

# FEDERAL COMMON LAW, COOPERATIVE FEDERALISM, AND THE ENFORCEMENT OF THE TELECOM ACT

PHILIP J. WEISER\*

*Congress increasingly has enacted cooperative federalism programs to achieve complex regulatory policy objectives. Such programs combine the authority of federal regulators, state regulators, and federal courts in creative and often pathmarking ways, but the failure of these actors to appreciate fully their respective roles threatens to undermine cooperative federalism's effectiveness. In this Article, Professor Philip Weiser develops a coherent vision of how federal courts should enforce cooperative federalism regulatory programs. In particular, he relates the rise and purpose of cooperative federalism to the federal courts' increased reluctance to make federal common law under the Erie doctrine and their greater deference to administrative agencies under the Chevron doctrine. Professor Weiser then applies this conception of cooperative federalism to the implementation of the Telecommunications Act of 1996, the most ambitious cooperative federalism venture yet, and shows how federal courts should exercise their authority in coordination with federal and state regulators to advance the Act's goals.*

## INTRODUCTION

The advent of cooperative federalism regulatory programs challenges courts and commentators to conceptualize a new model of law-making. Cooperative federalism's rise follows two developments that reshaped the architecture of the American legal system. First, *Erie Railroad v. Tompkins* abandoned *Swift v. Tyson*'s aspiration of a uniform federal system of judge-made commercial law, thereby yielding authority to state law.<sup>1</sup> Then, as the Court recognized in *Chevron U.S.A. v. Natural Resources Defense Council*,<sup>2</sup> courts shifted to rely on administrative agencies to fill in gaps and interstices in federal regulatory programs. Unfortunately, courts and commentators often fail to appreciate the full import of these two developments. The lack of a coherent vision for the respective roles of federal agencies, state agen-

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\* Associate Professor of Law, University of Colorado. B.A., 1990, Swarthmore College; J.D., 1994, New York University School of Law. Thanks to Curtis Bradley, Jim Chen, Mike Dorf, Bill Eskridge, Heather Gerken, David Getches, Larry Malone, Hiroshi Motomura, Jon Nuechterlein, Kevin Reitz, and Jim Speta for their helpful comments and encouragement. I also thank Bill McGeveran for excellent editing and Jane Thompson for invaluable library assistance.

<sup>1</sup> See 304 U.S. 64, 74-79 (1938) (overruling *Swift v. Tyson*, 41 U.S. (16 Pet.) 1 (1842)).

<sup>2</sup> 467 U.S. 837, 865-66 (1984).

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cies, and federal courts in implementing cooperative federalism regulatory programs threatens to undermine their success.

Cooperative federalism regulatory programs, which combine federal and state authority in creative ways, strike many courts and commentators as a messy and chaotic means of generating federal law. Compounding the hostility to such regimes, some argue that globalization and technological change leave little or no role for states in implementing complex regulatory regimes and thus endorse a “preemptive federalism” that relies primarily or exclusively on federal courts or administrative agencies to develop unitary and pinpointed federal policies.<sup>3</sup> Attacking cooperative federalism programs from the other end of the spectrum, some focus on the importance of preserving states as sovereign and distinct entities, calling for a “dual federalism” that leaves the states as autonomous actors separated from the federal government.<sup>4</sup>

The architecture of the modern administrative state, as reflected in cooperative federalism regulatory programs, also faces challenges from calls to strengthen the role of federal judges in the policymaking process.<sup>5</sup> In particular, some commentators, most famously Peter Huber,<sup>6</sup> have challenged the modern consensus that agencies are superior to courts in developing rules of law to regulate specialized areas.<sup>7</sup> Similarly, the recent moves towards a new nondelegation doctrine, which would restrict Congress’s ability to empower agencies to make discretionary policy judgments,<sup>8</sup> highlights the federal judici-

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<sup>3</sup> See, e.g., Steven R. Salbu, Who Should Govern the Internet: Monitoring and Supporting a New Frontier, 11 Harv. J.L. & Tech. 429, 462-78 (1998) (emphasizing need for uniformity and championing preemption, where necessary, to achieve that goal).

<sup>4</sup> See, e.g., John C. Yoo, Sounds of Sovereignty: Defining Federalism in the 1990s, 32 Ind. L. Rev. 35, 41-43 (1998) (advocating dual federalism model).

<sup>5</sup> Such a move hearkens back to an earlier era that endorsed the use of federal judge-made law as an important tool to implement federal public policies. See, e.g., Henry J. Friendly, In Praise of *Erie*—And of the New Federal Common Law, 39 N.Y.U. L. Rev. 383, 405 (1964) (claiming that *Erie* “opened the way” for development of “specialized federal common law”); Paul J. Mishkin, The Variousness of “Federal Law”: Competence and Discretion in the Choice of National and State Rules for Decision, 105 U. Pa. L. Rev. 797, 799-800 (1957) (suggesting that federal judiciary must be competent to declare law for proper implementation of congressional programs).

<sup>6</sup> Peter Huber, Law and Disorder in Cyberspace: Abolish the FCC and Let Common Law Rule the Telecom (1997).

<sup>7</sup> See, e.g., George D. Brown, Of Activism and *Erie*—The Implication Doctrine’s Implications for the Nature and Role of the Federal Courts, 69 Iowa L. Rev. 617, 618 (1984) (arguing that judicial restraint properly leaves policymaking authority to Congress); Thomas W. Merrill, The Common Law Powers of Federal Courts, 52 U. Chi. L. Rev. 1, 21-22 (1985) (suggesting that agency accountability distinguishes executive branch lawmaking authority from judicial lawmaking authority).

<sup>8</sup> See *Am. Trucking Ass’ns v. EPA*, 175 F.3d 1027, 1034, modified in part and reh’g en banc denied, 195 F.3d 4 (D.C. Cir. 1999) (invoking nondelegation principle to overturn

ary's continuing struggles with the relationship between courts and agencies.

Despite these challenges, the fact remains that since the enactment of the major environmental statutes in the 1970s, Congress repeatedly has endorsed the cooperative federalism regulatory strategy. Courts and regulators will continue to confront the conflicting visions of cooperative federalism as they implement the Telecommunications Act of 1996 (the Telecom Act or the Act),<sup>9</sup> perhaps the most ambitious cooperative federalism regulatory program to date. The Act institutes a regulatory regime that confers authority on both federal and state agencies to open local telephone markets to competition. A number of critical statutory gaps—such as the substantive rules for remedying violations of the Act—remain open. Some combination of the Federal Communications Commission (FCC), state agencies, federal courts, and state courts will need to fill these gaps. Because courts and commentators have failed to articulate a coherent vision for cooperative federalism, however, the outcome of this gap-filling process remains very unclear.

This Article develops a vision of cooperative federalism's architecture by placing it within the *Erie/Chevron* model of the federal legal system. Viewed in this light, the currently perplexing question of how to enforce the Telecom Act can be answered quite easily. More generally, this approach suggests how federal judges can better understand their role in implementing cooperative federalism regulatory programs.

Part I of this Article discusses the nature of cooperative federalism regulatory programs, which invite state agencies to implement federal law. Part II traces the fall of the post-*Erie* federal common law, highlighting how an ambitious role for federal judge-made rules gave way to a greater reliance on state authority (as the federal courts reconsidered their commitment to uniformity) and to agency-made rules (as the federal courts attended to separation-of-powers and institutional-competence concerns). Part II also addresses the challenge to this trend by Huber and proponents of a new nondelegation doctrine. Part III sets forth the modern consensus on federal common law, noting that two forms of it have survived the increased skepticism of judicial lawmaking: the judicial creation of appropriate remedies to

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EPA regulation), rev'd in relevant part sub nom. *Whitman v. Am. Trucking Ass'ns*, 121 S. Ct. 903 (2001); Lisa Schultz Bressman, *Schechter Poultry at the Millennium: A Delegation Doctrine for the Administrative State*, 109 Yale L.J. 1399, 1415-31 (2000) (arguing for new nondelegation doctrine).

<sup>9</sup> Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996) [hereinafter *Telecom Act*] (codified as amended in scattered sections of 47 U.S.C.).

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address violations of federal rights, and the use of background principles to guide statutory interpretation.

Part IV turns to the Telecom Act as an example of cooperative federalism that supersedes the old dual federalism model for telecommunications regulation. Part V addresses how to enforce the Act in light of its silence on the subject. In particular, Part V argues that the Act's cooperative federalism architecture requires an evolving federal standard—preferably to be developed by the FCC—with the opportunity for states to supplement the federal rule with additional compatible measures.

## I

### THE COOPERATIVE FEDERALISM REGULATORY STRATEGY

After a period of fits and starts, federal courts appear finally to have settled into a comfortable role in the post-*Erie*, post-New Deal state.<sup>10</sup> The federal judiciary is just beginning, however, to develop its approach towards interpreting statutes that rely on state agencies to implement federal law. To do so, courts first must appreciate the character of cooperative federalism statutes and the benefits of such regimes. This Part addresses these points in turn.

#### A. *The Character of Cooperative Federalism*

Starting most notably with the environmental protection statutes passed in the 1970s,<sup>11</sup> federal regulatory programs increasingly have relied on state agencies to implement federal law.<sup>12</sup> In enacting such programs, Congress opts for the benefits of diversity in regulatory policy within a federal framework. Rather than preempting the authority of state agencies and supplanting them with federal branch offices, cooperative federalism programs invite state agencies to superintend federal law.

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<sup>10</sup> See Kenneth W. Starr, *Of Forests and Trees: Structuralism in the Interpretation of Statutes*, 56 *Geo. Wash. L. Rev.* 703, 703 (1988) (noting “judicial reordering” caused by need to develop comfortable relationship “between post-*Erie* courts and post-New Deal agencies engaged in the joint but separate enterprise of interpreting statutes”).

<sup>11</sup> For example, the Resource Conservation and Recovery Act (RCRA) anticipates that state agencies will act “in lieu of” the federal government to administer and enforce its hazardous waste program, 42 U.S.C. § 6926(b) (1994), making clear that any state agency action “has the same force and effect” as action taken by the EPA. § 6926(d); see *Harmon Indus. v. Browner*, 191 F.3d 894, 899 (8th Cir. 1999) (noting that RCRA gives state agencies prime responsibility of implementing this federal law).

<sup>12</sup> For a brief history of the rise of cooperative federalism, see Philip J. Weiser, *Towards a Constitutional Architecture for Cooperative Federalism*, 79 *N.C. L. Rev.* 663, 668-73 (2001).

Cooperative federalism programs set forth some uniform federal standards—as embodied in the statute, federal agency regulations, or both—but leave state agencies with discretion to implement the federal law, supplement it with more stringent standards,<sup>13</sup> and, in some cases, receive an exemption from federal requirements.<sup>14</sup> This power allows states to experiment with different approaches and tailor federal law to local conditions.<sup>15</sup> When implementing a cooperative federalism statute, the state agency often steps into the shoes of the federal agency and makes federal law.<sup>16</sup> A state agency thus may

<sup>13</sup> Cooperative federalism statutes regularly include “savings clauses,” which explicitly allow states to impose more stringent requirements than federal law demands. See, e.g., Clean Water Act, 33 U.S.C. § 1370 (1994); Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), 42 U.S.C. § 9614(a) (1994); Telecom Act, 47 U.S.C. § 251(d)(3) (Supp. IV 1998). As the Second Circuit put it:

By the contemplation of minimum federal standards, however, Congress did not intend to relegate the States to the status of enforcement agents for the executive branch of the federal government. To the contrary, it is indisputable that Congress specifically declined to attempt a preemption of the field in the area of water pollution legislation, and as much as invited the States to enact requirements more stringent than the federal standards.

*Mianus River Pres. Comm. v. EPA*, 541 F.2d 899, 906 (2d Cir. 1976).

<sup>14</sup> See David L. Markell, *The Role of Deterrence-Based Enforcement in a “Reinvented” State/Federal Relationship: The Divide Between Theory and Reality*, 24 *Harv. Envtl. L. Rev.* 1, 31 (2000) (explaining state role in enforcement of federal programs); Robert V. Percival, *Environmental Federalism: Historical Roots and Contemporary Models*, 54 *Md. L. Rev.* 1141, 1174-75 (1995) (same).

<sup>15</sup> See *infra* Part I.B (discussing these and other benefits of state agency discretion provided by cooperative federalism). In a provocative article, Edward L. Rubin and Malcolm Feeley challenge the notion that states, as opposed to local branch offices of federal agencies, are in a better position to deliver such benefits as experimentation and local tailoring. Edward L. Rubin & Malcolm Feeley, *Federalism: Some Notes on a National Neurosis*, 41 *UCLA L. Rev.* 903, 924 (1994) (noting that federal administrator could order local offices to “experiment with different strategies until the best way to achieve the goal emerges”). As I have explained elsewhere, this argument overlooks some important benefits of independent state governments. See Weiser, *supra* note 12, at 673.

<sup>16</sup> See, e.g., *Arkansas v. Oklahoma*, 503 U.S. 91, 110 (1992) (calling state water quality standards promulgated by states with EPA’s guidance under Clean Water Act “part of the federal law of water pollution control”). In some cases, the cooperative federalism statute takes the form of allowing state law to operate within a federal scheme. Under the Clean Water Act, for example, state agencies, pursuant to EPA approval and subject to EPA revocation of authority, are authorized to administer their own regulatory program under the mantle of federal law. See 33 U.S.C. § 1342 (1994). The EPA retains a supervisory role and may object to state decisions in administering that program, subject to federal court review; an EPA decision not to object, however, is unreviewable in federal court. *District of Columbia v. Schramm*, 631 F.2d 854, 859-61 (D.C. Cir. 1980). The Public Utilities Regulatory Policy Act (PURPA) provides for a similar cooperative federalism regulatory strategy. See 16 U.S.C. § 824a-3(h)(2)(B) (1994); *N.Y. State Elec. & Gas Corp. v. Saranac Power Partners*, 117 F. Supp. 2d 211, 216-17 (N.D.N.Y. 2000) (describing PURPA enforcement regime). An alternate approach that provides even more deference to states is the model adopted in the Surface Mining Control and Reclamation Act of 1977 (SMCRA), which allows state agencies to make state law that substitutes for federal authority. See 30 U.S.C. § 1253 (1994); *Bragg v. W. Va. Coal Ass’n*, 248 F.3d 275, 289 (4th Cir. 2001)

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have greater authority when implementing the federal act than otherwise available under state law.<sup>17</sup>

A critical feature of cooperative federalism statutes is the balance they strike between complete federal preemption (a preemptive federalism) and uncoordinated federal and state action in distinct regulatory spheres (a dual federalism). Under preemptive federalism regimes like the Employee Retirement Income Security Act (ERISA), for instance, the federal courts interpret federal enactments or defer to federal agency action as preempting all state action in a field.<sup>18</sup> Dual federalism regimes, by contrast, separate federal and state authority into two uncoordinated domains, giving rise to heated legal battles and considerable confusion for the regulated parties.<sup>19</sup>

Cooperative federalism regimes blend these two models. Congress and the federal agency bear responsibility for setting forth the basic framework within which state agencies can act, defining relevant federal statutory terms, and instituting uniform minimum standards.<sup>20</sup>

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(describing SMCRA's jurisdictional framework); see also *id.* at 294 (recognizing Clean Water Act's different approach of directly incorporating state law into federal law).

<sup>17</sup> See *PUD No. 1 v. Wash. Dep't of Ecology*, 511 U.S. 700 (1994). Even though the Supreme Court had previously found that the Federal Energy Regulatory Commission (FERC) could issue licenses for a dam that would preempt state law, *California v. FERC*, 495 U.S. 490, 505 (1990), the *PUD No. 1* court held that a state agency exercising its authority under the Federal Clean Water Act could interpose objections that would sidestep such FERC preemption. *PUD No. 1*, 511 U.S. at 712 (noting EPA's broad construction of state authority to regulate water quality). Thus, the state agency would not be allowed to veto the dam under state authority, but could exercise that very power under federal environmental law. But cf. *id.* at 733-34 (Thomas, J., dissenting) (criticizing this result).

<sup>18</sup> See Eleanor D. Kinney, *Clearing the Way for an Effective Federal-State Partnership in Health Reform*, 32 U. Mich. J.L. Reform 899, 935-36 (1999) (criticizing broad preemptive scope of Employment Retirement Income Security Act (ERISA), 29 U.S.C. §§ 1001-1461 (1994), suggesting it be replaced with more flexible framework that allows for state experimentation, and noting that Hawaii, only state with waiver from its requirements, enjoys nearly universal health care coverage); see also *infra* Part II.A.1 (discussing ERISA's use of preemptive federalism).

<sup>19</sup> This aptly characterizes the challenges under the old dual federalism regime set forth in the Communications Act of 1934. See ch. 652, 48 Stat. 1064 (current version codified as amended in scattered sections of 47 U.S.C.); *infra* notes 216-26 and accompanying text. Other statutory regimes create similar challenges for the regulated parties. See *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 256 (1984) (noting "tension" under Atomic Energy Damages Act (Price-Anderson Act), 42 U.S.C. §2210 (1994), where "Congress assumed that state-law remedies, in whatever form they might take, were available to those injured by nuclear accidents . . . even though it was well aware of the [Nuclear Regulatory Commission's] exclusive authority to regulate safety matters").

<sup>20</sup> See, e.g., *AT&T v. Iowa Utils. Bd.*, 525 U.S. 366, 378 (1999) (explaining that cooperative federalism statutes presumptively leave federal agency with such authority); *id.* at 380-81 & 381 n.8 (discussing "hodgepodge" conception of cooperative federalism statute that left superintending federal agency with narrow statutory mandate). Congress possibly may take the task of delineating the scope of permissible state decisions unto itself in some

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State agencies then can supplement that framework and experiment with regulatory approaches that are consistent with it.

### B. *The Rationale for Cooperative Federalism*

Put simply, the cooperative federalism regulatory strategy makes sense where the benefits of allowing for diversity in federal regulatory programs outweigh the benefits of demanding uniformity in all situations.<sup>21</sup> Either by contemplating state variances from the minimum federal standards (e.g., environmental regulation) or by encouraging state discretion in implementing federal law (e.g., the Telecom Act), Congress often prefers cooperative federalism programs to unitary federal administration.<sup>22</sup> In particular, there are at least three related reasons why the federal government has decided to promote diversity in federal regulatory regimes: (1) to allow states to tailor federal regulatory programs to local conditions; (2) to promote competition within a federal regulatory framework; and (3) to permit experimentation with different approaches that may assist in determining an optimal regulatory strategy.<sup>23</sup>

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instances. This would put the federal agency on notice that its residual authority to engage in this task cannot be taken for granted. Although this arrangement would raise novel separation-of-powers questions, they can be answered satisfactorily. See Weiser, *supra* note 12, at 713.

<sup>21</sup> This is a point that I have developed elsewhere. See Philip J. Weiser, *Chevron*, Cooperative Federalism, and Telecommunications Reform, 52 Vand. L. Rev 1, 40-44 (1999).

<sup>22</sup> See *Prudential Ins. Co. v. Benjamin*, 328 U.S. 408, 431 n.39 (1946) (noting that McCarran Act, which preserved regulation of “business of insurance” to States, recognized that this area of interstate commerce did not warrant uniform federal regulation); James E. Krier, *On the Topology of Uniform Environmental Standards in a Federal System—And Why It Matters*, 54 Md. L. Rev. 1226, 1231 (1995) (noting that Congress, through practice of granting variances, already concedes value of diversity).

<sup>23</sup> Some commentators have suggested that a fourth possible reason in favor of decentralized implementation of statutory regimes is enhancement of political participation. See Robert P. Inman & Daniel L. Rubinfeld, *Making Sense of the Antitrust State-Action Doctrine: Balancing Political Participation and Economic Efficiency in Regulatory Federalism*, 75 Tex. L. Rev. 1203, 1232 (1997) (“Political participation is likely to increase as policy responsibilities are decentralized to state and local governments.”). In a succinct explanation of the significance of federalism that touches on these four reasons, the Supreme Court explained that:

It assures a decentralized government that will be more sensitive to the diverse needs of a heterogeneous society; it increases opportunity for citizen involvement in democratic processes; it allows for more innovation and experimentation in government; and it makes government more responsive by putting the States in competition for a mobile citizenry.

*Gregory v. Ashcroft*, 501 U.S. 452, 458 (1991) (citing Michael W. McConnell, *Federalism: Evaluating the Founders’ Design*, 54 U. Chi. L. Rev. 1484, 1491-1511 (1987) (book review)); Deborah R. Merritt, *The Guarantee Clause and State Autonomy: Federalism for a Third Century*, 88 Colum. L. Rev. 1, 3-10 (1988).

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### 1. *Local Tailoring*

The local tailoring ability of cooperative federalism regimes facilitates ambitious regulatory ventures like the Telecom Act's attempt to open up local telephone markets to competition. A cooperative federalism approach recognizes that many regulatory problems "are so complex that they cannot be resolved by one level of government acting alone; rather, they require cooperation among all levels."<sup>24</sup> Economists repeatedly have praised this aspect of federalism.<sup>25</sup> Professor Richard Stewart calls it a "reconstitutive" approach to regulatory programs, a strategy which can "afford flexibility to accommodate diverse subsystem conditions and values, broaden decisional responsibility, and reduce costly and dysfunctional centralized decisionmaking."<sup>26</sup>

The federal government simply does not have the know-how and resources to tailor broad standards to local circumstances.<sup>27</sup> As an important case in point, modern environmental regulation convincingly demonstrates how "[t]he need to tailor environmental policy to local conditions and the even more important need to use state technical and personnel resources compel Congress to share some of its authority."<sup>28</sup> Notably, when the Federal Environmental Protection

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<sup>24</sup> Mark C. Gordon, *Differing Paradigms, Similar Flaws: Constructing a New Approach to Federalism in Congress and the Court*, 14 *Yale L. & Pol'y Rev.* 187, 215 (1996).

<sup>25</sup> See, e.g., George Stigler, *Tenable Range of Functions of Local Government*, in *Joint Econ. Comm., 85th Cong., Federal Expenditure Policy for Economic Growth and Stability: Papers Submitted by Panelists Appearing Before the Subcommittee on Fiscal Policy 213, 213* (Joint Comm. Print 1957) ("[A] good political system adapts itself to the differing circumstances and mores of different localities . . ."); Wallace D. Oates, *Fiscal Federalism* 11 (1972) ("A basic shortcoming of a unitary form of government is its probable insensitivities to varying preferences among the residents of the different communities.").

<sup>26</sup> Richard B. Stewart, *Reconstitutive Law*, 46 *Md. L. Rev.* 86, 92 (1986).

<sup>27</sup> See Weiser, *supra* note 12, at 671 n.27 (noting that federal officials readily admit their inability to assume states' regulatory responsibilities); cf. Larry Kramer, *Understanding Federalism*, 47 *Vand. L. Rev.* 1485, 1544 (1994) ("Realistically speaking, Congress [cannot] . . . have federal bureaucrats assume full responsibility [for administrative programs].").

<sup>28</sup> John P. Dwyer, *The Role of State Law in an Era of Federal Preemption: Lessons From Environmental Regulation*, 60 *Law & Contemp. Probs.*, Summer & Autumn 1997, at 203, 203; see *id.* at 220 ("To be effective, regulatory officials must be knowledgeable about local conditions and concerns to set appropriate regulatory priorities and to plan for future developments."). As one example, Congress structured SMCRA to enable states to regulate surface mining in a manner that best fit local needs and conditions. See *supra* note 16 (discussing deference to states under SMCRA); see also *Hodel v. Va. Surface Mining & Reclamation Ass'n*, 452 U.S. 264, 289 (1981) (recognizing SMCRA's "program of cooperative federalism that allows the States, within limits established by minimum federal standards, to enact and administer their own regulatory programs, structured to meet their own particular needs"); John D. Edgcomb, *Comment, Cooperative Federalism and Environmental Protection: The Surface Mining Control and Reclamation Act of 1977*, 58 *Tul. L. Rev.* 299, 313 (1983) ("One of the primary reasons for utilizing the cooperative approach is the great variation in geological and ecological conditions under which surface mining is

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Agency (EPA) stepped in for the state of Idaho to administer its air quality regulatory program, it clearly was not up to the task, reportedly spending almost five times as much as the state would have spent to do the same job.<sup>29</sup>

As a result of this need for cooperation, both the states and the federal government are well aware that they are tied together in their ability to administer cooperative federalism programs.<sup>30</sup> The resulting interdependence gives each important influence over the other.<sup>31</sup>

## 2. *Interstate Competition*

The argument that competition between states can produce optimal results rests upon at least four decades of economic theory and empirical research. Although there are a number of important contexts where competition between states can have negative results,<sup>32</sup> “a great deal of empirical research appears to support” the Tiebout hypothesis that allowing citizens and businesses to choose among competing jurisdictions can help to maximize social welfare.<sup>33</sup> That is, by adopting a flexible federal regulatory regime, a cooperative federalism

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conducted.”). Indeed, since the need for states to be able to tailor federal programs to meet local conditions has become sufficiently accepted in the environmental community, proponents of new programs routinely suggest that they adopt the cooperative federalism model. See, e.g., David H. Getches, *Groundwater Quality Protection: Setting a National Goal for State and Federal Programs*, 65 *Chi.-Kent L. Rev.* 387, 394-95 (1989) (“[S]tates must not simply have ‘primacy’ in administering a federally mandated and structured program, but must craft their own programs that fit specific situations of the resources being protected in each case.”).

<sup>29</sup> Martha Derthick, *American Federalism: Madison’s Middle Ground in the 1980s*, 47 *Pub. Admin. Rev.* 66, 70 (1987).

<sup>30</sup> See Paul E. Peterson et al., *When Federalism Works* 160 (1986) (“In a complex administrative system in which cooperative relationships must be established among federal, state, and local officials, policy professionals help create a cohesiveness necessary for conjoint intergovernmental action.”).

<sup>31</sup> See Daniel J. Elazar, *American Federalism: A View From the States* 182 (3d ed. 1984) (“To develop this atmosphere of cooperation, [federal officials] are prepared to make concessions to their state counterparts.”); Samuel H. Beer, *Federalism, Nationalism, and Democracy in America*, 72 *Am. Pol. Sci. Rev.* 9, 9 (1978) (“[A]s the federal government has made a vast new use of state and local governments[,] these governments in turn have asserted a new direct influence on the federal government.”). Larry Kramer has suggested that state agency influence in Washington, along with the sensitivity of political parties to state interests, is such that no judicial protection against commandeering is necessary. See Larry D. Kramer, *But When Exactly Was Judicially-Enforced Federalism “Born” in the First Place?*, 22 *Harv. J.L. & Pub. Pol’y* 123, 136 (1998).

<sup>32</sup> See Weiser, *supra* note 21, at 31-33 (describing deviations from federal policy goals, such as underinvestment in goods and services that would benefit neighboring states, and engaging in “race to the bottom,” as key problems with state competition).

<sup>33</sup> Jacques LeBoeuf, *The Economics of Federalism and the Proper Scope of the Federal Commerce Power*, 31 *San Diego L. Rev.* 555, 559-60 (1994) (discussing Charles M. Tiebout, *A Pure Theory of Local Expenditures*, 64 *J. Pol. Econ.* 416 (1956)).

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program allows for a degree of competition between the states for residents, capital, and economic activity in an increasingly mobile society.<sup>34</sup>

One classic approach for achieving this objective is to set a federal floor that provides flexibility to the states to enact stricter standards.<sup>35</sup> This model, which is adopted by almost all environmental statutes and the Telecom Act,<sup>36</sup> appropriately recognizes a role for federal involvement, but leaves the states with important flexibility to adapt to local conditions, compete for superior regulatory approaches, and experiment with various arrangements.<sup>37</sup> Significantly, imposing minimum standards does not dampen interstate competition (particularly where waivers are available).<sup>38</sup> In the case of the Telecom Act, for example, a state agency's enforcement decisions will have a real impact on the marketplace, influencing its ability to attract competitive entry and deployment of advanced services.<sup>39</sup>

### 3. *Experimentation*

In perhaps the most memorable defense of federalism, Justice Brandeis explained that “[i]t is one of the happy incidents of the federal system that a single courageous State may, if its citizens so choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.”<sup>40</sup> Unlike some New Deal programs that left no room for variation between the states,<sup>41</sup>

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<sup>34</sup> See Barry R. Weingast, *The Economic Role of Political Institutions: Market-Preserving Federalism and Economic Development*, 11 *J.L. Econ. & Org.* 1, 5 (1995) (“In combination, the choices of local jurisdictions and economic actors yield a diversity of public goods, with some jurisdictions providing lower taxes and a lower level of public goods and others providing higher taxes and a higher level of public goods.”).

<sup>35</sup> See Peter P. Swire, *The Race to Laxity and the Race to Undesirability: Explaining Failures in Competition Among Jurisdictions in Environmental Law*, 14 *Yale L. & Pol’y Rev.* 67, 86 (1996) (“The usual pattern of environmental law has been to set federal minimum standards, and allow the states to enact rules that are stricter.”). The Medicaid Act provides for a similar approach. See 42 U.S.C. § 1396a(10)(A) (1994 & Supp. IV 1998).

<sup>36</sup> See 47 U.S.C. § 251(d)(3) (Supp. IV 1998) (preserving state authority to adopt additional regulations where consistent with Telecom Act’s basic framework); see also *supra* note 13 and accompanying text.

<sup>37</sup> A further variant of this scheme is to allow exemptions from federal standards when a state can satisfy certain criteria. See *supra* note 14 and accompanying text.

<sup>38</sup> See Swire, *supra* note 35, at 87 (“Federal minimum standards are not inconsistent with—and may in fact facilitate—such experimentation and consequent beneficial competition.”).

<sup>39</sup> Cf. *Tristani Says Regulators Must Send “United Message” Against Deception*, *Comm. Daily*, Mar. 7, 2000, 2000 WL 4694609 (reporting that competitors “are hesitant to set up operations in states where PUCs have little enforcement authority”).

<sup>40</sup> *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting).

<sup>41</sup> See Henry N. Butler & Jonathan R. Macey, *Externalities and the Matching Principle: The Case for Reallocating Environmental Regulatory Authority*, 14 *Yale L. & Pol’y Rev.*

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cooperative federalism programs capitalize on these laboratories. When states enjoy significant discretion, they can experiment and learn from one another when performing complex regulatory tasks—from setting pole attachment rates (Pole Attachment Act of 1978)<sup>42</sup> to encouraging the development of alternate sources of electric power (the Public Utilities Regulatory Policy Act (PURPA))<sup>43</sup> to making judgments about cost containment in health care reimbursement (Medicaid)<sup>44</sup> to setting appropriate water quality benchmarks (Clean Water Act).<sup>45</sup>

Resisting the immediate institution of a uniform national rule hedges the federal government's bet by waiting to pick a single standard. A national standard may ultimately emerge, but avoiding the premature selection of such a standard—or its ineffective administration—leads to better regulatory policy.<sup>46</sup> The absence of a federal standard in difficult regulatory policy areas can help ensure that the regulatory regime does not “lock in” a suboptimal standard.<sup>47</sup>

Through the process of interstate competition, other states and the federal government may move to adopt preferable approaches.<sup>48</sup> In this sense, a federal regulatory agency, like the Supreme Court, can

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23, 28 (1996) (“[F]ederal preemption may reduce the ability and incentives of state regulators to experiment with creative solutions to local environmental problems.”).

<sup>42</sup> 47 U.S.C. § 224 (1994 & Supp. IV 1998).

<sup>43</sup> See Charles G. Stalon & Reinier H.J.H. Lock, *State-Federal Relations in the Economic Regulation of Energy*, 7 *Yale J. on Reg.* 427, 465 (1990) (determining that states have learned from one another in implementing PURPA, “giving credence to the notion of a fifty-state regulatory laboratory, a notion used to justify the substantial initial discretion given by FERC to states”).

<sup>44</sup> 42 U.S.C. § 1396a(13) (1994 & Supp. IV 1998).

<sup>45</sup> See *supra* notes 12-16 and accompanying text (referring to Clean Water Act as example of cooperative federalism regulatory program). R

<sup>46</sup> Professor Peter H. Schuck, for example, suggested that “[u]niformity mandated at the ‘wrong’ level, or administered incompetently even at the ‘right’ one, may well be worse than heterogeneous outcomes among the states.” Peter H. Schuck, *Some Reflections on the Federalism Debate*, 14 *Yale L. & Pol’y Rev.* 1, 19 (1996). Put differently, where the optimal approach is unclear, “the learning model of the law suggests that values other than uniformity may be primary.” Mary Loring Lyndon, *Tort Law, Preemption and Risk Management*, 2 *Widener L. Symp. J.* 69, 80 (1997).

<sup>47</sup> The literature on “network effects” explains how reliance on a particular standard that is quickly selected can lead to the persistence of a suboptimal standard. The selection of the QWERTY standard for typewriter keyboards stands as a case in point of how a less optimal standard can be “locked in” through an early adoption that is very difficult to reverse. See W. Brian Arthur, *Competing Technologies, Increasing Returns, and Lock-in by Historical Events*, 99 *Econ. J.* 116, 116-17 (1989).

<sup>48</sup> Mark C. Gordon has suggested that there is some tension between the conception of experimentalism for adoption by other states (or the national government) and the tailoring of a program to local conditions. Gordon, *supra* note 24, at 189 n.6. This suggestion assumes, however, that other states and the federal government cannot ascertain to what extent local conditions influence the success of state experiments before adopting them. From the conclusions drawn by other commentators, it seems that states and the federal R

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benefit from “percolation” of different approaches before ultimately settling upon a single approach or delineating the scope of acceptable approaches.<sup>49</sup>

In sum, the advantages of cooperative federalism have made it an attractive model for lawmakers designing complex regulatory systems. In addition to these instrumental reasons for the rise of cooperative federalism, the evolution of federal common law jurisprudence in the last half of the twentieth century also encouraged this structure for filling statutory gaps. Part II turns to this history.

## II

### THE FALL OF THE “NEW” FEDERAL COMMON LAW

Originally, even after *Erie Railroad v. Tompkins* closed the curtain on the era of general federal common law,<sup>50</sup> federal courts regularly still crafted rules of federal common law. Even though they were not compelled by an authoritative text, these rules still enjoyed the status of federal law and thus displaced incompatible state law.<sup>51</sup>

In his famous article championing an active role for federal common law, Judge Friendly declared that *Erie*, combined with major cases in which federal courts developed common law to implement statutory policies,<sup>52</sup> “brought us to a far, far better [world] than we

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government are able to make such determinations. See, e.g., LeBoeuf, *supra* note 33, at 561 n.25 (listing sources).

<sup>49</sup> Cf. *United States v. Mendoza*, 464 U.S. 154, 160 (1984) (“Allowing only one final adjudication would deprive this Court of the benefit it receives from permitting several courts of appeals to explore a difficult question.”); Richard L. Revesz, *Specialized Courts and the Administrative Lawmaking System*, 138 U. Pa. L. Rev. 1111, 1156-57 (1990) (arguing that intercircuit court conflicts ensure more time devoted to identical issues, improve quality of legal decisions, and facilitate dialogue).

<sup>50</sup> 304 U.S. 64, 73-77 (1938) (overruling *Swift v. Tyson*, 41 U.S. (16 Pet.) 1 (1842)).

<sup>51</sup> See Merrill, *supra* note 7, at 5, 7 (defining federal common law in this manner). This conception of federal common law declines to draw a sharp line between “interpretation” and “lawmaking,” recognizing that questions like whether to imply a right of action, fill in interstices of a statute, or develop a statutory policy through the adoption of federal common law all look to an underlying federal statutory (or constitutional) provision to generate legal rules. See *id.* at 4-5; see also Peter Westen & Jeffrey S. Lehman, *Is There Life for Erie After the Death of Diversity?*, 78 Mich. L. Rev. 311, 332 (1980) (“The difference between ‘common law’ and ‘statutory interpretation’ is a difference in emphasis rather than a difference in kind.”). But see Martin H. Redish, *Federal Common Law, Political Legitimacy, and the Interpretive Process: An “Institutionalist” Perspective*, 83 Nw. U. L. Rev. 761, 767 n.23 (1989) (attempting to distinguish between common lawmaking and statutory interpretation).

<sup>52</sup> In particular, Judge Friendly focused on the impact of *Clearfield Trust Co. v. United States*, 318 U.S. 363 (1943), and *Textile Workers Union v. Lincoln Mills of Alabama*, 353 U.S. 448 (1957), two cases which exemplify a robust vision of the role for post-*Erie* federal common law. In *Clearfield*, the Court concluded that to protect the United States in actions involving commercial paper, the federal courts should develop rules of federal common law, drawing on pre-*Erie* general common law decisions for guidance. *Clearfield*, 318

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have ever known before.”<sup>53</sup> Under this conception of federal common law, federal courts enjoyed—and often employed—the power to draw from common law sources to “effectuate the policy we think implicit in federal statutes.”<sup>54</sup>

Over the last two decades, however, the courts have cut back on the creation of federal common law,<sup>55</sup> in light of not just the federalism concerns that most clearly animated *Erie*,<sup>56</sup> but also concerns about separation of powers,<sup>57</sup> institutional competence,<sup>58</sup> and increased judicial workloads.<sup>59</sup> Once the federal judiciary exited from an aggressive lawmaking role and scrutinized administrative agencies’ policy judgments less closely, the administrative state emerged as an independent lawmaking force. The enactment of cooperative federalism statutes thus represents a partial congressional response to keep the resulting federal bureaucracy in check.<sup>60</sup>

This Part chronicles the shift away from Judge Friendly’s view of federal common lawmaking. First, it will examine the increasing judicial reluctance to create federal common law, emphasizing how this trend relates to an increasing skepticism of the value of uniform rules as a goal in and of itself. Next, it will discuss the federal judiciary’s

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U.S. at 366-67. In *Lincoln Mills*, the Court concluded that section 301(a) of the Labor Management Relations Act created a federal forum for the resolution of labor disputes which called for a federally created law of labor relations. *Lincoln Mills*, 353 U.S. at 456.

<sup>53</sup> Friendly, *supra* note 5, at 422.

<sup>54</sup> *D’Oench, Duhme & Co. v. FDIC*, 315 U.S. 447, 465 (1942) (Jackson, J., concurring).

<sup>55</sup> See Brown, *supra* note 7, at 627 (“The new *Erie* doctrine rejects any notion of the federal courts playing a concurrent and complementary law-making function vis-à-vis the legislative branch.”); Paul Lund, *The Decline of Federal Common Law*, 76 B.U. L. Rev. 895, 899 (1996) (arguing that Supreme Court has constricted federal common law by requiring that state law govern more issues and that federal courts incorporate state law rules in more circumstances); Richard B. Stewart & Cass R. Sunstein, *Public Programs and Private Rights*, 95 Harv. L. Rev. 1193, 1223 (1982) (“The ‘mid-twentieth century type of federal common law’ celebrated by Judge Friendly seems rapidly headed for oblivion.” (citing Friendly, *supra* note 5, at 413)).

<sup>56</sup> This Article focuses on how abandoning the judicial effort to develop uniform federal commercial law opened the path for law created by federal agencies and state law to fill in statutory gaps and interstices. In so doing, it does not grapple with *Erie*’s core legacy of harmonizing state substantive law and federal procedural law.

<sup>57</sup> See Paul Mishkin, *Some Further Last Words on Erie—The Thread*, 87 Harv. L. Rev. 1682, 1683 (1974) (highlighting separation-of-powers concerns).

<sup>58</sup> See *Middlesex County Sewerage Auth. v. Nat’l Sea Clammers Ass’n*, 453 U.S. 1, 24-25 (1981) (Stevens, J., concurring in part and dissenting in part) (“In recent years, however, a Court that is properly concerned about the burdens imposed upon the federal judiciary, the quality of the work product of Congress, and the sheer bulk of new federal legislation, has been more and more reluctant to open the courthouse door to the injured citizen.”).

<sup>59</sup> Erwin Chemerinsky & Larry Kramer, *Defining the Role of the Federal Courts*, 1990 BYU L. Rev. 67, 67 (“If there is one thing about which practically all federal judges agree, it is that their dockets are overcrowded.”).

<sup>60</sup> See Weiser, *supra* note 12, at 667 (explaining how cooperative federalism helps to keep federal agencies in check for fear of delegation to state agencies).

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withdrawal from aggressive oversight of agency lawmaking under the *Chevron* doctrine. With this backdrop in mind, this Part will conclude by examining the calls for increased judicial scrutiny of agency-made federal law, arguing that courts should refuse to undermine the current structure of the administrative state as defined by *Chevron*.

### A. *The Uses and Abuses of Federal Common Law*

In the earlier post-*Erie* era, federal courts created common law regularly in a number of situations: where they discerned a “uniquely federal interest,”<sup>61</sup> where a statute conferred federal jurisdiction that the courts interpreted as calling for the creation of substantive federal law,<sup>62</sup> or where Congress delegated the task to the federal courts by enacting a broad statutory concept.<sup>63</sup>

This Section will examine the later decline of federal common lawmaking in three spheres: the reluctance to establish unitary spheres of federal common law, the incorporation of state decisional law as a substitute for creating federal common law, and the increased skepticism about implying rights of action into federal statutes.

#### 1. *Federal Unitary Regimes*

The development of federal common law for unitary federal regimes, ranging from the Sherman Antitrust Act,<sup>64</sup> to the Labor Management Relations Act,<sup>65</sup> to maritime law, often rests on the assumption that such uniformity is necessary to effectuate the relevant

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<sup>61</sup> The Court has explained that such instances include cases involving (1) the obligations to, and rights of, the United States under its contracts; (2) the liability of federal officers for official acts; (3) civil liabilities arising out of federal procurement contracts relating to national defense; and (4) the distribution of powers in our federal system. See *Boyle v. United Techs. Corp.*, 487 U.S. 500, 504-08 (1988); *Texas Indus. v. Radcliff Materials, Inc.*, 451 U.S. 630, 640-41 (1980).

<sup>62</sup> *Textile Workers v. Lincoln Mills of Ala.*, 353 U.S. 448, 456 (1957).

<sup>63</sup> The Sherman Antitrust Act’s restrictions on the “restraint of trade” provide a case in point. See 15 U.S.C. § 1 (1994); *Nat’l Soc’y of Prof’l Eng’rs v. United States*, 435 U.S. 679, 688 (1978) (describing common law process called for by Sherman Act). In *Lincoln Mills*, the Supreme Court explained how federally created rules would be developed from a statutory directive that provides only minimal guidance

by looking at the policy of the legislation and fashioning a remedy that will effectuate that policy. The range of judicial inventiveness will be determined by the nature of the problem. Federal interpretation of the federal law will govern, not state law. But state law, if compatible with the purpose of § 301, may be resorted to in order to find the rule that will best effectuate the federal policy. Any state law applied, however, will be absorbed as federal law and will not be an independent source of private rights.

*Lincoln Mills*, 353 U.S. at 456-57 (citations omitted).

<sup>64</sup> 15 U.S.C. §§ 1-7 (1994).

<sup>65</sup> 29 U.S.C. §§ 141-187 (1994 & Supp. V. 2000)

substantive federal policies in each area. In fact, however, courts and commentators have begun to recognize that the aspiration for uniformity—both before *Erie* and after it—often rests on flawed assumptions.<sup>66</sup> By focusing on achieving uniform legal rules, courts often overlook the potential value of diversity and fail to examine adequately the policies advanced by the federal statute.<sup>67</sup> Consequently, federal judge-made law and its attendant aspiration to develop a uniform regime impose institutional costs on the lawmaking system by displacing other actors and undermining the benefits of experimentation by state agencies, state courts, and other bodies.<sup>68</sup>

In recent years, courts have moved away from a reflexive commitment to uniformity as a justification for federal common law.<sup>69</sup> In particular, recent Supreme Court jurisprudence has rejected the notion that the mere mention of the importance of a uniform federal rule can justify the displacement of state law and the development of

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<sup>66</sup> See William R. Casto, *The Erie Doctrine and the Structure of Constitutional Revolutions*, 62 Tul. L. Rev. 907, 947 (1988) (“Once uniformity was recognized as unattainable, the last obstacle to overturning *Swift* was removed.”); John F. Duffy, *Administrative Common Law in Judicial Review*, 77 Tex. L. Rev. 113, 137 (1998) (stating that post-*Erie* federal common law rested on belief in national uniformity and virtues of judicial lawmaking).

<sup>67</sup> See, e.g., *Atchison, Topeka & Santa Fe Ry. v. Brown & Bryant*, 159 F.3d 358, 363 (9th Cir. 1998) (noting, in context of developing rule for CERCLA successor liability, that uniformity rationale is often invoked, but “there has been no real explanation of the need for uniformity” and that almost all state rules are in accord on this issue).

<sup>68</sup> Cf. Ruth Bader Ginsburg, *Speaking in a Judicial Voice*, 67 N.Y.U. L. Rev. 1185, 1198-209 (1992) (explaining how decision in *Roe v. Wade*, 410 U.S. 113 (1973), by displacing other actors in policy development process, had unintentional consequence of undermining efforts to develop better justifications for, and rules governing, abortion). In addition, there may well be a harmful “one way ratchet in the federal system—once a federal issue, always a federal issue.” *Butler & Macey*, supra note 41, at 24. This point may be better understood as a tendency, not a rule. See Curtis A. Bradley, *A New American Foreign Affairs Law?*, 70 U. Colo. L. Rev. 1089, 1097-100 (1999) (noting emergence of local and state involvement in foreign affairs).

<sup>69</sup> Compare *Clearfield Trust Co. v. United States*, 318 U.S. 363, 367 (1943) (holding, without examining policies or purposes of legislation in any depth, that in transactions involving commercial paper drawn from federal government, “[t]he desirability of a uniform rule is plain” and that relying on state law is “singularly inappropriate”), with *United States v. Yazell*, 382 U.S. 341, 354-58 (1966) (rejecting, in similar context involving commercial debts owed to Small Business Administration, argument that underlying statute justified development of uniform federal rule). This trend away from an emphasis on uniformity has become widespread. See *Metro. Life Ins. Co. v. Taylor*, 481 U.S. 58, 65 (1987) (explaining that complete preemption is rare exception); *Burks v. Lasker*, 441 U.S. 471, 479 n.6 (1979) (explaining, in context of regulations governing investment companies and advisers, that concern is meeting certain federal standards rather than uniformity); Catherine L. Fisk, *The Last Article About the Language of ERISA Preemption?—A Case Study of the Failure of Textualism*, 33 Harv. J. on Legis. 35, 95 (1996) (arguing for “pragmatic approach” to interpreting preemption provision rather than reliance on uniformity as producing regulatory efficiency).

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federal common law.<sup>70</sup> Notably, in *United States v. Kimbell Foods*,<sup>71</sup> to replace what it saw as insufficient “generalized pleas for uniformity” or “considerations of administrative convenience,” the Supreme Court instituted a three-part test to determine whether federal statutory policies called for a federal common law rule.<sup>72</sup> More generally, recent cases such as *O’Melveny & Myers v. FDIC* have sought to rein in “the runaway tendencies of ‘federal common law’ untethered to a genuinely identifiable (as opposed to judicially constructed) federal policy.”<sup>73</sup>

The Supreme Court’s most recent venture in an ambitious development of a unitary federal regime, implementing the ERISA, highlights the hazards of engaging in federal common lawmaking for the sake of uniformity.<sup>74</sup> The Court’s basis for intervening was the ERISA’s broad mandate to preempt any state rules that “relate to” the administration of employee benefit plans,<sup>75</sup> and a statement by one of the ERISA’s congressional sponsors that was interpreted as inviting such judicial involvement.<sup>76</sup> After a quarter-century of judicial development of this common law regime, however, “[t]housands of opin-

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<sup>70</sup> See Merrill, *supra* note 7, at 43 n.188 (“[T]he Court has tended to fashion a federal rule only when a uniform rule is considered necessary . . .”).

<sup>71</sup> 440 U.S. 715 (1979).

<sup>72</sup> *Id.* at 728-30, 33. *Kimbell Foods*’s test evaluated (1) whether there is a need for a uniform body of law; (2) whether the application of state law would frustrate specific objectives of a congressional program; and (3) whether the application of the federal rule would disrupt relationships based on state law. *Id.* Subsequent cases also have stressed that “[t]o invoke the concept of ‘uniformity’ . . . is not to prove its need.” *Atherton v. FDIC*, 519 U.S. 213, 220 (1997); see *O’Melveny & Myers v. FDIC*, 512 U.S. 79, 88 (1994) (noting that case for uniformity is often overblown); cf. *Merrell Dow Pharms. v. Thompson*, 478 U.S. 804, 815-16 (1986) (rejecting “powerful federal interest in seeing that the federal statute is given uniform interpretations” as justification for providing federal jurisdiction to adjudicate state-created cause of action involving matters of federal law).

<sup>73</sup> 512 U.S. at 89; see also *Ins. Co. of N. Am. v. Fed. Express Co.*, 189 F.3d 914, 924-25 (9th Cir. 1999) (Fletcher, W., J., concurring) (examining statutory purpose and legislative intent with care in order to justify existence of federal common law in context of limited liability provisions of air carrier contracts).

<sup>74</sup> *Franchise Tax Bd. v. Constr. Laborers Vacation Trust*, 463 U.S. 1, 24 n.26 (1983) (embarking on ERISA federal common law venture); see also *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41, 56 (1987) (stating that Congress “intended that a body of Federal substantive law will be developed by the courts to deal with issues involving rights and obligations under private welfare and pension plans”).

<sup>75</sup> 29 U.S.C. § 1144(a) (1994) (superseding “any and all State laws insofar as they may now or hereafter relate to any employee benefit plan”).

<sup>76</sup> 120 Cong. Rec. S29,942 (daily ed. Aug. 22, 1974) (statement of Sen. Javits) (cited in *Franchise Tax Bd.*, 465 U.S. at 24 n.26) (“[A] body of Federal substantive law will be developed by the courts to deal with issues involving rights and obligations under private welfare and pension plans.”); see also Jeffrey A. Brauch, *The Federal Common Law of ERISA*, 21 *Harv. J.L. & Pub. Pol’y* 541, 550 (1998) (“The Javits statement has become the single most important, and undoubtedly most cited, source for the asserted authority to create federal common law under ERISA.”).



ions have mouthed platitudes about the broad remedial purpose behind the ERISA, but the implementation of that purpose, if that purpose was ever really intended by Congress (a matter of legitimate debate), is in shambles.”<sup>77</sup> In the face of such withering criticism,<sup>78</sup> the Supreme Court recently has cautioned against developing judge-made rules to supplement those provided for in the ERISA’s statutory regime.<sup>79</sup>

Despite the shift away from the uniformity rationale, it continues to garner adherents, even when its recitation seems closer to incantation than sound analysis.<sup>80</sup> Thus, there is a danger that federal courts unfamiliar with the cooperative federalism regulatory model will lean towards a preemption approach, rejecting local choices as inconsistent with the longstanding rhetorical commitment to preserving the uniformity of federal law.<sup>81</sup>

The classic objection to the promotion of diversity in a federal regulatory program argues that a uniform federal rule is easier to

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<sup>77</sup> William M. Acker, Jr., *Can the Courts Rescue ERISA?*, 29 *Cumb. L. Rev.* 285, 286 (1998-1999) (“I have now arrived at the conclusion that ERISA cannot be rescued and made workable by the courts.”).

<sup>78</sup> This criticism goes beyond the substance of the judge-made law under ERISA to the suggestion that “[t]he accepted understanding—that Congress specifically delegated broad common-law powers to federal courts to create new rights and obligations—is simply not true.” Brauch, *supra* note 76, at 557.

<sup>79</sup> *Hughes Aircraft Co. v. Jacobson*, 525 U.S. 432, 447 (1999) (warning that ERISA is “a ‘comprehensive and reticulated statute’” (quoting *Nachman Corp. v. Pension Benefit Guar. Corp.*, 446 U.S. 359, 361 (1980)) that “is ‘enormously complex and detailed’” (quoting *Mertens v. Hewitt Assocs.*, 508 U.S. 248, 262 (1993))); see also *Pegram v. Herdrich*, 530 U.S. 211, 214, 221-22 (2000) (declining to recognize right to sue health-maintenance organizations under ERISA, and pointing to limits of judicial competence in health-care policy as reason to defer to other branches).

<sup>80</sup> Judge Coffey’s opinion in the Seventh Circuit’s debate over the proper standard in employer liability for sexual harassment reflects just this sort of resort to the argument that uniformity in federal law should be pursued for its own sake, on the ground that it will make life easier for multistate employers:

[F]ederal common law rules governing employer liability serve the basic ‘policy or interest’ of uniformity. Interposing the statutes and decisional law of the fifty states, as proposed by Judge Easterbrook and Wood, would make a crazy-quilt of the law and thus grievously undermine our interest in fostering uniformity. Such an approach would make it most difficult, if not impossible, for an employer with plants in more than one state to comply with federal law, obviously necessitating that employers retain knowledgeable local counsel in several states, or even all of them.

*Jansen v. Packaging Corp. of Am.*, 123 F.3d 490, 523-24 (7th Cir. 1997) (en banc) (Coffey, J., concurring in part and dissenting in part). But see Paul Wolfson, *Preemption and Federalism: The Missing Link*, 16 *Hastings Const. L.Q.* 69, 107 (1988) (decrying use of “uniformity,” “efficiency,” “predictability,” and “simplicity” as “euphemisms for complete disablement of state authority”).

<sup>81</sup> See Weiser, *supra* note 21, at 7.

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comply with and more efficient for interstate businesses.<sup>82</sup> This objection, however, is often overstated. Some have justified the broad preemptive scope of the ERISA, for example, on the ground “that ‘[i]f we have each state doing its own thing, we are going to have an unworkable maze’ for those employers that operate in several states.”<sup>83</sup> As a result, some parties are denied any remedy under the ERISA, even where states might choose to supplement its minimum requirements.<sup>84</sup> At the same time, nationwide employers still need to navigate the maze of fifty different regimes of employment law and tort law anyway.<sup>85</sup>

To be sure, proponents of cooperative federalism recognize that uniformity sometimes can be one important consideration.<sup>86</sup> Regimes

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<sup>82</sup> The uniformity argument sometimes takes on a formalist cast, concluding either that federal law must be uniform and administered by federal agents or that state agencies (as opposed to state courts) cannot be trusted. For my response to these points, see generally Weiser, *supra* note 21; see also Weiser, *supra* note 12, at 673-93 (discussing role of state agencies in implementing cooperative federalism).

<sup>83</sup> Angelo A. Stio III, *State Government: The Laboratory for National Health Care Reform*, 19 *Seton Hall Legis. J.* 322, 338 n.57 (1994) (quoting statement of corporate benefits manager quoted in Kenneth M. Coughlin, *While Congress Debates, the States Legislate*, *Bus. & Health*, Mid-Sept. 1992, at 24, 26).

<sup>84</sup> See, e.g., *Bast v. Prudential Ins. Co.*, 150 F.3d 1003, 1011 (9th Cir. 1998) (noting tragic circumstances of case, but holding that ERISA preempts state law and provides no remedy).

<sup>85</sup> Given the pervasive diversity of legal rules across the several states, it is worth asking whether businesses pressing for a uniform federal rule truly need a single rule—or even necessarily will receive one under federal law—or are more focused on the value of securing a *favorable* rule. See Alison Grey Anderson, *The Meaning of Federalism: Interpreting the Securities Exchange Act of 1934*, 70 *Va. L. Rev.* 813, 846 (1984) (“Questions about federalism in the corporate and securities area also appear primarily to involve the question of which interests a given outcome will further, whether state or federal.”); David P. Currie, *Motor Vehicle Air Pollution: State Authority and Federal Pre-emption*, 68 *Mich. L. Rev.* 1083, 1085 (1970) (noting how threat of environmental legislation on local level spurred industry to support federal legislation); Jonathan R. Macey, *Federal Deference to Local Regulators and the Economic Theory of Regulation: Toward a Public-Choice Explanation of Federalism*, 76 *Va. L. Rev.* 265, 271-73 (1990) (arguing that changing single federal law involves lower transaction cost, while without federal change, specter of pre-emption remains). As one commentator put it:

How, for example, did bipartisan support for federal motor-vehicle safety and emissions control coalesce? The automobile industry lobbied to preempt the states from setting disparate standards, some of which might be overly militant. Better to have one 500-pound gorilla in charge of regulating the industry, its lobbyists reckoned, than to deal with 50 monkeys on steroids.

Pietro S. Nivola, *Does Federalism Have a Future?*, *Pub. Int.*, Winter 2001, at 44, 55.

<sup>86</sup> For an example of a set of criteria justifying a uniform federal regime, see generally Jerry L. Mashaw & Susan Rose-Ackerman, *Federalism and Regulation*, in *The Reagan Regulatory Strategy* 111 (George C. Eads & Michael Fix eds., 1984); see also Susan Rose-Ackerman, *Rethinking the Progressive Agenda: The Reform of the American Regulatory State* 159-73 (1992). Mashaw and Rose-Ackerman offer thoughtful criteria for when and why uniform federal administration may be appropriate, with the notable exception that they conclude that state agencies are more vulnerable than federal ones to regulatory cap-

should impose national rules where doing so gives rise to substantial efficiencies,<sup>87</sup> protects important equity concerns,<sup>88</sup> guards against substantial interstate spillovers,<sup>89</sup> or prevents a “race to the bottom” between states.<sup>90</sup> Along the lines of *Erie*’s concern with forum-shopping, uniform national rules also are important where parties are not rooted in a particular state and thus cannot plan based on the decisions of a state regulatory body or court system.<sup>91</sup> Thus, where a na-

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ture. As an initial matter, I am not prepared to join this conclusion, particularly because the costs of federal capture are greater, as it affects all fifty states. But, more fundamentally, many cooperative federalism programs address this concern by instituting a variety of measures, including minimum federal standards that would prevent some of the most pernicious effects of capture. Weiser, *supra* note 21, at 36-37.

<sup>87</sup> Such efficiencies could inhere in compliance with certain requirements in exceptional cases. See, e.g., Electronic Signatures in Global and National Commerce Act, 15 U.S.C.A. §§ 7001-7031 (West Supp. 2000); S. Rep. No. 106-131, at 5 (1999) (stating that purpose of electronic-signature bill is to assure “a consistent national baseline for electronic commerce”). Similarly, such efficiencies might be found in centralized administration of setting (and possibly enforcing) standards for which substantial economies of scale exist. See Kirsten H. Engel, *State Environmental Standard-Setting: Is There a “Race” and Is It “to the Bottom”?*, 48 *Hastings L.J.* 271, 277-80 (1997) (arguing that federal minimum standards should be retained and federal-state cooperation promoted in environmental standard-setting in order to maximize efficiency).

<sup>88</sup> Paul E. Peterson, *City Limits* 82-83 (1981) (supporting federal involvement in redistributive programs to improve equity).

<sup>89</sup> Significantly, spillovers can be positive or negative. Negative spillovers include environmental pollution that can cross state lines and thus will not be addressed adequately by the state in which the polluter is located. Conversely, a positive spillover would be clean air that leaves the state and thus would not be provided in adequate quantities. Another positive spillover would be support for research and development that could be transported to other states, reducing the results of such support on a state level. For a good explanation of both positive and negative spillovers, see Inman & Rubinfeld, *supra* note 23, at 1244, noting that when interjurisdictional spillovers or externalities are implicated, “state and local governments underprovide regulations with valuable, positive spillovers (for example, air quality control) and overprovide regulations with harmful, negative spillovers (for example, anticompetitive business regulations),” removing guarantee of efficiency from economic competition. See also Richard J. Pierce, Jr., *Regulation, Deregulation, Federalism, and Administrative Law: Agency Power to Preempt State Regulation*, 46 *U. Pitt. L. Rev.* 607, 670 (1985) (“It is in the national interest to permit each state to adopt its own regulatory policy to the extent that such state decisions affect only, or predominantly, the interests of state residents. States should not be permitted, however, to make regulatory decisions that create substantial interstate spillovers.”).

<sup>90</sup> See, e.g., Lucian Arye Bebchuk, *Federalism and the Corporation: The Desirable Limits on State Competition in Corporate Law*, 105 *Harv. L. Rev.* 1435, 1440 (1992) (asserting that certain areas of corporate law produce “race for the bottom” between states and would benefit from uniform federal rules). But see Richard L. Revesz, *Rehabilitating Interstate Competition: Rethinking the “Race-to-the-Bottom” Rationale for Federal Environmental Regulation*, 67 *N.Y.U. L. Rev.* 1210, 1212 (1992) (noting that, although interstate externalities may justify certain environmental regulations, “competition can [generally] be expected to produce an efficient allocation of industrial activity among the states”).

<sup>91</sup> Congress deemed this consideration, along with the importance of specially trained judges, sufficient grounds to make a special exception in the patent law by establishing a

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tional market truly exists—say, in the validity of online signatures—the presence of state regulation that differs substantially from federal requirements could stifle the growth of the regulated industry.<sup>92</sup>

In most areas of regulation, however, the justifications for uniformity suggest the value of a federally acceptable range of reasonableness, not a mandatory pinpointed policy that would sacrifice the advantages of cooperative federalism's flexibility. Thus, federal courts should treat pleas for a rule of federal common law to advance the interests of uniformity with care and skepticism, doing so only where the requested effort relates closely to a clearly articulated statutory or constitutional policy.<sup>93</sup>

## 2. *Federal Incorporation of State Law*

When federal courts stressed the importance of uniformity under federal law, resort to state law threatened to destroy the integrity of the federal statutory regime. But, as they increasingly recognized that a range of acceptable alternatives would serve the goals of most federal schemes, federal courts often opted for diverse state rules to fill gaps in federal statutes.<sup>94</sup>

In part, the judicial preference for relying on existing state-law rules respects the presumed congressional expectation that courts will borrow from state law to address certain matters, like the appropriate statute of limitations period.<sup>95</sup> More fundamentally, where there is no obvious federally created counterpart from which to borrow, judicial

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single court of appeals for this area of law. See Rochelle Cooper Dreyfuss, *The Federal Circuit: A Case Study in Specialized Courts*, 64 *N.Y.U. L. Rev.* 1, 7 (1989) (describing incentives for forum-shopping—and opportunity to do so—under previous patent-law regime).

<sup>92</sup> See Nivola, *supra* note 85, at 51 (noting concern about uniformity in telecommunications and information technologies); *supra* note 87 (citing electronic-signature bill as example of area where uniformity is needed).

<sup>93</sup> See *O'Melveny & Myers v. FDIC*, 512 U.S. 79, 87 (1994) (finding occasions when federal common law is justified are “few and restricted” (internal quotation marks omitted)); *id.* at 88 (emphasizing that FDIC “identified *no* significant conflict with an identifiable federal policy or interest”).

<sup>94</sup> See, e.g., *Yamaha Motor Corp., U.S.A. v. Calhoun*, 516 U.S. 199, 209-11, 210 n.8 (1996) (leaving in place state remedies to supplement federal maritime law); *N. Star Steel Co. v. Thomas*, 515 U.S. 29, 36 (1995) (noting that both ends of spectrum of state-law rules cohere with federal policy governing resolution of labor disputes).

<sup>95</sup> See *Wilson v. Garcia*, 471 U.S. 261, 266-67 (1985) (“When Congress has not established a time limitation for a federal cause of action, the settled practice has been to adopt a local time limitation as federal law if it is not inconsistent with federal law or policy to do so.”); see also *N. Star Steel*, 515 U.S. at 34 (noting that federal legislation has repeatedly adopted statutes of limitations from state statutes that were not inconsistent with national policies); *Reed v. United Transp. Union*, 488 U.S. 319, 323-24 (1989) (stating that Congress's failure to supply express statute of limitations suggests congressional intent that state law be used).

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invention of a rule would take the courts into an area of unguided policymaking;<sup>96</sup> by contrast, the courts often can simply apply an already developed state rule.<sup>97</sup>

Before incorporating a state rule, however, federal courts must examine the federal regime's policy vigilantly to ensure that a state rule does not undermine it.<sup>98</sup> To that end, the Supreme Court has rejected the argument that state law is the only source for federal rules such as statutes of limitations.<sup>99</sup> "[E]ven assuming in general terms the appropriateness of 'borrowing' state law, specific aberrant or hostile state rules do not provide appropriate standards for federal law."<sup>100</sup> In some situations, following rules like statutes of limitations from different states would disrupt the regulatory program and create

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<sup>96</sup> As expressed by Judge Posner, who is a critic of this borrowing from states:

[J]udges feel that they have to borrow an existing statute of limitations rather than lay down a period of limitations as a matter of federal common law because it would be arbitrary to pick a term of years. They feel in other words that enactment of a limitations period, because of its inescapable arbitrariness, is a legislative rather than a judicial task.

Short v. Belleville Shoe Mfg., 908 F.2d 1385, 1394 (1990) (Posner, J., concurring), cert. denied, 501 U.S. 1250 (1991). In another response to the lack of a discernible guide where state statutes of limitations would frustrate the federal policy, Justice Scalia suggests applying no limitation period at all. Agency Holding Corp. v. Malley-Duff & Assocs., 483 U.S. 143, 170 (1987) (Scalia, J., concurring). Other commentators prefer relying on a federal common law rule to ensure a uniform period. See generally Abner J. Mikva & James E. Pfander, On the Meaning of Congressional Silence: Using Federal Common Law to Fill the Gap in Congress's Residual Statute of Limitations, 107 Yale L.J. 393 (1997).

<sup>97</sup> See, e.g., United States v. Crown Equip. Corp., 86 F.3d 700, 707 (7th Cir. 1996) (applying well-developed state law in area because no "concrete reason" justified different federal rule).

<sup>98</sup> See Occidental Life Ins. Co. v. EEOC, 432 U.S. 355, 367 (1977) ("[I]t is the duty of the federal courts to assure that the importation of state law will not frustrate or interfere with the implementation of national policies.").

<sup>99</sup> DelCostello v. Int'l Bhd. of Teamsters, 462 U.S. 151, 161 (1983) ("[I]n some circumstances, however, state statute of limitations can be unsatisfactory vehicles for the enforcement of federal law."). *DelCostello* pointed to both presumed congressional intent and the language of the Rules of Decision Act, 28 U.S.C. § 1652 (1994) ("The laws of the several states, except where the Constitution or treaties of the United States or Act of Congress otherwise require or provide, shall be regarded as rules of decision . . . ." (emphasis added)). *DelCostello*, 462 U.S. at 158-59 & nn.12-13. But see *id.* at 173-74 (Stevens, J., dissenting) (arguing for state law on Rules of Decision Act grounds); *id.* at 174 (O'Connor, J., dissenting) (arguing for state law on congressional expectation grounds).

<sup>100</sup> United States v. Little Lake Misere Land Co., 412 U.S. 580, 595-96 (1973). As to this question, Professor Mishkin explained that

even where state law might be generally adopted on an issue, it would be possible to reject the rule of a particular state whose doctrine on the specific issue was not entirely consistent with federal objectives, though this might mean that state law was incorporated as to forty-six out of the forty-eight states but not the remaining two.

Mishkin, *supra* note 5, at 806.

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considerable confusion.<sup>101</sup> In these cases, the rule is borrowed from either an analogous federal rule or an established doctrine.<sup>102</sup>

Overall, however, federal courts may presume that state law supplies the relevant rule. Examples of federal common law substituting for available state law have become the carefully considered exception rather than the mechanically applied rule, as the majority of cases present no special warrant to employ a federally developed alternative to state law.

### 3. *Implied Rights of Action*

In the same year that Judge Friendly celebrated the new federal common law, the Supreme Court held, in *J.I. Case Co. v. Borak*,<sup>103</sup> that section 14(a) of the Securities Exchange Act<sup>104</sup> provided an implied right of action, despite the fact that this provision expressly contemplated public—and not private—enforcement.<sup>105</sup> In so doing, the Court presumed that the scope of applicable remedies under a regulatory statute should be expanded through federal common lawmaking.<sup>106</sup> Just as it later reconsidered the justifications for creating

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<sup>101</sup> See *Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson*, 501 U.S. 350, 357 (1991) (developing uniform federal rule to advance “federal interests in predictability and judicial economy”); *Ceres Partners v. Gel Assocs.*, 918 F.2d 349, 354 (2d Cir. 1990) (stating that borrowing state law for statutes of limitations in federal Rule 10b-5 litigation would cause considerable uncertainty); *Short*, 908 F.2d at 1389 (same).

<sup>102</sup> E.g., *Agency Holding Corp. v. Malley-Duff & Assocs.*, 483 U.S. 143, 156 (1987) (applying statute of limitations from antitrust laws to RICO cases); see also *DelCostello*, 462 U.S. at 162 (noting that, as alternative to state rules, federal courts can look to “either express limitation periods from related federal statutes, or such alternatives as laches”). Pursuant to this basic approach, federal courts also endeavor to fashion federal common law rules around policy decisions made in related statutory areas rather than simply “making up” an appropriate rule. See *McAllister v. Magnolia Petroleum Co.*, 357 U.S. 221, 224-25 (1958) (applying federal statute to seaworthiness actions under general admiralty law that are almost invariably brought in tandem with federal Jones Act claims). But cf. *Moragne v. States Marine Lines*, 398 U.S. 375, 390-403 (1970) (creating federal remedy where gap in statutory rights could be interpreted as denying any recovery under federal law).

<sup>103</sup> 377 U.S. 426 (1964).

<sup>104</sup> Securities Exchange Act of 1934, 15 U.S.C. § 78n(a) (1994).

<sup>105</sup> *Borak*, 377 U.S. at 431-33.

<sup>106</sup> *Id.* at 433. As the Second Circuit had opined earlier:

Although the Act does not expressly create any civil liability, we can see no reason why the situation is not within the doctrine which, in the absence of contrary implications, construes a criminal statute, enacted for the protection of a specified class, as creating a civil right in members of the class, although the only express sanctions are criminal.

*Reitmeister v. Reitmeister*, 162 F.2d 691, 694 (2d Cir. 1947). Of course, the move away from state law to federally implied remedies departed from the initial reliance on state remedies. See Ronald J. Greene, *Hybrid State Law in the Federal Courts*, 83 Harv. L. Rev. 289, 298 (1969) (“The trend lately has been away from the creation of hybrid state law remedies . . . and toward the development of that purer strain, the implied federal cause of

federal common law, the Court also began to cut back on its willingness to imply rights of action in federal statutes, announcing a four-part test in *Cort v. Ash*<sup>107</sup> that ended the presumption in favor of judicially supplied rights of action.<sup>108</sup>

The *Cort* approach recognized that a comprehensive enforcement scheme—like a comprehensive elaboration of statutory duties—strongly suggests that Congress deliberately settled on the remedies contained in the statute so that any judicially developed remedy “might upset carefully considered legislative programs.”<sup>109</sup> Primarily, this recognition appreciates that congressional inaction may sometimes be deliberate,<sup>110</sup> particularly as Congress drafts more complex and comprehensive statutes.<sup>111</sup> Secondly, this recognition takes account of separation-of-powers concerns.<sup>112</sup> The connection between the Court’s jurisprudence in cutting back on federal common law and

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action.”). But cf. *Moore v. Chesapeake & Ohio Ry.*, 291 U.S. 205, 214 (1934) (holding that state law provides remedy for violations of Federal Safety Appliance Act).

<sup>107</sup> 422 U.S. 66 (1975).

<sup>108</sup> *Id.* at 78. Although *Cort* set out four factors to evaluate whether courts should imply a cause of action into federal statutes, the Court later emphasized that these factors essentially are aids to statutory interpretation, and that the crucial inquiry is whether Congress intended to provide for a cause of action. See *Touche Ross & Co. v. Redington*, 442 U.S. 560, 568 (1979).

<sup>109</sup> *N.W. Airlines, Inc. v. Transp. Workers Union*, 451 U.S. 77, 97 (1981). The move away from the presumption in favor of implied rights of action can also be viewed as an effort to bring this area of statutory interpretation into line with the general principle of “*expressio unius est exclusio alterius*”—to include one thing is to exclude others. See *Botany Worsted Mills v. United States*, 278 U.S. 282, 288-89 (1929) (“When a statute limits a thing to be done in a particular mode, it includes the negative of any other mode.”).

<sup>110</sup> See Hans A. Linde, *Due Process of Lawmaking*, 55 *Neb. L. Rev.* 197, 233 (1976) (“Contrary to the instrumentalist canon, the ineffectiveness of a law to achieve its goal may be itself a policy, a policy shared by the act’s opponents and some of its supporters and may be the price for permitting the law to reach enactment.”). As Judge Easterbrook put it:

Knowing that a law is remedial does not tell a court how far to go. Every statute has a stopping point, beyond which, Congress concluded, the costs of doing more are excessive—or beyond which the interest groups opposed to the law were able to block further progress. A court must determine not only the direction in which a law points but also how far to go in that direction.

*Stomper v. Amalgamated Transit Union, Local 241*, 27 F.3d 316, 320 (7th Cir. 1994).

<sup>111</sup> See *Merrill, Lynch, Pierce, Fenner & Smith, Inc. v. Curran*, 456 U.S. 353, 374 (1982) (“Our approach to the task of determining whether Congress intended to authorize a private right of action has changed significantly, much as the quality and quantity of federal legislation has undergone significant change.”); *id.* at 408 (Powell, J., dissenting) (“[M]odern federal regulatory statutes tend to be exceedingly complex. . . . Judicial creation of private rights of action is as likely to disrupt as to assist the functioning of the regulatory schemes developed by Congress.”).

<sup>112</sup> See, e.g., *Brown*, *supra* note 7, at 626 (“[I]mplication of a private right of action under a federal statute *a la Borak* was a violation of the constitutional doctrine of separation of powers.”).

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in implying rights of action makes perfect sense,<sup>113</sup> as they function in analogous ways.<sup>114</sup>

By focusing closely on legislative intent, modern jurisprudence concerning implied rights of action places the courts in a role clearly subsidiary to the legislature in evaluating the merits of creating rights of action. In particular, courts stress that they must find persuasive evidence to justify implying a right of action that the legislature did not include expressly.<sup>115</sup> Federal common law still can supply remedies left out of a statutory scheme, provided that they cohere with the statutory scheme and that “[c]ourts conform the implied remedies to the rules Congress devised for the remedies it authorized expressly . . . .”<sup>116</sup>

### *B. Federal Judicial Humility Redux: The Emergence of the Chevron Doctrine*

A second *Erie*-like transformation<sup>117</sup> in the federal courts’ emerging conception of federal common law, albeit on a significantly smaller scale, is the increasing tendency to leave lawmaking to administrative agencies and Congress.<sup>118</sup> The courts’ renewed reluctance to develop common law stems from a solicitude not only for state authority in the area—the federalism concern—but also for congressional authority—the separation-of-powers concern.<sup>119</sup>

<sup>113</sup> Some commentators have suggested that the rethinking of the implied right of action jurisprudence actually spurred the decline in the new federal common law. See Duffy, *supra* note 66, at 120.

<sup>114</sup> Compare *Plucinski v. I.A.M. Nat’l Pension Fund*, 875 F.2d 1052 (3d Cir. 1989) (creating federal common-law rule under ERISA entitling employers to recover overpayments into pension funds), with *Award Serv., Inc. v. N. Cal. Retail Clerks Unions & Food Employers Joint Pension Trust Fund*, 763 F.2d 1066 (9th Cir. 1985) (implying right of action under statute to bring overpayment suit).

<sup>115</sup> See *Touche Ross & Co. v. Redington*, 442 U.S. 560, 568-69 (1979) (noting that, in cases where private rights of action have been applied, statute in question prohibited conduct or created rights in favor of private parties); *Spicer v. Chicago Bd. of Options Exch.*, 977 F.2d 255, 258 (7th Cir. 1992) (“In sum, courts may not recognize an implied remedy absent persuasive evidence that Congress intended to create one.”).

<sup>116</sup> *Stomper v. Amalgamated Transit Union, Local 241*, 27 F.3d 316, 319 (7th Cir. 1994).

<sup>117</sup> Lawrence Lessig has explained how a change in context can alter existing perceptions of acceptable practices and thus produce an “*Erie*-effect.” See Lawrence Lessig, *Erie-Effects of Volume 110: An Essay on Context in Interpretive Theory*, 110 *Harv. L. Rev.* 1785, 1795-1801 (1998); see also Casto, *supra* note 66, at 908 (describing *Erie* as paradigm change in constitutional law).

<sup>118</sup> See Cass R. Sunstein, *Is Tobacco a Drug? Administrative Agencies as Common Law Courts*, 47 *Duke L.J.* 1013, 1056 (1998) (calling *Chevron* “the most important case about legal interpretation in the last thirty years”); see also Lund, *supra* note 55, at 899-900 (describing modern transformation in federal common law).

<sup>119</sup> Judge Friendly’s article responded primarily to the federalism concern. See Friendly, *supra* note 5, at 405-22. Obviously, there is a connection between respect for congressional

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The Supreme Court responded to this second concern in *Chevron U.S.A. v. Natural Resources Defense Council*,<sup>120</sup> its pathbreaking decision outlining the role of administrative agencies in the modern state. The Court acknowledged that “federal judges—who have no constituency—have a duty to respect legitimate policy choices made by those who do.”<sup>121</sup> A statute’s reliance on administrative agencies thus was recognized as a “self-conscious repudiation of regulation through the judiciary.”<sup>122</sup>

*Chevron* instructs federal courts to defer to regulatory agencies who are charged with implementing a statute when they resolve ambiguous statutory questions, fill in gaps left by the statute, and engage in interstitial lawmaking.<sup>123</sup> Unlike regimes where the federal courts assumed the role of “delegated lawmaking” in implementing common-law statutes like the Sherman Antitrust Act,<sup>124</sup> if an agency enjoys residual authority to address the relevant issue, courts following *Chevron* construe a gap in the statutory scheme as a “delegation of authority to the agency to elucidate . . . the statute by regulation.”<sup>125</sup> This default rule “operates principally as a background rule of law against which Congress can legislate.”<sup>126</sup> When Congress establishes regulatory regimes superintended by administrative agencies, courts

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authority and state authority insofar as “the states, and their interests as such, are represented in the Congress but not in the federal courts.” Mishkin, *supra* note 57, at 1685.

<sup>120</sup> 467 U.S. 837 (1984).

<sup>121</sup> *Id.* at 866.

<sup>122</sup> Cass R. Sunstein, *Law and Administration After Chevron*, 90 *Colum. L. Rev.* 2071, 2079 (1990).

<sup>123</sup> 467 U.S. at 843-44. To be sure, the “*Chevron* doctrine” actually precedes *Chevron*, as the courts had been employing variants of such an approach since the late 1960s. E.g., *Morton v. Ruiz*, 415 U.S. 199, 231 (1974) (holding that power to administer regulatory program created by Congress includes ability to make rules to fill in any gap “left, implicitly or explicitly, by Congress”); *Permian Basin Area Rate Cases*, 390 U.S. 747, 780 (1968) (“We are, in the absence of compelling evidence that such was Congress’ intention, unwilling to prohibit administrative action imperative for the achievement of an agency’s ultimate purposes.”).

<sup>124</sup> See *Merrill*, *supra* note 7, at 42, 44 (stating that delegations to federal courts to engage in common lawmaking can be express or implied and illustrating point by referring to antitrust statutes).

<sup>125</sup> *Chevron*, 467 U.S. at 843-44; see also *United States v. Mead Corp.*, 121 S. Ct. 2164, 2171 (2001) (holding that administrative action “qualifies for *Chevron* deference when it appears that Congress delegated authority to the agency generally to make rules carrying the force of law”); Thomas W. Merrill & Kristin E. Hickman, *Chevron’s Domain*, 89 *Geo. L.J.* 833, 837 (2001) (“Congress impliedly delegates the power to interpret only when it grants the agency power to take action that binds the public with the force of law.”); Sunstein, *supra* note 122, at 2075 (“*Chevron* defines a cluster of ideas about who is entrusted with interpreting ambiguous statutes and, less obviously, about what legal interpretation actually is.”).

<sup>126</sup> Antonin Scalia, *Judicial Deference to Administrative Interpretations of Law*, 1989 *Duke L.J.* 511, 517.

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will consider those agencies more competent to make what are essentially policy judgments.<sup>127</sup> And in light of the increased workload of the federal courts and the increased complexity of specialized regulatory regimes, limiting federal common lawmaking to areas where no administrative agency can pick up the slack makes good sense.

The *Chevron* approach also recognizes that agencies will be able to move more quickly than courts to experiment with different approaches and respond more ably to changing contexts. In the *Chevron* case itself, for example, when the EPA altered its definition of a “source” of pollution (from a smokestack to a plant-wide basis of measurement), it reflected a change in technocratic thinking as well as political judgment.<sup>128</sup> To be sure, common-law judges can, and do, change their minds to update policy judgments, but there can be little doubt that administrative agencies are more up to that task.<sup>129</sup>

### C. Agency Supremacy and Federal Common Lawmaking

*Chevron* routinely is celebrated as revolutionizing modern administrative law,<sup>130</sup> but its impact on the development of federal com-

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<sup>127</sup> See *Chevron*, 467 U.S. at 866 (“The responsibilities for assessing the wisdom of such policy choices and resolving the struggle between competing views of the public interest are not judicial ones . . .”); see also *id.* at 865 (stressing judges’ lack of expertise relative to administrative agencies). Adoption of this approach recognizes that administrative agencies would, within their sphere, play the role Judge Friendly previously envisaged for federal common law:

One of the beauties of the *Lincoln Mills* doctrine for our day and age is that it permits overworked federal legislators, who must vote with one eye on the clock and the other on the next election, so easily to transfer a part of their load to federal judges, who have time for reflection and freedom from fear as to tenure and are ready, even eager, to resume their historic law-making function—with Congress always able to set matters right if they go too far off the desired beam.

Friendly, *supra* note 5, at 419 (referring to *Textile Workers Union v. Lincoln Mills of Ala.*, 353 U.S. 448 (1957)); see also *Jacksonville Terminal Co. v. Fla. E. Coast Ry.*, 363 F.2d 216, 219 (5th Cir. 1966) (“Nor is there any difficulty from an absence of any formalized body of federal law. With judicial inventiveness and resourcefulness the Federal Courts are quite adequate for the task of fashioning an appropriate set of standards.” (citing *Lincoln Mills*, 353 U.S. at 456-57)).

<sup>128</sup> See *Chevron*, 467 U.S. at 857-58 (discussing EPA’s change of thinking on measurement); Sunstein, *supra* note 118, at 1062.

<sup>129</sup> For an example of a long-overdue judicial change in policy under federal maritime law, see *Moragne v. States Marine Lines*, 398 U.S. 375 (1970), which overruled *The Harrisburg*, 119 U.S. 199 (1886). For a candid assessment of the limits on judges’ ability to respond quickly to changing circumstances, see Antonin Scalia, *The Doctrine of Standing as an Essential Element of the Separation of Powers*, 17 *Suffolk U. L. Rev.* 881, 897 (1983), in which he writes, “Yesterday’s herald is today’s bore—although we judges, in the seclusion of our chambers, may not be *au courant* enough to realize it.”

<sup>130</sup> See, e.g., Patricia M. Wald, *Judicial Review in Midpassage: The Uneasy Partnership Between Courts and Agencies Plays On*, 32 *Tulsa L.J.* 221, 241 (1996) (“*Chevron*, in my view, is as much of a landmark decision as exists in administrative law.”).

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mon law is often overlooked. In the pre-*Chevron* era, federal courts did not shrink from entering the field of policymaking. They often formulated rules of federal common law as an intermediate measure that would recede only if a subsequent statute or regulation addressed the particular area at issue.<sup>131</sup> In *Ivy Broadcasting Co. v. AT&T*,<sup>132</sup> for example, the Second Circuit created a body of federal common law pursuant to the Communications Act,<sup>133</sup> which authorized the FCC to delimit the terms under which common carriers could provide telephone service, with little focus on the presence of FCC authority in the area.<sup>134</sup>

Similarly, in *Illinois v. City of Milwaukee (Milwaukee I)*, the Supreme Court initially did not hesitate to craft a federal common law of nuisance to address “the pollution of interstate or navigable waters.”<sup>135</sup> Ten years later, however, as a principle of deference to agencies built up considerable steam, the Court heard an appeal of the same case in *Milwaukee II*.<sup>136</sup> In light of congressional amendments making it illegal to discharge pollutants without a permit, the Court determined that “Congress has not left the formulation of appropriate federal standards to the courts through application of often vague and indeterminate nuisance concepts and maxims of equity jurisprudence, but rather has occupied the field through the establishment of a comprehensive regulatory program supervised by an expert administrative agency.”<sup>137</sup>

In addition to these institutional competence concerns, *Milwaukee II* also emphasized the separation-of-powers concerns that soon

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<sup>131</sup> See, e.g., *Texas v. Pankey*, 441 F.2d 236, 241 (10th Cir. 1971) (stating that federal common law applies only until “comprehensive legislation or authorized administrative standards” are put in place (quoted in *Illinois v. City of Milwaukee (Milwaukee I)*, 406 U.S. 91, 107 n.9 (1972))).

<sup>132</sup> 391 F.2d 486 (2d Cir. 1968).

<sup>133</sup> 47 U.S.C. §§ 151-613 (1994).

<sup>134</sup> *Ivy Broadcasting*, 391 F.2d at 491 (“Where neither the Communications Act itself nor the tariffs filed pursuant to the Act deals with a particular question, the courts are to apply a uniform rule of federal common law.”); see also *Farmers Educ. & Coop. Union v. WDAY, Inc.*, 360 U.S. 525, 533 (1959) (crafting federal common law in area where FCC has authority).

<sup>135</sup> 406 U.S. at 102-04; see also *Farmers Educ. & Coop. Union*, 360 U.S. at 533 (noting, but not focusing on, FCC’s interpretation of issue before developing rule of federal common law); *id.* at 537 (Frankfurter, J., dissenting) (“An administrative agency cannot, of course, determine the constitutional issue whether a federal statute has displaced state law . . .”).

<sup>136</sup> *City of Milwaukee v. Illinois (Milwaukee II)*, 451 U.S. 304 (1981).

<sup>137</sup> *Id.* at 317.

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would animate *Chevron* itself.<sup>138</sup> *Milwaukee II* thus took an important step towards the *Chevron* doctrine by surrendering interstitial lawmaking responsibility to regulatory authorities. In particular, the Court did not refrain from merely developing federal common law in areas where a regulatory agency actually took action, but held that where an agency could take action based on a gap in a statute that it administered, the judiciary was barred from crafting federal common law rules.<sup>139</sup>

Thus, under *Milwaukee II*, *Chevron*, and their progeny, administrative agencies displace the previously central role of federal courts in the making of federal common law. Courts must refrain from developing a federal common law rule—even an interim one—if a federal agency is authorized to do so.<sup>140</sup>

Where the statutory scheme does not set up a comprehensive regulatory program, federal courts retain their authority to make federal common law, even if an administrative agency also is involved.<sup>141</sup> By focusing on such scenarios, however, commentators often overlook the impact of federal or state regulatory agencies on the ability of the federal courts to craft federal common law rules.<sup>142</sup> Consequently,

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<sup>138</sup> See *id.* at 313 (stressing that federal law “is generally made not by the federal judiciary, purposefully insulated from democratic pressures, but by the people through their elected representatives in Congress”).

<sup>139</sup> See *Milwaukee II*, 451 U.S. at 324-25, 324 n.18 (stating that relevant consideration in filling gap is whether agency can deal with subject at issue); see also *Mattoon v. City of Pittsfield*, 980 F.2d 1, 5 (1st Cir. 1992) (“Provided the EPA has the statutory authority to regulate contaminants in the public drinking water supply, it is within the province of the agency, not the courts, to determine which contaminants will be regulated.”).

<sup>140</sup> Courts might be well advised to refer such matters to the administrative agency for decision under the primary jurisdiction doctrine. See *United States v. W. Pac. R.R.*, 352 U.S. 59, 63-64 (1956) (explaining that courts should refer resolution of core regulatory disputes to expert agency and suspend litigation until agency addresses regulatory issue).

<sup>141</sup> See, e.g., *Resolution Trust Corp. v. Cityfed Fin. Corp.*, 57 F.3d 1231, 1247 (3d Cir. 1995) (noting that “defendants in this action can point to nothing in the plain language of the statute or its legislative history to suggest that Congress, in enacting FIRREA [the Financial Institutions, Reform, Recovery, and Enforcement Act of 1989, currently codified at 12 U.S.C. § 1821(k) (1994)], intended to establish a comprehensive legislative program,” thus leaving court’s federal common law authority intact).

<sup>142</sup> See, e.g., Daniel A. Farber & Philip P. Frickey, *In the Shadow of the Legislature: The Common Law in the Age of the New Public Law*, 89 Mich. L. Rev. 875, 894 (1991) (criticizing *Milwaukee II* without grappling with significance of regulatory authority bestowed on EPA). Professors Farber and Frickey, in an attempt to address the EPA’s role, suggest that a later decision, *International Paper v. Ouellette*, 479 U.S. 481 (1987) (allowing nuisance suits in federal court under common law of discharging state as means of supplementing Clean Water Act), will require federal courts to handle these matters in common law cases under their diversity jurisdiction. The result, they assert, is not “a uniform and neutral body of law, but . . . fifty separate versions of nuisance doctrine.” Farber & Frickey, *supra*, at 894. This criticism fails to undermine the *Chevron* rationale of *Milwaukee II* for several reasons. First, the ability of states to supplement federal regulatory statutes is a hallmark of cooperative federalism, and diversity cases will require federal

most commentators fail to appreciate that *Milwaukee II*, while emphasizing separation-of-powers concerns vis-à-vis Congress,<sup>143</sup> really gives way to administrative lawmaking in the same fashion as *Chevron*.

In sum, *Milwaukee II* exemplifies the *Erie/Chevron* model: While administrative agencies may develop new rules to implement statutes in the face of statutory silence, the federal courts should refrain from doing so.<sup>144</sup> This model ensures that the relevant agency can retain complete control over enforcement of a statute within its jurisdiction, while courts avoid closely superintending the administration of a complex regulatory regime.<sup>145</sup> It welcomes the administrative state as a powerful generator of federal law,<sup>146</sup> and sees administrative agencies—more so than the federal judiciary—as the common law courts charged with addressing questions of regulatory law and policy.<sup>147</sup> Recent commentary suggests, however, that the future of this model is very much in question. The last Section of this Part addresses that challenge.

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courts to hew to state law standards. Second, the development of supplemental state rules will not require the creation of an entire regulatory scheme from scratch; like other areas of common law actions in regulated industries, state tort law is likely to cohere with federal regulation. See Restatement (Third) of Torts: Products Liability § 4 cmt. e (1998) (noting traditional rule that federal regulatory standards constitute minimal acceptable standard under state tort law). Finally, by suggesting the inherent superiority of a uniform scheme, Professors Farber and Frickey invoke the empty justification that federal courts have rejected in view of the cooperative federalism benefit of allowing the supplementation of minimum federal standards. See supra Part II.A.1. In their view, the *Milwaukee II* Court failed to pay attention to the lessons of the Clean Water Act in making federal common law. Farber & Frickey, supra, at 892-93. In fact, the Court was paying attention to the cooperative federalism architecture of the Clean Water Act by refraining from displacing state law with uniform federal common law.

<sup>143</sup> *Milwaukee II*, 451 U.S. at 315 (“Our ‘commitment to the separation of powers is too fundamental’ to continue to rely on federal common law ‘by judicially decreeing what accords with common sense and the public weal’ when Congress has addressed the problem.” (quoting *TVA v. Hill*, 437 U.S. 153, 195 (1978))).

<sup>144</sup> See *Atherton v. FDIC*, 519 U.S. 213, 225 (1997) (noting that if reliance on state law rather than federal common law proves problematic, “Congress and federal agencies acting pursuant to congressionally delegated authority remain free to provide to the contrary”).

<sup>145</sup> See Stewart & Sunstein, supra note 55, at 1206-07 (“[P]rivate rights of action may usurp the agency’s responsibility for regulatory implementation, decrease legislative control over the nature and amount of enforcement activity, and force courts to determine in the first instance the meaning of a regulatory statute.”).

<sup>146</sup> See Lawrence Lessig, *Fidelity and Constraint*, 65 *Fordham L. Rev.* 1365, 1392 (1997) (“Once the matter is viewed as a matter of policy, it follows quite quickly that the matter is a matter for legislatures, not courts.”).

<sup>147</sup> See Sunstein, supra note 118, at 1059 (“In the modern era, administrative agencies have become America’s common law courts.”). See generally supra Part II.B (discussing increased deference to administrative agencies to fill in statutory gaps under *Chevron*).

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*D. The Future of Agency-Centered Lawmaking:  
An Evolution of Chevron or Its Demise?*

The continuing rhetorical support for the *Chevron* doctrine masks a lingering disquiet about the appropriate role for administrative agencies in our lawmaking system.<sup>148</sup> In particular, various commentators have voiced three related strands of criticism: Huber's assessment of the relative effectiveness of judge-made versus agency-made law, the potential re-emergence of the nondelegation doctrine, and an appreciation for the value of close judicial oversight of the soundness of agency interpretations of federal statutes. This Section first outlines these challenges to the *Chevron* model and then explains how the appropriate response is to endorse the *Chevron* model and make clear how judges can implement it with appropriate oversight of agency lawmaking.

*1. Challenges to Agency Lawmaking*

The first criticism of agency lawmaking comes from commentators such as Peter Huber, who suggest that the model of delegated lawmaking reflected by the Sherman Antitrust Act provides a vehicle for developing regulatory policy that is superior to the one set forth by regulatory statutes such as the Telecom Act, with their attendant reliance on administrative agencies.<sup>149</sup> In *Law and Disorder in Cyberspace*, Huber elaborates upon this argument by embracing a judge-centered, reactive model of regulation.<sup>150</sup> As Huber puts it, the courts can develop a modern law of common carriage to facilitate competition between telecommunications companies “the way common-law courts have always built things, enforcing rights to interconnect here, punishing uncommon discrimination, and affirming the legal immunities that truly nondiscriminatory carriage legitimately deserves.”<sup>151</sup> Huber thus challenges the very essence of the *Milwaukee III/Chevron* perspective on agency regulation, maintaining that agencies do not enjoy institutional advantages over courts and—even to the extent they

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<sup>148</sup> Given the historical ebb-and-flow of the judicial involvement with the administrative state, the potential for—indeed, the likelihood of—significant change is quite understandable. See Reuel E. Schiller, *Enlarging the Administrative Polity: Administrative Law and the Changing Nature of Pluralism*, 53 *Vand. L. Rev.* 1389, 1451 (2000) (“[T]hroughout the twentieth century, judicial involvement with the administrative state ebbed and flowed with the political and ideological currents of the time.”).

<sup>149</sup> See Huber, *supra* note 6, at 7 (arguing that FCC “should shut its doors, once and for all”).

<sup>150</sup> See generally Huber, *supra* note 6.

<sup>151</sup> *Id.* at 154.

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do—they make wrongheaded decisions that prevent important innovations from reaching the market.<sup>152</sup>

A second attack on agency lawmaking comes from the push for a nondelegation doctrine that would keep agency discretion on a short leash. Historically, the nondelegation doctrine, which limits agency delegations to statutory directives with an “intelligible principle,”<sup>153</sup> has exerted limited influence.<sup>154</sup> Nonetheless, some commentators would revive the doctrine in order to roll back reliance on administrative agencies to develop policy. This view self-consciously rejects *Chevron*’s deference to administrative agencies.<sup>155</sup> Thus, the embrace of such a doctrine—or even a serious flirtation with it—would constitute a major reworking of our lawmaking system.

For these two sets of *Chevron* critics, the D.C. Circuit’s decision in *American Trucking Ass’ns v. EPA*<sup>156</sup> represented a potential clarion call towards a new model of lawmaking. In that case, the D.C. Circuit invalidated EPA air quality regulations on the ground that the agency did not offer a precise definition of how it took the relevant factors into account when developing its standards.<sup>157</sup> To avoid declaring the statute itself unconstitutional, the court remanded the issue to the EPA to “give the agency an opportunity to extract a determinate standard on its own.”<sup>158</sup> Upon review, the Supreme Court rejected this approach, concluding that “[t]he idea that an agency can cure an unconstitutionally standardless delegation of power by declining to exercise some of that power seems to us internally contradictory.”<sup>159</sup> Nonetheless, Justice Thomas’s concurrence, which held out the possi-

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<sup>152</sup> *Id.* at 7-9.

<sup>153</sup> *J. W. Hampton, Jr. & Co. v. United States*, 276 U.S. 394, 409 (1928) (“If Congress shall lay down by legislative act an intelligible principle to which the person or body authorized to fix such rates is directed to conform, such legislative action is not a forbidden delegation of legislative power.”).

<sup>154</sup> See Jerry L. Mashaw, Textualism, Constitutionalism, and the Interpretation of Federal Statutes, 32 *Wm. & Mary L. Rev.* 827, 834 (1991) (“[T]he Court seems to have written its opinion in *Chevron* as if to drive the last nail in the sporadically reopened casket of the nondelegation doctrine.”); Cass Sunstein, Is the Clean Air Act Unconstitutional?, 98 *Mich. L. Rev.* 303, 332-35 (1999) (outlining relevant history, in which only two atypical 1935 decisions actually invalidated federal statutes on nondelegation grounds).

<sup>155</sup> See, e.g., David Schoenbrod, Delegation and Democracy: A Reply to My Critics, 20 *Cardozo L. Rev.* 731, 732 (1999) (arguing that Congress avoids its constitutional responsibility when it delegates legislative power, thereby harming democracy).

<sup>156</sup> 175 F.3d 1027, modified in part and reh’g en banc denied, 195 F.3d 4 (D.C. Cir. 1999), overruled by *Whitman v. Am. Trucking Ass’ns*, 121 S. Ct. 903 (2001).

<sup>157</sup> *Am. Trucking*, 175 F.3d at 1034 (“Although the factors EPA uses in determining the degree of public health concern associated with different levels of ozone and [particulate matter] are reasonable, EPA appears to have articulated no ‘intelligible principle’ to channel its application of these factors; nor is one apparent from the statute.”).

<sup>158</sup> *Id.* at 1038.

<sup>159</sup> *Whitman*, 121 S. Ct. at 912.

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bility of a revitalized nondelegation doctrine,<sup>160</sup> demonstrated that the basic architecture of the modern administrative state at least is contestable.

A third challenge to the *Chevron* model simply advocates a more robust judicial role in overseeing regulatory decisions. For a good illustration of how this could work, take *AT&T v. Iowa Utilities Board*,<sup>161</sup> a recent case involving the Telecom Act. In that case, the Supreme Court evaluated a challenge to an FCC regulation delineating which elements of an incumbent provider's local telephone network must be "unbundled" and shared with its competitors.<sup>162</sup> Under the Act, Congress directed the FCC to require that incumbent providers allow access to all elements that are "necessary," in that the lack of access would "impair the ability of the [entrant] to provide the services that it seeks to offer."<sup>163</sup> Based on this mandate, the FCC instituted a presumption that incumbent providers must unbundle the elements of their networks wherever possible.<sup>164</sup> The Supreme Court reversed the agency's decision because the failure to provide for any "limiting standard" disregarded the force of the congressional mandate.<sup>165</sup>

*Iowa Utilities Board* might represent a simple application of *Chevron*'s requirement that an agency interpretation be reasonable—"step two" of the *Chevron* analysis.<sup>166</sup> Professor Bressman, however, links this case with the D.C. Circuit's decision in *American Trucking*, arguing that it reflects the beginnings of a "new delegation doctrine."<sup>167</sup> The remainder of this Section explains how *Iowa Utilities Board* exemplifies sensible judicial review of agency decisions, not a radical overhaul of the existing *Chevron* regime.

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<sup>160</sup> See *id.* at 920 (Thomas, J., concurring) ("On a future day, . . . I would be willing to address the question whether our delegation jurisprudence has strayed too far from our Founders' understanding of separation of powers.").

<sup>161</sup> 525 U.S. 366 (1999).

<sup>162</sup> *Id.* at 386-95.

<sup>163</sup> 47 U.S.C. § 251(d)(2) (Supp. IV 1998).

<sup>164</sup> *Iowa Utils. Bd.*, 525 U.S. at 375 (noting that incumbent providers complained that "the FCC had virtually ignored the 1996 Act's requirement that it consider whether access to proprietary elements was 'necessary' and whether lack of access to nonproprietary elements would 'impair' an entrant's ability to provide local service").

<sup>165</sup> *Id.* at 388 ("[T]he Act requires the FCC to apply *some* limiting standard, rationally related to the goals of the Act, which it has simply failed to do."); see also Phil Weiser, *Paradigm Changes in Telecommunications Regulation*, 71 *U. Colo. L. Rev.* 819, 827-29 (2000) (explaining and praising *Iowa Utilities Board* decision).

<sup>166</sup> *Chevron U.S.A. v. Natural Resources Defense Council*, 467 U.S. 837, 843 (1984) (stating that if Congress has not directly addressed question at issue, "the question before the court is whether the agency's answer is based on a permissible construction of the statute").

<sup>167</sup> Bressman, *supra* note 8, at 1431-38.



## 2. *Preserving the Chevron Regime and Giving Substance to Step Two*

From the outset, many struggled to understand the relationship between *Chevron's* announced policy of deference and the "hard look" doctrine that calls for a painstaking analysis of the predicates for an agency's decision.<sup>168</sup> Similarly, many commentators have debated the connection between the "arbitrary and capricious" review under the Administrative Procedure Act (APA)<sup>169</sup> and the second step of the *Chevron* analysis, which calls upon courts to evaluate whether the agency reasonably construed an ambiguous or vague statutory term.<sup>170</sup> Finally, as noted above, Professor Bressman has argued that an aggressive application of *Chevron's* second step can be understood as a means of enforcing nondelegation principles.<sup>171</sup>

In evaluating *Chevron's* future direction (or its possible demise), its insight about the institutional advantage of agencies over courts merits attention. Advocates of an increased judicial role in setting regulatory policy must acknowledge that intricate matters, such as rate-setting and determining the technical feasibility of regulatory mandates, lie beyond the core of judicial competence.<sup>172</sup> In an honest assessment of how judges lack such skills, Judge Easterbrook remarked that courts possess two critical flaws in making such policy judgments: They lack access to refined information and expertise, and they are not subject to a reward structure depending on whether their policies succeed or fail.<sup>173</sup>

In light of these judicial shortcomings, some proponents of a nondelegation doctrine—or a return to judge-made law—really may wish to require Congress to legislate with more specificity. This ap-

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<sup>168</sup> See Schiller, *supra* note 148, at 1451 & n.303 (comparing *Chevron* with *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 40-56 (1983)).

<sup>169</sup> 5 U.S.C. § 706(2)(A) (1994); see also *Motor Vehicle Mfrs. Ass'n*, 463 U.S. at 41-43.

<sup>170</sup> *Chevron*, 467 U.S. at 843-44; see, e.g., Ronald M. Levin, *The Anatomy of Chevron: Step Two Reconsidered*, 72 Chi.-Kent L. Rev. 1253 (1997) (arguing for harmonization of two tests); Laurence H. Silberman, *Chevron—The Intersection of Law and Policy*, 58 Geo. Wash. L. Rev. 821, 827 (1990) ("It may well be that the second step of *Chevron* is not all that different analytically from the APA's arbitrary and capricious review."); Elizabeth Magill, *Step Two of Chevron v. Natural Resources Defense Council* 9 (June 2001), at <http://www.abanet.org/adminlaw/apa/chevrscope3.doc> (suggesting that D.C. Circuit treats APA review and *Chevron's* step two as "nearly coextensive").

<sup>171</sup> See *supra* note 167 and accompanying text.

<sup>172</sup> See Joseph D. Kearney, *Twilight of the FCC?*, 1 Green Bag 2d 327, 329 (1998) (reviewing Huber, *supra* note 6) ("Huber has virtually nothing to say on how non-discriminatory and reasonably priced interconnection would be ensured under his proposal. This is a notable shortcoming.").

<sup>173</sup> Frank H. Easterbrook, *Cyberspace Versus Property Law?*, 4 Tex. Rev. L. & Pol. 103, 108-10 (1999).

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proach, however, would handicap Congress's ability to address complex regulatory matters, forcing it to accept ill-considered policy choices or not to legislate at all.<sup>174</sup> Indeed, if one would like to see Congress legislate more specifically and delegate more carefully, judicial deference to agencies—as opposed to judicial lawmaking—would be the better approach, as Congress would be more willing and more able to override its agent than its co-equal branch.<sup>175</sup> Unless one is a deep skeptic of government regulation of any kind, any reform of our regulatory system should focus on the application of the *Chevron* doctrine, not on rethinking its underlying principles.

A clearer and more effective “reasoned decisionmaking” requirement as part of *Chevron* would facilitate a more effective judicial role in the development of regulatory policy. Congressional limitations on the front end and judicial oversight on the back end—as opposed to judicial involvement in policymaking itself—best can check any agency failure to implement statutory directives in a principled manner.<sup>176</sup> Viewed in this light, *Iowa Utilities Board* did not reflect a nondelegation approach, but a *Chevron* analysis that enforced a limiting congressional directive.<sup>177</sup>

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<sup>174</sup> See *Mistretta v. United States*, 488 U.S. 361, 372 (1989) (justifying very limited use of nondelegation doctrine by “practical understanding that in our increasingly complex society, replete with ever changing and more technical problems, Congress simply cannot do its job absent an ability to delegate power under broad general directives”); Richard J. Pierce Jr., *The Inherent Limits on Judicial Control of Agency Discretion: The D.C. Circuit and the Nondelegation Doctrine*, 52 *Admin. L. Rev.* 63, 80 (2000) (“The argument that Congress should make all ‘fundamental policy decisions’ sounds good in theory, but it collapses completely upon consideration of the institutional limitations of Congress.”).

<sup>175</sup> This point is true in two distinct ways. First, Congress can influence agencies—for example, by holding hearings or threatening to cut agency budgets—with methods it cannot use to influence the judiciary. Second, one might speculate that Congress would hesitate more before overruling a court decision than overruling an agency decision. See Douglas W. Kmiec, *Judicial Deference to Executive Agencies and the Decline of the Nondelegation Doctrine*, 2 *Admin. L. Rev.* 269, 281 (1988) (suggesting that Congress may be “more willing and more likely to countermand an agency than the judiciary”).

<sup>176</sup> Weiser, *supra* note 21, at 48-49 (arguing that courts must provide guidance to agencies by determining range of acceptable choices, not by second-guessing choices made within that range).

<sup>177</sup> Relying on *Iowa Utilities Board*, the Tenth Circuit employed just this model of judicial review, remanding a matter back to the FCC for failing to give effect to Congress's directive on universal service policy. *Qwest Corp. v. FCC*, 258 F.3d 1191, 1199-1202 (10th Cir. 2001) (applying *Chevron* analysis to FCC's statutory interpretation). There are other examples of such judicial oversight. See *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (requiring agency to “examine the relevant data and articulate a satisfactory explanation for its action including a ‘rational connection between the facts found and the choice made’” (quoting *Burlington Truck Lines v. United States*, 371 U.S. 156, 168 (1962))); *Fed. Power Comm'n v. Conway Corp.*, 426 U.S. 271, 278 (1976) (stating that “zone of reasonableness . . . ‘allows a substantial spread between what is unreasonable because [it is] too low and what is unreasonable because [it is] too high’” (quoting *Mont.-Dakota Utils. Co. v. N.W. Pub. Serv. Co.*, 341 U.S. 246, 251 (1951)));

Adherents of a nondelegation approach, such as Professor Sunstein, suggest that courts can use canons of interpretation, like the kind the D.C. Circuit used in *American Trucking*, as an alternate method of achieving the same result reached in *Iowa Utilities Board*: the development of floors and ceilings for regulatory law.<sup>178</sup> However, the APA's arbitrary and capricious review also limits an agency's discretion and thus obviates the need for any special new doctrine to achieve the same result.<sup>179</sup> To the end, the Supreme Court's *American Trucking* decision suggests that reform efforts should be directed at improving the *Chevron* framework, not eviscerating it.<sup>180</sup> Under this framework, courts can ensure that agencies adhere to basic statutory directives and avoid second-guessing the type of discretionary judgments that are better left to agencies than courts.<sup>181</sup>

### III

#### THE ROLE OF MODERN FEDERAL COURTS UNDER *ERIE*, *CHEVRON*, AND COOPERATIVE FEDERALISM

Even if the Supreme Court continues to adhere to the *Chevron* regime, federal courts will play an important role in developing remedies for federal rights of action as well as crafting rules for statutory interpretation. Nonetheless, the emergence of cooperative federalism will test the federal courts' ability to respect congressional and agency decisions, as opposed to interposing a policy judgment in favor of a unitary federal regime. Put simply, courts should select interpretive rules that will facilitate the success of cooperative federalism.

##### A. *Judicial Implementation of a Federal Statutory Scheme*

When a federal statute does not address all issues necessary to give effect to a clearly articulated policy, courts must determine whether to supplement the statute with common law rules.<sup>182</sup> As

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Schurz Communications, Inc. v. FCC, 982 F.2d 1043, 1050 (7th Cir. 1992) (rejecting FCC's grounds for new rules to implement statutory policies as "not adequately reasoned").

<sup>178</sup> Sunstein, *supra* note 154, at 350.

<sup>179</sup> *Am. Trucking Ass'ns v. EPA*, 195 F.3d 4, 15 (D.C. Cir. 1999) (Silberman, J., dissenting from denial of rehearing en banc).

<sup>180</sup> *Whitman v. Am. Trucking Ass'ns*, 121 S.Ct. 903, 916 (2001) ("Our approach to the merits of the parties' dispute is the familiar one of *Chevron* . . .").

<sup>181</sup> Weiser, *supra* note 21, at 38-39.

<sup>182</sup> See *Sullivan v. Little Hunting Park, Inc.*, 396 U.S. 229, 239 (1969) ("The existence of a statutory right implies the existence of all necessary and appropriate remedies."); *Sola Elec. Co. v. Jefferson Elec. Co.*, 317 U.S. 173, 176 (1942) ("When a federal statute condemns an act as unlawful, the extent and nature of the legal consequences of the condemnation, though left by the statute to judicial determination, are nevertheless federal questions, the answers to which are to be derived from the statute and the federal policy . . ."); *Royal Indem. Co. v. United States*, 313 U.S. 289, 296 (1941) ("In the absence of

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courts and commentators often emphasize, without judicial assistance in implementing statutory policies, the “federal system would be impotent. This follows from the recognized futility of attempting all complete statutory codes.”<sup>183</sup> To be sure, federal statutes could rely on state law to fill in every applicable gap, but doing so would render federal law a “juridical chameleon, changing complexion to match that of each state wherein lawsuits happen to be commenced . . . .”<sup>184</sup> Thus, as Chief Justice Marshall declared in his famous dictum, where a statute calls for a right of action, that right must be protected by federally created remedies<sup>185</sup>—an approach embraced even by critics of a more robust vision of federal common law.<sup>186</sup>

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an applicable federal statute, it is for the federal courts to determine, according to their own criteria, the appropriate measure of damage . . . .”); Mishkin, *supra* note 5, at 800 (noting circumstances “which will at times compel congressional by-passing of any issue—thus leaving it open until pending litigation forces court resolution” and listing as examples both “political realities” and also “such simpler pressures as shortness of time and, perhaps most important, the severe limits of human foresight”); cf. *Matter of Linton*, 136 F.3d 544, 545 (7th Cir. 1998) (“When the interpretation of federal statutes fails to yield specific answers to procedural issues, federal courts have implicit authority to supply the answers.”).

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<sup>183</sup> *D’Oench, Duhme & Co. v. FDIC*, 315 U.S. 447, 470 (1942) (Jackson, J., concurring); Mishkin, *supra* note 5, at 800 (“[E]xclusive reliance upon statutory provision for the solution of all problems is futile.”). As Peter Strauss put it,

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Legislation will inevitably be imprecise, requiring both interpretation and gap-filling; pretending otherwise increases its costs. Courts are better suited than legislatures for the classic common law function of continually inventing coherence out of the materials of the law. With statutes the dominant form of law, and especially as they become more numerous, problems of aging statutory judgment will inevitably arise and need to be resolved before legislative attention can be directed to them. In the long run, finally, successful government must be a cooperative enterprise in its everyday affairs; as the years leading to the New Deal should have taught us, continuous legislative-judicial antagonism over ordinary political judgments is unsustainable.

Peter L. Strauss, *On Resegregating the Worlds of Statute and Common Law*, 1994 *Sup. Ct. Rev.* 429, 442-43.

<sup>184</sup> *D’Oench*, 315 U.S. at 472 (Jackson, J., concurring); see *Jerome v. United States*, 318 U.S. 101, 104 (1943) (“[W]e must generally assume, in the absence of a plain indication to the contrary, that Congress when it enacts a statute is not making the application of the federal act dependent on state law.”).

<sup>185</sup> As Chief Justice Marshall put it,

The very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury. One of the first duties of government is to afford that protection. . . . The government of the United States has been emphatically termed a government of laws, and not of men. It will certainly cease to deserve this high appellation, if the laws furnish no remedy for the violation of a vested legal right.

*Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 163 (1803).

<sup>186</sup> See, e.g., *Brauch*, *supra* note 76, at 569 (“[I]t is appropriate for courts to create, as a matter of federal common law, collateral or subsidiary rules that are necessary to effectuate the specific directions of Congress to avoid frustrating the statutory scheme.”).

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Nonetheless, some members of the current Supreme Court would abandon even this enclave of federal common lawmaking responsibility, treating silence on remedies as a lack of federal concern on the subject, even if that might jeopardize a meaningful vindication of a federally recognized right.<sup>187</sup> This viewpoint ignores significant differences between establishing remedies for recognized rights and other more troublesome forms of federal common lawmaking.

The task of implementing an articulated policy is less hazardous than the unguided federal common law venture warned against in *O'Melveny & Myers v. FDIC*.<sup>188</sup> In particular, the question of what remedies should lie to enforce a federal statute is “analytically distinct” from the question of whether a vested federal right exists in the first place (or should be implied from the statute).<sup>189</sup> Unlike the latter, the remedies inquiry begins with the presumption that all appropriate remedies are available.<sup>190</sup> In interpreting 42 U.S.C. § 1988, which is silent on the measure of damages, the Supreme Court explained, “[t]he rule of damages, whether drawn from federal or state sources, is a federal rule responsive to the need whenever a federal right is impaired.”<sup>191</sup> Similarly, the Court explained that federal courts must provide federal remedies for violations of the Federal Employee Liability Act (FELA).<sup>192</sup> Unlike developing substantive rules of federal common law, or even implying rights of action into a statute that is silent on the matter, supplying remedies for a statutory right does not raise separation-of-powers concerns; indeed, the Supreme Court has suggested the opposite by stating that “selective ab-

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<sup>187</sup> See *Musick, Peeler & Garrett v. Employers Ins. of Wausau*, 508 U.S. 286, 305-06 (1993) (Thomas, J., dissenting) (“Courts should not treat legislative and administrative silence as a tacit license to accomplish what Congress and the SEC are unable or unwilling to do.”). Justice Stevens, in particular, has urged the Court not to recede entirely from the task of developing appropriate remedies to vindicate federal rights. See *Middlesex County Sewerage Auth. v. Nat'l Sea Clammers Ass'n*, 453 U.S. 1, 24 (1981) (Stevens, J., concurring in part and dissenting in part) (“Since the earliest days of the common law, it has been the business of courts to fashion remedies for wrongs.”).

<sup>188</sup> 512 U.S. 79, 88-89 (1994) (cautioning against federal common law “untethered” to concrete federal policy).

<sup>189</sup> *Davis v. Passman*, 442 U.S. 228, 239 (1979) (distinguishing recognition of cause of action from fashioning remedy for cause of action).

<sup>190</sup> *Franklin v. Gwinnett County Pub. Schs.*, 503 U.S. 60, 66 (1992) (“[W]e presume the availability of all appropriate remedies unless Congress has expressly indicated otherwise.”); *id.* at 70-71 (stating general rule that “absent clear direction to the contrary by Congress, the federal courts have the power to award any appropriate relief in a cognizable cause of action brought pursuant to a federal statute”).

<sup>191</sup> *Sullivan v. Little Hunting Park, Inc.*, 396 U.S. 229, 240 (1969) (noting that “both federal and state rules on damages may be utilized, whichever better serves the policies expressed in the federal statutes”).

<sup>192</sup> See *Norfolk & W. Ry. v. Liepelt*, 444 U.S. 490, 493 (1980) (clarifying that FELA remedies are provided by federal law).

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dication” of the judicial responsibility to supply appropriate remedies “would harm separation of powers principles . . . by giving judges the power to render inutile causes of action authorized by Congress . . . .”<sup>193</sup> Consequently, courts enjoy more flexibility in crafting appropriate remedies than in developing a new substantive right.<sup>194</sup>

*O’Melveny* warned that, in implementing statutes which contain a detailed remedial scheme, creating “additional ‘federal common law’ exceptions is not to ‘supplement’ this scheme, but to alter it.”<sup>195</sup> Significantly, however, this admonition against creating federal common law addresses that doctrine in its “strictest sense”—the creation of federal rules that are not closely tied to interpreting a statute and effectuating its articulated objectives.<sup>196</sup> The question of implied remedies, in contrast, is closer to the core of ordinary statutory interpretation questions.<sup>197</sup> Thus, the Court recognizes “the inevitable incompleteness presented by all legislation means that interstitial federal lawmaking is a basic responsibility of the federal courts.”<sup>198</sup>

### B. *Formulating Rules for Statutory Interpretation*

The development of background principles to guide statutory interpretation, like the development of remedies by judges, also remains a viable body of judge-made law. Critics of the canons of statutory interpretation attack them on a number of grounds, from being overly mechanical in their use to contriving a false congressional intent.<sup>199</sup> As a call for greater candor in statutory interpretation, these points

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<sup>193</sup> *Franklin*, 503 U.S. at 74.

<sup>194</sup> See *AT&T v. Winback & Conserve Program, Inc.*, 42 F.3d 1421, 1429-31 (3d Cir. 1994) (holding that courts may rely on common law doctrines in order to determine scope of liability, but not to expand “the category of affirmative conduct proscribed by the relevant statute”).

<sup>195</sup> *O’Melveny & Myers v. FDIC*, 512 U.S. 79, 87 (1994). The decision could have rested on that point, except the action at issue predated the statute and the Court thus decided to inquire whether federal common law, standing alone, might provide a special decisional rule to govern the action at issue. See *id.*

<sup>196</sup> *Atherton v. FDIC*, 519 U.S. 213, 218 (1997) (noting distinction in *O’Melveny* and other cases between judicial interpretation of statute or administrative regulation and “judicial ‘creation’ of a special federal rule of decision”).

<sup>197</sup> *N.W. Airlines, Inc. v. Transp. Workers Union*, 451 U.S. 77, 91 (1981) (“In determining whether a federal statute that does not expressly provide for a particular private right of action nonetheless implicitly created that right, our task is one of statutory construction.”).

<sup>198</sup> *United States v. Little Lake Misere Land Co.*, 412 U.S. 580, 593 (1973) (refusing to interpret silence on whether agreement should be governed by federal or state law as reason for limiting scope of federal law).

<sup>199</sup> See Karl N. Llewellyn, *Remarks on the Theory of Appellate Decision and the Rules or Canons About How Statutes Are to Be Construed*, 3 *Vand. L. Rev.* 395, 399 (1950) (imploping courts to interpret statutes “as a whole” and decrying “foolish pretense” that there is “only one single correct answer possible”); Posner, *Statutory Interpretation—in*

are well taken—the canons are not mere neutral principles to discern a pre-existing intent. Rather, they often reflect substantive values that courts choose to attribute to Congress in the absence of an otherwise clear resolution of an issue.<sup>200</sup> Perhaps reflecting the judicial acceptance of background principles for statutory construction (as opposed to more freewheeling forms of federal common law), commentators have rushed to fill the prior vacuum of scholarship on this topic.<sup>201</sup> Particularly because Congress, for any number of reasons, often omits or leaves ambiguous key terms in a statute,<sup>202</sup> the application of interpretive background rules plays a critical substantive role in shaping statutory meaning.<sup>203</sup>

In the wake of the renewed judicial and scholarly interest in statutory interpretation, commentators increasingly appreciate the interpretive consequences of substantive norms incorporated into the canons—or background principles—that help courts ascertain statutory meaning.<sup>204</sup> In particular, courts employ three kinds of canons of

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the Classroom and in the Courtroom, 50 U. Chi. L. Rev. 800, 811 (1983) (“Most canons of statutory construction go wrong . . . because they impute omniscience to Congress.”).

<sup>200</sup> See Daniel A. Farber, *Statutory Interpretation and Legislative Supremacy*, 78 Geo. L.J. 281, 318 (1989) (“Courts can read ‘off-the-rack’ rules of interpretation into congressional enactments, provided those rules would be favored by rational enacting legislators.”); *id.* at 317 (suggesting that when court interprets unclear statute it is free to consider “any additional factors it deems appropriate, including its own view of public policy”); see also *Bank One Chi., N.A. v. Midwest Bank & Trust Co.*, 516 U.S. 264, 275-76 (1996) (declining to attribute “incoherent” design to Congress); *EEOC v. Commercial Office Prods. Co.*, 486 U.S. 107, 122 (1988) (rejecting interpretation of statute that would create additional complications for administering agency and make its remedial goals more difficult to achieve).

<sup>201</sup> See, e.g., Farber, *supra* note 200, at 287 (“Our legal traditions do not countenance freewheeling judicial activism in statutory cases. They do, however, call for a variety of interpretative techniques that allow interstitial policymaking.”); Jonathan R. Macey, *Promoting Public-Regarding Legislation Through Statutory Interpretation: An Interest Group Model*, 86 Colum. L. Rev. 223, 226-27 (1986) (discussing different possible approaches to statutory interpretation).

<sup>202</sup> See William J. Brennan Jr., *Some Thoughts on the Supreme Court’s Workload*, 66 *Judicature* 230, 233 (1983) (“[C]ompromise . . . often accounts for the studied ambiguity of legislative language, deliberately adopted to let the courts put a gloss on the words that the legislators could not agree upon.”).

<sup>203</sup> Take, for example, the question whether the Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071 (codified in scattered sections of 42 U.S.C.) should have been given retroactive effect to cover cases filed, but not decided, before the Act’s passage. The legislation provided no guidance on the issue, so the Supreme Court applied a canon and concluded that, unless Congress clearly directed otherwise, statutes would not be applied retroactively. *Landgraf v. USI Film Prods.*, 511 U.S. 244, 280 (1994).

<sup>204</sup> See Jane S. Schacter, *Metademocracy: The Changing Structure of Legitimacy in Statutory Interpretation*, 108 *Harv. L. Rev.* 593, 593-94 (1995) (“[S]tatutory interpretation represents the legal moment when a court confronts the product of the legislative branch and must assign meaning to a contested provision. To carry out its task, the court must adopt—at least implicitly—a theory about its own role by defining the goal and methodol-

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interpretation: those aimed at discerning statutory meanings (e.g., “*inclusio unis, exclusio alterius*”),<sup>205</sup> those that allocate interpretive authority (e.g., the *Chevron* rule requiring deference to agency interpretations)<sup>206</sup> and those that bear on the substantive meaning of a particular statute (e.g., the *Gregory* rule designed to protect the sovereign interests of states).<sup>207</sup> Taken together, the canons of statutory interpretation aim to ensure that a regulatory regime respects constitutional and public values, hews to Congress’s intent, serves the purpose of the statute, and works in a sensible manner.<sup>208</sup>

### *C. Towards a Set of Background Principles for Interpreting Cooperative Federalism Statutes*

As the federal courts construe cooperative federalism statutes, they should develop an architecture that supports the values embodied in such regulatory programs. In particular, courts should interpret these statutes with sensitivity to two basic goals: instituting federal standards that allow for flexibility in their implementation (as opposed to unitary ones that pinpoint particular policies), and harmoniz-

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ogy of the interpretive enterprise . . . .”); David L. Shapiro, *Continuity and Change in Statutory Interpretation*, 67 N.Y.U. L. Rev. 921, 924 (1992) (“The process of interpretation, [commentators] assert, necessarily entails the application of a whole range of guides to construction; some guides are useful in figuring out what the drafters were up to linguistically, and others help to implement important democratic values.”); Stewart & Sunstein, *supra* note 55, at 1231 (“When courts apply or interpret a statute, they must look to general background understandings as a basis for identifying the norms—sometimes hypostatized as ‘legislative intent’—that underlie the statute.”). Even modern formalists concede the existence of the imaginative and substantive aspect of statutory interpretation. See Frank H. Easterbrook, *Statutes’ Domains*, 50 U. Chi. L. Rev. 533, 551 (1983) (asserting that gap-filling through statutory interpretation “is an essential part of government, lest statutes become brittle and fail of their essential purposes”); John F. Manning, *Constitutional Structure and Statutory Formalism*, 66 U. Chi. L. Rev. 685, 685 (1999) (stating that modern formalists would not argue “that ‘the duty of interpretation does not arise’ when a statute has a plain meaning” (quoting *Caminietti v. United States*, 242 U.S. 470, 485 (1917))).

<sup>205</sup> Literally, this canon provides that “the inclusion of one thing excludes the other.” Among its uses, this canon counsels against implying rights of action where Congress has included other rights of action in the statute. See *Touche Ross & Co. v. Redington*, 442 U.S. 560, 571-72 (1979).

<sup>206</sup> See *Chevron U.S.A. v. Natural Resources Defense Council*, 467 U.S. 837, 844 (1984); see also Duffy, *supra* note 66, at 190-91, 197 (explaining that *Chevron* reflects judicially developed background principle for interpreting regulatory statutes and can be classed as version of federal common law).

<sup>207</sup> See *Gregory v. Ashcroft*, 501 U.S. 452, 460 (1991).

<sup>208</sup> Thus, even Justice Scalia maintains that “the ‘traditional tools of statutory construction’ include not merely text and legislative history but also, quite specifically, the consideration of policy consequences.” Scalia, *supra* note 126, at 515; see also *Bank One Chi., N.A. v. Midwest Bank & Trust Co.*, 516 U.S. 264, 275-76 (1996) (declining to adopt “decidedly inefficient jurisdictional scheme”).

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ing the exercise of federal and state agency authority.<sup>209</sup> Moreover, judicial interpretations of cooperative federalism statutes, like the Telecom Act,<sup>210</sup> should honor their preference for allowing state agencies to supplement federal law.

Cooperative federalism, like modern federal common law, rejects the suggestion that federal law demands uniformity in all situations.<sup>211</sup> Rather, cooperative federalism presumes that supplementation of a uniform minimum standard should be left to the states. Only where the proponents of a single federal rule can establish clearly that it is necessary or superior<sup>212</sup> should varying state supplementation, tailoring, and experimentation be swept aside.<sup>213</sup>

Cooperative federalism also presupposes that relevant federal and state agencies can, and should, share authority. As Part IV explains about the Telecom Act, cooperative federalism statutes presume that many areas of regulation cannot be governed effectively through dual federalism. Both federal agencies and federal courts should understand that cooperative federalism statutes give state agencies considerable discretion to address interstitial matters left open by federal agencies. They should appreciate this sharing of authority as an opportunity to form a partnership and realize the benefits of cooperative federalism.<sup>214</sup>

The essence of cooperative federalism is that both federal and state agencies should endeavor to harmonize their efforts with one another, while federal courts oversee this partnership by insisting on

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<sup>209</sup> Professors Farber and Frickey suggest the approach of looking to the character of legislation to extract public values to shape judicial action reflects a strand of civic republicanism. See Farber & Frickey, *supra* note 142, at 888-89.

<sup>210</sup> See *infra* Part IV (discussing interpretation of Telecom Act).

<sup>211</sup> In exercising—or not exercising, as it were—its federal common lawmaking power, the federal courts have followed this very model. See *Atherton v. FDIC*, 519 U.S. 213, 231 (1997) (construing statute to allow federal minimum standard of care to be supplemented by state law); *Yamaha Motor Corp. v. Calhoun*, 516 U.S. 199, 202 (1996) (rejecting emphasis on uniformity and holding that state law can supplement federal maritime remedies).

<sup>212</sup> See *supra* notes 86-93 and accompanying text (reviewing situations where uniform federal regime may be justified).

<sup>213</sup> An example of how an appreciation for cooperative federalism should inform statutory interpretation is *Batterton v. Francis*, 432 U.S. 416 (1977). Recognizing that “the goal of greater uniformity can be met without imposing identical standards on each State” and that the program at issue (Aid for Families With Dependent Children) involved “the concept of cooperative federalism,” the Court concluded that it “should not lightly infer a congressional intention to preclude the Secretary from recognizing legitimate local policies in determining eligibility.” *Id.* at 431-32.

<sup>214</sup> See Weiser, *supra* note 21, at 36 (“[T]he very point of cooperative federalism schemes—and the argument for deference to state agencies [implementing federal law]—is to allow states to adopt the approach that they deem to be the optimal regulatory strategy . . . whenever the statutory scheme authorizes them to make that decision in the first instance.”); *supra* Part I.B (reviewing benefits of cooperative federalism).

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articulations of regulatory policy that respect the values embodied in the underlying legislation. On the federal side, this means a greater sensitivity to displacing state authority. On the state side, this means a reluctance to invoke state law or policy grounds to justify a departure from the federal framework of a statute it chooses to administer. The two jurisdictions can work together better by adopting *Erie's* approach to a cooperative judicial federalism: to respect the interests of one another and seek to accommodate them if at all possible.<sup>215</sup>

To appreciate better how to identify, advance, and accommodate the interests of the federal and state jurisdictions, Parts IV and V examine the Telecom Act, which is perhaps the most ambitious cooperative federalism venture to date, and explain how it should be conceived and implemented.

#### IV

##### THE EMERGENCE OF COOPERATIVE FEDERALISM IN TELECOMMUNICATIONS REGULATION

Telecommunications reform may well be the most important deregulatory effort of an era of deregulation in the United States. But telecommunications reform will reveal not only whether competition can improve upon the old regulatory regime (a fairly safe bet), but also whether agencies and courts can develop a new regulatory model (a riskier bet). To properly understand the jurisdictional challenges in implementing the Telecom Act, this Part sets out the nature of the old model of telecommunications regulation and outlines the new regime put in place by the Telecom Act. It then explains how the new regime provides considerable flexibility for state agencies to operate within the federal framework. Finally, this Part discusses how the Supreme Court construed the Act's jurisdictional scheme in *Iowa Utilities Board* and why the Act calls for federal court review of enforcement decisions made by state agencies.

##### A. *The Old Dual Federalism Model*

Despite their partnership in regulating an integrated telecommunications network, the states and the federal government followed, for most of the past century, the aphorism that "good fences make good neighbors."<sup>216</sup> In the wake of the Interstate Commerce Commission's

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<sup>215</sup> For a discussion of how this principle works in practice, see Weiser, *supra* note 12, at 700-01. For an alternate vision focused on limiting federal intrusion into state authority, see Anthony J. Bellia Jr., *Federal Regulation of State Court Procedures*, 110 *Yale L.J.* 947 (2001), discussing the constitutional questions raised by the overlap of federal and state laws.

<sup>216</sup> Robert Frost, *Mending Wall*, in *Collected Poems, Prose & Plays* 39, 39 (1995).

earlier intrusion into state ratemaking authority,<sup>217</sup> the Communications Act of 1934<sup>218</sup> clearly limited federal regulatory authority, instituting “a system of dual state and federal regulation over telephone service.”<sup>219</sup> In particular, section 2(b) of the 1934 Act essentially limited FCC regulation to interstate communications and required that it isolate this federal subject matter if at all possible so that states would reign supreme over regulation of intrastate communications.<sup>220</sup>

By all accounts, the mandate to “separate” the costs and requirements of operating a telephone network into different regulatory spheres defied reality. After all, “[t]he subject matter of telecommunications—lines, circuits, switches, services, transmissions, etc.—does not neatly fall into separate federal and state jurisdictional compartments.”<sup>221</sup> To address the anomaly of different rules for the same equipment, the FCC sought to “nationalize” the regulation of many issues implicating the telephone network. Initially, for example, where it mandated the introduction of competition into areas such as customer premises equipment (CPE) (e.g., the home telephone), the courts concluded that the interstate nature of the equipment justified this action.<sup>222</sup>

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<sup>217</sup> See *Houston, E. & W. Tex. Ry. Co. v. United States*, 234 U.S. 342, 359 (1914) (upholding Interstate Commerce Commission’s jurisdiction over intrastate rates).

<sup>218</sup> ch. 652, 48 Stat. 1064 (current version codified as amended in scattered sections of 47 U.S.C.).

<sup>219</sup> *La. Pub. Serv. Comm’n v. FCC (Louisiana PSC)*, 476 U.S. 355, 360 (1986); cf. *Computer Communications Indus. Ass’n v. FCC*, 693 F.2d 198, 216 n.99 (D.C. Cir. 1982) (noting that complaints about Interstate Commerce Commission’s regulation of intrastate rates may well have prompted Congress to enact limitation on such actions in Communications Act).

<sup>220</sup> “[N]othing in this chapter shall be construed to apply or to give the [FCC] jurisdiction with respect to . . . charges, classifications, practices, services, facilities, or regulations for or in connection with intrastate communication service . . . .” 47 U.S.C. § 152(b) (1994). Under this proviso, the FCC is precluded from regulating intrastate matters unless they are impossible to divide from interstate ones and unless the state rule would negate the federal policy unless preempted. See *Louisiana PSC*, 476 U.S. at 375 n.4. For a succinct review of the law before and after *Louisiana PSC*, see generally Michael J. Zpevak, *The Current Law of FCC Preemption*, 6 Alb. L.J. Sci. & Tech. 105 (1996). In short, the basic approach called for under *Louisiana PSC* and its progeny is a requirement that if there is any method to separate the subject matter being regulated it must be used as an alternative to federal preemption. See *id.* at 110-11.

<sup>221</sup> Walt Saproinov, *Overview of the Playing Field After the Telecommunications Act of 1996*, in *Practising Law Inst., Telecommunications Mergers & Acquisitions: Financing, Regulatory and Business Issues* 9, 44 (1998); see *Louisiana PSC*, 476 U.S. at 360 (“[W]hile the Act would seem to divide the world of domestic telephone service neatly into two hemispheres . . . in practice, the realities of technology and economics belie such a clean parceling of responsibility.”).

<sup>222</sup> See *Computer Communications Indus. Ass’n*, 693 F.2d at 214 (upholding FCC deregulation of CPE on ground that inconsistent state regulation would frustrate objectives of federal regulatory scheme), cert. denied, 461 U.S. 938 (1983); see also *N.C. Util. Comm’n v. FCC*, 537 F.2d 787, 793-95 (4th Cir. 1976) (upholding FCC preemption of state regula-

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Encouraged by its initial success in asserting its jurisdiction, the FCC-enacted rules governing how local telephone companies should account for depreciation of their physical plant for both inter- and intrastate ratemaking purposes. The states strongly fought the FCC's regulations, which would have had a great impact on the prices telephone companies could charge end users and, if allowed to stand, would have limited state agency discretion in a critical area.<sup>223</sup> The states took the FCC to court, claiming that section 2(b) of the 1934 Act barred such an intrusion on their turf. This time, in the modern high-water mark for state authority, they won. Siding with the states, the Supreme Court's opinion in *Louisiana PSC* rejected the FCC's contention that state flexibility in setting depreciation rates for intrastate rates would undermine "the federal policy of increasing competition in the industry" and thus must be preempted.<sup>224</sup> The Court concluded that section 2(b)'s limitation of the FCC's authority meant that desirability for a federal policy is not a sufficient reason to oust state regulation of intrastate telephone service.<sup>225</sup> In the wake of *Louisiana PSC*, the states prevailed on subsequent challenges as well, establishing that the FCC could not preempt state regulation simply to establish a uniform national scheme, but must demonstrate that state regulations are incompatible with the federal regulatory regime.<sup>226</sup>

Perhaps mindful of the flaws of the old dual federalism model, Congress began looking at new approaches for assigning telecommunications regulation functions to federal and state agencies. In the Pole Attachment Act of 1978, for example, Congress enacted a coop-

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tions that would impede implementation of federal CPE interconnection requirements), cert. denied, 429 U.S. 1027 (1976).

<sup>223</sup> Quicker depreciation schedules, for example, meant that telephone companies would be entitled to recover their costs more quickly and thus charge higher rates to their customers. As the Supreme Court described it,

[d]epreciation is defined as the loss in service value of a capital asset over time. . . . [I]t is a process of charging the cost of depreciable property, adjusted for net salvage, to operating expense accounts over the useful life of the asset. Thus, accounting practices significantly affect, among other things, the rates that customers pay for service. This is so because a regulated carrier is entitled to recover its reasonable expenses and a fair return on its investment through the rates it charges its customers, and because depreciation practices contribute importantly to the calculation of both the carrier's investment and its expenses.

*Louisiana PSC*, 476 U.S. at 364-65.

<sup>224</sup> *Louisiana PSC*, 476 U.S. at 358. On direct review, the Fourth Circuit, in contrast, had ruled for the FCC, declining to protect the "states' sphere of intrastate jurisdiction at the expense of an efficient, viable interstate telecommunications network." *Va. State Corp. Comm'n v. FCC*, 737 F.2d 388, 392 (1984).

<sup>225</sup> *Louisiana PSC*, 476 U.S. at 370.

<sup>226</sup> See, e.g., *California v. FCC*, 905 F.2d 1217, 1239-40 (9th Cir. 1990).

erative federalism approach to ensuring equal access to utility poles for all telecommunications providers.<sup>227</sup> This statute gave states ratemaking authority to determine whether access to poles is nondiscriminatory, provided the states certify that they do so within federally adopted parameters. States may choose to use the specific rates suggested by the FCC to simplify life for interstate companies,<sup>228</sup> but are not required to do so.

### B. *The Fall of the Dual Federalism Regime*

In a sense, the states' victory in *Louisiana PSC* only highlighted the increasingly poor fit between the 1934 Act and the reality of modern telecommunications.<sup>229</sup> The interchangeability of equipment for local and long-distance uses made regulatory oversight of AT&T very difficult, a point the Justice Department emphasized in its antitrust suit against the company.<sup>230</sup> In addition, the dual federalism method of accounting created the possibility that different depreciation schedules in each jurisdiction might allow AT&T to be under- or overcompensated (say, if the FCC allowed recovery of thirty percent in the federal jurisdiction and a state allowed eighty percent in the state jurisdiction). To avoid this state of affairs, the Supreme Court assumed

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<sup>227</sup> 47 U.S.C. § 224(f)(1) (1996) (requiring utilities to provide "nondiscriminatory access to any pole, duct, conduit, or right-of-way"). Such access is provided because poles constitute "essential facilities" that could not easily be duplicated by a competitor. See, e.g., *FCC v. Fla. Power Corp.*, 480 U.S. 245, 247 (1987) ("[I]n most instances underground installation of the necessary cables is impossible or impracticable. Utility company poles provide, under such circumstances, virtually the only practical physical medium for the installation of television cables."); Implementation of Section 703(e) of the Telecommunications Act of 1996, Amendment of the Commission's Rules and Policies Governing Pole Attachments, 13 F.C.C.R. 6777, 6780 (1998) (describing utility poles as "scarce infrastructure and rights-of-way that many communications providers must use in order to reach customers").

<sup>228</sup> See, e.g., Proceeding on Motion of the Commission to Consider Certain Pole Attachment Issues, N.Y. Pub. Serv. Comm'n Case No. 95-C-0341 (June 17, 1997), 1997 N.Y. PUC LEXIS 364 (explaining that New York chooses to use FCC's rate and access standards to promote competition and assist telecommunications providers in deploying telecommunications facilities seamlessly across state lines); see also *MCI Telecomm. Corp. v. N.Y. Tel. Co.*, 134 F. Supp. 2d 490, 503-04 (N.D.N.Y. 2001) (discussing discretion enjoyed by New York state regulators).

<sup>229</sup> The comparable jurisdictional framework for electricity regulation was also breaking down at this time, as changes in economics and technology gave rise to a clash between a model of a state-centered rate regulation program and a multistate integrated system. See *Stalon & Lock*, *supra* note 43, at 437-61.

<sup>230</sup> See *United States v. AT&T*, 552 F. Supp. 131, 222-23 (D.D.C. 1982) (explaining that AT&T allegedly evaded local regulation to reap monopoly profits that it used to cross-subsidize its competitive operations).

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in *Louisiana PSC*,<sup>231</sup> as the Ninth Circuit later decided,<sup>232</sup> that the FCC's rules governing separations<sup>233</sup> bound the states.

Recognizing the changes in the marketplace and in telecommunications technology, Congress finally took up the Supreme Court's suggestion that it revise the nation's telecommunications law.<sup>234</sup> The Telecommunications Act of 1996, the first major overhaul of the Communications Act in over sixty years, sets forth a "pro-competitive, de-regulatory national policy framework" for the telecommunications industry.<sup>235</sup> Its most significant provisions focus on transforming our telephone system from a heavily regulated industry to a competitive market.<sup>236</sup> The Telecom Act plainly anticipated that the mere pre-emption of barriers to entry under state or local law<sup>237</sup> would not be sufficient to allow this competition to take root. Thus, to enable competitors to overcome the "economies of density, connectivity, and scale [that] traditionally . . . have been viewed as creating a natural monopoly,"<sup>238</sup> the Telecom Act imposes a series of obligations on incumbent local exchange carriers.<sup>239</sup>

The Telecom Act "is a unique hybrid of statutory and common law" that followed the cooperative federalism model by assigning im-

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<sup>231</sup> 476 U.S. 355, 360 (1986).

<sup>232</sup> *Hawaiian Tel. Co. v. Pub. Utils. Comm'n*, 827 F.2d 1264, 1277-78 (9th Cir. 1987).

<sup>233</sup> The rules were promulgated under 47 U.S.C. § 221(c) (1994) (empowering FCC to "determine what property of said carrier shall be considered as used in interstate or foreign telephone toll service").

<sup>234</sup> See *Louisiana PSC*, 476 U.S. at 376 ("As we so often admonish, only Congress can rewrite this statute.").

<sup>235</sup> S. Conf. Rep. No. 104-230, at 1 (1996).

<sup>236</sup> See *Reno v. ACLU*, 521 U.S. 844, 857 (1997) (describing Act as "an unusually important legislative enactment" whose "major components . . . were designed to promote competition in the local telephone service market"); Glen O. Robinson, *The "New" Communications Act: A Second Opinion*, 29 Conn. L. Rev. 289, 304 (1996) (stating that "all other parts of the Act pale in importance" compared to telephony provisions).

<sup>237</sup> See § 253 (Supp. IV 1998).

<sup>238</sup> Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, *Interconnection Between Local Exchange Carriers and Commercial Mobile Radio Service Providers*, 11 F.C.C.R. 15,499, 15,508 (1996) (First Report and Order), *aff'd* in part and *rev'd* in part, *AT&T v. Iowa Utils. Bd.*, 525 U.S. 366 (1999).

<sup>239</sup> See §§ 251, 252 (1994); H.R. Rep. No. 104-204, at 203 (1995) (indicating that Act's local competition provisions "create the transition to a more competitive marketplace"); Richard A. Epstein, *A Clear View of The Cathedral: The Dominance of Property Rules*, 106 Yale L.J. 2091, 2119-20 (1997) ("[T]he blockade position of the local monopolists is such that they would have every incentive to guard access to their networks against their would-be competitors."). As noted in the appeals court decision in *Iowa Utilities Board*:

Congress recognized that the amount of time and capital investment involved in the construction of a complete local stand-beside telecommunications network are substantial barriers to entry, and thus required incumbent LECs to allow competing carriers to use their networks in order to hasten the influence of competitive forces in the local telephone business.

*Iowa Utils. Bd. v. FCC*, 120 F.3d 753, 816 (8th Cir. 1997).

portant roles to the FCC, the state agencies, and the federal courts.<sup>240</sup> Under the Act, all incumbent providers are obligated to negotiate in good faith with new entrants to agree on the terms and conditions for the necessary arrangements between them.<sup>241</sup> They must submit any interconnection agreement they reach to the state public utilities commission (PUC) for approval.<sup>242</sup> If the parties are unable to reach an agreement, either one may petition the state PUC to arbitrate any disputed issues and to order the parties to comply with certain terms and conditions.<sup>243</sup> If a party believes that the arbitrated settlement does not comport with the Act, it may challenge those determinations in federal district court.<sup>244</sup> In the event that a state PUC declines to assume the responsibility of arbitrating and approving interconnection agreements, that task falls to the FCC.<sup>245</sup>

By investing state agencies with primary responsibility for arbitrating and approving interconnection agreements, the Telecom Act assigns them a key role in superintending this federal regulatory program.<sup>246</sup> In particular, the states enjoy substantial policymaking discretion under the Act, both explicitly and implicitly. For example, states determine whether smaller incumbent local exchange carriers (LECs) should be exempt from the Act's interconnection obligations.<sup>247</sup> In addition, states implicitly are required to exercise discretion when addressing interstitial questions left open by the Act or the FCC.

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<sup>240</sup> *S.W. Bell Tel. Co. v. Connect Communications Corp.*, 72 F. Supp. 2d 1043, 1044 (E.D. Ark. 1999), rev'd, 225 F.3d 942, 946 (8th Cir. 2000). It is worth noting that the nature of the project thrust upon these actors is dramatically different from the historic regulatory project. This transformation of the regulatory state largely reorients the mission of regulators and courts from "one of protecting end-users to one of arbitrating disputes among rival providers and, in particular, overseeing access to and pricing of 'bottleneck' facilities that could be exploited by incumbent firms to stifle competition." Joseph D. Kearney & Thomas W. Merrill, *The Great Transformation of Regulated Industries Law*, 98 Colum. L. Rev. 1323, 1326 (1998).

<sup>241</sup> See 47 U.S.C. §§ 251(c)(1), 252(a)(1) (Supp. IV 1998).

<sup>242</sup> See § 252(e)(1).

<sup>243</sup> See § 252(b).

<sup>244</sup> See § 252(e)(6).

<sup>245</sup> See § 252(e)(5).

<sup>246</sup> Recognizing this important role, federal courts repeatedly have refused to exercise jurisdiction over federal Telecom Act claims until the relevant state agency considered them first. See, e.g., *Bell Atl.-Va., Inc. v. Worldcom Techs. of Va., Inc.*, 70 F. Supp. 2d 620, 626 (E.D. Va. 1999) ("Circumventing the state commission's initial review undermines the review process established by Congress in the Telecommunications Act."); *Ind. Bell Tel. Co. v. McCarty*, 30 F. Supp. 2d 1100, 1104 (S.D. Ind. 1998) ("The Telecommunications Act was designed to allow the state commission to make the first determination on issues prior to judicial review."); *Mich. Bell Tel. Co. v. MFS Intelenet of Mich., Inc.*, 16 F. Supp. 2d 817, 823 (W.D. Mich. 1998) (collecting cases refusing to allow such premature review).

<sup>247</sup> See § 251(f)(1)(A).

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Federal courts remain somewhat uncomfortable with allowing states to exercise discretion on the meaning of federal law and thus almost uniformly reject the argument that reasonable state agency interpretations of the Act merit judicial deference.<sup>248</sup> In practice, however, the federal courts routinely defer to such interpretations by states,<sup>249</sup> particularly those involving ambiguous areas that the FCC specifically authorized states to resolve.<sup>250</sup>

The Act envisions this “unique sharing of federal and state regulatory power”<sup>251</sup> because Congress recognized and appreciated “the technical expertise of the state agenc[ies] for regulating the intrastate telecommunications industry,”<sup>252</sup> and, among other things, assigned them “an important role to play in the field of interconnection agreements.”<sup>253</sup> Thus, where the FCC does not mandate a national approach to interpreting and applying the Telecom Act, state agencies are left with considerable flexibility to do so, albeit subject to federal court review.<sup>254</sup>

Since the Telecom Act took cooperative federalism to a new level,<sup>255</sup> it created a slew of legal questions that are not close to being settled, even after years of litigation.<sup>256</sup> As the Supreme Court put it, the Act

<sup>248</sup> See Weiser, *supra* note 21, at 20 n.80 (collecting cases). But see *US West Communications, Inc. v. Pub. Serv. Comm’n*, 75 F. Supp. 2d 1284, 1287 (D. Utah 1999) (according deference to state commission’s interpretations of the Act).

<sup>249</sup> See *US West Communications, Inc. v. Worldcom Techs., Inc.*, 31 F. Supp. 2d 819, 825 (D. Or. 1998) (upholding state agency interpretation of ambiguous term on ground that it is not inconsistent with FCC regulation or terms of Act); Weiser, *supra* note 21, at 44-53 (discussing cases).

<sup>250</sup> See *Ill. Bell Tel. Co. v. Worldcom Techs., Inc.*, 179 F.3d 566, 573-74 (7th Cir. 1999) (providing such deference and noting that Act calls on state agencies to play important role with regard to interconnection agreements); *MCI Telecomm. Corp. v. Mich. Bell Tel. Co.*, 79 F. Supp. 2d 768, 776-77 & n.8 (E.D. Mich. 1999) (upholding, without de novo inquiry, state agency decision to institute liquidated damages that were neither required nor impermissible under Act); *US West Communications, Inc. v. Hix*, 57 F. Supp. 2d 1112, 1120-22 (D. Colo. 1999) (upholding state agency’s development of requirements, liquidated damages, and penalties not specifically authorized by Act or FCC regulations on ground that they fell within FCC expectation that state agencies would develop specific rules to implement FCC’s general policies).

<sup>251</sup> *Wis. Bell, Inc. v. Pub. Serv. Comm’n*, 27 F. Supp. 2d 1149, 1151 (W.D. Wis. 1998).

<sup>252</sup> *Ind. Bell Tel. Co. v. Smithville Tel. Co.*, 31 F. Supp. 2d 628, 643 (S.D. Ind. 1998).

<sup>253</sup> *Ill. Bell Tel. Co.*, 179 F.3d at 574.

<sup>254</sup> *Supra* note 250.

<sup>255</sup> See *P.R. Tel. Co. v. Telecomm. Regulatory Bd.*, 189 F.3d 1, 8, 14 (1st Cir. 1999) (highlighting Act’s cooperative federalism attributes); *Wis. Bell, Inc. v. Pub. Serv. Comm’n*, 57 F. Supp. 2d 710, 711 (W.D. Wis. 1999) (stating that Act created “new universe of ‘cooperative federalism’”).

<sup>256</sup> Such questions include the scope of the authority of state agencies to implement federal law. See Weiser, *supra* note 12, at 677-81 (analyzing justification of state agency actions on basis of federal law). One court complained that conceptualizing the relation-

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broadly extended [federal] law into the field of intrastate telecommunications, but in a few specified areas (ratemaking, interconnection agreements, etc.) has left the policy implications of that extension to be determined by state commissions, which—within the broad range of lawful policymaking left open to administrative agencies—are beyond federal control. Such a scheme is decidedly novel, and the attendant legal questions, such as whether federal courts must defer to state agency interpretations of federal law, are novel as well.<sup>257</sup>

### C. *The Telecom Act's Cooperative Federalism Strategy*

In implementing the Telecom Act, the FCC has made clear that it appreciates how state flexibility in developing varied and experimental approaches—provided that they fall within a range of reasonableness—can produce better results. When promulgating rules to address “slamming” of telephone customers,<sup>258</sup> for instance, the FCC concluded that “a ‘one-size-fits-all approach,’ as recommended by the carriers, would not take into consideration the specific experiences and concerns of individual states in the slamming area.”<sup>259</sup> In many cases, the initial flexibility provided to the states will recede when the FCC determines that certain approaches are clearly superior to others. Consider, for example, the issue of whether “subloops” should be delineated as an unbundled element.<sup>260</sup> The FCC initially refrained from settling the matter one way or the other, instead authorizing the individual state agencies to take account of local conditions.<sup>261</sup> This approach allowed state agencies to experiment<sup>262</sup> before the FCC ultimately decided to raise the floor of minimum stan-

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ship between federal and state authority “establishes a quagmire, pushing one further into the analytical abyss with each step toward resolution.” *BellSouth Telecomms., Inc. v. MCI Metro Access Transmission Servs., Inc.*, 97 F. Supp. 2d 1363, 1368 (N.D. Ga. 2000).

<sup>257</sup> *AT&T v. Iowa Utils. Bd.*, 525 U.S. 366, 385 n.10 (1999).

<sup>258</sup> “Slamming” refers to the practice of switching a customer’s carrier without permission.

<sup>259</sup> Implementation of the Subscriber Carrier Selection Changes Provisions of the Telecommunications Act of 1996, 14 F.C.C.R. 1508, 1562 (1998) (Second Report and Order and Further Notice of Proposed Rulemaking).

<sup>260</sup> Subloops are a portion of the line between an end user and a central office. The entire connection, referred to as the “local loop,” often includes various subconnections, which are commonly referred to as “subloops.” An unbundled element is one that incumbent LECs must make available to new entrants. See *supra* note 162 and accompanying text.

<sup>261</sup> Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, 11 F.C.C.R. 15,499, 15,696 (1996) (First Report and Order).

<sup>262</sup> See, e.g., *AT&T Communications of the S.W. v. S.W. Bell Tel. Co.*, 86 F. Supp. 2d 932, 958 (W.D. Mo. 1999) (upholding state agency decision, in absence of FCC requirement, that subloops should be offered as unbundled network element).

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dards for unbundled elements to include subloops.<sup>263</sup> Thus, as the FCC's approaches to both slamming and unbundling policy demonstrate, the Telecom Act's design anticipates flexibility and variation in its implementation and rejects a preemptive federalism with a single set of rules.<sup>264</sup>

Section 271 of the Telecom Act, which governs the entry of Bell companies into long-distance markets in their region, provides another good example of the local tailoring and experimentation afforded by the Act's cooperative federalism framework. Section 271 holds out entry into in-region long-distance markets as an incentive for the incumbent Bell companies to open up their local-calling markets to competition. Although the FCC makes the ultimate judgment on whether a Bell company meets the standard for entry into long distance, the FCC first must consult with the relevant state agency to "verify the compliance of the Bell operating company" with section 271's requirements.<sup>265</sup> In practice, the state agency enjoys far greater influence than a "consultant" because it acts, in effect, as the "record-maker" for a Bell company's application to enter long distance.<sup>266</sup> Provided that the state agency proceeds in a rigorous and exhaustive fashion, the FCC will accord considerable deference to its discretionary judgments.<sup>267</sup>

Section 271's critical market-opening incentive counteracts the natural tendency of incumbent providers not to help their competitors steal the incumbents' customers. There is understandable concern that local markets will not remain open after the FCC grants a Bell

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<sup>263</sup> Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, 15 F.C.C.R. 3696, 3788-89 (1999) (Third Report and Order and Fourth Further Notice of Proposed Rulemaking) (requiring incumbent LECs to provide access to unbundled subloops nationwide, where technically feasible).

<sup>264</sup> See Bob Rowe, 'Best Practices' in Implementation of the Telecommunications Act, in 17th Annual Institute on Telecommunications Policy & Regulation 41, 43-44 (Practicing Law Institute, PLI Order No. G0-0089, 1999), Westlaw 584 PLI/Pat 41 (discussing efforts to assess differing implementations of Telecom Act and identify "best practices").

<sup>265</sup> See 47 U.S.C. § 271(d)(2)(B) (Supp. IV 1998).

<sup>266</sup> See Application of Ameritech Michigan Pursuant to Section 271 of the Communications Act of 1934, as Amended, To Provide In-Region, InterLATA Services in Michigan, 12 F.C.C.R. 20,543, 20,559-60 (1997) (Memorandum Opinion and Order) (noting that state commissions' role in section 271 application process requires that they develop "comprehensive factual record concerning [the Bell company's] compliance with the requirements of section 271").

<sup>267</sup> See Application by Bell Atlantic New York for Authorization Under Section 271 of the Communications Act to Provide In-Region InterLATA Service in the State of New York, 15 F.C.C.R. 3953, 3958 (1999) (Memorandum Opinion and Order) ("[R]igorous state proceedings can contribute to the success of a section 271 application."). The FCC analogizes the state agency's role, like that of the Justice Department (which also must be consulted on section 271 applications), to that of an expert witness. *Id.* at 3973.

company authority to enter long distance in a particular state, thus removing this positive incentive. To address this concern, the FCC strongly encourages state agencies to monitor a Bell company's wholesale performance and institute a post-entry wholesale performance assurance plan.<sup>268</sup> Significantly, however, the FCC has not mandated a specific approach to the development of these post-entry plans,<sup>269</sup> leaving the state agencies with considerable freedom in their design.<sup>270</sup> Indeed, recognizing that the Act's cooperative federalism design anticipates experimentation by states on matters where there is not a single correct answer, the FCC emphasized that "[p]lans may vary in their strengths and weaknesses, and there is no one way to demonstrate assurance."<sup>271</sup>

The Telecom Act's cooperative federalism design affords flexibility to states on procedural issues as well as substantive matters. In terms of substantive policy discretion, states are free under section 251 of the Act to mandate interconnection agreement provisions not specified under FCC regulations.<sup>272</sup> The Telecom Act does not mandate—or attempt to influence through the withholding of federal funds—the states' participation under either section 271 or section 251. Rather, it invites them to join federal entities in a cooperative federalism regime.<sup>273</sup> The Act allows the agencies latitude to proceed in any num-

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<sup>268</sup> Application by SBC Communications, Inc., S.W. Bell Tel. Co., and S.W. Bell Communications Servs., Inc. Pursuant to Section 271 of the Telecommunications Act of 1996 to Provide In-Region, InterLATA Services in Texas, 15 F.C.C.R. 18,354, 18,559-60 (2000) (Memorandum Opinion and Order); Application by Bell Atlantic New York, 15 F.C.C.R. at 4164.

<sup>269</sup> Compare Application by Bell Atlantic New York, 15 F.C.C.R. at 4165-73 (summarizing New York Commission's performance reporting and enforcement mechanisms), with Application by SBC Communications, 15 F.C.C.R. at 18,560-65 (summarizing Texas performance remedy plan).

<sup>270</sup> See Application by SBC Communications, 15 F.C.C.R. at 18,561 (reviewing state plan under reasonableness standard).

<sup>271</sup> *Id.*

<sup>272</sup> See 47 U.S.C. § 251(d)(3) (Supp. IV 1998) (preserving state commissions' authority to establish obligations of LECs); *supra* notes 241-247 and accompanying text (explaining Act's treatment of interconnection agreements). A good example of such discretion is the decision of some states to impose performance standards and liquidate damages in interconnection agreements. See, e.g., *MCI Telecomm. Corp. v. Mich. Bell Tel. Co.*, 79 F. Supp. 2d 768, 774-77 (E.D. Mich. 1999) (upholding state agency's adoption of performance benchmarks and penalties in interconnection agreement); *US West Communications, Inc. v. Hix*, 57 F. Supp. 2d 1112, 1120-22 (D. Colo. 1999) (deciding that state commission had authority under Act to adopt penalties in order to provide opportunity to compete).

<sup>273</sup> Accordingly, the Telecom Act has withstood almost all Tenth and Eleventh Amendment challenges to its statutory structure. See, e.g., *MCI Telecomm. Corp. v. Ill. Bell Tel. Co.*, 222 F.3d 323, 348 (7th Cir. 2000), cert. denied, 121 S. Ct. 896 (2001); *MCI Telecomm. Corp. v. N.Y. Tel. Co.*, 134 F. Supp. 2d 490, 497 (N.D.N.Y. 2001) (listing cases). One circuit, however, recently invalidated the federal court review of state agencies, *Bell Atl. Md., Inc. v. MCI Worldcom, Inc.*, 240 F.3d 279, 292 (4th Cir. 2001), prompting the Supreme

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ber of fashions, provided that they are not inconsistent with the Act and FCC regulations.<sup>274</sup>

The Act's provisions clearly anticipated that state agencies would play an important role and exercise considerable discretion in its implementation. Unfortunately, as is often the case with complex federal regulatory programs, the Act failed to articulate a clear vision of federal-state relations. Left to fill in the gaps, the FCC has, among other things, set out to redesign the jurisdictional separations process to meet the emergence of a competitive telecommunications system that defies jurisdictional categorization.<sup>275</sup> Moreover, as discussed in Section D below, the FCC and the states fought a prolonged litigation battle over their conflicting visions of the Act's jurisdictional scheme. Thus, although the Telecom Act holds out the promise of an innovative regulatory regime that fits market realities and provides a model of a cooperative federalism, it leaves the FCC, the state agencies, and the courts with considerable work to get there.

#### D. Iowa Utilities Board: *An Integrated Vision of Federal-State Relations*

As is the case with most major legislation that is heavily lobbied by competing interests, the Telecom Act was not "a model of clarity."<sup>276</sup> While realigning the basic jurisdictional framework for telecommunications, the Act authorized the FCC to oversee the introduction of competition into local telecommunications, but left

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Court to grant certiorari on this question, *Mathias v. Worldcom Techs., Inc.*, 121 S. Ct. 1224 (2001). Should the Court conclude that the Eleventh Amendment protects state agencies from suit under the Telecom Act—that neither a waiver theory nor the *Ex Parte Young* fiction apply—it would raise the question of whether review of interconnection agreements and their enforcement implicates the state agencies as an indispensable party. If state agencies meet this requirement, such a ruling would jeopardize cooperative federalism regulatory programs by making it much harder to ensure that state agencies implement federal law in an acceptable manner.

<sup>274</sup> See §§ 251(d)(3), 252(g).

<sup>275</sup> Jurisdictional Separations Reform and Referral to the Federal-State Joint Board, 12 F.C.C.R. 22,120, 22,123 (1997) (Notice of Proposed Rulemaking) (seeking comment "on whether some form of separations must exist under the 1930 *Smith v. Illinois* decision or whether statutory, regulatory, and market changes since that decision have been so pronounced and persuasive as to make its holding inapplicable in our new deregulatory environment") (citing *Smith v. Ill. Bell Tel. Co.*, 282 U.S. 133, 148 (1930)); *Jurisdictional Separations Reform*, 12 F.C.C.R. at 22,126 (noting that "today's network architecture and service offerings differ in many important ways from the network and services" that spawned current separations process, constructed at a time when services were provided "through a regulated monopoly").

<sup>276</sup> *AT&T v. Iowa Utils. Bd.*, 525 U.S. 366, 397 (1999).

section 2(b)<sup>277</sup> in place.<sup>278</sup> Despite these mixed signals, the FCC concluded that the 1996 Act abandoned the dual regulatory system in favor of one that embraced a creative blending of federal and state authority.<sup>279</sup>

Not surprisingly, the states disagreed with the FCC's view of the Act's jurisdictional scheme. And, due to the Act's ambiguity on where the role of the FCC ended and the role of the state agencies began, the Act spawned yet another jurisdictional battle that ultimately reached the Supreme Court. But this time, the FCC prevailed.

The resulting decision in *Iowa Utilities Board* left a number of issues for further litigation, but resolved one: The FCC enjoys full residual authority to implement all of the Act's market-opening provisions.<sup>280</sup> In particular, the Supreme Court overturned the Court of Appeals for the Eighth Circuit<sup>281</sup> on two key points, concluding that section 201(b) empowers the FCC to construe all provisions of the Act, even those affecting local telephony,<sup>282</sup> and that § 252(c)(2) leaves the FCC's authority intact.<sup>283</sup>

The Telecom Act's cooperative federalism regime gives state agencies considerable discretion, and the FCC specifically authorized them to develop innovative approaches to effectuate its market-open-

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<sup>277</sup> § 152(b); see supra note 220 and accompanying text (discussing requirement of section 2(b) that that FCC refrain from regulating intrastate matters unless they are impossible to separate from interstate matters).

<sup>278</sup> This somewhat ambiguous signal to the courts stemmed from the fact that "[t]he Telecommunications Act of 1996 was nothing if not a complex balancing act among many conflicting interests. Not the least of these were the interests of state and local governments in continuing to regulate certain aspects of this industry, and the need for a uniform federal policy." *Aegerter v. City of Delafield*, 174 F.3d 886, 887 (7th Cir. 1999).

<sup>279</sup> In particular, the FCC explained that Congress, in passing the 1996 Acts:

created a regulatory system that differs significantly from the dual regulatory system it established in the 1934 Act. That Act generally gave jurisdiction over interstate matters to the FCC and over intrastate matters to the states. The 1996 Act alters this framework, and expands that applicability of both national rules to historically intrastate issues and state rules to historically interstate issues. Indeed, many provisions of the 1996 Act are designed to open telecommunications markets to all potential service providers, without distinction between interstate and intrastate services.

Local Competition Provisions in the Telecommunications Act of 1996, 11 F.C.C.R. 15,499, 15,544 (1996) (First Report and Order).

<sup>280</sup> The Court followed its precedent in the Clean Water Act context, where it previously had concluded that, absent clear congressional direction to the contrary, the federal agency enjoys wide latitude in deciding how to implement a cooperative federalism program. See *Arkansas v. Oklahoma*, 503 U.S. 91, 105 (1992).

<sup>281</sup> *Iowa Utils. Bd. v. FCC*, 120 F.3d 753, 800 (8th Cir. 1997) (holding that section 2(b) erects a fence that is "hog tight, horse high, and bull strong, preventing the FCC from intruding on the states' intrastate turf").

<sup>282</sup> *AT&T v. Iowa Utils. Bd.*, 525 U.S. 366, 379-81 (1999).

<sup>283</sup> *Id.* at 383-86.

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ing requirements,<sup>284</sup> but Congress did not charge them with developing any of the Act's requirements without FCC oversight.<sup>285</sup> Thus, the FCC can decline to impose a uniform national standard, allowing different states to experiment with approaches that are consistent with the statutory text and purpose, but the FCC can ultimately set a single national standard if it decides one is appropriate.<sup>286</sup>

Despite *Iowa Utilities Board's* depiction of a cooperative federalism model for the Telecom Act, the FCC, the state agencies, and the federal courts have not adapted easily to the new jurisdictional regime inaugurated by this landmark law. The FCC, for example, initially failed to appreciate that it did not need to establish the interstate nature of telephone calls to Internet Service Providers (ISPs) in order to justify promulgation of rules concerning reciprocal compensation<sup>287</sup> for these calls.<sup>288</sup> In fact, as the D.C. Circuit has held, the FCC's residual authority to define the appropriate reciprocal compensation regime, and not its jurisdiction over interstate calls, presumably governed the resolution of this issue.<sup>289</sup>

By focusing on the Act's provision for reciprocal compensation, which is to be interpreted by the FCC under its residual authority and implemented by the states (as opposed to the old jurisdictional separation analysis applied by the FCC), the court properly recognized the significance of the Act's cooperative federalism design. Unfortu-

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<sup>284</sup> The FCC required the state commissions to implement the Act's nondiscriminatory access requirement by "adopting, inter alia, specific rules . . . and any other specific conditions they deem necessary to provide new entrants, including small competitors, with a meaningful opportunity to compete in local exchange markets." Local Competition Provisions, 11 F.C.C.R. at 15,657.

<sup>285</sup> Section 252(c), which assigned state agencies to set rates for unbundled elements, could have been interpreted as a delegation to state agencies not to be subject to FCC rules. In rejecting this argument, the Court explained that the presumption when interpreting cooperative federalism statutes would be to leave the federal agency with complete residual authority. See *Iowa Utils. Bd.*, 525 U.S. at 378. In effect, the Court's approach requires a clear statement of congressional intent to displace the federal agency from issuing regulations that constrain state agency discretion.

<sup>286</sup> In deciding what elements of the network should be unbundled, the FCC took just this approach, first allowing states to decide on their own whether to mandate subloop unbundling, but later adopting regulations requiring that this element of the incumbent's network be unbundled and made available in all states. See *supra* notes 260-64 and accompanying text.

<sup>287</sup> Reciprocal compensation is the scheme under which telephone companies pay each other for use of infrastructure depending on which one receives more of the other's traffic. See 47 U.S.C. § 251(b)(5) (Supp. IV 1998); 47 C.F.R. § 51.701 (1999).

<sup>288</sup> See Implementation of the Local Competition Provisions in the Telecomm. Act of 1996, Intercarrier Compensation for ISP-Bound Traffic, 14 F.C.C.R. 3689, 3690 (1999) (Declaratory Ruling) (explaining that ISP-bound traffic is subject to reciprocal compensation provisions in part because it "appears to be largely interstate").

<sup>289</sup> *Bell Atl. Tel. Co. v. FCC*, 206 F.3d 1, 6 (D.C. Cir. 2000).

nately, the FCC's subsequent action on remand still failed to adhere to a cooperative federalism model, instead assuming sole jurisdiction on the question and calling for a single national approach.<sup>290</sup> The FCC's judgment about the need to reform the reciprocal compensation regime is quite sound, but this reform can take any number of paths and the imposition of a national approach prevents state experimentation.<sup>291</sup>

This failure to apprehend the full significance of cooperative federalism is a common problem for the institutions that make decisions to implement such statutes. The next Section turns as an example to an especially thorny issue—the enforcement of interconnection agreements.

#### *E. The Role of The Federal Courts in Reviewing Interconnection Agreement Disputes*

With its emphasis on the importance of an integrated federal regulatory scheme, *Iowa Utilities Board* partially anticipated the array of subsidiary questions that will arise as federal and state agencies and courts confront the implications of the Telecom Act's cooperative federalism approach. These questions, as Justice Scalia noted, are “decidedly novel”<sup>292</sup> and involve arrangements that, to him anyway, appeared “surpassing strange.”<sup>293</sup> Foremost among the questions to be resolved is whether the Act's enforcement regime will be reviewed in federal or state court, an issue the Supreme Court will address soon in *Mathias v. WorldCOM Techs, Inc.*<sup>294</sup>

Perhaps because the architecture of cooperative federalism regulatory regimes remains a relatively unfamiliar topic, the relevant agencies and the courts all appear to keep looking to one another to clarify how they should work in practice. Reflecting an almost comic result of this dynamic, the FCC initially justified the authority of state agencies to enforce interconnection agreements (subject to federal judicial review) on the ground that judicial decisions already had endorsed this reading of the Act—ignoring the fact that the judicial decisions in

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<sup>290</sup> See Implementation of the Local Competition Provisions in the Telecomm. Act of 1996, Intercarrier Compensation for ISP-Bound Traffic, CC Docket No. 99-68, FCC 01-131 (Apr. 27, 2001) (Order on Remand and Report and Order), available at 2001 WL 455869. The FCC recognized that its action was in tension with the spirit, if not the letter, of the D.C. Circuit's decision. *Id.* at 15 n.56 (“Some critics of the Commission's order may contend that we rely here on the same reasoning that the court rejected in *Bell Atlantic.*”).

<sup>291</sup> Commissioner Furchtgott-Roth recognized this point in dissent. See *id.* at 65 (noting how FCC's approach did not demonstrate “a modicum of respect for States”).

<sup>292</sup> *Iowa Utils. Bd.*, 525 U.S. at 386 n.10.

<sup>293</sup> *Id.* at 379 n.6.

<sup>294</sup> 121 S. Ct. 1224 (2001) (granting certiorari to determine issue).

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question had themselves relied on the FCC's prior suggestions of such a reading.<sup>295</sup>

Courts have regularly recognized that the text of the Telecom Act is unclear about whether it creates federal jurisdiction to enforce violations of interconnection agreements.<sup>296</sup> In particular, the Act provides for federal judicial review to evaluate whether any "determination" by a state agency on an interconnection agreement complies with federal telecommunications law.<sup>297</sup> Moreover, to ensure consistency with federal law, the Act prohibits state court review of "the action of a State commission in approving or rejecting an [interconnection] agreement . . . ."<sup>298</sup> Under well-established statutory interpretation principles, courts should construe these two related

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<sup>295</sup> Compare *Starpower Communications, LLC Petition for Preemption of Jurisdiction of the Va. State Corp. Comm'n*, 15 F.C.C.R. 11,277, 11,279 (2000) (Memorandum Opinion and Order) (finding judicial reasoning "instructive"), with *S.W. Bell Tel. Co. v. Pub. Util. Comm'n*, 208 F.3d 475, 480 (5th Cir. 2000) (deferring to FCC Order contemplating state agency interpretation of interconnection agreements), and *Ill. Bell Tel. Co. v. Worldcom Techs., Inc.*, 179 F.3d 566, 573 (7th Cir. 1999) (concluding that FCC order contemplated state interpretation of interconnection agreements). Along these same lines, then-Judge Starr previously noted how shared interpretive authority can lead both courts and agencies to be less focused. See Starr, *supra* note 10, at 704 ("Like two outfielders warily going after a fly ball, courts and agencies have tended to take their eye off the ball by virtue of understandable concerns over bumping into one another.").

<sup>296</sup> *P.R. Tel. Co. v. Telecomm. Regulatory Bd.*, 189 F.3d 1, 9 (1st Cir. 1999); *BellSouth Telecomm., Inc. v. MCIMetro Access Transmission Servs., Inc.*, 97 F. Supp. 2d 1363, 1368 (N.D. Ga. 2000); *Wis. Bell, Inc. v. TCG Milwaukee, Inc.*, 27 F. Supp. 2d 1145, 1148 (W.D. Wis. 1998). Moreover, the fact that "Congress considered but failed to include a private right of action for violations of an interconnection agreement" while doing so in other sections of the Act also militates against implying a judicial remedy that would be enforceable in federal court in the first instance. *AT&T Communications of Cal., Inc. v. Pac. Bell*, 60 F. Supp. 2d 997, 1001-02 (N.D. Cal. 1999). If the interpretation and enforcement of interconnection agreements are not subject to federal judicial review under the procedure set forth in section 252 (or under an implied cause of action), it would be quite possible that they could be enforced only through a state contract remedy. If so, such cases might not be subject to federal court review, even if a number of contractual terms—and possibly even certain remedial rules—depended on federal law. See *Mulcahey v. Columbia Organic Chems. Co.*, 29 F.3d 148, 152 (4th Cir. 1994) ("Therefore, under *Merrell Dow*, if federal law does not provide a private right of action, a state law action based on its violation does not raise a 'substantial' federal question."); Erwin Chemerinsky, *Federal Jurisdiction* 273 (2d ed. 1994) ("Therefore, without a federal cause of action, a federal law cannot be the basis for federal question jurisdiction.").

<sup>297</sup> Section 252(e)(6) states, in relevant part:

In any case in which a State commission makes a determination under this section, any party aggrieved by such determination may bring an action in an appropriate Federal district court to determine whether the agreement or statement meets the requirements of section 251 and this section.

47 U.S.C. § 252(e)(6) (Supp. IV 1998).

<sup>298</sup> § 252(e)(4).



provisions in a harmonious manner.<sup>299</sup> In this case, though, that approach does not necessarily suggest either a broad or narrow interpretation of the words “determination” and “action,” leaving courts with discretion on the matter. This Section first sets out the argument in favor of state jurisdiction and then explains why federal courts possess jurisdiction to review violations of interconnection agreements.

### 1. *The Argument for State Jurisdiction*

In *Iowa Utilities Board*, the states argued that the Telecom Act provided a federal interconnection right to new entrants in local telephone markets, but contemplated that state agencies would define the scope of that right, except where the Act clearly assigned that task to the FCC.<sup>300</sup> In a bow to the important role of federal agencies in superintending a federal regulatory regime, the Supreme Court rejected that argument.<sup>301</sup> Most likely, some states will make the same argument concerning enforcement of the right to interconnect. In addition, a number of state commissions (as well as some telephone companies)<sup>302</sup> have objected that issues of contract interpretation and enforcement do not constitute the requisite “determination” by a state agency to give rise to federal judicial review.<sup>303</sup>

Under one version of state control, interconnection agreements approved by the state agencies (and reviewed by federal courts) would be enforced by the state commission and in state courts. On this approach, the remedies for breach of an interconnection agreement would lie under state contract law, even though federal law and federal agency rulemaking established and delineated the underlying right. While it is “somewhat unusual” for “state courts [to] have exclusive jurisdiction over a cause of action created by federal law,”<sup>304</sup> it

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<sup>299</sup> See, e.g., *United Sav. Ass'n v. Timbers of Inwood Forest Assoc.*, 484 U.S. 365, 371 (1988) (stating that statutory term should not be interpreted in isolation); *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41, 45 (1987) (same); *Wash. Metro. Transit Auth. v. Johnson*, 467 U.S. 925, 934-36 (1984) (stating that related provisions in same statute should be interpreted in light of one another).

<sup>300</sup> *AT&T v. Iowa Utils. Bd.*, 525 U.S. 366, 374, 379-80 (1999).

<sup>301</sup> *Id.* at 385.

<sup>302</sup> Ameritech (now owned by SBC) appears to have found itself on both sides of this issue. Compare *Ind. Bell Tel. Co. v. McCarty*, 30 F. Supp. 2d 1100, 1103 (S.D. Ind. 1998) (noting that Ameritech argued that federal courts lacked jurisdiction to review interpretation and enforcement of interconnection agreements), with *Mich. Bell Tel. Co. v. MFS Intelenet of Mich., Inc.*, 16 F. Supp. 2d 817, 823 (W.D. Mich. 1998) (noting that Ameritech argued that order construing interconnection agreement was reviewable in federal court).

<sup>303</sup> *MFS Intelenet*, 16 F. Supp. 2d at 823 (noting argument advanced by Michigan Public Service Commission).

<sup>304</sup> *Int'l Sci. & Tech. Inst. v. Inacom Communications, Inc.*, 106 F.3d 1146, 1150 (4th Cir. 1997).

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is not unprecedented in telecommunications law; all circuit courts to address the issue have concluded that the Telephone Consumer Protection Act (TCPA)<sup>305</sup> did just that.<sup>306</sup>

The essence of the state law position is that the jurisdictional analyses should be separate entirely for, on the one hand, the review of interconnection agreements to determine conformity with federal law, and, on the other, the enforcement of interconnection agreements—with the Act’s policies explicit on the first of these points and silent on the second. Thus, the question for the federal courts is whether the statutory silence concerning enforcement is meaningful, foreclosing an implied right of action to enforce interconnection agreements.<sup>307</sup>

In the Telecom Act context, as with the TCPA, the states can emphasize that the 1934 Act (as amended by the Telecom Act) explicitly provides for federal jurisdiction in other contexts.<sup>308</sup> Following this logic, the Fourth Circuit has concluded that state laws—and state court jurisdiction—govern the enforcement of interconnection agreements absent some explicit direction to the contrary.<sup>309</sup> Similarly, courts have concluded that approval of a contract by the Interstate Commerce Commission does not necessarily trigger a federal interest sufficient to create federal jurisdiction.<sup>310</sup> Put simply, the Telecom

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<sup>305</sup> 47 U.S.C. § 227 (1994).

<sup>306</sup> See, e.g., *id.* at 1152-53 (holding that TCPA creates exclusive state court jurisdiction, based on statute’s specific reference to state court jurisdiction and its purpose of allowing consumers to enforce it easily and inexpensively); see also *Erienet, Inc. v. Velocity Net, Inc.*, 156 F.3d 513, 519 (3d Cir. 1998); *Foxhall Realty Law Offices v. Telecomm. Premium Servs.*, 156 F.3d 432, 434 (2d Cir. 1998); *Nicholson v. Hooters of Augusta, Inc.*, 136 F.3d 1287, 1289 (11th Cir. 1998); *Chair King, Inc. v. Houston Cellular Corp.*, 131 F.3d 507, 514 (5th Cir. 1997).

<sup>307</sup> See *Touche Ross & Co. v. Redington*, 442 U.S. 560, 571 (1979) (“[I]mplying a private right of action on the basis of congressional silence is a hazardous enterprise, at best.”); *Erienet*, 156 F.3d at 519 (noting “well established principles reflecting a reluctance to provide federal jurisdiction unless it is clearly provided for”).

<sup>308</sup> See *Inacom*, 106 F.3d at 1152 (noting other such provisions).

<sup>309</sup> *Bell Atl. Md., Inc. v. MCI Worldcom, Inc.*, 240 F.3d 279, 304 (4th Cir. 2001) (highlighting lack of express mandate for federal law and federal jurisdiction); *S.W. Bell Tel. Co. v. Connect Communications Corp.*, 72 F. Supp. 2d 1043, 1048 (E.D. Ark. 1999) (same).

<sup>310</sup> *McFaddin Express, Inc. v. Adley Corp.*, 346 F.2d 424, 427 (2d Cir. 1965) (holding that requirement that contract be approved by federal agency does not necessarily indicate Congress’s intent to apply federal law instead of “state law applicable to similar contracts relating to businesses not under federal regulation”); *Chi. & N.W. Ry. v. Toledo, Peoria & W. R.R.*, 324 F.2d 936, 938 (7th Cir. 1963) (determining that federal agency permission to enter contract does not make federal law part of contract); see also *Skelly Oil Co. v. Phillips Petroleum Co.*, 339 U.S. 667, 670-73 (1950) (holding contract phraseology borrowed from Natural Gas Act could be construed independently of statute and thus did not justify federal court review); *Mendenhall Enters. v. Currier*, 564 F.2d 1239, 1240-41 (9th Cir. 1977) (finding that ICC approval of contract, which was not even necessary to give it effect, did not justify federal jurisdiction).

Act could be interpreted along the lines of the Federal Safety Appliance Act,<sup>311</sup> which “while prescribing absolute duties, and thus creating correlative rights in favor of injured employees, did not attempt to lay down rules governing actions for enforcing these rights.”<sup>312</sup>

## 2. *The Role for Federal Jurisdiction*

The essential rationale for federal jurisdiction is that the Telecom Act’s scheme clearly is federal in nature. As such, federal law governs at least some provisions of interconnection agreements, even if it incorporates state law on some or all matters of interpretation and enforcement. In particular, the Act’s call for federal jurisdiction to review the formation of interconnection agreements also suggests a role for federal judicial review of their enforcement.<sup>313</sup> Like the formation of interconnection agreements, remedies for violating key provisions should be crafted with sensitivity to the policies underlying the Telecom Act. Moreover, any latent ambiguities in the agreements—those not evident at their creation which become clear at the enforcement stage—will need to be settled by reference to these federal policies. Finally, the FCC has come down in favor of this jurisdictional analysis,<sup>314</sup> and federal courts should (and do) give some weight to this opinion in a cooperative federalism regime.<sup>315</sup> For all these rea-

<sup>311</sup> ch. 196, 27 Stat. 531 (codified as amended in scattered sections of 49 U.S.C.).

<sup>312</sup> *Moore v. Chesapeake & Ohio Ry. Co.*, 291 U.S. 205, 215 (1934).

<sup>313</sup> To be sure, courts will (and should) focus on the Telecom Act’s specific jurisdictional provisions, and not the general federal jurisdictional statute, 28 U.S.C. § 1331 (1994). See *Califano v. Sanders*, 430 U.S. 99, 109 (1977) (determining that jurisdictional provision of Social Security Act supercedes jurisdiction under § 1331); *Bell Atl.-Va., Inc. v. Worldcom Techs. of Va., Inc.*, 70 F. Supp. 2d 620, 624 (E.D. Va. 1999) (collecting relevant telecommunications cases). Nonetheless, the § 1331 analysis remains instructive. In particular, in a great many state-law breach-of-contract actions arising in this context, the case will turn on the requirements of federal law as embodied in the interconnection agreements. Accordingly, a “substantial, disputed question of federal law [will be] a necessary element of one of the well pleaded state claims”—i.e., that the defendant violated a duty arising out of federal law—thereby justifying federal jurisdiction under the general federal jurisdiction statute based on the “well pleaded complaint rule.” *Franchise Tax Bd. v. Constr. Laborers Vacation Trust*, 463 U.S. 1, 13 (1983).

<sup>314</sup> The FCC made this position official in deciding to hear a complaint alleging a violation of an interconnection agreement that the State of Virginia had failed to adjudicate. See *Starpower Communications Petition for Preemption of Jurisdiction of the Virginia State Corporation Commission*, 15 F.C.C.R. 11,277, 11,278, 11,281 (2000) (concluding that Act provides federal authority to adjudicate interconnection agreement violations).

<sup>315</sup> See *S.W. Bell Tel. Co. v. Connect Communications Corp.*, 225 F.3d 942, 946-47 (8th Cir. 2000) (deferring to FCC decision in *Starpower Communications*); *S.W. Bell Tel. Co. v. Pub. Util. Comm’n*, 208 F.3d 475, 480 (5th Cir. 2000) (deferring to FCC order contemplating state agency interpretation of interconnection agreements); *Ill. Bell Tel. Co. v. Worldcom Techs., Inc.*, 179 F.3d 566, 572-73 (7th Cir. 1999) (same); *BellSouth Telecomm., Inc. v. MCIMetro Access Transmission Servs.*, 97 F. Supp. 2d 1363, 1376-79 (N.D. Ga. 2000) (deferring to reasonable FCC interpretation).

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sons, most of the federal courts of appeals that have considered this question have concluded that the Act provides federal jurisdiction over both interpretation and enforcement of interconnection agreements by state agencies.<sup>316</sup>

The close relationship between the federal- and state-law questions also points strongly towards federal court review of state-law issues raised in this context.<sup>317</sup> In particular, federal courts will need to evaluate whether a state agency properly applied state law to determine whether this state law rule is inconsistent with the Telecom Act's objectives. Moreover, allowing the review of state-law issues in federal court—to the extent that they apply of their own force, and not as incorporated by federal law—ensures that litigants are not forced first to litigate the federal set of issues in one forum and then a second set in another.<sup>318</sup> In adopting this view of the statutory scheme, courts will enable litigants to take advantage of a sensible and expeditious

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<sup>316</sup> *S.W. Bell Tel. Co. v. Brooks Fiber Communications of Okla., Inc.*, 235 F.3d 493, 498 (10th Cir. 2000); *S.W. Bell Tel.*, 208 F.3d at 480; *Ill. Bell Tel. Co.*, 179 F.3d at 574. But see *Bell Atl. Md., Inc. v. MCI Worldcom, Inc.* 240 F.3d 279, 308-09 (4th Cir. 2001) (concluding that Congress conferred very limited federal jurisdiction under Act, and “otherwise it intended for the right of review to be exercised in state courts”). The Eighth Circuit’s decision in *Iowa Utilities Board* suggested in dicta that “authority to accept or reject these agreements necessarily carries with it the authority to enforce the provisions of agreements that the state commissions have approved,” which would then be reviewed in federal court. *Iowa Utils. Bd. v. FCC*, 120 F.3d 753, 804 & n.24 (8th Cir. 1997).

<sup>317</sup> To date, the federal courts are split on whether they enjoy jurisdiction to review issues of state law raised in relation to interconnection agreements. Compare *Ill. Bell Tel.*, 179 F.3d at 572 (declining to review state law questions), with *S.W. Bell Tel.*, 208 F.3d at 482 (reviewing state-law questions under deferential standard). The decision to review state-law issues deferentially, while quite sensible, also underscores another reason for deferring to state agency interpretation of the Telecom Act: Doing otherwise would create a distorting incentive for state regulators to rest their judgments on state law, rather than federal law, in order to merit deference from a reviewing federal court. See Weiser, *supra* note 21, at 35 (discussing this issue).

<sup>318</sup> Ignoring vital policies of judicial economy, efficiency, and timely resolution of disputes, see 28 U.S.C. § 1367 (1994) (granting supplemental jurisdiction to federal courts); *United Mine Workers v. Gibbs*, 383 U.S. 715, 726 (1966) (turning to these policies when judging jurisdiction), the Seventh Circuit concluded that the Telecom Act provided for just such a bifurcated system, *Ill. Bell Tel. Co.*, 179 F.3d at 574, even while acknowledging criticism of this approach, *id.* at 571. Other courts have generally rejected the Seventh Circuit’s interpretation. See, e.g., *S.W. Bell Tel.*, 208 F.3d at 482 (comparing Seventh Circuit position to others and rejecting it in favor of “more expansive view of federal jurisdiction” over state-law issues); *BellSouth Telecomm.*, 97 F. Supp. 2d at 1376 n.10 (rejecting Seventh Circuit’s approach as creating “anomalous” results). While the First Circuit also concluded that purely state-law issues should not be reviewed in federal court, it did so in a case solely involving an issue of state law—a consumer protection measure—and thus did not address the scenario contemplated by the Seventh Circuit’s ruling. *P.R. Tel. Co. v. Telecomm. Regulatory Bd.*, 189 F.3d 1, 19 (1st Cir. 1999) (declining jurisdiction where no federal issue was implicated and refusal of supplemental jurisdiction was within court’s discretion).

jurisdictional regime that will serve the Act's purpose of enabling new entrants to bring competition to local telephone markets.<sup>319</sup>

In short, the interpretation and enforcement of interconnection agreements should be kept within the same jurisdictional framework—state-agency resolution and federal-court review—as their arbitration and approval.<sup>320</sup> This approach to enforcement most sensibly serves the Act's goals. Moreover, it presents another question implicit in the Act: What measure of damages should govern violations of the Telecom Act?

## V

### REMEDIES FOR VIOLATIONS OF THE FEDERAL TELECOM ACT

The law on remedies for Telecom Act violations will provide an important test case for the proper allocation of lawmaking responsibility between federal agencies, state agencies, and federal and state courts in implementing cooperative federalism statutes.<sup>321</sup> This Part discusses the role of each in turn.

As an initial matter, the federal agency's willingness to fill in the important statutory gap on remedies will help reveal whether or not agencies are willing and able to assume the responsibility assigned to them under the *Erie/Chevron* regime. Relatedly, the federal and state agencies also will be forced to endorse or reject the classic cooperative federalism architecture of a federal floor with state supplementation. Finally, the resolution of this matter (among others) will afford the federal courts an opportunity to reconcile the *Erie/Chevron* model regime, their historic role of supplying remedies for federal rights, and their conception of cooperative federalism.

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<sup>319</sup> See *Bank One Chi., N.A. v. Midwest Bank & Trust Co.*, 516 U.S. 264, 275-76 (1996) (declining to attribute "decidedly inefficient jurisdictional scheme" to Congress under Expedited Funds Availability Act, 12 U.S.C. §§ 4001-4010 (1994)).

<sup>320</sup> Otherwise, parties could avoid federal-court review of state-agency interpretation and enforcement of interconnection agreements by waiting to challenge issues until they arose at the enforcement stage. *Mich. Bell Tel. Co. v. MFS Intelenet of Mich., Inc.*, 16 F. Supp. 2d 817, 824 (W.D. Mich. 1998) (protesting that "[s]uch an interpretation defies logic").

<sup>321</sup> Even as the environmental statutes approach their fourth decade, there is still considerable confusion and debate about how federal and state agencies should enforce such cooperative federalism regulatory programs. See Ellen R. Zahren, Comment, *Overfiling Under Federalism: Federal Nipping at State Heels to Protect the Environment*, 49 *Emory L.J.* 373, 374 (2000) (discussing debate over division of authority between federal and state entities in environmental law and policy).

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### A. *The Role of the FCC*

The essence of the *Erie/Chevron* regime is that the province of common lawmaking can be assumed by regulatory agencies superintending comprehensive regulatory regimes. When Judge Friendly first advocated an important role for *Clearfield*-type common law,<sup>322</sup> he argued that while relying on legislatures was an option, legislators all too often failed to assume the necessary responsibility.<sup>323</sup> *Milwaukee II*, however, suggested that the same cannot be said of regulatory agencies when they are given a broad mandate to implement a comprehensive regulatory scheme.<sup>324</sup> Despite some scholarly support for agency use of this mandate,<sup>325</sup> federal agencies have yet to appreciate fully the implications of this approach.

#### 1. *Vertical Chevron and FCC Creation of Remedial Rules*

The Supreme Court's *Iowa Utilities Board* decision marks out the path for the FCC to create rules to govern violations of the Act's procompetitive requirements.<sup>326</sup> As Justice Scalia explained for the majority, "Congress is well aware that the ambiguities it chooses to produce in a statute will be resolved by the implementing agency. We can only enforce the clear limits that the 1996 Act contains . . . ."<sup>327</sup> This conception of the relationship between federal courts and administrative agencies recognizes that, in the wake of *Milwaukee II*, the FCC enjoys Necessary and Proper Clause-like authority.<sup>328</sup> On this

<sup>322</sup> *Clearfield Trust Co. v. United States*, 318 U.S. 363 (1943).

<sup>323</sup> See Friendly, *supra* note 5, at 419; see also Henry J. Friendly, *The Gap In Lawmaking—Judges Who Can't and Legislators Who Won't*, 63 *Colum. L. Rev.* 787, 789, 801-02 (1963) (discussing "the failure of Congress to perform its legislative task" and Congress's "neglect of the undramatic type of legislative activity"); *supra* note 127 (quoting Friendly on judiciary's institutional advantages over legislature).

<sup>324</sup> *Milwaukee II*, 451 U.S. at 317; *supra* Part II.C (discussing *Chevron/Milwaukee II* framework).

<sup>325</sup> See Joseph A. Grundfest, *Disimplying Private Rights of Action Under the Federal Securities Laws: The Commission's Authority*, 107 *Harv. L. Rev.* 961, 1014-15 (1994) (suggesting that SEC could define measure of damages for suits under implied rights of action in Rule 10-b5); Sunstein, *supra* note 118, at 1059 ("In the modern era, administrative agencies have become America's common law courts.").

<sup>326</sup> *AT&T v. Iowa Utils. Bd.*, 525 U.S. 366, 378 (1999) (making clear that FCC's general rulemaking power extends to implementation of all of Act's legal requirements).

<sup>327</sup> *Id.* at 397 (citing *Chevron U.S.A. v. Natural Resources Defense Council*, 467 U.S. 837, 842-43 (1984)).

<sup>328</sup> Courts have long recognized how broad mandates can justify the development of "necessary and proper"-like rules to implement their statutory mission. See, e.g., *Citizens to Save Spencer County v. EPA*, 600 F.2d 844, 873-74 (D.C. Cir. 1979) (upholding EPA rulemaking to harmonize conflicting statutory commands based upon broad authority conveyed to agency in statute). Commentators have suggested that the necessary and proper conception can justify the making of both agency regulations and federal common law. See Duffy, *supra* note 66, at 200 (suggesting that grants of general rulemaking authority create

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view, the FCC's administration of the Telecom Act justifies it, as Chief Judge Posner put it, in "straying a little way beyond the apparent boundaries of the Act" to implement its provisions.<sup>329</sup> Of course, agencies still must hew to defined statutory limits and refrain from taking action that clearly would underdeter or overdeter the regulated action, as such rules would "frustrate the congressional policy underlying [the] statute."<sup>330</sup>

Administrative law scholars have focused considerable attention on whether a general grant of authority and the *Chevron* principle authorize an agency to define the scope of its own jurisdiction.<sup>331</sup> Many commentators, however, have not appreciated the extent to which *Milwaukee II* suggests that an agency deserves leeway in defining the depth of its jurisdiction. Professor Sunstein says that administrative agencies have become common-law courts,<sup>332</sup> but he appears to conflate (or overlook) the analytical distinction between the "hori-

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"necessary and proper" clause-like authority and provide proper justification for deference to administrative agencies); cf. Larry Kramer, *The Lawmaking Power of the Federal Courts*, 12 *Pace L. Rev.* 263, 288 (1992) ("Once Congress has acted, however, federal courts can make any common law 'necessary and proper' to implement the statute.").

<sup>329</sup> *N. Am. Telecomm. Ass'n v. FCC*, 772 F.2d 1282, 1292 (7th Cir. 1985); see also *Pub. Serv. Comm'n v. Fed. Power Comm'n*, 327 F.2d 893, 896-97 (D.C. Cir. 1964) (holding that courts should allow federal agency sufficient authority "to permit the agency to perform its tasks consistently with the provisions and purposes of" its enabling legislation).

<sup>330</sup> *Bureau of Alcohol, Tobacco, & Firearms v. Fed. Labor Relations Auth.*, 464 U.S. 89, 97 (1983) (quoting *NLRB v. Brown*, 380 U.S. 278, 291 (1965)); see *supra* Part II.D.2 (suggesting clearer and more effective "reasoned decisionmaking" analysis under *Chevron* and *Milwaukee II*).

<sup>331</sup> There continues to be a vibrant debate over whether agencies can delimit the scope of their own jurisdiction. Compare Lars Noah, *Interpreting Agency Enabling Acts: Misplaced Metaphors in Administrative Law*, *Wm. & Mary L. Rev.* 1463, 1480-84 (2000) (arguing against expansive common law power for federal agencies), and Colloquy, *Judicial Review of Administrative Action in a Conservative Era*, 39 *Admin. L. Rev.* 353, 367-68 (1987) (remarks of Cass Sunstein) (suggesting that deference on scope of agency's jurisdiction violates principle that "foxes shouldn't guard henhouses"), with Sunstein, *supra* note 118, at 1059-62 (arguing that agencies should be afforded discretion to expand their jurisdiction), and Quincy M. Crawford, *Comment, Chevron Deference to Agency Interpretations That Delimit the Scope of the Agency's Jurisdiction*, 61 *U. Chi. L. Rev.* 957, 982 (1994) (same).

<sup>332</sup> Sunstein, *supra* note 118, at 1055-59. Some commentators instead would place the burden on the federal courts—or Congress—to address statutory interstices. Professors Gellhorn and Vekuil suggest that "[u]nlike common law courts with a recognized power to create their own authority, as well as to fill in and apply the law, it is contrary to the constitutional scheme for agencies to regulate areas beyond those which Congress authorized." Ernest Gellhorn & Paul Verkuil, *Controlling Chevron-Based Delegations*, 20 *Cardozo L. Rev.* 989, 995 (1999). In particular, such commentators call for closer scrutiny of the underlying statutory grant to ensure that agencies are not left with broad policymaking authority. See *id.* at 1018. One possible result of such an approach would be to increase the scope of issues open to federal common lawmaking. Certainly for critics of agency regulation and advocates of common law dispute resolution, this would be a salutary development. See generally Huber, *supra* note 6.

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zontal *Chevron*” debate over whether agencies merit deference in defining the scope of their jurisdiction with a “vertical *Chevron*” doctrine providing that agencies merit leeway in defining the depth of their jurisdiction—such as developing remedial rules to ensure compliance with substantive obligations. Horizontal *Chevron* provides that agencies can expand the scope of their jurisdiction—“mission creep” in the eyes of its critics—while the vertical *Chevron* doctrine allows agencies to take action not specifically contemplated by their enabling legislation in order to implement their assigned mission.<sup>333</sup> Horizontal *Chevron* might inspire skepticism that Congress intended to allow an agency to expand its mandate,<sup>334</sup> but vertical *Chevron* involves an agency’s tactics to implement congressionally-assigned goals.

Taken together, the *Milwaukee II* regime and the vertical *Chevron* principle show why agencies implementing comprehensive statutory mandates must be afforded deference to develop appropriate remedial rules. In *Kelley v. EPA*,<sup>335</sup> however, the D.C. Circuit demonstrated how the federal courts do not appreciate this fully. In that case, over Chief Judge Mikva’s dissent, the court concluded that the possibility of parallel federal court adjudication of the Comprehensive Environmental Response, Compensation, and Liability Act’s (CERCLA’s)<sup>336</sup> causes of action (in addition to EPA enforcement) meant that the EPA lacked vertical *Chevron* authority.<sup>337</sup> The D.C. Circuit relied on a pre-*Milwaukee II* vision of common law: Even with a regulatory agency on the scene, the federal court expected to fill in appropriate remedial rules by itself.<sup>338</sup> Moreover, the court did not investigate the nature of any Necessary and Proper Clause-like authority of the EPA to implement CERCLA;<sup>339</sup> rather, it suggested that federal court adjudication defeats *Chevron*’s rationale that an

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<sup>333</sup> Compare *Food & Drug Admin. v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 126 (2000) (rejecting agency efforts to regulate tobacco), with *Transmission Access Policy Study Group v. FERC*, 225 F.3d 667, 682-83 (D.C. Cir. 2000) (per curiam) (upholding FERC authority to mandate wheeling of power to facilitate procompetitive goals), and *W. Coal Traffic League v. Surface Transp. Bd.*, 216 F.3d 1168, 1175-76 (D.C. Cir. 2000) (concluding that moratorium on mergers imposed by Surface Transportation Board, though not expressly authorized under enabling legislation, reflected reasonable exercise of agency discretion).

<sup>334</sup> See, e.g., *ACLU v. FCC*, 823 F.2d 1554, 1567 n.32 (D.C. Cir. 1987) (calling for skepticism and searching inquiry of congressional intent in such cases).

<sup>335</sup> 15 F.3d 1100 (D.C. Cir. 1994), cert. denied, 513 U.S. 1110 (1995).

<sup>336</sup> 42 U.S.C. §§ 9601-9675 (1994 & Supp. V 2000).

<sup>337</sup> *Id.* at 1108.

<sup>338</sup> See *id.* at 1107-08 (discussing congressional history suggesting role for federal common law).

<sup>339</sup> See *id.* at 1112 (Mikva, C.J., dissenting) (noting that CERCLA charged EPA with interpreting provisions at issue); see also 42 U.S.C. § 9615 (1994) (“The President is au-



agency enjoys delegated authority to “reconcile reasonably statutory ambiguities or to fill reasonably statutory interstices.”<sup>340</sup> This reasoning departed from the *Erie/Chevron* regime by establishing the court as an alternate law-generating body to the superintending administrative agency—a state of affairs the Seventh Circuit properly rejected as “weird.”<sup>341</sup>

Under the vertical *Chevron* doctrine, where an agency seeks to implement statutory objectives, it should be allowed to develop ancillary rules to do so, even if they are not suggested directly by a statutory provision. In *Mourning v. Family Publications Service*,<sup>342</sup> for example, the Supreme Court upheld the Federal Reserve Board’s promulgation of disclosure rules under the Truth in Lending Act<sup>343</sup> as “reasonably related to its objectives.”<sup>344</sup> The Court emphasized that it should defer to the agency’s judgment on how best to implement the law’s objectives and to ensure that its obligations were adhered to, even if reasonable minds could differ on the appropriateness of the particular remedial measures selected by the agency.<sup>345</sup> The Supreme Court also has accorded the FCC a broad and deep mandate to develop ancillary rules designed to advance the purposes of the 1934 Act,<sup>346</sup> constraining the agency’s discretion only where it transgressed

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thorized to delegate and assign any duties or powers imposed upon or assigned to him and to promulgate any regulations necessary to carry out the provisions of this subchapter.”).

<sup>340</sup> *Kelley*, 15 F.3d at 1108. The D.C. Circuit’s attempt to rely on *Adams Fruit Co. v. Barrett*, 494 U.S. 638 (1990) for this proposition was, as Chief Judge Mikva pointed out, misplaced; in *Barrett*, the Department of Labor enjoyed no authority to implement the legislative scheme whereas the EPA enjoyed such authority under CERCLA. *Kelley*, 15 F.3d at 1112 (Mikva, C.J., dissenting); cf. *Crandon v. United States*, 494 U.S. 152, 177 (1990) (Scalia, J., concurring) (arguing that law “not administered by any agency but by the courts” is not entitled to deference under *Chevron*).

<sup>341</sup> *NAACP v. Am. Family Mut. Ins. Co.*, 978 F.2d 287, 300 (7th Cir. 1992), cert. denied, 508 U.S. 907 (1993). See generally Richard J. Pierce Jr., *Agency Authority to Define the Scope of Private Rights of Action*, 48 *Admin. L. Rev.* 1 (1996) (criticizing *Kelley*).

<sup>342</sup> 411 U.S. 356 (1973).

<sup>343</sup> 15 U.S.C. §§ 1601-1667f (1994).

<sup>344</sup> *Id.* at 371.

<sup>345</sup> *Id.* at 371-73.

<sup>346</sup> See *United States v. S.W. Cable Co.*, 392 U.S. 157, 172-73 (1968) (holding FCC enjoyed authority over cable television in order to protect broadcast stations). It is noteworthy that the 1934 Act’s necessary and proper clause for broadcasting (relied on in *S.W. Cable*) provided broad authority similar to the 1996 Act’s provision governing telecommunications regulation (relied on in *Iowa Utils. Bd.*). Compare 47 U.S.C. § 303, 303(r) (1994) (“[T]he Commission from time to time, as public convenience, interest, or necessity requires, shall . . . [m]ake such rules and regulations and prescribe such restrictions and conditions, not inconsistent with law, as may be necessary to carry out the provisions of [the Act].”), with § 201(b) (Supp. IV 1998) (“The Commission may prescribe such rules and regulation as may be necessary in the public interest to carry out the provisions of [the Act].”).

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clear statutory limitations.<sup>347</sup> In enacting the 1996 Telecom Act, Congress left the FCC's broad grant of rulemaking power intact, in contrast to other statutes that greatly restrict agency discretion,<sup>348</sup> thereby underscoring that the FCC should continue to be afforded broad leeway when implementing its provisions.

## 2. *Vertical Chevron and Remedies for Violations of Interconnection Agreements*

As the drafters of the Telecom Act appreciated, incumbent local providers have little incentive to cooperate with their competitors and help them to enter local telephone markets.<sup>349</sup> Accordingly, the Act imposes a series of duties on incumbent providers to facilitate entry into local telephone markets and a system of state-agency arbitration to develop interconnection agreements that codify those duties. On the question of how such duties will be enforced, however, the Act provides no specific guidance.

Without meaningful remedies for breach of interconnection agreements, an incumbent provider may decide that risking weak legal sanctions makes more sense than enabling its competitors to win over its customers.<sup>350</sup> In short, the incumbent provider lacks the mar-

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<sup>347</sup> See *FCC v. Midwest Video Corp.*, 440 U.S. 689, 705 (1979) (ruling that FCC authority over cable television does not include right to impose common carriage obligations).

<sup>348</sup> E.g., Sidney A. Shapiro & Robert L. Glicksman, Congress, the Supreme Court, and the Quiet Revolution in Administrative Law, 1988 *Duke L.J.* 819, 827-28 ("To combat the EPA's proclivity for implementing statutes in a manner contrary to congressional intent, Congress prescribed more detailed substantive criteria to guide the agency in implementing its regulatory responsibilities.").

<sup>349</sup> Admittedly, the Act's scheme for approving Bell company entry into long distance service and equipment manufacturing provides an important incentive for the Bell companies to open their local markets and implement interconnection agreements. See § 271; supra notes 265-68 and accompanying text (describing § 271's incentives). Non-Bell companies such as GTE, however, lack this incentive, which appears to explain their greater resistance to complying with the Act's market-opening measures. Frederico Mini, *The Role of Incentives for Opening Monopoly Markets: Comparing GTE and RBOC Cooperation with Local Entrants* (July 1999) (on file with the *New York University Law Review*); see also *Internet Freedom and Broadband Deployment Act of 1999: Hearing Before the Subcomm. on Telecomm., Trade, and Consumer Protection of House Comm. on Commerce, 106th Cong. 42-43* (2000) (statement of Leonard J. Cali, Vice President, Federal Government Affairs, AT&T Corporation) (explaining GTE's resistance to FCC regulations because "GTE (then an independent LEC) has 'no incentive' to cooperate to open its markets because it is not subject to Section 271").

<sup>350</sup> As one court explained:

Inadequate service can be fatal to a new local exchange carrier such as TCG. If prospective customers try TCG service only to discover that they cannot reliably obtain a dial tone, that calls are disconnected in the middle of a conversation, or that service orders are not timely filled, then those customers will probably switch back to U.S. West and turn a deaf ear to future entreaties from TCG. Adverse publicity will also deter other prospective customers from con-

ketplace incentive to provide the necessary cooperation to its competitors and thus will not always make its best efforts to implement fully its interconnection agreement obligations.<sup>351</sup> Thus, the only way the Act will realize its objective of facilitating competition in local telephone markets is if it can supply the necessary legal remedies to penalize noncompliance.<sup>352</sup> To pretend that the unique situation created by the Telecom Act does not bear on the selection of appropriate remedies for breach of an interconnection agreement is to turn a blind eye to reality.<sup>353</sup>

To implement the Telecom Act's procompetitive requirements, the FCC should develop regulations that help fill a crucial gap by providing some guidance on the appropriate measure of damages. These regulations should follow the cooperative federalism model of setting some uniform federal requirements that allow for state experimenta-

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sidering TCG. . . . U.S. West stands to gain financially if customers become dissatisfied with TCG's local service, hence U.S. West is operating under a conflict of interest.

*US West Communications, Inc. v. Worldcom Techs., Inc.*, 31 F. Supp. 2d 819, 837 (D. Or. 1998).

<sup>351</sup> See, e.g., *Premiere Network Servs. v. S.W. Bell Tel. Co.*, PUC Docket No. 19,879, 21 (Tex. Pub. Util. Comm'n) [hereinafter "Premiere Complaint"] ("Taken as a whole, the pattern of unnecessary and unreasonable dilatory conduct by SWBT, as reflected in the record of this docket, constitutes a failure by SWBT to perform in good faith . . .").

<sup>352</sup> The antitrust laws also stand as a potential remedy for anticompetitive conduct related to an incumbent monopolist's refusal to provide the necessary cooperation, though they are not an ideal instrument for doing so. See 47 U.S.C.A. § 152 historical and statutory note (West Supp. 2001) ("[N]othing in this Act or in the amendments made by this Act . . . shall be construed to modify, impair, or supersede the applicability of any of the antitrust laws."); Joel I. Klein, *The Race for Local Competition: A Long Distance Run, Not a Sprint*, Address Before the American Enterprise Institute 7 (Nov. 5, 1997), at <http://www.usdoj.gov/atr/public/speeches> ("[A]s Congress wisely recognized, antitrust remedies are not well suited to serve as the first line method for opening the local market."); see also *Olympia Equip. Leasing Co. v. W. Union Tel. Co.*, 797 F.2d 370, 379 (7th Cir. 1986) (Posner, J.) ("[A] monopolist may be guilty of monopolization if it refuses to cooperate with a competitor in circumstances where some cooperation is indispensable to effective competition."); *id.* at 376 ("The monopoly supplier who retaliates against customers who have the temerity to compete with him, by cutting such customers off, is severing a collateral relationship in order to discourage competition.").

<sup>353</sup> One case considered by the Texas Public Utility Commission outlined the types of scenarios that are unique to the implementation of the federal Telecom Act:

In an open market, a party providing service to a customer—SWBT to Premiere [in this case]—could easily and logically have concluded months ago that Premiere's positions were reasonable, and interpreted the contract to allow the provisioning of [unbundled network elements] and services as the Arbitrators have found above. Rather than read the contract in plain English, SWBT accepted but later rejected legitimate reasonable orders, refused to accept reasonable interpretations of the agreement, and experienced a curious but substantial number of technical and programming errors in providing service to Premiere . . . .

*Premiere Complaint*, supra note 351, at 20.

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tion and supplementation. At a minimum, the FCC should make clear that the question of remedies is federal in character and should be addressed to implement the Act's basic policies.<sup>354</sup>

One example of an important remedial question that the FCC might address in developing these rules is the role of punitive damages under the Act. In contrast to the old law of common carriage, a modern telecommunications law designed to facilitate competition should embrace a role for punitive damages,<sup>355</sup> because local incumbent providers have limited incentives to open up their networks to competitors.<sup>356</sup> Instituting a punitive damage requirement—with leeway for how it is implemented<sup>357</sup>—will help guard against willful violations of the Act's market-opening requirements (as embodied in interconnection agreements).<sup>358</sup> This would help the FCC guard against scenarios where incumbent providers decide that it makes economic sense under a compensatory damage scheme to breach their intercon-

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<sup>354</sup> Federal courts should appreciate this distinction from their *Erie* jurisprudence, which realizes that the measure of damages is a substantive rule designed to regulate primary behavior. *Gasparini v. Ctr. for the Humanities*, 518 U.S. 415, 426-31 (1996).

<sup>355</sup> Traditional telecommunications law regulated carriers' relations with their customers (as opposed to competitors). In this context, where a carrier did not have an incentive to undermine its own customer's service quality, judicial and agency interpretations of the Communications Act did not provide for punitive damages in any enforcement action. See 47 U.S.C. § 206 (1994) (making common carriers liable for "the full amount of damages sustained"); § 207 (providing for FCC or federal court jurisdiction to address damages resulting from breach of common carrier's obligations); *Aaron v. GTE Cal., Inc.*, 10 F.C.C.R. 11,519, 11,520 (1995) ("We lack authority, however, under the congressional mandate accorded by our governing statute to award punitive damages and legal expenses sought by Aaron."); see also *Penn. R.R. v. Int'l Coal Mining Co.*, 230 U.S. 184 (1913) (interpreting "damages sustained" in Interstate Commerce Act as providing compensatory damages, but not punitive damages); *Overbrook Farmers Union Coop. Ass'n v. Mo. Pac. R.R. Co.*, 21 F.3d 360, 364 (10th Cir. 1994) (same); cf. *Territory of N.M. ex rel. E.J. McLean & Co. v. Denver & Rio Grande R.R.*, 203 U.S. 38, 49 (1906) (measuring damages in common law cause of action against common carrier for breach of its duty as difference between value at point of tender and at proposed destination). Some state telecommunications laws, however, do authorize punitive damages to address willful harms. See, e.g., *Pink Dot, Inc. v. Teleport Communications Group*, 107 Cal. Rptr. 2d 392 (Cal. Ct. App. 2001).

<sup>356</sup> *Supra* notes 350-53 and accompanying text.

<sup>357</sup> In setting out a range of alternate strategies to implement the Act's policies with respect to damages, the FCC might allow explicitly for state experimentation with a treble damage approach like that used in the antitrust laws. Such experimentation well might enable regulators to strike the appropriate balance between over- and underdeterrence to comply with the Telecom Act's requirements. Cf. A. Douglas Melamed, *Damages, Deterrence, and Antitrust—A Comment on Cooter*, 60 *Law & Contemp. Probs.*, Summer & Autumn 1997, at 93, 95 (noting that whether antitrust treble-damage remedy strikes proper balance with respect to deterrence is empirical question); see also Cass R. Sunstein et al., *Assessing Punitive Damages (With Notes on Cognition and Valuation in Law)*, 107 *Yale L.J.* 2071, 2084 (1998) (noting that role for punitive damages must be harmonized with other enforcement regimes such as criminal and administrative actions).

<sup>358</sup> Cf. Sunstein et al., *supra* note 357, at 2083 (suggesting that intentional torts, because deliberate, "may provide particularly appropriate cases for punitive damage awards").

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nection duties, because the compensatory damages may be relatively insignificant compared to the benefit of holding onto its customer base and to maintaining any supracompetitive profits it enjoys as a result of its monopoly.<sup>359</sup> Moreover, punitive damages can ensure that an incumbent provider does not avoid paying the socially appropriate amount of damages (i.e., the total harm caused by its actions) because it believes that some breaches of its obligations would go unremedied.<sup>360</sup> Finally, under a default rule that called for punitive damages, new entrants could bargain away this entitlement for more important terms, providing regulators with key marketplace information.<sup>361</sup>

If the FCC does not provide the state agencies and federal courts with any guidance on the proper remedies for Telecom Act violations, the statute's complete silence on the issue would force federal courts to address the matter instead.<sup>362</sup> By providing some guidance on the appropriate measure of damages under the Telecom Act, the FCC would spare federal courts from the dilemma of whether to fill in the statute's gaps on remedies. Furthermore, by developing such guidance through rulemaking, the FCC could avoid taking positions in contexts where they would not necessarily be accorded deference, such as through interpretive rules adopted without notice and comment or amicus briefs.<sup>363</sup>

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<sup>359</sup> See *supra* note 350 and accompanying text; Melamed, *supra* note 357, at 95 (justifying role of treble damages in antitrust as means of deterring violations that create dead-weight loss because of monopoly profits).

<sup>360</sup> *Ciraolo v. City of New York*, 216 F.3d 236, 244 (2d Cir. 2001) (Calabresi, J., concurring) (“[C]ompensatory damages are, in wide categories of cases, an inaccurate measure of the true harm caused by an activity, and, as a result, making an injurer bear only such damages does not provide adequate deterrence against socially harmful acts.”); Sunstein et al., *supra* note 357, at 2082 (noting role for punitive damages to make up for excess of “total damages over compensatory damages” that may result from firm’s calculation that its violations are unlikely to be detected and penalized); see also A. Mitchell Polinsky & Steven Shavell, *Punitive Damages: An Economic Analysis*, 111 *Harv. L. Rev.* 869, 873-74 (1998) (same).

<sup>361</sup> Some commentators have explained how penalty-default rules can facilitate this phenomenon when set at levels that a party—particularly the one with more bargaining power—would not want. See Ian Ayres & Robert Gertner, *Filling Gaps in Incomplete Contracts: An Economic Theory of Default Rules*, 99 *Yale L.J.* 87, 91 (1989) (discussing concept of “penalty defaults” as method of encouraging contracting parties to reveal information through their bargaining).

<sup>362</sup> See *supra* notes 108, 115-16, and accompanying text (discussing continued viability of this form of common law); *Franklin v. Gwinnett County Pub. Schs.*, 503 U.S. 60, 70-71 (1992) (stating that without congressional direction on remedies, “the federal courts have the power to award any appropriate relief”).

<sup>363</sup> See *Christensen v. Harris County*, 529 U.S. 576, 587 (2000) (denying deference to agency interpretation contained in opinion letter without formal adjudication or notice-and-comment rulemaking); Robert J. Gregory, *When a Delegation Is Not a Delegation: Using Legislative Meaning to Define Statutory Gaps*, 39 *Cath. U. L. Rev.* 725, 756 (1990)

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*B. The Role for State Agencies in the Absence of FCC Guidance*

Embracing the state agency's creation of federal common-law rules may prove to be the ultimate test of whether state agencies and federal courts can conceptualize properly the cooperative federalism architecture of the Telecom Act. State agencies reflexively may believe that their authority and mandate must reflect ordinary state-law principles, but this approach fails to appreciate the novelty and significance of the Telecom Act's jurisdictional scheme.<sup>364</sup> Thus far, a number of courts have recognized that the state agency's role in this scheme is unique and that interconnection agreements are not ordinary contracts, as they arise from a federal legal mandate and are subject to subsequent legal developments,<sup>365</sup> but this understanding is just beginning to take root.

In the absence of FCC guidance, most state agencies (and federal courts) have looked to state substantive law to settle interconnection agreement disputes.<sup>366</sup> State regulators appear to assume that because they—as opposed to the FCC—superintend the formation and enforcement of interconnection agreements, state law must govern their interpretation and enforcement activities. In so doing, state agencies (and reviewing federal courts) fail to appreciate the character of cooperative federalism regulatory programs. That is, simply relying on state law could undermine the Telecom Act's objectives, violating

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(arguing that potential lack of judicial deference to less formal means of implementing statutory provisions “provides strong incentive for an agency to exercise rulemaking” authority); Merrill & Hickman, *supra* note 125, at 837 (“Interpretations entitled to deference must take the form of legislative rulemaking or binding adjudication.”).

<sup>364</sup> See *AT&T v. Iowa Utils. Bd.*, 525 U.S. 366, 385 n.10 (1999) (highlighting that Act's jurisdictional structure is “decidedly novel”).

<sup>365</sup> *S.W. Bell Tel. Co. v. Connect Communications Corp.*, 225 F.3d 942, 948 (8th Cir. 2000) (embracing approach “consistent with the scheme of cooperative federalism embodied in the Telecommunications Act”); *MCI Telecomm. Corp. v. BellSouth Telecomm., Inc.*, 7 F. Supp. 2d 674, 680 (E.D.N.C. 1998) (“[T]he statute itself allows parties aggrieved by any section of the Agreement to appeal to this court. . . . To hold otherwise would be to rely on an exhaustion of state remedies argument which does not seem to apply here, where Congress has devised an entirely new scheme.”); *AT&T Communications of the S. States, Inc. v. BellSouth Telecomm., Inc.*, 7 F. Supp. 2d 661, 670 (E.D.N.C. 1998) (holding earlier agreement does not bar later challenge in federal court because “[f]ederal law has changed on this matter and [a contested contract provision] is no longer consistent with that law”); *MCI Telecomm. Corp. v. US West Communications, Inc.*, No. C97-1508R, 1998 U.S. Dist. LEXIS 21585, at \*8 (W.D. Wash. July 21, 1998), *aff'd in part, rev'd in part* on other grounds, 204 F.3d 1262 (9th Cir. 2000) (noting that legal interpretation supporting prior arbitration decision was repudiated by subsequent law, and applying subsequent law).

<sup>366</sup> See *S.W. Bell Tel. Co. v. Brooks Fiber Communications of Okla., Inc.*, 235 F.3d 493, 497-98 (10th Cir. 2000); *S.W. Bell Tel. Co. v. Pub. Util. Comm'n*, 208 F.3d 475, 481-82 (5th Cir. 2000); *BellSouth Telecomm., Inc. v. MCIMetro Access Transmission Servs., Inc.*, 97 F. Supp. 2d 1363, 1376 n.10, 1378 (N.D. Ga. 2000).

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the principle that “[l]egal rules which impact significantly upon the effectuation of federal rights must, therefore, be treated as raising federal questions.”<sup>367</sup> Put simply, when evaluating whether to devise a federal remedy for breach of an interconnection obligation, state agencies (and reviewing federal courts) should make a “deliberate choice,” rather than simply assume that they are “bound by a rule of state law.”<sup>368</sup>

A rule of federal common law created by a state agency could be a variant of what Professor Merrill calls “preemptive lawmaking”—it displaces a state rule that “would unduly frustrate or undermine a federal policy as to which there is a specific intention on the part of the enacting body.”<sup>369</sup> In the telecommunications context, *Farmers Educational & Cooperative Union v. WDAY, Inc.*<sup>370</sup> provides an example of this type of federal common law. The plaintiff in that case sought to apply North Dakota libel laws to a speech aired by the defendant broadcaster.<sup>371</sup> The defendant argued that a federal rule required stations to provide equal time to candidates for political office and compelled the broadcast of the speech.<sup>372</sup> Although the 1934 Communications Act provided the stations no express immunity from libel, the Supreme Court concluded that a federal common law rule was necessary lest liability be imposed for the precise conduct required by federal law.<sup>373</sup> State agencies might take a similar approach and conclude that the policies of the Telecom Act support a federal common law rule providing for punitive damages to remedy breach of

<sup>367</sup> *Burks v. Lasker*, 441 U.S. 471, 477 (1979) (listing cases). As another case states what it calls the “familiar doctrine” concerning such federal questions:

When a federal statute condemns an act as unlawful, the extent and nature of the legal consequences of the condemnation, though left by the statute to judicial determination, are nevertheless federal questions, the answers to which are to be derived from the statute and the federal policy which it has adopted.

*Sola Elec. Co. v. Jefferson Elec. Co.*, 317 U.S. 173, 176 (1942).

<sup>368</sup> *Jones & Laughlin Steel Corp. v. Pfeifer*, 462 U.S. 523, 553 (1983) (holding that rate for discounting estimated stream of future earnings adopted by federal courts should be adopted as deliberate decision on what serves appropriate federal policy); *United States v. Little Lake Misere Land Co.*, 412 U.S. 580, 604 (1973) (holding that courts must ensure that relevant state law conforms to federal policy because state law that “is plainly not in accord with the federal program . . . is not a permissible choice”).

<sup>369</sup> Merrill, *supra* note 7, at 36 (“In effect, the court finds that some federal policy specifically intended by an enacting body ‘preempts’ the application of state law to some collateral or subsidiary point about which the enacting body has been silent.”).

<sup>370</sup> 360 U.S. 525 (1959).

<sup>371</sup> *Id.* at 526-27.

<sup>372</sup> *Id.* at 526.

<sup>373</sup> See *id.* at 531-35; Merrill, *supra* note 7, at 37 (“In short, because the state rule of decision (no immunity) would frustrate the specifically intended policy of promoting the use of broadcast facilities as political platforms, preemption of that rule—or, what was really the same thing, creation of a federal common law immunity—was required.”).

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an interconnection agreement that would apply in lieu of any state law rule against such damages in ordinary contract actions.

As outlined in Part II, development of the appropriate remedies for breach of a federal right (particularly by an administrative agency) is not, as Chief Judge Posner explained, “free-wheeling common-law rulemaking; it is filling a statutory gap, a standard office of interpretation.”<sup>374</sup> Unlike situations where a detailed remedial scheme under a regulatory agency’s supervision suggests that Congress deliberately omitted any federal private remedy,<sup>375</sup> the Telecom Act contains no provision addressing enforcement, leaving state agencies (and reviewing federal courts) an entirely open field to develop rules of federal common law.<sup>376</sup> Given the congressional commitment to facilitating competition in local telephone markets, however, it is not difficult to infer a congressional intent to ensure a meaningful right to interconnect.<sup>377</sup> When faced with congressional silence, federal common law is a “necessary expedient” to protect federal public policy.<sup>378</sup>

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<sup>374</sup> *Jansen v. Packaging Corp. of Am.*, 123 F.3d 490, 507 (7th Cir. 1997) (en banc) (Posner C.J., concurring in part and dissenting in part). Judge Posner had previously outlined his view as follows:

To construe a statute strictly is to limit its scope and its life span—to make Congress work twice as hard to produce the same effect . . . . I know of no principled, nonpolitical basis for a court to adopt the view that Congress is legislating too much and ought therefore to be reined in by having its statutes construed strictly.

Posner, *supra* note 199, at 821-22.

<sup>375</sup> See, e.g., *Touche Ross & Co. v. Redington*, 442 U.S. 560, 572-76 (1979) (judging congressionally intended scope of remedy by examining remedies created in other sections of same statutory scheme).

<sup>376</sup> See *S.W. Bell Tel. Co. v. Connect Communications Corp.*, 225 F.3d 942, 947 (8th Cir. 2000) (deciding that state enforcement authority is implied from section 252 of federal Telecom Act). Unlike other statutes where Congress “enacted a comprehensive legislative scheme including an integrated system of procedures for enforcement,” the Telecom Act is completely silent on the issue, and so does not fall within “[t]he presumption that a remedy was deliberately omitted from a statute . . . .” *N.W. Airlines, Inc. v. Transp. Workers Union*, 451 U.S. 77, 97 (1981); see also *Transamerica Mortgage Advisors, Inc. v. Lewis*, 444 U.S. 11, 19 (1979) (“[W]here a statute expressly provides a particular remedy or remedies, a court must be chary of reading others into it.”).

<sup>377</sup> As in all statutory interpretation, filling gaps in a statutory scheme requires courts to discern Congress’s intent. See *California v. Sierra Club*, 451 U.S. 287, 297 (1981) (“The federal judiciary will not engraft a remedy on a statute, no matter how salutary, that Congress did not intend to provide.”); *N.W. Airlines*, 451 U.S. at 94 (“[U]nless this congressional intent can be inferred from the language of the statute, the statutory structure, or some other source, the essential predicate for implication of a private remedy simply does not exist.”).

<sup>378</sup> *County of Oneida, N.Y. v. Oneida Indian Nation*, 470 U.S. 226, 237 (1985) (quoting *Milwaukee II*, 451 U.S. 304, 314 (1981)) (distinguishing Nonintercourse Act, 1 Stat. 329 (1793) (repealed 1796), which did not address particular remedy and therefore justified resort to federal common law, from 1972 amendments to the Federal Water Pollution Control Act, Pub. L. No. 92-500, 86 Stat. 816 (1972) which had specific remedial provisions that



In light of the Telecom Act's structure and purpose, there is much more than a "hint" at a role for state agencies (and federal courts) in resolving claims related to the interpretation and enforcement of interconnection agreements.<sup>379</sup> The conclusion that Congress intended the Act to provide for federal jurisdiction over violations of federal rights does not suggest that state agencies (and reviewing federal courts) should be powerless to remedy those violations.<sup>380</sup> Just as tariffs filed under the 1934 Act to codify a common carrier's obligations to its customers arise under federal law,<sup>381</sup> "an interconnection agreement is part and parcel of the federal regulatory scheme and bears no resemblance to an ordinary, run-of-the-mill private contract."<sup>382</sup>

Despite the strong case for federal common law in this area, state agencies and federal courts are far more likely to take action under the cloak of preemption than of its close cousin, preemptive lawmak-

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barred use of common law to develop remedies); see also *Local 174, Teamsters v. Lucas Flour Co.*, 369 U.S. 95, 104 (1962) (holding that central policy of federal labor laws of "ordering and adjusting of competing interests" through collective bargaining cannot be disturbed by inconsistent state-law rules).

<sup>379</sup> *Contra Am. Airlines, Inc. v. Wolens*, 513 U.S. 219, 232 (1995) (concluding that Airline Deregulation Act, Pub. L. No. 95-504, 92 Stat. 1705 (1978) (currently codified in 49 U.S.C. § 41,713 (1994)), which contained preemption provision but no specific authorization of federal right of action, provided no such "hint of such a role for the federal courts").

<sup>380</sup> See *Jackson Transit Auth. v. Local Div. 1285, Amalgamated Transit Union*, 457 U.S. 15, 22 (1982) (highlighting that "critical factor" in delineating scope of remedies under federal statute is congressional intent).

<sup>381</sup> *MCI Telecomm. Corp. v. Garden State Inv. Corp.*, 981 F.2d 385, 387 (8th Cir. 1992) (ruling that Telecom Act scheme creates federal jurisdiction and calls for creation of substantive federal law concerning federally created rights). It is worth noting that there exists a minority view on the significance of tariffs, providing that disputes arising from the violation of a federal tariff reflect ordinary state contract disputes. See *MCI Telecomm. Corp. v. Credit Builders of Am., Inc.*, 980 F.2d 1021, 1022-23 (5th Cir. 1993), vacated on other grounds and remanded, 508 U.S. 957, reinstated, 2 F.3d 103 (5th Cir.), cert. denied, 510 U.S. 978 (1993). But that view is even held in low regard within the circuit where it originated; a district court in that circuit subsequently declined to follow it. *MCI Telecomm. Corp. v. United Showcase, Inc.*, 847 F. Supp. 510, 513-14 (N.D. Tex. 1994) (rejecting *Credit Builders* as inconsistent with precedent); see also *Cahnmann v. Sprint Corp.*, 133 F.3d 484, 489 (7th Cir. 1998) (calling *Credit Builders* "impossible to reconcile with Supreme Court authority").

<sup>382</sup> Peter W. Huber, et al., *Federal Telecommunications Law* 60 (2d ed. Supp. 2001). Like some contracts entered into under federal government oversight, the interconnection agreements would not exist at all if not for the federal law, nor be valid until approved under that law, and thus the interconnection agreements merit federal court review. See *Int'l Ass'n of Machinists v. Cent. Airlines, Inc.*, 372 U.S. 682, 691 (1963) (noting that, because contracts at issue are validated and enforced under Railway Labor Act, currently codified at 45 U.S.C. §§ 151-163, 181-188 (1994), "their validity, interpretation, and enforceability cannot be left to the laws of the many States"); *St. Louis S.W. Ry. v. City of Tyler, Tex.*, 375 F.2d 938, 941 (5th Cir. 1967) (holding that contract which is authorized and legal only by virtue of federal law may be construed by federal court); *Fla. E. Coast Ry. v. Jacksonville Terminal Co.*, 328 F.2d 720, 722 (5th Cir. 1964) (same).

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ing. That is, if a state agency or federal court concludes that a case for punitive damages is particularly strong, it will be more likely to “apply” state law, but preempt the state-law bar to punitive damages. Justice Scalia views this distinction as merely academic.<sup>383</sup> Unfortunately, by viewing state law as presumptively applicable (and subject to preemption), state agencies and federal courts may fail to appreciate the unique demands of the Telecom Act and the opportunity for them to create remedial rules to help effectuate its purpose.<sup>384</sup>

### C. *The Responsibility of the Federal Courts*

Under the Telecom Act, federal courts will play an important role in ensuring that questions like how to remedy violations of interconnection agreements are answered properly. In particular, the courts should remind state agencies applying the Act of the Supreme Court’s admonition to look to “the design of the statute as a whole and to its object and policy.”<sup>385</sup> Administration and enforcement of interconnection agreements are intertwined.<sup>386</sup> Enforcement of a statute cannot be left to ordinary state contract law when “it would be fatal to the goals of the Act if a contractual provision contrary to the federal command were nevertheless enforced under state law or if a contract were struck down even though in furtherance of the federal scheme.”<sup>387</sup>

Although the federal courts retain their common-law powers to develop appropriate remedies for violations of federal law, they

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<sup>383</sup> *O’Melveny & Myers v. FDIC*, 512 U.S. 79, 85 (1994) (“The issue in the present case is whether the California rule of decision is to be applied . . . , and if it *is* applied it is of only theoretical interest whether the basis for that application is California’s own sovereign power or federal adoption of California’s disposition.”); *Boyle v. United Techs. Corp.*, 487 U.S. 500, 507 n.3 (1988) (“If the distinction between displacement of state law and displacement of federal law’s incorporation of state law ever makes a practical difference, it at least does not do so in the present case.”); see also *Calhoun v. Yamaha Motor Corp.*, 40 F.3d 622, 628 (3d Cir. 1994) (concluding that “it makes little practical difference” why state law is displaced); Martha Field, *Sources of Law: The Scope of Federal Common Law*, 99 *Harv. L. Rev.* 881, 977 & n.408 (1986) (stating distinction “is not sharp enough or important enough to support important consequences”).

<sup>384</sup> For a discussion of the flaw of using the preemption lens when the real question is the source of authority for a particular rule, see Weiser, *supra* note 12, at 680-81.

<sup>385</sup> *Crandon v. United States*, 494 U.S. 152, 158 (1990). Thus, courts should properly account for the Act’s purposes and the market environment to develop appropriate legal rules for the Act’s administration. See, e.g., *US West Communications, Inc. v. Minn. Pub. Utils. Comm’n*, 55 F. Supp. 2d 968, 986-87 (D. Minn. 1999) (considering procompetitive nature of Telecom Act and incumbent carrier’s market advantage as factors when assigning burden of proof).

<sup>386</sup> See *Harmon Indus. v. Browner*, 191 F.3d 894, 899 (8th Cir. 1999) (considering administration and enforcement of RCRA together because two stages are “inexorably intertwined”).

<sup>387</sup> *Int’l Ass’n of Machinists v. Cent. Airlines, Inc.*, 372 U.S. 682, 691 (1963).

should refrain from doing so under the Telecom Act until and unless state agencies require clear direction on this score. Put differently, the federal courts should apply the *Erie/Chevron* administrative law model as opposed to a common-law model when determining what remedies should lie for violations of interconnection agreements. If a state agency fails to appreciate its mandate under the Act (to devise appropriate rules to implement the federal policy), the court should remand the issue for further consideration rather than institute its own approach.<sup>388</sup> If the state agency develops a reasonable rule to fill the statutory gap, the federal courts should not second-guess this decision,<sup>389</sup> as judges are in an inferior position to expert agencies for developing the legal rules necessary to implement the Telecom Act.<sup>390</sup>

Finally, the federal courts should make clear that state agencies enjoy discretionary authority to supplement federal remedies to the Telecom Act.<sup>391</sup> State agencies should feel free to develop special contract law rules to serve the federal law's goals. Perhaps, for instance, some states might recognize a "special relationship" under contract law, imposing obligations on incumbent providers in recognition of their great market power.<sup>392</sup> Conceivably, states might take such an approach as an alternative to a federally created remedy—as long as they make clear that they provided the minimum remedy required by federal law, so that federal courts can review the decision under a *Michigan v. Long*-type standard.<sup>393</sup> Put simply, federal courts

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<sup>388</sup> See *Bell Atl. Tel. Co. v. FCC*, 206 F.3d 1, 9 (D.C. Cir. 2000) (following this course with respect to federal agency).

<sup>389</sup> Weiser, *supra* note 21, at 30.

<sup>390</sup> Judge Morris Sheppard Arnold demonstrated this very point by suggesting that federal common law developed to implement the Telecom Act would be virtually identical to ordinary state contract law, ignoring the possibility that the policies of the Telecom Act would call for any unique rules. See *S.W. Bell Tel. Co. v. Connect Communications Corp.*, 225 F.3d 942, 949 (8th Cir. 2000) (Arnold, M.S., J., dissenting).

<sup>391</sup> Cf. *Atherton v. FDIC*, 519 U.S. 213, 227 (1997) (concluding that statutory standard of gross negligence supplanted weaker state standards of care, but left states with ability to impose stricter standard); *O'Melveny & Myers v. FDIC*, 512 U.S. 79, 90 (1994) (Stevens, J., concurring) ("Indeed, a state court might well attach special significance to the fact that the interests of taxpayers as well as ordinary creditors will be affected by the rule at issue in this case.").

<sup>392</sup> See *English v. Fischer*, 660 S.W.2d 521, 524 (Tex. 1983) (Spears, J., concurring) (noting Texas courts' practice of implying duty of good faith and fair dealing into certain contractual relationships); see also *Houston Cable TV, Inc. v. Inwood W. Civic Ass'n*, 839 S.W.2d 497, 504 (Tex. App. 1992), judgment set aside, opinion not vacated, 860 S.W.2d 72 (Tex. 1993) (holding that cable company owes customers public duty in addition to usual contractual duties).

<sup>393</sup> 463 U.S. 1032, 1042 (1983) (requiring state courts to articulate clearly basis for constitutional rulings to enable reviewing federal courts to ascertain basis for judgments and facilitate federal judicial review).

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should encourage states to experiment with such creative remedies, thereby fulfilling the promise of cooperative federalism.

### CONCLUSION

The implementation of the Telecom Act will continue to challenge the FCC, state agencies, and the federal courts to construct a legal architecture that reflects the principles of the *Erie/Chevron* regime and best serves the purposes of cooperative federalism. The prevailing view of federal common lawmaking has just begun to appreciate the proper relationship between federal courts and state agencies administering federal statutes, so the adjustment process to the *Erie/Chevron* regime is still under way.

The FCC and state agencies also have yet to appreciate fully the implications of the *Erie/Chevron* regime. In particular, the FCC has yet to explore fully the nature of its authority under the vertical *Chevron* doctrine. Moreover, state regulatory agencies continue to focus almost exclusively on state law, even when they should be mindful of the federal goals that underpin cooperative federalism regulatory programs. Finally, federal courts all too often fall back on old models of federal common lawmaking that are inappropriate for a cooperative federalism regulatory regime. Over time, as these institutions adjust to their new roles, courts and commentators will understand better the nature of the modern administrative state.

Under the *Erie/Chevron* regime, federal courts superintending cooperative federalism regulatory programs still have a role to play in the development of modern common law. This role, however, is far more subtle and modest than the brave new world envisioned by cases like *Clearfield* and commentators like Judge Friendly. Following *Erie*'s appreciation for cooperative federalism and *Chevron*'s respect for agency lawmaking, the modern regime of federal common law embodied by *Milwaukee II* sees federal courts as advisors to and watchdogs over federal regulatory agencies, state agencies, and Congress, more than as direct lawmaking authorities. Admittedly, this role may appear less heady than that once envisioned by advocates of the "new federal common law." But if properly implemented, it will also prove to be far more sustainable and effective, because it will limit federal judicial action to the situations where judges are most competent to act.