

INTERACTION'S PROMISE: PREEMPTION POLICY SHIFTS, RISK REGULATION, AND EXPERIMENTALISM LESSONS

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INTRODUCTION

This Essay discusses two innovations in federalism and regulation, using the two to illuminate the merits of each other. These two innovations are recent aggressive political assertion of “ceiling preemption” and “experimentalist” agency modes that move away from more rigid forms of regulation. By using these two innovations to illuminate each other, I conclude that the clashing and interaction of actors and institutions under federal regulatory schemes utilizing cooperative federalism structures and “floor preemption,” which set minimum required federal protections, provide an array of regulatory benefits lost with complete recent “ceiling preemption.”¹

Fully preemptive federal standards can have their place. Indeed, such preemptive standards are consistent with a persistent strain in Supreme Court jurisprudence that values distinctly delineated federal and state terrains akin to those long embraced under the “dual federalism” doctrine.² Under the conflict

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¹ I explore this floor-ceiling distinction in two other forthcoming works. See William W. Buzbee, *Asymmetrical Regulation: Risk, Preemption, and the Floor/Ceiling Distinction*, 82 N.Y.U. L. REV. (forthcoming Dec. 2007) [hereinafter Buzbee, *Asymmetrical Regulation*]; William W. Buzbee, *Federal Floors, Ceilings, and the Benefits of Federalism's Institutional Diversity*, in PREEMPTION CHOICE: THE THEORY, LAW AND REALITY OF FEDERALISM'S CORE QUESTION (William W. Buzbee ed., forthcoming 2008).

² See, e.g., *U.S. v. Morrison*, 529 U.S. 598, 617–18 (2000) (explaining that the Constitution “requires a distinction” between what is regulated nationally and locally); *Printz v. U.S.*, 521 U.S. 898, 918 (1997) (explaining that “[i]t is incontestible that the Constitution established a system of ‘dual sovereignty’”); see also William W. Buzbee & Robert A. Schapiro, *Legislative Record Review*, 54 STAN. L. REV. 87 (2001) (analyzing the Supreme Court's aggressive parsing of the “legislative record” in federalism cases and the Court's statements about the need for distinct state and federal regulatory domains); Robert A. Schapiro & William W. Buzbee, *Unidimensional Federalism: Power and Perspective in Commerce Clause Adjudication*, 88 CORNELL

preemption doctrine rooted in the Supremacy Clause, it is also the case that where federal legal requirements in application come into direct conflict with state or local law, federal law prevails.

In statutory and regulatory regimes, however, Congress and agencies have for many years overwhelmingly manifested a preference for regulatory overlap and interaction, harnessing the strengths of state and federal institutional actors and forcing the two to interact. Common law regimes and their incentives for ongoing assessment and improvement have also typically been preserved under savings clauses. State and local governments, as well as common law regimes, have thus typically retained latitude under federal risk regulation to surpass the stringency of federal regulation or provide additional protections through different strategies. Fully preemptive federal standards, especially in their recently asserted form of ceilings operating as a unitary federal choice, pose an array of institutional risks. The regulatory experimentalist literature highlights the problematic implications of unitary federal choice ceiling preemption.

But examination of preemption dynamics and incentives also illuminates potentially aspirational elements of experimentalism that may be unrealistic in the risk regulation setting. This examination of experimentalism in light of preemption innovations suggests that federal regulatory floors in cooperative federalism settings offer what can be viewed as perhaps a second-best variant of experimentalism. Under cooperative federalism regimes, these more standard regulatory floors are more rigid than the fluid rolling-rule approaches that experimentalists tout. Nevertheless, such regulatory floors provide much of the interaction and room for innovation that experimentalists champion. In the risk-regulation setting, the messy clashing and interaction of real-world multilayered regulatory federalism creates incentives and markets for improvement and innovation that may not exist with more idealized forms of experimentalist regulation.

Part I of this Essay provides brief examples of ceiling preemption and experimentalism. Part II then uses each of these two innovations to critique the other, first illuminating the weaknesses and risks of recent unitary federal choice ceiling preemption. It then explores how federal regulatory floors, in their usual cooperative federalism schemes, provide incentives for innovation and regulatory tailoring that will often be lacking under experimentalism regimes.

L. REV. 1199 (2003) (analyzing Commerce Clause jurisprudence using “unidimensional” perspectives on the underlying regulatory challenge to strike down federal power and keep distinct federal and state roles).

I. THE TWO INNOVATIONS

First, this Part summarizes an array of areas where, in recent years, federal agencies and Congress have embraced forms of ceiling preemption that function as a unitary federal choice. These proposals and enactments constitute unitary federal-choice ceiling preemption due to their complete displacement of other regulatory actors. Second, this Part provides a brief synopsis of regulatory experimentalism as found in existing areas of regulation, embraced in analogous business settings, and advocated in an array of scholarly works.

A. *Ceiling Preemption*

The first innovation is recent aggressive political assertions of federal preemptive power in federal risk legislation or regulation. These actions propose or purport to preempt not only state regulatory law, but sometimes also common law. These assertions of strong preemptive impact involve so-called “ceiling preemption,” precluding any more stringent or different regulation. Due to how they displace other choices, such ceilings are really best characterized as unitary federal choice ceiling preemption. A true ceiling that leaves room for some diverse regulatory choices could theoretically exist. For example, if the federal government were to enact a law allowing state and local regulation up to a specified point, but without any federal standard, then state and local governments could choose to regulate up to that regulatory ceiling. Such a “true ceiling” would then be the converse of the regulatory floors described below. To this author’s knowledge, however, such true ceilings do not exist in current United States law.³

Floor preemption has been far more common. Under floor preemption, the federal government, through legislation or regulatory action, sets minimum required levels of protective stringency. Such floors leave room for more protective state and local regulation or incentives created through common law

³ The Dormant Commerce Clause doctrine creates an analogous regime, with state and local regulation allowed up until the point it unduly burdens interstate commerce. *See, e.g.,* *United Haulers Ass’n v. Oneida-Herkimer Solid Waste Mgmt. Auth.*, 127 S. Ct. 1786, 1796 (2007) (applying the Dormant Commerce Clause doctrine and distinguishing other cases in upholding challenged local requirements). For a recent case undertaking preemption analysis of a statute with a preemption clause but also analyzing the burdens imposed by state law and state law’s nondiscriminatory nature in ways analogous to Dormant Commerce Clause jurisprudence, see *New York Susquehanna & Western Railway Corp. v. Jackson*, No. 07-1675, 2007 WL 2472332 (3d Cir. Sept. 4, 2007).

regimes. Floor standards typically seek state and local involvement under cooperative federalism strategies.⁴

Until recently, ceiling preemption was rarely utilized outside of the preemption of regulations that deviate from design mandates. An array of recent proposals and actions, however, embrace preemptive ceilings that would function as a unitary federal choice. Perhaps of greatest importance, greenhouse gas (GHG) climate-change proposals are actively being debated in Congress, but with industry's support apparently conditioned on, if not motivated by desire for, a federal legislative fix preempting any state or local regulation of activities emitting such gasses.⁵ Numerous state and local initiatives regulating GHG emissions follow federal reluctance to address the causes of climate change.⁶

⁴ Federal floors preclude less stringent state and local regulation but allow for additional and more stringent regulation. See *infra* Part I.A. Typically, they are accompanied by savings clauses and cooperative regulatory structures. Multilayered regulatory schemes, often identified as cooperative federalism structures or delegated program federalism, typically involve the enactment of a federal statute that regulates a risk or addresses a social ill or need. Such cooperative federalism schemes are especially prevalent in the environmental law field. See, e.g., Endangered Species Act of 1973, 16 U.S.C. § 1531(c)(2) (2006); Clean Water Act, 33 § U.S.C. 1251(b) (2006); Clean Air Act, 42 U.S.C. § 7402(a) (2006); see also Jonathan H. Adler, *Judicial Federalism and the Future of Environmental Regulation*, 90 IOWA L. REV. 377, 384–87 & n.35 (2005) (discussing cooperative federalism schemes); William W. Buzbee, *Contextual Environmental Federalism*, 14 N.Y.U. ENVTL. L.J. 108, 114–20 (2005) [hereinafter Buzbee, *Contextual Environmental Federalism*] (discussing how federal and state interaction under multilayered federal regimes influences regulatory innovations and the content of environmental law).

⁵ A number of states and cities have started to regulate greenhouse gases through legislation, and common law suits have been filed as well. See Kirsten H. Engel & Scott R. Saleska, *Subglobal Regulation of the Global Commons: The Case of Climate Change*, 32 ECOL. L.Q. 183, 190–209 (2005) (acknowledging predication of lack of regulation of a global challenge like climate change, but using a game theoretic model to explain why state and local regulation is nevertheless occurring); see also Kirsten H. Engel, *Harnessing the Benefits of Dynamic Federalism in Environmental Law*, 56 EMORY L.J. 159 (2006) (exploring the same developments and theory, but linking it to larger benefits of retaining latitude for dynamic interaction at different levels of government). The industry's apparent change of heart reflects a desire to "avert the multiplicity of regulations being drafted by various state governments." Steven Mufson & Juliet Eilperin, *Energy Firms Come to Terms with Climate Change*, WASH. POST, Nov. 25, 2006, at A1 ("We cannot deal with 50 different policies," said [a representative of Shell], "We need a national approach to greenhouse gases.")). Relatedly, recent legislative debates concern the slightly narrower question of whether states should have the authority to regulate motor vehicle greenhouse gas emissions or if that should be exclusively federal domain. See Alex Kaplun, *Climate: Rep. Dingell Defends Plan to Limit State GHG Authority*, E&E NEWS PM, June 7, 2007, <http://www.eenews.net/pml/> (reporting on the debate as to whether federal law should preempt any state power to regulate motor vehicle greenhouse gas emissions and whether California and states following California should be allowed to choose different strategies, as well as the auto industry's concern with "50 different standards").

⁶ The reluctance of agencies to use existing statutory powers to promulgate regulatory constraints led to the *Massachusetts v. EPA*, 127 S. Ct. 1438 (2007), decision, where the Court rejected the EPA's claimed lack

In 2006, the Department of Homeland Security (DHS) issued a proposed regulation that initially appeared intended to supplant state and local ability to regulate risks associated with chemical plants.⁷ Until now, such risks were subject to regulation by all levels of government. The underlying law contains no provision granting power to preempt, leading critics in the press and regulatory process to complain that DHS was overreaching and violating the law.⁸ In its Interim Final Rule, DHS disavowed intent to engage in “field” preemption that would displace state, local, or common law related to chemical plant security, instead asserting its power to declare situations of “conflict” preemption.⁹ Subsequent skirmishing in legislative settings led to the insertion

of statutory authority and also found that the EPA’s justifications for not acting, assuming it did have statutory authority, lacked adequate legal and factual justification. *Id.* at 1462–63.

⁷ Relying on the DHS appropriations bill passed by the 109th Congress, DHS proposed the *Chemical Facility Anti-Terrorism Standards* regulation on December 28, 2006. 71 Fed. Reg. 78,276 (Dec. 28, 2006) (to be codified at 6 C.F.R. pt. 27). As discussed *infra* note 9 and accompanying text, DHS’s final rule backed off this broad preemption assertion, while not altogether abandoning its claim of such power. Under this proposed regulation and accompanying Federal Register explanation, the DHS stated an intent to preempt “conflicting” state and local law, including common law regimes. *Chemical Facility Anti-Terrorism Standards*, 71 Fed. Reg. at 78,292–93. After citing relevant cases and approaches, DHS explained that preemption choices here must include attention to the “balance” struck in the law, implying strongly that even additional risk-reduction efforts by state, local governments, or common law litigation would be preempted. *Id.* Furthermore, DHS stated:

A state measure frustrating this balance will be preempted The Department is particularly concerned that a conflict or potential conflict between an approved Site Security Plan and state regulatory efforts could create ambiguity that would delay or compromise implementation of security measures at a facility.

Id. at 78,293.

⁸ The *New York Times*, in an editorial, situated this regulation in the context of ongoing legislative proposals seeking to impose stringent regulation on chemical facility risks. Editorial, *Chemical Insecurity*, N.Y. TIMES, Jan. 23, 2007, at A18. The editorial asserted that these regulations sought to use a law lacking a preemption provision to protect “absurdly weak” federal regulations with a regulatory “agenda . . . to block serious safety measures at every level of government.” *Id.*

⁹ See *Chemical Facility Anti-Terrorism Standards*, 72 Fed. Reg. 17,688, 17,726 (Apr. 9, 2007) (to be codified at 6 C.F.R. pt. 27) (issuing the Interim Rule). In its Federal Register discussion, DHS concedes that its proposal’s discussion of the need to retain the “balance” struck by the proposed regulation was “potentially too broad.” *Id.* at 17,727; see also *supra* note 7 (discussing the proposal’s language). Instead, the final regulation’s explanation is that only conflict preemption, not field preemption, is meant to be asserted. 72 Fed. Reg. at 17,726. The regulation “is only meant to indicate that the regulation is not to be conflicted by, interfered with, hindered by or frustrated by State measures, under long-standing legal principles.” *Id.* at 17,727. The agency retains its view that it can appropriately make such determinations in actual application, subject to judicial review. Such applied conflict preemption determinations would ordinarily follow an opportunity for input from the affected state and, time permitting, public notice and comment as well. *Id.* The final regulatory discussion does not allude to the possibility of regulatory versus common law conflict or set forth what sorts of state or local regulation might raise such conflicts, although the agency does state that it “does not intend to preempt existing health, safety, and environmental regulations.” *Id.* Regulations to

of alternative competing legislative language trying either to uphold or preclude such preemptive power.¹⁰

In the spring of 2006, in the fields of product safety and pharmaceutical approvals, several agencies almost simultaneously claimed power to preempt state and local regulation and common law liabilities as well.¹¹

“prevent terrorist attacks” or “regulate security at chemical facilities” are characterized as more distinctly federal, *see id.* at 17,726, and DHS indicates that new state or local risk, health, or environmental regulations with such a focus would more likely be held preempted. *Id.* at 17,727. Of potential significance is language in the actual regulation declaring that potentially preempted state actions include, in addition to conflicting statutes, regulations, administrative actions, or “any . . . common law standard of a State or any of its political subdivisions” that the agency views as raising such a conflict. 6 C.F.R. § 27.405 (2007). In addition, despite the Federal Register discussion disavowing anything other than an intent to preserve the possibility of conflict preemption, the actual regulation still contains references to state or local laws, regulations, or actions that not only “conflict” with federal requirements but that “hinder, pose an obstacle to or frustrate the purposes of this Part.” *Id.*

¹⁰ As of the drafting of this Essay, the fate of these competing provisions was unresolved. Compare Jeffrey H. Birnbaum, *Chemical Makers and Trial Lawyers Square Off over Iraq Spending Bill*, WASH. POST, Apr. 10, 2007, at A15 (discussing these provisions and reporting that President Bush has indicated that he opposes spending bill language that would provide states latitude to “impos[e] extra security requirements on the nation’s chemical plants”), and Stephen Labaton, *Congress Passes 1st Minimum Wage Boost in Decade*, N.Y. TIMES, May 24, 2007, <http://www.nytimes.com/2007/05/24/washington/24cnd-wage.html> (reporting that “the National Association of Manufacturers succeeded in getting the lawmakers to strike a provision that would have prevented federal regulators from adopting rules that would pre-empt tougher chemical safety rules adopted by some states”), with Linda Roeder, *House-Passed Homeland Security Bill Includes Chemical Security State Preemption*, 31 CHEM. REG. REP. (BNA) 609, 609 (June 25, 2007) (reporting that “[s]tate and local governments would be able to set chemical security standards that are more stringent than federal requirements under a provision in the fiscal year 2008 Department of Homeland Security appropriations bill passed by the House of Representatives”).

¹¹ For a recent thorough survey of numerous areas where industries have recently sought federal regulation, often in attempt to fend off lawsuits, foreign competitors, and state regulation, see Eric Lipton & Gardiner Harris, *In Turnaround, Industries Seek U.S. Regulations*, N.Y. TIMES, Sept. 16, 2007, at A1.

For general discussion and analysis of these recent agency assertions of preemptive power, see Catherine M. Sharkey, *Preemption by Preamble: Federal Agencies and the Federalization of Tort Law*, 56 DEPAUL L. REV. 227 (2007), and Stephen Labaton, ‘Silent Tort Reform’ Is Overriding States’ Powers, N.Y. TIMES, Mar. 10, 2006, at C5 (finding that “the ‘silent tort reform’ movement . . . has quietly and quickly been gaining ground”). Several agencies asserted such preemptive power within a short period during 2006. As the Consumer Products Safety Commission recently explained about its mattress flammability regulation, “[s]tate requirements . . . have the potential to undercut the Commission’s uniform national flammability standard, create impediments for manufacturers . . . , establish requirements that make dual state and federal compliance physically impossible, and cause confusion among consumers.” Standard for Flammability (Open Flame) of Mattress Sets, 71 Fed. Reg. 13,472, 13,496 (Mar. 15, 2006) (codified in 16 C.F.R. pt.1633). The Consumer Products Safety Commission made clear its intent to preempt all state activity, including common law regimes. See Press Release, U.S. Consumer Product Safety Commission, CSPC Approves New Flammability Standard for Mattresses (Feb. 16, 2006), <http://www.cpsc.gov/cpscpub/prerel/prhtml06/06091.html> (asserting that the “consumer’s right to sue . . . potentially any manufacturer of a regulated consumer product . . . may be seriously curtailed” by this new preemption language that “will be inserted in every new regulation the Commission issues”). The FDA’s new drug-labeling rule asserted similar preemptive impact with a preamble declaring broad preemption of state drug labeling, advertising, and product liability laws: “[The] FDA believes

The 2005 Energy Bill modified the siting process for Liquid Natural Gas (LNG) facilities, supplanting state and local siting choice with a grant of exclusive permitting power to the Federal Energy Regulatory Commission (FERC).¹² State and local regulators are consigned to a commenting role.¹³ Although likely motivated by the different concerns, the net effect of this change is to preclude state and local governments from exercising their usual primacy over the most fundamental of risk choices—whether and on what conditions to site a risky facility.¹⁴

that under existing preemption principles, FDA approval of labeling under the act . . . preempts conflicting or contrary State law.” Requirements on Content and Format of Labeling for Human Prescription Drug and Biological Products, 71 Fed. Reg. 3922, 3934 (Jan. 24, 2006) (to be codified at 21 C.F.R. pts. 201, 314, 601); see also Allison M. Zieve & Brian Wolfman, *The FDA’s Argument for Eradicating State Tort Law: Why It is Wrong and Warrants No Deference*, 34 BNA PROD. SAFETY & LIAB. REP. 308, 308 (Mar. 27, 2006) (asserting that the FDA’s attempt to preempt state tort claims merits no deference from courts, as the position represents bad law and policy). The National Highway Traffic Safety Administration (NHTSA) is also working to implement a new safety standard that would include provisions exempting auto makers from lawsuits over roof defects if federal safety standards are met: “[I]f the proposal were adopted as a final rule, it would preempt all conflicting State common law requirements, including rules of tort law.” Federal Motor Vehicle Safety Standards; Roof Crush Resistance, 70 Fed. Reg. 49,223, 49,246–48 (Aug. 23, 2005) (codified at 49 C.F.R. pt. 571); see also Rob Ammons & David George, *Tort Reform by Regulation: The National Highway Traffic Safety Administration Attempts to Preempt State-Tort Lawsuits with Its Proposed Roof-Strength Regulation*, 58 ADMIN. L. REV. 709, 729 n.144 (2006) (discussing objections to NHTSA’s claim that the proposed standard does not raise sufficient federalism concerns to warrant involvement of state officials).

¹² Energy Policy Act of 2005, 42 U.S.C. § 15801 (2006). Previously, siting of dangerous or large industrial facilities had first and foremost been a decision dominated by state and local governments. The Energy Bill eliminated state and local LNG siting choice in favor of a mere state and local commenting role for a decision now handed to the Federal Energy Regulatory Commission (FERC). See 15 U.S.C. § 717b(e)(1) (2006) (retaining for the agency the “exclusive authority to approve or deny an application for the siting, construction, expansion, or operation of an LNG terminal”). One previous federal law arguably had a similar effect, but that law concerned the thornier issue of hazardous material transportation where a multiplicity of local strictures threatened to create an impossible situation for such transporters. Hazardous Materials Transportation Uniform Safety Act of 1990, 49 U.S.C. § 5101 (2006); see also *California v. Fed. Energy Regulatory Comm’n*, 495 U.S. 490, 506–07 (1990) (holding that FERC minimum stream flow standards preempt California state stream flow minimums despite a savings clause).

¹³ 15 U.S.C. § 717b(e)(1). For close analysis of this provision, see Angela J. Durbin, Comment, *Striking a Delicate Balance: Developing a New Rationale for Preemption While Protecting The Public’s Role in Siting Liquefied Natural Gas Terminals*, 56 EMORY L.J. 507, 520–22 (2006); see also Jacob Dweck et al., *Liquefied Natural Gas (LNG) Litigation After the Energy Policy Act of 2005: State Powers in LNG Terminal Siting*, 27 ENERGY L.J. 473, 479–81 (2006) (analyzing these provisions); James B. Lebeck, Note, *Liquefied Natural Gas Terminals, Community Decisionmaking, and the 2005 Energy Policy Act*, 85 TEX. L. REV. 243, 245, 250–53 (2006) (same).

¹⁴ This unusual regulatory choice may have been prompted by outright favoritism for the LNG industry but also could reflect a more principled policy concern with regulatory commons challenges and related free rider dynamics. A multiplicity of regulators that do not match well with an underlying social ill can lead to a regulatory commons problem, where neither potential regulators nor those desiring regulation will know where to turn, thereby leading them either not to act or to fragment their demands for a regulatory response. William W. Buzbee, *Recognizing the Regulatory Commons: A Theory of Regulatory Gaps*, 89 IOWA L. REV. 1, 22–36

These new, aggressive forms of unitary federal choice ceiling preemption are quite distinct from the far more typical floor preemption.¹⁵ With regulatory floors, the federal government sets a minimum required level of stringent protection, and states, local governments, and common law regimes can lead to even more protective results.¹⁶

B. *Regulatory Experimentalism*

The second innovation is one both chronicled and championed by Charles Sabel and others.¹⁷ This innovation goes by several names, most recently

(2003) [hereinafter Buzbee, *Regulatory Gaps*]. The result can be failures to address even a widely recognized social challenge, whether it is a risk or a necessary category of facility presenting both risks and benefits. In a related phenomenon, a widely perceived need may be subjected to the “not in my backyard” phenomenon, where many or all jurisdictions decline to site a needed facility due to their free riding; all will fail to act based on the hope that others will accept a needed but noxious facility. This is perhaps the most justifiable rationale for the shift of LNG siting authority to FERC. See Durbin, *supra* note 13, at 540; Richard J. Pierce, Jr., *Environmental Regulation, Energy, and Market Entry*, 15 DUKE ENVTL. L. & POL’Y F. 167, 176 (2005) (discussed in Durbin, *supra* note 13, at 541 & nn.253–58).

¹⁵ In most areas focused on the regulation of risks, especially efforts to enhance public welfare through regulation of environmental and occupation risks, the protective “one-way ratchet” of floor preemption has been the legislative and regulatory norm. See Buzbee, *Asymmetrical Regulation*, *supra* note 1, at Part II.B.

¹⁶ For about the past decade, much debate has centered on the legitimacy and wisdom of federal standard setting. Typically, the debate focuses on federal standard setting involving regulatory “floors,” where federal law allows states to increase the stringency of regulation but prohibits states from more lenient regulation. Much of this debate has centered on the “race-to-the-bottom” rationale for federal regulation. See, e.g., Richard L. Revesz, *The Race to the Bottom and Federal Environmental Regulation: A Response to Critics*, 82 MINN. L. REV. 535 (1997) (responding to criticism by Kirsten Engel, Daniel Esty, Joshua Sarnoff, and Peter Swire). Laws and regulations that cut the other way, prohibiting more protective state regulation of risks, have been a rarity in the law. Multilayered law involving all three layers of government is the norm. See Buzbee, *Contextual Environmental Federalism*, *supra* note 4, at 114–20 (discussing how federal and state interaction under multilayered federal regimes explains regulatory innovations and the content of environmental law); Robert A. Schapiro, *Toward a Theory of Interactive Federalism*, 91 IOWA L. REV. 243 *passim* (2005) (emphasizing benefits of interaction among courts and other regulatory actors, rather than the more common desire to keep regulatory roles separate).

¹⁷ See, e.g., Michael C. Dorf & Charles F. Sabel, *A Constitution of Democratic Experimentalism*, 98 COLUM. L. REV. 267, 287–88 (1998) (arguing for the continuous generation of new information and adjustment and improvement in response to changing conditions, systematic feedback loops, and rolling standards of best practice in an array of legal areas); Jody Freeman, *Collaborative Governance in the Administrative State*, 45 UCLA L. REV. 1, 66–97 (1997) (outlining the limits of collaborative governance projects and proposing new challenges to traditional models of agency discretion and experimentation); Bradley C. Karkkainen, *Environmental Lawyering in the Age of Collaboration*, 2002 WIS. L. REV. 555, 567–71 (discussing “collaborative ecosystem management” and the room it leaves for regionally tailored solutions with broad coordination and public accountability); Bradley C. Karkkainen, “*New Governance*” in *Legal Thought and in the World: Some Splitting as Antidote to Overzealous Lumping*, 89 MINN. L. REV. 471 *passim* (2004) (discussing the same legal innovations under the umbrella of “new governance” and a loosely-related family of alternative approaches to governance with often competing schools of thought regarding reflexivity and softness in law); James S. Liebman & Charles F. Sabel, *A Public Laboratory Dewey Barely Imagined: The*

“democratic experimentalism,” but also captured by labels such as “rolling rule regimes” and Sabel’s concept that in business and politics, there should be “learning by monitoring.”¹⁸ This work has two main components.

The first is that many areas of regulation are characterized by volatility and diversity, with concomitant changing states of knowledge.¹⁹ Advocates of experimentalism and related forms of regulation claim that rigid forms of regulation are ill suited to accomplish their designated tasks.²⁰ Federal standard-setting is generally vilified as too rigid²¹ and dysfunctional, unless the law contains provisions empowering citizens to provoke or force action.²² This literature appears not to distinguish regulatory floors and ceilings.

Emerging Model of School Governance and Legal Reform, 28 N.Y.U. REV. L. & SOC. CHANGE 183, 189–90 (2003) (arguing for a routine revision and reevaluation of institutional processes in public school systems); Orly Lobel, *The Renew Deal: The Fall of Regulation and the Rise of Governance in Contemporary Legal Thought*, 89 MINN. L. REV. 342, 396, 461 (2004) (discussing legal innovations and methods of governance that allow for uncertainty and diversity, characterized together as the “renew deal,” including experimentalist literature); Eric W. Orts, *Reflexive Environmental Law*, 89 NW. U. L. REV. 1227, 1231–32 (1995) (describing and advocating shift in environmental regulation to “reflexive law” which focuses on “influencing the ‘self-referential’ capacities of the social institutions subject to regulation”); Charles Sabel, et al., *Beyond Backyard Environmentalism*, in BEYOND BACKYARD ENVIRONMENTALISM 3, 6–7, 13–15 (Joshua Cohen & Joel Rogers eds., 2000) (describing rolling rule regimes); Charles F. Sabel & William H. Simon, *Destabilization Rights: How Public Law Litigation Succeeds*, 117 HARV. L. REV. 1016, 1082–94 (2004) (analyzing how public law “destabilization rights” can disentrench failing institutions and facilitate ongoing stakeholder negotiations, rolling rule regimes, and transparency); Susan Sturm, *Second Generation Employment Discrimination: A Structural Approach*, 101 COLUM. L. REV. 458, 479–89 (2001) (outlining an interactive structural approach for trial courts to address problems of compliance in employment discrimination); see also IAN AYRES & JOHN BRAITHWAITE, *RESPONSIVE REGULATION: TRANSCENDING THE DEREGULATION DEBATE* (1992) (exploring similar issues).

¹⁸ Dorf & Sabel, *supra* note 17, at 287; Sabel, et al., *supra* note 17.

¹⁹ Dorf & Sabel, *supra* note 17, 314–16 (emphasizing the importance of embracing interactive “experimentalist” regimes utilizing a diversity of actors in settings characterized by “volatility” and “diversity”).

²⁰ As pragmatists such as John Dewey illustrated, innovation and adjustment are often critical to devise effective regulation, especially in settings of change and evolving information. See, e.g., Dorf & Sabel, *supra* note 17, at 284 & n.54 (citing JOHN DEWEY, *DEMOCRACY AND EDUCATION: AN INTRODUCTION TO THE PHILOSOPHY OF EDUCATION* (1919)).

²¹ Dorf & Sabel, *supra* note 17, at 278, 370; *id.* at 443 n.587 (citing Richard J. Pierce, Jr., *Seven Ways to Deossify Agency Rulemaking*, 47 ADMIN. L. REV. 59, 60 (1995) (“For more than a decade, administrative law scholars have complained that the agency rulemaking process has become ossified.”); *id.* at 437 (“[N]ew legislation does not set mere preliminary benchmarks to be replaced by rolling best-practice standards. Instead, it sets rigid requirements that many critics claim to be based on unrealistic assumptions.”); Lobel, *supra* note 17.

²² Agencies frequently miss statutory deadlines, while altogether neglecting tasks that are not subject to statutory mandates. See Alden F. Abbott, *The Case Against Federal Statutory and Judicial Deadlines: A Cost-Benefit Appraisal*, 39 ADMIN. L. REV. 171, 176–79 (1987) (finding that individuals institute “[c]omplaints alleging unreasonable delay brought against federal agencies . . . rely[ing] upon specific statutory guarantees, the APA, or both” when agencies neglect tasks); Bradley C. Karkkainen, *Information-Forcing Environmental*

The second component of experimentalist work and regulation builds off of insights drawn from a study of industrial production, especially at Toyota plants.²³ Rather than a top-level bureaucrat choosing in a final way how a car should be produced, “learning by monitoring” occurs.²⁴ Under learning by monitoring, the production process is monitored, with best practices “benchmarked,” and then production adjustments are adopted.²⁵ Information is pooled so that others engaged in the same task can adopt this new “benchmarked” best production method.²⁶ Recent works observe analogous political and regulatory actions and argue that this mode of pragmatic adjustment can and should be more widely adopted in the world of government and law.²⁷ This literature argues that for effective regulatory choices, one needs to have a diversity of actors and institutions, providing them room for experimentation, sharing, and learning.²⁸

Much of this work focuses on provision of government services, such as education, child welfare, prisons, welfare, and social safety-net programs.²⁹ Experimentalist scholars’ analysis of safety and risk regulation is a bit sketchier. Here, previous scholarship is less certain, both criticizing federal standard setting and status quo arrangements, while also lauding laws like the Clean Air Act (CAA) and its cooperative federalism structures in place since 1972.³⁰ Experimentalist literature both advocates and chronicles these

Regulation, 33 FLA. ST. U. L. REV. 861, 897 (2006) (stating that when regulatory agencies fail to perform, citizens can institute deadline suits to “secure strict enforcement of conventional regulatory rules and standards, often in circumstances where the government enforcement agency has overlooked the violation, whether inadvertently or as a matter of policy or enforcement priorities”); *see also* Sidney A. Shapiro & Robert L. Glicksman, *Congress, the Supreme Court, and the Quiet Revolution in Administrative Law*, 1988 DUKE L.J. 819, 839 (stating that Congress has implemented statutory hammers and specific substantive criteria to counter environmental agencies’ lack of action); Sarah B. Van de Wetering & Robert W. Adler, *New Directions in Western Water Law: Conflict or Collaboration?*, 20 J. LAND RESOURCES & ENVTL. L. 15, 37 (2000) (finding that the Colorado Fish Recovery Programs will not work unless “regulatory hammers are retained, and if the resulting agreements are enforceable in some meaningful way”).

²³ *See* Dorf & Sabel, *supra* note 17, at 292–310.

²⁴ *Id.*

²⁵ *Id.*

²⁶ *Id.*

²⁷ *See, e.g., id.*

²⁸ *See, e.g., id.* at 314.

²⁹ *See id.* at 329, 346; *see, e.g.,* Sabel & Simon, *supra* note 17, at 1019.

³⁰ *See* Dorf & Sabel, *supra* note 17, at 345–54 (broadly criticizing regulatory standard setting and dysfunctions associated with the traditional regulatory process). Later, Dorf and Sabel offer more nuanced praise of the Clean Air Act’s use of “joint federal/state responsibility that functions largely according to principles of democratic experimentalism.” *Id.* at 433–34; *see also id.* at 352, 358, 376, 433 (discussing other Clean Air Act provisions).

innovations, with experimentalist regimes sometimes replacing more traditional arrangements under our federalist form of government.³¹

II. UNEASY INTERACTIONS: THE TWO INNOVATIONS' CROSS-ILLUMINATION

What does experimentalism tell us about this unitary federal-choice ceiling preemption, which acts to make a federal regulatory choice, and sometimes the federal regulatory actor, the sole actor with power? And what lessons does comparative analysis of regulatory floors and ceilings hold for a critique of experimentalist regulation? This Part considers each of these issues in turn.

A. *Experimentalism's Lessons for Preemption Innovations*

Unitary federal-choice ceiling preemption looks like a total disaster when examined in light both of experimentalist literature and long-established scholarship about regulatory failures.³² Any regulatory design choice needs to take into account and adjust for numerous regulatory failure risks.³³ Among those common risks are regulatory inertia,³⁴ capture,³⁵ poor initial choice or

³¹ When agencies do act, information limitations can lead to error, inordinate reliance on information provided by those regulated, and unduly lax regulation. This is a key element in the experimentalist critique of traditional regulatory methods. See *id.* at 279, 287; see also *supra* sources cited in note 17.

³² See, e.g., William W. Buzbee, *Regulatory Underkill in an Era of Anti-Environmental Majorities*, in STRATEGIES FOR ENVIRONMENTAL SUCCESS IN AN UNCERTAIN JUDICIAL CLIMATE 141, 141–62 (Michael Allan Wolf ed., 2005) [hereinafter Buzbee, *Regulatory Underkill*] (discussing numerous ways regulatory goals can be subject to underkill strategies and dynamics, leading to substantial disparity between legal goals and implemented reality); Daniel A. Farber, *Taking Slippage Seriously: Noncompliance and Creative Compliance in Environmental Law*, 23 HARV. ENVTL. L. REV. 297 *passim* (1999) (discussing the “slippage” at each level of environmental implementation which renders law less rigid and burdensome than indicated by statutory and regulatory edicts).

³³ One cannot assume that a policy goal, once defined, will translate into successful action. See William W. Buzbee, *Urban Sprawl, Federalism, and the Problem of Institutional Complexity*, 68 FORDHAM L. REV. 57, 59–61 (1999) (discussing the need for policy analysis not just to envision goals, but to understand the institutional roots and related incentives that cause a social ill and hence must be factored into responses); see also William W. Buzbee, *Sprawl's Dynamics: A Comparative Institutional Analysis Critique*, 35 WAKE FOREST L. REV. 509, 516–18 (2000) [hereinafter Buzbee, *Sprawl's Dynamics*] (distinguishing between “goal choice” and the need for utilization of comparative institutional analysis in assessing a multifaceted challenge such as urban sprawl and its associated harms and benefits).

³⁴ The mere possibility that another regulatory actor, such as a state attorney general, may act and reveal missed wrongdoing can serve to counter inertial tendencies of other government actors. See Robert B. Ahdieh, *Dialectical Regulation*, 38 CONN. L. REV. 863, 872–76 (2006) (discussing the role of state attorney generals in prompting federal regulatory action); Trevor Morrison, *The State Attorney General Role and Preemption Claims*, in PREEMPTION CHOICE, *supra* note 2.

³⁵ In its strong form, George Stigler claimed that regulation is typically actually for the benefit of the ostensibly regulated target. See George J. Stigler, *The Theory of Economic Regulation*, 2 BELL J. ECON. & MGMT. SCI. 3, 3 (1971). More usual “capture” theory arises out of concerns with the revolving door between

error,³⁶ outdated choices,³⁷ and inadequate funding of administrative agencies.³⁸ Creation of effective regulatory schemes must further anticipate status quo bias,³⁹ which can make any initial choice sticky,⁴⁰ and risk-averse regulators.⁴¹

industry and regulators, or regulators who over time become too cozy with the industry they are supposed to monitor. Much of such so-called capture behavior can arise out of agencies' dependence on information that industries provide. See Richard B. Stewart, *The Reformation of Administrative Law*, 88 HARV. L. REV. 1669, 1684–87 (1975) (discussing capture dynamics and suggesting that much of such behavior results from non-corrupt repeat interactions with targets of regulation).

³⁶ Regulatory actors may commit a regulatory error by choosing imprudently, leading either to overly zealous or inefficient action, or an action that itself causes unnecessary harms. See Richard B. Stewart, *Preclusion of Tort Liability: Limiting the Dual Track System*, 88 GEO. L.J. 2167 (2004) (arguing in favor of a regulatory compliance defense).

³⁷ Another risk is that changing conditions will render an earlier regulatory choice obsolete. With preemption choices, the risk exists both of changes being missed by a regulator who is too large or by one that is too small due to lack of resources. Changing information about a risk, or information about a risk's sources that is itself changing, requires regulators that are nimble or at least different regulators sensitive to actions and harms at different scales.

³⁸ See *supra* Buzbee, *Regulatory Underkill*, *supra* note 32.

³⁹ See Clayton P. Gillette, *Lock-in Effects in Law and Norms*, 78 B.U. L. REV. 813, 817 (1998) (finding that administrative law is subject to “lock-in” and “path dependence” because “regulations provide signals of acceptable behavior and promise rewards to those who conform . . . [and thus] threaten[] evolutionary processes that might return still greater rewards”); J.B. Ruhl & James Salzman, *Mozart and the Red Queen: The Problem of Regulatory Accretion in the Administrative State*, 91 GEO. L.J. 757, 818 (2003) (asserting that “[o]ver time, the accretion of rules will present more regulatory decision nodes, which will add to the path dependence of present regulatory positions, and will therefore limit the options for new rules”); see also Jeffrey J. Rachlinski, *The Psychology of Global Climate Change*, 2000 U. ILL. L. REV. 299, 307–08 (2000) (discussing industry investment and link to status quo bias). See generally Donald T. Hornstein, *Complexity Theory, Adaptation, and Administrative Law*, 54 DUKE L.J. 913, 926–28 (2005) (arguing that the Impossibility Theorem may be used to explain why administrative law is “extremely sensitive to initial conditions, a phenomenon related to path dependence”).

⁴⁰ See Rachlinski, *supra* note 39 (discussing status quo bias and stating that investment made in reliance on past regulatory and business norms often lead industries and legislators to maintain the status-quo) (citing Amos Tversky & Daniel Kahneman, *Loss in Riskless Choice: A Reference-Dependent Model*, 106 Q.J. ECON. 1039 (1991)).

⁴¹ See William W. Buzbee, *Remembering Repose: Voluntary Contamination Cleanup Approvals, Incentives, and the Costs of Interminable Liability*, 80 MINN. L. REV. 35, 90–93 (1995) [hereinafter Buzbee, *Remembering Repose*] (discussing legal, business and psychiatric insights regarding risk aversion in analysis of agency reluctance to create a mechanism to review and approve voluntary contamination cleanups). In addition, agencies face a modestly increased burden when changing approaches. They must confront the old approach, admit that a change is proposed, and explain it adequately so the change is not adjudged to be arbitrary and capricious. See Kevin M. Stack, *The Constitutional Foundations of Cheney*, 116 YALE L.J. 952, 952, 1004–12 (2007) (explaining that agency actors must engage in “reasoned decision-making to obtain deference under Chevron”). This will make any change more risky than maintenance of the status quo.

Handing all regulatory power to one actor is the antithesis of the diversity of actors called for in experimentalist literature.⁴² With complete displacement, especially if common law venues are preempted, no actor or institution outside the federal regulatory venue has any room or incentive to criticize and seek change.⁴³ Change will likely occur only if the preempting federal actor—be it an administrative agency or the legislature—decides to change its previous decision.⁴⁴ The more-standard floor preemption, in contrast, displaces some state choices, but it retains a diversity of actors and creates incentives for innovation. More-stringent regulation remains an option, plus common law regimes' different incentives and informational modalities mean that actors other than regulators can question the efficacy and adequacy of an earlier regulatory choice. In the common law setting, injured plaintiffs and their attorneys both have financial incentives to dig for evidence of unduly risky products or action. Furthermore, the latitude provided by civil litigation discovery allows litigants to probe the adequacy of a decision based not on an agency's record at the time of a regulatory action, but based on all information relevant to assessment of the reasonableness of an action. Subsequent innovations or belatedly revealed risks can be revealed through common law litigation.

⁴² See, e.g., NEIL GUNNINGHAM & PETER GRABOSKY, *SMART REGULATION: DESIGNING ENVIRONMENTAL POLICY* 15 (1998) (arguing for a combination of policy instruments); NEIL K. KOMESAR, *IMPERFECT ALTERNATIVES: CHOOSING INSTITUTIONS IN LAW, ECONOMICS, AND PUBLIC POLICY* 271 (1994) (stating that one institution alone cannot produce an optimal result); Daniel C. Esty, *Environmental Protection in the Information Age*, 79 N.Y.U. L. REV. 115, 146–48 (2004) (arguing that “a mix of institutions,” rather than a single institutional strategy, is necessary to effectively address the challenge of reducing toxic emissions); Daniel C. Esty, *Revitalizing Environmental Federalism*, 95 MICH. L. REV. 570, 614 (1996) (stating that the optimal strategy to regulate “the diversity of environmental harms” is a combination of governmental and private “structures”).

⁴³ The traditional answer to common forms of regulatory dysfunction, and especially prevalent problems in the area of risk regulation, has been the creation of public participation rights, requiring regulatory transparency, enacting detailed statutory mandates, adding statutory deadlines that require regulatory reexamination of past actions, and granting causes of action to challenge government action or inaction. See Michael Herz, *Judicial Textualism Meets Congressional Micromanagement: A Potential Collision in Clean Air Act Interpretation*, 16 HARV. ENVTL. L. REV. 175, 179 (1992) (discussing legislative use of increasingly detailed statutory language when confronted with executive actors “undercutting” or not vigorously implementing or enforcing the law); *supra* sources cited in note 22 (discussing deadlines, regulatory hammers, and citizen suits). Still, pervasive litigation threats and delay associated with litigation can make these responses of limited efficacy. Antidotes to stasis and regulatory imprudence are typically, at best, only partially effective.

⁴⁴ Legislation seldom requires or rewards agency reexamination and assessment of past action. Cf. Thomas O. McGarity, *Some Thoughts on “Deossifying” the Rulemaking Process*, 41 DUKE L.J. 1385, 1401 (1992) (finding that “a trip back to the drawing board . . . can consign [the project] to oblivion as the agency’s limited staff resources are committed to other projects, institutional memory fades, and more immediate priorities press old rulemaking initiatives to the bottom of the agenda”).

A place surely exists for strongly preemptive federal standards that provide no latitude for deviation and eliminate multiple regulators retaining roles with the associated possibility of divergent regulatory approaches. However, such settings are few and the risks of such approaches are considerable. A completely preemptive federal approach probably makes most sense in settings of design mandates for widely distributed goods, or where the government for some reason wants to promote a particular industry or initiative.⁴⁵ In settings of dynamism and uncertainty, especially where problems are caused by diverse sources at different scales and manifested in different ways, a single federal answer displacing all other regulatory approaches and institutions is particularly risky.⁴⁶ Hence, design mandates to a particular industry may justify a strongly preemptive approach. However, challenges like climate change and greenhouse gas emissions, or diverse risks of chemical facilities, seem poorly suited to federal assertion of a preemptive unitary federal choice that acts as a ceiling, prohibiting more protective state law or incentives and reexamination promoted by potential common law liability. Experimentalist scholarship helps illuminate the risks inherent in these recent aggressive preemption decisions.

B. Preemption's Lessons for Experimentalist Aspirations

What do these recent preemption innovations reveal about experimentalism? Here, my suggestion is that experimentalist literature does not yet adequately think through the different settings of risk regulation. Different regulatory tasks and settings often call for different structures, as Dean Rubin and Professor Komesar have effectively explained.⁴⁷

⁴⁵ See Buzbee, *Asymmetrical Regulation*, *supra* note 2.

⁴⁶ Effective regulation and preemption choice require attention to the many dimensions of risk creation and the conditions necessary for an effective regulatory response. See Buzbee, *Regulatory Gaps*, *supra* note 14, at 7–36 (discussing scholarly inattention to the “regulatory commons” problem, the many dimensions relevant to regulatory action, and the reasons regulatory gaps may result where a regulatory opportunity is shared among potential regulators, such as in settings of social ills like urban sprawl, climate change, or overfishing). For recent application of this concept in an in-depth examination of overfishing ills, see Hope M. Babcock, *Grotius, Ocean Fish Ranching, and the Public Trust Doctrine: Ride 'Em Charlie Tuna*, 26 *STAN. ENVTL. L.J.* 3, 4–6, 68–71 (2007).

⁴⁷ See, e.g., KOMESAR, *supra* note 42, *passim* (proposing that comparative institutional analysis is necessary to determine the relative ability of each institution in achieving the desired goal given the circumstances); Edward L. Rubin & Malcolm Feeley, *Federalism: Some Notes on a National Neurosis*, 41 *UCLA L. REV.* 903 (1994) (distinguishing between decentralization's and federalism's benefits, and arguing that the critical latitude that a federalist structure provides to state and local governments is the ability not just to tailor national goals to local settings, but to make different policy choices and be responsive to a different electoral constituency); see also William W. Buzbee, *Brownfields, Environmental Federalism, and*

Experimentalist literature often seems implicitly to assume that, in the governance setting, all interested parties will have the wherewithal and incentives to participate, give voice, and monitor these “rolling rules.” Markets will, it is claimed, exist and reward regulatory learning by monitoring. In the settings of government service provision, this expectation is not far-fetched, given the presence of large institutional players in a context where, as in business settings, analogous measures of efficiency and accomplishment are possible.

But what about risk regulation? How does it differ? What is driving recent ceiling preemption? Quite clearly, industry wants the certainty provided by ceiling preemption.⁴⁸ If regulations or legislation are unlikely to change and common law liabilities are no longer a risk, then those creating risk face a far less threatening regulatory environment.⁴⁹

Risk regulation presents challenges quite distinct from the provision of government services. Risk regulation is characterized by strong clashing groups—often industry versus consumers, unions, or environmental groups. In all of these settings, the government’s role is to make choices where one side or the other will feel a loss; zero sum outcomes are common, not win-win regulatory choices. Difficult regulatory choices are often at the bounds of science.⁵⁰ Great disparities in resources exist, with industry facing tremendous

Institutional Determinism, 21 WM. & MARY ENVTL. L. & POL’Y REV. 1, 30–58 (1997) (showing differences in historical circumstances for the same institution on the same issue can affect the outcome); Buzbee, *Sprawl’s Dynamics*, *supra* note 33, at 528–32 (noting that sensitivity to context, specifically to historical context, is necessary to determine the possible policy implications of choosing a particular institution); James E. Krier, *The Tragedy of the Commons, Part Two*, 15 HARV. J.L. & PUB. POL’Y 325, 340 (1992) (stating that the objective of comparative institutional analysis “is to determine what mixes of market and government, rights and regulation, work best under various circumstances”).

⁴⁸ For a variant on this argument, see Alan Schwartz, *Statutory Interpretation, Capture, and Tort Law: The Regulatory Compliance Defense*, 2 AM. L. & ECON. REV. 1, 8–10 (2000) (discussing inefficiencies associated with disparate state standards and questioning the presumption that Congress would want additional state regulation and common law). *See, e.g.*, Stigler, *supra* note 35 (arguing that regulation tends to be actually for the benefit of those ostensibly regulated).

⁴⁹ In essence, the room for change and multilayered regulatory structures is arguably in tension with “rule of law” values that stress clear mandates, legal stability, and distinct lines of accountability. *See, e.g.*, Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175 *passim* (1989).

⁵⁰ For example, setting standards for emissions of pollutants from particular industries based on an assessment of what can be accomplished with “best available technology” requires huge amounts of time, money, and technological knowledge. *See, e.g.*, Wendy E. Wagner, *The Triumph of Technology-Based Standards*, 2000 U. ILL. L. REV. 83, 94–95 (noting the considerable demands of standard setting but arguing that it is comparatively less demanding than other seemingly more ideal forms of regulation).

costs but having resources and cost-avoidance incentives to remain players.⁵¹ Organized not-for-profits can offer expertise and serve as a counterweight to industry or sometimes misguided government actors, but are dwarfed in power, money, and personnel. Citizens, especially in more local settings, tend to have no resources, face conflicts like jobs and children, and have little or no time to participate in ongoing regulatory revisions.

In this sort of polycentric setting, with clashing interests and disparate resources, the government's response is often not to act at all, to act and duck, to leave old choices unexamined,⁵² or to succumb to industry pressure.⁵³ Industry will invest in the initial regulatory choice and lobby against change.⁵⁴

⁵¹ Well-funded industries and motivated not-for-profits will stand ready to litigate after lengthy rulemaking. Compare Bruce A. Ackerman & Richard B. Stewart, *Reforming Environmental Law*, 37 STAN. L. REV. 1333 (1985) (bemoaning conflicts and the resulting rigid regulation of modern environmental regulation and suggesting alternative, more context-sensitive modes); with Howard Latin, *Ideal Versus Real Regulatory Efficiency: Implementation of Uniform Standards and "Fine Tuning" Regulatory Reforms*, 37 STAN. L. REV. 1267 (1985) (developing contrary arguments in support of current schemes and criticizing Ackerman and Stewart's arguments, and seeing regulatory conflict as reason not to utilize more "fine tuned" forms of regulation).

⁵² See, e.g., JERRY L. MASHAW & DAVID L. HARFST, *THE STRUGGLE FOR AUTO SAFETY* (1990) (arguing that the U.S. National Highway Traffic Safety Administration stopped re-visiting its regulations after 1976); Cary Coglianese, *Empirical Analysis and Administrative Law*, 2002 U. ILL. L. REV. 1111, 1126 (2002) (stating that "[i]n some cases, agencies have allegedly retreated altogether from efforts to establish new regulations"); McGarity, *supra* note 44, at 1436 (noting that "[g]iven all of the barriers to writing a rule in the first place, few agencies are anxious to revisit the process in light of changed conditions or new information"); see also Leslie Kux, *Looking Back at Existing Rules: Agency Perspectives on Analysis Requirements*, 48 ADMIN. L. REV. 375, 378 (1996) (analyzing the administration's objection to certain bills proposing lookback provisions).

⁵³ Concern with resulting regulatory inertia led regulatory critics to advocate enactment of a "lookback" provision requiring agencies to assess existing regulations during failed efforts of the 104th Congress to pass regulatory reform legislation. See 141 CONG. REC. S9710 (daily ed. July 11, 1995) (statement of Sen. Thompson) (arguing that "[w]hen the whim suits them, Federal agencies comply with the Executive order. When it does not, they do not. In most cases, agencies are not making careful assessments of the positive and negative impacts of their regulations" and thus urging Congress to pass S. 343); 141 CONG. REC. S1711 (daily ed. Jan. 27, 1995) (statement of Sen. Roth) (asserting that "the regulatory process itself has become too cumbersome, unresponsive, and inefficient" and thus citing the need for S. 291); H.R. REP. NO. 104-284, at 10 (1995) (noting that Presidential mandates have failed to regulate agency actions and thus H.R. 994's lookback provision is necessary to reduce "the number of duplicative or unnecessary regulations now on the books and at discouraging unnecessary rules in the future"). See generally Kux, *supra* note 52, at 375 (1996) (highlighting the 104th Congress' attempts to establish lookback provisions for regulatory agencies). For other discussions of problems of legal accretion, see GUIDO CALABRESI, *THE COMMON LAW FOR THE AGE OF STATUTES* 1-7, 80-90 (1982); and Ruhl & Salzman, *supra* note 39.

⁵⁴ See, e.g., *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 33-39 (1983) (reviewing industry opposition to imposition of additional safety features in cars in the context of a challenge to Standard 208, a regulation regarding airbags and seatbelts in cars promulgated by the National Highway Traffic Safety Administration); Dorf & Sabel, *supra* note 17, at 357-64 (reviewing the history of *State Farm* as evidence of need for less oppositional forms of regulatory process); see also KEITH BRADSHAW, HIGH AND

None of this is a pretty picture, as Professor Sabel and others demonstrate.⁵⁵ But the resource disparity and incentive issues are a problematic reality under current regimes and remain a challenge under any reformed mode of regulation, be it experimentalist or some other reform, such as requiring greater use of cost-benefit analysis and risk assessments.

Professors Dorf and Sabel posit that with an appropriate federally set baseline, better practices and accomplishments can be discovered and become the new standard, creating a competitive market rewarding the first to innovate.⁵⁶

But this is where the experimentalist literature seems to run into an analytical wall. With the clashing interests of risk regulation, status quo bias,⁵⁷ and inertial tendencies, coupled with massive resource disparities, where will the resources and incentives come from to lead to this public-regarding ongoing process of regulatory adjustment?

Industry will not want such change, nor will regulators. Citizens will be outgunned, and even issue-based not-for-profits will often lack the resources to stick with the ongoing process of adjustment.⁵⁸ To say that a new “peer inspectorate” will undertake this task seems to be positing a technocratic fix that is in tension with the legislative and agency incentives and failures that put us in a pickle in the first place.⁵⁹

There are few examples of experimentalist success in settings of risk regulation. As discussed above, ceilings that function as a preemptive unitary federal choice look, through the regulatory experimentalism lens, like a near perfect recipe for regulatory dysfunction.

MIGHTY: THE DANGEROUS RISE OF THE SUV 31–32 (2003) (reviewing American Motors’ resistance to addressing stability and rollovers in Jeeps).

⁵⁵ Dorf & Sabel, *supra* note 17, at 345–54 (broadly criticizing regulatory standard setting and dysfunctions associated with the traditional regulatory process).

⁵⁶ *Id.* at 354–56.

⁵⁷ The attachment of people to the status quo is a well documented psychological phenomenon, meaning that individuals will generally oppose change. See Jeffrey J. Rachlinski, *A Positive Psychological Theory of Judging in Hindsight*, 65 U. CHI. L. REV. 571, 576 (1998) (discussing the phenomenon that people will become attached to the status quo or present state of affairs, and retreat from change to the status quo even when they will benefit from change); William Samuelson & Richard Zeckhauser, *Status Quo Bias in Decision Making*, 1 J. RISK & UNCERTAINTY 7, 12–19 (1988) (summarizing experimental research studies revealing status quo bias).

⁵⁸ See *supra* notes 51–54 and accompanying text.

⁵⁹ See Dorf & Sabel, *supra* note 17, at 336–38, 354–55, 374–75 (discussing the role of government information pooling and the need for a “peer inspectorate”).

But maybe the floor preemption story provides a second best solution that looks a lot like what experimentalists advocate. Federal standards mandating a regulatory floor are concededly far from “rolling rule regimes.” Floors set a minimum level of stringency. In contrast to regulatory ceilings, floors typically retain common law regimes. A diversity of regulatory choices remains an option, although lax state regulation is ruled out.⁶⁰ Jurisdictions wanting to be the low risk, clean environment state can go further—see California,⁶¹ Minnesota, and Oregon.⁶² In addition, states are typically left room or obligated to tailor implementation to local settings.⁶³ Furthermore, broad citizen suit provisions with attorneys’ fees rights create a market for citizens and not-for-profits to challenge illegal private or government actions. With cooperative federalism structures usually accompanying floor preemption and room left for diverse and more stringent regulation, numerous levels of regulatory action are venues for innovation.⁶⁴ Multiple actors remain regulatory players. Little is irrevocably settled, apart from preclusion of more lax standard setting.

⁶⁰ In contrast to federal unitary choice preemption and sometimes unrealistic experimentalist aspirations, floor preemption can work by promoting reexamination and virtually precluding stasis despite human and institutional flaws such as inertia, selfishness, short-sightedness, and lack of willpower. See, e.g., Matthew D. McCubbins & Thomas Schwartz, *Congressional Oversight Overlooked: Police Patrols Versus Fire Alarms*, 28 AM. J. POL. SCI. 165, 166 (1984) (developing the theory that participation and ligation rights serve as “fire alarms” that will alert legislators if laws are not being implemented); Matthew D. McCubbins et al., *Structure and Process, Politics and Policy: Administrative Arrangements and the Political Control of Agencies*, 75 VA. L. REV. 431, 440 (1989) (arguing that in order to steer agencies to desired outcomes, legislatures can either write “into the law precisely what the agency is to achieve, and how it is to do so” or “constrain an agency’s policies . . . by enfranchising the constituents of each political actor”).

⁶¹ To reduce the possibility of a multiplicity of different state requirements with attendant balkanization of the market and losses in production economies of scale, federal law preempts any state regulation of automobile emissions, with one notable exception. See 42 U.S.C. § 7543(b)(1), (e)(2)(A) (2006). California, with Los Angeles’s pollution woes, has the option to require an even lower polluting vehicle.

⁶² For discussion of Minnesota’s and other states’ innovations in contamination cleanups, see Buzbee, *Remembering Repose*, *supra* note 41, at 107–10. Many states, however, have enacted statutes that now prohibit state regulators from promulgating any standards more stringent than the federal floor. See Jerome M. Organ, *Limitations on State Agency Authority to Adopt Environmental Standards More Stringent than Federal Standards: Policy Considerations and Interpretive Problems*, 54 MD. L. REV. 1373, 1376 (1995). In those states, due to the combination of federal and state action, the initial federal floor becomes the unitary choice.

⁶³ Statutory language leaves the impression that industry-wide technology-based standards leave little room for such tailoring, but in juggling sometimes clashing requirements, regulators issuing permits often engage in some facility-specific tailoring. Environmental quality-based standards, such as the CAA SIP (State Implementation Program), leave broad tailoring discretion.

⁶⁴ The possibility for federal “overfiling,” rejection of permit choices, citizen suits, or Administrative Procedure Act (APA) challenges if a permit violates the law, means that authority is pervasively monitored and checked. See, e.g., *Alaska Dep’t of Env’tl. Conservation v. EPA*, 540 U.S. 461 (2004) (affirming the EPA’s power to object to lax state permits issued in violation of the Best Available Control Technology requirement).

In addition, if regulators set a standard and never go back,⁶⁵ the possibility of common law claims, which are typically preserved under floor preemption savings clauses, creates a setting where actors not in the clashing regulation world can be entrepreneurs.⁶⁶ Plaintiffs and lawyers can engage in discovery, motivated by good old filthy lucre.⁶⁷ They can and often do show that a federal standard still leads to harm and perhaps is not strict enough.⁶⁸ Such incentives and discoveries are many, especially in connection with the risks posed by tobacco,⁶⁹ C8 used in Teflon,⁷⁰ certain heart stents, and California's more-stringent air pollution regulation authorized by federal law.⁷¹

⁶⁵ With limited resources and time, regulators may be tempted to leave initial judgments alone, given the limited opportunities for credit claiming when reexamining old work. See Ruhl & Salzman, *supra* note 39, at 782–88.

⁶⁶ Retaining common law regimes, with their different array of actors and incentives, is particularly likely to create incentives for reexamination of regulatory choices. Indeed, it is the different incentives and institutional structures of common law regimes that create a possible means to overcome a major weakness in “experimentalist” regimes, namely, the ordinary lack of incentives for regulators to engage in reflection, reexamination of past actions, admissions of error, and unsettling of the status quo.

⁶⁷ Professor Robert Rabin argues that despite the flaws in tort liability regimes, these regimes serve a valuable role in eliciting information about product risks that might otherwise be overlooked. Robert L. Rabin, *Reassessing Regulatory Compliance*, 88 GEO. L.J. 2049, 2068–70 (2000). Tort litigation can, in fact, serve as a sort of “feedback loop,” eliciting information that leads to reexamination of past federal regulatory actions. See Thomas O. McGarity, *The Regulation-Common Law Feedback Loop in Non-Preemptive Regimes*, in PREEMPTION CHOICE, *supra* note 2. For a work advocating latitude for tort claims for harms caused by pesticides, and tracing regulatory and common law regimes and institutions’ review of risks, as well as the relative strengths of such regimes and institutions, see Alexandra B. Klass, *Pesticides, Children’s Health Policy, and Common Law Tort Claims*, 7 MINN. J. L. SCI. & TECH. 89 (2005). For works also discussing feedback interactions but with more of an emphasis on tort claims and industry learning, see Joseph Frueh, Comment, *Pesticides, Preemption, and the Return of Tort Protection*, 23 YALE J. ON REG. 299, 308 (2006) (discussing how tort litigation provides feedback to manufacturers); David A. Hyman & Charles Silver, *The Poor State of Health Care Quality in the U.S.: Is Malpractice Liability Part of the Problem or Part of the Solution?*, 90 CORNELL L. REV. 893, 919–23 (2005) (describing the wave of malpractice lawsuits and negative publicity surrounding anesthesia that prompted changes to the American Society of Anesthesiologists’ monitoring guidelines and standards); Mary L. Lyndon, *Tort Law and Technology*, 12 YALE J. ON REG. 137, 163–65 (1995) (arguing that the issue is not whether tort law or agency law provides the best response to risks posed by technologies, but how tort law and agencies can work together to address those risks); and Richard A. Merrill & Jeffrey K. Francer, *Organizing Federal Food Safety Regulation*, 31 SETON HALL L. REV. 61, 64 (2000) (noting that tort law provides feedback, albeit incomplete, to the food industry).

⁶⁸ See, e.g., Marla Cone, *U.S. Rules Allow the Sale of Products Others Ban: Chemical-Laden Goods Outlawed in Europe and Japan are Permitted in the American Market*, L.A. TIMES, Oct. 8, 2006, at A1.

⁶⁹ See DAVID KESSLER, A QUESTION OF INTENT: A GREAT AMERICAN BATTLE WITH A DEADLY INDUSTRY 250–60 (2001) (reviewing the history of FDA efforts to regulate tobacco products); Catherine T. Struve, *The FDA and the Tort System: Postmarketing Surveillance, Compensation, and the Role of Litigation*, 5 YALE J. HEALTH POL’Y L. & ETHICS 587, 591 n.12 (2005) (citing Rabin, *supra* note 67, at 2069).

⁷⁰ See McGarity, *supra* note 67 (discussing history of regulation and common law litigation regarding C8 and observing a “feedback loop” between regulatory actors and common law process).

⁷¹ For discussion of these provisions and the regulatory dynamics it creates, see Ann E. Carlson, *Federalism, Preemption, and Greenhouse Gas Emissions*, 37 U.C. DAVIS L. REV. 281, 311–18 (2003).

This sort of interaction between regulatory regimes and common law settings is undoubtedly far from learning-by-monitoring regimes that, at least in their ideal form, can provide huge benefits in private markets and perhaps in provision of government services. Instead, in these settings of risk regulation and other poorly addressed risks, one finds clashing interests and a somewhat messy set of institutions, where no one controls the agenda and final choice. Concededly, any preemption at first blush appears contrary to the experimentalist regulatory goal of ongoing monitoring and revision. However, the form of multilayered federalism retained by floor federalism, with its preservation of state roles and usual saving of common law regimes, actually creates a more realistic sort of interactive tension than one finds in sometimes idealized descriptions of experimentalist regulation. Most critically, floor preemption's retention of multiple institutions and the different modalities and incentives of common law litigation mean that one need not rely on hyper-involved citizens and selfless bureaucrats to prompt regulatory reexamination and adjustment. The possibility of common law liabilities, something usually retained with floor preemption and its savings clauses, creates ongoing private incentives to challenge the status quo. Preserved common law regimes are thus particularly valuable antidotes to complacency and ineffective regulation.

In this world of risk and environmental regulation, the messy overlap and learning characterized by floor preemption in delegated-program federalism schemes add up to a good second-best variant of the surely more elegant experimentalism, with its ongoing learning and adjustment. Federal standard-setting, at least where floors are involved, can create conditions conducive to interaction, new information and innovation, with a diversity of actors, in ways championed in experimentalist scholarship.

CONCLUSION

Preemption, with its inherent displacement of state or local actors' roles, is necessarily in tension with forms of law and regulation that embrace interaction and legal revision by a diversity of actors at different scales. While preemption and federal standard-setting seem to be in inevitable tension with experimentalism's touted benefits, the partial preemption of regulatory floors has different implications than preemption in the form of unitary federal-choice ceilings. Such ceilings can completely displace other actors, undercutting the possibility of innovation and revision in response to diverse and changing settings. Regulatory floors, in contrast, retain the possibility of

several layers of legal actors and maintain incentives for innovation and adjustment. These floor and ceiling distinctions thus are illuminated by experimentalism's critique of regulation, but experimentalism is also illuminated by this analysis of preemption innovations. Any federal standard threatens to be more rigid than experimentalists advocate. Nevertheless, floor preemption's clashing roles and room for ongoing adjustment and innovation may better create conditions for experimentalist success than would the more-completely fluid rolling rule regimes described and championed in experimentalist scholarship.

