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Implied Reverse Preemption

Anita Bernstein[†]

With an elaborate Consumer Product Safety Improvement Act,¹ prepared and signed during the doldrums of midsummer 2008, Congress signaled its revived attention to the safety of consumer goods sold in the United States.² The new statute, which almost won unanimity in both chambers,³ announced a new scope and ambition: by increasing the powers of the Consumer Product Safety Commission (“Commission” or “CPSC”) rather than removing any of them, Congress took a turn in a direction not seen in decades.⁴ The 2008 law ordered the Commission to write new standards for all-terrain vehicles.⁵ It declared a provisional ban on six chemicals that it suspected of disrupting human reproductive systems.⁶ It prohibited lead in products for children under twelve—this ban an outright rather than a provisional rule.⁷ It required testing of all new children’s products offered for sale.⁸ It wrote new protections for consumer-minded whistleblowers.⁹ It augmented the existing penalties

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¹ Pub. L. No. 110-314, 122 Stat. 3016 (codified as amended at 15 U.S.C. §§ 2501-2089 (2006)).

² The 2006 election had given the Democratic Party control of both houses for the first time in twelve years, making passage of this legislation possible. See Eric Lotke, *Downsizing Government to Death: Thanks to “E. Coli Conservatism,” Weakened Government Watchdogs Have Put Us All at Risk*, L.A. TIMES, Jul. 20, 2008, at M7.

³ Three Senators and one member of the House of Representatives voted no. Editorial, *No Playing Around with Toy Safety: Congress Rightly Sets Tough Standards, and Backs Them up with Funding*, DETROIT FREE PRESS, Aug. 4, 2008, at 12.

⁴ See Aliya Sternstein, *Product Safety Law Overhaul on Track to Clear Senate After Passing House*, CONG. Q. TODAY, Jul. 30, 2008 (declaring that the new statute was “the most significant overhaul” of consumer safety laws in forty years (quoting Rep. John Dingell)); Editorial, *The President and Product Safety*, N.Y. TIMES, Aug. 5, 2008, at A18 (praising the new statute).

⁵ Pub. L. No. 110-314, § 232, 122 Stat. at 3071-72.

⁶ *Id.* § 108, 122 Stat. at 3036-37.

⁷ *Id.* § 101(a), 122 Stat. at 3017; 15 U.S.C. § 2052(a)(2)(2008).

⁸ Pub. L. No. 110-314, §102, 122 Stat. at 3022.

⁹ *Id.* § 219.

for violating consumer law.¹⁰ It invited state attorneys general into the federal courts to enforce some of its provisions.¹¹

Federal intervention in consumer safety as a plenary category began in the 1960s, when Congress established a National Commission on Product Safety to explore what the United States government could do to reduce product-caused injuries.¹² Congress passed the Consumer Product Safety Act (“CPSA”) in 1972.¹³ In its original form the CPSA defined consumer products broadly,¹⁴ exempting only a handful of manufactured items from its provisions.¹⁵ Congress bestowed on the newly created Consumer Product Safety Commission a wide array of “enforcement tools,” including powers to set standards, seize and condemn goods, prohibit the sale of products, and order recalls.¹⁶

Soon after its inception, burdened by onerous procedures that Congress had mandated, however, the Commission began to perform at a disappointing level.¹⁷ Its bureaucratic weakness got a boost from conservative ideology in 1981, when Congress started to roll back the federal presence in consumer regulation.¹⁸ A “deregulation-minded chairman,” Terry Scanlon, arrived in the mid-1980s to lead the Commission into quiescence.¹⁹ Reagan-era retrenchments from consumer

¹⁰ *Id.* § 217.

¹¹ *Id.* § 218.

¹² See Teresa M. Schwartz, *The Consumer Product Safety Commission: A Flawed Product of the Consumer Decade*, 51 GEO. WASH. L. REV. 32, 36 (1982).

¹³ For a history of the statute published soon after its enactment, see Antonin Scalia & Frank Goodman, *Procedural Aspects of the Consumer Product Safety Act*, 20 UCLA L. REV. 899, 899-904 (1973).

¹⁴ 15 U.S.C. § 2052(a)(1) (2006) (referring to “any article, or component part thereof, produced or distributed for sale to a consumer”).

¹⁵ Scalia & Goodman, *supra* note 13, at 902 (noting tobacco, firearms, and products covered by other federal legislation, such as boats, cosmetics, food, and aircraft).

¹⁶ Schwartz, *supra* note 12, at 42-43. The Consumer Product Safety Commission (“CPSC” or “Commission”) was established by statute in 1972. 15 U.S.C. § 2053. In this Article I occasionally refer to the Commission as an “agency,” a term some prefer to reserve for a single-administrator entity more closely associated with a presidential administration; Congress, led by Democrats, originally wrote the Consumer Product Safety Act (“CPSA”) to make the Commission “independent” from the Nixon presidency. Robert S. Adler, *From “Model Agency” to Basket Case—Can the Consumer Product Safety Commission Be Redeemed?*, 41 ADMIN. L. REV. 61, 82 n.123, 83 n.125 (1989). It functions as a “collegial body” of commissioners. *See id.* at 82. Commissioners are appointed by the President with the advice and consent of the Senate, cannot all be members of the same political party, and serve staggered terms of seven years, subject to removal by the President “for neglect of duty or malfeasance in office.” 15 U.S.C. § 2053.

¹⁷ See Schwartz, *supra* note 12, at 34-35.

¹⁸ See *infra* Part III.B.

¹⁹ John Hood, *Let the Market Protect Consumer Safety*, 40 THE FREEMAN: IDEAS ON LIBERTY (Apr. 1990), available at <http://www.fee.org/Publications/the-Freeman/article.asp?aid=648> (praising Scanlon’s views on regulation); see also JOAN CLAYBROOK AND THE STAFF OF PUBLIC CITIZEN, RETREAT FROM SAFETY: REAGAN’S ATTACK ON AMERICA’S HEALTH 58-70 (1984) (offering illustrations of regulatory retreat for consumer products).

Following CPSC practice, I refer to the head of the CPSC as its chairman, even though women heads of the agency occupy more space in this Article than do CPSC chairmen. S. John Byington, Terry Scanlon, Richard Simpson, and Hal Stratton.

safety regulation stayed in place through subsequent presidential administrations until the 2008 mandate and appropriations.²⁰

Observers will note an oscillation: steps forward, steps back, steps forward. Until 1972, federal law had taken no plenary regulatory position on consumer safety. Forward: The 1972 Consumer Product Safety Act launched an era of national engagement. Backward: Although Congress never repealed the Consumer Product Safety Act, the federal government spent years in steady retreat from its old agenda. Forward: the 2008 expansion of programs, penalties, and appropriations.

In this Article, I contend that congressional oscillation on consumer safety can inform the most incendiary topic in current American products liability: the law of preemption. Within products liability discourse, the term preemption (which has a large set of other meanings outside the scope of the Article) refers specifically to the affirmative defense that will extinguish actions for personal injury brought under the common law of torts.²¹ In a preemption scenario, a plaintiff attributes an injury to a product defect. The defendant seller responds by saying that a particular federal regulation on point preempts the claim—because Congress, exercising a supreme legislative power, has said so—and accordingly any court applying state law must dismiss it.

Preemption divides into two categories. “Express” preemption is present when Congress makes an overt statement about its intent to foreclose common-law tort liability.²² Congress rarely chooses to make such a statement, perhaps because its members, in perpetual pursuit of campaign funds to get reelected, worry that taking a stand on the divisive

²⁰ *But see* The Gale Group, Inc., Small Business Encyclopedia: Consumer Product Safety Commission (CPSC), www.answers.com/topic/consumer-product-safety-commission (last visited Mar. 13, 2009) (identifying 1999 as a “vigorous” year for the Commission; in 1999 it “issued more than 300 product recalls” and “levied approximately ten times the amount of fines on companies that it had assessed a decade earlier”). As this Article goes to press, I cannot confirm my provisional belief that the 2008 legislation marks a significant shift. Should the Consumer Product Safety Improvement Act reforms prove thin or illusory, my thesis remains the same.

²¹ DAVID G. OWEN, PRODUCTS LIABILITY LAW 940 (2d ed. 2008) (describing preemption as a defense to liability). This working definition of preemption excludes broader alternative understandings. *See id.* at 969 (discussing preemption of state regulations); Richard C. Ausness, “*After You, My Dear Alphonse!*”: *Should the Courts Defer to the FDA’s New Interpretation of § 360k(a) of the Medical Device Amendments?*, 80 TUL. L. REV. 727, 734 & n.50 (2006) (describing applications of preemption that do not entirely immunize defendants); Betsy J. Grey, *Make Congress Speak Clearly: Federal Preemption of State Tort Remedies*, 77 B.U. L. REV. 599, 562 n.14 (1997) (noting that, in addition to common law claims, state statutory remedies and punitive damages are amenable to preemption). Professor Ausness’s list of preemption cases includes *International Paper Co. v. Ouellette*, 479 U.S. 481, 491 (1987) (permitting tort liability, but holding that the Clean Water Act restricted plaintiffs to the law of only one state), and *Arkansas Louisiana Gas Co. v. Hall*, 453 U.S. 571, 582-84 (1981) (permitting liability, but holding that state doctrine on the calculation of contract damages was preempted under the Natural Gas Act). *Id.* at 734 n.50. This Article, by contrast, discusses preemption only insofar as it forecloses state tort liability.

²² OWEN, *supra* note 21, at 941.

subject of liability will offend financiers.²³ When Congress does speak overtly about preemption, it frequently will do so from two sides of its mouth: the same statute can contain both a preemption clause purporting to displace all contrary state regulation, perhaps including regulation by tort law, and a savings clause, purporting to preserve state tort liability.²⁴

By these means Congress punts its dilemma to the judiciary,²⁵ and so preemption is found mainly in the other category, “implied” preemption, where courts read into a statute a pertinent congressional intent: that is, either to occupy a field through federal regulation (“field preemption”) or to set up a regulatory scheme inconsistent in its particulars with what injured litigants could receive if they prevailed under state tort law (often called “conflict preemption”).²⁶ Conflict preemption is the type that often arises as an affirmative defense to personal injury claims, but either type of preemption can keep injured plaintiffs out of court. Part I gives a summary of implied preemption doctrine. This Part functions here mainly as background for the Article’s more novel claim.

Congressional oscillation, I argue, shows the need for another judge-made doctrine about preemption of tort liability. The consumer product safety example shows that Congress will occasionally move in more than one direction with respect to regulating industries, services, or public safety generally. The existence of implied preemption calls for a complementary judicial inference to recognize the abandonment of an earlier regulatory design. Any court empowered to infer that Congress

²³ See generally Randall S. Kroszner & Thomas Stratmann, *Corporate Campaign Contributions, Repeat Giving, and the Rewards to Legislator Reputation*, 48 J.L. & ECON. 41 (2005) (describing relations between fundraising and legislative duties for members of the House of Representatives).

²⁴ Catherine M. Sharkey, *What Riegel Portends for FDA Preemption of State Law Products Liability Claims*, 102 NW. U. L. REV. COLLOQUY 415, 416 & n.5 (2008) (citing, *inter alia*, the National Traffic and Motor Vehicle Safety Act of 1966 and the Federal Boat Safety Act of 1971).

²⁵ Grey, *supra* note 21, at 618; *id.* at 617 (“Congress knows how to preempt state common law claims expressly and has demonstrated its ability to do so a number times. Therefore, courts should not preempt matters beyond the express language of a federal state.”) (footnotes omitted); Catherine M. Sharkey, *Products Liability Preemption: An Institutional Approach*, 76 GEO. WASH. L. REV. 449, 450 (2008) [hereinafter Sharkey, *Institutional Approach*] (using the punt metaphor).

²⁶ Once one has delineated express and implied preemption—and even between these two broad concepts the line is not bright, *see* *Medtronic, Inc. v. Lohr*, 518 U.S. 470 (1996) (applying express-preemption and implied-preemption analysis to overlapping questions)—the next round of categorization, which sometimes includes “obstacle” as well as “field” and “conflict” preemption, becomes difficult. *See, e.g.,* *Gade v. Nat’l Solid Wastes Mgmt. Ass’n*, 505 U.S. 88, 98 (1992) (dividing implied preemption into “field” and “conflict” categories); *English v. Gen. Elec. Co.*, 496 U.S. 72, 79 n.5 (1990) (suggesting that “field pre-emption may be understood as a species of conflict pre-emption”); Nina A. Mendelson, *A Presumption Against Agency Preemption*, 102 NW. L. REV. 695, 699-700 (2008) (favoring “obstacle preemption” over “conflict preemption”); Rachel Mervis, *Furthering Consumer Safety of Medical Devices: The Necessity of a Device-Specific State Law as Required for Express Preemption Under the MDA*, 27 CARDOZO L. REV. 387, 395 n.38 (2005) (identifying three types of preemption: “express, implied, and conflict”); *see also* Grey, *supra* note 21, at 622-27 (dividing “direct conflict” preemption into “obstacle conflict” and “impossibility conflict”).

intended to occupy a field or impose a scheme, when Congress did not announce this path expressly, is also empowered to infer a congressional retreat.²⁷

The parallel from express preemption is repeal. Here is an illustration. Suppose that in year *X*, Congress passes the Goldhelmet Safety Act (“GSA”), declaring in the statute that compliance with federal regulations pertaining to the manufacture and sale of solid-gold motorcycle helmets insulates sellers from tort liability. To keep complication out of the hypothetical, the statute contains no savings clause of any kind. It plainly preempts. The President signs the new law. As long as the GSA is in effect, plaintiffs who attribute injury to helmets made in accord with GSA requirements may not sue manufacturers or other sellers: express preemption kills their claims. Sometime after year *X*, in year *Y*, Congress takes the federal government out of the gold-helmet regulation business by repealing the GSA. Or it leaves other parts of the GSA in the United States Code, but repeals the express-preemption provision. When the repeal goes into effect, persons who attribute injury to their gold helmets may sue. Congress has abandoned its express preemption.²⁸

Similar reasoning should govern implied preemption. Any congressional scheme to occupy a field or establish comprehensive regulation can be abandoned. Overt, express takeovers of fields or comprehensive regulatory schemes done through federal legislation and rulemaking are relatively easy to observe; by contrast, a takeover or a comprehensive design that a court can educe only through inference disappears by means other than a written declaration. Abandonments of these preemptive initiatives render obsolete any earlier judicial inference that might have found a congressional intent to preempt. Just as courts find implied preemption where circumstances warrant, they must also, again only where circumstances warrant, infer a retreat from implied preemption. I discuss this inference of retreat by Congress, which I call “implied reverse preemption,”²⁹ in Part II.

²⁷ This proposal joins others I have presented as recommendations to judges who hear claims of injury. See, e.g., Anita Bernstein, *Enhancing Drug Effectiveness and Efficacy Through Personal Injury Litigation*, 15 J.L. & POL’Y 1051, 1082-98 (2007) (proposing a cause of action for persons who can show they suffered physical harm from a drug’s failure to live up to the promises on its label); Anita Bernstein, *Treating Sexual Harassment with Respect*, 111 HARV. L. REV. 445, 521-24 (1997) (offering a draft jury instruction for hostile-environment sexual harassment claims).

²⁸ See Anant S. Narayanan, Note, *Standards of Protection for Databases in the European Community and the United States: Feist and the Myth of Creative Originality*, 27 GEO. WASH. J. INT’L L. & ECON. 457, 498 (1994) (observing that “Congress can always modify or repeal any existing federal statutory preemption”).

²⁹ “Reverse preemption” is sometimes used to describe restraint or abstention by Congress in deference to state prerogatives. Courts apply the term to regulation of the insurance industry under the McCarran-Ferguson Act. See *Safety Nat’l Cas. Corp. v. Certain Underwriters at Lloyd’s*, 543 F.3d 744, 752 (5th Cir. 2008); *Genord v. Blue Cross & Blue Shield*, 440 F.3d 802, 805 (6th Cir. 2006); *In re Med. Care Mgmt. Co.*, 361 B.R. 863, 871 (Bankr. M.D. Tenn. 2003). Commentators extend it to judicial refusals to apply federal law in a domain that is traditionally left to state authority. Reverse preemption of this sort has both detractors and admirers. Compare Daniel

As scholars have noted, the indicators of a tacit decision by Congress to bar state tort claims are both unclear and controversial,³⁰ and analogous difficulties necessarily occlude the reverse-preemption analysis. Implied reverse preemption is, however, easier to use than implied preemption in one crucial respect: Congress manifests its retreat from a domain more transparently than it manifests its intent to preclude tort liability. Implied reverse preemption, in this respect very different from implied preemption, gives courts distinct markers of congressional intent to look for. In Part II, I propose some criteria for courts to find implied reverse preemption. Fulfillment of the criteria suggests that Congress has pulled back from an inferred early agenda and no longer forecloses tort liability.

Both courts and scholars of preemption recognize that although Congress, as the originator and source of congressional intent, is central to any analysis of preemption, the executive branch of government—represented here by the agency charged with enforcement of a statutory mandate—plays its own role in determining whether injured persons can bring claims under state law. Constitutional and administrative laws recognize the possibility of delegation, whereby Congress cedes decisionmaking power to a federal agency.³¹ Federal agencies have manifested their belief that this delegation has given them the power to preempt state tort claims. Some courts have accepted these announced beliefs as authoritative.³² With more unanimity, courts have held that agencies must comply with statutory obligations even when Congress has not appropriated the necessary funds.³³ Accordingly, any federal

A. Crane, *Antitrust Antifederalism*, 96 CAL. L. REV. 1, 27 (2008) (identifying an unhealthy reverse preemption in state laws that defeat the purposes of antitrust law as written by Congress), with Michael J. Zydney Mannheimer, *When the Federal Death Penalty is "Cruel and Unusual,"* 74 U. CIN. L. REV. 819, 879-80 (2006) (extolling a form of reverse preemption whereby the choice of a state to have no death penalty would outweigh a federal statutory death penalty for crimes committed in that state). I use "implied reverse preemption" here very differently, as a short form of "inferred retreat from a previously inferred preemption."

³⁰ See Caleb Nelson, *Preemption*, 86 VA. L. REV. 225, 298 (2000) (commenting that the Supreme Court has left the presumption against preemption indeterminate); Sharkey, *Institutional Approach*, *supra* note 25, at 454 ("It is exceedingly difficult to demonstrate that any consistent principle or explanatory variable emerges from the Supreme Court's products liability preemption jurisprudence."). See generally OWEN, *supra* note 21, at 939-40 (summarizing the consensus among commentators that preemption is "a mess" (citation omitted)).

³¹ *Chevron U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 843-44 (1984) (stating that when "Congress has explicitly left a gap for the agency to fill, there is an express delegation of authority to the agency to elucidate a specific provision of the statute by regulation").

³² Among federal agencies, the Food and Drug Administration ("FDA") has attracted the most attention on this point. See *Horn v. Thoratec Corp.*, 376 F.3d 163, 167 (3d Cir. 2004) (noting the FDA's participation in the appeal as amicus curiae); Ausness, *supra* note 21, at 55-56. *Colacicco v. Apotex, Inc.*, 432 F. Supp. 2d 514, 534 (E.D. Pa. 2006), *aff'd*, 521 F.3d 253, 275-76 (3d Cir. 2008), *vacated*, No. 08-437, 2009 WL 578682 (U.S. Mar. 9, 2009), marked the first successful attempt in the federal appellate courts to invoke the FDA preamble as establishing preemption.

³³ *Cherokee Nation v. Levitt*, 543 U.S. 631, 640-42 (2005) (forcing the Department of Health and Human Services to pay sums it owed to two Indian tribes, notwithstanding its contention that Congress had not appropriated the money it needed); *N. Y. Airways, Inc. v. United States*, 369 F.2d 743, 748 (Ct. Cl. 1966).

agency holding assigned authority over safety, be it “independent” or subordinated to a Cabinet department, has a presence distinct from that of Congress in the setting of regulatory policies that pertain to preemption.³⁴

For judges and policymakers receptive to the thesis of this Article, it remains an open question which statutes and agencies will give the judiciary instances of implied reverse preemption to find; the experience of consumer safety is clear enough to provide a model of the phenomenon. Beginning either in 1976 or 1981, and continuing until 2008,³⁵ Congress knocked the teeth from the Consumer Product Safety Act and weakened the Consumer Product Safety Commission, whose leaders appeared to welcome rather than resist the stripping of their power. Unity and bipartisanship pervaded this reversal; both Democrats and Republicans pursued statutory rollback and a reduction in agency power.³⁶ Part III presents these undisputed developments without argument or criticism: I have my views about the federal interest in consumer safety, but they are of no moment here. The point of Part III is that at some point during a period of seventeen years, Congress ceased to intend, if it ever did intend, to assert a federal safety-regulatory stance that precluded tort liability for injuries attributed to consumer products.³⁷ Congress chose not to occupy the field of consumer safety, nor to establish a comprehensive regulatory scheme. This absence or withdrawal of preemption left consumer product safety open to the powers and prerogatives of state law, especially state tort liability.

Implied reverse preemption and traditional preemption function together harmoniously in the adversary binary of manufacturer-defendants versus consumer-plaintiffs. I will even claim that acceptance

³⁴ Independent federal agencies, of which the CPSC is one, traditionally respond more closely to Congress than to the President. Geoffrey P. Miller, *Introduction: The Debate Over Independent Agencies in Light of Empirical Evidence*, 1988 DUKE L. J. 215, 218.

³⁵ Though unanimous on the point that the CPSC plunged into somnolence during the Reagan years, commentators disagree on when this descent began. One publication that focuses on industry rather than consumers, the Small Business Encyclopedia, deemed 1999 a turnaround year. *See supra* note 20; *see also infra* Part III.B. (exploring the ambiguous decline of federal consumer safety regulation in the late Carter and early Reagan presidential administrations).

³⁶ *See* E. MARLA FELCHER, IT'S NO ACCIDENT: HOW CORPORATIONS SELL DANGEROUS BABY PRODUCTS 30 (2001) (noting that President Jimmy Carter explored abolishing the CPSC in 1977). Bill Clinton put through staffing cuts at the agency in 1995 and 1998. *See* Consumer Prod. Safety Comm'n, Memorandum, 1999 Budget Recommendation (July 1, 1997), *available at* <http://www.cpsc.gov/LIBRARY/FOIA/FOIA97/BRIEF/BP9739.PDF>. On Republican rollbacks, *see infra* notes 128-133 and accompanying text.

³⁷ This inference rests on my understanding that preemption is different from a congressional grant of mere immunity. Implied preemption presumes that Congress has substituted federal regulation for state-based tort liability as a means to promote consumer safety; it casts tort claims as obstructing a scheme that benefits consumers. If this premise is correct, then implied reverse preemption becomes a necessary counterpart to implied preemption, because as soon as Congress no longer desires to promote safety through federal regulation, immediately tort claims, or “regulation through litigation,” become the only available instrument of safety law. Retaining preemption under those circumstances would therefore generate only immunity, not safety. *See generally Big Loss for Big Tobacco*, N.Y. TIMES, Dec. 16, 2008, at A36 (praising the Supreme Court for insisting that preemption law does not require immunity for cigarette manufacturers).

of this new doctrine would make the work of preemption litigation more satisfying for lawyers and judges. At present, with only preemption and not implied reverse preemption available to them, lawyers on both sides immerse themselves in assembling decisional law that favors their clients' stance on a yes/no affirmative defense and try to distinguish the contrary line.³⁸ Judges find either preemption or no preemption. Everyone on the battleground has a set of tasks that are relatively mechanical.

The new front opened by implied reverse preemption brings a healthy challenge to precedents that had barred tort liability. Lawyers build an answer to the question of whether old findings of a congressional intent to preempt have been superseded. Because the evidence to support implied reverse preemption comes from relatively intelligible and accessible sources—amendments, budgets, agency announcements—courts could adjudicate the issue “on papers,” using memoranda and exhibits rather than costly stagings like *Daubert* hearings. Through this doctrine, judges would make preemption more even-handed and more consistent with law as legislators make it.

I. IMPLIED PREEMPTION OF STATE TORT LIABILITY: INFERRING A FEDERAL LEGISLATIVE DESIGN TO BAR PERSONAL INJURY CLAIMS

A. *To Begin: Congressional Intent*

Under varied sources of doctrine, of which the Supremacy Clause of the United States Constitution has garnered the most attention,³⁹ state law must yield to contrary federal law. The eighteenth-century declaration of congressional supremacy in the Constitution probably did not anticipate the twentieth-century rise of federal power under the Commerce Clause, suggesting that the searches for congressional intent to preempt inconsistent state law that courts now undertake may be inconsistent with the framers' design.⁴⁰ Nevertheless, the constitutional base from which courts find preemption today is solid.⁴¹ In its preemption decisions, the Supreme Court frequently pauses to pledge fealty to legislative intent, which it has called “the ultimate touchstone” in preemption analysis.⁴²

³⁸ See *infra* Part III.A (assembling cases that support an inference of preemption by the CPSA).

³⁹ U.S. CONST. art. VI, cl.2.

⁴⁰ See Stephen A. Gardbaum, *The Nature of Preemption*, 79 CORNELL L. REV. 767, 785-95 (1994); see also Mary J. Davis, *Unmasking the Presumption in Favor of Preemption*, 53 S.C. L. REV. 967, 972 (2002) [hereinafter Davis, *Unmasking*]; Nelson, *supra* note 30, at 227.

⁴¹ See *Wyeth, Inc. v. Levine*, 129 S. Ct. 1187, 1199 (2009); *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485-86 (1996); *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 516 (1992).

⁴² For expressions of the Court's devotion to congressional intent in preemption decisions, see *Riegel v. Medtronic, Inc.*, 128 S. Ct. 999, 1013 (2008); *Sprietsma v. Mercury Marine*,

Courts considering assertions of implied preemption must, at least in principle, construe statutes with a “presumption against preemption,” a canon first declared by the Supreme Court in 1926.⁴³ Although this presumption appears to be of doubtful force,⁴⁴ the Court has never declared it dead, and in more recent preemption decisions the Court has reiterated the presumption to hold that tort claims could proceed.⁴⁵ Any attempt to understand or enhance preemption doctrine accordingly must reckon with the canon of construction that reminds courts not to rush to this inference unless Congress has made clear its preemptive intent. Looking ahead to the implied reverse preemption thesis of this Article, we can make use of the canon: A presumption against preemption, if it has any impact at all, should affect interpretations not only of whether preemption exists, but how long it stays alive in a statute. The canon tells courts to recognize the possibility that Congress has abandoned an earlier ambition to preempt.

Another point of statutory interpretation that can inform implied reverse preemption relates to drawing inferences from a legislature’s failure to act. Following what William Eskridge has called the acquiescence rule, federal courts, led by the Supreme Court, have held that a failure by Congress to respond to the judicial construction of a statute signals congressional acceptance of that decision.⁴⁶ This inference will often be ill-founded in fact.⁴⁷ Congress might not have considered the judicial decision in question; it might have disagreed with it but failed to make a priority of reversing the holding; it might have rejected it but become frozen on the question of how to respond.⁴⁸ Nevertheless, courts will sometimes draw this inference of acceptance.

Inferring legislative acceptance from legislative inaction suggests a precedent for courts as they consider whether to infer retreat

537 U.S. 51, 69 (2002); *see also supra* note 41 and accompanying text. *But see* Keith N. Hylton, *Preemption and Products Liability: A Positive Theory*, 16 SUP. CT. ECON. REV. 205, 206 (2008) (arguing that courts do not care about congressional intent and instead choose to find preemption when they perceive the relevant agency to be independent and when they perceive a high “degree of congruence between the regulatory and common law standards” (emphasis omitted)).

⁴³ *Napier v. Atl. Coast Line R. Co.*, 272 U.S. 605, 611 (1926) (“The intention of Congress to exclude states from exerting their police power must be clearly manifested.”). The most-cited presumption-against-preemption decision is *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230-31 (1947).

⁴⁴ *See* Davis, *Unmasking*, *supra* note 40, at 972 (questioning whether the presumption against preemption ever existed).

⁴⁵ *Altria Group, Inc. v. Good*, 129 S. Ct. 538, 543 (2008); *Bates v. Dow Agrosciences LLC*, 544 U.S. 431, 449 (2005).

⁴⁶ Eskridge cites *Apex Hosiery Co. v. Leader*, 310 U.S. 469, 488 (1940) (declaring that this mission “is persuasive of legislative recognition that the judicial construction is the correct one”) and *Toolson v. New York Yankees*, 346 U.S. 356, 357 (1953) (“Congress has had the ruling under consideration but has not seen fit” to write new law). WILLIAM N. ESKRIDGE, JR., *DYNAMIC STATUTORY INTERPRETATION* 242 (1994).

⁴⁷ *See* William N. Eskridge, Jr., *Interpreting Legislative Inaction*, 87 MICH. L. REV. 67, 70 (1988); Lawrence C. Marshall, “*Let Congress Do It*”: *The Case for an Absolute Rule of Statutory Stare Decisis*, 88 MICH. L. REV. 177, 186-96 (1989).

⁴⁸ I thank Deborah Widiss for her careful articulation of this point.

by Congress from an earlier inferred preemption. Any inference of an acquiescence by the legislature, to which many courts are quick to leap, makes strenuous demands on judges. They must ignore the realities noted above that contradict acquiescence by Congress (ignorance of the new judicial interpretation, inability to agree on an expression of disagreement, and so on), as well as the larger reality that this legislature “is a discontinuous decision maker.”⁴⁹ Membership in the body turns over. Even if membership in a legislature could stay fixed, the focus of its legislation will change form.⁵⁰ These demands do not burden judges who apply the implied reverse preemption that this Article advocates. Judges can proceed without blinking themselves to the probabilities, well gathered by Eskridge, that suggest a misunderstanding of congressional inaction. Inferring distraction, disengagement, or the abandonment of a once-held legislative goal calls for much less conjecture than the established inference of embrace and agreement.

B. Speculating About Why Congress Would Want to Bar Personal Injury Claims

The doctrine of preemption recognizes that Congress can have plans that are inconsistent with state tort liability. Two of these legislative designs are familiar to courts. First, Congress might intend to occupy a field so completely that any state-level contribution to the regulatory endeavor could not supplement it.⁵¹ Second, Congress might have particular purposes that state tort law would obstruct by opening the possibility of a contrary result.⁵²

Both state-tort and federal-agency modes of regulation can make sense as sources of safety, and Congress might desire either path to the destination of fewer injuries in particular and public welfare in general. When policymakers understand the federal regulatory path as preemptive, however, they add asymmetry to the paths: federal rulemaking extinguishes tort claims, but tort claims do not extinguish

⁴⁹ ESKRIDGE, *supra* note 46, at 247.

⁵⁰ Eskridge, a gay activist as well as a scholar of statutory interpretation, gives the example of the Immigration and Nationality Act of 1952, written to bar mentally ill persons from entering the United States. The Public Health Service, enforcing a 1950s view of mental health, understood the statute to exclude homosexual persons. In 1979 the PHS reversed this position, reinterpreting the statute in light of charged circumstances. *Id.* at 51-55.

⁵¹ *See, e.g., Pac. Gas & Elec. Co. v. State Energy Res. Conservation & Dev. Comm'n*, 461 U.S. 190, 212-13 (1983) (concluding that Congress had occupied the field of regulating nuclear plants); *City of Burbank v. Lockheed Air Terminal, Inc.*, 411 U.S. 624, 633 (1973) (identifying regulation of aircraft noise as another federal domain); *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 229-30 (1947) (identifying grain-elevator regulation as a field that Congress had occupied).

⁵² *See, e.g., Geier v. Am. Honda Motor Co.*, 529 U.S. 861, 873 (2000) (reviewing instances of conflict preemption in the Supreme Court); *Russo v. Ballard Med. Prods.*, 550 F.3d 1004, 1011 (10th Cir. 2008) (describing the difference between field preemption and conflict preemption).

federal rulemaking.⁵³ Even at its most potent, tort liability can only hamper or obstruct a federal regulatory scheme. Because a finding of preemption makes the federal regulatory role a destroyer—in contrast to a finding of no preemption, which does not destroy the regulatory alternative—an inference of preemption requires courts to identify a congressional agenda consistent not only with favoring the federal-regulatory mode but with actively rejecting and repudiating tort liability.

A couple of rationales for this congressional agenda are available. Both have implications for implied reverse preemption as well.

1. Conflict Preemption and Field Preemption

Conflict or obstacle preemption is the plausible type of implied preemption for personal injury claims. The alternative, “field preemption,” usually applies to traditionally federal domains,⁵⁴ and tort law governing personal injuries is traditionally left to the states.⁵⁵ State governments hold a “police power[] to legislate as to the protection of the lives, limbs, health, comfort, and quiet of all persons.”⁵⁶ Tort liability is central to their police power.⁵⁷

Field preemption could plausibly arise, however, should Congress decide that state tort liability interferes with its regulation of a field. Discussing preemption of drug claims, for example, Richard Epstein has nominated as a possible “field” the effort by Congress to enhance innovation in the pharmaceutical sector, making regulation more streamlined and centralized.⁵⁸ Should courts agree that Congress has chosen this field preemption, a range of personal injury actions would fall away from American dockets. Though cogent, the suggestion has not persuaded judges to identify field preemption of pharmaceuticals complaints in particular, or of products liability complaints in general. Field preemption appears too vast and ambitious for courts to assert its existence without clearer guidance from Congress.

Judges and commentators are more inclined to find conflict preemption of personal injury claims when the result that a plaintiff is seeking through litigation would diverge from what Congress intended.

⁵³ The anomaly has drawn scholarly attention. See OWEN, *supra* note 21, at 969 (noting that “there is in fact no reason, as a general matter, why products safety regulation and products liability litigation cannot comfortably co-exist”).

⁵⁴ See *supra* note 26 and accompanying text.

⁵⁵ See Grey, *supra* note 21, at 622 (arguing that field preemption “has no legitimate role when the issue is whether Congress has preempted state tort remedies”).

⁵⁶ *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 475 (1996) (internal quotation marks omitted) (quoting *Metro. Life Ins. Co. v. Massachusetts*, 471 U.S. 724, 756 (1985)).

⁵⁷ Grey, *supra* note 21, at 613.

⁵⁸ See Richard A. Epstein, *The Case for Field Preemption of State Laws in Drug Cases*, 103 Nw. U. L. REV. 54 (2008), available at <http://www.law.northwestern.edu/lawreview/Colloquy/2008/29/LRColl2008n29Epstein.pdf>; Richard A. Epstein, *Why the FDA Must Preempt Tort Litigation: A Critique of Chevron Deference and a Response to Richard Nagareda*, 1 J. TORT L. art. 5, at 30-31 (2006).

The clearest example of such an inferred congressional design appears in *Geier v. American Honda Motor Co.*,⁵⁹ where the Supreme Court, in a five-to-four decision, determined that the plaintiff had to lose because what she desired clashed with a federal mandate to deny her this desire. Implied preemption in *Geier* came from the National Traffic and Motor Vehicle Safety Act of 1966, which forbade states from maintaining a motor vehicle standard not “identical” to the federal safety standard.⁶⁰ Alexis Geier objected to the lack of an airbag in a Honda vehicle, contending that the vehicular design was defective; the standard in effect at the time had condoned the no-airbag design.⁶¹ Because the plaintiff could prevail only through a state-tort judgment that would condemn the absence of an airbag, the Court concluded that her claim conflicted with the permissiveness that federal standards had conscientiously installed and thus was preempted.⁶²

As applied to defeat products liability under state tort law, both field preemption (which courts do not use for this purpose) and conflict preemption as exemplified by *Geier* rest on a premise that Congress has installed a federal regulatory scheme that functions actively and deliberately to foster safety. Although inferring preemption has the same effect on liability as does simple immunity for defendants—plaintiffs’ claims are dismissed—the rationale for this effect is very different from any rationale for immunity.⁶³ Congress might want to immunize a sector from tort liability for numerous varied reasons, but the reason for a preemptive regulatory scheme must be safety.⁶⁴ Should Congress lose its desire to foster safety through the regulatory scheme and, through its actions or inactions, cause the scheme to lose force, then this shift eliminates both field preemption and conflict preemption.

2. Regard for an Agency

Going beyond the doctrinal categories of field preemption and conflict preemption, another rationale can underlie the congressional decision to foreclose tort liability: Congress might regard a federal agency as the more competent regulator. For this suggestion I rely on, and extrapolate from, Catherine Sharkey’s work on agency deference.⁶⁵

⁵⁹ 529 U.S. 861 (2000).

⁶⁰ *Id.* at 867.

⁶¹ *Id.* at 865.

⁶² *Id.* at 866.

⁶³ See *supra* note 37 and accompanying text.

⁶⁴ Or so I presume. I thank Cathy Sharkey for urging me to state the premise and thereby clarify my argument for readers who may have joined the preemption debate from a contrary starting point.

⁶⁵ Sharkey, *Institutional Approach*, *supra* note 25, at 455; Samuel Issacharoff & Catherine M. Sharkey, *Supreme Court Preemption: The Contested Middle Ground of Products Liability*, in *FEDERAL PREEMPTION: STATES’ POWERS, NATIONAL INTERESTS* 194, 195 (Richard A. Epstein & Michael S. Greve eds., 2007). For related commentary on the possibility that agency

Sharkey argues that the best predictor of what the Supreme Court will do with a preemption claim is the position on preemption that the relevant agency has asserted.⁶⁶ This position will vary: agencies turn out “just as likely, if not more likely,” to oppose preemption as favor it.⁶⁷ The same agency will articulate more than one stance. For example, the Food and Drug Administration argued for preemption in *Buckman Co. v. Plaintiff’s Legal Committee*⁶⁸ and *Riegel v. Medtronic, Inc.*⁶⁹ but against preemption in *Medtronic, Inc. v. Lohr*;⁷⁰ the National Highway and Traffic Safety Administration wanted Alexis Geier to lose on preemption⁷¹ but opposed preemption in *Freightliner Corp. v. Myrick*;⁷² the Supreme Court, finding preemption in three of these cases and declining to find it in the other two, sided with the agency in all five.⁷³ Because the Court “has been cryptic at best” on “what stands behind such deference to agency views,”⁷⁴ Sharkey is forced to supply her own rationale for deference to an agency in its interpretive (as contrasted to regulatory) role. Concluding that agencies are often well situated to know the relative merits of a state-tort versus a federal-agency fix, Sharkey encourages courts to apply “Skidmore deference” to agency views on preemption.⁷⁵ A *Skidmore* judicial stance would respect the comparative advantage of an agency to know “whether a uniform federal regulatory policy should exist.”⁷⁶

This panoramic version of deference makes a point pertaining to congressional intent and agency power: Regardless of whether the Supreme Court should accept or reject a particular claim of preemption (a question Sharkey builds a model to answer), any particular instance of regulation originates at least in part in a view that Congress had about relative institutional competence. On occasions that warrant deference to agency wishes, Congress would have believed that the empowered agency is better positioned than state tort liability to resolve one iteration of the recurring question: *Do we need a uniform federal rule here?*⁷⁷ Like

regulation might be more competent than tort liability at achieving particular ends, see Hylton, *supra* note 42, at 219-20 (noting the importance of judicial, as contrasted to congressional, regard for an agency); Peter H. Schuck, *FDA Preemption of State Tort Law in Drug Regulation: Finding the Sweet Spot*, 13 ROGER WILLIAMS U. L. REV. 73, 76 (2008) (comparing the “regulatory toolkit” that state tort liability and federal rules each offer).

⁶⁶ Sharkey, *Institutional Approach*, *supra* note 25, at 471.

⁶⁷ *Id.* at 475.

⁶⁸ See 531 U.S. 341, 347-51 (2001).

⁶⁹ 128 S. Ct. 999, 1009 (2008).

⁷⁰ See 518 U.S. 470, 498-500 (1996).

⁷¹ See *Geier v. Am. Honda Motor Co.*, 529 U.S. 861, 883 (2000).

⁷² See 514 U.S. 280, 285 (1995).

⁷³ Sharkey, *Institutional Approach*, *supra* note 25, at 477.

⁷⁴ *Id.* at 471-72.

⁷⁵ *Id.* at 491-96 (citing *Skidmore*, 323 U.S. 134 (1944)).

⁷⁶ *Id.* at 484.

⁷⁷ Ascribing this inquiry to Congress, keeper of the vaunted congressional intent, seems strained, as Keith Hylton has contended. See generally Hylton, *supra* note 42 (arguing that it is

any other faith, congressional faith in the superior power of an agency can dwindle or disappear. If the judgment about agency superiority rests on facts rather than, or in addition to, faith or ideology, this judgment too can recede when facts change.

II. IMPLIED REVERSE PREEMPTION OF STATE TORT LIABILITY:
INFERRING THE WITHDRAWAL OF ANY JUDICIALLY INFERRED
BAR OF PERSONAL INJURY CLAIMS THAT MAY HAVE ONCE
EXISTED

Here we pursue the thesis of this Article: The exercise of drawing inferences about what a legislature once intended with respect to regulation necessarily entails the possibility of inferring that the legislature has relinquished an older inferred intent on this point. Any doctrine of implied preemption that does not recognize the possibility of abandoning a once-held preemptive scheme cuts courts off from reality. Dropping the regulatory ball is as normal and predictable—just as integral to regulation—as picking it up. This Part builds on the standard account of congressional intent by exploring congressional retreat from safety initiatives. After considering the markers of abandonment that Congress makes public, the Part proceeds to discuss abandonment as manifested by an agency.

A. *Congressional Abandonment*

Congress has at hand three devices to express its intentions regarding the launch of a regulatory agenda. To start, it can vote to approve a new statute that provides for agency rulemaking. Second, it can appropriate funds to support a federal agency in this initiative. Third, it can return to the statute as needed, codifying amendments to take into account developments in the regulated sector. The last two prerogatives are also at the center of any inferable withdrawal of regulation. Congress can withdraw from previous levels of appropriation, and it can enact amendments that contract or undermine the original regulatory endeavor.⁷⁸

1. Appropriations in Retreat

The monolithic Congress that, according to preemption doctrine, chooses to express what lies at the core of preemption—its singular intent to occupy a field or establish a comprehensive scheme of regulation incompatible with tort liability, or perhaps to opine on agency

judges who hold a view about relative institutional competence). Regardless of who asks it, however, the question is central to any analysis of preemption.

⁷⁸ Overt repeal of a statute, a reversal of the first prerogative, eliminates the need for inferring.

competence⁷⁹—is a fiction, as explained by the literatures on public choice, game theory, and other academic genres.⁸⁰ With respect to any issue before it, Congress has many intents and agendas, never just one. An aspect of its multiplicity that pertains to implied reverse preemption is the gap between substantive law-writing and appropriations. To effect a legislative change that requires money to proceed, a safety-reform coalition must first get the new statute written and then get it funded. Both houses of Congress have powerful appropriations committees that hold authority over federal disbursements.⁸¹ It is fairly common for Congress not to appropriate funds to pay for a new law it voted to enact.⁸²

This manifested ambivalence complicates the use of an appropriations criterion to draw any legal conclusion, not just the implied reverse preemption conclusion of this Article, because Congress can express conflicting desires about a new piece of legislation. Legislators can vote for a measure (implying congressional acceptance) yet not fund it (implying congressional rejection). Regardless of whether they find the response mixed or even contradictory, however, courts must consider the money-message that Congress sends to them. Their acceptance of implied preemption as doctrine has committed courts to drawing inferences about what Congress wants. As the case law on implied preemption indicates, manifestations of these wants emerge shrouded in ambiguity and doubt.⁸³

Committed to an appropriations analysis, courts considering implied reverse preemption could begin with a metric of decline in spending. This metric would direct judicial attention to an inflation-adjusted drop in appropriations over a period of years for the regulatory entity empowered to enforce what Congress has mandated. A court can infer that other things being equal, fewer dollars appropriated expresses

⁷⁹ See *supra* Part I.B.

⁸⁰ See ESKRIDGE, *supra* note 46, at 247-48 (summarizing legal process conclusions); Philip P. Frickey, *From the Big Sleep to the Big Heat: The Revival of Theory in Statutory Interpretation*, 77 MINN. L. REV. 241, 249-52 (1992) (explaining congressional intent in a public-choice perspective); Guy Halfteck, *Legislative Threats*, 61 STAN. L. REV. 629, 665-70 (2008) (applying game theory to legislative behaviors).

⁸¹ The authority of appropriations committees in Congress derives from the Constitution, which provides that “[m]oney shall be drawn from the treasury” only “in Consequence of Appropriations made by Law,” in a section describing the powers of Congress. U.S. CONST. art. I, sec. 9, cl. 7.

⁸² “New programs receive funding only if they can fit within predetermined limits. They can succeed legislatively only if some previously funded programs receive fewer funds or no money at all.” WILLIAM N. ESKRIDGE, JR., PHILIP P. FRICKEY & ELIZABETH GARRETT, *LEGISLATION AND STATUTORY INTERPRETATION* 184 (2000).

⁸³ See *supra* note 30 and accompanying text. For courts reviewing claims of implied reverse preemption, a plausible response to the funding gap would be to accept the enactment of substantive regulatory legislation as an expression of congressional interest, and after a reasonable interval (perhaps two years) to require Congress either to show observers the money, so to speak, or acknowledge that its earlier enactment did not articulate a serious regulatory plan.

less desire to regulate.⁸⁴ Use of this metric requires attention to the surrounding budgetary scene: agency budgets often include increases unrelated to regulatory policy. Federal agencies sometimes have to augment their expenditures on such items as mandatory pay raises, added premiums for employees' insurance, increased pension contributions, and escalation in rents for its office spaces.⁸⁵ Whenever such upticks are beyond the control of agency budgets at a time that appropriations remain flat—especially if the agency carries out its mission using human employees more than hardware—Congress has in effect diminished its spending on regulation.⁸⁶

An alternative metric would focus on whether a level of funding suffices to fulfill the statutory agenda. This conclusion may appear beyond the judicial ken, replete as it is with tradeoffs and indeterminate variables piled on top of the question of what the statute seeks to achieve. Courts are familiar with it, however, having issued numerous judgments in response to contentions that the federal government lacks the money to pay a claim or cannot afford to fund entitlements.⁸⁷

For judges who resist accepting implied reverse preemption in the belief that it is too novel or too potentially far-reaching, one last metric could limit the doctrine to extraordinary circumstances. A court could choose to find implied reverse preemption only when the relevant agency appears unfunded to the point of utter dysfunction: a de facto abolition of the entity.⁸⁸ This conservative approach to implied reverse preemption is at odds with the ready inference of preemption to immunize tort defendants, a locus of what might be called judicial

⁸⁴ Courts could refine this analysis with attention to circumstances as they arise. For example, a domestic spending freeze might dictate a reduction in dollar appropriations throughout the federal bureaucracy. Such a reduction does not express retreat from the particular regulatory mandate. Another possible metric that attends to circumstances would consider *relative* decline in spending. Similarly situated agencies or entities might have received more money while the agency in question is receiving less. Courts may infer that this shift in expenditure manifests a reduced desire to affect the statute's design. Relative decline, like the absolute decline mentioned above, would require data from a period of years to show the diminution in congressional interest, as well as an understanding of the relevant comparators.

⁸⁵ Telephone Interview with Rachel Weintraub, Dir. of Prod. Safety and Senior Counsel, Consumer Fed. of Am. (Dec. 29, 2008) [hereinafter Weintraub Interview].

⁸⁶ *Id.*

⁸⁷ See *supra* note 33 and accompanying text. A state-law analogy emerges in education cases. When local governments contend that they cannot afford to honor state constitutional rights to education, courts often insist that they must. See generally Christopher E. Adams, Comment, *Is Economic Integration the Fourth Wave in School Finance Litigation?*, 56 EMORY L.J. 1613, 1620-23 (2007) (describing judges' willingness to enforce rights by ordering expenditures).

⁸⁸ I have in mind a collapse in funding that in turn generates consensus that the agency has fallen to the level of the Federal Emergency Management Agency ("FEMA") following Hurricane Katrina. See Clif Chitwood, *Study Risk of Quake Before Adopting Codes*, ARK. DEMOCRAT-GAZETTE, Jan. 19, 2008 (available on LEXIS) ("In FEMA's world view, hurricanes, floods, tornadoes, earthquakes and any other event that might cost the federal government money are all of one kind and demand the same response: more money spent by others in the form of unfunded mandates"); Carol Eisenberg, *FEMA Falls Short on L.I.*, NEWSDAY (N.Y.), Dec. 14, 2007, at A30 (referring to "the Katrina debacle").

activism;⁸⁹ but it offers courts a principled basis to reject implied reverse preemption for the common run of cases while having it available whenever dire appropriation levels support the inference.

2. Manifested Regulatory Design in Retreat: Later Amendments

Courts can find implied reverse preemption manifested in decisions by Congress to pull back from its earlier safety mandates. We have already noted the possibility of repeal, the plainest signal of congressional retreat from an agenda.⁹⁰ Less overt, but just as probative of abandonment, is a pattern of amendments that weaken the original swath of regulatory powers.

The inference gains strength the more numerous such weakening amendments become. A single piece of amending legislation that appears to express withdrawal from a preempting scheme, if ambiguous, ought to receive the benefit of the doubt: it could look like relinquishment but might amount to a different approach to the same safety agenda that had been, and remains, incompatible with tort liability. After the withdrawing amendments accrete, however, they express in the aggregate a congressional intent to do less to maintain the original safety-enhancing federal regime.

B. Agency Abandonment

Judicial inquiries into implied preemption, a construct rooted in legislative supremacy and, from there, in congressional intent, also consider the policies that an agency has manifested, distinct from the statutory provisions that empower it.⁹¹ As constitutional actors, agencies respond to the direction of Congress. Courts call this direction delegation.⁹² Like preemption itself, delegation is a judicial construct that need not—and typically will not—be manifested in overt action by Congress.⁹³

⁸⁹ The writings of Mary Davis are on point. See generally Mary J. Davis, *The Supreme Court and Our Culture of Irresponsibility*, 31 WAKE FOREST L. REV. 1075 (1996) (summarizing the Supreme Court's energetic embrace of doctrines to protect products liability defendants); Davis, *Unmasking*, *supra* note 40.

⁹⁰ See *supra* note 28 and accompanying text.

⁹¹ See generally Sharkey, *Institutional Approach*, *supra* note 25; see also Ausness, *supra* note 21, at 758-71 (noting the complications of deferring to an agency position that has shifted over time).

⁹² Derived from *Chevron U.S.A., Inc. v. National Resources Defense Council*, 467 U.S. 837, 843-44 (1984), this delegation compels courts to recognize the authority of agency-set policy. On these relations in tripartite-government terms, see Cynthia R. Farina, *Statutory Interpretation and the Balance of Power in the Administrative State*, 89 COLUM. L. REV. 452 (1989).

⁹³ See *Chevron*, 467 U.S. at 865-66.

1. Authority: Recognizing Delegation to Make a Decision About Reversing a Regulatory Direction

Every federal agency brings its own expertise and methods to a legislative agenda. Under the version of congressional intent that courts use to hold that a plaintiff may not proceed with a personal injury claim, courts infer that Congress, instead of (or in addition to) writing safety regulations of its own, gave an administrative authority the power to craft rules superior to those that would emerge from state decisional law. The competence that makes delegation plausible in a particular context necessarily includes a distinct identity.

Accompanying this premise, so central to implied preemption, is the mirror-premise central to implied reverse preemption: An agency that once was inclined to codify and enforce safety regulations can become disinclined to stick to this task.⁹⁴ Inertia keeps old rules in the Code of Federal Regulations and other repositories long after individuals who effect agency policy have ceased to care about particular regulatory goals that the agency used to pursue. So seen, delegation represents a congressional grant of power that assigns an agency not only the prerogative to write rules potent enough to preempt tort liability, but also the prerogative to let go of its erstwhile preemptive ambition.⁹⁵

Any judge who reaches a conclusion of abandonment by an agency does not necessarily condemn this inaction. Agency restraint might bespeak a “no harm, no foul” conclusion about an industry or sector that has been functioning well, independent of or unaffected by the federal code. Alternatively, a problematic condition—sloth, corruption, capture by industry, or inadequate funding from Congress—might explain the torpor of a do-little agency.

Judges’ power to find implied reverse preemption has effects that are benign when the industry is functioning well and salutary when it needs intervention. If an agency has declined to write rules because the sector it regulates is not hurting anyone, then personal injury litigation will not clog the courts,⁹⁶ and no harm to the congressional design will

⁹⁴ Cf. OWEN, *supra* note 21, at 954 (observing, in another context, that “even a federal agency has the right to change its mind, and that an agency’s current views on preemption are entitled to respect”).

⁹⁵ See generally Sharkey, *Institutional Approach*, *supra* note 25 (emphasizing the role of agencies as safety decisionmakers).

⁹⁶ I assume an inverse relation between the safety of the sector’s activity and the rate of personal injury claiming. I do not mean to suggest that every claim filed bespeaks a real injury, only that preemption is not the solution to fraudulent or exaggerated allegations of injury by malingerers and their attorneys. Preemption functions to bar claims of true harm on the premise that giving plaintiffs the relief they seek, or forcing sellers to proceed with manufacture and distribution in anticipation of being sued, would retard rather than advance public safety. See *supra* text accompanying notes 59-62 (discussing *Geier v. Am. Honda Motor Co.*, 529 U.S. 861 (2000)). Like all other affirmative defenses, preemption does not catch or discourage dishonest claiming. Fears of the falsity problem have no place in the law of preemption. When applying the doctrine, courts may reasonably assume that attempts to bring personal injury claims bespeak real injuries, and, conversely, that the lack of such attempts suggests a track record of safety.

follow. The existence of an industry flourishing—and hurting few people—with few agency-written rules and little liability provides an instance of success with which implied reverse preemption will not interfere.⁹⁷ If the agency ought to have written and enforced rules but became inactive for malign reasons, then reversing the inference of preemption helps to cure a pathology.

2. Manifestations: Scant Rulemaking Activity, Budgetary Passivity, and a Subdued Public Presence

The Congressional Review Act, passed in 1996 as part of the famed anti-regulatory Contract With America, requires federal agencies to submit their proposed rules to Congress for approval.⁹⁸ The statute declares that a proposed rule may fall into the “major” category; a major rule is defined as a rule expected to have an annual impact on the economy of at least \$100 million.⁹⁹ During the first decade of enactment, federal agencies duly conveyed to Congress and the General Accounting Office 41,218 non-major rules and 610 major rules,¹⁰⁰ thereby setting a baseline quantity.

The rules appear numerous, but might not be so in relation to the amount of regulation needed. Scant rulemaking activity—or at least an attitude against rulemaking—occupied federal policy before the Contract With America. Calls for regulatory relief emerged loudly in the Reagan administration:¹⁰¹ critics who claimed that the government was wasting money on irrational and inefficient rules advocated successfully within the executive branch for cost-benefit analysis as a policy tool. The cost-benefit criterion compels administrators to justify proposed rules as tending to produce gains that exceed losses.¹⁰²

The premise behind the requirement is that administrators would otherwise overregulate. Advocates of regulatory rollback have argued that when unchecked by constraints like cost-benefit analysis, bureaucrats write rules more burdensome than what rational, informed

⁹⁷ An example of this success from my own long-concluded experience as a litigator: I used to defend personal injury claims for toxic shock syndrome, a disease attributed to tampons. Lawyers once specialized in this category of products liability work. Today, as a result of improved product design and well-written FDA-mandated warnings, tampon-associated toxic shock syndrome arises so much less often, and the decisional law about it has become so clear, that lawyers can no longer make a living prosecuting or defending these claims. Judges agree that claims of defective warning are preempted by compliance with the FDA script, *see, e.g.,* *Papike v. Tambrands, Inc.*, 107 F.3d 737, 740-41 (9th Cir. 1997); *Nat’l Bank of Commerce v. Kimberly-Clark Corp.*, 38 F.3d 988-90 (8th Cir. 1994), but because of the absence of injuries and claims, a contrary understanding of preemption would leave manufacturers and consumers in the same position.

⁹⁸ 5 U.S.C. § 801 (2006).

⁹⁹ *Id.* § 804(2)(A).

¹⁰⁰ Cindy Skrzycki, *Reform’s Knockout Act, Kept Out of the Ring*, WASH. POST, Apr. 18, 2006, at D1.

¹⁰¹ *See* Sidney A. Shapiro & Christopher H. Schroeder, *Beyond Cost-Benefit Analysis: A Pragmatic Reorientation*, 32 HARV. ENVTL. L. REV. 433, 446-47 (2008).

¹⁰² *See id.* at 449-50.

governments and individuals would choose.¹⁰³ This claim, which critics have contested vigorously,¹⁰⁴ may be stated in less controversial terms: Rule-promulgating is the core business of an agency. Administrators who do not occupy themselves with the creation of new rules are relatively inactive.

These administrators have other activities as well. Accompanying the truism that “rulemakers make rules” is the proposition that individuals who head agencies seek to maximize their budgets.¹⁰⁵ Anyone actively heading a federal agency would desire larger appropriations from Congress and want decisionmakers within the executive branch like the Office of Management and Budget to support the agency’s petition for more money. Finally, administrators who manage agencies actively will pursue public relations, understanding that media visibility tends to bolster taxpayer support for the mission. Administrators of any agency whose mission includes public safety will want recognition of its safety-enhancing efforts.

Vital signs like these have their antonyms. Reduced rulemaking activity, budgetary passivity, and a subdued public presence all manifest retreat from a regulatory agenda. Any agency that writes few or no major rules, or an exceptionally low number of non-major rules, is doing relatively little regulating. Lack of advocacy for budgetary largesse implies lack of participation in the regulatory endeavor. The public-visibility aspect of agency strength, though harder to quantify than the other two indicators, is amenable to observation of the agency head at work.

III. CONSUMER PRODUCT SAFETY AS AN INSTANCE OF IMPLIED REVERSE PREEMPTION

Evaluating consumer product safety in terms of implied reverse preemption calls for two steps of analysis. The first step, undertaken in the first section of this Part, looks for preemptive effects of federal statutes (focusing on the Consumer Product Safety Act) to show why readers of a statute might draw the inference of preemption and to explore the consequences of a retreat from preemption. The second section of the Part proceeds to evidence supporting an inference of retreat from preemption as manifested by both Congress and the Consumer Product Safety Commission.

¹⁰³ See, e.g., *id.* at 448 (summarizing studies by John F. Morrall, Robert W. Hahn, and Tammy O. Tengs and John O. Graham).

¹⁰⁴ See *id.* at 448-52.

¹⁰⁵ See William A. Niskanen, *Bureaucrats and Politicians*, 18 J.L. & ECON. 617, 630 (1975); Shapiro & Schroeder, *supra* note 101, at 452 (noting “that agency heads seek to increase their budgets”).

A. *Statutory Language Supporting an Inference of Preemption*

Congress empowered the Consumer Products Safety Commission to regulate under several statutes: the CPSA, the Federal Hazardous Substances Act, the Refrigerator Safety Act, the Flammable Fabrics Act, and the Poison Prevention Packaging Act.¹⁰⁶ Preemption is not an issue for three of the five. Because the Poison Prevention Packaging Act and the Refrigerator Safety Act have been invoked only rarely in personal injury litigation, a preemption defense has not emerged in decisional law.¹⁰⁷ The Flammable Fabrics Act is settled, at least as of this writing, in the opposite direction: even though this statute contains a preemption clause, “the courts have ruled that [it] does not preempt products liability claims for flammable clothing.”¹⁰⁸

As for the Federal Hazardous Substances Act (“FHSA”), this statute authorizes the Commission to establish mandatory labeling requirements for certain chemicals marketed for household use.¹⁰⁹ *Cipollone v. Liggett Group, Inc.*, which in 1992 held that congressionally mandated words on cigarette packaging preempted tort liability,¹¹⁰ invites a similar interpretation of CPSC-decreed warning language, and so one might have predicted the pattern reported in the leading products liability hornbook: cases from the 1970s find no preemption and cases post-*Cipollone* find that the FHSA does indeed preempt.¹¹¹ Because the FHSA gives the Commission authority to script acceptable warnings, courts interpreting this statute after *Cipollone* have found the inference of preemption straightforward.

Although its case law is sparse, the Consumer Product Safety Act presents a more varied preemption picture.¹¹² The CPSA contains both express-preemption and savings clauses.¹¹³ Express preemption appears in the CPSA provision that no state may establish a safety standard or regulation about a consumer product if a federal safety standard issued under authority of the CPSA already addresses this risk

¹⁰⁶ James L. Winokur & Jennifer Robbins, *Consumer Product Safety: Preemption, the Commerce Clause and State Regulatory Authority*, 25 VILL. L. REV. 232, 238-39 (1979-1980).

¹⁰⁷ Looking for cases, I found none where a defendant contended that a claim was preempted by the Refrigerator Safety Act and, on the Poison Prevention Packaging Act, I located only unpublished ones that provided little doctrine: *Miles v. S.C. Johnson & Son, Inc.*, No. 00 C 3278, 2002 U.S. Dist. LEXIS 22695, at *18 (N.D. Ill. Nov. 22, 2002) (holding that the plaintiff’s claim was preempted by “nearly identical” language in the Federal Hazardous Substances Act and the Poison Prevention Packaging Act); *Pinckney v. Zep Mfg. Co.*, No. 94-CV-0742, 1997 U.S. Dist. LEXIS 5172, at *19 (N.D.N.Y. Apr. 15, 1997) (conceding that the packaging statutes might preempt, but holding that they did not apply to the product in question).

¹⁰⁸ OWEN, *supra* note 21, at 966 n.215.

¹⁰⁹ *Id.* at 967.

¹¹⁰ 505 U.S. 504, 530-31 (1992).

¹¹¹ Compare OWEN, *supra* note 21, at 967 & n.225, with *id.* at 967 & n.226.

¹¹² See Davis, *Unmasking*, *supra* note 40, at 1028 (noting judicial confusion on this question).

¹¹³ See *supra* note 24 and accompanying text (noting that several federal statutes combine the two clauses).

of injury.¹¹⁴ Two savings clauses are also present in the statute. One clause saves remedies available under state law for violation of CPSA provisions.¹¹⁵ The second, more familiar, savings clause provides that compliance with federal consumer safety rules will not relieve a seller from liability at common law.¹¹⁶

Since 2000, federal courts have used *Geier v. American Honda Co., Inc.*¹¹⁷ for guidance in navigating the inclusion of these apparently contradictory preemption messages. Although *Geier* ruled in favor of a seller-defendant, the opinion of the Court insisted that the presence of a savings clause in a statute mandates a narrow reading of preemption language: a broad reading would mean that “little, if any, potential ‘liability at common law’ would remain. And few, if any, tort actions would remain for the savings clause to save.”¹¹⁸ Thus, despite the failure of the plaintiff’s personal injury claim in *Geier*, consumer-safety decisions that cite *Geier* agree that the multiple clauses of the CPSA must preserve at least some tort liability.¹¹⁹

Framing the CPSA preemption question in terms of *Geier* means that courts must scrutinize the particulars of the plaintiff’s claim, which typically will allege a warning or design defect. If the remedy sought does not conflict with a regulation promulgated under the statute, then the claim is not preempted, and the plaintiff may seek redress in tort. If what the plaintiff seeks is at odds with federal consumer safety regulations, then the CPSA preempts the claim.

Courts applying the CPSA to particular complaints have reached different conclusions on preemption. Most of what might be called the lawnmower cases have concluded that the CPSA preempts claims of design defect and failure to warn.¹²⁰ The other product-specific set of cases, attributing harm to cigarette lighters, has produced more mixed results.¹²¹ Presenting no unanimity on the question of preemption, in sum,

¹¹⁴ 15 U.S.C. § 2075(a) (2006).

¹¹⁵ *Id.* § 2075(b).

¹¹⁶ *Id.* § 2074(a).

¹¹⁷ 529 U.S. 861 (2000).

¹¹⁸ *Id.* at 868.

¹¹⁹ See, e.g., *Summerlin v. Scott Petroleum Corp.*, 324 F. Supp. 2d 810, 814 (S.D. Miss. 2004) (refusing federal jurisdiction because the CPSA had insufficient preemptive effect); *Churchill Village, LLC v. Gen. Elec. Co.*, 169 F. Supp. 2d 1119, 1128 (N.D. Cal. 2000); *Colon v. BIC USA, Inc.*, 136 F. Supp. 2d 196, 207 (S.D.N.Y. 2000) (noting that permitting tort liability would not obstruct federal regulation); see also *Sprietsma v. Mercury Marine*, 537 U.S. 51, 63-64 (2002) (holding that under this reading of the two clauses in a boat safety statute, plaintiff’s claim was not preempted). The legislative history of the CPSA is consistent with this inclination to preserve state liability. Robert B Leflar & Robert S. Adler, *The Preemption Pentad: Federal Preemption of Products Liability Claims After Medtronic*, 64 TENN. L. REV. 691, 741 & n.251 (1997).

¹²⁰ See *Moe v. MTD Prods., Inc.*, 73 F.3d 179 (8th Cir. 1995) (holding that warning claims but not design claims were preempted); *Frazier v. Heckingers*, 96 F. Supp. 2d 486, 491 (E.D. Pa. 2000) (holding that the CPSA preempts both design and warning claims); *Cortez v. MTD Prods., Inc.*, 927 F. Supp. 386, 389 (N.D. Cal. 1996).

¹²¹ Compare *Hittle v. Scripto-Tokai Corp.*, 166 F. Supp. 2d 142, 149 (M.D. Pa. 2001) (finding no preemption), and *Colon*, 136 F. Supp. 2d at 209 (same), with *Ball v. BIC Corp.*, No.

decisional law does feature several judicial conclusions that the Consumer Product Safety Act, coupled with actions taken by the Consumer Product Safety Commission, can bar injured persons from bringing claims against product sellers.

B. Manifestations of a Lesser Federal Regulatory Interest

1. Amendments Marching Backward

Staffers at the Consumer Product Safety Commission recently prepared a list of amendments to the Consumer Product Safety Act enacted through 2008, in the form of an unofficial compilation.¹²² Of the ten pieces of legislation named, two pertain directly to implied reverse preemption: the 1981 amendments are most central, but amendments of 1976 are of interest as well.¹²³ To show the arc of withdrawal, I review the 1976 and 1981 changes in chronological order.

The Consumer Product Safety Commission Improvements Act of 1976 achieved its “improvements” prominently by removing Commission authority to regulate tobacco and firearms.¹²⁴ As early as 1973 it had been clear enough to then-professor Antonin Scalia and his co-author Frank Goodman that the Act did not give the Commission any power with respect to these two products,¹²⁵ but the 1976 amendment took the form of an overt ban on CPSC authority.¹²⁶ An anti-regulatory sentiment is manifest throughout the 1976 amendments, which widened the swath of preemptable state law: the original CPSA had encouraged uniformity via its express preemption clause but allowed state consumer regulation to differ from CPSC-authorized rules whenever the CPSC approved these state alternatives as amenable to co-existence. The 1976 amendments ordered the CPSC to deem such state regulations

4:97-CV-02467, 2000 U.S. Dist. LEXIS 19699, at *7-8 (E.D. Mo. Feb. 8, 2000) (holding that the plaintiff’s design claims were preempted, and that the warning claim failed for other reasons), *and* Frith v. BIC Corp., 863 So. 2d 960, 967 (Miss. 2004) (holding that design defect claim was preempted because the CPSC had issued cigarette lighter regulations that did not require the safety feature at issue), *and* BIC Pen Corp. v. Carter, 251 S.W.3d 500, 509 (Tex. 2008) (same).

¹²² See Safety Matters and Other Thoughts, <http://blog.wemakeitsafer.com> (Nov. 9, 2008). The list mentions the Consumer Product Safety Commissions Improvement Act of 1976, the Emergency Interim Consumer Product Safety Act Authorization Act of 1978, the Consumer Product Safety Amendments of 1981, the Orphan Drug Act, the Lead Contamination Control Act of 1988, the Anti-Drug Abuse Act of 1988, the Consumer Product Safety Improvements Act of 1990, the Child Safety Protect Act, and the 2008 Consumer Product Safety Improvements Act, with which this Article began. *Id.*

¹²³ Six of the others, being narrower or more modest in scope, do not bear on the question of retreat; the Consumer Product Safety Improvements Act of 1990 focuses mainly on reporting obligations and does not relate directly to tort liability; the 2008 Act is written as a congressional volte-face. See *supra* notes 4-11 and accompanying text.

¹²⁴ Pub. L. No. 94-284, §§ 3(c), (e), 90 Stat. 503, 504 (1976).

¹²⁵ Scalia & Goodman, *supra* note 13, at 902.

¹²⁶ See Jon S. Vernick & Stephen P. Teret, *A Public Health Approach to Regulating Firearms as Consumer Products*, 148 U. PA. L. REV. 1193, 1196 (2000) (noting that firearms and ammunition are largely exempted from all safety regulation, not just CPSC rulemaking).

inconsistent when manufacturers' economic difficulties with compliance were included in the "burden" these state regulations created.¹²⁷

The maneuvers of 1976 show the need for a doctrine of implied reverse preemption. Implied reverse preemption perceives the difference between, on the one hand, a national scheme of safety regulation, which tort liability might obstruct and thereby harm public welfare and, on the other hand, an unprincipled gift of immunity to the injuring sector, which tort liability might also obstruct and thereby *enhance* public welfare. Mere enactments do not of themselves evince congressional occupation of a field or comprehensive regulation. As a judge can easily tell, the 1976 amendments did nothing to make consumer products safer. They took away from the CPSC regulatory authority over two products without giving this power to any other federal agency, and they squelched safety-fostering rules that states could otherwise have promulgated by adding an anti-safety economic-burden element to what the CPSC had to weigh when reviewing state regulations. Putting too much faith in the surface of the 1976 amendments—*Look! The amendments extend federal control. Congress must have intended to preempt!*—yields a wrong answer to the intent question. Implied reverse preemption, with its criteria for showing abandonment, repairs the error.

The Reagan-vintage 1981 amendments occupy the peak of congressional withdrawal from consumer product safety regulation. Declaring that the CPSC must do less and exercise less power, they display the retreat that is central to implied reverse preemption. Congress provided in 1981 that the CPSC could no longer write "requirements governing the contents, composition, design, construction, finish, or packaging of products."¹²⁸ Instead, it had to limit its standards to the domain of "performance, labeling, and warning."¹²⁹ Congress also prevented the Commission from releasing reports that manufacturers had provided about product hazards, removed amusement park rides from CPSC jurisdiction, and established a panel that had to be convened before the Commission could begin rulemaking about toxins.¹³⁰

More notoriously, in the 1981 amendments Congress prohibited the Commission from promulgating mandatory rules. "Voluntary" standards became the regulatory mode of choice.¹³¹ Under this reform, rather than write a mandate, the Commission must publish an advance notice of proposed rulemaking and invite the submission of an existing

¹²⁷ 15 U.S.C. § 2075(c). This manufacturer-protective view of interstate commerce diverged from Supreme Court case law that had prevailed. Susan Bartlett Foote, *Administrative Preemption: An Experiment in Regulatory Federalism*, 70 VA. L. REV. 1429, 1438 & n.44 (1984).

¹²⁸ Thomas O. McGarity, *Some Thoughts on "Deossifying" The Rulemaking Process*, 41 DUKE L.J. 1385, 1426 (1992).

¹²⁹ *Id.* (internal quotation marks omitted).

¹³⁰ Adler, *supra* note 16, at 98 n.204.

¹³¹ Schwartz, *supra* note 12, at 70.

voluntary standard or the intent to draft one.¹³² Only when no adequate voluntary standard emerges or when industry fails to comply with voluntary standards may the Commission resort to a mandatory rule.¹³³

The legislative history of the 1972 statute had expressed scorn for voluntary standards as a source of consumer safety.¹³⁴ According to the 1970 report that Congress commissioned, any voluntary standard that originated in an industry's "consensus" about what would be good typically will amount to "little more than an affirmation of the status quo."¹³⁵ An earlier report by the Department of Health, Education and Welfare, also included in the legislative history, viewed mandatory safety standards as necessary to eliminating as much as twenty percent of household accidents.¹³⁶ When it was young, the Commission habitually "expressed strong reservations about voluntary standards."¹³⁷

It would be naïve to celebrate mandatory standards as desirable per se; they have had a problematic record in American consumer product safety. Writing in 1973 about the Commission's administrative procedures, Scalia and Goodman described the extraordinarily cumbersome routes to mandatory rules that Congress had imposed on the fledgling agency.¹³⁸ One especially burdensome process—a road probably paved with good intentions—banned the CPSC from writing its own mandatory standards; instead it had to receive petitions from the public (individual citizens, regulated industries, and dilettantes alike) that contained draft standards for its review.¹³⁹ This "offeror" method of rulewriting, now gone, had the effect of compelling the Commission to dance to outsiders' tunes, causing its second chairman, S. John Byington, to install new rules that streamlined the bulky procedures at the price of shifting more work onto petitioners.¹⁴⁰ Thus, by the time Congress rejected mandatory standards in 1981, the CPSC had had negative experiences with such rules.

¹³² 15 U.S.C. § 2058(a)(5)-(6) (2006). Once it receives such a submission, the Commission is charged to assist in the development of voluntary standards. *Id.* § 2054(a)(3)-(4).

¹³³ *Id.* § 2058(b)(2).

¹³⁴ See Robert W. Hamilton, *The Role of Nongovernmental Standards in the Development of Mandatory Federal Standards Affecting Safety or Health*, 56 TEX. L. REV. 1329, 1399-1400 (1978).

¹³⁵ *Id.* at 1400 (quoting the NAT'L COMM'N ON PROD. SAFETY, FINAL REPORT OF THE NATIONAL COMMISSION ON PRODUCT SAFETY 62 (1970)).

¹³⁶ BUREAU OF NAT'L AFFAIRS, THE CONSUMER PRODUCT SAFETY ACT: TEXT, ANALYSIS, LEGISLATIVE HISTORY 2 (1973).

¹³⁷ Adler, *supra* note 16, at 94.

¹³⁸ See Scalia & Goodman, *supra* note 13, at 908.

¹³⁹ Carl Tobias, *Early Alternative Dispute Resolution in a Federal Administrative Agency Context: Experimentation with the Offeror Process at the Consumer Product Safety Commission*, 44 WASH. & LEE L. REV. 409, 411-12 (1987).

¹⁴⁰ Schwartz, *supra* note 12, at 52-54. Streamlining reduced the Commission's backlog but failed to quell constituent discontent. Congress responded by modifying the offeror procedure in 1978 and eliminating it in 1981. Tobias, *supra* note 139, at 412-13.

Arguably, then, the mandatory-to-voluntary shift could manifest mindfulness—a carefully chosen regulatory policy—rather than pathology. As one lawyer who advocates for manufacturers before the Commission recently argued, any agency with jurisdiction over many varied products will function more flexibly using voluntary industry standards, other things being equal.¹⁴¹ Proposed new federal rules, the only alternative type of administrative regulation, must clear “cumbersome notice-and-comment requirements.”¹⁴² A plenary mandate means that the Commission can have little comparative advantage as a writer of new product-specific regulations and thus can delegate rulemaking effectively to industry evaluations.¹⁴³ Under this approach, the Commission abstains conscientiously from the writing of standards (rather than fails to write them) and intervenes primarily through its power to find a “substantial product hazard” warranting a recall order.¹⁴⁴

To conclude that this mode of regulation supports a finding of implied reverse preemption is not to criticize the decisionmakers who choose it, nor the merits of any scheme that rests on voluntary standards. Undoubtedly both regulated sectors and Commission regulators could deploy the voluntary-standards method in good faith and with due regard for consumer welfare. The question for courts considering implied preemption, however, is not whether regulators are doing a bad job but whether the behavior of an agency bespeaks a retreat from overt intervention that had once been sufficient to indicate the occupying of a field or the imposition of a regulatory design incompatible with tort liability.¹⁴⁵ Laissez-faire execution of a statutory mandate, whatever virtues it may offer, does not comport with field preemption or conflict preemption. Instead it manifests a plan to refrain from telling the regulated sector what to do. When such a plan is in place, tort liability fills the regulatory void, and to the extent it tells a manufacturer what to do, it defies no contrary orders from an agency or Congress. Taken as a whole, the Consumer Product Safety Amendments of 1981 identify federal regulation—rather than danger to consumers—as an ill to be eradicated. Tort liability becomes necessary whenever federal regulation is cast as problematic.

This necessity remains even when regulators praise the effectiveness of voluntary controls. In a 1995 report, the Commission claimed to have enjoyed “great success in working cooperatively with

¹⁴¹ See John B. O’Loughlin, Jr., *Consumer Product Safety Improvement Act: Not the Last Word on Preemption*, Prod. Safety & Liab. Rep. (BNA), at 1037 (Oct. 20, 2008).

¹⁴² *Id.*

¹⁴³ *See id.*

¹⁴⁴ *Id.* (citing Consumer Product Safety Improvements Act, Pub. L. No. 110-314, § 218(c), 122 Stat. 3016, 3061 (codified as amended at 15 U.S.C. § 2073 (2008))).

¹⁴⁵ See *Wilson v. Bradlees of New Eng., Inc.*, 96 F.3d 552, 557 (1st Cir. 1996) (observing that “[f]ederal regulation may be a substitute for common-law liability; industry self-regulation is not”).

industry to develop voluntary standards.”¹⁴⁶ No better route to consumer safety, it asserted: “Indeed, the Commission has found that with the products it regulates, negotiating such standards can be far more efficient than rulemaking or even negotiated rulemaking.”¹⁴⁷ Perhaps. This Article has no ideological quarrel with standards that industries write to govern themselves; such precepts might function better than mandatory rules.¹⁴⁸

Used to suppress personal injury claiming, however, voluntary standards obstruct the entitlements of all who did not consent to them and could otherwise bring tort actions. In function these standards become just as mandatory as they are voluntary. Courts cannot escape the inference of compulsion; faced with preemption disputes in the context of consumer safety, they can weigh in on the “mandatory” question only by determining who will be compelled, manufacturers or the persons alleging injury from defective products. The libertarian 1981 amendments are coercive indeed without a doctrine of implied reverse preemption to ameliorate what they compel.

2. Defunding

By whatever metric a court might apply—absolute defunding, relative defunding, funding insufficient to meet the agency’s statutory mandate, perhaps even defunding to the point of dysfunction—appropriations to support the Consumer Product Safety Commission were too low to sustain an inference of preemption for the period 1981 to 2008. Though less dramatic than the statutory retreat of 1981, the appropriation pattern of that same year lends further support to an inference of reverse preemption. Fiscal year 1982 manifested a shrunken budget for the CPSC: the Commission had to close offices and retrench its operations.¹⁴⁹ The ideology ascendant in the early 1980s—deregulation coupled with tax cuts to “starve the beast”¹⁵⁰—helped to impose a view that one writer has described, with a straight face, as “Let the Market Protect Consumer Safety.”¹⁵¹

¹⁴⁶ U.S. CONSUMER PROD. SAFETY COMM’N, REGULATORY REFORM INITIATIVE—SUMMARY REPORT (June 1995), available at <http://www.cpsc.gov/businfo/8005.html>.

¹⁴⁷ *Id.*

¹⁴⁸ In the context of pharmaceuticals, I have argued for a regulatory shift that would favor transparency, incentives for the industry, and information production over traditional command-based restraints. See generally Anita Bernstein & Joseph Bernstein, *An Information Prescription for Drug Regulation*, 54 BUFF. L. REV. 569 (2006).

¹⁴⁹ Eliot Klayman, Comment, *Standard Setting Under the Consumer Product Safety Amendments of 1981—A Shift in Regulatory Philosophy*, 51 GEO. WASH. L. REV. 96, 98 & n.15 (1982).

¹⁵⁰ For a summary of this ideology as put into effect in 1981, see Jon Margolis, *Reagan Revolution Stronger Now than During Presidency*, CHI. TRIB., June 6, 2004, at C1.

¹⁵¹ Hood, *supra* note 19.

Commission funding never regained the level of the benchmark year 1974.¹⁵² In 1997, the General Accounting Office (“GAO”) studied the appropriation of money to the CPSC and how the agency used these funds.¹⁵³ During that year, the CPSC budget was \$42.5 million, and the agency employed 480 full-time equivalents.¹⁵⁴ The GAO calculated that these numbers represented a 60% drop in funding (adjusting for inflation) and a 43% cut in the staff compared to 1974.¹⁵⁵ The Commission had noted with pride in 1994 that it had the same budget (unadjusted) that it had in 1979.¹⁵⁶

Flat levels of appropriation and staffing for the CPSC represent a retreat from regulation because “since 1974, many of the industries the CPSC regulates have experienced explosive growth.”¹⁵⁷ Injury rates too have increased: for example, “toy-related injuries [went] from about 130,000 in 1996 to about 220,000 in 2006,” a rise that exceeds the concomitant growth in population.¹⁵⁸ Similarly, the rise in deaths associated with all-terrain vehicles, “from 55 in 1985 to 734 in 2004,” far exceeds their rise in sales.¹⁵⁹

Reductions in federal budgets result from a combination of lessened inclination among legislators to appropriate money and lessened agency requests. Negotiations among the CPSC, the Office of Management and Budget, and congressional committees yield each annual appropriation.¹⁶⁰ Courts attuned to the negotiation dynamic can conclude that reduced appropriation for an agency may bespeak not only congressional retreat but an agency’s disinclination to spend money on regulation. Observed through this lens, the CPSC at least cooperated with, and may have hastened, the decline in congressional funding that supports an inference of reverse preemption.

¹⁵² “From FY 1974, when the agency first became fully operational, to FY 2008, CPSC’s budget has been cut almost 40 percent when adjusted for inflation.” OMB Watch, *Product Safety Regulator Hobbled by Decades of Negligence*, Feb. 5, 2008, <http://www.ombwatch.org/article/articleview/4154/1/527> [hereinafter OMB Watch].

¹⁵³ FELCHER, *supra* note 36, at 195.

¹⁵⁴ *Id.*

¹⁵⁵ *Id.*

¹⁵⁶ CONSUMER PROD. SAFETY COMM’N, 1994 ANNUAL REPORT TO CONGRESS, *available at* <http://www.cpsc.gov/cpscpub/pubs/reports/114.html>.

¹⁵⁷ FELCHER, *supra* note 36, at 195. Sectors that have burgeoned since the 1970s include home improvement equipment (marketed through the Home Depot chain, which grew enormous over those years), recreational equipment like snowmobiles and scooters, and items used to transport small children. *Id.*

¹⁵⁸ OMB Watch, *supra* note 152.

¹⁵⁹ *Id.*; see also Robin Ingle, *Which Toys are Okay? Don’t Ask the Safety Police*, WASH. POST, Dec. 24, 2007, at B3 (observing, from an inside-the-agency perspective, that by 2004 “[d]eaths and injuries [from all-terrain vehicles] had grown to such alarming numbers that my supervisor [at CPSC], a meticulous statistician, asked me to recalculate them several times”).

¹⁶⁰ Weintraub interview, *supra* note 85.

3. Almost No Strong Rules

We have seen that two adjectives modify the word “standards” or “rules” to connote heft: “mandatory” and “major.”¹⁶¹ Rules in the mandatory category indicate that the Consumer Product Safety Commission deems the danger too strong for rulemaking by industry consensus. Rules in the major category have a significant effect on the economy. Both adjectives are vanishingly rare in the annals of consumer safety rulemaking from 1981 to 2009.

When the Consumer Product Safety Commission was formed, its first chairman, Richard Simpson, predicted that the Commission would promulgate about a hundred mandatory standards during its early years.¹⁶² Commissioner Simpson was off by a factor of about a hundred.¹⁶³ Agency frustration with the mandatory-standard approach can account for only part of this slender record.¹⁶⁴

Over its entire history, the Consumer Product Safety Commission has written only one rule that falls into the “major” category: a rule on mattress flammability promulgated in 2006.¹⁶⁵ Given the wide jurisdiction of the agency—“consumer product” describes many things, even after retrenchments from the original statutory language¹⁶⁶—it is hard to suppose that no other hazard belongs in the \$150 million category. An output this slender shows a disinclination to write important rules.

4. Lassitude in Leadership

Torpor at the Consumer Product Safety Commission before the 2008 amendments exudes from the public behaviors of commissioners and those who appointed them. The two years preceding the 2008 legislation are particularly salient: in this period the Bush administration manifested its lack of interest in robust regulation of consumer safety. When the chairman of the CPSC, Hal Stratton, left the agency in 2006 to join “a law firm that specialize[d] in attacking class-action lawsuits filed by consumers,”¹⁶⁷ the President did not appoint anyone to replace him,

¹⁶¹ See *supra* text accompanying notes 131-133 (noting the exceptional status of mandatory rules in contemporary CPSC rulemaking); text accompanying notes 99-102 (describing major rules as classified in the Congressional Review Act).

¹⁶² Schwartz, *supra* note 12, at 44.

¹⁶³ FELCHER, *supra* note 36, at 29-30 (noting that by 1977 the Commission “had issued only three mandatory standards”).

¹⁶⁴ See *id.*; see also *supra* notes 138-140 and accompanying text.

¹⁶⁵ See *infra* notes 178-186 (discussing this rule).

¹⁶⁶ See Schwartz, *supra* note 12, at 42-43 (noting “expansive jurisdiction” of the statute and reporting estimates that the CPSC regulates about “ten thousand consumer products and over a million producers and sellers of such products”).

¹⁶⁷ David Lazarus, *Trouble at the Top for Safety Agency*, L.A. TIMES, Nov. 4, 2007, at C1.

and left office without having named a chairman.¹⁶⁸ Starting in January 2008, until a stopgap in August 2008 was set up to run for the remainder of the calendar year, the CPSC lacked a quorum of commissioners and was thus precluded from doing much of its work. President Bush nominated an employee of the National Association of Manufacturers to one of the Commission's vacant seats; this nominee withdrew two months later when members of the Senate insisted on seeing his severance agreement from this defense-side lobby.¹⁶⁹

This void at the Commission is sufficient of itself to evince an absence of field preemption or conflict preemption—that is, emptiness signifies inaction—and the public behaviors of its chairman during this period confirm the inference. It bears mention that regulators working in an era suspicious of regulation are under pressure not to look like zealots.¹⁷⁰ That said, a CPSC commissioner can stick out as especially disinclined to regulate.

The CPSC chairman holding office at the time of this writing embodies such disinclination. Back in 2007, when Congress began to plan its increased appropriations for consumer safety, Nancy Nord declared she did not want what a news story at the time called “more money and more power.”¹⁷¹ A Senate panel had proposed to increase the agency's budget from \$63 million to nearly \$142 million in 2015 and raise its cap on penalties from \$1.8 million to \$100 million.¹⁷² The commissioner “said thanks but no thanks to the Senate's offer.”¹⁷³ She wrote two letters to members of the Senate Commerce Committee, asking them “not to approve the bulk of legislation that would increase the agency's authority, double its budget and sharply increase its dwindling staff.”¹⁷⁴

¹⁶⁸ See William M. Welch, *Lead Law Throttles Youth Powersports*, USA TODAY, Feb. 17, 2009, at 3A (reporting information announced to the media by the chief of staff to the acting chairman). In May 2009, when this Article was going to press, President Barack Obama named Inez Moore Tenenbaum as chairman and Robert S. Adler, a scholar of product safety regulation, as commissioner. Andrew Zajac, *Head of Product Safety Is Named*, L.A. TIMES, May 6, 2009, at B4; see also *supra* note 16 (citing Adler's work on the CPSC).

¹⁶⁹ David Lazarus, *Consumer Advocates Hope Watchdog Agencies Get More Bite*, L.A. TIMES, Dec. 28, 2008, at C1; see also Kevin G. Hall, *Government Regulation of Business May Increase*, CHATTANOOGA TIMES FREE PRESS, Jan. 11, 2009, at A3.

¹⁷⁰ One chairman appointed by President Clinton and remembered as a consumer activist, Ann Brown, mentioned early in her tenure that “being an advocate and being a regulator are very different, and they should be. I have to bring all the disparate interests together. I can't just be advocating for any one group.” Julie Gannon Shoop, *The New, Improved CPSC: Under Ann Brown, A Consumer Protection Revival*, TRIAL, Sept. 1, 1994, at 22 (reporting an interview with Brown).

¹⁷¹ Lazarus, *supra* note 167.

¹⁷² *Id.*

¹⁷³ *Id.*

¹⁷⁴ Stephen Labaton, *Bigger Budget? No, Responds Safety Agency*, N.Y. TIMES, Oct. 30, 2007; see also *id.* (noting that the Commission had only one employee to test toys and only 15 inspectors handling imported consumer products, “a marketplace that last year was valued at \$614 billion”).

The acting chairman made artful arguments against the proffered largesse. She did not say that she found the prospect of actually regulating anyone to be repugnant. Instead she spoke about agency expertise and unintended consequences. The whistleblower protection provision would, she protested, give the CPSC a “dramatic and unprecedented mission.”¹⁷⁵ The proposed increase in penalties would motivate manufactures to blanket the CPSC with self-protective documentation. Both new powers—apparently, any new powers—could have the perverse effect of “hampering, rather than furthering consumer product safety,” she said.¹⁷⁶ She also protested the absence of immediate appropriations to fund the expanded mandates, even though Congress always mandates first and funds second.¹⁷⁷

Similar resistance to overt regulatory effort—if not out-and-out bad faith—emerges from the Commission’s long-awaited 2006 standard for mattress flammability.¹⁷⁸ Here the Consumer Product Safety Commission practiced preemption by preamble, a measure that Congress banned two years later.¹⁷⁹ One commentator describes the wording of this preemption statement as “expansive.”¹⁸⁰ It was more than expansive; it was something of an ambush. In January 2005, the CPSC issued a far blander preamble in its Notice of Proposed Rulemaking.¹⁸¹ Both the January 2005 and the March 2006 notices in the Federal Register discuss preemption, as federal agencies must when they announce purposed new regulation;¹⁸² but whereas the 2005 notice purported only to summarize the existing effect of rules and standards created pursuant to the Flammable Fabrics Act,¹⁸³ in 2006 the Commission wrote that it “intends and expects that the new mattress flammability standard will preempt inconsistent state standards and requirements.”¹⁸⁴ It included “common law” as a source of such inconsistent input from the states,¹⁸⁵ and deplored the possibility that “each state could use its tort law to enforce whatever flammability standard it deemed appropriate, potentially creating fifty different mattress fire standards across the nation.”¹⁸⁶

¹⁷⁵ Stephen J. Hedges, *Toy Recalls Spur Call for Ouster*, CHI. TRIB., Oct. 31, 2007, at C1.

¹⁷⁶ *Id.*

¹⁷⁷ Lazarus, *supra* note 167.

¹⁷⁸ Standard for the Flammability (Open Flame) of Mattress Sets, 71 Fed. Reg. 13,472 (Mar. 15, 2006). On the status of this regulation as the CPSC’s first and only major rule, see Press Release CPSC, *CPSC Approves New Flammability Standard for Mattresses*, Feb. 16, 2006; <http://www.cpsc.gov/cpsc/pub/prerel/prhtml06/06091.html>. The agency has not released a count of its non-major regulations.

¹⁷⁹ See *infra* note 190-192 and accompanying text.

¹⁸⁰ O’Loughlin, *supra* note 141, at 1038.

¹⁸¹ See 70 Fed. Reg. 2,469 (Jan. 13, 2005). For discussion of this change, see O’Loughlin, *supra* note 141, at n.12.

¹⁸² Exec. Order No. 12,988, 61 C.F.R. 4729 (1996).

¹⁸³ 71 Fed. Reg. 2,470, 2,492-93 (Jan. 13, 2005).

¹⁸⁴ 71 Fed. Reg. 13,472, 13,496 (Mar. 15, 2006).

¹⁸⁵ *Id.*

¹⁸⁶ *Id.* at 13,497.

The 2008 amendments to the statute articulated a clear position on preemption-by-preamble that suggests 2008 was indeed a turning point.¹⁸⁷ Under Section 231 of the Consumer Product Safety Improvement Act, the Commission and all other administrative units of the federal government writing rules pursuant to the CPSA, the Federal Hazardous Substances Act, and the Flammable Fabrics Act may not practice “preemption by preamble.”¹⁸⁸ Congress drew up a comprehensive list—“any preamble, statement of policy, executive branch statements, or other matter associated with the publication” of a rule—of administrators’ devices that have been misused to declare a preemptive effect.¹⁸⁹ The statement amounts to an “admonishment from Congress.”¹⁹⁰ Implicitly it recognizes the dangers of preemption-by-preamble assertion. By repudiating this technique, Congress expressed its skepticism about the value of preempting tort claims. The statutory prohibition directs courts to infer preemption more parsimoniously post-2008 than did the courts willing to cede preemption-power to agency statements.

Observers investigating the CPSC for signs of withdrawal from regulation might also consider the informed impressions of a recently departed employee who left the agency saddened (rather than, as she noted, “disgruntled”).¹⁹¹ One year before the 2008 volte-face, a former statistician for the CPSC published an editorial in the *Washington Post* claiming that the agency had “lost the will to perform the function it was created for.”¹⁹² To say that an entity has lost the will for something is hard to document: the writer, Robin Ingle, met the challenge with a couple of telling anecdotes from the office. In 2004, after Ingle documented an astounding rise in all-terrain vehicle (“ATV”) deaths, the general counsel of the agency, who happened to have been a former lawyer for the industry, first tried (unsuccessfully) to get two CPSC statisticians to modify the presentation of data and then declined to release the report for three months. According to Ingle, CPSC employees circa 2007 labor inside “a defeatist anti-regulation atmosphere,” where no matter which product one worked on—ATVs, portable heating generators, hydroxides that poison children—individual efforts were impeded by industry resistance to rulemaking and even basic research on safety.¹⁹³

¹⁸⁷ See *supra* note 1.

¹⁸⁸ See generally Catherine M. Sharkey, *Preemption by Preamble: Federal Agencies and the Federalization of Tort Law*, 56 DEPAUL L. REV. 227 (2007).

¹⁸⁹ Pub. L. No. 110-314, § 231, 122 Stat. 3070 (codified as amended at 15 U.S.C. § 2501 (2008)).

¹⁹⁰ O’Loughlin, *supra* note 141, at 1038-39.

¹⁹¹ Ingle, *supra* note 159.

¹⁹² *Id.*

¹⁹³ *Id.*

CONCLUSION

The doctrine of preemption as applied in federal courts contains a troubling asymmetry: Courts regularly infer that Congress intended to forestall tort liability, but have not been willing to infer that Congress, later on, abandoned this old intent. A longstanding tradition in accident law encourages judges (and juries) to examine circumstantial evidence in order to draw plausible conclusions.¹⁹⁴ Consumer safety offers an illustration of what courts should be inferring: Strong circumstantial evidence supports the inference that no later than 1981, Congress and the Consumer Product Safety Commission jointly weakened federal consumer safety law. During a period of years that may have ended in 2008,¹⁹⁵ any inference that the 1973 statute preempted tort liability—the only other law-based source of consumer safety—became no longer tenable.

I conclude with two anxieties about, and one extension of, the thesis of this Article.

Anxieties first. The Consumer Product Safety Act and Consumer Product Safety Commission present a strong illustration of implied reverse preemption—perhaps *too* strong, in that it may set the bar too high. Should courts come to see CPSA-levels of retreat as necessary to reverse a preexisting inference that had precluded state tort liability, several difficulties ensue. Parties and their lawyers will forfeit certainty about the presence of implied reverse preemption *vel non*. Judges will share in this uncertainty. Perhaps worse, it will become relatively easy for both members of Congress and agency administrators who want to foreclose tort liability to feign stronger commitments to federal regulation than they really hold. Recall the announcements by the acting chairman of the CPSC that Congress should decline to appropriate the money and power it had offered the agency.¹⁹⁶ This individual, Nancy Nord, disclaimed her regulatory power transparently. Fearing implied reverse preemption, a savvier successor-bureaucrat could probably come up with a more convincing gesture toward real regulation while stymieing the agency's mission as laid out in the statute. Other criteria proposed here are vulnerable to the same tactic.¹⁹⁷ Congress has also feigned regulatory vigor. Courts inferring a retreat from preemption must proceed forewarned that the paradigm explored in this Article presents an instance of the phenomenon, rather than a set of tests and hurdles. What

¹⁹⁴ See DAN B. DOBBS, *THE LAW OF TORTS* 372 (2000) (explaining that although *res ipsa loquitur* is a form of circumstantial evidence, negligence law is replete with other circumstantial inferences).

¹⁹⁵ See *supra* note 20 (expressing uncertainty about whether 2008 marks a distinct end).

¹⁹⁶ Asked to name a power that her agency had and that she actually wanted, Commissioner Nord named only an obscure one, the prerogative to seize assets of companies convicted of crimes. Hedges, *supra* note 175.

¹⁹⁷ See *supra* note 127 and accompanying text (summarizing the 1976 amendments to the CPSA, which appear busy but retreat from regulation).

Congress circa 1981-2008 and the Consumer Product Safety Commission manifested is sufficiency rather than necessity.

Another peril presented in implied reverse preemption that could diminish safety is what the philosopher Albert Hirschman called “perversity” and “jeopardy”¹⁹⁸—here the possibility that this reform would extinguish more tort liability than it can preserve. Implied reverse preemption protects or revives personal injury claims that defendants could otherwise get dismissed as preempted. Fairness as parity between injured persons and product sellers suggests that sellers should lose access to shelter that only they now enjoy. In principle, implied reverse preemption puts plaintiffs and defendants on a level playing field, where each can benefit or suffer from judicial inferring. But just as a Congress desirous of reducing tort liability can feign regulation by appearing to empower an agency, it can also use the federal commerce power to abrogate state regulation altogether¹⁹⁹—and thereby extinguish tort liability, if courts agree that tort liability remains a form of state regulation. Congress has already eliminated whole categories of products liability from the reach of state courts.²⁰⁰ Risk-adverse defenders of tort liability might prefer to take their chances with preemption as it now exists, which the Supreme Court occasionally deems no obstacle to plaintiffs,²⁰¹ rather than seek a pro-plaintiff rewrite that might tempt Congress to wipe out products liability categorically.

This misgiving noted, implied reverse preemption is desirable even at the level of trench-war realpolitik. Like Betsy Grey, who faced a similar dilemma when she proposed to “make Congress speak clearly” every time it wants to preempt,²⁰² I hope that compelling candor on the part of Congress would permit liability to coexist with codified regulation as a source of safety. Over the years since the tort reform movement began, Congress has declined to enact more proposed curbs

¹⁹⁸ See ALBERT O. HIRSCHMAN, *THE RHETORIC OF REACTION: PERVERSITY, FUTILITY, JEOPARDY* 133 (1982); see also *supra* notes 172-176 (reporting the protestations of CPSC chairman Nancy Nord, to the effect that giving the agency more money and prerogatives would lower consumer safety).

¹⁹⁹ Winokur & Robbins, *supra* note 106, at 233-35 (citing *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1 (1824)).

²⁰⁰ See Protection of Lawful Commerce in Arms Act, 15 U.S.C. §§ 7901-7903 (2006) (immunizing gun manufacturers and sellers from criminal misconduct involving their products); General Aviation Revitalization Act of 1994, 49 U.S.C. § 40101 (2006) (imposing a federal statute of repose, cutting off liability for defective aircraft after 18 years on the market). What became known as the Cheeseburger Bill, or more formally the Personal Responsibility in Food Consumption Act, H.R. 544, 109th Cong. (1st Sess. 2005), which Congress did not pass but whose restrictions several states did enact, would have precluded claims against restaurants for weight-related injuries from the food they sold.

²⁰¹ See *Wyeth, Inc. v. Levine*, 129 S. Ct. 1187 (2009); *Altria Group, Inc. v. Good*, 129 S. Ct. 538, 541 (2008); *Bates v. Dow Agrosociences, LLC*, 544 U.S. 431, 452-53 (2005); *Sprietsma v. Mercury Marine*, 537 U.S. 51, 65-69 (2002); *Freightliner Corp. v. Myrick*, 514 U.S. 280, 286-90 (1995).

²⁰² Grey, *supra* note 21.

on liability than it has codified.²⁰³ Should this pattern come to an end, and comprehensive liability-killing legislation enter the United States Code, I doubt that judicial recognition of retreats from preemptive intent will be the culprit. A doctrine of implied reverse preemption is more likely to foster awareness within Congress of the relation between its work product (for this purpose, new statutory language and appropriations) and liability.

Now, the more radical extension. Like implied preemption, the doctrine of implied reverse preemption has what I have called markers. Judges would frame and apply criteria for this legal conclusion just as they have framed and applied criteria for the conclusion of preemption. I have suggested a few available to courts, nominating two broad categories: amendments that move away from an earlier regulatory agenda and de-funding of the agency empowered to enforce safety statutes.²⁰⁴

Markers from Congress—though inadequate as currently used for implied preemption²⁰⁵—are a source of transparency and fairness for implied reverse preemption. As a matter of due process, manufacturers are entitled to notice about any shift in their status that removes an affirmative defense. Whenever old conclusions of preemption that had once sheltered them are no longer present, they have a right to know. Injured persons and their lawyers are entitled to the same information. Under a judicial regime that accepts implied reverse preemption, these persons and entities would keep alert to the indicators of retreat that Congress can manifest: amendments moving away from old regulatory agendas and de-funding of the agencies authorized to regulate under federal statutes. Attorneys for both plaintiffs and defendants will know when the ground has given way under a preemption fortress.

The central criterion of intelligibility would also permit another application of the implied reverse preemption doctrine, one available to judges who accept the thesis of this Article. I have argued that any court competent to infer preemption is also competent to infer a retreat from preemption. The same competence can alter express preemption. As was noted, the line between express preemption and implied preemption is not bright: when the Supreme Court finds express preemption in a statutory clause that prohibits contrary state regulation, it uses inference, rather than explicit language from Congress, to deem tort liability a form of regulation.²⁰⁶ Nuance and ambiguity, in other words, are present in express preemption as well as implied preemption. Implied reverse

²⁰³ See generally Anita Bernstein, *A Model of Products Liability Reform*, 27 VAL. U. L. REV. 637, 660-62 (1993) (describing the tendency of proposed federal tort reforms to be diluted before enactment).

²⁰⁴ See *supra* Part III.B.

²⁰⁵ See *supra* note 30 and accompanying text.

²⁰⁶ *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 486 (1996); *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 516 (1992).

preemption could empower judges to return to old holdings that tort liability is expressly preempted, inferring from circumstantial evidence that a clause in a statute forbidding inconsistent state regulation has lost its inferred meaning of “no tort liability,” and so a personal injury claim can proceed. This mode of reading statutes places language once deemed as expressly preemptive within reach of judicial reinterpretation.²⁰⁷

A decision by the United States District Court of the District of Massachusetts provides an example of how judges can give effect to a congressional retreat from express preemption. In *Andrews-Clarke v. Travelers Insurance Company*,²⁰⁸ “one of the classic broadsides” against preemption by the Employee Retirement Income Security Act of 1974 (“ERISA”),²⁰⁹ the court noted with regret that Congress had expressly preempted the tort and contract claims that the plaintiff tried to bring.²¹⁰ “Congress intended to relieve employers and ERISA plans from the burdens of compliance with conflicting state laws not as an end in and of itself,” wrote Judge Young, “but rather as a means to promote the principal object of ERISA as a whole,” i.e. protecting plan participants.²¹¹ Back in 1974, according to Judge Young, “ERISA did provide an adequate remedy for the wrongful denial of health benefits. The present gap in remedies is therefore attributable . . . to the failure of Congress to amend ERISA’s civil enforcement provision to keep pace with the changing realities of the health care system.”²¹²

Implied reverse preemption recognizes, as did Judge Young, the existence of “changing realities”²¹³ that render obsolete an earlier conclusion that Congress cut off, expressly or by implication, the opportunity for an injured person to seek redress in a state court. Diane Andrews-Clarke had to do without a remedy for the harm she suffered; Judge Young implored Congress to modify what he called “a law that has gone conspicuously awry from its original intent,” adding, “Does anyone care? Do you?”²¹⁴ This Article has argued that Judge Young had in his hands the interpretive tool for which he longed. Any power to draw an inference favoring defendants necessarily includes the power to draw an inference favoring plaintiffs.²¹⁵

Judicial determinations of preemption not only may, but should, evolve in response to new circumstantial evidence that Congress has lost

²⁰⁷ See generally ESKRIDGE, *supra* note 46 (arguing that the meaning of statutory language can change over time).

²⁰⁸ 984 F. Supp. 49 (D. Mass. 1997).

²⁰⁹ E-mail from Anthony Sebok, Professor of Law, Benjamin N. Cardozo School of Law, to author (Feb. 16, 2009) (on file with author).

²¹⁰ *Andrews-Clarke*, 984 F. Supp. at 55-56.

²¹¹ *Id.* at 58.

²¹² *Id.*

²¹³ *Id.* at 53.

²¹⁴ *Id.* at 65.

²¹⁵ I thank Tony Sebok not only for alerting me to *Andrews-Clarke* but for adding a cogent analysis.

its earlier desire to thwart tort liability. What Peter Schuck has called “the sweet spot”²¹⁶—a balance between tort and administrative rules as a regulatory design—varies in response to what Congress, exercising legislative supremacy, installs. Courts attuned to this balance will find implied reverse preemption just as fundamental as preemption.

²¹⁶ Schuck, *supra* note 65.