

# RESPONSE

## Preemption Deals: Response to Robert Mikos

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### ABSTRACT

*This Response analyzes the dynamics of federal-state bargaining in the preemption domain in the context of both Congress and federal agencies. It develops both the argument for intergovernmental bargaining, and considers how the circumstances of negotiation and other factors might impede salutary results. Turning to Professor Robert Mikos's cogently argued suggestion that states use "poison pill" measures to achieve socially desirable equilibrium outcomes, it raises a series of objections. Intergovernmental bargaining may be inevitable, and even better than any plausibly available alternative mechanism for calibrating preemption effects. But it still may well be highly flawed.*

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## INTRODUCTION

Two threads traverse the voluminous scholarly literature about state law's preemption by federal statute or regulation. The first is a widely articulated worry that federal law ousts too much state law.<sup>1</sup> By contrast, few fret that too little state law is being ousted.<sup>2</sup> The reason for this asymmetry in concern is unclear. From the Framers' perspective, it seemed more likely that the states would overawe the federal government,<sup>3</sup> and there is little systematic evidence to suggest that there is either overall too much or too little federal preemption at present from a pure welfarist perspective. Indeed, even calculating the "optimal" level of across-the-board preemption would entail daunting difficulties given the many domains across which the national and state governments interact.

Second, scholars have, of late, shifted their focus from proposing boundaries to Congress's law-displacing authority, to instead investigating the quintessential legal process question: which forum—Congress, federal administrative agencies, or the federal judiciary—is most conducive to the appropriate settlement of preemption questions?<sup>4</sup> This "process-based" turn in preemption scholarship echoes (or perhaps mimics) an older, but analogous, pivot in the scholarly

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1 Catherine M. Sharkey, *Tort-Agency Partnerships in an Age of Preemption*, 15 THEORETICAL INQUIRIES L. 359, 360 (2014) [hereinafter Sharkey, *Tort-Agency Partnerships*] ("Tort preemption decisions rendered by the U.S. Supreme Court over the last two decades seem to triumph industry interests over consumer and patient interests."); see also Roderick M. Hills, Jr., *Against Preemption: How Federalism Can Improve the National Legislative Process*, 82 N.Y.U. L. REV. 1, 17 (2007) [hereinafter Hills, *Against Preemption*]; Garrick B. Pursley, *Preemption in Congress*, 71 OHIO ST. L.J. 511, 513 (2010); Ernest A. Young, "The Ordinary Diet of the Law": *The Presumption Against Preemption in the Roberts Court*, 2011 SUP. CT. REV. 253, 255 ("Some of the most important federalism choices that Congress and executive actors make have to do not so much with the scope of federal regulation, but rather with the extent to which that regulation will displace state law.").

2 An exception is Thomas W. Merrill, *Preemption in Environmental Law: Formalism, Federalism Theory, and Default Rules*, in FEDERAL PREEMPTION: STATES' POWERS, NATIONAL INTERESTS 166, 167 (Richard A. Epstein & Michael S. Greve eds., 2007).

3 THE FEDERALIST NO. 25, at 159 (Alexander Hamilton) (Clinton Rossiter ed., 2003) ("[I]n any contest between the federal head and one of its members, the people will be most apt to unite with their local government.").

4 See, e.g., Catherine M. Sharkey, *Inside Agency Preemption*, 110 MICH. L. REV. 521, 526 (2012) [hereinafter Sharkey, *Inside Agency Preemption*] (describing a "robust, emergent debate of the comparative institutional competencies among Congress, courts, and agencies in resolving the statutory interpretation, federalism, and regulatory policy issues that are embedded in preemption disputes"). Compare Thomas W. Merrill, *Preemption and Institutional Choice*, 102 NW. U. L. REV. 727, 727–28 (2008) (analyzing preemption in institutional choice terms, and recommending a central role of courts), with Jamelle C. Sharpe, *Legislating Preemption*, 53 WM. & MARY L. REV. 163, 173 (2011) (suggesting that agencies should take the lead role).

theorization of individual rights<sup>5</sup> and constitutional federalism.<sup>6</sup> Across these domains, the ascendancy of process as a solution for dysfunction in lieu of a substantive solution is a clue that something is awry. It suggests, in my view, scholars' discomfort at the difficulty of homing in upon a sound first-order rule for preemption—i.e., a clear specification of when and how far the federal government can go in displacing state law. Given the varying strength of federal and state interests across different domains, and the fact that the optimal inter-governmental equilibrium even in a specific substantive domain may well change with time, this difficulty is likely to be well-nigh insoluble. Indeed, the depth of first-order disagreement is suggested by the persisting debate about the basic question of the textual source of Congress's power to preempt state laws.<sup>7</sup> In this light, the felt need to retreat instead of to process is a gesture of defeat.

To this debate, Professor Robert Mikos's illuminating paper, *Making Preemption Less Palatable: State Poison Pill Legislation*, brings a new proposal.<sup>8</sup> Mikos shares the common prior assumption of preemption scholars that too much state law is ousted via federal statutes.<sup>9</sup> Rather than a procedural response, however, he breaks un-plowed ground by offering the states a novel legal technology that can be applied to shift the results of federal-state interactions.<sup>10</sup> Invoking the terminology of corporate governance, Mikos urges states to adopt a "poison pill."<sup>11</sup> This would render state assistance to federal programs "conditional on Congress forbearing from preempting another state law."<sup>12</sup>

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5 Compare JOHN HART ELY, *DEMOCRACY AND DISTRUST* 87 (1980), with Laurence H. Tribe, *The Puzzling Persistence of Process-Based Constitutional Theories*, 89 YALE L.J. 1063, 1080 (1980).

6 See, e.g., Herbert Wechsler, *The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Government*, 54 COLUM. L. REV. 543, 546 (1954).

7 The two potential textual sources for Congress's power to preempt are the Supremacy Clause, see Caleb Nelson, *Preemption*, 86 VA. L. REV. 225, 231 (2000) ("[T]he source of preemption doctrine[] [is] the Supremacy Clause of the federal Constitution."), and the Necessary and Proper Clause, see Stephen A. Gardbaum, *The Nature of Preemption*, 79 CORNELL L. REV. 767, 782 (1994).

8 Robert A. Mikos, *Making Preemption Less Palatable: State Poison Pill Legislation*, 85 GEO. WASH. L. REV. 1 (2017).

9 *Id.* at 7 (diagnosing a "neglect of states' interests").

10 *Id.*

11 *Id.*

12 *Id.* at 25.

Although Mikos's analogy to the corporate law context is importantly incomplete (or at least I shall argue in what follows),<sup>13</sup> the normative core of his proposal is quite legible. In forceful terms, Mikos contends that in anticipation of preemptive federal legislation, states should install inseverability clauses that tie together the fates of (a) a state law that may be vulnerable to preemption with (b) a state law that enables policy valuable to the achievement of the federal government's goals.<sup>14</sup> Drawing on a recent body of scholarship on "inter-governmental bargaining,"<sup>15</sup> including my own recent work,<sup>16</sup> Mikos proposes that states leverage their plenary control over valuable institutional resources.

Critically here, Mikos points out that the "regulatory machinery . . . [of] administrative agencies, legislative bodies, and other officers"<sup>17</sup> is protected by the anticommandeering rule.<sup>18</sup> Using this property entitlement, and the fact that federal-state bargaining arises in congruent and divergent domains, states can engage in a species of "Coasean bargaining" with Congress. I call this the preemption poison pill ("PPP").<sup>19</sup> By hitching the fate of state-law provisions vulnerable to preemption to that of state-law provisions of value to the federal

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<sup>13</sup> A corporate "poison pill" is a governance rule inserted into a corporate charter by incumbent management as a means of raising the price of a hostile takeover bid by limiting a bidder's ability to acquire a controlling stake without regard to the preferences of current shareholders. *Unocal Corp. v. Mesa Petrol. Co.*, 493 A.2d 946, 958 (Del. 1985) ("[I]n the face of the destructive threat [the] tender offer was perceived to pose, the board had a supervening duty to protect the corporate enterprise, which includes the other shareholders, from threatened harm."). Mikos's preemption poison pill ("PPP") is a good analogy to this corporate device in one sense: in both cases, one actor (a firm or state) installs a governance mechanism that is triggered by the prospect of control being exercised by another actor (a bidder or the national government). In both contexts, the "poison pill" can induce negotiation. The analogy, however, breaks down in two ways. First, there is a robust debate as to whether poison pills help or harm firm value, whereas PPPs are presented as being an expected benefit. See Lucian Bebchuk et al., *What Matters in Corporate Governance?*, 22 REV. FIN. STUD. 783, 783 (2009). Second, the corporate law literature is focused on the problem of agency costs between shareholders and managers. Mikos's model, by contrast, treats states as unitary actors. Mikos does not consider whether the state legislators legislating a PPP are seeking to further some conception of the public interest in so doing. See *infra* text accompanying notes 102–11.

<sup>14</sup> Mikos, *supra* note 8, at 25–28.

<sup>15</sup> *Id.* at 26–28.

<sup>16</sup> See *id.* at 23–24, 31 (citing and discussing Aziz Z. Huq, *The Negotiated Structural Constitution*, 114 COLUM. L. REV. 1595 (2014) [hereinafter Huq, *Negotiated Constitution*]).

<sup>17</sup> Roderick M. Hills, Jr., *The Political Economy of Cooperative Federalism: Why State Autonomy Makes Sense and "Dual Sovereignty" Doesn't*, 96 MICH. L. REV. 813, 856 (1998) [hereinafter Hills, *Political Economy*].

<sup>18</sup> See *New York v. United States*, 505 U.S. 144, 176–77 (1992); Mikos, *supra* note 8, at 6.

<sup>19</sup> Mikos, *supra* note 8, at 30–31. Federal-state bargaining over cooperative regulatory programs is hinted at in Hills, *Political Economy*, *supra* note 17, at 872–77.

government, Mikos contends, states will increase federal actors' cognizance of the costs of preemptive national action to local control of law.<sup>20</sup>

As one might expect from his earlier work, Mikos's account is rich, engaging, and sophisticated. His article invites reflection on preemption as a cynosure of federalism anxieties. It also extends the scholarly debate on how negotiation or bargaining between different institutional bearers of constitutional entitlements might arise, and the conditions under which it might be desirable. This Response takes up both its central claims in the spirit of friendly, albeit intensive, scrutiny. On the general question of how to think about preemption, it zooms out from Mikos's specific claims to question the widely shared assumption that the problem with preemption is that there is too much of it. Figuring out how much preemption is desirable turns out to be quite hard. Turning to Mikos's bargaining model, this Response then develops a number of concerns about when and how bargaining over preemption will be availing for the ends that Mikos himself specifies as desirable. Although I find much to commend in Mikos's analysis, I remain unsure whether it would promote states' interests in the fashion that he hopes.

Finally, I take yet another step back to consider this critical analysis's implications for theories of institutional bargaining more generally. In this regard, Mikos's analysis usefully prompts me to reconsider my own contributions on this topic. In my previous work, I had made the descriptive claim that negotiation occurs both between branches<sup>21</sup> and between governments.<sup>22</sup> Rather than a static system of entitlements such as real property, the Constitution creates a dynamic and fluid ecosystem of institutional entitlements.<sup>23</sup> Focusing on the separation of powers context, I offered a qualified, normative defense of such negotiation as an alternative to judicial settlement of institutional boundaries.<sup>24</sup> I also flagged reasons for breakdowns or failures of bargaining. Some of the latter anticipate the concerns raised in this Response about PPPs.<sup>25</sup> But Mikos's analysis prompts me to think my earlier analysis missed something important—I failed to recognize the importance of the precise choice of *forum* for institutional bargaining.

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<sup>20</sup> See Mikos, *supra* note 8, at 25.

<sup>21</sup> See Huq, *Negotiated Constitution*, *supra* note 16, at 1620–32.

<sup>22</sup> See *id.* at 1632–44.

<sup>23</sup> See *id.*

<sup>24</sup> See *id.* at 1646–86.

<sup>25</sup> See *id.*

As legal process theorists would have appreciated, the institutional locus for dickering over the price of intergovernmental (or interbranch) deals turns out to matter quite a bit. The different institutional characteristics of diverse settings for intermural bargaining can either enhance the success of such efforts, or else scupper them entirely. Just like the more familiar marketplace for goods and services, the infrastructure and context in which deals are struck, in short, will influence the nature of those deals.

### I. THE PREEMPTION BASELINE

The normative premise of PPP is that “preemption decisions now threaten to displace too much state authority.”<sup>26</sup> Among federalism scholars, this is not an especially controversial assumption.<sup>27</sup> But is it correct? Mikos, like many commentators, implies that the problem with federal preemption is not simply a matter of a few isolated bad decisions, but rather adheres in our legal regime. In his view, a surfeit of ousting federal rules is a systematic threat to the “vibrancy of our federal system.”<sup>28</sup>

I am not so sure. More thought is needed to ascertain whether our current doctrinal and institutional arrangements produce too much, too little, or (Goldilocks-like) exactly enough preemption. It is not enough to identify a few “bad” federal decisions, even assuming there is a common criterion for the identification of “bad” preemptive acts. It is also necessary to show that the general legal framework for preemption does not result in an offsetting number of “good” decisions. While Mikos may in the end be correct in his assessment of the status quo, it would nonetheless be valuable for scholars of preemption who assume a need to rein in preemption to prove up their starting premise more convincingly.

To motivate my threshold concern on this point, it is useful to turn first to the evidence of excessive preemption that Mikos assembles. Even considered on their own terms, his examples are, at best, equivocal. In some of the case studies he uses to frame the PPP proposal, there is an observed effort by the federal government to account for the interests of states, at least as represented by the latter’s officials. In the immigration context, for example, Mikos notes that “Congress . . . has shown little tolerance for state laws that supplant its own

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<sup>26</sup> Mikos, *supra* note 8, at 17.

<sup>27</sup> See *supra* note 1.

<sup>28</sup> Mikos, *supra* note 8, at 17–18.

immigration policy.”<sup>29</sup> Although this may be true of mandatory detainers under the Secure Communities and Priority Enforcement programs, it is not plainly true of antecedent programs under section 287(g) of the Immigration and Nationality Act,<sup>30</sup> or other “coordinated enforcement efforts”<sup>31</sup> developed in tandem with state and local authorities.

Mikos does flag instances of apparent federal solicitude for state interests. In the context of marijuana decriminalization, for example, Mikos notes that the Department of Justice “has already demonstrated a willingness to work with the states.”<sup>32</sup> But this willingness (which may well be rather shallow depending on a state’s policy choices<sup>33</sup>) does not figure extensively in his analysis. Similarly, analyzing the Department of Transportation rule at issue in *Geier v. American Honda Motor Co.*,<sup>34</sup> he notes that the federal government offered “to rescind immediately” its rule if a sufficient number of states took regulatory action of some kind.<sup>35</sup> Again, this fact is not carefully accounted for in his analysis.<sup>36</sup>

What then are we to make of the fact that in each of the policy domains that Mikos uses to exemplify federal overreach, there is some, albeit arguably ambiguous, evidence that the federal government endeavored to account for states’ regulatory interests? If these are the best grounds for concluding that there is a surfeit of preemption due to federal inattention to states’ interests, then perhaps we should consider the possibility that, on balance, the quantum of fed-

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<sup>29</sup> *Id.* at 34.

<sup>30</sup> See Immigration and Nationality Act, Pub. L. No. 414-477, 66 Stat. 163 (1952); Adam B. Cox & Thomas J. Miles, *Policing Immigration*, 80 U. CHI. L. REV. 87, 93 (2013) (discussing these agreements).

<sup>31</sup> Maureen A. Sweeney, *Fact or Fiction: The Legal Construction of Immigration Removal for Crimes*, 27 YALE J. ON REG. 47, 73 (2010).

<sup>32</sup> Mikos, *supra* note 8, at 45. On the other hand, the Drug Enforcement Agency has opposed states’ moves toward decriminalization. Erwin Chemerinsky et al., *Cooperative Federalism and Marijuana Regulation*, 62 UCLA L. REV. 74, 100 (2015). Federal-state interactions on marijuana regulation, in short, are complex, and depend, in part, on which federal government is at work.

<sup>33</sup> See Memorandum from James M. Cole, Deputy Att’y Gen., to All U.S. Att’ys 2–3 (Aug. 29, 2013), <http://www.justice.gov/iso/opa/resources/3052013829132756857467.pdf> (“The Department’s guidance . . . rests on its expectation that states . . . will implement strong and effective regulatory and enforcement systems that will address the threat those state laws could pose to public safety, public health, and other law enforcement interests. A system adequate to that task must not only contain robust controls and procedures on paper; it must also be effective in practice.”).

<sup>34</sup> 529 U.S. 861 (2000).

<sup>35</sup> Mikos, *supra* note 8, at 49–50 (citing *Geier*, 529 U.S. at 881).

<sup>36</sup> See *id.*

eral preemption of state law may not be excessive? It is a truism that there are often “considerable benefits” in federalizing a policy question, and these gains might *often* outweigh losses to state regulatory autonomy.<sup>37</sup>

To be sure, I cannot say for sure whether, overall, the federal government has struck the right balance. And given that the balance has been struck by different Congresses on different issues at different times, I cannot even be sure there is a single, consistent standard being applied that can be the subject of rigorous evaluation. But, so far as I can tell, Mikos—like the majority of preemption scholars—simply assumes the conclusion that there is excessive preemption. That presumption, however, is not plainly supported by the facts and case studies he adduces.

One way of redeeming the baseline assumption of excessive preemption is by diagnosing process flaws that are conducive to systematic undercounting of states’ interests in congressional and agency determinations of when to preempt. In this vein, Mikos addresses, and summarily rejects, the possibility of “political safeguards” of federalism in Congress.<sup>38</sup> He also disparages the value of a 2009 executive order that instructs agencies to curtail the preemptive effect of their regulations.<sup>39</sup> Both Congress and the agencies in his view thus fall short.

I find his submissions on both points underwhelming. In respect to the congressional safeguards of federalism, the efficacy of states as lobbyists for their regulatory interests in the congressional or agency contexts is an empirical question. Contrary to Mikos’s claim that “no one . . . believe[s]” in the efficacy of that lobby,<sup>40</sup> there is in fact a rather extensive body of empirical political science work confirming the efficacy of that lobby, at least in some instances.<sup>41</sup> Reviewing that literature in 2014, I suggested that “states’ record of success inside the

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<sup>37</sup> Samuel Issacharoff & Catherine M. Sharkey, *Backdoor Federalization*, 53 UCLA L. REV. 1353, 1356–57 (2006).

<sup>38</sup> Mikos, *supra* note 8, at 11, 13–15, 17 (decrying “[t]he disregard of state interests demonstrated by Congress”). The idea of political safeguards was first articulated by Herbert Wechsler, *supra* note 6, at 552.

<sup>39</sup> See Mikos, *supra* note 8, at 13–15; see also Preemption: Memorandum for the Heads of Executive Departments and Agencies (May 20, 2009), 74 Fed. Reg. 24,693, 24,693–94 (May 22, 2009).

<sup>40</sup> Mikos, *supra* note 8, at 11. Elsewhere, Mikos suggests that “the case of medical marijuana . . . demonstrate[s] that the national political process can protect states’ prerogatives.” Robert A. Mikos, *Medical Marijuana and the Political Safeguards of Federalism*, 89 DENV. U. L. REV. 997, 998 (2012).

<sup>41</sup> I have canvassed and analyzed that literature in Aziz Z. Huq, *Does the Logic of Collec-*



Beltway may be varied, but they have won sufficient trophies to suggest a singular and fatal prisoners' dilemma logic of collective action is not always at work."<sup>42</sup>

The matter is yet even more complex: as Michael Greve and Rick Hills have argued in separate work, the intergovernmental lobby, which acts on states' behalf on Capitol Hill, may be advocating for preemptive measures that reduce regulatory competition amongst states in undesirable ways.<sup>43</sup> If preemptive federal legislation is itself the product of states' lobbying, the failure of states' mobilization in Congress will consequently sometimes be a *boon*—a mechanism that tends toward what Mikos and others see as the optimal measure of preemption. Merely observing a measure of state success in Washington, D.C., therefore, cannot be taken as evidence that *federalism* as a value has been furthered.

So far as agencies and their efforts to curtail preemption go, I discern no rebuttal in Mikos's article to Catherine Sharkey's nuanced and well-reasoned argument, grounded in careful qualitative consideration, of the 2009 executive order's effects. Sharkey argued that the order "not only put an end to the 'preemption by preamble' trend but has also triggered real transformations within some federal agencies."<sup>44</sup> Evaluating the preemption status quo requires grounded empirical judgments about the behavior of complex governmental institutions such as Congress and federal agencies. Without the spadework necessary for those judgments, it is hard to vouchsafe strong normative recommendations. At least to date, the weight of evidence seems to me to support Sharkey's nuanced and grounded analysis of the executive order.

There is another hypothesis about the preemption baseline worth entertaining, albeit one that might undermine PPPs' attractiveness. The hypothesis is that the magnitude of federal preemption of state rules varies by field. This would unsettle the claim that the regulatory apparatus of preemption must be rejiggered across the board to render it more favorable to the states. It opens up the real possibility that the most sensible way to approach preemption is on a retail, rather than a wholesale, basis.

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*tive Action Explain Federalism Doctrine?*, 66 STAN. L. REV. 217, 280–88 (2014) [hereinafter Huq, *Collective Action*].

<sup>42</sup> *Id.* at 288.

<sup>43</sup> See MICHAEL S. GREVE, *THE UPSIDE-DOWN CONSTITUTION* 7–8 (2012); Hills, *Against Preemption*, *supra* note 1, at 17.

<sup>44</sup> Sharkey, *Inside Agency Preemption*, *supra* note 4, at 527–28.

This hypothesis is supported by observed variation in the verbal formulations that Congress inserts into the “quite diverse” array of federal statutes with either express or implied preempting effect.<sup>45</sup> It is also a consequence of the nuanced, and contextualized, way in which courts read such statutory language. Consider, for example, the fact that the Court’s preemption jurisprudence teaches that the identical statutory language—to wit, the phrase “regulation or prohibition”—can have different implications for state law depending on the statutory context.<sup>46</sup> The end result of this interpretive variance is a high degree of heterogeneity in the force of preemptive effect from domain to policy domain, and even from statute to statute.

There are fields in which the federal government, perhaps because of an industry-captured federal regulatory agency, ousts what is by any measure an excessive measure of state law. In the banking domain, for example, Professor Roderick Hills has identified 2011 rules promulgated by the Office of the Comptroller of the Currency as plainly inconsistent with the authorizing Dodd-Frank Act’s<sup>47</sup> text and at odds with its regulatory goal of minimizing systemic financial risk.<sup>48</sup> In the antitrust context, by contrast, the opposite may be true. The Supreme Court has read the Sherman Act<sup>49</sup> narrowly so as not to preempt state anticompetitive conduct by consistently invoking “principles of federalism and state sovereignty.”<sup>50</sup> Yet, as antitrust scholars have observed, there are ample examples of state regulations that “enrich local producers and also create interstate spillovers that harm consumers located in other states.”<sup>51</sup> Given these harms, antitrust might well be a field where *more* preemption is desirable. Lurking

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<sup>45</sup> See Young, *supra* note 2, at 255.

<sup>46</sup> Compare *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 487–90 (1996) (finding same language in the Medical Device Act not to have preemptive effect), with *Cipollone v. Liggett Grp., Inc.*, 505 U.S. 504, 521 (1992) (interpreting the terms “requirement or prohibition” in the Public Health Cigarette Smoking Act of 1969, Pub. L. No. 91-222, 84 Stat. 87, to apply to some common law torts).

<sup>47</sup> Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1376 (2010).

<sup>48</sup> Roderick M. Hills, Jr., *Exorcising McCulloch: The Conflict-Ridden History of American Banking Nationalism and Dodd-Frank Preemption*, 161 U. PA. L. REV. 1235, 1239–41 (2013).

<sup>49</sup> Sherman Act, 15 U.S.C. §§ 1–7 (2012).

<sup>50</sup> See *City of Columbia v. Omni Outdoor Advert., Inc.*, 499 U.S. 365, 370 (1991); *Parker v. Brown*, 317 U.S. 341, 344, 352 (1943). This accords, it should be said, with the enacting Congress’s likely intent. See Herbert Hovenkamp, *State Antitrust in the Federal Scheme*, 58 IND. L.J. 375, 378–79 (1983). Note how antitrust seems to be another domain in which federal institutions took states’ regulatory interests seriously.

<sup>51</sup> Alan J. Meese, *Antitrust Federalism and State Restraints of Interstate Commerce: An Essay for Professor Hovenkamp*, 100 IOWA L. REV. 2161, 2166 (2015).

behind such retail disputes, moreover, is another larger issue: reasonable people disagree, as is well-known, on the appropriate and fiscal heft of the federal regulatory state on both normative and constitutional grounds. Disputes on retail preemption questions are likely to be shaped, at least at the margins, by the gravitational pull of one's judgment on that foundational puzzle.

Adding yet more complexity to the mix, there is another genre of preempting federal law. This comprises those statutes where any evaluation of preemption demands hard *normative* judgments for which there is no obviously "correct" answer. Immigration might be one such field, as whether or not a community can rightly seek to exclude individuals to promote some element of linguistic or cultural homogeneity remains a highly contested question, for example. The Supreme Court's normative ambivalence on that difficult question is plainly visible in its unsteady series of rulings on Arizona's various sallies against undocumented migrants (and those perceived as such)—restricting them from the workplace (upheld);<sup>52</sup> subjecting them to additional police scrutiny (largely invalidated);<sup>53</sup> and installing barriers to their potential appearance at polling places (invalidated, at least for now).<sup>54</sup> Although these cases can be reconciled on casuistic doctrinal grounds, they can also be glossed as the Court's internally conflicted attempt to reconcile competing normative demands—sovereignty and self-determination on the one hand, and dignity and rank on the other—that ebb and flow precariously across immigration preemption cases.<sup>55</sup>

But if a sound evaluation of whether we have sufficient or insufficient preemption requires that we first settle this, as well as other deeply divisive questions,<sup>56</sup> then we have good reason to question whether it is possible to evaluate at a single glance the current preemption status quo as desirable or undesirable. Further, if there is substantial heterogeneity in terms of quality of the status quo—with

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<sup>52</sup> See *Chamber of Commerce v. Whiting*, 563 U.S. 582, 594, 611 (2011).

<sup>53</sup> See *Arizona v. United States*, 132 S. Ct. 2492, 2507–10 (2012).

<sup>54</sup> See *Arizona v. Inter Tribal Council*, 133 S. Ct. 2247, 2257 (2013).

<sup>55</sup> Yet another complication is that the welfarist grounds for greater federal control in some policy domains (e.g., immigration and foreign-affairs preemption) might change in magnitude depending on the external geopolitical context in which the United States finds itself. See Daniel Abebe & Aziz Z. Huq, *Foreign Affairs Federalism: A Revisionist Approach*, 66 VAND. L. REV. 723, 724–32 (2013).

<sup>56</sup> For myself, I find compelling the normative and welfarist case against homogeneity-promoting local regulations of noncitizens. But I also recognize that respected scholars take other views. See, e.g., SAMUEL P. HUNTINGTON, *WHO ARE WE? THE CHALLENGES TO AMERICA'S NATIONAL IDENTITY* 17–20 (2004).

some domains evincing excessive federal control and others suffering from absence thereof—then perhaps one-size-fits-all solutions are unwise. Rather than trying to determine whether the legal parameters of preemption process and jurisprudence are desirable, it may well be better to repair to more retail analysis of particular policies. This means abandoning the quest for a blanket institutional or doctrinal fix to the preemption “problem,” in lieu of trying to get banking, anti-trust, and immigration federalism “right.” As a result, the starting assumption upon which the PPP proposal rests falls away.<sup>57</sup>

I have so far not said exactly what I think it means to get even the normatively straightforward questions of preemption “right.” Even setting aside rebarbative normative questions raised by immigration and its ilk, how do we judge whether a general, transubstantive preemption regime is desirable or not? What is the legal or normative criterion for evaluating the overarching preemption baseline more generally? Welfare? Some Founding-era equilibrium? Some formula derived from a conception of sovereignty?

With respect, Mikos might have set forth his view on this point with greater clarity. On the one hand, there are traces in his argument of an appeal to a simple welfarist criterion. PPP, he explains, “would increase the power of the states in a way that should enhance total welfare.”<sup>58</sup> But if his implicit normative baseline is exclusively welfarist in character, then it is a puzzle why he does not take the “agency reference” model proposed by Catherine Sharkey more seriously. As Sharkey explains that proposal, “[a]gencies can serve as a reference in determining the optimal regulatory strategy; specifically, agencies conduct context-specific cost-benefit (or risk-risk) analyses in deciding whether or not to pass regulations.”<sup>59</sup> That is, if one’s desideratum is welfare, the optimal solution to the preemption problem is probably more delegation to agencies, and concomitantly a greater measure of deference to agency work-product by courts.

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<sup>57</sup> I think Mikos could respond that the PPP proposal is not inconsistent with this point because it allows more fine-grained bargaining. But it does so in a way that plainly shifts some quanta of bargaining power toward the states, and it is that shift that has not been justified.

<sup>58</sup> Mikos, *supra* note 8, at 9, 30 (“[P]reemption decisions should strive to balance the two sets of interests [state and federal] in order to maximize the net welfare of society.”).

<sup>59</sup> Catherine M. Sharkey, *Products Liability Preemption: An Institutional Approach*, 76 GEO. WASH. L. REV. 449, 479 (2008); *see also* Sharkey, *Tort-Agency Partnerships*, *supra* note 1, at 376 (advocating an extension of the “agency reference model to the ‘enforcement preemption’ context. Courts should place more emphasis on FDA input when deciding if tort requirements are ‘parallel’ to federal dictates and . . . whether, even if the state claims are parallel, they nonetheless infringe on the federal agency’s discretionary enforcement prerogatives”).

Yet at the same time, Mikos also evinces concern for “the continued vibrancy of our federal system” and the “diminution of state authority.”<sup>60</sup> This seems to take devolution and local democracy as intrinsic goods independent of their effect on welfare. It suggests a commitment to heterogeneous goals. I share Mikos’s hesitation to embrace welfarism here. Welfare maximization is not, in my view, a plausible exclusive goal for a social planner, let alone for a constitutional designer.<sup>61</sup> In the separation of powers context, Professor Jon Michaels and I have recently identified a range of partially inconsistent goals that the Constitution seeks to promote.<sup>62</sup> The incommensurability of these goals makes hard tradeoffs inevitable. More generally, each of the structural principles of constitutional design—including both federalism and the separation of powers—certainly are appropriately analyzed as means to promote welfare,<sup>63</sup> but should not be reduced to welfarism. They also enable intrinsic goods not commonly submerged within the welfare label. In the federalism context, these nonconsequentialist goals plausibly include local self-determination, the enabling of different forms of social life, and the structuring of self-government through localized democratic deliberation and public debate. It is not easy to see how this complex blend of goods can be applied as a benchmark offhandedly to ascertain whether the preemption status quo is justified.

As in the separation of powers context, in discrete and individual instances, the distinct normative strands of structural constitution might come into conflict. Exercising local autonomy to maintain separate-but-equal schools, to pick an obvious example, conflicts sharply with any plausible version of welfare. Normative evaluation in the structural constitutional context, as a result, is rarely a matter of maximizing one value—it is instead a task that demands some sort of optimizing across disparate and somewhat incompatible human goods in specific cases so as to resolve moral conundrums and tragic tradeoffs. If even the normative evaluation of specific cases poses such hard questions, then it is all the more difficult to see how one can, in a glance, determine that there is too much preemption as a systemic matter.

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<sup>60</sup> Mikos, *supra* note 8, at 17–18.

<sup>61</sup> For a broader argument against welfare as a desideratum in constitutional design, see Aziz Z. Huq, *Hippocratic Constitutional Design*, in *ASSESSING CONSTITUTIONAL PERFORMANCE* (Tom Ginsburg & Aziz Z. Huq eds., 2016).

<sup>62</sup> Aziz Z. Huq & Jon D. Michaels, *The Cycles of Separation-of-Powers Jurisprudence*, 126 *YALE L.J.* 346 (2016).

<sup>63</sup> See U.S. CONST. pmbl. (stated purposes include to “promote the general Welfare”).

In summary, the PPP proposal is contingent upon our agreement that the current preemption baseline is not desirable, and that it must be tilted in favor of the states. It is not so much that I disagree outright with those premises. Rather, I think the appropriate characterization of the preemption status quo is a surprisingly hard question, partly due to empirical complexities and partly given normative complications. I have taken the easy path here of pointing out those uncertainties, and suggesting the desirability of resolving them on a retail, rather than a wholesale, basis. I hope that Mikos, and others equally dedicated to the study of preemption, can undertake the real challenge of mapping this baseline in future work.

## II. CAN STATES PREEMPT FEDERAL PREEMPTION WITH POISON PILLS?

Assume for now that the baseline question has been settled, and we are agreed that there is too much preemption. Let us turn instead to the heart of Mikos's proposal and ask whether the PPP would achieve his end of promoting a larger freedom for state regulation, which in turn would yield a more desirable regulatory regime "from a welfarist perspective."<sup>64</sup> As much as I admire the innovation and thought underwriting the PPP proposal, I will develop three grounds for concern. All three take up, in different ways, questions of where and how Coasean bargaining over regulatory entitlements occur. These concerns set the stage for a reconsideration of when institutional bargaining can or cannot succeed in Part III.

### A. *Timing and Coordinating PPPs*

My first pair of concerns are surfaced by asking *where* "the state can trade its entitlement not to pass or enforce a law for Congress's entitlement to preempt state law."<sup>65</sup> Mikos identifies two potential forums. First, such deals would be reached in Congress,<sup>66</sup> and second, PPPs could inflect judicial constructions of the preemptive shadows of federal legislation.<sup>67</sup> (What about federal agencies? Mikos does not flag them as promising forums, although he briefly touches on state bargaining with the Justice Department.<sup>68</sup> I will come back to their potential in a moment). The first two reasons for resisting PPPs relate

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<sup>64</sup> Mikos, *supra* note 8, at 17.

<sup>65</sup> *Id.* at 31.

<sup>66</sup> *Id.* at 25–26.

<sup>67</sup> *Id.* at 28.

<sup>68</sup> *Id.* at 45.

respectively to the timing and coordination obstacles to legislative dealmaking, and to judicial consideration. In contradistinction to Mikos's focus on the realization of Coasean deals, they both dwell on the possibility of derailing transaction costs.<sup>69</sup>

Focus first on how PPPs would play out in the environment of legislative negotiations.<sup>70</sup> Imagine a potentially successful congressional coalition seeking to enact a federal statute with preemptive effect. To influence that law, state legislatures must be aware of the measure, and be capable of forming a timely response. But I am not sure it is plausible to assume that states are consistently aware of the consequences of preemptive language in federal *bills*, especially if such effect is implied rather than express. Scholars have expressed concern that even unfunded federal mandates fail to catch states' attention, and states' opposition to such burdens founder even though there is a federal statute that enables members of Congress to raise alarms about some fiscal spillovers.<sup>71</sup> Unlike unfunded mandates, preemption does not trigger special legislative-process rules. Hence, it seems reasonable to infer that the identification of preemptive legislation somewhere in the mass of federal legislation enacted each year will be a costly and difficult enterprise. If states are represented by a powerful and well-connected lobby, with ample connections to Representatives' and Senators' offices, that might flag forthcoming preemptive measures, this might not be a great concern. But if you are skeptical of the strength of the intergovernmental lobby—as Mikos professes to be<sup>72</sup>—you should also be leery of the idea that states will be able to anticipate regulatory threats far down the congressional pike.

This identification issue, though, is perhaps the most trivial of the barriers to effective bargaining over PPPs. There is also a timing problem that is of substantial concern. Many state legislatures have brief annual sessions.<sup>73</sup> They are as a result not set up either to monitor constantly what happens in Washington, or to respond in an expeditious fashion.

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<sup>69</sup> *Id.* at 30 n.138.

<sup>70</sup> Mikos recognizes that PPPs will not work for the plethora of federal statutes already on the books. *Id.* at 29, 32. If you think that the preemption problem already adheres in the U.S. Code, his proposal may thus become much less appealing.

<sup>71</sup> See, e.g., Elizabeth Garrett, *Enhancing the Political Safeguards of Federalism? The Unfunded Mandates Reform Act of 1995*, 45 KAN. L. REV. 1113, 1137–43 (1997).

<sup>72</sup> See Mikos, *supra* note 8, at 11.

<sup>73</sup> See, e.g., ALA. CONST. art. IV, § 48.

Even more worryingly, coalitions of states with varying concerns over different sorts of federal preemption face impressive coordination problems. States have a variety of regulatory priorities. Officials in some states care deeply about drug safety.<sup>74</sup> Others, by contrast, are preoccupied by the costs of federal immigration enforcement levels.<sup>75</sup> Differences in regulatory priorities from state to state are compounded by the fact that some federal regulation is enacted at the behest of state coalitions in order to mitigate adverse spillovers from other states' policy choices<sup>76</sup> (or, more sinisterly, to preserve anticompetitive advantages<sup>77</sup>). Where concern for interstate spillovers fuels federal legislative intervention, it is inevitable that states will sharply disagree about the scope of needful preemption. Without some robust institutional structure through which states coordinate and resolve these motivational conflicts—which, again, Mikos has dismissed as implausible<sup>78</sup>—how is the bargaining with Congress that PPPs are supposedly enabling to get off the ground?

The same worry emerges when we flip our perspective to focus on how Congress would respond to PPPs. To get Mikos's model of Coasean bargaining off the ground, we have to assume federal legislators (or their staff) first know about PPPs.<sup>79</sup> We must further assume they object to PPPs' practical effects, rather than being indifferent<sup>80</sup> or welcoming them. The latter is not a safe assumption given sharp divisions today among legislators over whether specific cooperative federalism programs are appropriate. Imagine here, for example, current House Speaker Paul Ryan's response to a state threat to stop implementing Obamacare. Finally, we must assume that Congress as a body is capable of aggregating the effects of different states' PPPs—which might tether different preemption measures to a variety of cooperative federalism programs—so as to reach a rational, even accurate re-

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<sup>74</sup> See *Zogenix, Inc. v. Patrick*, No. 14-11689-RWZ, 2014 WL 1454696, at \*1 (D. Mass. Apr. 15, 2014) (describing Massachusetts's emergency ban on Zohydro as part of a "public health emergency").

<sup>75</sup> See, e.g., *Arizona v. United States*, 132 S. Ct. 2492, 2497–98 (2012) (addressing Arizona laws created by state officials concerned with unauthorized aliens and immigration policy).

<sup>76</sup> See, e.g., Gillian E. Metzger, *Congress, Article IV, and Interstate Relations*, 120 HARV. L. REV. 1468, 1506–07, 1531–41 (2007) (setting out argument for congressional primacy).

<sup>77</sup> See Michael S. Greve, *Federalism's Frontier*, 7 TEX. REV. L. & POL. 93, 95 (2002).

<sup>78</sup> See Mikos, *supra* note 8, at 11.

<sup>79</sup> See *id.* at 30–31.

<sup>80</sup> A possibility Mikos recognizes. See *id.* at 26–27 ("[I]t seems unrealistic to expect Congress to explicitly respond to every offer the states make . . ."). I think this too small a response, and one that is in tension with Mikos's rejection of the political safeguards of federalism more generally.



sult.<sup>81</sup> Depending on the extent of one's skepticism about the contemporary Congress's rationality and epistemic capabilities, this assumption might seem, at best, demanding and, at worst, absurd.

In other work, I have pointed out that states face not *one* collective action problem when negotiating with Congress; rather, states face *one of several* potential collective action challenges depending on the distribution and intensity of preferences and information across heterogeneous arrays of state delegations and lobbies.<sup>82</sup> This variety is part of what makes it difficult to draw inferences about institutional design in the federalism context. Accordingly, I do not think that states will necessarily fail to press effectively their interests in Congress. Whether they prove able to do so likely depends on the constellation and magnitude of the state interests at stake. Hence, I fear that Mikos may be too quick to assume that bargaining with PPPs will easily be accommodated or achieved given the timing and coordination problems facing states that seek to nudge the federal legislative process—especially given his assumptions about the efficacy of the intergovernmental lobby.<sup>83</sup>

Along with Congress, Mikos offers judicial interpretation of federal law as a second and alternative forum in which PPPs might have effectual force.<sup>84</sup> Courts, he says, could “ask whether a *package* of state laws . . . *together* frustrates congressional purposes.”<sup>85</sup> But this proposal again raises puzzles of both aggregation and method. First, it is true that canonical preemption precedent suggests that “congressional purpose” is the touchstone of preemption analysis.<sup>86</sup> But judges today cannot be assumed to hew to this legal process-inflected approach and they may be more likely to concur with Justice Holmes that “[w]e do not inquire what the legislature meant; we ask only what

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<sup>81</sup> See *id.* at 32.

<sup>82</sup> See generally Huq, *Collective Action*, *supra* note 41, at 240–55 (providing theoretical grounds for anticipating heterogeneous forms of state collective action).

<sup>83</sup> See Mikos, *supra* note 8, at 11. Note that if you believe the intergovernmental lobby is generally successful in advancing states' interests, then you might be less inclined to embrace a means of placing a thumb on the scales in states' favor, as Mikos has done with the PPP.

<sup>84</sup> *Id.* at 28–29.

<sup>85</sup> *Id.* at 28.

<sup>86</sup> See, e.g., *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947) (“[T]he question . . . is what the purpose of Congress was.”). Read in context, Justice Douglas's statement that congressional intent should be considered is not an invitation to imaginative reconstruction of what Congress would have done had it faced the specific question raised in litigation. In the very next sentences of his opinion, Justice Douglas deviates from “intention” *sensu stricto* to the nonpurposive “assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress.” *Id.*

the statute means.”<sup>87</sup> The Supreme Court today tends to stick closely to the semantic meaning of the statute, even if it only occasionally accounts for the purposes embedded in a statute’s enactment context.<sup>88</sup> It is one thing to use the internal logic of a complex regulatory intervention as a guide to resolve the ambiguities embedded within specific elements of a statutory scheme (as the Court now does). It is quite another to assign meaning by weighing out the costs and benefits of a result in light of a hypothesized reconstruction of what Congress would have done.<sup>89</sup>

Moreover, a court does not necessarily choose the case in which it confronts a preemption question. It may well first face the problem in a case in which the relevant state (which may or may not be a party) has not enacted a PPP. A court will not necessarily know that construing the federal statute to have a wider rather than a narrower preemptive gauge will trigger a PPP elsewhere in the nation. It is likely to rule on the federal statute’s meaning while focused on the state law operative in the case at bar. Its ruling, moreover, is not severable.<sup>90</sup> It will apply equally in other states and affect their laws without regard to the presence or absence of a PPP. The risk of judicial error (in the sense of failing to account properly for the existence of PPPs) due to path-dependent litigation trajectories, in short, is nontrivial. All this is to say, in short, that there are considerable implementation-related difficulties obscured in the proposal to bargain over preemption using PPPs in Congress or the courtroom.

But recall that I bracketed the question of agencies as potential forums for dealmaking over PPP. There is already a rich literature suggesting that agency-state interactions are plentiful.<sup>91</sup> Agencies are

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<sup>87</sup> Oliver Wendell Holmes, *The Theory of Legal Interpretation*, 12 HARV. L. REV. 417, 419 (1899).

<sup>88</sup> For recent examples of this approach, see, e.g., *Torres v. Lynch*, 136 S. Ct. 1619, 1634 (2016) (“The question is instead, and more simply: Is that the right and fair reading of the statute before us?”); *King v. Burwell*, 135 S. Ct. 2480, 2496 (2015) (“If at all possible, we must interpret the Act in a way that is consistent with [its purpose] . . .”).

<sup>89</sup> The latter exercise is fraught with difficulties, regardless of one’s general approach to statutory interpretation. See WILLIAM N. ESKRIDGE, JR., *DYNAMIC STATUTORY INTERPRETATION* 14–25 (1994) (“[N]one of the originalist schools (intentionalism, purposivism, textualism) is able to generate a theory of what the process or the coalition ‘would want’ over time, after circumstances have changed.”).

<sup>90</sup> Once a court has given a statute a certain meaning, it must stick to that meaning even if the underlying concerns that prompted it to do so are absent in subsequent cases. See *Clark v. Martinez*, 543 U.S. 371, 386 (2005).

<sup>91</sup> The most recent iteration is found in Miriam Seifter, *States as Interest Groups in the Administrative Process*, 100 VA. L. REV. 953, 976–77 (2014).

now required to solicit affirmatively states' input in certain instances.<sup>92</sup> And the empirical evidence gathered by Sharkey and others suggests so far that they do not stint on this obligation.<sup>93</sup> Agencies can also tailor their preemption-related interventions even after promulgation based on new information from states.<sup>94</sup> So perhaps Mikos's proposal would fare better within the agency context?

Again, the availability of a forum within an agency does not mean that states have sufficient incentives to participate in policymaking in that forum. Indeed, in some instances, they fail to do so despite strong preferences against preemption.<sup>95</sup> One reason for their failure may be that regulations do not have the staying power of clear statutes. Whereas enacted statutes tend to be sticky, agencies have at their disposal a number of legal means—such as agency interpretations of their own rules,<sup>96</sup> nonlegislative rules,<sup>97</sup> and guidance manuals<sup>98</sup>—that facilitate the adjustment of regulatory regimes in light of new information. In certain instances, agencies can even “waive” statutory requirements,<sup>99</sup> including requirements imposed on states as regulated parties.<sup>100</sup> And even after an agency has promulgated a final legislative rule, it retains power to replace it with the symmetrically opposite rule.<sup>101</sup> In effect, the hypothesis is that the moral hazard created by

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<sup>92</sup> See Exec. Order No. 13,132, §§ 3(a), 4(d), 3 C.F.R. 208–09 (2000), *reprinted in* 5 U.S.C. § 601 app. at 807–09 (2012) (“directing federal agencies to avoid infringing on states’ policymaking authority and to consult state-level authorities in developing policies that could restrict such authority” (quoting Catherine M. Sharkey, *States Versus FDA*, 83 GEO. WASH. L. REV. 1609, 1611 n.3 (2015))).

<sup>93</sup> See Sharkey, *Inside Agency Preemption*, *supra* note 4, at 527, 531–69 (offering “an on-the-ground empirical assessment of what federal agencies are doing with respect to preemption in the rulemaking and litigation realms”).

<sup>94</sup> See *id.*

<sup>95</sup> See *id.*

<sup>96</sup> See, e.g., *Chase Bank USA, N.A. v. McCoy*, 562 U.S. 195, 207 (2011) (“[W]e find Regulation Z to be ambiguous as to the question presented, and must therefore look to the Board’s own interpretation of the regulation for guidance in deciding this case.”); see also *Nat’l Mining Ass’n v. McCarthy*, 758 F.3d 243, 250, 252 (D.C. Cir. 2014) (noting that interpretive rules are not subject to notice-and-comment procedures).

<sup>97</sup> See *Perez v. Mortg. Bankers Ass’n*, 135 S. Ct. 1199, 1211 (2015) (holding that under the APA, agencies need not comply with notice-and-comment procedures when amending interpretive rules).

<sup>98</sup> See Emily S. Bremer, *Incorporation by Reference in an Open-Government Age*, 36 HARV. J.L. & PUB. POL’Y 131, 145–46 (2013).

<sup>99</sup> See David J. Barron & Todd D. Rakoff, *In Defense of Big Waiver*, 113 COLUM. L. REV. 265, 277–78 (2013).

<sup>100</sup> See *id.* at 279–81 (describing waiver of No Child Left Behind provisions).

<sup>101</sup> See *Nat’l Cable & Telecomms. Ass’n v. Brand X Internet Servs.*, 545 U.S. 967, 981–82 (2005).

post-enactment recalibration opportunities saps the incentive for states to participate in notice-and-comment rulemaking.

In sum, agencies' timing-related flexibility, their mandate to reach out to states, and their ability to tailor regulatory solutions based on states' divergent regulatory agendas all suggest they are a more fruitful forum for PPP-based preemption bargaining than either Congress or the courts.

### *B. States' Incentives and PPP*

According to Mikos, the PPP is "formulated by a state," and so "should reflect the strength of the state's interest" in preventing preemption.<sup>102</sup> He thus models the aggregate of federal and state interests as a rough proxy for "total welfare."<sup>103</sup> Subsumed here are two implicit assumptions: (1) an equivalence between the interests of a polity and the expressed preferences of its elected representatives, and (2) the idea that the interests expressed in state and federal legislation, in combination, proxy for "the net welfare of society."<sup>104</sup>

I am skeptical of both these assumptions. To begin with, public choice theory teaches that legislation is a function of interest-group competition, and so is likely to reflect the asymmetrical strengths and weaknesses of different factions within a jurisdiction.<sup>105</sup> It is well known, for example, that interest groups at both federal and state levels seek to have legislation enacted as a way of restricting new entrants to their market, thus choking competition and reducing consumer surpluses.<sup>106</sup> The first assumption is thus not viable. In the two-tier context of a federal system, moreover, federal legislation may be a product of state-level interest groups seeking to extinguish regulatory pressures that are created by interjurisdictional competition between the several states.<sup>107</sup> Such interest groups may capture both state and federal legislators. In that eventuality, there will be systematic diver-

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<sup>102</sup> Mikos, *supra* note 8, at 30.

<sup>103</sup> *See id.* at 25–26, 30.

<sup>104</sup> *Id.* at 9.

<sup>105</sup> *See* MAXWELL L. STEARNS & TODD J. ZYWICKI, PUBLIC CHOICE CONCEPTS AND APPLICATIONS IN LAW 43 (2009). For a marvelous and justly famous application at the state level, see Bruce Yandle, *Bootleggers and Baptists—The Education of a Regulatory Economist*, REG., May/June 1983, at 12–13.

<sup>106</sup> The classic treatment of legislation as the product of rent-seeking interest groups is George J. Stigler, *The Theory of Economic Regulation*, 2 BELL J. ECON. & MGMT. SCI. 3, 3–4 (1971).

<sup>107</sup> *See supra* note 43 and accompanying text.

gences between combined federal and state legislative preferences and a welfarist maximand.

Even without pathological federal legislation that seeks to limit market-based or state-to-state competition, I am doubtful that deficiencies in the quality of *state* legislation will be corrected by aggregating it with federal legislation. It is well known, for example, that Democrats and Republicans alike are unresponsive to the interests of the least wealthy in both the national context<sup>108</sup> and at the state level.<sup>109</sup> If the same deficiencies in representation occur at both the federal and the state level (albeit to different degrees), the political structure of federalism will tend to enable privileged interest groups two opportunities to exercise oversize influence. For this reason, among others, I see no reason to think that the most consequential deficiencies in state-level representation are systematically remedied at the federal level, or vice versa.

Further, will states really use PPPs in ways to track net welfare, even at the state level? Imagine a state with a powerful agricultural interest group (say, a tobacco lobby). That interest group is more likely to be aware of pending federal legislative action than, say, the diffuse group of consumers who will benefit from state-law tort remedies. This tobacco lobby—perhaps out of concern that a federal agency or Congress may enact a preempting rule that undermines its interests<sup>110</sup>—would also be better positioned to finagle a PPP from the state legislature. Notice what follows: just as federal preemption efforts might disproportionately reflect the interests of state-level interest groups seeking welfare-depreciating shelter from interstate competition, so, too, PPPs may disproportionately reflect the interests of state-level interest groups seeking to stave off welfare-enhancing federal measures. In consequence, PPPs' introduction into state-federal interactions will not necessarily cure deficiencies in representation. Instead, it may well track and reinforce gaps between the interests of the general public and the concerns of powerful interest groups.

One final point is worth adding here: Mikos's simple model of a PPP in action assumes that the preempted law has a net positive value

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<sup>108</sup> See LARRY M. BARTELS, *UNEQUAL DEMOCRACY: THE POLITICAL ECONOMY OF THE NEW GILDED AGE* 257–65 (2008).

<sup>109</sup> See Elizabeth Rigby & Gerald C. Wright, *Political Parties and Representation of the Poor in the American States*, 57 AM. J. POL. SCI. 552, 552–53 (2013).

<sup>110</sup> See, e.g., *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 120, 127 (2000) (describing and invalidating the FDA's effort to regulate tobacco as a "drug," a measure that might have had wide effects on state law).

to the state, whereas the state law that is valuable to the federal government has a net negative value to the state.<sup>111</sup> But how often will this be the case? Cooperative federalism measures in which a state administrative apparatus is brought to bear as part of a larger federal regulatory scheme will in many instances benefit the state as well as the nation. For example, cooperative environmental programs preserve the quality of states' air and water, federal cooperative educational efforts such as Head Start help states foster future generations ready for the workforce, and so on. It is one thing to say that states can leverage their epistemic and practical advantages as operational actors within these regulatory programs to promote their preferences *insofar as that program goes*. It is quite another to say they can threaten to forego participation in programs that promote vital state, as well as federal, goals to prevent preemption of some other law in the future. I would imagine that more than a few governors or state legislators could not credibly claim they would close their schools, let their tap water flow when replete with lead, or allow crime rates to soar by withdrawing from a federal program as a bargaining chip in the preemption wars.

In summary, when one attends to the precise ways in which a PPP might be leveraged in a court or in Congress (or, indeed, in the agency context that Mikos does not examine), a number of complications arise. To my mind, these complications raise considerable doubts about the practicality of reliance upon a PPP to rectify perceived nationalist biases in the preemption context. One way of sharpening these concerns would be to ask why, if PPPs were as effective as Mikos suggests, we do not see them in operation? Perhaps it is because no one has yet had Mikos's insight. But perhaps it is because the epistemic and transaction costs of PPPs are, in practice, too great to make the tactic effective.<sup>112</sup> At the very least, I think that Mikos's innovative proposal requires more elaboration, and perhaps supplementary mechanisms, in order to be effectual on the ground.

### III. THE CIRCUMSTANCES OF INSTITUTIONAL BARGAINING

Reflection on the possibility of a PPP points toward a further lesson for the literature on bargaining between states and branches over institutional entitlements. In previous work, I have identified a range

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<sup>111</sup> See Mikos, *supra* note 8, at 25, 25 tbl.1.

<sup>112</sup> If we do not see PPPs employed after Mikos's article is published, we will have further reason to think that the transaction costs are preclusive simply because the first option is off the table.

of contexts in which such bargaining occurs on both federalism and separation of powers matters.<sup>113</sup> Focusing on the separation of powers context, I argued that ambiguities in the horizontal separation of powers are better resolved via interbranch negotiation than by the courts.<sup>114</sup> My claim was emphatically comparative in character: at least with respect to the separation of powers, boundary disputes and ambiguities are usually better resolved by interbranch negotiation than by courts.<sup>115</sup> I also raised the concern that structural features of certain institutional actors—such as the numerosity of the states—might generate impediments to effective bargaining—i.e., the sort of coordination and notice problems discussed above.<sup>116</sup> Institutional bargaining may be better than judicial settlement, but it is no panacea.

Working through Mikos's innovative proposal, and thinking about how different transaction costs might impede state-to-federal bargaining, reveals another point: the *venue* in which institutional bargaining occurs powerfully influences whether different actors can enter the marketplace, and whether they can effectively transact. This venue choice is not so salient in the separation of powers context. But in the federalism context, there are real choices to be made between different venues (courts, Congress, and agencies), which are structured in ways that are more or less conducive to states' ability to formulate and advance their positions. Different forums, moreover, have different epistemic environments. Judges, for example, are less likely than members of Congress to know about PPPs. Agencies may be better placed than either legislators or jurists both to know when a PPP exists, but also to know whether the state's threat to withdraw cooperation is a credible one, or whether the loss to the state from withdrawal from a valuable federal program renders the threat a hollow one.

A moment's reflection suggests that the idea that the context in which bargaining occurs influences outcomes is hardly a surprising one. Centralized physical markets in preindustrial times enabled buyers and sellers to compare prices more easily, and reduced arbitrage opportunities. More recently, the internet, along with the evolution of technology that enables secure financial transactions, has centralized

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<sup>113</sup> See Huq, *Collective Action*, *supra* note 41 (considering collective action in a federalism context); Huq, *Negotiated Constitution*, *supra* note 16 (concerning negotiations in separation of powers context).

<sup>114</sup> See Huq, *Negotiated Constitution*, *supra* note 16, at 1665–66.

<sup>115</sup> See *id.*

<sup>116</sup> *Id.* at 1667–71 (discussing states' collective action problems); see also Huq, *Collective Action*, *supra* note 41, at 280–88.

marketplaces yet further by eliminating the need for physical meeting. I have already underscored the dynamic and fluid nature of structural constitution.<sup>117</sup> The importance of venue and context for the scope and nature of bargaining provides another reason for underscoring those qualities. The consequences of intergovernmental bargaining are likely to shift as governmental actors develop new contexts for bargaining—ranging from preemption litigation to cooperative federalism regulations styled through notice-and-comment rulemaking to guidance memos committing to nonenforcement under certain contexts.<sup>118</sup> This second-order process of change renders our structural constitution especially poorly described in terms of fixed and static entitlements defined in terse and often unilluminating text.

For this reason, consideration of PPP bargaining, even if it yields no immediate on-the-ground innovation, will be useful insofar as it elicits attention to that element of institutional design. It might also provoke useful reflection on how a forum might be designed to elicit successful bargaining by coordinated states. The institutional-choice question highlighted by legal process scholars, therefore, continues to bite even when those institutional arrangements are endogenously generated via governmental bargaining.

### CONCLUSION

I have advanced a number of concerns and objections to Mikos's innovative and thoughtful proposal. My aim has been to bring into focus its underlying assumptions and the conditions of its possible implementation. If one believes preemption excessive, and has confidence that states will employ PPPs wisely, one may well embrace PPP bargaining. Even then, it is worth considering whether agencies, rather than the courts or Congress, provide the most desirable forum for such transacting.

More profoundly, I have suggested that attention to the vicissitudes of federal-state bargaining over preemption's scope gives us a useful vehicle for thinking about the institutional context in which federalism is realized, and for thinking about how that context evolves subtly or suddenly over time. Like the separation of powers, federalism is not a static set of entitlements (like real property) but a dynamic ecosystem of shifting practices, norms, and arrangements. By bringing attention to these important, and quite basic, questions of

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<sup>117</sup> See *supra* note 23 and accompanying text.

<sup>118</sup> See *supra* Part I.



structural constitution, Robert Mikos has made an important contribution to discussions of the Constitution writ large, even apart from his distinctive and innovative contribution to the preemption literature. And for this, he deserves much praise.