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# The Problem of Federal Preemption: Reformulating the Black Letter Rules

Robert R. Gasaway\*

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## I. INTRODUCTION

The Supreme Court's current preemption jurisprudence can be neatly summarized in three black letter rules that cannot easily be applied in a manner that protects federal policies from intrusions by the fifty States. The first rule is that the touchstone of preemption analysis is Congress's intention to permit or proscribe state regulatory activity.<sup>1</sup> Rule two says that preemption analysis, meaning the sources of federal preemptive authority, revolves around four distinct doctrinal categories — express preemption, conflict preemption, obstacle preemption, and field preemption.<sup>2</sup> Rule three says that there should be a presumption against preemption where the relevant state regulatory activity falls within a field of traditional state

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1. See, e.g., *Metro. Life Ins. Co. v. Massachusetts*, 471 U.S. 724, 747 (1985) (noting that Congressional intent is the "ultimate touchstone" of all preemption analysis).

2. See, e.g., *English v. Gen. Elec. Co.*, 496 U.S. 72, 79 (1990).

authority.<sup>3</sup> All three rules are landmarks of Supreme Court jurisprudence.<sup>4</sup> All three were inherited by the Rehnquist Court from post-New Deal precedents.<sup>5</sup> As currently formulated and applied, however, none of the three captures the constitutional calculus that should — and in the best-reasoned cases actually does — drive decisional outcomes.<sup>6</sup> This article suggests reformulating the preemption rules, by reinforcing the best analysis from the best-reasoned cases, in order to achieve greater clarity and constitutional integrity in this important area of law.

## II. REFORMULATING THE BLACK LETTER RULES

### A. *Rule 1: Congress's Intent As The Touchstone Of Preemption Analysis*

The notion that the touchstone of preemption analysis is or should be Congress's specific intention to displace an identifiable body of state law is perhaps the least controversial — but ultimately the most problematic and subversive — of our current black letter rules. As an initial matter, there is strong evidence that concrete intentions do not in fact animate Congress's draftsmanship of express preemption provisions. For example, many statutes confusingly contain both broad preemption provisions and broad savings clauses. These statutory structures, far from rare or exceptional, are found in health and safety statutes;<sup>7</sup> economic regulatory regimes;<sup>8</sup> benefits regulations;<sup>9</sup> and environmental statutes.<sup>10</sup> Likewise, many statutory

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3. See, e.g., *Bates v. Dow Agrosciences LLC*, 125 S. Ct. 1788 (2005).

4. See *English*, 496 U.S. at 79 (and cases cited therein).

5. See *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230-31 (1947) (and cases cited therein); see also Stephen Gardbaum *New Deal Constitutionalism and the Unshackling of States*, 64 U. CHI. L. REV. 483, 533 (1997) (noting that in the New Deal era, the Supreme Court revised its preemption doctrine by establishing “a new requirement that state law is preempted if and only if Congress intends the federal statute in question to have this effect, and has clearly manifested such intent”).

6. The scholarly preemption literature is voluminous. Compare, e.g., Caleb Nelson, *Preemption*, 86 VA. L. REV. 225, 229 (2000) (stating that “[a]dvocates of ‘states’ rights’ have obvious reasons to oppose preemption: They dislike many federal statutes to begin with, and they want those statutes to leave states with as much policymaking authority as possible.”) with Gregory L. Taddonio, *Revisiting Myrick v. Freightliner: Applying the Brakes on Restrictive Preemption Analysis*, 14 J.L. & COM. 257, 273 (1995) (explaining how activity in state courts can “undermine the premise behind the Constitution’s Supremacy Clause by permitting an inconsistent state common law claim to outlast a federal statute.”). See also Calvin Massey, *Federalism and the Rehnquist Court*, 53 HASTINGS L.J. 431, 436 (2002).

7. See, e.g., *Geier v. Am. Honda Motor Co.*, 529 U.S. 861 (2000); *Sprietsma v. Mercury Marine*, 537 U.S. 51 (2002).

8. 47 U.S.C. § 332(c)(3)(A) (2000) (stating that “no State or local government” has “any authority to regulate the entry of or the rates charged by any commercial mobile service”); 47 U.S.C. § 414 (2000) (“[n]othing in this chapter contained shall in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this chapter are in addition to such remedies”).

9. See *Employment Retirement Income Security Act of 1974*, 29 U.S.C. § 1144(a) (2000) (preempting “any and all State laws insofar as they may now or hereafter relate to any employee benefit plan” governed by ERISA); 29 U.S.C. § 1144(b)(2)(A) (2000) (“[e]xcept as provided in subparagraph (B), nothing in this subchapter shall be construed to exempt or relieve any person from any law of any State which regulates insurance, banking, or securities”).

10. See *Bates*, 125 S. Ct. at 1788; *Wis. Pub. Intervenor v. Mortier*, 501 U.S. 597 (1990).

preemption provisions are drawn in exceedingly broad — and in many instances patently opaque — terms. The express preemption provision in the Employment Retirement Income Security Act (“ERISA”), which has spawned more Supreme Court litigation than any other such provision,<sup>11</sup> imposes federal preemption on all state laws “relat[ing] to any employee benefit plan.”<sup>12</sup> Other express preemption provisions employ similar locutions such as preempting all law “related to a price, route, or service of an air carrier.”<sup>13</sup> The seeming opacity of such “relating to” language has prompted Justice Scalia to observe that efforts to enforce such provisions according to their terms are necessarily “doomed to failure.”<sup>14</sup> And strictly speaking it is hard to disagree. It is certainly difficult to discern in such directives any concrete congressional guidance pointing to specific categories of (or even examples of) state laws subject to federal preemption.

Instead of parsing the language of such express-preemption provisions for concrete meaning that may well be absent, courts should recognize them as general instructions to apply preemption as broadly as necessary. Express preemption provisions that are either broadly framed or accompanied with savings clauses presumptively call for the displacement of some not precisely-definable class of state law in order to protect federal statutory regimes and effectuate their purposes.<sup>15</sup> The fact that Congress often paints over state law with broad preemptive brush-strokes is frequently met with lamentation. A common response from commenters of various stripes is the assertion that preemption, both express and implied, should be narrowly applied in order to force the congressional hand; induce the congressional

11. See, e.g., *Ky. Ass'n of Health Plans, Inc. v. Miller*, 538 U.S. 329 (2003); *Rush Prudential HMO, Inc. v. Moran*, 536 U.S. 355 (2002); *Pegram v. Herdich*, 530 U.S. 211 (2000); *UNUM Life Ins. Co. of Am. v. Ward*, 526 U.S. 358 (1999); *N.Y. State Conference of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.*, 514 U.S. 645 (1995); *John Hancock Mut. Life Ins. Co. v. Harris Trust & Sav. Bank*, 510 U.S. 86 (1993); *D.C. v. Greater Wash. Bd. of Trade*, 506 U.S. 125 (1992); *Ingersoll-Rand Co. v. McClendon*, 498 U.S. 133 (1990); *FMC Corp. v. Holliday*, 498 U.S. 52 (1990); *Massachusetts v. Morash*, 490 U.S. 107 (1989); *Mackey v. Lanier Collection Agency & Serv., Inc.*, 486 U.S. 825 (1988); *Fort Halifax Packing Co. v. Coyne*, 482 U.S. 1 (1987); *Metro. Life Ins. Co. v. Taylor*, 481 U.S. 58 (1987); *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41 (1987); *Metro. Life Ins. Co. v. Massachusetts*, 471 U.S. 724 (1985); *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85 (1983); *Alessi v. Raybestos-Manhattan, Inc.*, 451 U.S. 504 (1981); see generally Matthew O. Gatewood, *The New Map: The Supreme Court's Guide to Curing Thirty Years of Confusion in ERISA Savings Clause Analysis*, 62 WASH. & LEE L. REV. 643, 647-48 (2005).

12. Employment Retirement Income Security Act of 1974, 29 U.S.C. § 1144(a) (2000).

13. Airline Deregulation Act of 1978, 49 U.S.C. § 41713(b)(1) (2000).

14. *Cal. Div. of Labor Standards Enforcement v. Dillingham Constr., N.A., Inc.*, 519 U.S. 316, 335 (1997) (Scalia, J., concurring).

15. See *United States v. An Article of Drug . . . Bacto-Unidisk*, 394 U.S. 784, 798 (1969) (giving remedial statutes a “liberal construction”); *Piedmont & Northern Ry. v. Interstate Commerce Comm'n*, 286 U.S. 299, 311 (1932) (emphasizing that remedial legislation should receive “a broader and more liberal interpretation than that to be drawn from mere dictionary definitions of the words employed by Congress”); but see *Norfolk Redevelopment & Hous. Auth. v. Chesapeake & Potomac Tel. Co.* 464 U.S. 30, 35 (1983) (“It is a well-established principle of statutory construction that “[t]he common law . . . ought not to be deemed repealed, unless the language of a statute be clear and explicit for this purpose.”) (alterations in original) (citation omitted).

mind to contemplate which state statutes should and should not be preempted; and prompt the congressional pen to write with specificity. The corollary to this view is that the preemption provisions we actually have reflect a slumbering Congress shirking its responsibility. But in fact Congress cannot possibly draft precise preemption provisions — either before States act or afterward. For several interrelated reasons, it is unrealistic to expect Congress to form specific intentions as to what state regulatory activity it wishes to permit or proscribe.

*First*, it is a truism, but an important one, that written law is necessarily infused with ambiguity, which will become evident as the law is applied to events. It has been recognized at least since Medieval times that no lawmaker can anticipate all circumstances in which a given law will be applied.<sup>16</sup> In the preemption context, this means Congress cannot possibly anticipate the precise state activity deserving of preemption. Just as lawmakers can never fully anticipate what private parties will do, Congress cannot possibly anticipate what States might do to undermine federal policies. Precisely because no law can provide for all contingencies, letting state experimentation flourish will, at a minimum, allow States to undermine federal policies in the not-insubstantial interim between the point when the baleful consequences of state experiments gone awry become manifest and the time when responsive preemptive legislation can be enacted.

*Second*, the complexities involved in framing preemptive meta-laws restricting state lawmaking are far greater than those associated with writing primary law restricting private conduct. Consider, as an example, the broadly drawn provisions of Section 17200 of the California Business and Professions Code.<sup>17</sup> This broad wording has led, in many instances, to applications unfair to, and unanticipated by, businesses.<sup>18</sup> But the solution to this unfairness cannot possibly be as simple as providing exact legal descriptions of what trade practices are permitted and proscribed. A legislature could not possibly define every conceivable type of deceptive or unfair practice that might bilk consumers. Because no legislature could describe in advance each and every prohibited practice, a broadly drawn remedial law is inevitable.

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16. See St. Thomas Aquinas, TREATISE ON LAW, Question 96, Art. 6 (R.J. Henle, S.J. ed., Univ. of Notre Dame Press 1993) (“[N]ullius hominis sapentia tanta est ut possit omnes singulares casus excogitare; et ideo non potest sufficienter per verba exprimere ea quae conveniunt ad finem intentum . . . . No man is so wise that he can take into account every single case, and, therefore, he cannot sufficiently express in words everything that is conducive to the end he intends.”).

17. CAL. BUS. & PROF. CODE §§ 17200 *et seq.* (West 2005).

18. See, e.g., *Kasky v. Nike, Inc.*, 45 P.3d 243 (Cal. 2002), *cert. granted*, 537 U.S. 1099, *cert. dismissed as improvidently granted*, 539 U.S. 654 (2003) (holding that a corporation that participates in a public debate — writing letters to newspaper editors and to educators and publishing communications addressed to the general public on issues of great political, social, and economic importance — may be subject to liability under California law for factual inaccuracies on the theory that its statements are “commercial speech”); *Committee on Children’s Television, Inc. v. Gen. Foods Corp.*, 673 P.2d 660, 676 (Cal. 1983) (allowing Section 17200 complaint to proceed on theory that defendants had “engaged in a nationwide, long-term advertising campaign designed to persuade children to influence their parents to buy sugared cereals”).

The critical point for preemption analysis is that, as one moves from primary law governing private conduct to meta-law governing the preemption of state lawmaking, the problem of anticipating future consequences is made geometrically more difficult. Any preemption of sovereign lawmaking must, by definition, account both for all possible types of relevant private conduct and for all possible types of counterproductive state regulation of that conduct. The number of scenarios of concern can therefore be estimated by multiplying one very large number (representing modes of private conduct) by a second very large number (representing modes of counterproductive state regulation of that conduct). The ever-present problem of envisioning how a given law plays out in the real world is thus multiplied many times over in the preemption context.<sup>19</sup>

*Third*, there are fifty sovereign States that might potentially infringe the policies of Congress or the Executive Branch. The geometric increase in complexity discussed above describes only the difficulties of anticipating and pre-interdicting the counter-productive ways in which a *single* sovereign might undermine federal policies. Our system encompasses fifty such sovereigns. And, for better or worse, current Supreme Court doctrine permits each of the fifty States wide latitude in imposing its policies in extraterritorial fashion.<sup>20</sup> As a practical matter, then, effective congressional pre-interdiction efforts must account for all types of private conduct of concern, as well as all types of counterproductive state regulation that might potentially reach such conduct, as well as how these complex interactions might play out in the political, economic, and social contexts of any of the fifty States.

*Fourth*, although state actors are usually public-spirited, we know from no less acute an observer than James Madison that state governments, especially, are subject to capture by factions.<sup>21</sup> Experienced attorneys of our own day would, I believe, confirm this diagnosis. It is frequently observed that political interest groups that have lost in a federal legislative, administrative, or judicial process are sorely tempted to appeal their federal losses to state legislatures, courts, or attorneys general.<sup>22</sup> These interest groups are inevitably sophisticated enough to figure out that their efforts

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19. Cf. H. L. A. HART, *THE CONCEPT OF LAW* (1961) (distinguishing primary law from meta-law and, separately, discussing the difficulties of laying down comprehensive legal rules in advance).

20. See, e.g., *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797 (1985) (describing due process limitations on the extent to which state laws may be given extra-territorial application); *Franchise Tax Bd. of Cal. v. Hyatt*, 538 U.S. 488 (2003) (declining to strictly enforce the Full Faith and Credit Clause).

21. THE FEDERALIST NO. 10 (James Madison).

22. See, e.g., *Am. Ins. Ass'n v. Garamendi*, 539 U.S. 396 (2003) (striking down California statute requiring disclosure of information concerning Holocaust-era insurance policies); *Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363 (2000) (striking down Massachusetts statute prohibiting Massachusetts and its agencies from purchasing goods and services from companies that did business with Burma).

should target those States most susceptible to their appeals, blandishments, and intrigues. Factions that lose at the national level can therefore be expected as a matter of inherent political dynamics — call it a matter of demanding constituent service — to attempt to induce the most susceptible States to infringe, undermine, or totally nullify a federal policy equilibrium they oppose.

Finally, *post hoc* congressional responses to state encroachments are every bit as unrealistic as *ex ante* congressional preemption. For better or worse, the Founders deliberately hobbled the Congress in a manner that effectively precludes it from reacting to minor events occurring on multiple fronts. Our Congress is not a unified parliament on the British model. The Constitution imposes not only a separation of powers, but also checks and balances, among the most important of which is the check on federal legislative authority from that authority's division between a House of Representatives, a Senate, and a veto-wielding President.<sup>23</sup> This division was purposefully established at the Founding to disable the federal legislative power, prevent Congress from legislating in the absence of what amounts to a super-majority consensus,<sup>24</sup> and defuse the dangers of a “vortex” of untrammelled legislative power.<sup>25</sup> The answer to the advocates of narrow preemption who contend that Congress can respond to wayward States via after-the-fact preemption is that such policing is simply impractical. Congress is a lone, divided entity that must attend to its own legislative responsibilities. It cannot possibly react quickly and individually to the innumerable major and minor incursions that interest groups can be expected to demand of the States.

In summary, it is impossible for Congress to anticipate in advance or nullify afterward all the many state laws deserving of federal preemption. No legislature can envision the full effects of ordinary laws; it is especially impossible for a legislature to pre-envision the need for preemptive laws; and it is even more unrealistic to expect a legislature to pre-interdict state action that occurs simultaneously on fifty fronts, and that, as a matter of hydraulic political pressure, will center in those States most opposed to federal policies. Likewise, a divided federal legislature cannot possibly negate, after-the-fact, all of the intrusions one expects from fifty quasi-independent and potentially hostile sovereigns.

Precisely because our federal institutions do not allow for a *legislative* solution to the problem of protecting federal policy from the States, that responsibility — if it is to be discharged at all — must be assumed by the executive and judicial branches. For the reasons stated above, such protections must necessarily be (i) context-specific, (ii) activated after-the-fact, and (iii) imposed by an institution not practically disabled

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23. See generally David Epstein & Sharyn O'Halloran, *Nondelegation Doctrine and the Separation of Powers: A Political Science Approach*, 20 CARDOZO L. REV. 947 (1999) (discussing the nuances of the separation of powers doctrine).

24. See William N. Eskridge, Jr. & John Ferejohn, *Super-Statutes*, 50 DUKE L.J. 1215, 1221 (2001).

25. THE FEDERALIST NO. 48 (James Madison).

from making prompt, effective, and individualized responses. Under our Constitution, those criteria point uniquely to the adjudicatory and quasi-adjudicatory processes traditionally carried out by administrative agencies and, above all, the judicial branch of government. The first principles of preemption doctrine should therefore be that courts regard themselves as the *primary* guardians of federal policies and that preemption applies broadly to safeguard the effective operation of federal statutes.

### B. Rule 2: The Four Sources Of Federal Preemptive Authority

The second black letter rule in current jurisprudence is the four-fold scheme that recognizes “express preemption,” “obstacle preemption,” “conflict preemption,” and “field preemption” as distinct doctrinal categories.<sup>26</sup> But rather than being distinct, these categories overlap. In truth, any preemption analysis of the collisions between state and federal laws governing the same private conduct necessarily involves, not one, but precisely *two* of these recognized categories. This overlapping of doctrinal categories in the heartland of preemption jurisprudence — clashes between the federal commerce power and state police power<sup>27</sup> — can be seen in the following grid:

	<b>EXPRESS PREEMPTION</b>	<b>IMPLIED PREEMPTION</b>
<b>CONFLICT PREEMPTION</b>	Express-Conflict Preemption	Implied-Conflict- With-Federal- Objectives Preemption
<b>FIELD PREEMPTION</b>	Express-Field Preemption	Implied-Field Preemption

This grid illustrates that the Supreme Court’s preemption decisions divide, first, along the dimension of express versus implied preemption, and,

26. See, e.g., *English v. Gen. Elec. Co.*, 496 U.S. 72, 79 (1990); see also Richard E. Levy, *Federal Preemption, Removal Jurisdiction, and the Well-Pleaded Complaint Rule*, 51 U. CHI. L. REV. 634, 664 (1984) (discussing the different forms of preemption).

27. The heartland of courts’ preemption jurisprudence involves reconciliations of the federal commerce power with the States’ police power. But in addition to the Commerce Clause, important federal displacements of state law can also occur pursuant to the Naturalization Clause, Bankruptcy Clause, Patent Clause, Copyright Clause, foreign affairs powers, and other constitutional provisions. See U.S. CONST. art I, § 8., cl. 4 (Naturalization and Bankruptcy Clauses), cl. 8 (Copyright and Patent Clauses); U.S. CONST. art II, §§ 2, 3 (delineating presidential powers and responsibilities with respect to the conduct of war and foreign affairs). This article’s analysis is limited to instances of collisions between state and federal law regulating the same private conduct and, in particular, collisions between the federal commerce power (as supplemented by the Necessary and Proper Clause) and state police power. The article thus puts to the side questions of how preemption analysis might change in instances of direct federal regulation of States, contexts not involving the federal commerce power, or exercises of federal authority not primarily directed to private conduct.



secondarily, along lines of conflict versus field preemption. Express preemption cases are those in which Congress has deliberately written a statute directed at cabinining the sovereign law-making activity of the fifty States.<sup>28</sup> By contrast, implied preemption involves federal law directed in the first instance to private activity, but which by necessary implication displaces additional, conflicting regulation of that same private activity by State governments. Conflict preemption and field preemption occur through both express preemption and implied preemption — the difference being whether the particular congressional enactment addresses itself directly to state lawmaking conduct, as opposed to private conduct.

The distinction between conflict and field preemption likewise arises from the fundamental nature of a preemption inquiry. Conflict preemption occurs where Congress either expressly or impliedly focuses on the particular type of state law that must be disabled for the achievement of federal purposes.<sup>29</sup> By contrast, field preemption arises where Congress focuses expressly or impliedly on setting aside a specific type of activity that must remain free of state regulation for federal purposes to be achieved.<sup>30</sup> In one case, the legislative focus is on the state regulation to be struck down; in the other, the focus is on the flip-side of the coin — the private conduct to be affirmatively protected from state intrusion.

And what of that odd category out: “obstacle” preemption? As an initial matter, *all* preemption is “obstacle” preemption in the sense that all preemption involves the striking down of state statutes that pose obstacles to “the accomplishment and execution of the full purposes and objectives of Congress.”<sup>31</sup> The obstacle preemption category might therefore be viewed as a nugatory tautology.<sup>32</sup> On a second look, however, the recognition of an “obstacle” preemption principle serves a critical function in the express preemption context.

In cases involving express preemption, the independent recognition of obstacle preemption is analytically helpful: it emphasizes that in those cases, as in other contexts, “[t]he Constitution ‘nullifies sophisticated as well as simple-minded modes’ of infringing on constitutional protections.”<sup>33</sup> Obstacle preemption is thus one instance of the general principle that constitutional protections apply fully against infringements that have been cleverly disguised under non-infringing forms of state action. In other words, the same constitutional principle that holds unconstitutional facially

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28. See Nelson, *supra* note 6, at 226-27.

29. See *id.* at 227-28.

30. See *id.* at 227.

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

32. Cf. Nelson, *supra* note 6, at 232, 287 (arguing that a general doctrine of obstacle preemption is misplaced).

33. *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 829 (1995) (quoting *Lane v. Wilson*, 307 U.S. 268, 275 (1939), and *Harman v. Forssenius*, 380 U.S. 528, 540-41 (1965)).

neutral rules that are substantively discriminatory as to speech,<sup>34</sup> religion,<sup>35</sup> race,<sup>36</sup> or out-of-state businesses<sup>37</sup> encompasses attempted evasions of express preemption provisions. In this context, the application of this firmly rooted principle demands preemption of state regulations that substantively infringe expressly preemptive federal statutes, even where the state regulation in question facially avoids the narrow terms of preemptive statutory language. Obstacle preemption ensures that state laws do not evade express preemption by taking on creative legal forms in order to accomplish forbidden purposes.<sup>38</sup>

But if the “obstacle preemption” rubric serves useful functions in express preemption cases, it unfortunately retards analysis in implied preemption cases. There, distinctions between “direct conflict” situations, where “it is impossible for a private party to comply with both federal and state requirements,”<sup>39</sup> and “obstacle conflict” situations, “where state law ‘stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress,’”<sup>40</sup> are almost always insignificant and diversionary. For reasons canvassed above, one expects that States seeking to undermine federal policies will be adroit enough to accomplish their undermining without opening direct conflicts between state and federal law. The essential core of the implied preemption caseload will therefore be the many instances where, short of resorting to directly opposing federal law, States obstruct the “accomplishment and execution of the full purposes and objectives of Congress.” Direct conflict cases are rare birds in bright plumage perched atop a submerged jurisprudential iceberg of state laws subtly undermining federal objectives.

A quantum advance in analytical clarity would be achieved simply by merging the implied preemption analyses now carried out under the “obstacle” and “direct conflict” categories into a unified inquiry that

34. See, e.g., *United States v. Eichman*, 496 U.S. 310 (1990) (striking down flag-burning amendment as violative of the First Amendment); *Minneapolis Star & Tribune Co. v. Minn. Comm’r of Revenue*, 460 U.S. 575 (1983) (holding that the imposition of a use tax on the cost of paper and ink products consumed in production of publications violated the First Amendment).

35. See, e.g., *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520 (1993); *Bd. of Educ. v. Grumet*, 512 U.S. 687 (1994).

36. See *Washington v. Davis*, 426 U.S. 229 (1976) (assessing constitutionality of written personnel test alleged to have discriminatory impact); *Gomillion v. Lightfoot*, 364 U.S. 339 (1960) (holding that lawsuit challenging local act passed by Alabama legislature redefining city boundaries to exclude minority votes stated cause of action under the Constitution’s Due Process and Equal Protection Clauses).

37. See *Pike v. Bruce Church, Inc.*, 397 U.S. 137 (1970).

38. See, e.g., *Gilmore v. Sw. Bell Mobile, Inc.*, 156 F. Supp. 2d 916 (N.D. Ill. 2001) (concluding that plaintiffs’ breach-of-contract allegations effectively challenged defendant’s rates and, therefore, were preempted under the Federal Telecommunications Act).

39. *English v. Gen. Elec.*, 496 U.S. 72, 79 (citing *Fla. Lime and Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142-43 (1963)).

40. *Id.* (citing *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941); *Maryland v. Louisiana*, 451 U.S. 725, 747 (1981)).

analyzes preemption on grounds of “implied conflict with federal objectives.” As current doctrine stands, little is accomplished by asking whether “it is impossible for a private party to comply with both federal and state requirements.” In those rare cases of direct conflict, the Constitution is so *clearly* violated that the state law at issue may well be a statement of dissent from federal policy or an overt challenge to Congress’s authority to legislate<sup>41</sup> — as opposed to a fair-minded attempt to supplement a federal law whose constitutionality is accepted as a given. The “direct conflict” prong of implied preemption analysis can thus form an analytical diversion tending to delegitimize the hard work of ascertaining whether and to what extent state law undermines federal objectives. It is as if courts confronting Eighth Amendment claims, before getting down to business, asked first whether a challenged practice involved “a drawing on the rack, boiling in oil, or burning at the stake.” In the implied preemption context, contested “direct conflict” cases are only modestly more common — and only marginally more difficult — than burning-at-the-stake Eighth Amendment cases.

In sum, Courts should recognize that implied preemption always involves the search for conflicts between state law and federal *objectives*, accompanied by a recognition that such conflicts are easy to identify in cases of direct opposition between state and federal law. Conversely, in the express preemption context, the obstacle preemption rubric serves as a critical reminder that displacements of state law via express preemption must be interpreted liberally to accomplish their purposes.

Reformulated in this manner, current Supreme Court doctrine can sensibly be seen as recognizing many of the underlying legal and logical distinctions inherent in preemption analysis. Those distinctions include: (i) the essential difference between preemptive law addressed to private activity (implied preemption) and preemptive law addressed to state lawmaking (express preemption),<sup>42</sup> (ii) the essential difference between enactments negating specified state laws (conflict preemption) and enactments walling private activity off from state interference (field preemption); and, finally, (iii) the essential difference between legal substance and legal form (between “obstacle” and “express” preemption) as that distinction has come to be applied across a wide spectrum of constitutional analysis, including preemption cases.

Notwithstanding its continuity with received doctrine, this reformulation has consequences. As one example, it calls for the elaboration and

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41. An example is the California law legalizing medicinal uses of marijuana in direct conflict with federal law criminalizing such uses. *See Gonzales v. Raich*, 125 S. Ct. 2195 (2005). That law was supported by advocates of marijuana legalization as a means of both delegitimizing the federal policy of criminalization and challenging the federal government’s authority to criminalize medicinal uses of marijuana under the Commerce Clause.

42. One scholar has argued that congressional authority to effect these two types of preemption might potentially rest on two different constitutional provisions. *See generally* Stephen Gardbaum, *Rethinking Constitutional Federalism*, 74 TEX. L. REV. 795 (1996) (discussing differences between the Supremacy Clause and the Necessary and Proper Clause as sources of Congress’s authority to preempt state laws).

refinement of the traditional test for finding “field” preemption. That traditional test asks whether federal regulation so pervades a substantive area of law that it allows no room for state supplementation.<sup>43</sup> But if one were considering not state lawmaking but federal *agency* lawmaking and the question were the same — whether a given federal statute had so pervasively occupied the field as to leave no room for supplementation via administrative regulations — the answer would be obvious.<sup>44</sup> There is *always* potential clarification, supplementation, and administrative interpretation that an agency might conceivably engage in to flesh out a given statutory regime. Accordingly, the “pervasiveness” test for field preemption is difficult to apply with consistency. One can always imagine further, additional levels of regulation — whether by federal administrators or state legislatures. The question becomes how pervasive is pervasive enough to preempt?

### *C. Rule 3: The Presumption Against Preemption*

A complete answer to that critical question must include consideration of the third black letter rule of current doctrine — the presumption against preemption in areas of traditional state authority. An obvious difficulty with this presumption is that its application can depend on how the inquiry is framed. In the medical device context, one might ask whether it is within traditional notions of state authority for States to govern the design and manufacture of federally licensed, completely standardized goods shipped everywhere in the United States in interstate commerce. Framed in this manner, the answer is “no.” Alternatively, however, one might ask whether States have traditionally legislated to ensure the health and safety of their citizens. Stated in this manner, the answer is “yes.” More generally, the traditional-authority inquiry will almost always be sufficiently elastic to ask either whether States have traditionally regulated the cross-border and economic aspects of an activity (like selling medical devices or pharmaceuticals) or, alternatively, whether they have regulated the localized, health-and-safety aspects of that same activity. A principled choice between these alternatives is difficult to achieve under current doctrine.

Here again, the underlying logic of preemption may show the way. Findings of federal preemption are often rooted in the need to protect federal resolutions of problems requiring the balancing of competing objectives — cases where Congress or a federal agency has arrived at what is assertedly an optimal level of regulation.<sup>45</sup> Such analysis can be seen in the early ratemaking preemption cases.<sup>46</sup> If the Interstate Commerce Commission

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43. See *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 248 (1984).

44. Cf. *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984).

45. See, e.g., *Nw. Cent. Pipeline Corp. v. Kan. Corp. Comm'n*, 489 U.S. 493, 513-14 (1989).

46. See *S. Ry. Co. v. Reid*, 222 U.S. 424 (1912).

sets a transportation rate that fairly balances the interests of shippers and customers, that rate should be regarded as an optimum and protected against State attempts to make shifts in either direction. Customers get their fair price; shippers get their fair return on investment; and by definition any movement from that set rate undermines one federal objective or the other, thus conflicting with the federal regime.<sup>47</sup> Another example of this logic comes from the Supreme Court's recognition of what amounts to implied preemption under the National Labor Relations Act ("NLRA").<sup>48</sup> Although the NLRA contains no express preemption provision, some of the most potent instances of preemption appear in the NLRA context.<sup>49</sup> The explanation for this preemptive potency likely lies in the fact that the NLRA, like ratemaking statutes, seeks to strike a balance, optimum, or golden mean. Courts have emphasized that in enacting the NLRA, Congress specified the various powers of unions and management in order to achieve a balance of power in the collective-bargaining process.<sup>50</sup> Accordingly, States that try to upset this equilibrium balance — whether to the advantage of unions or management — necessarily encroach upon a field of economic activity impliedly reserved for federally ordered private conduct.

In the pharmaceutical and medical device context, the case for implied field preemption rests on the premise that drug and device approval processes undertaken by the Food and Drug Administration ("FDA") were established to strike just the right balance between protecting consumers from harmful products and preserving manufacturers' ability to sell therapeutic products — including those with known health-and safety risks and side effects.<sup>51</sup> Given that premise, the preemption presumption in the drug and device context should be not one against federal preemption, but one in favor of preempting state regulation that upsets this delicate federal balance. That is, courts should apply a strong presumption in favor of preempting state common law, statutory, or regulatory standards that conflict with policy balances implicit in FDA drug or device approvals.

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47. See *id.* at 436, 442 (holding that the Interstate Commerce Act had "taken possession of the field" of interstate railroad rate regulation and that consequently both existing state laws and future exercises of state lawmaking in the field had been "superseded").

48. See, e.g., *Wis. Dep't of Indus., Labor, & Human Relations v. Gould, Inc.*, 475 U.S. 282, 288-89 (1986).

49. *Livados v. Bradshaw*, 512 U.S. 107 (1994) (holding California Labor Commissioner's policy preempted by federal law); *Nash v. Fla. Indus. Comm'n*, 389 U.S. 235 (1967) (holding that Florida's refusal to pay unemployment insurance frustrated Congressional purpose and, therefore, is preempted).

50. See, e.g., *Allis-Chalmers Corp. v. Lueck*, 471 U.S. 202, 210-211 (1985); *Local 174, Teamsters v. Lucas Flour Co.*, 369 U.S. 95, 104 (1962); see also *Chamber of Commerce of the United States v. Reich*, 74 F.3d 1322 (1996) (holding that National Labor Relations Act provision guaranteeing management's right to hire permanent replacements during labor strikes preempted conflicting Executive Order made under the Procurement Act).

51. See *Buckman Co. v. Plaintiffs' Legal Committee*, 531 U.S. 341 (2001).

## III. CONCLUSION

As I have attempted to show, the Supreme Court's preemption jurisprudence rests on three mostly uncontroversial rules that cannot be readily and directly applied in a manner that adequately protects federal policy from intrusions by the fifty States. Instead of continuing to apply them, our constitutional system would be better served if the Court were to carefully reformulate these rules in conformity with the structural logic of federal preemption. This reformulation should include at a minimum (i) the recognition by courts that they, not the Congress, must serve as primary guardians of federal law against state intrusions; (ii) better understandings of the underlying logic and overlapping nature of the doctrinal categories of preemption analysis; and (iii) a recognition that when federal policies are carefully calibrated to achieve a delicate balance of competing objectives, presumptions should weigh in favor of, not against, federal preemption of state law.

