

Factors to Consider in Applying a Presumption Against Preemption to State Environmental Regulations

Gabrielle Cuskelly*

California's struggles with air pollution are well known, particularly in the South Coast Air Basin. Since the ports of Long Beach and Los Angeles—both located in the Basin—handle 40 percent of the nation's imports, the shipping industry contributes heavily to the pollution in the South Coast Air Basin. Specifically, the shipping industry is the heaviest emitter of sulfur dioxide and fifth-largest emitter of nitrogen dioxide in the area. To combat the shipping industry's contribution to the area's air pollution problems, in 2008 the California Air Resources Board enacted Vessel Fuel Rules requiring ships to use low-sulfur fuels while within twenty-four miles of California's coast and when stopping at California ports.

The Vessel Fuel Rules were challenged as preempted by the Submerged Lands Act in Pacific Merchant Shipping Association v. Goldstene (Pacific Merchant II). The Ninth Circuit upheld the Vessel Fuel Rules against the Pacific Merchant Shipping Association's motion for summary judgment by, in part, applying a presumption against preemption. The Ninth Circuit held that application of a presumption against preemption was appropriate because the Vessel Fuel Rules fell under an area of traditional state control by targeting the prevention of air pollution. Although applied in Pacific Merchant II, the presumption against preemption doctrine is unclear and the application of the presumption appears inconsistent at best.

This Note uses the circumstances in Pacific Merchant II to illustrate that, in determining whether a presumption against preemption applies, courts should examine the strength of the state's interests, whether subsequent legislation has further explained the relative weight of federal interests in the area, whether federal regulations are insufficiently protective and only serve as

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a regulatory floor, and whether the level of decision making enforces political accountability. In the environmental law context, these factors will show that applying a strong presumption against preemption is favorable and will serve to protect state implementation of environmental protections that are necessary to protect the health and safety of the state's residents.

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INTRODUCTION

The South Coast Air Basin (SCAB), which includes Orange County and the urban portions of Riverside, San Bernardino, and Los Angeles Counties, suffers from severe air pollution. Currently, the pollution levels for 8-hour ozone and particulate matter with a diameter of less than 2.5 micrometers (PM_{2.5}) are significantly above the federally mandated limits for these pollutants. Ozone and particulate matter have significant adverse effects on respiratory systems. Other pollutants, such as nitrogen oxide (NO_x) and sulfur oxide (SO_x), have similar health effects and are precursors to the formation of ozone and particulate matter.

The SCAB's air pollution problems stem not only from stationary and land based mobile sources, but also from heavy offshore shipping activity in the area. The shipping industry is the single heaviest emitter of SO_x and the fifth largest emitter of NO_x in the area.¹ In order to combat that pollution, California enacted Vessel Fuel Rules ("the Rules" or "the Vessel Rules"), which require ships to use low-sulfur fuels when operating within twenty-four miles of California's coastline and when calling at California ports. Full implementation of the Rules was expected to prevent 3500 premature deaths and 10,000 asthma attacks between 2009 and 2015.

In *Pacific Merchant Shipping Association v. Goldstene* (*Pacific Merchant II*), the Pacific Merchant Shipping Association (Pacific Merchant) challenged these Rules, claiming the Submerged Lands Act (SLA) preempted them. The Ninth Circuit denied Pacific Merchant's motion for summary judgment by applying a presumption against preemption. The court reasoned that such a presumption was appropriate because the Rules were meant to prevent air pollution, which is an area of traditional state control.

Under the doctrine of preemption, federal law may preempt state regulations either expressly or impliedly. When a party claims preemption, courts seek to determine whether Congress intended federal law to supersede existing or future state regulations. Although courts frequently cite a

1. The California Air Resources Board (CARB) estimated in 2006 that the shipping industry emitted 157 tons of NO_x, 117 tons of SO_x, and 15 tons of PM per day. *Pac. Merchant Shipping Ass'n v. Goldstene* (*Pac. Merchant II*), 639 F.3d 1154, 1160 (9th Cir. 2011).

presumption against preemption when federal legislation encroaches on a traditionally state-regulated field, the doctrine is unclear and actual application of the presumption is inconsistent at best.

This Note argues that, in certain circumstances where various important interests are implicated, courts should clearly and consistently apply a presumption against preemption. Specifically, courts should apply a presumption against preemption when the strength of the state interest is great, where subsequent legislation has clarified the federal interest in the area, where federal regulations are insufficiently protective or meant only to serve as a regulatory floor, and where political accountability is lacking. When any of these four circumstances is present, a presumption against preemption would maintain an appropriate balance between state and federal interests. Additionally, it reduces the potential for judicial activism by limiting the amount that judges infer about Congress's intent. Consistent and strong application of a presumption would also require Congress to account for and consider important state and federal interests, and to clearly delineate the appropriate roles for federal and state regulation. Finally, a stronger presumption would reduce the chilling effect to state regulation resulting from current inconsistencies in the presumption against preemption and in the preemption doctrine generally.

The above factors would frequently be present in the environmental law context. Especially in circumstances where a state implements regulations more stringent than a federal statute, a strong and consistent application of the presumption against preemption would support state implementation of environmental protections the state finds necessary for the health and safety of its residents.

This Note begins with a brief overview of preemption doctrine and a synthesis of the current presumption against preemption in Part I. Part II provides background information concerning the legal and factual framework within which the Rules operate. Part III examines the Ninth Circuit's decision in *Pacific Merchant II* and the court's application of the presumption against preemption. This Note then argues that, because the four factors illustrated by *Pacific Merchant II* are also present in many environmental regulations, a presumption against preemption should apply to most environmental state regulation preemption challenges to provide clarity, reduce harms to the environment and human health and welfare, and protect the balance of federalism.

I. THE DOMINANCE OF FEDERAL LAW AND THE PRESUMPTION AGAINST PREEMPTION

The Constitution establishes that “the Laws of the United States . . . shall be the supreme law of the land; . . . anything in the constitution or laws of any

state to the contrary notwithstanding.”² The doctrine of preemption grew out of the Court’s attempt to determine when a state law is “contrary” to the laws of the United States.³ Federal law may preempt a state action expressly in the language of a congressional enactment, implicitly by “the depth and breadth” of the congressional legislation in a particular field, or by a subsequent conflict between state and federal law.⁴

The Supreme Court articulates “two cornerstones” of its preemption doctrine.⁵ First, the “ultimate touchstone” in preemption cases is congressional purpose.⁶ Courts seek to understand what Congress intended the statute to do and how Congress intended it to affect individuals, business, and the law.⁷ In undertaking this reasoning process, courts look to the language and purpose of the statute as well as the statutory framework.⁸ Second, in all preemption cases, but “particularly in those in which Congress has legislated . . . in a field which the States have traditionally occupied,” the starting point is an “assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress.”⁹ In other words, if the federal law encroaches on a traditionally state-occupied field, courts initially presume that Congress did not intend to override or displace the state legislation.¹⁰

A. *The Express and Implied Flavors of Preemption*

Statutory language, so long as enacted within Congress’s constitutional powers, can expressly preempt a state’s effort to regulate.¹¹ Even where Congress expressly preempts state law, the courts must still determine the extent to which the express congressional statement displaces state law.¹² Thus, disputes over express preemption provisions frequently focus on the scope of

2. U.S. CONST. art. VI, cl. 2; see *McCulloch v. Maryland*, 17 U.S. 316, 427 (1819).

3. Christopher H. Schroeder, *Supreme Court Preemption Doctrine*, in *PREEMPTION CHOICE: THE THEORY, LAW, AND REALITY OF FEDERALISM’S CORE QUESTION* 119, 119 (William W. Buzbee ed., 2009).

4. *Wyeth v. Levine*, 555 U.S. 555, 565 (2009) (quoting *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996) (internal quotation marks omitted)); *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 541 (2001) (applying the assumption that federal law shall not supplant the historic state police powers unless it is “the clear and manifest purpose of Congress” to do so).

5. *Wyeth*, 555 U.S. at 565.

6. *Id.*

7. *Lohr*, 518 U.S. at 486.

8. *Id.*

9. *Wyeth*, 555 U.S. at 565 (quoting *Lohr*, 518 U.S. at 485).

10. See *Lohr*, 518 U.S. at 485.

11. See *Pac. Gas & Elec. Co. v. State Energy Res. Conservation & Dev. Comm’n*, 461 U.S. 190, 203 (1983).

12. See *Cipollone v. Liggett Grp., Inc.*, 505 U.S. 504, 518 (1992) (articulating the role of the Court as merely to determine “the domain expressly preempted” by the legislative sections at issue); Caleb Nelson, *Preemption*, 86 VA. L. REV. 225, 227 (2000) (explaining that the role of courts when faced with an express preemption provision is to decide “what the clause means, and . . . whether the Constitution permits Congress to bar the states from exercising the powers in question”).

preemption,¹³ requiring courts to define the parameters of the express preemption clause of the statute. This inquiry focuses on determining Congressional intent, one of the two cornerstones of preemption doctrine.¹⁴

Congress may also imply preemption via conflict or field preemption. The courts similarly look to congressional intent in implied preemption cases to determine whether the state law or regulation at issue is impliedly prohibited or limited by federal law. Conflict preemption exists either where it is physically impossible to comply simultaneously with state and federal law or where the state law operates as an “obstacle” to federal legislation.¹⁵ Physical impossibility is “a demanding defense”¹⁶ and requires that the state and federal laws impose incompatible requirements so that complying with one violates the other.¹⁷ Although physical impossibility preemption is difficult to satisfy, obstacle preemption—where state law “stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress”¹⁸—is less demanding and is applied more frequently to find preemption.¹⁹

Field preemption prohibits state regulation where Congress intended the federal government to wholly occupy a field.²⁰ That intent may be inferred from the pervasiveness of the congressional enactment or the dominance of the federal interest in the field.²¹ For example, in *United States v. Locke*, the Court found that Title II of the Ports and Waterways Safety Act (PWSA) preempted Washington’s state regulations governing oil tankers through field preemption.²² Title II of the PWSA required the Coast Guard to “prescribe regulations for the design, construction, alteration, repair, maintenance, operation, equipping, personnel qualifications, and manning of vessels.”²³ The Court interpreted this comprehensive regulatory scheme as leaving “no room for state regulation of these matters.”²⁴ Thus, the Court struck down Washington’s regulations governing training, English language proficiency,

13. Schroeder, *supra* note 3, at 122.

14. *See Wyeth*, 555 U.S. at 565.

15. Nelson, *supra* note 12, at 228.

16. *Wyeth*, 555 U.S. at 573.

17. *Fla. Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142–43 (1963) (indicating that state law is preempted when “compliance with both federal and state regulations is a physical impossibility”); *see Geier v. Am. Honda Motor Co.*, 529 U.S. 861, 867 (2000).

18. *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941)

19. Schroeder, *supra* note 3, at 132.

20. *California v. ARC Am. Corp.*, 490 U.S. 93, 100 (1989).

21. *English v. Gen. Elec. Co.*, 496 U.S. 72, 79 (1990); *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947) (indicating that Congress’ intent to legislate in a field may exist when there is a “scheme of federal regulation . . . so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it . . . [o]r [where] . . . the federal interest is so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject”).

22. *United States v. Locke*, 529 U.S. 89, 111 (2000).

23. 46 U.S.C. § 3703 (2006).

24. *Locke*, 529 U.S. at 111.

and drill requirements as entering the preempted fields of “operation” and “personnel qualifications.”²⁵

B. The Presumption Against Preemption as a Cornerstone of Preemption Doctrine

Scholars have described the law of preemption as a “muddle.”²⁶ Scholars generally agree that the Supreme Court’s preemption doctrine is unclear and “follow[s] no predictable jurisprudential or analytical pattern.”²⁷ Contributing to the confusion is the oft-articulated, but sporadically applied, presumption against preemption.

The presumption against preemption reflects the idea that “Congress does not cavalierly preempt state law causes of action”²⁸ when regulating in a traditionally state-occupied field.²⁹ This presumption applies to express and implied preemption challenges.³⁰ The presumption may have less or no force, however, where federal legislation covers a field with a significant historical federal presence.³¹ Although cited as a cornerstone of preemption doctrine, the presumption is not frequently mentioned, or is mentioned and dismissed summarily in preemption cases, as discussed below.³²

This presumption against preemption originates from *Rice v. Santa Fe Elevator Corp.*³³ There, the Court indicated that where Congress legislates in a traditionally state-occupied field, a court starts with the “assumption that the

25. *Id.* at 112–14.

26. Nelson, *supra* note 12, at 232.

27. Viet D. Dinh, *Reassessing the Law of Preemption*, 88 GEO. L.J. 2085, 2085 (2000); *see also* Jamelle Sharpe, *Toward (a) Faithful Agency in the Supreme Court’s Preemption Jurisprudence*, 18 GEO. MASON L. REV. 367, 368 (2011) (“There is a puzzling and fundamental disconnect between what the Supreme Court says in its preemption cases and what it does in its preemption cases.”).

28. *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996).

29. *See Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947) (indicating that because Congress legislated in a traditionally state-occupied field, the Court starts with the “assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress”); *see* Robert R.M. Verchick & Nina Mendelson, *Preemption and Theories of Federalism*, in PREEMPTION CHOICE: THE THEORY, LAW, AND REALITY OF FEDERALISM’S CORE QUESTION, *supra* note 3, at 13, 22–24 (arguing that judges will be more reluctant to find preemption where it would upset a state’s “historic powers, core authority or traditional balance” partly due to considerations revolving around “the Tenth Amendment and political safeguards” (internal citations omitted)).

30. *Wyeth v. Levine*, 555 U.S. 555, 565 n.3 (2009); Mary J. Davis, *The “New” Presumption Against Preemption*, 61 HASTINGS L.J. 1217, 1247 (2010) (“The Court has made it clear that the presumption against preemption of historic state police powers continues to operate in cases of both express and implied preemption.”).

31. *See United States v. Locke*, 529 U.S. 89, 108 (2000) (applying no presumption against preemption to national and international maritime commerce, which it considered to be an area in which “Congress has legislated . . . from the earliest days of the Republic, creating an extensive federal statutory and regulatory scheme.”).

32. For a concise, case-by-case examination of the Supreme Court’s recent preemption decisions, *see generally* Mary J. Davis, *The “New” Presumption Against Preemption*, 61 HASTINGS L.J. 1217 (2010).

33. *Rice*, 331 U.S. 218.

historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress.”³⁴ This emphasis on whether the congressional legislation enters a traditional state field continues to guide whether a presumption against preemption applies.³⁵ Thus, where federal legislation enters the field of a state’s historic police powers, such as the ability to regulate to protect the health and safety of its citizens, the presumption against preemption should be triggered.³⁶

When a state regulates outside a traditionally state-occupied field, courts may choose not to apply a presumption against preemption.³⁷ In *United States v. Locke*, the Court said that a presumption against preemption “is not triggered when the State regulates in an area where there has been a history of significant federal presence.”³⁸ But the Court more recently clarified that the extended duration of federal regulation in a field is not by itself dispositive of whether a presumption applies because the appropriate focus is the “historic presence of state law,” an inquiry not dependent on “the absence of federal regulation.”³⁹

If a court decides to apply a presumption against preemption, the presumption applies to the determination of whether Congress intended to preempt state law as well as “the scope of [Congress’s] intended invalidation of state law.”⁴⁰ In field preemption cases, then, the presumption assists the court in deciding whether Congress intended to preempt state law in an area.⁴¹ In express preemption cases, the presumption extends to defining the scope of preemption and “reinforces the appropriateness of a narrow reading” of an express preemption provision.⁴²

34. *Id.* at 230.

35. For a criticism of this approach, see Trevor W. Morrison, *The State Attorney General and Preemption*, in PREEMPTION CHOICE: THE THEORY, LAW, AND REALITY OF FEDERALISM’S CORE QUESTION, *supra* note 3, at 81, 92 (criticizing the categorical approach to determining whether a presumption applies as giving courts the “impractical” task of determining whether an issue falls within the zone of historical state police powers, and arguing that the proper focus should be not on the subject matter of laws but instead on the “institutions involved in the implementation of those laws”).

36. *De Buono v. NYSA-ILA Med. & Clinical Servs. Fund*, 520 U.S. 806, 814 (1997).

37. *See United States v. Locke*, 529 U.S. 89, 108 (2000); *Buckman Co. v. Plaintiffs’ Legal Comm.*, 531 U.S. 341, 347 (2001) (declining to apply a presumption against preemption because policing fraud committed against federal agencies is not traditionally a state-occupied field).

38. *Locke*, 529 U.S. at 90–91.

39. *Wyeth v. Levine*, 555 U.S. 555, 565 n.3 (2009).

40. *Medtronic, Inc. v. Lohr*, 518 U.S. 470 (1996).

41. *See Wyeth*, 555 U.S. at 565 (starting with the presumption in an implied preemption case that federal legislation is not to supersede state law absent “the clear and manifest purpose of Congress” to do so).

42. *See Cipollone v. Liggett Grp., Inc.*, 505 U.S. 504, 518 (1992); *Altria Grp., Inc. v. Good*, 555 U.S. 70, 93 (2008); *Engine Mfrs. Ass’n v. S. Coast Air Quality Mgmt. Dist.*, 541 U.S. 246, 260 (2004) (Souter, J., dissenting) (indicating that the presumption applies to the initial question of whether Congress intended to preempt state law as well as to the scope of such preemption in specific statutory sections). *But cf. Engine Mfrs.*, 541 U.S. at 256 (majority opinion) (using an interpretive method that “neither invokes the ‘presumption against preemption’ to determine the scope of preemption nor delves into legislative history” of section 209(a) of the Clean Air Act).

If a court applies a presumption, challengers to state law bear a “considerable burden of overcoming” the presumption against preemption⁴³; however, it can be overcome with a “strong enough” showing of Congress’s intent to preempt the state law at issue.⁴⁴ For example, in *Egelhoff v. Egelhoff ex rel. Breiner*, the Court applied a presumption against preemption because the challenged Washington State statute⁴⁵ dealt with the traditional state field of family law.⁴⁶ The Court found the presumption overcome by Congress’s clear intent to preempt state family law when in conflict with or related to plans under the Employee Retirement Income Security Act (ERISA), a federal statute that sets standards for private industry pension plans.⁴⁷ In *Egelhoff*, the Court’s decision rested on the expansive express preemption provision in ERISA indicating “that ERISA shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan covered by ERISA.”⁴⁸

Scholars argue that, although the Court may seem to disfavor preemption in traditional state fields,⁴⁹ the effect of such a presumption is unclear, unpredictable, or even preemption friendly.⁵⁰ If the Court applies a presumption against preemption, the Court will typically find no preemption, or will narrowly construe the scope of the preemption.⁵¹ But where the Court

43. See *De Buono v. NYSA-ILA Med. & Clinical Servs. Fund*, 520 U.S. 806, 814 (1997) (indicating that, because the state regulation operated in a traditionally, state-occupied field, the respondents in a case bore the “considerable burden” of defeating the presumption).

44. See *Hillsborough Cnty. v. Automated Med. Labs., Inc.*, 471 U.S. 707, 715 (1985) (“Appellee must thus present a showing of implicit preemption of the whole field, or of a conflict between a particular local provision and the federal scheme, that is strong enough to overcome the presumption that state and local regulation of health and safety matters can constitutionally coexist with federal regulation.”); *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230, 232–33 (1947) (finding that amendments that delete an act’s provisions that had expressly provided that state law would govern, that vested exclusive authority to the Secretary over all persons licensed under the act, and that committee reports clarified as intending to “make the Act ‘independent of any State legislation on the subject’” indicate the clear intent of Congress to preempt state law); see also *Davis*, *supra* note 30, at 1247 (“Only clear and manifest intent of Congress to the contrary will defeat the presumption. The question remaining is what type of evidence will support this conclusion.”).

45. Upon divorce, the statute caused revocation of the spouse’s beneficiary status of any nonprobate asset, including life insurance or pension plans. WASH. REV. CODE § 11.07.010 (1994).

46. *Egelhoff v. Egelhoff ex rel. Breiner*, 532 U.S. 141, 151 (2001).

47. *Id.* Specifically, the Employee Retirement Income Security Act requires that benefits be dispersed to the beneficiary in accordance with the plan’s terms on how payments are made to and from the plan. See 29 U.S.C. §§ 1102, 1104, 1002(8) (2006).

48. *Egelhoff*, 532 U.S. at 146 (internal quotations omitted).

49. See William W. Buzbee, *State Greenhouse Gas Regulation, Federal Climate Change Legislation, and the Preemption Sword*, 1 SAN DIEGO J. CLIMATE & ENERGY L. 23, 46 (2009).

50. See Daniel A. Farber, *Climate Change, Federalism, and the Constitution*, 50 ARIZ. L. REV. 879, 903 (2008) (“It is not clear, however, how signification this presumption is in practice.”); Buzbee, *supra* note 49, at 46 (arguing that the practical effect of the presumption is “unpredictable and often friendly to pro-preemption results” and that the Supreme Court often selectively ignores the presumption in order to achieve pro-preemption results).

51. See, e.g., *Hillsborough Cnty. v. Automated Med. Labs., Inc.*, 471 U.S. 707 (1985); *Cipollone v. Liggett Grp., Inc.*, 505 U.S. 504 (1992); *N.Y. State Conference of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.*, 514 U.S. 645 (1995); *Medtronic, Inc. v. Lohr*, 518 U.S. 470 (1996); *De Buono v.*

holds that federal law preempts state law, it frequently does not even mention the presumption against preemption or, if it does, summarily dismisses it as inapplicable.⁵²

Proponents of the presumption against preemption argue that a stronger presumption would clarify and better address the underlying state sovereignty, federalism, and separation-of-powers concerns involved in preemption cases.⁵³ Others suggest that a presumption against preemption is justified because it serves as a tiebreaker for ambiguous statutes that could support both finding and not finding preemption.⁵⁴ As scholars Verchick and Mendelson argue, this would provide Congress with a clear default rule of statutory interpretation for future legislation.⁵⁵

Opponents of applying a presumption against preemption argue that a presumption is inappropriate for numerous reasons. Some argue that it is not justified because Congress has largely unrestrained power, subject only to its enumerated powers, to preempt state law.⁵⁶ Others argue that at the very least a blanket presumption is inappropriate because of a textual interpretation of the Supremacy Clause⁵⁷ or because a blanket presumption is not sufficiently tailored to adapt to the specific statutes at issue.⁵⁸ Finally, others argue that courts should first examine why Congress is regulating an issue nationally in order to decide whether a presumption against preemption should apply.⁵⁹

NYSA-ILA Med. & Clinical Servs. Fund, 520 U.S. 806 (1997); *Bates v. Dow Agrosciences LLC*, 544 U.S. 431 (2005); *Altria Grp., Inc. v. Good*, 555 U.S. 70 (2008); *Wyeth v. Levine*, 555 U.S. 555 (2009).

52. See, e.g., *Gade v. Nat'l Solid Wastes Mgmt. Ass'n*, 505 U.S. 88 (1992); *Geier v. Am. Honda Motor Co.*, 529 U.S. 861 (2000); *United States v. Locke*, 529 U.S. 89 (2000); *Buckman Co. v. Plaintiffs' Legal Comm.*, 531 U.S. 342 (2001); *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525 (2001); *Engine Mfrs. Ass'n v. S. Coast Air Quality Mgmt. Dist.*, 541 U.S. 246 (2004); *Riegel v. Medtronic, Inc.*, 552 U.S. 312 (2008).

53. See Nelson, *supra* note 12, at 230 (highlighting that, “for those who think that the Court’s current jurisprudence risks preempting too much state law, the most common prescription for reform is to strengthen the presumption against preemption that the Court already purports to apply”). Others argue that the current presumption against preemption is insufficient because of the difficulties in determining whether an issue is within the historic state police powers, and that it inappropriately detracts from considerations of the underlying institutions involved in implementing the challenged state laws. See, e.g., Morrison, *supra* note 35, at 92.

54. Verchick & Mendelson, *supra* note 29, at 22.

55. *Id.* The authors argue that thus a presumption, absent a clear statutory mandate of preemption, helps promote legislative deliberation. *Id.* at 23.

56. *Id.* at 22.

57. Caleb Nelson argues against applying a general presumption against preemption because of how legal draftsmen in the eighteenth century used particular clauses. Specifically, he argues that the “any Thing in the Constitution or Laws of any State to the Contrary notwithstanding” portion of the Supremacy clause is a “non obstante clause” that “tells courts that even if a particular interpretation of a federal statute would contradict (and therefore preempt) some state laws, this fact is not automatically reason to prefer a different interpretation. It follows that courts should not automatically seek ‘narrowing’ constructions of federal statutes solely to avoid preemption.” See Nelson, *supra* note 12, at 232 (focusing primarily on the application of the presumption in implied “obstacle” preemption cases).

58. *Id.* at 297.

59. Stephen Williams, *Preemption: First Principles*, 103 NW. U. L. REV. 323, 323–24 (2009). In particular, Williams argues that “the essential question is: What interstate collective action problem did Congress seek to solve?” Thus, he argues that this inquiry requires examining a very specific portion of

Thus, although the Supreme Court describes the presumption against preemption as a cornerstone of preemption doctrine, application of the preemption is not always clear or certain, and scholars disagree as to whether a presumption against preemption is ever appropriate. As I argue in Part IV, courts should look to four factors to guide the decision of whether to apply a presumption against preemption. Namely, courts should examine the strength of the state's interests, whether subsequent legislation has further explained the relative weight of federal interests in the area, whether federal regulations are insufficiently protective and only serve as a regulatory floor, and whether the level of decision making enforces political accountability. Consideration of these factors would maintain and promote state and federal interests and provide clarity to an otherwise uncertain doctrine.

II. THE LEGAL AND FACTUAL FRAMEWORK IN WHICH THE VESSEL FUEL RULES OPERATE

The analysis of a preemption claim requires an examination of the legal and factual framework in which the challenged state regulations operate.⁶⁰ This Part proceeds by briefly discussing the SLA, the Clean Air Act (CAA), and the Supreme Court's decision in *United States v. Locke*. It concludes with a description of California's air pollution problems and the 2008 Vessel Rules.

A. *The Submerged Lands Act*

Congress enacted the SLA⁶¹ in 1953 to return various submerged lands to state ownership.⁶² The SLA established the seaward boundaries of coastal states at three geographical miles from that state's coastline or at the boundary established by the constitution or laws of the state before or at the time the state entered the Union.⁶³ The United States maintained, however, powers of

Congress's purpose in legislating. *Id.* at 324. Arguably, however, this inquiry is merely a mutation on the Supreme Court's inquiry as to whether the challenged statute or regulation occupies a traditional state field when it determines whether an initial presumption should apply in a preemption case at all.

60. See *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485–86 (1996). The court noted that

Congress' intent, of course, primarily is discerned from the language of the preemption statute and the "statutory framework" surrounding it. Also relevant, however, is the 'structure and purpose of the statute as a whole,' as revealed not only in the text, but through the reviewing court's reasoned understanding of the way in which Congress intended the statute and its surrounding regulatory scheme to affect business, consumers, and the law.

Id. (citations omitted).

61. 43 U.S.C. §§ 1301–1356a (2006).

62. See BUREAU OF OCEAN ENERGY MGMT., REGULATION AND ENFORCEMENT, SUBMERGED LANDS ACT 1 (2002), available at <http://www.boemre.gov/aboutboemre/pdf/files/submerged.pdf>.

63. The Act provides:

The seaward boundary of each original coastal State is approved and confirmed as a line three geographical miles distant from its coast line or, in the case of the Great Lakes, to the international boundary. Any State admitted subsequent to the formation of the Union which has not already done so may extend its seaward boundaries to a line three geographical miles distant from its coast line, or to the international boundaries of the United States in the Great Lakes or any other body of water traversed by such boundaries. Any claim heretofore or

“regulation and control . . . for purposes of commerce, navigation, national defense, and international affairs” within those three miles.⁶⁴ Beyond the three-mile state boundary, the Act affirmed the United States’ rights, jurisdiction, and control over the natural resources in the submerged lands of the Continental Shelf and that the United States’ rights, jurisdiction, and control would not be affected by the Act.⁶⁵

Congress enacted the SLA after a series of cases involving ownership disputes over the submerged lands and, more importantly, the natural resources contained within those lands.⁶⁶ In *United States v. California (California I)*,⁶⁷ the United States sued California for trespass, alleging that the United States owned the lands and resources seaward of the low water mark⁶⁸ and that the state was impermissibly executing petroleum, gas, and other leases in that area of the ocean.⁶⁹ The Court ultimately granted an injunction against California, concluding that the “Federal government rather than the State has paramount rights in and power over that [three-mile marginal] belt, an incident to which is full dominion over the resources of the soil under that water area, including oil.”⁷⁰

Similarly, in *United States v. State of Louisiana (Louisiana I)*,⁷¹ the United States sought a declaration that it owned the lands seaward of Louisiana’s low water mark and sought an injunction to stop Louisiana from granting leases for petroleum, gas, and other wells to individuals and corporations in those lands.⁷² In granting the United States’ motion for

hereafter asserted either by constitutional provision, statute, or otherwise, indicating the intent of a State so to extend its boundaries is approved and confirmed, without prejudice to its claim, if any it has, that its boundaries extend beyond that line. Nothing in this section is to be construed as questioning or in any manner prejudicing the existence of any State’s seaward boundary beyond three geographical miles if it was so provided by its constitution or laws prior to or at the time such State became a member of the Union, or if it has been heretofore approved by Congress.

43 U.S.C. § 1312.

64. Section 1314 provides in full:

The United States retains all its navigational servitude and rights in and powers of regulation and control of said lands and navigable waters for the constitutional purposes of commerce, navigation, national defense, and international affairs, all of which shall be paramount to, but shall not be deemed to include, proprietary rights of ownership, or the rights of management, administration, leasing, use, and development of the lands and natural resources which are specifically recognized, confirmed, established, and vested in and assigned to the respective States and others by section 1311 of this title.

Id. § 1314(a).

65. *Id.* § 1302.

66. See *Pac. Merchant II*, 639 F.3d 1154, 1174 (9th Cir. 2011) (interpreting the SLA as “essentially a kind of real estate conveyance”).

67. *United States v. California (California I)*, 332 U.S. 19 (1947).

68. Defined as “[t]he shoreline of a sea marking the edge of the water at the lowest point of the ordinary ebb tide” BLACK’S LAW DICTIONARY 1730 (9th ed. 2009).

69. *California I*, 332 U.S. at 22–23.

70. *Id.* at 38–39.

71. *United States v. Louisiana*, 339 U.S. 699 (1950).

72. Louisiana claimed rights to all lands within twenty-seven miles of its coast. *Id.* at 705.

judgment, the Court explicitly relied on *California I*, highlighting that “[n]ational interests, national responsibilities, [and] national concerns are involved” and thus “[n]ational rights must therefore be paramount in that area.”⁷³ The Court clarified that it offered no opinion on the extension or establishment of extraterritorial limits by a state or on the consequences of such state action on people other than the United States or those acting on behalf of the United States.⁷⁴

Subsequently, the Court described the SLA’s purpose as

[t]o confirm and establish the titles of the States to lands beneath navigable waters within State boundaries and to the natural resources within such lands and waters, to provide for the use and control of said lands and resources, and to confirm the jurisdiction and control of the United States over the natural resources of the seabed of the Continental Shelf seaward of State boundaries.⁷⁵

The Act thus clearly defines the territorial boundaries of the states and the ownership of the natural resources contained in the submerged lands. The Act does not, however, speak to state regulatory powers within or beyond its territorial boundaries, and instead only confirms the federal government’s ability to regulate navigation, commerce, international affairs, and national defense within the state’s territorial boundaries.⁷⁶

B. *The Clean Air Act*

Congress passed the Clean Air Act (CAA) to improve air quality, promote public health and welfare, and to support the productive capacity of the United States.⁷⁷ The CAA sought to achieve this goal, in part, by encouraging reasonable pollution prevention actions by federal, state, and local governments.⁷⁸ Specifically, Congress affirmed that air pollution prevention and control is the “primary responsibility of states and local governments.”⁷⁹

The CAA requires the Environmental Protection Agency (EPA) Administrator to promulgate primary national ambient air quality standards (NAAQS) “requisite to protect the public health” with an adequate margin of safety and secondary NAAQS “requisite to protect the public welfare”⁸⁰ States then prepare and submit State Implementation Plans (SIP) detailing how the state will comply with the NAAQS. If the Administrator finds, in part, that the proposed SIP provides for the implementation, maintenance, and enforcement of the primary and secondary standards, and that the proposed SIP meets the requirements for nonattainment areas, the EPA will approve the SIP

73. *Id.* at 704.

74. *Id.* at 705.

75. *United States v. Louisiana*, 363 U.S. 1, 8 (1960).

76. 43 U.S.C. § 1314(a) (2006); *see generally id.* §§ 1301–1356a.

77. 42 U.S.C. § 7401(b)(1) (2006).

78. *Id.* § 7401(c).

79. *Id.* § 7401(a)(3).

80. *Id.* § 7409(b).

and the state will bear the responsibility for achieving the NAAQS.⁸¹ Areas that do not meet the NAAQS for a specific pollutant are considered in nonattainment and the Administrator classifies them based upon severity and the availability and feasibility of achieving attainment through pollution control measures.⁸² For areas in nonattainment, the SIP must show that all reasonably available measures will be implemented as quickly as practicable to reach the NAAQS.⁸³

The Administrator must also set standards necessary to meet and maintain federal and state air quality standards for sources located on the Outer Continental Shelf.⁸⁴ Those sources within twenty-five miles of the state's boundaries are to be treated as new stationary sources and must meet the requirements that would otherwise apply in those states, including "[s]tate and local requirements for emission controls, emission limitations, offsets, permitting, monitoring, testing and reporting."⁸⁵ If a state proposes regulations for implementing and enforcing these requirements, the Administrator shall delegate its authority to the state.⁸⁶

Although the states are given a prominent role in the CAA, the statute also contains an express preemption clause. Section 209 preempts states from regulating emission standards from new motor vehicles⁸⁷ or from certain new nonroad engines or vehicles.⁸⁸ Section 209(e)(2) "creates a sphere of implied preemption" around nonroad engines and vehicles not covered by section 209(e)(1), including existing nonroad engines or vehicles.⁸⁹ California alone can seek a waiver from these emission standards however—both for new motor vehicles or engines, and for those nonroad engines or vehicles preempted under section 209(e)(2).⁹⁰

*C. United States v. Locke: A Presumption Against
Preemption Does Not Apply in the Field of Maritime
Commerce*

In *United States v. Locke*, the Court examined whether the Ports and Waterways Safety Act (PWSA) preempted Washington State regulations governing oil tankers.⁹¹ The PWSA and the Washington regulations were

81. *See id.* § 7410.

82. *Id.* § 7502(a).

83. *Id.* § 7502(c).

84. *Id.* § 7627.

85. *Id.* This section provides that "[t]he authority of this subsection shall supersede section 5(a)(8) of the Outer Continental Shelf Lands Act but shall not repeal or modify any other Federal, State, or local authorities with respect to air quality." *Id.*

86. *Id.*

87. *Id.* § 7543(a).

88. *Id.* § 7543(e)(1).

89. *Pac. Merchant Shipping Ass'n v. Goldstene (Pac. Merchant I)*, 517 F.3d 1108, 1113 (9th Cir. 2008).

90. 42 U.S.C. §§ 7543(b), (e)(A).

91. *United States v. Locke*, 529 U.S. 89, 94 (2000).

enacted in response to the same oil spill off the coast of England.⁹² Thus, the Washington regulations and the PWSA addressed the same subject and had the same purpose—preventing oil tanker spills.⁹³ Title II of the PWSA requires the Coast Guard to issue “regulations for the design, construction, alteration, repair, maintenance, operation, equipping, personnel qualification, and manning of vessels.”⁹⁴ The Washington regulations covered tanker design, equipment, reporting and operating requirements, and specifically governed event reporting, watch practices, navigation operating procedures, engineering procedures, pre-arrival tests and inspections, emergency procedures, personnel training, personnel work hours, personnel language requirements, and advance notice of entry to the state.⁹⁵

In *Locke*, the Court held that Title II of the PWSA preempted state regulations that fell into the field of “design, construction, alteration, repair, maintenance, operation, equipping, personnel qualification, and manning” of oil tankers.⁹⁶ Examining four of the challenged Washington regulations governing training, English language proficiency, and drill requirements, the Court held that these regulations fell within the scope of the preempted fields of operation and personnel qualifications.⁹⁷ The Court then remanded to the court of appeals or district court to determine whether the PWSA preempted the remaining regulations.⁹⁸

In undertaking its preemption analysis, the Court held that a presumption against preemption did not apply because the state laws implicated maritime commerce, a field in which Congress has legislated “from the earliest days of the Republic.”⁹⁹ In doing so, the Court emphasized that the assumption against preemption from *Rice v. Santa Fe Elevator Corp.* does not apply when state regulations enter an area with a historically large federal presence.¹⁰⁰ Interestingly, *Rice* and the other cases cited by the Court provide that the presumption is triggered when Congress “legislate[s] . . . in a field which the States have traditionally occupied.”¹⁰¹ None of the cases cited by the Court actually indicate what effect federal presence in an area has upon the presumption against preemption. Nevertheless, the Court did not apply a preliminary presumption against preemption since the state laws touched on national and international maritime commerce, an area of historical federal presence.¹⁰² By doing so, the Court seems to suggest that there is no difference

92. *Id.*

93. *See Pac. Merchant II*, 639 F.3d 1154, 1167 (9th Cir. 2011).

94. 46 U.S.C. § 3703(a) (2006).

95. *Locke*, 529 U.S. at 117–19 (appendix to majority opinion).

96. *Id.* at 111.

97. *Id.* at 116.

98. *Id.* at 117.

99. *Id.* at 108.

100. *Id.*

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

102. *Locke*, 529 U.S. at 108.

between a traditionally state-occupied field and a field with a history of significant federal presence.

The Court also concluded that the Oil Pollution Act of 1990 (OPA), enacted after the *Exxon Valdez* oil spill, did not affect the field preemption of Title II of the PWSA.¹⁰³ Title I of the OPA covers oil pollution liability and compensation, while the remaining titles of the OPA addresses regulations and duties imposed on the federal government, such as oil pollution research requirements, tank vessel construction standards, and other “extensive regulations.”¹⁰⁴ Although Title I of the OPA contained two saving clauses,¹⁰⁵ the Court clarified that the savings clauses only preserve state laws addressing liability and financial requirements related to oil spills.¹⁰⁶ Because the savings clauses only appear in Title I and because they contained identical words to those used to define the scope of Title I, the Court concluded that the savings clauses preserved state laws on oil spill liability and compensation but did not preserve state laws on the other topics covered by the OPA.¹⁰⁷

D. California’s Struggles with Air Pollution and Meeting Its NAAQS

California and, in particular, the area designated as the SCAB has long struggled with air pollution.¹⁰⁸ Even before the federal government passed the CAA, California enacted vehicle emissions standards to mitigate the harms and negative health effects of air pollution.¹⁰⁹ Although the CAA prohibits states from enacting new motor vehicle emission standards,¹¹⁰ the CAA provides a mechanism through which California can seek a waiver from the EPA’s standards.¹¹¹ Currently, the EPA classifies the SCAB as in extreme nonattainment for 8-hour ozone¹¹² and in nonattainment for PM_{2.5}.¹¹³ In order

103. *Id.* at 104.

104. *Id.* at 106; see 33 U.S.C. § 2761 (2006). Title IV of the Act is called “Prevention and Removal.” Oil Pollution Act of 1990, Pub. L. No. 101-380, 104 Stat. 484 (1990).

105. Section 2718 preserves the States’ ability to impose “any additional liability or requirements with respect to the discharge of oil” and to “establish . . . a fund . . . to pay for costs or damages arising out of . . . oil pollution or . . . to require any person to contribute to such a fund.” 33 U.S.C. §§ 2718(b)(1)–(2) (2006).

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

107. *Id.* at 105–06.

108. This area encompasses all of Orange County and portions of Riverside, San Bernardino, and Los Angeles Counties. CAL. CODE REGS. tit. 17, § 60,104 (2012).

109. See CAL. CODE REGS. tit. 13, § 1961.1 (2012).

110. 42 U.S.C. § 7543(a) (2006).

111. See *id.* § 7543(b)(1).

112. See *8-Hour Ozone Nonattainment Areas*, ENVTL. PROT. AGENCY, <http://www.epa.gov/airquality/greenbook/gntc.html> (last visited Mar. 30, 2012). As of 2005, the SCAB stood at 171 percent of the federal standard. S. COAST AIR QUALITY MGMT. DIST., FINAL 2007 AIR QUALITY MANAGEMENT PLAN 2-5 (2007), available at http://www.aqmd.gov/aqmp/07aqmp/aqmp/Complete_Document.pdf.

113. See *Particulate Matter (PM-2.5) 2006 Standard Nonattainment State/Area/County Report*, ENVTL. PROT. AGENCY, <http://www.epa.gov/airquality/greenbook/rncs.html#CALIFORNIA> (last visited Mar. 30, 2012). As of 2005, the SCAB stood at 139 percent of the federal standard. S. COAST AIR QUALITY MGMT. DIST., *supra* note 112, at 2-5.

to reach the NAAQS for PM_{2.5}, the SCAB must reduce SO_x by 70 percent by 2014 or face sanctions by the EPA.¹¹⁴

Commercial shipping vessels contribute significantly to this air pollution, largely because of use of highly sulfuric fuels. In particular, “[c]ommercial marine businesses arrange for fuels that involve less refining (leaving the sulfur in the fuel), and therefore lower cost than other diesel fuels.”¹¹⁵ Thus, commercial shipping air pollution has a profound effect on the SCAB, especially since, together, the ports of Long Beach and Los Angeles constitute the largest port in the United States, handling 40 percent of the nation’s imports.¹¹⁶

2006 CARB data indicates that ocean-going vessels generate around 15 tons of PM, 157 tons of NO_x, and 117 tons of SO_x per day when within twenty-four nautical miles off California’s coast.¹¹⁷ In the South Coast Air Quality Management District’s 2007 Air Quality Management Plan (AQMP), the District notes that ships and commercial boats together are the fifth-largest NO_x emitter in the area, and forecasts that it will be the third-largest NO_x emitter by 2014 and the largest emitter in 2023.¹¹⁸ Ships and commercial boats together are the number-one emitter of SO_x, and the AQMP forecasts that ships and commercial boats will remain the number-one emitter in 2014 and 2023.¹¹⁹ In terms of the top ten emitters of PM_{2.5}, ships and commercial boats were the sixth largest in 2002, and are expected to be the tenth largest in 2014 and the fifth largest in 2023.¹²⁰

In addition to the risk of federal sanctions for failing to meet the NAAQS, the air pollution in the SCAB and in California generally poses numerous health threats to state residents. PM exposure is correlated with an increase in mortality, a decrease in respiratory function, an increase in respiratory infections, and exacerbated asthma symptoms.¹²¹ Exposure to NO_x may increase acute respiratory illness and cardiopulmonary mortality and decrease lung function, while SO_x exposure increases asthmatic symptoms and can be a respiratory irritant that may cause lung tissue damage at high levels.¹²² Although SO_x at ambient levels does not have as deleterious health effects as

114. *Pac. Merchant II*, 639 F.3d 1154, 1160 (9th Cir. 2011). California’s statewide estimated annual average of emissions per day for ocean going vessels is 249.81 tons of NO_x, 154.21 tons of SO_x, 20.85 tons of PM, 20.06 tons of PM₁₀, and 19.56 tons of PM_{2.5}. 2008 *Estimated Annual Average Emissions*, CAL. AIR RES. BD., 2009, http://www.arb.ca.gov/app/emsinv/emssumcat_query.php?F_YR=2008&F_DIV=-4&F_SEASON=A&SP=2009&F_AREA=CA (last visited Mar. 30, 2012). Total stationary sources across the board, in comparison, contribute 369.64 tons of NO_x, 109.38 tons of SO_x, 266.87 tons of PM, 161.37 tons of PM₁₀, and 95.69 tons of PM_{2.5} per day. *Id.*

115. S. COAST AIR QUALITY MGMT. DIST., *supra* note 112.

116. *Pac. Merchant II*, 639 F.3d at 1159.

117. *Id.* at 1160.

118. S. COAST AIR QUALITY MGMT. DIST., *supra* note 113, at 3-26.

119. *Id.* at 3-29.

120. *Id.* at 3-32.

121. *Id.* at 2-11 to 2-12.

122. *Id.* at 2-16.

ozone, PM, or NO_x, it is also a precursor to PM, which has strong negative health effects.¹²³

California has attempted to institute numerous regulations and programs to reduce air pollution to reach its NAAQS and decrease adverse health affects, but it has faced multiple challenges to these actions.¹²⁴ For example, recognizing the significant negative contribution that ocean-going vessels make to its air pollution problems,¹²⁵ California promulgated the Marine Vessel Rules in 2006, which limited emissions from ocean-going vessels within twenty-four miles of its coast.¹²⁶ Specifically, the Marine Vessel Rules prohibited any auxiliary diesel engine “operating in any of the Regulated California Waters, [from emitting] levels of diesel PM, NO_x, or SO_x in exceedance of the emission rates of those pollutants that would result” from using specific types of fuels.¹²⁷ The Ninth Circuit invalidated the Marine Vessel Rules in *Pacific Merchant I* because it found that CAA Section 209(e)(2) preempted the emissions standards.¹²⁸ Following the decision, CARB formulated new Vessel Fuel Rules to conform to the Ninth Circuit’s decision.

These Vessel Fuel Rules require ocean-going vessels traveling within twenty-four miles of California’s coastline¹²⁹ and calling at California ports to use low-sulfur marine fuels.¹³⁰ Seeking to reduce the amount of PM, NO_x, and SO_x emitted from ocean-going vessels,¹³¹ the Rules require qualifying vessels to use marine gas oil with no more than 1.5 percent sulfur or to use marine diesel oil with no more than 0.5 percent sulfur by weight.¹³² Beginning in 2012, the initial Rules required further reductions to 0.1 percent sulfur by weight for both marine gas oil and marine diesel oil by 2012, although this requirement has now been postponed to 2014.¹³³ CARB calculated that the Rules would increase costs of shipping by approximately \$6 per twenty-foot

123. *Id.* at 2-16 to 2-17.

124. In terms of on-road vehicle pollution, SCAQMD adopted six Fleet Rules in 2000 that required various fleet operators to purchase or lease vehicles meeting specific emission standards when replacing or adding to their vehicle fleets. The Supreme Court held that “certain aspects” of the Fleet Rules were preempted by the express prohibition in section 209(a) of the CAA against state or political subdivisions enforcing new motor vehicle emissions standards. *Engine Mfrs. Ass’n v. S. Coast Air Quality Mgmt. Dist.*, 541 U.S. 249–50, 258 (2004).

125. *See Pac. Merchant II*, 639 F.3d 1154, 1160 (9th Cir. 2011).

126. CAL. CODE REGS. tit. 13, § 2299.1 (2012).

127. *Id.* § 2299.1(e)(1).

128. *Pac. Merchant I*, 517 F.3d 1108, 1115 (9th Cir. 2008).

129. Thus, the Rules only extend as far as the United State’s established twenty-four-mile contiguous zone for purposes of exercising territorial control and do not cover international deep waters. Proclamation No. 7219, 64 Fed. Reg. 48,701 (Aug. 2, 1999); *see* 33 C.F.R. § 2.28 (2012).

130. CAL. CODE REGS. tit. 13, § 2299.2 (2012).

131. *Id.* § 2299.2(a).

132. *Id.* § 2299.2(e)(1).

133. *Id.* Subsequent to *Pacific Merchant II*, the 2011 amendments to the Rules have postponed implementation of the 0.1 percent sulfur by weight requirements to 2014. *Compare id. with* CAL. CODE REGS. tit. 13, § 2299.2(e) (2009).

shipping container,¹³⁴ yet would yield approximately thirteen tons of PM emission reductions, ten tons of NO_x emissions reductions, and 109 tons of SO_x emissions reductions per day.¹³⁵ The estimated health benefits of the Rule include preventing around 3500 premature deaths and 10,000 asthma attacks between 2009 and 2015.¹³⁶

E. Portions of U.S. Coastal Waters Are Designated an Emission Control Area in 2010

In 2009, after California's Rules were promulgated, the United States and Canada jointly proposed that specific portions of waters adjacent to the Pacific coast, the Atlantic/Gulf coast, and the Hawaiian Islands be designated an Emission Control Area (ECA) under Annex VI of the International Convention for the Prevention of Pollution from Ships.¹³⁷ The International Convention for the Prevention of Pollution from Ships is the "main international convention covering prevention of pollution of the marine environment by ships from operational or accidental causes."¹³⁸ Annex VI, titled "Prevention of Air Pollution from Ships," sets general limits on pollutant emissions and provides more stringent regulations for ECAs.¹³⁹ The United States and Canada sought designation for these portions of waters as an ECA in order to prevent and reduce NO_x, SO_x, and PM emissions from ships.¹⁴⁰ On March 26, 2010, the International Maritime Organization designated the proposed portions of water off the coasts of the United States and Canada as the North American ECA.¹⁴¹

As a result of this designation, ships operating within the North American ECA must use fuel with no more than 0.1 percent sulfur by weight by 2015, which is expected to reduce PM and SO_x emissions by 85 percent.¹⁴² Many ships already have the capacity to carry more than one fuel, but some may require modification to carry the lower sulfur fuels in addition to their normal

134. *Pac. Merchant II*, 639 F.3d 1154, 1159 (9th Cir. 2011).

135. Full implementation of the Rules are thus estimated to reduce SO_x in the air by 90 percent. *Id.* at 1160. In a study conducted on an ocean-going ship that considered the cumulative effect of the Rules with voluntary reductions in speed, the study found 91 percent reductions in SO₂ and a 90 percent drop in PM emissions. Daniel A. Lack et al., *Impact of Fuel Quality Regulation and Speed Reductions on Shipping Emissions: Implications for Climate and Air Quality*, 45 ENVTL. SCI. & TECH. 9052, 9054 tbl.1 (2011).

136. *Pac. Merchant II*, 639 F.3d at 1160.

137. Int'l Maritime Org. [IMO], Marine Env'tl. Prot. Comm'n, *Proposal to Designate an Emission Control Area for Nitrogen Oxides, Sulphur Oxides and Particulate Matter*, at 5, IMO Doc. MEPC 59/6/5 (Apr. 2, 2009), available at <http://www.epa.gov/otaq/regs/nonroad/marine/ci/mepc-59-eca-proposal.pdf>.

138. International Convention for the Prevention of Pollution from Ships, Nov. 2, 1973, 12 I.L.M. 1319, as amended by Protocol, Feb. 17, 1978, 17 I.L.M. 546.

139. *Id.*

140. IMO, *supra* note 137, at 2.

141. Regulatory Announcement, ENVTL. PROT. AGENCY, *Designation of North American Emission Control Area to Reduce Emissions from Ships (2010)*, available at <http://www.epa.gov/nonroad/marine/ci/420f10015.pdf>.

142. *Id.*

fuels.¹⁴³ The estimated cost of complying with these fuel restrictions in the North American ECA will be a total of \$3.2 billion by 2020, which would increase operating costs for a twenty-foot container by \$18 for a 1700-mile nautical journey.¹⁴⁴ The EPA estimates, however, that these standards will prevent between 5500 and 14,000 premature deaths and 4,900,000 cases of acute respiratory symptoms in 2020, monetized to a benefit of \$47 to \$110 billion in 2006 dollars.¹⁴⁵ Violations of these standards can result in criminal penalties and civil penalties not exceeding \$25,000 per violation, with each day of a continuing violation counting as a separate violation.¹⁴⁶

In the implementing federal legislation to the International Convention for the Prevention of Pollution from Ships, Congress expressly preserved other laws in effect, clarifying that the legislation “neither amend[s] nor repeal[s] any other authorities, requirements or remedies conferred by any other provision of law.”

The preceding brief discussion of the SLA, CAA, *United States v. Locke*, California’s air pollution, and the Vessel Rules establish the necessary background required to consider Pacific Merchant’s challenge of the Rules as preempted by the SLA. The next Part considers the *Pacific Merchant II* decision and the Ninth Circuit’s application of a presumption against preemption to the Rules.

III. *PACIFIC MERCHANT II*: THE NINTH CIRCUIT RELIES ON THE
PRESUMPTION AGAINST PREEMPTION TO HOLD THAT THE VESSEL RULES
ARE NOT PREEMPTED

In the district court, Pacific Merchant moved for summary judgment on its claim that the SLA field preempted the Vessel Rules. The district court denied Pacific Merchant’s motion, articulating that there was “no indication in either the SLA itself or within its legislative history to suggest that Congress intended the SLA to prevent coastal states like California herein from regulating offshore air pollution from ocean-going vessels.”¹⁴⁷

Importantly for the purposes of this Note, the district court invoked the presumption against preemption as a starting point for its analysis of Pacific

143. *Id.*

144. *Id.*

145. *Id.*

146. 33 U.S.C. § 1908 (2006). In the implementing federal legislation to the International Convention for the Prevention of Pollution from Ships, Congress expressly preserved other laws in effect and clarified that the legislation “neither amend[s] nor repeal[s] any other authorities, requirements or remedies conferred by any other provision of law.” *Id.* § 1911.

147. *Pac. Merchant Shipping Ass’n v. Goldstene (Pacific Merchant III)*, No. 2:09-CV-01151-MCE-EFB, 2009 WL 2777778, at *4 (E.D. Cal. 2009). The district court defined the supposed preempted field as navigation and commerce. It rejected that “such minimal cost increases [as the Rules impose] hardly constitute a ‘direct and substantial’ effect on international commerce.” The court further said that “it all but defies logic to argue that the Vessel Fuel Rules regulate commerce at all instead of curbing air pollution They do not purport to specify who may or may not engage in commerce, or who may or may not navigate in waters beyond the three-mile limit.” *Id.* at *6.

Merchant's implied field preemption challenge to the Rules.¹⁴⁸ The district court categorized the Rules as pertaining to air pollution, which the CAA places primarily under the states' authority,¹⁴⁹ and not as an attempt to regulate maritime commerce, like the Washington regulations at issue in *United States v. Locke*.¹⁵⁰ Concluding that air pollution fell under the "police powers historically delegated to the states," the district court expressly relied upon the presumption against preemption to reject Pacific Merchant's motion.¹⁵¹

On appeal, Pacific Merchant contended, in part, that the district court inappropriately applied a presumption against preemption. Pacific Merchant argued that no presumption should apply because the Rules did not fall into a traditionally state-occupied field and, instead, operated in the traditional federal fields of "maritime commerce, conduct at sea outside of state boundaries, and the definition of state boundaries."¹⁵² Pacific Merchant relied heavily on *United States v. Locke* to support these arguments.¹⁵³ The Ninth Circuit recognized that a presumption against preemption might not apply, per *United States v. Locke*,¹⁵⁴ when state regulations intrude into an area with a historical, significant federal presence.¹⁵⁵ The Ninth Circuit further relied on a later Supreme Court decision¹⁵⁶ in clarifying that application of the presumption against preemption is not dependent on an absence of federal regulation but instead is meant to "account[] for the historic presence of state law."¹⁵⁷

The Ninth Circuit affirmed that the Rules were meant to prevent and control air pollution, that they were an exercise of the state's traditional police powers, and that a presumption against preemption applied to PWSA's challenge.¹⁵⁸ In doing so, the court emphasized the CAA's articulation of the continued primacy of the states in the prevention of air pollution.¹⁵⁹ The Ninth Circuit distinguished the *Locke* Washington regulations governing oil tankers—also enacted to protect the environment—from the Rules.¹⁶⁰ The Ninth Circuit emphasized that the Washington regulations in *Locke* had the same subject and purpose as the Port and Waterways Safety Act of 1972—preventing oil tanker accidents—while the SLA and the Rules did not have these characteristics.¹⁶¹

Thus, the Ninth Circuit applied a presumption against preemption in rejecting PWSA's summary judgment motion that the SLA preempted the

148. *Id.* at *5.

149. *See* 42 U.S.C. § 7401(a)(3) (2006).

150. *Pac. Merchant III*, 2009 WL 2777778, at *5–6.

151. *Id.*

152. *Pac. Merchant II*, 639 F.3d 1154, 1166 (9th Cir. 2011).

153. *Id.*

154. *See* *United States v. Locke*, 529 U.S. 89, 108 (2000).

155. *Pac. Merchant II*, 639 F.3d at 1166.

156. *Wyeth v. Levine*, 555 U.S. 555 (2009).

157. *Pac. Merchant II*, 639 F.3d at 1166–67.

158. *Id.* at 1167.

159. *See* *Exxon Mobil Corp. v. U.S. Envtl. Prot. Agency*, 217 F.3d 1246, 1254 (9th Cir. 2000).

160. *Pac. Merchant II*, 639 F.3d at 1162.

161. *Id.* at 1167.

Rules.¹⁶² The court noted, however, that “the regulatory scheme at issue here pushes a state’s legal authority to its very limits.”¹⁶³ The Ninth Circuit characterized the SLA as a “kind of real estate conveyance”¹⁶⁴ establishing state territorial boundaries and concluded that it did not appear that Congress intended for the SLA to create a blanket rule prohibiting states from exercising their police powers extraterritorially where justified and not in conflict with federal law.¹⁶⁵ The Ninth Circuit contrasted the “terse” language in the SLA with the “extensive and elaborate preemptive scheme[,]”¹⁶⁶ including the objective of maritime commerce uniformity¹⁶⁷ established by the PWSA.¹⁶⁸ The Ninth Circuit thus concluded that, because of the “limited purposes of the SLA,” the Act should not be applied to mechanically override any extraterritorial state regulation.¹⁶⁹

Instead, the Ninth Circuit clarified that the Vessel Fuel Rules would be permissible if they satisfied the “well-established effects test.”¹⁷⁰ The effects test originates from numerous courts rejecting challenges to state regulations governing conduct on the high seas based upon the effect such conduct has upon the state.¹⁷¹ The Restatement of Foreign Relations Law of the United States further provides that “a state has jurisdiction to prescribe law with respect to . . . (c) conduct outside its territory that has or is intended to have substantial effect within its territory.”¹⁷² Thus, the effects test would allow California to “enact reasonable regulations to monitor and control extraterritorial conduct substantially affecting its territory.”¹⁷³ Applying this effects test to the Rules, the Ninth Circuit concluded that, at least, a question of fact existed on this issue because of the high density of shipping going through California, the environmental effects of such shipping, and the close proximity of the area regulated to California’s coast.¹⁷⁴ The Ninth Circuit therefore

162. *Id.* at 1174–75.

163. *Id.* at 1162. Further, the Court indicated that the circumstances of this case raised a variety of important considerations regarding the supremacy of federal law over California’s sovereign police powers. *Id.*

164. The SLA provides that “[t]he seaward boundary of each original coastal state is . . . a line three geographical miles distant from its coast line . . .” 43 U.S.C. § 1312 (2006).

165. *Pac. Merchant II*, 639 F.3d at 1174.

166. Title II of the PSWA specifies that only the federal government may “regulate the ‘design, construction, alteration, repair, maintenance, operation, equipping, personnel qualification, and manning’ of tanker vessels.” 46 U.S.C. § 3703(a) (2006).

167. *See* *United States v. Locke*, 529 U.S. 89, 108 (2000).

168. *Pac. Merchant II*, 639 F.3d at 1174.

169. *Id.*

170. *Id.* at 1175.

171. *See id.* at 1168–74.

172. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 402(1)(c) (1986).

173. *Pac. Merchant II*, 639 F.3d at 1170.

174. *Id.* at 1175.

upheld, “in light of the applicable presumption against preemption,” the district court’s denial of PWSA’s motion for summary judgment.¹⁷⁵

IV. FEDERAL SUPREMACY AND STATE SOVEREIGNTY AS COMPETING CONSIDERATIONS UNDER A PREEMPTION ANALYSIS

As emphasized by the court in *Pacific Merchant II*, preemption cases often raise two strong but potentially conflicting considerations. One issue is the constitutionally supported supremacy of federal law, only constrained by Congress’s limited, enumerated powers.¹⁷⁶ The second issue is the consideration of respect for state sovereignty, conservation of state power, and recognition of states’ responsibilities to protect their residents’ health and safety.¹⁷⁷ Whether state or federal regulation should be favored, and thus whether preemption is preferred, depends heavily on the regulatory context and how the benefits of state or federal regulation would play out within that context.

A. *The Benefits of State Regulation over Federal Regulation*

State regulation may be more beneficial than federal regulation when the activities regulated are localized and where innovation and quick implementation are necessary to meet quickly changing situations. They also reflect states’ roles in the federalism structure. State regulation of localized activities will reflect local concerns more frequently.¹⁷⁸ State regulation allows for acknowledging state roles and choices and promotes “mutual learning” through regulatory interaction.¹⁷⁹ Additionally, state regulation offers

175. *Id.* at 1177. The Ninth Circuit also concluded that neither the Commerce Clause nor general maritime law barred the Rules. *Id.* at 1182. Following the Ninth Circuit’s decision, PWSA filed a petition for writ of certiorari, articulating one of the questions presented as

[w]hether, by establishing the measure of California’s seaward boundary at ‘three geographical miles distant from its coast line,’ the *Submerged Lands Act*, 43 U.S.C. §1312, preempts California’s regulations that require foreign- and U.S.-flagged vessels engaged in international and interstate commerce to use specified low-sulfur fuels while those ships are navigating outside of the State’s three-mile seaward territorial boundary so established.

Petition for Writ of Certiorari, *Pac. Merchant Shipping Ass’n v. Goldstene (Pacific Merchant IV)*, No. 10-1555 (U.S. June 23, 2011), available at <http://sblog.s3.amazonaws.com/wp-content/uploads/2011/07/10-1555.pdf>.

176. See U.S. CONST. art. VI, cl. 2.

177. State regulation can also serve to recognize and implement local values, local expertise, and citizen involvement with local governments. See Buzbee, *supra* note 49, at 53–55; see also Robert S. Peck, *A Separation-of-Powers Defense of the “Presumption Against Preemption,”* 84 TUL. L. REV. 1185, 1201 (2010).

178. Daniel A. Farber, *Federal Preemption of State Law: The Current State of Play* 11 (UC Berkeley Pub. Law Research Paper, No. 1740043, 2011), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1740043.

179. William Buzbee, *Asymmetrical Regulation: Risk, Preemption, and the Floor/Ceiling Distinction*, 82 N.Y.U. L. REV. 1547, 1586 (2007). Buzbee argues that blanket federal regulation should be disfavored when the “contextual and informational complexities” prevent a federal rule from being

opportunities for creativity and experimentation and is essential to the states' traditional role in federalism jurisprudence as "laboratories" of democracy.¹⁸⁰ Although some argue that the federal government may be uniquely situated to disperse and enforce successful innovations from the "laboratory" state to all states across the nation,¹⁸¹ relying only on federal regulation could fail as a result of federal inertia and a lack of communication between the federal government and affected localities.¹⁸² Thus, local or state regulation is preferred because of the quick and powerful feedback received regarding the regulation's costs and benefits.¹⁸³

*B. When the Benefits of Federal Regulation Exceed
Those of State Regulation*

Federal regulation may be preferred when the issue is largely national or international in scope or in areas where federal expertise exceeds state expertise.¹⁸⁴ Federal regulation provides uniformity and legal stability in an area, thereby eliminating regulatory uncertainty and reducing costs of compliance to industry.¹⁸⁵ This uniformity argument is particularly strong for product regulations enacted under the federal government's interstate commerce power,¹⁸⁶ but less persuasive for state health and safety standards enacted under historic state police powers.¹⁸⁷ Finally, federal regulation also serves to prevent states from externalizing regulatory harms in situations where the state would directly benefit from the regulation but the costs of regulation would be imposed outside of the state.¹⁸⁸ Thus, the usefulness of a state regulation versus a federal regulation will depend in part on the tension between "the room left for change and multilayered regulatory structures"

highly tailored to the circumstances, such as when the area of regulation or information underlying the area changes frequently. *Id.* at 1603.

180. Buzbee, *supra* note 179, at 1618; see Farber, *supra* note 178, at 11 (indicating that state regulation may be favored "in the interest of experimentation").

181. David E. Adelman & Kirsten H. Engel, *Adaptive Federalism: The Case Against Reallocating Environmental Regulatory Authority*, 92 MINN. L. REV. 1796, 1824–25 (2007).

182. *Id.* at 1826.

183. *Id.*

184. Farber, *supra* note 178, at 11.

185. Buzbee, *supra* note 179, at 1590.

186. An example of the federal government's use of its interstate commerce power over product regulation is the CAA's clause expressly preempting states from enacting new motor vehicle emission standards. See 42 U.S.C. § 7543(a) (2006).

187. Victor Flatt, *The History of State Action in the Environmental Realm: A Presumption Against Preemption in Climate Change Law*, 1 SAN DIEGO J. CLIMATE & ENERGY L. 63, 65 (2009). Flatt thus emphasizes the CAA's explicit savings clause to support his argument that states should retain regulatory power over other health and safety standards. Specifically, he argues that the explicit savings clause preserves state air pollution actions reaching beyond the federal regulatory floor, except in the context of new mobile sources. *Id.* at 68.

188. Buzbee, *supra* note 179, at 1608 (2007); see also Robert L. Glicksman & Richard E. Levy, *A Collective Action Perspective on Ceiling Preemption by Federal Environmental Regulation: The Case of Global Climate Change*, 102 NW. U. L. REV. 579 (2008). Glicksman and Levy support federal environmental regulation as a type of defense to the collective action problem. *Id.* at 593.

under state regulation versus the “rule-of-law values that stress clear mandates, legal stability, and distinct lines of accountability” promoted by federal regulation.¹⁸⁹

C. A Presumption Against Preemption Can Effectuate the Benefits of State Regulation While Still Allowing Congress the Power to Enact Preemptive Legislation

Advocates of a presumption against preemption cite federalism,¹⁹⁰ separation-of-powers, and pragmatic concerns, such as overcoming collective action problems, to reinforce the application of a presumption against preemption in preemption cases.¹⁹¹ For example, the presumption against preemption serves an important role in ensuring that Congress specifically expresses its intent to preempt state law in its legislation.¹⁹² Requiring clear congressional expression maintains historic state regulatory primacy, especially in areas such as health and safety, and forces Congress to remain politically accountable when it overrides these traditional state areas. The presumption can also serve to preserve the “diversity of experiences and knowledge of an entire level of government” that may otherwise be eliminated if congressional legislation preempts state regulations.¹⁹³

In the absence of a presumption against preemption, the courts may be encouraged to step into the role of legislators, thereby weakening the separation between the legislative and judicial branches.¹⁹⁴ Justice Thomas has expressed skepticism towards implied conflict preemption because it serves as a “potentially boundless” doctrine that allows a court to determine preemption based on its own “interpretation of broad federal policy objectives, legislative

189. Buzbee, *supra* note 179, at 1600.

190. For example, it is “fundamental in our federal structure that States have vast residual powers. Those powers, unless constrained or displaced by the existence of federal authority or by proper federal enactments, are often exercised in concurrence with those of the National Government.” *United States v. Locke*, 529 U.S. 89, 109 (2000).

191. See, e.g., Farber, *supra* note 50, at 920–21 (arguing in the climate change context that there are “strong pragmatic arguments that reinforce the usual federalism-based contentions” for a presumption against preemption, such as the large collective action problem involved with climate change, and that such a presumption would help to protect future generation’s interests that otherwise are the “most underrepresented of all underrepresented groups”).

192. Peck, *supra* note 177, at 1196; see *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996) (indicating that application of the presumption “is consistent with . . . historic primacy of state regulation of matters of health and safety”).

193. Adelman & Engel, *supra* note 181, at 1833.

194. See Peck, *supra* note 177, at 1196. Jamelle Sharpe also offers numerous critiques of the Supreme Court’s preemption doctrine, partly by examining the actions of the courts and Congress. Specifically, he argues that

it would strain credulity to attribute resolution of an issue to Congress if Congress is unlikely to have ever considered it. Conversely, it is difficult for the Court to plausibly deny that it has reached a conclusion independent of congressional judgment when it rejects conclusions that Congress has plainly made. When the Court does either, the most reasonable inference is that it has engaged in independent policymaking.

Sharpe, *supra* note 27, at 372.

history, or generalized notions of congressional purposes that are not contained within the text of federal law.” He opines that conflict preemption raises constitutional questions because “[c]ongressional and agency musings” do not comport with the bicameralism and presentment requirements of legislation.¹⁹⁵ Thus, especially in cases falling under an implied preemption analysis, a presumption against preemption may be justified since Congress knows how to expressly indicate its intent to preempt state law.¹⁹⁶

V. THE PRESUMPTION AGAINST PREEMPTION SHOULD APPLY WHEN FOUR FACTORS ARE PRESENT

Various policy justifications provide support for and against applying a presumption against preemption. Even though the presumption is articulated as a “cornerstone” of preemption doctrine, the Supreme Court’s inconsistency in applying the presumption and the respective weight paid to such a presumption increase the uncertainty in preemption doctrine. In particular, this uncertainty may undermine congressional intent by dampening many states’ willingness to implement potentially “preempted,” but more protective, regulations.

Pacific Merchant provides an opportunity to consider the implications of applying or not applying a presumption against preemption in a circumstance where a state’s environmental regulation “pushes a state’s legal authority to its very limit.”¹⁹⁷ In the environmental context, the policies discussed previously for or against application of a presumption are highlighted, as well as other considerations further supporting application of a substantive presumption against preemption. Specifically, *Pacific Merchant* illustrates the justifications for applying a presumption against preemption in environmental cases: strong state interest, congressional legislation indicating the relative weight of the federal interest, insufficient federal regulatory floors or nonexistence federal regulation, and lack of political accountability.

A. *Strong State Interest*

Under the first factor, the court should look to the strength of the state’s interest when deciding whether a presumption against preemption should apply. Assumedly, a state regulates an area because it has an interest in that area; however, the strength of this interest will likely vary based upon the factual circumstances at issue. In the context of environmental protection, the state interest at issue will be very strong for a variety of reasons. First, environmental regulation and protection is a traditional area of state concern, often necessary for the protection of the health and safety of its citizens. Next,

195. *Wyeth v. Levine*, 555 U.S. 555, 587 (2009) (Thomas, J., concurring).

196. See Buzbee, *supra* note 179, at 1613; see also Adelman & Engel, *supra* note 181, at 1834 (advocating against “implied preemption” in part because it would have the “benefit of depoliticizing court rulings on preemption, which many commentators believe reflect judges’ political ideologies far more than the legislative intent of Congress”).

197. *Pac. Merchant II*, 639 F.3d 1154 (9th Cir. 2011).

environmental issues are frequently localized and require flexibility in implementation. Finally, state interests may be particularly strong because of conflicting or multiple federal compliance requirements and penalties.

1. Protection of Health and Safety of Residents

Before congressional enactment of pervasive environmental regulations in the 1970s, such as the CAA, CWA, and the National Environmental Policy Act (NEPA), environmental protections fell squarely within states' historical police powers.¹⁹⁸ Because environmental harms are commonly localized,¹⁹⁹ states have strong interests in regulating these harms that would otherwise adversely affect the states' residents.

When the federal government enacts environmental legislation, it also limits the traditional state powers. The extent of the constraint varies based upon the statute, but federal legislation generally recognizes the role of states in environmental protection. For example, the CAA provides that "air pollution prevention (that is, the reduction or elimination, through any measures, of the amount of pollutants produced or created at the source) and air pollution control at its source is the primary responsibility of States and local governments."²⁰⁰

States thus have a strong interest, recognized by the federal government, in protecting the health and safety of its citizens, which increases as adverse environmental effects increase. When a state struggles to reach air, water, and other environmental standards sufficiently protective of the health and safety of its citizens, regulations targeting these problems should be encouraged. In such circumstances, a presumption against preemption is particularly important to acknowledge the sovereignty of the state and to respect the state's right and duty to protect its citizens.²⁰¹

The circumstances in *Pacific Merchant II* illustrate this strong state interest in the protection of the health and safety of its citizens and the state's desire to retain its traditional control over air pollution. The air pollution problems in the SCAB are widely acknowledged, and the contribution of shipping to these problems is significant. In particular, the Ninth Circuit observed that

- (1) in 2006, ocean-going vessels operating within the applicable 24-mile zone were estimated to generate, per day, approximately 15 tons of PM, 157 tons of NO_x, and 117 tons of SO_x; (2) emissions from these vessels are believed to constitute the single largest source of SO_x emissions in California; (2) the vessels' daily PM emissions represent the equivalent of

198. See *Huron Portland Cement Co. v. Detroit*, 362 U.S. 440, 442 (1960) ("Legislation designed to free from pollution the very air that people breathe clearly falls within the exercise of even the most traditional concept of what is compendiously known as the police power.").

199. See Jonathan H. Adler, *Jurisdictional Mismatch in Environmental Federalism*, 14 N.Y.U. ENVTL. L.J. 130, 141 (2005).

200. 42 U.S.C. § 7401(a)(4) (2006).

201. See Peck, *supra* note 177, at 1196; *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996).

approximately 150,000 big rig trucks traveling 125 miles per day; (3) 27 million Californians, representing 80% of the state's population, are exposed to these emissions; (4) these emissions are known to cause cancer, respiratory illnesses, and to increase the risk of heart disease, and CARB estimated that the vessels' direct PM emissions alone cause at least 300 premature deaths every single year; and (5) the effects of the fuel use have long been especially severe in the South Coast Air Basin region of Southern California, with over 80% of the population in this heavily populated region exposed to PM_{2.5} levels exceeding federal standards.²⁰²

Thus, California's interest in promulgating the Rules is strong and supported by the presence of extreme air pollution that the Rules attempt to reduce. Application of a presumption against preemption would acknowledge both the traditional role of states in environmental regulation, as well as allow states to fulfill their duties of protecting the health and safety of their residents.

2. Localized Conditions and Flexibility in Responses

Since many environmental problems are localized in nature, regulations must recognize any peculiar conditions and embrace flexibility in order to best address these problems. Because of the national focus of federal legislation, local conditions and requirements may go unaddressed when states are precluded from tailoring federal legislation.²⁰³

This is particularly true in circumstances involving unique land and water formations or new or evolving environmental concerns. States are more capable than the federal government of quickly reacting to local feedback and adapting their regulations accordingly.²⁰⁴ Because the federal government has less knowledge of local concerns and conditions and a reduced capacity for responding quickly to changed circumstances, states have a particularly strong interest in the flexibility and adaptability of environmental regulations.

Professor Erwin Chemerinsky argues that federalism should be used to empower all levels of government in order to provide for more effective environmental protections.²⁰⁵ Empowering multiple levels of government increases environmental protections, because if one level of government fails to act, another level of government can respond to the problem.²⁰⁶ Applying a presumption against preemption can serve to strengthen the abilities of multiple levels of government, thus serving as a safeguard against unexpected or unaddressed problems. Strengthening and increasing certainty in the application of a presumption against preemption bolsters the ability of multiple levels of government to respond and protect the particularized needs of the American people.

202. *Pac. Merchant II*, 639 F.3d at 1175–76.

203. Alder, *supra* note 199, at 170.

204. See Adelman & Engel, *supra* note 181, at 1826.

205. See Erwin Chemerinsky, *Empowering States: The Need to Limit Federal Preemption*, 33 PEPP. L. REV. 69, 74 (2006).

206. *Id.*

Therefore, where the regulations at issue address localized or regional concerns, the state interest will be particularly strong and thus will justify application of a presumption against preemption. Since federal regulation is nationally applicable, federal regulation will fail to address or inadequately address unique circumstances such as those found in the SCAB.²⁰⁷ Applying a presumption against preemption, however, will allow states to implement effective and flexible regulations to adapt to changing circumstances or unique local concerns.

3. Multiple Federal Requirements Compelling Compliance

Finally, the state interest is particularly strong where federal regulations impose seemingly conflicting or multiple demands on the state. Where a state must comply with federally mandated standards, federal preemption challenges to corresponding state regulations present significant barriers to state actions. The state's interest increases further if failure to reach these federal standards results in significant sanctions or penalties. In these circumstances, a presumption against preemption should apply to the state's regulations that were implemented to meet federal standards.

In *Pacific Merchant II*, the Ninth Circuit recognized the difficulties California faces in reaching the federal standards. Specifically, the SCAB must significantly reduce air pollution to reach the federally mandated NAAQS, yet preemption challenges limited the state's regulatory ability to do so. As the court highlighted, California's Vessel Rules are "necessary to comply with basic federal standards in the first place."²⁰⁸ Courts should apply a presumption against preemption in situations where federal legislation requires certain results but potential preemption challenges would make achieving the federal standards difficult or impossible.

B. Congressional Legislation Illustrates the Relative Weight of Federal Interests

Under the second factor, courts should look to whether legislation enacted after the challenged federal statute further clarifies the relative weight of the federal interests in the area. Because one of the two cornerstones of the Court's preemption analysis is congressional intent,²⁰⁹ subsequently enacted legislation should inform whether a presumption against preemption is appropriate and

207. For example, the extreme air pollution at the center of *Pacific Merchant II* is a result of a combination of localized and unique circumstances, including the physical landscape of the SCAB, the number of emission sources within the SCAB, and the population growth of the area. S. COAST AIR QUALITY MGMT. DIST., *supra* note 113, at 1-1 to -2 (listing circumstances such as "the physical and meteorological setting, the large pollutant emissions burden of the Basin (including pollution from international goods movement), and the rapid population growth of the area").

208. *Pac. Merchant II*, 639 F.3d 1154, 1181 n.8 (9th Cir. 2011).

209. *See Wyeth v. Levine*, 555 U.S. 555, 565 (2009).

guide courts' preemption analyses. Particularly in field preemption claims, where congressional intent of preemption is determined by examining the pervasiveness and dominance of federal legislation,²¹⁰ legislation enacted after the challenged act may clarify Congress's purpose and intent in enacting the legislation. Subsequent legislation may also indicate the weight to be given to numerous federal interests when such interests are in tension with each other. Thus, where the challenged legislation does not speak explicitly to an issue but subsequently enacted statutes clarify and indicate the weight of federal interests, courts should apply a presumption against preemption.

Pacific Merchant II illustrates how subsequently enacted statutes can provide clarification to a challenged statute and when subsequently enacted legislation would support application of a presumption against preemption. Specifically, after the SLA, Congress enacted substantial legislation regarding environmental protection,²¹¹ the states' environmental protection responsibilities,²¹² the national policies of the United States in regard to environmental protection,²¹³ and the federal government's responsibilities on the Outer Continental Shelf.²¹⁴

1. NEPA's Policy of Restoring and Maintaining Environmental Quality

Congress articulated in NEPA that "the policies, regulations and public laws of the United States shall be interpreted and administered in accordance with the policies of this chapter,"²¹⁵ which include "recognizing . . . the critical importance of restoring and maintaining environmental quality to the overall welfare and development of man."²¹⁶ This mandate encourages application of a presumption against preemption, particularly where states regulate above a federally established regulatory floor, because such regulations aim to restore or at least maintain "environmental quality."²¹⁷

In *Pacific Merchant II*, the Ninth Circuit's application of a presumption against preemption conformed to NEPA's interpretative mandate.²¹⁸ Through the later-enacted NEPA, Congress spoke directly to how prior and future statutes should be interpreted: in accordance with restoring and improving environmental quality.²¹⁹ In the environmental regulatory context, NEPA thus

210. *English v. Gen. Elec. Co.*, 496 U.S. 72, 79 (1990); *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947).

211. *See, e.g.*, 42 U.S.C. §§ 4321–4370f (2006) (NEPA); *id.* §§7401–7671q (CAA).

212. *See, e.g.*, 42 U.S.C. § 7401(a)(3) (CAA).

213. *See, e.g., id.* §§ 4321–4370f (NEPA).

214. *See, e.g.*, 16 U.S.C. §§ 1801–1884 (2006) (Magnuson-Stevens Fishery Conservation and Management Act); 43 U.S.C. §§ 1331–1356 (2006) (Outer Continental Shelf Lands Act).

215. 42 U.S.C. § 4332.

216. *Id.* § 4331(a).

217. *See id.*

218. *See Pac. Merchant II*, 639 F.3d 1154, 1174–75 (9th Cir. 2011).

219. 42 U.S.C. § 4332.

suggests that a presumption should apply to environmentally protective state regulations.

2. The CAA's Recognition of State Authority over Air Pollution

Congress enacted the CAA for the purposes of improving air quality.²²⁰ The CAA also placed affirmative mandates on the states to reach protective levels of air quality for their citizens.²²¹ The CAA granted states flexibility in meeting the federal minimum standards, reinforcing the idea that air pollution control and prevention rests primarily on the states.²²² The CAA also provides that stationary sources on the Outer Continental Shelf located beyond state jurisdiction shall be regulated as if on-shore in that area.²²³ Upon submission of a state plan to regulate offshore stationary sources, the CAA mandates that the EPA grant air pollution regulatory authority over these stationary sources to the state.²²⁴ In other words, the CAA provides for state regulation of stationary sources located beyond their territorial boundaries so long as the states can submit plans showing they can sufficiently regulate those sources.²²⁵

In contrast, the SLA, passed prior to the CAA, did not expressly contemplate the regulatory authority of states beyond the three-mile territorial boundary.²²⁶ Because of the “terse” provisions of the SLA,²²⁷ the importance of other federal interests like those expressed in the CAA should inform the determination of the field Congress intended to occupy by passing the SLA. Because the SLA did not directly address air pollution originating from the waters above the submerged lands, the CAA’s placement of responsibility for air pollution on states may indicate that Congress did not intend the SLA to govern such regulations of submerged lands. Thus, the CAA’s interests in air pollution and state responsibility, detailed after the SLA was enacted, support application of a presumption against preemption when examining the preemptive effect of the SLA on pollution control regulations enacted by California.

3. Other Statutes Speaking to the Federal Role on Outer Continental Shelf Lands

Congress enacted several other statutes after the SLA, such as the Outer Continental Shelf Lands Act²²⁸ and the Magnuson-Stevens Fishery

220. *See id.* § 7401(b).

221. *Id.* § 7410.

222. *See id.* §§ 7410, 7410(a)(3).

223. *Id.* § 7627.

224. *Id.*

225. *See id.*

226. *See Pac. Merchant II*, 639 F.3d 1154, 1174 (9th Cir. 2011).

227. *See id.*

228. The Outer Continental Shelf Lands Act governs mineral exploration and development on the federally-owned Outer Continental Shelf lands. *See* 5 WEST’S FED. ADMIN. PRAC. § 6003 (4th ed.

Conservation and Management Act,²²⁹ to address the federal lands stretching beyond the three-mile state territorial boundary.²³⁰ These subsequent statutes indicate the need for state law and regulations to fill gaps in federal law and show Congress's desire to clarify that it was asserting "exclusive management authority" over certain topics on its submerged lands.²³¹ This further suggests a presumption against preemption should apply when examining preemption challenges under the SLA.

The interstitial nature of federal law has been recognized by courts, suggesting that in many circumstances federal substantive law will be inadequate unless state law is considered in tandem with federal law.²³² For example, OCSLA adopted state civil and criminal laws to "the extent they are applicable and not inconsistent with . . . other federal laws" in part to address this issue.²³³ Thus, although the SLA did not expressly address such concerns, subsequent legislation highlighted the need for state law to supplement federal law at times when federal law would otherwise be inadequate or absent.

Legislation subsequently enacted also suggests that Congress felt some need to clarify when federal legislation would be exclusive in the waters beyond the state territorial boundaries. In the Magnuson-Stevens Fishery Conservation and Management Act, for example, Congress declared that it was exercising sovereign rights over fishery resources and established exclusive management authority in the Exclusive Economic Zone over those fishery resources.²³⁴ This suggests that Congress did not believe that the SLA was

2011); *OCS Lands Act History*, BUREAU OF OCEAN MGMT., available at <http://www.boem.gov/Oil-and-Gas-Energy-Program/Leasing/Outer-Continental-Shelf/Lands-Act-History/OCSLA-History.aspx> (last visited Mar. 30, 2012).

229. The Magnuson-Stevens Fishery Conservation and Management Act was enacted for the purpose of conserving and managing fishery resources within the United States' exclusive economic zone and to those anadromous species (species that travel upriver from the ocean to breed) outside of the economic zone. 16 U.S.C. § 1801(b) (2006).

230. See *id.* §§ 1801–1884 (Magnuson-Stevens Fishery Conservation and Management Act); 43 U.S.C. §§ 1331–1356 (2006) (Outer Continental Shelf Lands Act).

231. See, e.g., 16 U.S.C. § 1801.

232. The gaps in federal law if state law is not incorporated have been recognized, for example, on the Outer Continental Shelf. *Ten Taxpayer Citizens Grp. v. Cape Wind Assocs., LLC*, 373 F.3d 183, 193 (1st Cir. 2004). The Outer Continental Shelf Lands Act reads:

To the extent that they are applicable and not inconsistent with this subchapter or with other Federal laws and regulations of the Secretary now in effect or hereafter adopted, the civil and criminal laws of each adjacent State, now in effect or hereafter adopted, amended, or repealed are declared to be the law of the United States for that portion of the subsoil and seabed of the outer Continental Shelf, and artificial islands and fixed structures erected thereon, which would be within the area of the State if its boundaries were extended seaward to the outer margin of the outer Continental Shelf.

43 U.S.C. § 1333(a)(2)(A).

233. 43 U.S.C. § 1333(a)(2)(A).

234. 16 U.S.C. § 1801 (2006). The Exclusive Economic Zone extends 200 miles out from states' coastlines or, alternatively phrased, as extending 197 miles beyond the three-mile state jurisdiction boundary. Proclamation No. 5030, 48 Fed. Reg. 10,605 (Mar. 10, 1983). The Act also expressly preserves state powers to regulate fishing within their three-mile SLA boundary. 16 U.S.C. § 1856.

intended to bar all state regulations beyond the three-mile territorial limit and indicates that a presumption against preemption is correct.

4. Later Legislation Expressing a Continued Intent to Occupy a Field Would Not Support Application of a Presumption Against Preemption

A presumption against preemption would not apply if later legislation expressed continued congressional intent to occupy a field. For example, in *Locke*, not only did the PWSA address oil tankers and the attendant harms of oil spills, but subsequent legislation also asserted the federal interest and control over this field.²³⁵ After the PWSA and the *Exxon Valdez* spill, the federal government enacted the OPA to further regulate maritime oil transport.²³⁶ The OPA compelled the Coast Guard to enact regulations governing oil tankers, but also preserved state laws establishing liability rules and financial requirements relating to oil spills.²³⁷ Thus, the OPA spoke to the continuance of the relative weight given to the federal versus state interests already established in the PWSA. Because subsequent legislation did not significantly alter the congressional intent expressed in the PWSA, the presumption against preemption would not further the aim of ensuring congressional intent and thus should not be applied.

C. Insufficient Federal Regulatory Floors or Nonexistent Federal Regulation

Third, courts should consider whether the federal statute imposes a regulatory floor and should apply a presumption against preemption if the federal regulations are insufficiently protective. Initial justifications for federal environmental regulations arose because of race-to-the-bottom concerns that states would not adequately regulate to protect the health and safety of its citizens.²³⁸ Many federal environmental statutes therefore establish a regulatory floor of minimum standards necessary to protect health and welfare, though most also allow for more strict state regulations.²³⁹

Conversely, federal statutes that establish a regulatory ceiling prohibit state and local regulations in an area, effectively “displac[ing] multilayered institutional arrangements offering different actors, venues, and modalities for addressing a social problem.”²⁴⁰ Scholars Adelman and Engel argue that courts should apply a presumption against finding federal ceiling preemption because “[f]ederal ceilings will thus be both most susceptible to public-choice distortions and potentially the most destructive of the diversity essential to a

235. *United States v. Locke*, 529 U.S. 89, 104 (2000).

236. *Id.*

237. *Id.* at 105.

238. Adler, *supra* note 199, at 151.

239. Buzbee, *supra* note 179, at 1565–66.

240. *Id.* at 1576.

robust federal system.”²⁴¹ When Congress has clearly defined such ceilings, however, it also seems to express its clear intent for federal legislation to preempt state regulations. Regulatory floors, on the other hand, suggest a congressional intent not to preempt state law.

Even in the absence of an explicitly preemptive ceiling, however, federal minimum standards may become a ceiling.²⁴² “The existence of a federal standard may discourage state policymakers from adopting and maintaining more stringent measures of their own, even where such measures could be justified.”²⁴³ Because preemption may dampen states’ willingness to enact regulations above the federal minimum standards, poor environmental results will occur if the federal standards are too lax or inflexible.²⁴⁴ Thus, application of a presumption is particularly appropriate to environmental floor regulations in order to reduce state interpretation of federal floors as ceilings and the resulting negative effects from such interpretation.

State regulation beyond federal floors will rarely result in overregulation, particularly in areas of environmental protections. For example, Professor Victor Flatt examined the history of state regulations before and after the CAA and subsequently argued that “despite rhetoric . . . we should generally allow states to exceed federal standards since the evidence supports that states will only do so where the need is great, and, in such circumstances, costs can generally be put back on states that do so.”²⁴⁵ Professor Flatt concludes that states usually only create new regulatory schemes when necessary to protect the health and safety of their citizens, such as where federal regulations are lacking or insufficient.²⁴⁶

As stated by the Supreme Court in *Massachusetts v. EPA*, upon entering the Union the states “surrender[ed] certain sovereign prerogatives,”²⁴⁷ and these sovereign prerogatives vested in the federal government.²⁴⁸ The Court thus concluded in its standing analysis that states are to receive “special solicitude.”²⁴⁹ The Court emphasized that the states maintain an interest “in protecting its quasi-sovereign interests” and that the EPA has a congressionally mandated duty to protect states from harmful emissions.²⁵⁰ Although in a different context, the federal government’s failure to enact sufficiently

241. Adelman & Engel, *supra* note 181, at 1836–37.

242. See Adler, *supra* note 199, at 171.

243. *Id.*

244. *Id.* at 170.

245. Flatt, *supra* note 187, at 77.

246. *Id.*

247. The Court provided as examples of these sovereign prerogatives surrendered by states the right to invade a neighboring state “to force reductions in greenhouse gas emissions,” the right to negotiate a treaty regarding greenhouse gas emissions with foreign countries, and even the possibility that the free exercise of its police powers might become limited as preempted by a federal law. *Massachusetts v. Env’tl. Prot. Agency*, 549 U.S. 497, 498 (2007).

248. *Id.* at 519.

249. *Id.* at 519–20.

250. *Id.*

protective regulations should similarly invoke a “special solicitude” for state regulations, primarily through application of a presumption against preemption. Here, the CAA enacts a federal regulatory floor with NAAQS, but grants states flexibility in reaching these minimum standards, including the ability to regulate beyond the NAAQS.²⁵¹ Since the CAA establishes a type of regulatory floor, a presumption against preemption should apply.

A presumption against preemption was appropriate in *Pacific Merchant II* under factor three because the federal government failed to adequately address the deleterious impact of ship pollution on the health and welfare of California citizens.²⁵² In *Pacific Merchant II*, the federal government had not implemented protective legislation and had not made efforts to regulate the pollution from ocean-going vessels calling at the SCAB’s ports. *Locke*, in contrast, provides an example of a situation where factor three would not be supported, and thus where a presumption against preemption would not be applied. In *Locke*, the federal government had implemented detailed and comprehensive legislation—the PWSA and OPA—specifically addressing the concerns of Washington State. This contrast between *Pacific Merchant II* and *Locke* illustrates when factor three would weigh towards applying a presumption against preemption (*Pacific Merchant II*) and not applying the presumption (*Locke*).

D. Absence of Political Accountability

Finally, under the fourth factor, the court should look at whether the level of decision making present in the statutory scheme enforces political accountability. In federalism discussions, the states—not the federal government—are frequently considered to serve as the “repositories of the democratic values of accountability and transparency because of the ability of local actors directly to partake in their own governments.”²⁵³ Scholars argue that society can reach optimum results where the people experiencing the costs and benefits of the regulation are those determining the policy, methods, and

251. Although the CAA expressly prohibits states from regulating emissions from new motor vehicles, new non-road engines, and existing non-road engines, it does allow states to impose in-use requirements on these vehicles. 42 U.S.C. § 7543(d); *Engine Mfrs. Ass’n v. U.S. Envtl. Prot. Agency*, 88 F.3d 1075, 1094 (1996) (“*Chevron* deference permits the EPA’s interpretation that § 213(d) incorporates into the nonroad regime at least the reservation of the states’ right to impose in-use regulations found in § 209(d).”).

252. Following promulgation of the Rules, the International Maritime Organization designated the area an ECA and established fuel sulfur standards to be implemented by 2015. Regulatory Announcement, ENVTL. PROT. AGENCY, Designation of North American Emission Control Area to Reduce Emissions from Ships 1, 3–4 (2010), available at <http://www.epa.gov/nonroad/marine/ci/420f10015.pdf>. These standards fall short of the California requirements articulated in the Rules in terms of time for implementation. See CAL. CODE REGS. tit. 13, § 2299.2(e)(1) (2009) (requiring 0.1 percent sulfur by weight to be implemented by 2012); *Pac. Merchant II*, 639 F.3d 1154, 1161 (9th Cir. 2011) (stating that vessels subject to the treaty will be forced to meet the same sulfur fuel limits imposed by the Rules by 2015).

253. Judith Resnik, *Foreign as Domestic Affairs: Rethinking Horizontal Federalism and Foreign Affairs Preemption in Light of Translocal Internationalism*, 57 EMORY L.J. 32, 88 (2007).

extent of environmental regulations.²⁵⁴ In the absence of interstate effects, local and state environmental decision making thus allows those directly affected to be involved in the process, forcing local and state decision makers to be politically accountable to their constituents.

At the federal level, the general scholarly consensus is that “political processes tend to generate suboptimally lax environmental regulation and that this bias exists in large part because diffuse environmental interests are out-lobbied by more concentrated and powerful business interests.”²⁵⁵ For example, interest groups today frequently bring litigation based on “protecting” the President or Congress from state and local initiatives that violate congressional legislation or the Constitution.²⁵⁶ While industry groups are able to assert strong political pressure at the federal level, diffuse local and state environmental interests may be unable to demand the same level of responses and political accountability.²⁵⁷ In particular, scholars have argued that, by requiring clear express congressional intent, application of a presumption against preemption will force interest groups to be overwhelmingly successful in the political process in order to have their regulations be adopted.²⁵⁸

Thus, where the benefits of lax regulations inure to a nationally powerful interest group but the costs of lax regulations fall primarily on local groups with limited national powers, the federal government may fail to account equally for all interested parties when imposing environmental regulations. In these circumstances, the state’s interest in providing an opportunity for public involvement and accountability to its citizens increases, raising the need for a presumption against preemption.

Pacific Merchant II illustrates the potential for political imbalance in the environmental context. The Vessel Rules cover an area of the ocean in which the “public” directly affected by the regulations is the shipping industry, a nationally strong interest group. Although the pollution from this industry harms California residents, this harm may not be clear to the California public at large, thus reducing the likelihood that the public will strongly support the regulations at the national level on par with the shipping industry. The industry has strong incentives to advocate for non-regulation, while California residents will disproportionately bear the cost of such regulations in the form of negative health effects and federal sanctions resulting from failure to meet the required NAAQS.

A presumption against preemption reduces the political disparities between industry groups benefiting from reduced regulation and the public who bear the costs of lax environmental protections. The presumption also promotes

254. Adler, *supra* note 199, at 133.

255. Adelman & Engel, *supra* note 181, at 1805.

256. Resnik, *supra* note 253, at 40.

257. See Adelman & Engel, *supra* note 181, at 1805.

258. See *id.* at 1834.

democratic principles by ensuring that those enacting the regulations will be politically accountable to the local groups affected by the regulations.

CONCLUSION

Environmental problems are uniquely multifaceted, with sources of the problems stemming from failures in markets or regulations, and “aris[ing] along numerous dimensions and at widely variant temporal and spatial scales.”²⁵⁹ As a result, solutions or attempts to solve these environmental problems require diverse responses and “originate from more than one level of government based upon a variety of political, socioeconomic, and environmental factors, each differing from the other in the mix of these variables.”²⁶⁰

The presumption against preemption, especially in the environmental context, should thus be reformulated to ensure that these interests are sufficiently respected absent clear congressional intent to the contrary. Although courts articulate that a presumption against preemption applies when a state issues regulations under its historic police powers, current application of this presumption is inconsistent and unreliable.

Four factors should be considered when examining whether a presumption against preemption is appropriate. Namely, courts should examine the strength of the state’s interests, whether subsequent legislation has further explained the relative weight of federal interests in the area, whether federal regulations are insufficiently protective and only serve as a regulatory floor, and whether the level of decision making enforces political accountability.

As illustrated by *Pacific Merchant II*, these considerations will often lead to an application of a presumption against preemption in the environmental law context, especially when challenges are made to state environmental regulations extending beyond a federal regulatory floor. By applying a presumption against preemption in the environmental regulation context, the strong policy reasons underlying the presumption will be more consistently supported. A strengthened presumption will allow courts to view the state regulations more favorably, and yet still allow for clear congressional intent to overcome the presumption. By clarifying and strengthening the presumption against preemption doctrine, states will be able to effectively exercise their historical police powers and avoid the chilling effect otherwise resulting from uncertainty over the validity of their environmental regulations.²⁶¹

259. *Id.* at 1799.

260. *Id.*

261. *See, e.g.*, Buzbee, *supra* note 49, at 45. Buzbee, in discussing climate change regulation, expresses a concern about the chilling effect of unclear preemption language. Specifically, he asserts that “any preemption language that is not closely tailored with explicit, focused language could result in preemption claims against thousands of government actions inextricably linked to climate change. Once again, the price of ambiguity and policy uncertainties could be unpredictable, expansive claims about the preemptive reach of federal law.” *Id.*

We welcome responses to this Note. If you are interested in submitting a response for our online companion journal, *Ecology Law Currents*, please contact ecologylawcurrents@boalt.org. Responses to articles may be viewed at our website, <http://www.boalt.org/elq>.