The Defense of Preemption: A View from the Trenches

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I. INTRODUCTION

Most lawyers who have any familiarity with the law of federal preemption, and in particular the United States Supreme Court's cases involving the preemption of state tort requirements, would freely admit that the law is a muddle. Beginning with the Court's fractured 1992 decision in *Cipollone v. Liggett Group, Inc.*,[1] which was argued twice before it was decided, the Court has issued a series of decisions, some of them fractured and confusing, that have alternatively cheered and flummoxed the plaintiffs' bar as well as product manufacturers, transportation companies, and other businesses that regularly rely on the preemption defense. Unfortunately, these cases—which are among the most hotly contested of all cases on the Supreme Court's docket, judging by amicus participation—have produced significant confusion in the law of preemption generally. As someone who has participated

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1. 505 U.S. 504 (1992).

in many of these cases over the years since *Cipollone*, my purpose is to offer a few observations drawn from my own experience about some of the major disputed issues in preemption law today, including the proper role of courts in resolving preemption cases. I also hope to make a few broader points about the preemption doctrine that are often overlooked in the acrimonious debate over tort cases.

II. PREEMPTION IN OUR CONSTITUTIONAL SCHEME AND THE ROLE OF THE JUDICIARY

The doctrine of federal preemption is a bedrock feature of our constitutional scheme, included in the United States Constitution by the Framers to help overcome major shortcomings in the Articles of Confederation.[2] The Supremacy Clause provides that "the Laws of the United States . . . shall be the supreme Law of the Land . . . any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."[3] During the Constitutional Convention, the delegates also considered but ultimately rejected a stronger version of the Supremacy Clause under which "the National Legislature" would have been "impowered . . . to negative all laws passed by the several States, contravening in the opinion of the National Legislature the articles of Union."[4] Notably, the available evidence suggests that this "congressional negative," like the Crown's prerogative to approve Colonial laws, would have operated to *prevent* state laws from going into effect *unless and until* Congress acted.[5] Although James Madison championed this potent congressional negative as "essential to the efficacy & security of the Genl. Govt.,"[6] opponents such as Roger Sherman and Gouverneur Morris opposed it as "unnecessary" because, under the provision that would become the Supremacy Clause, the "laws of the General Government" will be "Supreme & paramount to the State laws."[7] Any "law that ought to be negatived,"

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2. For a discussion of problems under the Articles of Confederation that were addressed by the Supremacy Clause and other provisions of the Constitution, see ALAN E. UNTEREINER, THE PREEMPTION DEFENSE IN TORT ACTIONS: LAW, STRATEGY AND PRACTICE 39-41 (2008).

3. U.S. CONST. art. VI, cl. 2.

4. James Madison, *Notes on the Constitutional Convention (May 29, 1787)*, *in* 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 21 (Max Farrand ed., 1911) [hereinafter FARRAND'S RECORDS]. For a more detailed account of the Supremacy Clause's origins, see UNTEREINER, *supra* note 2, at 42-44.

5. *See* UNTEREINER, *supra* note 2, at 44-45.

6. James Madison, *Notes on the Constitutional Convention (July 17, 1787)*, *in* 2 FARRAND'S RECORDS, *supra* note 4, at 27.

7. *Id.* at 390 (Aug. 23, 1787).

Gouverneur Morris pointed out, "will be set aside in the Judiciary departmt. and if that security should fail; may be repealed by a Nationl. law."[8] Consistent with this evidence of the Framers' intent, the Supreme Court has long recognized as a "fundamental principle of the Constitution" that Congress, through the exercise of its enumerated powers in Article I and the Necessary and Proper Clause, "has the power to preempt state law."[9]

Under the Constitution, then, both Congress and courts play a vital role with regard to the preemption doctrine. To better understand these institutional roles, it is useful to review the basic contours of modern preemption doctrine as it has been developed by the Supreme Court in cases stretching back almost two hundred years.[10] Over time, the Court has come to recognize various types of preemption. Thus, it has long distinguished between "express" preemption—where Congress includes in a statute an explicit statement of intent to preempt state or local law and sets forth the scope of that preemption—and "implied" preemption, which covers instances where Congress's preemptive intent is not clearly stated.

"Implied" preemption comes in two basic flavors. In implied "field" preemption, courts draw the inference, typically from the existence of detailed or extensive federal regulation, that Congress intended to occupy an entire field of regulation to the exclusion of state and local laws. The second type is implied "conflict" preemption. In contrast to express preemption and implied field preemption, both of which ultimately turn on Congress's intent, conflict preemption turns on the degree of collision or conflict between federal and state (or local) law. The doctrine of implied conflict preemption has its roots in the Supremacy Clause.[11]

The Court has also distinguished between three forms of implied conflict preemption, which represent points on a continuum of degrees of conflict. At one extreme is "impossibility" conflict preemption, which is relatively rare, where state and federal law are so directly at odds that it is literally impossible for regulated parties to comply with both. Next is what might be called "ordinary" conflict preemption,

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8. *Id.* at 28 (July 17, 1787).

9. *See* Crosby v. Nat'l Foreign Trade Council, 530 U.S. 363, 372 (2000).

10. *See* Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1, 197-219 (1824); Houston v. Moore, 18 U.S. (5 Wheat.) 1, 22-24 (1820); *see also* McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 427 (1819).

11. *See* Brown v. Hotel & Rest. Employees & Bartenders Int'l Union Local 54, 468 U.S. 491, 501 (1984) (finding state law "preempted by direct operation of the Supremacy Clause").

where federal and state laws are in conflict but not impossible to comply with simultaneously. Finally, the other end point of the continuum is "obstacle" preemption, which includes instances where state or local laws frustrate the purposes underlying federal law or "stand[] as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress."[12]

As this overview of preemption doctrine suggests, courts play a critically important—but different—role in dealing with different types of preemption. In cases involving express preemption, courts try to ascertain Congress's controlling intent by examining the text, structure, and legislative history of federal statutes and by interpreting the language of express preemption clauses. In cases involving implied field preemption, courts conduct a similar inquiry but do so without the benefit of any statutory provision that explicitly says that state or local law is preempted. In conflict preemption cases, courts undertake an analysis that involves at least three steps. First, they determine the scope or meaning of federal law (or identify a federal purpose). Second, courts determine the scope or meaning of a state or local law that is alleged to conflict with federal law. Although federal courts can and do determine this for themselves, they are bound to follow the authoritative judgments of state courts about the meaning of state law. Third, and finally, courts make judgments about whether the degree of tension between federal and state laws rises to the level of an impermissible conflict under the Supremacy Clause. The first two steps involve statutory construction; the last involves a question of constitutional law.

This overview is useful because it helps to frame some of the ongoing debates over the proper role of the judiciary in deciding preemption cases. In recent years, many critics of the preemption doctrine generally—and of the Supreme Court's decisions sustaining the defense in tort cases specifically—have suggested that judges have played a questionable role in deciding these cases. For example, some have suggested that pro-preemption holdings—beginning with *Cipollone*'s common-sense holding that the Federal Cigarette Labeling Act's express preemption of state "requirement[s]"[13] includes

12. *See* Hines v. Davidowitz, 312 U.S. 52, 67 (1941); Kenneth W. Starr, *Reflections on* Hines v. Davidowitz*: The Future of Obstacle Preemption*, 33 PEPP. L. REV. 1, 2-3 (2005) (noting that this "deliciously rich concept [was] first articulated by the Supreme Court" in *Hines*).

13. *See* 15 U.S.C. § 1334(b) (2006) ("No requirement or prohibition based on smoking and health shall be imposed under State law with respect to the advertising or

requirements imposed by the common law—are nothing more than an effort by "conservative" Justices to use the preemption doctrine to carry out tort reform at the federal level.[14] Others (most notably Justice Thomas) have called into question the continuing validity of certain forms of conflict preemption—specifically obstacle preemption, which involves the weakest form of federal-state conflict—or have suggested that obstacle preemption is standardless and involves far too much judicial discretion.[15] And in recent decades, the Court has had to face an issue that was never considered by the Framers: What role should federal administrative agencies play in administering the doctrine of federal preemption? Not surprisingly, many of these controversies have arisen in a small but combustible category of disputes: cases involving the federal preemption of state tort law. Although I will return to some of these controversies in due course, before doing so I would like to take a broader perspective on the preemption doctrine since that perspective is so often missing in the current controversies that swirl around the doctrine's recent use.

III. THE SYSTEMIC BENEFITS OF PREEMPTION: REGULATORY UNIFORMITY, UNIFIED NATIONAL MARKETS, EFFICIENCY, EXPERT REGULATORS, AND THE PROTECTION OF FEDERAL LAWS AND PROGRAMS

Often forgotten in the preemption battles over tort cases is the fact that the broadly applicable preemption doctrine can and does bring with it very substantial public benefits. We live in a large and sprawling country that is rich in many things, including government and regulation. In addition to the fifty state governments, each with its

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promotion of any cigarettes the packages of which are labeled in conformity with the provisions of this chapter.").

14. At times these criticisms have emanated from Members of the Court who found themselves on the losing side of hotly disputed issues. *See, e.g.*, Geier v. Am. Honda Motor Co., 529 U.S. 861, 894 (2000) (Stevens, J., dissenting) ("[T]he Supremacy Clause does not give unelected federal judges *carte blanche* to use federal law as a means of imposing their own ideas of tort reform on the States.").

15. *See, e.g.*, Wyeth v. Levine, 129 S. Ct. 1187, 1204, 1207-08, 1211-17 (2009) (Thomas, J., concurring) (expressing harsh criticism of obstacle preemption); *Geier*, 529 U.S. at 907 (Stevens, J., dissenting) (emphasizing the importance of the "presumption against preemption" in "prevent[ing] federal judges from running amok with our potentially boundless . . . doctrine of implied conflict pre-emption based on frustration of purposes"); KENNETH STARR ET AL., THE LAW OF PREEMPTION: A REPORT OF THE APPELLATE JUDGES CONFERENCE 36, 38 (1991) (explaining that obstacle preemption "encourages courts to make less than fully textured, careful judgments about the central or animating concern of a statute" and "demands a high degree of judicial policymaking"); Caleb Nelson, *Preemption*, 86 VA. L. REV. 225, 231-32 (2000) (arguing that obstacle preemption should be abandoned).

own legislature, executive branch and administrative agencies, and court system, there were by last count more than 87,500 local governmental units in the United States, including counties, cities, and other municipalities.[16] This multiplicity of government actors below the federal level virtually ensures that, in the absence of federal preemption, businesses with national operations that serve national markets will be subject to complicated, overlapping, and sometimes even conflicting legal regimes. These overlapping regulations have the potential to impose onerous burdens on interstate commerce and to disrupt and undermine federal regulatory programs.

Congress can address this situation by electing to regulate preemptively. When Congress decides to legislate preemptively and prescribes a single set of uniform rules for the entire country, it streamlines the legal system, reduces the regulatory burdens on business, and helps to create a unified national marketplace for goods and services. It also reduces the barriers to new entry by small businesses and lowers the cost of doing business, which in turn can result in reduced costs of goods and services to consumers.[17] In many cases, Congress's adoption of a preemptive scheme also ensures that the legal rules governing complex areas of the economy or products are formulated by expert regulators with a broad national perspective and needed scientific or technical expertise, rather than by decision makers—such as municipal officials, elected state judges, and lay juries—who may have a far more parochial perspective and limited set of information. For businesses, having a single, uniform federal rule is

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16. U.S. CENSUS BUREAU, STATISTICAL ABSTRACT OF THE UNITED STATES: 2004-2005, at 262 (2004), *available at* http://www.census.gov/prod/2004pubs/04statab/stlocgov.pdf.

17. In light of these obvious benefits, it is not surprising that Congress has elected to pass scores of statutes that contain preemption clauses. According to one survey, between 1789 and 1992 Congress enacted "approximately 439 significant preemption statutes"—"more than 53 percent" of which were enacted between 1969 and 1992. U.S. ADVISORY COMM'N ON INTERGOVERNMENTAL RELATIONS, FEDERAL STATUTORY PREEMPTION OF STATE AND LOCAL AUTHORITY: HISTORY, INVENTORY, AND ISSUES, at iii (1992). Federal preemption is common in the areas of copyright, telecommunications, banking, and labor law. Not surprisingly given Congress's responsibility for regulating interstate commerce, a large number of these express preemption provisions are aimed at freeing up nationally distributed products of one kind or another—including mobile products such as automobiles that regularly cross jurisdictional borders—from the burdens imposed by different or additional state regulations concerning product labeling or design. Separate federal statutes accomplish this for recreational boats, automobiles, pesticides, cigarettes, medical devices, flammable fabrics, hazardous substances, and many other consumer products. These uses of the preemption doctrine reduce the burdens on interstate commerce and thus serve a central purpose underlying the Commerce Clause.

usually far preferable to dealing with a welter of federal, state, and local requirements.

Nor is this all. The preemption doctrine is indispensable to effectuating any policy or program of *deregulation* at the federal level. Nowadays, of course, in the wake of the financial crisis of recent years, deregulation has become almost a four-letter word. But this will not always be so. Unless we are willing to agree that market forces and the absence of regulation are incapable of providing the best means of ensuring the right outcomes in *some* area of the national economy *at some point* in the future, it would be unwise to embrace changes to preemption doctrine that remove this potentially valuable tool completely from the federal regulator's toolbox.

The doctrine of implied preemption also serves an important role in our constitutional scheme. At bottom, it carries out the command of the Supremacy Clause and protects federal law and federal regulatory programs in all of their myriad forms from interference by state and local governments. Even the weakest form of conflict preemption—obstacle preemption—plays an important role in this connection. And obstacle preemption makes eminent sense. Why would Congress want to permit state and local governments to subvert Congress's objectives? Why would Congress want state and local governments to have the ability to interfere with or defeat the methods Congress has chosen to carry out its objectives? By the same token, "impossibility" conflict preemption ensures that private parties who are subject to the commands of federal law are not placed in the untenable position of being subjected to state and local laws that are impossible to comply with at the same time federal law is obeyed.

IV. MISPLACED CRITICISMS OF OBSTACLE PREEMPTION

As noted above, in recent years "obstacle" preemption has come under criticism as being of questionable validity and requiring excessive discretion on the part of judges. I believe these criticisms are overstated. Here again, it is important not to focus too narrowly on the most controversial cases involving the preemption of product liability and tort requirements. The preemption doctrine has a far broader reach than this relatively limited category of disputes. The various doctrines governing express, implied, and agency preemption apply to, and protect from, interference by subordinate governmental entities, federal law, and federal regulatory programs in all of their forms. They protect the federal civil rights laws no less than the Medical Device

Amendments. This is true of obstacle preemption just as it is of other forms of implied conflict preemption.

An example I like to give is the Supreme Court's decision in *Felder v. Casey*.[18] In that case, the Court ruled that 42 U.S.C. § 1983 preempted a Wisconsin notice-of-claim statute that required a civil rights plaintiff to provide written notice (of at least 120 days before filing suit) to putative government defendants of the circumstances giving rise to her constitutional claims, the amount of the claim, and her intent to bring suit. In the absence of such notice, the Wisconsin statute required the state courts to dismiss the plaintiff's section 1983 lawsuit. Writing for the Court, Justice Brennan explained that the Wisconsin statute was barred under the doctrine of obstacle preemption because, among other things, it "burdens the exercise of the federal right by forcing civil rights victims who seek redress in state courts to comply with a requirement that is entirely absent from civil rights litigation in federal courts."[19] That conclusion necessarily rested on a robust doctrine of obstacle preemption because it was not impossible to comply with both the Wisconsin statute and the requirements of section 1983, and there was no direct conflict between the federal and state laws. It must be remembered that, like other forms of implied conflict preemption, the long-established doctrine of obstacle preemption serves to protect *all* federal laws—those one likes, as well as those one dislikes—against unwarranted interference by the states and by municipal governments.

As this example confirms, a useful exercise before proposing sweeping changes to long-settled preemption doctrines (as some have done in recent years) is to put oneself in a Rawlsian "original position" where one does not yet know which federal law will be subject to the preemption rule one is proposing.[20] This exercise is useful because it tends to ensure neutrality: federal laws that one likes and agrees with will get the same measure of protection from the Supremacy Clause, and their express preemption clauses will be interpreted according to the same principles of statutory construction, as will federal laws one dislikes or disagrees with. By the same token, agency interpretations and regulatory actions that are pro-preemption will get the same treatment as antipreemption interpretations and actions.

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18. 487 U.S. 131 (1988).
19. *Id.* at 141; *see also id.* at 138, 144-56.
20. *See* JOHN RAWLS, A THEORY OF JUSTICE 10-15, 118-23 (rev. ed. 1999) (arguing that just rules may be formulated *ex ante* in the "original position" by assuming a "veil of ignorance" about one's role in future society that will be governed by the rules).

Equally flawed, in my view, is the criticism that obstacle preemption is problematic because it grants judges too much discretion. Although it is true that obstacle preemption sometimes requires federal and state judges to make subtle judgments in identifying the relevant congressional "purpose" or "purposes," and in deciding when those federal purposes are being frustrated by state law, Congress often declares its purposes explicitly in a statute (or in the accompanying legislative materials). More importantly, such judgment calls are no different from a wide array of decisions made by federal and state courts every day. The law is filled with broad concepts—reasonableness, probable cause, excusable neglect, good cause, ordinary care—that call for the exercise of discretion by judges. Beyond that, obstacle preemption cases also require judges, as a threshold matter, to construe the state and federal laws that are claimed to be in tension. That type of statutory construction is the bread and butter of what judges do and hardly a basis for concern over unbridled judicial discretion. Finally, the concerns about judicial discretion voiced by the critics of obstacle preemption overlook the history of the Supremacy Clause described above. The Framers intended this bedrock structural safeguard for the efficacy of federal law to be *enforced by the courts*; they rejected a competing alternative (the potent congressional negative) that would have vested the responsibility for nullifying repugnant state laws solely in "the National Legislature."[21] Under the Supremacy Clause, in contrast, the courts are given the role of determining when state and local law reaches a level of inconsistency with federal law that requires state and local law to yield. That is precisely the system our Constitution envisions.

V. FEDERALISM AND THE PRESUMPTION AGAINST PREEMPTION

Another major theme in preemption disputes is federalism, because the effect of preemption in all of its forms is the nullification of state or local law. The so-called "presumption against preemption," for example, is often praised or defended on the ground that it serves federalism values by minimizing or reducing the amount of state or local law that is displaced by federal law.[22]

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21. *See supra* note 4 and accompanying text.

22. At least since the late 1940s, the Supreme Court has repeatedly stated that when Congress "legislate[s] . . . in a field which the States have traditionally occupied," the Court will "start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress." *See, e.g.*, Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947). At the same time,

The presumption has been controversial in recent years. For example, in *Cipollone* Justice Scalia took the position that it was inappropriate to apply the presumption to the interpretation of an express preemption clause.[23] He wrote that once there is tangible evidence that Congress actually intends to preempt state law—and it is difficult to imagine clearer evidence than an express preemption clause—the presumption should disappear and courts should interpret an express preemption clause according to its ordinary meaning. That ordinary meaning, after all, is the best indication of Congress's true intent—and if Congress's intent is controlling, as it is in express preemption cases, applying a presumption will have a distorting effect. Notably, in 1992 when *Cipollone* was decided, only Justice Thomas joined in this view.[24] But if one fast-forwards sixteen years to last term in *Altria Group, Inc. v. Good*,[25] one sees that Chief Justice Roberts and Justice Alito joined a dissent authored by Justice Thomas that makes this very same point. Although the majority in *Altria* did not adopt this view, only a year earlier a much more lopsided majority in *Riegel v. Medtronic, Inc.*, issued an express preemption decision that did not even mention the presumption and interpreted the preemption clause of the Medical Device Amendments according to its ordinary meaning.[26] So this issue continues to sharply divide the Court.

The presumption has also been controversial in recent years when invoked in the context of *implied* preemption. Interestingly, other "substantive" canons of statutory construction that are rooted in federalism find support in constitutional provisions that at least point in the direction of a "clear statement" rule.[27] To cite an obvious

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however, the Court in *Rice* made clear that this "assumption" can be overcome without great difficulty, adding that Congress's clear and manifest purpose to preempt "may be evidenced in several ways," including where the "scheme of federal regulation [is] so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it," or where "state policy may produce a result inconsistent with the objective of the federal statute." *Id.* This listing of circumstances closely tracks the situations in which ordinary doctrines of implied preemption operate. *See* United States v. Locke, 529 U.S. 89, 107-08 (2000) (explaining that the Court's reference to an "assumption" in *Rice* was "followed by extensive and careful qualifications" and declining to apply the "artificial" presumption against preemption to the question whether Washington State's oil tanker regulations were preempted by federal law).

23. 505 U.S. 504, 544 (1992).

24. *Id.*

25. 129 S. Ct. 538, 561 (2008).

26. 128 S. Ct. 999, 1008-09 (2008) (interpreting the Medical Device Amendments, 21 U.S.C. § 360k(b) (2006), according to its ordinary meaning).

27. William Eskridge has distinguished between *textual* or *linguistic* canons of construction (which embody "general conventions of language, grammar, and syntax"), *referential* canons (which "refer[] the Court to an outside or preexisting source to determine

example, the Eleventh Amendment *expressly protects* the states from being haled into federal court to answer in certain types of lawsuits.[28] It thus provides a strong textual basis for imposing on Congress a "clear statement" requirement before state sovereign immunity may be abrogated. But that is not true in the same way in the area of implied preemption. In fact, the most directly relevant provision of the Constitution—the Supremacy Clause—emphatically points in *exactly the opposite direction*, providing that federal law "shall be the supreme Law of the Land . . . *any* Thing in the Constitution or Laws of *any* State to the Contrary notwithstanding."[29] The Supremacy Clause's clear bias *in favor of* preemption distinguishes the preemption doctrine from other situations where the Supreme Court has correctly held that federalism concerns must play a critical role.[30] Moreover, in recent years Professor Caleb Nelson has persuasively demonstrated that eighteenth-century lawyers and judges would have recognized the concluding phrase of the Supremacy Clause as a "*non obstante*" provision "telling courts *not* to apply the traditional presumption

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statutory meaning"), and *substantive* canons of statutory construction that are "even more controversial, because they are rooted in broader policy or value judgments" and "attempt to harmonize statutory meaning with policies rooted in the common law, other statutes, or the Constitution." WILLIAM N. ESKRIDGE, JR. ET AL., LEGISLATION AND STATUTORY INTERPRETATION 329-30 (2000); *see also* William N. Eskridge, Jr. & Philip P. Frickey, *Quasi-Constitutional Law: Clear Statement Rules as Constitutional Lawmaking*, 45 VAND. L. REV. 593, 595 (1992). Examples of substantive canons are the rule of lenity (rooted in due process), the rule that "statutes are to be construed liberally in favor of the Indians, with ambiguous provisions interpreted to their benefit," *e.g.*, Montana v. Blackfeet Tribe of Indians, 471 U.S. 759, 766 (1985) (based on the unique trust relationship between the United States and Indians), and various federalism-based rules such as those relating to intergovernmental immunity and to federal interference with the operations of state government. ESKRIDGE ET AL., *supra*, at 354-62; *see, e.g.*, Gregory v. Ashcroft, 501 U.S. 452, 460-61 (1991) (declining to interpret the Age Discrimination in Employment Act of 1967 as covering state judges, explaining that Congress will not be understood to have intruded upon "a decision of the most fundamental sort for a sovereign entity," implicating "the structure of [state] government," unless Congress says so in unmistakably clear language); Pennhurst State Sch. & Hosp. v. Halderman, 451 U.S. 1, 24 (1981) ("Congress must express *clearly* its intent to impose conditions on the grant of federal funds so that the States can knowingly decide whether or not to accept those funds." (emphasis added)).

28. *See* U.S. CONST. amend. XI; Atascadero State Hosp. v. Scanlon, 473 U.S. 234, 242 (1985) ("Congress may abrogate the States' constitutionally secured immunity from suit in federal court only by making its intention *unmistakably clear* in the language of the statute." (emphasis added)).

29. U.S. CONST. art. VI, cl. 2 (emphasis added).

30. Of course, a majority of the current Supreme Court continues to believe that the presumption against preemption *does* have strong roots in the doctrine of federalism. *See* Wyeth v. Levine, 129 S. Ct. 1187, 1195 n.3 (2009) ("We rely on the presumption because respect for the States as 'independent sovereigns in our federal system' leads us to assume that 'Congress does not cavalierly pre-empt state-law causes of action.'" (quoting Medtronic, Inc. v. Lohr, 518 U.S. 470, 485 (1996))); *id.* at 1205-07 (Thomas, J., concurring).

against implied repeals in determining whether federal law contradicts state law."[31] So understood, the Supremacy Clause directs courts to avoid precisely the anomaly that a presumption *against* preemption introduces: that they "might strain the federal law's meaning in order to harmonize it with state law."[32]

Unfortunately, the Supreme Court has never addressed this new historical evidence casting doubt on the validity of the presumption against preemption. In *Wyeth v. Levine*, a majority of the Court recently rejected the argument that the presumption against preemption should not be applied in cases involving implied conflict preemption.[33] But it did so in passing, in a footnote, without addressing any of the historical evidence, and over the dissent of three Members of the Court.[34] Thus, it seems likely that this issue will continue to divide the Court in the foreseeable future, unless (as rarely seems to happen in preemption cases) the dissenters abandon their views about the proper methodology for resolving preemption questions.[35]

VI. CONGRESS'S ABILITY TO ACCOMMODATE FEDERALISM CONCERNS

Those who invoke federalism as a reason to treat the preemption defense with disfavor often overlook Congress's own track record in enacting a wide variety of statutory preemption clauses. If one examines Congress's handiwork, it becomes apparent that federal

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31. Nelson, *supra* note 15, at 255 (emphasis added); *see also* Jack Goldsmith, *Statutory Foreign Affairs Preemption*, 2000 SUP. CT. REV. 175, 184 ("[T]he Supremacy Clause's *non obstante* clause . . . was designed precisely to eliminate any residual presumption against implied repeals.").

32. Nelson, *supra*, note 15, at 255; *see also* Viet D. Dinh, *Reassessing the Law of Preemption*, 88 GEO. L.J. 2085, 2092 (2000) (arguing that any "system[ic] favor[ing]" of state law in analyzing preemption questions "risk[s] an illegitimate expansion of the judicial function" by "disrupt[ing] the constitutional division of power between federal and state governments, rewrit[ing] the laws enacted by Congress, or both"); Fla. State Conference of the NAACP v. Browning, 522 F.3d 1153, 1168 (11th Cir. 2008) ("Federal law is not obliged to bend over backwards to accommodate contradictory state laws, as should be clear from the Supremacy Clause's blanket instruction . . . .").

33. 129 S. Ct. 1187, 1195 n.3 (2009).

34. *Id.* at 1217, 1228-29 n.14 (Alito, Roberts & Scalia, JJ., dissenting).

35. The presumption against preemption creates significant confusion in the case law because it raises a number of vexing interpretive questions. For a discussion of these difficulties, see UNTEREINER, *supra* note 2, at 178-83. In addition, the presumption sometimes comes into conflict with a competing principle: the notion that when Congress acts in an area "where the federal interest" is "dominant," there should be a presumption *in favor of* preemption. *See, e.g.*, Hines v. Davidowitz, 312 U.S. 52, 62, 68 (1941) (holding that a federal statute embodying an all-embracing system of alien registration preempts a Pennsylvania statute regulating the same subject because, given the uniquely national nature of "the general field of foreign affairs, including power over immigration," state authority to act concurrently in that area must be "restricted to the narrowest of limits").

preemption schemes often include special safeguards—both substantive and procedural—that protect and preserve the authority of state and local governments to regulate, as well as to meet their own operational needs. The existence of these safeguards strongly confirms that Congress is perfectly able to accommodate federalism concerns in crafting preemptive federal legislation. It also calls into question the need for courts to invent or impose additional safeguards that Congress itself has not selected, especially in cases raising issues of express preemption.

Examples of such federalism-based provisions are numerous. One or more of the following six examples are present in many preemption schemes.

- Congress often elects to preempt *only* state and local laws that relate to a particular, quite limited subject matter. For example, the preemption provision in the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA), is limited to state and local "requirements for labeling or packaging."[36] State requirements unrelated to "labeling or packaging" are left intact and unaffected by Congress's careful limitation on FIFRA's preemption clause.
- Congress often elects only to preempt state and local laws that *are different from* federal law, thus leaving intact state and local laws that are identical or substantially similar to federal mandates.[37]
- Congress frequently places an exclusion within express preemption clauses for goods or products purchased by state or local governments *for their own use*. Such exclusions can be found in the preemption provisions of the Flammable Fabrics Act and the Poison Prevention Packaging Act.[38] These exclusions preserve the authority of state and local governments to make their own procurement and spending decisions.
- Congress sometimes includes in a preemption scheme an exception for state or local requirements that are *needed to address special or unique local conditions*. The Federal Railroad Safety Act, for example, excludes certain "additional or more

36. 7 U.S.C. § 136v(b) (2006).

37. *See, e.g.*, Consumer Products Safety Act, 15 U.S.C. § 2075(a) (2006) (preempting state safety standards "unless such requirements are identical to the requirements of the Federal standard"); Medical Device Amendments, 21 U.S.C. § 360k(a) (2006). Under these schemes, state and local governments retain the authority to enforce requirements that parallel those imposed by the federal government, including through tort lawsuits initiated by private individuals.

38. 15 U.S.C. § 1203(b); *id.* § 1476(b).

stringent" measures taken by a state "related to railroad safety or security" where the state's regulation, among other things, "is necessary to eliminate or reduce an essentially local safety or security hazard."[39]

- Congress sometimes specifically creates a role for the states *in setting the preemptive federal standards*. The Federal Boat Safety Act, for example, provides for state input into the Coast Guard's process of formulating uniform federal design standards for recreational boats. The Coast Guard is required to "consult with" the National Boating Safety Advisory Council (NBSAC), a group of experts and other persons interested in boat safety.[40] One-third of the twenty-one members of the NBSAC must be state officials responsible for state boat safety programs.[41]
- Congress often *authorizes the granting of exemptions* to state and local governments under an express preemption scheme. Although these provisions vary somewhat in form, they typically allow the responsible federal administrative agency to grant exemptions if a state or local requirement: (1) provides a higher degree of protection than applicable federal standards; (2) does not unduly burden interstate commerce; and (3) does not cause the product to be in violation of any federal requirements.[42] Some of these provisions also create *procedural* rights insofar as they require exemption decisions to be made in notice-and-comment rulemaking, which includes a right to be heard, as well as certain appellate remedies in the courts.[43]

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39. 49 U.S.C. § 20106(1) (2006); *see also* Boat Safety Act, 46 U.S.C. § 4306 (2006) (excluding from preemption certain state or local regulations concerning "uniquely hazardous conditions or circumstances within the State").

40. 46 U.S.C. §§ 4302(c)(4), 13110.

41. *See id.* § 13110(b)(1)(A).

42. *See, e.g.*, Toxic Substances Control Act, 15 U.S.C. § 2617(b); Medical Device Amendments, 21 U.S.C. § 360k(b).

43. The exemption provision of the Medical Device Amendments is illustrative:

> Upon application of a State or a political subdivision thereof, the Secretary may, *by regulation promulgated after notice* and *opportunity for an oral hearing*, exempt from subsection (a) of this section [the preemption clause], under such conditions as may be prescribed in such regulation, a requirement of such State or political subdivision applicable to a device intended for human use if—(1) the requirement is more stringent than a requirement under this chapter which would be applicable to the device if an exemption were not in effect under this subsection; or (2) the requirement—(A) is required by compelling local conditions, and (B) compliance with the requirement would not cause the device to be in violation of any applicable requirement under this chapter.

21 U.S.C. § 360k(b) (emphasis added).

As these six examples show, Congress is hardly inattentive to federalism concerns in crafting preemptive legislation. The availability of these and other measures to accommodate the interests of state and local governments suggests that there is no need for courts to create additional measures to restrict the scope of federal preemption.

VII. AGENCY PREEMPTION

Agency preemption has also been a controversial subject in recent years. Does Congress need to grant explicit preemptive regulatory authority to an administrative agency in order for the agency to exercise such power? The traditional answer has been thought to be "no," but that answer has been called into question by three Members of the Court in a recent dissenting opinion.[44] At the same time, it is well-settled that federal regulations are fully protected by the implied preemption doctrines that flow directly from the Supremacy Clause.[45] What weight, if any, is an administrative agency's interpretation entitled to be given in situations where the agency interprets an express preemption clause? What weight, if any, should an administrative agency's views be given in a conflict preemption case (with regard, for example, to whether state law is interfering with congressional policy or agency programs)? These questions have all generated controversy in recent years.

Without attempting to offer answers to these questions, I would like to suggest that the questions themselves should be examined in light of the entire history of the preemption doctrine, and not just its use by agencies in the most recent administrations. This is especially important in considering agency preemption. For example, in recent

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44. *Compare* Fid. Fed. Sav. & Loan Ass'n v. De la Cuesta, 458 U.S. 141, 154 (1982) ("A pre-emptive regulation's force does not depend on express congressional authorization to displace state law . . . ."), *with* Watters v. Wachovia Bank, N.A., 127 S. Ct. 1559, 1582-83 (2007) (Stevens, Roberts & Scalia, JJ., dissenting) (noting that dissenters would not be "inclined" to "assume" that "congressional silence should be read as a conferral of pre-emptive authority" on administrative agencies).

45. *See* City of New York v. FCC, 486 U.S. 57, 63-64 (1988) ("The phrase 'Laws of the United States' [in the Supremacy Clause] encompasses both federal statutes themselves and federal regulations that are properly adopted in accordance with statutory authorization. For this reason, at the same time that our decisions have established a number of ways in which Congress can be understood to have pre-empted state law, we have also recognized that 'a federal agency acting within the scope of its congressionally delegated authority may pre-empt state regulation' and hence render unenforceable state or local laws that are otherwise not inconsistent with federal law." (citations omitted)); Hillsborough County v. Automated Med. Labs., Inc., 471 U.S. 707, 713 (1985) ("[S]tate laws can be pre-empted by federal regulations as well as by federal statutes."); *De la Cuesta*, 458 U.S. at 153 ("Federal regulations have no less pre-emptive effect than federal statutes.").

years, there has been much focus on the activities of the United States Food and Drug Administration (FDA) and other administrative agencies in the Bush Administration with respect to the doctrine of preemption. But it is important to bear in mind that during the Clinton Administration there also were instances of federal agency action that were controversial *in the other direction* and *highly objectionable to the business community*. In particular, a year after a majority of the Supreme Court squarely held in *Medtronic v. Lohr* that the Medical Device Amendments (MDA) expressly preempt state tort requirements, the FDA issued a notice of proposed rulemaking that would have, in effect, overruled *Lohr* by "interpreting" the MDA's express preemption provision narrowly as not preempting requirements based on product liability law.[46] Ultimately, the agency's proposal was withdrawn after it became clear that the FDA, in apparent violation of federal regulations, selectively provided an advance copy of the proposed regulation to, and received comments from, a national advocacy group that often represents plaintiffs in preemption cases (and that had represented the plaintiff in *Lohr*).[47] Interestingly, the secret comments provided by the plaintiffs' advocacy group also praised the FDA for including in the draft regulation a provision that would have overruled various lower court cases holding that "fraud-on-the-agency" claims are impliedly preempted by the Medical Device Amendments and the Supremacy Clause of the Constitution. In 2001, when that issue finally reached the Supreme Court, the Court ruled by a wide margin that fraud-on-the-FDA claims *are* impliedly preempted.[48]

The point here is simply that agencies can take both pro- and antipreemption positions, and an agency's unjustified efforts to weaken or defeat the preemption intended by Congress or mandated by the Supremacy Clause is no less illegitimate and troubling than agency overreaching in the opposite direction. The legal principles that govern agency preemption should be neutral and apply evenhandedly to both pro- and antipreemption actions taken by administrative agencies. Here again, the Rawlsian "original position" is instructive in thinking

46. *See* Preemption of State Product Liability Claims, 62 Fed. Reg. 65,384 (proposed Dec. 12, 1997) (to be codified at 21 C.F.R. pt. 808).

47. *See* Preemption of State Product Liability Claims, 63 Fed. Reg. 39,789 (proposal withdrawn July 24, 1998) (to be codified at 21 C.F.R. pt. 808); *FDA May Have Violated Rulemaking Process Rules, MDMA Charges*, FDA ENFORCEMENT MANUAL NEWSLETTER (Food & Drug Admin., Silver Springs, Md., May 1998).

48. *See* Buckman Co. v. Plaintiffs' Legal Comm., 531 U.S. 341, 343-44 (2001).

about the legal principles that should govern issues of agency preemption.

VIII. CONCLUSION

Preemption law is complex and nuanced. Many of the controversies described above are rooted in disagreements among the current Justices of the Supreme Court. The Justices today appear to disagree about whether the presumption against preemption should be applied in cases involving implied conflict preemption, whether legislative history is relevant to deciding express preemption issues, whether implied obstacle preemption is a doctrine that should be regarded with skepticism and applied sparingly, whether state law requirements that happen to be imposed through tort law or the common law deserve special protection from preemption, and whether, and in what circumstances, administrative agencies may take regulatory actions that preempt state and local laws. With such widespread disagreement among the Justices over how to go about deciding such a wide array of preemption issues, it is no wonder that preemption law lacks overall coherence. But preemption law would be clearer and more coherent if courts kept some of the points made above in mind, especially in the most controversial category of cases involving state tort requirements. Those cases have added to the confusion with their negative spillover effects for the overall doctrine of federal preemption.

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