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Federal Preemption of State Tort Claims

Marin R. Scordato[*]

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[*] Visiting Professor of Law, University of Maryland School of Law, Professor of Law, Southwestern University School of Law. B.A., Haverford College, J.D., University of Virginia. I would like to thank Paula Monopoli for her very insightful comments and her constant inspiration. I would also like to thank Stephen Lau for his excellent work. I am grateful to the University of Maryland School of Law for its generous financial support of this work. Finally, I wish to express my appreciation for the special contributions of Jasper Lamar Crabb and Ned Racine, Esq.

INTRODUCTION

Since the middle of the twentieth century, with the rise of the modern administrative state and our movement from a predominately common law jurisprudence to the great age of statutes,[1] explosive growth in the amount and variety of federal regulation has taken place. As federal law making and federal regulation have increased in size and importance, so too has the doctrine of federal preemption.[2] One legal scholar has described preemption as "almost certainly the most frequently used doctrine of constitutional law in practice."[3]

Befitting a constitutional law doctrine of such stature, federal preemption continues to draw the interest and resources of the highest court in the land. During its 1999-2000 Term, the U.S. Supreme Court accepted petitions for certiorari and decided four preemption cases, two of which involved federal preemption of state tort claims. All four decisions found in favor of federal preemption. One, *Crosby v. National Foreign Trade Council*,[4] is a unanimous affirmance of the First Circuit.[5] Another, *United States v. Locke*,[6] is a unanimous reversal of a unanimous Ninth Circuit panel decision.[7] A third case, *Norfolk Southern Railway Co. v. Shanklin*,[8] is a seven-to-two reversal of a unanimous panel decision by the Sixth Circuit,[9] which had joined with Judge Posner and the Seventh Circuit[10] in rejecting a doctrine of expansive federal preemption known as constructive approval.[11] The fourth case, in many ways the most intriguing, is *Geier v. American Honda Motor Company*,[12] a five-to-four

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[1] GUIDO CALABRESI, A COMMON LAW FOR THE AGE OF STATUTES 1 (1982).

[2] One study, published in 1993, estimates that more than one-half of the federal statutes that preempt state regulation have been enacted into law since 1970. David M. O'Brien, *The Supreme Court and Intergovernmental Relations: What Happened to Our Federalism?*, 9 J.L. & Pol. 609, 619 (1993).

[3] Stephen A. Gardbaum, *The Nature of Preemption*, 79 CORNELL L. REV. 767, 768 (1994).

[4] 530 U.S. 363 (2000), *aff'g sub nom.* Nat'l Foreign Trade Council v. Natsios, 181 F.3d 38 (1st Cir. 1999), *aff'g sub nom.* Nat'l Foreign Trade Council v. Baker, 26 F. Supp. 2d 287(D. Mass. 1998).

[5] *Crosby*, 530 U.S. at 388; *Natsios*, 181 F.3d at 38.

[6] 529 U.S. 89 (2000), *rev'g sub nom.* Int'l Ass'n of Indep. Tank Owners (Intertanko) v. Locke, 148 F.3d 1053 (9th Cir. 1998), *aff'g sub nom.* Int'l Ass'n of Indep. Tank Owners (Intertanko) v. Lowry, 947 F. Supp. 1484 (W.D. Wash. 1996).

[7] United States v. Locke, 529 U.S. at 117; Intertanko v. Locke, 148 F.3d at 1069.

[8] 529 U.S. 344 (2000).

[9] *Id.* at 345, *rev'g* Shanklin v. Norfolk S. Ry. Co., 173 F.3d 386, 394-95 (6th Cir. 1999).

[10] *See* Shots v. CSX Transp., Inc., 38 F.3d 304, 307 (7th Cir. 1994) (stating that federal law preempts not only conflicting state law, but merely inconsistent state law as well).

[11] *See infra* note 22.

[12] 529 U.S. 861 (2000).

decision featuring a spirited split among members of the Court regarding fundamental aspects of preemption analysis.[13]

Among the interesting aspects of preemption as a legal doctrine is the way that it seemingly cuts across traditional ideological lines in non-traditional ways. For example, conservatives might generally be expected to favor greater limitations on the regulatory power of the federal government versus the states, as they do in the Commerce Clause area. This view pushes towards a narrow doctrine of federal preemption. However, a conservative might also be expected to favor an overall smaller amount of government regulation, and less stringent regulatory requirements (at any level). Both of these tendencies would typically push in the direction of a relatively broad preemption doctrine. Similarly, conservatives are usually associated with a hostility towards expansive tort liability and general support for tort reform. This consideration too might recommend a doctrine that produces greater federal foreclosure of state tort claims.

The converse of this analysis, of course, applies to a liberal perspective. Historically, liberals have favored federal government authority and displayed a lack of enthusiasm for expansive states' rights, suggesting an attraction to relatively broad federal preemption. This view runs against traditional liberal support for more aggressive government regulation of potentially dangerous activities, including the expansion of tort liability for those that cause harm. This preference for tort expansion would normally resonate with a narrower view of the proper federal preemption of state tort claims.[14]

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[13] *See infra* text accompanying notes 52-85.

[14] It is difficult to know with any certainty before the fact whether the federal preemption of a state law will result in a disposition of any future case that would be more attractive to liberals or to conservatives. During periods of liberal control of the federal legislature, preemption may possibly serve to constrain more conservative states from effectively thwarting the purposes of liberal federal legislation. The converse is also true. This feature of preemption jurisprudence, the inability of traditional political ideologies to align themselves, *ex ante*, with an across-the-board support for either broad or narrow federal preemption doctrine, can be illustrated merely by reference to the Supreme Court cases in this area. For example, in *Nash v. Florida Industrial Commission*, 389 U.S. 235 (1967), the Supreme Court held that a Florida law withholding unemployment compensation to a worker because the worker had filed an unfair labor practice charge against her employer was preempted by the National Labor Relations Act, despite the absence in the Act of an express preemption provision. The Court reasoned that enforcement of the Florida law would serve "to frustrate the purpose of Congress to leave people free to make charges of unfair labor practices." *Id.* at 239; *see also* Livadas v. Bradshaw, 512 U.S. 107, 110 (1994) (holding that National Labor Relations Act preempted California state labor policy in favor of employers because California's policy significantly compromised certain employee rights that federal Act granted); Hill v. Florida *ex rel.* Watson, 325 U.S. 538 (1945) (holding

Indeed, one can find some strange bedfellows in this area. For example, it is probably fair to suppose that the Justices on the current U.S. Supreme Court who are most resistant to expansive federal preemption are Justices Stevens and Ginsburg. Justice Stevens authored the dissent in the five-to-four *Geier* case, which Justice Ginsburg joined.[15] Justice Ginsburg authored the dissenting opinion in the seven-to-two *Shanklin* case, which only Justice Stevens joined.[16] Moreover, in *Geier*, the five-to-four decision from the 1999-2000 Term, the majority that found for preemption was composed of Justice Breyer, who authored the opinion, and Justices Rehnquist, O'Connor, Scalia, and Kennedy.[17] The dissent consisted of Justice Stevens, who authored the dissenting opinion, and Justices Souter, Thomas, and Ginsburg.[18] For even a casual observer of the Supreme Court, that is an interesting, and unusual, split among the Justices.[19]

Florida statute requiring business agents of labor unions to qualify for annual license preempted as being in conflict with National Labor Relations Act goal of protecting workers' freedom to select bargaining representatives). On the other end of the spectrum, the Supreme Court found that Washington's state regulations, which aggressively governed the operation of tankers in an effort to prevent environmental damage from possible oil spills, were preempted by less stringent federal regulations. United States v. Locke, 529 U.S. 89 (2000), *rev'g sub nom.* Int'l Ass'n of Indep. Tank Owners (Intertanko) v. Locke, 148 F.3d 1053 (9th Cir. 1998), *aff'g sub nom.* Int'l Ass'n of Indep. Tank Owners (Intertanko) v. Lowry, 947 F. Supp. 1484 (W.D. Wash. 1996); *see infra* note 41; *see also* Int'l Paper Co. v. Ouellette, 479 U.S. 481, 500 (1987) (holding that Clean Water Act preempted Vermont's state nuisance law with respect to out-of-state source of contamination); Ray v. Atl. Richfield Co., 435 U.S. 151, 160-68 (1978) (holding that earlier version of Washington's state tanker law was in part preempted by federal legislation).

[15] *Geier*, 529 U.S. at 886.

[16] Norfolk S. Ry Co. v. Shanklin, 529 U.S. 344, 360 (2000) (Ginsburg, J., and Stevens, J., dissenting). The dissent praised Judge Richard Posner's persuasive explanation in *Shots v. CSX Transp., Inc.*, 38 F.3d 304, 360-61 (7th Cir. 1994), that, while federal funding is "necessary to trigger" federal preemption of state law, such funding is not dispositive of the federal preemption issue. *Id.* at 361; *see* CSX Transp., Inc. v. Easterwood, 507 U.S. 658 (1993). The dissent's resistance to broad federal preemption of state laws was apparently shared by the Reagan administration, which in October of 1987 issued an Executive Order providing:

> To the extent permitted by law, Executive departments and agencies shall construe, in regulations and otherwise, a Federal statute to preempt State law only when the statute contains an express preemption provision or there is some other firm and palpable evidence compelling the conclusion that the Congress intended preemption of State law, or when the exercise of State authority directly conflicts with the exercise of Federal authority under the Federal statute. . . .

Exec. Order No. 12,612, 52 Fed. Reg. 41,685 (Oct. 26, 1987).

[17] *Geier*, 529 U.S. at 863.

[18] *Id.* at 886.

[19] Of all the cases decided during the Supreme Court's 1999-2000 Term, the *Geier* case

The issue of federal preemption is not only intellectually interesting, it also carries enormous practical importance. Consider, for example, the international and domestic ramifications of the four preemption-related Supreme Court cases decided during the 1999-2000 Term. In *Crosby v. National Foreign Trade Council*, the European Union and Japan lodged formal complaints against the United States in the World Trade Organization about a Massachusetts law that barred state entities from buying goods or services from companies doing business with Burma.[20] *United States v. Locke* involved the regulation of oil tankers in navigable waters, much like the Exxon Valdez, and featured a formal diplomatic expression of concern in the outcome of the case by thirteen ocean-going nations, led by Denmark.[21] *Shanklin v. Norfolk Southern Railway Co.*

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is among only 10% of the cases in which Justices Scalia and Thomas did not vote for the same result; 16% of the cases in which Justices Breyer and Souter did not vote for the same result; and 47% of the cases in which Justices Ginsburg and Thomas voted in the same manner. *Voting Alignments on the Supreme Court*, NAT'L L.J., Aug. 7, 2000, at A22, *available at* http://www.law.com/special/professionals/supreme_chart.html. *See generally* Richard G. Wilkins et. al., *Supreme Court Voting Behavior: 1997 Term*, 26 HASTINGS CONST. L.Q. 533 (1999) (analyzing whether Supreme Court and its Justices have been more liberal or more conservative than in past terms).

[20] Crosby v. Nat'l Foreign Trade Council, 530 U.S. 363, 382-83 (2000), *aff'g sub nom.* Nat'l Foreign Trade Council v. Natsios, 181 F.3d 38 (1st Cir. 1999), *aff'g sub nom.* Nat'l Foreign Trade Council v. Baker, 26 F. Supp. 2d 287 (D. Mass. 1998). In 1996, the Commonwealth of Massachusetts passed a law barring state entities from buying goods or services from companies doing business with Burma. *Crosby*, at 366-67. Just three months after the passage of the Massachusetts law, Congress enacted a statute imposing certain sanctions on Burma. *Id.* at 368. In April of 1998, the National Foreign Trade Council, representing certain companies engaged in foreign trade that were prohibited from doing business with Massachusetts pursuant to that Commonwealth's law regarding trade with Burma, filed suit in federal court seeking an injunction against enforcement of the Massachusetts law. *Baker*, 26 F. Supp. 2d at 287. The National Foreign Trade Council argued, among other things, that the federal Act preempted the Massachusetts law. *Id.* at 291. The district court issued a permanent injunction. *Id.* at 293. The First Circuit Court of Appeals affirmed, in part as the result of determining that the Federal Burma Act preempted the Massachusetts law. *Natsios*, 181 F.3d at 71-77. The U.S. Supreme Court unanimously affirmed the First Circuit, holding:

> Because the state Act's provisions conflict with Congress's specific delegation to the President of flexible discretion, with limitation of sanctions to a limited scope of actions and actors, and with direction to develop a comprehensive, multilateral strategy under the federal Act, it is preempted, and its application is unconstitutional, under the Supremacy Clause.

Crosby, 530 U.S. at 388.

[21] United States v. Locke, 529 U.S. 89 (2000), *rev'g sub nom.* Int'l Ass'n of Indep. Tank Owners (Intertanko) v. Locke, 148 F.3d 1053 (9th Cir. 1998), *aff'g sub nom.* Int'l Ass'n of Indep. Tank Owners (Intertanko) v. Lowry, 947 F. Supp. 1484 (W.D. Wash. 1996.) In *Locke* (sometimes referred to as the "Intertanko Case"), the courts analyzed the interaction between state and federal rules that both regulate the design, necessary equipment,

involved the regulation of safety devices at railroad crossings, certainly an important issue in practice when one considers that a train collides with a car or truck somewhere in the United States, frequently killing or badly injuring the vehicle's occupant, nearly ten times every day.[22] *Geier*

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reporting requirements, and operation of oil tankers in Washington's state waters, particularly Puget Sound. United States v. Locke, 529 U.S. at 94-95. Both state and federal rules were enacted, and then subsequently amended and expanded upon, in response to two crude-oil spills: 120,000 tons near England in 1967 by the supertanker *Torrey Canyon*, and approximately 53 million gallons on the coast of Alaska in 1989 by the *Exxon Valdez*. *Id.* at 94. In response to a challenge made by Intertanko, in which it claimed that federal law preempted sixteen of Washington's conflicting state regulations, the district court upheld the constitutionality of all sixteen regulations and granted Washington's motion for summary judgment. Intertanko v. Lowry, 947 F. Supp. at 1500-01. The Ninth Circuit Court of Appeals upheld the district court's holding with respect to fifteen of the sixteen regulations, and reversed with respect to one. Intertanko v. Locke, 148 F.3d at 1069. The U.S. Supreme Court, in a unanimous decision, reversed the Ninth Circuit, holding that various federal laws preempted four of the sixteen regulations and remanding the case to allow the Ninth Circuit or the District Court to create a fuller record and to consider further the constitutional status of the remaining twelve regulations. United States v. Locke, 529 U.S. at 116-17. In its opinion, the Court indicated that state regulations, which are likely to avoid conflict with concurrent federal regulations and thus avoid federal preemption, "pose a minimal risk of innocent noncompliance, do not affect vessel operations outside the jurisdiction, do not require adjustment of systemic aspects of the vessel, and do not impose a substantial burden on the vessel's operation within the local jurisdiction itself." *Id.* at 112.

[22] Shanklin v. Norfolk S. Ry. Co., 529 U.S. 344 (2000); *see* NAT'L TRANSP. SAFETY BD., SAFETY STUDY, 1 SAFETY AT PASSIVE GRADE CROSSINGS, vii (adopted July 21, 1998) (reporting that more than 4000 accidents per year have occurred at passive and active railroad crossings). At the time of this study, there were approximately 158,000 public railroad crossings in the United States. *Id.* at 4. Two-thirds of these crossings warn of their presence and the impending approach of a train with only a set of traditional, stationary, black-and-white, X-shaped signs displaying the words "RAILROAD CROSSING" (commonly known in the industry as a "crossbuck"), a so-called "passive" warning. *Id.* Sixty percent of all fatalities that occur at railroad crossings occur at crossings with only a passive warning in place. *Id.* at vii & app. A, tbl. 2.

The facts underlying *Shanklin* illustrate the dangers of passive warnings. Early on the morning of October 3, 1993, Dedra Shanklin's husband, Eddie, was killed in a collision with a train at a railroad crossing in Tennessee. *Shanklin*, 529 U.S. at 350. Ms. Shanklin subsequently filed a wrongful death claim against Norfolk Southern Railway Company, the operator of the train. Ms. Shanklin's claim asserted five separate theories of negligence, including Norfolk Southern's failure to install more than purely passive warning devices at the railroad crossing. Shanklin v. Norfolk S. Rw. Co., 173 F.3d 386, 388 (1999). The district court denied the defendant's motion for summary judgment, which was based on the federal preemption of all of the plaintiff's claims. *Id.* The plaintiff's inadequate warning claim, as well as two other claims, went to a jury. *Id.* The jury determined that Shanklin had suffered $615,379 in damages, but that the deceased was thirty percent responsible for the collision. *Id.* Thus, the district court entered a judgment for plaintiff in the amount of $430,765.30. *Id.* Norfolk Southern appealed the district court's denial of its motion for summary judgment, renewing its assertion that Shanklin's inadequate warning claim was preempted by the Federal Railroad Safety Act, 49 U.S.C. § 20106 (formerly 45 U.S.C. § 434), and the Highway Safety Act, 23 U.S.C. §§ 101-401 . *Id.* at 389. The Federal Railroad Safety Act contains an express preemption provision that reads:

v. American Honda Motor Co. involved the regulation of air bags in passenger cars,[23] a safety device that is expected, if installed in all cars, to save approximately 12,000 lives and prevent 100,000 serious physical injuries each year.[24]

Despite the gravity of the issues that turn on preemption analysis, preemption jurisprudence is in a state of disarray. Indeed, there is a widely held view that the preemption doctrine, at least as currently applied by the courts, is not altogether clear or coherent. As Professor Caleb Nelson recently commented:

> Laws, regulations, and orders related to railroad safety shall be nationally uniform to the extent practicable. A State may adopt or continue in force a law, regulation, or order related to railroad safety until the Secretary of Transportation prescribes a regulation or issues an order covering the subject matter of the State requirement.

49 U.S.C. § 20106 (1994).

The U.S. Supreme Court had occasion prior to *Shanklin* to interpret the scope of this express-preemption provision. In *CSX Transportation, Inc. v. Easterwood*, 507 U.S. 658 (1993), involving facts very similar to those in *Shanklin*, the Supreme Court held that state law negligence claims were not preempted by the Federal Railroad Safety Act. The Supreme Court reasoned that federal preemption did not occur under the Act unless federal funds were involved in the installation of the warning devices at the railroad crossing in question, and that federal funds were not so involved in the particular crossing at issue in the *Easterwood* case. *Id.* at 671-73. A split subsequently developed among the federal circuits regarding the proper interpretation of the *Easterwood* decision. Courts in the Fifth, Eighth, and Tenth Circuits held that the Federal Railroad Safety Act always preempts state law claims based on inadequate warnings if the warnings at the railroad crossing in question had been installed using federal funds, an approach that has come to be called "constructive approval." *See* Armijo v. Atchison, Topeka & Santa Fe Rw. Co., 87 F.3d 1188, 1190 (10th Cir. 1996); Elrod v. Burlington N. R.R. Co., 68 F.3d 241, 244 (8th Cir. 1995); Hester v. CSX Transp., Inc., 61 F.3d 382, 386 (5th Cir. 1995). In contrast, the Seventh Circuit held that federal funding is a necessary, but not a sufficient, condition for federal preemption, thereby rejecting the doctrine of constructive approval. Shots v. CSX Transp., Inc., 38 F.3d 304, 307 (7th Cir. 1994).

In *Shanklin*, the Sixth Circuit Court of Appeals embraced the approach of the Seventh Circuit. *Shanklin*, 173 F.3d at 397. The Sixth Circuit found that federal funding alone was insufficient to trigger preemption of Plaintiff Shanklin's inadequate-warning claim. *Id.* The court also found that Norfolk Southern had failed to demonstrate the "something more" that would have effectively triggered preemption. *Id.* Specifically, the court indicated that "something more" would include evidence that the Federal Highway Administration had actually, and not just constructively, approved the passive warnings at the particular railroad crossing where the fatal collision took place. *Id.* The U.S. Supreme Court reversed the Sixth Circuit. *Shanklin*, 529 U.S. at 359. The seven members of the majority concluded that, "[o]nce the FHWA [the Federal Highway Administration] approved the project and the signs were installed using federal funds, the federal standard for adequacy displaced Tennessee statutory and common law addressing the same subject, thereby preempting respondent's claim." *Id.*

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

[24] Motor Vehicles Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 35 (1983).

> Most commentators who write about preemption agree on at least one thing: Modern preemption jurisprudence is a muddle. Indeed, academic commentaries risk understating the extent of the muddle, because they often focus on preemption decisions in one particular area of law. Scholars bemoan the "chaos" caused by preemption decisions in the realm of real-estate finance, or the "awful mess" of preemption doctrine in certain parts of labor law, or the wildly confused lower court case law on copyright preemption of state unfair competition / misappropriation law.[25]

Undoubtedly, this "muddle" is caused in part by the fact that preemption analysis is so widely misunderstood and misapplied in the federal courts. In this article, I argue that preemption analysis should be approached as an ordinary exercise of statutory interpretation, not a judicial determination of federalism. Specifically, Part I of this article provides an introduction to federal preemption law, describing the constitutional sources and categories of federal preemption. Part II examines the Supreme Court's holding in *Geier* and analyzes the doctrinal issues underlying the disagreement between the majority and the dissent in that case. Part III critically examines two approaches that courts have advanced to facilitate preemption analysis: a "bright-line rule" requiring express legislative language, and a presumption against preemption. Part IV concludes by rejecting these approaches and proposing instead that courts approach preemption as pure statutory interpretation.

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[25] Caleb Nelson, *Preemption*, 86 VA. L. REV. 225, 232-33 (2000) (first quoting Frank S. Alexander, *Federal Intervention in Real Estate Finance: Preemption and Federal Common Law*, 71 N.C. L. REV. 293, 340 (1993); second quoting Richard A. Bales, *The Discord Between Collective Bargaining and Individual Employment Rights: Theoretical Origins and a Proposed Solution*, 77 B.U. L. REV. 687, 702 (1997); third quoting William Patry, *The Enumerated Powers Doctrine and Intellectual Property: An Imminent Constitutional Collision*, 67 GEO. WASH. L. REV. 359, 368 n.51 (1999)) (footnotes omitted). A striking agreement exists among legal scholars on this point. *See, e.g.*, Viet D. Dinh, *Reassessing the Law of Preemption*, 88 GEO. L.J. 2085, 2085 (2000) ("[N]otwithstanding its repeated claims to the contrary, the Supreme Court's numerous preemption cases follow no predictable jurisprudential or analytical pattern."); David B. Spence & Paula Murray, *The Law, Economics, and Politics of Federal Preemption Jurisprudence: A Quantitative Analysis*, 87 CALIF. L. REV. 1125, 1128 (1999) ("The conflict [in preemption decisions] is apparent in the relatively large number of splits among the circuits and the inability of the Supreme Court to calm the preemption waters.").

I. INTRODUCTION TO FEDERAL PREEMPTION

Federal preemption can be conceptualized as part of the answer to the following larger question: what are the sources of limitations on state governmental power that exist in the U.S. Constitution? In other words, in what ways does the federal constitution affirmatively limit the power of states? There are commonly thought to be six such sources of limitation.

A. Sources of Federal Preemption

One constitutional source of limitation is a list of specifically prohibited state governmental actions that appears in Article I, section 10. This section provides that "[n]o state shall . . . enter into any treaty, alliance, or confederation . . . coin money . . . or grant any title of nobility."[26] A second limitation, of course, is that states may not violate fundamental individual rights granted to persons by the Constitution.[27]

Third, states may not constitutionally place an undue burden on interstate commerce, even if the federal government has not acted in the area or on the subject of the state regulation. For example, the Supreme Court has struck down state laws that protect their in-state markets from out-of-state competition, such as a state law that prohibits retailers in the state from selling products that they purchased out-of-state for less than

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[26] U.S. CONST. art. I, § 10.

[27] U.S. CONST. amend. XIV, § 1. The current standard for incorporation into the Fourteenth Amendment of an individual right is set forth in *Duncan v. Louisiana*, 391 U.S. 145 (1968), *reh'g denied*, 392 U.S. 947 (1968):

> The test for determining whether a right extended by the Fifth and Sixth Amendments with respect to federal criminal proceedings is also protected against state action by the Fourteenth Amendment has been phrased in a variety of ways in the opinions of this Court. The question has been asked whether a right is among those "fundamental principles of liberty and justice which lie at the base of all our civil and political institutions," *Powell v. State of Alabama*, 287 U.S. 45, 67 (1932); whether it is "basic in our system of jurisprudence," *In re Oliver*, 333 U.S. 257, 273 (1948); and whether it is "a fundamental right, essential to a fair trial," *Gideon v. Wainwright*, 372 U.S. 335, 343-344 (1963); *Malloy v. Hogan*, 378 U.S. 1, 6 (1964); *Pointer v. State of Texas*, 380 U.S. 400, 403 (1965). (parallel citations omitted).

Id. at 148-49; *see also* Palko v. Connecticut, 302 U.S. 319, 325 (1937) (Cardozo, J.) (noting that constitutional rights should not be incorporated into Fourteenth Amendment if, "they are not of the very essence of a scheme of ordered liberty," and "[t]o abolish them is not to violate a 'principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental. . . .'" (quoting Snyder v. Massachusetts, 291 U.S. 97, 105 (1934))).

they sell the same products produced within the state.[28] This is the so-called "Dormant Commerce Clause," arising from Article I, section 8, clause 3.[29]

Fourth, states may not discriminate against out-of-state residents with regard to constitutional rights or important economic activities. This limitation originates from the Interstate Privileges and Immunities Clause in Article IV, section 2, which states: "The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States."[30] Applying this limitation, the U.S. Supreme Court struck down a New Hampshire Supreme Court ruling limiting admission to the New Hampshire bar to residents of New Hampshire.[31]

Fifth, states may not tax or regulate the federal government. As first established in the famous case of *McCulloch v. Maryland*,[32] which held as unconstitutional a discriminatory tax on the Bank of the United States, neither states nor local governments may levy a tax on property owned by the federal government unless Congress expressly consents.[33]

Finally, states may not enforce a state law that conflicts with a valid federal law or regulation. This limitation arises from Article VI, clause 2, of the Supremacy Clause, which states:

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[28] Baldwin v. G.A.F. Seelig, Inc., 294 U.S. 511 (1935).

[29] U.S. CONST. Art. I, § 8, cl. 3. *See generally* Martin H. Redish & Shane V. Nugent, *The Dormant Commerce Clause and the Constitutional Balance of Federalism*, 1987 DUKE L.J. 569 (arguing that Dormant Commerce Clause jurisprudence is illegitimate exercise); Saul Levmore, *Interstate Exploitation and Judicial Intervention*, 69 VA. L. REV. 563 (1983) (suggesting that only exploitative state laws violate Dormant Commerce Clause while state laws that merely interfere do not). Compare more critical approaches to the Dormant Commerce Clause: Julian N. Eule, *Laying the Dormant Commerce Clause to Rest*, 91 YALE L.J. 425 (1982); Paul E. McGreal, *The Flawed Economics of the Dormant Commerce Clause*, 39 WM. & MARY L. REV. 1191 (1998). Interestingly, Dormant Commerce Clause jurisprudence places courts in an interpretive posture that is nearly the converse of that required in the preemption area. In handling preemption issues, courts generally must interpret the intent of Congress through close examination of the legislative actions that Congress has taken. In the Dormant Commerce Clause cases, courts "face the fundamental dilemma of trying to interpret the meaning of congressional silence." Michael A. Lawrence, *Toward A More Coherent Dormant Commerce Clause: A Proposed Unitary Framework*, 21 HARV. J.L. & PUB. POL'Y 395, 396 (1998).

[30] U.S. CONST. Art. IV, § 2. *See generally* Jonathan D. Varat, *State "Citizenship" and Interstate Equality*, 48 U.CHI.L.REV. 487 (1981) (proposing theory of state "citizenship" within meaning of Privileges and Immunities Clause); Gary J. Simson, *Discrimination Against Non-Residents and the Privileges and Immunities Clause of Article IV*, 128 U. PA. L. REV. 379 (1979) (arguing that original intent of Privileges and Immunities Clause necessitates more rigorous application).

[31] Supreme Court of New Hampshire v. Piper, 470 U.S. 274 (1985).

[32] 17 U.S. (4 Wheat.) 316 (1819).

[33] *Id.* at 436.

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority 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.[34]

Thus, in such a case of conflict, the federal law supercedes, or preempts, the state action.

B. Categories of Federal Preemption

Federal preemption can be productively categorized into three main types. One type is field preemption, which occurs when the courts determine that Congress has intended to fully occupy a particular area of regulation to the exclusion of any state action in that same area.[35] Thus, under field preemption, a state law that was in no practical way in conflict with an existing federal law would nevertheless be preempted if it regulated conduct in an area which Congress had expressed an intent to exclusively occupy.[36]

Sometimes, field preemption can be based on an explicit statement in a federal act, such as the Employee Retirement Income Security Act of 1974 (ERISA), which includes a provision stating that ERISA "supersede[s] any and all State laws insofar as they may now or hereafter relate to any employee benefit plan."[37] At other times, courts have found field preemption without the benefit of an explicit statement in federal law.

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[34] U.S. CONST. art. VI, cl. 2; *see* Gade v. Nat'l Solid Waste Mgmt. Ass'n, 505 U.S. 88, 108 (1992) ("[U]nder the Supremacy Clause, from which our pre-emption doctrine is derived, "'any state law, however clearly within a State's acknowledged power, which interferes with or is contrary to federal law, must yield'"." (quoting Felder v. Casey, 487 U.S. 131, 138 (1988) (quoting Free v. Bland, 369 U.S. 663, 666 (1962)))). *But cf.* Gardbaum, *supra* note 3 at 767 (questioning link between federal preemption and Supremacy Clause).

[35] *See* Fid. Fed. Sav. & Loan Ass'n v. de la Cuesta, 458 U.S. 141 (1982).

> Absent explicit pre-emptive language, Congress' intent to supercede state law altogether may be inferred because "[t]he scheme of federal regulation may be so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it," because "the Act of Congress may touch a field in which the federal interest is so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject," or because "the object sought to be obtained by the federal law and the character of obligations imposed by it may reveal the same purpose."

Id. at 153 (quoting Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947)).

[36] Hines v. Davidowitz, 312 U.S. 52, 66-67 (1941).

[37] 29 U.S.C. § 1144(a) (1994).

Instead, in areas like foreign policy and immigration, the court would find preemption based on such factors as the overall comprehensiveness of the federal regulatory scheme, the existence and scope of jurisdiction of a federal regulatory agency, and the historically national nature of the matter being regulated.[38]

A second type of preemption is known as express preemption, where the superceding of the state law is based on an explicit statement regarding preemption in the relevant legislation, even though that statement may not set forth congressional intent for full field preemption.[39] While there need not be any explicit statement at all regarding intended preemption in a given federal act, if there is, it usually comes in the form of one or both of two kinds of provisions. One such kind of provision is commonly known as an express preemption provision. The National Traffic and Motor Vehicles Safety Act of 1966, which is the focus of *Geier v. American Honda Motor Co.*,[40] contains an express preemption provision which states:

> Whenever a Federal motor vehicle safety standard established under this subchapter is in effect, no State or political subdivision of a State shall have any authority either to establish, or continue in effect, with respect to any motor vehicle or item of motor vehicle equipment, any safety standard applicable to the same aspect of performance of such vehicle or item of equipment which is not identical to the Federal standard.[41]

A federal act may also contain what is known as a saving clause, which will typically remove state common law claims from the force of an express preemption provision. An example of a saving clause

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[38] *See, e.g.*, Pennsylvania v. Nelson, 350 U.S. 497 (1956) (field preemption in area of sedition); *Hines v. Davidowitz*, 312 U.S. at 52 (field preemption in area of immigration). *But cf.* Uphaus v. Wyman, 360 U.S. 72 (1959) (significantly narrowing holding in *Pennsylvania v. Nelson*).

[39] Jones v. Rath Packing Co., 430 U.S. 519, 525 (1977) ("[W]hen Congress has 'unmistakably . . . ordained,' that its enactments alone are to regulate a part of commerce, state laws regulating that aspect of commerce must fall. This result is compelled . . . [if] . . . Congress's command is explicitly stated in the statute's language . . ." (quoting Fla. Lime & Avocado Growers, Inc. v. Paul, 373 U.S. 132, 142 (1963))).

[40] 529 U.S. 861 (2000).

[41] *Geier*, 529 U.S. at 895 (Stevens, J., dissenting) (quoting National Traffic and Motor Vehicle Safety Act of 1966, 15 U.S.C. § 1392(d)) (repealed 1994) (codified at 49 U.S.C. § 30103 (b)(1) (1994)). *But see* United States v. Locke, 529 U.S. 89 (2000), *rev'g sub nom.* Int'l Ass'n of Indep. Tank Owners (Intertanko) v. Locke, 148 F.3d 1053 (9th Cir. 1998), *aff'g sub nom.* Int'l Ass'n of Indep. Tank Owners (Intertanko) v. Lowry, 947 F. Supp. 1484 (W.D. Wash. 1996) ("[W]e decline to give broad effect to saving clause where doing so would upset the careful regulatory scheme established by federal law.").

appears in the National Traffic and Motor Vehicles Safety Act of 1966: "Compliance with any Federal motor vehicle safety standard issued under this subchapter does not exempt any person from any liability under common law."[42]

Finally, even in the absence of field preemption or any direct statement of preemptive intent in the federal act, courts will determine that a state law is preempted if it is found to actually conflict with an existing federal law.[43] A conflict can be found in cases where it would be impossible for a person to comply with both the federal and the state requirement. For example, in a 1913 Supreme Court case, a Wisconsin statute required that certain containers of syrup be labeled in such a way that the producer, in order to comply, would have to remove the product labels that were required by Congress under the Pure Food and Drug Act.[44] Preemption based on an impossibility conflict might also arise, hypothetically, where a manufacturer faces state tort claims alleging injury caused by the proper deployment of federally required airbags. Here, the manufacturer finds itself in a situation where it is impossible to both comply with federal regulations requiring airbags and to protect itself from state tort claims by plaintiffs injured by those airbags.

A conflict sufficient to support preemption can also be based on a finding that the state law is an obstacle to the accomplishment of Congress's goals in passing the legislation, or, as it is sometimes said, if the objectives of the federal legislation would be frustrated by enforcement of the state law.[45] This form of preemption is sometimes called "frustration-of-purposes" conflict preemption.[46] An example of "frustration-of-purposes" preemption is a 1967 case in which the U.S. Supreme Court held that the National Labor Relations Act, which encouraged the filing of unfair labor practice charges with the National Labor Relations Board, preempted a Florida law that denied unemployment benefits to those who filed such charges.[47] Another

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[42] *Geier*, 529 U.S. at 895 (Stevens, J., dissenting) (quoting National Traffic and Motor Vehicle Safety Act of 1966, 15 U.S.C. § 1397(k)) (repealed 1994) (codified at 49 U.S.C. § 30103 (e) (1994)).

[43] *See, e.g.*, Gade v. Nat'l Solid Waste Mgmt. Ass'n, 505 U.S. 88, 98 (1992); California v. ARC Am. Corp., 490 U.S. 93, 100-01 (1989).

[44] McDermott v. Wisconsin, 228 U.S. 115 (1913). *See also* Fla. Lime & Avocado Growers, Inc. v. Paul, 373 U.S. 132, 142-43 (1963) (recognizing that impossibility of dual compliance requires federal preemption of state law).

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

[46] *Geier*, 529 U.S. at 873-74; *Fla. Lime & Avocado Growers*, 373 U.S. at 176; San Diego Bldg. Trades Council (San Diego Unions) v. Garman, 359 U.S. 236, 244 (1959).

[47] Nash v. Fla. Indus. Comm'n, 389 U.S. 235, 240 (1967).

example is a 1971 case that involved an Arizona state law that suspended the driver's licenses of those who did not pay judgments arising from automobile accidents, even if the debt had been discharged in bankruptcy. This law was preempted because one of the objectives of federal bankruptcy law was to provide uniform national standards for determining when a debt was discharged.[48]

The existence of any one of these three types of preemption – field, express, or conflict – is sufficient to support a finding of preemption. The categories, however, are not strictly exclusive. Thus, any given case may involve more than one type of federal preemption.[49]

Further, preemption doctrine extends far beyond the conventional situation of conflict between federal law and state law. In addition to statutes passed by Congress, duly authorized regulations promulgated by a federal agency can also preempt state action on any one of these three bases.[50] Moreover, purely private tort actions based on state causes of action can be preempted by federal statutes or federal regulations.[51]

II. *GEIER V. AMERICAN HONDA MOTOR COMPANY*

With these categories of preemption as background, it is interesting to take a closer look at the five-to-four decision in *Geier v. American Honda Motor Co.*,[52] the most divisive of the four preemption-related decisions issued by the Supreme Court during its 2000-2001 Term. Each of the

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[48] Perez v. Campbell, 402 U.S. 637, 649 (1971).

[49] *See* La. Pub. Serv. Comm'n v. FCC, 476 U.S. 355, 368-69 (1986) (listing instances in which preemption occurs and noting that two types of preemption are alleged by respondents).

[50] Fid. Fed. Svgs. & Loan Ass'n v. de la Cuesta, 458 U.S. 141, 153 (1982) ("Federal regulations have no less pre-emptive effect than federal statutes."). *See also La. Pub. Serv. Comm'n*, 476 U.S. at 369 ("Pre-emption may result not only from action taken by Congress itself; a federal agency acting within the scope of its congressionally delegated authority may pre-empt state regulation.").

[51] *See, e.g.*, Medtronic, Inc. v. Lohr, 518 U.S. 470, 502-03 (1996) (plurality opinion) (declining to find federal statute at issue never preempts common law actions); *id.* at 503-05 (Breyer, J., concurring in part and concurring in judgment) (finding federal statute may sometimes preempt tort action based on state law); *id.* at 509-12 (O'Connor, J., concurring in part and dissenting in part) (finding federal statute preempts tort actions based on state law when application of state law would impose any additional or different requirements than those imposed by federal statute); CSX Transp., Inc. v. Easterwood, 507 U.S. 658, 664 (1993) (finding federal regulations regarding railroad safety may preempt similar state laws, rules, regulations, orders, or standards); Cipollone v. Liggett Group, Inc., 505 U.S. 504, 548-49 (1992) (Scalia, J., concurring in judgment in part and dissenting in part) (finding, contrary to majority opinion, that petitioner's tort actions were completely preempted by federal statutes).

[52] 529 U.S. 861 (2000).

other three preemption decisions of the Term involves a relatively harmonious court, unanimous in two cases[53] and seven-to-two in the third.[54] Two of these three cases show the Court adopting positions that clearly operate to enlarge the scope of federal preemption.[55] Thus, a Court that appears reasonably unified in a trend toward broader and more expansive federal preemption doctrine suddenly runs into a set of issues in *Geier* that leaves it sharply divided. In this section, I will examine the court's holding in the *Geier* case and the issues that brought out the fundamental doctrinal disagreements on the Court.

The *Geier* case began in 1992 when Alexis Geier hit a tree while driving a 1987 Honda Accord and was seriously injured.[56] The Accord was equipped with a manual shoulder and lap belt, which Alexis had buckled, but did not have an airbag or any other passive restraint system.[57] Subsequently, Alexis and her parents sued American Honda Motor Company in federal court under District of Columbia tort law, claiming that American Honda had designed the Accord negligently and defectively because it lacked a driver's side airbag.[58]

Defendant American Honda moved to dismiss the case based on federal preemption because, at the time in question, American Honda had clearly complied with the then-existing version of Federal Motor Vehicle Safety Standard 208, promulgated by the Department of Transportation under the authority of the National Traffic and Motor

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[53] Crosby v. Nat'l Foreign Trade Council, 530 U.S. 363 (2000), *aff'g sub nom.* Nat'l Foreign Trade Council v. Natsios, 181 F.3d 38 (1st Cir. 1999), *aff'g sub nom.* Nat'l Foreign Trade Council v. Baker, 26 F. Supp. 2d 287(D. Mass. 1998); United States v. Locke, 529 U.S. 89 (2000), *rev'g sub nom.* Int'l Ass'n of Indep. Tank Owners (Intertanko) v. Locke, 148 F.3d 1053 (9th Cir. 1998), *aff'g sub nom.* Int'l Ass'n of Indep. Tank Owners (Intertanko) v. Lowry, 947 F. Supp. 1484 (W.D. Wash. 1996).

[54] Norfolk S. Ry. Co. v. Shanklin, 529 U.S. 344 (2000). Justice O'Connor authored the majority opinion, joined by Justices Rehnquist, Scalia, Kennedy, Souter, Thomas, and Breyer. *Id.* at 346. Justice Ginsburg wrote the dissenting opinion, joined by Justice Stevens. *Id.*

[55] In *Crosby v. National Foreign Trade Council*, 530 U.S. at 363, the Court adopted a relatively expansive definition of the scope of field preemption. Additionally, in *Norfolk Southern Railway Company v. Shanklin*, 529 U.S. at 358-59, the Court accepted the doctrine of constructive approval, at least under the Federal Railroad Safety Act of 1970. The Court held that the federal funding of required safety devices alone, even in the absence of a separate specific determination of adequacy of the devices by the Federal Highway Administration, serves as a constructive determination of the safety devices' adequacy and confers upon the requirement (that such safety devices be installed) preemptive effect over a state tort claim. *Id.*

[56] *Geier*, 529 U.S. at 865.

[57] *Id.*

[58] *Id.*

Vehicle Safety Act of 1966.[59] Standard 208 required auto manufacturers to equip 10% of their 1987 model year cars with passive restraints.[60]

The district court granted the defendant's motion and dismissed the suit.[61] The Court of Appeals for the District of Columbia affirmed the district court's dismissal based on preemption, but on a somewhat different basis than that relied upon by the district court.[62] The plaintiff then sought Supreme Court review, emphasizing that a number of states had already held that Standard 208 did not preempt a suit of this sort. The plaintiff also emphasized that, while all six federal courts of appeal that had confronted the issue had found for preemption, few of those courts agreed on the appropriate basis for such a result.[63] The Supreme Court granted the plaintiff's petition for a writ of certiorari in the case[64] and issued its decision on May 22, 2000.[65]

The National Traffic and Motor Vehicle Safety Act of 1966, pursuant to which Federal Motor Vehicle Safety Standard 208 was created, contained both an express preemption provision and a saving clause.[66] Thus the first issue dealt with by the majority in its opinion is the question of whether the Act, by its terms, expressly preempts a state common law tort action.[67] The majority determined that the state tort action is not expressly preempted by the Act.[68]

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[59] *Id. See* 49 C.F.R. § 571.208, S4.1.3 - S4.1.4 (1998) (repealing and codifying National Traffic and Motor Vehicle Safety Act of 1966).

[60] Standard 208 required auto manufacturers to equip with passive restraints 25% of their model year 1988 cars, then 40% of their model year 1989 cars, and then 100% of their cars thereafter. 49 Fed. Reg. 28999 (July 17, 1984) (codified at 49 C.F.R. § 571.208, S4.1.3-S4.1.4 (2000)).

[61] *Geier*, 529 U.S. at 865.

[62] The district court had granted Honda's motion for summary judgment on the basis that the National Traffic and Motor Vehicles Safety Act of 1966 expressly preempted Geier's action. Geier v. Am. Honda Motor Co., 166 F.3d 1236, 1237 (D.C. Cir. 1999). The court of appeals was skeptical about Honda's express preemption claim, but nevertheless affirmed the district court's grant of Honda's summary judgment motion because it determined that, "a verdict in her [Geier's] favor would stand as an obstacle to the federal government's chosen method of achieving the Act's safety objectives, and consequently, the Act impliedly preempts her lawsuit." *Id.* at 1241.

[63] *Geier*, 529 U.S. at 866.

[64] Geier v. Am. Honda Motor Co., 527 U.S. 1063 (1999).

[65] *Geier*, 529 U.S. at 861.

[66] The express preemption provision appears at 49 U.S.C. § 30103 (b)(1) and *supra* in text accompanying note 41. The saving clause appears at 49 U.S.C. § 30103 (e) and *supra* in text accompanying note 42.

[67] *Geier*, 529 U.S. at 867-74.

[68] *Id.* at 868.

The majority then asks the following question: given that the state tort action is not expressly preempted by the Act, could it still be preempted on the basis of conflict preemption?[69] In other words, if Congress has explicitly spoken on the issue of preemption by including an express preemption provision or a saving clause, and that provision reflects a congressional intent not to preempt state action, is it acceptable for the court to find that the state action is nevertheless preempted due to functional conflict with the federal statute? Or, alternatively, should the determination of the will of Congress as expressed in the actual language of the Act be the final word on the preemption issue?

The majority decided that it is acceptable for a court to find conflict preemption even in the face of express preemption language which has already been determined not to preempt a state tort action. Specifically, the majority held that such conflict preemption may be based on either the practical impossibility of compliance with both the federal and state regulation or a conflict based on the state action being deemed to be an obstacle to the achievement of federal objectives.[70] In this case, the tort action brought by the Geiers, if decided in their favor, clearly would not make it impossible for Honda to both comply with the federal standard and avoid a similar future suit. Such a tort action would instead encourage Honda to go beyond the federal requirement that airbags be installed in a certain percentage of their cars and install airbags in all of their cars, or at least in all of their cars sold in the District of Columbia. So the only possible basis of preemption in this case was a finding by the Court that the state tort action, if allowed to continue, would be an unacceptable obstacle to the achievement of the goals or objectives of the federal statute.

After a detailed analysis of the history of federal regulation of passive restraint systems in automobiles,[71] the majority determined that the continued viability of a state tort action such as the one brought by the Geiers would serve as an impermissible obstacle to the achievement of federal objectives. The court thereby held that the tort action is in fact preempted as being in conflict with the federal Act.[72] In essence, the majority found that one important federal objective in the passage of the

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[69] *Id.* at 874.

[70] *Id.*

[71] *Id.* at 874-81.

[72] *Id.* at 881. ("Because the rule of law for which petitioners contend would have stood 'as an obstacle to the accomplishment and execution of' the important means-related federal objectives that we have just discussed, it is pre-empted." (quoting Hines v. Davidowitz, 312 U.S. 52, 67 (1941))).

relevant regulations was the creation of a slow phase-in period for the federal requirement of passive restraints in automobiles rather than an immediate blanket mandate. The Court also found that the viability of a state tort suit as the one at issue in this case could well frustrate this purpose by allowing the states, through the threat of tort liability, to effectively mandate the immediate blanket installation of airbags.[73]

The four dissenting Justices in this case agreed with the majority on almost nothing. The dissent took issue with the majority's interpretation of the express preemption provision,[74] the majority's interpretation of the saving clause,[75] and even the majority's identification of the objectives of the Act and Standard 208.[76] Many of these disagreements are specific to the National Traffic and Motor Vehicle Safety Act of 1966, Standard 208, and the particular facts of the *Geier* case.

However, there are some vigorous disagreements between the majority and the dissent that run deeper, that go to more fundamental aspects of preemption jurisprudence. One disagreement is the dissent's view, explicitly rejected by the majority,[77] that if a federal law contains a saving clause, then the party seeking preemption should bear a special burden in trying to establish preemption based on the state action being in conflict with the goals and objectives of the federal law.[78] More generally, the dissent seems to suggest that if the federal law contains any express language regarding preemption — either a preemption provision, a saving clause, or both — and the state action in question is not preempted thereby on the basis of express preemption, then a special burden should be borne by the party seeking preemption on the basis of any theory of conflict preemption.[79]

Second, the dissent believes that it is inappropriate for the Court to identify a federal objective sufficient to support conflict preemption on

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[73] *Geier*, 529 U.S. at 881.

[74] *Id.* at 894-97 (Stevens, J., dissenting).

[75] *Id.* at 897-99 (Stevens, J., dissenting).

[76] *Id.* at 900-05 (Stevens, J., dissenting).

[77] *Id.* at 869-74.

[78] *Id.* at 899-900, n.16.

> Thus, because there is a textual basis for concluding that Congress intended to preserve the state law at issue, I think it entirely appropriate for the party favoring pre-emption to bear a special burden in attempting to show that valid federal purposes would be frustrated if that state law were not pre-empted.

Id. (Stevens, J., dissenting).

[79] *Id.* at 898-900 (Stevens, J., dissenting). The majority identified and disagreed with the dissent's view. *Id.* at 870-74.

the basis of the federal regulatory agency's litigating position, the history of federal regulation in the area, and commentary accompanying the relevant administrative regulation, as occurred in this case.[80] The dissent suggested instead that in cases in which preemption is based upon an administrative agency action rather than a congressional action, the administrative action in question should not be granted preemptive effect unless the agency clearly and specifically states such an intent after formal notice-and-comment rulemaking.[81] The majority flatly rejects this suggested approach.[82]

Underlying the disagreement between the majority and the dissent on both of these fairly significant doctrinal issues is a divergence of views on an even larger issue: the appropriate scope of conflict preemption based on frustration of federal objectives, often referred to as "obstacle" or "frustration," branch of conflict preemption. The dissent clearly believes that the scope of obstacle preemption outside the realm of express preemption should be very narrow.[83]

Both of the more specific doctrinal differences between the majority and the dissent go to the dissent's desire to pull the preemption inquiry back to the stated intent of the federal law, based on either the express language of the congressional act or the formal statement of preemptive intent the dissent would require of an administrative agency. In fact, the majority at one point in its opinion stated that "the dissent's willingness to impose a 'special burden' here stems ultimately from its view that 'frustration-of-purpose[s]' conflict pre-emption is a freewheeling, 'inadequately considered' doctrine that might well be 'eliminated.'"[84] The dissent, for its part, did not challenge this characterization, but instead made an approving reference in a footnote to just such an idea.[85]

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[80] *Id.* at 910-12 (Stevens, J., dissenting).

[81] *Id.* at 908-10 (Stevens, J., dissenting).

[82] *Id.* at 884-85.

[83] *Id.* at 907-08. The Court wrote:

> [T]he presumption [against preemption] serves as a limiting principle that prevents federal judges from running amok with our potentially boundless (and perhaps inadequately considered) doctrine of implied conflict pre-emption based on frustration of purposes—*i.e.*, that state law is pre-empted if it "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress."

Id. (Stevens, J., dissenting) (quoting Hines v. Davidowitz, 312 U.S. 52, 67 n.22 (1941)).

[84] *Geier*, 529 U.S. at 874.

[85] *Id.* at 908 n.22 (Stevens, J., dissenting).

Thus, it appears that some number of the Justices of the current Supreme Court would very likely support the formal abolition of the frustration-of-purposes branch of conflict preemption altogether. Moreover, at least four of the nine Justices would impose limitations on the operation of the doctrine that would narrow its effect greatly, perhaps to the point of practical elimination. This seems, then, like an opportune time to reconsider preemption jurisprudence.

III. APPROACHES TO PREEMPTION JURISPRUDENCE

Preemption jurisprudence has been hindered by the common misperception that preemption necessarily involves a judicial determination of federalism. In this section, I explain why courts should approach preemption analysis not as a question of federalism, but as an ordinary exercise of statutory interpretation, to which the ordinary rules of interpretation apply. I also critically examine two preemption-specific doctrines that courts have proposed to facilitate preemption analysis: a bright-line requirement of express legislative intent and a presumption against preemption.

A. Federal Preemption: Statutory Interpretation vs. Federalism

A consistently encountered refrain, almost a mantra, in the area of preemption jurisprudence is the idea that preemption at its foundation is about federalism, that it deals with critical aspects of the relationship between federal and state government power. For example, in the *Geier* case, Justice Stevens begins the second paragraph of his dissenting opinion by saying flatly, "'This is a case about federalism' . . . that is, about respect for 'the constitutional role of the States as sovereign entities.'"[86] This same characterization of the subject appears throughout the literature.

It is intuitively appealing to conceive of a body of legal doctrine dealing with the foreclosure of state law actions by the existence of federal law as inevitably deeply involved in the jurisprudence of federal-state relations. However, there is an important sense in which this notion is simply not accurate. It is not accurate to say that court cases dealing with preemption are about federalism in the same way that court

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[86] *Id.* at 886 (Stevens, J., dissenting) (first quoting Coleman v. Thompson, 501 U.S. 722, 726 (1991); second quoting Alden v. Maine, 527 U.S. 706, 713 (1999)). The petitioners made the same statement in their brief. Brief for Petitioners at 17, Geier v. Am. Honda Motor Co., 529 U.S. 861 (2000) (No. 98-1811) ("This case is about federalism and the separation of powers.").

cases dealing with the limits of federal government power pursuant to the Commerce Clause are about federalism. The Constitution itself has already clearly made and announced the fundamental judgment regarding the relation of federal and state power: so long as the federal government has the constitutional power to enact the law, then the federal law is granted supremacy over conflicting state actions.[87]

Therefore, unlike jurisprudence in the Commerce Clause area, preemption jurisprudence does not, in a direct way, involve the court in establishing, or considering, fundamental limits on the nature and scope of federal power. Because the Supremacy Clause itself contains no independent limitation on the federal government's authority to preempt state action,[88] so long as Congress has the constitutional power to enact the legislation, then it seems quite clear that the Supremacy Clause grants to Congress the power to have that legislation preempt any conflicting state action. Therefore, if it is clear that Congress intended for the federal law to preempt, then the law does indeed preempt.

Thus, there are numerous instances of the Supreme Court, and lower courts, stating that the process of determining appropriate preemption is an inquiry into congressional intent. For example, in a 1996 case, *Metronic Inc. v. Lohr*,[89] the Supreme Court wrote that, "'[t]he purpose of Congress is the ultimate touchstone' in every preemption case."[90] Again, there is little disagreement with this point throughout the academic literature.[91]

Thus, if Congress is clear in expressing its intent, then there should be no controversy over the preemptive scope of the federal law.

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[87] *See supra* text accompanying notes 26-34.

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

[89] 518 U.S. 470 (1996).

[90] *Id.* at 485 (quoting Retail Clerks v. Schermerhorn, 375 U.S. 96, 103 (1963)).

[91] *See, e.g.*, Stephen F. Befort & Christopher J. Kopka, *The Sounds of Silence: The Libertarian Ethos of ERISA Preemption*, 52 FLA. L. REV. 1, 5 (2000) ("Preemption analysis, therefore, is a matter of divining Congressional intent with respect to the particular federal statute at issue."); *The Supreme Court, 1999 Term – Leading Cases*, 114 HARV. L. REV. 339, 343 (2000) ("Among the various forms of implied preemption Congress has unfettered choice, for preemption is ultimately a question of congressional intent."); Samuel M. Bayard, Note, *Chihuahuas, Seventh Circuit Judges, and Movie Scripts, Oh My!: Copyright Preemption of Contracts to Protect Ideas*, 86 CORNELL L. REV. 603, 632 (2001) ("Accordingly, courts should incorporate matters of copyright policy into their preemption analysis in order to reach a result that better approximates congressional intent and vindicates the underlying purposes of the Act."); Joshua A. T. Fairfield, Comment, *ERISA Preemption and the Case for a Federal Common Law of Agency Governing Employer-Administrators*, 68 U. CHI. L. REV. 223, 245 (2001) ("Whichever rule is adopted pursuant to the courts' authority to develop common law interpreting ERISA must be specifically adapted to serve the congressional purposes underlying that statute.").

Correspondingly, if in ambiguous circumstances, a court theoretically interprets congressional intent incorrectly, Congress always has the power to correct the court and express its intent more clearly and directly by amending the relevant statute. In this way, judicial preemption analysis resembles ordinary statutory analysis more than analysis in areas of constitutional adjudication, such as the commerce clause and individual rights, where the judicial branch sets the basic boundaries of governmental power and possesses the last word on the issue.

From this perspective, one could view preemption analysis as being like the default rules in contract law, such as rules allocating risk of loss if goods are damaged or lost in transit and determining valid methods of acceptance of an offer. These rules come into play only when the parties to the contract fail to come to any agreement on a matter or fail to clearly express their agreement. Preemption analysis is, in this sense, a default, a background, or an "off-the-rack" rule, to be engaged and employed only in the absence of clear Congressional intent on the issue. Viewing preemption analysis from this perspective, are there any useful approaches that might facilitate the judicial determination of Congressional intent with respect to preemption?

B. Bright-line Rule Requiring Express Legislative Language

One possible approach is to urge the adoption of a fairly bright-line rule in the federal preemption area. For instance, one might encourage the Court to announce that the Supremacy Clause only provides preemptive effect to those federal laws that clearly and unambiguously set forth such an intent by Congress. In effect, this approach suggests that courts recognize only express preemption as valid and require that the expression of preemptive intent in the federal Act be clear and unambiguous.[92] Far from being a radical suggestion, this is, in fact, exactly the approach that the dissent in the *Geier* case strongly urges the Court to adopt, at least in the case of administrative regulations preempting state action in areas in which the states have historically exercised power.

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[92] *See, e.g.*, Betsy J. Grey, *Make Congress Speak Clearly: Federal Preemption of State Tort Remedies*, 77 B.U. L. REV. 559, 607-18 (1997). *See generally* William N. Eskridge, Jr. & Philip P. Frikey, *Quasi-Constitutional Law: Clear Statement Rules as Constitutional Lawmaking*, 45 VAND. L. REV. 593 (1992) (outlining different areas where Supreme Court requires clear statement of congressional intent).

In a sense, this approach to preemption would, analogous to "off-the-rack" contract law doctrine, and in recognition of the Constitution creating a federal system, simply adopt concurrent federal and state regulation as the background default. Under this approach, the court would interpret a federal act as not preempting state regulation of the same activity unless the federal act clearly and unambiguously provides for such preemption. At least six plausible arguments exist to support such a judicial approach to preemption.

First, such an approach to preemption is appropriate given that the speaker on whom the burden of clear expression is placed, either Congress or a federal administrative agency, is a very sophisticated actor with deep expertise and experience in the drafting of legislation and regulations. Thus, unlike a consumer in a sales transaction, or corporations contracting for reasonably routine business with standardized forms, it would be appropriate to expect the party responsible for drafting the relevant language in these circumstances to be aware of the existence of the clear and unambiguous expression requirement. In addition, it would be appropriate to expect the drafting party to possess the resources and the expertise to comply with the requirement if it desired the legislation or regulation at issue to carry preemptive effect.

Second, this approach to preemption compels careful deliberation on the part of the drafter. As a policy matter, it is desirable to encourage the federal actor, either Congress or an administrative agency, to explicitly consider the desired preemptive effect of an act or regulation prior to its adoption.

Third, the process of drafting express language requiring preemption promotes legislative accountability. The process by which the federal actors produce the relevant preemption language and the procedure for its enactment are open and public and as responsive to broad political sentiment as is available in our current system. Certainly, that process is more responsive to democratic pressures than the process of litigation that produces judicial branch interpretations of a federal law's preemptive effect. This observation would be especially true if the courts adopt the *Geier* dissenters' suggestion to limit preemptive effect to only those agency actions that have satisfied notice-and-hearing requirements. Thus, by adopting a bright-line rule of interpretation, Congress would be encouraged to speak clearly regarding the intended preemptive effect of any legislation that it passes. Congress would thereby stand to account politically for cases in which safety or environmental federal requirements preempt more rigorous state

requirements or foreclose the possibility of an injured person recovering compensation in a state court action.

Fourth, the bright-line approach will give the community regulated by the federal legislation a greater role in identifying and resolving problematic preemption laws. It is inevitable that the federal actor will draft defective regulation or legislation — for example, by crafting preemption provisions that end up by their terms permitting state action that makes it impossible for a person to comply with both the state and the federal requirements. In these situations, the regulated community itself will have a strong incentive to bring the matter to the attention of the federal actor and seek a correction. In addition, the regulated community is arguably in the best position to identify such conflicts at an early stage and bring them vigorously to the attention of the federal actor. Thus, one might not expect practically significant conflicts between federal law and state law that were unanticipated and unwanted by the federal actor to exist for very long. Certainly one could expect such conflicts to exist for a much shorter period than they would if their correction was dependent upon the final judgment of the judicial branch through litigation. Moreover, since the appropriate response under this bright-line interpretive rule to such conflicts is amendment of the express preemption language in the federal act, one could reasonably expect that the resolution of such conflicts might be more broadly applicable than the product of litigation between discrete parties.

Fifth, the bright-line approach creates stability and consistency. Because a bright-line doctrinal approach could be expected to be far more predictable in its results than the current jurisprudence, it could be expected to generate much greater beneficial reliance on the part of the regulated community, state legislatures, state administrative agencies, and potential tort claimants. Sixth, and finally, this approach will benefit the perpetually overwhelmed federal dockets. As a result of the much greater predictability of a bright-line rule, it could be expected to reduce dramatically the amount of litigation in this area.

Taken together, these six arguments constitute a substantial case for at least serious consideration of a rule conditioning preemption on a clear and unambiguous express statement of such intent in the federal act. Given the benefits of this rule, is it possible to identify any good reasons not to adopt such an approach? It is, and there are at least five such reasons.

The first reason begins with an appreciation that clarity is not so easy to achieve when drafting preemption provisions. A good example is the express preemption provision and the saving clause in the National

Traffic and Motor Vehicles Safety Act of 1966, featured in the *Geier* case.[93] The express preemption provision reads as follows:

> "Whenever a Federal motor vehicle safety standard established under this subchapter is in effect, no State or political subdivision of a State shall have any authority either to establish, or continue in effect, with respect to any motor vehicle or item of motor vehicle equipment, any safety standard applicable to the same aspect of performance of such vehicle or item of equipment which is not identical to the Federal standard."[94]

The saving clause provides: "Compliance with any Federal motor vehicle safety standard issued under this subchapter does not exempt any person from any liability under common law."[95]

These provisions appear fairly straightforward on their face. They are hardly over-subtle, nor do they appear to set forth a complicated scheme of shared federal-state regulation in this area. Yet, the National Traffic and Motor Vehicle Safety Act of 1966 has produced a significant amount of preemption litigation, culminating thus far in the almost evenly split five-to-four Supreme Court decision in *Geier*.[96]

Similarly, note the express preemption provision in the Employee Retirement Income Security Act (ERISA), stating reasonably clearly and unambiguously that the Act "supercede[s] any and all State laws insofar as they may now or hereafter relate to any employee benefit plan."[97] Nevertheless, in the slightly more than two and a half decades since ERISA has been enacted, the U.S. Supreme Court has issued written opinions in at least sixteen ERISA preemption cases.[98] In a 1992 Supreme

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[93] Geier v. Am. Honda Motor Co., 529 U.S. 861, 895 n.10 (2000) (Stevens, J., dissenting).

[94] *Id.* at 895 (Stevens, J., dissenting) (quoting National Traffic and Motor Vehicle Safety Act of 1966, 15 U.S.C. § 1392(d)) (repealed 1994) (codified at 49 U.S.C. § 30103 (b)(1) (1994)).

[95] *Id.* (Stevens, J., dissenting) (quoting National Traffic and Motor Vehicle Safety Act of 1966, 15 U.S.C. § 1397(k)) (repealed 1994) (codified at 49 U.S.C. § 30103 (e) (1994)).

[96] *Id.* at 861.

[97] 29 U.S.C. § 1144(a) (1994).

[98] UNUM Life Ins. Co. of Am. v. Ward, 526 U.S. 358 (1999); Boggs v. Boggs, 520 U.S. 833 (1997); DeBuono v. NYSA-ILA Med. and Clinical Servs. Fund, 520 U.S. 806 (1997); Cal. Div. of Labor Standards Enforcement v. Dillingham Constr., N.A., Inc., 519 U.S. 316 (1997); N.Y. State Conference of Blue Cross & Blue Shield Plans v. Travelers Ins. Co., 514 U.S. 645 (1995); John Hancock Mut. Life Ins. Co. v. Harris Trust & Savs. Bank, 510 U.S. 86 (1993); District of Columbia v. Greater Wash. Bd. of Trade, 506 U.S. 125 (1992); Ingersoll-Rand Co. v. McClendon, 498 U.S. 133 (1990); FMC Corp. v. Holliday, 498 U.S. 52 (1990); Massachusetts v. Morash, 490 U.S. 107 (1989); Mackey v. Lanier Collection Agency & Serv., Inc., 486 U.S. 825 (1988); Fort Halifax Packing Co. v. Coyne, 482 U.S. 1 (1987); Pilot Life Ins. Co. v. Dedeaux, 481 U.S. 41 (1987); Metro. Life Ins. Co. v. Massachusetts, 471 U.S. 724 (1985); Shaw v. Delta Air Lines, Inc., 463 U.S. 85 (1983); Alessi v. Raybestos-Manhattan, Inc.,

Court case, Justice Stevens estimated that there had been at that time approximately 2,800 formal judicial opinions rendered on ERISA preemption.[99] A recent Westlaw search produced more than 5,400 cases.[100] This proliferation of cases fairly raises the question of how much more detailed and specific and exhaustive these provisions would need to be before they achieve sufficient clarity to generate the suggested benefits of a bright-line rule.

Second, a bright-line rule may represent an impermissible intrusion into legislative power. Even assuming that a clear and unambiguous statement of preemptive effect is achievable with enough effort, it may be inappropriate for the Court to adopt a rule of constitutional interpretation that in effect requires the federal legislature to expend such resources in the designing and drafting of its own legislative product. It may also be constitutionally inappropriate for the judicial branch to in effect withhold the recognition and enforcement of an important power, preemption of conflicting state laws, clearly granted to the federal legislative branch in the Constitution, until the legislative branch succeeds in passing legislation that contains express preemption language that meets the court's standard as sufficiently clear and unambiguous.

Third, the bright-line rule hampers political compromise. As a practical matter, the Court would be ignoring political reality by adopting a bright-line rule that requires Congress to decide upon a clear and unambiguous statement regarding the intended preemptive effect of the legislation. Ambiguity is occasionally an acceptable product of difficult negotiations and hard compromise. In some circumstances, perhaps many, a deal would likely not be completed if the parties were required to explicitly agree in detail and in writing on every point involved in the negotiations. A bright-line preemption requirement leaves little, or at least less, room for soft agreement, face saving, and, sometimes, outright mutual denial of the troublesome issue. Each of these things can sometimes be useful as a means of achieving difficult compromise. Moreover, it is almost always the case with legislation that

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451 U.S. 504 (1981).

[99] District of Columbia v. Greater Wash. Bd. of Trade, 506 U.S. at 135 (Stevens, J., dissenting) ("A recent LEXIS search indicates that there are now over 2,800 judicial opinions addressing ERISA pre-emption.").

[100] On March 20, 2001, the author performed this search by entering the search term "ERISA w/p preempt!" into the Westlaw ALLFEDS database. Professor Catherine L. Fisk reports having produced 3330 cases with an identical search in the same database conducted in 1996. Catherine Fisk, *The Last Article About the Language of ERISA Preemption? A Case Study of the Failure of Textualism*, 33 HARV. J. ON LEGIS. 35, n.106 (1996).

the operative language is crafted and negotiated by agents on behalf of principals; the requirement that lawmakers produce a fully detailed, clear, and unambiguous statement makes it much more difficult for the representatives to sell a difficult and carefully crafted compromise back to their constituency.

Fourth, the bright-line rule would permit the existence of unanticipated conflicts between federal and state law. Given the extraordinary complexity of some of the matters regulated by the federal government, and the fact that potentially conflicting state laws or regulations may not be created or even imagined until years after the relevant federal legislation has been passed, it is likely that the federal actor will enact defective preemption provisions a fair amount of the time. Specifically, Congress will enact preemption provisions that, by their express terms, fail to prevent state action making it impossible for the regulated party to comply with both the state and the federal law. Because the courts will not preempt the state law in the absence of express federal permission, the regulated party is simply trapped between violating state law or violating federal law.

Given the inevitability of such unanticipated conflicts, it seems unacceptable for the courts to force the regulated party to simply choose their poison — state or federal consequences for violation of the standard — and then exercise their political influence in hope that one or the other sovereign will correct the situation. In fact, one can make a strong due process argument that it is not constitutionally permissible for the federal and a state government to have laws that regulate the same activity concurrently but both of which can not possibly be complied with by persons subject to these laws.

If such conflicts are indeed considered constitutionally inappropriate and it is determined that, at a minimum, the courts should not craft a preemption doctrine that permits functional impossibility conflicts to exist, irrespective of the clarity of the preemption language, then a completely straightforward, bright-line rule of preemption would not be possible. At the least, the doctrine would have to be re-crafted as follows:

A federal Act will be deemed not to preempt a State law regulating the same activity unless:

> (1) the federal Act contains express provisions which state clearly and unambiguously that such a State law is intended to be preempted; or
>
> (2) it is not possible for a person engaging in the regulated activity

to comply with both the federal law and the State law.

This hypothetical language actually represents the strongest version of the position suggested by the dissent in *Geier*,[101] and the position that the majority in the case suggests very clearly is underpinning the dissent.[102] This language is essentially what the preemption doctrine would look like if the frustration-of-purposes branch of conflict preemption were eliminated and field preemption were confined to express field preemption only.

While this version of preemption doctrine is not as elegant as the single bright-line rule alone, it might still be expected to generate the potential benefits that were associated with a bright-line approach. Correspondingly, it is also likely to suffer from the same problems as the bright-line approach: (1) an overly optimistic implicit assumption about the achievability of a clear and unambiguous statement of preemptive effect; (2) an inappropriate demand on legislative resources; and (3) the elimination of a potentially valuable tool of legislative compromise.

Moreover, such an approach to preemption jurisprudence must face a slightly different version of the fourth challenge to the bright-line rule identified above. Given the extraordinary complexity of some of the matters regulated by the federal government, and the fact that potentially conflicting state laws or regulations may not be created or imagined until years after enactment of the legislation, it is likely that the federal actor will enact preemption provisions that, by their express terms, fail to prevent state actions that *frustrate* the goals of the federal act.

For example, suppose that some years after passage of the National Labor Relations Act, a state passes a law which denies unemployment benefits to those who file an unfair labor practice charge with the National Labor Relations Board. The NLRA does not have an express preemption provision that covers this situation, though it is fairly clear that one of the objectives of the Act is to encourage the filing of such claims.[103] Even a modified bright-line approach would create a system that allows the states to frustrate federal goals in this way until the federal actor crafts its preemption language just right. It is unacceptable to create a system that essentially requires Congress or a federal agency to constantly monitor potential state law obstacles to legitimate federal

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[101] Geier v. Am. Honda Motor Co., 529 U.S. 861, 886 (2000).

[102] *Id.* at 874. *See supra* text accompanying note 85.

[103] These are, in summary, the facts of *Nash v. Florida Industrial Commission*, 389 U.S. 235 (1967).

objectives and amend the relevant preemption language accordingly.

Fifth, if the purpose of eliminating the frustration-of-purpose branch of conflict preemption is to significantly narrow the preemptive effect of federal law, and it seems pretty clear that it is, the bright-line approach may actually have exactly the converse effect. The reason is that Congress, faced with the elimination of default frustration-of-purposes conflict preemption, will respond by enacting additional, and more comprehensive, express preemption provisions. At the least, Congress could effectively and easily reverse any attempt by the judicial branch to eliminate the frustration-of-purpose branch of conflict preemption by simply routinely including in federal legislation an express preemption provision that reads, in part, that state requirements are preempted if "the requirement is an obstacle to accomplishing and carrying out this Act or a regulation prescribed pursuant to this Act." In fact, this kind of preemption provision is not wholly hypothetical, the quoted language comes directly from the Hazardous Materials Transportation Act.[104]

C. A Presumption Against Preemption

A second approach to resolving questions of preemption is to adopt a presumption against preemption. It is frequently asserted, not the least by Justices of the Supreme Court, that there should, or that in fact there does, exist a presumption against federal preemption, particularly in those cases in which the state law at issue falls within the historic powers of the states to regulate general health, safety and welfare.[105] Yet, many of the factors that weigh against a bright-line preemption rule also militate against the adoption of a presumption against preemption.

At the start, it should be noted that there is no textual support whatsoever in the Supremacy Clause for any such presumption against federal preemption. Moreover, so far as it can be determined from the

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[104] 49 U.S.C. § 5125(a)(2).

[105] California v. ARC Am. Corp., 490 U.S. 93, 101 (1989) ("When Congress legislates in a field traditionally occupied by the States, 'we start with the assumption that the historic police powers of the States were not to be superceded by the Federal Act unless that was the clear and manifest purpose of Congress.'" (quoting Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947))). *See also Geier*, 529 U.S. at 894 (Stevens, J., dissenting):

> Because of the role of the States as separate sovereigns in our federal system, we have long presumed that state laws — particularly those, such as the provision of tort remedies to compensate for personal injuries, that are within the scope of the States's historic police powers — are not to be pre-empted by a federal statute unless it is the clear and manifest purpose of Congress to do so.

Id. (citations omitted).

cases and the available literature, there appears to be no significant support in constitutional history for the conclusion that the framers intended any such presumption to be read into Article VI, clause 2.[106]

Second, in the context of a case being tried before a jury, it is always difficult to know just what effect a rebuttable presumption will have, or has had, on the jury's verdict. In the trial context, however, one can assume that some persuasive impact is achieved by the judge formally charging the jury with regard to the presumption as part of the final jury instructions. In the appellate context, with sophisticated decision makers balancing a myriad of relevant factors, it is hard to say with any confidence, perhaps even for the appellate judges themselves, just what impact the suggested existence of a rebuttable presumption has on the final judgment.

Thus, in cases in which the majority finds against preemption, the presumption is often cited.[107] In cases like *Geier*,[108] where the majority finds for preemption, the dissent, if there is one, accuses the majority of ignoring the presumption.[109] The majority typically counters that the presumption was not ignored, but it was simply the case that, on balance, the majority concluded that the presumption was effectively overcome in this particular instance.[110] At the least, it can be said that the continued presence of the presumption against preemption has not seemed to stop a generally perceived trend toward broader federal preemption decisions by the courts in recent years.

Third, and perhaps most importantly, the maintenance of a presumption against preemption puts the courts into a position in which they are forced to treat essentially similar cases in very different

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[106] *See generally* S. Candice Hoke, *Transcending Conventional Supremacy: A Reconstruction of the Supremacy Clause*, 24 CONN. L. REV. 829 (1992) (stating that Supremacy Clause was less nationalistic compromise adopted by Constitutional Convention). *But see* Caleb Nelson, *supra* note 25, at 251 (stating that Supremacy Clause forecloses possibility that subsequently enacted state statute could prevent application of federal law).

[107] *See, e.g.*, Medtronic, Inc. v. Lohr, 518 U.S. 470, 485 (1996); Cipollone v. Liggett Group, Inc., 505 U.S. 504, 518, 523 (1992); Fort Halifax Packing Co., Inc. v. Coyne, 482 U.S. 1, 21 (1987); Hillsborough County, Florida v. Automated Med. Labs., Inc., 471 U.S. 707, 715-16 (1985).

[108] *Geier*, 529 U.S. at 861.

[109] *Id.* at 894, 906-07 (Stevens, J., dissenting) ("Under 'ordinary experience-proved principles of conflict pre-emption,' . . . therefore, the presumption against pre-emption should control. Instead, the Court simply ignores the presumption, preferring instead to put the burden on petitioners to show that their tort claim would not frustrate the Secretary's purposes.").

[110] *Id.* at 883 (citations omitted) ("And in so concluding, we do not 'put the burden' of proving preemption on the petitioners. We simply find unpersuasive their arguments attempting to undermine the Government's demonstration of actual conflict.")

manners. For example, consider a hypothetical federal act that requires certain specifications for all tires sold on new pickup trucks and vans, but not passenger cars. Imagine two versions of this hypothetical regulation.

In the first version of this tire regulation, there is an express provision that clearly preempts all state tort claims that are based on the theory that regulated vehicles are negligently designed for failure to have installed tires that exceed the federal specifications. However, it is not clear from the language of the act whether heavy sports utility vehicles sold primarily for use as passenger cars are subject to the regulation. In short, this version of the act leaves ambiguous whether SUVs fall under its purview and the preemption safe harbor provided therein.

In the second version of this tire regulation, the ambiguities are reversed. Here, the language of the act expressly provides that sports utility vehicles are considered trucks and not passenger cars, and therefore are covered by the tire regulations. However, the act contains an express preemption provision that leaves uncertain the status of state tort claims that are based on the manufacturer's failure to install tires that exceed the federal requirements. In short, this version of the act makes it clear that SUVs fall under its regulation but leaves ambiguous whether the act provides a safe harbor against state tort claims.

Assume then that a state tort action is brought against a manufacturer on the theory that the tires installed on a particular new sports utility vehicle failed to have some quality or characteristic not required by the federal act. Under the first regulation, the question of whether the claim was preempted would most likely be viewed as a straightforward issue of statutory interpretation. The court would presumably approach this issue as it would any other interpretive problem posed by the statutory language, that is, without adopting presumptions one way or the other. Under the second regulation, however, the case is very likely to be viewed as an issue of preemption to which the court might, assuming that it has an important practical effect, bring to bear the traditional presumption against preemption.

This result seems inappropriate given that under both versions of the hypothetical, the case in question poses precisely the same issue and carries exactly the same stakes: whether or not a sports utility vehicle-owner plaintiff can bring a state tort action. Thus, the court is in the position of making essentially the same practical judgment. Preemption jurisprudence to date has offered no justification for treating the second hypothetical case in such a dramatically different doctrinal fashion than the first.

CONCLUSION

On balance, the preceding analysis suggests that the elimination of the frustration-of-purposes branch of conflict preemption is probably unworkable, undesirable, and ultimately unlikely to effect much narrowing of federal preemption. In addition, the analysis strongly suggests the undesirability of the frequently cited rule that a presumption against preemption should be adopted by the court, at least in those cases in which the state law at issue falls within the historic police powers of the states to regulate general health, safety, and welfare. Even further, the analysis suggests that it is hard to develop a convincing rationale for the formal adoption by the courts of any preemption specific doctrine, be it special bright-line requirements in the face of a saving clause, modified bright-line requirements, or presumptions one way or the other.

It is a mistake for courts to conceive of their work in the preemption area as thrusting them into the heart of federalism policy and debate. Indeed, courts should not be engaging in case-specific balancing of federal and state interests in order to determine the proper scope of federal act preemption in each instance. This way of thinking only results in a jurisprudence in which courts take on the task in every case of rethinking and redesigning anew a fundamental question of federal-state relations that has already been clearly and unambiguously decided by the federal constitution itself. Such a conception has inevitably resulted in the present vagueness, indeterminacy, and occasional incoherence of preemption jurisprudence.

A far better approach would be for courts to recognize the clear mandate of federal supremacy set forth in Article VI, clause 2. From this full recognition would come the logical, and quite simple, doctrinal principle that a federal act supercedes all state actions that the federal authority intended be preempted by passage of the act. The court's task in determining the exact scope and content of the federal authority's intent with respect to preemption should be no different than its determination of any other issue of statutory interpretation under the act. The debate, and the resolution, of a preemption question should call upon and employ the full panoply of traditional tools and techniques of statutory interpretation, nothing more and nothing less. At the very least, any proposal for alteration of this approach in the preemption area should bear a heavy burden of persuasion.