

MONOPHONIC PREEMPTION

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INTRODUCTION

In the 1990s, the United States Supreme Court embarked on a “federalism revolution.”¹ In several doctrinal areas, the Court reinvented older principles to apply new limits on the power of the national government. With the retirement of Justice Marshall and the appointment of Justice Thomas in 1991, a new conservative majority struck down a series of federal laws as violating constitutional principles of federalism.² For the moment, that prong of the federalism revolution appears to have abated.³ Much scholarly and public attention has now turned to another aspect of the Court’s federalism jurisprudence, the preemption of state law.⁴ In recent years, the Court has invalidated many state statutes and state judicial decisions, finding them preempted by federal law. Commentators have pointed out that this side of the federalism story has by far the greater impact. Preemption issues arise frequently,⁵ and an aggressive approach to preempting state law poses a

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¹ See generally Erwin Chemerinsky, *The Federalism Revolution*, 31 N.M. L. REV. 7 (2001).

² See, e.g., *United States v. Morrison*, 529 U.S. 598 (2000); *Printz v. United States*, 521 U.S. 898 (1997); *Seminole Tribe v. Florida*, 517 U.S. 44 (1996); *United States v. Lopez*, 514 U.S. 549, 567–68 (1995); *New York v. United States*, 505 U.S. 144 (1992).

³ The Court refused to extend *Lopez* and *Morrison* in *Gonzales v. Raich*, 545 U.S. 1 (2005), and refused to extend its sovereign immunity jurisprudence in *Central Virginia Community College v. Katz*, 546 U.S. 356 (2006), and *United States v. Georgia*, 546 U.S. 151 (2006). However, the Court may be only one vote shy of a major new limitation on the authority of the federal government to promulgate environmental regulations. See *Rapanos v. United States*, 547 U.S. 715 (2006) (plurality opinion).

⁴ See, e.g., Stephen Gardbaum, *Congress’s Power to Preempt the States*, 33 PEPP. L. REV. 39 (2005); Caleb Nelson, *Preemption*, 86 VA. L. REV. 225 (2000).

⁵ See Stephen A. Gardbaum, *The Nature of Preemption*, 79 CORNELL L. REV. 767, 768 (1994) (characterizing preemption as “almost certainly the most frequently used doctrine of constitutional law in practice”); Lisa Heinzerling, *The Commercial Constitution*, 1995 SUP. CT. REV. 217, 217 (asserting that, with regard to the antidiscrimination component of the dormant commerce clause, “few constitutional principles give the Court as regular . . . business”).

much greater threat to health, safety, and environmental regulations than do the Court's restrictions on the power of the federal government.⁶

In this Article, I seek to situate a normative theory of preemption within a broader theory of federalism. Drawing on my prior work, I analyze preemption from the perspective of a "polyphonic" conception of federalism.⁷ The polyphonic conception rejects the notion, embodied in theories of "dual federalism," that the project of federalism consists of drawing lines between state and federal spheres of authority. Polyphonic federalism understands state and federal power as largely concurrent. The key problem for federalism is not separating state from federal power, but managing the overlap of state and federal law. As the focus of federalism shifts away from policing the boundaries between state and federal jurisdiction, the role of courts diminishes. Other governmental institutions enjoy greater competence in negotiating the interplay of state and federal power.

The polyphonic conception of federalism, I argue, has several important implications for the study of preemption. First, despite various assertions to the contrary, the Court's preemption jurisprudence is best understood as continuous with, rather than opposed to, its overall approach to federalism. The limitations on the constitutional power of the national government and the broad preemption of state law both reflect an underlying dualist conception of federalism. Second, preemption arguments should be directed in the first instance to nonjudicial actors. Congress has the authority broadly to preempt state law. The core federalism question is how that power should be exercised. Other bodies, such as federal agencies and state legislatures, also face important issues of how to make best use of the dynamic interplay of federal and state prerogatives. State courts, most notably as adjudicators of tort suits, serve as players, rather than referees, in the elaboration of federalist principles. Courts will inevitably confront the question whether federal law preempts particular state regulations, but a theory of federalism should guide those bodies that promulgate state and federal laws, as well as courts faced with potential conflict.

Third, the polyphonic approach suggests that both Congress and federal agencies in the first instance, and eventually courts, should seek to accommodate an overlap of state and federal regulation and thus should be wary of preempting state law. In particular, preemption eliminates the institutional diversity and attendant benefits of plurality, dialogue, and redundancy that federalism offers. Countervailing considerations of cost-shifting, national uniformity, and democratic accountability might favor preemption in some circumstances. However, I argue that these concerns generally do not justify the negation of state law. Each of these potential justifications for preemption relies on a fixed and formal conception of ter-

⁶ See Ernest A. Young, *Is the Sky Falling on the Federal Government? State Sovereign Immunity, the Section Five Power, and the Federal Balance*, 81 TEX. L. REV. 1551, 1591–93 (2003) (book review).

⁷ See Robert A. Schapiro, *Toward a Theory of Interactive Federalism*, 91 IOWA L. REV. 243 (2005).

itoriality and of the significance of political boundaries. In their own ways, the cost-shifting, uniformity, and accountability arguments reproduce the dualist project of identifying the “truly local” and the “truly national” and defending the boundary between the two. Each argument reifies a particular understanding of political space.

The economic, social, cultural, technological, and political realities of the contemporary world undermine the distinction between the “truly local” and the “truly national,” thus falsifying the hypotheses underlying dual federalism. The cost-shifting, uniformity, and accountability positions suffer from similar weaknesses. The problems these arguments identify are ubiquitous and to some extent unavoidable. However, if one adopts a more functional and porous understanding of political boundaries, these concerns diminish in importance. The borders between states and between nation-states have lost much of their significance. Political power has moved both “down” toward regional and local bodies and “up” toward multinational institutions. Transactions of all kinds stretch beyond a single polity. Multiple layers of law generally apply to complex businesses. The effort to use preemption to create a single, geographically based, uniform set of laws is doomed to fail, and such attempted homogenization will impair important regulatory interests. The polyphonic conception of federalism seeks to move beyond this focus on territoriality. The resulting functional conception addresses the concerns about cost-shifting, uniformity, and accountability, without the need to resort to preemption.

Part I situates the Supreme Court’s current approach to preemption within its dualist conception of federalism. When understood in this broader context, the Court’s decisions robustly preempting state law appear not as anomalous deviations from a states’ rights agenda, but as symptomatic of the Court’s commitment to policing the lines between state and federal authority. Part II describes the polyphonic alternative to dualist federalism. The Part outlines the key features of polyphonic federalism, particularly its embrace of overlapping state and federal power, and analyzes its implications for a theory of preemption. Part III addresses arguments in favor of preemption, based on cost-shifting, uniformity, and democratic accountability. I argue that while these concerns certainly are legitimate, various features of contemporary society reduce their impact. In this regard, the polyphonic alternative to a spatial understanding of federalism helps to illuminate the limited scope of these potential problems. While this Article focuses primarily on the first-order decisions about when preemption is desirable, Part IV discusses the appropriate judicial perspective in adjudicating preemption issues. With its rejection of dualism, polyphonic federalism cannot justify a presumption against the preemption of the “historic police powers of the States.”⁸ The polyphonic conception, however, replaces this formalist maxim with a broader, functional understanding of

⁸ *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947).

the perils of preemption. Courts, like legislative, executive, and administrative bodies, should recognize the pitfalls of preempting state law and thereby substituting monophony for polyphony.

I. THE PARADIGM OF PREEMPTION

The United States Supreme Court in recent years has issued several decisions voiding state law as inconsistent with federal law.⁹ The Supreme Court also has developed doctrines to impose federal restrictions on the operation of state common law suits. These judicially fashioned doctrines limit the substantive theories of liability available in state courts,¹⁰ as well as the measure of recovering damages, especially punitive damages.¹¹ In this regard, the most controversial decision of the Rehnquist Court was paradigmatic, rather than anomalous. *Bush v. Gore*¹² provided but one example of a broad willingness of the Court to impose federal restrictions on the operation of state law and state courts.¹³

The growth in preemption doctrine has come at the same time the United States Supreme Court has embarked upon a “federalism revolution.”¹⁴ In restricting federal authority in several areas, the Court has professed a concern for guaranteeing sufficient state autonomy in a federalist system.¹⁵ Some scholars have found a tension or even a contradiction in the Court’s limiting the constitutional authority of Congress based on a professed concern for state autonomy, while at the same time liberally striking down state laws based on a professed concern for protecting federal interests.¹⁶ I agree that a comparison of the two lines of cases is illuminating,

⁹ See, e.g., *Am. Ins. Ass’n v. Garamendi*, 539 U.S. 396 (2003) (holding a California statute requiring disclosure of information about Holocaust-era insurance policies preempted by United States foreign policy); *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525 (2001) (holding a state statute regulating advertising of tobacco products preempted by federal law); *Crosby v. Nat’l Foreign Trade Council*, 530 U.S. 363 (2000) (holding a state law restricting state transactions with companies doing business with Burma preempted by United States foreign policy); *United States v. Locke*, 529 U.S. 89 (2000) (holding state regulation of oil spills preempted by a federal statute); *Gade v. Nat’l Solid Waste Mgmt. Ass’n*, 505 U.S. 88 (1992) (holding a state law regulating workers at hazardous waste sites preempted by federal law).

¹⁰ See, e.g., *Geier v. Am. Honda Motor Co.*, 529 U.S. 861 (2000).

¹¹ See *Philip Morris USA v. Williams*, 127 S. Ct. 1057 (2007); *BMW v. Gore*, 517 U.S. 559 (1996); *TXO Prod. Corp. v. Alliance Res. Corp.*, 509 U.S. 443 (1993).

¹² 531 U.S. 98 (2000).

¹³ *Bush v. Gore* was not even the only decision involving a Gore to witness new federal oversight of state courts. In *BMW v. Gore*, 517 U.S. 559 (1996), the Court also took a victory away from a Gore because of the putative inadequacy of state court procedures.

¹⁴ See Chemerinsky, *supra* note 1, at 30.

¹⁵ See, e.g., *Seminole Tribe v. Florida*, 517 U.S. 44, 72 (1996); *New York v. United States*, 505 U.S. 144, 168–69 (1992).

¹⁶ See, e.g., Erwin Chemerinsky, *Empowering States: The Need to Limit Federal Preemption*, 33 PEPP. L. REV. 69, 70 (2005) (describing “hypocrisies” in the Rehnquist Court’s treatment of federalism in preemption cases); Erwin Chemerinsky, *Empowering States When It Matters: A Different Ap-*

not because of a disturbing contradiction, but rather because of a more disturbing continuity.

The cases broadly interpreting preemption and narrowly interpreting the scope of federal power both reflect a particular, consistent theory of federalism. The comparison of the two strands is enlightening because it casts into sharp relief the underlying conception of federalism that shapes the approach of a majority of the current Court. The Court's approach both in limiting the power of states and in limiting the power of the national government reflects an underlying dualism.¹⁷ Both lines of cases reveal the pathologies of this view of federalism.

A. *The Passing of Dual Federalism*

Dual federalism, the idea that the states and the national government enjoy exclusive and non-overlapping regulatory domains, no longer holds sway on the United States Supreme Court. The concept of dual federalism did underlie much of the Supreme Court's doctrine from 1890 to 1936. During this period, the Court invalidated several pieces of federal legislation based on their intrusion into the area reserved to the states,¹⁸ and the Court struck down a variety of state laws based on their encroachment on the powers of Congress.¹⁹ Even in this era, as before and since, the Court tolerated some overlap of state and federal power. The doctrine of *Cooley v. Board of Wardens*²⁰ purported to sort out such instances based on whether uniform regulation was required. Beginning in the mid-1880s, while ostensibly continuing to follow *Cooley*, the Court came to prohibit a broader swath of state regulation as intruding on the national market.²¹

As Stephen Gardbaum has pointed out, even in realms in which the states and the federal government enjoyed concurrent jurisdiction, the Court followed a doctrine of "latent exclusivity," interpreting any action by the federal government as ousting state authority.²² With regard to a variety of topics, states could regulate unless the federal government entered the field. Once the national government acted, that realm became an exclusive federal enclave. Any state laws in the area became invalid, even if they did not

proach to Preemption, 69 BROOK. L. REV. 1313, 1324 (2004) (finding preemption cases inconsistent with the Court's other federalism cases); Daniel J. Meltzer, *The Supreme Court's Judicial Passivity*, 2002 SUP. CT. REV. 343, 343 (2003); James B. Staab, *Conservative Activism on the Rehnquist Court: Federal Preemption Is No Longer a Liberal Issue*, 9 ROGER WILLIAMS U. L. REV. 129, 183 (2003).

¹⁷ See Schapiro, *supra* note 7.

¹⁸ See, e.g., *Carter v. Carter Coal Co.*, 298 U.S. 238 (1936); *United States v. Butler*, 297 U.S. 1 (1936); *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935); *United States v. E.C. Knight Co.*, 156 U.S. 1 (1895).

¹⁹ See, e.g., *Leisy v. Hardin*, 135 U.S. 100 (1890).

²⁰ 53 U.S. (12 How.) 299 (1851).

²¹ See Stephen Gardbaum, *New Deal Constitutionalism and the Unshackling of the States*, 64 U. CHI. L. REV. 483, 508–09 (1997).

²² See *id.* at 535–40.

conflict with the federal law. The very activity of federal regulation functioned as a kind of field preemption. Latent exclusivity constitutes a dialectical perspective on dual federalism. The federal and state governments operate in separate, non-overlapping spheres, but their proper domains are not set in advance. Instead, their separate spheres are recognized on an ongoing basis depending on where the federal government chooses to act. Again, as in other manifestations of dual federalism, the Court sought to avoid overlapping regulatory domains.

In sum, in this pre-New Deal Court era, the Court's restrictions on state and federal activities went hand in hand. The Court aggressively limited the federal government's powers under the Commerce Clause and used preemption and the dormant commerce clause to restrict the state governments' powers. The regulatory authority of the states and the national government fell together.

In 1937, they rose together. The New Deal Court broadly interpreted the Commerce Clause as authorizing congressional regulation of vast realms of social and economic life. The Court also permitted the overlap of state and federal power.²³ As the Court validated federal regulation of large portions of the economy, a strict application of dual federalist principles would have substantially disempowered the states. Moreover, the Court replaced its prior, formalistic approach to federalism with a new, more functional conception. The Court no longer sought to construct boundaries between state and federal power through such dichotomies as manufacturing versus commerce²⁴ or indirect versus direct effects on commerce.²⁵ The Court looked instead to the practical economic impact of an activity. The Court adopted a test that inquired whether an activity, in aggregate, had a substantial effect on interstate commerce.²⁶

The Court quickly realized that this "substantial effects" test did not allow ready judicial application. The determination of the substantiality of the effects on interstate commerce and, more generally, of the need to regulate an area to protect interstate commerce, was best left to Congress. The Court's functional approach thus went along with a deferential attitude toward Congress. The Court understood Congress to possess the best ability

²³ See, e.g., *Prudential Ins. Co. v. Benjamin*, 328 U.S. 408, 439 n.52 (1946) ("It would be a shocking thing, if state and federal governments acting together were prevented from achieving the end desired by both, simply because of the division of power between them." (quoting FREDERICK D.G. RIBBLE, *STATE AND NATIONAL POWER OVER COMMERCE* 211 (1937)) (internal quotation marks omitted)); *Wickard v. Filburn*, 317 U.S. 111 (1942) (upholding the Agricultural Adjustment Act); *United States v. Darby*, 312 U.S. 100 (1941) (upholding the Fair Labor Standards Act).

²⁴ See *United States v. E.C. Knight*, 156 U.S. 1, 12 (1895) (distinguishing between manufacture and commerce).

²⁵ See *Carter v. Carter Coal Co.*, 298 U.S. 238 (1936) (distinguishing between direct and indirect effects on commerce).

²⁶ See *Wickard v. Filburn*, 317 U.S. 111 (1942).

and hence the primary authority for applying the Commerce Clause test.²⁷ Similarly, the Court adopted a deferential stance with regard to state law. The Court followed a more restrained approach to applying doctrines of preemption and the dormant commerce clause.²⁸

The Court did not invalidate federal legislation as exceeding the Commerce Clause from 1937 to 1995. The record with regard to state authority was not as clean. In contrast to the application of the Commerce Clause itself, the Court did strike down state laws under the doctrines of preemption²⁹ and the dormant commerce clause.³⁰ However, the states enjoyed substantially more regulatory authority after 1937, even as the powers of the national government also expanded.

B. Dualist Federalism

Dual federalism died in 1937. The Supreme Court has not tried to resurrect it. States and the national government continue to enjoy broad realms of concurrent power. Even as it moved to reinvigorate federalism, the Court never sought a complete return to pre-1937 principles. The Court never held that the ability of Congress to regulate in a particular area automatically disempowered the states.

The Court did, however, embrace a formal approach that I term dualist federalism. In so doing, the Court hearkened back to some of the principles of the pre-1937 era. Like dual federalism, dualist federalism attempts to draw boundaries around areas of exclusive state and exclusive federal authority. Under dualist federalism, however, the Court accepts a large realm of overlapping power, even while insisting on some areas of exclusive jurisdiction. The three main lines of cases restricting federal authority since 1995 each carve out autonomous state domains, subject to federal judicial protection. The Commerce Clause cases, *United States v. Lopez*³¹ and *United States v. Morrison*,³² create a protected enclave for intrastate, noneconomic activity, the regulation of which is not necessary for a broader federal scheme. The Court also has described this area as the “truly local,” as opposed to the “truly national.”³³ The “anti-commandeering cases,” *New*

²⁷ See Barry Cushman, *Formalism and Realism in Commerce Clause Jurisprudence*, 67 U. CHI. L. REV. 1089, 1138–44 (2000).

²⁸ See Gardbaum, *supra* note 21, at 535–40.

²⁹ See, e.g., *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218 (1947) (holding state law to be preempted while affirming the presumption against preemption).

³⁰ See, e.g., *Pike v. Bruce Church, Inc.*, 397 U.S. 137 (1970) (applying the dormant commerce clause to strike down a state law that imposed an excessive burden on commerce).

³¹ 514 U.S. 549 (1995).

³² 529 U.S. 598 (2000).

³³ See *id.* at 617–18 (“The Constitution requires a distinction between what is truly national and what is truly local.”); *Lopez*, 514 U.S. at 567–68.

*York v. United States*³⁴ and *United States v. Printz*,³⁵ define state legislative and executive authority, themselves, as regions protected from federal intrusion. The federal government cannot directly require states to legislate or to enforce federal law. Finally, the states are protected from private suits seeking to impose money damages for violations of federal statutory rights.³⁶ To this extent, the Court has returned to the project of judicial line drawing. Like the pre-1937 Court, this Court understands federalism as creating some spheres of exclusive state activity and some spheres of exclusive federal authority. Unlike the dual federalism of the pre-1937 Court, the dualist federalism of today also accepts large realms of concurrent authority.

C. *Dualist Federalism and Preemption*

The same dualist federalism that creates regions of exclusive state authority also protects regions of federal power. State laws that intrude into federal domains are struck down. Just as in the pre-1937 period, strict enforcement of the limits of the Commerce Clause accompanies a robust view of the breadth of preemption and the dormant commerce clause. Lines must be drawn by courts to protect areas of state and federal hegemony. The dualist perspective tolerates overlap, but seeks sovereign clarity.

The Court has not formally returned to an attitude of latent exclusivity. Nevertheless, the broad interpretation of the preemptive effect of federal statutes hearkens back to this earlier period. The Court creates a wide protective band, preempting state laws that might interfere with federal interests. As with limitations on congressional power, the Court's dualist approach to preemption entails actively drawing lines delimiting the proper scope of governmental activity.

II. POLYPHONIC FEDERALISM

By contrast to forms of dualism, "polyphonic federalism" understands federal and state power as presumptively concurrent. From a polyphonic perspective, federalism refers to the existence of distinct nodes of governmental power. Federalism does not entail a division of authority between the states and the national government.³⁷ Polyphonic federalism eschews the search for the "truly local" and the "truly national." Freed from their role in drawing lines around state and federal authority, courts can focus on managing the overlap of state and federal power. Thus, from a polyphonic

³⁴ 505 U.S. 144 (1992).

³⁵ 521 U.S. 898 (1997).

³⁶ *Seminole Tribe v. Florida*, 517 U.S. 44 (1996).

³⁷ See Erwin Chemerinsky, *Federalism Not as Limits, But as Empowerment*, 45 U. KAN. L. REV. 1219, 1219–20 (1997).

perspective, preemption is the central issue of federalism. The key question for federalism is not how to separate the federal and state governments, but rather how to ensure that they will play well together.

In the first instance, it is the governments themselves that should try to work out any potential tensions. The key preemptive choices should be made by federal policymakers, not by federal courts. Congress is better equipped than the courts to decide how overlapping functions should be handled. Congress can receive information from a wider variety of sources and balance the various policy risks and benefits. Moreover, from the polyphonic perspective, federalism doctrine no longer turns on constitutional adjudication. Instead, the question is what Congress chooses to do. Federalism is no longer understood as creating state enclaves protected from federal intrusion, with the courts actively policing the boundaries. Accordingly, federalism theory should be directed at Congress, and at the states. Important policy choices need to be made about the appropriate overlap of state and federal authority in various areas. The federal and state governments should devise the best arrangement.

A. *Values of Polyphony*

In previous work, I have discussed the values served by a polyphonic approach, which I denominated as plurality, dialogue, and redundancy.³⁸ This list of values differs from the standard dualist list because the point is not to enumerate the potential advantages of dividing state and federal authority. The question is rather what benefits the overlapping exercise of power is likely to advance.

The existence of federal and multiple state regulatory regimes allows a variety of different responses to a perceived threat. People in different states can experiment with different legal solutions to common problems. The states and the federal government can operate as “laboratories,”³⁹ experimenting with divergent regulatory regimes. In some instances, the appropriate regulations may differ from region to region. No single best solution will dominate. In other areas, the states and the national government will converge on a single, preferred outcome.

The diversity in regulatory perspectives makes this plurality especially important. States and the federal government function in different settings and are subject to different pressures and concerns. Professors Robert Cover and Alexander Aleinikoff emphasized this valuable diversity with regard to state and federal courts in the context of habeas corpus.⁴⁰ However, the point is much more general. Law flows from executive, legislative, judicial, and administrative bodies at the state and the federal level.

³⁸ See Schapiro, *supra* note 7, at 288–90.

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

⁴⁰ See Robert M. Cover & T. Alexander Aleinikoff, *Dialectical Federalism: Habeas Corpus and the Court*, 86 YALE L.J. 1035 (1977).

Each of these institutional actors gathers information in different ways, tends to focus on different kinds of costs and benefits, is subject to different constituent and interest group influences, exercises its authority in different manners, and exists within different structures of accountability. These institutional contexts give the regulators divergent perspectives.

Different purposes also may guide different legal institutions. Of particular relevance to the study of preemption, tort law administered by courts seeks both to deter certain forms of conduct and to compensate victims. Much tort scholarship focuses on the role of private law suits in regulating risk-creating behavior.⁴¹ One of the great insights of law and economics is the role of tort law in creating incentives to shape conduct. From this perspective, tort law constitutes a system of risk regulation, coaxing actors to undertake an optimal level of accident avoidance, not more and not less. The judicial system functions like an administrative agency, promulgating regulations by means of adjudication.

Tort law, however, also seeks to redress harms to individuals⁴² and to advance goals of corrective justice.⁴³ While the regulatory function of tort law might duplicate the role of administrative agencies, the redress and corrective justice functions do not. Most agency risk-regulation proceeds at the systemic level. Preempting state tort suits with federal administrative standards would thus greatly reduce the plurality of legal voices. Preemptive federal action would not merely replace a state voice with a federal voice, nor merely substitute one form of risk regulation for another. Federal preemption would completely eliminate the individual voice of redress and corrective justice. The federalist system offers the possibility of both federal regulation of systemic risks and state redress for harmed individuals. Polyphonic federalism allows both voices to sing.

Dialogue magnifies the value of plurality. Not only can each government try different responses to common problems, but the different regulators can learn from each other. In their account of democratic experimentalism, Professors Michael Dorf and Charles Sabel have emphasized the importance of bottom-up problem solving.⁴⁴ Regulators can learn

⁴¹ See Jules Coleman, *The Costs of The Costs of Accidents*, 64 MD. L. REV. 337, 341 (2005) (discussing the development of the view that “tort law is an available technology of cost avoidance: a potential tool of social policy”); John C.P. Goldberg, *The Constitutional Status of Tort Law: Due Process and the Right to a Law for the Redress of Wrongs*, 115 YALE L.J. 524, 582–83 (2005) (describing development of the conception of tort law as public, regulatory law).

⁴² See Goldberg, *supra* note 41, at 596–611 (arguing that tort law should be conceived as the law for the redress of private wrongs).

⁴³ See, e.g., JULES L. COLEMAN, *RISKS AND WRONGS* (1992) (arguing that rather than viewing tort law as designed to rectify market failure by moving resources from one party to another in the form of forced transfers, tort law rectifies wrongful losses by imposing their costs on those individuals who have the duty in justice to repair them).

⁴⁴ See Michael C. Dorf & Charles F. Sabel, *A Constitution of Democratic Experimentalism*, 98 COLUM. L. REV. 267 (1998).

from the best practices of other regulatory regimes. Professor Kirsten Engel's theory of "dynamic" federalism conceives of a similar ongoing, dialectical process.⁴⁵ The interaction of state and federal regulators may produce a regulatory scheme superior to what either government would produce in isolation. Engel has demonstrated how the development of national low emission vehicle standards built on such a productive dialogue. The resulting regulatory scheme represented an advance on what state or federal regulators had conceived on their own.⁴⁶ Dialogue facilitates regulatory innovation. The optimal regulatory regime develops and changes over time, with constant interaction from a variety of forces, including information generated by other regulators. State tort suits may produce information of great value to federal regulators.⁴⁷ Again, like a musical composition, federalism consists of multiple participants contributing to an unfolding, dynamic process.

Regulatory overlap facilitates redundancy as well. If one set of regulators fails to address the problem, another set provides an alternative avenue for relief. The failure of one government does not foreclose all possibility of assistance. The different institutional positions of state and federal regulators make redundancy especially powerful. Information and interest group dynamics may function differently at the state than at the national level. Each regulator may enjoy different strengths and weaknesses.⁴⁸ Federalism means that if one route to relief is foreclosed, citizens may pursue an alternative path. Professor William Buzbee has suggested a useful analogy to biological systems. Regulatory diversity, like biological diversity, leaves a system more stable and less prone to failure when confronted with shocks.⁴⁹

This account, in accord with most discussions of regulatory federalism, has focused on civil contexts. However, the operation of polyphonic federalism appears in criminal law as well. Federal and state criminal laws over-

⁴⁵ Kirsten H. Engel, *Harnessing the Benefits of Dynamic Federalism in Environmental Law*, 56 EMORY L.J. 159 (2006).

⁴⁶ See *id.* at 168–69.

⁴⁷ See William W. Buzbee, *Asymmetrical Regulation: Risk, Preemption, and the Floor/Ceiling Distinction*, 82 N.Y.U. L. REV. 1547, 1583 (2007) (noting the role of tort litigation, including discovery, in eliciting information that can inform regulatory activity); Robert L. Rabin, *Reassessing Regulatory Compliance*, 88 GEO. L.J. 2049, 2068–70 (2004) (noting role of tort law in forcing companies to disclose important health-related information).

⁴⁸ See Robert M. Cover, *The Uses of Jurisdictional Redundancy: Interest, Ideology, and Innovation*, 22 WM. & MARY L. REV. 639, 656–57 (1981) (discussing the values of redundancy); Cover & Al-einikoff, *supra* note 40, at 1042–46 (discussing federalism as providing a redundant system for protecting rights); Martin Landau, *Federalism, Redundancy and System Reliability*, PUBLIUS, Autumn 1973, at 173, 188–89 (emphasizing the role of federalism in providing redundancy).

⁴⁹ See Buzbee, *supra* note 47, at 1589.

lap in many areas.⁵⁰ Constitutional principles of double jeopardy do not prohibit successive state and federal prosecutions. However, the United States Department of Justice has developed a specific policy, the “Petite Policy,”⁵¹ to address the propriety of bringing a federal prosecution following a state trial. The policy generally bars a federal prosecution following a state prosecution based on the same acts, unless the matter involves a “substantial federal interest” that the state prosecution left “demonstrably unvindicated.”⁵² The “dual sovereignty” justification for allowing successive state and federal prosecutions has been subject to substantial academic critique.⁵³ The actual operation of the Petite Policy also has come into question.⁵⁴ Nevertheless, as evidenced by the Rodney King affair, the possibility of multiple prosecutions can provide redundant mechanisms for vindicating important public interests.⁵⁵

It may be that either the federal government or a state government is ideally suited to address an issue. However, in the second best world of practical reality, other interest groups or inertial forces may impede this optimal regulatory regime. Redundancy provides a second best solution for dealing with problems.

B. Pitfalls of Polyphony

Regulatory overlap has potential pitfalls. Concurrent regulation may undermine important principles of uniformity, finality, and hierarchical accountability.⁵⁶ Sometimes great inefficiencies may result if diverse, potentially contradictory regulations apply to a particular item. It may be quite expensive for the manufacturer of a hair dryer to comply with divergent warning requirements in every state. Even if the regulations are not actually incompatible, the existence of multiple regulatory regimes imposes

⁵⁰ See, e.g., Michael A. Simons, *Prosecutorial Discretion and Prosecution Guidelines: A Case Study in Controlling Federalization*, 75 N.Y.U. L. REV. 893, 902–29 (2000) (discussing “federalization” of criminal law).

⁵¹ The policy takes its name from *Petite v. United States*, 361 U.S. 529 (1960). For a discussion of the history of the doctrine, see Ellen S. Podgor, *Department of Justice Guidelines: Balancing “Discretionary Justice,”* 13 CORNELL J.L. & PUB. POL’Y 167, 177–81 (2004).

⁵² See U.S. DEP’T OF JUSTICE, U.S. ATTORNEYS’ MANUAL § 9-2.031 (2003).

⁵³ See, e.g., Akhil Reed Amar & Jonathan L. Marcus, *Double Jeopardy Law After Rodney King*, 95 COLUM. L. REV. 1, 5–27 (1995) (arguing that in light of Fourteenth Amendment incorporation doctrine, it is anomalous to allow states and the federal government together to prosecute a defendant twice, when neither acting alone could prosecute the defendant twice).

⁵⁴ See Podgor, *supra* note 51, at 177–81.

⁵⁵ In 1991, a video tape captured four white Los Angeles Police Department Officers beating Rodney King, who was African American. The police officers were tried and acquitted in state court of using excessive force. Widespread rioting followed the verdicts. In a subsequent federal prosecution, two of the officers were convicted of violating King’s civil rights. For a description of the events, see Laurie L. Levenson, *The Future of State and Federal Civil Rights Prosecutions: The Lessons of the Rodney King Trial*, 41 UCLA L. REV. 509, 510–33 (1994).

⁵⁶ See Schapiro, *supra* note 7, at 290–92.

costs on firms who must ascertain and satisfy the rules of all the relevant polities. The existence of overlapping regulatory regimes also diminishes the certainty and finality of any particular regulatory outcome. Even within a particular state, a firm may be subject to state and federal restrictions. Clarifying and resolving any potential violation of one set of rules will not necessarily end compliance problems. Making peace with state regulators will not satisfy federal officials.

Accountability also may suffer in a polyphonic system. In limiting the authority of the national government, the United States Supreme Court emphasized the danger of blurring lines of responsibility. The Court hypothesized that either federal commandeering of state government⁵⁷ or federal regulation of traditional state domains⁵⁸ undermined political accountability. Dissatisfied citizens might be confused about which level of government to blame. To the extent these accountability concerns are valid,⁵⁹ concurrent state and federal regulation might well pose the same kind of harm that the Court sought to avoid in its Commerce Clause and anti-commandeering cases.

A federal system presents a different kind of concern that also could be understood as a threat to accountability. State regulation of interstate business may have different effects in different states. A state's laws might impose burdens on out-of-state firms while benefiting in-state consumers. Product safety rules, for example, might protect consumers in one state, while imposing costs on manufacturing processes that take place in other states. Depending on the structure of the market, firms might not be able to customize their price structure so as to force a state to internalize the costs of regulation.⁶⁰ These concerns represent the flip-side of the "race-to-the-bottom" debate, which focuses on the potential need for federal regulation when states have incentives not to regulate.⁶¹ Federal preemption becomes

⁵⁷ See *New York v. United States*, 505 U.S. 144, 168 (1992) ("[W]here the Federal Government compels States to regulate, the accountability of both state and federal officials is diminished.")

⁵⁸ See *United States v. Lopez*, 514 U.S. 549, 576 (1995) (Kennedy, J., concurring) ("The theory that two governments accord more liberty than one requires for its realization two distinct and discernable lines of political accountability . . ."); see also *United States v. Morrison*, 529 U.S. 598, 611 (2000) ("Were the Federal Government to take over the regulation of entire areas of traditional state concern, areas having nothing to do with the regulation of commercial activities, the boundaries between the spheres of federal and state authority would blur . . ." (quoting *Lopez*, 514 U.S. at 577 (Kennedy, J., concurring)) (internal quotation marks omitted)).

⁵⁹ Dean Edward Rubin has offered a powerful critique of this accountability argument. See Edward Rubin, *The Myth of Accountability and the Anti-Administrative Impulse*, 103 MICH. L. REV. 2073, 2083–91 (2005) (discussing the "implausibility" of underlying assumptions that citizens could properly identify the responsible level of government in the absence of "commandeering," that "commandeering" confuses the citizens, and that state and local officials cannot dispel any confusion that does result).

⁶⁰ See Samuel Issacharoff & Catherine M. Sharkey, *Backdoor Federalization*, 53 UCLA L. REV. 1353, 1386–89 (2006).

⁶¹ See, e.g., Kirsten H. Engel, *State Environmental Standard-Setting: Is There a "Race" and Is It "To the Bottom"?*, 48 HASTINGS L.J. 271 (1997) (discussing the incentive of states to lower environ-

relevant when states have incentives to regulate in ways that may impose costs on other states.

The next Part examines common arguments for preemption based on cost-shifting, uniformity, and accountability. I contend that the diminished importance of territorial boundaries reduces the significance of these concerns. These issues generally will not justify a resort to preemption and the resulting loss of the benefits of polyphony.

III. AVOIDING MONOPHONIC PREEMPTION: MOVING BEYOND TERRITORIALITY

Federal preemption of state law eliminates the advantages of regulatory overlap. Preemption is “jurispathic,” erasing the benefits of concurrent legal regimes.⁶² The negation of state law destroys plurality, dialogue, and redundancy. These losses occur whether the effect of the preemptive federal law is to replace the state regulations with a comprehensive, national scheme or to forestall all regulation. Whether there is one set of regulations or none, the possibilities for experimentation, for dynamic interaction and learning, and for the fail-safe benefits of multiple regulators all disappear. Overlapping regulations also have costs. The question is when the burdens of multiplicity outweigh their benefits.

A. *The Unavoidability of Interstate Effects: No State Is an Island*

The dangers of governments shifting costs onto other jurisdictions provides one of the most common rationalizations for preemption. States, the argument goes, will naturally try to adopt rules that impose burdens on out-of-state entities, while retaining benefits for local constituents. These regulations may not be cost-justified, but will be promulgated because the costs are not internalized by the political system. In such situations, federal preemption may be necessary to eliminate the problem of regulatory externalities, thus remedying a failure in the policy market.⁶³ The central premise of this argument is correct: state laws often have effects outside the enacting state. Serious questions remain, though, whether such laws represent failures of democracy and whether preemption provides the best solution.

Regulations rarely, if ever, have effects solely within a single jurisdiction. In the United States, interstate movement is pervasive. People travel from state to state, and firms do business in multiple states. Indeed, the facilitation of interstate movement and commerce provided a central motive

mental standards to attract businesses); 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) (questioning the race-to-the-bottom rationale for federal standard-setting).

⁶² See Ernest A. Young, *The Rehnquist Court’s Two Federalisms*, 83 TEX. L. REV. 1, 130 (2004) (quoting Robert M. Cover, *The Supreme Court, 1982 Term: Foreword—Nomos and Narrative*, 97 HARV. L. REV. 4, 40 (1983)).

⁶³ See Issacharoff & Sharkey, *supra* note 60, at 1368.

for the decision to replace the Articles of Confederation with the United States Constitution.⁶⁴ Regulating people and firms who operate in more than one jurisdiction will inevitably have interstate effects. The costs and benefits will travel with the regulated entity. Laws that touch the stream of commerce in one state will have downstream and upstream effects. Rules that increase the cost of doing business in one state will have an impact on the production and management that may occur elsewhere. Laws in one state will influence the products and profits throughout the United States. In this sense, every state law has effects outside the state, and no state can resist the incursion of laws from other states.

In the classic case of *Pennoyer v. Neff*,⁶⁵ Justice Field asserted a contrary principle of exclusive state control within its own borders: “[E]very State possesses exclusive jurisdiction and sovereignty over persons and property within its territory. . . . [N]o State can exercise direct jurisdiction and authority over persons or property without its territory.”⁶⁶ Of course, *Pennoyer* itself demonstrated the limitations of this territorial conception. *Pennoyer* dealt with the issue of someone who allegedly cheated in a business deal and then moved to another state. The rules of the *Pennoyer* world, that people who flee can be sued in-state if they leave property behind, presented a partial solution. The continuing development of interstate business, and the creative efforts to address the resulting jurisdictional problems in cases such as *Harris v. Balk*,⁶⁷ demonstrated that this concept of exclusive territorial control was fast becoming obsolete, if indeed it ever held true.

In the contemporary context, the development of the Internet helps to crystallize the diminished importance of territoriality.⁶⁸ On the World Wide Web, the concept of territory loses its traditional referent. Business and social life transpire in a place not defined by physical geography. Amazon.com has actual physical facilities, but those seem far removed from the shopping center it provides. Ebay is not really in the East Bay, and MySpace and Second Life create real spaces that do not correspond to existing political boundaries.

Spillover effects, then, are pervasive. A state’s actions will produce consequences that pour over its borders in all directions. Such spillovers, moreover, are not limited to the economic realm. All people in the United

⁶⁴ See, e.g., *Newfound/Owatonna, Inc. v. Town of Harrison*, 520 U.S. 564, 571 (1997) (“If there was any one object riding over every other in the adoption of the constitution, it was to keep the commercial intercourse among the States free from all invidious and partial restraints.” (quoting *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 231 (1824) (Johnson, J., concurring in the judgment)) (internal quotation marks omitted)).

⁶⁵ 95 U.S. 714 (1877).

⁶⁶ *Id.* at 722.

⁶⁷ 198 U.S. 215 (1905).

⁶⁸ For a broad discussion of the significance of the declining importance of borders, see Paul Schiff Berman, *The Globalization of Jurisdiction*, 151 U. PA. L. REV. 311 (2002).

States may feel the effects of the social and moral policies of other states. Whatever the recognition policy in the various states, the ability of gay and lesbian couples to receive official validation of their marriages or partnerships in some states may have significant effects in other states, especially, but not exclusively, those in which the couples choose to live. The abortion policies, the alcohol sale policies, the firearms policies, and many other policies of neighboring states may have an impact on the social fabric of a particular state. Executions in one state may give rise to feelings of moral horror or satisfaction in others. As became especially clear in 2000, the electoral policies of one state may determine the outcome of an election for President of the United States.⁶⁹ As long as state borders exist, spillover effects will exist.

If preemption is contemplated as an antidote to spillovers, some theory must differentiate among different kinds of extraterritorial impacts. It cannot be the existence of interstate effects that triggers preemption. Rather, certain kinds of cross-border incursions must elicit special scrutiny. A concern among many preemption scholars is that states may seek to shift costs onto out-of-state businesses, while retaining benefits for those within the state, leading to inefficient regulations.⁷⁰ Such conduct is theoretically possible. Real firms do exist in particular locations. Corporations are incorporated in particular states and have offices and perhaps factories in specific locations. State legislatures, agencies, or courts could seek to identify out-of-state firms and target them for costly regulation. Somewhat more benignly, state regulators might act with selective indifference, showing concern for the costs that regulations impose within the state, but ignoring the potential costs that fall on out-of-state parties. The potential inefficiency and inequity of calculating in-state benefits, without concern for out-of-state costs, might justify the promulgation of a uniform federal rule, which would avoid that tendency to predation.⁷¹

⁶⁹ See *Bush v. Gore*, 531 U.S. 98 (2000).

⁷⁰ See, e.g., Roderick M. Hills, Jr., *Against Preemption: How Federalism Can Improve the National Legislative Process*, 82 N.Y.U. L. REV. 1, 7 (2007) (“Ideally, federal law ought to preempt state law when state governments are untrustworthy because of their partiality, disruptive effects on national markets, and incentives for cost exporting.”); Issacharoff & Sharkey, *supra* note 60, at 1368 (proposing an account of preemption that focuses on “interests in promoting national uniformity and protecting against spillover effects”); Thomas W. Merrill, *Preemption in Environmental Law: Formalism, Federalism Theory, and Default Rules*, in *FEDERAL PREEMPTION: STATES’ POWERS, NATIONAL INTERESTS* 166, 174–76 (Richard Epstein & Michael Greve eds., 2007) (noting preemption as a potential remedy for states’ exporting a disproportionate share of the costs of their environmental regulations onto other states); Alan Schwartz, *Statutory Interpretation, Capture, and Tort Law: The Regulatory Compliance Defense*, 2 AM. L. & ECON. REV. 1, 20–22 (2000) (discussing the problem of state regulation that externalizes costs and disrupts national markets in uniform products).

⁷¹ The federal legislative process, of course, may be subject to other dangers of predation. See Hills, *supra* note 70, at 10–16 (describing the institutional failings resulting from the large scale of federal government).

The diffuse nature of firm ownership, however, renders such cost-shifting difficult. The state of incorporation reflects merely a choice of law to govern internal corporate affairs, rather than any connection to that state. Factories and offices do exist in specific states, but the overall economic beneficiaries of firms tend to be widely dispersed.⁷² The stockholders, individual and institutional, and other stakeholders of a firm have no necessary geographical relationship with a firm. In sum, the diminished significance of territorial boundaries makes it much more difficult for regulators or courts to identify the true outsider, who would be the appropriate target for cost externalization.

The prevalence of attempted cost-shifting is an empirical question. Professors Eric Helland and Alexander Tabarrok have undertaken several studies of the potential judicial targeting of out-of-state defendants. Their research suggests that defendants who are out-of-state firms are subject to larger damage awards in the ten states using partisan judicial elections.⁷³ The key finding is not that out-of-state firms generally fare worse in tort litigation, but that such firms fare worse only in states with partisan election systems.⁷⁴ Indeed, the bias against out-of-state defendants disappeared when the study examined cases decided by federal courts sitting in diversity.⁷⁵ The Helland and Tabarrok studies strongly suggest that it is not the law or the juries that may target out-of-state firms, but rather judges selected through partisan elections. Cost-shifting appears to result from particular electoral structures, rather than from substantive state policies.

More generally, it is not clear why out-of-state businesses cannot protect their interests adequately in the state political process. Such firms individually or collectively are well situated to make their arguments known

⁷² See Buzbee, *supra* note 47, at 1608 n.216.

⁷³ See Eric Helland & Alexander Tabarrok, *The Effect of Electoral Institutions on Tort Awards*, 4 AM. L. & ECON. REV. 341 (2002) [hereinafter Helland & Tabarrok, *Effect of Electoral Institutions*]; Alexander Tabarrok & Eric Helland, *Court Politics: The Political Economy of Tort Awards*, 42 J.L. & ECON. 157 (1999) [hereinafter Tabarrok & Helland, *Court Politics*].

⁷⁴ See Helland & Tabarrok, *Effect of Electoral Institutions*, *supra* note 73, at 359 (“The coefficients on nonpartisan out and on nonpartisan in are almost identical, which suggests that there is little or no penalty against out-of-state businesses in nonpartisan states.”). The findings of the earlier Helland and Tabarrok study, by contrast, do suggest that even in states without partisan elections, out-of-state businesses fare worse. However, the authors note the potential for confounding factors, such as the possibility that out-of-state firms are systematically larger and involved in more serious cases than in-state firms. See Tabarrok & Helland, *Court Politics*, *supra* note 73, at 163, 169 (“Our preliminary results indicate . . . [that i]n both elected and appointed states, awards against out-of-state firms are much larger than against in-state firms.”).

⁷⁵ See Helland & Tabarrok, *Effect of Electoral Institutions*, *supra* note 73, at 367 (“[A]wards in cases with out-of-state defendants are larger in partisan elected states when state judges are deciding cases, but not when nonelected federal judges with life tenure are deciding cases.”); see also Gary T. Schwartz, *Considering the Proper Federal Role in American Tort Law*, 38 ARIZ. L. REV. 917, 936 (1996) (“The presence of these federal judge liability-expanding landmarks makes it difficult to believe that state court judges, in expanding liability, have been influenced in any major way by mere in-state preferences.”).

through advertising and campaign contributions. It might be burdensome for individual firms to monitor and participate in the political processes in fifty states. Organizations, however, can assist firms in coordinating their efforts. With regard to judicial elections, firms have become more active in protecting their interests in this manner. The United States Chamber of Commerce and other business organizations recently have intervened with growing vigor to elect pro-business candidates.⁷⁶ These efforts may reverse even the residual out-of-state bias that Helland and Tabarrok detected in states with partisan judicial elections.

To the extent that a normative theory of impermissible spillover effects is needed, one relatively well-developed doctrine appears suited to answer that call. The dormant commerce clause functions exactly to negate state laws that discriminate against interstate commerce or impermissibly burden interstate commerce.⁷⁷ That doctrine targets a small subset of state actions with interstate effects and subjects them to harsh treatment, invalidating them without the need for any congressional action in the area. The normative underpinnings of the doctrine appear with clarity in various judicial opinions. Justice John Paul Stevens, for example, is one of the Justices least likely to find state regulations preempted by federal law, but he has an active and robust view of the scope of the dormant commerce clause.⁷⁸ Protecting the free flow of commerce from partisan interference stands as a normative goal of supreme importance. In more extreme cases, the Due Process Clause restricts the ability of states to regulate truly out-of-state conduct.⁷⁹ The potential for spillover effects does not, by itself, justify broad preemption of state law.

A distinct, though related, concern arises specifically from the problem of standard products designed for a national market.⁸⁰ Compliance by firms with varying regulatory regimes in different states might eliminate economies of scale and raise the price of the product everywhere. In addition, the manufacturer as a practical matter might be compelled to design the product in accordance with the standards of the most populous state or group of states. A small state might never be able to influence the safety features of such a product. In such circumstances, the arguments against a national standard diminish. The choice is not between plural standards and a single

⁷⁶ See Kavan Peterson, *Cost of Judicial Races Stirs Reformers*, STATELINE.ORG, Aug. 5, 2005, <http://www.stateline.org/live/ViewPage.action?siteNodeId=136&languageId=1&contentId=47067> (reporting that in judicial elections, “[b]usiness groups, [led] by the U.S. Chamber of Commerce, doubled contributions from \$8.4 million in 2002 to \$15.8 million nationwide in 2004, exceeding for the first time total contributions by trial lawyers”).

⁷⁷ See ERWIN CHERMERINSKY, *CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES* § 5.3.4 (3d ed. 2006).

⁷⁸ See Robert A. Schapiro, *Justice Stevens’s Theory of Interactive Federalism*, 74 *FORDHAM L. REV.* 2133, 2165–68 (2006).

⁷⁹ See *ASARCO Inc. v. Idaho State Tax Comm’n*, 458 U.S. 307, 315 (1982).

⁸⁰ See Schwartz, *supra* note 70, at 16–17.

standard, but between a single standard set by California and a single standard set by a national process.

Even in this situation, a preemptive federal standard may not be the best solution. The federal government can facilitate greater regulatory uniformity without simply displacing state law. Acting as a coordinator, rather than as a command-and-control regulator, the federal government can encourage states to work toward uniform laws. Similarly, the federal government could urge states to devise their own regulatory systems and then give all states the option of choosing from a short menu of sister-state regulatory alternatives. Or the federal government could require state regulations to follow a general federal framework designed to reduce interstate conflict. This option could include a requirement to seek federal approval before implementing a plan.⁸¹ All of these schemes would promote plurality, dialogue, and redundancy. The resulting regulations would reflect a dynamic, bottom-up system. However, by limiting the number of choices, this plan would afford some measure of uniformity, or at least constrained diversity.

Finally, concerns for uniformity should never lead to the elimination of a state compensatory scheme without the substitution of an alternative, individual remedy. State tort systems have regulatory impacts, but they serve other purposes as well.⁸² Federal regulators should be cautious before decreeing that a category of accident victims must bear their own losses because of the larger needs of the national economy. Some benchmark must be fashioned to define what constitutes a compensable harm. Nevertheless, that benchmark may not match the regulatory goals of a program. Regulators may decide that the best course is to promote a uniform national design standard, while making provisions to compensate all who suffer harm, even if that standard is met.⁸³ It would be reasonable to decide, for example, that auto manufacturers should not be required to install airbags without necessarily deciding that no auto manufacturer should be found liable if someone is injured because of the absence of an airbag. At the least, a court should not assume that a decision not to impose a requirement is necessarily a decision to preempt a compensatory tort action.

B. National Uniformity and the Post-Westphalian Order

The federal interest in uniformity, especially in foreign policy matters, provides another justification for preemption.⁸⁴ The federal government has

⁸¹ See JOSEPH F. ZIMMERMAN, CONGRESSIONAL PREEMPTION: REGULATORY FEDERALISM 159–75 (2005) (discussing various forms of partial federal preemption).

⁸² See *supra* text accompanying notes 41–43.

⁸³ See Buzbee, *supra* note 47, at 1561 n.36 (giving examples of nuclear power and vaccine regulations, which have preemptive force, but provide alternative compensatory schemes).

⁸⁴ See Issacharoff & Sharkey, *supra* note 60, at 1374–76 (arguing that preemption protects the constitutional principle of a uniform national policy with regard to international commerce).

the power to dictate the foreign policy of the United States, and the United States Supreme Court has construed broadly the congressional desire to prohibit states from developing their own foreign policies.⁸⁵ Throughout the world, however, regulatory authority increasingly is exercised by supranational and subnational bodies. The nation-state no longer functions as the sole source of law. In this way, a post-Westphalian order is emerging.

Under the Westphalian system, the sovereign state is the principal political unit.⁸⁶ While the nation-state certainly retains its central role in contemporary politics, that dominance is waning. Supranational bodies, such as the European Union, the World Trade Organization, and entities devised by the North American Free Trade Agreement, exercise significant power. Subnational units do as well. Governor Arnold Schwarzenegger recently described California as “the modern equivalent of the ancient city-states of Athens and Sparta,”⁸⁷ which suggests a decidedly non-Westphalian conception of the nation-state.

In the area of climate change, these nonnational entities have been especially active. The federal government has undertaken little action to mitigate the effect of greenhouse gases or global warming. The United States, for example, refused to ratify the Kyoto Protocol, relating to global warming.⁸⁸ In the face of inaction by the national government, states and regions have attempted to address climate change. California has undertaken various initiatives designed to control the output of carbon dioxide.⁸⁹ Seven northeastern and mid-Atlantic states entered into a memorandum of understanding regarding a plan to cut carbon dioxide emissions through a cap and trade plan.⁹⁰ Other organizations of governors are working to develop their own regional plans to reduce greenhouse gases.⁹¹

In an even more direct threat to the primacy of the nation-state, various states have worked with Canadian Provinces on devising plans to address

⁸⁵ See, e.g., *Am. Ins. Ass'n v. Garamendi*, 539 U.S. 396 (2003) (holding the California statute requiring the disclosure of information about Holocaust-era insurance policies preempted by the foreign policy of the United States); *Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363 (2000) (holding a state law restricting state transactions with companies doing business with Burma preempted by the foreign policy of the United States); *United States v. Locke*, 529 U.S. 89 (2000) (holding the state regulation of oil spills preempted by federal statute).

⁸⁶ For a discussion of the development of the Westphalian order, see Berman, *supra* note 68, at 453–59.

⁸⁷ See Gar Alperovitz, *California Split*, N.Y. TIMES, Feb. 10, 2007, at A15.

⁸⁸ See Kirsten H. Engel & Scott R. Saleska, *Subglobal Regulation of the Global Commons: The Case of Climate Change*, 32 *ECOLOGY L.Q.* 183, 192–93 (2005).

⁸⁹ See Felicity Barringer, *California, Taking Big Gamble, Tries to Curb Greenhouse Gases*, N.Y. TIMES, Sept. 15, 2006, at A1.

⁹⁰ See Kirsten Engel, *State and Local Climate Change Initiatives: What Is Motivating State and Local Governments to Address a Global Problem and What Does this Say about Federalism and Environmental Law?*, 38 *URB. LAW.* 1015, 1018 (2006).

⁹¹ See Kirsten H. Engel, *Mitigating Global Climate Change in the United States: A Regional Approach*, 14 *N.Y.U. ENVTL. L.J.* 54, 65–68 (2005).

climate change. In 2001, the Conference of New England Governors and Eastern Canadian Premiers adopted a “climate action plan,” which included specific targets for the reduction of greenhouse gases.⁹² A less formal organization, known as “Powering the Plains,” includes representatives from North Dakota, South Dakota, Iowa, Minnesota, Wisconsin, and Manitoba.⁹³ The group is collaborating on alternative fuel projects.⁹⁴

Professor Kirsten Engel has published a series of articles explaining the value of these regional environmental efforts.⁹⁵ While these collaborations may have little impact on the overall scope of climate change, she has suggested the variety of benefits these projects promote. They may develop innovative solutions to common problems and may prod the national government into action. These efforts illustrate the value of plurality, dialogue, and redundancy. The state regulatory processes provide information to the United States and afford a fail-safe mechanism should national regulations be absent or fall short of desired goals.

Global subnational initiatives exist outside of the environmental context, as well. Professor Judith Resnik has documented the transnational story of groups seeking to gain local support for the Convention to Eliminate All Forms of Discrimination Against Women (CEDAW).⁹⁶ The United States has not ratified CEDAW. However, several transnational nongovernmental organizations, including Amnesty International and the General Federation of Women’s Clubs, encouraged states and localities to endorse CEDAW. Resnik reports that “[a]s of 2004, forty-four cities, eighteen counties, and sixteen states have passed or considered legislation relating to CEDAW.”⁹⁷

San Francisco has gone farther and sought to implement some of the provisions of CEDAW, in particular by investigating and issuing reports relating to systematic discrimination against women.⁹⁸ Similarly, Los Angeles adopted an ordinance noting the “continuing need . . . to protect the human rights of women and girls by addressing discrimination, including

⁹² *Id.* at 65.

⁹³ See Engel, *supra* note 90, at 1028.

⁹⁴ See Engel, *supra* note 91, at 65–68.

⁹⁵ See Kirsten H. Engel, *Harmonizing Regulatory and Litigation Approaches to Climate Change Mitigation: Incorporating Tradable Emissions Offsets into Common Law Remedies*, 155 U. PA. L. REV. 1563 (2007); Engel, *supra* note 90; Kirsten H. Engel, *Harnessing the Benefits of Dynamic Federalism in Environmental Law*, 56 EMORY L.J. 159 (2006); Engel, *supra* note 91; Engel & Saleska, *supra* note 88.

⁹⁶ See Judith Resnik, *Law’s Migration: American Exceptionalism, Silent Dialogues, and Federalism’s Multiple Ports of Entry*, 115 YALE L.J. 1564 (2006); see also Catherine Powell, *Dialogic Federalism: Constitutional Possibilities for Incorporation of Human Rights Law in the United States*, 150 U. PA. L. REV. 245 (2001).

⁹⁷ Resnik, *supra* note 96, at 1640.

⁹⁸ See *id.* at 1641–42.

violence, against them and to implement, locally, the principles of CEDAW.”⁹⁹

These examples indicate that states and localities can interact directly with international organizations and conventions. These global-regarding activities may have some capacity to spur the United States to action, or at least mitigate to some small degree the perceived harms of federal inaction. These state and local initiatives do not contradict the foreign policy of the United States government. Rather, states and localities have taken positions in situations in which the national government has declined to make a commitment. Prohibiting these kinds of actions by state and local governments would promote national uniformity, but would not advance any independent federal interest. Applying broad doctrines of preemption to prohibit these efforts to think globally, and act locally with global effects, would achieve little benefit and risk broad losses. If significant federal interests do exist, Congress or the President should clearly articulate the nature of these interests and the necessity for their preemptive scope. The unique functions of the nation-state are diminishing in number, and contemporary doctrines of preemption should not try to recapture the lost world in which nation-states alone exercised significant prerogatives.¹⁰⁰

C. *Legitimacy Without Borders*

As this discussion illustrates, the polyphonic conception of federalism resists a focus on regions of exclusive authority, whether the regions are defined as the exclusive domains of states, the federal government, or the international community. Polyphony acknowledges, and indeed promotes, the interaction of a wide variety of actors. The polyphonic conception of federalism rejects boundary maintenance as the central project of federalism. The previous Sections have sought to demonstrate the value and ubiquity of cross-border interactions.

The question of legitimacy remains. Though nation-states did not begin as democracies, by the end of the twentieth century, nation-states in the industrialized world generally functioned as liberal democracies. The commitment to popular sovereignty legitimated the state’s exercise of power. The nation could regulate its citizens because its citizens participated in the process of making the laws. Under the dual federalism model, states in the United States were understood as junior varsity nation-states, with similar claims to democratic legitimacy. States promulgated laws that

⁹⁹ *Id.* at 1642–43 (quoting L.A., Cal., Ordinance 175,735 (Dec. 24, 2003)) (internal quotation marks omitted).

¹⁰⁰ Of course, the initial rise of the nation-state served to displace political systems in which power tended to be more decentralized. The existence of significant and interactive subnational and supranational bodies has a long history. The Holy Roman Empire provides a notable example. *See* Berman, *supra* note 68, at 453–56.

bound their own citizens, who participated in the fashioning and revision of those laws.

Within this conception, federal preemption may promote democracy. The spillover effects of state actions threaten not just economic efficiency, but democratic accountability. When state laws have extraterritorial effects, they undermine democratic principles. A state is imposing its will on people who are not represented in the state political process. When California develops its own environmental policy or foreign policy with effects outside of California, it detracts from the ability of others to engage in meaningful self-governance. A preemptive federal standard, on the other hand, reflects the decisions of the national government, which is democratically accountable to all the citizens of the United States. The polyphonic approach to preemption, which accepts broad spillover effects and deprecates the significance of territorial boundaries, must find a different ground for its legitimacy.

Drawing on the insights of political science, Professor Roderick Hills has developed an ingenious response to this legitimacy problem.¹⁰¹ He argues that the national legislative process also suffers from democratic deficits. When courts refuse to find state regulations preempted by federal law, they force the interest groups favoring preemption to convince Congress to change the law. Hills accepts the notion that states enact inefficient laws, which impose costs on others. However, those laws provide an incentive for firms to place issues on the congressional agenda that would otherwise languish in obscurity or committee.¹⁰²

I would like to draw on a different body of literature to address the issue of democratic accountability. Another area in which scholars have focused on the legitimacy of laws emanating from outside a given political system is the debate over customary international law (CIL).¹⁰³ CIL puts into sharp relief the issues of extraterritoriality that underlie more general discussions of preemption. Arguments developed in the CIL context may help to illuminate broader questions of legitimacy.

When the United States ratifies a treaty, according to the mechanism prescribed in the Constitution, the provisions of the treaty become binding federal law. Questions may arise about whether a treaty is self-executing or requires implementing legislation,¹⁰⁴ but treaty law clearly becomes federal law through the ratification process. The legitimacy of treaty law raises few

¹⁰¹ See generally Hills, *supra* note 70.

¹⁰² *Id.* at 16–32.

¹⁰³ See, e.g., Curtis A. Bradley & Jack L. Goldsmith, *Customary International Law as Federal Common Law: A Critique of the Modern Position*, 110 HARV. L. REV. 815 (1997); Harold Hongju Koh, *Is International Law Really State Law?*, 111 HARV. L. REV. 1824 (1998).

¹⁰⁴ See *Mendellin v. Texas*, 128 S. Ct. 1346, 1356 (2008) (discussing the distinction between treaties that automatically have effect as domestic law and those that do not); RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 111 (1987).

questions because ratification according to the process set forth in the Constitution satisfies democratic standards. Treaties themselves may be controversial, and their intersection with other domestic law may raise interesting issues, but their basic status as federal law remains uncontested. In contrast to treaty law, customary international law “results from a general and consistent practice of states followed by them from a sense of legal obligation.”¹⁰⁵ A fierce scholarly debate has arisen recently over the status of CIL in domestic courts. Does CIL count as binding federal law in the same manner as ratified treaties? Under the modern view, advanced by Dean Harold Koh, among others, CIL is federal law, like other federal law.¹⁰⁶ On this conception, CIL is binding on federal and state courts and preempts contrary state law.¹⁰⁷ According to the revisionist position, supported by Professors Curtis Bradley and Jack Goldsmith, CIL is not, of its own force, a valid source of law. In this view, CIL is not federal law, unless federal lawmakers make it so.¹⁰⁸ Similarly, Bradley and Goldsmith argue that CIL is not state law, unless state lawmakers make it law. Without further action by authorized bodies in the United States, such as state or federal legislatures, CIL is not law that is binding in courts in the United States.¹⁰⁹

Dean Alexander Aleinikoff, among others, has offered what might be termed an intermediate position, arguing that CIL might function as non-preemptive federal law.¹¹⁰ In this view, federal and state courts would apply CIL, but state courts would not be bound by federal court interpretation of CIL, and federal courts would not be bound by state court interpretation of CIL.¹¹¹ CIL would function like general common law in the pre-*Erie* era.

This understanding of CIL as nonpreemptive federal law fits well within a polyphonic framework. State courts and federal courts could develop diverse perspectives and contribute to an ongoing debate about the content and application of CIL. This approach, unlike the modern view of CIL as binding federal law, would allow CIL to develop in non-uniform ways in state and federal courts. Professor Ernest Young has noted the fear that the failure to treat CIL as preemptive federal law “would invite a ca-

¹⁰⁵ RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 102(2) (1987).

¹⁰⁶ See, e.g., Koh, *supra* note 103.

¹⁰⁷ See Ernest A. Young, *Sorting Out the Debate Over Customary International Law*, 42 VA. J. INT’L L. 365, 366–67 (2002) (describing the modern view of CIL as well as the revisionist position before advocating an intermediate solution).

¹⁰⁸ See Bradley & Goldsmith, *supra* note 103, at 870.

¹⁰⁹ See *id.*

¹¹⁰ See, e.g., T. Alexander Aleinikoff, *Thinking Outside the Sovereignty Box: Transnational Law and the U.S. Constitution*, 82 TEX. L. REV. 1989 (2004) [hereinafter Aleinikoff, *Thinking Outside the Sovereignty Box*]; T. Alexander Aleinikoff, *International Law, Sovereignty, and American Constitutionalism: Reflections on the Customary International Law Debate*, 98 AM. J. INT’L L. 91 (2004) [hereinafter Aleinikoff, *International Law, Sovereignty, and American Constitutionalism*].

¹¹¹ See Aleinikoff, *International Law, Sovereignty, and American Constitutionalism*, *supra* note 110, at 97–99.

cophony of diverse state interpretations.”¹¹² Cacophony is always the dark underside of polyphony. As Professor Young also points out, uniformity concerns are likely overstated, and Congress always would retain the authority to federalize CIL by enacting an appropriate statute.¹¹³

My goal here, however, is not to intervene directly in this debate, but to draw on the cogent arguments that Dean Aleinikoff made in the course of elaborating his position.¹¹⁴ A key issue in the CIL controversy is the source of legitimacy for CIL. If CIL is not the product of the federal or state lawmaking process, how can it be treated as law, consistent with principles of popular sovereignty? To apply CIL in the United States is to apply law not made by the people to whom it applies. In other words, the CIL issue presents a special case of the more general problem of intersystemic governance. Sometimes laws that are the product of a different political system apply in a polity.

Dean Aleinikoff offers an approach that is particularly helpful in addressing the issue of preemption. He proposes that legitimacy need not derive from direct democratic control of the lawmaking process. Such direct control is lacking in many aspects of our political system, including agency rulemaking and judicial review. Instead, Dean Aleinikoff suggests that legitimacy flows from institutions operating in a “field of democratic control.”¹¹⁵ Elements of this field include fair, transparent processes and the ultimate possibility of popular control. “It is these kinds of considerations,” he argues, “that make the Federal Reserve System, the Environmental Protection Agency, *Marbury v. Madison*, and the United States Congress fully acceptable aspects of an American constitutionalism dedicated to the premise of popular sovereignty.”¹¹⁶

These arguments shed light on the preemption debate. These kinds of procedural attributes also would lend legitimacy to the potential extraterritorial effects of state law. A variety of federal norms regulate and guarantee the legitimacy of state governmental bodies. The Equal Protection Clause, the Voting Rights Act, the Due Process Clause, and even the seldom-invoked Republican Guarantee Clause, shape state lawmaking processes. Congress retains the authority to trump offending state laws. This political context provides substantial legitimacy for the effect of state laws beyond the boundaries of the state. Embedded in this political process, state laws with extraterritorial impact do not automatically violate ideals of popular sovereignty. Indeed, given the growing significance of international law

¹¹² Young, *supra* note 107, at 460.

¹¹³ *See id.* at 496–508.

¹¹⁴ *See* Aleinikoff, *Thinking Outside the Sovereignty Box*, *supra* note 110; Aleinikoff, *International Law, Sovereignty, and American Constitutionalism*, *supra* note 110.

¹¹⁵ Aleinikoff, *International Law, Sovereignty, and American Constitutionalism*, *supra* note 110, at 106.

¹¹⁶ *Id.*

and international institutions, these kinds of process constraints are likely to become increasingly important guarantors of democratic legitimacy. The rise of the nation-state allowed for a territorial match of legal inputs and outputs. The citizens of that nation-state dictated the laws, which would apply only within that nation-state. With the nation-state losing its exclusive control of lawmaking authority, the ideal of popular sovereignty will need to find vindication outside of direct popular electoral control. Viewed in this perspective, preemption is an unnecessary mechanism for promoting principles of legitimacy and accountability. Democratic legitimacy is central, but the means for guaranteeing it are not judicial invalidation of state laws with extraterritorial effects, but rather the democratic process by which Congress chooses to allow or invalidate such laws. Appropriately, Congress, not the courts, gives the system a democratic imprimatur. The congressional decision to permit such laws embodies a democratically legitimate process. A contrary principle of matching laws and territorial jurisdictions, judicially enforced by preemption doctrine, is not necessary to confer democratic legitimacy.

IV. CONGRESS AND THE COURTS

The discussion thus far focuses primarily on the appropriate stances of Congress and federal agencies. I argue that federal rulemaking bodies should be wary of completely preempting state law. Uniformity may be necessary in some areas, but it will come at a loss. More fine-tuned harmonization methods exist, wherein the federal government and the states work together to devise an optimal regulatory scheme.

For similar reasons, courts should be wary of assuming that Congress intended its statutes to have a broad preemptive sweep.¹¹⁷ Congress has a wide variety of options in addition to all-or-nothing preemption. A court, however, generally cannot craft a creative solution to address a problematic state law. Such situations demand a congressional, rather than a judicial, resolution. Congressional embrace of polyphonic principles should guide the courts to accept greater state-federal overlap.

What the polyphonic approach does not provide is a presumption against preemption rooted in dualist principles. In *Rice v. Santa Fe Elevator Corp.*, the Supreme Court used dualist language in declaring an “assumption” against preemption: “[W]e start with the assumption that the historic police powers of the States were not to be superseded by the Fed-

¹¹⁷ Determining legislative intent is always difficult. For an overview of some of the problems, see WILLIAM N. ESKRIDGE, JR. ET AL., *LEGISLATION AND STATUTORY INTERPRETATION* 213–22 (2000). Canons of interpretation can be especially useful when intent is unclear. See, e.g., John F. Manning, *Legal Realism & the Canons’ Revival*, 5 *GREEN BAG 2D* 283, 285 (2003); Edward T. Swaine, *The Local Law of Global Antitrust*, 43 *WM. & MARY L. REV.* 627, 717–18 n.365 (2001) (discussing the usefulness of canons in light of the difficulty in ascertaining legislative intent).

eral Act unless that was the clear and manifest purpose of Congress.”¹¹⁸ *Rice*’s reference to “historic police powers” has assumed a talismanic quality, meriting repetition throughout the Court’s preemption jurisprudence.¹¹⁹ It is not clear, however, that this *Rice* presumption against preemption has a dispositive effect on the outcome of actual cases.¹²⁰ In *Rice* itself, the Court held that the federal law preempted state law. *Rice* often is cited in dissent from decisions holding state law preempted.¹²¹

Polyphony offers different resources to oppose what Professor John McGinnis has aptly termed the Court’s “promiscuous” invocation of preemption.¹²² As Professor Caleb Nelson has demonstrated, the Court has developed a broad concept of conflict preemption under a theory of “obstacle preemption.”¹²³ Under the obstacle preemption doctrine, a state law will be preempted if a court concludes that the state law will hinder the accomplishment of the purposes underlying the federal law.¹²⁴ The Court has deployed this doctrine to strike down state regulations that it finds to be in conflict with a federal statute, without regard to whether the state law actually conflicts with some textual provision of the federal enactment.¹²⁵ A key issue implicated by the obstacle preemption doctrine is how to understand Congress’s purpose when it regulates with a specific goal in mind. Should a court presume that Congress wanted to accomplish a particular purpose, even to the point of preempting state law? An understanding of the background principle of concurrent regulation should make a court hesitate to adopt this presumption.

The polyphonic perspective emphasizes that obstacle preemption might actually undermine the statutory purpose. Eliminating complementary state regulatory schemes might contradict the congressional purpose to advance

¹¹⁸ 331 U.S. 218, 230 (1947); *see also* *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996) (“[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.”).

¹¹⁹ *E.g.*, *City of Columbus v. Ours Garage & Wrecking Serv., Inc.*, 536 U.S. 424, 432–33 (2002); *United States v. Locke*, 529 U.S. 89, 108 (2000).

¹²⁰ Scholars find mixed evidence of the importance of the *Rice* presumption. *See, e.g.*, Issacharoff & Sharkey, *supra* note 60, at 1383 n.109 (“The Court has seemed to adhere to a ‘presumption against preemption,’ especially prevalent in situations in which the federal government regulates in areas traditionally within the domain of the states. . . . The current viability of the presumption is, however, subject to debate.”).

¹²¹ *See, e.g.*, *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 591 (2001) (Stevens, J., dissenting); *Geier v. Am. Honda Motor Co.*, 529 U.S. 861, 907 (2000) (Stevens, J., dissenting).

¹²² John O. McGinnis, *Reviving Tocqueville’s America: The Rehnquist Court’s Jurisprudence of Social Discovery*, 90 CAL. L. REV. 485, 526 n.203 (2002) (discussing the Supreme Court’s “promiscuous use” of preemption).

¹²³ *See* Nelson, *supra* note 4, at 228–29; *see also* CHEMERINSKY, *supra* note 77, § 5.2, at 412–16 (discussing preemption of state laws that impede federal objectives).

¹²⁴ *See* CHEMERINSKY, *supra* note 77, § 5.2, at 412–16.

¹²⁵ *See* *Buckman Co. v. Plaintiffs’ Legal Comm.*, 531 U.S. 341 (2001); *see also* Meltzer, *supra* note 16, at 366 (discussing *Buckman*).

health and safety aims. Legislators might envision a particular federal purpose, embedded in a rich interplay of state and federal regulations, which promote a variety of valuable goals. Courts should not assume that a decision to adopt a particular regulation equates to a decision to prohibit all other regulatory options. Courts should not presume that federal regulators embrace monophony.

CONCLUSION

In *Gonzales v. Raich*,¹²⁶ the Court upheld the authority of Congress to regulate marijuana grown at home for medical purposes. The ruling constituted a broad reaffirmation of the post-New Deal compromise. The courts would defer to congressional determinations of the need for federal regulation. The decision also represented a somewhat uncharacteristic instance of judicial restraint.¹²⁷ The Court should extend that restrained attitude into the preemption context.

Determining the appropriate interplay of state and federal law is a complex task, much better performed by Congress than by the courts. Judicial preemption decisions are blunt instruments, lacking the subtlety of congressionally fashioned accommodations. Line drawing is something that courts can do well. However, preemption doctrine, like other instantiations of federalism, should focus on accommodating state and federal programs, not on drawing lines between them. Once the courts acknowledge these lessons of polyphony, they should understand the proper limitations of their role. Not only may preemption decisions fail to effectuate congressional purposes, but the rejection of concurrence may undermine critical regulatory goals.

State law may well have interstate effects, potentially raising concerns about cost-shifting, impairing uniform federal policy, and democratic accountability. In the contemporary world, however, such cross-border influences are inevitable and often desirable. The interaction of regulations across state and national boundaries promotes diversity and dialogue, rendering the resulting regulatory systems more innovative and responsive.

One could conceive of a static model of sovereignty based on strict territorial principles. In such a conception, each state would regulate only citizens of that state; the United States would have a uniform foreign policy, determined in Washington, with the national government acting as the sole voice in international and transnational affairs; and political legitimacy would rest on territorial notions of popular sovereignty, with the only laws applying in a state being those produced by the democratic processes of that state or of the United States. This conception, however, is not a descrip-

¹²⁶ 545 U.S. 1 (2005).

¹²⁷ Dean Larry Kramer, among others, has noted the assertive nature of the Rehnquist Court. See Larry D. Kramer, *The Supreme Court, 2000 Term—Foreword: We The Court*, 115 HARV. L. REV. 5, 131–58 (2001).

tively accurate account of the contemporary United States. In the United States, as elsewhere in the world, political boundaries no longer carry this weight. The alternative, polyphonic account I have sought to develop is descriptively more accurate and normatively more attractive. Democratic accountability is no longer guaranteed by a matching of law and polity. Instead, in the federalism of the contemporary United States, legitimacy inheres in the political process by which Congress ultimately can decide which state laws to allow and which to invalidate. Regulators and courts should not resort to preemption in an attempt to recapture a monophonic, strictly territorial conception of sovereignty. Such a project would be unlikely to succeed and would eliminate many of the important benefits of a federalist system.

