to), i.e., that it is appropriate to regulate where $B_R + B_{RP} > C_R$ even if $B_R < C_R$.[201] Even if the federal government is convinced that a product or activity does not objectively pose a risk, should it preempt a state government from regulating that product or activity?[202]

Federal and state governments also may objectively assess the scientific evidence differently, leading them to value the benefits and costs differently.[203] As an example, the federal government seems to

icizing risk assessment under CERCLA statute as sometimes too stringent, in part as response to public perceptions of risks of hazardous waste sites); Cass R. Sunstein, *The Laws of Fear*, 115 HARV. L. REV. 1119, 1163–68 (2002) (reviewing PAUL SLOVIC, THE PERCEPTION OF RISK (2000)) (using Slovic's empirical research on how people and experts think about risk to craft a policy analysis).

201 For discussion, see, for example, Howard F. Chang, *Risk Regulation, Endogenous Public Concerns, and the Hormones Dispute: Nothing to Fear but Fear Itself?*, 77 S. CAL. L. REV. 743, 761 (2004) (identifying as especially problematic the scenario where industry seeks to exploit and expand public fears in order to obtain beneficial regulatory regime); Douglas A. Kysar, *Preferences for Processes: The Process/Product Distinction and the Regulation of Consumer Choice*, 118 HARV. L. REV. 526, 579–80 (2004) (arguing in favor of a role for consumer preferences in developing regulatory policy); Cass R. Sunstein, *Probability Neglect: Emotions, Worst Cases, and Law*, 112 YALE L.J. 61, 94–105 (2002) (explaining that individuals often fall prey to both over- and underestimating probabilities, and that it is undesirable, and often illegal, for administrative actors to act based upon such reactions).

202 For example, effective July 1, 2008, a New York State health law severely limits the circumstances under which physicians may administer flu vaccines with more than trace amounts of mercury to pregnant women. *See* N.Y. PUB. HEALTH LAW § 2112 (McKinney Supp. 2009). The Centers for Disease Control indicates that such vaccines are "safe" for pregnant women. *See* Ctrs. for Disease Control & Prevention, Q&A: Thimerosal in Seasonal Influenza Vaccines, http://www.cdc.gov/Flu/about/qa/thimerosal.htm (last visited Jan. 28, 2010) (answering "yes" to the question, "Is it safe for pregnant women to receive an influenza vaccine that contains thimerosal [a mercury-based preservative]?" and noting that "the benefits of influenza vaccine with reduced or standard thimerosal content outweighs the theoretical risk, if any, of thimerosal"). Another provision of the law, captioned "Statement of legislative findings and intent," makes clear that the legislature acted in response not to actual risk, but rather to public concern and fear: "It is the intent of the legislature to minimize public fear and to increase public confidence in the safety of New York's vaccine supply by explicitly limiting the mercury content of vaccines where substitutes are available." 2005 N.Y. Laws 3379, 3379. *See also* Chang, *supra* note 201, at 750–58 (discussing this question in the context of the European Union's ban on the import of beef treated with growth hormones and the United States WTO challenge of the ban).

203 In *Natural Res. Def. Council, Inc. v. EPA*, 16 F.3d 1395 (4th Cir. 1993), the federal government deferred to state reliance on scientific studies that, contrary to the then-current official federal position, allowed for less restrictive regulation. The case concerned the choice by states, subject to EPA approval, of safe levels of dioxin in

have taken the scientific evidence of global warming less seriously than, say, the State of California.[204] If the state assessment of the relevant science renders the benefits of regulation $B_{RL}$ much larger than the benefits that the federal government's science assessment, $B_R$, then it is possible that the state will consider regulation justified since $B_{RL} > C_R$, while the federal government will not if $B_R < C_R$. Even if the federal government is convinced that greenhouse-gas emissions do not pose a real threat,[205] should it preempt California from acting on its belief that they do?

Next, federal and state governments may rely upon the precautionary principle to varying degrees, and under different interpretations, or not at all. The precautionary principle is a principle that provides normative guidance as to whether and when to regulate.[206] In its essential form, it holds that scientific uncertainty as to a risk is not a sufficient basis to refuse to regulate, at least where the risk that may be posed is substantial.[207] Thus, for example, if the United States and a state—say California—both find equally uncertain the scientific support for greenhouse-gas emissions causing global warming, yet California subscribes to the precautionary principle in this context[208] while the United States does not (or subscribes more strongly or to a

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water bodies. *Id.* at 1398–99. Though the EPA had officially endorsed certain scientific studies, Maryland and Virginia chose to rely on scientific studies that found greater levels of dioxin were acceptable. Interestingly, the EPA chose to approve of Maryland and Virginia's action, leaving it to private litigants to raise a challenge. *Id.* In the end, the United States Court of Appeals for the Fourth Circuit ruled it proper to defer to the EPA's decision. *Id.* at 1402–06.

204 For discussion, see Cass R. Sunstein, *Of Montreal and Kyoto: A Tale of Two Protocols*, 31 HARV. ENVTL. L. REV. 1, 42–55, 58–60 (2007); Cass R. Sunstein, *The World vs. The United States and China? The Complex Climate Change Incentives of the Leading Greenhouse Gas Emitters*, 55 UCLA L. REV. 1675, 1691, 1694–95 (2008) [hereinafter Sunstein, *Complex Climate Change Incentives*].

205 For an argument that the Supreme Court has recently—including in the *Massachusetts v. EPA* case—come to doubt administrative agencies' assertions of alleged expertise because of increased politicization, see Jody Freeman & Adrian Vermeule, Massachusetts v. EPA*: From Politics to Expertise*, 2007 SUP. CT. REV. 51, 64–92. Professors Freeman and Vermeule's argument casts even more normative doubt on administrative assertions of null preemption.

206 *See* Nash, *supra* note 16, at 498 ("The precautionary principle is a normative principle of environmental law.").

207 *See id.*

208 *Cf.* Cass R. Sunstein, *Irreversible and Catastrophic: Global Warming, Terrorism, and Other Problems*, 23 PACE ENVTL. L. REV. 3, 3–4 (2005) (discussing how the United States varies its adherence to the precautionary principle depending upon context); Cass R. Sunstein, *On the Divergent American Reactions to Terrorism and Climate Change*, 107 COLUM. L. REV. 503, 515–16 (2007) (same); Jonathan B. Wiener, *Whose Precaution After All? A Comment on the Comparison and Evolution of Risk Regulatory Systems*, 13 DUKE J.

stronger interpretation of the principle[209] than does the Untied States), then California may find it normatively appropriate to regulate while the United States will not. In effect, the state government may include benefits in its calculation that the federal government will not, so that, as above, $B_{RL} > C_R$, thus justifying local regulation, while $B_R < C_R$. Should the United States also preempt California's regulation based on its views on the precautionary principle?

Consider, finally, the possibility that different valuations or approaches to foreign affairs may cause the federal and state governments to value the benefits and costs of regulation differently.[210] In particular, there may be benefits to be gained from regulation and the benefits might outweigh the costs domestically, but one might think that those benefits would be dwarfed by the greater benefits that might result were the United States to hold off on such regulation in order to induce other countries to act accordingly and/or to extract other foreign-relations benefits. Indeed, this was the type of argument used to support foreign policy preemption of state tailpipe emission regulation and also by the EPA in support of its decision to decline to regulate motor vehicle greenhouse-gas emissions.[211] A state, by comparison, might take a different view either as to the importance of the short-term local benefits of regulation in such circumstances, or of the appropriateness or likely success of holding out on domestic regulation in order to induce action by foreign countries.[212] Letting $C_I$ represent the international relation costs of regulation, it is possible that the federal government will not want to regulate since $B_R < C_R + C_I$, while the local government will consider only that $B_R > C_R$. Once again, the question arises whether the federal government is justified in preempting state regulation in this setting.[213]

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COMP. & INT'L L. 207, 225–43 (2003) (comparing evaluations of the level of risk posed by certain policy problems in the United States and Europe).

209 *See* Nash, *supra* note 16, at 500–01 (discussing varying interpretations of the principle).

210 *Cf.* Am. Ins. Ass'n v. Garamendi, 539 U.S. 396, 427 (2003) ("California seeks to use an iron fist where the President has consistently chosen kid gloves.").

211 Massachusetts v. EPA, 549 U.S. 497, 513–14 (2007) ("According to EPA, unilateral EPA regulation of motor vehicle greenhouse gas emissions might also hamper the President's ability to persuade key developing countries to reduce greenhouse gas emissions.").

212 *See* Sunstein, *Complex Climate Change Incentives*, *supra* note 204, at 1694–95 (describing and analyzing California's willingness to regulate greenhouse-gas emissions even in the absence of commitment that other countries would do the same).

213 *See* Douglas A. Kysar & Bernadette A. Meyler, *Like a Nation State*, 55 UCLA L. REV. 1621, 1628–37 (2008) (characterizing certain California public policy initiatives

The foregoing makes clear that it is difficult to make a clear normative case for federal preemption of state regulation in favor of no regulation at all where state normative goals and practices may differ from the federal ones. This is even more the case where the state regulation would not externalize costs on other states or on the federal government.

What does this narrow normative picture mean for the various paradigmatic settings of null preemption?[214] On the understanding that the answer to this question is to simply take the view that the normative desirability of the outcome is determinative,[215] regulatory inaction null preemption is normatively justified if null preemption is warranted, notwithstanding the fact that Congress did not intend null preemption to inhere. Intentional null preemption should be judged based upon the justifications for introducing null preemption.

Regulatory-delay null preemption would be justified to the extent that (1) federal regulation, which would be normatively desirable, is forthcoming within some reasonable period of time, and (2) in the interim an absence of regulation is preferable to leaving states free to continue to regulate (for example, if state regulation would impose interstate externalities). Regulatory inaction null preemption would be normatively justified only to the extent that permanent null preemption is normatively appropriate.

Duplicative regulation null preemption will be normatively justified under this approach only if two conditions are met. First, it presumably must be the case that the state laws to be preempted are in fact duplicative of federal law. Second, it must be that allowing state regulation would be normatively undesirable—for example, if it would impose interstate externalities. Put another way, the mere fact that state law duplicates federal law should not be enough to justify preemption. States should be free to exercise their sovereign prerogative to echo federal law (or to allow federal law to echo their law).

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as those more typical of a nation state than of a state in a federal union); *id.* at 1637–51 (arguing that the "bargaining chip" justification for foreign affairs preemption has held sway in particular circumstances); Judith Resnik, supra note 113, at 74–78 (arguing that foreign affairs preemption lacks a clear constitutional basis, and that the rise of translocal networks argues against federal preemption of state and local initiatives that may affect foreign relations); Note, *Foreign Affairs Preemption and State Regulation of Greenhouse Gas Emissions*, 119 HARV. L. REV. 1877, 1881–94 (2006) (rejecting notion of foreign affairs preemption on "bargaining chips" grounds). For discussion of the understanding of states as nations as the basis for state sovereign immunity jurisprudence, see Smith, *supra* note 186, at 28–50.

214 *See supra* Part II.C.

215 This analysis does not consider the matter of institutional choice, to which I turn below. *See infra* Part III.B.

Even duplicative regulation can serve an expressive function. It may also continue a dialogue between federal and state law.[216]

Regulatory-preemptive-mismatch null preemption occurs where Congress inadvertently extends its preemptive reach more broadly than its regulatory grant. As such, regulatory-preemptive-mismatch null preemption will only be normatively desirable where it can be argued that, though Congress made the choice accidentally, the resulting null preemption is somehow normatively justified.

### *B. Normativity and Institutional Choice*

Some of the literature on preemption by federal agencies addresses the question from the perspective of institutional choice—that is, which institutional actor (Congress or an agency) is better situated to make the decision as to whether to preempt state law.[217] The institutional choice question has potential ramifications for normative evaluation of assertions of null preemption. First, one might view the institutional choice question as dispositive of the normative question. On that understanding, for example, if it is normatively desirable for Congress to make null preemption decisions, then a congressional decision to invoke null preemption is normatively desirable while a regulatory decision to do so is not. Second, one might employ the institutional preference as a heuristic to judge (to some degree at least) the normative desirability of the outcome based on which actor(s) in fact implemented each step of null preemption.

Commentators have divided over the related (and perhaps simpler) question of whether Congress or agencies are better positioned to make the decision as to whether to preempt state law—i.e., as to preempt but presumably with affirmative federal regulation on the books. Some commentators are skeptical of regulatory preemption of state law.[218] They argue that agencies lack the relevant expertise to evaluate the importance of state sovereignty and federal-state rela-

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216 *Cf.* Schapiro, *supra* note 192, at 44 (discussing the benefits of redundant regulation).

217 *See supra* note 118 (offering varying perspectives on Congress's and agencies' respective capacities for preemption).

218 *See* Mendelson, *supra* note 118, at 708–25 (arguing that institutional competence and separation of powers weigh in favor of Congress making preemption choices, and so the standard presumption against preemption should apply with even greater force against agency preemption); Merrill, *supra* note 118, at 766–69 (contending that courts should uphold agency preemption only where Congress has delegated such authority); Rosen, *supra* note 118, at 796–800 (emphasizing, despite its shortcomings, Congress's institutional advantages in making preemption decisions); Verchick & Mendelson, *supra* note 118, at 27 (taking a skeptical view of agency pre-

tions.[219] They also emphasize the importance of separation of powers as a basis for vesting Congress with such decisions. For those who subscribe to this view, it is a small leap to conclude that agencies similarly lack the expertise needed to preempt state law and in addition conclude that no regulation is appropriate. Indeed, given the affront to state sovereignty, the potential harm to federal-state relations is heightened even further, making agencies' lack of expertise even more pointed.

Other commentators are more sanguine about regulatory preemption of state law.[220] There are reasons to believe, however, that the reasoning these commentators advance might not apply as strongly, or as broadly, to settings of null preemption. First, Professors Brian Galle and Mark Seidenfeld have argued that regulatory agencies may often have more information and greater expertise than Congress or courts, such that they may be well positioned to determine whether uniform federal regulation is appropriate.[221] Professor Catherine Sharkey argues that agencies are competent to consider preemption in the first instance, subject to judicial review (with the agencies providing information to the court to allow proper review).[222] But the question of whether uniform federal regulation is preferable to a collection of state regulation is fundamentally different from the question of whether regulation is appropriate at all. The latter question is one that legislatures typically decide. Second, Professor Sharkey notes that agencies' institutional advantage does not extend to exercises of their interpretive authority.[223] The question of whether null preemption should be permitted to arise is often

emption); Young, *supra* note 118 (advocating restricting the freedom of agencies to preempt unilaterally).

219 *See* Verchick & Mendelson, *supra* note 118, at 27.

220 *See* Galle & Seidenfeld, *supra* note 118, at 1990 (arguing that agencies may be better positioned than Congress to decide whether preemption of state law is appropriate); Metzger, *supra* note 118, at 2069–72 (arguing that existing administrative law requirements may facilitate the inclusion of states' interests in administrative decisions); Sharkey, *Products Liability Preemption*, *supra* note 118, at 477–502 (arguing in favor of agency preference of preemption decisions, with judicial review to ensure proper administrative process); Sharkey, *What* Riegel *Portends*, *supra* note 118, at 441–46 (same).

221 *See* Galle & Seidenfeld, *supra* note 118, at 1971–79; Sharkey, *Products Liability Preemption*, *supra* note 118, at 484–90.

222 *See* Catherine M. Sharkey, *Federalism Accountability: "Agency-Forcing" Measures*, 58 DUKE L.J. 2125, 2146–55 (2009); Sharkey, *Products Liability Preemption*, *supra* note 118, at 484–490.

223 *See* Sharkey, *Products Liability Preemption*, *supra* note 118, at 491–502.

(though not always) a question of interpretation, especially as null preemption requires two steps before it can arise.

Third, Professors Galle and Seidenfeld, Professor Gillian Metzger, and Professor Sharkey argue that agency action on preemption holds the promise of greater transparency and enhanced dialogue between the states and the federal government.[224] These commentators rely on the notion that existing administrative law will compel agencies to announce their intentions honestly and to consider the views of states on the matter (which views will be solicited during the rulemaking process).[225] While this reasoning applies well to instances where an agency intentionally invokes null preemption, it is more problematic in settings where an agency tries to effect null preemption through the "back door"[226] by, for example, engaging in regulatory inaction null preemption or by asserting that an instance of unintentional regulatory-preemptive-mismatch null preemption on the part of Congress in fact was intentional. In the end, then, even those who would allow room for agencies to preempt state law may nonetheless not be as willing to allow agencies to invoke null preemption absent some authorization from Congress. In particular, they should welcome constraints on agency freedom to invoke null preemption other than intentionally and forthrightly.

## IV. The Political Economy of Null Preemption

The foregoing Part established that the normative case for null preemption is narrow. In this Part, I consider the political economy of null preemption. I shall argue that, as one might expect from the limited normative appropriateness of null preemption, null preemption has been historically rare. I shall also argue, however, that occurrences of null preemption are becoming more common as industry interest groups realize that null preemption is more attainable than previously thought.

Under a typical (albeit somewhat stylized) account, oppositely aligned interest groups vie for state and federal legislative and admin-

224 *See* Galle & Seidenfeld, *supra* note 118, at 1954–61, 1973 ("Agency proceedings are more transparent than intuition might suggest."); Metzger, *supra* note 118, at 2074–76; Sharkey, *Preemption by Preamble*, *supra* note 118, at 253–56.

225 *See, e.g.*, Galle & Seidenfeld, *supra* note 118, at 1954.

226 *Cf.* Samuel Issacharoff & Catherine M. Sharkey, *Backdoor Federalization*, 53 UCLA L. Rev. 1353, 1356 (2006) ("[T]he U.S. Supreme Court has . . . attempted to capture the considerable benefits that flow from national regulatory uniformity and to protect an increasingly unified national . . . commercial market from the imposition of externalities by unfriendly state legislation.").

istrative action and/or inaction.[227] On one side, public interest groups seek regulation to further goals as diverse as public safety, consumer awareness, and environmental protection, as well as perhaps their own self-interest.[228] On the other side, industry groups by comparison often seek less regulation.[229] In addition, to preserve national markets and reduce the costs of doing business, they also often seek uniform laws.[230]

Sometimes interest groups on one side of an issue gain more of a hold on government at one level than at another.[231] In such a case, the other interest group may turn to the other level of government to achieve its goal. Thus, for example, if industry is able to convince the federal government not to regulate, then environmental organizations may turn to state governments for relief. By contrast, if desire to attract industry motivates states to enact suboptimally protective environmental laws, environmental organizations may turn to the federal government to set a national floor for environmental protection.[232]

On this understanding, one can envision a scenario that often might result in null preemption: Public interest organizations are successful at getting states to regulate in a certain area. Industry, displeased with the regulation, turns to the federal government and successfully demands null preemption in the area.

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227 *See, e.g.*, Nash, *The Illusion of Devolution*, *supra* note 199, at 1006–07.

228 *See* Zywicki, *supra* note 179, at 879–88 (elucidating environmental organizations' motives, including self-interest).

229 That industry generally seeks less regulation than do environmental organizations does not mean that industry as a whole always prefers no regulation. Indeed, commentators have explained that a subset of industry actors may welcome regulation that falls disproportionately on competitors. *See* Nathaniel O. Keohane et al., *The Choice of Regulatory Instruments in Environmental Policy*, 22 HARV. ENVTL. L. REV. 313, 348–53 (1998); Richard L. Revesz, *Federalism and Environmental Regulation: A Public Choice Analysis*, 115 HARV. L. REV. 553, 572 (2001); Zywicki, *supra* note 179, at 849 (noting that industry, or a subset thereof, sometimes gains by virtue of greater regulation). Still, the overarching point remains that as a whole industry will prefer less stringent regulation than will environmental organizations. *Cf.* Keohane et al., *supra* at 348 ("It would then follow that firms would oppose regulatory instruments that shift a greater cost burden onto industry.").

230 *See* Revesz, *supra* note 229, at 573 ("Firms in [industries with strong economies of scale] tend to prefer uniform federal regulation . . . .").

231 For example, one would expect an interest group that represents a large number of members diffuse throughout a country to be more powerful at the national, than the local or state, level. For discussion and critique of this proposition, see *id.* at 559–78.

232 *See, e.g.*, Nash, *The Illusion of Devolution*, *supra* note 199, at 1005.

Yet, despite the ease with which this scenario can be explained, examples of null preemption are not common. Why? There are three possible answers to this question.

The first answer is that industrial actors—or at least large companies who trade nationally and have more money and power than their local counterparts[233]—are much more concerned with obtaining uniform national regulation than with avoiding regulation altogether.[234]

Second, and perhaps relatedly, it may be that it is easier (and cheaper) to have the federal government enact a uniform law than to engage in null preemption. Indeed, the traditional story is not the one detailed above—that is, that state level regulation begets industry efforts to obtain null preemption. Rather, a commonly found story goes that, once rebuffed by the federal government with respect to efforts to obtain regulation, public interest organizations turn to state governments for relief *with the expectation* that state action will spur industry groups to prompt the federal government to produce uniform regulation.[235] In other words, public interest organizations may lobby state governments to act *with the expectation* that the end result will be some form of federal regulation that they were unable to obtain directly. Needless to say, were null preemption foreseen as a possible outcome, one would doubt that the public interest actors would proceed in this way.[236]

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233 *See* Keohane et al., *supra* note 229, at 351–53 (distinguishing between sectors of industry that face differential costs with respect to reactions to environmental regulation); *cf.* Thomas W. Merrill, *Explaining Market Mechanisms*, 2000 U. ILL. L. REV. 275, 288 (noting likelihood of some degree of heterogeneity among industry actors, but concluding that industry will largely still coalesce around some issues, including opposition to pollution taxes).

234 *See, e.g.*, Nash, *The Illusion of Devolution*, *supra* note 199, at 1011–14; Revesz, *supra* note 229, at 573 (noting that, once a few states adopted automobile emissions standards in the 1960s, the automobile industry "decided to end its opposition to federal standards and became a supporter, provided that such standards preempted any more stringent state standards").

235 *See, e.g.*, J.R. DeShazo & Jody Freeman, *Timing and Form of Federal Regulation: The Case of Climate Change*, 155 U. PA. L. REV. 1499, 1504–16 (2007) (describing defensive preemption as when industry demands uniform federal regulation as a response to varied state enactments). *But cf.* Jonathan H. Adler, *When Is Two a Crowd? The Impact of Federal Action on State Environmental Regulation*, 31 HARV. ENVTL. L. REV. 67, 98–106 (2007) (arguing that federal environmental regulation may "crowd out" state environmental regulation, with the possible result of lower environmental regulatory standards).

236 *Cf.* Revesz, *supra* note 229, at 577 n.139 (noting that industry will seek federal preemption to avoid more stringent state regulation, but also observing that, "[i]n contrast, in states that had not previously entered the regulatory fray, the resulting standards will be more stringent under federal regulation," thus implying that the

Third, the notion of null preemption may appear unseemly to the federal government. As I discussed above, null preemption deprives a state that believes regulation in a particular area to be appropriate not only of its ability to regulate, but also to see to the wellbeing of its citizens by virtue of federal regulation.[237] As such, it can be seen as the apex of the use of federal power to displace state law, and therefore as a substantial affront to state dignity. Federal actors may also perceive that such a step would be quite unwelcome to citizens of states whose laws and regulation are preempted without replacement.

Does the rarity of null preemption continue to hold today, and will it continue to hold? Demand for null preemption continues to rise.[238] Industries that perform in, and respond to, national markets continue to grow.[239] These industrial actors generally enjoy considerable political power, and they are likely to be able to exercise that power at the national level. First and foremost, they will seek uniform federal regulation.[240] But, all else equal, they would also prefer that that uniform level of regulation be zero.[241] It stands to reason, then, that demand for null preemption has increased, and will continue to increase.

The supply of null preemption also seems to be increasing.[242] First, fully intentional null preemption on the part of Congress remains a possibility. It requires Congress to declare that it believes that a zone free of federal or state regulation is desirable. Given the possibility of immediate political consequences from such assertions,

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result of lobbying for federal preemption will be affirmative federal regulation and not null preemption); *id.* at 557 (arguing that "environmental groups [should] come to understand that federal regulation is not a panacea," and that as a consequence, "they will be able to mitigate [an] increasingly negative feature[ ] of federal regulation: the threat of federal preemption of more stringent state standards" (footnote omitted)).

237 *See supra* text accompanying notes 186–91.

238 *See supra* Part I.

239 *See* Issacharoff & Sharkey, *supra* note 226, at 1360–64; Nash, *The Illusion of Devolution*, *supra* note 199, at 1004–08.

240 *See supra* note 234 and accompanying text.

241 Faced with the prospect of regulation, existing industrial actors generally prefer regulations that "grandfather" existing actors and impose more stringent regulation on new entrants. This distinction provides existing actors with a beneficial barrier against entry. *See* Keohane et al., *supra* note 229, at 348–51. While it is possible that existing national market actors may have a similar preference, it is also likely that the very breadth of resources required for an actor to compete nationally provides a national barrier against entry to existing national markets.

242 *See supra* Part I.

however, it would seem that such steps would remain relatively uncommon.

In contrast, two other paths to null preemption seem perhaps to be becoming more acceptable today. First, industry may be using the argument that state regulation is duplicative of existing federal regulation as a means of getting the federal government to preempt state law.[243] And, if criticisms of preemption under the NSMIA are any guide, then the result may be more null preemption under the guise of duplicative regulation null preemption.[244]

Even if congressional endorsement of intentional null preemption remains uncommon, executive branch embrace of null preemption—or at least executive branch willingness to interpret ambiguous congressional action as intentional null preemption—may be growing.[245] This was exemplified by the EPA's argument that Congress intentionally effected null preemption of motor vehicle greenhouse-gas emissions.[246] Executive branch actors may be less concerned about the political impact of taking such positions. It may also be that they believe that they can avoid political costs by passing the "blame" as such for null preemption to the Congress.

## V. Prescriptions for Legislative and Judicial Constraint of Null Preemption

In Part III, I argued that null preemption is rarely justified normatively. In Part IV, I suggested nonetheless that, while it has been historically rare, occurrences of null preemption may be increasing. In this Part, I first suggest ways that Congress might short circuit efforts by regulators to introduce null preemption where that was not Congress's intent. Second, I offer some suggestions as to how courts should be true to the notion that null preemption is rarely normatively justified by policing such circumstances with special care.

### *A. Legislative Constraint of Null Preemption*

There are two bases on which I ground my prescriptions for Congress. First, the normative case for null preemption is generally a narrow one.[247] Thus, Congress might want to constrain regulators' ability

243 *See supra* Part II.C.1 (discussing intentional null preemption).

244 *See supra* Part II.C.4 (discussing duplicative-regulation null preemption).

245 *See* Sharkey, *Preemption by Preamble*, *supra* note 118, at 251–56. *But see* John Schwartz, *From New Administration, Signals of Broader Role for States*, N.Y. Times, Jan. 30, 2009, at A16.

246 *See supra* text accompanying notes 72–73.

247 *See supra* Part III.A.

to invoke null preemption. Second, even commentators who might accept regulators' superior ability to make decisions on null preemption would, it seems, base that expectation on the proper functioning of the administrative process.[248] On that understanding, it is normatively desirable for Congress to take steps to force agencies to be transparent and honest about their decisions on null preemption and to constrain agencies' ability to invoke null preemption through the "back door."[249]

In undertaking a strategy to constrain regulators' ability to give rise to null preemption, Congress might either take a broad approach, or act on a statute-by-statute basis. Consider first the broad strategy. An Executive Order already purports to require executive branch actors to consider matters of federalism when considering actions that will have an impact on states.[250] Some argue that, this order notwithstanding, recent government actions have not properly considered federalism issues.[251] In response, Congress could codify, and even expand upon, the existing order.[252]

Consider now congressional action with respect to particular statutes. Congressional strategy should be motivated by the setting of null preemption that it is concerned may arise. Regulatory-delay null pre-

248 *See supra* notes 221–22 and accompanying text.

249 *See supra* note 226 and accompanying text.

250 *See* Exec. Order No. 13,132, 3 C.F.R. 206 (2000), *reprinted in* 5 U.S.C. § 601 (2006). For discussion, see Funk, *supra* note 118, at 224–26; Verchick & Mendelson, *supra* note 118, at 26.

251 *See* Funk, *supra* note 118, at 226 ("During the latter years of the Bush administration, the status of the order can only be termed benign neglect."). For discussion, see THOMAS O. MCGARITY, THE PREEMPTION WAR 242–45 (2009); Funk, *supra* note 118, at 226–30; Nina Mendelson, Chevron *and Preemption*, 102 MICH. L. REV. 737, 783–91 (2004).

252 For discussion, see Sharkey, *supra* note 222 at 2174–76. An analogy may be found in congressional efforts to codify executive orders mandating the use of cost-benefit analysis in promulgating regulations. The Risk Assessment and Cost-Benefit Act of 1995, H.R. 1022, 104th Cong., was part of the "Contract with America"; it would have codified much of President Reagan's cost-benefit analysis executive order. It was narrowly defeated. *See* Amy Sinden, *The Economics of Endangered Species: Why Less Is More in the Economic Analysis of Critical Habitat Designations*, 28 HARV. ENVTL. L. REV. 129, 136 n.21 (2004). The Unfunded Mandates Reform Act of 1995, 2 U.S.C. § 1532 (2006), however, *did* make it into law, and it calls for cost-benefit analysis for regulations that would introduce a federal mandate that would cost in excess of $100 million. *Id.* Its terms are not restricted to any particular subject matter. *See* David M. Driesen, *The Societal Cost of Environmental Regulation: Beyond Administrative Cost-Benefit Analysis*, 24 ECOLOGY L.Q. 545, 555–58 (1997). For discussion, see Thomas O. McGarity, *The Expanded Debate over the Future of the Regulatory State*, 63 U. CHI. L. REV. 1463, 1476–79, 1481 (1996); Cass R. Sunstein, *Congress, Constitutional Moments, and the Cost-Benefit State*, 48 STAN. L. REV. 247, 289–96 (1996).

emption, regulatory inaction null preemption, and regulatory-preemptive-mismatch null preemption are the settings in which null preemption might arise even where the legislature intended otherwise—or, even worse, where regulators might take advantage of an inadvertent statutory loophole to introduce null preemption even where the legislature intended otherwise.

Let us start with regulatory-delay and regulatory inaction null preemption. Congress may be accepting of regulatory-delay null preemption that lasts for some reasonable length of time, but not if it continues to persist, and especially not if it becomes regulatory inaction null preemption.[253] To guard against this, Congress might put in place a timetable according to which regulators are obligated to regulate. Private citizens could be granted standing to challenge a failure to comply.[254]

Next, Congress might include a "regulatory hammer" provision. Under such a provision, Congress provides for the application of stringent rules unless an agency promulgates less stringent regulations within a set period of time. For example, in the 1984 amendments to the Resource Conservation and Recovery Act of 1970,[255] Congress, concerned over land and groundwater contamination, attempted to minimize the use of landfills. It required the EPA to promulgate regulations that prohibited disposal of solid wastes in landfills unless it could be established that "there will be no migration of hazardous constituents" from the landfill.[256] But it also directed that, in the absence of the EPA regulations explaining when landfills might appropriately be used, their use was entirely banned.[257] This would

253 *See supra* text accompanying notes 162–63.

254 For example, under the Clean Air and Clean Water Acts, Congress has seen fit to set out timetables by which the EPA is supposed to have issued certain regulations. *See* Clean Water Act, 33 U.S.C. § 1313(c)(4) (2006) (setting deadlines for promulgation of CWA standards); Clean Air Act, 42 U.S.C. §§ 7491(a)(4), (b), 7492(c) (2006) (setting deadlines for promulgation of CAA standards). Private actors have sometimes successfully filed suit where the EPA has failed to meet a statutory deadline. *See, e.g.*, Natural Resources Def. Council, Inc. v. Train, 510 F.2d 692, 698 (D.C. Cir. 1974) (compelling promulgation of effluent guidelines under the Clean Water Act); Natural Resources Def. Council, Inc. v. EPA, 475 F.2d 968, 970–71 (D.C. Cir. 1973) (compelling production of transportation control plans under the Clean Air Act). For discussion and analysis of the topic, see Jacob E. Gersen & Anne Joseph O'Connell, *Deadlines in Administrative Law,* 156 U. PA. L. REV. 923, 950–71 (2008).

255 The Hazardous and Solid Waste Amendments of 1984, Pub. L. No. 98-616, 98 Stat. 3221 (codified as amended in scattered sections of 42 U.S.C.).

256 42 U.S.C. § 6924(d)(1).

257 *Id.*

put in place a background federal regulation, such that regulatory delay or inaction would not result in null preemption.[258]

Finally, Congress might explicitly provide that any preemption of state law does not take effect until regulators in fact promulgate regulations.[259] This is the flip slide of the regulatory hammer: Whereas a regulatory hammer approach averts null preemption by putting in place a background federal rule that applies in the absence of agency action, under this approach Congress would in effect avoid null preemption by forbidding preemption of state law until regulators promulgated affirmative regulations.

Consider next regulatory-preemptive-mismatch null preemption. Here, Congress might incorporate in legislation that includes a preemption provision and an authorization for regulation an additional boilerplate provision directing that Congress did not intend to approve preemption broader in scope than the regulatory authorization.

### *B. Judicial Constraints on Null Preemption*

Courts can also act to limit instances of null preemption. There are two bases on which I ground my prescriptions for courts. First, the normative case for null preemption is a narrow one. Thus, one should be wary of accepting claims that null preemption inheres. Second, as I discussed above, the existence of null preemption may be seen to offend states' dignity and frustrate states' prerogative to see to the wellbeing of their citizens.[260] To the extent that the states have empowered the federal government to preempt state law in some cir-

258 The Federal Boat Safety Act, 46 U.S.C. §§ 4301–4311 (2006), addressed by the Court in *Sprietsma*, presents an example where (at least according to the *Sprietsma* Court) regulators acted so as to avoid an automatic null preemption mandated by congressional action in the absence of regulation. Sprietsma v. Mercury Marine, 537 U.S. 51, 59 (2002). The Act preempts state law not identical to regulations prescribed under the Act. *See* § 4306. The day after the President signed the Act into law, the Secretary of Transportation issued a statement "exempting all then-existing state laws from preemption under the Act." *Sprietsma*, 537 U.S. at 59 (citing Exemption to Preserve Certain State and Local Boat Safety Laws and Regulations, 36 Fed. Reg. 15,764, 15,764–65 (Aug. 11, 1971)). The Court explained that this action "was based on the assumption that [the Act's preemption provision] would [otherwise] preempt existing state regulation that 'is not identical to a regulation prescribed' under . . . the Act, even if no such federal regulation had been promulgated." *Id.*

259 *Cf.* Consolidated Appropriations Act of 2008, tit. v, § 534, Pub. L. No. 110-161, § 534, 121 Stat. 1844, 2075 (2007) (codified as amended at 6 U.S.C.A. § 121 note (West Supp. 2009)) (enacting a savings clause that preserves state law governing chemical plant security unless it directly conflicts with federal law).

260 *See supra* text accompanying notes 186–91.

cumstances, the states might reasonably expect that in return for the loss of sovereign prerogative (where the federal government chooses to divest the states of power to regulate by preemption) the federal government will regulate in their stead. Where this does not happen, states ought at least to be able to challenge the null preemption—i.e., to challenge either the preemption of state law or the failure of the federal government to regulate.

These normative points can be given effect in various ways. Consider first the question of state standing to challenge the federal government's failure to regulate. States ought to have greater solicitude to pursue such challenges where the federal government has also preempted the states' freedom to regulate.

Note that this argument is consistent with the *Massachusetts* Court's assertion that states deserve "special solicitude" when conducting standing analysis, while it also does a better job of explaining why that should be so. The Court in *Massachusetts* indicated that states enjoy, by virtue of their sovereignty, greater freedom to pursue such challenges than do other claimants.[261] The Court's treatment of the issue in *Massachusetts* is unsatisfying, however. The Court rested standing upon two grounds: first, the allegation that Massachusetts would lose land that it owned by virtue of continued global warming[262] and, second, the EPA's failure to controvert the plaintiff's allegations about the anthropogenic sources of global warming and its effects.[263] Despite the majority's explication of the "special solicitude" owed to state sovereigns, the reliance by the majority upon Massachusetts's actual loss of land seems very much like traditional analysis that would have justified standing for any owner of land under the circumstances.[264] Further, as I have argued elsewhere, to the extent that the holding is grounded upon traditional notions of standing, the outcome may be good for environmental protection, but to the extent that the holding turns upon the EPA's failure to contest the scientific evidence, the outcome is very narrow and may not accommodate early court challenges to government failures to react to future environmental problems.[265]

Resting standing upon special solicitude for state sovereigns challenging null preemption avoids these problems. First, grounding the result in *Massachusetts* on the allegation of null preemption would

261 *See* Massachusetts v. EPA, 549 U.S. 497, 518–21 (2007).

262 *See id.* at 522–23.

263 *See id.* at 523–24.

264 *See* Nash, *supra* note 16, at 510 n.79.

265 *See id.* at 524–25.

make clear that standing in such cases need not wait for the government to come around to—or perhaps erroneously neglect to object to—the view that science on a particular issue is clear.

In addition, unlike the Court's actual reasoning, the alleged existence of null preemption plainly jibes with states' sovereign status. First, the injury, causation, and redressability all directly tie in to the failure to regulate, not the question of whether scientific evidence adequately supports the need to regulate. The injury is not loss of land, but loss of sovereign prerogative. The causation inquiry asks not whether motor vehicle greenhouse-gas emissions are contributing to global warming, but rather whether null preemption is entirely precluding the state (whether on its own or though ceded powers that the federal government then exercises) from fulfilling its obligations as sovereign to protect its citizens and resources. And redressability would turn not on whether federal regulation of greenhouse-gas emissions might actually have a positive impact on reducing global warming, but simply on whether limiting the federal government's discretion not to regulate in the area would remedy the loss of sovereign power complained of. Unlike in the *Massachusetts* case itself, it would be clear that only sovereign states (perhaps with an extension to municipalities)[266] would have a claim to such a position. Moreover, the danger of the expansion of standing pushing the floodgates of litigation open too wide would be very clearly circumscribed.[267]

Consider next that evidence of null preemption might affect courts' resolution of challenges by states to the federal government's failure to regulate and of state challenges to federal preemption. Specifically, a state pursuing a challenge to the federal government's failure to regulate should be allowed to submit evidence that the federal government asserts preemption of state law in that area; that evidence should favor a court ruling in favor of the state.[268] Similarly, a state pursuing a challenge to federal preemption of state law should be allowed to submit evidence that the federal government has also failed to regulate in the relevant area; that evidence should favor a court ruling in favor of the state.

The justification for courts leaning more toward ruling in favor of states in cases where null preemption can be shown is a presumption against null preemption. Much as courts generally apply a presump-

266 *See id.* at 514 n.91.

267 *See id.* at 519.

268 This might slightly modify the presumption of *Heckler v. Chaney*, 470 U.S. 821 (1985), that agency inaction is generally not subject to judicial review. *See id.* at 831. The modification would arise only in a small number of cases—to wit, those brought by states in which null preemption can be shown.

tion against preemption of state law,[269] they should apply an especially strong presumption in cases of null preemption. That is, where there is no federal regulation whatsoever, courts should be reluctant to accept that the government truly intended to preempt state law. The standard presumption against preemption arises in areas where the states have traditionally governed and regulated.[270] Preemption alters the standard allocation of authority between the state and federal governments.[271] Null preemption upsets the traditional standard even more: it effectively extends the preemptive force of the dormant Commerce Clause to areas of traditional state regulation. As such, the presumption against null preemption should be even stronger than the traditional presumption against preemption.

In evaluating state allegations of null preemption in challenges to federal preemption and to the federal government's failure to regulate, courts should vary the showing required to rebut the presumption according to the category into which the alleged null preemption falls. The presumption should easily give way to clear congressional intent to create, as with *Machinists* preemption, a zone free of federal and state regulation. Settings of duplicative regulation null preemption should draw more scrutiny, but should generally survive; Congress's explicit conclusion that state law unnecessarily duplicates existing federal law deserves judicial deference. So, too, should regulatory-delay null preemption generally be upheld; courts should defer to an administrative agency's setting of its own priorities.[272]

Executive branch claims of intentional null preemption should receive the closest scrutiny. In particular, courts should question whether the null preemption is, rather than intentional, simply the result of a regulatory-preemptive-mismatch on the part of Congress. To give effect to the presumption, courts should demand a clear statement from Congress to this effect—or, if authority has been delegated to an executive branch actor, at least a statement that the possibility of opting for null preemption was also delegated. The Court's ruling in

269 *See supra* note 153 and accompanying text.

270 *See* Altria Group, Inc. v. Good, 129 S. Ct. 538, 543 (2008); Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947). Even if one does not accept that the general presumption against preemption broadly persists, *see supra* note 153, one still might advocate the presumption in settings of null preemption.

271 *See supra* note 186 and accompanying text.

272 This assumes that the agency is not acting beyond congressional direction and not misrepresenting its intent to ultimately consider regulation. For discussion and analysis of the processes agencies follow in deciding whether or not to regulate, see Mark Seidenfeld, *Why Agencies Act: A Reassessment of the Ossification Critique of Judicial Review*, 70 OHIO ST. L.J. 251, 258–67 (2009).

*Massachusetts* is consistent with this view. There, the Court relied upon language in the relevant statute to conclude that Congress had not left the door open for the EPA to decline to regulate for any reason that it chose.[273] The Court could have bolstered its reasoning by observing that the notion that Congress had intended otherwise was undercut by its clear decision to preclude the states from regulating in the area.

A still more ambitious use of null preemption would be to have courts recognize a new cause of action under which a state could actually challenge the federal government's alleged assertion of null preemption.[274] The state would have to provide evidence of both federal preemption in a particular area and also the federal government's refusal to regulate in that area. By way of relief in a successful case, the court could issue an injunction directing the federal government to ameliorate the null preemption, either by vacating the preemption of state law or, at the federal government's discretion,[275] by agreeing to regulate in the area. As above, the extent to which null preemption would pass muster would vary with the category into which the null preemption at issue falls.

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273 *See supra* notes 53–54 and accompanying text.

274 *Cf.* Rosen, *supra* note 118, at 807–08 (suggesting that states as a matter of course be informed that a preemption judicial decision is in the offing, and that they and their agents be given an unconditional right to intervene to litigate such questions).

275 Leaving the option as to the form of relief to the government is not unheard of. In takings cases, for example, the government may, in a losing case, decide whether to pay just compensation or abandon the law that has been held to give rise to the taking (although partial compensation for the period during which the offending regulation was in effect may be due). *See, e.g.*, First English Evangelical Lutheran Church of Glendale v. County of L.A., 482 U.S. 304, 321 (1987) ("Once a court determines that a taking has occurred, the government retains the whole range of options already available—amendment of the regulation, withdrawal of the invalidated regulation, or exercise of eminent domain."); *id.* at 319 (noting, with respect to takings that later prove to be temporary, that "[i]nvalidation of the ordinance or its successor ordinance after this period of time, though converting the taking into a temporary one, is not a sufficient remedy to meet the demands of the Just Compensation Clause" (internal quotation marks omitted)); Kenneth Salzberg, *The Dog that Didn't Bark: Assessing Damages for Valid Regulatory Takings*, 46 NAT. RES. J. 131, 144 (2006) ("[C]ompensation is only granted when the regulatory body takes too long to undo the invalid regulation."); *see also* Vicki Been, *Lucas v. The Green Machine: Using the Takings Clause to Promote More Efficient Regulation?*, *in* PROPERTY STORIES 221, 231–32 (Gerald Korngold & Andrew P. Morriss eds., 2004) (relating that the defendant in *Lucas*, South Carolina Coastal Council, "argued that if the court should find that a taking had occurred, it should remand the matter back to the Council to allow it to choose whether to issue a building permit or pay compensation" (internal quotation marks omitted)).

To see how this might work, consider the relief a court might have afforded under the facts of the *Massachusetts* case had Massachusetts sought to invalidate null preemption. Absent a clear statement by Congress indicating an attempt to effect null preemption, a court would likely find the presumption against null preemption unrebutted. By way of relief, the court might then hold that the same interpretation of the term "emission" in the CAA's authorization of federal regulation should apply to the term "emission" in the Act's preemption provision.[276] If, as the federal government asserted, the Act did not empower the EPA to regulate emissions of greenhouse gases,[277] then the Act should be read not to empower the federal government to require a waiver for California (or other states) to regulate greenhouse-gas emissions. Alternatively, if the federal government instead wished to assert its authority to require such a waiver, then it ought not to be able to deny its power to regulate such emissions directly.[278]

## Conclusion

Null preemption is a decision by one possible government regulator—the federal government—not only that it should not regulate, but also that no other government regulator should regulate. Insofar

276 *Cf.* Motor Vehicle Mfrs. Ass'n v. EPA, 627 F.2d 1095, 1107 (D.C. Cir. 1979) ("The plain meaning of the statute indicates that Congress intended to make the waiver power coextensive with the preemption provision.").

277 *See supra* note 43 and accompanying text.

278 Note that such an interpretation is entirely consistent with the statute and with ordinary canons of statutory construction. Both the CAA's preemption provision ("No State or any political subdivision thereof shall adopt or attempt to enforce any standard relating to the control of emissions from new motor vehicles or new motor vehicle engines subject to this part." 42 U.S.C. § 7543(a) (2006)), and regulatory empowerment provision ("The Administrator shall by regulation prescribe . . . standards applicable to the emission of any air pollutant from any class or classes of new motor vehicles or new motor vehicle engines, which in his judgment cause, or contribute to, air pollution which may reasonably be anticipated to endanger public health or welfare." 42 U.S.C. § 7521(a)(1) (2006)), use the term "emission," and there is every reason to afford the same meaning to the term in both contexts. Of course, one might argue that the regulatory empowerment provision, but not the preemption provision, subjects "emission" to modification by "of any air pollutant . . . which in his judgment cause[s], or contribute[s] to, air pollution which may reasonably be anticipated to endanger public health or welfare." *Id.* But that is why the relief suggested in the text is not a mandate that the federal government in fact regulate, but only a mandate that the EPA accept that it has the power to regulate. The EPA might still, consistent with that mandate, adhere to the position that it could decline to exercise that authority "in [its] judgment." *Id.* Presumably, though, the courts would constrain that possibility in line with the Court's actual holding in *Massachusetts*.

as null preemption disables state regulators (who presumably want to regulate) without offering any regulation at the federal level, null preemption is justified in a narrow set of circumstances. At the same time, it seems that instances of null preemption are increasing. As a result, Congress should take steps to limit (or at least hold accountable) regulators who wish to give rise to null preemption. Courts should examine assertions of null preemption carefully, especially when agencies advance such assertions in the absence of congressional intent to that end. Finally, judicial procedure should perhaps grant states greater latitude to challenge assertions of null preemption.

Not all political structures that feature hierarchical layers of governments make similar assumptions about the allocation of powers.[279] Only for those that do will the analysis here apply. Thus, for example, the analysis here could apply to governance in the European Union to the extent that the European Union arose by virtue of sovereign states surrendering power to a new supranational government—with the directives of that new government requiring compliance by member states under the principle of subsidiarity.[280]

In contrast, local and municipal governments in the United States derive their authority to govern from the states themselves.[281] This optional devolvement of power does not lend itself to the analysis here.[282] The federal structure of Canada also does not lend itself to the analysis here. Unlike the relationship between the United States federal government and the several states, the Canadian provinces are creatures of the Canadian national government. Thus, the relationship between provincial and national power is quite different from

279 *See generally* JAN ERK, EXPLAINING FEDERALISM (2008) (comparing federalist structures of various countries).

280 *See, e.g.*, Larry Catá Backer, *Forging Federal Systems Within a Matrix of Contained Conflict: The Example of the European Union*, 12 EMORY INT'L L. REV. 1331, 1335 (1998) ("Subsidiarity ultimately rejects the independent power of the networks of obligations to impose normative limits on the power of the nation, except to the extent the nation-state permits it.").

281 *See, e.g.*, 1 ROBERT H. FREILICH, GELFAND'S STATE AND LOCAL DEBT FINANCING § 1:1 (2009).

282 *Cf.* Fireman's Fund Ins. Co. v. City of Lodi, 302 F.3d 928, 956–57 (9th Cir. 2002) (holding that while CERCLA explicitly preserved state law, CERCLA combined with state law occupied the field and thus preempted local law, and reasoning in part that local governments may regulate only to the extent authorized by state government). Null preemption analysis also does not apply to regulatory voids among the states, insofar as no state enjoys the power of precluding sister states from regulating. For analysis of preemption questions among the states, see generally Allan Erbsen, *Horizontal Federalism*, 93 MINN. L. REV. 493, 498–510 (2008).

what prevails in the United States.[283] Future research should focus on how the proper analysis of null preemption varies with the interrelationship among governments.

283 *See, e.g.*, Nathalie J. Chalifour, *Making Federalism Work for Climate Change: Canada's Division of Powers over Carbon Taxes*, 22 NAT'L J. CONST. L. 119, 142–43 (2008).