Saving Savings Clauses from Judicial Preemption

Sandra Zellmer
Saving Savings Clauses from Judicial Preemption

Sandra Zellmer *

Abstract

Savings clauses can be found in an array of federal statutes governing public health, welfare, and environmental quality. Like explicit preemption provisions, the function of a savings clause is to differentiate the boundaries of federal and state authority. Unlike preemption clauses, however, savings clauses strike the balance in favor of the states and state law remedies. Despite the existence of savings clauses, many of the Supreme Court’s recent preemption opinions have invalidated state laws that are more stringent than the federal regulatory threshold, based on a crabbed interpretation of statutory language, a myopic view of congressional purposes, or both. Even in areas within the states’ traditional police powers, industries and developers have been extraordinarily successful in asserting federal preemption to eliminate burdens imposed by state programs.

This article seeks to identify preemption patterns and principles from the Supreme Court’s caselaw on statutory savings clauses. A comparison of caselaw in four areas – pollution, workplace safety, products liability, and agricultural activities – indicates a judicial willingness to provide some redress to injured persons through state tort law but, at the same time, an underlying bias against protective state regulations. The disparate treatment cannot be explained by distinctions in the terms of the savings clauses themselves; the text is so similar that not even the “most dedicated hair-splitter” can distinguish them. Rather, the Court apparently views positive state enactments and regulatory regimes as a greater threat to the implementation of federal programs. As a result, broad spheres of activity have been left unaddressed where state regulation is prohibited but federal regulation is minimal or absent, and, in some cases, citizens are even worse off than they were before the advent of federal laws protecting human health and the environment. The article concludes that, if savings clauses were given appropriate weight in the regulatory context, as they generally are in the common law context, a pattern of cooperative, polyphonic federalism would be more likely to emerge, as state and federal entities would be motivated and empowered to capitalize on each of their institutional strengths and to craft coordinated regulatory solutions.

* Professor, University of Nebraska College of Law. I am grateful to Professors William Buzbee, Robert Glicksman, and Alexandra Klass for their comments on drafts of a chapter on this topic, forthcoming as WHEN CONGRESS GOES UNHEARD, in WILLIAM BUZBEE, ED., PREEMPTION CHOICES (CAMBRIDGE PRESS 2008), and to Duke University Law School, the Center for Progressive Reform, and the American Constitutional Law Society for hosting a workshop on Federalism in the Overlapping Territory, where I presented portions of this article.
Contents

Introduction .......................................................................................................................... 3
I. Federalism and Savings Clauses ...................................................................................... 4
II. Saving State Common Law ............................................................................................ 8
   A. Pollution ........................................................................................................ 9
      1. Air and Water Pollution ......................................................................................... 9
      2. Nuclear Plants .................................................................................................... 14
   B. Workers and Workplaces ......................................................................................... 16
   C. Products Liability ................................................................................................... 17
      1. Medical Devices and Drugs ............................................................................... 16
      2. Vehicles ............................................................................................................. 20
   D. Agriculture ............................................................................................................ 22
   E. Harmonizing Common Law Remedies with Federal Law ........................................ 23
III. Saving State Regulatory Power ................................................................................... 24
   A. Pollution ................................................................................................................ 23
      1. Nuclear Plants .................................................................................................. 25
      2. Air and Water Pollution ..................................................................................... 26
   B. Workers and Workplaces ........................................................................................ 35
   C. Agriculture ............................................................................................................ 37
   D. Medical Practice and Drugs ................................................................................... 39
   E. Harmonizing State Regulations with Federal Law .................................................. 43
IV. Conclusion: Saving Savings Clauses ......................................................................... 42
Introduction

By unequivocally 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 often emphasize federalism concerns, but in many cases innovative state laws 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 welfare and promoting economic development while fostering innovation and improvement by governments and regulated entities– preemption of state and local law would be far less controversial.² Of course, federal regulatory regimes are not always perfect, so the preemption of state laws can leave dangerous regulatory gaps.

Preemption is particularly troublesome when Congress has included a savings clause in the federal statute at issue. Many if not most 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. Supreme Court cases reveal a pattern of increasingly hostile reception of savings clauses, particularly in cases involving state regulatory programs. In contrast, the Court’s reception of savings clauses for common law tort claims has been wildly unpredictable, but by and large tort claims have been treated more favorably. The inclusion of generously worded savings clauses governing state tort claims may explain these results in some cases, but the text of most savings clauses is so similar that, as the Supreme Court has noted, not even the “most dedicated hair-splitter” could distinguish them.³ Rather, the Court apparently views positive enactments and formal regulatory programs issued by state legislatures and state agencies as a greater threat to the implementation of federal programs and the accomplishment of federal goals than tort claims.

Congress itself has, in some instances, muddied the waters by including both preemption clauses and savings clauses in the same statute. Dueling clauses pose a difficult 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.

This article seeks to identify preemption patterns and principles from the Supreme Court’s caselaw on statutory savings clauses. It begins with an assessment of the

² Richard Nagareda, FDA Preemption: When Tort Law Meets the Administrative State, 1 J. of Tort Law 1, 3 (2006).
relationship of preemption and federalism and the need for savings clauses in federal legislation. It then turns to the Court’s treatment of savings clauses when victims seek tort remedies for harm caused by federally regulated activities. Next, it assesses the treatment of savings clauses when state governments seek to establish more stringent regulatory requirements than imposed by the federal floor.

A comparison of caselaw in four areas – pollution, workplace safety, products liability, and agricultural practices – indicates a willingness to provide some redress to injured persons but, at the same time, an underlying bias against protective state regulations. In the latter set of cases, judicial outcomes appear to be driven by a results-oriented, anti-regulatory sentiment rather than by the statutory language or the overarching congressional goals. The results in the regulatory cases have often fallen short of protecting people and their environment, and have frustrated or even eviscerated legislative objectives as well as federalism ideals. If savings clauses were given appropriate weight in the regulatory context, as they generally are in the common law context, dangerous regulatory gaps would be less likely. Meanwhile, a pattern of cooperative federalism would be more likely to emerge, as state and federal entities would be motivated and empowered to capitalize on each of their institutional strengths and to craft coordinated regulatory solutions.

There is no magic language that would ensure against preemption, but careful drafting may promote more rational, equitable results. The article concludes with suggestions for crafting a statutory savings clause that may survive preemption challenges, as well as more global suggestions for harmonizing federal objectives with state tort law and regulatory initiatives.

I. Federalism and Savings Clauses

The system of joint sovereignty in America is intended to promote a decentralized government that is more 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. 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 anti-regulatory impulses. Reams of scholarly commentary have been written on the former (constitutional power) and only slightly less on the latter (preemption). This 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. 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.”

Federalism has a dual nature. At its best, federalism serves as a firewall that safeguards the public from dangerous, tyrannical impulses by allowing flexible, decentralized institutions to flourish. At its worst, federalism can be an impediment to rational, comprehensive planning and to the achievement of uniform yet progressive results that transcend political boundaries. The 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. Even beyond areas of customary federal concern, such as national security, air traffic control, navigation, Indian affairs, and immigration, 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-

the Composition and Selection of the National Government, 54 Colum. L. Rev. 543 (1954), and articles included in Federalism Symposium, 86 Yale L.J. 1018-1296 (1977).


8 DONALD J. PISANI, WATER AND THE AMERICAN WEST: THE RECLAMATION BUREAU, NATIONAL WATER POLICY, AND THE WEST 1902-1935, 295 (2002). See THE FEDERALIST NO. 10, at 59, 62 (James Madison) (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”).

9 Roderick M. Hills, Jr, Against Preemption: How Federalism can Improve the National Legislative Process 82 N.Y.U. L. Rev. 1, 6-10 (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) (“In addition to the inability of the states to enforce adequate environmental standards on their own, there are at least four other rationales for an active federal role in environmental protection: overriding local resistance to environmental protection, especially with regard to transboundary pollution; guaranteeing minimal environmental protection for a mobile population; helping states resist industry pressure to relax standards (the race-to-the-bottom hypothesis); and industry preference for uniform federal standards instead of a variety of state standards.”); CHARLES E. DAVIS AND JAMES P. LESTER, FEDERALISM AND ENVIRONMENTAL POLICY, in JAMES P. LESTER, ED., ENVIRONMENTAL POLITICS AND POLICY: THEORIES AND EVIDENCE 57, 59 (1989) (arguing that uniform national policies may be the most efficient means of attacking large-scale problems).


11 Hills, supra note , at 8.
looking solutions to widespread problems. State law, on the other hand, can be relatively inefficient because of a lack of expertise and a parochial inclination to impose external costs on their neighbors, thereby disrupting national markets.12

In the post-New Deal years, federal regulation became more comprehensive and the Supremacy Clause became more significant.13 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.14

If Congress has included an express preemption provision in a statute addressed to the matter of the legislation's scope, then courts simply need to 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 it is impossible to comply with both federal and state law or (b) state law poses an obstacle to the achievement of federal objectives.15

Before the explosion of federal public health and environmental requirements in the 1970s, state and local authorities exercised their police powers through regulations and common law theories to combat the multifarious problems of an increasingly industrialized society. Federal and state courts alike accepted common law doctrines of nuisance, trespass, and strict liability, in particular, as appropriate means to address the effects of harmful industrial activities.16 Since its 1947 opinion in *Rice v. Santa Fe Elevator Corp.*,17 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.18 Among such state powers are the protection of health and safety, utility and insurance regulation, tort law, and domestic relations.19 Although the strength

---

12 Id. at 1, 7.
14 Davis, supra note , at 968.
15 Id. at 970.
17 331 U.S. 218, 230 (1947) (“Congress legislated here in a field [i.e., agricultural warehousing] which the States have traditionally occupied. So we 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.”).
18 Mary J. Davis, *Unmasking the Presumption in Favor of Preemption*, 53 S.C. L. Rev. 967, 968 (2002). 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), the modern iteration is typically traced to Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947).
of the presumption has waxed and waned through the years, 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 co-exist with federal requirements. Evidence of congressional intent would be gleaned from canons of statutory interpretation, the scope and historic context of the statute in question, and legislative history.

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. One primary mechanism is cooperative federalism, which has been a recurring theme of federal-state relations since at least since the late 1930s but gained prominence with the expansion of federal environmental law beginning in 1970. 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 between regulating in accordance with federal standards or having federal regulation preempt state regulation altogether.

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, state authority and state remedies. Where Congress includes a savings clause, it recognizes the need either to fill a regulatory void 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. As a result, both states and their residents are worse off than before the passage of federal law.

Despite the cooperative federalism trend seen in congressional action during the past two decades, the Supreme Court’s preemption decisions have been wildly inconsistent. This is so even though the majority of the Court professes ever stronger allegiance to federalism principles, particularly state sovereignty. Whether placed under the heading of “new federalism,” “real federalism,” or “libertarian federalism,” it seems plain that some sort of federalism is on the rise, but the new brand of federalism seen in recent Supreme Court cases is a far cry from Brandeis’s happy partnership with state and local governments.

Judicial outcomes in many of the 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. A dynamic, polyphonic view of federalism – a workable government where federal, state, tribal, and local authorities are appropriately matched with geographic and socio-economic issues – should encourage stronger, more coherent, and more cooperative forms of leadership.

When it comes to preemption, the Justices split in ways that cut across ideological lines. Champions of federalism and states’ rights, like Justices Scalia, Thomas, and

---

25 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.”).


27 See Dinh, supra note , at 2085 (“the Supreme Court’s numerous preemption cases follow no predictable jurisprudential or analytical pattern”).

28 See Rena I. Steinzor, Unfunded Environmental Mandates and the ”New (New) Federalism: Devolution, Revolution, or Reform?”, 81 Minn. L. Rev. 97, 113-114 (1996) (concluding that the “new federalism” rhetoric the 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 U.S. v. Morrison, 529 U.S. 598, 654 (2000) (Souter, J., dissenting) (“not 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”).

29 Kendall, supra note , at 10449. “Real federalism” has come to mean protection from regulation regardless of its source. Id. (citing MICHAEL S. GREVE, REAL FEDERALISM: WHY IT MATTERS, HOW IT COULD HAPPEN (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. Richard A. Epstein, The Proper Scope of the Commerce Clause Power, 73 Va. L. Rev. 1387 (1987); Richard A. Epstein, Constitutional Faith and the Commerce Clause, 71 Notre Dame L. Rev. 167 (1996).

30 Kendall, supra note , at 10445, 10450.

31 See supra note 7 and accompanying text.

32 Hills, supra note , at 4.

33 See Robert A. Schapiro, Polyphonic Federalism and the Perils of Preemption, Working Paper for Federalism in the Overlapping Territory at Duke Law School, at 8-9 (Nov. 10, 2006) (under polyphonic federalism, federal and state power are “presumptively concurrent,” and the focus becomes managing the overlapping areas in a productive and equitable fashion).
former Justice O’Connor, do not always vote against preemption of state laws, while
champions of strong central government, like Justice Stevens, do not always vote in favor
of preemption. 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 regulatory programs. It is tempting to surmise that the
preemption cases are not about federalism at all but rather reflect anti-regulatory goals.
Perhaps hostility toward government regulation at any level is in play to some degree, but
it is impossible to discern a clear pattern to this effect in the preemption cases viewed as a
whole. In some cases, state law remedies and state regulatory initiatives are applauded
and in others they are excoriated.

In general, state tort law has fared better than regulatory programs. Supreme
Court opinions in the past two decades have tended to preserve state tort remedies and, in
many of these cases, a theme of deference to the states’ historic police powers can be
seen. In contrast, when one focuses on the cases on state regulatory programs, a fairly
clear anti-regulatory pattern emerges, where judicial outcomes do in fact appear to be
driven by a results-oriented, anti-regulatory sentiment rather than by the overarching
congressional objectives expressed in the federal statute at issue.

Whether reviewing challenges to state tort law or regulatory programs, the Court
frequently recites the mantra that “‘[t]he purpose of Congress is the ultimate touchstone’
in every pre-emption case.” Yet in relatively few cases has the Court actually delved
into congressional purposes underlying a particular statute in any depth; rather, it limits
itself to often ambiguous statutory language and dictionary definitions to resolve
preemption claims. According to Professor Roderick Hills, preemption cases exhibit a
pattern of “faux textualism,” where the Court invokes the so-called “plain meaning” of
one or more ambiguous words in a statutory clause to reach anti-regulatory results. A
closer look at cases involving explicit statutory savings clauses lends support to this
accusation.

II. Saving 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.42 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 by providing for compensatory and punitive damages.43 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.44 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.45 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 true costs of production, enabling them to make better purchasing decisions.46 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, the Supreme Court has generally accepted supplemental state law remedies as consistent with congressional objectives to protect health and welfare where Congress has included a savings clause. Although the pattern is not wholly consistent, at least some common law tort claims for 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 neutralizes the savings clause.

A. Pollution

1. Air and Water Pollution

Air and water pollution is 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.47 State tort law remedies for harm caused by pollutants have long been an important part of the

---

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

43 Klass, supra note , at 567-568.


45 See David C. Vladeck, Preemption and Regulatory Failure, 33 Pepp. L. Rev. 95, 101 (2005) (identifying the threat of liability for imposing unreasonable risks on others as an important source of market discipline).


47 Percival, supra note , at 1173-74.
cooperative federalism formula. Climate change litigation is currently putting this approach to the test. Climate change has become the most pressing environmental problem in the world. Existing federal statutes, enacted long 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 climate change. These claims are proving to be a catalyst for governmental action, 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. The Clean Air Act expressly states congressional intent that “air pollution prevention . . . and air pollution control at its source is the primary responsibility of States and local governments.” It comes as no surprise, then, that perhaps more than any other federal statute the Clean Air Act is peppered with savings clauses. 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.

The Supreme Court has not yet had occasion to address the preemptive effect of the Clean Air Act in this context, 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. Some of the earliest preemption battles over pollution involved the

52 42 U.S.C. §§ 7604(e), 7412(d)(7), 7416.
Clean Water Act, aimed at restoring and maintaining the chemical, biological, and physical integrity of the nation’s waterways.\textsuperscript{55} As one means of accomplishing this goal, Congress included several savings clauses to preserve statutory and common law claims and to preserve states’ ability to impose more protective pollution control requirements and to establish and enforce rights to allocate and use water resources.\textsuperscript{56}

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 \textit{Illinois v. Milwaukee}.\textsuperscript{57} 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 the expansive nature of the savings clause: “[n]othing in this 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.”\textsuperscript{58} 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.\textsuperscript{59} 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.\textsuperscript{60} 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 \textit{in favor} of displacement of federal common law was consistent with the long-standing presumption \textit{against} displacement of state common law.\textsuperscript{61}

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 \textit{International Paper v. Ouellette}, the Supreme Court confirmed that state common law was still a viable avenue for redressing interstate water pollution.\textsuperscript{62} 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.\textsuperscript{63}

\textsuperscript{55} 33 U.S.C. § 1251(a).
\textsuperscript{56} 33 U.S.C. §§ 1251(g), 1365(e), 1370.
\textsuperscript{58} Milwaukee v. Illinois, 599 F.2d 151, 155, 163 (7th Cir. 1979) (citing 33 U.S.C. § 1365(e)), rev’d, 451 U.S. 304 (1981).
\textsuperscript{59} 451 U.S. 304.
\textsuperscript{60} 33 U.S.C. § 1365(e); Robert L. Glicksman, \textit{Federal Preemption and Private Legal Remedies for Pollution}, 134 Penn. L. Rev. 121, 179 (1985).
\textsuperscript{61} 451 U.S. at 313-316.
\textsuperscript{62} 479 U.S. 481 (1987).
\textsuperscript{63} Id.
This 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 common law, and the paper mill was required to pay a $5 million settlement and establish a trust fund for environmental projects in the area. But as Professors Richard Levy and Robert Glicksman explain, the Court’s apparent presumption in favor of preemption improperly allocates the burden of showing Congress’s intent to preserve state remedies to the party arguing against preemption, which runs completely counter to the Clean Water Act’s overarching goals of eliminating water pollution and maintaining the states’ ability to impose more stringent requirements to effectuate that goal.

Preemption has also been asserted to shield polluters from liability for oil spills in interstate waters. In response to the 1989 wreck of the *Exxon Valdez* near the Alaska coast, Congress adopted the Oil Pollution Act of 1990 (OPA). The OPA integrated a mélange of provisions governing tanker vessels by imposing federal design requirements and penalties for spills. Various bills related to oil spills had been considered prior to passage of the OPA, but preemption had been a major sticking point. In fact, preemption was discussed by the Senate Environment and Public Works Committee “more than any other single issue,” and it was the primary point of contention between the Senate and the House of Representatives. In the end, Congress preserved the states’ ability to respond to oil spills through two savings clauses. The first is concerned with clean-up: “Nothing in 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.” 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.”

As for Exxon, after months of trial, a jury awarded billions of dollars in compensatory and punitive damages under Alaska law to fishermen and landowners.

---

73 33 U.S.C. § 2718(c).
injured by the oil spill. Because the OPA does not apply retroactively, Exxon invoked
the Clean Water Act in an attempt to preempt common law punitive damages awards.
The Ninth Circuit Court of Appeals rejected Exxon's contention. The court 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. Subsequent district court opinions have
likewise found that the OPA does not preempt tort claims for damages to oyster beds and
other natural resources affected by oil spills.

Exxon played a major role in seeking federal preemption under another
environmental clean-up statute, the Comprehensive Environmental Response,
Compensation and Liability Act (CERCLA or Superfund). After years of opposing a
federal clean-up program, the petrochemical industry ultimately supported CERCLA,
largely out of a desire to preempt non-uniform and increasingly rigorous state
requirements. The Supreme Court concluded that the statute preempted state taxation
intended to pay for hazardous waste clean-up efforts that could be compensated under
CERCLA, based on its perception that Congress wished to avoid “the potentially adverse
effects of overtaxation on the competitiveness of the American petrochemical industry.” In
an unusual display of responsiveness to states’ concerns, Congress reversed the
Court’s holding in the Superfund Amendments and Reauthorization Act of 1986. The
Senate Report explained:

The primary effect of the amendment will be to remove a potential barrier to the
creation of State superfund programs. The amendment may result in an increase
in the number and pace of hazardous substance response actions undertaken or
partially funded by States, since States will be able to raise funds to assist such
hazardous substance response.

---

74 In re Exxon, 270 F.3d 1215 (9th Cir. 2001).
75 Id.
76 Id. at 1231.
866119 (M.D. Fla. 1996); Clausen v. M/V New Carissa, 171 F.Supp.2d 1127 (D. Or. 2001); Williams v.
Moran Trade Corp., 924 F. Supp. 1436 (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).
78 42 U.S.C. §§ 9601 et seq.
79 J.R. DeShazo and Jody Freeman, Timing and Form of Federal Regulation: The Case of Climate
Manor Care, Inc. v. Yaskin, 950 F.2d 122 (3rd 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 clean-up 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.
recovering damages under both CERCLA and state law, 42 U.S.C. § 9614(b), but also provides that
"[n]othing in this chapter shall affect or modify in any way the obligations or liabilities of any person under
Taking their cue from the amendment, federal appellate courts have found that Congress did not intend for CERCLA to occupy the field of hazardous waste clean-up or otherwise prevent states from supplementing federal clean-up requirements.\(^{83}\)

2. Nuclear Plants

In a case that gained notoriety from the movie *Silkwood*, Karen Silkwood’s estate sought recovery for injuries caused by exposure to plutonium while working at Kerr-McGee’s federally licensed nuclear plant.\(^{84}\) Kerr-McGee argued that state-authorized awards of punitive damages should be preempted because they would punish and deter conduct related to radiation hazards, an area within the exclusive domain of the Atomic Energy Act.\(^{85}\)

Congress gave the relationship between federal and state law close attention in the debates preceding passage of the Atomic Energy Act, and it ultimately adopted a pervasive federal regulatory scheme to ensure the safe operation of nuclear plants.\(^{86}\) Accordingly, the Act preempted state safety laws but explicitly preserved other state regulatory authorities in two separate savings clauses.\(^{87}\) Although neither of these clauses applied 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 melt-downs.\(^{88}\)

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

\(^{83}\) [Fireman’s Fund Ins. v. City of Lodi, 302 F.3d 928, 941-43 (9th Cir.2002); PMC, Inc. v. Sherwin-Williams Co., 151 F.3d 610, 617 (7th Cir.1998); Stanton Road Associates v. Lohrey Enterprises, 984 F.2d 1015, 1021-22 (9th Cir. 1993); Manor Care, 950 F.2d at 126. In contrast, the Tenth Circuit has taken a pro-preemption approach, holding that a state’s public nuisance and negligence claims for damages for groundwater contamination conflicted with, and thus were preempted by CERCLA. N.M. v. General Elec. Co., 467 F.3d 1223 (10th Cir. 2006). “The purpose of a saving clause is merely to nix an inference that the statute in which it appears is intended to be the exclusive remedy for harms caused by the violation of the statute. The legislature doesn’t want 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.” Id. at 1247. At the same time, the court recognized that, “[g]iven these saving clauses, as well as the spirit of cooperative federalism. . ., we may safely say Congress did not intend CERCLA to completely preempt state laws related to hazardous waste contamination . . . CERCLA sets a floor, not a ceiling.” Id. at 1246. The decision does not preclude claims for residual damage or interim loss of use that are limited to restoration and replacement of natural resources, particularly if an ongoing CERCLA remedy does not address a particular contaminant or injury. James Derouin, *Recent Tenth Circuit Decision on Natural Resource Damages is a Mixed Bag*, 9 ABA Envtl. Lit. & Toxic Torts News 16, 18 (2007).]


\(^{85}\) [See 42 U.S.C. § 2021(c)(4) (giving the Commission exclusive regulatory power over “the disposal of such . . . nuclear material as the Commission determines . . . should, because of the hazards or potential hazards thereof, not be disposed of without a license from the Commission”).]


\(^{87}\) [See *infra* notes 165-167 and accompanying text.]

evidence of congressional intent to preserve state tort remedies, including Silkwood’s punitive damage award.\footnote{464 U.S. at 251, 256.} 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.\footnote{Id.}

In the years following the \textit{Silkwood} opinion, the Court reaffirmed its holding by allowing workers’ compensation claims and claims for retaliation and intentional infliction of emotional distress against nuclear power plants.\footnote{\textit{Id.}} These opinions demonstrate that state remedies have a viable role to play even in heavily regulated areas such as nuclear power.

\textbf{B. Workers and 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.\footnote{Note, \textit{Getting Away with Murder: Federal OSHA Preemption of State Criminal Prosecutions for Industrial Accidents}, 101 Harv. L. Rev. 535, 537 (1987).} 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.\footnote{Id.} The purpose of the Act is to provide “safe and healthful working conditions.”\footnote{29 U.S.C. § 651(b).} 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.\footnote{29 U.S.C. § 657.} 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.”\footnote{29 U.S.C. § 654(a).}

Since its creation, OSHA has been the subject of severe criticism from both sides of the aisle.\footnote{\textit{Getting Away with Murder, supra note }, at 539.} 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. To fill the enforcement gap, local prosecutors have stepped in, filing both criminal and civil suits under state law for industrial injuries and deaths.\footnote{\textit{See, e.g., In re Welding Fume Products Liability Litigation}, 364 F.Supp.2d 669 (N.D.Ohio 2005).}
Like most federal health and welfare statutes, the Act is designed to prevent injuries rather than to compensate victims for harm. 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.”

In light of the savings clause and Congress’s broad remedial purpose, courts have generally found that tort claims arising out of workplace injuries are not preempted. 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.” Other courts have been equally willing to construe the Act’s savings clause broadly to preserve state tort claims.

C. Products Liability

1. Medical Devices and Drugs

State common law remedies for harms caused by drugs and medical devices like pacemakers have been the subject of fierce preemption battles. 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 death caused by one of the most addictive and dangerous products on the market – cigarettes.

Tobacco use, according to the Court, “poses perhaps the single most significant threat to public health in the United States.” Yet the Court’s 1992 decision in Cipollone v. Liggett Group shielded tobacco companies from failure-to-warn claims brought by smokers and their families. 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 not dangerous to consumers’ health, 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

100 In re Welding Fume Products Liability Litigation, 364 F.Supp.2d at 687-688.
101 See Lindsey v. Caterpillar, Inc., 480 F.3d 202, 207 (3d Cir. 2007) (applying the Act’s savings clause in holding that a tort claim for a worker’s death caused when a tractor flipped over and crushed him was not preempted by federal requirements for protective rollover devices); Pedraza v. Shell Oil Co., 942 F.2d 48 (1st Cir.), cert. denied, 502 U.S. 1082 (1991); Barrientos v. UT-Battelle, LLC, 284 F.Supp.2d 908 (S.D. Ohio 2003).
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.”\(^{105}\) 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 the federal objectives by upsetting Congress’s “carefully drawn balance between the purposes of warning the public of the hazards of cigarette smoking and protecting the interests of national economy.”\(^{107}\) The Court agreed, and construed 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.”\(^{108}\)

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*.\(^{109}\) A key distinction was that, unlike the Atomic Energy Act and most other federal health and welfare statutes, 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.\(^{110}\)

Just a few years after *Cipollone*, the Supreme Court took a more nuanced approach to the Medical Device Act, a statute with both a savings clause and a preemption clause.\(^{111}\) *Medtronic Inc. v. Lohr*\(^{112}\) involved a negligence action against the manufacturer of a pacemaker that had failed. Like the Cigarette Smoking Act, the Medical Device Act specified 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.”\(^{113}\) The Court reasoned that the word “requirement,” as used in the Medical Device Act, entailed the imposition of a specific, positive duty on the

---

108 505 U.S. at 521.
113 21 U.S.C. § 360k(a) (emphasis added).
manufacturer and therefore did not preempt common law claims. It acknowledged that 
*Cipollone* had held that the Cigarette Smoking Act’s preemption of state “requirements” 
cluded tort claims, but found that Act distinguishable because it preempted only a 
limited set of state requirements – those related to advertising or promotion. 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.”

The Medical Device Act was distinct from the Cigarette Smoking Act in another 
important way. It included a savings clause for liabilities related to devices recalled for 
posing unreasonable risks of harm. Although this clause was not strictly applicable to 
the pacemaker at issue in *Medtronic*, the Court of Appeals viewed it as evidence of 
congressional intent to preserve common law remedies. The Supreme Court agreed 
that, “[t]o 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.” Yet it completely ignored 
the savings clause, which would have lent strong support to this conclusion.

Because the pacemaker at issue in *Medtronic* had not been subject to a specific 
Food and Drug Administration (FDA) regulation – it evaded the otherwise applicable 
approval process by being “substantially equivalent” to a previously permitted device – 
some lower courts have distinguished the Supreme Court’s opinion and found preemption 
in cases involving devices that were subject to FDA requirements. Apparently, these 
courts believe that general FDA approval constitutes sufficient federal oversight of the 
product’s safety that tort claims should be displaced. Other courts have required the 
manufacturer to show that state law claims conflict with specific federal requirements 
applicable to the particular device that allegedly caused harm. Because the MDA is a 
licensing statute designed to promote the manufacture and marketing of medical devices 
by balancing the need for effective medical devices with public safety, the latter line of 
cases seems more in line with congressional intent as well as cooperative federalism 
objectives.

---

114 518 U.S. at 487.
115 Id.
116 Id. at 488.
118 56 F.3d 1335, 1342 (11th Cir. 1995).
119 518 U.S. at 502-503.
120 Id. at 493-494.
121 See Vladeck, supra note , at 110 (citing cases).
122 Id. (citing Horn v. Thoratec Corp., 376 F.3d 163, 179 (3d Cir. 2004)).
123 Id. at 109.
124 See 21 U.S.C. § 360h (limiting FDA authority to devices that present “an unreasonable risk of 
substantial harm to public health”).
125 See Vladeck, supra note , at 127 (“[A]lthough it is generally referred to as a public health 
statute, the 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 Federal Boat Safety Act all “embody trade-offs between 
public health concerns and the need to ensure a competitive marketplace that rewards innovation and
2. Vehicles

Damages due to other types of products sold in interstate commerce have provoked vigorous preemption challenges by manufacturers and trade associations. State law remedies for injuries caused by motor vehicles have been especially troublesome. Supreme Court results are mixed.

In *Freightliner Corp. v. Myrick*, the Court considered a design defect claim against manufacturers who failed to equip trucks with antilock braking systems. 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. The Act also included a savings clause providing that compliance with a federal vehicle safety standard “does not exempt any person from any liability under common law.”

Distinguishing *Cipollone*, the Court concluded that the existence of a limited preemption clause in the Act indicated that Congress did not intend to preempt other matters. As in *Medtronic*, the Court paid no attention to the Act's savings clause.

The 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. 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.

The Court observed that the Act’s preemption provision, barring states from establishing any non-identical “safety standard,” could be construed broadly to include common law actions but that the existence of the savings clause required a more narrow interpretation. When it came to implied preemption, however, the Court’s approach

---

quality. None of these statutes, standing alone, imposes a discipline on the marketplace sufficient to ensure a reasonable margin of safety . . . Congress enacted these statutes with the understanding that the background discipline of tort law would remain undisturbed.”).  

127 See id at 284 (citing 15 U.S.C. § 1392(d) (subsequently moved to 49 U.S.C. § 30103(b)(1))) (“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.”).  
128 Id. at 284 (citing 15 U.S.C. § 1397(k) (subsequently moved to 49 U.S.C. § 30103(e)).  
129 Id. at 287 n.3 (“Because no federal safety standard exists . . . [we] need not address respondents’ claim that the savings clause . . . does not permit a manufacturer to use a federal safety standard to immunize itself . . .”).  
130 529 U.S. 861 (2000).  
131 Id. at 874.  
132 See id. at 868-869 (questioning whether the savings clause does more than just “remove[] tort actions from the scope of the express pre-emption clause” by 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.”).
turned the presumption against preemption of traditional state police powers on its head. It found that, read together, the provisions reflected a “neutral policy” toward conflict preemption.\textsuperscript{133} It went on to declare that giving the savings clause broad effect would “upset the careful regulatory scheme established by federal law.”\textsuperscript{134} 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.\textsuperscript{135}

Another wrinkle was added to the Court’s savings clause jurisprudence in \textit{Spriettsma v. Mercury Marine}, where a passenger struck by a boat’s propeller blades brought a design defect claim against the engine designer.\textsuperscript{136} The Court issued an unanimous opinion that relied heavily on the language of the Boat Safety Act’s savings clause in finding that the claim survived express preemption.\textsuperscript{137} Unlike \textit{Geier}, it also took note of the clause in finding that the claim also survived implied preemption.\textsuperscript{138}

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.\textsuperscript{139} The Act’s savings clause stated that “[c]ompliance with this chapter or standards, regulations, or orders . . . does not relieve a person from liability at common law.”\textsuperscript{140} Contravening \textit{Cipollone}, the Court concluded that the phrase “a law or regulation,” as used in the Act’s preemption clause, referred only to positive enactments and not to common-law torts.\textsuperscript{141} 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.\textsuperscript{142}

The Court was careful to note that regulations perform distinct functions from common law claims, which serve important compensatory and remedial ends.\textsuperscript{143} 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.\textsuperscript{144} To the contrary, the Court recognized that compensating victims

\textsuperscript{133} Id. at 870-871.
\textsuperscript{134} Id. at 870 (citing U.S. v. Locke, 529 U.S. 89, 106-107 (2000)).
\textsuperscript{137} Id. at 64.
\textsuperscript{138} Id. at 70.
\textsuperscript{139} Id. at 58 (citing 46 U.S.C. § 4306).
\textsuperscript{140} Id. at 63 (citing 46 U.S.C. § 4311(g)).
\textsuperscript{141} Id.
\textsuperscript{142} Id.
\textsuperscript{143} Id. at 69.
\textsuperscript{144} Id.
“serve[s] the Act’s more prominent objective, emphasized by its title, of promoting boating safety.”

D. Agriculture

Congress attempted to respect the states’ historic role in controlling the 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). FIFRA, initially passed in 1947 and amended in 1972, requires manufacturers to register pesticides before placing them on the market. The initial statute was a limited attempt to address pesticide licensing and labeling, but the 1972 amendments turned FIFRA into a “comprehensive regulatory statute,” resulting in a “highly centralized” regulatory framework.

As in the Medical Device Act and the Boat Safety Act, Congress carved out spheres of federal and state authority by including both preemption and savings clauses. To ensure nationwide uniformity, the statute creates a centralized regulatory framework by giving 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].” Meanwhile, 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.

In a 1991 case, Wisconsin Public Intervenor v. Mortier, the Supreme Court construed the savings clause expansively to afford room for local governments, as political subdivisions of states, to restrict or prohibit aerial spraying to protect the health of their citizens. Despite this precedent and FIFRA’s explicit savings clause, after Cipollone was handed down, almost all of the federal courts and many state courts held that tort claims related to pesticides were preempted. In 2005, the Supreme Court reversed this trend in Bates v. Dow Agrosciences by allowing claims for crop damages allegedly caused by defective design and manufacture of herbicides, breach of express

---

145 Id. at 69-70. However, the court indicated that if, as in Geier, the agency had issued an opinion regarding the preemptive effect of the Act, it might have gone the other way. Id. For analysis of agency preemption, see WILLIAM FUNK, PREEMPTION BY FEDERAL AGENCY ACTION, in BUZBEE, supra note .
149 Alexandra B. Klass, Bees, Trees, Preemption and Nuisance: A New Path to Resolving Pesticide Land Use Disputes, 32 Eco. L. Q. 763, 773, 806 (2005) (“FIFRA has been called one of the most ‘federal’ of the environmental statutes. . . . Unlike [others] . . . , FIFRA provides a lesser role for state and local governments, creating and maintaining a uniform national system of registering and labeling pesticides.”).
151 7 U.S.C. § 136v(a), (c)(1).
153 Klass, Bees, supra note , at 783.
warranty, and violation of the Texas Deceptive Trade Practices Act.\textsuperscript{154} 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 does not preclude jury verdicts simply because they might motivate an optional decision to revise a label. As in \textit{Medtronic}, the Court distinguished the much broader language of the preemption clause at issue in \textit{Cipollone}, prohibiting any state “requirement or prohibition . . . with respect to the advertising or promotion of any cigarettes,” from FIFRA’s preemption clause, prohibiting only labeling or packaging requirements “in addition to or different from” federal requirements.\textsuperscript{155} As for the plaintiff’s fraud and failure-to-warn claims, the Court held that they would be preempted if they imposed an additional or different labeling or packaging obligation than FIFRA.\textsuperscript{156}

The \textit{Bates} Court gave appropriate weight 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.\textsuperscript{157}

Unlike \textit{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. As in \textit{Sprietsma}, the Court was persuaded that tort remedies would aid, rather than obstruct, the functioning of FIFRA and the accomplishment of congressional goals.\textsuperscript{158} The Court’s rationale extends well beyond FIFRA. Common law tort claims can serve as a catalyst for regulatory evolution and for eventual improvement, not just for pesticide use but for a broad range of federally regulated activities.\textsuperscript{159}

\textbf{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.

\textsuperscript{154} 544 U.S. 431 (2005).
\textsuperscript{155} \textit{Id.} at 447 (emphasis in original) (citing 15 U.S.C. § 1334(b); \textit{Cipollone}, 505 U.S. at 515).
\textsuperscript{156} \textit{Id.}
\textsuperscript{157} \textit{Id.} at 449 (citing \textit{Silkwood}, 464 U.S. at 251).
\textsuperscript{158} 537 U.S. 51 (2002).
\textsuperscript{159} Klass, \textit{supra} note , at 567-568.
Statutes that include both preemption and savings clauses, such as FIFRA and the Medical Device Act, 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 non-dispositive but as non-existent. Absent a strong backdrop of historic state involvement in areas such as agriculture and products liability, the Court has been too quick to conclude that, read together, preemption and savings clauses merely reflect a “neutral policy” toward preemption. 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 federal agencies, even when those arguments appear in informal guidance documents and litigation briefs. The result has been to displace any state law that occupies the same sphere of influence as the federal law in question, whether or not 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. 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 historic state powers to protect public health and welfare are implicated.

III. Saving State Regulatory Power

State regulatory regimes have been more vulnerable to preemption invalidation than common law claims, despite the presence of statutory savings clauses. During the past two decades, state regulations have been struck down almost without exception whenever those regulations would impose greater economic burdens on industry than established by the federal regulatory floor. The recent trend 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 economic and social regulation. 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 anti-regulatory forces have become equally aggressive in wielding preemption as an obstacle to the implementation of protective state laws.

A. Pollution

---

161 Id. at 883. Agency preemption is another important facet of the Supremacy/federalism debate. See, e.g., Catherine M. Sharkey, Preemption by Preamble: Federal Agencies and the Federalization of Tort Law, 56 DePaul L. Rev. 227 (2007); WILLIAM FUNK, PREEMPTION BY FEDERAL AGENCY ACTION, IN WILLIAM BUZBEE, ED., PREEMPTION CHOICES (FORTHCOMING CAMBRIDGE PRESS 2008).
162 Wolfson, supra note , at 69 (citing Lochner v. New York, 198 U.S. 45 (1905)).
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 and Electric v. State Energy Resources Commission, the Supreme 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. 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.

Two savings clauses played a role in the resolution of the case. The first, found in § 274(k) of the Atomic Energy Act (AEA), was narrowly drawn 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.” The Court was willing to consider it for guidance nonetheless. 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.” It then turned to the more generally applicable savings clause of § 271: “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.” The Court concluded that this provision removed any doubt that questions of ratemaking and the public need for additional electric plants were to remain in state hands. It then engaged in an unusual foray into the legislative history of the California statute to find a non-safety rationale for the moratorium. An Assembly Report provided the sought-after economic justification that “without a permanent means of disposal, the nuclear waste problem could . . . lead[ ] to unpredictably high [electricity] costs.”

The Court expressed alarm that a dangerous gap would be left in the regulatory framework if states were stripped of all 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

---

164 Id.
166 461 U.S. at 210.
168 461 U.S. at 213-214.
a regulatory vacuum; the only reasonable inference is that Congress intended the states to continue to make these judgments.\textsuperscript{169}

More than twenty years after the \textit{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.\textsuperscript{170} Other than construction moratoria, states have been rebuked at nearly every turn by the lower courts, which have invalidated state law requirements notwithstanding the Supreme Court’s admonition against congressional occupation of the field.\textsuperscript{171} The inclusion of explicit savings clauses in the AEA and the Resource Conservation and Recovery Act (RCRA),\textsuperscript{172} which regulates the management of hazardous wastes, seems to make no difference.\textsuperscript{173} By authorizing supplemental state regulation of waste management, RCRA’s savings clause is more encompassing than the AEA’s.\textsuperscript{174} However, the comprehensiveness of RCRA, which was intended to provide federal “cradle-to-grave” regulation of hazardous wastes,\textsuperscript{175} raises the specter of implied preemption, allowing regulated entities to successfully challenge state and local efforts to restrict hazardous waste disposal, including nuclear waste.\textsuperscript{176} This trend is consistent with more recent Supreme Court cases, which have viewed state regulatory programs far less favorably in the years following \textit{Pacific Gas}.

2. Air and Water Pollution

The wreck of the \textit{Exxon Valdez} motivated coastal states all the way from Alaska to Florida to enact oil spill legislation. Some of these statutes impose preventative

\textsuperscript{169} Id. at 208.
\textsuperscript{172} See 42 U.S.C. §§ 6901 -6992k. 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.
\textsuperscript{174} See 42 U.S.C. § 6929 (“[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.”).
\textsuperscript{176} See, e.g., Blue Circle Cement, Inc. v. Bd. of County Comm'rs, 27 F.3d 1499 (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 (8th Cir. 1986) (invalidating a local ordinance prohibiting the storage, treatment, or disposal of “acute hazardous waste” as implicitly preempted); Ogden Envtl. Servs., Inc. v. City of San Diego, 687 F. Supp. 1436 (S.D. Cal. 1988) (holding that a city’s denial of a permit for a waste facility was implicitly preempted). State and local waste regulations have also been struck down on dormant Commerce Clause grounds. \textit{See} Jonathan R. Stone, \textit{Supremacy and Commerce Clause Issues Regarding State Hazardous Waste Import Bans}, 15 Colum. J. Envtl. L. 1, 30 (1990).
measures while others impose liability on the vessel owner and operator for cleanup costs and other damages. The Oil Pollution Act of 1990 (OPA) has been given broad preemptive effect in the regulatory context, even though common law claims for damages caused by oil spills have generally survived preemption challenges.

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. When it comes to regulating vessel safety, however, the notion of cooperative federalism is illusory at best. In U.S. v. Locke, the Supreme Court displaced Washington's requirements for navigation watch procedures, training requirements for crew members, and maritime casualty reporting. 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, but retains the states’ authority to impose requirements “relating to the discharge, or substantial threat of a discharge, of oil,” and to regulate matters reflective of local peculiarities of their ports and waterways. Regardless, the Court held that the OPA preempted Washington’s requirements. It explained away 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. 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.” Ironically, the Court concluded that a restrictive reading of the savings clause best respected a federal-state balance and found the presumption against preemption inapplicable when the state regulates activities marked by a history of substantial federal presence, such as maritime law.

State regulatory programs governing other types of pollution have fared poorly as well. A recent addition to the Court’s cases preempting state regulatory authority invalidated an attempt to control air pollution from vehicles. As in the OPA, 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. A key

---

179 529 U.S. 89 (2000).
180 529 U.S. at 105.
182 529 U.S. at 105.
183 Id. at 106.
184 Id. at 106, 108-109.
186 See United States v. Morrison, 529 U.S. 598, 661 (2000) (including the CAA as an example of cooperative federalism); Sierra Club v. U.S. E.P.A., 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. E.P.A., 268 F.3d 1075, 1083 (D.C.Cir.2001) (describing the CAA as “an
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. Statutory savings clauses explicitly retain states’ latitude to implement air quality requirements for factories, power plants, and other stationary sources. The Act includes a savings clause applicable to motor vehicles as well, but the Supreme Court has given this provision short shrift.

In *Engine Manufacturers Association v. South Coast Air Quality Management District*, the Court, at the behest of a trade association representing manufacturers of diesel engines, invalidated a local regulation requiring local fleet operators to purchase or lease only vehicles that met stringent emission standards. The regulation was adopted by California’s South Coast Air Quality District, which had become 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 § 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.” To offset this provision, § 209(d) incorporates a savings clause that explicitly allows states “otherwise to control, regulate, or restrict the use, operation, or movement” of vehicles. Through § 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.

According to the Supreme Court, the South Coast District’s regulation was a “standard” within the preemption provision of § 209(a). 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.” 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.

In dissent, Justice Souter criticized the majority’s unduly broad construction of the term “standard” as violating the plain meaning of § 209(a). As Justice Souter also

---

188 See supra note 52 and accompanying text.
192 42 U.S.C. § 7543(d).
193 541 U.S. at 261 (Souter, J., dissenting).
194 Id. at 252-253.
195 Id. at 253.
196 Id. at 254.
197 541 U.S. at 261 (Souter, J., dissenting).
noted, the majority ignored the presumption against preemption 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."\(^{198}\) Section 209 may not be a "model of clarity," as Justice Souter correctly 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. 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 vehicles 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."\(^{199}\)

Although the South Coast 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 global issues such as 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 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 Kirsten Engel and David Adelman explain, 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.\(^{200}\) As for preemption, there is reason to believe that state and local restrictions on emissions from stationary sources, like power plants, would be less vulnerable than restrictions on mobile sources, given the historic state and local presence in regulating stationary sources and the absence of the countervailing federal interest in transportation efficiencies and nationwide vehicle manufacturing standards.

Congress’s desire to adopt a “cooperative federalism” approach is also evidenced by several savings clauses in the Clean Water Act of 1972 (CWA).\(^{201}\) However, Congress constrained states’ rights to some extent in the CWA by creating mandatory federal permit programs to regulate discharges of pollutants into water.\(^{202}\) The CWA explicitly provides states with the power to impose tougher water pollution standards than required by the Act.\(^{203}\) States and tribes that meet statutorily delineated criteria are authorized to accept delegations to administer the permit programs and take enforcement actions against non-complying point sources.\(^{204}\) Upon delegation, the EPA’s permit program is suspended but EPA may still veto proposed permits and must periodically

---

\(^{198}\) Id. at 260 (citing Medtronic, Inc. v. Lohr, 518 U.S. 470, 485 (1996)).

\(^{199}\) Lin, supra note , at 584-585.

\(^{200}\) Kirsten Engel and David Adelman, Adaptable Federalism, Preemption Choice and Regulatory Dynamism, in Buzbee, supra note ; 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 Urban Lawyer 1015, 1026-1027 (2006).

\(^{201}\) 33 U.S.C. §§ 1251(g), 1365(e), 1370. See supra Part II.A.1 (describing Supreme Court’s treatment of tort claims under the CWA savings clauses).

\(^{202}\) 33 U.S.C. §§ 1342, 1344.

\(^{203}\) 33 U.S.C. § 1370.

\(^{204}\) 33 U.S.C. §§ 1342(b), 1370, 1377.
review state or tribal administration to ensure compliance. States also retain almost exclusive responsibility for pollution from diffuse, non-point sources. Finally, Congress empowered states to condition federally issued licenses on compliance with state water quality standards. 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.

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 are implicated. Perversely, a broad construction of the CWA’s savings clauses has resulted in anti-regulatory consequences. Rather than providing more protection to the nation’s fresh water resources, under the guise of federalism, the Court’s construction of the CWA’s savings clauses has resulted in less protection.

In two such cases, the Supreme Court took the opportunity to emphasize the states’ “primary state responsibility for ordinary land-use decisions.” 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 any authority to protect isolated wetlands and non-perennial streams. In a 2006 opinion, Rapanos v. United States, the developers found a steadfast friend in Justice Scalia. Citing the statutory savings clause, Scalia cloaked his analysis in the language of federalism:

[The 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.

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.” The evidence does not support this assertion. State capabilities for wetlands protection vary tremendously, and some – perhaps most – states have fallen

205 33 U.S.C. § 1342(b)-(c).
207 33 U.S.C. § 1251(g).
209 126 S.Ct. at 2208.
210 126 S.Ct. at 2223-2224 (citing 33 U.S.C. § 1251(b) (“[i]t 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”)) (other citations omitted).
211 Id.
far short of what is needed to maintain and enhance the integrity of water resources.\textsuperscript{212} Notably, in \textit{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 U.S., seeking to maintain broad federal jurisdiction over wetlands and tributaries.\textsuperscript{213} This sends a clear signal that most states believe that preserving wetlands from development is best accomplished by the federal government. Their 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.\textsuperscript{214} Yet in \textit{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.\textsuperscript{215}

In another 2006 case, \textit{S.D. Warren v. Maine}, the Court bowed to a state’s authority to impose conditions on a federally licensed hydropower dam.\textsuperscript{216} This time, the state had affirmatively asserted its power to protect the environment from the adverse effects of dam operations. The Maine Department of Environmental Protection had found that the dam in question had dried up long stretches of the river, ruining fish habitat and eliminating fishing and other recreational opportunities on the river.\textsuperscript{217} The state required the dam operator to maintain minimum flows and to allow passage for fish and eels in its certification under CWA §401, which requires state approval of any federal activity that “may result in any discharge into navigable waters.”\textsuperscript{218} In contrast to \textit{Rapanos}, the United States weighed in as amicus curiae in support of the state of Maine.\textsuperscript{219}

In upholding Maine’s certification requirement, the \textit{S.D. Warren} Court explained:

\begin{itemize}
\item \textsuperscript{212} Clifford Rechtschaffen, \textit{Enforcing the Clean Water Act in the Twenty-First Century: Harnessing the Power of the Public Spotlight}, 55 Ala. L. Rev. 775, 784 (2004).
\item \textsuperscript{213} \textit{Rapanos}, 126 S.Ct. at 2208.
\item \textsuperscript{215} 126 S.Ct. at 2253 (Stevens, J., dissenting).
\item \textsuperscript{216} 126 S.Ct. 1843 (2006).
\item \textsuperscript{217} \textit{Id.} at 1853.
\item \textsuperscript{218} 33 U.S.C. § 1341(a)(1).
\item \textsuperscript{219} 126 S.Ct. 1843.
\end{itemize}
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.”

Foreshadowing the decision in Rapanos, the Court stated that “[c]hanges in the river like these fall within a State's legitimate legislative business, and the CWA provides for a system that respects the States' concerns.” Accordingly, it construed § 401 in a way that best “preserves the state authority apparently intended” by Congress.

Outside of the § 401 context, state regulation of the hydroelectric industry had been spurned in a long line of previous Supreme Court cases involving not the CWA but the Federal Power Act of 1920. The Federal Power Act requires any non-federal entity seeking to build or operate a hydro-electric project to comply with a federal license. In a 1946 case, First Iowa Hydro-Electric Coop. 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 . . . .” Not surprisingly, the state opposed the project, but the Court held that Iowa law was preempted, in spite of 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.” 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 used in irrigation or for municipal or other uses,” as protecting only proprietary water rights rather than general state authorities over water usage. 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

126 S.Ct. at 1853. The Court followed the precedent of PUD No. 1 v. Washington DOE, 511 U.S. 700 (1994), where it upheld a state’s stream flow requirements as consistent with its §401 authority to prevent the degradation of water quality. 126 S.Ct. at 1848.

Id.

Id.


328 U.S. 152, 180 (1946).

328 U.S. at 164-166 (citing Iowa Code §§ 7767 and 7771).

Id. at 177-178.

Id. at 176.
scheme for full development of the nation’s water resources.\textsuperscript{229} \textit{First Iowa} thus placed the Commission in “sole command” of hydropower licensing, “freeing it from impediments caused by any shared decision making with the states in the licensing process.”\textsuperscript{230}

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.\textsuperscript{231} After passage of the amendments, the Court had an opportunity to re-examine the Act’s preemptive effect in \textit{California v. FERC}.\textsuperscript{232} 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.\textsuperscript{233} It reaffirmed \textit{First Iowa} over the objections of all fifty states.\textsuperscript{234}

Although the power given to states under CWA § 401 seems to contradict the constraints on state power imposed by the Federal Power Act, so far the Supreme Court has not had to face a direct conflict between the two. Hydropower operators have asserted Federal Power Act preemption arguments in an attempt to defeat restrictive state conditions issued under the CWA, but where FERC had not yet acted on their hydropower license application, the Court found that the two statutory schemes could be reconciled.\textsuperscript{235} 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 when deciding whether to issue a license, . . . any FERC license [might] contain the same conditions as the state § 401 certification.”\textsuperscript{236} Notably, in that case, FERC went on record as having no objection to the conditions contained in the state’s § 401 certification.\textsuperscript{237} The Court noted, however, that if FERC were to issue a license containing a stream flow conditions that contradicted the state’s certification requirements, the hydropower operators could pursue judicial remedies at that time.\textsuperscript{238}

\begin{thebibliography}{9}
\bibitem{229} Id. at 164, 180-181 (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.”).
\bibitem{231} 16 U.S.C. § 803(j).
\bibitem{233} Id. at 494-496, 500-503.
\bibitem{234} Id. at 504. It distinguished 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. \textit{Id.} at 506 (citing California v. U.S., 438 U.S. 645, 674-75 (1978)).
\bibitem{235} PUD No. 1 of Jefferson County v. Washington Dept. of Ecology, 511 U.S. 700 (1994). In \textit{PUD No. 1}, the state of Washington imposed minimum stream flows under CWA § 401 to enforce a designated use contained in a state water quality standard.
\bibitem{236} Id. at 722.
\bibitem{237} Id.
\bibitem{238} Id. at 723 (citing Escondido Mut. Water Co. v. La Jolla Band of Mission Indians, 466 U.S. 765, 778, n. 20 (1984)).
\end{thebibliography}
Like the Federal Power Act, federal flood control acts explicitly recognize the federal responsibility for flood control measures.\textsuperscript{239} 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.”\textsuperscript{240} Passage of the Act raised federalism concerns because the states were apprehensive about retaining control over land use development and the use of valuable water resources.\textsuperscript{241} 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.”\textsuperscript{242} Despite this savings clause, the courts have consistently affirmed the Corps’ power over matters that affect state prerogatives. In \textit{ETSI Pipeline Project v. Missouri},\textsuperscript{243} 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 Interior acquiesced. The project was invalidated, however, because Interior lacked the power to authorize the project without obtaining the approval of the Secretary of the Army, as the Flood Control Act had plainly given the Army Corps predominant authority over the projects.\textsuperscript{244} The opinion gave only passing mention to South Dakota’s interest in preserving the integrity of its water permitting decisions.\textsuperscript{245}

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 prerogatives under the CWA.\textsuperscript{246} Close consideration of the two lines of cases, however, reveals a consistent pro-development 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 in these types of 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. A leading example of a clear textual blueprint is the Reclamation Act of 1902, where Congress authorized an extensive federal network of dams, reservoirs, and canals but explicitly required that federal water deliveries be in accordance with state law.\textsuperscript{247} Beyond that Act, at least thirty-six other federal statutes expressly save state laws

\textsuperscript{239} 33 U.S.C. § 701a-1.
\textsuperscript{240} Id.
\textsuperscript{241} ETSI Pipeline Project v. Missouri, 484 U.S. 495, 503 (1988).
\textsuperscript{242} 33 U.S.C. § 701-1.
\textsuperscript{243} 484 U.S. 495 (1988).
\textsuperscript{244} Id. at 511-12.
\textsuperscript{245} Id. at 512. The Corps’ programs for improvement of navigation and flood control have never been subject to any significant state control. \textit{See id.}; South Dakota v. Ubbelohde, 330 F.3d 1014, 1030-31 (8th Cir. 2003), cert. denied, 541 U.S. 987 (2004); Benson, \textit{supra} note , at 61 n.352 (citing Frank J. Trelease, Federal-State Relations in Water Law, Legal Study No. 5, 80 (1971)).
protective of water rights and development. According to the Court, a “consistent thread of purposeful and continued deference to state water law” runs throughout the history of federal-state relations on water resources development. As a result, irrigators and developers with state-sanctioned rights to use water have been emboldened to assert states’ rights and their own property rights in challenging and sometimes defeating federal regulations protective of endangered species and the environment.

B. Workers and Workplaces

In contrast to judicial preservation of tort claims for workplace injuries, state workplace regulations have been struck down despite strongly worded savings clauses in the Occupational Safety and Health Act. Along with the Act’s explicit savings clause for common law remedies, Congress also specified 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.” States are authorized to assume responsibility for the development and the enforcement of occupational safety and health standards, but such plans may only be approved if the Secretary certifies that the state standards are “at least as effective” as federal standards and that the state will dedicate sufficient resources to administration and enforcement. Although many states simply adopt the OSHA regulations as their own, several have adopted more stringent requirements than provided by the federal floor on a range of subjects ranging from fire codes to criminal enforcement schemes.

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. 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 Supreme Court agreed that the Act preempted any non-approved state regulation of an occupational issue for which a federal standard had been adopted. Its opinion contracted the scope of the statutory savings clause by presupposing “a background preemption of all state occupational safety and health standards whenever a federal standard governing

250 33 U.S.C. § 1251(g). See, e.g., Tulare Lake Irrigation Dist. v. U.S., 49 Fed. Cl. 313 (2001) (asserting a takings clause against the U.S. Bureau of Reclamation for curtailing deliveries to protect species); James City County, Va. v. E.P.A., 12 F.3d 1330, 1336 (4th Cir. 1993) (asserting § 1251(g) in challenging a federal decision to veto a dam permit).
251 See supra Part II.B.
254 29 U.S.C. § 667(a), (c).
255 Getting Away with Murder, supra note , at 539.
the same issue is in effect." 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. 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.

The Court has given the Employee Retirement Income Security Act (ERISA) similarly broad preemptive effect. Prior to ERISA, several states had adopted aggressive laws requiring special insurance benefits, such as cost of living increases in pensions. To preempt disparate and increasingly onerous state laws regulating employee benefit plans, unions and employers alike sought federalization. State insurance commissions, however, wanted to preserve their traditional role over insurance. Congress crafted a compromise in ERISA’s preemption and savings clauses. First, ERISA specifies that its “provisions . . . shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan [covered by ERISA].” 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].” The all-important phrase “relate to” was left undefined.

At the time of enactment in 1974, attention was focused on vesting and funding requirements for pensions, not the regulation of managed care organizations (MCOs),
which barely existed at the time.267 During the 1970s, most benefit plans simply reimbursed fees charged for medical services, wherever those services were rendered.268 Managed care soon became the vehicle of choice, however, for controlling health care costs. It was not long before the courts had to consider whether ERISA would preempt the regulation of third parties hired by plan administrators to provide plan benefits. Professor Roderick Hills described the dilemma:

ERISA was intended to protect plan administrators (chiefly employers and unions) and employees. Nothing about ERISA’s history suggested the slightest hint that it was intended to protect doctors, hospitals, MCOs, or other third parties who administered plan benefits on behalf of employers. . . . [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.269

The Supreme Court exhibited some tolerance for state regulation of MCOs270 until its 2004 opinion in Aetna Health Inc. v. Davila.271 There, the Court preempted the Texas Health Care Liability Act, citing allegedly “clear congressional intent” to displace liability of MCOs that administered ERISA-covered benefits plans.272 As a result, state regulation of employee benefits has been almost wholly eclipsed by ERISA. Meanwhile, Congress has failed to address the MCO issue,273 although such “absolute 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.274

C. Agriculture

State and local restrictions on pesticide spraying survived preemption analysis in Wisconsin Public Intervenor v. Mortier, where the Supreme Court construed a federal savings clause expansively to afford room for local governments to protect their citizens’

---

267 Hills, supra note , at 41.
268 Id.
269 Id. at 41-42.
270 Id. at 43-51.
272 Id. at 209, 213-14.
273 See Hills, supra note , 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.”).
274 Id. at 53.
health. The holding rested in part on a recognition of the states’ historic powers to regulate agricultural activities within their borders.

The presumption against preemption of state powers played a role in saving state agricultural laws in an earlier case, *Florida Lime & Avocado Growers, Inc. v. Paul*.

There, the Court considered the effect of federal law on a California statute dealing with maturity standards for avocados. Both laws had the purpose of protecting consumers from immature avocados. 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 such minimum standards of quality and maturity.’” A portion of Florida avocados could not meet the more stringent California maturity standards. There was no question but that Congress had the power, under the Commerce Clause, to regulate agricultural commodities to insure standards of quality and competition, 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 a traditional area of state concern – “the States have always possessed a legitimate interest in ‘the protection of . . . people against fraud and deception in the sale of food products’ at retail markets within their borders.” Although there was no savings clause in the Act, the Court invoked the presumption against preemption and sought, but did not find, clear congressional intent to oust state authority over agricultural products.

In contrast, in *Michigan Canners & Freezers Ass'n, Inc. v. Agricultural Mktg. & Bargaining Bd.*, the Court narrowly construed a savings clause in the Agricultural Fair Practices Act and preempted a Michigan statute that established accredited associations who wielded power to coerce producers to pay a service fee and to sell their products according to association terms. The federal Act was intended to protect the rights of farmers and other producers to join cooperative associations by which to market their agricultural products “to rectify a perceived imbalance in bargaining position between producers and processors of such products.” Its savings clause provided that the Act

---

278 *Id.* at 137-38.
279 *Id.* at 138 (citing 7 U.S.C. § 602(3)).
280 373 U.S. at 144 (citing Savage v. Jones, 225 U.S. 501 (1912)).
281 *Id.* at 147.
283 *Id.* citing M.C.L.A. §§ 290.707, 290.710, 290.713.
284 *Id.* at 464. Responding to “the growing concentration of power in the hands of fewer and larger buyers [of agricultural products],” Congress enacted the Agricultural Fair Practices Act “to protect individual producers from interference by processors when deciding whether to belong to a producers’ association . . . [and] protect the producer from coercion by associations of producers.” *Id.* (citing S.Rep. No. 474, 90th Cong., 1st Sess., 2-3 (1967), U.S.Code Cong. & Admin.News 1968, pp. 1867, 1869). The Act therefore prohibits processors or associations to engage in practices that interfere with a “producer's
“shall not be construed to change or modify existing State law.” Under this provision, state commissions established for the purpose of promoting agricultural products have generally survived preemption challenges; so long as they do not dictate the price, terms, or timing of the sale of products, they are seen as acting within the historic state powers to promote agricultural production.

In Michigan Canners, however, the Supreme Court construed the savings clause as mere evidence of Congress’s intent not to occupy the field. It did not, however, preclude obstacle preemption. Although the Court recognized that “the supervision of the readying of foodstuffs for market has always been deemed a matter of peculiarly local concern,” it concluded that the state law was preempted because it “authorizes producers’ associations to engage in conduct that the federal Act forbids” by certifying associations as exclusive bargaining agents for all producers of a particular commodity. The Michigan law therefore “stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.”

D. Medical Practice and Drugs

An anomaly in the Supreme Court’s recent preemption jurisprudence can be seen in a case involving the individual’s ability to seek the assistance of a doctor in making deeply personal medical choices. The Court has demonstrated more willingness to respect state regulatory choices in this area in part because Congress has been exceptionally careful to include a strongly worded savings clause and in part because of the historic backdrop of state authority regarding medical practice.

A doctor’s ability to use lethal drugs to assist terminally ill patients with suicide has long been the subject of heated debate. Congress has provided no federal resolution, and states have taken vastly different approaches to fill the void. Dr. Jack Kevorkian was prosecuted and jailed under Michigan law for injecting lethal drugs at the freedom to choose whether to bring products to market himself or to sell them through a producers' cooperative association.”

---

286 Id. at 469 (citing 7 U.S.C. § 2305(d)).
287 See Newark Gardens, Inc. v. Michigan Potato Industry Commission, 847 F.2d 1201, 1206 (6th Cir. 1988) (rejecting a preemption challenge to Michigan’s Potato Commission because potato producers remained free to sell to whomever they chose at whatever price they negotiated and because the Commission was not a “handler” engaged in the “marketing” of agricultural products but merely financed generic commodity promotions).
288 467 U.S. at 464.
289 Id. at 470 (citing Florida Lime & Avocado Growers, 373 U.S. at 144).
291 467 U.S. at 478.
294 Kingsbury, supra note , at 211-212 (describing states’ reactions).
behest of a patient dying of Lou Gehrig’s disease. In contrast, an Oregon law specifically allows physician-assisted suicide through a statute that authorizes licensed physicians of terminally ill patients to administer lethal drugs, but only after counseling about palliative alternatives and ensuring that patients are competent to make life-ending decisions.

The Oregon law provoked a preemption challenge by the U.S. Attorney General under the Controlled Substances Act. 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.”

The Supreme Court rejected the preemption challenge in Oregon v. Gonzales. 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. While the CSA generally represents “a comprehensive regime to combat the international and interstate traffic in illicit drugs,” 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. Its interpretation of the CSA was “based in no small part on ‘the structure and limitations of federalism, which allow the States great latitude under their police powers to legislate as to the protection of the lives, limbs, health, comfort, and quiet of all persons.’” According to the majority, “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.”

Although the Court applied the presumption against preemption to uphold the states’ historic powers over the practice of medicine in Oregon, it refused to do so in an earlier case involving prescribed uses of marijuana. 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

---

300 Id. at 922.
301 Id. (citing Ashcroft v. Raich, 545 U.S. 1 (2005)).
302 Id.
303 126 S.Ct. at 939-940 (Thomas, J., dissenting) (citations omitted).
304 Id.
305 Raich, 545 U.S. 1.
too inconclusive to outweigh potential negative effects.\textsuperscript{306} As of 2005, however, California and eight other states had enacted laws allowing the use of marijuana for pain relief.\textsuperscript{307} The Controlled Substances Act prohibits the possession, use, or distribution of marijuana for any purpose.\textsuperscript{308} In 1998, Congress passed a joint resolution addressing medical marijuana: “Congress continues to support the existing Federal legal process for determining the safety and efficacy of drugs and opposes efforts to circumvent this process by legalizing marijuana . . . for medicinal use without valid scientific evidence and the approval of the Food and Drug Administration.”\textsuperscript{309}

In \textit{Ashcroft v. Raich},\textsuperscript{310} California growers and users sought injunctive and declaratory relief from the CSA. The U.S. Court of Appeals for the Ninth Circuit held that the federal 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.”\textsuperscript{311} 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.\textsuperscript{312}

The primary issue before the Supreme Court in \textit{Raich} was whether the Commerce Clause authorized Congress to prohibit the use of home-grown marijuana.\textsuperscript{313} Although the case did not involve a direct dispute with the state of California itself, the Court nonetheless invoked the Supremacy Clause to preempt the state law. It stated that the federal power “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.”\textsuperscript{314} Notwithstanding the States’ “‘traditional police powers to define the criminal law and to protect the health, safety, and welfare of their citizens,’ “ the \textit{Raich} majority concluded that the CSA applied to the possession of marijuana for medicinal purposes because

\begin{itemize}
\item 308 21 U.S.C. §§ 841(a)(1), 844(a).
\item 310 \textit{Raich}, 545 U.S. 1.
\item 311 \textit{Raich} v. Ashcroft, 352 F.3d 1222, 1228-29 (9th Cir. 2003).
\item 312 \textit{Id.} at 1229. 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 \textit{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. \textit{Id.} at 1230.
\item 313 545 U.S. at 15.
\item 314 \textit{Id.} at 29.
\end{itemize}
Congress could have rationally concluded that a broad application of the federal law was necessary to control the “larger interstate marijuana market.”

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

This case exemplifies the role of States as laboratories. The States’ core police powers have always included authority to define criminal law and to protect the health, safety, and welfare of their citizens. Exercising those 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 on interstate commerce and is therefore an appropriate subject of federal regulation.

One year later, Justice Thomas’s dissent in the Oregon case echoed this theme:

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 admittedly “at least reasonable,” determination that administering controlled substances to facilitate a patient’s death is not a “‘legitimate medical purpose.’” . . . [In stark contrast to Raich’s broad conclusions about the scope of the CSA as it pertains to the medicinal use of controlled substances, today this Court concludes that the CSA is merely concerned with fighting “‘drug abuse’”. . . . [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.’”

The Oregon Court’s reliance upon the same savings clause and the same constitutional principles that it rejected in Raich is perplexing. A key distinction, however, is the stance of the federal agency. In Raich, the FDA maintained its position that marijuana has no proven medical value, but rather a “very high potential for abuse,” while in Oregon the FDA took no position and the Drug Enforcement

---

315 126 S.Ct. at 939-940 (citations omitted).
317 126 S.Ct. at 939-940, 941 (citations omitted).
318 Amicus Brief of Drug Free America Foundation, Inc., et al., in Ashcroft v. Raich, 2004 WL 1843964, at 6 (Aug. 12, 2004); see 21 C.F.R. § 1308.01 et seq. and Table (classifying marijuana as a Schedule 1 drug, which, under 21 U.S.C. § 812(b)(f), 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”).
319 Stephanie Armour, Employers Grapple With Medical Marijuana Use, USA TODAY, Apr. 17, 2007, at 1B.
Administration had taken contradictory positions leading up to the litigation. Likewise, the American Medical Association has refused to sanction medical use of marijuana. These two forces militated against the California’s interest in allowing the broadest array of medical choices for its citizens.

E. Harmonizing State Regulations with Federal Law

In the past two decades, the Supreme Court has consistently shielded industry from progressive state regulations in areas ranging from oil spill prevention to workplace safety. In cases involving state law constraints on economic interests, statutory savings clauses have been given short shrift or even blatantly ignored, but in cases where states are seen as less onerous on economic pursuits, pro-development interests have been upheld under the guise of saving state law.

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 welfare 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 indicate congressional intent to allow regulatory overlap to ensure comprehensive coverage. In either case, federal law should not be construed to preempt state regulatory programs that provide greater protection for public health and welfare than is established by the federal regulatory baseline.

IV. Conclusion: Saving Savings Clauses

The Supremacy Clause gives Congress “an extraordinary power” to displace state laws despite federalism concerns. To temper this power, congressionally enacted savings clauses preserve the states’ ability to provide increased protection over and above the federal regulatory floor. Supreme Court precedent, however, has left the courts free to interpret savings clauses in a fashion that actually 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 would honor congressional choices, avoid regulatory gaps, and enhance institutional competency by empowering governments at all levels to protect the public.

Judicial narrowing of savings clauses is especially troubling when common law remedies for harmful activities 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.

320 See Oregon, 126 S.Ct. at 913-914 (describing vacillating agency positions through the Clinton and Bush Administrations).
321 N.J. to Consider Legalizing Use of Medical Marijuana, NEW JERSEY RECORD, May 10, 2006, at A04.
Conversely, in most cases, federal regulatory requirements and state common law can be easily harmonized. Far from posing a conflict or undermining congressional objectives, state common law remedies give greater force to federal remedial purposes and in doing so give greater stability to the law as a whole.

Giving savings clauses proper weight is important in the regulatory arena, too. So long as the state regulation in question comports with Congress’s remedial objectives and is a reasonable construction of the space preserved by the savings clause, state regulatory choices should be honored, particularly when those choices are made against a backdrop of the states’ traditional police powers.

Where Congress has included a savings clause, straightforward rules of statutory construction dictate that the state laws 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 the intent not to occupy the field. Moreover, the savings clause should weigh against a finding that state law poses an obstacle to the accomplishment of federal purposes.

Notwithstanding the presence of a savings clause, challengers may be successful in defeating state provisions if they can show an actual conflict between state and federal law. Congress cannot avoid the basic application of the Supremacy Clause, which mandates that, when federal and state laws collide such that the compliance with one necessitates the violation of the other, the federal law trumps the conflicting state law.

For its part, Congress may be able to take positive steps with more precision in drafting. Many have called upon Congress to speak more clearly regarding preemption. In the event that Congress intends to save the broadest array of state and local remedies and requirements, 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 authorities, be they regulatory or judicial in nature, and nothing in this act shall in any way affect, or be

---

324 See A. Benjamin Spencer, Anti-Federalist Procedure, 64 Wash. & Lee L. Rev. 233, 284 (2007) (arguing that savings clauses “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.”).
325 See id. at 284-285 (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 (‘any Thing in the Constitution or Laws of any State to the Contrary notwithstanding’) call for it”); 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.”).
326 See, e.g., Grey, supra note , at 564, 582.
construed to affect, statutory or common law rights or remedies.” To the extent that Congress chooses to use terms such as “regulatory,” “rights,” or “remedies,” it should define each term to foreclose judicial resort to generic dictionary definitions. 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.

That said, there is no magic formula, and indeed there is good reason to be skeptical that plain language will tip the judicial scales one way or another. The Supreme Court itself acknowledges that not even the “most dedicated hair-splitter” can distinguish the highly analogous text of most preemption and savings clauses. 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 anti-regulatory results.

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 precision from our elected officials. In the absence of precision, courts are stuck with an unenviable job. The more they invoke the judicial presumption against preemption, the more likely regulated entities will be to pressure Congress to place these issues on its decision-making agenda. Although state and local governments and representatives of injured persons might also lobby Congress to seek savings clauses, collective action theories suggest – and the weight of the evidence shows – that they have been far less successful.

---

327 See supra notes 89-90, 165-167, and accompanying text (discussing judicial treatment of the Atomic Energy Act); notes 62, 76, and accompanying text (discussing judicial treatment of the Clean Water Act).
328 See supra notes 195-196 and accompanying text (describing judicial invocation of Webster’s dictionary to find preemption of “standards”).
329 See U.S. v. Locke, 529 U.S. 89, 105-106 (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).
330 See Davis, supra note , 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 this song); Spence, supra note , at 1149 (observing that statutes containing savings clauses have failed to produce any more consistent preemption results than statutes containing express preemption provisions).
332 Hills, supra note , at 9.
333 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); J.R. DeShazo, supra note , at 1500, 1507-1508 (concluding that state regulation often acts as a catalyst that prompts industry to seek preemption from Congress).
334 See Hills, supra note , at 11 (noting that collective action problems prevent people from “coalescing on behalf of a common but diffuse interest . . . these 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 is “the result of a clash of powerful interests-- patients, trial lawyers, insurers, the managed care industry, doctors, and the general public. The best forum for resolving this conflict is a political forum, not a juridical one.”).
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 compromise and passage of the statute in question, it must be especially clear regarding the specific topic or activity 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 presumption against preemption should still be given full force when states adopt protective measures 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.