Federal Preemption Under the Hazardous Materials Transport Act: Assessing Standards and Procedures

Jordan Jay Hillman*

TABLE OF CONTENTS

* Jordan Jay Hillman, Emeritus Professor of Law and Research Counsel-Professor, Transportation Center (Ret.), Northwestern University. M.A. and J.D., University of Chicago (1948) and (1950); S.J.D., Northwestern University (1965).

I. INTRODUCTION: THE ROLE OF FEDERAL PREEMPTION IN HAZMAT TRANSPORT REGULATION

Federal preemption offers a mechanism for promoting social welfare through a proper allocation of regulatory functions between federal and state authority. To that end, the following assessment of preemption under the Hazardous Materials Transportation Act ("HMTA") is guided by two premises. First, federal preemption in hazardous materials ("HazMat") transport should aim to promote an efficient balance between the societal costs and benefits attributable to a regulation. Unless the total incremental benefits of a regulation at least equal its total incremental costs, society is burdened with waste. Second, the dual task for Congress is to (i) establish preemption standards conducive to such efficiency and (ii) provide for their effective implementation through objective and efficient decisional processes.

The quest for regulatory efficiency requires an objective balance of the welfare concerns of at least the three principal parties to the regulatory process. These include: (i) entrepreneurial concerns of transporters and shippers; (ii) general welfare concerns represented by the federal government; and (iii) local welfare concerns represented by state or local governments.

In general, the achievement of regulatory efficiency requires broad knowledge of the economic and operational characteristics of the regulated activity. Equally important for the efficient allocation of regulatory functions through federal preemption is particular knowledge of the social concerns and political factors affecting local attitudes toward the regulated activity. It is these concerns and factors which shape the character of state and local regulations as they affect wider national interests.

The vital role of commercial transport in interstate commerce and its important local effects have assured its central role in the development of preemption doctrines. In particular, Congress and the courts have dealt extensively with federal preemption in the context of transport safety. Their enactments and precedents might be assumed to provide a useful model for latter day preemption policies governing the regulation of HazMat transport safety. But this is true only to the extent that the social and political forces shaping state/local HazMat transport regulation are essentially the same as those affecting general transport safety.

The main thesis here is that the differences are sufficient to require a greater departure from existing preemption standards governing general transport safety than has yet been achieved. Also, to promote greater decisional consistency and procedural efficiency, changes are warranted in the processes through which preemption standards are implemented.

While the 1990 HMTA amendments are useful in both respects, they remain incomplete. Further improvements are needed.

In many cases, of course, local welfare gains from a regulated activity are thought to outweigh any potential welfare losses. These circumstances create state or local incentives for permissive regulatory standards intended to assure retention of the highly valued activity. As perceived gains to the locality increase, so may local incentives to discount risks or to ignore external costs.

At the national level, however, the balance of welfare gains and losses from competitively induced state and local standards may be less favorable. Some measure of federal preemption may then be warranted to prevent more permissive local standards from undermining whatever stricter national standards are found justified by broader welfare concerns. (In the same way, the welfare interests of an entire state may diverge from those of a particular locality.)

In contrast to this "race to the bottom" regulatory phenomenon are the well known NIMBY ("Not In My Back Yard") aspects of HazMat transport.[1] This factor operates with far greater force in relation to HazMat transport than to general transport. The public within a locality is more likely to view HazMat transport as a "no win" activity, except where it is tied to a highly valued local economic activity. More often, however, such transport is merely in transit or otherwise lacks major offsetting benefits.

The natural impulse within the locality is toward regulations calculated to reduce the apparent risks and amounts of HazMat transport. The focus in such efforts is on local concerns. Here the role of preemption is to maintain regulatory ceilings (rather than floors) which best balance legitimate local concerns against broader societal impacts. The question is to what extent should a state or locality be able to serve its own welfare by detracting from the broader general welfare? Another factor complicating the search for an answer is that cost transfers permitted to one locality may soon be claimed by others.

A decision on the use federal preemption in regard to a particular state/local regulation requires a comparison of the welfare consequences of regulatory uniformity or diversity. Due to the difficulties of risk assessment and of quantifying social costs and benefits, the task can be formidable. Nor is total scientific objectivity in this political context a realistic

1. In the context of Federal preemption the term "race to the bottom" has been applied to State incorporation laws which are claimed to vest excessive control in managements to the detriment of shareholder interests. The competitive motive of states in such cases is to induce corporate decisions, generally dominated by managements, to incorporate in a particular state. Cary, *Federalism and Corporate Law: Reflections Upon Delaware*, 83 YALE L.J. 663, 666 (1974). Preemptive "federal legislation" is one widely suggested remedy for protecting shareholders against the alleged excesses of "hospitable jurisdictions." *Id.*

goal. But the effort must be to minimize the influence of uninformed speculation, uninstructive rhetoric and irrelevant biases, whether favoring federal or state authority.

II. Problems in the Use of Constitutional Doctrines for Promoting Efficiency Through Federal Preemption

A. *The Constitutional Framework for Federal Preemption*

The Constitutional framework governing the use of federal preemption consists of the following principal provisions:

1. *Article I, Section 8, Clause 3.* "The Congress shall have Power. . .To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes."

2. *Article VI, Clause 2.* "This Constitution, and the Laws of the United States. . .and all Treaties. . .shall be the supreme Law of the Land. . . ."

3. *Amendment X.* "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

The first and third components of this framework provide for the separate, but overlapping, powers of federal and state authority. The Article I clause establishes federal power over interstate commerce. The Tenth Amendment reserves to the states a broad range of police powers. Where conflicts occur in the use of these powers, Article VI establishes the supremacy of the federal power. Accordingly, even if otherwise lawful under the Tenth Amendment, state police powers in conflict with the federal commerce power may be nullified, or "preempted." Subject only to other Constitutional constraints, Congress has plenary authority under Article I to exercise the federal power to regulate commerce.

Congress, of course, can not possibly delineate the intended roles of federal and state authority in advance of every conflict which might arise. In regard to a given conflict, it is likely that Congress has dealt with the matter of its intent by one of the following means: (i) through total silence; (ii) through a broad legislative scheme which does not speak directly to federal preemption, but whose breadth suggests a possible intent to "occupy the entire field"; (iii) through statutory provisions which otherwise offer ambiguous clues to intended preemption; or (iv) clear statutory provisions which are either decisive in themselves or which offer meaningful decisional guidelines.

The advantages of using means (iv) to express the preemption intent of Congress in transportation safety regulation is suggested by experience in the use of others.

B. Judicial Preemption under the "Dormant" Commerce Power as Applied to State Highway Safety Regulation

By its nature, Means (i) calls for direct judicial resolution of preemption disputes under the dormant commerce power. Its role in federal preemption has been described by the U.S. Supreme Court as follows: "the constitutional grant to Congress of power to regulate interstate commerce has been held to operate of its own force to curtail state power in some measure . . . even though Congress has not acted."[2] The Court has based the power "upon the implications of the commerce clause . . . or upon the presumed intention of Congress, where Congress has not spoken."[3]

As to transport safety and the dormant commerce power, several U.S. Supreme Court cases involving state regulations of motor carrier design are instructive.

In *South Carolina v. Barnwell*[4], the Court, in 1938, upheld state truck width and loaded weight limits. In *Raymond Motor Transportation, Inc. v. Rice*[5], the Court, in 1978, struck down a state law which, with discriminatory exceptions, barred single and multi-trailer trucks exceeding specified lengths. In *Kassell v. Consolidated Freightways*[6], the Court, in 1981, also struck down a state law limiting the length of double-trailers. Of the varying decisional principles invoked by Justices in these cases, efficiency considerations were among the least significant.

This result is most pronounced in the earliest *South Carolina* decision. For a unanimous Court, Mr. Justice Stone set out the following guidelines for exercising judicial authority in "dormancy" cases. Absent legislation, "the judicial function under the commerce clause. . .stops with the inquiry whether the state legislature . . . has acted within its province, and whether the means of regulation chosen are reasonably adapted to the end sought." In evaluating reasonableness "courts . . . cannot act as Congress does when, after weighing all the conflicting interests, state and national, it determines when and how much the state regulatory power shall yield to the larger interests of national commerce." The opinion goes on to accord greater fact finding finality to state legislatures than to

2. South Carolina Highway Dept. v. Barnwell Bros., 303 U.S. 177, 184-5 (1938).

3. Southern Pacific v. Arizona, 325 U.S. 761, 768 (1945). The distinction between these two sources of the "dormant" commerce power in theory affects the way in which judges consider and decide cases. In drawing on "implications of the commerce clause", Supreme Court Justices, as ultimate interpreters of the Constitution, enjoy greatest decisional discretion. Where recourse is to "the presumed intention of Congress", however, judges are technically subject to the constraints imposed by an effort to fulfil the aims of someone else.

4. *Supra*, n. 2.

5. 434 U.S. 429 (1978)

6. 450 U.S. 662 (1981)

federal courts. "Since the adoption of one weight or width regulation, rather than another, is a legislative and not a judicial choice, its constitutionality is not to be determined by weighing. . .the merits of the legislative choice and rejecting it if the weight of the evidence presented in court appears to favor a different standard."[7]

In *Raymond*, the guidelines of the Court's deceptively unanimous opinion (one member not participating) were blurred by an added separate concurring opinion of four members. The principal opinion initially seemed to call for careful judicial scrutiny of facts bearing on national and state/local interests. The need in such dormant power cases was for "a sensitive consideration of the weight and nature of the state regulatory concern in light of the extent of the burden imposed on. . .interstate commerce."[8] Nevertheless, "those who would challenge state regulations said to promote highway safety must overcome a 'strong presumption of their validity.' "[9]

Whatever the strength of this presumption, in *Raymond* two factors worked against its use. First, "The State. . .virtually defaulted in its defense of the regulations as a safety measure." Second, several exceptions to the regulations favoring Wisconsin industries were held to weaken the presumption "because they undermine the assumption that the State's own political processes will act as a check on local regulations that unduly burden interstate commerce." The Court deemed its holding "narrow" in that similar laws might be upheld "if the evidence . . . on . . . safety . . . were not so overwhelmingly one-sided as in this case."[10]

The complete absence of any plausible safety rationale for the particular length limits was the decisive factor in the Court's opinion. Given the state's failure to demonstrate a legitimate safety issue, the need to balance national and state/local interests was eliminated. Had the state advanced plausible safety considerations, the balance would have been reached under *South Carolina*'s doctrine of a "strong presumption" favoring state regulation "said to promote highway safety."

The added thrust of the concurring opinion was its rejection of balancing tests which might bring non-illusory state safety regulations into question. Also drawing on *South Carolina*, the four concurring Justices argued, "[I]f safety considerations are not illusory the Court will not sec-

7. The three preceding quotations are at *supra*, n. 2 at 190-91. The Court by *dictum* also suggested a basis for a broader Federal preemption role in railroad regulation. "Unlike the railroads, local highways are built, owned and maintained by the state or its local subdivisions." 303 U.S. 187.

8. *Supra*, n. 5 at 441.

9. *Id.* at 444.

10. *Id.* at 444, 447.

ond-guess legislative judgments about their importance in comparison with burdens on interstate commerce."

The one opinion in *South Carolina*, and the two in *Raymond*, grew to three in *Kassell*.

The facts of *Kassell* as to truck length limits and discriminatory exceptions were much like those in *Raymond*. Added to them, however, was the State of Iowa's vigorous defense of its regulation on safety grounds. Eroding its effort was a legislative history supportive of a predominant intent to force the transfer of large interstate rigs to highways in more permissive adjoining states. A majority favoring invalidation of the state law was reached through a four Justice principal opinion and a two Justice concurrence on different grounds. Three other Justices filed a dissenting opinion.

The Federal District Court in *Kassell* had observed that "[t]he *total effect* of the law as a safety measure is so slight and problematical that it does not outweigh the national interest in keeping interstate commerce free from interferences that seriously impede it."[11] In affirming the Trial Court and Court of Appeals, the four Justice opinion observed that "Iowa made a more serious effort to support the safety rationale of its law than did Wisconsin in *Raymond*, but its effort was no more persuasive."[12]

With reference to these facts, the opinion held the dormant commerce power to require invalidation where "the State's safety interest has been found to be illusory . . . ." But to this it added the phrase "and its regulations impair significantly the federal interest in efficient and safe transportation . . . ."[13] In this view, even where enforcement of a state's "illusory" safety interest imposes a totally useless burden on commerce, it is not necessarily "undue." Nevertheless, in a subtle transmutation, the four Justice *Kassell* opinion also restricted *Raymond's* "strong presumption" favoring state regulations from those "said to promote highway safety" to "bona fida safety regulations."[14] The principal *Kassell* opinion relied also on discriminatory exceptions favoring local interests as grounds for withdrawing the "special deference" normally accorded to state highway safety requirements. The two Justice concurring opinion, essential to a binding majority, centered its analysis on this issue of moti-

11. *Supra*, n. 6 at 668.

12. *Id.* at 671-72.

13. *Id.* at 671.

14. *Id.* at 670 and *supra*, n. 5 at 444. Rather than citing Raymond, however, the opinion cites Bibb v. Navajo Freight Lines, 359 U.S. 520, 524 (1959). This is another significant highway safety case in which the Supreme Court struck down an Illinois law requiring motor carrier mudguards different than those prevailing in most other states. As to highway safety regulations in general, without reference to their actual credibility, the Bibb Court said "These safety measures carry a strong presumption of validity when challenged in court." Literally, this formulation seems closer to Raymond than to the Kassell reformulation.

vation. Its touchstone for legitimizing the state regulation was not in purposes "suggested after the fact by counsel", these being subject to "the vagaries of litigation." It was instead whether "an examination of the evidence before or available to the lawmaker indicates that the regulation is not wholly irrational in the light of its purposes."

In general, assuming a semblance of rationality, "the burdens imposed on commerce must be balanced against the local benefits actually sought to be achieved by the State's lawmakers . . . ."[15] Thus, any need to balance national and state interests would depend on the character of motives drawn from the pertinent legislative history. Given the predominance of its "protectionist" purposes, this particular state highway safety regulation required no balancing of benefits and burdens. It was by its own background "*impermissible* under the Commerce Clause."[16]

This leaves open how these two Justices would view the role of "special deference" and "strong presumption" in balancing conflicting interests in a context of legitimizing motives. The only clue lies in their approving citation of a principle from the *Raymond* concurring opinion. The present concurring Justices found in that doctrine "a judicial disinclination to weigh the interests of safety against other societal interests, such as the economic interest in the free flow of commerce."[17] For these two Justices, the answer to whether a state regulation should prevail is a function of its purpose, not its impact.

In contrast, the three dissenting Justices in *Kassell* would have relied on the "strong presumption of validity" accorded highway safety regulation to uphold the state's position. Their interpretation of how "the safety purpose in relation to the burden on commerce" should be given "sensitive consideration" has particular relevance here.

> When engaging in such a consideration the court does not directly compare safety benefits to commerce costs and strike down the legislation if the latter can be said in some vague sense to 'outweigh' the former. Such an approach would make an empty gesture of the strong presumption of validity accorded state safety measures, particularly those governing highways.

Indeed, the limited purpose of the "sensitive consideration" is simply to determine ". . .if the asserted safety justification, although rational, is simply a pretext for discrimination." Based on the trial court record (rather than the legislative history), the dissenters had "no doubt that the challenged statute is a valid highway safety regulation . . . ." In the context of the dormant commerce power, the dissenters were especially averse to "compelling Iowa to yield to the policy choices of neighboring states." Only Congress through actual exercise of its commerce powers

15. *Supra*, n. 6 at 680.
16. *Id.* at 685.
17. *Id.* at 686.

could "preempt the rational policy determinations of the Iowa legislature. . . ."[18]

These three Supreme Court decisions involving the validity of highway safety regulation under the dormant commerce power establish an important point. In all of the varying doctrinal formulations, efficiency as a decisional factor was thoroughly subordinated to considerations of comity and motivation.

C. *Preemption Issues Arising from Ambiguities in Federal Transportation Safety Statutes and Regulations*

Where the allocation of regulatory authority depends on inferences of Congressional intent drawn from statutes, judges appear to place no greater reliance on efficiency values. The trio of U.S. Supreme Court opinions in *Ray v. Atlantic Richfield Co.*[19] demonstrate the point.

Various requirements of Washington State law regulating tankers navigating Puget Sound were claimed to be preempted, largely by a specific Federal Act[20], but in part by the dormant commerce power. These were: (1) that tankers of 50,000 DWT or larger employ a pilot licensed by the state while navigating Puget Sound and adjacent waters; (2) that tankers from 40,000 to 125,000 DWT possess each of five "standard safety features"; or, alternatively, move under tug escort; and (3) that tankers over 125,000 DWT were barred. The difficulties in discerning an intended role for federal preemption on Issues 2 and 3 are reflected in three opinions from which a majority on each issue was eked out.

The clarity of the statutory scheme affecting preemption as to Issue 1 produced unanimity. In 1871, Congress acted to limit traditional state authority over the licensing of pilots for ocean vessels operating in navigable coastal waters. It did so by vesting exclusive authority in the federal government to license pilots on ocean vessels in domestic trade. Authority to license pilots on "other than coast-wise steam vessels" (i.e. vessels in foreign trade) was left in the states.[21]

All five "concurring or dissenting" Justices joined the four Justice "Opinion of the Court" ("principal opinion") in upholding preemption as

18. The preceding quotations from the dissenting opinion in *Kassell* are at 450 U.S. 692 and 699.

19. 435 U.S. 151 (1978).

20. Ports and Waterways Safety Act of 1972 ("PWSA"), 86 Stat. 424.

21. The statutory basis for the bifurcation of pilot licensing authority as of the 1978 *Ray* decision is set out at 435 U.S. 159-60. It was first established in 16 Stat. 455 (1871). Current statutes which maintain the bifurcation are 46 U.S.C. Secs. 8501, 8502 and 8503. Primary authority over vessels in foreign trade remains with the states. Absent licensing by a particular state, the Secretary of Transportation may impose pilot licensing on such vessels in navigable waters within that state's primary authority.

to tankers in domestic trade, but not in foreign trade. Since the holding was clearly ordained by the statutory scheme, there was no occasion to consider any factors bearing on the original or continuing efficacy of the substantive result.

Ambiguities of intent may abound, however, where Congress acts less decisively to foreclose state authority. As a guide in such cases, the *Ray* opinion set out the established Supreme Court standard of inconsistency. It can be broadly viewed as an effort to accomplish what Congress would have thought sensible in the circumstances.

> Even if Congress has not completely foreclosed state legislation in a particular area, a state statute is void to the extent that it actually conflicts with a valid federal statute. A conflict will be found 'where compliance with both federal and state regulations is a physical impossibility,' [Case cited.], or where the state 'law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.'[Cases cited.][22]

All nine members of the Supreme Court joined in this Part II of the opinion. The stunningly varied fruits of its judicial application, however, are found in the principal and two concurring and dissenting opinions discussed below.

As to Issue 2, the principal opinion read the PWSA as establishing "that Congress intended uniform national standards for design and construction of tankers that would foreclose the imposition of different or more stringent standards." More specifically, under Title II of the Act, "Congress anticipated the enforcement of federal standards that would pre-empt state efforts to mandate different or higher design requirements."[23] Since the vessels met existing federal standards, state regulation of vessel design was barred.

As noted, the state exempted vessels moving under tug escort from its conflicting design and construction standards. In the principal opinion, this alternate requirement was viewed as an operating condition. Under Title I of the PWSA, the Secretary of Transportation ("DOT") was authorized, but not mandated, to issue operating condition standards. Absent the issuance of such preemptive federal standards (as in this case), states were authorized to regulate operating conditions. On the matter of statutory preemption, therefore, the principal opinion upheld the alternative tug escort requirement for vessels not in compliance with the state's "standard safety features."[24]

Also in issue was the validity of the tug escort requirement under the Commerce Clause. Here the Court was a bit more inclined to allude to issues of relative efficiency. The principal opinion viewed the requirement

22. *Supra*, n. 19 at 158.
23. *Id.* at 163.
24. *Id.* at 171-72.

as an essentially local regulation, similar to local pilotage requirements. Since compliance with it had no practical effect on operations beyond the locality, the tug-escort requirement "is not the type of regulation that demands a uniform national rule." Nor was the State barred from waiving the requirement for vessels meeting its design standards. The added cost of "less than one cent per barrel of oil" established the absence of any significant impediment to "the free and efficient flow of foreign and interstate commerce."[25]

In comparison, the three Justice "concurring and dissenting" opinion relied on the tug escort exemption to sustain the State's "standard safety feature" requirements. These Justices noted that no tanker operating in Puget Sound waters had ever complied with the design requirements. Due to the tug escort exemption they had become a dead-letter. Accordingly, the State law was no obstacle to the operation of federal law. These Justices joined the principal opinion in sustaining the tug-escort alternative on statutory and Commerce Clause grounds.[26]

In an ironic twist, these dissenters found assurance in the "relative expense of compliance" that the "standard safety features" would remain a dead-letter.[27] Under this view, a state regulation subject to preemption because compliance costs were low enough to be met might be saved by costs high enough to assure non-compliance.

The third opinion, by two "concurring and dissenting" Justices, agreed on invalidating the "standard safety feature", but dissented from the validation of the tug-escort requirement.[28] Rather than viewing this requirement as an exemption, the third opinion characterized it as "an inseparable appendage to the invalid design requirement", constituting a "special penalty" for non-compliance.

The opinion did note the "small" annual compliance cost of $277,500 imposed on ARCO by the tug-escort requirement. But once the principle was allowed, this single minor burden could be exacerbated through "addition and multiplication by similar action in other states."[29]

Issue 3 involved the state ban in Puget Sound on tankers over 125,000 DWT. On this issue the two Justice concurring opinion provided

---

25. *Id.* at 172-73.
26. *Id.* at 180-87.
27. *Id.* at 181.
28. *Id.* at 187-90.
29. *Id.* at 189. This broader impact would fall as heavily on an independent tug-escort requirement as on an "inseparable appendage" to an invalid regulation. The dissenters, however, distinguished the burdens of an "inseparable appendage" from those of "general rules imposing tug-escort requirements. . . ." It posited that the modest costs of compliance with the tug-escort requirements might constitute a burden on commerce only when tied to invalid state regulation. In such case, costs deemed modest when weighed against the benefits of non-conflicting state regulation might constitute an "obstacle" to the Congressional goal of uniform vessel design.

the necessary majority. The main disagreement between the principal and the three Justice dissenting opinion was over the scope of relevant preemptive rulemaking authority, if any, exercised by DOT.

Title I of the PWSA authorized DOT to establish "vessel size and speed limitations."[30] The principal opinion, drawing on statutory language and legislative history, ascribed the following relevant intent to Congress: "it desired someone with an overview of all the possible ramifications of the regulation of oil tankers to promulgate limitations on tanker size and that he should act only after balancing all the competing movements." Regulations, which DOT was also authorized but not mandated to issue, would preempt state law to the extent of their coverage. The question was whether the tanker size limit was preempted by federal regulations covering the same subject.

The principal opinion held the state law to have been preempted by virtue of the manner in which DOT's authority had been exercised. In part, the opinion relied on an unwritten Coast Guard "local navigation rule" prohibiting passage of more than one 70,000 DWT vessel at a time through Rosario Strait. In bad weather the limit was 40,000 DWT. From this local rule the principal opinion found it "sufficiently clear that federal authorities have indeed dealt with the issue of size and in what circumstances tanker size is to limit navigation in Puget Sound."

The jump from the Coast Guard's narrow local rule to this sweeping conclusion might seem unduly expansive. Perhaps to buttress its position, the principal opinion also drew on the failure of DOT to issue additional regulations on tanker size limits. From that failure it inferred DOT's judgment that "no such regulation is appropriate or approved pursuant to the policy of the statute." Justices joining in the principal opinion were thus satisfied that "the Secretary has exercised his authority in accordance with the statutory directives . . . ."

The analysis of the three Justice dissenting opinion was predicated on the limited scope of the Coast Guard's local navigation rule. It found ". . .no indication that in establishing the vessel traffic rule for Rosario Strait the Coast Guard considered the need for promulgating size limitations for the entire Sound."[31] Moreover, it found no conflict between the Coast Guard rule and the state's size limitation applicable to tankers moving throughout Puget Sound. From the state law's statement of purpose, the dissenters concluded that the size limitation was "tailored to respond to unique local conditions" including "susceptibility. . . to damage from large oil spills and. . .peculiar navigational problems . . . ."[32] It made no

30. *Id.* at 173-78.

31. *Id.* at 183. The opinions did not identify the location of Rosario Strait or indicate the percentage of Puget Sound tankers affected by the Coast Guard rule.

32. *Id.* at 184-85.

effort to weigh the broader economic impact of barring larger tankers from Puget Sound against these asserted state interests. Justification was found in the tanker operators failure to establish that any impact on commerce was ". . . clearly excessive in relation to the putative local benefits."[33]

It appears that in applying the "inconsistency" standard in *Ray*, recourse by Justices to efficiency values was opportunistically selective. While efficiency factors were used to support conclusions reached on other grounds, no systematic invocation of efficiency as a decisional factor is evident. The widely differing opinions are best explained as projections by Justices of their own ideological views on the proper relationship between federal and state authority.

D. Summary

Where Congressional enactments offer ambiguity in place of silence, the court in theory is obliged to strive toward the result most likely intended by the enacting Congress. Since the nature of that intent is rarely clear, courts must serve as proxies for Congress. In determining the ultimate question of whether "a state statute . . .actually conflicts with a valid federal statute", judges in theory may impute efficiency goals to Congress. Costs incurred or benefits lost as a result of state regulations are surely relevant in identifying "obstacles" to the accomplishment of Congressional purposes. In their implementation of federal preemption policies, however, there is little in these Supreme Court opinions to suggest the imputation of efficiency goals to Congress.

III. Federal Preemption Under The 1975 Hazardous Materials Transportation Act: A Critical Overview

A. The Statutory Framework

The provisions of the 1975 Hazardous Materials Transportation Act allocating regulatory authority between federal and state governments are much the same as those of the Senate Bill.[34] The House Bill made no provision for preemption and limited DOT's regulatory authority to interstate and foreign commerce. Subject to exceptions on request, the Senate Bill preempted all state and local requirements "inconsistent" with the Act and DOT's regulations. It also extended DOT's authority directly to intrastate commerce.[35] As described in the Conference Report, the com-

33. *Id.* at 187.

34. HMTA, 88 Stat. 2156 (1974), 49 U.S.C. Secs. 1801-1813 (1988), Passed by the 93rd Cong., 2nd Sess. which adjourned in 1974, the Act comprises Title I of The Transportation Safety Act of 1974. Presidential approval was on Jan. 3, 1975. 88 Stat. 2173.

35. The House and Senate Bills, H.R. 15223 and S. 4057, were reported in House Rep. No.

promise kept the Senate's preemption provisions but narrowed DOT's authority over intrastate commerce to that affecting interstate or foreign commerce.[36]

The granting of exceptions from the statutory preemption of "inconsistent" state and local requirements was delegated to DOT. Statutory waivers would be allowed, in effect, upon DOT's determination that: (i) the requirement in issue affords public protection equal to, or greater than, that afforded by the Act or DOT's regulations and (ii) it does not unreasonably burden interstate commerce.[37]

Because of its theoretical importance in expanding the grounds for exceptions, the introduction of "unreasonably" into the Act to modify "burden" warrants a brief comment. It confirms occasional rumors of a mysterious mutability in the statutory drafting process.

The Senate Bill as reported and passed in the Senate did not include "unreasonably."[38] The Conference Report accurately described the grounds in the Senate Bill for excepting "inconsistent" state/local regulations from preemption as follows: "where they afford an equal or greater level of protection and they do not burden interstate commerce."[39] The Conference Report then described the final preemption agreement: "The conference substitute adopts the Senate provision on preemption [subject to an added unrelated exclusion of personal firearms and ammunition from the Act]."[40] Despite the purported adoption of the Senate proposal in which "unreasonably" had never appeared, the term worked its way into the text of the Conference Bill.[41]

Modifying "burden" by "unreasonably" operates to justify waivers that might be denied absent such modification. Thus, the inclusion of "unreasonably" would further the House aim of limiting statutory preemption. How its insertion into the final text was effected may never be known to those not privy to the process. In Senate proceedings on the Conference Report, however, a Senate manager complained of "the way in which the conference on this bill was mishandled by staff." His immediate concern involved a separate issue, but the "staff" alluded to was a particular staff member "of the House Interstate Commerce Commit-

93-1083 and Sen. Rep. No. 93-1192, 93rd Cong., 2nd Sess. The formal vehicle for passage was H.R. 15223, which was amended in the Senate by substitution of the provisions of S. 4057. 120 Cong. Rec. 34089, 34393.

36. Statutory language is occasionally paraphrased for simplification. See, 88 Stat. 2156 and 2161. The Conference Report was printed as House Rep. 93-1589 and Sen. Rep. 93-1347. It is also set out at 120 Cong. Rec. 39678, *et seq.*, to which subsequent references are made.

37. 88 Stat. 2161.

38. Sen. Rep. No. 93-1192, p. 63; 120 Cong. Rec. 34089-90, 34092, 34393.

39. 120 Cong. Rec. 39685.

40. *Id.*

41. 120 Cong. Rec. 39678, 39680.

tee."[42] These events occurred on December 18, 1974, two days prior to *sine die* adjournment amidst the usual turmoil of the period.

The Senate Report set out the Committee's intent in regard to the Act's preemption provisions.

> The Committee endorses the principle of federal preemption in order to preclude a multiplicity of state and local regulations and the potential for varying as well as conflicting regulations in the area of hazardous materials transportation. However, the Committee is aware that certain exceptional circumstances may necessitate immediate action to secure more stringent regulations. For the purpose of meeting such emergency situations, the Committee has provided that any state . . . may request . . . approval of regulations which vary from federal regulations.[43]

Although House members had accepted the statutory preemption provisions of the Senate Bill, they had not agreed to the text of the Senate Report. In particular, they might well reject "exceptional circumstances" or "emergency situations" as limiting conditions for excepting "inconsistent" state and local regulations from preemption.

B. Administrative Implementation of Preemption under the HMTA

1. DOT's Decisional Standards in Inconsistency Rulings and Non-Preemption Determinations

To define "inconsistent", DOT drew on U.S. Supreme Court decisions dealing with preemption under Congressional enactments. *Ray* had not yet been decided, but DOT found guidance in earlier decisions. The following tests were thus adopted:

> (1) Whether compliance with both the state or political subdivision requirement and the Act or regulations issued under the Act is possible; and
> (2) The extent to which the state or political subdivision requirement is an obstacle to the accomplishment and execution of the Act and the regulations issued under the Act.[44]

The first test (also termed the "dual compliance" or "direct conflict" test) corresponds to the "physical impossibility" test of *Ray*.[45] As noted below, the second test varies in one important respect from its formulation in *Ray* and earlier Supreme Court decisions.

The two tests of inconsistency differ in their reliance on issues of fact or judgment. The first test is largely factual. The impossibility of dual

---

42. 120 Cong. Rec. 40680.

43. Sen. Rep. 93-1192, at 37-38.

44. These tests are found in 49 CFR § 107.209 (c). See also, 41 Fed. Reg. 38167, 38171, Sept. 9, 1976. 49 CFR §§ 107.201-225 contain DOT's regulations on preemption in general.

Test (1) derived most notably from Hines v. Davidowitz, 312 U.S. 52, 67 (1941) and Jones v. Rath Packing, 430 U.S.519, 526 (1977). Both tests appear in Florida Lime & Avacado Growers v. Paul, 373 U.S. 132, 142 (1963).

45. *Supra*, n. 22 and related text.

compliance in any respect or degree (greater than *de minimis*) creates an "inconsistency." No substantial question as to the scope of the "impossibility" is presented.

In contrast, once the existence of an "obstacle" short of an "impossibility" is determined, the second test becomes judgmental.[46] Is "the extent" to which such an obstacle impedes the purposes of federal regulation sufficient to constitute an inconsistency? This differs from the usual inquiry suggested by *Ray* and its predecessors. These decisions (if taken literally) look only to whether a state regulation "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress."[47] DOT's formulation of the second test, at least facially, offers greater freedom not to find inconsistency in "obstacles" not rising to the level of "impossibility."

In itself, a finding of inconsistency carries no implication of how it should be removed. Does it make sense, therefore, that a finding of inconsistency should force the state or locality to initiate proceedings for an *ex post facto* exception from preemption? The answer lies in the Supremacy Clause, the logic of which supports an initial presumption favoring removal of an inconsistent state requirement. That logic, however, extends only to the burden of presenting a case for retaining the inconsistent requirement. In assessing the consequences of preemption, the added burden of a presumption against the substance of the state regulation should be avoided. To so presume would preclude an objective evaluation of opposing federal and state claims for regulatory authority.

In regard to non-preemption (or waiver) determinations, the HMTA also vested broad decisional discretion in DOT. Like DOT's dual tests of inconsistency, the Act's dual waiver of preemption standards included a largely factual and a largely judgmental test. Whether a state/local requirement affords "an equal or greater level of protection" than that afforded by federal regulations is largely factual. (However, the complication of assessing tradeoffs between multiple facets of a single regulation might arise.) Conversely, whether a requirement "unreasonably burdens" commerce (as compared to whether it simply "burdens" commerce) almost always involves a subjective judgment.

DOT has viewed as a "question of fact" the balancing of "the states's. . . interest in public health and safety against the national interest in maintaining a free flow of commerce."[48] Its calculus for identifying

46. DOT considers the first test to be "subsumed" in the second, which includes all "obstacles", including those arising from the impossibility of "dual compliance." IR-2, 44 Fed. Reg. 75566-67, Dec. 20, 1979. *Aff'd.* 45 Fed. Reg. 71881, Oct. 30, 1980.

47. *Supra*, n. 21 and cases cited.

48. 41 Fed. Reg. 38168, Sept. 9, 1976.

"unreasonable" burdens, however, involves issues considerably more subjective than those found in "pure" fact determinations. The rationality and effectiveness of the state/local requirement is first balanced against "the extent to which increased costs and impairment of efficiency result from [that] requirement." DOT then considers the balance in relation to "the need for uniformity" and the prevalence or absence of the requirement in other jurisdictions.[49] For better or worse, these standards create a far broader potential for not preempting inconsistent state regulations than the "emergency situations" and "exceptional circumstances" cited in the Senate Report.

2. *DOT'S PROCEDURES FOR INCONSISTENCY RULINGS AND NON-PREEMPTION DETERMINATIONS*

The 1975 Act explicitly gave DOT original jurisdiction to issue non-preemption determinations, but was silent on the source of inconsistency rulings. Although the Senate Report did not address this issue, it is a reasonable inference that Congress viewed courts as that primary source. The Report, however, did describe DOT's rulemaking authority as "a broad mandate so that comprehensive regulations can be issued as the need arises covering whatever facet of the transportation requires regulation."

DOT used this expansive implementational authority under the 1975 Act "to facilitate" advisory inconsistency rulings through self-established concurrent jurisdiction. Thus, "the opportunity to seek administrative rulings as to. . .inconsistency" was accorded to "states and their political subdivisions and persons affected by [their] requirements . . . ."[50]

Parties within these categories were authorized to request DOT to issue an administrative ruling on the inconsistency of any particular state/local requirement. Applications from "persons affected" were served by applicant(s) on the "concerned" state or political subdivision. Applications from governmental entities were served by DOT directly on persons "readily identifiable" as affected persons or by Federal Register publication. DOT could also initiate proceedings for inconsistency rulings in the absence of an application.

Proceedings were by informal investigation, with opportunities for all parties to make "submissions . . . relevant to the application . . . ." Hearings or conferences could be used in DOT's discretion.

Appeals from an initial administrative determination were taken to DOT's Administrator, Research and Special Programs Administration.

---

49. 49 CFR § 107.221.

50. 41 Fed Reg. 38168, Sept. 9, 1976. 49 CFR § 107.203. DOT procedures for inconsistency rulings are codified in 49 CFR § 107.202-211.

Appeals had to be filed within 30 days of service of an initial ruling, but no time limit was set for the Administrator's ruling.[51]

In regard to non-preemption determinations, an application by states or political subdivisions pertaining to a particular requirement had to be preceded by a final court or DOT ruling, or an acknowledgement, of inconsistency.[52] Primary responsibility was on the applicant for service on "reasonably ascertainable" affected persons. Where service by applicants proved impractical, DOT could supplement, or assume the primary responsibility for, service. As with inconsistency rulings, DOT could proceed less informally by investigation, hearing or conference. A DOT ruling became final in the absence of a timely appeal from the initial administrative ruling or by service of the Administrator's order on appeal.

DOT's regulations provided that "to the extent possible" each application "will be acted upon in a manner consistent with previous applications for non-preemption determinations."[53] This is presumably intended to assure parties of reasonable decisional consistency. Where the material facts of separate proceedings were much the same, however, "to the extent possible" could invite as much concern as it offers assurance. Where they differ, the "assurance" had little purpose.

DOT's non-preemption procedures treat as a denial of an application the failure to issue a final order within 90 days of the receipt of all necessary substantive information.[54] Appeal procedures from an initial administrative order on non-preemption are the same as those governing inconsistency rulings. As with inconsistency rulings, DOT's non-preemption procedures impose no time limit on the Administrator's order on appeal.

DOT's 1975 Act procedures relating to inconsistency and non-preemption seem capable of eliciting the information needed to resolve these issues. The substantive standards covering both types of proceedings, however, called for judgmental evaluations requiring broad discretion. Overall, the regulations offered a potential both for objectively considering efficiency concerns and for favoring a possibly inappropriate institutional perspective. In short, the implementation of these regulations (as is true of most administrative regulations) requires a measure of judicial oversight. The only questions are how and how much.

---

51. 49 CFR Sec. 107.211.

52. DOT procedures governing Non-Preemption Determinations are codified in 49 CFR Sec. 107.215-225.

53. 49 CFR Sec. 107.219 (e).

54. 49 CFR Sec. 107.223. Time runs from DOT's service of notice of such receipt on the parties. See 49 CFR Sec. 107.219 (d).

3. *Relationships Between DOT and the Courts in Implementing HMTA Preemption Policies.*[55]

A. *Preliminary Comment: Inconsistency Rulings*

The fact of concurrent judicial and administrative jurisdiction over inconsistency rulings creates a potential for conflict between DOT and the courts. Ultimately, the courts must prevail. Their supremacy is assured, not necessarily by greater competence or impartiality in the rendering of initial decisions, but by their unique enforcement authority. The logic of a DOT inconsistency ruling may in itself invite compliance by state or local regulators. If it does not, the matter of barring enforcement of the state/local regulation in issue rests with the courts. Conversely, states or localities seeking to enforce their regulations must look to the courts for vindication. In either case, enforcement ultimately depends on a *de novo* court resolution of the inconsistency issue. Prior DOT rulings on the same issues are advisory at most. Relationships which have developed in these circumstances between the courts and DOT are discussed below.

B. *Primary Jurisdiction*

The existence of concurrent judicial and administrative jurisdiction to decide complex issues of fact and policy may lead courts to seek guidance from the more specialized and experienced administrative agency. Primary jurisdiction involves discretionary court deferral to an administrative agency for an initial decision on a designated issue. Its common uses have been summarized as follows:

> (1) when resolution of the case involves complex factual inquiries particularly within the province of the regulatory body's expertise;
> (2) when interpretation of administrative rules is required; and
> (3) when interpretation of the regulatory statute involves broad policy determinations within the special ken of the regulatory agency.[56]

In the matter of inconsistency rulings, courts have made little use of primary jurisdiction. Its use has been largely confined to federal courts in the First Circuit. Initially, that Circuit's Court of Appeals affirmed a District Court's preliminary injunction against enforcement of three Rhode Island liquid energy gas ("LEG") equipment regulations. Further decisions were

---

55. In preparing this analysis the aim was to utilize all judicial preemption decisions obtainable with reasonable effort. A few unreported decisions not available through usual library sources, including computerized services, were not considered. However, all cases obtainable through these sources were considered. These are numbered essentially in chronological order in a Case Appendix titled "*Court Decisions Relating To HMTA Preemption* (1975-90)." (Two "primary jurisdiction" cases, however, relate only indirectly to preemption. See, *infra*, n. 61.) Citations are to Case Appendix Numbers (e.g. Case App. No. 1).

56. L. SCHWARTZ, J. FLYNN, H. FIRST, FREE ENTERPRISE AND ECONOMIC ORGANIZATION: GOVERNMENT REGULATION (6th Ed. 1985), at 838-9.

deferred pending the issuance of DOT inconsistency rulings. DOT advisory rulings involving all Rhode Island LEG regulations had been requested by the defendant-state two days prior to the District Court hearing on plaintiff-transporter's injunction request.

When DOT failed to meet the original expiration date, the District Court extended the preliminary injunction. The Court of Appeals upheld the District Court's deferral to DOT as a proper exercise of discretion. It also observed that the District Court was free to proceed to a final decision on the merits should it become "no longer reasonable to await DOT action."[57]

For whatever reasons, the transporter and the state at this stage of HMTA experience differed as to whose initial rulings might prove most advantageous. DOT eventually ruled on the state's request. As to the regulations which had been preliminarily enjoined, DOT found two inconsistent and another not inconsistent. In 1982, the transporter-plaintiff renewed the effort begun in 1978 for a permanent injunction and the state withdrew the two equipment related regulations found inconsistent by DOT.[58]

In a subsequent case, the First Circuit Court of Appeals observed that "district courts are free . . . to use the 'flexible tool' of primary jurisdiction . . . where doing so will expedite just resolution of the controversy."[59] The comment followed DOT's declination of the Court's invitation for an *amicus* brief on a pending inconsistency issue. DOT's stated reason was its reluctance to express an opinion absent the opportunity for a "decision likely based on a more complete record and informed by greater expertise . . . ." Its aim was to encourage initial use of its own procedures. In the end, the Court of Appeals decided the matter without input from DOT. Having found "the legal questions . . . not particularly difficult", it sought to avoid "significant additional delay."[60] In general, courts have not used primary jurisdiction in determining inconsistency.[61]

C. *The Status of a Prior DOT Inconsistency Ruling in Subsequent Court Proceedings*

This section reviews five court cases in which acceptance or rejec-

57. Case App. No. 4, at 824-5.

58. These later proceedings, discussed below, are reported in DOT Inconsistency Ruling No. 2 ("IR-2"), 44 Fed. Reg. 75566 and 45 Fed. Reg. 718811, and Case App. No. 7.

59. Case App. No. 10, at 51.

60. *Id.*

61. In circumstances not involving DOT inconsistency procedures, two federal courts remitted litigants to DOT's "primary" HMTA rulemaking jurisdiction as a condition for further judicial proceedings. See, Case App. Nos. 1 & 3.

tion of a prior DOT inconsistency ruling on the state/local requirement in issue is central to the court's decision. Taking the cases chronologically, the first is an exception to the more common judicial adherence to prior DOT inconsistency rulings.[62] In Appendix Case No. 5, the District Court considered DOT's ruling that certain City of Boston regulations governing the transport of various flammable materials were inconsistent and thus preempted. These regulations established a morning rush hour curfew and required special permits for the use of city streets conditioned on compelling need. DOT had found these requirements inconsistent mainly on the basis of HMTA regulations intended to prevent traffic diversions and unnecessary delays. DOT also expressed its view that Boston had failed to act "through a process that adequately weighs the full consequences of its routing choices and ensures the safety of citizens in other jurisdictions . . . ."

The District Court rejected DOT's ruling and denied the transporter's request for a preliminary injunction. Boston's regulations, it noted, had been submitted to the state's Department of Public Safety and Fire Marshals in neighboring jurisdictions. Since these submissions were "information not made available to DOT", the Court could find Boston's requirements "fully consistent with federal law . . . without reflecting on [DOT's] considered and expert views."[63]

In balancing the equities for granting or denying an injunction, the court put forward this case for Boston:

> Boston's unique geography and the accidents of its historical development have resulted in a highway system that is peculiarly vulnerable to the dangers of transporting hazardous materials.

Under the HMTA, of course, this consideration pertains to a waiver from preemption rather than to an inconsistency ruling.

In Appendix Case No. 7, the District Court gained Court of Appeals approval for enjoining the previously discussed Rhode Island LEG regulations found inconsistent by DOT. At the same time, the transporter's Constitutional preemption claims against other regulations found not inconsistent by DOT were rejected.

In accepting DOT's rulings on inconsistency, the District Court spoke deferentially of "the experience and judgment of those with nation-wide responsibility who rendered the inconsistency determination . . . ." The court found further support for DOT's findings of no inconsistency in Constitutional standards governing preemption under the dormant commerce power.

> Although a primary Congressional objective was . . . uniform, national stan-

62. The ruling was IR-3, 46 Fed. Reg. 18918 (March 26, 1981) and 47 Fed. Reg. 18457 (April 29, 1982).

63. All quotations from Case App. No. 5 are found at pp. 58,626-27.

> dards in hazardous materials transportation, preemption of state regulations regarding highway safety is not to be undertaken lightly. [citing *Raymond, supra]* . . . .
>
> Deference should be given to state highway safety regulations because the state generally knows best how to handle problems unique to the area. [citing *Ray*, *supra*.] Consequently, state highway safety regulations carry a strong presumption of validity. [citing *Raymond* and *Bibb*, *supra*] This presumption, however, clearly is not irrebuttable.[64]

These doctrines are also extraneous to HMTA preemption standards.

Two other cases involved the circumstance of a DOT rule (HM-164) which included (as Appendix A) DOT's own "interpretation of the general preemptive effect of its regulation . . . ."[65] It was therefore possible, absent a DOT ruling, for the parties and courts to agree from the facts that DOT, if requested to rule, would find inconsistency.[66] The first of these involved one of several disputes between New York City and DOT regarding population density as a preemption factor.[67]

The New York City Health Code barred the transport of large quantity shipments of radioactive materials ("RAMs") in or through the City. In early 1977, various RAM shippers sought an inconsistency ruling from DOT. DOT denied the request on the grounds that it had not as yet issued routing regulations with which the City's routing requirements might prove inconsistent.[68] DOT then initiated a rulemaking proceeding leading to Rule HM-164, governing RAM transport.

The City sued to invalidate Rule HM-164 or bar its preemption of the City's regulation. The District Court characterized HM-164 as:

> arbitrary, capricious, and an abuse of discretion insofar as it overrides nonfederal bans on truck transportation of spent fuel and other large-quantity radioactive materials through densely populated areas such as New York City.[69]

As to localities of lesser density, the District Court found the record insufficient to sustain a broader injunction against the rule.

A divided Court of Appeals (2-1), in reversing the District Court, upheld the validity of HM-164, including its inconsistency standards. In essence, the Court of Appeals faulted the District Court view that DOT should have determined the safest mode for moving RAMs in and about New York City. It saw as DOT's proper role the development of acceptable levels of safety for all modes engaged in the transport. Thus, highway

---

64. Case App. No. 7, 535 F. Supp. 516.

65. 49 CFR Sec. 177.825 and Appendix A, Part 177. The quote is from the General Preamble to Inconsistency Rulings IR-7 Through IR-15. 49 Fed. Reg. 46632, 46634. (Nov. 27, 1984).

66. *See* 539 F. Supp. 1248 and 772 F.2d 1113.

67. Case App. No. 8.

68. IR-1, 43 Fed. Reg. 16954 (April 20, 1978).

69. 539 F. Supp. 1293.

transport at acceptable levels of safety was not to be barred because barges might be inherently safer. The Court of Appeals was also critical of the District Court's treatment of the case as "an inquiry into DOT's anticipated denial of the City's request for a non-preemption ruling . . . ."[70]

If the District Court could be fairly faulted on these grounds, it could also be complimented on the standards it applied in deciding for non-preemption. The Court was unremittingly concerned with the possible existence of local safety problems arising from high population density which might render DOT's general rule inapplicable to New York City. It avoided reliance on Constitutional Commerce Clause presumptions favoring state/local highway regulations. It approached the issue before it as less a matter of general highway safety and more a matter of the particular problems associated with HazMat transport.

A second case involving HM-164 arose from a local township ban on the importation of radioactive waste and spent nuclear fuel for storage. The Court of Appeals affirmed a District Court judgment that the importation ban was preempted by the DOT rule.[71] Specifically, the Court of Appeals construed the rule to render the routing ban inconsistent as a prohibition of transportation "on routes or at locations" authorized by the DOT rule.

The final case in this category dealt with a municipal annual permit requirement for the loading, unloading and storage of hazardous materials by railroads. In rejecting DOT's finding of inconsistency, the District Court summarily dismissed its "Advisory Ruling" as "poorly reasoned, based primarily on speculation . . . ."[72] In contrast, the Court of Appeals found substantial overlap between DOT regulations covering loading, unloading and storage and the City's permit requirements. In reversing the District Court, the Court of Appeals emphasized the trial court's failure "to accord sufficient deference to [DOT's] ruling."

Generally, but not invariably, courts have deferred to prior DOT inconsistency rulings on the subject matter of a particular case. As has been noted, however, there is a persistent tendency for courts to combine the separate statutory standards of inconsistency and preemption waivers into a single judicial standard of preemption. Its roots are in the decisional needs of an injunctive proceeding and the simultaneous consideration of statutory and Constitutional issues.

---

70. 715 F.2d 752.

71. Case App. No. 12. The Court also held the township ban preempted under the Atomic Energy Act and the Commerce Clause.

72. Case App. No 18. This was preceded by DOT's ruling of inconsistency in IR-19, 52 Fed Reg. 24404 (June, 30, 1987) and 53 Fed. Reg. 11600 (April 7, 1988).

D. Judicial Application of the Inconsistency Standard Absent a Prior DOT Ruling on the Identical Subject Matter

These decisions fall into two sub-classes: (i) those reached without reference to other arguably relevant DOT inconsistency rulings, and (ii) those in which such rulings figure prominently.

As would be expected, the two decisions in the first sub-class shed little light on judicial deference to DOT or its expertise.[73] In both cases, however, a state or local regulation applicable to HazMat transport was held preempted under the HMTA.[74] In three other decisions the courts relied significantly on other DOT inconsistency rulings.[75] A fourth proceeding in this same class, however, requires fuller attention as a prototype of the substantive and procedural problems inherent in the original 1975 HMTA.[76]

On August 27, 1980, New York City obtained a state court temporary restraining order against defendant-transporters ("defendants") barring further violations of municipal regulations governing hazardous gas highway transport. Following the court's stated intent to grant a preliminary injunction, defendants removed the action to the Federal District Court. Defendants then moved to vacate the preliminary injunction on grounds of statutory and Constitutional preemption.

On September 26, 1980, defendants also requested DOT to rule the City's regulations inconsistent under the HMTA.[77] On October 16, 1980, following an October 8, 1980 argument on the preliminary injunction, defendants filed cross complaints in the District Court against enforcement of the City regulations. Pending a District Court decision on the same statutory issue, DOT deferred action on its own ruling.

The principal regulations in issue conditioned highway transport of hazardous gases in New York City on a Fire Commissioner permit fixing route and curfew restrictions. In claiming inconsistency under the HMTA, defendants relied on a DOT regulation barring "unnecessary delay in movement of shipments." The thrust of this argument was perhaps blunted by added reliance on a motor carrier safety regulation which DOT had expressly not incorporated into its HMTA regulations. That regulation

---

73. Case App. Nos. 9 and 19.

74. Case App. No. 19, however, contains intimations, without specific citation, of Court reliance on IR-19 (*supra*, n. 72) involving unnecessary delays in transit. 747 F. Supp. 1403.

75. Case App. Nos. 10, 14 and 17. In No. 14, however, the Court of Appeals relied wholly on the preemptive effect of the Federal Railroad Safety Act. The significance of that Act to preemption under the HMTA is discussed below.

76. Case App. No. 6.

77. The events concerning DOT's role are set out in IR-5, 47 Fed. Reg. 51991 (Nov. 18, 1982), issued after the District Court and Court of Appeals opinions in Case App. No. 6.

required, in the absence of a "practical alternative", that motor vehicles carrying hazardous materials "must be operated over routes which do not go through or near heavily populated areas . . . tunnels, narrow streets or alleys."

In viewing the non-HMTA regulation as relevant to "the question of preemption", the District Court found the City regulations "entirely consistent" with the HMTA and applicable DOT regulations. It did so following a review of principal Supreme Court decisions applying the "inconsistency" standard under the Supremacy Clause in the context of conflicting federal and state/local regulatory requirements. What proved dispositive, however, was the Court's ultimate recourse to the basic principle of comity governing highway safety regulation under the dormant commerce power.[78]

> In addition to providing general rules regarding preemption in the cases cited earlier, the Supreme Court has given a specific direction as to preemption in highway safety cases. The Supreme Court has stated that local highway safety regulations should be given deference and that they enjoy a strong presumption of validity. *Raymond Motor Transportation, Inc. v. Rice*, 434 U.S. 429, 443-44 (1978).

Thus, for the statutory preemption standards of the HMTA, a District Court once more substituted a Constitutional preemption doctrine under the dormant commerce power.[79] In its separate rejection of defendants' added Constitutional claim of preemption based on a "disproportionate burden on interstate commerce", the District Court again cited *Raymond* as its principal authority.[80]

In affirming the District Court's conclusion of non-preemption under the Constitution and the HMTA, the Court of Appeals was better able to separate these two strands of its decision. Its statutory holding reflected its view that DOT had not extended the goal of national uniformity "to embrace the local routing necessary to avoid the very dangers contemplated by [its rules]." The Court of Appeals, however, remanded the issue of the possible inconsistency of the City's hazard class definitions to the District Court. Finding the record "scanty" on this issue, the City proposed to "defer to the DOT, before which there is currently pending an

---

78. 515 F. Supp. 670.

79. In Case App. No. II the District Court was even more resolute in melding the distinctive preemption standards of the dormant commerce power and the HMTA into a single overarching principle. (1986 Fed. Carr. Cas. at p. 58,017).

> Although a primary Congressional objective in enacting the HMTA was promulgation of uniform, material standards for hazardous materials transportation, preemption of state regulations regarding highway safety is not undertaken lightly. [citing Raymond.]

The answer, of course, is that preemption under the HMTA should reflect its unique statutory goals rather than broad Constitutional doctrines.

80. 515 F. Supp. 672. See, Raymond, *supra*, Part II. B.

inconsistency action." The Court of Appeal's remand allowed the District Court "to take more evidence or to await DOT action, which it is not bound to do . . . ."

Thereafter, the City, as well as the initial petitioners for the DOT inconsistency ruling, returned to DOT for a ruling on this remaining issue. DOT then issued an initial ruling of inconsistency from which it does not appear that an appeal was taken.

In itself, the wastage of decisional resources resulting from the concurrent initial jurisdiction of DOT, state courts and federal courts over the issue of inconsistency is of no small concern. It is of less concern, however, than this further demonstration of the substantive confusion to which courts are prone in simultaneously applying the Constitutional and statutory standards of preemption.

Whatever the basis for deference to state/local regulation in the context of general highway safety, Congress in the HMTA treated HazMat transport as a separate problem. The preemption provisions of the HMTA were intended to reflect that difference by basing preemption on the standard of inconsistency. Under established judicial doctrine, a finding of inconsistency in itself, whether under the "physical impossibility" or the "obstacle" test, results in federal preemption under the Supremacy Clause.[81] The 1975 HMTA assigned solely to DOT the separate task of waiving preemption of inconsistent state or local regulations. It is only this waiver process which calls for consideration of the relative merits of inconsistent regulations.

Courts undermine HMAT preemption goals when they apply doctrines covering general highway safety under the dormant commerce power to statutory waiver decisions. This practice ignores those elements of HazMat transport which led to a separate regulatory structure. The fault lies as much in the Act, however, as in the courts. The Act's use of a "burden" standard for preemption waivers might well be taken by courts as a green light to proceed over the more familiar routes of Constitutional interpretation.

E. Judicial and Administrative Accommodation of Preemption under the Multi-Modal HMTA and Specific Modal Safety Statutes

The application of HMTA preemption policies to HazMat transport is further complicated by other statutory preemption policies governing general transport safety. One problem is the preemptive effect of DOT's Federal Motor Carrier Safety Regulations, incorporated by DOT into its HMTA

81. *Cf.* Ray, *supra*, 435 U. S. 151, 158; Florida Lime, *supra*, 373 U. S. 132, 142; Jones, *supra*, 430 U.S. 519, 540-543.

regulations. Even when applied to HazMat transport, preemption is determined under Motor Carrier Safety Act, rather than HMTA, standards.

The Motor Carrier Safety Act covers the general safety regulation of commercial motor vehicles.[82] It vests authority in DOT to determine the enforceablilty of state highway laws or regulations in accordance with the Act's standards. Those which have the "same effect" as a DOT regulation may remain in effect. Laws or regulations "less stringent" than DOT's are preempted. State requirements "additional to or more stringent" than DOT's are enforceable unless DOT finds: (i) an absence of safety benefit; (ii) incompatibility with a DOT regulation; or (iii) "an undue burden on interstate commerce." DOT may waive determinations of preemption when satisfied that a waiver is consistent with the public interest and the safe operation of the motor vehicle.[83]

DOT has issued extensive regulations under the Act.[84] In regard to their effect on "state and local laws" these regulations include the following general standard:

> Subchapter B of this chapter [i.e., DOT's Federal Motor Carrier Safety Regulations] is not intended to preclude states or subdivisions thereof from establishing or enforcing state or local laws relating to safety, the compliance with which would not prevent full compliance with these regulations.[85]

Several court decisions have construed this regulation to cover only the first "direct conflict" test of the inconsistency standard and not the second "obstacle" test.[86]

When DOT incorporated its Federal Motor Carrier Regulations into its HMTA regulations in 1978,[87] its sole stated aim "was to make civil penalties and other enforcement tools of the HMTA applicable to those hazardous materials carriers already subject to Parts 390-397." DOT disavowed any intent "to preempt state or local law not preempted by the FMCSR . . . ." This creates the anomaly of an entire class of HMTA regulations not subject to preemption under the HMTA.

Whether DOT may modify the HMTA in this manner need not be pursued here. However, the better part of administrative valor might lie in a legislative solution. If retention of current general motor carrier safety pre-

---

82. Title II, P.L. 98-554, 98 Stat. 2829, 2832; 49 U.S.C. App. Secs. 2501, *et seq.*

83. 49 U.S.C. App. Sec. 2505 (c) and (d). See, also, *id.*, Sec. 2509 regarding State inspection powers.

84. In particular see 49 CFR Parts 390-397. These Parts are included in Subchapter B of Chapter III, "Federal Highway Administration, Department of Transportation."

85. 49 CFR § 390.9.

86. *See*, Case App. No. 11 at p. 58,020; No. 6 at 670 and No.7 at 515-16. For further discussion of the preemption policy of the Motor Carrier Safety Act of 1984 see Specialized Carriers & Rigging v. Commonwealth of Virginia, 795 F.2d 1152 (6th Cir. 1986).

87. 43 Fed. Reg. 4858 (Feb. 6, 1978). All such regulations were so incorporated except 49 CFR §§ 397.3 and 397.9.

emption standards is desired, Congress could simply authorize HMTA penalties against motor carriers in violation of general safety regulations while transporting hazardous materials. Conversely, if incorporation of general safety regulations into the HMTA is thought useful, then why should HMTA preemption standards not apply? The inclusion of a class of motor carrier safety regulations under the HMTA subject to lesser preemption standards only encourages further judicial erosion of HMTA motor carrier preemption standards.[88]

Much thornier problems now exist in coordinating the separate statutory preemption standards governing the safety of general railroad operations and those involving hazardous materials. DOT regulates general railroad safety under the Federal Railroad Safety Act ("FRSA").[89] The FRSA preemption standard reflects the traditionally greater concern for national uniformity in rail safety regulation as compared to highway safety regulation. In essence, a state rail safety regulation becomes ineffective upon DOT's issuance of a regulation ". . .covering the subject matter of such state requirement." In the case of "more stringent" state requirements, however, the following class of exceptions to preemption are provided:

> [W]hen necessary to eliminate or reduce an essentially local safety hazard, and when not incompatible with any federal law, rule, regulation, order, or standard, and when not creating an undue burden on interstate commerce.

The major differences between HMTA and FRSA preemption standards are readily apparent. HMTA preemption applies only where concurrent federal and state local requirements are inconsistent. FRSA preemption applies to any state requirement whose subject matter is covered in DOT regulations. Neither statute explicitly assigns responsibility for initial preemption decisions, but exceptions from HMTA preemption require initial administrative determinations by DOT. Exceptions to FRSA preemption arise directly from the Act itself (subject to judicial resolution of disputes). Several courts have held the FRSA exception applicable only to state, and not local, requirements.[90]

Substantively, where state or local requirements afford "equal or greater" protection, HMTA exceptions are available for those which "[do] not unreasonably burden commerce." Under the FRSA, an otherwise preempted "more stringent" state requirement remains effective if, as a first condition, it is "necessary to eliminate or reduce an essentially local hazard . . . ." Thus, the immediate focus is on the character of the particular hazard which is claimed to require a more strict regulation. Regard-

88. Case Appendix No. 11 effectively illustrates how the narrower motor carrier preemption standard may operate in this manner. See, 1986 Fed. Carr. Cas. at p. 58,020.

89. 45 U.S.C. §§ 421 *et seq.*

90. Case Appendix No. 16, 705 F.Supp. 387-88, and cases cited.

less of the severity of that hazard, the state must then run two further gauntlets on the path to an exception. It must demonstrate that its requirement is "not incompatible" with any federal requirement and does not create "an undue burden on interstate commerce."

The problems of accommodating statutory preemption provisions relating to railroad safety with HMTA preemption are the opposite of those relating to motor carrier safety. Motor carrier safety regulations incorporated by DOT into the HMTA are nevertheless declared by DOT to remain subject to the preemption standards of the Motor Carrier Safety Act. In contrast, FRSA preemption provisions begin with this declaration: "[T]hat laws, rules, regulations, orders, and standards *relating to railroad safety* shall be nationally uniform to the extent practicable." (Emphasis added.)[91]

Putting aside the possible ambiguities of "to the extent practicable", the fact is that FRSA preemption *literally* covers the entire field of railroad safety. Does this mean that FRSA preemption extends to railroad safety laws governing the rail transport of hazardous materials? Conversely, does it mean that in regard to rail transport, HMTA preemption is superseded by the FRSA? Under current case law, the answer to both questions is "Yes".

An early indication of the potential confusion arising from these overlapping preemption provisions occurred in 1977.[92] The Illinois Commerce Commission had issued General Order 200 having statewide application to the use of certain railroad tank cars carrying hazardous materials. The District Court held the regulations preempted under both the FRSA and the HMTA. With regard to the FRSA, the court held that General Order 200 dealt with the subject matter of an existing FRSA regulation. Moreover, being statewide, it could not qualify as relating to "an essentially local hazard." An exception from FRSA preemption was therefore not possible.[93]

While the court also found General Order 200 preempted because of inconsistency with DOT's HMTA regulations, procedural confusion marked its decree. The Commission was barred from enforcing its order until it obtained ". . .an appropriate non-preemption determination issued by [DOT] pursuant to 49 U.S.C. Sec. 1811(b)." That order in itself, of course, could not operate as an exception to FRSA preemption unless FRSA preemption was thought to be superseded by HMTA preemption. The court did not address the issue.

A second court case considered claims by affected railroads that a

91. 45 U.S.C. Sec. 434, first sentence.

92. Case Appendix No. 2.

93. 453 F.Supp. 925-926.

state law requiring cabooses on most trains was preempted by the FRSA and the HMTA.[94] The District Court held the State law preempted under both Acts. As for the FRSA, the Court found that DOT had considered and rejected a proposed rule requiring cabooses or alternative equipment on trains. It viewed DOT's inaction as "an affirmative ruling that caboose regulation is inappropriate." Since the subject matter was thus covered by DOT, the FRSA required preemption. Also, because the law operated statewide, the court found it did not "address a local safety hazard."

The caboose requirements specifically covered trains longer than 2,000 feet carrying certain designated hazardous materials. The court found that this requirement, ". . .insofar as it purports to regulate hazardous materials", was inconsistent with the HMTA. The District Court left in limbo, however, some questions of practical concern. Would a HMTA preemption waiver from DOT serve to eliminate FRSA preemption as to hazardous materials? Or, would FRSA preemption supersede a HMTA waiver because the statewide regulation "relating to railroad safety" served no essentially local safety purpose?

In affirming the District Court judgment, the Court of Appeals did not address these questions. Instead, it based its affirmance not on HMTA preemption, but "on the clear application of the FRSA and its preemptive effect . . . ."[95] The role of HMTA preemption was not decided. The Court of Appeals appeared to construe the FRSA as covering the entire state law, including its application to hazardous materials. If so, it managed in the process to eliminate any role for an HMTA preemption waiver directed solely to HazMat transport by rail.

In 1990, the 6th Circuit Court of Appeals put the issue in these terms:

> The question before us is simply this: Should a train carrying a load of hazardous waste be considered a railroad which happens to be carrying hazardous waste (thus suggesting the application of the FRSA preemption provision) or hazardous waste which happens to be carried by rail (thus suggesting application of the HMTA preemption provision)?[96]

Its answer was unequivocal:

> In this case, the decision of the district court, applying the FRSA preemption provision to regulations promulgated under the HMTA, retains the essential character and purpose of both statutes. The national character of railroad regulation and the need for regulation of hazardous materials transportation on an intermodal basis are both respected.[97]

An important element of the court's analysis was the "plain mean-

94. Case Appendix No. 14. A separate claim of partial preemption under the Locomotive Boiler Inspection Act, 45 U.S.C. Secs. 421, *et seq.*, was also made.

95. 850 F.2d 265.

96. Case Appendix No. 20 at 501.

97. *Id.* at 503.

ing" in the FRSA of "any . . . law relating to railroad safety."[98] The court discerned no purpose of Congress in enacting the HMTA to restrict the scope of the FRSA's preemption coverage.

In denying *certiorari* the Supreme Court took no position on the Court of Appeal's holding.

For the present, the prevailing view in the federal courts is that the preemption standards of the FRSA supersede those of the HMTA in regard to the rail transport of hazardous materials. This poses a major policy issue. Should rail safety regulation directed solely to HazMat transport remain subject to FRSA preemption, or should HMTA preemption apply uniformly to all modes?

IV. Summary of 1990 Amendments Affecting HMTA Preemption

The Hazardous Materials Transportation Uniform Safety Act of 1990 ("HMTUSA") is the first general overhaul of the 1974-5 HMTA.[99] Many Congressional hearings were held in the intervening sixteen years on the subject of HazMat transport. The principal hearings of the 100th and 101st Congresses are listed in the Hearing Appendix.[100] These include a variety of perspectives and proposals on the subject of federal preemption. They are background to the following major 1990 changes from previous HMTA preemption policies, standards and procedures.

Section 2. Findings.[101]

The Congressional findings place added emphasis on the role of federal preemption in the regulatory scheme. Finding 3 speaks of state/local "laws and regulations which vary from federal laws and regulations", thereby creating "the potential for unreasonable hazards in other jurisdictions and for confounding shippers and carriers which attempt to comply with multiple and conflicting. . .regulatory requirements." Finding four declares "consistency in laws and regulations" as "necessary and desirable" given the "potential risks. . .posed by unintentional releases of hazardous materials."

Finding five speaks to the need for federal regulatory standards applicable to "intrastate, interstate and foreign commerce" in order "to achieve greater uniformity and to promote public health, welfare, and safety at all levels." Finding eight defines the movement of hazardous

98. *Id.* at 501.

99. P. L. 101-615, 104 Stat. 3244. Its principal stated purpose is "To amend the Hazardous Materials Transportation Act. . . .", 49 U.S.C. §§ 1801, *et seq.* The 1990 HMTA consists of 31 Sections amending various provisions of the HMTA. Statutory citations are to these Sections and corresponding pages of 104 Stat.

100. The occasional citations will be to Hearing Appendix Numbers (e.g. Hearing App. No. I).

101. 104 Stat. 3244-5.

materials in commerce as "necessary and desirable to maintain economic vitality and meet consumer demands. . . ." To these ends it posits the aim of "efficient" as well as "safe" transport.

SECTIONS 3 AND 4. INTRASTATE COMMERCE.[102]

In substance, the pre-1990 HMTA (Sec. 103, 49 U.S.C. § 1802) defined domestic "commerce" to include (i) interstate commerce and (ii) intrastate commerce "which affects" interstate commerce. The task of determining which aspects of intrastate commerce affected interstate commerce was left to DOT. In turn, DOT was authorized to issue "regulations for the safe transportation in commerce of hazardous materials." (Sec. 105, 49 U.S C. § 1804). The definition was thus consistent with the limitation of DOT's intrastate commerce authority to those aspects "affecting" interstate commerce.

Section 3 of HMTUSA leaves the definition of "commerce" intact. Section 4, however, directs DOT to issue regulations for the safe transportation of hazardous materials in "intrastate, interstate and foreign commerce." Failure to amend the definition was possibly an oversight; but if so, one shared by three reporting Committees.[103] Oversight or not, the directive that DOT issue regulations governing the whole of intrastate commerce seems a more decisive expression of intent than the failure to amend the definition of commerce. In any case, ambiguities now arise from other provisions of HMTUSA limiting application of DOT regulations to "Commerce" (presumably as defined).[104] A clarification of Congressional intent would be useful.

In Constitutional terms, the direct application of federal authority to the whole of the intrastate transport of hazardous materials implies a Congressional determination that all such commerce "affects" interstate commerce. Minor differences may exist in the operational characteristics of intrastate and interstate HazMat transport. But the similarities and func-

102. 140 Stat. 3245 and 3247-50.

103. Whatever their differences, each of the principal hazardous materials transport bills reported by Committees during the 101st Cong., 2nd Sess. contained these same provisions. See: House Rep. No. 101-444, Part 1, to accompany H.R. 3520, House Comm. on Energy and Commerce, April 3, 1990, at 2-3; Sen. Rep. No. 101-449 on S.2936, Senate Comm. on Commerce, Science and Transportation, Aug. 30, 1990, at 31-32; and House Rep. No. 101-444, Part 2, to accompany H.R.3520, House Comm. on Public Works and Transportation, Oct. 17, 1990, at 50 and 52.

104. For example, Section 4 (amending § 105, 49 U.S.C. § 1804 (a) (3)) covers the applicability of DOT regulations to various categories of persons with functions relating to packages or containers. Such regulations are limited to packages and containers intended "for use in the transportation in commerce of hazardous materials." Does this limitation to "commerce" imply that DOT may not issue regulations covering packages and containers used in intrastate commerce absent a determination that it "affects" interstate commerce? This seems unlikely. See also, § 105 (b) (3) (F) in Section 4 of the 1990 HMTA.

tional relationships of the two sectors seem sufficient to support unified regulation.[105]

SECTION 13. RELATIONSHIP TO OTHER LAWS: STANDARDS

Most notably, the pre-1990 preemption standard of "Inconsistency" is replaced by the following:

> [Any state/local requirement][106] is preempted if—
> (1) compliance with both the [state/local] requirement and any requirement of this title or of a regulation issued under [it] is not possible,
> (2) [the state/local] requirement as applied or enforced creates an obstacle to the accomplishment and execution of this title or the regulations issued under [it], or
> (3) it is preempted under section 105(a)(4) or section 105(b).

Insofar as paragraphs (1) and (2) essentially replicate the judicially formulated Constitutional standard of inconsistency (i.e. the "impossibility" and "obstacle" tests), the change would seem purely formal. The proper comparison, however, is with the inconsistency standard as formulated by DOT. DOT's "obstacle" test differed from the judicial formulation by purporting to consider "[t]he extent to which" the state/local requirement operated as an "obstacle."[107]

It is not readily apparent that DOT's administration of its own version of the "obstacle" test led to different results than would have been reached under the judicial formulation. Nevertheless, it seems useful to simplify the preemption standard itself by minimizing its balancing elements. Where an obstacle has no more than a *de minimis* impact, it may be treated as a non-obstacle whose removal would serve no purpose. An obstacle of any greater impact, however, once identified, should be preempted. At that point, the burden of proceeding to justify the obstacle as an overriding need of local safety should be assumed by the state or locality.

HMTUSA's recital of the two inconsistency tests provides a sharper focus on the presence of an obstacle. This will better serve the new em-

---

105. The extension of direct regulatory authority to intrastate commerce was supported by several major shipper and transporter organizations: the Office of Technological Assessment; the HazMat transport expert of the Congressional Research Service, Library of Congress; and ultimately by DOT. The City of New York was opposed.

For a flavor of the varying views see: Hearing App. No. I, 16, 26, 57, 48; No. II, 87, 91; No. IV, 171, 260, 616, 691, 815; No. V, 735; No. VI, 416. An Office of Technology Assessment Report, "Transportation of Hazardous Materials", July, 1986 ("OTA Report"), prepared at Congressional request, provided a major resource for the legislative deliberations. Portions relating to the "intrastate commerce" issue are at 16, 149, 197-199.

106. The general statutory reference to a "state or political subdivision thereof or Indian tribe" is shortened herein to "states and localities" or "state/local."

107. *See*, *supra*, nn. 44-47 and related text.

phasis on "consistency" and "greater uniformity" by clearly delineating the initial technical test of preemption from the balancing test for waivers.

To the preemption standards of paragraphs (1) and (2) requiring administrative or judicial determinations, paragraph (3) adds two categories of broader and direct statutory preemption. Section 105(a)(4) (See Section 4, HMTA) preempts by statute any state/local regulations "not substantively the same" as the HMTA, or regulations under it, as to five covered subjects. In substance, these relate to: (i) designation, description and classification of hazardous materials; (ii) packing, labeling and placarding; (iii) shipping documents; (iv) written notification, recording and reporting of unintentional releases in transportation; and (v) packages and containers.

Direct statutory preemption reflects the judgment of Congress that the requirements of uniformity are sufficiently compelling to warrant eliminating the statutory processes for determining preemption. In the interest of procedural efficiency, widespread acceptance was expressed in the hearings for the principle of direct preemption by statute of limited subjects. Views on particular subjects varied, but the final statutory selection reflects a broad (if not a total) consensus on appropriate coverage.[108]

Notwithstanding their broad preemption by statute, the usual opportunity for a waiver of preemption is accorded on these five covered subjects. This allows for the needed flexibility to consider claims of local necessity. The arrangement thus combines greater decisional efficiency with the opportunity to maximize substantive efficiency.

By its reference to section 105(b)(4) (Section 4, HMTA), paragraph (3) applies the same procedures to the statutory preemption of the federal highway routing standards of section 105 (b). Subject to the detailed provisions of section 105 (b), DOT by regulation must issue standards for use by states and localities in:

> establishing, maintaining, and enforcing (A) specific highway routes over which hazardous materials may and may not be transported by motor vehicles, and (B) limitations and requirements with respect to highway routing.

Thereafter, subject to the statutory time schedule, no state or locality may establish, maintain or enforce:

> (i) any highway route designation over which hazardous materials may or may not be transported by motor vehicles, or
>
> (ii) any limitation or requirement with respect to such routing, [except] in accordance with [the procedural and substantive requirements of the federal standards].

---

108. *See*, Hearing Appendix No. I, pp. 101, 134-5, 163, 364, 373-4; No. II, pp. 70, 74-5, 81-2, 156-7, 162; No. IV, pp. 564-6, 580-1, 584, 737, 805, 815, 817, 829; No. V., pp. 583, 754, 789, 794, 1628; No. VI., pp. 335, 355, 407, 420; No. VIII, pp. 30, 33-4, 120, 125, 162, 272. Among the proposed subjects not included for statutory preemption was pre-notification of movements.

Among the more contentious preemption issues under the HMTA have been those involving local routing bans or constraints. Especially intense have been disputes involving routing restrictions against radioactive materials, as a commodity class, and based on population density, as a geographical factor. Most intense, have been these two in combination. The use of preemption to enforce uniform federal standards responds to the previously noted "NIMBY" motivations of state and local governments. As with the "covered subjects", procedural and substantive efficiency are well served by including DOT's routing standards under direct HMTA preemption.

Previous HMTA standards governing waivers of preemption were not changed.

SECTION 13. RELATIONSHIP TO OTHER LAWS: PROCEDURES.[109]

HMTUSA addresses the matter of concurrent preemption rulings by DOT and the courts. It accords statutory status to DOT's determinations of preemption under the modified standards. It also authorizes DOT to determine whether state/local requirements are preempted under the statutory provisions governing "covered subjects" and "routing." Concurrent court jurisdiction continues as to all categories of preemption.

As for DOT's jurisdiction, any state or locality or any person "affected by any [state or local requirement]" may apply to DOT for a determination of preemption. DOT must provide notice of the application by publication in the Federal Register. Following publication, applicant is barred from seeking judicial relief on the same issue until the earlier of DOT's final action, or 180 days after filing the application. Concurrent court jurisdiction to make preemption determinations is expressly preserved. Any party authorized to apply to DOT for a determination may also seek it "in any court of competent jurisdiction in lieu of applying to [DOT]." Thus, the only restriction on concurrent jurisdiction is the maximum 180 day delay imposed on a party who has initially applied to DOT. Parties remain free to continue the race to the forum they perceive as most favorable.

The amendments continue the formality of DOT's exclusive role in granting initial waivers of preemption. The one stated condition for filing a waiver application is acknowledgement by the state/local applicant that the subject requirement is preempted under the HMTA. Final court or DOT determinations of preemption would presumably constitute acknowledgement. More to the point, however, a voluntary acknowledgement can obviate the need for a prior determination.

Any party to a DOT preemption determination or waiver decision may seek judicial review "by the appropriate district court of the United

109. 104 Stat. 3259-60.

States." Absent other HMTA provisions governing the appeal, the standards of judicial review and procedures would be determined under the Administrative Procedure Act (APA).[110]

SECTION 30. HMTA PREEMPTION AND RAIL TRANSPORT.[111]

The most recent Court of Appeals decision to hold the rail transport of hazardous materials subject to preemption under the FRSA, rather than HMTA, was issued on April 13, 1990.[112] The final House and Senate votes on HMTUSA were on October 25 and 26, 1990 respectively.[113] Attention was given in the House to the decision and the *certiorari* petition pending in the Supreme Court.[114]

In a floor colloquy a member stated his understanding of the Court decision and posed a question:

> [T]he Sixth Circuit ruled that section 205 [of the FRSA] encompasses hazardous materials, so that if DOT has promulgated regulations in a subject area pertaining to hazardous materials, the states cannot.[115] The preemption sections of this bill, then, do not address the scope of section 205?

In reply the bill's manager observed that ". . .the gentleman is correct. The preemption provisions of this bill, Sections 4 and 13, do not address that issue." This statement confirmed his previous assurance that "[n]othing in this bill affects in any way the scope of section 205 of the Federal Railroad Safety Act."

He was correct. Section 30 of the bill (as enacted), which he might well have cited, said just that: "Nothing in this Act, including the amendments made by this Act, shall be construed to alter, amend, modify or otherwise affect the scope of section 205 of the [FRSA]."

Court decisions holding that FRSA preemption supersedes HMTA preemption, in regard to HazMat transport by rail, find support in the literal provisions of the 1970 FRSA. The legislative history of the 1974-5 HMTA, however, carries no hint of any intended modal bifurcation of its preemption provisions.

Section 30 of HMTUSA constitutes acceptance by Congress of the interpretation placed by courts on the applicability of FRSA preemption to rail transport of hazardous materials. Its inclusion in the legislation was hardly necessary because, absent any amendments restoring HMTA preemption, judicial accommodation of the two statutes would prevail. There

110. 5 U.S.C. §§ 701-706.

111. 104 Stat. 3277.

112. *See*, *supra*, nn. 96-98 and related text.

113. House, 136 Cong. Rec. (No. 148, Pt. II) H 13645, *et seq.*; Senate, 136 Cong. Rec. (No 149, Pt. III) S 17264, *et seq.*

114. *Id.*, House, at H 13648-9.

115. *See*, *supra*, n. 89 and related text.

was, however, a possible purpose for enacting Section 30. This would be to forestall an argument that the failure of the more recent HMTUSA to exclude railroads from its preemption provisions implied a rejection of the judicial interpretation.

None of the three Committee reports recommended Section 30, or its substance, although two came well after the Court's April 13, 1990 decision (the other preceding it by 10 days).[116] It seems doubtful that its real significance as a major HMTA amendment effected through subtle reference to another statute was understood by many in Congress. Also, in late 1990, a reversal of prevailing judicial doctrine was still possible. Had this occurred, HMTA preemption would have been simply restored to the modal uniformity more likely assumed by Congress in the 1974 HMTA. For those favoring FRSA preemption over HazMat rail transport, the insertion of Section 30 could provide potential benefits without risk.

MISCELLANY

Apart from the foregoing amended preemption provisions, HMTUSA broadens the scope of federal preemption by expanding subjects covered by the Act or DOT regulations. Among these are Personnel Training (Sections 7 and 17), Fees (Section 13) and State Motor Carrier Registration and Permitting Forms and Procedures (Section 22).

Of particular interest is an ancillary disavowal of federal preemption, possibly intended to resolve an issue in litigation between the State of Colorado and the Department of Defense.[117] The question is whether the sovereign immunity of the United States should extend to DOT contractors hired to haul nuclear materials. Section 20 places such contractors in the same status as other HazMat transporters.

V. CONCLUSION: RECOMMENDED CHANGES IN HMTA PREEMPTION PROVISIONS AND PRACTICES

A. INTRODUCTION

If justification can exist for an article of this length, it lies in the effort to set out the considerations which give rise to the recommendations which follow. These include:

(i) the need to give effect to the distinctive social and political factors which underlie the use of federal preemption in the field of HazMat transport;

116. The Reports are cited *supra*, n. 103. At various hearings the Association of American Railroads presented a case for the exclusive use of FRSA preemption for the rail transport of hazardous materials. Hearing Appendix No. IV, 699, 711-12; No. VI, 100-01 and No. VIII, 99-100. Its basic contention was that "There should be total federal preemption except where state regulation is necessary to deal with essentially local hazards." Hearing Appendix No. VI, 101.

117. *See*, Hearing App. No. V, at 450.

(ii) the difficulties encountered by courts in separating customary Constitutional doctrines of federal preemption as applied to general highway and rail safety from the statute directed exclusively to the needs of HazMat transport;
(iii) a tendency of courts to resolve close questions of statutory construction involving federal preemption through reliance on broad ideological preferences regarding federal/state relations rather than on comparative efficiency;
(iv) the procedural inefficiencies generated by the concurrent authority of the courts and DOT to issue preemption decisions or opinions;
(v) the need for a unified and efficient decisional process which promotes the objective resolution of conflicting claims for uniformity and diversity and elicits public confidence in that resolution.
(vi) the need to minimize statutory ambiguities in the interest of administrative consistency and efficiency; and
(vii) the need to maintain uniform standards and procedures for preemption and waivers which, as to all modes, effectively balance State/local safety concerns with broader national interests.

B. Section 3. Definition of "Commerce"

For the reasons previously stated, the definition of "Commerce" should be amended to include intrastate commerce.[118]

C. Section 13. Preemption and Waiver Standards

Two changes in the statutory standards of Section 13 are proposed, one relating to preemption determinations and the other to waivers of preemption.[119] The proposed changes will be stated first and brief rationales will follow.

A waiver of preemption is presently available for a state/local requirement which: (i) affords protection "equal or greater" than HMTA requirements; and (ii) "does not unreasonably burden commerce." It is first proposed to eliminate the second standard as a basis for waivers but to utilize it as an added standard in determining preemption.

A model of sorts is found in the bill reported by the House Committee on Energy and Commerce. Under that proposal an added basis for preemption would have been that the state/local requirement as applied or

118. *See*, *supra*, nn. 102-05, and related text. The same concern might logically apply to "foreign" commerce, which has the same status under Section 4 in regard to DOT regulations as intrastate and interstate commerce. It is conceivable, however, that foreign commerce may be subject to unique considerations under international arrangements not applicable to domestic commerce. In any case, the present concern is with Federal preemption as it affects domestic commerce.

119. With regard to the inclusion of Motor Carrier Safety regulations under the HMTA, a change in DOT regulations is also recommended. As incorporated in the HMTA, these regulations, where hazardous materials transport is involved, should be given the same preemptive effect as all other HMTA regulations. *Supra*, nn. 83-88 and related text.

enforced "imposes an unreasonable burden on commerce."[120]

The second proposed change in Section 13 standards is for a replacement of the current "burden" standard for waivers. The new standard, drawn essentially from the FRSA[121], would focus on the need for any added safety requirements arising from unique or unusual local conditions. Whether local safety factors create a need for more stringent regulation than that provided by the HMTA should be approached from the perspective of the "Findings" of HMTUSA. That is, do any unique or unusual local safety factors create added risks sufficient to warrant an exception to the statutory principles of "uniformity" and "consistency?" Would a waiver of preemption in the circumstances serve better than enforced uniformity in furthering the ultimate statutory aim of "safe and efficient" HazMat transport?

These proposals are rooted in the judicial administration of the "burden" standard and the added emphasis on consistency and uniformity in HMTUSA. In the role of a "loophole", this standard has become a repository for ideological preferences regarding the proper relationship between federal and state authority in a federal system. As applied by courts, it contributes little to the use of federal preemption in promoting safe and efficient HazMat transport.[122]

The "burden" standard could be kept, however, as a supplemental preemption test rather than as the basis for granting waivers.

In this role the standard under the HMTA may add no more to the preemption of state/local HazMat transport regulation than it has under the Supremacy Clause. But in either context it permits preemption where the added costs of state/local regulation unduly burden HazMat transport without transgressing other statutory preemption tests.

D. Section 13. Preemption and Waiver Procedures

As in the discussion of preemption standards, the statement of each proposal will be followed by its rationale.

The first proposal is to eliminate the concurrent jurisdiction of courts

120. House Rep. 101-444, Part 1, *supra*, n. 103, at 84. Without explanation of how the same standard would operate for the two different purposes, the Committee also chose to retain the "burden" standard as grounds for a waiver of preemption. *Id.*, at 48-50.

121. *Supra*, n. 89 and text following.

122. It should be noted that under the 1974-5 HMTA virtually no use has been made of DOT's "exclusive" waiver of preemption jurisdiction. See, Case Appendix No. 15, at 1297-98. An earlier waiver request to DOT was processed as a preemption determination. 49 Fed. Reg. 3166 (Jan. 25, 1984). An important reason has been the previously noted practice of the federal courts, in exercising jurisdiction over preemption determinations, to decide the waiver issue as well. The proposals made here as to preemption and waiver standards and procedures are likely to increase the number of waiver requests. This would result from both the 1990 expansion of HMTA preemption and, as proposed, the elimination of initial concurrent judicial jurisdiction.

to rule on preemption. In addition, HMTA procedures should constitute the only method by which preemption and waiver issues covering HazMat transport under the HMTA are determined.[123]

Federal preemption under the HMTA should be guided by the special circumstances relating to the regulation of HazMat transport and the specific purposes of Congress in enacting the HMTA. The "uniformity" and "consistency" sought by Congress in HMTUSA can best be realized through the unified administration of the statutory preemption standards. This will lessen the tendency to rely unduly on preemption doctrines developed in other contexts, or used to implement views on federal/state relationships. In addition, the wasteful procedural inefficiency resulting from split jurisdiction would be eliminated.

The second proposal is to revise the administrative processes through which DOT issues preemption and waiver rulings.

Initial decisions should be issued by, and developed under the aegis of, an Administrative Law Judge (ALJ) as provided in the APA.[124] The ALJ should have discretion to proceed by written testimony, absent prejudice to any parties and subject to appropriate oral cross examination.

Appeals from initial decisions should be to a Special Appeals Board empowered to issue Final Agency Orders. The Board would consist of the following DOT officials: (i) the Administrator of the Research and Special Programs Administration (as administrator of the HMTA); (ii) the relevant modal Administrator (i.e. of the Federal Highway, Railroad or Aviation Administration or the Coast Guard); and (iii) the General Counsel. Because the composition of the Appeals Board could be established by order of the Secretary, a statutory amendment may not be necessary. Greater permanence might be assured, however, through an appropriate statutory provision.

These procedural proposals governing DOT's initial and final orders stem from the near monopoly over preemption and waiver decisions conferred on DOT under the preceding proposals. The increase in DOT's decisional authority creates a need for increasing the credibility and public acceptance of its decisions.[125] The use of an ALJ will reduce any possible influence of irrelevant or inappropriate institutional biases in the initial decision. Although the Special Appeals Board consists of DOT offi-

123. The single temporary exception would be for injunctive proceedings involving the operation of a state/local requirement prior to the invocation of DOT jurisdiction. See procedural proposal 3, *infra*.

124. 5 U.S.C. §§ 551, *et seq*. In particular see §§ 554, 556 and 3105.

125. As noted, DOT inconsistency rulings have been largely well received by courts. Nor did the legislative hearings reveal any general lack of confidence in the integrity or objectivity of those rulings. Nevertheless, concerns were expressed. See, Hearing Appendix No. II, 187; No. V, 512-22; VI, 337; VIII, 272.

cials, the three members would bring the distinctive perspectives of their differing responsibilities to the appeal process. They should provide a beneficial balance conducive to an objective review of the initial order.

The third proposal is for DOT authority to issue a type of interim cease and desist order. This should be issuable, prior to a final order, on sufficient showing of need based on HMTA goals of "safe and efficient" transport. Pending a final order, a state or locality might be barred from enforcing a particular requirement. Conversely, an order denying interim relief would operate as a preliminary and tentative ruling of non-preemption. Interlocutory appeals from interim DOT orders could be taken in the manner provided for appeals from final orders (see proposal D. 4., *infra*). Provision should also be made for emergency judicial authority to grant injunctive relief prior to the invocation of DOT's jurisdiction. This would become ineffective to the extent that the subject matter was covered in any subsequent final order by DOT.

Interim cease and desist orders of the type proposed and subject to judicial review seem a consistent and necessary aspect of DOT's expanded jurisdiction. The proposal would balance any need for emergency judicial intervention with DOT's primary responsibility for the uniform and consistent application of the HMTA.

The fourth procedural proposal is for direct appeals from final DOT preemption and waiver orders to a Court of Appeals. Specifically, appellants could choose between the District of Columbia Circuit or the Circuit in which the subject matter is located.[126] Authority to enforce DOT orders relating to preemption and waivers would, of course, remain in the Federal District Courts.[127]

As implied by direct appeal to a Court of Appeals, judicial review would not involve *de novo* hearings. Review would be on a record compiled in proceedings conducted by an ALJ under APA standards. The APA standard of review would also apply.[128]

Direct appeals to Courts of Appeal seem warranted in the interest of decisional efficiency. The use of an ALJ to compile the record under APA standards should minimize problems of fairness and completeness. The composition of the Special Appeal Boards should assure that the initial order has received balanced and attentive scrutiny from a variety of perspectives. *De novo*, or other, proceedings in a federal District Court

126. Technically, this change in appellate procedure would require amending 49 U.S.C. App. § 1811(e) (Section 112 (e) of the HMTA, as amended) which presently provides for District Court review. The direct appeals jurisdiction of Courts of Appeal is covered generally in 5 U.S.C. § 2342, which should also be amended to include this category of appeals.

127. For an analogous arrangement see 5 U.S.C. § 2321 covering judicial review of Interstate Commerce Commission orders.

128. *See*, 5 U.S.C. § 706.

would simply impose an added decisional stage to the process of reaching a final resolution.

E. Section 30. Railroads

Section 30 should be repealed and the HMTA amended to provide expressly that all federal preemption for HazMat transport is subject to the HMTA, without modal distinction.

The need for efficiently balancing the claims for uniformity and diversity in HazMat transport regulation applies equally to all modes. In particular, all modes should be subject to the same standards and decisional processes for determining whether unique or unusual local safety factors require exceptions to the principles of uniformity and consistency. Other proposed changes in HMTA preemption and waiver standards would assure that highly integrated railroad operations need forgo the benefits of uniformity only to meet compelling local safety needs.

CASE APPENDIX

Court Decisions Relating to HMTA Preemption (1975-90).

1. Kappleman v. Delta Air Lines, Inc., 539 F.2d 165 (D.C. Cir. 1976); *cert. den.* 429 U.S. 1061 (1977).

2. Atchison T. & S.F. Ry. v. Illinois Commerce Comm., 453 F. Supp. 920 (N. D. Ill. 1977).

3. Consolidated Rail Corp. v. City of Dover, 450 F. Supp. 966 (D. Del. 1978).

4. National Tank Truck Carriers, Inc. v. Burke, 608 F.2d 819 (1st Cir. 1979).

5. American Trucking Ass'n v. City of Boston, 1981 Fed. Carr. Cas. (CCH) par. 82,938 (U.S.D.C. Mass. 1981).

6. City of New York v. Ritter Transp., Inc., 515 F. Supp 663 (S.D.N.Y. 1981); *aff'd sub nom* National Tank Truck Carriers v. City of New York, 677 F.2d 270 (2d Cir. 1982).

7. National Tank Truck Carriers v. Burke, 535 F. Supp. 509 (D.R.I. 1982); *aff'd* 698 F.2d 559 (1st Cir. 1983).

8. City of New York v. U.S. Dept. of Transportation, 539 F. Supp. 1237 (D.R.I. 1982); *rev'd* 715 F.2d 732 (2d Cir. 1983); *cert. denied* 465 U.S. 1055 (1984).

9. South Dakota Dept. of Public Safety v. Haddenham, 339 N.W.2d 786 (S.D. 1983).

10. New Hampshire Motor Transp. v. Flynn, 751 F.2d 43 (1st Cir. 1984).

11. National Paint & Coatings Ass'n v. City of New York, 1986 Fed. Carr. Cas. (CCH), Par. 83,235 (E.D.N.Y. 1985).

12. Jersey Central P. & L. v. Lacey, 772 F.2d 1103 (3d Cir. 1985).

13. Seaboard System R.R. v. Bankester, 254 Ga. 455, 330 S.E.2d 700 (1985).

14. Missouri Pac. R.R. v. Railroad Comm. of Texas, 671 F. Supp. 466 (W.D. Tex. 1987); *aff'd on other grounds* 850 F.2d 264 (5th Cir. 1988); *cert. denied sub nom* Railroad Comm. of Texas v. Missouri Pac. R.R., 488 U.S. 1009 (1989).

15. City of New York v. U.S. Dept. of Transp., 700 F. Supp. 1294 (S.D.N.Y. 1988).

16. CSX Transp., Inc. v. City of Tullahoma, 705 F. Supp. 385 (E.D. Tenn. 1988).

17. Consolidated Rail Corp. v. City of Bayonne, 724 F. Supp. 320 (D.N.J. 1989).

18. Southern Pac. Transp. Co. v. Public Service Comm. of Nevada, Civil

No. CV-N.86-444-BRT (D. Nev. 1988); *rev'd and rem'd* 909 F.2d 352 (9th Cir. 1990).

19. Union Pac. R.R. v. City of Las Vegas, 747 F. Supp. 1402 (D. Nev. 1989).

20. CSX Transp., Inc. v. Public Util. Comm. of Ohio, 701 F. Supp. 608 (S.D. Ohio 1988); *aff'd* 901 F.2d 497 (6th Cir. 1990); *cert. denied sub nom* Public Util. Comm. of Ohio v. CSX Transp., Inc., 111 S. Ct. 781 (1991).

HEARING APPENDIX

Major HMTA Congressional Hearings, 100th and 101st congresses (1987-1990).

I. "Hazardous Materials Transportation", Subcomm. on Surface Transportation, Senate Comm. on Commerce, Science and Transportation, 100th Cong., 1st Sess., April 22, 24 & May 12, 1987. (S. Hrg. 100-147).

II. "Hazardous Materials Transportation Act", Subcomm. on Transportation, Tourism and Hazardous Materials, House Comm. on Energy and Commerce, 100th Cong., 1st Sess., July 30, 1987. (Ser. No. 100-112).

III. "Risks of Transporting Hazardous Materials", Subcomm. on Transportation, Tourism and Hazardous Materials, House Comm. on Energy and Commerce, 100th Cong., 1st Sess., Oct. 23, 1987. (Ser. No. 100-152).

IV. "Transportation of Hazardous Materials", Subcomm. on Surface Transportation, House Comm. on Public Works and Transportation, 100th Cong., 2d Sess., May 19 & 25, 1988. (Ser. No. 100-60).

V. "Transportation of Hazardous Materials", Subcomm. on Surface Transportation, Comm. on Public Works and Transportation, 101st Cong., 1st Sess., May 5 & 15, June 5, July 12 & 13, 1989. (Ser. No. 101-52).

VI. "Hazardous Material Transportation", Subcomm. on Transportation, Tourism and Hazardous Materials, House Comm. on Energy and Commerce, 101st Cong., 1st Sess., Nov. 7 & 8, 1989. (Ser. No. 101-113).

VII. "Transportation of Hazardous Materials by Rail", Subcomm. on Government Activities and Transportation, House Comm. on Government Operations, 101st Cong., 2d Sess., Feb. 28, 1990.

VIII. "Hazardous Materials Transportation", Subcomm. on Surface Transportation, Senate Comm. on Commerce, Science and Transportation, 101st Cong., 2d Sess., July 25, 1990. (S. Hrg. 101-955).