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Alexandra B. Klass

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STATE INNOVATION AND PREEMPTION: LESSONS FROM STATE CLIMATE CHANGE EFFORTS

*Alexandra B. Klass**

INTRODUCTION

Can an area of “traditional state concern” evolve into an area of exclusive federal interest for purposes of federal preemption in the absence of express congressional intent? How can it happen? These are two of the fundamental questions that must be asked in considering recent developments in state efforts to protect public health and the environment where the federal agency with congressionally-delegated authority does not support such state efforts. Until now, scholars and courts have approached the preemption issue by looking almost exclusively at the federal side of the equation. Courts find preemption where: (1) Congress preempts state law by stating so in express terms (express preemption); (2) Congress and federal agencies create a federal regulatory structure that is sufficiently comprehensive in an area where the federal interest is so dominant that it allows the inference that Congress left no room for supplementary state regulation (implied field preemption); or (3) Congress has not completely displaced state regulation in a specific area, but the state law at issue actually conflicts with federal law either because compliance with both federal and state law is impossible or because state law “stands as an obstacle” to achieving the full purposes and objectives of Congress (implied conflict preemption).¹ Under this framework, preemption

* Associate Professor of Law, University of Minnesota Law School. Thanks to William Buzbee, Daniel Farber, Robert Glicksman, Heidi Kitrosser, Bradley Karkkainen, J.B. Ruhl, Daniel Schwarcz, and Kenneth Simons for their valuable comments on earlier drafts of this Article. I also benefited greatly from comments received at the “Frontiers of Tort Law” conference at Loyola Law School Los Angeles in January 2008 and at a faculty workshop at the University of Florida Levin College of Law in March 2008.

1. See *Hillsborough County v. Automated Med. Labs. Inc.*, 471 U.S. 707, 715 (1985) (citing and quoting *Capital Cities Cable, Inc. v. Crisp*, 467 U.S. 691, 698–99 (1984) (discussing

can result from either congressional action or federal agency action through duly promulgated regulations. For all three types of preemption, courts generally apply a “presumption against preemption” where Congress is regulating in an area of “traditional state concern.”² Thus, in considering preemption, courts look to whether the area was traditionally governed by state law prior to the federal legislation. The Supreme Court and lower courts have applied this presumption to preserve state affirmative regulation and state common law claims for relief in areas of public health, safety, and environmental protection.³

In determining preemption in these cases, courts generally consider the state regulatory landscape prior to the congressional legislation, and then attempt to determine Congress’s intent against that historical state backdrop, as well as subsequent federal agency action that may create a conflict between federal and state law.⁴ I suggest that in areas of “traditional state concern,” it is relevant to look not only at how federal agencies have used their power to implement congressional mandates but also what states have done with the power Congress preserved for them. Have states remained static or have they pursued innovative regulatory or common law liability schemes to protect public health and the environment?

Existing jurisprudence already recognizes that the scope of federal law is dynamic for purposes of preemption; it can change through congressional action, but it can also change through federal agency regulation implementing congressional purposes. I propose

three types of preemption)); *Jones v. Rath Packing Co.*, 430 U.S. 519, 525 (1977)); *Fla. Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142–43 (1963); *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947); *Hines v. Davidowitz*, 312 U.S. 52, 66 (1941); Caleb Nelson, *Preemption*, 86 VA. L. REV. 225 (2000) (discussing the three types of preemption). The concept of federal preemption emanates from the Supremacy Clause of the United States Constitution, specifically, Article VI, Clause 2, which reads: “This Constitution, and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.” See *Hillsborough*, 471 U.S. at 712–13; see also *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1 (1824) (holding that the Supremacy Clause invalidates state laws that “interfere with, or are contrary to” federal law).

2. See *Bates v. Dow AgroSciences LLC*, 544 U.S. 431, 449 (2005) (“[B]ecause the States are independent sovereigns in our federal system, we have long presumed that Congress does not cavalierly pre-empt state-law causes of action.” (quoting *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996))); *Hillsborough*, 471 U.S. at 715 (discussing the “presumption that state or local regulation of matters related to health and safety is not invalidated under the Supremacy Clause”).

3. See *Hillsborough*, 471 U.S. at 715.

4. *Id.* at 717–21.

that the same should be true for the states. In situations where states have created innovative common law or regulatory approaches to achieve broad congressional purposes, such dynamic state efforts should act as a counterweight to arguments by federal agencies or industry groups that such efforts are preempted unless and until Congress conveys an express intent that the states have gone too far or that federal uniformity must prevail. Such an approach can be based on congressional intent, often expressed through statutory state savings clauses, to allow states to assist in federal agency efforts to meet federal objectives.

In order to better explore this proposal, I consider state common law claims for relief and affirmative state regulation to control greenhouse gas emissions (“GHG emissions”). I have chosen this area as a case study for two primary reasons. First, the legitimacy of state efforts to reduce GHG emissions is at the center of today’s debates over the role state law can and should play in the federal framework to protect public health and the environment. This debate is made more difficult in part because courts have been forced to address a situation where Congress has not spoken on the issue of preemption for decades but federal agency action and state law developments have significantly altered the federal-state landscape. Over the last thirty years, the federal agency with delegated authority under the Clean Air Act, the U.S. Environmental Protection Agency (“EPA”), enacted scores of new regulations, technology-based standards, and enforcement mechanisms to implement congressional mandates to control air pollution. In so doing, the EPA has engaged in significant federal regulation of air pollution—an area that was once dominated by state common law and regulation—without the benefit of any subsequent congressional statements on preemption to validate any displacement of state law.

Second, just as federal agency regulation has fundamentally changed the nature of air pollution law, the federal agency position on whether preemption of state efforts should go beyond current federal agency policy in areas of traditional state concern has also changed. Today, the EPA and other federal agencies frequently argue that the authority to control certain air pollutants (i.e., GHG emissions) is exclusively a federal issue and that even the EPA’s authority to control GHG emissions is limited by the needs of the

President to promote countervailing economic and foreign policy goals.

The agency's significant departure from Congress's last expression of intent regarding federal and state jurisdiction over air pollution poses a difficult legal question for courts. Now, courts are called upon in case after case to weigh that original congressional intent against a changing federal agency position on preemption. Of course, this change in federal agencies' position on preemption is not limited to air pollution issues. It is also evident in recent positions favoring preemption of state law by the U.S. Food and Drug Administration ("FDA"), the Consumer Product Safety Commission ("CPSC"), the National Highway Transportation Safety Administration ("NHTSA"), and other federal agencies regulating in related public health areas.⁵

Third, state common law and regulatory efforts to control GHG emissions illustrate today's almost complete linkage between the common law of torts and the regulatory state in areas of public health, safety, and environmental protection. While law students still study, almost exclusively, the common law in their first-year torts courses, the reality of tort law in today's world is, of course, quite different. The use of statutory and regulatory standards to create duties of care for purposes of negligence per se is an early, obvious example of how the regulatory state influences tort law. Other examples include the recent tort reform movement for statutory caps on certain types of damages and legislative efforts to create regulatory compliance defenses to common law tort claims.

State common law and regulatory efforts to control GHG emissions take this interconnectedness to a new level. States themselves use both common law and legislative tools to achieve not

5. See, e.g., Catherine M. Sharkey, *Preemption by Preamble: Federal Agencies and the Federalization of Tort Law*, 56 DEPAUL L. REV. 227, 229-42 (2007) (discussing recent efforts by federal public health and safety agencies to preempt state regulations and common law claims for relief through express statements in federal regulations) [hereinafter Sharkey, *Preemption by Preamble*]; see also WILLIAM FUNK ET AL., THE TRUTH ABOUT TORTS: USING AGENCY PREEMPTION TO UNDERCUT CONSUMER HEALTH AND SAFETY 704 (2007) (discussing regulatory efforts by the FDA, NHTSA, and CPSC to preempt state tort law claims against product manufacturers); Richard A. Epstein, *Why the FDA Must Preempt Tort Litigation: A Critique of Chevron Deference and a Response to Richard Nagareda*, 1 J. TORT L., Dec. 2006, at art. 5 (arguing in favor of FDA preemption of common law claims); Richard A. Nagareda, *FDA Preemption: When Tort Law Meets the Administrative State*, 1 J. TORT L., Dec. 2006, at art. 4 (discussing recent FDA regulatory actions intended to preempt state tort law claims against drug manufacturers).

only state and federal goals for limiting air pollution but also the basic tort law goals of compensation and deterrence. Thus, the study of preemption in the context of state efforts to control GHG emissions brings together many of the fundamental issues facing state legislatures, Congress, and the courts in reconciling traditional tort law with today's regulatory state.⁶

In Part I, I review recent Supreme Court preemption decisions in the areas of public health and environmental protection to establish the legal principles that exist today to guide lower courts' efforts to define the boundaries of federal and state influence in these areas of law. In Part II, I introduce an alternate approach to analyzing preemption claims in areas of traditional state concern. This approach takes into account federal agency action to implement congressional public health and environmental protection goals, but it also places significant weight on innovative state efforts to achieve those same goals. In Part III, I briefly trace the congressional language on preemption and preservation of state law in the Clean Air Act ("CAA"), with a particular emphasis on those provisions that relate to today's debates over state efforts to reduce GHG emissions. I then discuss recent developments in the EPA's position on preemption of state efforts to control GHG emissions and judicial efforts to apply current preemption doctrine in this area of law. I conclude in this Part that courts have reached widely varying results in these cases, in part because the existing jurisprudential framework they have to work with does not sufficiently weigh post-congressional state action when it considers post-congressional federal agency action. I also conclude that the Supreme Court's 2007 decision in *Massachusetts v. Environmental Protection Agency*,⁷ although not a preemption case, supports the idea that state innovation should be relevant in the preemption analysis. Finally, in Part IV, I discuss the justifications for allowing state innovation to "count" in the preemption analysis in the context of state efforts to

6. See, e.g., JOHN C.P. GOLDBERG ET AL., *TORT LAW: RESPONSIBILITIES AND REDRESS* xix, 33, 325, 1020 (2004) (discussing negligence *per se*, the post-New Deal emergence of the modern administrative state, and statutory tort reform, as part of the body of tort law that "exists within a vastly more complex regulatory state that devotes substantial effort to promoting safety and to providing for citizens' welfare").

7. 127 S. Ct. 1438 (2007).

control GHG emissions and also explain how this approach might apply in related areas of “traditional state concern.”

I. PRESUMPTIONS AGAINST PREEMPTION AND DEFINING SPHERES OF INFLUENCE IN THE SUPREME COURT

The doctrine of preemption is based in the Supremacy Clause of the U.S. Constitution, which provides that the Constitution and U.S. laws “shall be the supreme Law of the Land” notwithstanding any state law to the contrary.⁸ This Part reviews selected Supreme Court preemption decisions involving public health and the environment with an eye toward how the Court has addressed the growth of the federal regulatory state and the Court’s deference (or lack thereof) to the federal agency view of preemption of state law. As many scholars have noted, the Supreme Court’s preemption jurisprudence is often inconsistent and does not lend itself to easy application.⁹ Within this scholarship, there has been much debate over whether a “presumption against preemption” of state law still exists in areas of traditional state concern.¹⁰ Based on the Supreme Court’s most recent decisions in cases involving public health and the

8. See U.S. CONST. art. VI, cl. 2 (“This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; . . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.”); *Fidelity Fed. Sav. & Loan Ass’n v. Cuesta*, 458 U.S. 141, 152 (1982) (stating that preemption doctrine “has its roots in the Supremacy Clause”); *Chi. & N.W. Transp. Co. v. Kalo Brick & Tile Co.*, 450 U.S. 311, 317 (1981) (attributing the “underlying rationale of the pre-emption doctrine” to the Supremacy Clause); see also *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 211 (1824) (holding that the Supremacy Clause invalidates state laws that “interfere with, or are contrary to” federal law); Nelson, *supra* note 1, at 234 (stating that virtually all commentators have acknowledged that “the Supremacy Clause is the reason that valid federal statutes trump state law”).

9. See DAVID G. OWEN, *PRODUCTS LIABILITY LAW* § 14.4, at 896 (2005) (stating the preemption doctrine continues to “wallow in a state of utter chaos”); Viet D. Dinh, *Reassessing the Law of Preemption*, 88 GEO. L.J. 2085, 2085 (2000) (“Notwithstanding its repeated claims to the contrary, the Supreme Court’s numerous preemption cases follow no predictable jurisprudential or analytical pattern.”); Nelson, *supra* note 1, at 232 (stating that “[m]odern preemption jurisprudence is a muddle” both as applied to discrete areas of law and in general).

10. See Mary J. Davis, *Unmasking the Presumption in Favor of Preemption*, 53 S.C. L. REV. 967, 971 (2002) (arguing that if there ever was a presumption against preemption of state law, the Court has replaced it with an unstated presumption in favor of preemption of state law); Roderick M. Hills, Jr., *Against Preemption: How Federalism Can Improve the National Legislative Process*, 82 N.Y.U. L. REV. 1, 61 (2007) (stating that while the Court “continues to recite the conventional bromide” that there is a presumption against preemption, the Court has often abandoned this principle in practice); Calvin Massey, *“Joltin’ Joe Has Left and Gone Away”*: *The Vanishing Presumption Against Preemption*, 66 ALB. L. REV. 759, 759 (2003) (presumption against preemption has no force).

environment, there continues to be much disagreement on the Court over the force of the presumption, particularly in cases of express preemption.

Indeed, it is more difficult today for the Supreme Court and lower courts to apply a presumption against preemption—or more generally, any preemption jurisprudence—in areas where the lack of congressional expressions of preemptive intent have been significantly eclipsed by the growth of the federal regulatory state and aggressive federal agency statements in favor of preemption. Against this current backdrop, a primary question the Court considers in many of these cases is whether federal regulatory developments within the states’ “traditional” spheres of influence can fundamentally alter state authority that existed at the time of the congressional enactment. In confronting this issue, however, the Court has so far failed to address whether state law developments—not just federal law developments—can also be relevant to the preemption analysis.

The primary cases which lay the foundation for this discussion are *Hillsborough County v. Automated Medical Laboratories*,¹¹ *Medtronic, Inc. v. Lohr*,¹² *Buckman Co. v. Plaintiffs’ Legal Committee*,¹³ *Bates v. Dow AgroSciences, LLC*,¹⁴ and *Riegel v. Medtronic, Inc.*¹⁵ Although these cases each build on the Court’s broader preemption jurisprudence in matters of public health, safety, and the environment,¹⁶ I focus on the cited cases to identify existing

11. 471 U.S. 707 (1985).

12. 518 U.S. 470 (1996).

13. 531 U.S. 341 (2001).

14. 544 U.S. 431 (2005).

15. 128 S. Ct. 999 (2008).

16. Other Supreme Court cases have addressed important aspects of preemption of state law in the areas of public health, safety, and environmental protection and serve as precedent to one or more of the cases discussed in this section. *See, e.g.*, *Sprietsma v. Mercury Marine*, 537 U.S. 51, 70 (2002) (holding that the Federal Boat Safety Act did not expressly or impliedly preempt common law claims for damages against a boat manufacturer for the failure to equip a boat engine with a propeller guard); *Geier v. Am. Honda Motor Co.*, 529 U.S. 861, 868 (2000) (holding that the Department of Transportation safety standard enacted pursuant to the federal Motor Vehicle Safety Act, which provided auto manufacturers with a choice of safety restraints, preempted common law tort claims for design defects); *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 520–24 (1992) (holding that the provision in the federal Public Health Cigarette Smoking Act prohibiting state law “requirements” or “prohibitions” based on smoking and health with respect to advertisement or promotion of cigarettes could act to preempt state common law tort actions against cigarette companies, in addition to preempting affirmative state regulation); *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 257–58 (1984) (holding that the federal Atomic

judicial principles that may assist in creating a framework that gives “credit” to state efforts to innovate in an area of traditional state concern when faced with federal agency statements arguing for preemption of state law. These cases, however, are hardly the final word from the Supreme Court, which has heard four separate cases this term and last term involving the preemption of consumer state law damage claims arising out of the use of prescription drugs and medical devices.¹⁷ As a result, the review below of the Court’s existing jurisprudence on federal preemption of the states’ interests in protecting public health and the environment is only a starting point.

Despite uncertainty regarding the Court’s next move, the existing case law, as shown below, supports a few tentative conclusions relevant to efforts to count state innovation in the preemption analysis. First, the presumption against preemption of

Energy Act did not preempt state awards of punitive damages against a nuclear plant for exposure to plutonium on grounds that the federal law regulated the overall safety aspects of nuclear materials but did not displace state tort law). For recent scholarship discussing the Court’s preemption jurisprudence in the areas of public health, safety, environmental protection, see David E. Adelman & Kirsten H. Engel, *Adaptive Federalism: The Case Against Reallocating Environmental Regulatory Authority*, 92 MINN. L. REV. 1796 (2008); William W. Buzbee, *Asymmetrical Regulation: Risk, Preemption, and the Floor/Ceiling Distinction*, 82 N.Y.U. L. REV. 1547 (2007); Ann E. Carlson, *Federalism, Preemption, and Greenhouse Gas Emissions*, 37 U.C. DAVIS L. REV. 281 (2003); Dinh, *supra* note 9; Howard L. Dorfman et al., *Presumption of Innocence: FDA’s Authority to Regulate the Specifics of Prescription Drug Labeling and the Preemption Debate*, 61 FOOD & DRUG L.J. 585 (2006); Jean Macchiaroli Eggen, *The Normalization of Product Preemption Doctrine*, 57 ALA. L. REV. 725 (2006); Robert L. Glicksman, *From Cooperative to Inoperative Federalism: The Perverse Mutation of Environmental Law and Policy*, 41 WAKE FOREST L. REV. 719 (2006) [hereinafter Glicksman, *Cooperative to Inoperative*]; Robert L. Glicksman, *Nothing Is Real: Protecting the Regulatory Void Through Federal Preemption by Inaction*, 26 VA. ENVTL. L.J. 5 (2008); Michael D. Green & William B. Schultz, *Tort Law Deference to FDA Regulation of Medical Devices*, 88 GEO. L.J. 2119 (2000); Lars Noah, *Rewarding Regulatory Compliance: The Pursuit of Symmetry in Products Liability*, 88 GEO. L.J. 2147 (2000); Robert L. Rabin, *Keynote Paper: Reassessing Regulatory Compliance*, 88 GEO. L.J. 2049 (2000); Sharkey, *Preemption by Preamble*, *supra* note 5; Paul S. Weiland, *Federal and State Preemption of Environmental Law: A Critical Analysis*, 24 HARV. ENVTL. L. REV. 237 (2000).

17. See *Warner-Lambert Co. v. Kent*, 128 S. Ct. 1168 (2008) (affirming, by an equally divided Court, a lower court decision finding no preemption of fraud exception to state statutory regulatory compliance defense for drug manufacturers); *Riegel v. Medtronic, Inc.*, 128 S. Ct. 999 (2008) (holding that the FDA’s pre-market approval process established federal requirements that preempt state law product liability claims against a medical device manufacturer); *Altria Group, Inc. v. Good*, 128 S. Ct. 1119, 2008 WL 161478 (U.S. Jan. 18, 2008) (granting certiorari to review the preemption of claims under state deceptive trade practices law against a cigarette manufacturer); *Wyeth v. Levine*, 128 S. Ct. 1118, 2008 WL 161474 (U.S. Jan. 18, 2008) (granting certiorari to review the preemption of state law product liability claims against a prescription drug manufacturer).

state law is still used (if not always applied uniformly) in many cases involving public health and environmental protection. Second, federal agency regulation can, but need not, preempt state law. Third, agency positions on preemption of state law are extremely influential although not always dispositive. These conclusions are summarized here to set the stage for the idea that the Court's precedent allows room for courts to weigh innovative state law efforts to protect human health and the environment beyond federal agency standards in the preemption analysis. In many cases, emphasis on state innovation may create a better and more contemporary framework for analysis than the historic presumption against preemption of state law.

A. Implied Preemption and the Growth of the Federal Regulatory State: Hillsborough County v. Automated Medical Laboratories and Buckman Co. v. Plaintiffs' Legal Committee

It was in 1985 that the Court squarely addressed how much the growth of the federal regulatory state on its own should impact preemption of state law in areas of traditional state concern. In *Hillsborough County v. Automated Medical Laboratories*, the Court held that FDA regulations establishing minimum standards for the collection of blood plasma did not preempt a county's local ordinances governing blood plasma centers within the county under either implied field preemption or implied conflict preemption.¹⁸ In reaching this conclusion, the Court applied the presumption against preemption because the county ordinances addressed a matter of health and safety, which falls under the "historic police powers of the State,"¹⁹ and such powers were not to be superseded by federal law unless that was the "clear and manifest purpose of Congress."²⁰ The Court fully recognized that federal agency regulations can preempt state law just as easily as federal statutes but that the mere comprehensiveness of the federal regulations did not result in preemption.²¹ Even though the regulations had broadened

18. *Hillsborough County v. Automated Med. Labs., Inc.*, 471 U.S. 707, 716 (1985). Express preemption was not an issue in the case. *See id.* at 712-13 (focusing on implied preemption arguments).

19. *Id.* at 715 (quoting *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947)).

20. *Id.*

21. *Id.* at 713, 717.

significantly since 1973, the FDA had not indicated that its original position rejecting preemption had changed, and even if the agency had expressed an intent to preempt, the comprehensiveness of the regulations still would not justify preemption.²² The Court found that “merely because the federal provisions were sufficiently comprehensive to meet the need identified by Congress did not mean that States and localities were barred from identifying additional needs or imposing further requirements in the field.”²³

The Court also noted that it was even more reluctant to infer preemption from the comprehensiveness of federal regulations than from the comprehensiveness of statutes.²⁴ To infer preemption whenever a federal agency deals with a problem comprehensively would mean that “whenever a federal agency decides to step into a field, its regulations will be exclusive.”²⁵ The Court rejected such a rule on grounds that it would “be inconsistent with the federal-state balance embodied in our Supremacy Clause jurisprudence.”²⁶ The Court found this to be particularly true in light of “the presumption that state and local regulation related to matters of health and safety can normally coexist with federal regulations.”²⁷ Thus, the Court “will seldom infer, solely from the comprehensiveness of federal regulations, an intent to pre-empt in its entirety a field related to health and safety.”²⁸

In *Hillsborough*, the Court made clear that simply because an agency regulates broadly under its delegated powers does not mean that the federal interest identified by Congress expands or becomes exclusive at the expense of the corresponding state interest in protecting public health and safety.²⁹ Instead, in the absence of congressional intent to the contrary, federal agencies can regulate to implement congressional mandates, while states can continue to exercise their own influence in that same area of law.³⁰ Thus, the

22. *Id.* at 716–18.

23. *Id.* at 717.

24. *Id.*

25. *Id.*

26. *Id.* (stating that the “mere volume and complexity” of federal regulations will not result in the inference that the federal agency intended to preempt state law).

27. *Id.* at 718.

28. *Id.*

29. *See id.* at 717.

30. *See id.* at 718.

importance of *Hillsborough* for present purposes is its focus on defining the federal interest and the relationship between that federal interest and the state interest, both as that relationship existed prior to the congressional action as well as after comprehensive federal regulation in the area.

Any harmony *Hillsborough* created between a growing federal regulatory structure and areas of traditional state concern has become tempered, however, by the Court's later willingness to carve out "exclusive" spheres of federal interests. Once a federal interest becomes completely separated from what may have been a traditional area of state law in the past, any presumption against preemption disappears. This is precisely what the Court did in 2001 in *Buckman Co. v. Plaintiffs' Legal Committee*.³¹ In *Buckman*, the plaintiff sued a regulatory consultant to a manufacturer of orthopedic bone screws, alleging that the FDA would never have approved use of the bone screws in the absence of fraudulent representations by the consultant.³² The plaintiff included a state common law misrepresentation claim entitled "fraud-on-the-FDA," which alleged the defendant made specific fraudulent representations to the agency during the device approval process.³³ In reversing the Third Circuit's rejection of a preemption defense, the Court carved out an "exclusive" federal interest when it considered the consultant's implied preemption defense.³⁴ Rather than describing the case as one involving the state's traditional interest in protecting the health and safety of its citizens, the Court defined the case as one involving "[p]olicing fraud against federal agencies," which is "hardly 'a field which the States have traditionally occupied.'"³⁵

The Court proceeded to focus on the "delicate balance" between federal statutory objectives to deter fraud and the burdens placed on regulated parties.³⁶ The Court feared in particular that "complying

31. 531 U.S. 341 (2001).

32. *Id.* at 343.

33. *Id.* at 346–47; see also *In re Orthopedic Bone Screw Prods. Liab. Litig.*, 159 F.3d 817, 821–22 (3d Cir. 1998) (discussing the elements of the plaintiff's fraud-on-the-FDA claim), *rev'd sub nom. Buckman*, 531 U.S. 341.

34. *Buckman*, 531 U.S. at 352 (pointing to clear evidence that "Congress intended that the MDA [Medical Device Act] be enforced exclusively by the Federal Government" (citing 21 U.S.C. § 337(a) (2002))).

35. *Id.* at 347 (quoting *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947)).

36. *Id.* at 348.

with the FDA's detailed regulatory regime in the shadow of fifty States' tort regimes will dramatically increase the burdens facing potential applicants" and that Congress had not contemplated such burdens in enacting the medical device provisions of the Federal Food, Drug, and Cosmetic Act ("FDCA").³⁷

Buckman shows what can happen when a federal interest is defined in a manner that allows it to be divorced from the historic state interest in protecting the health, safety, and welfare of its citizens. In such a case, the federal regulatory state preempts parallel or overlapping state authority (e.g., common law fraud claims) in areas of traditional state concern.³⁸ Moreover, *Buckman* reveals the beginning of an FDA position in favor of preemption that is broad enough to cover not only state actions that interfere with the defined federal interest but even those actions that would provide only an additional remedy for an already-determined federal violation.³⁹ Indeed, as Justice Stevens pointed out in his concurring opinion, the FDA's position in the case was not only that the federal agency should have exclusive jurisdiction to make the initial fraud determination but that consumers should not even be able to use state law to obtain damages in cases where the FDA had already made the fraud determination.⁴⁰ According to Justice Stevens, a plaintiff should be able to bring a state law claim for damages based on a prior FDA finding of fraud because, in such a case, state law would be providing solely a remedy for an existing federal violation, rather than interfering with the federal interest in balancing deterrence of fraud against reducing burdens on the agency and regulated parties.⁴¹ *Buckman* thus stands as an example of the Court allowing federal agency action to create an exclusive federal sphere of influence that prevents the parallel or overlapping influence of state law. As discussed later, this federal-agency-created tension between federal and state interests has become even more acute today in the areas of public health and the environment.

37. *Id.* at 350; *see also* Warner-Lambert Co. v. Kent, 128 S. Ct. 1168 (2008) (granting certiorari to address split in the circuits over whether the fraud exception to a Michigan statute granting immunity to drug manufacturers is subject to preemption but affirming by an equally divided court the lower court decision finding no preemption).

38. *See Buckman*, 531 U.S. at 353.

39. *Id.* at 354 (Stevens, J., concurring).

40. *Id.*

41. *Id.*

Buckman, along with *Hillsborough*, shows the Court attempting to balance the impact of the growth of the federal regulatory state as well as the views of the federal agency in the context of implied preemption. In both cases, Congress had given no clear statement of intent to preempt state law, and many years had passed since Congress had spoken on the issue at all.⁴² In the interim, the federal agency had significantly expanded its influence, and in *Buckman*, expressed a position in favor of preemption of state law.⁴³

*B. Express Preemption and the Presumption Against Preemption:
Medtronic, Inc. v. Lohr, Bates v. Dow AgroSciences LLC, and
Riegel v. Medtronic, Inc.*

Despite the protests of some Justices, the Court has applied the presumption against preemption of state law in areas of traditional state concern in at least some cases of express, as well as implied, preemption. In *Medtronic, Inc. v. Lohr*, a plurality of the Court rejected the argument that the FDA regulations creating a streamlined approval process for certain medical devices (the §510(k) process) preempted state common law claims for damages against the medical device manufacturer.⁴⁴ Unlike *Hillsborough* and *Buckman*, which involved implied preemption, the issue before the Court in *Medtronic* was the interpretation of express congressional language in the federal Medical Device Act (“MDA”), §360(k), prohibiting state “requirements” for medical devices that were “different from, or in addition to” any federal “requirement” or “which relate[] to the safety or effectiveness of the device.”⁴⁵

42. Not only do the prescription drug provisions of the FDCA contain no preemption clause, but the 1962 amendments to the FDCA provide: “Nothing in the amendments made by this Act to the Federal Food, Drug, and Cosmetic Act shall be construed as invalidating any provision of State law which would be valid in the absence of such amendments unless there is a direct and positive conflict between such amendments and such provision of state law.” Drug Amendments of 1962, Pub. L. No. 87-781, § 202, 76 Stat. 780, 793 (1962).

43. See *Buckman*, 531 U.S. at 353.

44. 518 U.S. 470, 501–02 (1996).

45. The precise statutory language stated: “Except as provided . . . no State or political subdivision of a State may establish or continue in effect with respect to a device intended for human use any requirement—(1) which is different from, or in addition to, any requirement applicable under this chapter to the device, and (2) which relates to the safety or effectiveness of the device or to any other matter included in a requirement applicable to the device under this chapter.” *Id.* at 481–82 (citing 21 U.S.C. § 360k(a) (2000)).

Despite the fact that the Court was interpreting an express statutory preemption clause, it still applied a strong presumption against preemption of state law.⁴⁶ First, the federal law was in “matters of health and safety,” which are within the historic police powers of the states.⁴⁷ Second, the federal law did not create an express or implied private cause of action against manufacturers.⁴⁸ The Court found it “difficult to believe that Congress would, without comment, remove all means of judicial recourse for those injured by illegal conduct.”⁴⁹

The Court thus interpreted the historic state “field” in which Congress was regulating quite broadly (health and safety) and then interpreted the preemptive scope of the statutory term “requirements” fairly narrowly. As a result, the statutory provision preempted only state affirmative regulations or common law claims that conflicted with federal device-specific requirements. Because the FDA had not promulgated such device-specific requirements through the §510k process, state law damage claims relating to the device did not necessarily conflict with any federal requirements.⁵⁰ As in *Hillsborough*, the Court also relied on the FDA’s statements in its regulations that the statutory preemption clause did not preempt state or local requirements of general applicability, but instead preempted only state or local requirements that established a substantial requirement for a specific device.⁵¹ The Court concluded that state law damage claims could in some cases be “requirements” that are preempted under the MDA but that such a finding would be rare and did not occur in this case.⁵²

The dissent, by contrast, argued that state damage claims did impose “requirements” under the MDA. It disagreed with the

46. *Id.* at 485.

47. *Id.*

48. *Id.* at 487.

49. *Id.* (quoting *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 251 (1984)).

50. *See id.* at 493–94.

51. *Medtronic*, 518 U.S. at 499–500 (citing 21 C.F.R. § 808.1(d) (1995)).

52. *Id.* at 502–03. In his concurring opinion, Justice Breyer disagreed with the conclusion that it would be rare for the MDA to preempt state law claims for damages and gave an example where a jury would hold, based on expert testimony, that a 2-inch wire was required for a hearing aid component where the federal regulation had required a 1-inch wire. *Id.* at 504. In such a case, Justice Breyer would find that the state law claim was preempted. He agreed in this case, however, that the federal agency position arguing against preemption was subject to deference and that the preemptive scope of §360k should be interpreted narrowly. *Id.* at 508.

plurality's narrow reading of the exclusive federal interest at stake as well as its interpretation of the MDA's preemption clause.⁵³

In defining the federal interest, the dissent focused on the "extensive federal manufacturing and labeling requirements" the FDA had created under the MDA.⁵⁴ Because of the comprehensive federal regulations "relating to every aspect of the device-manufacturing process," the dissent would not require Congress to be any more explicit than it was in §360k to preempt state law claims for damages.⁵⁵

Thus, a fundamental difference between the majority and the dissent was in defining the scope of the exclusive federal interest and the specificity with which Congress must legislate in order to preempt a traditional area of state law. The majority applied a presumption against preemption and required specific language by Congress to preempt common law claims for damages in areas of traditional state concern. The dissent focused on the broad scope of the federal interest expressed by the comprehensiveness of the federal regulations and, without any presumption against preemption, did not require Congress to legislate with specificity to preempt state law damage claims. Once again, however, the FDA's position on preemption favored allowing state law damage claims, providing support for the plurality's decision.⁵⁶

The issue of the scope of federal authority versus state authority was also center stage in the Court's 2005 case of *Bates v. Dow AgroSciences LLC*.⁵⁷ *Bates* dealt with whether an express preemption provision in the federal pesticide law preempted state statutory and common law claims for damages by peanut farmers against a pesticide manufacturer.⁵⁸ The federal pesticide law, known as "FIFRA," contains an express preemption clause providing that states "shall not impose or continue in effect any requirements for labeling or packaging [of pesticides] in addition to or different from

53. *Id.* at 509–10 (O'Connor, J., concurring in part and dissenting in part).

54. *Id.* at 513–14.

55. *Id.*

56. *Id.* at 498–99.

57. 544 U.S. 431 (2005).

58. *Id.* at 434.

those required under this subchapter.”⁵⁹ At issue was whether the plaintiffs’ claims for damages under state law were “requirements for labeling or packaging.”⁶⁰ The Court held that merely because a jury verdict against the defendant might motivate “an optional decision” on the part of the manufacturer to change the pesticide label did not mean such a verdict would be a “requirement” subject to express preemption.⁶¹

In reaching this decision, the Court once again applied the presumption against preemption, defined the historic state field in which Congress was regulating broadly, and defined the exclusive federal interest narrowly.⁶² The Court noted that when Congress created the modern version of the federal pesticide law in 1972, courts had entertained tort litigation against pesticide manufacturers for many decades.⁶³ The Court then focused on the continuing role states played in regulating pesticide sales and application in their jurisdictions, drew attention to their role as “independent sovereigns in our federal system,” and applied the presumption against preemption in “areas of traditional state regulation.”⁶⁴ In particular, the Court relied on the “long history of tort litigation against manufacturers of poisonous substances” to “add[] force to the basic presumption against pre-emption.”⁶⁵

In its prior cases involving the FDA, the Court had bolstered similar conclusions with reference to the delegated federal agency’s view that the state laws or claims at issue were not preempted.⁶⁶ In *Bates*, however, the EPA had changed its longstanding position against preemption and argued for preemption of state law on

59. 7 U.S.C. § 136v(b) (2000). FIFRA stands for the Federal Insecticide, Fungicide, and Rodenticide Act, 7 U.S.C. §§ 136-136y.

60. *Bates*, 544 U.S. at 443-44 (quoting 7 U.S.C. § 136v(b) (2000)).

61. *Id.* at 445.

62. *Id.* at 449 (stating that even if the defendant’s reading of the express preemption clause was plausible, “we would nevertheless have a duty to accept the reading that disfavors pre-emption”). In a partial concurrence and partial dissent, Justice Thomas, joined by Justice Scalia, objected to the majority’s use of a presumption against preemption in a case of express preemption (as opposed to implied preemption) and also argued that the history of state tort litigation against manufacturers should be irrelevant to the Court’s preemption analysis. *See id.* at 457-58 (Thomas, J., concurring in part, dissenting in part).

63. *Id.* at 440-41, 449-50.

64. *Id.* at 449.

65. *Id.*

66. *See, e.g.,* *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 489-500 (1996); *Hillsborough County v. Automated Med. Labs., Inc.*, 471 U.S. 707, 716-17 (1985).

grounds that such state law claims would allow juries in fifty states to establish “a crazy-quilt of anti-misbranding requirements different from the one defined by FIFRA itself and intended by Congress to be interpreted authoritatively by EPA.”⁶⁷ The Court rejected the EPA’s position based on the presumption against preemption, the historic role of state law in areas of safety and the environment, and the fact that the EPA’s position was contrary to the position it had advocated only five years prior to the case.⁶⁸

In *Bates*, like in *Hillsborough* and *Medtronic* (and unlike in *Buckman*), the Court defined the state interest broadly and the exclusive federal interest narrowly. The state’s interest was to protect the public health and safety of its citizens. The federal interest was not the regulation of pesticides generally, but ensuring a uniform program of required labeling of pesticides. Thus, the law allowed ample room for state law to create damage remedies for violations of federal labeling requirements or new causes of action for violation of express warranty, fraud, or other violations not specifically tied to required labeling language. The Court’s definition of the relevant state and federal interests, along with the presumption against preemption, prevailed over the EPA’s own attempts to define the exclusive federal interest more broadly.

This expansive view of the role of state tort law in express preemption cases ground to a halt, however, when the Court decided *Riegel v. Medtronic, Inc.*⁶⁹ in 2008. In *Riegel*, the Court returned to the express preemption provision of the MDA (also at issue in *Medtronic v. Lohr*) but here in the context of whether the plaintiff could sue in state tort law for injuries resulting from a medical device approved not under the 510(k) process but under the much more stringent premarket approach process for Class III devices.⁷⁰ In finding the plaintiff’s claims preempted, Justice Scalia, writing for the majority, focused extensively on the rigorous premarket approval process, the extensive amounts of time the FDA spends reviewing each application, and the post-approval monitoring and reporting

67. *Bates*, 544 U.S. at 448 (quoting Brief for Respondent at 16, *Bates*, 544 U.S. 431 (No. 03-388)).

68. *Id.* at 449.

69. 128 S. Ct. 999 (2008).

70. *Riegel*, 128 S. Ct. at 1005-06.

requirements placed on regulated parties.⁷¹ The Court held that unlike the 510(k) process at issue in *Lohr*, the premarket approval process here had set federal, device-specific requirements under the MDA.⁷² The Court then went on to hold that the plaintiff's state common law tort claims were "requirements" that were different from those set under federal law, thus running afoul of the MDA's express preemption provision.⁷³

Notably, throughout the opinion, the focus was on the present-day pervasiveness of federal regulation governing medical devices and the fact that state tort law "disrupts" the federal scheme in this area.⁷⁴ The Court made no mention of any presumption against preemption of state law and rejected the idea that its interpretation of the term "requirements" in the express preemption clause should be narrow simply because Congress was aware of the pervasive use of state tort law against medical devices but yet did not express any intent to preempt such claims specifically.⁷⁵

It is only in Justice Ginsburg's dissent that there is a discussion of medical device regulation as "a domain historically occupied by state law" prior to the MDA.⁷⁶ In her view, it was error to interpret the term "requirements" in the MDA to include state common law tort claims because, in fact, Congress enacted the MDA against the backdrop of numerous, high profile lawsuits against manufacturers of medical devices that highlighted the need for federal regulation in the area.⁷⁷ Because California and other states had enacted their own premarket approval processes to fill the regulatory void prior to the MDA, Congress's preemption of state "requirements" was focused on replacing such state approval processes with a unified, federal approval system and did not contemplate any preemption of state tort law.⁷⁸ Justice Ginsburg found "informative the absence of any sign

71. *Id.* at 1003-05.

72. *Id.* at 1007.

73. *Id.* at 1007-08.

74. *Id.* at 1003-05, 1008.

75. *Id.* at 1008-09.

76. *Id.* at 1013 (Ginsburg, J., dissenting).

77. *Id.*

78. *Id.* at 1013, 1018.

of a legislative design to preempt state common-law tort actions” given Congress’s awareness of these state lawsuits.⁷⁹

Unlike in *Lohr* and *Bates* where the Court focused on the important and continuing role of state tort law and allowed federal and state law to co-exist, in *Riegel*, state tort law is nothing more than a disruptive force that interferes with the FDA’s regulatory authority. The majority opinion did not acknowledge that state law had any legitimate role to play, and the Court rejected state tort law as anything other than a conflicting “regulation” that must stand aside for an expanded federal interest. Thus, *Riegel* shows how defining the scope of the federal interest and the state interest is critically important not only in cases of implied preemption but also as a foundation upon which the Court decides cases of express preemption.

C. Summary

A review of this selection of the Court’s recent preemption cases involving public health and environmental protection matters allows for at least a few tentative conclusions. First, the Court has applied a presumption against preemption of state law in the areas of public health and environmental protection in cases involving both express and implied preemption. Second, the Court has recognized that agency regulation can preempt state law. Third, federal agency enactment of a large volume of complex regulations over a period of years or decades after the original charge from Congress does not on its own transform an area of traditional state concern into one dominated by exclusive federal interests, although, as seen in *Buckman* and *Riegel*, it can certainly serve to expand the federal interest in that area. Fourth, agency statements of intent to preempt (or lack of intent to preempt) are important but not always dispositive.⁸⁰ Fifth, arguments attempting to carve out exclusive spheres of federal interest are possible but have so far been limited. One fundamental problem in attempting to reconcile these cases is

79. *Id.* at 1013 (stating that MDA’s preemption provision responded to state regulation, and particularly California’s system of premarket approval for medical devices, by preempting such state regulation absent FDA permission).

80. *But see* Catherine M. Sharkey, *Products Liability Preemption: An Institutional Approach*, 76 *GEO. WASH. L. REV.* 449 (2008) (discussing the emphasis the Supreme Court places on agency views regarding federal preemption of state law).

that, in many instances, the Court is attempting to determine congressional intent that was expressed (if at all) decades ago and did not contemplate many of today's conflicts between federal and state law over the issues of most concern today. Part II discusses this and other problems with current preemption doctrine and introduces a framework to begin to address these problems.

II. INTRODUCING A PREEMPTION DOCTRINE THAT WEIGHS POST-CONGRESSIONAL STATE INNOVATION ALONG WITH POST-CONGRESSIONAL FEDERAL AGENCY ACTION

This Part first sets forth the problems with current preemption doctrine in areas of traditional state concern, focusing on the inability of the courts to fully acknowledge the inherent interrelationship between state and federal law in today's regulatory state. Next, it explains precisely what should "count" as state innovation and why state innovative action should be given weight in analyzing claims of both implied and express preemption. Thus, this Part lays the groundwork for the analytical framework that will be applied in later Parts to state efforts to control GHG emissions and to other areas of traditional state concern.

A. The Problem with Current Preemption Doctrine

An assessment of the Supreme Court's preemption jurisprudence reveals an unstated assumption that state law is primarily a static force in the Court's preemption analysis. The Court, by contrast, readily acknowledges that federal law can change through agency action and, in particular, expand to displace state law.⁸¹ In reaching decisions on preemption, the Court first examines the congressional language (or lack thereof) on preemption and then the federal structure the delegated agency has created since receiving its authority and what influence that federal structure should have on state law. State action is considered only for purposes of determining whether it conflicts with federal law as shaped by federal agency action. Courts generally recite the presumption against preemption of state law in "areas of traditional state concern" but do not consider the possibility that innovative state action should "count" in assessing whether federal agency action can displace it.

81. See *supra* notes 42–43 and accompanying text.

The question that arises in attempting to count state innovation in the preemption analysis is whether the Supremacy Clause allows such a factor to be part of the equation. The Court has held that, ultimately, it is up to Congress to determine when it wishes to displace state law and when it wishes to allow federal law and state law to coexist. Where Congress has created a broad state savings clause (as it often does when it regulates in areas of “traditional state concern”), not only can it be said that Congress wishes to leave state law alone but also that Congress wants to recruit state law to assist in achieving federal policy goals.⁸² This intent appears to be particularly true in areas of environmental protection, public health, safety, and consumer issues, where both regulators and the regulated community have now spent several decades being aware of, and responsive to, a cohesive framework of both state and federal law. Viewed this way, placing greater weight on state initiatives that occur *after* Congress has spoken through legislative action is consistent with congressional intent as well as the Supremacy Clause.

One might argue that state action subsequent to congressional action should not “count” because all that matters is the intent of Congress, and it is the federal agencies with congressionally-delegated authority, not the states, that are charged with carrying out the intent of Congress. Indeed, it is this special role played by federal agencies in implementing congressional intent that is the basis for the significant deference the courts are required to give agencies’ interpretation of federal statutes under *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*⁸³ and *Skidmore v. Swift & Co.*⁸⁴ Therefore, federal agencies can reduce the room left

82. See *Bates*, 544 U.S. at 450–51 (examining express preemption clause and savings clause in federal pesticide law to conclude that the statute “authorizes a relatively decentralized scheme that preserves a broad role for state regulation” and creates “concurrent authority of the Federal and State Governments”); *Sprietsma v. Mercury Marine*, 537 U.S. 51, 70 (2002) (stating that while Congress expressed an interest in uniformity through its preemption clause in the Federal Boat Safety Act, that interest cannot defeat the law’s broad savings clause for state law); *Hillsborough*, 471 U.S. at 717, 721 (stating that the structure of the Public Health Service Act did not bar states and localities from “identifying additional needs or imposing further requirements” and, in fact, “contemplated additional state and local requirements”); Hills, *supra* note 10, at 56–57.

83. 467 U.S. 837 (1984).

84. 323 U.S. 134 (1944); see also Nina A. Mendelson, *Chevron and Preemption*, 102 MICH. L. REV. 737 (2004) (discussing the tension between the *Chevron* doctrine and the presumption against preemption of state law where the federal agency interprets a statute in favor of

for states through their regulations, and there is nothing states can do about it. Such an approach, however, allows federal agency intent to substitute for congressional intent on preemption.⁸⁵ By failing to expressly preempt state law (or doing so only very narrowly), particularly in areas of public health, safety, and environmental protection, Congress has not only delegated authority to federal agencies to act but also allowed and encouraged state actors to pursue congressional goals using both traditional and innovative regulations and common law theories.⁸⁶ Both sides of the equation are dynamic, and by ignoring state innovation, courts are depriving states of the ability to use the space for regulatory and common law change Congress left for them to implement.

During the rise of the federal regulatory state, this issue tended to lurk in the background as states and private parties relied on the new tools Congress and the federal agencies had created for the regulation and enforcement of public health and environmental matters.⁸⁷ Now, however, the federal regulatory state often appears to be contracting rather than expanding. Instead of new regulations and new technology standards, we are in an era of federal deregulation as the agencies in the public health and environmental protection arena attempt to ease the regulatory burdens on industry, provide more products to consumers, place fewer burdens on the economy, and deal with significant cuts in federal enforcement budgets.⁸⁸ At the same time, states are attempting to fill the gap

preemption of state law); Sharkey, *Preemption by Preamble*, *supra* note 5, at 243–47 (discussing the *Chevron* doctrine in context of recent agency arguments in favor of preemption of state law); *infra* note 102 (citing cases where courts have struggled balancing deference to federal agency positions in favor of preemption of state law with the presumption against preemption of state law).

85. See *Alexander v. Sandoval*, 532 U.S. 275, 291 (2001) (“Agencies may play the sorcerer’s apprentice but not the sorcerer himself.”); Sharkey, *Preemption by Preamble*, *supra* note 5, at 228 (discussing “[f]ederal agency momentum towards increased preemption” by using examples of the FDA, CPSC, and NHTSA, and comparing these agencies’ “recent aggressive stances” to their “more mixed—and often muted—preemption positions” in the past).

86. See *Hills*, *supra* note 10, at 56. “Congress routinely legislates against a background of state laws that it does not intend to disturb” and it “implicitly enlists state law to serve federal ends, by operating on the tacit understanding that state and federal rules dovetail into a single scheme.” *Id.*

87. See, e.g., Alexandra B. Klass, *Common Law and Federalism in the Age of the Regulatory State*, 92 IOWA L. REV. 545, 566–76 (2007) (discussing the rise of the regulatory state in environmental law).

88. See, e.g., *Riegel v. Medtronic, Inc.*, 451 F.3d 104, 130 (2d Cir. 2006) (Pooler, J., concurring in part, dissenting in part) (stating that preemption of common law tort claims against

created by federal deregulation by setting stricter emission standards for automobiles and industries to control GHG emissions, in addition to bringing common law nuisance suits against power plants and automobile manufacturers.⁸⁹ In other areas of the law, such as products liability, consumers rely on common law damage claims to obtain relief from harmful prescription drugs and medical devices, while scholars, the public, and the courts express growing concern that the FDA, the CPSC, and other federal regulators are neither

medical device manufacturers and other product manufacturers will “undoubtedly reduce the resources expended on safety related innovations that would benefit consumers,” and such a reduction of state resources is a problem in light of the “influence of the regulated industry” over the FDA, along with inadequate agency resources to genuinely ensure that devices are safe when approved and are properly reevaluated when new information becomes available), *aff’d*, 128 S. Ct. 999 (2008); *In re Zyprexa Prods. Liab. Litig.*, 493 F. Supp. 2d 571, 575 (E.D.N.Y. 2007) (“[L]awyers and their clients often find themselves serving as drug safety researchers of last resort.”); *Perry v. Novartis Pharma. Corp.*, 456 F. Supp. 2d 678, 687 (E.D. Pa. 2006) (refusing to find that the federal prescription drug law preempts state common law tort claims, citing “the recent concerns about the effectiveness of the FDA’s safety monitoring of recently approved drugs,” and finding that “the availability of state law tort suits provides an important backstop to the federal regulatory scheme”); William W. Buzbee, *Contextual Environmental Federalism*, 14 N.Y.U. ENVTL. L.J. 108, 115 (2005) (“It is a common view that during the past five years the environmental zeal of the federal executive branch has waned, resulting in fewer new or strengthened laws, fewer strengthened regulations, and less federal enforcement than one would have expected in a more pro-environment administration.”); David A. Kessler & David C. Vladek, *A Critical Examination of the FDA’s Efforts to Preempt Failure-to-Warn Claims*, 96 GEO. L.J. 461, 465 (stating that the FDA’s pro-preemption position is inconsistent with the Food, Drug, and Cosmetic Act and is based on an unrealistic assessment of the agency’s ability to police the adverse effects of drugs after the approval process is complete); Anne Erikson Haffner, Comment, *The Increasing Necessity of the Tort System in Effective Drug Regulation in a Changing Regulatory Landscape*, 9 J. HEALTH CARE L. & POL’Y 365, 379–87 (2006) (discussing “industry-friendly” changes in the FDA drug approval process and oversight process that has reduced FDA authority over drug manufacturers and led to an increase of unsafe drugs on the market); Catherine T. Struve, *The FDA and the Tort System: Postmarketing Surveillance, Compensation, and the Role of Litigation*, 5 YALE J. HEALTH POL’Y L. & ETHICS 587, 601–07 (2005) (discussing problems with FDA oversight of prescription drugs and stating that “the FDA does not have the capability—or, some charge, the motivation—to analyze thoroughly and act swiftly upon all the information that it does receive”); Gardiner Harris, *F.D.A. Failing in Drug Safety*, *Official Asserts*, N.Y. TIMES, Nov. 19, 2004, at 11 (discussing the congressional testimony of an FDA reviewer from its office of safety research who stated that federal drug regulators are incapable of protecting the public from unsafe drugs); Stephen Labaton & Ron Nixon, *OSHA Leaves Worker Safety Largely in Hands of Industry*, N.Y. TIMES, Apr. 25, 2007, at A1 (reporting that since 2000, the Occupational Safety and Health Administration (OSHA) has issued the fewest significant standards in its history, and has expressed a preference against regulations in favor of a “voluntary compliance strategy” allowing industry associations and companies to police themselves); Eric Lipton, *Safety Agency Faces Scrutiny Amid Charges*, N.Y. TIMES, Sept. 2, 2007, at 1 (Sept. 2, 2007) (discussing budget cutbacks, political pressure, and the current administration’s “deregulatory agenda” as reasons why the CPSC is ineffective in protecting consumers from harmful products).

89. See *infra* Part III.B.

motivated nor equipped to adequately regulate these industries.⁹⁰ In response, many federal agencies have taken the position (with some success) that state regulations and common law claims are preempted because we have, in essence, crossed the divide beyond which federal uniformity must prevail over more protective state regulation or common law.

One can certainly chalk up this shift to politics as usual—federal agencies are merely pursuing a political agenda that is friendly to industry interests. Dismissing the shift as merely political, however, ignores the question of how state and federal goals can and should overlap, particularly when so much has changed in the many decades that have passed since Congress spoke on the issue. Even if there ever were clear “boundaries” dividing the federal and state spheres of influence, it is overly simplistic today to attempt to draw those lines in modern preemption analysis and allow dynamic movement only on the federal side. Roderick Hills has argued that “[a]s federal and state laws become more intertwined, it becomes less plausible to say that federal law is preserving state law’s independent scope and more plausible to say that federal law is effectively deputizing the states to fill gaps in federal statutes.”⁹¹ It is this real linkage between state and federal law in fulfilling congressional objectives that argues for a new approach to the role of state law in the preemption analysis.

B. Counting State Innovation in the Preemption Analysis

In order to consider giving weight to state innovation in the preemption analysis in areas of traditional state concern, it is first necessary to identify when states are being innovative. For purposes of the analysis below, I define state innovation as legislative or common law actions by states (not merely citizens of states) to implement congressional goals (e.g., reducing air pollutants or protecting consumers from unsafe drugs, medical devices, or products) that differ from federal agency policy but do not conflict with minimum federal standards or preclude compliance with federal standards.

90. See *supra* note 91 and accompanying text (citing articles and cases discussing the failure of federal agencies to effectively police drug, medical device, and other consumer product manufacturers, as well as the need for state common law claims to fill federal gaps in enforcement and encourage industry compliance with health and safety standards).

91. Hills, *supra* note 10, at 56–57.

Thus, state regulations or common law claims brought by state attorneys general to limit air pollution, as well as state lawsuits or regulation in other public health areas (such as relating to prescription drugs or medical devices), would count as state innovation. By contrast, private party common law or statutory claims to obtain injunctive relief or damages from air pollution or harm arising from the use of products or prescription drugs would not count as state innovation. In such private party actions, the existing presumption against preemption of state law in areas of traditional state concern would apply, but there would be no additional weight against preemption. As explained in subsequent Parts, recent Supreme Court pronouncements, along with other authority, support a special rule for states acting in their sovereign capacity. In other cases, the current presumption against preemption of state law, along with other scholars' recent suggestions to better define those presumptions, should suffice for current purposes.⁹²

The question then arises whether states can “innovate” in ways that are both more protective and less protective than federal standards. The answer to that question depends in large part on the precise federal statute that governs the area in which states are attempting to innovate. With regard to air pollution, water pollution, or other areas governed by federal environmental laws, state innovation generally can be more, but not less, protective than federal standards or provide an alternative path to achieving federal standards. This is because most federal environmental legislation expressly sets a “regulatory floor” that prohibits states from enacting or enforcing standards that are less protective than federal standards.⁹³ In this circumstance, state innovation would include

92. See, e.g., Adelman & Engel, *supra* note 16 (creating a presumption against preemption of state law that operates differently based on whether the issue is pending before Congress, a court, or an administrative agency and proposing that Congress adopt a new drafting principle that contains a presumption against federal regulatory “ceilings”); Hills, *supra* note 10, at 54–61 (proposing that courts apply a presumption against preemption of state law based on a *Chevron*-style deference to state laws threatened with preemption) (citing *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842–45 (1984) (instructing federal courts to defer to a federal agency’s interpretation of a federal statute when the statutory language is ambiguous and the agency’s interpretation of the statute is permissible or reasonable)).

93. See *infra* notes 112–115 and accompanying text (discussing CAA); ROBERT V. PERCIVAL ET AL., *ENVIRONMENTAL REGULATION: LAW, SCIENCE AND POLICY* 103–04 (5th ed. 2006) (discussing Congress’s establishment of federal minimum, but not maximum, standards in numerous federal environmental laws).

state standards that are more protective than federal standards and that allow industry to achieve or exceed compliance with federal standards using methods that differ from federal standards. It would also include legal actions by state attorneys general using state tort law to achieve levels of compliance not required by federal law.

Outside the area of environmental law, however, the situation may be different. Congress has done much more to set uniform standards for nationwide products (such as drugs and medical devices) than it has in regulating individual power plants and other industrial facilities.⁹⁴ As a result, the states have historically had less authority to set regulations governing the labeling and distribution of products that may harm public health and the environment. In this area then, the focus often turns from state regulation to state tort law.

For the most part, Congress has not set a “floor” for the level of protection states must give to their citizens to recover for injury, and so state legislatures are free to innovate not only by increasing protections for their citizens but also by decreasing those protections. States have engaged in this type of innovation in recent years through various types of “tort reform” that include limiting liability, punitive damages, or noneconomic damages in suits against doctors or product manufacturers.⁹⁵ In these circumstances, states need to be concerned primarily with limits contained in their state constitutions, rather than limits imposed by federal law.

Such state legislative action that arguably reduces protection from harm can thus “count” as state innovation for present purposes. State action that increases protection from harm (through state legislation creating enhanced rights of action or enhanced damages, or actions taken by state attorneys general on behalf of state citizens) also counts as state innovation. Such experimentation would not

94. See J.R. DeShazo & Jody Freeman, *Timing and Form of Federal Regulation: The Case of Climate Change*, 155 U. PA. L. REV. 1499, 1507–09 (2007) (noting that the economic case for federal preemption is strongest when states engage in regulation that is likely to interfere with the national distribution of uniform products and lowest when states merely regulate “end-of-pipe pollution”).

95. See MICH. COMP. LAWS § 600.2946(5) (West 2008) (adopting blanket immunity for drug manufacturers based on federal regulatory compliance with exceptions to such immunity if the defendant has deceived or defrauded the FDA); Alexandra B. Klass, *Punitive Damages and Valuing Harm*, 92 MINN. L. REV. 83, 98–99 (2007) (discussing state tort reform efforts); Catherine M. Sharkey, *The Fraud Caveat to Agency Preemption*, 102 NW. U. L. REV. 841 (2008) (discussing Michigan and other statutory schemes granting immunity from liability or from punitive damages for compliance with FDA requirements).

raise preemption concerns (even if it might raise other concerns) unless Congress chooses to set minimum or maximum standards in that area. Thus, states can innovate in the area of products liability in ways that are either more, or less, protective than federal standards and with arguably more freedom than exists in the area of environmental law.

The next issue is whether state innovation should count in both express and implied preemption cases. I suggest that it should, despite the fact that courts must conduct different analyses for the two types of preemption claims. In deciding implied preemption claims, particularly implied conflict preemption claims,⁹⁶ courts must determine whether the state law at issue actually conflicts with federal law, either because compliance with both federal and state law is impossible or because state law “stands as an obstacle” to achieving the full purposes and objectives of Congress.⁹⁷ In such an analysis, federal agency action already counts, and state innovation can and should count. Particularly when it has been decades since Congress set forth its statutory goals and issued statements (if any) on the continuing role of state law (such as is the case with the Clean Air Act amendments of the 1970s and congressional legislation in the prescription drug area and other public health areas),⁹⁸ the courts’ focus is often on whether state law conflicts not with congressional action, but with federal agency regulations and current federal agency positions on preemption.⁹⁹

96. There has been less focus on implied field preemption in the Court’s recent cases involving public health and the environment probably because of the fact that public health and environmental protection are areas of traditional state concern where Congress is less likely to expressly or impliedly preempt the field.

97. See *supra* note 1 and accompanying text.

98. Although Congress recently amended the FDCA by enacting the Food and Drug Administration Amendments Act of 2007, the only preemption language in those amendments precludes states and political subdivisions from establishing requirements for the registration of clinical trials or for the inclusion of information relating to the results of clinical trials in a database. See Pub. L. No. 110-85, 121 Stat. 823 (2007).

99. See, e.g., *Tucker v. SmithKline Beecham Corp.*, No. 1:04-cv-1748-DFH-WTL, 2007 WL 2726259, at *8 (S.D. Ind. Sept. 19, 2007) (noting that courts considering the issue have generally continued to allow common law failure-to-warn claims against drug manufacturers to proceed despite the FDA preemption preamble but finding conflict preemption in cases where the FDA had specifically considered and rejected the warning the plaintiff alleged should have been given); *In re Vioxx Prods. Liab. Litig.*, 501 F. Supp. 2d 776, 787 (E.D. La. 2007) (granting no deference to the FDA position and finding no preemption of state tort law); *Sarli v. Mylan Bertek Pharms., Inc.*, No. 1:07CV43, 2007 WL 2111577 (M.D.N.C. July 19, 2007); *In re Zyprexa Prods. Liab. Litig.*, 489 F. Supp. 2d 230, 273–78 (E.D.N.Y. 2007) (finding the FDA position on

As the Court noted in *Hillsborough County v. Automated Medical Laboratories, Inc.*,¹⁰⁰ extensive federal regulations enacted pursuant to a federal statute can, but need not, preempt state law, particularly where federal, state, and local regulation can continue to coexist in areas of public health, safety, and other areas of traditional state concern.¹⁰¹ Thus, for implied preemption claims, the focus is often on whether federal activity that has occurred *after* the congressional enactment has created a conflict between federal and state law. In such an analysis, it is appropriate not only to look at federal action and federal positions on preemption but also at state actions and whether those state actions attempt to be innovative in an effort to meet congressional public health and environmental protection goals. In such a situation, innovative state regulatory or common law efforts that are consistent with congressional goals (i.e., to protect human health and the environment through controlling air pollution or, as in *Hillsborough*, creating standards for the collection of blood plasma from donors) can and should count to offset industry and/or federal agency claims of preemption. As shown above, such an approach can be supported by a view of state savings clauses in

preemption entitled to no deference, finding no clear statement by Congress that it intended to preempt state tort law, and finding no actual conflict between plaintiffs' claims and federal law); *Sykes v. Glaxo-SmithKline*, 484 F. Supp. 2d 289 (E.D. Pa. 2007); *Perry v. Novartis Pharm. Corp.*, 456 F. Supp. 2d 678, 686–87 (E.D. Pa. 2006) (stating that the FDA position cannot substitute for lack of clear congressional statement preempting state tort law and finding state law claims not preempted); *McNellis ex rel DeAngelis v. Pfizer, Inc.*, No. Civ. 05-1286(JBS), 2006 WL 2819046 (D.N.J. Sept. 29, 2006), *rev'd* *Colacicco v. Apotex, Inc.*, 521 F.3d 253 (3d Cir. 2008); *In re Bextra & Celebrex Mktg. Sales Practices & Prods. Liab. Litig.*, No. M: 05-1699 CRB, 2006 WL 2374742 (N.D. Cal. Aug. 16, 2006); *Jackson v. Pfizer, Inc.*, 432 F. Supp. 2d 964, 968–69 (D. Neb. 2006) (finding FDA drug labeling requirement does not preempt state law failure to warn claim); *Colacicco v. Apotex, Inc.*, 432 F. Supp. 2d 514, 526 (E.D. Pa. 2006) (giving deference to the FDA position in preamble and finding FDCA impliedly preempted state common law failure to warn claims), *aff'd* *Colacicco v. Apotex, Inc.* 521 F.3d 253; *Levine v. Wyeth*, No. 2004-384, 2006 WL 3041078 (Vt. Oct. 27, 2006) (giving no deference to the FDA preemption preamble and finding no conflict between state and federal law that required preemption of state failure to warn claim against prescription drug manufacturer), *cert. granted*, 128 S. Ct. 1118 (U.S. Jan. 18, 2008); *Peters v. Astrazeneca, LP*, 417 F. Supp. 2d 1051, 1056 (W.D. Wis. 2006) (finding no preemption of state law claim against drug manufacturer in the absence of record evidence that the FDA had actually considered and rejected the additional warning on the drug and that the FDA had determined including such warning would be false and misleading); Sharkey, *Preemption by Preamble*, *supra* note 5 (discussing the impact of federal health agency positions on preemption); *see also infra* notes 155–158 and accompanying text (discussing courts' focus on agency positions on preemption with regard to state regulation of GHG emissions).

100. 471 U.S. 707, 713–18 (1985).

101. *Id.*

federal legislation that is based on an implied delegation of authority to the states in addition to the express direction to leave existing state law in place.

A similar approach can apply to cases of express preemption. In deciding express preemption claims, the issue is whether a more expansive or less expansive interpretation of the express preemption clause is consistent not only with the language of the statute but also with the overall purpose of the statute. For instance, in *Medtronic, Inc. v. Lohr*,¹⁰² the Court stated that its goal was to interpret the precise language of the statutory preemption provision with reference to “‘the domain expressly pre-empted’ by that language.”¹⁰³ The Court then proceeded to interpret the scope of the express preemption clause based on the structure and purpose of the statute and the presumption against preemption of state law in areas of traditional state concern.¹⁰⁴ Likewise, in *Bates v. Dow AgroSciences LLC*,¹⁰⁵ the Court’s focus was on the precise language of the federal pesticide law’s express preemption provision against a backdrop of “[t]he long history of tort litigation against manufacturers of poisonous substances.”¹⁰⁶ Thus, courts in express preemption cases start with the language of the express preemption clause, but when that fails to resolve the issue (as was the case in *Medtronic* and *Bates*), courts turn not only to subsequent agency action but also to the overall purpose of the statute, which generally has left some room for state law—the question being how much.

In each case, so long as the express preemption clause does not clearly apply to the state action at issue, a court must ask whether Congress would have wanted to oust or preserve state action if it had known at that time that state innovation might conflict with federal agency action or position on preemption. So long as the answer is not clear on the face of the statute, state innovation should act as an offset to federal agency arguments in favor of preemption based on the important role state and federal law can play in implementing congressional public health and environmental protection goals.

102. 518 U.S. 470 (1996).

103. *Id.* at 484–85 (Kennedy, J., concurring in part and concurring in judgment) (quoting *Gade v. Nat’l Solid Wastes Mgmt. Ass’n*, 505 U.S. 88, 111 (1992)).

104. *Id.* at 484–86.

105. 544 U.S. 431 (2005).

106. *Id.* at 449.

With this preemption framework in place, the next Part examines state efforts to control GHG emissions and whether state innovation can and should count in resolving preemption claims. This study reveals the shortcomings of current preemption doctrine in attempting to resolve state and federal conflicts in contemporary efforts to address one of today's most pressing public health and environmental issues. In exploring this issue, what becomes clear is that the idea of separate and independent "spheres" of state and federal influence no longer accurately describes (if it ever did) the federal-state relationship in addressing modern tort law and regulatory problems.

III. THE CLEAN AIR ACT, COOPERATIVE FEDERALISM, CLIMATE CHANGE, AND THE GROWTH OF THE FEDERAL REGULATORY STATE

Beginning in the 1970s, Congress enacted sweeping legislation regulating air pollution, water pollution, pesticides, hazardous waste, and other environmental matters.¹⁰⁷ At that same time, President Nixon created the EPA to implement congressional environmental mandates through federal regulatory and enforcement actions.¹⁰⁸ In the enabling laws, Congress set forth savings clauses and preemption provisions that have for the most part not changed in over thirty years. The brief summary below of the key congressional statements (and silences) on preemption in the regulation of air pollution is the starting point for the analysis of the development of the federal-state relationship over state efforts to control GHG emissions that follows. As this Part shows, the EPA's failure to make real efforts to limit GHG emissions under the CAA has created a regulatory policy void that the states have attempted to fill in an aggressive and innovative manner. More and more frequently, courts are called upon to determine what limits the Supremacy Clause should place on these state efforts based on the structure and overall purpose of the CAA and the expressions of congressional intent that exist regarding the state and federal roles in controlling air pollution.

107. PERCIVAL ET AL., *supra* note_93, at 90–91.

108. *Id.*

A. Federal Regulation of Air Pollution

In 1970, Congress created the first comprehensive federal regulatory program to control ambient air emissions through major amendments to the Clean Air Act.¹⁰⁹ The CAA included a charge to the EPA, which had been created that same year, to promulgate national air quality standards for certain pollutants, provisions to address the reduction of emissions from new motor vehicles, and authority for citizen suits to help enforce the requirements of the law.¹¹⁰ Subsequent amendments to the CAA in 1977 and 1990 strengthened various provisions, created new programs to control acid rain, and ratified various EPA programs.¹¹¹ A central focus of the CAA is the National Ambient Air Quality Standards (“NAAQS”), which EPA sets to provide national uniform minimal standards for levels of air pollutants necessary to protect public health and welfare.¹¹² These minimal acceptable levels are intended to be met through a combination of federal standards for new stationary sources (factories, power plants, etc.) and mobile sources (automobiles, etc.), coupled with standards contained in federally approved state plans for existing stationary sources.¹¹³

Congressional language in the CAA regarding the basic relationship between state and federal governments for purposes of preemption has remained unchanged since the 1970s. Section 101 of the CAA includes a congressional finding that air pollution prevention and control at its source “is the primary responsibility of States and local governments,” but federal financial assistance and leadership is “essential for the development of cooperative Federal, State, regional, and local programs to prevent and control air pollution.”¹¹⁴ Section 116 contains a savings clause, entitled “Retention of State Authority.” That section states that, except with regard to preemption of certain state regulation of auto emissions, nothing in the CAA shall deny the right of any state or political

109. See Pub. L. 91-604, 84 Stat. 1676 (1970) (1970 Amendments to CAA); Clean Air Act, 42 U.S.C. §§ 7401–7671q (2008); PERCIVAL ET AL., *supra* note 93, at 470.

110. 42 U.S.C. § 7409 (2008); PERCIVAL ET AL., *supra* note 93, at 470–75.

111. Pub. L. 95-95, 91 Stat. 685 (1977) (1977 Amendments to CAA); Pub. L. 101-549, 104 Stat. 2399 (1990) (1990 Amendments to CAA); PERCIVAL ET AL., *supra* note 93, at 470.

112. Pub. L. 101-549, 104 Stat. 2399; see also 42 U.S.C. § 7408 (2008).

113. See 42 U.S.C. §§ 7410–7411, 7521 (2008); PERCIVAL ET AL., *supra* note 93, at 470.

114. 42 U.S.C. § 7401(a)(3)–(4) (2008).

subdivision to adopt or enforce “(1) any standard or limitation respecting emissions of air pollutants or (2) any requirement respecting control or abatement of pollution,” except for standards that fall below certain federal standards or federally approved state implementation plans.¹¹⁵ Thus, for the most part, the federal standards are a floor, not a ceiling, for regulating air pollution.

The regulation of auto emissions is one major exception to this general principle that states can set standards above the federal “floor.” Section 202 of the CAA authorizes the EPA Administrator to establish standards for air pollutants from new motor vehicles that cause or contribute to air pollution that may reasonably be anticipated to endanger public health or welfare.¹¹⁶ As for states, Section 209 of the CAA provides that “[n]o State or political subdivision thereof shall adopt or attempt to enforce any standard relating to the control of emissions from new motor vehicles.”¹¹⁷ California, however, has a special waiver from this preemption provision. Section 209’s waiver section allows the EPA Administrator to waive its application to any state that adopts new motor vehicle emission standards before March 30, 1966 (i.e., California) so long as the state determines that its standards will be at least as protective as federal standards.¹¹⁸ The EPA Administrator may only refuse to grant the waiver if it finds that (1) the state determination is “arbitrary and capricious,” (2) the state does not need special standards to meet “compelling and extraordinary conditions,” and (3) the state standards are not consistent with the process by which EPA sets standards for auto emissions (i.e., section 7521 of the CAA).¹¹⁹ Although California is the only state entitled to seek a waiver from section 209’s prohibition on state regulation of auto emissions, other states may adopt and enforce new auto emission standards if they “are identical to the California standards

115. *Id.* § 7416.

116. *Id.* § 7521(a)(1).

117. *Id.* § 7543(a).

118. *See id.* § 7543(b). Another CAA provision grants California authority to set standards for fuel and fuel additives for the purpose of controlling motor vehicle emissions. *See id.* § 7545(c)(4)(B) (“Any State for which application of section 7543(a) has at any time been waived under section 7543(b) . . . may at any time prescribe and enforce, for the purpose of motor vehicle emission control, a control or prohibition respecting any fuel or fuel additive.”).

119. *See id.* § 7543(b)(1)(A)–(C).

for which a waiver has been granted” and enacted at least two years before the automobile model year to which they will apply.¹²⁰

The role of the National Highway Traffic Safety Administration further complicates the federal framework regulating air emissions from motor vehicles. While the CAA authorizes the EPA to establish emission standards for new motor vehicles to control air pollution, the Environmental Policy and Conservation Act (“EPCA”), enacted in 1975 in response to the 1970s energy crisis, directs the NHTSA to establish average fuel economy standards (known as “CAFE” standards) for an auto manufacturer’s fleet of new vehicles.¹²¹ EPCA includes a preemption clause, Section 509(a), which provides that a state may not adopt or enforce laws related to fuel economy standards for automobiles where a federally established fuel economy standard exists.¹²²

Thus, the CAA creates a framework where federal, state, local, and regional governmental entities will work together to control air pollution, while the federal government retains exclusive control over setting standards for new auto emissions. However, an exception exists where California may seek permission to set its own standards and other states may adopt the California standards. Apart from the auto emission provisions, this structure is typical of many other environmental laws, such as the Clean Water Act, where Congress has directed the EPA to work together with state and local

120. *See id.* § 7507. The exception was limited to California in part because it is the largest single market for automobiles in the United States and because California already had a regulatory framework for auto emissions control prior to the enactment of the CAA Amendments. *See Am. Auto. Mfrs. Ass’n v. Mass. Dep’t of Env’tl. Prot.*, 163 F.3d 74, 77 (1st Cir. 1998); *see also Motor Vehicle Mfrs. Ass’n of the U.S. v. N.Y. State Dep’t of Env’tl. Conservation*, 17 F.3d 521, 525–28 (2d Cir. 1994) (describing in detail the CAA’s motor vehicle provisions and the California exception); *Green Mountain Chrysler Plymouth Dodge Jeep*, 508 F. Supp. 2d 295, 398 (D. Vt. 2007) (“Congress has essentially designated California as a proving ground for innovation in emission control regulations.”); *infra* note 104 (discussing interplay between CAA, EPCA, and California motor vehicles standards).

121. 49 U.S.C. § 32902(a), (c) (2008).

122. *Id.* § 32919; *see also Green Mountain Chrysler Plymouth Dodge Jeep v. Crombie*, 508 F. Supp. 2d at 302 (holding that California regulations limiting GHG emissions from new motor vehicles were not “related to fuel economy standards” and thus not preempted by EPCA because the regulations “embrace much more than a simple requirement to improve fuel economy” and because multiple approaches, with various levels of fuel economy allow compliance with the regulations); *Cent. Valley Chrysler-Jeep, Inc. v. Goldstene*, No. CV F 04-6663 AWI LJO, 2007 WL 4372878, at **13–19 (E.D. Cal. Dec. 11, 2007) (discussing interplay between CAA and EPCA); *infra* notes 195–97 (discussing case law on preemption of California standards under EPCA).

governments, creating a “cooperative federalism” approach to environmental protection.¹²³ Since the 1970 CAA Amendments, the EPA has created a vast regulatory structure to control the emission of air pollutants, including technological standards, health standards, risk levels, and enforcement provisions, completely transforming what was once the province of state law. States have subsequently adopted and enforced federal standards and gone beyond these standards as part of the cooperative federalism approach Congress envisioned.¹²⁴ Despite the increasing federalization of environmental law in general and air pollution control law in particular, courts continue to consider air pollution regulation an area of traditional state concern, falling under “the broad police powers of the states, which include the power to protect the health of citizens in the state.”¹²⁵

B. Climate Change and State Efforts to Control GHG Emissions

The term “climate change” (which is often used synonymously with the term “global warming”) refers to “any significant change in measures of climate (such as temperature, precipitation, or wind) lasting for an extended period (decades or longer).”¹²⁶ Climate change is driven in part by the amount of “greenhouse gases” in the

123. See PERCIVAL ET AL., *supra* note 93, at 103–04, 470–75 (describing model of cooperative federalism and its application in the Clean Air Act); Adelman & Engel, *supra* note 16 (describing cooperative federalism as the “dominant model for federal environmental statutes”); Glicksman, *Cooperative to Inoperative*, *supra* note 16, at 737–44 (describing cooperative federalism in the context of the Clean Air Act and other federal environmental statutes since the 1970s as “shared governmental responsibilities for regulating private activity” and using sections from the Clean Air Act and other federal environmental statutes as examples of such shared authority (citation omitted)).

124. See *Green Mountain Chrysler*, 508 F. Supp. 2d at 351 (“From the beginning of federal involvement in environmental pollution regulation, the area has been regarded as a cooperative state federal legislative effort.”); PERCIVAL ET AL., *supra* note 93, at 103–04; Klass, *supra* note 87, at 579–82 (discussing Congress’s cooperative federalism approach to environmental law and recent state efforts to enact innovative programs and regulations to address air pollution, water pollution, toxic substances, right-to-know laws, remediation of contaminated property, hazardous and solid waste, and environmental review).

125. *Exxon Mobil Corp. v. U.S. EPA*, 217 F.3d 1246, 1255 (9th Cir. 2000) (citing *Massachusetts v. U.S. Dep’t. of Transp.*, 93 F.3d 890, 894 (D.C. Cir. 1996)); *see also Engine Mfrs. Ass’n v. S. Coast Air Quality Mgmt. Dist.*, 498 F.3d 1031, 1042 (9th Cir. 2007) (“The Clean Air Act largely preserves the traditional role of the states in preventing air pollution.” (citing *Exxon Mobil Corp.*, 217 F.3d at 1255)).

126. EPA, Climate Change, Basic Information, <http://www.epa.gov/climatechange/basicinfo.html> (last visited Oct. 17, 2008).

atmosphere, which include carbon dioxide, methane, nitrous oxide, and fluorinated gases.¹²⁷ As the Supreme Court noted in its 2007 decision in *Massachusetts v. EPA*, when Congress enacted the 1970 CAA Amendments, “the study of climate change was in its infancy” and the issue “went largely unmentioned” in the congressional debates over the legislation.¹²⁸ Since that time, Congress directed the EPA in 1987 to propose a “coordinated national policy on global climate change,” and multinational scientific bodies such as the Intergovernmental Panel on Climate Change (“IPCC”) began to publish comprehensive reports on the subject beginning in 1990.¹²⁹ The IPCC’s most recent reports have concluded that immediate measures to control GHG emissions are necessary to avoid “severe and irreversible changes to natural ecosystems” and that human activity “very likely” has caused most of the rise in temperatures since 1750.¹³⁰

Despite these congressional mandates and the growing body of scientific evidence linking GHG emissions and climate change, the EPA has so far refused to take any major action on GHG emissions that would include mandatory caps on emissions.¹³¹ Congress itself has also so far declined to place limits on GHG emissions. Until directed to do so by the Supreme Court in 2007, in *Massachusetts v.*

127. EPA, Climate Change, Emissions, <http://www.epa.gov/climatechange/emissions/index.html> (last visited Oct. 17, 2008).

128. 127 S. Ct. 1438, 1447 & n.8 (2007).

129. *Id.* at 1448 (citation omitted).

130. *Id.* at 1455–56 (citing MacCracken Aff. ¶ 5(d)); INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE (“IPCC”), SUMMARY FOR POLICYMAKERS 2–5, 10 (2007), available at http://ipcc-wg1.ucar.edu/wg1/Report/AR4WG1_Print_SPM.pdf.

131. See Ken Alex, *A Period of Consequences: Global Warming as a Public Nuisance*, Symposium: Climate Change Liability and the Allocation of Risk, 26A STAN. ENVTL. L.J. 77, 82–84 (2007) (describing federal government’s lack of response to global warming); DeShazo & Freeman, *supra* note 94 at 1517 & n.54 (describing state climate change initiatives as arising “against the background of a relative vacuum of policy response at the federal level” and detailing the Bush administration’s policy positions on the issue); Glicksman, *Cooperative to Inoperative*, *supra* note 16, at 772–78 (describing failure of the federal government in general to adequately protect the environment through enforcement of existing environmental laws and regulations and enactment of new ones); David Hunter & James Salzman, *Negligence in the Air: The Duty of Care in Climate Change Litigation*, 155 U. PA. L. REV. 1741, 1742–43 (2007) (describing federal government’s failure to take meaningful action with regard to climate change as compared to the significant activity at the state and local levels); Danny Hakim, *States Set to Sue the U.S. Over Greenhouse Gases*, N.Y. TIMES, Oct. 24, 2007, at B4 (describing New York’s efforts to control GHG emissions and quoting New York Governor Eliot Spitzer with regard to these initiatives as stating “I believe that states have to step into a void created by a failure of federal action.”).

EPA, the EPA refused to take any action that would involve regulating GHG emissions from new motor vehicles as “air pollutants” under the CAA.¹³² The EPA justified this decision by arguing that the CAA did not authorize EPA to issue mandatory regulations to address global climate change and, even if it did, it would be unwise to do so because such regulations would interfere with the President’s “‘comprehensive approach’ to the problem.”¹³³ This “comprehensive approach” has consisted of further research, support for technological innovation, and the creation of other nonregulatory programs to encourage voluntary private-sector reductions in GHG emissions.¹³⁴ Although the Supreme Court rejected the EPA’s arguments, finding the agency had authority under the CAA to regulate GHG emissions from motor vehicles and did not provide a reasonable explanation for failing to do so,¹³⁵ the EPA has yet to propose or enact any such regulations.

States and even local governments, by contrast, have actively attempted to reduce GHG emissions.¹³⁶ In 2002, California passed legislation which directed the California Air Resources Board (“CARB”) to develop and implement standards to control GHG emissions from new motor vehicles.¹³⁷ In 2004, CARB promulgated thirteen regulations requiring certain levels of emission reductions from tailpipes under a set timetable.¹³⁸ In December 2005, California formally requested a preemption waiver from EPA for its auto

132. 127 S. Ct. at 1450; *see also* sources cited *supra* note 131.

133. *Massachusetts*, 127 S. Ct. at 1451 (citation omitted).

134. *Id.*

135. *Id.* at 1462–63.

136. Several recent articles detail the various state and local statutory and regulatory initiatives to control GHG emissions. *See, e.g.*, DeShazo & Freeman, *supra* note 94, at 1521–30 (providing overview of various state initiatives); Kirsten H. Engel, *Mitigating Global Climate Change in the United States: A Regional Approach*, 14 N.Y.U. Envtl. L.J. 54, 60–65 (2005) [hereinafter Engel, *Mitigating Global Climate Change*]; Robert L. Glicksman & Richard E. Levy, *A Collective Action Perspective on Ceiling Preemption by Federal Environmental Regulation: The Case of Global Climate Change*, 102 NW. U. L. REV. 579 (2008). The Pew Center on Global Climate Change website contains a significant amount of information on state, local, and regional efforts to control GHG emissions. *See* Pew Center on Global Climate Change, Latest News, http://www.pewclimate.org/what_s_being_done/

[in_the_states/news.cfm](http://www.pewclimate.org/what_s_being_done/in_the_states/news.cfm) (last visited Oct. 17, 2008); *see also* UNITED NATIONS FRAMEWORK CONVENTION ON CLIMATE CHANGE (“UNFCCC”), U.S. CLIMATE ACTION REPORT 50–54 (2006), available at <http://www.state.gov/documents/organization/89641.pdf> (surveying state and regional climate change initiatives as of 2006).

137. *See* CAL. HEALTH & SAFETY CODE §§ 42823 (repealed 2008), 43018.5 (West 2008).

138. *See* CAL. CODE REGS. tit. 13, § 1961.1 (2008).

emission regulations.¹³⁹ In December 2007, the EPA denied California's waiver request,¹⁴⁰ after more than sixteen states had adopted or were in the process of adopting the California standards pending EPA's decision on the preemption waiver.¹⁴¹

On a broader scale, California adopted a state-wide cap on GHG emissions in 2006, setting forth a goal of reducing state emissions to their 1990 levels by 2020, a cut of 25 percent.¹⁴² Other states and cities have also committed to various GHG emission reduction targets and goals.¹⁴³ Legislatures in at least twenty-two states require electric utilities to generate some of their energy from renewable sources.¹⁴⁴ Oregon, Washington, New Hampshire, and Massachusetts have set emission caps and created offset programs

139. 73 Fed. Reg. 12156–57 (Mar. 6, 2008) (discussing events leading up to waiver denial).

140. See *id.* at 12156; John M. Broder & Felicity Barringer, *E.P.A. Says 17 States Can't Set Greenhouse Gas Rules for Cars*, N.Y. TIMES, Dec. 20, 2007, at A1 (reporting on EPA's denial of California's CAA waiver request); Letter from U.S. EPA to Arnold Schwarzenegger, Governor of Cal. (Dec. 19, 2007) (informing California Governor of EPA's decision to deny California waiver request). See also *infra* notes 156 - 58.

141. See William H. Carlile, *Arizona Proposes Emissions Regulations Modeled After California Clean-Vehicle Rules*, BNA DAILY ENV'T REP., Jan. 14, 2008, at A-8 (reporting on Arizona Department of Environmental Quality's release of draft rules proposing to adopt California Low Emission Vehicle program beginning with model year 2011); William H. Carlile, *New Mexico Adopts Emissions Regulations Modeled After California Clean-Vehicle Rules*, BNA DAILY ENV'T REP., Dec. 4, 2007, at A-10 (reporting that New Mexico's Environmental Improvement Board has formally approved regulations adopting the California auto emission standards, making it the first state in the Rocky Mountain Region to do so); Drew Douglas, *Florida Finalizes Executive Orders, Climate Agreements with Germany, U.K.*, BNA DAILY ENV'T REP., July 16, 2007 (reporting that the Florida Governor Charlie Crist had signed an executive order directing the state agency to adopt the California tailpipe emissions standards, joining Vermont, New York, New Jersey, Massachusetts, Connecticut, Maine, Rhode Island, Pennsylvania, Maryland, Washington, and Oregon which had already adopted the California standards). The California standards may only go into effect if EPA grants a waiver under 42 U.S.C. § 7543(b), which it denied on December 19, 2007. See also *Green Mountain Chrysler Plymouth Dodge Jeep v. Crombie*, 508 F. Supp. 2d 295, 302–04 (D. Vt. 2007) (finding California tailpipe emissions standards were not preempted by federal law and would be valid upon EPA's grant of a waiver).

142. See California Global Warming Solutions Act of 2006, CAL. HEALTH & SAFETY CODE §§ 38500–38599 (Deering Supp. 2008).

143. See Engel, *Mitigating Global Climate Change*, *supra* note 136, at 60; Hari M. Osofsky & Janet Koven Levit, *The Scale of Networks? Local Climate Change Coalitions*, 8 CHI. J. INT'L L. 409 (2008) (studying efforts of Portland, Oregon and Tulsa, Oklahoma to reduce GHG emissions within city limits and noting that on May 15, 2007, Tulsa became the 500th city to join the U.S. Mayor's Climate Protection Agreement); THE U.S. CONFERENCE OF MAYORS, THE U.S. MAYORS CLIMATE PROTECTION AGREEMENT (2005), available at <http://www.usmayors.org/climateprotection/documents/mcpAgreement.pdf>.

144. See DeShazo & Freeman, *supra* note 94, at 1523 (describing state programs).

for new and existing power plants.¹⁴⁵ Delaware, New Jersey, New York, Connecticut, Rhode Island, Massachusetts, Vermont, New Hampshire, Maine, and Maryland are currently signatories to the Regional Greenhouse Gas Initiative (“RGGI”), which establishes regional limits on CO₂ emissions from fossil-fuel-fired electricity generation, and states in other regions are in the process of establishing similar programs.¹⁴⁶ Several states (Wisconsin, Illinois, Indiana, Michigan, Minnesota, Ohio, California, and New Hampshire) have established GHG registries that encourage industry to inventory and voluntarily reduce their emissions with the idea that such reductions will result in the award of credits if and when mandatory reductions are imposed by state or federal law.¹⁴⁷ In addition to these regulatory initiatives, state attorneys general have brought high-profile lawsuits against automakers and power plants under various theories of federal or state nuisance in an effort to reduce GHG emissions.¹⁴⁸ In this way, states have used the common law in conjunction with state regulatory authority in an attempt to reshape the existing structure of air pollution control in furtherance of both state and federal air pollution control objectives.¹⁴⁹

145. Oregon and Washington have set emission caps and created an offset program for new power plants while New Hampshire and Massachusetts have created similar programs for existing power plants. See 310 MASS. CODE REGS. 7.29(1) (2007); N.H. REV. STAT. § 125-O:3 (2006 & Supp. 2007); OR. REV. STAT. § 469.501 (2003); WASH. REV. CODE ANN. § 80.70.020(4) (2008).

146. See Regional Greenhouse Gas Initiative, <http://www.rggi.org/about.htm> (last visited Oct. 17, 2008) (discussing the RGGI and the ten states that are currently participating). A Western Regional Climate Action Initiative is also in the early stages of development. See DeShazo & Freeman, *supra* note 94, at 1526; see also Gerald B. Silverman, *New York Agencies Propose Regulations to Implement Regional Controls on Emissions*, BNA DAILY ENV'T REP., Oct. 25, 2007, at A-2 (discussing regulations proposed by two New York state agencies to implement the RGGI in New York State which will establish a cap-and-trade program to reduce CO₂ emissions by fossil fuel-fired power plants starting in 2009).

147. See DeShazo & Freeman, *supra* note 94, at 1527–30 (discussing various state registry programs).

148. See *California v. Gen. Motors Corp.*, No. C06-05755 MJJ, 2007 WL 2726871 (N.D. Cal. Sept. 17, 2007) (dismissing federal public nuisance claim in action brought by California Attorney General against auto makers for damages for creating and contributing to global warming on political question grounds and dismissing without prejudice state public nuisance claims); *Connecticut v. Am. Elec. Power Co.*, 406 F. Supp. 2d 265, 274 (S.D.N.Y. 2005) (dismissing federal public nuisance claim by several northeastern states against electric power plants on political question grounds); *North Carolina v. Tenn. Valley Auth.*, 439 F. Supp. 2d 486, 497 (W.D.N.C. 2006) (denying a motion to dismiss and allowing state nuisance claim to proceed); Andrew M. Ballard, *North Carolina Lawsuit Against TVA Alleges Harm from Power Plant Emissions*, BNA DAILY ENV'T REP. (2006).

149. See, e.g., Elizabeth Shogren, *States Dust Off “Nuisance” Suits to Fight Pollution*, NPR.ORG, Nov. 1, 2006, <http://www.npr.org/templates/story/story.php?storyId=6417774>

Not surprisingly, industry and, in some cases, the federal government, have opposed many of these state and local initiatives to control GHG emissions. They argue that the EPA, another agency, or the national interest in a uniform policy toward GHG emissions in general, precludes state action.¹⁵⁰ The auto manufacturers have sued numerous states to prevent them from applying California's more stringent emission standards on preemption grounds.¹⁵¹ Significantly, the U.S. Department of Justice along with the NHTSA have also opposed state efforts requiring more stringent standards for motor vehicle emissions in order to control GHG emissions on preemption grounds.¹⁵² For its part, the EPA failed to rule on California's request for a preemption waiver under the CAA for two years and then, after California sued the EPA to compel a decision on the waiver request, the EPA denied the request in December

(discussing how states have used historic common law public nuisance suits as a tool to remedy haze and global warming problems in the absence of strong federal action and that such lawsuits could end up spurring congressional action, as happened in the 1970s and 1980s when common law claims to recover for hazardous waste damages led to the enactment of federal Superfund laws).

150. See *Massachusetts v. EPA*, 127 S. Ct. 1438, 1444 (2007) (rejecting EPA position that it cannot regulate GHG emissions from automobiles under CAA and holding that its decision not to do so was arbitrary and capricious); Broder & Barringer, *supra* note 140 (reporting on EPA's refusal to grant California preemption waiver under the CAA to impose limits on GHG emissions from motor vehicles); Glicksman, *Cooperative to Inoperative*, *supra* note 16, at 793–98 (describing efforts by EPA to bar states from adopting measures to protect air quality and other natural resources that are more stringent than federal standards). See *supra* notes 141–44 and accompanying text for a discussion about EPA's refusal to grant California's request for a preemption waiver under the CAA.

151. See, e.g., *Ass'n of Int'l Auto Mfrs. v. Comm'r*, 208 F.3d 1 (1st Cir. 2000) (lawsuit by auto manufacturers challenging state's adoption of emission standards on preemption grounds); *Am. Auto. Mfrs. Ass'n v. Cahill*, 152 F.3d 196, 197 (2d Cir. 1998); *Motor Vehicle Mfrs. Ass'n v. N.Y. State Dep't. of Envtl. Conservation*, 79 F.3d 1298, 1308 (2d Cir. 1996); *Cent. Valley Chrysler-Jeep, Inc. v. Goldstene*, No. CV F 04-6663 AWI LJO, 2007 WL 4372878 (E.D. Cal. Dec. 11, 2007, as corrected Mar. 26, 2008) (lawsuit by auto dealers against California Air Resources Board to prevent enforcement of state regulations creating GHG emission limits for new motor vehicles); *Green Mountain Chrysler Plymouth Dodge Jeep v. Crombie*, 508 F. Supp. 2d 295 (D. Vt. 2007) (lawsuit by auto manufacturers and auto dealers seeking to prevent enforcement of Vermont regulations adopting California GHG emission standards for new automobiles).

152. See 71 Fed. Reg. 17566–67 (Apr. 6, 2006) (setting forth NHTSA's position that a state carbon dioxide emission standard that would result in requiring better fuel economy than required under federal standards is preempted because it “would upset the efforts of NHTSA to balance and achieve Congress's competing goals”); Brief for the United States as Amicus Curiae in Support of Affirmance at 6, *Cent. Valley Chrysler-Plymouth, Inc. v. Kenny*, No. 02-16395, 2002 WL 32298119 (9th Cir. Oct. 1, 2002); see also Carlson, *supra* note 16, at 304–05 (discussing Justice Department position on preemption in lawsuits challenging California's low-emission and zero-emission vehicle program).

2007.¹⁵³ In the past, the EPA had never denied in full a California waiver request and prior to that time has granted more than forty in the past thirty years.¹⁵⁴ California and numerous other states have petitioned the Court of Appeals for the Ninth Circuit to review the EPA's decision.¹⁵⁵ These conflicts have begun to force courts to consider how to balance state innovation to prevent air pollution and a new federal policy of creating exclusive federal interests, all against the backdrop of congressional intent expressed decades before today's current air pollution challenges.

C. Judicial Efforts to Determine the Relevant Federal and State Interests in Controlling GHG Emissions

This section examines lower courts' recent efforts to navigate the federal-state divide in cases involving state efforts to control GHG emissions. In recent years, numerous federal agencies that regulate in the public health and environmental protection areas have aggressively attempted to expand federal interests and minimize state interests through amicus briefs and statements in federal regulations. Catherine Sharkey documents this phenomenon of "backdoor federalization" and "preemption by preamble" in her work.¹⁵⁶ As discussed earlier in the case of GHG emissions, the EPA has so far declined to regulate or otherwise attempt to place mandatory limits on GHG emissions while states and local governments have greatly expanded their efforts in that area through regulation and litigation.¹⁵⁷

153. See *California v. EPA*, No. 1:07-cv-02024-RCL (D.D.C. Nov. 5, 2007); 73 Fed. Reg. 12156 (March 6, 2008) (EPA findings supporting California waiver denial); Broder & Barringer, *supra* note 140 (reporting on EPA waiver denial); Carolyn Whetzel, *California Sues EPA Over Inaction on Waiver to Allow State to Regulate Vehicle Emissions*, BNA DAILY ENV'T REP., Nov. 9, 2007, at A9.

154. See Laura Mahoney, *California Says Denial of Waiver by EPA Would Contradict Previous Decisions*, BNA DAILY ENV'T REP., May 31, 2007, at A10. For a discussion of the relationship between EPA's regulation of air pollution from motor vehicles and the Department of Transportation's authority to set fuel economy standards for motor vehicles, see *Massachusetts v. EPA*, 127 S. Ct. 1438, 1451 (2007); *Green Mountain Chrysler*, 508 F. Supp. 2d at 347; *Goldstene*, 2007 WL 4372878 at *1157.

155. See *California v. EPA*, No. 08-70011 (9th Cir. Jan. 2, 2008); Carolyn Whetzel, *California, 15 Other States Seek Reversal of EPA's Decision to Deny Waiver Request*, BNA DAILY ENV'T REP., Jan. 4, 2008, at 10 [hereinafter Whetzel, *15 Other States*].

156. See Samuel Issacharoff & Catherine M. Sharkey, *Backdoor Federalization*, 53 UCLA L. REV. 1353 (2006); Sharkey, *Preemption by Preamble*, *supra* note 5; Samuel Issacharoff & Catherine M. Sharkey, *Backdoor Federalization*, 53 UCLA L. REV. 1353 (2006).

157. See *supra* notes 139–152 (discussing state, local and regional efforts to control GHG emissions).

What then, should courts do when faced with arguments that common law nuisance claims brought by state attorneys general are invalid on justiciability grounds or that state efforts to control GHG emissions through innovative regulations are invalid on preemption grounds?

This section sets the groundwork for answering those questions by exploring how these issues have played out in the courts so far. First, I consider lawsuits involving state-initiated common law nuisance claims against industries emitting GHGs. Second, I consider lawsuits involving state regulatory efforts to establish auto emission standards more stringent than federal requirements. These state efforts (and the courts' treatment of them) provide insight into today's current tension over how to evaluate state affirmative efforts (through state regulation or common law claims for relief brought by states) to go beyond federal standards in areas that were once within the realm of traditional state concern but have been overshadowed in recent decades by the federal regulatory state.

In these cases, courts have little in the way of congressional guidance to help them balance the importance of state sovereignty, the desire to promote federal objectives, and positions of federal agencies that have changed dramatically in recent years. In many of these cases, courts also grapple with whether and how to apply the traditional presumption against preemption based on the states' history of regulating in these areas and the increasing federalization of many of the areas of law in question. Reviewing these cases as a whole leads to the conclusion that what states have done with their retained power to implement congressional purposes should "count" in the preemption analysis, just as what federal agencies do with their delegated power already counts.

1. States As Plaintiffs: Common Law Public Nuisance Actions to Reduce GHG Emissions

This subsection considers state efforts to limit GHG emissions through public nuisance lawsuits against automobile manufacturers, power plants, and other major sources of GHG emissions. In these cases, courts so far have been mostly skeptical about states' ability to use the common law, namely public nuisance claims, to force reductions in GHG emissions because such efforts implicate political questions best answered by other branches of government. Thus,

these public nuisance cases involve not only tensions between state governments and the EPA over how to implement the CAA but also tensions between state governments and broader national political interests in coordinating efforts to reduce global warming. Adding another new variable into the legal mix, however, is the Supreme Court's 2007 decision in *Massachusetts v. EPA*. As explained below, the Court's findings in that case on the special role granted to states and its view of the appropriate deference to the federal agency may have significant implications for resolving justiciability and preemption issues in lawsuits brought by states to limit GHG emissions.

The first case to address a public nuisance claim brought by a state to limit GHG emissions was *Connecticut v. American Electric Power Co.*¹⁵⁸ In that case, the U.S. District Court for the Southern District of New York held in 2005 that a federal public nuisance lawsuit by several northeastern states against coal-fired electric power plants to enjoin the continued release of GHG emissions was nonjusticiable because it raised political questions over how to address global warming better addressed by the legislative and executive branches.¹⁵⁹ The court rejected the plaintiffs' contention that "theirs is a simple nuisance claim of the kind courts have adjudicated in the past" because, unlike the prior nuisance cases cited by the plaintiffs, "[t]he scope and magnitude of the relief Plaintiffs seek reveals the transcendently legislative nature of this litigation."¹⁶⁰ Because plaintiffs were asking the court to cap carbon dioxide emissions and mandate annual reductions of an undetermined percentage of GHG emissions, the court would be forced to identify and balance "economic, environmental, foreign policy, and national security interests" not appropriate for judicial determination because these initial policy decisions must first be made by the political branches of government.¹⁶¹

In 2007, the U.S. District Court for the Northern District of California reached a similar conclusion in a case brought by the State of California against the nation's auto manufacturers for damages resulting from GHG emissions. In that case, *California v. General*

158. 406 F. Supp. 2d 265 (S.D.N.Y. 2005).

159. *Id.* at 274.

160. *Id.* at 272.

161. *Id.* at 272-74.

Motors, Corp.,¹⁶² the court held that even though California sought damages rather than injunctive relief, to rule on the public nuisance claim would still require the court to balance the interests of reducing global warming with economic and industrial developments, and that such policy determinations should “be made by the political branches, and not this Court.”¹⁶³ Thus, the court refused to make a determination on California’s “global warming nuisance tort” and cited the Supreme Court’s 2007 decision in *Massachusetts v. EPA*¹⁶⁴ for the proposition that it is the political branches under the Clean Air Act that should make “the precise initial carbon dioxide policy determinations.”¹⁶⁵ The court declined to rule on California’s public nuisance claim under state law and dismissed that claim without prejudice for it to be refiled in state court.¹⁶⁶

By contrast, the U.S. District Court for the Western District of North Carolina held in 2006 on a motion to dismiss that North Carolina’s state public nuisance claim could proceed against the Tennessee Valley Authority (“TVA”) to enjoin GHG emissions from TVA’s coal-fired electric generating units in neighboring states.¹⁶⁷ In rejecting TVA’s arguments that it should be protected by the “discretionary function” doctrine because it is a federal governmental agency, the court held that the “appropriate level of pollution emissions is a matter, not for only one or two Branches, but rather for all three Branches of government.”¹⁶⁸ The court explained that because air pollution is “one of the most notorious types of public nuisance[s] in modern experience,”¹⁶⁹ rejecting a discretionary function exemption for TVA “would not threaten the institutional integrity of the judiciary.”¹⁷⁰ The court also rejected TVA’s preemption arguments, citing earlier cases in which courts held state common law nuisance suits for air pollution against public and

162. No. C06-05755 MJJ, 2007 WL 2726871 (N.D. Cal. Sept. 17, 2007).

163. *Id.* at *8.

164. *See infra* notes 175–188_(discussing *Massachusetts v. EPA*).

165. *Gen. Motors Corp.*, 2007 WL 2726871, at **11–13.

166. *Id.* at *16.

167. North Carolina *ex rel. Cooper v. Tenn. Valley Auth.*, 439 F. Supp. 2d 486 (W.D.N.C. 2006).

168. *Id.* at 495.

169. *Id.* (quoting *Washington v. Gen. Motors Corp.*, 406 U.S. 109, 114 (1972)).

170. *Id.*

private entities were not preempted so long as they were brought pursuant to the law of the source states.¹⁷¹

It is clear that public nuisance claims brought by states to address GHG emissions are in the early stages of development, and no court of appeals, much less the Supreme Court, has yet ruled on the propriety of such an action. There are arguments, however, that the Supreme Court's 2007 decision in *Massachusetts v. EPA* supports a result more favorable to the states than has been achieved so far. Although *Massachusetts v. EPA* involved neither a public nuisance claim nor preemption, its conclusions are instructive in assessing the federal-state relationship in connection with state efforts to address air pollution in the face of federal inaction.

In *Massachusetts v. EPA*, the EPA argued that it did not have authority under the CAA to regulate GHG emissions from motor vehicles as a "pollutant."¹⁷² Moreover, it argued that even if it had such authority, it was within its discretion to decline to set standards for GHG emissions because setting such standards would interfere with the President's ability to negotiate with developing nations to reduce emissions and, in any event, would not be a complete solution to the problem of global warming.¹⁷³ In rejecting the EPA's arguments, the Court first addressed whether Massachusetts and the other nine state plaintiffs had standing to challenge the EPA's decision not to regulate GHG emissions under the CAA.¹⁷⁴ In finding that the states had standing, the Court declared that states "are not normal litigants" for purposes of invoking federal jurisdiction, and cited *Georgia v. Tennessee Cooper Co.*¹⁷⁵ (a public nuisance case with a state plaintiff) for the proposition that each state

171. 42 U.S.C. § 7418; North Carolina *ex rel. Cooper v. Tenn. Valley Auth.*, 439 F. Supp. 2d 486, 497 (W.D.N.C. 2006) (citing *Technical Rubber Co. v. Buckeye Egg Farm, L.P.*, No. 2:99-CV-1413, 2000 WL 782131, at *5 (S.D. Ohio June 16, 2000)) (concluding that the CAA does not preempt plaintiffs' state common law nuisance claims); *Her Majesty the Queen in Right of the Province of Ont. v. City of Detroit*, 874 F.2d 332, 343 (6th Cir. 1989) (citing to *Int'l Paper Co. v. Ouellette*, 479 U.S. 481, 497 (1987) for the proposition that nuisance suits are proper so long as brought pursuant to the law of the source states); *Fisher v. Perma-Fix of Dayton, Inc.*, No. 3:04-CV-418, 2006 WL 212076, at *2 (S.D. Ohio Jan. 27, 2006); *Gutierrez v. Mobil Oil Corp.*, 798 F. Supp. 1280, 1285 (W.D. Tex. 1992) (also concluding that the CAA does not preempt plaintiffs' state common law nuisance claims).

172. 127 S. Ct. 1438, 1461-62 (2007).

173. *Id.* at 1462-63.

174. *Id.* at 1452-53.

175. 206 U.S. 230, 237 (1907).

“has the last word as to whether its mountains shall be stripped of their forests and its inhabitants shall breath pure air.”¹⁷⁶

The Court thus placed significant attention on the fact that states as litigators, whether in litigation against private individuals, other states, or even the federal government, are entitled to “special solicitude.”¹⁷⁷ Although the states surrendered to the federal government certain “sovereign prerogatives” when they entered the Union, Congress has “ordered” the EPA to protect the states by setting air pollution emission standards from motor vehicles under the CAA.¹⁷⁸ The states, in turn, have a procedural right (enhanced by the states’ “special solicitude”) to challenge any failure by the EPA based on the states’ quasi-sovereign interests.¹⁷⁹ Moreover, the Court rejected the argument that the EPA could decline to regulate in order to allow the President more flexibility in foreign policy negotiations over GHG emissions.¹⁸⁰ The Court bluntly stated that “while the President has broad authority in foreign affairs, that authority does not extend to the refusal to execute domestic laws.”¹⁸¹

Thus, there is support in recent Supreme Court precedent for the idea that when states act as litigants in their sovereign capacity, they deserve special “solicitude” that can be applied broadly beyond standing doctrine. Indeed, in his dissent Chief Justice Roberts took Justice Stevens to task for using the Court’s precedent in *Georgia v. Tennessee Copper Co.*,¹⁸² (which did not involve Article III standing) to support a “special” rule for state litigants attempting to establish Article III standing in the instant case.¹⁸³ By applying (or creating, depending on your view) a special rule for states as litigants, the Court laid the groundwork for this special rule to apply, not only to standing, but also to preemption doctrine and justiciability doctrine.

In its opinion, the Court also rejected the EPA’s expert agency position on the extent of its authority to regulate GHG emissions as

176. See *Massachusetts*, 127 S. Ct. at 1454 (quoting *Georgia*, 206 U.S. at 237).

177. *Id.* at 1454–55.

178. *Id.* at 1454.

179. *Id.* at 1454–55.

180. *Id.* at 1462–63.

181. *Id.* at 1463.

182. 206 U.S. 230 (1907).

183. See *Massachusetts*, 127 S. Ct. at 1465 (Roberts, C.J., dissenting) (recognizing that *Georgia* drew a distinction between state and private litigants but that the distinction was made solely as to available remedies and “had nothing to do with Article III standing”).

“pollutants” under the CAA, as well its claim that federal regulation would interfere with the President’s exclusive powers to engage in foreign policy negotiations.¹⁸⁴ The Court noted that the EPA’s position had changed regarding its authority to regulate GHG emissions in recent years, just as the Court had noted a similar change in the agency position regarding preemption of state law in *Bates v. Dow AgroSciences*.¹⁸⁵ In both cases, the Court used this change of position as a reason to give little, if any, weight to the EPA’s position on preemption.¹⁸⁶ Thus, simply because the federal agency takes the position that its authority is limited under a statute for which it has delegated authority does not mean that is the final word on whether or not that authority exists. This lack of deference to the agency’s position on the scope of its own authority under federal law would seem to apply equally to the agency’s position on the scope of state authority under federal law.

Of course, the district court in *California v. General Motors Corp.*¹⁸⁷ specifically rejected the idea that *Massachusetts v. EPA* required it to give special consideration to California’s public nuisance claim merely because a state, California, was the plaintiff.¹⁸⁸ Instead, the court found that *Massachusetts v. EPA* merely granted states special solicitude to pursue their “procedural right” through administrative channels, namely to challenge the EPA’s rejection of their rulemaking petitions under the CAA.¹⁸⁹ Thus, the scope of the impact of *Massachusetts v. EPA* on state public nuisance suits remains to be seen, as these and other similar cases make their way through the federal appellate courts.

Litigation over the use of public nuisance and other common law claims to limit GHG emissions is at its infancy. Ultimately,

184. *Id.* at 1463.

185. *See id.* at 1449–50. In 1998, the “EPA’s General Counsel, prepared a legal opinion concluding that ‘CO₂ emissions are within the scope of EPA’s authority to regulate,’” that the general counsel’s successor had reiterated that opinion before a congressional committee, and that it was not until 2003 that the EPA expressed the opinion that it did not have authority to regulate CO₂ as a pollutant under the CAA. *Id.* *See also* *Bates v. Dow AgroSciences*, 544 U.S. 431, 449 (2005) (“The notion that FIFRA contains a nonambiguous command to pre-empt the types of tort claims that parallel FIFRA’s misbranding requirements is particularly dubious given that just five years ago the United States advocated the interpretation that we adopt today.” (citation omitted)).

186. *See id.*

187. No. C06-05755 MJJ, 2007 WL 2726871 (N.D. Cal. Sept. 17, 2007).

188. *Id.* at *12.

189. *Id.* at *11–12.

federal regulation rather than state public nuisance suits undoubtedly will be a much more effective and realistic vehicle to begin to address the problem of GHG emissions and climate change.¹⁹⁰ Nevertheless, both now in the absence of federal regulation and later, if and when federal regulation occurs, courts should be cautious about rejecting supplemental common law efforts under state law. This is particularly true where the state itself is using the common law in an innovative fashion to impose limitations on GHG emissions or recover damages associated with harm from GHG emissions.

2. States As Regulators: State Efforts to Use Retained Regulatory Authority under Federal Law to Limit GHG Emissions

This subsection considers state regulatory efforts to require reductions in GHG emissions. So far, despite the groundswell of state and local regulatory activity, the first judicial decisions in this area are only now being released. These cases focus primarily on state regulation of GHG emissions for new motor vehicles.

In 2004, California adopted a comprehensive set of GHG emission regulations for new motor vehicles effective in model year 2009.¹⁹¹ California applied to the EPA for a waiver of federal preemption under the CAA in 2005, which the EPA denied on December 19, 2007.¹⁹² Prior to that denial, however, more than fifteen other states,¹⁹³ pursuant to 42 U.S.C. § 7507, adopted or were in the process of adopting the California rules. Meanwhile, numerous automobile manufacturers challenged those rules (which the parties assumed, for purposes of argument, would receive EPA

190. See Thomas W. Merrill, *Global Warming as a Public Nuisance*, 30 COLUM. J. ENVTL. L. 293, 332–33 (2005) (“Global warming is not going to be solved by public nuisance litigation. This only makes it more important to redouble our efforts to consider what form a realistic solution should take.”).

191. See *Green Mountain Chrysler Plymouth Dodge Jeep v. Crombie*, 508 F. Supp. 2d 295, 302 (D. Vt. 2007); *supra* note 141 and accompanying text.

192. See 73 Fed. Reg. 12156–57 (Mar. 6, 2008).

193. The states that have adopted or are in the process of adopting the California rules include Arizona, Connecticut, Delaware, Illinois, Maine, Maryland, Massachusetts, New Mexico, New Jersey, New York, Oregon, Pennsylvania, Rhode Island, Vermont, and Washington. See *Green Mountain Chrysler*, 508 F. Supp. 2d at 302 n.5; Broder & Barringer, *supra* note 143; Whetzel, *15 Other States*, *supra* note 158 (reporting on California and fifteen other states’ petition for review in 9th Circuit of EPA’s denial of CAA waiver).

approval) in two lawsuits, one filed in the District of Vermont and the other filed in the Eastern District of California.¹⁹⁴

In September 2007, the U.S. District Court for the District of Vermont rejected the manufacturers' various preemption arguments and held that the California rules would be valid if and when the EPA granted a preemption waiver under the CAA.¹⁹⁵ In December 2007, the U.S. District Court for the Eastern District of California reached the same conclusion.¹⁹⁶ The EPA's recent denial of California's waiver request, of course, means that the fate of the California rules will remain in limbo for some time as lawsuits over the denial play out in the courts.¹⁹⁷ In the meantime, however, it is instructive to consider how the Vermont and California federal courts relied on both *Massachusetts v. EPA* and the role of state innovation in reaching their conclusions on preemption.

First, on the issue of express preemption, both courts relied on *Massachusetts v. EPA* to find that there was no conflict between EPA's authority under the CAA (and consequently, California's authority under the CAA waiver provision) to regulate GHG emissions from new motor vehicles and NHTSA's authority under EPCA to promote energy efficiency by setting mileage standards.¹⁹⁸ In reaching its conclusion, the Vermont court applied a presumption against preemption of the state regulations because the regulation of air pollution in general and the regulation of air pollution from mobile sources in particular was "traditionally a state

194. See *Cent. Valley Chrysler-Jeep, Inc. v. Goldstene*, 529 F. Supp. 2d 1151, 1154–56 (E.D. Cal. 2007); *Green Mountain Chrysler*, 508 F. Supp. 2d at 302 (describing procedural history of California GHG rules and automobile manufacturers' legal challenge in Vermont federal court). For purposes of resolving these lawsuits, all parties assumed that the EPA would grant California's waiver request. See, e.g., *Green Mountain Chrysler*, 508 F. Supp. 2d at 302 ("[T]he Court and the 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).").

195. *Green Mountain Chrysler*, 508 F. Supp. 2d at 302–03.

196. *Cent. Valley Chrysler-Jeep*, 529 F. Supp. 2d at 1173.

197. See *supra* notes 141–144 and accompanying text (discussing California waiver request and EPA denial of request).

198. *Green Mountain Chrysler*, 508 F. Supp. 2d at 343–49 (citing *Massachusetts v. EPA*, 127 S. Ct. 1438 (2007)); *Cent. Valley Chrysler-Jeep*, 529 F. Supp. 2d at 1173–75. The Vermont federal court conducted a full preemption analysis despite its holding that the conflict raised by the case was actually between two federal statutes—the CAA, including its waiver provision for California, and EPCA—rather than a conflict between federal law and state law.

responsibility.”¹⁹⁹ The court ultimately found that there was no clear evidence that Congress intended fuel economy standards under the EPCA to trump EPA efforts or EPA-approved state efforts to reduce air pollution from motor vehicles under the CAA.²⁰⁰ Instead, fuel economy standards under the EPCA must be assumed to be established against a backdrop of valid CAA standards.²⁰¹ The California federal court similarly found that Congress created the CAA’s waiver provision for California to recognize that the state had regulated emissions from motor vehicles well before the enactment of the CAA. Based on this history, the court found that it “must presume that Congress did not intend that EPCA would supercede California’s exercise of its historically established police powers.”²⁰²

As for implied conflict preemption, the Vermont federal court noted that Congress allowed California to avoid preemption because of its severe air pollution problems, because it had led the nation in establishing motor vehicle emission control prior to the enactment of the CAA, and because “there were potential benefits for the nation in allowing California to continue to experiment and innovate in the field of emissions control.”²⁰³ Thus, California, with its more stringent standards has “served as a proving ground for new technology that would later be introduced nationwide pursuant to federal regulations,”²⁰⁴ allowing it to be a “laboratory” for motor vehicle regulation.²⁰⁵ Finally, the court determined that the regulation of GHG emissions from new motor vehicles cannot be clearly categorized as an area of traditional state regulation or an area of exclusive federal control because “[f]rom the beginning of federal involvement in environmental pollution regulation, the area has been regarded as a cooperative state federal legislative effort.”²⁰⁶ As a

199. *Green Mountain Chrysler*, 508 F. Supp. 2d at 350. (citing, e.g., *Massachusetts v. EPA*, 127 S. Ct. at 1462; H.R. REP. NO. 89-899 (1965), reprinted in 1965 U.S.C.C.A.N. 3608, 3612); Glicksman, *Cooperative to Inoperative*, supra note 16, at 719–20.

200. 508 F. Supp. 2d at 350–54.

201. *Id.*

202. *Cent. Valley Chrysler-Jeep*, 529 F. Supp. 2d at 1174–75.

203. *Green Mountain Chrysler*, 508 F. Supp. 2d at 344 (citing 113 CONG. REC. 30,946 (remarks of Rep. Bell); 30,950 (remarks of Rep. Croman) (1967)).

204. *Id.* at 345.

205. *Id.* at 345 (citing *Engine Mfrs. Ass’n v. United States EPA*, 88 F.3d 1075, 1090-91 (D.C. Cir. 1996)).

206. *Id.* at 351.

result, the important policy principles supporting the ability of California to innovate in the area of controlling motor vehicle air pollutants (and the ability of other states to follow California's lead) counterbalanced efforts by industry to argue for an exclusive sphere of federal control. The California federal court reached a similar conclusion and focused on the authority of EPA (and, consequently, the authority of California through the CAA waiver provisions) to set "technology-forcing goals" for motor vehicle emissions standards, even if those standards would pose a financial burden on motor vehicle manufacturers and consumers.²⁰⁷

Finally, both courts refused to invalidate the California regulations based on "foreign policy preemption."²⁰⁸ The auto manufacturers had argued that to allow the California regulations to go into effect would improperly interfere with the ability of the President to negotiate with other countries over the timing and scope of global GHG emissions reductions.²⁰⁹ This argument followed the position the EPA had taken on the issue both in a policy report and in *Massachusetts v. EPA*.²¹⁰ The courts found that the Supreme Court's decision in *Massachusetts v. EPA* had already rejected that argument with regard to EPA's authority to regulate, and then proceeded to reject that argument regarding California's authority to regulate under the CAA waiver provisions.²¹¹

In particular, the California federal court held that an executive branch policy on negotiating with other nations over GHG emissions could not interfere with "the congressionally-established pathway in the Clean Air Act that enables California to seek and receive a waiver of preemption" so that California and states that wish to follow California's lead may require compliance with more protective auto emission regulations.²¹² Moreover, the court found that if states can be barred from attempting to control GHG emissions, current state efforts to encourage the use of energy

207. *Cent. Valley Chrysler-Jeep*, 529 F. Supp. 2d at 1178.

208. *Id.* at 1187–89; *Green Mountain Chrysler*, 508 F. Supp. 2d at 391–96;

209. *Green Mountain Chrysler*, 508 F. Supp. 2d at 396; *Cent. Valley Chrysler-Jeep*, 529 F. Supp. 2d at 1187–89.

210. *Massachusetts v. EPA*, 127 S. Ct. 1438, 1462–63 (2007) (describing EPA's arguments).

211. *Green Mountain Chrysler*, 508 F. Supp. 2d at 397; *Cent. Valley Chrysler-Jeep*, 529 F. Supp. 2d at 1187–89.

212. *Cent. Valley Chrysler-Jeep*, 529 F. Supp. 2d at 1182.

efficient light bulbs, to support the installation of solar electric panels, to grant tax rebates for hybrid cars, to require enhanced energy efficiency in building codes, or to encourage or require other activities that result in lower energy use would likewise constitute an interference with the President's authority to conduct foreign policy.²¹³ Instead, the court found that the California motor vehicle emissions regulations at issue support U.S. policy because "they provide a state economy that favors by statute such innovations as alternative fuels, hybrid motors, and other technological approaches to greenhouse gas reduction" recommended in U.S. policy documents.²¹⁴

The Vermont and California actions are only the most recent efforts of auto manufacturers to use preemption doctrine to define narrowly the role of the states in reducing GHG emissions.²¹⁵ Although the case law is in its infancy, courts may be more comfortable upholding innovative state action within a CAA framework than they are in upholding broad based public nuisance claims. Indeed, the existence of the CAA framework allows courts to make room for state law within an existing regulatory structure established by other branches of government. This statutory and regulatory structure allows courts to avoid worrying about exercising their judicial powers to make critical policy decisions weighing economic development, foreign policy, and other matters in deciding cases involving limits on GHG emissions.

The next Part builds on these recent decisions and explores in more detail how courts could expressly give more credit to state innovation in the preemption analysis in a way that is based on the

213. *Id.* at 1188.

214. *Id.* at 1189.

215. *See, e.g.,* Ass'n of Int'l Auto Mfrs. v. Mass. Dep't of Env'tl. Prot., 208 F.3d 1, 8 (1st Cir. 2000) (invalidating Massachusetts regulations purporting to adopt California auto emission standards on grounds that Memorandum of Understanding signed by California and auto manufacturers was not a "standard" under the CAA that could be adopted by other states); *Am. Auto. Mfrs. Ass'n v. Cahill*, 152 F.3d 196, 197 (2d Cir. 1998) (invalidating New York's adoption of California's zero-emission vehicles standard because it was not identical to the California standards for which EPA had granted a waiver); *Motor Vehicle Mfrs. Ass'n of America v. N.Y. State Dep't of Env'tl. Conserv.*, 79 F.3d 1298, 1308 (2d Cir. 1996) (upholding New York's adoption of California's more stringent fuel standards); *DeShazo & Freeman*, *supra* note 94, at 1512-13 (discussing the history of the auto industry's efforts in Congress and in the courts to limit as much as possible the ability of states to set auto emission standards that exceed federal standards).

Supremacy Clause and better reflects the actual role states play in today's federal framework governing the protection of human health and the environment. Rather than working in a "separate sphere" of state law, states are increasingly integrating their statutory and common law with the ever-growing federal policy in this area. Recognizing a dynamic state law in this way is consistent with congressional intent and is good public policy.

IV. WHY STATE ACTION SHOULD MATTER: ALLOWING STATES TO IMPLEMENT CONGRESSIONAL PURPOSES DESPITE AGENCY PREEMPTION EFFORTS

This Part first presents in more detail reasons why state action should count in the preemption analysis, as well as why the benefits associated with such an approach tend to outweigh the costs. It then proceeds to explore how this proposal could apply not only to current state efforts to control GHG emissions but also to potential state efforts to protect public health more broadly, including in the prescription drug and product liability areas.

A. State Innovation, Congressional Intent, and the Supremacy Clause

Both the Supremacy Clause and Supreme Court precedent support a preemption jurisprudence that gives credit for state innovation. The Supremacy Clause "requires courts to ignore state law if (but only if) state law contradicts a valid rule established by federal law, so that applying the state law would entail disregarding the valid federal rule."²¹⁶ This, of course, requires a determination of what Congress intended when it enacted the statute at issue. Except in cases where Congress intends to completely displace state law (by express preemption or by occupying the field), Congress, through its legislation, is assuming that that state law will continue to apply in some or all areas, as determined by the language of any express preemption clauses coupled with the creation of state savings clauses. In creating the federal regulatory structure in a particular area, Congress directs the delegated federal agency to implement the statute's overall purposes as well as respond to specific issues within the statutory mandate that may arise after the statute's enactment.

216. Nelson, *supra* note 1, at 234.

For instance, in *Massachusetts v. EPA*, the Court rejected the idea that the CAA could not be used to regulate GHG emissions simply because Congress was not thinking specifically about GHG emissions at the time of the statute's enactment. Instead, the Court stated:

While the members of Congress that drafted § 202(a)(1) might not have appreciated the possibility that burning fossil fuels could lead to global warming, they did understand that without regulatory flexibility, changing circumstances and scientific developments would soon render the Clean Air Act obsolete. The broad language of § 202(a)(1) reflects an intentional effort to confer the flexibility necessary to forestall such obsolescence.²¹⁷

By this language the Court was confirming that the EPA, as the federal agency with delegated authority under the CAA, has the power and the obligation to respond to new concerns that arise within the scope of a congressional mandate (controlling air pollutants).

The question then becomes whether states also have that power through their retained authority consistent with the Supremacy Clause. The answer is yes, so long as that authority can be grounded in the federal enabling statute establishing the federal-state framework. For instance, in the CAA, Congress directed the states, along with EPA, to address the country's air pollution problems. In doing so, Congress intended both EPA and the states to experiment with different approaches to air pollution, even going so far as to allow California to enact motor vehicle standards that, if approved through the EPA waiver process, take on the authority of federal law.²¹⁸ This approach allows and even encourages a dynamic state law that has been impliedly "deputized" to implement congressional air pollution reduction goals. Indeed, in *Central Valley Chrysler-Jeep*, the California federal district court justified its finding of no preemption in large part on the important role Congress had intended for states, and particularly for California. Citing prior cases dealing with different aspects of the motor vehicle waiver provisions, the court found that Congress intended that California "should have the

217. *Massachusetts v. EPA*, 127 S. Ct. 1438, 1462 (2007).

218. See *supra* notes 119–121 and accompanying text.

'broadest possible discretion in selecting the best means to protect the health of its citizens'" and that Congress "consciously chose to permit California to blaze its own trail with a minimum of federal oversight."²¹⁹ As a result, California and any states that choose to follow it have been an integral part of Congress's mission regarding air pollution from the start.

While not all statutes governing public health and the environment contain such an express statement of cooperative federalism as exists in the CAA, state savings clauses themselves also support a dynamic role for state law, including common law. By failing to include express preemption clauses (or creating only limited ones) along with broad state savings clauses, Congress can be seen as legislating not only against a backdrop of existing state law but also with an expectation that a dynamic state law will respond to new concerns. For instance, Congress indicated in the Food, Drug, and Cosmetic Act, that "[n]othing in the amendments made by this Act . . . shall be construed as invalidating any provision of State law which would be valid in the absence of such amendments unless there is a direct and positive conflict between such amendments and such provision of State law."²²⁰ This expressly leaves room for all forms of state law to govern in this area in the absence of a "direct and positive conflict." The question then is what Congress means by "state law" and whether that is state law only as it exists at that moment or state law as it develops over time in response to changing circumstances.

It does not seem too much of a stretch to maintain that Congress is presumed to be fully aware that state statutory and common law change over time. Indeed, any student of tort law is aware that there have been profound changes in state product liability law (both statutory and common law) both prior to and since Congress spoke on the issue of the role of state law in the federal framework governing food and drug safety in 1962. Therefore, one can conclude that state savings clauses in federal statutes governing public health, safety, and the environment both preserve existing state law (to the extent allowed by Congress) and allow for that state

219. *Cent. Valley Chrysler-Jeep, Inc. v. Goldstene*, 529 F. Supp. 2d 1151, 1171 (E.D. Cal. 2007) (quoting *Ford Motor Co. v. EPA*, 606 F.2d 1293, 1297 (D.C. Cir. 1979)).

220. *Drug Amendments of 1962*, Pub. L. No. 87-781, § 202, 76 Stat. 780, 793 (1962).

law to be dynamic and change over time to address new concerns. A preemption doctrine that places express weight on state innovative efforts to fulfill Congressional mandates in the area of public health, safety, and environmental protection provides a more realistic and comprehensive doctrine that reflects the relationship between state law in areas of traditional state concern and the federal regulatory state.

Ultimately, the federal statute itself, coupled with substantive agency regulatory standards, will be the focal point of determining whether the federal standards set only a floor for state action or also a ceiling. As recent events in the area of climate change have shown, however, federal agency action generally has not set substantive standards, but instead only made arguments against *states* setting substantive standards against the backdrop of federal agency inaction. In such circumstances, state action that is grounded in the federal statutes, which themselves maintain a role for state law, is consistent with the Supremacy Clause. Moreover, in addition to its constitutional and statutory basis, recognizing state innovation in the preemption analysis is supported by existing case law and is good public policy. These issues are discussed below.

B. Support for State Innovation in the Preemption Analysis

This section discusses case law and policy principles that support counting state innovation in the preemption analysis and suggest ways that courts can implement such a change in a manner that is consistent with the Supremacy Clause. These reasons include: (1) the Court's recent decision in *Massachusetts v. EPA*, along with empirical data on the Court's preemption decisions that, together, support the idea of a special solicitude for states; (2) the important policy developments that can occur when states act as "laboratories of democracy;" and (3) the fact that such an approach may encourage Congress to focus on the policy issues in question in a way that also addresses the relationship between the federal and state government in implementing that policy. As shown below, there are significant benefits to allowing state innovation to count in the preemption analysis that, on balance, outweigh the costs associated with non-uniformity.

1. Judicial Recognition of a Special Role for States as Parties

As explained earlier, the Supreme Court has recently recognized in *Massachusetts v. EPA* that states “are not normal litigants” and are entitled to “special solicitude,” particularly when they are attempting to protect the public health of their citizens and state natural resources.²²¹ Although the Court made this statement in the context of Article III standing, the case upon which the Court relied, *Georgia v. Tennessee Copper Co.*,²²² was a state public nuisance case, not a standing case. Thus, the Court’s recent use of this precedent supports the idea that courts should give greater leeway to states’ use of the judicial process in general to achieve public health and environmental protection goals.²²³

Notably, in 2006, Michael Greve and Jonathan Klick conducted an empirical assessment of Supreme Court statutory preemption decisions during most of the Rehnquist Court years (1986-2004).²²⁴ They found that “[a]ll else equal, rulings *against* preemption are much more likely in cases to which the state is a party” than when the state is not a party.²²⁵ Although the data set was small, the authors observed that business interests seemed to do fine against private parties but could not “catch a break” against the states, regardless of a state’s role as petitioner or respondent.²²⁶ The authors ultimately concluded that despite any pro-business tendencies of conservative justices, “when states insist upon their right to regulate business over and above a federal baseline, the Court will often give them their due.”²²⁷

The Court’s recent recognition in *Massachusetts v. EPA* of a “special solicitude” for states in the context of standing is consistent

221. *Massachusetts v. EPA*, 127 S. Ct. at 1454–55.

222. 206 U.S. 230 (1907).

223. See Bradford Mank, *Should States Have Greater Standing Rights than Ordinary Citizens?: Massachusetts v. EPA’s New Standing Test for States*, 49 WM. & MARY L. REV. 1701 (2008) (“[The Supreme Court] has historically given states preferential status in federal courts when a state files a *parens patriae* suit based on the state’s quasi-sovereign interest in the health and welfare of its citizens or the natural resources of its inhabitants and territory.”).

224. Michael S. Greve & Jonathan Klick, *Preemption in the Rehnquist Court: A Preliminary Empirical Assessment*, 14 SUP. CT. ECON. REV. 43 (2006).

225. *Id.* at 55. State participation as an amicus did not appear to have nearly as significant an effect on the outcome of the preemption question as did the state participation as a party to the dispute. *Id.* at 69–72.

226. *Id.* at 67–68.

227. *Id.* at 68.

with the existing data regarding the Court's preemption cases. Just as *Massachusetts v. EPA* gave states "their due" in their efforts to protect state public health and natural resources, the existing data show the Court is attuned to similar efforts on conflicts between state efforts to go beyond a federal baseline and arguments for federal uniformity under the Supremacy Clause. Taken together, the Court's existing jurisprudence and empirical data support the idea that courts should create a preemption jurisprudence that places more express weight on state efforts to protect the interests of their citizens and natural resources through innovative regulatory and common law actions. Giving extra weight to state innovation in the preemption analysis as a doctrinal matter makes the already recognized special status of state action an explicit rather than an implicit and haphazard part of the analysis.

2. State Regulation as Laboratories of Democracy

When discussing legal principles based on federalism, Justice Brandeis's famous dissent in *New State Ice Co. v. Liebmann* is quoted frequently to support the idea that "[t]here must be power in the States and the Nation to remould, through experimentation, our economic practices and institutions to meet changing social and economic needs."²²⁸ According to Justice Brandeis, courts should avoid interfering with state legislative efforts so that "a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments . . ."²²⁹ This idea that courts should allow state experimentation to help find solutions to the difficult economic and social concerns of the day has found its way into the Supreme Court's majority and dissenting opinions in many of its most high-profile and difficult cases in recent years. These cases include decisions on the limits of congressional authority under the Commerce Clause,²³⁰ limits of state authority

228. 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting).

229. *Id.*

230. *United States v. Lopez*, 514 U.S. 549, 581 (1995) (striking down the federal Gun-Free School Zones Act on grounds that it exceeded Congress's powers under the Commerce Clause). "In this circumstance, the theory and utility of our federalism are revealed, for the States may perform their role as laboratories for experimentation to devise various solutions where the best solution is far from clear." *Id.* (citation omitted).

under the Sixth Amendment in the context of criminal sentencing,²³¹ limits the Equal Protection Clause of the Fourteenth Amendment places on state policies governing affirmative action and single-sex higher education,²³² and the ability of states to allow the use of marijuana for medical purposes despite federal law to the contrary.²³³

By contrast, with the exception of ERISA²³⁴ cases and now the the California auto emissions cases, courts have placed little, if any, emphasis in preemption analysis on the fact that state innovation, in and of itself, is important.²³⁵ Instead, preemption analysis has mostly ignored the role of states as laboratories even though preemption analysis in general centers on the importance of states in our federalist system of government. This should change, and state efforts to prevent GHG emissions show why. As has been recently noted, “[p]erhaps more than at any time in the last thirty-five years, the states and localities have begun to fulfill their potential as ‘laboratories’ of experimentation in achieving environmental

231. *Blakely v. Washington*, 542 U.S. 296, 327 (2004) (Kennedy, J., dissenting) (dissenting from decision invalidating state trial court sentencing procedure on Sixth Amendment grounds). The decision “implicates not just the collective wisdom of legislators on the other side of the continuing dialogue over fair sentencing, but also the interest of the States to serve as laboratories for innovation and experiment.” *Id.* (citation omitted).

232. *Gruiter v. Bollinger*, 539 U.S. 306, 342 (2003) (upholding Michigan Law School’s affirmative action policy, discussing alternatives to racial preferences in admissions in various states, and suggesting that “[u]niversities in other States can and should draw on the most promising aspects of these race-neutral alternatives as they develop” (citation omitted)); *United States v. Virginia*, 518 U.S. 515, 601 (1996) (Scalia, J., dissenting) (stating that majority’s decision holding same-sex military college violated the Equal Protection Clause of the Fourteenth Amendment “places it beyond the power of a ‘single courageous State,’ not only to introduce novel dispositions that the Court frowns upon, but to reintroduce, or indeed even adhere to, disfavored dispositions that are centuries old” (citation omitted)).

233. *Gonzales v. Raich*, 545 U.S. 1, 42 (2005) (O’Connor, J., dissenting). In her dissent from the majority decision finding the federal Controlled Substances Act within Congress’s Commerce Clause authority, Justice O’Connor stated that the case “exemplifies the role of States as laboratories” within the states’ “core police powers” to define criminal law and to protect the health, safety, and welfare of their citizens.” *Id.* (citation omitted).

234. Employee Retirement Income Security Act of 1974, 29 U.S.C. §§ 1001–1461 (2000).

235. See *N.Y. State Conference of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.*, 514 U.S. 645, 667 n.6 (1995) (holding that Congress did not intend ERISA to block state health care cost control, “but rather meant to encourage and rely on state experimentation like New York’s”); *Boyle v. Anderson*, 68 F.3d 1093, 1109 (8th Cir. 1995) (using *Travelers* to reject expansive interpretation of ERISA’s preemption clause to avoid a result that would “preempt a state’s effort to serve as a ‘laboratory of democracy’ in the realm of health care”); *Green Mountain Chrysler Plymouth Dodge Jeep v. Crombie*, 508 F. Supp. 2d 295, 312 (D. Vt. 2007) (relying on California’s history as a “laboratory” of innovative policy in controlling new motor vehicle auto emissions as a reason to find no preemption).

protection goals.”²³⁶ There can be little dispute today that in the case of efforts to prevent GHG emissions, states are undertaking innovative regulatory and common law tort efforts to achieve national and state-wide emissions reductions while the federal government has done little other than create roadblocks for the states. This is happening in a context where it has been decades since Congress spoke on the issue of federal preemption and state reserved authority, where federal agency action has completely transformed the field of air pollution law, and where, in the area of GHG emissions, there is no guidance from Congress and little action from the EPA. In attempting any preemption analysis in this area, a legal framework that gives weight to state innovation makes sense. This is particularly true in the case of auto emissions, where the CAA expressly allows only California to set standards that exceed federal standards, thus allowing state experimentation without forcing industry to comply with a host of different standards from different states.²³⁷

The proposal set forth here would allow state law, along with federal law, to be innovative and address areas not specifically anticipated by Congress (i.e., climate change issues as part of air pollution law) but that become necessary to meet federal and state needs until Congress can take up the issue itself.²³⁸ While the states do not have the status of the delegated federal agency to achieve congressional purposes, in the absence of express preemption, one can argue that Congress preserved a role for the states to be active, not static, and states should be given leeway to act at least until Congress says otherwise.

Giving states this leeway does not necessarily run afoul of the Supremacy Clause. Congress can always take action to indicate that it wishes to rein in the states and have a unified, federal policy on GHG emissions emanating from the EPA and other federal agencies.

236. See Glicksman, *Cooperative to Inoperative*, *supra* note 16, at 720; see also Kirstin H. Engel, *Harnessing the Benefits of Dynamic Federalism in Environmental Law*, 56 EMORY L.J. 159, 182–83 (2006) (“Regulatory innovation is especially important with respect to environmental law where the actual object of regulation—the environment—is continually changing, in response to myriad factors, including the effects of regulation itself.”) [hereinafter Engel, *Harnessing the Benefits*].

237. See Carlson, *supra* note 16, at 311 (“Policy experimentation by one of fifty states in the absence of federal regulation seems an ideal way to experiment with new technology.”).

238. See Hills, *supra* note 10, at 56–57.

Indeed, as Roderick Hills has suggested and as is explained in more detail below, Congress is much more likely to act and provide clarity on these issues if courts decline to preempt state law.²³⁹ Although Hills's point was made in arguing for continuing to apply the presumption against preemption of state law, it has equal force in connection with arguing that courts should not only apply a presumption against preemption but also consider whether states are taking innovative actions to achieve federal goals. In this way, states acting as "laboratories" create a forum that allows new ideas to spread from state to state ("horizontal" policy innovation) but also allows new ideas to spread from the states to the federal government ("vertical" policy innovation).²⁴⁰ Giving states more leeway when they are attempting to be innovative, particularly in the face of comparative federal agency inaction, gives Congress more "material" to work with when and if it takes up the issue itself. If, however, state innovation is squelched through industry or federal agency preemption arguments, not only does industry have no incentive to bring the issue to Congress but even if Congress (or EPA) does eventually take up the issue, there will be less data and more limited policy options to rely upon in creating a solution.

3. Counting State Innovation May Result in Quicker Federal Congressional Policy on New Issues and Clearer Congressional Statements on Preemption

Allowing state innovation to act as a counterweight against federal agency arguments in favor of preemption may, even more than the basic presumption against preemption, result in quicker federal policy and clearer congressional statements on preemption. Roderick Hills has argued that courts should apply a presumption against preemption of state law because business interests are better able to respond to adverse preemption decisions by placing the issue

239. See *id.* at 1, 4, 17 (2007) (arguing that an anti-preemption rule will mobilize more powerful business groups to place preemption issues on Congress's agenda, leading to a public debate of the issue in the appropriate forum); see also *infra* note 244–246 and accompanying text.

240. See Engel, *Harnessing the Benefits*, *supra* note 236, at 182–83 (discussing horizontal and vertical policy innovation in environmental law); see also Adelman & Engel, *supra* note 16 (arguing that the current system of environmental federalism is a "dynamic one of overlapping federal and state jurisdiction" and that such a dynamic model should be encouraged through presumptions against preemption of state law, principles of legislative drafting against federal preemption, and a more specific presumption against federal regulations that preclude states from establishing more stringent standards).

on Congress's agenda.²⁴¹ Congress can then have an open, democratic debate on the issue, and a clearer statement from Congress is more likely to result.²⁴² If, by contrast, courts do not apply a presumption against preemption, they are more likely to preempt state law, a result that adversely impacts less powerful interests, making it less likely that the issue will be placed on the congressional agenda.²⁴³

This analysis applies not only to Hills's goal of putting preemption issues on Congress's agenda but also to the goal of encouraging Congress to take up difficult substantive policy issues (such as limits on GHG emissions) in the first place. If courts interpret the CAA and other federal legislation to preempt state innovation in the area of controlling GHG emissions, industry has little, if any, incentive to encourage Congress to address the issue of whether there should be federal limits on GHG emissions. If, however, courts allow states to regulate GHG emissions and pursue common law claims for relief, industry has a significant incentive to lobby for uniform federal standards (which it hopes will be less stringent than state standards) and to attempt to obtain some level of preemption of state law in the process. Thus, allowing state innovation to counteract agency and industry preemption arguments can accelerate a federal legislative response to the general policy issue along, perhaps, with a more contemporary congressional statement on preemption of state law than exists today in the CAA or any other laws related to stationary source or vehicle emissions.

There is at least some evidence that this is occurring right now in the case of GHG emissions. In late 2007, Congress made a significant effort to take up the issue of federal limits on GHG emissions. Although industry is lobbying heavily to achieve a bill that favors its interests, industry is not opposed to the idea of

241. Hills, *supra* note 10, at 1, 4, 17.

242. *Id.*

243. *Id.*; see also DeShazo & Freeman, *supra* note 94, at 1500 (arguing that "states can be important catalysts of a federal policy response by stimulating both pro-regulatory and anti-regulatory forces to appeal to the federal government for relief sooner rather than later"); E. Donald Elliot et al., *Toward a Theory of Statutory Evolution: The Federalization of Environmental Law*, 1 J.L. ECON. & ORG. 313, 326 (1985) (arguing over twenty years ago that diverse state regulation could prompt industry to lobby for uniform federal regulation, and using the example of industry support for federal air pollution laws in the 1970s to obtain preemption of inconsistent and more stringent state laws).

congressional legislation because of the mounting number of state regulations and state-initiated lawsuits that, if successful, have the potential to impose far more stringent and nonuniform burdens on industry. While courts have not overwhelmingly favored the states in their efforts, they have not shut them down either, leaving business in a position of great uncertainty that it hopes Congress can remedy through federal legislation.²⁴⁴

Moreover, giving weight to state innovation allows courts to acknowledge explicitly the special role of states in preemption cases in a way not possible under current doctrine. Many scholars complain that the presumption against preemption of state law has become virtually meaningless, even though courts continue to pay it lip service in their opinions.²⁴⁵ Although that point is debatable, if the presumption has indeed lost some of its meaning, it may be because it is often overshadowed by post-congressional, federal agency positions attempting to carve out exclusive areas of federal interest or a failure of courts to recognize today's interrelationship between state and federal law. To some extent, if states are acting in areas of "traditional state concern," then it may be more difficult to recognize that they are also helping implement congressional public health and environmental protection goals through regulation or litigation. If, however, courts include as part of their analysis an additional credit for state innovation, they can value the special role of states as policymakers and litigators and distinguish the case from other cases of preemption involving solely private parties and/or

244. See Felicity Barringer, *A Coalition for Firm Limit on Emissions*, N.Y. TIMES, Jan. 19, 2007, at C1 (reporting the formation of a group of industry leaders seeking congressional legislation on climate change based on concerns over stringent state regulations and the opportunity to take advantage of a political climate at the federal level currently favorable to business interests); Eric Lipton & Gardiner Harris, *In Turnaround, Industries Seek U.S. Regulations*, N.Y. TIMES, Sept. 16, 2007 at A1 (reporting that after years of opposing federal regulation, some of the nation's biggest industries are pushing for congressional and federal agency health, safety and environmental standards in large part to avoid a patchwork of more stringent state regulations); see also DeShazo & Freeman, *supra* note 94, at 1509–16 (discussing how "regulatory uncertainty, induced or exacerbated by inconsistent state activity" produces significant industry costs which, along with other factors, "can increase the likelihood and move up the timing of federal regulation"); Richard L. Revesz, *Federalism and Environmental Regulation: A Public Choice Analysis*, 115 HARV. L. REV. 553, 571–78 (2001) (discussing public choice theories that support the idea that industry has the incentive to seek uniform, federal legislation over more diffuse state regulation governing environmental protection issues); *supra* note 246 and accompanying text (discussing claims by scholars that judicial allowance of diverse state policy encourages powerful industry interests to lobby Congress for a national solution).

245. See *supra* note 11 and accompanying text.

business interests. As shown earlier, the Supreme Court in *Massachusetts v. EPA* has already expressly acknowledged the special role of states for purposes of standing, and the data on Supreme Court decisions show that the Court is implicitly acknowledging that role in preemption cases. Giving express weight to state innovation in preemption cases merely makes more transparent a shift that finds support in precedent and is good policy.

Finally, the current failure to give weight to state innovation leads to unnecessarily strained arguments by the states to avoid preemption. Under current law, there is an incentive for states to assure courts that they are not using any tools beyond those that existed prior to the congressional legislation to avoid preemption. For instance, in both of the cases in which the lower courts dismissed the states' public nuisance claims, the states described their claims as "routine," "well-established," "simple," and "of the kind courts have adjudicated in the past."²⁴⁶ Such arguments attempt to establish that the states are acting in a "traditional" manner in areas of "traditional state concern." The states' incentive for arguing in this fashion is that current preemption doctrine still rests on an assumption that federal law can expand or change while state law stays the same. The fact that the states were actually attempting to be innovative to reduce pollution may have detracted, rather than added, to the merits of the claim. Indeed, once the courts rejected the idea that these were traditional, run-of-the-mill nuisance claims, the cases were over.

C. Broader Applications

While the focus of this Article has been on using state efforts to control GHG emissions to explore a new role for state innovation in the preemption analysis, the approach developed here can apply to other areas that involve state efforts to protect public health and the environment. Putting aside for a moment the state environmental protection regulations discussed in this Article, a main complement

246. *California v. Gen. Motors Corp.*, No. C06-05755 MJJ, 2007 WL 2726871, at *5, *15 (N.D. Cal. Sept. 17, 2007) (rejecting state's common law nuisance claim despite state's argument that the claim, "although complex, is the type of case that courts routinely resolve" and that "the legal framework for assessing global warming nuisance damages is well-established"); *Connecticut v. Am. Elec. Power Co.*, 406 F. Supp. 2d 265, 272 (S.D.N.Y. 2005) (dismissing states' common law nuisance claim and rejecting plaintiffs' arguments "why theirs is a simple nuisance claim of the kind courts have adjudicated in the past").

to federal regulation in the area of public health is, of course, tort litigation by individuals against product manufacturers. Much has been written about the benefits and detriments of tort litigation in this area. These benefits include providing compensation to injured plaintiffs, deterring risky conduct by product manufacturers, and providing to the public and government regulators information about the risks associated with products that often are not disclosed in the federal regulatory approval or oversight process (litigation against the tobacco companies, breast implant manufacturers, and pharmaceutical companies are only a few examples).²⁴⁷ Critics of the tort system argue, by contrast, that allowing the tort system to play a central role in product safety risks overdeterrence through the creation of a system that lacks uniformity and predictability and benefits primarily plaintiffs' lawyers.²⁴⁸ The argument follows that the federal agencies with delegated congressional authority to set health and safety standards have the scientific expertise necessary to set product standards, and thus, compliance with such standards should foreclose tort liability based on a regulatory compliance defense, an express or implied preemption defense, or both.²⁴⁹

So where does a preemption jurisprudence that takes into account state innovation (as defined in this Article) fit into this debate? As an initial matter, the bulk of product liability lawsuits, particularly those against drug and medical device manufacturers at the center of today's debate over agency preemption of state tort claims, do not count as state innovation at all because they are neither state regulatory initiatives nor common law suits brought by states.²⁵⁰ Nevertheless, states have been innovative in some areas of product liability law and might be encouraged to be more innovative

247. See, e.g., Rabin, *supra* note 16 (discussing compensation needs, monitoring the ethics of business practices, and recognizing the unanticipated circumstances where the regulatory system fails to disclose or act on critical information regarding product risks as reasons why there should be concerns with abandoning tort law and replacing it with a regulatory expertise model); Wendy E. Wagner, *When All Else Fails: Regulating Risky Products Through Tort Litigation*, 95 GEO. L.J. 693, 695 (2007) (arguing that in some settings, particularly those involving consumer and health protection, "the tort system can be more effective than the regulatory system in accessing the various types of information needed to inform regulatory decisions").

248. See Wagner, *supra* note 247, at 694 (citing and discussing work of Richard Epstein, Kip Viscusi, Richard Reich, and Peter Schuck).

249. See *id.*; Epstein, *supra* note 5.

250. See *supra* Part II.B. and accompanying text.

in ways that benefit the public and the federal legislative process if state innovation was given more weight in the preemption analysis.

In recent years, states have filed high-profile product liability suits against the tobacco and lead paint industries while municipalities have filed suits against the gun industry.²⁵¹ On the regulatory side, California's Proposition 65 requires businesses to give "clear and reasonable warning" regarding chemicals they manufacture, use, or sell, if the chemical is known to cause cancer or reproductive toxicity.²⁵² The law creates a private right of action for violation of its provisions to supplement state enforcement efforts.²⁵³ Other states, such as Michigan, have experimented recently with various forms of regulatory compliance defenses (with fraud exceptions) for pharmaceutical companies in order to promote the development of useful drugs.²⁵⁴ These regulatory compliance defenses may raise state constitutional or other concerns but likely do not raise federal preemption concerns.

All of these initiatives are efforts by states to experiment with tort law and product regulation to protect public health and raise the profile of certain issues the states may believe are not being adequately addressed by the existing federal regulatory regime. Moreover, in all these areas, even without the express "cooperative federalism" approach that exists in federal environmental laws, Congress has retained a significant role for state law either through failing to legislate in the area or by creating broad state savings

251. THOMAS O. MCGARITY ET AL., *THE TRUTH ABOUT TORTS: LAWYERS, GUNS, AND MONEY* 603 (2006) (discussing suits by municipalities against the gun industry and suits by state attorneys general against the tobacco industry); Bob Driehaus, *6 Ohio Cities Rush to File Suits Against Makers of Lead Paint*, N.Y. TIMES, Jan. 6, 2007, at A12 (discussing public nuisance suits by states and municipalities against paint manufacturers and state legislative efforts to limit such suits).

252. See CAL. HEALTH & SAFETY CODE § 25249.5–.13 (Deering Supp. 2008); Bradley C. Karkkainen, *Information-Forcing Environmental Regulation*, 33 FLA. ST. U. L. REV. 861, 871–75 (2006) (describing California Proposition 65); Alexandra B. Klass, *Pesticides, Children's Health Policy, and Common Law Tort Claims*, 7 MINN. J. L. SCI. & TECH. 89, 137–39 (2005) (describing California Proposition 65).

253. CAL. HEALTH & SAFETY CODE § 25249.7 (Deering Supp. 2008).

254. See MICH. COMP. LAWS ANN. § 600.2946(5) (West 2007) (adopting blanket immunity for drug manufacturers based on federal regulatory compliance with exceptions to such immunity if the defendant has deceived or defrauded the FDA); Catherine M. Sharkey, *The Fraud Caveat to Agency Preemption*, 102 NW. U. L. REV. 841 (2008) (discussing Michigan and other statutory schemes granting immunity from liability or from punitive damages for compliance with FDA requirements). The Michigan law is an example of state innovation that limits rather than expands state tort remedies.

clauses in areas in which it has taken legislative action.²⁵⁵ Actions by states in these areas have the potential for a far greater impact nationally than hundreds or thousands of private tort lawsuits. It is in fact the heightened impact of state action, as opposed to private lawsuits, that provides some additional support for special treatment for states in the preemption analysis. Because such state actions make a bigger “splash” than private lawsuits, erring on the side of no preemption may encourage Congress to take up these now high-profile issues and create federal rules (that either follow or do not follow the state(s) lead) both with regard to substance as well as to whether or not federal uniformity and predictability of results are preferable to state experimentation and autonomy.

Further analysis is required to work through the specifics of the product liability examples cited here, along with other potential applications. For instance, there may be more powerful arguments in favor of uniform federal standards when it comes to the labeling of products such as drugs or pesticides that are distributed on a nationwide basis than there are when the issue is controlling GHG emissions, water pollution, or the release of toxic substances from individual power plants and other industrial facilities.²⁵⁶ Likewise, state common law claims for damages or injunctive relief against power plants or auto manufacturers may raise more concerns than state regulation in those areas based on the structure of the CAA, which expressly contemplates state regulation. The reverse, however, may be true with regard to claims against prescription drug, medical device, or pesticide manufacturers. In those cases, the FDCA and FIFRA arguably leave ample room for state law damages claims (brought by private parties or the state) but do not encourage (and, in the case of FIFRA, prohibit), certain types of affirmative state regulation regarding labeling and other matters.²⁵⁷ In sum, even within the realm of state action to protect human health and the environment, more or less leeway for state innovation may be more

255. See *supra* note 44, and accompanying text (discussing lack of express preemption of state law in FDCA).

256. See DeShazo & Freeman, *supra* note 94, at 1507–09 (noting that the economic case for federal preemption is strongest when states engage in regulation that is likely to interfere with the national distribution of uniform products and lowest when states merely regulate “end-of-pipe” pollution).

257. See *supra* notes 60–64 and accompanying text (discussing the *Bates* case and express preemption of state regulation of pesticide labeling).

or less appropriate depending on the existing federal statutory structure and real-world economic concerns. Apart from those real distinctions, however, this Article attempts to at least articulate the beginning of a more contemporary approach to federal preemption of state law within the now ever-present federal regulatory state that governs the protection of human health and the environment.

CONCLUSION

This Article proposes that courts should give express weight to state innovation in deciding preemption cases. In today's regulatory state, state law is inherently intertwined with federal law in fulfilling congressional policy goals in a way that current preemption doctrine does not reflect. While the presumption against preemption of state law may have been formulated for a preemption doctrine based on "separate spheres" of state and federal influence, an explicit role for state innovation may allow courts to more effectively implement congressional intent in a way that recognizes the role states play in implementing federal laws protecting human health and the environment. A review of recent developments in state efforts to control GHG emissions and the response of business interests, federal agencies, and Congress to these developments shows granting states "special solicitude" in the preemption analysis, as has been done in the Court's recent Article III standing analysis, is consistent with the Supremacy Clause and may also result in better federal policy.

