

## RESTRAINING FEDERAL PREEMPTION WHEN THERE IS AN “EMERGING CONSENSUS” OF STATE ENVIRONMENTAL LAWS AND POLICIES

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### INTRODUCTION

The model of cooperative federalism, which engages both the federal and state governments in setting and meeting environmental goals, has dominated the environmental regulatory field since the 1970s. It integrates national policies and interstate environmental pollution reduction goals with the sensibilities and flexibility of locally tailored actions. Recent trends in federalism jurisprudence, however, have circumscribed both federal and state power to regulate in the environmental arena. Courts' applications of federalism principles to constrict both federal and state solutions can impede the stronger environmental protection that the public is increasingly demanding.

At the same time, Congress and the executive branch have failed to advance key public environmental goals. For example, the federal government has failed both to address global climate change threats and to move aggressively forward on clean energy development solutions. Federal actions to reduce mercury pollution from coal plants and various pollutants from cars and trucks have widely been criticized as too little, too late. The political will for environmental leadership at the federal level has stagnated in the early part of the twenty-first century.

The states are serving as Justice Brandeis's fifty laboratories of democracy.<sup>1</sup> They are stepping up to fill this environmental law and policy gap as federal actions have been viewed as insufficient or, in some cases, counter-productive.

For example, more than a dozen states have enacted new statutes or regulatory standards directed at reducing more mercury pollution from coal

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

plants and sooner than the federal standards require.<sup>2</sup> Twenty-eight states and the District of Columbia have enacted renewable energy standards requiring utilities to provide an increasing percentage of the power supplied to consumers from wind power, solar energy, and other relatively cleaner “alternative” energy sources.<sup>3</sup> Sixteen states are following California in adopting “clean car” standards, designed to reduce carbon dioxide pollution from cars over the next decade,<sup>4</sup> and close to twenty states are enacting various forms of legislation, regulations, and executive actions designed to reduce greenhouse gas pollution in order to help solve climate change problems.<sup>5</sup>

While state governments are exerting greater responsibility for environmental protection in these and other related ways, the federal courts have sometimes applied the Supremacy Clause, federal preemption principles, and dormant commerce clause principles to strike down state laws that are held to conflict with federal law<sup>6</sup> or place an undue burden on interstate commerce.<sup>7</sup>

The balance of federal and state power in the environmental context is being disrupted. State environmental policies can and should be more than merely stronger stop-gap measures. Often these policies are carefully designed and tailored to meet the goals, needs, values, and circumstances of each state. Furthermore, state policies can create significant environmental benefits and experience, particularly when, as now, a large number of states step up to act, producing both cumulative impacts and comparative experiences.

A key question moving forward is how best to preserve the most significant benefits of these state policies over the long term. How and when should the courts and Congress create space for states to act more strongly in the interests of the environment and of their citizens? Moreover, if and

<sup>2</sup> Nat’l Ass’n of Clean Air Agencies, *State Mercury Programs for Utilities* (Dec. 7, 2006), <http://www.4cleanair.org/Documents/StateTable.doc>.

<sup>3</sup> Pew Center on Global Climate Change, *States with Renewable Portfolio Standards*, [http://www.pewclimate.org/what\\_s\\_being\\_done/in\\_the\\_states/rps.cfm](http://www.pewclimate.org/what_s_being_done/in_the_states/rps.cfm) (last visited Jan. 2, 2008).

<sup>4</sup> Pew Center on Global Climate Change, *States Poised to Adopt California Vehicle GHG Standards*, [http://www.pewclimate.org/what\\_s\\_being\\_done/in\\_the\\_states/vehicle\\_ghg\\_standard.cfm](http://www.pewclimate.org/what_s_being_done/in_the_states/vehicle_ghg_standard.cfm) (last visited Jan. 2, 2008).

<sup>5</sup> Pew Center on Global Climate Change, *States with Greenhouse Gas Emissions Targets*, [http://www.pewclimate.org/what\\_s\\_being\\_done/in\\_the\\_states/emissionstargets\\_map.cfm](http://www.pewclimate.org/what_s_being_done/in_the_states/emissionstargets_map.cfm) (last visited Jan. 2, 2008).

<sup>6</sup> *E.g.*, *Engine Mfrs. Ass’n v. S. Coast Air Quality Mgmt. Dist.*, 541 U.S. 246 (2004) (vacating and remanding a Ninth Circuit holding that, because local emissions rules for fleet operators affected purchase and not manufacture of vehicles, the rules were not preempted by the Clean Air Act); *Cent. Valley Chrysler-Jeep v. Witherspoon*, No. CV F 04-6663, 2007 WL 135688 (E.D. Cal. Jan. 16, 2007) (holding that California’s efforts to reduce global warming pollution were preempted by the Clean Air Act).

<sup>7</sup> *See, e.g.*, *City of Philadelphia v. New Jersey*, 437 U.S. 617 (1978) (holding that a New Jersey law prohibiting the importation of solid or liquid waste originating outside of the state limits violated the Commerce Clause); *Baldwin v. G.A.F. Seeling, Inc.*, 294 U.S. 511 (1935).

when Congress does eventually act on these pressing environmental issues, such as global climate change solutions, how can new federal legislation ensure the integrity of a national regulatory scheme while retaining the strongest elements of existing state measures? Should it matter how many states have stepped up to act when the federal government has not?

This Article focuses on one key point for consideration. When there is an emerging consensus of state legislative actions moving in the same general direction in a particular environmental field, should that influence a reviewing court's application of federal preemption principles? In short, in the federal-state cooperative framework of the Clean Air Act, Clean Water Act, and other major environmental laws, should it be a relevant factor for judicial adjudication and determination that a growing number of states are stepping up to act along common lines to provide stronger environmental protections? This Article argues yes: an emerging state consensus should, indeed, make a difference.

This principle would support a better balance of federal and state powers for environmental laws. In such cases, courts should apply the Supremacy Clause with more restraint and should not imply congressional intent to preempt state environmental laws absent a clear statement of preemptory language or a very clear and fundamental conflict between federal and state laws. If Congress is firmly convinced that adoption of a particular environmental policy by a growing number of states would undermine the efficacy of a national regulatory scheme, then Congress should clearly state its intention to preempt state action. Otherwise, implied preemption should be applied narrowly in the environmental policy context in order to recognize the states' traditional police powers over public health and safety and regulation of land uses.<sup>8</sup> This clear statement rule is advocated by many constitutional law scholars,<sup>9</sup> and it is supported by the traditional presumption

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<sup>8</sup> See, e.g., *Solid Waste Agency of N. Cook County v. U.S. Army Corps of Eng'rs (SWANCC)*, 531 U.S. 159, 174 (2001) (“[W]e find nothing approaching a clear statement from Congress that it intended § 404(a) to reach an abandoned sand and gravel pit such as we have here. Permitting respondents to claim federal jurisdiction over ponds and mudflats falling within the ‘Migratory Bird Rule’ would result in a significant impingement of the States’ traditional and primary power over land and water use.”).

<sup>9</sup> Commentators from across the ideological spectrum have advocated inclusion of such a clear statement rule in the Court's preemption doctrine, including then-Judge Kenneth Starr in his role as head of a task force of the U.S. Appellate Judges Conference, which in 1991 issued a report critical of the implied preemption doctrine, KENNETH STARR ET AL., *THE LAW OF PREEMPTION: A REPORT OF THE APPELLATE JUDGES CONFERENCE* 15–18 (Am. Bar Ass'n 1991); Justices Stevens, Souter, Thomas, and Ginsburg, calling for the Court to revisit its “obstacle” preemption doctrine in Stevens's dissenting opinion in *Geier v. American Honda Motor Co.*, 529 U.S. 861, 908–11 (2000) (Stevens, J., dissenting); and the Environmental Law Institute, ENVTL. LAW INST., *REDEFINING FEDERALISM, LISTENING TO THE STATES IN SHAPING “OUR FEDERALISM”* 9–20 (Douglas T. Kendall ed., 2004). See also Comment, *Preemption Doctrine in the Environmental Context: A Unified Method of Analysis*, 127 U. PA. L. REV. 197, 208 (1978) (“States would be better able to protect their own interests and to avoid intrusion on those of the nation if courts were to apply preemption doctrine in a coherent and predictable manner. Congress could alleviate much of the confusion in this area if it were to pass a provision forbidding the inference

against preemption. Some courts, however, have begun to deviate from that presumption.<sup>10</sup>

The clear statement rule should apply with even greater force, though, when there is an emerging consensus of state policy actions moving in a largely consistent direction. This makes sense for several reasons. It will enhance cooperative federalism by allowing states to fill gaps when the federal government fails to act. It will restore consistency to federalism jurisprudence in cases involving areas of traditional state concern. It will help courts apply preemption doctrine without having to “guess” at Congress’s intent. Overall, it is simply good policy to provide room for state creativity in addressing today’s challenging environmental problems while maintaining a strong federal floor of environmental protection.

To illustrate, there is a clear trend of states enacting renewable energy portfolio standards (RPS), which require utilities and other energy suppliers to provide a specified percentage of electricity from renewable and other clean energy sources.<sup>11</sup> The goals of state RPS statutes are: to avoid greenhouse gases and other air pollution, water pollution, and highly radioactive wastes from coal, oil, and nuclear power plants; and to improve electric supply reliability by increasing the diversity of power supply resources.

Illinois’s RPS, for example, requires that the new Illinois Power Agency and the investor-owned distribution utilities provide a specified percentage of renewable energy at an annually increasing rate: in 2008, renewable energy must constitute 2% of each utility’s total supply to eligible customers; in 2009, the required renewable energy is 4%; and the requirement then ramps up by 1% each year up to 10% by 2015.<sup>12</sup> Thereafter, between 2015 and 2025, the required renewable energy increases 1.5% each year up to 25% by the year 2025.<sup>13</sup> The statute specifies the types of renewable energy resources that are eligible to meet this standard: “wind, solar thermal energy, photovoltaic cells and panels, biodiesel, crops and untreated and unadulterated organic waste biomass, trees and tree trimmings, hydro-power that does not involve new construction or significant expansion of

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of congressional intent to occupy a field in the absence of a federal statute that contains an express provision to that effect.”).

<sup>10</sup> See generally Calvin Massey, “Joltin’ Joe Has Left and Gone Away”: *The Vanishing Presumption Against Preemption*, 66 ALB. L. REV. 759 (2003); Susan Raeker-Jordan, *A Study in Judicial Sleight of Hand: Did Geier v. American Honda Motor Co. Eradicate the Presumption Against Preemption?*, 17 BYU J. PUB. L. 1 (2002). But see *Oxygenated Fuels Ass’n v. Davis*, 331 F.3d 665 (9th Cir. 2003) (applying the clear statement rule in holding that California’s ban on the gasoline additive MTBE was not preempted by the Clean Water Act).

<sup>11</sup> RPS is the standard terminology, but some programs are called renewable energy standards, renewable resource standards, alternative energy standards, and so forth.

<sup>12</sup> Illinois Power Agency Act, 20 ILL. COMP. STAT. 3855/1-1 (2007).

<sup>13</sup> *Id.*

hydropower dams, [landfill gas,] and other alternative sources of environmentally preferable energy.”<sup>14</sup>

The other state RPS statutes move in the same policy direction, but dictate varying percentage targets, timelines, and eligible renewable energy resources. For example, state renewable energy production targets range from Maryland’s modest 9.5% by 2022<sup>15</sup> to California’s 20% by 2010<sup>16</sup> and New York’s 25% by 2013.<sup>17</sup> Maine already uses more than 30% renewable energy and has acted to increase new renewable energy production capacity by 10% by 2017.<sup>18</sup> Within these percentage goals, some states tier eligible renewable energy sources and establish separate goals for each tier or class. The variations in percentage targets, timelines, and eligible power resources often reflect different clean energy opportunities in the states (e.g., wind power in Illinois and hydropower in Maine), different environmental values and power mixes, and different energy structures among the states.

The Supreme Court has held that power need, feasibility, services, and economics, including retail energy pricing, are areas of traditional state regulation.<sup>19</sup> What is fundamental here is that many states are taking energy and environmental policy actions that move in the same direction and along a consistent trend line.

Part I of this Article explains the importance of preserving a balance of power that allows room for both state and federal actions to achieve stronger environmental protection goals. Part II presents a brief overview of preemption doctrine and explores the value of a clear statement rule when there is an emerging consensus of state environmental policy actions in similar directions.

## I. SETTING THE STAGE: STATE AND FEDERAL POWER IN ENVIRONMENTAL REGULATION

The Supreme Court moved to constrict the scope of Congress’s room to act under the Commerce Clause in the *United States v. Morrison* and

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<sup>14</sup> *Id.* § 1-10. Resources specifically excluded from eligibility include “incineration, burning, or heating of tires, garbage, general household, institutional, and commercial waste, industrial lunchroom or office waste, landscape waste other than trees and tree trimmings, railroad crossties, utility poles, and construction or demolition debris, other than untreated and unadulterated waste wood.” *Id.*

<sup>15</sup> MD. CODE ANN., PUB. UTIL. COS. § 7-703(b) (LexisNexis 2007).

<sup>16</sup> CAL. PUB. UTIL. CODE § 399.11(a) (West 2007).

<sup>17</sup> Order Regarding Retail Renewable Portfolio Standard, Proceeding on Motion of the Commission Regarding a Retail Renewable Portfolio Standard, Case 03-E-0188, at 4 (N.Y. Pub. Serv. Comm’n Sept. 24, 2004), available at [http://www3.dps.state.ny.us/pscweb/WebFileRoom.nsf/Web/85D8CCC6A42DB86F85256F1900533518/\\$File/301.03e0188.RPS.pdf](http://www3.dps.state.ny.us/pscweb/WebFileRoom.nsf/Web/85D8CCC6A42DB86F85256F1900533518/$File/301.03e0188.RPS.pdf).

<sup>18</sup> ME. REV. STAT. ANN. tit. 35-A, § 3210 (2007).

<sup>19</sup> *Pac. Gas & Elec. Co. v. State Energy Res. Conservation & Dev. Comm’n*, 461 U.S. 190, 205 (1983).

*United States v. Lopez* decisions and other related cases.<sup>20</sup> That has led to considerable concern that the Court will find insufficient Commerce Clause authority for such bedrock federal environmental laws as the Clean Water Act<sup>21</sup> and the Endangered Species Act.<sup>22</sup> Some litigants have also relied on the Tenth Amendment to argue that federal environmental regulation impinges on areas of traditional state and local authority<sup>23</sup> and on the Eleventh Amendment to limit the ability of citizens to sue a state agency for violations of federal environmental law.<sup>24</sup> Thus far, courts have not accepted those arguments.

At the same time, however, state-level environmental regulation has become subject to increasing scrutiny under dormant commerce clause principles. Despite the traditional state authority to regulate matters of public health and safety, some state environmental laws have been found to create an “undue burden” or discriminate against interstate commerce. Courts reason that states cannot isolate themselves from a “common” national problem even if such laws have legitimate health and safety pur-

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<sup>20</sup> *United States v. Morrison*, 529 U.S. 598 (2000) (holding that the Violence Against Women Act exceeded Congress’s authority to act under the Commerce Clause because gender-motivated crimes of violence were not considered economic activity); *United States v. Lopez*, 514 U.S. 549 (1995) (holding that the Gun-Free School Zones Act exceeded Congress’s authority to act under the Commerce Clause because it was not a regulation of activity arising out of or connected with a commercial transaction that substantially affected interstate commerce); see *Solid Waste Agency of N. Cook County v. U.S. Army Corps of Eng’rs (SWANCC)*, 531 U.S. 159, 174 (2001). *But see* *Gonzales v. Raich*, 545 U.S. 1 (2005) (holding that the regulation of marijuana under the federal Controlled Substances Act was within Congress’s authority to act under the Commerce Clause because production of marijuana meant for home consumption had a substantial effect on supply and demand in the national market).

<sup>21</sup> See Christine A. Klein, *The Environmental Commerce Clause*, 27 HARV. ENVTL. L. REV. 1 (2003); Matthew B. Baumgartner, Note, *SWANCC’s Clear Statement: A Delimitation of Congress’s Commerce Clause Authority to Regulate Water Pollution*, 103 MICH. L. REV. 2137 (2005); Jamie Y. Tanabe, Comment, *The Commerce Clause Pendulum: Will Federal Environmental Law Survive in the Post-SWANCC Epoch of “New Federalism”?*, 31 ENVTL. L. 1051 (2001).

<sup>22</sup> See J. Blanding Holman, *After United States v. Lopez: Can the Clean Water Act and the Endangered Species Act Survive Commerce Clause Attack?*, 15 VA. ENVTL. L.J. 139 (1995). Five federal courts have now considered the question of Congress’s power to regulate under the Endangered Species Act. All of these courts found that the Endangered Species Act does fall within Congress’s Commerce Clause authority. See *Alabama-Tombigbee Rivers Coalition v. Kempthorne*, 477 F.3d 1250 (11th Cir. 2007), *cert denied*, 128 S. Ct. 877 (2008); *GDF Realty Invs., Ltd. v. Norton*, 326 F.3d 622 (5th Cir. 2003); *Rancho Viejo, LLC v. Norton*, 323 F.3d 1062 (D.C. Cir. 2003); *Gibbs v. Babbitt*, 214 F.3d 483 (4th Cir. 2000); *Nat’l Ass’n of Home Builders v. Babbitt*, 130 F.3d 1041 (D.C. Cir. 1997). The Supreme Court, however, has not directly resolved this issue.

<sup>23</sup> In *Wyoming v. U.S. Department of Interior*, the United States District Court for the District of Wyoming rejected Wyoming’s claim that the United States Fish and Wildlife Service had violated the Tenth Amendment when it sent a letter to the state identifying Endangered Species Act-related deficiencies in its state wolf-management plan. 360 F. Supp. 2d 1214 (D. Wyo. 2005). On appeal, the Tenth Circuit affirmed the District Court’s judgment, but rejected the claims for lack of standing and expressed no opinion on the Tenth Amendment claims. 442 F.3d 1262, 1265 (10th Cir. 2006).

<sup>24</sup> See *Bragg v. W. Va. Coal Ass’n*, 248 F.3d 275, 298 (4th Cir. 2001) (rejecting citizens’ group claim that “West Virginia waived its sovereign immunity in federal court when it . . . accepted the federal government’s invitation to act as the regulator of surface coal mining in the State”).

poses.<sup>25</sup> Moreover, in some recent decisions, courts have further limited state authority by finding that a state law conflicts with the language or intent of a federal law, or that Congress has left no room for states to regulate in a particular field, even where Congress has not expressly prohibited state action on that issue.<sup>26</sup>

The twin effects of this constitutional jurisprudence are to limit *both* federal and state powers to achieve stronger environmental protection. This cuts against the grain of thirty years of cooperative federal-state environmental programs—e.g., the Clean Air Act; Clean Water Act; Comprehensive Environmental Response, Compensation, and Liability Act; Endangered Species Act; and Resource Conservation and Recovery Act—that were enacted to establish a framework for large-scale progress in addressing environmental problems amidst increasing public awareness and desire for better environmental protection. State laws enhance and implement the federal programs and fill in the gaps where federal legislation and regulation is lacking. Both are important to address environmental concerns in comprehensive and effective ways.

Federal environmental action both establishes a floor of regulatory control and harmonizes environmental controls across all states. This national action is also necessary to address the interstate nature of many pollutants, especially air and water pollution. For example, nitrogen oxide and sulfur dioxide pollution from Midwestern coal plants drifts east to create smog in New Jersey and acidification of lakes in the Adirondacks and New England. Likewise, water pollution from sewerage overflows in one state along Lake Michigan can affect water quality in another, just as air pollution from Illinois coal plants can add mercury to Lake Michigan along the Wisconsin shoreline.

Federal action is also essential to achieve shared public goals that require environmental protections across the states in order to be effective. For example, the goal of protecting endangered species could be totally defeated if some states with populations of endangered and threatened species did not act even if other states did. That is one reason why Congress passed

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<sup>25</sup> *City of Philadelphia v. New Jersey*, 437 U.S. 617, 627 (1978); *Clean Air Mkts. Group v. Pataki*, 194 F. Supp. 2d 147, 159–62 (N.D.N.Y. 2002).

<sup>26</sup> *See, e.g., Engine Mfrs. Ass'n v. S. Coast Air Quality Mgmt. Dist.*, 541 U.S. 246 (2004) (vacating and remanding a Ninth Circuit holding that local emissions rules for fleet operators of vehicles are not preempted by the Clean Air Act because the rules establish emission standards that necessarily impact auto manufacturers, although the rules purport to be aimed only at purchasers); *United States v. Locke*, 529 U.S. 89, 99 (2000) (“The State of Washington has enacted legislation in an area where the federal interest has been manifest since the beginning of our Republic and is now well established. The authority of Congress to regulate interstate navigation, without embarrassment from intervention of the separate States and resulting difficulties with foreign nations, was cited in the Federalist Papers as one of the reasons for adopting the Constitution.”); *CSX Transp., Inc. v. Williams*, 406 F.3d 667 (D.C. Cir. 2005) (granting a preliminary injunction against enforcement of the D.C. Act, which would have banned shipments of certain hazardous materials by rail or truck within 2.2 miles of the U.S. capital, and holding that the Act likely is preempted by the Federal Railroad Safety Act).

the Endangered Species Act in 1973.<sup>27</sup> Moreover, national standards help to ensure that citizens of every state receive a baseline level of environmental protection and obtain the benefits of protection against cross-border pollution intrusions, regardless of whether those protections would have been independently enacted in their respective states.

Another traditional justification for federal authority is to prevent a “race to the bottom” among states in which the economic burdens fall largely on the regulating state while the concomitant environmental benefits—e.g., less pollution and better air quality—are dispersed among neighboring states.<sup>28</sup> The absence of federal baseline standards could lead state lawmakers to race with each other to lower environmental standards in order to attract businesses and industry to their respective states.

Today, however, the emerging trend is that some states are “racing to the top” to achieve early benefits or meet public demands to regulate overall greenhouse gas pollution that causes climate change,<sup>29</sup> control mercury pollution that harms both public health and wildlife,<sup>30</sup> require utilities to purchase and supply more renewable energy resources, such as wind power, that avoid pollution and spur economic development in rural communities,<sup>31</sup> and require automakers to sell more cars that produce less carbon dioxide pollution in order to help solve global warming problems.<sup>32</sup> Some businesses within the affected regulated industries—especially those businesses that operate facilities in multiple states—are now calling for uniform federal mandates.<sup>33</sup> This advocacy is driven, in part, by an understandable business operating desire for consistency and a practical desire to avoid different standards requiring different corporate policies and compliance practices in different states. This advocacy is also driven, in part, by pragmatic politics of shopping among federal and state legislative forums in order to achieve weaker environmental standards overall. The “business community” is hardly monolithic, and the perceived individual business winners and losers often take separate paths in advocating federal versus state policies in order to seize competitive advantages and economic gains.

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<sup>27</sup> 16 U.S.C. §§ 1531–1539 (2000).

<sup>28</sup> Some scholars question this rationale for federal environmental regulation. See, e.g., Richard L. Revesz, *Rehabilitating Interstate Competition: Rethinking the “Race to the Bottom” Rationale for Federal Environmental Regulation*, 67 N.Y.U. L. REV. 1210 (1992); Kirsten H. Engel, *State Environmental Standard-Setting: Is There a “Race” and Is It to the “Bottom”?*, 48 HASTINGS L.J. 271 (1997).

<sup>29</sup> See Pew Center on Global Climate Change, *supra* note 5.

<sup>30</sup> See Nat’l Ass’n of Clean Air Agencies, *supra* note 2.

<sup>31</sup> See Pew Center on Global Climate Change, *supra* note 3.

<sup>32</sup> See Pew Center on Global Climate Change, *supra* note 4.

<sup>33</sup> For example, see the United States Climate Action Partnership, <http://www.us-cap.org/> (last visited Jan. 2, 2008), describing its purpose as “call[ing] on the federal government to quickly enact strong national legislation to require significant reductions of greenhouse gas emissions.”

States do have a longstanding history to draw upon in regulating many environmental concerns related to public health, safety, and land use.<sup>34</sup> The Supreme Court has often recognized strong state interests in preserving and protecting natural resources.<sup>35</sup> Indeed, in its recent landmark decision in *Massachusetts v. EPA* on the federal government's responsibility to regulate carbon dioxide as an air pollutant covered by the federal Clean Air Act, the Court reaffirmed the sovereignty of a state over its own land and resources.<sup>36</sup> The Court found "considerable relevance" in the fact that the party seeking review was a sovereign state. Under the Court's analysis, Massachusetts had standing to sue on an environmental issue because of its interest in "all the earth and the air within its domain."<sup>37</sup>

States are often well positioned to craft environmental solutions that are effectively tailored to the needs, values, and circumstances of their citizens. Moreover, environmental problems can be highly place-specific, reflecting geography, topography, ecology, and climate factors. For example, states such as Illinois, with a large number of mercury "hot spots" in or near populated areas, may understandably have a greater need to regulate mercury pollution from nearby coal plants in order to protect children's health and the environment.<sup>38</sup>

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<sup>34</sup> See, e.g., *Metro. Life Ins. Co. v. Massachusetts*, 471 U.S. 724, 756 (1985) ("States traditionally have had great latitude under their police powers to legislate as 'to the protection of the lives, limbs, health, comfort, and quiet of all persons.'" (citing *The Slaughter-House Cases*, 83 U.S. (16 Wall.) 36, 62 (1873) (citation and internal quotation marks omitted))).

<sup>35</sup> E.g., *Rapanos v. United States*, 126 S. Ct. 2208, 2224 (2006) ("Regulation of land use, as through the issuance of the development permits sought by petitioners in both of these cases, is a quintessential state and local power."); *Solid Waste Agency of N. Cook County v. U.S. Army Corps of Eng'rs (SWANCC)*, 531 U.S. 159, 174 (2001) ("Permitting respondents to claim federal jurisdiction over ponds and mudflats falling within the 'Migratory Bird Rule' would result in a significant impingement of the States' traditional and primary power over land and water use."); *Sporhase v. Nebraska ex rel. Douglas*, 458 U.S. 941, 946 n.6 (1982) ("[F]ew public interests are more obvious, indisputable and independent of particular theory than the interest of the public of a state to maintain the rivers that are wholly within it substantially undiminished . . . ." (quoting *Hudson County Water Co. v. McCarter*, 209 U.S. 349, 356 (1908))); see also *Hughes v. Oklahoma*, 441 U.S. 322, 337 (1979) ("We consider the States' interests in conservation and protection of wild animals as legitimate local purposes similar to the States' interests in protecting the health and safety of their citizens."); *Georgia v. Tenn. Copper Co.*, 206 U.S. 230, 237 (1907) ("[T]he state has an interest independent of and behind the titles of its citizens, in all the earth and air within its domain. It has the last word as to whether its mountains shall be stripped of their forests and its inhabitants shall breathe pure air."); cf. *Lewis v. BT Inv. Managers*, 447 U.S. 27, 36 (1980) ("In the absence of conflicting federal legislation, the state retains authority under the general police power to regulate matters of 'legitimate local concern' even though interstate commerce may be affected." (citation omitted)).

<sup>36</sup> 127 S. Ct. 1438, 1454 (2007) (describing "Massachusetts' well-founded desire to preserve its sovereign territory today").

<sup>37</sup> *Id.* at 1454 (quoting *Tenn. Copper*, 206 U.S. at 237).

<sup>38</sup> Press Release, Ill. Dep't of Human Servs., Governor Blagojevich Proposes Aggressive Mercury Emission Controls for Illinois Power Plants (Jan. 5, 2006), <http://www.illinois.gov/PressReleases/ShowPressRelease.cfm?RecNum=4566&SubjectID=49>; see *In re Proposed New 35 Ill. Adm. Code 225 Control of Emissions From Large Combustion Sources (Mercury)*, Case No. R2006-025 (Ill. Pollution

Justice Louis Brandeis posited that when states are free to create and implement their own policy models for addressing common issues, they can become laboratories of democracy, developing innovative solutions that can be replicated in other states, but that are also tailored to meet local needs and situations.<sup>39</sup> That is certainly happening in the environmental field. More states are creating new models for reducing greenhouse gas pollution, developing climate change solutions, and advancing traditional utility regulatory powers to include policies to support renewable energy development.<sup>40</sup> For example, the Northeastern states' collaborative Regional Greenhouse Gas Initiative (RGGI) is adopting a suite of new policies aimed at reducing carbon dioxide pollution.<sup>41</sup> RGGI is positioned to test the effectiveness of the various policy approaches, evaluate them, tweak them, and then replicate and expand the strongest models that meet the needs and values of its citizens. The best of these state models can be considered for adoption on the federal level. The laboratories of democracy are busy experimenting today. States are stepping up while the federal government fails to act sufficiently strongly on core environmental problems.

## II. LIMITING FEDERAL PREEMPTION WHEN THERE IS AN EMERGING CONSENSUS OF STATE ACTIONS

Congress has not passed a new major federal environmental law in recent years despite the public's apparent rising environmental concerns. State governments have been stepping up to fill this void. If and when the federal government does act, how should preemption doctrine principles apply? This Part outlines the traditional elements of preemption doctrine and suggests that a clear statement rule should be applied in determining the validity of state environmental laws and policies. Moreover, the presumption against preemption should apply with even greater force when a growing number of states have adopted a particular environmental policy. When there is an emerging consensus of state actions in the same stronger direction, the application of federal preemption should be very restrained.

### A. Preemption Doctrine

The Supremacy Clause eliminates conflicts between federal and state law by establishing that the Constitution and laws of the United States are the "supreme Law of the Land."<sup>42</sup> Thus, federal law trumps or "preempts" state law in the event of a conflict. As applied, preemption doctrine requires identifying where conflicts between federal and state law occur,

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Control Bd. 2007), available at <http://www.ipcb.state.il.us/cool/external/CaseView2.asp?referer=coolsearch&case=R2006-025#>.

<sup>39</sup> *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting).

<sup>40</sup> See *supra* notes 3–5 and accompanying text.

<sup>41</sup> Regional Greenhouse Gas Initiative, <http://rggi.org/> (last visited Jan. 2, 2008).

<sup>42</sup> U.S. CONST. art. VI, cl. 2.

based on interpretations of Congress's intent to preempt state law. Preemption is often allowed "whether Congress' command is explicitly stated in the statute's language or implicitly contained in its structure and purpose."<sup>43</sup>

In the absence of explicitly preemptive language, courts have recognized at least two types of implied preemption. "Field preemption" occurs when the scheme of federal regulation is "so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it."<sup>44</sup> In this kind of implied preemption, Congress has fully "occupied the field" of regulation with respect to a particular subject. "Conflict preemption" occurs where "compliance with both federal and state regulation is a physical impossibility,"<sup>45</sup> or, alternatively, where state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress."<sup>46</sup>

The clear statement rule requires a court to avoid implying preemption when reviewing constitutional challenges to a state law. This rule narrows the circumstances in which field preemption and conflict preemption principles come into play. Courts should find federal preemption only when there is a clearly expressed congressional intent to prohibit state regulation on a particular issue or when there is a direct conflict between state and federal law that clearly precludes compliance with both.

An especially strong argument exists for applying the clear statement rule in the environmental context. As traditionally understood, preemption doctrine contains a presumption against preemption. Courts must address claims of preemption "with the starting presumption that Congress does not intend to supplant state law."<sup>47</sup> This presumption has the most force when Congress is legislating in an area of traditional state regulation.<sup>48</sup> Indeed, the Supreme Court has held that "the historic police powers of the States [are] not to be superseded by the Federal Act unless that [is] the clear and manifest purpose of Congress."<sup>49</sup>

<sup>43</sup> *Jones v. Rath Packing Co.*, 430 U.S. 519, 525 (1977).

<sup>44</sup> *Gade v. Nat'l Solid Wastes Mgmt. Ass'n*, 505 U.S. 88, 98 (1992) (quoting *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947)) (internal quotation marks omitted).

<sup>45</sup> *Id.* (quoting *Fla. Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142–43 (1963)) (internal quotation marks omitted).

<sup>46</sup> *Id.* (quoting *Felder v. Casey*, 487 U.S. 131, 138 (1988), in turn citing *Perez v. Campbell*, 402 U.S. 637, 649 (1971), in turn citing *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941)) (internal quotation marks omitted).

<sup>47</sup> *N.Y. State Conference of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.*, 514 U.S. 645, 654 (1995).

<sup>48</sup> *Id.* at 655 (citing *Rice*, 331 U.S. at 230).

<sup>49</sup> *Rice*, 331 U.S. at 230; *see also Gade*, 505 U.S. at 115 (Souter, J., dissenting). However, even in *Rice* the Supreme Court found federal preemption, holding that the state of Illinois could not regulate grain warehouses licensed under federal law, regardless of whether the state law actually conflicted with federal law. 331 U.S. at 236. Justice Frankfurter wrote a strong dissent, noting that the majority "uproots a vast body of State enactments" and that "due regard for our federalism, in its practical operation, favors survival of the reserved authority of a State over matters that are the intimate concern of the State

Until the 1970s, environmental regulation was principally managed by states at the local level and governed by common law.<sup>50</sup> Recent Supreme Court dicta notes that “regulation of land use [is] a function traditionally performed by local governments.”<sup>51</sup> Similarly, public health and safety are widely understood to be local concerns and, therefore, traditional areas of state police power.<sup>52</sup> Likewise, utility regulation has been an area of traditional state control. Although the federal government regulates certain interstate aspects of electricity generation and transmission, states retain jurisdiction to regulate utilities within their borders.<sup>53</sup>

The Supreme Court recently noted that “we ordinarily expect a ‘clear and manifest’ statement from Congress to authorize an unprecedented intrusion into traditional state authority.”<sup>54</sup> However, some courts are not following this principle and, instead, as described above, have taken a narrow view of state authority to regulate activities affecting the environment.<sup>55</sup> Implementing a clear statement rule in the environmental context would restore consistency to preemption jurisprudence and would, in that way, move toward restoring an appropriate balance of federal and state powers in this field. Indeed, two federal district courts recently applied the clear statement rule in rejecting preemption challenges to the clean car standards adopted by California, Vermont, and other states, which are designed to reduce carbon dioxide pollution from new motor vehicles over the next decade.<sup>56</sup>

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unless Congress has clearly swept the boards of all State authority, or the State’s claim is in unmistakable conflict with what Congress has ordered.” *Id.* at 238–41 (Frankfurter, J., dissenting).

<sup>50</sup> Tanabe, *supra* note 21, at 1052.

<sup>51</sup> *Hess v. Port Auth. Trans-Hudson Corp.*, 513 U.S. 30, 44 (1994); *see also Rapanos v. United States*, 126 S. Ct. 2208, 2224 (2006) (“Regulation of land use . . . is a quintessential state and local power.” (citing *FERC v. Mississippi*, 456 U.S. 742, 768 n.30 (1982); *Hess*, 513 U.S. at 44)).

<sup>52</sup> *See, e.g., Maine v. Taylor*, 477 U.S. 131, 148–50 & n.19 (1986) (upholding a Maine statute prohibiting the import of live baitfish); *cf. Lewis v. BT Inv. Managers*, 447 U.S. 27, 36 (1980) (“In the absence of conflicting federal legislation, the States retain authority under their general police powers to regulate matters of ‘legitimate local concern,’ even though interstate commerce may be affected.” (citing *Raymond Motor Transp., Inc. v. Rice*, 434 U.S. 429, 440 (1978))).

<sup>53</sup> *New York v. FERC*, 535 U.S. 1, 24 (2002) (noting that the Federal Energy Regulatory Commission has recognized that the states retain significant control over local matters even when retail transmissions are unbundled); *see, e.g., Promoting Wholesale Competition Through Open Access Non-Discriminatory Transmission Services by Public Utilities; Recovery of Stranded Costs by Public Utilities and Transmitting Utilities*, 61 Fed. Reg. 21,540, 21,626 n.543 (May 10, 1996) (codified at 18 C.F.R. pts 35 & 385 (1996)) (“Among other things, Congress left to the States authority to regulate generation and transmission siting.”); *id.* at 21,626 n.544 (“This Final Rule will not affect or encroach upon state authority in such traditional areas as the authority over local service issues, including reliability of local service; administration of integrated resource planning and utility buy-side and demand-side decisions, including DSM [demand-side management]; authority over utility generation and resource portfolios; and authority to impose nonbypassable distribution or retail stranded cost charges.”).

<sup>54</sup> *Rapanos*, 126 S. Ct. at 2224 (citing *BFP v. Resolution Trust Corp.*, 511 U.S. 531, 544 (1994)).

<sup>55</sup> *See, e.g., Engine Mfrs. Ass’n v. S. Coast Air Quality Mgmt. Dist.*, 541 U.S. 246 (2004); *supra* notes 6, 26 and accompanying text.

<sup>56</sup> *Cent. Valley Chrysler-Jeep, Inc. v. Goldstene*, 529 F. Supp. 2d 1151 (E.D. Cal. 2007); *Green Mountain Chrysler Plymouth Dodge Jeep v. Crombie*, 508 F. Supp. 2d 295 (D. Vt. 2007) (appeal pend-

*B. More States Acting, Less Justification for Federal Preemption*

When there is an emerging consensus of states acting, for example, to limit mercury pollution from coal plants or to require utilities to buy and supply an increasing percentage of electricity generated by renewable energy resources, should that consensus affect the preemption analysis? In a word, yes. There are strong analogs from the Supreme Court's consideration of emerging consensus of state actions and views in evaluating constitutional rights.

For example, in Fourth Amendment jurisprudence involving search and seizure actions, the Court has looked to the emerging consensus of state decisions. In the landmark *Mapp v. Ohio* decision, the Court overturned its previous ruling in *Wolf v. Colorado*<sup>57</sup> and enforced the exclusionary rule against the states through the Fourteenth Amendment.<sup>58</sup> The Court's ruling was based, in part, on the fact that, while nearly two-thirds of states opposed the use of the exclusionary rule at the time that *Wolf* was decided, more than half of those states had since wholly or partially adopted the exclusionary rule by legislative or judicial decision.<sup>59</sup> The Court exhaustively cited the statutory provisions of the twenty-three states that had passed legislation attempting to control invasions of the right to privacy in the search and seizure context.<sup>60</sup>

Substantive due process provides another example of constitutional standards that reflect an emerging consensus of state actions. For example, in *Bowers v. Hardwick*, the Court upheld Georgia's antisodomy law.<sup>61</sup> Seventeen years later, in *Lawrence v. Texas*, the Court overruled *Bowers* in striking down Texas's similar law.<sup>62</sup> Part of the Court's reasoning in *Lawrence* turned on the clear direction in which states were heading on this issue: "The 25 States with laws prohibiting relevant conduct referenced in the *Bowers* decision are reduced now to 13, of which 4 enforce their laws only against homosexual conduct."<sup>63</sup> The Court noted an "emerging awareness that liberty gives substantial protection to adult persons in deciding how to conduct their private lives in matters pertaining to sex."<sup>64</sup> The Court relied

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ing). However, on December 19, 2007, the United States Environmental Protection Agency denied California's request under section 209(a) of the Clean Air Act for a waiver of national motor vehicle emissions control standards in order to set its own more protective pollution standards. California and other states immediately announced their intention to appeal the waiver denial. Press Release, Office of the Gov. of Calif., Governor Schwarzenegger Issues Statement After U.S. EPA Rejects California's Tailpipe Emissions Waiver Request (Dec. 19, 2007), <http://gov.ca.gov/press-release/8353/>.

<sup>57</sup> 338 U.S. 25 (1949).

<sup>58</sup> *Mapp v. Ohio*, 367 U.S. 643, 653 (1961).

<sup>59</sup> *Id.* at 652 n.7.

<sup>60</sup> *Id.*

<sup>61</sup> 478 U.S. 186, 196 (1986).

<sup>62</sup> 539 U.S. 558, 578 (2003).

<sup>63</sup> *Id.* at 573.

<sup>64</sup> *Id.* at 572.

on state law—as well as the degree to which state law is or is not enforced in reality—as the yardstick of this emerging awareness of privacy rights.<sup>65</sup>

Likewise, in Eighth Amendment jurisprudence, the Court has recognized the shifting tide of public consensus through state laws as a key factor in steering its constitutional course. In *Roper v. Simmons*, the Court set forth an “evolving standards of decency” test to determine whether a punishment is “cruel and unusual” in violation of the Eighth Amendment.<sup>66</sup> The Court turned to evidence of a “national consensus” in applying its evolving standards of decency test to declare that executing juveniles is cruel and unusual punishment.<sup>67</sup>

To derive its objective view of whether there is such a “national consensus” in Eighth Amendment jurisprudence, the Court looked to both the number of states that prohibit the death penalty in particular circumstances and the rate at which states adopted prohibitions against the execution of particular classes of individuals. The Court stated that “[i]t is not so much the number of these States that is significant, but the consistency of the direction of change.”<sup>68</sup> To be sure, the Court pointed out that thirty states prohibited application of the death penalty to juveniles.<sup>69</sup> Therefore, how the states’ views are emerging and trending, combined with the growing number of states acting, leads to the determinative “national consensus,” which controls along with the Court’s own “independent judgment.”

Emerging trends matter in the preemption context as well. When it comes to the Supremacy Clause and preemption analysis, Congress, subject to Commerce Clause and Tenth and Eleventh Amendment limitations, can always explicitly choose to enact exclusive federal standards no matter how many states have acted. However, the number of states that have moved to act in a given area and the direction of that movement are relevant to a court’s determination of whether there is an implied conflict between federal and state laws. When there is an emerging consensus of states acting in an area of environmental policy, it is much more difficult to contend that the federal government has occupied the field in that area.

What should happen, then, if Congress enacts legislation that comprehensively addresses global climate change problems or requires reductions in carbon dioxide pollution from cars after a dozen states or more have already taken legislative or administrative regulatory actions moving in the same direction? The rationale for a clear statement preemption rule should apply with greater force in circumstances involving a backdrop of clearly

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<sup>65</sup> *Id.* at 573.

<sup>66</sup> 543 U.S. 551, 561 (2005) (quoting *Trop v. Dulles*, 356 U.S. 86, 100–01 (1958)).

<sup>67</sup> *Id.* at 564 (“The evidence of a national consensus against the death penalty for juveniles is similar, and in some respects parallel, to the evidence *Atkins* held sufficient to demonstrate a national consensus against the death penalty for the mentally retarded.”).

<sup>68</sup> *Id.* at 566 (alteration in original) (quoting *Penry v. Lynaugh*, 492 U.S. 302, 315 (1989)).

<sup>69</sup> *Id.* at 552.

trending state actions. Congress would be “on notice” of the potential federal-state conflicts and could resolve any uncertainty regarding the preemptive effect of the federal law by clearly stating its intent. Thus, in the absence of explicit federal preemption, and where there is an emerging consensus of state action, there is much less justification for courts to rule that there is an “implied” conflict between federal and state laws.

Moreover, in both the *Roper* and *Lawrence* cases, the Supreme Court was asked to *strike down* a state law that was contrary to the emerging consensus of states interpreting the constitutional principle at issue.<sup>70</sup> By contrast, the approach suggested here—defeating claims of implied preemption of state environmental laws that are part of an emerging consensus, upholding the state law, and allowing baseline federal and stronger state laws to coexist—does less violence to both laws and is consistent with the presumption against preemption.

Implied preemption is a fuzzy concept, involving a court’s best guess of Congress’s intent. That is a more tenuous basis for overturning a state law, which reflects the will of the citizens not only of one particular state, but also of a growing number of other states. The clear statement rule allows for creativity in state environmental policies while maintaining a national environmental protection floor.

#### CONCLUSION

Cooperative federalism allows room for both federal and state actions to achieve environmental protection goals. In the first years of the twenty-first century, states have stepped up to act in robust ways to achieve environmental progress while the federal government has refrained from acting or has done so in ways perceived to be too little, too late. Applying the clear statement rule when there is an emerging consensus of state environmental actions in a similar stronger direction restrains preemption, is backed by sound policies respecting both federal and state roles, and follows a legal approach adopted by the Supreme Court in adjudicating constitutional rights.

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<sup>70</sup> *See id.* at 568 (holding that the Eighth Amendment requires states to refrain from imposing the death penalty on juvenile offenders under eighteen years of age and thereby striking down Missouri law permitting the state to impose the death penalty on juveniles); *Lawrence*, 539 U.S. at 578–79 (holding that the Texas sodomy law violates the Due Process Clause and is, therefore, unconstitutional).

