

Fear of Proliferation: A Nightmare Exception?*

A Response to Marin K. Levy, *Judging the Flood of Litigation*,
80 U Chi L Rev 1007 (2013).

Annie Decker†

This familiar parade of dreadfuls calls to mind wise counsel:
“Judges and lawyers live on the slippery slope of analogies;
they are not supposed to ski it to the bottom.”

Justice Ruth Bader Ginsburg¹

INTRODUCTION

In *Judging the Flood of Litigation*, Professor Marin Levy provides a novel, comprehensive, and thoughtful analysis of the nature and legitimacy of judicial floodgates arguments. Judges rely on the floodgates rhetoric—the idea that “a large number of new claims”² might result from a given action—when resolving cases on their merits or to avoid even getting to the merits.³ Levy shows that federal courts often rely on the floodgates argument in

* The subtitle riffs on a question that Justice Antonin Scalia posed during oral arguments in a 2012 tax equality case: “You don’t believe in the administrative nightmare exception to the Equal Protection Clause?” Transcript of Oral Argument, *Armour v Indianapolis*, No 11-161, *26 (US Feb 29, 2012) (available on Westlaw at 2012 WL 642778) (Scalia).

† Adjunct Professor of Law, Fordham University School of Law. Thank you to the participants in the 2013 Fordham Scholarship Retreat, including Nestor Davidson, Jennifer Gordon, Abner Greene, Sarah Jaramillo, Joseph Landau, Dean Michael Martin, and Jed Shugerman, as well as Alex Stein, Jacob Hodes, and Adam M. Josephs and the other editors at *The University of Chicago Law Review*, for their insights and editorial assistance.

¹ *Buckley v American Constitutional Law Foundation, Inc.*, 525 US 182, 195 n 16 (1999), quoting Robert Bork, *The Tempting of America: The Political Seduction of the Law* 169 (Free Press 1990).

² Marin K. Levy, *Judging the Flood of Litigation*, 80 U Chi L Rev 1007, 1009 (2013).

³ See *id.* at 1012–13.

a self-serving manner, protecting the federal judiciary from “what they see to be an excessive workload.”⁴

In addition to offering a thorough descriptive account, Levy develops a framework that helps explain when deploying floodgates arguments is more legitimate, such as to protect relations between the judiciary and the executive⁵ or to protect state judicial prerogatives, and less legitimate, such as when used merely to lighten the federal judiciary’s workload.⁶

Floodgates are an exemplar of a broader category of legal tropes, here termed “trigger arguments,” that raise important questions about the scope of judicial power. These arguments focus on an act that triggers subsequent, undesired behavior. In each case, the court develops rules for monitoring or preventing the triggering act. Other trigger tropes include “slippery slope” arguments, which often take a substantive form: the fear, for example, that permitting Policy A to survive a legal challenge will increase the palatability of the more extreme Policy B.⁷ Another trigger trope invokes the so-called parade of horrors that could result from a judicial decision.⁸

⁴ Id at 1012. As Levy details, perhaps most concerning is when judges recite the floodgates fear in order to limit prisoner petitions and thereby reduce their workload. See *Hudson v McMillian*, 503 US 1, 15 (1992) (Blackmun concurring) (“This audacious approach to the Eighth Amendment assumes that the interpretation of an explicit constitutional protection is to be guided by pure policy preferences for the paring down of prisoner petitions. . . . [T]his inherently self-interested concern has no appropriate role in interpreting the contours of a substantive constitutional right.”); note 17 (empirical studies). This kind of self-serving behavior is not evident in preemption decisions, except in the more attenuated manner in which judges in preemption cases tend to vote with their politics.

⁵ Levy also shows, for example, that getting congressional intent wrong and intruding on congressional prerogative are the main reasons to be concerned about floodgates in the judicial-legislative context. As shown in Part II.B, the same concerns arise with regard to the fear of proliferation—but they are not the causes but the effects of its invocation.

⁶ See Levy, 80 U Chi L Rev at 1056–76 (cited in note 2).

⁷ See Eugene Volokh, *The Mechanisms of the Slippery Slope*, 116 Harv L Rev 1026, 1030–31 (2003); David Enoch, *Once You Start Using Slippery Slope Arguments, You’re on a Very Slippery Slope*, 21 Oxford J Legal Stud 629, 630–31 (2001); Mark C. Rahdert, *Comparative Constitutional Advocacy*, 56 Am U L Rev 553, 658–59 (2007). This kind of substantive slippery slope argument has appeared in preemption cases as well. See, for example, Jean Macchiaroli Eggen, *The Mature Product Preemption Doctrine: The Unitary Standard and the Paradox of Consumer Protection*, 60 Case W Res L Rev 95, 141 (2009) (“Justice Thomas, concurring in the judgment in [*Wyeth v*] *Levine*, expressed the concern that the Court is on a slippery slope in its preemption analysis.”).

⁸ See, for example, *AT&T Mobility LLC v Concepcion*, 131 S Ct 1740, 1747 (2011) (“The *Concepcions* suggest that all this is just a parade of horrors.”).

This Essay identifies a “fear of proliferation” as another trigger argument, one endemic to federal preemption decisions.⁹ By fear of proliferation, I mean the fear that courts express that, if a given subfederal law is permitted to survive the preemption challenge, similar laws might multiply throughout other jurisdictions, with negative consequences. While fear of proliferation arguments resemble floodgates arguments, the underlying concerns are quite distinct.¹⁰

Federal preemption doctrine pursuant to the Constitution’s Supremacy Clause¹¹ permits federal law to trump state or local

⁹ Although reciting the proliferation fear in areas as wide-ranging as the climate change, broadband, Indian crafts, takeovers, music, and housing, scholars have not analyzed the legitimacy of the proliferation fear itself. See, for example, J.R. DeShazo and Jody Freeman, *Timing and Form of Federal Regulation: The Case of Climate Change*, 155 U Pa L Rev 1499, 1508 n 23 (2007); Hannibal Travis, *Wi-Fi Everywhere: Universal Broadband Access as Antitrust and Telecommunications Policy*, 55 Am U L Rev 1697, 1703 (2006).

Professor Adam Levitin is the exception. See Adam J. Levitin, *Hydraulic Regulation: Regulating Credit Markets Upstream*, 26 Yale J Reg 143, 215 (2009) (briefly providing a critique of the proliferation fear, as discussed at greater length below). And the only attempt found to justify the proliferation fear could quote only a dormant Commerce Clause case for support. See James B. Slaughter and James M. Auslander, *Preemption Litigation Strategies under Environmental Law*, 22 Nat Resources & Envir 18, 19 (Spring 2008), quoting *Healy v The Beer Institute*, 491 US 324, 336 (1989) (“[T]he practical effect of the statute must be evaluated not only by considering the consequences of the statute itself, but also by . . . what effect would arise if not one, but many or every, State adopted similar legislation.”). See also *C & A Carbone, Inc v Town of Clarkstown, New York*, 511 US 383, 406 (1994) (stating a similar principle, though adding this caveat: “This is not a hypothetical inquiry. Over 20 States have enacted statutes authorizing local governments to adopt flow control laws.”); Anne Havemann, Comment, *Surviving the Commerce Clause: How Maryland Can Square Its Renewable Energy Laws with the Federal Constitution*, 71 Md L Rev 848, 855 (2012) (discussing the role of such considerations). It is possible, indeed, that the fear of future proliferation is more relevant in the dormant Commerce Clause context.

¹⁰ See Levy, 80 U Chi L Rev at 1011 & nn 13–16 (cited in note 2). A version of the floodgates fear appears occasionally in preemption cases, along these lines: if I preempt this state or local law, it will trigger a wave of preemption litigation. See, for example, *Olson v General Dynamics Corp*, 960 F2d 1418, 1424–25 (9th Cir 1991) (Reinhardt concurring). Overbroad express preemption provisions, for example in the Employee Retirement Income Security Act of 1974 (ERISA), often produce complaints along these lines. See, for example, Marin R. Scordato, *Federal Preemption of State Tort Claims*, 35 UC Davis L Rev 1, 26 & nn 99–100 (2001) (providing data on the “proliferation” of ERISA preemption cases); Catherine Fisk, *The Last Article about the Language of ERISA Preemption? A Case Study of the Failure of Textualism*, 33 Harv J Leg 35, 59 n 106 (1996).

¹¹ Federal preemption doctrine arises from the US Constitution’s Supremacy Clause, which mandates that “state law must yield to federal law as supreme” if state and federal law conflict. Robert R.M. Verchick and Nina Mendelson, *Preemption and Theories of Federalism*, in William W. Buzbee, ed, *Preemption Choice: The Theory, Law, and Reality of Federalism’s Core Question* 13, 14 (Cambridge 2009); US Const Art VI, § 2

law when they conflict.¹² Federal law can preempt both statutes and common law claims. One might assume that if a party challenges a state or local law or common law claim as preempted, the court will consider the legality only of that *single* law.¹³

But judges cite the fear of future proliferation of that challenged law in other jurisdictions as one reason to strike down the law in front of them. In other words, this challenged statute or common law claim might be permissible on its own—it does not necessarily require preemption—but if enough other state or local governments were to enact the same law, or if a multiplying number of private litigants were to bring similar common law claims, then we would have a preemption problem, and, therefore, we will strike down this law. The key point is this: it is not an actual proliferation of subfederal laws or common law claims, but that *possibility*, that judges bring to bear on a given preemption lawsuit. While judges frequently embrace the trope, they never justify its legal relevance.

Fear of proliferation in preemption cases is a procedural, not substantive, argument. It is about numbers, about the replication of something whose multiplication poses a threat, like bacteria or a virus. Unlike floodgates, the fear of proliferation stems from a structural federalism concern: that a future abundance of state or local laws on a given subject will, in sum, disturb the balance of powers between the state (or local) and federal governments. The solution to the proliferation fear is structural as well: employ the federal trump card. Preventing future proliferation means acting prophylactically for the collective good; treat the individual case disproportionately harshly, like quarantining

(“This Constitution, and the Laws of the United States which shall be made in Pursuance thereof . . . 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.”). See also *Arizona v United States*, 132 S Ct 2492, 2500 (2012) (“From the existence of two sovereigns follows the possibility that laws can be in conflict or at cross-purposes.”).

¹² In addition to the range of preemption cases detailed in Part I, federal preemption has been employed recently to strike down innovative subfederal environmental regulations on matters such as hybrid taxicabs and employer-mandated insurance, and in a range of other cases, such as state tort suits against pharmaceutical and medical device companies and meat-inspection processes. See, for example, *National Meat Association v Harris*, 132 S Ct 965, 970 (2012).

¹³ See, for example, *Hines v Davidowitz*, 312 US 52, 67 (1941) (addressing an obstacle preemption claim, and declaring that judges must “determine whether, *under the circumstances of this particular case*, [a state’s] law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress”) (emphasis added).

early viral victims.¹⁴ The extent and nature of the political power disruption is harder to estimate in the preemption context.

Just as the underlying concerns differ, the harms resulting from the invocation of proliferation and floodgates arguments differ. Relying on the floodgates fear to foreclose litigation deprives individuals of the protection of the laws.¹⁵ Treating possible future proliferation as relevant has the same effect in that preemption prohibits individuals from bringing certain common law claims, but preemption also deprives state and local governments of being able to enact otherwise legal laws that express their residents' political preferences.

Part I reveals the fear of proliferation weaving through federal preemption cases—immigration, environment, and more. Certain subject matters, indeed, might exacerbate the fear, as might whether a local or, instead, state law is at issue. Part II analyzes whether the fear of proliferation is ever a legitimate argument in the context of both preemption doctrine and constitutional constraints. I suggest that the proliferation concern can be relevant to a narrow band of federal preemption cases—certain express preemption claims (those involving federal preemption provisions enacted because of uniformity concerns) and to certain obstacle preemption cases (again, those in which federal uniformity is a congressional goal)—but is rarely, if ever, relevant to field or impossibility preemption claims. The courts' act of invoking the fear of proliferation also threatens the separation of powers between courts and Congress. It is not that the sheer number of subfederal laws never matters; in certain cases, it might matter more than we have been willing to acknowledge.

I. THE FEAR OF PROLIFERATION IN PREEMPTION CASE LAW

The proliferation fear works hard in federal preemption decisions.¹⁶ Some judges cite a fear of proliferation as a rhetorical

¹⁴ Therefore, preemption here is *unlike* situations where the prevention targets a related but distinct act, such as suppressing a speech act to prevent a riot or putting a finger in the dam to prevent a flood.

¹⁵ See Levy, 80 U Chi L Rev at 1010 (cited in note 2).

¹⁶ This pattern of federal judges deploying the fear of proliferation became legible when I examined dozens of environmental and health and safety preemption cases for a prior article. See Annie Decker, *Preemption Conflation: Dividing the Local from the State in Congressional Decision Making*, 30 Yale L & Pol Rev 321 (2012) (analyzing the preemption decisions underlying the empirical analysis in David B. Spence and Paula Murray, *The Law, Economics, and Politics of Federal Preemption Jurisprudence: A Quantitative Analysis*, 87 Cal L Rev 1125, appendix A (1999)).

flourish with no apparent bearing on the actual decision. Others treat the fear as a contributory factor in the outcome. Still others, including in cases of great importance, suggest that the threat of proliferation is dispositive.¹⁷ The goal here is not to catch every instance in which a federal judge express a fear of future proliferation but rather to provide a textured account of representative situations.

A. Tracing the Fear

1. Immigration.

The proliferation fear has surfaced persistently in decisions responding to the subfederal explosion of immigration-related laws across the country. Most of these laws can be characterized as anti-immigrant, or at least as distinctly unfriendly to immigrants, particularly undocumented ones.¹⁸

¹⁷ Levy discusses a similar range of dispositiveness in the context of floodgates arguments. See Levy, 80 U Chi L Rev at 1010 n 12 (cited in note 2) (“I am not claiming that floodgates arguments have been dispositive in all or even most of the cases in which they have been raised. Rather, I am asserting that this kind of reasoning has directly impacted the outcome of at least a few key cases.”); id at 1023 (noting that “[s]imilar rhetoric surfaces even in cases involving constitutional rights”). See also Elizabeth Weeks Leonard, *Rhetorical Federalism: The Value of State-Based Dissent to Federal Health Reform*, 39 Hofstra L Rev 111, 112 (2011) (“Even if some of the rhetoric [about federalism] is empty, it has the potential to sharpen the debate and build appreciation for the challenges of implementing major new policies, while renewing deliberation about the appropriate role of states in federal policymaking and government in individuals’ lives.”). The influence of this fear should be no surprise. Descriptive and empirical studies continue to demonstrate that factors other than doctrinal merits influence preemption outcomes, whether those factors are federalism principles, political convictions, or other predispositions. See, for example, Catherine M. Sharkey, *Against Freewheeling, Extra-textual Obstacle Preemption: Is Justice Clarence Thomas the Lone Principled Federalist?*, 5 NYU J L & Liberty 63, 64–66 (2010); Tonja Jacobi and Matthew Sag, *Taking the Measure of Ideology: Empirically Measuring Supreme Court Cases*, 98 Georgetown L J 1, 20 & n 87 (2009); Richard Pildes, *Democracy and Disorder*, 68 U Chi L Rev 695, 705 (2001); Thomas W. Merrill, *Preemption and Institutional Choice*, 102 Nw U L Rev 727, 729, 741 (2008).

¹⁸ See, for example, *Lozano v City of Hazleton*, 620 F3d 170, 201 (3d Cir 2010) (“[I]n 2009, over 1,500 bills pertaining to immigration were introduced. From these, 222 laws were enacted, and 131 resolutions adopted.”); Karen E. Bravo, *On Making Persons: Legal Constructions of Personhood and Their Nexus with Human Trafficking*, 31 N Ill U L Rev 467, 488 (2011) (“This floodtide of legislation is justified under a theory that illegal immigration undermines the sovereignty of the United States . . .”); Gabriel J. Chin, et al, *A Legal Labyrinth: Issues Raised by Arizona Senate Bill 1070*, 25 Georgetown Immig L J 47, 89 (2010) (noting “[t]he stunning proliferation of new state laws”); Peter H. Schuck, *Taking Immigration Federalism Seriously*, 2007 U Chi Legal F 57, 91 (similar); Daniel Eduardo Guzmán, Note, *“There Be No Shelter Here”: Anti-immigrant Housing Ordinances and Comprehensive Reform*, 20 Cornell J L & Pub Pol 399, 401 (2010). In challenging

A majority of the Supreme Court presented a strong version of the proliferation fear in 2012 when striking down parts of Arizona's SB 1070, also known as the Support Our Law Enforcement and Safe Neighborhoods Act: "If § 3 of the Arizona statute were valid," the Court stated, "every State could give itself independent authority to prosecute federal registration violations, diminishing the Federal Government's control over enforcement and detracting from the integrated scheme of regulation created by Congress."¹⁹ Justice Scalia in dissent poked at the majority's invocation of this "looming specter of inutterable horror" and said that the Court's vision "seems to me not so horrible and even less looming."²⁰ Moreover, Justice Scalia noted, "The fact that [a law] might operate unconstitutionally under some conceivable set of circumstances is insufficient to render it wholly invalid, since we have not recognized an 'overbreadth' doctrine outside the limited context of the First Amendment."²¹ In the decision below on review, the Ninth Circuit had made clear that the potential for future proliferation affected its judgments when striking down §§ 2(B), 3, 5(C), and 6 of Arizona's SB 1070, using statements such as the following: "Finally, the threat of 50 states layering their own immigration enforcement rules on top of the INA also weighs in favor of preemption" of Section 2(B),²² and "S.B. 1070's detrimental effect on foreign affairs, and its potential to lead to 50 different state immigration schemes piling on top of the federal scheme, weigh in favor of the preemption of Section 3."²³ The court repeated that language about all the states piling onto the federal scheme when finding §§ 5(C)²⁴ and 6²⁵

this legislation, plaintiffs have invoked, inter alia, the federal Immigration and Nationality Act of 1952, Pub L No 82-414, ch 477, 66 Stat 163, codified as amended at 8 USC § 1101 et seq; Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub L No 104-193, 110 Stat 2105, most substantially amended by the Immigration Reform and Control Act of 1986; Pub L No 99-603, 100 Stat 3359, codified as amended in various sections of Title 8; Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub L No 104-208, 110 Stat 3009-546, codified as amended in various sections of Title 8.

¹⁹ *Arizona*, 132 S Ct at 2502 (citations, quotation marks, and alterations omitted).

²⁰ *Id* at 2521 (Scalia dissenting).

²¹ *Id* at 2515 (Scalia dissenting) (citations omitted).

²² *United States v Arizona*, 641 F3d 339, 354 (9th Cir 2011), *affd* in part, *revd* in part, and *remd*, 132 S Ct 2492 (2012) (affirming on all grounds except holding that state courts should have a chance to construe § 2(B), particularly in the absence of proof of actual conflict).

²³ *Arizona*, 641 F3d at 356.

²⁴ *Id* at 360.

²⁵ *Id* at 365–66.

preempted as well. Judge Noonan, concurring, flagged the trope as problematic.²⁶

The proliferation fear saturated a 2011 district court opinion striking down an Alabama statute that had, in part, prohibited undocumented immigrants from making “any transaction” with the state government or its subdivisions and prohibited anyone else from doing so on behalf of such an “alien.”²⁷ The district court found the “cumulative effect” of potential future statutes like Alabama’s relevant to “the scope of preemption analysis” and to “why the court’s perspective is not only Alabama’s law” but also other states’ enactments.²⁸ As the court declared in various iterations throughout the opinion, if the state “can regulate as it has here, then so could every state or locality.”²⁹

The Alabama court quoted a Third Circuit decision, *Lozano v City of Hazleton*,³⁰ which itself provided several fear-of-proliferation arguments.³¹ The Supreme Court vacated and remanded the Third Circuit’s first *Lozano* decision for reconsideration in light of a

²⁶ See *id.* at 369 (Noonan concurring) (“For those sympathetic to immigrants to the United States, [the statute] is . . . a chilling foretaste of what other states might attempt. . . . It is not our function, however, to evaluate the statute as a symbol.”).

²⁷ See *Central Alabama Fair Housing Center v Magee*, 835 F Supp 2d 1165, 1170 n 2 (MD Ala 2011) (internal quotation marks and citations omitted), *vacd* by *Central Alabama Fair Housing Center v Commissioner*, 2013 WL 2372302 (11th Cir 2013) (dismissing appeal as moot after the state amended its statute).

²⁸ *Central Alabama Fair Housing Center*, 835 F Supp 2d at 1181.

²⁹ *Id.* (“[I]f every State adopted the rental ordinances and manufactured home ownership bans seen here, undocumented immigrants’ residency in these classes of housing would be impossible nationwide.”). See also *id.* (“[W]e can imagine the slippery slope . . . if every local and state government enacted laws purporting to determine that . . . [persons] could not stay in their bounds. If every city and state enacted and enforced such laws . . . the federal government’s control over decisions relating to immigration would be effectively eviscerated.”) (citations omitted).

³⁰ 620 F3d 170 (3rd Cir 2010).

³¹ See *id.* at 213 (“If [this town’s] ordinance is permissible, then each and every state and locality would be free to implement similar schemes.”), *vacd* and *remd.*, *City of Hazleton v Lozano*, 131 S Ct 2958 (2011) (vacating in light of the decision in *Chamber of Commerce v Whiting*, 131 S Ct 1968 (2011)). See also *Lozano*, 620 F3d at 221 (“Again, it is not only Hazleton’s ordinance that we must consider. If Hazleton can regulate as it has here, then so could every other state or locality.”). The idea of proliferation itself seems to be contagious in preemption decisions. The Third Circuit, for example, in turn cited a Northern District of Texas case that had expressed the proliferation fear. See *id.* at 202, citing *Villas at Parkside Partners v City of Farmers Branch*, 701 F Supp 2d 835 (ND Tex 2010). See also *Villas at Parkside Partners v City of Farmers Branch*, 726 F3d 524, 548 (5th Cir 2013) (Dennis concurring) (providing an extended fear-of-proliferation argument, quoting the Supreme Court’s formula in *Arizona*, 132 S Ct at 2502, and other sources that “[i]f [the subfederal provision] were valid, every State could” do the same); *id.*, quoting *Bonito Boats, Inc v Thunder Craft Boats, Inc*, 489 US 141, 161–63 (1989) (similar).

recent ruling. On remand, the Third Circuit once again cited the fear of proliferation and affirmed the district court's decision to preempt a city ordinance.³²

2. Other policy areas.

While immigration law has been the most recent arena in which fears of proliferation have been cited, it is not alone. Take state efforts to regulate tobacco: as the Supreme Court declared in 2008, allowing one state to proceed “would allow other States to do the same. . . . easily lead[ing] to a patchwork of state [] laws, rules, and regulations.”³³ The Court struck down provisions of Maine's Tobacco Delivery Law.³⁴

Subfederal environmental laws also have inspired a fear of proliferation. In its 2004 *Engine Manufacturers Association v South Coast Air Quality Management District*³⁵ decision, the US Supreme Court held that the federal Clean Air Act³⁶ preempted a regional air-quality district's efforts to encourage the purchase of clean-energy vehicles through emissions requirements placed on public and private transportation fleets within its jurisdiction.³⁷ The majority reasoned that, because of the potential for proliferation, it was irrelevant that the single defendant air-quality district's efforts would have a minor effect: “[I]f one State or political subdivision may enact such rules, then so may any other; and the end result would undo Congress's carefully calibrated regulatory scheme.”³⁸ Lower courts have emphasized that line when striking down efforts by cities such as New York and Boston to encourage the use of hybrid taxis.³⁹

And before Congress enacted national health care legislation, state and local governments had begun entering the field. One of the most visible such laws, known (accurately or not) as

³² See *Lozano v City of Hazleton*, 724 F3d 297, 318 (3d Cir 2013) (“If every other state enacted similar legislation to overburden the lives of aliens, the immigration scheme would be turned on its head.’ . . . Accordingly, the housing provisions conflict with federal law.”).

³³ *Rowe v New Hampshire Motor Transport Association*, 552 US 364, 373 (2008).

³⁴ 22 Rev Stat Ann §§ 1555–C(3)(C), 1555–D. See *Rowe*, 552 US at 377.

³⁵ 541 US 246 (2004).

³⁶ Pub L No 88-206, 77 Stat 392 (1963), codified at 42 USC § 7401 et seq.

³⁷ *Engine Manufacturers Association*, 541 US at 255–58 (relying on 42 USC § 7543(a)).

³⁸ *Engine Manufacturers Association*, 541 US at 255. But see *id* at 259, 266 (Souter dissenting) (relying on the presumption against preemption to disagree).

³⁹ See *Metropolitan Taxicab Board of Trade v City of New York*, 2008 WL 4866021, *10 (SDNY 2008); *Ophir v City of Boston*, 647 F Supp 2d 86, 90 (D Mass 2009).

the Wal-Mart Act,⁴⁰ was enacted in Maryland. When striking it down as preempted by the Employee Retirement Income Security Act of 1974⁴¹ (ERISA), the Fourth Circuit declared that “[w]ere we to approve Maryland’s enactment solely for its noble purpose, we would be leading a charge against the foundational policy of ERISA, and surely other States and local governments would follow.”⁴²

The foregoing examples cite the fear of proliferation as a legitimate factor to be considered in a court’s reasoning. Part II excavates a few signs of discontent.

3. Coda on subject matter.

A concluding question is whether the substantive content of the subfederal law facing federal preemption influences whether a court invokes the fear of proliferation. For example, immigration regulations could differ from other subfederal regulation in a manner that judges find meaningful—viscerally, politically, or even legally. To give an example: the enactment of an anti-immigrant subfederal law might seem particularly likely to lead to an outbreak of similar subfederal anti-immigrant laws because racism and xenophobia would feed the process. Such an outbreak, in turn, would make more likely an impermissible burden on federal regimes. In contrast, a local environmental building code would not receive the same fodder, and any replication would occur at a slower, more deliberative pace. The idea, in other words, is that the fear of proliferation could be more justified in certain substantive contexts—ones where the creation of an impermissible burden is more foreseeable.

B. The Relevance of Local Difference

Tracking the proliferation fear in preemption decisions uncovers another twist: the fear of proliferation seems to be felt more acutely when a local ordinance, rather than a state statute, lies on the preemption chopping block.⁴³

⁴⁰ Fair Share Health Care Fund Act, 2006 Md Laws 1, codified at Md Lab & Empl Code Ann §§ 8.5-101–107.

⁴¹ Pub L No 93-406, 88 Stat 829, codified as amended at 29 USC § 1001 et seq.

⁴² *Retail Industry Leaders Association v Fielder*, 475 F3d 180, 198 (4th Cir 2007).

⁴³ This question was teed up in Decker, 30 Yale L & Pol Rev at 352 (cited in note 16) (“[L]ocal laws present a greater threat of proliferation as a matter of sheer numbers. There are fifty states but thousands of local bodies available to mimic each other.”).

One reason for this increased fear is the sheer number of local jurisdictions, which makes a “nightmare scenario” of proliferation more nightmarish. This twist has appeared in cases involving federal preemption challenges under the Federal Insecticide, Fungicide, and Rodenticide Act,⁴⁴ Toxic Substances Control Act,⁴⁵ Hazardous Materials Transportation Act⁴⁶ (HMTA), Occupational Safety & Health Act,⁴⁷ and ERISA.⁴⁸

Another reason why courts fear local proliferation more than state proliferation is that some of them believe that local regulation deserves less deference. And indeed, when courts call local ordinances a “subterfuge” and a “sham” in federal preemp-

⁴⁴ Pub L No 80-104, 61 Stat 163 (1947), codified at 7 USC § 136 et seq. See, for example, *Professional Lawn Care Association v Village of Milford*, 909 F2d 929, 931, 934 (6th Cir 1990) (citing the “thousands of regulatory jurisdictions” that potentially could enter the field, ruining federal uniformity “in the muddle of thousands of local standards and regulations,” making the federal statute “the lowest common denominator in an equation of infinite variables”); Appendix Volume II, *Wisconsin Public Intervenor v Mortier*, Docket No 89-1905, *43 (US filed June 5, 1990) (available on Lexis at 1990 US S Ct Briefs LEXIS 257) (“[I]f you allowed local governments to set up regulations in this field, you could have 300 different regulations in the State of Michigan, you could have every City coming up with a different plan.”).

⁴⁵ Pub L No 94-469, 90 Stat 2003 (1976), codified at 15 USC § 2601 et seq. See, for example, *Warren County v North Carolina*, 528 F Supp 276, 290 (ED NC 1981) (“Were the Court to approve this ordinance, no doubt the other ninety-nine counties in North Carolina would quickly enact identical bans.”); *Rollins Environmental Services (FS), Inc v Parish of St. James*, 775 F2d 627, 637 (5th Cir 1985) (similar).

⁴⁶ Pub L No 93-933, 88 Stat 2156 (1975), codified at 49 USC § 103 et seq. See, for example, *Consolidated Rail Corp v City of Bayonne*, 724 F Supp 320, 331 (D NJ 1989) (“[I]f the present limitations were upheld, could not other municipalities through which the cars travel, or briefly come to rest, enact similar ordinances . . . generating chaos in the movement of butane tank cars along their assigned routes?”).

⁴⁷ Pub L No 91-596, 84 Stat 1590 (1970), codified as amended at 29 USC § 651 et seq. See, for example, *Environmental Encapsulating Corp v City of New York*, 666 F Supp 535, 540 (SDNY 1987) (“If the adoption of differing worker safety standards in each of the fifty states would prove inconsistent with [federal standards], the presence of differing standards in each of the nation’s thousands of municipalities would prove a far greater obstacle to achieving uniformity,” but, in a rare instance, not preempting the challenged law despite citing the fear), *affd in part and revd in part*, 855 F2d 48 (2d Cir 1988). For another example of a court citing the fear but then ignoring it, see *New York State Pesticide Coalition, Inc v Jorling*, 874 F2d 115, 117 (2d Cir 1989) (noting the “concern[]” expressed by the New York State Pesticide Coalition on appeal “that other states will create notification schemes similar to New York’s,” but then ignoring it).

⁴⁸ See, for example, *Golden Gate Restaurant Association v City and County of San Francisco*, 558 F3d 1000, 1004, 1007–08 (9th Cir 2009) (Smith dissenting from denial of rehearing en banc) (“[I]f our decision in this case remains good law, similar laws will become commonplace, and the congressional goal of national uniformity in the area of employer-provided healthcare will be thoroughly undermined”; indeed, “while the ‘administrative burden imposed by a single law may be tolerable, the cumulative burden could be staggering,” and, “[i]f upheld, *Golden Gate* will undoubtedly serve as a roadmap in jurisdictions across the country on how to design and enact a labyrinth of laws.”).

tion cases,⁴⁹ it could seem like special treatment. There is a perception that lower bars exist to enacting local laws than state laws, and that therefore weaker laws are enacted more easily at the local level.⁵⁰

Judges treating local laws more harshly than state laws because of the fear of local proliferation would conflict with what I elsewhere call the “conflation axiom”—the rule in federal preemption cases that courts must treat state and local laws as equivalents.⁵¹ As the Court has declared, “It is [] axiomatic that, for the purposes of the Supremacy Clause, the constitutionality of local ordinances is analyzed in the same way as that of statewide laws.”⁵² A district court, in other words, must approach an Arizona anti-immigrant law as it would one from the city of Hazleton, Pennsylvania. While courts are constrained, Congress, in contrast, has certain powers to distinguish between the state and the local that it should consider wielding more often in preemption and savings clauses.⁵³

II. DOCTRINAL AND CONSTITUTIONAL CONCERNS

Recently, in *Chamber of Commerce v Whiting*,⁵⁴ the Supreme Court rendered a decision that explicitly set aside one party’s proliferation argument.⁵⁵ In doing so, the Court highlighted the unsteady foundations of this trope:

The Chamber contends that “if the 49 other States followed Arizona’s lead, the state-mandated drain on federal resources would overwhelm the federal system and render it completely ineffective, thereby defeating Congress’s primary objective in establishing E-Verify.” *Whatever the legal*

⁴⁹ *Rollins Environmental Services (FS)*, 775 F2d at 634–35; Spence and Murray, 87 Cal L Rev at 1178–79, 1186–87 & nn 236, 253 (cited in note 16) (speculating that local laws are preempted more often than state laws because of “the tendency of local governments to pursue losing cases,” or “greater deference” by judges to state laws).

⁵⁰ See Jonathan H. Adler, *When Is Two a Crowd? The Impact of Federal Action on State Environmental Regulation*, 31 Harv Envir L Rev 67, 80 (2007) (discussing the contagion effect).

⁵¹ Decker, 30 Yale L & Pol Rev at 332–34 (cited in note 16).

⁵² *Wisconsin Public Intervenor v Mortier*, 501 US 597, 605 (1991) (citations and quotation marks omitted).

⁵³ See Decker, 30 Yale L & Pol Rev at 344–50 (cited in note 16).

⁵⁴ 131 S Ct 1968 (2011).

⁵⁵ *Id* at 1986.

significance of that argument, the United States does not agree with the factual premise.⁵⁶

The majority, in other words, ducked—even though Justice Sotomayor in dissent argued against the Arizona statute explicitly on the basis of fear of a proliferation of similar laws in other jurisdictions.⁵⁷ Even she, though, provided no elaboration on the fear’s legal justification.

Less-recent decisions also cast doubt on the legal status of the proliferation argument. Courts have cited the fear of proliferation—made on their own initiative or by parties—and then ignored it and ruled against preemption; that choice can be seen as a mild form of critique.⁵⁸ More directly, the US Supreme Court in *Wisconsin Public Intervenor v Mortier*⁵⁹ declared that the judiciary should not get involved in addressing potential proliferation.⁶⁰ Instead, “Congress is free to find that local regulation does wreak such havoc and enact legislation with the purpose of preventing it.”⁶¹ And a Seventh Circuit judge called the

⁵⁶ Id (emphasis added) (citation omitted) (upholding part of the Legal Arizona Workers Act of 2007 (LAWA), Ariz Rev Stat Ann §§ 23–211, 212, 212.01 (2010)). This language resembles that in an antifloodgates Antiterrorism and Effective Death Penalty Act of 1996 majority opinion that Levy cites: “*Whatever merits these and other policy arguments may have*, it is not the province of this Court to rewrite the statute to accommodate them.” *Artuz v Bennett*, 531 US 4, 10 (2000) (emphasis added). The Court in *Artuz*, and I would say also in *Whiting*, leaves open the possibility of that argument having “legal significance” in a different case.

⁵⁷ *Whiting*, 131 S Ct at 2003, 2007 & n 11 (Sotomayor dissenting):

I cannot believe that Congress intended for the 50 States and countless localities to implement their own distinct enforcement and adjudication procedures.

...

Notably, the Government’s brief does not state that the E-Verify system could accommodate the increased use that would result if all 50 States enacted similar laws. . . . I would hold that federal law impliedly preempts the Arizona requirement.

But see Levy, 80 U Chi L Rev at 1054 (cited in note 2), noting that Justice Sotomayor was on the opposite side of the floodgates trope in *Perry v New Hampshire*, 132 S Ct 716, 737–38 (2012) (Sotomayor dissenting) (using the term “flood” to argue that a flood would not come).

⁵⁸ See note 47.

⁵⁹ 501 US 597 (1991).

⁶⁰ Id at 616.

⁶¹ Id at 615–16 (rejecting the contagion argument that a small Wisconsin town’s attempt to regulate pesticide use “rais[ed] the specter of gypsy moth hordes safely navigating through thousands of contradictory and ineffective municipal regulations” and therefore should be preempted).

proliferation fear “inadmissible,” but—unfortunately for our purposes—did not state why.⁶²

This Part tackles the question of whether the proliferation fear is legally justifiable under current preemption doctrine and constitutional principles. Reliance on the proliferation fear, I conclude, can exceed the confines of preemption doctrine⁶³ and can run against broader constitutional mandates.

A. Doctrinal Legitimacy

This Section sketches out a framework that courts can adopt when considering preemption challenges across a range of substantive areas. The proliferation concern, I suggest, is most relevant to cases that involve express federal preemption clauses whose goal is uniformity and to so-called *obstacle* preemption cases where, again, federal uniformity is a leading goal, but is rarely if ever relevant to other implied preemption claims.

1. A skeletal overview of preemption doctrine.

Complex doctrines have developed to fill out the relatively simple commandment of the Supremacy Clause.⁶⁴ Preemption claims fall into two major categories: express and implied. Express preemption doctrine governs those situations where Congress has explicitly prohibited state regulation over a given

⁶² *Brown v Kerr-McGee Chemical Corp.*, 767 F.2d 1234, 1245 (7th Cir. 1985) (Cudahy concurring in part and dissenting in part):

The majority [] speculates that individuals residing adjacent to [] other sites or state authorities might bring injunctive actions similar to this one, and jumps to the conclusion that therefore this action is preempted. This approach is *simply inadmissible*. The majority is correct to be aware of the *possibility* of this conflict, in which the several states bar each of the options approved or considered by the [Nuclear Regulatory Commission]. But so far this conflict is *possible, not actual, and it is sheer speculation* to conclude that it will ever transpire.

(first and third emphases added). See also *City of New York v United States Department of Transportation*, 700 F. Supp. 1294, 1305–06 (SDNY 1988) (rejecting the agency’s argument that if the city prevailed in upholding its scheme against a preemption challenge, “uniformity would be destroyed and localities would be encouraged to race to export risks of hazardous materials transportation to their neighbors”; as the court observed, it has not happened yet).

⁶³ Consider Levy, 80 U. Chi. L. Rev. at 1057 (cited in note 2) (“[O]nce situated, the use of some floodgates arguments becomes fairly easily defensible, while the use of others—precisely because they are not supported by accepted lines of doctrine and practice—becomes far more questionable.”).

⁶⁴ See note 11 and accompanying text.

matter—that is, where federal statutory text explicitly prohibits subfederal regulation. The rest of the case law—and the bulk of it—addresses the range of situations in which Congress has *not* spoken clearly as to whether it wants to prohibit state law on a given topic. Courts then take up the task of determining whether, nonetheless, Congress intended such laws to be preempted pursuant to implied preemption doctrine.⁶⁵

Implied preemption claims fall into two main subcategories—first, field preemption, in which Congress occupies or squats on an entire field such that states cannot regulate in it, and second, conflict preemption, which includes both obstacle preemption⁶⁶ (where subfederal law stands as an obstacle to the fulfillment of congressional goals, which essentially constitutes a judgment call for the courts) and impossibility preemption (where a party cannot comply with federal law simultaneously with complying with state or local law).⁶⁷ Congressional purpose is seen as the touchstone for deciding preemption cases.⁶⁸

2. Express preemption and the proliferation fear.

Future proliferation, I suggest, is generally irrelevant to express preemption claims—those claims asserted pursuant to Congress having inserted a preemption clause into a statute. However, proliferation is relevant to express preemption cases in those rare cases where congressional statements on contagion

⁶⁵ See Bradley W. Joondeph, *The Partisan Dimensions of Federal Preemption in the United States Courts of Appeals*, 2011 Utah L Rev 223, 227 (“While these categories may be helpful in distinguishing the various means by which Congress can signal the scope of its preemptive intent, they ultimately carry no independent legal significance.”).

⁶⁶ Whether local law constitutes a sufficient obstacle to federal law to require preemption “is a matter of judgment.” *Crosby v National Foreign Trade Council*, 530 US 363, 373 (2000). See also Lauren Gilbert, *Immigrant Laws, Obstacle Preemption and the Lost Legacy of McCulloch*, 33 Berkeley J Empl & Labor L 153, 199–204 (2012). Some believe that obstacle preemption is unconstitutional. See, for example, Note, *Preemption as Purposivism’s Last Refuge*, 126 Harv L Rev 1056, 1057 (2013); Sharkey, 5 NYU J L & Liberty at 68–70 (cited in note 17) (describing Justice Thomas’s position that “the entire jurisprudence of obstacle preemption . . . should altogether vanish”). As Justice Thomas has stated elsewhere, “matters of political theory are beyond the ordinary sphere of federal judges.” *Holder v Hall*, 512 US 874, 901 (1994) (Thomas concurring).

⁶⁷ See Ernest A. Young, “*The Ordinary Diet of the Law*”: *The Presumption against Preemption in the Roberts Court*, 2011 S Ct Rev 253, 273–74 (“Traditionally, the Court has defined ‘impossibility’ very narrowly. . . . By contrast, the Court has often defined ‘conflicting purposes’ or ‘obstacle’ preemption quite broadly.”) (footnotes omitted).

⁶⁸ Even if an express “savings” clause protects state regulation from express preemption, the Court recently clarified, the regulation could fall to an implied preemption challenge. See *Geier v American Honda Motor Co*, 529 US 861, 869–70 (2000).

might help elucidate the meaning of plain text, in particular in the subset of express preemption cases where courts are seeking clarity on the scope of a preemption clause and the clause was inserted as part of Congress's effort to establish a uniform federal scheme. The idea is that uniformity concerns are so closely related to the number—and potential growth—of regulations that future contagion is arguably relevant. Under this approach, the fear of proliferation was more legitimately used in *Engine Manufacturers Association*⁶⁹ than in *Whiting*.⁷⁰ Future proliferation is least likely to be relevant or legitimate where Congress expressly has set a floor below which state and local regulation cannot go, or where it has set a maximum standard.⁷¹

However, this carve-out that I suggest for cases where Congress has expressed strong uniformity concerns should be considered in light of the presumption against preemption and the well-known failings of legislative history.

3. Implied preemption and the proliferation fear.

a) Field preemption. The fear of proliferation should be stopped at the door in field preemption cases, where the question is merely whether Congress has intended to occupy the subject matter in question. In such cases, it should not matter whether one or twenty or three hundred subfederal jurisdictions regulate.

b) Conflict preemption: obstacle and impossibility. In obstacle preemption cases, the first type of conflict preemption addressed here, plaintiffs argue that federal law preempts state and local laws because they present an obstacle to federal objectives. The potential for a legal conflagration is relevant to certain

⁶⁹ For a discussion of the *Engine Manufacturers Association* approach, see notes 37–38 and accompanying text.

⁷⁰ Congress indicated that uniformity was a leading goal of the Clean Air Act preemption provision employed in *Engine Manufacturers Association*. The same is true for many federal immigration provisions, but employment is different, as the majority in *Whiting* noted while upholding the LAWA: “Congress expressly preserved the ability of the States to impose their own sanctions through licensing; that—like our federal system in general—necessarily entails the prospect of some departure from homogeneity.” *Whiting*, 131 S Ct at 1979–80.

⁷¹ See William W. Buzbee, *Asymmetrical Regulation: Risk, Preemption, and the Floor/Ceiling Distinction*, 82 NYU L Rev 1547, 1559 (2007) (describing a “unitary federal choice ceiling”). See also *id.* at 1558 (“[A] ‘true ceiling’ is analytically possible but appears to be virtually nonexistent in the law.”).

types of obstacle preemption claims: those where uniformity was a leading goal of Congress's in enacting the statute. For example, parties challenge subfederal immigration regulation on field and express preemption grounds, but most frequently they do so on obstacle preemption grounds because there are few express preemption provisions and because uniformity is generally, though not always, such an important federal goal with immigration law.⁷² For example, Congress clearly expressed its uniformity goals when enacting the HMTA.⁷³ Many of these decisions are resolved on obstacle preemption grounds, citing the proliferation fear in a manner that is more acceptable than in other contexts.⁷⁴

As with field preemption, the threat of contagion is irrelevant to implied impossibility preemption claims. In such cases, the question is whether a party simultaneously can comply with both state and federal law—and if the answer is no, then the state law is preempted. Future proliferation is not meaningful to that question.

4. Preemption presumptions.

Preemption should be exercised rarely and cautiously, as a matter of constitutional law and because of the functional importance of state power, localism, and multiplicity.⁷⁵ Further, applying general presumptions against preemption⁷⁶ and clear

⁷² Cristina Rodríguez, Muzaffar Chishti, and Kimberly Nortman, *Testing the Limits: A Framework for Assessing the Legality of State and Local Immigration Measures*, 1916 PLI/Corp 195, 208 (2007) (describing the rarity of express, field, and impossibility preemption claims in immigration cases, and noting that “most cases become obstacle preemption cases”).

⁷³ See, for example, *Colorado Public Utilities Commission v Harmon*, 951 F2d 1571, 1575 (10th Cir 1991) (“Congress [] strongly reaffirmed that uniformity was the linchpin in the design of the statute.”). But see *Colorado Pyrotechnic Association v Meyer*, 740 F Supp 792, 796 (D Colo 1990) (not identifying uniformity as Congress's main concern in enacting the HMTA, but instead identifying risk prevention).

⁷⁴ See *Colorado Public Utilities Commission*, 951 F2d at 1580, 1582 (citing Congress's concern about the “potential for unreasonable hazards in other jurisdictions and confounding shippers and carriers which attempt to comply with multiple and conflicting . . . requirements”).

⁷⁵ Federal agency preemption should be exercised even more rarely. See David S. Rubenstein, *Delegating Supremacy?*, 65 Vand L Rev 1125, 1190–91 (2012) (arguing that agencies should not have the power to create preemptive—supreme—federal law).

⁷⁶ The so-called presumption against preemption means that Congress must demonstrate its “clear and manifest purpose” to preempt subfederal law, *particularly* when states are regulating in areas where they traditionally have exercised their authority. *Rice v Santa Fe Elevator Corp*, 331 US 218, 230 (1947).

statement rules helps reflect our constitutional structure.⁷⁷ These approaches reflect the weightiness of federal intrusions on state authority, particularly in areas in which states traditionally have exercised their authority.⁷⁸ At least as far as an anti-preemption principle goes, Congress seems to agree.⁷⁹

Relying on the proliferation fear works against the presumption against preemption by placing a thumb on the scale in favor of the court finding preemption.⁸⁰ The longevity and shape of the presumption against preemption is in doubt, and some courts have backed away from it.⁸¹ Nonetheless, it still has a strong toehold in doctrine and the literature, often cited as among the leading judicially created doctrines protecting structural federalism and taking its place among a set of clear statement rules that courts have developed to hand back responsibility to Congress.⁸²

⁷⁷ See, for example, William N. Eskridge Jr., *Public Values in Statutory Interpretation*, 137 U Pa L Rev 1007, 1019, 1023 (1989) (describing the presumption against preemption as one of the “meta-rules,” which are “general rules of statutory interpretation that reflect the gravitational force of constitutional values”). Consider Merrill, 102 Nw U L Rev at 741 (cited in note 17) (“[T]he presumption against preemption is honored as much in the breach as in observance.”).

⁷⁸ See, for example, Young, 2011 S Ct Rev at 254 (cited in note 67) (noting that “[t]he doctrine of preemption, grounded in the Supremacy Clause rather than in Article I’s scheme of limited and enumerated powers, is the key instrument by which the law manages this overlap” between federal and state power in our contemporary federalist structure emphasizing concurrency instead of exclusive dual sovereignty); William Funk, *Preemption of Federal Agency Action*, in Buzbee, ed, *Preemption Choice* 214, 230 (cited in note 11) (rooting the presumption against preemption in this principle).

⁷⁹ See, for example, William W. Buzbee, *Introduction*, in Buzbee, ed, *Preemption Choice* 1, 10 (cited in note 11) (noting that “nonpreemptive regimes,” however, “remain the dominant political choice”).

⁸⁰ See Levitin, 26 Yale J Reg at 215 (cited in note 9) (criticizing the Court’s employment of the proliferation fear in *Engine Manufacturers Association* as “run[n]g] contrary to the standard presumption against [] preemption”). Using the phrase “slippery slope” in the way that the “fear of proliferation” is used here, Levitin marks the holding as being “founded on a dubious concern about a slippery slope of regulation,” without which “the Court would have to engage in the [merits] analysis proposed in Justice Souter’s dissent.” Id.

⁸¹ See Caleb Nelson, *Preemption*, 86 Va L Rev 225, 290–303 (2000). But see Young, 2011 S Ct Rev at 310–32 (cited in note 67) (providing a vigorous defense of the presumption against preemption based on concurrency).

⁸² See, for example, Gillian E. Metzger and Trevor W. Morrison, *The Presumption of Constitutionality and the Individual Mandate*, 81 Fordham L Rev 1715, 1720–21 (2013) (“Clear statement rules represent yet another method of statutory construction with a deep connection to constitutional norms.”).

B. Overextending the Scope of Judicial Power

Judicial reliance on the fear of proliferation also overextends the scope of judicial power, putting pressure on the separation of powers between courts and Congress.

Congress can respond to what it sees as the proliferation of state and local regulation or excessive common law claims by enacting preemptive statutory provisions.⁸³ And Congress can act prophylactically when it foresees problems of proliferation or has set uniformity as a leading goal of some form of federal regulation. The question is to what extent courts can act in this manner—not by creating prophylactic doctrine per se but instead by acting prophylactically to prevent some future political phenomenon.

The answer is that they likely cannot. Congress is responsible for legislation,⁸⁴ and the Supremacy Clause recites as relevant the laws of the United States made pursuant to the Constitution, not judicial speculation about potential future burdens. This is not a situation where judicial supremacy matters.⁸⁵ It is an example of positive legislation making by judges. While no one who has an ounce of legal realist in her thinks that Thomas Jefferson's idea of the judge as a "mere machine" is feasible,⁸⁶ there are limits to positive legislation making by judges.⁸⁷

But, one objection goes, courts and Congress are engaged in a fruitful dialogic relationship regarding protecting constitutional

⁸³ See Levy, 80 U Chi L Rev at 1069 (cited in note 2) ("Specifically, our constitutional system gives Congress the authority to adjust laws so as to stem that flow."). But see Geoffrey C. Hazard Jr., *Quasi-Preemption: Nervous Breakdown in Our Constitutional System*, 84 Tulane L Rev 1143, 1152 (2010) (arguing that Congress historically has not thought sufficiently or systematically about the preemptive effects of federal statutes, so the task falls to the courts).

⁸⁴ See, for example, *National Federation of Independent Business v Sebelius*, 132 S Ct 2566, 2579 (2012) ("Members of this Court are vested with the authority to interpret the law; we possess neither the expertise nor the prerogative to make policy judgments. Those decisions are entrusted to our Nation's elected leaders."); *Hepburn v Griswold*, 75 US 603, 611 (1869) (similar).

⁸⁵ For more on when judicial supremacy *does* matter, see Barry Friedman and Erin F. Delaney, *Becoming Supreme: The Federal Foundation of Judicial Supremacy*, 111 Colum L Rev 1137, 1140 (2011) (providing historical and theoretical answers to the "puzzle [of] how judicial supremacy gains traction").

⁸⁶ See Laurence P. Claus and Richard S. Kay, *Constitutional Courts as "Positive Legislators" in the United States*, 58 Am J Comp L 479, 480 & n 5 (2010) (citation omitted).

⁸⁷ Id at 481 ("We need to ask . . . not 'was this positive legislation?' but 'to what extent was this positive legislation?'").

values.⁸⁸ However, the most important constitutional values protected in the *preemption* context are matters of structural federalism, not interbranch relations, with the Court applying doctrines such as the presumption against preemption to ensure that Congress does not unwittingly or lazily run roughshod over state and local interests—although even those rules are arguably more about getting Congress’s intent right (canons of interpretation) than about pure protection of the proper federal-state boundary.⁸⁹ Second, just because an observation has descriptive traction does not make it normatively desirable⁹⁰ or legally sound.

Judges invoking the proliferation fear are not as sensitive to the executive’s interests, or even the judiciary’s, as in Levy’s floodgates situation—and perhaps those interests are less at stake. Courts more often employ the floodgates argument in an other-regarding manner. They justify citing the floodgates fear by invoking separation of powers considerations and concerns for state courts.⁹¹ Those invoking the proliferation fear often, instead, create tension with separation of powers and state interests. *Rejecting* the fear of proliferation therefore is supported by, if not compelled by, independent constitutional principles.

In a sense, then, this overextension of judicial power by employing the proliferation fear as a factor in preemption decisions resembles a justiciability problem, buttressing the suggestion that the proliferation fear is an illegitimate consideration in most slices of federal preemption cases. Judicial power is limited to deciding cases involving redress or to “prevent actual or imminently threatened injury to persons caused by private or official

⁸⁸ See, for example, Garrick B. Pursley, *Defeasible Federalism*, 63 Ala L Rev 801, 805 & n 11 (2012); Victoria Nourse, *Misunderstanding Congress: Statutory Interpretation, the Supermajoritarian Difficulty, and the Separation of Powers*, 99 Georgetown L J 1119, 1122 (2011) (discussing the integration of normative theories about separation of powers into theories of statutory interpretation); John F. Manning, *Separation of Powers as Ordinary Interpretation*, 124 Harv L Rev 1939, 1942 (2011) (similar).

⁸⁹ See, for example, Pursley, 63 Ala L Rev at 803 (cited in note 88) (“Federalism-related concerns about the constricting effects of preemption on state regulatory authority partially justify the presumption, but federalism norms are not its direct object. The presumption is an interpretive canon.”) (emphasis omitted).

⁹⁰ See Barry Friedman, *A Different Dialogue: The Supreme Court, Congress and Federal Jurisdiction*, 85 Nw U L Rev 1, 60–61 (1990) (citing these arguments, and then rejecting them in favor of a role for courts in deciding the scope of their jurisdiction under Article III). But see F. Andrew Hessick III, *The Common Law of Federal Question Jurisdiction*, 60 Ala L Rev 895, 936–39 (2009) (rejecting the dialogic approach).

⁹¹ See Levy, 80 U Chi L Rev at 1012 (cited in note 2) (providing a thorough accounting of how interbranch concerns shape the form that the floodgates argument takes).

violation of law.”⁹² While the plaintiffs might have presented a case or controversy,⁹³ and while they might have standing to challenge a given state or local law,⁹⁴ when judges cite future contagion elsewhere as a reason to resolve the merits against that state- or local-government law, the facts underlying that consideration are purely hypothetical. Federal courts can issue only *temporary* injunctions when faced with little information and projected consequences, and federal courts cannot issue advisory opinions.⁹⁵ Reliance on the fear of preemption can also be seen through the lens of ripeness problems. Ripeness requires an inquiry into whether the “harm asserted has matured sufficiently to warrant judicial intervention.”⁹⁶ Although consequentialist reasoning is part of the judicial toolbox, duly enacted state and local laws can only be struck down on a full consideration of concrete facts or imminently threatened harm. The Supreme Court has imported these principles to preemption, declaring, as *Lozano* summarized, that “it is clear that solely ‘hypothetical conflicts’ between state and local enactments and federal law are usually insufficient to support a finding of preemption.”⁹⁷

C. Pushing against Structural Federalism

The very bones of the Constitution support a balance of powers between the state and federal governments in order to

⁹² *Summers v Earth Island Institute*, 555 US 488, 492 (2009).

⁹³ US Const Art III, § 2, cl 1. See also, for example, *Mistretta v United States*, 488 US 361, 385 (1989) (“According to express provision of Article III, the judicial power of the United States is limited to ‘Cases’ and ‘Controversies.’ In implementing this limited grant of power, we have refused to issue advisory opinions or to resolve disputes that are not justiciable.”) (citation omitted); *Warth v Seldin*, 422 US 490, 498 (1975) (similar).

⁹⁴ Residents of the given state or locality that enacted an arguably preempted law might face real injury from enforcement of that law.

⁹⁵ This Essay looks beyond the Supreme Court to inspect lower federal court opinions but does not turn to state court opinions. Levy, on the other hand, focuses on the US Supreme Court. See Levy, 80 U Chi L Rev at 1001 n 13 (cited in note 2). As courts of general jurisdiction, state courts can and do entertain federal preemption claims. Perhaps the fear of proliferation operates differently in the context of state courts: their standing requirements are typically looser than those of federal courts, and advisory opinions are generally permissible, for example. However, as a matter of structural federalism, a state court employing the proliferation fear to strike down a state or local law on federal grounds would raise similar concerns.

⁹⁶ *Warth*, 422 US at 499 n 10. See also *Morgan v McCutcher*, 365 F3d 882, 890 (10th Cir 2004) (“Like standing, the ripeness inquiry asks whether the challenged harm has been sufficiently realized at the time of trial.”).

⁹⁷ *Lozano*, 620 F3d at 203 n 25, citing *Schneidewind v ANR Pipeline Co*, 485 US 293, 310 (1988).

secure liberties and freedoms to citizens.⁹⁸ In the Supreme Court's view, protecting state sovereignty is not an end in itself; the goal is to protect individuals.⁹⁹ Structural federalism does so in two ways: first "by protecting the integrity of the governments themselves, and second by protecting the people, from whom all governmental powers are derived."¹⁰⁰ As part of that structure, the Supremacy Clause can come down with force on state law.¹⁰¹ Some see preemption already as "an arrow to the heart of structural federalism."¹⁰² Whether or not preemption cases are considered "constitutional" as opposed to purely statutory cases, they implicate the deepest federalism concerns.¹⁰³

Reliance on the fear of proliferation is a one-way ratchet, giving more power to the federal government at the expense of the state or local governments. The text of the Supremacy Clause says nothing about giving more weight to the federal government in the case of hypothetical conflicts.¹⁰⁴ While the body of implied preemption doctrine, plus the canons of statutory interpretation employed in express preemption cases, extends the bare constitutional text, we should place thoughtful limits on just how far to extend it.

⁹⁸ See, for example, Kenneth T. Cuccinelli II, E. Duncan Getchell Jr, and Wesley G. Russell Jr, *State Sovereign Standing: Often Overlooked, but Not Forgotten*, 64 *Stan L Rev* 89, 95 (2012). See also generally Ernest A. Young, *Making Federalism Doctrine: Fidelity, Institutional Competence, and Compensating Adjustments*, 46 *Wm & Mary L Rev* 1733 (2005). But see John F. Manning, *Federalism and the Generality Problem in Constitutional Interpretation*, 122 *Harv L Rev* 2003, 2009 (2009) (providing the strict textualist critique of such a thing as "federalism doctrine").

⁹⁹ See, for example, *New York v United States*, 505 US 144, 181 (1992) ("[T]he Constitution divides authority between federal and state governments for the protection of individuals. State sovereignty is not just an end in itself.").

¹⁰⁰ *Bond v United States*, 131 S Ct 2355, 2364 (2011).

¹⁰¹ See Pursley, 63 *Ala L Rev* at 814 (cited in note 88) (stating that the constitutional federalism design, in its barest form, "requires simply that there be both federal and state governments and suggests that federalism doctrine should prevent actions that would undermine that basic federalist structure"). See also *id* at 804 & n 8 (citing *New York*, 505 US at 157, as "holding that federalism norms must be enforced 'even if one could prove that federalism secured no advantages to anyone'").

¹⁰² Ashutosh Bhagwat, *Wyeth v. Levine and Agency Preemption: More Muddle, or Creeping to Clarity?*, 45 *Tulsa L Rev* 197, 226 (2009).

¹⁰³ Young, 2011 S Ct Rev at 257 (cited in note 67) (noting that while preemption cases are "generally exercises in statutory construction" and have only recently been categorized as constitutional, "the construction of federal statutes plays a critical role in our federal structure").

¹⁰⁴ See note 11 and accompanying text.

D. Remaining Questions

Both this Essay and *Judging the Flood of Litigation* leave room for future research. What happens when dissents invoke tropes such as floodgates and the fear of proliferation? How can courts accurately forecast whether the predicted and feared outcomes will result from pulling the trigger? Should judges provide more of an empirical explanation when they rely on the trigger fear as a factor?¹⁰⁵ How can we better apply literatures such as pragmatic utilitarianism, “brass-tacks pragmatism,”¹⁰⁶ rule consequentialism, and theories on prophylactic action? Are state courts applying these tropes?¹⁰⁷ What more can we learn about state/local difference by examining the operation of these trigger arguments?¹⁰⁸

Mechanisms for alleviating the fears underlying these arguments also deserve further study. Procedure, for example, might play a role. Levy identifies the tools of case dismissal, summary judgment, and Rule 11 sanctions as better mechanisms than floodgates for controlling caseload.¹⁰⁹ To cabin the improper use of the proliferation fear, courts could knock cases out on ripeness grounds or could stay cases in order to see if the predicted proliferation occurs, preserving the status quo as a default and waiting on merits. Relevant state authorities could be brought into the case if the anticipated proliferation begins to occur; in other words, consequentialist reasoning can become dispositive once courts have held the case in abeyance and permitted the laws to multiply.

¹⁰⁵ See Levy, 80 U Chi L Rev at 1074 (cited in note 2) (“[W]e should expect the justices to have some extended discussion about why they think a flood is likely to come.”); id (concluding that “if a particular decision is made to avoid an influx of cases that could harm a coordinate branch of government or state court, then it should be based on something more than the suggestion that an ‘avalanche’ or ‘flood’ is imminent.”). See also id at 1075 (“[T]he Court’s task goes beyond mere forecasting. . . . [T]he justices must still make a determination about whether the figure will truly be problematic.”).

¹⁰⁶ John C.P. Goldberg, *Introduction: Pragmatism and Private Law*, 125 Harv L Rev 1640, 1641 (2012).

¹⁰⁷ See note 95 and accompanying text.

¹⁰⁸ See Levy, 80 U Chi L Rev at 1028 (cited in note 2), citing Abbe R. Gluck, *Inter-systemic Statutory Interpretation: Methodology as “Law” and the Erie Doctrine*, 120 Yale L J 1898, 1906 (2011).

¹⁰⁹ Levy, 80 U Chi L Rev at 1070 (cited in note 2).

CONCLUSION

When adjudicating preemption claims, courts at times weigh the fact that deciding *not* to preempt the challenged state or local law will encourage other state and local governments to pass similar laws that, cumulatively, will harm federal interests. And then courts rely on that mere possibility—termed here a fear of proliferation—to strike down the law in front of them. Courts' unexamined invocation of this trope is concerning. In contrast, potential proliferation is a legitimate concern for Congress when it enacts preemptive legislation.

Like floodgates, the fear-of-proliferation phenomenon combines the psychology of fear with a rhetorical form, creating both doctrinal and constitutional problems. While these legal tropes are understandable, they are not always legally justifiable. The best justification for the invocation of future proliferation is that it protects, prophylactically, the balance of powers between state and federal governments. But that structural argument also works against its invocation: it unduly cramps state and local powers otherwise protected by the Constitution, falls, with narrow exceptions, outside of the federal preemption doctrinal rules that have grown on top of their constitutional foundation, and lies in tension with justiciability principles. A thumb is placed on the scale in favor of federal interests that requires justification or removal.