Obsolescent Preemption

Rosa Hayes*

During the first Trump Administration, cities and states responded to the void in federal climate leadership with a flurry of climate-protective policies and lawsuits. Even during the Biden Administration, subnational actors remained engaged in extensive—and necessary—climate change mitigation strategies. But the specter of preemption looms large over subnational climate action. Scholars of the "new preemption" have documented how conservative state legislatures exercise their preemption power to prevent progressive cities from adopting more protective climate policies. As this Article documents, however, judicial interpretations of preemption can create obstacles for municipalities and states even when they pursue policy agendas that are ideologically consistent with the agendas of their state or federal government.

The recent fate of two municipal gas bans illustrates this problem. In April 2023, the Ninth Circuit struck down Berkeley, California's gas ban as preempted under a federal statute concerned with energy efficiency. A similar ban enacted by Brookline, Massachusetts was likewise deemed preempted under state laws related to building safety. Both municipalities had justified their bans as exercises of their police power necessary to protect the health and welfare of their residents. But even though public health regulation has long been viewed as an area of traditional municipal authority, courts struck down the bans under sweeping interpretations of the assertedly preemptive laws. Their swift adoption of expansive theories of preemption raises troubling questions not only for the viability of subnational climate policy, but also about the prospect of success in ongoing subnational climate litigation.

This Article offers a critique of such unduly expansive applications of preemption grounded in the notion of obsolescence: the idea that a court's interpretation of supposedly preemptive statutory language can become antiquated over time or be unjustifiably extrapolated to new contexts so as to render a preemption determination inconsistent with the preemptive

* Clinical Fellow, Emmett Environmental Law & Policy Clinic, Harvard Law School. J.D., Yale Law School. I am grateful to Aladdine Joroff, Brandon Deutsch, John Lawson, and Daniel Montoya for early conversations about this topic. This Article benefited immensely from the feedback and encouragement of my Clinic colleagues, Sommer Engels and Andy Mergen; participants in the Clinical Writing Partners Initiative at Harvard Law School, Sabi Ardalan, Sheryl Dickey, Ruth Greenwood, Tiffany Lieu, Lia Monahon, and Emma Scott; and attendees of the 2023 Colloquium on Environmental Law Scholarship at Vermont Law School. I thank the editors of the *Texas Law Review* for their thoughtful and diligent editing, with special thanks to Sydney Jean Gottfried, Veda Tsai, and Eliza Levy. All errors are my own.

objective of the legislature. In developing this theory of obsolescent preemption, I explore the theoretical underpinnings of the legislature's preemption authority and explicate the judicial role in articulating and effecting preemption. After identifying the circumstances in which obsolescence occurs, I describe how obsolescent preemption arose in the gas ban context. Building on this case study, I provide a road map for advocates and courts to use as they think about applying the framework of obsolescent preemption in future litigation. I justify the existence of the theory of obsolescent preemption with respect to theories of federalism, separation of powers, and the twenty-first-century situation of subnational actors vis-à-vis climate change.

Introduction

The years of the Obama and Trump Administrations ushered in a new era of subnational contention.[1] From conservative states suing to enjoin enforcement of President Obama's immigration and healthcare policies,[2] to progressive states suing to forestall the Trump Administration's rollback of civil rights and climate protections,[3] subnational governments began flexing their policymaking authority in unprecedented opposition to the federal government's regulatory agenda. After the 2016 election, cities entered this conversation in new and innovative ways, such as by adopting broad sanctuary policies and challenging federal anti-sanctuary policy,[4] expanding protections for LGBT+ people,[5] and pursuing novel strategies to mitigate climate harm.[6] After four years of the Biden Administration, subnational governments' enthusiasm for litigation and policy innovation that challenges

1. *E.g.*, Sarah Fox, *Localizing Environmental Federalism*, 54 U.C. DAVIS L. REV. 133, 135 (2020); Tara Leigh Grove, *When Can a State Sue the United States?*, 101 CORNELL L. REV. 851, 852 (2016); Amanda Frost, *In Defense of Nationwide Injunctions*, 93 N.Y.U. L. REV. 1065, 1071–80 (2018); Jonathan Remy Nash, *State Standing for Nationwide Injunctions Against the Federal Government*, 94 NOTRE DAME L. REV. 1985, 1991–92 (2019).

2. *E.g.*, Texas v. United States, 809 F.3d 134, 188 (5th Cir. 2015); California v. Texas, 141 S. Ct. 2104, 2113 (2021).

3. *E.g.*, Trump v. Hawaii, 138 S. Ct. 2392 (2018); Complaint, California v. Chao, No. 1:19-cv-02826 (D.D.C. Sept. 20, 2019); *see* Fox, *supra* note 1, at 135 (discussing the Trump Administration's attempt to roll back many climate protections).

4. *E.g.*, Pratheepan Gulasekaram, Rick Su & Rose Cuison Villazor, *Anti-Sanctuary and Immigration Localism*, 119 COLUM. L. REV. 837, 847 (2019); City of Chicago v. Sessions, 264 F. Supp. 3d 933 (N.D. Ill. 2017).

5. *E.g.*, Benjamin Gordon Larsen, Cities Take the Lead: LGBT Nondiscrimination Policy Adoption by Local Governments (April 2018) (Ph.D. dissertation, Northeastern University), https://repository.library.northeastern.edu/files/neu:cj82rd74n/fulltext.pdf [https://perma.cc/H8MZ-KEUG]; *Local Nondiscrimination Ordinances*, MOVEMENT ADVANCEMENT PROJECT, https://www.lgbtmap.org/equality-maps/non_discrimination_ordinances [https://perma.cc/JY7M-4KVG] (Sept. 4, 2024).

6. *E.g.*, City of Oakland v. BP PLC, 969 F.3d 895, 901 (9th Cir. 2020) (climate tort litigation); Franklin R. Guenthner, Note, *Reconsidering Home Rule and City-State Preemption in Abandoned Fields of Law*, 102 MINN. L. REV. 427 (2017) (local energy benchmarking); BERKELEY, CAL. MUNI. CODE, tit. 12, §§ 12.80.010–12.80.080 (2019) (municipal gas ban), *repealed by* BERKELEY, CAL., ORDINANCE 7,907-N.S. § 1 (June 10, 2024) [hereinafter, BERKELEY ORDINANCE].

or conflicts with the policy priorities of the superior government[7] shows no sign of diminishing.[8]

The increased activity of cities and states in tension with state and federal governments has illuminated new issues in preemption doctrine. One issue that has received significant attention in recent years is "new preemption,"[9] the phenomenon of (largely conservative) state legislatures enacting laws to limit, disempower, or punish (largely progressive) cities that pursue progressive policy agendas.[10] Several states, for example, have penalized municipalities for attempting to enforce more stringent firearm regulations than allowed under state law,[11] or have proposed or enacted laws that authorize fines against, or withhold state funding from, sanctuary cities.[12]

But preemption creates obstacles for municipalities and states even when they pursue policy agendas that are ideologically consistent with the agendas of the superior government. The realm of municipal climate policy illustrates this phenomenon particularly well. For example, one recently popular mitigation measure has been the adoption of municipal "gas bans," or a prohibition on fossil fuel infrastructure in new construction within the

7. I use this terminology as shorthand to reflect the hierarchies that exist (1) between the lawmaking capacity of the federal government and the lawmaking capacities of state (and local) governments, and (2) between the lawmaking capacity of state governments and the lawmaking capacity of local governments. In the case of the federal government, the hierarchy is determined by the Supremacy Clause, the Necessary and Proper Clause, and the exercise of enumerated powers. *See infra* subpart II(A). Because Congress possesses the power to preempt state and local law, one might characterize Congress's lawmaking capacity as superior to the lawmaking capacity of state and local governments, and the lawmaking capacity of state and local governments as correspondingly inferior. For similar reasons, the label can be applied to the situation of state governments vis-à-vis local governments. *See infra* subpart II(D). I recognize that these descriptors both oversimplify the relative lawmaking capacities of federal, state, and local governments and elide the actual locus of the comparison, i.e., their respective lawmaking capacities, and could be read as suggesting a normative commentary on the governments themselves, which I emphatically do not intend. *See* Richard Briffault, *"What About the 'Ism'?" Normative and Formal Concerns in Contemporary Federalism*, 47 VAND. L. REV. 1303, 1308 (1994) (emphasizing the complexities of these ostensibly hierarchical relationships).

8. *E.g.*, Clark Mindock, *24 Republican-led states sue Biden administration over water regulations*, REUTERS (Feb. 16, 2023, 6:13 PM), https://www.reuters.com/legal/24-republican-led-states-sue-biden-administration-over-water-regulations-2023-02-16/ [https://perma.cc/S9VW-BDMG]; Seung Min Kim, *GOP states sue Biden administration over student loan plan*, ASSOCIATED PRESS (Sept. 29, 2022, 7:34 PM), https://apnews.com/article/biden-health-lawsuits-covid-missouri-862d783188de45b698c54b00820d3616 [https://perma.cc/2RRF-GSY2].

9. Richard Briffault, *The Challenge of the New Preemption*, 70 STAN. L. REV. 1995, 1997–98 (2018); *see infra* subpart I(B) (describing new preemption). *But see infra* note 93 (noting that new preemption is not necessarily limited to this ideological orientation).

10. *See infra* subpart I(B).

11. *See* Briffault, *supra* note 9, at 2003 (describing how Florida and Kentucky penalize municipal officers for deviating from state gun control laws).

12. *See* Erin Adele Scharff, *Hyper Preemption: A Reordering of the State-Local Relationship?*, 106 GEO. L.J. 1469, 1498–99 (2018) (discussing states that have enacted—such as Arizona, Georgia, Indiana, and Texas—or deliberated over—such as Florida, Idaho, Iowa, Michigan, Pennsylvania, Nevada, Tennessee, Virginia, and Wisconsin—bills penalizing sanctuary cities).

municipality.[13] In April 2023, a Ninth Circuit panel struck down Berkeley, California's gas ban as preempted under a federal statute concerned with energy conservation.[14] A similar ban adopted by the Town of Brookline, Massachusetts was likewise deemed preempted under state laws related to building safety.[15] Both cases required courts to assess the preemptedness of municipal actions directed at mitigating climate change amidst background statutory schemes consistent with this purpose.[16] In both cases, courts were quick to adopt sweeping and—this Article suggests—*unduly* expansive interpretations of the assertedly preemptive laws so as to restrain municipal climate action.

The swiftness with which courts have found preemption in the gas ban cases is worrying not only for subnational governments' abilities to pursue climate mitigation measures via state and local policy, but also for municipalities' likelihood of success in legal actions under state law that seek remedies supporting climate adaptation and mitigation. After years of litigating whether the current generation of climate-tort lawsuits belonged in state or federal court,[17] the cases have finally been remanded to state courts,[18]

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13. *E.g.*, BERKELEY ORDINANCE, *supra* note 6; Brookline, Mass., art. 21, Select Board's Supplemental Recommendation (Nov. 19, 2019), https://www.brooklinema.gov/DocumentCenter/View/20839/ARTICLE-21-as-voted-per-Town-Clerk? [https://perma.cc/B5KL-FZ4H] [hereinafter, Brookline By-Law]; N.Y.C., N.Y., Law No. 154 (Dec. 22, 2021), https://www.nyc.gov/assets/buildings/local_laws/ll154of2021.pdf [https://perma.cc/4YQ7-TVJV]; *cf.* Engrossed Substitute House Bill 1589, ch. 351, 2024 Wash. Sess. Laws ch. 351 (requiring large gas utilities to take steps toward decarbonization and electrification); State Energy Conservation Construction Code Act, Part RR, sec. 1, § 11-104(6)(b), 131,131 (2023) (codified as amended at ENERGY § 11-104) (prohibiting fossil fuel infrastructure in some new construction); N.Y.C., N.Y., Local Law No. 97 (2019) (establishing a municipal framework to impose increasingly stringent greenhouse gas emissions standards on large buildings), https://www.nyc.gov/assets/buildings/local_laws/ll97of2019.pdf [https://perma.cc/3WFY-DJ7R].

14. Cal. Rest. Ass'n v. City of Berkeley, 65 F.4th 1045, 1048 (9th Cir. 2023).

15. Case No. 9752, Mass. Attorney General, Municipal Law Unit (July 21, 2020) [hereinafter MLU Decision 1]; Town of Brookline v. Healy, No. 2282CV00400, 2023 WL 3095136, at *7 (Mass. Super. Ct. Mar. 23, 2023).

16. *See infra* Part III.

17. *See, e.g.*, Bd. of Cnty. Comm'rs. v. Suncor Energy (U.S.A.) Inc., 25 F.4th 1238, 1246 (10th Cir. 2022) (affirming the district court's order remanding a climate-change case to state court after several years of litigation); Mayor of Baltimore v. BP P.L.C., 31 F.4th 178, 194 (4th Cir. 2022) (same); Cnty. of San Mateo v. Chevron Corp., 32 F.4th 733, 744 (9th Cir. 2022) (same); City of Honolulu v. Sunoco LP, 39 F.4th 1101, 1106 (9th Cir. 2022) (same); Rhode Island v. Shell Oil Prods. Co., 35 F.4th 44, 49 (1st Cir. 2022) (same).

18. *See* Order List, 143 S. Ct. 1795, 1795–97 (Apr. 24, 2023) (denying certiorari in the five climate tort appeals cited in note 17), https://www.supremecourt.gov/orders/courtorders/042423zor_1p24.pdf [https://perma.cc/M533-4EST]. *But see* Petition for Writ of Certiorari at i, Shell PLC v. City of Honolulu (2024) (No. 23-952) [hereinafter Shell Petition] (asking the Court to decide whether the Constitution or the Clean Air Act preempts state-law claims relating to "emissions"); Petition for Writ of Certiorari at I, Sunoco LP v. City of Honolulu (2024) (No. 23-947) (asking the Court to decide whether federal law precludes state law claims for "injuries allegedly caused by . . . emissions").

where state judges must now confront the fossil-fuel defendants' arguments that the Clean Air Act preempts state-law claims sounding in deceptive practices and nuisance.[19] On the surface, state tort law and the Clean Air Act seem to address different things: on the one hand, imposing liability for deceptive marketing practices;[20] on the other, improving air quality and controlling air pollution.[21] But the willingness of courts in the gas ban cases to adopt expansively preemptive interpretations of statutes with seemingly peripheral connections to the subject matter regulated by the state and municipal policies augurs challenges ahead and urges care.

This Article offers a critique of unduly expansive applications of preemption grounded in the notion of obsolescence: The idea that a court's interpretation of supposedly preemptive statutory language can become antiquated over time or be unjustifiably extrapolated to new contexts, so as to render a preemption determination inconsistent with the preemptive objective of the legislature. When courts engage in this kind of interpretive behavior, they produce *obsolescent preemption*. As I describe it, obsolescent preemption arises in the world of implied preemption, where courts attempt to infer the extent of preemption intended by the legislature and required by a statute's underlying purpose. Because legislative schemes can shift over time while judicial interpretations remain stagnant, obsolescent preemption occurs when courts reinforce or extend extant preemption doctrine in ways that are inconsistent with the shifted statutory scheme. This Article suggests that courts' failures to adequately account for newly created gaps between the legislatively intended and the judicially interpreted extent of preemption, or their active creation of such gaps, is problematic not only for the consequential reasons outlined above—e.g., the preclusion of subnational

19. *See, e.g.*, City of Honolulu v. Sunoco LP, 537 P.3d 1173, 1181–82 (Haw. 2023) (denying motions to dismiss for failure to state a claim based on CAA preemption), *petition for cert. filed* (Mar. 1, 2024); *see also* Defendants' Joint Opening Brief in Support of Motion to Dismiss for Failure to State a Claim at 25–31, Delaware v. BP America Inc. (Del. Super. Ct. May 18, 2023) (No. N20C-09-097-MMJ) [hereinafter Delaware MTD] (arguing that the Clean Air Act preempts any state law that effectively regulates out-of-state emissions); Supplemental Brief in Support of Defendant's Motion to Dismiss Amended Complaint at 4, *Suncor Energy* (D. Colo. June 12, 2023) (No. 2018CV30349) [hereinafter Suncor MTD] (arguing state law is not competent to regulate interstate emissions and the CAA does not authorize state suits); *cf.* Brief for the United States as Amicus Curiae at 14, *Suncor Energy*, 143 S. Ct. 1795 (2023) (No. 21-1550) (arguing that ordinary preemption defenses cannot provide a basis for removal to federal court).

20. The municipal and state plaintiffs have alleged that the energy companies' decades-long marketing of fossil fuels and simultaneous concealment of the connection between those products and climate change caused them harm. *See, e.g.*, *Sunoco*, 537 P.3d at 1181 (explaining defendants "knew of the dangers" of their fossil fuel products and engaged in "sophisticated disinformation campaigns"); *Suncor Energy*, 25 F.4th at 1247 (alleging the defendants "contributed significantly to the changing climate . . . by producing, marketing, and selling fossil fuels"); *Shell*, 35 F.4th at 49–50 (explaining the defendants knew for *decades* burning fossil fuels damaged the earth but "duped" plaintiffs into buying more products).

21. *See* 42 U.S.C. § 7401(b) (declaring purposes of Clean Air Act).

climate-protection activities—but also because the phenomenon of obsolescent preemption transgresses normative principles of federalism and separation of powers.

To justify my theory of obsolescent preemption, this Article proceeds as follows: In Part I, I provide an overview of classical preemption doctrine, survey the literature on the recent phenomenon of "new" preemption, and sketch an outline of the idea of "obsolescent preemption." Part II then probes the legal bases of the legislature's preemption power and courts' role in enforcing exercises of that power, setting forth the foundation on which I construct a theory of obsolescent preemption. From this theoretical foundation, I identify the circumstances and conditions that create obsolescence. After articulating the operation of and constitutional justifications for obsolescent preemption, Part III explores its current and future relevance to subnational climate action. I use the case of Brookline's gas ban to illustrate the significant consequences of obsolescent preemption and consider how a theory of obsolescent preemption could alter courts' preemption inquiries in upcoming climate-tort litigation. Part IV concludes by considering the normative values that obsolescent preemption reinforces and justifying the theory's existence with respect to theories of federalism, separation of powers, and the twenty-first-century status of subnational actors with respect to climate change.

I. Cataloguing Preemption

This Part sets forth the basic contours of modern preemption doctrine. Beginning with preemption in the federal courts, subpart A rehearses the seemingly settled jurisprudential distinctions between express and implied preemption, with particular attention to two subtypes of the latter: field preemption and obstacle preemption. I then consider the extent to which state courts have adopted the federal schema and how intrastate preemption doctrines differ, if at all. After establishing this "classical" model of preemption, subpart B reflects on the recent phenomenon of "new" preemption in the states, whereby state legislatures preempt municipal policy or capacities, and considers its significance for other models of intrastate preemption. Finally, with this background on classical and evolving preemption doctrine established, subpart C sketches the outline of the theory that I call "obsolescent" preemption. The focus of this Part is largely descriptive: I describe the practical operation and implications of preemption doctrine and begin to outline a theory of obsolescent preemption. Subsequent Parts will delve into the legal and historical foundations of preemption doctrine; the relationship between the federal government, states, and municipalities; and the legal justifications for my theory of obsolescent preemption. For now, I seek only to describe what obsolescent preemption is and what it is not, with reference to preemption doctrine as it exists today.

A. Classical Preemption

Although they spring from different legal foundations, federal and intrastate preemption doctrines reflect similar typologies. I begin by outlining the contemporary federal doctrine of preemption before describing the ways in which state preemption doctrines adhere to or depart from the federal model.

1. Federal Preemption.—It is a "fundamental principle" of constitutional law that Congress "has the power to preempt state law."[22] Equally fundamental, perhaps, is the principle that congressional intent to preempt state law must be clear.[23] As modern preemption doctrine demonstrates, however, clear intent to preempt does not require an "express" statement of preemptive intent.[24] Instead, the Court will find implied preemption when it is clear from the statutory scheme that "Congress intends that federal law occupy a given field," i.e., field preemption, or when, "even if Congress has not occupied the field, state law . . . actually conflicts with federal law,"[25] i.e., conflict preemption.[26]

Although early preemption cases often demarcated the reach of congressional power,[27] modern preemption cases typically scrutinize whether a congressional enactment actually represents an exercise of Congress's preemptive authority.[28] This question can arise in both express

22. Crosby v. Nat'l Foreign Trade Council, 530 U.S. 363, 372 (2000); *see also infra* notes 111–13 and accompanying text. But even though Congress's constitutional power to preempt is inarguable, scholars debate both the constitutional source of that power and, correspondingly, the appropriate scope and manner of reviewing exercises of that power. *See infra* subpart II(A).

23. Crosby, 530 U.S. at 372; Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947) (allowing preemption only if "that was the clear and manifest purpose of Congress").

24. *Crosby*, 530 U.S. at 372; *see also* Garrick B. Pursley, *Preemption in Congress*, 71 OHIO ST. L.J. 511, 515 (2010) (noting that courts infer preemptive intent from the "structure or purposes of the federal statute"); Ernest A. Young, *"The Ordinary Diet of the Law": The Presumption Against Preemption in the Roberts Court*, 2011 SUP. CT. REV. 253, 270 ("'[E]xpress preemption,' as that term is used in current doctrine, deals only with . . . the construction of statutory provisions that expressly address the preemptive effect of federal law.").

25. California v. ARC Am. Corp., 490 U.S. 93, 100 (1989); *accord Crosby*, 530 U.S. at 372 (describing two types of preemption, field preemption and conflict preemption); *see also* JAY B. SYKES & NICOLE VANATKO, CONG. RES. SERV. R45825, FEDERAL PREEMPTION: A LEGAL PRIMER 17–26 (2019) (collecting implied preemption case law).

26. The Court has further divided conflict preemption into obstacle preemption, where "'under the circumstances of [a] particular case, [the challenged state law] stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress,'" *Crosby*, 530 U.S. at 373 (alteration in original) (quoting Hines v. Davidowitz, 312 U.S. 52, 67 (1941)), and impossibility preemption, where "it is impossible for a private party to comply with both state and federal law," *id.* at 372.

27. *See, e.g.*, Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1, 211 (1824) (delimiting preemptive action by Congress to legislation enacted pursuant to the Constitution or treaty obligations).

28. *See* Young, *supra* note 24, at 257 (calling preemption cases "exercises in statutory interpretation"); *see also* Jesse Merriam, *Preemption as a Consistency Doctrine*, 25 WM. & MARY

and implied preemption cases. Even where Congress has included an express preemption clause in a statute, for example, litigants might contest the scope of that provision.[29] Or, as Daniel Meltzer documented, the Court might decide the preemption question based on general preemption principles instead of relying on the express preemption clause.[30] On the other hand, where statutes lack express preemption provisions, courts are called upon to evaluate whether the statutory scheme nevertheless evinces congressional intent to occupy a field or whether a particular state law poses an obstacle to effecting the legislative purposes and objectives of the scheme.

Within this muddle, the Supreme Court has repeatedly stated that "[t]he purpose of Congress is the ultimate touchstone" of preemption analysis.[31] Consequently, "any understanding of the scope of a pre-emption statute must rest primarily on 'a fair understanding of *congressional purpose*.'" [32] Congressional intent "primarily is discerned from the language of the pre-emption statute and the 'statutory framework' surrounding it."[33] But the "structure and purpose of the statute as a whole" is also relevant, "as revealed not only in the text, but through the reviewing court's reasoned understanding of the way in which Congress intended the statute and its surrounding regulatory scheme to affect business, consumers, and the law."[34] Because how courts assess *implied* preemption is at the heart of the theory of obsolescent preemption that I present in this Article, I briefly discuss the doctrinal frameworks applicable to field and obstacle preemption.

BILL RTS. J. 981, 990–91 (2017) (noting how preemption analysis has become "messier" over time); Thomas W. Merrill, *Preemption and Institutional Choice*, 102 NW. U. L. REV. 727, 738–39 (2008) (observing that preemption analysis is "highly formulaic" in theory but inconsistent and ad hoc in practice).

29. *See* Medtronic, Inc. v. Lohr, 518 U.S. 470, 484 (1996) ("While the pre-emptive language of § 360k(a) means that we need not go beyond that language to determine whether Congress intended the MDA to pre-empt at least some state law . . . we must nonetheless 'identify the domain expressly pre-empted' by that language." (quoting Cipollone v. Liggett Grp., Inc., 505 U.S. 504, 517 (1992))).

30. Daniel J. Meltzer, *The Supreme Court's Judicial Passivity*, 2002 SUP. CT. REV. 343, 362–63.

31. *Medtronic*, 518 U.S. at 485 (quoting Retail Clerks Int'l Ass'n v. Schermerhorn, 375 U.S. 96, 103 (1963)); *accord* Hughes v. Talen Energy Mktg., LLC, 136 S. Ct. 1288, 1297 (2016).

32. *Medtronic*, 518 U.S. at 485–86 (quoting *Cipollone*, 505 U.S. at 530 n.27 (plurality opinion)).

33. *Id.* at 486 (quoting Gade v. Nat'l Solid Wastes Mgmt. Ass'n, 505 U.S. 88, 111 (1992) (Kennedy, J., concurring in part and concurring in judgment)).

34. *Id.* (quoting *Gade*, 505 U.S. at 98 (plurality opinion)); *see also* Wyeth v. Levine, 555 U.S. 555, 566 (2009) (probing the "purpose of Congress" in part by considering the regulatory scheme). As Daniel Meltzer pointed out, the doctrinal requirement to examine legislative purpose to determine whether federal law impliedly preempts state law puts the Court's field and obstacle preemption doctrines at odds with its generally textualist orientation. Daniel J. Meltzer, *Preemption and Textualism*, 112 MICH. L. REV. 1, 9 (2013). I examine this tension in Part II.

Courts find field preemption where Congress has manifested intent to occupy an entire field of regulation and preclude supplementary state action in the area.[35] The comprehensiveness of a statutory scheme is often relevant to this inquiry,[36] but comprehensiveness alone is insufficient to establish field-preemptive intent.[37] Instead, the Court has emphasized that field preemption arises where "[t]he scheme of federal regulation [is] so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it," or where "the federal interest is so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject."[38] The consequences of field preemption are significant: In addition to preempting state laws that "conflict," "interfere," or are "inconsistent[] with the purpose of Congress," field preemption precludes even those state laws that "complement" or supplement federal regulation.[39] Consequently, "the Court has cautioned against overly hasty inferences that Congress has occupied a field,"[40] and "adopted a narrow view of the *scope* of certain preempted fields."[41] Alien registration,[42] locomotive equipment regulation,[43] and certain areas of nuclear safety regulation are some of the areas of law that have been held to be field preempted.[44]

Obstacle preemption also requires courts to develop a fair understanding of congressional purpose with reference to the statutory scheme. But whereas field preemption asks whether Congress's purpose in enacting the scheme included occupying a field, obstacle preemption asks whether, absent clear intent to occupy the field, the intended purpose of a statute would be

35. *See, e.g.*, *Hughes*, 136 S. Ct. at 1297 (holding that Maryland's program "invades" FERC's "exclusive jurisdiction"); *see* SYKES & VANATKO, *supra* note 25, at 17–18, 18 n.146–52 (defining field preemption and then collecting cases).

36. *See, e.g.*, Hines v. Davidowitz, 312 U.S. 52, 66, 74 (1941) (holding that Congress has occupied the field of alien registration); Arizona v. United States, 567 U.S. 387, 401 (2012) (reaffirming that a "comprehensive" regime of federal regulation continues to "occup[y] the field of alien registration").

37. *See* Wis. Pub. Intervenor v. Mortier, 501 U.S. 597, 613 (1991) (concluding that state action was not preempted despite a statute's "comprehensive[ness]"); *cf.* Hillsborough Cnty. v. Automated Med. Lab'ys, Inc., 471 U.S. 707, 718 (1985) ("[W]e will seldom infer, solely from the comprehensiveness of federal regulations, an intent to pre-empt . . . .").

38. Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947); *accord Arizona*, 567 U.S. at 399 (reiterating how an extensive federal regulatory system or interest gives rise to field preemption).

39. *Hines*, 312 U.S. at 66; *accord Arizona*, 567 U.S. at 401 (holding "even complementary state regulation is impermissible").

40. SYKES & VANATKO, *supra* note 25, at 22, 22 n.196 (citing cases); *see also* Caleb Nelson, *Preemption*, 86 VA. L. REV. 225, 227 (2000) ("The Court has grown increasingly hesitant to read implicit field-preemption clauses into federal statutes.").

41. SYKES & VANATKO, *supra* note 25, at 23.

42. *Arizona*, 567 U.S. at 401.

43. Kurns v. R.R. Friction Prods. Corp., 565 U.S. 625, 637 (2012).

44. *See* SYKES & VANATKO, *supra* note 25, at 18–22 (detailing field preemption of alien registration and nuclear safety regulation).

frustrated by the enforcement of state law.[45] According to Ernest Young, this inquiry involves two uncertainties: first, "whether that [federal] law actually creates a conflict with state law, or the conflict in question may be so minor that a court is unsure whether Congress would prefer for state and federal law to operate side by side."[46] Resolving this first uncertainty requires a court to "ascertain the nature of the federal interest" and how Congress intended for a law to operate.[47] Second, because "[a]lmost any two laws will potentially undermine one another's purposes[,] . . . [t]he question in many conflict preemption cases is . . . just how much conflict is tolerable."[48] The Court previously has said that the conflict between the state law and federal scheme must be "irreconcilable"; in other words, "[t]he existence of a hypothetical or potential conflict is insufficient . . . ."[49] Moreover, "[w]hat is a sufficient obstacle is a matter of judgment, to be informed by examining the federal statute as a whole and identifying its purpose and intended effects."[50]

One final piece of the preemption framework bears on how courts evaluate congressional intent: the "presumption against preemption," or "the 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."[51] The presumption applies not "only to the question [of] whether Congress intended any pre-emption at all," but also "to questions concerning the *scope* of its intended invalidation of state law."[52] As I discuss in greater depth *infra*,[53] the Court has located the constitutional justification for the presumption in principles of federalism.[54] Consequently, the

45. *See* Crosby v. Nat'l Foreign Trade Council, 530 U.S. 363, 373 (2000) ("What is a sufficient obstacle is a matter of judgment, to be informed by examining the federal statute as a whole and identifying its purpose and intended effects . . . ."). In *Crosby*, the Court suggested that "the categories of preemption are not 'rigidly distinct,'" and "field pre-emption may be understood as a species of conflict pre-emption." *Id.* at 372 n.6 (quoting English v. Gen. Elec. Co., 496 U.S. 72, 79 n.5 (1990)).

46. Young, *supra* note 24, at 274.

47. Hillman v. Maretta, 569 U.S. 483, 491–92 (2013).

48. Young, *supra* note 24, at 275.

49. Rice v. Norman Williams Co., 458 U.S. 654, 659 (1982).

50. *Crosby*, 530 U.S. at 373.

51. Rice v. Santa Fe Elevator Corp, 331 U.S. 218, 230 (1947); *see also* Raygor v. Regents of Univ. of Minn., 534 U.S. 533, 543 (2002) (holding that to alter the state and federal balance, Congress "must make its intentions to do so 'unmistakably clear'" (quoting Will v. Mich. Dept. of State Police, 491 U.S. 58, 65 (1989))).

52. Medtronic, Inc. v. Lohr, 518 U.S. 470, 485 (1996).

53. *See infra* Parts II and IV.

54. *Medtronic*, 518 U.S. at 485 ("[B]ecause the States are independent sovereigns in our federal system, we have long presumed that Congress does not cavalierly pre-empt state-law causes of action."); *see also Raygor*, 534 U.S. at 544 (explaining that the presumption "reflects 'an acknowledgment that the States retain substantial sovereign powers under our constitutional scheme, powers with which Congress does not readily interfere'" (quoting Gregory v. Ashcroft, 501 U.S. 452, 461 (1991))).

presumption possesses special relevance "'[w]here . . . the field which Congress is said to have pre-empted' includes areas that have 'been traditionally occupied by the States,'"[55] such as health and safety[56] and family relations.[57]

2. Intrastate Preemption.—State courts have largely adopted the distinctions made by federal courts between express and implied preemption and between obstacle and impossibility preemption.[58] This state-local analogue of federal-state preemption doctrine makes intuitive sense to the extent that the situation of state legislatures vis-à-vis municipal governments resembles that of Congress and state legislatures, i.e., a superior legislature wielding authority that affects the inferior government's policymaking. As scholars like Uma Outka have pointed out, however, "the legal status of local governments is fundamentally different from states' position relative to the federal government," and this distinction "inheres as an important component in the judicial review of state preemption claims."[59] Outka's recent scholarship on intrastate preemption illuminates two key distinctions between the legal foundations of state-local preemption and the federal-state analogue.

First, whereas federal-state preemption authority arises under the U.S. Constitution and applies uniformly to the fifty states, intrastate preemption arises under fifty unique state constitutions.[60] The inherent nature of state-local preemption thus differs in a fundamental, technical way from federal-state preemption because the origin of preemptive authority differs. Unlike the U.S. Constitution, which enumerates the powers of Congress but defines those belonging to the states as a residuum, state constitutions might expressly allocate certain powers between state and local governments.[61] Whereas the residual nature of state power under the U.S. Constitution

55. English v. Gen. Elec. Co., 496 U.S. 72, 79 (1990) (omission in original) (quoting Jones v. Rath Packing Co., 430 U.S. 519, 525 (1977)). *But see* Hillman v. Maretta, 569 U.S. 483, 491 (2013) (holding that the presumption will not overcome "clearly conflicting federal enactments" (quoting Ridgway v. Ridgway, 454 U.S. 46, 55 (1981))); Puerto Rico v. Franklin Cal. Tax-Free Tr., 136 S. Ct. 1938, 1946 (2016) (holding that the presumption is not invoked when there is an express preemption clause).

56. *See Medtronic*, 518 U.S. at 475 (framing the case as a matter of local concern where States traditionally use police powers to legislate health).

57. *See Hillman*, 569 U.S. at 490–91 (noting state primacy in the field of family relations but ultimately concluding that the state statute was preempted).

58. Paul Diller, *Intrastate Preemption*, 87 B.U. L. REV. 1113, 1140–42 (2007) [hereinafter *Intrastate*] (describing state courts' functional adoption of the federal categories of preemption).

59. Uma Outka, *Intrastate Preemption in the Shifting Energy Sector*, 86 U. COLO. L. REV. 927, 950 (2015).

60. *See id.* at 944, 950 (noting that a local government is limited by its state's constitution). State preemption doctrine might also depend on legislative enactments. *Id.* at 943–44.

61. *Id.* at 951.

permits interpretive ambiguity at the margins of congressional authority and enables Congress to preempt nearly everything that can be justified as an exercise of enumerated power,[62] a state legislature's preemptive authority is more clearly limited in states whose constitutions endow independent substate entities with certain regulatory authorities.[63] State constitutions also empower municipalities vis-à-vis state legislatures in a variety of ways. Some, for example, expressly provide for municipal Home Rule,[64] whereas other states grant Home Rule by statute, and still others continue to adhere to Dillon's Rule[65] and conceptualize municipalities as mere subdivisions of the state.[66] Some state constitutions even expressly limit the state legislature's preemption authority over certain kinds of municipal actions.[67] Because Home Rule and Dillon's Rule represent different models of empowering municipal government and, correspondingly, restraining state legislative power, intrastate preemption doctrine must account for this difference.[68]

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62. *Compare, e.g.*, Bond v. United States, 572 U.S. 844, 855 (2014) ("In our federal system, the National Government possesses only limited powers; the States and the people retain the remainder. The States have broad authority to enact legislation for the public good—what we have often called a 'police power.'" (quoting United States v. Lopez, 514 U.S. 549, 567 (1995))), *with* Richard Primus & Roderick M. Hills, Jr., *Suspect Spheres, Not Enumerated Powers: A Guide for Leaving the Lamppost*, 119 MICH. L. REV. 1431, 1433 (2021) ("This official picture bears little resemblance to the way American federalism actually works. In reality, Congress is not much limited by its enumerated powers, and national lawmaking is normal across a very broad swath of policymaking space."), *and* Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528, 550 (1985) ("[T]he Constitution does not carve out express elements of state sovereignty that Congress may not employ its delegated powers to displace."), *and* Haaland v. Brackeen, 143 S. Ct. 1609, 1630 (2023) ("[W]hen Congress validly legislates pursuant to its Article I powers, we 'ha[ve] not hesitated' to find conflicting state family law preempted, '[n]otwithstanding the limited application of federal law in the field of domestic relations generally.'" (quoting Ridgway v. Ridgway, 454 U.S. 46, 54 (1981))).

63. *See* Outka, *supra* note 59, at 944, 950–51 (observing that "if local governments are constitutionally empowered to act independently within certain spheres, then a state law purporting to prevent local action would be deemed unconstitutional").

64. Paul Diller has described home rule as "a system of state and local relations that gives some degree of permanent substantive lawmaking authority to localities beyond that which was provided by the traditional Dillon's Rule regime." Diller, *Intrastate*, *supra* note 58, at 1124; *see also* Briffault, *supra* note 9, at 2011–12 (describing a "primary purpose" of home rule as the empowerment of "local governments to take the initiative and adopt local laws without having to wait for specific or express state authority"); David J. Barron, *Reclaiming Home Rule*, 116 HARV. L. REV. 2255, 2327 (2003) (explaining that under the American Municipal Association's 1953 model home rule provision "no longer would the powers of the great cities be limited to matters of 'local' concern").

65. Outka, *supra* note 59, at 950; Diller, *Intrastate*, *supra* note 58, at 1126–27.

66. "Under Dillon's Rule, municipalities possessed only those powers indispensable to the purposes of their incorporation as well as any others expressly bestowed upon them by the state." Diller, *Intrastate*, *supra* note 58, at 1122–23; *see also* Richard Briffault, *Our Localism: Part I—The Structure of Local Government Law*, 90 COLUM. L. REV. 1, 8 (1990) (noting that Dillon's Rule "reflects the view of local governments as agents of the state by requiring that all local powers be traced back to a specific delegation").

67. Paul A. Diller, *Reorienting Home Rule: Part 2–Remedying the Urban Disadvantage Through Federalism and Localism*, 77 LA. L. REV. 1045, 1066 (2017) [hereinafter *Reorienting*].

68. Outka, *supra* note 59, at 944–45.

Second, even where state judiciaries have adopted preemption frameworks with analytic similarities to the federal model, the principles underlying the state-local analytic framework may differ from the principles that animate the federal framework.[69] In other words, in addition to the fundamental differences between the sources of intrastate and federal preemption powers and the legal implications of those differences, methodological variation in state court review of intrastate preemption can cause additional divergence between the two preemption frameworks.[70] These constructed differences between federal and intrastate preemption doctrine reflect everything from diverse conceptions about the source of preemptive authority and corresponding methodologies of review, to varying inclinations about the appropriate scope and necessary markers of preemption.[71] For example, state courts differ in the extent to which they apply a presumption against preemption, which may reflect state laws that mandate or prohibit such a presumption.[72]

B. New Preemption

In recent years, scholars have documented the rise of what Richard Briffault labeled *new* preemption.[73] New preemption refers not to an alternative model for resolving questions of federal or intrastate preemption, but rather to a new frontier in the motivations of superior governments that exercise their preemptive authority. Generally, new preemption takes the form of "sweeping state laws that clearly, intentionally, extensively, and at times punitively bar local efforts to address a host of local problems."[74] Much of the recent scholarship has focused on new preemption within states, but the phenomenon can also arise in the federal-state context. New preemption

69. *Id.* at 951–52.

70. *Id.* at 947.

71. *Compare id.* at 951–52 (describing Colorado's preemption analysis that permits "three basic ways" to preempt a local law), *with id.* at 952–53 (describing Kansas's preemption analysis that rejects implied preemption).

72. To see how state courts differ in their application of a presumption versus preemption, compare Massachusetts, where the Massachusetts "courts attempt to reconcile local regulations with state statutes," with Nevada, where the Nevada court noted that a preemption was mandated with respect to county actions. *'Home Rule in the 50 States' Memos Examine the Nature and Scope of Local Authority: Massachusetts*, LOC. SOLS. SUPPORT CTR. 3 (May 2017), https://static1.squarespace.com/static/5ce4377caeb1ce00013a02fd/t/5eb4be1fe863b43dc5bf6e65/1588903456157/Massachusetts.pdf [https://perma.cc/9MZZ-C7GE]; *Nevada*, LOC. SOLS. SUPPORT CTR. 1–2 (May 2017), https://static1.squarespace.com/static/5ce4377caeb1ce00013a02fd/t/5eb4bf0c05feaf0320de6c42/1588903692201/Nevada.pdf [https://perma.cc/H9B4-VASN]. *See generally 'Home Rule in the 50 States' Memos Examine the Nature and Scope of Local Authority*, LOC. SOLS. SUPPORT CTR. (Mar. 22, 2021), https://www.supportdemocracy.org/the-latest/home-rule-in-the-50-states-memos-examine-the-nature-and-scope-of-local-authority [https://perma.cc/C45P-GFLZ].

73. Briffault, *supra* note 9, at 1997.

74. *Id.*

appears in many forms and under many labels, but each of these typologies fits within Briffault's conception of "new" preemption—that is, an attempt by a superior government (i.e., federal or state) to impede regulation by the inferior government (i.e., state or local).

The least aggressive form of new preemption is what Jonathan Remy Nash identified as "null preemption," or the phenomenon of federal laws "preempt[ing] state law without providing any federal regulation, thus leaving a vacuum."[75] Richard Briffault has applied the term "nuclear preemption" to the analogous process of state legislation that "den[ies] . . . local lawmaking authority over broad fields like commerce, trade, or labor; den[ies] local authority over any field in which the state has also engaged in lawmaking; or require[es] state legislative consent for local action in these areas";[76] and Briffault and Richard Schragger have described state laws that "preempt for no obvious regulatory purpose" and "operate[] by frustrating or blocking local regulations simpliciter" as examples of "deregulatory preemption."[77] But, despite their different labels, the aforementioned processes are one and the same, united by the common purpose of depriving municipalities of authority to act in a particular sphere *for the purpose* of depriving them of that authority. Conceptualized in this manner, null preemption is characterized by a shift in the locus of preemptive intent relative to classical preemption. In classical preemption, the primary legislative purpose is substantive—i.e., a legislature enacts legislation to achieve a policy goal—and preemptive intent is generally secondary—i.e., some degree of preemption is deemed necessary to achieve that policy goal. In null preemption, however, the primary legislative purpose is preemption in and of itself, and there is no substantive legislative policy goal that can only be effectuated via preemption.

Another species of new preemption that goes beyond the goal of null preemption is the phenomenon of "hyper" or "punitive" preemption: state lawmaking that "seeks not just to curtail local government policy authority over a specific subject, but to broadly discourage local governments from exercising policy authority in the first place" by "*punish*[*ing*] local governments or their public officials for taking policy positions that only

75. Jonathan Remy Nash, *Null Preemption*, 85 NOTRE DAME L. REV. 1015, 1017 (2010); *see also* Guenthner, *supra* note 6, at 429 (describing the phenomenon of "parent political bodies passing preemptive laws without prescribing affirmative policies to replace the newly defunct ordinances" as "abandon[ment]" of a field of law).

76. Briffault, *supra* note 9, at 2023.

77. Richard C. Schragger, *The Attack on American Cities*, 96 TEXAS L. REV. 1163, 1182 & n.113 (2018) (citing Richard Briffault for this terminology); *see, e.g.*, Sarah Fox, *Home Rule in an Era of Local Environmental Innovation*, 44 ECOLOGY L.Q. 575, 577, 597 (2017) (documenting deregulatory preemption in the environmental space).

arguably violate state law."[78] Whereas null preemption simply precludes municipalities from acting lawfully in a particular sphere of regulation, punitive preemption authorizes punishment for municipal activity in a preempted space.

For example, states have authorized personal and criminal liability against local officials who enforce local ordinances that are more strict than state laws,[79] and imposed monetary penalties against cities whose policies contravene state law.[80] In addition, many punitive preemption statutes not only authorize punitive measures against municipalities that engage in preempted conduct, but expansively define the scope of preempted conduct[81] and deny cities "access to the typical legal processes for determining the legality of local ordinances."[82] The double mechanism of punitive preemption laws—steep financial penalties for individuals and cities, combined with diminished procedural safeguards and restricted avenues for defending municipal action against preemption challenges—ensures that punitively preemptive laws will discourage cities from pursuing not only obviously preempted municipal policy but also marginal and possibly non-preempted but contentious policy. Punitive preemption thus goes far beyond classical preemption in restraining municipal action in particular spheres.

Finally, Joshua Sellers and Erin Scharff have documented "structural preemption," in which state legislatures seek to control how cities function by displacing their structural authority "to design and modify their government institutions and the terms of local political participation."[83] Examples of structural preemption include state laws that alter the structure of local government or dictate the time, place, and eligibility conditions of local elections.[84] Structurally preemptive laws differ from substantively preemptive laws that operate via null or punitive preemption in their operation and underlying legislative purpose: Instead of preventing

78. Scharff, *supra* note 12, at 1473 (emphasis added); *see also* Briffault, *supra* note 9, at 1997 (defining "punitive preemption" as "laws that do not merely nullify inconsistent local rules—the traditional effect of preemption—but rather impose harsh penalties on local officials or governments simply for having such measures on their books") (emphasis omitted); Schragger, *supra* note 77, at 1183 (defining this as "retaliatory preemption").

79. *See* Briffault, *supra* note 9, at 2002–03, 2014 (detailing civil and criminal liability for the enforcement of local firearm ordinances that conflict with certain states' gun preemption laws).

80. *See id.* at 2004–05 (listing Arizona and Texas as examples of states that impose financial penalties on localities for violating state law); Scharff, *supra* note 12, at 1495–96 (elaborating on Arizona's provisions for imposing fiscal sanctions on local governments with policies contravening state law).

81. *See* Briffault, *supra* note 9, at 2003 (cataloguing expansively preemptive punitive laws).

82. Scharff, *supra* note 12, at 1473; *see id.* at 1495–96 (describing the punitive procedures and complaint process in Arizona).

83. Joshua S. Sellers & Erin A. Scharff, *Preempting Politics: State Power and Local Democracy*, 72 STAN. L. REV. 1361, 1364 (2020).

84. *Id.* at 1384–92.

municipal activity in a substantive field, structural preemption operates by diminishing municipalities' capacity to self-govern.[85]

The new preemption literature characterizes null, punitive, and structural preemption as relatively recent phenomena in which state legislatures affirmatively act to limit the regulatory capacity of municipal governments in different ways. Most scholarship on new preemption has emphasized its relationship to intrastate partisanship, wherein generally "red" states seek to constrain predominantly "blue" cities.[86] Documented examples of punitive preemption largely involve actions by "red" state legislatures to punish "blue" cities: Common targets have included local firearms restrictions,[87] plastic bag ordinances,[88] sanctuary city policies,[89] labor protections,[90] abortion providers,[91] and protections for LGBTQ individuals.[92] But punitive preemption, and new preemption more generally, need not be exclusively a red legislature versus blue city phenomenon, and theoretically could arise wherever intrastate partisanship exists.[93] Moreover, the affirmative forms of new preemption described above are not the only varieties of preemption that are stymying municipal attempts to regulate in innovative ways.

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85. *See id.* at 1376–77 (raising questions about the "democratic design, political entrenchment, and political preemption" and "the ability of a local government to control" its operation). Unlike punitive preemption, which lacks any sort of redeeming normative justification, Sellers and Scharff suggest that the normative calculus of structurally preemptive laws is less sharply defined and "th[e] instinct to defer to local governments may not always be correct." *Id.* at 1418. For example, whereas democratic and pluralist values weigh strongly towards maintaining local control of voter eligibility requirements, Sellers and Scharff suggest that these same values might weigh in favor of structurally preemptive laws addressed to electoral timing. *Id.* at 1419.

86. *See, e.g.*, Scharff, *supra* note 12, at 1486–90 (surveying the dynamics between state and local governments in the context of national political partisanship); Sellers & Scharff, *supra* note 83, at 1364 (examining state efforts to undermine localities' authority as often typified in intrastate partisan struggles).

87. Briffault, *supra* note 9, at 2002–03; William Peter Maruides, *The Use of Preemption to Limit Social Progress in South Carolina: The Road to the Bathroom Bill*, 69 S.C. L. REV. 977, 984 (2018).

88. Scharff, *supra* note 12, at 1497–98.

89. Briffault, *supra* note 9, at 2004; Scharff, *supra* note 12, at 1498–99; Toni M. Massaro & Shefali Milczarek-Desai, *Constitutional Cities: Sanctuary Jurisdictions, Local Voice, and Individual Liberty*, 50 COLUM. HUM. RTS. L. REV. Fall 2018, at 1, 91 (2018).

90. Maruides, *supra* note 87, at 987–89.

91. Juliana Bennington, *Intrastate Preemption: A New Frontier in Burdening Choice*, 40 COLUM. J. GENDER & L. 93, 94 (2020).

92. *Id.* at 108.

93. *See, e.g.*, Lauren E. Phillips, Note, *Impeding Innovation: State Preemption of Local Regulations*, 117 COLUM. L. REV. 2225, 2236, 2236 n.60 (2017) (citing to a *New York Times* article that contains an example of preemption from the California legislature); David Fagundes & Darrell A.H. Miller, *The City's Second Amendment*, 106 CORNELL L. REV. 677, 679 n.5 (2021) (describing the attempt of a California municipality to insulate its residents from enforcement of the state's restrictive gun laws).

This Article describes another preemption phenomenon, which I call "obsolescent preemption," that poses a distinct and significant challenge to the regulatory capabilities of inferior governments. Unlike most documented examples of new preemption, obsolescent preemption is not related to recent trends in intrastate partisanship; it poses a problem for "blue" municipalities within blue states as much as blue municipalities in "red" states. And, unlike some forms of new preemption, obsolescent preemption is relevant to federal preemption.

C. "Obsolescent" Preemption

This subpart introduces the idea of "obsolescent preemption," which exists in relation to the doctrinal framework laid out in subpart I(A). For now, I seek to give a general theory of obsolescent preemption: what it is, and what it is not. Subsequent parts will elaborate upon the constitutional and doctrinal foundations of my theory and explore its practical significance in a selection of case studies. In this subpart, I only attempt to delineate the contours of obsolescent preemption to the extent necessary to guide subsequent discussion.

As I define it, obsolescent preemption is a framework for evaluating when a statute's preemptive scope, as interpreted by a court, cannot or can no longer be justified. "Obsolescent preemption" also refers to the phenomenon of a court extending a statute's preemptive scope beyond its justifiable limits, and a statute to which this occurs can be said to "obsolescently preempt." Courts and their interpretations of preemption are central to this understanding. As subpart I(A) makes clear, the preemptive scope of a law is a question of legislative purpose,[94] and preemption doctrine does not permit courts to disregard the clear and manifest purpose of the legislature in interpreting the extent to which a law passed by a superior legislature preempts action by an inferior polity.[95] The theory of obsolescent preemption springs from the recognition that a court's designation of a statute as impliedly preemptive simply is a judicial interpretation of the extent of preemption intended by the legislature.[96] To reach that conclusion, courts

94. *See supra* notes 31–34 and accompanying text.

95. *See, e.g.*, Gade v. Nat'l Solid Wastes Mgmt. Ass'n, 505 U.S. 88, 111 (1992) (Kennedy, J., concurring in part and concurring in judgment) ("A freewheeling judicial inquiry into whether a state statute is in tension with federal objectives would undercut the principle that it is Congress rather than the courts that pre-empts state law."); *see also* Martin H. Redish, *Federal Common Law, Political Legitimacy, and the Interpretive Process: An "Institutionalist" Perspective*, 83 NW. U. L. REV. 761, 764 (1989) ("Short of a finding of constitutional invalidity, it is democratically illegitimate for an unrepresentative judiciary to overrule, circumvent, or ignore policy choices made by the majoritarian branches.").

96. Obsolescent preemption may be less relevant in cases of express preemption, where a statute contains a provision expressly delineating its preemptive intent and scope. However, where

will have examined the statutory text, the structure of the statutory scheme, and, perhaps, the structure of the corresponding regulatory scheme.[97] Courts might also consider the interplay between superior and inferior law and the extent to which the legislature's understanding of preemption analysis informed its lawmaking.[98] Regardless of how courts deploy these interpretive aids, however, a court's conclusion that a statute is field or obstacle preemptive ultimately represents a judicial inference that is one step removed from Congress's actual preemptive intent.

As I conceive of it, obsolescent preemption encompasses two mechanisms of obsolescence, which I briefly outline here and explicate in greater detail in subpart II(C). First, judicial interpretations of preemption can obsolesce, or become "stale," over time.[99] Because courts develop inferences of preemption based on manifestations of legislative purpose,[100] newly available indicia of legislative purpose can illuminate judicial inferences of preemption that are incorrect in kind or scope, rendering an existing preemption holding "stale" for failure to incorporate this newly available information. Staleness can also arise when the policies embodied in ancillary sources of meaning on which preemption decisions rely are no longer necessary to achieve the legislative objective of the statute, rendering a preemption holding "stale" to the extent it relies on antiquated assumptions.[101] Second, judicial interpretations of preemption can be obsolete *ab initio* where they unjustifiably extend extant preemption doctrine to encompass new circumstances.[102] The justifiability of such extensions depends, of course, on the consistency of the extrapolation with legislative purpose; in other words, the gap between intended purpose and interpreted purpose must be minimal. Thus, obsolescence *ab initio*, like staleness, arises in the space between legislative intent and judicial inference.

At its core, the theory of obsolescent preemption recognizes that changing circumstances can illuminate a gap between the legislative

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a court is called upon to delimit the *scope* of an express preemption provision, obsolescent preemption retains relevance. *See supra* notes 27–30 and accompanying text.

97. *See, e.g.*, Geier v. Am. Honda Motor Co., 529 U.S. 861, 867–71875, 879, 884 (2000) (looking first to the plain language, then to the statutory structure, and finally to the regulatory purpose); Fidelity Fed. Sav. & Loan Ass'n. v. De la Cuesta, 458 U.S. 141, 152–53, 158–59 (1982) (inferring preemption from the regulatory framework established by statute); *see also infra* notes 171–85 and accompanying text.

98. *See, e.g.*, Crosby v. Nat'l Foreign Trade Council, 530 U.S. 363, 387–88 (2000) ("A failure to provide for preemption expressly may reflect nothing more than the settled character of implied preemption doctrine that courts will dependably apply . . . .").

99. Critically, in this framework, "staleness" characterizes the *judicial* interpretation of the preemptive extent of the statute and not expressions of legislative purpose.

100. *See supra* subpart I(A) (discussing how courts decide questions of preemption).

101. Courts assign interpretive weight regarding the extent of preemption to a variety of ancillary, or nontextual, sources of meaning.

102. *See infra* notes 108–10 and accompanying text.

objective enshrined in a statute (and the corresponding degree of preemption intended by the legislature) and the judicial interpretation of the degree of preemption required by the statute. As a comprehensive framework, obsolescent preemption suggests that courts can and should consider the evolution of the statutory regime and the complete environment in which that regime exists when evaluating the preemptiveness of a statute. I discuss these ideas in greater depth next, in Part II, after setting forth the necessary theoretical and doctrinal background.

II. Constructing Obsolescent Preemption

Part I set forth the framework of modern preemption doctrine and sketched an outline of obsolescent preemption; now, Part II seeks to fill in the remaining theoretical gaps by setting forth a principled construction of the theory. Specifically, I describe the institutional structure in which preemption doctrine exists and describe how obsolescent preemption would operate within that structure. My focus here is relatively narrow; although I offer some prescriptive statements about the proper operation of obsolescent preemption, the normative propositions I set forth here largely concern its consistency with general preemption doctrine. Parts III and IV, in turn, will zoom out to consider the broader implications of obsolescent preemption with regard to preemption's function as a framework for ordering the relationship between superior and inferior governments.

I begin with preemption. Preemption is most commonly understood as a legislative power.[103] However, because preemption unfolds in the realm where superior and inferior governments wield nonexclusive and concurrent authority,[104] courts play a particular, integral role in delineating the extent of preemption and thereby effectuating the legislature's preemption power.[105]

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103. *See, e.g.*, *Crosby*, 530 U.S. at 372 ("A fundamental principle of the Constitution is that Congress has the power to preempt state law."). *But see* Merrill, *supra* note 28, at 737 (suggesting that "all governmental actors—federal and state, executive, legislative, and judicial—have potential constitutional authority to decide whether the vindication of federal law requires displacement of state law").

104. *See* Roderick M. Hills, Jr., *Against Preemption: How Federalism Can Improve the National Legislative Process*, 82 N.Y.U. L. REV. 1, 4 (2007) (arguing that theories of preemption must recognize that "federal and state governments have largely overlapping jurisdictions"); Meltzer, *supra* note 34, at 51 (identifying contemporary "appreciation" for the idea that "the authority of state and national governments pervasively overlaps").

105. *See* Meltzer, *supra* note 30, at 376, 396–97 (observing the impossibility of resolving all statutory issues "up front in statutory text"); Merrill, *supra* note 28, at 754 (characterizing Congress playing an exclusive or dominant role in displacing state law as impossible); Meltzer, *supra* note 34, at 40 (noting that although "preemption decisions are subject to legislative override . . . [,] in practice, judicial decisionmaking is likely to be final in the vast majority of instances"); Jamelle C. Sharpe, *Legislating Preemption*, 53 WM. & MARY L. REV. 163, 168, 196 (2011) ("[C]ourts will inevitably stray from the intended effects of even the most carefully crafted statutes."); *cf.* John F. Manning, *Foreword: The Means of Constitutional Power*, 128 HARV. L. REV. 1, 3 (2014)

Consequently, as subpart I(A) alluded, modern preemption doctrine largely comprises layers of judicial gloss applied to legislative exercises of that power. We can conceptualize the judiciary's power over the enforcement of legislative preemption as a distinct, albeit ancillary, power of preemption—specifically, an interpretive power of preemption.[106] In this way, the power of preemption implicates both legislative power and judicial power.

Obsolescent preemption is concerned with the circumstances in which layers of judicial gloss extend statutes' preemptive scope beyond the extent required and justified by the legislative purposes of the statutory scheme.[107] Obsolescent preemption thus bears on the judicial role in effecting and perpetuating preemptive legislation: It encompasses a theory of how courts should wield their power of preemptive interpretation, a framework for doing so that derives from and augments extant frameworks of preemption, and an adjectival descriptor of the problem. Locating the authority and justifications for deploying obsolescent preemption thus requires interrogating both the legal foundations of the legislative preemption power and the doctrinal foundations of preemption analysis.

Despite its operative relevance to judicial interpretations of preemption, obsolescent preemption shares the same analytic focus on legislative purpose that characterizes the classical and new preemption frameworks. In this way, the starting point of inquiry into obsolescent preemption remains consistent with the methodology of classical preemption. But this common focus can obscure a critical distinction in how legislative purpose enters these judicial inquiries. In classical (including new) preemption analyses, the focal conflict between superior and inferior law arises from affirmative legislative action.

(explaining that the Court influences how Congress exercises its Necessary and Proper authority by "establish[ing] the rules of statutory and constitutional interpretation").

106. *See* Manning, *supra* note 105, at 3 ("[J]udge-made rules of statutory construction deeply affect how federal power is carried out and by whom."); James J. Brudney & Ethan J. Leib, *Statutory Interpretation as "Interbranch Dialogue"?*, 66 UCLA L. REV. 346, 350 (2019) (conceptualizing statutory interpretation as interbranch dialogue); *cf.* Aziz Z. Huq, *The Negotiated Structural Constitution*, 114 COLUM. L. REV. 1595, 1619 (2014) (conceptualizing statutory interpretation by analogy to bargaining in the private-law context); M. Elizabeth Magill, *The Real Separation in Separation of Powers Law*, 86 VA. L. REV. 1127, 1157–59 (2000) (describing the balance of powers as a "self-executing safeguard" fueled by natural tension and rivalry between the branches); Margaret H. Lemos, *The Other Delegate: Judicially Administered Statutes and the Nondelegation Doctrine*, 81 S. CAL. L. REV. 405, 412 (2008) (acknowledging the necessity of delegation by Congress to other branches of government as a "formal model of separation of powers"); THE FEDERALIST NO. 48 (James Madison) (stressing that no branch should possess "an overruling influence over the others, in the administration of their respective powers"); Note, *Textualism as Fair Notice*, 123 HARV. L. REV. 542, 554 (2009) (observing that "applying th[e] law . . . can become law declarative").

107. *Cf.* Daniel B. Rodriguez & Barry R. Weingast, *The Paradox of Expansionist Statutory Interpretations*, 101 NW. U. L. REV. 1207, 1223 (2007) (defining a related concept of "statutory expansionism" in which courts "extend the statute beyond the critical legislators' understanding of what the statutory language he or she voted upon meant").

The recent new preemption scholarship, in particular, has described the legislative motives and affirmative actions directed towards impeding the regulatory capacity of inferior governments, and proposed interpretive methodologies for counteracting the often-malign underlying objectives.[108] In addition, the phenomenon of new preemption is usually contextualized against a backdrop of political partisanship and red-vs.-blue-stateism that characterizes contemporary legal, political, and social commentary,[109] and the legislative actions at new preemption's heart have been interpreted as arising from and reinforcing a larger, ideological strategy.[110] The object at the heart of the obsolescent preemption inquiry is slightly different. Although I, too, seek to describe and critique contemporary developments in the application of the preemption power, unlike the scholars of new preemption, I am not responding specifically to affirmative legislative actions taken to implement a particular substantive agenda. Instead, obsolescent preemption is concerned with how courts enforce preemption, rather than new legislative attempts to preempt, and critically evaluates *judicial* interpretations of the legislature's preemptive intent.

This Part proceeds as follows: Subpart A considers the origins of legislative authority to preempt action by an inferior government and considers how the judicial doctrine of preemption accounts for this constitutional foundation. In light of the centrality of legislative purpose to courts' preemption inquiry, subpart B examines how courts evaluate expressions of legislative purpose within the implied preemption framework. Finally, subpart C gets to the heart of the matter and considers the circumstances under which judicial interpretations of preemption become stale or emerge as obsolete. After focusing on the powers of the federal government in subparts A–C, subpart D justifies obsolescent preemption's relevance to intrastate preemption, too. Although much of this argument is achieved by analogy, the legal differences between the situation of state legislatures vis-à-vis local governments and the situation of Congress vis-à-vis state and local governments create a wrinkle in the translation. Nevertheless, as I argue *infra*, these differences do not create an insurmountable obstacle to applying obsolescent preemption in the intrastate context in a manner analogous to its application in the federal context. And, as Part IV explains, the normative benefits of obsolescent preemption apply equally in the context of intrastate preemption and federal preemption.

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108. *See, e.g.*, Briffault, *supra* note 9, at 2013, 2025 (identifying state court approaches to preemption that blunt the deregulatory or punitive effects of "new preemption"-style laws).

109. *See supra* notes 87–94 and accompanying text.

110. *See, e.g.*, Gulasekaram, Su & Villazor, *supra* note 4, at 848 (describing state anti-sanctuary laws as part of the conservative effort to "conscript local officials into federal immigration enforcement"); *see also* Briffault, *supra* note 9, at 2003 (identifying several state anti-gun-control laws as examples of new preemption).

A. The Legislative Power of Preemption

The Supreme Court has located the source of the "fundamental principle . . . that Congress has the power to preempt state law" in the Supremacy Clause of the Constitution,[111] which states:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.[112]

Despite using varied terminology to describe the phenomenon of federal law preempting state law, the connection between the Supremacy Clause and that phenomenon has remained a consistent part of the Court's preemption jurisprudence since the early years of the Constitution,[113] and most scholars and scholarship take this connection as given.[114] Some scholars have argued, however, that the Court's characterization of the origins of Congress's preemption authority is erroneous or, at least, incomplete.[115] These heterodox perspectives exist on a spectrum, with one end accepting the Court's description of the mechanics of Congress's preemptive power while questioning the constitutional source of that power, and the other end accepting the Court's identification of the constitutional source of Congress's preemption authority—the Supremacy Clause—and querying whether that source can support the full extent of the exercise of preemption authority tolerated in current preemption doctrine.

At one end of the spectrum, Stephen Gardbaum has gone as far as asserting that, "contrary to the standard view, the power of preemption has little if anything to do with the Supremacy Clause,"[116] and instead has located the source of Congress's power of preemption in the Necessary and Proper

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111. Crosby v. Nat'l Foreign Trade Council, 530 U.S. 363, 372 (2000) (citing U.S. CONST. art. VI, cl. 2 (Supremacy Clause) and Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1, 211 (1824)).

112. U.S. CONST. art. VI, cl. 2.

113. *See* Merriam, *supra* note 28, at 992, 994, 1000 n.104 (describing the evolution of the Court's preemption doctrine from 1789 to today).

114. *See id.* at 983–84, 984 n.15 (explaining that there are few exceptions to this general trend); Nelson, *supra* note 40, at 234 (stating that "virtually all commentators" have acknowledged the connection); Stephen Gardbaum, *Congress's Power to Preempt the States*, 33 PEPP. L. REV. 39, 43–44 (2005) (noting this "entrenched orthodoxy").

115. *See*, *e.g.*, Gardbaum, *supra* note 114, at 40 ("Supremacy and preemption are distinct constitutional concepts, each of which regulates the relationship between concurrent federal and state powers in a different way."); Pursley, *supra* note 24, at 516, 529 (highlighting room for further elaboration—beyond the Supremacy Clause and *Gibbons*—on congressional preemption authority); *cf.* Nelson, *supra* note 40, at 231 (suggesting that the Court has misinterpreted the preemptive mechanism of the Supremacy Clause).

116. Stephen A. Gardbaum, *The Nature of Preemption*, 79 CORNELL L. REV. 767, 769 (1994).

Clause.[117] The foundation of this argument rests on a distinction between the concepts of supremacy and preemption, which "regulate[] the relationship between concurrent federal and state power[] in . . . different way[s]."[118] According to Gardbaum, supremacy is merely an inherent, automatic attribute of all federal law, derived from the Supremacy Clause, that "specif[ies] its hierarchical status vis-à-vis state law."[119] The Supremacy Clause might account for why valid federal laws trump state laws that conflict with them (i.e., impossibility preemption), but—because it does not "empower" Congress to displace state law[120]—cannot account for other acknowledged types of preemption, such as the displacement of non-conflicting state law, the occupation of a regulatory field, and the displacement of concurrent state authority.[121] In contrast, deriving preemption from the Necessary and Proper Clause provides a constitutional foundation for the entirety of Congress's preemption power.[122]

Underlying Gardbaum's inquiry into the source of Congress's preemptive authority is the assumption that, as a matter of constitutional law, preemption *is* an affirmative power of Congress that encompasses the types of displacement of state law mentioned above. This assumption is reasonable and unsurprising given that preemption doctrine has long recognized Congress's ability to occupy a regulatory field and foreclose state lawmaking even in realms of concurrent jurisdiction.[123] In one way, this argument attempts to map a better constitutional foundation onto a longstanding doctrinal object whose badly plumbed constitutional justification represents centuries of mechanical invocations of a constitutional justification[124]—

117. *Id.* at 781; Stephen Gardbaum, *Rethinking Constitutional Federalism*, 74 TEXAS L. REV. 795, 801 (1996).

118. Gardbaum, *supra* note 114, at 40; *see also* Merrill, *supra* note 28, at 730 (describing these phenomena as, respectively, "trumping" and "displacement").

119. Gardbaum, *supra* note 114, at 40; *see also* Meltzer, *supra* note 30, at 366 ("It should be clear that one cannot view preemption decisions merely as straightforward applications of the Supremacy Clause.").

120. Gardbaum, *supra* note 116, at 774; *see also* Pursley, *supra* note 24, at 516 ("[T]hat Clause does not obviously confer any additional authority on Congress at all.").

121. Gardbaum, *supra* note 114, at 41; *see* Gardbaum, *supra* note 116, at 771 (describing preemption as "jurisdiction-stripping" because it deprives state power at all regardless of conflicts).

122. *See* Gardbaum, *supra* note 114, at 41, 49 (explaining how Congressional preemption is stronger and more effective than federal supremacy); Gardbaum, *supra* note 116 at 782, 803–07 (discussing how the Court came to endorse Congress's preemptive powers); *see also* Pursley, *supra* note 24, at 516–17 (suggesting that "Congress's displacement authority [may] come[] from the way that its enumerated powers are augmented by the Supremacy Clause or Necessary and Proper Clause").

123. *See supra* notes 2–18 and accompanying text.

124. Gardbaum is not alone in objecting to courts' inattentive invocations of the Supremacy Clause. *See, e.g.*, Nelson, *supra* note 40, at 234 ("For too long, though, courts have treated the Supremacy Clause chiefly as a symbol—a rhetorical expression of federal dominance, but a provision with little practical content of its own."); Pursley, *supra* note 24, at 516 ("Even if the

judicial epoxy, in other words. But in order to truly understand the constitutional origins and implications of preemption, Gardbaum's assumptions about the scope of Congress's preemption authority are worth interrogating further—especially because other scholars have expressed doubts that Congress's constitutional authority to preempt state law stretches as far as the Supreme Court doctrine has indicated.[125] And, unlike Gardbaum, these scholars tend to believe that the scope of Congress's preemptive power begins and ends with the Supremacy Clause.[126]

At this end of the spectrum, Caleb Nelson has argued that the legislative power of preemption is narrower, as a matter of constitutional law, than either the Court and commentators commonly assert.[127] In making this argument, Nelson begins from the premise that "the Supremacy Clause is the reason that valid federal statutes trump state law,"[128] and produces a searching originalist account of the clause's origins.[129] According to Nelson, the framers intended for the Supremacy Clause to operate like a "*non obstante*" clause,[130] which, he argues, compels the following "logical-contradiction" test for preemption: "Courts are required to disregard state law if, but only if, it contradicts a rule validly established by federal law."[131] In this formulation, Congress's power to preempt state law arises from both its enumerated powers and the Supremacy Clause: To the extent that an exercise of enumerated legislative power—i.e., a law—is valid, the Supremacy Clause endows that law with preemptive effect over any contradictory state law. A

Supremacy Clause is the source of Congress's power to displace state law and regulatory authority—which seems unlikely—courts in their rush to deference have not explained how that is so."); *id.* at 529 (critiquing the Supremacy Clause justification as being "under-explained without an account of the constitutional basis for Congress's displacement authority").

125. *See, e.g.*, Nelson, *supra* note 40, at 265–66 (describing Supreme Court doctrine on obstacle preemption as overly broad).

126. *See id.* at 233, 303 (suggesting a reevaluation of the preemption doctrine because the Supremacy Clause limits preemption to only when there is exclusive contradiction).

127. *See generally id.* ("Drawing on long-overlooked historical materials, I argue that the Supremacy Clause puts questions about whether a federal statute displaces state law within the same framework as questions about whether one statute repeals another.").

128. *Id.* at 234. Nelson does not describe the Supremacy Clause as creating a legislative power of preemption, and his description of how the Supremacy Clause operates is consistent with how Gardbaum describes its operation. Nevertheless, his argument rejects Gardbaum's premise that the power of preemption exists independently of the Supremacy Clause. *Compare id.* at 234 & n.32 (articulating the operation of the Supremacy Clause that permits federal law to supersede state law), *with* Gardbaum, *supra* note 114, at 42 & n.12 (pointing to Nelson's literature and ascribing federal power to the Commerce Clause and not a form of preemption).

129. *See generally* Nelson, *supra* note 40 (referring to, for example, the Articles of Confederation).

130. According to Nelson, a non obstante clause "acknowledge[s] that a statute might contradict some other laws and . . . instruct[s] courts not to apply the traditional presumption against implied repeals." *Id.* at 232. Other scholars have criticized Nelson's interpretation. *See, e.g.*, Meltzer, *supra* note 34, at 49–50; Young, *supra* note 24, at 327–32.

131. Nelson, *supra* note 40, at 260.

state law will not be preempted under the logical-contradiction test simply because it is inconsistent with the purposes and objectives of Congress.[132] Nelson's theory of preemption, which has been adopted by Justice Thomas,[133] thus implies that the contemporary doctrine of obstacle preemption—under which courts weigh the magnitude of the conflict between federal and state law against the backdrop of congressional intent and legislative purpose to determine whether state law creates an irreconcilable conflict with the federal law[134]—is unconstitutional.[135]

Other scholars have sought to find a middle ground between these perspectives that accommodates both the doctrinal articulation of Congress's preemption authority with the text of the Supremacy Clause. For example, while accepting his distinction between the concepts of preemption and supremacy, which he refers to as "displacement" and "trumping," Thomas Merrill has argued that Gardbaum interprets the Supremacy Clause too narrowly.[136] Merrill advocates a "more expansive[]" reading of the Supremacy Clause in which "the supreme law of the land" incorporates the "purposes and policies reflected in federal law," thereby "entitl[ing them] to full vindication" "whenever state law would frustrate th[ose] purposes or policies."[137] Under this reading, Congress's power of displacement is nonexclusive because the Supremacy Clause operates equally on "all governmental actors—federal and state, executive, legislative, and judicial,"[138] and thus Congress has the "authority to delegate to administrative agencies the power to displace" state law.[139] But even if administrative agencies can exercise delegated preemption authority, the *power* to displace state law originates with an act of Congress.[140] Regardless of the Supremacy Clause's reach, it does not empower Congress to enact laws whose purpose and policies conflict with state law; instead, it provides

132. *See generally id.* (suggesting that the doctrine of obstacle preemption lacks constitutional and subconstitutional foundation).

133. Wyeth v. Levine, 555 U.S. 555, 590 (2009) (Thomas J., concurring in judgment); Merriam, *supra* note 28, at 985; Meltzer, *supra* note 34, at 3.

134. *See supra* notes 46–50 and accompanying text.

135. Nelson, *supra* note 40, at 231, 278–80, 290. *But see* Meltzer, *supra* note 34, at 36 (suggesting that Nelson's definition of constitutional preemption is more malleable than Nelson and Justice Thomas suggest).

136. *See* Merrill, *supra* note 28, at 734 (arguing that the Supremacy Clause can be read expansively to the same extent that it can be read narrowly).

137. *Id.*

138. *Id.* at 737.

139. *Cf. id.* at 736 (explaining that the opposite theory, where the Necessary and Proper Clause is the sole authority to displace, would mean Congress did *not* have the authority to delegate).

140. *See* Ernest A. Young, *Executive Preemption*, 102 NW. U. L. REV. 869, 896 (2008) (discussing the implications of the Supreme Court recognizing administrative agencies' preemptive powers as coming from congressional delegation).

the rule that validly enacted federal laws can displace state laws.[141] Consequently, this Article begins from the premise that Congress's preemption power represents an exercise of its enumerated powers (including those derived from the Necessary and Proper Clause). The effectuation of this preemption depends on the rule of decision set forth by the Supremacy Clause—namely, that valid exercises of the preemption power displace state law.

Understanding preemption in this way removes the teeth of Nelson's argument that the Supremacy Clause cannot support a broader preemptive power than impossibility preemption: Because Congress's power of preemption does not derive from the Supremacy Clause, the constitutional justification for a doctrine of implied preemption must arise from another source. This framing is also consistent with the absence of citations to the Necessary and Proper Clause in doctrinal preemption analysis[142] because it recognizes that preemption incorporates two distinct inquiries—about Congress's authorization to act and the consequences of action—of which courts tend to focus only on the second question, which implicates the Supremacy Clause.[143] Stated another way, the Necessary and Proper Clause, in conjunction with another enumerated power, provides authority for Congress to enact law for the central or ancillary purpose of preempting state law. The Supremacy Clause renders this displacement constitutional—if the displacing law is constitutional[144]—but it is not concerned with the substantive constitutionality of the legislative act, which depends on Article I.[145] Thus, the Supremacy Clause answers the question of whether a *valid* congressional enactment properly displaces state law—yes—but does not address the underlying validity of the enactment itself—that is, whether Congress was constitutionally authorized to enact the law that entails the

141. *See* Pursley, *supra* note 24, at 516, 524–26 (describing how the intent to displace law regardless of conflict must be justified, and that the Supremacy Clause offers no additional authority for that); Meltzer, *supra* note 30, at 367 (describing implied preemption as a "kind of judicial lawmaking" because the Supremacy Clause only permits federal law to prevail if there is a conflict).

142. *See* Merrill, *supra* note 28, at 733 ("The Supreme Court has repeatedly identified the Supremacy Clause as the source of its authority to declare state law displaced (preempted). As far as I have been able to determine, the Court has never mentioned the Necessary and Proper Clause in this context.").

143. *See* Pursley, *supra* note 24, at 516, 529 (arguing that "[c]ourts continue to portray" preemption based on whether the *effect* is contrary and characterizing the Supremacy Clause doctrine as "under-explained"); Bradford R. Clark, *The Supremacy Clause as a Constraint on Federal Power*, 71 GEO. WASH. L. REV. 91, 92 (2003) (noting the "double standard" where courts vigorously review if state law conflicts with federal statutes but *not* whether federal statutes exceed constitutional enumeration).

144. Pursley, *supra* note 24, at 516, 529; Clark, *supra* note 143, at 92, 101.

145. *See* Alison L. LaCroix, *What If Madison Had Won? Imagining a Constitutional World of Legislative Supremacy*, 45 IND. L. REV. 41, 51 (2011) ("[T]he preempting federal legislation must always be consistent with Congress's enumerated Article I powers.").

displacement of state law.[146] This charge falls to the courts, which I turn to next.

B. The Judicial Role in Effecting Preemption

The preceding subpart suggested that federal preemption represents an exercise of Article I authority, the effectuation—but not existence—of which depends on judicial enforcement of the Supremacy Clause. Where statutes lack express statements of preemption—and occasionally even where statutes contain express preemption clauses[147]—courts engage in statutory interpretation to determine whether, and to what extent, Congress has exercised its preemption power. Consequently, both the method and sources of interpretation in implied preemption cases are critical for understanding how the theory of obsolescent preemption operates in that context. This subpart provides an overview of this process, which differs in significant ways from statutory interpretation outside the preemption context.

In holding federal laws to be preemptive, courts understand their role to be enforcing the purpose of Congress,[148] and their process for determining whether the purpose of a legislative enactment requires preemption is wholly "unilateralist."[149] In other words, courts ask whether "Congress intended to preempt and do not place any countervailing value on state law."[150] As Daniel Meltzer observed, to answer this key question, "often the critical issue . . . is the degree of textual explicitness and specificity that is required to interpret a statute as having a particular substantive meaning,"[151] and, "in general, the Court has not required great explicitness and specificity" to resolve this question in favor of preemption.[152] Meltzer and others have documented how textualist-leaning Justices abandon their textualist

146. *See* Clark, *supra* note 143, at 101–02, 119–20 (finding a textual basis for preemption in the "made in Pursuance" language of the Supremacy Clause); Meltzer, *supra* note 30, at 367 (noting that the Supremacy Clause's "operation requires prior identification of the rule of federal law with which state law is said to conflict"); Pursley, *supra* note 24, at 516, 531 (arguing a constitutional basis can be found even when rules do not resemble the constitutional text).

147. *See supra* text accompanying notes 28–29; *infra* note 173 and accompanying text.

148. *See* Medtronic, Inc. v. Lohr, 518 U.S. 470, 485–86 (1996) ("'[T]he purpose of Congress is the ultimate touchstone' in every pre-emption case. As a result, any understanding of the scope of a pre-emption statute must rest primarily on 'a fair understanding of *congressional purpose.*'" (first quoting Retail Clerks v. Schermerhorn, 375 U.S. 96, 103 (1963); then quoting Cipollone v. Liggett Group, Inc., 505 U.S. 504, 530 n.27 (1992))); *see also* Meltzer, *supra* note 34, at 8 (characterizing the case law as inquiring into whether Congress made a decision to preempt).

149. Young, *supra* note 24, at 313; Mark D. Rosen, *Contextualizing Preemption*, 102 NW. L. REV. 503, 781, 785 (2008); *see also* Louise Weinberg, *The Federal-State Conflict of Laws: "Actual" Conflicts*, 70 TEXAS L. REV. 1743, 1756 (1992) ("[A] court finding actual federal-state conflict will generally apply federal law, as it is bound to do under oath and the Supremacy Clause.").

150. Young, *supra* note 24, at 313.

151. Meltzer, *supra* note 34, at 14.

152. *Id.*

commitments in preemption cases,[153] including by disregarding explicit savings clauses that the Court perceived as not reflecting Congress's "considered judgment,"[154] by looking to the administrative record to inform statutory meaning,[155] and by appealing to the amorphous "purpose" of statutes without regard to express preemption clauses or clear impossibilities.[156] This abandonment of textual primacy in favor of a purpose-oriented interpretation that abrogates state sovereignty is particularly surprising because, as Meltzer observed, "[o]ne would expect that Justices sympathetic to protecting state sovereignty would be particularly disinclined to engage in purposive, nontextual interpretation of a federal statute . . . . But, . . . the pattern is just the reverse."[157] Thus, textualist, originalist, and relatively more purposivist Justices[158] appear to engage in preemption analysis in similar, atextualist ways: "examining the federal statute as a whole and identifying its purpose and intended effects" to determine whether state laws present a "sufficient obstacle" to the effectuation of that purpose.[159]

To identify the legislative purpose underlying a putatively preemptive statute, courts look to traditional sources of legislative meaning—the statutory text and legislative history—but also to the structure and operation of the regulatory regime constructed from statutory foundations.[160] The nature of this inquiry differs somewhat between field preemption and obstacle preemption: In the former, the question is whether the purpose of

153. *E.g.*, Meltzer, *supra* note 30, at 363–65, 368, 369 & n.111 (collecting scholarship); Note, *Preemption as Purposivism's Last Refuge*, 126 HARV. L. REV. 1056, 1056–57 (2013); John F. Manning, *The New Purposivism*, 2011 SUP. CT. REV. 113, 114 & n.5 (2012); *see* Meltzer, *supra* note 34, at 14 (observing that justices might be committed to particular interpretive methodologies that yield to substantive commitments). Justice Thomas has become an exception to this phenomenon. *Compare* Meltzer, *supra* note 30, at 369–71 (noting that, as of 2002, Justice Thomas voted frequently in favor of preemption), *with* Note, *supra*, at 1056 (noting that, by 2013, Justice Thomas's views on preemption had evolved to disfavor atextual preemption).

154. Note, *supra* note 153, at 1066 (quoting Int'l Paper Co. v. Ouellette, 479 U.S. 481, 497 (1987)).

155. *See id.* at 1059–62 (pointing to *Geier v. Am. Honda Motor Co.*, where the Court based its preemption finding on agency comments and regulatory history).

156. Meltzer, *supra* note 30, at 365–66 (discussing Crosby v. Nat'l Foreign Trade Council, 530 U.S. 363, 373 (2000), and Buckman Co. v. Plaintiffs' Legal Comm., 531 U.S. 341, 347–48 (2001)).

157. Meltzer, *supra* note 30, at 375.

158. As Dean John Manning has observed, most nontextualist Justices embody a kind of "new purposivism" in which "all that distinguishes new purposivists from textualists is the new purposivists' willingness to invoke legislative history in cases of genuine semantic ambiguity." Manning, *supra* note 153, at 117.

159. *Crosby*, 530 U.S. at 373.

160. *See, e.g.*, Fid. Fed. Savs. & Loan Ass'n v. De la Cuesta, 458 U.S. 141, 153–54 (1982) (holding that federal regulations may preempt state law so long as the agency has not exceeded its statutory authority or acted arbitrarily). *But see* Stuart Minor Benjamin & Ernest A. Young, *Tennis with the Net Down: Administrative Federalism Without Congress*, 57 DUKE L.J. 2111, 2134 (2008) (arguing that only the Constitution, statutes, and treaties can preempt state law).

Congress included occupying the regulatory field; in the latter, the question is whether the state law impermissibly (i.e., sufficiently) inhibits the effectuation of the intended purposes of the federal act. Although the inquiries differ in focus, the sources of meaning on which courts rely are common. I briefly discuss significant cases of implied preemption in which the Court looked beyond the express language of a statute to determine that the statute impliedly preempted state action.

In *Hines v. Davidowitz*[161] and *Arizona v. United States*,[162] the Supreme Court held and subsequently reaffirmed that Congress had occupied the field of alien registration via the enactment of "a single integrated and all-embracing system."[163] In *Hines*, the Court first observed that "the power to restrict, limit, regulate, and register aliens as a distinct group is not an equal and continuously existing concurrent power of state and nation, but [instead] that whatever power a state may have is subordinate to supreme national law."[164] While the decline of dual federalism and the rise of the theory of concurrent jurisdiction might appear to diminish the significance of this spoke of inquiry, it nevertheless remains the case that certain areas of law continue to be perceived as predominantly federal or predominantly state areas of concern.[165] Second, the Court observed that Congress had enacted "a broad and comprehensive plan describing the terms and conditions upon which aliens may enter this country, how they may acquire citizenship, and the manner in which they may be deported . . . . [a]nd in 1940 Congress added to this comprehensive scheme a complete system for alien registration." [166] Thus, the entire statutory backdrop, as much as any particular statutory enactment, provides relevant context for evaluating how Congress intended for a particular enactment to operate vis-à-vis state laws. Third, the Court described the sociopolitical context in which the statute had been enacted and identified in the legislative history of the enactment the stated "[c]ongressional purpose" of "work[ing] the new provisions into the existing [immigration and naturalization] laws so as to make a harmonious whole."[167]

Taken together, these characteristics of the challenged enactment "plainly manifested" the objective of creating a "uniform national . . . system" of alien registration to the exclusion of any state regulation in the

161. 312 U.S. 52 (1941).

162. 567 U.S. 387 (2012).

163. *Hines*, 312 U.S. at 74; *accord Arizona*, 567 U.S. at 401.

164. 312 U.S. at 68.

165. *Compare* Crosby v. Nat'l Foreign Trade Council, 530 U.S. 363, 381 (2000) (identifying foreign affairs as an area of federal concern), *with* Gonzales v. Oregon, 546 U.S. 243, 270 (2006) (identifying health and welfare regulation as a traditional area of state concern).

166. *Hines*, 312 U.S. at 69–70.

167. *Id.* at 72 (quoting CONG. REC. 8302 (1940)) (third alteration in original).

same field.[168] Seventy-one years later, when the Court reaffirmed *Hines*'s conclusion in *Arizona*, it noted that "[t]he present regime of federal regulation [wa]s not identical to the statutory framework considered in *Hines*, but it remains comprehensive" and still "le[d] to the conclusion . . . that the Federal Government has occupied the field of alien registration."[169] In reaching this conclusion, the Court examined both statutory text[170] and atextual indicia of the intended preemptive reach of a statute, including legislative history[171] and Executive Branch policies for enforcing the statutory scheme.[172] Although *Hines* and *Arizona* were field-preemption cases, the Court pursues the same inquiry in obstacle-preemption cases.[173] In the latter type, however, the decisive question is whether the substantive purpose of a federal law is impermissibly frustrated by a state law instead of whether the purpose of the federal law includes occupying the regulatory field.

In obstacle preemption cases, moreover, the Court has looked even further than legislative history and agency policy to determine whether a state law stands as an obstacle to the purpose and objectives of federal law. In *Geier v. American Honda Motor Co.*,[174] for example, the Court held that a substantive rule of state tort law "conflict[ed] with the objectives of" regulations promulgated by the Department of Transportation (DOT) pursuant to its delegated authority under the National Traffic and Motor Vehicle Safety Act of 1966, and thus that a lawsuit alleging a violation of that state-law rule was preempted by the federal Act.[175] The conclusion that obstacle preemption can arise from a conflict between state law and federal *regulations* in addition to federal *statutory* law was not a novel holding;[176] nevertheless, the *Geier* opinion is striking for several reasons. First, the Court expressly held that the Act's express preemption provision did not preempt

168. *Id.* at 73–74.

169. *Arizona*, 567 U.S. at 401.

170. *Id.* at 403–05.

171. *Id.* at 405–06 (discussing the findings of a congressional commission established to study immigration policy, Congress's rejection of that commission's findings, and related hearings on the subject).

172. *Id.* at 407–08.

173. *See, e.g.*, Crosby v. Nat'l Foreign Trade Council, 530 U.S. 363, 374–78, 375 n.9, 388 (2000) (evaluating the text of the federal statute, its legislative history, and its implementation by the Executive Branch on the way to determining that the challenged state law "conflict[ed] with Congress's specific delegation to the President . . . and [] direction to develop a comprehensive multilateral strategy" such that "it [wa]s preempted[] and its application [wa]s unconstitutional"); *see also* Medtronic, Inc. v. Lohr, 518 U.S. 470, 496 (1996) (deferring to the FDA, under the Executive Branch, to determine whether a law "stands as an obstacle").

174. 529 U.S. 861 (2000).

175. *Id.* at 864, 866–67.

176. *See* Fid. Fed. Savs. & Loan Ass'n v. De la Cuesta, 458 U.S. 141, 154 (1982) (making this point nearly two decades earlier).

Geier's lawsuit, in light of the savings clause that saved at least some tort actions from preemption.[177] But, the Court explained, "[n]othing in the language of the savings clause suggests an intent to save state-law tort actions that conflict with federal regulations."[178] Instead of relying solely on the text of the Act, the Court reasoned from general conflict-preemption principles:

> [W]ould Congress not have wanted ordinary pre-emption principles to apply where an actual conflict with a federal objective is at stake? Some such principle is needed. In its absence, state law could impose legal duties that would conflict directly with federal regulatory mandates . . . . [I]t would take from those who would enforce a federal law the very ability to achieve the law's congressionally mandated objectives that the Constitution, through the operation of ordinary pre-emption principles, seeks to protect.[179]

Applying conflict-preemption principles, the Court reasoned that the Act preempted the plaintiff's lawsuit because the alleged state-law duty to install seatbelts was inconsistent with the federal policy—embodied in the DOT regulations promulgated under the Act—favoring the use of a "variety and mix of [safety] devices" and a "gradual passive restraint phase-in."[180] To identify this federal policy, the Court recited the history of the DOT regulations, as captured in publications in the Federal Register;[181] referred to DOT's justifications for the final regulations at the time of promulgation; [182] and invoked DOT's contemporary interpretation of the purpose of regulations, as conveyed via briefing in the instant litigation.[183] The Court's construction of this federal policy proved controversial: The four dissenting Justices objected to the majority's reliance on the regulatory history and commentary associated with the DOT regulations, "rather than either statutory or regulatory text," as the basis for the asserted federal policy.[184] Nevertheless, the Court's obstacle preemption decisions continue to rely on an expansive array of indicia of legislative purpose, including regulatory

177. *Geier*, 529 U.S. at 868–69.

178. *Id.* at 869.

179. *Id.* at 871–72.

180. *Id.* at 881.

181. *Id.* at 875–77.

182. *Id.* at 877–81.

183. *Id.* at 881.

184. *Id.* at 888 (Stevens, J., dissenting); *id.* at 910–11 ("[T]he Court identifies no case in which we have upheld a regulatory claim of frustration-of-purposes implied conflict pre-emption based on nothing more than an *ex post* administrative litigating position and inferences from regulatory history and final commentary. The latter two sources are even more malleable than legislative history."); *see also id.* at 876–82 (majority opinion) (describing the history of the DOT regulations).

history,[185] even as a minority of the Court has begun advocating a rethinking of this expansive inquiry.[186]

Two observations flow from this discussion of how courts evaluate and enforce implied preemption. First, an implied preemption holding represents a court's attempt at implementing its interpretation of congressional purpose.[187] When a court interprets a federal statute to preempt state law, the court has understood the congressional objectives of the statute to require the displacement of state law, either because of intent to occupy the field or because the statutory objectives—as they are construed by the court—are impermissibly impeded by the concurrent operation of state law. Second, to reach its particular interpretation of congressional purpose in a given implied preemption case, a court relies on statutory text as well as other indicia of legislative purpose the court deems relevant to discerning the objective and purpose of a statutory scheme, which often includes the regulatory context and practical operation of the laws. This second observation is anecdotal: It describes how courts in practice have attempted to discern legislative purpose and preemptive intent. The first observation, however, is structural: It reflects the inherent gap that arises between intended and interpreted meaning;[188] the theory of obsolescent preemption arises from this gap.

C. Obsolescent Preemption

As I have described it, obsolescent preemption is both an interpretive sub-framework within the doctrinal framework of preemption and a

185. *See, e.g.*, Williamson v. Mazda Motor of Am., Inc., 562 U.S. 323, 332–36 (2011) (examining regulatory history to determine that a federal regulation did not preempt a state-law suit).

186. *See, e.g.*, *Williamson*, 562 U.S. at 340–43 (Thomas, J., concurring in the judgment) (rejecting purposes-and-objectives preemption as a subjective, extratextual inquiry). Justice Gorsuch, joined only by Justices Thomas and Kavanaugh similarly emphasized the importance of text and structure in *Virginia Uranium Inc. v. Warren*:

> No more than in field preemption can the Supremacy Clause be deployed here to elevate abstract and unenacted legislative desires above state law; only federal laws 'made in pursuance of' the Constitution, through its prescribed processes of bicameralism and presentment, are entitled to preemptive effect. So any '[e]vidence of pre-emptive purpose,' whether express or implied, must . . . be 'sought in the text and structure of the statute at issue.'

139 S. Ct. 1894, 1907 (2019) (opinion of Gorsuch, J.; 3–3–3 decision) (citations omitted) (alteration in original) (first quoting U.S. CONST. art. VI, cl. 2; then quoting CSX Transp., Inc. v. Easterwood, 507 U. S. 658, 664 (1993)).

187. *See* Manning, *supra* note 1055, at 3, 17–18, 24–25 (describing how both purposivism and textualism purport to reconstruct the congressional purpose embedded in a statute); Richard H. Fallon, *The Meaning of Legal "Meaning" and Its Implications for Theories of Legal Interpretation*, 82 U. CHI. L. REV. 1235, 1237 (2015) ("[M]eaning is the object, or at least one of the objects, that statutory and constitutional interpretation seek to discover.").

188. *See* Fallon, *supra* note 187, at 1249 (describing the lengths some courts go to ascertain legislative intent).

description of preemption holdings that rely on stale or incomplete information. The nature of the preemption inquiry and the significance of a preemption holding make this obsolescence possible.[189] After all, a judicial determination that a statute impliedly preempts inferior law reflects a court's conclusion that the policy objectives embodied in the statutory scheme require the displacement of inferior law. We can understand this preemption decision as a function of the information set available at the time of decision.[190] Resting on this foundation, the theory of obsolescent preemption makes two claims. First, that changes in the information set can render preemption holdings "stale," from which follows the conclusion that newly available information *should* become relevant for subsequent analyses of preemption. And second, that preemption interpretations must account for the relevant full information set to be legitimate, such that unjustified extrapolations of extant preemption holdings to new contexts are obsolete *ab initio*. I elaborate the "stale" variation of obsolescent preemption first, as the "obsolete *ab initio*" version follows from the principles laid out in the discussion of staleness.

The idea of stale preemption arises from the observation that judicial interpretations of preemption remain fixed as precedent, even as the universe of information relevant to identifying the legislative purposes implicated by the preemption question constantly evolves.[191] This new information, which might be new or simply newly available, can reinforce or undermine the prevailing judicial interpretation of a statute's preemptiveness. But, due to the nature of the judicial process, relevant new information generally does not enter the preemption calculus. The theory of obsolescent preemption suggests that judicial interpretations should be revisited to eliminate staleness in interpretation. Before delving into the kinds of changes in the information set that create staleness, I detour briefly to moderate any concerns arising from my description of this evolutionary-seeming process of interpretation. Because, despite appearances, this process of re-evaluation is more of a rebalancing than an evolution. And, while the mere suggestion of evolutionary interpretation might trigger alarms for some readers, I submit

189. The phenomenon of staleness is distinct from judicial abrogation, for example. A judicial decision is abrogated when a court of higher authority overrules precedent. Staleness, on the other hand, arises when external circumstances vitiate a premise upon which a preemption decision rests.

190. As discussed *supra* subpart II(B), courts rely on a variety of evidence to identify the legislative objectives of a given statute, including the statute's text, of course, but also the broader statutory scheme, the enforcement policies associated with the statute, and the regulatory environment built upon statutory foundations. The information set encompasses all this material, and a given preemption holding can incorporate only the evidence of legislative purpose that exists within this set at the time of decision.

191. *See supra* notes 165–66 (examples of stale preemption in interpreting immigration laws), 179–81 (DOT regulations), and 188 (comparing staleness to judicial abrogation) and accompanying text.

that the idea of revisiting stale preemption holdings is more consistent with the principles ostensibly secured by preemption doctrine than the present alternative of stasis, in at least two ways.

First, since preemption represents a judicial interpretation of legislative purpose, the preemption inquiry necessarily involves some construction and interpreted preemption might diverge from legislatively intended preemption. Incorporating new *or* newly available information into the consideration of extant preemption holdings ensures judicial interpretation will more closely approximate a statute's actual legislative purpose,[192] ensuring that preemption decisions more accurately reflect congressional intent.[193] This would remain true even if courts are constrained to consider only the legislative objectives manifested at the time of enactment,[194] because expanding the information set to include *newly available* information, even if not all *new* information, still expands the information set and facilitates a better interpretive approximation. We can conceptualize a change in judicial interpretation in response to this kind of change in the information set as a realignment; In other words, stale preemption provides a framework for realigning the judicial interpretation of a statute's preemptive scope with the preemptive scope originally intended by the legislature in response to new information that illuminates the existence of a gap between actual and interpreted purpose.

Second, as subpart II(B) establishes, the record from which courts attempt to discern legislative purpose encompasses the statutory scheme *and* the regulatory and enforcement regimes *and* the judicial interpretations that develop around that statutory scheme. When courts assign interpretive weight to these ancillary sources of meaning that were developed to implement a particular statutory scheme, those regulations, policies, and associated judicial interpretations can become entrenched such that the preemptive interpretation bestowed upon them, rather than the legislative purpose for which the underlying statutory scheme was enacted, becomes the locus of doctrinal development and preemption analysis. However, changing circumstances—such as technological innovation or changes in societal behavior—may render such policies, regulations, and interpretations superfluous, obsolete, or even detrimental to achieving the underlying legislative objective. When this occurs, perpetuating a conclusion of

192. *Cf.* David L. Shapiro, *Continuity and Change in Statutory Interpretation*, 67 N.Y.U. L. REV. 921, 925–26, 951 (1992) (noting that "[t]he danger in emphasizing continuity over change is that legislative purpose can be thwarted by excessive devotion to the status quo" and contemplating the possibility that a change in the information set might warrant revisiting a judicial interpretation).

193. For a discussion of methods used to interpret legislative intent, see *infra* subpart III(B).

194. *See* Nelson, *supra* note 40, at 289 ("If Congress cannot reliably anticipate the results of the Court's test for preemption, Congress cannot approve those results in advance—unless every federal statute without a savings clause is read to delegate essentially standardless discretion to judges.").

preemptiveness derived from antiquated policies and regulations via judicial opinions that reinforced or extrapolated them can be inconsistent with the legislative purpose of the underlying statutory scheme and thereby *stale*. Recognizing that judicial interpretations of preemption can become stale in this manner and permitting a reassessment of preemption with reference to the underlying legislative purpose ensures that preemption decisions will more closely reflect congressional intent. We can think of this type of change in judicial interpretation as a reorientation. In other words, when changes in the world illuminate the newfound superfluity or obsolescence of policies and regulations once deemed essential—and thereby assigned preemptive power by courts—to the effectuation of an underlying legislative purpose, stale preemption provides a framework for courts to reorient their interpretation of a statute's preemptive scope to center the underlying statutory purpose rather than the layers of preemptive gloss applied to the regulatory and doctrinal scaffolding surrounding the statute.

Constructed in this manner, stale preemption might appear superficially as a type of statutory updating[195] or dynamic interpretation.[196] But, critically, the object of interpretation differs: Whereas statutory updating generally encompasses judicial re-interpretations of statutory *text*,[197] stale preemption involves at most the reassessment of judicial *interpretations* layered on statutory text.[198] Stale preemption is thus one step removed from statutory updating. Moreover, the justification for re-interpretation differs: Rather than revising an interpretation to reflect a change in the interpreter's impression of the appropriate balance between "original legislative expectations" and "current policies and societal conditions," as in the case of dynamic interpretation,[199] stale preemption counsels re-interpretation where new information illuminates the gap between the interpreted preemptiveness of a statute and its intended preemptiveness. In other words, stale preemption brings judicial enforcement of a statute's preemptive effect closer to the original legislative expectation. By emphasizing these distinctions, I do not intend to suggest any normative commentary on statutory updating or

195. *See* Karen Petroski, Comment, *Retheorizing the Presumption Against Implied Repeals*, 92 CALIF. L. REV. 487, 496 (2004) (describing the ways that courts can engage in statutory updating).

196. *See generally* William N. Eskridge, Jr., *Dynamic Statutory Interpretation*, 135 U. PA. L. REV. 1479 (1987) (describing dynamic statutory interpretation as incorporating current societal, political, and legal contexts).

197. *See* Petroski, *supra* note 1955, at 496–97 (explaining that courts update the statutory scheme by reinterpreting statutes themselves).

198. In particular, revisiting preemption precedent within the framework of obsolescent preemption differs fundamentally from the process of revisiting and overturning non-preemption statutory precedents. *See generally* William N. Eskridge, Jr., *Overruling Statutory Precedents*, 76 GEO. L.J. 1361 (1988). This is because the former, unlike the latter, involves inferential interpretation. That is, in the absence of an expressly delimited preemptive scope, courts infer the extent of preemption with reference to the statutory scheme. *See supra* subpart II(C).

199. *See* Eskridge, *supra* note 1966, at 1484 (discussing the dynamic model).

dynamic interpretation as theories of statutory interpretation; instead, I highlight these characteristics of stale preemption to illustrate how, despite facilitating evolving interpretation, the framework actually reinforces the principle of legislative supremacy by bending succeeding judicial interpretations of preemption closer to original legislative purpose.

Inherent in a model that understands preemption holdings—and the corresponding gap between interpreted and intended preemption—as a function of the information set at the time of decision is the assumption that courts actually avail themselves of the entire information set. Thus, one corollary arising from the model of stale preemption is that a court's failure to avail itself of the full information set at the time of decision can result in a preemption determination that is congenitally obsolete. In other words, if relevant information eludes the preemption analysis, a court may reach a conclusion about the extent of intended preemption that over or understates a statute's preemptiveness relative to the result that would have been obtained had the inquiry encompassed all relevant information.[200] In a case of first impression, we can understand such a judicial decision as simply wrong—i.e., the court reached an inexact interpretation of legislative purpose because it omitted relevant indicia of meaning from its inquiry. But when this kind of judicial interpretation builds on and improperly extends extant preemption doctrine, the subsequent preemption interpretation is wrong in a particular way. Namely, by failing to adequately avail itself of the full information set at the time of decision, and by instead relying solely on preexisting judicial interpretations of preemption, the court's preemption inquiry has aggrandized judicial inference at the expense of legislative purpose. The resulting preemption interpretation is obsolete *ab initio* because it builds on a judicial interpretation derived from an obsolete information set rather than interrogating the justifications for preemption contained within the current information set.

In producing the archetypes of stale preemption and obsolescence *ab initio*, the framework of obsolescent preemption fosters the interrelated interpretive principles of incrementalism, non-analogism, and revisitation of preemption precedents. Together, these principles inhere in the obsolescent preemption archetypes but diffuse to the preemption inquiry more broadly to the extent the framework of obsolescent preemption bears on that inquiry. By incrementalism, I mean a philosophy of interpretation that seeks to ensure a given preemption holding extends only as far as is required based on the information set at the time of decision. Non-analogism occupies a similar role to incrementalism but in a more specific way: Instead of advocating incrementalism in all directions, non-analogism is concerned with

200. *Cf.* Rodriguez & Weingast, *supra* note 107, at 1223–24 (modeling overexpansive judicial interpretation).

minimizing the use of incautious, and thereby often inapt, analogies to extend preemption. Because their adoption will lead to more restrained interpretations of statutes' preemptiveness, incrementalism and non-analogism will minimize the risk that a particular preemption decision becomes obsolescently preemptive in the future. The downside of incrementalism and non-analogism is, of course, under-preemption, but accepting the capacity of courts to revisit extant preemption holdings helps minimize this risk and separation-of-powers and federalism values counsel towards under- rather than over-preemption.[201]

Although the idea of revisiting precedent superficially might appear in tension with the ideas of incrementalism and non-analogism, I argue that revisiting precedent in the manner contemplated by this Article, in tandem with a commitment to incrementalism and non-analogism, actually reinforces judicial restraint in a separation-of-powers-reinforcing way. After all, obsolescent preemption arises when the information set on which the preemption inference depends changes such that the inference is no longer justified, or when an old information set cannot justify extending an inference of preemption to new applications—changes that arise *because of* legislative activity or executive action.[202] In these circumstances, perpetuating or extending preemption will produce outcomes inconsistent with the legislative purpose of the underlying statute;[203] consequently, to *not* revisit and reevaluate the underlying preemption inference creating such inconsistences would infringe on the political branches' authority. In this way, the specific method of revisiting precedent advocated by the obsolescent preemption framework actually reinforces judicial restraint, and, so oriented, can be understood as consistent with the interpretive principles of incrementalism and non-analogism.

D. Intrastate Obsolescent Preemption

Thus far, I have described obsolescent preemption in relation to federal preemption doctrine. This analytic orientation facilitated my articulation of the theory and applications of obsolescent preemption but does not confine its applicability to the federal context. Although intrastate preemption doctrines differ from federal preemption in critical ways[204] and exhibit significant diversity between states, the theory of obsolescent preemption

201. *See infra* subparts IV(A)–(B).

202. *See supra* subpart I(C) (defining the framework of obsolescent preemption).

203. *Cf.* Eskridge, *supra* note 198, at 1386 (describing how the Court reconsiders common-law admiralty precedent when the legal terrain evolves or the precedent produces "anomalous" results).

204. *See supra* section I(A)(2); *cf.* Diller, *Instrastate*, *supra* note 58, at 1141 (noting that only one state "has formally embraced the federal preemption taxonomy" but that "all but one state . . . recognize some form of implied preemption" and use categories similar to those recognized by the Supreme Court).

articulated in the preceding subparts can apply analogously to intrastate preemption.[205] This subpart sets forth the justification and conditions for this analogy.

I begin with the foundational sources of federal and intrastate preemption authority, the fundamental differences between which ultimately do not limit the extension of obsolescent preemption to the intrastate context. Congress's authority to preempt the states derives, of course, from the U.S. Constitution. But the Constitution says nothing about the preemptive authority of state legislatures; indeed, it is silent as to the relationship between states and municipalities.[206] In an early twentieth-century opinion, the Supreme Court interpreted this silence in line with Dillon's Rule,[207] writing that

> [m]unicipal corporations are political subdivisions of the State, created as convenient agencies for exercising such of the governmental powers of the State as may be entrusted to them . . . . The State, therefore, at its pleasure may modify or withdraw all such powers . . . . unrestrained by any provision of the Constitution of the United States.[208]

But the Court's conclusion about the legal significance of the absence of *federal* constitutional restraints on a state's authority over political subdivisions located within its borders is not the end of the story. Within the space created by the U.S. Constitution's silence on the ordering of state-municipal relations, state constitutions establish the conditions governing the exercise of state governmental authority,[209] which constrain states' dealings with their political subdivisions beyond the nonexistent constraints of the federal Constitution. For purposes of the preemption analogy, the most

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205. Not all states' intrastate preemption doctrines can accommodate a theory of obsolescent preemption. *See supra* notes 66–67 and 72 (describing state models of municipal government that impose greater restraint on the state legislature's power). Nevertheless, many intrastate preemption doctrines share the characteristics necessary to accommodate the application of obsolescent preemption, and this subpart is concerned with this majority. *Cf.* DALE KRANE, PLATON N. RIGOS & MELVIN B. HILL, JR., HOME RULE IN AMERICA: A FIFTY-STATE HANDBOOK 476–77 (2001) (describing the type of home rule in each of the fifty states).

206. *See* Outka, *supra* note 59, at 942 ("Local governments are not identified by nor do they derive power from the United States Constitution."); *see also* Hunter v. City of Pittsburgh, 207 U.S. 161, 178–79 (1907) (noting that the relationship between state legislatures and municipalities is "unrestrained" by the Constitution).

207. *See supra* note 65 and accompanying text (describing the Dillon's Rule model of municipal government).

208. *Hunter*, 207 U.S. at 178–79.

209. *See* JAMES A. GARDNER, INTERPRETING STATE CONSTITUTIONS 18 (2005) ("State constitutions . . . exist for the purpose of creating, limiting, and regulating state power and the governmental organs that exercise it."); *see also* Jonathan L. Marshfield, *Models of Subnational Constitutionalism*, 115 PENN ST. L. REV. 1151, 1159–60 (2011) (describing kinds of subnational constitutionalism made possible by different federal regimes).

relevant condition affecting the intrastate hierarchy is the extent to which a state constitution or statute provides for municipal home rule.

Today, the law of most states provides for the exercise of home-rule authority by municipalities, enabling them to pursue local policy without specific state authorization.[210] Municipalities come into their home rule authority by either state constitutional provision or legislative enactment, which also sets forth the conditions under which the state legislature can preempt municipal action.[211] These state constitutional provisions and statutes play the same role in the intrastate preemption framework as principles of federalism and the Tenth Amendment play in the federal preemption framework; each sets forth the foundational rule that structures the inferior government's capacity to govern—a rule necessarily defined in relation to other provisions of the foundational texts that set forth the superior government's capacity to govern.[212] Thus, in addition to defining the lawmaking authority of municipal governments vis-à-vis the lawmaking authority of the state government, these definitional texts—be they constitutional provisions or statutes—also provide the legal backbone of the state government's preemption authority and the rules that govern state courts' evaluation and demarcation of competing authority.[213]

Comparing the sources of inferior governmental power at the state versus federal levels—in affirmative grants of home rule authority via constitution or statute at the state level, and in the reservation of all unenumerated powers at the federal level—one might think that the preemptive power of the superior government vis-à-vis the inferior government is necessarily stronger at the state versus federal level, thereby diminishing the force of the analogy between federal and intrastate preemption in a manner relevant to obsolescent preemption's intrastate applicability. This impression, based on a superficial comparison of the sources of authority as well as the Supreme Court's longstanding (federal) constitutional holding that municipalities are merely conduits of state power, is both understandable and ultimately orthogonal to obsolescent

210. *See* KRANE, RIGOS & HILL, *supra* note 2045, at 476–77; Diller, *Reorienting*, *supra* note 67, at 1066; Richard C. Schragger, *The Political Economy of City Power*, 44 FORDHAM URB. L.J. 91, 103 (2017); Diller, *Intrastate*, *supra* note 58, at 1126–27. *See generally* Lynn A. Baker & Daniel B. Rodriguez, *Constitutional Home Rule and Judicial Scrutiny*, 86 DENV. U. L. REV. 1337 (2009) (describing the extent of the adoption of constitutional home rule doctrine within different state courts).

211. *See* Diller, *Reorienting*, *supra* note 67, at 1066–67 (discussing imperio home rule); *see also* Fox, *supra* note 77, at 577, 591–93 (describing different home-rule frameworks).

212. *See* Diller, *Reorienting*, *supra* note 67, at 1067 (describing the kinds and sources of municipal authority within state constitutional and statutory frameworks).

213. *See* Fox, *supra* note 77, at 577 (describing how home rule power is subject to override through state legislation).

preemption's intrastate applicability.[214] Obsolescent preemption is concerned with judicial enforcement of the superior legislature's *implied* preemption power in areas where the inferior government also claims regulatory authority. Though the sources of these competing authorities differ in kind, in practice, state and federal courts mediate the contest between them in the same manner, leading to intrastate implied preemption doctrines that are sufficiently like federal implied preemption doctrine for the principles of obsolescent preemption that apply at the federal level to apply at the intrastate level, too.[215] Consequently, even if state law permits the state legislature to aggressively preempt municipal regulatory authority,[216] this capacity does not, by itself, create a presumption of preemption or necessarily imbue a particular, contested legislative enactment with preemptive effect. Because obsolescent preemption is concerned with the specific legislative purpose underlying a discrete statutory scheme, the critical factors justifying its applicability in the intrastate context are the extent to which intrastate preemption doctrine recognizes and allows for a doctrine of implied preemption and the extent to which state courts examine legislative purpose to determine the preemptive effect of a statutory scheme. While not all states' preemption doctrines exhibit these characteristics, enough do for obsolescent preemption to be relevant in the intrastate context, too.[217]

III. Applying Obsolescent Preemption: Subnational Climate Action

As I have described it, obsolescent preemption offers a sovereignty- and separation-of-powers-reinforcing framework for judicial review whose power lies in its ability to force courts to do less in the long run—e.g., damage, disruption, misinterpretation—by doing more at the outset. In other words, by pursuing a rigorous inquiry into a statute's intended preemptive scope whenever called upon to do so and by being prepared to revisit

214. Moreover, federal preemption power appears to be stronger, and intrastate preemption is often weaker, than the superficial technical comparison intimates. On one hand, whereas the federal Constitution grants Congress specific, enumerated powers, and through the Eleventh Amendment reserves all unenumerated powers to the states, Congress exercises its enumerated powers expansively. *See supra* note 62. And, on the other hand, even though municipalities receive home rule authority through affirmative grants, these delegations are generally "often quite broad and . . . rarely revoked." Briffault, *supra* note 9, at 1318. *But see supra* subpart I(B) (discussing recent developments in which some state legislatures seek to minimize local governmental authority).

215. *See* Diller, *Intrastate*, *supra* note 58, at 1126–27, 1141–42, 1154–55 (noting how implied preemption has become the "primary battleground" for delineating the scope of local power and describing state approaches to conflict and field preemption).

216. *See* Nestor M. Davidson & Richard C. Schragger, *Do Local Governments Really Have Too Much Power? Understanding the National League of Cities'* Principles of Home Rule for the 21st Century, 100 N.C. L. REV. 1385, 1389 (2022) ("All states permit fairly aggressive preemption of local laws").

217. *See* Diller, *Intrastate*, *supra* note 58, at 1141, 1146–47, 1150, 1156–57 (describing intrastate implied preemption doctrine).

obsolescently preemptive decisions, courts will reach contemporary conclusions about preemption that better reflect legislative objectives and better preserve subnational governments' regulatory autonomy. While this kind of sweeping interrogation of congressional purpose is generally disfavored in favor of strict textual analysis,[218] I suggest that the nature of preemption doctrine actually requires the opposite practice. Specifically, the theory of obsolescent preemption suggests that, within the inherently purposivist framework of preemption,[219] *ignoring* relevant indicia of purpose in favor of judicial construction of text or extrapolation of existing judge-created implied preemption holdings subverts the balance of powers so as to elevate judicial policymaking above legislative policy. Oriented in this way, obsolescent preemption provides a road map for litigants seeking to invoke the theory and for courts seeking to apply it.

This Part considers the relevance of obsolescent preemption to subnational climate action, a phenomenon that burgeoned during the Trump Administration as federal climate policy languished[220] in the face of an increasingly dire climate outlook.[221] Against this vacuum of federal leadership and the urgent need for climate action, states and municipalities enthusiastically stepped into the roles of climate protector and enforcer.[222] Even now, at the conclusion of the Biden Administration, grim reports about climate change continue to blanket front-page news[223] and federal climate

218. *See supra* notes 153–58 and accompanying text.

219. *See supra* notes 31–34, 153–58 and accompanying text.

220. *See, e.g.*, Nadja Popovich, Livia Albeck-Ripka & Kendra Pierre-Louis, *The Trump Administration Rolled Back More than 100 Environmental Rules. Here's the Full List.*, N.Y. TIMES (Jan. 20, 2021), https://www.nytimes.com/interactive/2020/climate/trump-environment-rollbacks-list.html [https://perma.cc/MD8K-XWKR] (documenting the Trump Administration's deregulatory approach to climate).

221. *See, e.g.*, U.S. GLOBAL CHANGE RESEARCH PROGRAM, *Report-in-Brief* at 11–12, *in* 2 FOURTH NATIONAL CLIMATE ASSESSMENT: IMPACTS, RISKS, AND ADAPTATION IN THE UNITED STATES (2018); INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE, *Summary for Policymakers* at 11, *available in* GLOBAL WARMING OF 1.5 ºC (2018), http://www.ipcc.ch/report/sr15 [https://perma.cc/74ML-9YFG].

222. *See, e.g.*, Fox, *supra* note 1, at 135 (introducing the ways local governments have protected the environment at the onset of the Trump Administration); C40 Cities Press Release, *One Year After Trump Decision to Withdraw from Paris Agreement, U.S. Cities Carry Climate Action Forward*, C40 (June 1, 2018), https://www.c40.org/news/one-year-after-trump-decision-to-withdraw-from-paris-agreement-u-s-cities-carry-climate-action-forward/ [https://perma.cc/RC8V-CFDP] (documenting affirmative subnational climate action); *e.g.*, sources cited *supra* notes 6, 13 and 17.

223. *E.g.*, Damian Carrington, *Gulf Stream could collapse as early as 2025, study suggests*, GUARDIAN (July 26, 2023, 11:00 AM), https://www.theguardian.com/environment/2023/jul/25/gulf-stream-could-collapse-as-early-as-2025-study-suggests [https://perma.cc/M4NF-UT2U]; Scott Dance, *Earth is at its hottest in thousands of years. Here's how we know.*, WASH. POST. (July 8, 2023, 6:00 AM), [https://perma.cc/C44R-FUVC]; David Gelles, *Climate Disasters Daily? Welcome to the 'New Normal.'*, N.Y. TIMES (July 10, 2023), https://www

action—though greatly improved relative to the prior Administration—is still insufficient to meet U.S. emissions targets under the 2015 Paris Agreement.[224] To actually achieve those targets and keep the goal of only 1.5 degrees of warming alive,[225] additional climate mitigation efforts by states and municipalities are necessary.[226]

Many subnational governments are actively engaging in these efforts. But preemption remains a consistent concern.[227] This Part focuses on two examples of subnational climate action that have been challenged as preempted—gas infrastructure bans and climate-tort litigation—and considers how a theory of obsolescent preemption could alter the preemption inquiry therein. Subpart A describes the case of a municipal gas ban in Brookline, Massachusetts to illustrate how obsolescent preemption can impair subnational governments' abilities to enact regulatory polices far outside the scope of regulation clearly contemplated by the legislature that enacted it.[228] Subpart B then considers the lessons obsolescent preemption holds for the upcoming disputes over Clean Air Act preemption in the climate

.nytimes.com/2023/07/10/climate/climate-change-extreme-weather.html [https://perma.cc/KXY2-QV82].

224. *See* Frances Colón, Anne Christianson & Cassidy Childs, *How the Inflation Reduction Act Will Drive Global Climate Action*, CAP 20, CTR. FOR AM. PROGRESS (Aug. 17, 2022), https://www.americanprogress.org/article/how-the-inflation-reduction-act-will-drive-global-climate-action/ [https://perma.cc/7B9D-H982] ("With the Inflation Reduction Act, the United States will be significantly closer to meeting its Paris Agreement commitment.").

225. *The Paris Agreement*, U.N.F.C.C.C., https://unfccc.int/process-and-meetings/the-paris-agreement [https://perma.cc/4AB6-3AFG].

226. *See* Colón et al., *supra* note 2244 (observing that state action would put the goal of fifty-percent reduction "within reach"); Anna McGinn, *What the Inflation Reduction Act Means for U.S. Engagement at the U.N. Climate Talks*, ENVT'L. & ENERGY STUDY INST. (Oct. 18, 2022), https://www.eesi.org/articles/view/what-the-inflation-reduction-act-means-for-u.s-engagement-at-the-u.n-climate-talks [https://perma.cc/BJB6-URU8] (noting the gap between U.S. emissions reductions targets and projected reductions under the Inflation Reduction Act); Johannes Friedrich, Mengpin Ge & Alexander Tankou, *8 Charts to Understand US State Greenhouse Gas Emissions*, WORLD RES.S INST. (Aug. 17, 2021), https://www.wri.org/insights/8-charts-understand-us-state-greenhouse-gas-emissions [https://perma.cc/K6PT-WRCB] (highlighting the necessity and opportunities for additional emissions reductions at the subnational level).

227. *See supra* notes 13–21.

228. I focus on the Brookline case, and not the Ninth Circuit's decision in *Cal. Rest. Ass'n v. City of Berkeley*, 65 F.4th 1045 (9th Cir. 2023), *en banc denied*, 89 F.4th 1094 (2024), because the latter represents an example of obsolescence *ab initio*, see *supra* subpart II(C), that raises similar issues as the cases discussed in subpart III(B). As noted in Judge Friedland's extraordinary dissent from the en banc court's denial of rehearing en banc in *City of Berkeley*, which seven other active judges joined, the panel only reached its "erroneous[]" holding by "misinterpret[ing] the statute's key terms to have colloquial meanings instead of the technical meanings required by established canons of statutory interpretation." 89 F.4th, at 1120 (9th Cir. 2024) (Friedland, J., dissenting); *see also id.* at 1119 ("In nearly a decade on the bench, I have never previously written or joined a dissent from a denial of rehearing en banc. I feel compelled to do so now to urge any future court that interprets the Energy Policy and Conservation Act not to repeat the panel opinion's mistakes." (footnote omitted)); *id.* at 1126 (statement of Senior Circuit Judges Berzon, Paez, and Fletcher agreeing with Judge Friedland).

accountability lawsuits.[229] Using these case studies, I explore how the framework of obsolescent preemption could alter courts' preemption inquiry to better respect subnational autonomy, legislative purpose, and the separation of powers.

A. Case Study: Brookline, Massachusetts's Gas Ban

To read the news, one might think that every city in the United States is trying to pass a gas ban.[230] Proponents of the bans view them as a way of mitigating greenhouse gas emissions and protecting individual health by reducing indoor air pollution;[231] opponents describe them as government overreach—even when the effect of any ban would be negligible or nonexistent.[232] The gas bans that various cities and states have actually adopted are more nuanced than any news headline can adequately reflect. But the public's tendency to transmogrify gas bans into something beyond what their drafters intended appears to extend even to the courts that have considered preemption challenges to gas bans, as illustrated in the case of the gas ban adopted by Brookline, Massachusetts.

In November 2019, the Town of Brookline, Massachusetts invoked its home rule authority and police powers to adopt a by-law prohibiting fossil fuel infrastructure in most new construction.[233] The by-law's stated purposes included "protect[ing] the health and welfare of the inhabitants of the town from air pollution, including that which is causing climate change and thereby threatens the Town and its inhabitants,"[234] and "support[ing] the Brookline Climate Action Plan[,] which states the Town's intention to

229. *See supra* notes 17–21 and accompanying text.

230. Concerns about gas stoves (and gas stove bans) have even migrated into consumer-focused periodicals. *E.g.*, Alia Akkam & Tim Nelson, *Wait, What's Going On with the Gas Stove Ban?* ARCH. DIG. (May 4, 2023), https://www.architecturaldigest.com/story/whats-going-on-with-the-gas-stove-ban [https://perma.cc/4TP9-2UVE]; Sam Stone, *NY Approves Statewide Gas Stove Ban in New Buildings*, BON APPETIT (May 3, 2023), https://www.bonappetit.com/story/gas-stove-ban-new-york-state [https://perma.cc/HK58-LVE5]; Johnny Brayson, *Are Gas Stoves Going to Be Banned? Here's What You Need to Know*, GEARPATROL (Aug. 21, 2023), https://www.gearpatrol.com/home/a42534412/gas-stove-ban/ [https://perma.cc/WD5F-VEGF].

231. *See generally* Aaron Regunberg, *Taking On "Now We're Cooking with Gas": How a Health-First Approach to Gas Stove Pollution Could Unlock Building Electrification*, HARV. ENV'T L. REV. ONLINE (Aug. 29, 2022), https://journals.law.harvard.edu/elr/2022/08/29/taking-on-now-were-cooking-with-gas-how-a-health-first-approach-to-gas-stove-pollution-could-unlock-building-electrification/ [https://perma.cc/G784-S4GE] (exploring the role "gas stoves play in the climate crisis" and the need for regulation of indoor pollution).

232. *See, e.g.*, Sam Sachs, *Only 8% of Floridians Have Gas Stoves, But DeSantis Promises to Fight Potential Ban*, WFLA: NEWSCHANNEL8 (Feb. 2, 2023, 2:11 PM), https://www.wfla.com/news/politics/only-8-of-floridians-have-gas-stoves-but-desantis-promises-to-fight-potential-ban/ [https://perma.cc/U9B9-KFJS].

233. Brookline By-Law, *supra* note 13, at 1, 11.

234. *Id.* at 12.

reduc[e] its greenhouse gas emissions to zero by 2050."[235] Before the by-law could go into effect, however, the Massachusetts attorney general (AG) disapproved[236] it as impliedly preempted by the state Building Code,[237] the Gas Code,[238] and Chapter 164 of the Massachusetts General Laws, which regulates the sale and distribution of natural gas in the commonwealth.[239]

The AG's reasoning was largely the same across the three sources of law. Invoking nearly century-old precedent stating that "[w]here there is 'importance in uniformity in the law to govern the administration of the subject[, a] statute of that nature displays on its face an intent to supersede local . . . laws,'"[240] the AG reasoned that the Building and Gas Codes and Chapter 164 each independently impliedly preempted Brookline's by-law because each statutory scheme exhibited a goal of uniformity with which the by-law supposedly interfered.[241]

But while the aforementioned statutory schemes *do* mention uniformity,[242] fixating on these discrete references obfuscates the purposes

235. *Id.* at 2.

236. MLU Decision 1, *supra* note 15, at 2 (disapproving Brookline's by-law). In Massachusetts, *town* bylaws must be approved by the attorney general before they can take effect. MASS. GEN. LAWS ch. 40, § 32. Towns can challenge the AG's disapproval in court. MASS. GEN. LAWS ch. 249, § 4. *City* ordinances, by contrast, do not require AG approval and their effectiveness is governed by each city's charter. Forbes v. City of Woburn, 27 N.E.2d 733, 734–35 (Mass. 1940). After the AG disapproved Brookline's first by-law, the town passed a second by-law using its zoning authority, which the AG disapproved for the same reasons. *See* Decision in Case No. 10315 (Mass. Attorney General, Municipal Law Unit Feb. 25, 2022) at 1, 3–4. In March 2023, a Massachusetts trial court upheld the AG's disapproval. Town of Brookline v. Healy, No. 2282CV00400, WL 3095136, at *8 (Mass. Super. Ct. 2023).

237. MASS. GEN. LAWS ch. 143, § 95; *see* St. George Greek Orthodox Cathedral v. Fire Dep't of Springfield, 967 N.E.2d 127, 134 (Mass. 2012) (holding that the Building Code field preempts a municipal fire safety regulation).

238. MASS. GEN. LAWS ch. 142, § 13; *see also id.* ch. 143, § 96 (incorporating the Gas Code into the Building Code). Hereafter, I refer to the "Building Code" to signify both the Gas Code and the Building Code.

239. MASS. GEN. LAWS ch. 164; *see* Bos. Gas Co. v. City of Somerville, 652 N.E.2d 132, 134 (Mass. 1995) (holding that Chapter 164 preempts a municipal sidewalk excavation regulation).

240. MLU Op. 1, *supra* note 15, at 4 (quoting McDonald v. Justices of Super. Ct., 13 N.E.2d 16, 17 (Mass. 1938)).

241. *Id.* at 4 (Building Code), 8 (Gas Code), 10 (Chapter 164).

242. The statute creating the Building Code, for example, identifies as one of its objectives the establishment of "*[u]niform* standards and requirements for construction and construction materials, compatible with accepted standards of engineering and fire prevention practices, energy conservation and public safety." MASS. GEN. LAWS ch. 143, § 95(a) (emphasis added). And the Massachusetts Supreme Judicial Court (SJC) previously held that the legislative history of the Building Code "evince[s] a clear legislative intent . . . to create uniform standards . . . for the construction of buildings and materials used therein." *St. George*, 967 N.E.2d at 132 (omissions in original). The statute creating the Gas Code, too, authorizes the state gas board to promulgate "rules and regulations relative to gas fittings in buildings . . . , which . . . shall be reasonable, *uniform*, based on generally accepted standards of engineering practice, and designed to prevent fire, explosion, injury and death, and not inconsistent with rules and regulations [promulgated under Chapter 164]." MASS. GEN. LAWS ch. 142, § 13 (emphasis added). And Chapter 164, as a statute

the legislature intended uniformity to serve. For example, the provision of the Building Code that mentions its objective of uniform building standards associates that policy of uniformity with "accepted standards of engineering and fire prevention practices, energy conservation and public safety."[243] Likewise, the history of Chapter 164 shows that its policy of uniformity is directed towards preventing municipalities from imposing disparate regulatory burdens on the operation of utility companies[244] or interfering with the state licensing and rate-setting schemes for utilities.[245] To the extent uniformity is essential to these legislative purposes, it is thus better viewed as an essential mechanism for effecting these purposes rather than a legislative objective in and of itself.[246]

The AG's perfunctory invocation of the "importance of uniformity" elides the distinction between uniformity as a means to an end and as an end in and of itself. In so doing, the AG opinion mirrors case law in which the Massachusetts Supreme Judicial Court (SJC) invoked a nebulous policy of uniformity to hold municipal laws impliedly preempted.[247] But, in those cases, the municipal laws at issue aimed directly at the regulatory targets on which the Building Code and Chapter 164 also operated.[248] The purpose of Brookline's by-law, by contrast, is neither the regulation of building

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regulating the operation of gas utilities in the commonwealth, has been held to manifest a "fundamental State policy of ensuring *uniform* and efficient utility services to the public." *Bos. Gas*, 652 N.E.2d at 134 (emphasis added); *see also* New Eng. Tel. & Tel. Co. v. City of Lowell, 343 N.E.2d 405, 407 (Mass. 1976) (collecting case law documenting "the desirability of uniformity of standards applicable to utilities regulated by the Department of Public Utilities").

243. MASS. GEN. LAWS, ch. 143 § 95.

244. *See Boston Gas*, 652 N.E.2d at 134 (holding preempted a city ordinance that would have required a utility company to employ certain contractors, use certain materials and tools, and maintain responsibility for an excavation site beyond the date required by Chapter 164); *New England Telephone*, 343 N.E.2d at 407 (holding preempted a city ordinance that required utilities to employ registered engineers for certain jobs).

245. *See, e.g.*, Bos. Edison Co. v. City of Boston, 459 N.E.2d 1231, 1233–34 (Mass. 1984) (holding utility regulation authorizing interest charges on overdue state and municipal accounts preempts city ordinances); Pereira v. New England LNG Co., 301 N.E.2d 441, 447 (Mass. 1973) (affirming the authority of Department of Public Utilities to regulate gas companies).

246. For example, National League of Cities argues that states themselves must expressly articulate a substantial state interest that is narrowly tailored:

> It is not enough for a state simply to decry the lack of uniformity, as local variation is inherent to any regime of home rule. Indeed, courts adjudicating conflicts between states and local governments should not simply defer to a statement of state interests; rather, it is important that the state bear the burden of demonstrating the state interest that justifies displacing local authority and that the given state interference with local democracy is *narrowly tailored*.

Principles of Home Rule for the 21st Century, 100 N.C. L. Rev. 1329, 1345 (2022) (emphasis added).

247. *St. George*, 967 N.E.2d at 134–35; *Boston Gas*, 652 N.E.2d at 134.

248. *St. George*, 967 N.E.2d at 129, 134 (considering a municipal law aimed at the same targets as the Building Code); *Boston Gas*, 652 N.E.2d at 134 (considering a municipal law aimed at the same targets as Chapter 164).

materials to ensure structural integrity nor the operational behavior of regulated utility monopolies. Instead, its objective is the elimination of fossil fuel emissions from new construction to achieve the Town's emissions reduction targets and improve public welfare with respect to air quality. By reflexively invoking a longstanding yet amorphous policy of uniformity, the AG avoided grappling with these disparate purposes and the interpretive impact of intervening statutory adjustments,[249] arguably reaching an unduly expansive interpretation of the statutes' preemptive scopes.[250]

Obsolescent preemption provides a framework for how the AG could have evaluated the preemptedness of Brookline's by-law, and how an appellate court can approach the question if it is called upon to consider the preemptiveness of the Building Code and Chapter 164 with respect to municipal laws directed at regulatory targets outside the core purposes of those statutes. In particular, instead of relying on longstanding judicial refrains of uniformity in Building Code and Chapter 164 case law, courts[251] evaluating municipal law with facially ancillary relations to these statutes' purposes should consider the *current* regulatory regime in which those statutes reside and evaluate whether the allegedly preempted municipal law actually inhibits the statutory purposes expressed therein. In so doing, courts must pay attention to the entire statutory scheme, including how the executive branch administers the statute and intervening legislative amendments to the overarching scheme. Courts should also consider whether a municipal law is at odds with the actual legislative objective of the statutory scheme or simply with a policy of uniformity previously deemed essential to effecting that legislative objective.[252]

These are just some of the considerations implicated by the theory of obsolescent preemption. And while the answers to these questions likely would not have changed the outcome of the SJC cases on which the AG relied,[253] they suggest a different conclusion in the Brookline case. First, to the extent that ensuring uniform *consumer access* to gas across municipalities was ever a legislative purpose embodied in Chapter 164 and the Building

249. *See infra* notes 252–54 and accompanying text.

250. In addition to repeating the aforementioned errors, the Massachusetts trial court that affirmed the AG's opinion went even further by failing to consider how recent legislative changes had altered the statutory scheme. *See* Town of Brookline v. Healy, No. 2282CV00400, 2023 WL 3095136, at *7 (considering only the Climate Act and the Drive Act). Specifically, in 2022, the Massachusetts legislature passed a law creating a pilot program that allows ten municipalities to require that new construction projects be "fossil fuel-free." An Act Driving Clean Energy and Offshore Wind, 2022 Mass. Acts ch. 179 § 84 [hereinafter Gas Ban Pilot Law].

251. I use courts as a shorthand for both the judiciary and the AG's Municipal Law Unit.

252. *Cf.* National League of Cities, *supra* note 2466, at 1345 (suggesting that state law should be required to "articulate the substantial state interest at issue" and "narrowly tailor[]" preemptive law to further that interest).

253. *See supra* note 246 and accompanying text.

Code statute, subsequent legislative enactments have modified the regulatory scheme to permit municipal disuniformity in consumer access to gas,[254] indicating that uniformity per se cannot be an animating purpose of the statutory schemes. These recent changes in the statutory scheme suggest that Chapter 164 and the Building Code are stalely preemptive with respect to at least some municipal actions that affect consumer access to gas. Second, the purposes for which courts initially deemed uniformity relevant to municipal gas regulation no longer require uniform gas access to achieve.[255] Because actual uniformity's assumed necessity to achieving these purposes informed courts' initial interpretation of the statutes' textual references to uniformity, the modern dispensability of actual uniformity now renders those interpretations stale. Third, expansively interpreting the scope of Chapter 164 to encompass the regulation of gas *consumption* rather than simply the regulation of gas *distribution* creates tension with more recent legislation that requires sweeping reductions in fossil fuel consumption.[256] In other words, the extension of Chapter 164 and the Building Code preemption to a new area—preemption of local action affecting gas consumption, and not just gas distribution—without considering the effect of recent legislation on those statutes' preemptiveness may have created obsolete *ab initio* preemption.

B. Road Map for the Future: Climate Accountability Lawsuits

During the first year of the Trump Administration, a wave of municipalities and eventually two states began filing climate accountability lawsuits in state courts against producers of fossil fuel products.[257] The choice of forum and defendant distinguishes this generation of climate-tort lawsuits from prior iterations. Instead of suing greenhouse-gas (GHG) *emitters* for creating an interstate nuisance via their GHG emissions,[258] the plaintiffs modeled their theory of tort liability on the tobacco litigation of the

254. *See, e.g.*, Gas Ban Pilot Law, *supra* note 2500 (allowing ten municipalities to adopt nonuniform regulations); *cf.* Global Warming Solutions Act, ch. 298, 2008 Mass. Acts 1157 *codified at* MASS. GEN. LAWS ch. 21N (requiring that emissions be reduced by 80% below 1990 levels by 2050) [hereinafter GWSA]. The GWSA requires the Massachusetts Department of Environmental Protection to promulgate binding, enforceable emissions limits. Kain v. Dep't of Env't Prot., 49 N.E.3d 1124, 1136 (Mass. 2016).

255. *See, e.g.*, Bos. Gas Co. v. City of Newton, 682 N.E.2d 1336, 1340 (Mass. 1997) (describing the purpose of Chapter 164 as ensuring the safe and efficient distribution of gas); St. George Greek Orthodox Cathedral v. Fire Dep't of Springfield, 967 N.E.2d 127, 133–34 (Mass. 2012) (describing the Building Code as setting comprehensive standards to ensure safety and cost effectiveness).

256. *E.g.*, GWSA, *supra* note 254; *Kain*, 967 N.E.3d at 1142; *see also* New Eng. Power Generators Ass'n, Inc. v. Dep't of Env't Prot., 105 N.E.3d 1156, 1158 (Mass. 2018) (observing that the GWSA "establish[ed] significant, ambitious, legally binding, short- and long-term restrictions on [GHG] emissions") (citation omitted).

257. *See* sources cited *supra* notes 17–20 and accompanying text.

258. *E.g.*, Am. Elec. Power Co. v. Connecticut (AEP), 564 U.S. 410 (2011).

1990s,[259] alleging that the defendant-*producers* of fossil fuel products created a nuisance and engaged in deceptive practices via their marketing of those products. And, because they seek a remedy for harms caused by deceptive marketing practices rather than an emissions nuisance, the plaintiffs' nuisance claims arise under state common law rather than the federal laws that govern interstate pollution-based nuisance claims.[260] After years of litigating jurisdictional disputes in federal court,[261] the climate-tort suits have begun to proceed in state court. In motions to dismiss filed in two of the cases so far, the fossil fuel defendants have argued that the plaintiffs' claims are preempted under at least two theories of preemption.[262] Obsolescent preemption is useful in evaluating both theories.

One theory posits that the plaintiffs' claims are simply interstate-nuisance claims based on nuisance emissions rather than nuisance-marketing claims, and that federal common law preempts state-law nuisance claims.[263] But the Supreme Court held in *American Electric Power v. Connecticut* (*AEP*)[264] that the enactment of the Clean Air Act (CAA) displaced any federal common law of interstate nuisance, and the displacement of federal common law by legislation necessarily extinguishes that substantive body of law.[265] Thus, to whatever extent federal common law ever could have

259. *See generally* Martin Olszynski, Sharon Mascher & Meinhard Doelle, *From Smokes to Smokestacks: Lessons from Tobacco for the Future of Climate Change Liability*, 30 GEO. ENV'T L. REV. 1 (2017). The recent JUUL, opioid, and AR-15 litigation offer other examples of product-based nuisance claims. *See* Leslie Kendrick, *The Perils and Promise of Public Nuisance*, 132 YALE L.J. 702, 727 & n.129, 731–36 (2023) (describing the litigation strategy and outcomes in recent opioid litigation, comparing opioid litigation to tobacco litigation, and briefly discussing firearm public-nuisance litigation); Nora Freeman Engstrom & Robert L. Rabin, *Pursuing Public Health Through Litigation*, 73 STAN. L. REV. 285, 280–90, 324–25 (2021) (surveying and comparing tobacco and opioid nuisance litigation and briefly discussing recent JUUL litigation).

260. *See AEP*, 564 U.S. at 423 (noting that "a federal common-law claim for curtailment of greenhouse gas emissions because of their contribution to global warming . . . would be displaced by" the Clean Air Act); *cf.* Illinois v. City of Milwaukee (*Milwaukee I*), 406 U.S. 91, 105 (1972) (recognizing that rights in interstate waters are a question of federal common law).

261. *See supra* notes 17–18 and accompanying text.

262. Shell Petition, *supra* note 18, at i (question 1); Suncor MTD, *supra* note 19, at 4; Delaware MTD, *supra* note 19, at 25, 27–31.

263. *E.g.*, Suncor MTD, *supra* note 19, at 1; Delaware MTD, *supra* note 19, at 12–13, 19.

264. 564 U.S. at 424.

265. *Id.* at 423; *accord* City of Milwaukee v. Illinois (*Milwaukee II*), 451 U.S. 304, 313–14 (1981) ("Federal common law is a 'necessary expedient,' and when Congress addresses a question previously governed by . . . federal common law the need for such an unusual exercise of lawmaking by federal courts disappears.") (citations omitted); City of Honolulu v. Sunoco LP, 537 P.3d 1173, 1195, 1199 (Haw. 2023); *see also* Brief for the United States, *supra* note 19, at 13 (making this argument).

preempted the plaintiffs' state-law claims, the federal common law of nuisance is only stalely preemptive in light of the CAA.[266]

The defendants' second theory posits that the CAA preempts the plaintiffs' tort claims for the same reasons that the Supreme Court deemed the Clean Water Act (CWA) to impliedly preempt pollutant-nuisance claims against pollutant-source states that arise under the law of an affected non-source state.[267] They contend that both the CAA and CWA establish comprehensive, carefully delineated regulatory schemes whose careful balance would be upset by emissions-nuisance claims.[268] But, in addition to ignoring the plaintiffs' non-nuisance causes of action,[269] this analogy rests on a mischaracterization of the plaintiffs' nuisance claims as emissions-nuisance claims rather than marketing-nuisance claims.[270] Properly viewed, it becomes clear that the nuisance claim at the heart of the climate-tort litigation is not comparable to the nuisance claim that the Court determined would upset the CWA's delicate regulatory balance.[271] Moreover, even though the CAA establishes an extensive regulatory framework that applies to emissions of air pollutants, it does not establish a framework for marketing fossil fuels. This distinction is critical because the Supreme Court has made clear that comprehensive regulation of a product does not foreclose tort claims arising from the marketing of that product unless Congress manifests intent to preclude marketing-based claims.[272]

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266. *See AEP*, 564 U.S. at 429 (holding that because the CAA "displaces federal common law, the availability *vel non* of a state lawsuit depends, *inter alia*, on the preemptive effect of the [CAA]"); *accord Sunoco*, 537 P.3d at 1199–1200 (holding the same).

267. *See* Int'l Paper Co. v. Ouelette, 479 U.S. 481, 494 (1987) (holding that the CWA preempts pollutant-nuisance claims brought under an affected state's laws against an out-of-state source).

268. *E.g.*, Shell Petition, *supra* note 18, at i (question 2); *id.* at 23–24; Delaware MTD, *supra* note 19, at 25–28; Suncor MTD, *supra* note 19, at 4, 4 n.5.

269. To the extent the defendants acknowledge this distinction, they do so while arguing that "there is no way to trace any injury suffered [by the subnational plaintiff State] to alleged failures to warn or misrepresentations," and that "[i]t is beyond dispute that 'the *singular source* of [Plaintiff's] harm' is . . . nationwide greenhouse gas emissions . . . and worldwide emissions." Delaware MTD, *supra* note 19, at 30. However, this argument about traceability goes to the merits of the plaintiffs' claims, not to the preemption of those claims by the CAA.

270. *See, e.g.*, *Sunoco*, 537 P.3d at 1204–05 ("[T]he City's claims do not seek to regulate emissions . . . . [T]heir claims arise from Defendants' alleged failure to warn and deceptive marketing conduct . . . ."); Suncor MTD, *supra* note 19, at 4 (characterizing plaintiffs' injuries as "allegedly caused by interstate emissions"); Delaware MTD, *supra* note 19, at 27–29 (similarly describing plaintiff's alleged harms as "arising from interstate greenhouse gas emissions"); *see generally* Rachel Rothschild, *State Nuisance Law and the Climate Change Challenge to Federalism*, 27 N.Y.U. ENV'T L.J. 412, 438–54 (2019) (arguing that existing precedent interpreting the Clean Air Act should not preempt state marketing-nuisance lawsuits).

271. *See* Rothschild, *supra* note 270, at 450–54 (arguing that the climate change lawsuits are different than the nuisance claim at issue in *Ouellette*); *Ouellette*, 479 U.S. at 494.

272. Prescription drugs, for example, are extensively regulated, and yet the Supreme Court has held that the Federal Food, Drug & Cosmetic Act (FDCA) does not manifest congressional intent to preempt all state-law claims related to deceptive marketing. Wyeth v. Levine, 555 U.S. 555, 573

Principles of obsolescent preemption counsel against expanding CAA preemption beyond claims aimed at reducing emissions directly to encompass suits aimed at staunching the deceptive marketing of fossil fuels. Because the CAA by its text does not apply to marketing, extending its preemptive scope in this direction would represent a significant interpretive leap and aggressive exercise of the judicial role in effecting preemption, creating obsolescence *ab initio*. At minimum, the differences between the marketing-nuisance claims raised in the climate-tort litigation and the emissions-nuisance claims at issue in *International Paper* counsel against a surface-level analogy between the comprehensive enforcement regime created by the CWA and deemed preemptive in *International Paper* and the emissions regulation regime created by the CAA.[273] And a full application of obsolescent preemption counsels much deeper engagement with the legislative objectives of the CAA in order to determine whether any part of that Act is truly aimed at preventing subnational governments from enforcing state laws against corporate deception.

To facilitate reviewing courts' ability to apply obsolescent preemption, the subnational-government plaintiffs can present comprehensive histories of the entire statutory scheme that illustrate the chasm between the purposes of the CAA and state business-practices laws. Litigants can invoke the separation-of-powers and federalism-reinforcing properties of obsolescent preemption and appeal to principles of judicial restraint as they urge courts to recognize the disparate purposes of these laws—and thus the CAA's lack of preemptive effect with respect to climate-tort claims grounded in deceptive business practices. Courts can and should heed these entreaties; to do otherwise would aggrandize the judiciary at the expense of multiple legislative bodies, violating principles of federalism and separation of powers.

(2009); *accord* Merck Sharp & Dohme Corp. v. Albrecht, 139 S. Ct. 1668, 1676–78 (2019) ("[The Court] . . . found nothing within that history to indicate that the FDA's power to approve or to disapprove labeling changes, by itself, pre-empts state law."); *see also* Engstrom & Rabin, *supra* note 259, at 335–36 (noting that state law claims may be preempted where there is a comprehensive regulatory scheme). Instead, the FDCA coexists with whatever duties exist under state law for drug companies to "provide a warning that adequately describe[s] th[e] risk" of their product. *Albrecht*, 139 S. Ct. 1668, 1677 (alteration in original) (citing to *Wyeth*, 555 U.S. at 573); *cf.* Cipollone v. Liggett Grp., Inc., 505 U.S. 504, 524–25 (1992) (holding that some failure to warn claims were preempted but others were not). Moreover, in the years since the CAA was enacted and amended, Congress has exercised its authority to preempt deceptive marketing claims against certain defendants. *E.g.*, Protection of Lawful Commerce in Arms Act, Pub. L. No. 109-92, 119 Stat. 2095 (2005). Despite reports of industry lobbying for a similar immunity from liability, no such protection has been granted to companies marketing fossil fuels. *See* Adam Lowenstein, *Meet the DC Thinktank Giving Big Oil 'The Opportunity to Say They've Done Something,'* GUARDIAN (July 9, 2023, 5:00 AM), https://www.theguardian.com/us-news/2023/jul/09/climate-leadership-council-big-oil-thinktank [https://perma.cc/NW4D-RJHS] (describing industry lobbying for an immunity provision but failing).

273. *See supra* subpart II(C).

IV. Justifying Obsolescent Preemption

At its core, obsolescent preemption is a framework to guide judicial interpretation in preemption cases that is similar in spirit to the presumption against preemption[274] or a localist canon of construction.[275] These canons derive from principles of federalism and counsel against finding preemption in recognition of both an inferior government's democratic legitimacy and sovereign authority and the gravity of any decision by the superior government to displace that authority.[276] Beyond its conspicuous analogy to these federalism-reinforcing rules, however, obsolescent preemption also reinforces values associated with the separation of powers, such as interbranch dialogue,[277] institutional competence, and judicial restraint, by providing a framework through which to evaluate and correct divergence between legislatively intended preemption and judicially interpreted preemption. And, in addition to these traditionally recognized values, obsolescent preemption also promotes other, contemporary values—which this Article calls "21st Century Values"—such as ensuring that legal rules enforced by courts reflect current law,[278] fortifying the constitutional status of twenty-first-century cities,[279] and, in the case of subnational climate action, protecting inferior governments' capacity to act according to the environmental ethic of the polity.[280] This Part addresses these values in turn.

274. *See supra* notes 51–53, 56–58 and accompanying text.

275. *See generally* Note, *To Save a City: A Localist Canon of Construction*, 136 HARV. L. REV. 1200 (2023) (advocating a substantive canon of statutory interpretation for state courts that permits only express or impossibility preemption).

276. *See, e.g.*, Raygor v. Regents of the Univ. of Minn., 534 U.S. 533, 543–44 (2002) (explaining that clear statement rules of preemption reflect an acknowledgement of states' retained sovereignty); Note, *supra* note 275, at 1209 (explaining that canons of construction disfavoring preemption are rooted in the "value of popular sovereignty"); *see also* Heather K. Gerken, Foreword, *Federalism All the Way Down*, 124 HARV. L. REV. 4, 21 (2010) (theorizing federalism's applications to and lessons for substate and non-sovereign entities).

277. *See* sources cited *supra* note 106.

278. *Cf.* Joshua C. Macey, *Zombie Energy Laws*, 73 VAND. L. REV. 1077, 1081 (2020) (describing how legal rules designed to protect consumers can actually harm them when the original justifications for those rules disappear).

279. *See* Sarah L. Swan, *Constitutional Off-Loading at the City Limits*, 135 HARV. L. REV. 831, 882–87 (2022) [hereinafter *Constitutional Off-Loading*] (explaining how judicial recognition of constitutional offloading "strengthens the arguments for recognizing that cities are entitled to 'big city localism' and to a special constitutional status").

280. *See, e.g.*, Sarah L. Swan, *Plaintiff Cities*, 71 VAND. L. REV. 1227, 1267, 1278 (2018) (noting the moral and sociological valence of plaintiff cities' lawsuits); JEDEDIAH PURDY, AFTER NATURE: A POLITICS FOR THE ANTHROPOCENE 4–7 (2015) (advocating an ethical framework of common responsibility and humanity for conceptualizing the problem of, and potential solutions to, climate change).

A. Federalism Values

In legal scholarship, federalism appears as both a system of ordering relations between superior and inferior government and a collection of associated principles that both characterize the system and represent normative goods. To the extent there is space between these two kinds of principles,[281] I am primarily concerned with the latter: the normatively good values that federalism, or a federalist system, reinforces. And although federalism was traditionally understood as a model of federal–state relations, I draw on the arguments of countless federalism scholars in understanding federalism as paradigm that encompasses interactions between other pairs of superior and inferior governments.[282]

One of the more significant values associated with federalism is democratic accountability.[283] In theory, when citizens of a democratic polity are dissatisfied by legislation adopted by that polity, they can express their dissatisfaction and hold their legislators accountable at the next election. But preemption impedes this process: When a superior government preempts legislation favored by an inferior polity and its citizens, those citizens often lack direct recourse for registering their discontent with the superior government due to the districted nature of state and federal elections.[284] This problem becomes more consequential in states with severely gerrymandered districts, in which state legislatures "over-represent[] the views of a particular slice of the electorate" to the detriment of a minority.[285] Even if it cannot fully protect municipal or state action from punitive preemption, obsolescent preemption can insulate municipal and state actions from inadvertent preemption caused by unjustified expansion, reinforcement of existing preemption holdings, or selective judicial interpretations of the statutory scheme.

Obsolescent preemption has more potential as a bulwark protecting another significant value associated with federalism: policy diversity, which encompasses both the ability of subnational governments to tailor policy to their constituents' preferences[286] and the possibility for diverse policy

281. *See* Briffault, *supra* note 9, at 1303–04 (noting federalism scholarship's "normative turn"); Scharff, *supra* note 12, at 1490 (noting a distinction between the value of federalism and the values that federalism reinforces).

282. *E.g.*, Gerken, *supra* note 276, at 22–25, 28; Briffault, *supra* note 9, at 1305, 1315.

283. *See, e.g.*, Sellers & Scharff, *supra* note 83, at 1396–97 ("Throughout both Supreme Court case law and academic scholarship pertaining to federalism, government accountability is held up as a particularly important value.").

284. *See* Paul A. Diller, *The Political Process of Preemption*, 54 U. RICH. L. REV. 343, 358 (2020) [hereinafter *The Political Process*] (describing how districting and intentional gerrymandering affects mechanisms of democratic accountability).

285. *Id.* at 362.

286. *See* Scharff, *supra* note 12, at 1491–92 (noting that local governments may be better situated to identify and realize their constituents' policy preferences); Outka, *supra* note 59, at 980–

experimentation and innovation that diffuses horizontally and vertically[287]—the so-called "laboratories of democracy" idea.[288] As countless scholars have documented and any casual observer of society understands, local preferences vary within and between municipalities and within and between states, leading to heterogenous policy priorities and outcomes.[289] This diversity of policies forms the heart of the "laboratories of democracy" idea,[290] a process in which "a policy first embraced by a city proves itself manageable and popular at the local level before percolating 'out' to other cities and 'up' to the state level," according to Paul Diller.[291] But to create an environment that truly fosters this kind of subnational experimentation, Charles Tyler and Dean Heather Gerken have argued that courts need to be "far more tolerant of tension in areas of regulatory overlap"[292] between federal, state, and local governments. Deploying obsolescent preemption is one way to align preemption doctrine with this goal.[293] For example, as indicated in the discussion of Brookline's gas ban, stale preemption will offer more evidence of preemptive intent than a reference to "uniformity," such as evidence indicating that a superior legislature intended uniformity for the purpose of preempting the substantive purpose of the inferior government's action.[294] As the National League of Cities wrote in the recently published *Principles of Home Rule for the 21st Century*, "a diversity of regulatory approaches is one of the benefits of local self-government."[295] Consequently, "[u]niformity alone is not a sufficient reason for state law preemption. Disuniformity has to be 'so pervasive' as to cause substantial and demonstrable harm."[296]

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81 (suggesting that local governments may be better equipped to design policies for controversial issues); Diller, *Intrastate*, *supra* note 58, at 1121 (documenting the neutral partisan valence of many municipal enactments).

287. *See* Diller, *Intrastate*, *supra* note 58, at 1117–20 (describing how subnational policies percolate out and up).

288. *See, e.g.*, Sellers & Scharff, *supra* note 83, at 1400–02, 1402 n.235 (identifying values of pluralism).

289. *See, e.g.*, Scharff, *supra* note 12, at 1491–92 (discussing heterogeneous regulatory preferences); Swan, *Constitutional Off-loading*, *supra* note 279, at 838–40 (highlighting the emergence of "sanctuary cities" expressing local positions on constitutional issues); Diller, *Intrastate*, *supra* note 58, at 1117–20 (noting state legislative action taken in response to policies first adopted by cities).

290. Charles W. Tyler & Heather K. Gerken, *The Myth of the Laboratories of Democracy*, 122 COLUM. L. REV. 2187, 2195–98 (2022) (describing the laboratories of democracy idea).

291. Diller, *Intrastate*, *supra* note 58, at 1119.

292. Tyler & Gerken, *supra* note 290, at 2230–31.

293. Indeed, obsolescent preemption fulfills the goal of many of the interventions Tyler and Gerken suggest: strengthening the presumption against preemption, reining in conflict preemption, and policing unilateral executive preemption. Tyler & Gerken, *supra* note 290, at 2231–32.

294. *See supra* subpart III(A).

295. National League of Cities, *supra* note 246, at 1368.

296. *Id.*

The phenomenon of diverse subnational policy experimentation illuminates another value associated with federalism that obsolescent preemption helps to reinforce: the discursive relationship between levels of government. When inferior governments enact innovative policies, they can motivate the superior government to take action. For example, industry lobbying groups often respond to stringent state or local regulation by seeking uniform federal or state regulation.[297] In some cases, a superior government might respond directly to regulation by an inferior government with its own regulation.[298] But not all responsive regulation by the superior government will incorporate preemption of subsequent action by the inferior government;[299] this allows the inferior government to continue pressing for more restrictive regulation over time. Through this process of ratcheting regulation, superior and inferior governments engage in a vertical dialogue about the proper balance and kind of regulation. By limiting the preemptive reach of old and tangentially related statutes, obsolescent preemption increases the likelihood that this vertical dialogue will produce government regulation that is well-tailored to the diverse needs of affected parties.

B. Separation-of-Powers Values

Separation of powers, like federalism, is another structural framework that describes the relationship between different governmental actors and comes with a set of principles that both define and emanate from the framework. In this case, the relevant governmental bodies exist not in a pseudo-hierarchy determined by lawmaking capacity, but rather in an unambiguously co-equal plane of authority.[300] The U.S. Constitution's creation of the three coordinate branches of the federal government is the most well-known version of the separation of powers, but all state constitutions provide for a similar structure of coordinate legislative, judicial, and executive branches.[301] In this subpart, I consider how obsolescent

297. *See* Roderick M. Hills, Jr., *Against Preemption: How Federalism Can Improve the National Legislative Process*, 82 N.Y.U. L. REV. 1, 19–21 (2007) (documenting how regulation of certain industries by a handful of states prompted those industries to lobby for uniform regulation because uniformity is preferable to patchwork regulation); *see also* Diller, *The Political Process*, *supra* note 284, at 400–01 (documenting how interest groups that prefer strong regulation might nevertheless prefer a uniform state regulatory floor to a patchwork of intrastate regulation that includes both strong and nonexistent regulation).

298. *See* Shannon M. Roesler, *Federalism and Local Environmental Regulation*, 48 U.C. DAVIS L. REV. 1111, 1160–61 (2015) (contending that federal regulation that empowers local authorities could remedy the imbalance within states and the benefits of local regulation).

299. *See, e.g.*, Diller, *The Political Process*, *supra* note 284, at 400 (presenting an example of how this process occurs with local groups pushing for change in labor laws in one state).

300. For qualifications to this statement, see *supra* note 7.

301. Jim Rossi, *Institutional Design and the Lingering Legacy of Antifederalist Separation of Powers Ideals in the States*, 52 VAND. L. REV. 1167, 1190–91 (1999); *see also id.* at 1225–27 (noting that some state constitutions provide for nonunitary executives).

preemption promotes separation-of-powers values. In doing so, I am most concerned with the values that *fortify* systems of separated powers rather than the values that derive from such systems. In other words, I take as given that the separation of powers is normatively beneficial,[302] and explore characteristics of that framework that obsolescent preemption reinforces.

Much in the same way that it reinforces vertical dialogue between superior and inferior governments in federalist systems, obsolescent preemption can enhance productive dialogue between coordinate branches. As scholars have documented, a judicial decision rarely brings an end to contentious issues, and instead often engages the political branches in follow-up "dialogue."[303] The legislature, in particular, might respond to judicial decisions by rewriting statutes to correct the perceived problem with the judicial conclusion,[304] or, in more severe cases, might enact not only substantively corrective legislation, but also punitive legislation that constrains courts' jurisdiction or operation.[305] By limiting the tendency of courts to overexpand statutory preemption,[306] obsolescent preemption reduces the likelihood that Congress will respond punitively to judicial "dialogue," leading to more efficient interbranch dialogue.

By improving interbranch dialogue, obsolescent preemption also helps to ensure that substantive decisions are made by the branch with the appropriate substantive expertise and institutional competence. After all, legislatures—of both superior and inferior governments—possess expertise, or the capacity to engage experts, in a variety of substantive policy areas.[307] Courts' expertise, in contrast, is limited to the application of legal rules and precedent.[308] When courts expand the reach of laws to preempt inferior government action in areas not expressly identified by the superior government as within a statute's preemptive scope, they risk substituting the

302. *See* THE FEDERALIST NO. 51 (James Madison) (outlining the values of separated government); Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 635 (1952) (Jackson, J., concurring) (suggesting that "the Constitution diffuses power . . . to secure liberty"). *But see, e.g.*, Curtis A. Bradley & Trevor W. Morrison, *Historical Gloss and the Separation of Powers*, 126 HARV. L. REV. 411, 438–40 (2012) (explaining that the Madisonian account is a flawed version of the *modern* separation of powers particularly as to Congress).

303. *See* Christine Bateup, *The Dialogic Promise Assessing the Normative Potential of Theories of Constitutional Dialogue*, 71 BROOK. L. REV. 1109, 1109, 1118–19 (2006) (explaining how the political branches challenge judicial decisions, which prompt judicial decision changes).

304. *Id.* at 1118–19.

305. *Id.* at 1119.

306. *See supra* note 107 and accompanying text.

307. *See* Turner v. Safley, 482 U.S. 78, 84–85 (1987) (suggesting that courts are "ill-equipped" to deal with policy decisions that require "expertise, planning, and the commitment of resources, all of which are peculiarly within the province of the legislative and executive branches of government"); *accord* Brown v. Plata, 563 U.S. 493, 559 (2011) (Scalia, J., dissenting) (quoting *Turner*, 482 U.S. at 84–85).

308. *See* Kisor v. Wilkie, 139 S. Ct. 2400, 2417 (2019) (identifying "elucidation" of common-law terms as part of courts' "bailiwick").

policy preferences of judges for the policy decisions of not one, but two bodies with expertise in the relevant substance—the superior government that enacted the assertedly preemptive law and the inferior government whose action is asserted to be preempted.[309] Obsolescent preemption ensures that courts and legislatures stay in their respective lanes by limiting the opportunities for courts to overextend statutes' preemptive reaches via expansive interpretations of antiquated or ancillary precedent. This restraint on judicial extrapolation ensures that substantive policy decisions are made by those with expertise, or access to expertise, in the subject matter at issue.

In the aforementioned ways, obsolescent preemption also reinforces the principle of judicial restraint and thus the democratic legitimacy of courts within a system of separated powers. Relative to legislatures, which are elected by and accountable to their constituents, all levels of the state and federal judiciaries are populated by democratically insulated judges.[310] Thus, in addition to their diminished institutional competence and substantive knowledge, courts also possess less democratic authority for engaging in substantive lawmaking.[311] As an umbrella principle encompassing a number of doctrinal practices, judicial restraint "help[s] safeguard th[e] separation [of powers] by keeping the courts away from issues 'more appropriately addressed in the representative branches.'"[312] By reducing opportunities for

309. *See* Am. Fed'n of Lab. v. Am. Sash & Door Co., 335 U.S. 538, 555–56 (1949) (Frankfurter, J., concurring) ("[T]he judiciary is prone to misconceive the public good by confounding private notions with constitutional requirements, and such misconceptions are not subject to legitimate displacement by the will of the people except at too slow a pace."); Justice Souter's dissent in *United States v. Lopez* emphasizes this facet of judicial restraint:

> The practice of deferring to rationally based legislative judgments . . . . reflects our respect for the institutional competence of the Congress on a subject expressly assigned to it by the Constitution and our appreciation of the legitimacy that comes from Congress's political accountability in dealing with matters open to a wide range of possible choices.

514 U.S. 549, 604 (1995) (Souter, J., dissenting).

310. Although most state court judges are elected, see Aaron-Andrew P. Bruhl & Ethan J. Leib, *Elected Judges and Statutory Interpretation*, 79 U. CHI. L. REV. 1215, 1216–17 (2012), judges on just over half of the state supreme courts are appointed. *How State Supreme Court Justices Are Selected*, DEMOCRACY DOCKET (Mar. 21, 2023), https://www.democracydocket.com/analysis/how-state-supreme-court-justices-are-selected/ [https://perma.cc/4RYT-5ZPB]. Moreover, as Bruhl and Leib document, state judicial elections largely lack "the qualities that ordinarily give [legislative] elections their legitimating power." Bruhl & Leib, *supra*, at 1231.

311. *See* United States v. Richardson, 418 U.S. 166, 188 (1974) (Powell, J., concurring) ("[The Court] should be ever mindful of the contradictions that would arise if a democracy were to permit general oversight of the elected branches of government by a nonrepresentative, and in large measure insulated, judicial branch."); *Lopez*, 514 U.S. at 604 (Souter, J., dissenting) (noting the legitimacy that derives from Congress's democratic accountability); THE FEDERALIST NO. 78 (Alexander Hamilton) (emphasizing the importance to reasoned judicial decisionmaking of insulation from the electoral process).

312. TransUnion LLC v. Ramirez, 141 S. Ct. 2190, 2225 (2021) (Kagan, J., dissenting) (quoting Allen v. Wright, 468 U.S. 737, 751 (1984)).

judicial self-aggrandizement at the expense of the legislature,[313] obsolescent preemption ensures that substantive lawmaking authority rests with more democratically accountable branches of the relevant level of government.

C. 21st-Century Values

The preceding subparts explored how obsolescent preemption can reinforce values associated with federalism and the separation of powers—two well-studied structural elements of U.S. law that legal scholars have increasingly examined through a normative rather than formal or functional lens.[314] In this subpart, I address obsolescent preemption's relevance to a different set of values, which I term "21st-Century Values." While some of these values can also be associated with federalism or the separation of powers, I include them under the "21st-Century" umbrella to emphasize their common particular relevance to structural theories that respond to distinct attributes of the contemporary environment.

I first address the idea that legal rules and doctrine should reinforce current laws. Despite appearing to be a self-evident and uncontroversial principle of judicial review, Joshua Macey has documented how legal doctrines developed in the energy context persist even after their original justifications have dissipated, leading to a suboptimal equilibrium in which "zombie" laws preclude the development of renewable generation that is actually favored under both current law and economics.[315] As Macey points out, these zombie laws initially served an important purpose—"mitigat[ing] market power abuses"—but, he argues, the regulatory system in which they operated "has largely been abandoned," such that "[t]heir continued application is now facilitating market power abuses" in a modern regulatory regime that looks significantly different from the former.[316] Without incorporating a principle like obsolescent preemption, the classical preemption framework risks creating the same problem as these "zombie" energy laws, because it can insulate and overextend extant preemption

313. *See* THE FEDERALIST NO. 51 (James Madison or Alexander Hamilton) (explaining the policy of opposite and rival interests and the predominate authority of legislative power); *see also* Daryl J. Levinson, *Empire-Building Government in Constitutional Law*, 118 HARV. L. REV. 915, 918 (2005) (identifying the possibility of this kind of self-aggrandizement); Victoria Nourse, *Misunderstanding Congress: Statutory Interpretation, the Supermajoritarian Difficulty, and the Separation of Powers*, 99 GEO. L.J. 1119, 1165 (2011) ("Given already scarce legislative resources and demands on legislators' time, the idea that 'Congress can always override' should not relieve courts of worrying far more explicitly about aggrandizing their power in statutory interpretation."); *cf. TransUnion*, 141 S. Ct. at 2225 (Kagan, J., dissenting) ("The Court here transforms standing law from a doctrine of judicial modesty into a tool of judicial aggrandizement.").

314. *See* Briffault, *supra* note 9, at 1303–04 (remarking on a shift in discussions of federalism from formal to normative).

315. *See generally* Macey, *supra* note 278 (explaining how unfavorable laws in the energy sector persist despite changing attitudes towards renewable energy).

316. *Id.* at 1083.

holdings beyond the regulatory context in which they were originally relevant, to constrain the operation of the modern regulatory regime that has arisen around or in place of it. This problem is a uniquely twenty-first-century problem, as the complex statutory and regulatory frameworks that developed throughout the twentieth century[317] encounter the rapid technological, social, and environmental change of the late twentieth and early twenty-first centuries.[318] The gas ban cases exemplify this problem. In both the Brookline and Berkeley cases, courts expansively interpreted the preemptiveness of two statutory schemes—which initially existed to ensure public safety and unify energy conservation standards, respectively—to prevent municipalities from taking needed action (in their perspectives) to mitigate a problem causing their citizens direct and indirect harms.[319] As discussed in Part III, obsolescent preemption offers a framework for alleviating this problem.

Obsolescent preemption also expresses appropriate respect for and reinforces the constitutional status of "21st-Century" cities, by which I mean the status that inheres in certain cities via the phenomenon of constitutional off-loading recently identified and characterized by Professor Sarah Swan.[320] According to Swan, by applying different constitutional scrutiny to the behavior of large urban centers versus rural towns, courts have "affirm[ed] . . . big-city borders as compelling," thereby "elevat[ing] cities onto the same conceptual plane as states"[321] and weakened the rationale for continuing to conceptualize all municipalities in line with their depiction in *Hunter v. City of Pittsburgh*.[322] The National League of Cities' *Principles of Home Rule for the 21st Century* provides another rationale for respecting the "21st-Century" status of big cities, noting, for example, that "in 2017 . . . the nation's ten highest-producing metro economies combined generated a record $6.8 trillion in economic value in 2017—more than the collective output of

317. *See, e.g.*, Daniel Martin Katz, Corinna Couppette, Janis Beckedorf & Dirk Hartung, *Complex Societies and the Growth of the Law*, NATURE: SCI. REPS., 2020, at 3 (2020), https://doi.org/10.1038/s41598-020-73623-x [https://perma.cc/7HYJ-JQFM] (documenting the growing complexity of statutory and regulatory regimes); Gabe Scheffler, *The Costs of Complexity in Policy Design*, YALE INST. SOC. & POL'Y STUD. BLOG (Apr. 2014), https://isps.yale.edu/news/blog/2014/04/the-costs-of-complexity-in-policy-design [https://perma.cc/R4JN-SVLF] (identifying how the increasing complexity of regulations leads to inefficiency and increased costs).

318. *See* Richard L. Revesz, *Strengthening Our Regulatory System for the 21st Century*, OFF. OF MGMT. & BUDGET BRIEFING ROOM BLOG (Apr. 6, 2023), https://www.whitehouse.gov/omb/briefing-room/2023/04/06/strengthening-our-regulatory-system-for-the-21st-century/ [https://perma.cc/33KA-G8QF] (remarking on the need for regulatory modernization).

319. *See supra* notes 13–16 and accompanying text; *supra* subpart III(A) (discussing court interpretation of existing statutory schemes for fossil fuels).

320. Swan, *Constitutional Off-loading*, *supra* note 279, at 882–87.

321. *Id.* at 882.

322. 207 U.S. 161, 178–79 (1907); *see supra* notes 205–07 and accompanying text.

37 states."[323] By reinforcing and insulating the lawmaking capacity of local governments, obsolescent preemption respects the twenty-first-century dignity of all municipalities,[324] but, practically speaking, does so more consequentially for "big-city" municipalities with significant populations, economies, and expenditures.[325] As the populations of big-city municipalities continue to grow,[326] those cities' claims to constitutional status simultaneously increase and demand they receive the accoutrements of that status.

Finally, in light of the existential nature of the threat posed by climate change,[327] it is worth highlighting one climate-specific argument for obsolescent preemption that incorporates many of the aforementioned values: its ability to encourage and defend subnational polities' capacity to theorize and pursue their own twenty-first-century climate change ethics. In recent decades, countless scholars, scientists, and spiritual and movement leaders have advocated the adoption of a new environmental ethic to gird society to meet the challenge posed by the oncoming crisis.[328] Municipalities around the United States have responded to such calls to action by formulating their own climate ethics and have begun taking climate action in accordance with their polity's climate principles, such as by declaring climate emergencies,[329] adopting climate change mitigation strategies,[330] and

323. National League of Cities, *supra* note 246, at 1337; *see also id.* (noting that metropolitan areas, more generally, contribute the vast majority of gross state product in all but four largely rural states); Richard C. Schragger, *Federalism, Metropolitanism, and the Problem of States*, 105 VA. L. REV. 1537, 1541 (2019) (noting that while cities have economic prominence, states have increasingly attempted to "delegitimize" cities).

324. *See* Swan, *Constitutional Off-loading*, *supra* note 279, at 884–85 ("The 'dignity' of states requires that they fulfill their own constitutional obligations; big cities may have a similar dignity that requires them to fulfill theirs.").

325. This proposition follows directly from the statistical fact that freedom from preemption will affect more people, in a more substantial way (in economic terms), in large cities with large budgets.

326. National League of Cities, *supra* note 246, at 1337–38.

327. *See supra* notes 222–25.

328. *E.g.*, Richard Sylvan, *Is There a Need for a New, an Environmental Ethic?*, *in* THE ETHICS OF THE ENVIRONMENT, 3 (Robin Attfield ed., 2008); POPE FRANCIS, LAUDATO SI': ON CARE FOR OUR COMMON HOME (2015); THICH NHAT HANH, LOVE LETTER TO THE EARTH (2013); *see also* Simon Caney & Derek Bell, *Morality and Climate Change*, 94 THE MONIST 305, 305–08 (2011) (discussing moral issues that arise from the reality of climate change); PURDY, *supra* note 280. See also Prime Minister of Barbados Mottley's speech calling attention to the climate crisis and the need to work collaboratively to combat the environmental damage. Mia Amor Mottley, *A Call to Action for a New Internationalism* (Sept. 23, 2022), *in* KOFI ANNAN FOUND., https://www.kofiannanfoundation.org/app/uploads/2023/03/First-Annual-Kofi-Annan-Lecture-transcript-final.pdf [https://perma.cc/C9X7-ANJY].

329. *E.g.*, Berkeley Res. No. 68,486—N.S. (Berkeley City Council 2018), *available at* https://www.cedamia.org/wp-content/uploads/2018/12/Berkeley-Climate-Emergency-Declaration-Adopted-12-June-2018-BCC.pdf [https://perma.cc/34RH-J92M].

330. *See, e.g.*, sources cited *supra* note 13 (listing municipal laws with a purpose of mitigating climate change).

seeking accountability for climate harms.[331] This phenomenon can, of course, be justified with reference to the federalism principles of democratic accountability and policy diversity, and the separation-of-powers notion of democratic legitimacy. But I suggest that the incomprehensible scale and universally threatening nature of climate change[332] provides an additional justification for this kind of municipal climate action that, in turn, justifies the existence and necessity of a theory of obsolescent preemption, to the extent that obsolescent preemption enables and safeguards municipalities and states' ability to pursue such prerogatives.

Conclusion

As municipalities and states continue to exercise their regulatory and enforcement authority to address the urgent issues facing their citizens, they will continue to confront the challenge of preemption—at the behest of aggrieved entities, vindictive superior governments, and also, as the gas ban cases illustrate, in the aggrandizing interpretations of federal and state courts. This Article has suggested that preemption doctrine should incorporate a theory of obsolescent preemption to minimize the tendency of the judiciary to adopt overexpansive interpretations of assertedly preemptive law. Adopting the principles that inhere in this framework will help ensure that judicial interpretations of preemption do not obsolesce, thereby reinforcing a variety of normatively desirable values grounded in federalism and the separation of powers.

331. *See, e.g.*, sources cited *supra* note 17 (listing several recent climate-tort lawsuits initiated by municipalities).

332. *See* Bryan Walsh, *Why Your Brain Can't Process Climate Change*, TIME (Aug. 14, 2019, 7:00 AM), https://time.com/5651393/why-your-brain-cant-process-climate-change/ [https://perma.cc/PQ9X-B5HG] (exploring the mental difficulty of comprehending climate change); Matthew Taylor & Jessica Murray, *'Overwhelming and Terrifying': The Rise of Climate Anxiety*, THE GUARDIAN (Feb. 10, 2020, 1:16 PM), https://www.theguardian.com/environment/2020/feb/10/overwhelming-and-terrifying-impact-of-climate-crisis-on-mental-health [https://perma.cc/6GPP-NAZ8] (describing the mental health crisis among young people associated with climate change).