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Preemption by Stealth

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ARTICLE

PREEMPTION BY STEALTH

Sandra Zellmer[*]

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I. INTRODUCTION

By making federal law supreme to state law, the U.S. Constitution gives Congress "an extraordinary power."[1] Perhaps the extraordinarily powerful nature of the Supremacy Clause is the reason for its checkered treatment by the Supreme Court. Recent preemption decisions give lip service to federalism concerns, but in many cases state statutes, regulations, and remedies have been struck down with little regard for either federal–state comity or institutional competence. If federal regulatory regimes always accomplished optimal regulation—perfect equipoise between protecting human health and promoting economic development while fostering innovation by governments and regulated entities—preemption of state law would be far less controversial. Of course, federal regulatory regimes are not always perfect, and the preemption of state laws can leave dangerous regulatory gaps.

Preemption is particularly troublesome when Congress has included a savings clause in the statute at issue. Many federal public health and environmental statutes include savings clauses intended to leave ample room for state law to provide increased protection above the federal regulatory floor. Yet recent Supreme Court cases reveal a pattern of increasingly hostile reception of savings clauses. This seems particularly true in cases involving state regulatory programs, while tort claims have been treated somewhat more favorably. The inclusion of generously worded savings clauses for state tort claims may explain the results in some cases, but the text of most savings clauses is so similar that, as the Court has noted, "[n]ot even the most dedicated hair-splitter" could distinguish them.[2]

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1. Gregory v. Ashcroft, 501 U.S. 452, 460 (1991); *see also* U.S. CONST. art. VI, cl. 2 ("This Constitution, and the laws of the United States which shall be made in Pursuance thereof . . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.").

2. Bates v. Dow Agrosciences LLC, 544 U.S. 431, 446 n.21 (2005) (citation omitted).

Congress itself has, in some instances, muddied the waters by including both preemption clauses and savings clauses in the same statute. Dueling clauses pose an interpretive conundrum for courts. Both savings clauses and preemption clauses serve to demarcate the boundaries of federal and state law, but unlike preemption clauses, savings clauses strike the balance in favor of states and state law remedies. In many Supreme Court cases, however, their combined effect has been to neutralize or weaken state police powers and, in turn, diminish the protection of health, safety, and environmental quality by leaving gaping holes in the regulatory framework.

One can hardly dispute that preemption issues are complex and highly nuanced, involving both federalism and separation of powers—congressional prerogatives, agency competence, and judicial deference—as well as efficiency, equity, victim compensation, and cost-shifting objectives. By focusing specifically on cases involving statutory savings clauses, this Article makes a modest attempt to identify preemption patterns and principles from a discrete set of opinions issued by the Rehnquist and Roberts Courts through 2008. It undertakes a comparative analysis of case law in four areas: (1) the environment; (2) labor and employment; (3) products liability; and (4) agricultural practices. These four were chosen both because of the tremendous activity in these areas by all three branches of the federal government since the 1980s and because of their importance to federal–state relations. This study is, admittedly, neither a comprehensive survey nor an empirical analysis of all one hundred-plus preemption cases issued by the Rehnquist and Roberts Courts.[3] Rather, it is more narrowly drawn in hopes of making sense of the Court's treatment of savings clauses and, by extension, its treatment of an important piece of evidence regarding congressional intent on preemption.

The analysis of key cases in these four areas indicates that, where Congress has included a savings clause in the allegedly preemptive federal statute, the Rehnquist Court was willing to allow some redress to injured persons, yet at the same time it paid little attention to savings clauses when it came to the preemption of protective state or local regulations. Where state

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3. *See* Michael S. Greve & Jonathan Klick, *Preemption in the Rehnquist Court: A Preliminary Empirical Assessment*, 14 SUP. CT. ECON. REV. 43, 49 (2006) (identifying 105 preemption cases issued by the Rehnquist Court from the 1986–87 Term to the 2003–04 Term). During the period assessed by Greve and Klick, an average of six preemption cases was issued each term. *Id.* Without performing an exact nose count, it is safe to assume that, since 2004, there have been at least twenty more.

or local regulations were challenged on preemption grounds, neither the statutory language nor the overarching congressional goals seemed to carry much weight. Although an empirical study of the full range of preemption cases issued by the Rehnquist Court indicated that preemption may be less likely when a state is a party to the dispute,[4] in the cases surveyed in this Article, judicial outcomes reflect an antiregulatory sentiment, whether or not a state played a role in the litigation. A majority of the members of the Rehnquist Court apparently viewed positive legislative enactments and formal regulatory programs issued by state and local governments as a significant threat to the implementation of federal programs and the accomplishment of federal goals, notwithstanding congressional intent to the contrary. The results in the regulatory cases often fell short of protecting people and their environment, and frustrated or even eviscerated legislative objectives as well as federalism ideals.

If we narrow the focus even further and consider only the Roberts Court, a nascent trend in favor of business and against both state interests and injured persons alike is discernible in *both* tort and regulatory cases. The most significant tort case issued by the Roberts Court to date, *Riegel v. Medtronic, Inc.*, indicates that the Court is taking an especially broad view of preemption clauses and a correspondingly dim view of savings clauses.[5] It is too early to tell whether we might expect it to find preemption *whenever* business interests are affected, regardless of the context, but *Riegel* may be indicative of the future direction of the Roberts Court.

The assessment of preemption cases involving statutory savings clauses makes one thing, at least, readily apparent. Dangerous regulatory gaps would be far less likely if savings clauses were given appropriate weight in both the regulatory context and the tort context. One could take this conclusion a step further and hypothesize that taking savings clauses

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4. *See id.* at 68. Greve and Klick found no discernible distinction between the results in tort cases and regulatory cases of the Rehnquist Court but, rather, concluded that states tend to do better in defeating preemption challenges when one of them is a party to a case. *Id.* at 76. Their analysis included all preemption cases from 1986–2003 and did not focus on those involving federal savings clauses. *Id.* at 46. For discussion of the Greve and Klick report, see *infra* notes 48–52 and accompanying text.

5. Riegel v. Medtronic, Inc., 128 S. Ct. 999, 1003, 1011 (2008). The outcome of another major product liability case pending before the Court this term, *Levine v. Wyeth*, 944 A.2d 179 (Vt. 2006), *cert. granted*, 128 S. Ct. 1118 (2008), is likely to shed light on the Court's view of state tort law. Like *Riegel*, *Levine* seeks a remedy for injuries caused by a product approved by the Food and Drug Administration, but unlike *Riegel*, the statute at issue in *Levine* does not include a preemption clause. *See infra* notes 196–203 and accompanying text.

seriously would also enhance oft-cited but only infrequently applied congressional objectives of cooperative federalism, as local, state, and federal entities would be motivated and empowered to capitalize on each of their institutional strengths and to craft coordinated regulatory and tort-based solutions.

This Article sets off in Part II with an assessment of the relationship of preemption and federalism. Part III turns to the Rehnquist and Roberts Courts' treatment of savings clauses when victims seek tort remedies for harm caused by federally regulated activities or products. Next, Part IV assesses the tendency, during the Rehnquist era and continuing through the Roberts Court, to give short shrift to savings clauses when state governments seek to establish more stringent regulatory requirements than imposed by the federal floor. The Article concludes in Part V with suggestions for crafting statutory savings clauses that may survive preemption challenges, as well as more global observations on harmonizing federal objectives with state tort law and state and local regulatory initiatives. In light of the Roberts Court's apparent pro-preemption proclivity, there may be no magic language that ensures against preemption. Careful congressional drafting, however, may promote more rational, equitable results, at least in close cases.

II. PREEMPTION AND FEDERALISM

The system of joint sovereignty in America is intended to promote a decentralized government that is responsive to the needs of a heterogeneous democratic society by preventing "capture" by industry, increasing opportunities for public involvement, and encouraging governmental creativity by making states compete to satisfy a mobile citizenry.[6] The question is whether federalism as we know it—including both the allocation of power addressed in Article I of the Constitution and the choice of law considerations embedded in the Supremacy Clause of Article VI—advances those goals or whether it simply serves preemptive, antiregulatory impulses. Reams of scholarly commentary have been written on the former (constitutional power) and only slightly less on the latter (preemption).[7] This

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6. *Gregory*, 501 U.S. at 458; *see also* Michael W. McConnell, *Federalism: Evaluating the Founders' Design*, 54 U. CHI. L. REV. 1484, 1492–93 (1987) (reviewing RAOUL BERGER, FEDERALISM: THE FOUNDERS' DESIGN (1987)).

7. For seminal articles on preemption, see generally Viet D. Dinh, *Reassessing the Law of Preemption*, 88 GEO. L.J. 2085 (2000); Stephen A. Gardbaum, *The Nature of Preemption*, 79 CORNELL L. REV. 767 (1994); Caleb Nelson, *Preemption*, 86 VA. L. REV. 225 (2000); and Catherine M. Sharkey, *Preemption by Preamble: Federal Agencies and the*

Article focuses on the latter, but puts a finer point on the inquiry to draw attention to a topic that has received far less analysis—judicial treatment of savings clauses meant to preserve state law from displacement by federal law.

First, a few words on federalism. American federalism is defined generally as the extent to which state autonomy limits the exercise of federal power.[8] The classic description comes from a Supreme Court dissent penned by Justice Brandeis: "It is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country."[9]

Federalism has a dual nature. At its best, federalism safeguards the public from dangerous, tyrannical impulses at the national level by allowing flexible, decentralized institutions to flourish.[10] At its worst, federalism impedes rational, comprehensive planning and the achievement of uniform yet progressive results that transcend political boundaries.[11] The

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Federalization of Tort Law, 56 DEPAUL L. REV. 227 (2007). Although federalism articles are so plentiful that they evade any reasonable attempt at listing, important ones include Akhil Reed Amar, *Of Sovereignty and Federalism*, 96 YALE L.J. 1425 (1987); Erwin Chemerinsky, *The Values of Federalism*, 47 FLA. L. REV. 499 (1995); Samuel Issacharoff & Catherine M. Sharkey, *Backdoor Federalization*, 53 UCLA L. REV. 1353 (2006); McConnell, *supra* note 6; Laurence H. Tribe, *Unraveling* National League of Cities*: The New Federalism and Affirmative Rights to Essential Government Services*, 90 HARV. L. REV. 1065 (1977); Herbert Wechsler, *The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Government*, 54 COLUM. L. REV. 543 (1954).

8. *See* Chemerinsky, *supra* note 7, at 504.

9. New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting).

10. DONALD J. PISANI, WATER AND AMERICAN GOVERNMENT: THE RECLAMATION BUREAU, NATIONAL WATER POLICY, AND THE WEST, 1902–1935, at 295 (2002); *see also* THE FEDERALIST NO. 10, at 58–59, 62 (James Madison) (Carl Van Doren ed., 1979) (arguing that the federal system renders factions "unable to concert and carry into effect schemes of oppression" because the "influence of factious leaders may kindle a flame within their particular States, but will be unable to spread a general conflagration through the other States").

11. *See* Charles E. Davis & James P. Lester, *Federalism and Environmental Policy*, *in* ENVIRONMENTAL POLITICS AND POLICY: THEORIES AND EVIDENCE 57, 59 (James P. Lester ed., 1989) (identifying efficiency gains as one argument in support of problemsolving at the national level); Roderick M. Hills, Jr., *Against Preemption: How Federalism Can Improve the National Legislative Process*, 82 N.Y.U. L. REV. 1, 6–9 (2007) (describing efficiency-based arguments against federalism); Robert Ressetar, *The Yucca Mountain Nuclear Waste Repository from a Federalism Perspective*, 23 J. LAND RESOURCES & ENVTL. L. 219, 221 (2003) (identifying five reasons for an active federal role in environmental protection: "the inability of the states to enforce adequate environmental standards on their own . . . local resistance to environmental protection, especially with regard to transboundary pollution; [the need to guarantee] minimal protection for a mobile population; [the need to help] states resist industry pressure to

latter theme can be seen in the work of numerous scholars, including this Author, who place a heavy emphasis on federal law for protecting public health and the environment.[12] Even beyond areas of customary federal concern, such as national security, air traffic control, navigation, Indian affairs, and immigration,[13] the federal government is often in the best position to remedy transboundary problems such as air and water pollution and the manufacture and sale of dangerous chemicals and drugs. It possesses greater resources and data-collection capabilities than any single state. In addition, federal law can provide uniform, forward-looking solutions to widespread problems. State law, on the other hand, is relatively inefficient when it comes to solving these types of problems because of a lack of expertise and a parochial inclination to impose external costs on neighboring states.[14]

From the post-New Deal years to the modern era, federal regulation has become more comprehensive and, consequently, the Supremacy Clause has become more significant.[15] The preemption doctrine is a tool for defining the parameters of federal supremacy when Congress has adopted legislation pursuant to other enumerated powers, such as the Commerce Clause or the Spending Clause.[16]

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relax standards (the race-to-the-bottom hypothesis); and industry preference for uniform federal standards instead of a variety of state standards").

12. *See, e.g.*, Daniel C. Esty, *Revitalizing Environmental Federalism*, 95 MICH. L. REV. 570, 574 (1996) (suggesting regulatory responses should be delegated to the level of government best adapted to solve a particular environmental problem); Robert L. Glicksman, *From Cooperative to Inoperative Federalism: The Perverse Mutation of Environmental Law and Policy*, 41 WAKE FOREST L. REV. 719, 802 (2006) (lamenting the federal government's failure to solidify its authority over environmental regulation); Robert A. Schapiro, *Toward a Theory of Interactive Federalism*, 91 IOWA L. REV. 243, 316 (2005) (advocating a "polyphonic conception" of federalism that would reduce restrictions on federal authority); Rena I. Steinzor, *Devolution and the Public Health*, 24 HARV. ENVTL. L. REV. 351, 364 (2000) (arguing that the protection of health and safety through federal environmental regulation should be "one of the roles of democratic government"); Sandra Zellmer, *A Tale of Two Imperiled Rivers: Reflections from a Post-Katrina World*, 59 FLA. L. REV. 599, 617–18 (2007) (arguing for the enactment of a "holistic federal strategy" in water law).

13. Hills, *supra* note 11, at 8.

14. *Id.* at 1, 7.

15. Sandra B. Zellmer, *The Devil, The Details, and the Dawn of the 21st Century Administrative State: Beyond the New Deal*, 32 ARIZ. ST. L.J. 941, 967–68 (2000) (describing the post-New Deal Supreme Court's willingness to uphold broad federal legislation on Commerce Clause grounds). The New Deal era tracks the Roosevelt presidency from 1933–1945. Stephen Gardbaum, *New Deal Constitutionalism and the Unshackling of the States*, 64 U. CHI. L. REV. 483, 485 n.6 (1997); Zellmer, *supra*, at 959.

16. Mary J. Davis, *Unmasking the Presumption in Favor of Preemption*, 53 S.C. L. REV. 967, 968 (2002).

Congressional objectives are the "touchstone" of any preemption case.[17] If Congress has included an express preemption provision in a statute, then courts must simply interpret that provision. As in many areas of statutory interpretation, this is often easier said than done. Application of the preemption doctrine is even trickier in the absence of an express preemption provision. In those cases, courts apply one of three categories of implied preemption: (1) field occupation, where the federal legislation is so comprehensive that Congress must have intended to occupy the field; and (2) conflict preemption, where state law must yield to federal law because either (a) there is an actual conflict such that a party cannot possibly comply with both federal and state law; or (b) state law poses an obstacle to the achievement of federal objectives.[18]

Before the explosion of federal public health and environmental requirements, state and local authorities exercised their police powers through regulations and common law theories to combat the multifarious problems of an increasingly industrialized society. In particular, federal and state courts alike accepted common law doctrines of nuisance, trespass, and strict liability as appropriate means to address the effects of harmful industrial activities.[19] Since its 1947 opinion in *Rice v. Santa Fe Elevator Corp.*,[20] the Supreme Court has routinely espoused adherence to a presumption against preemption when federal law bumps up against activities within the states' historic police powers.[21] Among such state powers are the protection of health and safety, utility and insurance regulation, agricultural practices, tort law, and domestic (family) relations.[22] Although the strength of the presumption has waxed

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17. Medtronic, Inc. v. Lohr, 518 U.S. 470, 485 (1996) (quoting Retail Clerks Int'l Ass'n, Local 1625 v. Schermerhorn, 375 U.S. 96, 103 (1963)).

18. Davis, *supra* note 16, at 970.

19. Alexandra B. Klass, *Common Law and Federalism in the Age of the Regulatory State*, 92 IOWA L. REV. 545, 567–68 (2007).

20. Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947).

21. Davis, *supra* note 16, at 968. Although a presumption against preemption was mentioned in earlier cases, *see, e.g.*, N.Y. Cent. R.R. Co. v. Winfield, 244 U.S. 147, 156 n.1 (1917) (Brandeis, J., dissenting) (declaring that state police power will not be preempted unless it "actually frustrate[s] . . . the intended operation of the federal legislation"), the modern iteration is typically traced to *Rice v. Santa Fe Elevator Corp.*, in which the Court stated, "[W]e start with the assumption that the historic police powers of the States were not to be superseded by Federal Act unless that was the clear and manifest purpose of Congress." *Rice*, 331 U.S. at 230. *See* Gardbaum, *supra* note 15, at 536 (referring to the *Rice* decision as the "locus classicus of modern preemption doctrine").

22. *See* Silkwood v. Kerr–McGee Corp., 464 U.S. 238, 255 (1984) (tort law); Pac. Gas & Elec. Co. v. State Energy Res. Conservation & Dev. Comm'n, 461 U.S. 190, 205 (1983) (utility regulation); Hisquierdo v. Hisquierdo, 439 U.S. 572, 581 (1979) (domestic

and waned through the years,[23] generally speaking, tort claims for harm from pollution and other activities affecting public health and welfare were routinely upheld, even in heavily regulated areas where the federal interest was deemed most compelling. Unless regulated entities could rebut this presumption by showing a clear manifestation of congressional intent to preempt state remedies, courts would allow state law and state sanctioned remedies to coexist with federal requirements.[24] Evidence of congressional intent would be gleaned from canons of statutory interpretation, the historic context of the statute in question, and legislative history.[25]

When Congress began to enact more comprehensive regulatory programs related to human health and the environment in the 1970s, it embraced several mechanisms to accentuate the positive attributes of federalism by drawing on the unique strengths of state and local governments.[26] One primary mechanism is cooperative federalism, which has been a recurring theme of federal–state relations since at least the late 1930s but gained prominence with the expansion of federal environmental law beginning in 1970.[27] Cooperative federalism typically entails the establishment of uniform national health or technology-based standards that leave state and local governments sufficient flexibility to implement those standards in ways that reflect local particularities and needs. The two dominant models of cooperative federalism adopted by Congress either condition the receipt of federal funds on compliance with federal standards or, in the alternative, give states a choice

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relations); Paul Wolfson, *Preemption and Federalism: The Missing Link*, 16 HASTINGS CONST. L.Q. 69, 95 (1988) (citing Hillsborough County v. Automated Med. Labs., Inc., 471 U.S. 707, 715 (1985)) (health); *see also* Cal. State Auto. Ass'n Inter-Ins. Bureau v. Maloney, 341 U.S. 105, 109–10, 109 n.2 (1951) (insurance); *Rice*, 331 U.S. at 229–30 (agricultural warehousing).

23. *See* Catherine M. Sharkey, *Products Liability Preemption: An Institutional Approach*, 76 GEO. WASH. L. REV. 449, 454 (2008) (finding that the presumption against preemption "breaks down in the products liability realm, rearing its head with gusto in some cases, but oddly quiescent in others").

24. N.Y. State Conference of Blue Cross & Blue Shield Plans v. Travelers Ins. Co., 514 U.S. 645, 665–67 (1995); *Hillsborough County*, 471 U.S. at 715–18.

25. Fla. Lime & Avocado Growers, Inc. v. Paul, 373 U.S. 132, 146–48 (1963); San Diego Bldg. Trades Council v. Garmon, 359 U.S. 236, 240–44 (1959); *Rice*, 331 U.S. at 232–34.

26. *See* Douglas T. Kendall, *Redefining Federalism*, 35 ENVTL. L. REP. 10,445, 10,446 (2005) (arguing that a more balanced view of federalism by the courts would allow appropriate environmental regulation at both the state and federal levels).

27. Glicksman, *supra* note 12, at 719 (citing *Symposium on Cooperative Federalism: Foreword*, 23 IOWA L. REV. 455, 455 (1938)); Robert V. Percival, *Environmental Federalism: Historical Roots and Contemporary Models*, 54 MD. L. REV. 1141, 1174 (1995) (describing cooperative federalism as the dominant model of modern environmental law).

between regulating in accordance with federal standards or having federal regulation preempt state regulation altogether.[28]

The second important mechanism is the inclusion of an explicit statutory savings clause to avoid displacement of state and local law. Savings clauses reflect the congressional desire to preserve the presumption against preemption and, more generally, maintain state authority and state remedies. Where Congress includes a savings clause, it recognizes the need either to fill a regulatory void left by federal law or to enhance protection for affected communities through complementary federal and state authorities. The preemption of state law in these areas inevitably causes a regulatory vacuum, where the states are prevented from regulating broad spheres of harmful activity even though federal regulation is lacking or, in some cases, completely absent.[29] As a result, both states and their residents are worse off than before the passage of federal law.[30]

Despite the cooperative federalism trend seen in congressional action during the past three decades,[31] the Supreme Court's preemption decisions have gone in the opposite direction. This is so even though the majorities of both the Rehnquist and Roberts Courts profess ever stronger allegiance to federalism principles, particularly state sovereignty. Whether placed under the heading of "new federalism,"[32] "real federalism,"[33] or

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28. Robert V. Percival, *Environmental Implications of the Rehnquist Court's New Federalism*, 17 NAT. RESOURCES & ENV'T 3, 52 (2002).

29. *See* Aetna Health Inc. v. Davila, 542 U.S. 200, 222 (2004) (Ginsburg, J., concurring) ("A series of the Court's decisions has yielded a host of situations in which persons adversely affected by ERISA-proscribed wrongdoing cannot gain make-whole relief"; the majority has created a "'regulatory vacuum'" in which "[v]irtually all state law remedies are preempted but very few federal substitutes are provided.").

30. *See* Albert C. Lin, *Erosive Interpretation of Environmental Law in the Supreme Court's 2003–04 Term*, 42 HOUS. L. REV. 565, 584–85 (2005) (noting that the Court's decision in *Engine Manufacturers Ass'n v. South Coast Air Quality Management District*, 541 U.S. 246 (2004), deprived states of a regulatory tool for air quality).

31. Glicksman, *supra* note 12, at 753 (observing that, beginning in 1970, Congress built cooperative federalism mechanisms into numerous pollution control laws).

32. *See* Rena I. Steinzor, *Unfunded Environmental Mandates and the "New (New) Federalism": Devolution, Revolution, or Reform?*, 81 MINN. L. REV. 97, 113–14 (1996) (concluding that the "new federalism" rhetoric that emerged during the Reagan Administration "had as one of its primary goals radical deregulation, especially in the areas of public health, safety, and the environment"); *see also* United States v. Morrison, 529 U.S. 598, 654 (2000) (Souter, J., dissenting) ("[N]ot the least irony of these cases [on Violence Against Women] [is] that the States will be forced to enjoy the new federalism whether they want it or not.").

33. *See* Kendall, *supra* note 26, at 10,449. "Real federalism" has come to mean protection from regulation regardless of its source. *Id.* at 10,448 (citing MICHAEL S. GREVE, REAL FEDERALISM: WHY IT MATTERS, HOW IT COULD HAPPEN 81–82 (1999)). The conceptual foundation of real federalism was provided by Richard Epstein, who argued that the Court should take aggressive steps to reduce the size of government at all levels.

"libertarian federalism,"[34] it seems plain that some sort of federalism is on the rise, but the new brand of federalism in recent Supreme Court cases is a far cry from Brandeis's happy partnership between state and local governments.[35]

Collectively, judicial outcomes in the recent preemption cases fail to reflect federalism's primary virtue, which lies not in a hermetic wall between federal, state, and local governments, requiring them to operate in mutually exclusive spheres, but in the sometimes cooperative and often competitive interaction between governments.[36] A dynamic, polyphonic view of federalism—a workable government where federal, state, tribal, and local authorities are appropriately matched with geographic and socioeconomic issues—should encourage stronger, more coherent, and more cooperative forms of problem solving and leadership.[37]

Whether reviewing challenges to state tort law or to state or local regulatory programs, the Court has frequently recited the mantra that "'[t]he purpose of Congress is the ultimate touchstone' in every pre-emption case."[38] Yet in relatively few of the recent cases have the Rehnquist or Roberts Courts actually delved into congressional purposes underlying a particular statute in any depth; rather, they limit themselves to often ambiguous statutory language and dictionary definitions to resolve preemption claims. Likewise, in relatively few cases has the Court considered the impact of preemption on cooperative federalism objectives or the relative competence of different levels of government to solve societal problems. Rather, as Professor Roderick Hills points out, preemption cases exhibit a type of "faux textualism in which the Court invokes the alleged plain meaning of two wholly ambiguous words" in a statutory

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See Richard A. Epstein, *Constitutional Faith and the Commerce Clause*, 71 NOTRE DAME L. REV. 167, 190 (1996) (advocating rolling back the clock on 200 years of court precedent in order to limit the modern regulatory state); Richard A. Epstein, *The Proper Scope of the Commerce Power*, 73 VA. L. REV. 1387, 1388, 1454 (1987).

34. *See* Kendall, *supra* note 26, at 10,450.

35. *See supra* note 9 and accompanying text.

36. Hills, *supra* note 11, at 4.

37. *See* Robert A. Schapiro, *From Dualism to Polyphony*, *in* PREEMPTION CHOICE: THE THEORY, LAW, AND REALITY OF FEDERALISM'S CORE QUESTION 33, 43–44 (William W. Buzbee ed., 2008) (positing that, under polyphonic federalism, federal and state power are presumptively concurrent, and the focus becomes managing the overlapping areas in a productive and equitable fashion).

38. *See, e.g.*, Medtronic, Inc. v. Lohr, 518 U.S. 470, 485 (1996) (quoting Retail Clerks Int'l Ass'n, Local 1625 v. Schermerhorn, 375 U.S. 96, 103 (1963)); Cipollone v. Liggett Group, Inc., 505 U.S. 504, 516 (1992); Gade v. Nat'l Solid Wastes Mgmt. Ass'n, 505 U.S. 88, 96 (1992); Malone v. White Motor Corp., 435 U.S. 497, 504 (1978).

clause to reach antiregulatory results.[39] A closer look at cases involving explicit statutory savings clauses lends some support to this theory.[40]

When it comes to preemption, however, the Justices split in ways that cut across ideological lines. Champions of federalism and states' rights, like Justice Scalia and former Justices Rehnquist and O'Connor, do not always vote against preemption of state laws, while champions of strong central government, like Justices Stevens, Ginsburg, Breyer, and Souter, do not always vote in favor of preemption.[41] As a result, Supreme Court opinions seem to oscillate between a love of federalism, which would suggest a restrictive view of preemption, and an aversion to state interference with federal programs.[42] It is tempting to surmise that the preemption cases are not about federalism at all but rather reflect promarket, antiregulatory goals.[43] Perhaps hostility toward government regulation at *any* level is in fact in play, but it is difficult to discern a clear pattern to this effect in the preemption cases viewed as a whole. In some cases, state law remedies and state and local regulatory initiatives are applauded and in others they are excoriated.[44]

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39. *See* Hills, *supra* note 11, at 9; David B. Spence & Paula Murray, *The Law, Economics, and Politics of Federal Preemption Jurisprudence: A Quantitative Analysis*, 87 CAL. L. REV. 1125, 1149–50 (1999) (noting the inconsistency of preemption decisions and their apparent lack of correlation to textual differences).

40. *See infra* Parts III–IV (observing that state common law tort regimes are generally upheld, while state regulatory innovations are generally struck down on preemption grounds).

41. Hills, *supra* note 11, at 3–4; *see also* Greve & Klick, *supra* note 3, at 79–80 (finding that, with the exception of Justice Thomas, the voting records of the liberal justices (those in favor of strong, uniform federal regulations) and conservative justices (those that express pro-federalism, pro-state, and antiregulatory opinions) in the preemption cases are a near mirror image of the voting records in federalism cases, but that voting alignments are "substantially more fluid" in preemption cases than in other federalism cases); Bradley W. Joondeph, *The Deregulatory Valence of Justice O'Connor's Federalism*, 44 HOUS. L. REV. 507, 511 (2007) ("O'Connor voted to limit regulation as frequently as she voted to enhance state autonomy.").

42. *See* Hills, *supra* note 11, at 8 ("The struggle over preemption is, in large part, a struggle between proponents of markets and proponents of regulation.").

43. *Id.* at 8–9; Steinzor, *supra* note 32, at 111–14 (describing "new federalism" as a strategy to eliminate big government in Washington); *see also* Richard H. Fallon, Jr., *The "Conservative" Paths of the Rehnquist Court's Federalism Decisions*, 69 U. CHI. L. REV. 429, 462–63 (2002) (noting that, between 1989 and 1999, 22 of the 35 preemption cases issued by the Rehnquist Court, including all seven preemption cases in 1999, found in favor of preemption).

44. *See* Greve & Klick, *supra* note 3, at 49, 68 (finding that no clear antiregulatory sentiment could be discerned from 105 preemption cases issued by the Rehnquist Court through 2003). For discussion of the Greve and Klick report, see *infra* notes 48–52 and accompanying text.

In general, in the four areas assessed in this Article, when Congress included an explicit savings clause, state tort law fared better than state regulatory programs through the Rehnquist years (1986–2005). Supreme Court opinions tended to apply the savings clause and preserve state tort remedies and, in many of these cases, a theme of deference to the states' historic police powers can be seen.[45] If *Riegel* is any indication, however, this phenomenon will be less pronounced or perhaps completely eviscerated in the Roberts Court, but it is too early and there have been too few relevant cases to draw anything but tentative conclusions.[46]

When one focuses on challenges to state and local regulatory programs, Supreme Court jurisprudence of the Rehnquist and Roberts Courts exhibits a palpable pro-preemption pattern, where the presence of a savings clause has not been given much weight. In these cases, judicial outcomes do in fact appear to be driven by a results-oriented, antiregulatory sentiment rather than by the overarching congressional objectives expressed in the federal statute at issue.[47]

To a certain extent, this observation bucks the conclusions of Michael Greve and Jonathan Klick, who conducted an empirical assessment of all the statutory preemption decisions of the Rehnquist Court between 1986 and 2003, and concluded that the Court was "much more likely" to find *against* preemption in cases where the state was a party, as is often (but not always) the case when a regulatory program is challenged.[48] The authors concluded that, although business interests did well against private parties, they could not "catch a break" when a state was

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45. *See infra* Part III.E.

46. *See infra* notes 153–95 (discussing *Riegel v. Medtronic, Inc.*, 128 S. Ct. 999, 1007, 1011 (2008), which held that plaintiff's state tort claims were preempted by the Medical Device Amendments of 1976).

47. *See infra* Part IV.E (explaining the interaction between state and federal law in regulatory cases involving preemption and savings clauses).

48. Greve & Klick, *supra* note 3, at 66. Regulatory cases include challenges to both state regulatory programs where the state is a party and local regulatory cases where the state is not directly involved. For an example of the latter, see Engine Mfrs. Ass'n v. S. Coast Air Quality Mgmt. Dist., 541 U.S. 246, 248–49 (2004), in which the State of California filed an amicus brief on behalf of an air quality management district and against preemption. *See* Brief for the State of California as Amicus Curiae Supporting Respondents, *Engine Mfrs. Ass'n*, 541 U.S. 246 (No. 02-1343). Despite California's arguments that "[t]o protect the health of [amici states'] residents and the strength of their economies, states need to be able to use the most varied and effective tools . . . to attack some of the worst air pollution problems in the nation," *id.* at 1, the Court invalidated the district's regulation. *Engine Mfrs. Ass'n*, 541 U.S. at 258. The *Engine Manufacturers* case is examined in Part IV.A.2, *infra*.

either a petitioner or a respondent.[49] According to Greve and Klick, "[W]hen states insist upon their right to regulate business over and above a federal baseline, the Court will often give them their due."[50] They found that, of the 32 tort cases (out of a total of 105 preemption cases handed down during the period of analysis), the Rehnquist Court found the plaintiffs' claims preempted in 20 cases, or 62.5%.[51] Despite this relatively poor track record, Greve and Klick concluded that an assumption of judicial bias against tort claims is "likely unwarranted"; rather, the lack of state participation in the tort cases was a determinative factor.[52] When the subset of cases is narrowed to the four areas of concern explored in this Article and to challenges involving statutory savings clauses, the results are still mixed, but to the extent that a judicial preemption trend can be discerned it appears to cut in favor of tort claims and against regulatory programs.

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49. Greve & Klick, *supra* note 3, at 67–68.

50. *Id.* at 68; *see also* Alexandra B. Klass, *State Innovation and Preemption: Lessons from State Climate Change Efforts*, 41 LOY. L. REV. (forthcoming 2008) (manuscript at 39, on file with the Houston Law Review) ("[C]ourts should create a preemption jurisprudence that places more express weight on state efforts to protect the interests of their citizens and natural resources through innovative regulatory and common law actions [and make the] special status of state action an explicit . . . part of the analysis."); Bradford Mank, *Should States Have Greater Standing Rights than Ordinary Citizens?:* Massachusetts v. EPA*'s New Standing Test for States*, 49 WM. & MARY L. REV. 1701, 1708 (2008) ("[T]he Court has historically given states preferential status in federal courts when a state files a parens patriae suit based on the state's quasi-sovereign interest in the health and welfare of its citizens or [its] natural resources . . . .").

51. Greve & Klick, *supra* note 3, at 52. In some of these cases, plaintiffs' claims were only partially preempted. *Id.* at 55. In comparison, 47.9% of the non-tort cases studied during this timeframe resulted in preemption. *Id.* at 52. Greve and Klick note that preemption of tort cases occurred more frequently during the second Rehnquist Court, 1994–2005, while the frequency of preemption in non-tort cases stayed about the same. *Id.* at 52. The delineation between the first and second Rehnquist Courts is marked by the appointment of Justice Ginsburg in 1993 and of Justice Breyer in 1994, but a more significant ideological change occurred in 1991, when Justice Thomas replaced Justice Marshall. From 1994 to 2004, the Court's composition was unchanged. *Id.* at 49. For an assessment of the composition of the Rehnquist Court, see Thomas W. Merrill, *The Making of the Second Rehnquist Court: A Preliminary Analysis*, 47 ST. LOUIS U. L.J. 569, 643–44 (2003), which questions the assumption that the Chief Justice is responsible for setting institutional norms and discusses the impact of Justice Scalia on the Court's certiorari policy.

52. Greve & Klick, *supra* note 3, at 53. Greve and Klick also found that, where many states join together to file an amici brief, their participation is likely to result in an antipreemptive result, whereas if only a few states participate as amici, they are unlikely to effect the outcome. *Id.* at 71. They conclude that the number of signatories may signal both the intensity and the authenticity of the states' concern as a "true federalism interest, as opposed to a parochial and opportunistic interest in a particular outcome." *Id.* at 72.

III. STATE COMMON LAW

Most federal public health and environmental statutes neither preclude nor independently authorize private recovery of compensatory damages for personal injury or property damage. Although some federal statutes authorize citizens' suits as a supplemental enforcement scheme, they only allow injunctions and the assessment of civil penalties payable to the federal treasury, not to the private plaintiff.[53] As a result, individuals seeking compensation for harm caused by a federally regulated activity are limited to whatever relief is provided by state law. Even where federal law addresses the harmful activity through comprehensive, prescriptive regulations and prohibitions, state common law serves as an important gap filler. It not only provides for compensatory and punitive damages in cases where relief would otherwise be unavailable, it also operates to bring information to light about the product or activity in question through discovery and trial.[54] Tort law represents different—yet complementary—values than public law. Societal norms of reciprocity, distributive justice, morality, and punishment for careless or malicious deeds undergird tort law.[55] In addition, tort remedies foster economic efficiency by forcing the entity engaging in risky activities to internalize the costs of harm otherwise imposed on others.[56] Once internalized, those costs will be reflected in the prices of the products produced by the risky activity, and consumers will receive a more accurate signal of the

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53. *See* 7 U.S.C. §§ 136–136y (2006) (providing no private right of action for harms caused by pesticides); 33 U.S.C. § 1365 (2006) (providing no right to compensatory damages under the Clean Water Act); 42 U.S.C. § 300j-8 (2000) (providing no right to compensatory damages under the Safe Drinking Water Act); 42 U.S.C. § 7604 (2000) (providing no right to compensatory damages under the Clean Air Act); 42 U.S.C. § 9607 (2000) (providing no right to compensatory damages for injuries due to releases of hazardous substances).

54. Klass, *supra* note 19, at 569–70; Wendy E. Wagner, *When All Else Fails: Regulating Risky Products Through Tort Litigation* 3 (Univ. of Tex. Pub. Law & Legal Theory, Paper No. 99, 2006), *available at* http://ssrn.com/abstract=902412; *see also* Thomas O. McGarity, *Regulation–Common Law Feedback Loop in Nonpreemptive Regimes*, *in* PREEMPTION CHOICE: THE THEORY, LAW, AND REALITY OF FEDERALISM'S CORE QUESTION, *supra* note 37, at 235, 245–52 (describing the informational function served by tort litigation over chemicals used to make Teflon, and noting that the regulatory agency did not have access to the relevant information, which ultimately led to a phase-out of the chemical, until plaintiffs provided it).

55. Klass, *supra* note 19, at 549–50, 552; *see also* Betsy J. Grey, *The New Federalism Jurisprudence and National Tort Reform*, 59 WASH. & LEE L. REV. 475, 522–23 (2002).

56. Robert L. Glicksman, *Federal Preemption and Private Legal Remedies for Pollution*, 134 U. PA. L. REV. 121, 194 (1985); *see also* David C. Vladeck, *Preemption and Regulatory Failure*, 33 PEPP. L. REV. 95, 101 (2005) (identifying the threat of liability as an important source of market discipline).

true costs of production, enabling them to make better purchasing decisions.[57] If damage awards make the costs of the existing practice too high to continue as is, the producer will be motivated to improve the product or take it off the market.

With some exceptions where Congress has included a savings clause, the post-New Deal twentieth century Supreme Court opinions have generally accepted supplemental state law remedies as consistent with congressional objectives to protect health and welfare. Although the pattern is not wholly consistent, a broad array of tort claims for injuries caused by air and water pollution, radiation poisoning, workplace injuries, dangerous products, and pesticide use have been allowed to proceed. Conversely, tort claims have been displaced where the relevant statute lacks a savings clause or where it includes a preemption clause that could be said to neutralize the savings clause. The most recent cases issued by the Roberts Court, in particular, exhibit an alarming tendency to read preemption clauses, but not savings clauses, broadly, even in cases involving tort claims.

A. *Environment and Energy*

1. Air and Water Pollution. Air and water pollution are governed by a cooperative federalism framework intended to respect states' police powers to protect public health and safety within their borders, but also to authorize uniform federal standards that transcend state lines.[58] State tort law remedies for harm caused by pollutants have long been an important part of the cooperative federalism formula. Climate change litigation is currently putting this approach to the test. Few would contest that climate change has become the most pressing environmental problem in the world.[59] Existing federal statutes, enacted long

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57. Glicksman, *supra* note 56, at 194.

58. Percival, *supra* note 27, at 1174; *see also* Glicksman, *supra* note 12, at 719–20. Professor Glicksman notes, however, that in recent years "the model of cooperative federalism reflected in federal environmental and natural resource management legislation has faltered, not flourished" as courts, Congress, and federal administrative agencies "have placed significant obstacles in the path of state or local efforts to pick up the slack created by the federal government's withdrawal from its previous role as prime environmental policymaker." *Id.* at 802. Doctrines employed by the Court to obstruct state and local efforts include preemption, the dormant Commerce Clause, and regulatory takings. *Id.*

59. *See* Massachusetts v. EPA, 127 S. Ct. 1438, 1455–56 (2007) (concluding that immediate steps to control GHG emissions are necessary to avoid "'severe and irreversible changes to natural ecosystems'"); WORKING GROUP II, INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE, FOURTH REPORT, CLIMATE CHANGE 2007: IMPACTS, ADAPTATION AND

before anyone recognized that warming trends were exacerbated by greenhouse gas emissions from industrial activities, provide only the most rudimentary tools to combat climate change. Most recently, dozens of states and cities, increasingly frustrated with the federal government's failure to curb emissions through regulatory means, have brought common law nuisance claims against power plants and automobile manufacturers in hopes of combating global warming.[60] These claims are proving to be a catalyst for governmental action, at least at the state and local level, but they can only be successful if they are saved from preemption.

Power plants and automobile manufacturers have asserted that tort claims to remedy greenhouse gas emissions are preempted, but precedent generally cuts the other way. State and local governments historically grappled with air pollution problems through smoke abatement ordinances and the like, and air pollution prevention falls squarely within states' traditional police powers of protecting their citizens' health.[61] The Clean Air Act expressly states the congressional intent that "air pollution prevention . . . and air pollution control at its source is the primary responsibility of States and local governments."[62] It comes as no surprise, then, that perhaps more than any other federal statute the Clean Air Act is peppered with savings

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VULNERABILITY 9 (2007), *available at* http://www.ipcc.ch/ipccreports/ar4-wg2.htm (finding that global warming is likely not due solely to natural causes); *see also* Thomas W. Merrill, *Global Warming as a Public Nuisance*, 30 COLUM. J. ENVTL. L. 293, 293–94 (2005) (discussing the obstacles to successful climate change litigation brought by state attorney generals); *cf.* Klass, *supra* note 50, at 3–4 (examining common law claims for relief as well as state regulatory efforts to control greenhouse gas emissions to "illustrate today's almost complete linkage between the common law of tort and the regulatory state in areas of public health, safety, and environmental protection").

60. *See, e.g.*, California v. Gen. Motors Corp., No. C06-05755, 2007 WL 2726871, at *1 (N.D. Cal. Sept. 17, 2007) (granting automobile manufacturers' motion to dismiss public nuisance claims); Connecticut v. Am. Elec. Power Co., 406 F. Supp. 2d 265, 274 (S.D.N.Y. 2005) (dismissing certain claims against power plants without reaching the preemption issue, finding a nonjusticiable political question consigned to the political branches); *see also* Kirsten H. Engel, *Climate Change Litigation (Other than Under the Clean Air Act)*, in GLOBAL WARMING: CLIMATE CHANGE AND THE LAW COURSEBOOK (ALI–ABA) 141–46 (2007) (describing public nuisance claims raised in climate change cases); Merrill, *supra* note 59, at 316, 319 (concluding that federal common law regarding air pollution as a nuisance is most likely displaced by the Clean Air Act); James Kanter, *Fighting Climate Change, One Lawsuit at a Time*, INT'L HERALD TRIB., Aug. 15, 2007, at 12 (describing a "spate of cases" pending in the United States and Europe that attempt to hold companies who emit greenhouse gases responsible for global warming).

61. Train v. Natural Res. Def. Council, Inc., 421 U.S. 60, 64 (1975); Huron Portland Cement Co. v. Detroit, 362 U.S. 440, 442 (1960); Georgia v. Tenn. Copper Co., 206 U.S. 230, 238 (1907).

62. 42 U.S.C. § 7401(a)(3) (2000); *see also Train*, 421 U.S. at 64 (quoting the Air Quality Act of 1967).

clauses.[63] Many courts have allowed tort recovery for harms caused by air pollutants as supplemental to the statutory and administrative requirements of the Clean Air Act.[64]

The Supreme Court has not yet had occasion to address the preemptive effect of the Clean Air Act in this context,[65] but it has reconciled common law tort claims with the Clean Water Act, which has a similar legislative background and contains a similar savings clause.[66] Some of the earliest preemption battles over pollution involved the Clean Water Act, aimed at restoring and maintaining the chemical, biological, and physical integrity of the nation's waterways.[67] As one means of accomplishing this goal, Congress included several savings clauses to preserve common law claims, preserve the states' ability to impose more protective pollution control requirements, and establish and enforce rights to allocate and use water resources.[68]

In the early days after enactment, it appeared that these savings clauses preserved both federal and state common law claims for harm caused by water pollution. The door was slammed shut on the use of federal common law as a remedy for interstate pollution, however, in *City of Milwaukee v. Illinois*.[69] The State of Illinois asserted a federal common law nuisance claim against Wisconsin cities for dumping untreated sewage into Lake Michigan. The lower courts agreed that federal common law required the defendants to treat their sewage more stringently than compelled by the Clean Water Act, emphasizing

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63. 42 U.S.C. §§ 7604(e), 7412(d)(7), 7416 (2000).

64. *See, e.g.*, Her Majesty The Queen in Right of the Province of Ont. v. City of Detroit, 874 F.2d 332, 342–43 (6th Cir. 1989) (enabling Michigan state courts to both establish and enforce state emissions standards alongside the Clean Air Act); North Carolina *ex rel.* Cooper v. Tenn. Valley Auth., 439 F. Supp. 2d 486, 496–97 (W.D.N.C. 2006) (addressing direct state regulation of federal facilities for air pollution purposes); *In re* Methyl Tertiary Butyl Ether Prods. Liab. Litig., 341 F. Supp. 2d 386, 406, 409–11 (S.D.N.Y 2004) (allowing state tort claims on the grounds that the claims were aimed at controlling the behavior by the defendants rather than attempting to regulate the actual fuel products); Gutierrez v. Mobil Oil Corp., 798 F. Supp. 1280, 1281–82, 1284–85 (W.D. Tex. 1992) (reasoning that allowing the Clean Air Act to preempt state tort actions would prevent plaintiffs from recovering deserved compensatory relief); United States v. Atlantic–Richfield Co., 478 F. Supp. 1215, 1219–20 (D. Mont. 1979) (finding the Clean Air Act devoid of any intent to bar common law tort claims).

65. The Court has, however, ordered the EPA to take steps to regulate GHGs under the Clean Air Act, Massachusetts v. EPA, 127 S. Ct. 1438, 1463 (2007), and it has preempted California's regulatory efforts to control emissions from automobiles, Engine Mfrs. Ass'n v. S. Coast Air Quality Mgmt. Dist., 541 U.S. 246, 252, 255 (2004). The latter case is examined in Part IV.A.2, *infra*.

66. 33 U.S.C. §§ 1251, 1370 (2006).

67. 33 U.S.C. § 1251(a) (2006).

68. 33 U.S.C. §§ 1251(g), 1365(e), 1370 (2006).

69. City of Milwaukee v. Illinois (*Milwaukee II*), 451 U.S. 304, 317–19 (1981).

the expansive nature of the savings clause: "[N]othing in the section 'shall restrict any right which any person . . . may have under any statute or common law to seek enforcement of any effluent standard or limitation or to seek any other relief . . . .'"[70] The Supreme Court reversed. Despite the explicit savings clause, the Court believed that interstate pollution must be addressed by federal regulatory standards only, not federal common law.[71] The decision failed to give weight to either the plain language of the savings clause, which makes no distinction between federal and state rights but preserves *any* common law right, or to congressional intent to preserve all types of supplemental remedies to ensure accomplishment of statutory goals.[72] Rather than giving full effect to the statutory language, the Court articulated a myopic view that, in a case involving one state against polluters in another state, a presumption *in favor* of displacement of federal common law was consistent with the long-standing presumption *against* displacement of state common law.[73]

The foreclosure of federal common law to rectify harms caused by federally regulated activities makes the preservation of state common law all the more important. Subsequently, in *International Paper Co. v. Ouellette*, the Supreme Court confirmed that state common law was still a viable avenue for redressing interstate water pollution.[74] Once again, however, it read the savings clause narrowly in concluding that only the law of the source state (New York), not the affected state (Vermont), would be applied. The Court believed that this limitation was necessary to ensure that the regulatory decisions of the source state were respected, thereby ensuring that economically beneficial activities in one state would be impervious to complaints by other, often competing, states.[75]

The results in both *Illinois* and *International Paper* may seem like a simple and none-too-troubling choice of law issue rather than a federalism issue. Indeed, on remand in *International Paper*, the district court allowed Vermont's claims for both water and air pollution to go forward under New York

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70. Illinois v. City of Milwaukee, 599 F.2d 151, 163 (7th Cir. 1979) (quoting 33 U.S.C. § 1365(e) (2000)), *vacated*, 451 U.S. 304 (1981).

71. *Milwaukee II*, 451 U.S. at 319.

72. 33 U.S.C. § 1365(e) (2006); *see also* Glicksman, *supra* note 56, at 163, 179 n.331 (characterizing Justice Rehnquist's opinion as "unsupported speculation").

73. *Milwaukee II*, 451 U.S. at 316–17.

74. Int'l Paper Co. v. Ouellette, 479 U.S. 481, 497 (1987).

75. *Id.* at 496–97 (quoting Illinois v. City of Milwaukee (*Milwaukee III*), 731 F.2d 403, 414 (7th Cir. 1984)).

common law,[76] and the paper mill was required to pay a $5 million settlement and establish a trust fund for environmental projects in the area.[77] But the apparent proclivity *in favor of* preemption demonstrated by these two cases improperly imposes the burden of showing Congress's intent to preserve state remedies on the party arguing *against* preemption, which runs counter to the long-standing presumption against preemption as well as Congress's overarching goals of eliminating water pollution and maintaining the states' ability to impose more stringent requirements to effectuate that goal.[78]

Preemption has also been asserted to shield polluters from liability for oil spills in interstate waters, but state law remedies have been preserved. The most significant oil spill case arose out of the 1989 wreck of the *Exxon Valdez* near the Alaska coast.[79] The wreck and the resulting public outcry prompted Congress to enact the Oil Pollution Act of 1990 (OPA).[80] The OPA integrated a mélange of provisions governing tanker vessels by imposing federal design requirements and penalties for spills.[81] Various bills related to oil spills had been considered prior to the passage of the OPA, but preemption had been a major sticking point.[82] In fact, preemption was discussed by the Senate Environment and Public Works Committee "more than any other single issue,"[83] and it was the primary point of contention between the Senate and the House of Representatives.[84] In the end, Congress preserved the states' ability to respond to oil spills through two savings clauses. The first is concerned with cleanup: "Nothing in

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76. Ouellette v. Int'l Paper Co., 666 F. Supp. 58, 62 (D. Vt. 1987).

77. Klass, *supra* note 19, at 565.

78. *See* Richard E. Levy & Robert L. Glicksman, *Judicial Activism and Restraint in the Supreme Court's Environmental Law Decisions*, 42 VAND. L. REV. 343, 401–02 (1989) (dissecting the Court's rationale for undermining the presumption against preemption). The presumption is described at *supra* notes 20–25 and accompanying text.

79. *See* Exxon Shipping Co. v. Baker, 128 S. Ct. 2605, 2611 (2008).

80. 33 U.S.C. §§ 2701–2761 (2006).

81. In particular, the OPA amended the Comprehensive Emergency Response, Compensation and Liability Act (CERCLA), 42 U.S.C. § 9607 (2000), and the Clean Water Act, 33 U.S.C. § 1321 (2006).

82. Craig H. Allen, *Federalism in the Era of International Standards: Federal and State Government Regulation of Merchant Vessels in the United States (Part II)*, 29 J. MAR. L. & COM. 565, 607–08 (1998).

83. S. REP. NO. 101-94, at 17 (1989); *see also* Russell V. Randle, *The Oil Pollution Act of 1990: Its Provisions, Intent, and Effects*, 21 ENVTL. L. REP. 10,119, 10,133 (1991).

84. Randle, *supra* note 83, at 10,133; *see also* Walter B. Jones, *Oil Spill Compensation and Liability Legislation: When Good Things Don't Happen to Good Bills*, 19 ENVTL. L. REP. 10,333 (1989) (noting that various House versions would have preempted state law entirely).

this Act . . . shall . . . be construed . . . as preempting[ ] the authority of any State . . . from imposing any additional liability or requirements with respect to the discharge of oil . . . or any removal activities in connection with such a discharge."[85] The second relates to liability and penalties:

> Nothing in this Act . . . shall in any way affect, or be construed to affect, the authority of the United States or any State . . . to impose additional liability or additional requirements; or to impose, or to determine the amount of, any fine or penalty . . . for any violation of law; relating to the discharge, or substantial threat of a discharge, of oil.[86]

Since 1990, the federal courts have generally found that the OPA does not preempt tort claims for damages to fisheries, oyster beds, water fowl, and other natural resources affected by oil spills.[87]

As for the *Exxon Valdez*, after months of trial, a jury awarded billions of dollars in compensatory and punitive damages under Alaska law to fishermen and landowners injured by the oil spill.[88] Because the OPA does not apply retroactively to pre-1990 spills, Exxon invoked the Clean Water Act and federal admiralty law in an attempt to preempt common law damages awards.[89] In rejecting these contentions, the U.S. Court of Appeals for the Ninth Circuit gave weight to the Clean Water Act's savings clause, and reasoned that the absence of a federal private right of action could more reasonably be construed as leaving private claims intact than as implicitly destroying them.[90]

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85. 33 U.S.C. § 2718(a) (2006).

86. 33 U.S.C. § 2718(c) (2006).

87. *See, e.g.*, Clausen v. M/V New Carissa, 171 F. Supp. 2d 1127, 1133 (D. Or. 2001) (oyster beds); Williams v. Potomac Elec. Power Co., 115 F. Supp. 2d 561, 565 (D. Md. 2000) (damage to land adjacent to river); Dostie Dev., Inc. v. Arctic Peace Shipping Co., No. 95-808-CIV-J-MMP, 1996 WL 866119, at *3 (M.D. Fla. Aug. 14, 1996) (damage to land adjacent to river); *cf.* Nat'l Shipping Co. of Saudi Arabia v. Moran Mid-Atl. Corp., 924 F. Supp. 1436, 1446–48 (E.D. Va. 1996), *aff'd*, 122 F.3d 1062 (4th Cir. 1997) (per curiam), *cert. denied*, 523 U.S. 1021 (1998) (rejecting plaintiff's argument that the OPA allowed recovery in excess of the statutory limit and concluding that the OPA preserves state law claims for those damaged by the spill but not for other responsible parties seeking contribution claims from third parties).

88. *In re* Exxon Valdez, 270 F.3d 1215, 1225 (9th Cir. 2001), *vacated sub nom.* Exxon Shipping Co. v. Baker, 128 S. Ct. 2605 (2008). For arguments that the punitive damages award against Exxon was appropriate and necessary, see Alexandra Klass & Sandra Zellmer, *Exxon Should Just Pay Its Penance*, MINNEAPOLIS STAR TRIB., Feb. 29, 2008; Posting of Alexandra Klass & Sandra Zellmer, *Fishermen are Entitled to Punitive Damages from Exxon*, to American Constitution Society Blog, http://www.acsblog.org/guest-bloggers-fishermen-are-entitled-to-punitive-damages-from-exxon.html (Feb. 27, 2008, 11:06 AM).

89. *Exxon Valdez*, 270 F.3d at 1226, 1228.

90. *Id.* at 1231.

The Supreme Court affirmed, but reduced the amount of punitive damages under federal maritime law.[91]

Exxon and other members of the petrochemical industry played a major role in seeking federal preemption under another environmental cleanup statute, the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA or Superfund).[92] After years of opposing a federal cleanup program, the industry ultimately supported CERCLA, largely out of a desire to preempt non-uniform and increasingly rigorous state requirements.[93] Shortly after enactment, the Rehnquist Court concluded that CERCLA preempted state taxation intended to pay for hazardous waste cleanup, based on its perception that Congress wished to avoid "the potentially adverse effects of overtaxation on the competitiveness of the American petrochemical industry."[94] In response to states' concerns, however, Congress overturned the Court's holding in the Superfund Amendments and Reauthorization Act of 1986.[95] The Senate Report explained that the amendments were intended "to remove a potential barrier to the creation of State superfund programs" and to stimulate "the number and pace of hazardous substance response actions undertaken or partially funded by States."[96] Taking their cue from the 1986 amendments, most federal appellate courts have found that Congress did not intend for CERCLA to occupy the field of hazardous waste cleanup or otherwise prevent states from supplementing federal cleanup requirements with either regulatory or common law responses.[97]

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91. *Exxon Shipping Co.*, 128 S. Ct. at 2633–34. The Court reduced the award from $2.5 billion to $500 million to reflect a one-to-one ratio between punitive and compensatory damages. According to Professor Benjamin Zipursky, "The case reflects a combination of the court's pro-business willingness to cut punitive damages quite sharply, its disinclination to spare Exxon all punitive damages in today's political environment, and its occasional capacity to resolve disagreement by striking a bargain." Warren Richey, *High Court Slashes Exxon Valdez Oil Spill Damages*, CHRISTIAN SCI. MONITOR, June 26, 2008, at 10.

92. 42 U.S.C. §§ 9601–9675 (2000).

93. J.R. DeShazo & Jody Freeman, *Timing and Form of Federal Regulation: The Case of Climate Change*, 155 U. PA. L. REV. 1499, 1508 n.22 (2007).

94. Exxon Corp. v. Hunt, 475 U.S. 355, 371–72 (1986).

95. Superfund Amendments and Reauthorization Act of 1986, Pub. L. No. 99-499, § 114, 100 Stat. 1613, 1652 (1986) (codified at 42 U.S.C. § 9614 (2000)); *see also* Manor Care, Inc. v. Yaskin, 950 F.2d 122, 125–26 (3d Cir. 1991) (citing the 1986 amendments in holding that CERCLA does not preempt the New Jersey Spill Act, which required a responsible party to pay for the state's share of cleanup costs). The *Manor Care* opinion was written by Justice Samuel Alito, then an appellate judge on the U.S. Court of Appeals for the Third Circuit.

96. S. REP. NO. 99-11, at 59–60 (1985).

97. *See, e.g.*, Fireman's Fund Ins. Co. v. City of Lodi, 302 F.3d 928, 941–43 (9th Cir.

As for common law claims, CERCLA expressly provides that "[n]othing in this chapter shall affect or modify in any way the obligations or liabilities of any person under other Federal or State law, including common law, with respect to releases of hazardous substances or other pollutants or contaminants."[98] The statute does, however, prevent double recovery by precluding plaintiffs from recovering damages under both CERCLA and state law.[99]

2. *Nuclear Plants*. In a case that gained notoriety from the movie Silkwood,[100] Karen Silkwood's estate sought recovery for injuries caused by her exposure to plutonium while working at Kerr–McGee's federally licensed nuclear plant.[101] In its 1984 opinion, the Burger Court, in a 5–4 opinion with Rehnquist in the majority, rejected Kerr–McGee's argument that state-authorized awards of punitive damages should be preempted because they would punish conduct related to radiation hazards, an area within the exclusive domain of the Atomic Energy Act (AEA).[102]

2002) (finding that CERCLA's savings clause granted supplemental powers to both states and smaller communities); PMC, Inc. v. Sherwin–Williams Co., 151 F.3d 610, 617–18 (7th Cir. 1998) (noting that CERCLA was not intended to prevent state common law claims); Bedford Affiliates v. Sills, 156 F.3d 416, 426–27 (2d Cir. 1998) (determining that while supplemental cleanup measures are allowable, state law restitution and indemnification claims conflict with and are thus preempted by CERCLA); United States v. Akzo Coatings of Am., Inc., 949 F.2d 1409, 1455 (6th Cir. 1991) (noting that Congress contemplated the existence of state environmental laws alongside federal environmental laws); *Manor Care*, 950 F.2d at 125–26 (examining amendments to CERCLA to determine that Congress had no intention of barring state supplementation of federal hazardous waste cleanup). *But see infra* note 99 (discussing New Mexico v. Gen. Elec. Co., 467 F.3d 1223 (10th Cir. 2006)).

98. 42 U.S.C. § 9652(d) (2000).

99. 42 U.S.C. § 9614(b) (2000). The Tenth Circuit expressed concerns about double recovery in holding that a state's public nuisance and negligence claims for damages for groundwater contamination conflicted with, and thus were preempted by, CERCLA. New Mexico v. Gen. Elec. Co., 467 F.3d 1223, 1246, 1248 (10th Cir. 2006). The court recognized, "Given the[ ] saving clauses, as well as the spirit of cooperative federalism . . . Congress did not intend CERCLA to completely preempt state laws related to hazardous waste contamination." *Id.* at 1244, 1246. Even though Congress did not intend "to wipe out people's rights inadvertently, with the possible consequence of making the intended beneficiaries of the legislation worse off than before it was enacted," the court held that nuisance and negligence claims conflicted with statutory provisions for natural resource damages. *Id.* at 1247. Notably, the decision does not preclude claims for residual damage or loss of use that are limited to restoration and replacement of natural resources if an ongoing CERCLA remedy does not address the contaminant or injury at issue. James G. Derouin et al., *Recent Tenth Circuit Decision on Natural Resource Damages is a Mixed Bag*, ABA ENVTL. LIT. & TOXIC TORTS COMMITTEE NEWSL., Apr. 2007, at 16, 18.

100. *See* SILKWOOD (ABC Motion Pictures 1983).

101. Silkwood v. Kerr–McGee Corp., 464 U.S. 238, 241–43 (1984).

102. *Id.* at 249; *see also* 42 U.S.C. § 2021(c)(4) (2000) (giving the Commission exclusive regulatory power over "the disposal of such . . . nuclear material as the

Congress gave the relationship between federal and state law close attention in the debates preceding passage of the AEA, and it ultimately adopted a pervasive federal regulatory scheme to ensure the safe operation of nuclear plants.[103] Accordingly, the Act preempted state safety laws but explicitly preserved other state regulatory authorities in two separate savings clauses.[104] Although neither of these clauses applies directly to common law claims, subsequent statutory amendments in the Price–Anderson Act more clearly evidenced the intent *not* to displace state tort law by placing a cap on liability for nuclear meltdowns.[105]

While noting that none of these provisions offered a definitive resolution to Kerr–McGee's preemption challenge, the Supreme Court looked to them nonetheless as evidence of congressional intent to preserve state tort remedies, including Silkwood's punitive damage award.[106] Not only was there no "irreconcilable conflict" between the federal and state requirements, the Court concluded that preemption of common law remedies would be especially inappropriate given that no federal remedies existed for persons injured by radiation exposure.[107]

In the years following the *Silkwood* opinion, the Rehnquist Court reaffirmed its holding by allowing workers' compensation claims and tort claims for retaliation and intentional infliction of emotional distress against nuclear power plants.[108] These opinions demonstrate that state tort remedies continue to play a viable role even in areas subject to comprehensive federal regulation, such as nuclear power.

Commission determines . . . should, because of the hazards or potential hazards thereof, not be so disposed of without a license from the Commission").

103. Pac. Gas & Elec. Co. v. State Energy Res. Conservation & Dev. Comm'n, 461 U.S. 190, 204–08, 211 (1983).

104. *See infra* notes 250–53 and accompanying text (discussing 42 U.S.C. §§ 2018, 2021(k)).

105. Atomic Energy Act of 1954, Pub. L. No. 85-256, 71 Stat. 576, 576 (1957) (codified as amended in 42 U.S.C. § 2012 (2000)).

106. *Silkwood*, 464 U.S. at 251–52, 256.

107. *Id.* at 251, 256.

108. *See* English v. Gen. Elec. Co., 496 U.S. 72, 80, 83–86 (1990) (finding that a claim for intentional infliction of emotional distress fell outside of the preempted field of nuclear regulation); Goodyear Atomic Corp. v. Miller, 486 U.S. 174, 183–84, 186 (1988) (allowing workers compensation claims for workers at federal facilities). In *El Paso Natural Gas Co. v. Neztsosie*, 526 U.S. 473, 487–88 (1999), however, the Supreme Court remanded for a determination whether claims for personal injury and wrongful death brought by uranium miners in Navajo Tribal Court constituted "public liability action[s] arising out of or resulting from a nuclear incident" so as to be subject to the Price–Anderson Act, 42 U.S.C. § 2210(n)(2) (2000), which does not preempt such claims but caps them and provides for their removal to federal court.

B. Workplaces

One of the few areas where savings clauses are consistently given full effect involves tort claims arising from workplace hazards. Congress was motivated to pass the Occupational Safety and Health Act of 1970 in response to a veritable "epidemic of industrial injuries and deaths."[109] While debating the bill, congressional members observed that more Americans died at work in a span of just four years than in Vietnam in a decade.[110] The purpose of the Act is to provide "safe and healthful working conditions."[111] To accomplish this goal, Congress authorized the Secretary of Labor, through the Occupational Safety and Health Administration (OSHA), to promulgate and enforce health and safety standards for workplaces.[112] Employers are required to comply with the standards as well as a generalized duty to provide a workplace "free from recognized hazards that are causing or are likely to cause death or serious physical harm."[113]

Since its creation, OSHA has been the subject of criticism from both sides of the aisle.[114] Employers complain that OSHA's regulations are too expensive and too intrusive, while advocates of workplace safety argue that the agency's standards and enforcement efforts are far too weak.[115] To fill the enforcement gap, local prosecutors and injured workers have stepped in, filing lawsuits under state law for industrial injuries and deaths.[116]

Like most federal health and welfare statutes, the Act is designed to prevent injuries rather than to compensate victims for harm.[117] Accordingly, Congress explicitly saved common law and statutory rights to ensure redress: "Nothing . . . shall be construed . . . to enlarge or diminish or affect in any other manner the common law or statutory rights, duties, or liabilities of employers and employees under any law with respect to injuries, diseases, or death of employees arising out of, or in the course of, employment."[118]

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109. Note, *Getting Away with Murder: Federal OSHA Preemption of State Criminal Prosecutions for Industrial Accidents*, 101 HARV. L. REV. 535, 537 (1987).

110. *Id.* at 537 n.14

111. 29 U.S.C. § 651(b) (2006).

112. 29 U.S.C. § 655 (2006).

113. 29 U.S.C. § 654(a) (2006).

114. *Getting Away with Murder*, *supra* note 109, at 539.

115. *Id.*

116. *Id.* at 540.

117. 29 U.S.C. § 651(b) (2006).

118. 29 U.S.C. § 653(b)(4) (2006).

In light of the savings clause and Congress's broad remedial purpose, federal courts have generally found that tort claims arising out of workplace injuries are not preempted.[119] One court, in allowing tort claims by workers injured by welding fumes, observed that "no other enactment contains a savings clause more broad," plainly evidencing Congress's intent to leave common law liabilities "absolutely unchanged."[120] The Supreme Court has not had occasion to issue a ruling on the matter, but it has noted that, due to the statutory savings clause, compliance with OSHA standards is no defense to state tort or criminal liabilities.[121]

C. Products Liability

1. Medical Devices, Drugs, and Practices. State common law remedies for harms caused by drugs and medical devices have been the subject of some of the fiercest preemption battles before the Supreme Court.[122] Savings clauses have played a role in nearly every dispute. In one case, the *absence* of a savings clause left the Supreme Court free to deny a remedy for wrongful

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119. *See, e.g.*, Lindsey v. Caterpillar, Inc., 480 F.3d 202, 207, 211 (3d Cir. 2007) (finding that OSHA's focus on the health and safety of workers does not preempt state law tort claims asserted on behalf of deceased workers); Pedraza v. Shell Oil Co., 942 F.2d 48, 50–53 (1st Cir. 1991) (noting that while OSHA does not create private rights of action, neither does it preempt private tort actions), *cert. denied*, 502 U.S. 1082 (1991); Nat'l Solid Wastes Mgmt. Ass'n. v. Killian, 918 F.2d 671, 677, 684 (7th Cir. 1990) (holding that while state laws regulating workplace health and safety are preempted by OSHA, state laws regulating public health and safety would not necessarily be preempted); Pratico v. Portland Terminal Co., 783 F.2d 255, 266–67 (1st Cir. 1985) (allowing violations of OSHA to be considered as evidence of negligence per se); *In re* Welding Fume Prods. Liab. Litig., 364 F. Supp. 2d 669, 685 (N.D. Ohio 2005) (finding that state failure to warn claims are not preempted by OSHA); Barrientos v. UT–Battelle, LLC, 284 F. Supp. 2d 908, 915–16 (S.D. Ohio 2003) (relying on OSHA's savings clause to find no preemption of state tort claims); *see also* Sakellaridis v. Polar Air Cargo, Inc., 104 F. Supp. 2d 160, 164 (E.D.N.Y. 2000) ("The savings clause plainly states that workers' statutory remedies for personal injuries are preserved" regardless of whether the duty of care stems from "common law, a separate statutory scheme, or an administrative scheme"). *But see* ConocoPhillips Co. v. Henry, 520 F. Supp. 2d 1282, 1330, 1340 (N.D. Okla. 2007) (holding that OSHA's requirement that employers provide workplaces free of serious hazards implicitly preempted a state statute barring property owners from prohibiting storage of firearms in vehicles located on the premises because the presence of weapons could obstruct the employer's duty to protect employees).

120. *Welding Fume Prods. Liab. Litig.*, 364 F. Supp. 2d at 687–88.

121. Int'l Union, United Auto., Aerospace & Agric. Implement Workers of America, UAW v. Johnson Controls, Inc., 499 U.S. 187, 214 (1991). For the Court's treatment of state regulation of the workplace, see *infra* Part IV.B.

122. *See* Robert Barnes, *Supreme Court Shields Medical-Device Makers*, WASH. POST, Feb. 21, 2008, at D1 (reporting on reactions to the Supreme Court's decision in *Medtronic, Inc. v. Lohr*). *See generally* Sharkey, *supra* note 23 (examining preemption in the context of products liability).

death caused by one of the most addictive and dangerous drugs on the market: cigarettes.[123]

Tobacco use, according to the Court, "poses perhaps the single most significant threat to public health in the United States."[124] Rather than seeking the assistance of federal agencies and states to protect consumers, however, since the nation's founding, Congress has jealously guarded congressional oversight and protection of commerce in tobacco.[125] In *Cipollone v. Liggett Group, Inc.*, the Court took note of the near-exclusive congressional prerogative over tobacco products in its decision to shield tobacco companies from failure-to-warn claims brought by injured smokers and their families.[126]

Cipollone, whose mother died of lung cancer, alleged that the tobacco companies failed to provide adequate warnings about the risks of smoking, expressly warranted that their products were safe for consumer use, and conspired to conceal medical evidence about smoking risks. The companies' defense turned on the Public Health Cigarette Smoking Act, which was intended both to warn the public of the hazards of smoking and to protect the economic interests of tobacco companies by imposing uniform cigarette labeling and advertising requirements.[127]

The Act provided that, other than statements or labeling required by the Act, "[n]o requirement or prohibition based on smoking and health shall be imposed under State law with respect to the advertising or promotion of any cigarettes."[128] The Court of Appeals found that tort claims related to warnings or advertisements were not expressly preempted but rather were impliedly preempted because they would conflict with federal objectives by upsetting Congress's "carefully drawn balance between the purposes of warning the public of the hazards of

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123. Cipollone v. Liggett Group, Inc., 505 U.S. 504, 508–10, 522 (1992). Although the Court determined that tobacco products are not a "drug" regulated by the FDA under federal law, *see* FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 131–33 (2000), the common meaning of the term—"A chemical substance, such as a narcotic, that affects the central nervous system, causing changes in behavior and often addiction," AMERICAN HERITAGE DICTIONARY 431 (4th College ed. 2002)—certainly reaches cigarettes.

124. Lorillard Tobacco Co. v. Reilly, 533 U.S. 525, 570 (2001) (quoting *Brown & Williamson Tobacco*, 529 U.S. at 161).

125. *See Brown & Williamson Tobacco*, 529 U.S. at 159–60 ("Owing to its unique place in American history and society . . . Congress, for better or for worse, has created a distinct regulatory scheme for tobacco products . . . ."). Congress has "repeatedly acted to preclude any agency from exercising significant policymaking authority" over tobacco products, including the FDA. *Id.* at 160.

126. *Cipollone*, 505 U.S. at 516–20.

127. Public Health Cigarette Smoking Act of 1969, Pub. L. No. 91-222, § 2, 84 Stat. 87, 87 (1970) (codified as amended at 15 U.S.C. § 1331 (2006)).

128. 15 U.S.C. § 1334 (2006).

cigarette smoking and protecting the interests of national economy."[129] The Rehnquist Court affirmed, but on express preemption grounds, construing the phrase "requirement or prohibition" as "easily" encompassing tort actions because "regulation can be as effectively exerted through an award of damages as through some form of preventive relief."[130]

The Court's conclusion that the Act expressly preempted all claims related to omissions or inclusions in cigarette advertising represents a marked departure from *Silkwood*.[131] A key distinction was that, unlike the AEA and most other federal health and welfare statutes, tobacco has been a predominantly federal, rather than state, concern. Accordingly, the Cigarette Smoking Act included no savings clause. Absent a savings clause, it was easier for the *Cipollone* Court to infer that Congress was indifferent about leaving injured plaintiffs with no remedy. Although a few courts recognized this distinction, a trend quickly emerged in the lower courts to construe *Cipollone* as requiring an expansive reading of preemption clauses, regardless of the presence of a savings clause in the statute under consideration.[132]

Just a few years after *Cipollone*, the Rehnquist Court assumed a more nuanced approach in a preemption case involving the Medical Device Act (MDA), a statute with both a savings clause and a preemption clause.[133] Prior to its enactment in 1976, the regulation of new medical devices was left largely to the states.[134] However, as complex devices proliferated and some, like the Dalkon Shield, failed and caused widespread harm, Congress deemed it appropriate to require uniform premarket approval processes.[135]

Medtronic, Inc. v. Lohr involved negligence and strict liability claims against the manufacturer of a pacemaker that

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129. Cipollone v. Liggett Group, Inc., 789 F.2d 181, 187 (3d Cir. 1986); *cf. Brown & Williamson Tobacco*, 529 U.S. at 159–61 (holding that the Food and Drug Administration lacks authority to regulate tobacco products and that Congress's express policy of protecting commerce in tobacco to the maximum extent reveals its intent that tobacco products remain on the market).

130. *Cipollone*, 505 U.S. at 521.

131. *See* Richard C. Ausness, *Preemption of State Tort Law by Federal Safety Statutes: Supreme Court Preemption Jurisprudence Since* Cipollone, 92 KY. L.J. 913, 939 (2004) (examining the Court's shift from *Silkwood* to *Cipollone*); *supra* notes 101–07 and accompanying text (discussing *Silkwood*).

132. Betsy J. Grey, *Make Congress Speak Clearly: Federal Preemption of State Tort Remedies*, 77 B.U. L. REV. 559, 582 (1997); *infra* note 232 and accompanying text.

133. 21 U.S.C. §§ 360h(d), 360k(a) (2006).

134. Riegel v. Medtronic, Inc., 128 S. Ct. 999, 1002 (2008).

135. *Id.* at 1003–04.

failed.[136] Like the Cigarette Smoking Act, the Medical Device Act specifies that "no State . . . may establish . . . *any requirement* which is different from, or in addition to, any requirement . . . which relates to the safety or effectiveness of the device."[137] The Court reasoned that the word "requirement," as used in the Medical Device Act, entailed the imposition of a specific, positive duty on the manufacturer and therefore did not preempt common law claims.[138] It acknowledged that *Cipollone* held that the Cigarette Smoking Act's preemption of state "requirements" included tort claims, but found that Act distinguishable because it preempted only a limited set of claims—those related to advertising or promotion.[139] In contrast, according to the Court, a sweeping interpretation of the phrase "any requirement" as used in the Medical Device Act "would require far greater interference with state legal remedies, producing a serious intrusion into state sovereignty while simultaneously wiping out the possibility of remedy for . . . injuries."[140]

The Medical Device Act is distinct from the Cigarette Smoking Act in another important way. It includes a savings clause for liabilities related to devices recalled for posing unreasonable risks of harm.[141] Although this clause was not strictly applicable to the pacemaker at issue in *Lohr*, the Court of Appeals viewed it as evidence of congressional intent to preserve common law remedies.[142] The Supreme Court agreed that, "To the extent that Congress was concerned about protecting the industry . . . any such concern was far outweighed by concerns about the primary issue motivating . . . enactment: the safety of those who use medical devices."[143] Yet it completely ignored the savings clause, which would have lent support to this conclusion.

Because the *Lohr* pacemaker had not been subject to a specific Food and Drug Administration (FDA) regulation—it evaded the approval process by being "substantially equivalent"

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136. Medtronic, Inc. v. Lohr, 518 U.S. 470, 480–81 (1996). Plaintiffs brought both a negligence count, alleging a breach of "duty to use reasonable care in the design, manufacture, assembly, and sale" of the device and a failure to warn the plaintiff or her physicians of the pacemaker's tendency to fail, and a strict liability count, alleging that the pacemaker was "in a defective condition and unreasonably dangerous to foreseeable users at the time of its sale." *Id.* at 481 (citations omitted).

137. 21 U.S.C. § 360k(a) (2006) (emphasis added).

138. *Lohr*, 518 U.S. at 487–89.

139. *Id.* at 488.

140. *Id.* at 488–89.

141. 21 U.S.C. § 360h(d) (2006).

142. Lohr v. Medtronic, Inc., 56 F.3d 1335, 1342 (11th Cir. 1995).

143. *Lohr*, 518 U.S. at 490–91.

to a previously permitted device[144]—some lower courts distinguished the Supreme Court's opinion and found preemption in cases involving devices that had received direct approval.[145] The Court itself noted that the outcome in *Lohr* would have been less certain if the FDA had given specific approval of the pacemaker's design.[146] Conversely, other courts have concluded that premarket approval did not impose federal "requirements" because the *manufacturer*, not the FDA, selected the design, manufacturing, and labeling specifications. "So long as the statutory standards are met, the FDA must approve the device."[147] In other words, the FDA is not authorized "to determine whether the device's design or performance is optimal," or whether it is safer than devices already on the market.[148] FDA requirements therefore "create a floor, not a ceiling, for state regulation."[149] Moreover, a liability finding would not *require* the manufacturer to redesign its product but only to pay a judgment in favor of the injured party. While the manufacturer might choose to take measures to avoid recurring problems, it might instead do nothing, particularly if it believes "that the adverse ruling is simply an aberration or that the likelihood of recurrence is too remote to justify any change in the [device]."[150]

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144. *Id.* at 493.

145. *See, e.g.*, Horn v. Thoratec Corp., 376 F.3d 163, 167, 176, 179–80 (3d Cir. 2004) (holding that the FDA's issuance of HeartMate's premarket approval imposed "requirements" on the manufacturer, and that tort claims "would impose substantive requirements on [the manufacturer] that would conflict with, or add to, the requirements imposed by the FDA involved in the design, manufacturing, fabrication and labeling" of the device); Brooks v. Howmedica, Inc., 273 F.3d 785, 795 (8th Cir. 2001) (distinguishing between the premarket approval in *Lohr* and the close FDA scrutiny applied to the device in question); Martin v. Medtronic, Inc., 254 F.3d 573, 584 (5th Cir. 2001) (interpreting *Lohr*).

146. *See Lohr*, 518 U.S. at 498 (citing an FDA regulation that provided that state requirements are preempted "'only' when the FDA has established 'specific counterpart regulations or . . . other specific requirements applicable to a particular device.' 21 C.F.R. § 808.1(d) (1995)").

147. David C. Vladeck, *Preemption and Regulatory Failure Risks*, *in* PREEMPTION CHOICE: THE THEORY, LAW, AND REALITY OF FEDERALISM'S CORE QUESTION, *supra* note 37, at 54, 62; *see also In re* Guidant Corp. Implantable Defibrillators Prods. Liab. Litig., No. 06-25, 2007 U.S. Dist. LEXIS 42765, at *19 n.6 (D. Minn. June 12, 2007) (noting that FDA approval of medical devices cannot necessarily be used as a complete liability shield); *In re* Medtronic, Inc., Implantable Defibrillators Litig., 465 F. Supp. 2d 886, 894–96 (D. Minn. 2006) (noting that state law tort claims may provide parallel restrictions on medical devices, rather than additional restrictions). For details on the premarket approval process, see 21 U.S.C. § 360e(d) (2006).

148. Vladeck, *supra* note 147, at 61–62.

149. Levine v. Wyeth, 944 A.2d 179, 184 (Vt. 2006), *cert. granted*, 128 S. Ct. 1118 (2008).

150. Vladeck, *supra* note 147, at 62; *see also Levine*, 944 A.2d at 188–89 (holding that

The MDA is a licensing statute designed to promote the manufacture and marketing of medical devices by balancing the desire for effective, widely available devices with the need for patients' safety;[151] thus, the latter line of cases seems more in line with congressional intent to preserve both common law remedies for victims of unsafe devices and the states' abilities to provide recourse in specific cases where the devices are not effective or safe.[152] In 2008, however, the Roberts Court reviewed another medical device case, *Riegel*, and concluded in an 8–1 decision that tort claims relating to the failure of a catheter specifically approved by the FDA are indeed preempted as imposing additional "requirements" on manufacturers.[153] Writing for the Court, Justice Scalia found that allowing state juries to impose liability on the manufacturer of an approved device "disrupts the federal scheme," which grants the FDA authority to evaluate the risks and benefits of a new device through its premarket approval processes.[154] The device in question, a balloon catheter that burst during its use in an angioplasty, had received premarket approval from the FDA.[155] This distinguished the catheter from the pacemaker at issue in *Lohr*, which had been grandfathered as an equivalent device that preexisted the statutory requirements and was therefore subject to "generic concerns about device regulation generally."[156] For the *Lohr* pacemaker, the FDA had determined only that the device was equivalent to an approved device, not that it was necessarily safe.[157] The Court drew a sharp distinction between equivalency review and premarket approval, noting that the FDA is authorized to provide premarket approval only when the device offers a reasonable assurance of safety, and once approval is

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prescription drug labeling judgments imposed on manufacturers by the FDA do not preempt state law product liability claims, as the label's compliance with FDA requirements did not establish the adequacy of the warning or prevent the manufacturer from strengthening the warning to prevent harm to consumers).

151. *See* 21 U.S.C. § 360h (2006) (limiting FDA recall authority to devices that present "an unreasonable risk of substantial harm to the public health").

152. *See* Vladeck, *supra* note 56, at 127 ("[T]he MDA is not designed to optimize public health. It is a licensing statute that trades off public health imperatives for the benefit of medical device manufacturers."); *id.* at 130 (arguing that the MDA, FIFRA, the Motor Vehicle Safety Act, and the Boat Safety Act all "embody trade-offs between public health concerns and the need to ensure a competitive marketplace that rewards innovation and quality. None of [the] statutes . . . imposes a discipline on the marketplace sufficient to ensure a reasonable margin of safety . . . .").

153. Riegel v. Medtronic, Inc., 128 S. Ct. 999, 1005, 1008 (2008).

154. *Id.* at 1008.

155. *Id.* at 1004–05 (discussing 21 U.S.C. § 360e(d) (2006)).

156. *Id.* at 1006–07 (quoting Medtronic, Inc. v. Lohr, 518 U.S. 470, 501 (1996)).

157. *Id.* at 1007.

given, the device must be manufactured with virtually "no deviations from the specifications in its approval application, for the reason that the FDA has determined that the approved form provides a reasonable assurance of safety and effectiveness."[158] This distinction, along with the statutory requirements for postapproval disclosure by industry coupled with the FDA's duty to withdraw approval for devices that turn out to be unsafe or ineffective,[159] convinced the Court that premarket regulatory approvals constituted "requirements" that therefore preempted any "duties" imposed by state common law.[160]

This holding, standing alone, has relatively limited impact on potential tort claims aimed at harmful devices because the "rigorous regime" of premarket approval is required only for a limited number of new Class III devices.[161] Only thirty-two Class III devices required premarket approval in 2005, while 3,148 Class III devices were approved as substantial equivalents, like the *Lohr* pacemaker.[162] By comparison, Class I and Class II devices, such as bandages, surgical gloves, and wheelchairs, are subject to far less rigorous controls.[163]

Arguably, if the Court had stopped there, the case would be rather unremarkable. The remainder of the opinion, however, poses far-reaching concerns for all tort claims related to federally regulated products. First, in a departure from *Lohr*, the Court construed the term "requirements," as used in the MDA and many other statutory preemption provisions, to include common law liabilities.[164] It relied heavily on *Cipollone* in reaching this conclusion:

> Absent other indication, reference to a State's "requirements" includes its common-law duties. As the

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158. *Id.* (citing 21 U.S.C. § 360e(d) (2006)).

159. *Id.* at 1005 (citing 21 U.S.C. §§ 360(i) (2006)) (requiring manufacturers to report any changes or problems with the product to the FDA); *see also* 21 U.S.C. § 360e(e)(1) (2006) (noting the FDA's duty to withdraw approval for devices that are later proven to be unsafe or ineffective); 21 U.S.C. § 360h(e) (2006) (granting the FDA the authority to recall devices on the market that are shown to be unsafe or ineffective).

160. *Riegel*, 128 S. Ct. at 1007–08 (addressing 21 U.S.C. § 360k(a) (2006)).

161. *Id.* at 1003–04. Premarket approval is required only for devices that have no "substantial equivalent" already on the market, *id.* at 1004, and that are "for a use in supporting or sustaining human life or for a use which is of substantial importance in preventing impairment of human health, or present[ ] a potential unreasonable risk of illness or injury," where a less stringent classification cannot provide reasonable assurances of safety and effectiveness. 21 U.S.C. § 360c(a)(1)(C)(ii) (2006).

162. *Riegel*, 128 S. Ct. at 1004.

163. *Id.* at 1003.

164. *Id.* at 1008; *see also supra* notes 136–40 and accompanying text (discussing *Lohr*'s construction of the term "requirements").

> plurality opinion said in *Cipollone*, common-law liability is "premised on the existence of a legal duty," and a tort judgment therefore establishes that the defendant has violated a state-law obligation. . . . [A] liability award "can be, indeed is designed to be, a potent method of governing conduct and controlling policy."[165]

Although the Court left open the possibility for some "other indication" to negate its sweeping interpretation of the term "requirements," it firmly rejected arguments that Congress had provided any such indication in the MDA.[166] Instead, it recited numerous concerns with jury verdicts that make it seem unlikely that common law tort claims could survive *any* statutory preemption clause that uses the term "requirements":

> State tort law that requires a manufacturer's catheters to be safer, but hence less effective, than the model the FDA has approved disrupts the federal scheme no less than state regulatory law to the same effect. Indeed, one would think that tort law, applied by juries under a negligence or strict liability standard, is *less* deserving of preservation. A state statute, or a regulation adopted by a state agency, could at least be expected to apply cost–benefit analysis similar to that applied by the experts at the FDA: How many more lives will be saved by a device which, along with its greater effectiveness, brings a greater risk of harm? A jury, on the other hand, sees only the cost of a more dangerous design, and is not concerned with its benefits; the patients who reaped those benefits are not represented in court.
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> . . . [T]he solicitude for those injured by FDA-approved devices . . . was overcome in Congress's estimation by solicitude for those who would suffer without new medical devices if juries were allowed to apply the tort law of 50 States to all innovations.[167]

The irony of the Court's conclusions regarding the disruptive nature of jury verdicts was not missed by Justice Ginsburg, who stated in dissent, "The Court's construction . . . has the 'perverse effect' of granting broad immunity 'to an entire industry that, in the judgment of Congress, needed *more* stringent regulation' . . . *not exemption* from liability in tort litigation."[168]

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165. *Riegel*, 128 S. Ct. at 1008 (citing Cipollone v. Liggett Group, 505 U.S. 504, 521–22 (1992)). The Court also cited *Bates v. Dow Agrosciences LLC*, 544 U.S. 431 (2005), described at *infra* notes 233–38 and accompanying text, in support of its reading of the term "requirements."

166. *Riegel*, 128 S. Ct. at 1008.

167. *Id.* at 1008–09 (emphasis added).

168. *Id.* at 1016 (Ginsburg, J., dissenting) (quoting Medtronic, Inc. v. Lohr, 518 U.S.

She noted a complete lack of evidence that, in passing the MDA, Congress believed state tort remedies impeded the development of medical devices.[169] If anything, Congress was aware that tort liability for injuries caused by defectively designed or labeled medical devices was a "domain historically occupied by state law" that ought not be displaced by federal legislation,[170] and intended the MDA only to preempt a hodgepodge of state regulatory systems of premarket approval.[171] Moreover, the lack of any provision for a federal compensatory remedy in the MDA provides further evidence that "Congress did not intend broadly to preempt state common-law suits."[172] As for the Court's strained interpretation of the ambiguous term "requirements," Justice Ginsburg pointed out that "[i]n the absence of legislative precision . . . courts ordinarily 'accept the reading that disfavors preemption.'"[173]

Both practical and equitable considerations support Justice Ginsburg's position. As noted above, the manufacturer, not the FDA, selects the device's design as well as its manufacturing and labeling features.[174] The FDA is not charged with deciding whether the device's design is optimal or even whether the device is safer or more effective than other existing devices.[175] So long as the statutory standards are met, the FDA must approve the device.[176] By awarding monetary damages in individual cases, juries, on the other hand, can respond to specific instances where a particular device was *not* safe and ends up harming the very person it was supposed to benefit: the patient.

As for the MDA's savings clauses, the Court gave only a passing, footnoted reference to them. Section 360k(b), which authorizes the FDA to exempt state "requirements" from preemption when states seek an exemption for "more stringent"

470, 487 (1996)) (emphasis added); *see also id.* at 1014 ("Congress enacted the MDA 'to provide for the safety and effectiveness of medical devices intended for human use'" in the wake of "[a] series of high profile medical device failures that caused extensive injuries and loss of life . . . ." (quoting Medical Device Amendments of 1976, Pub. L. No. 94-295, preamble, 90 Stat. 539, 539 (1976))).

169. *Id.* at 1012 (majority opinion).

170. *Id.* at 1013 (Ginsburg, J., dissenting).

171. *Id.* at 1013. California, for example, adopted a system of premarket approval for medical devices prior to 1976, when the federal government first engaged in premarket regulation. *Id.*

172. *Id.* at 1015 (citing Silkwood v. Kerr–McGee Corp., 464 U.S. 238, 251 (1984)).

173. *Id.* at 1014 (quoting Bates v. Dow Agrosciences LLC, 544 U.S. 431, 449 (2005)).

174. *See supra* notes 147–49 and accompanying text.

175. Brief for Senator Edward Kennedy and Representative Henry A. Waxman as Amici Curiae in Support of Petitioners at 18–19, *Riegel*, 128 S. Ct. 999 (No. 06-179).

176. *Riegel*, 128 S. Ct. at 1004 (majority opinion) (citing 21 U.S.C. § 360e(d) (2006)).

requirements or when state requirements are necessitated by "compelling local conditions," was construed as barely relevant in the statutory scheme because, according to the Court, it specifies "circumstances that would rarely be met for common-law duties."[177] Section 360h(d), which provides that compliance with certain FDA orders "shall not relieve any person from liability under Federal or State law,"[178] fared no better. The Court agreed that this provision means that some state-law claims, such as those raised in *Lohr*, are not preempted, but went on to state that Section 360h(d) "could not possibly mean that *all* state-law claims are not pre-empted, since that would deprive the MDA pre-emption clause of all content. And it provides no guidance as to which state-law claims are pre-empted and which are not."[179] In effect, the Court's interpretation eviscerated both savings clauses by allowing the preemption provision to trump them, at least as applied to medical devices. This resulted despite the presumption against preemption, which should have been applied in *Riegel* to clear up any ambiguities in favor of common law remedies.[180]

The FDA itself has taken contradictory positions on preemption over the years. In its amicus brief, it argued that Riegel's claim was preempted,[181] citing a regulatory provision that specifies that "the MDA sets forth a 'general rule' pre-empting state duties 'having the force and effect of law (whether established by statute, ordinance, regulation, *or court decision*).'"[182] A separate subsection of the same regulation, however, provides that "[s]tate or local requirements of general applicability . . . [applicable to other products] in addition to [medical] devices," such as provisions related to unfair trade practices or fire codes, are *not* preempted.[183] Adding to the confusion, in previous FDA briefs, advisory opinions, and a published statement regarding the *Lohr* decision, the FDA expressed its belief that "FDA product approval and state tort

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177. *Id.* at 1008 n.4.

178. 21 U.S.C. § 360h(d) (2006).

179. *Riegel*, 128 S. Ct. at 1008 n.4.

180. *See id.* at 1016 n.9 (Ginsburg, J., dissenting) ("[T]he perceived lack of 'guidance' [in Section 360h(d)] should cut against Medtronic, not in its favor.").

181. *Id.* at 1016 n.8 (citing Brief for United States as Amicus Curiae at 16–24, *Riegel*, 128 S. Ct. 999 (No. 06-179)).

182. *Id.* at 1010 (majority opinion) (citing Exemptions from Federal Preemption of State and Local Medical Device Requirements, 21 C.F.R. § 808.1(b) (1993)).

183. 21 C.F.R. § 808.1(d)(1) (1993). The Court found that this subsection, which was discussed in the *Lohr* case, *see supra* note 146, was limited to those requirements that relate only incidentally to medical devices, not general tort duties of care. *Riegel*, 128 S. Ct. at 1010.

liability usually operate independently, each providing a significant, yet distinct, layer of consumer protection."[184] In *Riegel*, the Roberts Court concluded that it need not rely on the agency's interpretation of the MDA's preemption and savings clauses, however, because it found the statutory language unambiguous.[185]

In the end, the Court conceded only that states could continue to provide common law remedies for "parallel" state law claims premised on a violation of FDA regulations.[186] However, this concession provides little solace for patients like Mr. Riegel who are injured by devices that are approved by the FDA but nonetheless prove unsafe.[187] While the FDA may order a manufacturer to repair, replace, refund, or even recall a dangerous device, such action may not occur until after patients are injured.[188] Congress was surely aware that the FDA's power to order some recourse would be insufficient to make injured patients whole, as demonstrated by the inclusion of Section 360h(d): "Compliance with an order issued under this section shall not relieve any person from *liability* under Federal or State law."[189]

It is telling that the medical community itself acknowledges that FDA approval "is not a guarantee of . . . safety,"[190] because

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184. *Id.* at 1015 (Ginsburg, J., dissenting) (quoting Margaret Jane Porter, *The* Lohr *Decision: FDA Perspective and Position*, 52 FOOD & DRUG L.J. 7, 11 (1997)). The dissent quoted further from the passage published by the former chief counsel to the FDA in 1997:

> FDA regulation of a device cannot anticipate and protect against all safety risks to individual consumers. . . . Regulation cannot protect against all possible injuries that might result from use of a device over time. Preemption of all such claims would result in the loss of a significant layer of consumer protection.

Id.

185. *Id.* at 1009 (majority opinion). For an in-depth assessment of the effect of agency positions on preemption, see Sharkey, *supra* note 7, which examines the way in which agencies attempt to influence state regulations and common law through the use of preambles; and William Funk, *Preemption by Federal Agency Action*, *in* PREEMPTION CHOICE: THE THEORY, LAW, AND REALITY OF FEDERALISM'S CORE QUESTION, *supra* note 37, at 214. Professor Funk observes that federal agencies are increasingly attempting to dictate preemption of state tort remedies not only through their regulations but also through preambles to regulations and amicus briefs, and notes that the FDA in particular has received the most press for leading the charge in this effort. *Id.* at 214, 226.

186. *Riegel*, 128 S. Ct. at 1011.

187. *Id.* at 1015 (Ginsburg, J., dissenting).

188. *Id.* at 1016 (citing 21 U.S.C. § 360h(b)(2), (e) (2006)).

189. 21 U.S.C. § 360h(d) (2006) (emphasis added). Section 360h(d) "anticipates '[court-awarded] damages for economic loss' from which the value of any FDA-ordered remedy would be subtracted." *Riegel*, 128 S. Ct. at 1016 (quoting 21 U.S.C. § 360h(d) (2006)).

190. Gregory D. Curfman, M.D., Stephen Morrissey, Ph.D. & Jeffrey M. Drazen, M.D., *Why Doctors Should Worry about Preemption*, 359 NEW ENG. J. MED. 1, 2 (2008).

the FDA "knows only what manufacturers reveal."[191] Both the public and the FDA can learn significant details about the effects on patients through the process of pretrial discovery and trial itself, where previously unknown or undisclosed information about toxicity or defects may come to light. "[P]roduct-liability litigation has unquestionably helped to remove unsafe products from the market and to prevent others from entering it."[192] Prior to the George W. Bush Administration, members of both the executive and legislative branches apparently considered tort litigation to be a vital part of the regulatory framework for drugs and medical devices. The FDA itself believed that "litigation by consumers . . . complement[ed] the FDA's regulatory actions and enhance[d] patient safety."[193] For their part, congressional members, including several who were involved in the passage of the MDA, have introduced legislation to overturn *Riegel* by explicitly limiting the scope of MDA preemption.[194]

Finally, although manufacturers of medical devices applaud the *Riegel* decision, manufacturers would not be unduly burdened by having to comply with both premarket approval requirements imposed by the FDA and the need to answer to state common law claims in the event that a patient is injured by its device. Indeed, a manufacturer's proof of compliance with FDA requirements could be used as evidence that it used due care in the design and labeling of the product, which would help it in defending against a negligence claim.[195]

The Roberts Court's treatment of tort claims by patients injured by FDA-approved products will soon be tested again in a Vermont case, *Levine v. Wyeth*.[196] Unlike the MDA, however, the statutory regime for the product at issue in *Levine*—a drug known as Phenergan—is silent regarding preemption.[197] The drug manufacturer has raised implied conflict preemption arguments

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191. *Id.* Unlike other agencies, the FDA has no subpoena power. Thus, "serious safety issues often come to light only after a drug [or device] has entered the market." *Id.*

192. *Id.*

193. *Id.* at 1; *see also supra* note 184 and accompanying text (discussing viewpoints of the FDA's former General Council).

194. Barnaby J. Feder, *Medical Device Ruling Redraws Lines on Lawsuits*, N.Y. TIMES, Feb. 22, 2008, at C2.

195. Riegel v. Medtronic, Inc., 128 S. Ct. 999, 1020 (2008).

196. Levine v. Wyeth, 944 A.2d 179 (Vt. 2006), *cert. granted*, 128 S. Ct. 1118 (2008).

197. Food, Drug and Cosmetics Act (FDCA), 21 U.S.C. §§ 301–399 (2006). Although the statute itself is silent, in 2006 the FDA asserted that the FDCA preempts state tort claims in its preamble to a new labeling regulation. *See* Sharkey, *supra* note 7, at 241 (citing Requirements on Content and Format of Labeling for Human Prescription Drug and Biological Products, 71 Fed. Reg. 3922, 3934 (Jan. 24, 2006) (to be codified at 21 C.F.R. pts. 201, 314, 601)).

to shield itself from negligent failure-to-warn claims by a patient who lost her arm to gangrene after Phenergan was administered.[198] The Vermont Supreme Court cited a long line of federal and state court cases holding that FDA approval of a drug does not preempt state tort claims,[199] and explicitly distinguished the preemption provision of the MDA from the statutory provisions related to drugs.[200] It rejected the manufacturer's arguments and upheld the $7 million verdict for the plaintiff.[201]

By accepting certiorari in the *Levine* case, the Roberts Court has demonstrated its keen interest in preemption battles.[202] The Court has an opportunity to set the record straight by soundly rejecting preemption arguments for drug related tort claims,[203] and by casting *Riegel* in the narrow light it deserves, as a case governing only the limited group of Class III devices that receive the most rigorous FDA scrutiny available under federal law.

2. Vehicles. State law claims arising from injuries caused by vehicles sold in interstate commerce have provoked vigorous preemption challenges by manufacturers and trade associations. The results in three opinions issued by the Rehnquist Court are mixed.

In a 1995 case, *Freightliner Corp. v. Myrick*, the Rehnquist Court considered a design defect claim against manufacturers

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198. *Levine*, 944 A.2d at 184 (quoting Cipollone v. Liggett Group, 505 U.S. 504, 516 (1992)). The drug was injected into her arm to alleviate nausea resulting from a migraine headache. *Id.* at 182.

199. *Id.* at 186.

200. *Id.* at 187 (citing Buckman Co. v. Plaintiffs' Legal Comm., 531 U.S. 341, 348 (2001) (holding that "fraud-on-the-FDA claims" were preempted by the MDA in a case involving a medical device).

201. *Id.* at 182–83.

202. *See* Erwin Chemerinsky, *A Troubling Trend in Preemption Rulings*, TRIAL, May 2008, at 62 (noting a "troubling trend" in preemption cases issued thus far by the Roberts Court, indicating that the Court is "very willing to let federal law trump state law when business interests are at stake"); *see also* Riegel v. Medtronic, Inc., 128 S. Ct. 999, 1008 (2008) (holding that state common law duties constituted "requirements" and were thus preempted by the MDA); Rowe v. N.H. Motor Transp. Ass'n, 128 S. Ct. 989, 993 (2008) (preempting state requirements for shippers to ensure against delivery of cigarettes to minors); Preston v. Ferrer, 128 S. Ct. 978, 981 (2008) (holding that, when parties agree to arbitrate all questions arising under contract, the Federal Arbitration Act (FAA) preempts state laws lodging primary jurisdiction in any other forum).

203. David C. Vladeck, *The FDA and Deference Lost: A Self-Inflicted Wound or the Product of a Wounded Agency? A Response to Professor O'Reilly*, 93 CORNELL L. REV. 981, 993–94 (2008). The Court was unable to resolve this issue in another recent drug-related case, *Desiano v. Warner–Lambert & Co.*, 467 F.3d 85, 87 (2d Cir. 2006), where the appellate court's decision that federal law did not preempt state tort claims was affirmed per curiam by an equally divided Court. Warner–Lambert Co., LLC v. Kent, 128 S. Ct. 1168, 1168 (2008). Chief Justice Roberts recused himself from the case because he owned shares in Pfizer, Inc., the parent company of Warner–Lambert. *Id.*

who failed to equip trucks with antilock braking systems.[204] Plaintiffs were seriously injured when semi trucks struck their vehicles. The Motor Vehicle Safety Act contained an express preemption clause prohibiting states from enacting vehicle safety standards that were not identical to applicable federal standards.[205] The Act also included a savings clause providing that compliance with a federal vehicle safety standard "does not exempt a person from any liability at common law."[206] Distinguishing *Cipollone*, which it had handed down just a few years earlier, the Court concluded that the existence of a limited preemption clause in the Act indicated Congress did not intend to preempt other matters.[207] Interestingly, as in *Lohr*, the Court paid no attention to the Act's savings clause.[208]

In 2000, the Rehnquist Court returned to the Motor Vehicle Safety Act in *Geier v. American Honda Motor Co.*, where it took note of the statutory savings clause but preempted a products liability claim nonetheless.[209] Ms. Geier, who was seriously injured when she struck a tree while driving her 1987 Honda Accord, claimed that Honda's failure to install an airbag constituted a design defect. Honda argued that it had complied with a Department of Transportation standard requiring passive restraints in some but not all vehicles by installing airbags in a percentage of its 1987 models.[210]

The Court observed that the Act's preemption provision, barring states from establishing any nonidentical "safety standard," could be construed broadly to include common law actions but that the existence of the savings clause required a more narrow interpretation.[211] When it came to implied

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204. Freightliner Corp. v. Myrick, 514 U.S. 280, 282 (1995).

205. *Id.* at 284 ("When a motor vehicle safety standard is in effect under this chapter, a State . . . may prescribe or continue in effect a standard applicable to the same aspect of performance of a motor vehicle . . . only if the standard is identical to the standard prescribed under this chapter." (quoting 15 U.S.C. § 1392(d) (subsequently moved to 49 U.S.C. § 30103(b)(1) (2000)))).

206. 49 U.S.C. § 30103(e) (2000) (previously 15 U.S.C. § 1397(k)).

207. *Freightliner Corp.*, 514 U.S. at 287–88.

208. *Id.* at 287 n.3 ("Because no federal safety standard exists . . . . [we] also need not address respondents' claim that the savings clause . . . does not [permit] a manufacturer to use a federal safety standard to immunize itself . . . ."). Much like *Lohr*, where no specific premarket approval had been required for the device at issue, the Court noted that no specific federal safety standard had been issued for antilock brakes. *Id.* at 286.

209. Geier v. Am. Honda Motor Co., Inc., 529 U.S. 861, 865 (2000).

210. *Id.* at 864–65. In *Riegel*, by comparison, preapproval requirements for a balloon catheter were held to preempt liabilities imposed by state tort law under the MDA. *See supra* Part III.C.1 (analyzing the *Riegel* decision and its potential consequences).

211. *See Geier*, 529 U.S. at 869 (questioning whether the savings clause does more than just "remove[ ] tort actions from the scope of the express pre-emption clause" by

preemption, however, the Court's approach turned the presumption against preemption of traditional state police powers on its head. It found that, read together, the savings and preemption provisions reflected a "neutral policy" toward conflict preemption.[212] Foreshadowing *Riegel*, the Court concluded that giving the savings clause broad effect "would upset the careful regulatory scheme established by federal law" for vehicle safety standards.[213] Because the preemption and savings clauses "neutralized" each other, the Court felt free to look outside the statutory text and to "place some weight" on the Department's conclusion, expressed in the government's litigation brief, that tort actions would pose an obstacle to the accomplishment of federal regulatory objectives.[214]

Just two years later, another wrinkle was added to the Rehnquist Court's savings clause jurisprudence in *Sprietsma v. Mercury Marine*, where a passenger struck by a boat's propeller brought a design defect claim against the engine designer.[215] The Court issued a unanimous opinion that relied heavily on the language of the Boat Safety Act's savings clause in finding that the claim survived express preemption.[216] Unlike *Geier*, it also took note of the clause in finding that the claim also survived implied preemption.[217]

The Boat Safety Act authorized the Coast Guard to establish minimum safety standards and prohibited states from enforcing "a law or regulation establishing a . . . safety standard . . . not identical to a regulation" promulgated under the Act.[218] The Act's savings clause stated, "Compliance with this chapter or standards, regulations, or orders . . . does not relieve a person from liability at common law."[219] Contravening both *Geier* and *Cipollone*, the Court concluded that the phrase "a law or regulation," as used in the Act's preemption clause, referred only

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foreclosing or limiting "the operation of ordinary pre-emption principles insofar as those principles instruct us to read statutes as pre-empting state laws . . . that 'actually conflict' with the statute or federal standards promulgated thereunder" and answering no).

212. *Id.* at 870–71.

213. *Id.* at 870 (quoting United States v. Locke, 529 U.S. 89, 106–07 (2000). *Riegel* is discussed at *supra* Part III.C.1.

214. *Id.* at 883; *see also* Alexander K. Haas, *Chipping Away at State Tort Remedies Through Pre-Emption Jurisprudence:* Geier v. American Honda Motor Co., 89 CAL. L. REV. 1927, 1930–31 (2001) (commenting on the Court's justifications for preempting Geier's tort claims).

215. Sprietsma v. Mercury Marine, 537 U.S. 51, 54–55 (2002).

216. *Id.* at 53, 64.

217. *Id.* at 69–70.

218. 46 U.S.C. § 4306 (2000).

219. 46 U.S.C. § 4311(g) (2000).

to positive enactments and not to common law torts.[220] Parsing the statutory language, it stated that "the article 'a' before 'law or regulation'" suggested a concern with discrete directives in statutes or administrative regulations rather than more generalized provisions of common law.[221]

The Court was careful to note that regulations perform functions distinct from common law claims, which serve important compensatory and remedial ends.[222] As for implied preemption, it concluded that Congress had provided no evidence of a "clear and manifest" intent to preempt tort claims by occupying the field, nor did tort claims conflict with the Act.[223] To the contrary, the Court recognized that compensating victims "serve[s] the Act's more prominent objective, emphasized by its title, of promoting boating safety."[224] It is notable that, like *Freightliner* and *Lohr*, but unlike *Geier* and *Riegel*, the Coast Guard had not promulgated a specific safety standard for boat propeller blades nor had it argued in favor of preemption.[225]

D. Agriculture

Congress recognized the states' historic role in controlling agricultural activities—in particular, the application and use of pesticides, herbicides, and other agricultural chemicals—when it passed the Federal Insecticide, Fungicide, and Rodenticide Act of 1972 (FIFRA).[226] FIFRA, initially passed in 1947 and amended in 1972, requires manufacturers to register pesticides before placing them on the market.[227] The initial statute was a limited attempt to address pesticide licensing and labeling, but the 1972 amendments turned FIFRA into a comprehensive statute, resulting in a centralized federal regulatory framework.[228]

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220. *Sprietsma*, 537 U.S. at 63.

221. *Id.*

222. *Id.* at 70.

223. *Id.* at 69.

224. *Id.* at 70.

225. *Id.* at 69–70. However, the court indicated that if, as in *Geier*, the agency had issued an opinion on the preemptive effect of the Act, it might have gone the other way. *Id.* at 70. On agency preemption, see *supra* note 185.

226. 7 U.S.C. §§ 136–136y (2006).

227. 7 U.S.C. § 136a(a) (2006).

228. Ruckelshaus v. Monsanto Co., 467 U.S. 986, 991 (1984); *see also* Alexandra B. Klass, *Bees, Trees, Preemption, and Nuisance: A New Path to Resolving Pesticide Land Use Disputes*, 32 ECOLOGY L.Q. 763, 772–73 (2005) ("FIFRA has been called one of the most 'federal' of the environmental laws. Unlike [others] . . . FIFRA provides a lesser role for state and local governments, creating and maintaining a uniform national system of registering and labeling pesticides.").

As in the Medical Device Act and the Boat Safety Act, Congress carved out a sphere of federal authority without eviscerating state authority by including both preemption and savings clauses. To ensure nationwide uniformity, the statute gives the EPA exclusive power over registration, labeling, and packaging requirements. Its preemption clause provides that states "shall not impose or continue in effect any requirements for labeling or packaging in addition to or different from those required under [FIFRA]."[229] Yet FIFRA's savings clause authorizes any state to impose additional restrictions on the sale or use of pesticides within the state in recognition of regional and local factors like climate, geographic variation, population density, and water supply.[230]

In a 1991 regulatory preemption case, *Wisconsin Public Intervenor v. Mortier*, the Rehnquist Court gave weight to the savings clause to afford room for local governments, as political subdivisions of states, to restrict or even prohibit aerial spraying in order to protect the health of their citizens.[231] A pattern of treating tort claims more favorably than state regulatory regimes would suggest that tort claims for personal injury or property damage from pesticide use would fare quite well against preemption challenges. However, despite the persuasive, albeit not binding, precedent set by *Wisconsin Public Intervenor*, and despite FIFRA's explicit savings clause, after *Cipollone* was handed down in 1992, almost all of the federal courts and many state courts held that tort claims related to pesticides were preempted.[232] In 2005, the Rehnquist Court reversed this trend in *Bates v. Dow Agrosciences LLC* by allowing claims for crop damages allegedly caused by defective design and manufacture of herbicides, breach of express warranty, and violation of the Texas Deceptive Trade Practices Act.[233] According to the Court, the term "requirements," as used in FIFRA's preemption clause, reaches positive enactments as well as other compulsory forms of law, but

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229. 7 U.S.C. § 136v(b) (2006).

230. *See* 7 U.S.C. § 136v(a) (2006) ("A State may regulate the sale or use of any federally registered pesticide or device in the State, but only if and to the extent the regulation does not permit any sale or use prohibited by this subchapter."); *see also* 7 U.S.C. § 136v(c)(1) (2006) ("A State may provide registration for additional uses of federally registered pesticides formulated for distribution and use within that State to meet special local needs in accord with the purposes of this subchapter and if registration for such use has not previously been denied, disapproved, or canceled by the Administrator.").

231. Wis. Pub. Intervenor v. Mortier, 501 U.S. 597, 607–08 (1991) (interpreting 7 U.S.C. § 136v(a) (2006)); *see also infra* notes 373–75 and accompanying text.

232. Klass, *supra* note 228, at 783.

233. Bates v. Dow Agrosciences LLC, 544 U.S. 431, 444 (2005).

does not preclude jury verdicts simply because they might motivate an optional decision to revise a label.[234] As in *Lohr*, but contrary to *Riegel*, the Court distinguished the much broader language of the preemption clause at issue in *Cipollone*, prohibiting any state "requirement or prohibition . . . with respect to the advertising or promotion of any cigarettes,"[235] from FIFRA's preemption clause, prohibiting only labeling or packaging requirements "*in addition to or different from*" federal requirements.[236] Claims for defective design and manufacture and for breach of warranty were not such requirements, but the Court drew a distinction for the plaintiff's fraud and failure-to-warn claims, which would be preempted if they imposed an additional or different labeling or packaging obligation than FIFRA.[237]

The *Bates* Court gave appropriate regard to the statutory savings clause, in large part because the long-standing history of state regulation and common law remedies weighed in favor of a broad construction. It explained:

> The long history of tort litigation against manufacturers of poisonous substances adds force to the basic presumption against pre-emption. If Congress had intended to deprive injured parties of a long available form of compensation, it surely would have expressed that intent more clearly. . . . Moreover, this history emphasizes the importance of providing an incentive to manufacturers to use the utmost care in the business of distributing inherently dangerous items.[238]

Unlike *Cipollone*, where the statute prescribed certain "immutable" warning statements, Congress intended pesticide labels to evolve over time as more information comes to light about the pesticide's efficacy and effects.[239] As in *Sprietsma* and *Lohr*, the Court was persuaded that tort remedies would aid, rather than obstruct, the functioning of FIFRA and the

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234. *Id.* at 447.

235. Cipollone v. Liggett Group, Inc., 505 U.S. 504, 515 (1992).

236. *Bates*, 544 U.S. at 447 (quoting 7 U.S.C. § 136v(b) (2006)); *see also supra* notes 136–40 (describing *Lohr*) and 153–60 (describing *Riegel's* construction of the term "requirements").

237. *Bates*, 544 U.S. at 447.

238. *Id.* at 449–50 (citing Silkwood v. Kerr–McGee Corp., 464 U.S. 238, 251 (1984)).

239. *Id.* at 451.

accomplishment of congressional goals.[240] The Court's rationale extends well beyond FIFRA, but it failed to see this in *Riegel*.[241]

E. Harmonizing Common Law Remedies with Federal Law

In most circumstances, federal regulatory requirements and state common law can be easily harmonized. Savings clauses reflect congressional recognition that preserving common law remedies strengthens the overall stability of the law, both by drawing on the unique attributes of different levels and branches of government and by providing justice to injured individuals. Common law tort claims can serve as a catalyst for regulatory evolution and for eventual improvement of a broad range of federally regulated items, including pesticides, medical devices, and motor vehicles.[242]

Statutes that include both preemption and savings clauses, such as FIFRA, the Medical Device Act, and the Motor Vehicle and Boat Safety Acts, create a conundrum for courts attempting to give proper weight to both. The inclusion of a savings clause precludes a global finding of express preemption. But when it comes to implied preemption, the Supreme Court's approach to dueling statutory provisions has, in some cases, treated the savings clause not only as nondispositive but as nonexistent. Absent a strong backdrop of historic state involvement in areas such as agriculture and products liability, the Rehnquist Court in its later years was quick to conclude that, read together, preemption and savings clauses merely reflect a "neutral policy" toward preemption,[243] and the Roberts Court has given every indication that it will continue, and perhaps even accentuate, this trend.[244]

A determination that preemption and savings clauses neutralize each other leaves the courts free to look outside the statutory text, to ignore congressional objectives, and to place weight on pro-business sentiments and on pro-preemption arguments advanced by the regulated entities, which wish to avoid responsibility for harm caused by their products and activities, and by the federal agencies "captured" by them. The result has been to displace any state law that occupies the same sphere of influence as the federal law in question, despite

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240. *See* Sprietsma v. Mercury Marine, 537 U.S. 51, 70 (2002); *see also* Medtronic, Inc. v. Lohr, 518 U.S. 470, 501–02 (1996).

241. *See supra* Part III.C.1 (discussing *Riegel*).

242. Klass, *supra* note 19, at 567–68.

243. Geier v. Am. Honda Motor Co., 529 U.S. 861, 870–71 (2000).

244. Riegel v. Medtronic, Inc., 128 S. Ct. 999, 1008–09 (2008).

congressional intent to the contrary and regardless of whether the "offending" state law conflicts with the federal requirement or objective. This outcome is just as detrimental for injured parties as in *Cipollone*, where the statute in question included no savings clause at all.[245] *Cipollone* can perhaps be rationalized (if not justified) by the long history of federal presence in tobacco marketing and sales and by Congress's apparent intent to occupy the entire field through a pervasive federal regulatory scheme. The inclusion of both a savings clause and a preemption clause in other areas, however, should not be construed the same way. Rather, courts should give savings clauses appropriate weight by staying true to the long-standing presumption against preemption, particularly where state powers to protect public health and welfare are implicated.

IV. STATE REGULATORY INNOVATIONS

In the Rehnquist and Roberts Courts, progressive state and local regulatory programs have been exceptionally vulnerable to judicial preemption despite the presence of statutory savings clauses. During the past decade in particular, such regulations have been struck down almost without exception whenever they would impose greater economic burdens on industry than those established by the federal regulatory floor.[246] The recent trend, which began in the mid-1990s, has prompted some scholars to equate the modern day preemption doctrine with the Lochner Era of the early 1900s, where the Court employed an array of tools to strike down progressive state and local economic and social regulation.[247] As the states become more aggressive in filling gaps left by lax federal regulatory schemes and federal enforcement failures, for-profit corporations, developers, and other antiregulatory forces have become equally aggressive—and quite effective—in wielding preemption as an obstacle to the implementation of protective state regulations.

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245. *See supra* notes 123–32 (discussing *Cipollone*).

246. *See supra* notes 48–52 and accompanying text (describing the results of the Greve and Klick study, which found that 47.9% of all non-tort cases issued by the Rehnquist Court from 1985 to 2003 resulted in preemption); *see also infra* Part IV.E (describing regulatory preemption trend).

247. Wolfson, *supra* note 22, at 69 (citing Lochner v. New York, 198 U.S. 45 (1905)). In rejecting a 2007 dormant commerce clause challenge to a local waste management ordinance, the Roberts Court denied any intent to return to the Lochner Era. United Haulers Ass'n, Inc. v. Oneida–Herkimer Solid Waste Mgmt. Auth., 127 S. Ct. 1786, 1798 (2007). Chief Justice Roberts delivered the Court's decision but did not join in the portion of the opinion repudiating *Lochner*. *Id.* at 1789.

A. Environment and Energy

1. Nuclear Plants. A high water mark of modern regulatory savings clause jurisprudence was a 1983 case involving a state's moratorium on the construction of nuclear power plants. In *Pacific Gas & Electric v. State Energy Resources Conservation & Development Commission*, the Burger Court found that, although Congress had provided the federal Nuclear Regulatory Commission absolute power to regulate the safety of nuclear power, the states retained their traditional authority over reliability, cost, and other economic concerns related to electricity.[248] At issue was a California statute that conditioned the construction of nuclear power plants on a finding that adequate means of disposal would be available for nuclear waste. The Court recognized that, although nuclear energy and nuclear waste were areas extensively regulated by the federal government, Congress intended to leave sufficient authority to allow states to slow or even stop the development of nuclear power for economic reasons.[249]

Two savings clauses played a role in the resolution of the case. The first, found in section 274(k) of the AEA, used broad language but was narrowly circumscribed to apply only to the particular topic addressed in that section, that is, certain federal–state agreements: "Nothing in this section shall be construed to affect the authority of any State or local agency to regulate activities for purposes other than protection against radiation hazards."[250] The Court was willing to consider it for guidance, even though it was not applicable to the California statute at issue. It recognized that "Congress, by permitting regulation 'for purposes other than protection against radiation hazards' underscored the distinction . . . between the spheres of activity left respectively to the Federal Government and the States."[251] It then turned to the more generally applicable savings clause of section 271 of the AEA: "Nothing in this chapter shall be construed to affect the authority or regulations of any Federal, State, or local agency with respect to the generation, sale, or transmission of electric power produced through the use of nuclear facilities licensed by the Commission."[252] The Court

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248. Pac. Gas & Elec. Co. v. State Energy Res. Conservation & Dev. Comm'n, 461 U.S. 190, 205 (1983).

249. *Id.*

250. 42 U.S.C. § 2021(k) (2000) ("State regulation of activities for certain purposes").

251. *Pacific Gas*, 461 U.S. at 210.

252. 42 U.S.C. § 2018 (2000) ("Agency jurisdiction").

concluded that this provision removed any doubt that questions of ratemaking and the public need for additional power plants were to remain in state hands.[253] It then engaged in an unusual foray into the legislative history of the California statute to find a nonsafety rationale for the moratorium. An Assembly Report provided the sought-after economic justification that "[w]ithout a permanent means of disposal, the nuclear waste problem could . . . lead[ ] to unpredictably high [electricity] costs."[254]

The Court expressly noted that a dangerous gap would be left in the regulatory framework if states were stripped of power over the construction of new plants:

> While the NRC does evaluate the dangers of generating nuclear power, it does not balance those dangers against the risks, costs, and benefits of other choices available to the State . . . . It is almost inconceivable that Congress would have left a regulatory vacuum; the only reasonable inference is that Congress intended the States to continue to make these judgments.[255]

Nearly three decades after the *Pacific Gas* decision, the United States has yet to provide a permanent nuclear waste repository, while spent fuel rods from the nation's reactors continue to accumulate. The potential consequences of improper storage and disposal cry out for a federal solution, but so long as none is forthcoming states like California have struggled to fill, or at least alleviate, the regulatory gap by limiting nuclear reactor construction or expansion and by restricting the transportation and disposal of nuclear waste.[256] Other than construction moratoria, states have been rebuked at nearly every turn by the lower courts, which have invalidated state requirements notwithstanding the Supreme Court's admonition against congressional occupation of the field.[257] The inclusion of

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253. *See Pacific Gas*, 461 U.S. at 210–11 (examining Section 271 in light of congressional intent).

254. *Id.* at 213–14.

255. *Id.* at 208, 225.

256. *See* Angela Cole Bonstead, *EPA's Mixed Approach to Mixed Waste*, 8 ENVTL. LAW. 521, 545–46 (2002) (discussing interplay between federal and state regulations).

257. *See, e.g.*, Skull Valley Band of Goshute Indians v. Nielson, 376 F.3d 1223, 1227 (10th Cir. 2004) (holding that Utah statutes "regulating the storage and transportation of spent nuclear fuel [were] preempted by federal law"), *cert. denied*, 546 U.S. 1060 (2005); United States v. Kentucky, 252 F.3d 816, 820–23 (6th Cir. 2001) (finding that federal law preempted environmental permit conditions imposed by Kentucky regarding disposal of radioactive waste); United States v. Manning, 434 F. Supp. 2d 988, 1006 (E.D. Wash. 2006) (concluding that a Washington law regulating mixed wastes was invalid on grounds of federal preemption); Abraham v. Hodges, 255 F. Supp. 2d 539, 549 (D.S.C. 2002) (invalidating a state ban on the United States' transportation of plutonium on South

explicit savings clauses in the AEA and the Resource Conservation and Recovery Act (RCRA),[258] which regulates waste management, seems to make no difference.[259] By authorizing supplemental state regulation of hazardous waste management, the RCRA's savings clause is more encompassing than the AEA's.[260] However, the comprehensiveness of RCRA, which was intended to provide federal "cradle to grave" regulation of hazardous wastes,[261] raises the specter of implied preemption, allowing regulated entities to successfully challenge state and local efforts to restrict hazardous waste disposal, including nuclear waste.[262] This trend is consistent with more recent cases of the Rehnquist and Roberts Courts, which have been more inclined to invalidate state regulatory programs on preemption grounds in the years following *Pacific Gas*.

2. Air and Water Pollution. The wreck of the *Exxon Valdez* motivated coastal states from Alaska to Florida to enact oil spill legislation. Some of these statutes impose preventative measures while others impose liability on the vessel owner and operator for cleanup costs and other damages.[263] The OPA has been given

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Carolina roadways).

258. 42 U.S.C. §§ 6901–6992k (2000). Like the Clean Air Act and the Clean Water Act, RCRA authorizes states to maintain a substantial role in regulating hazardous waste, 42 U.S.C. § 6926 (2000), and cedes states the primary role in managing solid waste. 42 U.S.C. § 6901 (2000). However, it leaves the regulation of nuclear waste to the AEA. 42 U.S.C. § 6903(27) (2000).

259. Spence & Murray, *supra* note 39, at 1148–49; Melissa Beutler Orien, *Battle over Control of Low-Level Radioactive Waste: Some States Are Overstepping Their Bounds*, 2005 B.Y.U. L. REV. 155, 189 (2005).

260. *See* 42 U.S.C. § 6929 (2000) ("[N]o State or political subdivision may impose any requirements less stringent than those authorized under this subchapter . . . . Nothing in this chapter shall be construed to prohibit any State or political subdivision thereof from imposing any requirements, including those for site selection, which are more stringent than those imposed by such regulations.").

261. Chicago v. Envtl. Def. Fund, 511 U.S. 328, 331 (1994).

262. *See, e.g.*, Blue Circle Cement, Inc. v. Bd. of County Comm'rs, 27 F.3d 1499, 1508 (10th Cir. 1994) (holding that a conditional use permit that resulted in a de facto ban on disposal conflicted with RCRA's goals); ENSCO, Inc. v. Dumas, 807 F.2d 743, 745 (8th Cir. 1986) (invalidating a local ordinance prohibiting the storage, treatment, or disposal of "acute hazardous waste" as implicitly preempted); Ogden Envtl. Servs. v. City of San Diego, 687 F. Supp. 1436, 1448 (S.D. Cal. 1988) (holding that a city's denial of a permit for a waste facility was implicitly preempted). Discriminatory state and local waste regulations have also been struck down on dormant Commerce Clause grounds. *See, e.g.*, C & A Carbone, Inc. v. Town of Clarkstown, 511 U.S. 383, 391 (1994) (holding a flow control ordinance violated the dormant Commerce Clause). *But see* United Haulers Ass'n, Inc. v. Oneida–Herkimer Solid Waste Mgmt. Auth., 127 S. Ct. 1786, 1795 (2007) (upholding a flow ordinance that favored a county-run facility over private facilities as a nondiscriminatory governmental exercise of power with only incidental burdens on interstate commerce).

263. *See* 2 DANIEL P. SELMI & KENNETH A. MANASTER, STATE ENVIRONMENTAL LAW

broad preemptive effect in the regulatory context, even though common law claims for damages caused by oil spills have generally survived preemption challenges.[264]

As is typical of other environmental statutes, the OPA envisions a role for state regulators and includes an explicit savings clause for protective state requirements.[265] When it comes to regulating vessel safety, however, the notion of cooperative federalism is illusory at best. In *United States v. Locke*, the Rehnquist Court displaced Washington's requirements for navigation watch procedures, training requirements for crew members, and maritime casualty reporting.[266] The Ports and Waterways Safety Act, as amended by the OPA, authorizes the federal government to regulate the design, construction, operation, and staffing of tanker vessels,[267] but retains the states' authority to impose additional liabilities and to regulate matters reflective of local peculiarities of their ports and waterways.[268] In striking down Washington's requirements, the Court explained away the statutory savings clause by finding that its placement in Title I limited its scope to oil pollution liability and compensation, while vessel-manning requirements are contained in Title II, which includes no savings clause.[269]

Moreover, according to the Court, giving broad effect to the savings clause would "disrupt national uniformity" and "upset the careful regulatory scheme established by federal law."[270] It

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§§ 18:2, 18:14–18:26 (2007) (surveying state law approaches to oil spills); Daniel G. Rauh, *State Authority Under the Oil Pollution Act of 1990: Federalist Elixir, or Should the Supreme Court Sink* Intertanko v. Locke*?*, 24 TUL. MAR. L.J. 323, 329 n.42 (1999) (citing, for example, HAW. REV. STAT. § 128D-6 (2006); MASS. ANN. LAWS ch. 21E, § 5 (2002)).

264. *See supra* notes 79–91 and accompanying text (describing the Exxon Valdez incident and ensuing litigation).

265. 33 U.S.C. § 2718(a) (2006) (preserving state authority to impose additional liability or requirements relating to discharges of oil or removal of such discharges); *see also* Ray v. Atl. Richfield Co., 435 U.S. 151, 171 (1978) (finding that Title I of the Ports and Waterways Safety Act of 1972, 33 U.S.C. §§ 1221, 1223 (2006), preserves state authority over matters reflective of local peculiarities).

266. United States v. Locke, 529 U.S. 89, 113–15 (2000).

267. 46 U.S.C. § 3703(a) (2000).

268. 33 U.S.C. § 2702(a) (2006); *see also Atlantic Richfield*, 435 U.S. at 171 (upholding a state tanker law as reflective of the "peculiarities of local waters").

269. *Locke*, 529 U.S. at 105.

270. *Id.* at 106. A district court in Michigan distinguished *Locke* in finding that state law requirements for ballast water treatment to prevent introduction of invasive species into state waters was not preempted by the National Invasive Species Act (NISA), which allows alternative methods of treatment so long as they are deemed to be at least as effective as saltwater exchange. Fednav, Ltd. v. Chester, 505 F. Supp. 2d 381, 395–96 (E.D. Mich. 2007) (citing 16 U.S.C. § 4711(b)(2)(B) (2006)), *aff'd*, 547 F.3d 607 (6th Cir. 2008). The court was willing to give NISA's savings clause greater weight than was afforded the clause at issue in *Locke*, because the NISA clause was located in the same

found the presumption against preemption inapplicable when the state regulates activities marked by a history of substantial federal presence, such as maritime law.[271] Ironically, the Court concluded that, in contrast, a restrictive reading of the savings clause best respected a federal–state balance, stripping the states of their ability to control important aspects of passage to their ports and harbors.[272]

State regulatory programs governing other types of interstate pollution have fared relatively poorly since the mid-1990s as well. In one of the last major environmental cases of the Rehnquist Court, an air quality ordinance that attempted to control emissions from vehicles was struck down on preemption grounds.[273] As in the OPA, RCRA, and the Clean Water Act, Congress embraced a cooperative federalism model in the Clean Air Act to preserve the authority of the states to make policy decisions within their borders while authorizing the EPA to establish national ambient air quality standards and certain emission limitations.[274] A key feature of this approach is the ability of states to adopt their own state implementation plans to meet national air quality standards by controlling source-by-source emissions in a fashion that balances the state's own economic and environmental concerns.[275] Statutory savings clauses within the Clean Air Act explicitly retain states' latitude to implement air quality requirements for factories, power plants, and other stationary sources.[276] The Act includes a savings clause applicable to motor vehicles as well, but the Supreme Court has given this provision short shrift.[277]

In *Engine Manufacturers Ass'n v. South Coast Air Quality Management District*, the Court, at the behest of a trade

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chapter as the substantive ballast water regulation, indicating that "a role for the states was forefront in the minds of the drafters of NISA." *Id.* at 396 (citing 16 U.S.C. § 4725 (2006)).

271. *Locke*, 529 U.S. at 106, 108–09.

272. *Id.* at 108–09.

273. Engine Mfrs. Ass'n v. S. Coast Air Quality Mgmt. Dist., 541 U.S. 246, 255 (2004).

274. *See* United States v. Morrison, 529 U.S. 598, 661 (2000) (Breyer, J., dissenting) (including the CAA as an example of cooperative federalism); Sierra Club v. EPA, 315 F.3d 1295, 1300 (11th Cir. 2002) (describing "division of labor" between states and the EPA as "inherent in the regime of cooperative federalism created by the CAA"); Michigan v. EPA, 268 F.3d 1075, 1083 (D.C. Cir. 2001) (describing the CAA as "an experiment in cooperative federalism"); Envtl. Def. Fund, Inc. v. EPA, 82 F.3d 451, 468–69 (D.C. Cir. 1996) (discussing CAA's program of federal and state cooperation and planning).

275. 42 U.S.C. § 7410(k) (2000).

276. *See supra* notes 59–64 and accompanying text (discussing CAA savings clauses and state actions to reduce greenhouse gas emissions in effort to combat climate change).

277. 42 U.S.C. § 7543(d) (2000).

association representing manufacturers of diesel engines, invalidated an ordinance requiring local fleet operators to purchase or lease only vehicles that met stringent emission standards.[278] The ordinance was adopted by California's South Coast Air Quality District, which is one of the most polluted regions in the United States due in large part to excessive vehicle traffic. The manufacturers relied on a preemption clause found in Section 209(a) to challenge the regulation: "No State or any political subdivision thereof shall adopt or attempt to enforce any standard relating to the control of emissions from new motor vehicles or new motor vehicle engines subject to this part."[279] To offset this provision, Section 209(d) incorporates a savings clause that explicitly allows states "otherwise to control, regulate, or restrict the use, operation, or movement" of vehicles.[280] Through Section 209, Congress acted to prevent states from imposing production mandates that would cause "'undue economic strain on the industry'" by forcing vehicle manufacturers to produce engines with state-specific characteristics as a condition of sale.[281]

According to the Supreme Court, the South Coast District's regulation was a "standard" within the preemption provision of Section 209(a).[282] Rather than looking closely at the statute itself, the Court invoked *Webster's Dictionary*, which defines "standard" as that which "is established by authority, custom, or general consent, as a model or example; criterion; test."[283] This generic definition freed the Court to find that "a standard is a standard even when not enforced through manufacturer-directed regulation," and to ignore the savings clause, which would seemingly preserve a local requirement that certain types of vehicles be used within the district.[284]

In dissent, Justice Souter criticized the majority's unduly broad construction of the term "standard" as violating the plain meaning of Section 209(a).[285] As Justice Souter also noted, the majority ignored the presumption that "the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress."[286]

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278. *Engine Mfrs. Ass'n*, 541 U.S. at 255.

279. 42 U.S.C. § 7543(a) (2000).

280. 42 U.S.C. § 7543(d) (2000).

281. *Engine Mfrs. Ass'n*, 541 U.S at 261 (Souter, J., dissenting) (citation omitted).

282. *Id.* at 252–54 (majority opinion).

283. *Id.* at 253. (citing WEBSTER'S INTERNATIONAL DICTIONARY 2455 (2d ed. 1945)).

284. *Id.* at 254.

285. *Id.* at 263 (Souter, J., dissenting).

286. *Id.* at 260 (quoting Medtronic, Inc. v. Lohr, 518 U.S. 470, 485 (1996)). The state of California was not a party to the *Engine Manufacturers* case, but it filed an Amicus

Section 209 may not be a "model of clarity," as Justice Souter noted, but tie breakers in interpreting statutes that are "unsystematic, redundant, and fuzzy about drawing lines" must cut in favor of sustaining more protective state and local rules.[287] Local rules that motivate, but do not compel, manufacturers to develop and market vehicles that meet stringent emission controls are consistent both with congressional intent regarding motor vehicle emissions and the overall purposes of the statute, "which sought to rectify states' unwillingness or inability to address air pollution problems, not to restrict their efforts."[288]

Although the South Coast District experience demonstrates that air pollution is both a local and a national problem and that solutions are necessary at both levels, it might seem counterintuitive to say that local governments can play an important role in addressing regional or global issues such as smog or climate change. However, both common law remedies and state and local regulatory programs have proven necessary to fill the regulatory gap left by the federal failure to take a meaningful stance, particularly on greenhouse gas emissions. Acting alone, local air quality initiatives may have very little impact on overall emission reductions, but they may trigger action at the national level. As Professors David Adelman and Kirsten Engel have explained, environmental law is replete with examples where state and local initiatives successfully motivated a comprehensive federal regulatory response on topics ranging from acid rain to mercury emissions.[289] As for preemption, although the Court struck down a local ordinance related to vehicle emissions, there is reason to believe that state and local restrictions on emissions from stationary sources, like power plants, are less vulnerable to invalidation given the broad savings clauses,[290] historic state and local presence in regulating stationary sources, and absence of a countervailing federal interest in transportation efficiencies and nationwide vehicle

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Curiae brief in support of the South Coast Air Quality District. *See* Brief for the State of California as Amicus Curiae Supporting Respondents, *supra* note 48.

287. *Engine Mfrs. Ass'n*, 541 U.S. at 266 (Souter, J., dissenting).

288. Lin, *supra* note 30, at 584.

289. David E. Adelman & Kirsten H. Engel, *Adaptive Federalism, Preemption Choice and Regulatory Dynamism*, *in* PREEMPTION CHOICE: THE THEORY, LAW, AND REALITY OF FEDERALISM'S CORE QUESTION, *supra* note 37, at 277, 371; Kirsten Engel, *State and Local Climate Change Initiatives: What Is Motivating State and Local Governments to Address a Global Problem and What Does This Say About Federalism and Environmental Law?*, 38 URB. LAW. 1015, 1026–27 (2006).

290. 42 U.S.C. §§ 7604(e), 7416 (2000); *see supra* notes 60–64 and accompanying text (discussing state action to reduce greenhouse gas emissions in an effort to combat climate change).

manufacturing standards. The Supreme Court has yet to resolve the issue, but state and local restrictions on stationary source emissions of greenhouse gases should be saved from preemption under the Clean Air Act.[291]

Congress's desire to adopt a "cooperative federalism" approach is also evidenced by several savings clauses in the Clean Water Act of 1972 (CWA).[292] Although Congress constrained states' rights to some extent by creating mandatory federal permit programs to regulate discharges of pollutants into water,[293] it explicitly provided states with the power to impose tougher pollution standards than required by the Act.[294] States and tribes that meet statutorily delineated criteria are authorized to accept delegations to administer the permit programs and take enforcement actions against noncomplying sources.[295] Upon delegation, the EPA's permit program is suspended, but the EPA may still veto proposed permits and must periodically review state or tribal administration to ensure compliance.[296] States also retain almost exclusive responsibility for pollution from diffuse, nonpoint sources.[297] Finally, Congress empowered states to condition federally issued licenses on compliance with state water quality standards.[298] In addition, the CWA provides that a state's authority "to allocate quantities of water within its jurisdiction shall not be superseded, abrogated or otherwise impaired," and that nothing should be construed to "supersede or abrogate" state-sanctioned water rights.[299]

As a result of these provisions, federal and state powers overlap considerably with regard to a broad array of activities affecting coastal waters, inland navigable waters, and adjacent wetlands. The savings clauses have taken prominence when private property interests in water and wetlands are implicated. Perversely, a broad construction of the CWA's savings clauses has resulted in antiregulatory consequences: federal regulation is

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291. *See* Robert L. Glicksman & Richard E. Levy, *A Collective Action Perspective on Ceiling Preemption by Federal Environmental Regulation: The Case of Global Climate Change*, 102 NW. U. L. REV. 579, 616, 648 (2008) (describing state efforts to control greenhouse gas emissions from stationary sources and explaining why the preemption arguments of regulated entities should be rejected).

292. 33 U.S.C. §§ 1251(g), 1365(e), 1370 (2006); *see also supra* Part III.A.1 (describing the Supreme Court's treatment of tort claims under the CWA savings clauses).

293. 33 U.S.C. §§ 1342, 1344 (2006).

294. 33 U.S.C. § 1370 (2006).

295. 33 U.S.C. §§ 1342(a)(5), 1370, 1377(e) (2006).

296. 33 U.S.C. § 1342(c) (2006).

297. 33 U.S.C. §§ 1313, 1342(a) (2006).

298. 33 U.S.C. § 1341(a)(1) (2006).

299. 33 U.S.C. § 1251(g) (2006).

defeated even when state regulation is absent. Rather than providing more protection to the nation's fresh water resources, under the guise of federalism, the construction of the CWA's savings clauses by both the Rehnquist and Roberts Courts has resulted in less protection.

In two such cases, the Court took the opportunity to shrink federal power by emphasizing the states' "primary state responsibility for ordinary land-use decisions."[300] Although both cases involved the construction of the Act's jurisdictional reach to "waters of the U.S.," rather than preemption per se, in both cases developers championed states' rights in a coordinated strategy to strip the United States of authority to protect isolated wetlands and nonperennial streams. In a 2006 opinion by the Roberts Court, *Rapanos v. United States*, developers found a steadfast friend in Justice Scalia.[301] Citing the statutory savings clause as well as a previous prodevelopment decision of the Rehnquist Court, *Solid Waste Agency of Northern Cook County (SWANCC) v. U.S. Army Corps of Engineers*,[302] Scalia cloaked his analysis in the language of federalism:

> [T]he Government's expansive interpretation would "result in a significant impingement of the States' traditional and primary power over land and water use." Regulation of land use, as through the issuance of the development permits . . . is a quintessential state and local power. . . . We ordinarily expect a "clear and manifest" statement from Congress to authorize an unprecedented intrusion into traditional state authority.[303]

In rejecting arguments that comprehensive federal regulation was needed to achieve the CWA's goals, Justice Scalia speculated, "It is not clear that the state and local conservation efforts that the CWA explicitly calls for . . . are in any way inadequate for the goal of preservation."[304] As the Court itself may have recognized in a 1985 case that extended federal jurisdiction

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300. Rapanos v. United States, 547 U.S. 715, 756 (2006); *see also* Solid Waste Agency of N. Cook County v. U.S. Army Corps of Eng'rs (*SWANCC*), 531 U.S. 159, 174 (2001) (recognizing states' traditional role in regulating land and water use). Both cases mark a significant departure from *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121 (1985), where the federal assertion of authority over wetlands adjacent to navigable waters was upheld in a unanimous opinion penned by Justice White.

301. *Rapanos*, 547 U.S. at 715–16.

302. *SWANCC*, 531 U.S. at 174.

303. *Rapanos*, 547 U.S. at 737–38 (citing 33 U.S.C. § 1251(b) (2006) ("It is the policy of the Congress to recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution, [and] to plan the development and use . . . of land and water resources . . . .")).

304. *Id.* at 745.

to adjacent wetlands, *United States v. Riverside Bayview Homes, Inc.*, the evidence does not support this assertion.[305] State capabilities for wetlands protection vary tremendously, and some—perhaps most—states have fallen short of meeting the statutory goals of maintaining and enhancing the integrity of water resources.[306] Notably, in *Rapanos*, thirty-three States, the District of Columbia, the Association of State Wetland Managers, and the Association of State Floodplain Managers filed amicus briefs on behalf of the United States, seeking to maintain broad *federal* jurisdiction over wetlands.[307] This sends a clear signal that most states believe that preserving wetlands from development is best accomplished by the federal government, which is better able to withstand pressure from local developers and property owners. The states' concern is well placed. In the absence of federal regulation, the contiguous United States has lost over fifty percent of its wetlands since industrialization began, and some states have lost as much as ninety percent.[308] Yet in *Rapanos*, the Court discounted the states' concerns and made little effort to judge the issues according to institutional competency. It also gave short shrift to legislative history replete with evidence of congressional intent to extend federal jurisdiction as far as constitutionally permissible in order to achieve the environmental goals of the Act.[309]

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305. *Riverside Bayview Homes*, 474 U.S. at 139.

306. Clifford Rechtschaffen, *Enforcing the Clean Water Act in the Twenty-First Century: Harnessing the Power of the Public Spotlight*, 55 ALA. L. REV. 775, 784 (2004).

307. *Rapanos*, 547 U.S. at 719–20, 737.

308. Ohio State Research News, *Wetland Loss Still Outweighs Gain Despite 20 Years of Progress*, http://researchnews.osu.edu/archive/mitigate.htm (last visited Jan. 31, 2009) (citing NAT'L RESEARCH COUNCIL, COMPENSATING FOR WETLAND LOSSES UNDER THE CLEAN WATER ACT 16 (2002)); *see also* U.S. FISH & WILDLIFE SERV., GEOGRAPHICALLY ISOLATED WETLANDS: A PRELIMINARY ASSESSMENT OF THEIR CHARACTERISTICS AND STATUS IN SELECTED AREAS OF THE UNITED STATES § 3 (2002), *available at* http://www.fws.gov/nwi/PubsReports/isolated/isolated_no_images.pdf. (studying selected wetland areas within each state); PAT PARENTEAU, ASS'N OF STATE WETLANDS MANAGERS & THE ASS'N OF STATE FLOODPLAIN MANAGERS, POSITION PAPER ON CLEAN WATER ACT JURISDICTION DETERMINATIONS PURSUANT TO THE SUPREME COURT'S JANUARY 9, 2001 DECISION, *SOLID WASTE OF NORTHERN COOK COUNTY V. UNITED STATES ARMY CORPS OF ENGINEERS* (SWANCC) 5 (2001), *available at* http://www.aswm.org/fwp/swancc/position.pdf (supporting clear regulatory guidance). According to the U.S. Fish and Wildlife Service, "wetland acreage has diminished to the point where environmental and even socio-economic benefits (i.e. ground water supply and water quality, shoreline erosion, floodwater storage and trapping of sediments, and climatic changes) are now seriously threatened." U.S. Fish and Wildlife Service, *Wetland Threats and Loss: Wetlands Losses in the United States: 1780's to 1980's*, http://wetlandextension.ifas.ufl.edu/threats.htm (last visited Jan. 31, 2009).

309. *Rapanos*, 547 U.S. at 787–88 (Stevens, J., dissenting); Solid Waste Agency of N. Cook County v. U.S. Army Corps of Eng'rs (*SWANCC*), 531 U.S. 159, 175–76 (2001) (Stevens, J., dissenting).

In another 2006 case, *S.D. Warren Co. v. Maine Board of Environmental Protection*, the Court bowed to a state's authority to impose conditions on a federally licensed hydropower dam.[310] This time, the State had affirmatively asserted its power to protect the environment from the adverse effects of dam operations, utilizing the explicit authority of Section 401 of the CWA, which requires state certification of any federal activity that "may result in any discharge into navigable waters."[311] The Maine Department of Environmental Protection found that the dam in question had dried up long stretches of the river, ruining fish habitats and eliminating fishing and other recreational opportunities on the river.[312] The State's certification required the dam operator to maintain minimum flows and to allow passage for fish and eels. In contrast to *Rapanos*, in the *S.D. Warren* case, the United States weighed in as amicus curiae in support of the State of Maine.[313]

In upholding Maine's certification requirement, the Roberts Court explained:

> State certifications under § 401 are essential in the scheme to preserve state authority to address the broad range of pollution, as Senator Muskie explained . . . when what is now § 401 was first proposed: "No polluter will be able to hide behind a Federal license or permit as an excuse for a violation of water quality standard[s]. . . . No State water pollution control agency will be confronted with a fait accompli by an industry that has built a plant without consideration of water quality requirements."[314]

Foreshadowing its subsequent decision in *Rapanos*, the Court stated that "[c]hanges in the river like these fall within a State's legitimate legislative business, and the Clean Water Act

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310. S.D. Warren Co. v. Maine Bd. of Envtl. Prot., 547 U.S. 370, 373 (2006).

311. 33 U.S.C. § 1341(a)(1) (2006).

312. *S.D. Warren*, 547 U.S. at 385–86.

313. *Id*. at 372.

314. *Id*. at 386 (citations omitted). The Court followed *PUD No. 1 of Jefferson County v. Washington Department of Ecology*, where it upheld a state's stream flow requirements as consistent with its Section 401 authority to prevent the degradation of water quality. PUD No. 1 of Jefferson County v. Wash. Dep't. of Ecology, 511 U.S. 700, 723 (1994). Notably, in *PUD No. 1*, Justices Thomas and Scalia argued that the Federal Power Act preempted the ability of states to impose minimum stream limits on FERC licensed projects under CWA Section 401. *Id.* at 734 (Thomas, J., dissenting) ("Today, the Court gives the States precisely the veto power over hydroelectric projects that we determined in [prior cases] they did not possess."). The Court has consistently recognized the regulation of utilities as a traditional state police power. *See* Ark. Elec. Coop. Corp. v. Ark. Pub. Serv. Comm'n, 461 U.S. 375, 377 (1983); Pac. Gas & Elec. Co. v. State Energy Res. Conservation & Dev. Comm'n, 461 U.S. 190, 211 (1983).

provides for a system that respects the States' concerns."[315] Accordingly, it construed Section 401 in a way that best "preserves the state authority apparently intended" by Congress.[316] The subtext of all three of these cases—a recognition of traditional state regulatory power over both land use development and electric utilities—helps make sense of *S.D. Warren*, *Rapanos*, and *SWANCC*.[317]

Outside of the Section 401 context, however, state regulation of the hydroelectric industry had been questioned in a line of Supreme Court cases involving not the CWA but the Federal Power Act of 1920.[318] The Federal Power Act requires any nonfederal entity seeking to build or operate a hydroelectric project to comply with federal licensing requirements.[319] In a 1946 case, *First Iowa Hydro-Electric Cooperative v. Federal Power Commission*, the project proponent proposed to divert nearly the entire flow of the Cedar River, but, as in Maine, Iowa law required water to be returned to the stream "without being materially diminished in quantity or polluted or rendered deleterious to fish life."[320] Not surprisingly, the state opposed the project, but the Court held that Iowa law was preempted, despite two savings clauses in the Act. The Court construed the first clause, that an applicant supply the Commission with evidence of compliance with the requirements of state law, as merely suggesting "subjects as to which the Commission may wish some proof submitted to it of the applicant's progress."[321] The second clause was given short shrift as well. The Court treated the provision, which stated that the Act should not be construed as interfering with state laws relating to "the control, appropriation, use or distribution of water in irrigation or for municipal or other uses," as protecting only proprietary water rights rather than

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315. *S.D. Warren*, 547 U.S. at 386.

316. *Id.* at 387.

317. *Compare id.* at 386–87, *with* Rapanos v. United States, 547 U.S. 715, 738 (2006) (private developers need not obtain a federal permit to drain and fill isolated wetlands or ephemeral streams), *and* Solid Waste Agency of N. Cook County v. U.S. Army Corps of Eng'rs (*SWANCC*), 531 U.S. 159, 174 (2001) (similar).

318. 16 U.S.C. §§ 791a–823d; *see, e.g.*, First Iowa Hydro-Elec. Coop. v. Fed. Power Comm'n, 328 U.S. 152, 179–80 (1946) (discussing history and purposes of the Federal Water Power Act); United States v. Appalachian Elec. Power Co., 311 U.S. 377, 426–28 (1940). *See generally* Michael P. Healy, *The Attraction and Limits of Textualism: The Supreme Court Decision in* PUD No. 1 of Jefferson County v. Washington Department of Ecology, 5 N.Y.U. ENVTL. L.J. 382 (1996) (assessing tension between the Federal Power Act and the CWA).

319. 16 U.S.C. § 817 (2006).

320. *First Iowa Hydro-Elec. Coop.*, 328 U.S. at 164–66.

321. *Id.* at 178.

general state authorities over water usage.[322] To hold otherwise, according to the Court, would destroy the effectiveness of the Federal Power Act by subordinating the Commission's judgment to the state and negating its purpose of promoting a comprehensive national regulatory scheme for full development of the nation's water resources.[323] The Court's ruling in *First Iowa* thus placed the Commission in "sole command" of hydropower licensing, "freeing it from impediments caused by any shared decisionmaking with the states in the licensing process."[324]

Congress subsequently amended the Federal Power Act to explicitly require the Commission (now known as the Federal Energy Regulatory Commission (FERC)) to accept any conditions on licenses recommended by state, tribal, or federal agencies, or explain in writing why it rejected them.[325] After passage of the amendments, the Rehnquist Court had an opportunity to reexamine the Act's preemptive effect in *California v. FERC*.[326] When California sought to impose higher minimum streamflows on a federally licensed project to protect in-stream values, the Court held once again that state-mandated minimum streamflows would conflict with congressional objectives by effectively allowing California to veto the project.[327] It reaffirmed *First Iowa* over the objections of all fifty states.[328]

To some extent, states have been able to accomplish through CWA Section 401 what they could not do under the Federal Power Act.[329] Although the power given to states under CWA

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322. *Id.* at 175–76.

323. *Id.* at 164, 180 (describing the Federal Power Act as "a complete scheme of national regulation which would promote the comprehensive development of the water resources of the Nation, in so far as it was within the reach of the federal power to do so").

324. Charles R. Sensiba, *Who's in Charge Here? The Shrinking Role of the Federal Energy Regulatory Commission in Hydropower Relicensing*, 70 U. COLO. L. REV. 603, 615 (1999); *see also* William L. Plouffe, *Forty Years After* First Iowa*: A Call for Greater State Control of River Resources*, 71 CORNELL L. REV. 833, 836–37 (1986) (analyzing the effects of the *First Iowa* opinion).

325. 16 U.S.C. § 803(j) (2006).

326. California v. FERC, 495 U.S. 490, 493–94 (1990).

327. *Id.* at 494–96, 500–07.

328. *Id.* at 492–93, 505. The Court distinguished the more deferential language of the Reclamation Act, which requires the U.S. Bureau of Reclamation to "proceed in conformity with" state laws governing the use and allocation of water. *Id.* at 504–05 (citing California v. United States, 438 U.S. 645, 674–75 (1978)). *California v. FERC* was also distinct from the regulation at issue in *Arkansas Electric Cooperative Corp. v. Arkansas Public Service Commission*, 461 U.S. 375, 386–87 (1983), in which the Court held that the Federal Power Act did not preempt state regulation of rural cooperative wholesale power rates absent a showing that the state rates appreciably disrupted interstate electricity markets.

329. *See* S.D. Warren Co. v. Maine Bd. of Envtl. Prot., 547 U.S. 370, 373 (2006) (requiring state approval for dams which discharge into a state's navigable waters).

Section 401 seems to contradict the constraints on state power imposed by the Federal Power Act, the Supreme Court has yet to resolve a direct conflict between the two. In a 1994 Washington case, hydropower operators asserted Federal Power Act preemption arguments in an attempt to defeat restrictive state conditions issued under CWA Section 401, but where FERC had not yet acted on their hydropower license application, the Court found that the two statutory schemes could be reconciled.[330] It explained that FERC might eventually deny the hydropower application or, alternatively, "given that FERC is required to give equal consideration to the protection of fish habitat . . . any FERC license would contain the same conditions as the state § 401 certification."[331] Notably, in the Washington case, FERC went on record as having no objection to the conditions contained in the state's Section 401 certification.[332] The Court noted, however, that if FERC were to issue a license containing streamflow conditions that contradicted the state's certification requirements, the hydropower operators could pursue their preemption arguments at that time.[333]

Like the Federal Power Act, federal flood control acts explicitly assume federal responsibility for flood control measures.[334] The Act of 1936, in particular, gives the U.S. Army Corps of Engineers virtually unbridled discretion by authorizing it to proceed with a project whenever "the benefits to whomsoever they may accrue are in excess of the estimated costs."[335] Passage of the Act raised federalism concerns because the states were apprehensive about retaining control over land use and water resources development.[336] To alleviate these concerns, Congress declared a policy of "recogniz[ing] the interests and rights of the States in determining the development of the watersheds within their borders and likewise their interests and rights in water utilization and control."[337] Despite this savings clause, the Court

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330. PUD No. 1 of Jefferson County v. Wash. Dep't of Ecology, 511 U.S. 700, 721–22 (1994). In *PUD No. 1*, the state of Washington imposed minimum stream flows under CWA Section 401 to enforce a designated use contained in a state water quality standard. *Id.* at 705–09.

331. *Id.* at 722.

332. *Id.*

333. *Id.* at 723 (citing Escondido Mut. Water Co. v. La Jolla Band of Mission Indians, 466 U.S. 765, 778 n.20 (1984)).

334. 33 U.S.C. § 701a-1 (2006).

335. 33 U.S.C. § 701a (2006). For a critique of this open-ended authority, see Zellmer, *supra* note 12.

336. ETSI Pipeline Project v. Missouri, 484 U.S. 495, 502–03 (1988).

337. 33 U.S.C. § 701-1 (2006). This 1944 amendment came on the heels of the Court's opinion in *Oklahoma ex rel. Phillips v. Guy F. Atkinson Co.*, 313 U.S. 508, 516 (1941),

has routinely affirmed the Corps' power over matters that affect state prerogatives.[338] In *ETSI Pipeline Project v. Missouri*, the State of South Dakota had granted ETSI a permit to withdraw water from Lake Oahe for a coal slurry pipeline, and the Department of the Interior acquiesced.[339] The project was invalidated by the Rehnquist Court, which found that the Interior lacked the power to authorize the project without obtaining the approval of the Secretary of the Army because the Flood Control Act had given the Corps predominant authority over flood control reservoirs such as Lake Oahe.[340] The preemption of state law was not directly at issue, but in a type of backdoor preemption ruling, the Court gave only passing mention to South Dakota's interest in preserving the integrity of its permitting decisions and no mention whatsoever to the statutory savings clause.[341]

At first blush, it seems difficult if not impossible to square the Court's sanctioning of strong federal preemptive powers under the Flood Control Act and the Federal Power Act with its deferential approach to state and local prerogatives for wetland and floodplain development under the CWA.[342] Close consideration of these lines of cases, however, reveals a consistent prodevelopment pattern, where state regulations that promote land use development and private water rights necessary for development have fared relatively well in surviving displacement by preemption. The Supreme Court's rationale for favoring states' rights in the prodevelopment cases is two-fold. It relies both on textual analysis—Congress has been most careful to include strongly worded savings clauses in these areas—and on the historic backdrop of strong state authority over both land use and water rights. Beyond the CWA, at least thirty-six other federal statutes expressly save state laws protective of water

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which upheld federal supremacy over flood control projects on navigable waters. Robert W. Adler, *Addressing Barriers to Watershed Protection*, 25 ENVTL. L. 973, 1028 & n.317 (1995).

338. Reed D. Benson, *Deflating the Deference Myth: National Interests vs. State Authority Under Federal Laws Affecting Water Use*, 2006 Utah L. Rev. 241, 297–98.

339. *ETSI Pipeline Project*, 484 U.S. at 497–98.

340. *Id.* at 511–12.

341. *See id.* at 498 n.2 (disclaiming any need to weigh the relative interests of the United States and the state of South Dakota in Oahe water).

342. *See* Healy, *supra* note 318, at 391–95 (describing tension between federal and state regulators created by the Federal Power Act and the CWA). The *ETSI* case is an anomaly, in that it not only pitted two federal agencies against each other but it also pitted the development interests of South Dakota, the upstream state, against the development interests of the downstream states of Missouri, Iowa, and Nebraska.

rights and development,[343] demonstrating what the Court has called a "consistent thread of purposeful and continued deference to state water law."[344] As a result, irrigators with state-sanctioned rights to use water and developers with property interests in wetlands and floodplain land have been emboldened to assert states' rights and their own property rights in challenging and sometimes defeating any regulations—federal or state—protective of the environment.[345]

B. Workplaces

In contrast to judicial preservation of tort claims for workplace injuries,[346] state workplace regulations and pension provisions have been struck down despite strongly worded statutory savings clauses.[347] With respect to workplace safety, OSHA includes an explicit savings clause for common law remedies and also specifies that states are free to "assert[ ] jurisdiction under State law over any occupational safety or health issue with respect to which no [OSHA] standard is in effect."[348] States are authorized to assume responsibility for the development and the enforcement of occupational safety and health standards, but state standards may only be approved if the Secretary certifies that they are "at least as effective" as

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343. United States v. New Mexico, 438 U.S. 696, 702 n.5 (1978). For commentary on deference to states on the allocation of water resources, see Benson, *supra* note 338; David H. Getches, *The Metamorphosis of Western Water Policy: Have Federal Laws and Local Decisions Eclipsed the States' Role?*, 20 STAN. ENVTL. L.J. 3, 7–8 (2001); and Amy K. Kelley, *Staging a Comeback—Section 8 of the Reclamation Act*, 18 U.C. DAVIS L. REV. 97, 117–18 (1984).

344. California v. United States, 438 U.S. 645, 653 (1978).

345. For decisions impeding federal regulatory authority over developers or irrigators, see, for example, James City County, Va. v. EPA, 12 F.3d 1330, 1336 (4th Cir. 1993) (asserting CWA Section 1251(g), which precludes federal regulation from abrogating or superseding states' authority to allocate water, to challenge a federal decision to veto a dam permit); Tulare Lake Basin Water Storage Dist. v. United States, 49 Fed. Cl. 313, 314 (2001) (asserting a takings clause claim against the U.S. Bureau of Reclamation for curtailing deliveries to protect species). For judicial constraints on state environmental regulations, see *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1030 (1992), in which the Court held that a restriction on coastal development was a Fifth Amendment taking that required just compensation.

346. *See supra* Part III.B (reviewing Court jurisprudence with regard to tort claims arising from workplace hazards).

347. *See* 29 U.S.C. § 667(a) (2006) (workplace safety); 29 U.S.C. § 1144(b)(2) (2006) (state regulated insurance plans). State requirements for resolving workplace disputes have also been struck down as preempted by the Federal Arbitration Act. Preston v. Ferrer, 128 S. Ct. 978, 981 (2008) (holding that when parties have agreed to arbitrate all questions arising under a service contract, federal law supersedes state statutes lodging primary jurisdiction in any other judicial or administrative forum).

348. 29 U.S.C. § 667(a) (2006).

federal standards and that the state will dedicate sufficient resources to administration and enforcement.[349] Although many states simply adopt the OSHA regulations as their own, several have adopted more stringent requirements than provided by the federal floor on subjects ranging from fire codes to criminal enforcement schemes.[350]

In *Gade v. National Solid Wastes Management Ass'n*, a trade association sued to prevent Illinois from enforcing state laws providing for the licensure of workers at hazardous waste sites.[351] Both the association and OSHA argued that OSHA's standards for the training of workers who handle hazardous wastes preempted Illinois law. Emphasizing a desire to avoid subjecting employers to duplicative regulation, the Rehnquist Court agreed that the Act preempted any nonapproved state regulation of an occupational issue for which a federal standard had been adopted.[352] Its opinion contracted the scope of the statutory savings clause by presupposing "a background pre-emption of all state occupational safety and health standards whenever a federal standard governing the same issue is in effect."[353] The Court noted, however, that state laws of general applicability, such as traffic safety laws and fire codes, would not be preempted because they regulate workers as members of the general public and not strictly as workers; in short, generally applicable requirements would not be considered occupational standards.[354] In the wake of *Gade*, states are precluded from issuing regulations that directly concern worker safety if any related federal standard exists, even when the state regulations advance congressional objectives by setting more protective standards than required by the federal regulatory floor, and even when enforcement of the state requirement would not preclude or otherwise conflict with enforcement of the federal standard. In effect, the *Gade* Court allowed OSHA's standards to occupy the entire field of licensure and training even though Congress evidenced its intent, through the statutory savings clause, *not* to do so.[355]

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349. 29 U.S.C. § 667(a)–(c) (2006).

350. *Getting Away With Murder*, *supra* note 109, at 539 n.27.

351. Gade v. Nat'l Solid Wastes Mgmt. Ass'n, 505 U.S. 88, 94 (1992).

352. *Id.* at 108–09.

353. *Id.* at 100.

354. *Id.* at 107. Similar reasoning was employed in *Riegel*. *See* Riegel v. Medtronic, Inc., 128 S. Ct. 999, 1009–10 (2008).

355. *See* 29 U.S.C. § 667(a) (2006) (allowing states to enact regulation over occupational safety and health issues where no standard exists under OSHA).

The Rehnquist Court gave the Employee Retirement Income Security Act (ERISA) similarly broad preemptive effect.[356] Prior to ERISA, several states had adopted aggressive laws requiring special insurance benefits, such as cost of living increases, in pensions.[357] To preempt disparate and increasingly onerous state laws regulating employee benefit plans, unions and employers alike sought federalization.[358] State insurance commissions, however, wanted to preserve their traditional role over insurance.[359] Congress crafted a compromise in ERISA's preemption and savings clauses.[360] First, ERISA expressly preempts "any and all State laws insofar as they may now or hereafter *relate to* any employee benefit plan [covered by ERISA]."[361] The all-important preemptive phrase "relate to" was left undefined, but an "employee welfare benefit plan" includes

> any plan, fund, or program which was heretofore or is hereafter established or maintained by an employer or by an employee organization, or by both, to the extent that such plan, fund, or program was established or is maintained for the purpose of providing for its participants or their beneficiaries, through the purchase of insurance or otherwise . . . medical, surgical, or hospital care or benefits, or benefits in the event of sickness, accident, disability, death or unemployment, or vacation benefits . . . .[362]

Meanwhile, ERISA's savings clause preserves "any law of any State which regulates insurance, banking, or securities," with the caveat that an "employee benefit plan" shall not "be deemed to be an insurance company or other insurer, bank, trust company, or investment company . . . for purposes of [state regulation of banking, insurance, or securities]."[363]

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356. *See, e.g.*, Aetna Health Inc. v. Davila, 542 U.S. 200, 208 (2004) (citing 29 U.S.C. §§ 1001(b), 1144 (2006)).

357. Hills, *supra* note 11, at 40.

358. JAMES A. WOOTEN, THE EMPLOYMENT RETIREMENT INCOME SECURITY ACT OF 1974: A POLITICAL HISTORY 258–59, 264–65 (2004).

359. *Id.* at 234–35.

360. 29 U.S.C. § 1144(a), (b)(2) (2006); *see also* 29 U.S.C. § 1001(b) (2006) ("It is hereby declared to be the policy of this chapter to protect interstate commerce and the interests of participants in employee benefit plans and their beneficiaries, by requiring the disclosure and reporting to participants and beneficiaries of financial and other information with respect thereto, by establishing standards of conduct, responsibility, and obligation for fiduciaries of employee benefit plans, and by providing for appropriate remedies, sanctions, and ready access to the Federal courts.").

361. 29 U.S.C. § 1144(a) (2006) (emphasis added).

362. 29 U.S.C. § 1002(1) (2006).

363. 29 U.S.C. § 1144(b)(2)(A)–(B) (2006).

An understanding of these two phrases can be gleaned from the purpose of ERISA "to protect plan administrators (chiefly employers and unions) and employees . . . . [not] to protect doctors, hospitals, MCOs [managed care organizations], or other third parties who administered plan benefits on behalf of employers."[364] At the time of enactment in 1974, attention was focused on vesting and funding requirements for pensions, not the regulation of MCOs, which barely existed at the time.[365] During the 1970s, most benefit plans simply reimbursed fees for medical services, wherever those services were rendered.[366] Managed care soon became the vehicle of choice, however, for controlling health care costs. It was not long before the courts had to determine whether ERISA preempted the regulation of third parties hired by plan administrators to provide plan benefits. Professor Roderick Hills described the dilemma:

> [E]mployers' contracts with MCOs are not "employee welfare benefit plans" covered by ERISA, because this statutory term encompasses only contracts between employers, unions, or other plan administrators and employees. In addition . . . no credence has been given to the suggestion that any state law—say, state taxes or state-law malpractice liability—"relates to" employment relations under ERISA merely because such laws will affect the price of MCOs' services. By the same token, one could argue that state regulation of the employers' contracts with MCOs do not "relate to" employers' benefit plans merely because such laws will affect the cost of those benefit plans.[367]

The Supreme Court exhibited some tolerance for state regulation of MCOs and other insurers[368] until its 2004 opinion in *Aetna Health Inc. v. Davila*.[369] There, the Rehnquist Court preempted the Texas Health Care Liability Act, citing allegedly "clear congressional intent" to displace liability of MCOs that administered ERISA-covered benefit plans.[370] As a result, state regulation of employee benefits has been almost wholly eclipsed

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364. Hills, *supra* note 11, at 41.

365. *Id.*

366. *Id.*

367. *Id.* at 41–42.

368. *Id.* at 43–44 (discussing De Buono v. NYSA-ILA Med. & Clinical Servs. Fund, 520 U.S. 806 (1997); Cal. Div. of Labor Standards Enforcement v. Dillingham Constr., N.A., Inc., 519 U.S. 316 (1997); N.Y. State Conference of Blue Cross & Blue Shield Plans v. Travelers Ins. Co., 514 U.S. 645 (1995)).

369. *See* Aetna Health Inc. v. Davila, 542 U.S. 200, 214 (2004) (holding that respondent's claims fell within ERISA section 502(a)(1)(B) and were thus preempted by ERISA).

370. *Id.* at 209, 213–14.

by ERISA. Meanwhile, Congress has failed to address the MCO issue,[371] although immunity from liability for damages caused by wrongful denial of benefits would be unlikely to win a majority vote if the issue were to come directly before Congress.[372] The result has been a "regulatory vacuum" where injured persons cannot obtain meaningful relief.[373]

C. *Agriculture*

The supervision of agricultural practices within a state, especially those related to food quality, "has always been deemed a matter of peculiarly local concern."[374] Accordingly, an early Rehnquist Court decision rejected a preemption challenge to local restrictions on pesticide spraying in *Wisconsin Public Intervenor v. Mortier* and construed the statutory savings clause of FIFRA in a manner that allowed local governments to protect their citizens' health.[375] The holding rested in part on the plain language of the savings clause itself, which authorizes states to impose more (but not less) stringent regulations on "the sale or use of any federally registered pesticide"[376] and in part on recognition of the states' historic powers to regulate agricultural activities within their borders.[377]

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371. *See* Hills, *supra* note 11, at 42 ("By bestowing the protection of ERISA preemption on the managed care industry, the Court eliminated that industry's incentive to lobby Congress for any clarification of ERISA's scope. The result arguably has been gridlock in Congress over the status of managed care for decades.").

372. *Id.* at 53.

373. *See Aetna*, 542 U.S. at 222 (Ginsburg, J., concurring) (observing that the Court has created a "'regulatory vacuum' . . . in which persons adversely affected by ERISA-proscribed wrongdoing cannot gain make-whole relief"). In its 1983 opinion in *Pacific Gas*, the Burger Court explicitly noted, "It is almost inconceivable that Congress would have left a regulatory vacuum; the only reasonable inference is that Congress intended the states to continue to make . . . judgments" related to the need for nuclear power. Pac. Gas & Elec. Co. v. State Energy Res. Conservation & Dev. Comm'n, 461 U.S. 190, 207–08 (1983); *see also supra* note 248 and accompanying text (summarizing the *Pacific Gas* opinion).

374. Mich. Canners & Freezers Ass'n v. Agric. Mktg. & Bargaining Bd., 467 U.S. 461, 470 (1984) (quoting Fla. Lime & Avocado Growers, Inc. v. Paul, 373 U.S. 132, 144 (1963)); *see also* Wis. Pub. Intervenor v. Mortier, 501 U.S. 597, 608 (1991) (finding that Congress intended to leave the regulation of pesticides to the "absolute discretion" of the States); Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 229–30 (1947) (observing that states historically regulated grain warehouses).

375. *Wisconsin Public Intervenor*, 501 U.S. at 607–08.

376. 7 U.S.C. § 136v(a) (2006) ("A State may regulate the sale or use of any federally registered pesticide or device in the State, but only if and to the extent the regulation does not permit any sale or use prohibited by this subchapter."); *see also supra* notes 231–32 and accompanying text (discussing *Wisconsin Public Intervenor* and FIFRA's savings clauses).

377. *Wisconsin Public Intervenor*, 501 U.S. at 608. Where state agricultural laws authorize conduct that a federal statute specifically forbids, however, the state law will

The presumption against preemption of state powers played a role in saving state agricultural laws, even absent a savings clause, in an earlier case, *Florida Lime & Avocado Growers, Inc. v. Paul*.[378] There, the Warren Court considered the effect of federal law on a California statute imposing maturity standards for avocados. Both laws had the purpose of protecting consumers from sub-par agricultural products.[379] The federal requirements were adopted pursuant to the Agricultural Adjustment Act, enacted "to restore and maintain parity prices for the benefit of producers of agricultural commodities, to ensure the stable and steady flow of commodities to consumers, and 'to establish and maintain . . . minimum standards of quality and maturity.'"[380] A portion of Florida avocados could not meet the more stringent California standards. There was no question that Congress had the power, under the Commerce Clause, to regulate agricultural commodities,[381] so the Florida Avocado Growers asserted implied preemption to displace the California standards. The Court, as an initial observation, found that the regulation of food quality was an area of traditional state concern—"the States have always possessed a legitimate interest in 'the protection of . . . [their] people against fraud and deception in the sale of food products' at retail markets within their borders."[382] In upholding the California regulation, the Court invoked the presumption against preemption and sought, but did not find, clear congressional intent to oust state authority over agricultural products.[383]

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still be displaced under conflict preemption. *See Michigan Canners*, 467 U.S. at 478 (noting that by certifying associations as exclusive bargaining agents for all producers of a particular commodity, Michigan law conflicted with the federal Agricultural Fair Practices Act, which was intended to protect the rights of farmers to join cooperative associations by which to market their products); *see also* Jim Chen, *Of Agriculture's First Disobedience and Its Fruit*, 48 VAND. L. REV. 1261, 1286 (1995) (describing the Agricultural Fair Practices Act as providing farm owners "generous legal safeguards . . . against coercion by product handlers").

378. *Fla. Lime*, 373 U.S. at 132.

379. *Id.* at 137.

380. *Id.* at 138 (quoting 7 U.S.C. § 602(3) (2006)).

381. *See* Wickard v. Filburn, 317 U.S. 111, 128–29 (1942) (holding that Congress had the authority to regulate the price of wheat, even that wheat consumed entirely on the farm upon which it was grown).

382. *Fla. Lime*, 373 U.S. at 144 (quoting Plumley v. Massachusetts, 155 U.S. 461, 472 (1894)).

383. *Id.* at 146–47. Other than labeling restrictions, state and local provisions related to agricultural chemicals have generally survived preemption challenges in the lower courts. *See* Croplife Am., Inc. v. City of Madison, 373 F. Supp. 2d 905, 908 (W.D. Wis. 2005) (upholding city and county ordinances barring the sale of fertilizers containing phosphorus); Chem. Producers and Distribs. Ass'n v. Helliker, 319 F. Supp. 2d 1116, 1118 (C.D. Cal. 2004) (upholding a state law that granted exclusive rights to data to the

D. Medical Devices, Drugs, and Practices

As with agricultural practices, many states have traditionally taken an active role in the struggle to protect their residents from public health risks posed by waterborne diseases, smoke inhalation, and unsafe workplaces.[384] This is no less true of the public health risks posed by drugs and other harmful products.[385] States have attempted to guard against epidemics and injuries through regulatory means as well as jury awards.[386] Yet when faced with preemption challenges, states have been less successful in maintaining regulatory efforts over drugs that affect their citizens' health.

A 2008 opinion by the Roberts Court is, at the time of this writing, the latest chapter in the saga of federal preemption of states' efforts to regulate the sale and consumption of tobacco products. In this case, *Rowe v. New Hampshire Motor Transport Ass'n*, the Court struck down a regulatory effort by the State of Maine to protect the health of its youngest citizens from the health risks posed by cigarettes.[387]

In recent years, tobacco sales to adolescents over the Internet "have reached epidemic proportions," posing a grave danger to public health.[388] In 2003, to thwart underage consumption, the Maine legislature adopted a statute requiring shippers of tobacco products to utilize delivery services that would verify the legal age of the buyer.[389] A provision of the Federal Aviation Administration Authorization Act preempts states from enacting or enforcing "a law . . . related to a price, route, or service of any motor carrier . . . with respect to the transportation of property."[390] The goal of the Act is to deregulate the transportation industry and induce "maximum reliance on competitive market forces."[391] In a unanimous opinion, the Court

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original applicants, thereby making registration more costly for companies subsequently seeking to register generic pesticides), *vacated as moot*, 463 F.3d 871 (9th Cir. 2006).

384. *See supra* Part III.A–C. (discussing tort preemption issues in the areas of environment and energy, workplace hazards, and products liability).

385. Medtronic, Inc. v. Lohr, 518 U.S. 470, 485 (1996); Riegel v. Medtronic, Inc., 128 S. Ct. 999, 1013 (2008) (Ginsburg, J., dissenting).

386. *See supra* Part III.C.1. (analyzing preemption battles over tort claims arising from drugs and medical devices).

387. Rowe v. N.H. Motor Transp. Ass'n, 128 S. Ct. 989, 993 (2008).

388. *Id.* at 999 (Ginsburg, J., concurring) (quoting Brief for California et al. as Amici Curiae for Petitioner at 9, *Rowe*, 128 S. Ct. 989 (No. 06-457)).

389. ME. REV. STAT. ANN. tit. 22, § 1555-C(3)(C) (2004).

390. 49 U.S.C. § 14501(c)(1) (2000); *see also* 49 U.S.C. § 41713(b)(4)(A) (2000) (prohibiting states from enacting similar laws concerning air carriers).

391. Morales v. Trans World Airlines, Inc., 504 U.S. 374, 378 (1992) (quoting 49 U.S.C. § 1302(a)(4) (current version at 49 U.S.C. § 40101 (2000))).

held that Maine's statute was preempted.[392] It reasoned that "to interpret the federal law to permit these . . . state requirements could easily lead to a patchwork of state service-determining laws, rules, and regulations" contrary to Congress's decision to leave such decisions to the marketplace.[393] It rejected Maine's attempt to avail itself of various exceptions within the Act that allow states to set local route controls, insurance requirements, and the like, finding no evidence that Congress intended to save other types of state laws.[394]

In view of the Act's broad preemption language and its lack of an explicit savings clause, the result in the Maine case is not terribly surprising. It does, however, evidence a "large regulatory gap" left by Congress, which probably did not foresee the growth of online tobacco sales and deliveries fostered by the Internet.[395] Justice Ginsburg and a number of states have urged Congress to fill that gap.[396]

An anomaly in the Supreme Court's recent pro-preemption jurisprudence can be seen in a case involving a patient's ability to seek a doctor's assistance in effectuating a deeply personal medical choice—namely, life or death.[397] The Court has demonstrated more willingness to respect state regulatory choices in this area, in part because of the historic backdrop of state authority regarding medical practice and in part because Congress has been exceptionally careful to include a strongly worded savings clause for medical prescriptions.[398]

A doctor's ability to use lethal doses of prescription drugs to assist terminally ill patients with suicide has long been the subject of heated debate.[399] Congress has provided no federal resolution, and states have taken vastly different approaches to

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392. *Rowe*, 128 S. Ct. at 992, 995.

393. *Id.* at 996.

394. *Id.* at 997.

395. *Id.* at 998–99 (Ginsburg, J., concurring). A similar preemption provision was adopted in 1978 in the Airline Deregulation Act and expanded to motor carriers in the 1994 Federal Aviation Administration Act. *Id.* at 993 (majority opinion) (citing 49 U.S.C. § 1302(a)(4) (current version at 49 U.S.C. §§ 40101, 14501(c)(1) (2000))).

396. *Id.* at 998–99 (Ginsburg, J., concurring).

397. Gonzales v. Oregon, 546 U.S. 243, 248–49 (2006).

398. 21 U.S.C. § 903 (2006) ("No provision of this subchapter shall be construed as indicating an intent on the part of the Congress to occupy the field . . . to the exclusion of any State law on the same subject matter . . . .").

399. Melvin I. Urofsky, *Leaving the Door Ajar: The Supreme Court and Assisted Suicide*, 32 U. RICH. L. REV. 313, 331–32 (1998); *see also* Brett Kingsbury, *A Line Already Drawn: The Case for Voluntary Euthanasia After the Withdrawal of Life-Sustaining Hydration and Nutrition*, 38 COLUM. J.L. & SOC. PROBS. 201, 219 (2004) (proposing that a constitutional right to privacy could form the basis for an argument in support of an individual's right to suicide).

fill the void.[400] Dr. Jack Kevorkian was prosecuted and jailed under Michigan law for injecting lethal drugs at the behest of a patient dying of Lou Gehrig's disease.[401] In contrast, an Oregon law specifically allows physician-assisted suicide through a statute that authorizes licensed physicians to administer lethal drugs, but only after counseling about palliative alternatives and ensuring that patients are competent to make life ending decisions.[402]

The Oregon law provoked a preemption challenge by the U.S. Attorney General under the Controlled Substances Act.[403] Despite its comprehensive nature, the Act's savings clause cautions against displacement of state law by stating that, absent a direct conflict, none of the Act's provisions should be construed as indicating an intent "to occupy the field . . . to the exclusion of any State law on the same subject matter which would otherwise be within the authority of the State, unless there is a positive conflict between that provision of this subchapter and that State law so that the two cannot consistently stand together."[404]

The Roberts Court rejected the preemption challenge in *Gonzales v. Oregon*.[405] It noted that, although Congress could, as a matter of constitutional power, establish national standards for the administration of prescription drugs, Congress had not in fact done so.[406] While the Controlled Substances Act represents "a comprehensive regime to combat the international and interstate traffic in illicit drugs,"[407] the congressional objective regarding the type of medical service at issue in *Oregon* was relatively modest—barring doctors from using prescription-writing powers to engage in illicit drug trafficking. This narrow objective, coupled with the savings clause, convinced the Court that Congress intended states to continue exercising their historic police powers by regulating the practice of medicine.[408] Its interpretation of the CSA was "based in no small part on 'the structure and limitations of federalism, which allow the States

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400. *See* Kingsbury, *supra* note 399, at 211–12.

401. Vera Bergelson, *The 2008 David J. Stoffer Lecture: Autonomy, Dignity, and Consent to Harm*, 60 RUTGERS L. REV. 723, 732 (2008).

402. OR. REV. STAT. §§ 127.800–127.897 (2007).

403. Gonzales v. Oregon, 546 U.S. 243, 249 (2006); *see also* 21 U.S.C. § 903 (2006) (CSA savings clause).

404. 21 U.S.C. § 903 (2006).

405. *Oregon*, 546 U.S. at 274–75.

406. *Id.* at 267, 269–70.

407. *Id.* at 269 (quoting Gonzales v. Raich, 545 U.S. 1, 12 (2005)).

408. *Id.* at 270.

great latitude under their police powers to legislate as to the protection of the lives, limbs, health, comfort, and quiet of all persons.'"[409] According to the Court, "background principles of our federal system . . . belie the notion that Congress would use . . . an obscure grant of authority to regulate areas traditionally supervised by the States' police power."[410]

Although the Roberts Court invoked federalism and the statutory savings clause to uphold the states' historic powers over the practice of medicine in *Oregon*, it refused to do so in a California case involving prescribed uses of marijuana, issued just one year earlier.[411] The Controlled Substances Act prohibits the possession, use, or distribution of marijuana as an illegal, controlled substance.[412] In 1998, Congress passed a joint resolution addressing medical marijuana: "Congress . . . opposes efforts to . . . legaliz[e] marijuana . . . for medicinal use without valid scientific evidence and the approval of the Food and Drug Administration."[413] The American Medical Association recognizes marijuana's capacity to reduce nausea and pain and stimulate appetite, but has not endorsed its legalization, stating that the evidence of its benefits is too inconclusive to outweigh potential negative effects.[414] As of 2005, however, California and eight other states had enacted laws allowing the use of marijuana for pain relief.[415]

In *Gonzales v. Raich*, California growers and users sought injunctive and declaratory relief from the Controlled Substances Act.[416] The U.S. Court of Appeals for the Ninth Circuit held that

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409. *Id.* at 300–01 (Thomas, J., dissenting) (citations omitted).

410. *Id.* at 301 (citations omitted).

411. *Raich*, 545 U.S. at 9.

412. 21 U.S.C. §§ 841(a)(1), 844(a) (2006).

413. Omnibus Consolidated and Emergency Supplemental Appropriations Act, Pub. L. No. 105–277, Div. F(11), 112 Stat. 2681, 2681–761 (1998).

414. *See* 141 CONG. REC. E1374 (1995) (arguing against potential benefits of medical marijuana use) (statement of Rep. Solomon, referencing the Journal of the American Medical Association); Brief for Lymphoma Foundation of America et al. as Amici Curiae Supporting Respondents at 10, *Raich*, 545 U.S. 1 (No. 03-1454) (reporting that cannabis extract works to significantly relieve intractable pain in 18 out of 23 patients). The AMA has, however, taken the position that doctors should be able to freely discuss treatment alternatives with their patients, including marijuana, without fear of criminal sanctions. 1 UELMEN AND HADDOX, DRUG ABUSE AND THE LAW SOURCEBOOK § 2:23 (2006) (citing American Medical Association House of Delegates, Dec. 1997); *see also* Conant v. McCaffrey, 172 F.R.D. 681, 685 (N.D. Cal. 1997) (granting preliminary injunction against imposition of federal criminal penalties on physician–patient discussions about medical marijuana as a violation of physicians' and patients' free speech rights), *permanent injunction entered*, No. C-97-00139, 2000 WL 1281174 (N.D.Cal. Sept.7, 2000).

415. K.K. DuVivier, *State Ballot Initiatives in the Federal Preemption Equation: A Medical Marijuana Case Study*, 40 WAKE FOREST L. REV. 221, 283–86 (2005).

416. *Raich*, 545 U.S. at 6–7.

the Act was not controlling because "the intrastate, noncommercial cultivation, possession and use of marijuana for personal medical purposes on the advice of a physician—is, in fact, different in kind from drug trafficking."[417] It rejected the United States' Commerce Clause justification, stating that the limited personal use of marijuana to alleviate pain is "not properly characterized as commercial or economic activity," and upheld the California law.[418]

The primary issue before the Supreme Court in *Raich* was whether the Commerce Clause authorized Congress to prohibit the use of homegrown marijuana,[419] but the Court also invoked the Supremacy Clause to preempt the state law.[420] It stated that the "federal power over commerce is 'superior to that of the States to provide for the welfare or necessities of their inhabitants,' however legitimate or dire those necessities may be."[421] Notwithstanding the States' "traditional police powers to define the criminal law and to protect the health, safety, and welfare of their citizens," the *Raich* majority concluded that the federal Controlled Substances Act applied to, and therefore criminalized, the possession of medicinal marijuana because Congress could have rationally concluded that a broad application of the Act was necessary for the effective regulation of the "larger interstate marijuana market."[422]

Justices O'Connor, Roberts, and Thomas invoked federalism concerns in dissent:

> This case exemplifies the role of States as laboratories. . . . Exercising [its core police] powers, California . . . has come to its own conclusion about the difficult and sensitive question of whether marijuana should be available to relieve severe pain and suffering. Today the Court sanctions an application of the federal Controlled Substances Act that extinguishes that experiment, without any proof that the personal cultivation, possession, and use of marijuana for medicinal purposes, if economic activity in the first place, has a substantial effect

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417. Raich v. Ashcroft, 352 F.3d 1222, 1228 (9th Cir. 2003).

418. *Id.* at 1229–30. The Ninth Circuit distinguished previous decisions upholding the CSA on Commerce Clause grounds because they were based on "the commercial nature of drug trafficking," while the marijuana at issue in *Raich* was not sold, nor did the aggregation principle of *Wickard v. Filburn*, 317 U.S. 111 (1942), apply as medicinal marijuana use is not commercial. *Id.* at 1230.

419. *Raich*, 545 U.S. at 15.

420. *Id.* at 29.

421. *Id.* (citations omitted).

422. Gonzales v. Oregon, 546 U.S. 243, 300 (2006) (citations omitted).

> on interstate commerce and is therefore an appropriate subject of federal regulation.[423]

One year later, Justice Thomas's dissent in the Oregon case echoed this theme, but used it to attack the majority's decision to uphold Oregon's euthanasia law:

> Confronted with a regulation that broadly requires all prescriptions to be issued for a "legitimate medical purpose," a regulation recognized in *Raich* as part of the Federal Government's "closed . . . system" for regulating . . . "controlled substances . . . " the majority rejects the Attorney General's . . . determination that administering controlled substances to facilitate a patient's death is not a " 'legitimate medical purpose. . . . ' " [I]n stark contrast to *Raich*'s broad conclusions about the scope of the CSA . . . today this Court concludes that the CSA is merely concerned with fighting " 'drug abuse . . . .' "
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> . . . [Yet] we are interpreting broad, straightforward language within a statutory framework that a majority of this Court has concluded is so comprehensive that it necessarily nullifies the States' " 'traditional. . .powers. . .to protect the health, safety, and welfare of their citizens.' "[424]

The *Oregon* Court's reliance upon the same savings clause and the same constitutional principles that it rejected just one year earlier in *Raich* is perplexing, but there seem to be two key distinctions. First is the stance of the federal agency. In *Raich*, the FDA maintained its position that marijuana has no proven medical value, but rather a "high potential for abuse."[425] This militated against California's interest in allowing the broadest array of medical choices, including medical marijuana, for its citizens. Conversely, in *Oregon*, the FDA took no position on medically assisted suicide, and the Drug Enforcement Administration had taken contradictory positions leading up to the litigation.[426] The agencies' ambivalence operated in Oregon's

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423. *Raich*, 545 U.S. at 42–43 (citing Brecht v. Abrahamson, 507 U.S. 619, 635 (1993); Whalen v. Roe, 429 U.S. 589, 603 & n.30 (1977)).

424. *Oregon*, 546 U.S. at 299–300, 302 (citations omitted).

425. Brief for Drug Free America Foundation, Inc., et al. as Amici Curiae Supporting Petitioner at 6, *Raich*, 545 U.S. 1 (No. 03-1454); Stephanie Armour, *Employers Grapple with Medical Marijuana Use*, USA TODAY, Apr. 17, 2007, at 1B; *see also* 21 C.F.R. § 1308.11 (2008) (classifying marijuana as a Schedule I drug, which, under 21 U.S.C. § 812(b)(1), has (1) a high potential for abuse; (2) no currently accepted treatment in the United States; and (3) a lack of accepted safety for use of the drug under medical supervision).

426. *See Oregon*, 546 U.S. at 252–54 (describing vacillating agency positions through

favor. The second significant distinction between the two cases is that in *Oregon*, the state itself was a litigant, whereas in *Raich*, California weighed in only as an amicus, but did not have full party status. According to one theory of preemption, "when states insist upon their right[s]" as parties to the litigation, the Supreme Court is more likely to "give them their due."[427]

E. Harmonizing State Regulations with Federal Law

Since the mid-1990s, the Rehnquist and Roberts Courts have consistently shielded industry from progressive state regulations in areas of traditional state concern ranging from pollution prevention to workplace safety. With the exception of certain agricultural practices, where states have imposed constraints on economic interests, statutory savings clauses have been given short shrift or even ignored. Conversely, in cases where state laws are less onerous on economic pursuits than federal regulation would be, prodevelopment interests have been upheld under the guise of saving state law. Despite the presence of savings clauses, progressive state regulatory programs have been even more vulnerable to judicial preemption than have state common law claims, particularly where the state, for whatever reason, was not a party to the litigation.

If courts gave more careful attention to congressional choices reflected in statutory savings clauses and, more generally, the remedial purposes of federal public health and environmental statutes, there would be fewer regulatory gaps. In some cases, savings clauses reflect congressional determinations of institutional competency, fairness, and efficiency, while in others, savings clauses signal congressional intent to allow regulatory overlap to ensure comprehensive coverage. In either case, absent an unequivocal expression of congressional intent to preempt, federal law should not be construed to preempt state programs that provide greater protection than is established by the federal regulatory baseline, particularly where states are uniquely competent to provide enhanced protection to their citizens, as in the four areas analyzed above (protection from pollution, unsafe products, hazardous workplaces, and unsafe or otherwise inappropriate agricultural practices).

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the Clinton and Bush Administrations). On the relevance of agencies' positions in preemption cases, see sources cited *supra* note 185.

427. Greve & Klick, *supra* note 3, at 68.

V. CONCLUSION

Statutory savings clauses have been included in many federal regulatory statutes in order to temper Congress's "extraordinary power" to displace state laws.[428] Savings clauses preserve the states' ability to use a variety of regulatory and common law tools to provide increased protection for their citizens and the environment over and above the federal regulatory floor. Supreme Court precedent in both the Rehnquist and Roberts Courts, however, has interpreted savings clauses in a fashion that diminishes overall protection of health, safety, and environmental quality.

Ignoring explicit savings clauses or construing them unduly narrowly undermines congressional policy in the highly sensitive, politically charged area of federal–state relations. Conversely, giving savings clauses appropriate weight honors congressional choices, avoids regulatory gaps, fosters innovative measures to protect human health and the environment, and enhances institutional competency by empowering governments at all levels to protect the public at appropriate scales.

The preemption decisions of both the Roberts and Rehnquist Courts have flouted the cooperative federalism objectives articulated by Congress in its environmental and public welfare enactments of the past three decades. Judicial narrowing of savings clauses is especially troubling when common law remedies are displaced. There are compelling reasons for courts to apply the presumption against preemption faithfully to preserve states' powers to protect human health and welfare through the common law. Leaving individuals without adequate means of redressing invasions of their privacy, health, and property causes a severe imbalance between government and corporate power and individual rights. In most cases, federal regulatory requirements and state common law can be easily harmonized. Far from undermining congressional objectives, state common law remedies give greater force to federal remedial purposes. Moreover, through discovery and trial, common law litigation can bring relevant information to light about the harmful effects of the product or activity in question, in some cases long before the agency gets wind of it. Both outcomes foster greater respect for, and stability of, the law as a whole.

Giving savings clauses proper weight is important in the regulatory arena, too. Although an argument can be made that preemption is more justified in regulatory cases than in tort

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428. Gregory v. Ashcroft, 501 U.S. 452, 460 (1991).

cases if the state or local regulation at issue poses a greater threat to the "union-preserving" objective of the preemption doctrine than do tort claims,[429] the review of cases undertaken in this Article reveals no such threat. Thus, so long as the state regulation in question does not obstruct the accomplishment of Congress's objectives, state regulatory choices should be honored. This is especially true when those choices are made against a backdrop of the states' traditional police powers for the protection of public health and safety, and the regulation of utility services, insurance providers, and local agricultural practices.[430]

Where Congress has included a savings clause, straightforward rules of statutory construction dictate that state laws and remedies related to the subject matter of the clause should not be displaced. If the clause does not strictly apply to the state law or activity in question, implied preemption arguments may still be raised to defeat the state law, but the savings clause should be seen as evidencing congressional intent *not* to occupy the field.[431] Moreover, the savings clause should weigh against a blanket determination that state law poses an obstacle to the accomplishment of federal purposes.[432] Notwithstanding the presence of a savings clause, challengers will still be successful in defeating state provisions if they can show an actual conflict between state and federal law, as the Supremacy Clause mandates that federal law trumps conflicting state law when federal and state laws collide such that the compliance with one necessitates the violation of the other.[433]

For its part, Congress should employ more precision in drafting. Many have called upon Congress to speak more clearly regarding preemption.[434] In the event that Congress intends to

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429. Joondeph, *supra* note 41, at 507, 509 (citing 1 LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 6-1 (3d ed. 2000)).

430. *See supra* notes 20–22 and accompanying text.

431. *See, e.g.*, Cleveland v. Piper Aircraft Corp., 985 F.2d 1438, 1442 (10th Cir. 1993) (interpreting savings clause as evidence of Congress's reluctance to displace state common law), *cert. denied*, 510 U.S. 908 (1993).

432. *See* A. Benjamin Spencer, *Anti-Federalist Procedure*, 64 WASH. & LEE L. REV. 233, 284 (2007) (arguing that savings clauses "should serve as an absolute bar to field and obstacle preemption"); *id.* ("Federalism-respecting procedure would . . . treat savings clauses as foreclosing any recourse to implied preemption.").

433. *See id.* at 285 (arguing that conflict preemption "is in no sense 'implied' . . . quite to the contrary, such preemption is the most basic and express form of preemption that exists because the express terms of the Supremacy Clause . . . call for it"); *see also* Erwin Chemerinsky, *Empowering States: The Need to Limit Federal Preemption*, 33 PEPP. L. REV. 69, 74–75 (2005) ("[T]here should be only two situations when there is preemption of state law. One is express preemption. The other is when federal law and state law are mutually exclusive, so it is not possible for somebody to comply with both.").

434. *See, e.g.*, Grey, *supra* note 132, at 627 ("[R]equiring that Congress speak clearly

save the broadest array of state and local laws, it might craft a savings clause that reads as follows:

> Nothing in this act shall be construed to occupy the field on the topics subject to this act. Moreover, absent a direct conflict that makes compliance with both state and federal law impossible, nothing in this act shall be construed to affect state or local provisions, be they legislative, regulatory, or judicial in nature, and nothing in this act shall in any way affect, or be construed to affect, statutory or common law requirements, rights, or remedies.[435]

To the extent that Congress chooses to use terms such as "requirements," "rights," or "remedies," it should define each term to foreclose judicial resort to generic dictionary definitions.[436] Finally, to ensure the broadest possible application, the savings clause should be placed within the statutory chapter on "General Provisions," rather than tucked within a subchapter related to a discrete topic.[437]

That said, there is no magic formula, and indeed there is good reason to be skeptical that language alone will tip the judicial scales.[438] The Supreme Court itself acknowledged that not even the "most dedicated hair-splitter" can distinguish the highly analogous text of most preemption and savings clauses.[439] Despite careful drafting, preemption cases may continue to exhibit "faux textualism," where the Court invokes the so-called "plain meaning" of a statutory clause to reach antiregulatory results.[440]

Yet the decision about relative institutional competencies and the need for innovation at various levels of government is constitutionally vested in Congress through the Supremacy Clause, and there is nothing wrong with demanding greater

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will help ensure that its decision to preempt is the product of a deliberate policy choice.").

435. *See supra* notes 101–05, 250–62 and accompanying text (discussing judicial treatment of the Atomic Energy Act); *supra* notes 89–90 and accompanying text (discussing judicial treatment of the Clean Water Act).

436. *See supra* notes 282–84 and accompanying text (describing judicial invocation of *Webster's Dictionary* to find preemption of "standards").

437. *See* United States v. Locke, 529 U.S. 89, 105–06 (2000) (giving a restrictive reading to the OPA's savings clause by finding that its placement in Title I limited its scope to oil pollution liability and compensation, while vessel manning requirements are contained in Title II, which includes no savings clause).

438. *See* Davis, *supra* note 16, at 972 (joining the chorus of those who call for Congress to speak clearly regarding its intent to preempt state law, but expressing doubt that courts will hear the song); Spence & Murray, *supra* note 39, at 1149 (observing that statutes containing savings clauses have failed to produce any more consistent preemption results than statutes containing express preemption provisions).

439. Bates v. Dow Agrosciences LLC, 544 U.S. 431, 446 n.21 (2005) (citation omitted).

440. Hills, *supra* note 11, at 9.

precision from our elected officials. In the absence of precision, courts are left with an unenviable job. Arguably, one of the advantages of judicial invocation of the presumption against preemption is the impetus for stakeholders to step forward and pressure Congress to place the issue on its decisionmaking agenda.[441] A disadvantage, however, lies in the political process as well. Although state and local governments and representatives of injured persons may lobby Congress for explicit savings clauses if courts find in favor of preemption, collective action theories suggest—and the weight of the evidence shows—these groups are less successful in seeking and obtaining legislation than regulated entities motivated by judicial decisions against preemption.[442]

If, on the other hand, Congress chooses to include both savings and preemption clauses, either because it wishes to carve out an area for preemptive effect or because both clauses are necessary to achieve passage of the statute in question, it must be especially clear regarding the specific topic to be preempted. It must also be clear regarding whether preemption extends only to positive enactments and regulations or to other types of requirements, such as common law remedies. Of course, this may be impossible if the two clauses were included not to carve out specific spheres of federal and state activity but instead to reach an ambiguous yet passage-enabling compromise. If this is the case, the judicial presumption against preemption should still be given full force when states adopt measures protective of their citizens' health, safety, and well-being in areas within their historic police powers, but in the end judges, rather than Congress, will be left to resolve the preemption issue with little meaningful guidance from the Supreme Court.

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441. *See id.* at 22 (arguing that, if regulated entities are upset by the prospect of non-uniform state requirements, they will be motivated to contact their lobbyists and seek a clear preemptive provision from Congress); *see also* DeShazo & Freeman, *supra* note 93, at 1507–08 (concluding that state regulation often acts as a catalyst that prompts industry to seek preemption from Congress).

442. *See* Hills, *supra* note 11, at 11 (noting that collective action problems prevent people from "coalescing on behalf of a common but diffuse interest . . . . [T]hese difficulties are exacerbated by the fact of heterogeneous preferences in a large republic."); *id.* at 54 (explaining that the protection of MCOs from liability under ERISA was "the result of a clash of powerful interests—patients, trial lawyers, insurers, the managed care industry, doctors, and the general public"); *cf.* Note, *New Evidence on the Presumption Against Preemption: An Empirical Study of Congressional Responses to Supreme Court Preemption Decisions*, 120 HARV. L. REV. 1604, 1605, 1619 (2007) (concluding that Congress rarely responds to the Court's preemption decisions by amending the statute at issue).