Federal Preemption: A Legal Primer

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SUMMARY

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The Constitution's Supremacy Clause provides that federal law is "the supreme Law of the Land" notwithstanding any state law to the contrary. This language is the foundation for the doctrine of federal preemption, according to which federal law supersedes conflicting state laws. The Supreme Court has identified two general ways in which federal law can preempt state law. First, federal law can *expressly* preempt state law when a federal statute or regulation contains explicit preemptive language. Second, federal law can *impliedly* preempt state law when Congress's preemptive intent is implicit in the relevant federal law's structure and purpose.

This report begins with an overview of certain general preemption principles. In both express and implied preemption cases, the Supreme Court has made clear that Congress's purpose is the "ultimate touchstone" of its statutory analysis. The Court's analysis of Congress's purpose has at times been informed by a canon of statutory construction known as the "presumption against preemption," which instructs that federal law should not be read as preempting state law "unless that was the clear and manifest purpose of Congress." However, the Court has recently applied the presumption somewhat inconsistently, raising questions about its current scope and effect. Moreover, in 2016, the Court held that the presumption no longer applies in express preemption cases.

After reviewing these general themes in the Supreme Court's preemption jurisprudence, the report turns to the Court's express preemption case law. In this section, the report analyzes how the Court has interpreted federal statutes that preempt (1) state laws "related to" certain subjects, (2) state laws concerning certain subjects "covered" by federal laws and regulations, (3) state requirements that are "in addition to, or different than" federal requirements, and (4) state "requirements," "laws," "regulations," and "standards." While preemption decisions depend heavily on the details of particular statutory schemes, the Court has assigned some of these phrases specific meanings even when they have appeared in different statutory contexts.

Finally, the report reviews illustrative examples of the Court's implied preemption decisions. In these cases, the Court has identified two subcategories of implied preemption: "field preemption" and "conflict preemption." Field preemption occurs when a pervasive scheme of federal regulation implicitly precludes supplementary state regulation, or where states attempt to regulate a field where there is clearly a dominant federal interest. Applying these principles, the Court has held that federal law occupies a number of regulatory fields, including alien registration, nuclear safety regulation, and the regulation of locomotive equipment.

In contrast, conflict preemption occurs when simultaneous compliance with both federal and state regulations is impossible ("impossibility preemption"), or when state law poses an obstacle to the accomplishment of federal goals ("obstacle preemption"). The Court has extended the scope of impossibility preemption in two recent decisions, holding that compliance with both federal and state law can be "impossible" even when a regulated party can (1) petition the federal government for permission to comply with state law, or (2) avoid violations of the law by refraining from selling a regulated product altogether. In its obstacle preemption decisions, the Court has concluded that state law can interfere with federal goals by frustrating Congress's intent to adopt a uniform system of federal regulation, conflicting with Congress's goal of establishing a regulatory "ceiling" for certain products or activities, or by impeding the vindication of a federal right.

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The Constitution's Supremacy Clause provides that "the Laws of the United States . . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."[1] This language is the foundation for the doctrine of federal preemption, according to which federal law supersedes conflicting state laws.[2]

Federal preemption of state law is a ubiquitous feature of the modern regulatory state and "almost certainly the most frequently used doctrine of constitutional law in practice."[3] Indeed, preemptive federal statutes shape the regulatory environment for most major industries, including drugs and medical devices, banking, air transportation, securities, automobile safety, and tobacco.[4] As a result, "[d]ebates over the federal government's preemption power rage in the courts, in Congress, before agencies, and in the world of scholarship."[5] These debates over federal preemption implicate many of the themes that recur throughout the federalism literature. Proponents of broad federal preemption often cite the benefits of uniform national regulations[6] and the concentration of expertise in federal agencies.[7] In contrast, opponents of broad preemption often appeal to the importance of policy experimentation,[8] the greater democratic

[1] U.S. CONST. art. VI, cl. 2.

[2] Gade v. Nat'l Solid Wastes Mgmt. Assn., 505 U.S. 88, 108 (1992).

[3] Stephen A. Gardbaum, *The Nature of Preemption*, 79 CORNELL L. REV. 767, 768 (1994). *See also* Jamelle C. Sharpe, *Toward (a) Faithful Agency in the Supreme Court's Preemption Jurisprudence*, 18 GEO. MASON L. REV. 367, 367 (2011) ("Preemption has become one of the most frequently recurring and perplexing public law issues facing the federal courts today."); Garrick B. Pursley, *Preemption in Congress*, 71 OHIO ST. L. J. 511, 513 (2010) (describing preemption as "the issue of constitutional law that most directly impacts everyday life"); Thomas W. Merrill, *Preemption and Institutional Choice*, 102 NW. U. L. REV. 727, 730 (2008) (noting that "[p]reemption is one of the most widely applied doctrines in public law.").

[4] Pursley, *supra* note 3, at 513.

[5] William W. Buzbee, *Introduction*, *in* PREEMPTION CHOICE: THE THEORY, LAW, AND REALITY OF FEDERALISM'S CORE QUESTION 1, 1 (William W. Buzbee ed., 2009).

[6] *See* Alan Untereiner, *The Defense of Preemption: A View From the Trenches*, 84 TUL. L. REV. 1257, 1262 (2010) (arguing that the "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."); Richard B. Stewart, *Regulatory Compliance Preclusion of Tort Liability: Limiting the Duel-Track System*, 88 GEO. L. J. 2167, 2169 (2000) (arguing that state common law "cannot ensure desirable consistency and coordination in legal requirements," which are "especially important for nationally marketed products"); Geier v. Am. Honda Motor Co., Brief for the Chamber of Commerce of the United States of America as Amicus Curiae, Nov. 19, 1999 at 20 (arguing that "common-law decisionmaking is notoriously ill-suited to the establishment of nationwide standards that strike the proper balance among the multitude of societal interests at stake in a particular regulatory setting").

[7] *See* Untereiner, *supra* note 6, at 1262 ("In many cases, Congress's adoption of a preemptive scheme . . . 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."); Scott A. Smith & Duana Grage, *Federal Preemption of State Products Liability Actions*, 27 WM. MITCHELL L. REV. 391, 416 (2000) ("[E]xpert federal regulators, intimately familiar with the products and industries they regulate, are arguably far better suited [than state courts and juries] . . . to ascertain the degree of federal uniformity necessary to assure safety, efficacy, and availability at a reasonable cost.").

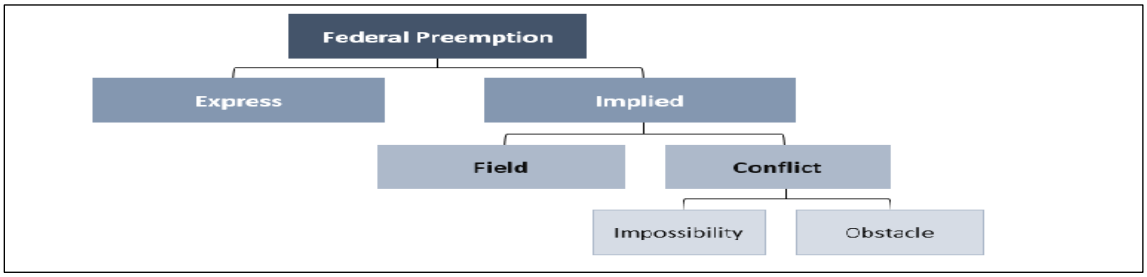
[8] *See* Ernest A. Young, *Making Federalism Doctrine: Fidelity, Institutional Competence, and Compensating Adjustments*, 46 WM. & MARY L. REV. 1733, 1850 (2004) ("Preemption doctrine . . . goes to whether state governments actually have the opportunity to provide beneficial regulation for their citizens; there can be no experimentation or policy diversity, and little point to citizen participation, if such opportunities are supplanted by federal policy.").

accountability that they believe accompanies state and local regulation,[9] and the "gap-filling" role of state common law in deterring harmful conduct and compensating injured plaintiffs.[10]

These broad normative disputes occur throughout the Supreme Court's preemption case law. However, the Court has also identified different ways in which federal law can preempt state law, each of which raises a unique set of narrower interpretive issues. As **Figure 1** illustrates, the Court has identified two general ways in which federal law can preempt state law. First, federal law can *expressly* preempt state law when a federal statute or regulation contains explicit preemptive language. Second, federal law can *impliedly* preempt state law when its structure and purpose implicitly reflect Congress's preemptive intent.[11]

The Court has also identified two subcategories of implied preemption: "field preemption" and "conflict preemption." Field preemption occurs when a pervasive scheme of federal regulation implicitly precludes supplementary state regulation, or when states attempt to regulate a field where there is clearly a dominant federal interest.[12] In contrast, conflict preemption occurs when compliance with both federal and state regulations is a physical impossibility ("impossibility preemption"),[13] or when state law poses an "obstacle" to the accomplishment of the "full purposes and objectives" of Congress ("obstacle preemption").[14]

Figure 1. Preemption Taxonomy



Source: CRS.

While the Supreme Court has repeatedly distinguished these preemption categories, it has also explained that the presence of an express preemption clause in a federal statute does not preclude implied preemption analysis. In *Geier v. American Honda Motor Co*., the Court held that

[9] *See* Robert R.M. Verchick & Nina Mendelson, *Preemption and Theories of Federalism, in* PREEMPTION CHOICE: THE THEORY, LAW, AND REALITY OF FEDERALISM'S CORE QUESTION 13, 17 (William W. Buzbee ed., 2009) ("[P]reserving state regulatory authority may . . . benefit citizens by prompting greater engagement in government. Citizens are often presumed to be able to participate more directly in policy making at the state level."); Roderick M. Hills, Jr., *Against Preemption: How Federalism Can Improve the National Legislative Process*, 82 N.Y.U. L. REV. 1, 4 (2007) ("Federalism's value, if there is any, lies in the often competitive interaction between the levels of government. In particular, a presumption against federal preemption of state law makes sense not because states are necessarily good regulators of conduct within their borders, but rather because state regulation makes Congress a more honest and democratically accountable regulator of conduct throughout the nation.").

[10] Thomas O. McGarity, THE PREEMPTION WAR: WHEN FEDERAL BUREAUCRACIES TRUMP LOCAL JURIES 237 (2008) ("The common law provides an effective vehicle for filling regulatory gaps that inevitably arise at the implementation stage because agencies can never anticipate and regulate every potentially socially undesirable aspect of an ongoing business and cannot possibly envision all of the possible ways that regulatees will react to regulatory programs.").

[11] Gade v. Nat'l Solid Wastes Mgmt. Assn., 505 U.S. 88, 98 (1992).

[12] *Id.*

[13] Fla. Lime & Avocado Growers, Inc. v. Paul, 373 U.S. 132, 142-43 (1963).

[14] Hines v. Davidowitz, 312 U.S. 52, 67 (1941).

although a preemption clause in a federal automobile safety statute did not *expressly* displace state common law claims involving automobile safety, the federal statute and associated regulations nevertheless *impliedly* preempted those claims based on conflict preemption principles.[15] Congress must therefore consider the possibility that the laws it enacts may be construed as impliedly preempting certain categories of state law even if those categories do not fall within the explicit terms of a preemption clause.

This report provides a general overview of federal preemption to inform Congress as it crafts laws implicating overlapping federal and state interests. The report begins by reviewing two general principles that have shaped the Court's preemption jurisprudence: the primacy of congressional intent and the "presumption against preemption." The report then discusses how courts have interpreted certain language that is commonly used in express preemption clauses. Next, the report reviews judicial interpretations of statutory provisions designed to insulate certain categories of state law from federal preemption ("savings clauses"). Finally, the report discusses the Court's implied preemption case law by examining illustrative examples of its field preemption, impossibility preemption, and obstacle preemption decisions.

General Preemption Principles

The Primacy of Congressional Intent

The Supreme Court has repeatedly explained that in determining whether (and to what extent) federal law preempts state law, the purpose of Congress is the "ultimate touchstone" of its statutory analysis.[16] The Court has further instructed that Congress's intent is discerned "primarily" from a statute's text.[17] However, the Court has also noted the importance of statutory structure and purpose in determining how Congress intended specific federal regulatory schemes to interact with related state laws.[18] Like many of its statutory interpretation cases, then, the Court's preemption decisions often involve disputes over the appropriateness of consulting extra-textual evidence to determine Congress's intent.[19]

The Presumption Against Preemption

In evaluating congressional purpose, the Court has at times employed a canon of construction commonly referred to as the "presumption against preemption," which instructs that federal law should not be read to preempt state law "unless that was the clear and manifest purpose of Congress."[20] The Court regularly appealed to this principle in the 1980s and 1990s,[21] but has

[15] 529 U.S. 861, 881-82 (2000).

[16] Wyeth v. Levine, 555 U.S. 555, 565 (2009) (quoting Retail Clerks v. Schermerhorn, 375 U.S. 96, 103 (1963)).

[17] Medtronic, Inc. v. Lohr, 518 U.S. 470, 486 (1996) (internal quotation marks and citation omitted).

[18] *Id*. (internal quotation marks and citation omitted).

[19] *See, e.g., Wyeth*, 555 U.S. at 583 (Thomas, J., concurring in the judgment) (rejecting the Court's obstacle preemption jurisprudence as "inconsistent with the Constitution," while noting that the Court "routinely invalidates state laws based on perceived conflicts with broad federal policy objectives, legislative history, or generalized notions of congressional purpose that are not embodied within the text of federal law").

[20] Rice v. Sante Fe Elevator Corp., 331 U.S. 218, 230 (1947). The presumption against preemption has traditionally been justified on the grounds that it promotes respect for federalism and state sovereignty. *See* Cipollone v. Liggett Grp., Inc., 505 U.S. 504, 533 (1992) (Blackmun, J., concurring in part, concurring in the judgment, and dissenting in part).

[21] *See, e.g.*, De Buono v. NYSA-ILA Med. and Clinical Servs. Fund, 520 U.S. 806, 814 (1997) ("Respondents . . . bear

invoked it inconsistently in recent cases.[22] Moreover, in a 2016 decision, the Court departed from prior case law[23] when it held that the presumption no longer applies in express preemption cases.[24]

The Court's repudiation of the presumption in express preemption cases can be traced to the growing popularity of textualist approaches to statutory interpretation, as many textualists have expressed skepticism about such "substantive" canons of construction.[25] Unlike "semantic" or "linguistic" canons, which express rules of thumb concerning ordinary uses of language,[26] substantive canons favor or disfavor particular *outcomes*—even when those outcomes do not follow from the most natural reading of a statute's text.[27] Because of these effects, prominent textualists have expressed suspicion about substantive canons' legitimacy.[28] According to

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the considerable burden of overcoming the starting presumption that Congress did not intend to supplant state law.") (internal quotation marks and citation omitted); N.Y. State Conference of Blue Cross & Blue Shield Plans v. Travelers Ins. Co., 514 U.S. 645, 654 (1995). ("[W]e have never assumed lightly that Congress has derogated state regulation, but instead have addressed claims of pre-emption with the starting presumption that Congress does not intend to supplant state law."); Bldg. and Const. Trades Council of Metropolitan Dist. v. Assoc. Builders and Contractors of Massachusetts, 507 U.S. 218, 224 (1993) ("Consideration under the Supremacy Clause starts with the basic assumption that Congress did not intend to displace state law.") (internal quotation marks and citation omitted); *Cipollone*, 505 U.S. at 518 ("[W]e must construe these provisions in light of the presumption against the pre-emption of state police power regulations."); Gade v. Nat'l Solid Wastes Mgmt. Ass'n, 505 U.S. 88, 116 (1992) ("[Preemption] [a]nalysis begins with the presumption that Congress did not intend to displace state law.") (internal quotation marks and citation omitted); Metropolitan Life Ins. Co. v. Massachusetts, 471 U.S. 724, 740 (1985) ("We also must presume that Congress did not intend to pre-empt areas of traditional state regulation."); Hillsborough County, Fla. v. Automated Med. Lab., Inc., 471 U.S. 707, 715 (1985) ("The second obstacle in appellee's path is the presumption that state or local regulation of matters related to health and safety is not invalidated under the Supremacy Clause."); Maryland v. Louisiana, 451 U.S. 725, 746 (1981) ("Consideration under the Supremacy Clause starts with the basic assumption that Congress did not intend to displace state law.").

[22] *See, e.g.*, Mutual Pharmaceutical Co., Inc. v. Bartlett, 570 U.S. 472 (2013) (holding that federal law preempted state law without mentioning the presumption against preemption); Kurns v. Ry. Friction Products Corp., 565 U.S. 625 (2012) (similar); PLIVA, Inc. v. Mensing, 564 U.S. 604, 622 (2011) (similar); Bruesewitz v. Wyeth LLC, 562 U.S. 223 (2011) (similar); Rowe v. New Hampshire Motor Transport Ass'n, 552 U.S. 364 (2008) (similar); Geier v. Am. Honda Motor Co., Inc., 529 U.S. 861 (2000) (similar); United States v. Locke, 529 U.S. 89, 108 (2000) (similar).

[23] *See, e.g.*, CTS Corp. v. Waldburger, 573 U.S. 1, 19 (2014) ("[W]hen the text of a pre-emption clause is susceptible of more than one plausible reading, courts ordinarily accept the reading that disfavors preemption.") (internal quotation marks and citations omitted); Wyeth v. Levine, 555 U.S. 555, 565 (2009) (explaining that the presumption against preemption applies "[i]n all preemption cases"); Altria Group, Inc. v. Good, 555 U.S. 70, 77 (2008) (explaining that the Court "begin[s its] analysis" with a presumption against preemption "[w]hen addressing questions of *express or implied* pre-emption") (emphasis added); Bates v. Dow Agrosciences, LLC, 544 U.S. 431, 449 (2005) ("Even if [the defendant] had offered us a plausible alternative reading of [the relevant preemption clause]—indeed, even if its alternative were just as plausible as our reading of the text—we would nevertheless have a duty to accept the reading that disfavors preemption."); Egelhoff v. Egelhoff *ex rel.* Breiner, 532 U.S. 141, 151 (2001) (invoking the presumption against preemption in interpreting ERISA's preemption clause); Medtronic, Inc. v. Lohr, 518 U.S. 470, 485 (1996) (explaining that the presumption against preemption applies "[i]n all preemption cases"); De Buono v. NYSA-ILA Med. and Clinical Servs. Fund, 520 U.S. 806, 814 (1997) (invoking the presumption against preemption in interpreting ERISA's preemption clause); *Travelers*, 514 U.S. at 654 (same); *Cipollone*, 505 U.S. at 518 (invoking the presumption against preemption in interpreting the Federal Cigarette Labeling and Advertising Act's preemption clause).

[24] Puerto Rico v. Franklin Cal. Tax-Free Trust, 136 S. Ct. 1938, 1946 (2016) (explaining that in express preemption cases, the Court "do[es] not invoke any presumption against pre-emption but instead focus[es] on the plain wording of the clause, which necessarily contains the best evidence of Congress' pre-emptive intent.").

[25] See CRS Report R45153, *Statutory Interpretation: Theories, Tools, and Trends*, by Valerie C. Brannon.

[26] *See* WILLIAM N. ESKRIDGE, JR., PHILIP P. FRICKEY & ELIZABETH GARRETT, CASES AND MATERIALS ON LEGISLATION: STATUTES AND THE CREATION OF PUBLIC POLICY 819 (3d ed. 2001).

[27] JOHN F. MANNING & MATTHEW C. STEPHENSON, LEGISLATION AND REGULATION: CASES AND MATERIALS 202 (2d ed. 2013).

[28] *See* Amy Coney Barrett, *Substantive Canons and Faithful Agency*, 90 B.U. L. REV. 109, 123-24 (2010) ("Substantive

textualist critics of the presumption against preemption, a statute's inclusion of a preemption clause provides sufficient evidence of Congress's intent to preempt state law.[29] These critics contend that in light of this clear expression of congressional intent, preemption clauses should be given their "ordinary meaning" rather than any narrower constructions that the presumption might dictate.[30] The Supreme Court ultimately adopted this position in its 2016 decision in *Puerto Rico v. Franklin California Tax-Free Trust*.[31]

The Court has also endorsed certain narrower exceptions to the presumption against preemption. Specifically, the Court has declined to apply the presumption in cases involving (1) subjects which the states have not traditionally regulated,[32] and (2) areas in which the federal government has traditionally had a "significant" regulatory presence.[33] In *Buckman Company v. Plaintiffs' Legal Committee*, for example, the Court declined to apply the presumption when it held that federal law preempted state law claims alleging that a medical device manufacturer had defrauded the Food and Drug Administration during the pre-market approval process for its device.[34] The Court refused to apply the presumption in *Buckman* on the grounds that states have not traditionally policed fraud against federal agencies, reasoning that the relationship between federal agencies and the entities they regulate is "inherently federal in character."[35] Likewise, in *Arizona v. Inter Tribal Council of Arizona, Inc.*, the Court declined to apply the presumption in holding that the National Voter Registration Act preempted a state law requiring voter-registration officials to reject certain registration applications.[36] In refusing to apply the presumption, the Court explained that state regulation of congressional elections "has always existed subject to the express qualification that it terminates according to federal law."[37]

Similarly, the Court has declined to apply the presumption in cases involving areas in which the federal government has traditionally had a "significant" regulatory presence.[38] In *United States v. Locke*, the Court held that the federal Ports and Waterways Safety Act preempted state regulations regarding navigation watch procedures, crew English language skills, and maritime casualty

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canons are in significant tension with textualism . . . insofar as their application can require a judge to adopt something other than the most textually plausible meaning of a statute."); John F. Manning, *Textualism and the Equity of the Statute*, 101 COLUM. L. REV. 1, 124 (2001) ("If textualists believe . . . that statutes mean what a reasonable person would conventionally understand them to mean, then applying a less natural . . . interpretation is arguably unfaithful to the legislative instructions contained in the statute."); ANTONIN SCALIA, A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 28 (1997) (arguing that "[t]o the honest textualist," substantive canons "are a lot of trouble"); *id.* at 28-29 (". . . whether these dice-loading rules are bad or good, there is also the question of where the courts get the authority to impose them. Can we really just decree that we will interpret the laws that Congress passes to mean more or less than what they fairly say? I doubt it.").

[29] Cipollone v. Liggett Grp., Inc., 505 U.S. 504, 548 (1992) (Scalia, J., concurring in the judgment in part and dissenting in part).

[30] *Id. See also* ANTONIN SCALIA & BRYAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 293 (2012) ("[T]he [presumption against preemption] . . . ought not to be applied to the text of an explicit preemption provision . . . The reason is obvious: The presumption is based on an assumption of what Congress, in our federal system, would or should normally desire. But when Congress has explicitly set forth its desire, there is no justification for not taking Congress at its word—i.e., giving its words their ordinary, fair meaning.").

[31] 136 S. Ct. 1938, 1946 (2016).

[32] Buckman Co. v. Plaintiffs' Legal Committee, 531 U.S. 341 (2001).

[33] United States v. Locke, 529 U.S. 89, 108 (2000).

[34] *Buckman*, 531 U.S. at 347-48.

[35] *Id.* at 347.

[36] 570 U.S. 1, 14 (2013).

[37] *Id.* (internal quotation marks and citation omitted).

[38] United States v. Locke, 529 U.S. 89, 108 (2000).

reporting based in part on the fact that the state laws concerned maritime commerce—an area in which there was a "history of significant federal presence."[39] In such an area, the Court explained, "there is no beginning assumption that concurrent regulation by the State is a valid exercise of its police powers."[40]

However, the status of the *Locke* exception to the presumption against preemption is unclear. In its 2009 decision in *Wyeth v. Levine*, the Court invoked the presumption when it held that federal law did not preempt certain state law claims concerning drug labeling.[41] In allowing the claims to proceed, the Court acknowledged that the federal government had regulated drug labeling for more than a century, but explained that the presumption can apply even when the federal government has long regulated a subject.[42] This reasoning stands in some tension with the Court's conclusion in *Locke* that the presumption does not apply when states regulate an area where there has been a "history of significant federal presence."[43] Whether the presumption continues to apply in fields traditionally regulated by the federal government accordingly remains unclear.

Language Commonly Used in Express Preemption Clauses

Congress often relies on the language of existing preemption clauses in drafting new legislation.[44] Moreover, when statutory language has a settled meaning, courts often look to that meaning to discern Congress's intent.[45] This section of the report discusses how the Supreme Court has interpreted federal statutes that preempt (1) state laws "related to" certain subjects, (2) state laws concerning certain subjects "covered" by federal laws and regulations, (3) state requirements that are "in addition to, or different than" federal requirements, and (4) state "requirements," "laws," "regulations," and "standards." While preemption decisions depend heavily on the details of particular statutory schemes, the Court has assigned some of these phrases specific meanings even when they have appeared in different statutory contexts.

"Related to"

Preemption clauses frequently provide that a federal statute supersedes all state laws that are "related to" a specific matter of federal regulatory concern. The Supreme Court has characterized

[39] *Id.*

[40] *Id.*

[41] Wyeth v. Levine, 555 U.S. 555, 565 n.3 (2009).

[42] *Id.* (explaining that the presumption's application "does not rely on the absence of federal regulation").

[43] *Locke*, 529 U.S. at 108. The uncertainty surrounding the status of the *Locke* exception to the presumption against preemption is compounded by the fact that the Court did not mention the presumption in two other cases concerning drug labeling decided within four years of *Wyeth*. *See* Mutual Pharm. Co., Inc. v. Bartlett, 570 U.S. 472 (2013); PLIVA, Inc. v. Mensing, 564 U.S. 604 (2011).

[44] ALAN UNTEREINER, THE PREEMPTION DEFENSE IN TORT ACTIONS: LAW, STRATEGY AND PRACTICE 77 (2008) ("Although express preemption provisions cover a wide range of subjects, they also follow certain familiar patterns. They often contain similar if not identical words or phrases, including limitations on or exceptions to the scope of preemption.").

[45] *See* Bragdon v. Abbott, 524 U.S. 624, 645 (1998) ("When judicial interpretations have settled the meaning of an existing statutory provision, repetition of the same language in a new statute indicates, as a general matter, the intent to incorporate [the same] judicial interpretations as well."); Morales v. Trans World Airlines, 504 U.S. 374, 383-84 (1992) (relying on the Court's earlier interpretation of a preemption clause in the Employee Retirement Income Security Act to interpret a similarly worded preemption clause in the Airline Deregulation Act).

such provisions as "deliberatively expansive"[46] and "conspicuous for [their] breadth."[47] At the same time, however, the Court has cautioned against strictly literal interpretations of "related to" preemption clauses. Instead of reading such clauses "to the furthest stretch of [their] indeterminacy,"[48] the Court has relied on legislative history and purpose to cabin their scope.[49] The following subsections discuss the Court's interpretation of three statutes that contain "related to" preemption clauses: the Employee Retirement Income Security Act, the Airline Deregulation Act, and the Federal Aviation Administration Authorization Act.

Employee Retirement Income Security Act

The Employee Retirement Income Security Act (ERISA) contains perhaps the most prominent example of a preemption clause that uses "related to" language.[50] ERISA imposes comprehensive federal regulations on private employee benefit plans, including (1) detailed reporting and disclosure obligations,[51] (2) schedules for the vesting, accrual, and funding of pension benefits,[52] and (3) the imposition of certain duties of care and loyalty on plan administrators.[53] The statute also contains a preemption clause providing that its requirements preempt all state laws that "relate to" regulated employee benefit plans.[54] In interpreting this provision, the Supreme Court has identified two categories of state laws that are preempted by ERISA because they "relate to" regulated employee benefit plans: (1) state laws that have a "connection with" such plans, and (2) state laws that contain a "reference to" such plans.[55]

The Court has held that state laws have an impermissible "connection with" ERISA plans if they govern or interfere with "a central matter of plan administration."[56] In contrast, state laws that *indirectly* affect ERISA plans are not preempted unless the relevant effects are particularly "acute."[57] Applying these standards, the Court has held that ERISA preempts state laws governing areas of "core ERISA concern," like the designation of ERISA plan beneficiaries[58] and the disclosure of data regarding health insurance claims.[59] In contrast, the Court has held that ERISA does not preempt state laws imposing surcharges on certain types of insurers[60] and mandating

[46] Pilot Life Ins. Co. v. Dedeaux, 481 U.S. 41, 46 (1987).

[47] FMC Corp. v. Holliday, 498 U.S. 52, 58 (1990).

[48] N.Y. State Conference of Blue Cross & Blue Shield Plans v. Travelers Ins. Co., 514 U.S. 645, 655 (1995).

[49] *See, e.g.*, Dan's City Used Cars, Inc. v. Pelkey, 569 U.S. 251, 265 (2013); *Travelers*, 514 U.S. at 658. *See* Cal. Div. of Labor Standards Enforcement v. Dillingham Const., N.A., Inc., 519 U.S. 316, 335 (1997) (Scalia, J., concurring) ("[A]pplying the 'relate to' provision [in the Employee Retirement Income Security Act] according to its terms was a project doomed to failure, since, as many a curbstone philosopher has observed, everything is related to everything else.").

[50] Daniel J. Meltzer, *Preemption and Textualism*, 112 MICH. L. REV. 1, 20 (1993) (noting that "[t]he most frequently litigated 'related to' preemption clause is found in [ERISA].").

[51] 29 U.S.C. §§ 1021-1031.

[52] *Id.* §§ 1051-1086.

[53] *Id.* §§ 1101-1114.

[54] *Id.* § 1144(a).

[55] Shaw v. Delta Air Lines, Inc., 463 U.S. 85, 96-97 (1983).

[56] Egelhoff v. Egelhoff *ex rel.* Breiner, 532 U.S. 141, 148 (2001).

[57] New York State Conference of Blue Cross & Blue Shield Plans v. Travelers Ins. Co., 514 U.S. 645, 668 (1995).

[58] *Egelhoff*, 532 U.S. at 147.

[59] Gobeille v. Liberty Mut. Ins. Co., 136 S. Ct. 936, 945 (2016).

[60] *Travelers*, 514 U.S. at 651-52.

wage levels for specific categories of employees who work on public projects.[61] The Court has explained that these state laws are permissible because they affect ERISA plans only indirectly, and that ERISA preempts such laws only if the relevant indirect effects are particularly "acute."[62]

The Court has also held that ERISA preempts state laws that contain an impermissible "reference to" ERISA plans. Under the Court's case law, a state law will contain an impermissible "reference to" ERISA plans where it "acts immediately and exclusively upon ERISA plans," or where the existence of an ERISA plan is "essential" to the state law's operation.[63] In *Mackey v. Lanier Collection Agency & Service, Inc.*, for example, the Court held that ERISA—which does not prohibit creditors from garnishing funds in regulated employee benefit plans—preempted a state statute that prohibited the garnishment of funds in plans "subject to . . . [ERISA]."[64] Because the challenged state statute expressly referenced ERISA plans, the Court held that it fell within the scope of ERISA's preemption clause even if it was enacted "to help effectuate ERISA's underlying purposes."[65] Similarly, in *Ingersoll-Rand Company v. McClendon*, the Court held that ERISA—which provides a federal cause of action for employees discharged because of an employer's desire to prevent a regulated pension from vesting—preempted an employee's state law claim alleging that he was terminated in order to prevent his regulated pension from vesting.[66] The Court reasoned that ERISA preempted this state law claim because the action made "specific reference to" and was "premised on" the existence of an ERISA-regulated pension plan.[67] Finally, in *District of Columbia v. Greater Washington Board of Trade*, the Court held that ERISA preempted a state statute that required employers providing health insurance to their employees to continue providing coverage at existing benefit levels while employees received workers' compensation benefits.[68] The Court reached this conclusion on the grounds that ERISA regulated the relevant employees' existing health insurance coverage, meaning that the state law specifically referred to ERISA plans.[69]

Airline Deregulation Act

The Airline Deregulation Act (ADA) is another example of a statute that employs "related to" preemption language.[70] Enacted in 1978, the ADA largely deregulated domestic air transportation, eliminating the federal Civil Aeronautics Board's authority to control airfares.[71] In order to ensure that state governments did not interfere with this deregulatory effort, the ADA prohibited states from enacting laws "*relating to* a price, route, or service of an air carrier."[72] The Supreme Court's interpretation of the ADA's preemption clause has largely followed its ERISA decisions in

[61] Cal. Div. of Labor Standards Enforcement v. Dillingham Const., N.A., Inc., 519 U.S. 316, 334 (1997).

[62] *Travelers*, 514 U.S. at 668. The Court held that such "indirect" effects on ERISA plans were sufficiently "acute" to support a finding of preemption in *Shaw v. Delta Air Lines, Inc.*, where it concluded that ERISA preempted a state law that (1) prohibited discrimination in employee benefit plans based on pregnancy, and (2) required employers to pay sick-leave benefits to employees unable to work because of pregnancy. 463 U.S. 85, 97-99 (1983).

[63] *Dillingham*, 519 U.S. at 325.

[64] 486 U.S. 825, 828 (1988) (quoting Ga. Code Ann. § 18-4-22.1 (1982)).

[65] *Id*. at 829-30.

[66] 498 U.S. 133, 139-141 (1990).

[67] *Id*. at 140.

[68] District of Columbia v. Greater Wash. Bd. of Trade, 506 U.S. 125, 130 (1992).

[69] *Id*.

[70] 49 U.S.C. § 1371 (1979).

[71] Am. Airlines, Inc. v. Wolens, 513 U.S. 219, 222 (1995).

[72] 49 U.S.C. § 41713(b)(1) (emphasis added).

applying the "connection with" and "reference to" standards. In *Morales v. Trans World Airlines, Inc*., for example, the Court relied in part on its ERISA case law to conclude that the ADA preempted state consumer protection statutes prohibiting deceptive airline fare advertisements.[73] Specifically, the Court reasoned that because the challenged state statutes expressly referenced airfares and had a "significant effect" on them, they "related to" airfares within the meaning of the ADA's preemption clause.[74]

Federal Aviation Administration Authorization Act

The Federal Aviation Administration Authorization Act of 1994 (FAAA) is a third example of a statute that utilizes "related to" preemption language.[75] While the FAAA (as its title suggests) is principally concerned with aviation regulation, it also supplemented Congress's deregulation of the trucking industry. The statute pursued this objective with a preemption clause prohibiting states from enacting laws "*related to* a price, route, or service of any motor carrier . . . with respect to the transportation of property."[76] In interpreting this language, the Supreme Court has relied on the "connection with" standard from its ERISA and ADA case law. However, the Court has also acknowledged that the clause's "with respect to" qualifying language significantly narrows the FAAA's preemptive scope.

In *Rowe v. New Hampshire Motor Transport Association*, the Supreme Court relied in part on its ERISA and ADA case law to hold that the FAAA preempted certain state laws regulating the delivery of tobacco, including a law that required retailers shipping tobacco to employ motor carriers that utilized certain kinds of recipient-verification services.[77] The Court reached this conclusion for two principal reasons. First, the Court reasoned that the requirement had an impermissible "connection with" motor carrier services because it "focuse[d] on" such services.[78] Second, the Court concluded that the state law fell within the terms of the FAAA's preemption clause because of its effects on the FAAA's deregulatory objectives. Specifically, the Court reasoned that the state law had a "connection with" these objectives because it dictated that motor carriers use certain types of recipient-verification services, thereby substituting the state's commands for "competitive market forces."[79]

However, the Court has also held that the FAAA's "with respect to" qualifying language significantly narrows the statute's preemptive scope. In *Dan's City Used Cars, Inc. v. Pelkey*, the Court relied on this language to hold that the FAAA did not preempt state law claims involving the storage and disposal of a towed car.[80] Specifically, the Court held that the FAAA did not preempt state law claims alleging that a towing company (1) failed to provide the plaintiff with proper notice that his car had been towed, (2) made false statements about the condition and value of the car, and (3) auctioned the car despite being informed that the plaintiff wanted to reclaim it.[81] In allowing these claims to proceed, the Court observed that the FAAA's preemption clause mirrored the ADA's preemption clause with "one conspicuous alteration"—the addition of the

[73] 504 U.S. 374, 382 (1992).

[74] *Id*. at 388.

[75] 49 U.S.C. § 14501.

[76] *Id*. § 14501(c)(1) (emphasis added).

[77] 552 U.S. 364, 368 (2008).

[78] *Id*. at 371.

[79] *Id*. at 372.

[80] 569 U.S. 251, 265 (2013).

[81] *Id*. at 259.

phrase "with respect to the transportation of property."[82] According to the Court, this phrase "massively" limited the scope of FAAA preemption.[83] And because the relevant state law claims involved the *storage* and *disposal* of towed vehicles rather than their *transportation*, the Court held that they did not qualify as state laws that "related to" motor carrier services "with respect to the *transportation* of property."[84]

Conclusion

The Supreme Court's case law concerning "related to" preemption clauses reflects a number of general principles. The Court has consistently held that state laws "relate to" matters of federal regulatory concern when they have a "connection with" or contain a "reference to" such matters.[85] Generally, state laws have an impermissible "connection with" matters of federal concern when they prescribe rules specifically directed at the same subject as the relevant federal regulatory scheme,[86] or when their indirect effects on the federal scheme are particularly "acute."[87] As a corollary to the latter principle, the Court has made clear that state laws having only "tenuous, remote, or peripheral" effects on an issue of federal concern are not sufficiently "related to" the issue to warrant preemption.[88] In contrast, a state law contains an impermissible "reference to" a matter of federal regulatory interest (and therefore "relates to" such a matter) when it "acts immediately and exclusively upon" the matter, or where the existence of a federal regulatory scheme is "essential" to the state law's operation.[89] Finally, the inclusion of qualifying language can narrow the scope of "related to" preemption clauses. As the Court made clear in *Dan's City*, the scope of "related to" preemption clauses can be significantly limited by the addition of "with respect to" qualifying language.[90]

"Covering"

The Supreme Court has interpreted a preemption clause that allowed states to enact regulations related to a subject until the federal government adopted regulations "covering" that subject as having a narrower effect than "related to" preemption clauses. The Court reached this conclusion in *CSX Transportation, Inc. v. Easterwood*, where it interpreted a preemption clause in the Federal Railroad Safety Act allowing states to enact laws related to railroad safety until the federal government adopted regulations "covering the subject matter" of such laws.[91] In *Easterwood*, the Court explained that "covering" is a "more restrictive term" than "related to," and that federal law will accordingly "cover" the subject matter of a state law only if it "substantially subsume[s]" that subject.[92]

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[82] *Id*. at 261.

[83] *Id*. (internal quotation marks and citation omitted).

[84] *Id*. (emphasis added).

[85] *See, e.g.*, Rowe v. N.H. Motor Transport Ass'n, 552 U.S. 364, 370 (2008); Morales v. Trans World Airlines, Inc., 504 U.S. 374, 383 (1992); Shaw v. Delta Air Lines, Inc., 463 U.S. 85, 96 (1983).

[86] Egelhoff v. Egelhoff *ex rel.* Breiner, 532 U.S. 141, 148 (2001).

[87] N.Y. State Conference of Blue Cross & Blue Shield Plans v. Travelers Ins. Co., 514 U.S. 645, 668 (1995).

[88] *Shaw*, 463 U.S. at 100 n.21.

[89] Cal. Div. of Labor Standards Enf't v. Dillingham Const., N.A., Inc., 519 U.S. 316, 325 (1997).

[90] Dan's City Used Cars, Inc. v. Pelkey, 569 U.S. 251, 261 (2013).

[91] 507 U.S. 658, 664 (1993).

[92] *Id*.

Applying this standard, the Court held that federal laws and regulations did not preempt state law claims alleging that a train operator failed to maintain adequate warning devices at a grade crossing where a collision had occurred.[93] The Court allowed these claims to proceed on the grounds that the relevant federal regulations—which required states receiving federal railroad funds to establish a highway safety program and "consider" the dangers posed by grade crossings—did not "substantially subsume" the subject of warning device adequacy.[94] Specifically, the Court reasoned that the federal regulations did not "substantially subsume" this subject because they established the "general terms of the bargain" between the federal government and states receiving federal funds, but did not reflect an intent to displace supplementary state regulations.[95]

However, the *Easterwood* Court held that federal law preempted other state law claims alleging that the relevant train traveled at an unsafe speed despite complying with federal maximum-speed regulations. In holding that these claims were preempted, the Court reasoned that federal maximum-speed regulations "substantially subsumed" (and therefore "covered") the subject of train speeds because they comprehensively regulated that issue, reflecting an intent to preclude additional state regulations.[96] Accordingly, while the Court has made clear that "covering" preemption clauses of the sort at issue in *Easterwood* have a narrower effect than "related to" clauses, specific determinations that federal law "covers" a subject will depend heavily on the details of particular regulatory schemes.

"In addition to, or different than"

A number of federal statutes preempt state requirements that are "in addition to, or different than" federal requirements.[97] The Supreme Court has explained that these statutes preempt state law even in cases where a regulated entity can comply with both federal and state requirements. The Court adopted this position in *National Meat Association v. Harris*, where it interpreted a preemption clause in the Federal Meat Inspection Act (FMIA) prohibiting states from imposing requirements on meatpackers and slaughterhouses that are "in addition to, or different than" federal requirements.[98] In *Harris*, the Court held that certain California slaughterhouse regulations were "in addition to, or different than" federal regulations because they imposed a distinct set of requirements that went beyond those imposed by federal law.[99] Because the

[93] *Id*. at 665-73.

[94] *Id*. at 667.

[95] *Id*. at 667.

[96] *Id*. at 673-76.

[97] *See, e.g.*, 7 U.S.C. § 136v(b) (providing that states "shall not impose or continue in effect any requirements for labeling and packaging [pesticides] *in addition to or different from* those required under this subchapter.") (emphasis added); *id*. § 467e ("Marking, labeling, packaging, or ingredient requirements . . . *in addition to, or different than*, those made under this subchapter may not be imposed by any State . . . .") (emphasis added); *id*. § 4817(b) ("The regulation of [promotion and consumer education involving pork and pork products] . . . that is *in addition to or different from* this chapter may not be imposed by a State.") (emphasis added); 21 U.S.C. § 360k(a) ("[N]o state . . . may establish or continue in effect with respect to a device intended for human use any requirement . . . which is *different from, or in addition to*, any requirement applicable under this chapter to the device, and which relates to the safety and effectiveness of the device or to any other matter included in a requirement applicable to the device under this chapter.") (emphasis added); *id*. § 1052(b) ("Requirements within the scope of this chapter with respect to premises, facilities, and operations of any official plant which are *in addition to or different than* those made under this chapter may not be imposed by any State . . . .") (emphasis added).

[98] 565 U.S. 452, 455 (2012).

[99] *Id*. at 459 (internal quotation marks and citation omitted).

California requirements differed from federal requirements, the Court explained, they fell within the plain meaning of the FMIA's preemption clause even if slaughterhouses were able to comply with both sets of restrictions.[100]

Preemption clauses that employ "in addition to, or different than" language often raise a second interpretive issue involving the status of state requirements that are *identical to* federal requirements ("parallel requirements"). The Supreme Court has interpreted two statutes employing this language to *not* preempt parallel state law requirements.[101] In instructing lower courts on how to assess whether state requirements in fact parallel federal requirements, the Court has explained that state law need not explicitly incorporate federal standards in order to avoid qualifying as "in addition to, or different than" federal requirements.[102] Rather, the Court has indicated that state requirements must be "*genuinely* equivalent" to federal requirements in order to avoid preemption under such clauses.[103] One lower court has interpreted this instruction to mean that state restrictions do not genuinely parallel federal restrictions if a defendant could violate state law without having violated federal law.[104]

The Court has also explained that state requirements do not qualify as "in addition to, or different than" federal requirements simply because state law provides injured plaintiffs with different *remedies* than federal law.[105] Accordingly, absent contextual evidence to the contrary, preemption clauses that employ "in addition to, or different than" language will allow states to give plaintiffs a damages remedy for violations of state requirements even where federal law does not offer such a remedy for violations of parallel federal requirements.[106]

"Requirements," "Laws," "Regulations," and "Standards"

Federal statutes frequently preempt state "requirements," "laws," "regulations," and/or "standards" concerning subjects of federal regulatory concern.[107] These preemption clauses have required the Supreme Court to determine whether such terms encompass state common law actions (as opposed to state statutes and regulations) involving the relevant subjects.

The Supreme Court has explained that absent evidence to the contrary, a preemption clause's reference to state "requirements" includes state common law duties.[108] In contrast, the Court has

[100] *Id*. at 459-60.

[101] Bates v. Dow Agrosciences LLC, 544 U.S. 431, 446 (2005); Medtronic, Inc. v. Lohr, 518 U.S. 470, 494-97 (1996).

[102] *Bates*, 544 U.S. at 447.

[103] *Id*. at 454 (emphasis in original).

[104] *See* McMullen v. Medtronic, Inc., 421 F.3d 482, 489 (7th Cir. 2005).

[105] *See Bates*, 544 U.S. at 447-48.

[106] *See id*.

[107] *See, e.g.*, 7 U.S.C. § 136v(b) (providing that no state "shall . . . impose or continue in effect any *requirements* for labeling or packaging in addition to or different from those required under this subchapter.") (emphasis added); 21 U.S.C. § 360k(a) (providing that no state "may establish or continue in effect with respect to a device intended for human use any *requirement* . . . which is different from, or in addition to, any requirement applicable under this chapter to the device.") (emphasis added); 46 U.S.C. § 4306 ("[A] state . . . may not establish, continue in effect, or enforce a *law or regulation* establishing a recreational vessel or associated equipment performance or other safety standard or imposing a requirement for associated equipment . . . that is not identical to a regulation prescribed under . . . this title.") (emphasis added); 49 U.S.C. § 30103(b)(1) ("When a motor vehicle standard is in effect under this subchapter, a State . . . may prescribe or continue in effect a *standard* applicable to the same aspect of performance of a motor vehicle or motor vehicle equipment only if the *standard* is identical to the standard prescribed under this subchapter.") (emphasis added).

[108] Riegel v. Medtronic, Inc., 552 U.S. 312, 324 (2008). *See also* Medtronic, Inc. v. Lohr, 518 U.S. 470, (1996);

interpreted one preemption clause's reference to state "law[s] or regulation[s]" as encompassing only "positive enactments" and not common law actions.[109] The Court reached this conclusion in *Sprietsma v. Mercury Marine*, where it considered the meaning of a preemption clause in the Federal Boat Safety Act of 1971 (FBSA) prohibiting states from enforcing "a law or regulation" concerning boat safety that is not identical to federal laws and regulations.[110] The FBSA also includes a "savings clause" providing that compliance with the Act does not "relieve a person from liability at common law or under State law."[111] In *Sprietsma*, the Court held that the phrase "a law or regulation" in the FBSA did not encompass state common law claims for three reasons.[112] First, the Court reasoned that the inclusion of the article "a" before "law or regulation" implied a "discreteness" that is reflected in statutes and regulations, but not in common law.[113] Second, the Court concluded that the pairing of the terms "law" and "regulation" indicated that Congress intended to preempt only positive enactments. Specifically, the Court reasoned that if the term "law" were given an expansive interpretation that included common law claims, it would also encompass "regulations" and thereby render the inclusion of that latter term superfluous.[114] Finally, the Court reasoned that the FBSA's savings clause provided additional support for the conclusion that the phrase "law or regulation" did not encompass common law actions.[115]

Lastly, while the Court had the opportunity to determine whether a preemption clause's use of the term "standard" encompassed state common law actions in *Geier v. American Honda Motor Co., Inc.*, it ultimately declined to take up that question and resolved the case on other grounds discussed in greater detail below.[116]

Savings Clauses

Many federal statutes contain provisions that purport to restrict their preemptive effect. These "savings clauses" make clear that federal law does not preempt certain categories of state law, reflecting Congress's recognition of the need for states to "fill a regulatory void" or "enhance protection for affected communities" through supplementary regulation.[117] The law regarding savings clauses "is not especially well developed," and cases involving such clauses "turn very much on the precise wording of the statutes at issue."[118] With these caveats in mind, this section discusses three general categories of savings clauses: (1) "anti-preemption provisions," (2) "compliance savings clauses," and (3) "remedies savings clauses."

Cipollone v. Liggett Group, 505 U.S. 504, 521 (1992).

[109] Sprietsma v. Mercury Marine, 537 U.S. 51, 63 (2002).

[110] 46 U.S.C. § 4306 (emphasis added).

[111] *Id.* § 4311(g).

[112] *Sprietsma*, 537 U.S. at 63.

[113] *Id.*

[114] *Id.*

[115] *Id.*

[116] *See* "Compliance Savings Clauses" and "Example: Automobile Safety Regulations."

[117] Sandi Zellmer, *When Congress Goes Unheard: Savings Clauses' Rocky Judicial Reception*, *in* PREEMPTION CHOICE: THE THEORY, LAW, AND REALITY OF FEDERALISM'S CORE QUESTION 144, 146 (William W. Buzbee, ed., 2009).

[118] UNTEREINER, *supra* note 44, at 204-05.

Anti-Preemption Provisions

Some savings clauses contain language indicating that "nothing in" the relevant federal statute "may be construed to preempt or supersede" certain categories of state law,[119] or that the relevant federal statute "does not annul, alter, or affect" state laws "except to the extent that those laws are inconsistent" with the federal statute.[120] Certain statutes containing this "inconsistency" language further provide that state laws are not "inconsistent" with the relevant federal statute if they provide greater protection to consumers than federal law.[121] Some courts and commentators have labeled these clauses "anti-preemption provisions."[122]

While the case law on anti-preemption provisions is not well-developed, some courts have addressed such provisions in the context of defendants' attempts to remove state law actions to federal court. Specifically, certain courts have relied on anti-preemption provisions to reject removal arguments premised on the theory that federal law "completely" preempts state laws concerning the relevant subject. In *Bernhard v. Whitney National Bank*, for example, the U.S. Court of Appeals for the Fifth Circuit relied on an anti-preemption provision in the Electronic Funds Transfer Act to reject a defendant-bank's attempt to remove state law claims involving unauthorized funds transfers to federal court.[123] A number of federal district courts have also adopted similar interpretations of other anti-preemption provisions.[124]

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[119] *See, e.g.*, 7 U.S.C. § 2910(a) ("Nothing in this chapter may be construed to preempt or supersede any other program relating to beef promotion organized and operated under the laws of the United States or any State."); *id.* § 6812(c) ("Nothing in this chapter may be construed to preempt or supersede any other program relating to cut flowers or cut greens promotion and consumer information organized and operated under the laws of the United States or a State."); *id.* § 7811(c) ("Nothing in this chapter may be construed to preempt or supersede any other program relating to Hass avocado promotion, research, industry information, and consumer information organized and operated under the laws of the United States or of a State.").

[120] *See, e.g.*, 12 U.S.C. § 2616 ("This chapter does not annul, alter, or affect, or exempt any person subject to the provisions of this chapter from complying with, the laws of any State with respect to [real estate] settlement practices, except to the extent that those laws are inconsistent with any provision of this chapter, and then only to the extent of the inconsistency."); 15 U.S.C. § 1693q ("This subchapter does not annul, alter, or affect the laws of any State relating to electronic fund transfers, dormancy fees, inactivity charges or fees, service fees, or expiration dates of gift certificates, store gift cards, or general-use prepaid cards, except to the extent that those laws are inconsistent with the provisions of this subchapter, and then only to the extent of the inconsistency."); *id.* § 5722 ("This subchapter does not annul, alter, or affect, or exempt any person subject to the provisions of this subchapter from complying with, the laws of any State with respect to telephone billing practices, except to the extent that those laws are inconsistent with any provision of this subchapter, and then only to the extent of the inconsistency.").

[121] 12 U.S.C. § 2616 (authorizing the Consumer Financial Protection Bureau (CFPB) to determine whether state laws are "inconsistent with" the relevant federal statute, and providing that the CFPB "may not determine that any State law is inconsistent with" the federal statute "if the [CFPB] determines that such law gives greater protection to the consumer."); 15 U.S.C. § 1693q ("A State law is not inconsistent with this subchapter if the protection such law affords any consumer is greater than the protection afforded by this subchapter."); *id.* § 5722 (authorizing the Federal Trade Commission (FTC) to determine whether state laws are "inconsistent with" the relevant federal statute, and providing that the FTC "may not determine that any State law is inconsistent with" the federal statute "if the [FTC] determines that such law gives greater protection to the consumer.").

[122] *See* Bank of Am. v. City and Cty. of San Francisco, 309 F.3d 551, 565 (9th Cir. 2002); Bank One v. Guttau, 190 F.3d 844, 850 (8th Cir. 1999); UNTEREINER, *supra* note 44, at 20.

[123] 523 F.3d 546, 548 (5th Cir. 2008).

[124] *See* Ervin v. JP Morgan Chase Bank NA, No. GLR-13-2080, 2014 WL 4052895 at *3 (D. Md. Aug. 13, 2014); Palacios v. IndyMac Bank, FSB, No. CV 09-04601, 2009 WL 3838274 at *4 (C.D. Cal. Nov. 13, 2009); Perkins v. Johnson, 551 F. Supp. 2d 1246, 1255 (D. Colo. 2008).

Compliance Savings Clauses

Some savings clauses provide that compliance with federal law does not relieve a person from liability under state law.[125] The principal interpretive issue with such clauses is whether they limit a statute's preemptive effect (a question of *federal* law) or are instead intended to discourage the conclusion that compliance with federal regulations necessarily renders a product nondefective as a matter of *state* tort law.[126]

While the Supreme Court has not adopted a generally applicable rule concerning the meaning of compliance savings clauses, it has concluded that such clauses can support a narrow interpretation of a statute's preemptive effect. In *Geier v. American Honda Motor Co., Inc.*, the Court relied in part on a compliance savings clause in the National Traffic and Motor Vehicle Safety Act (NTMVSA) to hold that the statute did not expressly preempt state common law claims against an automobile manufacturer.[127] The NTMVSA contains (1) a preemption clause prohibiting states from enforcing safety standards for motor vehicles that are not identical to federal standards,[128] and (2) a "savings clause" providing that compliance with federal safety standards does not "exempt any person from any liability under common law."[129] In *Geier*, the Court explained that although it was "possible" to read the NTMVSA's preemption clause standing alone as encompassing the state law claims, that reading of the statute would leave the Act's savings clause without effect.[130] The Court accordingly held that the NTMVSA did not expressly preempt the state law claims based in part on the Act's savings clause.[131] Similarly, in *Sprietsma v. Mercury Marine*, the Court reasoned that a nearly identical savings clause in the FBSA "buttresse[d]" the conclusion that state common law claims did not qualify as "law[s] or regulation[s]" within the meaning of the statute's preemption clause.[132] The Court has accordingly relied on compliance savings clauses to inform its interpretation of express preemption clauses, but has not held that such clauses automatically insulate state laws from preemption.

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[125] *See, e.g.*, 15 U.S.C. § 2074(a) ("Compliance with consumer product safety rules or other rules or orders under this chapter shall not relieve any person from liability at common law or under State statutory law to any other person."); 21 U.S.C. § 360pp(e) ("Except as provided in the first sentence of section 360ss of this title, compliance with this part or any regulations issued thereunder shall not relieve any person from liability at common law or under statutory law."); 42 U.S.C. § 5409(c) ("Compliance with any Federal manufactured home construction or safety standard issued under this chapter does not exempt any person from any liability under common law."); 46 U.S.C. § 4311(g) (providing that compliance with federal boat regulations "does not relieve a person from liability at common law or under State law.").

[126] *See* UNTEREINER, *supra* note 44, at 194-96. In many jurisdictions, a defendant's compliance with government regulations can serve as relevant evidence in products liability litigation, and some courts have further held that compliance with government regulations renders a product nondefective as a matter of law. *See* RESTATEMENT OF THE LAW (THIRD): PRODUCTS LIABILITY section 4 cmt. e (1998).

[127] 529 U.S. 861, 868 (2000).

[128] 15 U.S.C. § 1392(d).

[129] *Id.* § 1397(k).

[130] *Id.* As discussed in "Example: Automobile Safety Regulations," the *Geier* Court held that the NTMVSA *impliedly* preempted the relevant common law claims even though it did not *expressly* preempt those claims. Notably, the Court appeared to consider the NTMVSA's savings clause to be relevant only to its interpretation of the statute's express preemption clause, reasoning that the savings clause did not create any sort of "special burden" disfavoring *implied* preemption. *Geier*, 529 U.S. at 870-71.

[131] *Id.* at 868.

[132] Sprietsma v. Mercury Marine, 537 U.S. 51, 63 (2002).

Remedies Savings Clauses

Some savings clauses provide that "nothing in" a federal statute "shall in any way abridge or alter the remedies now existing at common law or by statute."[133] While the case law on these "remedies savings clauses" is limited, the Supreme Court has interpreted one such clause as evincing Congress's intent to disavow field preemption, but not as preserving state laws that conflict with federal objectives.[134]

"State" Versus "State or Political Subdivision Thereof"

Some savings clauses limit a federal statute's preemptive effect on certain laws enacted by "State[s] or political subdivisions thereof,"[135] while others by their terms protect only "State" laws.[136] The Supreme Court has twice held that savings clauses that by their terms applied only to "State" laws also insulated *local* laws from preemption. In *Wisconsin Public Intervenor v.*

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[133] 47 U.S.C. § 414. *See also* 7 U.S.C. § 209(b) ("[T]his section shall not 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."); *id.* § 499e(b) ("[T]his section shall not in any way abridge or alter the remedies now existing at common law or by statute, and the provisions of this chapter are in addition to such remedies.").

[134] *See* Pennsylvania R.R. v. Puritan Coal Mining Co., 237 U.S. 121, 129-30 (1915) ("The [savings clause] was added . . . not to nullify other parts of the act, or to defeat rights or remedies given by preceding sections, but to preserve all existing rights which were not inconsistent with those created by the statute . . . But for this proviso . . . , it might have been claimed that, Congress having entered the field, the whole subject of liability of carrier to shippers in interstate commerce had been withdrawn from the jurisdiction of the state courts, and this clause was added to indicate that the commerce act, in giving rights of action in Federal courts, was not intended to deprive the state courts of their general and concurrent jurisdiction."); *see also* Am. Tel. and Tel. Co. v. Central Office Tel., Inc., 524 U.S. 214, 226 (1998) (holding that a remedies savings clause in the Communications Act of 1934 did not save state laws that were inconsistent with federal law).

[135] *See, e.g.*, 33 U.S.C. § 1370 ("[N]othing in this chapter shall . . . preclude the right of any *State or political subdivision thereof* . . . to adopt or enforce . . . any standard or limitation respecting discharges of pollutants. . . .") (emphasis added); 42 U.S.C. § 2018 ("Nothing in this chapter shall be construed to affect the authority or regulations of any Federal, *State, or local agency* with respect to the generation, sale, or transmission of electric power produced through the use of nuclear facilities licensed by the Commission.") (emphasis added); *id.* § 6929 ("Nothing in this chapter shall be construed to prohibit any *State or political subdivision* thereof from imposing any requirements, including those for site selection, which are more stringent than those imposed by such regulations.") (emphasis added).

[136] *See, e.g.*, 7 U.S.C. § 136v(a) ("A *State* may regulate the sale or use of any federally registered pesticide or device in the State, but only if and to the extent that the regulation does not permit any sale or use prohibited by this subchapter.") (emphasis added); 42 U.S.C. § 9614(a) ("Nothing in this chapter shall be construed or interpreted as preempting any *State* from imposing additional liability or requirements with respect to the release of hazardous substances within such State.") (emphasis added); 49 U.S.C. § 14501(c)(2)(A) (providing that the Interstate Commerce Act "shall not restrict the safety regulatory authority of a *State* with respect to motor vehicles . . . .") (emphasis added).

Similarly, some *preemption clauses* bar any "State or . . . political subdivision thereof" from regulating a certain subject matter, while others by their terms preempt only "State" laws. *Compare* 42 U.S.C. § 7543(a) ("No *State or any political subdivision thereof* shall adopt or attempt to enforce any standard relating to the control of emissions from new motor vehicles or new motor vehicle engines subject to this part.") (emphasis added); 49 U.S.C. § 5125(a) (providing that "a requirement of a *State, political subdivision of a State*, or Indian tribe is preempted" under certain circumstances) (emphasis added); *id.* § 14501(a)(1) ("No *State or political subdivision thereof* . . . shall enact or enforce any law, rule, regulation, standard, or other provision having the force and effect of law relating to" certain subjects) (emphasis added), *with* 7 U.S.C. § 136v(b) ("Such *State* shall not impose or continue in effect any requirements for labeling or packaging in addition to or different from those required under this subchapter.") (emphasis added); 21 U.S.C. § 360eee-4(b)(2) ("No *State* shall regulate third-party logistics providers as wholesale distributors.") (emphasis added); 42 U.S.C. § 7543(a) ("No *State* shall require certification, inspection, or any other approval relating to the control of emissions from any new motor vehicle or new motor vehicle engine as condition precedent to the initial retail sale, titling (if any), or registration of such motor vehicle, motor vehicle engine, or equipment.") (emphasis added).

Mortier, the Court held that the Federal Insecticide, Fungicide, and Rodenticide Act did not preempt *local* ordinances regulating pesticides based in part on a savings clause providing that "State[s]" may regulate federally registered pesticides in certain circumstances.[137] In concluding that the term "State" included political subdivisions of states, the Court relied on the principle that local governments are "convenient agencies" by which state governments can exercise their powers.[138] Similarly, in *City of Columbus v. Ours Garage & Wrecker Service*, the Court held that the Interstate Commerce Act (ICA) did not preempt municipal safety regulations governing tow-truck operators based in part on a savings clause providing that the ICA "shall not restrict the safety regulatory authority of a *State* with respect to motor vehicles."[139] Relying in part on its reasoning in *Mortier*, the Court explained that absent a clear statement to the contrary, Congress's reference to the regulatory authority of a "State" should be read to preserve "the traditional prerogative of the States to delegate their authority to their constituent parts."[140]

Implied Preemption

As discussed, federal law can *impliedly* preempt state law even when it does not do so *expressly*.[141] Like its express preemption decisions, the Supreme Court's implied preemption cases focus on Congress's intent.[142] The Supreme Court has recognized two general forms of implied preemption. First, "field preemption" occurs when a pervasive scheme of federal regulation implicitly precludes supplementary state regulation, or when states attempt to regulate a field where there is clearly a dominant federal interest.[143] Second, "conflict preemption" occurs when state law interferes with federal goals.[144]

Field Preemption

The Supreme Court has held that federal law preempts state law where Congress has manifested an intention that the federal government occupy an entire field of regulation.[145] Federal law may reflect such an intent through a scheme of federal regulation that is "so pervasive as to make reasonable the inference that Congress left no room for States to supplement it," or where federal law concerns "a field in which the federal interest is so dominant that the federal system will be

[137] 501 U.S. 597, 607-08 (1991); 7 U.S.C. § 136v(a).

[138] *Mortier*, 501 U.S. at 607-08 (internal quotation marks and citation omitted).

[139] 536 U.S. 424, 429 (2002); 49 U.S.C. § 14501(c)(2)(A) (emphasis added).

[140] *Ours Garage*, 536 U.S. at 429.

[141] *See* Crosby v. National Foreign Trade Council, 530 U.S. 363, 372 (2000).

[142] *See* Wyeth v. Levine, 555 U.S. 555, 565 (2009) ("[T]he purpose of Congress is the ultimate touchstone in every pre-emption case.") (quoting Retail Clerks v. Schermerhorn, 375 U.S. 96, 103 (1963)); Barnett Bank of Marion County, N.A. v. Nelson, 517 U.S. 25, 31 (1996) (explaining that where "explicit pre-emption language does not appear, or does not directly answer the question . . . courts must consider whether the federal statute's 'structure and purpose,' or nonspecific statutory language, nonetheless reveal a clear, but implicit, pre-emptive intent.").

[143] Gade v. Nat'l Solid Wastes Mgmt. Assn., 505 U.S. 88, 98 (1992).

[144] *Id*. The Court has explained that these subcategories of implied preemption are not "rigidly distinct," and that "field preemption may be understood as a species of conflict preemption" because "[a] state law that falls within a pre-empted field conflicts with Congress' intent . . . to exclude state regulation." English v. General Elec. Co., 496 U.S. 72, 79 n.5 (1990). *See also* LAURENCE TRIBE, AMERICAN CONSTITUTIONAL LAW 486 (2d ed. 1988) (noting that when state law "undermin[es] a congressional decision in favor of national uniformity of standards," it "presents a situation similar in practical effect to that of federal occupation of a field").

[145] Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947).

assumed to preclude enforcement of state laws on the same subject."[146] Applying these principles, the Court has held that federal law occupies a variety of regulatory fields, including alien registration,[147] nuclear safety,[148] aircraft noise,[149] the "design, construction, alteration, repair, maintenance, operation, equipping, personnel qualification, and manning" of tanker vessels,[150] wholesales of natural gas in interstate commerce,[151] and locomotive equipment.[152]

Examples

Grain Warehousing

In its 1947 decision in *Rice v. Santa Fe Elevator Corporation*, the Supreme Court held that federal law preempted a number of fields related to grain warehousing, precluding even complementary state regulations of those fields.[153] In that case, the Court held that the federal Warehouse Act and associated regulations preempted a variety of state law claims brought against a grain warehouse, including allegations that the warehouse had engaged in unfair pricing, maintained unsafe elevators, and impermissibly mixed different qualities of grain.[154] The Court discerned Congress's intent to occupy the relevant fields from an amendment to the Warehouse Act that made the Secretary of Agriculture's authorities "exclusive" vis-à-vis federally licensed warehouses.[155] Because the text and legislative history of this amendment reflected Congress's intent to eliminate overlapping federal and state warehouse regulations, the Court held that federal law occupied a number of fields involving grain warehousing. As a result, the Court concluded that the Warehouse Act preempted certain state law claims that intruded into those federally regulated fields, even if federal law established standards that were "more modest" and "less pervasive" than those imposed by state law.[156]

Immigration: Alien Registration

The Court has also held that federal law preempts the field of alien registration.[157] In its 1941 decision in *Hines v. Davidowitz*, the Court held that federal immigration law—which required

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[146] *Id.*

[147] *See* Arizona v. United States, 567 U.S. 387 (2012).

[148] *See, e.g.*, English v. Gen. Elec. Co., 496 U.S. 72, 82-85 (1990).

[149] City of Burbank v. Lockheed Air Terminal Inc., 411 U.S. 624, 633 (1973).

[150] United States v. Locke, 529 U.S. 89, 111 (2000) (quoting 46 U.S.C. § 3703(a)); *see* Ray v. Atlantic Richfield Co., 435 U.S. 151, 163-65 (1978).

[151] Schneidewind v. ANR Pipeline Co., 485 U.S. 293, 300, 305 (1988); Exxon Corp. v. Eagerton, 462 U.S. 176, 184 (1983).

[152] Kurns v. R.R. Friction Prods. Corp., 565 U.S. 625, 636 (2012).

[153] 331 U.S. 218 (1947). The Supreme Court's mid-century decisions did not always clearly distinguish between field preemption and conflict preemption. *See, e.g.*, Pennsylvania v. Nelson, 350 U.S. 497, 501-02 (1956) (noting that "different criteria have furnished touchstones" for the Court's implied preemption decisions, and that the Court had used a variety of expressions in those decisions, including "conflicting; contrary to; occupying the field; repugnance; difference; irreconcilability; inconsistency; violation; curtailment; and interference").

[154] *Rice*, 331 U.S. at 221-22.

[155] *Id*.

[156] *Id*. The *Rice* Court also held that certain state law claims—for example, an allegation that the warehouse had violated state law by failing to secure state approval for certain construction contracts—survived preemption because they involved fields that the Warehouse Act did not address. *Id*. at 236-37.

[157] *See* Arizona v. United States, 567 U.S. 387 (2012). Under the Immigration and Nationality Act, the term "alien"

aliens to register with the federal government—preempted a Pennsylvania law that required aliens to register with the state, pay a registration fee, and carry an identification card.[158] In reaching this conclusion, the Court explained that because alien regulation is "intimately blended and intertwined" with the federal government's core responsibilities and Congress had enacted a "complete" regulatory scheme involving that field, federal law preempted the additional Pennsylvania requirements.[159]

The Court reaffirmed these general principles from *Hines* in its 2012 decision in *Arizona v. United States*.[160] In *Arizona*, the Court held that the Immigration and Nationality Act (INA), which requires aliens to carry an alien registration document,[161] preempted an Arizona statute that made violations of that federal requirement a crime under state law.[162] In holding that federal law preempted this Arizona requirement, the Court explained that like the statutory framework at issue in *Hines*, the INA represented a "comprehensive" regulatory regime that "occupied the field of alien registration."[163] Specifically, the Court inferred Congress's intent to occupy this field from the INA's "full set of standards governing alien registration," which included specific penalties for noncompliance.[164] The Court accordingly held that federal law preempted even "complementary" state laws regulating alien registration like the challenged Arizona requirement.[165]

However, the Court has also made clear that other types of state laws concerning aliens do not necessarily fall within the preempted field of *alien registration*. In its 1976 decision in *De Canas v. Bica*, the Court held that federal law did not preempt a California law prohibiting the

refers to "any person not a citizen or national of the United States." 8 U.S.C. § 1101(a)(3).

[158] 312 U.S. 52, 72-74 (1941).

[159] *Id*. at 66. While *Hines* did not hold that federal power over alien regulation was "exclusive," subsequent Supreme Court cases have characterized it as a field preemption decision. *See Arizona*, 567 U.S. at 401.

[160] *Arizona*, 567 U.S. at 401-02 ("Federal law makes a single sovereign responsible for maintaining a comprehensive and unified system to keep track of aliens within the Nation's borders.").

[161] 8 U.S.C. § 1304(e).

[162] *Id.* at 401. Even though a violation of the identification card requirement was already punishable as a misdemeanor under federal law, the Arizona statute made violation of the requirement a state misdemeanor. *Id.*

[163] *Id.* at 401.

[164] *Id.*

[165] *Id.* at 402. In *Arizona*, the Court also invalidated two other provisions of the relevant Arizona law because they conflicted with federal law. First, the Court held that federal law preempted a provision in the Arizona law that prohibited unauthorized aliens from seeking work. *Id*. at 406-07. Specifically, the Court reasoned that the federal Immigration Control and Reform Act of 1986 (IRCA)—which made it unlawful for *employers* to hire unauthorized aliens, but did not impose liability on unauthorized aliens themselves—preempted this provision in the Arizona law because it reflected "a deliberate choice" not to penalize unauthorized aliens for seeking work. *Id*. at 405. Second, the Court held that federal law preempted a provision in the Arizona statute that allowed state police to arrest persons who they reasonably believed committed a removable offense without a warrant. *Id*. at 410. The Court reasoned that this provision in the Arizona law "violate[d] the principle that the removal process is entrusted to the discretion of the Federal Government" by allowing state police to "perform[] the functions of an immigration officer" in circumstances not authorized by federal law. *Id*. at 408-09.

In contrast, the Court upheld another provision in the Arizona statute that required state police to make a reasonable attempt to determine the immigration status of any person they stopped, detained, or arrested if an officer had reasonable suspicion that the person was an unlawfully present alien. *Id*. at 413-15. The Court held that this provision did not conflict with federal law, which "le[ft] room for a policy requiring state officials to contact ICE" to verify an individual's immigration status. *Id.* at 412-13. However, the Court noted that this provision (which had not gone into effect) was still susceptible to as-applied challenges—specifically, in cases where state police prolong a detention solely to verify a person's immigration status. *Id.* at 413-15.

employment of aliens not entitled to lawful residence in the United States.[166] The Court reached this conclusion on the grounds that nothing in the text or legislative history of the INA—which did not directly regulate the employment of such aliens at the time—suggested that Congress intended to preempt all state regulations concerning the activities of aliens.[167] Instead, the Court reasoned that while the INA comprehensively regulated the immigration and naturalization processes, it did not address employment eligibility for aliens without legal immigration status.[168] As a result, the Court held that the challenged California law fell outside the preempted field of alien registration.[169] The Court has also upheld several state laws regulating the activities of aliens since *De Canas*. In *Chamber of Commerce v. Whiting*, for example, the Court held that federal law did not preempt an Arizona statute allowing the state to revoke an employer's business license for hiring aliens who did not possess work authorization.[170] The Court has accordingly made clear that the preempted field of *alien registration* does not encompass all state laws concerning aliens.

Nuclear Energy: Safety Regulation

The Supreme Court has also held that federal law preempts the field of nuclear safety regulation. However, the Court has explained this field does not encompass all state laws that affect safety decisions made by nuclear power plants. Instead, the Court has concluded that state laws fall within the preempted field of nuclear safety regulation if they (1) are motivated by safety concerns and implicate a "core federal power," or (2) have a "direct and substantial" effect on safety decisions made by nuclear facilities.[171]

This division of authority is the result of a regulatory regime that has changed significantly over the course of the 20th century. Before 1954, the federal government maintained a monopoly over the use, control, and ownership of nuclear technology.[172] However, in 1954, the Atomic Energy Act (AEA) allowed private entities to own, construct, and operate nuclear power plants subject to a "strict" licensing and regulatory regime administered by the Atomic Energy Commission (AEC).[173] In 1959, Congress amended the AEA to give the states greater authority over nuclear energy regulation. Specifically, the 1959 Amendments allowed states to assume responsibility over certain nuclear materials as long as their regulations were "coordinated and compatible" with federal requirements.[174] While the 1959 Amendments reserved certain key authorities to the federal government, they also affirmed the states' ability to regulate "activities for purposes other than protection against radiation hazards."[175] Congress reorganized the administrative framework

[166] 424 U.S. 351 (1976).

[167] *Id.* at 358-59. *De Canas* pre-dated the current federal work-authorization rules for aliens contained in the IRCA. *See* 8 U.S.C. § 1324a(a)(1)(A).

[168] *De Canas*, 424 U.S. at 359.

[169] *Id*.

[170] 563 U.S. 582, 587 (2011). In *Whiting*, the Court also upheld a provision of the Arizona law that required employers use the "E-Verify" program, which allows users to verify a person's work authorization status. *See id.* at 608-09.

[171] *See* Va. Uranium, Inc. v. Warren, 587 U.S. _ (2019) (Gorsuch, J., lead opinion) (slip op., at 9); English v. Gen. Elec. Co., 496 U.S. 72, 84-85 (1990).

[172] *English*, 496 U.S. at 80.

[173] *Id.* at 81; 42 U.S.C. § 2011.

[174] 42 U.S.C. § 2021(g).

[175] *Id*. § 2021(k).

surrounding these regulations in 1974, when it replaced the AEC with the Nuclear Regulatory Commission (NRC).[176]

The Supreme Court has held that while this regulatory scheme preempts the field of nuclear *safety* regulation, certain state regulations of nuclear power plants that have a *non-safety* rationale fall outside this preempted field. The Court identified this distinction in *Pacific Gas and Electric Company v. State Energy Resources Conservation & Development Commission*, where it held that federal law did not preempt a California statute regulating the construction of new nuclear power plants.[177] Specifically, the California statute conditioned the construction of new nuclear power plants on a state agency's determination concerning the availability of adequate storage facilities and means of disposal for spent nuclear fuel.[178] In challenging this state statute, two public utilities contended that federal law made the federal government the "sole regulator of all things nuclear."[179] However, the Court rejected this argument, reasoning that while Congress intended that the federal government regulate nuclear *safety*, the relevant statutes reflected Congress's intent to allow states to regulate nuclear power plants for *non-safety* purposes.[180] The Court then concluded that the California law survived preemption because it was motivated by concerns over electricity generation and the economic viability of new nuclear power plants—not a desire to intrude into the preempted field of nuclear safety regulation.[181]

In addition to holding that the AEA does not preempt all state statutes and regulations concerning nuclear power plants, the Court has upheld certain state tort claims related to injuries sustained by power plant employees. In *Silkwood v. Kerr-McGee Corporation*, the Court upheld a punitive damages award against a nuclear laboratory arising from an employee's injuries from plutonium contamination.[182] In upholding the damages award, the Court rejected the laboratory's argument that the award impermissibly punished and deterred conduct related to the preempted field of nuclear safety.[183] Instead, the Court concluded that federal law did not preempt such damages awards because it found "no indication" that Congress had ever seriously considered such an

[176] *Id.* §§ 5814, 5841.

[177] 461 U.S. 190, 216 (1983).

[178] *Id*.

[179] *Id.* at 205.

[180] *Id.* at 205 (emphasis added).

[181] *Id.* at 207. In its 2019 decision in *Virginia Uranium, Inc. v. Warren*, the Court clarified that AEA preemption will depend on this type of inquiry into the motivations of a challenged state law only when the state law implicates a "core federal power" reserved to the NRC. 587 U.S. _ (2019) (Gorsuch, J., lead opinion) (slip op., at 9); (Ginsburg, J., concurring in the judgment) (slip op., at 7, 9-10). In that case, the Court held that federal law did not preempt a Virginia statute banning the mining of uranium—a radioactive metal used in the production of nuclear fuel. *See id*. (Gorsuch, J., lead opinion) (slip op., at 1); (Ginsburg, J., concurring in the judgment) (slip op., at 7). Under the AEA and its subsequent amendments, the NRC has the authority to regulate the milling, transfer, use, and disposal of uranium, but not uranium *mining* conducted on private lands. *See id.* (Gorsuch, J., lead opinion) (slip op., at 1). In upholding the Virginia mining ban, a majority of the Court declined to evaluate the state's underlying motivation, explaining that such an inquiry is appropriate (if at all) only when state law regulates an activity related to the NRC's "core federal powers" under the AEA. *See id.* (Gorsuch, J., lead opinion) (slip op., at 9); (Ginsburg, J., concurring in the judgment) (slip op., at 7, 9-10). While the Court interpreted *Pacific Gas* as recognizing that the construction of nuclear power plants involves one of these "core federal powers," a majority of the Justices agreed that uranium mining does not implicate similar federal authorities because it falls outside the NRC's jurisdiction. *See id.* (Gorsuch, J., lead opinion) (slip op., at 9); (Ginsburg, J., concurring in the judgment) (slip op., at 7). The Court accordingly relied on this distinction to uphold the Virginia law without evaluating its underlying purpose.

[182] Silkwood v. Kerr-McGee Corp., 464 U.S. 238, 241-42 (1984).

[183] 9 U.S. 236, 247 (1959).

outcome.[184] Moreover, the Court observed that Congress had failed to provide alternative federal remedies for persons injured in nuclear accidents.[185] According to the Court, this legislative silence was significant because it was "difficult to believe" that Congress would have removed all judicial recourse from plaintiffs injured in nuclear accidents without an explicit statement to that effect.[186] The Court also reasoned that Congress had assumed the continued availability of state tort remedies when it adopted a 1957 amendment to the AEA.[187] Under the relevant amendment, the federal government partially indemnified power plants for certain liabilities for nuclear accidents—a scheme that reflected an assumption that plaintiffs injured in such accidents retained the ability to bring tort claims against the power plants.[188] Based on this evidence, the Court rejected the argument that Congress's occupation of the field of nuclear safety regulation preempted all state tort claims arising from nuclear incidents.[189]

The Court applied this reasoning from *Silkwood* six years later in *English v. General Electric Company*, where it held that federal law did not preempt state tort claims alleging that a nuclear laboratory had retaliated against a whistleblower for reporting safety concerns.[190] In allowing the claims to proceed, the Court rejected the argument that federal law preempts all state laws that affect plants' nuclear safety decisions. Rather, the Court explained that in order to fall within the preempted field of nuclear safety regulation, a state law must have a "direct and substantial" effect on such decisions.[191] While the Court acknowledged that the relevant tort claims may have had "some effect" on safety decisions by making retaliation against whistleblowers more costly than safety improvements, it concluded that such an effect was not sufficiently "direct and substantial" to bring the claims within the preempted field.[192] In making this assessment, the Court relied on *Silkwood*, where it held that the relevant punitive damages award fell outside the field of nuclear safety regulation despite its likely impact on safety decisions.[193] Because the Court concluded that the type of damages award at issue in *Silkwood* affected safety decisions "more directly" and "far more substantially" than the whistleblower's retaliation claims, it held that the retaliation claims were not preempted.[194]

Conclusion

A determination that federal law preempts a field has powerful consequences, displacing even state laws and regulations that are consistent with or complementary to federal law.[195] However, because of these effects, the Court has cautioned against overly hasty inferences that Congress has occupied a field.[196] Specifically, the Court has rejected the argument that the

[184] *Id*. at 251.

[185] *Id*.

[186] *Id*.

[187] *Id*. at 251-52.

[188] *Id.* at 250-52.

[189] *Id*. at 256.

[190] 496 U.S. 72, 90 (1990).

[191] *Id*. at 85.

[192] *Id*.

[193] *Id*. at 85-86.

[194] *Id*. at 86.

[195] *See* Arizona v. United States, 567 U.S. 387, 402 (2012); Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 231 (1947).

[196] *See* O'Melveny & Myers v. FDIC, 512 U.S. 79, 85 (1994) ("Nor would we adopt a court-made rule to supplement federal statutory regulation that is comprehensive and detailed; matters left unaddressed in such a scheme are presumably left subject to the disposition provided by state law."); *see also* Bates v. Dow Agrosciences LLC, 544 U.S.

comprehensiveness of a federal regulatory scheme is sufficient to conclude that federal law occupies a field, explaining that Congress and federal agencies often adopt "intricate and complex" laws and regulations without intending to assume exclusive regulatory authority over the relevant subjects.[197] The Court has accordingly relied on legislative history and statutory structure—in addition to the comprehensiveness of federal regulations—in assessing field preemption arguments.[198]

The Court has also adopted a narrow view of the *scope* of certain preempted fields. For example, the Court has rejected the proposition that federal nuclear energy regulations preempt all state laws that affect the preempted field of nuclear safety regulation, explaining that state laws fall within that field only if they have a "direct and substantial" effect on it.[199] As a corollary to this principle, the Court has held that in certain contexts, generally applicable state laws are more likely to fall outside a federally preempted field than state laws that "target" entities or issues within the field. In *Oneok, Inc. v. Learjet, Inc.*, for example, the Court held that state antitrust claims against natural gas pipelines fell outside the preempted field of interstate natural gas wholesaling because the relevant state antitrust law was not "aimed" at natural gas companies and instead applied broadly to all businesses.[200]

Finally, the Court's case law underscores that Congress can narrow the scope of a preempted field with explicit statutory language. In *Pacific Gas*, for example, the Court held that the preempted field of nuclear safety regulation did not encompass state laws motivated by non-safety concerns based in part on a statutory provision disavowing such an intent.[201] While the Court has subsequently narrowed the circumstances in which it will apply *Pacific Gas*'s purpose-centric inquiry to state laws affecting nuclear energy,[202] it has reaffirmed the general principle that Congress can circumscribe a preempted field's scope with such "non-preemption clauses."[203]

Conflict Preemption

Federal law also impliedly preempts conflicting state laws.[204] The Supreme Court has identified two subcategories of conflict preemption. First, federal law impliedly preempts state law when it

431, 459 (2005) (Breyer, J., concurring) (noting "this Court's increasing reluctance to expand federal statutes beyond their terms through doctrines of implied preemption"); Camps Newfound/Owatonna, Inc. v. Town of Harrison, 520 U.S. 564, 617 (1997) (Thomas, J., dissenting) ("[O]ur recent cases have frequently rejected field pre-emption in the absence of statutory language expressly requiring it."); Southland Corp. v. Keating, 465 U.S. 1, 18 (1984) (Stevens, J., concurring in part and dissenting in part) ("[E]ven where a federal statute does displace State authority, it rarely occupies a field completely, totally excluding all participation by the legal systems of the states.") (internal quotation marks and citation omitted).

[197] *See* N.Y. State Dep't of Social Servs. v. Dublino, 413 U.S. 405, 415 (1973). *See also* Hillsborough Cty., Fla. v. Automated Med. Lab., Inc., 471 U.S. 707, 716 (1985) (explaining that courts should not infer field preemption "whenever an agency deals with a problem comprehensively," because such an inference would be inconsistent with "the federal-state balance embodied in [the Court's] Supremacy Clause jurisprudence").

[198] *See, e.g.*, Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 231-32 (1947).

[199] English v. Gen. Elec. Co., 496 U.S. 72, 85 (1990).

[200] 135 S. Ct. 1591, 1600-01 (2015). *See also English*, 496 U.S. at 83 (explaining in dicta that generally applicable criminal laws are not likely to fall within the preempted field of nuclear safety regulation).

[201] Pac. Gas & Elec. Co. v. State Energy Res. Conservation & Dev. Comm'n, 461 U.S. 190, 209-10, 213-14 (1983).

[202] *See* note 181 *supra*.

[203] *See* Va. Uranium, Inc. v. Warren, 587 U.S. _ (2019) (Gorsuch, J., lead opinion) (slip op., at 6); (Ginsburg, J., concurring in the judgment) (slip op., at 8).

[204] *See* Gade v. National Solid Wastes Mgmt. Ass'n, 505 U.S. 88, 108 (1992).

is impossible for regulated parties to comply with both sets of laws ("impossibility preemption").[205] Second, federal law impliedly preempts state laws that pose an obstacle to the "full purposes and objectives" of Congress ("obstacle preemption").[206] The two subsections below discuss these subcategories of conflict preemption.

Impossibility Preemption

The Supreme Court has held that federal law preempts state law when it is physically impossible to comply with both sets of laws.[207] To illustrate this principle, the Court has explained that a hypothetical federal law forbidding the sale of avocados with *more* than 7% oil content would preempt a state law forbidding the sale of avocados with *less* than 8% oil content, because avocado sellers could not sell their products and comply with both laws.[208] The Court has characterized impossibility preemption as a "demanding defense,"[209] and its case law on the issue is not as well-developed as other areas of its preemption jurisprudence.[210] However, the Court extended impossibility preemption doctrine in two recent decisions concerning prescription drug labeling.

Example: Generic Drug Labeling

In *PLIVA v. Mensing* and *Mutual Pharmaceutical Co. v. Bartlett*, the Court held that federal regulations of generic drug labels preempted certain state law claims brought against generic drug manufacturers because it was impossible for the manufacturers to comply with both federal and state law.[211] In both cases, plaintiffs alleged that they suffered adverse effects from certain generic drugs and argued that the drugs' labels should have included additional warnings.[212] In response, the drug manufacturers argued that the Hatch-Waxman Amendments (Hatch-Waxman) to the Food, Drug, and Cosmetic Act preempted the state law claims.[213] Under Hatch-Waxman, drug manufacturers can secure Food and Drug Administration (FDA) approval for generic drugs by demonstrating that they are equivalent to a brand-name drug already approved by the FDA.[214] In doing so, the generic drug manufacturers need not comply with the FDA's standard preapproval process, which requires extensive clinical testing and the development of FDA-approved labeling.[215] However, generic drug makers that use the streamlined Hatch-Waxman process must ensure that the labels for their drugs are the same as the labels for corresponding brand-name drugs, meaning that generic manufacturers cannot unilaterally change their labels.[216]

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[205] Fla. Lime & Avocado Growers v. Paul, 373 U.S. 132, 142-43 (1963).

[206] Hines v. Davidowitz, 312 U.S. 52, 67 (1941).

[207] *Fla. Lime*, 373 U.S. at 142-43.

[208] *Id.*

[209] Wyeth v. Levine, 555 U.S. 555, 573 (2009).

[210] *See* Meltzer, *supra* note 50, at 8 (describing situations in which it is impossible to comply with both state and federal requirements as "rare").

[211] 570 U.S. 472, 493 (2013); 564 U.S. 604, 610 (2011).

[212] *Bartlett*, 570 U.S. at 475; *PLIVA*, 564 U.S. at 610.

[213] *Bartlett*, 570 U.S. at 475; *PLIVA*, 564 U.S. at 610.

[214] *See PLIVA*, 564 U.S. at 612.

[215] *Bartlett*, 570 U.S. at 476-77; *PLIVA*, 564 U.S. at 612-13.

[216] *Bartlett*, 570 U.S. at 476-77; *PLIVA*, 564 U.S. at 612-13. For further information on the approval and labeling process for generic drugs under Hatch-Waxman and related laws, see CRS Report R44703, *Generic Drugs and GDUFA Reauthorization: In Brief*, by Judith A. Johnson.

In both *PLIVA* and *Bartlett*, the Court held that the Hatch-Waxman Amendments preempted the relevant state law claims because it was impossible for the generic drug manufacturers to comply with both federal and state law.[217] Specifically, the Court reasoned that it was impossible for the drug makers to comply with both sets of laws because federal law prohibited them from unilaterally altering their labels, while the state law claims depended on the existence of a duty to make such alterations.[218] In other words, the Court reasoned that it was impossible for the manufacturers to comply with both their state law duty to change their labels and their federal duty to keep their labels the same.[219] In reaching this conclusion in *PLIVA*, the Court rejected the argument that it was possible for manufacturers to comply with both federal and state law by petitioning the FDA to impose new labeling requirements on the corresponding brand-name drugs.[220] The Court rejected this argument on the grounds that impossibility preemption occurs whenever a party cannot *independently* comply with both federal and state law without seeking "special permission and assistance" from the federal government.[221] Similarly, in *Bartlett*, the Court rejected the argument that it was possible for generic drug makers to comply with both federal and state law by refraining from selling the relevant drugs. The Court rejected this "stop-selling" argument on the grounds that it would render impossibility preemption "all but meaningless."[222] As a result, an evaluation of whether it is "impossible" to comply with both federal and state law must presuppose some affirmative conduct by the regulated party.

Despite its decisions in *PLIVA* and *Bartlett*, the Court has rejected impossibility preemption arguments made by *brand-name* drug manufacturers, who *are* entitled to unilaterally strengthen the warning labels for their drugs. In *Wyeth v. Levine*, the Court held that federal law did not preempt a state law failure-to-warn claim brought against the manufacturer of a brand-name drug, reasoning that it was possible for the manufacturer to strengthen its label for the drug without FDA approval.[223] However, the *Wyeth* Court noted that an impossibility preemption defense may be available to brand-name drug manufacturers when there is "clear evidence" that the FDA would have rejected a proposed change to a brand-name drug's label.[224]

Obstacle Preemption

Federal law also impliedly preempts state laws that pose an "obstacle" to the "full purposes and objectives" of Congress.[225] In its obstacle preemption cases, the Court has held that state law can interfere with federal goals by frustrating Congress's intent to adopt a uniform system of federal regulation, conflicting with Congress's goal of establishing a regulatory "ceiling" for certain products or activities, or by impeding the vindication of a federal right.[226] However, the Court has

[217] *Bartlett*, 570 U.S. at 486-87; *PLIVA*, 564 U.S. at 617.

[218] *Bartlett*, 570 U.S. at 487-87; *PLIVA*, 564 U.S. at 610.

[219] *PLIVA*, 564 U.S. at 618.

[220] *Id.* at 616.

[221] *PLIVA*, 564 U.S. at 623-24.

[222] *Bartlett*, 570 U.S. at 488-89.

[223] 555 U.S. 555, 573 (2009).

[224] *Id.* at 571. The Court further clarified this standard in its 2019 decision in *Merck Sharp & Dohme Corp. v. Albrecht*, explaining that "clear evidence" requires drug manufacturers to demonstrate that they "fully informed" the FDA of the justifications for the warning required by the relevant state law and that the FDA nevertheless rejected the proposed change. 139 S. Ct. 1668, 1672 (2019).

[225] *See* Hines v. Davidowitz, 312 U.S. 52, 67 (1941).

[226] *See id.*; Geier v. American Honda Motor Co., Inc., 529 U.S. 861, 875 (2000); Felder v. Casey, 487 U.S. 131, 153 (1988).

also cautioned that obstacle preemption does not justify a "freewheeling judicial inquiry" into whether state laws are "in tension" with federal objectives, as such a standard would undermine the principle that "it is Congress rather than the courts that preempts state law."[227] The subsections below discuss a number of cases in which the Court has held that state law poses an obstacle to the accomplishment of federal goals.

Example: Foreign Sanctions

The Supreme Court has concluded that state laws can pose an obstacle to the accomplishment of federal objectives by interfering with Congress's choice to concentrate decisionmaking in federal authorities. The Court's decision in *Crosby v. National Foreign Trade Council* illustrates this type of conflict between state law and federal policy goals.[228] In *Crosby*, the Court held that a federal statute imposing sanctions on Burma preempted a Massachusetts statute that restricted state agencies' ability to purchase goods or services from companies doing business with Burma.[229] The Court identified several ways in which the Massachusetts law interfered with the federal statute's objectives. First, the Court reasoned that the Massachusetts law interfered with Congress's decision to provide the President with the flexibility to add or waive sanctions in response to ongoing developments by "imposing a different, state system of economic pressure against the Burmese political regime."[230] Second, the Court explained that because the Massachusetts statute penalized certain individuals and conduct that Congress explicitly excluded from federal sanctions, it interfered with the federal statute's goal of limiting the economic pressure imposed by the sanctions to "a specific range."[231] In identifying this conflict, the Court rejected the state's argument that its law "share[d] the same goals" as the federal act, reasoning that the additional sanctions imposed by the state law would still undermine Congress's intended "calibration of force."[232] Finally, the Court concluded that the Massachusetts law undermined the President's capacity for effective diplomacy by compromising his ability "to speak for the Nation with one voice."[233]

Example: Automobile Safety Regulations

The Court has concluded that some federal laws and regulations evince an intent to establish both a regulatory "floor" and "ceiling" for certain products and activities. The Court has interpreted certain federal automobile safety regulations, for example, as not only imposing minimum safety standards on carmakers, but as insulating manufacturers from certain forms of *stricter* state regulation as well. In *Geier v. American Honda Motor Co.*, the Court held that the National Traffic and Motor Vehicle Safety Act (NTMVSA) and associated regulations impliedly preempted state tort claims alleging that an automobile manufacturer had negligently designed a

[227] Chamber of Commerce v. Whiting, 563 U.S. 582, 607 (quoting Gade v. Nat'l Solid Wastes Mgmt. Ass'n, 505 U.S. 88, 111 (1992) (Kennedy, J., concurring)).

[228] *Crosby*, 530 U.S. at 366-67. As the Court noted in *Crosby*, Burma changed its name to Myanmar in 1989. *See id*. at 366 n.1. However, because the parties in *Crosby* referred to the country as Burma, the Court followed suit. *Id*.

[229] *Id.* at 366-67.

[230] *Id.* at 376.

[231] *Id*. at 377-79.

[232] *Id.* at 380. After *Crosby*, Congress has included specific language in certain sanctions statutes that explicitly allows states to pass sanctions laws of their own. *See, e.g.*, Comprehensive Iran Sanctions, Accountability and Divestment Act, Pub. L. No. 111-195, 124 Stat. 1312 (July 1, 2010).

[233] *Crosby*, 530 U.S. at 380-81.

car without a driver's side airbag.[234] While the Court rejected the argument that the NTMVSA *expressly* preempted the state law claims,[235] it reasoned that the claims interfered with the federal objective of giving car manufacturers the option of installing a "variety and mix" of passive restraints.[236] The Court discerned this goal from, among other things, the history of the relevant regulations and Department of Transportation (DOT) comments indicating that the regulations were intended to lower costs, incentivize technological development, and encourage gradual consumer acceptance of airbags rather than impose an immediate requirement.[237] The Court accordingly held that the NTMVSA impliedly preempted the state law claims because they conflicted with these federal goals.[238]

However, the Court has rejected the argument that federal automobile safety standards impliedly preempt all state tort claims concerning automobile safety. In *Williamson v. Mazda Motor of America, Inc.*, the Court held that a different federal safety standard did not preempt a state law claim alleging that a carmaker should have installed a certain type of seatbelt in a car's rear seat.[239] While the regulation at issue in *Williamson* allowed manufacturers to choose between a variety of seatbelt options, the Court distinguished the case from *Geier* on the grounds that the DOT's decision to offer carmakers a range of choices was not a "significant" regulatory objective.[240] Specifically, the Court reasoned that because the DOT's decision to offer manufacturers a range of options was based on relatively minor design and cost-effectiveness concerns, the state tort action did not conflict with the purpose of the relevant federal regulation.[241]

Example: Federal Civil Rights

The Court has also held that state law can pose an obstacle to federal goals where it impedes the vindication of federal rights. In *Felder v. Casey*, the Court held that 42 U.S.C. § 1983 (Section 1983)—which provides individuals with the right to sue state officials for federal civil rights violations—preempted a state statute adopting certain procedural rules for bringing Section 1983 claims in state court.[242] Specifically, the state statute required Section 1983 plaintiffs to provide government defendants 120 days' written notice of (1) the circumstances giving rise to their claims, (2) the amount of their claims, and (3) their intent to bring suit.[243] The Court held that federal law preempted these requirements because the "purpose" and "effect" of the requirements conflicted with Section 1983's remedial objectives.[244] Specifically, the Court reasoned that the requirements' *purpose* of minimizing the state's liability conflicted with Section 1983's goal of providing relief to individuals whose constitutional rights are violated by state officials.[245] Moreover, the Court concluded that the state statute's *effects* interfered with federal objectives

[234] 529 U.S. 861, 865 (2000).

[235] *See* "Compliance Savings Clauses."

[236] *Geier*, 529 U.S. at 875.

[237] *Id.*

[238] *Id*.

[239] 562 U.S. 323 (2011).

[240] *Id*. at 332.

[241] *Id*.

[242] 487 U.S. 131, 153 (1988).

[243] *Id.*

[244] *Id*. at 138.

[245] *Id*. at 141-42.

because its enforcement would result in different outcomes in Section 1983 litigation based solely on whether a claim was brought in state or federal court.[246]

Conclusion

The Supreme Court has held that state law can conflict with federal law in a number of ways. First, state law can conflict with federal law when it is physically impossible to comply with both sets of laws. While the Court has characterized this type of impossibility preemption argument as a "demanding defense,"[247] its decisions in *PLIVA* and *Bartlett* arguably extended the doctrine's scope.[248] In those cases, the Court made clear that impossibility preemption remains a viable defense even in instances in which a regulated party can petition the federal government for permission to comply with state law[249] or stop selling a regulated product altogether.[250]

State law can also conflict with federal law when it poses an "obstacle" to federal goals. In evaluating congressional intent in obstacle preemption cases, the Court has relied upon statutory text,[251] structure,[252] and legislative history[253] to determine the scope of a statute's preemptive effect. Relying on these indicia of legislative purpose, the Court has held that state laws can pose an obstacle to federal goals by interfering with a uniform system of federal regulation,[254] imposing stricter requirements than federal law (where federal law evinces an intent to establish a regulatory "ceiling"),[255] or by impeding the vindication of a federal right.[256]

While obstacle preemption has played an important role in the Court's preemption jurisprudence since the mid-20th century, recent developments may result in a narrowing of the doctrine. Indeed, commentators have noted the tension between increasingly popular textualist theories of statutory interpretation—which reject extra-textual evidence as a possible source of statutory meaning—and obstacle preemption doctrine, which arguably allows courts to consult such evidence.[257] Identifying this alleged inconsistency, Justice Thomas has categorically rejected the Court's obstacle preemption jurisprudence, criticizing the Court for "routinely invalidat[ing] state laws based on perceived conflicts with broad federal policy objectives, legislative history, or generalized notions of congressional purposes that are not embodied within the text of federal law."[258]

The Court's recent additions may also presage a narrowing of obstacle preemption doctrine, as some commentators have characterized Justices Gorsuch and Kavanaugh as committed

[246] *Id*. at 138.

[247] Wyeth v. Levine, 555 U.S. 555, 573 (2009).

[248] *See* Ernest A. Young, *"The Ordinary Diet of the Law": The Presumption Against Preemption in the Roberts Court*, 2011 SUP. CT. REV. 253, 327-28 (2011) (characterizing *PLIVA* as an "expansion" of impossibility preemption).

[249] PLIVA, Inc. v. Mensing, 564 U.S. 604, 623-24 (2011).

[250] Mutual Pharm. Co., Inc. v. Bartlett, 570 U.S. 472, 488 (2013).

[251] *See* Crosby v. Nat'l Foreign Trade Council, 530 U.S. 363, 380 (2000).

[252] *See id*. at 377-80.

[253] Geier v. Am. Honda Motor Co., 529 U.S. 861, 875 (2000).

[254] *Crosby*, 530 U.S. at 374-77.

[255] *Geier*, 529 U.S. at 875.

[256] Felder v. Casey, 487 U.S. 131, 138-142 (1988).

[257] Note, *Preemption as Purposivism's Last Refuge*, 126 HARV. L. REV. 1056, 1065 (2013). *See also* Meltzer, *supra* note 50, at 35-43 (considering whether obstacle preemption is consistent with textualism).

[258] Wyeth v. Levine, 555 U.S. 555, 583 (2009) (Thomas, J., concurring in the judgment).

textualists.[259] Indeed, the Court's 2019 decision in *Virginia Uranium, Inc. v. Warren* suggests that Justices Gorsuch and Kavanaugh may share Justice Thomas's skepticism toward obstacle preemption arguments.[260] In that case, Justice Gorsuch authored an opinion joined by Justices Thomas and Kavanaugh in which he rejected the proposition that implied preemption analysis should appeal to "abstract and unenacted legislative desires" not reflected in a statute's text.[261] While Justice Gorsuch did not explicitly endorse a wholesale repudiation of what he characterized as the "purposes-and-objectives branch of conflict preemption," he emphasized that any evidence of Congress's preemptive purpose must be sought in a statute's text and structure.[262]

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[259] *See* Thomas Jipping, *What Brett Kavanaugh's Speeches Tell Us About His Judicial Approach*, THE HERITAGE FDN. (July 22, 2018), https://www.heritage.org/courts/commentary/what-brett-kavanaughs-speeches-tell-us-about-his-judicial-approach (arguing that Justice Kavanaugh embraces a "textualist" approach to statutory interpretation); Max Alderman & Duncan Pickard, *Justice Scalia's Heir Apparent?: Judge Gorsuch's Approach to Textualism and Originalism*, 69 STAN. L. REV. ONLINE 185, 185 (2017) (characterizing Justice Gorsuch as a "rigorous textualist").

[260] *See* Va. Uranium, Inc. v. Warren, 587 U.S. _ (2019) (Gorsuch, J., lead opinion) (slip op., at 14-15).

[261] *Id*. (Gorsuch, J., lead opinion) (slip op., at 14).

[262] *Id*. (Gorsuch, J., lead opinion) (slip op., at 15).